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The Reasonable Girl: A New Reasonableness Standard to Determine Sexual Harassment in Schools

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THE REASONABLE GIRL: A NEW REASONABLENESS STANDARD TO DETERMINE SEXUAL HARASSMENT IN SCHOOLS

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Abstract: The U.S. Supreme Court held in *Davis v. Monroe County Board of Education* that schools may be liable under Title IX of the 1972 Education Amendments for student-to-student hostile-environment sexual harassment. Although the Court required that conduct be severe, pervasive, and objectively offensive to qualify as sexual harassment under the statute, it did not establish an objective reasonableness standard to evaluate allegedly harassing conduct. In the context of Title VII employment-discrimination jurisprudence, some courts apply a reasonable-woman standard to determine what conduct is objectively hostile or abusive such that it constitutes actionable hostile-environment sexual harassment in the workplace. This Comment argues that a reasonable-girl standard, which is an amalgamation of reasonable-woman precedent and the reasonable child from tort law, is consistent with previous U.S. Supreme Court interpretations of Title IX. This Comment further contends that courts should adopt the reasonable-girl standard because it will further girls' equal educational opportunities, thereby serving the goal of Title IX.

In February of 2000, a thirteen-year-old girl in Federal Way, Washington, filed a complaint against Kilo Junior High School for failing to prevent a classmate from repeatedly accosting her in the school's hallways and reaching under her clothing to grope her.[1] The school had responded to the girl's complaint of harassment by having her confront her alleged perpetrator, whom she feared, and eventually suggesting that she leave the school district, which she did.[2] The school never punished the perpetrator.[3] The experience caused the girl's grades to suffer and left her feeling as though she had no friends.[4]

This thirteen-year-old girl is not alone. Despite studies chronicling the prevalence of sexual harassment in schools and its adverse effects on girls, including reduced academic performance and damaged emotional well-being,[5] the U.S. Supreme Court has not yet established an objective standard that schools and courts can use to determine what types of conduct rise to the level of sexual harassment. Consequently, Kilo Junior

1. Nancy Bartley & Lisa Pemberton-Butler, *Student's Suit Blames School for Harassment*, SEATTLE TIMES, Jan. 19, 2000, at B1.

2. *Id.*

3. *Id.*

4. *Id.*

5. *See infra* Part I.A.

High School's administrators had no guidance to determine whether the conduct the thirteen-year-old girl complained of amounted to sexual harassment for which the school could become liable.

In some circuits, the courts of appeals have been one step ahead of the U.S. Supreme Court in adopting a reasonableness standard to aid in determining what conduct constitutes hostile-environment sexual harassment. In the workplace context, these courts have adopted a gender-specific reasonable-woman standard, rather than a gender-neutral reasonable-person standard, in determining what is objectively hostile or abusive.[6] Under Title IX, a statute that prohibits sex discrimination in schools, the U.S. Supreme Court has determined that sexual harassment is a form of sex discrimination and thus violates the statute.[7] In *Davis v. Monroe County Board of Education*,[8] the U.S. Supreme Court held that schools may be held liable for student-to-student hostile-environment sexual harassment.[9] However, by focusing the inquiry on whether a school has taken appropriate steps to remedy the harassment rather than on the type of conduct that amounts to sexual harassment in schools, the *Davis* Court neglected to establish a reasonableness standard to determine whether allegedly harassing conduct is objectively offensive and thus amounts to actionable hostile-environment sexual harassment.[10]

This Comment examines the standards of reasonableness by which student-to-student sexual harassment should be evaluated when girls in junior high and high school are the victims and boys are the

6. Ellison v. Brady, 924 F.2d 872, 878–79 (9th Cir. 1991).

7. *See* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1992).

8. 526 U.S. 629 (1999).

9. *Id.* at 650. There is great disagreement regarding what conduct constitutes hostile-environment sexual harassment. This Comment adopts the U.S. Supreme Court's definition of sexual harassment, meaning conduct such as comments, gestures, or unwelcome touching that is so severe, pervasive, and objectively hostile or abusive that it limits the victim's access to equal opportunity. *See, e.g.*, Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 78 (1998); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993). Different courts of appeals have found hostile-environment sexual harassment to stem from different conduct. *Compare* Torres v. Pisano, 116 F.3d 625, 632–33 (2d Cir. 1997) (holding that calling woman "dumb cunt" and telling her to "stay home, go on welfare, and collect food stamps like the rest of the 'spics'" constituted hostile environment), *and Ellison*, 924 F.2d at 878 (holding that continuing to send love letters despite request to stop constituted hostile environment), *with* DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 596 (5th Cir. 1995) (holding that derogatory comments about women in general and plaintiff in particular published in monthly workplace newsletter could not amount to hostile-environment sexual harassment), *and* Rabidue v. Osceola Ref. Co., 805 F.2d 611, 622 (6th Cir. 1986) (holding that pornographic comments and pictures that sexually objectified plaintiff did not create hostile environment).

10. *See Davis*, 526 U.S. at 650.

perpetrators.[11] Part I of this Comment provides an overview of sexual harassment in schools. Part II explores previous judicial interpretations of Title IX of the Education Amendments of 1972. Part III discusses competing reasonableness standards that courts use to determine what conduct is objectively offensive—the reasonable-person standard, the reasonable-woman standard, and the reasonable-person-in-the-plaintiff's-position standard—and the U.S. Supreme Court's position regarding these standards. Part IV argues that courts should adopt a reasonable-girl standard when determining the objective offensiveness of harassing conduct under Title IX because this standard both comports with previous U.S. Supreme Court interpretations of the statute and best serves the purposes of the statute. This Comment concludes that the reasonable-girl standard would put girls on an even playing field with boys with regard to educational opportunities.

I. SEXUAL HARASSMENT IN SCHOOLS

Statistics show that sexual harassment in schools is prevalent and has many negative effects on girls. In *Davis*, the U.S. Supreme Court addressed this problem by finding that schools that allow girls to continue to be harassed by their peers may be liable in private actions brought under Title IX. *Davis* extended case law that had found that individuals may bring private actions against schools when they are deliberately indifferent to known sexual harassment to include school liability for student-to-student sexual harassment.

A. *The Prevalence and Effects of Sexual Harassment in Schools*

Empirical evidence collected throughout the past decade demonstrates that sexual harassment in schools is prevalent and that girls are common victims of sexual violence. Half of the high school girls surveyed in one study reported having been sexually harassed in school.[12] A study of junior high school students found that 17% reported having been

11. The "reasonable-girl standard" is one standard that may be used to determine whether alleged harassment is objectively offensive such that it may amount to sexual harassment. Although the reasonable-girl standard may be applicable in same-sex harassment cases, or in cases where boys are the victims and girls are the perpetrators, these situations are beyond the scope of this Comment. The gender issues at play in those two instances could affect the type of standard that would be appropriate.

12. Susan Fineran et al., *Teenage Peer Sexual Harassment: Implications for Social Work Practice in Education*, 43 SOC. WORK 55, 56 (1998).

sexually coerced by a teenager, 19% reported feeling pressure from their friends to have intercourse, 7% reported having been sexually coerced by an adult, and 6% reported having sexually coerced someone else.[13] Another study found that 7% of respondents, primarily women between the ages eighteen and twenty-two, had experienced at least one episode of involuntary sexual intercourse during childhood or adolescence, while less than one-half of these experiences occurred before age fourteen.[14] The majority of these unwanted sexual experiences happened to girls between the ages of thirteen and sixteen.[15]

Sexual harassment in schools can be devastating to girls both academically and emotionally. Empirical evidence focused on high school students demonstrates that sexual harassment can lead to absenteeism, decreased quality of schoolwork, skipping or dropping classes, lower grades, loss of friends, tardiness, and truancy, all of which may result in ineligibility for specific colleges or merit scholarships and loss of recommendations for awards, colleges, or jobs.[16] Furthermore, early adolescents who were less successful academically were more likely to have been coerced sexually.[17]

B. Davis v. Monroe County Board of Education *Extended School Liability for Sexual Harassment to Include Liability for Student-To-Student Sexual Harassment*

In *Davis*, the U.S. Supreme Court held that a school could be liable under Title IX for allowing known student-to-student harassing conduct to occur.[18] The plaintiff in *Davis* was a fifth-grade girl. Another student had touched and rubbed up against her breasts and genital area, and told her vulgar statements such as "I want to get in bed with you" and "I want to feel your boobs."[19] The girl's mother complained to the school principal, but the school took no disciplinary action; meanwhile the harassment continued for months, stopping only when the harasser was

13. Timothy R. Jordan et al., *Junior High School Students' Perceptions Regarding Nonconsensual Sexual Behavior*, 68 J. SCH. HEALTH 289, 291 (1998).

