

# William & Mary Journal of Race, Gender, and Social Justice

---

Volume 3 (1997)  
Issue 1 *William & Mary Journal of Women and  
the Law*

---

Article 14

April 1997

## An Evolutionary Perspective of Peer Sexual Harassment in American Schools: Premising Liability on Sexual, Rather Than Power Dynamics

Laura M. Sullivan

Follow this and additional works at: <https://scholarship.law.wm.edu/wmjowl>



Part of the [Education Law Commons](#)

---

### Repository Citation

Laura M. Sullivan, *An Evolutionary Perspective of Peer Sexual Harassment in American Schools: Premising Liability on Sexual, Rather Than Power Dynamics*, 3 Wm. & Mary J. Women & L. 329 (1997), <https://scholarship.law.wm.edu/wmjowl/vol3/iss1/14>

Copyright c 1997 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.  
<https://scholarship.law.wm.edu/wmjowl>

## AN EVOLUTIONARY PERSPECTIVE OF PEER SEXUAL HARASSMENT IN AMERICAN SCHOOLS: PREMISING LIABILITY ON SEXUAL, RATHER THAN POWER DYNAMICS

When confronted with allegations that the boys in his classroom were sexually harassing one of his female students, a sixth grade teacher casually remarked that, "Eve was so beautiful that the guys would be all over her in a couple of years."<sup>1</sup> Unfortunately, the antics of her male classmates did not make Eve feel beautiful; rather, she felt "unsafe and depressed."<sup>2</sup> Her male peers referred to her as a "prostitute," "lesbian," "whore," and "ugly dog faced bitch."<sup>3</sup> The young girls in Eve's class complained to their teachers that the boys were snapping their bras, groping their breasts, caressing their backs, and cutting their hair.<sup>4</sup> Despite Eve's protests, the behavior continued and the school did nothing. One of Eve's teachers, however, regarded the boys' behavior as innocent flirting and teasing, because after all, "Eve was beautiful." This teacher's response to the problem of peer sexual harassment reflects the prevalence of the view, in society and by extension in the legal community, that peer sexual harassment in American elementary and secondary schools is an innocuous emergence of sexual curiosities and attractions among adolescent students. The behavior, however, even if innocent, is dangerous.

The nonchalant approach of school officials in American schools to the problem of peer sexual harassment implicitly condones its existence and ignores the harms suffered by girls who are entrusted to the care of the school districts.<sup>5</sup> Hostile learning environments unduly undermine the ability of female students to receive the full benefits of an education. As Title IX prohibits sexual discrimination in the schools, the question arises whether the failure of school districts to protect girls from peer sexual harassment renders the schools liable for monetary damages under the statute. In effect, by deciding not to act against the problem, the school officials discriminate against

---

1. *Bruneau v. South Kortright Cent. Sch. Dist.*, 935 F.Supp. 162, 167 (N.D.N.Y. 1996).

2. *Id.* at 166.

3. *Id.*

4. *Id.*

5. One study reports that as of 1993, 82% of American schools ignore the problem of sexual harassment in their midst. See N. STEIN ET AL., RESEARCH ON WOMEN AT WELLESLEY COLLEGE AND THE NOW LEGAL DEFENSE FUND, SECRETS IN PUBLIC: SEXUAL HARASSMENT IN OUR SCHOOLS 11 (1993). Even when school administrators were made aware of a specific incident, 45% of them still did not react. *Id.*

female students. A recognition and definition of a private claim for damages under Title IX is crucial considering the inability of the administrative process,<sup>6</sup> as well as state common law claims,<sup>7</sup> to redress the problem. Before society can eliminate the harms that girls suffer because of peer sexual harassment, the courts must properly designate and allocate legal responsibility for the problem under current statutory and jurisprudential directives.

This paper will analyze the problem of peer sexual harassment as a natural manifestation of the biological drives in women and men. Through an understanding of peer sexual harassment in evolutionary terms, this paper will propose legal responses to the issue of institutional liability and the appropriateness of Title VII workplace hostile environment jurisprudence in the educational context. Part I will provide an overview of the statistical and anecdotal data on peer sexual harassment in American secondary schools. Part II will describe the biological drives of the harassers and the biological responses of the harassed, as well as assess the different impact peer sexual harassment has on each gender. Part III will present an outline of the past and present legal treatment of the issue. And Part IV will synthesize the evolutionary propositions with the legal doctrine and pose administrative solutions to the problem.

## I. THE STATISTICAL AND EMPIRICAL EVIDENCE

Concerned organizations and social scientists have conducted surveys and field studies in order to explore to what extent sexual harassment affects school children and thwarts the educational process. The data reveal that both sexes encounter sexual harassment in the schools. Unlike the adult workplace, high percentages of both females and males in junior high and high school reported peers having subjected them to harassment of a sexual nature.<sup>8</sup> The numbers are alarming. In June of

6. See Kirsten M. Eriksson, Note, 83 GEO. L.J. 1799, 1805-1806 and nn.40-41 (1995).

7. Suits based on theories of assault, battery, or intentional infliction of emotional distress are rarely successful. See Monica L. Sherer, Comment, *No Longer Just Child's Play: School Liability under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, 2142 (1993). Further, few state legislatures have taken initiatives to address the issue. See Eriksson, *supra* note 6, at 1804-1805 and nn.40-41. Lack of state-based protections and administrative efficaciousness highlights the need for a federal private cause of action under Title IX.

8. Usually, male workers do not report the same level of sexual harassment as women. For example, in one study that included 23,000 randomly selected federal employees, 15% of the men reported being subjected to sexual harassment, whereas 42% of the women reported being sexually harassed during the two year period of the study.

1993, the American Association of University Women Education Foundation (AAUW) published "Hostile Hallways: the AAUW Survey on Sexual Harassment in America's Schools."<sup>9</sup> The survey recorded the responses of public school students in grades eight through eleven from 79 schools throughout the continental United States. The 1,632 students who responded to the survey indicated that 85 percent of the girls and 76 percent of the boys experienced some form of sexual harassment at school.<sup>10</sup> The primary instigators were not adults; they were peers. Eighty-six percent of the harassed girls and 71 percent of the harassed boys pointed out that most of the incidents occurred between students.<sup>11</sup> The students reported that sexual harassment was most prevalent between the sixth and eighth grade, with only six percent of the students facing the harassment for the first time before the third grade.<sup>12</sup>

The Center for Research on Women at Wellesley College and the NOW Legal Defense and Education Fund supplemented the AAUW study, with "Secrets in Public: Sexual Harassment in Our Schools," a study focusing its attention on the exposure of the female student population to sexual harassment.<sup>13</sup> Of the 2,000 female students polled, 89 percent experienced inappropriate sexual comments, gestures, and looks, and 83 percent reported males touching, grabbing or pinching them at school.<sup>14</sup> Sexual harassment became a daily part of school life for 39 percent of

---

See Kathleen McKinney & Nick Maroules, *Sexual Harassment*, in *SEXUAL COERCION* 29, 40 (Elizabeth Grauerholz & Mary A. Koralewski eds., 1991).

9. AMERICAN ASSOCIATION OF UNIVERSITY WOMEN EDUCATION FOUNDATION, *HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICAN SCHOOLS* 7 [hereinafter 1993 AAUW Study].

10. *See id.*

11. *See id.* *See also* Jill Suzanne Miller, Note, 1995 U. ILL. L. REV. 699, 707 (1995) (pointing out that peer sexual harassment is more common than faculty-student harassment).

12. The survey also requested that the students specify the type of harassment they encountered. *See* 1993 AAUW STUDY, *supra* note 9 at 8-10. Seventy-six percent of the girls and 56 percent of the boys reported that peers made sexual comments, jokes, gestures, or looks. *See id.* at 9. Less children suffered an attack on their bodily integrity, with 65 percent of the girls and 42 percent of the boys claiming that peers touched, grabbed, or pinched them in a sexual way. *See id.* Relatively equal numbers of girls and boys, with 31 percent of the girls and 34 percent of the boys, reported sexual harassment in the form of showing, giving, or leaving sexual pictures, photos, illustrations, messages or notes. *See id.* Peers, however, were twice as likely to accuse boys of being gay rather than accusing girls of being lesbian. *See id.* at 10. Only ten percent of the girls faced such accusations, while 23 percent of the boys claimed peers harassed them in this manner. *See id.*

13. N. STEIN ET AL., *supra* note 5.

14. *See id.* at 2.

the girls who responded to the survey.<sup>15</sup> Most harassment promulgated against girls involved commentary on their bodies, as well as an emphasis on sexuality as their most significant attribute.<sup>16</sup> Girls also complained that boys make direct allegations that they are sexually active or promiscuous.<sup>17</sup> In general, data suggest that male harassers target girls for the more serious verbal and physical assaults.<sup>18</sup> Further, girls have a greater tendency to allow the harassing behavior to affect their lives, their grades, and their sense of well-being.<sup>19</sup>

Anecdotal evidence demonstrates how sexual harassment can severely hamper the educational and personal development of female students. A high school freshman, Sarah Conrow, described how fellow band members poked her in the behind with drum sticks, and later called her derogatory and sexually suggestive names in the hallway.<sup>20</sup> In another school district, male schoolmates regularly barraged an eighth-grade girl on the bus with comments such as: "When are you going to let me fuck you?"; "What bra size are you wearing?"; and "What size panties are you wearing?"<sup>21</sup> Later they swatted her behind, grabbed her genital area, and groped her breasts in public.<sup>22</sup> Another girl became powerless to retain her own identity after graffiti scrawled in the boys bathroom declared her a "slut" and callously told readers among other things, that she had "sucked the dick"

15. *See id.*

16. *See* JUNE LARKIN, *SEXUAL HARASSMENT: HIGH SCHOOL GIRLS SPEAK OUT* 79 (1994). Girls take from the harassing comments, a feeling that their sexuality is their most significant attribute. In fact, boys communicate to girls that the their relationships with male friends are contingent upon sexual accessibility. *See id.*

17. *See id.* Girls and boys deal with allegations that they are sexually promiscuous in two distinct ways. Girls feel compelled to defend their reputation whereas boys engage in a "practice of telling stories about stuff they've done with girls whether it is true or not." *Id.*

18. *See* Ellen Goodman, *Sexual Bullies*, BOSTON SUNDAY GLOBE, June 6, 1993, available in 1993 WL 6596154.

19. For example, 33% of girls surveyed, report not wanting to go to school versus 12% of the boys. *See* 1993 AAUW STUDY, *supra* note 9 at 15. *See infra* notes 73-76 & accompanying text (discussing the potential impact of harassment on the quality and effectiveness of a girl's education).

20. *See* Gina Pera, *Agony of Sexual Harassment: Two Sides*, USA WEEKEND, Sept. 8, 1996, available in 1996 WL 7817203. Sarah responded to an essay contest soliciting information regarding peer sexual harassment from secondary school female students. She ignored the harassment for fear of appearing as a "tattle tale." *Id.*

21. *Rowinsky v. Bryan Indep. Sch. Dist.* 80 F.3d 1006, 1008 (Fifth Circuit April 2, 1996).

22. *See id.*

of a classmate<sup>23</sup> The graffiti spurred inquiries from random male students such as "Are you as good as everyone says?"<sup>24</sup> Another high school girl summed up her experience by saying, "I've had boys put their hand in my shirt, ask me if I was a virgin, and touch my body. It is humiliating."<sup>25</sup>

Male students target not only individuals, but also engage in a broad campaign of sexual harassment. The abuse ranges from ranking girls according to "who would be good in bed," to the daily snapping of bra straps.<sup>26</sup> Boys greet girls with crotch grabbing gestures and shout obscenities as girls travel school halls.<sup>27</sup> Daily exposure to this degrading behavior, whether comments, gestures, or touching, places a tremendous toll upon female victims, as well as same gender observers of the behavior.<sup>28</sup> Even though statistics in documented surveys depict sexual harassment as a problem for both girls and boys, three considerations prod legal and social science commentators to reserve more concern for the plight of young girls than that of boys in American schools. For one, surveys suggest that boys are less likely to label the harassing behavior as unwanted or unwelcome, but rather view the behavior as complimentary.<sup>29</sup> Second, evidence indicates that sexual harassment traumatizes girls more than boys.<sup>30</sup> Third, as boys are more reluctant to report sexual harassment, most personal accounts and legal disputes involve cases of students sexually harassing female students.<sup>31</sup>

Traditional feminists, therefore, view peer sexual harassment as a problem implicating the rights of women.<sup>32</sup> Such feminists

---

23. Katy Lyle, *Sexual Harassment in the Boy's Room: One Teen's True Story*, CHOICES, Jan. 1993.

24. See *id.*

25. NAN STEIN & LISA SJOSTROM, FLIRTING OR HURTING? 98 (1994) (citing Adrian Nicole LeBlanc, *Harassment at School: The Truth is Out*, SEVENTEEN, May 1993, at 134, 134).

26. See *id.*

27. See *id.*

28. The Department of Education recognizes that the sexual harassment of a girl, not only constitutes a hostile environment for that particular student, but for her female classmates who witness the harassing behavior as well. See Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12033-12051 (1997) [hereinafter Sexual Harassment Guidance] (visited March 21, 1997) <[http://www.gpo.ucop.edu/cgi-bin/gpogate...s/data/1997\\_register/frml3mr97.dat.wais](http://www.gpo.ucop.edu/cgi-bin/gpogate...s/data/1997_register/frml3mr97.dat.wais)>.

