

Masculinity & Title IX: Bullying and Sexual Harassment of Boys in the American Liberal State

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**MASCULINITY & TITLE IX: BULLYING AND SEXUAL
HARASSMENT OF BOYS IN THE AMERICAN LIBERAL STATE**

NANCY CHI CANTALUPO*

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I. INTRODUCTION

In February 2012, a University of Virginia men's lacrosse player, George Huguely, was convicted of second-degree murder of a fellow student.¹ The murder occurred after the student broke off her abusive dating relationship with Huguely, which included at least one attack on a classmate who Huguely believed had kissed her,² and one public assault in which Huguely hurled racist and sexist epithets at the female police officer who arrested him.³ Both Huguely and his victim were products of private, single-sex schools, with Huguely attending Landon School, an all-boys high school with "a reputation for cultivating athletes—especially lacrosse players—and using athletic competition to instill a boyish camaraderie."⁴ Huguely's first appearance in the local media occurred in a *Washington Post* interview in April 2006,⁵ when accusations of rape against members of Duke University's men's lacrosse team were the subject of much local and national attention. Several of the accused players were former members of Landon's men's lacrosse team, as was Huguely.⁶ Although the rape accusation was later deemed false, several of the uncontested events on the evening when the alleged rape had occurred painted a picture of general misogyny and racism among the players.⁷ Accounts of Landon in the local media

1. Mary Pat Flaherty, Jenna Johnson & Justin Jouvenal, *George Huguely Guilty of Second-Degree Murder*, WASH. POST, Feb. 23, 2012, at A1; see also *George Huguely 'Obsessive' About Yearley Love, Friend Says*, HUFFINGTON POST (July 7, 2010, 6:12 AM), http://www.huffingtonpost.com/2010/05/07/george-huguely-obsessed-w_n_567429.html (describing aspects of the relationship between Huguely and Yearley).

2. Daniel de Vise & David Nakamura, *Concerns on Huguely Not Voiced, U-Va. Says; 'No One Came Forward' to Help Students Kept Any Signals of Violent Behavior to Themselves*, WASH. POST, May 15, 2010, at B1.

3. Steve Yanda, Daniel de Vise & Jenna Johnson, *Heartbreaking Finish for U-VA. Romance; Ex-Boyfriend Slammed Woman's Head into Wall, Police Say*, WASH. POST, May 5, 2010, at A1.

4. Harry Jaffe, *Our Sons Have Something to Say*, WASHINGTONIAN MAGAZINE, (Oct. 1, 2003, 12:00 AM), <http://www.washingtonian.com/articles/people/from-the-archives-our-sons-have-something-to-say/>.

5. Liam Dillon, *Duke Scandal Hits Home; Nine Blue Devil Players Are from the D.C. Area*, WASH. POST, Apr. 1, 2006, at E16.

6. *Id.*

7. See Robin West, *Literature, Culture, and Law—at Duke University* 23 (Georgetown Law Research Paper, No. 1201867, 2008), available at <http://ssrn.com/abstract=1201867> (explaining that the false rape charge was believable in the eyes of the public due to evidence of a "rape-positive" culture at Duke University generally and among the student-athletes specifically); Linda Martin Alcoff, *On Prejudging the Duke Lacrosse Team Scandal*, ALCOFF.COM, <http://www.alcoff.com/content/dukelacrosse.html> (last visited Feb. 27, 2014) ("The facts that are not in dispute here are that the team members hired sex workers for group entertainment, that they asked for racially specific types of sex workers . . . , that some of them referred during the evening to the sex workers as niggers and bitches, that one shouted out to a sex worker (as heard by a neighbor) 'Hey bitch, thank your grandpa for your nice cotton shirt,' that one said to a sex worker

seemed to point to a similar culture there, as the school had previously experienced difficulties involving questionable accusations of cheating against an African American honor student, and unsuccessful attempts made by a group of Landon parents to remove a coach with a record of making homophobic remarks to his players, along with remarks equating them to women.⁸ Not long after the Hugueley murder, a group of Landon students were caught developing a sex “fantasy league” involving the “drafting” of primarily ninth grade girls from other schools onto “teams” such as the “Southside Slampigs” and the scoring of points based on the amount of sexual contact Landon boys could achieve with the girls on their “teams.”⁹

The Hugueley murder and related incidents are not the only recent incidents involving sex-segregated educational environments, sexual harassment, gender-based violence or the like. Most recently, *Bloomberg* reported that, based on its review of court documents and news accounts in 2012 to 2013, “[m]ore than 40 high school boy[-athletes] were sodomized with foreign objects by their teammates in over a dozen alleged incidents reported in the past year, compared with about three incidents a decade ago.”¹⁰ In April of 2012, *Rolling Stone* published an extensive expose of Dartmouth College’s all-male fraternity culture, documenting hazing and sexual violence-related abuses against both Dartmouth men and women.¹¹ That February, New York University Professor Pedro Noguera reported that a four-year study on recently created public K-12 single-sex schools serving Black and Latino boys found that “there is no magic to be found in merely separating boys of color from their peers.”¹² Professor Noguera’s report was preceded in September 2011 by an article in *Science* magazine entitled “The Pseudoscience of Single-Sex Schooling,” authored by a collection of re-

that he was going to shove a broomstick up her, and that another one sent around a sick email professing his intention to rape, kill, and skin the sex workers.”)

8. Michael Birnbaum & Valerie Strauss, *Landon School’s Self-Examination; Unusual Rash of Events Shakes Campus*, WASH. POST, July 1, 2010, at B1.

9. Michael Birnbaum & Valerie Strauss, *Boys at Landon School Planned Sex Parties; Girls Were Targeted for Sportslike Competition, Sources Say*, WASH. POST, June 10, 2010, at B5; Maureen Dowd, Op-Ed, *Their Dangerous Swagger*, N.Y. TIMES, June 9, 2010, at A25; Laura Stepp, *Dear Landon School: Decorum Is Not the Same as Honor*, HUFFINGTON POST (June 15, 2010, 12:04 PM), http://www.huffingtonpost.com/laura-stepp/dear-landon-school-decoru_b_608435.html.

10. Chris Staiti & Barry Bortnick, *Sodomy Hazing Leaves 13-Year-Old Victim Outcast in Colorado Town*, BLOOMBERG (June 20, 2013), <http://www.bloomberg.com/news/2013-06-20/sodomy-hazing-leaves-13-year-old-victim-outcast-in-colorado-town.html>.

11. Janet Reitman, *Confessions of an Ivy League Frat Boy: Inside Dartmouth’s Hazing Abuses*, ROLLING STONE (Mar. 28, 2012), <http://www.rollingstone.com/culture/news/confessions-of-an-ivy-league-frat-boy-inside-dartmouths-hazing-abuses-20120328>.

12. Pedro A. Noguera, *Saving Black and Latino Boys*, EDUC. WEEK (Feb. 3, 2012), http://www.edweek.org/ew/articles/2012/02/03/kappan_noguera.html.

spected academics from a range of disciplines, including psychology, neuroscience, child development, and social work, which concluded that sex-segregated education is “ineffective, misguided and may actually increase gender stereotyping.”¹³ Finally, the previous fall, Yale fraternity pledges chanted, “No means yes! Yes means anal!” outside the campus Women’s Center, the latest in a string of such incidents,¹⁴ and a series of teenaged boys committed suicide due to sexual harassment and bullying.¹⁵

From 2010 to 2013, in response to complaints or at their own initiative, federal and state governments also took several actions related to sexual harassment, bullying, and gender-based violence. The U.S. Department of Education Office for Civil Rights (“OCR”) issued guidance clarifying its rules related to bullying¹⁶ and sexual violence.¹⁷ In addition, several statutes regarding bullying, sexual harassment, and sexual violence in education were enacted or proposed.¹⁸ Finally, a number of high-profile complaints and compliance reviews made their way through OCR or the federal courts regarding sex-segregated education or bullying, sexual harassment, and sexual violence in schools,¹⁹ including a complaint against Yale related

13. Michael Alison Chandler, *Study Faults Case for Single-Sex Education*, WASH. POST, Sept. 23, 2011, at A2; Tamar Lewin, *Single-Sex Education Is Assailed in Report*, N.Y. TIMES, Sept. 23, 2011, at A19; Mikaela Conley, *Single-Sex Schools Have Negative Impact on Kids, Says Study*, ABCNEWS (Sept. 22, 2011), <http://abcnews.go.com/Health/single-sex-schools-negative-kids-study/story?id=14581023>.

14. Michael Kimmel, *The Men, and Women, of Yale*, MS. MAG. BLOG (Oct. 17, 2010), <http://msmagazine.com/blog/blog/2010/10/17/the-men-and-women-of-yale/>.

15. John Cloud, *When Bullying Turns Deadly: Can It Be Stopped?*, TIME (Oct. 24, 2010), <http://www.time.com/time/magazine/article/0,9171,2024210,00.html>.

16. Letter from Russlynn Ali, Assistant Secretary for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., to Colleague (Oct. 26, 2010) [hereinafter *Bullying Dear Colleague Letter*], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

17. Letter from Russlynn Ali, Assistant Secretary for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., to Colleague (Apr. 4, 2011) [hereinafter *Sexual Violence Dear Colleague Letter*], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

18. Erin Buzuvis & Kristine Newhall, *Campus SaVE Act Codifies Institutions’ Sexual Assault Response Requirements*, TITLE IX BLOG (August 8, 2013), <http://title-ix.blogspot.com/2013/08/campus-save-act-codifies-institutions.html>; Campus SaVE Act, S. 834, 112th Cong. (1st Sess. 2011); Campus SaVE Act, H.R. 2016, 112th Cong. (1st Sess. 2011); Safe Schools Improvement Act of 2011, S. 506, 112th Cong. (1st Sess. 2011); MASS. GEN. LAWS ch. 71, § 370 (2012).

19. See, e.g., *Doe ex rel. Doe v. Vermilion Parish Sch. Bd.*, No. 10-30378, 2011 U.S. App. LEXIS 7321 (5th Cir. Apr. 6, 2011); Letter from Zachary Pelchat, Supervisory Attorney, Office for Civil Rights, U.S. Dep’t of Educ., and Anurima Bhargava, Chief, Civil Rights Div., U.S. Dep’t of Just., to Richard L. Swanson, Superintendent, Tehachapi Unified Sch. Dist. (June 29, 2011) [hereinafter *Tehachapi Resolution Letter*], <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/09111031.html>; Allie Bohm, *I’d Like to File a Complaint*, ACLU (Dec. 6, 2012, 5:10 PM), <http://www.aclu.org/blog/womens-rights/id-file-complaint; Charges Contemplated over Hazing Allegations at Valencia High School>, ALBUQUERQUE J. (Mar. 31, 2011, 11:31 PM),

to the fraternity pledge incident mentioned earlier.²⁰ In K-12 education, OCR issued letters and the agreements reached with two school districts, Anoka-Hennepin²¹ and Tehachapi,²² regarding these schools' violations of Title IX of the Education Amendments of 1972²³ ("Title IX") as a result of tolerating sex-based harassment against multiple students at Anoka-Hennepin and against one student who eventually committed suicide at Tehachapi.

On the surface, these events seem to be separable into two essentially unrelated categories: those having to do with sex-segregated schools and classes and those dealing with sexual harassment, sexual violence, and bullying. However, a closer look reveals that both involve all-boys educational environments in some form. In addition, both involve claims of sex discrimination against boys. In the bullying and sexual harassment context, the OCR enforcement actions noted above, as well as an increasing number of boy plaintiffs in private lawsuits, are relying on Title IX, the federal anti-sex discrimination in education statute, to sue their schools for not adequately protecting them from sex discrimination in the form of bullying, sexual harassment, hazing, and sexual violence, mainly at the hands of other boys.²⁴ In the sex-segregated education category, concerns about a "boy crisis" in K-12 public education have either explicitly or implicitly attributed boys' lag in achievement behind girls in certain subject areas to a feminized K-12 public educational environment that is said to discriminate against boys' more masculine learning styles and needs.²⁵ This argument has led to a push for sex-segregated K-12 public education, facilitated by Department of Education ("ED") regulations in 2006 under the No Child

<http://www.abqjournal.com/main/2011/03/31/abqnewsseeker/charges-contemplated-over-hazing-allegations-at-valencia-high-school.html>; Kristen Lombardi, *Education Department Touts Settlement as 'Model' for Campus Sex Assault Policies*, CTR. FOR PUB. INTEGRITY (Dec. 8, 2010, 11:59 AM), <http://www.publicintegrity.org/2010/12/08/2266/education-department-touts-settlement-model-campus-sex-assault-policies>.

20. *Yale Is Subject of Title IX Inquiry*, N.Y. TIMES, Apr. 1, 2011, at A17; Jordi Gasso, *Yale Under Federal Investigation for Possible Title IX Violations*, YALE DAILY NEWS, Apr. 1, 2011, <http://yaledailynews.com/blog/2011/04/01/yale-under-federal-investigation-for-possible-title-ix-violations/>; Allie Grasgreen, *Education Department and Yale Settle Title IX Complaint*, INSIDE HIGHER EDUC. (June 18, 2012, 3:00 AM), <http://www.insidehighered.com/quicktakes/2012/06/18/education-department-and-yale-settle-title-ix-complaint>.

21. Letter from Debbie Osgood, Director, Office for Civil Rights, U.S. Dep't of Educ., to Dennis Carlson, Superintendent, Anoka-Hennepin Sch. Dist. (Mar. 15, 2012), <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/05115901.html>.

22. *Tehachapi Resolution Letter*, *supra* note 19.

23. 20 U.S.C. §§ 1681–1688 (2006).

24. *See infra* Part III.

25. *See infra* notes 222–227.

Left Behind Act,²⁶ which suspended Title IX's previous prohibition of virtually all public, K-12 sex-segregated educational programs.

This Article examines these two different approaches to Title IX: the first, suspending enforcement; and the second, increasing enforcement; and asks: which of these recent approaches to Title IX more accurately reflects and effectively addresses boys' and young men's actual experiences with sex discrimination? In order to answer this question, this Article proceeds in four parts. In Part II, it provides general statistics about prevalence of various forms of gender-based violence²⁷ in education, and then examines two sources of information about boys' experiences in single-sex groupings and with sex discrimination: first, the social sciences literature on "masculinities" that has developed over the last thirty years; and second, media reports involving boys' experiences in all-boys educational settings. It first reviews masculinities scholars' accounts of "traditional masculinity," the kind of masculinity that is most dominant in educational environments, and traditional masculinity's susceptibility to becoming "hypermasculine." These accounts also link this type of masculinity, especially in its hyper-

26. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.).

27. In this Article:

The term "gender-based violence" refers to violence that targets individuals or groups on the basis of their gender. The United Nations' Office of the High Commissioner for Human Rights' Committee on the Elimination of Discrimination against Women ("CEDAW") defines it as "violence that is directed against a woman because she is a woman or that affects women disproportionately", in its General Recommendation 19.

....

This does not mean that all acts against a woman are gender-based violence, or that all victims of gender-based violence are female. The surrounding circumstances where men are victim of sexual violence could be a man being harassed, beaten or killed because they do not conform to view of masculinity, which are accepted by the society.

Gender-Based Violence, IRIN, <http://www.irinnews.org/InDepthMain.aspx?InDepthId=20&ReportId=62847> (last visited Feb. 27, 2014).

In addition, this Article uses "victim" and "survivor" interchangeably to refer to people who report that they have been victims of sexual violence. Therefore, "victim" is not a term of art used to indicate a finding of responsibility for sexual violence. "Perpetrator" or "assailant" is used when someone accused of gender-based violence has been found responsible or in discussions where it can be assumed the person perpetrated the sexual violence, such as statistical analyses.

Other than when discussing studies or other sources that use terms such as "sexual assault" or "rape," this Article will use "sexual violence" instead of terms such as "sexual assault" or "rape" as a broader, more descriptive term that is not a term of art, and which includes a wider range of actions that may not fit certain legal or readers' definitions of "sexual assault" or "rape." The term therefore includes "sexual assault" or "rape," as well as other actions involving physical contact of a sexual nature. Finally, this Article uses "school" and "institution" to identify either K-12 schools or higher education institutions, although it uses "college," "university," "campus," or "higher education" to refer to the latter category of schools.

masculine forms, to gender-based violence and show how boys are socialized into this masculinity by the “hidden curriculum” (“the process of socialization that cues children into their place in the hierarchy of larger society”).²⁸ Part II then discusses the “hypermasculine” educational methodology being adopted by many of the public, K-12 sex-segregated educational initiatives created since ED passed its 2006 regulations.

This Part also includes journalistic accounts that suggest that all-male environments both intensify traditional masculinity into hypermasculine forms and are the site of some of the most severe instances of gender-based violence—directed at both girls and boys—in school settings. These accounts reflect and confirm the connections drawn by the social science research and demonstrate that the bullying and violence evident in all-boy environments is not only discriminatory against boys, but also operates quite similarly to the sex discrimination experienced by girls.

Part III then examines the litigation through which boys have invoked Title IX to combat same-sex bullying, sexual harassment, and sexual violence. These cases again reflect and confirm *both* the insights of the social science literature and the dynamics reflected in the media reports discussed in Part II. In addition, they demonstrate not only the power of Title IX to stop bullying, sexual harassment, and violence against both girls and boys, but also to advance the classical liberal and feminist goals of the American State. This discussion shows how the Title IX prohibition of sexual harassment used in the same-sex sexual harassment and bullying cases incorporates and seeks to realize important feminist and classical liberal ideals, whereas allowing all-boys education offends those principles.

A clear conclusion emerges after examining the cases in Part III: suspending Title IX enforcement to allow all-boys education not only fails to reduce sex discrimination against boys, but it actually is liable to *increase* the chances of discrimination against boys. In contrast, the same-sex bullying and sexual harassment cases show how effective Title IX can be in protecting boys from the very real and documented sex discrimination that they face.

Indeed, looking at these two Title IX developments side-by-side adds to the extant reasons not to sex-segregate students—likely in any schools, but certainly not in K-12 public schools, which educate the vast majority of U.S. children and are both compulsory and the “school of last resort” for most Americans. At the most practical level, the cost-benefit analysis of sex-segregated education does not seem to work. In fact, the practical reasons to oppose sex-segregating K-12 public education suggest a moment of

28. PEGGY ORENSTEIN, *SCHOOLGIRLS: YOUNG WOMEN, SELF-ESTEEM, AND THE CONFIDENCE GAP* 5 (1995).

“interest convergence,” as Professor Derrick Bell theorized existed during the era of *Brown v. Board of Education*²⁹ and the cases that followed *Brown*, ordering schools to racially desegregate.³⁰ As the foregoing pages will show, virtually all girls and women, as well as the vast majority of boys and men, are vulnerable to sex discrimination in the form of sexual harassment, bullying, and gender-based violence. In light of what the research and journalistic accounts show about the increased likelihood of bullying, sexual harassment, and gender-based violence in all-male settings, the potential costs of these environments to boys are clear. Moreover, although some research has shown that *some* girls *may* benefit from sex-segregated education, this research is equivocal at best.³¹ What is unequivocal is girls’ interest, like boys’, in avoiding conditions that support and encourage sexual harassment and gender-based violence. The families and friends of violence victims of all genders likewise experience the costs of violence, and given the rates of victimization in education discussed in Part II, those costs are significant. Finally, the front-end permission to create all-boys education is costly to schools, courts, and ED because it is likely to intensify the back-end problem of increased bullying and sexual harassment requiring Title IX enforcement, increasing the workloads of institutions and government regulators alike.

At a more normative level, as discussed in Part III.B., when one examines sex segregation and all-boy sexual harassment from classical liberal and feminist theoretical perspectives, allowing sex segregation, particularly when it feeds into sexual harassment, is also contrary to fundamental values of the American liberal state. From a feminist theoretical perspective, suspending Title IX’s prohibition on sex segregation goes against just about every branch of feminist legal theory, including liberal feminism, cultural feminism, dominance or radical feminism, anti-essentialist feminism, and intersectional or multidimensional feminism. From a classical liberal perspective, allowing all-boys education, particularly with its hypermasculine aspects, is “markedly illiberal”³² due to its restrictions on boys’ freedom to

29. 347 U.S. 483 (1954).

30. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980). Note that Bell was critical of the results of this interest convergence for the education of black youth and questioned whether desegregation was ultimately in their interests.

31. See generally, Nancy Chi Cantalupo, *Comparing Single-Sex and Reformed Coeducation: A Constitutional Analysis*, 49 SAN DIEGO L. REV. 725 (2012).

32. Oral comments from David Super, Professor, Georgetown Law, to author (Dec. 18, 2012).

choose from multiple possible notions of masculinity and to be equally protected from violence regardless of that choice.³³

Therefore, Part IV concludes that greater enforcement of Title IX takes advantage of this moment of interest convergence by providing a mechanism for educating and mobilizing the large majority of Americans who have an interest in changing the hidden curriculum and the bullying and harassment-supportive student cultures that accompany it. In contrast, the suspension of Title IX to promote single-sex education, especially as promoted by the “boys’ crisis” proponents, highlights interest *divergence* between the genders by constantly comparing the relative educational achievements of children in an enormous, seemingly zero-sum competition of girls against boys. As a result, Part IV argues for rescission of ED’s 2006 regulations in light of the tremendous increase in sex-segregated educational programs—particularly those that intensify hypermasculine messages—since ED proposed the new rules.

Instead of continuing the 2006 suspension of Title IX, Part IV advocates for two alternative measures that strengthen Title IX’s sexual harassment prohibition and are more likely to eliminate discrimination against both boys and girls by intervening in the traditionally masculine hidden curriculum.³⁴ Both lowering the bar that plaintiffs must meet to carry a case forward and developing resources for schools to address bullying and sexual harassment proactively by targeting the hidden curriculum will provide a mechanism to encourage school action addressing the role of masculinity in creating sex discriminatory educational environments for both boys and girls. Targeting the hidden curriculum in this way can help schools not only address sex segregation proponents’ goals of improving boys’ and girls’ educational experiences but also protect both girls and boys from gender-based violence such as same-sex bullying, sexual harassment, hazing, sexual violence, and even mass school shootings.

II. THE HIDDEN-CURRICULUM-TO-VIOLENCE PHENOMENON

When one considers three sets of information relating to gender in American education, one can easily see the links between the socialization of boys into traditional masculinity via the hidden curriculum, the hyper-masculinity found in all-male educational environments, and gender-based

33. My particular thanks to Deborah Brake, Paul Butler, and David Super for comments encouraging me to develop these theoretical perspectives.

34. The analysis of Part II draws from masculinities studies at many different levels of education, whereas Parts III and IV focus primarily on elementary and secondary schools, due to the greater implications for K–12 schools of both the sex segregation and sexual harassment and bullying issues.

violence directed at girls and lower-status, feminized boys. Using a combination of empirical research, journalistic accounts, and court opinions, this Part explains those connections. It begins, in Section A, with a summary of statistics on the prevalence of four forms of gender-based violence that are common among middle school, high school, and college students: sexual harassment, sexual violence, dating violence, and hazing. Section B then discusses studies dealing with masculinities, particularly traditional masculinity, the most dominant form of masculinity in American education, and traditional masculinity's connections to gender-based violence. Section C reviews both the methods by which the hidden curriculum educates boys in how to be traditionally masculine and the hypermasculine characteristics of the hidden curriculum in common recently-created all-boys educational programs. Finally, Section D presents various studies and media reports related to gender-based violence committed in all-male environments. Together, these sections show a clear link between gender-based violence and the often hypermasculine traditional masculinity promoted by the hidden curriculum found in all-male educational environments.

A. The Prevalence of Harassment, Violence, and Hazing Among Students

This Section provides a sense of the scope and dynamics of the gender-based violence problem in education by reviewing the data on this violence. This review will focus mainly on four categories of gender-based violence commonly found in schools and all covered by Title IX as a form of sexual harassment. For reasons that the following discussion will elucidate, however, it will treat "bullying" and "sexual harassment" as one category, "sexual violence" as another, "dating violence" as a third, and "hazing" as the last of these categories. These categories either retain their original classification by the authors of the studies themselves or are defined by the level, kind, and combinations of violence involved in each category. For the most part, the studies on bullying and sexual harassment reviewed here include the full range of gender-based behaviors, from the purely verbal to the physically assaultive, with many variations and combinations in between. However, definitions of hazing, sexual, and dating violence generally focus upon behavior involving some combination of gender-based verbal, emotional, and physical violence.

With regard to bullying and sexual harassment, estimates of its prevalence vary depending on student age and other characteristics, but the U.S. Department of Health and Human Services ("HHS") states that fifteen to twenty-five percent of U.S. students report being bullied "with some fre-

quency.”³⁵ The National Center for Education Statistics estimates that thirty-two percent of middle and high school students are bullied.³⁶ HHS also cites statistics that:

three-quarters of the high school students surveyed heard derogatory and homophobic remarks “frequently” or “often” at school, and [ninety] percent heard the term “gay” used generally to imply someone is stupid or something is worthless.

....

... [sixty] percent of students (aged 13-18) had been verbally or physically harassed or assaulted during the past school year because of real or “perceived race/ethnicity, disability, gender, sexual orientation, gender expression, or religion.” Over half of these incidences were thought to be based on sexual orientation alone. Among students who identified themselves as LGBT [lesbian, gay, bisexual, transsexual], [ninety] percent had been bullied in the past year.³⁷

The American Association of University Women (“AAUW”) has conducted numerous studies of sexual harassment among public school students in middle and high schools, in 1993, 2001, and 2011, as well as one study of college students in 2005. In both of the older secondary school surveys, nearly nine out of ten students reported that students sexually harass other students in school,³⁸ eight out of ten students reported “experienc[ing] some form of sexual harassment at some time during their school lives,”³⁹ and approximately fifteen percent reported high levels of sexual harassment in school.⁴⁰ In the most recent secondary school survey, forty-eight percent of students reported experiencing harassment in the previous

35. *What We Know About Bullying*, U.S. DEP’T OF HEALTH & HUMAN SERV., <http://www.cms.k12.nc.us/mediaroom/backtoschool/Documents/Bullying-Prevention%20Tips%20for%20Parents/Tips-What%20We%20Know%20About%20Bullyingpdf.pdf> (last visited Dec. 18, 2013).

36. Mimi Hall, *White House Conference Tackles Bullying: Today’s Event Aims to Bring Issue to Forefront*, USA TODAY, Mar. 10, 2011, at 2A.

37. *Bullying Among Children and Youth on Perceptions and Differences in Sexual Orientation*, U.S. DEP’T OF HEALTH & HUMAN SERVS., <http://cms.bs.u.edu/-/media/WWW/DepartmentalContent/CounselingCenter/Conference/Holsopple%20Fact%20Sheet.pdf> (last visited Dec. 18, 2013) (citation omitted).

38. HOSTILE HALLWAYS: BULLYING, TEASING, AND SEXUAL HARASSMENT IN SCHOOL, AM. ASS’N OF UNIV. WOMEN EDUC. FOUND., 5 (May 2001) [hereinafter HOSTILE HALLWAYS], available at <http://www.aauw.org/files/2013/02/hostile-hallways-bullying-teasing-and-sexual-harassment-in-school.pdf>.

39. *Id.* at 3.

40. *Id.* at 5.

school year alone.⁴¹ In all three surveys, girls were more likely to be, and more often were, sexually harassed than boys,⁴² but there was an increase in boys' experiences of sexual harassment in the 2001 high school survey.⁴³ In the latter two surveys, twenty-two to thirty-two percent of students who were harassed did not want to go to school and experienced other negative effects affecting their education and health in significant percentages.⁴⁴ In both surveys, girls were more likely than boys to say that they were negatively affected by harassment,⁴⁵ but boys' most negative and upsetting experiences with harassment related to being called gay.⁴⁶ In the 2011 survey, thirty-three percent of girls and twenty-four percent of boys witnessed harassment,⁴⁷ and thirty-seven percent of students thought boys "who are not athletic or not very 'masculine'" were most at risk for harassment.⁴⁸

In the college survey, eighty-nine percent of students said that sexual harassment is extremely common.⁴⁹ One student described it as "almost normal."⁵⁰ About two-thirds of students said they had been sexually harassed and forty-one percent admitted to sexually harassing someone,⁵¹ with male harassers outnumbering female harassers by two to one in most categories,⁵² and twenty-five percent of male harassers versus ten percent of female harassers harassing someone of their own gender.⁵³ Women were more likely to be physically harassed, whereas men were three times more likely than women to be called gay, lesbian, or another homophobic name.⁵⁴ Lesbian, gay, transgender or bisexual students experienced both a greater

41. CATHERINE HILL & HOLLY KEARL, *CROSSING THE LINE: SEXUAL HARASSMENT AT SCHOOL*, AM. ASS'N OF UNIV. WOMEN EDUC. FOUND., 11 (Nov. 2011), available at <http://www.aauw.org/files/2013/02/Crossing-the-Line-Sexual-Harassment-at-School.pdf>. Note that the older surveys asked about students' experiences with sexual harassment "at any time during their entire school careers," whereas the 2011 survey asked only about incidents during a single school year. *Id.* at 47.

42. *Id.* at 11; *HOSTILE HALLWAYS*, *supra* note 38, at 4.

43. *HOSTILE HALLWAYS*, *supra* note 38, at 4. Because of the differences in methodology, increases or decreases from 2001 to 2011 could not be confirmed.

44. *Id.*; HILL & KEARL, *supra* note 41, at 23.

45. HILL & KEARL, *supra* note 41, at 20.

46. *Id.*; *HOSTILE HALLWAYS*, *supra* note 38, at 11.

47. HILL & KEARL, *supra* note 41, at 27.

48. *Id.* at 15–16.

49. CATHERINE HILL & ELENA SILVA, *DRAWING THE LINE: SEXUAL HARASSMENT ON CAMPUS*, AM. ASS'N OF UNIV. WOMEN EDUC. FOUND., 14 (Dec. 2005), available at <http://www.aauw.org/files/2013/02/drawing-the-line-sexual-harassment-on-campus.pdf>.

50. *Id.*

51. *Id.*

52. *Id.* at 23.

53. *Id.* at 3.

54. *Id.* at 18.

likelihood and greater frequency of harassment than heterosexual students,⁵⁵ and white students were harassed more than African American or Hispanic students.⁵⁶ Less than eight percent of male students but approximately two to three times that number of female students reported that, as a result of sexual harassment, they found it hard to sleep, to eat, to study, to pay attention, attend, or participate in class, or to continue with the same courses, group of friends, or activities.⁵⁷

In the area of sexual violence, comprehensive studies on campus-based, peer sexual violence that have been completed over the last several decades consistently find that twenty to twenty-five percent of college women are victims of attempted or completed nonconsensual sex during their time in college.⁵⁸ Because so few male victims report instances of abuse, there is a limited amount of information about the extent of campus peer sexual violence against men. Despite the low rate of male victim reporting, statistics do show that when men are raped, other men usually do it.⁵⁹ Although Professor Kimmel noted in 2008 that studies show that “these chilling rates are similar across race and class,” with rates of sexual violence dipping significantly only among Asian American men,⁶⁰ a study on campus sexual assault (“CSA”) conducted in 2010 at four historically black colleges and universities (“HBCUs”) contradicts this characterization. The HBCU-CSA found that rates of attempted and completed rape while in

55. *Id.* at 19.

56. *Id.*

57. *Id.* at 31.

58. Brenda J. Benson, Carol L. Gohm & Alan M. Gross, *College Women and Sexual Assault: The Role of Sex-Related Alcohol Expectancies*, 22 J. FAM. VIOLENCE 341, 348 (2007); CHRISTOPHER P. KREBS, CHRISTINE H. LINDQUIST & TARA D. WARNER, NAT’L INST. OF JUST., THE CAMPUS SEXUAL ASSAULT STUDY: FINAL REPORT, 5-3 thru 5-4 (Oct. 2007), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> (finding that nineteen percent of students in the sample had experienced “attempted or completed sexual assault since entering college,” but noting that over fifty percent of the sample had completed less than two years of college and therefore discussing the incidence reported by college seniors, where twenty-six percent had experienced attempted or completed sexual assault since entering college, to predict a woman’s risk during her overall college career); BONNIE S. FISHER, FRANCIS T. CULLEN & MICHAEL G. TURNER, NAT’L INST. OF JUST., THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 10 (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/182369.pdf>; CAROL BOHMER & ANDREA PARROT, SEXUAL ASSAULT ON CAMPUS: THE PROBLEM AND THE SOLUTION 6 (1993). Although some of the studies that are cited here are somewhat old, they are included because the findings of the older studies are quite consistent with the most recent ones, even when the studies have been conducted in different decades. This indicates that the findings of older studies are still valid in terms of what we see today.

59. RANA SAMPSON, OFFICE OF CMTY. ORIENTED POLICING SERVICES, DEP’T OF JUST., ACQUAINTANCE RAPE OF COLLEGE STUDENTS 3 (2003), available at <http://www.cops.usdoj.gov/pdf/e03021472.pdf>; BOHMER & PARROT, *supra* note 58, at 6.

60. KIMMEL, *infra* note 110, at 312.

college averaged 14.9%,⁶¹ whereas a 2007 CSA using the same methodology by the same researchers at two predominantly white institutions found rates averaging 19%.⁶² In addition, individual reports of each of these schools shows that the lowest rate among the HBCUs was 12%⁶³ and the highest 16%,⁶⁴ and the lowest rate at the predominantly white schools (18%)⁶⁵ was two percentage points higher than the highest rate of the HBCU.

Also, studies have shown that:

Women ages 16 to 24 [are raped] four times [more often] than the assault rate of all women, making the college (and high school) years the most vulnerable for women. [Furthermore,] college women are more at risk for rape and other forms of sexual assault than women the same age but not in college.⁶⁶

The vast majority of sexual violence that student victims experience is not at the hands of a stranger but of someone they know.⁶⁷ In one study, “12.8 percent of completed rapes, 35.0 percent of attempted rapes and 22.9 percent of threatened rapes took place on a date.”⁶⁸ Typical perpetrators in-

61. CHRISTOPHER P. KREBS, CHRISTINE H. LINDQUIST & KELLE BARRICK, NAT’L INST. OF JUST., THE HISTORICALLY BLACK COLLEGE AND UNIVERSITY CAMPUS ASSAULT (HBCU-CSA) STUDY: FINAL REPORT, ES-3 (Nov. 2010), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/233614.pdf>, ES-3.

