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DEVELOPING A VIABLE CAUSE OF ACTION FOR STUDENT VICTIMS OF SEXUAL HARASSMENT: A LOOK AT MEDICAL SCHOOLS

INTRODUCTION

Dr. Bernadine Healy, former Director of the National Institutes of Health and arguably one of the most powerful women in medicine, remembers well the claims of sexual harassment she launched while a student at Johns Hopkins University Medical School in 1982.1 They cost Healy her reputation there and eventually resulted in her leaving the school.2 Her complaints were aimed at the Pithotomy Club, an all-male eating society in which students and faculty gathered, performed songs and skits, and drank.3 After a male student wearing fish-net stockings and a half-brassiere portrayed Healy as performing sexual acts on a number of physicians at Johns Hopkins, Healy complained of sexual harassment.4 She received virtually no support. Instead, faculty members told her that “boys will be boys” and that she needed to develop a sense of humor and “learn to play the game.”5

More than a decade has passed since Healy first raised the issue of sexual harassment at Johns Hopkins. The Pithotomy Club still exists.6 Healy still experiences sexism within her profession,7 and female medical students often are still expected to “play the game.”8 Even after the Anita Hill-Clarence Thomas hearings thrust the issue of sexual harassment to the forefront of American politics in October 1991, little appears to have changed for women entering the medical profession.9 Increasing numbers of women have asserted their right to work

2. Id.
3. Id.
4. Id.
5. Id.
6. Id.
7. Id. Scientists criticize Dr. Healy at seminars in which they discuss her plans for the National Institutes of Health. “It is not that they do not respect her. Or that they doubt her intelligence or commitment. It seems something less intellectual than emotional. She does not fit in.” Id.
8. Id.
9. According to Lila Wallis, a clinical professor of medicine at Cornell University Medical College and past president of the American Medical Women’s Association, “[m]ost women medical students are prepared to be the butt of silly jokes, a certain amount of harassment and discrimination in terms of promotions and obtaining residency, fellowship
in an environment free of sexual harassment, but female medical students and residents have been less willing to voice similar complaints.

In one recent study, nearly three-fourths of the women medical residents surveyed reported having been sexually harassed at least once during their medical training. The respondents indicated that more harassment occurred while in medical school than during residency, and more of their harassers were attending physicians than classmates. Although two-thirds of the women surveyed indicated that the harassment created an intimidating, offensive or hostile environment, less than one-tenth reported such harassment to an authority.

While student complaints of sexual harassment have increased in recent years, most claims of harassment in the medical profession continue to be made by female doctors who have achieved a position of some power among their colleagues. Although these women

or a job. Some kid themselves and say this is just a good sense of humor." Sarah Glazer, Are Medical Schools Sexist?, WASH. POST, Feb. 18, 1992, at Z10.

10. Jane Gross, Suffering in Silence No More: Fighting Sexual Harassment, N.Y. TIMES, July 13, 1992, at A1. The number of sexual harassment claims filed with the Equal Employment Opportunity Commission in the first half of 1992 was 4754, a more than 50% increase in the total number of claims filed during the same period of the previous year. Id. at D10.

11. Miriam Komaromy et al., Sexual Harassment in Medical Training, 328 N. ENG. J. MED. 322, 323 (1993) [hereinafter Komaromy Study]. The harassment described by students ranged from invitations for dates by physicians who were preparing letters of recommendation on behalf of the students to a physician’s request that a student stand next to him during a surgical procedure throughout which he rubbed his groin on her. Id. One student reported that a physician asked her if she had seen the pornographic film “Deep Throat;” he then reportedly “leaned across the desk toward her, opened his mouth wide, and ran his tongue slowly all the way around his lips.” Id.

12. Id. Another study published in 1990 reported that 42% of the medical students surveyed claimed to have experienced harassment from their peers. K. Harnett Sheehan et al., A Pilot Study of Medical Student ‘Abuse’: Student Perceptions of Mistreatment and Misconduct in Medical School, 263 JAMA 533, 535 (1990).


14. For example, women complained for the first time in 1992 about the customary dirty jokes and lewd skits performed at the annual year-end parties for residents at the University of California at San Francisco. Gross, supra note 10, at D10. Similarly, a second-year Georgetown student recently wrote in the school newspaper that lecturers often make sexist comments during class and that “snickering, giggling and generally rude commentary occur any and every time there is discussion of female reproductive organs.” Glazer, supra note 9, at Z10.

15. In May 1991, for example, Dr. Frances Conley announced her plan to resign from her position as Professor of Neurosurgery at Stanford Medical School because she could no longer work in an environment of widespread sexism. Veronizue Mistiaen, Staying the
have been marginally successful in alerting other members of the profession to the problem of sexism on campus, the majority of sexually harassed students continue to endure the harassment rather than risk retaliation for reporting it. Many of these students graduate from medical school and go on to practice medicine successfully, but they do so only after enduring a rigorous academic experience made unnecessarily difficult solely because of their gender.

Since more sexual harassment is reported in medical school than during residency, this Article will focus on sexual harassment in medical education. It will address sexual harassment by supervising physicians and professors as well as by peers. Part I describes the reasons why sexual harassment continues to be a widespread problem in medical schools. Part II explains the history and effect of the laws prohibiting sexual harassment generally. Part III focuses on Title IX of the Education Amendments of 1972 and sexual harassment in education. Finally, Part IV proposes several changes in the analytical framework used by courts to evaluate hostile environment sexual harassment claims under Title IX. Section A of Part IV argues that courts should evaluate the abusiveness of a learning environment from the perspective of a reasonable victim and demand only that the victim prove that the harassment made learning in that environment more difficult. Section B focuses on student-on-student harassment and argues that courts should, in appropriate circumstances, hold schools liable for student peer harassment as well as harassment by school employees.

Course: Professor Who Cried 'Sexism' Keeps on Teaching, Speaking. Houston Chron., Jan. 5, 1993, at 10. In a letter sent to local newspapers, Dr. Conley described Stanford Medical School as "a school dominated by men, where faculty use slides of Playboy centerfolds to spice up lectures and women are subjected to demeaning comments, fondling and advances." Id.


17. Although most women finish school and enjoy successful careers in medicine, they specialize in less lucrative and less prestigious fields than men. As a result of discrimination on the part of supervising physicians, faculty and peers, women are discouraged (and often flatly prohibited) from entering certain fields such as surgery. Dr. Frances Conley, Keynote Address at the Meeting of the Organization of Student Representatives of the Association of American Medical Colleges (Nov. 5, 1993) [hereinafter Conley, Keynote Address].

18. See supra note 12 and accompanying text.

I. FACTORS CONTRIBUTING TO THE CONTINUED PERVERSIVENESS OF SEXUAL HARASSMENT IN MEDICAL SCHOOLS

Medical school is unlike any other academic or professional training environment. In no other academic setting do faculty and supervisors wield so much control over the educational experiences and future career paths of their students. Medical training also involves a commitment of time and energy that far exceeds most other types of professional training. Finally, men dominate the field of medicine to a greater degree than they do in other professions. Each of these factors contributes to the pervasiveness of sexual harassment in medical schools.

Dr. Frances Conley, a well-known neurosurgeon and crusader for gender equality in the medical profession, attributes the problem of sex discrimination to the legacy of sexism in medicine. She points out that, in contrast to law or business, women have always had a role in health care—an essential, yet inferior role as nurse or home caregiver. She posits that as a result of this history, "[w]e all live with a social concept, tacitly accepted by both men and women, that in the medical profession men are dominant and women are subservient." Sex discrimination in the medical profession consequently remains "invisible" to many women as well as men, and those who do recognize it are reluctant to challenge the powerful status quo.