29. See LARKIN, *supra* note 16, at 35.

30. See STEIN & SJOSTROM, *supra* note 25, at 29.

31. See 1993 AAUW STUDY, *supra* note 9, at 14.

32. Most legal and social science literature addressing sexual harassment is feminist in perspective. The feminist approach is based on two assumptions: (1) socialization and enculturation are primary forces shaping human behavior; and (2) the desired goal of men

propose that through peer sexual harassment, male students ensure their present and future maintenance of power and advantage over females in society.<sup>33</sup> Evolutionary biology theories, however, may provide a better explanation for why sexual harassment is so common in American schools and why peer sexual harassment results in graver consequences for female victims.<sup>34</sup> For evolutionists, pervasive peer sexual harassment in schools reflects sexual motivations that exist in both adolescents and adults, rather than a male agenda to forge an unequal distribution of power between the genders.<sup>35</sup> The societal bias to focus on power issues, without investigation into the sexual goals of males and females, precludes achievement of a full understanding of the phenomenon of peer sexual harassment in the schools and the formulation of appropriate legal and social responses.

## II. EVOLUTIONARY THEORIES ON PEER SEXUAL HARASSMENT

### A. *Internal Drive of the Harasser*

Both internal and external forces influence how the sexes interact in American schools.<sup>36</sup> An emphasis on only external

---

is patriarchal power; therefore, men oppress women through sexual aggression and violence. See Michael V. Studd, *Sexual Harassment*, in *SEX, POWER, CONFLICT: EVOLUTIONARY AND FEMINIST PERSPECTIVES* 54, 55 (David M. Buss & Neil M. Malamuth eds., 1996). See Wendy E. Stock, *Feminist Explanations: Male Power, Hostility, and Sexual Coercion*, in *SEXUAL COERCION* 61, 62 (Elizabeth Grauerholtz & Mary A. Koralewski, eds., 1991) ("Power inequality is seen as the root of all forms of discrimination and violence directed at women; it is the result of and represents an attempt to maintain that imbalance.").

33. See Stock, *supra* note 32, at 61-62. Feminists emphasize economic solutions to combat the incidence of sexual harassment, as well as other forms of sexually coercive behavior directed towards women in society. See Heidi Gottfried, *Preventing Sexual Coercion: A Feminist Agenda for Economic Change*, in *SEXUAL COERCION* 173-183 (Elizabeth Grauerholtz & Mary A. Koralewski, eds., 1991).

34. Further, studies also reveal that the harm to adolescent girls may be greater than the harm to adult women in the workplace. See Miller, *supra* note 11, at 708.

35. See *id.* Catharine MacKinnon, however, advocates that sexuality itself is a hierarchical construct. That is, even in the case of sexual harassment between coequals, an inherent imbalance of power exists between the genders. See CATHARINE A. MACKINNON, *Sex and Violence: A Perspective* (1981), in *FEMINISM UNMODIFIED* 85, 89 (1987) [hereinafter *Sex and Violence*]. The courts generally interpret harassment between coequals, hostile environment situations, as a maldistribution of power. The imbalance, however, occurs because female victims of harassment view male harassers as agents of those higher on the hierarchical ladder, rather than primarily because they are males harassing females.

36. See TIMOTHY H. GOLDSMITH, *THE BIOLOGICAL ROOTS OF HUMAN NATURE: FORGING LINKS BETWEEN EVOLUTION AND BEHAVIOR* 75 (1991) ("Biologists have recognized for decades that the process of development involves an interplay between information coded in the

causes of peer sexual harassment, that is cultural and social stimuli, produces an incomplete explanation of the problem. An analysis must also consider the internal drive for sex that colors the way males, as well as females, react to sensory information within the social environment.<sup>37</sup> The reasons why boys harass girls are more complex than a mere conformance to what society advocates or a solitary lust for power. Evolutionary biology proposes that strategies devised to maximize sexual access to women, rather than inculcated beliefs, shape male behavior.<sup>38</sup> Boys' conscious or unconscious need to achieve reproductive success, which is necessary to ensure that their genes survive through the generations, determines some behavioral patterns.<sup>39</sup> This biological urge, not power itself or the belief that women are inferior, encourages boys to engage in sexually harassing behavior.

Evolutionists propound that males seek one or two long-term mating relationships in conjunction with numerous short-term sexual commitments.<sup>40</sup> Males do not want to invest large amounts of time and energy for every reproductive encounter. A male reserves parental investment for a limited number of offspring.<sup>41</sup> There is a presumption, however, that all females desire a male who will parentally invest in their offspring. Females have the capacity to conceive significantly less offspring than males; therefore, they guard their mating opportunities.<sup>42</sup>

---

genome (genetic factors) and a continuum of external signals influencing how that information is expressed (epigenetic processes).").

37. In essence, peer sexual harassment implicates both internal factors, such as an internal need for sex, and external factors, such as societal disregard and fear of women. The internal drive for sex determines how boys will react to external pressures and influences provided by the school environment, and society as a whole. *Id.* at 73.

38. See Randy Thornhill & Nancy Wilmsen Thornhill, *The Evolutionary Psychology of Men's Coercive Sexuality*, 15 BEHAVIORAL AND BRAIN SCIENCES 363 (1992).

39. Social biologists attempt to analyze social behaviors of animals "armed mainly with the presumption that the purpose of such behavior is the maximization of reproductive success." MELVIN KONNER, *THE TANGLED WING: BIOLOGICAL CONSTRAINTS ON THE HUMAN SPIRIT* 15 (1982).

40. "For the 'optimal male course,' as Trivers noted, is a 'mixed strategy.' Even if long-term investment is their main aim, seduction and abandonment can make genetic sense, provided it doesn't take too much, in time and other resources, from the offspring in which the male does invest. The bastard youngsters may thrive even without paternal investment; they may, for that matter, attract investment from some poor sap . . . . So males in a high MPI species should, in theory, be ever alert for opportunistic sex." ROBERT WRIGHT, *THE MORAL ANIMAL: EVOLUTIONARY PSYCHOLOGY AND EVERYDAY LIFE* 61 (1994).

41. See *id.*

42. "[T]here is a large sexual asymmetry in the minimal reproductive effort required for the production of offspring. The minimum for a man is a few minutes of time and an



If a female surrenders to a male, she expects in return a long term pair bond with that male.<sup>43</sup> Whereas a man chooses a few women with whom he will share parenting responsibilities,<sup>44</sup> in every instance a female seeks males who will provide sufficient resources and protection for herself and her offspring.<sup>45</sup> As a consequence, the sexual goals of males and females conflict when males seek to mate for the short term.<sup>46</sup>

*B. Response to Conflicting Reproductive Goals: Seduction and Coercion*

A male's evolutionary programming assumes that short-term mating activity leads to a higher number of offspring who will carry his genes.<sup>47</sup> The increase in the number of offspring he fathers, inevitably, means an increase in the probability that some of those offspring will survive and pass his genetic code onto future generations. While males want to have these short-term mating opportunities, females naturally maintain a desire for long-term mating relationships. Males must, therefore, "coerce" females to participate in short term sexual activity that is against a typical female's "evolutionary" self-interest.<sup>48</sup>

---

energetically cheap ejaculate; the minimum for a woman is nine months of pregnancy and a long period of lactation." Thornhill & Thornhill, *supra* note 38, at 366.

43. WRIGHT, *supra* note 40, at 59-60.

44. The fear of cuckoldry is high in such relationships because the male does not want to make a huge investment in offspring that are not genetically tied to him. Males, therefore, select females who appear coy and reserved for such an endeavor. Further, in an effort to produce offspring with a higher probability of survival, the male chooses mates whom he considers genetically superior to other females. Two of the most important aspects a male looks for in a long-term mate are "her reproductive value and the likelihood that this value will be channeled exclusively to him." DAVID M. BUSS, *THE EVOLUTION OF DESIRE: STRATEGIES OF HUMAN MATING* 156 (1991).

45. "Sexual selection on females in human evolutionary history favored individuals who could gain access to males whose resources and genetic endowment could promote the survival of offspring." Thornhill & Thornhill, *supra* note 38, at 366. In addition, females who pursue promiscuous mating strategies become more vulnerable to sexual coercion and infanticide, for they lack the protection of a loyal male associate and the "respect" that serves to inhibit other males from attacking the mates of fellow males. Barbara Smuts, *Male Aggression against Women: An Evolutionary Perspective*, 3 *HUMAN NATURE* 1, 10 (1992).

46. "In the sexual arena [ ] a man who seeks sex without investing in his partner short circuits a mating goal of many women, who want greater emotional commitment and higher material investment." BUSS, *supra* note 44, at 143. *See also* Smuts, *supra* note 45, at 3.

47. Women, however, regardless of an increase in mating activity may only conceive a limited number of offspring.

48. "[S]ometimes males attempt to overcome female resistance by employing force, or the threat of force." Smuts, *supra* note 45, at 3.

Males utilize two stratagem, in addition to honest courtship, to achieve sexual access: deceiving females about their intentions to mate for the long term, that is seduction, or forcing females to mate, that is rape.<sup>49</sup> The emergence of small artificial communities that were not part of the primal biological environment, like the school or the workplace, has compelled males to create a third sexual strategy to increase their sexual access -- sexual harassment.<sup>50</sup> This strategy occupies a place somewhere on the continuum that extends between seduction and violent force.<sup>51</sup> Accordingly, the harassment manifests itself in different forms, combining various levels of seduction and aggression.

### C. *Sexual Strategies in the Educational Setting*

Seduction is the most attractive of the three alternatives to gain access to females. The seduce and abandon method allows the male to monopolize the female for a short period of time without the force necessary with rape,<sup>52</sup> thereby enhancing the likelihood of conception,<sup>53</sup> as well as providing him with greater assurance that the offspring are in fact his. The seduce and abandon method produces efficient results for the male population as a whole, however, male students in a school context are unlikely to achieve the same level of success.<sup>54</sup>

The inability of boys to capitalize on the seduce and abandon method stems from two considerations. First, in the primal

---

49. See Thornhill & Thornhill, *supra* note 38, at 366.

50. See Studd, *supra* note 32, at 56.

51. Males subject females to an array of adapted aggressive and violent behavior in order to gain sexual access. Males choose behavior that involves a mixture of artifice and violence; however, the less crafty the male, the more likely violence will be the final expression. As one educator commented:

If we really think about it, sexual assault almost always begins with some type of harassment: a threatening comment, a menacing look, an unwanted touch. This is why the concept of a continuum is so important: it helps us to see how the various forms of violence are connected and it gives us a sense of the spectrum of violence in women's lives. By the time young women reach high school, they have usually come to accept male violence as an inescapable part of life and many have already experienced it. Sexual harassment at school is just part of the bigger picture.

LARKIN, *supra* note 6, at 25.

52. Rape involves serious cost disincentives, like potential injury to the male and to his family members, or loss of status or resources. See Thornhill & Thornhill, *supra* note 38, at 366.

53. There is a lower probability that pregnancy will result from a rape.

54. See WRIGHT, *supra* note 40, at 62.

biological environment, school communities did not exist and younger boys had to compete with older, higher status males for females. Male students, on average, have acquired less resources in comparison with their older counterparts. Females, however, seek high status males who can provide resources and safety.<sup>55</sup> Evolutionary programming, therefore, informs young boys that their inferior status inevitably will inhibit their mating opportunities. This programming remains with young males, despite the fact that modern societal structure promotes dating among school students because girls tend to gravitate towards those males with whom they have the most social exposure.<sup>56</sup>

Second, an unfavorable reputation hinders male attempts to gain sexual access to females. Even if a male student has sufficient status, the small school community with an active flow of information, diminishes the capacity of the most savvy male to convince a girl his intentions are honorable. He may succeed initially; however, a negative reputation will check his future efforts to mate. Thus, in order to procure sexual access, male school students resort to a means other than the seduce and abandon method.

#### *D. Marginalization of Girls to Increase Sexual Accessibility*

Frustrated in their efforts to obtain short-term sexual access through deception, male school students may move further on the continuum towards coercion. Sexual harassment has evolved as an evolutionary compromise between the extremes of seduction and rape.<sup>57</sup> The harassment operates in a similar fashion as rape, however, with a far lower level of force and violence. In the wild, scientists observe primates that compel females to copulate, as well other primates who rarely utilize coercive tactics to attain sexual access. Between these extremes, some species "do not force copulation but nonetheless use threats and intimidation to

---

55. "Men's willingness to use sexual coercion should be related to their social status. Women prefer as mates men of high economic and social status. Sexual access to preferred mates (young and attractive) is thus positively correlated with the status, resource holdings, and prestige of a man." Thornhill & Thornhill, *supra* note 38, at 367.

56. Mechanisms selected in ancestral environments remain an integral part of male thinking even if the surrounding environment presents a different external reality than that provided by the ancestral environment. See BUSS, *supra* note 44; Studd, *supra* note 32, at 61. "The effect of an adaptation on current reproduction does not identify the evolutionary function of the adaptation because the current environment may differ from the evolutionary environment that generated the selection that designed the adaption." Thornhill & Thornhill, *supra* note 38, at 365.

57. Aggressive and violent male tendencies may surface as sexual harassment.

get sex."<sup>58</sup> This behavior is akin to the adapted tactic amongst human males of sexually harassing females.

Utilizing sexual harassment, boys hope to emotionally marginalize girls in order to increase the likelihood that the girls will submit to sexual overtures. In essence, the aggression enables boys to exercise control over a girl's sexuality. Both rape and sexual harassment employ aggression to gain sexual access. Rape, however, uses absolute force to achieve the ultimate goal of penetration, whereas, sexual harassment employs aggression in order to increase the effectiveness of seductive efforts. Modern society views sexual harassment with less opprobrium than rape; therefore, young boys have adapted to choose this sexual strategy in the schools.<sup>59</sup>

The marginalization for greater access approach, however, is contingent upon the evolved tendencies of females. Peer sexual harassment has a two-fold agenda: the instigation of fear and the deterioration of female self esteem. As females instinctively view the behavior as a predicate to more serious forms of aggression, fear is a natural reaction to the more aggressive types of sexual harassment.<sup>60</sup> Scientists recognize a pattern among male primates to use aggression as a means to train females to submit to male sexual advances.<sup>61</sup> In American schools, teenage girls reveal that sexual harassment creates a threatening environment.<sup>62</sup> Girls no longer feel safe at school and fear that

---

58. Barbara Smuts, *Apes of Wrath*, DISCOVER, Aug. 1995, at 35, 36.

59. Men consider rape, however, as personally acceptable "when there is no chance of being caught or punished." Thornhill & Thornhill, *supra* note 38, at 373.