14. Kristin Anderson Moore et al., *Nonvoluntary Sexual Activity Among Adolescents*, 21 FAM. PLAN. PERSP. 110, 111 (1989).

15. Pamela I. Erickson et al., *Unwanted Sexual Experiences Among Middle and High School Youth*, 12 J. ADOLESCENT HEALTH 319, 321 (1991).

16. Fineran et al., *supra* note 12, at 55.

17. Jordan et al., *supra* note 13, at 290.

18. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 633 (1999).

19. *Id.*

charged with sexual battery.[20] The Court concluded that the school had created a hostile environment for the girl by allowing the harassment to continue for months and found that the school could be held liable under Title IX for its deliberate indifference to the harassment.[21]

Davis extended prior cases holding schools liable for inaction in the face of known harassment. In *Franklin v. Gwinnett County Public Schools*,[22] the plaintiff was a student who had been subjected by a teacher to continued sexual harassment that included sexually oriented conversations, forced kissing, and coercive intercourse.[23] The school district allegedly became aware of the teacher's misconduct and investigated but took no remedial action until the victim filed the lawsuit.[24] The U.S. Supreme Court found that under Title IX, the statute that prohibits sex discrimination in schools, sexual harassment may amount to sex discrimination and held the school liable for the teacher's actions.[25] The plaintiff in *Gebser v. Lago Vista Independent School District*[26] was an eighth-grade student when her teacher began making sexually suggestive comments to her.[27] The school responded to complaints of these comments by telling the teacher to be careful about his classroom comments.[28] Nevertheless, the teacher initiated sexual contact with the plaintiff, kissed and fondled her, and later engaged in sexual intercourse with her, often during class time.[29] The Court concluded that schools may only be held liable for taking inadequate remedial action when they have been informed of the harassment.[30]

II. JUDICIAL INTERPRETATION OF TITLE IX IN LIGHT OF LEGISLATIVE HISTORY, TITLE VI, AND TITLE VII

The U.S. Supreme Court has examined Title IX sexual harassment in schools from three perspectives. First, the fact that Title IX is a contract

20. *Id.* at 634.
21. *See id.* at 653–54.
22. 503 U.S. 60 (1992).
23. *Id.* at 63.
24. *Id.* at 64.
25. *See id.* at 75.
26. 524 U.S. 274 (1998).
27. *Id.* at 277–78.
28. *Id.* at 278.
29. *Id.*
30. *See id.* at 290.

between schools and the federal government is the foundation on which all U.S. Supreme Court interpretations of the statute are built.[31] Second, the Court has analogized Title IX to Title VI of the 1964 Civil Rights Act,[32] interpreting Title IX as a contractual agreement that not only explicitly calls for administrative remedies, but also implicitly allows private causes of action when schools act with deliberate indifference to the rights of students by taking clearly unreasonable remedial actions.[33] Lastly, the Court has relied on Title VII of the 1964 Civil Rights Act[34] when interpreting sex discrimination under Title IX to include hostile-environment sexual harassment when a school has actual notice of the harassment.[35]

A. *Title IX Is a Binding Contractual Agreement that Prohibits Schools from Discriminating on the Basis of Sex*

Title IX[36] of the 1972 Education Amendments[37] is a contract between schools and the federal government that conditions federal funding on a promise to end sex discrimination in schools. This statute prohibits schools from excluding, on the basis of sex, students from the participation in or benefits of any federally funded educational activity.[38] Implementing regulations provide that a school district receiving federal funding shall not "otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity."[39] Courts have also used Title IX to remedy broad-based discrimination in admissions and athletic programs.[40]

Title IX's contractual nature controls when and how schools may become liable in private actions. Enacted pursuant to Congress's

31. *See, e.g.*, Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 640 (1999); *Gebser*, 524 U.S. at 286; Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1992); Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979).

32. 42 U.S.C. § 2000d (1994).

33. *See Davis*, 526 U.S. at 648.

34. 42 U.S.C. § 2000e.

35. *See Davis*, 526 U.S. at 648.

36. 20 U.S.C. § 1681 (1994).

37. Pub. L. No. 92-318, 86 Stat. 373 (codified at 20 U.S.C. § 1681).

38. 20 U.S.C. § 1681(a).

39. 34 C.F.R. § 106.31(b)(7) (1999).

40. *See, e.g.*, Favia v. Ind. Univ. of Penn., 7 F.3d 332, 343-44 (3d Cir. 1993) (holding that university receiving federal funding must make same amount of money available to women's and men's athletic programs); Berkelman v. S.F. Unified Sch. Dist., 501 F.2d 1264, 1269-70 (9th Cir. 1974) (holding that school district may not apply higher admission standards to girls than to boys).

spending powers,[41] Title IX makes the initial and continued provision of federal funding for educational programs and activities contingent upon the schools' promise not to discriminate on the basis of sex.[42] The Court has concluded that because Title IX is a contract, rather than a broad-based remedial measure such as Title VII, liability may not arise under it unless educational institutions have been notified that they may become liable.[43] Contractual statutes such as Title IX, enacted pursuant to the Spending Clause,[44] prohibit only intentional discrimination.[45] For a school to intentionally violate Title IX when it is not the actual harasser, it must have actual knowledge of the harassment, know what standard to use to determine whether the harassment rises to the level of discrimination,[46] and ignore harassment that amounts to a violation of the statute such that it allows discrimination against the victim.[47] In the administrative-remedy context, this means that the Department of Education (DOE) must notify a school of its violation of the statute and offer the school an opportunity to remedy the situation before remedies are imposed upon it.[48] In the private-action context, this means that schools may be liable for damages only when they had actual notice of discrimination, had an opportunity to remedy the discrimination, and were deliberately indifferent to known discrimination.[49]

Only deliberate indifference will support monetary damages in private Title IX actions.[50] To make schools liable for their own inaction, the Court in *Gebser* held schools liable for allowing discrimination to

41. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 287 (1998).

42. *See id.* at 286.

43. *See id.* at 290.

44. U.S. CONST., art. I, § 8, cl. 1.

45. *See* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 74–75 (1992).

46. When school administrators investigate and resolve claims of sexual harassment of students, they are guided by the Department of Education (DOE) Office of Civil Rights Guidance on Sexual Harassment, which has been cited with approval by the U.S. Supreme Court, applies to students at every level of education, and is intended to inform officials of the standards and procedures that schools are expected to follow under Title IX. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,034 (March 13, 1997); *see also* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 651 (1999). Although implementation of the standard proposed by this Comment would require a change in the standard at some regulatory level before a school could become liable under the new standard, details regarding implementation are beyond the scope of this Comment.

47. *See Gebser*, 524 U.S. at 287.

48. *See id.* at 288.

49. *See Davis*, 526 U.S. at 643–44.