62. KREBS, LINDQUIST & WARNER, *supra* note 58, at xiii.

63. HBCU4 Report (on file with author).

64. HBCU3 Report (on file with author).

65. U2 Report (on file with author).

66. *Id.* at 2. *But see* KATRINA BAUM & PATSY KLAUS, BUREAU OF JUST. STATISTICS, VIOLENT VICTIMIZATION OF COLLEGE STUDENTS, 1995–2002 3 (2005), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/vvcs02.pdf> (finding that college students were less likely to be the victim of sexual assault than non-students). The discrepancy in these two findings is due to the wording of questions asked during data collection. The conclusions of Baum and Klaus are based on the National Crime Victimization Survey, which gathers information on sexual assault by asking category-centered questions, such as “Has anyone attacked or threatened you in [this way]: rape, attempted rape or other type of sexual attack.” *Id.* The conclusions that Sampson cites are based on studies such as the National College Women Sexual Victimization study, which use behavior-oriented questions, such as “Has anyone made you have sexual intercourse by using force or threatening to harm you or someone close to you?” *See* FISHER ET AL., *supra* note 58, at 6, 13 (explicitly comparing the difference between the National Crime Victimization Survey methodology and results and the National College Women Sexual Victimization study methodology and results). Other than the wording of the questions, the basic methodology of the two studies was identical, yet behavior-oriented questions have been found to produce eleven times the number of reported rapes. *Id.* at 11.

67. *See* KREBS, LINDQUIST & WARNER, *supra* note 58, at xviii (explaining that “the large majority of victims of sexual assault [are] being victimized by men they know and trust, rather than strangers”); FISHER ET AL., *supra* note 58, at 17 (“For both completed and attempted rapes, about 9 in 10 offenders were known to the victim.”).

68. FISHER ET AL., *supra* note 58, at 17.

clude classmates and friends of the survivor and boyfriends or ex-boyfriends.⁶⁹ Studies on college men indicate that 6% to 14.9% of them “report acts that meet legal definitions for rape or attempted rape,”⁷⁰ and that a small number of repeat perpetrators commit most of the sexual violence and likely contribute to other violence problems as well.⁷¹

Statistics on dating violence indicate that it is a similarly widespread phenomenon.⁷² Studies have found that about one in three high school students have experienced dating violence,⁷³ including 20% of female students.⁷⁴ In one study, a quarter of the teenagers (14 to 17) said they knew a student who has been a victim of dating violence,⁷⁵ including 40% of girls.⁷⁶ The American Bar Association reported that “20% of surveyed male students report witnessing someone they go to high school with physically hit

69. *Id.* at 19. See also KREBS, LINDQUIST & WARNER, *supra* note 58, at 2-3 (“[A]mong the college women who experienced completed and/or attempted rape, the perpetrator (most commonly a classmate, friend, boyfriend or ex-boyfriend, or acquaintance) was known to the victim in nearly 90% of cases.”).

70. David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 73 (2002).

71. For example, a 2002 study surveyed 1,882 male students at a university, and found that 6.4% self-reported acts qualified as rape or attempted rape. *Id.* at 76, 78. Of this group, 63.3% reported committing repeat rapes, averaging about six rapes per perpetrator. *Id.* at 78-80. In addition, these “undetected” (that is, not arrested or prosecuted) rapists each committed an average of fourteen additional acts of interpersonal violence (battery, physical and/or sexual abuse of children, and sexual assault short of rape or attempted rape). *Id.* Therefore, 4% of the students in the study accounted for 28% of the violence, nearly ten times that of non-rapists (1.41 acts of violence per person) and 3.5 times that of single-act rapists (3.98 acts of violence per person). *Id.* A more limited study in 1987 revealed that 96 college men accounted for 187 rapes. MARTIN D. SCHWARTZ & WALTER S. DEKESEREDY, SEXUAL ASSAULT ON THE COLLEGE CAMPUS: THE ROLE OF MALE PEER SUPPORT 12 (1997).

72. See Nan Stein, *A Rising Pandemic of Sexual Violence in Elementary and Secondary Schools: Locating a Secret Problem*, 12 DUKE J. GENDER L. & POL’Y 33, 40 (2005) (“A recent analysis of the national 2001 data from 6,864 female students in grades nine through twelve found that 9.8% of all girls reported being intentionally physically hurt by a date in the previous year and 17.7% of sexually active girls reported the same abuse.”).

73. *Dating Violence*, ALA. COAL. AGAINST DOMESTIC VIOLENCE, <http://www.acadv.org/dating.html#statistics> (last visited Oct. 31, 2013).

74. TEEN DATING VIOLENCE: PREVENTION RECOMMENDATIONS, AMERICAN BAR ASSOCIATION 4 (2006), available at <http://www.americanbar.org/content/dam/aba/migrated/unmet/teenabuseguide.authcheckdam.pdf> (“Approximately 1 in 5 female high school students report being physically and/or sexually abused by a dating partner.”). See generally Lisa Vollendorf Martin, *What’s Love Got to Do with It: Securing Access to Justice for Teens*, 61 CATH. U. L. REV. 457 (2012) (reviewing the teen dating violence problem and suggesting changes to state civil protection order statutes to better protect teen dating violence victims).

75. TEEN DATING VIOLENCE: PREVENTION RECOMMENDATIONS, *supra* note 74, at 5.

76. *Dating Violence*, *supra* note 73.

a person they were dating.”⁷⁷ Same-sex dating partners appear to experience similar rates of violence as heterosexual couples.⁷⁸

In addition to the prevalence of violence itself, teen relationships displayed many of the power- and control-related behaviors commonly associated with domestic violence. “One-third or more of teens in relationships have been with a partner who frequently asked where they were and whom they were with,”⁷⁹ and “[one] in [three] teens (30%) say they are text messaged 10, 20, or 30 times an hour by a partner inquiring where they are, what they’re doing, or who they’re with.”⁸⁰ “[One] in [four] teens in serious relationships have been prevented from spending time with friends and family or pressured to only spend time with their partner,”⁸¹ and “39% of female high school students report that students talk in school about whether someone is attempting to control the person they are dating.”⁸²

Finally, over the last dozen years, studies have estimated that 47% of high school students and 55% of college students belonging to organized groups experience hazing.⁸³ Journalism professor Hank Nuwer collects information about hazing incidents on his website,⁸⁴ the sheer number of which confirm the scope and severity of the problem.⁸⁵ Nuwer’s list of hazing incidents includes at least one documented hazing death per year for the last several decades,⁸⁶ and a list of particularly severe high school hazing incidents, almost all involving male high school athletes anally raping other players with various objects or fingers.⁸⁷ Other surveys corroborate this

77. TEEN DATING VIOLENCE: PREVENTION RECOMMENDATIONS, *supra* note 74, at 5.

78. *See id.* at 1 (“In a study of gay, lesbian, and bisexual adolescents, youths involved in same-sex dating are just as likely to experience dating violence as youths involved in opposite sex dating.”).

79. *10 Teen Dating Abuse Facts*, LOVEISRESPECT.ORG, <http://www.loveisrespect.org/resources/tdvaw/10Teen%20Dating%20Abuse%20Facts.pdf>.

80. *Id.*

81. *Id.*

82. TEEN DATING VIOLENCE: PREVENTION RECOMMENDATIONS, *supra* note 74, at 5.

83. ELIZABETH J. ALLAN & MARY MADDEN, HAZING IN VIEW: COLLEGE STUDENTS AT RISK 2 (2008), available at http://www.hazingstudy.org/publications/hazing_in_view_web.pdf. “Activities considered to be hazing include threats of social ostracism; submitting a student to ignominy, shame or disgrace among his/her fellow students; and playing abusive or truculent tricks.” Melissa Dixon, *Hazing in High Schools: Ending the Hidden Tradition*, 30 J.L. & EDUC. 357, 358 (2001).

84. Hank Nuwer, *High School Hazing 1905–2012*, (Sept. 9, 2012), <http://hazing.hanknuwer.com/hs2.html> (last visited Oct. 31, 2013).

85. *See id.* (including an unofficial list of over 150 hazing-related incidents).

86. Hank Nuwer, *Hank Nuwer’s List of Deaths by Hazing*, (Sept. 19, 2013), <http://www.hanknuwer.com/hazingdeaths.html>.

87. Hank Nuwer, *25 Bad Hazing Incidents by Hank Nuwer*, <http://hazing.hanknuwer.com/bad.html> (last visited Oct. 31, 2013).

high school hazing phenomenon.⁸⁸ Boys and men experience a higher rate of hazing than girls and women, both in high school⁸⁹ and in college,⁹⁰ with male students at the highest risk for “dangerous hazing.”⁹¹

Common characteristics of hazing include the use of “[a]lcohol consumption, humiliation, isolation, sleep-deprivation, and sex acts,”⁹² and the openness of hazing, which “appears to occur ‘In View’ of adults both in school and in the community.”⁹³ With regard to its paradoxical simultaneous visibility and invisibility, 24% of college students witnessed hazing;⁹⁴ students believed that 25% of coaches or organization advisors knew about the hazing behaviors of the group;⁹⁵ 25% of hazing occurred in a public space,⁹⁶ and alumni were present for 25% of hazing experiences.⁹⁷ Nevertheless, 95% of students who identified an experience as hazing did not report it,⁹⁸ and 91% who experienced a hazing behavior did not identify it as hazing.⁹⁹

B. Masculinity Studies’ Explanations for Gender-Based Violence

Such widespread gender-based violence among students is both comparable to its incidence in the larger society (if anything, it is more widespread among students) and cannot be attributed merely to some individual students’ poor behavior and choices. These two undeniable facts have led many on a search for what is causing such an epidemic, and increasingly the searchers are pointing their fingers toward “masculinity.”¹⁰⁰

88. *E.g.*, Staiti & Bortnick, *supra* note 10.

89. *See* ALLAN & MADDEN, *supra* note 83, at 32 (“Forty-seven percent of the respondents report experiencing at least one hazing behavior while in high school, including 51% of the male and 45% of the female respondents.”).

90. *Id.* at 14 (“More specifically, 61% of male respondents and 52% of female respondents [in college] who are involved with a student organization or team have experienced a behavior that meets the definition of hazing.”).

91. NADINE C. HOOVER & NORMAN J. POLLARD, *HIGH SCHOOL HAZING: INITIATION RITES IN AMERICAN HIGH SCHOOLS: A NATIONAL SURVEY 1* (2000).

92. ALLAN & MADDEN, *supra* note 83, at 2.

93. *See* Mary Madden & Elizabeth Allan, *Summary, Hazing in View: High School Students at Risk*, 1 http://www.hazingstudy.org/publications/hs_hazing_summary.pdf (last visited Oct. 31, 2013).

94. ALLAN & MADDEN, *supra* note 83, at 30.

95. *Id.* at 2.

96. *Id.*

97. *Id.*

98. *Id.* at 28.

99. *Id.* at 33.

100. *See* Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment “Because of Sex,”* 79 U. COLO. L. REV. 1151, 1154 (2008) (arguing “that masculinities theory and

The last several decades have witnessed the development of a new area of study in fields including sociology, social psychology, and law¹⁰¹ that has focused on “masculinity,” or how “manhood” is constructed in society¹⁰² and what it means—particularly to boys and men themselves—to be a “man.” Drawing from feminist theory, in particular,¹⁰³ these scholars have slowly drawn a more detailed picture of boys and men as gendered beings.¹⁰⁴

Masculinity theory posits, moreover, that, as gendered beings, boys and men inhabit a fundamentally social, not a biological, category¹⁰⁵—one that, like other social categories, is complex and far from monolithic.¹⁰⁶ For this reason, the study of “masculinity” has increasingly been broadened to examine multiple “masculinities,” and is now more generally referred to as “masculinities studies” or “masculinities theory.”

Nevertheless, masculinities scholars also acknowledge that one form of masculinity is dominant, both historically and in contemporary American society.¹⁰⁷ Alternately described as “traditional” or “hegemonic,” this form of masculinity is the primary focus of this Article. The Article will generally use “traditional masculinity” because of its historical dominance, but this term should not be taken to mean that this form of masculinity is a thing of the past. In fact, it is still so dominant that it significantly marginalizes other forms of masculinity in current society.¹⁰⁸ In addition, this Article will sometimes use the term “hypermasculinity” to identify particularly strong forms of traditional masculinity.

This Article’s concern with traditional masculinity does not derive primarily from traditional masculinity’s dominance, but rather from its particular relationship to gender-based violence, including bullying, sexual harassment, hazing, and sexual and dating violence. A significant subset of masculinities scholars have focused on the links between traditional masculinity and gender-based violence, including those links as they appear

new research on the gendered nature of bullying can help courts and juries to understand that certain group harassing behaviors occur because of sex”).

101. *E.g.*, NANCY E. DOWD, *THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE* (2010).

102. *Id.* at 3.

103. McGinley, *supra* note 100, at 1165.

104. *Id.* at 1166.

105. *Id.* at 1161.

106. *Id.* at 1162.

107. *See* Ann C. McGinley, *Ricci v. Destefano: A Masculinities Theory Analysis*, 33 *HARV. J. L. & GENDER* 581, 586 (2010) (“Although numerous types of masculinities exist in tension with one another, the ideal is the powerful hegemonic masculinity that is white, middle class, and heterosexual.”).

108. *See id.*

among boys and young men who are in middle school, high school, or college.

Masculinities scholars have identified the ideal traits of traditionally masculine boys and men as naturally heterosexual, aggressive, active, sports-obsessed, competitive, stoic, and most importantly, not girls.¹⁰⁹ Traditional masculinity also generally includes other privileged identities, including white and middle/upper class.¹¹⁰ One of the earliest masculinities scholars, Dr. Robert Brannon, identified “four traditional rules of American manhood”:

(1) No Sissy Stuff: . . . Manhood is a relentless repudiation and devaluation of the feminine. (2) Be a Big Wheel: . . . Whoever has the most toys when he dies, wins. (3) Be a Sturdy Oak: . . . [M]en [do] not reveal their feelings. (4) Give ‘em Hell. Exude an aura of manly daring and aggression.¹¹¹

The first two rules show that traditional masculinity is deeply hierarchical. First, women and girls are at the bottom of the hierarchy, and traditional masculinity constructs them as inferior.¹¹² Second, there is constant competition as to power and status within the male group.¹¹³ These two rules combine to create a pervasive culture of both misogyny and homophobia because one of the best ways to enhance one’s masculine status with other boys is to equate other boys to girls.¹¹⁴ For instance, Professor Michael Kimmel quotes his “favorite contemporary gender theorist, Eminem”:

The lowest degrading thing that you can say to a man when you’re battling him is to call him a faggot and try to take away his manhood. . . . Call him a sissy, call him a punk. “Faggot” to me doesn’t necessarily mean gay people. “Faggot” to me just means taking away your manhood.¹¹⁵

These comments demonstrate the centrality of the hierarchies of boys/men over girls/women and of some boys/men over other boys/men, as

109. David S. Cohen, *No Boy Left Behind? Single-Sex Education and the Essentialist Myth of Masculinity*, 84 IND. L.J. 135, 153 (2009); DAVID SADKER, MYRA SADKER & KAREN ZITTELMAN, *STILL FAILING AT FAIRNESS: HOW GENDER BIAS CHEATS GIRLS AND BOYS IN SCHOOL AND WHAT WE CAN DO ABOUT IT* 125–26 (2009).

110. MICHAEL KIMMEL, *GUYLAND: THE PERILOUS WORLD WHERE BOYS BECOME MEN* 8 (2008).

111. Michael Kimmel, *Men, Masculinity, and the Rape Culture*, in *TRANSFORMING A RAPE CULTURE* 139, 142 (Emilie Buchwald, Pamela R. Fletcher & Martha Roth, eds., revised ed. 2005).

112. *Id.*

113. *Id.*

114. See McGinley, *supra* note 107, at 586 (“The definition of ‘masculinity’ depends on proof of two negatives: that one is not feminine or a girl, and that one is not gay.”).

115. Kimmel, *supra* note 111, at 146.

well as two primary methods of maintaining those hierarchies, misogyny and homophobia.

The second two of Dr. Brannon's rules are specific behavioral edicts that relate to how boys and men establish their masculinity and maintain both their difference from and superiority over girls, women, and feminized men and boys, as well as how they compete with each other for dominance within the male group. A number of masculinities scholars have described just how early in life boys begin to face pressure to conform to these rules, and how boys' conformity to these rules affects their lived experiences of masculinity.¹¹⁶ For instance, Michael Kimmel relates a story of a mother who approached him following a presentation to ask advice for dealing with her husband's recent announcement that their son would be spending less time with her because the boy had started to cry at the barbershop when the barber used heat and some strong chemicals on the boy's hair. Her husband was quite shaken when the barber said the boy was a "wimp" and "has been spending too much time with his mama!" When Professor Kimmel asked the mother how old her son was, she said, "Three and a half."¹¹⁷

Masculinities scholars Drs. William Pollack and Dan Kindlon have explained this phenomenon more comprehensively. Dr. Pollack coined the term "the boy code" to explain the pressure boys face to separate from their mothers and distance themselves from emotion and empathy.¹¹⁸ Similarly, Dr. Kindlon and his co-authors track the suppression of emotion that boys learn and suggest a new masculine model that presents multiple models of masculinity, including ones that involve and embrace emotion.¹¹⁹

Multiple scholars have explained that such pressures lead boys and, later in life, men to experience masculinity as a "constant test" that "is always up for grabs, always needing to be proved."¹²⁰ Moreover, this constant testing is about gaining acceptance with other men, a "'homosocial event' that . . . is a dangerous experience for men, full of risk and relentless competition."¹²¹ However, because the rules cannot be satisfied all the time, a phenomenon that Dr. Kindlon calls "The Big Impossible,"¹²² very few boys ever feel like they consistently measure up. Much of masculinity then becomes a *hypermasculine* performance for other boys that is designed to show that one boy is more masculine than other boys, but that is con-

116. Cohen, *supra* note 109, at 138.

117. KIMMEL, *supra* note 110, at 52.

118. DOWD, *supra* note 101, at 40.

119. *Id.* at 41–42.

120. KIMMEL, *supra* note 110, at 51.

121. McGinley, *supra* note 100, at 1164.

122. DOWD, *supra* note 101, at 41.

stantly underlaid with insecurity and fear that other boys might see through the performance.¹²³ Violence plays a key part in this performance, as “a compensatory mechanism. . . . [A] way of re-establishing the masculine equilibrium, of asserting to oneself and to others [one’s] masculine credentials.”¹²⁴ Youth is also a critical factor because boys and younger men are likely to feel most insecure by virtue of their developmental stage in life.¹²⁵ When these factors are combined with the key tool in the masculine performance—denigrating other boys’ masculinity by comparing them to girls—boys’ insecurity leads to a cycle of even more hypermasculine posturing and more intense denigration of girls and other boys, including through violent means.

It is this cycle of hypermasculine performance and insecurity that links traditional masculinity to gender-based violence on the front end and provides a potent recipe for bullying and sexual harassment of both boys and girls in school. At the back end, however, once the violence has occurred, traditional masculinity also makes sure that the perpetrators of such violence will not be punished or held accountable for their actions, through what Professor Kimmel characterizes as the “cultures of silence and protection.”¹²⁶ These cultures mean that most boys and men are not perpetrators of harassment or violence. The majority are silent bystanders who remain silent not because they support the behavior, but because the denigration of girls and feminized boys *through* harassment and violence generally establishes or maintains the perpetrators’ status at the top of the hierarchy.¹²⁷ Challenging the perpetrators therefore threatens a loss of masculine status for the bystander.¹²⁸ To make it even riskier, that loss of masculine status could itself open the bystander up to becoming a victim of harassment and violence himself.¹²⁹ This risk not only leads to the widespread silent bystander phenomenon, but could also influence both perpetrators and bystanders to be more tolerant of gender-based violence or even see it as an acceptable form of sexual expression.¹³⁰ As Dr. Christopher N. Kendall explains, “men [] have two options: be violent and aggressive, hence mascu-

123. *Id.*

124. Michael Kaufman, *The Seven P’s of Men’s Violence*, (Oct. 4, 1999), <http://www.michaelkaufman.com/1999/the-7-ps-of-mens-violence/> (emphasis added).

125. *Id.*

126. KIMMEL, *supra* note 110, at 59.

127. *Id.* at 61–62.

128. *Id.* at 61.

129. *Id.* at 62.

130. Christopher N. Kendall, *Gay Male Liberation Post Oncale: Since When Is Sexualized Violence Our Path to Liberation?*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 221, 225 (Catherine A. MacKinnon and Reva B. Siegel, eds., 2004).

line and in control, or be the person upon whom that power is exercised sexually. . . . [I]f they want to maintain the privilege that attaches to those who are male, [men must] reject any form of sexual expression that is non-hierarchical, nonabusive, nonalienating, read equal.”¹³¹ By these accounts, the feedback loop of traditional masculinity and gender-based violence seems virtually hermetically sealed.

Unfortunately, what might be viewed by some as mere theories is backed up in reality by other evidence suggesting a link between traditional masculinity and gender-based violence. For instance, going back to Robert Brannon’s four rules, perpetrators of sexual violence commonly devalue women and the feminine, and multiple studies have shown that such perpetrators share characteristics such as “macho” attitudes, “high levels of anger at women,” and “the need to dominate women.”¹³² With regard to the second rule, masculinity scholars have also suggested, “Men often will use their sexual conquests as a form of currency to gain status among other men. Such homosocial competition contributes to the strange hearing impairment that leads us to hear ‘no’ as ‘yes.’”¹³³ Finally, with regard to rules three and four, Professor Michael Messner suggests, in connection with his studies of athletes among whom there is a high incidence of gender-based violence, that the encouragement of aggression and the repression of emotion and physical pain in sports combine to suppress athletes’ empathy for others, which enables several forms of violence, including gender-based violence.¹³⁴ Lack of empathy is also a trait associated with perpetrators of sexual violence more generally.¹³⁵

In fact, scholars who have examined traditional masculinity in a variety of disciplines are increasingly suggesting that the operation of these rules can actually encourage the perpetration of such violence. For instance, Professor Messner discusses how the culture of traditional masculinity can lead to a “dynamic of date and acquaintance rape, even among young men who are marginal” within the male peer group.¹³⁶ He gives as an example his own experiences in college as such a marginal member who, after being ridiculed by another man for being a virgin, “step[ped] up the pressure on [his]

131. *Id.*

132. *See, e.g.*, BOHMER & PARROT, *supra* note 58, at 23; Lisak & Miller, *supra* note 70, at 73; Martin D. Schwartz et al., *Male Peer Support and a Feminist Routine Activities Theory: Understanding Sexual Assault on the College Campus*, 18 JUST. Q. 623, 628 (2001).

133. Kimmel, *supra* note 111, at 147.

134. Michael A. Messner, *The Triad of Violence in Men’s Sports*, in TRANSFORMING A RAPE CULTURE, *supra* note 111, at 23, 41.

135. *E.g.*, Lisak & Miller, *supra* note 70, at 73; Schwartz et al., *supra* note 132, at 628 (discussing how perpetrators objectify women and legitimize coercive techniques).

136. Messner, *supra* note 134, at 32.

girlfriend to put out.”¹³⁷ In an echo of Professor Kimmel’s analysis of the cultures of silence and protection, he also notes that many men who are not engaging in such violence remain silent about others’ perpetration of it because they might be “banished from the group and possibly also beaten up, or . . . remain in the group as a degraded, feminized ‘faggot’ who betrayed the ‘men.’”¹³⁸

Even more directly, Drs. Martin D. Schwartz and Walter S. DeKeseredy have done a series of studies, together or in conjunction with others, where they have examined the role of male peer support in encouraging men—including college men—to perpetrate gender-based violence. Their recently published volume¹³⁹ collects various studies—conducted by them or others—that provide evidence for their theory that men with “attachments to male peers [who provide] resources . . . that encourage and legitimate woman abuse” are more likely to commit violence against women.¹⁴⁰ These studies include men and boys from rural Ohio, Kentucky, South Africa, and New Zealand, as well as those in Chicago, St. Louis, New York City, and Canadian urban areas, whose locations range “from impoverished public housing projects [to] elite college campuses to rural semi-isolated homes to newer online cyber communities.”¹⁴¹

In the college studies, Professors Schwartz, DeKeseredy, and their colleagues concluded that “men who report having [sexually aggressive friends] clearly report more sexually aggressive behavior,”¹⁴² and that these “peers encourage [sexually abusive male undergraduates] to assault their girlfriends or dating partners.”¹⁴³ Specifically, they found that male peer support for emotional, physical, or sexual violence approximately doubled the chances for the man to commit an act of sexual aggression.¹⁴⁴ When the peer support was combined with drinking alcohol two or more times a week, the likelihood that a man would force sexual activity on a dating partner increased nearly ten-fold over men who did not drink so frequently or did not have peers who influenced them to be emotionally, physically, or

137. *Id.*

138. *Id.* at 35.

139. WALTER S. DEKESEREDY & MARTIN D. SCHWARTZ, *MALE PEER SUPPORT AND VIOLENCE AGAINST WOMEN: THE HISTORY AND VERIFICATION OF A THEORY* (2013).

140. *Id.* at xiv.

141. *Id.* at xvi.

142. Schwartz et al., *supra* note 132, at 642. Although they acknowledge that “it is impossible to discover whether the man’s friends actually act in this manner, or whether the man simply perceives that they do so,” this caveat does not affect the analysis because the perception acts as a form of peer support. *Id.*

143. *Id.* at 641.

144. *Id.* at 644.

sexually violent.¹⁴⁵ In contrast, “men who claim to have no friends advocating abuse of women admit to relatively little abuse themselves.”¹⁴⁶

In addition to their own studies, Drs. DeKeseredy and Schwartz review in their recent book a 2012 study that used the male peer support theory and concluded that “male peer support . . . explained much of the incidence and motivation for sexual assault on the college campus.”¹⁴⁷ Their review also mentions previous studies on dating violence among “college students and adolescents that identify male peer influence as a key determinant of [this violence].”¹⁴⁸

Professors Schwartz and DeKeseredy also discuss a study by Dr. Eugene Kanin that seeks to explain certain “hypererotic” college subcultures as being created from “extremely high or exaggerated levels of sexual aspiration” among group members who “*expect* to engage in a very high level of consensual sexual intercourse, or what is to them sexual conquest.”¹⁴⁹ However, in an echo of Dr. Kindlon’s “the Big Impossible”:

[F]or most men such goals are impossible to achieve. When they fall short of what they see as their friends’ high expectations, and perhaps short of what they believe their friends are all actually achieving, some of these men experience relative deprivation. This sexual frustration . . . can result in predatory sexual conduct.¹⁵⁰

Critically, the male peer support studies that Drs. DeKeseredy and Schwartz review show the interactions between hypermasculine values, perceived threats to that masculinity, and the damage men fear those threats

145. *Id.* Interestingly, Professors Schwartz and DeKeseredy and their colleagues found that the perpetrator’s consumption of alcohol had more of a clear effect on the perpetration of sexual violence than the victim’s consumption of alcohol. *Id.* at 638–39 (finding a “mostly linear relationship” between “men who admit to engaging in sexually aggressive behavior” and men who “drink and use drugs more often [than light drinkers/drug users and abstainers],” but stating that “[t]he relationship for women is more complex”). Professor Messner posits that the key role of heavy alcohol consumption in the male peer support group dynamic is again largely about men’s status and relationships with each other. It is simultaneously a “part of the system of competitive status enhancement” and providing the “short term benefit[]” of “loosen[ing] constraints on verbal and emotional expression” and making “[t]he key desires underlying boys’ and mens’ affiliations with each other—for acceptance, emotional connection, respect—seem more accessible.” Messner, *supra* note 134, at 38. Furthermore, Professor Kimmel notes that some have speculated that “[d]rinking may be part of some men’s premeditated strategy to coerce women into unwanted sex or to be violent . . . [and then] distance themselves from their violence.” KIMMEL, *supra* note 110, at 239.

146. Schwartz et al., *supra* note 132, at 646.

147. DEKESEREDY & SCHWARTZ, *supra* note 139, at 99.

148. *Id.*

149. *Id.* at 95.

150. *Id.*

will have on their status amongst peers who hold similar values. In several studies—particularly those focusing on sexual violence committed during separation and divorce—men and their peer groups hold traditionally masculine beliefs such as an “ideology of familial patriarchy,”¹⁵¹ which outside forces such as unemployment (a factor in both urban and rural settings) often strain.¹⁵² Already “desperately attempting to reassert their grandfathers’ lost autocratic control over the household,”¹⁵³ when their wives or girlfriends leave these men, “many . . . are influenced by their male peers to engage in separation/divorce sexual assault to regain control and to avoid losing status.”¹⁵⁴ Similarly, the use of the male peer support theory in studies on the American police and the U.S. Army, both groups known for higher rates of gender-based violence,¹⁵⁵ found that these groups also have hypermasculine cultures that are linked to violence, including sexual harassment of female coworkers and abuse of intimate partners.¹⁵⁶

Several studies indicate that issues of status amongst male peers are a distinct commonality, even when the men studied are widely diverse in other respects. For instance, Drs. DeKeseredy and Schwartz studied primarily white, rural men and found very similar dynamics to those discussed in previous studies of primarily minority, inner-city men.¹⁵⁷ They discuss three studies of the inner-city: Dr. Phillippe Bourgois’s *In Search of Respect: Selling Crack in El Barrio*; Dr. William Julius Wilson’s *When Work Disappears: The World of the New Urban Poor*; and Dr. Jody Miller’s *Getting Played: African American Girls, Urban Inequality, and Gendered Violence*. Dr. Wilson’s book mentions that the poor, urban, primarily African American men he studied felt pressure from male peers to be both sexually active and to brag about their exploits.¹⁵⁸ In addition, Dr. Bourgois’s ethnographic study of “roughly twenty-four” Puerto Rican crack dealers in East Harlem (“El Barrio”) explains some of the dynamics of the “pervasiveness of sexual violence”¹⁵⁹ among the local gangs in this way: “sexual relations have more to do with the gang members’ need to compensate for their lack of money and their need to sustain their status among their peers than a need to satisfy

151. *Id.* at 84.

152. *Id.* at 87.

153. *Id.* at 89 (citation and internal quotation marks omitted).

154. *Id.* at 85.

155. *Violence Perpetrated by State Actors*, CTR. FOR WOMEN’S GLOBAL LEADERSHIP, 1 http://16dayscwgl.rutgers.edu/component/docman/doc_view/450-violence-by-state-agentspdf (last visited Dec. 19, 2013).

156. DEKESEREDY & SCHWARTZ, *supra* note 139, at 111.

157. *Id.* at 103–07.

158. *Id.* at 74–75.

159. *Id.* at 116.

their sexual urges.”¹⁶⁰ Like the college men in the “hypererotic” college subcultures studied by Dr. Kanin, the gang cultures “produce high or exaggerated levels of [sexual] aspiration.”¹⁶¹

Dr. Miller discusses how young urban men develop “presentations of self that emphasize toughness and independence, a willingness to use violence, and heterosexual prowess demonstrated by means of sexual conquest.”¹⁶² She explains that these ways of “performing masculinity” come about because “alternative forms of status and prestige are denied to young men living in disadvantaged communities.”¹⁶³ Dr. Miller begins her book with descriptions of the “routine” practice of rape in disadvantaged communities from journalist Nathan McCall’s autobiography, *Makes Me Wanna Holler: A Young Black Man in America* and Luis Rodriguez’s *Always Running: La Vida Loca—Gang Days in L.A.*¹⁶⁴ McCall characterizes the common practice of gang rape, or running “trains,” as “a social thing . . . like passing a joint. The dude who set up the train got pats on the back. He was considered a real player . . . it didn’t seem to be about sex at all. Like almost everything we did, it was a macho thing.”¹⁶⁵ Similarly, Professors Schwartz and DeKeseredy mention gang rape as a phenomenon in the rural communities that they studied, where one victim told them that her ex would force her to have sex with his friends because he was “trying to be the big man.”¹⁶⁶ While poverty is a commonality for the men in most of these studies, Drs. DeKeseredy’s and Schwartz’s own studies were on “elite college students.”¹⁶⁷ Thus, their review as a whole suggests that the redefinition of sexual violence as sexual “conquests,” as well as the motivation for doing so, crosses even economic boundaries and is shared by men from otherwise widely divergent backgrounds and social positions. These studies suggest that, while the perceived need to establish one’s masculinity may have different root causes, the surface motivation of achieving and maintaining status with male peers and the methods for doing so are remarkably similar.

It should be noted, however, that studies on Asian American men and on students enrolled at the four HBCUs mentioned above do indicate lower sexual violence rates among some men of color. In the case of Asian

160. *Id.*

161. *Id.*

162. JODY MILLER, GETTING PLAYED: AFRICAN AMERICAN GIRLS, URBAN INEQUALITY, AND GENDERED VIOLENCE 5 (John Hagan ed., 2008).

163. *Id.*

164. *Id.* at 1.

165. *Id.*

166. DEKESEREDY & SCHWARTZ, *supra* note 139, at 106.

167. *See generally* DEKESEREDY & SCHWARTZ, *supra* note 139.

