LEVELING THE PLAYING FIELD: ALIGNING TITLE IX AND TITLE VII SEXUAL HARASSMENT STANDARDS TO ENSURE EQUITY FOR FEMALE HAZING VICTIMS

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As hazing has become more common among student-athletes at colleges and universities throughout the country, litigants have used Title IX as a legal remedy to hold these educational institutions accountable for hazing practices on their campuses. However, while various male plaintiffs have brought successful Title IX cases alleging that their hazing experiences constitute actionable discrimination under Title IX, fewer women have had success in bringing such cases. This disparity looms especially large as the number of hazing incidents among women has grown and as intercollegiate athletics has transformed into a massive, lucrative industry. Since 2021, student-athletes have been able to profit from their name, image, and likeness and can be likened to "employees" due to their significant role in generating revenue and esteem for their colleges and universities. This Note attempts to reconcile the changing role of student-athletes with the stagnant legal standard that courts use to adjudicate hazing claims under Title IX. This Note argues that the Title IX peer-on-peer sexual harassment standard should be amended for hazing claims to be more aligned with the sexual harassment standard under Title VII, which addresses sexual harassment practices in the workplace.

TABLE OF CONTENTS

INTRODUCTION 1098
I. BACKGROUND..1103

† Associate Editor, *Cardozo Law Review* (Vol. 46); J.D. Candidate, Benjamin N. Cardozo School of Law (May 2025); B.A., Northwestern University (June 2020). I would like to thank Professor Myriam Gilles for her invaluable feedback and guidance throughout the writing process. I would also like to thank all my colleagues on *Cardozo Law Review* for their thoughtful edits in preparing this Note for publication. Finally, I would like to thank my parents and brother for always being my biggest supporters, and my friends for getting me through law school with more laughs than I could possibly count.

A. *The Origins and Characteristics of Hazing on College Campuses* 1103
1. The Emergence of Hazing Among Female Student-Athletes..1104
B. *How Criminal and Civil Law Has Responded to the Rise in Hazing Incidents*....1106
1. Criminal Hazing Laws 1106
2. Civil Remedies....1109
II. TITLE IX AS A VEHICLE TO HOLD EDUCATIONAL INSTITUTIONS ACCOUNTABLE FOR HAZING PRACTICES....1111
A. *Legal Standards for Title IX Claims*....1111
B. *Analysis of Title IX Peer-on-Peer Sexual Harassment Lawsuits Brought by Male Plaintiffs Versus Female Plaintiffs*....1113
1. Male Plaintiffs 1113
2. Female Plaintiffs....1116
III. TITLE VII AS A VEHICLE TO HOLD EMPLOYERS ACCOUNTABLE FOR DISCRIMINATION AND SEXUAL HARASSMENT 1118
A. *Legal Standards for Title VII Claims*....1119
IV. PROPOSAL....1122
A. *Legal Relationship Between Title IX and Title VII*....1122
B. *Student-Athletes as Employees* 1126
CONCLUSION....1130

INTRODUCTION

When most people think of college sports, they envision talented young athletes representing their universities and playing at the top of their ability. But for some, those images have become clouded by the systemic hazing present in intercollegiate sports. Historically, hazing has been associated with fraternities, sororities, and other social groups on college campuses, but in the past decade, hazing has become more common among college athletes.[1] Even as intercollegiate athletics has ballooned into a multibillion-dollar industry,[2] reports of hazing on

1 George Ramsay, *What Is Hazing and How Is It Affecting Student Athletes in the US?*, CNN (Sept. 29, 2023, 6:07 AM), https://www.cnn.com/2023/09/29/sport/what-is-hazing-explainer/index.html [https://perma.cc/SG9N-QXHE].

2 *See* Tyler J. Murry, *The Path to Employee Status for College Athletes Post-*Alston, 24 VAND. J. ENT. & TECH. L. 787, 788 (2022).

college sports teams continue to dominate headlines.[3] The serious hazing allegations at multiple high-profile institutions in 2023 prompted universities to fire coaches and to finally address the rampant hazing practices on their campuses.[4]

The National Study of Student Hazing, a research study surveying over 11,000 college students at fifty-three colleges and universities, defined hazing as a range of activities expected of members of social groups that "humiliates, degrades, abuses, or endangers them."[5] Another study examining student attitudes and behaviors relating to hazing defined hazing as any activity *implicitly or explicitly* required as a condition of initiation or continued membership in an organization.[6] Various types of hazing have commonly plagued male sports, such as forced alcohol consumption, sexual abuse/assault, and forced nudity.[7]

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3 *See* Ramsay, *supra* note 1; Ralph D. Russo, *Hazing Remains Ingrained in Team Sports and Experts Say They See Increase in Sexualized Attacks*, ABC NEWS (July 20, 2023, 10:30 AM), https://www.cbsnews.com/sacramento/news/hazing-remains-ingrained-in-team-sports-and-experts-say-they-see-increase-in-sexualized-attacks-3 [https://perma.cc/X74C-GX9S]; Jesus Jiménez, *Boston College Suspends Swimming and Diving Teams Over Hazing*, N.Y. TIMES (Sept. 20, 2023) https://www.nytimes.com/2023/09/20/sports/boston-college-swim-hazing-suspension.html [https://web.archive.org/web/20240910111337/https://www.nytimes.com/2023/09/20/sports/boston-college-swim-hazing-suspension.html].

4 Kevin B. Blackistone, *Pat Fitzgerald Had to Go, but Coaches Are Just Symptoms of Hazing Problem*, WASH. POST (July 12, 2023, 5:51 AM), https://www.washingtonpost.com/sports/2023/07/12/pat-fitzgerald-hazing-college-sports [https://perma.cc/S9SP-WL6K]. Northwestern University was rocked in July 2023 by allegations of hazing within the school's football program. Over a dozen former student athletes came forward claiming that they were subjected to a "toxic culture" of harassment and sexual abuse. Ramsay, *supra* note 1. New Mexico State University also faced allegations of hazing in February 2023, which ultimately led to the suspension of its men's basketball program and the firing of head coach Greg Heiar. *Id.* The Harvard women's ice hockey program was also placed under scrutiny following allegations of hazing and abusive behavior by coach Katey Stone. Hailey Salvian & Katie Strang, *New Allegations of Hazing, Mistreatment of Athletes Within Harvard Women's Ice Hockey Program*, ATHLETIC (Mar. 10, 2023), https://theathletic.com/4288247/2023/03/10/harvard-womens-hockey-hazing-allegations [https://perma.cc/S25Z-9GNR].

5 ELIZABETH J. ALLAN & MARY MADDEN, HAZING IN VIEW: COLLEGE STUDENTS AT RISK 2 (2008), http://www.stophazing.org/wp-content/uploads/2014/06/hazing_in_view_web1.pdf [https://perma.cc/6AM2-SWNS].

6 Shelly Campo, Gretchen Poulos & John W. Sipple, *Prevalence and Profiling: Hazing Among College Students and Points of Intervention*, 29 AM. J. HEALTH BEHAV. 137, 137 (2005) ("Hazing is any activity, required implicitly or explicitly as a condition of initiation or continued membership in an organization, that may negatively impact the physical or psychological well-being of the individual or may cause damage to others, or to public or private property. A range of hazing behaviors exists, such as being kidnapped, transported, and abandoned; participating in drinking contests/games; being deprived of sleep; engaging in or simulating sexual acts; being physically assaulted; carrying unnecessary objects; and being required to remain silent.").

7 *See* Susan P. Stuart, *Warriors Machismo and Jockstraps: Sexually Exploitative Athletic Hazing and Title IX in the Public School Locker Room*, 35 W. NEW ENG. L. REV. 377, 407–12 (2013). Stuart discusses multiple instances of male-on-male hazing that constitute sexual

However, hazing in college athletics has grown far beyond what some have labeled "boys being boys."[8] Indeed, hazing has become a significant problem for women's sports as well.[9] As the number of women who participate in athletics at the college level has grown, so has the number of hazing incidents involving female student-athletes.[10] A study conducted by Nadine C. Hoover at Alfred University proposed that hazing is just as common among female athletes as male athletes.[11] The results from this study add a layer of complexity to the problem because many hazing practices involve sexually exploitative and harassing conduct as a means of enforcing a team's power structure.[12] Older players utilize sexually exploitative hazing to emasculate and humiliate younger players, reaffirm younger players' positions at the bottom of the team's

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harassment. *Id.* Brian Seamons, a member of the Sky View High School football team in Utah, was bound up by his genitals in the locker room by his upperclassman teammates. *Id.* The football coach characterized the incident as a rite of passage and an incident of boys being boys. *Id.* The Snelling brothers, members of a high school basketball team in New Hampshire, experienced physical and verbal abuse from teammates. *Id.* Derek Snelling was continually taunted with homosexual comments and experienced an incident of physical abuse that sent him to the hospital. *Id.* The Waynesboro Middle School basketball team in Pennsylvania also had a systemic culture of hazing. *Id.* One ritual involved a "prank" where eighth graders would hump seventh graders in the dark. *Id.* Other hazing incidents included eighth graders attempting to shove a pencil and a magic marker in seventh graders' rectums. *Id.*; *see also* HANK NUWER, HIGH SCHOOL HAZING: WHEN RITES BECOME WRONGS 62–65 (2000) (providing a full list of the various behaviors that have encompassed hazing among high school, college athlete, and cheerleading populations).

8 *See* Blackistone, *supra* note 4.

9 *See infra* Section I.A.1.

10 *See* Colleen A. McGlone, Hazing in N.C.A.A Division I Women's Athletics: An Exploratory Analysis 1 (May 2005) (Ph.D. dissertation, University of New Mexico) (ProQuest). This Note uses the binary terms "male" and "female" primarily because intercollegiate sports in this country have long been organized according to the gender binary. However, it is important to recognize that the gender binary in sports has long been a mechanism for exclusion of transgender and nonbinary athletes. The legal landscape for transgender athletes is in flux with different states and partisan groups fighting about restrictions on transgender athletes and whether Title IX can be used to protect transgender athletes. *See* B.P.J. v. W. Va. State Bd. of Educ., 98 F.4th 542, 562–65 (4th Cir. 2024) (holding that a West Virginia statute prohibiting transgender athletes from playing on women's sports teams violates Title IX); Andrew DeMillo, *Federal Rule on Title IX Is a Ruse to Require Trans Sports Participation, GOP States Say*, ASSOCIATED PRESS (May 31, 2024, 9:40 AM), https://apnews.com/article/title-ix-transgender-sports-athletes-7bf158a721fa40623ec18c3a4fef4525 [https://perma.cc/H3XR-Y38F] (discussing efforts by different states to remove Title IX protections for transgender students who want to compete on sports teams that align with their gender identity). A full analysis of the shifting legal landscape for transgender athletes and how hazing uniquely affects athletes across the LGBTQIA+ spectrum is beyond the scope of this Note. But as more transgender and nonbinary athletes join school and university sports teams, it will become even more important to consider the particular effects hazing has on these athletes.

