

# THE MISAPPLICATION OF PEER HARASSMENT LAW ON COLLEGE AND UNIVERSITY CAMPUSES AND THE LOSS OF STUDENT SPEECH RIGHTS

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## INTRODUCTION

A significant problem has presented itself on campuses across the nation: some colleges and universities have misapplied hostile environment sexual and racial harassment law to suppress and punish much constitutionally protected speech. Despite clear holdings in the case law counseling against this practice, those colleges and universities have applied “overbroad harassment rationales” against student expression simply because it is deemed to be offensive, disagreeable, or critical of another person or group, even though such speech falls well short of the legal standards for sexual and racial harassment. The Third Circuit’s recent ruling in *DeJohn v. Temple University*,<sup>1</sup> in which it struck down the University’s sexual harassment policy as facially overbroad, is the latest decision to recognize the problem. *DeJohn* is only the most recent in a line of cases, spanning the past two decades, which have uniformly struck down college and university harassment policies.<sup>2</sup> As a strongly worded federal circuit court decision, *DeJohn* should send an unequivocal message to institution administrators, one which is much-needed in light of the misuse and abuse of harassment law that has long been a problem in the college and university setting.

The problem has historically manifested itself in two ways. First, some colleges and universities have enforced their sexual and racial harassment policies against students engaging in protected speech and other innocuous

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1. 537 F.3d 301 (3d Cir. 2008).
2. See discussion *infra* Part III.C.

conduct. One university, for instance, found a student guilty of sexual harassment for posting satirical flyers in which he joked about freshman female students gaining weight.<sup>3</sup> Another university found a student-employee guilty of racial harassment merely for reading a scholarly book in the presence of co-workers.<sup>4</sup> Second, some colleges and universities have drafted and maintained harassment policies which by their very terms are constitutionally vague, overbroad, or both. For example, the sexual harassment policy at one university prohibits “comments or inquiries about dating,” “patronizing remarks,” “innuendos,” and “dismissive comments.”<sup>5</sup> Another university defines sexual harassment to include anything that “occurs when somebody says or does something sexually related that you don’t want them to say or do, regardless of who it is.”<sup>6</sup> In its racial harassment policy, still another institution prohibits its students from “making disparaging remarks that insult or stigmatize a student’s cultural background or race.”<sup>7</sup>

By targeting and punishing students for engaging in constitutionally protected speech,<sup>8</sup> these institutions are ignoring the importance on a college or university campus of allowing for robust speech rights, rigorous debate and discussion, and the unfettered exchange of ideas. The Supreme

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3. See *infra* notes 28–30 and accompanying text.

4. See *infra* notes 17–19 and accompanying text.

5. Davidson College, Student Handbook: Definition of Harassment, <http://www3.davidson.edu/cms/x8905.xml> (last visited Mar. 3, 2009).

6. The University of Iowa, What is Sexual Harassment?, <http://www.sexualharassment.uiowa.edu/index.php> (last visited Mar. 4, 2006).

7. Westfield State College, Student Handbook: Equal Opportunity, [http://www.wsc.ma.edu/Current%5FStudents/Student\\_Handbook/Equal\\_Opportunity/index.html](http://www.wsc.ma.edu/Current%5FStudents/Student_Handbook/Equal_Opportunity/index.html) (last visited Mar. 3, 2009).

8. Students at public colleges and universities, which are legally bound by the Constitution as state institutions, enjoy the full protection of the First Amendment. See, e.g., *Healy v. James*, 408 U.S. 169, 180 (1972).

[S]tate colleges and universities are not enclaves immune from the sweep of the First Amendment . . . . [T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large.

*Id.* Private institutions are not bound by the First Amendment, since they are not governmental entities. However, they typically promise their students extensive speech rights in school materials such as student handbooks, recruiting brochures, and codes of conduct. Courts have held in several cases that private institutions must live up to these types of promises, based on a “contract theory.” See *Schaer v. Brandeis Univ.*, 735 N.E.2d 373 (Mass. 2000); *Tedeschi v. Wagner Coll.*, 404 N.E.2d 1302 (N.Y. 1980); *McConnell v. Le Moyne College*, 808 N.Y.S.2d 860 (App. Div. 2006); see also *Ross v. Creighton Univ.*, 957 F.2d 410, 416 (7th Cir. 1992) (“It is held generally in the United States that the ‘basic legal relation between a student and a private university or college is contractual in nature. The catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant become a part of the contract.” (quoting *Zumbrun v. Univ. of S. Cal.*, 25 Cal.App.3d 1, 10 (1972))).

Court and lower federal courts have traditionally and consistently upheld the ideal of the college or university as a true “marketplace of ideas,”<sup>9</sup> a place where free speech rights are accorded heightened protection in order to promote academic freedom and the search for truth and knowledge. Given these realities, it makes little sense for college and university administrators to misapply harassment law so egregiously. Whether such misapplication is intentional and stems from a desire to remove certain expression from campus, or rather is the result of misunderstanding the law, the end result is that some administrators are interfering with students’ speech rights. This impedes the proper functioning of the college or university campus as a true battleground for ideas and place for academic debate.

Colleges and universities misapplying harassment law have sometimes justified their actions as being required under federal law, specifically Title IX<sup>10</sup> and Title VI.<sup>11</sup> However, these statutes have a narrow focus: discriminatory conduct on the basis of gender and race, color, or national origin, respectively. The case law under both statutes has made it clear that an alleged hostile environment must be based on extreme patterns of harassing conduct rather than pure verbal expression. Properly understood, hostile environment law under Title IX and Title VI has a limited scope and should not be interpreted to encompass various protected expressions.

In overstepping their obligations under these statutes, schools are acting contrary to the stated policy of the Department of Education’s Office for Civil Rights (OCR), the federal agency charged with enforcing Title IX and Title VI in the educational context. They are also acting contrary to the strong legal precedent set by courts uniformly striking down constitutionally infirm college and university harassment policies and invalidating institutions’ overbroad applications of their policies.

A major contributing factor to the misapplication of harassment law in higher education has been conflation of the law under Title VII,<sup>12</sup> which governs harassment in employment, with Title IX and Title VI law. In a number of cases, courts have imported Title VII hostile environment principles into the college and university setting, even though the harassment standard for the workplace is legally distinct from the standard

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9. *See, e.g.*, *Papish v. Bd. of Curators*, 410 U.S. 667, 670 (1973) (“[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’”); *Healy*, 408 U.S. at 180 (“The college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas.’”); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) (“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”).

10. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2006).

11. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2000).

12. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000).

for harassment in education.<sup>13</sup> Most often, courts have applied the Title VII standards for employer liability to the issue of institutional liability under Title IX or Title VI for student-on-student (or peer) harassment. Some colleges and universities have interpreted these decisions as, firstly, signaling and endorsing a parallel in the law under the respective statutes and, secondly, imposing a broader scheme of institutional liability for peer harassment. These schools have therefore decided to draft and enforce their harassment policies in a manner which tracks Title VII hostile environment standards for the workplace. This practice ignores the fundamental differences between the workplace and the campus setting as well as the unique issues raised by peer harassment.

Despite the many problems caused by the misapplication of racial and sexual harassment law on some college and university campuses, there is little existing legal scholarship on the subject. This is somewhat surprising given the amount of coverage, both in legal scholarship and in mainstream media, on general free speech issues in higher education<sup>14</sup> and on the impact of harassment law in employment.<sup>15</sup> This article seeks to fill the gap in the legal scholarship by analyzing the restriction of speech and doctrinal difficulties created by the misapplication of peer harassment law in the college and university setting, the root causes of this misapplication,

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13. See discussion *infra* Part IV.A.1.

14. See, e.g., ALAN CHARLES KORS & HARVEY A. SILVERGLATE, *THE SHADOW UNIVERSITY: THE BETRAYAL OF LIBERTY ON AMERICA'S CAMPUSES* (1998); ROBERT M. O'NEIL, *FREE SPEECH IN THE COLLEGE COMMUNITY* (1997); Michael O. Finnigan, Jr., *Extra! Extra! Read All About It! Censorship at State Universities: Hosty v. Carter*, 74 U. CIN. L. REV. 1477 (2006); Karyl Roberts Martin, *Demoted to High School: Are College Students' Free Speech Rights the Same as Those of High School Students?*, 45 B.C. L. REV. 173 (2003); Chris Sanders, *Censorship 101: Anti-Hazelwood Laws and the Preservation of Free Speech at Colleges and Universities*, 58 ALA. L. REV. 159 (2006); Suzanne Fields, *Trumping Moses and Matthew: Silencing Free Speech Is What the Campus Is All About*, WASH. TIMES, Nov. 7, 2005, at A21; Mary Beth Marklein, *On Campus: Free Speech for You But Not for Me?*, USA TODAY, Nov. 3, 2003, at 1A.

15. See, e.g., BRUCE BARRY, *SPEECHLESS: THE EROSION OF FREE EXPRESSION IN THE AMERICAN WORKPLACE* (2007); DAVID E. BERNSTEIN, *YOU CAN'T SAY THAT!: THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS* (2003); Henry L. Chambers, Jr., *(Un)Welcome Conduct and the Sexually Hostile Environment*, 53 ALA. L. REV. 733 (2002); Tara Kaesebier, Comment, *Employer Liability in Supervisor Sexual Harassment Cases: The Supreme Court Finally Speaks*, 31 ARIZ. ST. L.J. 203 (1999); Jessica M. Karner, *Political Speech, Sexual Harassment, and a Captive Workforce*, 83 CAL. L. REV. 637 (1995); Stanford Edward Purser, Note, *Young v. Bayer Corp.: When is Notice of Sexual Harassment to an Employee Notice to the Employer?*, 1998 BYU L. REV. 909 (1998); Lisa Wehren, Note, *Same-Gender Sexual Harassment Under Title VII: Garcia v. Elf Atochem Marks a Step in the Wrong Direction*, 32 CAL. W. L. REV. 87 (1995); Jeffrey Rosen, *Court Watch: Reasonable Women*, NEW REPUBLIC, Nov. 1, 1993, at 12 (arguing "the most serious threat to the First Amendment of the past decade [is] the notion that words that create an intimidating, hostile or offensive working environment, without inflicting more tangible harms, can be punished as harassment.") (internal quotations omitted).

and the most logical methods for correcting the problem.

This article will focus on peer harassment in higher education. The doctrinal analysis and prescriptions I offer are directed solely toward the subject of peer harassment, as the issues raised by professor-on-student or employee-on-student harassment require a separate analysis. Peer harassment, and the ways in which colleges and universities have addressed it, presents a unique legal issue, one which must be analyzed on its own. The right of students to speak freely on campus is a paramount concern, and the impact of peer harassment law upon the exercise of this right is a compelling matter and deserving of close attention and scrutiny.

Part I of this article provides some examples of the misapplication of peer harassment law on campus, both in the drafting and enforcement of college and university harassment policies, and discusses the ways in which such measures restrict student speech rights. Part II sets forth the legal framework for peer harassment under Title IX and Title VI, the statutes from which colleges and universities draw their obligations to prevent sexual and racial harassment, respectively. Part III then analyzes the tendency on the part of many schools, in addressing the problem of peer harassment, to overstep their Title IX and Title VI requirements. As detailed in Part III, schools far too often ignore the crucial distinction between actionable harassing conduct and pure speech, act contrary to stated OCR policy, and ignore strong legal precedent regarding the misuse and misapplication of harassment law in the college and university setting.

Part IV of the article argues that a major contributing factor to the misapplication of peer harassment law has been the conflation of Title VII law with Title IX and Title VI law. In Part V, I argue that, in following Title VII standards, colleges and universities fail to consider the fundamental differences between the workplace and the college or university campus, as well as the unique characteristics of peer harassment. These considerations counsel strongly against importing Title VII law into the realm of higher education.

Finally, Part VI proposes some potential solutions to the problems discussed in the article. The most important of these solutions is to amend Title IX and Title VI to abolish institutional liability for peer harassment. This solution would eliminate a college or university's primary justification for censoring and punishing much protected expression and would therefore advance campus speech rights considerably.

If eliminating institutional liability is not achievable, the best available alternate measure is to adopt the hostile environment standard formulated by the Supreme Court in its seminal decision in *Davis v. Monroe County Board of Education*<sup>16</sup> as the controlling standard for peer racial and sexual

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16. 526 U.S. 629 (1999). See *infra* Part II.A.2 for a discussion of the *Davis* standard for creation of a hostile educational environment.

harassment. The *Davis* standard is more stringent than other existing standards in its requirements for the creation of a hostile educational environment. It would, therefore, provide the highest possible level of protection for student speech under any system wherein institutions remain liable for peer harassment.

The third and final proposed solution is for the courts to deny qualified immunity to college and university administrators in all cases where a student at a public college or university brings suit for the deprivation of First Amendment rights. In taking this measure, the courts would make it much less likely that administrators continue to apply overbroad harassment rationales in contravention of free speech principles, because the threat of being held personally liable to a student for monetary damages would provide administrators with the necessary incentives to respect and uphold students' speech rights. This respect would help to ensure that the considerable impact of peer harassment law on student speech rights is ultimately reversed.

#### I. ESTABLISHING THE PROBLEM: THE MISAPPLICATION OF HARASSMENT LAW ON COLLEGE AND UNIVERSITY CAMPUSES

Some colleges and universities have misapplied racial and sexual harassment law, improperly targeting constitutionally protected speech as being offensive or disagreeable. This misapplication manifests in two ways. First, colleges and universities have sometimes charged students and faculty with harassment for engaging in clearly protected speech. A related, but distinct problem is that some college and university harassment policies, by their very terms, are constitutionally overbroad, vague, or both. Consequently, overbroad harassment rationales have undercut campus speech rights in several ways, making it difficult for the college and university campus to serve its vital role as a true marketplace of ideas.

##### A. Colleges and Universities Have Applied Harassment Rationales Against Protected Speech.

Some colleges and universities have charged students and faculty with sexual harassment, racial harassment, or simply harassment for engaging in protected speech, as demonstrated by some noteworthy cases. As an initial matter, I wish to clarify that while this article focuses on college and university policy toward student-on-student harassment, and the many problems associated therein, I have included here some examples of cases where allegations were raised against professors. Even though these cases do not fall within the doctrinal discussion and prescriptions of this article, they are presented here to illustrate the extent to which colleges and universities have misunderstood and misapplied racial and sexual harassment law.

One illustrative case took place at Indiana University—Purdue University Indianapolis (IUPUI) in 2007. Keith John Sampson, a student-employee, was charged with racial harassment merely for reading a book entitled *Notre Dame Vs. the Klan: How the Fighting Irish Defeated the Ku Klux Klan* during his work breaks.<sup>17</sup> A co-worker filed a complaint alleging that the book was offensive and antagonistic because of its subject matter and front cover featuring pictures of robed Klansmen and burning crosses.<sup>18</sup> The University found Sampson guilty of racial harassment, reasoning that he “demonstrated disdain and insensitivity” toward his co-workers by openly reading a book with an “inflammatory and offensive topic.”<sup>19</sup> In reaching this conclusion, IUPUI failed to consider the completely innocuous nature of Sampson’s behavior and instead capitulated to an unreasonable claim of offense.

Brandeis University presents another recent example of the misapplication of harassment law. In 2007, Professor Donald Hindley faced a complaint from at least one student in his class for explaining that the term “wetbacks” is commonly used as a derogatory reference to Mexican migrants.<sup>20</sup> Hindley’s discussion of the term was germane to his Latin American Politics class and did not advocate the use of the term or any other racist behavior. Nevertheless, Brandeis found Hindley guilty of racial harassment, threatened him with termination, and placed a monitor in his classes to observe him.<sup>21</sup> Hindley was told by the University that it “will not tolerate inappropriate, racial and discriminatory conduct by members of its faculty.”<sup>22</sup> Similarly to what took place at IUPUI, Brandeis found it sufficient that an individual took offense at the mere discussion of a disfavored topic and failed to consider the context in which the topic was discussed.

George Fletcher, a criminal law professor at Columbia Law School, became embroiled in a sexual harassment controversy in 1999.<sup>23</sup> On an

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17. The book in question is a historical account which chronicles a street fight in 1924 between University of Notre Dame students and members of the Ku Klux Klan in South Bend, as well as the Klan’s subsequent decline in influence in the state of Indiana. See Azhar Majeed, *Book-reading IUPUI Worker Deserved Better*, INDIANAPOLIS STAR, Mar. 25, 2008, at 7; Dorothy Rabinowitz, *American Politics Aren’t ‘Post-Racial,’* WALL ST. J., July 7, 2008, at A13.

18. Majeed, *supra* note 17.

19. Letter from Lillian Charleston to Keith John Sampson (Nov. 25, 2007), available at <http://www.thefire.org/pdfs/4b26b68ef98eb6b6de987138657f0467.pdf>.

20. Press Release, Foundation for Individual Rights in Education (FIRE), Brandeis University Tramples Free Speech and Academic Freedom: Professor Found Guilty of ‘Harassment’ and Subjected to Classroom Monitoring for Protected Speech (Jan. 23, 2008), available at <http://www.thefire.org/index.php/article/8854.html>.

21. *Id.*

22. Letter from Marty Krauss to Donald Hindley (Oct. 30, 2007), available at <http://www.thefire.org/pdfs/4bb7801320fb0fbecb4734c2cf1e4a09.pdf>.

23. Letter from The Foundation for Individual Rights in Education (FIRE) to Dean

exam, Fletcher presented a hypothetical case, based in part on real cases, in which a woman who had been seeking an abortion was physically assaulted by an assailant, resulting in the death of her fetus, and was thankful to the attacker for conferring this “benefit” on her.<sup>24</sup> Several students complained to the dean of the law school that this exam question created a hostile environment for women. The dean subsequently informed Fletcher that the University’s General Counsel found a “plausible” hostile environment claim.<sup>25</sup> Additionally, a faculty committee denied Fletcher’s proposal to teach an LL.M. course for which he was certainly qualified.<sup>26</sup> In the end, Columbia relented, affirming that the exam question did not constitute sexual harassment and would have no impact on Fletcher’s career.<sup>27</sup> Nevertheless, the case serves as an example of how a college or university’s overzealous approach to addressing hostile environment issues can threaten academic freedom.

Lastly, Tim Garneau, a student at the University of New Hampshire, was evicted from his dormitory in 2004 for posting satirical flyers in which he joked that freshman women could lose weight by using the stairs in their residence hall rather than the elevators.<sup>28</sup> The University found Garneau guilty of several offenses, including sexual harassment, and, in addition to evicting him from his dormitory, subjected him to disciplinary probation and mandatory meetings with a counselor.<sup>29</sup> Eventually, the University yielded to public pressure and reversed the harassment finding.<sup>30</sup> However, Garneau’s case remains proof that overbroad harassment rationales can be abused to reach and punish clearly protected speech.

#### B. College and University Harassment Policies Have Encompassed Protected Speech.

In addition to the fact that some colleges and universities have enforced their harassment policies to punish protected expression, campus speakers face another impediment: college and university policies on hostile

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David Leebron (Sept. 6, 2000), *available at* <http://www.thefire.org/index.php/article/4957.html>.

24. *Id.*

25. *Id.*

26. *Id.*

27. The Foundation for Individual Rights in Education (FIRE), Academic Freedom Vindicated, <http://www.thefire.org/index.php/article/110.html> (last visited Mar. 4, 2009).

28. Press Release, Foundation for Individual Rights in Education (FIRE), University of New Hampshire Evicts Student for Posting Flier (Oct. 28, 2004), *available at* <http://www.thefire.org/index.php/article/5005.html>.

29. *Id.*

30. Press Release, Foundation for Individual Rights in Education (FIRE), Victory at University of New Hampshire (Nov. 12, 2004), *available at* <http://www.thefire.org/index.php/article/5044.html>.



environment sometimes encompass constitutionally protected speech by their very terms. Here the problem lies not with the way in which an institution applies its policy, but with how a policy initially defines sexual or racial harassment.

School policies are sometimes phrased in terms that are unconstitutionally vague, overbroad, or both. A statute or regulation is unconstitutionally vague when “men of common intelligence must necessarily guess at its meaning.”<sup>31</sup> In order to escape the vagueness doctrine, a statute or regulation must “give adequate warning of what activities it proscribes” and “set out ‘explicit standards’ for those who must apply it.”<sup>32</sup> A statute or law regulating speech is unconstitutionally overbroad “if it sweeps within its ambit a substantial amount of protected speech along with that which it may legitimately regulate.”<sup>33</sup>

To cite one example of an infirm sexual harassment policy, Davidson College bans its students from making “[c]omments or inquiries about dating,” “[p]atronizing remarks,” “[i]nnuendos,” and “dismissive comments.”<sup>34</sup> Kansas State University prohibits “generalized sexist statements and behavior that convey insulting or degrading attitudes about women.”<sup>35</sup> The University of Iowa defines sexual harassment to include anything that “occurs when somebody says or does something sexually related that you don’t want them to say or do, regardless of who it is.”<sup>36</sup> Murray State University defines sexual harassment to include “[c]alling a person a doll, babe, or honey” and “[m]aking sexual innuendoes.”<sup>37</sup>

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31. *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)).

32. *Id.* (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)); see *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (holding that “a more stringent vagueness test” should apply to laws that interfere with the right of free speech).

33. *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 864 (E.D. Mich. 1989); see also *Broadrick*, 413 U.S. at 611–12 (“[S]tatutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.”); *NAACP v. Button*, 371 U.S. 415, 433 (1963) (“Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.”); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 871–72 (N.D. Tex. 2004) (citing *Broadrick*, 413 U.S. at 612) (noting that like the vagueness doctrine, “[t]he doctrine of overbreadth, while extremely circumscribed in most applications, is generally afforded a broader application where First Amendment rights are involved.”).

34. Davidson College, *supra* note 5.

35. Kansas State University, Types of Sexual Harassment Covered by the Policy, [http://www.k-state.edu/dh/sex\\_harass/types.html](http://www.k-state.edu/dh/sex_harass/types.html) (last visited Mar. 4, 2008).

36. The University of Iowa, *supra* note 6.

37. Murray State University, Stop Sexual Harassment, <https://www.murraystate.edu/womenscenter/MSUWomensCenterSexualHarassment.htm> (last visited March 27, 2009).

College and university policies on racial harassment can be just as problematic. The University of North Carolina at Charlotte, for example, defines racial harassment to include behavior that “stigmatizes or victimizes an individual on the basis of race, ethnicity, or ancestry.”<sup>38</sup> Similarly, Westfield State College prohibits its students from “making disparaging remarks that insult or stigmatize a student’s cultural background or race.”<sup>39</sup>

In using amorphous terms such as “stigmatize,” “patronizing,” and “degrading,” these harassment policies leave themselves open to a wide range of interpretation, giving students and faculty no notice of what is actually prohibited and leaving them guessing as to how they should curb their speech. This lack of notice presents a fundamental vagueness problem. Furthermore, in defining harassment to include speech which, for example, merely “insult[s]” another, is “dismissive,” or involves “something sexually related,” many policies bring within their sweep various protected, and indeed innocuous, expressions. These policies face an overbreadth problem.

Lastly, some institutions conflate sexual and racial harassment by addressing them within the same policy and defining them in vague or overbroad terms. Le Moyne College, for instance, bans “[s]tigmatizing or disparaging statements related to race, gender, ethnicity,” and several other personal characteristics.<sup>40</sup> In a separate policy, Le Moyne addresses “[h]arassment and hate crimes/incidents” based on a person’s gender, race, color, and other listed traits, and defines them to include “remarks, language or illustrations that deprecate or offend” another on the basis of his or her immutable characteristics.<sup>41</sup> Another school, Saginaw Valley State University, maintains a policy on “Discrimination, Sexual Harassment and Racial Harassment” which bans “taunting or verbal abuse” and “degrading comments or jokes” relating to an individual’s “race, religion, sex,” and several other listed traits.<sup>42</sup>

In addition to encountering the same issues of vagueness and overbreadth discussed above, these policies improperly conflate two distinct areas of the law. Colleges and universities taking this approach fail to consider the differences between sexual and racial harassment and how

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38. University of North Carolina at Charlotte, Full-time Faculty Handbook 4, <http://www.thefire.org/pdfs/ca130fcebb3dd7d6619e0f32153b285b.pdf> (last visited Mar. 4, 2008).

