

## PORNOGRAPHY, THE INTERNET, AND STUDENT-TO-STUDENT SEXUAL HARASSMENT: A DILEMMA RESOLVED WITH TITLE VII AND TITLE IX

EVELYN OLDENKAMP<sup>\*</sup>

### I. INTRODUCTION

Today, a female student may walk into a university computer lab to further her academic pursuits and find herself in a hostile environment because of other students' use of the Internet.<sup>1</sup> She may find a picture of a woman being raped on the screen next to her, hear male students laughing as they joke about the "big tits" of a naked woman on the computer screen, or be forced to wait at a printer while a male student prints a picture of a naked woman in bondage. This environment hinders female students' academic performance.

I have witnessed some of this behavior myself. One day, I went to retrieve a printout in the University of Oregon School of Law's computer center and was forced to wait while the printer slowly printed a full picture of a naked woman gagged and bound to a chair. I have also been shocked by my female colleagues' stories about male law students spending fifteen to thirty minutes doing nothing but viewing pornography in the law school computer lab.

These incidents made me uncomfortable within an environment which is essential to my academic pursuit, and they also indicated that some of my male colleagues see me and other women as less than an equal or, at least, have no qualms about engaging in behavior that many of their female colleagues perceive as disrespectful of women. Initially, I distanced myself from the individuals who viewed the pornography and many of their friends. I avoided having conversations with them. Feeling that their behavior showed disrespect for women, I respected them less.

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<sup>\*</sup> J.D. 1997, University of Oregon School of Law.

1. The Internet evolved from ARPANET, a reliable networking system under the auspices of the Department of Defense, developed by the Advanced Research Projects Agency (ARPA). See JOHN R. LEVINE & CAROLE BAROUDI, *THE INTERNET FOR DUMMIES* 11 (1994). This network could survive attacks on one of its links by rerouting information. The reliability of ARPANET-type networking was demonstrated during the 1991 Gulf War. The primary reason the United States had difficulty shutting down Iraqi command networks was Iraq's use of the commercial networks designed from the ARPANET. See *id.* at 12.

In 1980, university computing systems began to rely on UNIX operating software which could be used to access the Internet. See *id.* at 13. Currently, most universities, colleges, and recently, many high schools and elementary schools provide access to the Internet in their computer centers. The benefits that have been created, unfortunately, also come with disadvantages. The Internet allows students to access a wide variety of "sites." These include pornographic materials provided by both commercial enterprises and individual users.

I have since changed my perspective, taking a more proactive stance. I now presume that many of these men simply do not understand how their behavior affects their female colleagues. Universities should also take proactive approaches to this behavior by developing policies to prevent the negative repercussions it has on some of their students. Virginia Rezmierski, referring to pornography on the Internet, insightfully stated, "To ignore such acts is to enable the disintegration of a community, to allow hostilities and misunderstandings to increase, and to allow the disempowering of some individuals within the community at the expense for [sic] empowering others."<sup>2</sup>

This article proposes that student use of the Internet within university computer centers to view pornography should give rise to a per se hostile environment sexual harassment claim, and that such claims should be brought by students against their peers under university conduct codes and disciplinary procedures.<sup>3</sup>

Part II discusses why student use of the Internet to view pornography within a university presents a greater legal challenge than the same behavior by students within elementary and secondary schools. Part II also discusses the case law concerning obscenity and pornography leading to the creation of hostile environment sexual harassment claims under Title VII. Part III lays out the history of Title VII, discussing the development of the hostile environment sexual harassment claim and the judicial construction of such a claim under Title IX. Part IV proposes a legally sound means of dealing with hostile environment sexual harassment claims within the university context. The article concludes with the suggestion that the proposed policy is a legally valid and practical means of effectuating the purpose of Title IX.

This article focuses only on pornography that depicts women as sexual objects because studies suggest that the majority of the viewers of pornography on the Internet are men.<sup>4</sup> Therefore, assuming that homosexual male viewers are not vastly disproportionately represented, the majority of pornography viewed on the Internet depicts women. This focus also assumes that female students will usually be the ones who find the display of pornography to create a hostile environment because pornography primarily depicts women as sexual objects and thus reminds women of their unequal status within society. However, the policy proposed here will also allow male students to bring actions against peers who view pornography on the Internet within common areas. Pornography would include the display of men, women, or children in nude photos, when such photos displayed sexual acts, sexually provocative poses, or otherwise were sexual in nature. Thus, male or female students could bring actions against their peers for the display of pornography.

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2. Virginia Rezmierski, *Computers, Pornography, and Conflicting Rights*, 30 EDUCOM REV., Mar./Apr. 1995, No. 2, at 42, 44.

3. See generally David K. McGraw, *Sexual Harassment in Cyberspace: The Problem of Unwelcome E-Mail*, 21 RUTGERS COMPUTER & TECH. L.J. 491 (discussing the problem of sexual harassment via e-mail and a proposed legal solution).

4. See Marty Rimm, *Marketing Pornography on the Information SuperHighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in Over 2000 Cities in Forty Countries, Provinces and Territories*, 83 GEO. L.J. 1849, 1904-05 (1995) (discussing data that shows most viewers of pornography on the Internet are men).

## II. PORNOGRAPHY AND THE INTERNET

## A. The Unique Problem of Pornography at Universities

Prohibiting student access to pornography at high schools and elementary schools is not a difficult legal dilemma. The Supreme Court has recognized the broad authority of states, school boards, and officials to control student conduct within primary and secondary schools,<sup>5</sup> including freedom of expression in classrooms and school assemblies,<sup>6</sup> as long as it is consistent with constitutional safeguards.<sup>7</sup> The minor student's constitutional right to freedom of expression is not coextensive with the adult's right to freedom of expression.<sup>8</sup> The school may censor speech that disrupts classwork or school discipline, interferes with the rights of other students,<sup>9</sup> or "undermine[s] the school's basic educational mission."<sup>10</sup>

Schools may also censor speech occurring at activities considered part of the school curriculum. This includes any faculty supervised activity designed to impart knowledge or skills to the students.<sup>11</sup> It also includes school sponsored publications, assemblies,<sup>12</sup> and other events. The Supreme Court will uphold school regulations designed to ensure students learn the skills a curriculum offers while protecting students from exposure to material which is inappropriate for their level of maturity.<sup>13</sup> The Supreme Court will not interfere with a school's regulations unless there is no valid educational purpose for such restriction of student expression.<sup>14</sup>

A school's computer resources can clearly be established as part of the school curriculum and consequently are subject to school regulation. Pornography can be inconsistent with a school's basic educational mission and inappropriate for the students' maturity level. The Supreme Court is therefore unlikely to find a ban on pornography within elementary and secondary schools to be unconstitutional.

However, in colleges and universities the situation is slightly more complicated. College students for the most part are adults, and universities are places for the unrestricted exchange of ideas, so a more complex legal dilemma exists in

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5. See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 507 (1969). In this case two high school students were suspended for wearing black armbands in protest of the Vietnam War.

6. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986).

7. See *Tinker*, 393 U.S. at 507.

8. Although some people over 18 may attend secondary schools, the vast majority of students are minors. See *Fraser*, 478 U.S. at 682.

9. See *Tinker*, 393 U.S. at 508 (noting that the rights of other students include "the rights . . . to be secure and to be let alone.").

10. *Fraser*, 478 U.S. at 685.

11. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

12. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986). The Supreme Court upheld the school's discipline of a student for delivering a "sexually explicit" speech at a school assembly, even though the speech was not legally obscene. The school was justified in prohibiting vulgarity "wholly inconsistent with the 'fundamental values' of public school education." *Id.* at 685-86.

