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Student-Athlete Sexual Violence Against Women: Defining the Limits of Institutional Responsibility

Timothy Davis*
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I. Introduction

On August 26, 1991, Katherine Redmond moved to Lincoln, Nebraska to attend the University of Nebraska (University). Upon her arrival, Redmond moved into a women's residence hall operated by the University. According to Redmond, less than a week after her arrival, she was sexually assaulted and raped in an adjacent University residence hall. A few days later, Redmond’s assailant allegedly appeared at her residence hall and sexually assaulted and raped her while two other males watched and stood guard.

Redmond identified her assailant as Christian Peter, a prominent scholarship athlete on the University’s football team. According to Redmond, Peter’s sexual assault of her represented another incident in a pattern of sexually abusive and lawless behavior by Peter that included arrests for: sexual assault against another female student, Peter was convicted of disturbing the peace and sentenced to 10 days in jail for allegedly grabbing a female non-student by the neck in a Nebraska bar. Peter pleaded guilty and was sentenced to 18 months for a third-degree sexual assault against a former non-student.

2. Id.
3. Id. ¶ 21.
4. Id. ¶ 24.
5. Id. ¶ 60. The 6' 3", 300 pound Peter was a starting defensive lineman for a Nebraska football team that won two consecutive national championships. Terri Somers, The Boy Next Door . . . Christian Peter's Hidden History, ASBURY PARK PRESS, Nov. 22, 1996, at D1. His peers elected him co-captain of the football team. Id.
6. See Complaint of Katherine Redmond ¶ 40, Redmond (No. 4:CV95-3223). Peter was convicted of disturbing the peace and sentenced to 10 days in jail for allegedly grabbing a female non-student by the neck in a Nebraska bar. Eric Olson, Ex-Husker Peter Still Awaiting Call from NFL Team, OMAHA WORLD-HERALD, July 9, 1996, at 17SF. In May 1994, Peter pleaded guilty and was sentenced to 18 months for a third-degree sexual assault against a former non-student.
a parking lot attendant, disturbing the peace, trespassing, and urinating in public.\textsuperscript{7}

On June 26, 1995, attorneys for Redmond filed a lawsuit against, inter alia, the University and Christian Peter.\textsuperscript{8} Redmond alleged that the University engaged in a pattern of conduct— including refusing to investigate her allegations of sexual harassment, failing to alleviate the sexual harassment,\textsuperscript{9} and failing to investigate, counsel or discipline Peter\textsuperscript{10}— that created a hostile educational environment in violation of Title IX.\textsuperscript{11} Redmond specifically claimed that the University

had a duty to provide and ensure an educational environment for the Plaintiff free of sexual innuendo, intimidation, and discriminatory animus and to enforce the regulations, rules and laws necessary to protect the Plaintiff and other female students from acts of sexual abuse, including but not limited to bias and discrimination. The failure of the Defendants to take action to prevent or stop sexual harassment constitute[d] deliberate indifference and intentional discrimination.\textsuperscript{12}

Redmond also asserted claims against Peter sounding in sexual assault and battery,\textsuperscript{13} false imprisonment,\textsuperscript{14} and intentional infliction of emotional distress.\textsuperscript{15}

Redmond's allegations against Peter attracted national attention when the New England Patriots selected him in the 1995 National Football League (NFL) draft.\textsuperscript{16} Following a public outcry over allegations of Peter's sexual misconduct, the Patriots relinquished their rights to the football player.\textsuperscript{17}

\begin{itemize}
\item Miss Nebraska. \textit{Id.} She alleged Peter groped her while saying, "Come on, I know you like that." George Diaz, \textit{Nebraska's Peter Fumbles in Life}, \textit{Orlando Sentinel}, May 3, 1996, at D3.
\item Peter's troubles with women preceded his matriculation at Nebraska. In high school, he was suspended for an incident involving sexual misconduct toward female students. Somers, \textit{supra} note 5.
\item Complaint of Katherine Redmond ¶ 29-31, 39. Redmond v. University of Neb., 1995 WL 928211 (D. Neb. Dec. 5, 1995) (No. 4:95CV-3223); see also Olson, \textit{supra} note 6 (delineating various incidents for which Peter was arrested).
\item Complaint of Katherine Redmond ¶ 62, \textit{Redmond} (No. 4:95CV-3223).
\item \textit{Id.} ¶ 69.
\item \textit{Id.} ¶ 64.
\item \textit{Id.} ¶ 68.
\item \textit{Id.} ¶ 71.
\item \textit{Id.} ¶¶ 83-84.
\item \textit{Id.} ¶¶ 90-92.
\item \textit{Id.} ¶¶ 98, 101.
\item See Somers, \textit{supra} note 5.
\end{itemize}
However, in January 1997 the NFL's New York Giants agreed to sign Peter to a contract. According to the Giants, Peter had proven he was getting treatment for the alcoholism and attention deficit disorder that he claimed were the source of his behavioral problems. In March 1997, the University agreed to pay Katherine Redmond an estimated $50,000 in settlement of her claims against the school. The terms of Redmond's settlement with Peter were undisclosed.

The forgoing scenario draws attention to a complex and emotionally charged issue residing within institutions of higher education: male student-athlete violence against women students. This Article explores the availabil-


19. See Woman to Receive $50,000 as Part of Peter Case Settlement, OMAHA WORLD-HERALD, Mar. 9, 1997, at C8. The University stated that the payment would assist Redmond to cover incurred and future medical expenses. See Nancy Hicks, Christian Peter Case Ends in Settlement, OMAHA WORLD-HERALD, Mar. 8, 1997, at 45.


21. Although this Article's focus is on acts of sexual violence committed by college athletes, the problem permeates all levels of competitive athletics, including high school and professional. Notable instances of current and former athletes who are recipients of the unwelcome notoriety that accompanies violence against women include: misdemeanor assault charges against former Minnesota Vikings quarterback, Warren Moon, for allegedly striking and choking his wife; the arrest of a Cincinnati Bengal defensive lineman for punching his four-month pregnant girlfriend in the stomach; and the arrest of Atlanta Braves' manager Bobbie Cox for allegedly striking his wife in the face with his fist. See Jimmy Smith, The Spotlight Is on Domestic Violence, NEW ORLEANS TIMES-PICAYUNE, Jan. 14, 1996, at C1; see also Gil B. Fried, Illegal Moves Off-The-Field, University Liability for Illegal Acts of Student-Athletes, 7 SETON HALL J. SPORT L. 69, 70-71 (1997) (identifying various acts of violence by athletes against women); Hal Bock, College Bad Boys: Not Just a Game: Even NCAA Unsure How to Best Tackle Lawless Athletes, CHI. TRIB., Dec. 8, 1996, at C6 (reporting Lawrence Phillips's probation for incident in which he reportedly "grabbed [his former girlfriend by] her hair 'caveman style,' pulled her down three flights of steps and slammed her head into a wall"); Gordon Edes, Violent Reaction: Domestic Abuse Affecting Sports, BOSTON GLOBE, June 20, 1997, at C1 (discussing charges that Boston Red Sox outfielder Wilfredo Cordero assaulted his wife); Richard Roeper, Athletes' Records Are Made to Be Busted, CHI. SUN-TIMES, Jan. 6, 1997, at 11 (discussing allegations that four Grambling University football players raped 14-year old girl and noting Washington Redskin Leslie Shepard's guilty plea for punching woman in face).

A particularly disturbing instance of sexual violence occurred at the high school level in 1989 in Glen Ridge, New Jersey. Members of the Glen Ridge High School football team brutally assaulted a mentally retarded 17 year-old female classmate with a broom and baseball bat while classmates observed. See Bernard Lefkowitz, The Boys Next Door, SPORTS ILLUSTRATED, June 23, 1997, at 76 (detailing events surrounding sexual assault). After losing the battle to overturn the 1993 convictions for the assault, the three defendants were imprisoned in 1997. Jeffrey Gold, Three Resentenced in Rape of Retarded Girl, CHI. SUN-TIMES, July 1, 1997, at 54.
ity of Title IX as a vehicle for imposing legal liability on colleges and universities for acts of sexual violence committed by their athletes against women students. In addressing this issue, this Article endeavors to avoid the hyperbole that so often accompanies the discourse regarding this issue. Such overstatement often involves claims without empirical basis regarding the extent to which athletes, in contrast to other males in our society, engage in acts of sexual violence against women. Therefore, a necessary predicate to this Article's discussion of institutional accountability is to present the social and factual context surrounding student-athlete sexual violence against women students. Part II begins this process with a review of literature that attempts to answer a fundamental question: Do male athletes, in contrast to nonathletes, possess a greater propensity to engage in acts of sexual aggression against women? Although the research to date fails definitively to establish a positive correlation, this Article proposes that various factors—principally the disproportionate influence of sports in reinforcing cultural themes—nevertheless warrants exploring approaches to changing the conditions that contribute to athlete assault against women.

Against this backdrop, Part III explores the circumstances under which it may be appropriate to hold institutions liable pursuant to Title IX for acts of sexual violence committed by their male student-athletes. This discussion begins with an examination of current law regarding teacher-to-student and student-to-student sexual harassment. After exploring the evolution of judicial recognition of Title IX hostile environment sexual harassment claims, the Article examines the substantive standards that courts have adopted for determining institutional liability. A review of Title IX jurisprudence suggests that courts will apply either a Title VII or an intentional discrimination substantive standard in assessing the limits of institutional

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22. Acts of sexual violence against women constitute one manifestation of sexual harassment which is defined herein as the "imposition of unwelcome sexual demands or the creation of sexually offensive environments." DEBORAH L. RHODE, JUSTICE AND GENDER 231 (1989); see also CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN I (1979) (defining sexual harassment as "unwanted imposition of sexual requirements in the context of a relationship of unequal power"); Jill Suzanne Miller, Title VI and Title VII: Happy Together as a Resolution of Title IX Peer Sexual Harassment Claims, 1995 U. ILL. L. REV. 699, 707 (defining sexual harassment in education context as "the use of authority to emphasize the sexuality or sexual identity of the student in a manner which prevents or impairs the student's full enjoyment of education benefits, climate, or opportunities" (citation omitted)).

23. See infra Part II.A.
24. See infra Part II.A.
25. See infra Part II.B.
26. See infra Part III.
27. See infra Part III.B.2.a.
28. See infra Part III.B.2.b.
liability. The Article concludes that doctrine and policy support recognizing Title IX claims involving student-athlete violence against women students. It also proposes that whether courts adopt a Title VII or intentional discrimination standard in assessing institutional liability for such misconduct, Title IX may still provide a means of redress for women who are sexually harassed by student-athletes.

II. A Propensity for Sexual Aggression?

A. Empirical Research

Prior to 1990, researchers devoted little attention to assessing whether there is a positive connection between participation in college athletics and sexual assault. The growing, yet still limited, body of research conducted since then has not reached incontrovertible conclusions regarding such an association. The recent undertakings, however, have contributed to the development of what appears to be two principal schools of thought. While deplores acts of sexual aggression, some authorities argue that college athletes are no more prone to commit violent acts against women than other males in American society. Adherents

29. See infra Part III.B.2.b.
30. See infra Part IV.
31. See infra Part III.B.
33. These commentators emphasize that their skepticism of studies suggesting a greater propensity by athletes to sexually assault women is not a back-door attempt to downplay the gravity of the problem. See Edes, supra note 21. For example, although he challenges the studies that conclude a positive relationship exists between participation in competitive athletics and violence against women, Richard Lapchick, director of Northeastern University’s Center for the Study of Sports in Society, nevertheless argues for a zero tolerance policy that seeks to send a two-fold message: the intolerance of sexual crimes against women and the need to afford greater protection for women against such crimes. Id. These goals led the National Consortium for Academics and Sport, a group of major colleges and universities, to adopt a resolution pursuant to which an athlete convicted of gender violence would be banned for a year from sport. Id.
35. See Crosset et al., supra note 32, at 126 (noting argument that greater scrutiny to which athletes are subjected by media "creates a distorted perception regarding the proportion of athletes who commit sexual assault and fails to account for the large number of athletes who do not commit sexually aggressive acts"); Thomas L. Jackson, A University Athletic Depart-
to this view also argue that the empirical data has failed sufficiently to support assumptions that the violent overtones of football, hockey, and other sports are integral to the other parts of athletes' lives.\textsuperscript{36}

Other authorities adopt the contrary position that "athletes appear to be disproportionately involved in incidents of sexual assault on college campuses."\textsuperscript{37} Two factors appear particularly important to the authorities holding this contrary position. First, although adherents to this view recognize that sexual violence is the product of multiple variables,\textsuperscript{38} they identify the subculture of which athletes are a part as a significant contributor to an athlete's slightly greater propensity to engage in sexual violence. "[A]ggression on the playing field, sexist language and attitudes in the locker room, and an inordinate need to prove one's maleness can combine in complex ways to predispose some male athletes towards off-the-field hostility."\textsuperscript{39} Second, researchers argue that the existing research establishes that athletes may be slightly more prone to violence.\textsuperscript{40}

\textit{ment's Rape and Assault Experiences}, 32 J. C. STUDENT DEV. 77, 77 (1991) (concluding that much greater media attention is given to cases involving athlete versus nonathlete assaults against women); Merrill Melnick, \textit{Male Athletes and Sexual Assault}, J. PHYSICAL EDUC., RECREATION, & DANCE, May-June 1992, at 32, 32 (noting media's tendency to magnify crimes committed by public figures, including athletes); Bock, supra note 21 (noting anecdotal evidence that suggests that athletes are unfairly targeted because of their high profile); Smith, supra note 21 (commenting that one group of sports authorities believes athletes are unfairly stereotyped as violent sexual abusers because of their visibility).

36. \textit{See} Smith, supra note 21 (quoting Richard Lapchick).

37. Crosset et al., supra note 32, at 135.

38. These factors include media promotion of violence, "a patriarchal system, myths about rape, sexual values and scripts that men and women use in relating to each other." \textit{See} Cobbs, supra note 34 (quoting Mary Koss). According to sociologists who have examined male athlete violence:

Sexual aggression is widely recognized as multiply determined. It is influenced by a hierarchy of social forces including societal-level supports (cultural values, sexual scripts), institutional influences (peer groups, schools, religious groups), the dyadic interpersonal context (relationship characteristics, victim characteristics, miscommunication, the situation surrounding the social interaction), and characteristics of the individual man (attitudes, personality traits, gender schema, attraction to sexual aggression, sex/power motives).


39. Melnick, supra note 35, at 33 (concluding however that further research is necessary to determine whether "physically aggressive, intimidating behavior taught and learned in some sport contexts transfers to nonsport situations").

40. Some studies have concluded that athletes appear more likely than non-athletes to commit acts of sexual aggression against women. \textit{See}, e.g., Crosset et al., supra note 32, at 128; Timothy Jon Curry, \textit{Fraternal Bonding in the Locker Room: A Profeminist Analysis of Talk
Even those who ascribe to the view that athletes are disproportionately involved in sexual assaults, however, warn against extracting concrete conclusions and overly broad generalizations from existing research. Both the limited body of research and the scientific methodology utilized therein underlies their call for caution.\(^4\) For instance, a 1995 study reported that "athletes appear to be disproportionately involved in incidents of sexual assault on college campuses."\(^4\) In reaching this conclusion, however, the study’s authors emphasized its limitations. Most notably, the finding was based on a limited survey, and the disproportionate number is not overwhelming.\(^4\) They also noted a desire to avoid overstating the problem as many commentators in the popular press have done.\(^4\) In this regard they dispelled the notion that the disproportion reaches the high levels (thirty-three percent) reported by many scholars and journalists.\(^4\)

In sum, the empirical research has failed to provide unchallenged evidence of an athlete’s propensity for sexual aggression against women.\(^4\) The

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\(^4\) See Crosset et al., supra note 32, at 127-29, 135 (pointing out that significance and reliability of those few studies conducted thus far have been circumscribed due to limited samples and/or unscientific methodology); Koss & Gaines, supra note 38, at 95-96 (arguing that few studies that have posited positive relationship between sexual aggression and membership in athletic and other campus organizations are open to serious methodological challenge); see also Cobbs, supra note 34 (questioning propensity of college athletes to commit violence).

\(^4\) Id. at 134-35.

\(^4\) Id. at 136.

\(^4\) Id. at 135. A primary source of claims that athletes commit one in three campus sexual assaults was a 1996 newspaper article. \textit{Id.} The author of the article admits, however, that his findings were flawed in that the figures on which he relied were based on a non-scientific informal survey of university officials. \textit{Id.} Despite these limitations, the one in three figure has been relied on by scholars and journalists. \textit{Id.}

\(^4\) See Note, \textit{Out of Bounds: Professional Sports Leagues and Domestic Violence}, 109 \textit{Harv. L. Rev.} 1048, 1050-51 (1996) (concluding uncertainty surrounds question of propensity of athletes, in contrast to nonathlete males, to commit violent acts toward women); William Nack & Lester Munson, \textit{Sports' Dirty Secret}, \textit{Sports Illustrated}, July 31, 1995, at 62, 68 (noting that there are no definitive answers to questions of whether athletes abuse their mates more than nonathletes, whether something inherent in sports encourages sexual abuse, or whether heightened scrutiny of athletes creates such impression); see also Cobbs, supra note 34 (stating "[t]here is no unchallenged evidence that athletes are more likely than other men to
data has established the need for a comprehensive inquiry into the relationship between participation in athletics and sexual violence.

B. Sport's Influence in Shaping Cultural Values

The inconclusiveness of research attempting to establish a relationship between athletic participation and sexual violence underscores the need to exercise restraint to avoid unfairly labeling and stereotyping athletes.\(^47\) It is equally important, however, not to marginalize the problem of male athlete sexual violence against women. Indeed, overemphasis on the question of the propensity of athletes, in comparison to non-athletes, to engage in acts of sexual aggression risks obscuring an important reality: the impact of athlete violence against women may exceed its actual quantifiable prevalence. As the following discussion demonstrates, the potentially disproportionate influence of acts of sexual aggression by athletes against women is intimately tied to the role afforded sport and its participants in American society.

1. Sport's Reinforcement of Cultural Themes

Like other institutions, sport reflects and reinforces cultural themes,\(^48\) both empowering and harmful, that pervade our society.\(^49\) For instance, values generally considered positive and empowering, such as those associated with hard work and success, are disseminated through sport. Commenting on why sports-related opportunities must be expanded for women, Norma Cantu, commit assaults\(^5\).)