50. *Gebser*, 524 U.S. at 290. Monetary damages include both punitive and compensatory damages. *See id.* at 285–86.

continue despite actual notice of the discrimination.[51] The Court determined that agency liability of any kind, like that arising under Title VII when a party has constructive knowledge and thus should have known that discrimination was taking place, is untenable under Title IX given the statute's contractual nature and the notice requirement that flows from it.[52] Only when schools' intentional discrimination through deliberate indifference subjects victims of discrimination to further harassment is the threshold of action met.[53] For example, in *Davis* the school became liable by refusing to take any remedial action in response to known acts of harassment such as the persistent unwanted groping and fondling of a fifth-grade girl.[54]

The "clearly unreasonable" standard governs the determination of deliberate indifference.[55] Courts will deem school administrators' actions or lack thereof deliberately indifferent only if their responses to harassment that is severe, pervasive, and objectively offensive are clearly unreasonable in light of the known circumstances.[56] While the U.S. Supreme Court has not clarified its definition of this standard in the Title IX context, it has explained why it uses the standard and how it expects courts to utilize it.[57] In her majority opinion in *Davis*, Justice O'Connor stated that the clearly unreasonable standard would allow administrators considerable discretion to determine what remedial response was appropriate, because the judiciary should "refrain from second guessing the disciplinary decisions made by school administrators."[58] She emphasized that this standard is not one of "mere reasonableness" and that courts should be able to determine for themselves on motions for directed verdict whether the school's response was clearly unreasonable.[59] Finally, she stated that this standard would allow sufficient flexibility for schools of different types to address harassment

51. *See id.* at 285.

52. *See id.* at 287–88.

53. *Id.* at 290.

54. *See Davis*, 526 U.S. at 653–54.

55. *Id.* at 648–49.

56. *Id.* at 648 ("School administrators will continue to enjoy the flexibility they require so long as funding recipients are deemed 'deliberately indifferent' to acts of student-on-student harassment only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.").

57. *See id.* at 648–49.

58. *Id.*

59. *Id.* at 649.

commensurate with the level of control they have over their students.[60] One method of showing that the school's response was clearly unreasonable under Title IX is to demonstrate, as the *Davis* plaintiff did, that by failing to respond in any way to her complaints of sexual harassment the school board in effect subjected the student to continued discrimination.[61] The Court has not yet decided a case in which the plaintiffs alleged that a school responded, but did so in a clearly unreasonable manner.

B. *Liability Arises Similarly Under Both Title IX and Title VI*

Because Congress patterned Title IX after Title VI and intended both statutes to end discrimination in schools,[62] courts have looked to Title VI liability standards to determine when liability arises under Title IX.[63] Title VI forbids the use of federal funds in programs that discriminate on racial grounds.[64] Title VI has both an administrative remedy, which authorizes the DOE to investigate and force educational institutions to comply with the statute or risk the loss of federal funding, and a private remedy, which makes schools liable to victimized students for allowing race discrimination to continue.[65] A school becomes liable under Title VI when there is a racially hostile environment of which the district has notice but fails adequately to remedy.[66]

In addition to the potential loss of federal funding, educational institutions also face liability for monetary damages under Title IX when sex discrimination occurs in their programs and activities. In *Cannon v. University of Chicago*,[67] the U.S. Supreme Court held that under Title IX victims of such sex discrimination could bring a private cause of action against educational institutions.[68] The Court's decision rested on four grounds. First, the Court noted that the legislative history of Title IX indicates congressional approval of Title VI's statutory enforcement

60. *Id.*

61. *Id.* at 646–47, 654.

62. *See* 117 CONG. REC. 39,252 (1971); 110 CONG. REC. 7062 (1964); 110 CONG. REC. 1540 (1964).

63. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 287 (1998).

64. 42 U.S.C. § 2000d (1994); Lau v. Nichols, 414 U.S. 563, 566 (1974) (citing 42 U.S.C. § 2000d).

65. *See* Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1033 (9th Cir. 1998).

66. *Id.*

67. 441 U.S. 677 (1979).

68. *See id.* at 705–08.

procedures, which include a private remedy.[69] Second, because the Court had already interpreted Title VI as allowing private causes of action, the Court observed that the similarities between Titles VI and IX supported interpreting the latter as giving rise to private remedies.[70] Third, the Court noted that the administrative procedure for cutting off federal financial support for institutions was an insufficient remedy for victims of sex discrimination.[71] Finally, the Court reasoned that a private remedy would enhance the efficiency of the enforcement mechanism of an exclusively administrative scheme because the burden of proof for a single plaintiff—that a violation of the statute occurred—is much lower than the "pervasive discrimination" required for agency action.[72]

C. *Courts Have Looked to Title VII Jurisprudence To Define Sex Discrimination Under Title IX*

Courts often look to Title VII case law to determine what behaviors Congress meant to proscribe when it stated that "sex discrimination" was a violation of Title IX. In the Title IX context, courts rely on Title VII precedent holding that sexual harassment is a form of sex discrimination, defining sexual harassment as conduct that is severe, pervasive, and objectively offensive.[73] Further, the Court cited Title VII precedent when finding that Title IX protects subordinates and students from harassment by superiors and peers.[74]

While courts look to Title VI to determine standards of liability under Title IX, they also look to Title VII to determine what conduct amounts to sex discrimination under Title IX. Title VII prohibits sex discrimination in the employment context.[75] Courts have interpreted this statute as prohibiting both quid pro quo sexual harassment[76] and hostile-

69. *Id.* at 706 n.40; *see also* 118 CONG. REC. 5807 (1972); 118 CONG. REC. 5806–07 (1972); 117 CONG. REC. 30,408 (1971).

70. *See Cannon*, 441 U.S. at 704–05.

71. *Id.*

72. *Id.* at 705.

73. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 650–51 (1999) (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986)); Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1992).

74. *See Davis*, 526 U.S. at 651; *Franklin*, 503 U.S. at 75.

75. 42 U.S.C. § 2000e (1999).

76. Quid pro quo sexual harassment under Title VII involves a supervisor offering an employee tangible goods such as job benefits in exchange for sexual favors. *See, e.g.*, Henson v. City of Dundee, 682 F.2d 897, 908–09 (11th Cir. 1982) (finding that employer may not require employee to exchange sexual favors for job benefits). Quid pro quo sexual harassment is the easier form of sexual

environment sexual harassment[77] when the harassment interferes with the victim's working conditions such that she no longer has equal opportunity to work.[78] In *Meritor Savings Bank, FSB v. Vinson*,[79] the U.S. Supreme Court first recognized an action under Title VII for hostile-environment sexual harassment, defining it as conduct by the employer that is sufficiently severe or pervasive to alter the victim's conditions of employment.[80] Thus, only that sexual harassment that alters the conditions of employment is actionable under Title VII, whereas harassment that does not rise to the level of interfering with the conditions of employment is not actionable.[81] The Court justified this recognition of hostile-environment sexual harassment on the same grounds that it has used to recognize the need to prevent racial harassment, stating that requiring a man or woman to "'run a gauntlet of sexual abuse in return for the privilege of being allowed to work can . . . be as demeaning and disconcerting as the harshest of racial epithets.'"[82]

The U.S. Supreme Court and some federal circuit courts have looked to Title VII case law to determine whether sexual harassment has occurred under Title IX.[83] In *Davis*, the Court defined hostile-environment sexual harassment as conduct that is severe, pervasive, and objectively offensive such that it undermines the victim's educational experience and frustrates the purpose of Title IX: to afford everyone the benefit of equal access to education.[84] By adopting the *Meritor* definition of sex discrimination for Title IX purposes, the *Davis* Court equated sex

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harassment to identify because of its obvious harm to the plaintiff. *See* Jolynn Childers, Note, *Is There a Place for a Reasonable Woman in the Law? A Discussion of Recent Developments in Hostile Environment Sexual Harassment*, 42 DUKE L.J. 854, 860 (1993). Further, it is generally agreed on that this type of harassment is objectionable. Sharon J. Bittner, Note, *The Reasonable Woman Standard After* Harris v. Forklift Systems, Inc.*: The Debate Rages On*, 16 WOMEN'S RTS. L. REP. 127, 128 (1994).

77. *See generally supra* note 9.

78. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65–67 (1986).

79. 477 U.S. 57 (1986).

80. *Id.* at 67. Although the Court later eliminated the distinction between quid pro quo and hostile-environment sexual harassment in the employment context, *see* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 754 (1998), Faragher v. City of Boca Raton, 524 U.S. 775, 802 (1998), this Comment does not rely on or reference a distinction between the two types of sexual harassment.

