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In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education

ABSTRACT. The treatment of sexual harassment victims by their schools, and of schools by courts, under the institutional liability standard of deliberate indifference for damages in private suits is inconsistent with Title IX's guarantee of equal educational outcomes on the basis of sex. Replacing deliberate indifference with the international human rights liability standard of due diligence would shift power into the hands of survivors, guarantee institutional accountability, ending current impunity for sexual abuse in schools, and promote change toward sex equality in education.

AUTHOR. Elizabeth A. Long Professor of Law, University of Michigan Law School; James Barr Ames Visiting Professor of Law (long-term), Harvard Law School. Decades of experience with students reporting sexual harassment to me and working with their cases, both short of and in litigation, provides the ultimate source material for, and background for the perspectives on, the experiences and processes discussed here. The excellent technical assistance of Kim Nayoung and Sean Ouellette, with the research help of the ever-resourceful and on-the-job University of Michigan Law School Library, are gratefully acknowledged. Heartfelt thanks for making the term "colleague" meaningful go to Michele Landis Dauber, Diane Rosenfeld, Louise Fitzgerald, and Alexandra Brodsky. As disclosure, the author has been involved in cases of sexual harassment in education since their inception, including a number referenced in this piece.

FEATURE CONTENTS

INTRODUCTION

"The rape was nothing compared to the way my school has treated me."
– Andrea Pino[1]

Accountability to survivors by educational institutions is crucial to the delivery of Title IX's[2] promise of equal access to the benefits of an education without discrimination on the basis of sex, a promise vitiated by sexual harassment with impunity. Since 1998, the legal standard for institutional liability has been "deliberate indifference" to known discrimination.[3] Inequality is produced by many practices other than conscious disregard of known discrimination.[4] The deliberate indifference standard does not implement Title IX's distinctive statutory outcome-defined mandate of providing equal access to the benefits of an education. None of its liability elements necessarily promote equality, nor are they measured against an equality standard. Deliberate indifference as used under Title IX applies after assaults are reported with no attention to the unequal context, hierarchical relations, or documented climate of abuse that produces them. It looks at procedural steps taken by an educational institution but not at whether the steps produce a sex-equal education for the survivor or the group of which the survivor is a member. No changes that would preclude repetition, so as to transform campuses into sex-equal educational environments going forward, are incentivized or mandated.

Over the years of its application, the deliberate indifference standard has repeatedly and disproportionately[5] been deployed against survivors' cases,

1. Katie J.M. Baker, *Rape Victims Don't Trust the Fixers Colleges Hire To Help Them*, BUZZFEED NEWS (Apr. 26, 2014, 12:35 PM), http://www.buzzfeed.com/katiejmbaker/rape-victims-dont-trust-the-fixers-colleges-hire-to-help-the#.rkEZK4Xjy [http://perma.cc/MAS5-LBBE].

2. "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance . . . ." 20 U.S.C. § 1681(a) (2012). This analysis focuses on Title IX, although Title IX and the Equal Protection Clause—through § 1983—have often been interpreted together in the sexual harassment area, as has the Due Process Clause under *Stoneking v. Bradford Area School District*, 882 F.2d 720, 727 (3d Cir. 1989), so both constitutional rubrics are occasionally referenced.

3. The Supreme Court first imposed this test on cases of teacher-student sexual harassment in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 290 (1998), and on student-student cases a year later in *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, 526 U.S. 629, 633 (1999).

4. *Black's Law Dictionary* defines deliberate indifference as "conscious disregard." *Indifference*, BLACK'S LAW DICTIONARY (10th ed. 2014).

5. Of all federal cases in district and appellate courts from *Gebser* to the end of May 2014 that significantly discuss "deliberate indifference," the plaintiff student's case was dismissed on

including when administrative handling of their situations is concededly callous, incompetent, unresponsive, inept, and inapt.[6] Under deliberate indifference, overall data on the occurrence of sexual abuse in schools has not moved an inch.[7] The standard permits a wide margin of tolerance for sexual abuse, appearing predicated on a belief in its inevitability, especially in the helplessness of officials and authorities to prevent or eliminate it among young people. Under the aegis of the deliberate indifference standard, women students in particular—disproportionately subjected to this form of gender-based aggression along with some students of all sexes and sexual orientations—have been sexually violated in their schooling from elementary grades through graduate school. The abuse has left them damaged academically, emotionally, and developmentally without mitigation or relief, let alone change, for decades.[8]

The "due diligence" standard as applied in international human rights law, including in international law against violence against women, provides a promising doctrine for institutional liability for sexual harassment in schools. Due diligence, adopted as a liability standard, would hold schools accountable to survivors for failure to prevent, adequately investigate, effectively respond to, and transformatively remediate sexual violation on campuses, so that sex equality in education is delivered in reality. Its contents would not be foreign to schools, courts, and agencies that have struggled creatively within the straitjacket of existing doctrine to produce such outcomes against the strictures of the current standard. Due diligence would provide what Title IX should be: a tool students could use in their own private actions in courts with their own lawyers to back up administrative enforcement efforts. Crucially, holding schools to a due diligence rule would provide the incentive for change that is

summary judgment, or its dismissal was affirmed, in 140 cases. An additional thirty-six were dismissed on a Rule 12 motion. During this same period, sixty-eight cases survived summary judgment motions, while thirty-eight survived Rule 12 motions. In 2014 to 2015, approximately seventy cases under Title IX were found with significant deliberate indifference discussions in the federal district and appellate courts. Around one third were dismissed on Rule 12(b)(6) or summary judgment motions. Some cases are duplicates, as sometimes a case is first challenged under Rule 12 and then again on summary judgment. Without having counted the percentage of all Title IX cases brought in federal courts that were decided on the deliberate indifference question on preliminary motions, my reading of the cases and extensive experience with litigation and litigators in this area lead to the conclusion that deliberate indifference is the main issue used to eliminate cases on preliminary motions under Title IX, as well as the principal one used by litigators to decide whether cases for survivors will be brought at all. (The lists of cases are on file with the author.)

6. *See infra* text accompanying notes 194-233.

7. *See infra* text accompanying notes 13-82.

8. *See infra* text accompanying notes 83-101.

lacking under the deliberate indifference doctrine. The goal would be ensuring that sexual abuse is no longer endemic to many schools' cultures, so that all students receive the safe and equal benefit of an education without discrimination on the basis of sex.

I. SEXUAL HARASSMENT IN EDUCATION AS SEX INEQUALITY

Sexual harassment in education, which includes rape and other sexual assault, is a recognized form of gender-based violence long documented to be widespread and prevalent in the United States.[9] As the accounts and data

9. *See* Charol Shakeshaft, *Educator Sexual Misconduct: A Synthesis of Existing Literature*, U.S. DEP'T EDUC. (2004), http://www2.ed.gov/rschstat/research/pubs/misconductreview/report.pdf [http://perma.cc/9EY6-FZGK] [hereinafter Shakeshaft, *Educator Sexual Misconduct*] (discussing faculty-student harassment). On peer sexual harassment, see *infra* text accompanying notes 20-33. "Sexual misconduct" has no legal meaning in the sexual harassment area. It is used in social science discussions of sexual harassment in education, as in Elaine Ingulli, *Sexual Harassment in Education*, 18 RUTGERS L.J. 281 (1987); and Shakeshaft, *Educator Sexual Misconduct*, *supra*. It may have first appeared in American law in a libel case. *See* Bennett v. Salisbury, 78 F. 769 (2d Cir. 1897). Recent actors in the sexual harassment area claim to have coined or popularized variants of the term and use it as a substitute for sexual harassment. *See, e.g.*, Baker, *supra* note 1 (citing Gina Smith for pioneering the phrase); Charol Shakeshaft, *Know the Warning Signs of Educator Sexual Misconduct*, PHI DELTA KAPPAN, Feb. 2013, at 8, 9 [hereinafter Shakeshaft, *Warning Signs*] ("I coined the phrase educator sexual misconduct at least a decade ago . . . ."); Brett Sokolow, *The Nonconsensual Sex Debate About Terminology*, ATIXA TIP WEEK, I (May 1, 2014), http://atixa.org/wordpress/wp-content/uploads/2012/01/ATIXA-Tip-of-the-Week-05_01_14.pdf [http://perma.cc/5XQX-MPWB] (claiming credit for proliferation of "sexual misconduct" in college policies by helping popularize the term). "Sexual misconduct" was used in the University of Pennsylvania's 1985 to 1987 policy as a generic opposite of mature, responsible, and respectful conduct. Ingulli, *supra*, at 341 app. 7. The term has been used by some to define behavior that is actually sexual harassment. *See, e.g.*, *Administrative Guide, 1.7.3. Prohibited Sexual Conduct: Sexual Misconduct, Sexual Assault, Stalking, Relationship Violence, Violation of University or Court Directives, Student-on-Student Sexual Harassment and Retaliation*, STANFORD U., http://adminguide.stanford.edu/chapter-1/subchapter-7/policy-1-7-3 [http://perma.cc/HU5W-TE4W]; *Sexual Misconduct Response, Yale Sexual Misconduct Policies and Related Definitions*, YALE U., http://smr.yale.edu/sexual-misconduct-policies-and-definitions [http://perma.cc/SX8U-345Y].

My suspicion is that the substitution of "sexual misconduct" for sexual harassment in some school policies is, at least in part, an attempt to dodge legal accountability, as no judicial standards exist to which schools are held in their treatment of "sexual misconduct" per se, although the Office for Civil Rights of the Department of Education (OCR) sometimes employs the term in parallel or synonymously with sexual harassment in their investigations. As one court put the point:

> The court notes an enormous chasm between the terms "sexual harassment" and "sexual misconduct." Title IX only speaks to the former. While sexual misconduct may form the basis of illegal acts, and subject the perpetrator to liability, that does

below demonstrate, sexual harassment is gender-based because it "is directed against a woman because she is a woman or . . . affects women disproportionately."[10] The same principle applies to anyone harassed because of their sex or gender, including sexuality. Sexual harassment exemplifies the international understanding that violence against women results from "historically unequal power relations between women and men, which have led to domination over and discrimination against women by men and to the prevention of women's full advancement."[11]

Acts of sexual harassment at school are largely similar to those at work and elsewhere, although their harmful effects can be distinctive to the educational setting and the growing mind. The behaviors commonly include sexual epithets, name-calling, importuning, accosting, pornography, molestation and other forms of unwanted sexual contact, and rape.[12] Case law and empirical

> not make such acts into sexual harassment. To constitute sexual harassment, the behavior in question must be unwelcome.

Benefield *ex rel.* Benefield v. Bd. of Trs. of Univ. of Ala. at Birmingham, 214 F. Supp. 2d 1212, 1220 (N.D. Ala. 2002). The last sentence is not wholly accurate, as with young victims or even somewhat older ones who are preyed upon by teachers, unwelcomeness is not dispositive of sexual harassment *vel non*. Mary M. v. N. Lawrence Cmty. Sch. Corp., 131 F.3d 1220, 1226 (7th Cir. 1997); *see infra* text accompanying notes 118-120. For reasons that may reflect lack of information, some survivors seem convinced that "sexual misconduct"—the treatment of which they are likely unaware has no legally enforceable consequences against schools—somehow conveys more seriousness about the abuse than "sexual harassment" does.

10. Comm. on the Elimination of Discrimination Against Women, General Recommendation 19, ¶ 6, U.N. Doc. CEDAW/C/1992/L.1/Add. 15 (1992). Because the Committee on the Elimination of Discrimination Against Women applies to discrimination against women as a group, this general recommendation's formulation is confined to the treatment of women.

11. G.A. Res. 48/104, Declaration of the Elimination of Violence Against Women, at 2 (Feb. 23, 1994). Although some universities around the world have internal sexual harassment procedures, and the United Nations General Assembly passed a resolution that included a prohibition on sexual harassment in educational institutions in 1994, *see id.*, few countries have confronted the problem by law.

12. For discussion of sexual harassment as an experience, see CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 25-47 (1979); and MARTHA J. LANGELAN, BACK OFF! HOW TO CONFRONT AND STOP SEXUAL HARASSMENT AND HARASSERS 21-36 (1993). Examples of pornography as sexual harassment in the educational setting, all of which have been reported to the author repeatedly in the past forty years, include circulating pictures of women students' heads on other women's bodies from pornography to other students, *see, e.g.*, Virginia Hennessey, *More Allegations in Molestation Case: Prosecutor Says Students' Faces Morphed to Provocative Pictures*, MONTEREY COUNTY HERALD (Aug. 8, 2007) (finding that former teacher "used Photoshop software to cut and paste digital photos of female students onto pornographic images he downloaded from the Internet"); NokNoi Ricker, *Pornographic Facebook Fraud Under Investigation, Bangor Police Say*, BANGOR DAILY NEWS (Apr. 18, 2012), http://bangordailynews.com

/2012/04/18/news/bangor/pornographic-facebook-fraud-under-investigation-bangor-police-say [http://perma.cc/8Y7Y-LRDS] ("Two girls in Florida—one 15 and one 16—were charged with aggravated stalking of a minor in January after they created a fake Facebook account in the name of a fellow Estero High School girl that featured a nude photo of a girl with the victim's face superimposed.") *Police Investigate Sexually Graphic Photographs*, U.S. FED. NEWS SERV. (May 10, 2006), http://www.highbeam.com/doc/1P3-1035497021.html [http://perma.cc/53GW-XMWL] ("Victims receiving these packages opened them to find photographs containing their own images which have been superimposed onto, or 'morphed,' into sexually graphic material."), forcing pornography on students, or sending it around digitally in school environments, *see, e.g.*, Sandy Cullen, *Teacher Accused of Sexual Harassment; Parents Say He Eyed Students and Brought Pornographic Material to Class*, MADISON.COM (Aug. 27, 2005), http://host.madison.com/news/local/teacher-accused-of-sex-harassment-parents-say-he-eyed-students/article_792c780c-1503-5afc-8a26-a4359f815a04.html [http://perma.cc/7X8X-82AE] ("Their complaint claims that Vasquez 'repeatedly introduced pornographic material into the classroom and engaged in other sexually oriented behavior that made the students feel acute discomfort and concern for their safety.'"); Josh Dooley, *Former Student: Sexting Issue Real in MH Schools*, BAXTER BULL. (May 31, 2014), http://www.baxterbulletin.com/story/news/local/2014/05/30/former-student-sexting-exists-in-mh-schools/9797421 [http://perma.cc/9Z57-PQPR] ("In April, two students in the school district were disciplined after nude and partially nude photos of girls were found to have been spread in the junior high and high school, highlighting that the problem Barnes faced some three years ago, exists today."); Tina Nguyen, *Miss America Was Reportedly Kicked Out of Sorority for Extreme Hazing*, MEDIA ITE (Sept. 22, 2014), http://www.mediaite.com/online/miss-america-was-reportedly-kicked-out-of-sorority-for-extreme-hazing [http://perma.cc/E4UF-B9WP] ("A recent graduate who attended Hofstra at the same time as Kazantsev told Jezebel that the final two steps of pledging in one (unnamed) sorority involved making all of the pledges remove their underwear and sit on newspapers while the older members forced them to watch lesbian porn."), creating pornography using women students' real names and posting it on public internet sites, *see, e.g.*, United States v. Alkhabaz, 104 F.3d 1492, 1493 (6th Cir. 1997) (finding no "true threat[]" in defendant posting on alt.sex.stories graphic sexually explicit accounts of "abduction, rape, torture, mutilation and murder of women and girls" including one centered on description with name of University of Michigan classmate), threatening to circulate and circulating originally private sexually intimate photos, *see, e.g.*, Sergio Bichao, *Teen "Revenge Porn" on the Rise*, COURIER-NEWS (Nov. 15, 2013) ("School administrators . . . now have to be on the lookout for compromising images—technically child pornography—making the rounds in and off their campuses."); Caitlin Dewey, *The Revenge Pornographers Next Door*, WASH. POST (March 19, 2015), http://www.washingtonpost.com/news/the-intersect/wp/2015/03/19/the-revenge-pornographers-next-door [http://perma.cc/29J3-FERV] ("Of all the deeply disturbing revelations to emerge from the recent investigation into a Penn State fraternity's secret Facebook page, perhaps none was quite so alarming as this: At least 144 people knew about the page, where Kappa Delta Rho brothers posted pictures of nude, unconscious women without their knowledge. Of those 144 people, 143 just rolled with it."); Zach Gase, *Sexting Scandals Run Amok in Harrison High School*, CIN. SUNTIMES (Jan. 9, 2015), http://cincinnati.suntimes.com/cin-news/7/102/78844/sexting-scandals-run-amok-harrison-high-school [http://perma.cc/2M4N-ZQRF] ("According to WCPO, superintendent Chris Brown informed parents several students are being investigated for sending nude pictures of underaged students throughout the school."); Dan Herbeck, *Texting + Sex = Teens Flirting with Porn*, BUFF. NEWS (Jan. 25, 2009) ("'In the past year, I've

studies divide perpetrators along the lines of school hierarchies. Some of the unwanted sex acts are committed by other students, some by teachers, coaches, and other superiors.[13] Victims are disproportionately women but also include

probably spoken to police or school officials about at least 100 incidents locally,' said Patti McLain, Buffalo program director for the National Center for Missing and Exploited Children . . . . At Pioneer middle and high schools in Cattaraugus County, four students were suspended after using cell phones to send nude photographs of female classmates, some as young as 13."); Zachary T. Sampson & Claire McNeill, *Nude Photos of Students Show Up on New App, Causing Uproar at Osceola High*, TAMPA BAY TIMES (Jan. 16, 2015), http://www.tampabay.com/news/education/nude-photos-of-students-show-up-on-new-app-causing-uproar-at-osceola-high/2213856 [http://perma.cc/D2SY-BWX9] ("A new smartphone application threw one of Pinellas County's strictest high schools into an uproar this week when some students used it to anonymously post photos of their classmates."); Tom Calver, *At Least 200 Children, Some as Young as 11, Have Been Victims of "Revenge Porn" in Past Nine Months*, TELEGRAPH CO. (Jan. 23, 2016), http://www.telegraph.co.uk/news/uknews/law-and-order/12117342/At-least-200-children-some-as-young-as-11-have-been-victims-of-revenge-porn-in-past-nine-months.html [http://perma.cc/G44J-PNZS] ("Alison Saunders, the director of public prosecutions, has described it as a 'particularly distressing crime' which is 'often brought about by the vengeful actions of former partners' and intends to 'publicly humiliate' . . . . [T]he data shows that young people are more likely to have their private sexual photographs circulated on social media sites such as Facebook, which was the most common method of distribution, and Instagram."); Lauren Jiggetts, *High School Students Face Charges After Suburban Sexting Scandal*, NBC CHI. (Nov. 6, 2014), http://www.nbcchicago.com/news/local/High-School-Students-Face-Charges-After-Suburban-Sexting-Scandal-281875101.html [http://perma.cc/D2JQ-G6PW] ("The Gurnee Police Department said three freshman boys at Warren Township High School were arrested and may face charges of distributing child pornography after they allegedly texted an explicit photo of a freshman girl, which ultimately spread throughout the school's O'Plaine campus."), forcing students to translate pornography in foreign language tutorials (complaints reported to author), and pornography festivals and other public pornography showings in educational environments, *see, e.g.*, Susan Kinzie & John Wagner, *Porn Movie Excerpts Shown at University of Maryland Despite Legislator's Threats*, WASH. POST (Apr. 7, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/04/06/AR2009040603581.html [http://perma.cc/9HRW-765Z]; Koga, *Digital Playground's 'Pirates II: Stagnetti's Revenge' Screening and Q&A @ UCLA, 12/3/08*, LAIST DAILY (Dec. 8, 2008), http://laist.com/2008/12/08/pirates_ii_stagnettis_revenge.php#photo-1 [http://perma.cc/2BPF-S8TT] ("Last Wednesday, while Hustler Hollywood's flagship store celebrated its tenth anniversary, just a few miles down Sunset Blvd., UCLA's Campus Events Commission hosted a free screening of Digital Playground's (MySpace) blockbuster epic adult movie PIrates II: Stagnetti's Revenge (MySpace) . . . billed as 'The Biggest Adult Production in History.'").

13. Every case in this piece, and almost every case in law, exemplifies one of these relationships or the other, though a few exceptions involve employees such as custodians or food service workers as perpetrators of sexual assault of students. *See, e.g.*, Lopez v. Regents of Univ. of Cal., 5 F. Supp. 3d 1106 (N.D. Cal. 2013). Most studies provide data that carefully distinguishes between the two, with the exception of the AAU study. *See* David Cantor et al., *Report on the AAU Climate Survey on Sexual Assault and Sexual Misconduct*, WESTAT (2015), http://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/Report%20on%20the%20AAU%20Campus%20Climate

some men; a substantial number of affected students identify as gay, bisexual, transgender, and queer.[14] A report commissioned by the National Institute of Justice found that nineteen percent of women and 2.5% of men reported experiencing attempted or completed rape since starting college.[15] These numbers, while substantial, are likely to be undercounts, given known factors that depress reporting. Also, they document rape and attempted rape only, not other forms of sexual abuse, and count people raped, not rapes.

The American Association of Universities (AAU) 2015 survey of twenty-seven campuses similarly found that the incidence of sexual assault and sexual misconduct due to physical force, threats of physical force, or incapacitation among women undergraduate respondents was 23.1%, including 10.8% by penetration.[16] By the time they were seniors, 26.1% of women and 29.5% of students who identify as trans, genderqueer, or identification not mentioned reported nonconsensual sexual contact through completed penetration or sexual touching by physical force or incapacitation.[17] Since a version of the

%20Survey%20on%20Sexual%20Assault%20and%20Sexual%20Misconduct.pdf [http://perma.cc/M7N9-W6JW].

14. David Cantor et al., *supra* note 13, at iv.

15. CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY 5-27 (2007).

16. David Cantor et al., *supra* note 13, at 57. It is difficult to interpret the figures gathered by the AAU study with any certainty. The study used a version of the labeling approach, that is, terms like sexual misconduct, harassment, and sexual coercion, which almost certainly depresses findings. It inaccurately distinguished sexual violence, coercion, and misconduct from sexual harassment, which is problematic both legally and educationally. It provided what appeared to be a quasi-legal description of harassment but got the law wrong. Certainly it is helpful to have numbers on behaviors that fall short of the legally actionable, but omitting any proxy for the severity, pervasiveness, or objective offensiveness requirement produced an unhelpful category. By tilting the instrument toward student-on-student sexual abuse, which is easier for universities to deal with because accused students do not have the power or status of accused faculty members, and combining the forms of sexual harassment, which are equally serious but different in many ways, the study almost certainly minimized findings on teacher-student harassment. Possibly a reanalysis of the data through perpetrator portals could produce more useful information. If the AAU, a lobbying entity for universities, intended to minimize the data on campus sexual abuse through controlling the outcome of these studies by excluding the most knowledgeable researchers in the field from the study, this strategy backfired badly. Despite the methodological missteps, the numbers were substantial and overall came out ($2.5 million and almost thirty years later) essentially the same as the much better study by Mary P. Koss et al., *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students*, 55 J. CONSULTING & CLINICAL PSYCHOL. 162, 163 (1987).

