

NOTE

SEXUAL HARASSMENT BETWEEN PEERS UNDER TITLE VII AND TITLE IX: WHY GIRLS JUST CAN'T WAIT TO BE WORKING WOMEN

INTRODUCTION

This note addresses the problem of sexual harassment between peers in secondary schools. Although this behavior is widespread, neither the educational nor the legal system effectively identifies or regulates it.¹ Sexual harassment, in the form of verbal abuse, physical molestation, and a sexually derogatory atmosphere, is a common feature of the coeducational experience. Where such treatment focuses solely on members of one sex, it should be legally actionable as sex discrimination. However, there is currently no statutory remedy for this particular harm when it occurs between students. As a consequence, female² adolescents have no meaningful legal recourse for the damaging psychological and physical effects of unwanted sexual aggression.³

The lack of statutory coverage arises in part from the minority status of both the victims and the harassers.⁴ Because adolescents are neither children nor adults, the legal system has difficulty evaluating both responsibility and harm. Exacerbating the situation is the commonly held view that violent and aggressive conduct is an inherent part of male behavior.⁵ This attitude, when manifested by teachers and school administrators, implicitly condones aggressive male behavior. It also shifts institutional attention and resources from female adolescents, who experience the harm, to the "misbe-

1. See *infra* section VII.

2. Males may also bring sexual harassment claims. See, e.g., *Wright v. Methodist Youth Services*, 511 F. Supp. 307 (N.D. Ill. 1981). However, most victims of sexual harassment are female and most perpetrators are male. Schneider, *Sexual Harassment in Higher Education*, 65 *TEX. L. REV.* 525, 531 n.30 (1987) and cases cited therein. Therefore, female pronouns are used throughout this note when referring to victims of sexual harassment, unless the discussion specifically addresses male victims.

3. See *infra* section III.

4. See *infra* section IV.

5. See generally, Smith, *He Only Does It To Annoy*, in *SEX DIFFERENCES AND DISCRIMINATION IN EDUCATION* 28 (S. Anderson ed. 1972).

having" boys who cause it.

Working women may seek legal relief for this kind of harm. Title VII protects women in the workplace from the sexual harassment of their peers.⁶ Under this statute, a woman may sue her employer for the offensive conduct of her co-workers if that conduct rises to the level of discrimination based on sex. Hence, if co-workers single out an employee and subject her to conduct such as offensive touching, sexual propositions or other sexually motivated abuse, that employee is legally considered a victim of sexual harassment.⁷ Unfortunately Title IX,⁸ the corresponding statute addressing sex discrimination in schools, fails to protect female adolescents who experience "student to student" sexual harassment.

This note proposes expanding the parameters of the legal protection under Title IX. Title IX should protect students to the same degree that Title VII protects working women. To make this possible, this proposal suggests that the doctrine of negligent supervision⁹ apply where sexual harassment between students is so egregious that a teacher knew, or should have known about it. In fairness to teachers, sexual harassment should trigger liability only if a teacher fails to make a good faith effort to check the conduct. Consequently, the burden on teachers to protect against sexual harassment would differ little from the burden they already carry to protect students from physical harm.¹⁰

This proposal makes standards under Title IX consistent with similar standards under Title VII that require actual or constructive knowledge that prohibited behavior is occurring. Under Title VII, an employer is liable when he or she implicitly or explicitly condones co-worker sexual harassment. Similarly, under Title IX, complimented by the proposal this note offers, a school board faces liability if a teacher fails to act when either actually or constructively apprised of sexual harassment between students.¹¹ Legal rec-

6. 42 U.S.C. § 2000e-2(a)(1) (1988).

7. See *infra* section II.

8. 20 U.S.C §§ 1681-86 (1988).

9. See *infra* section VIII.

10. *Id.*

11. No doubt this proposal will raise criticism from individuals who believe that teachers are already burdened with too much disciplinary responsibility. This is a serious concern in American schools. This note recognizes that educators are already overworked. As a consequence, it proposes only that administrators and teachers make a good faith effort to address sexual harassment. Teachers need not patrol corridors and locker rooms. Rather, they need act only in egregious and obvious situations. This line drawing with respect to the duty

ognition of sexual harassment between adolescent peers would provide much needed relief for female students.

Section I of this note introduces the problem of sexual harassment as it occurs in the workplace. It traces the evolution of Title VII litigation from *quid pro quo* sexual harassment to the recognition of hostile environment abuse. Section II describes co-worker sexual harassment as a category of hostile environment sexual harassment. This section concludes with the state of the law under current decisions of the United States Supreme Court. Section III examines current legal remedies for sexual harassment in educational institutions. It includes a description of the procedural hurdles that a student faces in pursuing a case of sexual harassment against a school.

Section IV documents the harm that results from sexual harassment among adolescents, dispelling the myth that sexual violence and oppression occur to a damaging degree only among adults. It also argues that the law as applied to adolescent sex offenders and victims inadequately addresses the problem of unwanted sexual aggression. Section V then discusses the problems attendant to a coeducational system operating within a sexist society. It points out that the predicament of female students is exacerbated by the myopic focus on the "male" mode of achievement in coeducational schools.

Section VI describes sexual harassment as it is actually experienced by girls and boys—but primarily by girls. This section draws upon all the previous sections; Title VII sexual harassment as an analogy, sexual harassment litigation in education as a springboard to reform, and critiques of coeducation as illustrative of the problem of sexual harassment between peers in secondary schools.

Section VII examines the current legal recognition of adolescent sexual aggression in the academic setting. It exposes the misguided and sexist attitudes of many judges who hear cases involving sexual aggression between adolescents in school. Section VIII describes the theory of negligent supervision and how it is applied in school settings. Section IX draws parallels between the harm

to act can evolve in the same way that it has in Title VII litigation. Adolescent females who have been subject to abuse must not be deterred from seeking recourse by archaic notions that sexual harassment is not harmful, is invited, is impossible to regulate, or is a normal part of life.

that occurs in the workplace and the harm that occurs in school. Similarly, it draws parallels between the notice standards in co-worker sexual harassment and the standards in negligent supervision liability in the educational context. Finally, it includes a proposal to provide a remedy under Title IX for sexual harassment between adolescent students.

I. THE RELEVANT BACKGROUND: TITLE VII LITIGATION

Sexual harassment, actionable as sex discrimination, was first recognized only where an employer or a supervisory employee demanded sexual favors as a "term and condition of employment."¹² Title VII provides that "[i]t shall be an unlawful employment practice for an employer . . . to discharge any individual or otherwise to discriminate against any individual with respect to his [sic] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."¹³ Sexual harassment was established as a legally cognizable harm in 1976.¹⁴ Under early case law, Title VII covered only situations involving forced submission to some kind of sexual bargaining. This give and take form of sexual harassment was appropriately termed "quid pro quo."¹⁵

The *quid pro quo* theory required that plaintiffs demonstrate a sufficient nexus between the rejection of unwelcome sexual advances and the loss of tangible job benefits.¹⁶ Retaliatory measures, such as termination, loss of favorable job evaluations, loss of promotions, or other concrete losses relating to the employment, were actionable under this theory.¹⁷ Courts initially refused to expand the definition of "terms, conditions, or privileges" to include harassment where no tangible job loss occurred. This hesitance arose from a fear of frivolous suits or of imposing liability on conduct

12. *Williams v. Civiletti*, 487 F. Supp. 1387, 1389 (D.D.C. 1980).

13. 42 U.S.C. § 2000e-2(a) (1988).

14. *See Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976), *rev'd on other grounds sub nom. Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978).

15. *Allegretti, Sexual Harassment of Female Employees by Nonsupervisory Coworkers*, 15 CREIGHTON L. REV. 437, 438 (1982).

16. Note, *Meritor Savings Bank v. Vinson: The Supreme Court's Recognition of the Hostile Environment in Sexual Harassment Claims*, 20 AKRON L. REV. 575, 576 (1987) (authored by Victoria J. Bartels).

17. *Id. See, e.g., Miller v. Bank of America*, 600 F.2d 211, 212 (9th Cir. 1979), *rev'g*, 418 F. Supp. 233 (N.D. Cal. 1976); *Barnes v. Costle*, 561 F.2d 983, 984-85 (D.C. Cir. 1977); *Heelan v. Johns-Manville Corp.*, 451 F. Supp. 1382, 1384 (D. Colo. 1978); *Munford v. James T. Barnes & Co.*, 441 F. Supp. 459, 460 (E.D. Mich. 1977).

personal in nature.¹⁸

In 1981, however, courts expanded the parameters of legal protection.¹⁹ Title VII coverage came to include sexual harassment that makes working conditions unbearable.²⁰ In foregoing the requirement of tangible job loss, courts recognized a wider range of women's real life experiences in the workplace.²¹ This shift legitimized objections to sexually disparaging treatment which courts formerly considered to be inevitable, beyond regulation, and by implication, sanctioned behavior.²² Catherine MacKinnon, instrumental to this legal reform, explained sexual harassment creating a hostile environment as

[u]nwanted sexual advances, made simply because she has a woman's body. . . . She may be constantly felt or pinched, visually undressed and stared at, surreptitiously kissed, commented upon, manipulated into being found alone and generally taken advantage of at work—but never promised or denied anything explicitly connected with her job.²³

In *Bundy v. Jackson*, the United States Court of Appeals for the District of Columbia Circuit found that the defendant had discriminated against the plaintiff Sandra Bundy with respect to the "terms, conditions and privileges" of her employment even though she lost no tangible job benefits.²⁴ Bundy's supervisors had subjected her to sexually disparaging treatment.²⁵ She suffered sexual

18. Schneider, *Sexual Harassment in Higher Education*, 65 TEX. L. REV. 525, 545-46 (1987).

19. See, e.g., *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981).

20. See, e.g., *id.*

21. "Such an approach not only enriches the law. It begins to shape it so that what really happens to women, not some male vision of what happens to women, is at the core of the legal prohibition." C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN, A CASE OF SEX DISCRIMINATION* 26 (1979).