13. See *Kuhlmeier*, 484 U.S. at 271.

14. See *id.* at 273.

addressing student access of pornography at the university level. Academic freedom allows students and faculty to interpret, explore, and expand existing knowledge by challenging old ideas and proposing new ideas and theories, and it is vigorously protected in the academic community.<sup>15</sup> The Supreme Court has indicated that universities are “peculiarly the ‘marketplace of ideas’” and has proclaimed that “no new constitutional ground [is broken] in reaffirming this Nation’s dedication to safeguarding academic freedom.”<sup>16</sup> However, universities also have the responsibility to ensure all students the freedom to learn<sup>17</sup> and, under Title IX, the duty to prevent gender-based discrimination.<sup>18</sup>

University students’ use of the Internet to view pornography in public sectors creates a conflict between the free expression of ideas and each student’s right to learn free from gender discrimination. Universities need to develop a means of effectively balancing these two interests.

### B. Pornography: Definition, Constitutional Standing, and Impact on Women

In *Miller v. California*,<sup>19</sup> the United States Supreme Court defined the constitutional standard for what is obscene and therefore subject to state restriction. Works which “taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value,” are obscene.<sup>20</sup> A publication’s offensiveness is measured by the standards of the community where it is distributed or published.<sup>21</sup> The Supreme Court later noted that “obscene” material must appeal to something other than “normal, healthy sexual desires.”<sup>22</sup>

The constitutional definition of obscenity focuses on the “immorality” of a publication.<sup>23</sup> It defines as unacceptable only that which conflicts with established community norms. Most pornography is not classified as obscene and has been protected as freedom of expression.<sup>24</sup> It apparently fits within the category

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15. See Terrance Sandalow et al., *A Preliminary Report: Freedom of Expression and Campus Harassment Codes*, 77 ACADEME: BULL. OF THE AM. ASSOC. OF UNIV. PROFESSORS, May-June 1991, at 23-26.

16. Healy v. James, 408 U.S. 169, 180-81 (1972), citing *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

17. See James R. Kreuzer, *A Student “Right” Examined*, 53 AAUP BULL. 196-201 (1967).

18. 20 U.S.C. §§ 1681-88 (1994).

19. 413 U.S. 15 (1973).

20. See *id.* at 24.

21. See *id.* at 30-34.

22. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 498 (1985).

23. See Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1, 21 (1985).

24. See *American Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 330 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986), (citing *Jenkins v. Georgia*, 481 U.S. 153 (1974)) (finding the film *Carnal Knowledge*, a film showing a woman groveling to please the sexual whims of a man, not obscene); see also *id.* at 333 (citing *Erznnonznik v. City of Jacksonville*, 422 U.S. 205 (1975)) (striking down a state ordinance prohibiting showing films with nudity at a drive-in theater and concluding that exposure to sex is not something the government may prevent).

of “normal, healthy sexual desires.”<sup>25</sup> These “healthy sexual desires” are often offensive to women and detrimental to women’s health.<sup>26</sup>

In stark contrast to the Supreme Court’s definition of obscenity, Catharine MacKinnon and Andrea Dworkin defined pornography as “a systematic practice of exploitation and subordination based on sex which differentially harms women.”<sup>27</sup> According to these authors, pornography harms women’s opportunities and rights by inducing men to view women with contempt.

Pornography is speech about women and sex which constructs a social reality of women as sex objects.<sup>28</sup> This perpetuates bigotry and justifies acts of aggression against women.<sup>29</sup> Pornography that appeals to “normal, healthy sexual desire” is not perceived as “immoral,” therefore, it is not subject to government regulation. Instead, it is defined and defended as a form of freedom of expression, and thereby, is given legal protection under the Constitution.<sup>30</sup> As Catharine MacKinnon noted, this legal protection focuses not upon the nature of pornography, but upon its medium: books, photographs, films, videos, television programs, and images in “cyberspace.” Thus, pornography becomes a part of the “marketplace of life.”<sup>31</sup> Pornography has “fallen into a reality warp” and the detrimental impact which pornography has upon women is perpetuated under the guise of “freedom of expression.”<sup>32</sup> Evidence of the harmful effect which pornography has on women has led some communities to enact legislation or otherwise advocate for the restriction or banning of some pornography.<sup>33</sup> However, community attempts to regulate pornography have been held to unconstitutionally injure First Amendment rights of the pornographers.<sup>34</sup>

25. *Brockett*, 472 U.S. at 498.

26. See Catharine A. MacKinnon, *Vindication and Resistance: A Response to the Carnegie Mellon Study of Pornography in Cyberspace*, 83 GEO. L.J. 1959, 1959 n.1 (1995).

27. *American Booksellers Ass’n*, 771 F.2d at 329, quoting INDIANAPOLIS [sic] CODE § 16-1(a)(2) (1984).

28. See MacKinnon, *supra* note 23, at 19.

29. See *id.* at 45, 53-54:

[Because pornography] is reinforcing, [and leads to sexual release, it] leads men to want the experience which they have in photographic fantasy to happen in “real” life . . . [Exposure to pornography] makes normal men more closely resemble convicted rapists attitudinally, although as a group they don’t look all that different from them to start with. It also significantly increases attitudinal measures known to correlate with rape and self-reports of aggressive acts, measures such as hostility toward women, propensity to rape, condoning rape, and predicting that one would rape or force sex on a woman if one knew one would not get caught. This latter measure, by the way, begins with rape at about a third of all men and moves to half with “forced sex.”

MacKinnon further notes that there is no experimental research to contrast these results. See *id.* at 55-56.

30. See *American Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 333-34 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986).

31. See MacKinnon, *supra* note 26, at 1961 (1995).

32. *Id.*

33. See MacKinnon, *supra* note 23, at 3 n.2 (discussing hearings held in Minneapolis, Minn. regarding proposed ordinances that would classify pornography as a form of discrimination against women).

34. See *American Booksellers Ass’n*, 771 F.2d at 333-34.

Because power in American society has traditionally been under male control,<sup>35</sup> men have defined the norms of sexual desire. “[P]ower constructs the appearance of reality by silencing the voices of the powerless, by excluding them from access to authoritative discourse.”<sup>36</sup> Women are excluded from that discourse, and what they perceive as “norms” of sexual desire are not incorporated in defining what is and is not constitutionally protected.

The leading case concerning the regulation of pornography is *American Booksellers Association, Inc., v. Hudnut*<sup>37</sup> in which the Seventh Circuit struck down as unconstitutional an Indianapolis statute which defined pornography as a practice that discriminates against women.<sup>38</sup> The court acknowledged that people often act in accord with images and patterns they find around them and accepted the legislation’s premise that pornography perpetuates the subordination of women and results in “lower pay at work, insult and injury at home, battery and rape on the streets.”<sup>39</sup> The court, however, noted that a direct link between pornography and violent acts against women has never been conclusively established. It acknowledged that because the socialization process has so many factors it is difficult to determine whether viewing pornography alone leads to violent acts.<sup>40</sup> While sufficient evidence exists on both sides to create a valid empirical dispute<sup>41</sup> because the effects of pornography on male mentality are not immediate, the court held that the state may not penalize pornography by allowing civil actions against pornographers under Indianapolis’ definition of pornography.<sup>42</sup>

Regardless of federal courts’ views on pornography, this paper adopts Catharine MacKinnon’s conclusion that pornography essentially sexualizes societal inequality and institutionalizes the sexuality of male dominance thereby violating women’s right to equal protection under the law.<sup>43</sup> Pornography defines how men see women. Furthermore, men’s power over women defines who women can be within the societal hierarchy.<sup>44</sup> Pornography perpetuates some men’s view of women as non-equals at home, within the workplace, and within the academic arena.