Most female medical students believe that they are incapable of stopping the harassment in their environment. In the Komaromy Study, for example, more than three-fourths of the women who decided not to report sexual harassment indicated that they did not be-

20. Komaromy Study, supra note 11, at 322. A medical student's ability to pursue a preferred specialization depends in large part on the evaluations and recommendations received from supervising physicians. Id.; see also BRUCE WEINSTEIN, ORGANIZATION OF STUDENT REPRESENTATIVES, ASSOCIATION OF AMERICAN MEDICAL COLLEGES, MEDICAL EDUCATION IN THE UNITED STATES: A STUDENT PERSPECTIVE 10 (1993) (describing the clinical experiences of third and fourth year students); BICKEL & QUINNIE, supra note 13, at 23 (describing students' fears regarding the educational and professional consequence of reporting gender-related problems encountered during medical training).
21. During their third and fourth years of medical school, students typically spend between 10 and 14 hours per day and every third or fourth night in the hospital. WEINSTEIN, supra note 20, at 9.
23. Id.
24. Id.
25. Id.
27. See supra notes 11-13 and accompanying text.
lieve reporting the incidents would have helped them.\textsuperscript{28} More significantly, they feared retaliation by their harassers.\textsuperscript{29} Medical students invest large amounts of time, energy, and money in their education and are understandably hesitant to challenge harassers who control their educational and career opportunities.\textsuperscript{30}

Regrettably, many female students accept sexual harassment as a form of initiation into the male-dominated medical profession.\textsuperscript{31} They hope that if they are tough enough to endure the harassing comments and gestures, they eventually will be accepted into the powerful "old boys' network."\textsuperscript{32} Contrary to their hopes, however, female medical students are rarely rewarded for enduring the sexual harassment they encounter in medical school. Instead of being welcomed into the profession as equals, they are reminded repeatedly that they do not fit in.\textsuperscript{33}

Finally, because of the legacy of sexism in medicine, it will be difficult to implement effective procedures to control sexual harassment in medical schools. Title IX's regulatory scheme\textsuperscript{34} requires educational institutions that receive federal funds to establish a sex discrimination complaint procedure.\textsuperscript{35} Appointing a person with sufficient authority to oversee this procedure and to enforce standards against sexual harassment may be difficult given that the harassers themselves commonly wield substantial power within the institution.\textsuperscript{36} Moreover, many students lack confidence in school reporting procedures and commonly elect to endure the harassment.\textsuperscript{37} The result is rampant sexism in medical schools, where talented women must tolerate hostile training environments in exchange for the opportunity to work in their chosen profession.

Because most sexual harassment of medical students goes unreported, harassers continue to perceive their actions as harmless.\textsuperscript{38} But

\begin{itemize}
  \item \textsuperscript{28} Komaromy Study, \textit{supra} note 11, at 324.
  \item \textsuperscript{29} \textit{Id.}
  \item \textsuperscript{30} \textit{Id.} at 322.
  \item \textsuperscript{31} \textit{See} Glazer, \textit{supra} note 9, at Z10 (describing the reactions of female students to sexual harassment).
  \item \textsuperscript{32} Conley, Keynote Address, \textit{supra} note 17.
  \item \textsuperscript{33} \textit{Id.}
  \item \textsuperscript{35} 34 C.F.R. § 106.8(b) (1993). The regulations require educational institutions to employ an individual responsible for investigating complaints and coordinating compliance efforts, but they do not identify a specific procedure. \textit{Id.} § 106.8(a).
  \item \textsuperscript{36} Komaromy Study, \textit{supra} note 11, at 322.
  \item \textsuperscript{37} \textit{Id.} at 324.
  \item \textsuperscript{38} \textit{See generally} Conley, \textit{supra} note 22, at 351 (describing the harassment of women as a cultural norm in medicine).
\end{itemize}
to continue to train medical students in hostile environments can only have grave effects on the medical profession. If male leaders of the profession are permitted to harass women, their trainees are likely to emulate their behavior and perpetuate sexism within the medical profession. Patient care will suffer if doctors are conditioned to ignore the complaints of women patients and trainees who suffer harassment are distracted from their work. Not only are many women deprived of an educational experience equal to their male counterparts, but physicians who intimidate or harass their trainees may also treat their female patients with the same lack of respect and train others to do likewise.

II. THE GENERAL PRINCIPLES OF SEXUAL HARASSMENT

Only a few laws specifically address the problem of sexual harassment. Claims of sexual harassment are commonly based on the two most prominent federal sex discrimination statutes: Title VII of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972. Title VII prohibits sex discrimination in the workplace and Title IX prohibits sex discrimination in federally funded education programs. Because the vast majority of sexual harassment

39. Id. at 352. Dr. Adriane Fugh-Berman, a 1988 graduate of Georgetown Medical School, recently charged the school with "buil[ding] disrespect for women into [the] curriculum." Glazer, supra note 9, at Z10. Fugh-Berman believes that the sexist attitudes that she observed while at Georgetown were unfair to women students and generally detract from the quality of female patient care. Id.
40. Id.
41. Komaromy Study, supra note 11, at 325.
42. Id.
46. Title VII declares that an employer may not lawfully discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ; or . . . limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex . . . .
47. 20 U.S.C. §§ 1681-1688 (1988). Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." Id. § 1681(a).
claims have alleged discrimination in the workplace, sexual harassment jurisprudence is drawn primarily from Title VII precedent.

Sexual harassment was first recognized as a form of sex discrimination in 1980 when the Equal Employment Opportunity Commission (EEOC) issued guidelines defining sexual harassment. Under current EEOC regulations, sexual harassment is defined as:

> [u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Although courts have consistently referred to the EEOC guidelines in the adjudication of sexual harassment claims, they have not developed a precise standard to distinguish between actions that do and do not constitute sexual harassment. Sexual harassment may be verbal or physical and may take the form of:

- verbal harassment such as sexual comments or name calling; leering or ogling; jokes or pictures; unnecessary touching; sexist remarks about a person's clothing, body, or sexual activities; constant brushing up against a person's body; subtle or overt pressure for sexual favors; physical assault; and rape.

Because it is sometimes difficult to isolate and label specific behavior as sexual harassment, courts have focused on the effect of the behavior on the victim to decide whether the conduct in question constitutes sexual harassment. Using this approach, federal courts have recognized two types of sexual harassment: quid pro quo harass-

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48. Sherer, supra note 43, at 2123 (noting that a "significant body" of case law has developed regarding workplace sexual harassment).
49. Id.; see also Mabry v. State Bd. of Community Colleges and Occupational Educ., 813 F.2d 311, 316 n.6 (10th Cir.) (stating that Title VII is "the most appropriate analogue when defining Title IX's substantive standards"), cert. denied, 484 U.S. 849 (1987).
51. 29 C.F.R. § 1604.11(a) (1993).
52. Sherer, supra note 43, at 2125.
53. See CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 29 (1979) (listing conduct that may constitute sexual harassment).
54. Sherer, supra note 43, at 2127 (citations omitted).
ament and hostile environment harassment. Quid pro quo harassment occurs when a supervisor conditions a job or academic benefit on the receipt of sexual favors, or punishes or threatens to punish the victim if the victim refuses to comply with sexual demands.\textsuperscript{55} Hostile environment harassment occurs where the harassing conduct so infuses the academic or work atmosphere with hostility toward members of one sex that it alters the victim's educational experience or conditions of employment.\textsuperscript{56}

The United States Supreme Court first addressed hostile environment sexual harassment in \textit{Meritor Savings Bank v. Vinson}.\textsuperscript{57} This case involved a female bank employee who claimed to have complied unwillingly with her supervisor's sexual requests because she feared losing her job.\textsuperscript{58} Although the plaintiff suffered no tangible job loss, the Court held her claim of hostile environment harassment actionable under Title VII.\textsuperscript{59} The Court noted that Title VII prohibits discrimination in the terms, conditions, or privileges of employment, as well as in tangible employment benefits such as compensation and promotions,\textsuperscript{60} and held that conduct which forces "a man or woman" to "'run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living'" violates Title VII.\textsuperscript{61} The Court stressed, however, that in order to be actionable, the harassment must be "unwelcome"\textsuperscript{62} and "sufficiently severe or pervasive so as 'to . . . create an abusive working environment.'"\textsuperscript{63} Furthermore, the Court directed the trier of fact to evaluate whether an abusive environment existed in light of "'the record as a whole' and 'the totality of circumstances.'"\textsuperscript{64}

\begin{itemize}
\item \textsuperscript{55} See, e.g., Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979) (Title VII claim); Alexander v. Yale Univ., 459 F. Supp. 1 (D. Conn. 1977) (Title IX claim), \textsl{aff'd}, 631 F.2d 178 (2d Cir. 1980).
\item \textsuperscript{56} See, e.g., \textsl{Meritor Sav. Bank v. Vinson}, 477 U.S. 57 (1986) (Title VII claim); Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988) (Title IX claim).
\item \textsuperscript{57} \textsl{477 U.S. 57} (1986).
\item \textsuperscript{59} \textsl{Meritor}, \textsl{477 U.S. at 73}.
\item \textsuperscript{60} \textsl{Id. at 66}.
\item \textsuperscript{61} \textsl{Id. at 67} (quoting \textsl{Henson v. Dundee}, 682 F.2d 897, 902 (11th Cir. 1982)).
\item \textsuperscript{62} \textsl{Id. at 68} (citing \textsl{EEOC Guidelines}, 29 C.F.R. \textsection 1604.11(a) (1985)).
\item \textsuperscript{63} \textsl{Id. at 67} (quoting \textsl{Henson}, 682 F.2d at 904).
\item \textsuperscript{64} \textsl{Id. at 69} (quoting the \textsl{EEOC Guidelines}, 29 C.F.R. \textsection 1604.11(b) (1985)). The EEOC Guidelines currently state:
\begin{quote}
[T]he Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.
\end{quote}
\end{itemize}
In *Meritor*, the Court did not identify the perspective from which the factfinder should assess abusiveness, and, until recently, the applicable standard was in dispute. In 1991, the Court of Appeals for the Ninth Circuit adopted a "reasonable woman" standard, but other circuits have consistently applied the more traditional "reasonable person" standard. Because a determination of sexual harassment claims is often made on the basis of whether the plaintiff is found to have misconstrued or overreacted to the defendant's conduct, the perspective that controls is extremely important. In November 1993, the Supreme Court settled this discrepancy. In *Harris v. Forklift Systems, Inc.*, the Court held that "[con]duct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview."