22. See, e.g., *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163-64 (D. Ariz. 1975) (maintaining that it was "ludicrous" to attempt to prohibit such behavior and that "[t]he only sure way an employer could avoid such charges would be to have employees who were asexual"); *Miller v. Bank of America*, 418 F. Supp. 233, 236 (N.D. Cal. 1976) (stating that "under plaintiff's theory, flirtations of the smallest order would give rise to liability" and that "[t]he attraction of males to females and females to males is a natural sex phenomenon"); *Tomkins v. Pub. Serv. Elec. & Gas*, 422 F. Supp. 553, 557 (D.N.J. 1976) (stating that "if an inebriated approach by a supervisor to a subordinate at the office Christmas party could form the basis of a federal lawsuit for sex discrimination if a promotion or raise is denied to the subordinate we would need 4,000 federal trial judges instead of some 400").

23. C. MACKINNON, *supra* note 21, at 40.

24. *Bundy v. Jackson*, 641 F.2d 934, 943 (D.C. Cir. 1981).

25. *Id.* at 940.

advances, sexual invitations, and questions as to her sexual proclivities.²⁶ The supervisor to whom she complained invited her to engage in a sexual relationship and trivialized her complaints by stating that "any man in his right mind would want to rape" her.²⁷

In re-evaluating the definition of "conditions of employment,"²⁸ the *Bundy* court held that Title VII protected an employee psychologically and emotionally by prohibiting unwanted sexual attention.²⁹ The sexually stereotypical insults and demeaning propositions caused Bundy unnecessary anxiety and "illegally poisoned" her work environment.³⁰ Because *Bundy* was the first reported decision finding hostile environment sex discrimination actionable, the court looked to cases involving hostile environment claims based on race discrimination. The *Bundy* court's analysis of one such case, *Rogers v. EEOC*,³¹ is particularly instructive.

Rogers involved an Hispanic plaintiff who sought relief from an offensive work environment.³² The plaintiff claimed that her employer, a Texas optometrist, had engaged in unfair employment practices by giving discriminatory treatment to minority optometry patients.³³ The employer allegedly segregated minority patients from non-minority patients during treatment.³⁴ The United States Court of Appeals for the Fifth Circuit found that such offensive conduct as alleged in this case, if sufficiently proven, could profoundly affect the conditions of employment.³⁵ A general policy of segregating minority patients amounted to discrimination against a minority employee forced to work in an atmosphere hostile to his or her national origin.³⁶

The *Bundy* court, quoting *Rogers*, underscored the parallels between racially and sexually hostile environments. "One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psycho-

26. *Id.*

27. *Id.*

28. See 42 U.S.C. § 2000e-2(a)(1) (1988).

29. *Bundy v. Jackson*, 641 F.2d 934, 943-44 (D.C. Cir. 1981).

30. *Id.* at 944.

31. *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971).

32. *Id.*

33. *Id.* at 234.

34. *Id.* at 236.

35. *Rogers v. EEOC*, 454 F.2d 234, 236 (5th Cir. 1971).

36. *Id.* at 238.

logical stability of minority group workers'³⁷ *Bundy*, therefore, was extremely important in acknowledging the devastating effects that sexually discriminatory treatment has on women. The court analogized the harm of sexual harassment with the impact that similarly derogatory treatment has on other historically oppressed groups.³⁸

In designating these experiences as harmful to women, the court sent the message that women need not endure such treatment.³⁹ Other courts ruling in favor of female plaintiffs have drawn similar comparisons to recognize the detrimental effects of a hostile environment. One year after the *Bundy* decision, the United States Court of Appeals for the Eleventh Circuit stated that "[s]urely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."⁴⁰

To establish a prima facie claim charging a sexually derogatory work environment, a plaintiff must prove several elements.⁴¹ She must plead and prove that she was a member of a protected class, and that she was forced to endure unsolicited and unwelcome treatment related to her sex or which was sexual in nature.⁴² She must also plead and prove that the harassment affected a "term, condition, or privilege" of her employment by creating an abusive working environment and that her employer had actual or constructive notice of the abuse and failed to take prompt remedial action.⁴³

II. CO-WORKER SEXUAL HARASSMENT

In the last decade, the courts have recognized that the hostile

37. *Bundy v. Jackson*, 641 F.2d 934, 944 (D.C. Cir. 1981) (quoting *Rogers*, 454 F.2d at 238).

38. See also *Carroll v. Talman Fed. Sav. & Loan Ass'n*, 604 F.2d 1028 (7th Cir. 1979); *Firefighters Inst. for Racial Equality v. City of St. Louis*, 549 F.2d 506 (8th Cir. 1977); *Cariddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87 (8th Cir. 1977); *United States v. City of Buffalo*, 457 F. Supp. 612 (W.D.N.Y. 1978).

39. *Bundy*, 641 F.2d at 945 ("How then can sexual harassment, which injects the most demeaning sexual stereotypes into the general work environment and which always represents an intentional assault on an individual's innermost privacy, not be illegal?").

40. *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982).

41. *Id.* at 903-05.

42. *Id.* at 903.

43. *Id.* at 904-05.

environment theory of sex discrimination includes the more specific problem of co-worker sexual harassment.⁴⁴ In the 1970s and early 1980s, most sexual harassment cases involved sexual aggression from supervisory personnel and *quid pro quo* bargaining.⁴⁵ There were very few cases brought under the hostile environment theory which involved harassment among co-workers.⁴⁶

The first case acknowledging co-worker sexual harassment was *Continental Can Co. v. State*.⁴⁷ Although the plaintiff stated her claim under Minnesota's Human Rights Act,⁴⁸ the provision on sex discrimination was parallel to that in Title VII.⁴⁹ In *Continental Can*, Willie Ruth Hawkins was one of only two female employees at Continental's plant.⁵⁰ Ms. Hawkins and her female co-worker both testified that male co-workers sexually harassed them with abusive language.⁵¹ Both complained to no avail.⁵² The harassment against Hawkins escalated, including frequent pats on her buttocks.⁵³ This treatment culminated in an incident where a male co-worker grabbed Hawkins between the legs from behind.⁵⁴

The court tailored its decision to conform to the Equal Employment Opportunity Commission's (EEOC) guidelines, which make co-worker sexual harassment actionable where the employer knew or should have known of the conduct.⁵⁵ Although stopping

44. Allegretti, *supra* note 15, at 461-67.

45. *Id.* at 459.

46. *Id.*

47. *Continental Can Co. v. State*, 297 N.W.2d 241 (Minn. 1980).

48. MINN. STAT. ANN. §§ 363.01-.13 (West 1966 & Supp. 1991).

49. *Id.* § 363.03-1(2)(c) (Supp. 1991). This section provides, in pertinent part, that it is a violation "[f]or an employer, because of . . . sex, . . . to discriminate against a person with respect to . . . compensation, terms, . . . [or] conditions . . . of employment." *Id.*

50. *Continental Can Co.*, 297 N.W.2d at 244.

51. *Continental Can Co. v. State*, 297 N.W.2d 241, 244 (Minn. 1980).

52. *Id.* at 244-46. The three men made repeated sexual advances to Hawkins. They told her of their sexual prowess and how it could make her want to leave her husband. The sexually derogatory remarks also included references to the movie "Mandingo." One of the men stated his wish for a return to the slavery days so that he could sexually train Hawkins. *Id.*

53. *Id.*

54. *Id.*

55. *Continental Can Co. v. State*, 297 N.W.2d 241, 244-46 (Minn. 1980). The regulations explicitly address coworker sexual harassment. 29 C.F.R. § 1604.11(d) (1990). "With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." *Id.* See also Note, *Administrative Law—Continental Can Co., Inc. v. State of Minnesota: A Cause of Action for Sexual Harassment by Coworkers*, 59 N.C.L.

short of obliging an employer to maintain a work environment absolutely free of sexual innuendo, the decision made it clear that an employer has a duty to take prompt and appropriate action where conduct amounts to illegal sex discrimination.⁵⁶

Continental Can established that under the hostile environment theory, actual or constructive knowledge of sexual harassment in the workplace triggers employer responsibility. Employer inaction implicitly condones such illegal behavior and accordingly, results in liability.⁵⁷ The court in *Continental Can* found that by failing to inquire into the situation, Continental was liable for discriminating against Hawkins on the basis of sex.⁵⁸

In spite of the positive judicial response to claims of co-worker sexual harassment, such as that in *Continental Can*, these cases often produce problems of proof for plaintiffs.⁵⁹ Plaintiffs must show both that the employer condoned the behavior and that the harassment was sufficiently severe.⁶⁰

Not all courts require that the discriminatory behavior be explicitly sexual in nature. Some decisions recognize that sexual harassment exists even when the derogatory treatment is not blatantly sexually motivated, but rather focused on a particular person simply because she is a woman.⁶¹ In *McKinney v. Dole*, the United States Court of Appeals for the District of Columbia Circuit held that sex discrimination under Title VII occurs where the "continuing pattern of behavior . . . differentiates a particular employee or

Rev. 803, 810 (1981) [hereinafter *Administrative Law*].

56. *Continental Can Co.*, 297 N.W.2d at 249.

57. *Id.*

58. *Id.* at 250.

59. Allegretti, *supra* note 15, at 453-54, 461.

60. See 29 C.F.R. § 1604.11(a) (1990). The EEOC guidelines require that the conduct be sufficiently severe such that it unreasonably interferes with job performance by creating an "intimidating, hostile, or offensive working environment." *Id.* See also *Downes v. FAA*, 38 Empl. Prac. Dec. (CCH) ¶ 35,590 (Oct. 18, 1985) (isolated actions or remarks are not enough to constitute actionable sexual harassment).

61. See, e.g., *McKinney v. Dole*, 765 F.2d 1129, 1139 (D.C. Cir. 1985). See also *Carroll v. Talman Fed. Sav. & Loan Ass'n*, 604 F.2d 1028 (7th Cir. 1979) (requiring women to wear uniforms on the job while male employees were allowed to wear their own suits was a violation of Title VII); *Harrington v. Vandalia-Butler Bd. of Educ.*, 585 F.2d 192 (6th Cir. 1978) (illegal condition of employment existed where male gym teachers had locker room facilities superior to those of female gym teachers).

"Sexual harassment is distinguished from 'harassment because of sex,' which is not motivated by sexual feelings but is directed toward a person solely because of his or her gender." *Administrative Law*, *supra* note 55, at 803 n.1. This note refers to both forms of harassment as "sexual harassment."

group of employees because of sex."⁶² The court asserted that "[b]ut for her womanhood, . . . the harassment would not have occurred."⁶³ Thus, actions singling out a woman, though not sexually oriented, can nonetheless be unlawful.