39. Westfield State College, *supra* note 7.

40. Le Moyne College, Student Handbook 2008–2009 53, [http://www.lemoyne.edu/Portals/11/pdf\\_content/SH08-web.pdf](http://www.lemoyne.edu/Portals/11/pdf_content/SH08-web.pdf) (last visited Mar. 4, 2009).

41. Le Moyne College, *supra* note 40, at 45.

42. Saginaw Valley State University, 2007–08 Student Handbook 19, [http://www.svsu.edu/emplibrary/07-08%20\\_Student\\_Handbook\\_B.pdf](http://www.svsu.edu/emplibrary/07-08%20_Student_Handbook_B.pdf) (last visited Mar. 4, 2009).

these differences impact the ways in which the respective problems should be addressed. Instead, they are telling their students and faculty that any expression which another person perceives to be offensive, stigmatizing, or otherwise undesirable will be treated as harassment of some kind. This represents a fundamental misapplication of harassment law.

### C. The Consequences of the Misapplication of Harassment Law for Campus Speech

I shall now examine the most visible consequences of harassment regulation for the free speech rights of students and faculty. It is important to reiterate, when discussing these consequences, that college and university campuses have long served as an important battleground for the debate and exploration of diverse views and ideas, and that the Supreme Court and lower federal courts have strongly recognized the need to uphold and protect speech rights on campus.<sup>43</sup>

To begin with, when college and universities take an expansive approach toward hostile environment issues, they create a chilling effect on campus speech, curtailing much campus debate and discussion. Second, harassment law, as applied on the college or university campus, far too often restricts and punishes important types of speech such as political debate and social commentary. Third, such expansive approaches contribute to a sense among students that there is a general “right not to be offended,” a concept which is especially out of place on a college or university campus. Fourth, the enactment of vaguely-worded and open-ended harassment policies empowers administrators to engage in content-based and viewpoint-based restrictions on speech. Fifth, some schools address sexual harassment in the same policy or set of policies as sexual assault and rape, creating a misconception on campus that pure verbal expression can have consequences of the same magnitude as the more serious problems of sexual assault and rape.

#### 1. The Chilling Effect on Speech

The first consequence of the misapplication of harassment law is that the enactment of infirm harassment policies and the frequent application of school policies against protected speech place speakers on notice that they must be very careful in what they do or say. As previously discussed, college and university policies on sexual and racial harassment are often vague, overbroad, or both.<sup>44</sup> Even when these policies are not actually applied to suppress protected speech, their mere existence creates a chilling effect on speech, because one cannot be sure whether the speech that one

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43. See cases cited *supra* note 9.

44. See discussion *supra* Part I.B.

wishes to engage in might fall within the institution's harassment policy. Of course, sexual and racial harassment policies, regardless of the terms in which they are drafted, *are* oftentimes applied against protected speech,<sup>45</sup> which again leads many potential speakers to conclude that it is better to stay silent and not risk the consequences of being charged with harassment.

The chilling effect problem has been widely recognized in the legal scholarship on harassment law. As Eugene Volokh has commented, "The law's 'uncertain meaning' requires people 'to "steer far wider of the unlawful zone" than if the boundaries of the forbidden areas were clearly marked," leading "[t]hose . . . sensitive to the perils posed by . . . indefinite language [to] avoid the risk only by restricting their conduct to that which is unquestionably safe."<sup>46</sup> Another commentator, Kingsley Browne, sees very much the same problem, in that "the vagueness of the definition of 'harassment' leaves those subject to regulation without clear notice of what is permitted and what is forbidden."<sup>47</sup>

The unfortunate result, then, is that students have a strong incentive to refrain from saying anything provocative, inflammatory, or bold and to instead cautiously stick to that which is mundane or conventional. This halts much campus discussion and debate, taking away from the campus's function as a true marketplace of ideas. In light of the importance on a college or university campus of allowing for the free exchange of ideas, the chilling effect on speech makes it impossible for a college or university to serve one of its central functions, thereby depriving its students of the type of free and open learning environment that they have been promised and denying them the full benefits to which they are entitled from their college or university experience.

## 2. Suppression of Important Types of Speech

The misapplication of harassment law has had a second major consequence for campus speech—the restriction of highly important types of expression, such as social and political debate and commentary. This is the sort of speech that usually receives "maximum protection" under the First Amendment.<sup>48</sup> However, college and university harassment policies,

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45. See discussion *supra* Part I.A.

46. Eugene Volokh, *How Harassment Law Restricts Free Speech*, 47 RUTGERS L. REV. 563, 568–69 (1995) (quoting *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964)).

47. Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 483 (1991).

48. Volokh, *supra* note 46, at 563–64; see, e.g., *Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."); *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our 'profound national commitment to the principle that debate

while drafted in the name of addressing only harassing conduct, are often written and applied in an overbroad manner such that they reach clearly protected speech, including social and political speech at the core of the First Amendment.<sup>49</sup>

In drafting and applying their harassment policies, colleges and universities frequently target protected speech merely because the expression in question is alleged to be sexist, prejudicial, or demeaning. The aforementioned policies at Kansas State University<sup>50</sup> and the University of North Carolina at Charlotte<sup>51</sup> are perfect illustrations. This approach ignores the fact that even explicitly sexist or racist speech is entitled to protection,<sup>52</sup> and all the more so where it espouses views on important issues of social policy.<sup>53</sup> Few people would disagree, for example, that the subjects of relations between the sexes, women's rights, and the pursuit of economic and social equality are all important matters of public concern and debate. Therefore, speech relating to such topics, regardless of whether it takes a favorable or negative view of women, is highly germane to the debate of public matters and social policy. In the marketplace of ideas, these expressions should not be suppressed merely to avoid offense or discomfort.

Moreover, as one commentator has argued, if statements such as "blacks are entitled to the same respect as whites" and "women have as much right to participate in the economic life of our country as men" are accorded full constitutional protection, then for purposes of public debate and discussion, the converse of those statements must be recognized as having the same value because of the government's fundamental obligation of neutrality.<sup>54</sup>

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on public issues should be uninhibited, robust, and wide-open . . . ") (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

49. *DeJohn v. Temple Univ.*, 537 F.3d 301, 317–18 (3d Cir. 2008) (holding that Temple University's sexual harassment policy "provides no shelter for core protected speech"). The court deemed the policy to be sufficiently broad and subjective that it "could conceivably be applied to cover any speech" of a "gender-motivated" nature "the content of which offends someone," and that, significantly, "[t]his could include 'core' political and religious speech, such as gender politics and sexual morality." *Id.* (quoting *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001)).

50. See *Kansas State University*, *supra* note 35 and accompanying text.

51. See *University of North Carolina at Charlotte*, *supra* note 38 and accompanying text.

52. See, e.g., *Am. Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd* 475 U.S. 1001 (1986). In *Hudnut*, the Seventh Circuit invalidated a statute prohibiting pornography, defined as "the graphic sexually explicit subordination of women, whether in pictures or in words." *Id.* at 324 (citation omitted). Rather than following the established legal standard for obscenity, the statute banned any and all speech depicting women in the disapproved manner. *Id.* at 324–25. This constituted discrimination on the basis of speech content, rendering the statute invalid under the First Amendment. *Id.* at 332–34.

53. *Browne*, *supra* note 47, at 540.

54. *Id.*; see also *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)

In other words, “[t]hat we as a society no longer accept the truth of the statements arguing for inequality does not make them any less worthy of protection.”<sup>55</sup> To hold otherwise would be to deny constitutional protection to certain viewpoints (and only those viewpoints) regarding gender and race issues, creating a fundamental First Amendment problem. And since the speech implicated in sexual and racial harassment cases is typically far tamer than the examples alluded to here,<sup>56</sup> this argument underscores the need to restore vigorous First Amendment protection for social and political commentary.

Furthermore, one of the benefits of providing breathing room for such expression is that it allows the speaker to espouse his or her views through constructive dialogue rather than act out of frustration by committing acts of violence or hate crimes. This outlet has been labeled the “safety valve” function of speech.<sup>57</sup> Given that sexist and racist expression can often arise from the speaker’s feelings of resentment towards anti-discrimination policies, affirmative action policies, and other policies, such resentment is only exacerbated by attempting to insulate certain groups on campus from offense and requiring everyone on campus to restrict their speech accordingly. Thus, by taking aim at the slightest offense, college and university administrations could be acting against their own interests by creating an environment which leads to incidents that are more damaging than offensive speech could ever be.

Conversely, giving students the freedom to engage in all kinds of social and political commentary, even where it is offensive and misguided, allows the “marketplace of ideas” to serve its vital role. On the one hand, there is no reason to believe that regulation of offensive expression is an effective means of eliminating prejudice. Intuitively, it stands to reason that someone who deeply and firmly holds a particular belief will not let it go simply because he or she is not free to express it in certain settings. On the other hand, the expression of prejudicial viewpoints often has a positive impact on the listener’s social views, because “hearing such statements in their baldest form may have the effect of demonstrating the poverty of the beliefs expressed.”<sup>58</sup> By exposing the real ugliness of prejudice, ignorance and hate, such speech can reach and convince people in ways that polite conversation never could.<sup>59</sup> Moreover, ignorant or misguided speech,

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(“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).

55. Browne, *supra* note 47, at 540.

56. *See supra* Part I.A.

57. Browne, *supra* note 47, at 541.

58. *Id.* at 542.

59. *See* Nadine Strossen, *The Tensions Between Regulating Workplace Harassment and the First Amendment: No Trump*, 71 CHI.-KENT L. REV. 701, 710

though seemingly possessing little value or merit on its own, often has the “downstream” effect of leading to constructive discussion and debate which would not have taken place otherwise. Consequently, the initial expression greatly benefits the marketplace of ideas and enriches students’ understanding of important issues by increasing the potential for real and meaningful debate on campus.

### 3. The Right Not to Be Offended?

The third major consequence of the misapplication of harassment law is that it has contributed to a sense among students that there is a general “‘right’ not to be offended”<sup>60</sup>—a false notion that ill serves students as they transition from the relatively insulated college or university setting to the larger society. Colleges and universities too often address the problems of sexual and racial harassment by targeting any expression which may be perceived by another as offensive or undesirable. This can be seen in the enactment of university policies broadly aimed at protecting students from offense. Texas A&M University, for example, mandates that “respect for personal feelings” and “freedom from indignity of any type” are rights belonging to all students.<sup>61</sup> In a similar type of policy, Jacksonville State University states, “No student shall threaten, abuse, or degrade anyone on University owned or operated property.”<sup>62</sup> Johns Hopkins University simply bans “[r]ude, disrespectful behavior.”<sup>63</sup> In taking this type of approach, administrators “increasingly coddle and even reward the hypersensitive and easily outraged, perversely encouraging more people to be hypersensitive and easily outraged.”<sup>64</sup>

This is especially troubling in that a modern liberal arts education

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(1995) (“[S]peeches arguing that women should be second-class citizens might persuade some who hear them or hear about them, but they may well galvanize greater numbers to oppose those views, and to work against them.”).

60. KORS & SILVERGATE, *supra* note 14, at 99. In *The Shadow University*, the authors write, “At almost every college and university, students deemed members of ‘historically oppressed groups’ . . . are informed during orientations that their campuses are teeming with illegal or intolerable violations of their ‘right’ not to be offended.” *Id.* They add, “What an astonishing expectation (and power) to give to students: the belief that, if they belong to a protected category, they have a right to four years of never being offended.” *Id.*

61. Texas A&M University, Student Rights and Obligations 1, <http://www.tamus.edu/offices/policy/policies/pdf/13-02.pdf> (last visited Mar. 5, 2009).

62. Jacksonville State University, University Policies, <http://www.jsu.edu/depart/handbook/page17.html#personal%20abuse> (last visited Mar. 5, 2009).

63. Johns Hopkins University, Principles for Ensuring Equity, Civility and Respect for All, [http://www.jhu.edu/news\\_info/policy/civility.html](http://www.jhu.edu/news_info/policy/civility.html) (last visited Mar. 5, 2009).

64. David E. Bernstein, *Defending the First Amendment from Antidiscrimination Laws*, 82 N.C. L. REV. 223, 245 (2003).

requires exposure to, and tolerance of, a wide range of ideas and interactions, some of which may be disagreeable or offensive. Contrary to this ideal, students are being told that they have far-reaching rights which override others' freedom of expression, and that it is okay to be easily offended. This creates the danger that, as time goes on, students will become even more hypersensitive and will feel entitled to be insulated from the slightest offense. Put succinctly, "to the extent the legal system gives people a remedy for offense, they are more likely to feel offended."<sup>65</sup> This can be for one of two reasons, or in many cases both.

The first explanation arises from the fact that students see colleges and universities taking an expansive approach to the problems of sexual and racial harassment, one that targets any offensive or disagreeable expression and in the process shortchanges free speech rights. Once granted this right to be hypersensitive, it becomes increasingly difficult for students to recede in terms of their level of sensitivity. This has been referred to as the "psychological endowment effect," whereby "once people are endowed with a right, they lose far more utility once that right is interfered with than if it had never been granted at all."<sup>66</sup>

The other explanation is that allowing people to bring suit against their school for being subjected to offensive speech will lead to more lawsuits simply because the potential for a large award of monetary damages creates an incentive to interpret another person's expression as offensive.<sup>67</sup> This suggests that, regardless of the extent to which they are genuinely offended, at least some harassment plaintiffs are acting out of a desire to capitalize financially. Either way, the end result is harmful for those who wish to exercise their free speech rights on college and university campuses, as the false notion of entitlement to be free from offense undercuts the proper functioning of the marketplace of ideas.

#### 4. Content-Based and Viewpoint-Based Restrictions

Another major concern about the increased scope of harassment law on college and university campuses is that such policies empower administrators to engage in content-based and viewpoint-based restrictions and punishments. The Supreme Court has consistently held that such restrictions are an especially egregious violation of the First Amendment.<sup>68</sup>

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65. *Id.*

66. *Id.*

67. Browne, *supra* note 47, at 543.

68. *See, e.g.,* *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); *U.S. v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989). In *R.A.V.*, the Court stated, "The First Amendment generally prevents government from proscribing speech . . . or even expressive conduct . . . because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid." 505 U.S. at 382 (citations omitted). In *Johnson*, the Court stated, "If there is a bedrock principle underlying the



It has stated that “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>69</sup> Rather, “[u]nder the First Amendment the government must leave to the people the evaluation of ideas.”<sup>70</sup>

However, having vaguely worded, open-ended sexual and racial harassment policies on the books gives administrators excessive discretion to decide which expressions they will tolerate on their campus and which ones they will suppress. This opens the door to selective censorship and politicized, subjective decision-making. Courts have recognized that harassment policies are “susceptible to selective application amounting to content-based or viewpoint discrimination.”<sup>71</sup> As a result, certain expressions face the danger of being restricted and punished under the guise of harassment regulations in ways that do not affect more favored speech.

In one example of viewpoint discrimination, DePaul University sought to punish the DePaul Conservative Alliance (DCA), a campus student group, in 2006 for holding an “affirmative action bake sale.”<sup>72</sup> The University charged the group with violating its Anti-Discrimination Harassment Policy, and shut down the bake sale under the pretext that the event was taking place at an inappropriate location, even though it allowed a different student group to set up a protest table at the same location a week later.<sup>73</sup> The University seemingly had no problem with the latter student group, a chapter of the People for the Ethical Treatment of Animals, and its form of protest but refused to accord the DCA the same freedom of expression.<sup>74</sup>

Another case arose at Pennsylvania State University. In 2006, the

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First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” 491 U.S. at 414.

69. *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

70. *Am. Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 327 (7th Cir. 1985).

71. *DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008).

72. Press Release, The Foundation for Individual Rights in Education (FIRE), DePaul University Calls Affirmative Action Protest “Harassment” (Jan. 30, 2006), available at <http://www.thefire.org/index.php/article/6754.html>. The basic idea behind this event, a form of protest which has been used at several colleges nationwide, is to charge less money to certain minority groups than to white students for the same baked goods. In doing so, the student group hoped to satirize the use of affirmative action in college and university admissions and to spark student debate about the issue. *Id.*

73. *Id.*

74. *See id.* Making it even clearer that the administration’s actions were motivated by viewpoint, it responded to initial queries about the harassment charges by stating that it had not yet determined its reasons for intervening in the bake sale. *Id.* Essentially, the administration’s approach was to shut down the bake sale and then come up with a justification after the fact, making this an obvious case of viewpoint discrimination. *Id.*

University's School of Visual Arts cancelled the opening of a student's art exhibit on the grounds that his art violated the University's Statement on Nondiscrimination and Harassment.<sup>75</sup> In so deciding, the school reasoned that the exhibit, which was entitled "Portraits of Terror" and depicted Palestinian violence in Israeli settlements, "did not promote cultural diversity" or "opportunities for democratic dialogue."<sup>76</sup> The school had, however, never expressed any concerns about the same student's previous art exhibits, including one that depicted, among other things, the hind of a horse, a man in a bathroom stall, and a nude man leaning against a janitor's broom.<sup>77</sup> Only when it was confronted with expression on a politically contentious issue that may have offended some students did the University invoke its harassment policy. The manifest inconsistency in the University's application of its policy is an example of content-based discrimination.

Colleges and universities should not be able to abuse harassment law to prevent students from speaking about certain topics or espousing a particular viewpoint whenever the administration finds such expression to be undesirable or inconvenient. To grant administrators this power is to open the floodgates to politicized and unprincipled censorship, creating a situation on campus wherein students are unable to benefit from a true marketplace of ideas.

##### 5. Should Sexual Harassment Be Equated with Sexual Assault?

Finally, the misapplication of harassment law in higher education has touched upon a matter that is not directly related to campus speech: sexual assault and rape. Some colleges and universities are using the same policy or set of policies to address both sexual harassment and sexual assault, even though the obvious differences between the two issues, both in degree and nature, counsel against this practice. Yale University, for example, has a joint undergraduate policy on "Sexual Harassment & Sexual Assault" in which it lists "sexual assault [and] attempted sexual assault" as examples of peer sexual harassment.<sup>78</sup> Similarly, Ohio University includes "[c]oerced sexual intercourse" and "[s]exual assault or abuse" as examples of sexual harassment.<sup>79</sup>

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75. Chris Perez, *Penn State Gets It Wrong*, THE TORCH, Apr. 25, 2006, <http://www.thefire.org/index.php/article/6997.html>.

76. *Id.*

77. Lauren Seitz, *Student Showcases Making of Art*, THE DAILY COLLEGIAN (University Park, Pa.), Feb. 14, 2006, available at <http://www.collegian.psu.edu/archive/2006/02/02-14-06tdc/02-14-06darts-02.asp>.

78. Yale University, *Sexual Harassment & Sexual Assault*, <http://www.yale.edu/yalecollege/students/services/harassment.html> (last visited Mar. 5, 2009).

79. Ohio University, *Policy & Procedure: Harassment*, <http://www.ohiou.edu/policy/03-004.html> (last visited Mar. 5, 2009).

This trend may have developed as a reaction to the “marked increase” in Title IX suits brought by alleged victims of rape and sexual assault against their colleges and universities.<sup>80</sup> In drafting their sexual harassment policies, many administrations have decided to address Title IX liability for sexual assault and rape under the same rubric. This practice has enjoyed some support in academia as well.<sup>81</sup>

While sexual assault and rape are highly important matters of public concern, they should not be in the same category as sexual harassment. To categorize sexual assault and rape with sexual harassment is to both trivialize the serious nature of sexual assault and rape and, given the tendency that some colleges and universities have shown to interpret sexual harassment law to encompass merely offensive or undesired speech, to distort and threaten the status of such speech. In reality, the problems presented by sexual harassment and sexual assault or rape, respectively, should be handled quite differently; colleges and universities should take individualized and precisely tailored measures in order to properly respond to the particular issues and concerns presented by each problem.

With respect to the issue of sexual harassment, college and university policy should take full account of the need to provide sufficient breathing room for free expression, in light of the campus’s function as a place for the free exchange of ideas. Colleges and universities should take a judicious, narrowly tailored approach to ensure that they do not infringe upon protected speech and address only that which constitutes actionable harassment. Such an approach is necessary to preserve robust campus speech rights and to avoid placing a chilling effect on speech.

By contrast, few would disagree that colleges and universities should

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80. BRETT A. SOKOLOW, NAT’L CTR. FOR HIGHER EDUC. RISK MGMT., TITLE IX AND SEXUAL MISCONDUCT: WHAT DOES RECENT CASE LAW MEAN FOR INSTITUTIONS IN CASES OF STUDENT-ON-STUDENT SEXUAL ASSAULT? (2000), *available at* <http://www.nchem.org/whitepaper-2001-title-ix.html>. Examples of recent cases in which students brought Title IX suits for sexual assault include *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170 (10th Cir. 2007); *Williams v. Bd. of Regents*, 477 F.3d 1282 (11th Cir. 2007); *Doe v. Ohio State Univ. Bd. of Regents*, No. 2:04-CV-0307, 2006 U.S. Dist. LEXIS 70444 (S.D. Ohio Sept. 28, 2006).

81. *See, e.g., Holly Hogan, What Athletic Departments Must Know About Title IX and Sexual Harassment*, 16 MARQ. SPORTS L. J. 317, 319 (2006).

What many people do not realize is that rape and other types of sexual assault are not different forms of harassment; rather, rape and sexual assault are severe forms of sexual harassment. Sexual assault is a term that includes such actions as rape, attempted rape, and forced fondling. Sexual assault is unwelcome physical conduct of a sexual nature, and like the other forms of sexual harassment, it “can deny or limit, on the basis of sex, the student’s ability to participate in or to receive benefits, services, or opportunities in the school’s program.”

*Id.* (quoting 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 2 (2001)).

have greater latitude to address the problems of sexual assault and rape. An administration should take the necessary precautions within its means to make its campus safe and well-policed, so that students are free from physical danger. Furthermore, policy should reflect the fact that a potential victim of sexual assault or rape faces much greater harms than does a potential victim of sexual harassment. As one commentator, in discussing the differences between sexual harassment and sexual assault or rape, has asserted, “[G]iven the severity of the conduct involved, it may no longer be a best practice to fold sexual assault within sexual harassment in terms of campus policies and procedures.”<sup>82</sup> Rather, they are different enough that there needs to be a “stand-alone policy” addressing sexual assault.<sup>83</sup> If colleges and universities instead continue to conflate sexual harassment with sexual assault and rape, they run the risk of selling short their students’ speech rights, providing another way in which harassment law as applied in the college and university setting undermines freedom of speech.

## II. PEER HARASSMENT UNDER TITLE IX AND TITLE VI

Having examined the ways in which some colleges and universities have articulated overbroad harassment rationales as well as the resulting impact on campus speech rights, I turn now to analyzing the doctrinal issues involved. In this section, I will set out the legal standards for peer hostile environment sexual and racial harassment under Title IX and Title VI, respectively. In the following section, I will argue that the misapplication of harassment law has proceeded from the efforts of colleges and universities to meet their Title IX and Title VI obligations.

### A. Setting the Title IX Landscape

#### 1. What Is the Aim of Title IX?

Title IX of the Education Amendments of 1972 reads in pertinent part, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>84</sup> Courts and commentators have often had to turn to the congressional debates from the time of Title IX’s passage to identify its main objectives, and this search has pointed towards two overarching goals—to “prevent the use of federal funds in support of discriminatory practices” based on gender, and to “provide individual citizens with some level of protection from those practices.”<sup>85</sup>

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82. SOKOLOW, *supra* note 80.

83. *Id.*

84. 20 U.S.C. § 1681(a) (2006).