11 McGlone, *supra* note 10, at 5 (citing NADINE C. HOOVER, ALFRED UNIV., NATIONAL SURVEY: INITIATION RITES AND ATHLETICS FOR NCAA SPORTS TEAMS 9 (1999), https://www.alfred.edu/about/news/studies/_docs/hazing.pdf [https://perma.cc/T3AJ-8J56]).

12 *See* Stuart, *supra* note 7, at 396–400.

hierarchy, and create a culture of dominance and subordination.[13] While the specific practices differ across genders and may vary significantly, much of what occurs in locker rooms can be characterized as sexually exploitative and sexually and physically abusive.[14]

Considering the indicia of sexual harassment in many types of hazing, Title IX of the Education Amendments of 1972 (Title IX) is one legal remedy that both male and female victims of hazing have utilized to hold universities accountable for hazing practices on their campuses.[15] Since its passage in 1972, Title IX has sought "to prevent sex discrimination in federally funded education programs."[16] In many ways, it has succeeded in this goal by serving as a catalyst for women's sports and advancing women's participation in intercollegiate athletics.[17] In addition, courts have found that Title IX protects against sexual harassment, derived from its general prohibition against sex discrimination.[18] This protection extends to instances of teacher-student sexual harassment as well as peer-on-peer sexual harassment.[19] However, in the context of hazing, this legal measure has been woefully inadequate.[20] Various male plaintiffs have brought successful Title IX claims alleging that their hazing experiences constituted actionable discrimination under Title IX, but fewer women have pursued such hazing claims under Title IX, and those women have not had great success.[21]

Outside the Title IX context, Congress has enacted other statutory measures in order to curb sexual harassment. Specifically, Title VII of the Civil Rights Act of 1964 (Title VII) emerged as a vehicle to address sexual harassment in the workplace.[22] Title IX borrows heavily in theory and

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13 *Id.*

14 *Id.*

15 20 U.S.C. § 1681(a)–(c); *see* Stuart, *supra* note 7, at 377–78.

16 Vanessa Lauber & Charlotte Butash, *The Changing Playing Field of Title IX*, 43 HARV. J.L. & GENDER 169, 169 (2020).

17 McGlone, *supra* note 10, at 1.

18 *Title IX Legal Manual*, U.S. DEP'T OF JUST. (Sept. 14, 2023), https://www.justice.gov/crt/title-ix [https://perma.cc/ZL2Z-MH8C].

19 Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998) (holding that a school district may be liable for damages under Title IX where it is deliberately indifferent to known acts of teacher-student sexual harassment); Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999) (holding that a school district may be liable for damages under Title IX where it is deliberately indifferent to known acts of student-student sexual harassment).

20 *See infra* Part II.

21 *See* Stuart, *supra* note 7, at 378.

22 *See* 42 U.S.C. § 2000e-2; Justin S. Weddle, Note, *Title VII Sexual Harassment: Recognizing an Employer's Non-Delegable Duty to Prevent a Hostile Workplace*, 95 COLUM. L. REV. 724, 726–27 (1995) (discussing how courts came to interpret the text of Title VII to include protections against different forms of sexual harassment in the workplace).

evaluative methodology from Title VII, and Title VII guided courts' interpretations of Title IX.[23] However, the legal standards for establishing liability under the two statutes have started to diverge.[24] While Title VII has been a useful cause of action for many litigants seeking redress for the discrimination they have suffered in the workplace,[25] Title IX has not afforded female hazing victims the same success.[26] Courts have inconsistently interpreted what precisely constitutes sexual harassment "on the basis of sex" as prohibited by Title IX.[27] For hazing claims in particular, judicial decisions interpreting Title IX have failed to provide female litigants with an avenue to hold institutions accountable.[28]

In addition, the transformation of intercollegiate athletics into a massive, highly profitable industry has shifted how student-athletes are viewed in society.[29] College sports are no longer a form of nonmonetized competition—they have become a multibillion-dollar industry generating huge sums of money for universities, television networks, and corporate sponsors.[30] For a long time, student-athletes were unable to benefit from this financial success, but the legal landscape shifted in 2021, allowing student-athletes to start profiting from their names, images, and likenesses.[31] Hence, student-athletes have been likened to "employees" due to their role in generating revenue and publicity for their universities.[32] However, when these student-athletes bring hazing claims, their lawsuits are adjudicated under a Title IX standard that fails to recognize the nuanced role that student-athletes hold in the public eye and within the private confines of the locker room.[33]

This Note explores the misconceptions that surround hazing practices among female student-athletes and argues that, as student-athletes have become akin to profit-making employees of the university, courts should consider female hazing claims through the lens of Title VII jurisprudence. Part I will review the history and proliferation of hazing in the context of National Collegiate Athletic Association (NCAA) athletics

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23 U.S. DEP'T OF JUST., *supra* note 18.

24 *Id.*

25 *See infra* Section III.A.

26 *See* Stuart, *supra* note 7, at 378–89.

27 *See infra* Part II.

28 *See infra* Section II.B.2.

29 *See infra* Section IV.B.

30 Arianna Banks, Note, *The Supreme Court Gets the Ball Rolling:* NCAA v. Alston *and Title IX*, 117 NW. U. L. REV. 549, 554–55 (2022); Murry, *supra* note 2, at 790–91.

31 *See infra* Section IV.B.

32 *See infra* Section IV.B.

33 *See* Banks, *supra* note 30 (discussing the nuanced role of student athletes); Stuart, *supra* note 7, at 379–81 (discussing the "underlying pathology of sexually exploitative hazing" and how hazing fits into the notion of hegemonic masculinity in athletics).

and among female athletes in particular.[34] Part I will also address the legal response to the rise in hazing incidents in both the criminal and civil contexts.[35] Part II will consider the evolution of Title IX as a vehicle for holding universities accountable for hazing incidents in athletic programs.[36] Part III will then compare the standards used by courts in adjudicating hostile workplace sexual harassment claims under Title VII with the judicial approaches to resolving sexual harassment cases under Title IX.[37] Finally, Part IV will argue that the Title IX peer-on-peer sexual harassment standard should be amended for hazing claims.[38]

I. BACKGROUND

A. *The Origins and Characteristics of Hazing on College Campuses*

Hazing has existed for generations, spanning across various cultures and societies going as far back as ancient Greece.[39] In the early 1800s, hazing on college campuses started to become widespread, but has become increasingly rampant over the past few decades.[40] In the 1900s, hazing was a fixture on many college campuses, with some academics asserting that hazing was an acceptable way for new students to learn respect for their school.[41] Today, hazing practices have become firmly embedded in the structure of many university groups and institutions, including intercollegiate sports teams.

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34 *Infra* Section I.A.

35 *Infra* Section I.B.

36 *Infra* Part II.

37 *Infra* Part III.

38 *Infra* Part IV.

39 McGlone, *supra* note 10, at 19–20 (describing hazing as "a time-honored custom"). McGlone discusses numerous examples of hazing across different cultures throughout time including university hazing in the Middle Ages, "penalism" among French students in the 1600s consisting of freshmen experiencing various abuses in order "to prove their worthiness to the senior class," and "fagging" in the 1700s consisting of an upperclassman choosing an underclassman to perform his various errands and tasks. *Id.* at 20–22; *see also* HANK NUWER, UNOFFICIAL HAZING DEATHS DATABASE AND CLEARINGHOUSE (2024), http://hanknuwer.com [https://perma.cc/RNS8-CQ84] (providing examples of hazing deaths that have occurred in the United States since the 1800s and globally).

40 Andrew Lawrence, *'Nobody Called 911': What Can Be Done to Change the Culture of Hazing at US Colleges?*, GUARDIAN (June 23, 2022, 6:00 AM), https://www.theguardian.com/us-news/2022/jun/23/us-colleges-university-hazing-fraternities-sororities [https://perma.cc/8UU2-TQX6].

41 NUWER, *supra* note 7, at 17.

In 1999, Hoover conducted an expansive study surveying hazing practices at 224 participating NCAA institutions.[42] The study found that of the over 325,000 athletes who participated in intercollegiate sports in 1998 and 1999, over 250,000 athletes had experienced some form of hazing in joining their college team.[43] According to a 2008 study, 52% of female respondents who were part of a team or student organization experienced some sort of hazing incident.[44] The study also found that varsity student-athletes and students who are involved in Greek life have the highest likelihood of being hazed.[45] Thus, the research and data suggest that hazing practices have evolved over the generations and are now deeply rooted in the culture of many college athletic teams.

1. The Emergence of Hazing Among Female Student-Athletes

In a 2005 study conducted by Colleen A. McGlone on hazing in NCAA Division I women's athletics, nearly half of the athletes surveyed reported experiencing hazing, indicating the extent to which it has ingrained itself into the culture of women's sports.[46] While men tend to engage in more physically violent hazing activities,[47] reported incidents of severe hazing among women expose the gruesome hazing culture that has become a part of some women's sports teams.[48] For example, in 1997,

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42 HOOVER, *supra* note 11, at 2.

43 *Id.* at 6.

44 Allan & Madden, *supra* note 5, at 14.

45 *Id.* at 15.

46 McGlone, *supra* note 10, at ix.

47 *Id.* at 35.

48 *See, e.g.*, NUWER, *supra* note 7, at 60. Nuwer describes some of the hazing incidents that have taken place in female high school athletics. *Id.* In Michigan in 1992, two female softball players cut off "a freshman's ponytail with a knife and threw it out the school-bus window." *Id.* In Hawai'i in 1997, an initiation ritual for a girls' soccer team involved partial disrobing on school grounds. *Id.* In Washington in 1998, an initiation ritual among female soccer players involved "players being taped to a trash can and having their hair covered with toothpaste and cheese spread." *Id.* McGlone also addresses some violent hazing incidents that have taken place within female athletic teams. McGlone, *supra* note 10, at 23. In Michigan in 1988, underclassmen on the swim team "had shampoo poured on their clothing, were urinated on, had toothpaste smeared on their bodies," and were thrown naked into the snow. *Id.* The underclassmen "were also forced to do pushups while being whipped with towels" and received "hickies" from the seniors. *Id.* One woman who had experienced hazing rituals described her experience:

> [R]ookies had to participate in competitions such as eating peanut butter off the floor without using their hands. The losers had to place a dollop of peanut butter under their armpits and keep it there for the rest of the night. As an indication of the implicitly

a female soccer player at the University of Oklahoma endured a traumatic hazing incident in which she was coerced into wearing an adult diaper and simulating sex acts.[49] As a result of this event, she experienced "depression, feelings of guilt, anxiety, [and] hopelessness."[50] In 2023, facts also emerged surrounding the hazing culture of the Harvard women's hockey team.[51] The numerous allegations from players include having to fake orgasms, put condoms on bananas, and participate in a "Naked Skate."[52]

Research suggests that the primary psychological and sociological motivations underlying hazing stem from the belief that it enhances group cohesion and instills discipline and loyalty.[53] Athletes may rationalize hazing as an integral team tradition, or they may feel compelled to participate due to their own initiation experiences as new team members, thus perpetuating a cycle of victimization.[54] Sexually exploitative hazing in particular serves to reinforce a team's hierarchy, with older players using such practices to undermine and degrade younger teammates.[55] Additionally, many athletes remain silent about hazing rituals out of fear of repercussions, feeling they have no choice but to participate to maintain their position on the team.[56] One hallmark of hazing is that it often happens out of sight. Frequently, it is only after a student sustains serious injuries and requires medical attention that the truth emerges.[57]

Another factor contributing to the perpetuation of hazing among student-athletes is the lack of a formal NCAA hazing policy.[58] Instead, the NCAA, the primary governing body for collegiate sports in the United

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> heterosexist underpinnings of many of these sport hazings, the only way that the peanut butter was allowed to be removed was if a male stranger licked it off.