Similarly, in *Kyriazi v. Western Electric Company*, the plaintiff, a female industrial engineer, prevailed in her claims alleging harassment by co-workers.⁶⁴ The male employees had joined in ridiculing and harassing Kyriazi "as a woman."⁶⁵ They made many loud remarks concerning her marital status and virginity.⁶⁶ They also tormented her by deliberately blocking her path when she attempted to move in the aisles at work and by denigrating her position as a professional.⁶⁷ The co-workers' contempt for Kyriazi, manifested by the various attempts to ridicule her, successfully rendered her working environment unbearable.

The District Court of New Jersey did not find that the conduct was sexually-motivated. Nevertheless, the court assessed the behavior and its intended effect in terms of Kyriazi's gender.⁶⁸ Kyriazi, a woman weighing close to 200 pounds,⁶⁹ presented an easy target for the men because she did not conform to their standards of what is acceptable for a woman, professionally or physically. The court noted an obscene cartoon caricaturing obesity which the men had presented to Kyriazi as "objective evidence" of their attitudes.⁷⁰ "It was Kyriazi's testimony that she well understood that this cartoon was designed to embarrass and humiliate her, *as a woman*. . . . It is obvious to the court that this cartoon was created, disseminated and ultimately thrust upon the plaintiff to humiliate her *as a woman*."⁷¹

62. *McKinney*, 765 F.2d at 1139. The plaintiff alleged continuing verbal abuse and sexual harassment by her supervisor. She stated that the supervisor had exposed himself to her and had on another occasion rubbed up against her and asked for sexual favors. The plaintiff was also assaulted by the supervisor when she attempted to withdraw from a conversation concerning her termination. *Id.* at 1132.

63. *Id.* at 1138 (quoting *Bundy v. Jackson*, 641 F.2d 934, 942 (D.C. Cir. 1981)).

64. *Kyriazi v. Western Elec. Co.*, 461 F. Supp. 894, 950 (D.N.J. 1978), *vacated in part*, 473 F. Supp. 786 (D.N.J. 1979) (vacated insofar as court held defendants liable under 42 U.S.C. § 1985(3)).

65. *Id.* at 934.

66. *Id.*

67. *Id.*

68. *Kyriazi v. Western Elec. Co.*, 461 F. Supp. 894, 934-35 (D.N.J. 1978).

69. *Id.* at 934.

70. *Id.*

71. *Id.*

In *Kyriazi*, the men did not sexually harass the plaintiff because they were interested in engaging in a sexual relationship with her. Rather, they knew that inquiries and insults regarding her physical appearance, and how it related to her sexuality, would humiliate her. This harassment "spilled over into her working relationships" and consequently impeded her ability to work.⁷²

Other courts have adopted and expanded upon the *Kyriazi* court's definition of co-worker sexual harassment. In *Hall v. Gus Construction Co.*, the Court of Appeals for the Eighth Circuit rejected an employer's contention that the claims of three women could not be considered together in determining whether sexual harassment was sufficiently pervasive and severe to constitute a Title VII violation.⁷³ "Although [the co-plaintiff] was not subjected to sexual propositions and offensive touching, evidence of sexual harassment directed at employees other than the plaintiff is relevant to show a hostile work environment."⁷⁴

The three women plaintiffs had been harassed while working on a construction crew otherwise comprised of male employees.⁷⁵ Male co-workers incessantly referred to the women, who worked as traffic controllers, as "fucking flag girls."⁷⁶ The verbal abuse also included "Herpes," "Cavern Cunt" and "Blond Bitch."⁷⁷ Requests "to fuck" and to engage in oral sex were a common part of the women's workday.⁷⁸ The male co-workers also subjected the women to unwelcome touching. Together, the men cornered the women and physically immobilized them so that other men could freely molest them.⁷⁹

The male co-workers also exposed themselves to the women on various occasions, flashed obscene pictures at the women, and urinated in one plaintiff's water bottle and in the gas tank of another's truck.⁸⁰ Male crew members also refused to give the women a truck to take to town for bathroom breaks and then observed the women through surveying equipment when they relieved them-

72. *Kyriazi v. Western Elec. Co.*, 461 F. Supp. 894, 934 (D.N.J. 1978).

73. *Hall v. Gus Constr. Co.*, 842 F.2d 1010 (8th Cir. 1988).

74. *Id.* at 1015.

75. *Id.* at 1012.

76. *Id.*

77. *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1012 (8th Cir. 1988).

78. *Id.*

79. *Id.*

80. *Id.*

selves in a ditch.⁸¹ The project foreman, though witness to this conduct, and despite complaints from the women, did nothing to stop the abuse.⁸²

The court noted that the foreman, as an agent of the construction company, had both actual and constructive notice that the men were harassing the three women.⁸³ Under agency principles, because the incidents of abuse were so egregious and numerous, the employer was liable "for failing to discover what was going on and to take remedial steps to put an end to it."⁸⁴

The United States Supreme Court has addressed the hostile environment theory of sexual harassment in *Meritor Savings Bank v. Vinson*.⁸⁵ The decision in this case, although receiving mixed reviews from legal scholars,⁸⁶ is significant because the Court recognized that sexual harassment creating an unbearable work environment is illegal under Title VII.⁸⁷ *Vinson* was also an important step in sexual harassment litigation because it accepted the EEOC guidelines and decisions by the lower courts.⁸⁸

The plaintiff in this case, Mechelle Vinson, was sexually harassed by the bank manager for whom she worked as a teller.⁸⁹ In fear of losing her job, Ms. Vinson submitted to sexual relations with him.⁹⁰ Ms. Vinson also testified that the bank manager fondled her in the presence of other employees, harassed her in the

81. *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1012 (8th Cir. 1988).

82. *Id.*

83. *Id.* at 1016.

84. *Id.* See also *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987) (remanded to determine whether hostile environment had been created where female plaintiff was called "Buffalo Butt" and subjected to other verbal abuse and physical threats from coworkers and supervisors).

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

86. See, e.g., Dodier, *Meritor Savings Bank v. Vinson: Sexual Harassment at Work*, 10 HARV. WOMEN'S L.J. 203 (1987) [hereinafter *Harassment at Work*]. Legal scholars advocating expanded liability under Title VII find two major stumbling blocks for litigants after *Vinson*. Most troubling is the Supreme Court's decision that the plaintiff's manner of dress and her sexual fantasies were admissible. See *Vinson*, 477 U.S. at 69. The Court also failed to articulate a clear standard for employer liability. See *Vinson*, 477 U.S. at 72. Certain commentators propose strict employer liability for both *quid pro quo* and hostile environment harassment. *Harassment at Work, supra*, at 223. This is a step that the *Vinson* Court explicitly refused to take. See *Vinson*, 477 U.S. at 72.

87. *Vinson*, 477 U.S. at 67-68.

88. *Id.* at 66. Although this case specifically addresses hostile environment sex discrimination, it is likely to be relevant to sexual harassment law in general. *Vinson* may reflect the direction that the Supreme Court will take in future sex discrimination cases.

89. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 60 (1986).

90. *Id.*

women's bathroom, exposed himself to her at work, and forcibly raped her.⁹¹

The Court rejected the notion that a sexual harassment claim is limited to situations involving "'economic' or 'tangible' discrimination."⁹² The Court noted that the EEOC guidelines and sexual harassment precedent declared "employees [have] the right to work in an environment free from discriminatory intimidation, ridicule and insult."⁹³ It thereby affirmed the standard first established in *Bundy*. The Court held that plaintiffs have a legal remedy for a sexually hostile work environment under Title VII.⁹⁴

Thus, Title VII provides women with a legal remedy when they work in an environment made hostile by sexual innuendo, insult and aggression. Sexual harassment by a co-worker, like sexual harassment by a superior, is actionable under the hostile environment theory. Yet, the vast majority of the victims of sexual harassment have no legal recourse. Female students also endure sexual harassment by peers creating a hostile school environment. However, unlike working women, they have no legal recourse.

III. SEXUAL HARASSMENT IN EDUCATION

Title IX of the Education Amendments of 1972 prohibits sex discrimination in education.⁹⁵ The Office of Civil Rights (OCR) within the United States Department of Education has primary responsibility for Title IX enforcement.⁹⁶ Although the OCR maintains that sexual harassment is prohibited by Title IX,⁹⁷ it has declined to take a position on the issue of sexual harassment between students.⁹⁸ The OCR also failed to emulate the EEOC in promulgating guidelines to address sexual harassment.⁹⁹

91. *Id.*

92. *Id.* at 64.

93. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986).

94. *Id.* at 66, 73.

95. 20 U.S.C. §§ 1681-88 (1988). "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subject to discrimination under any education program or activity receiving federal financial assistance" *Id.* § 1681(a).

96. *Schneider, Sexual Harassment and Higher Education*, 65 *TEX. L. REV.* 525, 527 (1987).

97. *Id.* at 527.

98. *Id.* at 530 n.24.

99. *Id.* at 527.

The difference in the enforcement of Title VII and Title IX has been attributed to "the different characteristics and purposes of the institutions and persons subject to each Title."¹⁰⁰ First, students are more likely than employees to be transient, and consequently, their interest in institutional reform tends to be short lived.¹⁰¹ Second, unlike employees, students lack financial incentive to pursue litigation.¹⁰² Third, courts are more reluctant to intervene in the academic context than the nonacademic context.¹⁰³ Finally, the only remedy specifically granted under Title IX, is the termination of federal funds to the offending academic institution.¹⁰⁴ However, this remedy provides little incentive for individual student plaintiffs to pursue sexual harassment claims.¹⁰⁵ In contrast, worker plaintiffs can receive damages or reinstatement under Title VII.¹⁰⁶

Title IX regulations require educational institutions receiving federal funds to establish a public policy¹⁰⁷ and grievance procedure regarding sexual harassment.¹⁰⁸ Schools must also appoint an employee to be responsible for investigating complaints alleging sexual harassment.¹⁰⁹ Not only may students institute a grievance within the institution but they may also lodge a formal complaint directly with the OCR.¹¹⁰ The OCR investigates the complaint¹¹¹ and if the grievance has not been internally resolved, the OCR may terminate government funding.¹¹² The OCR may also request the federal Department of Justice to bring an action under Title IX.¹¹³

A Title IX suit may be successful where the institution fails to establish adequate and reasonable procedures for processing sexual harassment complaints.¹¹⁴ Alternatively, students may pursue a Title IX action against an institution where the institution fails to

100. *Id.*

101. *Id.*

102. *Id.* at 528.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. 34 C.F.R. § 106.9 (1990).

