The Cruelest of the Gender Police: Student-to-Student Sexual Harassment and Anti-Gay Peer Harassment Under Title IX

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THE CRUELEST OF THE GENDER POLICE: 
STUDENT-TO-STUDENT SEXUAL HARASSMENT AND 
ANTI-GAY PEER HARASSMENT UNDER TITLE IX

DEBORAH BRAKE*

I. TITLE IX'S TREATMENT OF PEER SEXUAL HARASSMENT: WHY 
DOES SCHOOL INACTION DISCRIMINATE ON THE BASIS OF SEX? . . . 43 
A. BEFORE DAVIS v. MONROE COUNTY BOARD OF EDUCATION: THE 
LOWER COURTS' APPROACHES TO DISCRIMINATION ................. 44 
B. THE MEANING OF DISCRIMINATION IN DAVIS: DID THE SCHOOL 
"CAUSE" THE DISCRIMINATION? ........................................ 47 
C. SCHOOL INACTION CAUSES THE DISCRIMINATION BY 
EXACERBATING THE HARM AND EMBOLDENING THE HARASSER . 55 
D. SCHOOL INACTION DISCRIMINATES BASED ON SEX IF THE 
HARASSMENT ITSELF IS BASED ON SEX ........................... 59 

II. THE LINE DIVIDING SEXUAL HARASSMENT AND ANTI-GAY 
HARASSMENT UNDER TITLE IX .................................... 60 

III. SEARCHING FOR THE SEX DISCRIMINATION IN PEER SEXUAL 
HARASSMENT: MODELS APPLIED TO PEER SEXUAL HARASSMENT 
BY COURTS AND OCR ............................................ 68 
A. THE ATTRACTION MODEL: "BUT FOR HER WOMANHOOD," THE 
PLAINTIFF WOULD NOT HAVE BEEN HARASSED ................. 69 
B. THE SEXUAL-IN-NATURE MODEL .............................. 76 
C. THE DISPARATE IMPACT MODEL: SEXUAL HARASSMENT AS 
DISPROPORTIONATELY HARMING WOMEN AND GIRLS ........... 82 
D. THE MOTIVATION MODEL: THE DISCRIMINATORY MOTIVE OF 
THE HARASSER ..................................................... 86 

IV. A BETTER ALTERNATIVE: SEXUAL HARASSMENT AS 
SEX-STEREOTYPING AND THE POLICING OF GENDER ROLES ...... 90 

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own.
The Supreme Court's recent decision in *Davis v. Monroe County Board of Education* brought student-to-student sexual harassment to the forefront of the national conversation on gender equity in schools.¹ The Court's landmark ruling, requiring schools to respond to known peer sexual harassment in their programs, marks a new era for recognition of sexual harassment among students as a serious educational and legal issue, and will prompt greater protection of students from such conduct. Despite this development in the area of peer sexual harassment, efforts to gain legal protection for students who have been harassed for being (or perceived as being) gay or lesbian have not fared as well. Courts approach anti-gay harassment very differently from peer sexual harassment, leaving victims of anti-gay harassment with few options for legal recourse.² This article explores the inconsistencies in the treatment of peer sexual and anti-gay harassment under sex discrimination law, with a particular focus on Title IX.³

Differences in the courts' treatment of anti-gay peer harassment and peer sexual harassment become evident when comparing *Davis* with a recent Seventh Circuit case, *Nabozny v. Podlesny*,⁴ brought by a former student who had been

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² In this paper, I use the terms anti-gay harassment and peer sexual harassment to denote the law's treatment of them as distinct forms of misconduct, even though anti-gay harassment is also peer harassment, and, I argue, like sexual harassment, a form of harassment based on sex.
³ Title IX of the Education Amendments of 1972 provides 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.

²⁰ U.S.C. § 1681(a) (1999). Title IX applies to any public or private educational institution that receives federal funds, with limited exceptions. ²⁰ U.S.C. § 1681(a)(1)-(9). All aspects of an educational institution's programs and activities must comply with Title IX if any part of it receives federal funding. ²⁰ U.S.C. § 1687 (1999). For a broader outline of the mechanics of Title IX's basic scope and enforcement, see Arthur L. Coleman, *When Hostile Hallways Become Hostile Environments: Understanding the Federal Law that Prohibits Sexual Harassment of Students by Students*, 1 GEO. J. GENDER & LAW 109 (1999). While Title IX applies to all levels of education, including elementary/secondary, undergraduate, and post-graduate education, this article primarily focuses on sexual harassment and anti-gay harassment occurring at the elementary/secondary level. However, much of the analysis and discussion herein could also apply to the higher education context.
⁴ 92 F.3d 446 (7th Cir. 1996).
subjected to prolonged and extreme harassment because he was gay. In Davis, the challenged behavior involved a five and one-half month pattern of escalating harassment and abuse by a male student, identified as G.F., towards a female classmate, LaShonda Davis. Both students were in the fifth grade. The harassment by G.F. included both verbal and physical sexual conduct, such as requesting to have sex, attempting to touch LaShonda's breasts and genital area, rubbing against LaShonda in a sexual manner and, in one instance, putting a doortstop in his pants and acting "in a sexually suggestive manner" towards her during physical education class. The behavior was persistent and unrelenting. At one point, LaShonda told her mother that she "didn't know how much longer she could keep [G.F.] off her." Despite repeated complaints to teachers and the school principal by both LaShonda and her mother, no action was taken to discipline G.F. In fact, during the first three months of the harassment, LaShonda was denied permission even to move her seat away from G.F., who sat next to her in class. G.F.'s constant barrage of abuse had an academic and psychological effect on LaShonda; her previously high grades of A's and B's dropped substantially, and she wrote a suicide note. Exasperated by the school's lack of response, Mrs. Davis filed criminal charges against G.F. with the county sheriff, and G.F. ultimately pled guilty to sexual battery. Only then did the harassment end, after more than five months of abuse.

In addition to filing criminal charges, Mrs. Davis, as next friend of LaShonda, also filed suit against the Monroe County Board of Education, alleging that the Board failed to take appropriate action in response to the sexually hostile environment created by G.F. The district court granted the defendant's motion to dismiss the claim as a matter of law on the ground that Title IX does not cover sexual harassment committed by students. On appeal, the Eleventh Circuit first held that Title IX requires schools to take corrective action once they knew or should have known of peer sexual harassment, and then reversed itself en banc, holding that Title IX does not apply to peer sexual harassment under any circumstances.

In a five-to-four decision, the Supreme Court reversed the Eleventh Circuit en banc decision and remanded the case to the district court. Under the Supreme Court's ruling, Title IX supports an action for damages where a school responds with deliberate indifference to peer sexual harassment once it has actual notice of

6. Id. at 1667.
7. Id.
8. Id.
9. Id.
10. Id.
11. Id.
12. Id. at 1667–68.
14. 74 F.3d 1186 (11th Cir. 1996), reversed en banc, 120 F.3d 1390 (11th Cir. 1997).
the harassment.\(^{16}\) As long as the underlying sexual harassment is "so severe, pervasive and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect," the school is accountable for its response (or lack thereof).\(^{17}\) The plaintiff must prove that the school acted with deliberate indifference, but need not demonstrate that the school treated the harassment complaints of students differently based on the sex of the complainant, or acted out of an impermissible discriminatory motive toward persons of one sex.

In *Nabozny v. Podlesny*, the Seventh Circuit took a very different approach toward anti-gay peer harassment in schools, although it also permitted the plaintiff to proceed with his claim in the face of a motion to dismiss.\(^{18}\) In this case, Jamie Nabozny, who realized that he was gay in the seventh grade and did not try to hide his sexual orientation from his peers, was subjected to extreme verbal and physical harassment by his fellow students.\(^{19}\) The harassment continued throughout middle school and high school, and included a "mock rape" by two boys in front of twenty onlookers, an assault in the bathroom during which Jamie was pushed into a urinal and urinated on, and an aggravated assault by eight boys in a hallway, which, weeks later, caused Jamie to collapse from internal bleeding.\(^{20}\) The school's response to these actions was consistent, and unfortunately, not atypical: "boys will be boys" and students who identify as gay should "expect" such abuse.\(^{21}\) One school official went so far as to tell Jamie, a few weeks before he collapsed from the final assault, that he "deserved such treatment because he is gay."\(^{22}\) After two suicide attempts and numerous unsuccessful efforts to enlist help from school officials, Jamie left school in the

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16. *Id.* at 1666.
17. *Id.* at 1675.
18. *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996). Because the plaintiff in *Nabozny* succeeded in his claim, it is arguably not the best case to show the full scope of the disparity in the law's treatment of peer sexual and anti-gay harassment, particularly since similar arguments by students challenging anti-gay harassment have not fared so well. *See*, e.g., Doe *v. Riverside Brookfield Township*, No. 95 C-2437, 1995 WL 680749 (N.D. Ill. Nov. 14, 1995) (rejecting equal protection claim based on school's failure to respond to anti-gay peer harassment where plaintiff failed to show that the school treated harassment victims differently, as opposed to having a low level of discipline generally). I have chosen to highlight the *Nabozny* case, however, both because it is the first, and to date only, circuit court decision to address anti-gay peer harassment in school under a sex discrimination analysis, and because it demonstrates that even a "win" in such a case under existing law leaves much to be desired.
20. *Id.* at 452.
21. *Id.* at 451. *Cf.* Bosley *v. Kearney R-1 Sch. Dist.*, 140 F.3d 776, 777 (8th Cir. 1998) (citing school officials' response to female students' complaints of sexual harassment by male students as "boys will be boys"); Doe *v. Londonderry Sch. Dist.*, 970 F. Supp. 64, 68, 75 (D.N.H. 1997) (describing superintendent's statement that verbal and physical sexual harassment of female student by male students was "normal behavior for kids her age"); Doe *v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1565 (1993) (describing school official who responded to sexual harassment complaints of female students with "boys will be boys"); Doe *v. University of Ill.*, 138 F.3d 653 (7th Cir. 1998) (describing school officials' suggestion that plaintiff herself was to blame for sexual harassment by male students, and one official's statement that she and her friends should start acting like "normal females" and stop making accusations that could injure the male students' futures).
22. *Nabozny*, 92 F.3d at 452.
eleventh grade.\textsuperscript{23} Jamie sued the school district under Section 1983 for violating his equal protection rights.\textsuperscript{24}

As in \textit{Davis}, the district court ruled for the school district on the ground that Jamie could not prove that the school district discriminated against him because of his sex.\textsuperscript{25} The Seventh Circuit reversed, finding that Jamie had produced sufficient evidence from which a reasonable jury could infer that a female student who had been subjected to the same harassment would have been treated more favorably.\textsuperscript{26} In support of such an inference, the court cited the school district's admitted policy and practice of "aggressively punish[ing] male-on-female battery and harassment."\textsuperscript{27} Accordingly, the court found it "impossible to believe that a female lodging a similar complaint would have received the same response."\textsuperscript{28} The court's approach, while disagreeing with the district court's conclusion, nevertheless requires victims of anti-gay harassment to prove that the school ignored the harassment because of their sex.\textsuperscript{29}

While Jamie Nabozny succeeded under a sex discrimination theory at this pre-trial stage of the litigation, the court's approach makes it far more difficult for plaintiffs to succeed with an anti-gay peer harassment claim than with a peer sexual harassment claim such as the one argued in \textit{Davis}. If the school in fact ignored the complaints of all gay students, male and female alike, or had a sketchy record of responding to sexual harassment complaints generally, a plaintiff would be unsuccessful under the \textit{Nabozny} holding. Thus, under the \textit{Nabozny} rationale, a school can insulate itself from liability for sex discrimination by treating male and female harassment complainants uniformly, however inadequately it responds to the underlying harassment.

The different approaches taken by these two cases reflect differences in how the \textit{Davis} and \textit{Nabozny} courts interpreted the based-on-sex requirement of Title IX. In \textit{Davis}, the Court assumed that the harasser treated the plaintiff differently

\textsuperscript{23} \textit{Id.} at 451–52.  
\textsuperscript{24} Section 1983 provides a cause of action for violations of federal rights by officials acting under color of state law. 42 U.S.C. § 1983 (1999). For an explanation of how Section 1983 applies to schools in sexual harassment cases, see DEBORAH BRAKE & VERNA WILLIAMS, NATIONAL WOMEN'S LAW CENTER, \textsc{Righting the Wrongs: A Legal Guide to Understanding, Addressing and Preventing Sexual Harassment in Schools} 48–49 (1998). Although \textit{Nabozny} involved a sex discrimination claim brought under the Equal Protection Clause and not Title IX, the Court's analysis is equally applicable to a Title IX claim for damages, because both causes of action require the plaintiff to demonstrate intentional discrimination on the basis of sex. See \textit{Nabozny} v. Podlesny, 92 F.3d 446, 453 (7th Cir. 1996) (requiring plaintiff to prove that the school intentionally discriminated based on sex); Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 75 (1992) (upholding a private damages action for intentional discrimination under Title IX).  
\textsuperscript{25} \textit{Nabozny} v. Podlesny, 92 F.3d 446, 449 (7th Cir. 1996).  
\textsuperscript{26} \textit{Id.} at 454–55.  
\textsuperscript{27} \textit{Id.} at 455. Interestingly, the court never used the term "sexual harassment" to describe the underlying conduct, and instead used gender-neutral terms such as "harassment," "physical abuse," "assault," and "battery," despite the sexual nature of the harassment involved in the case. \textit{Id.} at 449, 451–52.  
\textsuperscript{28} \textit{Id.} at 454–55.  
\textsuperscript{29} \textit{Id.} at 453–54.
because of her sex, and that the school was liable for damages because it was
deliberately indifferent to that harassment. Thus, in *Davis*, the based-on-sex
element was located at the level of the underlying harassment. In *Nabozny*,
however, the plaintiff had to do more than demonstrate that the school responded
with deliberate indifference to the harassment in order to succeed on his equal
protection claim; he had to show that the school itself treated him differently
because he was male. Unlike *Davis*, *Nabozny* located the sex-based element of
the discrimination at the level of the school’s conduct.

These different approaches stem from the law’s different treatment of sexual
harassment and harassment that is perceived to be based on sexual orientation.
Long before *Davis*, at least in male-female sexual harassment cases, courts have
assumed that the harasser’s conduct toward the victim was based on her sex.

The debate over peer sexual harassment has largely centered on the issue of
whether the school discriminates based on sex when it ignores sexual harassment
by students, not whether the harassment itself was based on sex. In the case of
anti-gay harassment, by contrast, the harassment is regarded as based on sexual
orientation and not sex. As a result, sex discrimination law has been interpreted to
provide a remedy for anti-gay harassment only where the school itself treated
harassed students differently on the basis of sex.

This article questions the courts’ differing treatment of peer anti-gay harass-
ment and peer sexual harassment under Title IX. By more fully elaborating the
theory for why peer sexual harassment generally discriminates based on sex, it
seeks to ground school indifference to anti-gay harassment as a sex-based wrong
as well. Both anti-gay harassment and peer sexual harassment discriminate
against students on the basis of sex. Once the underlying harassment is recog-
nized as sex-based, the school is liable for effectively condoning the harassment;
the school itself need not treat harassment victims differently based on sex to
violate sex discrimination law.

The article first explores why school inaction in the face of sexual harassment
discriminates on the basis of sex. Although sex discrimination law has recognized
sexual harassment as a form of sex discrimination for over two decades, there
has been little analysis of why an institution that fails to sufficiently remedy
sexual harassment itself violates anti-discrimination principles. In keeping with
this historic reticence, although *Davis* clearly held that school indifference is
sufficient to establish discrimination under Title IX, it did not fully explain how a
school’s inaction (or insufficient action) discriminates against students based on
sex. The clear implication of *Davis* is that a school discriminates when it
exacerbates or encourages sex discrimination by others. The lesson of *Davis*—
that a school essentially participates in the harassment when it responds with
deliberate indifference—is equally applicable to anti-gay harassment.

30. See infra Part III A.
Bell, 587 F.2d 1240 (D.C. Cir. 1978); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).
The article then more fully elaborates on the law’s different treatment of anti-gay and peer sexual harassment in schools. The two types of harassment are treated differently because harassment that targets gay and lesbian students is viewed as being based on sexual orientation and not based on sex. Even the Office for Civil Rights (OCR)—which takes a somewhat broader view of harassment of gay and lesbian students than courts have to date—regards such harassment as based on sex only when it is overtly sexual in nature. The current legal approach to anti-gay peer harassment in schools is inadequate to provide meaningful relief to the victims of such conduct and inconsistent with the law’s treatment of peer sexual harassment generally.

The next part of the article examines four alternative theories that courts have suggested or implied for grounding peer sexual harassment as a harm that is based on sex: (1) that the harasser is attracted to the target, who would not have been selected but for her sex; (2) that overtly sexual harassment is necessarily based on the sex of the persons harmed; (3) that the sexual harassment more frequently, or more severely, harms girls and women, and thus has a disparate impact based on sex; and (4) that the harasser acted out of a sex-discriminatory motive. This article concludes that each of these theories is incomplete and inadequate as an explanation for why peer sexual harassment generally, and anti-gay harassment in particular, is based on sex.

Finally, this article proposes grounding sexual harassment as based on sex because it polices gender roles and boundaries according to sex stereotypes. As argued by several scholars, much sexual harassment fits under the rubric of gender policing: both in punishing gender “outliers,” including students perceived as gay or lesbian, and in reinforcing stereotyped roles of females as sexual objects and males as sexual aggressors. Adding this theory to the existing arsenal of possibilities for explaining why peer harassment is sex discrimination under Title IX provides a more complete picture of how peer sexual harassment harms students based on their sex, while at the same time reaching anti-gay harassment under a more satisfactory theory.

I. TITLE IX’S TREATMENT OF PEER SEXUAL HARASSMENT: WHY DOES SCHOOL INACTION DISCRIMINATE ON THE BASIS OF SEX?

The controversy over whether Title IX requires schools to take sufficient action in response to peer sexual harassment was recently settled by the Supreme Court’s decision in Davis. The Davis Court held that a school’s deliberate

32. The Office for Civil Rights (OCR) of the U.S. Department of Education is the primary federal agency responsible for enforcing Title IX against education programs and activities that receive federal funds. Its interpretations of Title IX are generally afforded deference by courts. See, e.g., Cohen v. Brown Univ., 991 F.2d 888, 895 (1st Cir. 1993); Roberts v. Colorado State Bd. of Agric., 998 F.2d 824, 830 (10th Cir. 1993). For a more complete explanation of OCR’s enforcement responsibilities and its method of enforcing Title IX, see Coleman, supra note 3, at 120-22.

33. See infra Part IV A & B.
indifference to peer sexual harassment, once it has actual notice of the harassment, supports a private cause of action for damages under Title IX.\textsuperscript{34} Prior to 
Davis, lower courts had struggled with the question of whether, and in what respect, a school's failure to remedy sexual harassment discriminates on the basis of sex. These pre-
Davis decisions adopted one or more of three different lines of reasoning to explain the relationship between harassment by students and the school's own misconduct. Some courts viewed the harm as caused by students, for whom schools could not be held legally responsible under any circumstances.\textsuperscript{35} Others viewed schools as acting in a sex-neutral fashion if they ignored sexual harassment complaints brought by all students, regardless of sex.\textsuperscript{36} Still others required plaintiffs to demonstrate that the school's inadequate response stemmed from an intent to discriminate against harassment victims based on their sex.\textsuperscript{37} 

Davis implicitly rejected each of these approaches, and adopted its own interpretation of why a school discriminates on the basis of sex when it chooses to ignore peer sexual harassment. Examining the different interpretations of discrimination adopted by lower courts, and 
Davis' response to them, provides a clearer understanding of the full meaning of 
Davis' interpretation of what it means to discriminate, and in what sense peer sexual harassment cases involve discrimination on the basis of sex.

A. BEFORE 
Davis v. Monroe County Board of Education: 
The Lower Courts' Approaches to Discrimination

As stated above, one approach taken by lower courts prior to 
Davis held that because the school or its agents did not sexually harass the plaintiff, the school could not be held liable for the discriminatory actions of students.\textsuperscript{38} They reasoned that since the actual perpetrator was a student who did not act as an agent of, or with the authority of, the school, holding schools responsible for failing to remedy peer sexual harassment would be tantamount to holding schools responsible for the actions of third parties. The analysis employed by these lower courts parallels the approach taken by some courts to the state action doctrine,

\textsuperscript{34} 119 S. Ct. 1661 (1999).
\textsuperscript{35} See, e.g., infra notes 38–41.
\textsuperscript{36} See, e.g., infra notes 42–44.
\textsuperscript{37} See, e.g., infra notes 45, 47–48.
\textsuperscript{38} See 
Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1395 (11th Cir. 1997) (en banc) (characterizing the claim as "seeking direct liability of the Board for the wrongdoing of a student"); id. at 1400 n.13 (arguing for a different result in Title IX peer sexual harassment cases than under Title VII because "students are not agents of the school board"); Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1010 n.9 (5th Cir. 1996) (asking "whether the recipient of federal education funds can be found liable for sex discrimination when the perpetrator is a party other than the grant recipient or its agents," and answering in the negative) (citations omitted); Garza v. Galena Park Indep. Sch. Dist., 914 F. Supp. 1437 (S.D. Tex. 1994) (dismissing Title IX peer harassment claim because harasser was a student and not a school employee); Aurelia D. v. Monroe County Bd. of Educ., 862 F. Supp. 363, 367 (M.D. Ga. 1994) (dismissing Title IX peer sexual harassment claim because sexual harassment by students "is not part of a school program or activity," and plaintiff did not allege that the school board itself or any employee "had any role in the harassment").
which seeks to determine whether the challenged conduct was the work of a state or private actor. Lawsuits seeking to hold the state accountable for wrongdoing perpetrated by arguably private actors are often analyzed under the rubric of state action. Rather than directly examining the constitutionality of what the state has done, the focus is on whether the connection between the state and allegedly private party is sufficient to render the wrongful conduct "state action." Likewise, those pre-Davis courts that rejected peer sexual harassment claims on the basis that students, not the school, committed the harassment, found dispositive the lack of an agency connection between the school and the student harasser, thus foreclosing any meaningful inquiry into whether the school itself violated Title IX.

A second rationale in pre-Davis decisions for rejecting peer sexual harassment claims viewed the school's reaction to sexual harassment complaints as sex-neutral and in compliance with Title IX, so long as the school itself did not treat harassment victims differently based on their sex. This approach reflects an exceptionally narrow view of discrimination: even if the student-harasser harmed his target on the basis of sex, as long as the school acted neutrally with respect to the sex of harassment victims, it did not violate Title IX. The most prominent example of this type of reasoning is found in Rowinsky v. Bryan Independent

39. The "state action requirement" refers to the generally accepted principle that the Constitution, for the most part, only prohibits deprivations of individual rights caused by state actors. See, e.g., The Civil Rights Cases, 109 U.S. 3, 11 (1883) (recognizing that the Fourteenth Amendment prohibits states from invading individual rights); Deshaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189, 195 (1989) (stating that the Due Process Clause prohibits States, not private actors, from depriving individuals of liberties without due process of law); LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 350, 1688 (2d ed. 1988) (recognizing that a majority of the Constitution's protections of individual rights guard individuals only from government action).

40. See, e.g., Blum v. Yaretsky, 457 U.S. 991, 1005 (1982) (finding that individual transfer decisions of state-subsidized nursing home are not "state action"); Deshaney, 489 U.S. at 201 (1988) (holding the state not responsible for actions of abusive father because the father, not the state, inflicted the harm); Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1960) (upholding suit against state agency and private restaurant after finding state action in the "interdependence" and "joint participa[ton]" in the challenged activity); Shelley v. Kraemer, 334 U.S. 1 (1948) (finding state enforcement of private racially restrictive covenants to be state action under the Equal Protection Clause, so that such enforcement must be enjoined). These cases involved efforts to hold the states accountable for actions immediately carried out by private actors; they are thus different from lawsuits brought against private actors asserting that the state's imprimatur rendered them state actors. See, e.g., Blum, 457 U.S. at 1003.

41. As discussed below, the state action doctrine has often been criticized as a device to disguise determinations that actually go to the merits of constitutional principles. See, e.g., JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 507–08 (5th ed. 1995) ("Under traditional theory a holding that no state action is present is a separate ruling from a decision on the constitutionality of the challenged practice, but the consequence of such a ruling is the continuation of the challenged practice . . . Despite traditional doctrine, it can readily be seen that a ruling on the presence of state action is a decision on the merits of the underlying constitutional claim.").

