

NOTES

Deliberate Indifference: How to Fix Title IX Campus Sex-Assault Jurisprudence

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INTRODUCTION

Picturesque and isolated, the falls at Pillsbury Crossing are only ten miles from the heart of Kansas State University. On warm days, students flock south on County Road 177 for two miles before turning off onto Deep Creek Road and winding their way through the Northern Kansas landscape to arrive at the crossing. A limestone ledge creates a natural dam and a placid swimming hole. Ignoring the parking area, most students drive straight into the crossing, parking their Jeeps and Subarus at the edge of the falls while sipping beers, casting lines, or taking advantage of the rope swing hanging from a nearby tree.

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Even amidst this serene tranquility, there was nothing tranquil about April 26, 2014.¹ While attending a fraternity event at Pillsbury Crossing, Sara Weckhorst, a freshman, partook in the alcohol provided by the fraternity and blacked out.² While she was incapacitated, the fraternity's designated driver for the event raped her in his truck as at least a dozen students laughed, watched, and even videotaped the incident. The driver then took Ms. Weckhorst back to the fraternity house, assaulting her once on the short ride there and again back in the fraternity's "sleep room." After he finished, the driver left Ms. Weckhorst "naked and passed out" to join the party raging downstairs.

Ms. Weckhorst's nightmare was far from over. When she awoke from her blackout several hours later, another member of the fraternity was raping her.³ Dazed and confused, Ms. Weckhorst wandered outside to the patio, but her assailant followed her and continued to rape her outside. During the assault, the second member informed Ms. Weckhorst that she had been "penetrated" by another fraternity brother earlier in the day—the first she learned of the initial assault. Ms. Weckhorst began to cry, retrieved her clothes, and went home.

On that April day, a freshman at Kansas State University was assaulted by two Kansas State fraternity members, while attending a Kansas State fraternity event, and in a Kansas State fraternity house. But when Ms. Weckhorst reported the assaults to an investigator in the University's Office of Affirmative Action—the office responsible for enforcing the University's sexual misconduct policy—she was informed that the University "would do nothing about the rapes or the two student-assailants because the rapes occurred off-campus."⁴ When Ms. Weckhorst sought a second opinion from other University officials, the response was the same: because she was assaulted off-campus and at a privately-owned fraternity, the University would not investigate the incidents, let alone take action against her assailants.⁵ It is only about ten miles from Pillsbury Crossing to the heart of Kansas State University, but as far as the University was concerned, it might as well have been 10,000.⁶

1. The facts in this account are allegations drawn from the complaint in *Weckhorst v. Kansas State University*. See Complaint and Jury Demand, *Weckhorst v. Kan. State Univ.*, 241 F. Supp. 3d 1154 (D. Kan. 2017) (No. 16-CV-2255) [hereinafter "Complaint"]. Because the court ultimately considered Ms. Weckhorst's Title IX case on a motion to dismiss, it accepted her allegations as true. See *Weckhorst*, 241 F. Supp. at 1157–58, *appeal filed*, No. 17-3208 (10th Cir. Sept. 26, 2017). This Note does the same. At the outset, however, it is important to note that Ms. Weckhorst did report the assault to the Riley County Police Department, but prosecutors declined to pursue criminal charges against her alleged assailants. See Complaint, *supra*, at 7–8; Mará Rose Williams, *K-State Is Sued by Students who Say the University Refuses to Investigate Alleged Frat House Rapes*, KAN. CITY STAR (Apr. 20, 2016, 7:59 PM), <http://www.kansascity.com/news/local/article72981292.html> [https://perma.cc/ES7W-5BHE].

2. See Complaint, *supra* note 1, at 3.

3. *Id.* at 4.

4. *Weckhorst*, 241 F. Supp. 3d at 1160.

5. *Id.*

6. The University was not entirely without recourse. At her second meeting with University officials, Weckhorst was informed that because the fraternity was on probation, if she filed a report about alcohol at their parties the University could suspend the fraternity. *Id.* Ms. Weckhorst did so, and—proving

At first glance, it seems shocking that the University responded differently to these allegations than it would had the reported assault occurred not inside a privately-owned fraternity but at the dormitory across the street. The University's response is less surprising, however, when considered alongside the outdated legal framework that governs institutional liability for peer-to-peer sexual assault.

In *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, the Supreme Court held that educational institutions are liable under Title IX for peer-to-peer sexual harassment in "certain limited circumstances."⁷ Title IX states that "[n]o person . . . 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."⁸ Originally passed primarily to ensure women did not face discrimination in scholastic admissions or registration,⁹ the statute has become, in recent years, a critical tool in the battle against campus sexual assault. The theory of liability in these cases is that severe sexual assault "deprive[s]" students of access to educational opportunities, and when the school's own actions "effectively 'cause[d]' the discrimination," the school is liable under Title IX.¹⁰

Under *Davis*, a school's liability is not derived from theories of agency or respondeat superior. Rather than holding a school liable for the acts of the assailant, *Davis* makes clear that a university is only liable for damages when its *own* actions are so delinquent as to effectively cause the discrimination.¹¹ To state a claim under *Davis*, a plaintiff must show that the institution (1) had actual knowledge of (2) and was deliberately indifferent to gender-based harassment that is (3) so severe, pervasive, and objectively offensive as to (4) deprive the plaintiff of access to educational opportunities, and that (5) occurred in a context, and at the hands of a harasser, over which the defendant exercised substantial control.¹² In most cases, the dispute is over (1) whether the school exercised substantial control over the context in which the harassment occurred, and (2) whether the

irony is not dead—the University suspended the fraternity for serving alcohol while refusing to investigate the assault. *Id.*

7. 526 U.S. 629, 643 (1999).

8. 20 U.S.C. § 1681(a) (2012).

9. See 118 CONG. REC. 5812 (1972) (statement of Sen. Bayh) ("As the Senator knows, we are dealing with three basically different types of discrimination here[:] . . . discrimination in admission to an institution, discrimination of available services or studies within an institution once students are admitted, and discrimination in employment within an institution . . ."); see also *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526–27 (1982) ("Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted [as Title IX], are an authoritative guide to the statute's construction."); Birch Bayh, *Personal Insights and Experiences Regarding the Passage of Title IX*, 55 CLEV. ST. L. REV. 463, 468 (2007) ("Some schools, a woman could not get into at all. . . . If women had the opportunity to receive higher education on equal footing with men, further opportunities would be theirs for the taking.")

10. *Davis*, 526 U.S. at 642–43, 650 (alteration in original) (quoting *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 291 (1998)).

11. *Id.* at 642–43.

12. See *id.* at 643–45, 650.

school's response was deliberately indifferent.¹³

Although this framework may have made sense within the context of the specific facts presented in *Davis*, it has proven unwieldy in addressing college campus sexual assault—particularly in the temporal disconnect between the “actual knowledge” and “substantial control” prongs. Understandably, courts have been reluctant to require plaintiffs to prove an institution had actual knowledge of an assault before it happened to establish liability.¹⁴ Yet when it comes to substantial control, many courts still look to whether the assaulter's actions occurred within the institution's control, thereby upsetting the Title IX requirement that the institution be liable only for its own actions.¹⁵ The result is that the relevant time period for actual knowledge is post-assault, but for substantial control it is the assault itself.

