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School Liability for Peer Sexual Harassment After
Davis: Shifting From Intent to Causation in Discrimination Law

Deborah L. Brake*

INTRODUCTION

In Davis v. Monroe County Board of Education, the U.S. Supreme Court ruled for the first time that federally-funded schools discriminate on the basis of sex when they respond with deliberate indifference to known sexual harassment by students in their education programs. The ruling built upon the Court's prior decision in Gebser v. Lago Vista Independent School District, in which the Court rejected agency principles as a basis for school liability when a teacher sexually harasses a student, and instead based liability on the school district's own actions once it had notice of the harassment. Both decisions interpreted Title IX of the Education Amendments of 1972, a federal statute that prohibits discrimination on the basis of sex in education programs and activities that receive federal funds.

One of the most interesting and potentially significant aspects of the Supreme Court's decision in Davis is the Court's analysis of why a

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3. 20 U.S.C. § 1681(a) (2000). Specifically, Title IX provides that: "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...." Id. Congress clarified the broad scope of the statute in 1988, by enacting the Civil Rights Restoration Act, which rejected the Supreme Court's program-specific interpretation of Title IX and instead codified its understanding that all school programs and activities must comply with Title IX if any of its parts receive federal funds. 20 U.S.C. § 1687 (2000); see also Deborah Brake & Elizabeth Catlin, The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics, 3 DUKE J. GENDER L. & POLICY 51, 59-60 (1996) (discussing the history and effect of the Civil Rights Restoration Act).
school's inaction in the face of sexual harassment by students should be treated as discrimination by the school. Why is it discrimination on the part of the school when students are the ones engaging in the harassment? In other contexts, the Court has been reluctant to hold institutions responsible for enabling or reinforcing discrimination that is more directly perpetrated by others. Yet inDavis, the Court held that schools are liable for damages under Title IX whenever they have actual notice of sexual harassment by students and respond with deliberate indifference. At the same time, the Court emphasized that schools are liable for damages under Title IX only when the school itself has engaged in intentional discrimination. Thus, the Court took the view that school inaction in response to known sexual harassment is a species of intentional sex discrimination by the school, without regard to the actual intentions of school officials. In so ruling, the Court rejected alternative liability standards that would have required schools either to engage in differential treatment or to act with a discriminatory animus in such cases. This aspect ofDavis deserves further attention, as it provides a valuable opportunity for rethinking the meaning of discrimination more generally.

This essay seeks to explain theDavis case as an interpretation of discrimination that notably and correctly focuses on how institutions cause sex-based harm, rather than on whether officials within those institutions act with a discriminatory intent. In the process, I discuss what appears to be the implicit theory of discrimination underlying theDavis decision: that schools cause the discrimination by exacerbating the harm that results from sexual harassment by students. I then explore the significance of the deliberate indifference requirement in this context, concluding that the standard, for all its flaws, is distinct from and superior to a search for discriminatory intent. The final section offers a brief analysis of whatDavis could mean for discrimination law more broadly if courts seriously

4. See discussion infra Section III.
5. 526 U.S. at 650.
6. See id. at 640-42.
7. Because the Court has permitted damages under Title IX only for intentional discrimination, as opposed to disparate impact discrimination, the Court's decision to allow the plaintiff's claim to go forward inDavis was necessarily a determination that the school's actions amounted to intentional discrimination and not simply disparate impact discrimination. SeeFranklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 76 (1992) (permitting damages claims under Title IX in actions for intentional discrimination); cf.Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 597-98 (1983) (ruling that Title VI does not support a damages action for disparate impact discrimination, but suggesting that damages would be available for intentional discrimination).
8. This essay is in large part an elaboration of an argument presented in a previous article on sexual harassment and anti-gay harassment in schools. See Deborah Brake, The Cruelest of the Gender Police: Student-to-Student Sexual Harassment and Anti-Gay Peer Harassment Under Title IX, 1 GEO. J. GENDER & L. 37 (1999) [hereinafter Gender Police]. That article also presented a "gender policing" theory for why peer sexual harassment itself occurs on the basis of sex under Title IX—an issue not further considered here.
applied the insights embedded in the *Davis* case.

I. DISCRIMINATION AS CAUSATION OF SEX-BASED HARM AND THE REJECTION OF A DISCRIMINATORY INTENT REQUIREMENT

The *Davis* Court adopted a broad understanding of discrimination, one focused not on intent but causation, and a broad view of causation at that. The discrimination principle that the Court settled upon was not inevitable, nor was it the only interpretation before the Court. Three alternative standards had emerged in the lower courts for determining school liability in peer harassment cases prior to *Davis*, each of which was rejected by the majority in *Davis*.

One alternative, adopted by some lower courts, treated peer harassment as a harm perpetrated solely by students, for whose actions schools are not legally responsible. Under this approach, school liability was governed exclusively by agency principles, and since student-harassers do not act as agents of the school, schools were not liable for peer sexual harassment. The *Davis* Court easily rejected this analysis, explaining that the claim seeks to hold schools accountable for their own action (and inaction) in response to harassment by students, not for the conduct of other students. The *Davis* Court’s approach finds strong support in scholarly criticism and analysis of the Court’s state action case law. Commentators have long argued that the state action doctrine should not insulate the state from scrutiny for the action (or inaction) that it has taken and that the state always “acts” at some level, even if merely to enforce the background rules that shape private conduct. Rather than ending the analysis after

9. See, e.g., *Davis* v. Monroe County Bd. of Educ., 120 F.3d 1390, 1395 (11th Cir. 1997) (en banc) (characterizing the plaintiff’s claim as “seeking direct liability of the Board for the wrongdoing of a student”), rev’d and remanded, 526 U.S. 629 (1999); Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1010, 1016 n.9 (5th Cir. 1996) (responding negatively to the question, “whether the recipient of federal education funds can be found liable for sex discrimination when the perpetrator is a party other than the grant recipient or its agents”); Garza v. Galena Park Indep. Sch. Dist., 914 F. Supp. 1437 (S.D. Tex. 1994) (dismissing Title IX peer harassment claim because the harasser was a student and not a school employee); see also *Morse* v. Regents of the Univ. of Colo., 154 F.3d 1124 (10th Cir. 1998) (reversing the unpublished decision of the lower court that had dismissed a peer sexual harassment claim on the grounds that the harassing student was not an agent of the university).

10. 526 U.S. at 641.

determining that the private party acted independently of the state, the critique continues, courts should analyze and evaluate the state’s actions (or failure to act) under the relevant anti-discrimination principle. By applying Title IX to the actions that the school took or failed to take, the Davis Court essentially followed this approach. Once it resolved the objection that peer sexual harassment claims would hold schools responsible for the actions of others, the Court next considered whether the school’s own conduct in response to harassment by students constituted discrimination under Title IX.