108. *Id.* § 106.8(b) (1990).

109. *Id.* § 106.8(a) (1990).

110. *Id.* § 100.7(b) (1990).

111. *Id.* § 100.7(c) (1990).

112. 20 U.S.C. § 1682 (1988); 34 C.F.R. § 100.8(a) (1990).

113. 34 C.F.R. § 100.8(a)(1) (1990).

114. Ingulli, *Sexual Harassment in Education*, 18 *RUTGERS L.J.* 281, 292 (1987).

follow an established grievance procedure in response to student complaints.¹¹⁵ Institutions may also be liable under a negligent hiring theory for the improper conduct of faculty members.¹¹⁶

The current posture of student claims for sexual harassment under Title IX generally resembles early sexual harassment cases under Title VII.¹¹⁷ Student claims alleging sexual harassment have been successful only where the claims have involved the exploitation of an explicit power disparity between teacher and student.¹¹⁸ The power relationship in these cases parallels early workplace sexual harassment litigation where the only actionable harassment was that perpetrated by superiors against lower status employees.¹¹⁹ Student litigants are trodding the rough-hewn path first blazed by working women in the last decade. Although student to student sexual harassment creates a hostile environment, the law does not yet recognize this problem.

Students have instituted very few sexual harassment cases under Title IX.¹²⁰ Yet there is a general consensus that the sexual harassment of students is widespread.¹²¹ Students are reluctant to complain of sexual harassment for a number of reasons. First, female students still believe that they are somehow responsible for encouraging the sexual harassment.¹²² Second, female students fear

115. *Id.*

116. *Id.*

117. See generally Winks, *Legal Implications of Sexual Contact Between Teachers and Students*, 11 J. LAW AND EDUC. 437 (1982) (discussing successful cases against male teachers for sexually harassing minor female students). Single sex sports teams and discriminatory admission procedures are not within the scope of this note.

118. *Id.* See also DZIECH & WEINER, *THE LECHEROUS PROFESSOR, SEXUAL HARASSMENT ON CAMPUS* (1984). This work examines the harm of sexual harassment by analogizing on-campus abuse with abuses recognized by Title VII. *Id.* at 19-21.

119. See generally cases cited *supra* note 17.

120. Litigants suing in federal courts have had little success in attaining satisfactory remedies under Title IX. Ingulli, *supra* note 114, at 298. See, e.g., *Alexander v. Yale Univ.*, 631 F.2d 178 (2d Cir. 1980), *aff'g* 459 F. Supp. 1 (D. Conn. 1977); *Moire v. Temple Univ. School of Medicine*, 800 F.2d 1136 (3rd Cir. 1986), *aff'g* 613 F. Supp. 1360 (E.D. Pa. 1985).

The United States Supreme Court decision in *Grove City v. Bell* dealt a devastating blow to litigants suing under Title IX. See 465 U.S. 555 (1983). The Court's narrow definition of "program or activity" limited the liability of schools to only the direct recipients of federal aid. *Id.* at 571-72. For example, in *Grove*, the "program" receiving federal funds was the financial aid office. *Id.* at 559. Therefore, the rest of the college was free to discriminate against women. Fortunately, the Civil Rights Restoration Act of 1987 has once again redefined "program or activity." Now it includes all the operations of "a local educational agency." Civil Rights Restoration Act of 1987 §§ 197-98, 20 U.S.C. § 1687 (1988).

121. Ingulli, *supra* note 114, at 298.

122. *Id.*

that administrators will not find their claims credible.¹²³ Third, female students often believe that the administration will fail to take any action in response to their complaints.¹²⁴ Fourth, female students fear reprisals.¹²⁵ Finally, female students are reluctant to pursue litigation due to the expense and the delays in their education.¹²⁶

Another reason for the paucity of student initiated sexual harassment cases is judicial deference to the internal decision-making process of academic institutions.¹²⁷ The greatest obstacle to student claims under Title IX, however, is the legal system's refusal to recognize that the most pervasive and uncontrolled sexual harassment occurs between students.

The decision in *Alexander v. Yale University*¹²⁸ exemplifies many of the obstacles to student initiated sexual harassment claims under Title IX. In *Alexander*, five women brought claims of sexual harassment against the University.¹²⁹ The Court of Appeals for the Second Circuit analyzed the harm inflicted in terms of *quid pro quo* sexual harassment. One student alleged that her instructor "offered to give her a grade of 'A' in the course in exchange for her compliance with his sexual demands."¹³⁰ Because she refused to submit, she received a low grade.¹³¹ Although the court deemed this claim justiciable, it affirmed the lower court's decision which dismissed the claims of co-plaintiffs.¹³²

The first co-plaintiff asserted that she abandoned playing the flute because her flute instructor made repeated sexual advances toward her.¹³³ The court found that this injury was "too speculative" and did not amount to the deprivation of an educational benefit under Title IX.¹³⁴ The second co-plaintiff asserted that she left her position as manager of the field hockey team because the coach

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 298-99.

128. *Alexander v. Yale Univ.*, 631 F.2d 178 (2d Cir. 1980).

129. *Id.* at 180.

130. *Id.* at 182.

131. *Id.*

132. *Alexander v. Yale Univ.*, 631 F.2d 178, 185 (2d Cir. 1980).

133. *Id.* at 181.

134. *Id.* at 184-85.

sexually harassed her.¹³⁵ The court found that this allegation did not specify any injury.¹³⁶

The third co-plaintiff asserted that her knowledge of the sexual harassment of other students caused her emotional harm.¹³⁷ Finally, the fourth co-plaintiff asserted that, in the absence of a grievance procedure for sexual harassment complaints, she expended time, effort, and money pressing the complaints herself.¹³⁸ The lower court found that “[n]o judicial enforcement of Title IX could properly extend to such imponderables as atmosphere or vicariously experienced wrong.”¹³⁹

All the plaintiffs alleged injury from “deprivation of an educational environment free from condoned harassment.”¹⁴⁰ The Court of Appeals found all these claims moot because the students had graduated.¹⁴¹ The court stated that “[n]one of these plaintiffs at present suffers from the alleged injury.”¹⁴²

As *Alexander* illustrates, it is difficult for students pursuing claims under Title IX to achieve successful results. Unlike Title VII, Title IX evinces undeveloped standards of sexual harassment theory as it applies to students. Consequently, there is little litigation under Title IX. The law fails students even when sexual harassment is perpetrated by a superior, a form of discrimination well established as actionable under Title VII. Sexual harassment between adolescent peers, therefore, is far removed from a currently actionable form of discrimination.

135. *Id.* at 181.

136. *Alexander v. Yale Univ.*, 631 F.2d 178, 184 (2d Cir. 1980). Title IX “recognizes that loss of educational benefits is a significant injury, redressable by law. Where the alleged deprivation, however, relates to an activity removed from the ordinary educational process, in more detailed allegation of injuries suffered as a result of the deprivation is required.” *Id.*

137. *Id.* at 182.

138. *Id.*

139. *Alexander v. Yale Univ.*, 631 F.2d 178, 182 (2d Cir. 1980) (quoting *Alexander v. Yale Univ.*, 459 F. Supp. 1, 3 (1977)).

140. *Id.* at 184.

141. *Id.* To have standing “[t]he injury must be suffered personally by the party . . . and the relief requested must redound to that parties personal benefit.” *Id.* at 183. Because the plaintiffs sought an order requiring Yale to institute a grievance procedure, the court’s assistance would not benefit them personally. Therefore, none of the plaintiffs had standing.

142. *Id.*

IV. ABERRANT BEHAVIOR AMONG ADOLESCENTS: THE PERPETRATOR AND THE VICTIM

The incidence of sexual assault is higher among adolescents than any other age group.¹⁴³ Among adolescents, females are most frequently the victims.¹⁴⁴ One study found that only two percent of adolescent males reported being sexually assaulted, while twelve percent of adolescent girls responding to the survey had been raped.¹⁴⁵

Many adolescent victims, however, do not report rape.¹⁴⁶ Many young girls do not know what type of conduct constitutes rape,¹⁴⁷ and many adolescents do not believe there has been a rape where there was no significant force.¹⁴⁸ Rape in a social context may also be difficult for adolescents to define as rape.¹⁴⁹ One commentator points out that "even if they did define the incident as rape, it might not be reported because the adolescents did not want their parents to know, due to fear of being blamed or having their activities restricted."¹⁵⁰ Despite the prevalence of rape against female adolescents, incidents of child rape, incest, and rape against adults have received disproportionately more attention.¹⁵¹ Because adolescents are neither children nor adults, they present a peculiar problem for the legal system.

Just as victims of sex offenses are frequently female adolescents, a substantial number of sex offenders in this country are male adolescents.¹⁵² Reports indicate that boys between the ages of thirteen and eighteen commit twenty-one percent of the forcible rapes in the United States.¹⁵³ Furthermore, adolescent sex offend-

143. Hall, *Prevalence and Correlates of Sexual Assault Experiences in Adolescents*, 9 VICTIMOLOGY 398, 398 (1984).

144. See *id.*; Gruber, *The Social-Situational Context of Sexual Assault of Female Youth*, 9 VICTIMOLOGY 407, 407 (1984). Other studies show that "approximately one out of every four young females will likely be sexually victimized before she reaches adulthood." *Id.*

145. Hall, *supra* note 143, at 398.

146. *Id.* at 399.

147. *Id.*

148. *Id.*

149. Hall, *supra* note 143, at 399.

150. *Id.*

151. Gruber, *supra* note 144, at 408.

152. See Davidson, *Improving the Legal Response to Juvenile Sex Offenders*, 8 CHILDREN'S LEGAL RTS. J. 15, 15 (Fall 1987).