17. David Cantor et al., *supra* note 13, at 81 tbl.3-20.

discredited labeling methodology was used,[18] these numbers are most likely low. Sexual harassment in verbal or visual forms (other than quid pro quo) was reported by 61.9% of undergraduate women and 44.1% of graduate and professional women.[19] These data also combine faculty and student perpetrators, making them difficult to interpret. Very little of the abuse was reported to school officials, typically because the victim thought the incident was not serious enough, even when it included forced penetration.[20] Nationwide, most educational sexual harassment is by other students; most, but not all, of such peer sexual harassment is committed by boys against girls. Perpetrators of rape of women and girls, so far as is known, are almost always men or boys.[21]

Sexual harassment in education is neither a new phenomenon nor limited to students' college years.[22] The pattern begins early. In a not unusual case,

18. For a thorough discussion of this methodological issue in the sexual harassment context, see Louise F. Fitzgerald et al., *Measuring Sexual Harassment in the Military: The Sexual Experience Questionnaire,* 11 MIL. PSYCHOL. 243, 244-45 (1999). *See also id.* at 260; Vicki J. Magley et al., *Outcomes of Self-Labeling Sexual Harassment*, 84 J. APPLIED PSYCHOL. 390, 399 (1999) (finding that many women who do not label their experiences as sexual harassment suffer the same damage from the events as others who do). Perhaps the best discussion of labeling and other methodological issues in rape research, which are essentially the same in sexual harassment research, is Sarah L. Cook et al., *Emerging Issues in the Measurement of Rape Victimization*, 17 VIOLENCE AGAINST WOMEN 201 (2011). *See generally* ROBIN WARSHAW, I NEVER CALLED IT RAPE: THE MS. REPORT ON RECOGNIZING, FIGHTING, AND SURVIVING DATE AND ACQUAINTANCE RAPE 26 (1988) (discussing a nationwide study by Ms. Magazine Campus Project on Sexual Assault and Mary Koss that found that twenty-seven percent of women whose sexual assault met the legal definition did not label it as such).

19. David Cantor et al., *supra* note 13, at 84 tbl.4-1.

20. *Id.* at 36.

21. Based on a national study conducted under the auspices of the Centers for Disease Control,

> [f]or female rape victims, an estimated 99.0% had only male perpetrators. In addition, an estimated 94.7% of female victims of sexual violence other than rape had only male perpetrators. For male victims, the sex of the perpetrator varied by the type of sexual violence experienced. The vast majority of male rape victims (approximately 79.3%) had only male perpetrators.

Matthew J. Breiding et al., *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization—National Intimate Partner and Sexual Violence Survey, United States, 2011*, 63 MORBIDITY & MORTALITY WKLY. REP. SURVEILLANCE SUMMARIES 1, 5 (2014). As to the campus setting, the Bureau of Justice Statistics study of nine college campuses found that an average of ninety-four percent of female victims of rape report male perpetrators, and an average of ninety-five percent of female victims of sexual battery report male perpetrators. Christopher Krebs et al., *Campus Climate Survey Validation Study: Final Technical Report*, BUREAU JUST. STAT. RES. & DEV. SERIES 100 (Jan. 2016), http://www.bjs.gov/content/pub/pdf/ccsvsftr.pdf [http://perma.cc/JM84-F6QU].

22. A 1993 study of 1,632 students in grades eight through eleven in seventy-nine schools across the United States found that more than three-quarters of all girls and fifty-six percent of

"[t]he [p]laintiff and other girls were often referred to as 'lesbian,' 'prostitute,' 'retard,' 'scum,' 'bitch,' 'whore,' and 'ugly dog faced bitch.'"[23] In the same case, "[t]he physical harassment included the boys snapping the girls' bras, running their fingers down the girls' backs, stuffing paper down the girls' blouses, cutting the girls' hair, grabbing the girls' breasts, spitting, shoving, hitting, and kicking them."[24] In another,

> [p]laintiffs allege that some student defendants in the graphics class physically abused them through forcible and offensive sexual contact, . . . [allegedly] touched their breasts and genitalia, sodomized them, forced them to touch the genitalia of the student defendants, forced plaintiffs to perform acts of fellatio, forced plaintiffs to watch similar acts performed on other female students and forced plaintiffs to watch while the student defendants offensively, but non-sexually, touched their teacher . . . .[25]

boys said they have been the target of unwanted sexual comments, jokes, gestures, or looks, and two-thirds of girls and forty-two percent of boys had been touched, grabbed, or pinched in unwelcome ways at school. AM. ASS'N OF UNIV. WOMEN EDUC. FOUND., HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS 8 (1993). Eighty-five percent of girls were found to have experienced sexual harassment. *Id.* at 7. Sixty-five percent of all girls surveyed were touched, grabbed, or pinched in a sexual way; sixty-six percent experienced at least one form of sexual harassment "often" or "occasionally." *Id.* at 7-8. Seventy-nine percent of the sexual harassment of students was by other students; the rest was almost entirely from teachers, coaches, custodians, and other school employees. *See id.* at 10. For further documentation and analysis before the turn of the century, see NAN STEIN, CLASSROOMS AND COURTROOMS: FACING SEXUAL HARASSMENT IN K-12 SCHOOLS 12-27 (1999); NAN D. STEIN, NANCY L. MARSHALL & LINDA R. TROPP, SECRETS IN PUBLIC: SEXUAL HARASSMENT IN OUR SCHOOLS 6 (1993), which noted that ninety-six percent of sexually harassed girls are harassed by their peers; Donna J. Benson & Gregg E. Thomson, *Sexual Harassment on a University Campus: The Confluence of Authority Relations, Sexual Interest and Gender Stratification*, 29 SOC. PROBS. 236, 241-48 (1982); Louise F. Fitzgerald et al., *The Incidence and Dimensions of Sexual Harassment in Academia and the Workplace*, 32 J. VOCATIONAL BEHAV. 152, 159-68 (1988); and Valerie E. Lee et al., *The Culture of Sexual Harassment in Secondary Schools*, 33 AM. EDUC. RES. J. 383, 396-405 (1996).

23. Schofield *ex rel.* Bruneau v. S. Kortright Cent. Sch. Dist., 935 F. Supp. 162, 166 (N.D.N.Y. 1996) (involving sixth-grade children), *aff'd*, 163 F.3d 749 (2d Cir. 1998), *abrogated by* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009).

24. *Id.*; *see also* Wright *ex rel.* Wright v. Mason City Cmty. Sch. Dist., 940 F. Supp. 1412, 1414 (N.D. Iowa 1996) (involving similar insults and harassment directed against a high school student who pressed rape charges against her ex-boyfriend).

25. D.R. *ex rel.* L.R. v. Middle Bucks Area Vocational Tech. Sch., Civ. A. Nos. 90-3018, 90-3060, 1991 WL 14082, at *1 (E.D. Pa. Feb. 1, 1991), *aff'd en banc*, 972 F.2d 1364, 1377 (3d Cir. 1992).

In the first peer sexual harassment case, Jane Doe was harassed throughout the seventh and eighth grades by boys at school making sexual references involving hot dogs and calling her a "slut" and a "hoe."[26] In another early case, one boy was "forcibly restrained and bound to a towel rack with adhesive tape" that was also used by fellow football players to tape his genitals as he came out of a shower.[27] Among reported cases are many of sexual harassment by band directors or music teachers[28] and athletic coaches,[29] with many special needs or emotionally disabled children as victims.[30] One special-education student was led out of class by a boy to the boys' bathroom, "where he and at least five other boys raped and sodomized her."[31] One seventeen-year-old girl "entered into a romantic relationship" with an adult male teacher from another school who was supervising a musical in which she was participating at her own school. He then "subdued, sexually assaulted, and forcibly raped" her, smashing her head against the wall, leaving it stained with her blood.[32] One recent case alleges a nineteen-year-old freshman girl was abducted, sexually assaulted, and murdered by an older male student who lived next door to her at

26. Doe *ex rel.* Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560, 1564-65 (N.D. Cal. 1993).

27. Seamons v. Snow, 84 F.3d 1226, 1230, 1232-33 (10th Cir. 1996) (confirming Title IX's coverage of peer harassment but denying relief).

28. For some examples from cases ruled on by the federal courts in the last two years, see *Wyler v. Connecticut State University System*, 100 F. Supp. 3d 182 (D. Conn. 2015); and *Kobrick v. Stevens*, No. 13-2865, 2014 WL 4914186, at *1-2 (M.D. Pa. Sept. 30, 2014). *See also* Waters v. Drake, 105 F. Supp. 3d 780, 803 (S.D. Ohio 2015) (concerning a claim of "reverse discrimination" brought by a male marching band director).

29. For some examples of cases ruled on by the federal courts in the last two years, see *Campbell v. Dundee Community School*, No. 12-12327, 2015 WL 4040743, at *1 (E.D. Mich. July 1, 2015), *appeal filed*, No. 15-1891 (6th Cir. Aug. 5, 2015); *Tate v. Paris Junior College*, No. 13-737, 2015 WL 1738572, at *2 (E.D. Tex. Apr. 13, 2015); and *Najera v. Independent School District*, 60 F. Supp. 3d 1202, 1024 (W.D. Okla. 2014).

30. For illustrative examples of very recent federal cases alone, see *H.B. ex rel. C.B. v. State Board of Education*, No. 4:14-CV-204-BO, 2015 WL 2193778 (E.D.N.C. May 11, 2015), which concerned a thirteen-year-old deaf child who was repeatedly raped and bullied by another student who threatened to kill him if he left to seek help; *Lockhart v. Willingboro High School*, Civ. No. 14-3701, 2015 WL 1472104 (D.N.J. Mar. 31, 2015), in which a special needs girl was raped; *Kauhako v. Hawaii Department of Education*, Civ. No. 13-00567 DKW-BMK, 2015 WL 470230 (D. Haw. Feb. 3, 2015); *M.S. ex rel. Hall v. Susquehanna Township School District*, 43 F. Supp. 3d 412 (M.D. Pa. 2014); and *Estate of Barnwell ex rel. Barnwell v. Watson*, 44 F. Supp. 3d 859, 861 (E.D. Ark. 2014), which concerned a mentally disabled boy who committed suicide by shooting himself after being bullied, taunted, and insulted for failure to fit gender stereotypes.

31. Doe v. Bibb Cty. Sch. Dist., 83 F. Supp. 3d 1300, 1301-02 (M.D. Ga. 2015).

32. Doe *ex rel.* Doe v. Charleroi Sch. Dist., Civ. No. 2:14-cv-951, 2014 WL 5426229, at *1, *3 (W.D. Pa. Oct. 22, 2014).

school.[33] Hundreds of cases along a continuum of violence can be found in the federal courts alone.

Sexual harassment continues as students proceed through the educational system.[34] Students in college and graduate school are largely within the age range—eighteen to twenty-four years—at which vulnerability to sexual violence is highest,[35] to which sexual harassment in education makes a substantial contribution.[36] College women aged eighteen to twenty-four are three times more likely than women in general to be sexually violated; college-aged men students are seventy-eight percent more likely than nonstudents to be victims of rape or other sexual assault.[37] One study of interaction between faculty and students found that approximately one quarter of faculty surveyed reported sexual involvement with female students.[38] Mary P. Koss's 1985 study of the sexual experiences of a sample of 3,187 female and 2,972 male undergraduates on thirty-two college campuses across the United States found

33. Thomas v. Bd. of Trs., No. 8:12-CV-412, 2015 WL 4546712, at *3, *7-8 (D. Neb. July 28, 2015) (alleging defendant perpetrated the above acts after serving as an assistant to a women's basketball coach), *appeal filed*, No. 15-2972 (8th Cir. Sept. 8, 2015).

34. *See* Penelope Krener, *Sexual Harassment in Academia*, *in* SEXUAL HARASSMENT IN THE WORKPLACE AND ACADEMIA: PSYCHIATRIC ISSUES 203, 208 (Diane K. Shrier ed., 1996); David Cantor et al., *supra* note 13, at 29-30.

35. Bureau of Justice Statistics, *Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013*, U.S. DEP'T JUST. 3-4 (Dec. 2014) http://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf [http://perma.cc/EQ5X-YACA].

36. Nonstudents overall are more likely to be victimized by rape and other sexual assault than students, a rate that has increased, *id.* at 4, but they have no sex equality rights against this abuse unless the attack occurred in employment.

37. *See Who Are the Victims?*, RAPE, ABUSE & INCEST NAT'L NETWORK, http://rainn.org/get-information/statistics/sexual-assault-victims [http://perma.cc/HR4V-G66B] (citing numbers based on Bureau of Justice Statistics).

38. Louise F. Fitzgerald et al., *Academic Harassment: Sex and Denial in Scholarly Garb*, 12 PSYCHOL. WOMEN Q. 329, 335 tbl.1 (1988); *see also* Bruce Roscoe et al., *Sexual Harassment of University Students and Student-Employees: Findings and Implications*, 21 C. STUDENT J. 254, 254 (1987) (indicating that twenty-eight percent of women and twelve percent of men surveyed at a moderate-sized university reported experiencing sexually harassing behaviors); Beth E. Schneider, *Graduate Women, Sexual Harassment, and University Policy*, 58 J. HIGHER EDUC. 46, 51, 54 (1987) (indicating that sixty percent of female graduate students reported having experienced some form of "everyday harassment" by male faculty, meaning they were exposed to ogling and staring, comments and jokes about women's bodies or appearances, physical contact (pinches and touches), passes and casual sexual remarks, explicit sexual propositions, and that of the thirteen percent who had dated a faculty member at least once during their graduate academic careers, thirty percent reported pressure to date, and the same number reported pressure to be sexual with the faculty member).

that six percent had been raped in the prior year.[39] Of her female respondents, 15.4% had been raped since age fourteen and an additional 12.1% had been victims of attempted rape since age fourteen.[40] Of college men respondents, 4.4% said that after the age of fourteen, they had committed an act that met the legal definition of rape.[41] The combined figure for women who had been victims of either rape or attempted rape since age fourteen, 27.5%, has become known as the "one-in-four" statistic.[42] Koss's fifteen percent completed rape prevalence rate from her study of thirty-two campuses has been replicated by further studies of college students on specific campuses.[43] Over several decades, approximately one in four college women have consistently reported surviving rape or attempted rape in multicampus studies sampling thousands of college students.[44] One recent study suggests that five percent of college women

39. Mary P. Koss et al., *Hidden Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Students in Higher Education*, ANN. CONVENTION AM. PSYCHOL. ASS'N 2, 11, 17 (Aug. 1985), http://files.eric.ed.gov/fulltext/ED267321.pdf [http://perma.cc/A8HU-XU3B].

40. *Id.* at 20.

41. *Id.*

42. *Id.*; *see, e.g.*, CHRISTOPHER KILMARTIN & JULIE ALLISON, MEN'S VIOLENCE AGAINST WOMEN: THEORY, RESEARCH, AND ACTIVISM 203 (2007) ("John Foubert founded not-for-profit National Men's Outreach for Rape Education (NO MORE) in 1998. Later the organization changed its name to "One in Four" . . . named after the famous statistic that one in four college women is a victim of sexual assault or attempted sexual assault."); LINDA P. ROUSE, MARITAL AND SEXUAL LIFESTYLES IN THE UNITED STATES: ATTITUDES, BEHAVIORS, AND RELATIONSHIPS IN SOCIAL CONTEXT 98 (2002) (noting Koss's "figures resulted in the statistic popularized by the media that *one in four* college women experience rape or attempted rape"); JOHN J. SLOAN III & BONNIE S. FISHER, THE DARK SIDE OF THE IVORY TOWER: CAMPUS CRIME AS A SOCIAL PROBLEM 87 (2011) ("The one in four figure quickly and routinely began appearing in media reports about rape on college campuses and became a crucial rallying point for campus feminists, who had argued for years that a large proportion of college women were routinely being sexually victimized on campus." (footnote omitted)); Barbara Mantel, *Campus Sexual Assault*, 24 CQ RESEARCHER 915, 925 (2014) ("The 'one in four' statistic became a rallying cry and proof to feminists that sexual violence on campus was epidemic."); Sut Jhally, *The Date Rape Backlash: Media & the Denial of Rape*, MEDIA EDUC. FOUND. 9 (1994), http://www.mediaed.org/assets/products/201/transcript_201.pdf [http://perma.cc/H4A3-2BET] ("The growing backlash against the reality of sexual assault is in large part a response to the often-quoted statistic that one in four college women have been a victim of rape or attempted rape. This figure emerged from the research of psychologist Mary Koss . . . in a study conducted in 1987.").

43. *See* Mary P. Koss, *Rape: Scope, Impact, Interventions, and Public Policy Responses*, 48 AM. PSYCHOL. 1062 (1993); Mary P. Koss & Sarah L. Cook, *Facing the Facts: Date and Acquaintance Rape Are Significant Problems for Women*, *in* CURRENT CONTROVERSIES ON FAMILY VIOLENCE 104, 109 (Richard J. Gelles & Donileen R. Loseke eds., 1993).

44. On this point generally, see Bonnie S. Fisher et al., *The Sexual Victimization of College Women*, U.S. DEP'T JUST. 10 (2000), http://www.ncjrs.gov/pdffiles1/nij/182369.pdf

survive rape every year; some may be repeat victims.[45] These data were largely confirmed by the AAU study in 2015.[46]

Women graduate students face a substantial further risk of sexual harassment by faculty, staff, and other students. In 1988, thirty-five percent of women graduate students said they were sexually harassed at their current institutions,[47] and in another study as many as thirty percent of graduate women reported experiencing "unwelcome seductive behavior" from their professors.[48] Rates of sexual harassment may vary by field. One study found that fully seventy-five percent of women graduates of psychology doctoral programs were sexually harassed by a faculty member not of their own sex during graduate school.[49] Although disciplines have not been systematically studied for their rates of sexual harassment of students, women in some historically male specialties do report high rates. Medical education is especially notorious for sexist and sexual abuse and denigration of women students.[50] A meta-analysis of sixty-two studies found that thirty-three percent of medical students were sexually harassed in their training.[51] Preliminary findings further suggest that law students are exposed to a higher risk of sexual harassment than many other graduate students.[52] One preliminary study found sixty-three percent of women law students reported being sexually harassed by faculty, compared with forty-four percent of other women graduate students; eighty-

[http://perma.cc/F97W-VQL7]; Koss et al., *supra* note 16, at 163; and Meichun Mohler-Kuo et al., *Correlates of Rape While Intoxicated in a National Sample of College Women*, 65 J. STUD. ON ALCOHOL 37, 37 (2004).

45. Mohler-Kuo et al., *supra* note 44, at 42.

46. David Cantor et al., *supra* note 13, at 11-28.

47. Kathleen McKinney et al., *Graduate Students' Experiences with and Responses to Sexual Harassment: A Research Note*, 3 J. INTERPERSONAL VIOLENCE 319, 321 (1988).

48. Fitzgerald et al., *supra* note 22, at 162.

49. Margaret Schneider et al., *Sexual Harassment Experiences of Psychologists and Psychological Associates During Their Graduate School Training*, 11 CANADIAN J. HUM. SEXUALITY 159, 164 tbl.1 (2002).

50. *See, e.g.*, Erica Frank et al., *Prevalence and Correlates of Harassment Among US Women Physicians*, 158 ARCHIVES INTERNAL MED. 352, 354 (1998) (finding 40.2% of women reported gender harassment in medical school or internship, residency, or fellowship, and 29.8% reported sexual harassment).

51. Terry D. Stratton et al., *Does Students' Exposure to Gender Discrimination and Sexual Harassment in Medical School Affect Specialty Choice and Residency Program Selection?*, 80 ACAD. MED. 400, 404 (2005).

52. Jennifer J. Freyd et al., *Presentation at the 20th International Summit and Training on Violence, Abuse, and Trauma: Initial Findings from the University of Oregon 2015 Sexual Violence Survey*, U. OR. DEP'T PSYCHOL. 48-53 (Aug. 24, 2015), http://dynamic.uoregon.edu/jjf/campus/UO15-campus-IVAT-24Aug15.pdf [http://perma.cc/EY9J-KHN3].

six percent of female law students reported sexual harassment by other students, compared with sixty-two percent of other women graduate students.[53]

While the legal, social, and empirical development of the claim for sexual harassment initially centered on teacher-student sexual abuse, students connecting with each other through social media and online after the turn of the present century produced an explosion in the exposure of, and response to, sexual harassment of students by other students. When time periods and campuses are specifically focused, and the inquiry is expanded to include forms of sexual harassment in addition to rape, the picture becomes deeper and sharper, and worse not better. Between 2.8% and 4.9% of college women have been found to have been raped during a given academic year; up to 15.5% are sexually victimized by rape and other than by rape, with a substantial number violated repeatedly during college.[54] Among first year college women, 15.4% reported either an attempted or completed rape in which they were incapacitated, usually with drugs or alcohol; nine percent reported an attempted or completed forcible rape,[55] with drug rape emerging as a type of sexual victimization distinctly prevalent on college campuses.[56] Almost half of sexually victimized college women experienced more than one incident during the academic year.[57]

Research on sexual abuse of students has revealed fundamental facts of sexual assault, which becomes sexual harassment in the legal sense because equality law applies in schools: there is a great deal of it, most perpetrated by individuals known to the victim to some degree, most of it never reported, and most perpetrators never officially held accountable in any way.[58] Noting all the unreported rape this data revealed, David Lisak identified the need to study undetected rapists.[59] His research found that most men who rape and are not detected are adept at identifying victims and testing their boundaries; plan and

53. *Id.* at 52.

54. Fisher et al., *supra* note 44, at 10, 13, 17-18.

55. Kate B. Carey et al., *Incapacitated and Forcible Rape of College Women: Prevalence Across the First Year*, 56 J. ADOLESCENT HEALTH 678, 679 (2015).

56. Dean G. Kilpatrick et al., *Drug-Facilitated, Incapacitated, and Forcible Rape: A National Study*, NAT'L CRIME VICTIMS RES. & TREATMENT CTR. 23 (Feb. 1, 2007), http://www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf [http://perma.cc/QKQ4-CD8M].

57. Leah E. Daigle et al., *The Violent and Sexual Victimization of College Women: Is Repeat Victimization a Problem?*, 23 J. INTERPERSONAL VIOLENCE 1296, 1301 (2008).

58. *See* Koss et al., *supra* note 16, at 163.

59. Before Lisak, Samuel Smithyman illuminatingly studied unreported rapists. *See* Samuel David Smithyman, The Undetected Rapist (May 1978) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with author).

premeditate their attacks; groom and isolate victims physically; control their impulses to use only as much violence as is instrumental in terrifying and coercing their victims into submission; employ psychological weapons like power, control, manipulation, and threats, backed up by physical force, rarely resorting to other weapons; and deploy alcohol deliberately to incapacitate victims.[60] He found that a majority, sixty-three percent, of undetected rapists are serial offenders, averaging six rapes each.[61] A history of committing sexual assault before college was the most powerful predictor of offending.[62]

Lisak and Miller is the only study to conclude that the majority of rapes by men college students are intentional acts of conscious predation against targets selected for their vulnerability and maneuvered into defenselessness by the same men over and over again. No doubt this pattern is accurate for a percentage of perpetrators. Reassuring as it is to think that a few bad apples commit most campus rapes, recent empirical work has found this conclusion to be seriously overstated numerically and flawed as a focus for policy. Later systematic research on exactly what cohorts of men commit college rapes concludes that 10.8% of a sample of college men reported perpetrating at least one rape from fourteen years of age through the end of college, with most of their likelihood of raping being low or time-restricted.[63] Most who reported raping did so during one academic year, suggesting that the validity of the campus serial rapist assumption is "surprisingly limited."[64] The predictability of raping while in college based on raping while in high school was also found to be low; most men students raped either more or less than they did in high school while in college.[65] The researchers concluded that "at least 4 of 5 men on campus who have committed rape will be missed by focusing solely" on men who perpetrate rape across multiple college years.[66] Such men were also found not at high risk of raping when entering college and to account for a small percentage of campus perpetrators of rape.[67]

60. David Lisak, *Understanding the Predatory Nature of Sexual Violence*, 14 SEXUAL ASSAULT REP. 49, 56 (2011).

61. David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 80 (2002).

62. David Lisak et al., *Factors in the Cycle of Violence: Gender Rigidity and Emotional Constriction*, 9 J. TRAUMATIC STRESS 721, 732 (1996).