On one hand, this misapplication of the substantial control inquiry threatens to discriminate against students who, like Ms. Weckhorst, have the compound misfortune of suffering their otherwise actionable assault in an off-campus fraternity instead of an on-campus dormitory. On the other hand, despite the Supreme Court's purported rejection of agency principles in *Davis*, an inquiry that focuses on the assault itself threatens to hold universities accountable not for their own misconduct but rather for the assailant's misconduct.¹⁶ As a result, some commentators have called for a reexamination of whether Title IX is the correct vehicle for processing these complaints.¹⁷

These efforts are misguided. Title IX remains the appropriate avenue through which to gauge university liability for campus sexual assault, but only if courts return to a formalistic application of the *Davis* standard. Schools have a responsibility to ensure women are not deprived of opportunities because of sexual assaults, but their liability should arise only in instances where their own actions are so deficient as to effectively cause—or renew—the discrimination. Furthermore, because the university is not being held liable for the assault itself, the substantial control component of the *Davis* test should be abandoned, at least

13. See, e.g., *Farmer v. Kan. State Univ.*, No. 16-CV-2256, 2017 WL 980460, at *8–10 (D. Kan. Mar. 14, 2017) (explaining the university's defense as being first that the assault did not occur within its substantial control, and second that its response was not deliberately indifferent), *appeal filed*, No. 17-3207 (10th Cir. Sept. 26, 2017).

14. See, e.g., *Roe ex rel. Callahan v. Gustine Unified Sch. Dist.*, 678 F. Supp. 2d 1008, 1030 (E.D. Cal. 2009) (“The case law reveals no requirement that the appropriate district officials observe prior acts of a sexual nature against Plaintiff himself to establish ‘actual knowledge’ under Title IX . . .”).

15. See *infra* notes 75–77 and accompanying text.

16. There is a theory of Title IX liability predicated on having unreasonably exposed students to sexual assault. See, e.g., *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1184–85 (10th Cir. 2007) (predicating liability on whether the “risk of sexual harassment and assault” during recruiting parties was so obvious as to amount to pre-assault deliberate indifference). This theory is discussed in more depth in Part III.

17. See, e.g., Diana Moskovitz, *Why Title IX Has Failed Everyone on Campus Rape*, DEADSPIN (July 7, 2016, 2:58 PM), <http://deadspin.com/why-title-ix-has-failed-everyone-on-campus-rape-1765565925> [<https://perma.cc/JWF9-QSK4>].

insomuch as it focuses on the location of the assault rather than the deprivation of opportunities that ensues in the aftermath of the assault.

Instead, the focus should return to the text of Title IX. A better rule would emphasize the institution's deliberate indifference and hold a school liable under Title IX when (1) it has actual knowledge of a sexual assault against a student, (2) it acts with deliberate indifference in responding or not responding to that report, and (3) its deliberate indifference subjects the student to further discrimination or denies the student educational opportunities. Importantly, under this test, it is not the assault that establishes liability but rather the school's deliberately indifferent *response* to the assault.

This rule would properly hold schools accountable for their own action or inaction. The question is not whether the student was assaulted "on the school's watch"—*Simpson* liability¹⁸ or common law tort remedies are available in those instances—but instead whether the school's own actions in responding to a known assault were so deficient as to subject the student to further discrimination or deny the student educational opportunities. In this inquiry, the focus is not on the location of the assault or perhaps even the identity of the assailant,¹⁹ but rather whether the school responded in a manner that subjected a student to further discrimination.

For example, a school that fails to provide a student with housing or academic accommodations may be liable if that failure forces the student to repeatedly encounter her assailant in a dormitory or classroom. The ultimate discrimination that can be traced to the school—the secondary effects of encountering the assailant—arises regardless of whether the initial assault occurred in a location over which the school exercises substantial control. In Ms. Weckhorst's case, the question should not be whether the school is liable for the assault she suffered at Pillsbury Crossing. Instead, the focus should be whether the school's failure to adequately support Ms. Weckhorst following her report caused her to suffer further discrimination that effectively denied her educational opportunities.

This Note proceeds as follows. Part I details the evolution of Title IX from its inception to its use as a critical tool to combat campus sexual assault. Part II discusses the Court's ruling in *Davis* and explores whether the framework is appropriate for use in instances of campus sexual assault. Part III offers a recommendation for how courts should structure the *Davis* inquiry and concludes with how that inquiry would operate in practice.

18. See *supra* note 16.

19. See *infra* note 114 and accompanying text.

I. “HONEY, YOU CAN’T IGNORE THE BRAIN POWER OF FIFTY-THREE PERCENT OF THE AMERICAN PEOPLE.”²⁰

A. PURPOSE OF TITLE IX

In the landmark Civil Rights Act of 1964, Congress attempted to eliminate public and private discrimination using its power under the Spending and Interstate Commerce Clauses.²¹ Title VI forbids institutions receiving federal funds—including schools—from discriminating on the basis of “race, color, or national origin,”²² and Title VII outlaws employers engaged in interstate commerce from discriminating in the employment context, expanding the list of protected classes to discrimination on the basis of “race, color, religion, sex, or national origin.”²³

The passage of these two landmark prohibitions nonetheless left a gap in the protections they offered women and other nonracial minorities. Although schools could not discriminate against racial minorities, they remained free to discriminate on the basis of sex.²⁴ And, at least in the aggregate, it appears they continued to do so: as of 1970, women accounted for only six percent of law students and eight percent of medical students in the United States.²⁵

In the late 1960s and early 1970s, Birch Bayh, then the junior Senator from Indiana, was working to pass the Equal Rights Amendment (ERA).²⁶ While rallying support for the ERA, however, Bayh realized that “[o]f all the discrimination that women were being subjected to, the discrimination against women and girls in the area of education would have the most far-reaching negative impact.”²⁷ Understanding the difficulty inherent in amending the Constitution, Bayh simultaneously worked to add the language that became known as Title IX to the Higher Education Act. After a few fits and starts, the language was passed as part

20. Bayh, *supra* note 9, at 466. According to Senator Birch Bayh, his leadership on gender equality occurred after years of intense lobbying by his wife, Marvella. *Id.*

21. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

22. 42 U.S.C. § 2000d (2012).

23. *Id.* § 2000e-2(a).

24. See 117 CONG. REC. 30,411 (1971) (statement of Sen. Cook) (“There is a gap in the laws protecting women from biased educational policies . . .”); Emmalena K. Quesada, Note, *Innocent Kiss or Potential Legal Nightmare: Peer Sexual Harassment and the Standard for School Liability Under Title IX*, 83 CORNELL L. REV. 1014, 1021 (1998).

25. 117 CONG. REC. 30,411 (statement of Sen. McGovern). Some commentators have suggested that a reason for this gap was that Congress was concerned with interfering with the “independence” of educational institutions. See Paul C. Sweeney, *Abuse Misuse & Abrogation of the Use of Legislative History: Title IX & Peer Sexual Harassment*, 66 UMKC L. REV. 41, 51 & n.53 (1997).

26. The ERA would eventually pass both houses of Congress in 1972 and was submitted to the states for ratification. Eileen Shanahan, *Equal Rights Amendment is Approved by Congress*, N.Y. TIMES, Mar. 23, 1972, at A1. The amendment had seven years to win ratification from two-thirds of the state legislatures, but eventually fell three states short. See Memorandum for the Administrator of General Services Suggesting Mootness, *Nat’l Org. of Women v. Idaho*, 459 U.S. 809 (1982) (Nos. 81-1282, 81-1283).