47. Richard Lapchick wisely warns against such stereotypes, particularly given its possible racial dimensions. Richard Lapchick, Justice Always Deserves a Second Look, The Sporting News, Feb. 19, 1996, at 8. He notes that "as African-Americans have come to dominate our most popular sports, "the public seems more willing to believe the worst, including the stereotype developed in today's society of African-Americans "as being on the edge of the criminal world." Id.


49. From the positive perspective, sport reinforces major themes of what has been called the American Sports Creed. In this regard, commentators "assert that sport builds character, teaches discipline, develops competitiveness, prepares participants to compete in life, enhances physical and mental fitness, and contributes to a belief in (Christian) religion and a patriotic belief in America." Howard L. Nixon II & James H. Frey, A Sociology of Sport 41 (1996). According to this perspective, sport instills within its participants values of teamwork, self-discipline, fair play, perseverance, sacrifice and hard work. See Hyland, supra note 48, at 2; D. Stanley Eitzen, Ethical Dilemmas in American Sport, 62 Vital Speeches of the Day 182, 182 (1996).
Assistant Secretary for Civil Rights in the Justice Department, asserts that the "values we learn from participation in sports [include] teamwork, standards, leadership, discipline, work ethics, self-sacrifice, pride in accomplishment, [and] strength of character."50

On the other hand, sport as a microcosm of society51 also possesses and thereby reinforces the negative qualities of the society that it reflects.52 In this regard, participation in sport is one of multiple social mechanisms53 that introduces boys to conceptualizations of maleness.54 In this sense, involvement in sport constitutes a "gendering process" inasmuch as the values and ideology that reside in sport are not gender neutral.55 "Through sports, boys are trained to be men, to reflect all the societal expectations and attitudes surrounding such a rigid role definition."56 Thus, as a social institution, sport represents an external dynamic that socializes boys and helps to sculpt their developing gender identities.57

50. See Rodney K. Smith, When Ignorance Is Not Bliss: In Search of Racial and Gender Equity in Intercollegiate Athletics, 61 MO. L. REV. 329, 340 (1996) (quoting Norma Cantu). Professor Smith astutely notes that while Cantu offers some empirical evidence to support her conclusion, many of these values are controversial. Id. at 340-41; see also Gregory M. Travalio, Values and Schizophrenia in Intercollegiate Athletics, 20 CAP. U. L. REV. 587, 587 (1991) (questioning whether intercollegiate athletics is appropriate vehicle for transmitting values often used to justify status of college sports).

51. See, e.g., EITZEN & SAGE, supra note 48, at 17 (stating that sport provides useful institution for examining complexities of larger society because it represents microcosm of society in which it is embedded); HYLAND, supra note 48, at 2 (urging recognition that sport is reflection of society's values); NIXON & FREY, supra note 49, at 39 (noting that practices, norms, and values dominant in sport parallel those in society's culture).

52. These problems include drug abuse by athletes, cheating by athletes and coaches, and violence. HYLAND, supra note 48, at 42; Eitzen, supra note 49, at 183-84.

53. Various factors contribute to the socialization process. One commentator notes:

Through socialization, individuals learn to behave in accordance with the expectations of others in the social order. This social learning is accomplished through a network of ideological beliefs that is socially agreed upon with respect to expectations pertaining to appropriate behaviors, attitudes, and values in a wide range of situations. In addition, socialization is an influential process mediated by individuals, groups, and cultural practices; the outcome of socialization is the acquisition of an agreed-upon system of standards and values.


55. Id.

56. See id. at 20 (footnote omitted) (quoting sociologists Donald Sabo and Ross RunFola).

57. Id. at 22. According to Messner, the development of male gender identity is a product of the dynamic interaction of internal (conscious and less conscious values and beliefs) and external (social institutions) influences. Id. Consequently, it is not solely the product of either but rather comes into existence as a result of the interplay between the personal dynamic and social context. Id.
Commenting on the influence of sport in shaping gender identity, some feminist scholars argue that the values residing within sport contribute to the construction of male identity in ways that are harmful to women. This perspective is captured in the following comment:

[S]port is an institution that creates and reproduces male power and domination in this culture. . . . [S]port serves as a central site for the production of male supremacy and hypermasculinity, not only in sport, but in the larger social order. Perhaps most important is the direct connection between sport as a cult of masculinity and gender relationship built on power, domination, and control. . . . [A] central element of the sport experience for men is equating manhood and masculinity with attitudes and behaviors that demean and devalue women.

Similarly Michael Messner, a professor of sociology from the University of California, Berkley, argues that

sport is a social institution, that, in its dominant forms, was created by and for men. . . . [T]he gendered values of the institution of sport [make] it extremely unlikely that [young men will] construct anything but the kinds of personalities and relationships that [are] consistent with the dominant values and power relations of the larger gender order. . . . The fact that winning was premised on physical power, strength, discipline, and willingness to take, ignore, or deaden pain inclined men to experience their own bodies as machines, as instruments of power and domination -- and to see other peoples' bodies as objects of their power and domination.

58. See id. at 20 (noting researchers who agreed that, although sport socializes boys to values and attitudes that will serve them well as men, such values and skills often perpetuate domination of women). In addition, athletes are often encouraged by parents, brothers and sports enthusiasts, to assume a hyper-masculine style.


Sport as a male preserve, then, is an important cultural practice that contributes to the definition and recreation of gender inequality. . . . What has been emphasized here is that sport’s capacity to recreate—or transform—gender relations arises from its capacity to give meaning and realization to patriarchal forms of power and domination. The analysis of how sport contributes to gender inequality must therefore attend to the connections between sport as social practice and broader patterns of gender relations.

Nancy Theberge, Toward a Feminist Alternative to Sport as a Male Preserve, in WOMEN, SPORT AND CULTURE 181, 186 (Susan Birrell & Cheryl L. Cole eds., 1994); see Lois Bryson, Sport and the Maintenance of Masculine Hegemony, in WOMEN, SPORT, AND CULTURE, supra, at 47-48, 60 (arguing that sport supports male hegemony, in part, because of public's exposure to positively sanctioned use of aggression and violence by men); Kane & Disch, supra, at 335 (agreeing with argument that male athlete assaults against women are "part of a larger pattern of behavior with roots firmly planted in the very structure and culture of [men's] sport").

60. MESSNER, supra note 54, at 150-51; see Crosset et al., supra note 32, at 128 (noting that organized competitive sports have been described as supporting male dominance and sexist practices).
Despite sport's significance, it is inappropriate to cast sport as the primary influence with respect to the production and reproduction of masculine identity. Indeed, sport is merely one of the features of the "wider social structure that affect the relative power chances of the sexes." Yet, it is generally believed that "assaultive behavior is learned behavior[ ] and that abuse against women builds on traditional assumptions about gender roles." Therefore, to the extent that sport perpetuates such patterns of behavior through the reinforcement of traditional gender roles, it represents one of the strands that nurture the attitudes and beliefs that produce sexual violence by athletes.

2. The Impact of Athletes' Behavior – Real or Imagined

The status afforded athletes in American society may exacerbate the potentially harmful influence of sport in shaping cultural attitudes that contribute to athlete violence against women. "Because star athletes are held in such high esteem, they frequently find themselves worshiped by their adoring publics." A consequence of this adoration is that athletes are afforded a place in society which, at least historically, has given them and the public the perception that they are impervious to the standards that dictate the behavior of others. Privileged status, when combined with other factors, produces a distorted or unrealistic view of interpersonal relationships.

61. See Eric Dunning, Sport as a Male Preserve: Notes on the Social Sources of Masculine Identity and Its Transformations, in WOMEN, SPORT AND CULTURE, supra note 59, at 163, 177.

62. Id.

63. RHODE, supra note 22, at 244.

64. Melnick, supra note 35, at 33.

65. Michael O'Connor, Football Docs Blame Coddling of Peter, BOSTON HERALD, Apr. 27, 1996, at O33 (noting that sociologists assert belief that many athletes who receive special treatment beginning when they are youths eventually develop attitude that, as long as they perform in sports, they have impunity to violate society's norms).

66. See Melnick, supra note 35, at 33 ("American society holds 'star' athletes in such high regard that it is no wonder that these athletes expect, if not demand, differential treatment for their transgressions. The privileged status of star athletes begins in youth sports and extends all the way to the professional ranks."); Nack & Munson, supra note 46, at 70, 73 (discussing how status afforded athletes by worshiping public makes it difficult for society to accept that those athletes engage in abuse and therefore makes convictions more difficult).


68. This special "athlete" status, when combined with a "fundamental disrespect for women" lays – if unchecked – the foundation for a message that it is permissible for athletes to sexually abuse women. Robert Lipsyte, Married to the Game, One More Athlete's Wife
This privileged status may be more pernicious than merely contributing to shaping the multiple aspects, including social relationships, of the lives of individual athletes. Sociologists argue that the conduct of athletes extends beyond their peers to influence the behavior and attitudes of men, particularly the young, in the general population. On one hand, this influence could be expected given the enormous efforts devoted to packaging, exposing, and promoting athletes for commercial purposes. Mass media produce images that heighten the visibility of athletes and increase the likelihood that their conduct will have a disproportionate impact on shaping cultural values.

On the other hand, undue emphasis on athletes as a primary source of demeaning sexual attitudes toward women can inappropriately shift focus from institutional and structural contributors to such attitudes. As explained below, using the label role model may inadequately describe the impact of athletes in shaping cultural attitudes because to do so may not only be theoretically unsound, but may risk diverting attention from addressing structural factors that result in athlete violence against women.

The role model concept has been invoked in discourse regarding the influence of athletes in matters ranging from drugs to violence against

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69. See Donald Sabo & Michael A. Messner, Whose Body Is This? Women's Sports and Sexual Politics, in WOMEN IN SPORT: ISSUES AND CONTROVERSIES, supra note 53, at 20 (observing that "[i]n a very real sense, young male athletes' attitudes toward and relationships with girls and women, whether sexual or not, are constructed through (indeed, are often distorted by and subordinated to) their relationships with their male teammates").


71. In a segment on ABC's Nightline, noted sociologist Harry Edwards described Michael Jordan and other star athletes as commodities that are packaged and promoted to market the products of companies. Air Jordan -- The Selling of an Idol, ABC NIGHTLINE (ABC News television broadcast, Feb. 7, 1997); see also Jerry Roberts & Randall Tierney, NBA Dribbles to H'Wood, HOLLYWOOD REP., June 9, 1997, at 54 (commenting that marketing of athletes has become sophisticated endeavor); Erik Spanberg, Sponsors Buzz for Rice Shooting Star Becoming Hot Commodity, BUSINESS JOURNAL-CHARLOTTE, Apr. 21, 1997, at 1 (discussing efforts corporations engage in to package and promote athletes who promote their products); Gene Yasuda, Making Penny a Shoe-Biz Star, ORLANDO SENTINEL, Oct. 29, 1995, at A1 (same).

72. A notable example of the invocation of the role model concept notwithstanding the absence of an empirical basis occurred in Vernonia Sch. Dist. 47Jv. Acton, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661-64 (1995). The Vernonia court relied, in part, on the perceived influence of athletes as role models in holding that a school district's mandatory random drug testing program for students who participated in interscholastic athletics did not violate constitutional rights to be free from unreasonable searches. Id. at 663-67. Without empirical basis the court asserted: "It seems to us self-evident that a drug problem largely fueled by the 'role model' effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs." Id. at 663.
women. In the latter context, one commentator observed:

[I]t doesn't really matter whether athletes commit violence against women at a rate greater than the general population. . . . What I am concerned about is the enormous effect athletes have as role models on some men. When we see stories on a consistent basis, as we have, that prominent athletes have done terrible things and sometimes it gets papered over, that sends a message to some men that maybe it's really kind of OK — and really it might be kind of cool. That's the message we have to turn around.74

Professor Adeno Addis explores the genealogy of the role model concept and the circumstances giving rise to its emergence as a term increasingly invoked in social and legal contexts.75 According to Addis, the term role model is invoked with increasing frequency without solid empirical footing.76

Professor Adeno Addis persuasively argues that the Supreme Court's inappropriate invocation of the role model concept in Vernonia is illustrative of the "inconsistent, even paradoxical, ways" in which courts have used the concept. Adeno Addis, Role Models and the Politics of Recognition, 144 PA. L. REV. 1377, 1455 (1996). Professor Addis notes that the Vernonia Court's invocation of the concept displays the use of the concept as if it carries "an uncontested and clear meaning, thereby dispensing with the need for an extended explanation." Id. at 1459. Other commentators have criticized the "athlete as role model" justification relied on by the Vernonia Court. See Michael Hallam, Note, A Casualty of the "War on Drugs": Mandatory, Suspicionless Drug Testing of Student Athletes in Vernonia Sch. Dist. 47J v. Acton, 74 N.C. L. REV. 833, 856, 859-60 (1996); Denise E. Joubert, Note, Message in a Bottle: The United States Supreme Court Decision in Vernonia Sch. Dist. 47J v. Acton, 56 LA. L. REV. 959, 978-79 (1996).

73. The invocation of the athlete as role model in the context of violence against women proliferated in the aftermath of the O.J. Simpson case. The concept has been liberally employed in discussions of the impact of O.J. Simpson's violent conduct as well as that of other athletes. See, e.g., Addis, supra note 72, at 1396 n.58 (noting how O.J. Simpson matter "resurrected the issue of athletes as role models in the media"); Lundy Langston, Force African-American Fathers to Parent Their Delinquent Sons — A Factor to Be Considered at the Dispositional Stage, 4 COLUM. J. GENDER & L. 173, 183 (1994) (discussing impact of character flaws displayed by role models, such as O.J. Simpson, for African-American male youth); Thomas Morawetz, Fantasy, Celebrity, and Homicide, 6 HASTINGS WOMEN'S L.J. 209, 211 (1995) (explaining tendency to presume that sports heroes, such as O.J. Simpson, are heroes in all domains); C. Keith Wingate, The O.J. Simpson Trial: Seeing the Elephant, 6 HASTINGS WOMEN'S L.J. 121, 130-31 (1995) (stating that O.J. Simpson cannot realistically be viewed as role model due to his history as wife batterer).

74. Erik Brady, Study Searches for Tie Between Sport, Violence, USA TODAY, Oct. 4, 1995, at 1C (quoting then ABA President Roberta Cooper Ramo).

75. See Addis, supra note 72, at 1388-95. In describing the traditional circumstances under which it is appropriate to apply the role model concept, Addis borrows significantly from an earlier examination of role model. See generally ROBERT K. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE (enlarged ed. 1968).

76. Addis, supra note 72, at 1380. Addis argues that the role model concept is increasingly invoked to achieve certain objectives:

[T]he term is invoked as a means of making and contesting normative claims about
He argues the role model concept is inappropriately used – particularly in the case of athletes and entertainers\(^7\) – to describe individuals who fall outside of the legitimate conceptualizations of "role model."

Addis identifies two traditional circumstances\(^78\) – the "role imitation" view and "comprehensive" view – where invocation of the role model concept is "empirically informed, logically sound, or normatively defensible."\(^79\) Under the role imitation conceptualization, a role model provides an example in a specific field, such as a lawyer serving as a role model for law students.\(^80\) In contrast, the comprehensive conceptualization refers to "an individual who the desirability of certain activities and as a rhetorical device to defend desired objectives and to attack unacceptable commitments. Its attractiveness as a rhetorical device has resulted, to some degree, from its elasticity and indeterminacy, characteristics that allow people to invoke the term to assert varying normative positions under various circumstances without actually making an extended argument to defend those positions.

\[^{77}\] See \textit{id.} at 1380 n.8 (adding that "[e]ven though 'there's little evidence in social-science literature that children actually adopt the behavior of athletes they adore,' that has not stopped people from talking about the importance of professional athletes who act as good or positive role models").

\[^{78}\] Apart from the specific role imitation and comprehensive role modeling situations, Addis argues that the role model concept is increasingly used in situations that focus on race and gender emulations. \textit{id.} at 1387, 1395. Although he criticizes this shift in use from the traditional circumstances for invoking the concept of role model as "sometimes logically unsound, descriptively incoherent, and normatively suspect," Addis believes the new approach may be useful in the context of the politics of recognition. \textit{id.} at 1387. Addis identifies the politics of recognition as the dominant political fact of the late twentieth century. \textit{id.} at 1420. It involves the desire and process by which those who are excluded seek, through differing means, validation. \textit{id.} at 1420-22. Addis explains that in the United States, the politics of recognition is the process by which excluded groups who are formally recognized also seek the informal validation that allows them to be "equal participants in the public life of the community." \textit{id.} at 1422. He asserts that "[t]he recent movements for diversity and multiculturalism in the United States are informed by this desire for and necessity of recognition." \textit{id.} To be validated means much more than to be recognized as a formal participant in the political process. \textit{id.} It also means to see the processes, the "horizon[s] of significance," the culture, tradition, and history that go toward defining one's self. \textit{id.} As it relates to the politics of recognition, Addis proposes that "the presence of supposed role models of the same race or gender provides a counternarrative to the dominant narrative that has reinforced the exclusion of these marginalized groups." \textit{id.} at 1430.

\[^{79}\] \textit{id.} at 1459.

\[^{80}\] \textit{id.} at 1391. Thus "role imitation" refers "to a socializing process in a social and political environment where a clear division of roles exists and where people aspire to those roles by attempting to imitate those whom they regard as performing admirably in those roles." \textit{id.} at 1393. Addis adds that this view of role model traditionally conveyed only positive meaning since "a professional role model impliedly possesses a certain positive professional status. So long as the role aspirant disregards other negative aspects of the role model's life, imitation will be limited to his or her positive traits." \textit{id.} at 1392.
provides a comprehensive example in relation to "a wider array of behaviors and values." Thus, a comprehensive role model includes individuals who may influence certain people through aspects of their lives that "transcend a particular (professional) role." Addis adds that two limitations set the boundaries under which it is appropriate to invoke role model in the comprehensive context: the role model and follower must be "tied by physical proximity and by an authority-vulnerability social nexus." He adds that "[i]n the absence of physical presence and the authority-vulnerability nexus, the role model follower only emulates the role model in relation to the specific role for which he or she is known." Under Addis's conceptualizations, coaches and athletes' peers could serve as comprehensive role models. Thus a basketball player is a role model for what he or she engages in -- playing basketball. Addis concludes:

Athletes can only serve as comprehensive role models for their children or for people to whom they are in some way tied. They can serve as role models in the role imitation sense for anyone who aspires to be an athlete, but, despite the conventional wisdom and current popular usage, the notion of the athlete as a role model in the comprehensive sense seems logically unsound and normatively undesirable.