81. *See Meritor*, 477 U.S. at 67.

82. *Id.* (quoting Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).

83. *See* Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 75 (1992); Oona, R.-S.- v. McCaffrey, 143 F.3d 473, 477 (9th Cir. 1998).

84. *See supra* notes 79–82.

discrimination with sexual harassment.[85] The *Davis* Court concluded that a hostile environment can be created by verbal as well as physical harassment.[86] In addition, the Ninth Circuit has explicitly concluded that "Title VII standards apply to hostile environment claims under Title IX,"[87] using Title VII precedent to interpret sex discrimination under Title IX.

The U.S. Supreme Court and the Ninth Circuit have also cited Title VII case law as precedent for protecting students from harassment by a superior. In *Franklin*, the Court established that a school district can be liable for damages in cases involving a teacher's sexual harassment of a student.[88] The Court reasoned that the teacher-student relationship in the educational context is analogous to the supervisor-subordinate relationship in the employment discrimination context.[89] The Court relied on *Meritor* as persuasive authority for imposing liability on the school district.[90] By explaining how school liability arises, the *Franklin* Court also clarified its reference to *Meritor* in *Gebser*, where it held that a school district is not liable for damages in a teacher-student sexual harassment case "unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures . . . has actual knowledge of discrimination . . . and fails adequately to respond."[91] In *Oona, R.-S.- v. McCaffrey*,[92] the Ninth Circuit held that school districts may be held liable for teacher-student harassment when they fail to remedy a known hostile environment by failing to supervise the teacher.[93] In all of these cases, the courts ultimately found that schools may be held liable for failing to remedy sexual harassment.[94]

Moreover, the U.S. Supreme Court and the Ninth Circuit have found support in Title VII precedent when concluding that Title IX, like Title VII, also protects victims from peer hostile-environment sexual

85. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 650–51(1999) (citing *Meritor*, 477 U.S. 57; Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75 (1998)).

86. *See Davis*, 526 U.S. at 650–51.

87. *Oona*, 143 F.3d at 477.

88. *Franklin*, 503 U.S. at 75.

89. *Id.*

90. *Id.*

91. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998).

92. 143 F.3d 473 (9th Cir. 1998).

93. *Id.* at 477–78.

94. *See Gebser*, 524 U.S. at 478; *Franklin*, 503 U.S. at 63–64, 76; *Oona*, 143 F.3d at 477–78.

harassment. The *Davis* Court again cited *Meritor* for the proposition that school officials' potential liability for failure to remedy known peer hostile-environment sexual harassment under Title IX is triggered only when a student's conduct is so "severe, pervasive, and objectively offensive" as to deprive the victim of the educational opportunities provided by the school.[95] In *Oona*, the Ninth Circuit cited *Ellison v. Brady*,[96] a Title VII hostile-environment sexual harassment case, as authority for finding that school districts are liable under Title IX for not remedying peer hostile-environment sexual harassment in schools.[97] Thus, both the U.S. Supreme Court and the Ninth Circuit look to Title VII precedent when determining what conduct amounts to peer hostile-environment sexual harassment.

III. COURTS DO NOT AGREE ON A SINGLE REASONABLENESS STANDARD TO DETERMINE WHETHER A VICTIM EXPERIENCED SEXUAL HARASSMENT

Because the *Davis* Court did not adopt a specific reasonableness standard to be used under Title IX to determine whether conduct is objectively offensive, the historical debate among courts and legal commentators regarding which reasonableness standard best aids in the objective evaluation of harassing conduct continues in the Title IX context. Some courts use the traditional reasonable-person standard to determine whether harassing conduct was objectively offensive.[98] In reaction to what courts and commentators have identified as the failings of the reasonable-person standard, some courts apply a reasonable-woman standard. In *Harris v. Forklift Systems, Inc.*[99] and *Oncale v. Sundowner Offshore Services, Inc.*,[100] the U.S. Supreme Court could have

95. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 650 (1999) ("Having previously determined that 'sexual harassment' is 'discrimination' in the school context under Title IX, we are constrained to conclude that student-on-student sexual harassment . . . can likewise rise to the level of discrimination actionable under the statute.").

96. 924 F.2d 872 (9th Cir. 1991).

97. *Oona*, 143 F.3d at 477 ("We [have] expressly recognized that hostile environments include peer harassment in *Ellison v. Brady* [924 F.2d 872 (9th Cir. 1991)] . . . . Accordingly, we hold that the defendants are not entitled to immunity for their failure to take steps to remedy the hostile environment created by the male students in Oona's class.").

98. *See, e.g.*, DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 594 (5th Cir. 1995).

99. 510 U.S. 17 (1993).

100. 523 U.S. 75 (1998).

squarely resolved the question of which standard applies. Instead, the decisions in those cases caused more rather than less confusion.

A. *The Reasonable-Person Standard*

The evolution of the reasonable-person standard, which can be traced to the reasonable-man standard, originated in English common law as an objective standard to which courts compared litigants' actions.[101] When using this standard, courts occasionally consider certain defining characteristics of the person whose conduct is being evaluated. For example, courts have fashioned standards for a contextualized reasonable man,[102] and in cases utilizing a reasonable-child standard when they find that a child would not have interpreted facts in the same way as an adult.[103] Although courts have resisted altering the reasonable-man standard in order to create incentives for people to be careful,[104] they have sometimes raised the standard by requiring defendants to consider the unique perspective of the person being harmed.[105] Recently, courts have adopted gender-neutral language, changing the reasonable-man standard to that of the reasonable person,[106] and have applied the standard to men and women alike.[107]

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101. *See, e.g.*, Vaughan v. Menlove, 132 Eng. Rep. 490, 491 (1837). This Comment recognizes the difference between judging the reasonableness of a defendant's conduct, as occurs in torts cases, and judging the reasonableness of a plaintiff's response to some conduct, as occurs in discrimination cases. Instead, however, this Comment considers whether the conduct of the person who is being judged is objectively offensive.

102. *See, e.g.*, Roberts v. Louisiana, 396 So. 2d 566, 567 (La. Ct. App. 1981) (establishing standard for reasonable man with physical disability); Cordas v. Peerless Transp. Co., 27 N.Y.S.2d 198, 201 (1941) (reasonable man in emergency); Heath v. Swift Wings, Inc., 252 S.E.2d 526, 529 (N.C. Ct. App. 1979) (reasonable expert); Roth v. Union Depot Co., 13 Wash. 525, 545, 43 P. 641, 647 (1896) (reasonable child of same age).

103. *Roth*, 13 Wash. at 545, 43 P. at 647.

104. *See* RESTATEMENT (SECOND) OF TORTS §§ 283B(4), 895J(a) (1965); *see also* Johnson v. Lambotte, 363 P.2d 165, 166 (Colo. 1961); Ellis v. Fixico, 50 P.2d 162, 164 (Okla. 1935) (holding mentally ill people to same standard of care as mentally fit people).

105. *See* Scott v. Bradford, 606 P.2d 554, 558 (Okla. 1979) (holding that, in informed-consent case, doctor must anticipate what reasonable patient would want to be informed of); *see also* Nickerson v. Hodges, 84 So. 37, 39 (La. 1920) (holding that defendant should have anticipated that plaintiff would experience emotional distress because of his actions).

106. *Compare* RESTATEMENT (SECOND) OF TORTS § 291 (1965) (utilizing "reasonable man" language), *with* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (utilizing "reasonable person" language).

107. *See, e.g.*, DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 594 (5th Cir. 1995) (applying reasonable-person standard to woman).