American men, research indicates that cultural reasons lead Asian American men to feel they would “lose face” if they participated in sexual aggression, in contrast to white men, who fear loss of face from *not* participating.¹⁶⁸ Professor Kimmel, who warns of the costs of pornography in “sexualiz[ing] violence against women, mak[ing] it look acceptable,” reviews studies that have shown much lower rates of interest in pornography among all men of color in comparison to white men.¹⁶⁹ He quotes both Asian American and African American college and university men explaining their objections to mainstream pornography.¹⁷⁰ The interviewees objected to the intersectional racist and sexist images in this porn, including images of Asian American women and African American men, as well as to the invisibility of Asian American men and real (as opposed to stereotyped caricatures of) African American men.¹⁷¹

Finally, various scholars have noticed the demographics of mass shootings in school settings and noted the connections between the shootings, gender-based violence, and hypermasculine forms of traditional masculinity. Evidence suggests that some of the school shooting cases where the shooter has clearly targeted women or girls can themselves be cases of gender-based violence and that gender-based violence perpetrated by the shooters may be a prelude or warning sign of a subsequent mass shooting.¹⁷² Most importantly, hypermasculinity has played a distinct role in many school shootings—particularly in the secondary schools. For instance, although often not acknowledged by the media or the FBI,¹⁷³ thus far, nearly every school shooter has been a man or a boy,¹⁷⁴ and many of the shooters—the secondary school shooters in particular—appeared to have been undergoing identity crises related to their masculinity.¹⁷⁵ Many were

168. KIMMEL, *supra* note 110, at 312.

169. *Id.* at 183.

170. *Id.*

171. *Id.* at 185.

172. For a more detailed discussion of such connections, see generally, Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary Through the Ordinary*, 35 J.C. & U.L. 613 (2009). Note that neither the discussion here nor in the 2009 article incorporates discussion of the Newtown mass school shooting, about which too little is yet known.

173. See Marina Angel, *The School Shooters: Surprise! Boys Are Far More Violent than Girls and Gender Stereotypes Underlie School Violence*, 27 OHIO N.U. L. REV. 485, 490 (2001) (noting the failure of newspaper articles to accurately report the incidents); see also Jackson Katz, *Coverage of ‘School Shootings’ Avoids the Central Issue*, COMMON DREAMS (Oct. 11, 2006), <http://www.commondreams.org/views06/1011-36.htm> (arguing that society fails to acknowledge school shootings are a manifestation of gender-based violence); KIMMEL, *supra* note 110, at 87–90.

174. Angel, *supra* note 173, at 491. Many commentators on the secondary school shootings have also noted that all of the boys were white. *Id.* at 491–92.

175. *Id.* at 499.

bullied, harassed, and gay-baited,¹⁷⁶ and they reacted to this violence in ways that “define[] violence as a legitimate response to a perceived humiliation,” and used violence, especially gun violence, to establish the shooters as “real men.”¹⁷⁷ The higher education shooters were also often harassed.¹⁷⁸

Even more critically, many of the schools where shootings have taken place involved cultures that were characterized by a hypermasculine ethic and were tolerant of gender-based violence, harassment, and discrimination. Evidence suggests that such an environment existed at Columbine High School, which had:

a tough little group of about seven guys, mostly football players and wrestlers, who were known for painful, degrading hazing of younger male athletes, for harassing and physically abusing girls, for destroying property, and basically for getting away with it all. They also abused the outsider boys, one of whom was shoved into a locker by three football players who taunted, “Fag, what are you looking at?”¹⁷⁹

One girl got a restraining order against a Columbine football player but was obligated to get home schooling while he continued to take classes at the school.¹⁸⁰ A boy at Columbine said that he would have glass bottles thrown at him from moving vehicles by other students every day as he walked home from school.¹⁸¹

Similarly, Virginia Tech was the site of not only the most devastating university shooting, but one of the most prominent U.S. college rape cases ever, where the survivor was gang-raped by two football players and took her case all the way to the U.S. Supreme Court on one claim,¹⁸² and to the Fourth Circuit on the other claim.¹⁸³ In a strange echo of the Columbine

176. *Id.* at 487; Michael Kimmel, *Profiling School Shooters and Shooters' Schools: The Cultural Contexts of Aggrieved Entitlement and Restorative Masculinity*, in *THERE IS A GUNMAN ON CAMPUS: TRAGEDY AND TERROR AT VIRGINIA TECH* 65, 68 (Ben Agger & Timothy W. Luke eds., 2008).

177. Kimmel, *supra* note 176, at 68–69.

178. Helen Hickey de Haven, *The Elephant in the Ivory Tower: Rampages in Higher Education and the Case for Institutional Liability*, 35 *J.C. & U.L.* 503, 605 (2009).

179. Messner, *supra* note 134, at 38.

180. Angel, *supra* note 173, at 494.

181. Kimmel, *supra* note 176, at 71.

182. *United States v. Morrison*, 529 U.S. 598, 601–02 (2000) (addressing the claim brought under the 1994 Violence Against Women Act).

183. *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 132 F.3d 949, 953 (4th Cir. 1997), *vacated en banc*, 169 F.3d 820 (4th Cir. 1999), *aff'd sub nom.* *United States v. Morrison*, 529 U.S. 598 (2000). *Brzonkala* initially prevailed in the Fourth Circuit on both claims, one brought under Title IX and the other under the 1994 Violence Against Women Act (VAWA). Only the VAWA claim was appealed to the United States Supreme Court.

boy's story, Professor Kimmel relates his own experience of having students from a fraternity at Virginia Tech, to whom he had just presented regarding men's roles in supporting gender equality, throw a glass beer bottle at him from the back of a passing pick-up truck as he was walking back to his hotel.¹⁸⁴ He notes that this is the only physical harassment he has ever experienced after giving similar lectures at hundreds of schools,¹⁸⁵ and characterizes the climates at Columbine and Virginia Tech as "jockocracies"¹⁸⁶ where "the administration, teachers, and community colluded with" the behaviors creating those climates.¹⁸⁷ He quotes a boy at Columbine who stated that "the teachers and administrators invariably would turn a blind eye" when receiving reports as to how "those who were 'different' were crushed" because the bullies "were their favorites."¹⁸⁸

In a third example, at Appalachia School of Law, about a year prior to the shooting, a student's work on lesbians in Appalachia was maliciously erased from a school computer and a student who was killed in the shooting received an email that addressed her as a "fucking cocksucker" and threatened to "cut [her] nipples off, and stick jumper cables in [her] and connect them to [the email sender's] truck."¹⁸⁹ In addition, a female administrator presented three complaints against the student who would later become the shooter to the three top administrative officials, all male.¹⁹⁰ Those officials dismissed all three complaints as the product of "hormones" and "women's intuition,"¹⁹¹ and school officials likewise did not make significant efforts to find those responsible for the violently misogynistic email and the erasing of the Appalachian lesbianism research.¹⁹²

C. Traditional Masculinity, the Hidden Curriculum, and Sex-Segregated Education

As the school shooting examples demonstrate, the dominance of traditional masculinity in these hypermasculine forms is supported by powerful forces. One of the forces that significantly advance this dominance in school settings is often referred to as the "hidden curriculum," defined as "the running subtext through which teachers communicate behavioral

184. Kimmel, *supra* note 176, at 75.

185. *Id.*

186. *Id.* at 76.

187. *Id.* at 72.

188. *Id.* (internal quotation marks omitted).

189. *See de Haven, supra* note 178, at 537 n.152.

190. *Id.* at 538–39 n.160.

191. *Id.*

192. *Id.* at 537 & 537 n.152 and accompanying text.

norms and individual status in the school culture, the process of socialization that cues children into their place in the hierarchy of larger society.”¹⁹³ A phenomenon that was first discussed with regard to socialization of girls, a typical example of the hidden curriculum can be seen when examining the puzzling fact that, while girls score behind boys on standardized tests, they get better grades.¹⁹⁴ To explain this phenomenon, educational scholars Drs. David Sadker, Myra Sadker, and Karen Zittleman have shown that girls get better grades because teachers give them “good grade[s] for good behavior.”¹⁹⁵ In this way, they “teach girls to value silence and compliance, to view those qualities as a virtue.”¹⁹⁶

Tenets of traditional masculinity rising to hypermasculinity have long characterized the hidden curriculum’s education of boys in coeducational settings. Studies have documented both traditional masculine school structures and adult leadership. They have also documented students’ traditionally masculine attitudes. On the one hand, masculinities scholars have shown that “[s]chools, like all institutions, are thoroughly gendered in their own organisation and practice,”¹⁹⁷ and on the other, that “[s]chools are like factories, and what they produce is gendered individuals.”¹⁹⁸

Scholars studying traditional masculine school structures have described schools as “masculinizing agencies”¹⁹⁹ and “masculinizing institutions,” where masculinity is embedded throughout the school, including “as an unspoken standard, as a style, as well as a division of labor, process of resource allotment, and informal networking.”²⁰⁰ For instance, masculinities scholars Drs. Pollack and Kindlon both note the role that the educational system plays in perpetuating myths related to traditional masculinity, including that “boys will be boys,” that testosterone controls boy behavior, and that boys either are or are supposed to be tough and dangerous.²⁰¹ The Drs. Sadker and Dr. Zittleman relate stories of teachers characterizing as “queer” a four year-old boy who liked women’s clothes and played at being a “hairdresser,”²⁰² and telling boys to, “Stop crying. . . . Be a Man!”²⁰³

193. ORENSTEIN, *supra* note 28, at 5 (internal quotation marks omitted).

194. SADKER, SADKER, & ZITTLEMAN, *supra* note 109 at 176–77.

195. *Id.* at 196.

196. ORENSTEIN, *supra* note 28, at 35.

197. ROB GILBERT & PAM GILBERT, MASCULINITY GOES TO SCHOOL 114 (1998).

198. Michael Kimmel, *Series Editor’s Foreword*, in MASCULINITIES AT SCHOOL vii, vii (Nancy Lesko ed., 2000).

199. Nancy Lesko, *Introduction*, in MASCULINITIES AT SCHOOL, *supra* note 198, at xi, xiv.

200. *Id.* at xvii.

201. DOWD, *supra* note 101, at 41.

202. SADKER, SADKER & ZITTLEMAN, *supra* note 109, at 128.

203. *Id.* at 127.

Such observations are echoed in other studies, such as Dr. Mairtin Mac An Ghaill's study of a school where authoritarian male teachers used similar comments to "confirm and celebrate a normative macho mode of masculinity that many male teachers identified with, highly valued and amplified."²⁰⁴ Dr. Lyn Davies studied school power structures and characterized school management as traditionally masculine, with adjectives such as "competitive, point-scoring, over-confident, sporting, career and status conscious."²⁰⁵ Finally, in a study conducted in Australia, male teachers were described by their male students as saying things like, "I'd buy that for a dollar!" in reference to "girls passing outside the classroom" to create a "one of the boys" dynamic that would help them control their male students.²⁰⁶

The second category acknowledges the influence that students themselves have on the hidden curriculum, and how perceptions they may bring with them to school affect their school experience. For instance, Dr. Zittleman and the Sadkers discuss their observations of one teacher's only marginally successful struggles to get her fourth graders to accept the idea of a boy wanting to play with a doll,²⁰⁷ which demonstrates the influence of the traditionally masculine attitudes of the children themselves on the lesson she was trying to teach.²⁰⁸ Another study documents a similar dynamic, where the unitary definition of "high-status masculinity, which holds as axiomatic the domination of girls and non-masculine boys"²⁰⁹ held by boys at two American middle schools had damaging effects on both girls and boys.²¹⁰ Finally, a variety of scholars have pointed out that boys' academic interests and ultimately their performance in certain subject areas is influenced by boys' perceptions of what is masculine. Professor Kimmel notes that "ethnographic research has consistently found that boys profess disinterest in English because of what it might say about their (inauthentic) masculine pose,"²¹¹ quoting one boy as saying "[m]ost guys who like English are faggots,"²¹² and another explaining that "[i]n English you have to write down how you feel and that's what I don't like."²¹³ In addition, studies show that the aggressiveness of the traditional hypermasculine performance

204. GILBERT & GILBERT, *supra* note 197, at 118 (internal quotation marks omitted).

205. *Id.* at 115 (internal quotation marks omitted).

206. *Id.* at 118.

207. SADKER, SADKER & ZITTLEMAN, *supra* note 109, at 131–33.

208. *Id.*

209. Kimmel, *supra* note 198, at xxii.

210. Laurie Mandel and Charol Shakeshaft, *Heterosexism in Middle Schools*, in MASCULINITIES AT SCHOOL, *supra* note 198, at 75–103.

211. KIMMEL, *supra* note 110, at 74.

212. *Id.*

213. *Id.* at 75.

leads boys to overestimate their academic abilities²¹⁴ and, as Professor Kimmel puts it, to “assume they’ll be right.”²¹⁵ Therefore, boys tend not to like the subject areas that make up most of the “traditional liberal arts curriculum” because these are subjects in which it is “harder to be right.”²¹⁶

Related to the influence students have on their curriculum, masculinities and other scholars have also noted that one factor contributing to the traditionally masculine hidden curriculum is voluntary sex segregation, which is widespread in coeducation. Professor David S. Cohen and other scholars have observed that much of the American mixed-sex society is in fact sex segregated.²¹⁷ Coeducation is no exception to this phenomenon; in fact, school children—especially in the lowest grades—voluntarily sex segregate with a vengeance.²¹⁸ Moreover, too many schools and teachers are passively or actively complicit in the segregation, either by allowing “choice” to be the organizing principle of play and other activities, thus allowing voluntary sex segregation to run rampant,²¹⁹ using gender as a way to organize students into learning games of girls against boys,²²⁰ or threatening children with “humiliating” punishments, such as “[i]f you don’t behave, I’m going to make you sit with the girls.”²²¹ Thus, sex segregation may be a factor in the prevalence of traditional masculinity even in non sex-segregated educational settings.

Nevertheless, some have advanced sex segregation as a solution to the gendered hidden curriculum.²²² Initially, concerns about the inadequate and sex-discriminatory education of girls generated a push on the part of some activists, scholars and lawmakers to create all-girls schools and classes.²²³

214. *Id.* at 73–74.

215. *Id.* at 75.

216. *Id.*

217. David S. Cohen, *Keeping Men “Men” and Women Down: Sex Segregation, Anti-Essentialism, and Masculinity*, 33 HARV. J.L. & GENDER 509, 509–10 (2010).

218. SADKER, SADKER & ZITTLEMAN, *supra* note 109, at 76–82; LISE ELIOT, PINK BRAIN, BLUE BRAIN: HOW SMALL DIFFERENCES GROW INTO TROUBLESOME GAPS—AND WHAT WE CAN DO ABOUT IT 118, 137, 152 (2009) (finding that boys and girls naturally segregate themselves in play activities); Barrie Thorne, *Girls and Boys Together . . . But Mostly Apart: Gender Arrangements in Elementary School*, in MEN’S LIVES 87, 87 (Michael S. Kimmel & Michael A. Messner eds., 4th ed. 1998).

219. *See, e.g.*, ELIOT, *supra* note 218, at 137 (finding that “too much choice can be overwhelming and makes it likelier [children] will default to their biases”); SADKER, SADKER & ZITTLEMAN, *supra* note 109, at 78–79 (finding that teachers rarely intervene to prevent this voluntary segregation).

220. SADKER, SADKER & ZITTLEMAN, *supra* note 109, at 81.

221. *Id.* at 78 (internal quotation marks omitted).

222. Elizabeth Weil, *Teaching Boys and Girls Separately*, N.Y. TIMES MAGAZINE (Mar. 2, 2008), <http://www.nytimes.com/2008/03/02/magazine/02sex3-t.html?pagewanted=all>.

223. *Id.*

The work of these advocates is arguably the primary cause of the 2006 changes to the Department of Education's guidelines allowing an exception for sex-segregated programs under Title IX.²²⁴ They were, however, quickly joined by a different group of sex-segregated education proponents who made allegations of sex discrimination against boys in education and promoted all-boys education as a solution to this discrimination.²²⁵ Specifically, these proponents allege that boys are experiencing a crisis in educational achievement and that the reason for this crisis is an overly "feminized" school environment "shaped by females to match the abilities of girls," and where, as sex-segregated education proponent Leonard Sax puts it, boys are "taught by soft-spoken women who bore boys."²²⁶ They therefore advance segregating boys into their own classes and/or schools where teachers can structure the classroom experience around sex-based differences that proponents claim are "hard-wired" into children's brains.²²⁷

Much of the sex-based brain differences research has been seriously questioned at best²²⁸ and its further distorted use by proponents like Sax has been discredited as sex stereotypes dressed up in "pseudoscience" at worst.²²⁹ Nevertheless, sex-segregated educational initiatives, especially in K-12 public education, have been growing by leaps and bounds since 2002,²³⁰ when ED first announced its intent to clarify restrictions on sex-segregated programs under Title IX.²³¹ The majority of these new programs draw from the "boy crisis" contingent, as evidenced by their adoption of the ideas and methods of proponents such as Sax and Michael Gurian, instead of the group to which the architects of the 2006 ED regulations belong.²³²

The ideas of proponents such as Sax and Gurian follow the script of traditional masculinity, including its hypermasculine forms, quite closely. First, despite ample evidence to the contrary, they share with traditional masculinity the claim that masculine traits are biologically based.²³³ Sec-

224. *Id.*

225. *Id.*

226. *Id.* (internal quotation marks omitted).

227. *Id.*

228. *Id.*; ELIOT, *supra* note 218, at 5.

229. Diane F. Halpern et al., *The Pseudoscience of Single-Sex Schooling*, 333 *SCIENCE* 1706, 1706-07 (2011); CORDELIA FINE, *DELUSIONS OF GENDER: HOW OUR MINDS, SOCIETY, AND NEUROSEXISM CREATE DIFFERENCE* 15-17, 112-117 (2010).

230. Weil, *supra* note 222.

231. Single-Sex Classes and Schools: Guidelines on Title IX Requirements, 67 *Fed. Reg.* 31, 102-03 (May 8, 2002).

232. Weil, *supra* note 222.

233. See, e.g., Leonard Sax, *Six Degrees of Separation: What Teachers Need to Know About the Emerging Science of Sex Differences*, *EDUCATIONAL HORIZONS* 190, 191, (Spring 2006) (as-

ond, the teaching techniques and educational methodology that they encourage include such ideas as:

- “A boy who likes to read, who does not enjoy contact sports, and who does not have a lot of close male friends has a problem, even if he thinks he is happy. He should be firmly disciplined, required to spend time with ‘normal males,’ and made to play sports.”²³⁴
- “Literature teachers should not ask boys about characters’ emotions, and should only focus on what the characters actually did.”²³⁵
- “Boys should receive strict discipline based on asserting power over them. Young boys can be spanked. Girls must never be spanked. Girls should be disciplined by appealing to their empathy.”²³⁶
- “Pursuit of power is a universal male trait. Pursuit of a comfortable environment is a universal female trait.”²³⁷
- “Boys should be given Nerf baseball bats with which to hit things so they can release tension during class.”²³⁸

Sax and Gurian are hardly the only believers in such ideas.²³⁹ First, their books and teacher trainings are very popular and dominate the reasons for schools’ adoption of sex-segregated educational methods in the recent trend toward sex-segregated education.²⁴⁰ Second, as Professor Cohen has reviewed comprehensively, traditionally masculine ideas imbue discussions about all-boys education in the mass media as well as in the public comments filed with ED during the 2002–2006 rulemaking process that resulted in the 2006 regulations.²⁴¹ Professor Cohen notes that “[t]hemes of heterosexism, aggression, activity, sports-obsession, competitiveness, stoicism, and being anything but female or feminine dominate this narrative.”²⁴²

serting that there are sex differences in noncognitive areas, such as “the organization of the retina, the cochlea, and the autonomic nervous system”).

234. *Boys’ Brains vs. Girls’ Brains: What Sex Segregation Teaches Students*, AMERICAN CIVIL LIBERTIES UNION WOMEN’S RIGHTS PROJECT (May 2008), https://www.aclu.org/files/pdfs/womensrights/boysbrains_v_girlsbrains.pdf (quoting LEONARD SAX, *WHY GENDER MATTERS: WHAT PARENTS AND TEACHERS NEED TO KNOW ABOUT THE EMERGING SCIENCE OF SEX DIFFERENCES* 218–28 (2005)).

235. *Id.* (quoting LEONARD SAX, *WHY GENDER MATTERS: WHAT PARENTS AND TEACHERS NEED TO KNOW ABOUT THE EMERGING SCIENCE OF SEX DIFFERENCES* 108–12 (2005)).

236. *Id.* (quoting LEONARD SAX, *WHY GENDER MATTERS: WHAT PARENTS AND TEACHERS NEED TO KNOW ABOUT THE EMERGING SCIENCE OF SEX DIFFERENCES* 179–83, 188 (2005)).

237. *Id.* (quoting GURIAN INSTITUTE, *TEACHER TRAINING MATERIALS: HOW BOYS AND GIRLS LEARN DIFFERENTLY* (2006)).

238. *Id.* (quoting MICHAEL GURIAN, *THE BOYS AND GIRLS LEARN DIFFERENTLY ACTION GUIDE FOR TEACHERS* 75 (2003)).

239. *See infra* notes 240–260 and accompanying text.

240. Weil, *supra* note 222.

241. Cohen, *supra* note 109, 151–52 & 152 n.93.

242. *Id.* at 153.

Furthermore, prior even to the 2002 announcement that ED was going to change its rules to allow for sex-segregated K-12 public education, California opened a set of six paired public “single-sex academies” to meet “at-risk” students’ needs,²⁴³ and a group of researchers sought to study their effectiveness in raising students’ achievement levels as well as increasing gender equity.²⁴⁴ As Professor Verna Williams points out, “at-risk boys” was a synonym for “low-income, African American and Latino boys” and four of the six academies had primarily minority student populations.²⁴⁵ She also notes that the researchers found disturbing stereotypes that were intersectionally raced and gendered.²⁴⁶ For instance, instead of either boys or girls being taught academically challenging courses—there were no Advanced Placement classes even offered at the schools—girls were educated in home economics skills and encouraged to read books about romance.²⁴⁷ Both of these curricular choices, Professor Williams documents, harkened back to post-Civil War era education for African Americans that tended to be focused on practical, gendered skills, such as teaching women and girls to become domestic servants.²⁴⁸

For the boys, the academies tended to focus on discipline, and “some educators believed that the academies could not provide the ‘at-risk’ boys with enough discipline.”²⁴⁹ Moreover, the researchers noted that the discipline was “often quite harsh and usually meant that their classes were ‘very regimented.’”²⁵⁰ Professor Williams details how such attitudes also draw from raced and gendered Jim Crow-era stereotypes about black men being dangerous, especially to white women.²⁵¹ Indeed, school districts in the segregated South sought to postpone or forestall racial desegregation efforts by making proposals (which courts sometimes accepted) to sex segregate schools, the clear purpose of which was, in the words of one lone black school board member at a school district that attempted this strategy, “to keep the black boys from having any contact with the white girls—pure and simple.”²⁵² As a result of this education, Professor Williams states, the academies ended up “reinforc[ing] a vision of masculinity that focused on

243. Verna L. Williams, *Reform or Retrenchment? Single-Sex Education and the Construction of Race and Gender*, 2004 WIS. L. REV. 15, 69 (2004).

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at 71.

248. *Id.* at 48.

249. *Id.* at 70.

250. *Id.* at 70.

251. *Id.* at 61–62.

252. *Id.* at 62 (internal quotation marks omitted).

disruptive behavior, athleticism, and being ‘bad,’ such that when confronted with disciplinary action, the boys would proclaim, ‘Ooh, I’m the man.’²⁵³ This education, she notes, is “both limiting to the boys who seek to replicate it and threatening to those who fail to conform to its standards.”²⁵⁴

Professor Williams also discusses the plans to open three all-male academies in the Detroit public school system in the early 1990s, plans that were halted after the mother of a girl in the district sued for her daughter to be admitted.²⁵⁵ The only schools the district had for girls were for pregnant or parenting teens,²⁵⁶ indicating stereotypes about African American girls’ and women’s “excessive promiscuity and fecundity.”²⁵⁷ In comparison, Professor Williams points out, single-sex schools for primarily white girls are not focused on sexuality or reproduction, but rather on academic achievement.²⁵⁸ Likewise, the Detroit school plan treated the African American boys as dangerous²⁵⁹ and in need of male role models, while demonstrating racist and sexist views about African American female-headed households as being “deviant” and “pathological.”²⁶⁰

As the effects of both sex-segregated schools and classes, as well as voluntary sex segregation in co-educational institutions suggests, sex segregation appears to intensify traditional masculinity, regardless of whether it occurs voluntarily or is institutionalized in some way. According to the masculinities literature, this is not all that surprising. Because traditional masculinity is a “homosocial event,”²⁶¹ it is fundamentally about boys’ and men’s relationships with each other. Environments where women and girls are literally absent just make more evident the hierarchical principles of traditional masculinity, where boys and men take or do not take certain actions in an attempt to achieve status with each other.²⁶²

D. All-Male Educational Environments and Gender-Based Violence

Also not particularly surprisingly, given the connections between traditional masculinity and gender-based violence reviewed above, all-male groups and institutional cultures with high levels of sex segregation are

253. *Id.* at 71.

254. *Id.* at 76.

255. *Id.* at 16–17.

256. *Id.* at 23–24.

257. *Id.* at 24 (internal quotation marks omitted).

258. *Cf. id.* at 25 (recognizing that alleged concerns about pregnancy and sexuality did not arise “as justifications for all-female schools for white girls”).

259. *Id.* at 25.

260. *Id.* at 75–76.

261. McGinley, *supra* note 100, at 1164.

262. *Id.* at 1165–66.

well-known—in many cases infamous—for their high levels of gender-based violence. Fraternities, all-male athletic teams, all-male schools such as the Citadel and Virginia Military Institute, the military, police, and prisoners are all groups with documented greater than average rates of gender-based violence. Given the focus and scope of this Article, only the educational examples will be discussed in this Section. As this discussion will demonstrate, accounts and studies of these all-male educational environments document many of the hypermasculine dynamics leading to gender-based violence discussed in the masculinities studies reviewed in Section II above. These include deeply misogynistic and homophobic behaviors and cultures, the sexualized abuse of girls and low-status boys as a method of establishing and maintaining status within the male group, and the cultures of silence and protection surrounding the violence.

1. Gender-Based Violence Against Women and Girls by All-Male Student Groups

Over the last couple of decades, several instances of all-male student peer groups' sexually harassing and/or engaging in sexually violent behavior toward women and girls have received significant coverage in the press. Most recently, in August 2013, four Vanderbilt University football players were accused of gang-raping an unconscious female student earlier that summer, with questions remaining at this writing as to which other players knew about and helped cover-up the assault.²⁶³ In addition, two high school football players in Steubenville, Ohio have recently been convicted of taking an unconscious girl from a neighboring town to multiple parties and sexually assaulting her repeatedly while others, mainly male athletes, tweeted, took photos, and made videos about the girl and the assaults.²⁶⁴

Before the Vanderbilt and Steubenville assaults, however, the Glen Ridge jocks, the Richmond gang rape, and the Yale fraternity pledge chants all received widespread public attention. The Glen Ridge jocks were a group of thirteen high school football players and wrestlers who lured a slightly retarded seventeen-year-old girl into a basement, where four of the

263. Brian Haas & Tony Gonzalez, *Vanderbilt Rape Case: Graphic Details Emerge During Chris Boyd's Hearing*, TENNESSEAN (Sept. 14, 2013), <http://www.tennessean.com/article/20130913/NEWS03/309130145/Vanderbilt-rape-case-Graphic-details-emerge-during-Chris-Boyd-s-hearing>.

264. Juliet Macur & Nate Schweber, *Rape Case Unfolds on Web and Splits City*, N.Y. TIMES (Dec. 16, 2012), http://www.nytimes.com/2012/12/17/sports/high-school-football-rape-case-unfolds-online-and-divides-steubenville-ohio.html?pagewanted=all&_r=1&_r=1; Richard A. Opper Jr., *Ohio Teenagers Guilty in Rape That Social Media Brought to Light*, N.Y. TIMES (March 18, 2013), http://www.nytimes.com/2013/03/18/us/teenagers-found-guilty-in-rape-in-steubenville-ohio.html?pagewanted=all&_r=0.

players raped her, three stayed and watched, and six left the basement without intervening in the rape, reporting it, or agreeing, in subsequent litigation, to provide evidence.²⁶⁵ The Richmond gang rape was perpetrated against a fifteen-year-old female student while about twenty male witnesses watched, some laughing and taking photos,²⁶⁶ although some witnesses came forward later and said they did not intervene because they feared retaliation for calling the police and being viewed as a “snitch.”²⁶⁷ Finally, the Yale incident involved fraternity pledges chanting, “No means yes! Yes means anal!” outside the campus Women’s Center, which, in part due to the repetition of such incidents in recent years,²⁶⁸ ultimately led to a group of students and alumnae filing a complaint with OCR against Yale.²⁶⁹

In addition, a number of prominent court cases have involved similar instances of violence, including cases against the University of Colorado, University of Georgia, Virginia Tech, and Wesleyan University. The female student involved in the lawsuit with Wesleyan University alleged that the university “failed to protect her from a fraternity known on campus as a ‘rape factory.’”²⁷⁰ She settled for an undisclosed amount with both the university and the fraternity quite soon after filing her complaint, but after a several-month battle where the fraternity sought to have her anonymity in the suit revoked.²⁷¹

In *Simpson v. University of Colorado Boulder*,²⁷² several football players and high school football player recruits gang-raped two female students according to a prior plan, unbeknownst to the victims, “to provide the recruits with an opportunity to have sex with intoxicated female CU stu-

265. Russell Banks, *A Whole Lot of Poor Judgment*, N.Y. TIMES (Aug. 3, 1997), <http://www.nytimes.com/books/97/08/03/reviews/970803.03bankst.html> (reviewing BERNARD LEFKOWITZ, *OUR GUYS: THE GLEN RIDGE RAPE AND THE SECRET LIFE OF THE PERFECT SUBURB* (1997)).

266. Stephanie Chen, *Gang Rape Raises Questions About Bystanders’ Role*, CNN (Oct. 28, 2009, 2:48 PM), http://articles.cnn.com/2009-10-28/justice/california.gang.rape.bystander.1_bystander-crime-prevention-kitty-genovese?_s=PM:CRIME.

267. *Richmond Rape Witness Describes the Assault*, ABC7 NEWS, KGO-TV SAN FRANCISCO, CA (Nov. 12, 2009), http://abclocal.go.com/kgo/story?section=news/local/east_bay&id=7111732.

268. Kimmel, *supra* note 14.

269. *Yale Is Subject of Title IX Inquiry*, N.Y. TIMES (Mar. 31, 2011), <http://www.nytimes.com/2011/04/01/us/01yale.html>; Jordi Gasso, *Yale Under Federal Investigation for Possible Title IX Violations*, YALE DAILY NEWS (Apr. 1, 2011), <http://www.yaledailynews.com/news/2011/apr/01/yale-under-investigation/>.

270. Tyler Kingkade, *Wesleyan, Fraternity Settle “Rape Factory” Lawsuit on Undisclosed Terms*, HUFFINGTON POST (Sept. 12, 2013), http://www.huffingtonpost.com/2013/09/11/wesleyan-rape-lawsuit-settlement_n_3908416.html.

271. *Id.*

272. 372 F. Supp. 2d 1229 (D. Colo. 2005).

dents.”²⁷³ One student was raped by recruits while surrounded by football players, after she had gone to bed intoxicated, and the other student, also intoxicated, was raped by one player and another player or recruit in the same room.²⁷⁴ In *Williams v. Board of Regents*,²⁷⁵ two University of Georgia basketball players and a football player sexually assaulted a female student after she had consensual sex with one of the players.²⁷⁶ In a pre-arranged plan, another player hid in the closet until receiving a signal from the first player, and while he was assaulting the victim, the first player called two more friends, saying they were “running a train” on the victim, one of whom came to the apartment and also raped the victim.²⁷⁷ Finally, in *Brzonkala v. Virginia Polytechnic Institute*,²⁷⁸ a freshman was raped three times by two football players within thirty minutes of meeting them in her freshman dorm, after declining to have sex with James Morrison, the first perpetrator.²⁷⁹ Neither player used a condom, and Morrison “warned her ‘You better not have any fucking diseases’” after he raped her the second time.²⁸⁰ He also “announced publicly in the dormitory’s dining room that he ‘liked to get girls drunk and fuck the shit out of them.’”²⁸¹ After the victim filed a claim against the two perpetrators under Virginia Tech’s Sexual Assault Policy, “another male student athlete was overheard advising Crawford [the second perpetrator] that he should have ‘killed the bitch.’”²⁸²

Finally, stories of sexual harassment at the Citadel²⁸³ and Virginia Military Institute (“VMI”)²⁸⁴ accompanied coverage and discussion of the court-ordered de-segregation of those institutions. For instance, Professor Cornelia T. L. Pillard, who drafted the Supreme Court briefs for the United

273. *Id.* at 1232.

274. *Id.*

275. 477 F.3d 1282 (11th Cir. 2007).

276. *Id.* at 1288.

277. *Id.*

278. 132 F.3d 949 (4th Cir. 1997), *vacated en banc*, 169 F.3d 820 (4th Cir. 1999), *aff’d sub nom.* *United States v. Morrison*, 529 U.S. 598 (2000).

279. *Id.* at 953.

280. *Id.*

281. *Id.*

282. *Id.* at 954.

283. *See Faulkner v. Jones*, 51 F.3d 440, 442 (4th Cir. 1995) (holding that the Citadel, South Carolina’s state-supported male-only military college, violated the Equal Protection Clause when it refused to admit a female student and ordering the defendants to “implement a remedial plan” and admit female student).

284. *See United States v. Virginia*, 518 U.S. 515, 534 (1996) (holding that Virginia violated the Equal Protection Clause by excluding women from the state-supported Virginia Military Institute and that the remedy offered by Virginia, a female-only counterpart school, did not “cure the constitutional violation”).