The display of pornography in the workplace has been held to contribute to an actionable Title VII claim for hostile environment sexual harassment.<sup>45</sup> Some

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35. See MacKinnon, *Pornography, Civil Rights, and Speech*, *supra* note 23, at 3-9.

36. *Id.* at 3.

37. 771 F.2d 323. (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986).

38. See *id.* at 333-34.

39. *Id.* at 329.

40. See *id.* at 330.

41. See, e.g., *id.* at 329 n.2. See generally ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1989).

42. See *American Booksellers Ass’n, Inc. v. Hudnut*, 771 F.2d 323, 333 (7th Cir. 1985), *aff’d*, 475 U.S. 1001 (1986) (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969)).

43. See MacKinnon, *supra* note 23, at 8.

44. See *id.* at 17-18.

45. See *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1472-81 (3d Cir. 1990). *But see* *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 622 (6th Cir. 1986) (finding that sexually oriented poster display had de minimis effect on plaintiff’s work environment when considered within a society that condones, publicly features, and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime time television, at the cinema, and in other public places). The Supreme

courts have limited the constitutional protection given to pornography displayed within common areas of the workplace. These courts have identified pornography as an invidious means of perpetuating inequality within the workplace.<sup>46</sup> Pornography is restricted in these environments because of the effects it has on women's equality within the workplace. Pornography has the same negative implications within the university community and should be similarly circumscribed.

### III. TITLE VII: HISTORY, IMPACT ON PORNOGRAPHY, AND JUDICIALLY CONSTRUCTED RELATIONSHIP TO TITLE IX

#### A. Restricting Pornography Under Title VII

Title VII's prohibition against sexual discrimination includes sexual harassment.<sup>47</sup> Sexual harassment claims fall into two different categories. *Quid pro quo* claims occur when employment benefits are conditioned on sexual favors. Hostile environment sexual harassment occurs when the work environment is sexually abusive in nature. It is the latter category that is the focus here.<sup>48</sup>

The Supreme Court first recognized a Title VII hostile environment sexual harassment claim in the landmark case of *Meritor Savings Bank, F.S.B. v. Vinson*.<sup>49</sup> The Court stated that Congress' intent in passing Title VII was to eradicate the "entire spectrum of disparate treatment of men and women in employment,"<sup>50</sup> and that Title VII actions could not be limited to "economic" or "tangible" discrimination.<sup>51</sup> The Court adopted the definition of sexual harassment found in the Equal Employment Opportunity Commission Guidelines, which includes any "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."<sup>52</sup>

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Court's decision in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993), overturned the *Rabidue* Court's requirement that the hostile environment create psychological injury to the plaintiff. See *id.* at 22-32. Consequently, the *de minimis* effect may well be sufficient to make out a claim under today's hostile environment standard.

46. See *Andrews*, 895 F.2d at 1481; see also *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1493-536 (M.D. Fla. 1991) (holding that female welders suffered hostile environment sexual harassment primarily because pictures of nude and partially nude women appeared throughout the workplace).

47. See *Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 73 (1986).

48. See generally Jill Suzanne Miller, *Title VII and Title IX: Happy Together as a Resolution to Title IX Peer Sexual Harassment Claims*, 1995 U. ILL. L. REV. 699 (discussing in more detail the relationship between Title VII and Title IX and presenting a persuasive argument for including Title VII hostile environment sexual harassment claims under Title IX).

49. 477 U.S. 57 (1985).

50. *Id.* at 64, citing *Los Angeles Dep't of Water & Power v. Manhart* 435 U.S. 702, 707 n.13 (1978) (quoting *Sprogis v. United Airlines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

51. See *id.*

52. *Id.* at 65 (quoting 29 C.F.R. § 1604.11 (a)(3) (1995)). The Court discussed the guidelines of the Equal Employment Opportunity Commission which gave examples of workplace conduct that might be actionable, including "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . ." *Id.*

In *Harris v. Forklift Systems, Inc.*,<sup>53</sup> the Supreme Court expanded the hostile environment sexual harassment claim. First, the Court rejected the requirement that actionable conduct must have a serious effect on the plaintiff's psychological well-being.<sup>54</sup> The Court stated that the psychological well-being of the plaintiff should be considered under the circumstances along with a number of other factors, none of which was necessarily conclusive.<sup>55</sup> Factors such as the severity and frequency of the conduct, and whether the conduct was physically threatening or merely offensive were to be considered in determining if the alleged discriminatory behavior created an abusive environment sufficiently severe or pervasive to alter the conditions of a workplace. If the plaintiff perceived the environment as hostile and a reasonable person would also perceive it as hostile, then the behavior creating this environment violated Title VII.<sup>56</sup>

Today, a claim under Title VII is actionable if: the plaintiff was subjected to unwelcome harassment on the basis of his or her gender; the alleged harassment was sufficiently severe or pervasive to alter the conditions of employment; the plaintiff found his or her environment abusive and a reasonable person would find the environment abusive; and the employer knew or should have known of the behavior.<sup>57</sup>

Some courts have held that pornography falls into the category of actionable behavior even where it is not aimed at any one individual or group of individuals because it has a disparate impact on women.<sup>58</sup> Pornography creates a hostile environment for women who want to deal with their fellow employees with dignity, free from barriers created by sexual differentiation.<sup>59</sup> When pornography is displayed in common areas, it conveys the message to many women that they are welcome in the workplace only if they submit to the sexual stereotypes that permeate that environment.<sup>60</sup> The result is an environment that would be hostile to a reasonable person who seeks to work with fellow employees with professionalism.<sup>61</sup>

#### B. The Inclusion of Title VII Coverage by Analogy Under Title IX

Title VII was created to remove barriers which perpetuate stereotypes and a sense of degradation that limit or close women's employment opportunities.<sup>62</sup>

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53. 510 U.S. 17 (1993).

54. See *id.* at 22-33, *overruling* *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986).

55. See *id.* at 23. The Court decided that a hostile environment can be determined only by looking at all the circumstances, including the following factors: 1) the frequency of discriminatory conduct; 2) the severity of the conduct; 3) whether it was physically threatening or humiliating, or a mere offensive utterance; 4) whether it unreasonably interfered with an employee's work performance. See *id.* The Court then noted that the psychological well-being of the alleged victim is a relevant factor, but no single factor is required. See *id.*

56. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22-23 (1993).

57. See *id.* at 21.

58. See, e.g., *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1523-24 (M.D. Fla. 1991).

59. See *Bennet v. Corroon & Black Corp.*, 845 F.2d 104, 106 (5th Cir. 1988).

60. See *Robinson*, 760 F. Supp. at 1524.

61. See *id.*

62. See *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483 (3d Cir. 1990).



Pornography in common areas of the workplace violates Title VII. Title IX states, "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>63</sup> Courts should find that Title IX allows hostile environment claims under university conduct codes by analogizing to Title VII. If an educational program or activity fails to meet Title IX requirements, then individuals may initiate judicial review of the program.<sup>64</sup> The purpose is to eliminate sex discrimination at academic institutions. The Supreme Court has already recognized under Title VII that sexual harassment is a form of sex discrimination. To completely eradicate sex discrimination from the educational environment, Title IX should be construed analogously to Title VII to mandate that universities provide grievance mechanisms for students to bring actions against their peers whose behavior creates hostile environment sexual harassment.