Having defined the circumstances under which it is proper to invoke the role model concept, Addis explains the basis for his objection to the too frequent invocation of the comprehensiveness conceptualization of role model to describe the perceived influence of groups of persons including athletes. He observes that focusing on the behaviors and actions of certain individuals and groups to explain social decay may allow those in positions of power to avoid dealing with the institutional and structural conditions that led to social decline. . . .

81. Id. at 1393 (quoting MERTON, supra note 75, at 356-58).
82. Addis, supra note 72, at 1393.
83. Id. at 1411. With respect to the first limitation, Addis explains, comprehensive role models are likely to spend considerable time with role models followers, allowing the latter the opportunity "to watch closely and study the actions, habits, and commitments of their role models and perhaps will imitate them someday." Id. at 1394. The other limiting characteristic is power by comprehensive role models over the persons for whom they serve in that capacity and a degree of vulnerability in the role model follower. Id. Addis explains that by vulnerability he means that the role model follower is subject to sanction from the role model for acting in ways inconsistent with the "desires and commitments of the role model." Id. Second, "the role model follower will probably try to earn 'invulnerability and integrity' by purchasing recognition and approval through a process of emulation." Id.
84. Id. at 1403 (quoting Axel Honneth, Integrity and Disrespect: Principles of a Conception of Morality Based on the Theory of Recognition, 20 POL. THEORY 187, 189 (1992)).
85. Id. at 1412.
86. Id. at 1416.
It is easier for those in power to blame black athletes or a television program than to take responsibility for these structural and institutional problems which they have helped create or sustain.\footnote{87}

The modern world of mass media and mass merchandising causes one to question Addis's differentiation of role specific and comprehensive role models. For example, perhaps the images created by mass media exposure allow what would have traditionally been considered a specific role model to have a comprehensive influence despite the absence of interaction between the role model and follower.\footnote{88} In this sense, Addis's conceptualizations may be too narrowly defined. What is significant for our purposes, however, is Addis's concern that undue focus on the influence of athletes in shaping cultural attitudes toward women risks "emphasiz[ing] individuals and individual acts to the exclusion of institutions and collective acts and constraints."\footnote{89}

Assuming that athletes are instrumental in shaping cultural attitudes that translate into violence against women, steps should be taken to counteract such influence. Not to hold athletes accountable — whether they are in the professional or college ranks — sends an unattended message, particularly to men, of the acceptability of sexual violence against women. Yet, undue emphasis on the conduct of athletes may unintentionally divert attention from the institutional and structural conditions that contribute to such attitudes.\footnote{90}

\footnote{87. \textit{Id.} He critically observes that "athletes supposedly define for their potential emulators not only the particular professional role for which they are primarily known, but they are also expected to define the good and virtuous life for admirers they do not know personally and with whom they have no contact." \textit{Id.} at 1403.}

\footnote{He adds that race and gender-specific use of "role model[s] implicitly puts the blame for the underrepresentation of excluded groups in particular enterprises either on a lack of natural endowment among members of those groups or on cultural defects (or perceptual problems) that impede group members from succeeding." \textit{Id.} at 1418.}

\footnote{88. \textit{See} NIXON & FREY, \textit{supra} note 49, at 79 (defining athletes as examples of role models "who typically exert their influence from afar, especially in the form of mass media images"); MORAWETZ, \textit{supra} note 73, at 211 (observing that sports heroes become role models whom fans seek to emulate in ways that extend beyond athletes' success on playing field). Indeed, companies such as Nike seek to produce advertisements that not only humanize athletes, but create emotional ties with consumers. \textit{What Makes Nike Run?}, INVESTOR'S BUS. DAILY, Oct. 3, 1995, at A4. Given such intentional efforts, it is not inconceivable that consumers will idolize athletes and attempt to emulate their behavior in the comprehensive and not simply role imitation sense. \textit{See} Stephen Edelson, \textit{Steelers' Lloyd Just a Football Player}, ASBURY PARK PRESS, Jan. 24, 1996, at D2 (arguing that athletes are role models due in large part to influence of media, including newspapers, televised sports events, and commercials that relentlessly place them and all aspects of their lives before public).}

\footnote{89. Addis, \textit{supra} note 72, at 1384.}

\footnote{90. \textit{See} Pooley, \textit{supra} note 70, at 7.}
3. Summary

The enormous popularity and accessibility of sports in America makes sport a key component of our current gender order. Consequently, events that transpire in sport, including athlete violence against women, contribute significantly to shaping our cultural attitudes concerning the degree to which such conduct is deemed socially reprehensible. Despite its significance, however, sport constitutes merely one of the social institutions that is constructed by and subsequently aids in establishing gender order in society. Similarly, athletes represent mere components of the social institution of sport. Therefore, while it is important that individual perpetrators be held accountable for their conduct, accountability should extend to a broader institutional level.

In short, one should view challenging patterns in sport that contribute to violence against women as part of an overall effort to transform other social institutions, including our colleges and universities. One commentator adroitly stated: "As long as . . . both sexes are socialized to accept male aggression and female passivity, abuse will remain pervasive. Changing the conditions that foster violence requires changing cultural perspectives and priorities. It demands sustained challenges to media presentations, educational programs, and social services." 94

The next Part examines whether Title IX is useful as a transformative tool in addressing structural and institutional factors that influence athlete violence against women.

III. Title IX as a Means of Recourse

A. Limits of Litigation Strategy

Before examining Title IX’s role in imposing institutional accountability for student-athlete sexual violence, it is important to consider the limitations in employing litigation as a tool to address problems that are broad in scope and the product of multiple variables. Litigation is emotionally and financially expensive. Moreover, the "interstitial nature of judi-
cial decision making"\textsuperscript{97} means that a litigation strategy effectuates change slowly.\textsuperscript{98}

Despite such inherent limitations, litigation is a useful tool in effectuating social change. The role of Title IX litigation in increasing athletic opportunities for women students demonstrates the usefulness of litigation. It is unlikely that the increases\textsuperscript{99} in intercollegiate participation opportunities for women athletes over the last ten years would have occurred without the threat of liability exposure that institutions face for failing to comply with Title IX's gender equity requirements.\textsuperscript{100} Similarly, in the context of sexual violence, a litigation strategy provides an incentive for colleges and universities to develop programs and policies that seriously address the issue of sexual violence by student-athletes.\textsuperscript{101} Professor Rodney Smith, while recognizing the limitations of litigation as a means of addressing important societal issues, nevertheless concludes that it may "help to facilitate meaningful reform at the broader legislative or rulemaking level."\textsuperscript{102}

\textsuperscript{97} Id.

\textsuperscript{98} Id. at 367.

\textsuperscript{99} A recent report revealed that since 1992 the number of female athletes participating in competitive intercollegiate athletics has increased by 22 percent. Erik Brady & Tom Witosky, \textit{Title IX Improves Women's Participation}, USA TODAY, Mar. 3, 1997, at 4C. Even more impressive have been the gains over the two decades since the passage of Title IX. In 1994, over 2.12 million females participated in high school athletics compared to the 300,000 who participated in 1972. Deborah Brake & Elizabeth Catlin, 3 \textit{Duke J. Gender L. & Pol'y} 51, 52-53 (1996). At the college level, during 1994 over 105,000 female athletes competed annually in comparison to only 32,000 during 1972. \textit{Id.} at 52; see also Greendorfer, \textit{supra} note 53, at 3 (identifying Title IX as watershed in women's sports that at least on surface "seems to have ushered in significant social change in regard to women's roles in general and women's involvement in sport in particular").

These impressive gains have unfortunately been accompanied by sobering reminders that women still lag behind men. For example, "female athletes get just 38% of the scholarship money, 27% of recruiting money and 25% of operating budgets." Brady & Witosky, \textit{supra}. Moreover, during the 1995-96 academic term, women accounted for only 35% of athletes participating in Division I-A sports even though they account for half of the students enrolled at these institutions. \textit{Id.} See generally \textit{NCAA Gender-Equity Study Summary of Results} (1997).

\textsuperscript{100} See Smith, \textit{supra} note 50, at 354-55 (noting that success and threat of Title IX litigation has prompted many administrators to seek gender equity in intercollegiate athletics); Brady & Witosky, \textit{supra} note 99, at 4C (noting critically that "[h]istorically, it has taken a lawsuit by female athletes to achieve corrective action" under Title IX).

\textsuperscript{101} See Gregory E. Karpenko, Note, \textit{Making the Hallways Safe: Using Title IX to Combat Peer Sexual Harassment}, 81 Minn. L. Rev. 1271, 1273 (1997) (implying that as result of litigation and development of precedent, students will be better informed of their legal rights and will seek legal and non-legal recourse).

\textsuperscript{102} Smith, \textit{supra} note 50, at 367.
B. Title IX Sexual Harassment Jurisprudence

Title IX of the Education Act of 1972\textsuperscript{103} forbids discrimination on the basis of sex in any educational program or activity receiving federal funds.\textsuperscript{104} Over the last decade, the statute has gained notoriety due in large measure to its role in increasing participation opportunities for women athletes.\textsuperscript{105} However, attempts to expand the reach of Title IX both within and outside of the athletic participation context have occurred in the last several years.\textsuperscript{106} With respect to the latter, increased recognition of the pervasiveness of sexual harassment in educational settings has spawned lawsuits based on Title IX.\textsuperscript{107}

\textsuperscript{104} Id. § 1681(a). The statute provides in pertinent part: "No 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 education program or activity receiving Federal financial assistance. . . ." Id.
\textsuperscript{105} See supra text accompanying note 100.
\textsuperscript{106} With respect to the former, women coaches have resorted to Title IX in efforts to achieve equal compensation. See, e.g., Stanley v. Univ. of S. Cal., 13 F.3d 1313, 1318 (9th Cir. 1994); Bartges v. University of N.C. at Charlotte, 908 F. Supp. 1312, 1318-19 (W.D.N.C. 1995), aff'd, 94 F.3d 641 (4th Cir. 1996); Paddio v. Board of Trustees for State Colleges and Univrs., 61 Fair Empl. Prac. Cas. (BNA) 86, 87 (E.D. La. 1993).
\textsuperscript{107} Numerous commentators have acknowledged the pervasiveness of sexual harassment in the classroom and the emergence of Title IX as a means of addressing the problem. See, e.g., Jollee Faber, Expanding Title IX of the Education Amendments of 1972 to Prohibit Student to Student Sexual Harassment, 2 UCLA WOMEN'S L.J. 85, 91 (1992) (discussing peer sexual harassment cases based on Title IX and suggesting that courts employ Title VII's interpretive framework in future Title IX sexual harassment cases); Elaine D. Ingulli, Sexual Harassment in Education, 18 RUTGERs L.J. 281, 291-92 (1987) (setting forth Title IX's prohibitions against discrimination on basis of sex, and concluding that federal courts have interpreted statute as giving victims of educational sexual harassment right to sue under Title IX); Miller, supra note 22, at 706 (acknowledging Title IX as "primary tool" used to address educational sexual harassment claims); JoAnn Strauss, Peer Sexual Harassment of High School Students: A Reasonable Student Standard and an Affirmative Duty Imposed on Educational Institutions, 10 LAW & INEQ. J. 163, 172 (1992) (recognizing that Title IX's prohibitions of sex discrimination have been applied to remedy sexual harassment in schools); Edward S. Cheng, Note, Boys Being Boys and Girls Being Girls—Student-to-Student Sexual Harassment from the Courtroom to the Classroom, 7 UCLA WOMEN'SL.J. 263, 294-315 (1997) (identifying and analyzing cases in which plaintiffs have turned to Title IX to address peer sexual harassment); Elizabeth J. Gant, Comment, Applying Title VII "Hostile Work Environment" Analysis to Title IX of the Education Amendments of 1972—An Avenue of Relieffor Victims of Student-to-Student Harassment in the Schools, 98 DICK. L. REV. 489, 490 (1994) (recognizing that Title IX is frequently applied to peer harassment cases and concluding that Title VII standards should be used to impose liability on educational institutions); Laurie LeClair, Note, Sexual Harassment Between Peers Under Title VII and Title IX: Why Girls Just Can't Wait to Be Working Women, 16 VT. L. REV. 303, 317 n.120 (1991) (arguing that while sexual harassment cases have been litigated under Title IX, current state of law affords litigants little protection); Christopher T. Nixon, Note, Civil Rights Law—Title IX—School Liability for Student-to-Student Sexual Harassment, 64 TENN.
The contours of this body of Title IX sexual harassment jurisprudence are not yet firmly established. Nevertheless, this developing body of law provides helpful insights into issues fundamental to the question of institutional liability for student-athlete violence against women: (1) the theoretical and practical propriety of employing Title IX as a basis for holding colleges and universities legally accountable for student-athlete violence against their female peers; and assuming Title IX's applicability, (2) the standard by which Title IX liability should be assessed. As the following overview of Title IX case law reveals, under certain circumstances, the statute holds considerable potential for allowing women a private right of action against institutions of higher education that fail to take affirmative measures to protect them against violence by student-athletes.

This overview also shows that sexual harassment claims in educational settings typically involve one of two factual scenarios: teacher-to-student harassment and student-to-student harassment. In the former group of cases, most courts recognize students' claims against educational institutions for teacher sexual harassment as justiciable. In the absence of Supreme Court guidance, however, these courts have failed to establish a definitive legal standard for assessing liability. In the second group of cases, courts grapple with whether claims based on hostile environments created by peer harassment are legally cognizable. Although the prevailing trend is to recognize such claims, confusion exists as to the substantive standard for determining institutional liability.

L. REV. 237, 256 (1996) (concluding that Davis court's use of Title IX to address student-to-student sexual harassment case was "a welcome extension of Title IX" and that it furthered Congress's goal of protecting students from sex discrimination in education).


109. See Stacy, supra note 108, at 1338-39 (explaining no definitive standards of liability exist and criticizing standards applied by most courts as inadequate for failing to provide schools with substantive incentives to create effective preventative and monitoring measures against harassment).

110. See Karpenko, supra note 101, at 1273 (explaining that although most federal courts recognize peer hostile environment claims as actionable under Title IX, they disagree about nature and extent of school's liability); see also Verna L. Williams & Deborah L. Brake, When a Kiss Isn't Just a Kiss: Title IX and Student-to-Student Harassment, 30 CREIGHTON L. REV. 423, 442-55 (1997) (discussing confusion among courts regarding appropriate substantive standard to apply in Title IX peer harassment claims); Cheng, supra note 107, at 306-15 (same).
1. Teacher-to-Student Sexual Harassment

Two issues predominate in teacher-to-student sexual harassment lawsuits: (1) whether a teacher's conduct toward a student amounts to sexual harassment and (2) whether educational institutions should be held liable for the inappropriate conduct of their teachers. Courts have addressed the first issue with relative ease since sexual harassment by a teacher involves forms of misconduct that courts have deemed repugnant in Title VII employment discrimination cases. In the context of employment discrimination, both quid pro quo harassment and sexual misconduct that creates a hostile work environment have been defined. Equal Employment Opportunity Commission (EEOC) guidelines define quid pro quo harassment as the conditioning of certain benefits upon the granting of sexual favors. The EEOC and the Supreme Court have defined hostile work environment harassment. The EEOC defines hostile work environment harassment as conduct that has the "purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment."

On the other hand, the liability issue has defied easy resolution as courts attempt to provide redress to student victims of sexual harassment in a manner that is both just to victims and fair to educational institutions. In seeking to balance the competing interests of students and schools, courts have adopted one of three principal substantive standards of liability in teacher-to-student

111. See 29 C.F.R. § 1604.11(c) (1997).
112. Id. § 1604.11(a)(3). The Supreme Court defined hostile work environment as one that is objectively and subjectively hostile as well as severe and pervasive. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65-67 (1986).

The above definitions, though set forth in the context of employment discrimination, are transferable to the education context because of the similarity in manifestations of sexual harassment. With respect to education, sexual harassment includes the following: directing sexual comments at a student, staring, or inappropriately touching and fondling a student. Stacy, supra note 108, at 1338. In addition, a teacher may "make offensive sexual advances toward a student;" coerce the student into performing sexual acts by promising high grades if the student complies or by threatening to fail the student if she does not comply; and worst yet—a teacher may rape a student. Id.; see also RHODE, supra note 22, at 231 (offering another definition of educational sexual harassment).

113. Currently, only the three standards discussed below have emerged in this area of Title IX jurisprudence. Stacy, supra note 108, at 1339. However, one commentator has expressed concern that, in the absence of Supreme Court precedent, lower courts may rely on Cannon v. University of Chicago, 441 U.S. 677 (1979), to fashion a fourth standard based on Title VI. Stacy, supra note 108, at 1364 & n.146. In Cannon, the Supreme Court allowed a petitioner to file a sex discrimination suit against a university under Title IX. Cannon, 441 U.S. at 694. Although the Court limited its discussion of Title VI to that aspect of the statute that provides a basis for recognition of a Title IX private right of action, the Court's mere reference to the Title VI statute has created suspicion that some federal courts will promulgate a Title VI-based liability standard for Title IX sexual harassment claims. Stacy, supra note 108, 1364-65. One
sexual harassment cases: (1) a Title VII based "knew or should have known" standard,114 (2) a strict liability standard, or (3) a liability standard based on common-law agency principles.115

A predicate to liability under the Title VII standard is a showing by the student that a school knew of the harassment or should have known yet did nothing to curtail a teacher's sexual misconduct.116 In a frequently cited opinion, *Patricia H. v. Berkeley Unified School District*,117 the court acknowledged that Title IX generally is patterned after Title VI, but concluded that the Title VII standard is appropriate in Title IX sexual harassment cases because the type of conduct prohibited by each statute is the same.118 The holding in

commentator argues that such a broad interpretation of the Cannon decision would require student plaintiffs to prove that "their institution knew of the teacher's conduct and participated in the harassment." *Id.* at 1364. The author's primary concern seems to be that such an onerous standard would provide little protection to victims of teacher harassment because most sexual harassment claims do not involve the school district as a direct accomplice. Instead, the role of educational institutions in Title IX sexual harassment cases has generally centered around their failure, after being placed on notice, to respond to a student's complaint of teacher harassment.