42. See Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1016 (5th Cir. 1996); see also Seamos v. Snow, 84 F.3d 1226, 1235 (10th Cir. 1996) (dismissing male student's claim that school created a hostile environment by failing to respond adequately to sexually charged locker room attack by other male students because plaintiff failed to allege that the school treated him differently based on sex); Piwonka v. Tidehaven Indep. Sch. Dist., 961 F. Supp. 169, 171 (S.D. Tex. 1997) (following Rowinsky and dismissing plaintiff's claim because she failed to allege that the school district treats male and female sexual harassment victims differently).
School District, in which the Fifth Circuit held that a school does not discriminate on the basis of sex when it ignores a female student’s complaint of peer sexual harassment unless she can establish that the school treated male harassment victims more favorably.\footnote{3} Rowinsky thus requires plaintiffs to prove by comparative evidence that they were treated differently than a similarly-situated group on the basis of a prohibited criteria. If the school treats all sexual harassment victims alike, or if there is no comparison group of similarly situated persons because, for example, only female students have complained of sexual harassment, a victim of sexual harassment has no recourse under this approach.\footnote{4}

A third and somewhat more plaintiff-friendly approach taken by many pre-
Davis courts rejected Rowinsky’s requirement of comparative evidence, but nevertheless interpreted discrimination in this context to require that the school intended to discriminate against the plaintiff because of her sex.\footnote{5} While these lower courts disavowed the Rowinsky ruling as overly restrictive, and permitted peer sexual harassment claims to proceed based on the school’s failure to respond to the harassment, they nevertheless shared an important feature with the Rowinsky approach: they too required the plaintiff to demonstrate that the school itself discriminated against harassment victims on the basis of sex.\footnote{6} Thus, even if the harasser’s conduct was based on sex and the school failed to respond despite some degree of notice of the harassment,\footnote{7} the plaintiff still had to prove that the school’s insufficient response stemmed from an intent to discriminate against the plaintiff on the basis of sex. However, unlike Rowinsky, these courts permitted discriminatory intent to be inferred from the school’s knowing inaction in the face of the harassment.

\footnote{3. 80 F.3d 1006, 1016 (5th Cir. 1996). The Rowinsky formulation of sex neutrality does not find that the school acts neutrally when it fails to address the harassment merely because the challenge involves the school’s failure to act rather than an affirmative act. A failure to act, where such failure imposes disadvantages on the basis of sex, violates the anti-discrimination principle just as much as positive action. See, e.g., Yick Wo v. Hopkins, 118 U.S. 356 (1886) (concluding that a state’s selective denial of protective services to disfavored minorities violates Equal Protection Clause). Instead, Rowinsky grounded its view of school neutrality on the school’s symmetrical treatment of male and female complainants.}

\footnote{4. See Rowinsky, 80 F.3d at 1016 (placing the burden of proving different treatment on the female plaintiff, and assuming that complaints by male students would have been treated similarly, despite a lack of evidence that males had complained, or that such complaints had been treated similarly).}

\footnote{5. See, e.g., Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1205 (N.D. Iowa 1996) (stating that plaintiff must show that “the school district selected a particular course of action in responding to her complaints of sexual harassment at least in part ‘because of her sex’”); Franks v. Kentucky Sch. for the Deaf, 956 F. Supp. 741, 748 (E.D. Ky. 1996) (holding that plaintiff must show school intended to discriminate against her because of her sex, but such intent may be inferred from the school’s inadequate response where it knew or should have known of the harassment).}

\footnote{6. See infra note 48.}

\footnote{7. Prior to Davis, the courts were split on the issue of whether to require actual, as opposed to constructive, notice. Compare Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1195 (11th Cir. 1996) (adopting knew of should have known standard), reversed en banc 120 F.3d 1390 (1997); Brzonkala v. Virginia Polytechnic Inst. and State Univ., 132 F.3d 949, 960 (4th Cir. 1997) (same); Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1426 (N.D. Cal. 1996) (same), with Doe v. University of Ill., 138 F.3d 653, 661 (7th Cir. 1998) (requiring actual notice); Bruneau v. South Kortright Cent. Sch. Dist., 163 F.3d 749, 754 (2d Cir. 1998) (same).}
While some of these courts, based on the specific facts of the case, refused to find that the school intended to discriminate based only on the school’s knowing failure to respond to the harassment,48 other courts were more generous in inferring an intent to discriminate. One of the most generous in this regard, the Seventh Circuit, went so far as to insist that a discriminatory motive necessarily animated a school’s poor response to sexual harassment once it had actual notice of the harassment. In *Doe v. University of Illinois*, the Seventh Circuit stated that a school’s refusal to take prompt and appropriate action in response to known sexual harassment “is presumably, perhaps even necessarily, a manifestation of intentional sex discrimination.”49 After all, the court stated, “what other good reason could there possibly be for refusing even to make meaningful investigation of such complaints?”50 Yet, while more generous in the level of proof required, even the most favorable of these decisions shared Rowinsky’s premise that the school itself must intend to treat harassment victims differently because of their sex, and grounded the sex-based wrong of peer sexual harassment in the school’s intent to discriminate, rather than on the school’s response to the underlying discrimination by students.51


The *Davis* Court took an approach entirely different from each of those discussed above. The Court rejected the lower court approach that held schools

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48. *See, e.g.*, Bosley v. Kearney R-1 Sch. Dist., 140 F.3d 776, 781 (8th Cir. 1998) (affirming district court ruling setting aside jury verdict for plaintiff because evidence did not support an inference that the school district’s actions in response to plaintiff’s sexual harassment complaints “were impermissibly motivated by [her] sex”); Linson v. Trustees of Univ. of Penn., 1996 U.S. Dist. LEXIS 122243, at *11 (E.D. Pa. Aug. 21, 1996) (holding that plaintiff must show that the school’s "inaction (or insufficient action) in the face of complaints of student-to-student sexual harassment was a result of an actual intent to discriminate against the student on the basis of sex," and dismissing Title IX claim because plaintiff failed to establish that university’s inaction was "gender-motivated"); Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412, 1419–1420 (N.D. Iowa 1996) (assuming that the alleged peer sexual harassment was based on sex, but granting defendant’s motion for judgment as a matter of law and setting aside jury verdict for plaintiff because plaintiff failed to prove that school district intentionally discriminated against her on the basis of sex when it failed to adequately respond to the harassment).

49. 138 F.3d 653, 663 (7th Cir. 1998); *see also* Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1412, 1419–1420 (N.D. Cal. 1996) (holding that school that knew or should have known of peer sexual harassment, yet failed to take appropriate responsive action, is necessarily liable for intentional discrimination under Title IX).

50. *Doe*, 138 F.3d at 663. In equating the absence of a “‘good reason’ for school inaction with an intent to discriminate, the court went well beyond what discrimination law generally recognizes as intentional discrimination. *See, e.g.*, St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502 (1993) (holding that proof that employer’s asserted reason for negative employment action was merely a “pretext” may be insufficient to prove that the action was motivated by racial animus); Personnel Admin. of Mass. v. Feeney, 442 U.S. 256, 277 (1979) (finding that a policy disproportionately harming women must have been adopted because of, not despite, its harmful effect on women to constitute intentional discrimination under equal protection clause). Under these precedents, the reason for a school’s failure to remedy peer sexual harassment could be less than “good” (i.e., overloaded administrators who accept a low level of discipline generally), and yet not rise to the level of an intent to discriminate against girls or women.

51. *See supra* notes 45 & 48.
unaccountable because students do not act as the school’s agents, the Rowinsky formulation of school neutrality that simply requires schools to treat male and female harassment victims alike, and the somewhat more plaintiff-friendly approach that permits peer harassment claims to go forward but requires plaintiffs to establish that the school acted (or failed to act) based on an intent to discriminate against the plaintiff. In doing so, the Davis Court shed new light on the nature of peer sexual harassment as a species of sex discrimination in several important respects.

By refusing to immunize schools for their actions in response to sexual harassment by non-agents, Davis declined to import into Title IX a school-action equivalent of a state action analysis. Unlike many of the lower courts that rejected peer harassment claims, the Davis Court refused to halt the Title IX analysis once it acknowledged that the harassing student did not act on behalf of the school. Instead, the Court proceeded to analyze on the merits whether the school’s own misconduct in failing to stop the known harassment violated Title IX. The Davis Court thus recognized that even if the harassment was done by students, who are not agents of the school, the school “acted” in its response (or non-response) to the harassment. It is this school action (or failure to act), considered in light of the school’s control over the educational environment, that the Court examined in analyzing whether the school violated Title IX.

52. Davis v. Monroe County Bd. of Educ., 119 S. Ct. 1661, 1671-73 (1999). One threshold obstacle to importing a state action-type doctrine into Title IX is the statutory language itself. Unlike the Equal Protection Clause of the Fourteenth Amendment, which states that “no state shall . . . deny to any person within its jurisdiction the equal protection of the laws,” Title IX does not limit its prohibition to the actions of any particular actor, and focuses instead on the class of persons protected. See 20 U.S.C. § 1681 (1999). Nevertheless, the Court did read Title IX’s prohibition on sex discrimination to apply only to recipients of federal funds, and required that recipients themselves violate Title IX in order to support an action for damages. As explained below, however, the Court did not allow the requirement that the recipient itself discriminate to obscure its inquiry into whether the school’s response to private discrimination by students violated Title IX.

53. Davis, 119 S. Ct. at 1670-71. This approach accords with the position taken by commentators that the state action doctrine should not be used as a device to insulate states from scrutiny for the actions (or inactions) that they have undertaken, or to disguise the court’s substantive interpretation of constitutional principles. See, e.g., Charles L. Black, Jr., Foreword: “State Action,” Equal Protection, and California’s Proposition 14, 81 Harv. L. Rev. 69, 109 (1967) (urging less attention to the precise relationship between the state and private actors and more attention to the content of equal protection); Harold W. Horowitz, The Misleading Search for “State Action” Under the Fourteenth Amendment, 30 S. Cal. L. Rev. 208, 208-09 (1957) (“It is the thesis of this paper that in all of these problems there is state action, and that the sole issue, which tends to become obscured in the search for state action, is whether the particular state action in the particular circumstances . . . is constitutional”) (emphasis in original); William W. Van Alstyne & Kenneth L. Karst, State Action, 14 Stan. L. Rev. 3, 7 (1961) (“[W]hile the search for a merely formal connection—for “state action”—is misleading, the search for the values which stand behind the state action limitation is indispensable.”); David A. Strauss, Due Process, Government Inaction, and Private Wrongs, 1989 Sup. Ct. Rev. 53, 86 (“Whatever state of mind is needed to establish a “deprivation” within the meaning of the Due Process Clause, and whatever the role of state remedies, the supposed distinction between state action and state inaction should play no role.”); Robert J. Glennon, Jr. & John E. Nowak, A Functional Analysis of the Fourteenth Amendment’s State Action Requirement, 1976 Sup. Ct. Rev. 221, 228-30 (arguing that the state action issue is really a determination on the merits of the underlying constitutional claim).
Turning to the school’s own actions in the face of student harassment, the *Davis* Court agreed with the Monroe County Board of Education and the court below that the school itself must discriminate on the basis of sex in order to support a damages action for peer sexual harassment under Title IX.\(^{54}\) To analyze whether the school discriminated based on sex, the Court first analyzed the meaning of “discrimination.”\(^{55}\) In doing so, the Court settled upon a principle of discrimination law that is significantly broader than both the *Rowinsky* neutrality approach and the alternative approach that required proof of intentional discrimination by the school, but allowed such intent to be inferred from the school’s notice and failure to respond. Starting with the statutory language of Title IX, the Court framed the question in terms of whether a school that decides to ignore peer sexual harassment “‘subject[s] [persons] to discrimination under’ its ‘programs or activities.’”\(^{56}\) The Court ruled that a school subjects students to discrimination when it is deliberately indifferent to peer sexual harassment that “‘take[s] place in a context subject to the school district’s control,’” and where the school has authority to take remedial action.\(^{57}\)

The requirement that a school act knowingly and with deliberate indifference before it may be liable for damages stems from the Court’s treatment of Title IX “as legislation enacted pursuant to Congress’ authority under the Spending Clause.”\(^{58}\) Under the Court’s Spending Clause precedent, recipients of federal funds must have sufficient notice “that they could be liable for the conduct at issue,” before they may be held liable for damages under Spending Clause statutes.\(^{59}\) The *Davis* Court held that this notice requirement is satisfied where the

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54. The Court found this requirement applicable to both government enforcement actions and private actions, because of the statute’s focus on the actions of recipients of federal funds. See *Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661, 1670 (1999). However, while the requirement that the school itself discriminate applies to private lawsuits for injunctive relief and government enforcement actions, as well as to private actions for damages, the Court’s deliberate indifference standard applies only to private actions for damages, as discussed below. See infra notes 57–59.


56. Id. at 1670 (quoting Title IX).

57. Id. at 1672. *Davis*, like *Gebser* before it, did not address the standard for finding schools liable for peer harassment in OCR administrative proceedings or in private actions for injunctive relief, limiting its analysis to private actions for damages. See *Davis*, 119 S. Ct. at 1669; *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283 (1998) (adopting actual notice and deliberate indifference standard in Title IX damages actions for teacher-student harassment). See also News Release, Statement by U.S. Secretary of Education Richard Riley: On the Impact on Title IX of the U.S. Supreme Court’s *Gebser v. Lago Vista* Decision (July 1, 1998) <http:www.ed.gov/PressReleases/07–1998/lago.html> (“when a . . . school teacher abuses the authority given to him or her by the school district and engages in sexual conduct with his or her students,” there is a Title IX violation, regardless of whether school officials had notice of the conduct, and OCR may remedy such a violation through its administrative enforcement process).

58. *Davis*, 119 S. Ct. at 1669. The requirement that federal funds recipients have notice that they could be liable before subjecting them to damages liability stems from the Court’s view of Spending Clause legislation as contractual by nature: the recipient accepts the funds in exchange for agreeing to comply with certain obligations. Because the recipient could choose to decline the funds, under this line of reasoning, it should have sufficient notice of its obligations before it is held liable in damages. See id.

59. See *Davis*, 119 S. Ct. at 1670. The Court has often been unclear about what type of notice suffices
recipient is deliberately indifferent to known acts of harassment in its programs or activities. The Court thus concluded that schools may be liable in damages for 'subjecting' their students to discrimination where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority.

The Court's decision that a school discriminates on the basis of sex when it knowingly decides "to remain idle in the face of known student-on-student harassment," leaves no room for the approach taken by Rowinsky and other courts that permitted schools to ignore sexual harassment complaints by all students, as long as they treated males and females symmetrically. The Davis decision does not permit an institution to balance out the sexual harassment of one group of students by permitting sexual harassment of a comparable group.

The Court's rejection of mere symmetry as sufficient for Title IX compliance has strong support in anti-discrimination law generally. Discrimination law as it has developed in other contexts rejects the premise that imposing symmetrical disadvantages on the basis of a prohibited criteria is acting neutrally with respect to that criteria. Although the courts have viewed such symmetrical treatment as formally equal and non-discriminatory in the past, this approach has long been discredited.

More recently, in the area of sexual harassment, courts have begun to recognize that treating male and female harassment victims the same in all respects may be inconsistent with the non-discrimination principle. Symmetry to support a damages action under a spending clause statute. Compare Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 74 (1992) (finding no notice problem where the recipient engages in intentional discrimination), with Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 24–25 (1981) (stating that recipients must have notice of their potential liability and the specific obligations imposed by the statute), and Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 287 (1998) (finding that notice is not a problem where recipient knowingly engages in conduct that violates the statute). Davis takes an approach similar to that taken in Gebser, holding that the notice requirement is met where the recipient intends to engage in conduct that violates the statute. Under this standard, a school that deliberately chooses not to respond (or to respond inadequately) to known sexual harassment has sufficient notice to be liable in damages under Title IX. Davis, 119 S. Ct. at 1671.

60. Davis, 119 S. Ct. at 1671.
61. Id. at 1673.
62. Id. at 1670.
63. See, e.g., Plessy v. Ferguson, 163 U.S. 537 (1896) (holding that racial segregation of white and African American passengers treated members of both races equally because both races were subjected to the same system of racial segregation).
65. See, e.g., Ellison v. Brady, 924 F.2d 872, 878–79 (9th Cir. 1991) (adopting reasonable woman standard in Title VII sexual harassment case); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1524 (M.D. Fla. 1991) (same). See also Martha Chamallas, Writing About Sexual Harassment: A
The gender police

cal standards in sexual harassment cases, for example, may exacerbate sex differences in the perspectives of harassment victims. Indeed, treating people identically when they are not similarly situated often more effectively disadvantages one group than if they had been singled out for different treatment. Consequently, some courts have employed an asymmetrical standard to assess the severity and pervasiveness of the harassment in a manner that is tailored to the victim's circumstances, including the victim's sex.

The *Davis* Court also concluded, albeit in a different context, that antidiscrimination law requires more than the symmetrical treatment of male and female students. Thus, if a school's deliberate indifference to peer sexual harassment of female students discriminates on the basis of sex—and the Court in *Davis* found that it does—the school's discrimination may not be "neutralized" by opening the net wider and disregarding the sexual harassment of boys as well. Likewise, if a school ignored complainants of racial harassment across the board, it would not act neutrally with respect to race just because it treated all students subjected to racial harassment the same.

In addition to rejecting the *Rowinsky* neutrality formulation, the interpretation of discrimination adopted by the *Davis* court also surpassed that of those lower courts requiring plaintiffs to demonstrate that the school's inadequate response stemmed from an intent to discriminate. Although the *Davis* Court required the school itself to discriminate in order to be held liable for damages under Title


67. Discrimination law has not always reached such situations. See, e.g., Geduldig v. Aiello, 417 U.S. 484 (1974) (holding that denial of disability benefits to pregnant persons does not discriminate based on sex). However, it has recognized some limits to the principle that equality demands only symmetrical treatment, and thus, as explained above, a state may not bar both whites and blacks from marrying, and a school may not permit both males and females to be harassed because of their sex.

68. See Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 Tex. J. Women & L. 95, 108 (1992) [hereinafter Feminist Constructions of Objectivity] (arguing that some courts' acceptance of a reasonable woman standard reflects the recognition that "asymmetric" treatment may be required for substantive equality). While the Supreme Court has not adopted a "reasonable woman" standard, it has agreed that an assessment of the severity and pervasiveness of the harassment must take into account the particular circumstances of the harassment victim. See *Oncale* v. Sondowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) (stating that "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances")


70. See Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1034 (9th Cir. 1998) (recognizing peer racial harassment claim for damages under Title VI).
IX, it defined “discrimination” broadly to include a school’s deliberate indifference to discrimination by students. As the Court explained, in order for a school’s deliberate indifference to sexual harassment to “subject[]” students to discrimination, it “must, at a minimum, ‘cause [students] to undergo’ harassment or ‘make them liable or vulnerable’ to it.”

Under the Court’s approach, the school need not have desired or intended to discriminate against harassment victims on the basis of sex; rather, by knowingly deciding to ignore sexual harassment by students, the school “effectively ‘caused’ the discrimination.” In cases where the school has substantial control over both the harasser and the context in which the harassment occurs, the Court concluded, the school’s deliberate indifference to the harassment may “be said to ‘expose’ its students to harassment or ‘cause’ them to undergo it ‘under’ school programs.” Although the dissent in Davis took issue with the majority’s definition of discrimination, charging that it equated passive inaction in the face of discrimination with discrimination itself, the majority’s analysis rejected the dissent’s dichotomy between passively condoning private discrimination and active discrimination, as well as the approach taken by those lower courts that had required the plaintiff to demonstrate discriminatory intent on the part of the school.

The Davis Court’s explanation of how and in what sense the school discriminates in such cases is significant for two reasons. First, in refusing to require proof that the school intended to discriminate against harassment victims, the Court rejects a motive-centered inquiry in favor of one focused on causation. Second, by ruling that school inaction “causes” the discrimination, the Court adopts a remarkably broad reading of causation.

71. Davis, 119 S. Ct. at 1670.
72. Id. at 1672 (quoting dictionary definitions that define the word “subject” as: “‘to cause to undergo the action of something specified; expose’ or ‘to make liable or vulnerable; lay open; expose’” and “‘to cause to undergo or submit to: make submit to a particular action or effect: EXPOSE’”) (emphasis in original). The Court did not appear to interpret the terms “subjecting” students to discrimination” differently from “discrimination” itself; thus, the Court’s reasoning appears to define the concept of discrimination as much as it defines the concept of “subjecting” someone to discrimination. See id. at 1671.
73. Davis, 119 S. Ct. at 1671. See also Doe v. University of Ill., 138 F.3d 653, 679–80 (Posner, J., concurring) (advocating a standard that would hold a school liable under Title IX if it decides consciously and deliberately to remain passive in the face of peer sexual harassment, “although it does not base this decision on an invidious ground such as race or sex”); Carroll K. v. Fayette County Bd. of Educ., 19 F. Supp. 2d 618, 621–22 (D. W. Va. 1998) (applying Gebser standard to peer sexual harassment claim, rejecting Defendant’s argument that plaintiff had to prove that the school district intended to discriminate against her, and finding plaintiff’s allegation that school responded with deliberate indifference to peer harassment sufficient under Title IX).
74. Davis, 119 S. Ct. at 1672. Cf. Catharine A. MacKinnon, Sexual Harassment of Working Women 57 (1979) [hereinafter Sexual Harassment of Working Women] (“Equally apparent to most sexually harassed women is that employers could rectify their situation but instead wink at it, which means that they let it happen. To the victims, employer liability comes down to holding responsible for women’s situation the people with the power over it.”).
75. Davis, 119 S. Ct. at 1678–79.
76. Davis, 119 S. Ct. at 1673.
The first of these, the Court’s shift to a focus on causation, is arguably overdue. The statute itself uses the language of causation, not intent. The Court first introduced a requirement of intentional discrimination into the Title IX framework in 1992 when it decided Franklin v. Gwinnett County Public Schools, holding that damages are available under Title IX for intentional discrimination. Since Franklin, lower courts have struggled mightily to determine whether schools intended to discriminate in actions seeking damages under Title IX.

Intentional discrimination is a prominent feature in other areas of discrimination law, including Title VII and the Equal Protection Clause. Yet, as several commentators have argued, the search for intentional discrimination should really be a search for causation: whether persons have been subjected to harm because of their sex. The search for causation, in the form of a sex-based harm, may well diverge from an inquiry into whether the actor acted with a discriminatory intent or motive. By refocusing the inquiry as one of causation and not merely motive or animus, the Court returned to the true meaning of anti-

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77. See 20 U.S.C. § 1681 (1999) (stating that “[n]o person ... shall, on the basis of sex ... be subjected to discrimination”). I am indebted to Martha Chamallas for this insight.

78. 503 U.S. 60, 76 (1992). Although Franklin did not specifically foreclose a damages remedy for unintentional discrimination, lower courts so interpreted it. See, e.g., Pederson v. Louisiana State Univ., 912 F. Supp. 892, 918 (M.D. La. 1996) (“[I]n line with the Pennhurst and Guardians result, this Court finds that monetary damages are not recoverable under Title IX absent a finding of intentional discrimination”); cases cited supra note 48. After Davis and Gebser, it is highly unlikely that Title IX provides a damages remedy for unintentional discrimination. See Davis, 119 S. Ct. at 1671 (characterizing Gebser as ruling that “the district could be liable for damages only where the district itself intentionally acted in clear violation of Title IX”); see also Guardians Assoc. v. Civil Serv. Comm’n, 463 U.S. 582, 597–98 (1983) (White, J., announcing the judgment of the Court) (holding damages not available under Title VI for unintentional, or disparate impact, discrimination). It remains unclear whether Title IX reaches disparate impact discrimination (even without a damages remedy), or is limited to intentional discrimination. Compare Sharif v. New York State Educ. Dep’t, 709 F. Supp. 345, 348 (S.D.N.Y. 1989) (holding that Title IX reaches disparate impact), with Cannon v. University of Chicago, 648 F.2d 1104, 1109 (7th Cir. 1981) (holding that Title IX is limited to intentional discrimination).

79. See cases cited in supra notes 48 & 49. For examples of courts that have refused to find intentional discrimination under Title IX despite clear causation, see, e.g., Pederson v. Louisiana State Univ., 912 F. Supp. 892, 918 (M.D. La. 1996) (finding discrimination against female athletes to be the result of “arrogant ignorance, confusion regarding the practical requirements of the law, and a remarkably outdated view of women and athletics,” but not an intent to discriminate); Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779 (3d Cir. 1990) (finding that dismissal of pregnant student from National Honor Society under rule forbidding premarital sex was not necessarily intentional discrimination based on pregnancy).


discrimination law: to ensure that persons are not harmed because of their sex, not merely that they are not harmed by ill-meaning actors.\textsuperscript{82}

The second important facet of the Court's decision may well have even greater import. The Court interpreted causation in this context to extend to a school's deliberate choice to permit discrimination by students to continue unabated, provided that the school has control over the harasser and the context in which the harassment occurs. The view that an institution causes the harm when it chooses not to stop harmful conduct inflicted by others, despite having the power to do so, is unusually broad in relation to many of the Court's other precedents.\textsuperscript{83} Yet, sexual harassment law has long been difficult to reconcile with these precedents. When an employer permits persons within its control to sexually harass its employees, even if the harassers do not act as agents of the employer, courts view the institution's insufficient action as a form of intentional discrimination, with little explanation.\textsuperscript{84} The employer is liable in such cases for failing to respond to a

\textsuperscript{82} Thus, the Court treats an institution's response to sexual harassment more like a facial classification, where the harm is clearly imposed because of sex, and unlike the typical disparate treatment case where the search for causation collapses into an inquiry into motive. \textit{Compare} UAW v. Johnson Controls, 499 U.S. 187 (1991) ("[A]bsence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect."), \textit{with} Texas Dept. of Community Affairs v. Bourjine, 450 U.S. 248, 253 (1981) (stating that the "ultimate question" is whether defendant acted with an intent to discriminate).