In answering this question, the Court rejected two alternative interpretations of discrimination that were narrower than the one the Court settled upon in Davis. One approach that some lower courts had adopted prior to Davis required plaintiffs to prove that the school itself treated male and female harassment victims differently in order to establish that the school’s response to peer sexual harassment violated Title IX. The most prominent example of this type of reasoning is found in the Fifth Circuit’s decision in Rowinsky v. Bryan Independent School District, which held that a school discriminates on the basis of sex by ignoring a student’s complaint of peer sexual harassment only if it would have responded more favorably to a harassment victim of the other sex. Under this standard, if a school treats all sexual harassment victims alike or if there were no comparison group of similarly situated persons of the other sex (perhaps because no males had complained of sexual harassment), the plaintiff would not succeed in a Title IX claim against the school. Thus, a school that ignored sexual harassment complaints across the board, regardless of the sex of the complainant, would not be liable for discrimination under Title IX.

The Davis Court rejected such a constricted comparative approach. Instead, the Court found that a school discriminates on the basis of sex when it knowingly decides “to remain idle in the face of known student-on-student harassment,” regardless of whether it would treat harassment victims of the other sex more or less favorably. The Davis Court’s disagreement with Rowinsky’s narrow interpretation of discrimination is

12. See, e.g., Black, supra note 11, at 109. For example, Shelley v. Kramer, 334 U.S. 1 (1948), in which the Court found state action in the state enforcement of private racially restrictive covenants, has been extensively criticized for its tortured effort to find state action in the private covenants, instead of asking whether the state’s enforcement of the private contracts violated equal protection. See, e.g., Strauss, supra note 11, at 966-68 (discussing extensive scholarly criticism of Shelley).

13. 80 F.3d 1006. See also Piwonka v. Tidhaven Indep. Sch. Dist., 961 F. Supp. 169, 171 (S.D. Tx. 1997) (following Rowinsky and dismissing plaintiff’s claim because she failed to allege that the school district treats male and female sexual harassment victims differently); Seamons v. Snow, 84 F.3d 1226, 1235 (10th Cir. 1996) (dismissing male student’s claim that school created a hostile environment by failing to respond adequately to sexually charged locker room attack by other male students because plaintiff failed to allege that the school treated him differently based on sex).

easily explained. The Court has long rejected the notion that discrimination against persons of one group can be cancelled out by discrimination against persons of another group.\(^\text{15}\) If a school discriminates on the basis of sex when it ignores the sexual harassment of female students, the discrimination does not disappear simply because the school also ignores sexual harassment of male students.

The harder question at issue in \textit{Davis} is why school inaction (or insufficient action) in response to the sexual harassment of any student—male or female—discriminates on the basis of sex. In answering this question, the Court rejected yet another approach that had taken root in the lower courts prior to the \textit{Davis} decision, one that grounded the school’s discrimination on school officials’ intent to discriminate on the basis of the student’s sex. Most lower courts prior to the \textit{Davis} decision had required plaintiffs to prove that the school’s inadequate response to the harassment stemmed from a sex-based discriminatory intent.\(^\text{16}\) Some of the more plaintiff-friendly courts that took this approach were willing to presume that an inadequate response to harassment was necessarily motivated by sex bias.\(^\text{17}\) However, even courts that were willing to skimp on proof of discriminatory intent found the theoretical basis for the school’s liability to rest on existence of an intent by school officials to harm students on the basis of their sex.

Thus, at the time the Court decided \textit{Davis}, those lower courts that recognized peer sexual harassment claims under Title IX analyzed the school’s discrimination in terms of its differential treatment of male and female students, either in the way it actually treated harassment victims or in its discriminatory reasons for failing to remedy the harassment. \textit{Davis} implicitly rejected both of these approaches and adopted a different interpretation of why a school discriminates on the basis of sex when it

\(^{15}\) Although the courts have treated such symmetrical treatment as formally equal and non-discriminatory in the past, see, for example, \textit{Plessy v. Ferguson}, 163 U.S. 537 (1896), this approach has long been discredited. \textit{See} Brown v. Board of Educ., 347 U.S. 483 (1954); Loving v. Virginia, 388 U.S. 1 (1967).

\(^{16}\) \textit{See}, e.g., Burrow v. Postville Community Sch. Dist., 929 F. Supp. 1193, 1205 (N.D. Iowa 1996) (Plaintiff must show that “the school district selected a particular course of action in responding to her complaints of sexual harassment at least in part ‘because of her sex.’”); Franks v. Kentucky Sch. for the Deaf, 956 F. Supp. 741, 748-49 (E.D. Ky. 1996) (Plaintiff must show school intended to discriminate against her because of her sex, but such intent may be inferred from the school’s inadequate response where it knew or should have known of the harassment.); \textit{cf. Oona, R.-S. v. McCaffrey}, 143 F.3d 473, 477 (1998) (“[N]either the employers under Title VII, nor the school officials under Title IX, are vicariously liable for the actions of others. Rather, they are liable for their own discriminatory actions in failing to remedy a known hostile environment.”).

\(^{17}\) \textit{See}, e.g., Doe v. University of Ill., 138 F.3d 653, 663 (7th Cir. 1998) (stating that a school’s refusal to take prompt and appropriate action in response to known sexual harassment “is presumably, perhaps even necessarily, a manifestation of intentional sex discrimination. After all, what other good reason could there possibly be for refusing even to make meaningful investigation of such complaints . . . ?”).
chooses to ignore peer sexual harassment.

As a starting point, the Court agreed with the school district and the court below that the school itself must discriminate on the basis of sex in order to be liable in a damages action for peer sexual harassment under Title IX. To decide whether the school "discriminates" in such cases, the Court turned to the language of Title IX, framing the question in terms of whether a school that ignores or responds inadequately to peer sexual harassment "subject[s] [persons] to discrimination under" its 'programs or activities.' The Court concluded that a school subjects students to discrimination when it is deliberately indifferent to peer sexual harassment that "take[s] place in a context subject to the school district's control," and the school has authority to take remedial action. Thus, schools face damages liability "for 'subject[ing]' their students to discrimination where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority." Notably, the Court's language is the language of causation, not intent or motive. In the words of the Court, in order for a school's deliberate indifference to "subject" students to discrimination, it "must, at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it." Yet, despite the Court's repeated reference to the importance of causation, it stops short of explaining how school inaction "effectively 'cause[s]'" the discrimination when the immediate perpetrators are students rather than school officials. In one sense, a school's failure to stop any activity may be said to "cause" the resulting harm; were it not for the school's failure to stop the offending action, the resulting harm would not have occurred. The key question in *Davis* is how school inaction "causes" the harm of the harassment, aside from simply failing to stop its occurrence.