Some courts have applied Title VII's hostile environment sexual harassment by analogy under Title IX for teacher-to-student claims. Most importantly, the Supreme Court in *Franklin v. Gwinnett County Public School*<sup>65</sup> implicitly recognized a private action hostile environment sexual harassment claim against a school district under Title IX.<sup>66</sup> The Court noted that it would not explicitly rule on the applicability of Title VII by analogy under Title IX because the plaintiff did not raise the issue on appeal.<sup>67</sup> Nevertheless, the Court noted that when a supervisor sexually harasses a subordinate, the supervisor commits sexual discrimination.<sup>68</sup> The Court then concluded that the same rule should apply when a teacher sexually harasses a student.<sup>69</sup>

The *Franklin* decision explicitly recognized a claim for teacher-to-student hostile environment sexual harassment, and it suggested that the Court would be willing to recognize student-to-student hostile environment sexual harassment claims under Title IX if the issue were properly brought before it. Some lower courts have followed this interpretation of the case. In *Patricia H. v. Berkeley Unified School District*,<sup>70</sup> the district court, relying on the *Franklin* decision, recognized a claim for teacher-to-student hostile environment sexual harassment under Title IX.<sup>71</sup>

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63. 20 U.S.C. § 1681(a) (1994).

64. *See id.* § 1683.

65. 503 U.S. 60 (1992). In this case a female student brought a private action claim under Title IX against both a former teacher and the school district, alleging that the teacher sexually harassed her on several occasions and that the school system did not protect her from the discrimination. *See id.* at 60-61. The Court held that the student was entitled to damages under Title IX from the individual and the school system. *See id.*

66. In *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560 (N.D. Cal. 1993), the district court cited *Franklin* to indicate that hostile environment claims do apply under Title IX. *See id.* at 1563. It noted that the Supreme Court appeared to recognize the cause of action since there was no quid pro quo involved in the unlawful conduct. *See id.* at 1575.

67. *See Franklin*, 503 U.S. at 65, n.4.

68. *See id.* at 75, citing *Meritor Sav. Bank, F.S.B. v. Vinson*, 477 U.S. 57, 64 (1986).

69. *See id.*

70. 830 F. Supp. 1288 (N.D. Cal. 1993).

71. *See id.* at 1296-98. The court found that the students were allegedly molested off school grounds by a band teacher, who taught at a number of schools in the district. *See id.* at 1294-96.

The question of whether student-to-student sexual harassment is actionable under Title IX is still unresolved. In *Doe v. Petaluma City School District*,<sup>72</sup> the district court adopted the reasoning of *Patricia H.* to find a cause of action under Title IX for student-to-student hostile environment sexual harassment. The plaintiff's theory of liability analogized the school district to an employer, whereby the school district would be liable if it "knew or should have known" of the sexual harassment of the plaintiff by her peers and failed to take appropriate remedial action.<sup>73</sup> The plaintiff's school counselor failed to notify her parents of the school's Title IX policy or the school official employed to handle Title IX complaints, even though the plaintiff made repeated complaints to him regarding sexual harassment by her peers.<sup>74</sup> The plaintiff claimed that this violated her federal rights under Title IX and thus gave rise to a claim under 42 U.S.C. § 1983.<sup>75</sup>

The court refused to apply the plaintiff's suggested standard of liability to the school because under Title IX an educational institution's liability is premised on intentional, not negligent, discrimination.<sup>76</sup> The court denied the plaintiff's claim with leave to amend. It then suggested that a student's claim might be actionable if it were brought on the theory that the school's inaction in the face of student complaints evidenced the requisite intent to discriminate.<sup>77</sup>

On appeal, the Ninth Circuit addressed the student's second amended complaint, filed after the partial dismissal by the district court.<sup>78</sup> In the amended complaint, the plaintiff asserted a Title IX claim against the school for the counselor's failure to act.<sup>79</sup> The Ninth Circuit noted that the counselor's alleged inaction occurred prior to the Supreme Court's decision in *Franklin*.<sup>80</sup> Therefore, the counselor had no clearly established legal duty to intervene in peer sexual harassment at the time of his inaction.<sup>81</sup> Since the counselor did not have notice that his inaction was illegal, he was protected under the doctrine of qualified immunity, "which recognizes that officials can act without fear of harassing litigation only if they reasonably can anticipate when their conduct may give rise [to liti-

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72. 830 F. Supp. 1560 (N.D. Cal. 1993).

73. See *id.* at 1563.

74. See *id.* at 1564.

75. 42 U.S.C. § 1983 states, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects [any] other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . ." Since Title IX gives students a federal right to be free from sex discrimination in educational institutions receiving federal funding, when such a right is violated by an official or agency of the state (here a public institution) the individual has a remedy against such official or agency. See also *Monroe v. Pape*, 365 U.S. 167, 187 (1961) (holding that allegedly illegal actions by city police officers constitute action "under color of state statute" but that only the officers and not the city were potentially liable, because a municipal corporation is not a person within the meaning of the statute).

76. See *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1576 (N.D. Cal. 1993).

77. See *id.*

78. See *Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447, 1449 (9th Cir. 1995).

79. See *id.*

80. See *id.* at 1451.

81. See *id.* at 1452; see also Victoria E. Lovato, *Doe v. Petaluma City School District: A School Counselor's Qualified Immunity, a License to Tolerate Peer Sexual Harassment?*, 28 ARIZ. ST. L.J. 381 (criticizing the Ninth Circuit's failure to punish the counselor's inaction).

gation].”<sup>82</sup> The Ninth Circuit did surmise the *Franklin* decision may have created a legal duty for school personnel to act to prevent peer sexual harassment.<sup>83</sup> Therefore, in the future, a claim analogizing school personnel to an employer and the student to an employee might create a cause of action against a school for failure to respond properly to hostile environment sexual harassment.<sup>84</sup>

A year after the Ninth Circuit decision in *Petaluma City*, the district court in *Oona S. v. Santa Rosa City Schools*<sup>85</sup> recognized a student’s Title IX right to be free from sexual harassment by a teacher or fellow students.<sup>86</sup> The court found a Title IX violation when school officials failed to take appropriate steps to deter or punish peer sexual harassment. The court indicated that the school official’s failure to respond to the student’s complaints was a form of sex discrimination.<sup>87</sup>

The limited case law indicates that most courts appear willing to apply Title VII by analogy to student-to-student hostile environment sexual harassment claims under Title IX.<sup>88</sup> Courts have not yet addressed student-to-student sexual

82. *Doe*, 54 F.3d at 1452. “Qualified immunity” is an “[a]ffirmative defense which shields public officials performing discretionary functions from civil damages if their conduct does not violate clearly established statutory or constitutional rights of which reasonable person would have known;” BLACK’S LAW DICTIONARY 752 (6th ed. 1990) (citation omitted). The standard for determining qualified immunity is “[i]f the law at [the time of the official’s actions] was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to ‘know’ that the law forbade conduct not previously identified as unlawful.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The plaintiff has the burden of showing that the law was clearly established at the time of inaction, and “[i]f this burden is met by plaintiff, the defendant then bears the burden of establishing that his actions were reasonable, even though they may have violated the plaintiff’s [federally protected rights].” *Maraziti v. First Interstate Bank*, 953 F.2d 520, 523 (9th Cir. 1992).

83. The Ninth Circuit noted that:

If Homrighouse engaged in the same conduct today, he might not be entitled to qualified immunity. We would then be required to consider the Supreme Court’s recent *Franklin* decision . . . . It might turn out that Title VII cases decided subsequently to the events in this case could be used by analogy to provide the basis for creating a duty to act under Title IX. We express no opinion as to that question.

*Doe*, 54 F.3d at 1452.

84. *See id.*

85. 890 F. Supp. 1452 (N.D. Cal. 1995); *see id.* at 1469.