\textsuperscript{83} See, \textit{e.g.}, Deshaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189, 201 (refusing to hold state accountable for failing to intervene in abuse inflicted by father, despite state's knowledge of abuse and power to stop it); Washington v. Davis, 426 U.S. 229 (1976) (employer has no obligation to correct for disparate impact of standardized tests on African Americans); Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 277 (1979) (state has no obligation to ameliorate severe disparate impact of veteran's preference on women's job opportunities). One possible way to reconcile the \textit{Davis} case with these precedents would be to conclude that a school has a special relationship with its students, and thus an affirmative duty to protect them, so that the school is liable for permitting discrimination by others. See, \textit{e.g.}, \textit{DeShaney}, 489 U.S. at 200 (duty to protect may arise out of special relationship). However, courts generally have rejected the argument that mandatory education creates a special relationship between schools and students. See, \textit{e.g.}, D.R. v. Middle Bucks Area Voc. Tech. Sch., 972 F.2d 1364 (3d Cir. 1992); J.O. v. Alton Community Sch. Dist., 909 F.2d 267 (7th Cir. 1990); \textit{see also} Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1188 (11th Cir. 1996) (rejecting plaintiff's section 1983 claims). Moreover, such an explanation would not explain the courts' approach to workplace harassment. See \textit{infra} note 84.

sexually hostile environment created by others. By explicitly ruling that the institution’s toleration of such conduct causes the discrimination, and that the institution itself is discriminating, the *Davis* decision provides an opportunity to more fully explain why such cases are properly treated as discrimination by the institution.

The Court’s conclusion in *Davis* that the school itself causes the discrimination by its deliberate indifference to peer harassment can best be explained under the principle that the law prohibits covered institutions from causing discrimination in the sense of giving added effect to discrimination by others. The Court in other contexts has occasionally recognized that the state violates the non-discrimination principle when it effectuates and gives its imprimatur to private discrimination. While the *Davis* Court stopped short of explicitly adopting this explanation for why school inaction “effectively ‘cause[s]’” the discrimination, this rationale best explains the *Davis* case itself and fits well with the reality of peer sexual harassment, as argued in the next section.

C. SCHOOL INACTION CAUSES THE DISCRIMINATION BY EXACERBATING THE HARM AND EMBOLDENING THE HARASSER

When a school reacts with deliberate indifference to sexual harassment by students, despite notice of the harassment, the school causes the discrimination in the sense that its failure to act intensifies the harm and gives greater effect to the harassment. Perhaps even more so in school than in the workplace, the failure to intervene compounds the harm inflicted by the harassment itself. Because students tend to perceive the adult world as more powerful than their own, the failure to act is perceived as approval, not merely a neutral lack of discipline or failure to control the environment. The failure to act is particularly

§ 1981, which requires proof of intentional discrimination); Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1421 (7th Cir. 1986) (same).


86. *Davis*, 119 S. Ct. at 1671.

87. *See*, e.g., *Nan D. Stein et al., Wellesley College Center for Research on Women, Secrets in Public: Sexual Harassment in Our Schools* 15 (1993) [hereinafter *Secrets in Public*] (“In too many cases, the school’s ‘evaded curriculum’ teaches young women to suffer harassment and abuse privately. They learn that speaking up will not result in their being heard or believed and that if they insist on pursuing matters, they will be on their own.”). Cf. *Writing About Sexual Harassment*, supra note 65, at 46–48 (discussing literature explaining the harms to harassment victims when they find their credibility challenged and their injuries minimized). *See also* Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER RACE & JUST. 177, 179 n.12, 201–08 (1997) (discussing “secondary injuries” to discrimination victims when their complaints are met with intimidation, discouragement and disbelief by their institutions).

88. Amicus Brief for NOW Legal Defense and Education Fund *et al.*, at *15, *Davis v. Monroe County Bd. of Educ.*, 119 S. Ct. 1661 (1998) (No. 97–843) [hereinafter NOW LDEF Amicus Brief, *Davis*] (“Students recognize that adults often witness episodes of sexual harassment, and expect adults to see and feel these violations as they do. Yet, many students (particularly the girls) cannot get confirmation of their experiences from school personnel because most of those adults do not name it ‘sexual harassment’
harmful when accompanied by messages of blaming the victim, trivializing the conduct, or dismissing the harassment as "normal"—messages commonly conveyed by school officials who fail to intervene. Thus, school indifference to sexual harassment, and the lack of a serious response, is not neutral, in that it enhances and intensifies the harm of the underlying harassment, which is itself based on sex. Indeed, listening to the voices of female victims of peer sexual harassment suggests that when school officials ignore, trivialize, or fail to stop the harassment, their response is often as, if not more, harmful than the harassment itself:

I was in summer school on the last day, I was wearing a silk black tank top and jeans (very baggy). Three guys cornered me and said, 'You know if we raped you right now we could get away with it because you're dressed like a slut.' That alone made me feel so ashamed and embarrassed because I thought I looked nice, to have someone say you look like a slut just crushes your feelings. As if that weren't enough when I yelled out to my teacher she said 'You know you ask for it—you get what you deserve,' and she wouldn't help me. She always, in my opinion, favored the guys. I talked to two other girls in the class and similar things happened to them, and our teacher seemed to think it was our fault. [17 year old, Maryland]

I have told teachers about this a number of times; each time nothing was done about it. Teachers would act as if I had done something to cause it. Once I told a guidance counselor, but was made to feel like a whore when she asked questions like, 'Do you like it?' and 'They must be doing it for a reason. What did you do to make them do it?' [13 year old, Pennsylvania]

and do nothing to stop it.

89. See, e.g., Doe v. University of Ill., 138 F.3d 653, 655 (7th Cir. 1998) (citing complaint alleging that "some administrators suggested to Doe that she herself was to blame for the harassment, and that it was she who ought to adjust her behavior in order to make it stop," and that one administrator in particular "told Doe and two of her friends to start acting like 'normal' females and scolded them for making allegations of harassment that might injure some of the male students' futures"); Davis, 118 S. Ct. at 1667 (citing complaint alleging that when plaintiff reported sexual harassment to the principal, he asked why she "was the only one complaining"); Doe v. Londonderry Sch. Dist., 970 F. Supp. 64, 69, 75 (D.N.H. 1997) (stating that plaintiff felt "betrayed by the Londonderry Jr. High School administrators and the Londonderry School District," where superintendent responded to her complaints with the attitude that "boys will be boys"). Cf. SEXUAL HARASSMENT OF WORKING WOMEN, supra note 74, at 52 (arguing that "[t]rivialization of sexual harassment has been a major means through which its invisibility has been enforced").

90. The harm from school inaction may also spillover to other students not directly targeted by the harassment, thus exacerbating a sexually hostile environment generally. See SECRETS IN PUBLIC, supra note 87, at 1 ("The lessons of silence and neglect resulting from official inaction not only affect the subjects of sexual harassment, they also spread to the bystanders and witnesses. Boys as well as girls become mistrustful of adults who fail to intervene, to provide equal protection and to safeguard the educational environment.")

91. SECRETS IN PUBLIC, supra note 87, at 9–10 (emphasis in original).

92. Id. (emphasis in original).
One thing I learned was how unfair the world can be. I took a photography class and the majority of the class was boys. . . . I was in the darkroom developing pictures and they would come in and corner me. They would touch me, put their hands on my thighs and slide their hands up my skirt. They often tried to put my hands down their pants. . . . One day I was in the room alone and one of the boys came in. When I went to leave he grabbed me and threw me down and grabbed my breast. I felt I was helpless, but I punched him and he ran out. The teacher (who was a man) came in and yelled at me. When I tried to explain why I had hit him the teacher told me I deserved it because I wore short skirts. I was sent to the principal and I had to serve detention. I didn't tell the principal because I feared he would do the same and tell me it was my fault. I felt so alone. [15 year old, New Jersey]\(^93\)

I think schools need to pay more attention to what's going on around them because girls like me are just dying inside because no one will believe us. [14 year old, Florida]\(^94\)

The recognition that school inaction causes the harm of the underlying harassment is equally applicable in the context of anti-gay harassment. Victims of anti-gay harassment experience a similar, exacerbating harm from school indifference to their complaints of harassment. As reported in a five-year study of anti-gay harassment in Washington state schools by The Safe Schools Coalition:

Some adults who were not perceived as offenders per se, did add to a young person's distress. Respondents described these adults as witnesses or as people they went to for help after-the-fact, not as offenders, but some said they were as upset by an adult's response to an incident as by the actions of the offenders themselves. For example, one high school freshman who was verbally harassed, spit on, and kicked out of the locker room by his classmates, reported that his P.E. teacher responded to the attack by saying, "Maybe you should do more push-ups. What's the matter, don't you like girls?"\(^95\)

In addition to the added harm to harassment victims when schools remain deliberately indifferent to peer sexual harassment, school inaction causes the discrimination in another way as well. School inaction invites escalation of the harassment and effectively emboldens harassers to step up their efforts. For

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93. Id.
94. Id. at 12–13.
95. Safe Schools Coalition of Washington State, They Don't Even Know Me: Understanding Anti-Gay Harassment and Violence in Schools, Findings: Educators' Strategies (Jan. 1999) <http://www.safeschools-wa.org/ss5find10.html>. See also Nabozny v. Podlesny, 92 F.3d 446, 451 (7th Cir. 1996) (describing allegations that when plaintiff reported the harassment to school officials, the responses ranged from "boys will be boys" to telling plaintiff that "if he was 'going to be so openly gay,' he should 'expect' such behavior from his fellow students").
example, in the Davis case, once G.F. was called to account for himself (in the
criminal justice system, not by the school), the harassment immediately stopped.\textsuperscript{96} Until then, the school's apparent indifference provided all the encouragement he
needed to continue the harassment over a period of five months. This type of
reaction by harassers to school inaction is not unusual. When school officials
knowingly turn a blind eye to peer sexual harassment, harassers learn that their
actions are "normal" and even appropriate.\textsuperscript{97} A similar interaction between
harassers' actions and institutional tolerance of sexual harassment has been
documented in the workplace.\textsuperscript{98}

This dynamic of school inaction and encouragement of the harassment also
occurs where the harassment targets gay and lesbian students. Delayed or
inadequate school action in response to anti-gay harassment may exacerbate the
harassment and contribute to its severity. The Safe Schools Coalition study of
anti-gay harassment in schools reported that "[s]ome [respondents] expressed
concern that . . . less overtly violent incidents seem to serve as invitations to more
intense harassment, especially when adults perpetrate them or fail to inter-
vene."\textsuperscript{99} This same study found that in one quarter of the reported incidents of
anti-gay harassment where adult witnesses were present, no adult took any
corrective action.\textsuperscript{100} Respondents connected this inaction to the escalation of
abuse in subsequent incidents:

These cases of apparent neglect by adults were very troubling to respondents. They spoke about months of verbal violence and public
humiliation by peers that preceded a young person's resort to fists or
dropping out of school or, in one instance, committing suicide. In each
instance, adults had multiple opportunities to put a stop to the very
public abuse of a child or teen and failed to do so.\textsuperscript{101}

\textsuperscript{96} See Davis v. Monroe County Bd. of Educ., 119 S. Ct. 1661, 1667 (1999). G.F.'s punishment was
not particularly severe—he was required to write a letter of apology—but it apparently was sufficient to
end the harassment. Harriet Chiang, Justices Say Schools Liable in Harassment Cases: Ruling on

\textsuperscript{97} See SECRETS IN PUBLIC, supra note 87, at 15 ("At the same time, and as a result of the same
[school] silence, boys in school often receive tacit permission to intimidate, harass or assault girls.
Indeed, if school authorities do not intervene and challenge the boys who sexually harass others, the
schools may be encouraging a continued pattern of violence in relationships."). See also Valerie E. Lee
(stating that "students experience more harassment, and more severe forms of it, in schools where they
describe harassment as a serious problem")).

\textsuperscript{98} See John B. Pryor & Nora J. Whalen, A Typology of Sexual Harassment: Characteristics of
Harassers and the Social Circumstances Under Which Sexual Harassment Occurs, in SEXUAL HARAS-
demonstrating that whether local social norms condoned or permitted sexual harassment is an important
factor in whether individuals sexually harass).

\textsuperscript{99} Safe Schools Coalition of Washington State, They Don't Even Know Me: Understanding Anti-Gay
<http://www.safeschools-wa.org/ss5find1.html>.

\textsuperscript{100} Id.

\textsuperscript{101} Id.
Because schools are in charge of and regulate the overall school environment, school inaction in the face of known peer harassment is perceived by both victims and perpetrators as condoning the harassment. The double-harm from school inaction—harm to victims and encouragement to harassers—occurs regardless of whether the school acts out of an intent to discriminate against its students based on sex. The Davis Court implicitly recognized this relationship between school inaction and harassment by students, concluding that when schools know of, yet remain deliberately indifferent to, peer sexual harassment in their programs, they should bear the responsibility for the resulting harm to students.

D. SCHOOL INACTION DISCRIMINATES BASED ON SEX IF THE HARASSMENT ITSELF IS BASED ON SEX

The Davis Court essentially located the based-on-sex element of the discrimination at the level of the sexual harassment itself by holding the school liable for action and inaction that gives effect to or exacerbates sexual harassment by students. The school "cause[s]" discrimination based on sex because it exacerbates the harm, frequency and severity of a sex-based harm inflicted by others, not because the school itself treats (or intends to treat) students differently because of their sex. Thus, the school violates Title IX only if the underlying harassment is itself based on sex.

The key then to explaining why a school's failure to respond to peer sexual harassment discriminates based on sex lies in explaining why peer sexual harassment itself discriminates on the basis of sex. While Davis rejected the symmetry-as-neutrality perspective, and adopted a definition of discrimination that encompasses actions that give greater effect to discrimination by others, it did little to explain why peer sexual harassment itself discriminates against its victims because of their sex. Indeed, the Court simply assumed that the sexual abuse, touching, and propositions made by G.F. toward LaShonda were based on her sex. Other lower courts that have recognized claims for peer sexual harassment under Title IX have likewise assumed that the harassment—at least if it took a form that was sexual in nature—occurred because of sex, with little or no analysis.

102. Cf. Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1427 (N.D. Cal. 1996) ("In addition to the curriculum, students learn about many different aspects of human life and interaction from school. The type of environment that is tolerated or encouraged by or at a school can therefore send a particularly strong signal to, and serve as an influential lesson for, its students.").

103. Cf. Sexual Harassment of Working Women, supra note 74, at 39–40 ("Whatever they mean, people who do not take sexual harassment seriously are an arm of the people who do it.").


105. Davis, 119 S. Ct. at 1672–73.

106. Davis, 119 S. Ct. at 1676; see also id. at 1686 (Kennedy, J., dissenting) (arguing that "[t]he majority . . . has no problem labeling the conduct of fifth graders 'sexual harassment' and 'gender discrimination.'").

107. See cases cited infra note 117.
The same question lies at the heart of the inquiry into why school inaction in both the peer sexual harassment and anti-gay harassment contexts discriminates based on sex: why and under what circumstances does harassment between students inflict harm on the basis of sex? Title IX law to date, including OCR guidance and court decisions, has provided an inadequate response to this question. A fuller explanation of why sexual harassment among students occurs on the basis of sex (and is therefore a form of sex discrimination) is essential in explaining why a school’s failure to intervene violates Title IX. As argued in the following discussion, Title IX’s nondiscrimination principle should extend to harassment that is labeled “anti-gay,” and should not be limited to harassment that is sexual in nature.

II. THE LINE DIVIDING SEXUAL HARASSMENT AND ANTI-GAY HARASSMENT UNDER TITLE IX

In Title VII sexual harassment cases, courts have long accepted that male-female harassment that takes the form of unwelcome sexual overtures occurs because of sex, without further proof that the target was singled out because of his or her sex.\(^\text{108}\) Although the Supreme Court’s recent decision in Oncale v. Sundowner Offshore Services, Inc.\(^\text{109}\) reminds courts that plaintiffs must always establish that the challenged conduct occurred “because of sex,” it did little to disrupt the presumption that unwelcome sexual overtures—at least between men and women—occur because of sex.\(^\text{109}\) In the same breath that it declared that it has “never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations,” the Court nevertheless stated:

Court and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of

\(^{108}\) See, e.g., Barnes v. Costle, 561 F.2d 983, 990 (D.C. Cir. 1977) (“But for her womanhood, from ought that appears, [plaintiff’s] participation in sexual activity would never have been solicited”); Henson v. City of Dundee, 682 F.2d 897, 905 n.1 (11th Cir. 1982) (“Except in the exceedingly atypical case of a bisexual supervisor, it should be clear that sexual harassment is discrimination based on sex”); Katz v. Dole, 709 F.2d 251, 255 (4th Cir. 1983) (assuming sexual harassment includes an intent to discriminate based on sex).

\(^{109}\) 523 U.S. 75 (1998). Oncale involved a Title VII challenge by a male plaintiff, alleging that his employer failed to take any action to stop a relentless campaign of sexual harassment directed at him by his male colleagues. The harassment involved conduct of a graphically sexual nature, including sexual assault, threats of rape and forced sex. The workplace, an oil rig, was all-male, and there was no allegation that the harassers were homosexual. Lower courts in the case had ruled that same-sex harassment was not based on sex as a matter of law. The Supreme Court unanimously reversed, in an opinion written by Justice Scalia, holding that same-sex harassment may state a claim under Title VII, as long as the harassment occurred because of the sex of the plaintiff. However, the Court did not rule on whether the alleged harassment of Joseph Oncale occurred because of his sex, and instead remanded to the lower court for further proceedings. For a further discussion of Oncale’s effect on school harassment, see John Guenther, Oncale Goes to School: Male-Male Harassment and Gender-Policing, 1 GEO. J. GENDER & LAW 159 (1999).
sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex.\textsuperscript{110}

The presumption that male-female proposals of sexual activity are based on sex is "reasonable" to the Court apparently because it assumes that the harasser in such encounters is heterosexual and would not have propositioned a person of the same sex. This presumption rests on a view of sexual harassment as premised on sexual desire and attraction—a view that is highly questionable, as discussed below in Part III A. Nevertheless, even after \textit{Oncale}, male-female proposals of sexual involvement remain presumptively based on sex.

The \textit{Oncale} Court applied a somewhat different analysis to same-sex harassment. Although the sexual attraction approach is still available to victims of same-sex harassment in cases where there is "credible evidence that the harasser was homosexual," absent such evidence, the based on sex requirement in same-sex harassment cases must be established in some other way.\textsuperscript{111} While not purporting to provide an exhaustive list of other methods for proving the based-on-sex element in such cases, the \textit{Oncale} Court gave two alternatives for meeting this requirement.\textsuperscript{112} First, if the same-sex harassment involves "such sex-specific and derogatory terms" as to "make it clear that the harasser was motivated by general hostility" toward members of the same sex, the harassment is based on sex.\textsuperscript{113} This approach is unlikely to provide a basis for recovery for many victims of same-sex harassment, as it is rare that a harasser acts out of a general animus towards his own sex. Second, a victim of same-sex harassment may offer "direct comparative evidence" that the harasser did not harass members of the other sex.\textsuperscript{114} Where such evidence is not available, or where the harasser sexually harassed members of both sexes, this theory would not apply.

Thus, while the lesson in \textit{Oncale} purports to be that the plaintiff "must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discrimination... because of... sex,'"\textsuperscript{115} the Court's admonishment will probably have little effect on most cases of male-female sexual harassment, at least where sexual propositions are involved, and will prove more problematic in cases of same-sex harassment.\textsuperscript{116}

\textsuperscript{110} \textit{Oncale}, 523 U.S. at 75.
\textsuperscript{111} Id.
\textsuperscript{112} Id. At least one post-\textit{Oncale} court has read \textit{Oncale}'s suggestions for proving harassment based on sex as not exhaustive. See Shephard v. Slater Steels Corp., 168 F.3d 998, 1009 (7th Cir. 1999) ("we discern nothing in the Supreme Court's decision indicating that the examples it provided were meant to be exhaustive rather than instructive").
\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} However, \textit{Oncale} is having an effect on cases where the harasser makes sexual overtures to both males and females. See, e.g., Holman v. Indiana, 24 F. Supp. 2d 909, 912–16 (N.D. Ind. 1998) (finding that harassment of married couple was not because of sex where "equal opportunity harasser" made sexual requests of both wife and husband). Cf. Yoho v. Tecumseh Prods. Co., 43 F. Supp. 2d 1021, 1025 (E.D. Wis. 1999) (concluding that sexual graffiti directed at female employee was not because of sex
Likewise, in Title IX peer sexual harassment cases, Oncale may have greater implications for same-sex than for cross-sex harassment, at least in cases involving sexual advances. Title IX cases, like Title VII cases, have agreed with the assumption sanctioned in Oncale that male-female sexual overtures occur because of sex. Rather than struggling with the because-of-sex requirement in peer sexual harassment cases, the main difficulty—until Davis—had been one of explaining why the school’s response to the harassment discriminates based on sex. Peer sexual harassment in school of the male-female variety, like its counterpart in the workplace, remains presumptively based on sex after Oncale, at least if it involves “explicit or implicit proposals of sexual activity.”

The legal treatment of anti-gay harassment, however, is more complicated after Oncale. Anti-gay harassment may include cross-sex harassment and/or same-sex harassment, and may or may not involve explicit or implicit proposals of sexual activity. Although anti-gay harassment and sexual harassment are not distinct, easily divisible categories, the classification of the conduct as either sexual harassment or anti-gay harassment makes all the difference under sex discrimination law. Both Title IX and Title VII apply the categorical rule that sexual harassment is prohibited under the law, but harassment that is based on sexual orientation is not. By insisting that plaintiffs always demonstrate that

where male employees also were the subject of sexual graffiti); Landrau Romero v. Caribbean Restaurants, Inc., 14 F. Supp. 2d 185, 189 (D.P.R. 1998) (holding that male-male harassment was not based on sex where harasser also insulted female employees by grabbing his genitals and using lewd language to insult female employees). Presumably, these courts have decided that where a harasser sexually propositions both males and females, a presumption that male-female sexual conduct is based on sex is no longer reasonable.

117. See, e.g., Doe v. University of Ill., 138 F.3d 653, 655, 663 (7th Cir. 1998) (concluding that female student’s allegations that she was subjected to “unwanted touching, epithets, and the deliberate exposure of one’s genitals” by a self-styled “posse” of male students was sufficient to establish sexual harassment); Morlock v. West Cent. Educ. Dist., 1999 WL 176929, at *9-*11, *47-*48 (D. Minn. Mar. 29, 1999) (treating alleged threats of sexual violence, lewd sexual gestures, and exposure of genitals by male students to female students as conduct that is based on sex); Haines v. Metropolitan Govt of Davidson County, 32 F. Supp. 2d 991, 995, 1000 (M.D. Tenn. 1998) (accepting plaintiff’s allegation that sexual abuse and attempted rape of female student by male students was based on sex); Nicole M. v. Martirne Unified Sch. Dist., 964 F. Supp. 1369, 1372, 1378 (N.D. Cal. 1997) (finding that unwanted sexual comments and touching of female student’s breast by male student was sexual harassment); Collier v. William Penn Sch. Dist., 956 F. Supp. 1209, 1210, 1214 (E.D. Pa. 1997) (holding that sexual harassment of female student by male students, including “offensive language, sexual innuendo, sexual propositions, and threats of physical harm,” was because of sex); Doe v. Londonderry Sch. Dist., 970 F. Supp. 64, 67, 74–75 (D.N.H. 1997) (holding that male student’s retaliation against female student for refusing to date him, coupled with sexually explicit abusive language, was sexual harassment); Doe v. Oyster River Coop. Sch. Dist. 992 F. Supp. 467, 471, 479–80 (D.N.H. 1997) (finding that male student’s conduct toward female students, “includ[ing] exposing his genitalia, touching girls on the leg, waist, or breast, and making very obscene comments,” was because of sex); Franks v. Kentucky Sch. For the Deaf, 956 F. Supp. 741, 746 (E.D. Ky. 1996) (holding that harassment of plaintiff who was “raped, physically beaten and sexually abused and harassed” by male student is “presumed to be “based on [plaintiff’s] sex”); see also Office for Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties; Notice, 62 Fed. Reg. 12,034, 12,047 n.12 (Dep’t of Educ. 1997) [hereinafter Sexual Harassment Guidance].


119. See Sexual Harassment Guidance, 62 Fed. Reg. at 12,036, 12,039 (Title IX); Wrightson v. Pizza
the harassment is based on sex and not some other criteria, even when the harassment has sexual connotations, Oncale will only add to this divide.120

In the Title IX context in particular, Oncale may make it more difficult to situate harassment that is motivated by anti-gay animus as a form of harassment based on sex. Before the Court decided Oncale, the Office for Civil Rights issued its policy guidance on sexual harassment in schools, venturing somewhat farther than Title VII courts by interpreting Title IX to reach harassment against gay and lesbian students if the conduct is sexual in nature.121 Thus, under the Office for Civil Rights approach, both same-sex and cross-sex harassment of gay and lesbian students is prohibited under Title IX as long as it is sexual in nature, regardless of whether it is inspired by anti-gay animus.122 Although, in theory, this approach could leave room for non-sexual harassment of gay and lesbian students to be covered under Title IX as a form of gender-based, non-sexual harassment, OCR’s subsequent discussion forecloses such a result. According to OCR, “if a male student or group of male students target a lesbian student for physical sexual advances,” such conduct would be encompassed by Title IX; however, “[i]f students heckle another student with comments based on the student’s sexual orientation (e.g., ‘gay students are not welcome at this table in the cafeteria’), but their actions or language do not involve “sexual conduct,”
Title IX would offer no protection.124 Thus, where the harassment is not sexual in nature, and the victim is targeted for harassment because of her sexual orientation (by persons of either sex), OCR treats the harassment as based on sexual orientation, and not covered by Title IX.125

After Oncale, OCR's coverage of sexual-in-nature harassment targeting gay or lesbian students may still be viable where the harassment consists of actual or attempted sexual contact by students of the other sex. Cases involving this type of harassment may fare no worse under Oncale because of the presumption that male-female "explicit or implicit proposals for sexual activity" are "based on sex."126 For example, if a group of male students harass a lesbian student by threatening to rape her and "turn her around," Oncale's presumption that male-female proposals of sexual activity are based on sex, and OCR's presumption that sexually explicit harassment is based on sex, both lead to the same result.127

However, other types of harassment targeting gay or lesbian students may prompt different treatment after Oncale. In particular, OCR's approach to sexual-in-nature, same-sex harassment of gay and lesbian students is questionable after Oncale. For example, in contrast to the above example of male-female sexual proposals to a lesbian student, if male students harass a gay male student by threatening to rape him, Oncale's presumption that sexual overtures are based on sex would not apply absent "credible evidence" that the harassers are homosexual.128 Since Title IX courts to date have followed Oncale in determining the scope of Title IX's protections,129 the plaintiff in such a case would have an uphill battle, notwithstanding OCR's willingness to view all harassment of gay and lesbian students as based on sex if it is sexual in nature.