Recently, one court cited Cannon as providing a basis for imposing a Title VI intentional discrimination standard. Nelson v. Almont Community Sch., 931 F. Supp. 1345, 1353 (E.D. Mich. 1996). The court held, however, that intentional discrimination requires "a showing of direct involvement of the school district in the discrimination or actual or . . . constructive knowledge on the part of the [school] district of the sexual harassment of a student and that the school failed to take immediate appropriate action reasonably calculated to prevent or stop the harassment." *Id.* at 1355.

114. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1995), forbids sexual harassment in employment. In interpreting the statute, lower courts have interpreted the Supreme Court's decision in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 71 (1986) (noting that employer liability should be determined by "agency principles"), as setting forth a test based on actual or constructive knowledge. See, e.g., EEOC v. Hacienda Hotel, 881 F.2d 1504, 1515-16 (9th Cir. 1989) (holding employer liable if "management level employees knew, or in the exercise of reasonable care should have known" of hostile work environment); Henson v. City of Dundee, 682 F.2d 897, 905 (11th Cir. 1982) (holding that plaintiff must show that "employer knew or should have known of the harassment in question and failed to take prompt remedial action").

115. See Stacy, *supra* note 108, at 1339 (explaining that standard, which does not require institutional knowledge because it imputes teacher's conduct to educational institution, can be interpreted either as strict liability standard or as one based on agency principles).

116. *Id.* at 1348, 1360 (commenting that "caution must be exercised, however, when embracing ... [this standard] because the workplace and school contexts differ so drastically" and because Title VII standard allows school room to avoid liability by "averting its eyes to the problem").


118. Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1290 (N.D. Cal. 1993). The conclusions reached by the Patricia H. court were premised, in large part, on the court's interpretation of the Franklin decision as precedent for the application of Title VII's interpretive framework to a Title IX sexual harassment case. *Id.* at 1291-93. In 1992, the Supreme Court
Patricia H. represents the prevailing trend—applying the Title VII "knew or should have known" test to adjudicate teacher-to-student sexual harassment claims brought pursuant to Title IX.¹¹⁹

A clear minority of jurisdictions have applied a strict liability standard which does not require the educational institution to have any knowledge of the teacher’s misconduct. Instead, the harassing conduct of the teacher is blindly imputed to the institution.¹²⁰ Courts have offered several justifications in support of the adoption of a strict liability standard. These include the belief in the existence of "extreme and inherent inequities in age and power,"¹¹²¹ the belief that teachers who harass female students use "the authority vested in them by the school to further their illegal conduct,"¹²² and the

addressed a teacher-to-student Title IX sexual harassment case in Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1992). The Court determined that monetary damages are available to Title IX claimants. Franklin, 503 U.S. at 76. The Franklin Court reached its conclusion by analogizing teacher/student harassment claims to Title VII employment discrimination cases. Id. at 75. The Court’s use of Title VII case law, in this regard, suggested to lower federal courts that it approved of the use of a Title VII-based liability standard for Title IX teacher-to-student harassment cases. Consequently, lower courts have employed the Title VII standard to impose liability on institutions that fail to remedy teacher-to-student sexual harassment. See, e.g., Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 469 (8th Cir. 1996); Preston v. Virginia ex rel. New River Community College, 31 F.3d 203, 207 (4th Cir. 1994); Doe v. Covington County Sch. Bd. of Educ., 930 F. Supp. 554, 565-70 (M.D. Ala. 1996); Patricia H., 830 F. Supp. at 1290.

¹¹⁹ The use of Title VII as an interpretive framework for Title IX first occurred in Alexander v. Yale Univ., 459 F. Supp. 1, 4 (D. Conn. 1977), aff’d, 631 F.2d 178 (2d Cir. 1980), which involved an assertion of quid pro quo sexual harassment. See also supra note 118 and accompanying text (providing detailed discussion of evolution of use of Title VII liability standard in Title IX teacher-to-student sexual harassment cases).

After Alexander, courts expanded the reach of Title IX by allowing employees of educational institutions to bring Title IX actions premised on hostile environment sexual harassment. See, e.g., Lipsett v. University of P.R., 864 F.2d 881, 901 (1st Cir. 1988) (finding educational institution can be liable under Title VII "knew or should have known" standard for failing to remedy hostile environment created by university employees); Mabry v. State Bd. of Community Colleges & Occupational Educ., 813 F.2d 311, 316 (10th Cir. 1987) (recognizing that Title VII substantive standard applies to Title IX claim); Moire v. Temple Univ. Sch. of Med., 613 F. Supp. 1360, 1366 (E.D. Pa. 1985) (finding school can be liable under Title IX if it condoned discriminatory conduct).

¹²⁰ See Stacy, supra note 108, at 1339 (concluding that when courts use strict liability standard, knowledge is irrelevant because teacher’s harassing conduct is imputed to institution); see also Bolon v. Rolla Pub. Sch., 917 F. Supp. 1423, 1427-29 (E.D. Mo. 1996) (recognizing strict liability standard as appropriate in cases of teacher-to-student harassment in high school context); Leija v. Canutillo Indep. Sch. Dist., 887 F. Supp. 947, 955 (W.D. Tex. 1995), rev’d, 101 F.3d 393 (5th Cir. 1996) (applying strict liability standard to teacher-to-student harassment at elementary school level). The Fifth Circuit reversed the district court’s denial of summary judgment, stating that, "simply put, strict liability is not part of the Title IX contract." Id.

¹²¹ Bolon, 917 F. Supp. at 1429.

¹²² Id.
concern that "unless the acts of the employees of the district are fully and strictly imputed to the district, Title IX becomes potentially inoperative."\textsuperscript{123}

While the strict liability standard may be beneficial because it creates an incentive for schools to develop "effective preventative and monitoring measures" to protect young women from sexual harassment,\textsuperscript{124} it can erroneously place responsibility on an innocent school district which had no knowledge of the teacher's harassment. The potential for this standard to impose liability to hold an inculpable educational institution responsible for the misconduct of a third party has caused some courts to view it as overly broad. Hence, strict liability is unlikely to be adopted as the substantive standard of liability in Title IX teacher-to-student sexual harassment cases.\textsuperscript{125}

Despite judicial reluctance to apply a strict liability standard, at least one court has adopted agency principles to assess an institution's liability when a student plaintiff cannot produce evidence that the school knew about or should have known about the teacher's harassment.\textsuperscript{126} In \textit{Kracunas v. Iona College},\textsuperscript{127} two students sued their college alleging that a professor sexually harassed them in violation of Title IX.\textsuperscript{128} The court held that agency principles, similar to those applied in Title VII cases, were applicable to cases of teacher-to-student sexual harassment.\textsuperscript{129} The \textit{Kracunas} court explained that under Title VII an employer is liable for the hostile workplace environment created by an employee in two circumstances: (1) if the harasser is the plaintiff's supervisor and uses his "actual or apparent authority to harass the

\begin{footnotes}
\item 123. \textit{Leija}, 887 F. Supp. at 953.
\item 124. Stacy, supra note 108, at 1339, 1342 (arguing in favor of standard that does not condition liability on institution's level of knowledge because requiring institutional knowledge as predicate to liability may create incentive for educational institutions to close their eyes to problem of sexual harassment committed by teachers). \textit{But see} Kimberly A. Mango, Comment, \textit{Students Versus Professors: Combatting Sexual Harassment Under Title IX of the Education Amendments of 1972}, 23 CONN. L. REV. 355, 360-90 (1991) (discussing legislative history of Title IX and its relationship to Title VII).
\item 125. \textit{See} Stacy, supra note 108, at 1342 (expressing support for use of agency principles under \textit{RESTATEMENT (SECOND) OF AGENCY \S 219(2)(d)} (1958) to address hostile environment claims in context of teacher-to-student sexual harassment because it is "more palatable" to apply than strict liability standard). A standard based on the agency concept would require that a student prove that a teacher was aided in the accomplishment of the tort by the existence of an agency relationship. \textit{Id.} at 1372.
\item 126. \textit{See} Kracunas v. Iona College, 119 F.3d 80, 88 (2d Cir. 1997). \textit{But see} Doe v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223, 1226 (5th Cir. 1997) (rejecting adoption of agency principles and holding school district liable if management level official knew of harassment and failed to end it).
\item 127. 119 F.3d 80 (2d Cir. 1997).
\item 128. Kracunas v. Iona College, 119 F.3d 80, 82-83 (2d Cir. 1997).
\item 129. \textit{Id.} at 86.
\end{footnotes}
plaintiffs" or is otherwise "aided in the harassment by the existence of the agency relationship" and (2) if the harasser is a low-level supervisor or co-worker and the employer "provided no reasonable avenue for complaint or knew of the harassment and did nothing about it."30 Relying on this interpretation of Title VII, the Kracunas court concluded that the professor used his authority as the students' instructor to further his harassment because he engaged in the complained of sexual harassment during academic meetings in his office.31 This type of conduct, the court posited, reflects the type of behavior and circumstances for which an employer can be held liable under the Restatement (Second) of Agency.32 Pursuant to the Restatement, a court can hold an employer liable for the conduct of its employee if the latter "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."33 Accordingly, the Kracunas court found the university liable for the professor's conduct because he was aided in the accomplishment of the harassment by virtue of his position as a university professor.34

The Kracunas decision is an aberration in this body of Title IX jurisprudence because it is the only court decision to apply the agency test and inquire into whether a professor was "aided in the harassment by the existence of the agency relationship."35 While the Kracunas opinion is one of the more recent cases in this area of the law, the United States Court of Appeals for the Fifth Circuit's opinion in Doe v. Lago Vista Independent School District36 provides further evidence that Title VII standards continue to dominate this area of Title IX jurisprudence.37 In Lago Vista, the court expressly refused to replace

130. Id. at 85.
131. Id. at 89. The court compared the professor-student relationship to the supervisor-employee relationship based on the fact that a professor has the "authority to assign, review, and grade their work; in addition, he might be called upon to provide . . . an employment recommendation." Id. at 87.
132. Id. The Kracunas court identified Restatement (Second) of Agency subsections 219(1) and (2)(d) as the applicable provisions. Id. (citing RESTATEMENT (SECOND) OF AGENCY § 219(1), (2)(d)).
134. See Kracunas v. Iona College, 119 F.3d 80, 87 (2d Cir. 1997).
135. Id. at 85.
136. 106 F.3d 1223 (5th Cir. 1997).
137. See Doe v. Lago Indep. Sch. Dist., 106 F.3d 1223, 1225 (5th Cir. 1997). In Lago Vista, a high school student and her parents brought a Title IX claim, inter alia, against a school district arising from a teacher's sexual harassment of the student. Id. at 1224. The court in Lago Vista did not rule on the constructive notice theory of liability because the plaintiff did not pursue it. Id. at 1225. However, the court did recognize it as a viable theory in proving liability at school. Id. Under this theory, "Title IX plaintiffs, like Title VII plaintiffs, can
the Title VII-based standard of liability with a standard based on agency principles. Citing an earlier decision, the court noted that "school districts are not liable in tort for teacher-student harassment under Title IX unless an employee who has been invested ... with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so." This case provides a strong reminder that while a few court decisions have applied the strict liability standard or the agency standard, the trend in teacher-to-student harassment cases is to hold an institution liable only if it fails to take action after being notified of the teacher's misconduct.

2. Student-to-Student Sexual Harassment

The statutory directives of Title IX are two-fold: to prevent the use of federal funds for discriminatory practices and to protect individuals against sex discrimination in education. In the context of teacher-to-student sexual harassment, these objectives have come closer to realization because of judicial willingness to impose liability on educational institutions when teachers engage in sexual misconduct toward students. In contrast, uncertainty regarding the consequences of imposing liability on educational institutions and competing policy interests undergird greater judicial hesitancy to hold schools accountable for peer sexual harassment. As the following discussion reveals, this judicial attitude manifests itself in a split in authority regarding the propriety of Title IX as a basis for holding educational institutions legally accountable for peer harassment. This judicial uncertainty, prevail by showing that management-level authorities should have known of the misconduct and failed to take steps to end it." Id. (emphasis added).

138. Id. at 1225.
139. Id. (citing Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 658 (5th Cir. 1997)).
140. See Cheng, supra note 107, at 293. Like Title VI, Title IX's "primary enforcement mechanism is the threat of withholding federal funding." Id. This remedy alone, however, does little to protect the victims of sexual discrimination in education because the Department of Education rarely uses this "drastic" measure to enforce Title IX. Id.
141. See supra Part III.B.1 (evaluating jurisprudence of teacher-student sexual harassment). Several policy reasons have been identified as supporting greater judicial willingness to impose liability for teacher-to-student sexual harassment as opposed to student-to-student sexual harassment. See, e.g., Leija v. Canutillo Indep. Sch. Dist., 887 F. Supp. 947, 951-52 (W.D. Tex. 1995) (finding that "[o]ne of the core objectives of Title IX is to provide relief to young girls sexually abused by their male teachers at schools receiving federal funds"), rev'd, 101 F.3d 393 (5th Cir. 1996); Anita Bernstein, Law, Culture, and Harassment, 142 U.PA.L.REV. 1227, 1229 n.14 (1994) (observing that sexual harassment exists in almost all settings where people of unequal power must co-exist); Carrie N. Baker, Comment, Proposed Title IX Guidelines on Sex-Based Harassment of Students, 43 EMORY L.J. 271, 277 n.36 (1994) (concluding that frequent incidents of sexual harassment may "contribute to the tremendous decline in girls' self-esteem"); see also infra text accompanying notes 151-53 (discussing policy reasons that support imposition of liability on schools for peer-to-peer sexual harassment).
derived in part from differing views concerning the relationship between Title IX and Title VII, has produced confusion among courts regarding the applicable substantive standard of liability in cases of student-to-student harassment.

a. Recognition of Hostile Educational Environment Claims

Student-to-student sexual harassment claims revolve around allegations that such conduct creates a hostile educational environment.\(^{142}\) Hostile environment claims are common in the context of workplace sexual harassment. When such claims began to arise in the context of education, the judiciary gradually embraced them as actionable under Title IX. For example, the Patricia H. court recognized the viability of hostile educational environment claims when a teacher sexually harasses a student.\(^{143}\) The court therein interpreted Franklin v. Gwinnett County Public Schools\(^{144}\) as implicitly recognizing Title IX hostile educational environment claims as cognizable.\(^{145}\)

In Doe v. Petaluma City School District\(^{146}\) (Doe I), the same federal district court as in Patricia H. became the first to recognize the viability of a Title IX hostile environment claim involving peer sexual harassment. Doe I involved a junior high school student who brought an action against a school district, a counselor, and a principal, alleging that they failed to put an end to sexual harassment inflicted by the student's peers.\(^{147}\) The court relied on Patricia H. to hold that harassment by a fellow student could amount to a hostile educational environment, which is a violation of Title IX.\(^{148}\) In so ruling, the court noted that the court in Patricia H. conditioned liability on the "finding of a hostile environment" and the school district's "knowing failure to act."\(^{149}\) The Doe I court also stated that failure to recognize a student-to-

\(^{142}\) This differs from teacher-to-student harassment cases where claims may be brought under either a quid pro quo or hostile environment theory. The former theory is unavailable in peer harassment cases because a student is powerless to demand or coerce another student to engage in sexual conduct in exchange for promises of good grades or threats of bad grades.


\(^{144}\) 503 U.S. 60 (1992).


\(^{146}\) 830 F. Supp. 1560 (N.D. Cal. 1993).

\(^{147}\) See Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560, 1564-66 (N.D. Cal 1993) [hereinafter Doe I] (involving junior high school student who sued school district under Title IX because the school failed to take action to curtail harassment her peers were inflicting upon her). Ultimately, the court granted a motion for reconsideration on the standard of liability issue. \textit{Id.} at 1583. The court reconsidered this issue in Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1426 (N.D. Cal. 1996) [hereinafter Doe II].

\(^{148}\) See Doe I, 830 F. Supp. at 1572.

\(^{149}\) \textit{Id.} at 1573.
student hostile educational environment claim as within the purview of Title IX "would violate the Supreme Court's command to give Title IX a sweep as broad as its language."

Despite its reliance in part on Patricia H. in extending the hostile environment analysis to peer sexual harassment cases, the Doe I court failed to cite to the policy justifications articulated in Patricia H. Those policy reasons appear applicable, however, to cases of peer harassment. In Patricia H., the court articulated the following rationale: "[A] nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits that a student receives." The court further posited that a "sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential and receiving the most from the academic program." These observations are significant in cases involving student-to-student harassment – including student athlete violence against women – if for no other reason than they represent judicial acknowledgment of the manner in which sexual harassment can affect the quality of a victim's education.

While Doe I and its progeny represent the prevailing trend, a few courts have declined to recognize such claims as falling within the prohibi-
tions of Title IX. The reasons articulated in these cases include the following: (1) the behavior of a fellow classmate is "neither part of, nor an activity of a school program," meaning the harm is not proximately caused by the federally funded program and therefore falls outside the parameters of Title IX; (2) Title IX is patterned after Title VI, not Title VII, and consequently Title IX does not expressly include a cause of action for hostile environment claims; and (3) the extension of liability for student-to-student harassment does not "clearly-flow" from Title IX, nor can such a responsibility be gleaned from prior sexual harassment cases involving an institution's "duty-to-protect."

In *Davis v. Monroe County Board of Education* (Davis II), an en banc rehearing affirming the trial court's dismissal of a peer-to-peer sexual harassment claim based ostensibly on Title IX, the United States Court of Appeals for the Eleventh Circuit cited most of the above factors. The Eleventh Circuit articulated several reasons in support of its finding that Title IX does not permit an action against a school district for its failure to address a hostile

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155. See Mennone v. Gordon, 889 F. Supp. 53, 58 (D. Conn. 1995) (finding teacher not liable under Title IX for failure to protect student from peer sexual harassment in classroom because of qualified immunity); Aurelia D. v. Monroe County Bd. of Educ., 862 F. Supp. 363, 367 (M.D. Ga. 1994) (finding school board not liable under Title IX because lack of clear notice by Congress that such liability exists), aff'd on reh'g sub nom. Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1406 (11th Cir. 1997); Seamons v. Snow, 864 F. Supp. 1111, 1118 (D. Utah 1994) (declining expressly to decide whether such claims are viable under Title IX), aff'd, 84 F.3d 1226 (10th Cir. 1996).