The *Meritor* Court also neglected to describe the type of evidence of sexual harassment a plaintiff must offer in order to prove the existence of an abusive environment. Although the Court expressly held that a showing of tangible loss was not necessary in a hostile environment claim, several federal courts in the years following *Meritor* have required that plaintiffs show demonstrable psychological harm in order to prevail in Title VII hostile environment suits. In *Harris*, the Court attempted to demystify the abusiveness inquiry by listing spe-

29 C.F.R. § 1604.11(b) (1993).

65. Ellison v. Brady, 924 F.2d 872, 878, 879 (9th Cir. 1991). The court recognized that because women are disproportionately the victims of sexual abuse, they are affected differently than men. The court decided to evaluate harassment from the perspective of a reasonable woman in order to recognize the legitimacy of women's feelings and fears with regard to sexual conduct. *Id.*

66. See, e.g., Lipsett v. University of Puerto Rico, 864 F.2d 881, 898 (1st Cir. 1988) (stating that the fact finder must keep in mind the perspectives of both the female victim and her male harasser); Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987) (adopting the standard of a reasonable person in like or similar circumstances to the victim).

67. Lipsett, 864 F.2d at 898.


69. *Id.* at 370 (emphasis added). The *Harris* Court settled the debate regarding whether a "reasonable person" or "reasonable victim" standard should apply before it reached the issue of whether a plaintiff must prove serious psychological harm in order to prevail on a Title VII claim. *Id.* In fact, Justice O'Connor reportedly asked during the oral argument of the case: "Is it the reasonable person or the reasonable woman's perspective that should control?" Tony Mauro, *Drawing the Harassment Line: Court Debates the Standard for Workplace*, *The Sun* (Baltimore), Oct. 14, 1993, at 2A. In writing the opinion, however, Justice O'Connor failed to call attention to the importance of the perspective issue.

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

71. See, e.g., Vance v. Southern Bell Tel. & Tel. Co., 863 F.2d 1503, 1510 (11th Cir. 1989) (noting that an actionable harassment claim must establish the existence of a hostile work environment that is sufficiently severe to affect the employee's psychological stabil-
Specific factors courts should consider in deciding whether an environment was sufficiently abusive. Relevant factors include “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” Claiming to “reaffirm” the standard announced in Meritor, the Harris Court held that while Title VII does not make actionable “any conduct that is merely offensive,” it does not “require[e] the conduct to cause a tangible psychological injury.” Psychological harm, according to Harris, is a relevant factor in the hostile environment inquiry, but not a required one.

Once a plaintiff convinces the fact finder that the harassment created an environment that would reasonably be perceived as hostile or abusive, courts may impose vicarious liability on the harasser’s employer. Still regarded as the seminal Supreme Court ruling on this point, Meritor instructed courts to look to principles of agency in deciding questions of institutional liability in hostile environment sexual harassment cases. In addition, while the Meritor Court stated that employers are not always liable for harassment of their employees by supervisors, it indicated that they are not always shielded from liability by a lack of notice. Adopting these principles, lower courts generally have ruled that employers are liable for hostile environment sexual harassment imposed by a victim’s supervisors only where an official of the institution knew or should have known of the harassment and did not take appropriate action to stop it. That standard
also has been applied where sexual harassment by the victim's co-workers created a hostile environment.  

III. SEXUAL HARASSMENT UNDER TITLE IX  

A. Title IX Avenues of Relief

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." Because few states have enacted legislation regarding sexual harassment in education, Title IX may be the sexually harassed student's only recourse. In addition to mandating institutional self-regulation, Title IX provides for student-triggered government enforcement. Under the statute, student victims of any form of sex discrimination, including sexual harassment, may file a written complaint with the Office of Civil Rights (OCR). If OCR determines that a Title IX violation has occurred, it will attempt to bring the institution into compliance through informal means. If compliance is not achieved informally, OCR may initiate administrative proceedings to terminate federal funding or ask the Department of Justice to seek enforcement of Title IX through the courts.

For student victims, however, Title IX's enforcement mechanism is not a satisfactory procedure. First, the transient nature of student life and the inevitable delays in the administrative process typically deny the victim any personal or timely benefit from the school's even-

80. See, e.g., Ellison, 924 F.2d at 882 (noting employers have an obligation under Title VII to discipline employees who sexually harass co-workers); Lipsett, 864 F.2d at 901 (expressly holding that the "knew or should have known" standard applies "to situations in which the hostile environment harassment is perpetrated by the plaintiff's coworkers").
82. Minnesota and California are the only states to have enacted legislation regarding sexual harassment in schools. See Minn. Stat. Ann. § 363.01.41 (West 1994) (defining sexual harassment as unwelcome sexual advances, physical conduct or communication of a sexual nature that creates an intimidating, hostile, or offensive environment at work or in school); Cal. Educ. Code § 212.5 (West 1994) (defining sexual harassment as requests for sexual favors, unwelcome sexual advances, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the work of an educational setting). For a discussion of these laws, see Sherer, supra note 43, at 2139-41.
84. 34 C.F.R. § 106.7(b) (1993). Students need not first attempt to use the internal grievance procedure at their school. It's Not Academic, supra note 83, at 6.
85. 34 C.F.R. § 100.7(d)(1) (1993).
87. 34 C.F.R. § 100.8(a)(1) (1993).
tual reform.\textsuperscript{88} Second, settlement or negotiation with OCR ordinarily occurs without victim participation.\textsuperscript{99} Third, the punishment imposed on the institution for noncompliance with Title IX does not compensate the victim.\textsuperscript{90} Finally, the termination of government funding ultimately will harm students if sanctioned schools are compelled by funding reductions to eliminate programs or classes.\textsuperscript{91}

Fortunately, Title IX provides student victims of sexual harassment with another avenue for complaint and recovery. In \textit{Cannon v. University of Chicago},\textsuperscript{92} the Supreme Court ruled that an implied right of action exists under Title IX,\textsuperscript{93} and that student victims of sex discrimination need not exhaust institutional avenues of relief before filing suit.\textsuperscript{94} The Court noted that one of Congress's goals in enacting Title IX was to provide citizens with protection against sex discrimination in education\textsuperscript{95} and held that “[t]he award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with—and in some cases even necessary to—the orderly enforcement of the statute.”\textsuperscript{96}

Until recently, the damages available to a Title IX plaintiff were unclear, but in \textit{Franklin v. Gwinnett County Public Schools},\textsuperscript{97} the Supreme Court confirmed that monetary damages are available to plaintiffs who bring private Title IX actions.\textsuperscript{98} In addition, the \textit{Franklin} decision signified that student plaintiffs who no longer attend the defendant school have standing to bring suit under Title IX.\textsuperscript{99} With

\begin{itemize}
\item \textsuperscript{88} Studies indicate that OCR and the Department of Education rarely comply with the regulatory requirements of prompt resolution of complaints and completion of compliance reviews. N. Campbell et al., Sex Discrimination in Education: Legal Rights and Remedies 1-6 (1983). \textit{See generally} Ronna G. Schneider, Sexual Harassment and Higher Education, 65 Tex. L. Rev. 525, 527-28 (1987) (discussing the reasons why students are unlikely to file complaints for sexual harassment).
\item \textsuperscript{89} Campbell, supra note 88, at 1-8.
\item \textsuperscript{90} \textit{See generally} 20 U.S.C. §§ 1681-1688; 34 C.F.R. § 106.71; 34 C.F.R. § 100.8 (listing sanctions for failure to comply with regulations).
\item \textsuperscript{91} Schneider, supra note 88, at 532 n.35.
\item \textsuperscript{92} 441 U.S. 677 (1979).
\item \textsuperscript{93} Id. at 717.
\item \textsuperscript{94} Id. at 680 n.2, 717 (concluding that petitioner could maintain her lawsuit despite the incomplete investigation by the Department of Health, Education, and Welfare into petitioner's case).
\item \textsuperscript{95} Id. at 704. Congress also sought to ensure that federal resources would not be used to support discriminatory practices in the schools. Id.
\item \textsuperscript{96} Id. at 705-06.
\item \textsuperscript{97} 112 S. Ct. 1028 (1992).
\item \textsuperscript{98} Id. at 1038.
\item \textsuperscript{99} Id. The Court granted monetary damages to the plaintiff in \textit{Franklin} because she no longer attended the defendant school district and prospective relief would have been "clearly inadequate." Id. The Court refused to leave the plaintiff "remediless." Id. Under earlier Title IX case law, a plaintiff's graduation from the defendant school rendered her
\end{itemize}
the addition of personal compensation to the list of potential Title IX remedies and the removal of mootness as a defense to an action for damages, the *Franklin* Court provided student victims of sex discrimination a realistic means to obtain relief, and thereby rendered Title IX a much more powerful statute.  