63. Kevin M. Swartout et al., *Trajectory Analysis of the Campus Serial Rapist Assumption*, 169 JAMA PEDIATRICS 1148, 1150-51 (2015).

64. *Id.* at 1148. Of course, they could have committed multiple rapes all in one year.

65. *Id.* at 1152-53.

66. *Id.* at 1153.

67. *Id.*

No doubt there is much to both sets of findings. The Lisak research appears aimed at correcting an overly sympathetic image of so-called date rape as bumbling acts of callow youth who misread ambiguous sexual signals of passive girls who are drunk and/or naïve and/or overeager for acceptance. Perhaps a benign image (if this is one) has been overcorrected to converge with a formerly overly malign one. Imagining the cynical serial rapist prowling the campus hunting his next victim makes rape seem relatively simple and easy to detect, identify, predict, and stop; it also makes rape seem isolated and exceptional rather than systemic, evil rather than unequal. Taking a moral rather than explanatory approach substitutes condemnation for analysis. Given that men who rape have been found to be normal in virtually all material respects,[68] so that normal masculinity under conditions of sex inequality is consistent with sexual predation, the behaviors found by Lisak are to some extent normative in masculinity.

Most consistent with the sweep of the evidence, including Lisak's contextualized, is the conclusion that rape is a systematic act of sex inequality, disproportionately but not exclusively committed by men against women, encompassing masculine norm-hyper-conformists, group culture-followers, reckless unconscious misogynists, insecure strivers for male bonding, narcissistic egotists, aggressively oblivious nonempathetic advantage-takers, as well as conscious predatory serial exploiters. For equality purposes, the fact that sexual violation is essentially socially permitted, even supported, is more important than anyone's particular location on this spectrum.

Investigating specifics of context and climate, looking for factors that may vary or explain variance in findings, some studies have found that fraternity men score higher on attitude scales that are supportive of rape,[69] as well as higher in use of verbal coercion, drugs, and alcohol to obtain sex.[70] Several leading researchers have concluded that studies converged on the conclusion that fraternity men are far more likely to rape than nonfraternity men, and that fraternity culture includes "group norms that reinforce within-group attitudes

68. David Lisak, *Sexual Aggression, Masculinity, and Fathers*, 16 SIGNS 238, 242 (1991); *see also* DIANA SCULLY, UNDERSTANDING SEXUAL VIOLENCE: A STUDY OF CONVICTED RAPISTS 5, 90 (1990) (finding few differences between rapists and "normal" male felons in a study of 114 convicted rapists); James V.P. Check & Neil Malamuth, *An Empirical Assessment of Some Feminist Hypotheses About Rape*, 8 INT'L J. WOMEN'S STUD. 414, 415 (1985) ("Despite . . . numerous efforts to identify ways in which rapists are abnormal, the results have generally indicated very few differences between rapists and nonrapists which would justify any conclusion that rapists are grossly abnormal.").

69. *See* E. Timothy Bleecker & Sarah K. Murnen, *Fraternity Membership, the Display of Degrading Sexual Images of Women, and Rape Myth Acceptance*, 53 SEX ROLES 487, 490-91 (2005).

70. *See, e.g.*, Scot B. Boeringer, *Influences of Fraternity Membership, Athletics, and Male Living Arrangements on Sexual Aggression*, 2 VIOLENCE AGAINST WOMEN 134, 140 (1996).

that support perpetrating sexual coercion against women."[71] One study that found no effect of fraternity membership as such on attitudes supporting rape points instead to increased perceived male peer support for exploiting women through alcohol combined with the amount of alcohol men consume[72]—which of course may be correlated with Greek life.[73] Alcohol consumption is a factor in sexual assault both for victims and perpetrators; women who report higher levels of attempted and completed rape also report higher levels of alcohol consumption.[74] Clearly, campuses and fraternities vary considerably, although the "discourse, rituals, sexual ideology, and practices that make *some* fraternity environments rape prone" do exist.[75] Rape myth acceptance, which tends to flourish in such environments, has also been found associated with greater racism, sexism, homophobia, ageism, classism, and religious intolerance.[76] This reality likely contributes to the intersectional sexual assault that disproportionately targets young women of color.[77]

One explanation for the persistence and prevalence of campus sexual assault is that some college cultures support it. Studies suggest that rape cultures are fostered on college campuses when rape by acquaintances or dates—most frequently but not exclusively of women students by men students—is an encouraged and accepted, even integral, part of campus life. Peggy Sanday, who studies sexual ideologies cross-culturally, distinguished rape-prone societies—those in which the reported incidence of rape is high, and either excused as a ceremonial measure of masculinity or permitted by men to threaten or punish women—from rape-free societies, those in which the reported incidence of rape is low and in which sexual aggression is disapproved

71. John D. Foubert et al., *Behavior Differences Seven Months Later: Effects of a Rape Prevention Program*, 44 NASPA J. 728, 730 (2007).

72. *See* Martin D. Schwartz & Carol A. Nogrady, *Fraternity Membership, Rape Myths, and Sexual Aggression on a College Campus*, 2 VIOLENCE AGAINST WOMEN 148, 158-59 (1996).

73. *See* ALEXANDRA ROBBINS: THE SECRET LIFE OF SORORITIES 46, 125 (2d ed. 2015) (finding that the Greek systems frequently promote rape culture, including through consumption of alcohol).

74. *See* Brenda J. Benson et al., *College Women and Sexual Assault: The Role of Sex-Related Alcohol Expectancies*, 22 J. FAM. VIOLENCE 341, 348 (2007).

75. Peggy Reeves Sanday, *Rape-Prone Versus Rape-Free Campus Cultures*, 2 VIOLENCE AGAINST WOMEN 191, 191 (1996).

76. *See* Allison C. Aosved & Patricia J. Long, *Co-Occurrence of Rape Myth Acceptance, Sexism, Racism, Homophobia, Ageism, Classism, and Religious Intolerance*, 55 SEX ROLES 481, 488 (2006).

77. *See* Shakeshaft, *Educator Sexual Misconduct*, *supra* note 9, at 28 tbl.12 (documenting that educators sexually harass African American, Latina/o and American Indian students at a rate disproportionately higher than their percentage of the student population).

and punished.[78] Among U.S. campus cultures, Sanday found rape-prone ones characterized by attitudes and behaviors "adopted by insecure young men who bond through homophobia and 'getting sex.' The homoeroticism of their bonding leads them to display their masculinity through heterosexist displays of sexual performance."[79] This is clearly gender-based behavior. In rape-prone campus cultures, men students receive their information about women and sex from pornography, target women at parties for sex and watch their buddies rape them (live pornography), and take advantage of drunk women routinely on an accepted, even planned, basis.[80] A campus rape culture[81] could empirically be considered one in which 55.7% of men students report obtaining sex by verbal harassment, or one in which one quarter of male students report using drugs or alcohol to get sex, and 8.6% report at least one use of force or threatened force to obtain sex.[82]

Sexual harassment harms students distinctively in their education, as well as emotionally and physically, producing the injuries and damage to the person common to any sexual assault as well as destruction specific to the educational experience. Victims of sexual harassment consistently report trauma.[83] The frequency of sexual harassment is related to the severity of posttraumatic symptoms and other psychological distress, even when controlling for other trauma history, including abuse in childhood and intimate partner violence.[84] In addition to these harms, experienced by all victims of sexual harassment, students who are harassed in academic settings sustain damage to their education. They report worse experiences with faculty and advisors and lower confidence in their academic competence; they say they feel less able to speak

78. Peggy Reeves Sanday, *The Socio-Cultural Context of Rape: A Cross-Cultural Study*, 37 J. SOC. ISSUES 5, 9-18 (1981).

79. Sanday, *supra* note 75, at 194 (referring to her findings in PEGGY REEVES SANDAY, FRATERNITY GANG RAPE: SEX, BROTHERHOOD, AND PRIVILEGE ON CAMPUS (1990)).

80. *Id.* at 194-95.

81. On this concept, see generally PEGGY REEVES SANDAY, FRATERNITY GANG RAPE: SEX, BROTHERHOOD, AND PRIVILEGE ON CAMPUS (2d ed. 2007); and TRANSFORMING A RAPE CULTURE (Emilie Buchwald et al. eds., 1993).

82. These facts, used here as examples, come from Boeringer, *supra* note 70, at 139, 139 tbl.1.

83. *See generally* Claudia Avina & William O'Donohue, *Sexual Harassment and PTSD: Is Sexual Harassment Diagnosable Trauma?*, 15 J. TRAUMATIC STRESS 69 (2002); Ivy K. Ho et al., *Sexual Harassment and Posttraumatic Stress Symptoms Among Asian and White Women*, 21 J. AGGRESSION, MALTREATMENT & TRAUMA 95 (2012); Patrick A. Palmieri & Louise F. Fitzgerald, *Confirmatory Factor Analysis of Posttraumatic Stress Symptoms in Sexually Harassed Women*, 18 J. TRAUMATIC STRESS 657 (2005).

84. *See* Margaret S. Stockdale et al., *Sexual Harassment and Posttraumatic Stress Disorder: Damages Beyond Prior Abuse*, 33 LAW & HUM. BEHAV. 405 (2009).

up in class and less respected on campus.[85] Female graduate students may avoid enrolling in a course in order to avoid a professor who presents a concern;[86] they may avoid or drop a class to avoid a harasser (thirty percent), or switch mentors (nine percent).[87] Sexually harassed students may change disciplines or leave school entirely as a result of the harassment. One Title IX complainant who filed with OCR reported to a journalist:

> After an attempted assault my freshman year, I left school and was hospitalized for two days because I was ill from stress. When I came back I got a D on an exam—up until that point I had been a straight-A student. I stopped taking courses I thought he would be interested in, stopped hanging out with groups of mutual friends and refrained from participating in organizations he was a part of. I suffered panic attacks when I ran into him.[88]

Sexual harassment of students damages the developing person in ways that are distinctive to the educational setting, restricting women's advancement as individuals and as a group.[89] Imagine attempting to focus on studying and learning when you have just been raped, or feel you may be about to be. Sexual harassment in education is a major barrier to the achievement of equality for women, to which an equal education is essential.

Reporting sexual harassment to school administrations frequently becomes a distinctively damaging part of the abuse experience, termed "betrayal trauma,"[90] by exacerbating and frequently exceeding the harms of the original assault. Students often identify with and trust—even love—their schools, and are dependent on them in many ways. Students frequently believe the institutions they dreamed of attending will identify with and want to help them. Uncovering and living through the slowly unfolding nightmare of its

85. Lilia M. Cortina et al., *Sexual Harassment and Assault: Chilling the Climate for Women in Academia*, 22 PSYCHOL. WOMEN Q. 419, 431 (1998).

86. Fitzgerald et al., *supra* note 22, at 159-63.

87. McKinney et al., *supra* note 47, at 322.

88. Christina Huffington, *Yale Students File Title IX Complaint Against University*, YALE HERALD (Mar. 31, 2011), http://yaleherald.com/homepage-lead-image/cover-stories/breaking-news-yale-students-file-title-ix-suit-against-school [http://perma.cc/FF5P-DNM2].

89. A further summary of the harmful effects of teacher-student harassment can be found in Shakeshaft, *Educator Sexual Misconduct*, *supra* note 9, at 44-45.

90. *See* JENNIFER J. FREYD, BETRAYAL TRAUMA: THE LOGIC OF FORGETTING CHILDHOOD ABUSE (1996); JENNIFER J. FREYD & PAMELA J. BIRRELL, BLIND TO BETRAYAL: WHY WE FOOL OURSELVES WE AREN'T BEING FOOLED (2013); Carly Parnitzke Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Traumatic Aftermath of Sexual Assault*, 26 J. TRAUMATIC STRESS 119 (2013).

other agendas and higher priorities comes as a shock. It is remarkable how many accounts of sexual harassment in education focus on the school turning against the reporting student rather than on the sexual abuse itself. Many a student who begins the process believing in the beneficence and caring of their institution and its intentions is grievously, even viciously, disappointed.

Prominent examples at the college level include a young woman raped by an acquaintance in a college dormitory:

> Some nights I can still hear the sounds of his roommates on the other side of the door, unknowingly talking and joking as I was held down. . . . Eventually I reached a dangerously low point, and, in my despondency, began going to the campus' sexual assault counselor. In short I was told: No you can't change dorms, there are too many students right now. Pressing charges would be useless, he's about to graduate, there's not much we can do. Are you SURE it was rape? It might have just been a bad hookup . . . . You should forgive and forget.[91]

Many students recount similarly callous treatment by their schools, making the major trauma that marks their education not even when they are raped, but when they report being raped. The reactions to their reports provide a veritable lexicon of ignorance, victim-blaming, and rape myths, prominently including trivialization and demonstration of the belief that rape is inevitable. One young woman's dream of freedom and of showing the world what a minority woman like her could do took "a violent, crashing fall in June 2012":

> It was then that I reported several sexual assaults at the hands of my ex-boyfriend to the school administration. After an "informal mediation" arbitrated by the dean of students in the College, my rapist promptly left to graduate. I was then left to deal with my emotions regarding, as the dean so eloquently put it, this "dispute between students." To deal with this turmoil, the dean had me see the resident trauma expert at Student Counseling Services. This "expert" ended up telling me that "You should probably expect something when you sleep in a bed with a guy."[92]

91. Angie Epifano, *An Account of Sexual Assault at Amherst College*, AMHERST STUDENT (Oct. 17, 2012), http://amherststudent.amherst.edu/?q=article/2012/10/17/account-sexual-assault-amherst-college [http://perma.cc/7FWN-ZDJK].

92. Olivia Ortiz, *A Four Year Struggle*, CHI. MAROON (June 3, 2014), http://chicagomaroon.com/2014/06/03/a-four-year-struggle [http://perma.cc/5R9H-2TD8].

One young woman who said she was raped by a classmate and did not report at first due to the trauma of the event, decided to report when two other women told her the same boy had assaulted them. "During my hearing, one panelist kept asking me how it was physically possible for anal rape to happen."[93] The boy she accused remained on campus.[94] One girl raised in a conservative Mennonite home was one of several students who reported having been raped at Bob Jones University:

> She hadn't even held hands with a boy when, at age 19, she says her supervisor at her summer job raped her. Two years later, and desperate for help, she reported the abuse to the dean of students at her college. "He goes, 'Well, there's always a sin under other sin. There's a root sin,'" [she] remembers. "And he said, 'We have to find the sin in your life that caused your rape.'"[95]

She left college and told no one until five years later.[96] One male student who was raped three times by a classmate and was forced to leave campus at knifepoint said that his principal told him to "be a man" and "just deal with it."[97] When one young woman reported to the President of her school that she was sexually harassed by her basketball coach, she said the President told her "sometimes men will flirt and harass you in the 'real world' and that you should learn to deal with it," and she should not be troubled, although similar complaints had been made against the same coach many times before.[98] One special needs student who was sexually assaulted and battered by a male classmate was told by her teachers "not to tell her mother about the incident and encouraged . . . to forget it had happened at all."[99]

93. Francesa Trianni & Eliana Dockterman, *'My Rapist Is Still on Campus': Sex Assault in the Ivy League*, TIME (May 15, 2014), http://time.com/98433/video-ivy-league-rape [http://perma.cc/9MTA-FT22] (quoting Emma Sulkowicz). Emma Sulkowicz carried a mattress around campus identical to the one on which she said she was raped as a performance art project until she graduated. *Id.*

94. *Id.*

95. Claire Gordon, *Rape Victims Say Bob Jones University Told Them To Repent*, AL JAZEERA AM. (June 18, 2014), http://america.aljazeera.com/watch/shows/america-tonight/articles/2014/6/18/bob-jones-universitysexualabuse.html [http://perma.cc/A75J-V4VU].

96. *Id.*

97. O.H. v. Oakland Unified Sch. Dist., No. C-99-5123, 2000 WL 33376299, at *1 (N.D. Cal. Apr. 14, 2000).

98. Tate v. Paris Junior Coll., No. 4:13-cv-737, 2015 WL 1738572, at *4 (E.D. Tex. Apr. 13, 2015) (finding these facts allege deliberate indifference).

99. Murrell v. Sch. Dist. No. 1, 186 F.3d 1238, 1243-44 (10th Cir. 1999).

What is known about the sanctions schools impose for sexual assault on campuses, although limited, supports this generally dismal, even appalling, picture of unresponsiveness to victims who depend on their schools. Most students found to have harassed other students, including violently, stay on campus.[100] Most teachers who sexually abuse students remain in classrooms.[101] Accounts of institutional betrayal litter the mainstream press, social media, and Title IX case law.

II. LEGAL BACKGROUND

How have schools been permitted to behave this way, when educational sex equality is guaranteed? The primary route for complaint against schools for discriminatory treatment under Title IX is the federal administration through the OCR of the Department of Education, complaints that can, but so far have not, resulted in loss of federal funds to a school.[102] Sexual harassment was first

100. *See* Tyler Kingkade, *Fewer than One-Third of Campus Sexual Assault Cases Result in Expulsion*, HUFFINGTON POST (Sept. 29, 2014, 8:59 AM) http://www.huffingtonpost.com/2014/09/29/campus-sexual-assault_n_5888742.html [http://perma.cc/3X79-99WF] (citing information from a review of 221 cases of students found guilty, with seventeen percent expelled or dismissed and twenty-six percent suspended).

101. At least, an early study of New York City shows that of the 225 cases of sexual abuse by teachers in New York, all admitted to abusing a student, none had been reported, and only one percent lost their license to teach. Only thirty-five percent received a negative consequence of any kind, fifteen percent being terminated or not rehired and twenty percent receiving a reprimand or suspension. Nearly thirty-nine percent chose to leave, most with positive recommendations or retirement packages intact. *See* Shakeshaft, *Educator Sexual Assault*, *supra* note 9, at 45 (reporting on a 1994 study, CHAROL SHAKESHAFT & AUDREY COHAN, IN LOCO PARENTIS: SEXUAL ABUSE OF STUDENTS IN SCHOOLS: WHAT ADMINISTRATORS SHOULD KNOW (1994)). Consistent with this, in a study of 159 Washington state coaches as of 2003 who had been reprimanded, warned, or let go over the prior ten year period for sexual misconduct, at least ninety-eight percent continued coaching or teaching afterward. *See id.* (reporting on Christine Willmsen & Maureen O'Hagan, *Coaches Who Prey*, SEATTLE TIMES (Dec. 17, 2003), http://old.seattletimes.com/news/local/coaches/about.html [http://perma.cc/B22V-HEC6]).

102. *See* 20 U.S.C. § 1682 (2012); Grove City Coll. v. Bell, 465 U.S. 555, 571 (1984); *A Title IX Primer*, WOMEN'S SPORTS FOUND., http://www.womenssportsfoundation.org/home/advocate/title-ix-and-issues/what-is-title-ix/title-ix-primer [http://perma.cc/XW73-ZADT] ("Despite the fact that most estimates are that 80 to 90 percent of all educational institutions are not in compliance with Title IX as it applies to athletics . . . withdrawal of federal moneys has never been initiated. When institutions are determined to be out of compliance with the law, the United States Department of Education Office for Civil Rights (OCR) typically finds them 'in compliance conditioned on remedying identified problems.'"). Tufts came close to having its federal funds cut off. Press Release, U.S. Dep't of Educ., U.S. Department of Education Finds Tufts University in Massachusetts in Violation of Title IX for Its Handling of Sexual Assault and Harassment Complaints

recognized as sex discrimination in education under Title IX in the private suit[103] *Alexander v. Yale University*.[104] Brought in 1977, in *Alexander* five women students joined by a man teacher claimed that sexual harassment by faculty members, which included rape and nonresponse by Yale—specifically the absence of an established grievance procedure for handling sexual harassment complaints—violated the sex equality guarantee of Title IX, which provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[105] The *Alexander* plaintiffs sought injunctive relief: a responsive procedure.[106]

By 1980, the case established the cause of action by survivors for sexual harassment in education as sex discrimination.[107] In its wake, many steps

(Apr. 28, 2014), http://www.ed.gov/news/press-releases/us-department-education-finds-tufts-university-massachusetts-violation-title-ix-its-handling-sexual-assault-and-harassment-complaints [http://perma.cc/QJW2-JHYK] ("Although Tufts had entered into an agreement to remedy its violation on April 17, the university informed OCR on April 26 that it was 'revoking' the agreement. This action constitutes a breach of the agreement. Under federal civil rights regulations, OCR may move to initiate proceedings to terminate federal funding of Tufts or to enforce the agreement. The office stands ready to confer with Tufts on how to come into compliance speedily."). After being threatened with a federal funding cut off, Tufts University announced it would enter back into an agreement with the U.S. Department of Education that laid out reforms the Massachusetts school must make to its sexual violence policies. Tyler Kingkade, *Tufts University Backs Down on Standoff with Feds over Sexual Assault Policies*, HUFFINGTON POST (May 9, 2014, 5:59 PM), http://www.huffingtonpost.com/2014/05/09/tufts-sexual-assault-title-ix_n_5297535.html [http://perma.cc/9YCB-NXRU]. The fact that no funds have been cut off only means schools, knowing OCR means business, have complied, not that OCR is unwilling to use this tool.

103. Over strong resistance by schools, the Supreme Court implied a private right of action for individual students against schools in 1979. Cannon v. Univ. of Chi., 441 U.S. 677, 677-79 (1979) (reversing Seventh Circuit finding that female denied admission to medical school because of sex had no private right of action against medical school); Alexander v. Yale Univ., 631 F.2d 178, 182, 185 (2d Cir. 1980) (affirming district court finding that plaintiff Pamela Price, who alleged sexual harassment by faculty member violated her sex equality rights under Title IX, could sue Yale University).

104. 459 F. Supp. 1 (D. Conn. 1977).

105. *Id.* at 2 (quoting 20 U.S.C. § 1681(a)(1976)).

106. *Id.* at 6.

107. *Alexander*, 631 F.2d at 184-85. Then District Judge Newman had ruled that "academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education." *Alexander*, 459 F. Supp. at 4. This point in the ruling was not appealed. At trial, Pamela Price, a young African American student at Yale, was not believed by the white woman judge when she described her experience of having a grade of "A"

forward in policy and culture commenced, as educational institutions reasonably recognized that they faced exposure to risk of loss—perhaps substantial liability, at least litigation—if they failed to address sexual harassment that occurred on their campuses.[108] Some no doubt saw sexual assault as antithetical to educational quality and equality. The *Franklin v. Gwinnett County Public Schools* case, in which monetary damages were authorized against a school district that took no effective action against sexual harassment of a student by her coach and teacher, sustained and supported this progress,[109] expanding available relief and increasing the incentive for schools to be vigilant and proactive against sexual harassment in their purview.