60. The most common reaction of female students to sexual harassment is fear. As one girl explained, "A lot of girls don't feel very secure at school . . . [y]ou get scared in school. After a certain while you get really scared about all the situations." LARKIN, *supra* note 16, at 101. This tactic of using harassment as a threat creates an atmosphere of perpetual insecurity for girls. See *id.* See also, *Mosesto City Sch., OCR Case No. 09-93-1391* (last modified Feb. 15, 1997) <<http://www.ed.gov/offices/OCR/peers00.html>> (OCR discovered that several girls feared going to school because of the harassment.).

61. Jane Goodall describes in her book, *The Chimpanzees of Gombe*, how male primates rely upon aggression to overcome female resistance if they are unable to lure estrous females away for one-on-one sexual encounters. See Smuts, *supra* note 58 (making reference to the book).

62. The escalation of the coercive nature of the harassment to more violent acts despite the presence of societal restrictions and taboos is a very real danger. Society can not idly tolerate peer sexual harassment, not only because the behavior is far from innocuous in and of itself, but also because it can lead to progressively more violent and aggressive acts against female students. The high incidence of date rape in secondary schools demonstrates the need to counteract less severe manifestations of aggression and violent behavior in young males. See Casey Banas, *Ex-Nurse Tells High Schoolers of Date-Rape Horrors*, CHICAGO TRIB., Feb. 18, 1997 available in 1997 WL 3521833; Heather Wickes, *Unfortunately Date Rape a Grim Reality for Students*, OMAHA WORLD HERALD, March 7,

sexual harassment will escalate into more serious acts against them.<sup>63</sup> Many girls, in order to avoid the looming violent consequences, choose to minimize their losses and grant sexual access.<sup>64</sup>

More significantly, peer sexual harassment also enables boys to gain sexual access by facilitating a subtle attack on the self-esteem of young girls.<sup>65</sup> Sexual harassment has become a pervasive evolutionary tool to break down the natural barriers that girls erect in order to prevent boys from gaining sexual access. A long gestation period and a capability to conceive only a limited number of offspring drives women to emphasize quality over quantity.<sup>66</sup> As a result, women typically hoard their reproductive opportunities and reserve them only for worthy males. A female's conviction that she can and must be selective constructs a barrier that hampers males' sexual access to her. In order to gain access, boys must overcome this barrier.<sup>67</sup> "Madonnas," or sexually coy females, deny sexual access until they receive adequate assurance that the male will invest in their offspring.<sup>68</sup> The male sexual preference in most instances for short-term mating opportunities, however, demands that another category of women also exist, the "whores."

As whores settle for a lesser resource and time contribution from males, the natural drive of males to massively distribute

---

1996 available in 1996 WL 616191. Further, 49.5% of the women who report being sexually assaulted, first encountered sexually violent behavior when they were under the age of seventeen. See LARKIN, *supra* note 16, at 24. In fact, 60% of college age men admit that if the right circumstances existed, they would use force, rape, or both in sexual relations with women. See *id.*

63. One student explained, "Some guys might get sexually harassed but they're not in the same boat as we are. We're afraid to walk down the street." *Id.* at 35.

64. In the wild, male primates use aggression "to train a female to fear him so that she will be more likely to surrender to his subsequent sexual advances." Smuts, *supra* note 58, at 36.

65. Research indicates that women are less prone than men to value themselves as people: "women have lower self esteem than men do; women do not value their efforts as much as men do; women are less self-confident than men; women are more likely than men to repress their anger and to say they are 'hurt' than to admit they are angry." CAROL TAVRIS, *THE MISMEASURE OF WOMEN* 27 (1992).

66. "[F]emales do not benefit by mating with every male who comes their way. Females benefit from being choosy about their mates because some males provide better genes than others, or because some males are better able or more willing to provide the female with resources, parental care, protection, or other benefits that aid female reproduction." Smuts, *supra* note 45, at 3.

67. "Because women are more selective about mates and more interested in evaluating them and delaying copulation, men, to get sexual access, must often break through feminine barriers of hesitation, equivocation, and resistance." Thornhill & Thornhill, *supra* note 38, at 366.

68. See WRIGHT, *supra* note 40.

their genetic codes necessitates the existence of women who grant access under these conditions. Males identify women as ideal for either long-term or short-term mating according to the madonna/whore dichotomy. Some women, even though it is against their sexual best interest, become whores. Sexual harassment operates as a conditioning process through which boys marginalize certain girls by neutralizing their inclination to be selective. Peer sexual harassment, therefore, guarantees that male students in totem will gain greater access to a marginalized portion of the female population. The sexual harasser will not necessarily obtain access to the girl he harasses; but, by participating in a shared male agenda, each harasser increases the probability of access for the whole.<sup>69</sup>

### *E. Evolutionary Impact of Peer Sexual Harassment*

Once identified as sexual beings, girls feel violated and isolated.<sup>70</sup> Surveys and interviews indicate that harassing behavior has a significant impact on a young girl's self-esteem, whereas boys report being less affected.<sup>71</sup> For instance, the girl alluded to earlier, who endured getting poked by a drumstick responded, "These guys were making me seem like something I wasn't. It was hurting my entire self-image and reputation."<sup>72</sup> Another girl interviewed noted, "when I get sexually harassed, I feel like I don't exist."<sup>73</sup>

Every harassing act engenders in girls the feeling that they are inferior persons.<sup>74</sup> Sexual harassment impedes the emotional and educational development of young girls who admit feeling

---

69. Posses have emerged as a popular way in which young males bond in order to obtain greater sexual access for their group. Interestingly, the harassers become "cool" from the perspective of other students, including females. Many females begin to seek their attention. See Alexandra A. Bodnar, Note, *Arming Students for Battle: Amending Title IX to Combat the Sexual Harassment of Students by Students in Primary and Secondary School*, 5 S. CAL. REV. L. & WOMEN'S STUD. 549, 549-552 (1996).

70. Fellow female students do not come to the aid of harassed classmates. "Considering the hostile environment, the silence of the other young women can be seen as a reasonable strategy for securing their own safety." LARKIN, *supra* note 16, at 119. As a result female students feel isolated from the rest of the community, and boys break down female bonds.

71. "Adolescence seems to be a time when many girls begin to shut down and I believe sexual harassment has a lot to do with this. Sexual harassment can slowly erode young women's confidence and self-esteem and make it difficult for them to develop a positive female identity." LARKIN, *supra* note 16, at 102.

72. Pera, *supra* note 20.

73. LARKIN, *supra* note 16, at 32.

74. See *id.* at 102.

embarrassed, afraid, angry, frustrated, and powerless in school.<sup>75</sup> The ramifications extend beyond the psychological, as girls report suffering physical symptoms like insomnia, listlessness, and depression.<sup>76</sup> In the end, the manifestation of concrete consequences, such as absenteeism, tardiness, decreased classroom participation, and poor scholastic performance illustrate the severe impact harassing behavior has on a girl's ability to receive an equal education.<sup>77</sup>

Feminists correctly emphasize these negative impacts on female development and advancement as cause to eradicate sexual harassment; however, they also theorize that males harass solely to achieve these outcomes.<sup>78</sup> Evolutionary theory and mainstream feminist scholarship diverge at this juncture. According to evolutionary logic, males harass to lower self-esteem as a means to enlarge sexual accessibility, not to thwart female achievement and procurement of resources. In essence, the motivation is sex, not power.<sup>79</sup> Boys emotionally marginalize particular girls to create greater sexual access to these girls. Understandably, girls interpret sexual harassment as behavior motivated by a desire for power.<sup>80</sup> After all, as a result of the harassment, most girls feel powerless, not sexually aroused.<sup>81</sup>

---

75. Responses solicited from female students include feeling embarrassed and self-conscious, losing confidence, and being afraid or confused. See 1993 AAUW STUDY, *supra* note 9, at 16-17.

76. See Sherer, *supra* note 6, at 2134.

77. See *id.*

78. See Studd, *supra* note 32. "No research has conclusively shown that sexual attention is used as a means to achieve a power goal, rather than, for example, power being used as a means to achieve a desired sexual goal." *Id.* at 56. In fact, sexual harassment is more about social interaction, than a power struggle. Research indicates, for example, that sexual harassment is more prevalent and persistent in the service sector rather than in an office setting. One social scientist introduced the "social contact hypothesis" to explain this data. He asserts that the existence of more social interaction in the service sector presents the opportunity for males to aggressively pursue their sexual interests. *Id.* at 74. As schools afford an even greater chance for peers to socially interact, it becomes logical that peer sexual harassment has a higher incidence in the schools than in the workplace. The harassment is tied to social opportunities, rather than a need for power.

79. See *id.* at 54.

80. For example, one girl expressed, "[d]espite its name, [sexual harassment] has less to do with sex than power. For instance the guy that harassed me was obviously not interested in me sexually. All he was interested in was making me feel uncomfortable and intimidated. He just used sexual words and gestures to accomplish this." STEIN & SJOSTROM, *supra* note 25, at 64. The boys behavior, however, ultimately had sexual underpinnings, because his evolutionary objective was to obtain sexual access by making her feel uncomfortable. See *Sex and Violence*, *supra* note 35.

81. See *Sex and Violence*, *supra* note 35. The males, however, are sexually aroused. Both noncoercive and coercive sex arouses rapists. See Randy Thornhill & Nancy Wilmsen

The perception of girls, however, does not preclude a finding that sexual motivations, not contests for power and economic gain, underlie peer sexual harassment.

Social scientists observe a correlation between self-esteem and sexual promiscuity among women. Women with lower self-esteem tend to be less selective in their mating activities.<sup>82</sup> Lower self-esteem manifests itself as a general feeling of unattractiveness in girls. Women who perceive themselves as less attractive assume they have less of a chance to garner male attentions through sexual reserve. These women become promiscuous and receive smaller amounts of resources from a series of males, rather than seeking significant contributions from one or two male sources.<sup>83</sup>

A "gradual molding of sexual strategy" develops in response to stimuli a girl receives from her external environment. Perceived unattractiveness is neither inherent nor epiphanic, however, once a girl feels worthless her mating response is biologically predetermined.<sup>84</sup> A girl with low self-esteem will become more receptive to sexual activity on less than ideal Darwinian terms.<sup>85</sup> Studies indicate that assurances of beauty cultivate a high self-esteem in teenage girls, which in turn encourages sexual restraint.<sup>86</sup> By correlation, girls who possess low self-esteem do not exercise sexual restraint. Therefore, if peer sexual harassment can contribute to female students' sense of low worth, the behavior chips away at the female preference for selectivity when choosing a mate.<sup>87</sup>

#### *F. Different Impacts on Girls and Boys*

Peer sexual harassment impacts girls more severely than boys. Twice the number of girls than boys in schools report negative emotional reactions to sexually harassing incidents.<sup>88</sup> The fact that female students suffer more serious repercussions

---

Thornhill, *Coercive Sexuality of Men: Is There Psychological Adaptation to Rape?*, in *SEXUAL COERCION* 91, 101 (Elizabeth Grauerholz & Mary A. Koralewski eds., 1991).

82. See WRIGHT, *supra* note 40, at 84.

83. Robert Wright notes, "less attractive women, with less chance to hit the jackpot via sexual reserve, become more promiscuous, extracting small chunks of resources from a series of males." *Id.*

84. See *id.* at 83.

85. See *id.*

86. See *id.* at 84-85.

87. As an aside, the wearing down of this protective wall may contribute to the high percentage of teenage pregnancies.

88. 1993 AAUW STUDY, *supra* note 9, at 16-17.



from the harassing behavior corresponds to their evolved sexual objectives. As females possess significantly fewer reproductive opportunities than males, they tend to be more protective of their sexual resources. Males, however, do not have the same reproductive restrictions as women, and welcome most chances to copulate. Accordingly, boys tend to view sexual harassment as an invitation rather than a threat.<sup>89</sup> Even if boys experience peer sexual harassment to the same extent as girls, evolutionary biology informs society that the harassment will disproportionately affect the girls.

Boys, however, are not the only perpetrators of peer sexual harassment. The AAUW survey indicated that 57 percent of the boys who reported being sexually harassed were targeted by a single girl; 35 percent of those same boys were harassed by a group of girls.<sup>90</sup> Examples of sexually harassing behavior provided by the male victims included comments on the size of their reproductive organs, jokes about the extent of their sexual experience, being called "gay," and unwanted patting of their bottoms as they pass.<sup>91</sup>

Girls may use these comments and actions to denigrate a boy's sexual prowess or attack his masculinity. In this context, women may believe such behavior will serve to protect them by making males more sexually insecure.<sup>92</sup> On the other hand, girls may choose these comments or actions, other than allegations regarding a boy's sexual preferences, to encourage and fortify the male sexual ego. For instance, teasing about the size of a male's organ may involve praise on the organ's largesse, rather than its

---

89. See LARKIN, *supra* note 16, at 35. One girl interviewed commented: I know one female who harasses guys . . . She'll go right up and grab their rear end. She'll say things to them like "hi, sexy" or "What are you doing tonight?" A few of the guys have actually come over to her, after she says that. And I'm afraid for her because if she keeps that up she could get in trouble. If the guy comes over and starts talking to her . . . he might think she likes him in that kind of way and he might try some thing she doesn't want him to. It might turn out to be something pretty bad."

*Id.*

90. See STEIN & SJOSTROM, *supra* note 25, at 29.

91. See *Id.*

92. Unfortunately for girls, from an evolutionary perspective if a male is emasculated or feels insecure, then he is more likely to resort to force and violence in order to procure reproductive access. "Ironically, girls who harass boys often jeopardize their own safety." LARKIN, *supra* note 16, at 35. As such, when girls engage in sexually harassing behavior, they in effect exacerbate the problem by creating a class of males who are more likely to rape. Peer sexual harassment, therefore, increases the threat to girls in either context, whether as the harassed or the harasser.

tininess. In effect, the harassment could serve to aggrandize males confidence in their sexual desirability.