Courts have also utilized the reasonable-person standard as the generic standard by which women's interpretations of discrimination are judged to determine whether their reaction was reasonable. For example, in *DeAngelis v. El Paso Municipal Police Officers Association*,[108] the Fifth Circuit found, under the reasonable-person standard, that when an anonymous co-worker wrote harassing columns in a work newsletter that harassed a female colleague by questioning her competence, her looks, and her commitment to being a police officer because she was a woman, this conduct would not be offensive to a reasonable person.[109] The court in *Rabidue v. Osceola Refining Co.*[110] used the reasonable-person standard to compare purportedly harassing conduct to what the court held to be a societal norm that accepted the objectification of women through pornography and the media in general.[111]

Some courts have criticized a purely objective reasonable-person standard, particularly in the context of sex discrimination case law.[112] This critique has focused on the reasonable-person standard's impact on female victims of male harassment because women are largely the victims of sex discrimination.[113] In *Steiner v. Showboat Operating Co.*,[114] the Ninth Circuit found that there is a perception gap between men and women on the subject of sexual harassment, and that "words from a man to a man are differently received than words from a man to a woman."[115] The Ninth Circuit has also criticized the reasonable-person standard as assessing reasonableness from the harasser's perspective, rather than the victim's, thereby downplaying the adverse effect of offensive conduct.[116]

A prominent commentator has also critiqued the reasonable-person standard, claiming that it reifies a sexist community norm to which the facts of the cases are compared.[117] Professor Nancy Ehrenreich has

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108. 51 F.3d 591 (5th Cir. 1995).

109. *See id.* at 594–96.

110. 805 F.2d 611 (6th Cir. 1986).

111. *See id.* at 620–21.

112. *See, e.g.*, Torres v. Pisano, 116 F.3d 625, 632 (2d Cir. 1997); Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 965 (8th Cir. 1993); Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991).

113. *See Ellison*, 924 F.2d at 879 (citing Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1459 (1984)).

114. 25 F.3d 1459 (9th Cir. 1994).

115. *Id.* at 1464.

116. *Ellison*, 924 F.2d at 878.

117. *See* Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1204–05 (1990) (discussing Rabidue v. Osceola Ref. Co., 805 F.2d 611, 621 (6th Cir. 1986)).

argued that a community norm masks women's lack of power over what norm is adopted and what aspects of life fit into that norm.[118] She contends that the reasonable-person standard allows judges to clothe their decisions in an aura of neutrality while making decisions based on subjective ideals.[119] Professor Ehrenreich argues that the *Rabidue* court based its conclusion on the false premise that societal norms are egalitarian and nondiscriminatory.[120] Further, cloaking its decision in such norms enabled the *Rabidue* court to ground its rationale in society's view of acceptable conduct, thus avoiding a politically charged decision about what kinds of conduct constitute harassment.[121]

B. *The Reasonable-Woman Standard*

Courts view harassment from a gender-specific perspective when they use the reasonable-woman standard.[122] Although men and women might agree that some blatant conduct constitutes harassment, difficult cases will produce some disagreement.[123] Given this difference in perspective and given statistics indicating that women are more often the victims of sexual violence,[124] several circuits have adopted the reasonable-woman standard to determine when conduct rises to the level of hostile-environment sexual harassment in the workplace.[125]

In *Ellison v. Brady*,[126] the Ninth Circuit followed the Third, First, and Sixth Circuits[127] when it held that the determination of what conduct is

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118. *See id.* (noting that courts "implicitly assume that sexual discrimination is merely deviant behavior by individuals, rather than a structural problem inherent in American ideology and institutions" by focusing on whether harassing conduct was generally acceptable, "rather than . . . [on] whether it perpetuated conditions of inequality").

119. *See id.* at 1189–90 ("[R]elativism translates into neutrality, a refusal to ground judicial decisions on personal preferences for particular perspectives or political judgments about the importance of certain group interests.").

120. *See id.* at 1205.

121. *See id.*

122. *E.g.*, Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 965 (8th Cir. 1993); Ellison v. Brady, 924 F.2d 872, 880–81 (9th Cir. 1991).

123. *See* Elizabeth A. O'Hare & William O'Donohue, *Sexual Harassment: Identifying Risk Factors*, 27 ARCHIVES SEXUAL BEHAV. 561, 574 (1998). *Compare* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 634, 653–54 (1999) (agreeing that harassment amounting to criminal assault was deplorable), *with* DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 593 (5th Cir. 1995) (finding gender-based harassment not objectively offensive).

124. *Ellison*, 924 F.2d at 879.

125. Torres v. Pisano, 116 F.3d 625, 632 (2d Cir. 1997); *Burns*, 989 F.2d at 965; *Ellison*, 924 F.2d at 880–81; Andrews v. City of Phila., 895 F.2d 1469, 1485 (3d Cir. 1990); Lipsett v. Univ. of P.R., 864 F.2d 881, 906 (1st Cir. 1988); Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987).

126. 924 F.2d 872 (9th Cir. 1991).

offensive should take into consideration only conduct that a reasonable woman would consider offensive for Title VII purposes.[128] The *Ellison* court articulated three grounds supporting the reasonable-woman standard. First, it reasoned that this standard "ensures that courts will not sustain ingrained notions of reasonable behavior [protecting the] offender."[129] Second, the court held that the reasonable-woman standard better prevents the perpetuation of stereotypes that may be ingrained in popular culture and thus better serves the purpose of Title VII.[130] Finally, because Title VII is not based on the perpetrator's fault, but on employer action, the court determined that the reasonableness standard used need not focus on the motivation of the harassing action, but could focus, as does the reasonable-woman standard, on the harassment's effect on women.[131]

Even though the reasonable-woman standard has resulted in more findings of hostile-environment sexual harassment than has the reasonable-person standard,[132] criticism of the standard abounds.[133] The Fifth Circuit has found that the reasonable-woman standard is a preferential one.[134] Further, one critic has argued that the reasonable-woman standard does not empower men to prevent possibly harassing conduct because there is no way men can discern what a reasonable woman would find offensive.[135] The reasonable-person standard, the critic claims, may better allow men to prevent their own harassing conduct because it incorporates their viewpoint, thereby enabling them to recognize the conduct as harassing.[136] This critic argues that use of the

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127. *See Andrews*, 895 F.2d at 1485; *Lipsett*, 864 F.2d at 906; *Yates*, 819 F.2d at 637.

128. *Ellison*, 924 F.2d at 880; *see also* Brennan v. Metro. Opera Ass'n Inc., 192 F.3d 310, 320–21 (2d Cir. 1999) (Newman, J., dissenting in part) (comparing sex discrimination to race discrimination and stating that because most white people might not know that some remarks are offensive to most black people, one can see why "[t]he perspective of the reasonable 'person' might turn out to be the very stereotypical views that Title VII is designed to outlaw").

129. *Ellison*, 924 F.2d at 880–81 (citing *Lipsett*, 864 F.2d at 898 (quoting Rabidue v. Osceola Ref. Co., 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., dissenting))).

130. *Id.* at 881.

131. *Id.* at 880.

132. Childers, *supra* note 76, at 894 n.133.

133. *See, e.g.*, DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 593 (5th Cir. 1995); Naomi R. Cahn, *The Looseness of Legal Language: The Reasonable-Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1417 (1992); Bittner, *supra* note 76, at 132.

134. *DeAngelis*, 51 F.3d at 593 (concluding that reasonable-woman standard would "create incentives for employers to bend over backwards in women's favor for fear of lawsuits").

135. *See* Bittner, *supra* note 76, at 132.

136. *Id.*

reasonable-woman standard conveys the message that sexual harassment is not a serious issue, important to both men and women, but that courts will remedy it only to placate oversensitive women.[137] Those who criticize the reasonable-woman standard share the belief that the reasonable-person standard is a non-preferential standard that aims to enforce equality rather than preference.[138]

C. Harris v. Forklift Systems, Inc. *Does Not Resolve the Circuit Split Regarding the Appropriate Reasonableness Standard*

The U.S. Supreme Court first broached the issue of reasonableness in the workplace discrimination context in its *Harris* decision in 1993.[139] However, the Court granted certiorari in *Harris* to determine only whether proof of psychological harm was necessary to prove subjective offensiveness[140] and thus did not directly address the standard to prove objective offensiveness. The Court stated in dicta that the standard used to determine whether conduct was abusive or hostile must be objective based on what the reasonable person would find hostile or abusive given the totality of the circumstances.[141] Although the Court's reference to all of the circumstances suggested a subjective component to the standard, it did not address the use of the reasonable-woman standard, even though the parties briefed and argued this issue.[142] The Court failed explicitly to include or exclude gender as one of the circumstances important to determining objective offensiveness.[143] It thus failed to elaborate on the extent to which courts can take gender into account, even though it was aware of the circuit split on this issue.[144]

After *Harris*, one circuit changed from the reasonable woman to the reasonable-person standard,[145] another refused to adopt the reasonable-woman standard,[146] and others applied a reasonable-person-in-the-

137. *See id.*

138. *DeAngelis*, 51 F.3d at 593; Bittner, *supra* note 76, at 132.

139. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

140. *Id.* at 20.

141. *Id.* at 21–23.

142. *See* Brief for Petitioner at 34–35, *Harris*, 510 U.S. 17 (1993) (No. 92-1168); Transcript at 12, *Harris*, 510 U.S. 17 (No. 92-1168).

143. *See* Brief for Petitioner at 35, *Harris*, 510 U.S. 17 (No. 92-1168).

144. *See id.*

145. *See* Richardson v. N.Y. State Dep't of Corr. Serv., 180 F.3d 426, 436–37 n.3 (2d Cir. 1999).

146. *See* DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591, 593 (5th Cir. 1995).

plaintiff's-position standard rather than a reasonable-woman standard.[147] The Eighth and Fifth Circuits have elected to apply the reasonable-person standard because they believe *Harris* requires it.[148] According to these circuits, when the Court stated that the standard should be based on the reasonable person, it foreclosed any other reasonableness standards.[149] Other circuits have applied the reasonable-person-in-the-plaintiff's-position standard by reasoning that *Harris* referred to this standard when it stated that the objective element of proof may be met by utilizing a reasonable-person standard.[150]

While the Ninth Circuit has followed *Harris* in applying an objective standard when deciding Title VII cases, it has used the reasonable-woman standard as its objective standard.[151] Since *Harris*, district courts in the Ninth Circuit have used jury instructions that refer to the reasonable person in the plaintiff's position, but the court of appeals has interpreted this standard to include a reasonable woman analysis.[152] In *Steiner v. Showboat Operating Co.*,[153] the court concluded that *Ellison v. Brady* directs it to apply a reasonable-woman standard in the employment discrimination context.[154] In *Fuller v. City of Oakland*,[155] the Ninth Circuit approved a reasonable-person-with-the-same-fundamental-characteristics standard, but then analyzed the facts of the case under the reasonable-woman standard, comparing the facts of the case to what the

147. *See* Brown v. Hot, Sexy, & Safer Prods., Inc., 68 F.3d 525, 540 (1st Cir. 1995); West v. Phila. Elec. Co., 45 F.3d 744, 753 (3d Cir. 1995).

148. Gillming v. Simmons Indus., 91 F.3d 1168, 1172 (8th Cir. 1996); *DeAngelis*, 51 F.3d at 594.

149. *See Gillming*, 91 F.3d at 1172; *DeAngelis*, 51 F.3d at 594.

150. *Brown*, 68 F.3d at 540 ("[T]he court must consider not only the actual effect of the harassment on the plaintiff, but also the effect such conduct would have on a reasonable person in the plaintiff's position."); *West*, 45 F.3d at 753 (concluding that discrimination must have "detrimentally affected a reasonable person of the same protected class in that position").

151. Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994) (finding that it must consider what is offensive and hostile to reasonable woman).

152. Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1033 (9th Cir. 1998); *see also* Fuller v. City of Oakland, 47 F.3d 1522, 1527 (9th Cir. 1995); *Steiner*, 25 F.3d at 1464. The Ninth Circuit is not alone in continuing to apply a more contextualized standard than the reasonable-person standard espoused in *Harris*. *E.g.*, King v. Frazier, 77 F.3d 1361, 1363 (Fed. Cir. 1996) (noting that objective inquiry "require[s] that sexual harassment be judged from the perspective of the one being harassed"); *Brown*, 68 F.3d at 540; *West*, 45 F.3d at 753; Dey v. Colt Constr. & Dev. Co., 28 F.3d 1454, 1466 (7th Cir. 1994) ("We thus consider not only the actual effect of the harrasser's conduct on his victim, but also the effect similar conduct would have had on a reasonable person in the plaintiff's position.").

153. 25 F.3d 1459 (9th Cir. 1994).

154. *Id.* at 1464 (citing Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991)).

155. 47 F.3d 1522 (9th Cir. 1995).

reasonable woman would feel.[156] In a later case, the Ninth Circuit deemed a jury instruction that referred to a reasonable person with the same fundamental characteristics as the plaintiff, rather than to a reasonable woman, not to constitute an abuse of discretion.[157] The court reasoned that this instruction incorporated the standards set out in both the U.S. Supreme Court's decision in *Harris* and its own in *Ellison*.[158] Thus, when discussing whether conduct is objectively hostile under Title VII, the Ninth Circuit uses conflicting terminology in upholding the use of the reasonable-person-with-the-same-fundamental-characteristics standard while referring to *Ellison* and the reasonable-woman standard.

When using the reasonable-person-in-the-plaintiff's-position standard, courts take the plaintiff's particular characteristics into account.[159] In *Oncale v. Sundowner Offshore Services, Inc.*,[160] the U.S. Supreme Court stated that the objective severity of allegedly harassing conduct should account for the social context in which conduct occurs and is experienced.[161] Although the Court cited *Harris* for its standard,[162] it did not use the exact terminology used in *Harris*. Instead, *Oncale* referred to the "reasonable person in the plaintiff's position,"[163] and it did not state whether the reasonable-person-in-the-plaintiff's-position standard is a new standard altogether or simply a new name for the reasonable-person standard. Circuit courts have used a similar standard but referred to the reasonable person of the same protected class,[164] or the reasonable person with the same fundamental characteristics.[165] Under these standards, courts consider the totality of the circumstances when determining the objective severity of alleged harassment.[166]

While the *Harris* Court could have addressed the issue of the appropriate reasonableness standard in sexual harassment cases, it did not speak to the issue directly and different standards have abounded in

156. *Id.* at 1528 ("[T]he fact that she couldn't escape would lead a *reasonable woman* to feel her working environment had been altered.") (emphasis added).

157. Crowe v. Wiltel Communications Sys., 103 F.3d 897, 900 (9th Cir. 1996).

158. *Id.*

159. *See* Brown v. Hot, Sexy, & Safer Prods., Inc., 68 F.3d 525, 540 (1st Cir. 1995); West v. Phila. Elec. Co., 45 F.3d 744, 753 (3d Cir. 1995).

160. 523 U.S. 75 (1998).

161. *Id.* at 80–82.

162. *Id.* at 81.

163. *Id.*

164. *West*, 45 F.3d at 753.

165. Fuller v. City of Oakland, 47 F.3d 1522, 1527 (9th Cir. 1995).

166. *See id.* at 1527; *West*, 45 F.3d at 756.

the circuit courts since then. Some circuits agree with the Fifth Circuit that *Harris* directs them to use a pure reasonable-person standard, rather than a preferential reasonable-woman standard. Others subscribe to the reasonable-person-in-the-plaintiff's-position standard, which considers the totality of the circumstances. Others, including the Ninth Circuit, have stated that they follow *Harris*, but interpret the case to allow for an objective reasonable-woman standard.

IV. COURTS SHOULD ADOPT A REASONABLE-GIRL STANDARD FOR TITLE IX PURPOSES

Courts should use a reasonable-girl standard to determine whether conduct is objectively offensive such that it creates a hostile environment in a school. A reasonable-girl standard is supported by legal precedent and is consistent with U.S. Supreme Court interpretations of Title IX. Further, it best serves the purposes of Title IX by furthering girls' equal educational opportunities, and is therefore the best standard to determine whether harassment rises to the level of actionable sexual harassment.