States in *United States v. Virginia*,²⁸⁵ describes the reaction of VMI students to the admission of women: “Members of the last all male VMI class showed their opposition to women’s admission by referring to themselves as LCWB, or ‘last class with balls.’ . . . A male cadet, t[old] a female ‘you are the reason my school sucks’”²⁸⁶ Similarly, Professor Valerie Vojdik, Shannon Faulkner’s attorney in her suit to compel the Citadel to admit women, describes the treatment Faulkner faced after winning her suit:

Alumni sold t-shirts that proclaimed “1952 Bulldogs and One Bitch.” Citadel supporters screamed obscenities at Shannon in public. . . . As her admission grew near, the hostility escalated into death threats. In a bathroom stall, a cadet had scrawled, “Let her in—then fuck her to death.”

. . . .

. . . Shannon resigned from The Citadel less than a week after she entered, overcome by stress and terror as the only woman alone in the barracks with 1800 male cadets, most of whom hated her guts.²⁸⁷

Various research studies have focused on the larger phenomena that these cases exemplify, including issues among high school and college athletes, fraternity men, and students at all-male schools such as the Citadel and VMI.²⁸⁸ In doing so, they document the operation of many of the dynamics of traditional masculinity in these all-male groups.

For instance, educational researchers have often noted misogyny bordering on and crossing over into the realm of gender-based violence at many all-male schools. Professor Valerie Lee, who has done extensive research on sex segregation and coeducation, said that while sexism occurred in all schools, “‘in boys’ schools we saw incidents that went beyond the pale. When I see a class of boys talking about women as a collection of body parts hooked together, I think it’s a scandal.’”²⁸⁹ Gender and education experts Myra and David Sadker agree, saying that “the most clearly

285. 518 U.S. 515 (1996).

286. Cornelia T.L. Pillard, *United States v. Virginia: The Virginia Military Institute, Where the Men are Men and So Are the Women*, in *CIVIL RIGHTS STORIES* 265, 286 (Myriam E. Gilles & Risa L. Goluboff eds., 2008).

287. Valerie K. Vojdik, *Gender Outlaws: Challenging Masculinity in Traditionally Male Institutions*, 17 *BERKELEY WOMEN’S L.J.* 68, 68–69, 71 (2002) (citations omitted).

288. See, e.g., MYRA SADKER & DAVID SADKER, *FAILING AT FAIRNESS: HOW OUR SCHOOLS CHEAT GIRLS* x (1995) (discussing sexism in K–12 schools); PEGGY REEVES SANDAY, *FRATERNITY GANG RAPE: SEX, BROTHERHOOD, AND PRIVILEGE ON CAMPUS* 33 (2d ed. 2007) (fraternities); SCHWARTZ & DEKESEREDY, *supra* note 71 (college); Messner, *supra* note 134 (sports).

289. SADKER & SADKER, *supra* note 288, at 241.

disturbing forms of sexism occurred in boys' schools. . . . The worst culprits were English classes where discussions of sexual scenes in literature sometimes degenerated into the treatment of girls as sex objects."²⁹⁰ Finally, the researchers who examined the California single-gender public school "academies" noted that, at one academy, the boys were required to follow a particularly strong traditionally masculine code of conduct, which "instilled a strong sense of male privilege and authority . . . [and] positioned [men either] as the protector and provider or as the predator, [with] women [] either in need of assistance or in a position of sexual objectification."²⁹¹ Accordingly, "[g]irls at this academy were most likely to express fears and frustration about persistent sexual harassment from their male peers. Likewise, as [female] researchers, we experienced discomfort and disrespect . . . in interviews with boys at this school that were never experienced anywhere else throughout the project."²⁹²

The misogynistic attitudes documented by these scholars are echoed by observers of the cultures at VMI and the Citadel. For example, Professor Pillard notes:

At VMI, masculinity was often defined in terms of male superiority and female inferiority. . . . Cadets routinely used harshly gendered epithets, like bitch, whore, cunt, pussy, or even simply "woman," as a way to break one another down. Peeling apart the stiffly starched legs of a new pair of trousers was, to VMI cadets, "raping your virgin ducks."²⁹³ A female U.S. Army Major hired as Assistant Commandant was "drum[ed] out of the barracks with cries of 'bitch' and 'whore,'" by "hundreds of male VMI cadets."²⁹⁴

Similarly, in her examination of the Citadel, Susan Faludi researched the history of the school, observed classes, reviewed previous newspaper accounts, and talked to teachers, cadets, alumni, former students, and even local drag queens who cadets secretly date.²⁹⁵ "That this crucible of masculine transformation could be misogynistic was a vast understatement," she concludes, reviewing the harassment of female faculty members, that was tacitly encouraged and tolerated by male faculty and administrators; the

290. *Id.* at 240.

291. Elisabeth L. Woody, *Constructions of Masculinity in California's Single-Gender Academies*, in *GENDER IN POLICY AND PRACTICE: PERSPECTIVES ON SINGLE-SEX AND COEDUCATIONAL SCHOOLING* 280, 288 (Amanda Datnow & Lea Hubbard eds., 2002).

292. *Id.*

293. Pillard, *supra* note 286, at 270 (citation omitted).

294. *Id.*

295. See generally SUSAN FALUDI, *STIFFED: THE BETRAYAL OF THE AMERICAN MAN* (1999) (discussing the collapse of traditional masculinity that has left men feeling betrayed).

abuse and humiliation of “the dates,” that were followed by bragging about these activities through cadences with “lyrics about gouging out a woman’s eyes, lopping off body parts, and evisceration”; and the recognition that “female” was the ultimate insult among the cadets.²⁹⁶

In addition to the misogyny noted above, scholars who have studied all-male or virtually all-male subcultures have linked those subcultures to perpetration of gender-based violence. Drs. DeKeseredy and Schwartz review a study published in 2010 in which researchers analyzed data from a national study of American youth, who were interviewed at both 16 and “around 21.” The researchers found that:

[S]mall, dense peer groups that were all male or essentially all male, and that engaged in a higher level of delinquent behavior, evidently produced young men who were indeed much more likely to have engaged in violence against young women. Those youth who belonged to larger, more loosely connected groups of both males and females who committed relatively fewer acts of delinquency, were themselves much less likely to engage in violence against young female intimates.²⁹⁷

While this study did not disaggregate delinquency and the single-sex factor, other studies that Drs. DeKeseredy and Schwartz review focus on the homosocial aspects of these “heavily integrated [] male peer groups.”²⁹⁸ For instance, the studies mentioned earlier regarding the hypermasculine cultures in American policing and the U.S. Army show how even when delinquency is removed from the picture, support for gender-based violence from like-minded men in these historically and still close to all-male professions is still critical.²⁹⁹

In addition, scholars who have conducted extensive masculinities research on athletes—who are a significant all-male group at all levels of education—have commented on specific cases such as the Glen Ridge case in light of the overall research.³⁰⁰ Professor Messner characterizes the “factors that led up to the gang rape in Glen Ridge” as typical of “men, sexual violence, and sport,” including: “(1) Competitive, homophobic, and misogynistic talk and joking”; “(2) A group practice of voyeuring, where boys can watch their friends have sex with girls and sometimes join”; “(3) Suppression of empathy toward others, especially toward the girls”; and “(4) A cul-

296. *Id.* at 116–19.

297. *Id.* at 100.

298. *Id.* at 101.

299. *Id.* at 111.

300. Messner, *supra* note 134, at 26.

ture of silence among peers, in families, and in the community.”³⁰¹ He concludes that “[u]nderlying gang rape is male anxiety about status in a hierarchy of power, expressed through denigration of women and erotic bonding among men,”³⁰² and points to anthropologist Peggy Sanday’s research on fraternity gang-rape, which concludes that gang-rapists use female bodies to engage in sexualized bonding with each other.³⁰³

Professor Sanday’s research on fraternities deals with yet another homosocial grouping of men in an educational setting, but she is careful to specify that the gang-rape phenomenon that she studies “appears to be widespread not only among fraternities but in many other exclusively male contexts at colleges and universities in the United States, such as organized sports, [as well as] outside universities where men band together.”³⁰⁴ Her study focused in deep detail on one East Coast Ivy League university, but she also studies three additional fraternities on campuses in the Midwest, South, and West.³⁰⁵ The detailed picture that Professor Sanday draws of fraternity life and the gang-rape phenomenon is chilling. Based on her research, she constructs a “profile of gang rape on college campuses”:

The incident begins with drinking or drugs and male conspiracy in finding, trapping or coercing, and sharing a “party girl.” A vulnerable young woman, one who is seeking acceptance or is high on drugs or alcohol, is taken to a room. She may or may not agree to having sex with one man. She then passes out, or she is too weak or scared to protest, and a “train” of men have sex with her.³⁰⁶

Related to this profile, Professor Sanday also gives a comprehensive account of the environmental factors leading up to the fraternity gang-rape phenomenon, including the dominance of fraternities, both in terms of their physical presence³⁰⁷ and their position as “the primary focus of party life.”³⁰⁸ She also documents a certain theme relating to group and voyeuristic sex among fraternity brothers, including the existence at one fraternity of a “‘black bag,’ a room in which the lights remain off and couples enter to fool around, miming orgiastic sex,”³⁰⁹ a fascination with pornography and

301. *Id.* at 27.

302. *Id.* at 30.

303. *Id.*

304. SANDAY, *supra* note 288, at 35.

305. *Id.* at 109.

306. *Id.* at 108–09.

307. *Id.* at 56–57.

308. *Id.* at 54.

309. *Id.* at 58.

with watching pornography together,³¹⁰ a practice of leaving window blinds open and doors unlocked while having sex so others can watch or walk in,³¹¹ and the term “[b]eaching a girl,” which refers to frat brothers sitting on the roof of the first floor of the frat house and watching a brother having sex with a woman in a second floor room while she is unaware of the audience.³¹²

Although Professor Sanday’s research was published in 1990 and the gang-rape that is most central to the case study happened in 1983, significant evidence indicates that this research is far from outdated. First, the *Simpson*³¹³ and *Williams*³¹⁴ cases, both from the 2000s, as well as the current case playing out at Vanderbilt that occurred in fall 2013,³¹⁵ fit Professor Sanday’s profile.³¹⁶ Although media reports on the Wesleyan University case indicate that only one man, a non-fraternity member, is serving time for the rape, the “Rape Factory” name by which the fraternity is widely known on campus³¹⁷ suggests a culture similar to Professor Sanday’s description. Second, the Richmond gang-rape and the Steubenville, Ohio events, occurring in 2009 and 2011 respectively, have many of the same dynamics of voyeurism.³¹⁸ Third, Professors Messner’s and Kimmel’s research on male athletes and fraternity men is of significantly more recent vintage, and both cite to Professor Sanday’s research as well as confirm it in their own research.³¹⁹ Other recent research, including a “meta-analysis of 15 studies encompassing over 5,000 students from geographically diverse college campuses across the United States” found “a significant association . . . between fraternity membership and prior perpetration of sexual aggression.”³²⁰

310. *Id.* at 61–62.

311. *Id.* at 60.

312. *Id.*

313. *See Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1173 (10th Cir. 2007) (describing the sexual assault of two female students at the University of Colorado, Boulder, by male athletes and potential new recruits).

314. *See Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1288–89 (11th Cir. 2007) (describing the gang rape of a female student at the University of Georgia by male athletes).

315. *See Haas & Gonzalez, supra* note 263 (discussing details of an alleged gang rape involving four Vanderbilt football players).

316. *See SANDAY, supra* note 288, at 108–09 (profiling gang rapes on college campuses).

317. Kingkade, *supra* note 270.

318. *See Chen, supra* note 266 (“For more than two hours on a dark Saturday night, as many as 20 people watched or took part as a 15-year-old California girl was allegedly gang raped and beaten outside a high school homecoming dance.”).

319. KIMMEL, *supra* note 110, at 238; Messner, *supra* note 134, at 30.

320. Jeffery B. Kingree & Martie P. Thompson, *Fraternity Membership and Sexual Aggression: An Examination of Mediators of the Association*, 61 J. AM. C. HEALTH 213, 214 (2013).

Lastly, many of the aspects of fraternity culture discussed in Professor Sanday's study are confirmed in *Rolling Stone's* piece on Dartmouth fraternity whistleblower Andrew Lohse.³²¹ That extensive exposé notes that "[s]exual assault is rampant" and interviews one anonymous student who was "curbed"—invited to a fraternity party on the second night of her freshman year, where she drank two drinks and next woke up in the hospital, with "bruises that looked like bites on her chest," after security guards found her passed out on the curb in front of the fraternity.³²² Dartmouth women exchange names of men who are "dangerous" and discuss "unsafe" fraternities, and a male student is quoted in the article stating that "[t]here are always a few guys in every house who are known to use date-rape drugs."³²³ Meanwhile, "fraternities essentially control the social life on campus" and the Dartmouth President's mansion sits on Fraternity Row.³²⁴

Whereas Professor Messner's focus is mainly on athletes, Professor Kimmel has looked at boys and men between the ages of sixteen to twenty-six (who he renames "guys") more generally, including in fraternities and other all-male groupings.³²⁵ His research confirms such phenomena as the group consumption of pornography, even more accessible now in light of the availability of Internet porn,³²⁶ what he terms "Predatory Sex and Party Rape,"³²⁷ and the fact that gang-rape is more common in "intensive, all-male peer groups that foster rape-supportive behaviors and attitudes."³²⁸ This latter finding acknowledges what Professor Sanday also observes: that it is not only the fact of an all-male grouping, but also the presence of certain attitudes—attitudes associated with hypermasculinity—within that group, that leads to gang-rape.³²⁹ Most prominently, Professor Kimmel confirms Professors Messner's and Sanday's observations that gang-rape "actually confers status for the men involved,"³³⁰ as well as allowing "a certain homoerotic contact between men"³³¹ who understand that admitting

321. Reitman, *supra* note 11.

322. *Id.*

323. *Id.*

324. *Id.*

325. See KIMMEL, *supra* note 110.

326. *Id.* at 169–89.

327. *Id.* at 217.

328. *Id.* at 237.

329. Compare SANDAY, *supra* note 288, at 41 ("Men entice one another into the act of 'pulling train' [gang rape] by implying that those who do not participate are unmanly or homosexual."), with KIMMEL, *supra* note 110, at 238 ("The gang bang actually confers status for the men involved.").

330. KIMMEL, *supra* note 110, at 238.

331. *Id.* at 239; SANDAY, *supra* note 288, at 41–42.

sexual desire for other men would cause them to “give up their position in the male status hierarchy as superior, heterosexual males.”³³²

It should be noted that, in their review of the social science literature, Drs. DeKeseredy and Schwartz discuss studies where researchers have suggested that “[m]en already interested in exploiting women tend to seek out social groups, such as finding out which fraternities on campus have a reputation for this behavior.”³³³ Likewise, Dr. Miller points out that “just as contemporary research distinguishes between ‘high risk’ and ‘low-risk’ fraternities . . . not all young men in urban communities participate in or condone violence against girls or the masculine norms that facilitate it.”³³⁴ According to these studies, it may be that all-male groups such as fraternities simply provide an easy mechanism for “male undergraduates [who] arrive at college fully prepared to abuse women with no additional learning”³³⁵ to find each other. In addition, a very recent study shows that fraternities are associated with four other “mediating risk factors,” including “increases in their perceptions of peer approval of forced sex and peer pressure to have sex, as well as increased high-risk drinking and number of sexual partners.”³³⁶ These correlations may mean that those factors are more responsible for fraternity members’ gender-based violence.

Finally, because of traditionally masculine dynamics such as the cultures of silence and protection, some men may be pressed into sexually predatory behavior with which they are uncomfortable. Journalist Nathan McCall talks about feeling compelled, at the age of fourteen, to join his friends in gang-raping a girl (who thought she was being invited to a party) for fear of being called “soft.”³³⁷ Feeling “too guilty to actually do anything,” however, he faked intercourse to appear like he was joining in.³³⁸ Similarly, fear of retaliation was a factor in at least some of the witnesses’ failure to call police in the Richmond gang rape.³³⁹ In all of these studies, therefore, the central tenets of traditional masculinity, including misogyny, homophobia, the suppression of emotion and empathy, the glorifying of

332. SANDAY, *supra* note 288, at 42.

333. DEKESEREDY & SCHWARTZ, *supra* note 139, at 95.

334. MILLER, *supra* note 162, at 5.

335. DEKESEREDY & SCHWARTZ, *supra* note 139, at 97.

336. Kingree & Thompson, *supra* note 320, at 219.

337. KIMMEL, *supra* note 110, at 238.

338. *Id.*

339. See *Richmond Rape Witness Describes the Assault*, *supra* note 267 (describing how one witness was scared to call the police after watching a crowd gang rape and assault a young girl). But see Edecio Martinez, *While Dozens Gawked at Richmond Rape, One Brave Girl Called 911*, CBS NEWS (Nov. 5, 2009, 10:02 AM), http://www.cbsnews.com/8301-504083_162-5535036-504083.html?tag=contentMain%3bcontentBody (describing how one woman called the police after hearing about the same gang rape).

competition and aggression, and the cultures of silence and protection, are on full display.

2. *Gender-Based Violence Against Men and Boys by All-Male Student Groups*

Other studies and stories confirm that the sexual violence directed at girls and women by members of such all-male groups can often be rapidly turned on boys and men. For example, in Susan Faludi's account of the men of the Citadel, she observes that, especially in times of anxiety and crisis, the Citadel was "a campus consumed with a fascination for and fear of homosexuality," including such behavior as upperclassmen knocking the soap out of freshmen's hands in the communal showers then warning them not to pick it up because, "'We'll use you like we used those girls,'" and beatings of sophomores called "Bananarama," where the culminating act was sodomizing a cadet with a banana.³⁴⁰ She notes:

A homophobic hysteria vented itself with volcanic force on a few young men who either were, or were perceived to be, genuinely gay. Several were hounded out of the school. The scapegoating reached such ugly proportions that the generally slumbering Citadel counseling center set up a group therapy session for the targeted young men, who were known on campus as 'It.'³⁴¹

The violence directed at men by their classmates at the Citadel is echoed in several accounts of all-male fraternity and athletic team hazing rituals, which are both ubiquitous in high schools and colleges and clearly gendered phenomena. The term "hazing" refers to "any activity expected of someone joining or participating in a group that humiliates, degrades, abuses or endangers them regardless of a person's willingness to participate."³⁴² As such, hazing is about maintaining group hierarchies³⁴³ and, in the words of a fraternity leader who served six months in prison for the hazing death of a fraternity member, "power and control."³⁴⁴

Professor Kimmel states that "[h]azing takes place everywhere men gather on campus," ranging from "silly skits" to "physical assault, sexual assault, branding, torture, and ritual scarification,"³⁴⁵ including such rituals as blindfolding pledges, making them think that their penises are being tied

340. FALUDI, *supra* note 295, at 146.

341. *Id.* at 147.

342. ALLAN & MADDEN, *supra* note 83, at 1 (internal quotation marks omitted).

343. *What is Hazing?*, INSIDE HAZING, <http://www.insidehazing.com/definitions.php> (last visited Feb. 27, 2014).

344. KIMMEL, *supra* note 110, at 122.

345. *Id.* at 111.

to cinderblocks, and pushing the cinderblocks (which were never tied to the pledges) off a balcony.³⁴⁶ Like with gang rape, some hazing rituals are distinctly homoerotic, but are also “about . . . sexual humiliation of presumed heterosexual males.”³⁴⁷ Instances of such “degradation [through] homophobic taunting” include the “elephant walk,”³⁴⁸ “teabagging,”³⁴⁹ “egg races,”³⁵⁰ and the “Ookie Cookie.”³⁵¹ Almost all are preceded by massive amounts of binge-drinking, a hazing ritual in itself,³⁵² as are most gang and other forms of party rape, causing some to speculate that “[d]rinking may be part of some men’s premeditated strategy . . . to be violent [and then] distance themselves from their violence.”³⁵³ Forced binge drinking leads to at least one hazing-related student death a year,³⁵⁴ with many more deaths and serious injuries resulting from voluntary binge drinking.³⁵⁵ This research is further confirmed by Andrew Lohse’s account of fraternity hazing at Dartmouth: “I was a member of a fraternity that asked pledges, in order to become a brother, to: swim in a kiddie pool of vomit, urine, fecal matter, semen and rotten food products; eat omelets made of vomit; chug cups of vinegar, which in one case caused a pledge to vomit blood; drink beer poured down fellow pledges’ ass cracks . . . among other abuses.”³⁵⁶

As discussed above, hazing is not limited to college, but is on the rise among all-male groupings in high school as well. Probably the most well-known of the high school hazing incidents involved three players on the Mepham High School football team raping three younger players with broomsticks, pinecones, and golf balls coated with mineral ice, while other players watched.³⁵⁷ The incident, which occurred at a summer football camp in August 2003, resulted in an injury requiring surgery to one of the

346. *Id.* at 97.

347. *Id.* at 112.

348. Involving each pledge stripping naked, grabbing the penis of the pledge behind him, putting his other hand on the back of the pledge in front, and walking in a line with the other pledges. *Id.* at 96–97.

349. Involving a fraternity brother rubbing his naked scrotum on the face of a sleeping pledge. *Id.* at 113.

350. Involving pledges having to walk or run around after shoving “a peeled, hard-boiled egg up their rectums.” *Id.*

351. Involving fraternity brothers masturbating together onto a cookie, then requiring the pledges to eat it. *Id.*

352. *Id.* at 112.

353. *Id.* at 239 (internal quotation marks omitted).

354. *Id.* at 117–18.

355. According to a 2002 study, 1,400 college students are killed and nearly half a million are injured per year as a result of binge drinking. *Id.* at 106.

356. Reitman, *supra* note 11.

357. Robert Kolker, *Out of Bounds*, N.Y. MAG. (Oct. 27, 2003), http://nymag.com/nymetro/news/features/n_9391/.

victims,³⁵⁸ and two of the three perpetrators being “confined indefinitely” in January 2004, while the third was allowed to “return home on probation.”³⁵⁹ In addition, Hank Nuwer’s list of high school athlete anal rape hazing incidents, drawn primarily from news stories,³⁶⁰ as well as *Bloomberg*’s report of the “over a dozen” high school sodomy-hazing incidents in the previous year alone,³⁶¹ demonstrate that Mephram is hardly an anomaly.

Bloomberg’s report discusses incidents in California, Colorado, Illinois, Iowa, Missouri, and New York, and quotes experts who state that such hazing is taking place mainly on middle and high school athletic teams, that hazing techniques are being spread by social media, and that high school hazing is feeding college hazing practices.³⁶² Dr. Pollack, whose “boy code” research was discussed in Part II.B., was interviewed and explicitly connected the hazing to masculinity contests: “High school boys are trying to prove their masculinity to each other by humiliating younger boys because that’s what they think manliness is all about”³⁶³

Nearly all of the incidents involving all-male groups’ gender-based violence reviewed above, regardless of the gender of their victims, share another characteristic of traditional masculinity: the cultures of silence and protection.³⁶⁴ “[These cultures] are maintained by a wide range of actors, including not only teachers, coaches, and the rest of the school administration, but also students, alumni, parents, and the larger community.”³⁶⁵ As noted above, the six boys who left the scene at the Glen Ridge rape did nothing to stop the boys who stayed, they did not report the assault, and “they all refused, during the subsequent long and painful years of litigation, to turn on their male friends and provide incriminating evidence.”³⁶⁶ The Richmond gang rape was not reported until a woman, who was not present at the rape, heard about it from her brother-in-law and called the police.³⁶⁷ Many of the Steubenville party-goers provided social media evidence that they understood that the girl involved had been or was being raped, including a video in which one recent graduate made “jokes”—for 12.5 minutes—

358. *Id.*

359. Patrick Healy, *Confinement for 2 Athletes in Sex Abuse of Teammates*, N.Y. TIMES, Jan. 15, 2004, at B6.

360. Nuwer, *supra* note 87.

361. Staiti & Bortnick, *supra* note 10.

362. *Id.*

363. *Id.*

364. See KIMMEL, *supra* note 110, at 59, 61–64.

365. Nancy Chi Cantalupo, *Jessica Lenahan (Gonzales) v. United States & Collective Entity Responsibility for Gender-Based Violence*, 21 AM. U. J. GENDER SOC. POL’Y & L. 231, 275–76 (2012).

366. Messner, *supra* note 134, at 27.

367. Martinez, *supra* note 339.

about the “dead girl” who was “so raped.”³⁶⁸ The most action that the men in the video appear to take in response to the abuse are a couple of isolated voices in the background asking questions like “what if that was your daughter?” and another background person who appears to go to check on the girl.³⁶⁹

Similarly, the most serious sanction in the gang-rape in Professor Sanday’s study was a six-month suspension of the fraternity,³⁷⁰ despite the helpless dissatisfaction of the university’s president and provost, the local sex crimes prosecutor, and even the judge who presided over related litigation.³⁷¹ Such light sanctions are typical in campus sexual violence cases,³⁷² and the athlete gang-rape cases already discussed went to court under Title IX precisely due to the universities’ “deliberate indifference” to the perpetrators’ violence.³⁷³ Professor Kimmel points out that even those schools that are trying to encourage cultural change are often stymied by factors such as alumni threatening to cut off donations.³⁷⁴ One thousand students marched on the former Dartmouth President’s house in protest when he attempted to make fraternities co-ed, and the faculty have failed three times in “concerted effort[s] to reform the system since the 1990s,”³⁷⁵ largely due to student and alumni resistance.³⁷⁶ Evidence in the Steubenville case indi-

368. See generally Misternunya, *Leaked Steubenville Big Red Rape Video*, YOUTUBE (Jan. 2, 2013), <http://www.youtube.com/watch?v=W1oahqCzwcY&bpctr=135973884>.

369. *Id.*

370. SANDAY, *supra* note 288, at 103.

371. *Id.* at 104.

372. See generally Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205 (2011) (discussing various court cases and OCR Title IX investigations where schools had knowledge of sexual violence but did nothing or never disciplined the student accused of committing the violence, as well as a study conducted by the Center for Public Integrity that found “school adjudications of campus peer sexual violence cases” favor the alleged perpetrators).

373. See, e.g., *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1174 (10th Cir. 2007) (“Plaintiffs sought relief under Title IX, 20 U.S.C. § 1681(a), claiming that CU [University of Colorado at Boulder] knew of the risk of sexual harassment of female CU students in connection with the CU football recruiting program and that it failed to take any action to prevent further harassment before their assaults.”); *Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 477 F.3d 1282, 1295–97 (11th Cir. 2007) (concluding plaintiff alleged facts sufficient to support a finding of “deliberate indifference” under Title IX); *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 132 F.3d 949, 956 (4th Cir. 1997), *vacated en banc*, 169 F.3d 820 (4th Cir. 1999), *aff’d sub nom. United States v. Morrison*, 529 U.S. 598 (2000) (explaining that plaintiff brought a Title IX claim against Virginia Tech for its “handling of her rape claims and failure to punish the rapists in any meaningful manner”).

374. KIMMEL, *supra* note 110, at 119.

375. Reitman, *supra* note 11.

376. *Id.*

cates that school officials protected football players from any sanction,³⁷⁷ that they blamed the victim and told students to support the players,³⁷⁸ that the police may have destroyed evidence,³⁷⁹ that the initial prosecutor and judge in the criminal cases against the accused players “ha[ve] ties to the football team,”³⁸⁰ and that the victim’s family had received threats.³⁸¹

Finally, community approval and retaliation against the victims in hazing cases is common. *Bloomberg* reports that “[i]n at least four cases of sodomy hazing last year, the coach or supervising teacher was alleged to have known about it, ordered it, witnessed it or laughed about it, according to police reports and court filings.”³⁸² An Illinois soccer coach was arrested “on misdemeanor charges of hazing, battery and failure to report child abuse” for congratulating a victim and asking him if “it was all good,” after witnessing the victim being assaulted.³⁸³ The coach also reportedly warned players that they would be sodomized for “fail[ing] to communicate effectively.”³⁸⁴ In another case in Colorado, where the town is so small that three hundred students in all grades attend the same school, “three upperclassmen . . . bound [a 13 year-old boy] with duct tape and sodomized him with a pencil.”³⁸⁵ Two of the assailants were sons of the wrestling coach, who was also the school board president, and the victim was the school principal’s son.³⁸⁶ When the principal confronted the coach, the coach first denied that anything had occurred, but later said “[t]his happens 1,000 times a day around the U[nited] S[tates].”³⁸⁷ The assailants received “a one-day, in-school suspension,” and the school board did nothing when the principal complained about the light punishment.³⁸⁸ “[T]he principal finally reported the incident to the . . . police,” and “anger exploded in [the town], . . . aimed squarely at the principal and his 13-year-old son.”³⁸⁹ “Students protested against the victim at school, put ‘Go to Hell’ stickers on his locker and wore T-shirts that supported the perpetrators.”³⁹⁰ The princi-

377. Macur & Schweber, *supra* note 264.

378. *Did They Pinkie Swear?*, PRINNIFIED.COM (Jan. 11, 2013), <http://prinnified.com/wp/did-they-pinkie-swear/?COLLCC=2716641394>.

379. Macur & Schweber, *supra* note 264.

380. *Id.*

381. *Id.*

382. Staiti & Bortnick, *supra* note 10.

383. *Id.*

384. *Id.*

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.*

390. *Id.*

pal eventually accepted another job, for half the salary, in a town two hundred miles away.³⁹¹ All of this occurred despite the fact that the attackers pled guilty to the charges.³⁹²

Similarly, in Mephram, when the victims reported the assaults, other team members refused to speak about what they had witnessed, the perpetrators were not suspended for two weeks following the reports of abuse, and students harassed the victims by calling them names like “faggot” and “broomstick boy.”³⁹³ Students protested when the perpetrators were eventually suspended, and parents who spoke out on behalf of the victims at a school board meeting received “identical profanity-laced letters in the mail, warning that if they ke[pt] speaking out, they’[d] also get the broomstick treatment. ‘Keep your mouth shut,’ the letters read, ‘and nothing will happen to you or your family.’”³⁹⁴ In addition, a previous case of hazing, reported eight years prior to the most recent incident at Mephram, resulted in a lawsuit when the same coaches did nothing to intervene in the abuse, but was later settled.³⁹⁵ That student also received threatening letters and faced retaliation by the coach, who benched the student for two years and attempted to physically attack the student when he returned to play in his third year.³⁹⁶ In the very month prior to the more recent hazing incident, a parent reported harassment of his freshman son by the lead perpetrator in the hazing incident, after which the lead perpetrator apparently told the boy that he had better not “even *think* about sleeping at camp.”³⁹⁷

As the Mephram case demonstrates, where the cultures of silence and protection are particularly strong, it is not unusual to find repeated and escalating instances of violence. Moreover, violent acts that on the surface look different happen at the same schools.³⁹⁸ For instance, the University of Colorado was not only the site of the *Simpson* gang-rape,³⁹⁹ it was also the site of a fraternity hazing death, brought on by alcohol poisoning.⁴⁰⁰ In the hazing incident, fraternity members refused to speak to the press and other

391. *Id.*

392. *Id.*

393. Kolker, *supra* note 357.

394. *Id.*

395. *History of Violent Hazing at L.I. High School*, ABC NEWS (Sept. 24, 2003), <http://abcnews.go.com/US/story?id=90243&page=1>.

396. Kolker, *supra* note 357.

397. *Id.*

398. See Nuwer, *supra* note 86 (listing hazing and pledging-related accidental deaths, many of which occurred under similar circumstances at the same universities over a period of many years).

399. See *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1179–80 (10th Cir. 2007) (reciting the events of the alleged gang-rape at the University of Colorado Boulder).

400. Nuwer, *supra* note 86.

students who received “threatening letters” from the university’s administration.⁴⁰¹

Similarly, the Virginia Tech gang-rape and later mass shooting, and the reaction of the institution to both, further support this point. Even after the gang-rape survivor prevailed against one of her attackers, Antonio Morrison, in two hearings under Virginia Tech’s student conduct policies,⁴⁰² Morrison’s one-year suspension was significantly reduced by Virginia Tech Provost, Peggy Meszaros.⁴⁰³ Morrison returned to campus the next year on a full athletic scholarship.⁴⁰⁴ The survivor never returned.⁴⁰⁵ Likewise, the aftermath of the Virginia Tech Massacre demonstrates the depth of the administration’s commitment to the athletic culture on campus and the extent to which the university’s identity was defined by its football team. Following the massacre, the administration and campus community constantly invoked the football team’s name in the phrase, “We are Hokies. We will prevail.”⁴⁰⁶ Further, a senior administrator sent an email stating, “[n]othing in the events of last week will alter who we are and what we represent.”⁴⁰⁷ Commentators have noted that the school sent a clear message that the school itself saw no reason to change the “jockocratic” environment at the school.⁴⁰⁸

401. KIMMEL, *supra* note 110, at 118.

402. After Morrison lost his first hearing and subsequent appeal, he hired a lawyer and succeeded in intimidating Virginia Tech officials into holding a second hearing, described to the survivor as a “technicality” to correct supposed procedural irregularities in the first hearing. *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 132 F.3d 949, 954 (4th Cir. 1997), *vacated en banc*, 169 F.3d 820 (4th Cir. 1999), *aff’d sub nom.* *United States v. Morrison*, 529 U.S. 598 (2000). Despite this description, the survivor was not only told that all of the evidence she produced at the first hearing would be inadmissible at the second, but she was also denied “access to the tape recordings of the first hearing.” *Id.* at 954–55. Due to insufficient notice, she was unable to produce affidavits and witnesses. *Id.* at 955. Morrison, of course, received ample, and early, access to evidence from the first hearing, as well as more than sufficient notice to prepare his case. *Id.* Despite the advantages given to Morrison, the survivor prevailed again at the second hearing. *Id.*

403. *Id.*

404. *Id.*

405. *Id.*

406. Patricia Mooney Nickel, *There Is an Unknown on Campus: From Normative to Performative Violence in Academia*, in *THERE IS A GUNMAN ON CAMPUS: TRAGEDY AND TERROR AT VIRGINIA TECH* 159, *supra* note 176, at 161–62.

407. *Id.* at 165.