Id. (quoting Jamie Bryshun, Hazing in Sport: An Exploratory Study in Veteran/Rookie Relations (Sept. 1997) (M.A. Thesis, University of Calgary, Alberta))

49 Greg Garber, *It's Not All Fun and Games*, ESPN (June 3, 2002), https://www.espn.com/otl/hazing/wednesday.html [https://perma.cc/P9SR-39TG].

50 *Id.*

51 Hailey Salvian & Katie Strang, *Hazing, Naked Skates and a 'Mental-Health Hunger Games': The Dark Side of Harvard Women's Ice Hockey*, ATHLETIC (Mar. 10, 2023) https://www.nytimes.com/athletic/4288145/2023/03/10/harvard-womens-hockey-mistreatment-hazing-katey-stone [https://web.archive.org/web/20240729054641/https://www.nytimes.com/athletic/4288145/2023/03/10/harvard-womens-hockey-mistreatment-hazing-katey-stone].

52 *Id.*

53 Campo et al., *supra* note 6, at 138.

54 *Id.*; NUWER, *supra* note 7, at 73.

55 *See* Stuart, *supra* note 7, at 397–98.

56 *See* McGlone, *supra* note 10, at 25.

57 *Id.* at 32.

58 *See* Russo, *supra* note 3.

States, yields to individual school policies and state hazing law.[59] It is also worth noting that colleges and universities are not obligated to report hazing incidents under the Clery Act.[60] The Clery Act was enacted in 1990 largely in response to the rape and murder of Jeanne Clery, a freshman at Lehigh University, by one of her classmates.[61] It mandates that certain crime statistics such as homicides, hate crimes, sex offenses, and robberies be disclosed by educational institutions that participate in programs that receive federal aid.[62] While the Clery Act has drawn attention to these criminal acts on college campuses,[63] it has failed to do the same for college hazing.[64]

B. *How Criminal and Civil Law Has Responded to the Rise in Hazing Incidents*

1. Criminal Hazing Laws

Spurred by high-profile incidents on college campuses, a number of states and municipalities have enacted criminal hazing statutes over the past thirty years. Presently, forty-four states and the District of Columbia have some sort of hazing law written into either their criminal or educational code.[65] But these laws have largely failed to solve the problem of college hazing.[66] Of the states that do have criminal sanctions for hazing, the majority classify hazing as a misdemeanor of varying levels,

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59 *See id.*

60 20 U.S.C. § 1092(f); *see* Ralph D. Russo, *Why Is Hazing Such a Widespread Problem? Abuse Prevalent Despite Efforts to Stop It*, ASSOCIATED PRESS (July 20, 2023, 2:55 PM), https://apnews.com/article/northwestern-hazing-fitzgerald-86f87fc8e673f284ff2c80a22f3d95ab [https://perma.cc/9T8R-CJ47].

61 Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 244 (2011).

62 20 U.S.C. § 1092(f)(1)(F).

63 *See* Dennis E. Gregory & Steven M. Janosik, *The Clery Act: How Effective Is It? Perceptions from the Field—The Current State of the Research and Recommendations for Improvement*, 32 STETSON L. REV. 7, 8 (2002).

64 *See* Russo, *supra* note 60.

65 *States with Anti-Hazing Laws*, STOPHAZING, https://stophazing.org/policy/state-laws [https://perma.cc/467J-X28S]; Amanda Hernández, *Laws on Hazing Are on the Books in Most States. They Don't Protect Equally*, USA TODAY (Oct. 13, 2023, 5:05 AM), https://www.usatoday.com/story/news/education/2023/10/13/hazing-state-laws-differ-offer-uneven-protection-to-college-students/71076327007 [https://perma.cc/6CGK-ZDUT].

66 Brandon W. Chamberlin, Comment, *"Am I My Brother's Keeper?": Reforming Criminal Hazing Laws Based on Assumption of Care*, 63 EMORY L.J. 925, 937 (2014).

unless the incident results in serious bodily harm or death. For example, New York's statute reads:

> A person is guilty of hazing in the first degree when, in the course of another person's initiation into or affiliation with any organization, he intentionally or recklessly engages in conduct, including, but not limited to, making physical contact with or requiring physical activity of such other person, which creates a substantial risk of physical injury to such other person or a third person and thereby causes such injury. Hazing in the first degree is a class A misdemeanor.[67]

Many states have laws that are comparable to New York's existing criminal hazing law.[68] Others, such as Pennsylvania, have adopted more expansive anti-hazing laws.[69] In 2018, after the hazing-related death of Pennsylvania State University student Tim Piazza, Pennsylvania passed a law that provides more detailed classifications of hazing and requires schools to maintain policies to combat hazing.[70] The new law increased the penalties for hazing—hazing that results in serious injury or death was moved up from a fourth-degree to a third-degree offense.[71] A safe harbor provision was also added to protect individuals who assist hazing victims.[72]

Other states have also recently reformed their legislative schemes in response to hazing incidents on college campuses. In 2018, Louisiana enacted the Max Gruver Act following the death of eighteen-year-old

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67 N.Y. PENAL LAW § 120.16 (McKinney 2024).

68 *See* STOPHAZING, *supra* note 65; *see, e.g.*, MD. CODE ANN., CRIM. LAW § 3-607 (2024) ("A person may not recklessly or intentionally do an act or create a situation that subjects a student to the risk of serious bodily injury for the purpose of an initiation into a student organization of a school, college, or university."); N.C. GEN. STAT. § 14-35 (2024) ("It is unlawful for any student in attendance at any university, college, or school in this State to engage in hazing, or to aid or abet any other student in the commission of this offense."); NEV. REV. STAT. § 200.605 (2024) (establishing hazing as a misdemeanor and defining it as "an activity in which a person intentionally or recklessly endangers the physical health of another person for the purpose of initiation into or affiliation with a student organization, academic association or athletic team at a high school, college or university in this state").

69 *See* Timothy J. Piazza Antihazing Law, 18 PA. CONS. STAT. §§ 2802–2805 (2018).

70 *Id.* Timothy Piazza was a nineteen-year-old sophomore at Penn State who died in 2017 while seeking to join Beta Theta Pi fraternity. *See Law Named for Dead Penn State Student Boosts Hazing Penalty*, ASSOCIATED PRESS (Aug. 24, 2021, 1:39 PM), https://apnews.com/article/education-laws-4cc4af520695e978971fbde226cdeb9b [https://perma.cc/8YX9-MQJN]. During an initiation ritual, Piazza consumed a dangerous amount of alcohol and was fatally injured after falling down basement steps. *Id.*

71 *Law Named for Dead Penn State Student Boosts Hazing Penalty*, *supra* note 70.

72 *New Anti-Hazing Law Signed in Pennsylvania After Death of Penn State Student*, NBC NEWS (Oct. 19, 2018, 4:32 PM), https://www.nbcnews.com/news/us-news/new-anti-hazing-law-signed-pennsylvania-after-death-penn-state-n922231 [https://perma.cc/3HRU-9K2W].

Max Gruver, a freshman at Louisiana State University.[73] Similar to Pennsylvania's harsher hazing law,[74] the Max Gruver Act imposes stiffer hazing penalties—making hazing that results in serious bodily harm or death a felony.[75] In Washington State, the Sam Martinez Stop Hazing Law was enacted in May 2023, making hazing that causes substantial bodily harm a felony.[76] The goal of Washington's new law is to improve accountability for those who lead hazing rituals and to establish a much-needed culture against hazing.[77]

However, despite efforts by Washington and these other states to strengthen their anti-hazing statutes, the effectiveness of these laws in addressing hazing varies significantly. Scholars contend that the continued rise in hazing incidents stems in part from the lack of consistency across states in how hazing is defined and what punishments exist for those who violate the law.[78] Anti-hazing advocates argue that certain state penalties must be harsher in order to deter hazing.[79] Moreover, in states where hazing does not constitute a felony, it is often not treated with the seriousness it deserves by law enforcement.[80]

Another issue lies in the fact that numerous states lack a "consent clause" in their anti-hazing statutes—a provision asserting that agreement to take part in certain hazing activities does not exempt participants from criminal prosecution.[81] Various strategies have been proposed to reform the framework of criminal anti-hazing statutes,[82]

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73 *See* Max Gruver Act, 2018 La. Acts 481 (codified as amended at LA. REV. STAT. ANN. § 14:40.8 (2018)); Hernández, *supra* note 65. While rushing Phi Delta Theta at Louisiana State University, Max Gruver was forced to participate in a hazing ritual called "Bible Study," which involved quizzing pledges on fraternity facts. *Id.* Gruver died due to alcohol consumption during the hazing event. *Id.*

74 18 PA. CONS. STAT. §§ 2801–2805 (2018).

75 LA. REV. STAT. ANN. § 14:40.8 (2018).

76 Sam Martinez Stop Hazing Law, WASH. REV. CODE § 28B.10.902 (2023); *Hazing Becomes a Felony in Some Cases in Washington State*, ASSOCIATED PRESS (May 2, 2023, 5:57 PM), https://apnews.com/article/college-hazing-washington-felony-37fa0aeb36aa82181ff84107d2fdac87 [https://perma.cc/SQF5-QPAW]. Sam Martinez, a student at Washington State University, died of alcohol poisoning after attending an Alpha Tau Omega fraternity event in 2019. *Id.*

77 *Hazing Becomes a Felony in Some Cases in Washington State*, *supra* note 76.

78 *See, e.g.*, McGlone, *supra* note 10, at 19.

79 Hernández, *supra* note 65.

80 *Id.* According to Todd Shelton, the executive director of the Hazing Prevention Network, "Where hazing is a minor misdemeanor, it's not taken seriously by law enforcement because it's not worth the effort to prosecute . . . . One of the biggest hurdles is getting the penalty or statute to match the seriousness of the crime." *Id.*

81 *Id.*

82 *See, e.g.*, Chamberlin, *supra* note 66, at 963–70. Chamberlin proposes an omission liability framework that would "authorize punishment for failing to take reasonable steps to protect a helpless student from injury." *Id.* at 964. According to his proposal, this framework, unlike current

including some advocating for federal legislation.[83] However, in light of the aforementioned issues and the continued rise in hazing incidents, many survivors of hazing have turned to civil remedies to hold institutions accountable.