A. Precedent Using a Reasonable-Woman Standard Under Title VII Supports Adopting the Reasonable-Girl Standard Under Title IX

The reasonable-girl standard flows from an analogy to tort law and Title VII jurisprudence. When evaluating a girl's reaction to harassment in schools, the reasonable-girl standard would take a victim's sex and age into consideration when determining what conduct is objectively offensive under Title IX. This perspective would create incentives for boys and school administrators to learn what girls consider offensive and to remedy that conduct. Because a "gender-neutral" reasonable-person standard tends to ignore the experiences of females, the reasonable-girl standard is needed to address this issue and allow girls to participate in school activities on an equal footing with boys. Further, the reasonable child standard in tort law[167] reflects that a child's experience and knowledge base are sufficiently unique that evaluation of children's conduct requires a standard other than the generic reasonable-person standard. Because the need for a separate reasonableness standard reduces as a child matures, the reasonable-girl standard would only apply to students who are in primary or secondary education. This standard

167. *See supra* note 104 and accompanying text.

would remain objective because it would not account for the oversensitive or idiosyncratic girl who might find conduct offensive when a reasonable girl would not. Thus, the reasonable-girl standard would require that administrators consider whether the reasonable girl would find the harassment offensive, not whether the administrators themselves would find it offensive. Where a reasonable girl would find the conduct to be severe, pervasive, and objectively offensive, schools would be required to remedy the harassment.

Because both Title IX and Title VII cases conclude that sexual harassment constitutes sex discrimination,[168] a reasonableness standard used under Title VII should be applicable under Title IX. Title VII cases using the reasonable-woman standard provide persuasive authority for the adoption of a reasonable-girl standard in the Title IX context because the U.S. Supreme Court and courts of appeals have used Title VII case law to define many other key Title IX terms and to recognize particular types of claims.[169] For instance, the U.S. Supreme Court looked to Title VII case law to recognize peer-to-peer hostile-environment sexual harassment claims under Title IX.[170] Further, the U.S. Supreme Court's holding that objective offensiveness should be determined by looking at the totality of the circumstances does not reject the reasonable-woman standard.[171] Looking to the reasonable woman of Title VII and the Ninth Circuit's reasonable person with the plaintiff's fundamental characteristics,[172] courts should adopt the reasonable-girl standard in the Title IX context.

B. *The Reasonable-Girl Standard Is Consistent with U.S. Supreme Court Interpretations of Title IX*

The reasonable-girl standard is consistent with the U.S. Supreme Court's comparison of Title IX to Title VI and its interpretation of Title IX as an implied contract.[173] This standard would only focus on the existence of actionable sexual harassment without altering the standards

168. Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 649–50 (1999); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).

169. *See supra* Part II.C.

170. *See* Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 75 (1992).

171. *See* Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 81 (1998); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

172. Fuller v. City of Oakland, 47 F.3d 1522, 1527 (9th Cir. 1995).

173. *See supra* Parts II.A.–B.

of school liability. Title IX's contractual nature demands that schools be notified of possible liability, and Title IX imposes liability only where the schools were deliberately indifferent to the discrimination.[174] However, Title IX's contractual nature explains only how schools may become liable for harassment; to determine whether conduct amounts to harassment, the Court has looked to Title VII.[175] Although the reasonable-girl standard would require schools to remedy more harassing conduct than a gender-neutral standard might, the process by which a school becomes liable would not change. Schools would still have to be notified before they could become liable for sex discrimination. The only change would be in the standard to determine whether the allegedly harassing conduct could be reasonably considered offensive. Where the reasonable-person standard applies a purportedly gender-neutral vision of reasonableness, the reasonable-girl standard would simply apply a gender-specific vision of reasonableness.[176]

The reasonable-girl standard would not impose additional liability on schools. The key inquiry in a sexual harassment in school claim is whether the harassment rose to the level of actionable discrimination under the statute rather than the appropriateness of the school's response. Even under the reasonable-girl standard, courts would continue to apply the "clearly unreasonable" standard to administrators' responses.[177] The reasonable-girl standard would require the school to apply a new standard to determine whether conduct was objectively offensive, and thus rose to the level of actionable sexual harassment. But once the school has made this decision, essentially any response would satisfy the clearly unreasonable standard, which is highly deferential to schools' determinations of what response is appropriate.[178] This deference would remain regardless of what standard was used to determine whether the conduct amounted to actionable harassment in the first place. Therefore, while the reasonable-girl standard does alter the threshold of action, this standard is unlikely to impose additional liability on schools because the clearly unreasonable standard is so deferential to the school's determination of what response is appropriate.

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174. *See, e.g.*, Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998).

175. *See supra* Part II.A.–C.

176. *See supra* Part III.B.

177. *See supra* notes 55–60 and accompanying text.

178. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 650 (1999).

The reasonable-girl standard also would not impose unpredictable liability. The Court's focus in Title IX cases is on the school's reaction to discrimination.[179] Title IX does not require a reasonableness standard that affords the harasser the opportunity to know that he is harassing, as is required in a fault-based tort case, because Title IX relies on the school's deliberate indifference to harassment rather than on a harasser's fault to determine liability for peer-to-peer hostile-environment sexual harassment.[180] Under the reasonable-girl standard, the harasser would not become liable for something he could not have predicted because he would not be the defendant.[181] A gender-specific reasonable-girl standard would still require that schools be notified of harassment and that schools' remedial actions be evaluated by the courts, as is required by Title IX.[182] Therefore, under the reasonable-girl standard schools would not be exposed to liability by conduct that they could not have identified as sexual harassment because it is the school's reaction to the harassment that is reviewed by courts, not their fault for actually committing the harassment themselves.

C. *The Reasonable-Girl Standard Best Fulfills the Purposes of Title IX*

The reasonable-girl standard would best fulfill the purposes of Title IX by furthering girls' equal educational opportunities. Neither the reasonable-person nor the reasonable-person-in-the-plaintiff's-position standard successfully protect girls' equal educational opportunities because they do not address harassment that may be prevalent and that girls would consider offensive. The reasonable-girl standard would achieve this goal by focusing on girls' unique experiences and forcing schools to address girls' complaints, thus finding offensive, severe and pervasive harassment that so interferes with girls' educational opportunities that it becomes actionable under Title IX.

179. *See id.* at 651.

180. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 289 (1998).

181. *See* Ellison v. Brady, 924 F.2d 872, 880 (9th Cir. 1991).

182. *See Davis*, 526 U.S. at 646–47.

1. *The Reasonable-Person and Reasonable-Person-in-the-Plaintiff's-Position Standards Do Not Afford Girls Equal Educational Opportunities*

The reasonable-person standard, which uses a community norm to determine objective offensiveness,[183] is inadequate because it considers offensive only harassment that is outside the community norm. Title IX does not merely exempt sex discrimination that is prevalent; it is aimed at eliminating all sex discrimination that limits girls' equal educational opportunities.[184] Given the statistics indicating the prevalence of sexual harassment in junior high and high schools,[185] the reasonable-person standard is unable to eliminate much of this harassment precisely *because* it is prevalent and therefore within the status quo. Schools need only respond to harassment that is so severe and pervasive that it interferes with girls' educational opportunities. In contrast, the reasonable-person standard does not reach harassment that is severe and pervasive when it is prevalent in the school. The community norm is not determinative of whether the harassing conduct interferes with girls' educational opportunities because conduct may interfere with a girl's ability to take part in class regardless of whether it is prevalent in the school. Instead, it is the girl's perception of harassing conduct that determines whether potentially harassing conduct interferes with her educational opportunities and thus frustrates the purpose of Title IX. By measuring this perception against an objective standard, the reasonable-girl standard would not take into account oversensitive or idiosyncratic reactions to conduct.

Not only does the reasonable-person standard allow even severe and pervasive harassment to continue by focusing on what society considers offensive rather than on what girls would consider offensive, it reinforces an often sexist community norm. The reasonable-person standard fails to address root causes because it defines sexual harassment by relying on a sexist community norm and concludes that only conduct that falls outside that norm is objectively offensive.[186] For example, when the *Rabidue* court applied the reasonable-person standard, it found that potentially harassing conduct was consistent with a societal norm that includes

183. *See supra* Part III.A.

184. *Davis*, 526 U.S. at 650.