408. *See id.* at 166–68 (arguing that the university’s politicized response to the tragic massacre was intended to control the community’s grieving process, and ultimately stifled the natural transformation that should occur after any loss, in favor of preserving a “true and unchangeable” image of “Hokie Nation”); *see also* Kimmel, *supra* note 176, at 76 (“Virginia Tech . . . embodies . . . a heritage of violence: in the coercive coherence of the community of Hokie Nation, the nexus of campus and regional cultures with the jockocratic dominance of football . . . and the sanctimoniously sadistic exclusion of anyone who doesn’t fit in to that narrowly circumscribed community.”).

When all of this evidence is viewed together, the links between male “homosocial” environments and gender-based violence become clear. Moreover, it is clear that, while girls and women may be the primary victims, particularly in all-male environments, the targets of the violence can quickly become the low-status, and therefore feminized, boys and men. Finally, it is evident that the traditionally masculine cultures of silence and protection play a critical role in enabling gender-based violence by all-male groups, whether the victims of that violence are girls/women or boys/men.

III. THE TITLE IX BULLYING/SEXUAL HARASSMENT CASES

Fortunately, Title IX provides some good news in this grim picture. Since its passage in the early seventies, Title IX has “affect[ed] millions of girls and women and change[d] our schools and colleges forever.”⁴⁰⁹ This broad impact is undoubtedly influenced by the history of Title IX’s passage and its immediate aftermath. Because the statute was first brought forward at a time when Title VII did not prohibit employment discrimination in educational institutions,⁴¹⁰ hearing testimony when Title IX was proposed focused on:

[H]orror stories, mainly about women employed on campus such as departments refusing to hire women, or refusing to promote them or give them tenure; or women who received many thousands of dollars less salary than their male counterparts; or women working full-time as faculty, with no benefits, no office, no salary, because their husbands also taught at the same university.⁴¹¹

In addition, Representative Edith Green, who sponsored the bill in the House, first proposed it as an amendment to Title VI of the Civil Rights Act of 1964, which did not include sex, but was persuaded to advance it as a separate bill because civil rights groups did not want to open Title VI up and risk other, damaging amendments.⁴¹² The resulting language of Title IX is thus very similar to Title VI’s language, “prohibit[ing] discrimination o[n] the basis of race, color and national origin in all federally funded programs,”⁴¹³ even though some Ivy League and women’s colleges that had not yet gone coed succeeded in getting an exemption to this prohibition for

409. Bernice Resnick Sandler, *Title IX: How We Got It and What A Difference It Made*, 55 CLEV. ST. L. REV. 473, 480 (2007).

410. *Id.* at 475.

411. *Id.* at 477.

412. *Id.* at 479.

413. *Id.*

“private undergraduate admissions.”⁴¹⁴ When “the male athletic establishment” realized that Title IX would have a huge impact on the “pervasive and substantial” sex discrimination in athletics,⁴¹⁵ the focus of attention shifted to a different area of educational discrimination. Further, developments in anti-discrimination law in the educational arena often mirrored advancements in the employment arena, thus Title IX came to prohibit sexual harassment,⁴¹⁶ although quite a bit later than the other developments.

This history accounts for both of the topics addressed in this Part: the recent line of cases involving bullying and sexual harassment of boys by other boys and the way in which these cases reflect and advance the diverse purposes and underlying legal theories of Title IX. That is, because the Supreme Court only confirmed that Title IX prohibits peer sexual harassment in 1999,⁴¹⁷ the cases discussed in this Section are of quite recent vintage. In addition, they provide an example, especially when viewed through the masculinities analysis in Part II, of how the various influences on Title IX during its legislative history and early regulatory history have incorporated a wide range of legal theories into Title IX, including theories drawn from classical liberalism, liberal feminism, and dominance feminism. As such, this Part will demonstrate that suspending enforcement of Title IX in the single-sex context not only goes against the manifest purposes of Title IX and the underlying normative commitments of the American liberal state, but also distracts from the “interest convergence”⁴¹⁸ of the majority of Americans in stopping sexual harassment and bullying of all genders.

A. Same-Sex Sexual Harassment as Actionable Sex Discrimination Under Title IX

Although Title IX had been in place for more than a decade when the 1983 fraternity gang-rape discussed in Professor Sanday’s study occurred, and despite the fraternity’s litigation against the university and the wide

414. *Id.* at 477.

415. *Id.* at 480.

416. *Cf. id.* at 484–85 (describing the Supreme Court’s pronouncement that student-on-student sexual harassment was prohibited under Title IX and distinguishing the standard for establishing liability for schools in Title IX cases from the higher standard applied to employers in Title VII cases).

417. *See Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999) (holding that Title IX permits private damages actions against school boards for student-on-student harassment, “where the [federal] funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities”).

418. *See Bell, supra* note 30, at 523 (outlining a theory of judicial decisionmaking, evident in *Brown v. Board of Education*, where a dominant group will only afford greater rights and protections to a minority group if the interests of the dominant group converge with those of the minority).

range of commentary directed at the university's failures to deal adequately with the case, no mention was made of Title IX, including none made by the judge who wrote the book's foreword.⁴¹⁹ Since 1983 pre-dates by nine years the United States Supreme Court's confirmation that private suits for monetary damages are even available in Title IX cases,⁴²⁰ this is hardly surprising. That sexual harassment is a violation of Title IX qualifying for monetary compensation, moreover, was not affirmed by the Supreme Court for another six years, when *Gebser v. Lago Vista Independent School District*⁴²¹ found that schools could be held liable for inadequate responses to teacher-on-student sexual harassment.⁴²² *Davis v. Monroe County Board of Education*,⁴²³ doing the same in the case of peer sexual harassment, followed the next year.⁴²⁴ Thus, it took over fifteen years following the 1983 case in Professor Sanday's study for Title IX's now clear legal remedy in sexual harassment and violence cases to develop.

Although *Gebser* and *Davis* involved some disappointments for Title IX advocates, and the Title IX jurisprudence that has developed since those cases is not without its problems⁴²⁵ (one of which will be revisited in Part IV), overall *Gebser* and *Davis* count as significant victories in the fight to end sexual harassment and violence in schools. This success is ultimately due to the focus of Title IX jurisprudence on the schools' actions in responding institutionally both to specific cases and to the problem in general. In this respect, Title IX shares a theme with the academic study of gender-based violence in education, acknowledging the importance of a school taking seriously a charge of such harassment or violence.

Arguably most important of these sources are various sociological studies on different aspects of sexual harassment and violence that explain the role of institutional responses in interrupting or perpetuating sexual har-

419. See generally Judge Lois G. Forer, *Foreword* to SANDAY, *supra* note 288, at 23, 23–32.

420. See *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 72–73 (1992) (concluding that “Congress did not intend to limit the remedies available in a suit brought under Title IX”).

421. 524 U.S. 274 (1998).

422. See *id.* at 277 (concluding that “a school district may be held liable . . . for the sexual harassment of a student by one of the district's teachers,” provided an official of the school district with “authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct”).

423. 526 U.S. 629 (1999).

424. See *id.* at 643 (“We consider here whether the misconduct identified in *Gebser*—deliberate indifference to known acts of harassment—amounts to an intentional violation of Title IX, capable of supporting a private damages action, when the harasser is a student rather than a teacher. We conclude that, in certain limited circumstances, it does.”).

425. For more details on some of these difficulties, see Cantalupo, *supra* note 372, at 233–42 (outlining the problems with court and administrative enforcement of Title IX).

assment and gender-based violence.⁴²⁶ Sociologists and criminologists studying campus peer sexual violence have used the Routine Activities Theory to posit that sexual violence occurs so frequently on college campuses because there are a surfeit of “motivated offender[s] [and] suitable target[s], and an absence of capable guardians all converg[ing] in one time and space.”⁴²⁷ They suggest that all three elements must be present for there to be a significant crime problem and that a “‘rape-supportive’ culture,” prevalent on college campuses, creates a lack of “capable guardians”⁴²⁸ and thus elevates the influence of peer support in encouraging “motivated offenders” to commit such violence.⁴²⁹ In other words, as seen in many of the examples above, cultures that are supportive of sexual violence can lead to higher incidences of sexual violence. Additionally, if the institution itself ignores the problem and fails to act as a “capable guardian,” it too contributes to the problem.⁴³⁰

Title IX jurisprudence spurs schools to action by targeting their “guardianship” role and making it a liability to ignore or fail to take action in the face of sexual harassment and violence. Doing nothing when a student reports sexual harassment and violence is the response most likely to get a school in trouble under the precedents of *Gebser* and *Davis*.⁴³¹ Being

426. Amy I. Cass, *Routine Activities and Sexual Assault: An Analysis of Individual—and School—Level Factors*, 22 VIOLENCE AND VICTIMS 350, 351 (2007).

427. *Id.*

428. See Elizabeth Ehrhardt Mustaine & Richard Tewksbury, *Sexual Assault of College Women: A Feminist Interpretation of a Routine Activities Analysis*, 27 CRIM. JUST. REV. 89, 101 (2002) (explaining that the number of “capable guardians” on college campuses is reduced because “in . . . locational hot spot[s] like . . . college campus[es] . . . men are more likely to be members of social peer groups that promote violence against women”); Schwartz et al., *supra* note 132, at 630 (“Routine activities theory suggests that the presence or absence of capable guardians will help determine whether [sexual assaults on college campuses] occur.”). Schwartz, DeKeseredy, and their colleagues provide an explanation for the history and use of the routine activities theory in explanations of criminal violence generally and sexual violence on college campuses specifically. *Id.* at 625–32. The original theory apparently focused almost entirely on the victims, referred to as “suitable targets,” and has been criticized for seeking to “deflect[] attention away from offenders’ motivation.” *Id.* at 625–26. These scholars have thus deliberately focused on the “motivated offender” part of the equation, even promulgating a feminist version of the routine activities theory. *Id.* at 628. In addition, while they note that the “absence of capable guardians” aspect of the theory’s equation is the least studied, they highlight the effect that a rape-supportive culture has on all three parts of the equation, in that it “giv[es] men some of the social support they need . . . to victimize women. . . . [While women’s] internalization of [the same culture] can contribute both to the availability of ‘suitable targets’ and to the lack of deterrence structures to act as effective guardianship.” *Id.* at 630.

429. Schwartz et al., *supra* note 132, at 646.

430. *Id.*

431. For cases demonstrating instances of school officials ignoring or brushing aside victims’ complaints, see Nancy Chi Cantalupo, “Decriminalizing” *Campus Institutional Responses to Peer Sexual Violence*, 38 J.C. & U.L. 481, 495 (2012).

complicit in the harassment in other ways, such as retaliating directly or, as is more likely, passively allowing other students to retaliate against a victim who reports, is also likely to lead a school into greater liability.⁴³² Finally, several of the most high profile Title IX sexual violence cases discussed above, such as those at the University of Colorado and University of Georgia, indicate that schools have obligations wherever possible to protect students and prevent harassment and violence before it occurs. In both of those cases, athletic coaches and university officials were aware of a history of sexual violence, either in the program at issue (the University of Colorado's football player recruiting program)⁴³³ or by the individual perpetrator(s) (the "lead" perpetrator in the University of Georgia case had a criminal record of sexual violence).⁴³⁴ The failure of the administrators and coaches to act in light of their awareness of sexual violence by individuals and among members of athletic teams has led to two of the largest settlements in this group of cases, one case settling in the millions⁴³⁵ and at least two others for amounts in the hundred thousands.⁴³⁶

As these cases also demonstrate, Title IX gives schools a greater incentive to seek to prevent the sexual violence problem. To illustrate, the university in Professor Sanday's study arguably tried to do the right thing in the aftermath of the gang-rape.⁴³⁷ Because its processes were not designed to handle sexual violence between students, however, the university's ac-

432. For examples of instances where the victim reported the incident to a school official or some other authority figure, but the school did nothing, or used inadequate measures, to prevent the offender or his friends from continually coming in contact with the victim, see *id.* at 495–98.

433. See *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1173 (10th Cir. 2007) (describing university officials' awareness of reports, not specific to CU, "suggesting the risks that sexual assault would occur if recruiting was inadequately supervised," as well as reports specific to CU of prior assaults by CU recruits).

434. See *Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 477 F.3d 1282, 1289–90 (11th Cir. 2007) (establishing that the head basketball coach, the athletic director, and the university's president all knew of the perpetrator's disciplinary and criminal record at the time they recruited and admitted him to the university); see also *J.K. v. Ariz. Bd. of Regents*, No. CV 06–916–PHX–MHM, 2008 U.S. Dist. LEXIS 83855, at *5–8 (D. Ariz. Sept. 29, 2008) (denying summary judgment when a student athlete was expelled, in part because of sexual harassment, from a "Summer Bridge Program," but then re-admitted to Arizona State University as a freshman, only to be found responsible for sexually assaulting another student during his first year on campus).

435. See Diane L. Rosenfeld, *Changing Social Norms? Title IX and Legal Activism: Concluding Remarks*, 31 HARV. J.L. & GENDER 407, 418 (2008) (explaining that the University of Colorado Boulder "settled the case paying \$2.5 million to Simpson and another \$350,000 to the other plaintiff").

436. See *id.* at 420 (stating that the settlement in the University of Georgia gang-rape case was "confirmed to be in the six figures"); see also Tessa Muggeridge, *ASU Settlement Ends in \$850,000 Payoff*, STATE PRESS (Feb. 3, 2009), <http://www.statepress.com/archive/node/4020> (explaining that plaintiff would receive \$850,000, as part of the settlement agreement, in the Arizona State University sexual assault case).

437. SANDAY, *supra* note 288, at 83–84.

tions in response to the rape were vulnerable to outside interference and ultimately were nullified when the fraternity brought suit in state court.⁴³⁸ The university might have had more policies and procedures in place had a liability scheme like Title IX's been in place.

Proportional to the gender breakdown of sexual harassment and violence in schools, the vast majority of Title IX cases have of course been brought by girls and women. As will be discussed in greater detail below, however, there is a significant and growing subset of cases involving harassment of boys on the basis of gender stereotypes and perceived homosexuality. In one group of cases, the plaintiffs were subjected to one to six years of escalating harassment by multiple peer harassers, beginning with verbal epithets related to being gay or effeminate and usually culminating in severe physical and/or sexual assaults and the plaintiff leaving the school. In other cases, the victims appear to leave school more quickly, although this may be due to the harassment being quite severe from the very beginning of its occurrence. Both groups feature traditionally masculine behavior very similar to those illuminated by masculinities studies, including the roles played by the cultures of silence and protection surrounding the harassment, the sexist and homophobic name-calling, and the sexual violence directed at boys "feminized" by the name-calling and violence. A fair number of cases have also occurred in homosocial environments, such as school athletic teams or locker rooms, and involve teachers and particularly coaches encouraging the harassment in hypermasculine ways.

In the majority of these Title IX cases, the male students' suits successfully survived summary judgment motions or motions to dismiss. In the thirty-five cases reviewed for this Article, twenty-two found in favor of the boy plaintiffs or their representatives,⁴³⁹ seven in favor of the defendant

438. *Id.* at 86.

439. *Patterson v. Hudson Area Sch.*, 551 F.3d 438, 450 (6th Cir. 2009); *N.K. v. St. Mary's Springs Acad. of Fond du Lac Wis., Inc.*, No. 12-CV-1052-JPS, 2013 U.S. Dist. LEXIS 116209 (E.D. Wis. Aug. 16, 2013); *Corral v. UNO Charter Sch. Network, Inc.*, No. 10-CV-03379, 2013 U.S. Dist. LEXIS 62397, at *29–30 (N.D. Ill. May 1, 2013); *P.W. ex rel. H.W. v. Fairport Cent. Sch. Dist.*, 927 F. Supp. 2d 76, 78, 85–86 (W.D.N.Y. 2013); *Galloway v. Chesapeake Union Ex-empted Vill. Sch. Bd. of Educ.*, No. 1:11-cv-850, 2012 U.S. Dist. LEXIS 152080, at *29–30 (S.D. Ohio Oct. 23, 2012); *Braden v. Mountain Home Sch. Dist.*, 903 F. Supp. 2d 729, 738 (W.D. Ark. 2012); *Doe ex rel. J.D. v. Bd. of Educ.*, 888 F. Supp. 2d 659, 668 (D. Md. 2012); *Estate of Brown v. Ogletree*, No. 11-cv-1491, 2012 U.S. Dist. LEXIS 21968, at *57, *60 (S.D. Tex. Feb. 21, 2012) *on reconsideration sub nom.* *Estate of Brown v. Cypress Fairbanks Indep. Sch. Dist.*, 863 F. Supp. 2d 632 (S.D. Tex. 2012); *Walsh v. Tehachapi Unified Sch. Dist.*, 827 F. Supp. 2d 1107 (E.D. Cal. 2011); *Mathis v. Wayne Cnty. Bd. of Educ.*, No. 1:09-0034, 2011 U.S. Dist. LEXIS 85102, at *21–22 (M.D. Tenn. Aug. 2, 2011); *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 151–52 (N.D.N.Y. 2011); *Roe ex rel. Callahan v. Gustine Unified Sch. Dist.*, 678 F. Supp. 2d 1008, 1039 (E.D. Cal. 2009); *C.T. v. Liberal Sch. Dist.*, 562 F. Supp. 2d 1324, 1346 (D. Kan. 2008); *Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816, 824–25 (C.D. Ill. 2008); *Seiwert v.*

schools,⁴⁴⁰ and six in favor of the defendant schools on grounds not relevant to the issues discussed here.⁴⁴¹

A large subset of these cases involved sexist and homophobic name-calling, with courts concluding that such name-calling was an indication of gender-stereotyping or discrimination based on perceived sexual orientation almost three times more often than courts reaching a different conclusion. In fifteen cases, courts count as sex discrimination the use of anti-gay and sexist epithets such as “gay,”⁴⁴² “faggot,”⁴⁴³ “queer,”⁴⁴⁴ “pussy,”⁴⁴⁵ “flamer,”⁴⁴⁶ “pansy,”⁴⁴⁷ “sissy,”⁴⁴⁸ “homo,”⁴⁴⁹ “cunt,”⁴⁵⁰ and “girl.”⁴⁵¹ Courts also mention defacements of lockers and personal property with phrases such as

Spencer-Owen Cmty. Sch. Corp., 497 F. Supp. 2d 942, 954 (S.D. Ind. 2007); Doe v. Se. Greene Sch. Dist., No. 03-717, 2006 U.S. Dist. LEXIS 12790, at *22–23 (W.D. Pa. Mar. 24, 2006); Theno v. Tonganoxie Unified Sch. Dist. No. 464, 394 F. Supp. 2d 1299, 1301 (D. Kan. 2005); Doe v. Perry Cmty. Sch. Dist., 316 F. Supp. 2d 809, 834 (S.D. Iowa 2004); Schroeder *ex rel.* Schroeder v. Maumee Bd. of Educ., 296 F. Supp. 2d 869, 879–81 (N.D. Ohio 2003); Snelling v. Fall Mountain Reg’l Sch. Dist., No. 99-448-JD, 2001 U.S. Dist. LEXIS 3591, at *12 (D.N.H. Mar. 21, 2001); Henkle v. Gregory, 150 F. Supp. 2d 1067, 1078 (D. Nev. 2001); O.H. v. Oakland Unified Sch. Dist., No. C-99-5123 JCS, 2000 U.S. Dist. LEXIS 21725, at *56 (N.D. Cal. Apr. 14, 2000).

440. R.L. *ex rel.* C.L. v. Leander Indep. Sch. Dist., No. A-12-CA-589 LY, 2013 U.S. Dist. LEXIS 78621, at *29 (W.D. Tex. June 4, 2013); Shuler *ex rel.* M.D. v. Sch. Bd. of Richmond, No. 3:13CV329-HEH, 2013 U.S. Dist. LEXIS 76936, at *11–12 (E.D. Va. May 30, 2013); Evans *ex rel.* A.E. v. Harrisburg Sch. Dist. No. 7, No. 6:11-CV-6255-TC, 2012 U.S. Dist. LEXIS 145144, at *7 (D. Or. Oct. 9, 2012); Preston *ex rel.* AP v. Hilton Cent. Sch. Dist., 876 F. Supp. 2d 235, 243–44, 246 (W.D.N.Y. 2012); Loewen v. Grand Rapids Med. Educ. Partners, No. 1:10-CV-1284, 2012 U.S. Dist. LEXIS 49476, at *32–35 (W.D. Mich. Apr. 9, 2012); Estate of Carmichael v. Galbraith, No. 3:11-CV-0622-D, 2012 U.S. Dist. LEXIS 857, at *26 (N.D. Tex. Jan. 4, 2012); Cortese v. W. Jefferson Hills Sch. Dist., No. 53 C.D. 2008, 2008 Pa. Commw. Unpub. LEXIS 388, at *10 (Pa. Commw. Ct. Dec. 9, 2008).

441. Conner *ex rel.* Doe v. Unified Sch. Dist. 233, No. 12-2285-JTM, 2013 U.S. Dist. LEXIS 107802, at *11–31 (D. Kan. July 31, 2013); Baker v. Hamilton City Sch. Bd. of Educ., No. 1:12-cv-798, 2013 U.S. Dist. LEXIS 36921, at *20 (S.D. Ohio Mar. 18, 2013); Clifford v. Regents of Univ. of Cal., No. 2:11-CV-02935-JAM-GGH, 2012 U.S. Dist. LEXIS 60280, at *14–30 (E.D. Cal. Apr. 27, 2012); Turpin *ex rel.* J.F.T. v. Good, No. 1:07-cv-1205-LJM-WGH, 2010 U.S. Dist. LEXIS 62772, at *7–19 (S.D. Ind. June 24, 2010); Schaefer *ex rel.* AS v. Las Cruces Pub. Sch. Dist., 716 F. Supp. 2d 1052, 1058 (D.N.M. 2010); Wilson v. Beaumont Indep. Sch. Dist., 144 F. Supp. 2d 690, 696 (E.D. Tex. 2001).

442. *Seiwert*, 497 F. Supp. 2d at 947.

443. *Id.* at 947; *Patterson*, 551 F.3d at 439.

444. *Patterson*, 551 F.3d at 439.

445. *Walsh v. Tehachapi Unified Sch. Dist.*, 827 F. Supp. 2d 1107, 1112 (E.D. Cal. 2011).

446. *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 394 F. Supp. 2d 1299, 1305 (D. Kan. 2005).

447. *Walsh*, 827 F. Supp. 2d at 1112.

448. *Id.*

449. *Snelling v. Fall Mountain Reg’l Sch. Dist.*, No. 99-448-JD, 2001 U.S. Dist. LEXIS 3591, at *4 (D.N.H. Mar. 21, 2001).

450. *P.W. ex rel. H.W. v. Fairport Cent. Sch. Dist.*, 927 F. Supp. 2d 76, 80 (W.D.N.Y. 2013).

451. *Id.*

“I ♥ Penis”⁴⁵² and “I’m a mamma’s boy,”⁴⁵³ and pictures such as “a penis being inserted into a rectum.”⁴⁵⁴ In only a few cases did courts interpret such insults as common insults among children who “rarely mean it literally,”⁴⁵⁵ or see such epithets solely as harassment based on sexual orientation, which is not covered under Title IX.⁴⁵⁶

Another group of cases involves sexual and/or physical assaults on the victims. Thirteen of the cases, regardless of the court’s holding, recount factual allegations or evidence of sexual assaults,⁴⁵⁷ whereas twelve others refer to physical attacks or altercations without an indication of whether the violence was sexual in nature.⁴⁵⁸ While a few cases involve a single sexual

452. *Patterson v. Hudson Area Sch.*, 551 F.3d 438, 442 (6th Cir. 2009).

453. *Id.*

454. *Id.*

455. *A.E. v. Harrisburg Sch. Dist. No. 7*, No. 6:11-CV-6255-TC, 2012 U.S. Dist. LEXIS 145144, at *8 (D. Or. Oct. 9, 2012).

456. *See Shuler ex rel. M.D. v. Sch. Bd. of Richmond*, No. 3:13CV329-HEH, 2013 U.S. Dist. LEXIS 76936, at *10 (E.D. Va. May 30, 2013) (stating that “harassment based on actual or perceived sexual orientation is not generally actionable under Title IX”); *Corral v. UNO Charter Sch. Network, Inc.*, No. 10-CV-03379, 2013 U.S. Dist. LEXIS 62397, at *18 (N.D. Ill. 2013) (recognizing that although evidence showed that students called plaintiff gay, “harassment based on sexual orientation is not sex discrimination under Title IX”); *Preston ex rel. AP v. Hilton Cent. Sch. Dist.*, 876 F. Supp. 2d 235, 246–47 (W.D.N.Y. 2012) (granting a motion to dismiss on a Title IX claim after concluding that plaintiff did not “experience[] harassment on the basis of his . . . gender” when other students directed anti-homosexual comments toward him).

457. *See, e.g., N.K. v. St. Mary’s Springs Acad. of Fond du Lac Wis., Inc.*, No. 12-CV-1052-JPS, 2013 U.S. Dist. LEXIS 116209 (E.D. Wis. Aug. 16, 2013); *Conner ex rel. Doe v. Unified Sch. Dist. 233*, No. 12-2285-JTM, 2013 U.S. Dist. LEXIS 107802 (D. Kan. July 31, 2013); *R.L. ex rel. C.L. v. Leander Indep. Sch. Dist.*, No. A-12-CA-589 LY, 2013 U.S. Dist. LEXIS 78621 (W.D. Tex. June 4, 2013); *Corral v. UNO Charter Sch. Network, Inc.*, No. 10-CV-03379, 2013 U.S. Dist. LEXIS 62397 (N.D. Ill. May 1, 2013); *Galloway v. Chesapeake Union Exempted Vill. Sch. Bd. of Educ.*, No. 1:11-CV-850, 2012 U.S. Dist. LEXIS 152080 (S.D. Ohio Oct. 23, 2012); *Braden v. Mountain Home Sch. Dist.*, 903 F. Supp. 2d 729 (W.D. Ark. 2012); *Evans ex rel. A.E. v. Harrisburg Sch. Dist. No. 7*, No. 6:11-CV-6255-TC, 2012 U.S. Dist. LEXIS 145144 (D. Or. Oct. 9, 2012); *Doe ex rel. J.D. v. Bd. of Educ.*, 888 F. Supp. 2d 659 (D. Md. 2012); *Clifford v. Regents of Univ. of Cal.*, No. 2:11-CV-02935-JAM-GGH, 2012 U.S. Dist. LEXIS 60280 (E.D. Cal. Apr. 27, 2012); *Estate of Brown v. Ogletree*, No. 11-cv-1491, 2012 U.S. Dist. LEXIS 21968 (S.D. Tex. Feb. 21, 2012) *on reconsideration sub nom. Estate of Brown v. Cypress Fairbanks Indep. Sch. Dist.*, 863 F. Supp. 2d 632 (S.D. Tex. 2012); *Doe v. Se. Greene Sch. Dist.*, No. 03-717, 2006 U.S. Dist. LEXIS 12790 (W.D. Pa. Mar. 24, 2006); *Wilson v. Beaumont Indep. Sch. Dist.*, 144 F. Supp. 2d 690 (E.D. Tex. 2001); *O. H. v. Oakland Unified Sch. Dist.*, No. C-99-5123 JCS, 2000 U.S. Dist. LEXIS 21725 (N.D. Cal. Apr. 14, 2000).

458. *See, e.g., Shuler ex rel. M.D. v. Sch. Bd. of Richmond*, No. 3:13CV329-HEH, 2013 U.S. Dist. LEXIS 76936 (E.D. Va. May 30, 2013); *Loewen v. Grand Rapids Med. Educ. Partners*, No. 1:10-CV-1284, 2012 U.S. Dist. LEXIS 49476 (W.D. Mich. Apr. 9, 2012); *Estate of Carmichael v. Galbraith*, No. 3:11-CV-0622-D, 2012 U.S. Dist. LEXIS 857 (N.D. Tex. Jan. 4, 2012); *Walsh v. Tehachapi Unified Sch. Dist.*, 827 F. Supp. 2d 1107 (E.D. Cal. 2011); *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135 (N.D.N.Y. 2011); *Schaefer ex rel. AS v. Las Cruces Pub. Sch. Dist.*, 716 F. Supp. 2d 1052 (D.N.M. 2010); *Cortese v. W. Jefferson Hills Sch. Dist.*, No. 53 C.D. 2008, 2008 Pa. Commw. Unpub. LEXIS 388 (Pa. Commw. Ct. Dec. 9, 2008); *C.T. v. Liberal Sch.*

assault, at least according to the facts the court recounts,⁴⁵⁹ more often the sexual assaults are linked in some way to other sexual harassment such as name-calling, defacement of personal property, or previous, usually less severe, violence.⁴⁶⁰ In some cases, plaintiffs are put at the bottom of the hierarchy with epithets calling them gay or a girl, and this degraded status makes them vulnerable to sexual violence.⁴⁶¹ In others, the plaintiffs are “made gay” through being the victim of a sexual assault, which opens them up to further harassment as boys who are supposedly feminized and degraded under traditionally masculine norms.⁴⁶²

Examples in the first subset of cases, where what began as verbal harassment or other bullying escalated into sexual assault, include *Patterson v. Hudson Area School*,⁴⁶³ *P.W. ex rel. H.W. v. Fairport Central School District*,⁴⁶⁴ and *O.H. v. Oakland Unified School District*.⁴⁶⁵ In *Patterson*, after four years of harassment involving homophobic name-calling, defacement of property, and pushing the plaintiff into lockers, a baseball teammate forced him into a corner of the locker room and rubbed his naked penis and scrotum on the plaintiff’s neck and face while another classmate made sure the plaintiff could not flee.⁴⁶⁶ Similarly, in *P.W. ex rel. H.W.*, in both schools at which the plaintiff was a student, the students began with such harassment as name-calling, throwing things at the plaintiff, and defacing his locker, and progressed eventually to repeatedly grabbing the plaintiff’s genitals and “‘jam[ming]’ a lacrosse stick into H.W.’s buttocks.”⁴⁶⁷ In *O.H.*, the school did nothing in response to the plaintiff’s complaints of bul-

Dist., 562 F. Supp. 2d 1324 (D. Kan. 2008); *Theno v. Tonganoxie Unified Sch. Dist.* No. 464, 394 F. Supp. 2d 1299 (D. Kan. 2005); *Doe v. Perry Cmty. Sch. Dist.*, 316 F. Supp. 2d 809 (S.D. Iowa 2004); *Henkle v. Gregory*, 150 F. Supp. 2d 1067 (D. Nev. 2001); *Snelling v. Fall Mountain Reg’l Sch. Dist.*, No. 99-448-JD, 2001 U.S. Dist. LEXIS 3591 (D.N.H. Mar. 21, 2001).

459. *See, e.g., Corral*, 2013 U.S. Dist. LEXIS 62397, at *6–7 (describing a single incident where a student was sexually assaulted, while changing in the locker room, before his gym class).

460. *See, e.g., Conner ex rel. Doe*, 2013 U.S. Dist. LEXIS 107802, at *1–3 (describing one incident where plaintiff was physically harassed during a team photo, but noting that students had previously called plaintiff names, including “‘faggot’” and “‘asshole’”).

461. *See, e.g., id.* (explaining that name calling preceded the sexual harassment to which plaintiff was “‘subjected’”).

462. *See, e.g., Roe ex rel. Callahan v. Gustine Unified Sch. Dist.*, 678 F. Supp. 2d 1008, 1014 (E.D. Cal. 2009) (explaining that after defendant was sexually assaulted by teammates with an air pump, he was subjected to further harassment by his teammates based on the “‘collective’” belief that he was gay).

463. 551 F.3d 438 (6th Cir. 2009).

464. 927 F. Supp. 2d 76 (W.D.N.Y. 2013).

465. No. C-99-5123 JCS, 2000 U.S. Dist. LEXIS 21725 (N.D. Cal. Apr. 14, 2000).

466. *Patterson*, 551 F.3d at 441–42.

467. 927 F. Supp. 2d at 78–80.

lying by another student “on an almost daily basis,” and the harasser eventually took the victim off school grounds at knife point and raped him.⁴⁶⁸

The second set of cases involves a similar link but the opposite order of events. For instance, in *C.T. v. Liberal School District*,⁴⁶⁹ three male students filed charges of molestation against a male school volunteer who “ran a weight training program [for students] out of his home,”⁴⁷⁰ and one was subsequently harassed by peers physically assaulting him, directing a “death threat” at him, calling him “names such as ‘fag boy,’” and directing statements like, “‘I hear you are Johnny’s little bitch’” to him.⁴⁷¹ Similarly, the plaintiff who brought suit in *Roe ex rel. Callahan*⁴⁷² was “called homosexual epithets” after he was sexually assaulted with an air pump at a football camp, “‘resulting in a collective belief . . . that Plaintiff was a homosexual.’”⁴⁷³

These cases also mirror the treatment that out-gay plaintiffs received. In *Doe v. Southeastern Greene School District*,⁴⁷⁴ the plaintiff was originally “teased” by students about his weight, but when a supposed friend in seventh grade loudly repeated the plaintiff’s confession that he was gay, the harassment switched to the plaintiff’s homosexuality and escalated to sexual assaults.⁴⁷⁵ In *Henkle v. Gregory*,⁴⁷⁶ an openly gay high school student was subjected to frequent harassment, including one instance where he was “lassoed . . . around the neck” by students who “suggested dragging him behind a truck,” and in another instance a metal projectile, thrown by another student, narrowly “missed him and stuck in the wall.”⁴⁷⁷ Even the non-gay but gay-rights-supportive plaintiff in *Schroeder ex rel. Schroeder v. Maumee Board of Education*⁴⁷⁸ was subjected to “name-calling, offensive gesturing, and physical threats and violence” because students regarded his support of gay rights as an indication that he himself was gay.⁴⁷⁹ The treatment of the plaintiff’s out-gay son in *Walsh v. Tehachapi Unified School District*,⁴⁸⁰ involving the same facts as the OCR complaint discussed

468. 2000 U.S. Dist. LEXIS 21725, at *3.