85. Audra Pontes, Comment, *Peer Sexual Harassment: Has Title IX Gone Too*

A victim of gender discrimination within an educational program or activity, in a variety of circumstances, has the right to bring suit against the educational institution involved. Initially, Congress authorized an “administrative enforcement scheme for Title IX,” pursuant to which federal departments and agencies “with the authority to provide financial assistance are entrusted to promulgate rules, regulations, and orders to enforce the objectives” of Title IX and “may rely on ‘any . . . means authorized by law,’ including the termination of funding . . . to give effect to the statute’s restrictions.”<sup>86</sup> However, the Supreme Court has long recognized an implied private right of action under Title IX, dating back to its 1979 decision in *Cannon v. University of Chicago*.<sup>87</sup> It has also held that monetary damages are available in such suits.<sup>88</sup>

Because the Court has historically treated Title IX as legislation enacted pursuant to Congress’ authority under the Spending Clause, private damages are available only where an educational institution had adequate notice that it could be held liable for the conduct in question.<sup>89</sup> This is due to the fact that Title IX, like other Spending Clause legislation, sets up a contractual framework: it conditions an offer of federal funding to an educational institution on a promise by the funding recipient to refrain from discriminating on the basis of gender.<sup>90</sup> Therefore, a funding recipient can be held liable only for its own misconduct. This means that the institution itself must have excluded an individual from participation in, denied him the benefits of, or subjected him to discrimination under, its programs or activities.<sup>91</sup> The Supreme Court has made it clear that “sexual harassment is a form of discrimination for Title IX purposes and that Title IX proscribes harassment with sufficient clarity” to provide funding recipients with the requisite notice and to serve as a basis for imposing monetary damages.<sup>92</sup>

## 2. When Is Peer Sexual Harassment Actionable Under Title IX?

Two types of sexual harassment can constitute gender discrimination for purposes of Title IX: “quid pro quo” and “hostile environment.”

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*Far?*, 47 EMORY L.J. 341, 346 (1998). The members of Congress who enacted Title IX, including Senator Birch Bayh of Indiana, its sponsor, saw Title IX as filling in the respective voids of Title VII, which prohibited gender discrimination in employment practices but did not apply to educational institutions, and Title VI, which applied to educational institutions but did not prohibit gender discrimination. *Id.* at 346–47.

86. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 638–39 (1999) (quoting 20 U.S.C. § 1682 (2006)).

87. 441 U.S. 677 (1979).

88. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 72–73 (1992).

89. *Davis*, 526 U.S. at 640.

90. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998).

91. *Davis*, 526 U.S. at 640–41.

92. *Id.* at 649–50 (citing *Gebser*, 524 U.S. at 281).

According to the Office for Civil Rights, quid pro quo sexual harassment occurs when an employee of an educational institution “explicitly or implicitly conditions a student’s participation in an education program or activity or bases an educational decision on the student’s submission to unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature.”<sup>93</sup> This form of sexual harassment is properly understood as the act of attempting to utilize one’s position of authority over a student to gain sexual favors. Unlike hostile environment sexual harassment, it does not implicate free speech issues. Therefore, quid pro quo harassment is outside the scope of this article, which focuses on hostile environment sexual harassment.

A student alleging that he or she has been a victim of peer hostile environment sexual harassment, for purposes of Title IX institutional liability, must set forth and prove six elements. First, the complainant must demonstrate that he or she belongs to a “protected group.”<sup>94</sup> Next, the conduct in question must (2) be “unwelcome” and (3) discriminate against the complainant, (4) on the basis of his or her gender.<sup>95</sup> Fifth, under the Supreme Court’s decision in *Davis*, the complainant must demonstrate conduct that is “so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.”<sup>96</sup> Finally, the complainant must demonstrate that the educational institution had “actual knowledge” of the complained-of conduct and responded in a manner suggesting “deliberate indifference.”<sup>97</sup>

#### a. Protected Class

The first prong is easily met. OCR has clarified that, since the express language of Title IX protects any “person” from gender discrimination, both male and female students are protected under the statute against sexual harassment perpetrated by school employees, fellow students, and third parties.<sup>98</sup> This holds true even if the complainant and alleged harasser are members of the same sex.<sup>99</sup>

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93. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,038 (1997).

94. *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 467 (8th Cir. 1996).

95. *Id.* at 467–68.

96. *Davis*, 526 U.S. at 651.

97. *Id.* at 643.

98. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. at 12,039.

99. *Id.*

b. Unwelcomeness

The “unwelcome” requirement is met if the complainant “did not solicit or invite the conduct and regarded the conduct as undesirable or offensive.”<sup>100</sup> However, the fact that the complainant accepted the conduct, acquiesced in the conduct, or failed to complain does not necessarily mean that he or she regarded it as welcome.<sup>101</sup> Finally, the fact that the complainant willingly participated in conduct on a past occasion does not mean that he or she cannot indicate that the same conduct is unwelcome on a subsequent occasion.<sup>102</sup>

An instructive case for the “unwelcome” requirement is *Waters v. Metropolitan State University*,<sup>103</sup> in which a student alleged that she had been sexually harassed by one of her professors.<sup>104</sup> Her claim failed when the court ruled that the student, who had engaged in a consensual relationship with the professor, had not been subjected to unwelcome advances.<sup>105</sup> Rather than “merely acquiesc[ing]” to his advances, she had “actively encouraged a private, personal relationship with [the professor], going so far as to name him decision-maker for her children.”<sup>106</sup> On these facts, the court concluded that the student could not meet the “unwelcome” prong.<sup>107</sup> While *Waters* is a professor-student case, its analysis regarding the “unwelcome” requirement remains instructive for peer harassment cases as well.

c. Discrimination on the Basis of Gender

The third and fourth prongs require the complainant to demonstrate that he or she has been discriminated against in an educational program or activity on the basis of gender. In other words, he or she must show that he or she has been treated differently from similarly situated persons because of his or her sex. In the Title VII context, the Supreme Court has framed

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100. *Benefield ex rel. Benefield v. Bd. of Trs.*, 214 F. Supp. 2d 1212, 1217 (N.D. Ala. 2002) (citations omitted).

101. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. at 12,040.

[A] student may decide not to resist sexual advances of another student or may not file a complaint out of fear. In addition, a student may not object to a pattern of sexually demeaning comments directed at him or her by a group of students out of a concern that objections might cause the harassers to make more comments.

*Id.*

102. *Id.*

103. 91 F. Supp. 2d 1287 (D. Minn. 2000).

104. *Id.* at 1292.

105. *Id.* at 1291.

106. *Id.*

107. *Id.*

this inquiry in terms of “disparate treatment of men and women.”<sup>108</sup> The critical issue, according to the Court, is “whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”<sup>109</sup> The Court has not articulated a standard for determining when harassment occurs “because of” sex. However, most courts appear to have adopted a “but for” test.<sup>110</sup> This requires the complainant to demonstrate that the harassment would not have taken place but for his or her gender.<sup>111</sup> It is important to note that, under this standard, harassing conduct need not be of a sexual nature or motivated by sexual desire in order to constitute gender-based discrimination.<sup>112</sup>

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108. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (quoting *L.A. Dep’t of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

109. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

110. *See, e.g.*, *Smith v. First Union Nat’l Bank*, 202 F.3d 234, 242 (4th Cir. 2000); *Pasqua v. Metro. Life Ins. Co.*, 101 F.3d 514, 517 (7th Cir. 1996); *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1537 (10th Cir. 1995); *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 784 (1st Cir. 1990); *Hall v. Gus Constr. Co.*, 842 F.2d 1010 (8th Cir. 1988); *Jones v. Flagship Int’l*, 793 F.2d 714, 719 (5th Cir. 1986); *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982).

111. *See supra* note 110. Other federal circuit courts took other approaches. *See, e.g.*, *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 848 (9th Cir. 2002) (analyzing whether sex “was ‘a motivating factor’ . . . even if there were other motives”); *Bundy v. Jackson*, 641 F.2d 934, 942 (D.C. Cir. 1981) (analyzing whether “sex is for no legitimate reason a substantial factor in the discrimination”); *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1047 n.4 (3d Cir. 1977) (analyzing whether gender was a “substantial factor” in the act of discrimination).

112. *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12,034, 12,039 (1997) (“[G]ender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex, but not involving conduct of a sexual nature, may be a form of sex discrimination that violates Title IX.”).

Recent case law in the Title VII context, although not directly relevant for Title IX analysis, has demonstrated a circuit split regarding the elements of gender discrimination. Some circuits have held that a sexual harassment complainant must demonstrate intentional discrimination, while others have indicated that a showing of disparate impact is sufficient for Title VII purposes. Those circuits falling within the first group have held that it is insufficient to allege that one is disparately impacted, as a male or female, by speech or conduct in the workplace, and that one must allege that he or she was actually the target of such speech or conduct. *See, e.g.*, *Duncan v. Manager, Dep’t of Safety, City & County of Denver*, 397 F.3d 1300, 1312 (10th Cir. 2005); *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 332 (4th Cir. 2003); *Scusa v. Nestle U.S.A. Co., Inc.*, 181 F.3d 958, 965 (8th Cir. 1999); *Lyle v. Warner Bros. Television Prod.*, 132 P.3d 211, 229 (Cal. 2006). The circuits in the second category, conversely, have held that speech or conduct which one overhears, even though not directed or targeted at that person, can create a hostile environment. *See, e.g.*, *Reeves v. C.H. Robinson Worldwide, Inc.*, 525 F.3d 1139, 1143 (11th Cir. 2008); *Patane v. Clark*, 508 F.3d 106, 114 (2d Cir. 2007); *Huff v. Sheahan*, 493 F.3d 893, 903 (7th Cir. 2007).



d. The *Davis* Standard

A Title IX complainant must next demonstrate that the conduct in question rises to the level of actionable harassment. With respect to student-on-student hostile environment sexual harassment, the Supreme Court's decision in *Davis* established a standard which is highly protective of speech; the alleged conduct must be "so severe, pervasive, and objectively offensive, and . . . so undermine[] and detract[] from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."<sup>113</sup> Moreover, the conduct must have a "systemic effect" on a student's access to educational programs or activities.<sup>114</sup> Critically, as I shall fully discuss later in this article,<sup>115</sup> the *Davis* standard is legally distinct from the Title VII standard which governs harassment in the employment setting: conduct which is "sufficiently severe *or* pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"<sup>116</sup> Compared to the Title VII standard, the *Davis* standard is more stringent and encompasses a narrower range of conduct.

As the Court's first and, to this point, only decision on peer harassment, *Davis* has been widely followed by courts deciding subsequent peer

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Despite the current circuit split, some legal commentators have argued in favor of the disparate treatment approach. Eugene Volokh has proposed drawing a line in the employment context "between *directed* speech—speech that is aimed at a particular employee because of her race, sex, religion, or national origin—and *undirected* speech, speech between other employees that is overheard by the offended employee, or printed material, intended to communicate to the other employees in general, that is seen by the offended employee." Eugene Volokh, Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1846 (1992) (emphasis in the original). "The state interest in assuring equality in the workplace would justify restricting directed speech, but not undirected speech." *Id.*

Similarly, Nadine Strossen has argued that harassment, properly construed, is "a type of conduct which is legally proscribed in many jurisdictions when *directed at a specific individual or individuals* and when intended to frighten, coerce, or unreasonably harr[y] or intrude upon its *target*." Strossen, *supra* note 59, at 706 (quoting ACLU, POLICY GUIDE OF THE AMERICAN CIVIL LIBERTIES UNION, Policy No. 72a (rev. ed. 1995)) (emphasis added). She therefore advocates distinguishing "generalized statements of opinion—which should enjoy absolute protection no matter how sexist—from gender-based verbal abuse that . . . is targeted on a particular employee." *Id.* at 717 (quoting Kingsley R. Browne, *Stifling Sexually Hostile Speech: To What Extent Does the First Amendment Limit the Reach of Sexual Harassment Law When the Hostile Environment is Created by Speech?*, CONN. L. TRIB., Nov. 29, 1993, at 19). A proper understanding of sexual harassment as a form of gender-based discrimination, both in education and in the workplace, must not lose sight of these important principles.

113. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651 (1999).

114. *Id.* at 652

115. *See infra* Part IV.A.1.

116. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) (emphasis added)).

harassment cases.<sup>117</sup> While many of these cases, like *Davis* itself, arose outside of the college or university setting (i.e., in elementary or secondary schools), decisions such as *Benefield ex rel. Benefield v. Board of Trustees of the University of Alabama at Birmingham*,<sup>118</sup> *Simpson v. University of Colorado Boulder*,<sup>119</sup> and *Williams v. Board of Regents of the University System of Georgia*,<sup>120</sup> all of which arose in higher education, hold that the *Davis* standard is fully applicable to the college or university campus.<sup>121</sup>

e. Actual Knowledge and Deliberate Indifference

Finally, a peer harassment complainant must establish a basis for imposing institutional liability. This requires him or her to first establish that the institution is a Title IX funding recipient, in order to subject it to Title IX liability.<sup>122</sup> The complainant must then demonstrate that the educational institution had “actual knowledge”<sup>123</sup> of the complained-of conduct and responded in a manner suggesting “deliberate indifference.”<sup>124</sup>

Actual knowledge, or actual notice, requires that an “appropriate person” have the requisite knowledge, meaning “at a minimum, an official of the

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117. See, e.g., *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 171 (1st Cir. 2007); *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1176 (10th Cir. 2007); *Williams v. Bd. of Regents*, 477 F.3d 1282, 1293 (11th Cir. 2007); *Doe v. Bellefonte Area Sch. Dist.*, 106 Fed. App’x 798, 800 n.1 (3d Cir. 2004); *Winzer v. Sch. Dist. for City of Pontiac*, 105 Fed. App’x 679, 681 (6th Cir. 2004); *Hawkins v. Sarasota County Sch. Bd.*, 322 F.3d 1279, 1284–85 (11th Cir. 2003); *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 739 (9th Cir. 2000); *Soper v. Hoben*, 195 F.3d 845, 854–55 (6th Cir. 1999); *Drews v. Joint Sch. Dist. No. 393*, No. CV04-388-N-EJL, 2006 U.S. Dist. LEXIS 29600, at \*8 (D. Idaho 2006); *Benefield v. Bd. of Trs.*, 214 F. Supp. 2d 1212, 1221 (N.D. Ala. 2002).

118. 214 F. Supp. 2d 1212.

119. 500 F.3d 1170.

120. 477 F.3d 1282.

121. However, absent an on-point Supreme Court decision, one that clarifies that the *Davis* standard applies to higher education, the possibility still exists that some courts may apply lesser standards when deciding Title IX college cases. In particular, they may defer to the OCR formulation of hostile environment, since OCR is the federal agency charged with enforcing compliance with Title IX. See generally, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 34 C.F.R. § 106 (2008). In a 2003 letter sent to colleges and universities to clarify the scope and meaning of federal harassment regulations, OCR defined actionable hostile environment harassment as “sufficiently serious (i.e., severe, persistent or pervasive) as to limit or deny a student’s ability to participate in or benefit from an educational program.” See Gerald A. Reynolds, Office for Civil Rights, First Amendment: Dear Colleague, <http://www.ed.gov/about/offices/list/ocr/firstamend.html> (last visited Mar. 9, 2009) (emphasis added). By its terms, this standard is not as stringent, and consequently not as protective of speech, as the *Davis* formulation.

122. *Williams*, 477 F.3d at 1293.

123. *Id.*

124. *Id.* (quoting *Davis Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999)).

recipient entity with authority to take corrective action to end the discrimination.”<sup>125</sup> OCR has clarified that its regulations do not require any school employee, regardless of his or her actual authority, to be responsible for taking the necessary steps to end the harassment or prevent its recurrence.<sup>126</sup> Rather, an employee lacking such authority may be “required only to report the harassment to other school officials who have the responsibility to take appropriate action.”<sup>127</sup>

An educational institution’s failure adequately to respond to known instances of sexual harassment will amount to deliberate indifference “only where the recipient’s response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.”<sup>128</sup> The proper inquiry is whether the institution’s response, or lack thereof, “subject[ed]” the complainant to gender discrimination, or in other words “cause[d] [the student] to undergo” discrimination or “[made him or her] liable or vulnerable” to it.<sup>129</sup> This reflects the fact that a school cannot be held liable solely for the harassing behavior of someone affiliated with it, but only for its own wrongdoing in failing to react appropriately.<sup>130</sup>

Two recent decisions hold that a complainant can establish institutional liability under Title IX through “before-the-fact” deliberate indifference just as he or she could through “after-the-fact” deliberate indifference.<sup>131</sup> In the vast majority of cases, the complainant alleges that the educational institution was deliberately indifferent to known acts of sexual harassment that had already occurred. However, the Eleventh Circuit recognized a plaintiff’s claim that her University was liable for a student-athlete’s sexual assault perpetrated upon her, where the University knew that the student-athlete had previously committed acts of sexual misconduct while attending other schools.<sup>132</sup> In essence, the court held that the University’s failure adequately to counsel the student-athlete and monitor his behavior, given its knowledge of his proclivities for sexual misconduct, amounted to deliberate indifference on its part.<sup>133</sup>

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125. *Id.* at 1293 (quoting *Gebser v. Lago Vista Indep. Sch. Dist.* 524 U.S. 274, 290 (1998)).

126. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,037 (1997).

127. *Id.*

128. *Davis*, 526 U.S. at 648.

129. *Id.* at 644–45 (quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1415 (1966)).

130. *Id.* at 640–41.

131. See *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170 (10th Cir. 2007); *Williams v. Bd. of Regents*, 477 F.3d 1282 (11th Cir. 2007).

132. *Williams*, 477 F.3d at 1296.

133. See *id.* Likewise, plaintiff’s Title IX claim in *Simpson*, in which she alleged that she had been sexually assaulted by university football players and football recruits, was based on “before-the-fact” deliberate indifference. Plaintiff presented evidence

## B. Setting the Title VI Landscape

### 1. What is the Aim of Title VI?

Title VI of the Civil Rights Act of 1964 prohibits racial discrimination in programs receiving federal funding. It states in pertinent part, “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>134</sup> Unlike Title IX, which covers only educational institutions, Title VI applies to all programs receiving federal funding and thus has a broader scope of coverage.<sup>135</sup>

In the academic context, Title VI is administered by OCR. The agency has issued guidelines on Title VI in which it defines racial discrimination as follows:

[A] recipient violates title VI if one of its agents or employees, acting within the scope of his or her official duties, has treated a student differently on the basis of race, color, or national origin in the context of an educational program or activity without a legitimate, nondiscriminatory reason so as to interfere with or limit the ability of the student to participate in or benefit from the services, activities or privileges provided by the recipient.<sup>136</sup>

In the same guidelines, OCR recognizes hostile environment racial harassment as a form of actionable racial discrimination under Title VI.<sup>137</sup>

### 2. When Is Peer Racial Harassment Actionable Under Title VI?

The jurisprudence on hostile environment racial harassment under Title VI is sparse. There have been few reported decisions in this area of the law, and indeed, as recently as 1998, the Ninth Circuit stated it was “aware of no reported decision addressing the circumstances under which a school district’s failure to respond to racial harassment of one or more pupils by other students constitutes a violation of Title VI.”<sup>138</sup> Given the dearth of

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showing that there was an obvious risk of sexual assault during football recruiting visits, and that the University was aware of this risk. *Simpson*, 500 F.3d at 1173. The court found that the University’s “failure to provide adequate supervision and guidance to player-hosts” during football recruiting visits amounted to institutional deliberate indifference. *Id.*

134. Civil Rights Act of 1964, tit. VI, 42 U.S.C. § 2000d (2000).

135. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998).

136. Racial Incidents and Harassment Against Students at Educational Institutions: Investigative Guidance, 59 Fed. Reg. 11,448, 11,448 (1994).

137. *Id.* at 11,449.

138. *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1032 (9th Cir. 1998); see also Paul C. Sweeney, *Abuse, Misuse & Abrogation of the Use of Legislative History: Title IX & Peer Sexual Harassment*, 66 UMKC L. REV. 41, 50 n.47

reported decisions, as well as the fact that the Supreme Court has never addressed Title VI hostile environment racial harassment, it is not surprising that the case law is unsettled as to when an educational institution can be held liable for student-on-student racial harassment.

At the same time, courts have indicated that Title VI should be adjudicated under a legal framework similar to the one developed under Title IX. The Supreme Court has commented that Title IX, when enacted, was modeled after Title VI and that Title VI “is parallel to Title IX except that it prohibits race discrimination, not sex discrimination, and applies in all programs receiving federal funds, not only in educational programs.”<sup>139</sup> Therefore, “[t]he two statutes operate in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds.”<sup>140</sup> This contractual framework of the sister Spending Clause statutes<sup>141</sup> distinguishes them from Title VII, which is “framed in terms not of a condition but of an outright prohibition” and “applies to all employers without regard to federal funding.”<sup>142</sup>

The Court has recognized that Title VI and Title IX “provide the same administrative mechanism for terminating federal financial support for institutions engaged in prohibited discrimination” and that “[n]either statute expressly mentions a private remedy for the person excluded from participation in a federally funded program.”<sup>143</sup> It has also noted, “The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been,”<sup>144</sup> which is significant because “when Title IX was enacted, the critical language in Title VI had already been

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(1997) (“Litigation under Title VI has focused on discriminatory admission policies and their impact upon racial minorities. Title VI has not been used to remedy discrimination in the post-access educational environment.”).

139. *Gebser*, 524 U.S. at 286.

140. *Id.*

141. Courts have often held that Spending Clause statutes mirror each other, and not Title VII. *See, e.g.*, *Barnes v. Gorman*, 536 U.S. 181, 185–88 (2002) (holding that punitive damages are not available under the federal Rehabilitation Act, 29 U.S.C. § 794(a), precisely because punitive damages would not be available under other Spending Clause statutes such as Title VI and Title IX, whereas they would be available under Title VII); *see also* *Mercer v. Duke Univ.*, 50 F. App’x 643, 644 (4th Cir. 2002) (holding that punitive damages are not available under Title IX because they are not available under the Rehabilitation Act, its sister Spending Clause statute, under the *Barnes* decision); *Santos v. Merritt Coll.*, No. C-07-5227, 2008 WL 2622792 (N.D. Cal. July 1, 2008) (holding that punitive damages are not available under Title VI because they are not available under the Rehabilitation Act under the *Barnes* decision); *cf.* *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526 (1999) (holding punitive damages are available under Title VII).

142. *Gebser*, 524 U.S. at 286.

143. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 695–96 (1979).

144. *Id.* at 696 (citing 117 Cong. Rec. 30408 (1971) (statement of Senator Bayh)).

construed as creating a private remedy.”<sup>145</sup> Thus, given the parallels between the two statutes, including the fact that both include a judicially-recognized, implied private right of action, it should not be surprising that courts deciding Title VI racial harassment cases have tended to borrow from Title IX case law.

In *Bryant v. Independent School District Number I-38*,<sup>146</sup> for example, the Tenth Circuit stated that the Supreme Court’s decision in *Davis* would guide its resolution of the racial harassment claim before it, as “the Court’s analysis of what constitutes intentional sexual discrimination under Title IX directly informs our analysis of what constitutes intentional racial discrimination under Title VI.”<sup>147</sup> Another federal court observed that “[c]ourts have often noted the similarity in purpose and construction of Title VI and Title IX” and therefore “have consistently found language of Title IX decisions applicable to Title VI cases.”<sup>148</sup> Similarly, other courts have affirmed that “the reasoning that applies to Title IX cases applies to Title VI claims as well,”<sup>149</sup> and that “Title VI claims are analyzed under the same standards applied to Title IX claims.”<sup>150</sup>

As these precedents indicate, the required elements for setting forth a Title VI racial harassment claim largely parallel the Title IX elements discussed in the previous subsection.<sup>151</sup> Courts deciding Title VI cases have conducted the same analyses as seen in Title IX cases for the elements of membership in a protected group,<sup>152</sup> unwelcome conduct,<sup>153</sup> and

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145. *Id.*

146. 334 F.3d 928 (10th Cir. 2003).

147. *Id.* at 936.

148. *Davison v. Santa Barbara High Sch. Dist.*, 48 F. Supp. 2d 1225, 1229 (C.D. Cal. 1998) (quoting *Grimes v. Sobol*, 832 F. Supp. 704, 711 (S.D.N.Y. 1993)). Later in the same opinion, the court reiterated, “A racially hostile environment is as actionable under Title VI as is a sexually hostile environment under Title IX.” *Id.* at 1231.