The only type of harassment that elicited a response of "very upset" from boys was accusations of being gay.<sup>93</sup> These attacks on their sexual status understandably caused uneasiness from an evolutionary perspective. Homosexual activity does not produce offspring. Usually other males make such comments in order to lower the status of their sexual competitors. Furthermore, even if a girl does make similar statements, the impact is less severe because boys do not regard her as a competitor for the same sexual resources. The fact that boys view peer sexual harassment from girls as more complimentary than threatening, coupled with the fact that boys are most often harassed by a girl acting alone (a less threatening situation than if the perpetrators were a group of individuals or a boy acting alone), translates into a lesser likelihood that the harassment will cause serious harm. These factors render predictable the observance that boys suffer less harm from peer sexual harassment than girls in American schools.

### III. THE LAW

Analogizing Title IX sexual harassment claims to those recognized under a Title VII analysis, the courts are attempting to transfer the legal proscriptions against "hostile environment" sexual harassment in the workplace to the problems surrounding peer sexual harassment in American schools. The issue becomes, therefore, whether a cognizable private claim against the school district for sexual discrimination exists under Title IX of the Education Amendments Act of 1972,<sup>94</sup> when fellow students sexually harass a female student and school officials fail to take prompt remedial measures. As neither Congress nor the Supreme Court has provided sufficient guidance on the issue,<sup>95</sup> a uniform rule regarding the liability of school districts for peer sexual harassment has not yet emerged.<sup>96</sup>

---

93. See 1993 AAUW STUDY, *supra* note 9, at 20.

94. Education Amendments of 1972, § 901(a), 20 U.S.C.A. § 1681-88 (1997).

95. "Given the enormous social implications for students, schools, and parents, this court wishes that Congress would step in and simply tell us whether it intended to make school districts responsible for the payment of damages to students under these circumstances. Knowing that that will not occur, the court does its best to decipher Congressional intent." *Wright v. Mason City Community Sch. Dist.*, 940 F. Supp. 1412, 1412, No. C 94-3056, 1996 WL 526274, at \*4 (N.D. Iowa Aug. 27, 1996).

96. "The appellate court decisions do not present a uniform rule with regard to whether

In the fall of 1996, the Supreme Court avoided reconciliation of the conflict in the circuits when it denied certiorari in a Fifth Circuit case, *Rowinsky v. Bryan Independent School District*.<sup>97</sup> In this case, the court refused to interpret Title IX to allow institutional liability for peer sexual harassment and explicitly disagreed with the opposite conclusion drawn by the Eleventh Circuit<sup>98</sup> in *Davis v. Monroe County Board of Education*.<sup>99</sup> The court in *Davis* sustained a female student's private cause of action against school officials who negligently responded to her allegations of peer sexual harassment.<sup>100</sup> The Fifth and the Eleventh Circuits demonstrate the extremes on the issue, thereby opening the district courts to an onslaught of peer sexual harassment litigation.<sup>101</sup> This section will analyze and synthesize the legal alternatives proffered by the differing courts and attempt to formulate a uniform standard of institutional liability.

#### A. Sexual Harassment Jurisprudence

Before undertaking a study of the recent attempts to protect girls from sexual harassment in the schools, an overview of workplace sexual harassment jurisprudence is beneficial. Title VII of the Civil Rights Act of 1964<sup>102</sup> entitles women to equal treatment in employment through its prohibitions against sexual

---

a student must prove an intent to discriminate on the part of the educational institution to state a valid claim for monetary damages for peer - to - peer sexual harassment." *Id.* at \*6.

97. 80 F.3d 1006 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 165 (1996). Mother brought action under Title IX on behalf of daughters, alleging that the school district tolerated and contributed to hostile environment sexual harassment. She sought declaratory and injunctive relief, as well as compensatory damages for the peer sexual harassment that her daughters endured in school and on the school bus. The Fifth Circuit issued its decision on April 2, 1996. *Id.*

98. *Id.* at 1010 n.8.

99. A fifth grade student sued the school district for injunctive relief as well as compensatory damages in light of its failure to take any meaningful action when a fifth grade male student sexually harassed her on a continuous basis over a five month period. *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186 (11th Cir. 1996), *reh'g en banc granted*, 91 F.3d 1418 (11th Cir. 1996). The Court of Appeals reviewed de novo the decision by the The United States District Court for the Middle District of Georgia to dismiss plaintiff's action for failure to state a claim. *See Aurelia D. v. Monroe County Bd. of Educ.* 862 F. Supp. 363 (M.D. Ga. 1994).

100. *See Davis*, 74 F.3d at 1194.

101. *See Wright v. Mason City Community Sch. Dist.*, No. C 94-3056, 1996 WL 526274, at \*4 (N.D. Iowa Aug. 27, 1996) ("Resolution of this issue has yielded conflicting opinions in the appellate courts as to what proof is necessary to state a claim for money damages . . .").

102. 42 U.S.C. §2000e (1997).

discrimination.<sup>103</sup> Sexual harassment adversely affects the employment status of the victim on the basis of gender, and therefore, the courts have interpreted the statutory language of Title VII to prohibit both "quid pro quo" and "hostile environment" sexual harassment in the workplace.<sup>104</sup>

Quid pro quo sexual harassment occurs when an individual in a supervisory position attempts to extract sexual favors from a subordinate in exchange for employment security or advancement.<sup>105</sup> By premising favorable employment conditions upon adherence to these sexual overtures, the supervisor is, in essence, singling out the victim on the basis of her gender. As the terms of employment are different for the female victim than for her male counterparts, quid pro quo sexual harassment presents a clear example of sexual discrimination.<sup>106</sup>

The more tenuous arguments arise in the context of establishing hostile environment sexual harassment as a form of sexual discrimination. For example, when a female employee endures hostile environment sexual harassment from her supervisors or co-workers, the employee must not "do" anything additional to receive the same employment treatment; however, as a result of the harassment, the conditions of her employment are more unfavorable than those of her male peers. According to the Supreme Court, conduct that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment" constitutes hostile environment sexual harassment.<sup>107</sup> Further, if the victim endures this oppressive atmosphere solely because of her membership in a class protected by Title VII, and the employer chooses to allow the abusive environment to continue, the employer discriminates against the victim on the basis of her gender.<sup>108</sup>

---

103. Title VII makes it unlawful for an employer "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (1997).

104.

105. See *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1190 n.3 (11th Cir. 1996).

106. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 62-65 (1986).

107. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993) (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, at 67 (1986)).

108. *Id.* See also Title VII, 29 C.F.R. § 1604.11(c) (1997).

Hostile environment sexual harassment jurisprudence is in flux; uncertainty still surrounds the reasoning upon which courts have based institutional liability. A five part test, however, has emerged from the foray, even though the fifth element is still one of major contention. A *prima facie* case for hostile environment sexual harassment must allege five elements: (1) that the victim belongs to a protected group; (2) that the victim was the subject of unwelcome sexual harassment; (3) that the harassment was based on her sex; (4) that the sexual harassment effected a term, condition or privilege of employment; and (5) that the employer knew or should have known of the harassment and failed to take remedial action.<sup>109</sup> To justify imposing liability when employers do not possess actual notice of harassment under the fifth element, courts emphasize the agency dimension of the relationship between the harasser and the employer,<sup>110</sup> "[t]herefore, liability for a hostile work environment created by a co-worker may be imputed to an employer even though the employer possesses no direct knowledge of the hostile environment because the co-worker is an agent of the employer."<sup>111</sup> Thus, constructive notice is sufficient to render the employer legally responsible for curing sexual harassment in the workplace.<sup>112</sup>

Although the plain language of the fifth element intimates a negligence standard, some courts manifest a reluctance to relinquish the requirement that the employer exhibited an intent to discriminate.<sup>113</sup> These courts maintain that hostile work environment sexual harassment "is a type of intentional discrimination, but the intent is established by proof of the elements required to prove the cause of action and needs no additional proof."<sup>114</sup> When a plaintiff, therefore, alleges that an employer should have been aware of objectively severe and pervasive sexual harassment in the workplace, the plaintiff implicitly alleges that the employer's lack of response was synonymous with an intent to discriminate on the basis of the plaintiff's gender.<sup>115</sup> Further, these courts eschew premising employer liability upon respondeat superior principles and rather

109. See *Bruneau v. South Kortright Cent. Sch. Dist.*, 935 F.Supp. 162, 174 (N.D.N.Y. 1996) (citing *Fair v. Guiding Eyes for the Blind, Inc.*, 742 F.Supp. 151, 155 (S.D.N.Y.1990)).

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

111. *Bruneau*, 935 F.Supp. at 173.

112. See *id.*

113. See *id.* at 173-74.

114. *Doe v. Petaluma City Sch. Dist.*, 949 F.Supp. 1415, 1424 (N.D.Cal. 1996).

115. See *id.* at 1422-23.

emphasize the intentional action or inaction of the employer as the basis for liability under Title VII for hostile work environment sexual harassment.<sup>116</sup> The relevance of whether a court hinges employer liability on agency principles or on claims that an employer exhibited a pure intent to discriminate by ignoring the problem is minimal in the hostile environment sexual harassment cases under Title VII. In the school context, however, as students are not agents of the school district, the type of reasoning adopted is critical when applying Title VII jurisprudential principles to a hostile environment peer sexual harassment claim under Title IX. Reliance on agency principles as the source of liability for employers can effectively block a student's chance of recovery for peer sexual harassment through the legal system.

### B. Title IX Jurisprudence

Congress specifically exempted educational institution employees from liability for sexual discrimination under Title VII.<sup>117</sup> Legislative history, however, suggests that Congress enacted Title IX with the intention of extending the same equal employment protections excluded from Title VII to employees in the education sector.<sup>118</sup> Another class of citizens, students, are also at risk in the educational setting.<sup>119</sup> Title IX, therefore, not only ensures equal employment opportunities for female employees, but also equal educational opportunities for female students.<sup>120</sup> Title IX requires, in relevant part, that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance . . . ."<sup>121</sup>

The substantive import of Title IX's statutory language parallels Title VII's proscriptions for workplace behavior.

---

116. See *Bruneau*, 935 F.Supp. at 170.

117. See *Petaluma City Sch. Dist.*, 949 F.Supp. at 1421. The 1972 Amendments to the Act, however, removed the education exemption. See Eriksson, *supra* note 6, at 1803 n.28. In addition, gender was not included as a prohibited classification within Title VI of the Civil Rights Act of 1964. See 42 U.S.C. §§ 2000d-2000d-4 (1997).

118. See *Petaluma City Sch. Dist.*, 949 F. Supp., at 1421.

119. See *id.* ("[T]his Court discerns in Title IX no intent to provide a lesser degree of protection to students than to employees.").

120. Female students initially utilized Title IX to challenge discriminatory practices in athletic programs and admission policies. See *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1190 (11th Cir. 1996). The scope of Title IX's application, however, is broader than these "access" factors. See Eriksson, *supra* note 6, at 1804.

121. 20 U.S.C.A. § 1681(a) (1997).

Procedurally, however, Title VII and Title IX are critically different from a jurisprudential perspective. Congress passed Title IX, as it did Title VI, which prohibits racial discrimination by federally funded programs in a non-educational setting, pursuant to the Spending Clause.<sup>122</sup> Accordingly, Congress conditions an educational institution's receipt of federal funds upon its compliance with the directives of Title IX, as well as with the agency guidelines created to effectuate the goals of the statute.<sup>123</sup>

Congress derives its authority to impose Title IX duties upon the school districts from its power to disburse funds as it deems proper. As such, the schools are on notice that if they fail to follow the statutory mandates of Title IX then they risk losing federal funding.<sup>124</sup> In theory, the recipient considers the burdens tied to receipt of the funds before accepting the money.<sup>125</sup> If a future judicial or administrative action extends the legal obligations of the recipient beyond its expectations, the recipient "has the option of withdrawing and hence terminating the prospective force of the injunction."<sup>126</sup> Judicial recognition of private causes of action, not explicitly included in a Spending Clause statute, exposes the recipient to additional financial liability which may alter its decision to accept the funds.<sup>127</sup> Two judicial responses result from the fact that Title IX is a Spending Clause statute. First, courts are reluctant to recognize implicit rather than explicit obligations under Title IX. Second, courts are wary of granting broad based remedies under the statute if they find an implicit violation of Title IX.<sup>128</sup>

122. See *Bruneau v. South Kortright Cent. Sch. Dist.*, 935 F. SUPP. 162, 172 n.9 (N.D.N.Y. 1996).

123. See *Sherer*, *supra* note 6, at 2144-46.

124. See *Guardians Assoc. v. Civil Service Commission of the City of New York*, 463 U.S. 582, 596 (1983).

125. See *id.* Public schools, however, usually accept federal funds as a matter of course and without contemplation. After all, the school districts are slaves to federal funding. The operation of the public school system in the United States depends upon Congressional financial support. A public elementary or secondary school would unlikely be in a position in which it could afford to forgo federal funding. But see Andrew Cain, *Moran Bill Goes For Funds: Seeks Federal Aid Rejected By Allen*, THE WASH. TIMES, April 25, 1996, at C7 (Virginia Governor George F. Allen rejected Goals 2000 money from Federal Government).

126. *Guardians*, 463 U.S. at 596.

127. See *id.*

128. "Since the private cause of action under Title VI is one implied by the judiciary rather than expressly created by Congress, we should respect the foregoing considerations applicable in Spending Clause cases and take care in defining the limits of this cause of action and the remedies available thereunder." *Id.* at 597.