In 1998, it all came crashing down. Such claims, hence incentives, were largely destroyed when the Supreme Court in *Gebser v. Lago Vista Independent School District* confined damages in Title IX actions for teacher-student sexual

proposed in exchange for sex by a white male political science teacher. *Alexander*, 631 F.2d at 182-83, 185.

108. *See* BILLIE WRIGHT DZIECH & MICHAEL W. HAWKINS, SEXUAL HARASSMENT AND HIGHER EDUCATION: REFLECTIONS AND NEW PERSPECTIVES 31-32 (1998) ("[B]y now most [colleges and universities] can claim to meet the basic standards of good policy and practice: (1) provide the campus community with a coherent and comprehensive definition of sexual harassment (most use the EEOC definition as a base), (2) issue a strong policy statement expressing disapproval of the behavior, (3) establish an accessible grievance procedure that allows for both formal and informal complaints, (4) conduct student, faculty, and staff programs that educate all constituencies about the problem, and (5) employ multiple sources (catalogues, posters, campus newspaper and radio and television presentations) to communicate policies and procedures."); ROBERT O. RIGGS ET AL., SEXUAL HARASSMENT IN HIGHER EDUCATION: FROM CONFLICT TO COMMUNITY 33 (1993) ("It was not until the early 1980s that sexual harassment was recognized as a problem of significant dimensions in higher education and incidents of harassment on campuses were documented by survey and published. Since that time, . . . the potential for institutional and individual liability has prompted colleges and universities to adopt policies to avert such problems."); Ingulli, *supra* note 9, at 316-17 ("Since 1984, the AAUP has recommended that colleges and universities adopt specific policies banning sexual harassment to protect academic freedom by adopting appropriate ethical standards and providing suitable internal procedures to secure their observance. A number of studies have made similar recommendations. For the most part, academic institutions have adopted some policy statement addressing sexual harassment."); Claire Robertson et al., *Campus Harassment: Sexual Harassment Policies and Procedures at Institutions of Higher Learning*, 13 SIGNS 792, 794 (1988) (surveying institutions of higher education, with about 311 institutions responding, and finding that "[s]ixty-six percent of all respondent institutions had written sexual harassment policies, and 46 percent had grievance procedures specifically designed to deal with sexual harassment complaints"); María Aurora Yánez-Pérez, *Sexual Harassment Policies and Schools*, INTERCULTURAL DEV. RES. ASS'N (Aug. 1997), http://www.idra.org/IDRA_Newsletter/August_1997_Policy/Sexual_Harassment_Policies_and_Schools [http://perma.cc/KP3W-6DGA] ("Schools have received their wake-up call through highly publicized and costly litigation.").

109. 503 U.S. 60, 63, 65, 72, 76 (1992) (holding that implied private right of action under Title IX supports claim for monetary damages).

harassment to schools that had received notice to "an official who at minimum has authority . . . to institute corrective measures" who then responded with "deliberate indifference."[110] One year later, the Court applied the same institutional liability principles, with some increased difficulty for survivors added, to student-student sexual harassment in *Davis ex rel. LaShonda D v. Monroe County Board of Education*.[111] Once the Court held schools not liable in damages for sexual harassment in faculty-student or peer situations unless they were deliberately indifferent to the discrimination, and they had to know about it to deliberately be indifferent to it, schools perceptibly relaxed. The exhale was audible from coast to coast. Under this doctrinal regime, sexual harassment, including rape, in schools from elementary to post-secondary, the data substantiate, has once again proceeded with effective impunity, largely undeterred to this day.[112]

The legal architecture for claims against schools for sexual harassment in education developed by courts following these Supreme Court decisions has several elements. Provided the defendant institution receives federal funds, the harassing treatment must be based on sex or gender, which—especially when heterosexual behavior is involved, but often where behavior is sexual regardless of the sexes of the parties—is typically, although not always, treated as obvious.[113] Gay, lesbian, bisexual, and transgender students and behaviors are

110. 524 U.S. 274, 290 (1998); *see also* Murrell v. Sch. Dist. No. 1, 186 F.3d 1238, 1246 (10th Cir. 1999) (citing *Gebser*). The exact impact of *Gebser* on cases like *Alexander*, seeking exclusively equitable relief, is not resolved. *See, e.g.*, Frederick v. Simpson Coll., 160 F. Supp. 2d 1033, 1035-38 (S.D. Iowa 2001) (noting ambiguity created by the distinction but permitting college to voluntarily comply before liability anyway).

111. 526 U.S. 629, 644-45 (1999) (holding recipient of federal funding who retains significant control over context of harassment liable for damages when its deliberate indifference makes victim of peer sexual abuse vulnerable to it). Title IX is not an exclusive remedy for sex discrimination in the form of sexual harassment in education. The Equal Protection Clause is also available for private suit through § 1983 to claim that the school acted discriminatorily and for damages pursuant to a policy or practice under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). *See* Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009). *Monell* requires allegation of a municipal policy or custom that contains a pattern of constitutional violations by defendants. Such a policy can reflect deliberate indifference to constitutional rights if it produces a failure to properly train employees. *See, e.g.*, City of Canton v. Harris, 489 U.S. 378, 392 (1989). Almost all cases to reach decisions in the federal courts in 2014-15 involved public schools; most of them also brought equal protection claims. Most lost. *See* Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720 (3d Cir. 1989).

112. *See supra* Part I.

113. *See, e.g.*, Hawkins v. Sarasota Cty. Sch. Bd., 322 F.3d 1279, 1288 (11th Cir. 2003); *Davis*, 526 U.S. at 652 ("Damages are not available for simple acts of teasing and name-calling . . . even where these comments target differences in gender.").

covered.[114] Homophobic or otherwise same-sex harassment has often been found to be sex-based under Title IX,[115] especially after being recognized under Title VII,[116] although again not always.[117] The complained-of behavior must, in general, be unwelcome,[118] but sometimes youth, or a (usually inexplicit) notion of hierarchical power, particularly in teacher-student situations, substitutes for unwelcomeness[119] or can even overcome seemingly welcome behavior for liability purposes.[120]

114. Title IX covers sexual harassment, including sexual assault, against any student, including gay, lesbian, bisexual, and transgender students. Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, U.S. DEP'T EDUC. 5-6 (Apr. 29, 2014), http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf [http://perma.cc/S6YV-L2KW]. OCR recently found in favor of a transgender girl in her claim of right to access the girls' locker rooms, holding that privacy curtains would solve the school's concern for young girls viewing a transitioning body. *See* Letter of Findings from from Office for Civil Rights, U.S. Dep't of Educ., to Twp. High Sch. Dist. 211 (Nov. 2, 2015), http://www2.ed.gov/documents/press-releases/township-high-211-letter.pdf [http://perma.cc/L9ZB-F9FM] (holding discrimination based on sex in excluding trans girl from girls' locker rooms, noting no voluntary agreement reached). For some discussion of legal coverage of gendered variations under Title IX, see *J.R. v. New York City Department of Education*, No. 14-0392, 2015 WL 5007918 (E.D.N.Y. Aug. 20, 2015), which held that a young black boy with emotional disorders could sue for "perceived femininity and speech" for bullying and harassment for gender, race, and disability; and *Pratt v. Indian River Central School District*, 803 F. Supp. 2d 135, 151-52 (N.D.N.Y. 2011), which held that the *Price Waterhouse* standard of "aversion to given gender preferences" extended to Title IX when a boy was harassed for stereotypic feminine gestures and mannerisms considered a perceived nonconformity with sexist stereotypes.

115. *See* Doe *ex rel.* Doe v. Dall. Indep. Sch. Dist., 153 F.3d 211, 214, 219-20 (5th Cir. 1998) (holding claim by male students that they were sexually molested by male teacher cognizable under Title IX in light of Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998)); Roe *ex rel.* Callahan v. Gustine Unified Sch. Dist., 678 F. Supp. 2d 1008, 1026 (E.D. Cal. 2009); Doe v. Brimfield Grade Sch., 552 F. Supp. 2d 816, 823 (C.D. Ill. 2008); Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. DEP'T EDUC. 3 (Jan. 2001), http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf [http://perma.cc/HX9Z-UZU4].

116. *Oncale*, 523 U.S. at 79; *see also* Wolfe v. Fayetteville Sch. Dist., 648 F.3d 860, 865-66 (8th Cir. 2011).

117. *See Wolfe*, 648 F.3d at 865-67.

118. *See* Benefield v. Bd. of Trs. of Univ. of Ala., 214 F. Supp. 2d 1212, 1217-18 (N.D. Ala. 2002) (finding older students can consent to sexual activity even if they are minors).

119. *See* Mary M. v. N. Lawrence Cmty. Sch. Corp., 131 F.3d 1220, 1225-27 (7th Cir. 1997).

120. *See, e.g.*, A.W. v. Humble Indep. Sch. Dist., 25 F. Supp. 3d 973, 982, 994 (S.D. Tex. 2014) (not considering issue of welcomeness when high school student, in sexually abusive relationship with dance instructor, allegedly chose to live with teacher).

In form, the challenged behavior can be quid pro quo or create a hostile educational environment.[121] A hostile environment created by student-on-student harassment must be "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[122] Inquiry under this test includes all the surrounding circumstances, expectations, and relationships, including the ages of the harasser and victim and the number of individuals involved.[123] Some courts have held that for peer sexual harassment to meet this standard, the behavior must be more widespread than a single instance and its effects must touch the whole educational program or activity.[124] Other courts have given a more generous reading to student abuse, implicitly focusing more upon severity.[125]

Notice of the acts alleged must be given to the right person at the school, a fact-based inquiry. An "appropriate person" must have "actual knowledge of the discrimination in the recipient's programs and fail[] adequately to respond."[126] When notified, the funding recipient must "act[] with deliberate indifference to known acts of harassment in its programs or activities."[127] A funding recipient is deliberately indifferent "only where [its] response to the harassment or lack thereof is clearly unreasonable in light of the known

121. *See, e.g.*, Nelson v. Almont Cmty. Schs., 931 F. Supp. 1345, 1356-57 (E.D. Mich. 1996).

122. Davis *ex rel.* LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 633 (1999); *see also* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 205-06 (3d Cir. 2001). Note the Supreme Court added "and" to this test, which under Title VII uses "or." 29 C.F.R. § 1604.11(a) (2016) (defining harassment as conduct that creates "an intimidating, hostile, or offensive working environment"). Consequently, the substantive standard for sexual harassment is higher for children in school than for adult workers in employment. The focus on severity seldom operates in cases of teacher-student sexual harassment, a possible tacit rule being that the fact of harassment of a student by a teacher is always sufficiently severe, even if confined to one incident, taken together with proof of educational detriment.

123. *See, e.g.*, *Davis*, 526 U.S. at 651; *Saxe*, 240 F.3d at 206.

124. *See, e.g.*, Hawkins v. Sarasota Cty. Sch. Bd., 322 F.3d 1279, 1288-89 (11th Cir. 2003).

125. *See, e.g.*, Hill v. Cundiff, 797 F.3d 948, 972-73 (11th Cir. 2015) (holding that a single incident of sexual assault preceded by two weeks of harassment, combined with school's decision to use victim in rape-bait scheme, met "severe, pervasive, and objectively offensive" standard demonstrating hostile educational environment); Williams v. Bd. of Regents of the Univ. Sys. of Ga., 477 F.3d 1282, 1298-99 (11th Cir. 2007) (holding that woman who withdrew from University of Georgia after being gang-raped by multiple students, including one whose history of sexual misconduct the school had failed to address, demonstrated harm sufficiently severe, pervasive, and objectively offensive enough that it barred access to educational opportunities); *see also infra* text accompanying notes 170-172, 205.

126. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998) (quoting 20 U.S.C. § 1682 (1994)).

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

circumstances,"[128] also a fact-intensive investigation. The response of the institution must amount to "an official decision by the recipient not to remedy the violation."[129]

In the context of student-student sexual harassment, the claimed deliberate indifference must "cause students to undergo harassment or make them liable or vulnerable to it."[130] Schools' liability for peer sexual harassment is further limited to situations in which the school has "substantial control over both the harasser and the context in which the known harassment occurs."[131] Considerable tolerance is built into the standard for the behavior of students against other students—"schoolchildren may regularly interact in a manner that would be unacceptable among adults"[132]—as is flexibility toward school administrators in dealing with the disciplinary issues harassment raises.[133] As the Court put it in *Davis*, "courts should refrain from second-guessing the disciplinary decisions made by school administrators,"[134] giving schools considerable autonomy and discretion to manage disciplinary affairs on this issue.[135]

III. DELIBERATE INDIFFERENCE IN PRACTICE

As it is required for institutional liability under Title IX, the deliberate indifference doctrine conceptually has two parts: the schools' knowledge (making the deliberate part possible) and the schools' actions in response to that knowledge (the indifferent part).[136] First, the right person at the school

128. *Id.* at 648; *see also* Gabrielle M. v. Park Forest-Chi. Heights, Ill. Sch. Dist. 163, 315 F.3d 817, 824 (7th Cir. 2003).

129. *Gebser*, 524 U.S. at 290.

130. *Davis*, 526 U.S. at 645 (citation omitted); *Williams*, 477 F.3d at 1295-96.

131. *Davis*, 526 U.S. at 645.

132. *Id.* at 651.

133. *Id.* at 648.

134. *Id.* (citing New Jersey v. T.L.O., 469 U.S. 325, 342-43 n.9 (1985)).

135. *See, e.g.*, Roof v. New Castle Pub. Sch., No. CIV-14-1123-HE, 2015 WL 1040373, at *3 (W.D. Okla. Mar. 10, 2015) (finding school's decision—when told of "affair" between male teacher and minor girl student, told teacher to stay away from her, and subsequently suspended but did not terminate him—"to involve the quintessential judgment call" within school's discretion). This latitude has even been justified as an element of academic freedom. *See* Doe v. St. Francis Sch. Dist., 694 F.3d 869, 873 (7th Cir. 2012).

136. Technically, it may be said that the notice requirement is separate from, and precedes, the deliberate indifference test. Since it is impossible to deliberately treat something of which one has no knowledge, the scienter requirement is here treated as integral to deliberate indifference as a doctrine.

must know of the alleged act of discrimination, which requires a report to an official who has the power to remedy the situation.[137] Then, the school must respond not unreasonably to what it knew.[138] The basic floor for no deliberate indifference is that the school, upon being correctly notified of a teacher's sexually harassing conduct toward a student, "did not 'turn a blind eye and do nothing.'"[139] The relation between the two facets of the standard is, observably, proportionality: the appropriateness of the response measured against facts known when the institution acted or failed to act.[140] Obviously fact-heavy, making rules difficult, deliberate indifference can be determined as a matter of law when facts are undisputed (which happens frequently in this setting).[141] In general, the standard is easy for schools to satisfy, including on motions to dismiss or summary judgment, while doing little about sexual abuse—either its perpetrator or its consequences for survivors and other potential targets. Deliberate indifference is as hard on victims as it is easy on schools. Varying by circuit, heedless incompetence or even malignant cover-ups may not always qualify as deliberately indifferent.[142] A case finding deliberate indifference in which a school has held a hearing is rare.

137. The "appropriate person" depends on the individual's actual authority to end the discrimination. *See* Warren *ex rel.* Good v. Reading Sch. Dist., 278 F.3d 163, 172 (3d Cir. 2002) (quoting Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998)).

138. *Davis*, 526 U.S. at 648-49. For a standard application, see, for example, *Mallory v. Ohio University*, 76 F. App'x 634, 638 (6th Cir. 2003), which states the basic test for deliberate indifference as actual notice plus ignoring misconduct.

139. Kinman v. Omaha Pub. Sch. Dist., 171 F.3d 607, 610 (8th Cir. 1999) (quoting Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 467 (8th Cir. 1996)).

140. The term "proportionality" was perceptively used to describe this standard in *Doe v. Springfield-Clark Career Technology Center*, No. 3:14-cv-00046, 2015 WL 5729327, at *7 (S.D. Ohio Sept. 30, 2015), which held that claims by a culinary student that she was "sexually battered" by her teacher survived a summary judgment motion by the school, as well as in *McCoy v. Board of Education, Columbus City Schools*, 515 F. App'x 387, 391 (6th Cir. 2013).

141. *Davis*, 526 U.S. at 649.

142. Many cases discussed below support this conclusion. A specific illustration of the latitude schools are accorded can be found in *Wyler v. Connecticut State University System*, 100 F. Supp. 3d 182, 195 (D. Conn. 2015), which held that because "[t]he deliberate indifference standard . . . is not an invitation for courts to second-guess disciplinary decisions," the court must accept a university professor's one-week paid suspension as being adequate punishment for sexually propositioning a student in a closet while blocking her exit. Another such illustration can be seen in *Doe v. Galster*, 768 F.3d 611, 621 (7th Cir. 2014), which found no deliberate indifference by the school because it had no actual knowledge of physically violent bullying and harassment of a Russian woman middle school student, because of the facts that the "school officials [given] wide discretion in making disciplinary decisions" took action after each report of bullying (though the actions did not have to be effective), and because they were in the process of expelling the offending student. *See also* Shrum *ex rel.* Kelly v. Kluck, 249 F.3d 773, 780 (8th Cir. 2001) (finding that providing

Perhaps the strongest factual cases are now settled, so produce no new judicial decisions. But a close reading of all the Title IX cases decided in the federal courts in 2015 that substantially discuss the deliberate indifference standard, together with an assessment of the many brought in the years since *Gebser*, shows a vast disproportion between the number of cases that have lost on deliberate indifference and those that have won.[143] Yet little distinction emerges between the facts of cases dismissed for legal insufficiency or in which summary judgment is granted for the school, despite the school's failure to stop the sexual harassment or remedy the injury, and those that survive these preliminary motions.[144]

A. What Did They Know?

The lack of effectiveness and absence of realism of the deliberate indifference standard begin with the requisite notice. Schools need only act on information they had, but "the precise boundaries of . . . 'actual knowledge' . . . remain undefined,"[145] making the contours of the knowledge required for Title IX liability not notable for transparency or consistency. Decisions often appear arbitrary and contradictory. Some cases essentially require formal complaints for actual notice,[146] which is a lot to require, especially of a child or even a

harasser with letter of recommendation upon exit was not a violation of substantive due process by deliberate indifference).

143. *See supra* note 5 and accompanying text (describing the numbers found).

144. Of course, on preliminary motions, all facts are taken as true as alleged, in the light most favorable to the moving party. So, such decisions adjudicate the adequacy of factual allegations.

145. Ross v. Corp. of Mercer Univ., 506 F. Supp. 2d 1325, 1348 (M.D. Ga. 2007).

146. *See, e.g.*, DeCecco v. Univ. of S.C., 918 F. Supp. 2d 471, 494-95 (D.S.C. 2013) ("The failure of notice, at least prior to July 29, 2010, precludes a finding of deliberate indifference as USC cannot have been deliberately indifferent in failing to respond to an environment of which it was unaware. Even if DeCecco and her father gave some notice of a sexually hostile environment during the July 29, 2010 meeting, she cannot establish deliberate indifference after that date because it is undisputed that those present reacted to Mr. DeCecco's vague allegations by inviting the DeCeccos to make a formal complaint. Neither did so. USC cannot have been deliberately indifferent by failing to take further action under these circumstances."); Litman v. George Mason Univ., 5 F. Supp. 2d 366 (E.D. Va. 1998), (determining that university did not receive actual notice of harassment of student by professor until student filed formal complaint, although she had previously complained to another teacher), *aff'd on other grounds*, 186 F.3d 544 (4th Cir. 1999); Burtner v. Hiram Coll., 9 F. Supp. 2d 852 (N.D. Ohio 1998) (finding grievance officer did not receive notice of alleged harassment until formal complaint was filed upon graduation, although student argued that previous complaint filed through school's director of career services and grievance officer was adequate notice). A diametric contrast can be found in *Doe ex rel. Doe v. Charleroi School District*, Civ. No. 2:14-cv-951, 2014 WL 5426229, at *6 (W.D. Pa. Oct. 22,

young adult. Many display a narrow, specific, individualized notion of notice, requiring notice of the risk the particular perpetrator would sexually abuse the particular victim before he does, in the way he does.[147]

The implicit rule often appears to be that schools do not know enough for actual notice standards until they are informed of an exact specific possibility that then becomes an actuality.[148] When parents tell a superintendent about texts between a teacher and their daughter, the superintendent calls the teacher a "sick pervert," the parent says the teacher would "end up raping somebody,"[149] and he then rapes their daughter, this is actual notice.[150] (Who knew?) But numerous complaints for years and years of a teacher-and-coach's sexually inappropriate verbal and physical conduct with girl students are "stale," if many years have gone by, or "too different," if verbal rather than physical, to constitute actual notice to the school of sexual danger to female students when this same man then has a sexual affair with an underage girl student.[151] And when a professor grabs a student consulting with him in his office, places her on his lap twice, rubs her stomach and fondles her breasts, a trial court finds that the school had no notice despite a prior complaint by another student of the same conduct by the same professor to the school's ombudswoman, and the conduct allegedly continuing against the plaintiff after the incident of which she complained.[152] Essentially, we are waiting for the other shoe to drop, and then another, which even then may be found irrelevant.

2014), which found that notice was adequate for the purpose of surviving a motion to dismiss when the principal—to whom the girl reported being physically assaulted and forcibly raped by a supervising teacher—did not believe the girl was raped but thought she was seeking attention.

147. *See, e.g.*, *infra* notes 148-153 and accompanying text. *But cf.* Doe v. Springfield-Clark Career Tech. Ctr., No. 3:14-cv-00046, 2015 WL 5729327, at *11 (S.D. Ohio Sept. 30, 2015) (holding prior notice of same defendant engaging in similar acts with other individuals adequately alleged deliberate indifference).

148. *See* Campbell v. Dundee Cmty. Sch., No. 12-cv-12327, 2015 WL 4040743, at *7 (E.D. Mich. July 1, 2015) (dismissing case on summary judgment and noting that the perpetrator was imprisoned for his acts).

149. Thorpe v. Breathitt Cty. Bd. of Educ., 8 F. Supp. 3d 932, 936 (E.D. Ky. 2014).

150. *Id.* at 945.

151. Harden v. Rosie, 99 A.3d 950, 954-63 (Pa. 2014) (finding no actual notice and no deliberate indifference).

152. Wills v. Brown Univ., 184 F.3d 20 (1st Cir. 1999) (finding for school on appeal). On the notice question, the dissent quoted the district court stating: "*It would be relevant if there were a second assault on Ms. Wills that resulted from Brown's inaction then it certainly would be relevant,* but what is relevant, what this case focuses on is what Brown knew prior to the assault on Ms. Wills and what it did or didn't do to prevent that assault from taking place." *Id.* at 32 (Lipez, J., dissenting).

Because notice so often calls for a longer series of ignored reported events, it requires more assault. One plaintiff alleged she was sexually harassed by her physical education teacher the entire time she was in high school. Between her first and second complaint—the second finally found sufficient for notice—her whole high school experience passes before your eyes.[153] Sometimes, for actual knowledge, the report is required to identify not only the specific student and perpetrator, but also the specific behavior. When one young student complained of "an improper relationship" with her dance teacher, but not that it was sexual, although parents and other students had repeatedly complained to the school of an "obsessive and unusual relationship" between the two, no actual knowledge was found by the school until the student told its authorities that she had been sexually molested for two years—after she graduated.[154] The logic of this prong of the doctrine, in relation to the rest, frequently leaves the impression of permitting sexually predatory teachers at least one free bite.