B. Title IX Case Law Involving Sexual Harassment

Despite their right to sue under Title IX, very few student victims of sexual harassment have elected to pursue their claims in court. In 1977, the United States District Court for the District of Connecticut heard the first Title IX sexual harassment claim in *Alexander v. Yale University*. In *Alexander*, the court held that only students who can demonstrate that sexual harassment caused them tangible academic loss present "justiciable" claims. The *Alexander* case involved several plaintiffs, but the court found that only the student who asserted that she received a low grade after refusing a professor's sexual demands had an actionable claim. The court dismissed the allegations of another student who claimed that she was humiliated and distracted from her studies as a result of harassment by an athletic coach. In addition, the court dismissed the claims of co-plaintiffs who maintained that, although they were not the objects of sexual misconduct, they suffered emotionally when they learned of another student's harassment and of the lack of an effective complaint procedure at the school. Recognizing only quid pro quo harassment, the court held that "such imponderables as atmosphere and vicariously experienced wrong . . . are untenable on their face." The Second Circuit af-

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101. Sherer, supra note 43, at 2147. The *Franklin* Court's decision allowing Title IX plaintiffs to sue for money damages may induce more victims to sue in the future. *Franklin*, 112 S. Ct. at 1038; see supra notes 98-100 and accompanying text.


103. Id. at 46.

104. Id.

105. Id. at 3-4. The court stated that the critical difference between the plaintiffs' claims was that only one plaintiff had complained to and been rebuffed by the school. Id. at 4. The Supreme Court has since held that Title IX plaintiffs need not exhaust institutional procedures before filing suit. Cannon v. University of Chicago, 441 U.S. 677, 717 (1979); see supra notes 92-95 and accompanying text.


107. Id.
firmed the district court's decision in *Alexander*, upholding its ruling that the creation of a discriminatory environment without evidence of tangible loss is not actionable sexual harassment under Title IX.\(^{108}\)

Seven years later, in *Moiré v. Temple University School of Medicine*,\(^ {109}\) the District Court for the Eastern District of Pennsylvania came to a different conclusion and held sexual harassment that generates a hostile environment is actionable under Title IX.\(^ {110}\) In *Moiré*, the court stated that "[t]he issue is whether plaintiff because of her sex was in a harassing or abusive environment . . . with [the school's] tacit or explicit consent."\(^ {111}\) The court held that though the EEOC Guidelines on Sexual Harassment should inform Title IX as well as Title VII decisions,\(^ {112}\) there was no merit in the particular claim before it.\(^ {113}\) *Moiré* remains the only decision affirmed by a federal appeals court to acknowledge hostile environment sexual harassment in a purely educational setting.

In 1993, however, another federal district court twice held that hostile environment sexual harassment claims may be brought under Title IX. In *Patricia H. v. Berkeley Unified School District*,\(^ {114}\) the District Court for the Northern District of California acknowledged that a teacher's sexual harassment violates Title IX when it creates a hostile educational environment for the student victim.\(^ {115}\) In order for the institutional defendant to be liable, however, the plaintiff must demonstrate the institution's knowing failure to act.\(^ {116}\) In view of Title VII principles, the court stated that the harasser's employer is liable only if it fails to take "immediate and appropriate" action "reasonably calculated" to curtail the harassing conduct.\(^ {117}\)

Subsequently, in *Doe v. Petaluma City School District*,\(^ {118}\) the same court held that student-on-student hostile environment sexual harassment violates Title IX.\(^ {119}\) The *Petaluma* decision represents the first

110. Id. at 1367.
111. Id. The school could be held liable under Title IX to the extent it "condoned or ratified" any discriminatory behavior on the part of its employees. Id. at 1366.
112. Id. at 1367 n.2.
113. The court rejected the former medical student's claim that, during her third year psychiatric clerkship, the defendant physicians conspired to discriminate against her and gave her a failing grade because of her sex, necessitating that she repeat her third year at medical school. Id. at 1362.
115. Id. at 1289, 1293.
116. Id. at 1297.
117. Id.
119. Id. at 1576.
time a court found that school authorities may be held liable for student-on-student harassment. The case involved statements by the plaintiff's seventh and eighth grade classmates that, for example, "[she] had a hot dog in her pants and that she had sex with hot dogs." The plaintiff complained to her school counselor approximately every other week during the two year period of harassment. Her parents also complained numerous times, but the counselor responded essentially that "boys will be boys." Although the counselor promised to warn the harassers, the harassment continued until the plaintiff's parents finally transferred their daughter to a private school for girls.

Although the Petaluma court acknowledged that the harassment violated Title IX, it held that in order to be awarded damages from the school district, the victim must demonstrate intentional discrimination on the part of the institutional defendant. Because the harassers were not agents of the school district, the latter's knowledge of the harassment and failure to act was not enough to enable the plaintiff to recover. The court suggested, however, that a "student could proceed against [an institutional defendant] on the theory that its inaction (or insufficient action) in the face of complaints of student-on-student sexual harassment was a result of an actual intent to discriminate . . . ."

C. A Hybrid Case: Title IX in the Mixed Employment and Educational Setting

In Lipsett v. University of Puerto Rico, the Court of Appeals for the First Circuit heard a Title IX hostile environment sexual harass-

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120. See id. at 1573 (noting that no court has addressed the question of whether student-on-student sexual harassment is actionable under Title IX); see also Sherer, supra note 43, at 2123, 2152 (noting that no Title IX cases before 1993 involved purely student-on-student sexual harassment).
121. Petaluma, 830 F. Supp. at 1564.
122. Id.
123. Id. at 1564-65.
124. Id. at 1566.
125. Id. at 1576. The court looked to the Supreme Court's decision in Franklin v. Gwinnett County Pub. Sch., 112 S. Ct. 1098 (1992), for guidance. The Petaluma court noted that Franklin did not expressly hold that the prohibitions and remedies of Title VII and Title IX were identical. Nevertheless, the Petaluma court held that Franklin impliedly ruled that Title IX "damages are available only for intentional discrimination, but that respondeat superior liability exists, so that an institution is deemed to have intentionally discriminated when one of its agents has done so." Id. at 1575.
126. Id. at 1576.
127. Id.
128. 864 F.2d 881 (1st Cir. 1988).
ment claim that stemmed from harassment in a mixed employment and academic setting. The plaintiff in Lipsett, a female surgical resident, alleged that she was sexually harassed by supervising physicians and co-residents during her residency and that she was eventually expelled from the program because of her sex. She complained of a wide variety of discriminatory treatment: her chief resident informed her during her first year that "surgery was a male preserve not hospitable to women;" she was repeatedly reminded of another woman resident’s dismissal after complaining about harassment; and a supervising physician declared openly that he intended to eliminate all women from the program. In addition, she claimed that her supervising physician remarked to a group of male patients in her presence that he would like to have sex with a particular nurse, told a male patient on whom she was performing a rectal examination that she was about to give him "pleasure," and informed her that women should not be surgeons because they are not dependable when "in heat." Furthermore, male residents posted a sexually explicit drawing of the plaintiff’s body and an array of Playboy centerfolds in the area where residents met to eat and discuss academic matters. Male residents also circulated a list of sexually charged nicknames of female residents, made sexual demands of the plaintiff, and often attempted to make unnecessary bodily contact with her. Despite her complaints to supervisors, her situation did not improve and she was eventually dismissed from the program. Based on these allegations, the Court of Appeals for the First Circuit held that the plaintiff had made out a prima facie case of both quid pro quo and hostile environment sexual harassment.