Although the Court did not explain its reasoning with respect to the

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18. The Court found this requirement applicable to both government enforcement actions and private actions because of the statute's focus on the actions of recipients of federal funds. See *Davis*, 526 U.S. at 640-41. However, while the requirement that the school itself must discriminate applies to private lawsuits for injunctive relief and government enforcement actions, as well as to private actions for damages, the Court's deliberate indifference standard, which is discussed below, applies only to private actions for damages.

19. *Id.* at 641 (quoting Title IX).

20. *Id.* at 645.

21. *Id.* at 645-46.

22. *Id.* at 645 (quoting dictionary definitions that define the word "subject" as "to cause to undergo the action of something specified; expose" or "to make liable or vulnerable; lay open; expose" and "to cause to undergo or submit to: make submit to a particular action or effect: EXPOSE"). The Court did not appear to interpret the terms "subjecting students to discrimination" differently from "discrimination" itself; thus, the Court's reasoning defines "discrimination" as much as it defines the "subject[ion]" of someone to discrimination. *Id.* at 643 ("whether viewed as 'discrimination' or 'subjecting' students to discrimination . . .").

23. *Id.* at 642-43.
causation issue, its conclusion that the school’s response “causes” the discriminatory harm finds substantial support in the reality of peer sexual harassment. When a school reacts indifferently to sexual harassment by students, despite notice of the harassment, the school “effectively ‘cause[s]’” the discrimination in two ways: (1) it intensifies the harm inflicted on harassment victims and (2) increases the likelihood that the frequency and severity of the harassment will escalate.24

Perhaps even more so in schools than in the workplace, the failure to intervene in response to sexual harassment compounds the harm inflicted by the initial harassment.25 Because students perceive the adult world as more powerful than their own and view school officials as influential over student affairs, the failure to intervene is seen as approval, rather than a neutral lack of discipline or a simple failure to control the environment.26 The lack of response to harassment occurs in an environment where student conduct and activities are highly regulated, making the school’s failure to punish the harasser all the more conspicuous. The school’s failure to act is particularly harmful when, as is often the case, it is accompanied by messages of blaming the victim, trivializing the conduct or dismissing the harassment as “normal.”27 Students who have experienced peer sexual

24. Id.
25. See, e.g., NAN STEIN ET AL., SECRETS IN PUBLIC: SEXUAL HARASSMENT IN OUR SCHOOLS 15 (Center for Research on Women at Wellesley College and NOW Legal Defense Fund, March 1993) [hereinafter SECRETS IN PUBLIC] (“In too many cases, the school’s ‘evaded curriculum’ teaches young women to suffer harassment and abuse privately. They learn that speaking up will not result in their being heard or believed and that if they insist on pursuing matters, they will be on their own.”); cf. Martha Chamallas, Writing About Sexual Harassment: A Guide to the Literature, 4 UCLA WOMEN’S L.J. 37, 47-78 (1993) (discussing literature explaining the harms to sexual harassment victims in the workplace when they find their credibility challenged and their injuries minimized).
26. See, e.g., Brief of Amici Curiae NOW-Legal Defense and Education Fund et al., at 15, Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999) (No. 97-843) (“Students recognize that adults often witness episodes of sexual harassment, and expect adults to see and feel these violations as they do. Yet, many students (particularly the girls) cannot get confirmation of their experiences from school personnel because most of those adults do not name it ‘sexual harassment’ and do nothing to stop it.”) (quoting NAN STEIN, INCIDENCE OF SEXUAL HARASSMENT AND SEXUAL VIOLENCE IN K-12 SCHOOLS 35 (Hamilton Fish Nat’l Inst. on School and Community Violence 1998)); see also Leading Cases, Title IX—School District Liability for Student-on-Student Sexual Harassment, 113 HARV. L. REV. 368, 376 n.63 (1999) [hereinafter Leading Cases] (stating that, “[t]he harm of the harassment . . . is compounded by the school’s failure to respond seriously to student-on-student sexual harassment,” and citing research showing that “such inaction officially sanctions the discrimination in the eyes of the victim and teaches the victim not to speak up”); cf. Deborah Hellman, The Expressive Dimension of Equal Protection, 85 MINN. L. REV. 1, (2000) (arguing that the expressive content of government action, rather than the subjective intent of the actor, should be the defining consideration in evaluating potential violations of the Equal Protection Clause).
27. See, e.g., Doe v. University of Ill., 138 F.3d 653, 655 (7th Cir. 1998) (complaint alleged that “some administrators suggested to Doe that she herself was to blame for the harassment, and that it was she who ought to adjust her behavior in order to make it stop,” and that one administrator in particular “told Doe and two of her friends to start acting like
harassment first-hand often speak of how the reactions of school officials affected them as much, if not more, than the harassment itself.\textsuperscript{28} The effects of school actions that ignore, trivialize or condone the harassment comprise a "secondary injury" to harassment victims in addition to the impact of the harassment itself.\textsuperscript{29} In this way, school indifference to sexual harassment, and the lack of a serious response to it, enhances and intensifies the harm of the harassment itself.\textsuperscript{30}

In addition to inflicting additional harm on harassment victims, school inaction also \textit{causes} the discrimination in another way: it invites escalation of the harassment and emboldens the harasser.\textsuperscript{31} For example, in the \textit{Davis} case, the frequency and nature of the harassment escalated over a five-month period after the school failed to take remedial action to stop it. Had the school reacted swiftly to convey to the harasser that his conduct was unacceptable, in all likelihood the harassment at issue in the \textit{Davis} case

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'normal' females and scolded them for making allegations of harassment that might injure some of the male students' futures"; \textit{Davis}, 526 U.S. at 635 (complaint alleged that when plaintiff reported sexual harassment to the principal, he asked "why she was the only one complaining"); Doe v. Londonderry Sch. Dist., 970 F. Supp. 64, 69, 75 (D. N.H. 1997) (plaintiff felt "betrayed by the Londonderry Jr. High School administrators and the Londonderry School District," where superintendent responded to her complaints with the attitude that "boys will be boys"); \textit{cf.} CATHARINE A. MACKINNON, \textit{SEXUAL HARASSMENT OF WORKING WOMEN} 52 (1979) ("Trivialization of sexual harassment has been a major means through which its invisibility has been enforced.").

\textsuperscript{28.} See Brake, \textit{Gender Police}, supra note 8, at 56-57.