As difficult as it may be for victims of same-sex, sexually explicit anti-gay harassment to proceed under Title IX, anti-gay harassment that is not viewed as "sexual in nature" has an even more precarious place in Title IX law. Neither OCR nor Oncale would recognize such harassment as based on sex, and would instead view it as based on sexual orientation. Thus, under existing precedent, harassment targeting gay or lesbian students that does not involve sexual propositions would not be covered under either the Oncale or OCR approaches.

Although OCR's approach to anti-gay harassment diverges to some extent from that of Title VII cases, after Oncale, OCR's more lenient treatment of anti-gay harassment rests on shaky ground. Moreover, despite the divergence

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125. Id.
127. However, even in this situation, Oncale's presumption that the harassment is based on sex might not apply if the same harassers also threaten to rape a gay male student, thus falling into the loophole for "equal opportunity harassers." See supra note 116.
128. Oncale, 523 U.S. at 80.
between OCR and the *Oncale* decision, both approaches draw a sharp line between what they view as sexual harassment, and thus based on sex, and what they view as harassment that is based on sexual orientation, and not sex. This categorical distinction has thwarted any meaningful analysis of whether anti-gay harassment also occurs because of sex (in addition to sexual orientation).

Because harassment that is viewed as based on sexual orientation is treated as a species of discrimination separate and apart from sex discrimination, the *Davis* approach to school liability for peer sexual harassment, which locates the based-on-sex requirement at the level of the harassment, is not applicable to many forms of anti-gay harassment. Thus, while *Davis* rejected a requirement that the school itself discriminate based on the sex of the complainant, such a showing has been the only method that has succeeded in protecting students from anti-gay harassment under sex discrimination law. Until courts and OCR recognize anti-gay harassment as a wrong that is based on sex, plaintiffs and complainants challenging a school’s indifference to such harassment are left with the onerous burden of proving that the school itself treated her differently because of her sex.

In the *Nabozny* case, Jamie Nabozny was able to prove that the school discriminated based on sex when it ignored his complaints of anti-gay abuse. However, the decision—an important victory for anti-gay harassment victims in many respects—nevertheless falls far short of securing adequate protection from anti-gay harassment under sex discrimination law. The *Nabozny* ruling is limited in its potential to assist future victims of anti-gay harassment for several reasons.

First, the court required proof that the school district treated Jamie’s complaints worse than it treated the harassment complaints of similarly situated females. In comparing Jamie Nabozny to a hypothetical female student who was subjected to the type of abuse that Jamie suffered (which included a mock rape), the court did not elaborate on how to decide when victims of student-on-student abuse are similarly situated.

While the court appeared to require parity in the school’s treatment of anti-gay harassment and male-female harassment—comparing the treatment of Nabozny with that of female harassment victims—the court’s analogy is not as far-reaching as it may seem at first glance. The school district’s own policy treated sex discrimination and sexual orientation

130. *See, e.g.*, Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996) (finding that school’s failure to respond to anti-gay harassment of a male student violated equal protection sex discrimination principles because plaintiff showed that the school did enforce its anti-harassment policy where the harassment victims were female); Letter from Dep’t of Education, Office for Civil Rights, to David S. Buckel, Ref. 06971182 (June 17, 1998) (accepting voluntary settlement of complaint against Fayetteville Public Schools alleging that the school district failed to address harassment of male student “with the same degree of urgency and purpose extended to similarly situated female students”); *but see* Doe v. Riverside-Brookfield Township, 1995 WL 690749 (N.D. Ill. Nov. 14, 1995) (rejecting equal protection claim based on school’s failure to respond to harassment of a student perceived to be gay where the plaintiff failed to show that other harassed students had been protected by defendants, and suggesting that the failure to respond could merely reflect a low level of discipline generally).

131. *Nabozny*, 92 F.3d 446 (7th Cir 1996); *see also supra* notes 18–29.

132. *Id.* at 454–55.
discrimination on the same footing, which greatly assisted the court in viewing Jamie Nabozny as similarly situated to female victims of sexual harassment. Since even the school regarded victims of anti-gay discrimination as similarly situated to victims of sex discrimination, at least in its official policies, the Court would have been hard pressed to reject the analogy between the school’s treatment of Jamie and its treatment of female victims of sexual harassment. In the absence of such a school policy, a court may well find that male victims of anti-gay harassment are not similarly situated to female victims of sexual harassment, on the grounds that anti-gay harassment and sexual harassment are not the same and may be treated differently. Thus, the *Nabozny* ruling may not be generalizable to schools that do not purport to treat anti-gay discrimination and sexual harassment in the same manner.

However, even assuming that this obstacle could be overcome, so that the court is persuaded that victims of anti-gay harassment and sexual harassment are similarly situated, the *Nabozny* approach has more serious problems. The *Nabozny* court merely found that Jamie Nabozny had presented sufficient evidence to get to trial on the issue of whether the school had an intent to discriminate based on sex. Because the case was ultimately settled, we do not know whether Jamie Nabozny would have succeeded in proving that the school intentionally discriminated against him because of his sex, as opposed to his sexual orientation, or because of mere inattention to his situation. Convincing a court or a jury that a school failed to respond to harassment because it intended to discriminate based on sex has proven to be much more difficult than getting to trial. Demonstrating such an intent would be even more difficult if the school did not have a policy or practice of responding adequately to male-female harassment. In *Nabozny*, the Seventh Circuit’s willingness to infer sufficient proof of discriminatory intent to survive summary judgment stemmed in part from the school’s departure from its stated procedures.

The underlying problem with the *Nabozny* approach is that it analyzes the based-on-sex requirement by looking to the school’s own sex-based actions. That is, it locates the based on sex element at the level of the institutional response to harassment. The school can always evade responsibility for the harassment under this theory of sex discrimination by treating complainants of the other sex in the

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133. A court could even be assisted in such an analysis by citing legal decisions that treat sexual harassment and anti-gay harassment as different and unrelated forms of harassment, protecting victims of the former but not the latter under sex discrimination law. See cases cited *supra* notes 119, 120.

134. *Nabozny*, 92 F.2d at 455.

135. *See, e.g.*, Bosley v. Kearney R-1 Sch. Dist., 140 F.3d 776, 781 (8th Cir. 1998) (affirming district court ruling setting aside jury verdict for plaintiff in peer sexual harassment case because evidence did not support an inference that the school district’s actions in response to plaintiff’s complaints “were impermissibly motivated by [her] sex”); Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412, 1419–1420 (N.D. Iowa 1996) (assuming that the alleged peer sexual harassment was based on sex, but granting defendant’s motion for judgment as a matter of law and setting aside jury verdict for plaintiff on the ground that plaintiff did not prove that school district intentionally discriminated against her on the basis of sex when it failed to adequately respond to the harassment).

136. *Nabozny*, 92 F.2d at 455.
same deplorable manner. For example, if Jamie Nabozny had been a lesbian instead of a gay male and had been subjected to the same harassment, her chances for success under the court’s rationale would have been much bleaker. In such a case, a court would likely find that the school’s reason for departing from its policy of responding to male-female sexual harassment was not have been based on the sex of the complainant, but rather on her sexual orientation. Likewise, Jamie Nabozny, as a gay male student, may not have been able to raise the inference that the school treated him differently because of his sex if there had been evidence in the record that the school also ignored anti-gay attacks against lesbian students. Had such evidence existed, the school could have argued that it treated male and female victims of anti-gay assaults the same. Finally, Jamie would not have succeeded if the school had a poor record of addressing sexual harassment and assault generally. Thus, a school could protect itself under the Nabozny rationale by ignoring all harassment complaints, regardless of the sex of the complainant or the type of the harassment.

Nabozny is ultimately unsatisfactory because, unlike Davis, it rests on a comparative approach to peer sexual harassment cases that requires a school to treat persons differently based on their sex in order to be held accountable under sex discrimination law. While a sex-differentiated institutional response to sexual harassment complaints certainly should be one way to demonstrate that the harm was imposed because of sex, and may succeed in some cases, it should not be the only available avenue. If it were, schools could decide to ignore all harassment, however egregious, as long as they treated victims of both sexes equally. Such an approach would encourage schools to ignore all harassment complaints, rather than prevent and remedy conduct that limits the opportunities of individuals on the basis of their sex—a poor result for a statute designed to provide individuals with protection from sex discrimination.

137. See, e.g., Doe v. Riverside-Brookfield Township High Sch. Dist., 1995 WL 680749 (N.D. Ill. 1995) (dismissing equal protection claim of student challenging school’s failure to respond to anti-gay peer abuse because plaintiff failed to allege that students similarly situated to himself received protection from the school).

138. Had the Nabozny case gone to trial, the school’s treatment of harassment of lesbian students could well have become a problem. Given the school’s apparent intolerance of homosexuality and its belief that a gay student should “expect” such abuse, it is not unlikely that the school would react with similar complacency to the harassment of lesbians. Nabozny v. Podlesny, 92 F.3d 446, 451 (1996).

139. However, such a response could well cause legal difficulty for schools after Davis, since a school may be liable in damages for responding with deliberate indifference to sexual harassment. Since schools are unlikely to take such an approach after Davis, victims of anti-gay harassment who are treated with less concern than victims of sexual harassment may be able to succeed under an alternative rationale advanced by the Nabozny court. In addition to its sex discrimination ruling, the Nabozny court upheld an equal protection claim against the school for discriminating based on the plaintiff’s sexual orientation, because the school treated anti-gay harassment victims worse than sexual harassment victims without any rational basis for doing so. Nabozny, 92 F.3d at 457–58. Since Davis now requires schools to respond to sexual harassment, victims of anti-gay harassment may be able to “bootstrap” a sexual orientation discrimination claim onto the Davis ruling. However, because courts currently apply only rational basis review to equal protection claims based on sexual orientation, such an approach would have its own problems, which are beyond the scope of this article.
Requiring the institution to discriminate based on the sex of the complainant in order to prove sex discrimination is a particularly deficient approach for addressing anti-gay harassment. Schools that pay little attention to anti-gay harassment of members of one sex are likely to also disregard anti-gay harassment of the other sex. Requiring plaintiffs to prove that their harassment complaints would have been taken more seriously if the harassment had targeted a lesbian rather than a gay male (or vice-versa) will do little to remedy anti-gay harassment that is ignored or condoned across-the-board. On the other hand, if anti-gay harassment punishes both males and females for stepping outside of the traditional gender expectations assigned to their sex, ignoring the anti-gay harassment of males and females discriminates against both sexes. A better approach would recognize the sex-based nature of anti-gay harassment, and place it on the same legal footing as peer sexual harassment.

The line that courts and OCR have drawn for differentiating harassment that occurs on the basis of sex and that which occurs on the basis of sexual orientation is an untenable one, and does not square with a proper understanding of why sexual harassment is a sex-based harm in the first place. It also leads to incoherent results. Harassment that targets gay or lesbian students and involves explicit sexual propositions by a person of the other sex (such as threats by male students to rape a lesbian) is more likely to receive Title IX protection, even though it is not necessarily any more connected to the target’s sex than same-sex sexual harassment (such as threats by male students to rape a gay male student) or nonsexual, anti-gay harassment (such as physical assaults of gay or lesbian students) against students perceived to be gay or lesbian. Yet, under current law, courts are likely to treat the former as based on sex, while treating the later two situations as not based on sex. Rather than base the analysis on the sexual character of the harassment and the sex of the perpetrator, we should approach anti-gay harassment with a clearer understanding of why sexual harassment among students harms persons on the basis of sex in the first place, and recognize the overlap between peer sexual and anti-gay harassment.

III. SEARCHING FOR THE SEX DISCRIMINATION IN PEER SEXUAL HARASSMENT: MODELS APPLIED TO PEER SEXUAL HARASSMENT BY COURTS AND OCR

Sexual harassment case law has posited four principle explanations for why sexual harassment is a form of sex discrimination, or, in other words, why the harm is imposed on the basis of sex: (1) the harasser acts out of sexual attraction for the target and would not have selected that person for sexual attention but for his or her sex (the “attraction” model); (2) conduct that is sexual in nature inherently differentiates on the basis of sex because it is tailored to the sex of the target (the “sexual-in-nature” model); (3) sexually harassing behavior has a disproportionate impact on girls and women (the “disparate impact” model); and (4) the harasser acts out of a discriminatory animus toward persons of that sex.
(the "motivation" model). Although these four models may work for some subset of peer sexual harassment cases, they rely on theories of sexual harassment that are problematic and/or incomplete. The subsequent discussion explores the shortcomings in each of these theories as applied to peer sexual harassment generally, and anti-gay harassment specifically. The following section proposes an alternative to these approaches which would view sexual harassment and anti-gay harassment as sex-stereotyping that polices and reinforces gender role boundaries for male and female students.

A. THE ATTRACTION MODEL: "BUT FOR HER WOMANHOOD," THE PLAINIFF WOULD NOT HAVE BEEN HARASSED

The first courts to recognize sexual harassment as a form of sex discrimination in the workplace adopted the attraction model of sexual harassment, which remains the most prevalent explanation for why sexual harassment harms persons because of their sex. These courts grounded sexual harassment as a sex-based wrong on the theory that the harasser would not have singled out the target for harassment if the target had been a person of the other sex. For these courts, the harassment is based upon sex because "but for her womanhood," the plaintiff would not have been harassed by the male harasser—at least in the absence of

140. This categorization expands upon Katherine Franke’s pathbreaking analysis of sexual harassment in the workplace in which she identifies and discusses three explanations advanced by courts and commentators for “what is wrong with sexual harassment:” (1) the “but for” sex, attraction model; (2) the sexual-in-nature model; and (3) the anti-subordination model (i.e., sexual harassment subordinates women to men). Katherine Franke, What’s Wrong with Sexual Harassment?, 49 STAN. L. REV. 691 (1997) [hereinafter What’s Wrong with Sexual Harassment?]. In this article, I discuss two additional theories (subsumed under Franke’s first two categories) for grounding sexual harassment as based on sex: that the harasser acted with an intent to discriminate, and that the harassment has a disparate impact on women. In contrast to Franke, I do not address anti-subordination as a separate basis for grounding sexual harassment as a form of sex discrimination because I believe that an anti-subordination account is fully consistent with a gender-role policing model. Gender policing seeks to preserve male dominance and female submission by shaping the roles of both the harasser and the target, and thus perpetuates the systemic subordination of women.

141. After offering persuasive critiques of the three models that she identifies, Professor Franke offers her own proposed account, which views sexual harassment as a “technology” of sexism because it defines and constrains male and female identity and behavior by enforcing gender roles. While I view my proposal for student-to-student harassment as fully consistent with her approach, and draw heavily on her analysis, I have not used her language describing sexual harassment as a “technology” of sexism because I read this terminology to suggest that sexual harassment exists separate and apart from sexism, and that it could be used toward other benign ends that do not further sexism (e.g., guns are a technology of war, but can also be used for hunting). I prefer the terms “gender role policing” or “sex stereotyping” to describe the gender-role-policing function that I believe is intrinsic to male-female sexual harassment and anti-gay harassment.

142. See, e.g., Barnes v. Costle, 561 F.2d 983, 990 n.49 (D.C. Cir. 1977) (“[But for her gender [appellant] would have not have been importuned, and ... there is no suggestion that appellant’s allegedly amorous supervisor is other than heterosexual.”); Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982) (“In the typical case in which a male supervisor makes sexual overtures to a female worker, it is obvious that the supervisor did not treat male employees in a similar fashion.”); Bundy v. Jackson, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) (“Only by a red arguto ut absurdum could we imagine a case of harassment that is not sex discrimination where a bisexual supervisor harasses men and women alike.”).
any indication that the harasser was not heterosexual. The harasser is viewed as having acted out of a misguided, heterosexual attraction for the target. Oncale accepts this presumption as “reasonable” for cases involving harassers who make unwanted sexual advances to persons of the opposite sex, and who are presumptively heterosexual. In addition, the U.S. Department of Education’s Office for Civil Rights has accepted this theory as one way to demonstrate that the harassment was based on sex, and a number of Title IX peer harassment cases could be read to take this approach.

The attraction model also has been applied to same-sex harassment cases where the harasser is perceived to be gay or lesbian and targets a member of the same sex for unwelcome sexual attention. The target’s sexual orientation is irrelevant to the formula, which takes as its starting point the attraction of the harasser to members of the same sex. As with the attraction model of cross-sex harassment, the theory is that the harasser would not have selected this target but for the target’s sex. This type of case—involving the “homosexual predator”—as sexual harasser—was recognized as based on sex in the very first sexual harassment cases under Title VII.

The Court’s decision in Oncale explicitly approves of this approach to grounding same-sex harassment as based on sex, “if there [is] credible evidence that the harasser was homosexual,” although it does not limit the based-on-sex inquiry in same-sex cases to the attraction model.

143. See Barnes, 561 F.2d at 990 (stating that by indicating that plaintiff’s participation in sexual activity with the defendant would enhance her employment status and by working to eliminate plaintiff’s position upon refusal of defendant’s advances, the employer signalled that “retention of [the plaintiff’s] job was conditioned upon submission to sexual relations, an exaction which the supervisor would not have sought from any male”).


146. See, e.g., Haines v. Metropolitan Gov’t of Davidson County, 32 F. Supp. 2d 991, 995, 1000 (M.D. Tenn. 1998) (assuming that harassment of ten-year-old female student who was held down by two eleven year old male students while they laid on top of her in a sexual manner, fondled her breasts, genitals, buttocks, and attempted to rape her, was because of sex); Doe v. Londonderry Sch. Dist., 970 F. Supp. 64, 74-75 (D.N.H. 1997) (assuming conduct based on sex where female student was called “slut,” “whore,” “fucking bitch,” and physically assaulted by male students in retaliation for not dating them); Franks v. Kentucky Sch. for the Deaf, 956 F. Supp. 741, 746 (E.D. Ky. 1996) (finding rape and sexual assault of female student by male student presumed to be because of sex).

147. See What’s Wrong with Sexual Harassment?, supra note 140, at 696–97 nn.15, 16 (discussing same-sex cases which apply the attraction model).

148. This term was used by Professor Kathryn Abrams in describing courts’ sympathy to males who are targeted for unwelcome homosexual advances in the workplace. See Kathryn Abrams, Title VII and the Complex Female Subject, 92 MICH. L. REV. 2479, 2515 (1994) (discussing “the straight male fear of the spectral homosexual predator”).

149. See, e.g., Barnes v. Costle, 561 F.2d 983, 990 n.55 (D.C. Cir.1977) (acknowledging that imposition of sexual conditions by homosexual supervisor upon same-sex subordinate occurs because of sex); Bundy v. Jackson, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981) (same).

150. Oncale, 520 U.S. at 80 (1998). A plaintiff may also succeed in proving the harassment was based on sex by demonstrating that the harasser acted with a general animus toward persons of that sex, or by proffering direct comparative evidence that the harasser treated persons differently based on sex in a mixed-sex environment. Id. These later alternatives for proving the based-on-sex requirement in same-sex cases are of little value to plaintiffs, as discussed above, and as further discussed later in this section.
Like Title VII decisions, Title IX case law has had no difficulty recognizing same-sex harassment as occurring because of sex where a gay or lesbian harasser makes unwelcome sexual advances to a target of the same sex. OCR also applies this model to treat same-sex sexual overtures between students as occurring on the basis of sex.

In contrast, Oncale made clear that the attraction model does not reach same-sex harassment where the harasser is not believed to be homosexual. Even if same-sex harassment involves sexual propositions and overtures, such as the sexual touching, grabbing, groping, attempted rape, and the type of sexual propositioning involved in Oncale itself, it does not fit under the attraction model absent proof that the harasser is homosexual. Consequently, this model requires an explicit focus on, and, at least where same-sex harassment is involved, a determination of the harasser’s sexual orientation, in order to evaluate whether the harassment occurred because of sex.

Using attraction as the centerpiece for explaining why sexual harassment occurs because of sex over-emphasizes the significance of the harasser’s sexual orientation and ignores and obfuscates the gender dynamics that the harassment reinforces. As applied to same-sex harassment, the attraction model protects persons who are offended by sexual overtures from gays and lesbians, but exonerates harassment targeting gays and lesbians who are perceived as challenging sex stereotypes and failing to conform to traditional gender role assignments. The attraction model thus grounds the harm of sexual harassment in misplaced sexual desire, rather than the reinforcement of sexist structures and systems of sex subordination.

However problematic the attraction model is as applied to harassment in the workplace, it is even less adequate as an explanation of peer harassment in schools. Contrary to the premise of the attraction model, much sexual harassment in school is not about attraction—at least in the sense that attraction is commonly understood. Boys who have not yet developed their sexual identity may act in a sexually offensive and abusive manner to female classmates, regardless of whether they are (at least consciously) romantically or sexually attracted to

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152. See Sexual Harassment Guidance, 62 Fed. Reg. at 12,047 & n.12 (stating that harassment of male student who is repeatedly propositioned by a male student or employee occurs “on the basis of sex” if “the student would not have been subjected to it at all had he ... been a member of the opposite sex”).


154. See id. at 77; see also Guenther, supra note 109, at 169-70.

155. See What’s Wrong With Sexual Harassment, supra note 140, at 732–40 (criticizing attraction model as applied to same-sex harassment cases under Title VII).
them. Sexual harassment may be prompted by a desire to punish as much as a desire for sex. Grounding sexual harassment in a theory of attraction obscures the power dynamics of sexual harassment, turning it into seemingly benign, misplaced affection. At a minimum, the application of such a theory necessitates a better understanding of the nature of childhood and adolescent attraction, as well as its relationship to sexually harassing and abusive behavior in schools.

An attraction model also fails to adequately explain anti-gay harassment. Even harassment that targets gay or lesbian students and that involves sexual propositions or advances by persons of the other sex—which, under Oncale, may be presumptively based on the harasser’s heterosexual attraction toward the target—is more about punishment than attraction. A five year study by The Safe

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156. See, e.g., Bruneau v. South Kortright Cent. Sch. Dist., 163 F.3d 749, 752 (2d Cir. 1998) (involving a group of male sixth graders who subjected female classmates to “sexually derisive names such as bitches, prostitutes, whores, lesbians and lesbos,” called plaintiff a “dog-faced bitch,” and subjected female classmates to “bra-snapping, hair pulling, spitting, shoving paper down their blouses, punching, pushing and other physical abuse”); Collier v. William Penn Sch. Dist., 956 F. Supp. 1209, 1211 (E.D. Pa. 1997) (upholding sexual harassment claim by female student who was subjected to repeated sexual harassment from male students, including “offensive language, sexual innuendo, sexual propositions, and threats of physical harm,” and an incident in which one male student exposed his genitals to the plaintiff and grabbed her breast).

157. See, e.g., Morlock v. West Cent. Educ. Dist., No. 6–96–271, 1999 U.S. Dist. LEXIS 4155 (D. Minn. Mar. 29, 1999) (stating that male students in alternative secondary school subjected female students to verbal abuse of a threatening, sexual nature, including making statements such as “suck my cock,” “yelling ‘get her’ when female students entered the room, stating a desire to rape women and cut off their nipples, and stating ‘I want to smack you to the ground and cut you from the [sexual organ] up’”); Doe v. Londonderry Sch. Dist., 970 F. Supp. 64, 67 (D.N.H. 1997) (harassment of female student by group of male students was prompted by plaintiff’s refusal to date them and termination of her romantic relationship with a mutual male friend; harassment included calling plaintiff “slut,” “whore,” “fucking bitch,” pushing her into lockers and down stairs, and spitting on her); Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1196 (N.D. Iowa 1996) (finding that sexual harassment of a female student by both male and female students was prompted by plaintiff’s reporting of property damage caused by other students).

158. While sexual harassment in the post-secondary setting may approximate workplace harassment more closely than harassment in elementary and secondary school, an attraction model in the higher education context would still be problematic for many of the same reasons it has been criticized as an explanation for sexual harassment at work.