2. Civil Remedies

Civil remedies are an attractive avenue for hazing victims because they provide the opportunity to seek financial compensation for injuries and to hold more parties accountable for hazing practices on college campuses. Hazing survivors have pursued varied causes of action in their civil suits under tort law, such as civil hazing, assault and battery, intentional infliction of emotional distress, and negligence.[84] But numerous obstacles stand in the way of civil liability. For example, in some states, educational institutions can assert as an affirmative defense that they were actively enforcing an anti-hazing policy at the time of the incident.[85] Given that virtually all schools and colleges have developed some form of anti-hazing policy to govern student groups on their

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criminal laws, is "compatible with students' social norms" and would be much more likely to change on-campus behavior. *Id.* at 970. Another theory suggests that anti-hazing statutes should be amended to focus on deterring fraternities and schools, as opposed to the individual actors themselves. *See* Justin J. Swofford, Note, *The Hazing Triangle: Reconceiving the Crime of Fraternity Hazing*, 45 J. COLL. & U.L. 296, 322 (2020).

[83] *See, e.g.*, Stop Campus Hazing Act, S. 2901, 118th Cong. (2023). This bipartisan piece of legislation would improve the reporting and prevention of hazing on college campuses. *See id.* It would require hazing incidents to be included in a college's annual security report, require higher education institutions to educate students about the dangers of hazing, and provide parents and students with better information about a college's history of hazing incidents. *Id.*

[84] *See, e.g.*, Cortese v. W. Jefferson Hills Sch. Dist., No. 53 C.D. 2008, 2008 WL 9404638, at *1 (Pa. Commw. Ct. Dec. 9, 2008) (regarding counts of negligence, intentional infliction of emotional distress, civil conspiracy, and violation of Title IX against a student and school officials for a hazing incident that took place on a school bus); Cameron v. Univ. of Toledo, 98 N.E.3d 305, 309–10 (Ohio Ct. App. 2018) (regarding civil hazing and negligence claims for a hazing incident on the university football team); Humphries v. Pa. State Univ., 492 F. Supp. 3d 393, 400–01 (M.D. Pa. 2020) (regarding eleven counts in relation to hazing experienced on the football team including negligence per se, civil conspiracy, assault and battery, and intentional infliction of emotional distress).

[85] *See, e.g.*, *Cameron*, 98 N.E.3d at 312 (finding that Ohio law permits as an affirmative defense to an action against a school, university, college, or other educational institution for civil hazing that the school was "actively enforcing a policy against hazing at the time the cause of action arose").

campuses,[86] this is a powerful affirmative defense, even in cases where student-athletes were flouting the school's policy.[87]

Moreover, negligence and related legal theories are notoriously fact-intensive, with little uniformity in how courts impose liability.[88] Challenges in bringing negligence cases often arise when victims seek to establish the existence of a special relationship between student-athletes and universities, which would impose a duty of care on universities to protect plaintiffs from hazing abuse and discrimination.[89] This is because courts have been reluctant to acknowledge such a special relationship when student-athletes are off the field and not directly engaged in their sport.[90] For example, in 1993, the United States Court of Appeals for the Third Circuit held that a special relationship may exist between a school and student-athlete if a plaintiff can show that (1) the student was "actively recruited," (2) the student was "acting in an athletic capacity while injured", and (3) the resulting injury was "reasonably foreseeable."[91] The second factor poses significant challenges for hazing victims.[92] It implies that a special relationship can only exist when student-athletes are on the field or in the arena, actively engaged in their

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86 For example, Northwestern University's hazing policy defines hazing as:

> [A]ny action taken or situation created, intentionally or unintentionally, whether on or off University premises and whether presented as optional or required, to produce: mental, physical, or emotional discomfort; servitude; degradation; embarrassment; harassment; or ridicule for the purpose of initiation into, affiliation with, or admission to, or as a condition for continued membership in a group, team, or other organization, regardless of an individual's willingness to participate.

Hazing Prevention, NW. STUDENT AFFS. (Dec. 2, 2021), https://www.northwestern.edu/hazing-prevention/responsibilities/northwestern-policy.html [https://perma.cc/2P5U-T8LN]. The policy provides that individuals, as well as groups of students and student organizations, may face disciplinary sanctions (up to and including removal from the University) for acts of hazing. *Id.* "Failure of an individual in a leadership role or position of power to address and/or report an act of hazing committed against another individual may also be considered an abuse of power and a violation of the policy." *Id.* Silent participation in the presence of hazing are not neutral acts; they are violations of this policy. *Id.*

87 *See, e.g.*, *Cameron*, 98 N.E.3d at 313–14, 319 (holding that the affirmative defense of actively enforcing a policy against hazing applied because trial testimony and submitted exhibits had sufficiently established that the university had an anti-hazing policy in effect at the time of the incident).

88 *See* Nicole Somers, Note, *College and University Liability for the Dangerous Yet Time-Honored Tradition of Hazing in Fraternities and Student Athletics*, 33 J. COLL. & U. L. 653, 659–60 (2007).

89 *See id.* at 675–77.

90 *See id.*

91 Kleinknecht v. Gettysburg Coll., 989 F.2d 1360, 1366–67 (3d Cir. 1993); *see* Somers, *supra* note 88, at 676–77.

92 *See* Somers, *supra* note 88, at 677.

sport.[93] However, this is not when most hazing incidents actually occur.[94] More recently, the United States District Court for the Middle District of Pennsylvania addressed the question of whether colleges owe their student-athletes a general duty to protect them and ensure their well-being, answering in the negative.[95] Thus, relying on civil claims such as negligence has not consistently proven to be an effective means for curbing systemic hazing in higher education.

II. TITLE IX AS A VEHICLE TO HOLD EDUCATIONAL INSTITUTIONS ACCOUNTABLE FOR HAZING PRACTICES

Given the limitations of state hazing laws and civil remedies, many hazing plaintiffs in recent decades have sought relief under Title IX. Title IX makes it illegal for any person to, "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 [f]ederal financial assistance."[96] Title IX's scope was intended to be broad and sweeping,[97] and since its inception, women's sports have grown significantly: 29,977 female student-athletes competed in college sports in 1972, compared with 150,186 in 2003, and 226,212 in 2022.[98]

A. *Legal Standards for Title IX Claims*

In 1979, the Supreme Court held that a victim of sex discrimination is entitled to pursue a private cause of action against a federally funded

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93 *Id.*

94 *See id.*

95 Humphries v. Pa. State Univ., 492 F. Supp. 3d 393, 407–08 (M.D. Pa. 2020) (holding that there was no duty of care, for purposes of a negligence claim under Pennsylvania law, upon a university football coach based on a student's allegation that the coach promised to use his best effort to protect safety and welfare of the student in the student's action arising out of alleged harassment and hazing by university football team members).

96 20 U.S.C. § 1681.

97 Senator Birch Bayh of Indiana, one of Title IX's authors, articulated the goal that Title IX be "a strong and comprehensive measure which I believe is needed if we are to provide women with solid legal protection as they seek education and training for later careers." 118 CONG. REC. 5806–07 (1972).

98 McGlone, *supra* note 10, at 1; Corbin McGuire, *A Look At Trends for Women in College Sports*, NCAA (Mar. 1, 2023, 10:22 AM) https://www.ncaa.org/news/2023/3/1/media-center-a-look-at-trends-for-women-in-college-sports.aspx [https://perma.cc/2HDL-DDYX].

educational institution for a violation of Title IX.[99] Over the years, the Court has continued to carve out various avenues for litigants to seek relief under Title IX for different forms of discrimination. In *Gebser v. Lago Vista*, the Court held that a plaintiff can seek monetary damages in a lawsuit alleging Title IX violations for employee-on-student sex-based harassment.[100] To prevail on such a claim, an official with authority to institute "corrective measures" on behalf of the school must have received "actual notice" of the alleged harassment and the school's response must have amounted to "deliberate indifferen[ce]."[101] The actual notice requirement specifies that constructive or imputed knowledge is insufficient to invoke liability; the official must have actually known about the discrimination and failed to adequately respond.[102] Deliberate indifference constitutes "an official decision by the recipient not to remedy the violation."[103]

Furthermore, in *Davis v. Monroe County Board of Education*, the Supreme Court ruled that schools receiving federal education funds can be held liable for damages under Title IX for instances of peer-on-peer sexual harassment.[104] To succeed on this claim, a plaintiff must show that the funding recipient (1) had actual knowledge of, and (2) was deliberately indifferent to (3) harassment that was so "severe, pervasive, and objectively offensive" that it (4) might "effectively bar[s] the victim's access to an educational opportunity or benefit."[105] The standard articulated in *Davis* has been utilized by courts adjudicating hazing cases, despite the fact that *Davis* did not concern intercollegiate hazing.[106] The plaintiff in *Davis* was a fifth grader who was "the victim of a prolonged pattern of sexual harassment" by a male classmate; she was neither a college student nor a student-athlete.[107] Since *Gebser* and *Davis*, as lower courts have heard a range of peer-on-peer sexual harassment cases with diverse fact patterns,[108] female Title IX plaintiffs have struggled to prevail in their lawsuits and satisfy the stringent requirements set forth in *Davis*.

99 Cannon v. Univ. of Chi., 441 U.S. 677 (1979) (holding that a female plaintiff who was denied admission to medical school at two universities could bring a lawsuit under Title IX despite it having no express private right of action).

100 524 U.S. 274 (1998) (holding that a suit may be brought under Title IX by a student who has experienced sexual harassment by a teacher).

101 *Id.* at 277.

102 *Id.* at 290.

103 *Id.*

104 526 U.S. 629 (1999) (holding that a private right of action may exist under Title IX for a female plaintiff who experienced sexual harassment by her male classmate).

105 *Id.* at 633.

106 *See, e.g.*, Humphries v. Pa. State Univ., 492 F. Supp. 3d 393, 400–01 (M.D. Pa. 2020).

107 *Davis*, 526 U.S. at 633.

108 *See infra* Section II.B.

B. *Analysis of Title IX Peer-on-Peer Sexual Harassment Lawsuits Brought by Male Plaintiffs Versus Female Plaintiffs*

Since the *Davis* decision in 1999, much of the peer-on-peer sexual harassment case law under Title IX has involved allegations of violative conduct by male student-athletes against female student-athletes.[109] However, the hazing context is distinct from this line of cases because it typically involves sexual harassment occurring in sex-segregated spaces—males hazing other males and females hazing other females.[110] While the former aligns with common perceptions of athletic hazing,[111] the latter challenges societal expectations of women and cultural norms regarding femininity.[112] Consequently, it is not surprising that Title IX hazing cases reaching lower courts have varied based on the fact patterns and specific gender dynamics.