Much, even all, depends on what a court is willing to infer or project from known facts about the likelihood of future similar or worse facts—in another vernacular, foreseeability. The Seventh Circuit has held that the "school district need not possess actual knowledge of a teacher's acts directed at a *particular plaintiff*, but it must still have actual knowledge of misconduct that would create risks 'so great that they are almost certain to materialize if nothing is done,'" such as harboring a teacher who is a serial harasser.[155] Of course, several students have to have been harassed and previously reported, or the harasser has to have been known to harass when hired, for the school to know a harasser is serial. Some courts apply an individual victim predictability standard to notice. For example, suspicions that a woman teacher was too friendly with the students and was told to be more professional were found insufficient to constitute actual knowledge when the teacher was abusing a

153. When an athletic director first indicated to the principal that the teacher was spending too much time alone with women students, the principal warned the teacher not to do that. When a report of sexual harassment was later received, it was investigated by interviewing the student, her parents, and other witnesses. On receiving the second complaint, the principal investigated and terminated the teacher. Leach v. Evansville-Vanderburgh Sch. Corp., No. EV98-0196-C-Y/H, 2000 WL 33309376, at *10 (S.D. Ind., May 30, 2000) (finding school's response "not clearly unreasonable," hence not deliberately indifferent).

154. A.W. v. Humble Indep. Sch. Dist., 25 F. Supp. 3d 973, 994, 996-97 (S.D. Tex. 2014). Also reported while the liaison was ongoing was that the two came and left together often, were frequently at school with the door closed, went together on out-of-town trips for school-related events when they were known to be sleeping in the same bed, and the girl had moved into the teacher's home. *Id*. at 992-94. The teacher was subsequently arrested, charged with a felony, and convicted. *Id*. at 1005 n.59.

155. Hansen v. Bd. of Trs. of Hamilton Se. Sch. Corp., 551 F.3d 599, 605-06 (7th Cir. 2008) (quoting Delgado v. Stegall, 367 F.3d 668, 672 (7th Cir. 2004)).

female student for two entire years, because the school was not on notice that she had harassed this specific student.[156]

The inquiry into notice can focus on knowledge of substantial risk of abuse to students,[157] or on "whether the appropriate official possessed enough knowledge of the harassment that he or she reasonably could have responded with remedial measures to address the kind of harassment upon which [the] plaintiff's legal claim is based."[158] In two different holdings within this range in the same case, one court recently found that appropriate authorities were aware of verbal harassment by students who were responding to a sexual relationship the victimized student was having with the assistant principal, but the school was not aware of the affair itself.[159] Why the assistant principal is not the school, given his obvious awareness of the situation, was not discussed. Moreover, the students knew about the affair: they were verbally harassing the plaintiff about it. The information of which the school was found insufficiently aware was being spread around the school through verbal harassment by students. Why didn't this notify the school of a need to investigate? So when students engage in slurs and name-calling because the assistant principal is sexually abusing a student, the slurs about it are actionable but the sexual imposition by an administrative official of the school itself is not.

By contrast, further showing the crucial role of inference, when another school was aware of "tendencies to pedophilia, sexual abuse, and harassment of

156. E.R. v. Lopatcong Twp. Middle Sch., Civil Action No. 13-1550 (MAS)(DEA) 2015 WL 4619665, at *2-3 (D.N.J. July 31, 2015).

157. *See* Doe v. Bibb Cty. Sch. Dist., 83 F. Supp. 3d 1300, 1307, 1310 (M.D. Ga. 2015) (citing Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 659 (5th Cir. 1997)); Carabello v. N.Y.C. Dep't of Educ., 928 F. Supp. 2d 627, 638 (E.D.N.Y. 2013); Doe A. v. Green, 298 F. Supp. 2d 1025, 1033 (D. Nev. 2004); Johnson v. Galen Health Insts., Inc., 267 F. Supp. 2d 679, 688 (W.D. Ky. 2003)) (holding that school district's decision to turn criminal investigation over to city police department, and actions district took following that decision, were not deliberately indifferent). A parallel exists under equal protection theory. Stating a claim for municipal inaction requires alleging that the municipality, through its policy maker, acted with deliberate indifference to the risk of harm to the plaintiff and that its conduct affirmatively contributed to the injury suffered. *See supra* note 111.

158. Roe *ex rel.* Callahan v. Gustine Unified Sch. Dist., 678 F. Supp. 2d 1008, 1030 (E.D. Cal. 2009); *see also* Lopez v. Metro. Gov't of Nashville & Davidson Cty., 646 F. Supp. 2d 891, 915 (M.D. Tenn. 2009); *Green*, 298 F. Supp. 2d at 1033 n.2; Crandell v. N.Y. Coll. of Osteopathic Med., 87 F. Supp. 2d 304, 320 (S.D.N.Y. 2000).

159. M.S. *ex rel.* Hall v. Susquehanna Twp. Sch. Dist., 43 F. Supp. 3d 412, 429-30 (M.D. Pa. 2014). Here, the plaintiff lost on § 1983 but won on preliminary motions under Title IX, going to trial because the investigation into the verbal harassment by students was found adequately alleged to be a sham. Eventually, the relationship was properly reported and no action was taken to limit contact, which further supported the plaintiff's Title IX claim on deliberate indifference.

school-age boys" by a teacher and influential former member of the city council, such "warnings that a teacher is prone to inappropriate attractions to students should have set off alarm bells."[160] Comparing the two cases, the flexibility, even arbitrariness, of reasonableness is apparent. In the latter case, the failure to stop the perpetrator's grooming, aggressive pursuit of sexual relations, and offering of money in exchange for sex or a video of the plaintiff masturbating was "clearly unreasonable in light of the known circumstances."[161] By standards applied in other cases, this knowledge of "tendencies" could have been deemed overgeneralized, unspecific to this plaintiff, twenty-twenty intrusive disciplinary hindsight, and insufficient notice of actual events, making the failure to protect the student reasonable.[162]

Courts range between calling for knowing an individual has "potential" to sexually harass students,[163] to an intermediate standard of knowing of "substantial danger to students"[164] or "substantial risk of serious harm,"[165] to requiring a tighter fit between prior acts and ultimate harm, as in the Seventh Circuit's "almost certain to materialize if nothing is done"[166] standard. "Generalized" knowledge of threats of sexual assault is not usually considered sufficient for actual notice,[167] although some courts have found actual notice

160. K.S. v. Detroit Pub. Schs., No. 14-12214, 2015 WL 4459340, at *14-15 (E.D. Mich. July 21, 2015).

161. *Id.* at *14 (quoting Davis *ex rel.* LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 648 (1999)).

162. For a discussion of rulings that illustrate this comparison, see *supra* notes 131-133, 141, 157; and *infra* notes 164-171, 193-197, 225.

163. Tesoriero v. Syosset Cent. Sch. Dist., 382 F. Supp. 2d 387, 397 (E.D.N.Y. 2005) (stating that "[m]ost federal courts appear to agree that the 'actual knowledge' need only be of facts indicating that the teacher has *the potential* to abuse a student").

164. Bostic v. Smyrna Sch. Dist., 418 F.3d 355, 361 (3d Cir. 2005) (upholding jury instruction that "an educational institution has 'actual knowledge' if it knows the underlying facts, indicating sufficiently substantial danger to students, and was therefore aware of the danger"); *see also* Doe v. Boyertown Area Sch. Dist., 10 F. Supp. 3d 637, 653 (E.D. Pa. 2014) (applying the same standard to find that five complaints of a teacher's past sexual misconduct against other students provided sufficient notice for a finding of liability for the sexual abuse and rape of the plaintiff).

165. Carabello v. N.Y.C. Dep't of Educ., 928 F. Supp. 2d 627, 638 (E.D.N.Y. 2013) (holding knowledge of ninth grade boy's prior acts of harassment insufficient to notify school of risk that he would sexually abuse plaintiff students).

166. Hansen v. Bd. of Trs. of Hamilton Se. Sch. Corp., 551 F. 3d 599, 606 (7th Cir. 2008).

167. T.Z. v. City of New York, 635 F. Supp. 2d 152, 170 (E.D.N.Y.) ("The school cannot be held liable to plaintiff under Title IX for the assault against C.G. under a theory that it knew of past assaults, given that the school's knowledge was generalized, and there was no specific threat posed to C.G. or posed by her assailants."), *rev'd in part on reconsideration,* 634 F. Supp. 2d 263 (E.D.N.Y. 2009).

when members of the same sex-based group as were previously victimized were later victimized by the same sex-based group. In one example, both victims (seventh-grade basketball players) and perpetrators (eighth-grade team members) belonged to the same groups who had allegedly been involved in incidents of sexual harassment in the school locker room before. Whether the coach knew about the prior harassment became a genuine issue of fact.[168]

Some cases find actual notice, then deliberate indifference, if prior reports of the same perpetrator against other victims went uninvestigated, or the perpetrator was investigated but nothing was done about what was found, and then the same perpetrator violently abused another victim in the same way.[169] Generally, though, courts have held that notice of prior incidents of which authorities were informed needs to be either of behavior by the same individual perpetrator(s) whose conduct forms the subsequent complaint, or against the same victim—sometimes both. One girl with fetal alcohol syndrome and learning disabilities who was assaulted twice, for example, won on preliminary motions when the school board was allegedly aware of the prior incident (which it "wrongly deemed consensual"), a psychologist had noted "there is a great likelihood of future abuse against this young woman" after the first incident and before the second, a pattern of taunting and sexual touching took place in between, and the Board ignored it all and took no steps to protect her.[170] Similarly, the Eleventh Circuit has made clear that the "actual knowledge" required to hold a federal funding recipient liable need not be knowledge about prior harassment of the specific Title IX plaintiff, but "the substance of that actual notice must be sufficient to alert the school official of the possibility of the Title IX plaintiff's harassment."[171] The Tenth Circuit observed that the Supreme Court "implicitly decided that harassment of persons other than the plaintiff may provide the school with requisite notice to impose liability under Title IX."[172] Taking this approach to notice is unusual.

168. Mathis v. Wayne Cty. Bd. of Educ., 782 F. Supp. 2d 542, 545-46, 550-51 (M.D. Tenn. 2011).

169. *See, e.g.*, Doe v. Sch. Admin. Dist. No. 19, 66 F. Supp. 2d 57, 64-65 (D. Me. 1999) (holding jury could find the school district deliberately indifferent when teacher raped male student, when district knew teacher was rumored to have had relationships with her high school students, danced suggestively with them, and hosted them at her house, and district took no investigatory or disciplinary action other than to advise teacher not to have boys to her house).

170. Lockhart v. Willingboro High Sch., No. 14-3701, 2015 WL 1472104, at *12 (D.N.J. Mar. 31, 2015) (alterations omitted) (finding also that the Board ignored all this and took no steps to protect the plaintiff).

171. Doe v. Sch. Bd. of Broward Cty., 604 F.3d 1248, 1254 (11th Cir. 2010).

172. Escue v. N. Okla. Coll., 450 F.3d 1146, 1153 (10th Cir. 2006) (citing Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998)) (finding the university did not have actual knowledge).

Focusing on two Eleventh Circuit cases, a recent district court case found that notice to the defendant institution of similar allegations about the same perpetrator(s) who went on to sexually harass the present victim were inadequate.[173] All this builds on *Gebser v. Lago Vista Independent School District*, in which the principal knew of prior verbal sexual statements by the teacher/coach perpetrator, but the school was found not to have notice of the subsequent sexual relationship with the underage student.[174]

In light of these divergent developing standards, two cases turning on adequacy of notice that find a university deliberately indifferent for ignoring a known risk of sexual assault stand out. In one, the known risk was specific to a perpetrator; in the other, to a university-sponsored program. Tiffany Williams sued for being gang-raped by several athletes, one of whom the university knew when he was admitted had committed sexual harassment at other colleges. The perpetrators were suspended but reinstated, the internal proceeding moving neither promptly nor equitably, producing an atmosphere that Ms. Williams alleged was threatening, humiliating, abusive, unsafe, and hostile for women students, as well as forcing her to leave and not return. The Eleventh Circuit reasoned that when schools receive actual notice of high risk—"the alleged harasser's proclivities"—before the Title IX litigant is assaulted accordingly, doing nothing to supervise or train such students "substantially increase[s] the risk faced by female students" of sexual assault,[175] rendering the school deliberately indifferent to the resulting gang rape three times over.

173. Doe v. Bibb Cty. Sch. Dist., 126 F. Supp. 3d 1366 (M.D. Ga. 2015) (citing Doe v. Sch. Bd. of Broward Cty., 604 F.3d 1248, 1254 (11th Cir. 2010)). Here, the case of a girl in the special education program who reported sexual assault by seven male students in a bathroom was complicated by the facts that (a) the plaintiffs agreed that the school's initial investigation, which found she was raped, *id.* at *3, was not deliberately indifferent, *id.* at *8; (b) the school then turned the entire investigation over to the noncampus police, *id.* at *3; and (c) the young woman allegedly recanted her charges, word of which apparently reached the school, which filed disciplinary charges against her on the ground that she consented, charges her lawsuit contended were false, *id.* at *5. The school district also provided considerable accommodations, including paying for at-home schooling and later for her to attend a private school, *id.* at *4, and was found not deliberately indifferent either before or after the assault. *See id.* at *10; Doe v. Bibb Cty. Sch. Dist., 83 F. Supp. 3d 1300, 1310 (M.D. Ga. 2015); *see also* Doe v. Springfield-Clark Career Tech. Ctr., No. 3:14-CV-00046, 2015 WL 5729327, at *5-6 (S.D. Ohio Sept. 30, 2015) (alleging that after three students and others had told administration of sexual statements and actions by chef teacher, he then "sexually battered" plaintiff, making "sexual harassment, sexual grooming, and sexual abuse" a "condition of [her] education").

174. 524 U.S.274, 291 (1998).

175. Williams v. Bd. of Regents of the Univ. Sys. of Ga., 477 F.3d 1282, 1296 (11th Cir. 2007). For a case declining to apply the *Williams/Simpson* analysis, see *Karasek v. Regents of the University of California*, No. 15-CV-03717-WHO, 2015 WL 8527338, at *9 (N.D. Ca. Dec. 11, 2015).

Judge Adalberto Jordan's concurrence described the majority's theory that the school ignored its preexisting knowledge of past misconduct, producing Title IX liability, as "before-the-fact deliberate indifference."[176] Certainly, deliberate indifference is substantially easier to show when the notice requirement is rendered as a failure to mitigate a known hazard of sexual harassment and when subsequent consistent acts then occur.[177]

Similarly, in *Simpson v. University of Colorado*, two female students were sexually assaulted by football players and recruits in connection with a program to recruit high school players by bringing them to campus and pairing them with women-student "Ambassadors" instructed to show them a "good time."[178] The Tenth Circuit found that the risks of sexual assault in the absence of adequate supervision were known.[179] The knowledge included general knowledge or risk of sexual assault by student athletes, prior reports of assaults by recruits at a football player's party, and a local district attorney meeting with university authorities addressing the need for recruit supervision and sexual assault prevention training for football players.[180] The school did nothing. The Tenth Circuit held that a jury could infer that the need for training was obvious and the likelihood of Title IX violations—sexual assault in this case—was so high that the coach could "reasonably be said to have been deliberately indifferent to the need" to prevent it.[181] In other words, the university was sufficiently on notice of a more general risk of sexual assault and harassment during the recruiting program as, taking no remedial action, to be deliberately indifferent to the conditions that made the specific assault all but inevitable. Other courts have adopted variants of this theory both before and after these leading cases, although the "substantial risk" has been variously framed, sometimes requiring that the notice be quite specific.[182] Only the Fourth

176. *Williams*, 477 F.3d at 1305 (Jordan, J., concurring). Note that this description is only true if the events preceding the gang rape are not themselves regarded as discriminatory, which the majority saw them as being.

177. For further discussion, see Grayson Sang Walker, *The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault*, 45 HARV. C.R-C.L. L. REV. 95, 115-23 (2010). Query: does such conduct amount to negligence?

178. 500 F.3d 1170, 1173 (10th Cir. 2007).

179. *Id.*

180. *Id.*

181. *Id.* at 1184-85 (citing Canton v. Harris, 489 U.S. 378, 390 (1989)).

182. *See, e.g.*, Ross v. Corp. of Mercer Univ., 506 F. Supp. 2d 1325, 1346 (M.D. Ga. 2007) ("[A] court can find a Title IX violation when a university exhibits deliberate indifference before an attack that makes a student more vulnerable to the attack itself, or when a university exhibits deliberate indifference after an attack that causes a student to endure additional harassment.").

Circuit has explicitly rejected this entire approach, disallowing all but the narrowest and most specific forms of notice.[183]

Notably, *Williams* produced its result by distinguishing *Gebser* and *Davis,* while continuing to attend to their concerns, on the ground that in neither Supreme Court case did the schools have notice of the past sexual misconduct of the alleged perpetrators.[184] *Simpson* similarly overturned summary judgment for the school based on reasoning that the *Gebser/Davis* notice logic did not strictly apply to that case either, not that its notice standards had been met, because the assaults in *Simpson* were alleged to arise out of an official school program that promoted them. The Tenth Circuit creatively combined constitutional and statutory analysis[185] in finding that the risk of the assault that occurred was "obvious"[186] because extensive reporting and studies showed that the association between college football and sexual misconduct was widespread, including at the school, implicating the recruiting program. The police had been involved in prior incidents and met with school officials who promised reform. Signs of inadequate guidance of the program nonetheless proliferated; two months prior to the assaults at bar, a woman employee of the athletic department had been raped and was discouraged from pressing charges.[187] Although this is not an especially unusual fact pattern, inferring that

183. *See* Baynard v. Malone, 268 F.3d 228, 238 (4th Cir. 2001) (noting "Title IX liability may be imposed only upon a showing that school district officials possessed actual knowledge of the discriminatory conduct in question," and holding that one such official could not be liable because he did not know that teacher was currently harassing students, even though he "certainly should have been aware of the *potential* for such abuse" based on reports by prior students that the teacher had molested them in the past); *see also id.* at 240 (Michael, J., dissenting) ("Under the majority's standard a school board will escape liability even if an appropriate official knew that a teacher was engaging in behavior that raised warning flags of substantial risk as long as the official did not actually know that the teacher was abusing a student. The majority's standard will also let a school board off the hook if its official knew that a teacher had abused a student in the past as long as the official did not know of any current abuse."); Ray v. Bowers, 767 F. Supp. 2d 575, 580-81 (D.S.C. 2009) (confirming that *Baynard v. Malone* is still good law, and rejecting plaintiff's argument that school's deliberate indifference to "substantial risk" demonstrated by complaints of prior harassment against teacher triggered liability for teacher's sexual harassment of plaintiff).

184. Williams v. Bd. of Regents of the Univ. Sys. of Ga., 477 F.3d 1282, 1295 (11th Cir. 2007).

185. The analysis combined § 1983, citing *Canton v. Harris*, 489 U.S. 378, 388-92 (1989), with Title IX, noting *Gebser*'s statement of its inapplicability to some Title IX claims – including those involving official policy. *See Simpson*, 500 F.3d at 1184; *see also id.* at 1177 ("[T]he gist of the complaint is that CU sanctioned, supported, even funded, a program (showing recruits a 'good time') that, without proper control, would encourage young men to engage in opprobrious acts. We do not think that the notice standards established for sexual-harassment claims in *Gebser* and *Davis* necessarily apply in this circumstance.").

186. *Simpson*, 500 F.3d. at 1181.

187. *Id.* at 1181-85.

a policy based on a pattern of reality meets the Title IX notice requirement through combining constitutional and statutory reasoning is unusual.[188] It further speaks to the current legal framework that a valid claim of liability required the school be found to be promoting rape. The resulting institutional incentive not to know about sexual abuse committed by a person one is hiring or admitting could not be clearer. Hear no evil, see no evil, incur no liability.

One court huffed that a student need not "be raped twice before [a school is] required to appropriately respond to . . . requests for remediation and assistance."[189] Yet the fact that a school does not adequately address a report of sexual harassment the first time it is made does not necessarily make the institution liable.[190] This sympathetic court felt the need to state that "[i]n the Title IX context, there is no 'one free rape' rule"[191] for a reason. The requirement that a student can only recover damages based on injury done by actions of the university after the harassment is known,[192] particularly in light of the many courts that read *Davis* to require that a school, to be deliberately indifferent, subject a victim to "further discrimination,"[193] can amount to something very close to that.

188. A somewhat similar line of reasoning can be found in *Najera v. Independent School District of Stroud,* 60 F. Supp. 3d 1202 (W.D. Okla. 2014), which held that a failure to have a policy addressing complaints of sexual assault could constitute a constructive violation of § 1983 under *Canton,* showing that the school board was deliberately indifferent to the risk of the immediate violation. *See id.* at 1207. This plaintiffs' Title IX and § 1983 claims subsequently survived defendant's summary judgment motion. *See* Najera v. Indep. Sch. Dist. of Stroud., No. CIV-14-657-R, 2015 WL 4310552, at *6 (W.D. Okla. July 14, 2015).

189. S.S. v. Alexander, 177 P.3d 724, 741 (Wash. Ct. App. 2008) (ruling that material issues of fact precluded summary judgment on deliberate indifference to sexual harassment).

190. *See, e.g.*, Baynard v. Malone, 268 F.3d 228, 236 (4th Cir. 2001).

191. *S.S.*, 177 P. 3d at 741.

192. *Id.* at 745.

193. *Davis* states that a Title IX recipient "may not be liable for damages unless its deliberate indifference 'subject[s]' its students to harassment. That is, the deliberate indifference must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it." Davis *ex rel.* LaShonda D. v. Monroe Cty. Bd. of Educ. 526 U.S. 629, 644-45 (1999). *Williams*, for example, then reads the implications of this to be: "We hold that a Title IX plaintiff . . . must allege that the Title IX recipient's deliberate indifference to the initial discrimination subjected the plaintiff to further discrimination." Williams v. Bd. of Regents of the Univ. Sys. of Ga., 477 F.3d 1282, 1295-96 (11th Cir. 2007). Other courts in the Eleventh Circuit have followed this logic and language. *See, e.g.*, Hill v. Cundiff, 797 F.3d 948, 973 (11th Cir. 2015); Doe v. Bibb Cty. Sch. Dist., 126 F. Supp. 3d 1366, 1379-80 (M.D. Ga. 2015); Long v. Murray Cty. Sch. Dist., Civil Action File No. 4:10-CV-00015-HLM, 2012 WL 2277836, at *30 (N.D. Ga. May 21, 2012), *aff'd in part*, 522 F. App'x 576 (11th Cir. 2013). For further discussion, see *Lopez v. Regents of Univ. of Ca.*, 5 F. Supp. 3d 1106, 1125-26 (N.D. Cal. 2013). *But cf. supra* text accompanying note 176.