159. Not all feminist scholars would agree that sexual harassment—whether tinged with anti-gay bias or not—is not about sexual desire. See, e.g., Sexual Harassment of Working Women, supra note 74, at 220–21 (“[s]exual harassment (and rape) have everything to do with sexuality, . . . it eroticizes women’s subordination”); Amicus Brief of National Org. on Male Sexual Victimization, Inc. et al., at 20, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998) (No. 96–568) (arguing that male-male rapes are “sexual” even if the perpetrators identify themselves as heterosexuals). While sexual assaults intended to humiliate and punish gay students for their (actual or perceived) sexual orientation certainly involve sexual acts and eroticized aggression, viewing such assaults as primarily based on sexual attraction risks obscuring both the socializing function of peer harassment and the eroticism often involved in “nonsexual” harassment of students, and gay and lesbian students in particular. See Katherine M. Franke, Putting Sex to Work, DENN. UNIV. L. REV. 1139, 1143 (1998) [hereinafter Putting Sex to Work] (“First, once something is classified as sexual, we understand its meaning primarily in erotic terms and lose sight of the ways in which sex is easily deployed as an instrumentality of multiple relations of power. Second, we are likely to understand the erotic to be present in too few human behaviors insofar as we deny or ignore the role of the erotic in behavior less susceptible to being read as ‘sexual.’”). Unless the content of what is defined as sexual attraction is enlarged, so as to be unrecognizable from how the law currently
Schools Coalition on anti-gay harassment in Washington state schools provides examples of cross-sex sexual conduct towards gay and lesbian students that graphically illustrate the centrality of punishment and humiliation to such conduct.160

At the high school prom, a female student (who was there with a male date) kissed her female friend (who is openly lesbian); the kiss was photographed and the picture was circulated around school. One day after the prom, the first female student was picked up by her male prom date after school and taken behind the school to a storage building near the gym, where four male students held the second female student (who is openly lesbian) hostage. The second student’s lip was split and her clothes torn. The prom date forcibly held the first female student still and said they were going to teach her friend (the second student) to stay away from “their” girls. They made (the first student) watch while they raped and then urinated on her friend (the second student). [Incident 102]161

A high school male who had spoken about being gay in one of his classes was harassed by some of his classmates; one day they cornered him and forced him into an empty classroom. They beat him up and stripped him, and told him that he could “choose between fucking a girl and having his cock cut off.” The boys held him down while a girl forcibly raped him. [Incident 100]162

A ninth grade girl and her ninth grade girlfriend were chased under the bleachers by four male students, who called them “queers,” “dykes,” and “bitches.” The male students forced the girls to have sex with one another while they watched; then they broke one girl’s hand, beat both girls up, and held one of the girls down while they stripped and raped her girlfriend. [Incident 57]163

A sixteen year old high school junior female who was dating another girl was cornered in a hallway by two boys; they pushed her into a bathroom, said “really ugly things” about her and her girlfriend, and told her that if she were “normal,” she would want to have sex with them; they pulled her clothes off and forced her to have oral sex with them; they threatened her that “if you don’t want everyone to know about you and your friend, you’d better start getting it right”; then they urinated on her. [Incident 92]164

defines it, using this criteria as a litmus test for deciding whether peer harassment is covered under Title IX risks excluding much harassment that involves similar gender and power dynamics as harassment that does fit within an attraction model.

161. Id.
162. Id.
163. Id.
164. Id.
While these incidents may well have involved elements of eroticism and attraction on the part of the harassers, viewing them as primarily about an attraction to the opposite sex misses much of the dynamic involved. The presumption—approved of by the Court in Oncale—that the harasser would not act in such manner toward a person of the other sex (unless the harasser was homosexual or bisexual) is not convincing in these cases. It is not too difficult to imagine the same set of harassers turning their aggressions, acted out in a sexual manner, on a gay or lesbian student of a different sex, rather than the target that they selected. Sexual aggression, including rape, threats of sexual abuse, and promises to "turn" the person straight could be made by the same person to both males and females whose sexuality is perceived to depart from heterosexual norms, regardless of the sexual orientation of the harasser himself.

Just as heterosexual desire poorly describes cross-sex anti-gay harassment, homosexual desire is overly limiting and insufficient as an explanation for same-sex anti-gay harassment. Under Oncale, unless the harasser is proven to be homosexual, same-sex conduct is not based on sex under the attraction model, even if it involves sexual overtures and contact. Yet much sexual harassment in school occurs between students who are too young to have formed, realized, or acknowledged their sexual orientation. Since victims of same-sex harassment may not be able to prove their harasser's sexual orientation, particularly where the harasser himself does not even know his sexual orientation, the attraction model has a very limited capacity to address same-sex sexual harassment in schools. Such an approach is problematic from the harasser's perspective as well, since the mere allegation that a student acted out of sexual desire towards a person of the same sex, and is homosexual, may subject that student to anti-gay harassment and abuse by his peers. Indeed, this very danger may make courts and schools less likely to view same-sex peer harassment as based on sex, out of a reluctance to label young harassers as gay or lesbian. Thus, the attraction model is a poor method for dealing with same-sex harassment in schools for all parties involved.

As with other forms of peer harassment, the focus on the harasser's sexual orientation and attraction toward a same-sex target misses much of the picture. In cases involving same-sex anti-gay harassment, even if the harasser is not proven to be "homosexual," the harassment may nevertheless involve an erotic compo-

165. Martha Chamallas has made a similar point in connection with the harassment in Oncale. See Martha Chamallas, Remarks at Law and Society Meeting, Roundtable on the New Jurisprudence of Sexual Harassment, at 2 (May 30, 1999) ("I get the distinct impression, however, that a female roustabout would not have been welcomed in this environment.") (paper on file with author).


167. See, e.g., Davis v. Monroe County Bd. of Educ., 119 S. Ct. 1661 (1999) (involving the sexual harassment of a fifth grade female student by male classmate); Doe v. Sabine Parish Sch. Bd., 24 F. Supp. 2d 655 (W.D. La. 1998) (involving a male kindergarten student who was sexually aggressive and abusive toward a male student in his class); Haines v. Metropolitan Gov't of Davidson County, 32 F. Supp. 2d 991 (M.D. Tenn. 1998) (regarding an eleven year old male student's attempt to rape and sexually assault ten year old female student).
nent, even as it expresses contempt for its targets. Perhaps more to the point, the dynamics of punishment and humiliation take place in same-sex anti-gay harassment, with or without attraction, just as they do in cross-sex harassment, as illustrated in the following examples from the Safe Schools Coalition study.168

Fifteen year old freshman female athlete was surrounded by her female teammates, who just learned she is gay; they verbally attacked her, calling her “pussy-eater,” “bull-dyke,” “half-man-half-woman,” “freak,” “fag,” and “bitch”; spat on her; told her to get off the team and not to look at them; and then “pull[ed] her clothes off, grab[bed] her private parts, and beat the hell out of her.” [Incident 51].169

Ninth grade male who had been mistaken for a girl by other male students, including two male students who had been attracted to him before finding out his gender, was subjected to fierce harassment once his gender was discovered. He was verbally abused (“cocksucker,” homoboy,” “I’ll tear you another asshole,” “we’ll make you suck cock” “faggot”), and subjected to physical attacks and vandalism of his locker. The harassment escalated to an off-campus sexual assault where he was orally and anally raped and urinated on by two male students. [Incident 56].170

12 year old boy and one other male sixth grade student were sexually assaulted at elementary school camp by four male sixth graders and two high school male counselors; the attackers swore at him, beat him up, anally gang raped him with objects; one attacker vomited on him; and the attackers threatened to kill him if he reported the assault. [Incident 18].171

Eroticized aggression aimed at punishing and humiliating gay and lesbian students can occur by harassers of both the same and different sex than their targets, regardless of the harasser’s sexual orientation. Viewing such conduct as primarily about the harasser’s attraction to the target is at best an incomplete approach to such cases. Anti-gay harassment, like peer sexual harassment generally, often involves acts calculated to humiliate and express disdain for its victims. In the Safe Schools Study, for example, three of the eight gang-rapes reported involved attackers urinating on the victims; a fourth involved vomiting on the victim.172 The extreme nature of the violence that often occurs during sexual harassment and abuse of students perceived to be gay and lesbian suggests that such harassment is about something other than mere attraction toward persons of one sex.

169. Id.
170. Id.
171. Id.
172. Id.
Whether in the context of peer sexual harassment generally or anti-gay harassment specifically, the attraction model does not begin to explain the dynamics of peer harassment in the education context. While some sexual harassment in schools may well stem from an attraction toward persons of the target's sex, the attraction model obscures much of what is wrong with sexual harassment and does not sufficiently encompass other forms of peer sexual harassment that are not based on attraction. Reacting to the inadequacies of an approach which grounds the based-on-sex requirement in the harasser's presumed attraction to the victim, some courts have considered alternative theories for finding sexual harassment based on sex. However, the most commonly adopted alternatives to the attraction model have their own shortcomings.

B. THE SEXUAL-IN-NATURE MODEL

A somewhat more modern approach grounds the based-on-sex requirement in the character of the harassment as sexual in nature. Under this approach, sexual harassment is viewed as not necessarily motivated by the harasser's attraction to the target, although it may be in some cases. Rather, this theory presumes that harassment that takes an explicitly sexual form is necessarily based on the target's sex, regardless of whether it stems from attraction. A number of Title VII cases have taken this approach, finding harassment that is sexual in nature necessarily to be based on the sex of the persons harmed.\footnote{173}{See, e.g., Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990) ("The intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual derogatory language is implicit, and thus should be recognized as a matter of course. A more fact intensive analysis will be necessary where the actions are not sexual by their very nature."); Katz v. Dole, 709 F.2d 251, 255 (4th Cir. 1983) ("In cases involving claims of sexual harassment ... the sexual advance or insult almost always will represent an intentional assault on an individual's innermost privacy," and discriminates based on sex); Konstantopoulos v. Westvaco Corp., 893 F. Supp. 1263, 1277 (D. Del. 1994) ("Because at least some of the conduct at issue was sexually explicit, it is fair to draw the conclusion that, by virtue of this conduct, plaintiff suffered intentional discrimination because of her sex."); aff'd, 112 F.3d 710 (3d Cir. 1997); cf. Nichols v. Frank, 42 F.3d 503, 511 (9th Cir. 1994) ("Moreover, sexual harassment is ordinarily based on sex. What else could it be based on?") (emphasis in original).} Courts reviewing Title IX peer harassment claims have tended to follow suit, presuming that sexually charged harassment necessarily occurs on the basis of sex, with little or no analysis.\footnote{174}{See, e.g., Oona, R.S. v. McCaffrey, 143 F.3d 473, 475 (9th Cir. 1998) (upholding sexual harassment claim where "[b]oys allegedly referred to girls' body parts as 'melons' and 'beavers,' called the girls slang terms for whores, and persisted in other types of offensive behavior"); Doe v. Oyster River Coop. Sch. Dist., 992 F. Supp. 467, 479–80 (D.N.H. 1997) (finding that harassment of female students throughout seventh and eighth grade was based on sex where the harassment consisted of male student exposing his genitals, touching girls on legs, waist and breast, and making obscene comments and sexually explicit drawings).}

This presumption is not limited to cross-sex harassment. Courts have reached the same result in Title IX cases involving both male and female harassers, which necessarily involve same-sex harassment as well as cross-sex harassment.\footnote{175}{See, e.g., Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412, 1414, 1420 (N.D.}}
sexually explicit conduct to both males and females (the so-called "equal opportunity harasser"), courts have assumed that the conduct occurred on the basis of sex under Title IX.\footnote{OCR would apply this rule to all forms of sexually explicit harassment, "even if the harasser and the harassed are of the same sex or the victim of harassment is gay or lesbian."\footnote{OCR does not explain why such conduct would necessarily be based on the taunted student's sex.} As one example of harassment that is based on sex, OCR describes an incident where "female students allegedly taunted another female student about engaging in sexual activity."\footnote{OCR thus rejects a blanket assumption that sexually explicit language or behavior is inherently based on sex.'\footnote{Sexual Harassment Guidance, 62 Fed. Reg. at 12,047 n.12.} After Oncale, the theory that sexually explicit harassment is inherently based on sex is questionable, at least if the harassment did not consist of "explicit or implicit proposals of sexual activity" between males and females.\footnote{Oncale v. Sundowner Offshore Svs., Inc., 523 U.S. 75, 80 (1998).} Although \textit{Oncale} primarily concerned itself with determining whether same-sex harassment occurs on the basis of sex, the Court did not limit its discussion to same-sex harassment. The Court stated, "even harassment between men and women is not automatically discrimination because of sex merely because the words used have sexual content or connotations."\footnote{When confronted with male-female conduct that involves sexual propositions or intimate acts, however, \textit{Oncale} suggests that it is "reasonable" for courts to presume that the challenged conduct is based on sex. \textit{See id.}} In...
light of *Oncale*, plaintiffs must at a minimum have a theory for explaining why sexually explicit language or behavior is based on sex.

The apparent (if unarticulated) theory behind the sexual-in-nature model is that sexually explicit harassment is necessarily tailored to the sex of the recipient, such that it would not have occurred in precisely the same form had the plaintiff been a member of the other sex.\(^{183}\) Professor Martha Chamallas has described this connection between the harassment and the plaintiff's sex as the use of different sexual "scripts," that vary depending on the sex of the target.\(^{184}\) This theory is consistent with the approach taken by the courts that follow this model.\(^{185}\) The Office for Civil Rights is more explicit in its endorsement, stating that harassment is based on sex when "the student's sex was a factor in or affected the nature of the harasser's conduct, or both."\(^{186}\) As an example of such a case, OCR approvingly cites a Title VII case in which a supervisor directed sexually explicit comments toward both a male and female employee who were married to one another.\(^{187}\) In that case, the court found that the harassment of both employees was based on sex because the sexual comments directed to each employee were tailored to that employee's sex.\(^{188}\) After *Oncale*, however, the viability of this rationale is shaky at best. Although *Oncale* did not explicitly foreclose this method for demonstrating the based-on-sex requirement, it was not among the approaches endorsed by the Court. More importantly, had the Court approved of such a theory, there would have been no need to remand the case back to the lower court for further scrutiny of whether the conduct was based on sex. The specific conduct in the case, which included the grabbing of the plaintiff's testicles, was clearly tailored to the plaintiff's sex. It could not have occurred in the same manner had the plaintiff been female.

Regardless of whether the sexual-in-nature model survives *Oncale*, it should be reconsidered as a primary vehicle for explaining why peer sexual harassment harms students because of their sex. Although the sexual-in-nature theory has the

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\(^{183}\) An alternative theory, that sexually explicit harassment necessarily has a disparate impact on one sex, is addressed in the following section.

\(^{184}\) Remarks of Martha Chamallas, *supra* note 165.

\(^{185}\) See, e.g., *Davis v. Monroe County Board of Educ.*, 119 S. Ct. 1661, 1667 (1999); *Oona, R.S. v. McCaffrey*, 143 F.3d 473, 475 (9th Cir. 1998) (stating that boys referred to female students by slang names for female body parts, such as "melons," and "beavers," and called them whores); *Nicole M. v. Martinez Unified Sch. Dist.*, 964 F. Supp. 1369, 1372, 1378 (N.D. Cal. 1997) (upholding sexual harassment claim where male students made unwanted comments about female student's breasts and on one occasion touched her breasts in class); *Davis v. Monroe County Bd. of Educ.*, 862 F. Supp. 363 (M.D. Ga. 1994) (harassment included repeated attempts to touch female student's breasts and vaginal area).


\(^{187}\) *Id.* (citing *Chiapuzo v. BLT Operating Co.*, 826 F. Supp. 1334, 1337-38 (D. Wyo. 1993)).

\(^{188}\) See *Chiapuzo*, 826 F. Supp. at 1337-38; see also *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463-64 (9th Cir. 1994) (concluding that female employees' sexual harassment claims were not undermined by harasser's simultaneous abuse of male employees, since the harasser's mistreatment of the women was "different . . . . While [he] may have referred to men as 'assholes,' he referred to women as 'dumb fucking broads' and 'fucking cunts,' and when angry at [plaintiff], suggested that she have sex with customers").
advantage of having a broader reach than the attraction model (including in its
reach, for example, the bisexual harasser and sexually explicit same-sex harass-
ment of gay and lesbian students),189 without necessitating any inquiry into the
harasser’s subjective reasons for selecting the target, its greater comprehen-
sion comes at the expense of losing sight of why peer sexual harassment harms
students on the basis of their sex. Moreover, as discussed below, the sexual-in-
nature model, as explained by the different sexual “scripts” rationale, is less
comprehensive than it appears. As an analytical underpinning for a peer sexual
harassment claim, this model is weak—both in terms of its descriptive value in
explaining why such conduct treats male and female students differently, and its
normative value in explaining why sexual harassment imposes a sex-based harm.

The premise of the sexual-in-nature model, that sexually charged conduct is
necessarily tailored to the sex of the target, provides a poor explanation for why
sexual harassment discriminates on the basis of sex. Even in the easiest of these
cases, where verbal or physical conduct is specific to the anatomy of one sex, it is
not obvious why the conduct discriminates against the target on the basis of sex.
The analysis underlying the model is rather superficial: if the harasser grabs the
genitals of the target, the behavior occurred on the basis of the target’s sex
because it involved anatomy specific to that person’s sex.190 This approach
trivializes the sex-based harm of the harassment by suggesting that it comes
down to breasts and genitals; a harasser who grabs the genitals of male and
female students treats them differently on the basis of sex by touching their
different anatomy.

The sexual-in-nature model also neutralizes the sex-based harm if the “scripts”
do not differ. A harasser who uses the same anatomically-specific language for
both girls and boys, for example, calling girls “cunts” and “pussy,” while
directing those same epithets at boys viewed as not measuring up to masculine
norms, has not tailored the harassment to the target’s sex, and would not fit within
this rationale. By pretending that all sexually charged conduct distinguishes
between males and females, the sexual-in-nature model obscures the reality that
not all unwelcome sexual conduct plays out differently based on the sex of the
target, and does not explain why such abuse nevertheless imposes harm based on
sex.

Harassment that does not involve anatomy specific to one sex is even less
suitable for the sexual-in-nature model. Conduct that consists, for example, of
grabbing a person’s buttocks, or involves sexual threats or propositions that could

189. A number of gay rights groups have advocated this approach, presumably as a means of covering
more anti-gay harassment than would otherwise be covered under existing sex discrimination law. See,
e.g., Amicus Brief for Lambda Legal Defense and Education Fund et. al., Oncale v. Sundowner Offshore
Servs., 523 U.S. 75 (1998) (No. 96–568). For reasons discussed below, I believe that a sounder approach
would be to recognize sexual harassment as a form of sex discrimination based on sex stereotyping and
the policing of gender roles.

190. See, e.g., Doe v. City of Belleville, 119 F.3d 563, 567 (7th Cir. 1997) (describing incident where
harassers grabbed H. by the testicles and announced “I guess he’s a guy.”).
be made to either men or women (such as, "I’m going to rape you") could target both males and females.\textsuperscript{191} Even sexual acts themselves may not vary depending on the sex of the target, as many sexual acts can be performed by and between partners of either gender.

Likewise, whether or not the harasser’s “script” is specific to male or female anatomy, if both males and females are exposed to the harassment, and no individual is singled out for targeted abuse, the sexual-in-nature model does little to explain why the conduct is based on sex. If the challenged conduct did not target any particular individual, it would be difficult to argue that the form of the harassment is tailored to the sex of the individuals exposed to it.

For all of the model’s flaws as applied to peer sexual harassment generally, the sexual-in-nature model is especially problematic as applied to anti-gay harassment. Like much sexual harassment between students, sexually explicit harassment of gay and lesbian students is not always tailored to the target’s sex.\textsuperscript{192} But applying a sexual-in-nature model to anti-gay harassment has a more fundamental problem: at a basic level, all anti-gay harassment is sexual-in-nature by virtue of the fact that the target’s sexual preference is the reference point for the harassment. In a very real sense, any time harassment invokes a person’s sexual orientation, by definition, it is sexual-in-nature because it alludes to the target’s perceived sexual preference.\textsuperscript{193} Yet, by drawing the line at conduct that takes an explicitly sexual form, and excluding references to sexual orientation alone, the sexual-in-nature model as it has been applied to anti-gay harassment is unprincipled.

\textsuperscript{191} Compare Morlock \textit{v.} West Cent. Educ. Dist., No. 6-96-271, 1999 U.S. Dist. LEXIS 4155 (D. Minn. Mar. 29, 1999) (finding that female student told to “suck my cock” by male students), with Safe Schools Coalition of Washington State, \textit{They Don’t Even Know Me: Understanding Anti-Gay Harassment and Violence in Schools, Findings: What Happened in These Incidents?} (Jan. 1999) <http://www.safeschools-wa.org/ss5find1.html> (describing situation in which gay male high school student was subjected to verbal abuse by male students, including calling him “Faggot,” and saying “Do you want to suck my dick?” [Incident 85]). \textit{See also} Bosley \textit{v.} Kearney R-1 Sch. Dist., 140 F.3d 776, 777–79 (8th Cir. 1998) (assuming sexually charged environment to be based on sex where male students drew naked pictures of girls, touched female student’s bottom, talked about sex and having babies, made inappropriate sexual remarks about Freddy Kruger, fictional character in \textit{Nightmare on Elm Street}, directed inappropriate remarks about sex to another female student and told female student and her brother that they were homosexuals).

\textsuperscript{192} Compare Safe Schools Coalition of Washington State, \textit{They Don’t Even Know Me: Understanding Anti-Gay Harassment and Violence in Schools, Findings: What Happened in These Incidents?} (Jan. 1999) <http://www.safeschools-wa.org/ss5find1.html> (describing incident in which male fifth grade student was subjected to rumors that he is gay; another male fifth grader comes up behind him and pulls down his pants on playground, yells racial slurs and “you stay away from me or I’ll kick your butt.” [Incident 16]); with \textit{id.} (describing incident where female high school freshman was called “lesbian” and “whore;” on one occasion, group of twenty students, mostly male but led by one girl, pull her clothes down and threaten to “kick your butt” because she is a lesbian. [Incident 42]). \textit{Compare id.} (describing situation in which male ninth grader who is bisexual and “transgendered” was harassed by male students who “brush up against him in a sexually menacing way.” [Incident 48]); with \textit{id.} (describing incident in which five middle school boys cornered two ninth grade girls, call them “queers,” “faggots,” and “dykes,” and “brush[\textsuperscript{1}] up against them in a sexual way.” [Incident 25]).

\textsuperscript{193} OCR’s definition of “sexual-in-nature” includes sexual language (such as teasing someone about their sexual activities, calling them a “whore,” etc.), and is not limited to sexual touching. Sexual Harassment Guidance, 62 Fed. Reg. at 12,033 & n.6, 12,034 & nn. 12, 13.
For example, OCR states that sexual advances by male students toward a lesbian student are sexual in nature, but that student comments excluding gay students from the cafeteria are not sexual in nature. Yet, OCR does not explain why language targeting certain students because of their actual or perceived sexual orientation is not sexual in nature. Perhaps if the anti-gay comments in the cafeteria example included other, more graphic sexual references, OCR would find sufficient sexual content to rule that the harassment is sexual in nature; but it is unclear what degree of additional sexual content would suffice. Although OCR, like the courts, has treated the sexual-in-nature category as if it were self-explanatory, in fact, it requires interpretation—an interpretation that is obscured by presuming that anti-gay harassment is not sexual in nature.

Perhaps more importantly, even if it were possible to separate harassment that is sexual in nature from other forms of anti-gay harassment, it is questionable whether it makes sense to do so. Anti-gay harassment typically involves the same dynamic of humiliation and punishment, whether or not it takes an overtly sexual form. As discussed above, even sexual assaults of gay and lesbian students may be more about violence, humiliation, and intimidation than sexual gratification. Sexual language and conduct may be one of the means that harassers use to hurt their victims, but it is not clear that the use of sexual activity as a tool of humiliation and punishment is based on the sex of the victim any more than anti-gay epithets or non-sexual violence are based on the victim's sex.

Much anti-gay harassment that involves a sexual component is inseparable from the accompanying violence and anti-gay epithets that target and punish the victim for his or her perceived sexuality. The incoherency of the sexual-in-nature model as applied to anti-gay harassment stems ultimately from the treatment of harassment based on sex and harassment based on sexual orientation as distinct and mutually exclusive categories, when in fact they are interlocking and inseparable.

Contrary to the premise of the sexual-in-nature model, not all peer harassment with a sexual component is specifically tailored to males or females such that it could not be directed toward a person of the other sex. Given the wide variety of ways that students can sexually harass one another, much abuse that is sexual in nature could be directed at both males and females. The sexual-in-nature model

195. See, e.g., Safe Schools Coalition of Washington State, They Don't Even Know Me: Understanding Anti-Gay Harassment and Violence in Schools, Findings: What Happened in These Incidents? (Jan. 1999) <http://www.safeschools-wa.org/ss5find1.html> (describing harassment in which male student was subjected to anti-gay epithets, including “buttfucker.” [Incident 39] & describing situation in which male student was subjected to anti-gay epithets, including “cocksucker.” [Incident 99]).
196. Cf Putting Sex to Work, supra note 159 (arguing against “essentializing” sex as something inherent and pre-existing, and instead for a recognition of the cultural construction of what is “sexual”).
198. See discussion supra Part II.
does little to explain why such conduct should nevertheless be considered to be based on sex. Moreover, even where the harassment is tailored to the sex of its target, the sexual-in-nature model fails to capture the gender dynamics that animate sexual harassment generally, and anti-gay harassment specifically.