27. Bayh, *supra* note 9, at 467–68.

of the Education Amendments of 1972.²⁸

That the primary purpose of Title IX was to ensure women equal access to educational opportunities is clear from both the text and legislative history of the amendment. Subsection (a) of the statute says that “[n]o person . . . 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.”²⁹ Subsection (b), however, clarifies that this prohibition does not require an institution to remedy an *existing* imbalance within a covered program or activity.³⁰ The intent of the legislation, then, was to provide equal opportunities for men and women even where equality of outcomes was difficult to achieve.

This intent is echoed by the bill’s legislative history. In opening debate on the Senate floor in 1971, Bayh repeatedly referenced access and opportunity when discussing the purpose of the legislation. He referred to the legislation as “attempting to establish *access* to higher education as a basic Federal right.”³¹ He encouraged his colleagues to “insure that no American will be denied *access* to higher education because of . . . sex.”³² “How equal is educational *opportunity*,” he asked, “when admissions brochures for a State [U]niversity can explicitly state—as one did recently: ‘Admission of women on the freshman level will be restricted to those who are especially well qualified?’”³³ During one colloquy with a Senator opposed to the legislation, Senator Bayh sought to alleviate fears about the integration of dormitories or football teams by clarifying that all the legislation is “trying to do is provide equal *access* for women and men students to the educational process and the extracurricular activities in a school.”³⁴ Finally, as his amendment was being challenged as nongermane to the Higher Education Act, Senator Bayh pleaded: “Mr. President . . . [t]he bill deals with equal *access* to education.”³⁵

When the bill returned to the floor of the Senate a year later, Senator Bayh closed debate with a clear statement of the evil the bill intended to remedy:

[T]he simple, if unpleasant, truth is that we still do not have in law the essential guarantees of equal opportunity in education for men and women. . . . [This Amendment is] an important first step in the effort to provide for the women of America something that is rightfully theirs—an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those

28. See Pub. L. No. 92-318, §§ 901–907, 86 Stat. 235, 373–75 (codified as amended at 20 U.S.C. §§ 1681–1688 (2012)).

29. 20 U.S.C. § 1681(a) (2012).

30. See *id.* § 1681(b).

31. 117 CONG. REC. 30,403 (1971) (statement of Sen. Bayh) (emphasis added).

32. *Id.* (emphasis added).

33. *Id.* (emphasis added).

34. *Id.* at 30,407 (emphasis added).

35. *Id.* at 30,412 (emphasis added). This challenge ultimately succeeded, and Bayh was forced to return the bill to the floor the following year. See Bayh, *supra* note 9, at 468–69.

skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work.³⁶

The clear purpose of this legislation, then, as commentators and courts have recognized, was to impose “an obligation on educational institutions receiving federal funds to refrain from denying educational opportunities on the basis of sex.”³⁷

B. TITLE IX AND SEXUAL HARASSMENT

In 1972, the proponents of Title IX were primarily concerned with schools denying women opportunities for admission and benefits based principally on outdated notions and pernicious stereotypes.³⁸ Today, although overt discrimination undoubtedly still occurs in some corners, great strides have been made in educational admissions and the provision of benefits.³⁹ That does not mean, however, that women are no longer being denied the benefits of educational opportunities.

According to recent studies, roughly one-in-five women at American undergraduate universities will be the victim of an attempted or completed sexual assault during college.⁴⁰ In January 2017, the Obama Administration issued a report, based on the landmark Campus Climate Survey Validation Study, that highlighted that victimization rates are even greater for female bisexual and transgender students, and that less than ten percent of student victims report the assault to campus authorities.⁴¹

The effects of a campus sexual assault reverberate throughout the academic and cultural setting of a university. Fearful of encountering their assailant, victims tend to avoid classes and retreat socially.⁴² Grades fall, opportunities dwindle, and many victims end up dropping out of school all together.⁴³ According to

36. 118 CONG. REC. 5808 (1972) (statement of Sen. Bayh); *see also* Sweeney, *supra* note 25, at 63–67 (describing the legislative history in the House, which displayed a similar intent).

37. *See e.g.*, *Wills v. Brown Univ.*, 184 F.3d 20, 35–36 (1st Cir. 1999).

38. *See* 118 CONG. REC. 5804 (1972) (statement of Sen. Bayh) (“We are all familiar with the stereotype of women as pretty things who go to college to find a husband But the facts absolutely contradict these myths about the ‘weaker sex’ and it is time to change our operating assumptions.”).

39. For example, in 2011, 46.7% of all students at ABA-accredited law schools were female, compared to just 8.6% in 1970. AM. BAR ASS’N, FIRST YEAR AND TOTAL J.D. ENROLLMENT BY GENDER (2011), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/jd_enrollment_1yr_total_gender.authcheckdam.pdf [<https://perma.cc/2QMA-JN28>].

40. *See, e.g.*, Christopher P. Krebs et al., *College Women’s Experiences with Physically Forced, Alcohol- or Other Drug-Enabled, and Drug-Facilitated Sexual Assault Before and Since Entering College*, 57 J. AM. C. HEALTH 639, 639 (2009).

41. THE WHITE HOUSE, THE SECOND REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT 9–10 (2017), <https://obamawhitehouse.archives.gov/sites/obamawhitehouse.archives.gov/files/images/Documents/1.4.17.VAW%20Event.TF%20Report.PDF> [<https://perma.cc/M93M-FUZG>].

42. *See* CHRISTOPHER KREBS ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, CAMPUS CLIMATE SURVEY VALIDATION STUDY FINAL TECHNICAL REPORT 113–14 (2016), <https://www.bjs.gov/content/pub/pdf/ccsvsfr.pdf> [<https://perma.cc/H5KT-A7VJ>].

43. *See id.* at 114 (reporting that approximately twenty percent of rape victims surveyed indicated that they considered transferring or dropping out of college after the assault); Cari Simon, *On Top of Everything Else, Sexual Assault Hurts the Survivors’ Grades*, WASH. POST (Aug. 6, 2014), <https://www>.

Catherine Lhamon, then-Assistant Secretary for Civil Rights in the Department of Education, being the victim of a sexual assault “profoundly damages students’ physical and emotional well-being in ways that deprive them of the opportunity to obtain an education altogether.”⁴⁴ Her invocation of the deprivation language familiar to Title IX was no accident.

In *Meritor Savings Bank, FSB v. Vinson*, the Supreme Court affirmed that sexual harassment constitutes discrimination “on the basis of sex” for purposes of Title VII.⁴⁵ The Court later confirmed that this classification applies with equal force in the Title IX context,⁴⁶ opening the door for Title IX discrimination claims on the basis of sexual harassment.

II. “LITTLE MARY MAY ATTEND CLASS.”⁴⁷

As intimated by Assistant Secretary Lhamon’s testimony, Title IX has recently become the primary avenue through which the government and private parties hold educational institutions accountable for the deprivation of opportunities caused by peer-to-peer sexual harassment. According to the theory, when a school’s own actions, either in advance of or in response to sexual harassment, are so deficient as to effectively cause the discrimination, the ensuing deprivation is actionable under Title IX.⁴⁸

In *Gebser v. Lago Vista Independent School District*, the Supreme Court held that a school could—in some cases—be liable under Title IX when it was deliberately indifferent to a teacher’s sexual harassment of a student.⁴⁹ In so holding, the Court rejected an agency theory of liability similar to that which applies in the Title VII context.⁵⁰ Instead, the Court held that a funding recipient can only be liable for known instances of harassment—adopting an actual knowledge standard instead of the constructive knowledge standard advanced by the plaintiffs and

washingtonpost.com/posteverything/wp/2014/08/06/after-a-sexual-assault-survivors-gpas-plummet-this-is-a-bigger-problem-than-you-think/?utm_term=.fee9414d3449 [https://perma.cc/W59R-E55X].