In *Franklin v. Gwinnett County Public Schools*, the Supreme Court determined that a damages remedy was available to a female student who filed a hostile environment sexual harassment claim under Title IX.<sup>129</sup> The *Franklin* court decided that Congressional silence on the remedies issue did not foreclose a Title IX plaintiff from seeking monetary relief for alleged intentional gender-based discrimination.<sup>130</sup> When Congress creates a statutory cause of action that provides no intent to limit the remedies available for implied rights that may arise from the language of the statute, the court has discretion to award appropriate relief, including private damages.<sup>131</sup> The Court confined its provision of monetary relief under Title IX for hostile environment sexual harassment, however, to cases establishing intentional discrimination on the part of the school district. According to the Court, allowing private actions against educational institutions for unintentional violations under a Spending Clause Statute such as Title IX would commit the school districts to a financial risk for which they lacked adequate notice.<sup>132</sup>

The Court in *Franklin*, however, provided insufficient guidance as to whether a school district's failure to remedy a hostile environment resulting from peer sexual harassment was an implicit violation of Title IX's prohibition against sexual discrimination in the schools.<sup>133</sup> The implied action implicated in *Franklin* concerns a school's obligation to react promptly and

---

129. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 76 (1992). A teacher repeatedly and severely sexually harassed the plaintiff over a three year period. *Id.* at 63. Despite their awareness of the problem, school administrators failed to intervene and in fact advised the victim to refrain from pressing charges against the teacher. *Id.* at 64. As the administrative process afforded her no personal relief for the damages incurred, she pursued compensatory damages against the school district.

130. *Id.* Congress neglected to specifically mention within the Title IX statute, a private cause of action for a harassed student against the school district. *See id.* Justice White, however, concluded that once the court finds an intentional violation of Title IX, the presumption that remedies are limited under statutes enacted under the Spending Clause of the United States Constitution does not apply. *Id.* at 71-73.

131. *See id.* at 69.

132. "The point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award." *Franklin*, 503 U.S. at 74-75 (citing *Penhurst State Sch. and Hospital v. Halderman*, 421 U.S. 1, 17 (1981)). In the dissent Justice Scalia separated claims according to whether they implicated implied or explicit obligations under the statute, rather than the intentional/unintentional distinction offered by the majority. *See id.* at 76.

133. The Supreme Court did not conclude that Congress passed Title IX solely pursuant to the Spending Clause, however, the court intimated that "intentional" discrimination was a prerequisite for institutional liability. *See Burrow v. Postville Community Sch.*, 929 F. Supp. 1193, 1203 n.8, (N.D. Iowa 1996).



responsibly to a situation when an employee, namely a teacher, sexually harasses a female student.<sup>134</sup>

Further, even if the Court did recognize a duty on the part of schools to properly address peer sexual harassment complaints of its students in order to receive federal funds, it remains unclear as to whether a student may petition a court for private monetary relief because the school was derelict in its response. As a result, the Court left two critical aspects of a hostile environment peer sexual harassment claim open to scrutiny from the lower courts: the issue of notice, and the issue of whether intent or negligence is necessary on the part of the school district before it incurs liability.<sup>135</sup>

### *The Debate in the Circuits*

#### *Rowinsky and Davis*

In *Davis v. Monroe County Board of Education*, the Eleventh Circuit interpreted the *Franklin* decision as inviting courts to recognize monetary damages for peer sexual harassment claims against the school district under the statutory scheme of Title IX.<sup>136</sup> The court believed that Title IX should afford students the same protections in school that employees receive in the workplace under Title VII.<sup>137</sup> Directly transferring the

---

134. The issue of institutional liability for damages when an employee, especially an instructor, sexually harasses a student is still unresolved. This winter, even with the precedent of *Franklin*, the Fifth Circuit refused to hold the school liable when a karate instructor sexually harassed a student in his class, unless the school had "actual knowledge" of "underlying facts indicating a sufficiently substantial danger" to students. See *Rosa H. v. San Elizario Independent School District*, 106 F.3d 648, 659 (5th Cir. 1997). In this case, the student had indicated to a school counselor that she was having sexual relations with her instructor. *Id.*

135. "Under such interpretation, confusion and disagreement arise in a case like the present one in which the facts involve peer-to-peer sexual harassment, i.e. non-agent harassment, which does not fall within the respondeat superior scheme of liability." *Burrow*, 929 F. Supp. at 1203 n.8.

136. *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186 (11th Cir. 1996). In *Doe v. Petaluma City School District*, upon reconsideration of the issues, the court proposed an altered three prong test for liability in the aftermath of *Davis*: "that plaintiff was subjected to unwelcome harassment based on her gender, that the harassment was so severe or pervasive as to create a hostile educational environment, and that the [d]efendants knew, or should in the exercise of their duties have known, of the hostile environment and failed to take prompt and appropriate remedial action." 949 F. Supp. 1415, 1427 (N.D. Cal. 1996).

137. "[A] female student should not be required to run a gauntlet of sexual abuse in return for the privilege of being allowed to obtain an education." *Id.* at 1194. See generally, Christopher T. Nixon, Case Note, 64 TENN. L. REV. 237 (1996), for analysis

substantive principles of Title VII hostile work environment case law to the educational context, the court fashioned a legal standard for institutional liability. The school is responsible for damages if peer sexual harassment creates an abusive and oppressive learning environment for female students.<sup>138</sup> The court maintained a focus on the deliberate failure of school officials to ensure that the educational institution was free from pervasive sexual harassment regardless of who perpetrated the sexual harassment: a teacher, an administrator, or a student.<sup>139</sup>

As long as peer sexual harassment existed in the school and school officials "knew or should have known" of its existence, they must have made prompt attempts to remedy the situation.<sup>140</sup> The *Davis* court explained that centering the inquiry on whether the school committed the harassing behavior ignores the nature of a hostile environment claim. If the school allowed the oppressive behavior to continue in its midst, the school effectively discriminated against the victim on the basis of sex. The school denied her an equal chance to share in the benefits that the educational institution had to offer.<sup>141</sup> The school permits the student to endure inequities other students must not suffer, simply because of her sex. The court, therefore, applied a negligence standard, stating that sexual harassment, which reached a pervasive and severe level, even though the harassers were students, gave rise to an inference that the school possessed knowledge or constructive knowledge of the oppressive learning environment.<sup>142</sup> The Eleventh Circuit decided that knowledge of a hostile environment creates a responsibility to respond swiftly and sufficiently to the situation.<sup>143</sup>

---

supporting the *Davis* decision.

138. "Thus, we conclude that as Title VII encompasses a claim for damages due to a sexually hostile environment created by co-workers and tolerated by the employer, Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising authorities knowingly fail to act to eliminate the harassment." *Davis*, 74 F.3d at 1193.

139. Another court commented that other courts following the *Davis* approach "focus not on the fact that Congress enacted Title IX through the exercise of its spending power. Rather, these courts focus on the fact that Title IX was enacted to prohibit discrimination based on sex in the educational environment." *Wright v. Mason City Community Sch. Dist.*, 940 F. Supp. 1412, 1419 (N.D. Iowa 1996).

140. See *Davis*, 74 F.3d at 1195.

141. "The evil *Davis* sought to redress through her hostile environment claim was not the direct act of a school official demanding sexual favors, but rather the officials' failure to take action to stop the offensive acts of those over whom the officials exercised control." *Id.* at 1193.

142. See *id.* at 1195.

143. The dissent would hold, however that (1) Title IX should not encompass

Perturbed by the Eleventh Circuit's proposal of a negligent standard, the Fifth Circuit adopted in *Rowinsky v. Bryan Independent School District*, an opposite stance that effectively insulates the school districts from liability for peer sexual harassment in the schools.<sup>144</sup> An emphasis on the lack of agency between the school district and the students led the court to conclude that the school could not be liable for the transgressions of third parties under Title IX, a Spending Clause statute.<sup>145</sup> Under the agency theory of analysis, the court found that the school district has insufficient notice to know it is open to liability.<sup>146</sup>

Turning to the application of Title VII, the court asserted that Title VII anti-discrimination principles are intended to ameliorate the effects of sexual harassment in the context of unequal power.<sup>147</sup> Harassment between students, according to the court, is harassment between equals, and, therefore, does "not carry the same coercive effect or abuse of power as those made by a teacher, employer, or co-worker."<sup>148</sup> Absent some basis to impute the actions of students to school officials, the court concluded that Title VII hostile environment theories are inapplicable to peer sexual harassment in the schools.<sup>149</sup> The

---

student-on-student harassment; (2) even if it does apply, the courts should limit its application to intentional behavior; and (3) if the courts do extend Title IX's provisions to cover unintentional conduct on the part of the school, they should at least limit the remedy to injunctive relief. See Davis, 74 F.3d at 1195-96 (Birch, J., dissenting).

144. *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 165 (1996).

145. As Title IX is a Spending Clause statute, "[i]mposing liability for the acts of third parties would be incompatible with the purpose of a spending condition, because grant recipients have little control over the multitude of third parties who could conceivably violate the prohibitions of Title IX." *Rowinsky*, 80 F.3d at 1013.

146. One commentator suggests that the Fifth Circuit exhibited a misplaced fear that a recognition of the claim would impose strict liability upon the schools. See Case Comment, *Sexual Harassment--Title IX--Fifth Circuit Holds School District Not Liable for Student-to-Student Sexual Harassment*: *Rowinsky v. Bryan School District*, 110 HARV. L. REV. 787, 790-91 (1997) [hereinafter Case Comment]. The real debate, however, is between the application of either a negligence or an intent standard. See *supra* notes 62-98 and accompanying text.

147. Ironically, the court cites to the theories of Catherine MacKinnon, first advocate for the creation of a sexual harassment cause of action, in order to afford fewer protections to the rights of girls in the schools than their counterparts in the workplace receive. Assuming sexual harassment is a power issue, and the only reason to address the problem is because of this, no need exists to thwart sexual harassment where there is no power relationship. *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d at 1011 n.11. Peer sexual harassment, however, is not just about power. See *supra* notes 74-88 and accompanying text.

148. *Rowinsky*, 80 F.3d at 1011 n.11.

149. The dissenting judge argues, however, that it is disingenuous to assert that the

court focused primarily on the discrimination caused by the actual harassment, rather than the response of the school district to the situation.<sup>150</sup> The *Rowinsky* court's curt treatment of institutional responsibility in the matter produces a proposition that has serious implications for girls who fall victim to peer sexual harassment.<sup>151</sup> In essence, the court concluded that if a girl cannot establish that the school district addressed male claims differently than her claims, even if no procedure at all exists to deal with the problem of harassment, the school incurs no liability.<sup>152</sup>

### *The Reaction of the District Courts*

The intermediate positions brewing in the district courts manipulate the legal understanding of both intent and notice in order to arrive at a legally acceptable basis for institutional liability in the peer sexual harassment context.<sup>153</sup> These courts are wary of contorting available legal reasoning so as to contradict the statutory constructs of Title VII and Title IX and the established case law interpreting these statutes. The district courts have adopted a more sensitive approach than that manifested in the *Rowinsky* opinion.<sup>154</sup> Unlike the court in *Davis*,<sup>155</sup> however, the other districts also attempt to grapple with

---

school exercises no power or control over the school children. Even though the relationship is not economic, a relationship exists between the harassers and school officials which creates a duty on the part of the school to counteract peer sexual harassment. See *id.* at 1024 (Dennis, J., dissenting).

150. See *id.* at 1016. The Department of Education observed that the *Rowinsky* decision misunderstood institutional liability under Title IX. The Office of Civil Rights emphasized that, "Title IX does not make a school responsible for the actions of the harassing student, but rather for its own discrimination in failing to act and permitting the harassment to continue once a school official knows that it is happening." See Sexual Harassment Guidance, *supra* note 28, at 12048 n.27.

151. Without the threat of private law suits, schools will not address the problem of peer sexual harassment. See Case Comment, *supra* note 146 at 790.

152. "In the case of peer sexual harassment, a plaintiff must demonstrate that the school district responded to sexual harassment claims differently based on sex. Thus, a school district might violate Title IX if it treated sexual harassment of boys more seriously than sexual harassment of girls, or even if it turned a blind eye toward sexual harassment of girls while addressing assaults that harmed boys." *Rowinsky*, 80 F.3d at 1015. The court ignores the distinct inherent differences between sexual harassment claims and other claims.

153. The dissension stems from the courts' differing views as to the scope of duty Title IX places on educational institutions not to discriminate on the basis of sex." *Wright v. Mason City Community Sch. Dist.*, 940 F. Supp. 1412, 1418 (N.D. Iowa 1996).

154. *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir. 1996), *cert denied*, 117 S. Ct. 165 (1996).

155. *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1195 (11th Cir. 1996).

the implications of utterly disregarding notice and intent principles by casually transferring Title VII standards to a situation that only arises in an educational setting.<sup>156</sup>

Peer sexual harassment in the schools creates a situation idiosyncratic to the schools. Title VII jurisprudence, even though substantively similar, does not apply to the problem of extending institutional liability where no financial connection exists between the harasser and the institution. In efforts to placate legal precedent and statutory construction, however, the courts in many districts have formulated standards under Title VII that present a threshold of proof which renders it almost impossible for a peer sexual harassment victim to assert a legitimate claim against the school district.<sup>157</sup> Essentially, two queries receive attention from the courts: the determination of the criteria for intentional discrimination and the establishment of an acceptable level of notice which would trigger institutional liability.

The district courts have extracted from the Supreme Court's opinion in *Franklin v. Gwinnett County Public Schools* a principle that limits cognizable Title IX claims to those which allege intentional discrimination on the part of the school.<sup>158</sup> "Intentional," however, is an ambiguous marker for liability.<sup>159</sup> The Supreme Court neglected to specifically inform the courts as to what constituted Title IX intentional discrimination beyond

---

156. In *Davis*, the court hid behind the Supreme Court's mandate that Title IX be read broadly. See *Davis*, 74 F.2d at 1192 (citing *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982)). "The *Davis* court perceived public policy reasons for ensuring that schoolchildren receive at least as much protection as workers." *Doe v. Petaluma City Sch. Dist.*, No. C 93-00123 CW, 1996 WL 432298, at \*5. See also *Bruneau v. South Kortright Cent. Sch. Dist.*, 935 F. Supp. 162, 169 (N.D.N.Y. 1996) ("Title VII jurisprudence is a guide, and a Court should not blindly apply Title VII to determine the issues raised in a Title IX case.").