C. THE DISPARATE IMPACT MODEL: SEXUAL HARASSMENT AS DISPROPORTIONATELY HARMING WOMEN AND GIRLS

An alternative approach to explaining why sexually explicit harassment discriminates on the basis of sex would be to recognize that the harms resulting from such conduct fall disproportionately on girls and women. Under this rationale, even if sexual harassment could and does affect both male and female victims, it would still be based on sex if it disproportionately harms female students.

The Seventh Circuit suggested such a rationale in *Doe v. University of Illinois*, in which it criticized the Fifth Circuit's *Rowinsky* decision for requiring plaintiffs to prove that schools react differently to sexual harassment complaints by boys and girls. The Seventh Circuit rejected the *Rowinsky* formulation of the based-on-sex requirement on the ground that it ignored the reality that sexual harassment complaints are made more often by females than by males. The court concluded that, because of this difference, school inaction in the face of sexual harassment will have disparate impact on female students, stating:

> Occasional exceptions do not alter the rule that sexual harassment is an evil that affects mostly women and girls. For this reason, it must be exceedingly rare that a school receives any complaints of sexual harassment from its male students. The Fifth Circuit's rule would leave schools completely free to ignore the more frequent complaints of sexual harassment from girls, while imposing only the minimal cost that such schools would be required likewise to ignore any complaints they might receive from their male students.

In addition to the different frequency with which male and female students experience sexual harassment, sexual harassment may have a disparate impact because it results in greater harm to female students. OCR has accepted a disparate impact theory on this basis, stating that, where harassment affects both sexes, but impacts members of one sex more severely than the other, it is based on sex and is covered under Title IX. Some Title VII cases also have grounded the

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199. 138 F.3d 653 (7th Cir. 1998).
200. Id. at 662.
201. Id. at 662.
202. See Sexual Harassment Guidance, 62 Fed. Reg. at 12,047 & n.12 ("In other circumstances, harassing conduct will be on the basis of sex if the student would not have been affected by it in the same way or to the same extent had he or she been a member of the opposite sex").
because-of-sex requirement in the disproportionate effect that sexual harassment has on women, even if both men and women are subjected to the offensive language or conduct.\textsuperscript{203}

While some studies support this model by showing that sexual harassment in schools is a phenomenon that more often harms females than males (either because it happens with greater frequency or because it has a more severe effect),\textsuperscript{204} this approach to the based-on-sex requirement nevertheless falls short as a theoretical grounding for peer sexual harassment as a form of sex discrimination. The argument for a disparate impact model of sexual harassment may be less compelling in the education context than it is in the workplace due to differences between the school and work settings. Much of the theory for why sexual harassment at work has a greater negative impact on women than men is based on the premise that the infusion of sexuality into the workplace penalizes and stigmatizes female employees in part because of women's subordinate position in the workplace.\textsuperscript{205} The persistent restrictions on women's opportunities and rewards as workers, particularly in non-traditional fields, and the ongoing sex segregation of the labor force, may render women more susceptible to being perceived as sex objects in the workplace.\textsuperscript{206} Thus, the sexualization of the workplace may disadvantage female employees more than male employees, undermining the perception of women as competent workers.\textsuperscript{207}

However, in the education sphere, the connection between sexuality and sex hierarchies in education is more questionable. Although some education programs remain male-dominated, and a disproportionate harm theory may well apply to sexual harassment in such programs,\textsuperscript{208} female students outnumber male

\begin{itemize}
\item \textsuperscript{203} See, e.g., Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1522–23 (M.D. Fla. 1991) (recognizing conduct “that is not directed at a particular individual or group of individuals, but is disproportionately more offensive or demeaning to one sex” as a category of “actionable conduct”) (citations omitted).
\item \textsuperscript{204} See, e.g., Lee et al., supra note 97, at 385 (citing Massachusetts survey finding girls more likely than boys to be sexually harassed in school, especially for more severe forms of harassment); id. at 396, 400, 403-05 (finding that girls were more likely than boys to have been sexually harassed at school, that girls were harassed more severely than boys, and that girls suffered greater academic and psychological consequences from the harassment than boys); cf. Sandra S. Tangri et al., Sexual Harassment at Work: Three Explanatory Models, 38 J. OF SOC. ISSUES 33, 43 (1982) (citing findings from literature and research on workplace sexual harassment that women are much more likely to experience sexual harassment at work and that a higher percentage of female than male harassment victims experienced the most severe forms of harassment).
\item \textsuperscript{205} See, e.g., \textit{SEXUAL HARASSMENT OF WORKING WOMEN}, supra note 74, at 4 (arguing that sexual harassment reinforces and expresses women's inferior role in the labor force); Vicki Schultz, Reconceptualizing Sexual Harassment, 107 YALE L.J. 1683, 1755 (1998) (arguing for a reconsideration of the hostile environment paradigm as rooted in the preservation of male dominance in the workplace).
\item \textsuperscript{206} See \textit{Gender Discrimination}, supra note 66, at 1202–05 (arguing that women's position as “outsiders” in the workplace renders them more vulnerable to unwelcome sexual conduct).
\item \textsuperscript{207} See, e.g., Robinson v. Jacksonville Shipyards Inc., 760 F. Supp. 1486, 1522–23 (M.D. Fla. 1991) (finding that activity which sexualizes the work environment is particularly detrimental to female workers); Susan Estrich, \textit{Sex at Work}, 43 STAN. L. REV. 813, 859–60 (1991) (arguing that sexuality at work may be per se injurious to women workers).
\item \textsuperscript{208} See Sexual Harassment Guidance, 62 Fed. Reg. at 12,047 & n.12 (citing as an example of an
students in many general academic programs. For education programs in which girls and women are not a minority of participants, it is not clear that exposure to sexual material and conduct would disproportionately harm them.

In addition to distinctions between male-female hierarchies in the workplace and in school, sexuality generally may differently affect the work and school environments. Although the sexualization of an employment environment may undermine the image of women as competent workers, based in part on the conflict between viewing women as sexual and viewing them as competent employees, it is not necessarily the case that a similar conflict exists for female students. Part of the socialization process that occurs in school involves learning to relate to peers socially (including sexually), as well as academically. It may be possible for students to interact sexually and, in certain instances, in a sexually-charged school environment, without disproportionately impairing the ability of girls and young women to function as competent students.

By treating all sexually explicit conduct as based on sex, the disparate impact model may overstate the connection between the presence of sexuality in school and sex-based harm. For example, if a group of uninhibited girls spoke graphically about their own sexual experiences to a more inhibited girl, assuming such behavior otherwise met the requirements of unwelcomeness, pervasiveness, and objective offensiveness sufficient to create a hostile environment, the disparate impact model would view the resulting harm as sex-based because of the presumed disparate impact on female students. Yet, it is not necessarily the case that such sexual discussions and interactions in school necessarily would harm female students disproportionately.

The case of Brown v. Hot, Sexy, and Safer Productions, Inc., further demonstrates the limits of this model as applied to the school setting. In that case, a male and female student sued their school under Title IX for subjecting them to an allegedly hostile environment by requiring them to attend a sexually explicit AIDS awareness lecture. The lecture “advocated and approved oral sex, masturbation, homosexual sexual activity, and condom use during promiscuous sexual activity,” and included “simulated masturbation” and other graphic sexual displays. The First Circuit dismissed the students’ claims on the ground that being required to attend a single sexually explicit lecture did not rise to the level of severity or pervasiveness necessary to create a hostile environment under Title IX. Perhaps the bigger problem with such a claim—a problem barely alluded

instance where members of one sex may be harmed to a greater extent than those of the other sex, the distribution of pornography and sexually explicit material in a mostly male shop class).


210. See Sexual Harassment Guidance, 62 Fed. Reg. at 12,039 & n.13 (listing as an example of sexual harassment, a campaign of sexually explicit graffiti directed at a particular girl by other girls).

211. 68 F.3d 525 (1st Cir. 1996).

212. Id. at 540–41.
to by the court—is that even if the complained of conduct had occurred more frequently, it is difficult to explain why such material harmed the complaining students because of their sex. Indeed, accepting the premise that female students are necessarily more harmed than male students by exposure to sexual material risks reinforcing stereotypical protectionist views of female sexuality.

While sexually explicit language and conduct retain the potential for harming persons based on sex in the school environment, as in the workplace, the function of schools as instruments of socialization and sites of learning makes it impossible (and probably undesirable) to eliminate sexual content from the school environment. The failure to do so is not necessarily more harmful to female students.

The theory that sexual harassment harms girls and women more than it harms boys and men is also less than ideal from a doctrinal perspective. Peer sexual harassment typically has been viewed as a form of disparate treatment, or intentional discrimination, as opposed to a facially neutral practice with a disparate impact. Because the law (constitutional as well as statutory) provides greater protection against intentional discrimination than it does for disparate impact, there are clear advantages from a plaintiff's perspective in categorizing sexual harassment as a form of intentional discrimination. Yet, grounding the sex-based harm of sexual harassment in the notion that it has a disparate effect on women in comparison with men brings the wrong more in line with disparate impact discrimination. Although the value judgment that places disparate treatment higher on the discrimination hierarchy than disparate impact is certainly subject to challenge, and should be challenged, the theoretical placement of sexual harassment within these categories has important practical implications that should not be ignored.

The disparate impact approach to sexual harassment raises additional doctrinal problems because it would open the door to a case-by-case analysis of whether the harassment in a particular case affects men and women at that institution...
differently in terms of its frequency or severity. If the frequency and impact of sexual harassment fall equally on the shoulders of males and females at a particular school, the disparate impact approach suggests that no one would experience discrimination on the basis of sex when the institution fails to respond. Or, put another way, the sexual harassment of women and girls could be neutralized by demonstrating comparable levels of sexual harassment of male students that result in similar harms. Particularly at an institution where women are a minority, such as the newly sex-integrated Virginia Military Institute or the Citadel, it is quite possible that sexually explicit conduct could harm as many men, and to as great a degree, as it does women. In such cases, sexual harassment law, if grounded on this theory, would be of little or no assistance to harassment victims.

Finally, the notion that female students necessarily experience greater harm from sexual harassment than male students has little application in the context of anti-gay harassment. The harms resulting from anti-gay harassment appear to have little or no correlation to the victim's sex. If any conclusion about the correlation between the victim's sex and the impact of anti-gay harassment were to be drawn, it would be that male students have a somewhat greater likelihood of being the targets of anti-gay harassment in school. Yet, it would be a mistake to conclude that anti-gay harassment is based on sex simply because males are disproportionately disadvantaged by it. Too many female students are the victims of anti-gay harassment to conclude that it is a phenomenon that discriminates predominantly against males. Limiting anti-gay harassment to a form of sex discrimination against males would deny the harms and extent of anti-gay violence experienced by female students, and reinforce sex-based notions of the invisibility of lesbians in law and society.

Instead of grounding sexual harassment as sex-based discrimination because of a disparate impact on persons of one sex, the law should recognize the sex-based harms it inflicts on males and females, and allow for the possibility that both sexes may be sexually harassed.

D. THE MOTIVATION MODEL: THE DISCRIMINATORY MOTIVE OF THE HARASSER

A fourth alternative for explaining why peer sexual harassment is based on sex looks to the discriminatory intent, or motive, of the harasser. Under a motivation

216. See Safe Schools Coalition of Washington State, They Don't Even Know Me: Understanding Anti-Gay Harassment and Violence in Schools, Findings: What Happened in These Incidents? (last updated Jan. 1999) <http://www.safeschools-wa.org/ss5find1.html>; see also Fineran & Bennett, supra note 104, at 636 (finding that girls generally perceive all forms of peer sexual harassment as a greater threat than boys, but that “[t]he two behaviors that were not significantly different [by gender] were being called gay or lesbian and being the victim of sexual graffiti”).

217. See Safe Schools Coalition of Washington State, They Don't Even Know Me: Understanding Anti-Gay Harassment and Violence in Schools, Findings: What Happened in These Incidents? (last updated Jan. 1999) <http://www.safeschools-wa.org/ss5find1.html> (reporting that, of the 111 reported incidents of anti-gay harassment in Washington state schools, about one half of the targets were male, one-quarter of the targets were female, and the remaining incidents targeted both males and females or did not target any specific individual).
model, the harasser's intent, rather than the character of the harassment, is
dispositive of whether the harassment is based sex.\textsuperscript{218} Several Title IX courts
have suggested that the motivation of the harasser, and whether the harasser acted
with an intent to sexually harass or demean the plaintiff because of her sex, is
the key to determining whether the harassment occurred on the basis of
sex. These courts have suggested that even where the harassment takes
a sexual form, the plaintiff must demonstrate that the harasser acted with a
discriminatory motive in order to prove that the conduct was based on
sex.\textsuperscript{219} OCR also suggests that the harasser's intent may be determinative in
deciding whether the harassment was based on sex, at least if the harasser
subjects both males and females to sexual
misconduct.\textsuperscript{220} \textit{Oncale} endorsed a
motivation model as one method for finding same-sex harassment to be based on
sex, giving the example of a female employee who harasses other female
employees "in such sex-specific and derogatory terms . . . as to make it clear that
the harasser is motivated by general hostility to the presence of women in the
workplace."\textsuperscript{221}

\textsuperscript{218} The attraction model also could be called a motivation model, since it views the harassment as
premised on the harasser's erotic motivation. However, under the attraction model, the erotic motivation
is established by the combination of the harasser's (presumed) sexual orientation and the sexual conduct
itself. In the motivation model, discussed in this section, the harasser's intent to discriminate must be
proven, and is not established by the conduct itself. Although it is not clear exactly what kind of
discriminatory intent this model would require, in the equal protection context, discriminatory intent has
been interpreted to mean that the actor engaged in a particular act "because of," not "in spite of," the sex
of the persons harmed. See Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) ("'Discrimi-
natory purpose' . . . implies that the decisionmaker . . . selected or reaffirmed a particular course of action
at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.").

\textsuperscript{219} See, e.g., Bruneau v. South Kortright Cent. Sch. Dist., 163 F.3d 749, 760 (2d Cir. 1998)
(upholding jury verdict against the plaintiff where "the jury could have found that even if the harassment
had occurred, it was not based on sex due to the age of plaintiff's male peers," and suggesting that "even
physical conduct of a sexual nature, when perpetrated by young children, is not necessarily based on the
harassee's sex"); Does 1, 2, 3 and 4 v. Covington County Sch. Bd., 969 F. Supp. 1264, 1280-81 (M.D.
Ala. 1997) (suggesting that where students were sexually harassed by peers for having been molested by
a teacher, sufficient question of fact existed as to whether peers "were simply acting out of childish
cruelty or whether the plaintiffs' sex was the but-for cause of the harassment"); Burrow v. Postville
Community Sch. Dist., 929 F. Supp. 1193, 1206 (N.D. Iowa 1996) (finding sexually explicit harassment
of female student by male and female students, triggered by plaintiff's reporting of property damage
caused by other students, "arguably went beyond harassing her for 'betraying' certain students,", but it
was for the jury to decide whether the harassment was based on sex). \textit{But see} Wright v. Mason City
Community Sch. Dist., 940 F. Supp. 1412 (N.D. Iowa 1996) (assuming that sexually explicit harassment
of female student by other female students was sexual harassment, even though the harassment was
motivated by a desire to retaliate against the plaintiff for pressing charges against her ex-boyfriend for
rape).

\textsuperscript{220} Sexual Harassment Guidance, 62 Fed. Reg. at 12,047 & n.12 (discussing example where
supervisor harasses husband and wife in gender-specific terms, stating that "[i]n both cases, according to
the court, the remarks were gender-driven in that they were made with an intent to demean each member
of the couple because of his or her respective sex").

\textsuperscript{221} \textit{Oncale} v. Sundowner Offshore Svcs., Inc., 523 U.S. 75, 80 (1998). The intent standard endorsed
by the court in this example is much more limited than that suggested in the Title IX decisions and OCR
Guidance mentioned above. In \textit{Oncale} the court describes the relevant intent as a general hostility to the
members of the victim's sex, while the Title IX version would encompass an intent to harm certain
individuals because of their sex, while stopping short of an intent to harm all members of that sex. The
This approach, like the others discussed above, is an incomplete and problematic explanation for why peer sexual harassment is based on sex. As an initial matter, the harasser's intent may be impossible to ascertain, at least if the objective is to discover a conscious intent. A harasser may not have any specific intent at all, beyond engaging in the particular acts involved. Even in the workplace, the search for the intent of the harasser is elusive at best. Harassers may act out of ignorance or ingrained and internalized notions of power relations, rather than a sex-based animus. The harassers in Oncale, for example, probably had little awareness of the motivation for their actions. Since they identified themselves as heterosexual, despite their sexual aggressions toward Mr. Oncale, their actual motivations may have been deeply submerged in their subconscious in order to reconcile their actions with their sexual identification.

Because sex discrimination law would have little meaning if it only applied to actors who understood and consciously intended the sex-based implications of their actions, Title VII law recognizes that the unaware harasser can still sexually harass. The theoretical grounding of sexual harassment based on the motivation of the harasser is even more problematic in the education context. While an adult harasser may have some awareness that he has consciously singled out persons of

latter meaning is more consistent with the scope of Title VII generally. See Phillips v. Martin Marietta, 400 U.S. 542 (1971) (rejecting employer's argument that Title VII reaches only discrimination that disadvantages all members of one sex).

222. See generally Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317 (1987) (exploring the limits of a legal approach centered on intentional discrimination and analyzing the cultural and psychological forces that hinder consciousness of such an intent).

223. See Sexual Harassment of Working Women, supra note 74, at 199 (arguing that male harassers usually do not harass with an intent to injure the female sex, and that acts that oppress women are typically well-meaning); see also Linda Hamilton Kreiger, The Content Of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 STAN. L. REV. 1161, 1213-16 (1995) (discussing social science research demonstrating lack of awareness on the part of decision-makers of the reasons or motives for their actions).

224. See The New Jurisprudence of Sexual Harassment, supra note 123, at 1212 & n.225 (arguing that while some workplace sexual harassment may involve self-aware harassers acting on a conscious motive, other such behavior is a subconscious reflexive reaction to workplace and societal norms and structures).

225. See Gregory M. Herek, Beyond “Homophobia”: A Social Psychological Perspective on Attitudes Toward Lesbians and Gay Men, 10 J. HOMOSEXUALITY 1, 10 (1984) (stating that hostility toward gay men and lesbians may stem from unconscious conflicts in an individual's own gender identity).

226. See, e.g., Durham Life Ins. Co. v. Evans, 166 F.3d 139, 148 (3d Cir. 1999) ("We generally presume that sexual advances of the kind alleged in this case are sex-based, whether the motivation is desire or hatred."); Ellison v. Brady, 924 F.2d 872, 880 (9th Cir. 1991) (stating that "[t]he reasonable victim standard we adopt today classifies conduct as unlawful sexual harassment even when harassers do not realize that their conduct creates a hostile working environment."); cf. The New Jurisprudence of Sexual Harassment, supra note 123, at 1196-1205 (arguing that while Title VII law should not turn on the harasser's intent, scholars should examine it as part of the gender dynamics that animate the harassment); Sexual Harassment of Working Women, supra note 74, at 114 (asking "[w]hy should unconsciousness of its sexism exempt a practice, when unconsciousness that it is women who are damaged is integral to the easy disregard that has so long sanctioned women's oppressions?").
one sex for treatment that he would not impose on a person of the other sex, a younger person may not know why she targets a particular person for harassment. Children and younger adults may act out ingrained notions of sexuality and gender expectations without any conscious intent to treat persons differently based on their sex.\textsuperscript{227} Limiting the search for discrimination to a search for animus or an intent to discriminate based on sex would effectively immunize peer sexual harassment from the reach of Title IX.\textsuperscript{228} Like other students who harass their peers, students who engage in harassment that could be characterized as anti-gay may not know why they are singling out the target.\textsuperscript{229} The students who dish out anti-gay taunts and epithets on a daily basis may not be able to articulate why they have selected a particular victim for abuse, or what indicia of non-conformity in the victim's appearance or behavior marked that person for harassment. Even where the harassers single out a student who is openly gay, and intend to harass that person because of his sexual orientation, they may be unaware of the sex-based components that also animate the harassment.\textsuperscript{230} Categorizing such harassment as based on sexual orientation, and not based on sex, merely because the harasser did not intend (consciously) to target the victim based on her sex, again misses much of the picture.

In addition to the problem of discovering intent, regardless of whether an intent to discriminate is present, the harm that results from the harassment often does not depend on the harasser's intent.\textsuperscript{231} For example, when G.F., the harasser in \textit{Davis}, behaved in a sexually abusive manner towards LaShonda, the harms inflicted on her did not depend on his intent. Whatever his intent, his actions had the effect of causing LaShonda to experience shame, depression and humiliation, and to fear for her safety. The desire to limit sexual harassment among students, especially young students, to only those situations where the harasser knew what he was doing and intended to act in a sexually discriminatory manner seems to stem from a reluctance to punish innocent children as if they were adults and to

\textsuperscript{227} See, e.g., Elissa L. Perry, \textit{et. al.}, \textit{Propensity To Sexually Harass: An Exploration of Gender Difference}, 38 \textit{Sex Roles} 443, 445 (1998) (citing previous research finding that the propensity to sexually harass is based on a “cognitive association between social dominance and sexuality which results from early socialization experiences’").

\textsuperscript{228} Students are unlikely to consciously select their targets and engage in harassment out of a sex-based animus. See Bruce Roscoe \textit{et. al.}, \textit{Sexual Harassment: Early Adolescents’ Self-Reports of Experiences and Acceptance}, 29 \textit{Adolescence} 515, 521 (1994) (listing reasons given by students for sexually harassing their peers: “peer pressure; it is fun; to get the victim’s attention; everyone does it; have seen others do it; do not recognize the behavior as unwelcome and/or illegal; do not know other ways to show people of the opposite sex that they are interested in them; the entire area of sexuality is new and unfamiliar to them").


\textsuperscript{230} See discussion infra at Part IV B.

\textsuperscript{231} Cf. \textit{The New Jurisprudence of Sexual Harassment, supra} note 123, at 1211-12 & n.225 (arguing that it is not the harasser’s motivation that is central to the reinforcement of male norms, but his assertion of his authority to express himself sexually without considering the harm to the target and her existence as an independent agent).
label them sexual harassers. However legitimate such concerns may be, they do not justify limiting peer sexual harassment to instances where a discriminatory intent can be demonstrated on the part of the harasser. If the challenged conduct otherwise meets the legal elements of sexual harassment, such that it is unwelcome, severe, pervasive, objectively offensive, and based on sex, the harasser’s age and intent should be taken into account by school officials in formulating a reasonable response; it should not erase the recognition that sexual harassment has occurred.

Making a discriminatory motive the touchstone of a peer sexual harassment claim would have the consequence of heightening the resistance to recognizing and responding to sexual harassment in the first place. If the inquiry into whether sexual harassment has occurred is a quest for an ill-meaning actor with a discriminatory motive, schools, courts, and the Office for Civil Rights will be less likely to identify sexual harassment as such, out of a reluctance to attribute discriminatory motives to student-harassers. If sexual harassment as a legal category is limited to self-conscious chauvinists seeking to harm women, as opposed to persons acting out ingrained stereotypes and cultural gender expectations, the victims of peer sexual harassment will have little recourse under the law.

Grounding sexual harassment law on the intent of the harasser makes for an incomplete understanding of the scope and nature of harassment that is based on sex. Because so much sexism and gender role expectations are internalized and ingrained in individual belief systems, limiting sexual harassment law to those cases where a harasser’s conscious intent to discriminate can be proven would frustrate the law’s capacity to protect victims against some of the most damaging and pervasive sexual harassment and abuse.

IV. A BETTER ALTERNATIVE: SEXUAL HARASSMENT AS SEX-STEREOTYPING AND THE POLICING OF GENDER ROLES

While each of the above theories may be useful in certain cases to establish the basis for treating peer sexual harassment as a form of sex discrimina-

232. For example, the public outcry over the one day suspension of six year old Jonathan Prevette for kissing his classmate on the cheek prompted the school district to revise its sexual harassment policy to state that its “[s]tudent-to-student sexual harassment policy shall not be applied in the case of young students unless it clearly appears that there is an intent on the part of the students to engage in harassment of a sexual nature.” Kiss Leads to a Policy Revision, N.Y. TIMES, Oct. 9, 1996, at B9. A better course for the district would have been to revise its policy to clarify that the kiss did not rise to the level of unwelcome, severe, pervasive, and objectively offensive conduct, and that age-appropriate measures should be taken where sexual harassment has occurred.


234. See Krieger, supra note 223, at 1167 (criticizing Title VII disparate treatment law for focusing on discriminatory motivation, stating that “there is no discrimination without an invidiously motivated actor” or “villain”); Lawrence, supra note 222, at 324–27 (describing cultural resistance to identifying discrimination where discrimination requires a finding of animus).

235. Cf Sharon Toffey Shepela & Laurie L. Levesque, Poisoned Waters: Sexual Harassment and the College Climate, 38 Sex Roles 589 (1998) (attributing the reluctance of students to label offensive behavior as sexual harassment to the social norms that legitimate such behavior and its very prevalence).
tion, they are incomplete and not well-suited to much peer sexual harassment in schools. They also fail to recognize anti-gay harassment as a form of sex-based harassment, viewing it as an alternative to, rather than a form of, harassment based on sex.