44. *Sexual Assault on Campus: Working to Ensure Student Safety: Hearing Before the S. Comm. on Health, Educ., Labor, and Pensions*, 113th Cong. 7 (2014) (statement of Catherine E. Lhamon, Assistant Secretary for Civil Rights, Department of Education), <https://www.help.senate.gov/imo/media/doc/Lhamon.pdf> [https://perma.cc/YGL2-K9LN].

45. 477 U.S. 57, 64 (1986).

46. See, e.g., *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283 (1998).

47. Linda Greenhouse, *The Supreme Court: The Overview; Sex Harassment in Class Is Ruled Schools’ Liability*, N.Y. TIMES (May 25, 1999), <http://www.nytimes.com/1999/05/25/us/supreme-court-overview-sex-harassment-class-ruled-schools-liability.html> [https://nyti.ms/2yZAIr] (“In an unusually direct rejoinder from the bench today, Justice O’Connor concluded her announcement of the decision by addressing the dissenters who, she said, maintained that the ruling would ‘teach little Johnny a perverse lesson in Federalism.’ Rather, she said, the majority believed the decision ‘assures that little Mary may attend class.’”).

48. See *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 642–43 (1999).

49. 524 U.S. at 290. *Gebser* built off the already familiar notions that Title IX contained an implied private right of action, *Cannon v. Univ. of Chi.*, 441 U.S. 677, 717 (1979), and that monetary damages—in addition to injunctive relief—are an available remedy, *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 73 (1992).

50. Compare *Gebser*, 524 U.S. at 285 (rejecting agency theory of liability in Title IX context), with *Meritor Sav. Bank*, 477 U.S. at 72 (adopting agency theory of liability in Title VII context).

the United States as *amicus curiae*.⁵¹ It did so primarily because the express enforcement mechanism contained within Title IX—withdrawal of federal funding—required notice to the institution and determination that “compliance cannot be secured by voluntary means.”⁵² If the express remedy required actual knowledge and an opportunity to correct the discriminatory treatment, reasoned the Court, so, too, should the judicially implied remedy of private damages for teacher-to-student sexual harassment.⁵³

In rejecting a theory of respondeat superior in *Gebser*, the Supreme Court cracked the door to Title IX liability in instances of peer-to-peer sexual harassment. Because the institution’s liability was predicated on a failure to remedy known discrimination rather than a failure to supervise an employee, the status of the discriminator as a teacher, as opposed to a student, appeared meaningless.⁵⁴ It took only one term for the Court to confirm this analogy.

In *Davis*, the Court was presented with the question of whether a school could be liable for damages under Title IX for the sexual harassment of a student at the hands of another student.⁵⁵ The Plaintiff, LaShonda, was a student at an elementary school just outside of Macon, Georgia, and she was repeatedly sexually harassed by a fifth-grade classmate over the course of five months.⁵⁶ LaShonda told her teachers several times about the harassment, but no disciplinary action was ever taken against her assailant. When LaShonda and other girls who were being harassed attempted to speak with the principal, they were told that the teachers had passed their complaints along to the principal and that the principal would contact them if needed.⁵⁷ When LaShonda told her mother about her classmate’s harassment, her mother contacted LaShonda’s classroom teacher, who assured her that the principal had been informed.⁵⁸ This conversation occurred in late January of 1993, but the harassment continued unabated until mid-May, at which point the police were contacted, and the assailant pled guilty to sexual battery.⁵⁹

LaShonda’s mother filed suit on her behalf, seeking injunctive relief and monetary damages under Title IX.⁶⁰ The crux of the complaint alleged that “[t]he deliberate indifference by [the institution] to the unwelcome sexual advances of a

51. *Gebser*, 524 U.S. at 285.

52. *Id.* at 288 (quoting 20 U.S.C. § 1682).

53. *Id.* at 289 (“It would be unsound, we think, for a statute’s *express* system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance while a judicially *implied* system of enforcement permits substantial liability without regard to the recipient’s knowledge or its corrective actions upon receiving notice.”).

54. See Linda Greenhouse, *Court Is Asked Not to Extend Harassment Law in Schools*, N.Y. TIMES (Jan. 13, 1999), <http://www.nytimes.com/1999/01/13/us/court-is-asked-not-to-extend-harassment-law-in-schools.html> [<https://nyti.ms/2yZAvF9>] (describing oral argument in *Davis* and explaining that the definition of liability announced in *Gebser* “appeared comfortably to fit the current case”).

55. 526 U.S. 629, 633 (1999).

56. *Id.* at 633–34.

57. *Id.* at 635.

58. *Id.* at 634.

59. *Id.* at 633–34.

60. *Id.* at 632–33.

student upon LaShonda created an intimidating, hostile, offensive, and abus[ive] school environment in violation of Title IX.”⁶¹ The complaint further represented that the harassment left LaShonda unable to concentrate on her studies and her grades suffered as a result, and her father discovered she had drafted a suicide note.⁶² According to the complaint, “[t]he persistent sexual advances and harassment by the [assailant] upon [LaShonda] interfered with her ability to attend school and perform her studies and activities.”⁶³

Having cracked the door to student-to-student liability in *Gebser*, the Court stepped through it in *Davis*, holding that a school may be liable under Title IX for peer-to-peer harassment in certain circumstances.⁶⁴ Although the theory of liability is the same as that announced in *Gebser*—and both were authored by Justice Sandra Day O’Connor—the majority opinion is replete with limiting language designed to parry the concerns raised by the dissent, authored by Justice Anthony Kennedy.⁶⁵

The result is a standard that applies only in “limited circumstances.”⁶⁶ For a school to be liable under Title IX for instances of peer-to-peer sexual harassment, the following conditions must be met. First, the institution must receive federal funding, thereby falling within the ambit of Title IX.⁶⁷ Second, the school must have *actual* knowledge of the harassment.⁶⁸ As in *Gebser*, the Court rejected a constructive knowledge or even negligence standard.⁶⁹ Third, the harassment must be so “severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”⁷⁰ Fourth, liability is only appropriate when “the [institution] exercises substantial control over both the harasser and the context in which the

61. *Id.* at 636.

62. *Id.* at 634.

63. *Id.* at 636.

64. *Id.* at 633.

65. While the theories may have been the same, Justice Kennedy was joined in dissent by three Justices who—like him—had joined the majority in *Gebser*. *Id.* at 654 (Kennedy, J., dissenting). The dissent’s primary concern seemed to be that the decision will “breed a climate of fear that encourages school administrators to label even the most innocuous of childish conduct sexual harassment.” *Id.* at 681.

66. *Id.* at 642.

67. *Id.* at 646–47.

68. *Id.* at 650.

69. *See id.* at 642. State law negligence claims may also be available for victims of peer-to-peer sexual harassment. *See, e.g.*, Complaint, *supra* note 1, at 26–27 (outlining plaintiff’s negligence claim on theory that Kansas State supervised and controlled the fraternity and therefore owed her a legal duty). *But see* *Weckhorst v. Kan. State Univ.*, 241 F. Supp. 3d 1154, 1180 (D. Kan. 2017), *appeal filed*, No. 17-3208 (10th Cir. Sept. 26, 2017) (dismissing negligence claim on the basis that Kansas State did not owe legal duty to plaintiff in this context).