153. *Id.*

ers are more likely than other sex offenders to choose victims that they know.¹⁵⁴ Consequently, there is more reluctance to report these incidents.¹⁵⁵ The problem of adolescent sex offenders cannot be evaluated, much less addressed, until these incidents of sexual abuse are reported.¹⁵⁶

Some observers have suggested that adolescent acquaintance rape "is part of the 'rape culture' " in which "[r]ape may be a way of proving one's manhood, an important concern for adolescent males."¹⁵⁷ This proffered explanation, although perhaps well-founded, is profoundly disturbing. Researchers have suggested that male adolescents "may believe that normal sexual relationships involve male dominance and female resistance."¹⁵⁸ Such an explanation suggests that this problem cannot be adequately addressed without first recognizing that violent behavior is aberrant rather than inherently male.

The growing awareness of the sexually assaultive and otherwise aggressive behavior of boys has provoked attempts to remedy the problem that focus mostly on offenders.¹⁵⁹ Consistent with this imbalance of attention is the way in which schools deal with the aberrant behavior of adolescent males. For example, disruptive boys command great amounts of regulatory attention in the classroom.¹⁶⁰

The time spent regulating classroom disturbances created mostly by boys deprives girls of their fair share of the teacher's time. Traditional notions about boys and girls, together with a frequently disruptive classroom dynamic, leaves female students without sufficient educational attention and institutional protection. The plight of female adolescents is particularly disturbing in view of the fact that girls spend a major part of their adolescence in school with boys.

V. COEDUCATION AND THE DEVALUATION OF FEMALE STUDENTS

The prevalence of sexual harassment of girls by boys in the

154. Hall, *supra* note 143, at 404.

155. Davidson, *supra* note 152, at 15.

156. *Id.*

157. Hall, *supra* note 143, at 404-05.

158. *Id.* at 404.

159. *See id.* at 398.

160. *See generally* D. McGUINNESS, WHEN CHILDREN DON'T LEARN 168-229 (1985).

coeducational schools is not a surprising phenomenon considering that schools reproduce the social structure of the adult world, and prepare adolescents for their place in society.¹⁶¹ An evaluation of this system of indoctrination reveals that coeducation fails female students in many ways.¹⁶² Coeducation enforces sexist attitudes among boys, socializes girls into sexist role playing, and generally accommodates the educational needs of boys rather than the needs of girls. Nevertheless, the momentum behind the "coeducation movement" has been growing since the 1960s¹⁶³ such that today, the single-sex institution is no longer the norm.

Yet opponents to coeducation predict that single-sex schools, such as two-year women's colleges, will continue to appeal to many women.¹⁶⁴ One explanation for the continued appeal is that single-sex schooling preserves the quality of women's education.¹⁶⁵ Although paternalistic and sexist attitudes may have initially motivated single-sex schooling, advocates currently in favor of single-sex schooling justify their position under a completely different rationale. " 'Until women are really equal . . . there will be a need for a separate educational experience.' "¹⁶⁶

Title IX currently protects against overt discrimination in education against females.¹⁶⁷ Under this law a school guidance counselor may not expressly foreclose certain professional opportunity choices when advising female students.¹⁶⁸ Schools are also generally prohibited from excluding girls from participating in traditionally male classes.¹⁶⁹ Nevertheless, the doors that coeducation opens to female students are still different than those open to male students.¹⁷⁰ Considering the long history of sexist practices, it is not difficult to imagine the implicit ways in which such discrimination continues to operate. For example, schools still fail "to encourage qualified female students to pursue studies and careers in non-

161. See P. MAHONY, *SCHOOLS FOR THE BOYS? CO-EDUCATION REASSESSED* 65 (1985).

162. See Tobias, *How Coeducation Fails Women*, in *SEX DIFFERENCES AND DISCRIMINATION IN EDUCATION* 83-88 (S. Anderson ed. 1972).

163. Anderson, *Coeducation*, in *SEX DIFFERENCES AND DISCRIMINATION IN EDUCATION* 81, 81 (S. Anderson ed. 1972).

164. *Id.* at 82.

165. *Id.*

166. *Id.* (quoting Chattam College's president Edward D. Eddy).

167. See 20 U.S.C. § 1681(a) (1988). See also 34 C.F.R. §§ 106.34, 106.36 (1990).

168. 34 C.F.R. § 106.36(a)(b) (1990).

169. 34 C.F.R. § 106.34 (1990).

170. F. HOWE, *MYTHS OF COEDUCATION* 209 (1984).

traditional areas, such as science, math, [and] technology. . . ."¹⁷¹ Coeducation continues to prepare youth "for the division of labor along traditional sex lines."¹⁷² It, therefore, reproduces the paradigm of two distinct cultures: "male" and "female."¹⁷³

Attitudes based on sex-stereotypes, expressed by school administrators and teachers, and consequently, reinforced in all students, "overpowers" boys and "depowers" girls.¹⁷⁴ "Overpowering" and "depowering" cause dramatic psychological effects on girls. Throughout their education, girls experience achievement-related conflicts.¹⁷⁵ Because success, in direct competition with male students, conflicts with traditional notions of femininity, female students pay a high price for their academic success.¹⁷⁶ Female achievers are socially stigmatized by both peers and superiors.¹⁷⁷ As a result, girls often fear academic success.¹⁷⁸

Concomitant with the fear of success are problems of inferiority among female students.¹⁷⁹ Because female students learn early that they are inferior to male students, they are reluctant to

171. P. SEXTON, *WOMEN IN EDUCATION* 64 (1976).

172. Whyte, *The Development of Sex Stereotyped Attitudes Among Boys and Girls: Different Models of Their Origins and Their Educational Implications*, in *GIRLS AND WOMEN IN EDUCATION* 57 (Organization For Economic Co-operation and Development ed. 1986).

173. *Id.*

174. The terms "overpower" and "depower," although probably not entirely accurate, are more appropriate than the more common terms "empower" and "disempower." With respect to boys, the term "empower" implies that, vis-a-vis girls, boys are powerless at the onset of their secondary education experience. However, a boy embarks upon his secondary stage of schooling not only *with* power, but with more power than girls. Sex socialization and gender stratification start from the moment a child is born. Safilos-Rothschild, *Sex Differences in Early Socialisation and Upbringing and Their Consequences for Educational Choices and Outcomes*, in *GIRLS AND WOMEN IN EDUCATION* 30 (Organization For Economic Co-operation and Development ed. 1986). Thus, continued sex-stereotyping gives boys *too much power*—it "overpowers" them. Girls, on the other hand, enter secondary school with less power, vis-a-vis boys, and therefore, are further "depowered" by the sexist culturalization in post-elementary education. Girls start with and end up with *too little* power.

175. See Tobias, *supra* note 162, at 86.

176. *Id.*

177. See *id.* Students reacted negatively to a hypothetical involving a female student who ranked first in her class at medical school. Over one-half of the students suggested that the woman's success would result in internal conflicts with her "femininity." Others accused the female student of cheating. Some students replied that the female student must be ugly, could not catch a man, and therefore, became an academic achiever. *Id.*

178. *Id.* at 85-86.

179. *Id.* at 87.

express their own opinions.¹⁸⁰ "It is not only that they do not want to be unpopular, that their date is in the classroom and he does not like aggressive women. . . . [P]art of it also is that they do not believe that what they say is important."¹⁸¹

Lastly, coeducation "depowers" female students by rewarding girls for passivity and dependence in the classroom.¹⁸² Female students come to school with feelings of inferiority that facilitate the adoption of this behavior. Further, the hierarchical structure of most classroom settings emphasizes these insecurities. Attempts of female students to participate in class discussions often receive more criticism than the comments of male students, which teachers often consider "original."¹⁸³ Girls learn passivity, dependence, and aversion to conflict in secondary coeducational institutions. Consequently, these learned behaviors debilitate them when they enter college, where aggressiveness, active learning and independence are rewarded.¹⁸⁴ On the other hand, female students who exhibit these "male" characteristics are socially degraded.

VI. THE STAGE IS SET: STUDENT TO STUDENT SEXUAL HARASSMENT IN SECONDARY EDUCATION

The debate over the relative advantages and disadvantages of coeducation has been particularly informative in countries where the recent amalgamation of schools has highlighted the sexual tensions between adolescents.¹⁸⁵ Two types of sexual harassment between students have been documented in English secondary coeducational schools. First, girls, by virtue of their sex, experience hostility, humiliation, and active discouragement from male students.¹⁸⁶ This discriminatory treatment is similar to the sex-based conduct recognized in *McKinney*¹⁸⁷ and *Kyriazi*.¹⁸⁸ These cases in-

180. *Id.*

181. *Id.*

182. *Id.* at 87.

183. *Id.* at 86-87.

184. *Id.* at 87.

185. Girls who have only experienced a mixed sex schooling have great difficulty identifying offensive behavior as harassment because it is part of their normal, everyday life. P. MAHONY, *supra* note 161, at 41. Girls who have experienced both single and mixed sex schools, however, recognize sexist behavior and easily articulate how it makes them feel. *Id.* See generally M. STANWORTH, *GENDER AND SCHOOLING, A STUDY OF SEXUAL DIVISION IN THE CLASSROOM* (1983).

186. See generally P. MAHONY, *supra* note 161, at 37-47.

187. *McKinney v. Dole*, 765 F.2d 1120 (D.C. Cir. 1985).

188. *Kyriazi v. Western Elec. Co.*, 461 F. Supp. 894 (D.N.J. 1978).

volved Title VII violations where male co-workers harassed the female plaintiffs merely because they were women.¹⁸⁹ The perpetrators did not engage in sexual solicitation so much as they engaged in mistreating women. Similarly, in school, male students exhibit animosity toward female students merely because of their sex.

Second, girls endure the sexually motivated conduct exemplified in *Bundy*,¹⁹⁰ *Continental Can*,¹⁹¹ and *Vinson*.¹⁹² These cases present more extreme forms of sexual harassment where men attempt to engage women in unwanted sexual activity. Sexual harassment in these forms is easier to prove because of its blatantly sexual and often violent characteristics. Title VII and the philosophy behind it provide female workers with relief for both types of harassment. The present interpretation of Title IX, however, makes relief remote, if not impossible for female students.