1. Male Plaintiffs

Davis has arguably made it easier for male plaintiffs to argue successful hazing claims under Title IX.[113] One reason male victims may

109 *See* Simpson v. Univ. of Colo., 500 F.3d 1170, 1173 (10th Cir. 2007) (concerning a female students' claim against the University of Colorado based on alleged sexual abuse by male football players and high school football recruits); Williams v. Bd. of Regents of the Univ. Sys. of Ga., 477 F.3d 1282, 1288–90 (11th Cir. 2007) (involving a female student's claim against the University of Georgia because of alleged sexual abuse by male basketball and football players); Benefield *ex rel.* Benefield v. Bd. of Trs. of Univ. of Ala., 214 F. Supp. 2d 1212, 1214–15 (N.D. Ala. 2002) (involving a female student's sexual harassment claim against members of the University of Alabama men's football and basketball teams).

110 *See* Deborah L. Brake, *Lessons from the Gender Equality Movement: Using Title IX to Foster Inclusive Masculinities in Men's Sport*, 34 L. & INEQ. 285, 302–08 (2016). Brake discusses hazing that occurs between men as well as women. *Id.* Among men in sports, Brake characterizes hazing as a practice that "is intricately bound up with hegemonic masculinity." *Id.* at 303. Among women in sports, Brake also argues that hazing demonstrates women internalizing masculine norms in order to gain certain social advantages. *Id.* at 308; *see* cases cited *infra* note 113.

111 *See* Blackistone, *supra* note 4.

112 *See* McGlone, *supra* note 10, at 35–36; Brake, *supra* note 110, at 308–09.

113 *See, e.g.*, Snelling v. Fall Mountain Reg'l Sch. Dist., No. Civ. 99-448, 2001 WL 276975, at *4–5 (D.N.H. Mar. 21, 2001) (finding a Title IX hazing claim that rested on "sex-based stereotypes of masculinity" to be actionable); Bashus *ex rel.* Bashus v. Plattsmouth Cmty. Sch. Dist., No. 06-cv-300, 2006 WL 2226338, at *1 (D. Neb. Aug. 3, 2006) (finding that a Title IX hazing complaint relating to sexually inappropriate touching in a school locker room survived a motion to dismiss); Mathis v. Wayne Cnty. Bd. of Educ., 782 F. Supp. 2d 542, 552–53 (M.D. Tenn. 2011) (finding that seventh-grade basketball players successfully sued under Title IX for harassing locker room behavior from eighth graders); Roe *ex rel.* Callahan v. Gustine Unified Sch. Dist., 678 F. Supp. 2d 1008, 1038–39 (E.D. Cal. 2009) (finding that a Title IX claim relating to sexual assault brought by a

be more successful than their female counterparts is the fact that cases involving male athletes tend to be more graphic and violent.[114] In *Mathis v. Wayne County Board of Education*, for example, the United States District Court for the Middle District of Tennessee found that the harassment experienced by the male plaintiffs was sufficiently "severe, pervasive, and objectively offensive" because they "presented credible evidence that they were subjected to months of ongoing harassment of a sexual nature."[115] Central to the court's decision was the gruesome nature of each plaintiff's experience: one student had a marker forcibly inserted into his rectum, while the other had to perform blindfolded sit-ups where he made contact with the naked rear end of an older player.[116] Despite attempts by the eighth graders who perpetrated these acts to dismiss them as mere "pranks," the court remained unconvinced.[117] It determined that the plaintiffs had presented sufficient evidence, meeting the *Davis* standard, to proceed with their Title IX claim.[118]

Another possible reason behind the success of male plaintiffs is the hegemonic masculinity embedded in sports culture and the role that hazing plays in perpetuating hierarchical abuse.[119] In *Snelling v. Fall Mountain Regional School District*, high school underclassmen suffered verbal abuse and physical abuse from older players on the basketball team, consisting primarily of homosexual taunts and name-calling.[120] The plaintiffs argued that the suit was actionable under Title IX because the harassment that they experienced stemmed from the perpetrators' "sex-based stereotypes of masculinity."[121] In response, the defendants sought to characterize the verbal abuse as a form of harmless "name-calling," which the Supreme Court had explicitly excluded from liability in *Davis*.[122] However, the *Snelling* court rejected this characterization, finding that a reasonable jury could conclude the harassment exceeded mere teasing.[123] Consequently, the United States District Court for the District of New Hampshire acknowledged that hazing in the form of

high school football player survived summary judgment). These cases suggest that Title IX has provided male plaintiffs with "a potent litigation tool" in the context of hazing. Stuart, *supra* note 7, at 414.

114 *See* McGlone, *supra* note 10, at 35; Stuart, *supra* note 7, at 378–79.

115 782 F. Supp. 2d at 550–51.

116 *Id.* at 545–46.

117 *Id.* at 546, 551.

118 *Id.* at 551.

119 *See* Stuart, *supra* note 7, at 414.

120 No. Civ. 99-448, 2001 WL 276975, at *1 (D.N.H. Mar. 21, 2001).

121 *Id.* at *4.

122 *Id.* at *4; Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 651–52 (1999).

123 *Snelling*, 2001 WL 276975, at *5.

verbal abuse targeting sexual orientation and "sex-based stereotyped expectations of masculinity" falls within the purview of Title IX.[124]

These cases can be juxtaposed with *Seamons v. Snow*, which was decided in 1996 by the United States Court of Appeals for the Tenth Circuit, three years prior to *Davis*.[125] In that case, Brian Seamons was forcibly bound to a towel rack in the locker room and had his genitals taped by some upperclassmen football teammates.[126] Upon reporting the incident to school authorities, Seamons was accused by his coach of betraying the team, and the football players involved were permitted to play in the next football game.[127] Seamons brought a claim under Title IX alleging that his assault constituted sexual discrimination and harassment.[128] However, the court concluded that the acts against him were not perpetrated "on the basis of sex" and that he had failed to demonstrate how the attack was sexual in nature.[129]

The fact that the outcome of *Seamons* diverges so drastically from *Mathis* and *Snelling*, both decided after *Davis*, is a strong indication of *Davis*'s profound influence on male-on-male sexual harassment cases, particularly in the context of hazing.[130] *Seamons* reflected the court's willing attitude to accept sexually exploitative hazing as a way to foster team loyalty.[131] Conversely, cases like *Mathis* and *Snelling* demonstrate the Supreme Court's extension of Title IX protections to male victims of hazing and recognition of the role of sex-based stereotypes of masculinity in perpetuating abuse.[132] *Davis* arguably helped facilitate the success of these male plaintiffs in bringing their hazing claims and the *Davis* standard provided a framework for addressing these cases, putting the notion of "boys will be boys" in sports culture to bed.[133]

124 *Id.* at *4–5.

125 84 F.3d 1226 (10th Cir. 1996).

126 *Id.* at 1230.

127 *Id.*

128 *Id.*

129 *Id.* at 1232–33. In the pre-*Davis* landscape, the court suggested that in order to demonstrate a hostile environment, Seamons would need to demonstrate something along the lines of being "subjected to unwelcome sexual advances or requests for sexual favors, or that sex was used to contribute to a hostile environment for him." *Id.* at 1233.

130 *See* Nancy Chi Cantalupo, *Masculinity & Title IX: Bullying and Sexual Harassment of Boys in the American Liberal State*, 73 MD. L. REV. 887, 941–42 (2014).

131 *See* Stuart, *supra* note 7, at 408.

132 *See id.*; Mathis v. Wayne Cnty. Bd. of Educ., 782 F. Supp. 2d 542 (M.D. Tenn. 2011); Snelling v. Fall Mountain Reg'l Sch. Dist., No. Civ. 99-448, 2001 WL 276975, at *1 (D.N.H. Mar. 21, 2001).

133 Stuart, *supra* note 7, at 414.

2. Female Plaintiffs

While the aforementioned cases demonstrate the success that various male athletes have experienced in bringing peer-on-peer sexual harassment hazing claims under Title IX, women have encountered greater challenges in satisfying the *Davis* standard. For example, in *Carabello v. New York City Department of Education*, heard by the United States District Court for the Eastern District of New York in 2013, a ninth-grade girl was assaulted in a stairwell by a male student.[134] The assailant bit her on the neck and touched her legs, stomach, and breasts as she tried to push him off and repeatedly told him to "get off."[135] Despite the seriousness of the incident, the court ruled that it did not meet the *Davis* standard.[136] It was viewed as a single unfortunate event and not "severe, pervasive, or objectively offensive" enough.[137] The court suggested that the incident would have met the standard had it been a rape or a "serious sexual assault."[138]

In *Burch v. Young Harris College*, a hazing case, the United States District Court for the Northern District of Georgia invoked *Davis* to determine whether a school could be held accountable under Title IX for a sorority hazing incident.[139] Plaintiff Jo Hannah Burch, upon being accepted into Gamma Psi, was subjected to multiple nights of hazing, including being taken into the woods and spat on in the face by other sorority members.[140] Burch endured numerous sex-specific insults such as being called "bitch" and was forced to crawl through mud.[141] In evaluating Burch's Title IX claim, the court's decision ultimately hinged on whether sexual harassment had occurred and whether it was sufficiently "severe, pervasive, or objectively offensive" to deprive the plaintiff of educational opportunities or benefits.[142] Ultimately, the court concluded that the gender-based taunting and abuse experienced by Burch did not meet the threshold for sexual harassment.[143] Even if it did,

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134 928 F. Supp. 2d 627, 635 (E.D.N.Y. 2013).

135 *Id.*

136 *Id.*

137 *Id.* at 643.

138 *Id.*

139 No. 13-cv-64, 2013 WL 11319423, at *5–6 (N.D. Ga. Oct. 9, 2013) (citing Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 648 (1999)).

140 *Id.* at *1.

141 *Id.*

142 *Id.* at *7; *see* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 651 (1999).

143 *Burch*, 2013 WL 11319423, at *7–8.

the court determined that it did not rise to the level of effectively depriving access to educational programs.[144]

These two cases shed light on the challenges women face in establishing peer-on-peer sexual harassment claims under Title IX. Firstly, as previously discussed, the hazing rituals involving female athletes have traditionally been less graphically violent than those involving male athletes.[145] When courts evaluate these female hazing behaviors that do not rise to the level of sodomy or assault often present in male hazing cases, courts often find the behavior insufficiently severe or offensive under Title IX, particularly when presented with a single incident rather than a pattern of systemic sexual harassment.[146] However, this explanation alone may not suffice, considering there are instances of women engaging in similarly gruesome and violent behavior.[147] It is also possible that courts are still acclimating to the concept of women being the perpetrators, not just the victims, in sexual harassment cases. As is evident from *Davis*, *Carabello*, and much of the Title IX jurisprudence, female plaintiffs often bring suits related to sexual harassment perpetrated by men, not women.[148] Furthermore, the secrecy and concealment inherent in hazing likely contribute to the underreporting of incidents,[149] with a great number of cases settling before reaching court.[150]

In addition, societal expectations of women and cultural norms regarding masculinity and femininity contribute to the shock and discomfort associated with females hazing and sexually harassing other females.[151] Attributes such as strength and courage have long been tied to masculine identity and sports culture, while feminine identity has been traditionally tied to qualities such as submissiveness and dependence.[152] These classical descriptors of women directly clash with the role that

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144 *Id.*

145 *See* McGlone, *supra* note 10, at 35.