70. *Davis*, 529 U.S. at 650. This language was added in response to the dissent’s assertion that the Court’s ruling would allow for damages in cases where a child was “teased” or “called . . . offensive names.” *Id.* at 678, 680 (Kennedy, J., dissenting). The majority responds that these claims are “inapposite and misleading.” *Id.* at 652 (majority opinion).

known harassment occurs.”⁷¹

Finally, even if all these elements are met, the school may not be liable for damages unless its “deliberate indifference ‘subject[s]’ its students to harassment.”⁷² The deliberate indifference standard, imported from *Gebser*, does not require a school to “remedy” every instance of harassment; it only requires the school to “respond to known peer harassment in a manner that is not clearly unreasonable.”⁷³ Put together, the *Davis* standard imposes liability when a recipient of federal funding has actual knowledge of severe, pervasive, and objectively offensive harassment, occurring in a context over which—and at the hands of a perpetrator over whom—the recipient exercises substantial control, and its response is deliberately indifferent.

This standard works well when applied to the facts asserted in *Davis*. In that case, a young student was sexually harassed in her classroom over the course of five months while she repeatedly informed her teachers and administrators of the harassment without recourse.⁷⁴ The scenario left little doubt as to whether the school had actual knowledge of the harassment (it did), whether its deliberate indifference subjected the victim to further harassment (it did), and whether the harassment occurred in a context over which the school exercised substantial control (it did). In an elementary school setting, the *Davis* framework appropriately limits liability to egregious instances of institutional indifference while simultaneously ensuring that victims are not deprived of opportunities because of deficient responses to ongoing harassment.

In the university setting, however, the *Davis* framework raises as many questions as it does answers. At the outset, it is unclear how an institution could ever ex ante have actual knowledge of a single-instance of sexual assault. As most courts note, therefore, a school cannot be liable for the assault itself, at least when the assault occurred prior to the university being put on notice as to the harassing behavior.⁷⁵ In theory, then, the focus should shift from the actual assault to whether the school’s response caused the victim to undergo further harassment that is *itself* actionable under Title IX.⁷⁶ Yet, this is not how most courts interpret the substantial control requirement. In that aspect of the inquiry, courts repeatedly require that the assault itself occur in a context over which the institution exercises substantial control.⁷⁷

71. *Id.* at 645.

72. *Id.* at 644–45.

73. *Id.* at 648–49.

74. *See supra* p. 186.

75. *See, e.g.,* Kelly v. Yale Univ., No. 3:01-CV-1591, 2003 WL 1563424, at *4 (D. Conn. Mar. 26, 2003) (“[U]nder *Davis*, Yale cannot be held liable for the assault itself.”).

76. *See id.* (“After Yale received notice of the harassing conduct, it had a duty under Title IX to take some action to prevent the further harassment of [the victim].”); S.S. v. Alexander, 177 P.3d 724, 743 (Wash. Ct. App. 2008) (“In so holding, we emphasize that [the victim] may not recover damages for the rape itself but, rather, may only recover based on injury done to her by actions of the university after she reported the rape.”).

77. *See, e.g.,* Roe v. St. Louis Univ., 746 F.3d 874, 884 (8th Cir. 2014) (“On the facts of this case there was no evidence that the University had control over the student conduct at the off campus

This has the potential to lead to undeniably absurd results. As a clear example, Ms. Weckhorst was not the only young woman who sought to bring a claim against Kansas State University in 2015. In fact, Ms. Weckhorst actually sought to add a second woman, Crystal Stroup, to her complaint because Ms. Stroup alleged an assault at the hands of the same assailant.⁷⁸ In Ms. Weckhorst's case, the court found that Kansas State did have substantial control over both the assault at Pillsbury Crossing and the assault in the off-campus fraternity house,⁷⁹ basing its decision on the status of the fraternity as an appendage of the institution.⁸⁰

In the case of Ms. Stroup, however, the court found that the school did not have substantial control over the context of her harassment because she was assaulted not at a fraternity gathering or off-campus fraternity house, but instead at an off-campus apartment complex "close to the KSU campus."⁸¹ In short, although neither Ms. Weckhorst nor Ms. Stroup were attempting to hold Kansas State liable for the actual assaults themselves, one complaint was allowed to move forward because the assault occurred in a fraternity house whereas the other was dismissed because it occurred in an off-campus apartment.

This discrepancy—wherein the focus is on the assault itself for the substantial control inquiry but on the aftermath of the assault for purposes of actual knowledge—is unmoored from the statutory text. Title IX says that "no [student] shall, on the basis of sex, . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance"⁸² This language, which speaks of subjected to discrimination in the singular tense, is not easily bifurcated into multiple time periods. If the actionable discrimination for the purposes of "actual knowledge" is the school's response, rather than the assault itself, then the context of the assault should have no effect on the Title IX inquiry. The appropriate question, as recognized in *Davis*, is whether the school's deliberately indifferent response to known instances of sexual harassment causes the victim to undergo further harassment.⁸³

party."); *Samuelson v. Or. State Univ.*, 162 F. Supp. 3d 1123, 1132 (D. Or. 2016) ("Ms. Samuelson's rape occurred not on campus, where the OSU might exert some control over the comings and goings of students or guests, but at another off-campus apartment.").

78. *Weckhorst v. Kan. State Univ.*, 241 F. Supp. 3d 1154, 1180–81 (D. Kan. 2017), *appeal filed*, No. 17-3208 (10th Cir. Sept. 26, 2017).

79. *Id.* at 1167–68.

80. *Id.* at 1168.

81. *Id.* at 1181–82. The apartments where the alleged assault of Ms. Stroup occurred are equally as close to campus as the fraternity house in which Ms. Weckhorst was assaulted and much closer to campus than Pillsbury Crossing. *Id.* at 1158–59, 1181.

82. 20 U.S.C. § 1681(a) (2012).

83. *See supra* notes 72–73 and accompanying text.

III. “SHE HID IN HER DORMITORY, STOPPED GOING TO CLASSES, AND HER GRADES SUFFERED DRAMATICALLY.”⁸⁴

Title IX was passed to ensure that women are not deprived of educational opportunities on the basis of their sex.⁸⁵ Today, the primary way in which that deprivation occurs in higher education is through the epidemic of on- and off-campus sexual assaults by members of the university community. Title IX is the appropriate vehicle through which to consider institutional liability in this context, but the way the *Davis* test has evolved has left it unable to consistently and uniformly address single-instance sexual assault in the university setting. It is time for courts and commentators to recognize the inherent contradictions in the modern application of the test and reaffirm what the *Davis* majority originally believed: that a university is only liable under Title IX when its *own* deliberate indifference effectively causes the discrimination.⁸⁶ The focus, for all aspects of the *Davis* test, should not be on the assault itself but rather whether the school’s actions caused further harassment in contexts over which the school exercised substantial control.

Before moving forward, it is important to linger on a line of cases extending *Davis* liability to single instances of sexual assault even when the institution did not have actual notice of the assault itself. In *Simpson v. University of Colorado Boulder*, the Tenth Circuit recognized that the University of Colorado had an “official policy” of wanting to show athletic recruits a “good time,” and this policy “encourage[d] young men to engage in opprobrious acts.”⁸⁷ The court held that a jury could reasonably infer that the official policy’s inadequacies were “so likely to result in [Title IX violations]” that the university was “deliberately indifferent” to the subsequent harassment even though it did not have actual knowledge of the incident itself.⁸⁸ In essence, this theory—which has been adopted by some courts in similar factual scenarios⁸⁹—premises liability on official policies that are so lax as to create an unacceptably high risk of a Title IX violation.