B. What Did They Do?

Schools are routinely found sufficiently responsive to reported sexual harassment as not to be deliberately indifferent when they do almost nothing about it. The most stringent standards to which schools have been held in this highly fact-intensive inquiry, resulting in the most positive outcomes for sexually harassed students, have occurred in cases in which a teacher had sex with or sexually molested an underage, disabled, or boy student—or all three at once.[194]

The pattern in which courts are most likely to find deliberate indifference by the school is one in which the student is multiply vulnerable, the school does literally nothing about reports its appropriate officials received as the abuse continues—preferably by the same perpetrator against the same victim—and the same abuse is repeated or escalates to a sexual assault. Even if the school is on actual notice that a teacher was sexually harassing students, and its responses are demonstrably ineffective in stopping or remedying the harassment, schools have been held not deliberately indifferent where they investigated, interviewed, and talked to the alleged perpetrator.[195] If the school talks with the victim and the perpetrator, perhaps separates the two—as if the situation is about him and her as individuals—and gives the teacher a good talking-to, the school will typically not be found deliberately indifferent, even if no real remedy is provided to the student and no preventive change is implemented regarding the perpetrator or the school's procedures. When a school interviews a student upon notice of sexual harassment and removes her from the alleged offender's classroom, no deliberate indifference occurs.[196] What happens to the other students of the same sex in that classroom is apparently not a concern. One court found that asking the professor who had allegedly sexually harassed his research assistant to have no further contact with her was a "cure," granting the school's motion for summary judgment.[197]

194. *See, e.g.*, Doe v. Warren Consol. Sch., 93 F. App'x 812 (6th Cir. 2004); Campbell v. Dundee Cmty. Sch., No. 12-cv-12327, 2015 WL 4040743 (E.D. Mich. July 1, 2015), *appeal filed*, No. 15-1891 (6th Cir. Aug. 5, 2015); Thorpe v. Breathitt Cty. Bd. of Educ., 8 F. Supp. 3d 932, 932 (E.D. Ky. 2014). Charol Shakeshaft's reanalysis of data on teacher-student sexual harassment found that 8.8% of young people with disabilities were sexually abused, compared with 2.8% without disabilities. *See* Shakeshaft, *Educator Sexual Misconduct*, *supra* note 9, at 29; cases cited *supra* note 29.

195. *See, e.g.*, Doe v. D'Agostino, 367 F. Supp. 2d 157, 167 (D. Mass. 2005).

196. *See, e.g.*, Littleton v. Bd. of Educ. of Cty. of Ohio, 172 F.3d 43 (4th Cir. 1999).

197. Litman v. George Mason Univ., 186 F.3d 544, 547 (4th Cir. 1999); s*ee also* Yoona Ha v. Nw. Univ., Case No. 14 C 895, 2014 WL 5893292, at *2 (N.D. Ill. Nov. 13, 2014) (treating no contact order as satisfactory resolution despite ongoing plaintiff injuries, including suicide attempt and other trauma, from sexual attack by teacher on student).

If the deliberate indifference requirement that a school's response to actual knowledge be "unreasonable in light of the known circumstances"[198] seems to give wide latitude to institutions, that is because it does. Generally speaking, if administrators speak with the parties, separate them, tell the perpetrator(s) not to do it again, call the police in severe cases or suggest the parents do so, the school's response will not be found unreasonable, hence not deliberately indifferent, even as the abuse continues. In one example, a male student exposed himself, kissed the victim, a special education student, and lifted her skirt. Even though the district was aware of his prior disciplinary record and did not immediately remove him after the incident, it was not deliberately indifferent where it asked police to investigate, separated the students, and provided her with an escort at all times.[199] Nor was a school deliberately indifferent to bullying and harassment of which they were aware when they moved the victim's locker further away from one harasser, assigned the victim and perpetrator to different study groups, ordered bullying students to stop abuse the school saw, called parents after another incident, and eventually recommended expulsion of students after an investigation.[200] The Fourth Circuit appears to be the least sympathetic to victims under this standard. In one recent case, for example, a boy who was assaulted and harassed for a year was finally forced to engage in sex with another male student in the library and bathroom. He told no one about the sexual assault. The school was found not deliberately indifferent because after one prior incident was reported, it separated the two in the classroom, suspended the perpetrator, and gave the victim an escort to the bathroom.[201] Then, the perpetrator was allowed to return and was placed in the same classroom with the victim, whom he allegedly raped.[202]

There are a few strong cases for sexual harassment plaintiffs on the question of responsive action. These include, for example, one in which a school district's outright dismissal of sexual harassment allegations involving a female teacher and male students, reported by one teacher to a principal, and its initial failure to investigate or to interview any students in a later investigation, potentially amounted to deliberate indifference attributable to the district.[203] A failure to take action once a school district learned that its

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

199. Watkins v. La Marque Indep. Sch. Dist., 308 Fed. App'x 781, 784 (5th Cir. 2009).

200. Doe v. Galster, 768 F.3d 611, 620-22 (7th Cir. 2014).

201. Doe v. Bd. of Educ. of Prince George's Cty., 605 Fed. App'x 159, 170 (4th Cir. 2015) (involving an accused perpetrator who claimed the sex was consensual).

202. *Id.*

203. Doe v. Sch. Admin. Dist. No. 19, 66 F. Supp. 2d 57, 64-65 (D. Me. 1999).

initial response to complaints of sexual harassment had been ineffective could, another court found, support a reasonable juror's conclusion of deliberate indifference.[204] One trial court similarly found that a reasonable juror could conclude that when a school district received notice of a second complaint, having failed to follow up on its directives in response to previous complaints, the district was put on notice that its response to the first complaint had been ineffective, hence could be found deliberately indifferent.[205] Students have been found to raise an issue of material fact as to deliberate indifference, sufficient to deny a school's motion for summary judgment, where a school board received credible information of several instances of alleged sexual harassment but took no action, especially where it failed to investigate the teacher's background (which suggested pedophilia, although the police apparently found the allegations inconclusive) when he was hired.[206] To do literally nothing, at least sometimes, is to be potentially deliberately indifferent. One would hope.

Most of the strongest cases for victims on school response appear to be decades old. In one of only two cases found in the 2014-2015 federal courts in which nonminor, nondisabled women students prevailed on deliberate indifference motions to dismiss or summary judgment, a court addressing a plaintiff's allegations of peer drug rape assessed the school's response as follows:

> Her allegations support an inference that [the school] engaged in the investigation with the intention of minimizing the incident, protecting the school's reputation, and putting the incident behind the institution. Finally, she alleges that [the school], after ignoring or even encouraging continued harassment, informed her that she could not be protected on campus and facilitated her withdrawal. If those allegations are ultimately supported by the evidence, they could constitute deliberate indifference.[207]

204. Canty v. Old Rochester Reg'l Sch. Dist., 66 F. Supp. 2d 114, 116-17 (D. Mass. 1999).

205. Hart v. Paint Valley Local Sch. Dist., No. C2-01-004, 2002 WL 31951264, at *8-9 (S.D. Ohio Nov. 15, 2002).

206. Massey v. Akron City Bd. of Educ., 82 F. Supp. 2d 735, 746 (N.D. Ohio 2000). Similarly, where a student and mother alleged that a principal (1) took no action against a teacher after the mother reported sexual harassment of her daughter, (2) failed to inform the mother about the proper Title IX procedures, and (3) did not report the complaint to the Title IX officer, and the principal's testimony contradicted this account, an issue of material fact as to deliberate indifference by the principal was raised. Flores v. Saulpaugh, 115 F. Supp. 2d 319, 323-24 (N.D.N.Y. 2000).

207. Rex v. W. Va. Sch. of Osteopathic Med., No. 5:15-cv-01017, 2015 WL 4756279, at *6 (S.D. W. Va. Aug. 11, 2015).

From experience, such institutional responses are not unusual. That a federal court accepts these responses, as alleged, as potentially real and legally sufficient to satisfy deliberate indifference standards is unusual. The responses are also sufficiently vindictive to exceed any indifference threshold, even a deliberate one, coming closer to malignant concern.

Effective action is seldom required of a school. If it is, teacher-student harassment is likely involved.[208] One court held that a reasonable jury could find that a university's response to several alleged harassing incidents by a professor amounted to deliberate indifference where a professor had forcibly grabbed, kissed, and fondled a student in his office, having made unwelcome advances toward female students twice before.[209] After the first incident, he was reprimanded and told he would suffer serious consequences if he did it again; after the second time, the university sent him for counseling but failed to follow up.[210] The response was held deliberately indifferent because it "was not plausibly directed toward putting an end to" the professor's abusive behavior and instead "amounted to condoning" it.[211] Another court held that when the school principal "responded to the situation weakly, by reiterating to all coaches the standards for behavior," the school "d[id] not act in a way that could have been expected to remedy a sexual assault," hence "the institution [wa]s liable [under Title IX] for what amount[ed] to an official decision not to end discrimination."[212] These few results favorable to students harassed by teachers appear alongside many more factually similar cases marked by the opposite outcome.[213] Often teachers are investigated and reprimanded when

208. *See, e.g.*, Hayut v. State Univ. of N.Y., 352 F.3d 733, 751 (2d Cir. 2003).

209. Chontos v. Rhea, 29 F. Supp. 2d 931, 936 (N.D. Ind. 1998).

210. *Id.* at 937.

211. *Id.*; *see also* Munici *ex rel.* Landon v. Oswego Unit Sch. Dist. No. 308, No. 00 C 1803, 2001 WL 649560, at *5 (N.D. Ill. June 8, 2001) (finding clearly unreasonable response where school district failed to interview special education student about repeated complaints of sexual harassment and relied on incomplete video recordings to conclude that no harassment occurred, raising material fact question of deliberate indifference); Morlock v. W. Cent. Educ. Dist., 46 F. Supp. 2d 892, 916 (D. Minn. 1999).

212. Doe A. v. Green, 298 F. Supp. 2d 1025, 1035 (D. Nev. 2004); *see also* Kobrick v. Stevens, No. 3:13-2865, 2014 WL 4914186, at *18 (M.D. Pa. Sept. 30, 2014) (finding deliberate indifference where school chose not to investigate matters involving this defendant, including prior similar allegations, or to inform authorities).

213. *See, e.g.*, Hansen v. Bd. of Trs. of Hamilton Se. Sch. Corp., 551 F.3d 599 (7th Cir. 2008); *Hayut*, 352 F.3d 733; Schrum *ex rel.* Kelly v. Kluck, 249 F.3d 773 (8th Cir. 2001); Wills v. Brown Univ., 184 F.3d 20 (1st Cir. 1999); Littleton v. Bd. of Educ. of Cty. of Ohio, 172 F.3d 43 (4th Cir. 1999); Matthews v. Nwankwo, 36 F. Supp. 3d 718 (N.D. Miss. 2014); Bernard v. E. Stroudsburg Univ., No. 3:09-CV-00525, 2014 WL 1454913, at *1 (M.D. Pa. Apr. 14, 2014); Doe v. Northside Indep. Sch. Dist., 884 F. Supp. 2d 485 (W.D. Tex. 2012); Leach v.

reports or suspicions of sexual harassment of students arise, but their contact with schoolchildren is allowed to continue; when later abuse is committed and reported, and only then is action taken, no deliberate indifference is typically found.[214]

If meeting the standard for deliberate indifference in cases involving teachers sexually harassing students can be a heavy lift, even more difficult for plaintiffs is sexual harassment of students by other students—a substantial amount of the sexual abuse students suffer on campuses. Especially in the student-on-student setting, showing deliberate indifference, courts say, following the lead of *Davis*, is supposed to be "'an extremely high standard to meet' in and of itself."[215] Many cases founder on this rock or, one suspects, are not brought at all. Courts look to see if the recipient's response to student-on-student harassment reports is "clearly unreasonable in light of the known circumstances,"[216] if delays without justification occur in remedial action, and the response or delay in response causes students to be harassed or makes them vulnerable to harassment.[217] Regarding the requirement of clearly unreasonable response in peer sexual harassment cases, "[t]his 'high standard' precludes a finding of deliberate indifference in all but 'limited circumstances.'"[218] The school in *Davis* failed to respond to her severe abuse by a classmate in any way at all for five months.[219] Delays in investigating reports,[220] and lack of communication and follow-up or failure to notify parents or relevant others, resulting in the need to remove the child from school and place her in an inferior educational setting, can support a finding of deliberate indifference,[221] although such holdings are far less typical.

Evansville-Vanderburgh Sch. Corp., No. EV 98-196 C-M/S, 2000 WL 33309376 (S.D. Ind. May 30, 2000); Litman v. George Mason Univ., 5 F. Supp. 2d 366 (E.D. Va. 1998).

214. *See, e.g.*, *Schrum*, 249 F.3d 773; Kinman v. Omaha Pub. Sch. Dist., 171 F.3d 607 (8th Cir. 1999); *Leach*, 2000 WL 33309376; Burtner v. Hiram Coll., 9 F. Supp. 2d 852 (N.D. Ohio 1998), *aff'd*, 194 F.3d 1311 (6th Cir. 1999); Doe v. Granbury Indep. Sch. Dist., 19 F. Supp. 2d 667 (N.D. Tex. 1998).

215. Stewart v. Waco Indep. Sch. Dist., 711 F.3d 513, 519 (5th Cir. 2013) (quoting Domino v. Tex. Dep't of Criminal Justice, 239 F.3d 752, 756 (5th Cir. 2001)).

216. Davis *ex rel.* LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 648 (1999).

217. *See, e.g.*, Porto v. Town of Tewksbury, 488 F.3d 67, 72 (1st Cir. 2007); Doe *ex rel.* Doe v. Coventry Bd. of Educ., 630 F. Supp. 2d 226, 235 (D. Conn. 2009).

218. Doe v. Bd. of Educ. of Prince George's Cty., 982 F. Supp. 2d 641, 654 (D. Md. 2013).

219. *Davis*, 526 U.S. at 649.

220. *See, e.g.*, Dawn L. v. Greater Johnstown Sch. Dist., 586 F. Supp. 2d 332, 370-71 (W.D. Pa. 2008).

221. *Id.*

In addition to focusing on the unreasonableness of a school's response, many courts in peer cases scrutinize the school's "substantial control over both the harasser and the context in which the known harassment occurs."[222] One court found no substantial control when a rape occurred in an off campus apartment.[223] Clearly teachers have more power over students than other students do, but the capacity of peers to make an educational environment unbearable and unequal for other students, and the difficulty of escaping them, is not necessarily less. From their treatment of the facts, courts appear to think that school superiors have more control over teachers than they do over students, arguably dubious when students need permission to go to the bathroom or are dependent for recommendations for advancement or careers.

The *Davis* dictum that peer sexual harassment is less likely to be serious than teacher-student harassment[224] is inaccurate. Peer sexual harassment can be life-and-death serious. One student committed suicide after alleged sexual assault on her campus, including three separate instances of sexual violation on the same night.[225] Another student with depression and Asperger's syndrome committed suicide due to harassment by other students that included calling him a faggot.[226] The violated girl's mother could not get the school meaningfully to discuss alternate accommodations for the next term;[227] the boy's school failed to develop a plan to investigate or address his bullying.[228] In light of all the cases in which institutional nonresponses form part of a series of failed attempts by victims at getting help, query whether the treatment by these schools would have been found deliberately indifferent had the victims lived.

Lest this seem an extreme question, consider the First Circuit's ruling in *Porto*, in which the foster mother of a disabled boy with fetal alcohol syndrome told school officials that oral sex was being forced on him by another boy student.[229] The two were initially separated but put back in the same class a year later, whereupon the same perpetrator had sexual intercourse with the

222. *Davis*, 526 U.S. at 645.

223. *See, e.g.*, Roe v. St. Louis Univ., 746 F.3d 874, 884 (8th Cir. 2014).

224. *Davis*, 526 U.S. at 653. This is precisely one of the reasons the *Petaluma* court favored the "know or should have known" standard. *See* Doe *ex rel.* Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1426 (N.D. Cal. 1996).

225. McGrath v. Dominican Coll. of Blauvelt, N.Y., 672 F. Supp. 2d 477, 482-85 (S.D.N.Y. 2009).

226. Estate of Barnwell *ex rel.* Barnwell v. Watson, 44 F. Supp. 3d 859, 861-62 (E.D. Ark. 2014).

227. *McGrath*, 672 F. Supp. 2d at 488.

228. *Barnwell,* 44 F. Supp. 3d at 863.

229. Porto v. Town of Tewksbury, 488 F.3d 67, 70 (1st Cir. 2007).

disabled boy in a bathroom.[230] The Portos' boy, who was taken out of school, hospitalized, and attempted suicide, won at trial under Title IX.[231] On appeal, the First Circuit reversed, holding the school was not deliberately indifferent despite the fact that the known threat "was not abated" because deliberate indifference is "not [a test] of effectiveness by hindsight."[232] How putting the two back in the same class was "not unreasonable" under the circumstances remains elusive (as is how any subsequent assessment is not a species of hindsight). Similarly puzzling is the analysis of a subsequent court, distinguishing *Porto*, in which the school was found deliberately indifferent when it "demonstrate[d] a complete lack of concern about sexual contacts" between a learning disabled middle school girl and a student who raped her twice.[233] Being raped twice may not always be necessary to establish deliberate indifference, but it certainly seems to help.

IV. EQUALITY CRITIQUE

Closing in on two decades under the deliberate indifference test, its appropriateness to Title IX can be assessed by asking how different is the reality survivors face today from the time before sexual harassment in education was recognized as a legal equality claim. As things stand, schools have an incentive not to know about sexual harassment in their institutions, and when they do, to do little to nothing about it. They can only be liable for what they know, even when their own employees and superior agents engage in it, and any change they make or action they take can imply that something needed doing or correcting. This legal posture converges with schools' concern to control cases internally so as to not look bad externally.

The point is not that it is absolutely impossible to meet the deliberate indifference standard. Situations can be selected whose facts can be made to conform to or exceed its requirements as victims' realities are shoehorned into adverse legal standards. But the requirements of this doctrine are not only extremely difficult to meet by design, they prevent case after egregious case from being positively addressed, especially those not brought for these reasons. This doctrine has not promoted, and does not promote, sex equality in the educational setting.

230. *Id.* at 71.

231. *Id.* at 71-72.

232. *Id.* at 74, 76 (holding that directed verdict for school should have been granted under Title IX deliberate indifference).

233. Thomas v. Springfield Sch. Comm., 59 F. Supp. 3d 294, 304 (D. Mass. 2014).

The *Gebser v. Lago Vista Independent School District* decision, which originated deliberate indifference as Title IX's liability standard, did not even try to justify it in equality terms, nor did the *Davis* extension to peer cases.[234] The *Gebser* Court's principal concern was to distinguish institutional liability for acts of employees considered independent and official decisions not to remedy, framed in terms of a generic "deprivation of federal rights."[235] Congressional intent was discussed only in terms of whether Congress contemplated damages against a school that did not know of the discrimination in its program.[236] *Gebser* did not discuss whether Congress might have wanted schools, in order to guarantee and promote sex equality in education as the statute provides, to be held responsible for sex discrimination on their watch, empowering those with claims of hostile environments or otherwise unequal educational treatment to make such claims. Why the school's awareness of discrimination became the threshold damages issue—what does the school's knowledge of a student's sexual harassment have to do with whether the student's educational experience is equal?—and why a teacher or principal who is harassing a student is not assumed to *be* the school, given that authority and position enable harassment, a practice of inequality, were not discussed in these terms either.

Gebser contended that since the primary enforcement mechanism of Title IX required notice and an opportunity to correct, the implied right of action should also.[237] Nothing requires such parallels between administrative and judicial enforcement tests. Given Congress's clear purpose to produce equality in education, the real question is why it should be assumed that when a recipient educational institution is aware of discrimination, it will act to promote equality. There is not a shred of evidence that schools reliably did so before Title IX was interpreted to cover sexual harassment. As no sex equality argument supported the policy choice in *Gebser* of the deliberate indifference standard, none was offered for the use of unreasonableness for schools' responses to reports in *Davis*. Reasonableness is not an equality standard. Indeed, it is defined by its fit with the status quo, which makes it an inequality

234. *Gebser* adopted the deliberate indifference standard from § 1983 cases unrelated to legal equality, specifically police use of force and known work hazards. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 281 (1998). In applying *Gebser* to peer sexual harassment, *Davis* discussed equality in the "severity" element of the substantive test, not concerning deliberate indifference. *See* Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 642 (1999).

235. *Gebser*, 524 U.S. at 291.

236. *Id* at 283-84. The *Gebser* Court regarded it as "sensible to assume that Congress did not envision a recipient's liability in damages where the recipient was unaware of the discrimination." *Id.* at 287-88.

237. *Id.* at 285.

standard when the status quo is unequal. Moreover, as the cases discussed above show, the elasticity, even plasticity, of what has been considered reasonable in this area often depends upon moral outrage; cases seldom mention inequality of educational conditions.[238] A reasonable response is not necessarily a reasonably equal one. The results of the deliberate indifference test, as they have played out in case law[239]—particularly set against the backdrop of the empirical findings on the experiences of victims,[240] which have shown no reduction in sexual abuse—meet no sex equality measure, nor do they purport to. Under the aegis of this liability rule, the known rates of sexual abuse on campus have remained virtually unchanged for almost thirty years.[241]

The choice of deliberate indifference as a liability standard in *Gebser*, rather than being based on equality reasoning, was designed to keep the schools from being taken by surprise in being held responsible when students' education was disrupted or destroyed by sexual harassment. But what particular school officials are regarded as knowing is not coextensive with whether the educational environment is equal or made equal for students, individually or collectively. Predicating the choice of doctrine on a reading of Congress's decision to structure Title IX in a contractual framework under the Spending Clause[242] does not compel the selection of notice followed by deliberate indifference. Nothing about the standard is specific to equality[243] or to Title

238. *See, e.g.*, *supra* text accompanying notes 130, 157, 165, 196-197, 207-208, 212-214.

239. *See supra* Part III.

240. *See supra* Part I.

241. *See supra* text accompanying note 15.

242. *Gebser*, 524 U.S. at 287-88.

243. Its use for diverse claims across the legal system indicates just how not specifically equality-oriented the standard is. Deliberate indifference is used as a constitutional liability standard under § 1983 for the First Amendment, *see, e.g.*, Schroeder *ex rel.* Schroeder v. Maumee Bd. of Educ., 296 F. Supp. 2d 869, 877 (N.D. Ohio 2003), Fifth Amendment, *see, e.g.*, Bistrian v. Levi, 696 F.3d 352, 367 (3d Cir. 2012), Eighth Amendment, *see, e.g.*, Estelle v. Gamble, 429 U.S. 97, 106 (1976), and Fourteenth Amendment, *see, e.g.*, City of Canton v. Harris, 489 U.S. 378, 388 (1989) (using it in the due process context); Gant *ex rel.* Gant v. Wallingford Bd. of Educ., 195 F.3d 134, 140 (2d Cir. 1999) (using it in the equal protection context). It is also used for a range of claims in the criminal intent context. *See, e.g.*, United States v. Threadgill, 172 F.3d 357, 368 (5th Cir. 1999); United States v. Jewell, 532 F.2d 697, 702-03 (9th Cir. 1976). Examples include culpability for money laundering, *see, e.g.*, 18 U.S.C. § 1956 (2012); United States v. Rodriguez, 53 F.3d 1439, 1447 (7th Cir. 1995), for violation of the Securities Act of 1933, *see, e.g.*, United States v. Weiner, 578 F.2d 757, 787 (9th Cir. 1978); 21 MARVIN G. PICKHOLZ ET AL., SECURITIES CRIMES § 7:9 (2015), for concealing or harboring aliens, in which deliberate indifference is treated as synonymous with "reckless disregard," *see, e.g.*, United States v. Zlatogur, 271 F.3d 1025, 1029 (11th Cir. 2001); United States v. Uresti-Hernandez, 968 F.2d 1042, 1046 (10th Cir. 1992), and for violations of safety standards under the Mine Act, *see* Bridget E. Littlefield & Ann M. Mason, *Critical Issues in*

IX's language or purpose. Nor did the Supreme Court discuss why the proportionality between what a school subjectively knew and what it objectively did was the appropriate *equality* measure for students. Instead, it was as if the terrain of equality begins in the institutional mind with scienter, rather than in an equal educational environment for the student, in which each student receives or is denied the equal benefit of an education on the basis of their sex.