\textsuperscript{29.} Sumi K. Cho, \textit{Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzi Wong}, 1 J. GENDER RACE \& JUST. 177, 179 n.12, 201-208 (1997) (discussing "secondary injuries" to discrimination victims when their complaints are met with intimidation, discouragement and disbelief by their institutions); \textit{see also} MICHELLE A. PALUDI \& RICHARD R. BARICKMAN, \textit{ACADEMIC AND WORKPLACE SEXUAL HARASSMENT} 50 (1991) (discussing the tendency of educational institutions to trivialize sexual harassment as "personal relation issues outside the control of the institution and unrelated to its own powers and prerogatives"); S. Riger, \textit{Gender Dilemmas in Sexual Harassment Policies and Procedures}, 46 AM. PSYCHOLOGIST 497-505 (describing how university reporting procedures for sexual harassment can stigmatize harassment victims and reinforce their position of powerlessness); Nan Stein, \textit{Sexual Harassment in School: The Public Performance of Gendered Violence}, 65 HARV. EDUC. REV. 145, 148 (1995) ("Girls, and sometimes boys who are the targets of sexual harassment find that where they report sexual harassment or assault, the events are trivialized, and they, the targets, are simultaneously demeaned and/or interrogated. This lack of intervention is de facto sanctioning the students who sexually harass, and essentially encouraging a continued pattern of violence in relationships, additionally conveying a message to those not directly involved that engaging in such behavior is acceptable.").

\textsuperscript{30.} The harm from school inaction may also spill over to other students not directly targeted by the harassment, thus exacerbating a sexually hostile environment generally.

\textsuperscript{31.} The connection between the propensity to harass and the institution's response to harassment is supported by the organizational model of sexual harassment, which views sexual harassment as the result of an organization's vertical hierarchy, authority structure and climate. \textit{See generally} B.W. DZIECH \& L. WEINER, \textit{THE LECHEROUS PROFESSOR: SEXUAL HARASSMENT ON CAMPUS} (1984) (contending that "sexual harassment is a by-product of an organization's climate, hierarchy, and authority relations including diffused institutional authority, as well as a lack of accountability and mutual respect for professional autonomy").
would have ended rather than escalated. Instead, the school's failure to act supported the harasser in his course of conduct.\textsuperscript{32} When school officials look the other way in the presence of peer sexual harassment, harassers learn that their actions are "normal" and within the bounds of acceptable behavior.\textsuperscript{33} This lesson is not confined to harassers. School inaction is perceived as condonation by harassment victims, other perpetrators and persons who witness or hear about the harassment.\textsuperscript{34} The net effect can be to foster a school environment where peer sexual harassment is an expected norm of student interaction.

The harms of school inaction—the secondary harm to victims and the encouragement to harassers—occur regardless of whether the school acted out of a discriminatory intent or animus.\textsuperscript{35} The \textit{Davis} Court's holding implicitly recognizes the importance of the interconnection between school inaction and the harms of peer harassment and holds schools accountable for the harms that they inflict on students when they remain deliberately indifferent to known peer sexual harassment in their programs.\textsuperscript{36}

\section*{II. THE DELIBERATE INDIFFERENCE REQUIREMENT AND ITS ROLE IN THE DISCRIMINATION ANALYSIS}

The above discussion contends that the \textit{Davis} Court interpreted discrimination to include institutional conduct that causes students to be subjected to discrimination on the basis of their sex, regardless of the intentions of officials within that institution. In addition, the Court applied a very broad standard of causation in this context, holding that schools cause the discrimination by exacerbating the harm of sexual harassment inflicted by persons within the institution's control. Yet, after \textit{Davis},

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\item Cf. Valerie E. Lee et al., \textit{The Culture of Sexual Harassment in Secondary Schools}, 33 \textit{Am. Educ. Res. J.} 383 (1996) (contending that peer sexual harassment is best explained by the school culture surrounding sexual harassment, rather than by individuals or society at large).
\item See \textit{SECRETS IN PUBLIC}, \textit{supra} note 25, at 15 ("At the same time, and as a result of the same [school] silence, boys in school often receive tacit permission to intimidate, harass and assault girls. Indeed, if school authorities do not intervene and challenge the boys who sexually harass others, the school may be encouraging a continued pattern of violence in relationships."); see also Lee et al., \textit{supra} note 32, at 406 ("Students experience more harassment, and more severe forms of it, in schools where they describe harassment as a serious problem.").
\item Cf. Doe v. Petaluma City Sch. Dist., 949 F. Supp. 1415, 1427 (N.D. Cal. 1996) ("In addition to the curriculum, students learn about many different aspects of human life and interaction from school. The type of environment that is tolerated or encouraged by or at a school can therefore send a particularly strong signal to, and serve as an influential lesson for, its students.").
\item Cf. \textit{Mackinnon}, \textit{supra} note 27, at 39-40 ("Whatever they mean, people who do not take sexual harassment seriously are an arm of the people who do it.").
\end{enumerate}
important questions remain as to the scope and application of this principle. One important question is how, if at all, the deliberate indifference requirement affects the analysis of why the school’s response to the harassment discriminates on the basis of sex.

A. THE RELATIONSHIP BETWEEN DELIBERATE INDIFFERENCE AND DISCRIMINATORY INTENT

At first glance, the meaning of the term “deliberate indifference” is difficult to discern, as is the role of deliberate indifference as a legal standard in deciding the significance of an actor’s intentions. The word “indifference” is typically used to signify a lack of any intention, suggesting that a legal standard premised on deliberate indifference does not require any particular intent by the actor whose actions are under review. At the same time, however, the word “deliberate” suggests a specific state of mind, an intent or conscious desire to do something. Used together, this odd combination seems like a contradiction in terms: an intentional absence of intent.

Focusing on the word “deliberate” in isolation has the potential to create confusion as to the role of intent in the discrimination analysis. If deliberate indifference were interpreted to denote malice or animus, it could reassert discriminatory intent into the determination of school liability for peer sexual harassment under Title IX. Such an interpretation would be inconsistent with the causation-based approach elaborated above. However, properly understood, the deliberate indifference requirement is fully consistent with the above interpretation of Davis, which emphasizes the school’s role in exacerbating the harm of sexual harassment as the basis for school liability in such cases, regardless of whether or not school officials intended to discriminate on the basis of sex.

The history behind the Court’s adoption of the deliberate indifference standard under Title IX, coupled with the Court’s treatment of deliberate indifference in other contexts, support a more modest reading of the requirement—one that does not require any particular intent on the part of school officials. Under this reading, the deliberate indifference standard has both a subjective and an objective component. The subjective component of the standard relates to the actor’s actual knowledge of the sexual harassment. The remaining component of the standard measures the objective adequacy of the school’s response to the harassment. Motivation—including malice, animus and discriminatory intent—should not be part of the test for deliberate indifference.