But whereas *Simpson* liability addresses the ex ante deliberate indifference of academic institutions, *Davis* purports to address an institution’s ex post failures. When a student has been sexually harassed by a peer in a classroom, he or she reports the harassment to the proper authorities within the school, those authorities do nothing, and the sexual harassment continues unabated, it can be said that the school’s actions effectively caused the discrimination.⁹⁰ This was the case in *Davis*, and it made sense within that context to hold the institution liable for the

84. Complaint, *supra* note 1, at 8.

85. See *supra* Part I.

86. See *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 642–43 (1999).

87. 500 F.3d 1170, 1173, 1177 (10th Cir. 2007).

88. *Id.* at 1184–85 (alteration in original) (quoting *City of Canton v. Harris*, 489 U.S. 378, 390 (1989)).

89. See, e.g., *Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 477 F.3d 1282, 1296 (11th Cir. 2007). The Supreme Court has not accepted certiorari on a case applying this theory of liability.

90. See *Davis*, 526 U.S. at 633–34, 642–43.

deprivation of opportunities caused by the harassment. For nearly two decades, the *Davis* standard has governed institutional liability for peer-to-peer sexual harassment, but in recent years it has come under enhanced scrutiny, especially as applied to single instances of severe assault in the university setting. First, unlike in *Davis* where the harassment was ongoing, a single instance of severe sexual assault raises questions about the actual knowledge standard. Second, by framing the question as whether schools had substantial control over the *location* of the alleged assault, sexual assaults that occur in practically identical contexts but different places—and that lead to the same deprivation of educational opportunities—are treated quite differently by schools and courts. And this framing is understandable. After all, schools are hesitant to take any steps that would seem to open them to liability for events that occur far from the friendly confines of their carefully crafted campuses.

This Note suggests a new approach that operates largely within the *Davis* framework. It makes explicit, however, what the *Davis* Court thought it had already established: that institutional liability hinges not on the assault itself, but on whether the institutional response is so deliberately indifferent as to compound the effects of the initial assault in ways that deprive the victim of educational opportunities. Rather than the current test in which some courts bounce between a focus on the assault and a focus on the response,⁹¹ courts should hold a school liable under Title IX when (1) it has actual knowledge of a sexual assault against a student, (2) it acts with deliberate indifference in responding or not responding to that report, and (3) its deliberate indifference subjects the student to further discrimination or denies the student educational opportunities. This Part discusses how this inquiry would affect the actual knowledge and substantial control components of the *Davis* test.

The standard discussed in this Note does not disrupt the theory of liability announced in *Simpson*. When a university's negligence rises to the level of constituting deliberate indifference of a strong probability of assault, it is perfectly appropriate for courts to hold the school liable for the assault itself. In short, this Note proposes a bifurcated inquiry in cases of single-instance sexual assault: (1) Did the institution have official policies that were so deliberately indifferent that they created an unacceptably high risk that a student would become a victim of sexual assault? And, if not, (2) was the institution's response to a report of the assault so deliberately indifferent as to subject the student to further harassment? A useful taxonomy for considering these inquiries is to label the former "antecedent liability" and the latter "subsequent liability." This Note only suggests improvements to the subsequent liability inquiry and is not intended to change the standard for antecedent liability as established in *Simpson* and its progeny.⁹²

91. See *S.S. v. Alexander*, 177 P.3d 724, 736–37 (Wash. Ct. App. 2008) (surveying different ways courts have phrased the elements of the *Davis* standard).

92. Another useful way of considering this inquiry is that the institution's deliberate indifference must subject the victim to harassment. That indifference can occur before the assault, such that the assault itself is the further harassment, or it can occur after the assault.

A. ACTUAL KNOWLEDGE

In *Gebser*, the Court explicitly rejected a theory of constructive knowledge, holding that because Title IX's express method of enforcement—removal of federal funding—required notice and an opportunity to remediate, so, too, should the judicial remedy the Court was creating.⁹³ Subsequently, when considering *Davis*, the Court took the actual knowledge standard as a given, holding explicitly that liability extends only to deliberate indifference to *known* harassment.⁹⁴

This standard made sense when applied to the repetitive nature of the harassment in *Davis*, but it has created contradictions as applied to single instances of severe sexual assault, particularly in the university setting. Realistically, a school never has actual knowledge of an assault before it happens, which on the surface seems to suggest that a school can never be liable for a single instance of sexual assault. That is, if the assault were actionable harassment under Title IX yet the school had no knowledge of the assault until afterwards, then under a narrow reading of *Davis*, liability would be foreclosed.

Courts have appropriately rejected such a constrictive interpretation of the *Davis* standard. As the Washington Court of Appeals dryly noted in rejecting a requirement that harassment be ongoing to establish Title IX liability: “In the Title IX context, there is no ‘one free rape’ rule.”⁹⁵ This is the correct analysis. After all, *Davis* made clear that the school board's liability did not hinge on the actions of the assailant but rather on the school's own failure to respond to the discriminatory acts.⁹⁶ The issue is not whether the school had actual notice of an imminent assault yet nevertheless allowed it to happen, it is instead whether the school's actions were deliberately indifferent *once* the school had actual knowledge of alleged harassment.

This should be made explicit. The actual knowledge standard should continue to apply for all the reasons noted by the *Davis* majority,⁹⁷ but it should not be construed to require the school to have actual knowledge of an imminent—or even likely—assault to establish liability.⁹⁸ The focus should be on whether the school's response to a report of assault, one the university therefore has actual knowledge of, is deliberately indifferent, and whether that indifference causes an individual to be, on the basis of sex, “excluded from participation in, be denied the benefits of, or be subjected to discrimination under” any of the school's programs or activities.⁹⁹ To hold otherwise would unmoor the *Davis* test from the statutory language, and either expose institutions to rampant liability in all

93. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287–90 (1998).

94. *Davis*, 526 U.S. at 643.

95. *Alexander*, 177 P.3d at 741.

96. *Davis*, 526 U.S. at 643.

97. See *id.* at 643–44 (identifying the reasons for the actual knowledge standard as including: 1) the rejection of agency principles due to the textual differences between Title IX and Title VII, and 2) that the regulatory scheme for Title IX has long required notice before funding can be restricted.)

98. Antecedent liability, see *supra* Part III, could still apply in this situation.

99. 20 U.S.C. § 1681(a) (2012).

instances of campus sexual assault or provide no recourse for victims whose schools hide behind the “one free rape” rule rejected in *Alexander*.