86. The district court found the Ninth Circuit’s decision in *Clyde K. v. Puyallup Sch. Dist.*, 35 F.3d 1396, 1401 (9th Cir. 1994) to imply:

The right created by Title IX may be violated when female students are subjected to sexual harassment by their male peers at a school and school officials discriminate against the female students on the basis of sex in encouraging or failing to appropriately respond to such harassment. Such discrimination may manifest itself in the active encouragement of peer harassment, the toleration of the harassing behavior of male students, or the failure to take adequate steps to deter or punish peer harassment.

*Oona S.*, 890 F. Supp. at 1469.

87. *See Oona S.*, 890 F. Supp. at 1469; *see also* *Nabozny v. Podlesny*, 92 F.3d 446, 458, 460-61 (7th Cir. 1996) (holding that a student can bring a § 1983 action against school officials and a school district for failure to protect the student from harassment and harm by other students due to the student’s sexual orientation). In *Nabozny*, the court found that the student could maintain equal protection claims alleging discrimination based both on gender and sexual orientation. *See id.* In addition, the court found that none of the officials had immunity from their failure to act.

88. *See, e.g., Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 249 (2d Cir. 1995), *cert. denied*, 117 S. Ct. 165 (1996) (“[I]n 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

harassment claims within a university. The unique nature of the university environment<sup>89</sup> raises sensitive constitutional questions concerning safeguards for freedom of expression.<sup>90</sup> However, the policy proposed herein is consistent with existing case law and statutes and is narrowly tailored to fulfill those statutory purposes.

### C. Is the Inclusion of Title VII Coverage by Analogy Under Title IX Applicable to Universities?

In the few cases involving sexual harassment in the university setting, Title VII analyses and doctrine have been applied by analogy under Title IX to student claims against professors or university employees. In *Alexander v. Yale University*,<sup>91</sup> students brought an action to compel Yale to install grievance mechanisms for student sexual harassment claims.<sup>92</sup> The students also alleged that Yale's failure to provide such mechanisms interfered with their academic performance and constituted discrimination in education under Title IX.<sup>93</sup> The district court recognized a quid pro quo claim when students' grades are conditioned on the performance of sexual acts with a professor.<sup>94</sup> However, the students' claims were not seen as sufficient to establish quid pro quo harassment and were dismissed for failure to sufficiently allege the occurrence of sexual harassment.<sup>95</sup> The Second Circuit affirmed the district court's dismissal of the claims,<sup>96</sup> but the court's discussion of the dismissal implied that if the claims had not been moot, it would have recognized a hostile environment sexual harassment claim under Title IX.<sup>97</sup>

Similar claims have arisen in other cases. In *Moire v. Temple University School of Medicine*,<sup>98</sup> a student serving a psychiatric clerkship alleged sexual harassment by university employees.<sup>99</sup> The court determined that both quid pro quo and hostile environment sexual harassment law developed under Title VII were

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applied in cases under Title VII."). *But see* Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1016 (5th Cir. 1996) (holding that Title IX does not impose liability on a school district for peer hostile environment sexual harassment absent a showing that the school district itself, via supervisors, directly discriminated on the basis of sex); Garaya v. Galena Park Indep. Sch. Dist., 914 F. Supp. 1437, 1438 (S.D. Tex. 1994) (holding that hostile environment claims are not actionable under Title IX).

89. The Supreme Court has noted that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

90. See discussion *supra* notes 5-18 and accompanying text.

91. 459 F. Supp. 1 (D Conn. 1977), *aff'd*, 631 F.2d 178 (2d Cir. 1980).

92. See *id.* at 180.

93. See *id.* at 181.

94. See *id.* at 4. In 1980, the time of this case, the sexual harassment doctrine had not yet clearly recognized hostile environment sexual harassment. *Harris v. Forklift* clearly delineates it now.

95. See *Alexander*, 631 F.2d at 185.

96. See *id.*

97. See *id.* at 184. The court indicated that because the claims were moot it could neither redress the injury of "deprivation of an education environment free from condoned harassment," nor provide relief by ordering Yale to install "effective procedures for receiving and adjudicating complaints of sexual harassment." *Id.* The claims were moot because the students bringing the action had all been graduated. See *id.*

98. 613 F. Supp. 1360 (E.D. Pa. 1985).

99. See *id.* at 1362.

applicable to Title IX claims but found the evidence insufficient to establish either claim.<sup>100</sup> In *Lipsett v. University of Puerto Rico*,<sup>101</sup> a medical student was an employee of the university and was harassed by fellow employees.<sup>102</sup> The court found that a hostile environment claim could be brought under Title IX.<sup>103</sup>

The three cases discussed are the only reported decisions involving university students and hostile environment sexual harassment. Despite the paucity of case law addressing hostile environment sexual harassment claims at the university level, the Supreme Court's decision in *Franklin* and its mandate to give Title IX's coverage a scope as broad as its purpose of eradicating sex discrimination in education<sup>104</sup> makes the recognition of student-to-student claims within the university context a logical step toward fulfilling the purpose of Title IX.<sup>105</sup>

#### IV. HANDLING STUDENT-TO-STUDENT HOSTILE ENVIRONMENT SEXUAL HARASSMENT CLAIMS WITHIN THE UNIVERSITY CONTEXT

##### A. A Proposal for Applying Title VII Standards in the University

If the courts are willing to interpret Title IX to include the rights established under Title VII, then each university will have to develop a system to protect students from hostile environment sexual harassment created by their peers. Under Title IX,<sup>106</sup> universities have statutory responsibilities to their students that are similar to an employer's responsibilities to its employees under Title VII. These responsibilities require the university to eradicate all sex discrimination in the education context.<sup>107</sup> Universities should draft provisions into their student conduct codes to incorporate Title VII hostile environment sexual harassment law and allow students to bring student-to-student hostile environment claims when their peers' behavior unreasonably interferes with their academic performance or otherwise creates a hostile academic environment.<sup>108</sup> The student claimant would be required to meet the elements of an actionable Title VII claim, with minor modifications.

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100. See *id.* at 1366-67.

101. 864 F.2d 881 (1st Cir. 1988).

102. See *id.* at 914; see also Kimberly L. Limbrick, *Developing a Viable Cause of Action for Student Victims of Sexual Harassment: A Look at Medical Schools*, 54 MD. L. REV. 601 (discussing the prevalence of sexual harassment within medical schools).

103. See *Lipsett*, 864 F.2d at 901.

104. See *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982).

105. See 34 C.F.R. § 106.1 (1995) (prohibiting discrimination on the basis of sex within educational institutions); see also Kirsten M. Eriksson *What Our Children Are Really Learning in School: Using Title IX to Combat Peer Sexual Harassment*, 83 GEO. L.J. 1799, 1802 (1995) (arguing that the *Franklin* decision should be explicitly extended so as to encompass peer sexual harassment under Title IX).

106. 20 U.S.C. §§ 1681-88 (1994).

107. See 34 C.F.R. § 106.1 (1995).

108. See Alexandra A. Bodnar, *Arming Students for Battle: Amending Title IX to Combat Sexual Harassment of Students in Primary and Secondary Schools*, 5 S. CAL. REV. L & WOMEN'S STUD. 549, 559 (1996) (noting that studies show that sexual harassment may substantially interfere with a student's education; repercussions include low self-esteem and a variety of other psychological, physical, and academic harms).

For example, one modification would require that certain incidents of hostile environment sexual harassment would be actionable only if they occurred within a common area that provided academic services or resources that facilitate students' right to an education. The display of pornography on the Internet within the university computer center would be noted within the conduct code as a kind of behavior which commonly constituted hostile environment sexual harassment per se. In other words, the display of pornography by itself is considered inherently injurious, so the plaintiff would not be required to prove particulars such as actual injury or intent of defendant to harass.