The deliberate indifference test is especially inapt for an equality law that, unlike the Equal Protection Clause or any other equality statute other than Title VI, guarantees equal access to "the benefits of . . . any education program" free from sex discrimination.[244] *Title IX's guarantee of the benefits of an education is an outcome standard.* The *Davis* Court referred to "the equal access to education that Title IX is designed to protect."[245] Why don't schools have to create a sex-equal learning environment to satisfy that design? Given the harms routinely inflicted on students by reporting, to those who are in school to be educated and to their education, it is perverse that reporting is the *sine qua non* liability trigger. No student should have to make their educational experience more unequal in order to assert their equality rights, which has been their experience under this doctrine.

Well-meaning courts in the sexual harassment setting have struggled to wedge the realities of the often violent sex inequality before them into a concept that, in its intrinsic design, is unresponsive to that reality. Can deliberate indifference be made a workable and equality-promoting test for institutional liability for educational sexual harassment by a court determined to do so? With hideous facts, excellent litigation, and a sympathetic court, as the foregoing examination shows, equality-seekers can sometimes prevail under it against all odds. Apart from the unlikelihood of that perfect storm, the real problem remains that the standard itself has nothing to do with promoting equality. Schools need to do very little to show they are not deliberately indifferent because it is intentionally and inherently a flaccid, low, weak standard of accountability that focuses on the mind of the school rather than the equal education of the student, when it is equal educational benefits to

the Law of Civil and Criminal Liability Under the Mine Act, 31 ENERGY & MIN. L. INST. § 6.04 (2010), http://www.emlf.org/clientuploads/directory/whitepaper/Littlefield_Mason_11.pdf [http://perma.cc/GXC6-H4BP], and the Rehabilitation Act, *see, e.g.*, Mark H. v. Hamamoto, 620 F.3d 1090, 1097 (9th Cir. 2010). Equality does not belong on a one-size-fits-all list.

244. 20 U.S.C. § 1681(a) (2012) ("No person in the United States shall, on the basis of sex, . . . be denied the benefits of . . . any education program or activity receiving Federal financial assistance . . . .").

245. Davis *ex rel.* LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 652 (1999).

students that Title IX guarantees. The test is designed to protect authoritative institutions (which children are in essence compelled to attend)[246] *from* youngsters sexually victimized in, and often by, those institutions. Under this doctrine, schools are not required to deliver equality in education on pain of violating federal equality law. Deliberate indifference does not implement Title IX. As the *Gebser* dissenters put it, it "thwarts the purposes of Title IX."[247]

Should notice matter, one might think that schools are already, in advance, amply aware of the high risk of each incident of sexual harassment occurring, given the data on sexual harassment. Campus climate surveys apprise schools of the situation on their own campuses, as does Clery Act reporting, as does the fact that sexual harassment is a group-based injury—meaning that each member of the group has the potential, especially high at the ages that precisely define school-age young people, to fall prey to sexual harassment.[248] In its positioning of notice and response, deliberate indifference tends to treat each case as if it is individually uniquely personal to the parties, when the recognition that sexual harassment is sex-based discrimination is a recognition that it is *not* individual or personal, but driven by collective gender-based social dynamics that structurally endanger every member of the target group. The tendency of the notice standard to individuate, to make every assault an exception, entrenches the "one free rape" default baseline. One court noted early on, "[I]t appears that school districts are on notice that student-to-student sexual harassment is very likely in their schools, particularly in junior high school."[249] Yet deliberate indifference allows every incident to come as a surprise: what a shock, this can't happen here. (Reader: you are on notice as of now.)

A court, if it chooses, can require that the school respond effectively, but nothing prevents it from allowing a school simply to go through the motions in order not to be found deliberately indifferent to sex discrimination that is repeated, goes unaccommodated and unremediated, and continues to recur. Indeed, this happens time and again; it is why the data are as virulent as they are. A nominal investigation or hearing usually suffices to avoid a judicial

246. It is worth noting that the schools in the mind of the *Gebser* Court, as well as in the facts of both *Gebser* and *Davis*, appear to be public schools. Of course, the vast majority of schools are public, but many schools are private and independently extremely wealthy. The incentives the latter have to protect their reputations—arguably their primary concern—do not appear to have been part of the liability calculus in the *Gebser* and *Davis* adjudications.

247. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 293 (1998) (Stevens, J., dissenting).

248. *See supra* text accompanying notes 34-35.

249. Doe *ex rel.* Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1423, 1426 (N.D. Cal. 1996) (justifying a "knew or should have known" standard for schools in the sexual harassment context).

finding of deliberate indifference, even if no relief, sanctions, or even findings result, and the sexual abuse continues. Schools know this. Why shouldn't schools be legally responsible in damages to students for violations of their sex equality rights—that is, for sexual harassment that meets substantive legal standards, meaning any failure to produce a learning environment that is sex-equal, free of sex-based abuse and violation? Why isn't the legal requirement, almost forty years after *Alexander v. Yale* was brought, that if sexual harassment is severe or pervasive or oppressive so as to make the learning environment unequal, schools are liable? No student should have to be raped once, far less more than once. Forty years of notice are enough.

In virtually every case discussed in this analysis, the substantive test for sexual harassment was met beyond cavil. The educational environment was thus not equal. But this is not the standard the courts apply, or have been directed to apply, to institutional accountability. One case held that offering a harassed student enrollment at an alternative school made her school not deliberately indifferent to her abuse.[250] Why should she be the one to leave? One principal, informed that a student had been coerced into performing oral sex by male students off school grounds, had fifty conversations with law enforcement about an investigation and deferred to them, making the school not deliberately indifferent,[251] despite law enforcement's generally unreliable record on such issues.

The schools' response need not even be reasonable; it just cannot be unreasonable.[252] How is just not turning a blind eye and doing nothing the same as guaranteeing the equal benefit of an education on the basis of sex? As the dissenters in *Gebser* presciently foresaw, "few Title IX plaintiffs who have been victims of intentional discrimination will be able to recover damages under this exceedingly high standard."[253] Schools have not been liable to women students even when their response to what were ultimately nine reports of harassment by the same professor was "remarkably inept."[254] A school can be "far from thorough,"[255] need not "use[] the best practices,"[256] can

250. Doe *ex rel.* Doe v. Round Valley Unified Sch. Dist., 873 F. Supp. 2d 1124, 1138 (D. Ariz. 2012).

251. Rost *ex rel.* K.C. v. Steamboat Springs RE-2 Sch. Dist., 511 F.3d 1114, 1121 (10th Cir. 2008).

252. *Id.*

253. *Gebser*, 524 U.S. at 304 (Stevens, J., dissenting).

254. Wills v. Brown Univ., 184 F.3d 20, 27 (1st Cir. 1999).

255. Thomas v. Bd. of Trs. of the Neb. State Colls., No. 8:12-CV-412, 2015 WL 4546712, at *13 (D. Neb. July 28, 2015) (involving two prior women who had reported sexual harassment by the same perpetrator, who had admitted responsibility as to one).

respond with "[n]egligent or careless conduct"[257] and not be deliberately indifferent.[258] There almost seems to be a contest among some courts for how low the bar for institutional impunity can be set.

From the perspective of educational equality, the deliberate indifference standard creates perverse incentives. It encourages schools not to know and to avoid learning about sexual atrocities so as to avoid notice of them, so no response, however indifferent, can be deliberate. Contorted responses to reports result, sometimes supposedly in the interest of survivor confidentiality but actually hiding institutions behind victims, protecting schools from the kind of notice *Gebser* requires.[259] The concept of deliberate indifference, which

256. Harden v. Rosie, 99 A.3d 950, 964 (Pa. Commw. Ct. 2014) (overturning victory at trial because school had no actual notice that teacher posed substantial danger of engaging in sexual relationship with student, holding district's response not deliberately indifferent, and determining court below should have granted district's motion for judgment notwithstanding verdict).

257. T.L. *ex rel.* Lowry v. Sherwood Charter Sch., 68 F. Supp. 3d 1295, 1309 (D. Or. 2014).

258. Further illustrative cases of no deliberate indifference include *Shrum ex rel. Kelly v. Kluck*, 249 F.3d 773, 782 (8th Cir. 2001), which found that a school district issuing a positive letter of recommendation, even though it may have had reason to believe that a teacher had sexually abused children while within the district, did not amount to deliberate indifference to that teacher's subsequent abuse of students at a later school because its recommendation did not cause or directly allow the abuse, since the original district had no control over the subsequent environment in which later abuse occurred; *Davis ex rel. Doe v. DeKalb County School District*, 233 F.3d 1367, 1375 (11th Cir. 2000), which found no deliberate indifference where the principal's response to repeated complaints of sexual harassment by the gym teacher proved "ultimately ineffective" and the school's own procedures were not followed, even though the teacher ultimately resigned and was criminally prosecuted; and *Gordon ex rel. Gordon v. Ottumwa Community School District*, 115 F. Supp. 2d 1077, 1084 (S.D. Iowa 2000), which found no deliberate indifference even where the school had received three prior complaints about the sexual misconduct of a part-time employee, because the principal had investigated prior complaints and found them lacking in credibility and less serious than that of the student who sued, had interviewed the victim, and had advised the employee to remain off the premises during the investigation. These cases are not atypical.

259. *See, e.g.*, Roe v. St. Louis Univ., 746 F.3d 874, 883-84 (8th Cir. 2014) (citing the victim's stated desire for confidentiality as a factor in finding no deliberate indifference). OCR's encouragement of confidential reporting sources, predictably embraced by schools and trumpeted as an advance for survivor sensitivity, exacerbates this situation. Schools are now being "strongly encouraged" by OCR to designate virtually everyone that a survivor of sexual assault is likely to approach or trust as a "confidential source[]" for reporting. Office for Civil Rights, *supra* note 114. How a school as such becomes aware of a report for purposes of legal notice if it is provided to a "confidential source" is unclear. How schools can investigate allegations they cannot discuss—for example with the alleged perpetrator, which in most instances will identify the victim—is similarly unclear. "Confidentiality" means that even the fact of the allegations being made cannot be disclosed, although there are always exceptions for exigent circumstances and danger to others, meaning that the reassurance given to survivors may also be illusory. In the Q&A, OCR takes the position

centers on conscious choice and is measured in unreasonableness of procedural steps rather than in substantive equality outcomes, produces an incentive for schools to go through the motions with an eye primarily to looking as if action is being taken, rather than to redressing the injury, stopping the abuse, or addressing the climate in the environment that produced and permitted it.

The fact that the sexual abuse that actually occurred is all but invisible in most of the decisions—more often than not its existence is uncontested—reminds one of nothing so much as wartime rape prosecutions, where the fact of the atrocities is virtually never contested either. The pushback from the defense side comes from higher authorities being prosecuted under culpability standards for people who did not themselves violate the women, but either encouraged the attacks or let them go unpunished, that is, men being prosecuted for rapes of other men.[260] Nothing in existing law tells schools that the best way to avoid liability is to end the abuse, make sure it does not happen again, and repair the damage it did: deliver equality.

The *Gebser* Court may have thought that the liability standard it chose, given its use under related constitutional rubrics, was the best or most obvious available.[261] The Court did not want to blindside public school districts with large damage awards.[262] The intentionality of deliberate indifference as a test[263]

that confidential resource employees are not "responsible employees" within the meaning of Title IX. *Id.* This, combined with an earlier explanation that confidential sources are not responsible employees, seems to mean that the school does not have "notice" of sexual harassment that is reported only to a confidential resource, producing no obligation under Title IX to pursue such an investigation and no liability for failing to respond to a report. Thus, hiding behind sensitivity to survivors, who generally are responding to shame and a culture of blame and reflecting the stigma attached to them by their environments, produces what for OCR and victims, but not for schools, are doubtless unintended consequences for private litigation as institutional lack of accountability.

260. This describes virtually every case at the International Criminal Court. For discussion of liability standards in the preceding ad hoc tribunals, where this situation was also common, see Catharine A. MacKinnon, *The ICTR's Legacy on Sexual Violence*, 14 NEW ENG. J. INT'L. & COMP. L. 211 (2008). For articulation of these standards at the ICC, see Prosecutor v. Katanga, ICC-01/04-01/07-3436, Majority Opinion of Trial Chamber II, ¶¶ 1085-88, 1373-76, 1366-1421 (Mar. 7, 2014), which describes the relevant criminal liability standards, acquits Katanga of the indirect perpetration of rapes and use of child soldiers, and holds that the connection between him and these acts is insufficient, despite their being committed by forces under his command.

261. Appallingly, the U.S. Supreme Court in *Lawrence v. Texas* explicitly said that due process has a substantive component, but equal protection does not. *See* 539 U.S. 558, 574-75 (2003).

262. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 289-90 (1998).

263. *See Gebser*, 524 U.S. at 290; Bostic v. Smyrna Sch. Dist., 418 F.3d 355, 360 (3d Cir. 2005) (noting "the response must amount to deliberate indifference to discrimination . . . . The premise, in other words, is an official decision by the recipient not to remedy the violation" (quoting *Gebser*, 524 U.S. at 290)).

has been underlined by its development on the constitutional side, subsequently referred to by cases under Title IX.[264] Substantive due process, which uses the deliberate indifference test, is not directed toward ending sex inequality. It imposes a moral standard of some sort—say, whether authorities are willfully uncaring enough to "shock[] the conscience"[265]—not an equality standard. To clarify the distinction by illustration, in one substantive due process case in which a boy was sexually molested by a public school teacher, the Eighth Circuit found that the principal's actions did not rise to the level of deliberate indifference when the principal secretly asked the offending teacher to leave and provided him with a positive letter of recommendation.[266] Such actions may not shock the court's conscience but arguably discriminated against the victim as well as other young people down the road at the school to whom the offender was positively referred in this cover-up. Other than by showing that the violation was not remedied, intentional discrimination can be inordinately difficult to show, as litigation under other intent requirements in the inequality setting demonstrate.[267] And no other sex equality statute or constitutional provisions contains Title IX's explicit outcome-based language.

With little liability to fear and only conscience to govern, with low probability of loss of all federal funds or negative involvement of insurance or reinsurance companies,[268] schools effectively have become largely unaccountable for sexual harassment once again, even in the wake of unprecedented federal attention. The federal government is far more

264. *City of Canton v. Harris*, a constitutional case brought under § 1983, made clear that the official policy or custom, or lack of same, must "reflect[] a 'deliberate' or 'conscious' choice" in order to be actionable. City of Canton v Harris, 489 U.S. 378, 389 (1989). In her concurrence, Justice O'Connor suggested that a plaintiff might demonstrate "deliberate indifference" by showing "that policymakers were aware of, and acquiesced in, a pattern of constitutional violations" or that "a municipality [has] fail[ed] to train its employees concerning a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face." *Id.* at 396-97 (O'Connor, J., concurring in part and dissenting in part). For such a reference under Title IX, which is common, see, for example, *Doe v. Southeast Delco School District*, No. 15-901, 2015 WL 5936403, at *3 (E.D. Pa. Oct. 13, 2015).

265. Rochin v. California, 342 U.S. 165, 172 (1952).

266. Shrum *ex rel.* Kelly v. Kluck, 249 F.3d 773, 775 (8th Cir. 2001).

267. For critical discussion of the intent requirement generally, see CATHERINE A. MACKINNON, SEX EQUALITY 81, 113-14, 122-32, 332-42 (3d ed. 2016).

268. Colleges and universities insure against risk of litigation recoveries; their insurance companies typically reinsure themselves to manage their own exposure to risk of loss. Although the schools carefully guard information on their policy limits, especially from the other side in litigation, involvement of insurance and reinsurance company lawyers brings distinctive pressures on schools, including to solve the problems that give rise to risk of loss, when triggered by credible claims over certain amounts. It is thus obvious that so long as the threat of litigation is virtually nil, such pressures can be calculated as virtually nil.

predictable and tractable than victims armed with their own lawyers. Instead of being responsive to student survivors, schools are mainly responding to how they look in the media, mainstream and social, making the issue of sexual harassment one of branding and public relations, and of managing their relations with the federal government, which focuses on steps over results and systemic over individual discrimination. Schools respond to survivors through attorneys charged with containing rather than revealing information and protecting the institutional back. That sex equality in education is not being adequately provided as a result has been amply and vividly documented both by social science research and by student survivors connecting with each other, communicating through digital media, and complaining of sex inequality in their education to governmental bodies in unprecedented numbers.[269]

Some schools are no doubt sincere in their desire to address their rape cultures and equalize their educational environments. But since 1998, legally speaking, they do not have to. When equality of treatment depends on the good-hearted inclinations and aroused outrage of authorities, equality is not a right. Relying on the good will of nice men in power, and the notion that if they know about it, they will fix it, has not reliably worked for over three decades, nor did it work before sexual harassment was recognized as a legal claim for sex discrimination. For the most part, although there are exceptions, all a school has had to do about sexual harassment from the perspective of liability (that is, accountability to sexually violated students) has been something more than nothing. And that, for the most part, is all they have done. Amid shoddy investigations, deck-stacked hearings, absence of accommodations or communication, jerked-around deadlines, reliance on and repetition of rape myths and other victim blaming,[270] shunning and shaming, bending over backwards for accused perpetrators is all but standard and next to

269. The number of complaints for sexual harassment received at OCR by fiscal year for the last decade are: 2006, 53; 2007, 55; 2008, 70; 2009, 68; 2010, 88; 2011, 135; 2012, 144; 2013, 158; 2014, 278; 2015, 332, and fiscal year 2016 (through February 22, 2016), 95. *See* E-mail from Courtney B. Taylor, Confidential Assistant, Office of Civil Rights, U.S. Dep't of Educ., to author (Feb. 22, 2016) (on file with author). This is the number of complaints, not complainants. Many of the complaints contain multiple complainants.

270. In one trenchant recent example of rape myths in action, a fourteen-year-old middle-school girl was raped in the bathroom when school officials "use[d] her as bait . . . to catch" a perpetrator with a known history of verbal and physical sexual harassment of female students. Hill v. Cundiff, 797 F.3d 948, 955-56 (11th Cir. 2015). This scene was arranged by a sympathetic teacher's aide because the principal believed that if the perpetrator's guilt was not admitted, or no physical evidence of the attack existed, a student had to be "caught in the act" to be held accountable. *Id.* at 958.

nothing is being done about it.[271] The absence of recourse to outside authority for victims may help explain the widespread, well-documented lack of responsive policies against sexual assault, inadequate sexual assault training for school authorities, dilatory responses even when policies call for them, and underreporting of campus crime statistics to federal education officials, all as found by the National Institute of Justice as of 2005,[272] accompanied by the dramatic escalation in well-founded federal inquiries in the last few years.[273] Compared with the liability standard under Title VII, which has also been subject to Supreme Court dilution,[274] the sex equality of adult employees at work is better protected from sexual harassment than are the sex equality rights of children and young adults in school—which, it might be noted, they and their parents are paying for.

The deliberate indifference liability standard to date has obscured the actual referent of Title IX's conferral of rights: the survivor. Treating survivors of sexual assault as if they are the problem, need only be waited out until they

271. Despite the energetic efforts of a reinvigorated OCR, this is a report from my experience of forty years of dealing with sexual harassment proceedings in schools, supported by a reading of all the Title IX cases cited *supra* note 4, as well as the other cases discussed in this piece.

272. *See* Alberto R. Gonzales et al., *Sexual Assault on Campus: What Colleges and Universities Are Doing About It*, NAT'L INST. JUST. 3, 6, 11 (2005), http://www.ncjrs.gov/pdffiles1/nij/205521.pdf [http://perma.cc/H7EE-9CZN]; *see also Sexual Assault on Campus: A Frustrating Search for Justice*, CTR. FOR PUB. INTEGRITY (Feb. 24, 2010), http://www.publicintegrity.org/investigations/campus_assault [http://perma.cc/JA5G-3S4W] (documenting procedural lapses and lack of consequences imposed by schools on perpetrators of sexual assault).

273. As of March 2015, nearly one hundred administrative investigations had been opened for possible violations of federal law on sexual harassment, many of which were resolved. *See* Nick Anderson, *Tally of Federal Probes of Colleges on Sexual Violence Grows 50% Since May*, WASH. POST (Oct. 19, 2014), http://www.washingtonpost.com/local/education/tally-of-federal-probes-of-colleges-on-sexual-violence-grows-50-percent-since-may/2014/10/19/b253f02e-54aa-11e4-809b-8cc0a295c773_story.html [http://perma.cc/4WBD-QEWK]; Matthew Watkins, *Campuses Under Federal Review over Sexual Assault Investigations*, TEX. TRIB. (Nov. 17, 2015), http://www.texastribune.org/2015/11/17/department-education-investigating-texas-schools [http://perma.cc/B2SX-YY2Z] ("And the education department has increasingly been willing to hold universities' feet to the fire. In 2014, the department confirmed it was investigating 55 schools. This year, that number has grown to 146."); Caitlin Emma, *Politico Morning Education: SOTU May Feature STEM*, POLITICO (Jan. 6, 2016), http://www.politico.com/tipsheets/morning-education/2016/01/sotu-may-feature-stem-212030 [http://perma.cc/5NJ2-GM5S] ("The Education Department's Office for Civil Rights opened nearly two dozen Title IX college sexual violence investigations during the final months of 2015. As of Dec. 30, OCR had 194 cases open at 159 institutions . . . .");.

274. *See, e.g.*, Burlington Indus. v. Ellerth, 524 U.S. 742, 758-59 (1998) (eliminating threat of quid pro quo from sexual harassment liability); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) (providing employers with affirmative defense in sexual harassment in employment cases).

move on, and do not matter—effectively giving them the back of the hand—is epistemic, systemic, and institutionalized rather than usually consciously chosen. That schools can get away with it means that sex inequality is permitted. There is no need for anyone to form a conscious intent to discriminate to maintain a sexually hostile educational environment when sexual assault itself, with institutional responses to it that do not prioritize the equal benefit of an education, tend to be structurally, rather than deliberately, unequal. No one has to deliberate their indifference to produce unequal treatment. All administrators have to do is respond to existing incentives to continue business as usual, adding a soupçon of an investigation here or a dash of a hearing there to get OCR and ultimately the courts off their backs. The social norms of credibility, the social burdens of proof, are stacked against the survivor; so is the legal liability standard. In the meantime, social and legal norms and actors alike by reflex sympathetically and procedurally protect the accused's present and future, which is allegedly ruined by a report.[275] Should survivors become suicidal at the institutional jerk-around in the context of their PTSD, often not even their lives matter.[276]

V. DUE DILIGENCE

So what standard for institutional liability does Title IX's equal outcome guarantee require in cases of the unequal injury of sexual harassment? On the assumption that victims have a human right to access an effective remedy,[277] which deliberate indifference demonstrably fails to provide, "due diligence" as developed in international human rights law offers the appropriate, effective, and empowering standard that victims deserve. Due diligence requires that deprivations of equality rights, of which the state knew or should have known,

275. This dynamic is illustrated by the events leading to the documentary film, *The Hunting Ground*, and many of the responses since its release. THE HUNTING GROUND (The Weinstein Company 2015).