A better theory for addressing many forms of peer sexual harassment, including anti-gay harassment, would view the harassment as sex-stereotyped behavior that polices and reinforces male and female gender roles. The Supreme Court recognized gender role policing as a form of sex discrimination in *Price Waterhouse v. Hopkins.* In *Price Waterhouse,* the plaintiff, Ann Hopkins, was a candidate for a partnership in the predominantly male Price Waterhouse firm, but did not make partner based in part on her failure to conform to traditional, gendered expectations about women. Comments by partners denying her partnership reflected the widespread perception that she was too macho, not lady like, too aggressive, and in need of “charm school” and instruction in make-up application. In short, the partnership perceived her as insufficiently feminine. The Court, in a plurality opinion, found that the partners impermissibly relied on sex-stereotyping in deciding not to admit Ann Hopkins to the partnership.

The Court faulted the firm for “stereotypical notions about women’s proper deportment,” and for requiring female partners to match the gender stereotype associated with their sex. As Justice Brennan stated for a plurality of the Court, “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”

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236. Kathryn Abrams has pointed out that sexual harassment may assume many forms, including: consciously trying to exclude women from male-dominated institutions; more subtle preservation of male control (focusing on women’s sexuality and requiring conformity to female stereotypes); disciplining women (and men) perceived as departing from stereotyped gender roles or threatening “masculine” culture; and treating women as sexual objects in a way that makes clear that women lack control or influence in the environment. *The New Jurisprudence of Sexual Harassment,* supra note 123, at 1205–17. Thus, she concludes, it is important for feminists to embrace a multi-faceted approach to sexual harassment that has room for all of the different nuances and dimensions that this form of discrimination may involve. *Id.* at 1230. I agree generally with this approach and present the gender-role policing theory discussed here as a preferable approach in many cases, although not necessarily a complete substitute for, the models criticized above.

237. 490 U.S. 228 (1989).

238. *Id.* at 231–32, 258.

239. *Id.* at 235–37. This reaction to women perceived as defying sex stereotypes is not as uncommon as one might hope. See Julie Cart, *Lesbian Issue Stirs Discussion; Women’s Sports: Fear and Discrimination Are Common as Players Deal with a Perception of Homosexuality,* L.A. TIMES, Apr. 6, 1992, at C1 (quoting Mariah Burton Nelson on the lengths to which female athletes must go to counter the perception of lesbianism: “one of the first things she and her teammates were told to do when they were hired by the L.A. Dreams, a short-lived pro team, was to attend charm school. Other teams had mandatory makeup sessions before all home games”).

240. *Id.* at 258.

241. *Id.* at 256.

242. *Id.* at 251. A narrower reading of the *Price Waterhouse* decision would be that rather than viewing employment decisions that are based on sex stereotyping as sex discrimination *per se,* the Court faulted the firm for applying different criteria for partnership to men than it did to women. Under this
The Court's recognition of sex stereotyping and gender role policing as a form of sex discrimination should serve as a basis for analyzing sexual harassment as a harm that occurs because of sex. Recent scholarship on sexual harassment demonstrates the power of sexual harassment to police gender roles and reinforce existing gender hierarchies in the workforce. Peer sexual harassment in schools also supports the sexual subordination of girls and women through the policing and reinforcement of gender roles and sex stereotypes. Students can be the cruelest of the gender police. Gender role conformity is particularly important as a source of security and confidence in childhood and adolescence. Students, perhaps even more so than adults, learn the social meaning of sex, and its attendant gender roles and sexual identity, from their interactions with their peers. Peer sexual harassment polices those boundaries by enforcing the gender role expectations that follow from a student's sex.

A. GENDER STEREOTYPING AND ROLE POLICING IN PEER SEXUAL HARASSMENT GENERALLY

The role-policing and reinforcement function of peer sexual harassment operates both to punish gender outliers—persons perceived as transgressing the expected roles assigned to their sex—and to reinforce the boundaries of gender view, the firm veered off track by requiring aggressiveness for all potential partners, but penalizing women (and not men) for being too aggressive (e.g., aggressive men could succeed, but aggressive women could not; non-aggressive persons, male and female, could not succeed). Id. at 251 (stating that the firm created a “Catch 22” for women). Under this reading, Price Waterhouse would not necessarily discriminate on the basis of sex if it penalized both men and women who did not conform to their gender roles, as long as both men and women who did conform had the same chance to succeed. However, the facts of the case suggest the broader reading. The firm did have some (although few) female partners, suggesting that women who were less aggressive, or who compensated for their aggressiveness by conforming to gender stereotypes in other ways, could succeed at the firm. Thus, it violated Title VII not because it kept women but not men from making partner, but because it required women (and perhaps men as well) to conform to stereotyped gender roles in order to become partner.

243. The Court started down this path much earlier in its treatment of the old “sex-plus” cases. The Court first recognized that discrimination for failure to satisfy the gender role expectations associated with sex is a form of sex discrimination in Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971) (striking down rule excluding women, but not men, with young children from certain jobs). In Phillips, the Court implicitly recognized the linkage of sex and gender role expectations as sex discrimination, and that the challenged discrimination need not be directed towards all women to be unlawful; rather, plaintiffs can prove discrimination by showing that a subgroup of women who do not conform to expected sex roles are treated differently from men. Id. at 545 (Marshall, J., concurring) (stating that “ancient canards about the proper role of women” should not be a basis for discrimination under Title VII).

244. See The New Jurisprudence of Sexual Harassment, supra note 123, at 1220 (describing sexual harassment as enforcing sex and gender hierarchies in the workplace by perpetuating male control and furthering masculine norms); Gender, Sex, Agency and Discrimination, supra note 123, at 1246 (noting the similarity between Abram's approach and her own theory of sexual harassment as policing hetero-patriarchal gender norms in the workplace, but differing from Abrams insofar as Abrams suggests that male control is furthered only by subordinating women, as opposed to the gender-role policing of both men and women).

by bolstering the sex stereotypes associated with maleness and femaleness (not limited to gender outliers). Thus, peer sexual harassment strengthens sex stereotypes and gender roles by punishing individuals who challenge or deviate from them, and by acting out and further entrenching sex stereotypes and dichotomized male and female gender roles.

Much peer sexual harassment punishes departures from gender roles by targeting persons who challenge sex-stereotyped roles for unwelcome harassment. Like the discrimination in *Price Waterhouse*, which punished Ann Hopkins for not conforming to sex-stereotyped behavior, peer sexual harassment that punishes people who depart from sex-stereotyped roles discriminates on the basis of sex. This type of role policing is not limited to females; males who challenge "masculine" gender roles are also at risk. Moreover, the policing of gender non-conformity can be accomplished by both male and female harassers.

The harassment at issue in *Wright v. Mason City Community School District* is an example of how peer harassment can be used to police gender role non-conformity. In that case, after reporting to police that she had been raped by her former boyfriend in junior high school, a female student was subjected to relentless sexual harassment by a group of students at school, most of whom were female. She was called "whore," "bitch" and "slut," subjected to humiliating graffiti and physically accosted. In addition to harassing the female student who reported the rape, the students also harassed a male student "who had the courage and compassion to take the plaintiff to the prom." The female student sued the school under Title IX for failing to take corrective action in response to the harassment. Although the male student did not join the case, both students could be viewed as victims of gender-role policing. Both the female student who reported the rape, and the male student who supported her, challenged the sexual subordination of women.

The social meaning of gender, and the constraints imposed by gender roles, set limits on how both men and women are expected to respond to the sexual subordination of women. Women and girls who resist sexual exploitation, and

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246. See Fineran & Bennett, supra note 104, at 629 ("[P]eer sexual harassment is an instrument that creates and maintains male gender hierarchy. However, we do not assume that maintenance of male gender hierarchy is entirely the work of men and boys; girls and women also may support male dominance.").


248. *Id.* at 1414.

249. *Id.*

250. *Id.*

251. The jury rendered a verdict for the plaintiff and awarded $5,200. See *id.* However, the court set aside the jury's verdict, finding that although the harassment itself was based on sex, the plaintiff failed to show that the school district's lack of sufficient response to the harassment stemmed from an intent to discriminate against the plaintiff based on her sex. See *id.* at 1420. This ruling, issued before the Court decided *Davis*, is inconsistent with the *Davis* decision, which held that a plaintiff need not demonstrate that the school intended to treat harassment complainants differently on the basis of sex. See supra at Part I B.
have the temerity to complain about sexual harassment and rape, defy stereotypes of women as compliant with male sexual demands. The threat to social norms when a female does not remain passive in the face of male sexual aggression is particularly acute where the assertion of female autonomy questions the sexual prerogatives of a woman’s boyfriend or spouse. Thus, when the plaintiff in Wright pressed charges against her ex-boyfriend for rape, she became the target of an abusive campaign to punish her for her transgression. Males who challenge the sexual subordination of women also defy social norms of masculinity. Males who question, or simply refuse to participate in, the sexual dominance of women challenge ingrained notions of what it means to be male. A male student who supports a young woman for reporting a rape by an ex-boyfriend, and refuses to join in on the harassment of her, may himself be subjected to harassment for questioning the norms of male dominance and sexual ownership.

The fact that both sexes may be subjected to harassment that functions as gender-role policing does not mean that the harassment itself is not based on sex. Stereotypes about the proper roles of men and women can harm and constrain both males and females. In other contexts, sex discrimination law has recognized that a practice that subjects both men and women to sex-stereotypes discriminates on the basis of sex. For example, in J.E.B. v. Alabama ex rel. T.B., the Court struck down the state’s use of sex-based peremptory challenges to strike men from the jury in an action seeking to establish paternity and determine child support. The state’s use of sex stereotypes to strike men from the jury went hand in hand with the defendant’s use of sex stereotypes to strike women from the jury. Under the Court’s rationale, both the male and female jurors who were struck had suffered discrimination from the litigants’ use of stereotypes about the

252. See Shepela & Levesque, supra note 235, at 604 (asserting that the socialization of women to accept non-consensual and offensive sexual interactions with men, and predominant sexual norms that privilege male initiation of sexual activity, help explain the reluctance of female students to label certain conduct as sexual harassment); see also Sexual Harassment of Working Women, supra note 74, at 45–46 (“Something fundamental to male identity feels involved in at least the appearance of female compliance, something that is deeply threatened by confrontation with a woman’s real resistance, however subtly communicated.”).

253. The resistance to full protection from marital rape and “date rape” reflects a social norm legitimizing male sexual access to their female partners. See Note, To Have and To Hold: The Marital Rape Exemption and the Fourteenth Amendment, 99 Harv. L. Rev. 1255, 1270–71 (1986) (arguing that the marital rape exemption is premised on traditional notions of women as the sexual property of their husbands); Katharine K. Baker, Sex, Rape, and Shame, 79 B.U. L. Rev. 663, 674 n.55 (1999) (describing research identifying a correlation between the tendency to blame victims of date rape and the acceptance of sex-role stereotypes).

254. See, e.g., Bruce Kyle, U.S. Culture Blamed for Girls’ Despair, Bangor Daily News, Mar. 18, 1995 at B1 (quoting psychologist Mary Pipher, author of Reviving Ophelia, as stating, “[b]oy’s are being taught they’ll be more popular if they harass girls, unaggressive boys [are] labeled as gay”). Cf. Feminist Constructions of Objectivity, supra note 68, at 127–28 (describing Title VII case in which male employee was harassed by male co-workers “because he did not conform to the men’s image of male heterosexuality,” in that he was unusually sensitive to sexual comments and objected to comments depicting women as sex objects).


256. Id. at 129.
proper roles and abilities of men and women. Likewise, harassment that punishes both men and women for transgressions from socially constructed gender roles discriminates on the basis of sex.

An analogy to racial harassment further demonstrates the capacity for stereotypes to disadvantage more than one group of people, with the result that discrimination is intensified, rather than neutralized. Imagine a work or school environment in which racial harassment targets several persons of different races for challenging their respective "racial roles." For example, a group of employees might target African American employees viewed as "upppity" and seeking positions of power, and at the same time harass white employees who challenge the social expectations associated with their race—perhaps by socializing with African Americans or expressing sympathy for causes identified with racial minorities. Both types of harassment would target persons who are perceived as not conforming to racial stereotypes of socially appropriate behavior. Thus, both racial and sexual harassment can police the social norms that regulate race and gender by simultaneously targeting persons within dominant and subordinate groups who defy the expectations associated with their group status.

A gender role policing theory for peer sexual harassment is not limited to punishing persons who deviate in some respect from stereotyped notions of

257. *Id.* at 141–42 ("All persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination."); see also Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 147 (1980) (striking down state workers compensation law paying death benefits to a worker's wife, but requiring a worker's husband to prove dependency in order to qualify for benefits, as discrimination against female workers who are denied spousal benefits); *id.* at 154–55 (Stevens, J., concurring) (reaching the same result, but viewing the issue as discrimination against male spouses).

258. Although courts do not typically view race discrimination as premised on notions of traditional roles, Catharine MacKinnon has pointed out an exception to this, noting that the old miscegenation cases focused on the different social roles assigned by race. She notes that the district court judge in *Loving v. Virginia* justified Virginia's anti-miscegenation statute on the grounds that:

"Almighty God created the races, white, black, yellow, Malay and red, and He placed them on separate continents. And but for the interference with His arrangement there would be no cause for such marriages." (citation omitted)

Sexual Harassment of Working Women, supra note 74, at 136. In striking down Virginia's statute, the Supreme Court effectively recognized the policing of racial roles as straightforward race discrimination. See *Loving v. Virginia*, 388 U.S. 1 (1967). See also *Rogers v. EEOC*, 454 F.2d 234, 238–39 (5th Cir. 1971) (segregation of clients by national origin created a racially hostile work environment for employee with a Spanish surname).

259. That we speak of gender roles, but not racial roles, may reflect society's general (if far from complete) recognition that in the context of race, the prescription of racially appropriate roles is itself based on racism and racial bias. See Sexual Harassment of Working Women, supra note 74, at 138 ("It seems to have been decided that it is enlightened for blacks and whites to exchange social roles, but unseemly for the sexes to do so."). A parallel recognition in the context of sex has been complicated by the tendency to attribute gender role conformity to men's and women's different abilities or choices. See *id.* at 136–37; cf. Feminist Constructions of Objectivity, supra note 68, at 117 & n.112 (exploring how "conventional wisdom" treats sexual and racial harassment differently, and noting that while the traditional view "naturalized" and "rationalized" sexual harassment based on biological differences, it did not accept such a justification for racial discrimination, although it did limit it to blatantly racist behavior and excluded more subtle forms of racism).
masculinity and femininity. Sexual harassment also may police sex role boundaries by acting out sex stereotypes directly, regardless of whether the victims are perceived as conforming to or deviating from sex stereotyped roles. For example, if *Price Waterhouse* had required those women in the partnership who had been perceived as sufficiently "feminine" to make partner to conform to sex stereotyped roles, requiring them to get coffee, wear skirts, or act submissively toward male colleagues and clients, these requirements also would have discriminated based on sex.

Much male-female peer sexual harassment in schools involves sex-stereotyped conduct that reinforces conventional constructions of male and female sexuality. When male students sexually harass female students, they solidify sexual stereotypes and gender roles. The sexuality of the harassed student—or, more accurately, the sexuality of the harassed student as it is constructed by the harasser—becomes the most salient characteristic to the harasser, to the exclusion of the rest of her qualities as an individual. The harasser's conduct reflects and reinforces a sex-stereotyped view of women as passive, receptive to male advances, and lacking independent agency. At the same time, peer sexual harassment by males constructs the sexuality of the harasser based on sex-stereotyped roles of male dominance and aggression.

The *Davis* case is a good example of how male-female sexual harassment reinforces sex stereotyped gender roles. The harasser in *Davis*, known as G.F., accosted LaShonda with a barrage of public sexual harassment and abuse. He made comments about her breasts, told her in graphic terms what he planned to do to her sexually, groped her breasts and genital area, and generally treated her as a sexual object. Through the harassment, G.F. acted out stereotypical dichotomous male and female gender roles. In the very assertion of G.F.'s right to subject LaShonda to his sexual impulses, he robbed her of her autonomy and her agency as a self-directed being. At the same time, he reaffirmed his own "masculinity" through his very acts of harassment. The conduct was sex-

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260. See *Feminist Constructions of Objectivity*, supra note 68, at 116 (describing Dr. Susan Fiske's testimony in *Robinson v. Jacksonville Shipyards* as "stress[ing] that issues of sexuality form an important component of gender stereotyping," in that "[f]emale sexuality, as constructed by men, becomes women's salient attribute, to the exclusion of other characteristics. Women become judged in sexual terms, and anger directed toward women often takes on a sexual dimension.").

261. See, e.g., *Sexual Harassment of Working Women*, supra note 74, at 156 (discussing the influence of sex stereotypes on male and female sex roles, with the male sex role socially constructed to be "strong, aggressive, tough, dominant and competitive," and the social conditioning of the female sex role to "passivity, gentleness, submissiveness, and receptivity to male initiation, particularly in sexual contact").

262. See *Gender, Sex, Agency and Discrimination*, supra note 123, at 1251–53 (emphasizing the reflexive and performative power of sexual harassment, including the reinforcement of hetero-masculinity in the harasser); *Sexual Harassment of Working Women*, supra note 74, at 178 (stating that "what men learn makes them 'a man' is sexual conquest of women; in turn, women's femininity is defined in terms of acquiescence to male sexual advances").


stereotyped in that it was based on the socially ingrained role of the female as sexual object and the male as sexual actor.265

Lessons learned by female victims of sexual harassment include hopelessness, resignation, and passivity in accepting the conventional subordinate female role of sexual object. The voices of girls and young women who have been subjected to sexual harassment from their peers reflect these lessons in the sexual subordination of women to men and the limits imposed by gender:

It made me feel cheap, like I was doing something I wasn’t aware of to draw this kind of attention to myself. I could never stand up to him because [if] I told him to stop he’d threaten me, so I began to act like it didn’t bother me(. . . . He’d hit me (hard enough to bruise me twice) and then pin my arms behind my back till it hurt and push [me] against a wall and tell me all the awful things he would do to me if I ever hit him again, so I quit standing up to him again. [14 year old, Michigan]266

At first I didn’t really think of it because it was considered a ‘guy thing’, but as the year went on, I started to regret going to school, especially my locker, because I knew if I went I was going to be cornered and be touched, or had [sic] some comment blurted out at me. I just felt really out of place and defenseless and there was nothing I could do. [14 year old, Maryland]267

I’ve been sexually harassed for almost three years now, and it really hurts me, and it makes me feel like I’m a bad person, or that I’m no good and deserve what I get. One guy kept trying to feel me up and go down my pants in class. He’d also rub his leg up and down my leg and I hated it. He’d also ask me to have sex with him . . . I really felt low and he called me a slut and a bitch when I said ‘NO’. It shouldn’t be happening to anyone, it breaks your soul and brings you down mentally and physically. [14 year old, New Hampshire]268

First of all, let me say that being sexually harassed since fifth grade has gone beyond the damage of affecting the way I feel . . . Now, at age 15 and a sophomore in high school, I have no pride, no self-confidence and still no way out of the hell I am put through in my school. . . . I have been depressingly desperate for something to make me feel like I actually am not a slutty bitchy whore. [14 year old, Alabama]269

. . . Now sexual harassment doesn’t bother me as much because it happens so much it almost seems normal. I know that sounds awful, but the longer it goes on without anyone doing anything, the more I think

265. Shepela & Levesque, supra note 235, at 604 (discussing predominant social norms of male and female sexual roles and the reinforcement of these norms through sexual harassment).
266. NOW LDEF Amicus Brief, Davis, supra note 88, at *9 (quoting from INCIDENCE OF SEXUAL HARASSMENT, supra note 88, at 11).
267. Id.
268. SECRETS IN PUBLIC, supra note 87 at 3–4.
269. Id. at 7–8.
of it as just one of those things that I have to put up with. [14 year old, Washington state]^{270}

These lessons in female passivity and subordination are especially effective when schools respond to the harassment with indifference and inattention. A gender policing theory best captures the involvement of schools in contributing to the discrimination. When schools respond to peer sexual harassment by belittling the harm that results from sexual harassment, or minimizing the wrongfulness of the conduct, they add to the gender role policing effects of the harassment itself.^{271} The school’s deliberate indifference to the harassment thus contributes to impact of the underlying harassment.

B. GENDER STEREOTYPING AND ROLE POLICING IN ANTI-GAY HARASSMENT

Like peer sexual harassment that polices gender nonconformity and reinforces sex-stereotyped roles, anti-gay harassment also discriminates on the basis of sex under a gender policing framework. Harassment based on sex and harassment based on sexual orientation are inseparable and mutually reinforcing.^{272} The recognition that anti-gay harassment is also based on sex has been obscured by the law’s insistence on viewing sex and sexual orientation discrimination as mutually exclusive categories.^{273} In fact, however, the connection between harassment based on sex and that based on sexual orientation is twofold: sexism and sex-stereotyping provide the foundation for anti-gay harassment, and anti-gay harassment serves to police and enforce sexism and sex-stereotyped gender roles.

Anti-gay harassment is largely predicated on hostility toward perceived transgressions of gender roles, and is thus a form of sex discrimination.^{274}

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^{270} NOW LDEF Amicus Brief, Davis, supra note 88, at *19 (quoting from INCIDENCE OF SEXUAL HARASSMENT, supra note 88, at 11).

^{271} SECRETS IN PUBLIC, supra note 87, at 15 (arguing that schools’ failure to respond to peer sexual harassment “teaches young women to suffer harassment and abuse privately. They learn that speaking up will not result in their being heard or believed and that if they insist on pursuing matters, they will be on their own.”); NOW LDEF Amicus Brief, Davis, supra note 88, at *15 (citing finding of Connecticut study that “85 percent of school personnel who monitor Title IX compliance agree that ‘student to student sexual harassment often goes unrecognized because it is too often dismissed as normal adolescent behavior’ ” (quoting Permanent Commission on the Status of Women et. al, In Our Own Backyard: Sexual Harassment in Connecticut’s Public High Schools 21 n.7, 31 (1995))).

^{272} See What’s Wrong with Sexual Harassment?, supra note 140, at 760, 763–66 (applying theory of heteropatriarchy to explain why and how sexual harassment constructs male and female identities); Francisco Valdes, Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society, 83 CAL. L. REV. 3, 6–8 (1995) (discussing current system of “heteropatriarchy” which conflates sex, gender, and sexual orientation, and results in mutually reinforcing and interrelated oppressions across each of these dimensions).

^{273} See supra note 119, 120 and accompanying text.

^{274} See generally Sylvia A. Law, Homosexuality and the Social Meaning of Gender, 1988 WIS. L. REV. 187 (1988) (arguing that anti-gay hostility is a reaction to homosexuality’s challenge to traditional gender roles); see also Gregory M. Herek, On Heterosexual Masculinity: Some Physical Consequences of the Social Construction of Gender and Sexuality, 29 AM. BEHAV. SCI. 563, 565 (1986) (describing social science findings that heterosexuals’ negative attitudes toward gay men and lesbians are consistently correlated with traditional views of gender and family roles).
Homosexuality challenges the social construction of gender, in which masculinity and femininity are defined as opposite (as in the "opposite sex") and complementary.\textsuperscript{275} It also challenges social relationships structured on male dominance and female dependence.\textsuperscript{276}

Students, in particular, are targeted for anti-gay harassment when they are perceived to depart from appropriate gender roles.\textsuperscript{277} The connection between gender stereotyping and anti-gay harassment is especially evident where the harasser assumes, without knowing, that the target is gay or lesbian. In such cases, the harasser often uses other markings of gender role non-conformity to select the target.\textsuperscript{278} Where the harasser targets a male student perceived to be effeminate, for example, the harassment is based on the male student’s sex because his sex created the expectation of a more stereotypically masculine persona.\textsuperscript{279}

Even in those cases where the harasser selects a target who is openly gay or lesbian and does not otherwise depart from sex-stereotyped expectations, anti-gay harassment is also based on the target’s sex, in addition to her sexual

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., Jed Rubenfeld, The Right of Privacy, 102 Harv. L. Rev. 737, 800 (1989) (stating that “it is difficult to separate our society’s inculcation of a heterosexual identity from the simultaneous inculcation of a dichotomized complementarity of roles to be borne by men and women”).
\item See Law, supra note 274, at 219–21 (arguing that gay and lesbian relationships threaten the traditional, gender hierarchy based on male-female relationships); Mark A. Fajer, Can Two Real Men Eat Quiche Together? Storytelling, Gender Role Stereotypes, and Legal Protection for Lesbians and Gay Men, 46 U. Miami L. Rev. 511, 624–29 (1992) (arguing that lesbians threaten the established gender order because they are thought to be claiming more power than they deserve as women, while gay men do so because they are thought to be relinquishing power to which they are entitled as men).
\item See Friend, supra note 229, at 223 (stating that, “[i]t is not by accident that those who are most frequently targeted [for anti-gay harassment and violence in school] are seen as violating expectations about how women and men ‘should be’ or ‘should act,’ ” and explaining how anti-gay harassment reinforces conventional gender roles).
\item The Safe Schools Coalition study found that many students targeted for anti-gay harassment were not openly gay or lesbian. Of the 148 students targeted, 92 were not known to be gay or lesbian by the harasser(s). Of these, 38 had defended the civil rights of sexual minorities or had lesbian, gay, bisexual, or transgendered (LGBT) friends; 31 “were apparently perceived to fit LGBT stereotypes (e.g., girls with short hair, a boy who was soft-spoken and who studied during free time)”; and 23 were targeted “for no apparent reason.” Safe Schools Coalition of Washington State, They Don’t Even Know Me: Understanding Anti-Gay Harassment and Violence in Schools, Executive Summary (Jan. 1999) <http://www.safeschools-wa.org/ss5execsum.html>. See also Law, supra note 274, at 196 (summarizing historic evidence demonstrating that “the censure of homosexuality cannot be animated merely by a condemnation of sexual behavior,” and that instead “homosexuality is censured because it violates the prescriptions of gender role expectations”); Amicus Brief for Law Professors, at 15 n.12., Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998) (No. 96–568) [hereinafter Law Professors Amicus Brief, Oncale] (arguing that the male-male harassment in Doe v. City of Belleville was “typical of many same-sex harassment cases” in that the harassers “deployed homophobic epithets” without actually believing that the target is gay).
\item Valdes, supra note 272, at 24–25 (arguing that punishing “femininity” in men perpetuates male/female hierarchies and dichotomies); Law Professors Amicus Brief, Oncale, supra note 278, at 25 (arguing that male-male harassment is because of sex if the target is “singled out for harassment because of his failure to live up to some standard of masculinity,” or “because he objected to a hyper-masculine environment” in an all-male workplace).
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The departure from heterosexual norms itself represents a rejection of conventional gender roles. It is the target’s sex that makes her attraction to persons of the same sex unsettling and threatening to the harasser. The threat that homosexuality presents to ingrained notions of gender roles is not lost on students, even if they are not consciously aware of it. Anti-gay harassment thus serves to punish non-conformity with the gender role expectations designated by the target’s sex, much as Anne Hopkins was not admitted to the partnership because she was not perceived as acting sufficiently lady-like.