149. *Folkes v. N.Y. Coll. of Osteopathic Med.*, 214 F. Supp. 2d 273, 292 (E.D.N.Y. 2002).

150. *Shelton v. Trs. of Columbia Univ.*, No. 04 Civ 6714, 2005 U.S. Dist. LEXIS 26480, at \*18 (S.D.N.Y. Oct. 31, 2005); *see also Steel v. Alma Pub. Sch. Dist.*, 162 F. Supp. 2d 1083, 1085 (W.D. Ark. 2001) (“Title IX and Title VI are parallel to each other and operate in the same manner”); *Malcolm W. v. Novato Unified Sch. Dist.*, No. A094563, 2002 Cal. App. Unpub. LEXIS 11443, at \*8 n.3 (Cal. App. 2002) (“Because Title IX and Title VI both apply to educational programs receiving federal funds, they are interpreted in the same manner.”).

151. *See supra* Part II.A.2.

152. Like Title IX, Title VI expressly states that no “person” shall be subjected to discrimination on the basis of race, color, or national origin. *See* 42 U.S.C. § 2000d (2000). This element is therefore easily satisfied. *See, e.g., Center Grove Cmty. Sch.*, OCR Case No. 15-91-1168 (Dec. 31, 1991) (finding that Title VI was violated where a white student was forced to withdraw from all-white school as a result of harassment by classmates, which included a note criticizing her association with black student at another school). *But see Seabrook v. City of New York*, 509 F. Supp. 2d 393, 406 (S.D.N.Y. 2007) (holding that plaintiffs failed to state a claim under Title VI

discrimination on the basis of race (though this element is, of course, “based on sex” in Title IX suits).<sup>154</sup> These elements are therefore uncontroverted in Title VI case law, with Title IX jurisprudence serving as a guide. As such, I will simply refer here to my previous discussion of these elements in the Title IX context.

The final two elements, however, remain unsettled. First, it is unresolved whether the *Davis* standard for actionable sexual harassment governs Title VI racial harassment cases, or whether a different standard applies. Likewise, it is unresolved whether the Title IX standards of “actual notice” and “deliberate indifference” govern the issue of institutional liability under Title VI. Federal courts have taken diverging approaches to these two elements and, in the absence of a Title VI racial harassment decision from the Supreme Court, may continue to do so.

a. The *Davis* Standard?

On at least three occasions courts have decided Title VI racial harassment cases under the *Davis* standard. In the aforementioned *Bryant* decision,<sup>155</sup> the Tenth Circuit expressly indicated, “On remand, the district court is instructed to apply [the test] applied by the Supreme Court in *Davis*.”<sup>156</sup> *Bryant* involved allegations by a group of high school students that school officials had facilitated and maintained a racially hostile educational environment by tolerating racial slurs, epithets, and racially charged symbols and clothing.<sup>157</sup> In overturning the lower court’s decision to grant summary judgment to the school district, the Tenth Circuit stated that plaintiffs would have to demonstrate that the conduct in question was “so severe, pervasive and objectively offensive that it . . . deprived the victim of access to the educational benefits or opportunities provided by the school.”<sup>158</sup>

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because they did not specify the protected group to which they belonged and merely stated that they were “targeted by the defendants because of their *race, color, and national origin*” (quoting Complaint at ¶ 116, *Seabrook*, 509 F. Supp. 2d 393 (No. 05 Civ. 10760) (emphasis added)); *Flores v. Arizona*, 172 F. Supp. 2d 1225, 1240 (D. Ariz. 2000) (holding that “low-income ‘at risk’ students” are not a protected class under Title VI).

153. See, e.g., *Davison*, 48 F. Supp. 2d at 1230 (following *Nicole M. v. Martinez Unified Sch. Dist.*, 964 F. Supp. 1369, 1376 (N.D. Cal. 1997), a Title IX student-on-student sexual harassment case).

154. *Id.*; see also *Racial Incidents and Harassment Against Students at Educational Institutions*, 59 Fed. Reg. 11,448, 11,449 (1994) (stating that Title VI racial harassment “need not be based on the ground of the victim’s or complainant’s race, so long as it is racially motivated”).

155. See *Bryant v. Indep. Sch. Dist. No. I-38*, 334 F.3d 928 (10th Cir. 2003).

156. *Id.* at 934.

157. *Id.* at 931.

158. *Id.* at 934 (quoting *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1246 (10th Cir. 1999)).

*Malcolm W. v. Novato Unified School District*<sup>159</sup> is another case in which a court expressly followed *Davis* in adjudicating a Title VI racial harassment claim. There, the Court of Appeal of California affirmed the relevance of *Davis* for these cases, stating that in *Davis*, the Supreme Court “set forth the test for a school district’s liability for discrimination in the form of student-on-student harassment.”<sup>160</sup> In other words, the same was true for both sexual and racial harassment. Therefore, the court required the plaintiffs to demonstrate conduct which was “so severe, pervasive and objectively offensive that it effectively bars a victim’s access to an educational opportunity or benefit.”<sup>161</sup>

In another Title VI case, the complainant alleged that she was subjected to a racially hostile educational environment in the defendant University’s physician-assistance program.<sup>162</sup> The federal district court required her to demonstrate that the alleged behavior was “so severe, pervasive, and objectively offensive that it . . . deprived plaintiff of access to the educational benefits or opportunities provided by the Program.”<sup>163</sup> In other Title VI cases, however, courts have applied a lesser standard to the alleged creation of a hostile educational environment.

The Seventh Circuit, for instance, declined to follow *Davis* in *Qualls v. Cunningham*,<sup>164</sup> which involved a former university student’s Title VI suit for the alleged creation of a racially hostile environment on campus. The court framed the issue as whether “the alleged harassment was severe or pervasive enough to deprive [plaintiff] of access to educational benefits.”<sup>165</sup> In delineating this standard, however, *Qualls* cited to *Bryant*,<sup>166</sup> making this decision an ambivalent one on this issue, leaving open the possibility that the Seventh Circuit may, in a subsequent Title VI case, follow *Bryant*’s lead in adopting the *Davis* standard.

Other courts have been clearer in rejecting the *Davis* standard and adopting a lesser standard for the creation of a hostile educational environment. The Western District of Virginia,<sup>167</sup> the Eastern District of

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159. No. A094563, 2002 Cal. App. Unpub. LEXIS 11443 (Cal. App. 2002).

160. *Id.* at \*6.

161. *Id.* (citing *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999)).

162. *Koumantaros v. City Univ. of New York*, No. 03 Civ. 10170, 2007 U.S. Dist. LEXIS 19530 (S.D.N.Y. 2007).

163. *Id.* at \*50.

164. 183 F. App’x 564 (7th Cir. 2006). As an unpublished opinion, *Qualls* does not have precedential authority in the Seventh Circuit. *See, e.g.*, *Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526 (7th Cir. 1990) (refusing to follow *Havens S. Suburban Hous. Ctr. v. Santefort Real Estate, Inc.*, 857 F.2d 1476 (7th Cir. 1988), under 7th Cir. R. 53(b)(2)). Nonetheless, it is notable as a federal appellate court decision applying a hostile environment standard which is less stringent than the *Davis* standard.

165. *Qualls*, 183 F. App’x at 567.

166. *Id.*

167. *Langadinos v. Appalachian Sch. of Law*, No. 1:05CV00039, 2005 U.S. Dist.



New York,<sup>168</sup> and the Southern District of New York<sup>169</sup> have all decided Title VI cases by inquiring whether the conduct in question was “sufficiently severe or pervasive”<sup>170</sup> to alter the conditions of the complainant’s education and create an abusive educational environment.<sup>171</sup> In examining whether the alleged conduct was sufficiently severe *or* pervasive, rather than both severe *and* pervasive, these decisions decline to follow *Davis* and instead track the Title VII standard for creation of a hostile environment.<sup>172</sup>

OCR’s guidelines likewise define actionable racial harassment as “sufficiently severe, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by a recipient.”<sup>173</sup> Therefore, there is conflicting legal authority on the governing standard for Title VI racial harassment. The *Bryant* decision, issued by a federal court of appeals, may well persuade other federal courts to apply the *Davis* standard. However, in the absence of a controlling Supreme Court decision, it is also possible that there will continue to be conflicting decisions on this point.

#### b. Institutional Liability

The issue of institutional liability in Title VI racial harassment cases is more settled than the standard for an actionable hostile educational environment. Courts have almost uniformly required Title VI

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LEXIS 20958, at \*15 (W.D. Va. Sept. 25, 2005).

168. *Folkes v. N.Y. Coll. of Osteopathic Med.*, 214 F. Supp. 2d 273, 292 (E.D.N.Y. 2002).

169. *Shelton v. Trs. of Columbia Univ.*, No. 04 Civ 6714, 2005 U.S. Dist. LEXIS 26480, at \*19 (S.D.N.Y. 2005).

170. *Burrow v. Postville Cmty. Sch. Dist.*, 929 F. Supp. 1193, 1201 (N.D. Iowa 1996) (quoting *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1194 (11th Cir. 1996)) (articulating this standard for Title IX).

171. *See also Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1033 (9th Cir. 1998) (quoting *Racial Incidents and Harassment Against Students at Educational Institutions*, 59 Fed. Reg. 11,448, 11,449 (1994)) (citing the OCR guidelines for the proposition that actionable racial harassment must be “severe, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by the recipient”); *Davison v. Santa Barbara High Sch. Dist.*, 48 F. Supp. 2d 1225, 1230 (C.D. Cal. 1998) (quoting *Davis*, 74 F.3d at 1194) (holding that plaintiff had alleged “sufficiently severe or pervasive” harassment for purposes of her Title VI claim). Since both of these decisions were handed down in 1998, prior to the Supreme Court’s decision in *Davis*, they are of limited instructiveness for our discussion. Nonetheless, within the overall dearth of Title VI racial harassment cases, they provide two more examples of courts applying lesser standards for the alleged creation of a hostile educational environment in Title VI case law.

172. *See supra* note 113 and accompanying text.

173. *Racial Incidents and Harassment Against Students at Educational Institutions*, 59 Fed. Reg. at 11,449.

complainants to demonstrate actual notice and deliberate indifference just as in the Title IX context,<sup>174</sup> despite the fact that OCR's guidelines on racial harassment provide for different standards.<sup>175</sup> The uncertainty, however, comes from the Supreme Court's 2001 decision in *Alexander v. Sandoval*.<sup>176</sup>

In *Sandoval*, the Court held that Title VI included a private right of action only to enforce the statute's prohibition against intentional racial discrimination, and did not include a private right of action to enforce "disparate impact" regulations promulgated under the statute.<sup>177</sup> *Sandoval* dealt with disparate impact discrimination and did not involve a hostile environment claim. However, courts deciding Title VI racial harassment cases after *Sandoval* have struggled to determine whether an educational institution's deliberate indifference to known acts of racial harassment constitutes intentional racial discrimination and is therefore redressable in a private action.

The Tenth Circuit in *Bryant* answered the question in the affirmative, declaring, "It is inapposite that a court could hold that maintenance of a hostile environment is never intentional. Such a broad holding would permit school administrators to sit idly, or intentionally, by while horrible acts of discrimination occurred on their grounds by and to students in their charge."<sup>178</sup> The court clarified that it was not imposing on administrations a duty "to seek out and discover instances of discrimination or risk being held liable for intentional discrimination."<sup>179</sup> However, "when administrators who have a duty to provide a nondiscriminatory educational environment for their charges are made aware of egregious forms of intentional discrimination and make the intentional choice to sit by and

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174. See, e.g., *Bryant v. Indep. Sch. Dist. No. I-38*, 334 F.3d 928, 934 (10th Cir. 2003); *Koumantaros v. City Univ. of N.Y.*, No. 03 Civ. 10170, 2007 U.S. Dist. LEXIS 19530, at \*50 (S.D.N.Y. Mar. 15, 2007); *Folkes v. N.Y. Coll. of Osteopathic Med.*, 214 F. Supp. 2d 273, 292-93 (E.D.N.Y. 2002); *Malcolm W. v. Novato Unified Sch. Dist.*, No. A094563, 2002 Cal. App. Unpub. LEXIS 11443, at \*6 (Cal. App. 2002). The only two Title VI racial harassment decisions which adopted a different institutional liability standard than the one used in Title IX caselaw both came before *Davis* and therefore have not been followed in any subsequent cases. See *Monteiro*, 158 F.3d at 1034 (holding that a school district could be held liable for peer racial harassment under "actual or constructive notice," but upholding the Title IX requirement of deliberate indifference); *Davison*, 48 F. Supp. 2d at 1230-31 (holding that a school district could be held liable for peer racial harassment if it "knew or should have known" of the alleged conduct and failed to take "prompt, appropriate remedial action") (quoting *Nicole M. v. Martinez Unified Sch. Dist.*, 964 F. Supp. 1369, 1426 (N.D. Cal. 1997)).

175. 59 Fed. Reg. at 11,449 (declaring that institutional liability is established under the standards of "actual or constructive notice" and failure "to respond adequately to redress the racially hostile environment").

176. 532 U.S. 275 (2001).

177. *Id.* at 279-80, 293.

178. *Bryant*, 334 F.3d at 933.

179. *Id.*

do nothing, they can be held liable” under Title VI.<sup>180</sup> In the case before it, the court determined that the school principal “affirmatively chose to take no action” despite receiving numerous complaints and therefore “might have facilitated the hostile environment or, in the least, permitted it to continue.”<sup>181</sup>

At the same time, the Tenth Circuit cautioned that “the question of intent in a hostile environment case is necessarily fact specific” and framed the issue before it as “whether the events and inaction in this case reached a point where it can be fairly said that the principal and administrators acted intentionally.”<sup>182</sup> Moreover, it read *Davis* as holding that “in certain circumstances, ‘deliberate indifference to known acts of [student-on-student] harassment’ can constitute ‘an intentional violation of Title IX,’”<sup>183</sup> suggesting that demonstrated deliberate indifference might not be sufficient in some cases. The *Bryant* court’s focus on intentional discrimination, rather than the deliberate indifference standard, as the true basis for institutional liability therefore creates some ambivalence about its ultimate holding on the issue of Title VI liability.

The *Koumantaros* court echoed the Tenth Circuit’s approach. It stated that an educational institution can be found liable under Title VI “if it is deliberately indifferent to racial harassment to such an extent that the indifference can be seen as racially motivated.”<sup>184</sup> Once again, it did not adopt the deliberate indifference standard outright, but rather qualified it with the “racially motivated” language. Since it might be difficult to determine whether race-based motives existed in a particular case, the court clarified that a Title VI complainant “does not have to show that defendant actively ‘encouraged’ or ‘condoned’ the harassment.”<sup>185</sup> Rather, “‘turn[ing] a blind eye’ to the harassment is enough to state a prima facie case of hostile educational environment.”<sup>186</sup> While these pronouncements are helpful, they fall short of establishing that demonstrated deliberate indifference will always be sufficient to hold an institution liable under Title VI.

In contrast to *Bryant* and *Koumantaros*, the court in *Langadinos* took a more stringent approach to *Sandoval*’s requirement of intentional

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180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 934 (quoting *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 633 (1999)).

184. *Koumantaros v. City Univ. of N.Y.*, No. 03 Civ. 10170, 2007 U.S. Dist. LEXIS 19530, at \*48 (S.D.N.Y. Mar. 15, 2007) (quoting *Rodriguez v. N.Y. Univ.*, No. 05 Civ. 7374, 2007 U.S. Dist. LEXIS 3242, at \*6 (S.D.N.Y. Jan. 13, 2007)).

185. *Id.* (quoting *Deleon v. Putnam Valley Bd. of Educ.*, No. 03 Civ. 10274, 2006 U.S. Dist. LEXIS 3337, at \*12 (S.D.N.Y. Jan. 26, 2006)).

186. *Id.* (quoting *Deleon*, 2006 U.S. Dist. LEXIS 3337, at \*12).

discrimination. The court declared that an educational institution faces Title VI liability “only when it intentionally does something wrong, not when it merely sits by and does nothing at all.”<sup>187</sup> In the case before it, the court characterized the plaintiff’s complaint as focusing on the school’s “omissions, rather than on any intentional decision to discriminate.”<sup>188</sup> This was deemed insufficient, as the school could not be held liable “as a result of its ‘conscious disregard’ for the plaintiff’s rights” or “merely because it failed to do anything to help him.”<sup>189</sup>

Given the stringent approach taken by the *Langadinos* court, as well as the ambivalent language contained in the *Bryant* and *Koumantaros* opinions, it remains an open question whether a Title VI racial harassment complainant can establish institutional liability by demonstrating actual notice and deliberate indifference or instead will be held to a higher standard under the rubric of intentional discrimination. Despite the fact that courts deciding Title VI harassment cases have almost uniformly applied the standards of actual notice and deliberate indifference, in the aftermath of *Sandoval*, this framework stands on less secure ground under Title VI than under Title IX. Therefore, a Title VI complainant must at least satisfy the Title IX standards for institutional liability and, depending upon the court’s interpretation of Title VI, may well have to meet a higher standard.

### III. COLLEGES AND UNIVERSITIES ARE OVERSTEPPING THEIR TITLE VI AND TITLE IX OBLIGATIONS AND IGNORING BOTH OCR POLICY AND CLEAR LEGAL PRECEDENT

Having discussed the obligations that Title IX and Title VI place upon educational institutions, I will now analyze the tendency on the part of some colleges and universities to overstep these obligations when addressing the problems of sexual and racial harassment. First, these institutions, in enacting and applying their harassment policies, have ignored the fundamental and crucial distinction between pure speech and actionable harassing conduct. Second, they have acted contrary to stated OCR policy. Third, they have acted contrary to the strong legal precedent set by cases uniformly striking down infirm college and university harassment policies and invalidating institutions’ overbroad applications of their policies.

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187. *Langadinos v. Appalachian Sch. of Law*, No. 1:05CV00039, 2005 U.S. Dist. LEXIS 20958, at \*30–31 (W.D. Va. Sept. 25, 2005).

188. *Id.* at \*31.

189. *Id.*

### A. The Misconception of Conduct Versus Speech

First, a fundamental flaw common to some institutions' approaches to hostile environment is the misconception that pure speech, as opposed to a pattern of conduct, can constitute actionable harassment. This problem is manifested both in the drafting of infirm harassment policies and in the overbroad application of harassment rationales, as illustrated by many of the previously discussed examples.<sup>190</sup> In both situations, these colleges and universities improperly prohibit and punish pure verbal expression, typically focusing on that which is deemed to be offensive or undesirable. In doing so, they fail to recognize that sexual and racial harassment law, properly understood, are aimed at extreme patterns of behavior, and that speech can only be an incidental part of such conduct.<sup>191</sup> They may even misconstrue harassment as an outright exception to the First Amendment. However, it is plainly obvious that there is no such First Amendment exception,<sup>192</sup> as the Supreme Court has affirmed time and again the protected status of offensive, prejudicial, and demeaning speech.<sup>193</sup>

Moreover, Title IX and Title VI case law strongly mandate that pure

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190. See *infra* Parts I.A., I.B.

191. See, e.g., *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001) (striking down school district's anti-harassment policy on overbreadth grounds, declaring, "There is of course no question that *non-expressive, physically harassing conduct* is entirely outside the ambit of the free speech clause") (emphasis added).

192. See, e.g., *id.* at 204, 209 ("There is no categorical 'harassment exception' to the First Amendment's free speech clause . . . 'Harassing' or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections."); see also *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) ("In *Saxe*, we noted that there is no 'harassment exception' to the First Amendment's Free Speech Clause . . ."); *UWM Post, Inc. v. Bd. of Regents*, 774 F. Supp. 1163, 1177 (E.D. Wis. 1991) ("Since Title VII is only a statute, it cannot supersede the requirements of the First Amendment.").

193. See, e.g., *Virginia v. Black*, 538 U.S. 343, 358 (2003) ("The hallmark of the protection of free speech is to allow 'free trade in ideas'—even ideas that the overwhelming majority of people might find distasteful or discomforting."); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (invalidating hate-speech ordinance); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Cohen v. California*, 403 U.S. 15 (1971) (reversing defendant's conviction for disturbing the peace for wearing a jacket in a courthouse bearing the words "Fuck the Draft"); *Terminiello v. Chicago*, 337 U.S. 1 (1949) (reversing defendant's conviction for disorderly conduct for delivering a public speech with racist and prejudicial messages); see also *Silva v. Univ. of New Hampshire*, 888 F. Supp. 293, 314 (D.N.H. 1994) (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978)) ("The fact that society may find speech offensive is not a sufficient reason for suppressing it"); *Iota Xi Chapter v. George Mason Univ.*, 773 F. Supp. 792, 795 (E.D. Va. 1991) ("The First Amendment does not recognize exceptions for bigotry, racism, and religious intolerance or ideas or matters some may deem trivial, vulgar or profane.");

speech cannot, by itself, create a hostile educational environment. To begin with, the *Davis* standard for hostile environment speaks in terms of “behavior” which is “so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.”<sup>194</sup> In deciding *Davis*, the Supreme Court referred to the harasser-student’s continued five month pattern of conduct, for which he pleaded guilty to sexual battery, and similar conduct directed towards other students, as “sexually harassing conduct.”<sup>195</sup> That he made “vulgar statements” toward the complainant was significant insofar as it contributed to a “prolonged pattern” of attempting to touch her private parts, rubbing his body against her, and otherwise “act[ing] in a sexually suggestive manner” toward her.<sup>196</sup> In other words, the verbal expression involved in the case was but a small part of an extreme and continued pattern of conduct.

The facts before the Court in *Davis* parallel the underlying facts in the vast majority of Title IX and Title VI hostile environment cases, as these cases typically involve similarly extreme patterns of conduct with incidental, if any, speech components.<sup>197</sup> It is not surprising, therefore, that courts deciding Title IX and Title VI cases have echoed the *Davis* opinion in focusing on patterns of harassing conduct rather than pure speech. In *Benefield v. Board of Trustees of the University of Alabama at Birmingham*,<sup>198</sup> for example, the court spoke of Title IX’s proscription of

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194. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 652 (1999).

195. *Id.* at 634–35.

196. *Id.* at 634.

197. *See, e.g.*, *Williams v. Bd. of Regents*, 477 F.3d 1282 (11th Cir. 2007) (alleging sexual assault of college student by student-athlete); *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170 (10th Cir. 2007) (alleging sexual assault of college student by student-athlete); *Bryant v. Indep. Sch. Dist. No. 1-38*, 334 F.3d 928, 931 (10th Cir. 2003) (alleging a Title VI claim arising from racially hostile school environment which included “offensive racial slurs, epithets, swastikas, and the letters ‘KKK’ inscribed in school furniture and in notes placed in African American students’ lockers and notebooks,” as well as white students being allowed to wear clothing featuring the Confederate flag, in violation of school policy); *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253 (6th Cir. 2000) (alleging a Title IX claim arising from student-on-student molestation and physical attacks); *Murrell v. School Dist. No. 1*, 186 F.3d 1238 (10th Cir. 1999) (alleging a Title IX claim arising from the sexual assault of a developmentally disabled student by another student); *Soper v. Hoben*, 195 F.3d 845 (6th Cir. 1999) (alleging a Title IX claim arising from alleged rape and sexual assault of student by another student); *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022 (9th Cir. 1998) (alleging a Title VI claim arising from repeated usage of racial slurs and graffiti on school walls featuring similar racial epithets); *Turner v. McQuarter*, 79 F. Supp. 2d 911 (N.D. Ill. 1999) (alleging a coerced sexual relationship between a college student-athlete and her basketball coach); *S.S. v. Alexander*, 177 P.3d 724 (Wash. Ct. App. 2008) (alleging a Title IX claim arising from alleged rape of student by fellow student).

198. 214 F. Supp. 2d 1212 (N.D. Ala. 2002); *see supra* notes 100–102 and accompanying text.