157. If the courts emphasize intent and exhibit an exaggerated fear as to whether the standard for liability appears like "negligence," then many overtly delinquent approaches that the schools adopt will pass muster. For example, in *Wright*, even with no procedure or program in place, the court found the school's conduct to be "negligence at best." *Wright v. Mason City Community Sch. Dist.*, 940 F. Supp. 1412, 1420 (N.D. Iowa). The court conceded that "the school district through its lack of training and experience was not well equipped to handle this terrible situation." *Id.* The court, however, failed to see the evidence as going beyond "past negligence and into reckless or intentional discrimination." *Id.*

158. ". . . [I]n explaining that intentional discrimination creates a prima facie entitlement to monetary damages under Title IX in a way that unintentional conduct simply does not, the *Franklin* decision implicitly holds that intentional discrimination is an element of a claim that the school district has violated a plaintiff's rights under Title IX . . ." *Oona R.-S. v. Santa Rosa City Schools*, 890 F. Supp. 1452, 1464 (N.D.Ca. 1995) (citations omitted).

159. See *Guardians Assoc. v. Civil Serv. Comm'n*, 463 U.S. 582, 592 (1982).

those situations analogous to the employment context. The district courts, deriving partial guidance from Title VII jurisprudence, have reasoned that a showing of intentional discrimination requires proof that a student receives disparate treatment on the basis of her sex as a direct result of a school district's course of action in response to peer sexual harassment.<sup>160</sup> Although the courts retreat from a mandatory showing of direct discriminatory animus, they still demand more than raw disparate impact evidence before concluding that the school district intentionally discriminated against the harassed student.<sup>161</sup>

In the wake of *Franklin*, the courts are distinguishing intentional violations of Title IX from unintentional transgressions. The courts proffer that intentional violations warrant an entitlement to monetary damages. Unintentional violations, however, although sufficient according to the negligent standard of *Davis*, evince insufficient notice to hold a school liable pursuant to a Spending Clause statute.<sup>162</sup> The courts view proper notice as critical in cases of peer sexual harassment. In the absence of grounds to hold the school vicariously liable for the actions of students, who are under their control, but who are not their agents, proof of notice bridges the gap between the students and the school district.<sup>163</sup>

The courts are unable to completely abandon notice considerations associated with Spending Clause statutes. They, therefore, shy away from incorporating the "knew or should have known" language within the fifth element, the element that establishes some basis for institutional liability.<sup>164</sup> For instance, in *Wright v. Mason City Community School District*,<sup>165</sup> the court struck a compromise between the absolutes put forth by the *Davis* and *Rowinsky* courts. *Wright* put forth a modified version of the Title VII standard by advocating "that the educational institution knew of the harassment and *intentionally failed to take proper remedial measures because of the plaintiff's sex.*"<sup>166</sup> Generally,

---

160. See Doe, 1996 WL 432298 at \*7-\*8.

161. See *id.* at \*5.

162. See Oona R.-S., 890 F. Supp. at 1464.

163. See *id.*

164. "The Supreme Court's opinion in *Franklin* explicitly demands more than mere negligence to create liability for monetary damages for a violation of Title IX -- it requires plaintiffs to show an intent to discriminate." *Wright v. Mason City Community Sch. Dist.*, 940 F. Supp. at 1419.

165. *Wright*, 940 F. Supp. at 1419.

166. *Id.* at 1419 (citing *Burrow v. Postville Community Sch. Dist.*, 929 F. Supp. 1193,

absent clear legislative intent to impose a duty, the courts manifest an uneasiness about imposing such a duty upon the schools to guarantee students that they will be safe from discrimination by third parties.<sup>167</sup> The courts, therefore, expand or contract their understanding of what amounts to "knowledge," rather than making an explicit ruling on whether the school officials are responsible for policing the halls and classrooms for peer sexual harassment.

Knowledge, or notice, gauges the school district's level of awareness that peer sexual harassment is a problem in their schools. In *Burrow v. Postville Community School District*, the court clings to an "actual notice" requirement. This requirement prevents the circumstantial evidence from circumventing the intentional/unintentional distinction and slipping into a negligence standard. The court chose to constrict liability, however, by requiring "evidence of the school's failure to prevent or stop the sexual harassment despite actual knowledge of the sexually harassing behavior of students over whom the the school exercised some degree of control."<sup>168</sup> The school district must have actual notice of the harassment; therefore, a Title VII "should have known" standard is insufficient. Another approach, adopted by the court in *Bruneau v. South Kortright Central School District*,<sup>169</sup> refused to resort to a negligence standard; however, the approach introduced another source of institutional liability other than actual notice. The school district risks being held liable for peer sexual harassment under Title IX if the school district has implemented "no reasonable avenue of complaint" for victims.<sup>170</sup> With notice, the school districts' inadequate attempts to cure the harassment suffered by its students may produce an inference that they sought to promulgate, rather than eradicate, a hostile learning environment that denies students equal benefits on the basis of gender.<sup>171</sup>

---

at 1205-05 (N.D. Iowa 1996) (emphasis added).

167. *Oona R-S*, 890 F. Supp. at 1466 n.12.

168. *Burrow*, 929 F. Supp. at 1205.

169. *Bruneau v. South Kortright Cent. Sch. Dist.*, 935 F. Supp. 162 (N.D.N.Y. 1996).

170. *Id.* at 177. This requirement may provide impetus for the schools to formulate proper complaint procedures, however, it depends on what the court means by "reasonable." The EEOC recommends that if a school "has an expressed policy against sexual harassment and has implemented a procedure specifically designed to resolve sexual harassment," and the victim chooses not to take advantage of these procedures, then the school is shielded from liability. *Id.* at 173 n.10.

171. Conversely, the courts will implicitly find the schools possessed notice that their actions could expose them to liability under Title IX if the court determines that the school intentionally discriminated against its students on the basis of gender. See *Bruneau*, 935

The protections ultimately afforded the student in the case of peer sexual harassment depend upon whether the court prefers a broad or narrow understanding of the word "intentional." A strict interpretation of the intent requirement inches the analysis closer to the bar on peer sexual harassment claims that the court erected in *Rowinsky*. A willingness to infer intent from circumstantial evidence, however, creates a wider base of institutional liability. Some district courts will consider "evidence of the school's failure to prevent or stop the harassment despite actual knowledge, the school's toleration of the harassing behavior and the pervasiveness or severity of the harassment."<sup>172</sup> This language implicates school districts on two possible levels: imposition of liability for both actual and constructive notice. A school could be liable for failing to act when the student clearly informs the school of the sexual harassment, and when the harassment is so intense or pervasive as to give the school constructive knowledge of a problem. Other courts may not consider a broad range of evidence. Although another court noted "[s]uch discrimination may manifest itself in the active encouragement of peer harassment, the toleration of the harassing behavior of male students, or the failure to take adequate steps to deter or punish peer harassment."<sup>173</sup> This language imposes a duty to act, however, it is unclear as to whether constructive notice is adequate.<sup>174</sup>

#### IV. EVOLUTIONARY THEORIES IN A LEGAL CONTEXT

##### *Power, Agency, and the Spending Clause*

##### *Power and Agency*

The conceptualization of sexual harassment in terms of a power struggle directs courts to distinguish the legal liabilities for workplace peer sexual harassment from those liabilities that should be extended to the educational setting.<sup>175</sup> Essentially,

---

F. Supp. at 169 n.2.

172. *Burrow*, 929 F. Supp. at 1204 (citing *Bosley v. Kearney R-1 School District*, 904 F. Supp. 1006, 1023 (W.D.Mo. 1995)).

173. *Oona R-S.*, 890 F. Supp. at 1469.

174. In *Burrow*, for instance, the school district had *actual notice* and failed to act. See 929 F. Supp. at 1206.

175. If society understands sexual harassment in terms of the male drive for sex, then peer sexual harassment in the schools is not qualitatively different from harassment in the workplace, even in the absence of the power dynamic. See notes 79-81 and accompanying



female students and female employees suffer the same harm; however, the law treats the liability of a school district under Title IX differently than that of a company under Title VII.<sup>176</sup> A power focus coerces the courts to concentrate on the economic underpinnings that are relevant to the relationships between the harassers and the institution, as well as the harassers and the victims.<sup>177</sup> Vicarious liability, therefore, informs the court as to the scope of employer or institutional responsibility to battle peer sexual harassment present in those environments under their supervision, whether the classroom or the boardroom.

Employers have an economic interest in their employees. This agency relationship<sup>178</sup>, and its corresponding extension of power, imposes an obligation upon the employer to prevent employees from utilizing sexual harassment as a tool to exercise power on the basis of gender over other employees. Following this premise, peer sexual harassment in the schools implicates different issues and different harms than co-worker sexual harassment. Therefore, Title VII principles of liability are too encompassing.<sup>179</sup> As students are not economic agents of the school district, the absence of the transfer of power places the harassment outside the purview of the school officials.

text.

176. In *Davis v. Monroe County Bd. of Educ.*, the court noted that "[t]he damage caused by sexual harassment . . . is arguably greater in the classroom than in the workplace, because the harassment has a greater and longer lasting impact on its young victims, and institutionalizes sexual harassment as accepted behavior. Moreover, as economically difficult as it may be for adults to leave the workplace, it is virtually impossible for children to leave their assigned school." 74 F.3d 1186, 1193 (11th Cir. 1996). See also Eriksson, *supra* note 6, at 1808-09.

177. The manipulation of organizational power becomes the central evil in a workplace harassment claim, however, the real harm constitutes an attack on a female's reproductive, not economic or political resources. The temptation arises, therefore, to categorize peer sexual harassment as a lesser evil in light of the fact that organizational power is missing. As such, society presumes that the impetus to construct legal rather than private solutions to the problem of peer sexual harassment is less paramount. See Studd, *supra* note 32, at 54.

178. "A master is subject to liability for the torts of his servants acting in the scope of their employment." RESTATEMENT (SECOND) OF AGENCY § 219(1) (1957). If the employee is not acting within the scope of his employment then the employer is not liable unless:

- (a) the master intended the conduct or the consequences, or
- (b) the master was negligent or reckless, or
- (c) the conduct violated a non-delegable duty of the master, or
- (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

*Id.* § 219 (2)(a)-(d).

179. See, e.g. *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1195-96 (Birch, J., dissenting).

In fact, implicit in the way courts approach the problem of peer sexual harassment in the schools is the presumption that in the absence of unequal power, the sexual interplay of children is innocent and natural even if it rises to the level of harassment.<sup>180</sup> This attitude mirrors precisely that thinking which inhibits schools from properly addressing the issue of peer sexual harassment, and in so doing denies girls an equal opportunity to enjoy the benefits of an education. Evolutionary theories vitiate the court-erected distinctions between school harassment and workplace harassment. Under an evolutionary theory, sexual harassment is not a means of maintaining economic control and power; it is a means of obtaining sexual access through coercive tactics.

The school maintains a significant amount of control over students' conduct in the educational setting, even though students are not the agents of the school district.<sup>181</sup> For example, the school has authority to discipline students for disruptive behavior. Victims may, therefore, reasonably interpret a school's choice to allow abusive sexual harassment to continue as an endorsement of that behavior: even though the initial act of harassment does not involve institutional consent, the consent becomes implicit when the school neglects to redress the problem. In addition to the ability to assuage or eliminate the presence of peer sexual harassment through reasonable regulations, the school also has an obligation to protect students in its care from foreseeable types of harm.<sup>182</sup> Surveys and studies indicate that sexual harassment clearly has more egregious ramifications for female victims than males, and reported harassment reveals that it is a pervasive problem in American schools. At a minimum, schools should take reasonable measures to discourage and punish sexual harassment, as well as adopting convenient and unthreatening grievance procedures. A school has the statutory duty under Title IX to prevent the occurrence of sex discrimination during educational

---

180. School officials admit that, "it's difficult to change behavior that in the past was often dismissed as kids being kids." *Morning Edition: Parents Now Sue Schools for Allowing Sexual Harassment* (National Public Radio broadcast, October 5, 1994) [hereinafter *Morning Edition*]. Without an attempt to instigate aggressive policies, however, many schools will remain bound by these dangerous attitudes.

181. "The ability to control and influence behavior exists to an even greater extent in the classroom than in the workplace, as students look to their teachers for guidance as well as for protection." *Davis*, 74 F.3d 1186 at 1193.

182. "That parents yield so much of their children's care into the hands of public school officials may well be argued to place upon the officials an obligation to protect students at least from certain kinds of foreseeably dangerous harm during regular school hours." *Davis*, 74 F.3d 1186 at 1193.

programs and activities under its control and supervision. The permission of pervasive peer sexual harassment indirectly discriminates against girls.

### *Administrative Channels Versus Private Causes of Action*

Those persons who oppose actions for monetary damages against the school argue that the proper approach to expunging peer sexual harassment from the schools is through the administrative process established under Title IX.<sup>183</sup> If the school inadequately provides for grievance procedures or insufficiently addresses a student's complaint,<sup>184</sup> the student can lodge a complaint against the school district with the Department of Education.<sup>185</sup> Upon finding a violation of Title IX, if the Department of Education can not obtain voluntary compliance with agency guidelines, the Office of Civil Rights will initiate administrative proceedings against the school district.<sup>186</sup> The school risks termination of all federal funding if the record establishes that a Title IX violation exists.<sup>187</sup> Once the complainant has entered the administrative process, however, she loses control over her action and must submit to the objectives of the Department of Education and the Department of Justice.<sup>188</sup>

---

183. Title IX adopts and incorporates the procedural requirements of Title VI, found at 34 C.F.R. §§ 100.6 to .11 (1997) and 34 C.F.R. pt. 101 (1997). 34 C.F.R. § 106.71 (1997).