37. The dictionary definition of “indifference” is “lack of interest or concern.” RANDOM HOUSE UNABRIDGED DICTIONARY (2d Ed. 1993).
38. “Deliberate” is defined in the dictionary as “carefully weighed or considered; intentional.” Id.
1. The Spending Clause Origins of Deliberate Indifference in Title IX and the Requirement That Recipients Have Sufficient Notice for Damages Liability

Although the Court has offered little explicit guidance on the meaning of deliberate indifference under Title IX, the concerns that prompted the Court's adoption of the standard in this context provide some assistance. The Court has indicated that it views Title IX as a statute enacted pursuant to Congress' Article I power under the Spending Clause to place limitations on the use of federal funds. The origins of Title IX's deliberate indifference standard lie in the Court's concern about limiting damages liability under statutes enacted pursuant to the Spending Clause. As the Court restated in Davis, in order to hold a recipient of federal funds liable for damages under a Spending Clause statute, the recipient must have sufficient notice that it may be liable for violating the Act. Yet, while the Court has frequently articulated a notice requirement in claims to recover damages for violations of Spending Clause statutes, it has not been completely clear about the type of notice required. The Court has often conflated two types of notice: (1) notice of what the law requires and (2) notice of what has occurred within the recipient-institution.

At times, the Court seems to suggest that the notice requirement signifies the clarity with which Congress must specify the contours of the proscribed conduct. For example, in Davis, the Court emphasized that Congress must "speak with a clear voice" when it regulates under the Spending Clause because "[t]here can... be no knowing acceptance [of the terms of the putative contract] if a State is unaware of the conditions [imposed by the legislation] or is unable to ascertain what is expected of it." In addition, in discussing why the notice requirement for damages liability was met in Davis, the Court observed that Title IX's regulatory scheme "has long provided funding recipients with notice that they may be liable for their failure to respond to the discriminatory acts of certain non-agents," and that common law too "has put states on notice that they may be held responsible under state law for their failure to protect students from the tortious acts of third parties." In statements such as these, the Court's concern seems to be that recipients understand that their actions violate the terms of the statute.

However, in the same breath that the Court speaks of notice in terms of

41. 526 U.S. at 640.
42. Id. at 643-44.
the clarity of the statutory requirements, the Court also discusses notice as it relates to the recipient's awareness of the challenged conduct before being held liable for failing to remedy it. For example, the *Davis* Court cites approvingly to its prior statement in *Gebser* that it would be "unsound" to hold recipients liable for damages based on sexual harassment by a teacher in the absence of officials' knowledge of the harassment, given that Title IX's express enforcement mechanism requires notice of an alleged violation and an opportunity to correct it before being deprived of federal funds.\(^{43}\) This type of notice does not relate to whether a recipient understands its obligations under the statute, but whether it knows what is occurring within its own institution.\(^{44}\)

This latter interpretation of the notice requirement—notice of conduct within the institution as opposed to notice of the specific conduct proscribed by statute—is the most supportable reading of the concerns expressed in the *Davis* opinion. The Court was primarily concerned that recipients have notice of the alleged harassment and an opportunity to remedy it before being held liable in damages. This concern comes across clearly in the *Davis* Court's reliance on *Gebser* to explain its adoption of the deliberate indifference requirement.\(^{45}\) *Gebser* refused to recognize vicarious liability for a teacher's sexual harassment of a student, based on the Court's concern that schools would not have an opportunity to address the secretive actions of teachers before being held liable for damages under Title IX. The *Gebser* Court adopted the deliberate indifference standard as a limitation on school liability despite the absence of any confusion about whether Title IX proscribed teacher-student sexual harassment—an issue resolved by the Court years earlier in *Franklin v. Gwinnett County Public Schools*.\(^{46}\)

Thus, the deliberate indifference requirement is best seen as the Court's

\(^{43}\) Id. at 641 (citing *Gebser*, 524 U.S. at 289). See 20 U.S.C. § 1682 (2000) (authorizing agencies that disburse education funds to enforce Title IX through proceedings to suspend or terminate funds or through "other means authorized by law," and barring the agency from initiating enforcement proceedings until it has "advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means"); 34 C.F.R. § 100.7(d), 100.8(c)-(d) (2000) (requiring resolution of compliance problems by informal means if possible, and requiring notice to the recipient and an opportunity to comply voluntarily prior to enforcement proceedings to terminate federal funds).

\(^{44}\) At some points in the opinion, the Court ambiguously describes the notice requirement of Spending Clause statutes in a way that could refer to either version of notice discussed above. See, e.g., *Davis*, 526 U.S. at 641 (citing Pennhurst's requirement that recipients have "notice of their potential liability").

\(^{45}\) 526 U.S. at 642.

\(^{46}\) 503 U.S. 60, 75 (1992). Because the Court decided *Franklin* in 1992, before the sexual harassment in *Gebser* had occurred, there was no ambiguity about whether the teacher's conduct constituted discrimination on the basis of sex under Title IX. See *Gebser*, 524 U.S. at 278 (reciting facts of the case, including the occurrence of sexual intercourse between the plaintiff and her teacher in January 1993).
response to its desire to provide recipients of federal funds an opportunity to correct the discrimination before being held liable in damages. This concern is satisfied by premising school liability on the school’s prior knowledge of the harassment, followed by an insufficient response by school officials. The “deliberate” component of the deliberate indifference standard is met by the recipient’s knowledge of the harassment—knowledge that informs the school’s decision of how to respond. It does not require that the recipient intended to violate Title IX or intentionally subjected its students to discrimination on the basis of sex.47

Even under the alternative reading of the notice requirement—notice as awareness of the specific conduct prohibited by the statute—the deliberate indifference requirement would not necessitate proof that school officials acted with intent to discriminate or inflict harm on the basis of sex. Rather, it would be satisfied by notice of the terms of the statute, and the recipient’s decision to act in a way that violates those terms. It would not require proof of specific intent to violate the statute or the presence of a sex-based animus or bias.48

Perhaps more important than the Court’s view of the notice requirement embedded in Spending Clause statutes is the Court’s failure to suggest, in discussing the standard for school liability, that the recipient must intend to violate the statute or intend to discriminate on the basis of sex. Applying the liability standard to the case at hand, the Court upheld the complaint against the school district’s motion to dismiss, citing several key facts: the length and severity of the harassment, the effect of the harassment on the plaintiff, the actual notice of the harassment on the part of the school board and the school board’s failure to make “any effort whatsoever either to investigate or to put an end to the harassment.”49

The Court did not discuss or rely on any facts relating to the intentions or motivations underlying the school’s response. The implication of this parsing of the deliberate indifference discussion in Davis is that the only state of mind requirement established in the decision relates to the recipient’s actual knowledge of the underlying conduct.