The Lipsett decision is an optimistic sign for future student sexual harassment victims who bring suit under Title IX, although its efficacy in purely academic settings, as opposed to mixed employment-training contexts, is uncertain. On a positive note, the court stated that a plaintiff need not show tangible loss to prevail on a Title IX hostile environment sexual harassment claim. Citing the Supreme Court’s

129. Id. at 897.
130. Id. at 884.
131. Id. at 887.
132. Id.
133. Id.
134. Id.
135. Id. at 888.
136. Id.
137. Id. at 892.
138. Id. at 905-06.
139. Id. at 898.
decision regarding Title VII sexual harassment in *Meritor*, the court stated that to make out a prima facie case of Title IX hostile environment harassment, a victim need only demonstrate that she "was subjected to unwelcome sexual advances so 'severe and pervasive' that it altered . . . her working or educational environment." While the language of *Lipsett* explicitly covers hostile environment harassment in an educational setting, the extent to which the court may have extended the force of the *Lipsett* plaintiff's quid pro quo claim into its hostile educational environment assessment is unclear. The plaintiff's eventual dismissal from the program may have influenced the court's acceptance of her hostile environment claims. Although the court distinguished and found valid both the hostile environment and quid pro quo claims, the sheer volume of the plaintiff's evidence seemed to convince the court on both counts.

The *Lipsett* decision also represents the only instance in which a federal appeals court has recognized student-on-student harassment as a violation of Title IX. The degree to which the court's decision in *Lipsett* will benefit future victims of peer harassment in a purely academic setting is unclear. Although the court held that "sexual harassment by the residents could give rise to a cause of action against the University under Title IX," it also explicitly stated that its holding was limited to harassment in "this mixed employment-training context." Thus, the court's recognition of the plaintiff's allegations regarding her co-residents remains ambiguous. As residents, they were employees of the defendant institution, co-workers of the plaintiff, and students.

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141. *Lipsett*, 864 F.2d at 898 (citing *Meritor*, 477 U.S. at 67) (emphasis added). The court stated that the plaintiff's allegations of repeated unwanted sexual advances by supervising physicians constituted a prima facie case of actionable sexual harassment and that her claims regarding the male residents' drawing of her body, Playboy centerfolds and nicknames buttressed her case. *Id.* at 905.

142. *Id.* at 886-94 (highlighting the court's treatment of the plaintiff's evidence).

143. *See Sherer, supra* note 43, at 2150 (expressing the opinion that the First Circuit only established that sex discrimination standards developed under Title VII apply to employment related claims under Title IX).

144. *Lipsett*, 864 F.2d at 895.

145. *Id.* at 897.
IV. DEVELOPING A Viable Cause of Action for Sexually Harassed Medical Students: Proposals for Deciding Future Claims of Hostile Environment Sexual Harassment under Title IX

A. A New Method of Judging Abusiveness and Hostility

1. The Problem.—No court to date has decided a Title IX hostile environment sexual harassment claim in favor of a student victim without evidence of tangible loss.\textsuperscript{146} If, however, courts heed the Supreme Court's warning in \textit{Meritor} that women must not be required to "run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living,"\textsuperscript{147} they will not require Title IX plaintiffs to show evidence of tangible loss. Nor will they require student victims to show demonstrable psychological harm.\textsuperscript{148} Rather, as the Supreme Court recently explained in \textit{Harris}, factors such as psychological harm, the severity and frequency of the harassment, and whether it interferes with the victim's work are to be considered in the hostile environment evaluation, but no single factor is required under Title VII.\textsuperscript{149} Courts deciding claims of hostile environment harassment under Title IX should accept Title VII jurisprudence on this issue and permit student claims to go forward without evidence of tangible harm. In addition, in order to reduce the impact that sexist attitudes often play in the outcome of claims that lack evidence of tangible harm, courts should adopt a reasonable victim\textsuperscript{150} standard by which to evaluate the environment and an increased difficulty\textsuperscript{151} standard by which to judge abusiveness.

A female student who is subjected to an intimidating, hostile or offensive academic environment because of her gender is, indeed, the victim of sex discrimination. That she was not forced to leave her academic program altogether should not preclude the successful assertion of a Title IX action. The crucial point is that she was treated

\textsuperscript{146} See Sherer, \textit{supra} note 43, at 2150. Prior to 1993, \textit{Alexander}, \textit{Moire}, and \textit{Lipsett} were the only reported federal cases to consider a claim of sexual harassment under Title IX. All three cases required evidence of tangible loss. \textit{Id.; see supra} notes 102-113, 128-138 and accompanying text. \textit{Patricia H. and Petaluma}, the two federal cases decided since 1993, did not shed further light on the degree of evidence required to show tangible harm. \textit{See supra} notes 114-127 and accompanying text.

\textsuperscript{147} \textit{Meritor}, 477 U.S. at 67 (quoting \textit{Henson v. Dundee}, 682 F.2d 897, 902 (1982)).

\textsuperscript{148} \textit{Harris v. Forklift Sys., Inc.}, 114 S. Ct. 367, 370-71 (1993) (asserting a standard of harm mid-way between conduct that is merely offensive and conduct that causes tangible psychological injury, and holding the district court in error for its reliance on whether the conduct seriously affected plaintiff's psychological well-being).

\textsuperscript{149} \textit{Id.} at 371.

\textsuperscript{150} See \textit{supra} note 65.

\textsuperscript{151} See infra notes 175-176 and accompanying text.
In the words of Title IX, a sexually harassed student has been “denied the benefits” of an education equal to that of her male peers “on the basis of sex.” Managing to endure unfair and discriminatory treatment without incurring any tangible academic or psychological harm does not make a female student any less a victim of sex discrimination.

As the Komaromy Study demonstrates, the vast majority of sexually harassed female medical students elect to endure their treatment in silence. Sexual harassment is a price they pay for the opportunity to pursue an education in their chosen field. Many do not incur tangible loss. Their loss is instead measured by the degree to which pursuit of their chosen career is made more difficult for them as compared to their male classmates. As a result of such discriminatory treatment, female medical students often lose self-confidence, develop a sense of powerlessness, become cynical toward life and the medical profession, and forego medical specialties they would have chosen but for the discrimination within the profession.

The Moire, Petaluma, and Lipsett courts seemed to recognize the intangible harm caused by hostile environment sexual harassment within educational institutions. While these decisions offer encouragement, they give scant indication of the type or amount of evidence required for an award of damages in a Title IX hostile environment claim. In fact, Title IX case law indicates that courts generally find a sufficiently abusive or hostile environment only where the plaintiff has suffered in some demonstrable way. Where there is no convincing evidence of unfair tangible loss, harmful stereotypes and miscon-

152. The Office for Civil Rights of the United States Department of Education defines “sexual harassment” under Title IX as “verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under Title IX.” It’s NOT ACADEMIC, supra note 83, at 2.


154. See supra notes 11-13 and accompanying text.

155. See generally Sherer, supra note 43; Conley, Keynote Address, supra note 17.

156. See supra notes 109-112, 118-127, and 128-138 and accompanying text.

157. See supra Part III.B.

158. Convincing a court that a plaintiff has suffered unfair tangible academic loss can also be difficult. Courts often defer to the academic judgment of school officials when deciding whether a course grade or program dismissal was unfair. See Board of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 91 (1978) (“Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.”). See also infra note 160.
ceptions appear to influence abusiveness judgments and lead to the denial of meritorious claims.

In Moire, for example, the court dismissed the plaintiff's claims of sexual harassment for lack of "credible evidence."\textsuperscript{159} Not surprisingly, the court found more credible the testimony of an established physician than a third-year medical student, who, according to the court, may have been "[unable] . . . to perceive men's attitudes and intentions toward her."\textsuperscript{160} In Lipsett and Petaluma, on the other hand, the courts found believable the harassment claims of victims who also suffered some tangible academic and economic loss. Lipsett was dismissed from her surgical residency program\textsuperscript{161} and Doe was forced to leave her school to attend a private, more expensive school for girls.\textsuperscript{162} Although neither court included a tangible harm requirement in its discussion of hostile environment sexual harassment, each appeared to be influenced by the evidence of demonstrable harm before it. The Petaluma court stated that it did not intend "that an actionable hostile environment does not exist unless the environment is so bad that the victim feels compelled to quit the institution,"\textsuperscript{163} but it made no effort to explain what evidence, absent a clear and undeniable loss, would be enough to prove a sufficiently abusive or hostile environment.

This evidentiary problem stems in large part from the fact that no such standard has been articulated by the courts. Even under the more thoroughly developed Title VII jurisprudence, no concrete rule exists by which to judge environmental abusiveness or hostility. In Harris,\textsuperscript{164} the Supreme Court outlined factors that should be considered in the abusiveness evaluation, but it offered no guidance as to how triers of fact should weigh those factors.\textsuperscript{165} Thus, triers of fact must rely upon their own experience and discretion, often wrought with misconceptions and harmful stereotypes, to judge the legitimacy

\textsuperscript{159} Moire, 613 F. Supp. at 1362.