469. 562 F. Supp. 2d 1324 (D. Kan. 2008).

470. *Id.* at 1329.

471. *Id.* at 1335–36.

472. 678 F. Supp. 2d 1008 (E.D. Cal. 2009).

473. *Id.* at 1014.

474. No. 03-717, 2006 U.S. Dist. LEXIS 12790 (W.D. Pa. Mar. 24, 2006).

475. *Id.* at *2–3.

476. 150 F. Supp. 2d 1067 (D. Nev. 2001).

477. *Id.* at 1069–70.

478. 296 F. Supp. 2d 869 (N.D. Ohio 2003).

479. *Id.* at 871.

480. 827 F. Supp. 2d 1107 (E.D. Cal. 2011).

below, was so hostile and abusive that the thirteen year-old committed suicide after four students “taunted, threatened, and physically assaulted” him.⁴⁸¹

A large amount of this violence is perpetrated in single-sex settings like locker rooms, boys bathrooms, and among athletic teams, and such all-boy environments are explicitly mentioned as sites of harassment and violence in sixteen of the twenty-eight cases where the court makes reference to sexual or physical violence.⁴⁸² For example, in *Corral v. UNO Charter School Network, Inc.*,⁴⁸³ a gym teacher sued for retaliation by the school because he believed he was fired for reporting the sexual assault of one male student by other male students in the locker room prior to gym class.⁴⁸⁴ Several students, often with disabilities, were also sexually assaulted in the boys’ bathroom.⁴⁸⁵ Lastly, the twelve-year-old male student in *Doe v. Brimfield Grade School*⁴⁸⁶ was hit repeatedly in the testicles for nearly a year by six male teammates on the school’s basketball team.⁴⁸⁷ When he and his parents objected to what the principal later characterized as “sac stabbing,” he was only hit more in retaliation, until he had to undergo testicular surgery.⁴⁸⁸ When he returned to school he was hit again, breaking open the surgical incision.⁴⁸⁹

481. *Id.* at 1113.

482. See, e.g., *R.L. ex rel. C.L. v. Leander Indep. Sch. Dist.*, No. A-12-CA-589 LY, 2013 U.S. Dist. LEXIS 78621 (W.D. Tex. June 4, 2013); *Corral v. UNO Charter Sch. Network, Inc.*, No. 10-CV-03379, 2013 U.S. Dist. LEXIS 62397 (N.D. Ill. May 1, 2013); *Galloway v. Chesapeake Union Exempted Vill. Sch. Bd. of Educ.*, No. 1:11-CV-850, 2012 U.S. Dist. LEXIS 152080 (S.D. Ohio Oct. 23, 2012); *Evans ex rel. A.E. v. Harrisburg Sch. Dist. No. 7*, No. 6:11-CV-6255-TC, 2012 U.S. Dist. LEXIS 145144 (D. Or. Oct. 9, 2012); *Doe ex rel. J.D. v. Bd. of Educ.*, 888 F. Supp. 2d 659 (D. Md. 2012); *Clifford v. Regents of Univ. of Cal.*, No. 2:11-CV-02935-JAM-GGH, 2012 U.S. Dist. LEXIS 60280 (E.D. Cal. Apr. 27, 2012); *Walsh v. Tehachapi Unified School Dist.*, 827 F. Supp. 2d 1107 (E.D. Cal. 2011); *Mathis v. Wayne Cnty. Bd. of Educ.*, No. 1:09-0034, 2011 U.S. Dist. LEXIS 85102 (M.D. Tenn. Aug. 2, 2011); *Roe ex rel. Callahan v. Gustine Unified Sch. Dist.*, 678 F. Supp. 2d 1008 (E.D. Cal. 2009); *Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816 (C.D. Ill. 2008); *Doe v. Perry Cmty. Sch. Dist.*, 316 F. Supp. 2d 809 (S.D. Iowa 2004); *Schroeder ex rel. Schroeder v. Maumee Bd. of Educ.*, 296 F. Supp. 2d 869 (N.D. Ohio 2003); *Snelling v. Fall Mountain Reg’l Sch. Dist.*, No. 99-448-JD, 2001 U.S. Dist. LEXIS 3591 (D.N.H. Mar. 21, 2001); *Wilson v. Beaumont Indep. Sch. Dist.*, 144 F. Supp. 2d 690 (E.D. Tex. 2001); *O. H. v. Oakland Unified Sch. Dist.*, No. C-99-5123 JCS, 2000 U.S. Dist. LEXIS 21725 (N.D. Cal. Apr. 14, 2000); *Cortese v. W. Jefferson Hills Sch. Dist.*, No. 53 C.D. 2008, 2008 Pa. Commw. Unpub. LEXIS 388 (Pa. Commw. Ct. Dec. 9, 2008).

483. No. 10-CV-03379, 2013 U.S. Dist. LEXIS 62397 (N.D. Ill. May 1, 2013).

484. *Id.* at *12.

485. *R.L. ex rel. C.L.*, 2013 U.S. Dist. LEXIS 78621, at *2–3; *Doe ex rel. J.D.*, 888 F. Supp. 2d at 662; *Wilson*, 144 F. Supp. 2d at 691; *O. H.*, 2000 U.S. Dist. LEXIS 21725, at *40.

486. 552 F. Supp. 2d 816 (C.D. Ill. 2008).

487. *Id.* at 819–20.

488. *Id.* at 820 (internal quotation marks omitted).

489. *Id.*

Several cases also involved sexual and physical violence related to hazing by all-male groups. For instance, in *Mathis v. Wayne County Board of Education*,⁴⁹⁰ two seventh grade basketball players were harassed in the boys' locker room by older players on the team as a part of ongoing hazing rituals.⁴⁹¹ One boy was convinced to do sit-ups blind-folded, and "when James Doe came to the end of the sit-up, one of the eighth graders had placed his naked rear end so that James Doe hit the rear end with his (blind-folded) face."⁴⁹² The other was "grabbed by four of these eighth graders, held down, his shorts were pulled down and a marker was shoved up his rectum."⁴⁹³ The seventh grade players were generally subjected to repeated incidents of "lights out!" in which the eighth graders would: ensure that the locker room door was closed, turn off all the lights in the locker room, and then begin humping and gyrating on the seventh graders. The "ring leaders" of "lights out!" were also the boys primarily involved in the "blind-folded sit-up" and the "marker incident."⁴⁹⁴

Similarly, in *Roe ex rel. Callahan v. Gustine Unified School District*,⁴⁹⁵ the fourteen-year-old plaintiff was sexually assaulted, along with a number of younger players, at a high school football camp when four older teammates "held him down, and then inserted a battery-controlled air pump into his rectum . . . in the presence of several [other] students, who did not end the assault."⁴⁹⁶ The plaintiff "witnessed these individuals assault several other teammates with the air pump during the football camp," and it was "undisputed that [the students] assaulted or attempted to assault with an air hose approximately fifteen players during the July 2006 football camp."⁴⁹⁷ One player also cornered him in the shower, and "in an effeminate tone, called [p]laintiff a homosexual and grabbed his buttocks."⁴⁹⁸ The same player "repeatedly exposed his genitals, and would 'slap' players on the head and face with his penis."⁴⁹⁹ Other hazing cases include *Clifford v. Re-*

490. No. 1:09-0034, 2011 U.S. Dist. LEXIS 85102 (M.D. Tenn. Aug. 2, 2011).

491. *Id.* at *2-12.

492. *Id.* at *6-7.

493. *Id.* at *7.

494. *Id.* at *6 (internal quotation marks omitted).

495. 678 F. Supp. 2d 1008 (E.D. Cal. 2009).

496. *Id.* at 1013.

497. *Id.*

498. *Id.* at 1014.

499. *Id.*

*gents of University of California*⁵⁰⁰ and *Cortese v. West Jefferson Hills School District*,⁵⁰¹ where the plaintiffs were unsuccessful in their claims.⁵⁰²

The final commonality between these cases—one both highly evocative of the cultures of silence and protection and the most damaging from a liability perspective—is that coaches, teachers, or school administrators ignored or supported the harassers' behavior. The schools' inaction and failure to address the harassment is implied in all twenty cases where the courts denied schools' efforts to keep the cases from going to a jury.⁵⁰³ In many of these cases, the common school reaction is to do nothing.⁵⁰⁴ However, in several cases, teachers and school officials affirmatively supported the harassing students. In *Galloway v. Chesapeake Union Exempted Village Schools Board of Education*,⁵⁰⁵ "one teacher repeatedly questioned [the plaintiff, who had Asperger's and a seizure disorder,] about his seizures in front of the entire class and questioned whether he really had seizures."⁵⁰⁶ In *Snelling v. Fall Mountain Regional School District*,⁵⁰⁷ two brothers, who were harassed for their entire high school careers by fellow basketball players for supposedly being gay, were told by their coach "to take their 'bras' off," in reference to weight vests they wore to practice to improve "their

500. No. 2:11-CV-02935-JAM-GGH, 2012 U.S. Dist. LEXIS 60280 (E.D. Cal. April 30, 2012).

501. No. 53 C.D. 2008, 2008 Pa. Commw. Unpub. LEXIS 388 (Pa. Commw. Ct. Dec. 9, 2008).

502. *Clifford*, 2012 U.S. Dist. LEXIS 60280, at *30; *Cortese*, 2008 Pa. Commw. Unpub. LEXIS 388, at *9-11.

503. See *supra* note 439 (listing cases where the court allowed the case to be heard by a jury).

504. *Galloway v. Chesapeake Union Exempted Vill. Sch. Bd. of Educ.*, No. 1:11-CV-850, 2012 U.S. Dist. LEXIS 152080, at *5 (S.D. Ohio Oct. 23, 2012); *Braden v. Mountain Home Sch. Dist.*, 903 F. Supp. 2d 729, 733 (W.D. Ark. 2012); *Doe ex rel. J.D. v. Bd. of Educ.*, 888 F. Supp. 2d 659, 661-62 (D. Md. 2012); *Estate of Brown v. Ogletree*, No. 11-cv-1491, 2012 U.S. Dist. LEXIS 21968, at *7-8 (S.D. Tex. Feb. 21, 2012) *on reconsideration sub nom.* *Estate of Brown v. Cypress Fairbanks Indep. Sch. Dist.*, 863 F. Supp. 2d 632, 633 (S.D. Tex. 2012); *Estate of Carmichael v. Galbraith*, No. 3:11-CV-0622-D, 2012 U.S. Dist. LEXIS 857, at *4-5 (N.D. Tex. Jan. 4, 2012); *Walsh v. Tehachapi Unified Sch. Dist.*, 827 F. Supp. 2d 1107, 1112-13 (E.D. Cal. 2011); *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 139-40 (N.D.N.Y. 2011); *C.T. v. Liberal Sch. Dist.*, 562 F. Supp. 2d 1324, 1335 (D. Kan. 2008); *Doe v. Se. Greene Sch. Dist.*, No. 03-717, 2006 U.S. Dist. LEXIS 12790, at *4 (W.D. Pa. Mar. 24, 2006); *Theno v. Tonganoxie Unified Sch. Dist.* No. 464, 394 F. Supp. 2d 1299, 1310-11 (D. Kan. 2005); *Doe v. Perry Cmty. Sch. Dist.*, 316 F. Supp. 2d 809, 815-17 (S.D. Iowa 2004); *Schroeder ex rel. Schroeder v. Maumee Bd. of Educ.*, 296 F. Supp. 2d 869, 871-72 (N.D. Ohio 2003); *Snelling v. Fall Mountain Reg'l Sch. Dist.*, No. 99-448-JD, 2001 U.S. Dist. LEXIS 3591, at *7-8 (D.N.H. Mar. 21, 2001); *Henkle v. Gregory*, 150 F. Supp. 2d 1067, 1069-70 (D. Nev. 2001); *O. H. v. Oakland Unified Sch. Dist.*, No. C-99-5123 JCS, 2000 U.S. Dist. LEXIS 21725, at *3 (N.D. Cal. Apr. 14, 2000).

505. *Galloway v. Chesapeake Union Exempted Vill. Sch. Bd. of Educ.*, No. 1:11-CV-850, 2012 U.S. Dist. LEXIS 152080 (S.D. Ohio Oct. 23, 2012).

506. *Id.* at *3-4.

507. No. 99-448-JD, 2001 U.S. Dist. LEXIS 3591 (D.N.H. Mar. 21, 2001).

jumping abilit[ies].”⁵⁰⁸ Even spectators at basketball games and the audience at the older brother’s graduation screamed the homophobic nickname used by the harassing players for the brothers.⁵⁰⁹

In *Brimfield Grade School*, after the last incident of “‘sac stabbing’” ruptured plaintiff’s incision, he was told by his coach to “‘stick up for himself,’”⁵¹⁰ and on another occasion a school official told him to “‘stop acting like a little girl.’”⁵¹¹ When the plaintiff in *Patterson* was physically assaulted by a female classmate, a male teacher asked him in front of the full class “‘[h]ow . . . it fe[lt] to be hit by a girl.’”⁵¹² Further, after plaintiff was sexually assaulted, his coach informed the team in a meeting at which plaintiff was present that “‘they should ‘not joke around with guys who can’t take a man joke.’”⁵¹³ In *Theno v. Tonganoxie Unified School District No. 464*,⁵¹⁴ most of the teachers and administrators did nothing in the face of the abuse the plaintiff suffered, but the football coach laughed openly at harassment that he witnessed,⁵¹⁵ and when the assistant principal talked to the harassing football players he “‘talked about the harassment of plaintiff only ‘for like two minutes,’ then he ‘led into stuff about football.’”⁵¹⁶ Meanwhile, the plaintiff was often equally or more harshly punished by the administration for fights resulting from the harassment.⁵¹⁷ *Mathis v. Wayne County Board of Education*⁵¹⁸ involved even greater alleged involvement by adults in the harassment, including allegations that the coach had told the harassing students about some of the hazing techniques they used, including “‘the idea for the ‘blind-folded sit-up.’”⁵¹⁹ Ultimately, the court upheld the jury’s conclusion that the school was deliberately indifferent to the harassment because “‘the boys involved were suspended [from school] for 11 days, and, in the end, only formally suspended from the basketball team for about a month.’”⁵²⁰ Moreover, the jury could have concluded that the school’s response was influenced by the fact that “‘the four boys [the harassers] were

508. *Id.* at *3–9.

509. *Id.* at *8.

510. *Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816, 820 (C.D. Ill. 2008).

511. *Id.* at 823.

512. *Patterson v. Hudson Area Sch.*, 551 F.3d 438, 440 (6th Cir. 2009).

513. *Id.* at 443 (internal quotation marks omitted).

514. 394 F. Supp. 2d 1299 (D. Kan. 2005).

515. *Id.* at 1310.

516. *Id.* at 1310–11.

517. *Id.*; see also *Doe v. Perry Cmty. Sch. Dist.*, 316 F. Supp. 2d 809, 817–18 (S.D. Iowa 2004) (describing an altercation resulting in equal punishments for plaintiff and his harasser).

518. No. 1:09-0034, 2011 U.S. Dist. LEXIS 85102 (M.D. Tenn. Aug. 2, 2011).

519. *Id.* at *4.

520. *Id.* at *20–22.

among the better players on the team and had parents employed by the defendant [the school district].”⁵²¹

Many of these plaintiffs’ successes in their Title IX cases are heartening, but applying the insights contained in the masculinities research can make this success more uniform. Fortunately, many courts seem already to understand quite well the dynamics of the sexual harassment and sex discrimination experienced by these boy plaintiffs, even though they do not cite to the masculinities research.⁵²² More specifically, their understandings of why this harassment is discrimination on the basis of sex echoes masculinities scholars’ conclusions regarding the gender-policing function played by sexual harassment and same-sex bullying of boys in the context of the traditionally masculine hidden curriculum.⁵²³ For instance, some of these cases mention the Supreme Court’s decision in *Oncale v. Sundowner Offshore Services, Inc.*,⁵²⁴ which allows actions for same-sex sexual harassment in the Title VII employment context.⁵²⁵ In addition, as noted above, courts in these cases have recognized practically three to one that the “use of gender-based or sexually loaded insults such as ‘fag’ or ‘homo’ can certainly be indicative of animus on the basis of gender.”⁵²⁶ Moreover, they state clearly that “[d]iscrimination because one’s behavior does not ‘conform to stereotypical ideas’ of one’s gender can amount to actionable discrimination ‘based on sex.’”⁵²⁷ Still others appear to find so uncontroversial the premise that same-sex sexual harassment and bullying of boys

521. *Id.* at *21.

522. For example, although the court in *Theno* did not cite any academic articles, it notes with approval the testimony of a psychiatric expert who attributed the plaintiff’s physical aggression toward his harassers as a response to feeling his “masculinity [had been] threatened.” *Theno v. Tonganoxi Unified Sch. Dist. No. 464*, 394 F. Supp. 2d 1299, 1306–07 (D. Kan. 2005). The court also pointed out that the harassers chose to use terms with “sexual innuendos and undertones in an effort to debase and derogate [plaintiff’s] masculinity.” *Id.* at 1307.

523. For a discussion of the “hidden curriculum,” see *supra* Part II.C.

524. 523 U.S. 75 (1998).

525. For cases employing Title VII reasoning to establish that same-sex harassment is covered by Title IX, see *Roe ex rel. Callahan v. Gustine Unified Sch. Dist.*, 678 F. Supp. 2d 1008, 1026 (E.D. Cal. 2009); *Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816, 822 (C.D. Ill. 2008); *Doe v. Se. Greene Sch. Dist.*, No. 03-717, 2006 U.S. Dist. LEXIS 12790, at *15–17 (W.D. Pa. Mar. 24, 2006); *Theno*, 394 F. Supp. 2d at 1307.

526. *Roe ex rel. Callahan*, 678 F. Supp. 2d at 1027.

527. *Brimfield Grade Sch.*, 552 F. Supp. 2d at 823 (quoting *Howell v. N. Cent. Coll.*, 320 F. Supp. 2d 717, 722 (N.D. Ill. 2004)); see also *Theno*, 394 F. Supp. 2d at 1302–08 (discussing gender-based harassment and concluding that “the evidence was sufficient for the jury to find that plaintiff’s harassers were motivated by his failure to conform to stereotypical gender expectations”).

constitute sex discrimination that they simply assume it and go directly to applying the *Davis* test.⁵²⁸

Thus, nearly three quarters of courts already agree with how masculinities' scholars tell us traditional masculinity is constructed, how a primary way of policing these norms is carried out by degrading a boy and his status through feminizing him, and how feminization can be accomplished through sexist and homophobic name-calling, sexual assaults, or some combination of the two. In the minority of cases that go the other way, however, there is clearly a role for the masculinities social science research in explaining why two common methods of feminization, anti-gay and sexist epithets and sexual assaults, constitute sexual harassment, and why schools that do not address such behavior are engaging in sex discrimination.

In addition and related to this, masculinities scholars' explanations of the centrality of feminization in establishing traditionally masculine hierarchies⁵²⁹ make it unsurprising that the sex discrimination against boys accomplished through sexual harassment looks quite similar to sexual harassment-related sex discrimination against girls. Therefore, courts should resist interpreting and applying the *Davis* test differently with boys than with girls. For example, consider again the two cases mentioned above involving hazing that did not find in favor of the plaintiffs, *Clifford* and *Cortese*. While the *Clifford* plaintiff's allegations of sexual and physical assaults during a fraternity hazing were barred from recovery by the statute of limitations,⁵³⁰ the result in the *Cortese* case seems to proceed from a different—and problematic—standard adopted by the court for what constitutes severe sexual harassment satisfying the *Davis* standard.⁵³¹ In *Cortese*, one boy attacked another on a bus ride home from football camp and placed his genitals on the other boy's face,⁵³² an incident that the court found insuffi-

528. See *Patterson v. Hudson Area Sch.*, 551 F.3d 438, 444–45 (6th Cir. 2009); *Mathis v. Wayne Cnty. Bd. of Educ.*, No. 1:09-0034, 2011 U.S. Dist. LEXIS 85102, at *3–4 (M.D. Tenn. Aug. 2, 2011); *James v. Indep. Sch. Dist. No. 1-007*, No. CIV-07-434-M, 2008 U.S. Dist. LEXIS 82199, at *3–7 (W.D. Okla. Oct. 16, 2008). For an explanation of the test used to determine whether a claim of student-on-student sexual harassment is actionable based on Title IX, see *Davis v. Monroe Cnty Bd. of Educ.*, 526 U.S. 629 (1999).

529. See *supra* Part II.B.

530. *Clifford v. Regents of Univ. of Cal.*, No. 2:11-CV-02935-JAM-GGH, 2012 U.S. Dist. LEXIS 60280, at *14–20 (E.D. Cal. Apr. 27, 2012).

531. See *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999) (holding that a school board can be held liable if it is “deliberate[ly] indifferen[t]” to harassment “that is so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit”).

532. *Cortese v. W. Jefferson Hills Sch. Dist.*, No. 53 C.D. 2008, 2008 Pa. Commw. Unpub. LEXIS 388, at *2 n.4, (Pa. Commw. Ct. Dec. 9, 2008).

ciently “pervasive” to justify a finding of discrimination under Title IX because it just happened the one time.⁵³³ Yet, in cases primarily involving female plaintiffs, because of the severity of sexual violence, courts have generally concluded that even a single instance of such violence will be considered hostile environment sexual harassment.⁵³⁴ It thus seems quite likely that in a case where a boy attacked a girl and placed his genitals in her face, a court would hold such an act to be severe enough to meet that prong of the *Davis* test all on its own. In light of the feminizing power of such an act and the power of feminization to make boys vulnerable to some of the same sex discrimination as girls, the court should have reached the same conclusion for the boy in *Cortese*.

Similarly, in *Estate of Carmichael v. Galbraith*,⁵³⁵ the court twice dismissed plaintiff’s claims that the thirteen-year-old boy who ultimately committed suicide was harassed because of his sex.⁵³⁶ The court’s reason for the dismissal was that plaintiffs only pled one instance that would suggest a “gender-based animus rather than a personal animus” for the harassment⁵³⁷ when members of the school’s football team called the decedent homophobic slurs after they stripped him naked, tied him up, put him in a trash can, and then uploaded a video of their assault to YouTube.⁵³⁸ The school had time to respond to the assault and the video, but a teacher, who the pleadings suggested had actual knowledge of both the incident and the video, only directed the student who posted the video “to remove . . . and destroy it.”⁵³⁹ She did not file a report about the assault itself.⁵⁴⁰ Such inac-

533. *Id.* at *10.

534. See U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 31 n.45 (2001) [hereinafter REVISED GUIDANCE], available at <http://www.ed.gov/offices/OCR/archives/pdf/shguide.pdf> (citing cases in which hostile environments were shown after isolated incidents). According to OCR:

The more severe the conduct, the less the need to show a repetitive series of incidents; this is particularly true if the harassment is physical. For instance, if the conduct is more severe, e.g., attempts to grab a female student’s breasts or attempts to grab any student’s genital area or buttocks, it need not be as persistent to create a hostile environment. Indeed, a single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment.

Id. at 6.

535. No. 3:11-CV-0622-D, 2012 U.S. Dist. LEXIS 138206 (N.D. Tex. Sept. 26, 2012).

536. *Id.* at *2–3, *22–24.

537. *Id.* at *22–24.

538. *Id.* at *11–13, *22–23; see also *Estate of Carmichael v. Galbraith*, No. 3:11-CV-0622-D, 2012 U.S. Dist. LEXIS 857, at *21 (N.D. Tex. Jan. 4, 2012) (explaining that “there were numerous other instances in which [plaintiff] was harassed and bullied [without] . . . sexual overtones”).

539. *Estate of Carmichael*, 2012 U.S. Dist. LEXIS 138206, at *12.

540. *Id.*

tion should have counted as evidence of deliberate indifference—the court should have recognized the severity of the harassment in this single incident, as it likely would have done in the case of a girl. Although the court appears to reject the plaintiff’s pleading suggesting that the defendant school discriminated against the decedent because the school would have investigated such a violation against a girl but did not do so for a boy,⁵⁴¹ the critical insight is not about the school but about the legal standard used in *Davis*, which the court in *Carmichael* should have applied the same as it would have for a girl. In fact, in neither opinion does the court consider the severity or pervasiveness of the harassment in the case.⁵⁴²

Fortunately, the courts that need more information about traditional masculinity are significantly fewer than the ones that seem to already understand its dynamics. In addition, OCR has taken a number of steps in the last two years to make more explicit the ways in which Title IX applies to same-sex bullying and sexual harassment, and that OCR can, and will, enforce Title IX administratively against schools that deal inadequately with such incidents. The authority of OCR to enforce Title IX derives from the fact that schools agree to comply with Title IX in order to receive federal funds, and a school risks that federal funding if OCR investigates, usually in response to a complaint, and finds a violation of Title IX.⁵⁴³ A school must work with OCR to achieve voluntary compliance with Title IX and its regulations or OCR may take steps to terminate a school’s funding.⁵⁴⁴ While suits brought by private individuals also derive from schools’ receipt of federal funds,⁵⁴⁵ because administrative enforcement gives schools an opportunity to comply with Title IX prior to withholding federal funds, OCR has the discretion to define compliance more broadly than the more limited *Gebser/Davis* standard.⁵⁴⁶

The first recent action was a “Dear Colleague Letter” (“DCL”) that OCR issued in October of 2010, which addresses how various civil rights laws prohibiting discrimination on the basis of race, color, national origin, sex, and disability apply to bullying, including Title IX.⁵⁴⁷ In it, OCR uses

541. *See id.* at *13 (calling the allegations of “disparate treatment . . . conclusory and speculative”).

542. *See id.* at *17–18 (explaining that the court “reaches the same result” as was previously reached because plaintiff failed to support the inference that complaints of harassment were treated differently by the school because of the gender of the complainant).

543. REVISED GUIDANCE, *supra* note 534, at 3.

544. *Id.* at 15, 35 n.85.

545. *See id.* at ii (identifying Supreme Court decisions allowing for private action under Title IX).

546. *See id.* at iii–iv (contrasting private actions and administrative enforcement).

547. *Bullying Dear Colleague Letter*, *supra* note 16, at 1.

several examples to explain how schools should respond to bullying implicating these civil rights laws to meet their obligations under the statutes.⁵⁴⁸ One of the bullying examples involves the following scenario:

[A] gay high school student was called names (including anti-gay slurs and sexual comments) both to his face and on social networking sites, physically assaulted, threatened, and ridiculed because he did not conform to stereotypical notions of how teenage boys are expected to act and appear (e.g., effeminate mannerisms, nontraditional choice of extracurricular activities, apparel, and personal grooming choices).⁵⁴⁹

The school in the example violated Title IX because it did not identify the harassment as sexual harassment because the student was openly gay, and therefore simply used its anti-bullying policy—only partially successfully—to address the situation and stop the harassment.⁵⁵⁰

Six months later, in April of 2011, OCR issued a second DCL related to peer sexual violence.⁵⁵¹ This DCL clarified the application of Title IX to peer sexual violence cases in schools, including how OCR's 2001 *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* ("Revised Guidance")⁵⁵² applies to sexual violence in particular.⁵⁵³ The April 2011 letter discusses schools' obligations with regard to these cases⁵⁵⁴ and gives details on the procedures that schools must use in responding to such cases.⁵⁵⁵

Because OCR's enforcement is more proactive than a private suit for damages, OCR has applied stricter standards to school compliance under Title IX, many of which avoid some of the difficulties with the *Gebser/Davis* test, difficulties already mentioned above and discussed in detail below. The bullying and sexual violence DCLs both confirm and clarify that "a school that knows, or reasonably should know, about possible harassment must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation."⁵⁵⁶ "If an investigation re-

548. *Id.* at 4–9.

549. *Id.* at 7.

550. *Id.*

551. *Sexual Violence Dear Colleague Letter*, *supra* note 17, at 1.

552. *See generally* REVISED GUIDANCE, *supra* note 534.

553. *Sexual Violence Dear Colleague Letter*, *supra* note 17, at 2.

554. *Id.* at 4–5.

555. *Id.* at 6–14.

556. *Id.* at 4; *see also* *Bullying Dear Colleague Letter*, *supra* note 16, at 2 ("A school is responsible for addressing harassment incidents about which it knows or reasonably should have known.").

veals that discriminatory harassment has occurred,⁵⁵⁷ a school must “take immediate action to eliminate the harassment, prevent its recurrence, and address its effects,⁵⁵⁸ even if the conduct is also “covered [under] an anti-bullying policy⁵⁵⁹ or criminal law.⁵⁶⁰ In terms of specific steps schools should take to address both issues, the DCLs consistently require training for school employees,⁵⁶¹ taking steps to stop the harassment and prevent retaliation against a student for reporting the harassment,⁵⁶² and making sure those “steps [do] not penalize the student who was harassed.”⁵⁶³

Several recent resolution letters and agreements with schools that OCR has investigated for either reports of sexual violence or bullying are posted on OCR’s website. One of these investigations occurred as a result of an OCR complaint filed by the parent of a student,⁵⁶⁴ and a different investigation began after a complaint was filed with the U.S. Department of Justice (“DOJ”), which brought OCR into a co-investigation.⁵⁶⁵ Regardless of how it is initiated, an OCR investigation comprehensively reviews that school’s response system.⁵⁶⁶ This investigation often includes a close examination of institutional policies and procedures, the steps the school took to resolve a complaint,⁵⁶⁷ and files relating to past sexual harassment cases that required a school to respond in some way.⁵⁶⁸ The U.S. Department of Education Office for Civil Rights also interviews those involved in the case, particularly relevant school personnel.⁵⁶⁹ Even when OCR does not find a school in violation of Title IX or its regulations, it may find “technical

557. *Bullying Dear Colleague Letter*, *supra* note 16, at 2.

558. *Sexual Violence Dear Colleague Letter*, *supra* note 17, at 4.

559. *Bullying Dear Colleague Letter*, *supra* note 16, at 3.

560. *Sexual Violence Dear Colleague Letter*, *supra* note 17, at 10.

561. *Bullying Dear Colleague Letter*, *supra* note 16, at 3; *Sexual Violence Dear Colleague Letter*, *supra* note 17, at 4.

562. *Bullying Dear Colleague Letter*, *supra* note 16, at 3; *Sexual Violence Dear Colleague Letter*, *supra* note 17, at 4, 5, 16.

563. *Bullying Dear Colleague Letter*, *supra* note 16, at 3; *see also Sexual Violence Dear Colleague Letter*, *supra* note 17, at 15–16 (instructing schools to “minimize the burden on the complainant” in “separat[ing] the complainant and alleged perpetrator”).

564. *Tehachapi Resolution Letter*, *supra* note 19, at 1.

565. Letter from Debbie Osgood, Director, U.S. Dep’t of Educ. Office for Civil Rights, to Dennis Carlson, Superintendent, Anoka-Hennepin Sch. Dist. (Mar. 15, 2012) [hereinafter *Anoka-Hennepin Resolution Letter*], available at <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/05115901-a.pdf>.

566. *See* REVISED GUIDANCE, *supra* note 534, at 14 (providing a brief overview of the procedures OCR follows in investigating sexual harassment cases).

567. *Id.*

568. *See OCR Complaint Processing Procedures*, E.D.GOV., <http://www.ed.gov/about/offices/list/ocr/complaints-how.html> (last updated Dec. 2012) (providing that OCR may “review[] documentary evidence” in investigating complaints).

569. *Id.*

[non]compliance” in its policies or procedures and require a school to make changes to those policies as directed by OCR.⁵⁷⁰

The first of these OCR investigations was initiated by the same parent who filed the *Walsh* case, whose son committed suicide due to bullying and sexual harassment.⁵⁷¹ Once again, the facts of the case demonstrate similar dynamics to those discussed in the masculinities research and the private lawsuits above. First, the thirteen-year-old male student victim, who faced harassment since he was in fifth grade, was called “gay,” “queer,” and “girl” and teased because he “acted like a girl.”⁵⁷² This name-calling later escalated to “derogatory remarks[,] . . . crude questions” and “hostile and patently false sexual rumors.”⁵⁷³ The review of the school’s records by OCR showed that “taunting of students based on gender stereotypes is common, and that much of the taunting involves the use of anti-gay slurs.”⁵⁷⁴

Second, as the harassment of Walsh escalated, it turned physically and sexually violent, with the worst violence happening in the single-sex environment of the boys’ locker room.⁵⁷⁵ After the student told people he was gay in sixth grade, “students grabb[ed] the [s]tudent from behind while suggesting that he would be sexually gratified by the contact. . . . [And] [o]n one occasion . . . attempted to shove a pencil up the seat of the [s]tudent’s pants.”⁵⁷⁶ The student’s pants were regularly pulled down in the locker room, and a “male peer . . . threatened to rape the [s]tudent.”⁵⁷⁷ Additionally, “the [s]tudent was threatened, taunted, followed, and physically assaulted” at a park by four other students on the day he committed suicide.⁵⁷⁸

Finally, evidence suggested that teachers and officials at the school were either indifferent to the harassment or supported the harassers. Despite many reports of the harassment, school officials repeatedly took no or minimal action.⁵⁷⁹ “Some students speculated that adults did not intervene

570. See, e.g., Letter from Linda Howard-Kurent, Supervisory Team Leader, U.S. Dep’t of Educ., to Norman Cohen, President, Utah Coll. of Massage Therapy, at 2–3, available at <http://www.nchem.org/documents/149-UtahCollegeofMassageTherapy-08012022-B.pdf> (explaining that while the school was not in violation of Title IX, the school’s handbook did not adequately inform students of its procedures for addressing harassment complaints).

571. *Tehachapi Resolution Letter*, *supra* note 19, at 1.

572. *Id.* at 4.

573. *Id.* at 5.

574. *Id.* at 13.

575. *Id.* at 6.

576. *Id.* at 4–6.

577. *Id.* at 6.

578. *Id.* at 11.