At the same time that sex stereotypes fuel anti-gay harassment, anti-gay harassment itself polices and reinforces sex-stereotyped roles. Anti-gay harassment performs this function regardless of the sexual orientation of the target. Persons who transgress gender roles in any respect—whether or not they identify as gay or lesbian—may be subjected to anti-gay harassment as a means of punishing and deterring gender role departures.

When men or women act in a manner that challenges gender norms, they risk being labeled gay or lesbian, and subjected to harassment. Girls and women who push the boundaries of traditional gender roles risk being targeted as lesbians (regardless of their actual sexual orientation) and subjected to anti-gay harassment. The persistent harassment and lesbian-baiting of female athletes, whether

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280. In the Safe Schools Coalition study, 34 of the 148 students targeted were openly gay or lesbian, 15 had come out privately to friends or family who told others, and five were “found out.” Safe Schools Coalition of Washington State, They Don’t Even Know Me: Understanding Anti-Gay Harassment and Violence in Schools, Executive Summary (Jan. 1999) <http://www.safeschools-wa.org/ss5execsum.html>.

281. See Valdes, supra note 272, at 293 (discussing the conflation of sex, gender and sexual orientation, and summarizing the author’s theory that sexual orientation discrimination is contingent and derivative of sex and gender); Fajer, supra note 276, at 617–620 (discussing psychological literature linking homophobia to concern with departures from gender role norms).

282. See Elvia R. Arriola, The Penalties for Puppy Love: Institutionalized Violence Against Lesbian, Gay, Bisexual and Transgendered Youth, 1 J. GENDER RACE & JUST. 429, 448 (1998) (describing the gender-socialization function of anti-gay peer harassment, and identifying the gender norms that it embodies: “‘[n]ormal’ boys play sports, drink beer, and pursue girls, while ‘normal’ girls will pay more attention to their looks in order to attract boys’ attention”).

283. See Pryor & Whalen, supra note 98, at 140 (citing findings of AAUW study that, in asking respondents about their reaction to 14 types of sexual harassment, “[n]one provoked as strong a negative reaction in boys as being called ‘gay,’ ” and that 87% of girls reported “that they would be ‘very upset’ at being accused of being lesbian”).

284. The objection that sex discrimination law does not fit well with sexual orientation discrimination because gays and lesbians face discrimination even when they are not recognized as “gender non-conformers,”—that is, where they act like “real men” and “real women,” see Mary Eaton, At the Intersection of Gender and Sexual Orientation: Toward a Lesbian Jurisprudence, 3 S. CAL. REV. L. & WOMEN’S STUD. 183, 199–200 (1994)—gives too little weight to how threatening homosexuality is to the system of sex subordination, and too little weight to how heavily sexual orientation affects the social meaning of what is a “real” man and a “real” woman. See Law, supra note 274, at 196 (describing culturally pervasive gender norms prescribing that “[r]eal men are and should be sexually attracted to women, and real women invite and enjoy that attraction”); Valdes, supra note 272, at 16–18 (arguing that all acts of sexual orientation discrimination are necessarily based also on sex or gender or both).

1999] THE GENDER POLICE 101

or not they are lesbians, exemplifies the interlocking nature of sex and sexual orientation as a basis for harassment. For girls and women, even resisting sexual harassment may incite harassment that labels them as lesbians.

Likewise, boys and men who act in a manner considered inappropriate for their gender—for example, by demonstrating an interest in traditionally “feminine” subjects such as art, drama, cooking, or figure skating, or displaying a sensitivity associated with femaleness—also risk being targeted as gay by their peers. Indeed, some research suggests that males face even greater sanctions, in the form of anti-gay harassment, when they depart from gender expectations. For males, merely choosing not to engage in harassment may signal a failure to conform to masculine norms and may provoke accusations of homosexuality.

For both male and female students, anti-gay harassment reinforces sex stereotypes by enforcing the boundaries of the social roles assigned their sex.

The dichotomy between sex and sexual orientation under sex discrimination role boundaries); PHARR, supra note 245, at 24–26 (describing how the “lesbian” label deters women from identifying as feminists and working for women’s equality).

286. See, e.g., Leslie Heywood, Despite the Positive Rhetoric About Women’s Sports, Female Athletes Face a Culture of Sexual Harassment, CHRON. HIGHER EDUC., Jan. 8, 1999, at B4 (stating that “old assumptions that women who excel at sports are really more like men (and must, therefore, be lesbians, because they’re not conventionally feminine) are rearticulated in the kind of ‘lesbian baiting’ of female coaches and athletes that happens on many campuses”); Julie Phillips, Intolerable: Does the Ben Wright Saga Signal an End to the Fight Against Homophobia in Women’s Sports, or Just the Beginning?, 18 WOMEN’S SPORTS AND FITNESS 23 (1996) (quoting Michael Messner, Ph.D., sports sociologist at UCLA as stating, “[o]ne of the ways women’s sports have been policed, in the sense of not allowing them to challenge men’s power and authority, has been to associate women who are athletic with lesbianism”); Cate Terwiliger, Nike Ads Underlined Research Data, DENVER POST, Nov. 8, 1998, at F5 (citing 1993 Feminist Majority Foundation report finding that “‘[a] common barrier to girls and women in sports is the homophobic belief that female athletes are, or will become, lesbians,’ ” and that “‘[t]his myth puts pressure on girls and women to avoid activities perceived as ‘masculine’ for fear of facing harassment and discrimination’ ”); Lori Riley et. al., Women’s Progress in College Athletics, Part II: The Lesbian Stigma, HARTFORD COURANT, May 25, 1992, at B1 (citing instances of anti-lesbian harassment of female athletes).

287. See Pryor & Whalen, supra note 98, at 140–41 (arguing that women who reject sexual advances risk being targeted as lesbians); SEXUAL HARASSMENT OF WORKING WOMEN, supra note 74, at 51 (stating that women who resist sexual harassment become targets for additional abuse, including accusations of “prudery, unnaturalness, victorianism [a]nd lesbianism”).

288. See Friend, supra note 229, at 223 (noting that male students, perhaps even more than female students, face powerful consequences when they cross over the “gender line,” and that this line can be very tight, directing specific behaviors in terms of speech, dress, personality, sensitivity, and expression of emotions); John G. Kerns & Mark A. Fine, The Relation Between Gender and Negative Attitudes Toward Gay Men and Lesbians: Do Gender Role Attitudes Mediate This Relation?, 31 SEX ROLES 297, 304 (1994) (citing research suggesting that gay men are perceived as deviating more from traditional gender roles than lesbians).

289. See supra note 254; See also Gregory M. Herek, On Heterosexual Masculinity: Some Physical Consequences of the Social Construction of Gender and Sexuality, 29 AM. BEHAV. SCI., 563, 563–77 (1986) (arguing that to be a “man” in American society is to be homophobic, and that expressing hostility toward homosexuals in general, and gay men specifically, enhances culturally constructed “masculine” identity); The New Jurisprudence of Sexual Harassment, supra note 123, at 1219 (stating that targeting men perceived as “non-masculine” reinforces “masculinity” in the harasser at the same time that it punishes departures from “masculinity” in the target).

290. See generally PHARR, supra note 245, at 10–19 (explaining how condemnation of homosexuality enforces traditional gender roles and serves as a “weapon” of sex discrimination).
law threatens to undercut the effectiveness of the law by permitting the power of homophobia to keep men and women in their respective “places.” Courts would have little difficulty recognizing that the straight girl who is harassed for being a “tomboy,” playing football, and not acting sufficiently “ladylike” is being harassed because of her sex, whether or not the harassment takes an explicitly sexual form. But if this girl is gay (or is perceived to be gay), and the harassment also includes anti-gay taunts and epithets, or other indications of anti-gay hostility, the “because of sex” criteria will be much more difficult to establish under current law. Just as the absence of overt sexuality in gender role reinforcement and policing should not make the conduct any less because of sex, neither should the presence of anti-gay animus. If Anne Hopkins, in addition to being penalized for her supposedly “macho” demeanor and her failure to wear make-up, were also accused of being a lesbian, and subjected to anti-gay scorn, the harassment would be more—not less—linked to and triggered by her sex, which set the ground rules from which her departure from expected gender roles was measured. Unless sex discrimination law is interpreted to reach anti-gay harassment, the sexual orientation “loophole” will undercut the law’s promise of guaranteeing individuals opportunities without regard to their sex.

C. GENDER ROLE POLICING AS A THEORETICAL BASIS FOR PEER SEXUAL HARASSMENT CLAIMS UNDER TITLE IX

The theory proposed here would view much peer sexual harassment, including anti-gay harassment, as premised on, and reinforcing of, sex-stereotyped views about the proper gender roles of men and women and their relation to one another. This theory would have several advantages compared to the prevailing explanations for why peer sexual harassment discriminates on the basis of sex.

First, unlike a motivation framework, the harasser need not have any specific intent to demean or harass the target because of their sex. Sex stereotyping often

291. See supra discussion Part II.
292. Cf. Valdes, supra note 272, at 25 (arguing that the law must reach sexual orientation discrimination in order to fulfill the commitment of sex discrimination law).
293. While attraction-based same-sex and female-male harassment may not fall within this theory, such conduct could still be covered under the existing attraction analysis in cases where “but for” the target’s sex, the harassment would not have occurred. Although an attraction theory has severe limitations in failing to encompass much peer sexual harassment in school, as explained above, it may nevertheless retain some degree of usefulness in reaching attraction-based harassment that does not fit within other paradigms. Cf. The New Jurisprudence of Sexual Harassment, supra note 123, at 1210, 1227-29 (acknowledging that some sexual harassment is about desire, and viewing male-male attraction-based harassment as based on sex because, although it does not involve gender role policing of the target, it nevertheless affirms the traditional male norms of the male as sexual subject who unilaterally imposes his sexuality on the target, regardless of the target’s desires or agency). But cf. Gender, Sex, Agency and Discrimination, supra note 123, at 1255-56 (viewing “homosexual” advances by a harasser to a same-sex target as outside the scope of sexual harassment law because not involving gender policing, and preferring to encompass such conduct under a disparate treatment theory because of the dangers of an attraction model in sexual harassment cases).
operates at an unconscious level. In *Price Waterhouse v. Hopkins*, the Court did not require a showing that the partners who decided not to make Ann Hopkins a partner were aware of the sex bias that shaped their decision. Likewise, students who police and reinforce gender roles by harassing their peers may not be aware of the sex-stereotypes that animate their behavior. Moreover, even though the model does not require proof of a conscious intent or animus, it still should fit within an intentional discrimination, as opposed to a disparate impact, framework. Harassment that acts out or reinforces sex stereotypes begins with the reference point of the target’s sex. The harasser’s conduct responds to ingrained notions of maleness and femaleness, reinforcing and enforcing the boundaries of gender. As in *Price Waterhouse*, evaluating or responding to the target in a sex-stereotyped manner is a form of intentional discrimination under existing legal frameworks.

Second, a gender policing model would recognize that sex-based harassment can take non-sexual as well as sexual forms, and thus has the potential to reach a broader range of conduct than the sexual-in-nature model. The gender policing model also may have a better chance of grounding the harm of the harassment without giving voice to traditional, protectionist notions of female sexuality. One counter-argument in the comparison between the gender-policing and sexual-in-nature models is that the latter model is simpler to apply, and thus has the best prospect for capturing a broader range of conduct than its alternatives. However, the apparent simplicity of the sexuality model is not as great as it first appears. The sexual-in-nature model does not apply itself; courts only pretend that it does, and then make covert judgments about what they do and do not consider sexual. To the extent that application of a gender-role-policing model may require further elaboration for courts, that elaboration can be done through expert testimony on the connection between sex stereotypes, gender role expectations and the harassment. Where the connection is not apparent, factfinders would benefit from expert testimony to shed light on how the behavior acts out, reinforces or polices sex stereotypes of male and female roles. Such an education may be useful to develop the law in manner that better captures the harm of the harassment.

Grounding peer sexual harassment on a gender-role policing foundation also recognizes that both males and females can be subjected to sexual harassment, even simultaneously. A school that knowingly permits the harassment of a male student who takes home-economics and of a female student who takes auto-mechanics discriminates against both of these students. Likewise, a school could permit the sexual harassment of LaShonda Davis and the harassment of Jamie Nabozny, and yet “cause” the discrimination (in the *Davis* sense) against both of them by condoning sex-based harassment that reinforces sex stereotypes and polices gender roles.

Despite these advantages, courts have yet to consider sex-stereotyping and gender-role policing theories as a basis for grounding peer sexual harassment.

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294. 490 U.S. at 241–42.
under Title IX. Unfortunately, some courts have resisted a gender-role policing theory in Title VII cases, particularly where the plaintiff’s gender non-conformity is connected to perceptions of his sexual orientation. One prominent exception to this resistance is the Seventh Circuit’s pre-Oncale decision in Doe v. City of Belleville. In City of Belleville, two brothers who were perceived to be effeminate were harassed in a sexually explicit manner in an all-male workplace. The district court found that because the harassers targeted the brothers out of a belief that they were gay, the harassment was based on sexual orientation rather than sex, and was therefore beyond the reach of Title VII. The Seventh Circuit reversed, articulating two separate rationales. First, the court refused to treat same-sex and cross-sex harassment differently, holding that when the harassment has explicit sexual overtones, it is necessarily because of the victim’s gender, regardless of the sex of the harasser. Second, the court relied on the Price Waterhouse decision to conclude that harassment for the failure to conform to stereotyped gender roles is harassment because of sex. The Supreme Court’s summary decision vacating and remanding the Seventh Circuit’s decision “in light of” Oncale, calls into question which, if any, portions of the Seventh Circuit’s reasoning remain valid after Oncale.

The Supreme Court’s decision to vacate and remand in City of Belleville should be interpreted as simply rejecting the Seventh Circuit’s first ruling that harassment of a sexual nature is always based on sex. This explanation of the Court’s action would leave open the possibility that sex stereotyping could serve as a basis for the because of sex requirement in sexual harassment cases. This interpretation is bolstered by the Seventh Circuit’s own determination that the methods identified in Oncale for proving that harassment is based on sex are not exhaustive.

295. See, e.g., Dillon v. Frank, No. 90–2290, 1992 U.S. App. LEXIS 766 at *27–*29 (6th Cir. Jan. 15, 1992) (unpublished opinion) (rejecting male plaintiff’s argument that anti-gay harassment was sex-stereotyping and based on sex, and noting that plaintiff failed to show that a lesbian would have been treated more favorably); Klein v. McGowan, 36 F. Supp. 2d 885, 889–90 (D. Minn. 1999) (holding that harassment based on the “sexual aspect of Plaintiff’s personality,” is not because of sex); Simonton v. Runyon, 50 F. Supp. 2d 159, 162 (E.D.N.Y. 1999) (holding that harassment because of sexual orientation is not harassment because of sex); Higgins v. New Balance Athletic Shoe, 21 F. Supp. 2d 66, 73–76 (D. Me. 1998) (finding harassment of male plaintiff to be based on his perceived sexual orientation and not his sex, and refusing to view sexual orientation discrimination as a form of gender discrimination.).

296. 119 F.3d 563 (7th Cir. 1997).
297. Id. at 568.
298. Id. at 571–80.
299. Id. at 580–83.
301. See Shepherd v. Slater Steels Corp., 168 F.3d 998, 1009 (7th Cir. 1999) (“[W]e discern nothing in the Supreme Court’s decision indicating that the examples it provided were meant to be exhaustive rather than instructive.”).
One court within the Seventh Circuit has explicitly adopted this approach, ruling that *Oncale* does not foreclose the sex stereotyping theory adopted in *City of Belleville*.\(^{302}\) This court, in *Spearman v. Ford Motor Co.*, applied a gender role policing theory to the harassment of a male employee who, because of "the way he projected his gender," was perceived to be gay.\(^{302}\) In doing so, the court cited *Price Waterhouse* as standing for the proposition that "Title VII does not permit an employee to be treated adversely because his or her appearance or behavior does not conform to gender stereotypes."\(^{304}\) While recognizing that the Seventh Circuit "at present, has decided that discrimination based upon sexual orientation is beyond the reach of Title VII," the court nevertheless ruled that sex and sexual orientation are not mutually exclusive causes of harassment.\(^{305}\) As the court stated:

Harassment can be motivated by many factors—sex as well as sexual orientation—and just because one discriminatory motivation as of yet is not recognized as impermissible under Title VII does not release the employer from liability for discrimination because of sex under Title VII. Therefore, continuous comments by a harasser to a plaintiff, such as "fag," "dyke," "queer," could be covered under Title VII.\(^{306}\)

This approach would recognize anti-gay harassment as gender role policing that violates sex discrimination law.

Another district court in the Seventh Circuit also has been receptive to a gender policing theory for sexual harassment, although it found that such a theory did not fit that particular case. In *EEOC v. Trugreen Ltd. Partnership*, the court ruled that there was nothing in the record from which to infer that the plaintiff, who was a born-again Christian and married to a woman, was subjected to the harassment because of his gender, as opposed to his religious convictions or his personality.\(^{307}\) The court carefully surveyed Seventh Circuit precedent, including *Doe v. City of Belleville*, and found that the record in the case before it did not demonstrate sex stereotyping. In describing the plaintiff's argument that he was targeted because he "did not exhibit his masculinity in a way that met [the harasser's] conception of how a man should behave," the court stated:

Although plaintiff could succeed on such a theory, it cannot do so without the facts to support the theory. It has failed to come forward

\(^{302}\) *See Spearman v. Ford Motor Co.*, No. 98-C-0452, 1999 U.S. Dist. LEXIS 14852, at *18-*19 (N.D. Ill. Sept. 1, 1999) ("This court finds that the reasoning in Doe is not inconsistent with Oncale and therefore Doe remains viable.").

\(^{303}\) *Id.* at *19*, *21.

\(^{304}\) *Id.* at *19.*

\(^{305}\) *Id.* at *22* n.4.

\(^{306}\) *Id.*

with factual evidence sufficient to create a genuine dispute that [the harasser] treated [plaintiff] adversely because [plaintiff's] conduct did not conform to stereotypical gender roles.\textsuperscript{308}

After faulting plaintiff for his failure to identify specific evidence in the record, as required by the court's summary judgment procedures, the court further stated that:

There is no suggestion that [the harasser] used gender-specific, derogatory terms in response to [plaintiff's] aversion to sexually explicit banter and photographs. [Plaintiff] does not contend that [the harasser] called him a sissy or a queer or otherwise questioned his masculinity or sexual orientation.\textsuperscript{309}

In addition to these courts, one state court has applied a gender-policing theory to sexual harassment under its state employment discrimination law.\textsuperscript{310} In Zalewski v. Overlook Hospital, a New Jersey court relied on Price Waterhouse to recognize male-male sexual harassment as a form of sex stereotyping and gender role policing.\textsuperscript{311} In that case, a male employee was harassed in a sexual manner by his coworkers “because they believed him to be a virgin and effeminate.”\textsuperscript{312} The court characterized the harassment as occurring “because [plaintiff] was a male who did not behave as [the harassers] perceived a male should behave,” and ruled that such harassment was a form of gender stereotyping under the act.\textsuperscript{313}

While it is too soon to say that these courts represent the wave of the future with respect to a gender policing approach to harassment, they certainly give cause for optimism. Courts evaluating Title IX harassment claims may have even better prospects for recognizing such a theory. Because no Title IX cases yet have rejected such a theory, there is less precedential baggage to overcome in recognizing sex stereotyping as a basis for peer harassment. In addition, there may be reason to believe that gender policing plays a greater role in anti-gay harassment that occurs in school, as sexual orientation is not a fixed construct during childhood, adolescence, and young adulthood, such that anti-gay harassment during these life stages may have more to do with gender than homosexuality \textit{per se}.\textsuperscript{314} Finally, the pressures toward gender conformity may be particularly acute during school years—perhaps even more so that in the adult workplace.

\begin{itemize}
    \item \textsuperscript{308} Id. at *23–24.
    \item \textsuperscript{309} Id. at *26.
    \item \textsuperscript{311} Id.
    \item \textsuperscript{312} Id.
    \item \textsuperscript{313} Id. Although the state law at issue prohibited discrimination on the basis of actual or perceived sexual orientation, as well as discrimination based on sex, the court treated the claim as one of sex discrimination because there was no suggestion that the plaintiff was anything but heterosexual. \textit{Id.} at 132, 135–36.
    \item \textsuperscript{314} See, e.g., Friend, \textit{supra} note 229, at 220–21 (discussing inconsistencies in sexual behavior, sexual orientation, and self-labeling during the formation of adolescent sexual identity).
\end{itemize}
While the relationship between anti-gay harassment in school and gender role policing requires further investigation, a gender role policing model seems particularly promising for evaluating peer harassment claims under Title IX. As discussed above, much sexual harassment and anti-gay harassment in school takes the form of punishing departures from, or reinforcing the boundaries of, conventional gender roles. Title IX law should recognize this reality.

**CONCLUSION**

Sex discrimination law currently protects students from anti-gay peer harassment only if the school itself treated them worse than similarly situated persons of the other sex, or possibly, in a determination by the Office for Civil Rights, if the harassment took a form that was sexual in nature. Peer sexual harassment, on the other hand, gives rise to legal liability if the school had notice of it, but responded with deliberate indifference. The reason for the difference is that courts and the OCR assume that peer sexual harassment occurs on the basis of the target's sex, but that anti-gay harassment is based on sexual orientation and not sex. This line in the sand dividing sex and sexual orientation is hazy at best. Only an overly constrained and cryptic view of sex discrimination law supports such a categorical distinction. Sex discrimination law is not limited to discrimination that is based only on sex, and no other factor. Yet that is essentially the stance that courts and the OCR have taken in refusing to recognize anti-gay harassment as based on sex where the harassment targets persons who defy conventional gender roles. This view severely limits the capacity of Title IX to provide meaningful protection from sex discrimination.

The law's failure to recognize anti-gay peer harassment as a form of sex discrimination under Title IX finds a parallel in the recent reluctance by some courts to recognize a school's role in perpetuating peer sexual harassment as sex discrimination. In both instances, the challenge is to explain why the school's actions (or failure to take action) discriminated against the harassed students on the basis of sex. In the end, the same analysis answers this question for both types of harassment. Whether the underlying conduct is characterized as sexual harassment or anti-gay harassment, the school discriminates when it condones a form of gender policing that is so severe or pervasive as to interfere with the ability of harassment victims to receive an education. Both peer sexual harassment and anti-gay harassment are premised on, and reinforce, sex-stereotyped views about the proper roles of men and women and their relation to one another. Adopting an analysis that recognizes sexual harassment as a form of gender-role policing and sex-stereotyped behavior would provide a more complete explanation for why the school's role in acquiescing in the harassment discriminates against students on the basis of sex.

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315. As discussed supra Part II, OCR's treatment of at least some forms of peer harassment may no longer be viable after Oncale.

The policing of gender roles—either by punishing persons perceived as gender non-conformists, like Anne Hopkins and Jamie Nabozny, or by reinforcing the boundaries of male-female sex roles through the subordination of females, as in LaShonda Davis' case—lies at the heart of the conduct that sex discrimination law should address. The premise of the non-discrimination principle is that individuals should not have their life opportunities limited because of their sex. When harassment is used to punish persons who depart from the gender roles associated with their sex, or to reinforce the distinctions dictated by gender roles, individuals are very much limited in their opportunities because of their sex. This linkage between sex, gender roles, and sexual orientation plays out everyday in classrooms and hallways in federally-funded schools around the country. For the victims of peer sexual harassment and anti-gay harassment, the educational impact of non-intervention can be distressingly severe. A gender-role policing model of harassment under Title IX would go a long way toward protecting students from these consequences.