\textsuperscript{160} Id. at 1369. At issue in Moire was a course grade the plaintiff claimed was unfairly low. Deferring to the judgment of the educational institution's staff, the court held that "[i]t [was] not [its] role to set grading standards for a professional school but at most to consider whether a decision to fail a student was rational . . . ." Id. at 1371.

\textsuperscript{161} Lipsett, 864 F.2d at 892. The court did not defer to the judgment of the academic institution in Lipsett because the plaintiff's quid pro quo claim was particularly strong. See supra text accompanying notes 130-137.

\textsuperscript{162} Petaluma, 830 F. Supp. at 1566.

\textsuperscript{163} Id. at 1575 n.10.

\textsuperscript{164} Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993).

\textsuperscript{165} See supra text accompanying note 73. The Court "neither sa[id] how much of each is necessary . . . nor identifie[d] any single factor as determinative." Id. at 372 (Scalia, J., concurring).
of hostile environment claims. Where plaintiffs satisfactorily demonstrate tangible harm in the form of some undeniable loss, such as job or program dismissal, their allegations of intangible harm are more believable. Where plaintiffs fail to prove tangible harm or manage to leave a hostile environment without incurring any measurable loss, stereotypes and prejudice may easily seep into the abusiveness evaluation and overcome evidence of severe and entrenched sexism within the institution.166

2. The Proposal.—A two-part change in the analysis of hostile environment sexual harassment claims would significantly limit the impact of sexist attitudes on the outcome of these cases. First, courts should evaluate the abusiveness of an environment from the perspective of a reasonable woman (assuming the victim was a woman) rather than from the standpoint of a reasonable person. Second, the abusiveness inquiry should require no more than a finding that the harassment made the plaintiff's work or academic regime more difficult. The dispositive question would then become: Would a reasonable woman find that the conduct at issue made study or work in the environment more difficult? In Meritor, the Supreme Court held that, in order to be actionable, sexual harassment must be severe or pervasive;167 it did not declare that the alteration of the environment must be severe.168 An inquiry that examines whether a reasonable woman would have found that the conduct in question made her academic or work environment more difficult would properly focus the court's attention on the harasser's conduct, rather than on the appropriateness of the victim's reactions.

166. In Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987), for example, the court denied the sexual harassment claim of a woman whose workplace was plastered with posters of naked women, and where a male employee customarily called women "whores," "cunt," "pussy," and "tits." Rabidue v. Osceola Refining Co., 584 F. Supp. 419, 423 (E.D. Mich. 1984). Noting that the woman voluntarily entered an environment where she should have expected such treatment, and that society "condones and publicly features ... open displays of written and pictorial erotica," the court denied her hostile environment claim. Rabidue, 805 F.2d at 620, 622.

Similarly, in Scott v. Sears, Roebuck & Co., 798 F.2d 210 (7th Cir. 1986), the court denied the claim of a woman who alleged that she was constantly propositioned by a supervisor and that co-workers often slapped her buttocks and remarked about the way they thought she might act during sexual intercourse. Id. at 211-12. The court acknowledged that the conduct was "demeaning" but found the environment insufficiently abusive. Id. at 213.

168. Ellison, 924 F.2d at 878.
Prior to the Supreme Court's explicit application of the reasonable person standard in *Harris*, the Court of Appeals for the Ninth Circuit applied a narrower reasonable victim standard in Title VII sexual harassment cases. In recognition that men often incorrectly view sexual harassment as harmless amusement to which only overly sensitive women take issue, the court decided in *Ellison v. Brady* to evaluate the abusiveness of the environment from the perspective of a reasonable victim. To do otherwise, according to the court, would allow those responsible to "continue to harass merely because a particular discriminatory practice was common." In medical schools where sexual harassment is commonplace, this possibility poses a special threat. A focus on the victim's perspective tacitly recognizes that men and women often react differently to harassing conduct and requires triers of fact to evaluate the environment from the perspective of the victim. Such an inquiry would encourage sensitivity to the intangible harm caused by sexual harassment and reduce the impact of prejudice in the abusiveness analysis.

To require a plaintiff to prove only that the sexual harassment made work or study in the environment more difficult would also reduce the influence of sexist attitudes on the outcome of these cases. Fact finders would have fewer opportunities to inject personal prejudice because they would no longer be forced to make difficult judgments about the degree of abusiveness or hostility in the environment. Rather than assessing the severity of the alteration of the victim's environment, the fact finder would need only determine whether the alteration made work or study more difficult. Justice Ginsburg espoused this view in her concurring opinion in *Harris*. She described "the critical issue" as "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which mem-

170. *Ellison*, 924 F.2d at 878.
172. *Ellison*, 924 F.2d at 878.
173. *Id.*
174. Critics may claim that recognition of such differences between women and men only serves to perpetuate sexual stereotyping. In this instance, however, an acknowledgment of differences between the sexes will more likely legitimize women's reactions to and feelings about sexual harassment.
bers of the other sex are not exposed."\textsuperscript{175} To be actionable, she asserted, the harassment need only "make it more difficult to do the job."\textsuperscript{176}

The "job" of many female medical students is unquestionably made more difficult because of sexual harassment. Although many of these students do not incur tangible loss as a result of the discrimination, their educational experience is nonetheless more difficult than that of their male peers. To evaluate the environment from a woman's point of view and to judge abusiveness by simply asking whether the victim's work or study was made more difficult on account of the harassment would reduce the impact of sexist attitudes on the outcome of these claims.

\textbf{B. Holding Educational Institutions Liable for Longstanding and Pervasive Student Peer Harassment}

1. The Problem.—The term "peer harassment" refers to sexual harassment by a victim's colleagues rather than by her superiors.\textsuperscript{177} Although most definitions of sexual harassment refer to an uneven balance of power between the harasser and the victim,\textsuperscript{178} student-on-student peer harassment connotes harassment among equals. That is not to say, however, that power differentials do not exist among peers. On the contrary, men often wield more power in the workplace or academic environment than their female counterparts, even in fields where males no longer outnumber females.\textsuperscript{179} Female medical students are particularly vulnerable because they are pursuing careers in a field traditionally dominated by men, where the stereotype of the subservient woman is firmly entrenched.\textsuperscript{180}

The National Council on Women's Educational Programs defines "academic sexual harassment," such as that encountered by female

\textsuperscript{175} \textit{Harris}, 114 S. Ct. at 372 (Ginsburg, J., concurring). Although Justice Ginsburg found the Court's opinion "in harmony" with her view, the standard announced by the Court is vague and susceptible to a far less liberal reading. \textit{Id.}; see supra text accompanying notes 164-165.

\textsuperscript{176} \textit{Id.} (quoting \textit{Davis v. Monsanto Chem. Co.}, 858 F.2d 345, 349 (6th Cir. 1988) (discussing racial discrimination)). Justice Ginsburg would apparently apply the same legal analysis in the evaluation of sex- and race-based discrimination cases, unless sex was determined to be a bona fide occupational qualification under Title VII. \textit{See id.}


\textsuperscript{178} In her seminal book on sexual harassment, Professor MacKinnon defined sexual harassment as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power." \textit{MacKinnon}, supra note 53, at 1.

\textsuperscript{179} \textit{See generally Sherer}, supra note 43, at 2131-34.

\textsuperscript{180} Conley, supra note 22, at 351-52.
medical students, as "the use of authority to emphasize the sexual identity of a student in a manner which prevents or impairs that student's full enjoyment of education benefits, climate, or opportunities." Arguably, the "authority" of male medical students who harass their female classmates derives from the surviving stereotypes of women and the history of male dominance in the medical profession.

Contrary to the mandate of Title IX, victims of peer harassment are "denied the benefits" of an equal education and "subjected to discrimination" because of their sex. As with harassment in the workplace, student victims of peer harassment find themselves attempting to learn and study in a belittling and hostile climate. Unlike their male colleagues, female medical students must expend extra and unnecessary energy just to overcome the burdens of sexual harassment in the academic environment. They experience "feelings of embarrassment, fear, anger, frustration, loss of self-confidence, powerlessness, and cynicism about education." According to one commentator,

A nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits that a student receives. 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. Any diminution or deprivation of such an academic benefit on the basis of sex violates Title IX.

Courts have acknowledged and reacted to the harm caused by peer harassment in the workplace by imposing liability on employers. The Supreme Court's only ruling on institutional liability for hostile environment harassment encompasses employer liability under principles of agency law. Accordingly, courts have applied the same rule in both supervisor and co-worker Title VII harassment

183. See Sherer, supra note 43, at 2134. Students learn to develop a "thick skin," but, as one fourth-year medical student has remarked, "it gets very tiring having that thick skin." Glazer, supra note 9, at 210.
185. Schneider, supra note 88, at 551 (footnote omitted).
186. See Lipsett v. University of Puerto Rico, 864 F.2d 881, 897 (1st Cir. 1988) (stating that an actionable hostile environment may be created by supervisors or co-workers).
cases: An employer is liable for hostile environment harassment where the employer knew, or should have known, of the harassment and did not take action reasonably calculated to end it.\textsuperscript{188} The \textit{Lipsett} court adopted this rule for institutional liability claims involving co-worker harassment under Title IX.\textsuperscript{189} Until August 1993, however, no court had addressed the issue of peer harassment in a purely educational setting.