146 Compare, for example, the incidents at issue in *Carabello* and *Mathis*. The *Mathis* court determined that the act of sodomy was sufficient to state a claim under Title IX, whereas the *Carabello* court held that the forcible touching experienced was not a "serious" sexual assault and not actionable under Title IX. *See* Mathis v. Wayne Cnty. Bd. of Educ., 782 F. Supp. 2d 542, 551 (M.D. Tenn. 2011); Carabello v. N.Y.C. Dep't of Educ., 928 F. Supp. 2d 627, 643 (E.D.N.Y. 2013).

147 *See* McGlone, *supra* note 10, at 22–24 (describing incidents of severe and violent hazing involving women).

148 *See Davis*, 526 U.S. at 633–35; *see, e.g.*, cases cited *supra* note 109.

149 Allan & Madden, *supra* note 5, at 28.

150 *See Sports Hazing Incidents*, ESPN (June 3, 2002) https://www.espn.com/otl/hazing/list.html [https://perma.cc/535L-G4U2]; Maya King, *Bowling Green Reaches $2.9 Million Settlement in Hazing Death*, N.Y. TIMES (Jan. 23, 2023), https://www.nytimes.com/2023/01/23/us/bowling-green-state-university-hazing-settlement.html [https://perma.cc/Z682-L887].

151 McGlone, *supra* note 10, at 35–36.

152 *Id.* at 36.

hazing has come to occupy in sports and the expectations placed on women to prove themselves in such a male-dominated sphere.[153] Further, as women's participation in sports has increased significantly, data suggests that female athletes have started embracing more and more sports practices from their male counterparts.[154] Ryan Hamilton suggests that since many women do not have a long-standing athletic tradition to draw from in the same way that men do, "male-defined hazing practices" may become a part of the female sport subculture,[155] leaving women with conflicting pressures "to appear both masculine and feminine."[156] Courts may struggle to reconcile cultural perceptions of women with the traditionally masculine hazing rituals performed by some female student-athletes. However, it is essential to recognize that women, too, can at times exhibit traits of hegemonic masculinity.[157]

III. Title VII as a Vehicle to Hold Employers Accountable for Discrimination and Sexual Harassment

Given the persistence of hazing in intercollegiate athletics and the necessity to hold institutions accountable, the question arises: how can Title IX better serve female plaintiffs seeking recourse for hazing-related abuse and injuries? One avenue for improving how courts approach peer-on-peer sexual harassment under Title IX is to draw lessons from the statute that heavily influenced it: Title VII.[158] Enacted as part of the Civil Rights Act of 1964, Title VII aims to prohibit workplace discrimination and any practices that perpetuate inequality among different social groups in the workplace.[159] Prior to Title VII, victims of sex discrimination in the workplace had no legal remedy.[160] Through judicial interpretation of Title VII, courts developed the hostile work environment and sexual harassment doctrines to underscore Title VII's

153 *Id.* at 35–36; Ryan Hamilton, Clearing the Haze: Examining the Role of Social Cognitive Theory in the Prediction of Hazing Perpetration in Athletics 89–90 (2011) (Ph.D. dissertation, University of New Brunswick) (on file with Library and Archives Canada).

154 Hamilton, *supra* note 153, at 89–90.

155 *Id.*

156 *Id.* at 93.

157 *See* Brake, *supra* note 110, at 309–10.

158 *Title IX Legal Manual*, *supra* note 18.

159 42 U.S.C. § 2000e-2(a); *see* Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1463–64 (1984) (describing the legal remedies available under Title VII for victims of discrimination in the workplace).

160 *See* Note, *supra* note 159, at 1463.

prohibition on discriminatory employer practices based on sex.[161] While Title VII applies strictly to workplace sexual harassment as opposed to Title IX's educational reach, there are multiple reasons to draw from Title VII jurisprudence in adjudicating college athletic hazing cases: the significant historical and legal relationship between Title VII and Title IX, the similarities in the Supreme Court's jurisprudence on sexual harassment cases, and the growing social and legal trend toward treating student-athletes as employees.

A. *Legal Standards for Title VII Claims*

The first Title VII sexual harassment case reviewed by the United States Supreme Court was *Meritor Savings Bank v. Vinson*.[162] The plaintiff in *Meritor*, a former bank employee, claimed that she had been "constantly . . . subjected to sexual harassment" by the bank's branch manager.[163] This included the plaintiff's manager making repeated demands for sexual favors, fondling her in front of other employees, following her into the restroom, and exposing himself to her.[164] The Supreme Court held that "a claim of 'hostile environment' sex discrimination is actionable under Title VII" and that the plaintiff's claim should not be dismissed.[165] The standard used by the Court was that the sexual harassment, in order to be actionable, "must be sufficiently severe or pervasive" to alter the victim's employment conditions "and create an abusive working environment."[166]

The next significant Title VII sexual harassment case to come before the Supreme Court was *Harris v. Forklift Systems, Inc.*[167] Plaintiff Teresa Harris worked at Forklift Systems and, throughout the course of her employment, was subjected to gender-based insults and sexual innuendos by Charles Hardy, Forklift's president.[168] Hardy continued to act inappropriately in front of Harris and other female employees despite Harris complaining about his conduct.[169] The Supreme Court granted certiorari to resolve the circuit split concerning the standard of proof

161 *See* Sarah E. Burns, *Evidence of a Sexually Hostile Workplace: What Is It and How Should It Be Assessed After* Harris v. Forklift Systems, Inc.*?*, 21 N.Y.U. REV. L. & SOC. CHANGE 357, 360–61 (1994).

162 477 U.S. 57 (1986).

163 *Id.* at 59–60.

164 *Id.* at 60.

165 *Id.* at 73.

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

167 510 U.S. 17 (1993).

168 *Id.* at 19.

169 *Id.*

needed to support a hostile work environment claim.[170] The majority held that "concrete psychological harm" is not an element that is required by Title VII.[171] Rather, the Court reasoned that an abusive work environment may cause significant harm short of serious psychological injury[172] and outlined a test with both an objective and subjective component.[173] The majority also made clear that whether a work environment is "hostile" must be determined by looking at "all the circumstances."[174]

In *Oncale v. Sundowner Offshore Services Inc.*, the Supreme Court finally addressed the issue of same-sex harassment in the workplace.[175] In *Oncale*, a male plaintiff, Joseph Oncale, brought suit under Title VII claiming that his male coworkers sexually harassed him in the workplace on account of his sex.[176] Oncale was part of an eight-man crew at Sundowner Offshore Services, Inc.[177] During the course of his employment, Oncale was physically assaulted by his coworkers, threatened with rape, and "subjected to humiliating, sex-related actions."[178] The district court dismissed Oncale's claim not because the harassment was insufficiently severe to create a hostile work environment, but because Oncale was a man who had been harassed by other men.[179] Thus, the case presented the Supreme Court with the question of whether same-sex workplace harassment can violate Title

170 *Id.* at 20. There was a disagreement among circuits as to whether the abusive work environment must seriously affect an employee's psychological well-being or lead the plaintiff to suffer serious injury. *Compare* Rabidue v. Osceola Refin. Co., 805 F.2d 611, 620 (6th Cir. 1986) (requiring that an employee demonstrate serious psychological harm), *with* Ellison v. Brady, 924 F.2d 872, 877–78 (9th Cir. 1991) (rejecting such a requirement).

171 *Harris*, 510 U.S. at 22.

172 *Id.*

173 *Id.* at 21–22 ("This standard, which we reaffirm today, takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury. . . . Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.").

174 *Id.* at 23 ("These [circumstances] may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.").

175 523 U.S. 75, 76 (1998).

176 *Id.* at 77.

177 *Id.*

178 *Id.*

179 *Id.*

VII's prohibition against sex-based discrimination.[180] The majority held that same-sex harassment is indeed actionable under Title VII; the fact that a plaintiff and a defendant are of the same sex does not bar a discrimination claim.[181] The Court reaffirmed the requirements put forth in *Meritor* and *Harris*, namely that Title VII only reaches conduct that is severe or pervasive enough to create an objectively hostile or abusive work environment.[182] Further, Justice Antonin Scalia made clear that the inquiry regarding the objective severity of harassment requires careful consideration of the "social context" in which the behavior occurs and is experienced.[183]

While these cases demonstrate the Supreme Court's broad interpretation of Title VII's application to hostile environment sexual harassment claims, Title VII's protections against sexual harassment are not limitless. For example, the Supreme Court created an affirmative defense allowing employers to avoid liability for sex discrimination in 1998 in *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*.[184] In these cases, the Court held that an employer may be subject to vicarious liability "for an actionable hostile environment created by a supervisor," but that an employer may raise an affirmative defense if they exercised reasonable care to prevent the sexual harassment.[185] This is one significant way that the Court made it more difficult for litigants to gain redress under Title VII. Still, by not requiring plaintiffs to demonstrate severe psychological injury and establishing a test with both an objective and a subjective component, the Court's jurisprudence established a solid

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180 *Id.* at 76 (citing 42 U.S.C. § 2000e-2(a)(1)).

181 *Id.* at 79.

182 *Id.* at 81.

183 *Id.* The Court made a distinction between a coach smacking a football player on the buttocks as he heads out onto the field, and a secretary being smacked on the buttocks at the office. *Id.* As this example illustrates,

> [t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.

Id. at 81–82.

184 Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

185 *Faragher*, 524 U.S. at 807. The affirmative defense requires "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.*

legal foundation that provides flexibility for plaintiffs and considers the totality of each case's factual circumstances.[186]

IV. PROPOSAL

The "severe and persuasive" standard has made it challenging for many female victims of hazing to seek redress under Title IX. Therefore, courts should loosen *Davis*'s stringent requirements and embrace the spirit of Title VII so that more victims of hazing can hold institutions accountable and make meaningful change in combatting the problem. Specifically, judges should introduce a subjective element into the peer-on-peer sexual harassment inquiry and underscore the requirement that the inquiry requires careful consideration of all relevant circumstances.

A. *Legal Relationship Between Title IX and Title VII*

The primary reason that courts should reference Title VII in adjudicating hazing cases is the significant relationship and parallels between Title IX and Title VII. Title IX was largely modeled after portions of the Civil Rights Act of 1964 and the two statutes have similar goals of eliminating discrimination and harassment.[187] The Title IX standards articulated in *Gebser* and *Davis* were also largely influenced by lower courts' previous interpretations of Title VII.[188] The *Gebser* petitioners centered their argument in the context of Title VII, arguing that damages should similarly be awarded in the Title IX context for teacher-student sexual harassment.[189] In reaching its decision that damages may be awarded under certain circumstances for instances of teacher-student sexual harassment, the Court relied on Title VII principles.[190] *Davis* was

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186 Deb Lussier, Note, Oncale v. Sundowner Offshore Services Inc. *and the Future of Title VII Sexual Harassment Jurisprudence*, 39 B.C. L. REV. 937, 942–43 (1998).