47. Cf. Horner v. Kentucky High Sch. Athletic Ass’n, 206 F.3d 685, 692-93 (6th Cir. 2000) (discussing the deliberate indifference standard as the Court’s way of enforcing Title IX’s limitation of damages to cases involving intentional discrimination, and stating that “‘intent’ in that context means ‘actual notice’ of the abuse by a third party and a failure to stop it”).

48. Cf. Pederson v. Louisiana State Univ., 2000 U.S. App. LEXIS 12019, at *62-65 (5th Cir. June 1, 2000) (rejecting LSU’s argument that the Davis standard requires that LSU “must have been aware that they were discriminating on the basis of sex” in order to be liable in damages under Title IX, and suggesting that the deliberate indifference standard, though inapplicable to the athletics context, would actually support holding LSU liable for causing the discrimination against female athletes).

49. Davis, 526 U.S. at 653-54.
2. Deliberate Indifference in Other Legal Contexts

This understanding of deliberate indifference is consistent with the development of the deliberate indifference standard in case law decided under 42 U.S.C. section 1983.\textsuperscript{50} In \textit{Gebser}, the Court justified its adoption of a deliberate indifference standard in Title IX sexual harassment cases by noting that the same considerations—namely, that institutions not be held unfairly liable for the independent actions of their employees—motivated the Court to adopt a deliberate indifference standard for municipal liability under section 1983.\textsuperscript{51} The \textit{Gebser} Court cited three cases decided under section 1983 in support of its adoption of a deliberate indifference standard under Title IX.\textsuperscript{52} Each of these three cases interprets deliberate indifference to refer to the municipality’s knowledge of the risks of harm and the objective inadequacy of its subsequent response, rather than to a specific state of mind or an intent to violate the rights of others.

In the first of these, \textit{Board of the County Commissioners of Bryan County v. Brown},\textsuperscript{53} the Court addressed a section 1983 claim against a county based on a county police officer’s alleged use of excessive force in arresting the plaintiff. The plaintiff claimed that the county hired the officer without adequately reviewing the officer’s background, which included various criminal offenses, such as assault and battery. The plaintiff also claimed that the county’s decision to hire the officer established its deliberate indifference to the risk that the officer would use excessive force. As in \textit{Gebser}, the Court explained that the deliberate indifference standard serves as a substitute for respondeat superior liability in order to ensure that municipal liability is based on the municipality’s own actions rather than the tortious acts of its employees.\textsuperscript{54} The Court defined deliberate indifference as the county’s “conscious disregard for the known and obvious consequences of its actions.”\textsuperscript{55} The Court then rejected the plaintiff’s claim on the ground that the single decision to hire the officer did not in itself establish the county’s deliberate indifference to the “known or obvious consequences” of a future excessive use of force.\textsuperscript{56} Instead, the Court found, the failure to screen the officer’s background established, at

\begin{itemize}
\item \textsuperscript{50} The text of 42 U.S.C section 1983 (2000) states, in pertinent part:
Every person who, under the color of any statute, ordinance, regulation, custom or usage of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
\item \textsuperscript{51} 524 U.S. at 291.
\item \textsuperscript{52} \textit{Id}.
\item \textsuperscript{53} 520 U.S. 397 (1997).
\item \textsuperscript{54} \textit{See id}. at 403-404.
\item \textsuperscript{55} \textit{Id}. at 410.
\item \textsuperscript{56} \textit{Id}. at 411.
\end{itemize}
best, a deliberate indifference to the officer's background, noting that "a full screening of an applicant's background might reveal no cause for concern at all."\(^5\) Like the *Davis* Court, the Court in this case grounded the ultimate standard for institutional liability in the language of causation rather than motive.\(^6\) The Court summed up the liability standard by stating, "Congress did not intend to impose liability on a municipality unless deliberate action attributable to the municipality itself is the 'moving force' behind the plaintiff's deprivation of federal rights."\(^7\)

The other two section 1983 cases cited by the *Gebser* Court in support of its deliberate indifference requirement also used deliberate indifference to denote causation in the sense of the obvious consequences of disregarding known risk, rather than animus or an intent to harm. In *City of Canton v. Harris*,\(^6\) the Court held that a municipality may be liable under section 1983 where the failure to train its employees caused the violation of a federal right. In order to establish liability under this theory, the plaintiff must demonstrate that the defendant's failure to train amounts to deliberate indifference to the federal rights of persons who will come into contact with the untrained employees.\(^6\) The Court described the deliberate indifference standard as denoting the obviousness of the risk presented by the municipality's failure to provide additional training and the sufficiency of the existing training program in relation to the duties of the employees.\(^2\)

\(^5\) *Id.* at 410-11. In addition, the Court found that even if the county had discovered the officer's complete background, the officer's record of past misdemeanors would not have made the officer's subsequent use of excessive force "a plainly obvious consequence of the hiring decision." *Id.* at 414.

\(^6\) As with Title IX, the language of causation is traceable to the statute itself. *See id.* at 403 ("In light of the statute's imposition of liability on one who 'subjects [a person], or causes [that person] to be subjected,' to a deprivation of federal rights, we concluded that it 'cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor.'"). Although Justice Souter, in dissent, characterizes section 1983's deliberate indifference requirement as "tantamount to intent," the intent he refers to is not subjective motive or animus, but an intentional action, as opposed to an unknowing or accidental response. *Id.* at 419. Thus, both majority and dissent use the deliberate indifference standard as a way of ensuring that the municipality acted culpably in causing harm before it is held liable for the actions of others. The only subjective state required is the "subjective appreciation" of a substantial and obvious risk of harm from a failure to act. *Id.* at 421.

\(^7\) *Id.* at 400. The type of causation required by the Court to establish municipal liability under section 1983 is more akin to proximate causation, with all its complexity, as opposed to but-for causation, which the Court explicitly rejects. *See id.* at 410 (rejecting but-for causation because "[e]very injury suffered at the hands of a municipal employee can be traced to a hiring decision in a 'but-for' sense: [b]ut for the municipality's decision to hire the employee, the plaintiff would not have suffered the injury"); *see also id.* at 425 (Souter, J., dissenting) (characterizing the Court's discussion of causation as "simply saying that the tortious act must be proximately caused by the policymaker").


\(^1\) *See id.* at 388.

\(^2\) *See id.* at 390; *see also id.* at 396 (O'Connor, J., concurring in part and dissenting in part) ("Where a section 1983 plaintiff can establish that the facts available to city
Similarly, in *Collins v. City of Harker Heights*, the Court elaborated on its decision in *Canton*, ruling that a municipality's failure to train its officers "could be characterized as the cause of the constitutional tort if—and only if—the failure to train amounted to 'deliberate indifference' to the rights" of its inhabitants. In this decision as well, the Court focused on the city's knowledge of the risks of its failure to provide certain training to its officers, and the obviousness of the harm that would result from such failure.