156. See Cheng, supra note 107, at 307 (citing Aurelia D., 862 F. Supp. at 367). The harm alleged in student-to-student sexual harassment cases is not merely the occurrence of the sexual harassment, but also that the school allows or ignores its occurrence.

157. See id. (citing Seamons, 864 F. Supp. at 1118). Despite the absence of explicit directions in the statute to allow claims for hostile educational environments to be brought under Title IX, well-settled case law shows that such claims are actionable under the statute.

158. See id. at 308 (citing Mennone, 889 F. Supp. at 58); see also Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1292-93 (N.D. Cal. 1993) (setting forth overriding policy concerns that justify extension of Title IX to include cause of action against school for teacher-to-student sexual harassment claims); supra Part III.B.1 (evaluating jurisprudence of teacher-student sexual harassment).

159. 120 F.3d 1390 (11th Cir. 1997).

160. See Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1392 (11th Cir. 1997) [hereinafter Davis II]. In *Davis II*, the parent of a fifth grader who had been sexually harassed by fellow students brought a Title IX action against the school board, the superintendent of the board, and the principal of the school. *Id.*
environment emanating from student-to-student sexual harassment effectively. Based upon its analysis of the legislative history of Title IX, the court concluded that Congress did not intend to authorize student-to-student sexual harassment claims under Title IX. In this regard, the majority found that Congress, in enacting Title IX, was concerned with eliminating gender discrimination in school admissions, in the availability of school services or studies, and in employment opportunities for women. The court also emphasized the absence of any reference to student-to-student sexual harassment or school discipline in congressional discussions of Title IX.

A strongly worded dissent took issue with the majority's use of legislative history to interpret Title IX so narrowly as not to encompass peer-to-peer sexual harassment claims. The dissent relied on principles of statutory construction in concluding that the plain meaning of Title IX rendered it unnecessary to engage in a process of interpretation. Furthermore, the dissent stated that Title IX's language unambiguously establishes that liability hinges not upon the identity of the perpetrator of sexual harassment, but "upon whether the grant recipient maintained an educational environment that excluded any person from participating, denied them benefits, or subjected them to discrimination." Emphasizing Supreme Court pronouncements that Title IX should be given a "sweep as broad as its language" and the Office of Civil Rights' (OCR) broad interpretation of Title IX, the dissent argued that peer sexual harassment falls within the scope of Title IX.

The dissent also criticized the majority's conclusion that the lack of any reference to student-to-student sexual harassment in Title IX's legislative

161. Id. at 1395-97. The court noted that Senator Bayh "proposed a provision he thought would 'cover such crucial aspects as admission procedures, scholarships, and faculty employment' with limited exceptions." Id. at 1397 (quoting 118 CONG. REC. 5803 (1972) (statement of Senator Bayh)).

162. Id. at 1396-97.

163. Id. at 1411-19 (Barkett, J., dissenting).

164. The dissent articulated the maxim that "[c]ourts must assume that Congress intended the ordinary meaning of the words it used, and absent a clearly expressed legislative intent to the contrary, that language is generally dispositive." Id. at 1412 (Barkett, J., dissenting) (citations omitted) (quoting Gonzalez v. McNary, 980 F.2d 1418, 1420 (11th Cir. 1993)).

165. Id. (Barkett, J., dissenting).

166. Id. (Barkett, J., dissenting) (quoting North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982)).

167. The dissent noted that the OCR's interpretation of Title IX to cover peer sexual harassment is consistent with OCR's interpretation of Title VI to cover peer racial harassment. Id. at 1413 n.1 (Barkett, J., dissenting). The dissent characterized this similarity as significant given both the Supreme Court's statement that Title IX is patterned after Title VI and the Davis II court's reliance on the similarities between the two statutes. Id. (Barkett, J., dissenting).

168. Id. at 1412-13 (Barkett, J., dissenting).
history excluded those claims from the statute's scope. In this regard, the dissent stated: "The mere fact that student-on-student sexual harassment may not have been specifically mentioned in the Congressional debates does not mean that it was not encompassed within Congress's broad intent of preventing students from being 'subjected to discrimination' in federally funded educational programs." The dissent further posited that the majority's narrow interpretation of Title IX to include only matters specifically referenced in the statute's legislative history would also exclude teacher-to-student sexual harassment claims from the parameters of Title IX. According to the dissent, to conclude that Congress only intended Title IX to cover admission, services, and employment "contravenes both common sense and the plain meaning of the words of the statute."

After considering Title IX legislative history, the majority looked to the notice of liability requirements of Spending Clause statutes to justify its rejection of Title IX-based student-to-student sexual harassment claims. The court noted that Title IX's legislative history and similarities between Title IX and Title VI clearly establish that the former is a Spending Clause statute. According to the court:

To ensure the voluntariness of participation in federal programs, the Supreme Court has required Congress to give potential recipients unambiguous notice of the conditions they are assuming when they accept federal funding. A spending power provision must read like a prospectus and give funding recipients a clear signal of what they are buying.

The Eleventh Circuit summarized its reasoning in finding that the school district did not have the notice contemplated by Congress with respect to Spending Clause statutes as follows:

First, as we have noted, nothing in the language or history of Title IX suggests that Title IX imposes liability for student-student sexual harassment. Second, the imposition of this form of liability would so materially affect schools' decisions whether to accept Title IX funding that it would require an express, unequivocal disclosure by Congress. Adopting appellant's theory of liability, however, could give rise to a form of "whipsaw" liabil-

169. Id. at 1413 (Barkett, J., dissenting).
170. Id. (Barkett, J., dissenting).
171. Id. (Barkett, J., dissenting).
172. Id. at 1414 (Barkett, J., dissenting).
173. The majority found that Title IX and Title VI are virtually identical. The court noted that "[t]he only differences are the substitution of the words 'on the basis of sex' for the words 'on the ground of race, color, or national origin' and the insertion of the word 'educational' in front of the words 'program or activity."' Id. at 1398.
175. Id. at 1399 (citation omitted).
ity, under which public schools would face lawsuits from both the alleged harasser and the alleged victim of the harassment. Moreover, reasonable public school officials could perceive the likely number of such suits to be large. Because our endorsement of appellant's theory of liability would alter materially the terms of the contract between Congress and recipients of federal funding, appellant fails to state a claim upon which relief can be granted.176

Once again, the dissenting opinion persuasively addressed the concerns raised by the majority on the sufficiency of notice of liability issue. The dissent explained that an educational institution has "sufficient notice of liability based on the plain meaning of the statute, which unequivocally imposes liability on grant recipients" for maintaining a discriminatory educational environment.177 In addition, the dissent cited Franklin for the proposition that the notice requirement under the Spending Clause, which is a prerequisite to a Title IX damages action, is satisfied when the alleged violation is intentional.178 Relying on the reasoning articulated in Franklin, the dissent argued

176. Id. at 1401 (footnotes omitted). "Whipsaw" liability, as described by Judge Tjoflat, arises from the possibility that a school district, attempting to remedy the hostile environment resulting from student-to-student harassment, faces liability exposure to both the victim and the harasser. Id. School officials with knowledge of improper conduct by a harasser over whom they have control could become subject to personal liability to the victim under Title IX if the harassment persists. Id. On the other hand, a school official who disciplines the alleged harasser could face a lawsuit on grounds that he or she "acted out of bias — out of fear of suit" and, consequently, deprived the student of due process. Id. at 1402. Judge Tjoflat concluded that because of the official's financial incentive to punish harassers, the decisionmaker could become impermissibly biased and could thus subject the school district to suit by the harasser. Id. at 1403-04.

Judge Carnes, writing in concurrence, critically pointed out that members of the court who agreed with the majority decision, did not join in those aspects of Judge Tjoflat's opinion which discuss "whipsaw" liability. Id. at 1407 (Carnes, J., concurring). Judge Carnes further enunciated the belief that sexual harassment is such a pervasive problem in schools that it would expose school districts to massive liability. Id. at 1408 (Carnes, J., concurring). Judge Carnes argued that such matters were unnecessary for resolution of the issue before the court. Id. at 1411 (Carnes, J., concurring). Moreover, Judge Carnes severely criticized Judge Tjoflat's conclusions as being based on faulty premises. Id. at 1407-09 (Carnes, J., concurring).

Judge Tjoflat relied on findings of a 1993 survey of the American Association of University Women Education Foundation to buttress his speculation that "whipsaw" liability might arise in a substantial number of Title IX based student-to-student claims. Id. at 1405. He first noted the survey's conclusion that 65 percent of students in grades eight to eleven had experienced peer sexual harassment. Id. Based on this survey, Judge Tjoflat calculated that 7,784,000 public school students in those grades would be considered victims of peer sexual harassment. Id.

177. Id. at 1414 (Barkett, J., dissenting).

178. See id. (Barkett, J., dissenting) (citing Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 74-75 (1992)). The Franklin court held that the Spending Clause does not prohibit a Title IX cause of action for teacher-on-student sexual harassment. Id. (Barkett, J., dissenting).
that the notice requirement was met in *Davis II* given that "the alleged violation of Title IX was intentional because the school board knowingly permitted a student to be subjected to a hostile environment of sexual harassment."179

In addition to addressing the broad liability issue, the Eleventh Circuit commented on the applicability of Title VII standards to analyze Title IX claims. The court identified three reasons for refusing to apply Title VII standards. First, the court concluded that "[i]f Congress wished Title IX to be interpreted like the earlier enacted Title VII, Congress would have written Title IX to read like Title VII. Congress did not."180 Second, the court stated that Congress enacted Title VII, unlike Title IX, under the "far-reaching Commerce Clause and Section 5 of the Fourteenth Amendment."181 Consequently, the scope of Title IX is narrower than that of Title VII. Third, the court noted that agency principles underlie Title VII liability.182 Because student-to-student harassment does not involve employees, agency principles are irrelevant in addressing Title IX liability, and Title VII standards should not control the outcome of such cases.183

The dissent severely questioned the majority's conclusions regarding the inapplicability of Title VII standards. The dissent emphasized the extent to which other courts, including the Supreme Court,184 look to "Title VII principles to delineate the scope of [a] school board's duty and identify the elements of a cause of action under Title IX."185 The dissent noted that since *Franklin* "at least five circuit courts have found that Title VII standards are applicable to students' Title IX sexual harassment claims."186 The dissent also noted that virtually every district court that has addressed the issue has found that "Title IX, by analogy, to Title VII, imposes liability on schools for failure to remedy severe and pervasive student-on-student sexual harassment."187

179. *Id.* at 1414 (Barkett, J., dissenting).
180. *Id.* at 1400.
181. *Id.*
182. *Id.*
183. *Id.*
185. *Davis II*, 120 F.3d 1390, 1415 (11th Cir. 1997) (Barkett, J., dissenting).
186. *See id.* (Barkett, J., dissenting) (citing Oona v. McCaffrey, 122 F.3d 1207, 1209 (9th Cir. 1997)); *see also* Doe v. Claiborne County, 103 F.3d 495, 514 (6th Cir. 1996); Seamons v. Snow, 84 F.3d 1226, 1232-33 & n.7 (10th Cir. 1996); Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 469 (8th Cir. 1996); Murray v. New York College of Dentistry, 57 F.3d 243, 249 (2d Cir. 1995).
b. Defining the Substantive Standard of Liability

Despite the foregoing justifications, the majority of courts recognize the viability of student sexual harassment claims brought pursuant to Title IX. However, the court's recognition of such claims has narrowed, rather than resolved, the issues associated with Title IX student-to-student sexual harassment claims. Given that most courts have concluded that such claims fall within the scope of Title IX, the primary focus of judicial and scholarly inquiry shifts to the appropriate substantive standard of liability for determining when an educational institution's inaction or insufficient action exposes it to liability for student harassment.

The confusion regarding the substantive standard to apply in peer harassment cases is derived in large part from the Supreme Court's opinion in Franklin. In Franklin, the Court stated that Title IX imposed a duty on schools not to discriminate on the basis of sex. In finding that the Gwinnett County Public School System discriminated against the student plaintiff by allowing the student's teacher to sexually harass her, the Court analogized the teacher-student relationship to the supervisor-employee relationship. The Court stated that "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." Accordingly, the Court concluded that the same rule should apply when a teacher sexually harasses and abuses a student. The Court further supported its ruling by citing a Title VII case and summarily concluding that a school district may be held liable for sexual harassment - in the teacher-student relationship - the way that an employer may be held liable when such harassment occurs in the employment context.

As a result of the Franklin Court's reliance on Title VII case law, lower federal courts disagree as to whether the Title VII "knew or should have known" standard or some other standard should apply in Title IX peer harassment cases. Four standards have surfaced in the debate over the appropriate standard of institutional liability: (1) Title VII "knew or should have known," (2) actual notice, (3) intentional discrimination proven by direct and circum-

188. Franklin, 503 U.S. at 75.
189. Id.
190. Id.
191. See id. (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986)).
192. See id. at 75.
193. See id. (citing Meritor, 477 U.S. at 64).
194. See Karpenko, supra note 101, at 1284 (setting forth four standards of school board liability that have emerged and engaging in detailed discussion of each).
stantial evidence, and (4) disparate treatment. The following discussion briefly examines these standards and concludes that the Title VII and intentional discrimination standards hold the most promise for redressing the injuries of student victims of peer harassment.

i. Title VII's "Knew or Should Have Known" Standard

As stated above, courts have adopted Title VII as an interpretive framework for Title IX based in part on their interpretation of Franklin. However, the specific application of the Title VII standard of liability to Title IX peer harassment claims finds its roots in Davis v. Monroe County Board of Education (Davis I). The opinion in Davis I was issued by a three judge panel of the Eleventh Circuit. The court ultimately vacated the decision in Davis I so that the matter could be heard en banc. As discussed above, the Eleventh Circuit, en banc, affirmed the trial court's dismissal of plaintiff's Title IX claim. Nevertheless, an analysis of the reasoning of the three judge panel is necessary because other courts have employed the panel's reasoning when presented with the issue of Title IX peer harassment.

In Davis I, the parent of a fifth grader who had been sexually harassed by fellow students brought a Title IX claim against the school board, the superintendent of the board, and the principal of the school. The Eleventh Circuit relied on the Franklin court's analogy of educational sexual harassment to employment sexual harassment in concluding that Title IX encompasses the only court to adopt the actual notice standard for school board liability. Karpenko, supra note 101, at 1284 n.88. In approving an actual notice standard, the court acknowledged Title VII standards in general, but declined to adopt the "knew or should have known" liability standard because of its view that the agency relationships inherent in the employer-employee relationship do not exist between students and the school. Id. (citing Bruneau, 935 F. Supp. at 170-74).

196. See Karpenko, supra note 101, at 1284.
197. See supra Part III.B.2.b (applying Title VII framework to Title IX claims). But see Karpenko, supra note 101, at 1292 (criticizing federal courts that have relied on Franklin decision to develop Title VII standards of liability and stating that Franklin Court's reference to Meritor did not compel, or even suggest, adoption of Title VII liability standards).
198. 74 F.3d 1186 (11th Cir. 1996).
199. See Davis I, 74 F.3d 1186 (11th Cir. 1996), aff'd en banc, 120 F.3d 1390 (11th Cir. 1997).
200. See Davis v. Monroe County Bd. of Educ., 91 F.3d 1418 (11th Cir. 1996) (vacating three judge panel decision and granting rehearing en banc).
201. Davis II, 120 F.3d 1390, 1392 (11th Cir. 1997).
202. See Karpenko, supra note 101, at 1285 n.90 (explaining that although Eleventh Circuit vacated Davis I decision on rehearing en banc, courts still rely on initial decision).
203. Davis I, 74 F.3d at 1188.
claim for peer harassment in the same manner as does Title VII.\textsuperscript{204} The \textit{Davis I} court further found that the school board could be held liable if it "knew or should have known" of the harassment and failed to take remedial action.\textsuperscript{205}

In an effort to further justify its adoption of the Title VII substantive standard, the \textit{Davis I} court pointed to a Letter of Finding by the Department of Education's OCR.\textsuperscript{206} This Letter stated that an educational institution may also be found in violation of Title IX if it "failed to respond adequately to actual or constructive notice" of harassment by a nonagent student.\textsuperscript{207} Significantly, the Eleventh Circuit also enumerated several policy reasons that support providing students with the added level of protection suggested in OCR's Letter of Finding. The primary reasons articulated by the court are the following: (1) teachers have a greater ability than employers to model and control appropriate behavior in the classroom, (2) sexual harassment can cause greater damage in the classroom than in the workplace because of the youth of the victim and the tendency for schools to institutionalize certain behaviors if they are allowed to continue, (3) it is more difficult for students to leave their schools than it is for employees to find new jobs, and (4) a nondiscriminatory classroom is essential for proper intellectual and emotional growth.\textsuperscript{208}

As noted above, the reasoning and the policy considerations in the \textit{Davis I} decision have served as the bases for other courts to adopt the Title VII standard of liability. The court in \textit{Doe v. Petaluma City School District}\textsuperscript{209} (\textit{Doe II}) was the first district court to follow \textit{Davis I} and rule that Title VII was the most appropriate standard to apply in peer hostile environment sexual harassment cases.\textsuperscript{210} The \textit{Doe II} court analyzed several other Title IX sexual harassment cases that had been decided since it issued its original order.\textsuperscript{211}

\begin{itemize}
\item \textsuperscript{204} \textit{Id.} at 1190-92.
\item \textsuperscript{205} \textit{Id.} at 1193-95.
\item \textsuperscript{206} The Office of Civil Rights is the entity under the Department of Education that is responsible for enforcing Title IX. \textit{See} 34 C.F.R. §§ 106.1-.71 (1997).
\item \textsuperscript{207} \textit{See Davis I}, 74 F.3d 1186, 1192 (1996), \textit{aff'd en banc}, 120 F.3d 1390 (11th Cir. 1997) (citing Letters of Finding by John E. Palomino, Regional Civil Rights Director, Region IV, 2 (July 24, 1992)).
\item \textsuperscript{208} \textit{See Karpenko, supra} note 101, at 1286 (citing \textit{Davis I}, 74 F.3d at 1193); \textit{see also} Miller, \textit{supra} note 22, at 708 (quoting experts as saying that "sexual harassment could potentially cause both psychological harm, such as depression and anxiety, and physical harm, such as headaches and eating disorders"); Nixon, \textit{supra} note 107, at 256 (concluding that harassment can affect "victim's self esteem and self respect").
\item \textsuperscript{209} 949 F. Supp. 1415 (N.D. Cal. 1996).
\item \textsuperscript{210} \textit{See Doe II}, 949 F. Supp. 1415, 1420-21 (N.D. Cal. 1996).
\item \textsuperscript{211} \textit{Id.} at 1417-20. The court evaluated other recent Title IX decisions. \textit{See} Bosley v. Kearney R-I Sch. Dist., 904 F. Supp. 1006, 1023 (W.D. Mo. 1995) (stating that Title VII provides most appropriate standard for enforcing anti-discrimination provisions of Title IX and holding that proof of intentional discrimination could be demonstrated by showing that school
Nevertheless, it concluded that the standard of liability in student-to-student hostile environment cases was whether the educational institution failed to take action to end the hostile environment after it had actual or constructive notice of such.212

Recently, in Doe v. Londonderry School District,213 another federal court adopted a Title VII-based standard for a peer harassment case.214 Londonderry involved an adolescent girl who alleged that the school district took insufficient action to remedy a hostile educational environment caused by three male classmates who called her sexually explicit names and frequently spit on her.215 In addressing these allegations, the court ruled that a test of whether the school district "knew of the harassment and intentionally failed to take proper remedial action . . . best resolves the competing concerns relevant to school district liability under Title IX in the peer sexual harassment context."216 This language suggests that the court has adopted an intentional discrimination standard. However, close examination of the opinion reveals that the court may have actually promulgated a Title VII liability standard.