One explanation for the legal system's lack of attention to student-on-student harassment is the difficulty of imposing liability on an institution for the acts of its students. Although schools exercise a certain degree of control over students, recent Title IX jurisprudence reveals that courts are reluctant to impose liability on schools for student-on-student harassment because schools and their students do not share a traditional agency relationship.\textsuperscript{190} Students are not employed by the school, nor do they exercise or acquire authority for their actions directly from the school. Unlike employees who have suffered sexual harassment by co-workers, students who have experienced harassment by schoolmates have had no recourse in the courts.

In \textit{Petaluma}, the only reported instance of judicial recognition of student-on-student sexual harassment in a purely educational setting, the court applied agency principles to establish institutional liability.\textsuperscript{191} But, although \textit{Petaluma} found that student peer harassment violates Title IX,\textsuperscript{192} it held that educational institutions are liable only upon a showing of discriminatory intent on the part of the institution.\textsuperscript{193} Because students are not agents of their schools, the intentions of student harassers cannot be imputed to the school. Moreover, even though a school official's knowing failure to correct the problem may be offered as evidence of institutional intent, the standard announced in \textit{Petaluma} is very difficult to satisfy. The victim

\begin{itemize}
\item \textsuperscript{188} See, e.g., Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983) (harassment by a supervisor); \textit{Lipsett}, 864 F.2d at 901 (citing DeGrace v. Rumsfeld, 614 F.2d 796, 804-05 (1st Cir. 1980) (racial harassment by co-workers)).
\item \textsuperscript{189} \textit{Lipsett}, 864 F.2d at 901.
\item \textsuperscript{190} See UWM Post v. Board of Regents of Univ. of Wis., 774 F. Supp. 1163, 1177 (E.D. Wis. 1991) (noting that the theory of institutional liability set out in \textit{Meritor} does not make schools liable for the actions of their students).
\item \textsuperscript{191} \textit{Petaluma}, 830 F. Supp. at 1575.
\item \textsuperscript{192} \textit{Id.} at 1571. In formulating its opinion, the \textit{Petaluma} court consulted with authorities from the Office of Civil Rights, the federal agency charged with implementing Title IX. \textit{Id.} at 1572.
\item \textsuperscript{193} \textit{Id.} at 1576. The court held that because Title IX was modeled on Title VII, Title IX plaintiffs are subject to the same damages limitations as other plaintiffs suing pursuant to Spending Clause legislation. \textit{Id.} at 1566. "The point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award." \textit{Id.} at 1574.
\end{itemize}
must notify the institution of the problem and allow enough time for the school to remedy the situation.\textsuperscript{194} If the student demonstrates that the problem continued to exist despite the institution's knowledge of the situation, the student still may not have sufficient evidence of the institution's intention to discriminate.\textsuperscript{195}

To hold a student victim of peer harassment to such a difficult standard is unwise and unfair. Hostile environment harassment in the classroom is as harmful to its victims as co-worker harassment in the workplace.\textsuperscript{196} More importantly, peer harassment in the classroom often leads to peer harassment in the workplace.\textsuperscript{197} By holding educational institutions accountable for student-on-student harassment, courts would provide schools the incentive to teach respect for women and preempt the development of harmful attitudes that underlie the problem of sexual harassment.

2. The Proposal.—Courts should adopt a new standard for school liability for hostile environment peer harassment. A departure from Title VII jurisprudence in this area of sexual harassment litigation is appropriate for two primary reasons. First, Title VII principles, which provide no mechanism for the elimination of student-on-student harassment, do not satisfy the basic objective of Title IX, namely, the elimination of sex discrimination in education. Second, student-on-student harassment is unique to the educational setting. Co-worker harassment, although similar in effect, is not entirely analogous to peer harassment in the schools because students, unlike employees, are not agents of the institution.

Instead of reliance upon agency principles and the requirement of proof of an institution's intentional discrimination, courts should evaluate the notoriety and pervasiveness of student-on-student harassment in view of the school's effort to curtail it. They should recognize the duty of the schools to monitor and make efforts to eliminate any sexual harassment within the institution. Plaintiffs should not be required to notify the institution of particular incidents, nor should they have to prove that the institution set out to discriminate against them. A better way to measure institutional liability would be to incorporate a standard similar to that used in negligence cases. If the institution knew or should have known of ongoing student-on-student harass-

\textsuperscript{194} See supra notes 125-127 and accompanying text.
\textsuperscript{195} Petaluma, 830 F. Supp. at 1574.
\textsuperscript{196} See Sherer, supra note 43, at 2155.
\textsuperscript{197} Id. at 2157 (concluding discriminatory conduct tolerated in our schools often becomes the standard of behavior for interaction between the sexes after graduation).
ment and took no action to stop it, then the school should be held liable for negligently permitting sex discrimination in violation of Title IX. Even if an academic institution has grievance procedures in place, it should be held responsible to ensure that the procedures are effective and to take the necessary steps to eliminate the problem.

Congress enacted Title IX to end sex discrimination in public education. The Supreme Court has stated that the statute should be accorded "a sweep as broad as its language." Surely, under this mandate, Title IX imposes a duty on publicly funded educational institutions to monitor the occurrence of harassment within their walls. As previously discussed, few sexually harassed students elect to use their schools' internal grievance procedures. Thus, in order to carry out the mandate of Title IX effectively, schools must actively seek out current peer harassment and implement processes reasonably aimed to stop it. Otherwise, students will continue to suffer from sex discrimination in public education, in direct contradiction to Title IX. Presently, school officials may rely on the refusal of the courts to hold academic institutions liable for student-on-student harassment to argue that they are under no duty to monitor or eliminate such harassment. All too often, peer sexual harassment is viewed as confirmation that "boys will be boys," instead of evidence of an institution's neglect of its duty to maintain an educational environment free of sex discrimination. The pervasiveness of such views serves to downplay the significance of peer harassment and allows harmful sexual stereotypes to permeate educational institutions.

198. According to Dr. Bernice Sigmon, Dean of Student Affairs at University of Maryland School of Medicine, medical school officials are generally aware of "atmospheric" harassment problems caused by student misconduct, but few make any effort to "sensitize" students to the harm caused by sexual harassment. Telephone Interview with Dr. Bernice Sigmon, Dean of Student Affairs, University of Maryland School of Medicine (Nov. 4, 1993) (describing the situation at the University of Maryland).


200. North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982) (quoting United States v. Price, 393 U.S. 787, 801 (1966)). In fact, as Professor Schneider of the University of Cincinnati College of Law has asserted, "The inclusion of such prophylactic measures in Title IX may suggest that Congress perceived a need for broader protection against discriminatory behavior in the academic context than in the employment context." Schneider, supra note 88, at 545.

201. Admittedly, the problem is circular. If students believe they would be helped by reporting harassment to school authorities, they would use the internal grievance procedures, and the school's duty to monitor sex discrimination might be carried out without an additional monitoring mechanism.

In medical schools, where harassment is often commonplace, a duty to monitor student-on-student harassment would not impose a heavy burden on school administration. Already medical schools receive annual reports of student responses to the American Association of Medical Colleges' Medical School Graduation Questionnaire, which contains questions regarding peer sexual harassment. Although the questionnaire does not address all aspects of peer harassment, a formal evaluation of these reports might be demonstrative of a school's good faith attempt to monitor sexual harassment. Additionally, schools could establish their own monitoring mechanisms in the form of trained observers or internal anonymously administered surveys. In practice, survey results could serve as evidence of sexual harassment, or lack thereof, in student-on-student harassment cases.

Under this proposal, a school's potential liability for student-on-student harassment would not be unlimited. A school could avoid liability by demonstrating that it made good faith efforts to curtail any harassment uncovered by its monitoring mechanisms. It might conduct sensitivity training sessions, appoint a task force, conduct work-

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203. Each medical school receives an "All Schools Summary" from the Association of American Medical Colleges (AAMC) as well as the responses of its own students. Telephone Interview with Frances Hall, Director of the Section for Student Programs, AAMC (Nov. 17, 1993). By distributing this information, the AAMC hopes to encourage medical schools to identify problem areas in medical education and to implement programs for their elimination. Id. The AAMC, a membership organization, cannot mandate action by the schools. Id. Similarly, the American Medical Women's Association (AMWA), which publishes position papers and suggests methods of dealing with sexual harassment, does not have the authority to require any action on the part of a school. Telephone Interview with Sheri Singer, AMWA (Nov. 9, 1993).