579. *Id.* at 5–11.

on the [s]tudent's behalf because they themselves disapproved of the [s]tudent and privately agreed with things that students said about him."⁵⁸⁰ Additionally, "one of the [s]tudent's teachers would mock him in class . . . and [one teacher had] a conversation [with] a classmate . . . during which the teacher made fun of gay people and mentioned the [s]tudent by name."⁵⁸¹ After the suicide, the school district "posted a statement on its website" that inaccurately "suggested that the [s]tudent only briefly attended the [s]chool[;] . . . had an erratic pattern of transferring in and out of the [s]chool[; and], as a result of this purportedly erratic attendance, [s]chool staff did not know the [s]tudent well; and . . . were unaware of the harassment."⁵⁸²

In the face of this damning evidence, OCR found Tehachapi in violation of Title IX on the basis of allowing the student to be subjected to a hostile environment,⁵⁸³ making particular mention of the fact that school officials' "passive, incomplete action or inaction, creat[ed] for some students the perception that the harassment was acceptable."⁵⁸⁴ In doing so, OCR confirmed that the harassment was based on sex because the harassment the student suffered was both "sexual in nature" and "gender-based, motivated by the [s]tudent's failure to act as some of his peers believed a boy should act."⁵⁸⁵ The U.S. Department of Education Office for Civil Rights also stated that "the use of homophobic epithets in many instances [of harassment] stemmed from commonly held attitudes and perceptions about gender and masculinity from which also flowed the sexual and other gender-based conduct."⁵⁸⁶

In the second case, where OCR investigated the Anoka-Hennepin School District:

District students told OCR and DOJ investigators that they were constantly harassed (some almost every day for years) because of their failure to conform to gender stereotypes. Female students reported being called "manly," "guy," or "he-she"; male students reported being called "girl," and "gay boy," and being told, "you're a guy, act like it." A female student reported being told to "go kill herself" and students said they were threatened and

580. *Id.* at 9.

581. *Id.* at 10. *But see id.* ("Many students perceived that the [s]tudent was liked by his teachers.").

582. *Id.* at 13.

583. *Id.* at 1, 15, 18, 19.

584. *Id.* at 19.

585. *Id.* at 14.

586. *Id.* at 15.

subjected to physical assaults because of their nonconformity to gender stereotypes. Some of these students suffered from physical and mental health problems. Some students stopped attending school for periods of time, left the District, or dropped out of school entirely. . . .

. . . .

. . . The complaint further alleges that the District knew about the harassment, yet failed to take effective action to stop the harassment and that, as a result, the harassment continued and in certain instances escalated.⁵⁸⁷

After two federal lawsuits were filed against the school district, the court consolidated the cases and allowed the OCR/DOJ to intervene.⁵⁸⁸ The parties entered into settlement negotiations resulting in a consent decree specifying ten steps the school district agreed to take to change its practices⁵⁸⁹ and payment of \$270,000 to the six student plaintiffs in the lawsuits.⁵⁹⁰

Thus, both the all-boy bullying and sexual harassment cases, as well as the OCR and DOJ enforcement actions, echo the dynamics discussed in Part II related to constructions of traditional masculinity and the hypermasculine dynamics of homosocial educational environments in particular. The most common characteristic of the bullying and harassment in these cases is the use of homophobic and misogynist epithets to accompany violent—often sexually violent—actions by the bullies, who are overwhelmingly other boys. In addition, the most sexually violent behaviors experienced by the victims occurred in the most homosocial groups and environments: on sports teams and in boys' locker rooms. Finally, the hidden curriculum and cultures of silence and protection act as a key support of the harassing behavior, with the adults in charge of the all-boys groups and environments, coaches in particular, communicating the most hypermasculine messages to the children. In addition, both the private lawsuits and the administrative enforcement show that Title IX, a statute originally designed to eliminate sex and gender discrimination against girls, has developed into a powerful legal remedy for boys to address the gender-based discrimination that they face. For those boys who are sexually harassed and bullied because of how the school ignores hypermasculine peer dynamics or encourages a traditionally masculine hidden curriculum, Title IX provides one of the best options

587. *Anoka-Hennepin Resolution Letter*, *supra* note 565, at 2–3.

588. *Id.* at 3.

589. *Id.* at 3–4.

590. Consent Decree at 49, *Doe v. Anoka-Hennepin Sch. Dist. No. 11*, No. 11-cv-01999-JNE-SER (D. Minn. Mar. 6, 2012), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/05115901-d.pdf>.

under current law for compelling their schools to address the conditions that give rise to that harassment.

B. Same-Sex Sexual Harassment as Antithetical to American Feminism and Liberalism

Those who are familiar with feminist legal theory will find the line of same-sex bullying and sexual harassment cases emerging under Title IX to be unsurprising, especially with regard to the similarities between how girls and boys experience the sex discrimination that is constituted by sexual harassment. Not as obvious is the way this line of cases and the dynamics of the violence at issue in them also reflects key normative concerns in classical liberal theory. This Subpart therefore looks at both feminist legal theory as well as liberal theory and concludes that, because enforcement of Title IX advances all of these normative principles, suspension of that enforcement is not only contrary to Title IX's purposes but also to fundamental commitments of the American liberal state. In addition, this Subpart notes that critical race theory points to advantages for the majority of Americans to exploit this moment of "interest convergence."⁵⁹¹

As Professor Deborah Brake has demonstrated, Title IX incorporates a range of feminist legal theories in its specific legal doctrines, as those doctrines have developed through both Title IX jurisprudence and administrative enforcement.⁵⁹² In *Title IX as Pragmatic Feminism*, Professor Brake details the ways in which Title IX uses liberal feminist legal theories, cultural feminist theories, and dominance feminist theories to combat discrimination against women and girls in sports.⁵⁹³ Similarly, the Title IX prohibition of sex-segregated education and the sexual harassment cases—involving both boy and girl victims—can be seen as emanating from two different feminist legal theories.

Title IX's prohibition of sex-segregated education targets the different treatment of girls and boys in education. This derives from liberal feminism's focus on "seek[ing] equality [for women] on the same terms as men, to the extent that women are similarly situated to men,"⁵⁹⁴ as well as its "commitment to individual autonomy and choice and insist[ence] that these freedoms be afforded to women as well as men."⁵⁹⁵ It also draws from the

591. Cf. Bell, *supra* note 30, at 523 (explaining "interest convergence" in the context of racial equality).

592. Deborah L. Brake, *Title IX as Pragmatic Feminism*, 55 CLEV. ST. L. REV. 513, 514 (2007).

593. *Id.*

594. *Id.* at 535.

595. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 19 (3d ed. 2013).

liberal feminist approach, advanced by “African-American scholar and activist Pauli Murray,” that “analogize[d] unequal or discriminatory treatment of women to racial discrimination.”⁵⁹⁶ In the case of race discrimination, of course, the Supreme Court stated in 1954 what was understood by others many years and decades before *Brown v. Board of Education*,⁵⁹⁷ that “in the field of public education . . . [s]eparate educational facilities are inherently unequal.”⁵⁹⁸

In contrast to the liberal feminist theory embodied by the prohibition of sex-segregated education, Title IX’s sexual harassment theory is based on a “dominance” or “radical” feminist theory. Professor Catharine MacKinnon’s theories of dominance feminism contend that “the sexual use and abuse of women [is] the principal mechanism by which women’s subordination [is] perpetuated”⁵⁹⁹ and these theories were “instrumental in establishing the cause of action for sexual harassment.”⁶⁰⁰ Professor Brake characterizes the theory underlying Title IX’s sexual harassment provisions as “a very weak version of dominance feminism,”⁶⁰¹ because it adopts an “actual knowledge” standard rather than the constructive knowledge, “knew, or reasonably should have known”⁶⁰² standard used in employment sexual harassment cases.⁶⁰³ “Actual knowledge” requires that a plaintiff show that the school was informed directly of the violence at issue or sufficiently related violence, and thus sets a higher bar for victims of sexual harassment in school settings.⁶⁰⁴ Despite this comparative weakness—which certainly is significant and should be addressed⁶⁰⁵—Title IX’s dominance-based theory is increasingly used and used successfully.⁶⁰⁶

Although Professor Brake sees stronger versions of liberal and cultural feminist principles in Title IX, neither has been used thus far to address the sex discrimination experienced by boys. Indeed, this fact is evident in the way that “boys’ crisis” advocates of sex-segregated education have supported the *suspension* of Title IX enforcement in order to address their

596. *Id.* at 33–34.

597. 347 U.S. 483 (1954).

598. *Id.* at 495.

599. CHAMALLAS, *supra* note 595, at 57.

600. *Id.* at 58.

601. Brake, *supra* note 592, at 542.

602. Cantalupo, *supra* note 431, at 503.

603. Brake, *supra* note 592, at 543. For a more detailed discussion of the actual knowledge test and its application in Title IX cases, see Cantalupo, *supra* note 372, at 227–33.

604. Brake, *supra* note 592, at 543.

605. *See infra* Part IV.

606. For a detailed discussion of instances where the courts have found violations of Title IX, or at least permitted cases to proceed to a jury, see Cantalupo, *supra* note 431, at 491–96.

claims that the “feminized” educational system causes sex discrimination against boys.⁶⁰⁷ As this argument acknowledges, moreover, it is hard to see how sex segregation could be supported consistently with a liberal feminist perspective, when Dr. Bernice Sandler, the Godmother of Title IX, has confirmed that under Title IX, “with a very few exceptions, such as sex education, ‘separate but equal’ would not be acceptable; integration would be required.”⁶⁰⁸ As I, and others, have argued elsewhere, no research conclusively proves—and much seriously contests—the idea that girls and boys are not similarly situated when it comes to education,⁶⁰⁹ and actual single-sex educational initiatives have shown no measurable success in achieving “separate but equal” education.⁶¹⁰ Therefore, it is hard to see how a formal equality, liberal feminist approach would support sex-segregated education.

For similar reasons, sex segregation also violates theories within the “antiessentialist” or “multidimensional” feminist categories. Antiessentialism rejects the notion that an identified group such as “women (or blacks or gays, etc.)” have shared characteristics that are essential and common to all within the group,⁶¹¹ and points out that there is more variation within gendered categories than between them.⁶¹² Multidimensionality theory includes intersectional feminism and “holds that categories of identity are (1) always intertwined with one another and (2) experienced and interpreted differently in different contexts.”⁶¹³ Thus, Professor Cohen’s description of antiessentialism states that it rejects “virtually all stereotypes and groupings . . . as the product of [a] socially imposed categorization” that helps establish and perpetuate hierarchy.⁶¹⁴ This description could also be applied to multidimensional theory with its recognition of complex identities and the importance of context.⁶¹⁵ This common rejection must also repudiate a

607. See Weil, *supra* note 222 (explaining that “the boys-crisis argument,” in favor of single-sex education is that “[s]chool . . . is shaped by females to match the abilities of girls”).

608. Sandler, *supra* note 409, at 480.

609. See, e.g., Cantalupo, *supra* note 31, at 772–73 (“[T]he highly contested research on sex-based brain differences is unlikely to lead to girls and boys being regarded as not similarly situated in learning abilities.”).

610. See *infra* Part IV.

611. See Frank Rudy Cooper, *Race and Essentialism in Gloria Steinem*, 11 BERKLEY J. AFR.-AM. L. & POL’Y 36, 37 (2009) (defining essentialism).

612. David S. Cohen, *Sex Segregation, Masculinities, and Gender-Variant Individuals*, in MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH 167, 171 (Frank Rudy Cooper & Ann C. McGinley eds., 2012).

613. Ann C. McGinley & Frank Rudy Cooper, *Introduction: Masculinity, Multidimensionality, and Law: Why They Need One Another*, in MASCULINITIES AND THE LAW: A MULTIDIMENSIONAL APPROACH, *supra* note 612, at 2 (citation omitted).

614. Cohen, *supra* note 612, at 172.

615. McGinley & Cooper, *supra* note 613, at 2.

system where, by definition, one identity category—sex—is raised above all others in relevance, and where context is not considered at all. In addition, the particular type of sex segregation most popular with schools since the ED 2006 regulations, a type that relies heavily on biologically-based justifications and a highly hierarchical definition of masculinity, must be especially offensive to these theories.

Likewise, although cultural feminist theory has been used to justify sex-segregated education, cultural feminists themselves have rejected this use. Dr. Carol Gilligan, whose work forms the basis of the cultural feminist movement,⁶¹⁶ in amicus briefs “in both the VMI and Citadel cases,” has expressly protested this use of her work:

[M]y observations about psychological development patterns that are generally associated with gender are not based on any premise of inherent differences between the sexes, but solely on the different nature of their experiences [M]y observations in no way support . . . conclusions that an educational program for men designed to maximize certain ostensibly “masculine” characteristics is necessary, effective or beneficial, or that men necessarily profit from an all-male college setting. My research leads me to conclude that this is not the case.⁶¹⁷

Sex discrimination against boys and men of a different form, via same-sex sexual harassment, however, was contemplated as a possibility from the very genesis of the radical feminist sexual harassment theory. As Dr. Kendall points out, Professor MacKinnon stated, as early as 1979, that “sexual harassment . . . in a same-sex context can be sex discrimination . . . for reasons deriving from that moment in sexism where male supremacy and homophobia converge.”⁶¹⁸ That “moment” derives from the necessity that heterosexuality be “compulsory” so it can sustain sexual inequality, and the need to enforce that compulsoriness through homophobia.⁶¹⁹ By guaranteeing “the survival of both masculinity and femininity, defined as male over female,” this compelled heterosexuality ensures “male dominance over women.”⁶²⁰ This insight would later be documented and confirmed empirically by the masculinities studies discussed in Part II, as they pointed to numerous examples of boys and young men using homophobic slurs to es-

616. CHAMALLAS, *supra* note 595, at 65–66.

617. Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 85 (1995) (omission and second alteration in original) (quoting Affidavit of Carol Gilligan at 3–4, *Johnson v. Jones*, Civ. No. 2:92-1674-2 (D.S.C. Jan. 7, 1993)).

618. Kendall, *supra* note 130, at 222.

619. *Id.* at 227.

620. *Id.*

establish their place in all-male hierarchies in which girls and women are always at the bottom.⁶²¹

Dominance feminism has been characterized as a critique of liberalism and such liberal values as “privacy, objectivity, and individual rights.”⁶²² Professor Robin West, however, has analyzed Professor MacKinnon’s theory as drawing much more from classical liberalism, “particularly . . . its father, Thomas Hobbes,” than is generally acknowledged.⁶²³ Hobbes, the sixteenth century philosopher who wrote *Leviathan*, was a social contractarian who is well known for his description of man’s life in the “state of nature” as being “nasty, brutish, and short,” plagued by “continual[] fear[], and danger of violent death.”⁶²⁴ In *Law’s Nobility*, Professor West explained the connection between radical feminism and the Hobbesian justification of the state as the product of a social contract entered into by individuals who cede their power to commit violence in exchange for state protection from others’ violence in the state of nature:

Put in classically Hobbesian terms, MacKinnon, like Hobbes, sees a violent, fearful, and short life in the state of nature—a violence perpetrated by private individuals on private individuals—and consequently, a need, given the human propensity to violence, for the creation of a state. She then, implicitly and ideally, defines the heart of the state’s role by reference to that need: the state (whatever else it does or should do) must police against that private violence. In this, she is in good company, of an emphatically liberal pedigree.⁶²⁵

Moreover, Professor West explains that Professor MacKinnon’s synthesis of Hobbesian, Marxist, and feminist theory,

push the state’s *raison d’être* in directions Hobbes would have found foreign (to put it mildly) . . . [t]he members of the leviathan, for both Hobbes and MacKinnon, must be protected against the violence of others by the state’s monopoly on violence, and individuals accordingly have a right to that protection. For MacKinnon, distinctively, the beneficiaries of this pact must include women, and the private power that individuals must give up, when signing onto the project of the leviathan, must include patriarchal power.⁶²⁶

621. See *supra* Part II.B.

622. CHAMALLAS, *supra* note 595, at 22.

623. Robin West, *Law’s Nobility*, 17 YALE J.L. & FEMINISM 385, 400 (2005).

624. THOMAS HOBBS, LEVIATHAN 65 (Everyman’s Library 1987) (1651).

625. West, *supra* note 623, at 401 (citations omitted).

626. *Id.* at 402.

Professor West's analysis of the common Hobbesian roots shared by dominance feminist and classical liberal theories of equal state protection from private violence harkens back to an earlier analysis of liberal theory that she advanced in *Jurisprudence and Gender*. There, Professor West explains that "liberal legalism" values the freedom and autonomy of each individual to pursue his life and expects both government and others to treat each individual "as free, and as equally free."⁶²⁷ With freedom, however, comes vulnerability and a fear of annihilation: "Every other discrete, separate individual—because he is the 'other'—is a source of danger to me and a threat to my autonomy," up to and including death.⁶²⁸

Yet, this conception of the individual as free and autonomous on the one hand and vulnerable and fearful on the other is not just a neutral concept, applicable to all people. Instead, Professor West identifies it as "masculine" due to its basis in the "separation thesis," or "the claim that the word 'individual' has an uncontested biological meaning, namely that we are each physically individuated from every other."⁶²⁹ She contrasts this separation thesis with the "connection thesis," which more accurately describes women's "material experiences" of "pregnancy[;] . . . heterosexual penetration, which may lead to pregnancy; . . . menstruation, which represents the potential for pregnancy; and . . . breast-feeding."⁶³⁰ As such, the masculinity of liberal legal theory is linked to the biological fact that males do not experience the connections of pregnancy and its biological corollaries.

Although *Jurisprudence and Gender* has been criticized for essentializing women on the basis of biology while ignoring the importance of other characteristics such as race,⁶³¹ Professor West's description of why liberal theory is masculine does not limit itself to biology. Rather, she notes that, "[t]he Hobbesian story of the state of nature . . . is a synthesis of umpteen thousands of personal, subjective, everyday, male experiences . . . presumably, of school yard fights, armed combat, sports, games, work, big brothers, and fathers."⁶³² Thus, the masculine characteristics of liberal theory reflect boys' and men's material social experiences of traditional masculinity—

627. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 5–6 (1988).

628. *Id.* at 7.

629. *Id.* at 2.

630. *Id.* at 2–3.

631. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 602–05 (1990) ("Black women are entirely absent from West's work By suggesting that gender is more deeply embedded in self than race, [West's] theory privileges the experience of white people over all others, and thus serves to reproduce relations of domination in the larger culture.").

632. West, *supra* note 627, at 64.

experiences now separately documented by masculinities scholars and confirmed in the same-sex bullying and sexual harassment cases.⁶³³ The constant competition for power and status among boys and men, and the fear of other boys and men that is inherent in traditional masculinity, could as easily account for, if not be the genesis of, this particular aspect of liberal legal theory, or at least its ongoing relevance as a dominant political and legal theory underpinning the American state.⁶³⁴ Indeed, many of the facts in the same-sex sexual harassment cases and journalistic accounts discussed above—particularly those involving all-boy environments—read like descriptions of small Hobbesian states of nature.⁶³⁵ It is not hard to imagine how men who grew up in such environments might find a legal theory that recognizes the fear of annihilation and seeks to protect against such private violence to be appealing!

We do not have to just imagine the continuing relevance of masculinity in liberal legal theory, however. Indeed, Professor West quotes Professor Bruce Ackerman's more modern statement of Hobbes's concern:

So long as we live, there can be no escape from the struggle for power. *Each of us must control his body and the world around it.* However modest these personal claims, they are forever at risk in a world of scarce resources. . . . No one can afford to remain passive while competitors stake their claims. Nothing will be left to reward such self-restraint. Only death can purchase immunity from hostile claims to the power I seek to exercise.⁶³⁶

Although this description seems mainly to refer to competitions for scarce resources, presumably by adults, and, thus, at first glance seems inapplicable to children, it could still apply to the all-boy environments and relationships described in the previous sections. First, even when competition for basic necessities is unnecessary, masculinities studies indicate that many boys will compete purely for power, status, and hierarchy within the group.⁶³⁷ Second, because not all schoolchildren have access to basic necessities, it cannot be assumed that competition for resources is never a factor. Moreover, as the studies of inner-city gangs reviewed above have noted, when resources like employment are so scarce that they are practically

633. *See supra* Parts II & III.A.

634. *See* West, *supra* note 627, at 5 (“Liberal legalists, in short, describe an inner life enlivened by freedom and autonomy from the separate other, and threatened by the danger of annihilation by him.”).

635. *See supra* Parts II & III.A.

636. West, *supra* note 627, at 8 (quoting BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 3 (1980) (emphasis added)).

637. *See supra* Part II.B.

non-existent, hypermasculine struggles for status may come to substitute for resource competition.⁶³⁸

Professor Ackerman himself sees the relevance of liberal theory to the lives of children in both family and school settings, devoting a chapter of *Social Justice in the Liberal State* to “Liberal Education.”⁶³⁹ The chapter is devoted to answering the dilemma of the liberal educator in “distinguish[ing] the legitimate use of educational authority from an illegitimate attempt to constrict the child’s moral universe”⁶⁴⁰ and ensuring that the educator gives “children . . . a sense of the very different lives that could be theirs—so that, as they approach maturity, they have the cultural materials available to build lives equal to their evolving conceptions of the good.”⁶⁴¹

In this view, a liberal education uses a diminishing level of authority as a child ages and develops, restricting a child’s right to do just as he wishes until he has the maturity to exercise those rights in ways that will be acceptable to society.⁶⁴² Because childhood restrictions are necessary to keep a child from growing into an “aggressive adult” who could face restrictions on his behavior “by the criminal law,”⁶⁴³ Professor Ackerman suggests that one function of a liberal education is to avoid creating adults who would be quite comfortable in the Hobbesian state of nature.⁶⁴⁴ According to the social contractarian perspective, then, some authoritarian control is necessary at first because “the child comes into the world an unreasoning brute not yet capable of comprehending and acting in accordance with the social contract’s provisions.”⁶⁴⁵ Professor West confirms this view as one based in liberalism:

According to liberal theory, human beings respond aggressively to their natural state of relative physical equality. In response to the great dangers posed by their natural aggression, they abide by a sharply anti-naturalist morality of autonomy, rights, and individual spheres of freedom, which is intended to and to some extent does curb their natural aggression. They respect a civil state that enforces those rights against the most egregious breaches.⁶⁴⁶

638. *See supra* Part II.B.

639. BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 139–67 (1980).

640. *Id.* at 139–40.

641. *Id.* at 139.

642. *Id.* at 148.

643. *Id.*

644. *See id.* (concluding that “parental control appears as a less restrictive means of permitting a child-turned-adult to escape the yet more intrusive restrictions imposed by the criminal law”).

645. *Id.* at 164.

646. West, *supra* note 627, at 37.

Under this conception, educators' "authority resides in their ability to establish an environment in which the youth may perfect his capacities for aggression control while increasing his familiarity with the alternative forms of self-definition affirmed in a liberal society."⁶⁴⁷ Thus, as the child ages and "gains increasing familiarity with the range of cultural models open to him in a liberal society," less control must be exercised, and "the choice of [the child's] curriculum should increasingly become his responsibility, rather than that of his educators."⁶⁴⁸

This account acknowledges the possibility that children can be bullies and harassers of other children, while supporting an educational environment of increasing freedom in which children may begin to exercise their autonomy in "defin[ing their] own objectives,"⁶⁴⁹ and their "own moral ideals and patterns of life."⁶⁵⁰ Most fundamentally, because this vision of liberal education accepts multiple notions of the good, of objectives and ends, and of life paths,⁶⁵¹ it must oppose traditional masculinity. As reviewed in Part II, traditional masculinity, by definition, is utterly intolerant of other masculinities, of which there are many in American society. Not only are there many, but liberalism would say there *should* be many. Thus, traditional masculinity itself offends liberalism by *definitionally* eliminating all other masculinity choices, and, along with them, boys' freedom to choose from multiple possible masculinities.

In addition, the hypermasculine enforcement of traditional masculinity in the form of bullying and sexual harassment offends the Hobbesian principle of equal protection from private violence. Although Professor Ackerman's vision of liberal education gives the adult educator guidance in the context of the adult-child relationships involved in education, it does not seem to contemplate how relationships between children could affect a child's education. Yet as the bullying and sexual harassment cases, journalistic accounts, and masculinities literature discussed in previous sections of this Article demonstrate, these peer relationships can significantly diminish children's sense of freedom and autonomy to define their goals and moral principles. As such, classic liberalism is almost certain to view educational environments such as the hypermasculine all-boy environments examined in this Article with severe disapproval.

Given that peer relationships and the adult educator's role in supporting or intervening in peer dynamics are not addressed by liberal theory, it is

647. ACKERMAN, *supra* note 639, at 166.

648. *Id.* at 158.

649. *Id.* at 160.

650. *Id.* at 156.

651. *Id.* at 159–60.

hard to see what liberal theory can *do* about its disapproval. Indeed, to find a potential solution, one must look again to the liberal aspects of Professor MacKinnon's radical feminism. In particular, if one thinks of adult-educators as filling the role of the state, then they should be protecting each child from the violence of the other children. Furthermore, all children should be protected equally, and patriarchal violence—which certainly includes the violent enforcement of traditional masculinity, regardless of whether the victims are girls or boys—must be prohibited as much as any other kind of violence.

Thus, we can see that Title IX incorporates liberal theoretical principles in multiple ways. Its prohibition of sexual harassment realizes fundamental principles drawn not only indirectly through dominance feminism, but also directly from liberal legal theory. Moreover, as Professor West says, “[f]rom the radical feminist point of view, ‘liberal rights-talk’ . . . is just fine, and it would be even better if it protected women against the dangers that characterize their lives, as well as protecting men against the dangers that characterize their lives.”⁶⁵² Further, the liberalism embedded in sexual harassment theory is an addition to the more obvious liberal legalist principles found in the Title IX prohibition on sex-segregated education, a liberal feminist doctrine with a “commitment to individual autonomy and choice and insist[ence] that these freedoms be afforded to women as well as men.”⁶⁵³

At the most basic level, the theoretical analysis provided in this Section confirms what the empirical analyses, journalistic accounts, and cases already reviewed suggested: That persons of all genders *share* an interest in equality and protection from sex discrimination in all of its forms. As Professor Brake points out in the context of sports, the various feminisms found in Title IX—and based on the analysis reviewed here the various liberalisms they incorporate—work together. Thus, Title IX's prohibitions against *both* sex segregation and all-boy bullying and sexual harassment ultimately protect boys, as well as girls, from sex discrimination. For these reasons, the vast majority of children, their parents, and the many bystanders who object to living in a “bully society”⁶⁵⁴ should recognize this as a moment of “interest convergence,” a theory from yet another school of legal theory: critical race theory.

652. West, *supra* note 627, at 41.

653. CHAMALLAS, *supra* note 595, at 19.

654. JESSIE KLEIN, *THE BULLY SOCIETY: SCHOOL SHOOTINGS AND THE CRISIS OF BULLYING IN AMERICA'S SCHOOLS* 3 (2012) (attributing extreme forms of violence in schools to “the ‘everyday’ violence of bullying, and the destructive gender pressures and social demands created by the larger culture and endured by virtually all children in . . . schools”).

Professor Derrick Bell first theorized that the convergence of white and African American interests in desegregation supported the Supreme Court's landmark decision in *Brown v. Board of Education* and many of the school desegregation cases that followed.⁶⁵⁵ While African Americans' interests in desegregation were evident, whites also had interests.⁶⁵⁶ These included the pressures, in light of the Cold War, to convince both "third world peoples" and African American veterans returning from World War II that the United States was as committed to racial equality as the Soviet Union.⁶⁵⁷ To these interests were added a general perception that segregation was a barrier to industrialization of the South,⁶⁵⁸ as well as the federal courts' protection of their own power to interpret the Constitution and have their judgments followed.⁶⁵⁹

In the case of sex segregation, and in light of the dynamics of homosocial, all-male environments and the bullying, sexual harassment, and gender-based violence that often accompanies them, the interest convergence is clear, as is the cost-benefit analysis of allowing versus prohibiting educational sex segregation. First, most boys have a clear interest in avoiding all-boys environments. Research that neither boys nor their teachers prefer sex-segregated education for boys⁶⁶⁰ suggests that boys may recognize this already. On the other hand, while girls may benefit from sex-segregated education (although the research showing this is equivocal at best),⁶⁶¹ they have a clear interest in avoiding conditions that are supportive of sexual harassment and gender-based violence. Survivors' family members and others close to survivors also have an interest in preventing harassment and gender-based violence. Even more distant bystanders to violence have interests in freedom from the cultures of silence and protection as well as the chance to follow their definition of the good, in liberal theoretical terms.

655. Bell, *supra* note 30, at 523. Note that Bell was critical of the results of this interest convergence for the education of black youth and questioned whether desegregation was ultimately in their interests.

656. *See id.* at 524–25 (identifying international, domestic, and economic benefits that were expected to accrue from achieving equality in education).

657. *Id.*

658. *Id.* at 525.

659. *Id.* at 529.

660. Patricia B. Campbell & Ellen Wahl, *What's Sex Got to Do with It? Simplistic Questions, Complex Answers*, in *SEPARATED BY SEX: A CRITICAL LOOK AT SINGLE-SEX EDUCATION FOR GIRLS* 63, 66–67 (Susan Morse ed., 1998); Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 *GEO. WASH. L. REV.* 451, 499 (1999); *see also infra* Part IV.

661. *See* Cantalupo, *supra* note 31, at 759–71 (reviewing the research surrounding sex-segregated education and concluding that while "evidence of the benefits of sex-segregated education is inconclusive . . . evidence of its harms is getting increasing attention and is worthy of serious concern").

Finally, the regulators have an interest in avoiding the increased workloads of enforcing the sexual harassment prohibition to check the abuses that likely result from the allowance of all-boys education.

IV. RESCINDING THE 2006 REGULATIONS AND IMPROVING TITLE IX'S PROTECTIONS FOR BOYS (AND GIRLS)

Given the ample evidence that suspending Title IX's sex segregation prohibition has worked at theoretical and practical cross-purposes with achieving Title IX's feminist and liberal goals, the first and most obvious change required is rescission of the 2006 regulations that originally suspended the sex segregation prohibition. In addition, courts and ED should strengthen Title IX enforcement in the area that has been most effective in protecting boys from sex discrimination: the sexual harassment prohibition. Finally, ED should develop curricular resources for schools that can help confront the traditionally masculine hidden curriculum that amplifies the likelihood of sexual harassment of both boys and girls in schools. This Part will address each of these suggestions in turn.

The 2006 regulations create an exception to the operation of Title IX by allowing a school to "provide nonvocational single-sex classes or extracurricular activities,"⁶⁶² as long as they have an "important objective"⁶⁶³ and the single-sex method is "substantially related to achieving that objective."⁶⁶⁴ These requirements derive from the intermediate scrutiny test that is used to evaluate the constitutionality of government action based on sex classifications.⁶⁶⁵ The regulations further require schools to implement such programs in an "evenhanded manner,"⁶⁶⁶ to ensure that students' participation is "completely voluntary,"⁶⁶⁷ and to provide "a substantially equal coeducational class or extracurricular activity in the same subject or activity" for the "excluded sex."⁶⁶⁸ Although schools are required to review such programs "at least every two years,"⁶⁶⁹ there is no requirement that schools need to report their reviews to ED or any other regulatory body, nor is there any indication that schools face negative consequences for failing to review the programs or comply with the regulations.

662. 34 C.F.R. § 106.34(b)(1) (2013).

663. *Id.* § 106.34(b)(1)(i).

664. *Id.* §§ 106.34(b)(1)(i)(A)–(B).

665. *See Craig v. Boren*, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge [under the Equal Protection Clause] . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

666. 34 C.F.R. § 106.34(b)(1)(ii) (2013).

667. *Id.* § 106.34(b)(1)(iii).

668. *Id.* § 106.34(b)(1)(iv).

669. *Id.* § 106.34(b)(4)(ii).

Given this general lack of oversight, it is not entirely clear how many schools have started sex-segregated programs, how those programs are designed, or if they meet the legal requirements set forth in the regulations. All indications, however, seem to suggest that schools have not only jumped to experiment with sex-segregated education, but the majority have also adopted the particular kind of sex-segregated education promoted by Leonard Sax and Michael Gurian, whose traditionally masculine bent of ideas was reviewed in Part II. In 2008, Elizabeth Weil of the *New York Times Magazine* wrote an extensive story on the rise in sex-segregated K-12 public education, in which she covered not only the exponential increase in such programs since 2002,⁶⁷⁰ the year that ED announced its intent to pass the 2006 regulations,⁶⁷¹ but also the general character of many such programs.⁶⁷² Weil's statistics on the number of programs in existence came primarily from Sax himself and many of the programs the article discussed in detail employed Sax's methods.⁶⁷³

The American Civil Liberties Union ("ACLU") has challenged a couple of programs that clearly rely on ideas drawn from the Sax/Gurian approaches. First, in *Doe ex rel. Doe v. Vermilion Parish School Board*,⁶⁷⁴ the school board approved an experimental single-sex middle school program, after the school's principal presented solely positive studies of sex-segregated education when he proposed the experiment to the board.⁶⁷⁵ The experiment, and its later expansion, utilized different teaching techniques in the all-girls, all-boys, and coed classes, including "assigning different books to boys and girls based on their perceived interests . . . [and] teaching with 'action techniques' with boys but 'a more quiet environment' with girls."⁶⁷⁶ At the end of the experiment, the board approved an expansion of the program based on the principal's presentation of falsified evidence that student grades went up during the time they were in single-sex classes, when, in fact, they went down.⁶⁷⁷ Based on these fraudulent "successes," the school

670. Weil, *supra* note 222 ("In 1995, there were two single-sex public schools operating in this country. Currently, there are 49, and 65 percent of those have opened in the last three years. Nobody is keeping exact count of the number of schools offering single-sex classrooms, but Sax estimates that in the fall of 2002, only about a dozen public schools in the United States offered any kind of single-sex educational options By this past fall, Sax says, that number had soared to more than 360 . . .").