Sex divisions in the classroom are generally considered to be the result of natural sexual tension common among adolescents. Likewise, certain sexual tensions on the job were considered facts of life until the onset of Title VII litigation.¹⁹³ Characterizing sexual harassment as innocuous conduct caused further harm to women in the workplace. Unfortunately, female adolescents still face the same response that female workers faced in early Title VII litigation. Unwanted verbal and physical sexual aggression against female adolescents in school is a detrimental experience for these students. Sexist attitudes resulting in abusive conduct destroys the educational environment.¹⁹⁴ Nevertheless, this abuse is not currently actionable as sex discrimination.

Sexual harassment in coeducational schools occurs in many contexts. Often, coeducation stifles participation by girls in class discussion.¹⁹⁵ Subtle oppression by boys, who act obviously bored, sighing, groaning and rolling their eyes, sends a powerful message

189. See *supra* section II.

190. *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981). See *supra* notes 24-39 and accompanying text.

191. *Continental Can Co., v. State*, 297 N.W.2d 241 (Minn. 1980). See *supra* notes 47-58 and accompanying text.

192. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986). See *supra* notes 85-94 and accompanying text.

193. C. MACKINNON, *supra* note 21, at 2.

194. See P. MAHONY, *supra* note 161, at 34-53. See also Crocker & Simon, *Sexual Harassment in Education*, 10 CAP. U.L. REV. 546-49 (1981).

195. P. MAHONY, *supra* note 161, at 37-41.

when a girl contributes in class.¹⁹⁶ One female adolescent conveyed her experience with striking maturity.

It's very subtle really—whenever a girl speaks in more than one-word answers the atmosphere gets tense, the boys don't really like it. . . . [T]hey put their pens down—you know—time for a break. If she carries on they fold their arms, lean back in their chair and—sort of—look deliberately bored.¹⁹⁷

This effectively teaches most young girls not to participate at all.

Boys verbally abuse girls in and outside the classroom. In addition to the constant attack on the intellectual and academic abilities of girls,¹⁹⁸ boys degrade girls with language that is pejorative of women.¹⁹⁹ Boys direct the same language at other boys as the ultimate insult.²⁰⁰ Other examples of verbal abuse include male commentary about menstrual periods and loud pornographic statements intended entirely for the ears of female bystanders.²⁰¹

In addition to purposeful abuse, boys oppress girls by monopolizing physical space.²⁰² In 1977, teachers in England conducted research on coeducational schools. They found that while boys occupy the total area surrounding schools by playing football, girls observe from benches or wander in the periphery of the "boys' space."²⁰³ The researchers asked some girls why they did not participate in the games.²⁰⁴ The girls' reactions indicated that the question was ridiculous from their point of view.²⁰⁵ The researchers concluded that a request to participate "simply was not feasible—they would be howled down by boys."²⁰⁶

Seven years later, other teachers expanded upon the previous research using photographs of boys and girls in and around the school building.²⁰⁷ Their research showed that: (1) girls spend their lunch hour clustered in small groups of two to four in inconspicu-

196. *Id.* at 37-38.

197. *Id.*

198. *Id.* at 44.

199. *Id.* at 45.

200. *Id.* at 46.

201. *Id.* at 45-46. The term "pornographic" is Ms. Mahony's own word choice.

202. *Id.* at 24-25.

203. *Id.* at 25.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 25-28.

ous areas; (2) girls walk around paths which hug the buildings while boys walk directly across large, open areas; (3) girls often serve as spectators for boys' activities; (4) boys' activities are faster and more violent than girls' activities, and commonly involve large groups; (5) girls use less space than boys when they play active games; and finally, (6) boys regularly expand their dominion over certain areas by climbing on each other and on structures such as fences and walls.²⁰⁸

Girls also experience more blatant harassment.²⁰⁹ Boys hold their noses when girls pass in the corridors or give girls sexually appraising looks.²¹⁰ Boys use gestures to threaten girls and mimic the way girls walk.²¹¹ Girls, on the other hand, try to avoid boys if at all possible, often without even realizing that they have to go out of their way to do so.²¹² Sexual molestation is not an uncommon occurrence in classrooms but is even more frequent in corridors and other areas outside the classroom.²¹³ Female students in England reported "boys grabbing girls' breasts, dropping things down their blouses and pinging their bra straps, looking and slipping their hands up girls' skirts and boys exposing themselves."²¹⁴

Boys also suffer sexual harassment if they do not conform to male stereotypes.²¹⁵ Contempt for feminine characteristics among adolescent males causes them to emphasize their masculinity to prove that they are as unlike girls as possible.²¹⁶ Boys use girls as their negative reference group.²¹⁷ Judith Whyte reports that "[t]here is evidence that sex role socialisation bears more heavily on boys. Studies . . . show that boys exhibit more anxiety if encouraged to select 'sex-inappropriate' toys. Boys aged eight and over have been found to be rigidly anti-girl in the attempt to be masculine."²¹⁸

208. *Id.* at 26-27.

209. *See id.* at 41-47.

210. *Id.* at 41.

211. *Id.*

212. *Id.*

213. *Id.* at 47-48.

214. *Id.* at 48. Some schools had policies to let girls out of school ten minutes early to allow them time to get away from the buildings before the boys were released. *Id.*

215. *See id.* at 47, 52.

216. *Id.* at 31.

217. *Id.*

218. Whyte, *supra* note 172, at 59 (citations omitted). "Parents, especially fathers, appear to be more anxious about 'sex-inappropriate' activities and preferences on the part of their sons than of their daughters." *Id.*

In school, boys are under pressure to excel in athletics.²¹⁹ Boys who fail to conform to the athlete prototype may also suffer harassment.²²⁰ In addition, to survive—that is to escape sexual harassment themselves—boys must demonstrate at least an appreciation for sexually predatory heterosexual behavior.²²¹

Pat Mahony described male to male sexual harassment in her account of the male teacher who conducted an experiment to determine whether his students were “normal.”²²² The teacher announced to his all male class: “there’s a naked woman running across the playground.”²²³ After all but one student rushed to the window, the teacher directed the boys to return to their seats.²²⁴ At this point, the single boy who had remained seated objected to the experiment as sexist.²²⁵ The teacher subsequently informed the class: “now we know who isn’t normal.”²²⁶ In addition to the teacher’s ridicule, the classmates derided the student with obscene comments and physically abused him outside the classroom.²²⁷ From that point on, other boys continually harassed the student.²²⁸ This incident marginalized and silenced him, just as similar harassment marginalizes and silences adolescent girls.²²⁹

219. C. STOLL, *FEMALE & MALE: SOCIALIZATION, SOCIAL ROLES, AND SOCIAL STRUCTURE* 99 (1974).

220. *Id.* Although Ms. Mahony agrees that both boys and girls fear ridicule from other students when they do not conform to traditional sex-roles, she questions whether pressure on boys and girls is equivalent. “In terms of my own experience in classrooms I would expect the majority of the pressure on boys and girls to come from boys.” P. MAHONY, *supra* note 161, at 22.

221. *Id.* at 47.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.* The other boys threatened the student after school and as he got on his bike one boy repeatedly jabbed a pump into his rear. *Id.*

228. *Id.*

229. *Id.* The same societal indoctrination that perpetuates the sexual harassment of women and girls also perpetuates contemptuous attitudes toward non-traditional male behavior. See Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187 (1988) (arguing that legal and social contempt for lesbians and gay men serves primarily to preserve traditional social structure based on sex). Behavior and attitudes that violate gender norms are condemned socially and legally.

For example, a Chicago study revealed that “fag-bashing” focused on not only gay men, but also those who conformed to gay stereotypes. Harry, *Derivative Deviance: The Cases of Extortion, Fag-Bashing, and Shakedown of Gay Men*, 19 CRIMINOLOGY 546, 549 (1981-1982). “The impersonality of the cultural criteria defining probably deviant individuals implies that some nondeviant individuals may occasionally be so defined and therefore subject to cultural victimization. There have been reported cases where heterosexual persons who

A discrete example of classroom marginalization may not be actionable as sexual harassment. Nevertheless, various incidents taken together are probative of a hostile environment created by peers and perpetuated by teachers and administrators. Moreover, a hostile environment is often accompanied by various forms of sexual assault, and sometimes rape.²³⁰ Yet the harassment must reach the threshold point of an assault before the legal system opens its doors to female students. Furthermore, criminal prosecutions and tort suits for assault provide inadequate remedies because they fail to designate the harm in terms of sexual harassment.

The value resulting from designating the harm as sexual harassment is twofold. First, adolescent females should not be subject to abuse until boys' behavior amounts to the legal definition of an assault. Second, even if the abuse culminated in an assault, the harms suffered should be analyzed in the aggregate to include the sexually hostile environment. "Such a showing supports an analysis of the abuse as structural, and as such, worth legal attention as sex discrimination, not just as unfairness between two individuals"²³¹

An accurate designation condemns such harassment for what it is—the sexual subordination of girls in the academic environment.²³² Criminal prosecutions and tort suits, absent any reference to sexual discrimination, distills an analysis of what harm is really

conformed to homosexual stereotypes were beaten by the police while being called a 'fag-got.'" *Id.* at 560. The United States Supreme Court's refusal to find a right of privacy with respect to adult consensual homosexual conduct in *Bowers v. Hardwick*, 478 U.S. 186 (1986), legitimizes persecution of non-traditional male behavior.

230. See P. MAHONY, *supra* note 161, at 48.

231. C. MACKINNON, *supra* note 21, at 27.

232. Catharine MacKinnon analyzes gendered hierarchy as a social institution, with women on the bottom and men on the top. Her observation that sexual harassment in the workplace is both a product and a tool of this structure is equally applicable to educational institutions. Consequently, naming the harm is equally important.

[T]he law of discrimination has a distinctive contribution to make. Sex discrimination law can keep sexual violation of women in full view of the social setting within which it occurs. This social context has defined as normal a structural situation in which women can be and are systematically subordinated to men sexually and in other ways. . . . If sexual harassment expresses the pervasive reality of normal relations between the sexes, and if these relations express unequal social power, then the feelings and practices that emerge are not reasons that the practices should be allowed. They support and evidence the discrimination. Violations that would not be seen as criminal because they are anything but unusual may, in this context, be seen as discriminatory for precisely the same reason.