The university, consistent with its responsibilities under the proposed interpretation of Title IX, should do the following: provide notice to all students of the policy against hostile environment sexual harassment within common areas; distribute a handbook or other form of notice that indicates the type of physical or verbal conduct which may qualify as a violation; and develop an effective grievance procedure to handle student complaints in a prompt and equitable fashion. Without such efforts by the university, students may have a valid claim against the university under Title IX for a sexual discrimination suit.<sup>109</sup>

#### B. Common Area Incidents and Student-to-Student Hostile Environment Claims

While one of the purposes of a university is to promote academic freedom, consisting of the freedom to teach and the freedom to learn, this goal must be balanced against the university's responsibility to develop policies and procedures that safeguard this freedom for all students.<sup>110</sup> To assure equal access to educational facilities, universities need to adopt policies to protect students from pornography that leads to a hostile environment.<sup>111</sup> Such policies are based on responsibility for and sensitivity to others' needs.<sup>112</sup>

In this regard, common areas in the university are similar to common areas within the workplace. Employees are required to use certain common areas, such as computer rooms, secretarial pools, and office libraries, to fulfill their work responsibilities. Cafeterias, lounges, and hallways are other common areas. Students use similar common areas at universities. Computer centers, libraries, and science laboratories are important facilities on campuses. Other common areas, including food courts, student unions, and dormitory lounges, are part of students' daily routines. General standards of conduct have arguably been established for common areas in the workplace,<sup>113</sup> and similar standards should be

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109. See 20 U.S.C. § 1683 (1994).

110. Sandalow et al., *supra* note 15, at 24-25.

111. For pornography to result in a hostile environment it must occur within a common area. This leaves students' freedom of inquiry untouched, for they are able to view this material in magazines or on their own computers in the privacy of their dorm rooms or in other areas where it does not infringe upon other students' freedom to learn.

112. See *Joint Statement on Rights and Freedoms of Students*, 53 AAUP BULL. 365 (1967). The Joint Statement noted, "The freedom to learn depends upon appropriate opportunities and conditions in the classroom, on the campus, and in the larger community. Students should exercise their freedom with responsibility." *Id.* at 365-66.

113. See, e.g., *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990) (reviewing cases and stating that pornography in the workplace could "quite possibly" be regarded as offensive and may be a factor in creating a hostile work environment).

adopted for common areas at universities to facilitate a productive, welcoming academic environment for all.

Students should be primarily responsible for maintaining conditions conducive to a productive academic environment. University conduct codes that establish procedures for student-to-student hostile environment sexual harassment claims would make students responsible for their harassing or offensive conduct. A student's free inquiry and expression would only be checked when it infringed on another student's freedom to learn. The principle of freedom of expression with responsibility, enforced by student complaints, would create an environment where all students could learn free from harassment.

Students' viewing or reading of pornography within certain common areas in the university would not create a per se hostile environment, if they exercised their rights in a responsible manner that would not infringe on other students' rights to be free from sexual harassment. For example, in the library, a student could view pictorial pornography or read pornography without creating a per se hostile environment, so long as he did not intentionally or negligently expose unwilling viewers to the pornography. For example, if he viewed or read pornography while at a desk where another student would have to look hard to see what he was reading, the viewer would not be negligently or intentionally exposing other students to pornography. The viewer's behavior would not constitute a violation of the student conduct code because his behavior would not infringe upon the other students' right to be free from sexual harassment. In contrast, if the student viewed the pornography in a fashion which caused the exercise of his right to pervade the area and create a situation in which another student would have to move to avoid the display, then his behavior would constitute a violation. Thus, if a student looking at a pornographic magazine leaves it open on a table, holds it up for a friend to see, posts it on the wall, or otherwise intentionally or negligently displays it to an unwilling viewer, his behavior would constitute hostile environment sexual harassment.

In certain other common areas, the viewing of pornography would create a hostile environment per se because a student would not be able to exercise his right to view pornography without infringing on other students' right to be free from sexual harassment. A student's choice to view pornographic pictures<sup>114</sup> on computer terminals within a university computer center should be acknowledged as an irresponsible exercise of his right. Pornography on the Internet could pervade the entire computer center and is not easily avoided because of the typical open layout of such centers. The unwilling viewer should not be

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114. This article distinguishes between pictorial and written pornography on computer screens. The written form of pornography on computer screens does not pervade the environment and a student cannot know what her classmate is reading without looking closely at his screen. Therefore, his behavior does not constitute hostile environment sexual harassment per se. However, it may be proposed that such behavior results in hostile environment sexual harassment if the viewer intentionally or negligently draws attention to what he is viewing, i.e., laughing and joking about it, repeating what is written, or otherwise drawing attention to the material he is viewing. Arguably, when a student decides to view such material, he implicitly assumes the risk that someone will be exposed to it and become threatened by it. This area has far reaching First Amendment implications, more appropriately addressed in a separate article. Therefore, I focus only on pictorial pornography and set aside the issue of written pornography for future discourse.

forced to bear the burden of avoiding pornography, especially in a facility provided for academic purposes. The recognition of this behavior as hostile environment sexual harassment per se preserves other students' right to learn and, as subsequently discussed, serves to educate the harasser of behavior that may lead to negative repercussions within the workplace for which his university education is preparing him.<sup>115</sup>

### C. Pornography on Computer Screens Meets Title VII Hostile Environment Elements

The display of pornography on computer screens within university facilities meets the elements of a hostile environment sexual harassment claim.<sup>116</sup> First, pornography discriminates on the basis of gender because it has a disparate impact on female students.<sup>117</sup> Second, pornography creates an abusive environment because it reminds some female students that some of their male colleagues perceive women as sex objects, not as equals. Finally, unlike written work, a pornographic picture on a computer screen cannot be easily avoided, therefore it is sufficiently severe or pervasive to unreasonably alter the conditions of a student's academic environment.

Students should be subject to the same protections as employees are under Title VII. In *Meritor Savings Bank, F.S.B. v. Vinson*,<sup>118</sup> the Supreme Court noted that an employee should not be required to "run the gauntlet of sexual abuse in return for the privilege of being allowed to work . . ." <sup>119</sup> Thus, an employee does not have to endure pornographic pictures in the workplace simply because they are available in magazine stands or convenience stores.<sup>120</sup> A person can choose

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115. Mitigating circumstances, including the inadvertence of the viewing or the encouragement or participation of the alleged victim, would be considered during the disciplinary proceedings. The victim's silence should not be interpreted as consent, rather it should be seen as evidence of the effect the actions have upon him or her.

116. First, the plaintiff was subjected to unwelcome harassment on the basis of his or her gender; second, the alleged harassment was sufficiently severe or pervasive to alter the conditions of the employment; and third, the plaintiff found his or her environment abusive and a reasonable person would find the environment abusive. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22, 24-26 (1993). The fourth element, that the employer knew or should have known of the behavior, does not become applicable unless the university fails to provide proper notice and does not make grievance procedures available to students. See *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1576 (N.D. Cal. 1993). This application of the fourth element may not be consistent with some circuits requirement that intent be shown. See, e.g., *id.* However, requiring that intent be shown could make it difficult for students to hold universities accountable for failing to provide adequate services and procedures to address peer sexual harassment. The universities' responsibilities under Title IX already require them to prevent sexual discrimination. Therefore, eliminating the intent requirement applied under Title VII places no larger responsibility on the universities and, in fact, furthers the purpose of Title IX.

117. As previously mentioned, all types of pornography should be considered hostile environment sexual harassment. See *supra* notes 45-46 and accompanying text. Homosexual pornography also discriminates on the basis of gender because it makes either male or female students feel like sexual objects and not professional coequals. It interferes with students' academic pursuits and can be just as pervasive and severe as heterosexual pornography.