184. The Department of Education promulgates agency regulations to ensure institutional compliance with Title IX's proscription against sex discrimination. See 34 C.F.R. § 106.1-71 (1997). The Department places the affirmative obligation upon school districts to create and instigate formal grievance procedures that will allow for the "prompt and equitable resolution" of sex discrimination complaints. The Department also requires that schools employ a counselor to facilitate the proper working of the complaint procedure. See 34 C.F.R. § 106.8-9 (1997). A student either utilizes a school district's internal grievance process, or in the alternative lodges a complaint with the Department of Education.

185. The Office of Civil Rights within the Department of Education reviews sex discrimination complaints and determines whether the recipient of federal funds has failed to comply with Title IX. See, Sherer, *supra* note 6, at 2145.

186. See 34 C.F.R. § 100.8 (1997).

187. The Department of Education may also assign prosecutorial responsibility to the Department of Justice. The Department of Justice will decide whether to pursue an action against the school district in the courts. See Sherer, *supra* note 6, at 2145.

188. See, e.g., *Morning Edition*, *supra* note 180. One parent of a harassment victim noted:

[t]he discipline wasn't tough enough and the incidents didn't stop. So, Sandy Wright filed a complaint with the federal Department of Education's Office of Civil Rights, which came to Mason City to investigate, and concluded that Heather had been sexually harassed. The school agreed to implement new sexual harassment policies, but, the Wrights say, by that time the damage had been done.

*Id.*

The agency regulations do not afford the complainant any specific remedies for the harms inflicted upon her.<sup>189</sup> Even though the school will most likely implement proper procedures in order to avoid forfeiting federal funding, the harassed victim receives no compensation under this administrative scheme.<sup>190</sup> Although the denial of funds spurs schools to action once the Department of Education finds a violation, schools have no incentive to implement proper procedures before receiving a sanction.<sup>191</sup> Whereas, if the schools believed themselves to be liable to victims for monetary damages, they would take preventive measures to address the problem of peer sexual harassment in order to insulate themselves from liability.<sup>192</sup>

### *Notice, Intent, and Disparate Impact*

The courts should scrutinize legal doctrine with the presumption that peer sexual harassment inflicts serious harm in both schools and workplaces. The courts should afford victims in both contexts the legal right to realize damages against the institution who manages the working or educational environment in a way that either tolerates or negligently monitors the perpetration of peer sexual harassment. Incorporating evolutionary data within the legal framework provides direction on three fronts: determining the level of notice the institution must possess, defining "intentional," and recognizing the need for a differential impact standard.

### *Notice Standard*

The pervasive nature of peer sexual harassment favors the application of a constructive, rather than actual notice standard,<sup>193</sup>

---

189. See Eriksson, *supra* note 6, at 1806.

190. A tension exists under Spending Clause statutes such as Title IX. Such a statute provides for protection of each student's right to receive equal educational treatment and benefits, however does not afford specific compensation for the harms suffered by the one receiving unequal treatment. The administrative and injunctive remedies address the correction of the problem, not past and present harm to the victim. Unlike the workplace context, when a student becomes victim to sexual harassment, no economic harm results. Therefore, quantifiable relief such as back pay is not relevant. See *Franklin v. Gwinnet County Public Schools*, 503 U.S. at 76 (1992). Private causes of action recognize the special harm the victim suffers as a result of severe and pervasive sexual harassment, and encourage victims to endure the complaint process.

191. See Eriksson *supra* note 6, at 1817.

192. *Id.*

193. As a substitute for actual notice, constructive notice attaches "where a defective

when the courts assess whether the school knew of the harassing behavior.<sup>194</sup> However, the majority of the courts exhibit hostility toward the relinquishment of an actual notice requirement for fear of using a negligent standard in a case where non-agent third parties perpetrate the conduct.<sup>195</sup> As a result, courts cling to an actual notice prerequisite and thereby assign the victim the responsibility of making a hostile environment known to the school officials.<sup>196</sup> This formal requirement disadvantages girls, who as a group demonstrate a reluctance to report sexually humiliating experiences to school officials.<sup>197</sup> The school thereby reserves the right to harbor its misconceptions that peer sexual harassment is innocuous and ignore the behavior, unless a female

---

condition has existed for such a length of time that knowledge thereof should have been acquired in the exercise of reasonable care." *Bruneau v. South Kortright Cent. Sch. Dist.*, 935 F. Supp. 162, 173 (N.D.N.Y. 1996) (citing *Fiorella v. Calomiris*, 1996 WL 288471 \*3 (E.D.N.Y. 1996)).

194. *But see Morning Edition*, *supra* note 180 ("School officials fear costly settlements of [lawsuits] in an era of tight budgets, and they say it's not clear under what conditions a school could be held liable for such student behavior."). The new agency Guidance on peer sexual harassment, employee sexual harassment, and third party sexual harassment, however, provides schools with information on this front. See Sexual Harassment Guidance, *supra* note 28, at 12,042-43 ("Recipient's Response").

195. "This Court finds that to establish a Title IX claim for a hostile learning environment created by peer-on-peer sexual harassment, the Plaintiff must show that the school and/or school board received actual notice of the sexually harassing conduct and failed to take action to remedy it. Liability will not lie if the Plaintiff can show only constructive notice." See *Bruneau*, 935 F. Supp. at 173. The courts fear holding the schools liable for every incident of harassment in the educational environment. The Office of Civil Rights, however, adheres to a "constructive notice" standard. Further, "if a school otherwise has actual or constructive notice of a hostile environment and fails to take immediate and appropriate corrective action, a school has violated Title IX even if the student fails to use existing grievance procedures." See Sexual Harassment Guidance, *supra* note 28, at 12042.

196. In *Bruneau*, a female harassment victim did not file a written complaint, therefore, the court held the school could be found not to have "actual notice." 935 F. Supp. 176 at 182. Actual notice requirements in most contexts invite penalization of the victim for taking inadequate efforts to report the harassment.

197. Many cases of peer sexual harassment go unreported. See *Eriksson*, *supra* note 6, at 1800 n.14. For example, an Ohio student refrained from reporting an eighth grade boy for making obscene gestures to her. She explained that, "I was scared to say anything to my teacher, and he never did anything about what he saw." *Pera*, *supra* note 20. The reporting process is intimidating for female victims. As one student commented, "I can understand why a person wouldn't feel comfortable talking to an authority figure. Maybe, first they could talk to a student that everyone knew, that everybody felt comfortable around." *LARKIN*, *supra* note 16, at 133. Unless the schools are sensitive to the nature of the problem of peer sexual harassment when formulating reporting procedures, in essence girls will not utilize the process. With this reluctance, a requirement of actual notice effectively renders peer sexual harassment a problem seen, but not talked about. As such, the school districts will rarely have "actual notice" of the problem, and therefore, under current legal thinking, will rarely have an obligation to do anything. See also, *Goodman*, *supra* note 18 (referring to the findings of Mary Roe of MIT).

student explicitly informs school officials differently. An actual notice requirement assumes, first, that a formal grievance procedure is in place,<sup>198</sup> and second, if such a procedure exists that it encourages traumatized girls to report specifically in the case of peer sexual harassment.<sup>199</sup>

In light of the rampant peer sexual harassment occurring in American schools, a constructive notice standard is necessary to protect female students. Constructive notice liability would mandate that the schools monitor their classrooms and halls and take actions to neutralize the discriminatory harm inflicted upon students, as opposed to assuming the interplay to be innocent child's play.<sup>200</sup> As an underlying drive to attain sexual access gives rise to sexual harassment in both the workplace and school, an institution in one context should be no less liable for failing to address the problem.<sup>201</sup> Once the sexually harassing behavior escalates to a degree as to justify an action for damages,<sup>202</sup> the

---

198. Several of the cases brought under Title IX for peer sexual harassment involve school districts that have no policy in place to deal with the problem. *See, e.g.,* Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412, 1419 (N.D. Iowa 1996); Burrow v. Potsville Community Sch. Dist., 929 F. Supp. 1193, 1205 (N.D. Iowa 1996).

199. Critically, the Department of Education guidelines merely require that the school districts have a grievance procedure in place. However, it does not require that the grievance procedure specifically address peer sexual harassment complaints, just that it properly deals with sexual discrimination complaints. *See Sexual Harassment Guidance, supra* note 28, at 12,038 and 12,044.

200. The court in *Doe v. Petaluma City School District* stated, "thus it appears that school districts are on notice that student-to-student sexual harassment is very likely in their schools, particularly in junior high school. In light of this knowledge, if a school district fails to develop and implement policies reasonably designed to bring incidents of severe or pervasive harassment to the attention of the appropriate officials, it must be inferred that the district intended, the inevitable result of that failure, that is a hostile environment." No. C 93-00123 CW, 1996 WL 432298, at \*11 (N.D. Cal. July 22, 1996). Constructive notice, however, does not amount to strict liability. The standard is still a negligent standard; the school must have been unreasonable not to address the peer sexual harassment in light of its severe and pervasive nature. *See Case Comment, supra* note 146 at 790-91.

201. In the workplace, a "constructive notice" standard applies to sexual harassment claims. *See supra* notes 112-13 and accompanying text.

202. The "pervasive and severe" requirement also operates as a check on the extension of institutional liability. Singular and minor incidents of harassment will not pass the "pervasive and severe" prong of the test. *See Sexual Harassment Guidance, supra* note 28, at 12034, and *see supra* note 195. Recently, the press has highlighted instances when schools have sanctioned students for seemingly innocent violations of excessively strict sexual harassment policies. *See* Tamar Lewin, *New Guidelines on Sexual Harassment Tell Schools When a Kiss Is Just a Peck*, N.Y. TIMES, March 15, 1997, at A8. The Guidance specifically addresses this issue, and hopes to not only provide direction on what constitutes sexual harassment, but also, what does not. *Id.*

school should not escape liability simply because it claims not to have actual notice of the problem.<sup>203</sup>

### *Discriminatory Intent*

In addition to notice, the courts require that schools have the intent to discriminate against students on the basis of gender when choosing their course of action in response to peer sexual harassment.<sup>204</sup> Even if the plaintiff proves the school had notice, whether actual or constructive, the school district is immune from liability unless the plaintiff also shows the school intentionally discriminated against her. Another dimension of notice becomes inextricably tied up with this concept of intent, that is, a school's awareness that its actions constitute sex discrimination under the dictates of Title IX. As the statutory language of Title IX is ambiguous, some courts regard the absence of direction on the issue as a bar to finding the requisite level of intent.<sup>205</sup> In effect, the courts construct an enclave of immunity for the school districts, protecting them from the liability that flows from an inference of discriminatory intent.<sup>206</sup>

If Title IX's statutory purpose is to compel schools to ensure that girls receive an equal education, courts can easily infer that a school's acquiescence to the ramifications of peer sexual harassment is a clear violation of this mandate. Evolutionary data reveal that sexual harassment is a means by which boys attempt to gain sexual access to girls. The obscene and abusive remarks and gestures reflect not merely male interest in the opposite sex, but also a campaign to coerce sexual access. A school's determination that sexual harassment is not serious and demands only minimal attention reflects an intent to overtly

---

203. At a minimum, the school should be held liable according to a constructive notice standard if it provides "no reasonable avenue of complaint" for harassed victims. Bruneau, 935 F. Supp. 162, 177. The Department of Education, however, according to its proposed peer sexual harassment guidelines, would have held the school strictly liable, that is, liable even without notice, if the harassment was "pervasive and severe" and the school had no grievance procedure in place. See Sexual Harassment Guidance, *supra* note 28, at 12,040.

204. See *Burrow*, 929 F. Supp. 1193, 1206 ("However, for the purposes of this motion the court has assumed that the basis of institutional liability is the school district's own intentionally discriminatory conduct in failing to appropriately respond to the harassment of Lisa despite actual knowledge.") (emphasis added).

205. To be an intentional act, the offender must know the action or inaction is a violation of the statute. See *Rowinsky*, 80 F.3d 1006, 1012 (1996).

206. The *Rowinsky* opinion exploited this reasoning to extend its analysis so far as to excuse from liability school districts that disregard peer sexual harassment claims from female students, as long as the school districts also ignore the complaints of males. See *supra* note 144.

disregard the harm inflicted on individuals because of their gender.<sup>207</sup> Even under the vague language of Title IX, the courts justifiably could conclude that the schools evinced the requisite intent to discriminate.<sup>208</sup>

### Agency Action

In deference to legislative drafting, the courts evade broadening the statutory meaning of Title IX to prohibit unintentional discrimination.<sup>209</sup> Violations that seem unintentional according to the statutory language, however, may appear more intentional in light of supplemental agency regulations.<sup>210</sup> If the agency passes regulations imposing upon the school obligations to ensure that peer sexual harassment does not unduly restrict female students access and enjoyment of educational activities and programs, then the school is on notice that such behavior manifests an intent to discriminate on the basis of gender.<sup>211</sup> By referencing the administrative regulations, the courts can conclude that the school had sufficient notice that

---

207. See *Bosley V. Kearney R-1 Sch. Dist.*, 904 F. Supp. 1006, 1220-21 (W.D. Mo. 1995).

208. Title IX states, in pertinent part:

Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

- (1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
- (2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;
- (3) Deny any person any such aid, benefit, or service;
- (4) Subject any person to separate or different rules of behavior, sanctions, or other treatment; [or]

....

- (7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

34 C.F.R. § 106.31(b) (1997).

209. As peer sexual harassment remains murky under the statute, the courts have trusted an administrative system that corrects schools' unknowing violations of Title IX.