B. SUBSTANTIAL CONTROL

If courts have been quick to recognize the appropriate inquiry in the actual knowledge setting, they have been less adaptive in their interpretation of *Davis*'s substantial control standard. The assault-centric approach of some courts threatens to subsume the proper inquiry and turn a school's liability into a question of whether an assault occurred on- or off-campus, instead of whether the school subjected a student to discrimination on the basis of sex. Understandably, against this backdrop, schools will react quickly and forcefully to reports of on-campus sexual assault while simultaneously leaving similarly situated off-campus victims vulnerable to further discrimination.¹⁰⁰

The requirement that harassment occur in a context over which the institution exercises substantial control emerges from the statutory language of Title IX. Title IX protects students from being “subjected to discrimination *under* any education program or activity.”¹⁰¹ To cabin the extent of Title IX liability, the majority in *Davis* considered dictionary definitions of “under,” including “in or into a condition of subjection, regulation, or subordination”; “subject to the guidance and instruction of,”¹⁰² and “subject to the authority, direction, or supervision of.”¹⁰³ According to the Court, these definitions limited actionable harassment to that which occurred in a context subject to the school's “substantial control.”¹⁰⁴

This requirement only follows from the text of the statute if the associated inquiry is properly focused. As the Court made explicit in *Davis*, liability does not attach to the institution for the harassment suffered at the hands of the original assailant.¹⁰⁵ Instead, the institution is liable in damages under Title IX “only for its own misconduct.”¹⁰⁶ The Court even went out of its way to correct what it saw as a misperception of its holding in *Gebser*: “[T]he theory in *Gebser* was that the recipient was *directly* liable for its deliberate indifference to discrimination. . . . Liability in that case did not arise because the teacher's actions were treated as those of the funding recipient; the district was directly liable for its *own* failure

100. *See, e.g.,* *Weckhorst v. Kan. State Univ.*, 241 F. Supp. 3d 1154, 1160 (D. Kan. 2017), *appeal filed*, No. 17-3208 (10th Cir. Sept. 26, 2017) (“Ms. McBride explained that KSU would do nothing about the rapes or the two student-assailants because the rapes occurred off-campus.”).

101. 20 U.S.C. §1681(a) (emphasis added).

102. *Davis*, 526 U.S. at 645 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2487 (1st ed. 1961)).

103. *Id.* (quoting THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1543 (1st ed. 1966)).

104. *Id.*

105. *See id.* at 641 (“We disagree with respondents' assertion, however, that petitioner seeks to hold the Board liable for [the assailant's] actions instead of its own. Here, petitioner attempts to hold the Board liable for its *own* decision to remain idle . . .”).

106. *Id.* at 640.

to act.”¹⁰⁷

Taking the *Davis* majority at its word, then, the inquiry is not whether the institution exercised substantial control over the context of the initial harassment, but whether the institution exercised substantial control over the context of the subsequent harassment that occurred because of the school’s deliberate, post-assault indifference. Consider *Weckhorst*. In that case there were two plaintiffs: Ms. Weckhorst, whose assault had continued at an off-campus fraternity house, and a second victim, whose assault occurred at an off-campus apartment building.¹⁰⁸ Both premised their liability on the theory that the institution’s refusal to investigate their claims made an “already hostile educational environment even worse.”¹⁰⁹ Neither employed a theory of antecedent liability by claiming the assault itself was the actionable harassment.¹¹⁰

Yet, at the motion to dismiss stage, the court treated the two claims differently. In Ms. Weckhorst’s case, the court found that because the school exercised substantial control over the fraternity, her complaint could move forward.¹¹¹ In Ms. Stroup’s case, however, the court held that allowing Ms. Weckhorst to amend her complaint to include Ms. Stroup’s allegations would be “futile” because “the alleged sexual assault of Ms. Stroup occurred at a private off-campus apartment, and not in relation to any fraternity event.”¹¹²

The court in *Weckhorst* was not outside the mainstream when it separated these two scenarios. In fact, if anything, the court was more liberal than most in its application of the substantial control requirement because it allowed Ms. Weckhorst’s complaint to survive a motion to dismiss even though her initial assault occurred in a privately-owned fraternity house.¹¹³ Nonetheless, the court’s disparate treatment of these two claims demonstrates the frailty of the Title IX inquiry when courts make the mistake of focusing on the initial assault instead of the subsequent harassment.

To avoid these absurd results, courts should refocus their inquiry on the appropriate discriminatory actions: the school’s. Formalistically, rather than the modern focus on each of the *Davis* test’s individual elements in isolation, courts should instead focus on the alleged discrimination: the deliberate indifference. First, plaintiffs and courts should identify the deliberate indifference. If the indifference occurred before the assault—as in *Simpson*—then the plaintiff can proceed under a theory of antecedent liability where the assault itself is the discriminatory act. If the deliberate indifference occurred after the alleged

107. *Id.* at 645–46 (internal quotations omitted); see also *S.S. v. Alexander*, 177 P.3d 724, 735 (Wash. Ct. App. 2008) (discussing *Davis*).

108. See *Weckhorst v. Kan. State Univ.*, 241 F. Supp. 3d 1154, 1159–60, 1180 (D. Kan. 2017), appeal filed, No. 17-3208 (10th Cir. Sept. 26, 2017).

109. Complaint, *supra* note 1, at 22.

110. See *Weckhorst*, 241 F. Supp. 3d at 1165.

111. *Id.* at 1168.

112. *Id.* at 1182.

113. Compare *id.* at 1168, with *Roe v. St. Louis Univ.*, 746 F.3d 874, 884 (8th Cir. 2014) (holding that university did not have control over off-campus fraternity party at which plaintiff was assaulted).

assault—as in *Weckhorst*—then the plaintiff’s theory is necessarily one of subsequent liability. Importantly, in the latter case, the assault itself is relevant only to establish whether the university’s actions were deliberately indifferent.¹¹⁴ It should have no bearing on the actual knowledge or substantial control components of the *Davis* standard.

Some courts already employ this approach. In *Kelly v. Yale University*, for example, the District of Connecticut properly limited its focus to the on-campus harassment suffered by the plaintiff after she reported the alleged assault to the university.¹¹⁵ The court allowed the victim’s Title IX claim to survive summary judgment on the basis of the further harassment she suffered after reporting her alleged assault to the university.¹¹⁶ In so holding, the court found that “a reasonable jury could conclude that further encounters, of any sort, between a rape victim and her attacker could create an environment sufficiently hostile to deprive the victim of access to educational opportunities provided by a university.”¹¹⁷ The District of Connecticut reaffirmed this focus three years later, holding in *Doe ex rel. Doe v. Derby Board of Education* that “even though the defendant Board could not be liable for the rape of Sally Doe, it could still be liable for deliberate indifference to known post-assault harassment.”¹¹⁸

What would widespread adoption of this focus entail? First and foremost, it would prevent schools from hiding behind a veneer of control when deciding whether to process reports of peer-on-peer sexual harassment.¹¹⁹ Kansas State University and other institutions have argued that if they were liable for off-campus assaults, it would require them to monitor and remediate harassment “at every party spot in rural Riley County, Panama City Beach, or Cancun.”¹²⁰ “Universities do not have worldwide jurisdiction for every sexual assault,” Kansas State argued, and “[i]t is unreasonable and unrealistic to suggest that K-State can monitor, let alone regulate, unsanctioned activities” outside their

114. Whether a university’s response is deliberately indifferent may depend on the severity of the initial assault and notice to the institution.

115. No. 3:01-CV-1591, 2003 WL 1563424, at *3–4 (D. Conn. Mar. 26, 2003).

116. *Id.* at *4.

117. *Id.* at *3.

118. 451 F. Supp. 2d 438, 444 (D. Conn. 2006) (internal citation omitted).

119. *Cf. Weckhorst v. Kan. State Univ.*, 241 F. Supp. 3d 1154, 1160 (D. Kan. 2017), *appeal filed*, No. 17-3208 (10th Cir. Sept. 26, 2017); *Policy Prohibiting Discrimination, Harassment, Sexual Violence, Domestic and Dating Violence, and Stalking, and Procedure for Reviewing Complaints*, KAN. ST. U., <http://www.k-state.edu/policies/ppm/3000/3010.html> [<https://perma.cc/2M6A-F3T3>] (last updated Sept. 7, 2017) (“Conduct that occurs off campus and outside the context of University-sponsored programs and activities is covered by this Policy only to the extent such conduct relates to discrimination, harassment, domestic violence, dating violence, stalking, or retaliation that is alleged to have occurred on-campus or in the context of a University-sponsored program or activity.”). That Kansas State’s newly updated policy still reads thusly after the district court’s decision allowing Ms. Weckhorst’s complaint to proceed speaks to the persistence of the on-campus/off-campus dichotomy engendered by *Davis*.