118. 477 U.S. 57 (1986).

119. *Id.* at 67, quoting *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982).

120. *Cf. Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990) (stating that women



whether or not to enter a magazine stand or store that displays or sells pornography, for there are other stores that do not display or sell such materials. In contrast, both employees and students are required to be certain places within the employment and university contexts. Additionally, certain common areas in a workplace and an educational setting are essential to the individual's effective performance of his or her endeavors.

In summary, students should also not have to "run the gauntlet of sexual abuse" to get a college education. More specifically, students should not have to endure the display of pornographic pictures on the Internet in order to access university computer resources. A conduct code prohibiting hostile environment sexual harassment will assist universities in meeting their statutory responsibilities and in removing barriers of sex discrimination.

#### D. University Conduct Code Claims Are Consistent with University Responsibilities Under Title IX Mandates

The purpose of Title IX is to "eliminate . . . discrimination on the basis of sex in any education program or activity . . ." <sup>121</sup> To further this purpose, Title IX regulations mandate a number of duties for universities. A university must designate at least one employee to coordinate efforts toward compliance, including the investigation of complaints. <sup>122</sup> It also must give public notice of its anti-discrimination policy. <sup>123</sup> Additionally, the university has the responsibility not to "limit any person in the enjoyment of any right, privilege, advantage or opportunity." <sup>124</sup> The university also must establish grievance procedures to resolve complaints from both students and employees in a "prompt and equitable" manner. <sup>125</sup>

If the university computer center becomes a hostile or frightening environment for a student because of her peers' choice to use computers to view pornographic pictures, then her enjoyment of the privilege of using the computer resources is limited. This is analogous to pornography in the workplace which, by making it more difficult for a woman to do her job, qualifies as sex discrimination. <sup>126</sup> Furthermore, if the university does not have grievance mechanisms for student-to-student hostile environment sexual harassment claims <sup>127</sup> then the uni-

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might feel an offensive atmosphere had been created by the display of pornography in the workplace, even if men might feel otherwise).

121. See 34 C.F.R. § 106.1 (1995). Title IX covers all educational institutions receiving federal financial assistance, including ". . . any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department." 20 U.S.C. § 1681(c) (1994).

122. See 34 C.F.R. § 106.8(a).

123. See *id.* § 106.9 (stating the notice applies to applicants, parents, students, and union and professional organizations).

124. *Id.* § 106.31(b)(7).

125. See *id.* § 106.8(b).

126. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22, 24-26 (1993).

127. Arguably a student could be charged with hostile environment sexual harassment under already existing conduct code regulations. The University of Oregon prohibits unwanted sexual behavior, described as behavior which "[w]ould materially interfere with the individual's academic performance at the University, or participation in University-sponsored or supervised activi-

versity's inaction perpetuates a gender-based limitation of the student's privilege. This result contradicts Title IX's purpose and opens the university to civil liability.

A university could fulfill its responsibilities under Title IX by: (1) establishing and publicizing that the university is strongly opposed to sexual harassment; (2) ensuring that all members of the academic community are given proper notice of this policy; (3) providing materials which define hostile environment, indicating the type of behaviors that may result in a violation of conduct codes; (4) establishing grievance procedures to resolve complaints in a "prompt and equitable" manner;<sup>128</sup> and (5) appointing personnel and resources to ensure that the procedures work efficiently and effectively.

This course of action ensures that the university is engaged in the prevention of hostile environment claims and removes the university from the role of a disciplinarian. Instead, universities would be facilitating the education and development of all students. Students could be given notice of the hostile environment sexual harassment and other sex discrimination remedies through admission material, material given to incoming students, freshman lectures, and university publications. Thus the universities would preserve and promote the marketplace of ideas recognized by the Supreme Court as essential to academic freedom.<sup>129</sup>

The grievance procedures should use corrective education and discipline to remedy student conduct that is determined to be hostile environment sexual harassment. Discipline would be appropriate when the incident is egregious, for example, displaying pornographic pictures of torture, rape, or other violence; when the action is intentional; or when the action is a repeat offense. Discipline could include suspension or termination of the privilege to use the university computer center, fines, suspension or expulsion from school, or other means commonly used for other student conduct code violations.

Corrective education would be appropriate in all instances and could be used alone when the viewing is a first time offense done accidentally. Corrective education could include writing a letter of apology, enrolling in a women's

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ties . . ." Oregon Administrative Rule, Student Conduct Code, 571-21-030(10)(b) (1993) (on file with the *Duke Journal of Gender Law & Policy*).

[This behavior] may be accomplished by words or conduct of a sexual nature that threatens imminent physical harm, endangers the health or safety of any person, *or which a reasonable person would know was unwanted and would cause emotional distress*. Words conveyed by telephonic, written, or electronic means shall be included in the definition of "words" herein.

*Id.* at (20)(c) (emphasis added). Unfortunately, these regulations cover only student behavior which is intended and aimed at another student. Additionally, the requirement that the behavior cause emotional distress imposes a large burden on any complainant for it seems to require proof of injury, emotional or psychological. The conduct codes this paper proposes would classify the display of pornography on the Internet as hostile environment per se, thus avoiding the difficulty of proving that the complainant (or female students in general) found the display of pornography sufficiently "outrageous" so as to cause emotional distress.

128. See 34 C.F.R. § 106.8(b).

129. The Supreme Court noted that universities are "peculiarly the 'marketplace of ideas' and no new constitutional ground [is broken] in reaffirming this Nation's dedication to safeguarding academic freedom." *Healy v. James*, 408 U.S. 169, 180-81 (1972), quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

studies class or other academic program dealing with gender issues, or volunteering at a community center that deals with sexual assault, rape crisis, or similar issues. When discipline is appropriate, it should be combined with corrective education in order to make offenders aware of why their behavior is unacceptable.<sup>130</sup>

In Title IX, Congress recognized freedom from sexual discrimination in the academic world to be an important societal interest. University conduct codes that notify students of behavior that is disruptive and destructive of fellow students' educational environments encourage students to act with decency toward their peers. If this decency is not displayed, the codes provide a civilized means of redress for those students harmed by others' behavior. These conduct codes would thus further the congressionally recognized national interest of eliminating sex discrimination in education.<sup>131</sup>

#### E. Further Benefits of Student-to-Student Hostile Environment Claims

Universities provide the appropriate place and the means to create a change in societal behaviors. In modern society, a college diploma is essential for the pursuit of most professions. A student attends a university to further his or her career goals. Businesses and professionals expect universities to educate students for the professional world.

University policies that recognize student-to-student hostile environment sexual harassment would benefit all parties concerned: future employers, male and female students, and the public in general.<sup>132</sup> The policies would benefit future employers by training students to be professionals who are aware of the standards of conduct that govern public and private employment. This would also benefit students as future professionals by forewarning them of behavior that is illegal in the employment context. A student would learn rules of behavior in an educational environment and would not have to suffer the harsh costs and penalties of violating these rules within the workplace.<sup>133</sup> Finally, the universities could fulfill their responsibility not to deny or limit a student's enjoyment of his or her rights and privileges on the basis of gender<sup>134</sup> while still preserving the "marketplace of ideas" in its educational capacity.