C. MACKINNON, *supra* note 21, at 220.

occurring, who is causing it, and why they are causing it. Sexual harassment must be named to be stopped.²³³

VII. UNINVITED SEXUAL AGGRESSION IN SCHOOL: RECOGNIZING THE LEGAL PROBLEM

Courts have been struggling to name the harm resulting from sexual and aggressive conduct between minors. A recent case, *Campbell v. Montgomery County Board of Education*, epitomizes this struggle.²³⁴ In *Campbell*, a thirteen-year-old female junior high school student brought suit against a supervisory school teacher and the school district.²³⁵ Campbell had been group molested by two groups of male students at the Sligo Junior High School.²³⁶ The incident occurred when Campbell surreptitiously entered a restricted area of the boys' locker room while it was empty.²³⁷ A short time thereafter a male student entered the locker room, pulled her onto his lap and began molesting her.²³⁸ Subsequently, approximately fifteen boys entered the locker room and took part in the molestation for about one half hour.²³⁹

The lower court entered a judgment in favor of the defendants.²⁴⁰ The court justified its action by maintaining that Campbell was guilty of contributory negligence.²⁴¹ The court emphasized her sexual experience and the fact that she had been raped previously.²⁴² She was described as a girl

who had engaged in prior voluntary sex and had then dis-

233. "Until 1976, lacking a term to express it, sexual harassment was literally unspeakable, which made a generalized, shared, and social definition of it inaccessible." C. MACKINNON, *supra* note 21, at 27. "It is not surprising either that women would not complain of an experience for which there has been no name." *Id.*

234. *Campbell v. Montgomery County Bd. of Educ.*, 73 Md. App. 54, 533 A.2d 9 (1987), *cert. denied*, *Montgomery Bd. of Educ. v. Campbell*, 311 Md. 719, 537 A.2d 273 (1988).

235. *Id.* at 60, 533 A.2d at 12. Campbell also attempted to sue individual students. The action was brought through Campbell's mother and grandmother.

236. *Id.* at 58, 533 A.2d at 11.

237. *Id.* at 57, 533 A.2d at 11.

238. *Campbell v. Montgomery County Bd. of Educ.*, 73 Md. App. 54, 58, 533 A.2d 9, 11 (1987), *cert. denied*, *Montgomery County Bd. of Educ. v. Campbell*, 311 Md. 719, 537 A.2d 273 (1988).

239. *Id.* at 58-59, 533 A.2d 11-12.

240. *Id.* at 61, 533 A.2d at 13.

241. *Id.* at 56, 533 A.2d at 10.

242. *Campbell v. Montgomery County Bd. of Educ.*, 73 Md. App. 54, 55-56, 533 A.2d 9, 10 (1987), *cert. denied*, *Montgomery County Bd. of Educ. v. Campbell*, 311 Md. 719, 537 A.2d 273 (1988).

cussed it with her mother, who had previously, against the rules of the school and knowingly so, entered the boys locker room on four or five other occasions, and undertook directly and knowingly to do so about three months after she testified that she was forcibly raped by two individuals, one holding her while the other raped her — all of which gave her a degree of experience, a degree of knowledge, a degree of understanding²⁴³

According to the court's analysis, Campbell's experience and knowledge should have alerted her to the dangers awaiting her in the locker room.²⁴⁴

The Maryland Court of Appeals reversed the decision, holding that Campbell was not contributorily negligent because she had entered the area recently without incident.²⁴⁵ Yet its holding was of little precedential value because the court retained the notion that Campbell would have been contributorily negligent if she had been previously subjected to a sexual assault in the locker room. Finding that Campbell, had "on four prior occasions gone into the boys' locker room without being confronted by danger," the court reasoned that "it can hardly be said that, as a matter of law, [she] knew or should have known the peril that awaited her on the date of the incident."²⁴⁶ In other words, if Campbell had been raped the day before in the locker room, she would have been denied relief, because she should have known that this was an area where boys rape girls.

The message of this case is clear.²⁴⁷ The more frequently boys indulge in sexual assault in the locker room of Sligo high school, the more frequently the courts will impute notice to the potential victims of such aggression. Correspondingly, as the number of sexual attacks on the school grounds increases, the potential liability of the school decreases. According to the court's rationale, the bur-

243. *Id.* at 55-56, 533 A.2d at 10.

244. *Id.* at 56, 533 A.2d at 10. The court also noted Campbell's high IQ. *Id.* Implicit in the court's reasoning is the assumption that a "smart girl" should have known better.

245. *Id.* at 65-66, 533 A.2d at 15.

246. *Campbell v. Montgomery County Bd. of Educ.*, 73 Md. App. 54, 65, 533 A.2d 9, 15 (1987), *cert. denied*, *Montgomery County Bd. of Educ. v. Campbell*, 311 Md. 719, 537 A.2d 273 (1988).

247. The appeals court criticized the lower court's opinion because it implied that "insofar as civil law is concerned, if a young female enters a boys' locker room she simultaneously strips herself of any vestige of dignity and submits herself to whatever type of sexual aggressions she encounters." *Id.* at 64, 533 A.2d at 14.

den is on the girls themselves to avoid areas where sexual aggression might occur, rather than on the school to ensure the safety of its female students.

What is shocking about this case is the insinuation that Campbell should have expected it. A general application of the court's reasoning requires girls in schools to constantly consider their sexual vulnerability in making decisions about simple physical movement — in school and on school grounds. If girls are aware of areas or situations in which sexual aggression is a possibility, they are obliged to constrain their own freedom of movement and association. In effect, tort law abandons girls when they need protection the most — when there are frequent incidents of sexual aggression.

Girls should be safe from sexual aggression wherever they go in school.²⁴⁸ It should be the role of the school, not of individual female students, to evaluate the incidence of foreseeable sexual aggression. The court's misallocation of burdens demonstrates why students need statutory protection that identifies sexual and aggressive conduct between minors as a form of sexual discrimination.²⁴⁹

Another decision expounding the notion that female students should expect some form of sexual aggression in school is *State v. Wall*.²⁵⁰ In this case, a seventeen-year-old male student was charged with assault in connection with two incidents occurring at the West Seattle High School.²⁵¹ The first incident involved an eighteen-year-old female student.²⁵² She testified that the defendant, Wall, accompanied by three other males, accosted her in the hallway of the school.²⁵³ He put his hand between her legs and held it there, palm up, for a few moments before proceeding on his way.²⁵⁴

The second incident involved another female student, age

248. It makes no difference that this area was a boys' changing room, rather than, for example, a lounge. The *Campbell* court's implication that a male locker room is a randy "no girl's land" is not connected to any interest in protecting boys' privacy while changing. Rather, it is tied to the lingering belief that girls in this situation "asked for it."

249. The school's failure to eliminate danger to female students is a form of sexual discrimination that is similar to an employer's failure to eliminate a hostile work environment.

250. *State v. Wall*, 46 Wash. App. 218, 729 P.2d 656 (1986).

251. *Id.* at 219, 729 P.2d at 657.

252. *Id.*

253. *Id.*

254. *State v. Wall*, 46 Wash. App. 218, 219, 729 P.2d 656, 657 (1986).

fourteen.²⁵⁵ She testified that Wall, once again accompanied by two male students, blocked her path as she walked along the hallway.²⁵⁶ "I went to go around them on the right side . . . and [Wall] reached out and grabbed my crotch. . . ." ²⁵⁷

The question before the Washington Appeals Court was whether the victims were "particularly vulnerable," an aggravating factor for purposes of Wall's sentencing.²⁵⁸ The court of appeals squarely disagreed with the lower court's characterization of "particularly vulnerable."²⁵⁹ The lower court found that Wall's actions violated a "societal taboo."²⁶⁰ The court reasoned that no woman would expect such an assault, and would therefore pass Wall without being apprehensive or taking protective measures.²⁶¹ As a result, the court concluded that the female students were "particularly vulnerable."²⁶²

The court of appeals, however, found that the designation "particularly vulnerable" was applicable only to victims of "extreme youth, advanced age, or physical or mental infirmity."²⁶³ According to the court, "[a]lthough the victims here were vulnerable in the sense that they did not expect to be grabbed by Wall, vulnerability in the present context connotes some disability due to age or a physical or mental condition which renders the victim helpless, defenseless, or unable to resist."²⁶⁴ The appeals court refused to distinguish the crime of sexual aggression from any other crime. "In some sense at least, any crime violates a societal taboo, and most crime victims are vulnerable to some extent."²⁶⁵

The court misinterpreted the vulnerability issue by failing to consider the sex of the perpetrators and the victims, along with the social forces causing a power disparity between these parties. As female adolescents in an institutional setting built on the social imperatives of dominance and subordination, the victims were "vulnerable," almost by definition. In a sex-based social hierarchy,

255. *Id.*

256. *Id.*

257. *Id.* at 219-20, 729 P.2d at 657.

258. *State v. Wall*, 46 Wash. App. 218, 220, 729 P.2d 656, 657 (1986).

259. *Id.* at 220, 729 P.2d at 657.

260. *Id.*

261. *Id.*

262. *State v. Wall*, 46 Wash. App. 218, 220, 729 P.2d 656, 657 (1986).

263. *Id.*

264. *Id.* at 222, 729 P.2d at 658-59.

265. *Id.* at 23, 729 P.2d at 659.

both students and teachers devalue female adolescents.²⁶⁶ Girls in school, like women in the workplace, are "stigmatized as inferior."²⁶⁷

Thus, girls, simply by being female students, are vulnerable. Under the circumstances in *Wall*, the female students were particularly vulnerable. During both encounters, Wall, the offender, was accompanied by two male students. Each victim was alone. Given the social situation of female students and the fact that each victim was outnumbered, these girls were "particularly vulnerable." In addition, both assaults were sexually predatory. The offenders asserted their power over the female victims by denigrating them sexually. Reaching for the genitals is not equivalent to a blow on the arm. It is a manifestation of sexual superiority, a declaration of the sexual accessibility of girls.

In refusing to characterize these victims differently from victims of any other crime, the court avoided what should have been the primary focus of the inquiry. The relevant question in this case should have been: "Are these female students particularly vulnerable because they are subjected to a school environment where sexist behavior and sexual aggression against girls is condoned — even encouraged?" These cases indicate that courts are unwilling to recognize peer sexual harassment in schools even in its most blatant forms. Documentation of sexual harassment in schools,²⁶⁸ together with the examples of assaultive behavior represented in these cases, indicate that female students need statutory protection.