Even in the context of Eighth Amendment claims, where the deliberate indifference standard has been interpreted most stringently, a requirement of animus or malice is not the norm. The Court has applied a more stringent test for deliberate indifference in Eighth Amendment claims than it applies to cases involving a municipality's failure to provide adequate training for city officials. In a typical case alleging municipal liability for failure to train police officers, for example, a plaintiff need only show that the likely harm of not providing the training was obvious, whereas in the Eighth Amendment context, a plaintiff must demonstrate that the defendant actually knew that the harm was likely. In rationalizing the more objective standard for municipal liability in section 1983 cases than for determining Eighth Amendment violations, the Court has recognized the difficulty, if not impossibility, of discerning the subjective mental state of a municipal entity. This same concern would apply equally to school districts, supporting the more objective test for deliberate indifference in the Title IX context.

However, even the more stringent Eighth Amendment test for deliberate indifference generally does not require proof of intent to cause harm. The Court first adopted the deliberate indifference standard in an Eighth Amendment case in *Estelle v. Gamble*, holding that the provision of inadequate medical care in prison may violate the Eighth Amendment. As stated in *Estelle*, deliberate indifference requires "something more than policymakers put them on actual or constructive notice that the particular omission is substantially certain to result in the violation of the constitutional rights of their citizens, the dictates of *Monell* are satisfied. Only then can it be said that the municipality has made 'a deliberate choice to follow a course of action... from among various alternatives.'").

64. A great deal of section 1983 litigation involves Eighth Amendment challenges to prison conditions. *See generally Sheldon H. Nahmod, Civil Rights and Civil Liberties Litigation, The Law of Section 1983, Vol. I § 3:27* (4th ed. 1999). In such cases, the deliberate indifference requirement applies to the threshold determination of the constitutional violation, and is not merely, as in the context of municipal liability, a substitute for respondeat superior liability when municipalities are sued for the tortious conduct of their employees. *See Collins*, 503 U.S. at 124.
67. *See id.*
68. 429 U.S. 97 (1976).
mere negligence, [but] ... something less than acts or omissions for the very purpose of causing harm." The Court permitted the plaintiff to establish deliberate indifference by showing that the defendant "consciously disregarded" a substantial risk of serious harm. The subjective part of the deliberate indifference test in an Eighth Amendment challenge is limited to the defendant's awareness that its actions create a high risk of resulting harm; it does not require proof of animus or malice. Judge Posner explained the standard as follows:

[T]o be guilty of "deliberate indifference" [prison officials] must know they are creating a substantial risk of bodily harm. If they place a prisoner in a cell that has a cobra, but they do not know that there is a cobra there (or even that there is a high probability that there is a cobra there), they are not guilty of deliberate indifference even if they should have known about the risk, that is, even if they were negligent—even grossly negligent or even reckless in the tort sense—in failing to know. But if they know that there is a cobra there or at least that there is a high probability of a cobra there, and do nothing, that is deliberate indifference.

Only in a limited category of Eighth Amendment cases, such as prison security cases involving excessive use of force, have courts taken a more stringent approach to the deliberate indifference test, requiring plaintiffs to demonstrate that the defendant acted with a subjective intent to harm. In such cases, the rationale for the higher standard is that prison officials require more leeway when responding under the pressure of immediate threats to prison security without the luxury of hindsight or a second chance. In this limited context, the test for deliberate indifference asks "whether force was applied in a good faith effort to maintain or restore discipline or 'maliciously and sadistically' in order to cause harm." A malicious motive standard for deliberate indifference has not been expanded to other Eighth Amendment or section 1983 contexts and has been rejected in all but those most extreme situations that require the utmost deference to state officials. It should not influence the meaning of deliberate indifference in Title IX sexual harassment cases. The risks

69. Farmer, 511 U.S. at 835 (citing Estelle v. Gamble, 429 U.S. 97 (1976)).
70. Id. at 839. The requisite knowledge is not that the official knew that the harm would actually occur; only that the harm was likely to occur. This knowledge may be inferred from circumstantial evidence.
71. Billman v. Indiana Dep't of Corrections, 56 F.3d 785, 788 (7th Cir. 1995).
73. See Hudson v. McMillian, 503 U.S. 1, 6 (1992) (stating that, in such cases, plaintiffs must show that the prison officials acted "maliciously and sadistically" to bring about the violation in the prisoner's civil rights).
involved to institutional security in second-guessing school officials’ responses to student-to-student harassment are significantly different in kind and degree than the considerations that underlie the Court’s more stringent requirement in prison security cases.

3. Deliberate Indifference in Title IX Claims in the Lower Courts

Although it is too soon to tell what meaning courts will attribute to deliberate indifference in the Title IX context, to date, post-Gebser/Davis cases have applied a deliberate indifference test consistent with a causation-based standard, and have not used the standard as an opening to inquire into the subjective intent of school officials. Early judicial discussions of how deliberate indifference would apply to sexual harassment claims under Title IX reflect a similar reading of this standard. In a pre-Gebser opinion, for example, Judge Posner first endorsed a deliberate indifference test in a Title IX case involving peer sexual harassment in school as a way of protecting schools from what he viewed as excessive liability under a negligence-based standard. As articulated by Judge Posner, the deliberate indifference standard would require a school to possess actual notice of the harassment, but not discriminatory intent. As Posner explained:

Three types of intentional failure [to act] can be distinguished. The first, which must be very rare, is where the school wants the harassment to occur. The second is where the school deliberately treats harassment differently depending on the sex, race, etc. of the pupils involved. There too, liability is clear. The third and most difficult case is where the school knows about the harassment, knows that it is serious or even dangerous, and could take effective measures at low cost to avert the danger, but decides—consciously, deliberately—to do nothing, although it does not base this decision on an invidious grounds such as race or sex. The school doesn’t mean any harm to the victim of the harassment, but knowing that the harassment is occurring, is serious, etc., it decides to do nothing . . . . This difficult third case is the domain of “deliberate indifference,” which is the equivalent of criminal recklessness.

Posner defined deliberate indifference to encompass a situation where the school had actual notice of harassment that was likely to interfere with the victim’s education, yet, without justification, “deliberately did nothing,

75. See Doe v. University of Ill., 138 F.3d 653 (7th Cir. 1998), vacating and remanding, 526 U.S. 1142 (1999), on remand, 200 F.3d 499 (7th Cir. 1999) (remanding the case to the district court for reconsideration of the plaintiff’s claim under the “‘deliberate indifference’ liability standard established by the Supreme Court in Davis”).