“conduct that is so severe, pervasive, and objectively offensive . . .” and of “harassing behavior.”<sup>199</sup> In *Theno v. Tonganoxie Unified School District No. 464*,<sup>200</sup> another Title IX case implicating student-on-student harassment, the federal district court detailed a “pattern of harassment” which was “unrelenting” and went on pervasively for four years.<sup>201</sup> In *Monteiro v. Tempe Union High School District*,<sup>202</sup> a Title VI decision, the Ninth Circuit noted that “a hostile environment can be caused by the conduct of peers,” that the school “refused to make any effort to halt the racist conduct,” and that “[a] school where this sort of conduct occurs unchecked is utterly failing in its mandate to provide a nondiscriminatory educational environment.”<sup>203</sup> Similarly, the Tenth Circuit in *Bryant*<sup>204</sup> repeatedly referred to the “shameful student-to-student conduct” which had given rise to the plaintiffs’ Title VI suit.<sup>205</sup>

Affirming the case law under Title IX and Title VI, OCR has delineated the Title IX obligations placed on a funding recipient in terms of “regulating the conduct of its students and its faculty to prevent or redress discrimination prohibited by Title IX.”<sup>206</sup> In the same policy guidance, OCR stated, “Title IX is intended to protect students from sex discrimination, not to regulate the content of speech,” and that a funding recipient must therefore “formulate, interpret, and apply its rules so as to protect academic freedom and free speech rights.”<sup>207</sup> In the Title VI realm, OCR has similarly spoken of the responsibility of federal funding recipients to prevent “harassing conduct” within their programs and activities and of their obligations regarding “discriminatory conduct,” which “causes a racially hostile environment to develop.”<sup>208</sup> The agency stated in the same policy guidance that its guidance “is directed at conduct that constitutes race discrimination under Title VI . . . and not at the content of speech.”<sup>209</sup> Therefore, “OCR cannot endorse or prescribe speech or

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199. *Benfield*, 214 F. Supp. 2d at 1221 (emphasis added).

200. 377 F. Supp. 2d 952 (D. Kan. 2005).

201. *Id.* at 968 (emphasis added).

202. 158 F.3d 1022 (9th Cir. 1998); *see supra* note 138 and accompanying text.

203. *Monteiro*, 158 F.3d at 1032–34 (emphasis added).

204. *Bryant v. Indep. Sch. Dist. No. I-38*, 334 F.3d 928 (10th Cir. 2003).

205. *Id.* at 933 (quoting Record at 303, *Bryant*, 334 F.3d 928 (No. 02-6212)) (emphasis added).

206. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,045 (1997) (emphasis added).

207. *Id.*

208. Racial Incidents and Harassment Against Students at Educational Institutions, 59 Fed. Reg. 11,448, 11,450 (1994) (emphasis added). Elsewhere in its guidance, OCR delineated a funding recipient’s obligation to maintain “a policy that prohibits the conduct of racial harassment” and that moreover is “clear in the types of conduct prohibited.” *Id.* (emphasis added).

209. *Id.* at 11,451 n.1 (emphasis added).

conduct codes or other campus policies to the extent that they violate the First Amendment to the United States Constitution.”<sup>210</sup> Thus, according to the very agency charged with enforcing Title IX and enforcing Title VI in the educational context,<sup>211</sup> those statutes are aimed at preventing and addressing genuinely harassing conduct, not pure speech.

Lastly, legal commentators too have recognized the fundamental distinction between actionable conduct and verbal expression.<sup>212</sup> In the face of such legal authority,<sup>213</sup> it is inapposite for colleges and universities to target and censor pure verbal expression in their efforts to address racial and sexual harassment. There is a clear and substantial difference between a “[c]omment[] or inquir[y] about dating” or “dismissive comment[],”<sup>214</sup> on one hand, and a pattern of genuinely harassing behavior, on the other. The types of innocuous speech that can easily fall into the former category simply do not rise to the level of actionable harassment. There is similarly

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210. *Id.* at 11,450 n.7.

211. Strossen, *supra* note 59 and accompanying text; *see also* Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1033 (9th Cir. 1998) (“The Department of Education is the agency charged by Congress with enforcing Title VI.”).

212. *See* Strossen, *supra* note 59, at 706. In arguing for a balance between free speech principles and workplace sexual harassment law, Strossen states:

The fact that words may be used *in connection with otherwise actionable conduct* does not immunize such conduct from appropriate regulation. For example, intimidating telephone calls, threats of attack, extortion and blackmail are *unprotected forms of conduct which include an element of verbal or written expression*. As always, however, great care must be taken to avoid applying such provisions overbroadly to protected expression.

*Id.* (quoting ACLU, POLICY GUIDE OF THE AMERICAN CIVIL LIBERTIES UNION, Policy No. 72a (rev. ed. 1995)) (emphasis added); *see also id.* at 725 (“[W]hen women or employers cry ‘sexual harassment!’ at any passing reference to sex, they trivialize the issue, make it a laughingstock, and deflect attention and resources from the serious ongoing problems of gender discrimination in the workplace.”). While Strossen’s discussion is focused on sexual harassment law in employment, her arguments regarding the conduct-speech distinction are certainly relevant to the college and university campus and indeed apply with more vigor where the encroachment of harassment law has had a larger impact on speech rights. Given that speech rights are much more important in the college and university setting than in the workplace, Strossen’s observations strongly counsel in favor of paying close attention to the conduct-speech distinction in college and university policy.

213. It bears mentioning here that the focus on patterns of conduct, rather than pure speech, is seen in Title VII hostile environment case law as well. *See, e.g.,* DeAngelis v. El Paso Mun. Police Officers Ass’n, 51 F.3d 591, 596–97 (5th Cir. 1995) (“Where *pure expression* is involved, Title VII steers into the territory of the First Amendment . . . [W]hen Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech.” (emphasis added)); Ariel B. v. Fort Bend Indep. Sch. Dist., 428 F. Supp. 2d 640, 667 (S.D. Tex. 2006) (“The Fifth Circuit has acknowledged that all of the sexual hostile work environment cases decided by the Supreme Court have involved *patterns of long lasting, unredressed sexual conduct* that clearly affected the plaintiffs’ work environments.” (emphasis added)).

214. Davidson College, *supra* note 5; *see supra* note 34 and accompanying text.



a substantial difference between actionable harassment and the respective expressions of Donald Hindley and Tim Garneau.<sup>215</sup> However, by enacting overbroad and vague harassment policies and by enforcing their policies against clearly protected speech, too many colleges and universities have ignored these realities.

#### B. Colleges and Universities Are Acting Contrary to OCR Policy

Colleges and universities taking a misguided approach toward the problems of racial and sexual harassment are also acting contrary to stated OCR policy. This is most visible in the aforementioned 2003 OCR letter<sup>216</sup> sent to federally-funded colleges and universities to clarify the scope and meaning of federal harassment regulations. In the letter, OCR made abundantly clear that, as a federal agency, it cannot force an institution, whether public or private, to ban protected speech in order to comply with its regulations. As the agency charged with enforcing institutional compliance with Title IX and Title VI, OCR policy guidance on the relationship between harassment law and free speech principles is owed substantial deference.<sup>217</sup>

In the 2003 letter, OCR clarified that its regulations “are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution”<sup>218</sup> and added that this held true for private institutions as well as public ones.<sup>219</sup> Regarding the manner in which many schools had

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215. See *supra* Part I.A.

216. See *supra* note 121 and accompanying text.

217. See *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1033 (9th Cir. 1998) (“The Department of Education is the agency charged by Congress with enforcing Title VI. As such, its interpretation is entitled to a high degree of deference by the courts so long as it does not conflict with a clearly expressed congressional intent and it is reasonable.”); *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 658 (5th Cir. 1997) (quoting *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1015 n.20 (5th Cir. 1996)) (“In general, ‘when interpreting title IX we accord the OCR’s interpretations appreciable deference.’”).

218. Reynolds, *supra* note 121.

219. With respect to private institutions, OCR stated the following:

Because the First Amendment normally does not bind private institutions, some have erroneously assumed that OCR’s regulations apply to private federal-funds recipients without the constitutional limitations imposed on public institutions. OCR’s regulations should not be interpreted in ways that would lead to the suppression of protected speech on public or private campuses. Any private post-secondary institution that chooses to limit free speech in ways that are more restrictive than at public educational institutions does so on its own accord and not based on requirements imposed by OCR.

*Id.* See also Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,045 n.95 (1997) (“The receipt of Federal funds by private schools does not directly subject those schools to the U.S. Constitution . . . . However, all actions taken by OCR must comport with First Amendment principles, even in cases involving private schools that

addressed the problem of harassment on campus, the agency stated, "OCR's regulations and policies do not require or prescribe speech, conduct or harassment codes that impair the exercise of rights protected under the First Amendment."<sup>220</sup> Therefore, a college or university cannot infringe upon students' free speech rights and then simply claim that it had no choice if it were to comply with federal harassment regulations. By making this a point of emphasis, OCR sought to eliminate a popular rationale employed by many college and university administrators to justify severe restrictions on campus speech.

As OCR's letter explained, Title IX and Title VI are "intended to protect students from invidious discrimination, not to regulate the content of speech."<sup>221</sup> Significantly, this means that "the offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment" on a college or university campus.<sup>222</sup> Furthermore, any allegedly harassing behavior must be "evaluated from the perspective of a reasonable person in the alleged victim's position."<sup>223</sup> These last two statements appear to be OCR's way of responding to the tendency of college and university administrators to target particular expression merely because some individuals may find it offensive, disagreeable, or uncomfortable.

Therefore, OCR's stated position is that "schools in regulating the conduct of students and faculty to prevent or redress discrimination must formulate, interpret, and apply their rules in a manner that respects the legal rights of students and faculty, including those court precedents interpreting the concept of free speech."<sup>224</sup> It should be noted, moreover, that OCR has presented the same arguments elsewhere, for instance in the

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are not directly subject to the First Amendment.").

220. Reynolds, *supra* note 121.

221. *Id.*

222. *Id.* Elsewhere in the letter, OCR reiterated this point:

Some colleges and universities have interpreted OCR's prohibition of "harassment" as encompassing all offensive speech regarding sex, disability, race or other classifications. Harassment, however, to be prohibited by the statutes within OCR's jurisdiction, must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive. Under OCR's standard, the conduct must also be considered sufficiently serious to deny or limit a student's ability to participate in or benefit from the educational program.

*Id.*

223. *Id.*

224. *Id.* The point should not be lost that OCR once again spoke in terms of regulating *conduct*, not pure verbal expression, in order to prevent gender- or race-based discrimination. This corroborates the points made in the previous subsection regarding the fundamental distinction between conduct and speech. *See supra* Part III.A.

aforementioned policy guidelines.<sup>225</sup> Taken together, these statements should place college and university administrators on notice that federal law cannot be used as a justification for applying overbroad harassment rationales.

### C. Courts Have Repeatedly Struck Down Infirm Harassment Policies.

Colleges and universities misapplying harassment law have also ignored the legal precedent set by decisions striking down college and university harassment policies on the grounds of vagueness, overbreadth, or both. Over the past two decades, courts have uniformly upheld challenges to college and university speech codes, with each case involving a challenge to a harassment policy.<sup>226</sup> This trend demonstrates that a favorite mechanism of the drafters of speech codes is an overbroad harassment rationale. Given the uniformity of these cases, any institution maintaining a similarly infirm harassment policy should understand that its policy is just as unlikely to withstand a constitutional challenge.

The first in this line of cases was *Doe v. University of Michigan*.<sup>227</sup> A student challenged the University's Policy on Discrimination and Discriminatory Harassment, which prohibited, in pertinent part, "[a]ny behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of" race, gender, or other listed characteristics, and that, among other things, "[c]reates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities."<sup>228</sup>

The court in *Doe* found the policy to be facially vague and overbroad in sanctioning expression on the basis of its mere offensiveness.<sup>229</sup> It stated that since terms such as "stigmatizes" and "victimizes" were "general and

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225. See *supra* notes 206–210.

226. See *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008) (sexual harassment policy); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) ("discriminatory harassment" policy); *Coll. Republicans v. Reed*, 523 F. Supp. 2d 1005 (N.D. Cal. 2007) ("intimidation" and "harassment" policy); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (sexual harassment policy); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) ("racism and cultural diversity" policy); *Booher v. N. Ky. Univ. Bd. of Regents*, No. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 21, 1998) (sexual harassment policy); *UWM Post, Inc. v. Bd. of Regents*, 774 F. Supp. 1163 (E.D. Wisc. 1991) ("discriminatory harassment" policy); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) ("discrimination and discriminatory harassment" policy); *Corry v. Leland Stanford Junior Univ.*, No. 740309 (Cal. Super. Ct., Feb. 27, 1995) ("harassment by personal vilification" policy); see also *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001) ("anti-harassment" policy at the secondary school level).

227. 721 F. Supp. 852.

228. *Id.* at 856.

229. *Id.* at 867.

elude[d] precise definition” and since the University “never articulated any principled way to distinguish sanctionable from protected speech,” students were “necessarily forced to guess at whether a comment about a controversial issue would later be found to be sanctionable.”<sup>230</sup> Therefore, there was simply no way to give the policy a constitutionally permissible reading.

In *UWM Post, Inc. v. Board of Regents of the University of Wisconsin*,<sup>231</sup> a federal court found a racial and discriminatory harassment policy to be facially vague and overbroad. The policy prohibited “racist or discriminatory comments, epithets or other expressive behavior” if such conduct intentionally “[d]emean[ed] the race, sex, religion,” or other listed characteristics of an individual and “[c]reate[d] an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity.”<sup>232</sup>

The court rejected the University’s justification that “prohibition of discriminatory speech which creates a hostile environment has parallels in the employment setting,” and that “under Title VII, an employer has a duty to take appropriate corrective action when it learns of pervasive illegal harassment.”<sup>233</sup> The court countered, “Title VII addresses employment, not educational, settings,” and moreover “it cannot supersede the requirements of the First Amendment.”<sup>234</sup> In other words, the standards developed under Title VII hostile environment case law, which allow for comparatively broad regulation of verbal expression in the workplace, have no place in setting standards for speech in the educational setting.

In *Booher v. Northern Kentucky University Board of Regents*,<sup>235</sup> a federal district court declared a sexual harassment policy to be overbroad and vague in prohibiting verbal and non-verbal conduct which “unreasonably affects your status and well-being by creating an intimidating, hostile, or offensive work or academic environment.”<sup>236</sup> Finding that the policy “fail[ed] to draw the necessary boundary between the subjectively measured offensive conduct and objectively measured harassing conduct,”<sup>237</sup> the court concluded that the policy “gives one the impression that speech of a sexual nature that is merely offensive would constitute sexual harassment because it makes the individual hearer

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230. *Id.*

231. 774 F. Supp. 1163.

232. *Id.* at 1165.

233. *Id.* at 1177.

234. *Id.*

235. *Booher v. N. Ky. Univ. Bd. of Regents*, No. 2:96-CV-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. July 21, 1998).

236. *Id.* at \*3.

237. *Id.* at \*28.

uncomfortable to the point of affecting her status and well-being.”<sup>238</sup> Therefore, the policy was clearly capable of reaching protected speech, rendering it unconstitutionally overbroad.<sup>239</sup>

Just as importantly, the court stated,

The fact that the range of speech or expressive conduct prohibited by the policy overlaps the range prohibited by Title VII and Title IX is not necessarily determinative of whether the sweep of the policy impermissibly extends into the region protected by the *First Amendment*. That region is protected against even the reach of statute.<sup>240</sup>

The court also recognized that, in contrast to the policy at issue, OCR policy guidance “stresses that sexual harassment involves conduct—that is, not pure speech,”<sup>241</sup> thus echoing the earlier discussion in this section regarding the fundamental distinction between pure speech and the conduct of harassment.

In a 2007 decision, a federal district court in California issued a preliminary injunction which limited an entire University system’s ability to enforce a policy prohibiting “[c]onduct that threatens or endangers the health or safety of any person within or related to the University community, including physical abuse, threats, *intimidation*, *harassment*, or sexual misconduct.”<sup>242</sup> Recognizing that inclusion of the terms “intimidation” and “harassment” rendered the policy facially overbroad, the court limited enforcement of the policy to only “the sub-category of intimidation and harassment that ‘threatens or endangers the health or safety of any person.’”<sup>243</sup> In other words, it could not be applied against a student merely for engaging in expressive behavior with no intent to threaten or endanger the health or safety of another person. The court reasoned, “Standing alone, the terms ‘intimidation’ and ‘harassment’ are not clearly self-limiting and could be understood, reasonably, to proscribe at least some expressive activity that would be protected by the First Amendment.”<sup>244</sup>

Finally, there is the significant recent decision of *DeJohn v. Temple*

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238. *Id.* at \*30.

239. The court also found that the policy “fail[ed] to give adequate notice regarding precisely what conduct is prohibited,” *id.* at \*31, and “delegate[d] enforcement responsibility with inadequate guidance.” *Id.* at \*32. Therefore, it was unconstitutionally vague as well.

240. *Id.* at \*22 (citing *UWM Post, Inc. v. Bd. of Regents*, 774 F. Supp. 1163, 1177 (E.D. Wis. 1991)) (emphasis added).

241. *Id.* at \*28 n.18.

242. *Coll. Republicans v. Reed*, 523 F. Supp. 2d 1005, 1010 (N.D. Cal. 2007) (emphasis in the original).

243. *Id.* at 1022 (quoting CAL. CODE REGS. tit. 5, § 41301 (2008)).

244. *Id.* at 1021.

*University*.<sup>245</sup> In *DeJohn*, the Third Circuit upheld a student's overbreadth challenge to Temple University's sexual harassment policy.<sup>246</sup> As the most recent of the speech code cases, and as a strongly-worded federal circuit court opinion, *DeJohn* carries much significance and should convey a clear and powerful message to college and university administrators. At issue in *DeJohn* was a policy defining sexual harassment as "expressive, visual, or physical conduct of a sexual or gender-motivated nature, when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work, educational performance, or status; or . . . has the purpose or effect of creating an intimidating, hostile, or offensive environment."<sup>247</sup>

The Third Circuit noted that under the policy's "purpose or effect" prong, "a student who sets out to interfere with another student's work, educational performance, or status, or to create a hostile environment would be subject to sanctions regardless of whether these motives and actions had their intended effect."<sup>248</sup> This prong, it held, ran counter to the requirement that a school "must show that speech will cause actual, material disruption before prohibiting it."<sup>249</sup> Additionally, the court held that the use of terms such as "hostile," "offensive," and "gender-motivated" rendered the policy "sufficiently broad and subjective" that it "could conceivably be applied to cover any speech' of a 'gender-motivated' nature 'the content of which offends someone.'"<sup>250</sup> The court noted that the policy lacked "any requirement akin to a showing of severity or pervasiveness—that is, a requirement that the conduct objectively and subjectively creates a hostile environment or substantially interferes with an individual's work."<sup>251</sup> By thus failing to incorporate the elements of the *Davis* standard, the policy left student speech rights at the mercy of the subjective whims, no matter how unreasonable, of the listener. As a result of these doctrinal flaws, the Third Circuit found the policy to be facially overbroad.

It is not only in the college and university context that courts have found fundamental First Amendment problems with harassment policies.<sup>252</sup> In

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245. 537 F.3d 301 (3d Cir. 2008).

246. *Id.* at 320.

247. *Id.* at 305.

248. *Id.* at 317.

249. *Id.*

250. *Id.* (quoting *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001)).

251. *Id.* at 317–18.

252. See also *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1182 (6th Cir. 1995) (declaring unconstitutionally vague and overbroad a discriminatory harassment policy which defined racial and ethnic harassment as "any intentional, unintentional, physical, verbal, or nonverbal behavior that subjects an individual to an intimidating, hostile or offensive educational, employment or living environment by . . . demeaning or slurring individuals . . . or using symbols, [epithets] or slogans that infer negative connotations

*Saxe v. State College Area School District*,<sup>253</sup> the Third Circuit found a public school district's anti-harassment policy to be unconstitutionally overbroad. The policy banned "verbal or physical conduct" based on another's race, gender, and other listed personal characteristics, when such conduct "has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment."<sup>254</sup>

The Third Circuit held that the policy encompassed speech which did not fall under either federal or state law definitions of harassment,<sup>255</sup> and, moreover, that its restrictions were not necessary to prevent "substantial disruption" or interference with the school environment or the rights of other students.<sup>256</sup> Even under the comparatively lenient standards traditionally accorded by courts to secondary schools' attempts to regulate the behavior of their students,<sup>257</sup> the policy was held to be legally indefensible.

Significantly, the court also noted, "we have found no categorical rule that divests 'harassing' speech, as defined by federal anti-discrimination statutes, of First Amendment protection,"<sup>258</sup> and took critical notice of "the very real tension between anti-harassment laws and the Constitution's

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about the individual's racial or ethnic affiliation"); *Roberts v. Haragan*, 346 F. Supp. 2d 853, 871–72 (N.D. Tex. 2004) (finding a public university's speech code, including sexual harassment provision, to be unconstitutionally overbroad in banning "insults, epithets, ridicule, or personal attacks"); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357, 363 (M.D. Pa. 2003) (enjoining enforcement of University speech code prohibiting "acts of intolerance" based on gender, race, and other personal characteristics, and directing students to speak in a manner that "does not provoke, harass, intimidate, or harm another" (emphasis removed)); *Corry v. Leland Stanford Junior Univ.*, No. 740309 (Cal. Super. Ct., Feb. 27, 1995) (declaring University's discriminatory harassment policy unconstitutionally overbroad under California's Leonard Law, where the policy prohibited "[s]peech or other expression . . . intended to insult or stigmatize an individual" on the basis of gender, race, sexual orientation and other listed categories).

253. 240 F.3d 200 (3d Cir. 2001).

254. *Id.* at 202.

255. *Id.* at 210–11.

256. *Id.* at 216–17.

257. Under *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), a school may categorically prohibit lewd, vulgar, or profane language. Under *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), a school may regulate school-sponsored speech, defined as speech that a reasonable observer would view as the school's own speech, on the basis of any "legitimate pedagogical concern." *Id.* at 273. Finally, under the Supreme Court's seminal decision in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), a student's expression, even if not lewd or profane within the meaning of *Fraser*, and even if not school-sponsored within the meaning of *Hazelwood*, may be regulated if it would "substantially disrupt" or "material[ly] interfere" with the work of the school or the rights of other students. *Id.* at 513–14.

258. *Saxe*, 240 F.3d at 210.

guarantee of freedom of speech.”<sup>259</sup> In handing down its decision, the Third Circuit clarified that students at the secondary level of education, and certainly at the post-secondary level, enjoy speech rights that cannot be easily eroded away in the name of addressing the problems of harassment and discrimination. Therefore, under the baseline level of protection this decision establishes for the college and university setting,<sup>260</sup> a harassment policy which restricts a college or university student’s right to engage in protected speech is invalid.

#### D. Courts Have Repeatedly Invalidated the Application of Harassment Policies toward Protected Speech

Just as courts have repeatedly upheld facial challenges to college and university harassment policies, they have on several occasions invalidated an institution’s decision to apply a harassment policy to protected expression. This line of cases should therefore send an equally strong signal that an “as applied” challenge to a college or university’s abuse of overbroad harassment rationales will very likely succeed when there is a conflict with free speech rights.

In *Cohen v. San Bernardino Valley College*,<sup>261</sup> Professor Dean Cohen brought an action against his College under 42 U.S.C. § 1983, alleging that it had violated his First Amendment rights by ruling that he had violated the school’s sexual harassment policy and taking adverse employment action against him.<sup>262</sup> The harassment finding stemmed from a student’s complaint that Cohen focused on topics of a sexual nature in class discussion, used “profanity and vulgarities,” intentionally directed comments “at her and other female students in a humiliating and harassing manner,” and asserted controversial viewpoints in a “devil’s advocate” style.<sup>263</sup>

The Ninth Circuit held that the College’s policy was unconstitutionally vague as applied to Cohen’s teaching methods.<sup>264</sup> It reasoned, “Cohen’s speech did not fall within the core region of sexual harassment as defined by the Policy. Instead, officials of the College, on an entirely ad hoc basis, applied the Policy’s nebulous outer reaches to punish teaching methods that

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259. *Id.* at 209.