VIII. THE THEORY OF NEGLIGENT SUPERVISION AND SCHOOL LIABILITY²⁶⁹

In contrast to the lack of protection for girls from sexual harassment, girls are adequately protected from other kinds of harm. Courts commonly hold teachers and school districts liable in suits that allege negligence resulting in the physical injury of a student.²⁷⁰ Complaints brought in these situations most frequently al-

266. See *infra*, sections IV, V and VI.

267. See C. MACKINNON, *supra* note 21, at 144.

268. See *supra* section V.

269. Because the theory of negligent supervision necessarily applies only up to the secondary stage of education, the reforms set forth in this note are limited to the early stages of schooling. Although sexual harassment in higher education is beyond the scope of this note, it is a pervasive problem. See Schneider, *supra* note 18.

270. Collingsworth, *Applying Negligence Doctrine to the Teaching Profession*, 11 J.

lege that the defendant failed to provide adequate supervision.²⁷¹ Such suits usually involve contentions that the supervision was inadequate because a teacher was absent from the area in which an injury occurred, allowed students to participate in potentially risky activity, or failed to properly observe students' activities while present in the classroom.²⁷²

Teachers or school administrators having previous knowledge of the violent or anti-social propensities of particular students are charged with constructive knowledge of foreseeable harms to other students.²⁷³ The case of *Ferraro v. Board of Education* involved an assault by a female junior high school student against another student.²⁷⁴ The school principal was aware that the student had an extensive history of misbehavior and aggression, but that day's substitute teacher had no knowledge of the student's assaultive characteristics.²⁷⁵ Guidance records showed that the student was known for quarreling and displaying hostile behavior toward other students and teachers.²⁷⁶ The Supreme Court of New York for the Appellate Term found ample evidence supporting liability on the part of the school.²⁷⁷ The principal, fully aware of the student's history of assaultive behavior, erred by failing to inform the substitute teacher of the student's propensity to harm other children.²⁷⁸

Some courts extend the theory of negligent supervision even beyond the scope of *Ferraro*. In *Christofides v. Hellenic Eastern Orthodox Christian Church*, the Municipal Court of New York City held that a teacher's twenty-five minute absence from the classroom was the proximate cause of a pupil's injury.²⁷⁹ In this case a student was stabbed in the hand by a classmate who had been seen wielding a knife for "five or ten minutes" prior to the

LAW & EDUC. 479, 481 (1982).

271. Henderson, *Negligent Liability Suits Emanating From the Failure to Provide Adequate Supervision*, 16 J. LAW & EDUC. 435 (1987).

272. *Id.*

273. *Ferraro v. Bd. of Educ.*, 32 Misc. 2d 563, 212 N.Y.S.2d 615 (N.Y. App. Term. 1961), *aff'd* 14 A.D.2d 815, 221 N.Y.S.2d 279 (N.Y. App. Div. 1961).

274. *Id.* at 564, 212 N.Y.S.2d at 615.

275. *Id.* at 564-66, 212 N.Y.S.2d at 616-17.

276. *Id.*

277. *Ferraro v. Bd. of Educ.*, 32 Misc. 2d 563, 576, 212 N.Y.S.2d 615, 628 (N.Y. App. Term. 1961), *aff'd* 14 A.D.2d 815, 221 N.Y.S.2d 279 (N.Y. App. Div. 1961).

278. *Id.*

279. *Christofides v. Hellenic Eastern Orthodox Christian Church*, 33 Misc. 2d 741, 227 N.Y.S.2d 946 (N.Y. Mun. Ct. 1962).

stabbing.²⁸⁰ The plaintiff introduced only minimal evidence that the student who perpetrated the injury was an "unruly and mischievous" student.²⁸¹

The absence of this evidence, however, was not fatal to the plaintiff's case. According to the court, "[p]rior knowledge of 'vicious propensities' is not a necessary element. Nor is proof of a prior similar act. . . ."²⁸² Prior "conduct" is enough.²⁸³ The court defined "prior conduct" as conduct that immediately precedes the injurious act and gives reasonable notice that harm may be anticipated.²⁸⁴

Finally, in *Beck v. San Francisco Unified School District*, the California District Court of Appeal expanded the parameters of liability even further.²⁸⁵ In *Beck*, the student plaintiff was struck by two other pupils during the school carnival.²⁸⁶ Testimony revealed that twenty-three teachers had been assigned to supervise the carnival, and that there had never been any similar difficulties at previous carnivals.²⁸⁷ Despite this evidence, the court found a "prima facie case of lack of supervision and thus a violation of a duty owed [to the plaintiff] by the district."²⁸⁸ The court noted as probative a tendency toward "rowdiness" when adolescents gather together.²⁸⁹

Ferraro, *Christofides*, and *Beck* demonstrate that the duty and notice standards in negligence actions against schools are analogous to the standards created in cases involving co-worker sexual harassment. In *Continental Can*, *McKinney*, *Kyriazi*, *Hall* and other such cases, actual or constructive knowledge of harassment triggers employer responsibility.²⁹⁰ In those cases, failure to remedy "foreseeable" harassment constituted discrimination based on sex.

280. *Id.* at 742, 227 N.Y.S.2d at 947.

281. *Id.*

282. *Id.*

283. *Christofides v. Hellenic Eastern Orthodox Christian Church*, 33 Misc. 2d 741, 746, 227 N.Y.S.2d 946, 951 (N.Y. Mun. Ct. 1962).

284. *Id.*

285. *Beck v. San Francisco Unified School Dist.*, 225 Cal. App. 2d 503, 37 Cal. Rptr. 471 (Cal. Dist. Ct. App. 1964).

286. *Id.* at 506, 37 Cal. Rptr. at 473.

287. *Id.*

288. *Id.* at 508, 37 Cal. Rptr. at 474.

289. *Beck v. San Francisco Unified School Dist.*, 225 Cal. App. 2d 503, 508, 37 Cal. Rptr. 471, 474, (Cal. Dist. Ct. App. 1964).

290. *See supra* section II.

The theory of negligent supervision in school settings holds teachers and school boards to similar standards of care. Teachers or school administrators having actual or constructive knowledge of assaultive or aggressive propensities of students have a duty to protect other students. Moreover, as previously noted, teachers must neither expose students to unnecessarily risky activity nor leave students unsupervised for an unreasonable period of time.

IX. REWRITING TITLE IX: AN INCLUSIVE PROPOSAL

Because the standard of liability in co-worker sexual harassment cases so closely resembles the standard of care in school liability cases, the proposal set forth in this note closely traces the EEOC guidelines. The workplace model is also particularly appropriate because the sexual harassment that happens between co-workers on the job is nearly identical to the harassment occurring between adolescents in secondary education.

Therefore, this note recommends that the OCR adopt the following guidelines²⁹¹ for controlling sexual harassment between students in secondary education:

(a) Harassment on the basis of sex is a violation of § 1681 of Title IX. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when such conduct has the purpose or effect of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile, or offensive academic environment.

(b) With respect to conduct between fellow students a school is responsible for acts of sexual harassment in school or on school grounds where the school board (or teachers or administration) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.²⁹²

This proposal, while protecting students from sexual harass-

291. Because the OCR has not drafted guidelines for sex discrimination under Title IX, this proposal does not fit a pre-established regulatory scheme. However, even standing alone it provides much needed guidance for sexual discrimination litigation with respect to sexual harassment. See *supra* note 98 and accompanying text.

292. This proposal is directly modelled after the EEOC guidelines, specifically, 29 C.F.R. § 1604.11(a),(d) (1988). Other scholars have adapted the EEOC guidelines' definition of sexual harassment as applied to the academic setting, but have not gone so far as to address harassment between peers. See Schneider, *supra* note 18, at 542.

ment, would be manageable for schools because it requires no more than a reasonable standard of care. For example, schools that are on notice that the boys' locker room presents a threat to female students as "a place where boys rape girls"²⁹³ would be obliged to take some action to make the area a safe place. This requirement would be coextensive with the liability that schools incur when they are on notice that structural defects present a risk to students in a particular area or room in the school. Such liability would also correspond with the repercussions of failing to take reasonable steps to protect students from the known violent propensities of a fellow student.

The most difficult aspect of any proposal for remedying sexual harassment in secondary schools is the assumption that teachers and school boards will adequately identify sexually derogatory treatment as sexual harassment. The proposal set forth in this note will partially withdraw this barrier for two reasons. First, the mere existence of guidelines addressing the sexual harassment of students by other students contributes to consciousness-raising by giving the harm a name. Awareness that student to student sexual harassment is prohibited will enable students and teachers to articulate specific grievances and address specific behavior. Second, even if teachers reasonably fail to identify harassing behavior, students themselves may make complaints. The school can take steps to fulfill its duty to the complaining student by instituting a procedure by which complaints are screened and investigated. Under these circumstances such action would constitute "immediate and appropriate corrective action," thereby conforming with the proposal.

Restraints on the conduct of possible victims, as required by much of the current case law, is misguided. Under traditional negligent supervision doctrine, teachers do not protect against classroom injury by merely telling other students to avoid a violent student. Rather, the teacher remedies the situation by forestalling the violent conduct itself. Under the proposed Title IX guidelines, teachers would have a duty to prevent student to student sexual harassment by regulating the behavior of offending students. Sexually demeaning name-calling, oppressive behavior in the classroom, and physical molestation would fall under the rubric of the guidelines. Boys would no longer be allowed to destroy the learning en-

293. See *supra* notes 235-50 and accompanying text.

vironment for girls and non-conforming boys.

CONCLUSION

Litigation under Title VII has slowly and painfully given legal definition to women's injuries in the workplace. The acceptance of claims, from *quid pro quo*, to hostile environment, to co-worker sexual harassment, is a judicial declaration that what happens to women in the workplace matters. Although the United States Supreme Court has not explicitly addressed co-worker sexual harassment, lower courts have recognized the problem. Under Title IX's limited coverage, however, students remain defenseless against harassment.

A sexist coeducational system harms female students. The frequency with which female students are subject to verbal abuse, harassment, molestation, and sexual assault demands an immediate remedy. Schools should be held liable for these harms. The reforms to Title IX proposed in this note would protect adolescents from a sexually derogatory school environment. By recognizing peer sexual harassment within the context of education, the possibility exists that eventually sexism in our schools will be eliminated. Perhaps it would even make sexual harassment in the workplace a thing of the past.

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