671. Single-Sex Classes and Schools: Guidelines on Title IX Requirements, 67 Fed. Reg. 31,102, 31,103 (May 8, 2002).

672. Weil, *supra* note 222.

673. *Id.*

674. 421 F. App'x 366 (5th Cir. 2011).

675. *Id.* at 368.

676. *Id.* at 371.

677. *Id.* at 368.

later mandatorily assigned students to single-sex or coeducational classes.⁶⁷⁸ After the Fifth Circuit remanded the case for a determination regarding a mootness question,⁶⁷⁹ the school district decided to cease all sex-segregated classes.⁶⁸⁰

In a second case, *A.N.A. ex rel. S.F.A. v. Breckinridge County Board of Education*, the Breckenridge County Middle School (“BCMS”) also began sex-segregated classes as a “pilot program” for “math and science classes” and quickly expanded the program to virtually all classes.⁶⁸¹ Similar to *Vermilion Parish*, the BCMS’s approach was to adapt its teaching techniques based on what it described as each sex’s “specific needs,” as determined by “research [that] supports theories that boys and girls learn differently and need to be separated to avoid ‘hormonal’ influences.”⁶⁸² In connection with this emphasis on brain research, the school sent teachers to the Gurian Institute, founded by one of the sex segregation proponents discussed above.⁶⁸³ The court ultimately found that the student plaintiffs did not have standing to pursue the case.⁶⁸⁴

Most recently, the ACLU has filed two complaints with OCR alleging that the Birmingham (AL) City Schools and Middleton County (ID) School District are violating Title IX even under the 2006 regulations. Among other evidence that both school systems have a traditionally masculine hidden curriculum, in Birmingham, Huffman Middle School has used one of Michael Gurian’s books in its teacher training,⁶⁸⁵ and at Middleton Heights Elementary School (“Middleton Heights”), the school confirmed use of Gurian’s, Sax’s, and similar books as teacher resources.⁶⁸⁶ The ACLU also found evidence that the curriculum at Middleton Heights is based on the be-

678. *Id.*

679. *Id.* at 376.

680. *Doe v. Vermilion Parish School Board*, ACLU (Oct. 18, 2011), <http://www.aclu.org/womens-rights/doe-v-vermilion-parish-school-board>.

681. Memorandum of Law in Support of A.N.A. Plaintiffs’ Motion for Summary Judgment at 3, *A.N.A. ex rel. S.F.A. v. Breckinridge Cnty. Bd. of Educ.*, 833 F. Supp. 2d 673 (W.D. Ky. 2011) (No. 3:08-CV-4-S), [hereinafter *A.N.A. Brief*], available at http://www.aclu.org/files/assets/Memorandum_of_Law_2.pdf.

682. *Id.* at 4. Note that BCMS began denying that it used such sex-specific teaching methods at some point after litigation commenced. *Id.* at 25 n.32.

683. *Id.* at 4 & n.4.

684. *A.N.A. ex rel. S.F.A. v. Breckinridge Cnty. Bd. of Educ.*, 833 F. Supp. 2d 673, 677–79 (W.D. Ky. 2011).

685. ACLU Admin. Complaint to Birmingham City Sch. ¶ 17, at 4, available at http://www.aclu.org/files/assets/ocr_complaint_-_birmingham_city_schools_12_06_2012_0.pdf [hereinafter *Birmingham Complaint*].

686. ACLU Admin. Complaint to Middleton Cnty. Sch. Dist. No.134 ¶ 26, at 6–7, available at http://www.aclu.org/files/assets/ocr_complaint_-_middleton_heights_id_12_06_2012.pdf [hereinafter *Middleton Complaint*].

belief that there are “difference[s] in male/female brains,” as well as “gender differences in learning’ between boys and girls.”⁶⁸⁷ Boys’ classes were taught using competitive teaching methods and incorporated exercise and movement, while girls were taught in a more “cooperative” and “quiet[] environment.”⁶⁸⁸ Thus, the ACLU litigation and OCR complaints corroborate the New York Times Magazine’s conclusion that many, if not most, of these schools have adopted Sax- and Gurian-like hypermasculine curricula.

In addition, there is also evidence indicating that the hypermasculinity-intensifying effects associated with all-male environments are present in these programs. For instance, in both of the ACLU court challenges, the sex-segregated classes were more popular among girls than boys, leading to a skewed sex ratio in the coed classes of seventy-three percent boys and twenty-seven percent girls at one school⁶⁸⁹ and allegations at another school that coed and all-girls’ classes were nearly double the size of the all-boys classes.⁶⁹⁰ At the second school, at least one of the all-boys classes allegedly had “particularly severe behavioral issues.”⁶⁹¹ This information suggests that many boys may not be thriving in these sex-segregated environments, and that their preferences for coed classes belie the claims of “boys crisis” sex-segregated education proponents like Sax and Gurian. After all, boys’ actual lack of interest in such classes calls into question Sax’s and Gurian’s claims that sex segregation allows schools to teach boys in a manner most suited to their brains and preferences. While it is admittedly speculative to attribute the lack of interest in all-boys classes to the traditional masculinity-intensifying dynamics of all-male environments, when combined with evidence of greater behavioral problems in the all-boys classes and the research of both masculinity and sex-segregated education observers and scholars, such speculation is at worse an educated guess.

Thus, although some single-sex education proponents justify the 2006 regulations as helping to combat the discrimination against boys that is supposedly created by the feminized atmosphere of K-12 public coeducation, the evidence suggests the opposite. In fact, the evidence indicates that suspension of Title IX’s prohibition of sex-segregated education is more likely

687. *Id.* ¶ 21, at 5 (citations omitted).

688. *Id.* at ¶¶ 32–33, at 8–9.

689. *Doe ex rel. Doe v. Vermilion Parish Sch. Bd.*, 421 F. App’x 366, 370 (5th Cir. 2011) (“[T]he population of the school was closer to 55 percent boys and 45 percent girls.”).

690. *A.N.A. Brief, supra* note 681, at 8 n.7. Summary judgment was granted for the school district in this case, so a jury never determined whether the ACLU’s assertions were accurate. *A.N.A. ex rel. S.F.A. v. Breckinridge Cnty. Bd. of Educ.*, 833 F. Supp. 2d 673, 682–83 (W.D. Ky. 2011).

691. *See A.N.A. Brief, supra* note 681, at 38–39 (citing the deposition of one of the teachers at the school).

to exacerbate the conditions that create sex discrimination against boys than it is to ameliorate them.

Therefore, the 2006 ED regulations should be rescinded. Although the No Child Left Behind Act (“NCLB”) “authorized” sex-segregated educational programs, the statute merely includes “[p]rograms to provide same-gender schools and classrooms” on a list of twenty-seven types of programs that “may” be included in the “innovative assistance programs” for which schools may allocate federal funds.⁶⁹² Therefore, the 2006 ED regulations are certainly not required by the NCLB. In addition, this provision specifies that these programs must be “consistent with applicable law,”⁶⁹³ a qualification that is not found in any other provision in the list of twenty-seven possible program types. Although, as noted above, the regulations incorporate the constitutional test and require schools to provide both sex-segregated and coeducational options⁶⁹⁴ in a clear attempt to insure that any programs encouraged by the regulations pass muster under the Equal Protection Clause and Title IX, the utter lack of oversight essentially puts schools at risk of violating both. Perhaps ED is the only agency, of the more than twenty-five agencies that have issued regulations enforcing Title IX, to adopt an interpretation supporting sex-segregated education because all of the others have recognized the likelihood that such programs will violate Title IX or the Constitution.⁶⁹⁵ In light of the evidence provided by the ACLU challenges, the high likelihood that such programs will never pass constitutional muster,⁶⁹⁶ and the evidence presented here and elsewhere that these programs not only fail to advance gender equity, but they also actually could increase sex discrimination against both girls and boys, ED should finally end this experiment.

Instead, ED and the courts should use their limited resources to focus on strengthening Title IX’s operation and enforcement in the area where it is showing some success at addressing discrimination against boys: sexual harassment. First, Congress or the Supreme Court should replace the “actual knowledge” test required under the Supreme Court’s current standard with a constructive knowledge standard, or, short of that, lower courts

692. 20 U.S.C. § 7215(a) (2006).

693. *Id.* § 7215(a)(23).

694. 34 C.F.R. § 106.34(b)(1) (2013).

695. *Cf. A.N.A. Brief, supra* note 681, at 41–42 (arguing that the court should not defer to the 2006 regulations’ interpretation of Title IX, if it finds there are ambiguities with regard to Congress’s intent in promulgating certain provisions of Title IX, because it conflicts with the interpretations of every other agency issuing regulations).

696. *See Cantalupo, supra* note 31, at 771–87 (applying the intermediate scrutiny standard to sex-segregated programs permitted by the 2006 regulations and concluding that such programs are unlikely to survive the constitutional test).

should resolve several ambiguities that have developed under the current “actual knowledge” approach. Second, ED should create incentives and provide resources to schools to intervene in the traditionally masculine hidden curriculums. Congress should aid ED in this endeavor by appropriating more funds to support the development of such resources.

As noted above, the “actual knowledge” test has been widely criticized, since its adoption, on the basis of three problems with how the test is applied by the courts. First, the “actual knowledge” prong requires that the *school* have actual knowledge of the harassment, raising the question of who represents the school. A survey of peer sexual harassment cases, especially those involving physical violence, shows significant variation on this question. Although teachers generally count as the school in peer sexual harassment cases,⁶⁹⁷ this is not guaranteed,⁶⁹⁸ and others who would seem to be in similar positions of authority as teachers, such as bus drivers,⁶⁹⁹ coaches,⁷⁰⁰ and other school professionals or “paraprofessionals,”⁷⁰¹ have

697. See, e.g., *Jones v. Ind. Area Sch. Dist.*, 397 F. Supp. 2d 628, 644 (W.D. Pa. 2005) (concluding that the School District had actual knowledge where a student reported harassment “to teachers, guidance counselors, and vice principals”); *Soriano ex rel. Garcia v. Bd. of Educ.*, No. 01 CV 4961(JG), 2004 U.S. Dist. LEXIS 2397610, at *15 (E.D.N.Y. Oct. 27, 2004) (finding that “[a] rational juror could conclude that [a victim’s] statement to [a] teacher was sufficient to place defendants on actual notice of [another student’s] harassing behavior towards [the victim]”); *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1099 (D. Minn. 2000) (concluding that the duty “impose[d] upon teachers . . . to convey reports of sexual harassment to the school principal[]” was sufficient to “impart knowledge of the harassment to higher School District officials with even greater authority to act”); *Morlock v. W. Cent. Educ. Dist.*, 46 F. Supp. 2d 892, 908 (D. Minn. 1999) (stating that the school district could not refute “actual notice [of] student misconduct,” where complaints were made to teachers, because the teachers “had immediate responsibility over student discipline in their classrooms”).

698. See *M. v. Stamford Bd. of Educ.*, No. 3:05-CV-0177 (WWE), 2008 U.S. Dist. LEXIS 51933, at *25–26 (D. Conn. July 7, 2008) (holding that actual knowledge did not exist until the assistant principal was informed, even though other school officials were previously aware of the incident), *vacated in part* by 2008 U.S. Dist. LEXIS 67988 (D. Conn. Sept. 9, 2008); *Snethen v. Bd. of Pub. Educ. for the City of Savannah*, No. 406CV259, 2008 U.S. Dist. LEXIS 22788, at *21–31, *35 (S.D. Ga. Mar. 24, 2008) (granting summary judgment upon finding that the school did not act with deliberate indifference to an attempted rape of one student by another and concluding that a teacher did not necessarily qualify as an “appropriate person” for actual knowledge purposes although he had previously observed “horseplay” with sexual connotations between the assailant and another girl); *Peer ex rel. Doe v. Porterfield*, No. 1:05-cv-769, 2007 U.S. Dist. LEXIS 1380, at *28–29 (W.D. Mich. Jan. 8, 2007) (explaining that courts have found “appropriate persons” for purposes of the “actual knowledge” test to be “official[s] . . . capable of terminating or suspending . . . individual[s],” a standard which often encompasses principals but not necessarily teachers (quoting *Nelson v. Lancaster Indep. Sch. Dist. No. 356*, No. 00-2079 (JRT/RLE), 2002 U.S. Dist. LEXIS 3093, at *15 (D. Minn. Feb. 15, 2002))).

699. See, e.g., *Stahling v. Metro. Gov’t*, No. 3:07-0797, 2008 U.S. Dist. LEXIS 91519, at *30–31 (M.D. Tenn. Sept. 12, 2008) (“A school bus driver is not an ‘appropriate person’ with authority for purposes of Title IX liability.”).

700. See, e.g., *Halvorson v. Indep. Sch. Dist. No. I-007*, No. CIV-07-1363-M, 2008 U.S. Dist. LEXIS 96445, at *6 (W.D. Okla. Nov. 26, 2008) (explaining that the District did not have “actual

been judged to be “inappropriate persons.” This requires sexual harassment victims to know and parse through school hierarchies in specific and diverse contexts based on the identities of the perpetrators and the relationships between the person with knowledge and the harasser.

Second, variation has emerged as to what kind of knowledge constitutes actual knowledge. If a school is aware of a student’s harassment of students other than the victim who is asserting a claim in a given case, must the school have actual knowledge of the harassment experienced by that particular victim? In a review of the peer harassment cases where this question was posed, the decisions are fairly evenly split between courts that find that the school must have actual knowledge of the harassment experienced by the particular survivor bringing the case, those that state that the school’s knowledge of the peer harasser’s previous harassment of other victims is sufficient to meet the “actual knowledge” standard, and ambiguous decisions.⁷⁰²

notice” because the coaches “did not have authority to institute measures on the District’s behalf”). *But see* *Roe ex rel. Callahan v. Gustine Unified Sch. Dist.*, 678 F. Supp. 2d 1008, 1033–34 (E.D. Cal. 2009) (“Case law does not expressly limit the employee who may trigger a school district’s liability under Title IX; it is an ‘open question.’ . . . [D]eciding who exercises substantial control for the purposes of Title IX liability is necessarily a fact-based inquiry. . . . On the present record and without evidence from the District, it cannot be established as a matter of law that [the coach] was not an ‘appropriate person’ for purposes of Title IX.”).

701. *See, e.g.*, *Doe v. N. Allegheny Sch. Dist.*, No. 2:08cv1383, 2011 U.S. Dist. LEXIS 93551, at *26–27 (W.D. Pa. Aug. 22, 2011) (indicating that a student service coordinator and social work intern were not “appropriate persons” for actual knowledge purposes); *Noble v. Branch Intermediate Sch. Dist.*, No. 4:01cv 58, 2002 U.S. Dist. LEXIS 19600, at *47–48 (W.D. Mich. Oct. 9, 2002) (concluding that the “extremely limited disciplinary authority” vested in paraprofessionals disqualified them from consideration as “‘appropriate persons’ for purposes of Title IX”).

702. Of eighteen cases examined for a previous article where this question was dealt with directly or indirectly, six resulted in the court not requiring actual knowledge of harassment involving a specific victim. *See Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 477 F.3d 1282, 1294 (11th Cir. 2007) (finding that the University of Georgia and its Athletic Association had “actual knowledge” for purposes of Title IX where the president of the university and the athletic director were aware of a student’s history of sexual misconduct at the time he was recruited); *Roe ex rel. Callahan*, 678 F. Supp. 2d at 1030 (“The case law reveals no requirement that the appropriate district officials observe prior acts of a sexual nature against Plaintiff himself to establish ‘actual knowledge’ under Title IX[.]”); *Lopez ex rel. Lopez v. Metro. Gov’t*, 646 F. Supp. 2d 891, 915–16 (M.D. Tenn. 2009) (stating that Title IX liability is not limited to knowledge of harassment of a particular individual, but such knowledge may stem from the general conduct of a particular harasser); *Staebling*, 2008 U.S. Dist. LEXIS 91519, at *29 (adopting the position that “actual knowledge” does not require awareness that a particular victim was harassed); *J.K. v. Ariz. Bd. of Regents*, No. CV 06-916-PHX-MHM, 2008 U.S. Dist. LEXIS 83855, at *45–46 (D. Ariz. Sept. 29, 2008) (“The *Davis* court . . . contemplated that Title IX claims could be based on the recipient’s knowledge of, and deliberate indifference to, a *particular harasser’s* conduct in general.”); *Michelle M. v. Dunsmuir Joint Union Sch. Dist.*, No. 2:04-cv-2411-MCE-PAN, 2006 U.S. Dist. LEXIS 77328, at *16, *20 (E.D. Cal. Oct. 12, 2006) (illustrating that a school’s awareness of harassment of one student by another student, in an earlier case, can contribute to a finding of “actual knowledge” where the same student harasses a third student in a later case).

Eight cases resulted in the court finding that the actual knowledge prong had not been satisfied because the school did not have knowledge prior to the plaintiff's assault of harassment directed at the plaintiff. See *Pahssen ex rel. Doe v. Merrill Cmty. Sch. Dist.*, 668 F.3d 356, 363 (6th Cir. 2012) (concluding that the plaintiff's Title IX claim failed in part because she relied on "incidents involving third-party victims to show severe and pervasive harassment"); *N. Allegheny Sch. Dist.*, 2011 U.S. Dist. LEXIS 93551, at *27 ("[W]ithout evidence that an appropriate person in the School District had actual knowledge that [the plaintiff] was the victim of sexual harassment, [the plaintiff's] Title IX claim against the District fails as a matter of law."); *Ross v. Corp. of Mercer Univ.*, 506 F. Supp. 2d 1325, 1348 (M.D. Ga. 2007) ("While the precise boundaries of what kind of 'actual knowledge' a school must have to subject itself to Title IX liability remain undefined, it is generally accepted that the knowledge must encompass either actual notice of the precise instance of abuse that gave rise to the case at hand or actual knowledge of at least a significant risk of sexual abuse."); *Porterfield*, 2007 U.S. Dist. LEXIS 1380, at *29–30 (finding that although the principal had access to the harasser's academic and disciplinary record, the school nonetheless did not have "actual knowledge" because the student's record would not have "place[d] any school official on notice that [the harasser] posed a threat of sexual assault to female students"); *Soriano ex rel. Garcia*, 2004 U.S. Dist. LEXIS 21529, at *12–14 (holding that "[defendants] cannot be held liable for any harassment that occurred prior to th[e] date [that the victim reported the harassment]"); *Fortune ex rel. Fortune v. City of Detroit Pub. Sch.*, No. 248306, 2004 Mich. App. LEXIS 2660, at *11–12 (Mich. Ct. App. Oct. 12, 2004) (concluding that plaintiff's Title IX claim failed because her daughter "never complained of sexual harassment before the [alleged rape]" and the school did not act unreasonably in circumstances which plaintiff alleges demonstrate the school had knowledge of the potential for sexual harassment); *Noble*, 2002 U.S. Dist. LEXIS 19600, at *46–50 (explaining that Title IX liability requirements are not satisfied where paraprofessionals have knowledge of incidents of sexual harassment); *K.F. v. River Bend Cmty. Unit Sch. Dist. No. 2*, No. 01 C 50005, 2002 U.S. Dist. LEXIS 12468, at *5–6 (N.D. Ill. July 8, 2002) (finding that there was no evidence that the school district had knowledge of the victim's abuse).

Another twelve cases were ambiguous on this point or were decided on factual, as opposed to legal, considerations. See *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1177 (10th Cir. 2007) (concluding that "the notice standards established for sexual-harassment claims in *Gebser* and *Davis* necessarily apply in this circumstance"); *Winzer ex rel. Doe v. Sch. Dist. for City of Pontiac*, 105 F. App'x 679, 681 (6th Cir. 2004) (stating that "the record . . . w[ould] not support a finding of liability" because "[Plaintiff] presented no evidence that the defendants knew about even one incident of student-on-student harassment before the [incident at issue]"); *Ostrander v. Duggan*, 341 F.3d 745, 750–51 (8th Cir. 2003) (concluding that the court need not address plaintiff's Title IX claims because neither the university, nor the fraternity, controlled the property in which she was assaulted); *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238, 1247 (10th Cir. 1999) (finding that the principal's knowledge could be "charged to [the] [s]chool [d]istrict"); *Schaefer ex rel. AS v. Las Cruces Pub. Sch. Dist.*, 716 F. Supp. 2d 1052, 1080–81 (D.N.M. 2010) ("Because the alleged sexual assault in this case had not yet occurred, no official could have had actual knowledge of it; only when sexual harassment is ongoing and the school officials learn of it can the officials be said to have actual knowledge of the harassment."); *Morgan v. Bend-La Pine Sch. Dist.*, No. CV-07-173-ST, 2009 U.S. Dist. LEXIS 9443, at *84 (D. Or. Feb. 6, 2009) ("Absent evidence that RiverBend's teachers knew that [the victim] faced undue pressure to participate [in sexual conduct], the record lacks a basis on which to conclude that the District had actual knowledge of harassment."); *Renguette ex rel. J.R. v. Bd. of Sch. Trs. ex rel. Brownsburg Cmty. Sch. Corp.*, 540 F. Supp. 2d 1036, 1043 (S.D. Ind. 2008) (concluding that Plaintiff's assertions "wholly fail to create disputes of material fact sufficient to foreclose summary judgment, and misstate the requirement that a defendant have *actual knowledge* of the peer-to-peer harassment"); *Richard P. ex rel. R.P. v. Sch. Dist.*, No. 03-390 Erie, 2006 U.S. Dist. LEXIS 75068, at *15–16 (W.D. Pa. Sept. 30, 2006) (finding that there was a reasonable basis to support the jury's verdict); *Doe v. Ohio State Univ. Bd. of Regents*, No. 2:04-CV-0307, 2006 U.S. Dist. LEXIS 70444, at

Finally, the “actual knowledge” standard, as Justice Stevens noted in his dissent in *Gebser*, encourages schools to avoid knowledge rather than set up procedures through which victims can easily report harassment.⁷⁰³ Over a decade of experience with the “actual knowledge” standard has not resulted in a rush to develop policies, procedures, and training on sexual harassment among schools as there has been among employers in response to Title VII case law, which uses a constructive knowledge standard. In light of these problems, Congress or the Supreme Court should adopt a constructive knowledge standard, where the schools “knew, or in the exercise of reasonable care should have known” of harassment,⁷⁰⁴ to create incentives for schools to set up mechanisms likely to flush out and address harassment, since there is a substantial risk that a court will decide that the school “should have known” about the harassment anyway.

If neither Congress nor the Supreme Court takes such action, the lower courts can still clear up the two points of confusion mentioned above by adopting similar standards with regard to who constitutes the school and what type of knowledge qualifies as actual knowledge. The standard likely to make Title IX most effective with regard to the first question is to broaden the definition of who represents the school to include all employees, regardless of their position in the hierarchy. On the second issue, the most effective standard would be to count knowledge of any previous harassment and violence on the part of a student as “actual knowledge.” In addition to effectiveness, such a standard would avoid the victim-blaming implicit in a standard that states that the identity of the victim of harassing behavior is relevant to whether the school is obligated to respond to the harassment, focusing the school and court on the victim’s, and not the perpetrator’s, behavior and suggesting that some victims invite the harassment, whereas other victims are “blameless.” Indeed, if a perpetrator is known to have harassed or assaulted multiple victims, this should suggest that the victim’s

*31–34 (S.D. Ohio Sept. 28, 2006) (finding that “[t]he facts of this case differ from those in *Davis*, in which the actual notice standard was satisfied by repeated reports of the harassing conduct to the teacher and principal”); *Doe v. Town of Bourne*, No. 02-11363-DPW, 2004 U.S. Dist. LEXIS 10021, at *43 (D. Mass. May 28, 2004) (finding that Plaintiff “adduced insufficient evidence that the school’s response to her situation reflected the level of deliberate indifference required”); *Crandell v. N.Y. Coll. of Osteopathic Med.*, 87 F. Supp. 2d 304, 321 (S.D.N.Y. 2000) (“In order to be consistent with the goals of Title IX as articulated by *Gebser*, the actual knowledge requirement demands at minimum that the institution have had sufficient notice that it reasonably could have acted to remedy the discrimination that forms the basis of plaintiff’s claim.”); *Vaird v. Sch. Dist. of Phila.*, No. 99-2727, 2000 U.S. Dist. LEXIS 6492, at *11–12 (E.D. Pa. May 12, 2000) (concluding that “no reasonable jury could conclude that Defendant had actual knowledge of sexual harassment prior to the [date of the] incident”).

703. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 300 (1998) (Stevens, J., dissenting).

704. REVISED GUIDANCE, *supra* note 534, at 13.

identity and behavior are *not* relevant, because the perpetrator himself does not find the identity of the victim relevant.

Beyond what Congress and the courts can do, ED can shift its administrative enforcement of Title IX in another direction, which does not include rescinding the 2006 regulations. Its recent DCLs and compliance reviews are a clear indication that reducing sexual harassment and violence directed at both boys and girls is a priority of the current ED administration, a fact confirmed by Russlynn Ali, the head of OCR during the first Obama administration.⁷⁰⁵ Moreover, an explosion of activism,⁷⁰⁶ mainly by survivors of sexual violence at colleges and universities, as well as the announcement of a White House Task Force to Protect Students from Sexual Assault,⁷⁰⁷ virtually guarantees that this reduction will remain a goal. Thus, instead of allowing its encouragement of sex-segregated educational programs to work at cross-purposes with its efforts to reduce bullying, sexual harassment, and sexual violence in schools, ED would be well advised to develop resources and create incentives for schools to intervene in the traditionally masculine hidden curriculum that already exists in most coeducation.

There are, in fact, many potential interventions that have been successfully developed and used over the years by those who have devoted their careers to increasing gender equity in education, like the Drs. Sadker and their colleague Dr. Zittleman. Although the focus of this older work has been mainly on girls, because of the dependence of traditional masculinity on misogyny, sexism, and homophobia, focusing on gender equity can transform boys' educational experiences, too. An example from Peggy Orenstein's journalistic account, *Schoolgirls*, shows how this can occur. Orenstein profiles a teacher named Ms. Logan, who requires students to do two monologues, one female and one male, as African American history-makers during their African American history unit. Ms. Logan enthuses to Orenstein:

705. Kristin Jones, *Lax Enforcement of Title IX in Campus Sexual Assault Cases: Feeble Watchdog Leaves Students at Risk, Critics Say*, CTR. FOR PUB. INTEGRITY (Feb. 25, 2010, 12:00 PM), <http://www.publicintegrity.org/2010/02/25/4374/lax-enforcement-title-ix-campus-sexual-assault-cases-0>.

706. See, e.g., KNOW YOUR IX: EMPOWERING STUDENTS TO STOP SEXUAL VIOLENCE, <http://knowyourix.org/>; Emma Pearse, *Rape on Campus: Tougher Policies in New School Year*, MSN NEWS (Aug. 22, 2013), <http://news.msn.com/us/rape-on-campus-tougher-policies-in-new-school-year?stay=1>; Sylvie Reydam, *Lobbying for VAWA*, SURVJUSTICE (Aug. 8, 2012, 12:36 PM), <http://www.survjustice.org/in-the-news/personsnamesnewwebsitewinswobbyaward>.

707. Press Release, White House Office of the Press Sec'y, Memorandum—Establishing a White House Task Force to Protect Students from Sexual Assault (Jan. 22, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/01/22/memorandum-establishing-white-house-task-force-protect-students-sexual-a>.

This is learning from the inside out. . . . They do the research, they connect into that other life, and they really *become* the person. People always ask me how you can get boys to stop being so totally male-oriented. I say, 'You just do it, and they'll pick it up as you go.' . . . It's a thrill for me to hear the way boys stand up for women's rights in their monologues.⁷⁰⁸

One of Ms. Logan's students, an eleven-year-old white boy, gets exasperated with Orenstein when she interrupts his work on the Rosa Parks square for the class's "Women We Admire" quilt: "'I don't see what the big deal is about women,' he says, . . . 'I mean, as long as they're interesting, what's the difference if they're women? Women are people, too, you know.'"⁷⁰⁹

Schools, however, no longer need to depend strictly on these more girl-focused gender equity measures, as effective as Ms. Logan's example indicates they can be for boys as well as girls. Masculinities scholarship has long been paralleled by and connected to a men's activist movement that has focused most often on combating gender-based violence. The oldest group in the United States is the thirty-eight-year-old National Organization of Men Against Sexism, a national membership network that collects and distributes resources and runs an annual conference.⁷¹⁰

The White Ribbon Campaign is younger, having started in Canada in 1991 as a response to the Ecole Polytechnique Massacre, during which Marc Lepine mass murdered fourteen women engineering students for being "feminists."⁷¹¹ The White Ribbon Campaign also follows a network model, but with more staff, and has created an "Education and Action Kit" about gender-based violence that is apparently used in some three thousand schools across North America.⁷¹² The kit includes in class exercises, social norming exercises, facilitation notes, background information for teachers, activities, and school-wide projects, all of which are designed to "raise awareness about violence against women, and to promote ideals about gender equality and healthy relationships."⁷¹³ The curriculum is a "specially

708. ORENSTEIN, *supra* note 28, at 247–57.

709. *Id.* at 274.

710. *A Brief History of NOMAS*, NOMAS, <http://www.nomas.org/history> (last visited Feb. 28, 2014).

711. Adam Jones, *Case Study: The Montréal Massacre*, GENDERCIDE WATCH, http://www.gendercide.org/case_montreal.html (last visited Feb. 28, 2014).

712. *What We Do*, WHITE RIBBON, <http://www.whiteribbon.ca/what-we-do/> (last visited Feb. 28, 2014); Press Release NCDVS, White Ribbon Campaign Releases New Education and Action Kit: Our Future Has No Violence Against Women (Oct. 12, 2005), <http://www.ncdsv.org/images/WhiteRibbonCampaignReleasesNewEducationActionKit.pdf>.

713. Press Release NCDVS, *supra* note 712.

designed approach that speaks to boys and young men on their role [in ending] violence against women,” but can be used with both boys and girls, and is available for purchase on the group’s website.⁷¹⁴

Finally, Men Can Stop Rape, founded in 1997, “provides agencies, schools, and organizations with direct services for youth, public service messaging, and leadership training,” including the “Men of Strength Club,” a “school-based 22-week curriculum [that] teaches male teens ages 11-18 healthy dating relationship skills and encourages them to show their ‘strength’ in positive ways among their peers.”⁷¹⁵ The organization has also created a series of public awareness media, including the “‘My Strength is Not for Hurting’ posters [directed at] high school and college age men,” the “‘Young Men of Strength’ posters . . . focus[ing] on empowering middle school aged boys to take action against gender-based harassment, teasing, bullying, and cyber-bullying,” and the “Where Do You Stand?” campaign, which “gives young men tools for being effective bystanders in situations involving sexual assault, relationship violence, stalking, and harassment.”⁷¹⁶ Thus, there are multiple organizations providing resources and curricula specifically directed at intervening in traditional masculinity, with a particular focus on the places where traditional masculinity is connected to gender-based violence, such as training boys in effective bystander intervention.

The focus of these curricula on teaching boys how to play a part in ending gender-based violence, in particular, gives schools a new and very effective tool for preventing bullying, sexual harassment, sexual violence, hazing, and dating/relationship violence directed at both girls and boys in school. This could help lessen a school’s liability under Title IX considerably, in two ways. First, schools educating their students on the numerous ways they can prevent such violence, training them to use techniques such as bystander intervention, and dismantling the underlying sexist and homophobic stereotypes and hierarchies of traditional masculinity will go a long way toward preventing the violence in the first place. Second, since engaging in such education with students will require training teachers and other school officials in the same ideas, a school increases the likelihood that teachers and school officials will respond appropriately when violence does occur—that they will not tell a boy whose testicles have been damaged through harassment to “‘toughen up and stop acting like a little girl’”⁷¹⁷ and find themselves in court as a result. In addition to these negative incentives,

714. *Id.*

715. *Who We Are*, MEN CAN STOP RAPE, <http://www.mencanstoprape.org/Who-We-Are/> (last visited Feb. 28, 2014).

716. *Id.*

717. *Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816, 823 (C.D. Ill. 2008).

however, ED could also allocate more funding to the development of resources to help schools create or purchase curricula like those previously mentioned.

For all of these reasons, ED should stop encouraging sex-segregated education and start focusing on creating incentives for schools to intervene in the traditionally masculine hidden curriculum. Congress and the courts also have a positive role to play by addressing some of the problems with Title IX enforcement that diminish the effectiveness of Title IX's liability scheme in creating similar incentives. These include changing the "actual knowledge" prong of the *Gebser/Davis* test in sexual harassment cases and appropriating more funds for OCR and schools to address these thorny and persistent problems.

V. CONCLUSION

Forty plus years of Title IX and the social changes it encouraged have brought us to the point where sex discrimination law and theory created to benefit girls and women can effectively address discrimination faced by boys and men. This, by itself, is a remarkable achievement. In addition, because contemporary discrimination against boys and men originates in the rules and continued strength of one form of masculinity, including its deeply ingrained misogyny and homophobia, dismantling that discrimination promises substantial indirect benefits to girls and women. Most importantly, recent Title IX peer sexual harassment cases provide schools with concrete incentives to intervene in the hidden curriculum of traditional masculinity. Continuing to abrogate Title IX to encourage all-boys education, even after nearly a decade of experience with the hypermasculine all-boys education that popular sex-segregated education proponents have convinced many schools to adopt, is a particularly bad idea. As studies and observations of all-male educational environments show, these environments tend to intensify hypermasculinity's support for gender-based violence. In this context, suspending Title IX's prohibition on sex segregation just increases the likelihood of sex discrimination through bullying and sexual harassment, with both boys and girls suffering as a result. Instead of trying to get around Title IX, all genders will gain from using Title IX more and extending its reach beyond women and girls alone. Doing so will not only lead to such practical benefits, but will bring current Title IX jurisprudence and regulation more in line with the normative principles of the American liberal state.