260. While college and university officials may argue that *Saxe* is not directly on-point for the post-secondary level of education, the counterargument is that the result in *Saxe*, which counsels that constitutionally infirm harassment policies violate student speech rights even at the secondary level, underscores the trend highlighted by the aforementioned college and university cases.

261. 92 F.3d 968 (9th Cir. 1996).

262. *Id.* at 970.

263. *Id.* at 970.

264. *Id.* at 972.



Cohen had used for many years.”<sup>265</sup>

In another case, *Silva v. University of New Hampshire*,<sup>266</sup> Professor Donald Silva challenged the University’s decision to suspend him without pay for one year after it found that Silva had violated its sexual harassment policy. A group of students in Silva’s technical writing course had complained after he made statements in class analogizing focus to sex and comparing belly dancing to “jello on a plate with a vibrator under the plate.”<sup>267</sup> A University hearing panel concluded that Silva’s statements were “offensive, intimidating and contributing to a hostile academic environment.”<sup>268</sup>

In adjudicating Silva’s section 1983 claim against the University, the court held that the University’s application of its sexual harassment policy toward Silva’s in-class comments was “not *reasonably* related to the legitimate pedagogical purpose of providing a congenial academic environment because it employs an impermissibly subjective standard that fails to take into account the nation’s interest in academic freedom.”<sup>269</sup> Rather than constituting actionable sexual harassment, Silva’s comments were made “subject to discipline simply because six adult students found his choice of words to be outrageous.”<sup>270</sup> Thus, the court concluded that the University had violated Silva’s First Amendment rights.

Finally, in *Iota Xi Chapter of Sigma Chi Fraternity v. George Mason University*,<sup>271</sup> the Fourth Circuit reviewed a university’s imposition of sanctions against a fraternity for staging an “ugly woman contest.”<sup>272</sup> In the contest, members of the fraternity dressed as “caricatures” of different types of women, including one fraternity member who appeared as an “offensive caricature” of an African-American woman.<sup>273</sup> The University determined that the event created a “hostile learning environment” for female and African-American students, incompatible with the school’s mission, and suspended the fraternity from all activities for the rest of the semester.<sup>274</sup>

The fraternity brought a section 1983 action against the University, seeking to nullify the sanctions as violative of its members’ expressive rights.<sup>275</sup> The Fourth Circuit held that even though the University had a

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265. *Id.*

266. 888 F. Supp. 293 (D.N.H. 1994).

267. *Id.* at 299 (quoting Complaint at 8, *Silva*, 888 F. Supp. 293 (No. 93-533-SD)).

268. *Id.* at 307–08.

269. *Id.* at 314 (emphasis in original).

270. *Id.* at 313.

271. 993 F.2d 386 (4th Cir. 1993).

272. *Id.* at 387.

273. *Id.* at 388.

274. *Id.*

275. *Id.*

“substantial interest” in maintaining a campus free of discrimination and prejudice,<sup>276</sup> it could not, consistent with the First Amendment, place “selective limitations upon speech”<sup>277</sup> and punish students “based on the viewpoints they express.”<sup>278</sup> The court therefore overturned the sanctions imposed against the fraternity.

The import of decisions such as *Cohen*, *Silva*, and *Iota Xi* is that applying harassment policies against protected speech runs against legal precedent in the same way as maintaining facially unconstitutional policies. Given the decisions reached in these cases, college and university administrators should be on notice that overbroad harassment rationales are legally problematic in either form.

#### IV. THE IMPORTATION OF TITLE VII LAW INTO HIGHER EDUCATION AND INSTITUTIONAL FEAR OF EXPANDED LIABILITY FOR PEER HARASSMENT

This article has established that some colleges and universities have overstepped their Title IX and Title VI obligations in drafting and applying their harassment policies and that, in doing so, they have ignored the crucial distinction between pure verbal expression and actionable harassment and acted in clear contravention of both OCR policy and strong legal precedent. It has also demonstrated the harm caused on the college and university campus when student speech rights are restricted. The question then becomes, how has this trend occurred?

A major contributing factor to the problem is the importation of Title VII law into higher education. Courts have in numerous cases conflated Title VII law, which properly governs harassment occurring in the workplace, with Title IX and Title VI law. Some colleges and universities have had a two-fold reaction to these decisions. First, they have interpreted them as expanding the scope of institutional liability for peer racial and sexual harassment. Second, they have interpreted them as signaling and endorsing a complete parallel between Title VII law and Title IX and Title VI law. As a result, those institutions have adopted harassment policies tracking Title VII hostile environment standards, despite the fact that these policies do not leave the necessary breathing room for campus speech. Before discussing these issues, I shall first review employment harassment law under Title VII and then examine how courts have conflated it with Title IX and Title VI law.

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276. *Id.* at 393.

277. *Id.* (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992)).

278. *Id.*

## A. Title VII Standards for Harassment in Employment

## 1. Creation of a Hostile Environment

Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating against any individual “with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”<sup>279</sup> The seminal Supreme Court decision on hostile environment sexual harassment in employment is *Meritor Savings Bank, FSB v. Vinson*,<sup>280</sup> where the Court held that such harassment is a form of gender discrimination within the meaning of Title VII. The Court stated that in order for sexual harassment in the workplace to be actionable under Title VII, it must be “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”<sup>281</sup>

In subsequent case law, the Court emphasized, “We have never held that workplace harassment . . . is automatically discrimination because of sex merely because the words used have sexual content or connotations.”<sup>282</sup> Furthermore, “‘simple teasing,’ . . . offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment.’”<sup>283</sup> Rather, “[t]he critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”<sup>284</sup>

Racial harassment in employment is also adjudicated under the *Meritor* standard. The Supreme Court has cited with approval the practice of drawing upon employment racial harassment cases to decide sexual harassment cases, and vice versa.<sup>285</sup> Thus, courts facing racial harassment

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279. 42 U.S.C. § 2000e-2(a)(1) (2000).

280. 477 U.S. 57 (1986).

281. *Id.* at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

282. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

283. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (quoting *Oncale*, 523 U.S. at 82).

284. *Oncale*, 523 U.S. at 80 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)). In *Harris*, the Court attempted to create a definitive list of factors for courts to consider in deciding Title VII harassment cases: “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Harris*, 510 U.S. at 23. It also clarified that “no single factor is required” to find an abusive work environment. *Id.*

285. See, e.g., *Faragher*, 524 U.S. at 786–87; see also *id.* at 787 n.1 (“Although racial and sexual harassment will often take different forms, and standards may not be entirely interchangeable, we think there is good sense in seeking generally to harmonize the standards of what amounts to actionable harassment.”).

claims under Title VII have required complainants to demonstrate that they were targeted by conduct which was “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.”<sup>286</sup>

With these pronouncements in mind, it is clear that the Title VII standard for the creation of a hostile environment is less stringent and more easily met than the *Davis* standard,<sup>287</sup> which governs Title IX peer sexual harassment cases and which has been applied in several of the Title VI peer racial harassment decisions to date. Whereas Title VII law merely requires conduct to be sufficiently severe *or* pervasive, *Davis* requires conduct to be sufficiently severe *and* pervasive, as well as objectively offensive.<sup>288</sup> There is a significant difference between these requirements. Indeed, the Court specifically stated in *Davis* that, under the standard it was applying, a single instance of peer harassment would not be sufficient to establish a hostile educational environment.<sup>289</sup> A single instance of harassment, no matter how severe, would not meet the requirement of pervasiveness of conduct.<sup>290</sup> By contrast, under the “severe *or* pervasive” standard, a single instance of harassment, if found to be sufficiently severe, would establish the creation of a hostile environment.

Moreover, the requirement that harassing conduct, in order to be actionable under Title VII, must alter the conditions of one’s employment and create an abusive work environment presents a lower threshold than does the requirement under *Davis* that harassing conduct must “so undermine[] and detract[] from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.”<sup>291</sup> Effective denial of equal access to educational opportunities and resources is an extreme result, and therefore a more egregious violation of one’s rights than mere alteration of one’s work environment.<sup>292</sup>

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286. *Lovlace v. B.P. Prods. N. Am., Inc.*, 252 F. App’x 33, 39 (6th Cir. 2007) (quoting *Harris*, 510 U.S. at 21).

287. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651 (1999).

288. *Id.*

289. *Id.* at 652–53 (“[W]e think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment.”).

290. *See, e.g., Hawkins v. Sarasota County Sch. Bd.*, 322 F.3d 1279, 1289 (11th Cir. 2003) (“We take this to mean that gender discrimination must be more widespread than a single instance of one-on-one peer harassment and that the effects of the harassment touch the whole or entirety of an educational program or activity.”).

291. *Davis*, 526 U.S. at 651.

292. To illustrate the type of conduct that would qualify, the Supreme Court in *Davis* used the hypothetical example of male students “physically threaten[ing] their female peers every day, successfully preventing the female students from using a particular school resource,” such as an athletic field or computer lab. *Id.* at 650–51.

Therefore, the *Davis* standard provides far more protection for speech than does the Title VII standard. This has been borne out in the case law on employment harassment, as courts have repeatedly given short service to free speech rights in the workplace.<sup>293</sup> It should not be surprising, therefore, to see that various marginal harassment complaints have been brought in the employment setting on the basis of pure speech.<sup>294</sup> These cases provide a glimpse into the manner in which Title VII law has constrained the freedom of speech in the workplace.

## 2. Employer Liability

Under Title VII, an employer is liable to a victim of sexual or racial harassment perpetrated by a co-worker if it “knew or should have known” about the conduct in question and “failed to implement prompt and appropriate corrective action.”<sup>295</sup> Under the “knew or should have known

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The Court emphasized that, in contrast to such “overt, physical deprivation of access to school resources,” *id.* at 650, it would be insufficient to allege that one was subjected to “simple acts of teasing and name-calling . . . even where these comments target differences in gender.” *Id.* at 652.

293. For instance, in *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), the plaintiff alleged that her co-workers created a hostile work environment by putting up sexually suggestive or demeaning pictures, posters, and similar materials. *Id.* at 1493–99. In finding for her, the federal district court flatly stated that hostile environment claims do not implicate the First Amendment. *Id.* at 1535–36. Moreover, even if the First Amendment protects speech in the workplace, the court held that the government’s compelling interest in eradicating discrimination exempts hostile environment law from First Amendment scrutiny. *Id.*; see also *Baty v. Willamette Indus.*, 985 F. Supp. 987, 995 (D. Kan. 1997), *aff’d*, 172 F.3d 1232 (10th Cir. 1999) (stating, with respect to defendant’s argument that the First Amendment prohibited a finding of liability for hostile work environment sexual harassment, that “the court is persuaded by the reasoning” in *Robinson* and that “since *Robinson*, the Supreme Court has indicated that Title VII does not regulate speech in violation of the First Amendment”); *Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 884 n.89 (D. Minn. 1993) (“[A]cts of expression which may not be proscribed if they occur outside of the work place may be prohibited if they occur at work . . . . Title VII may legitimately proscribe conduct, including undirected expressions of gender intolerance . . . . That expression is ‘swept up’ in this proscription does not violate First Amendment principles.”).

294. In one case, a group of librarians complained that patrons were using library computers to view images that the librarians found offensive. See *Bernstein supra* note 64, at 226, n.14. The Equal Employment Opportunity Commission (EEOC) found that they had “probable cause” to pursue their harassment claim, leading the librarians to file suit against the city library system. *Id.* Apparently, it did not matter to the EEOC that the conduct at issue did not involve any co-workers or supervisors, but solely library patrons, nor did it matter that the librarians inadvertently saw the material rather than intentionally being targeted with it. In other cases, co-workers have brought complaints against a library employee who displayed a New Yorker cartoon containing the word “penis” and against a graduate student who had a small photograph of his wife in a bikini on his desk. See *Volokh, supra* note 46, at 566–67.

295. *Fleener v. Hewitt Soap Co.*, 81 F.3d 48, 50 (6th Cir. 1996) (quoting *Rabidue v. Osceola Refining, Co.*, 805 F.2d 611, 621 (6th Cir. 1986)); see also *Hall v. Gus*

standard,” an employer can be held liable on the basis of “actual” or “constructive” notice of harassing conduct.<sup>296</sup> Constructive notice is established where the harassing conduct was “so severe and pervasive that [the employer] reasonably should have known of it.”<sup>297</sup>

On the other hand, an employer is liable for harassment perpetrated by a supervisor if the conduct was “foreseeable or fell within his scope of employment” and the employer did not respond “adequately and effectively to negate liability.”<sup>298</sup> Courts have made it clear that this “agency” form of liability is broader in scope than the “respondeat superior” form of liability applied in co-worker harassment cases.<sup>299</sup> At the same time, they have cautioned that agency principles should not be construed as imposing strict liability for supervisors’ conduct.<sup>300</sup>

In contrast to employer liability under Title VII, institutional liability under Title IX or Title VI, as previously discussed, requires a showing that a college or university had “actual knowledge” of the complained-of conduct and responded in a manner suggesting “deliberate indifference.”<sup>301</sup> On its face, this standard is distinct from the Title VII standards for liability for both co-worker and supervisor conduct. Title IX and Title VI do not

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Constr. Co., Inc., 842 F.2d 1010, 1013 (8th Cir. 1988).

296. *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1259 (11th Cir. 2003).

297. *Id.* Courts have used the following list of factors on the issue of constructive notice: “the remoteness of the location of the harassment as compared to the location of management; whether the harassment occurs intermittently over a long period of time; whether the victims were employed on a part-time or full-time basis; and whether there were only a few, discrete instances of harassment.” *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 647 (11th Cir. 1997).

298. *Petrone v. Cleveland State Univ.*, 993 F. Supp. 1119, 1130–31 (N.D. Ohio 1998); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 184 (6th Cir. 1992); *see also Yates v. Avco Corp.*, 819 F.2d 630, 636 (6th Cir. 1987) (“The essential question in applying agency principles is whether the act complained of took place in the scope of the agent’s employment. This determination requires an examination of such factors as *when* the act took place, *where* it took place, and whether it was *foreseeable*.” (emphasis in original)).

299. *See Kauffman*, 970 F.2d at 184 (drawing the “distinction between imposing straight common law tort liability under respondeat superior and broadening the scope of an employer’s liability under agency principles,” and arguing that “applying the broader general agency theory in supervisor liability cases fits with the purpose of Title VII”).

300. *Id.* (“[A]gency liability is not strict and can be negated if the employer responds adequately and effectively once it has notice of the actions.”).

301. *See supra*, note 97 and accompanying text. While most courts deciding Title VI peer harassment cases have applied the standards of “actual notice” and “deliberate indifference,” at least one court has held that a Title VI complainant must in fact go beyond this and demonstrate that the educational institution affirmatively acted in an intentionally discriminatory manner towards him or her. *See Langadinos v. Appalachian Sch. of Law*, No. 1:05CV00039, 2005 U.S. Dist. LEXIS 20958, at \*30–31 (W.D. Va. Sept. 25, 2005). Thus, the standards of actual notice and deliberate indifference form the baseline or lower end for establishing institutional liability under Title VI.

incorporate the Title VII element of constructive notice and instead cover only instances where an institution had actual notice of harassing conduct.<sup>302</sup> Such notice must be given to an official “who at a minimum has authority to institute corrective measures” on behalf of the institution.<sup>303</sup> Moreover, under Title IX and Title VI, an institution must not only fail to respond adequately in order to be held liable, but must demonstrate “deliberate indifference” in doing so.<sup>304</sup> Deliberate indifference requires a showing that the institution’s “response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.”<sup>305</sup> Therefore, Title IX and Title VI give educational institutions more latitude in responding to allegations of harassment than does Title VII to employers.

#### B. The Conflation of Title VII with Title IX and Title VI

In spite of the significant differences between Title VI and Title IX, on one hand, and Title VII, on the other, a number of courts have conflated the statutes and applied Title VII principles to Title IX and Title VI harassment cases. These decisions ignore crucial differences, which have been recognized by the Supreme Court, in statutory framework<sup>306</sup> and in the

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302. The Supreme Court has stated that “it would ‘frustrate the purposes’ of Title IX to permit a damages recovery against a school district for a teacher’s sexual harassment of a student based on principles of *respondeat superior* or constructive notice, *i.e.*, without actual notice to a school district official.” *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1998).

303. *Id.* at 277.

304. A look at the case law demonstrates that an educational institution must act in an egregious manner before a court will find the requisite deliberate indifference. In *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), for example, the harassed student was denied an opportunity to speak with the school principal, and the school ultimately failed to discipline the offending student, to separate him from the complaining student, or to establish a policy or procedure to deal with instances of sexual harassment. *Id.* at 643. This was held to be sufficient for a finding of deliberate indifference. In another case, a janitor who found a male student assaulting a physically impaired special education student simply told them to return to class, while teachers who allegedly knew about the abuse did not inform the victim’s parents and told the victim not to tell her parents. *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1246 (10th Cir. 1999). Moreover, the school did not at any point inform law enforcement, nor did it investigate the matter or discipline the offending student. The court ultimately found deliberate indifference on the part of the school. *Id.* at 1252. However, the extreme nature of the facts involved underscores the heightened nature of the “deliberate indifference” standard.

305. *Davis*, 526 U.S. at 648. In contrast to this degree of deference, an employer’s response to complaints of harassment is held to a higher standard: EEOC Guidelines stipulate that an employer’s remedy be “immediate and appropriate.” 29 C.F.R. § 1604.11(d) (2009). This has been interpreted to mean that a remedy should be “reasonably calculated to end the harassment.” *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983).

306. In *Gebser*, the Court recognized that Title VI and Title IX, sister Spending

central aims of the respective statutes.<sup>307</sup>

I shall first discuss a line of cases which have conflated employer liability standards under Title VII with institutional liability standards under Title IX and Title VI, thereby confronting colleges and universities with the possibility of expanded liability for peer harassment. In addition, courts have broadly construed the relevance and applicability of Title VII law for deciding Title IX and Title VI cases, signaling to colleges and universities that it is permissible to borrow from Title VII law in addressing the problem of peer harassment.

### 1. Conflation of Liability Standards

Traditionally, courts deciding Title IX and Title VI cases have held that the question of institutional liability is governed by a different standard than the one applied in a Title VII case, whether involving co-worker or supervisor conduct.<sup>308</sup> However, several courts have applied Title VII principles for employer liability to the issue of institutional liability under Title IX or Title VI. These decisions are contrary to controlling Supreme

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Clause statutes, operate in the same manner by conditioning an offer of federal funding on a promise by the funding recipient not to discriminate on the basis of race and gender, respectively, in what is essentially a contract between the government and the recipient. *Gebser*, 524 U.S. at 286. In contrast to this contractual framework, whereby Title VI and Title IX apply only to funding recipients, “Title VII applies to all employers without regard to federal funding,” and is “framed in terms not of a condition but of an outright prohibition.” *Id.*

307. The Court in *Gebser* recognized that Title VII “aims broadly to ‘eradicate[] discrimination throughout the economy’” and to “make persons whole for injuries suffered through past discrimination.” *Id.* at 286, 287 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 254 (1994)). “[W]hereas Title VII aims centrally to compensate victims of discrimination,” Title IX, and by implication Title VI as well, is more focused on “‘protecting’ individuals from discriminatory practices carried out by recipients of federal funds.” *Id.* at 287; *see also* *Folkes v. N.Y. Coll. of Osteopathic Med.*, 214 F. Supp. 2d 273, 288 (E.D.N.Y. 2002) (recognizing the same).

308. *See, e.g.*, *Langadinos v. Appalachian Sch. of Law*, No. 1:05CV00039, 2005 U.S. Dist. LEXIS 20958, at \*30 (W.D. Va. Sept. 25, 2005) (“Unlike employers, who can be vicariously liable for the discriminatory acts of their employees, schools can be held liable under Title VI . . . only for intentional conduct because [Title VI] prohibit[s] only intentional discrimination.”); *see also* *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1175 (10th Cir. 2007) (noting *Gebser*’s rejection of respondeat superior and constructive notice bases of liability and stating that “the provisions of Title IX indicate that a funding recipient should be liable only for its own actions, and not for the independent actions of an employee or a student”); *Bostic v. Smyrna Sch. Dist.*, 418 F.3d 355, 361 (3d Cir. 2005) (discussing *Gebser*’s “express rejection of constructive notice or *respondeat superior* principles to permit recovery under Title IX”); *Reese v. Jefferson Sch. Dist.* No. 14J, 208 F.3d 736, 739 (9th Cir. 2000) (noting that the Supreme Court has “made clear that Title IX liability is not parallel to Title VII liability”); *Wills v. Brown Univ.*, 184 F.3d 20, 26 (1st Cir. 1999) (stating that hostile environment law requires a showing of actual knowledge of harassment “in the case of a Title IX claim (but not under Title VII)”).



Court case law, as recognized by other federal courts.<sup>309</sup>

In *Kracunas v. Iona College*,<sup>310</sup> the Second Circuit applied the Title VII liability standard to a group of students' Title IX suit against their college for alleged sexual harassment by a professor. The court took notice of a previous decision holding that "notice under Title VII includes both actual and constructive notice" and then stated, "We now extend that holding to claims of hostile environment sexual harassment arising under Title IX."<sup>311</sup> In another professor-student sexual harassment case, a federal district court held that "Title VII agency principles apply to sexual harassment cases brought pursuant to Title IX."<sup>312</sup> Rejecting the approach of applying distinct Title IX standards, the court proceeded to ask whether the University "responded adequately and effectively to negate liability" under agency law.<sup>313</sup>

The Fourth Circuit, faced with a Title IX suit alleging that a university student was the victim of rape perpetrated by two other students, asked whether "the [school] knew or should have known of the illegal conduct and failed to take prompt and adequate remedial action."<sup>314</sup> Not only did the court apply the constructive notice element of Title VII law, it substituted the "prompt and adequate remedial action" standard in the place of Title IX's "deliberate indifference" standard.<sup>315</sup> The court thus fully incorporated Title VII liability standards into its analysis.

Another example is the Eighth Circuit's decision in *Kinman v. Omaha*

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309. See, e.g., *Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 750 n.11 (2d Cir. 2003).

To the extent that *Kracunas* . . . held, *inter alia*, that constructive notice of hostile environment sexual harassment gives rise to Title IX liability for damages, that portion of the holding was overruled by *Gebser* . . . and *Davis* . . . . After *Gebser* and *Davis* it is clear that in Title IX cases, an educational institution that receives federal funds cannot be held liable for harassment by teachers or students short of the school's actual knowledge of, and deliberate indifference to, the harassment.

*Id.*; see also *Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134, 141 n.6 (2d Cir. 1999).

It would be inappropriate to base a finding of discriminatory intent on a defendant's failure to respond to circumstances that were not actually known to him, even if he reasonably *should have* known. The Supreme Court has rejected the use of such an objective ("should have known") test for deliberate indifference in the Title IX context.

*Id.* (citing *Davis*, 526 U.S. at 642-43; *Gebser*, 524 U.S. at 283-91) (emphasis in original); *Simpson*, 500 F.3d at 1176-77 (discussing *Davis* as following *Gebser*'s rejection of the constructive notice standard for liability under Title IX).

310. 119 F.3d 80 (2d Cir. 1997).

311. *Id.* at 88.

312. *Petrone v. Cleveland State Univ.*, 993 F. Supp. 1119, 1128 (N.D. Ohio 1998).

313. *Id.* at 1131.

314. *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 132 F.3d 949, 958 (4th Cir. 1997) (quoting *Andrade v. Mayfair Mgmt., Inc.*, 88 F.3d 258, 261 (4th Cir. 1006).

315. *Id.* at 960.