187 *Title IX Legal Manual*, *supra* note 18.

188 *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998); Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 651 (1999).

189 *See Gebser*, 524 U.S. at 281–82.

190 *Id.* at 286–90. The majority found the previous decision *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992), persuasive. *Gebser*, 524 U.S. at 288–89. In *Franklin*, the Court stated:

> Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." We believe the same rule should apply when a teacher sexually harasses and abuses a student.

503 U.S. at 75 (1992) (alteration in original) (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986)).

also influenced by Title VII at both the appellate and Supreme Court level.[191] At the Eleventh Circuit, the court drew from Title VII jurisprudence to find that the plaintiff had stated a claim for student-on-student harassment under Title IX.[192] At the Supreme Court, the majority relied on specific language from its prior Title VII cases to develop its standard for Title IX liability in cases of peer-on-peer sexual harassment.[193] Notably, the Court determined that an important part of the inquiry into what constitutes actionable sexual harassment under Title IX is a "constellation of surrounding circumstances"—language borrowed directly from the majority opinion in *Oncale*.[194]

Furthermore, the Court also expressly recognized the differences between students in the school setting versus employees in the workplace setting.[195] While this was an important distinction in the *Davis* decision, a case about a twelve-year-old girl, it is not as relevant when the plaintiffs are eighteen- to twenty-two-year-old student-athletes.[196] College athletes are not middle schoolers—it is not "understandable" for them to engage in certain immature and problematic behaviors as they grow up.[197] Thus, in the context of college hazing cases, courts should not focus on the distinction between school and workplace settings. Treating college women who are being systematically hazed on a college sports team the same as twelve-year-old girls being sexually harassed in middle school has not served to protect them. This is a significant reason why courts should return to the original conception and understanding behind Title IX and adopt a standard that resembles the Title VII standard for workplace discrimination.

Additionally, while Title IX and Title VII share overarching goals of eliminating discrimination and harassment, they also exhibit similarities

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191 *See Davis*, 526 U.S. at 647; Davis v. Monroe Cnty. Bd. of Educ., 74 F.3d 1186, 1193 (11th Cir. 1996).

192 *Davis*, 74 F.3d at 1193 ("[W]e conclude that as Title VII encompasses a claim for damages due to a sexually hostile working environment created by co-workers and tolerated by the employer, Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising authorities knowingly fail to act to eliminate the harassment.").

193 *See Davis*, 526 U.S. at 647.

194 *Id.* at 651 ("Whether gender-oriented conduct rises to the level of actionable 'harassment' thus 'depends on a constellation of surrounding circumstances, expectations, and relationships.'" (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998))).

195 *Davis*, 526 U.S. at 651 ("Courts, moreover, must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults.").

196 *See infra* Section IV.B.

197 *Davis*, 526 U.S. at 651 (arguing that certain "insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students" are understandable among students since they are still learning how to properly interact with each other).

and differences in their legal standards and adjudication methods. For example, the Title IX standard contains a few unique requirements, namely that a defendant must be a Title IX funding recipient and must have actual knowledge of the alleged discrimination or harassment.[198] Title IX and Title VII also contain similarities in terms of the type of harassment that petitioners must allege, and the impact of that harassment. Title IX requires that peer-on-peer harassment be "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."[199] Title VII necessitates that workplace harassment be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[200] However, while both statutes employ a similar "severe or pervasive" standard, significant differences exist between the two in terms of their application and scope.

Firstly, Title IX's requirement that the harassment must "deprive" the victim of educational opportunities and benefits has been interpreted to mean that the sexually harassing behavior must be severe enough to have a "systemic" effect of denying the victim equal access to an educational program or activity.[201] Title VII's requirement that sexual harassment alter the conditions of a victim's employment has been interpreted more loosely. For example, in *Harris*, the Court held that it was not necessary for a plaintiff to demonstrate that they experienced "concrete psychological harm" as a result of workplace harassment.[202] Furthermore, the Supreme Court in its Title VII jurisprudence has expressed that the standard contains both a subjective and an objective

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198 *Id.* at 650. Much has also been written about Title IX's actual notice requirement and the difficulty that it has posed for plaintiffs who are seeking relief. *See, e.g.*, Note, *Title IX—School District Liability for Student-on-Student Sexual Harassment*, 113 HARV. L. REV. 368, 374–78 (1999); Emily Suski, *The Title IX Paradox*, 108 CALIF. L. REV. 1147 (2020).

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

200 Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986)).

201 *Davis*, 526 U.S. at 650; Burch v. Young Harris Coll., No. 13-cv-64, 2013 WL 11319423, at *8 (N.D. Ga. Oct. 9, 2013) (citing *Davis*, 526 U.S. at 652). The *Burch* court found that the harassment experienced by the plaintiff did not result in the denial of educational opportunities and benefits. *Burch*, 2013 WL 11319423, at *8. A showing of depression, anxiety, inability to go into classrooms and common areas, and a decline in grades was not sufficient. *Id.*

202 *Harris*, 510 U.S. at 22 ("A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality.").

element,[203] and that the inquiry requires careful consideration of all the relevant circumstances.[204]

The Title IX peer-on-peer sexual harassment standard does not contain the same subjective element and courts have not recognized the importance of considering the totality of the circumstances. These elements would be particularly beneficial to plaintiffs bringing hazing claims. Introducing a subjective element to the standard would add an important dimension to the inquiry and actually put the experience of hazing victims at the forefront. In addition, considering the totality of the circumstances in hazing cases is particularly important. As discussed earlier, hazing, in the context of sex-segregated sports, presents a unique instance of one definable group discriminating against other members of the group.[205] This social context has not been properly considered in the way that cases have thus far been adjudicated and courts have failed to fully grasp the sex discrimination present when women haze other women.[206]

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203 *Id.* at 21–22 ("Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.").

204 Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. at 81–82 (1998) ("The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.").

205 *See supra* Section II.B.

206 *See* McGlone, *supra* note 10, at 35–36 (describing how gender norms regarding masculinity and femininity are ever present in the hazing context); Brake, *supra* note 110, at 308 ("[I]f the hazing practices men perform in relation to other men are a masculinizing practice, how can this be reconciled with the performance of similar behaviors by women? A skeptic might argue that the fact that women sometimes engage in the same hazing behaviors as men proves that hazing is not a masculinizing practice or a gendered phenomenon at all. Such an argument rests on a formalistic understanding of gender discrimination that insists on sex-based differential treatment and/or sex-based differential harm. However, this view is too simplistic and cannot account for the more complex ways that social practices construct hegemonic masculinity and reinforce gender inequality. One implication of the fact that masculinity is a social, rather than a biologically determined, construction is that women can perform masculinity too. In highly masculine environments, such as sports and blue-collar jobs, women may gain social advantages from performing masculinity.").

B. *Student-Athletes as Employees*

The final reason why courts should amend the Title IX standard and embrace the spirit of Title VII is the growing legal and social trend toward treating student-athletes as employees.[207] Student-athletes, now recognized with rights and responsibilities akin to employees by colleges and universities,[208] should receive the fundamental protections afforded to other employees. The growth of intercollegiate athletics and the Supreme Court's recent jurisprudence on college athletes suggests that it is not far-fetched to consider that college athletes should be treated as employees in the context of hazing and Title VII. The past few decades have seen the college athletics industry become highly commercialized.[209] Since the first intercollegiate competition in 1843, college sports has transformed into a multibillion-dollar industry.[210] Men's football and basketball have been especially lucrative, generating billions of dollars from network deals and sponsorships.[211] March Madness, the annual NCAA basketball tournament, is responsible for most of the NCAA's revenue.[212] Meanwhile, as the TV networks, sponsors, and other employees have been highly compensated, student-athletes have historically been barred from receiving any form of financial compensation due to the concept of "amateurism."[213]

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207 *See, e.g.*, Johnson v. NCAA, 108 F.4th 163 (3d Cir. 2024) (holding that college athletes may be able to meet the qualifications for employees under the Fair Labor Standards Act); Nicole Auerbach, *College Athletes Are Getting Closer to Becoming Employees. What Would Happen Next?*, ATHLETIC (Mar. 4, 2024) https://www.nytimes.com/athletic/5313992/2024/03/04/college-athletes-employees-dartmouth [https://perma.cc/D5R5-CL5P].

208 Auerbach, *supra* note 207.

209 *See* Banks, *supra* note 30, at 554–55.

210 *See id.* at 554; Murry, *supra* note 2; *Johnson*, 108 F. 4th at 167–68.

211 *See* Bruce Schoenfeld, *Student. Athlete. Mogul?*, N.Y. TIMES MAG. (Jan. 24, 2023), https://www.nytimes.com/2023/01/24/magazine/ncaa-nba-student-athlete.html [https://perma.cc/YNH7-QH86].

212 Andy Restrepo, *How Much Does the NCAA Make from March Madness? Where Does the Money Go?*, AS (Mar. 18, 2024, 8:56 AM), https://en.as.com/ncaa/how-much-does-the-ncaa-make-from-march-madness-where-does-the-money-go-n [https://perma.cc/AHJ6-QEEQ]. The NCAA made a record-breaking $1.16 billion in 2021 and March Madness accounted for 85% of that revenue. *Id.* March Madness revenue primarily comes from ticket sales and television rights. *Id.* The NCAA also signed a fourteen-year, $10.8 billion television rights deal in 2010 with CBS Sports and Turner Broadcasting System. *Id.* It was extended through 2032 and the networks agreed to pay an additional $8.8 billion dollars for the added term. *Id.*

213 Banks, *supra* note 30, at 561; *Amateurism*, NCAA, https://www.ncaa.org/sports/2014/10/6/amateurism.aspx [https://perma.cc/67D8-W9CN]. The NCAA distinguishes professional athletes, who are paid for their athletic performance, and amateur athletes, who are not. Banks, *supra* note 30, at 555–56. Amateur status is required of all athletes to participate in the NCAA. *Id.* at 556.

This all changed with the Supreme Court's decision in *National Collegiate Athletic Association v. Alston.*[214] The Court unanimously upheld a district court ruling that the NCAA rules limiting education-related compensation violated the Sherman Act.[215] The case was brought by various football and basketball players including Shawne Alston, a former running back for West Virginia University, who, despite receiving a full athletic scholarship, struggled financially during his four years of college.[216] While many view a full-ride athletic scholarship as the "golden ticket" into college,[217] a significant number of college athletes struggle financially and are unable to gain meaningful employment during school due to the demands of their sports and academic responsibilities.[218] While multiple circuits have held that student-athletes are not employees under the Fair Labor Standards Act (FLSA), these decisions predate the *Alston* decision.[219]

Furthermore, *Alston*, though grounded in antitrust principles,[220] is not the only case surrounding the idea that student-athletes should have certain rights and privileges as employees;[221] it is a part of a general trend among the courts and legal community toward recognizing the student-athlete as a type of employee.[222] In 2021, various plaintiffs, students at different colleges and universities, brought a suit contending that they should be compensated for their time participating in interscholastic athletic activity.[223] The District Court for the Eastern District of Pennsylvania held that the long-standing tradition of "amateurism" in

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214 594 U.S. 69, 80 (2021).