204. The 1992 AAMC Questionnaire inquired about "incidents of mistreatment [students] may have experienced from other students while in medical school." Three of the thirteen types of mistreatment listed in this questionnaire specifically relate to peer sexual harassment: "Do you believe you have . . ." (1) "been subjected to offensive sexual advances by other students;" (2) "been subjected to offensive sexist remarks/names directed at you personally;" and (3) "been ostracized by groups of fellow students because of . . . your gender." SECTION FOR EDUCATIONAL RESEARCH, AAMC, 1992 GRADUATING STUDENT SURVEY RESULTS: ALL SCHOOLS SUMMARY 35 (1992).

205. The 1992 Questionnaire did not inquire about general sexist remarks that are not directed at a particular individual but which nevertheless create a demeaning, hostile educational environment for female medical students. Furthermore, the AAMC does not report the responses of men and women separately. Id. These difficulties could be easily remedied.

206. Schools must ensure that survey respondents and responses remain anonymous. Without anonymity, the surveys will fail to provide accurate information for many of the same reasons that internal grievance procedures do not accurately reflect the incidence of sexual harassment within academic institutions. See supra note 13 and accompanying text.
shops,²⁰⁷ or incorporate courses that address sexism in the medical profession into the required curriculum.²⁰⁸ It might also appoint an ombudsperson, a neutral party to concentrate solely on the resolution of mistreatment issues at the school.²⁰⁹ One simple but often overlooked method of increasing awareness of a school’s intolerance of sexual harassment is to distribute copies of the school’s policy against sexual harassment to all students and staff.²¹⁰ In addition, it is imperative that schools punish known offenders.²¹¹ Regardless of what type of action the school takes, it must make both student-on-student harassment and other types of harassment prominent issues on campus. With the implementation of procedures reasonably designed to decrease sexual harassment,²¹² educational institutions could not only avoid liability for peer harassment that may occur despite its efforts, but, more importantly, effect real change. The prevalence of harassment would likely decline and students would have more confidence in their schools’ internal grievance procedures. As a consequence,

²⁰⁷. The AMWA suggests conducting mandatory workshops that deal explicitly with the elimination of sexist language in conversation. Annual workshops that include role-playing exercises for all students may effectively counterbalance the influence of societal sexism. The University of Louisville has implemented such a program entitled “A Matter of Respect.” Leah J. Dickstein, Gender Bias in Medical Education: Twenty Vignettes and Recommended Responses, 48 J. AM. MED. WOMEN’S ASS’N 152 (1993).

²⁰⁸. First-year students at Northeastern Ohio University College of Medicine take a course entitled Human Values in Medicine, and Georgetown University Medical Center students study Bioethics Problem-Solving during their second year. See BICKEL & QUINNIE, supra note 13, at 26 (providing examples of sexual harassment sensitivity curriculum).

²¹⁰. Id. at 24. Harvard Medical School and Dental School recently appointed an “ombudsperson.” Id.

²¹¹. Although Title IX requires that all public educational institutions have a policy prohibiting sex discrimination, many schools do not make students aware of the policy or notify them of how and to whom they should report sexual harassment. Telephone Interview with Dr. Sigmon, supra note 198. At the University of Maryland School of Medicine, for example, the school policy against sexual harassment is not discussed or distributed to students. Id. Although the University of Maryland’s Dean of Student Affairs has reported his awareness of general “atmospheric” harassment at the school and that sensitivity training for faculty was under consideration, he knew of no plans for student training. Id.

²¹². For additional recommended responses to sexual harassment problems, see Dickstein, supra note 207, at 152-54. For information about organizations or individuals that can suggest speakers or approaches to harassment problems, see BICKEL & QUINNIE, supra note 13, at 25-28.
fewer students would need to turn to the courts for relief and stu-
dents, schools, and society at large would benefit.

Under the proposed standard for school liability, educational in-
titutions would be held liable for proven student-on-student harass-
ment in two instances: (1) when they did not monitor environmental
harassment among students, and (2) when they did not take adequate
steps to curtail such harassment. Although these standards are far
more suitable to Title IX peer harassment inquiries than the agency
principles applied in Title VII cases, they are not without problems.
For example, courts would have to develop a standard by which to
judge the adequacy of a school's monitoring mechanisms. Simple re-
liance on the number of complaints launched through a school's in-
ternal grievance procedure ordinarily would not be sufficient, although anonymous survey results might suffice, particularly where
students are required to respond. Ideally, the accrediting body for
medical schools would require the adoption of some form of monitor-
ing as a prerequisite for accreditation. If every accredited school
were required to monitor student-on-student harassment, peer harass-
ment disputes would turn simply on whether the school took reason-
able steps to stop ongoing harassment.

It may also be difficult to decide whether a particular action on
the part of the institution constitutes a reasonable effort to curtail
peer harassment since the reasonableness of an institution's actions is
contingent upon the circumstances surrounding each claim. The
amount of effort which must be proven by the school in order to es-
cape liability would have to vary with the amount of harassment at the
school immediately prior to the complaint. An assessment of reasona-
bleness would have to depend on the school's ability to stop the har-
assment. If, for example, a school has implemented a mandatory
program to educate students regarding sexual harassment and has
made it clear that student harassers will be punished, then the school
should not be held responsible for the actions of a single deviant stu-
dent. If student-on-student harassment is common, however, and if

213. As previously noted, very few students utilize their schools' internal grievance pro-
cedures. See supra note 13 and accompanying text. Therefore, judging the adequacy of a
school's monitoring system by relying solely on the number of complaints would lead to
grossly inaccurate results.

214. In 1992, the Accreditation Council for Graduate Medical Education began requir-
ing all sponsoring institutions to provide information to residents about sexual harassment
and methods to address it. BICKEL & QUINNIE, supra note 13, at 24. Medical schools, how-
ever, are not yet subject to any harassment-related requirements. Id.

Katz, 709 F.2d at 256) (dealing with workplace harassment).
the school has done nothing more than offer a training session that few students attended, then the school should be held liable under Title IX for its failure to provide an educational environment free from discrimination.

**CONCLUSION**

The preceding proposals are intended to provide student victims of sexual harassment a way of obtaining meaningful relief. Although the courtroom is not the ideal arena to resolve sexual bias in the schools, legal action is too often the only realistic means to effect change and recover damages. As Janet Bickel and Renee Quinlue of the AAMC have noted, the infusion of women students and faculty into the medical profession will not eliminate gender discrimination. "[That] hope ignores the fact that: a) some men need to change; b) bias is too pervasive for the strategy of 'time' to solve it; and c) sexism will hamper the progress of young women just as it did their predecessors." Even in this age of "political correctness," sexism in medicine, often subtle in form and hard to uncover, continues to hold fast. Women students are justifiably reluctant to turn to their schools for support. To provide them with a realistic alternative in court will not only give them an avenue by which to fight sexual harassment, but also give schools the needed incentive to focus on the problem.

Critics contend that pursuing sexual harassment claims in court will only reinforce the stereotype of the "weak woman" who is unable to fight her own battles. Perhaps the proponents of this view consider the "strong woman" one who is able to endure mistreatment and avoid confrontation. Such a conviction may make sense to those interested in maintaining the status quo. They label as weak the woman who forces behavioral change and credit with strength those who tolerate harassment. To the contrary, a medical student who files a sexual harassment claim is fighting her own battle. She is refusing to tolerate discrimination and, despite intense pressure from her peers and members of the status quo, she is defending her rights.

Critics also argue that courtroom sexual harassment battles will cause increased bitterness between the sexes. Unfortunately, tem-

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216. AMWA "encourag[es] and support[s] individual women who experience discrimi-

217. BICKEL & QUINNIE, supra note 13, at 28.


219. See generally C. Leatherman, Legacy of a Bitter Sex Harassment Battle: Rising Complaints,

Frustrations and Fears, CHRON. HIGHER EDUC., Oct. 14, 1992, at A17-18 (discussing the conse-
porary bitterness may be a short term sacrifice women must make in order to effect long term change. The development of understanding between the sexes is the ultimate goal, but a refusal to address issues of sexual harassment for fear of creating bitterness between the sexes will only delay the inevitable battle for change. In the meantime, women in and out of the medical profession will continue to endure unfair and unnecessary harm. Female medical students will continue to be harassed, and many may be dissuaded from joining the profession.

The cycle of sexism in medicine will continue until a forced change occurs. The provision of a viable cause of action against sexual harassment is an important step in the process of bringing about that much needed change.

Kimberly L. Limbrick

quences of greater awareness of gender relations on campuses in the wake of the Clarence Thomas Senate confirmation hearings).