*Public School District*,<sup>316</sup> which arose from a school teacher's alleged sexual relationship with a student. The Eighth Circuit had previously held that "Title VII standards for proving discriminatory treatment should be applied to employment discrimination cases brought under Title IX," and in this case chose to "extend that holding to apply Title VII standards of institutional liability to hostile environment sexual harassment cases involving a teacher's harassment of a student."<sup>317</sup>

In *Davison v. Santa Barbara High School District*,<sup>318</sup> a federal district court cited OCR's guidelines on racial harassment for the proposition that a Title VI complainant must demonstrate that an educational institution had "actual or constructive notice of the racially hostile environment" and "failed to respond adequately to redress the racially hostile environment."<sup>319</sup> The court reasoned that importing Title VII liability principles into education "comported with case law and fairness" because "an official or a supervisor of students . . . cannot put her head in the sand once she has been alerted to a . . . hostile educational environment."<sup>320</sup>

Finally, *Oona R.-S. v. Santa Rosa City Schools*<sup>321</sup> is an interesting decision in that a federal court took judicial notice of OCR's application of the Title VII liability standards in a Title IX matter. In *Oona*, the plaintiff student brought an action under section 1983 against various school officials for deprivation of her Title IX rights, claiming that she had been sexually assaulted and harassed by a student-teacher and sexually harassed by male peers.<sup>322</sup> While the case did not involve a Title IX cause of action, the court discussed the fact that plaintiff had filed a complaint with OCR and that, with respect to the allegation of peer harassment, OCR had found that school officials "knew or should have known of the harassment but

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316. 94 F.3d 463 (8th Cir. 1996).

317. *Id.* at 469.

318. 48 F. Supp. 2d 1225 (C.D. Cal. 1998).

319. *Id.* at 1229 (quoting Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11,448, 11,449 (1994)).

320. *Id.* at 1230 (quoting *Nicole M. v. Martinez Unified Sch. Dist.*, 964 F. Supp. 1369, 1378 (N.D. Cal. 1997)). As a matter of state law, the *Davison* court also incorrectly allowed the plaintiff to present a harassment claim against the school under California's Unruh Civil Rights Act, CAL. CIV. CODE § 51 (West 2007), which provides, "All persons within the jurisdiction of this state are free and equal, and no matter what their . . . race . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." CAL. CIV. CODE § 51. Under the Unruh Act cause of action, plaintiff sought to impose punitive damages against the school and certain officials for their alleged failure to respond adequately to the student conduct at issue. *Davison*, 48 F. Supp. 2d at 1226. In denying defendants' motion to dismiss the Unruh Act claim, the court went against case law holding that the Unruh Act reached only certain intentional discrimination, rather than merely negligent behavior. *See, e.g., Brown v. Smith*, 64 Cal. Rptr. 2d 301, 305 (Ct. App. 1997).

321. 890 F. Supp. 1452 (N.D. Cal. 1995).

322. *Id.* at 1455-56.

failed to take timely, effective action to prevent it from continuing.”<sup>323</sup>

It is significant that OCR, the federal agency charged with enforcing compliance with Title IX, conducted its investigation and analysis under Title VII principles rather than under the Title IX standards of “actual notice” and “deliberate indifference.” Moreover, *Oona* is not the only decision in which a federal court took judicial notice of OCR application of the Title VII liability standard in a Title IX investigation.<sup>324</sup> OCR application of Title VII law into the educational context misinforms the courts about the proper legal framework for Title IX and Title VI cases and therefore furthers the conflation of these two statutes with Title VII.<sup>325</sup>

## 2. The Misreading of *Franklin*

A chief reason for the importation of Title VII liability standards into Title IX and Title VI case law is the misreading by federal courts of *Franklin v. Gwinnett County Public Schools*.<sup>326</sup> In *Franklin*, a faculty-on-student harassment case, the Supreme Court decided its first Title IX sexual harassment case, and analogized the issue to sexual harassment in employment, pronouncing,

Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and “when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminates’ on the basis of sex.” We believe the same rule should apply when a teacher sexually harasses and abuses a student.<sup>327</sup>

As it subsequently clarified in *Gebser v. Lago Vista Independent School*

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323. *Id.* at 1458.

324. *See* *Burrow v. Postville Cmty. Sch. Dist.*, 929 F. Supp. 1193, 1204 (N.D. Iowa 1996) (“OCR has similarly relied on Title VII principles in making its informal conclusions that Title IX prohibits educational institutions who receive federal funds from failing to respond to *actual or constructive* knowledge of peer sexual harassment.” (emphasis added)); *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1573 (N.D. Cal. 1993) (discussing OCR investigations and Letters of Finding stating that “an educational institution’s failure to take appropriate response to student-to-student sexual harassment of which it *knew or had reason to know* is a violation of Title IX” (emphasis added)).

325. *See also* Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,039–42 (1997).

[A] school will be liable under Title IX if its students sexually harass other students if (i) a hostile environment exists in the school’s programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action . . . .

A school has notice if it actually “knew, or in the exercise of reasonable care, should have known” about the harassment.

*Id.* (quoting *Ellison v. Brady*, 924 F.2d 872, 881 (9th Cir. 1991)).

326. 503 U.S. 60 (1992).

327. *Id.* at 75 (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986)).

*District*,<sup>328</sup> the Court was merely stating the general proposition that sexual harassment constitutes discrimination on the basis of gender under Title IX and can therefore subject an educational institution to Title IX liability.<sup>329</sup>

However, courts in several subsequent cases have cited *Franklin* for the much different proposition that Title IX liability follows the same standards as Title VII liability. For example, the Second Circuit stated, “The Court’s citation of *Meritor* . . . in support of *Franklin*’s central holding indicates that, in a Title IX suit for gender discrimination based on sexual harassment of a student, an educational institution may be held liable under standards similar to those applied in cases under Title VII.”<sup>330</sup> The Sixth Circuit held that “Title VII agency principles apply to resolve discrimination claims brought under Title IX,” arguing, “This practice implicitly received the Supreme Court’s approval in *Franklin*.”<sup>331</sup> It added that, by citing *Meritor*, the Court “indicated that it views with approval the application of Title VII principles to resolve similar Title IX cases.”<sup>332</sup>

Likewise, in deciding a Title IX peer harassment suit brought by a group of students against their school district, a federal district court rejected the school district’s argument against applying a “knew or should have known” liability standard, reasoning that that their position was “belied” by the *Franklin* decision, “in which the Court looks to Title VII to define the nature of Title IX discrimination.”<sup>333</sup> The court opined, “By citing [*Meritor*] with approval in the Title IX context, to define the critical concept of discrimination on the basis of sex, the Supreme Court in *Franklin* was analogizing the duties of school officials to prevent sexual harassment under Title IX, to those of employers under Title VII.”<sup>334</sup>

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328. 524 U.S. 274 (1998).

329. The Court clarified in *Gebser*,

Whether educational institutions can be said to violate Title IX based solely on principles of *respondeat superior* or constructive notice was not resolved by *Franklin*’s citation of *Meritor*. That reference to *Meritor* was made with regard to the general proposition that sexual harassment can constitute discrimination on the basis of sex under Title IX.

*Id.* at 283; *see also* *Olmstead v. L.C.*, 527 U.S. 581, 617 n.1 (1999) (Thomas, J., dissenting) (citing *Franklin* as “relying on *Meritor* . . . in determining that sexual harassment constitutes discrimination”).

330. *Murray v. N.Y. Univ. Coll. of Dentistry*, 57 F.3d 243, 249 (2d Cir. 1995). In *Murray*, the court proceeded from its citation of *Franklin* to analyze the plaintiff student’s Title IX claim against her University, arising from alleged sexual harassment by a third party, in terms of whether the school had actual or constructive notice of the complained-of conduct. *Id.*

331. *Doe v. Claiborne County*, 103 F.3d 495, 514 (6th Cir. 1996).

332. *Id.* The court therefore remanded the plaintiff student’s Title IX claim against her school, arising from alleged sexual assault by a teacher, with instructions to the district court to apply Title VII liability standards. *Id.* at 514–16.

333. *Doe v. Oyster River Coop. Sch. Dist.*, 992 F. Supp. 467, 477 (D.N.H. 1997).

334. *Id.* at 477; *see also* *Burrow v. Postville Cmty. Sch. Dist.*, 929 F. Supp. 1193, 1204 (N.D. Iowa 1996) (“The Supreme Court’s utilization of its Title VII case law to

Moreover, many courts have, under an erroneous reading of *Franklin*, broadly construed the relevance of Title VII law for Title IX and Title VI cases. The Tenth Circuit stated, for instance, “Courts have generally assessed Title IX discrimination claims under the same legal analysis as Title VII claims.”<sup>335</sup> Elsewhere, it declared that Title VII is “the most appropriate analogue when defining Title IX’s substantive standards.”<sup>336</sup> The Second Circuit similarly stated that “courts have interpreted Title IX by looking to . . . the caselaw interpreting Title VII.”<sup>337</sup> In Title VI case law, at least one federal court has held that “Title VII provides the appropriate framework” for adjudicating a racial harassment claim.<sup>338</sup>

In making such broad pronouncements, courts are going beyond conflation of liability standards. They are endorsing a complete parallel between Title VII, on one hand, and Title IX and Title VI, on the other hand, and thus contributing to the dangerous trend towards full conflation of the law under these statutes. It should not be surprising, therefore, to see that many colleges and universities have followed Title VII law in attempting to meet their obligations under Title IX and Title VI.

### C. The Consequences of Conflation: How Colleges and Universities Have Responded

The conflation of Title VII law with Title IX and Title VI law has had a two-fold impact upon some institutions’ approaches toward peer harassment. First, these colleges and universities have interpreted the decisions conflating the statutes as expanding the scope of institutional liability under Title IX and Title VI. By importing the constructive notice element from Title VII, these decisions have instilled fear among administrators that their institution could be held liable for peer harassment of which they “should have known.” Facing the possibility that a court adjudicating a Title IX or Title VI claim may broadly interpret the “should have known” prong, these colleges and universities have perceived it as necessary to take a stringent approach towards addressing peer harassment on their campuses. They have sought to discourage students from engaging in even remotely offensive or critical speech, thus reducing the chances of anyone on campus being offended.

Second, some colleges and universities have interpreted these decisions

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interpret Title IX in *Franklin* strongly indicates that Title VII precedent is appropriate for analysis of hostile environment sexual harassment claims under Title IX.”).

335. *Gossett v. Oklahoma*, 245 F.3d 1172, 1176 (10th Cir. 2001).

336. *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 832 (10th Cir. 1993) (quoting *Mabry v. State Bd. of Cmty. Colls. & Occupational Educ.*, 813 F.2d 311, 316 n.6 (10th Cir. 1987)).

337. *Yusuf v. Vassar Coll.*, 35 F.3d 709, 714 (2d Cir. 1994).

338. *Langadinos v. Appalachian Sch. of Law*, No. 1:05CV00039, 2005 U.S. Dist. LEXIS 20958, at \*15 (W.D. Va. Sept. 25, 2005).

as endorsing a complete parallel between Title VII law and Title IX and Title VI law. In other words, they have read them as making it permissible to borrow from Title VII law in addressing peer harassment on campus. As a result of these two factors, some institutions have adopted harassment policies tracking Title VII hostile environment standards, despite the fact that these policies encompass constitutionally protected speech and fail to provide adequate breathing room for student speech on campus. These policies reflect a “better safe than sorry” approach, and are often modeled after the Equal Employment Opportunity Commission (EEOC) guidelines for workplace harassment,<sup>339</sup> Title VII case law, or some combination of the two.

A good example is the University of Connecticut’s “Policy Statement on Harassment.”<sup>340</sup> The policy requires that members of the University community “refrain from actions that intimidate, humiliate or demean persons or groups, or that undermine their security or self-esteem.”<sup>341</sup> It also states that the University “deplores behavior that denigrates others.”<sup>342</sup> In defining harassment to include conduct which merely demeans another or undermines another’s self-esteem, the policy encounters the same overbreadth and vagueness concerns discussed previously with respect to college and university harassment policies.<sup>343</sup>

Just as importantly for the present discussion, the policy defines sexual harassment as behavior which has “the effect of interfering with an individual’s performance or creating an intimidating, hostile, or offensive environment.”<sup>344</sup> On its face, this definition parallels the harassment standards found in the EEOC guidelines and Title VII case law. In particular, it mirrors the EEOC standard of “verbal or physical conduct . . . [which] has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive work environment.”<sup>345</sup> In fact, the policy is actually broader in removing the qualifier “unreasonably” before “interfering.” This allows

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339. The EEOC has issued “Guidelines on Discrimination Because of Sex” which define sexual harassment in employment as conduct which “has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.” 29 C.F.R. § 1604.11(a)(3) (1985). Furthermore, “The principles involved here continue to apply to race, color, religion or national origin,” 29 C.F.R. § 1604.11(a) n.1, meaning that the EEOC standard for racial harassment in the workplace is the same as its standard for sexual harassment.

340. University of Connecticut, Policy Statement on Harassment, <http://policy.uconn.edu/pages/findPolicy.cfm?PolicyID=259> (last visited Mar. 18, 2009).

341. *Id.*

342. *Id.*

343. *See supra* Part I.B.

344. *See* University of Connecticut, *supra* note 340.

345. 29 C.F.R. § 1604.11(a)(3) (1985); *see supra* note 339 and accompanying text.

anyone who subjectively perceives interference to push forward with a complaint, no matter how unreasonable, thus placing speakers on campus at risk for prosecution over what is likely to be tame and innocuous speech.

The University of Connecticut policy falls well short of the *Davis* standard for hostile educational environment.<sup>346</sup> It fails to include any threshold requirement of severity *or* pervasiveness of conduct, meaning that a one-time, seemingly innocuous interaction could potentially be treated the same as repeated, even violent acts. It also allows offensiveness to be subjectively defined, in contrast to *Davis*'s requirement that the conduct in question be objectively offensive. Finally, Connecticut's policy targets the creation of any subjectively intimidating, hostile, or offensive environment, whereas *Davis* is addressed towards the far more serious act of barring another person's access to an educational opportunity or benefit. Whereas the *Davis* standard limits itself to truly harassing patterns of conduct, Connecticut's policy encompasses protected speech and appears to be aimed at creating a polite, bland campus free of any provocative or stimulating discussion.

Another school, Lewis-Clark State College in Idaho, maintains a harassment policy prohibiting "[a]ny practice . . . that detains a member of the College community, endangers his/her health, jeopardizes his/her safety, or interferes with class attendance or the pursuit of education or work responsibilities."<sup>347</sup> This policy too follows the EEOC guidelines and Title VII standards, in that it focuses on subjectively defined interference with educational or work responsibilities. There is no threshold requirement of severity or pervasiveness, no requirement that the conduct be objectively offensive, and no incorporation of a "reasonable person" standard. Rather, all that appears to matter is whether the complainant subjectively feels harassed.

Lastly, Richard Stockton College of New Jersey, another public institution, expressly states that its sexual harassment policy is modeled after the EEOC guidelines.<sup>348</sup> It defines sexual harassment to include verbal or physical conduct which "has the purpose or effect of unreasonably interfering with an individual's academic/work performance or creating an intimidating, hostile or offensive academic/work environment."<sup>349</sup> Once again, this policy does not incorporate objectiveness into the requirement of an "intimidating, hostile or offensive"

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346. See *supra* note 96 and accompanying text.

347. Lewis-Clark State College, Student Code of Conduct, <http://www.lcsc.edu/osl/SHB/CodePage4.htm> (last visited Mar. 18, 2009).

348. Richard Stockton College, Policy Prohibiting Discrimination in the Academic/Educational Environment, at 3, [http://intraweb.stockton.edu/eyos/affirmative\\_action/content/docs/Student%20Discrimination%20Policy-1.2008.doc](http://intraweb.stockton.edu/eyos/affirmative_action/content/docs/Student%20Discrimination%20Policy-1.2008.doc) (last visited Mar. 18, 2009).

349. *Id.*

environment, nor does it require the conduct in question to be severe and pervasive. Therefore, it serves as another example of the fact that the college and university practice of borrowing from Title VII law has resulted in the formation of harassment policies that substantially impinge upon students' expressive rights.

#### V. WHY TITLE VII LAW IS POORLY SUITED TO ADDRESS PEER HARASSMENT IN HIGHER EDUCATION

It is improper for colleges and universities to follow Title VII law in addressing peer harassment for two major reasons. First, colleges and universities doing so are ignoring crucial differences between the campus and the work environment which counsel against depriving students of the speech rights to which they are entitled. Second, they are failing to account for the lack of a "power imbalance" in student-to-student interactions, as power imbalances in the workplace are a major reason for taking a stringent approach towards harassment in employment.

##### A. Differences between the Workplace and the Campus

As previously discussed,<sup>350</sup> courts have repeatedly recognized the need to provide sufficient breathing room for speech on college and university campuses in order to allow for discussion and dialogue. They have held that the abuse of overbroad harassment rationales improperly restricts protected expression and places a chilling effect on student speech, to the detriment of the college or university in its ability to serve as a true marketplace of ideas. Significantly, OCR has recognized the same problem and has made it clear that its harassment regulations do not require colleges and universities to censor and punish protected speech.<sup>351</sup>

Concurring with OCR and the aforementioned case law, much legal scholarship has affirmed that the workplace and the college or university campus require divergent approaches to the problems of racial and sexual harassment.<sup>352</sup> As commentators have largely recognized, the workplace is

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350. See *supra* Parts III.C. and III.D.

351. See *supra* Part III.B.

352. See, e.g., Robert W. Gall, *The University as an Industrial Plant: How a Workplace Theory of Discriminatory Harassment Creates a "Hostile Environment" for Free Speech in America's Universities*, LAW & CONTEMP. PROBS., Autumn 1997, at 203.

Because hostile environment theory grew up within the workplace, university administrators should ask themselves about its appropriateness within the university. If Title VII's prohibition of hostile environment harassment is troublesome on First Amendment grounds in the workplace, the incorporation of such a prohibition into a speech code is much more disturbing in the university, a place that supposedly values academic freedom and the unfettered exchange of ideas.



a place for carrying out one's job functions and achieving certain results, whereas the college or university is a place for questioning, learning, and debating.

On one hand, restrictions upon workplace speech ultimately do not take away from the workplace's essential functions—to achieve the desired results, make the client happy, and get the job done.<sup>353</sup> Employers for the most part are focused on meeting their bottom lines, and free expression in the workplace is typically not necessary for that purpose. Consequently, “[f]ar from being the quintessential ‘marketplace of ideas’ in which speech and counter-speech are freely bandied about, many workplaces are highly regulated environments in which non-work-related speech is at best discouraged, and at worst, banned or restricted.”<sup>354</sup>

On the other hand, freedom of speech and unfettered discussion are so essential to a college or university that compromising them fundamentally alters the campus environment to the detriment of everyone in the community. The college or university is a “special setting where a premium is to be placed on free expression so that a ‘pall of orthodoxy’ does not descend” upon the campus.<sup>355</sup> “[F]ree speech and academic freedom are a necessary precondition to a university's success, rather than abstract values that must compete with others on a pluralistic battleground.”<sup>356</sup> Therefore, the proper role for harassment law in the college and university context is to ensure equal access to learning opportunities, not to protect and insulate students from offense.

Colleges and universities should avoid infringing upon the right of students to engage in protected speech. The practice of borrowing from Title VII law, however, contributes significantly towards doing precisely that. Colleges and universities must therefore recognize that the application of harassment law in higher education requires a markedly different approach than the one employers take under Title VII law.

#### B. Peer Harassment and the Lack of a Power Imbalance

In addition to the differences between the campus and the workplace in terms of their respective functions, there is a second compelling reason not to apply employment standards towards peer harassment in higher education: the “power imbalance” rationale for stringently regulating

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*Id.* at 205; *see also* Sweeney, *supra* note 138, at 89 (“The student, unlike any actor in the employment setting, faces problems which are unique to the educational setting. The major distinguishing factors [include] . . . general free speech considerations . . . . The purpose of illustrating the differences between the two environments is to make it clear that the two settings must be treated differently.”).

353. *See* Gall, *supra* note 352.

354. Strossen, *supra* note 59, at 706–07.

355. Gall, *supra* note 352, at 205.

356. *Id.* at 211.

workplace conduct under Title VII is simply not applicable to student-on-student interactions in the college or university setting.

The fundamental problem with harassment in the workplace is that there exists an imbalance of power between the harasser and the victim,<sup>357</sup> whereby the harasser holds a certain amount of authority, real or imagined, over the victim, making the latter more likely to feel intimidated, threatened, or coerced as a result of the former's conduct. This is due to the "hierarchical structure of most workplaces, and the fact that some individuals exercise supervisory and economic power over others."<sup>358</sup> When the harasser is a supervisor, the power imbalance is fairly obvious; when the harasser is a co-worker, his or her actions "may be imputed to an employer through a theory of respondeat superior."<sup>359</sup> In either case, it is easier for the victim of harassment to feel coerced or tormented to the point that his or her working conditions are appreciably altered within the meaning of the *Meritor* standard for hostile environment.<sup>360</sup>

Moreover, a target of harassment in the workplace, unlike individuals on a college or university campus, typically cannot resort to the weapon of counter speech to combat allegedly harassing behavior. To do so would be to potentially jeopardize one's job status and earning capacity, which most individuals are highly reluctant to do. Therefore, "[t]o relegate an employee who is the target of insulting, sexist remarks by her boss to the 'remedy' of answering him back is to foreclose her from any meaningful recourse at all."<sup>361</sup> Given the power differentials and economic constraints at play in one's employment, it is simply not realistic to expect employees to protect themselves against harassment under a "marketplace of ideas" model.

Peer harassment in education, by contrast, very rarely involves a power imbalance element, because "[i]n an educational setting, the power relationship is the one between the educational institution and the

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357. See *Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1011 n.11 (5th Cir. 1996).

358. Strossen, *supra* note 59, at 706; see also ACLU, POLICY GUIDE OF THE AMERICAN CIVIL LIBERTIES UNION, POLICY NO. 316 (rev. ed. 1995).

Sexual harassment is made possible by power imbalances; victims of harassment are generally in a minority in the workplace or in positions of relative powerlessness. Conduct or expression that might not be actionable outside the workplace may constitute harassment in the workplace precisely because of its hierarchical nature—employers and employees, supervisors and subordinates do not interact as equals—and because most people have to work in order to survive.

*Id.*

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

360. See *supra* Part IV.A.1.

361. Strossen, *supra* note 59, at 707.

student.”<sup>362</sup> When two students interact with one another, there is no power imbalance analogous to the one between a supervisor and an employee, nor is there any “precedential or logical support” for applying a theory of respondeat superior as when one co-worker allegedly harasses another.<sup>363</sup> This is due to the fact that a fellow student rarely, if ever, holds any institutional authority over one’s grades, academic standing, and other material elements of one’s education. As a result, “[u]nwanted sexual advances of fellow students do not carry the same coercive effect or abuse of power as those made by a teacher, employer or co-worker,”<sup>364</sup> and the same holds true for other types of alleged harassing conduct. It should not be surprising, therefore, that a federal court has declared that “peer harassment is less likely to satisfy the requirements of Title IX than is teacher-student harassment.”<sup>365</sup>

A student’s conduct, whether verbal, physical, or both, would have to be rather extreme in order for another student’s educational opportunities to be sufficiently affected,<sup>366</sup> because the targeted student will not as easily feel coerced or tormented as an employee being harassed at work. Therefore, given the absence of a power imbalance between fellow students, it is improper to apply employment harassment principles when addressing peer harassment in the higher education setting. Colleges and universities should recognize that peer harassment presents different issues than workplace harassment and, accordingly, tailor their policies and practices to address it as a unique problem.

## VI. PROPOSED SOLUTIONS

So what can be done to reverse the impact that harassment law has had on students’ speech rights? Given that the movement toward restriction and censorship of expression under harassment rationales has been steadily building over a long period of time, one should expect that it will not be easy to reverse the trend. Meaningful change will most likely be slow to

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

363. *Id.*; see also *Sweeney*, *supra* note 138, at 89–90.

It could be argued that a teacher’s sexual harassment of a student, or sexual harassment in a quasi-employment setting, has employment related components and, hence, Title VII principles are proper. No such analogy is present with respect to peer sexual harassment . . . . [A]dvocates for the importation of Title VII principles make a tenuous analogy to employee-employee sexual harassment. Such an analogy is inherently flawed and returns one to the conclusion that peer sexual harassment is a unique and distinct problem and must be analyzed accordingly.