215 *Id.* at 97–101.

216 *In re* NCAA Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1061–62 (N.D. Cal. 2019); Banks, *supra* note 30, at 550.

217 Banks, *supra* note 30, at 550.

218 *See id.* at 551; SARA GOLDRICK-RAB, BRIANNA RICHARDSON & CHRISTINE BAKER-SMITH, HOPE CTR., HUNGRY TO WIN: A FIRST LOOK AT FOOD AND HOUSING INSECURITY AMONG STUDENT-ATHLETES 6 (2020), https://www.luminafoundation.org/wp-content/uploads/2020/04/hungry-to-win.pdf [https://perma.cc/W687-SMLP]; Ben Strauss, *Ex-Athlete's Battle for Scholarship Upgrades: 'I Feel Like I Helped My Brothers'*, N.Y. TIMES (Feb. 12, 2017), https://www.nytimes.com/2017/02/12/sports/a-football-scholarship-is-a-full-ride-but-it-doesnt-mean-a-free-one.html [https://web.archive.org/web/20230417101609/https://www.nytimes.com/2017/02/12/sports/a-football-scholarship-is-a-full-ride-but-it-doesnt-mean-a-free-one.html].

219 *See, e.g.*, Dawson v. NCAA, 932 F.3d 905, 908 (9th Cir. 2019) (holding that a student-athlete is not an employee of the NCAA or collegiate athletic conference under the FLSA); Berger v. NCAA, 843 F.3d 285, 291–94 (7th Cir. 2016) (holding that student-athletes are not employees and therefore not entitled to a minimum wage under the FLSA). *See generally* Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. §§ 203, 206.

220 NCAA v. Alston, 594 U.S. 69 (2021).

221 *See* Johnson v. NCAA, 108 F.4th 163 (3d Cir. 2024).

222 *See* Jennifer A. Shults, *If at First You Don't Succeed, Try, Try Again: Why College Athletes Should Keep Fighting for "Employee" Status*, 56 COLUM. J.L. & SOC. PROBS. 451, 480–82 (2023).

223 Johnson v. NCAA, 556 F. Supp. 3d 491, 495 (E.D. Pa. 2021).

the NCAA did not support a showing that the student-athletes were not employees under the FLSA.[224] In 2024, the United States Court of Appeals for the Third Circuit partially affirmed the district court's ruling, agreeing that amateurism does not proscribe college athletes from bringing claims under the FLSA.[225]

In addition, the General Counsel of the National Labor Relations Board (NLRB) issued a memo in 2021 stating her position that "Players at Academic Institutions" are employees under the National Labor Relations Act (NLRA) and should be extended all protections under the statute.[226] According to Jennifer Abruzzo, the language of the NLRA, its policies, and the common law fully support the finding that certain "Players at Academic Institutions" are statutory employees.[227] Even more recently, in 2024, the NLRB ruled that the players on the men's basketball team at Dartmouth College were school employees.[228] This cleared the way for the men's basketball team to become the first college sports team in the country to unionize.[229] Many open questions remain about whether other teams will follow in unionizing and the impact it will inevitably have on college athletics.[230]

Amidst these legal changes, there have also already been significant developments enabling student-athletes to profit in various ways. In 2019, Governor Gavin Newsom of California signed the Fair Pay to Play Act, giving college student-athletes in California the ability to benefit financially from their name, image, and likeness (NIL).[231] Newsom signed the bill into law on HBO with Lebron James and other athletes beside

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224 *Id.* at 500–02.

225 *Johnson*, 108 F.4th at 182.

226 Memorandum from Jennifer A. Abruzzo, NLRB Gen. Couns., Statutory Rights of Players at Academic Institutions (Student-Athletes) Under the National Labor Relations Act 1–2 (Sept. 29, 2021), https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-jennifer-abruzzo-issues-memo-on-employee-status-of [https://perma.cc/Y43H-NXF4]. Abruzzo intentionally avoids the term "student-athletes," claiming that "the term was created to deprive those individuals of workplace protections." *Id.* at 1 n.1 (citing Molly Harry, *A Reckoning for the Term "Student-Athlete,"* DIVERSE (Aug. 26, 2020), https://www.diverseeducation.com/sports/article/15107633/a-reckoningfor-the-term-student-athlete [https://perma.cc/E2AR-642E]).

227 Abruzzo, *supra* note 226, at 5 ("[The Supreme Court] recognized that amateurism in college sports has changed significantly in recent decades and rejected the notion that NCAA compensation restrictions are 'forevermore' lawful. The decision is likely a precursor to more changes to come in college athletics." (quoting NCAA v. Alston, 594 U.S. 69, 93 (2021))).

228 Decision and Direction of Election at 18, Trs. of Dartmouth Coll., N.L.R.B. No. 01-rc-325633 (Feb. 5, 2024).

229 *See* Andrea Hsu, *Dartmouth Men's Basketball Team Votes to Unionize, Shaking Up College Sports*, NPR (Mar. 5, 2024, 2:39 PM), https://www.npr.org/2024/03/05/1235877656/ncaa-dartmouth-mens-basketball-union-election-nlrb [https://perma.cc/784E-NX9G].

230 *See id.*

231 CAL. EDUC. CODE § 67456 (West 2023).

him, stating that "[t]his is the beginning of a national movement."[232] While the ability to finally make money from their own NIL stands to greatly benefit both male and female athletes, women especially stand to gain a lot in a society where women's sports leagues are largely more underappreciated than men's and women still have far fewer athletic opportunities than their male counterparts.[233] The opportunity to take part in NIL deals stands to bring female athletes more attention and push for continued equality between men's and women's sports.[234] A flurry of recent NIL deals suggests that women have already started to benefit greatly from the recent changes in legislation. For example, three women's college basketball players were signed as part of Nike's newly finalized NIL endorsement deal: Caitlin Clark, Haley Jones, and Juju Watkins.[235] Since NIL deals have started to gain traction, NIL compensation for women's college basketball has been the highest behind only men's basketball and football.[236] While football players do earn significantly more than other athletes from NIL compensation, the data show that there is great potential for female athletes to profit greatly in the future.[237]

These legal and societal advancements underscore the considerable scholarly and popular support for treating student-athletes like employees.[238] While some might argue that *Alston* is solely grounded in antitrust principles and therefore should not lend support to the idea of broadening Title IX, the aftermath of *Alston* saw numerous states granting student-athletes various rights and privileges.[239] Student-athletes should not be given the rights and responsibilities of employees without also gaining the essential protections afforded to employees in the workplace. Therefore, broadening the peer-on-peer sexual harassment standard under Title IX represents a significant step towards providing protections to student-athletes who are being systematically

232 Press Release, Off. of Governor Gavin Newsom, Governor Newsom Signs SB 206, Taking on Long-Standing Power Imbalance in College Sports (Sept. 30, 2019), https://www.gov.ca.gov/2019/09/30/governor-newsom-signs-sb-206-taking-on-long-standing-power-imbalance-in-college-sports [https://perma.cc/W7T4-E9HP].

233 *See* Anna G. Williams, Note, *In a League of Her Own: Why Female Student-Athletes Are Poised to Win Big in the NIL Era with a Properly Crafted Federal Law*, 125 W. VA. L. REV. 371, 382 (2022).

234 *See* Kaitlin Balasaygun, *In the College Sports Pay Era, Female Athletes Are Emerging as Big Economic Winners*, CNBC (Nov. 4, 2022, 3:22 PM), https://www.cnbc.com/2022/10/15/that-nike-bronny-james-nil-deal-was-a-big-deal-for-women-too.html [https://perma.cc/2MF3-X83W].

235 *Id.*

236 *Id.*

237 *See id.*

238 *See* Banks, *supra* note 30, at 552–53.

239 *See supra* Section IV.B.

hazed and abused. This adjustment would not affect Title VII nor propose that certain groups should receive the protections of Title VII despite not meeting the statute's criteria. Rather, it seeks to change the Title IX peer-on-peer sexual harassment standard specifically for hazing cases; this is a narrow set of circumstances and does not encompass every claim brought under Title IX or Title VII.

CONCLUSION

In the wake of Title IX's fiftieth anniversary, women have made serious strides in the world of intercollegiate and professional athletics, but hazing is an area where Title IX has not delivered on one of its fundamental goals, namely, to protect female student-athletes from sexual harassment.[240] When athletes bring hazing lawsuits under Title IX, courts should utilize the approach that has proven more successful in providing litigants relief under Title VII. They should consider the subjective experience of the hazing victim in addition to what a reasonable person would consider to be severe, pervasive, and objectively offensive under the same circumstances. In addition, courts should return to *Davis*'s original guidance that the determination of "[w]hether gender-oriented conduct rises to the level of actionable 'harassment' . . . 'depends on a constellation of surrounding circumstances, expectations, and relationships.'"[241] When it comes to athletic hazing, harassment is truly on the basis of sex.[242] The surrounding circumstances at play in hazing cases exemplify a time-honored, inherently gendered tradition that has been firmly embedded in intercollegiate sports.[243] One cannot fully understand the sexual harassment present in hazing without considering the expectations of masculinity and the power dynamics of dominance and subordination.[244]

Furthermore, in a society where college athletes can finally earn financial compensation for their athletic contributions to universities, they should also be afforded the right to participate in athletics without the risk of harassment and discrimination in the form of hazing.[245] Institutions with systemic hazing issues should finally be held

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240 *See supra* Part II.

241 Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 651 (1999) (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998)).

242 *See* Stuart, *supra* note 7, at 402.

243 *See* Joshua A. Sussberg, Note, *Shattered Dreams: Hazing in College Athletics*, 24 CARDOZO L. REV. 1421, 1424–28 (2003).

244 Brake, *supra* note 110, at 306–08.

245 *See* Murry, *supra* note 2, at 788–90.

accountable and take direct steps to address the hazing on their campuses. It has never been, nor it is now fair for universities to profit off of student-athletes while not protecting their safety and well-being. Hazing practices should not be allowed to exist in silence and secrecy until the next scandal temporarily forces schools to bring hazing to the forefront. Title IX and Title VII were passed as sweeping pieces of legislation in order to give vital protections to students and employees. Now is the time, as society continues to celebrate and create more opportunities for female athletes, to revisit the meaningful connection between Title IX and Title VII and carve out more protections for student-athletes. Title IX utterly transformed women's sports for the better; it can do so again by finally putting an end to hazing.