185. *See supra* Part I.A.

186. *See* Ehrenreich, *supra* note 117, at 1205.

pornography and the objectification of women in the media.[187] The defendant's conduct was not objectively hostile or abusive precisely *because* this conduct was prevalent in society.[188] The *Rabidue* court failed to question whether the societal norm it used was a sexist one. Because sexual harassment, like objectification of women in the media, is prevalent in schools,[189] much of it is considered objectively normal rather than objectively offensive. The reasonable-person standard thereby reinforces sexist community norms rather than remedying sex discrimination.

By focusing on the community norm, the reasonable-person standard ignores the unique experiences of girls that inform their interpretations of potentially harassing conduct. Sexual harassment, sexual coercion, and involuntary sexual intercourse are not uncommon among teenage girls.[190] Women and girls experience sexual violence more often than males, and men are the perpetrators more than ninety percent of the time.[191] Because of this unique perspective, girls are likely to interpret potentially harassing conduct by boys differently than boys or men might.[192] The reasonable-person standard is blind to women's and girls' different interpretations of harassing conduct because it ignores prevalent sexual violence against women.[193] Because societal norms trump girls' perspectives under the reasonable-person standard, girls will continue to experience severe and pervasive harassment under this standard.

By allowing a baseline of sexual harassment, the reasonable-person standard does not protect girls' access to equal educational opportunities. This standard's failure to prevent the emotional distress and reduced academic success[194] leads to unequal educational opportunities. This in turn allows girls to continue to feel the effects of harassment.[195] The effects that the thirteen-year-old girl in Federal Way, Washington, experienced included being forced to move to a new school, where she was removed from her friends and school activities, causing her to

187. Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620–21 (6th Cir. 1986).

188. *See id.*

189. *See supra* Part I.A.

190. *See supra* Part I.A.

191. Fineran et al., *supra* note 12, at 56.

192. *Cf.* Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (explaining perception gap in employment-discrimination context).

193. *See id.*

194. *See supra* Part I.A.

195. *See supra* Part I.A.

become emotionally and academically devastated.[196] The fallout from harassment—severe emotional distress, fear, and anxiety that causes absenteeism, tardiness, and reduced work productivity—limits girls' educational opportunities.[197] When girls' grades are reduced because of on-going harassment, they are not eligible for tangible educational opportunities such as awards, jobs, colleges, and scholarships.[198] The cumulative effects of sexual harassment that the reasonable-person standard allows to continue amount to the type of non-physical but effective reduction of educational benefits for girls that the *Davis* Court expressly held were prohibited by Title IX.[199]

Although it was mentioned in *Oncale*, the reasonable-person-in-the-plaintiff's-position standard[200] is ambiguous and does not provide courts and school administrators with sufficient guidance. Circuit courts are split over how to interpret the *Oncale* Court's use of this standard.[201] This standard does not clarify for courts whether they are to consider only the circumstances that the plaintiff experienced or those circumstances plus the plaintiff's gender.[202] The reasonable-person-in-the-plaintiff's-position standard takes the totality of the circumstances into account,[203] and this may include gender to the extent that a reasonable girl would be the appropriate reasonable person in the plaintiff's position when the victim is not an adult and is female. However, because the Court has not expressly stated that a gender-based interpretation is appropriate, schools are still left with little guidance. Because the U.S. Supreme Court has not resolved the circuit split regarding the use of the reasonable person or reasonable-woman standard,[204] the term "totality of the circumstances" may be interpreted to support the use of a gender-specific or a gender-neutral reasonable-person standard depending on the inclination of a circuit court.

196. *See* Bartley & Pemberton-Butler, *supra* note 1.

197. *See supra* Part I.A.

198. Fineran et al., *supra* note 12, at 55.

199. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 650–51 (1999).

200. Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 81 (1998).

201. *See supra* notes 164-66 and accompanying text.

202. *See* Brennan v. Metro. Opera Ass'n, 192 F.3d 310, 321 (2d Cir. 1999).

203. *Oncale*, 523 U.S. at 81; *see also* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

204. *See supra* Part III.B.

2. *The Reasonable-Girl Standard Would Protect Girls' Equal Educational Opportunities*

The reasonable-girl standard would offer more protection from the reduced educational benefits caused by sexual harassment, and thus better promote Title IX's goal of equal educational opportunities. The U.S. Supreme Court stated in *Davis* that all severe, pervasive, and objectively offensive harassment that reduces or limits girls' access to educational opportunities violates Title IX.[205] By penalizing severe, pervasive harassment that the reasonable girl would find offensive and focusing on girls' unique perspectives, the reasonable-girl standard would eliminate more sexual harassment, which would in turn reduce the negative effects of the harassment.[206] Under the reasonable-girl standard, the thirteen-year-old girl in Federal Way would not be forced to switch schools to escape being groped and fondled in her school's hallways because the threshold for action would be lower and administrators would be compelled to take action to remedy harassment. The end result would be more educational opportunities for girls, allowing them to maintain their access to equal educational opportunities.

The reasonable-girl standard would increase administrator action and discourage further harassment in schools by encouraging administrators to view victims' complaints as credible. Because of shared experiences, a male administrator may identify with a male perpetrator more readily than with a female victim.[207] The administrator must choose between opposing views of harassment: one that views the conduct as harmless amusement and another that sees the conduct as offensive or as a prelude to violence.[208] The reasonable-girl standard would require administrators to credit girls' perspectives of the harassing conduct, take a second look at complaints of sexual harassment, and work harder at eliminating something that disrupts girls' benefits from education. Once perpetrators know that complaints of sexual harassment will be considered credible, and that remedial action will be taken, they are less likely to harass

205. *See* Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 650–51 (1999).

206. Schools would be informed of the reasonable-girl standard through the DOE Guidance on Sexual Harassment, *supra* note 46, which courts refer to when determining school liability for harassment under Title IX. *E.g.*, *id.* at 651.

207. *Cf.* Childers, *supra* note 76, at 884–85 (reaching same conclusion in employment-discrimination context).

208. *See id.* at 886.

someone again.[209] Thus, sexual harassment that interferes with girls' educational opportunities will decrease when courts use the reasonable-girl standard to evaluate complaints of sexual harassment.

V. CONCLUSION

The *Davis* Court left open the question of which reasonableness standard to apply in Title IX hostile-environment sexual harassment cases. In doing so, the Court exposed schools to unpredictable liability and left girls, common victims of sexual harassment in schools, unprotected. Some circuit courts have already formulated the reasonable-woman standard, a reasonableness standard that is meant to protect women in the workplace from harassment that women consider hostile.

A reasonable-girl standard comports with the U.S. Supreme Court's interpretation of Title IX as a contract and with the liability scheme that the Court created for the Title IX context. The reasonable-girl standard would not alter the notification requirement or the deliberate-indifference liability scheme that results from Title IX's contractual nature. Further, schools would still become liable under the reasonable-girl standard only when schools' remedial responses to harassing conduct were clearly unreasonable. Finally, this standard fits well with a statute such as Title IX that does not inquire into the perpetrator's fault, but rather demands that schools take appropriate remedial measures.

In order to protect schoolgirls, courts should modify the reasonable-woman standard for the Title IX context by creating a reasonable-girl standard and applying it when analyzing peer-to-peer sexual harassment in school cases. Further, because the reasonable-girl standard would recognize girls' unique perspective on sexual harassment, it is best capable of reducing the rate of sexual harassment that has reached epidemic proportions. The reasonable-girl standard would view all severe and pervasive harassment that reasonable girls would perceive to be offensive as objectively offensive, thereby addressing all sexual harassment that interferes with girls' equal educational opportunities. This standard is equipped to place girls back on an even playing field with boys by holding schools liable when they allow girls to be subjected to continued harassment.

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209. Harassers often believe that harassment is acceptable at school, that everyone does it, and that they will be able to get away with it. Jordan et al., *supra* note 13, at 296. Therefore, if school administrators make harassment less common in schools, and they ingrain in their students that harassment is unacceptable at school, harassers will not continue harassing other students.