The court cited to the Doe II decision as persuasive authority for the definition of "intentional."217 In addition, the Londonderry court's reliance
on the OCR's interpretation of Title IX further supports the proposition that the court has fashioned a Title VII-based standard that will allow a plaintiff to create an inference of intentional discrimination by demonstrating that the school had knowledge or should have had knowledge of the harassment yet failed to take remedial action. The Londonderry court specifically stated that according to the OCR, "a school will be liable under Title IX if its students sexually harass other students if (i) a hostile environment exists in the school's programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action." The court's use of the OCR guidelines, in conjunction with the Doe II decision, which expressly adopts the Title VII standard, suggests that it interprets the "intentional" standard as merely requiring a plaintiff to create an inference of intent to discriminate. A plaintiff can create this inference by complying with the Title VII standard.

ii. Intentional Discrimination Standard

Although Davis I and Doe II established the foundation for other courts to adopt the Title VII standard in peer harassment cases, not all courts have elected to follow these decisions. Other courts have applied an intentional discrimination standard of liability to determine the liability of educational institutions for peer harassment. Under an intentional liability standard, a


219. Several other courts considering Title IX peer harassment cases have adopted the Title VII standard or some limited variation of it. See Brzonkala v. Virginia Polytechnic & State Univ., Nos. 96-1815, 96-2316, 1997 WL 785529, at *7 (4th Cir., Dec. 23, 1997) (using Title VII test for hostile environment); Collier v. William Penn Sch. Dist., 956 F. Supp. 1209, 1213 (E.D. Pa. 1997) (recognizing Title VII as "most appropriate analogue" for defining Title IX's substantive standards); see also Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 652-53 (5th Cir. 1997) (imposing liability if school has actual notice); Nicole M. v. Martinez Unified Sch. Dist., 964 F. Supp. 1369, 1377 (N.D. Cal. 1997) (stating school could be held liable if it knew of harassment and "failed to take steps reasonably calculated to end the harassment"); Franks v. Kentucky Sch. for the Deaf, 956 F. Supp. 741, 746 (E.D. Ky. 1996) (applying Title VII standard); Bosley v. Kearney R-1 Sch. Dist., 904 F. Supp. 1006, 1023 (W.D. Mo. 1995) (applying slightly modified version of Title VII standard, which requires proof that school "knew or should have known of the hostile environment and took no or insufficient remedial action").

220. See Karpenko, supra note 101, at 1288. The intentional discrimination standard or some variation thereof has been adopted in several cases. See Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412, 1419-20 (N.D. Iowa 1996); Oona R.-S. v. Santa Rosa City Sch. Dist., 890 F. Supp. 1452, 1463-65 (N.D. Cal. 1995), aff'd, 122 F.3d 1207 (9th Cir. 1997); Bosley v. Kearney R-1 Sch. Dist., 904 F. Supp. 1006, 1020 (W.D. Mo. 1995) (applying hybrid
plaintiff is entitled to recover monetary damages pursuant to Title IX if she can prove her school intentionally discriminated against her.\footnote{221}

Once again Franklin has been instrumental in the adoption of the intentional discrimination standard.\footnote{222} Franklin's influence was evident in Wright v. Mason City Community School District,\footnote{223} in which the court stated that "[t]he Supreme Court's opinion in Franklin explicitly requires 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."\footnote{224} The Wright court reasoned that

in Franklin, the Supreme Court indicated that the respondeat superior theory of supervisor liability applies in the Title IX context. Thus, where the harasser is an agent of the school, a plaintiff must prove that the school district, or someone for whose actions the school district is responsible, intended to sexually harass the plaintiff.\footnote{225}

The application of the intentional discrimination standard has resulted in confusion regarding the precise manner in which intentional discrimination can be established. Some courts infer discriminatory intent from direct or standard that mixes elements of Title VII standard with intentional discrimination standard).

Like courts, commentators are split on whether it is more appropriate to apply the Title VII standard or the intentional discrimination standard. Those who favor the Title VII standard emphasize that Title VII and Title IX prohibit the same forms of conduct. Faber, supra note 107, at 86-90 (explaining that conduct prohibited by Title VII as creating hostile work environment also occurs in education and arguing for extension of "Title VII jurisprudence to Title IX actions"). They also argue that Title IX was promulgated in large part because of the inapplicability of Title VII to sexual discrimination in education. See Miller, supra note 22, at 706 (discussing fact that Title IX emerged as "gap-filler" to Title VII); Williams & Brake, supra note 110, at 442-56 (arguing that Eleventh Circuit's adoption in Davis of Title VII standard is "legally and ethically . . . the way to go").

One proponent of the intentional discrimination standard argues that it is most consistent with legal precedent. Karpenko, supra note 101, at 1298. Specifically, Karpenko states that courts should incorporate Title VI standards into Title IX since both are Spending Clause statutes. Id. at 1298-1300. Their status as Spending Clause statutes compels the adoption of an intentional discrimination standard in both. Id. at 1298-99.

221. Id. at 1298-99.

222. See id. at 1288 (stating that courts which have concluded that Title IX requires showing of intentional discrimination have typically relied on Franklin decision); see also Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992).


224. Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412, 1419 (N.D. Iowa 1996); accord Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1205 (N.D. Iowa 1996) (acknowledging that plaintiff conceded that she must meet intentional discrimination standard). The Burrow court applied the intent standard; however, the court did not expressly rule on the issue. Id.

225. Wright, 940 F. Supp. at 1418.
circumstantial evidence of the totality of the circumstances. Factors that a court may consider under the totality of the circumstances test include "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." The intentional discrimination standard was applied in Burrow v. Postville Community School District, wherein the court held that the "plaintiff must prove ‘intent to discriminate’ on the part of the school district in a Title IX claim against the school district for a hostile environment created by known of—yet unchecked—peer-to-peer sexual harassment.

In Bosley v. Kearney R-1 School District, the court, while professing to have adopted the intentional discrimination standard, held that the appropriate standard of liability in peer harassment cases is whether the school "knew of the harassment and intentionally failed to take proper remedial action." The court explained that discriminatory intent does not "require proof that unlawful discrimination is the sole purpose behind each act of the defendant. . . . It is, rather, the cumulative evidence of action and inaction which objectively manifests discriminatory intent." The standard articulated in Bosley seems to combine the Title VII standard and the intentional discrimination standard. Although the Bosley standard requires proof that a school had actual or constructive notice of the harassment (in accord with the Title VII test), it also requires the plaintiff to show that a school "intentionally" failed to take proper remedial action. At least one commentator believes that this standard was purposely developed, by the Bosley court, to reflect its interpretation of Franklin as requiring proof that the educational institution intentionally discriminated against the student and to acknowledge the trend in other courts to adopt the Title VII standard. In addition, the practice of creating

226. Karpenko, supra note 101, at 1288.
228. Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1205 (N.D. Iowa 1996); see also Oona R.-S. v. Santa Rosa City Sch., 890 F. Supp. 1452, 1469 (N.D. Cal. 1995) (holding "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").
231. Id. at 1020.
232. Id. at 1023.
233. Karpenko, supra note 101, at 1289 n.112. In Burrow, the court stated that the plaintiff "may bring a Title IX cause of action for damages against PCSD for its knowing failure to take appropriate remedial action in response to the hostile sexual environment created by students at Postville Community High School." Burrow v. Postville Community Sch. Dist., 929
hybrid standards is a common method that federal courts use to grapple with this area of Title IX jurisprudence.\textsuperscript{234} In this regard, "courts accordingly adjust the elements for hostile environment sexual harassment under Title VII to reflect [their] determination that Franklin requires a showing of intentional discrimination."\textsuperscript{235} 

In general, federal court decisions that have adopted the intentional discrimination standard narrowly interpret Title IX to apply only to conduct of educational institutions.\textsuperscript{236} These courts also take the stance that educational institutions must have notice of their potential liability under Title IX for the statute to effectively deter discrimination.\textsuperscript{237} In this respect, courts that support the application of the intentional standard reason that an institution will only have notice of its transgressions and subsequent liability if it actually intends to discriminate.\textsuperscript{238}

\textit{iii. The Rowinsky Disparate Treatment Approach}

The Fifth Circuit, in \textit{Rowinsky v. Bryan Independent School District},\textsuperscript{239} enunciated the third standard of liability, a disparate treatment approach.\textsuperscript{240} In \textit{Rowinsky}, two sisters were repeatedly harassed at school and on the school bus by their classmates.\textsuperscript{241} After filing numerous complaints with the school, the mother of the two girls brought an action against the school district on behalf of herself and her daughters.\textsuperscript{242} Plaintiffs alleged that the school district and its officials condoned and caused a hostile educational environment because they failed to respond sufficiently to the girls' complaints.\textsuperscript{243} The Fifth Circuit held that in a Title IX peer harassment case, "a plaintiff must demonstrate that the school district responded to sexual harassment claims differently based on sex."\textsuperscript{244}

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\textsuperscript{234} Karpenko, \textit{supra} note 101, at 1289 n.112.

\textsuperscript{235} \textit{Id.} at 1289.

\textsuperscript{236} \textit{See id.} (citing \textit{Rowinsky v. Bryan Indep. Sch. Dist.}, 80 F.3d 1006, 1015 (5th Cir. 1996)).

\textsuperscript{237} \textit{See} Karpenko, \textit{supra} note 101, at 1289.

\textsuperscript{238} \textit{Id.}

\textsuperscript{239} 80 F.3d 1006 (5th Cir. 1996).


\textsuperscript{241} \textit{Id.} at 1008-09.

\textsuperscript{242} \textit{Id.} at 1009-10.

\textsuperscript{243} \textit{Id.}

\textsuperscript{244} \textit{Id.} at 1016.
In reaching its conclusion, the Fifth Circuit cited three principal factors: the "scope and structure" of Title IX, its legislative history, and the OCR's interpretations of the statute. Regarding Title IX's "scope and structure," the Rowinsky court concluded that, since Congress enacted Title IX pursuant to its spending power, it can only prohibit discriminatory acts of grant recipients. The court stated that "[a]s an exercise of Congress’s spending power, Title IX makes funds available to a recipient in return for the recipient’s adherence to the conditions of the grant." The court further noted that "[w]hile it is plausible that the condition imposed could encompass ending discriminatory behavior by third parties, the more probable inference is that the condition prohibits certain behavior by the grant recipients themselves." The Rowinsky court's latter concession undermines the Fifth Circuit's contention that its holding is consistent with the "scope and structure" of the Title IX statute. The Supreme Court issued a mandate in North Haven Board of Education v. Bell that the scope of Title IX should be given a "sweep as broad as it’s language." The Rowinsky court's failure to interpret the statute as including peer harassment is contrary to the Supreme Court's mandate that the statute be broadly interpreted.

The court then turned to the legislative history and concluded that Title IX's purpose was to prevent sex discrimination in education by grant recipients only. It stated:

[T]itle IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices. . . . [B]oth of these purposes were repeatedly identified in the debates on the two statutes. Both supporters and opponents of the amendment focused exclusively on acts by the grant recipients.

Finally, the court construed the OCR's interpretation of Title IX as "consistent with refusing to impose liability for the acts of third parties." In this regard, the court stated:

245. See Cheng, supra note 107, at 311.
246. See Rowinsky, 80 F.3d at 1012.
247. Id. at 1012-13.
248. Id. at 1013.
251. See Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1014 (5th Cir. 1996) (citing 118 CONG. REC. 5803 (1972)).
252. Id. at 1013-14.
253. Id. at 1014.
The only OCR documents to apply Title IX to peer sexual harassment, i.e., recent Letters of Finding, should be accorded little weight. Any weight the letters do have are [sic] outweighed by both the implementing regulations and the Policy Memorandum promulgated by the OCR. As a legislative regulation, the implementing regulations found at 59 C.F.R. § 106 are accorded far greater deference than are interpretive regulations such as Letters of Finding.254

Relying on the foregoing rationale, the court held that the standard in Title IX peer harassment cases should require a student plaintiff to show that the school engaged in unequal treatment of the females, as compared with the males.255 The court stated that "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."256

The Fifth Circuit rationale in support of its holding suggests that the Rowinsky court disregarded the overriding public policy issue implicit in Title IX student-to-student sexual harassment cases—the institution's responsibility to prevent hostile educational environments. Similarly, the Fifth Circuit appears to disregard the consequences of allowing educational institutions to turn a deaf ear to complaints of peer harassment. Accordingly, the other federal courts have flatly rejected the Rowinsky approach, finding its reasoning faulty.257

In Doe II, a California district court harshly criticized an underlying rationale of the Rowinsky opinion. The Doe II court explained that the thrust of hostile educational environment claims is to impose liability on educational institutions based on their own conduct of "knowingly permitting the discriminatory hostile and abusive environment to continue and to inflict an

254.  Id. at 1015.
255.  Id. at 1016.
256.  Id.

Like courts, commentators have criticized the disparate impact standard adopted by the Rowinsky court for Title IX peer harassment claims. These criticisms focus on the Rowinsky court's fundamental misunderstanding of the essence and factual basis of peer harassment claims and the purpose and objectives of Title IX. See Anouchka Oppinger, Note, Educational Law—Title IX—Peer Sexual Harassment—Still Alive and Well In Our School Hallways After Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir.), cert. denied, 117 S. Ct. 165 (1996), 38 S. Tex. L. Rev. 307, 322 (1997).
ongoing injury on its female students. The insight appropriately shifts focus in peer harassment cases to institutions' reprehensible conduct in failing to remedy hostile environments, rather than student-offenders' conduct in creating it.

The Doe II court's criticism of Rowinsky also provides insight as to why the latter is the only court to adopt the disparate treatment standard. The Rowinsky standard effectively requires a plaintiff to meet a doubly unrealistic burden. First, the standard is unrealistic because schools are unlikely to have as many claims of sexual harassment from males as they will from females; therefore, such a standard will not be an accurate gauge of the school's treatment of peer sexual harassment complaints. Second, the Rowinsky standard requires a plaintiff to produce evidence of the school's motivation for its treatment of her claims. Students are unlikely to have first hand knowledge of such information.

Various federal courts continue to criticize the Fifth Circuit's disparate treatment standard. A recent decision that has rejected the applicability of the disparate treatment analysis, in student-to-student sexual harassment claims, is Collier v. William Penn School District. In Collier the court held unequivocally that Title IX should impose liability on a school district when it fails to prevent or eradicate a sexually hostile environment created by students since such an environment discriminates and limits educational opportunities based on sex. The court, interpreting Title IX broadly, found that if a plaintiff established facts to support her allegations that the school district was aware that she was being harassed by a fellow student, yet tolerated such conduct, the district would have denied the plaintiff the benefits of its educational program and/or subjected her to discrimination in violation of Title IX. The court also noted its disagreement with Rowinsky:

We disagree with Rowinsky. The Fifth Circuit failed to consider the role the omissions of the school district may have played. In our view, the inquiry should focus on whether the school district, as a recipient of federal funds, failed, after notice, to prevent or curtail the sexual harassment of students within its charge.