*Id.*

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

365. *Benefield v. Bd. of Trs.*, 214 F. Supp. 2d 1212, 1221 (N.D. Ala. 2002) (citing *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 653 (1999)).

366. *Davis*, 526 U.S. at 652–53.

come. Nevertheless, several possibilities for creating change present themselves.

#### A. Eliminating Title IX and Title VI Liability for Peer Harassment

The best and most direct solution is for Congress to amend Title IX and Title VI, and for OCR to change the implementing regulations for the statutes, to eliminate institutional liability for peer harassment.<sup>367</sup> Abolishing this form of liability would remove the incentives colleges and universities currently face under these statutes to stringently regulate student expression and interactions on campus and would therefore greatly advance campus speech rights.<sup>368</sup> Moreover, this measure is supported by three crucial realities. First, existing legal regimes address all of the types of conduct which fall under the *Davis* standard for creation of a hostile environment. Second, the will to prevent such conduct on campus already exists, and without federal mandates, one cannot assume that colleges and universities will simply do nothing to address them. Third, as recognized by a strong body of case law, colleges and universities do not have a duty to oversee and monitor every part of their students' lives.

##### 1. Existing Legal Regimes are Sufficient to Address Peer Harassment

The *Davis* hostile environment standard is limited to conduct that is "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."<sup>369</sup> This narrow standard leaves intact only extreme patterns of conduct as plausible bases for a peer harassment claim.<sup>370</sup> Consequently, it is not necessary to impose upon colleges and universities institutional liability for peer harassment, as existing legal regimes encompass the entire range of actionable conduct which is left after the *Davis* decision. It is

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367. In this section, I am arguing for the elimination of institutional liability for peer harassment only as it pertains to institutions of higher education. As the duties faced by primary and secondary educational institutions under Title IX and Title VI are outside the scope of this article, I take no position with respect to institutional liability in the primary and secondary educational context.

368. At least one legal commentator has already called for the elimination of Title IX liability for peer harassment. See Sweeney, *supra* note 138, at 83 (arguing that "the importation of Title VII's sexually hostile environment theory into Title IX of the Educational Amendments of 1972 to cover peer sexual harassment is premature, improper, unsupported by Title IX's legislative history, and an arbitrary and capricious abuse of the OCR's regulatory authority"). Sweeney argues that "it is also reasonable to conclude that if Title IX was intended to cover the acts of non-agent third parties, it would have been so stated, at least once, during the debates." *Id.* at 85.

369. *Davis*, 526 U.S. at 651.

370. See *supra* Part III.A.

much more logical to use these other areas of the law to address such conduct, since bringing in additional federal requirements has only confused the issues and led to injudicious college and university policymaking.

With respect to Title IX, I have previously discussed the fact that the vast majority of peer sexual harassment cases arise from alleged sexual misconduct, sexual assault, or rape.<sup>371</sup> This phenomenon should not be surprising, as the mere expression of sexist and otherwise prejudicial viewpoints logically does not meet the stringent *Davis* standard. Criminal law and the existing law enforcement apparatus have traditionally dealt with the problems of sexual assault and rape and, perhaps more importantly, are much better suited to do so than campus administrators whose expertise lies outside of these areas of the law. Given that these are sensitive and extremely serious matters, it is dangerous to place the burden upon ill-equipped administrators to address them. Moreover, in light of the severity of the consequences of a finding of rape or sexual assault for the accused student, campus disciplinary processes are insufficient to handle such cases. Therefore, these matters are best dealt with through the criminal law process.

With respect to Title VI, the types of conduct which can create a racially hostile educational environment and which have given rise to the few reported peer racial harassment decisions are mostly addressed by the First Amendment exceptions of incitement to imminent lawless action, true threats, and intimidation. Incitement to imminent lawless action encompasses advocacy of the use of force or of law violation “where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”<sup>372</sup> True threats are “statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”<sup>373</sup> Finally, intimidation is “a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”<sup>374</sup> In addition, the legal regimes of vandalism and disorderly conduct cover much of the remaining

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371. See *supra* note 197 and accompanying text. Other legal regimes which would cover genuinely harassing behavior include stalking and assault. These regimes apply to behavior, such as inappropriate touching or following an individual to his or her home, which is less extreme than sexual assault or rape but which potentially contributes to a pattern of harassing conduct. The court in *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989), made essentially the same point when it noted, “Many forms of sexually abusive and harassing conduct are also sanctionable. These would include abduction, rape, and other forms of criminal sexual conduct.” *Id.* at 862 (internal citations omitted).

372. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

373. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

374. *Id.* at 360.

behavior, such as the use of graffiti containing racial epithets on school property.

Put together, these First Amendment exceptions and other legal regimes encompass much of the conduct which has formed the basis for Title VI hostile environment claims, meaning that such conduct is proscribable independently of the federal mandate. For example, a student's act of directing true threats to minority students with the intent to place them in fear of grave harm would fall under the exception for intimidation, as the court recognized in the aforementioned *Reed* decision.<sup>375</sup> Since the case law under Title VI has required complainants to allege such types of conduct as opposed to the mere expression of racist or prejudicial views,<sup>376</sup> it is evident that the range of harassing conduct under Title VI is covered by the First Amendment exceptions and other legal regimes discussed above. As is the case with Title IX, this renders Title VI institutional liability unnecessary.

## 2. Colleges and Universities Will Act to Prevent Peer Harassment without a Federal Mandate

There is a second compelling argument for eliminating peer harassment liability under Title IX and Title VI. The will to prevent actionable forms of conduct already exists on campus, and absent federal mandates, there is little reason to assume that colleges and universities will simply do nothing to address them. Conversely, the threat of institutional liability only leads to downstream distortions and the misapplication of harassment law.

The threat of institutional liability is not necessary to provide colleges and universities with the incentives to prevent peer harassment. Rather, the perceived need to stringently regulate student behavior and interactions is so deeply embedded in the institutional culture that removing the federal mandates under Title IX and Title VI is unlikely to create a sudden shift. One commentator observes that college and university administrators tend

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375. See *supra* notes 242–244 and accompanying text.

376. See, e.g., *Bryant v. Indep. Sch. Dist. No. I-38*, 334 F.3d 928, 931 (10th Cir. 2003) (involving a Title VI claim arising from racially hostile school environment which included “offensive racial slurs, epithets, swastikas, and the letters ‘KKK’ inscribed in school furniture and in notes placed in African American students’ lockers and notebooks,” as well as white students being allowed to wear clothing featuring the Confederate flag, in violation of school policy); *Monteiro v. Temple Union High Sch. Dist.*, 158 F.3d 1022 (9th Cir. 1998) (involving a Title VI claim arising from repeated usage of racial slurs and graffiti on school walls featuring similar racial epithets); *cf.* *Langadinos v. Appalachian Sch. of Law*, No. 1:05CV00039, 2005 U.S. Dist. LEXIS 20958 (W.D. Va. Sept 25, 2005) (rejecting plaintiff’s Title VI claim based on repeated offensive and prejudicial comments regarding plaintiff’s ethnicity); *Folkes v. N.Y. Coll. of Osteopathic Med.*, 214 F. Supp. 2d 273, 292 (E.D.N.Y. 2002) (holding that plaintiff’s allegations of “inappropriate and offensive” racially-themed comments were insufficient to support a Title VI racial harassment claim).

to view their campus as “an island of equality, civility, tolerance, and respect for human dignity.”<sup>377</sup> The same commentator characterizes the college and university mission as “teach[ing] students how to contend vigorously within the marketplace of ideas while nevertheless observing certain norms of civility[.]”<sup>378</sup> Given the commitment modern colleges and universities have shown to advancing tolerance, civility, and diversity on campus, one need not worry about administrations suddenly not being zealous enough in their efforts to prevent instances of peer harassment, for two primary reasons.

First, colleges and universities are eager to avoid any negative publicity stemming from events which take place on their campuses. Colleges and universities largely depend on their name-recognition and institutional prestige to continue to attract students and scholars to their campuses. Consequently, the negative publicity that comes from a student being sexually assaulted on campus, for example, is highly damaging to a college or university’s reputation. Fear of such publicity provides colleges and universities with considerable motivation to prevent the types of conduct which constitute actionable peer harassment under Title IX or Title VI, and to take a stern approach towards rectifying any situation which arises.

Second, colleges and universities face the prospect of liability under causes of action other than Title VI and Title IX, giving them another major incentive to regulate student behavior thoroughly and thereby seek to prevent peer harassment. This often takes the form of tort liability, as demonstrated in the seminal case of *Mullins v. Pine Manor College*.<sup>379</sup> In *Mullins*, the Supreme Judicial Court of Massachusetts held that a college had been negligent in allowing a resident student to be the victim of rape on campus. The court ruled that the College demonstrated negligence in failing to correct certain deficiencies in its security system, that this negligence was the proximate cause of the rape, and that the student was entitled to recover damages for injuries suffered.<sup>380</sup> *Mullins* demonstrates that tort liability is a sufficient vehicle for holding colleges and universities accountable to students for failing to prevent the type of conduct which currently falls under peer racial or sexual harassment. Therefore, the threat of tort liability provides colleges and universities with the requisite incentives to properly address the problem of peer harassment, rendering the federal mandate under Title IX and Title VI unnecessary.

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377. Rodney A. Smolla, *Academic Freedom, Hate Speech, and the Idea of a University*, LAW & CONTEMP. PROBS., Summer 1990, at 217.

378. Smolla, *supra* note 377, at 223–24.

379. 449 N.E.2d 331 (Mass. 1983).

380. *Id.* at 337–42.

### 3. The Demise of “In Loco Parentis”

Finally, eliminating institutional liability for peer harassment would be consistent with modern case law recognizing that colleges and universities do not have a duty to monitor and oversee every part of students' lives.<sup>381</sup> Courts have, in a number of cases involving varying fact patterns and legal issues, decided that a college or university no longer stands “in loco parentis,” or in the role of parental supervision, with respect to its students.<sup>382</sup> These jurisprudential trends reflect prevailing societal views and expectations regarding the maturity, sophistication, and independence of students. We as a society should thus expect that students can handle interactions with fellow students in which they exchange differing, even offensive and disagreeable ideas and beliefs.

To decide otherwise is to take a dangerously paternalistic approach to the intellectual and emotional development of these young adults. Such an approach tells offended students that, rather than counter another's speech with more speech, the proper response is to sue the school for allowing the expression to occur in the first place. It makes no sense to apply Title IX and Title VI in this manner, both because it flies in the face of society's deeply grounded notions regarding college and university students and because doing so does not advance the fundamental statutory objectives of protecting individuals from discriminatory practices by federal funding recipients. Instead, attaching institutional liability to merely offensive student speech makes a mockery of the ideal of the “marketplace of ideas” and provides administrators with perverse incentives to cut down severely on student speech rights. Therefore, the courts should eliminate Title IX and Title VI institutional liability for peer harassment. In doing so, they would greatly advance the expressive rights of college and university students.

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381. *See, e.g.*, *Baldwin v. Zoradi*, 176 Cal. Rptr. 809 (Ct. App. 1981) (affirming a general demurrer in a student's action against her University, where the student was injured in an automobile collision during a speed contest with students who had been drinking and alleged that her injury was caused by the University's negligence in failing to adequately control on-campus drinking); *Beach v. Univ. of Utah*, 726 P.2d 413 (Utah 1986) (holding that a university did not have a custodial relationship with its students creating an affirmative duty to protect and supervise them, and therefore was not liable to a student who suffered injuries from a fall resulting from voluntary intoxication during a class field trip).

382. *See, e.g.*, *Benefield v. Bd. of Trs.*, 214 F. Supp. 2d 1212 (N.D. Ala. 2002) (holding that the school did not stand in loco parentis while denying a student's Title IX suit against her university for peer-on-peer sexual harassment, even though the student was under the age of majority); *Hartman v. Bethany Coll.*, 778 F. Supp. 286 (N.D.W. Va. 1991) (holding that a college did not stand in loco parentis to a seventeen-year-old freshman student); *Furek v. Univ. of Del.*, 594 A.2d 506 (Del. 1991) (holding that a university's policy against hazing constituted an assumed duty and exposed it to liability for a student's injury during a hazing incident, but clarifying that the University did not stand in loco parentis to its students).



### B. Adoption of the *Davis* Standard

In the absence of amendments to Title IX and Title VI eliminating institutional liability for peer harassment, the best available alternative measure is for the courts, Congress, OCR, and colleges and universities to unequivocally adopt the *Davis* hostile environment standard as the controlling standard for peer sexual and racial harassment. Adoption of the *Davis* standard would offer a high level of protection for student speech rights and ensure that institutional efforts to avoid liability do not contravene free speech principles.

As previously discussed, *Davis* is highly protective of speech, holding that peer harassment is no less and no more than conduct which is, under the totality of the circumstances, “so severe, pervasive, and objectively offensive, and [which] so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.”<sup>383</sup> Courts deciding peer sexual and racial harassment cases in the aftermath of *Davis* have not only almost universally adopted this standard,<sup>384</sup> they have recognized that it is a stringent standard met only by extreme patterns of conduct.<sup>385</sup>

Moreover, *Davis* importantly reiterated the other elements of a Title IX claim.<sup>386</sup> Thus, *Davis* should be understood as requiring that conduct have the following characteristics:

- (1) unwelcome;
- (2) discriminatory;
- (3) on the basis of gender;
- (4) directed at an individual; and
- (5) “so severe, pervasive, and objectively offensive, and . . . so undermine[] and detract[] from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.”<sup>387</sup>

*Davis* also requires a showing of actual notice and deliberate indifference in order to establish institutional liability.<sup>388</sup> In emphasizing all of these elements, the Supreme Court reiterated that Title IX claimants must clear a number of legal hurdles and that peer harassment truly encompasses a narrow range of conduct. In light of the full holding in *Davis*, adopting its hostile environment standard as controlling for all peer

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383. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651 (1999).

384. *See supra* note 117.

385. *See Bryant v. Indep. Sch. Dist. No. I-38*, 334 F.3d 928, 937 (10th Cir. 2003) (characterizing “the standard set forth by the *Davis* Court” as “quite high”).

386. *See supra* Part II.A.2.

387. *Davis*, 526 U.S. at 634, 636, 639, 651.

388. *Id.* at 650.

harassment cases would represent a significant advancement of student speech rights.

Therefore, courts adjudicating Title IX and Title VI peer harassment claims should uphold the *Davis* standard. Courts should emphasize that Title VII case law has no rightful place in setting the standards for peer harassment in education, that the unique qualities of the college and university setting call for a separate analysis, and that the *Davis* standard alone is capable of preserving the necessary breathing room for campus speech. If the case law on peer harassment uniformly upholds the *Davis* standard, colleges and universities cannot logically use the justification that there is some ambiguity in the law allowing for the use of broader definitions of sexual or racial harassment.

In addition, Congress could codify the courts' reading of peer harassment law by amending Title IX and Title VI to decree that peer racial and sexual harassment is no less and no more than the *Davis* standard. In conjunction, OCR could amend the respective implementing regulations under the statutes to do the same. By taking these measures, Congress and OCR would provide clear guidance to colleges and universities about the types of conduct which they are obligated to prevent under Title IX and Title VI peer harassment law. There can be no more direct form of clarification to colleges and universities than to amend the statutes themselves from which institutions derive their obligations to prevent peer harassment.

Next, given that the *Davis* standard reflects existing law, OCR could write a follow-up to its 2003 letter,<sup>389</sup> adopting the *Davis* standard for all higher education peer harassment cases and clarifying that conduct which falls short of the standard is not actionable. This would replace the 2003 letter and the lesser standard for hostile environment which OCR set forth in it.<sup>390</sup> The follow-up letter would be a significant step forward because giving schools one standard to follow would eliminate much of the uncertainty and room for interpretation which currently exists and which has contributed to the abuse of overbroad harassment rationales.

Colleges and universities should then follow all of this legal authority by adopting the *Davis* hostile environment standard themselves. First, they should ensure that their harassment policies follow the *Davis* standard and remove or redraft any policies which define peer harassment more broadly. Second, they should apply their policies only where conduct meets the requirements of *Davis*. Taking these measures would ensure that colleges and universities are providing the highest level of protection possible for campus speech while still meeting their statutory obligations to address peer harassment.

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389. See Reynolds, *supra* note 121.

390. *Id.*

### C. College and University Administrators and Qualified Immunity

The third proposed solution would have to come from the courts in their First Amendment jurisprudence. The courts should hold that the doctrine of qualified immunity does not protect college and university administrators who violate the First Amendment rights of students, for instance by applying overbroad harassment rationales against protected speech. While this solution addresses only those institutions that are subject to the Constitution,<sup>391</sup> the courts would force officials at these schools to think twice before taking such measures, knowing that they will not be able to hide behind the defense of qualified immunity if a student who has been harmed by their decision sues them in their personal capacity.

When a student at a public college or university has been deprived of a constitutional right by reason of official action, he or she has recourse to a section 1983 suit. This remedy allows the student to collect monetary damages from the responsible individual in his or her personal capacity. The cause of action comes from the federal Civil Rights Act of 1871,<sup>392</sup> which states:

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.<sup>393</sup>

The requirement of action under color of state law means that the defendant official must have exercised power “possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.”<sup>394</sup>

When facing a section 1983 suit for damages, one of the defenses available to a state official is qualified immunity. Qualified immunity shields government officials performing discretionary functions “from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>395</sup> The Supreme Court has clarified this standard by adopting a two-part test: first, whether the facts as alleged demonstrate violation of a constitutional or statutory right, and second, whether that right was clearly established at the time, such that it would have been clear

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391. *See supra* note 8.

392. 42 U.S.C. §§ 1983, 1985, 1986 (2000).

393. 42 U.S.C. § 1983.

394. *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

395. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

to a reasonable official that the alleged conduct was unlawful under the circumstances.<sup>396</sup> This inquiry entails consideration of both clearly established law and the factual information possessed at the time, and therefore must be “undertaken in light of the case’s specific context, not as a broad general proposition.”<sup>397</sup> Ultimately, Supreme Court jurisprudence commands government officials to look to “cases of controlling authority in their jurisdiction” or “a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.”<sup>398</sup>

The courts, in applying this doctrine whenever it is raised as an affirmative defense in a college or university student’s section 1983 suit, should recognize that depriving a student of his or her constitutional right to free speech is in fact a violation of clearly established law. The protections for free speech set forth in the First Amendment are most certainly clearly established rights within our society and apply with particular rigor in the college and university setting, in light of the importance of allowing for the free exchange of ideas on campus. I have previously discussed the significance that the Supreme Court and lower federal courts have traditionally attached to the modern college and university’s role in our society as a true marketplace of ideas.<sup>399</sup> These and similar judicial pronouncements not only go back several decades, they have been widely upheld in case law involving varying fact patterns and legal issues,<sup>400</sup> providing college and university officials with sufficient notice about the heightened protection accorded to free speech on campus.

Furthermore, if college and university officials wish to argue that they

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396. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). In *Saucier*, the Court mandated that lower courts apply the two-part test for qualified immunity in the order indicated above. That is, a court had to first decide whether the alleged facts demonstrated violation of a constitutional or statutory right before deciding whether the law had clearly established that right. However, in its recent decision in *Pearson v. Callahan*, 129 S.Ct. 808 (2009), the Court overruled *Saucier* on this point, holding that lower courts should have the discretion to decide the order in which to apply the two-part test. *Id.* Thus, while courts remain free to follow the *Saucier* protocol, they may also proceed directly to the second prong without answering the first.

397. *Saucier*, 533 U.S. at 194.

398. *Wilson v. Layne*, 526 U.S. 603, 617 (1999).

399. *See supra* note 9.

400. *See, e.g., Rosenberger v. Rector & Visitors*, 515 U.S. 819, 835 (1995) (citing *Healy* for the proposition that the danger of chilled speech is “especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition”); *Ornelas v. Regents of the Univ. of N.M.*, No. 99-2123, 2000 U.S. App. LEXIS 21151 (10th Cir. Aug. 21, 2000) (citing *Papish* to argue that a state university cannot expel a student in retaliation for engaging in legitimate First Amendment activity); *Stanley v. Magrath*, 719 F.2d 279, 282 (8th Cir. 1983) (citing *Papish* for the argument that a public university may not take adverse action against a student newspaper because it disapproves of the content of the paper).

are not aware of (nor should be aware of) clearly established law specifically dealing with the conflict between school harassment policies and speech rights, the answer lies in the previously discussed case law involving the application of overbroad harassment rationales.<sup>401</sup> These cases were *all* decided in favor of free speech, meaning that officials cannot reasonably argue that the courts have not given a clear indication of how the conflict between student speech rights and harassment law is to be resolved. Rather, the case law is over-determined on this issue. Consequently, it is disingenuous at best, and plainly ignorant at worst, for a public college or university to maintain a harassment policy mirroring one of the codes struck down in these cases or to apply a policy towards protected speech, and to then claim that it was unaware that its actions were unlawful. Moreover, even if a college or university official argues that none of these cases arose in his or her federal circuit and thus there were no binding legal decisions, the uniformity of the case law across several federal circuits establishes a general consensus of persuasive authority sufficient to meet the requirements of the Supreme Court's jurisprudence on qualified immunity.<sup>402</sup>

By rejecting the qualified immunity defense, the courts would dramatically alter the incentives for administrators addressing peer harassment. If administrators know that they face the prospect of paying monetary damages to a student who has been harmed in the exercise of his or her First Amendment rights, they will likely be much more careful when drafting and implementing sexual or racial harassment policies. They will more closely scrutinize the possibility of an infringement upon protected expression, resulting in a more sensible approach to the intersection and conflict between harassment law and free speech, allowing for much-needed breathing room for student expression on campus.

## VII. CONCLUSION

In fundamentally misapplying peer harassment law, some colleges and universities have taken aim at mere offensive and critical speech, despite the fact that hostile environment law, properly understood, is narrowly aimed at extreme patterns of harassing conduct and should not be applied against the exercise of free speech rights. By doing so, these colleges and universities have overstepped their obligations under Title IX and Title VI and are acting contrary to stated OCR policy and clear legal precedent, the latest example of which is the recent Third Circuit decision in *DeJohn*.<sup>403</sup>

A major contributing factor to the problem has been the practice on the part of some courts to conflate Title VII law with Title IX and Title VI law.

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401. See *supra* Parts III.C., III.D.

402. See *supra* note 398 and accompanying text.

403. *DeJohn v. Temple Univ.*, 537 F.3d 301 (3d Cir. 2008).

Some colleges and universities have reacted to these decisions by drafting and enforcing their harassment policies in a manner which follows Title VII hostile environment standards for the workplace. This practice is a manifestly inappropriate one; it ignores the significant differences between the workplace and the campus, and furthermore ignores the unique characteristics of peer harassment as compared to harassment in employment.

In this article, I have proposed some much-needed solutions. The most important of these is that Congress and OCR should amend Title IX and Title VI, and their respective implementing regulations, to eliminate institutional liability for peer sexual and racial harassment. The best available alternate solution is to adopt the *Davis* hostile environment standard as the controlling standard for all peer harassment cases. While colleges and universities would still remain liable for peer harassment, adoption of the *Davis* standard would provide the highest possible level of protection for student speech rights. The third and final proposed solution is for the courts to deny qualified immunity to college and university administrators in any case alleging the deprivation of a student's First Amendment rights. Taking this measure would provide administrators with clear incentives to respect and uphold students' speech rights.

The solutions I have proposed in this article are aimed at restoring student speech rights to where they properly should be on a college or university campus. Certainly, not every expression to be defended against the encroachment of harassment law will be agreeable to all parties. Giving sufficient breathing room for campus speech necessitates that everyone will have to tolerate some expression which one finds offensive, unredeemable, or just plain wrong. However, the more important point is that outright censorship is not the answer. It is dangerous to give one individual or group of individuals, whether it is a student body, college or university administration, or faculty, the power to draw the line separating what is too offensive or unacceptable from what is not. We will all be better off if everyone is instead more tolerant of expression and less sensitive about the "wrong" type of speech. May it ever be so.