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130. See Letter from Barbara L. Krause, Judicial Administrator, Cornell University, to the Cornell Community and Other Interested Persons (Nov. 17, 1995) (on file with the *Duke Journal of Gender Law & Policy*). This letter discusses an e-mail that was sent out describing 75 reasons why women should not have freedom of speech. See *id.* at 1. The students apparently apologized voluntarily after being made aware of the hurt and anger they caused their colleagues within the Cornell community. See *id.* This was done even though the students were found not to have violated the student conduct codes. See *id.*

131. See 34 C.F.R. § 106.1.c

132. "Men don't wake up when they are 21 and start sexually harassing women in the workplace. It is a learned behavior." Susan McGee Bailey, Director, Wellesley College Center for Research on Women, quoted in Elizabeth Mehren, *Sexual Harassment Shows Up at School*, L.A. TIMES, Mar. 25, 1993, at E5.

133. An employer's response to an employee that engaged in behavior violative of Title VII may include firing, refusal to promote, or general discontent. This could affect a person's future career path. Comparatively, a student who violates conduct codes may receive sanctions that are less drastic.

134. See 34 C.F.R. § 106.31(b)(7).

By making students responsible for bringing claims of sexual harassment, the students' right to learn and their right to free expression is equitably balanced. This removes the role of initiating enforcement from the university officials' hands while still ensuring that a student whose right to learn is adversely affected has an effective means of recourse. This procedure would mirror the professional world where individuals are responsible for bringing claims of discrimination. Consequently, university practices benefit the professional world.<sup>135</sup>

University conduct codes that provide mechanisms for student-to-student hostile environment sexual harassment claims represent a compromise between the many rights and freedoms of an academic environment and the coterminous responsibilities which must accompany them to avoid chaos and injury. Some universities have recognized the value of addressing hurtful and socially detrimental behaviors like sexual harassment; other universities defend students' free speech as essential to academic freedom, so they protect pornographic speech regardless of its possibly negative repercussions.<sup>136</sup> The former run the risk of being found to unconstitutionally restrict freedom of expression. The latter risk allowing sex discrimination to persist and being found liable under Title IX.

Academia is lauded for its preservation of students' free expression. The promotion of the free exchange of ideas and opinions is seen as essential to the pursuit of truth. Unfortunately, certain forms of expression serve to lock out some groups from the free market of ideas. The consequence of a university's blind devotion to free speech as being essential to academic freedom is that it deprives groups often already excluded from academic discourse of a meaningful response to "speech" that makes their educational environment hostile or offensive. These groups are silenced and consequently, the richness and diversity of the academic dialogue is decreased rather than increased.<sup>137</sup> What is created is only one version of the truth. If we continue to hold as inviolable the free expression of all and any ideas in any setting in an academic context, then "we see

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135. See Elizabeth T. Kennan, *The Moral Functions of Higher Education in Modern Society*, 20 J.C. & U.L. 69, 69-70 (1993). Universities will be more highly regarded by the public and professional worlds by properly educating students about appropriate codes of behavior accepted in the employment context. The university was once seen as a tool to develop the moral commitment of youth. This role has nearly disappeared in the eyes of society, for it now doubts that truthfulness and "good" are taught at the university. See *id.* at 70. Yet, it is argued, and I believe, that the university is the forum for resolving the raging conflicts between groups of people which arise when one group exercises rights without respect for the rights of others. See *id.* at 73. The university can help us recognize our common interest in cooperation and obtain a fundamental decency in our regard for each other. *Id.*

136. See Letter from Barbara L. Krause, *supra* note 130, at 1-2 (stating that Cornell University believes student dialogue will educate those students who say things that are hurtful to others and that those students, respecting the feelings of their peers, will stop).

137. See *On Freedom of Expression and Campus Speech Codes*, 78 ACADEME: BULL. OF THE AM. ASSOC. OF UNIV. PROFESSORS, No. 4, 30-31, (1992) (finding that some messages victimize some individuals and groups causing "fears, tensions and conflicts" creating an environment "inimical to learning," and that negative implications would fall both to minority and majority groups' members). However, the American Association of University Professors (AAUP) has maintained its devotion to preserving freedom of expression no matter how repugnant the ideas. See *id.* There has been no definitive response to computer pornography, however, the AAUP is likely to find education and dialogue the most effective response to this freedom of expression problem.

melancholy effects resulting from establishments which in theory promise none but happy results.<sup>138</sup>

Pornography has been recognized to have an adverse impact on women. It silences them, runs them out of jobs, and removes important opportunities. As previously discussed, the First Amendment protects pornography as a form of freedom of expression, however, the First Amendment status of pornography will not create a barrier to the university grievance mechanisms proposed here.<sup>139</sup> Free speech would be only slightly limited in comparison to the harm that would be prevented. The possibility that a student may be punished for viewing pornography in the university computer center creates a minor limitation upon students' freedom of expression. This cost is insignificant and the benefit is large: it removes barriers to many students' freedom to learn. Additionally, it furthers the national interest in removing sex-discrimination from all educational contexts.

## V. CONCLUSION

The adoption of Title VII standards concerning hostile environment sexual harassment by analogy under Title IX within the university context is necessary to effectuate the purpose of Title IX. The recognition of student-to-student claims

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138. CHARLES E. SILBERMAN, *CRIMINAL VIOLENCE, CRIMINAL JUSTICE* 169 (1978) (quoting Gustave De Beaumont and Alexis De Tocqueville).

139. While the details of the First Amendment restrictions on limits to free speech would require a separate article, what follows is a summary of the applicable law. The Supreme Court has created what is referred to as the constitutionally acceptable "time, place and manner" requirement to restrict speech. See *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63 n.18 (1976). The "time, place and manner" requirement demands that the regulation be "content-neutral," serve a substantial government interest, and be narrowly tailored so as not to unreasonably restrict alternative avenues of communication. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293-94 (1985). The Supreme Court has found that zoning ordinances that restrict the location of adult-entertainment businesses fall under the "time, place and manner" test. See *Young*, 427 U.S. at 62-63. Zoning ordinances were not found to be "content-based" regulations, which restrain free speech on the basis of its content and presumptively violate the First Amendment. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986). The Supreme Court justifies its review of such policies as "content-neutral" when evidence exists that a "predominate intent" of the legislature in passing regulations was not restricting the content of the materials produced by the adult-entertainment businesses, but rather at the secondary effects such businesses have upon neighborhoods. See *id.* at 49. The Supreme Court's review then focuses on whether the regulation is narrowly tailored to serve substantial governmental interest, and whether it unreasonably restricts other avenues of communication. See *id.* The Supreme Court has recognized the preservation of the quality of a neighborhood as "one that must be accorded high respect." *Id.* Therefore courts commonly find that the government furthers a substantial interest when it promulgates regulations restricting adult-entertainment businesses.

University conduct codes allowing for student-to-student actions for hostile environment sexual harassment created by fellow students' use of the Internet to view pornography in university computer facilities would meet the "time, place and manner" test for a constitutionally acceptable regulation of freedom of expression. University conduct codes are not aimed at the content of the pornography, rather, the "predominate intent" of the codes is to remove sex discrimination in the form of hostile environment sexual harassment from the educational environment. This purpose clearly furthers the substantial governmental interest of eradicating sex discrimination from the educational environment (as recognized by Title IX). Finally, the conduct codes are narrowly tailored to cover only common areas in a university and do not restrict students ability to gain access to pornography through other avenues of communication.

for hostile environment sexual harassment under university conduct codes and disciplinary procedures is the most practical and effective means of recognizing and combating hostile environment sexual harassment within the universities. The conduct codes allow students to preserve their academic freedoms while teaching them to exercise those freedoms with responsibility. The conduct codes represent a compromise with minor concessions by each side—the students offended by pornography and the students who view it as free speech.

The long established regard given to the market place of ideas within the university context should not be a barrier to the implementation of student-to-student hostile environment sexual harassment claims, though it does give pause for thought. The benefits of success will be significant for all concerned—the students, the universities, and the professional world.