261. The court cited to Supreme Court precedent in finding that Title IX should be given "a sweep as broad as its language." Id. at 1212.
262. Id.
263. Id. at 1212.
In addition, the *Collier* court identified several factors that supported using Title VII as the analogue when defining Title IX's substantive standard. These include the *Collier* court's interpretation of *Franklin v. Gwinnett* as authorizing the use of Title VII standards in Title IX cases involving peer harassment, Title IX's role in filling gaps left by Title VII, and the OCR's interpretation of Title IX as permitting the application of the Title VII substantive standard.\(^{264}\)

Similarly, the United States Court of Appeals for the Ninth Circuit in *Oona v. McCaffrey*\(^{265}\) found that school districts have a duty to take reasonable steps to prevent harassment by fellow students.\(^{266}\) In so ruling, the court criticized Rowinsky's interpretation of Title IX, which severely restricts the actionability of student-to-student sexual harassment claims under Title IX. The *Oona* court stated that it would "not consider what steps school officials may reasonably be required to take to prevent harassment."\(^{267}\) The court tempered its explicit refusal to endorse or create a standard of liability with its reliance on other appellate court decisions that have adopted the Title VII standard of liability to resolve Title IX sexual harassment claims.\(^{268}\)

**C. Institutional Liability for Peer Harassment: The Collegiate Level**

Issues regarding the availability of Title IX and the appropriate substantive standards to employ in peer harassment cases in educational settings have arisen primarily in the primary and secondary school context. Nevertheless, the few cases to address peer harassment claims brought pursuant to Title IX at the collegiate level have specifically addressed these issues. An overriding policy reason for allowing such claims in the context of post-secondary education is derived from one of the fundamental missions of institutions of higher education—the promotion of academic freedom.\(^{269}\) Included within this rather
expansive goal is the notion that universities should undertake policies and procedures that safeguard a student’s freedom to learn. This goal has played a central role in the two reported decisions that adjudicated Title IX student-to-student sexual harassment claims at the collegiate level. The following discussion briefly examines these cases as a prelude to an examination of the propriety of employing Title IX to provide redress for co-ed victims of student-athlete violence. This discussion reveals that peer harassment at collegiate levels manifests in misconduct similar to that which occurs at the primary and secondary school levels. Such conduct includes sexually explicit verbal remarks and occasional offensive touching. In addition, however, the more liberal nature of the college campus lends itself to more egregious forms of sexual misconduct such as rape, sexual assault, and stalking. To the extent that student-athletes engage in these forms of misconduct, this Article proposes that Title IX is an effective means of redress for women students.

I. Linson v. Trustees of the University of Pennsylvania

Linson v. Trustees of the University of Pennsylvania, involved peer sexual harassment at the collegiate level. In Linson, the plaintiff, a male graduate student, sought damages based upon the university’s failure to eradicate an alleged hostile educational environment created by a fellow graduate student. The plaintiff alleged that his graduate advisor repeatedly touched him, made lewd remarks, and called him names like "thief," "pervert," and "slut." The university failed to respond to the plaintiff’s complaints, and the court found that the university had created a hostile educational environment. The court held that Title IX was applicable to the conduct and awarded the plaintiff damages.

Harassment: A Dilemma Resolved with Title VII and Title IX, 4 DUKE J. GENDER L. & POL’Y 159, 172 (1997).

270. Id.


272. See, e.g., Davis I, 74 F.3d 1186, 1188 (11th Cir. 1996) (summarizing plaintiff’s factual allegations as follows: fellow fifth grader attempted to fondle her and directed offensive language toward her); Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412, 1414 (N.D. Iowa 1996) (stating that student harassed and humiliated plaintiff by calling her names like “whore,” “bitch,” and “slut” and by scrawling graffiti about her); Doe I, 830 F. Supp. 1560, 1564 (N.D. Cal. 1993) (stating that “most of the harassment was verbal, in the form of statements about Jane having a hot dog in her pants or that she had sex with hot dogs”).

273. See Terry Nicole Steinberg, Rape on College Campuses: Reform Through Title IX, 18 J.C. & U.L. 39, 41 (1991) (stating that “American colleges and universities may discriminate against female students because of their sex by failing to address the problem of campus rape” and explaining that “[r]ape on college campuses . . . is a systemic problem requiring far-reaching solutions”).


student. The plaintiff alleged that another student engaged in unwanted conduct toward him that included "verbal solicitations for sexual contact, unwanted touching of the private areas of the plaintiff's body, strangling, and other nonconsensual touching." Mr. Linson further alleged that as a result of his reporting of the sexual harassment, the university engaged in retaliatory conduct against him. With respect to the allegations of a hostile environment, the plaintiff alleged that he reported the harassment to a university official, but the university failed to take sufficient remedial action. In addressing the fundamental issue of whether the plaintiff presented a cognizable Title IX hostile environment claim, the court noted that the majority of courts recognize such claims. Based on the overwhelming body of precedent, the court found that "a school's failure to eradicate a hostile environment caused by [sexual harassment from another student] may also result in the school's liability for monetary damages under Title IX where intentional discrimination is shown." Thus, the court expressly recognized as cognizable a Title IX peer harassment claim at the collegiate level.

2. Brzonkala v. Virginia Polytechnic and State University

*Brzonkala v. Virginia Polytechnic & State University* is the other case in which a court has examined the applicability of Title IX in...
a case of peer harassment in the collegiate context. In addition, it is the

283. Brzonkala v. Virginia Polytechnic & State Univ., 935 F. Supp. 772, 779 (W.D. Va. 1996) [hereinafter Brzonkala I], rev'd, Nos. 96-1814, 96-2316, 1997 WL 785529 (4th Cir. Dec. 23, 1997). The Brzonkala district court issued two opinions. In the first opinion, the court dismissed plaintiff's Title IX claim on the ground that she failed to demonstrate that the University's conduct was based on illegal discriminatory intent. Id. However, the court allowed Brzonkala to proceed with her claim under the Violence Against Women Act (VAWA), 42 U.S.C. § 13981 (1994). Brzonkala I, 935 F. Supp. at 773. In its second opinion, the court addressed Brzonkala's VAWA claim against the university. Brzonkala v. Virginia Polytechnic & State Univ. 935 F. Supp. 779, 781 (W.D. Va. 1996) [hereinafter Brzonkala II], rev'd, Nos. 96-1814, 96-2316, 1997 WL 785529 (4th Cir. Dec. 23, 1997). With respect to her VAWA claim, Brzonkala alleged that her assailants sexually assaulted her with discriminatory animus toward her gender and that such conduct violated her right to be free from gender-motivated violence under the VAWA. Id. at 784. The district court recognized that Ms. Brzonkala successfully stated a claim under the VAWA. Id. at 784-85. It nevertheless dismissed her VAWA claim when it ruled the statute unconstitutional. Id. at 801. The court premised its ruling on its position that Congress lacked the authority to enact the statute "either under the commerce clause or under the enforcement clause of the Fourteenth Amendment." Id.

Congress created VAWA to address the problem of gender-based crime. See Chris A. Rauschl, Comment, Brzonkala v. Virginia Polytechnic and State University: Violence Against Women, Commerce, and the Fourteenth Amendment—Defining Constitutional Limits, 81 MINN. L. REV. 1601, 1603 (1997) (stating that Congress enacted VAWA to combat "the escalating problem of violent crime against women" (quoting S. REP. No. 103-138, at 37 (1993))). Accordingly, the VAWA creates a private right of action for victims of gender-motivated violent crimes. 42 U.S.C. § 13981(c) (1994). This rather expansive scope of VAWA would potentially include a claim against a student-athlete for violence directed at the victim because she is a woman. This fact was recognized by the district court, in that it conceded Ms. Brzonkala had brought a successful complaint under the statute. Brzonkala II, 935 F. Supp. at 785. However, it nullified that ruling by declaring the statute unconstitutional.

On appeal, a three-judge panel of the Fourth Circuit considered, inter alia, whether the district court erred in holding that Congress's enactment of the VAWA exceeded its authority under the Commerce Clause. Brzonkala v. Virginia Polytechnic & State Univ., Nos. 96-1814, 96-2316, 1997 WL 785529, at *15-16 (4th Cir., Dec. 23, 1997) [hereinafter Brzonkala III]. In reversing the district court's ruling, the Fourth Circuit first noted the strong presumption of validity and constitutionality where legislative judgments are based in part on empirical data. Id. at *15. Adopting a rational basis standard for determining if a "regulated activity substantially affects interstate commerce," the court concluded that under the directive of United States v. Lopez, 514 U.S. 549 (1995), Congress had a rational basis when it found that violence against women has a major effect on the national economy. Brzonkala III, 1997 WL 785529, at *15. The court's conclusion was influenced substantially by extensive empirical data gathered by Congress in support of its "unequivocal and persuasive finding" regarding the impact of violence against women on interstate commerce. Id. at *19. Given the detailed nature of Congress's finding, the court stated that "[w]hen a court finds "that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, [its] investigation is at an end."" Id. at *20 (citations omitted).

The Fourth Circuit aligns with other courts that have upheld the constitutionality of the VAWA. Seaton v. Seaton, No. 3:96-CV-741, 1997 WL 391601, at *7 (E.D. Tenn. July 1, 1997); Doe v. Doe, 929 F. Supp. 608, 610 (D. Conn. 1996). The Fourth Circuit's ruling is also
only case that involves sexual harassment by student-athletes against a woman student.\textsuperscript{284} Ms. Brzonkala alleged that she was brutally raped by two members of the Virginia Polytechnic and State University (VPI) football team in a room located on the third floor of her dormitory.\textsuperscript{285} Subsequent to the incident, Ms. Brzonkala filed charges against both athletes under the school's sexual assault policy. VPI conducted a disciplinary hearing, and only one of the athletes, Antonio Morrison, was found guilty of abusive conduct and suspended for two semesters.\textsuperscript{286} Morrison appealed the decision. Without notifying Ms. Brzonkala, VPI set aside the suspension and allowed Morrison to return to school the following semester on a full athletic scholarship.\textsuperscript{287} Upon learning that VPI permitted Morrison to return, Ms. Brzonkala canceled plans to return to VPI to complete her education.\textsuperscript{288}

Based on these factual assertions, the United States District Court for the Western District of Virginia interpreted Brzonkala's Title IX complaint as alleging that VPI participated in creating a hostile educational environment by allowing the student-athlete to return to campus while the plaintiff was still a student.\textsuperscript{289} In response to Brzonkala's complaint, the court ruled that a Title IX claim based on student-to-student harassment brought against the univer-

\begin{itemize}
  \item At least one commentator has criticized the district court's refusal to recognize the cause of action for victims of gender-motivated crimes. See Rauschl, supra, at 1604. The commentator argues that Section 5 of the Fourteenth Amendment authorizes Congress to enact the VAWA. \textit{Id.} Rauschl contends that Section 5 of the Fourteenth Amendment grants Congress the power to enforce the Amendment. \textit{Id.} at 1614. Moreover, when "Congress identifies an equal protection violation... [i]t is entitled to significant judicial deference." \textit{Id.} Rauschl adds, "Congress's choice of a remedy is also entitled to judicial deference and will be sustained if it is 'plainly adapted' to enforcing the Amendment and does not violate other constitutional limitations." \textit{Id.}

\item \textsuperscript{284} See Redmond v. University of Neb., No. 4:CV 95-3223, 1995 WL 928211, at *2 (D. Neb. Dec. 5, 1995) (refusing to determine applicability of Title IX to cases involving student-athlete violence against women students).

\item \textsuperscript{285} \textit{Brzonkala I}, 935 F. Supp. at 773.

\item \textsuperscript{286} \textit{Id.} The other athlete, Crawford, was found not guilty of sexual assault due to insufficient evidence. \textit{Id.} at 774. Morrison appealed the finding of the first hearing that he was guilty of sexual assault. \textit{Brzonkala III}, 1997 WL 785529, at *2. The outcome of the second hearing was a finding that he was guilty of abusive conduct. \textit{Id.} It was this finding that VPI set aside. \textit{Id.}

\item \textsuperscript{287} \textit{Id.}

\item \textsuperscript{288} \textit{Id.} VPI did not inform Brzonkala that Morrison's suspension had been deferred. \textit{Id.} She learned of this through a newspaper article. \textit{Id.; see Rauschl, supra note 283, at 1602 n.13 (discussing facts of Brzonkala cases).}

\item \textsuperscript{289} \textit{Brzonkala I}, 935 F. Supp. at 778 (stating that "[a]lthough Brzonkala does not specifically argue this point, it is possible to glean from her complaint an allegation that VPI has a hand in permitting a hostile school environment based on Brzonkala's gender").
\end{itemize}
sity is actionable. Next, the court articulated a two prong test for determining what constitutes a hostile environment: (1) conduct that objectively creates a hostile or abusive environment, and (2) the victim's subjective perception that an environment is abusive. Applying this test, the Brzonkala I court held that the plaintiff's hostile environment claim was premature because it was based on her fear of future reprisal that had not actually materialized.

On appeal in Brzonkala v. Virginia Polytechnic Institute and State University (Brzonkala III), the United States Court of Appeals for the Fourth Circuit considered whether Ms. Brzonkala stated a Title IX claim against VPI pursuant to hostile environment and disparate treatment theories. Relying on Title VII jurisprudence and cases which have adopted Title VII analysis in Title IX litigation, the court concluded that an "educational institution's handling of a known sexually hostile environment is actionable" under Title IX. In so holding, the Fourth Circuit severely criticized the Fifth Circuit's "deeply flawed analysis" in Rowinsky. Arguing that Rowinsky incorrectly framed the issue in terms of liability for acts of third parties, the court stated:

"[I]n a Title IX hostile environment action a plaintiff is not seeking to hold the school responsible for the acts of third parties (in this case fellow students). Rather, the plaintiff is seeking to hold the school responsible for its own actions, i.e. that the school "knew or should have known of the illegal conduct and failed to take prompt and adequate remedial action." Therefore, the entire focus of Rowinsky's analysis as to whether a school may be held responsible for the acts of third parties under Title IX misses the point. Brzonkala does not seek to make [VPI] liable for the acts of third parties. She seeks only to hold the school liable for its own discriminatory actions in failing to remedy a known hostile environment."

Having found that peer hostile environment claims are actionable under Title IX, the court turned to whether Ms. Brzonkala alleged facts were sufficient to establish VPI's liability for a hostile environment claim. The court adopted a Title VII standard of liability and articulated the test as "whether Brzonkala has alleged facts sufficient to support an inference that [VPI] 'knew

290. Id.
291. Id. (citing Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993), for two-prong test and use of Title VII standards in Title IX case).
292. See Brzonkala I, 935 F. Supp. at 778.
295. Id. at *5.
296. Id. at *6.
297. Id. at *7 (citations omitted).
or should have known of the illegal conduct and failed to take prompt and adequate remedial action.\textsuperscript{298} Applying this test, the appellate court rejected the district court's finding that, because Ms. Brzonkala failed to return to campus, a hostile environment never occurred. The court reasoned that the district court failed to recognize that the rape of Ms. Brzonkala created a hostile environment and that VPI was aware of this environment and failed to properly remedy it.\textsuperscript{299} According to the court, "[g]iven the seriousness of the harassment acts, the total inadequacy of [VPI's] redress, and Brzonkala's reasonable fear of unchecked retaliation including possible violence, Brzonkala did not have to return to the campus the next year and personally experience a continued hostile environment.\textsuperscript{300}

\textit{Linson} and \textit{Brzonkala I} are significant because they recognize that peer sexual harassment claims are actionable against colleges and universities. These cases are also instructive on the issue of what standards courts will apply in determining an institution's liability. In \textit{Linson}, the court adopted an intentional discrimination standard. In \textit{Brzonkala III}, the Fourth Circuit adopted the Title VII test for what constitutes a hostile educational environment. Next, the Article discusses the applicable standard of liability in student-athlete peer harassment claims.

\textbf{D. Institutional Liability for Student-Athlete Sexual Harassment}

\textit{1. The Title VII Standard}

\textit{a. Brzonkala and the Title VII Standard}

Given the overwhelming judicial precedent, courts are likely to find little difficulty in recognizing as actionable Title IX sexual harassment claims against institutions stemming from the conduct of their student-athletes. The \textit{Linson} and \textit{Brzonkala} decisions, as well as cases involving peer sexual harassment at the primary and secondary school levels, support bringing this form

\begin{itemize}
  \item \textsuperscript{298} \textit{Id.} at *9.
  \item \textsuperscript{299} \textit{Id.} at *6.
  \item \textsuperscript{300} \textit{Id.} at *9. The Fourth Circuit placed particular emphasis on the egregious nature of the circumstances that underlie Ms. Brzonkala's hostile environment. These included facts revealing that Ms. Brzonkala was brutally raped three times, ceased attending classes, attempted suicide, sought the aid of the university's psychiatrist, and that university officials, including the psychiatrist, made only a cursory inquiry into the cause of plaintiff's distress. \textit{Id.} at *9-10. The court also found it material that VPI officials provided neither a fair hearing nor exacted appropriate punishment given the seriousness of Ms. Brzonkala's allegations. \textit{Id.} at *9-10.
  
  With respect to plaintiff's disparate treatment claim, the court applied a Title VII standard that requires proof of discriminatory intent. \textit{Id.} at *11. Agreeing with the district court, the Fourth Circuit concluded that plaintiff failed to allege facts sufficient to establish the requisite discriminatory intent. \textit{Id.} at *11-12.
\end{itemize}
of misconduct within the parameters of Title IX. As alluded to above, the Brzonkala decisions will play a central role in setting the legal backdrop for courts addressing this issue in the future. The lack of Supreme Court precedent means courts, as in cases of peer harassment generally, will struggle to define the appropriate substantive standard of care to apply. In this regard, two issues are likely to emerge as critical in defining the limits of institutional liability: (1) the propriety of applying the Title VII standard to cases involving student athlete violence; and (2) assuming judicial adoption of an intentional discrimination standard, the factual showing a plaintiff must make in order to sustain a Title IX claim based upon a student-athlete’s misconduct.

With respect to the adoption of the Title VII standard, two narrower issues come into focus: (1) whether the Brzonkala decisions provide a basis for employing the Title VII standard in this context, and (2) whether the unique relationship of the student-athlete to his university supports adopting a Title VII standard.

With respect to the first of these issues, the Fourth Circuit’s opinion in Brzonkala III is likely to be particularly persuasive. The court borrowed from Title VII case law in articulating the five elements of a Title IX hostile environment claim. A plaintiff asserting a hostile environment claim must establish: (1) that plaintiff is a member of a protected group, (2) that plaintiff was the subject of unwelcome sexual harassment, (3) that the harassment was gender-based, (4) that the severity or pervasiveness of the harassment altered the conditions of plaintiff’s education and created an abusive educational environment, and (5) that some basis for institutional liability exists.301

Courts that emphasize the judicial trend to apply a Title VII standard because the educational opportunity that Title IX mandates can only be effectuated if the educational environment is free of the hostility and intimidation that results from sexual harassment will no doubt rely on the Brzonkala III court’s adoption of a Title IX standard that is similar to standards employed in Title VII cases.302 Other courts, however, will point to the policies that underlie Title IX, its status as a Spending Clause statute, and its relationship to Title VI to support their rejection of such an interpretation.303

b. Employee Status and the Title VII Standard

Apart from the Brzonkala decisions, an independent basis may exist for adopting a Title VII standard of care — the uniqueness of the student-athlete’s

302. See supra Part III.B.2.b (discussing reasons cited in support of application of Title VII substantive standard in Title IX peer harassment claims).
303. See supra Part III.B.2.b (discussing reasons courts identify in opposing application of Title VII substantive standards in Title IX peer harassment claims).
relationship with his college or university. More specifically, plaintiffs may argue that student-athletes are employees of the colleges and universities for which they play sports. Under Title VII, an employer can be held liable for the sexual misconduct of an employee if the employer had actual or constructive knowledge of the employee's harassing conduct. Therefore, designating student-athletes as employees could support application of a Title VII standard.