120. Reply Brief in Support of Defendant’s Motion to Dismiss for Failure to State a Claim at 11, *Weckhorst v. Kan. State Univ.*, 241 F. Supp. 3d 1154 (D. Kan. 2017) (No. 16-CV-2255).

substantial control.¹²¹

This slippery slope—from the fraternity house, to the off-campus apartment, to Pillsbury Crossing, to Mexico—misses the point of Title IX liability. Kansas State is correct that it cannot be expected to monitor and prevent every sexual assault wherever it may occur. And as a result, schools should not be liable under Title IX for assaults committed by members of their community. However, schools can—and under Title IX are required to—ensure that the aftereffects of those assaults, fomented by the deliberate indifference of the institution, do not create a substantially hostile environment on campus that “deprive[s] the victim of access to educational opportunities.”¹²² Although the steps a school would be required to take would depend on the individual circumstances of the assault, the victim, and the assailant, steps such as providing counseling services and academic or housing accommodations could clear the bar for deliberate indifference.

A focus on the university’s actions eliminates absurd results in the treatment of victims and protects universities from being held liable for the actions of sexual assailants. By properly cabining the inquiry, courts can ensure that the focus of the complaint, the plaintiff, and the jury is on whether the school acted with deliberate indifference to the plaintiff’s report of sexual assault, not whether the assault itself was severe, pervasive, and objectively offensive.

That is not to say the assault is irrelevant to a Title IX case under a theory of subsequent liability. It is, after all, the assault that creates a duty to remediate the on-campus hostile environment that deprives the plaintiff of educational opportunities under Title IX. The more severe the assault, the greater the institution’s responsibility to ensure that the assault does not deprive the victim of access to university programs or activities. What qualifies as deliberate indifference in responding to an alleged rape should be different than what qualifies in responding to verbal harassment, for example.

But that transfers the focus of the assault to the proper part of the *Davis* inquiry: deliberate indifference. In the nearly two decades since *Davis* was announced, much litigation has risen or fallen on ancillary disputes over location, knowledge, and control.¹²³ Title IX prevents an institution from discriminating against a student on the basis of sex; to use language familiar to *Davis*, Title IX prevents an institution from acting with deliberate indifference in response to known instances of peer-to-peer sexual assault. The deliberate indifference is the statutory violation and should be the crux of any Title IX inquiry.

Refocusing Title IX sexual harassment litigation on deliberate indifference creates a more equitable process for victims and provides stability for institutions

121. *Id.* Although Kansas State may actually be concerned primarily with assaults in Florida and Mexico, its policy also excludes from investigation assaults occurring in off-campus housing that, according to the U.S. News & World Report, houses over three-quarters of Kansas State students. *See Kansas State University*, U.S. NEWS & WORLD REP., <https://www.usnews.com/best-colleges/ksu-1928/student-life>.

122. *See Kelly*, 2003 WL 1563424, at *3.

123. *See supra* Part II.

looking to manage liability. More importantly, it recovers a connection to the statutory text and purpose, recapturing Title IX's birthright as a statute designed to ensure institutions do not deprive women of educational opportunities on the basis of sex. When a school receives a report of peer-to-peer sexual assault, *regardless of the location of the assault*, it has a duty to ensure that the assault does not interfere with its students' ability to pursue the range of opportunities provided by the institution.¹²⁴ That does not mean it must respond in a particular way or take steps that expose it to statutory or constitutional claims on behalf of the alleged assailants.¹²⁵ It does mean, however, that the school must not act clearly unreasonably in responding to the report, thereby impeding the victim's ability to participate in educational opportunities.¹²⁶

CONCLUSION

When Sara Weckhorst reported her assault to Kansas State University, the school hid behind a policy drafted in response to judicial interpretations of the substantial control requirement to justify its refusal to investigate the allegations. What happened to Ms. Weckhorst next was as predictable as it is depressing:

The sexual harassment Sara suffered from this hostile environment was so severe, pervasive, and objectively offensive that it effectively deprived Sara her access to educational opportunities and benefits, including forcing Sara to hide in her dormitory to avoid the student-assailants, causing her to be absent from class, . . . negatively impacting her grades, forcing her to drop her math class, causing her to lose the "Purple and White" scholarship awarded to her

124. This Note takes no position on the question of whether the assailant must also be a student for a university to be liable under Title IX. On one hand, it is possible for the aftereffects of any sexual assault to deprive a student of educational opportunities. On the other, the school's ability to remediate the situation is dramatically reduced when the alleged assailant is not a member of the school community. *See Samuelson v. Or. State Univ.*, 162 F. Supp. 3d 1123, 1132 (D. Or. 2016) (holding university not liable in part because alleged assailant was not a student). It may be that the proper moment to consider the identity of the assailant is in asking whether the institution acted with deliberate indifference.

125. *Cf. Doe v. Columbia Univ.*, 831 F.3d 46, 56 (2d Cir. 2016) (allowing male student's Title IX complaint to survive motion to dismiss on theory that his discipline—imposed in response to a complaint of sexual assault—was the product of "pro-female, anti-male bias").

126. *See Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 648 (1999) (equating deliberate indifference standard with actions that are "clearly unreasonable in light of the known circumstances"). In 2011, the Obama Administration took the position that Title IX required schools to process complaints of peer-to-peer sexual harassment "in accordance with its established procedures" regardless where the harassment occurred. U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter on Sexual Violence (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/ZZYA-DGB6>]. In September 2017, however, the Trump Administration rescinded the Obama-era guidance and issued an updated guidance document while announcing an intention to engage in rulemaking. U.S. Dep't of Educ., Office for Civil Rights, Q&A on Campus Sexual Misconduct (Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> [<https://perma.cc/3Y4K-KJCK>]. The new guidance indicates that "a university does not have a duty under Title IX to address an incident of alleged harassment where the incident occurs off-campus and does not involve a program or activity of the [funding] recipient." *Id.* at 1 n.3. It goes on to say, however, that "[s]chools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities," *id.*, so it is unclear how this guidance will be used in practice.

by K-State and forcing her to start [] paying tuition, leaving her in fear of encountering the student-assailants on campus, . . . and causing her severe psychological distress.¹²⁷

This is exactly the type of scenario a modern application of Title IX should prevent, yet too many courts still focus on the assault itself rather than the subsequent deprivation, putting victims and schools at the mercy of a formalistic inquiry far detached from the statutory text.

Title IX holds a university liable when its own actions deprive a student of educational opportunities on the basis of sex. In cases of peer-to-peer sexual harassment—at least under a theory of subsequent liability—the university should not be held accountable for the actions of its students. Nor, however, should it be able to escape liability because the harassment happened to occur in off-campus housing instead of the university-owned dormitory next door. Instead, a university is liable under Title IX when its deliberately indifferent response to allegations of sexual assault is the cause of discrimination that deprives a student of educational or programmatic opportunities—no matter if the initial assault occurs in Panama City, Cancun, or the previously idyllic tranquility of Pillsbury Crossing.

127. Complaint, *supra* note 1, at 23–24.