276. *See, e.g.*, *supra* notes 83, 214-229 and accompanying text.

277. Access to an effective remedy is a fundamental human right. *See* International Covenant on Civil and Political Rights art. 2(3), *adopted* Dec. 19, 1966, S. EXEC. DOC. NO. E, 95-2, 999 U.N.T.S. 171 (stating this in a treaty ratified by the United States). *See generally* G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Dec. 16, 2005). For other instances, see Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 13-14, *adopted* Dec. 10, 1984, S. TREATY DOC. NO. 100-20, 1465 U.N.T.S. 112; the American Convention on Human Rights art. 25, Nov. 22, 1969, S. TREATY DOC. NO. F, 95-2, 1144 U.N.T.S. 123; and the Convention for the Protection of Human Rights and Fundamental Freedoms art. 13, Nov. 4, 1950, 213 U.N.T.S. 221.

be prevented, victims of equality violations be protected, investigations be effective and based on accurate empirical data, punishment be exacted where justified, remedies, compensation, and reparations be provided to victims and where appropriate to the groups of which they are members, and prevention include transformative change to ensure that such abuses do not happen again.[278] Individual survivors to whom such relief has not been provided by their schools are entitled to such a robust tool in their hands to enforce their rights in court.

Due diligence was mentioned by Grotius and other early writers on international law[279] and was used in early international arbitration cases.[280] Its modern history in international human rights law springs from the foundational *Velásquez Rodriguez* case,[281] in which a state was held responsible for human rights violations perpetrated in a program of torture and disappearance allegedly carried out by quasi-official actors or tolerated by the state. The due diligence standard has been widely accepted in many settings as the global standard for state accountability for violations of human rights.[282] It has been applied in leading cases of violence against women, including cases involving widespread documented patterns and individual cases, that states failed to prevent or effectively investigate or redress,[283] including against states

278. An informative discussion documenting these requirements can be found in Yakin Ertürk, *15 Years of the United Nations Special Rapporteur on Violence Against Women (1994-2009)*, OFF. HIGH COMMISSIONER FOR HUM. RTS., http://www.ohchr.org/Documents/Issues/Women/15YearReviewofVAWMandate.pdf [http://perma.cc/U4YF-ZJY2].

279. *See* Jan Arno Hessbruegge, *The Historical Development of the Doctrines of Attribution and Due Diligence in International Law*, 36 N.Y.U. J. INT'L L. & POL. 265, 283-99 (2004).

280. *See, e.g.*, Alabama Claims Case (U.S. v. Gr. Br.), Treaty of Washington Trib. (May 8, 1871) (holding Great Britain responsible to the United States for making aggressive warships and selling them to the Confederacy during the Civil War).

281. Velásquez Rodríguez v. Honduras, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 172 (July 29, 1988).

282. *See, e.g.*, U.N. Comm. on the Rights of the Child, General Comment No. 5, ¶ 1, U.N. Doc. CRC/GC/2003/5 (Nov. 27, 2003); U.N. Econ. & Soc. Council, Comm'n on Human Rights, Subcomm. on the Promotion and Prot. of Human Rights, Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (Aug. 26, 2003); U.N. Econ. & Soc. Council, Recommended Principles and Guidelines on Human Rights and Human Trafficking, U.N. Doc. E/2002/68/Add.1 (May 20, 2002); U.N. Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 14, ¶ 33, U.N. Doc E/C.12/2000/4 (Aug. 11, 2000); U.N. Human Rights Comm., General Comment No. 31, ¶ 8, U.N. Doc. CCPR/C/21/Rev. 1/Add. 13 (May 26, 2004).

283. *See, e.g.*, M.C. v. Bulgaria, 2003-XII Eur. Ct. H.R. 646; González (Cotton Field) v. Mexico, Merits, Reparations, and Costs, Preliminary Objection, Inter-Am. Ct. H.R. (ser. C) No. 205 (Nov. 16, 2009); Lenahan (Gonzales) v. United States, Case 12.626, Inter-Am. Comm'n

for sexual violations that discriminate against women on the basis of sex under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[284] The developing legal area of domestic violence against women in international law illustrates the extension of liability by degrees of state responsibility for acts committed by increasingly-nonstate actors, the occurrence of which states were on notice collectively as well as individually, when state entities fail to prevent human rights violations and/or to respond to them effectively after the fact.[285] Based on world practice and judicial opinion, failure to respond to violence against women with due diligence may be becoming a violation of customary international law.[286] Due diligence requires states effectively implement human rights law, of which Title IX is one example, to prevent, protect, prosecute, and provide compensation for violence against women by intervening against sexual abuse at all levels – meaning effective investigation, responsive process, and compensation. Crucially, due diligence requires that known human rights violations, or those of which an entity should have been aware, actually be remedied and prevented from recurring.[287]

Due diligence as a standard for institutional liability for discrimination is vastly more appropriate than deliberate indifference for the very reason the *Gebser* Court thought deliberate indifference was appropriate: Title IX violations, which occur under the aegis of receipt of federal funds, become state acts. As power flows down, responsibility flows up. Impunity for human rights violations also renders states responsible for them. An excellent example close to home is *Lenahan*, in which the failure of U.S. police to act with due diligence in responding to multiple reports of domestic violence was found to violate the "obligation not to discriminate" on the basis of sex and ethnicity under the

H.R., Report No. 80/11 (2011); Maria da Penha Maia Fernandes v. Brazil, Case 12.051, Inter-Am Comm'n H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20 (2001).

284. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19, ¶ 9, U.N. Doc. A/47/38 (1992); Comm. on the Elimination of Discrimination Against Women, Yildirim v. Austria, ¶ 12.1.1, U.N. Doc. CEDAW/C/39/D/6/2005 (Oct. 1, 2007); Comm. on the Elimination of Discrimination Against Women, Goekce v. Austria, ¶ 12.1.1, U.N. Doc. CEDAW/C/39/D/5/2005 (Aug. 6, 2007).

285. Strong examples in the sex equality setting include *Opuz v. Turkey*, App. No. 33401/02, Eur. Ct. H.R. (2009); and *Lenahan (Gonzales)*, Report No. 80/11.

286. *See* Ertürk, *supra* note 278, at 9; Lee Hasselbacher, *State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, and International Legal Minimums of Protection*, 8 NW. J. INT'L HUM. RTS. 190, 198-200 (2010).

287. The substantive content of each facet of the due diligence standard would vary according to the particular requirements of each context. For instance, the equality needs of children in elementary school calls for different preventive and remedial strategies than those of graduate and professional students.

American Declaration.[288] Since the connection with the government—under Title IX, the Spending Clause—is the basis for the implied right of action, the standard to which the state is held for breaches of the same human right, discrimination, should be the standard to which the school, acting under its aegis, is held.

Some of the few responsive judicial decisions under deliberate indifference converge at points with aspects of the due diligence standard.[289] Considering a school's persistent ineffectual responses to be a failure to act "reasonably in light of known circumstances"[290] is not far from due diligence requirements at that juncture. However, if these standards were closer in practice, most of the cases discussed above would not be possible, and the incidence and prevalence of sexual harassment in schools would not be what it is today.[291]

288. *Lenahan (Gonzales)*, Report No. 80/11 at 5.

289. *See* Nancy Chi Cantalupo, Jessica Lenahan (Gonzales) v. United States *&* *Collective Entity Responsibility for Gender-Based Violence*, 21 AM. U. J. GENDER SOC. POL'Y & L. 231, 286 (2012) (arguing this point well in the Title IX setting).

290. Vance v. Spencer Cty. Pub. Sch. Dist, 231 F.3d 253, 261 (6th Cir. 2000); *see also* Wills v. Brown Univ., 184 F.3d 20, 40-41 (1st Cir. 1999).

291. As one indication, for 2014-2015, the Bureau of Justice Statistics, studying nine colleges, found a prevalence rate for completed sexual assault of undergraduate females, meaning the percentage of women college students who were sexually assaulted, to be 5.6%, ranging by school from 1.7% to 13.2%. Krebs et al., *supra* note 21, at 69, 70 fig.5. The numbers were higher for "nonheterosexual" female students. *Id.* at 79 fig.12. The prevalence of completed sexual assault for male undergraduates was found to be 1.4% to 5.7%, depending on the school, for an average rate of 3.1%. *Id.* at 71, 72 fig.6. Completed sexual assaults for female undergraduate students since entering college ranged from 12% to 38%, for an average of 21%. *Id.* at 73 fig.7. Lifetime rates ranged from 26% to 46%, depending on the school. *Id.* Since entering college, 3.7% to 11.8% of male undergraduates reported completed sexual assaults, for a lifetime rate of 8.4% to 16.3%, depending on the school. *Id.* at 74 fig.8.

When incidents rather than victims are the unit of analysis, producing a victimization rate, "[f]or undergraduate females, the rate of sexual assault victimization ranged from about 85 incidents per 1,000 female students at School 2 to 325 per 1,000 at School 1 . . . . The cross-school average victimization rate for completed sexual assault was 176 per 1,000 undergraduate females. The average victimization incidence rate for sexual battery per 1,000 undergraduate females was 96, and ranged from 34 at School 2 to 221 at School 1. The average victimization incidence rate for rape per 1,000 undergraduate females was 54, and ranged from 28 at School 9 to 110 at School 5." *Id.* at 87. "For male students, the victimization rate ranged from 27 sexual assaults per 1,000 male undergraduates at School 6 to 96 per 1,000 at School 5 . . . . The cross-school average sexual assault victimization rate for males was 53 victimizations per 1,000 undergraduate males. For sexual battery, the victimization rate ranged from 6.8 per 1,000 male undergraduates at School 6 to 45.7 per 1,000 at School 5. The cross-school average sexual battery victimization rate for males was 23.1 per 1,000 undergraduate males. For rape, the victimization rate ranged from 3.8 rapes per 1,000 male undergraduates at School 6 to 19.9 per 1,000 at School 5. The cross-school average rape victimization rate for males was 10.1 per 1,000 undergraduate males." *Id.* at 88.

Due diligence standards as developed in the international human rights setting are by no means foreign to U.S. jurisprudence or to Title IX. Strikingly, the administrative standards devised by OCR to enforce Title IX, which are not controlled by the legal standards set by courts,[292] converge closely at several points with "due diligence." OCR's standards for compliance review, to which it holds educational institutions at least on paper, are far more stringent than those applied by courts. Although some of its standards also require notice, OCR calls for schools to prevent sexual harassment, protect its victims, actively investigate reports, ensure equality in proceedings, and take steps to effectively remedy the sexual harassment as well as prevent its reoccurrence.[293] In its 2001 Guidance, OCR clarified that a recipient's failure to respond promptly and effectively to end severe, persistent, or pervasive harassment, which it knew or should have known about, and to prevent its recurrence, could violate Title IX for purposes of administrative enforcement.[294] Unlike often under the deliberate indifference judicial standard, OCR requires that, upon receiving actual or constructive notice of harassment, the school "should take immediate and appropriate steps to investigate or otherwise determine what occurred,"[295] and that every investigation "must be prompt, thorough, and impartial."[296] It requires the school take "prompt and effective action calculated to end the harassment," eliminate any hostile environment and its effects, and prevent the harassment from recurring.[297] However strong, these regulations require steps toward an outcome, not an outcome.

292. *See* Office for Civil Rights, *supra* note 115, at 3-4.

293. Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights Russlynn Ali*, U.S. DEP'T EDUC. 2 (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [http://perma.cc/46WS-A4WQ] [hereinafter DCL 2011] (outlining schools' Title IX obligations with respect to sexual harassment and other sexual violence); *id.* at 4 ("If a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects."); *id.* at 14 (providing schools should take proactive measures to prevent harassment); *id.* at 10 (specifying school must protect complainant); *id.* at 10-12 (requiring equality in proceedings by preponderance of the evidence, equal opportunity to present witnesses and evidence, and equal opportunity to appeal); *id.* at 15-19 (prescribing remedies including prevention of recurrence).

294. Office for Civil Rights, *supra* note 115, at 11-12.

295. *Id.* at 15 (stating schools should "take immediate and appropriate steps to investigate or otherwise determine what occurred and take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again").

296. *Id.*

297. *Id.* at iii-vii.

Aggressive administrative enforcement of Title IX in the sexual harassment setting by the Obama Administration's Department of Education, responding to increased activism and organizing by student survivors,[298] has challenged sexual harassment in schools on the ground. Together with issuing clarifying guidance,[299] federal authorities have successfully resolved many complaints filed with OCR by aggrieved victims of sexual harassment against their schools.[300] Some of this administrative action has addressed substantive questions, such as the definition of sexual harassment.[301] The principal focus of the guidance, findings of violation, and mandated relief has been evidentiary and procedural, also crucial for sex equality purposes. These administrative developments have spurred some changes in policies and procedures on campuses around the country.[302]

298. *See, e.g.*, KNOW YOUR IX, http://knowyourix.org [http://perma.cc/YT7H-ULJ9]; Watkins, *supra* note 273 ("And the education department has increasingly been willing to hold universities' feet to the fire. In 2014, the department confirmed it was investigating 55 schools. This year, that number has grown to 146.").

299. *See, e.g.*, DCL 2011, *supra* note 293.

300. For resolutions, see *Sex Discrimination Case Resolutions*, U.S. DEP'T EDUC., http://www2.ed.gov/about/offices/list/ocr/frontpage/caseresolutions/sex-cr.html [http://perma.cc/5FST-3EES]. The number of complaints resolved by fiscal year over the past decade, including complaints carried over from prior fiscal years, are: 2006, 47; 2007, 50; 2008, 71; 2009, 59; 2010, 81; 2011, 121; 2012, 140; 2013, 148; 2014, 176; and 2015, 208. As of February 22, 2016, eighty-three were resolved in fiscal year 2016. E-mail from Courtney B. Taylor to author, *supra* note 269.

301. *See, e.g.*, Letter of Findings from Office for Civil Rights, U.S. Dep't of Educ., to Univ. of Mont. 8-9 (May 9, 2013) (on file with author) ("The confusion about when and to whom to report sexual harassment is attributable in part to inconsistent and inadequate definitions of 'sexual harassment' in the University's policies. First, the University's policies conflate the definitions of 'sexual harassment' and 'hostile environment.' Sexual harassment is unwelcome conduct of a sexual nature. When sexual harassment is sufficiently severe or pervasive to deny or limit a student's ability to participate in or benefit from the school's program based on sex, it creates a hostile environment. The University's Sexual Harassment Policy, however, defines 'sexual harassment' as conduct that 'is sufficiently severe or pervasive as to disrupt or undermine a person's ability to participate in or receive the benefits, services, or opportunities of the University, including unreasonably interfering with a person's work or educational performance.' Sexual Harassment Policy 406.5.1. While this limited definition is consistent with a hostile educational environment created by sexual harassment, sexual harassment should be more broadly defined as 'any unwelcome conduct of a sexual nature.' Defining 'sexual harassment' as 'a hostile environment' leaves unclear when students should report unwelcome conduct of a sexual nature and risks having students wait to report to the University until such conduct becomes severe or pervasive or both.").

302. Every resolution letter of a Title IX complaint recounts many changes the school has made pursuant to it. Presumably these are not the only changes made by schools in a regime that relies largely on voluntary compliance. Legislative initiatives by Congress have changed the

By itself, this helpful activity has not proven to be enough. Administrative action as the primary route for enforcement is far from ideal for producing change. The tools realistically at hand for OCR to impose what amount to some due diligence requirements have predictably been insufficient—or perhaps it is a matter of adequate staff funding—to guarantee full implementation, despite energetic efforts of able administrators. The Department of Education has never applied its ultimate sanction, the nuclear option of cutting off federal funds to a school,[303] and the schools know it, although they also know it is possible. (It is worth asking whether cutting off federal funds would deliver sex equality, hence is better as threat than reality, since among other consequences, a cutoff would eliminate federal scholarship funds to low-income students.) Nor is OCR typically sufficiently nimble to provide equal educational opportunities to individual survivors within the time frame needed, its principal focus being systemic.[304] *Gebser* explicitly permitted administrative enforcement to proceed under standards that, if violated, would not result in money damages for survivors.[305] Nor is violation of administrative standards legally actionable in courts. OCR virtually never addresses sanctions against perpetrators, and it is not empowered to require schools to compensate

legal landscape of this issue as well. The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act), which requires schools whose students receive federal financial aid to report annual statistics on crimes on their campuses and to develop prevention programs, has revealed much sexual assault on campuses that was previously obscured and unknown except to its perpetrators and victims. Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, Pub. L. No. 101-542, 104 Stat. 2381 (codified at 20 U.S.C. § 1092(f) (2012)). Federal investigations enforce the provisions, 20 U.S.C. §1092(f)(15) (2012), which can result in fines and compliance orders, *see, e.g.*, *id.* §1092(f)(13). The Campus Sexual Violence Elimination Act, incorporating into statutory law many of the developments pioneered administratively by the Department of Education, amended the Clery Act to require procedures for reporting assault, set standards for those disciplinary procedures, and instituted prevention and awareness programs. *Id.* § 1092(f). But they have not solved the problem of lack of accountability to survivors by their schools.

303. *See supra* note 102 and accompanying text.

304. This case is made in this set of Features. *See* Alyssa Peterson & Olivia Ortiz, *A Better Balance: Providing Survivors of Sexual Violence with "Effective Protection" Against Sex Discrimination Through Title IX Complaints*, 125 YALE L.J. 2132, 2134 (2016) ("While OCR has dramatically improved its efforts to reform structural Title IX compliance across universities . . . it has done relatively little to promote complainants' immediate access to education.").

305. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 288-89 (1998).

individual victims,[306] although sometimes it negotiates compensation for educational costs in individual cases.[307]

Effectively leaving enforcement of Title IX in the hands of OCR, despite its concerted efforts, will never be enough. Apart from the currently deficient legal design—schools know survivors cannot, under the deliberate indifference standard, realistically expect lawyers to bring suit for them, and if they do, cannot expect to win most of the time—government cannot always be everywhere. Not until survivors have realistic access to remedies in their own hands will an equal education be within their grasp.

As a practical matter, Congress could accept the *Gebser* Court's explicit invitation to "speak[] directly on the subject"[308] and amend Title IX to provide a private right of action in United States district courts for equitable relief, compensatory and punitive damages, and reasonable attorneys' fees for all failures to adhere to Title IX. This step would reopen the question of the institutional liability standard, on which Congress could opine or not.[309] With liability no longer implied, Congress would also affirm its intent, as originally found by the Court in *Franklin*, that the private right of action under Title IX includes the availability to victims of money damage remedies for sexual harassment in education as a form of sex discrimination.[310] Such an addition to Title IX's enforcement tools would supplement the administrative threat of withholding federal funds and imposing fines. If the goal is that all educational institutions and programs receiving federal financial assistance prevent sexual harassment and all other forms of sexual violence in education, protect its targets and victims, promptly and effectively investigate all reports, punish

306. Dana Bolger, *Gender-Based Violence Costs: Schools' Financial Obligations Under Title IX*, 125 YALE L.J. 2106, 2123 (2016) ("None of the nearly two hundred student survivors surveyed . . . report[ed] receiving financial reimbursement from their school as the result of an OCR investigation . . . .").

307. Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, Dep't of Educ., to Know Your IX & the U.S. Students Ass'n (Nov. 17, 2014), http://knowyourix.org/letter-from-department-of-education-11-17-2014 [http://perma.cc/PS9P-AAWM].

308. *See Gebser*, 524 U.S. at 292-93 (stating that the Court would apply the knowing deliberate indifference standard "[u]ntil Congress speaks directly on the subject" of school district liability for sexual harassment). The Court stated it came to its conclusion "in the absence of further direction from Congress . . . ." *Id.* at 290.

309. Congresswoman Jackie Speier (D, CA) has proposed related legislation providing for a private right of action under the Clery Act, which would open the door to the adoption of an appropriate liability standard under that statute. HALT Campus Sexual Violence Act, H.R. 2680, 114th Cong. (2015).

310. *See* Franklin v. Gwinnett Cty. Pub. Schs., 503 U.S. 60, 71-72 (1992) (finding a "lack of any legislative intent to abandon the traditional presumption in favor of all available remedies" when Congress enacted Title IX).

perpetrators where and as warranted, and provide effective relief and remedies for all its harms, including transformative relief to prevent recurrence on pain of liability, due diligence is the obvious liability test.

CONCLUSION

The pattern repeatedly encountered by survivors of sexual violation in school is that educational institutions side with sexual abusers and the law sides with the institutions. This bias is not only a product of the cultural norms that value and believe men who sexually violate others and do not value and believe women or men who are sexually violated. The same skew is also built into the logic of the legal accountability doctrine of deliberate indifference. The consequence of male power siding with male power is that women and girls in particular, despite being admitted to and graduating from schools of quality, are deprived of equality in their access to the benefits of that education, the equal benefit of which they are the legally intended recipients. The same is true for all sexually violated students.

The greatest present cost, apart from the shattering results of the ongoing abuse itself, is the silence of those cases not brought for violations never reported or even spoken aloud. This cost begins with the victims, but it does not end there. As the Secretary General of the United Nations put the relation of impunity for sexual violence to gender inequality affecting women and girls as a whole:

> Impunity for violence against women compounds the effects of such violence as a mechanism of male control over women. When the State fails to hold the perpetrators of violence accountable and society explicitly or tacitly condones such violence, impunity not only encourages further abuses, it also gives the message that male violence against women is acceptable or normal. The result of such impunity is not solely the denial of justice to the individual victims/survivors, but also the reinforcement of prevailing gender relations and replication of inequalities that affect other women and girls as well.[311]

This cannot be what Congress intended in providing federal funding for education free from sex discrimination.

Due diligence as interpreted in the international human rights canon places the responsibility for implementing equality where it belongs: on those who

311. U.N. Secretary-General, *In-Depth Study on All Forms of Violence Against Women*, ¶ 368, U.N. Doc. A/61/122/Add.1 (July 6, 2006).

are in institutional control. Due diligence requires that schools promote sex equality by ending impunity for sexual harassment in their own educational environments. Schools are responsible for their communities, empowered with considerable autonomy over them, and accountable for inequality within them. Under this proactive liability concept, rooted in Title IX's plain language,[312] the institutional incentive to address rape cultures and redress sexual assault in schools would be restored and significantly strengthened, shifting power into the hands of the violated. Real and effective action against sexual harassment, including rape, would be realistically required as part of the funding contract between the government, acting for the people, and its educational institutions, placing the obligation to deliver a sex-equal education into the hands of those who have the capacity and the duty to provide it.

312. Further support for this reading of Title IX can be found in Justice Stevens's dissent in *Gebser*: "As Judge Rovner has correctly observed, the use of passive verbs in Title IX, focusing on the victim of the discrimination rather than the particular wrongdoer, gives this statute broader coverage than Title VII." *Gebser*, 524 U.S. 274, 296 (Stevens, J., dissenting).