The issue of whether student-athletes constitute employees, which typically arises in the context of workers' compensation benefits, has generated considerable scholarly debate. Legal scholars largely support affording student-athletes employee status. They argue that student-athletes comply with the primary standards used to determine employee status under existing workers' compensation legislation. In addition to doctrinal consider-

304. See supra notes 116-19 and accompanying text (discussing Title VII standard).


307. The principal standards are the relative nature of the work test and the right to control the details of the work test. Davis, supra note 305, at 284; Roberts, supra note 306, at 1322-24.

The control test focuses on whether the employer has a right to control, as opposed to actually controlling, the employee. As one commentator noted:

It is constantly said that the right to control the details of work is the primary test [of employment]. Courts generally include other factors in their control test analysis, such as the method of payment, the right to fire, and the furnishing of equipment. Under the relative nature of work test, courts ask whether the employee's duties are a substantial and recurring part of the employer's business. Davis, supra note 305, at 288 (quoting Whitmore, supra note 306, at 775); see also Roberts, supra note 306, at 1317 (stating that "litmus test of whether scholarship athletes should be considered as employees . . . is whether an implied or express contract for hire exists coupled with a quid pro quo arrangement with the university").

308. See Roberts, supra 306, at 1347 (stating that "[a]ny test that a court utilizes in order
ations, legal scholars argue that the nature of the student-athlete/university relationship, particularly the control that institutions exercise over their student-athletes, supports employee status. These variables combine with the commercial nature of intercollegiate athletics to underscore the true nature of the relationship as employer/employee.

Despite the urging of scholars, courts have split sharply on the issue of whether student-athletes are employees. In University of Denver v. Nemeth, the court allowed Nemeth to recover for injuries he incurred during football practice. The court premised its recognition of Nemeth as an employee of the university on the fact that he cared for campus tennis courts and cleaned sidewalks, in exchange for fifty dollars per month and free housing. The court reasoned that because Nemeth worked for the school, his participation on the football team was an "incident of his employment."

In contrast, the court in Rensing v. Indiana State University Board of Trustees recognized the contractual nature of the student-athlete/university relationship to ascertain the relationship between universities and scholarship athletes should result in a finding that an employer-employee relationship exists. Woodburn, supra note 305, at 626 (concluding that cases in which courts have deemed student-athletes to be employees correctly interpret workers' compensation principles).

309. See, e.g., Davis, supra note 305, at 293-98; Roberts, supra note 306, at 1344-47; Whitmore, supra note 306, at 789-97.

310. See Roberts, supra note 306, at 1327-28 (noting that whether scholarship athletes are employees remains unsettled issue).

There are several cases in which courts granted student-athletes employee status. See Van Horn v. Industrial Accident Comm'n, 33 Cal. Rptr. 169, 172-73 (Cal. Ct. App. 1963) (ruling that scholarship athlete may be considered employee for purposes of workers' compensation benefits); University of Denver v. Nemeth, 257 P.2d 423, 430 (Colo. 1953) (en banc) (noting employee status based on wages earned from job specially arranged because of student's athletic abilities). Other cases have denied student-athletes employee status. See Graczyk v. Workers' Compensation Appeals Bd., 229 Cal. Rptr. 494, 499-502 (Cal. Ct. App. 1986) (using statutory provision enacted after Van Horn that excludes student-athletes from definition of employee as basis for denial of benefits); State Compensation Ins. Fund v. Indus. Comm'n, 314 P.2d 288, 290 (Colo. 1957) (denying recognition of employee status because "the college was not in the football business and receives no benefit from this field of recreation"); Rensing v. Indiana State Univ. Bd. of Trustees, 444 N.E.2d 1170, 1175 (Ind. 1983) (holding student-athlete is not employee due to absence of intent to enter into employment agreement); Coleman v. Western Mich. Univ., 336 N.W.2d 224, 227-28 (Mich. Ct. App. 1983) (finding university's lack of control over student-athlete negates employment relationship).

311. 257 P.2d 423 (Colo. 1953).


313. Id. at 424-25.

314. Id. at 430.

315. 444 N.E.2d 1170 (Ind. 1983).
Nevertheless, the court found that the absence of an express or implied intent to enter into an employment agreement negated the existence of an employment relationship. In *Coleman v. Western Michigan University*, the court, noting the lack of control by the school over the athlete and the peripheral nature of college sports in relation to the business of colleges, concluded that a student-athlete is not an employee. The conclusions reached in these cases appear to turn as much on a court's perception of the inherent nature of college athletics as on whether the elements of the standards for determining employee status have been satisfied. These conflicting judicial views can be summarized as follows:

[L]egal doctrine and philosophical visions of college athletics combine to shape the judicial response to a student-athlete’s status as an employee for worker’s compensation purposes. Courts declining to define student-athletes as employees ... perceive[ ] college sports as serving an academic function where intercollegiate athletics are simply an avocation of the student. Juxtaposed with these decisions are cases in which the judiciary recognizes the impact of commercialism on college sports and on the student-athlete’s relationship with his university. Here, the duality of the student-athlete’s role, as a student on the one hand and an employee on the other, provides the framework from which the relevant issues are analyzed. Employment status stems from the quid pro quo which earmarks the contractual obligations between a student-athlete and his institution.

This split in authority and the increased call to recognize the commercial realities of college athletics creates the possibility that courts might characterize student-athletes as employees of their colleges and universities. Such a characterization could influence courts to apply a Title VII substantive standard in determining the Title IX liability of colleges for student-athlete sexual misconduct.

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317. Id. In addition, the court noted that Rensing failed to establish the performance of services for pay. Id. at 1173-74.
320. Id. at 226-27.
322. It is important to note, however, that employee status will not be dispositive on a court's determination of whether to adopt the Title VII standard. While a court may recognize a student-athlete as an employee, a court will not recognize the victimized student as an employee. Since a predicate to liability under Title VII, in the employment context, has typically been that the harassment is of an employee and by an employee, the fact that the victim is not an employee may impact a court's analysis. On the other hand, the employee status of the
2. The Intentional Discrimination Standard

As an alternative to the Title VII standard, a court may adopt an intentional discrimination standard to assess hostile environment claims involving student-athletes. Assuming that some courts will find it more appropriate to apply the intentional discrimination standard than the Title VII standard, the nature of the showing a victim of student-athlete violence must make to prove intentional discrimination on the part of a university emerges as an issue. Several factual scenarios may provide the basis of a plaintiff's Title IX hostile environment claim stemming from student-athlete sexual harassment. These scenarios include facts demonstrating that: (1) an institution recruited a student-athlete with knowledge that the athlete had a history of sexual misconduct toward women, and the student-athlete subsequently sexually assaults a female student; (2) an institution failed to take action in response to a female student's complaints in the aftermath of a sexual assault by a student-athlete; and (3) an institution imposed lenient sentences for a student-athlete's sexual assault of a female student.

In assessing the ability of a plaintiff to traverse the evidentiary obstacles erected by an intentional discrimination standard with respect to these scenarios, an analysis of the factual allegations in Redmond v. University of Nebraska\(^{324}\) is instructive.\(^{325}\) A member of the University of Nebraska football team allegedly sexually assaulted and raped Redmond.\(^{326}\) Redmond alleged in her complaint that the "Defendant Christian Peter was intentionally recruited to attend the University of Nebraska-Lincoln even though the Defendants by and through their agents knew or should have known that the Defendant Christian Peter had a propensity toward violence, assault, and sexually aggressive behavior."\(^{327}\) Moreover, Redmond asserted that the university's nonresponsiveness to her complaints of sexual harassment by Peter amounted to a "tacit endorsement of such sexual harassment[ ] and the creation of a hostile educational environment for [Redmond] by the Defendants."\(^{328}\)

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323. See supra Part III.B.1.
327. Id. ¶61.
328. Id. ¶64.
Redmond's allegations are relevant to the first scenario, which focuses on an institution's knowing recruitment of a student-athlete with a propensity for sexual misconduct. More specifically, the allegations suggest that because the university recruited him in spite of his violent history, the university had a lack of regard for female students who could potentially be placed in jeopardy by the student-athlete's presence on campus. Taken alone, an athlete's prior history of sexual assault is unlikely to meet the intentional discrimination standard. However, an institution's knowledge of an athlete's history of sexual abuse, when combined with facts indicating knowledge by the institution that such conduct persisted after the athlete became a member of the campus community, increases the likelihood of a finding of intentional discrimination.

In addition, Redmond alleged that the university engaged in a pattern of conduct that created a hostile educational environment in violation of Title IX. This conduct included the University's refusal to investigate her allegations of sexual harassment, failure to alleviate the sexual harassment, and failure to investigate, counsel, or discipline Peter. These factual allegations are relevant to the second scenario—failure by an educational institution to take action after it has knowledge of facts that indicate the existence of a hostile environment. Indeed, this scenario and Redmond's allegations possess the attributes of the quintessential peer hostile environment claim.

Accordingly, allegations such as those alleged by Redmond appear to comport with the test for intentional discrimination articulated in adolescent peer harassment cases. First, the allegations would likely satisfy the standard set forth in Burrow v. Postville Community School District, in which the court required the plaintiff to prove "intent to discriminate on the part of the school." The court ruled that the school's failure to stop the harassing behavior of the students, over whom it exercised some degree of "physical control," was a factor to consider in assessing the school's liability.

329. Id. ¶ 68.
330. Id. ¶ 69.
331. Id. ¶ 64.
333. Id.
334. Id; see also supra note 225 and accompanying text (identifying other factors that create inference of intentional discrimination on part of educational institutions).
This factor may be particularly relevant to cases, such as *Redmond*, that involve sexual harassment by student-athletes because of the degree of control that colleges and universities exercise over their student-athletes. In *University of Colorado v. Derdeyn*, the Colorado Supreme Court emphasized that colleges exercise considerable control over the lives of their student-athletes. According to the court, colleges regulate academic performance, course selection, training, practice sessions, diet, attendance at study halls, curfews, and substance abuse. Moreover, the National Collegiate Athletic Association (NCAA) regulations grant colleges the right to cancel a student-athlete's scholarship if he or she "engages in serious misconduct warranting substantial disciplinary penalty." In short, "the student-athlete's relationship with his or her institution is marked by dominance by institutions over most aspects of his or her college life." Consequently, colleges and universities are in a unique position to influence student-athletes' behavior in the campus community. The existence of this type of relationship may prompt courts to emphasize the control factor when assessing a college's liability arising out of student-athlete violence toward women.

In addition, the facts alleged in *Redmond* appear to satisfy the test adopted in *Wright v. Mason City Community School District*. There the court held that a plaintiff could demonstrate intentional discrimination by proof that the educational institution, or someone for whose actions the insti-

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335. 863 P.2d 929 (Colo. 1993).
337. *Id.* at 940. The athletic director at the University of Colorado described the nature of the relationship between schools and their athletes as follows:

> That the NCAA sets limits on financial aid awards, playing seasons, squad size, and years of eligibility; that the NCAA requires that CU maintain records of each athlete's academic performance; that the "athletes that eat at training tables are football and men's basketball and the other athletes eat in the dorms or at their off-campus residences;" that some coaches within their discretion impose curfews; that athletes are required to show up for practice; that athletes are "advised . . . on what they should take for classes" that "we have a required study hall in the morning and in the evening;" and that it is "fair to say that the athletes are fairly well regulated."

*Id.* at 940-41 (citations omitted).
338. NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, 1997-98 NCAA DIVISION I MANUAL art. 15.3.4.1(c), at 184. Article 15.3.4.1.(c) elaborates that "[a]n institution may cancel or reduce the financial aid of a student-athlete who is found to have engaged in misconduct by the university's regular student disciplinary authority, even if the loss-of-aid requirement does not apply to the student body in general." *Id.*
tution was responsible, intended to sexually harass the plaintiff.\textsuperscript{341} As previously discussed, the control that a university exercises over its student-athletes is substantial and varied.\textsuperscript{342} This ability to exercise influence over its student-athletes places a heightened burden on institutions to respond to allegations that a student-athlete has engaged in abusive behavior toward other members of the university community. Allegations, such as those in \textit{Redmond}, that a student-athlete raped and sexually assaulted a female student, illustrate the student-athlete’s intent to sexually abuse and harass her. Consequently, the \textit{Wright} test exposes colleges to a greater risk of liability for the type of conduct in which Peter allegedly engaged because a student-athlete could arguably be characterized as someone over whom the university is responsible.\textsuperscript{343} Although the control factor may be pivotal, it will not be determinative inasmuch as courts consider a range of factors in assessing the presence of an intent to discriminate.

\textit{Linson} may also provide support for women who claim that a college’s inaction contributed to a hostile educational environment.\textsuperscript{344} The court in \textit{Linson} explained that a plaintiff must point to something in the record that indicates the "University’s alleged discriminatory actions were gender motivated."\textsuperscript{345} For a plaintiff to prevail in a Title IX claim against a university for student-athlete violence, she could proffer evidence that the institution repeatedly failed to discipline or otherwise take actions to address reports that particular athletes committed acts of sexual misconduct against women.

Finally, the third scenario involves claims of sexual discrimination emanating from the lenient sanctions an institution imposes on student-athletes for the latter’s sexual misconduct. The distinction between this and the second scenario is somewhat blurred. Like the second scenario, allegations that focus on the punishment that a college imposes on a student-athlete found guilty of sexual misconduct relate to actions an institution takes to prevent or end a hostile environment following acts of peer sexual harassment. Yet by focusing specifically on the failure of an institution to impose sanctions that seem to match the severity of the sexual misconduct, plaintiffs allege more than inaction.

\textsuperscript{341} See id. at 1419-20.

\textsuperscript{342} See supra notes 333-37 and accompanying text (explaining colleges exert considerable influence over most aspects of student-athletes’ lives).

\textsuperscript{343} See \textit{Wright}, 940 F. Supp. at 1418 (discussing application of respondeat superior theory of supervisor liability in \textit{Franklin} decision).

\textsuperscript{344} See supra Part III.C.1 for a detailed discussion of \textit{Linson}.

Whether such action by a college constitutes a violation of Title IX is unclear. *Brzonkala I* provides limited guidance in this regard. The plaintiff in *Brzonkala I* alleged that VPI inadequately disciplined Morrison in order to permit him to play football. More generally she alleged that "VPI authorities treat the violent felony of sexual assault by male students against female students differently from all other violent felonies." With respect to Brzonkala's contentions relating to the conduct of proceedings, the court first noted that reasons, devoid of discriminatory animus, may exist for institutions to treat rape cases differently. With respect to allegations that VPI afforded male athletes preferential treatment over the plaintiff as evidenced by VPI's decision to allow Morrison to continue to play football, the court found that Brzonkala relied on a false comparison. Nevertheless, the court implicitly recognized that it might have reached a different result if the plaintiff had proffered evidence that VPI gave Morrison a light sentence not only because he is an athlete, but also because he is a male. Hence the intentional discrimination standard could potentially be met by demonstrating the disinterest a university takes in proceedings involving female athletes who have violated the school conduct code.

**IV. Conclusion**

Existing precedent and policy reasons support affording female students a Title IX cause of action against colleges and universities stemming from the violent acts of student-athletes. A review of Title IX jurisprudence reveals that this form of peer sexual harassment falls within the purview of the statute. Moreover, the idea that "[a] nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educa-

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346. *Brzonkala I*, 935 F. Supp. 772, 777-78 (W.D. Va. 1996), rev'd., Nos. 96-1814, 96-2316 1997 WL 785529 (4th Cir. Dec. 23, 1997). More specifically, plaintiff alleged that "[s]olely because he is a member of [VPI's] all-male football team, Morrison was accorded affirmative advantages in the second hearing which were not accorded to plaintiff, who is a female." *Id.* at 775.

347. *Id.* at 777.

348. *Id.* The court stated that rape cases may require different treatment in order to be sensitive to the interests of the victims. *Id.*

349. *Id.* at 777-78. The court noted that the relevant comparison would exist if Brzonkala was facing judicial proceedings in which her status at the college would be at issue. *Id.* at 777. According to the court, plaintiff's status was not at issue because she was the victim of a crime. *Id.*

350. *Id.*

351. *See* Yusuf v. Vassar College, 35 F.3d 709, 714-16 (2d Cir. 1994) (suggesting that Title IX bars imposition of university discipline when gender is motivating factor in discipline).
tional benefits that a student receives" supports judicial recognition of peer harassment claims involving student-athletes. When a university is aware or suspects student-athlete violence yet does nothing to protect the female victim, it fails in its responsibility to foster an academic environment free of hostility and fear. Such failure on the part of the university is inconsistent with its duty to provide equal education.

In assessing institutional liability, absent Supreme Court guidance, courts are likely to apply either a Title VII "knew or should have known standard" or an intentional discrimination standard. These two standards are amenable to a Title IX claim based on student-athlete violence because they afford the plaintiff a realistic opportunity to establish the elements of a Title IX cause of action. In addition, courts are likely to be more willing to apply these standards because the standards protect educational institutions from frivolous attempts to hold them responsible for a student's sexual misconduct. Regardless of which of these two standards courts apply, student-athlete violence against women, when combined with institutional indifference, sets the stage for women victims to meet the requisite evidentiary burdens.

As noted earlier in this Article, sexual harassment is a form of learned behavior. The effort to change the conditions that foster such behavior must occur on a broad level. While individuals who sexually harass women must be held accountable, so too must the institutions and structures that contribute to sexual harassment by creating environments that perpetuate the sexual harassment of women. Given the influence of two social institutions — colleges and sport — to shape cultural values, holding institutions accountable for student-athlete violence is a step toward recreating and transmitting societal norms and values that respect the integrity of women.


353. Oldenkamp, supra note 269, at 175-79.

354. Id.