A refusal of funds acts as an ad hoc check against inappropriate supervisory behavior, but, the courts consider monetary liability for unintentional discrimination to be an unfair burden for them to place on the school districts under a Spending Clause statute. See *Wright v. Mason City Community Sch. Dist.*, 940 F. Supp. 1412, 1417 (N.D. Iowa 1996).

210. See *Guardians Assoc. v. Civil Serv. Comm'n*, 463 U.S. 582, 645 (1983).

211. The courts point out that unlike Title IX, detailed regulations provide insight for employers as to what practices may constitute sexual discrimination under Title VII. See *Rosa H. v. San Elizario Indep. Sch. Dist.*, No. 95-50811, 1997 WL 66087, at \*8 (5th Cir. Tex. Feb. 17, 1997) ("Title IX, by contrast, does not create any administrative body to regulate private claimants' rights, and the regulations promulgated under Title IX make no mention of sexual harassment."). *Id.*



their actions violated the purpose of Title IX, without over-extending the plain statutory language.<sup>212</sup> The Department of Education, therefore, has discretion to designate what is in fact "intentional discrimination" under the broad language of Title IX through the promulgation and publication of regulations and guidelines.<sup>213</sup>

In an effort to furnish the schools and the courts with direction on the issue of peer sexual harassment, the Department of Education has published "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties" in an attempt to communicate the Office of Civil Rights' position on school liability for peer sexual harassment under Title IX.<sup>214</sup> These guidelines augment the published regulation that directs the schools to formulate and publish grievance procedures for sex discrimination complaints and to appoint at least one employee to supervise its compliance with Title IX.<sup>215</sup> The Guidance attempts to recognize peer sexual harassment as a legitimate, yet distinct, discriminatory concern in American secondary schools.<sup>216</sup> With the passage of the Guidance guidelines, the courts will be more receptive to recognizing personal claims against the school districts under Title IX for sexual discrimination in cases when the school districts fail to remedy peer sexual harassment, even though the school did not do so with the *intent* to discriminate.<sup>217</sup> Therefore,

---

212. Under Title VI, another Spending Clause statute enacted to prohibit racial discrimination, the courts recognize that the Office of Civil Rights could provide sufficient notice that actions having an unjustifiable disparate impact would constitute intentional discrimination by passing agency regulations pursuant to goals of the statute. See *Bruneau*, 935 F. Supp. 162, 172 n.9. "Even if Title VI does not proscribe unintentional racial discrimination, it nevertheless permitted federal agencies to promulgate valid regulations with such effect. . . . Those charged with enforcing Title VI had sufficient discretion to enforce the statute by forbidding unintentional as well as intentional discrimination." *Guardians Assoc.*, 463 U.S. at 591-92.

213. See *Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447, 1456 (N.D. Cal. 1994).

214. The Guidance consolidates directives on the issues of employee, third party, and peer sexual harassment. See *Sexual Harassment Guidance*, *supra* note 28. When the Office of Civil Rights resolves peer sexual harassment complaints it will consider whether "(1) the school has a policy prohibiting sex discrimination under Title IX and effective Title IX grievance procedures; (2) the school appropriately investigated or otherwise responded to allegations of sexual harassment; and (3) the school has taken immediate and appropriate corrective action responsive to quid pro quo or hostile environment harassment." *Id.* at 12040.

215. *Id.*

216. *Id.*

217. Recently, in response to sexual harassment by teachers the OCR has also issued proposed guidelines. 61 Fed. Reg. 52, 172-73. The regulations advise that "a school will be liable for sexual harassment by its employees if the school has notice of the harassment

the published agency guidelines, which require the officials to promptly and adequately redress peer sexual harassment in the schools, provide the courts with less precarious grounds for extending institutional liability to hostile environment peer sexual harassment claims in the schools.<sup>218</sup> As such, the Fifth Circuit, as well as those courts constructing herculean hurdles over which peer sexual harassment plaintiffs must leap, should now be more receptive to enforcing Title IX through private claims against the school districts for inadequate efforts to address peer sexual harassment.

### *Disparate Impact Through an Evolutionary Perspective*

The agency Guidance, although comprehensive, does not go far enough to protect victims of harassment. The guidelines create a major distinction between Title VII and Title IX sex discrimination jurisprudence by neglecting to adopt a disparate impact standard.<sup>219</sup> The two areas, despite substantive similarities will remain critically distinct jurisprudentially. Although Title VII has codified language that prohibits policies and programs which have a disparate negative impact on persons because of gender,<sup>220</sup> the Guidance refrains from advocating that particular line of reasoning within the educational context.

---

(i.e. knew or should have known of the harassment) but failed to take immediate and appropriate steps to remedy it." *Id.* at 173. The Fifth Circuit, which decided *Rowinsky*, indicated that once these proposed guidelines are promulgated, the court might consider accepting sexual discrimination claims under Title IX when a teacher sexually harasses or abuses a student. See *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 657 (5th Cir. 1997). At that time, however, the court refused to find the school had notice. *Id.*

218. Previously, official administrative direction solely consisted of the issuance of Letters of Findings by the Office of Civil Rights. This agency response to a particular situation, however, was insufficient to provide the courts with a basis to find the schools have notice of their duty to address peer sexual harassment complaints in *all* instances.

The agency's *Guidance* provides the schools with an explicit directive as to what conduct regarding peer sexual harassment will subject them to sanctions under Title IX. See Sexual Harassment Guidance, *supra* note 28.

219. Unlawful disparate impact occurs when a facially neutral employment practice affects more harshly than others a group protected by Title VII than on others and "cannot be justified by business necessity." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 n.15 (1977). Courts are wary of extending the more expansive disparate impact standard applied in Title VII cases within the Title IX context, especially for non-employment sexual discrimination claims. See *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 656 (5th Cir. 1997). In *Bruneau*, the Court categorized the Fifth Circuit's position in *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006 (5th Cir. 1996), as an "equal protection, disparate treatment analysis." 935 F. Supp. 162, 171 n.7 (N.D.N.Y. 1996).

220. See *infra* note 228.

Peer sexual harassment policies and grievance procedures may be deemed proper despite the fact that they have a disparate impact on female students. Further, the schools are not mandated to develop grievance procedures which specifically attempt to address peer sexual harassment claims, employee sexual harassment, or third party sexual harassment claims.<sup>221</sup> Extending Title IV jurisprudence, an issuance of guidelines by the Department of Education could encompass both intentional and unintentional violations of Title IX by the school districts.<sup>222</sup> Evolutionary principles which inform society that peer sexual harassment poses a more serious risk to female students in secondary schools support the proposition that the Department of Education should choose a disparate impact standard with regard to peer sexual harassment. As the motivating factor of male sexual harassment is a desire for sexual access according to evolutionary theory, students direct the more severe and intense behavior towards females, who as a whole, more adamantly protect their reproductive resources. Boys who sexually harass girls subconsciously hope to instill fear and lower the self esteem of females in order to render them more likely to grant sexual access. Further, from an evolutionary perspective, girls have more to lose than boys in a reproductive sense. Therefore, girls' emotional and psychological responses to the harassment are more grave than are boys: because the problem is more serious for female students, policies which on their face seem neutral will have a more adverse impact on girls than boys.<sup>223</sup> In order to

---

221. See *supra* note 212 and see generally Miller, *supra* note 11 (advocating the use of Title VI as a springboard from which to apply Title VII principles within the framework of Title IX).

222. See *Bruneau v. South Kortright Cent. Sch. Dist.*, 935 F. Supp. 162, 172 n.9 (N.D.N.Y. 1996).

223. Notably, once policies are in place, both boys and girls will benefit. According to evolutionary principles, the harm boys suffer is not as severe, therefore, the problem becomes gender specific. An ardent look at the impact on girls allows the courts to use Title IX as an initial means to force schools to instigate proper peer sexual harassment programs and procedures. Although the new policies will assist females to achieve equity, a sexually harassed boy will also have a better means for redress. In order to comply with the naked language of Title IX, school officials must not ignore the peer sexual harassment of boys, else they clearly discriminate on the basis of sex. In *Seamons v. Snow*, the court rejected a high school boy's claim of sexual harassment because he failed to establish that he incurred the harassment because of his sex. 84 F.3d 1226 (10th Cir. 1996). The court did not even address the legitimacy of insitutional liability under the fifth element that must be proven to succeed on a claim of sexual harassment. See *id.* at 1233. In addition to the *Seamons* hurdle, even if the male plaintiff proves he was harassed because of his gender, under the "pervasive and severe" element, the courts have held that the plaintiff must be subjectively harmed. Evolutionary principles proffer that boys view sexual harassment from girls as an invitation to sex. Sexual harassment does not undercut a

neutralize the educational environment so that female students can enjoy the full benefits of school activities and programs, school officials must either attempt to eradicate the harassment or counteract the negative effects that females disproportionately suffer.<sup>224</sup> In addition to the published guidelines within the Guidance, a disparate impact standard would appropriately address the disproportionate harms that female students endure.<sup>225</sup>

The Department of Education should further incorporate within its regulations disparate impact language similar to that used in the Title VII provision that codified disparate impact case law.<sup>226</sup> A regulation should require that schools refrain from adopting policies to address peer sexual harassment that disparately impact students by sex, as long as the policy is neither education-related nor necessary for the administration of the schools.<sup>227</sup> If the school can establish that the policy does not

---

boy's sense of self worth, but rather reinforces it. As such, no subjective harm accrues. If the policy exists and the school only uses it for female students, however, the school manifests an overt intent to discriminate and the subjective harm becomes less important to the analysis.

224. Not only must the school districts discourage harassing behavior, but they must also encourage girls to effectively cope with the presence of such behavior. An appropriate response would entail the promotion of female comradery in the face of harassment. An evolved defense in some female primates involves thwarting male aggression through the formation of female-bonded relationships. See Frans B. M. de Waal, *Bonobo Sex and Society*, SCI. AM. 82, 87 (March 1995). As one commentator noted, however, male sexual harassment tends to fracture female relationships.

In such a threatening environment, these young women knew that backing up their assaulted classmate could put them at great risk . . . . When a show of mutual support is such a scary thing for young women, the potential for their collective power is squashed. But, at the same time, their self-protective silence only strengthens the collective power of the young men.

LARKIN, *supra* note 16, at 118-19.

225. Harm to girls may result, however, according to evolutionary logic, even if no disparate treatment exists.

226. Under Title VII, an unlawful employment practice is established if:

[T]he complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity. Unlawful Employment Practices, 42 § 2000e-2(k)(1)(A)(i) (1997).

If the respondent "demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity." *Id.* § 2000e-2(k)(1)(B)(i). Title VII's language of disparate impact, alternative practices, and necessity are easily transferrable to cases under Title IX.

227. Intent occupies a less central role in the analysis when a disparate impact standard applies. See *Doe v. Petaluma City Sch. Dist.*, No. C 93-00123 CW, 1996 WL 432298, at \*9 (N.D. Cal. July 22, 1996).

cause a disparate impact on the basis of gender, however, then it need not prove either that the policy was education-related or that it was necessary for the administration of the school.

This regulation would place the schools on notice that they may be subject to sanctions or monetary liability under Title IX for not making earnest efforts to address the peer sexual harassment complaints of students and for not responsibly supervising the behavior of harassing students. The schools would also have to be sensitive to the effects that a chosen policy would have on the different genders. The regulations would propel schools to choose more proactive responses to the looming problem of peer sexual harassment in American schools. Through the use of hall monitors, programs designed to teach students to avoid harassers and avoid perpetrating harassment themselves,<sup>228</sup> trained peer and adult counselors,<sup>229</sup> and grievance procedures sensitive to the specific problems of peer sexual harassment, the schools could ensure that solutions emerge before damages accrue.

## V. CONCLUSION

The seige against female secondary students is not an exaggeration; peer sexual harassment is a reality that girls face every day in the halls and in the classrooms. For every achievement, there exists a remark or a gesture that undercuts girls' identities and their sense of safety. The high incidence of peer sexual harassment in American schools requires that the school districts make affirmative efforts to eliminate the occurrence and effects of harassment. From an evolutionary

---

228. Girls often express that punishment of the aggressors alone is insufficient; female empowerment is critical in the battle against peer sexual harassment. One female sixteen year-old student who was interviewed commented:

I think that getting school administration to be receptive to reports of sexual harassment is very important, but not enough. While you're training boys not to harass, train girls how to deal with harassment on their own. If I had reported this incident, and tried to make someone else do something about it, I would have been even more of a victim than before. Sexual harassment is victimization, and we need to fight that feeling most of all. Open ears to reports are very important, but not enough; we need to have the ability to throw off intimidation by ourselves, knowing that there is a support structure for us if we need it.

STEIN & SJOSTROM, *supra* note 25, at 67. Evolutionary biology instructs society that half of the problem is the motivations of the harassers, however, the other half is the disproportionate effect harassment has on girls. In order to fully address the problem, the school districts must not only deal with the harassers, but also counsel the harassed.

229. See *supra* text accompanying note 193.

perspective, the schools present an especially attractive environment for boys to engage in peer sexual harassment. The severe psychological and emotional reactions of young women correlate to their subconscious perception that their reproductive resources are in jeopardy.

In order to create an atmosphere conducive to allowing both genders to receive an equal education, the law should place obligations upon the school to counteract the harassment. If the courts or the agencies extend Title VII hostile environment sexual harassment principles to the educational setting, the school districts will respond accordingly and formulate appropriate remedies for the rampant peer sexual harassment in their midst. Legal standards that emphasize notice and purposeful intent disadvantage girls, because schools will be delinquent in addressing the problem as long as they lack actual notice and avoid the appearance of having the intent to discriminate. A fear of monetary repercussions for past negligent efforts, however, will prompt the schools to act against sexual harassment, rather than merely reacting to the problem. A movement away from an understanding of the problem solely in terms of inequality of power will allow the legal analysis to embrace standards that forcefully address the issue of peer sexual harassment in the schools.

LAURA M. SULLIVAN