76. Id. at 680 (emphasis added).
or took steps that it knew would be ineffectual, to protect the victim.\textsuperscript{77} As proposed by Judge Posner, deliberate indifference did not refer to an intent to harm or even a discriminatory motive, but a standard of fault somewhat higher than negligence, that is established by a school's actual knowledge of likely harm and its objectively unreasonable decision not to remedy it.

Since the Supreme Court's adoption of the deliberate indifference standard in \textit{Gebser}, which the Court applied to peer sexual harassment one year later in \textit{Davis}, lower courts have interpreted deliberate indifference to denote the objective inadequacy of the school's response to the harassment, rather than a discriminatory bias or motive on the part of school officials.\textsuperscript{78} Courts that have accepted plaintiffs' showing of deliberate indifference have done so based on proof that the school responded inadequately despite actual notice of the harassment, without regard to the presence or absence of discriminatory bias or intent.\textsuperscript{79} For example, in one case involving teacher-student sexual harassment, allegations that the board of education responded to reports of a male teacher's inappropriate sexual contact with male students by merely reprimanding the teacher and transferring him to a different school, rather than removing the teacher from the school environment, sufficed to defeat the school board's motion for summary judgment on the issue of deliberate indifference.\textsuperscript{80} The court's ruling focused on the school board's response to allegations of the teacher's sexual contacts with students in light of its awareness of reports about the teacher's past inappropriate sexual conduct with other students.\textsuperscript{81} The court did not inquire into the motivation underlying the school board's tepid

\textsuperscript{77}Id.

\textsuperscript{78}See, e.g., Flores v. Saulpaugh, 115 F. Supp. 2d 319, 323 (N.D.N.Y. 2000) (stating that deliberate indifference does not mean "that the defendant's action or inaction was taken 'maliciously or sadistically for the very purpose of causing harm,'" but rather that "the [defendant's] response to the harassment[,] or lack thereof[,] is clearly unreasonable in light of the known circumstances." (citations omitted); Haines v. Metropolitan Gov't of Davidson County, 32 F. Supp. 2d 991, 996, 1000 (M.D. Tenn. 1998) (plaintiff's allegation that school district imposed only minimal disciplinary action in response to severe, known student-on-student sexual harassment sufficed to show deliberate indifference); Chontos v. Rhea, 29 F. Supp. 2d 931, 934 (N.D. Ind. 1998) (describing the deliberate indifference standard adopted in \textit{Gebser} as referring to "an official's 'consciously disregard[ing] an obvious risk that [another] would subsequently inflict a particular injury'") (citation omitted).

\textsuperscript{79}See, e.g., Doe v. School Admin. Dist. No. 19, 66 F. Supp. 2d 57, 64 (D. Me. 1999) (finding sufficient evidence to show deliberate indifference where school officials failed to conduct a thorough investigation of allegations of a teacher-student sexual relationship); Massey v. Akron Bd. of Educ., 82 F. Supp. 2d 735, 738-45 (N.D. Ohio 2000) (evidence that school officials took minimal corrective action in response to allegations of teacher-student sexual abuse was sufficient to avoid summary judgment on issue of deliberate indifference); Murrell v. School Dist. No. 1, Denver, Colo., 186 F.3d 1238, 1247 (10th Cir. 1999) (evidence that school officials failed to investigate or take disciplinary action in response to alleged rape of a female student by a male student established deliberate indifference).

\textsuperscript{80}See Massey, 82 F. Supp. 2d at 738-42, 744-45.

\textsuperscript{81}See id.
Even in post-*Gebser* harassment cases where courts have used the language of discriminatory intent, they have not actually engaged in a search for intent or motive. For example, in *Gant v. Wallingford Board of Education*, a race discrimination claim alleging peer racial harassment under 42 U.S.C. sections 1981 and 1983, the court borrowed Title IX's deliberate indifference standard and engaged in a confusing discussion that conflated discriminatory intent with an unreasonable response to harassment. After describing the Supreme Court's adoption of the deliberate indifference standard in *Gebser*, the court concluded, "[t]he ultimate inquiry, of course, is one of discriminatory purpose on the part of the defendant himself." Yet, the court followed this statement with a sentence that refuted the suggestion that the critical issue is one of discriminatory intent:

It is not necessary to prove that the defendant fully appreciated the harmful consequence of the discrimination, because deliberate indifference is not the same as action (or inaction) taken "maliciously or sadistically for the very purpose of causing harm." Instead, deliberate indifference can be found when the defendant's response to known discrimination is clearly unreasonable in light of the known circumstances.

Most importantly, in deciding that the plaintiff failed to establish deliberate indifference, the court examined the reasonableness of the school's response rather than the motivations of school officials. Other courts that have slipped into the language of discriminatory intent also have applied the deliberate indifference standard objectively to gauge the adequacy of the school's response to known harassment.

As this brief survey of the post-*Gebser/Davis* case law suggests, so far, at least, lower courts have applied Title IX's deliberate indifference test in sexual harassment cases consistent with a causation-based approach to discrimination, rather than insisting upon proof of discriminatory intent.

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82. 195 F.3d 134 (2d Cir. 1999).
83. *Id.* at 141.
84. *Id.* (citation omitted).
85. See *id.* at 142-45.
86. See, e.g., *Carroll K. v. Fayette County*, 19 F. Supp. 2d 618, 621-22 (S.D. W. Va. 1998) (responding to the defendant's request to dismiss the complaint for failure "to allege facts showing the [school district] had a discriminatory intent" by pointing out that plaintiffs had alleged facts suggesting that the district knew of the harassment and decided not to intervene, and denying the motion to dismiss); *Morlock v. West Cent. Educ. Dist.*, 46 F. Supp. 2d 892, 908-10 (D. Minn. 1999) (discussing the concern that Title IX not be applied to grade school teasing, lest schools be "charged with discriminatory intent for permitting it to occur without substantial intervention," but upholding the Title IX peer harassment claim based on proof that the school's response was clearly unreasonable, without requiring proof of a discriminatory motive).
4. The Limitations of Deliberate Indifference as a Standard for School Liability

To say that the deliberate indifference standard properly avoids an inquiry into discriminatory intent is not to say that the standard is a plaintiff-friendly test or even, necessarily, the right legal standard. A great deal of commentary after *Davis* has criticized the Court’s ruling as setting too high a bar for plaintiffs seeking to hold schools accountable for their role in facilitating sexual harassment.87 Much of this criticism is justified. The adoption of the deliberate indifference standard in *Davis* marks an unwarranted upward departure from the standard of liability in workplace harassment law, which holds the employer liable for sexual harassment by coworkers if it knew or should have known of the harassment and failed to take prompt and appropriate corrective action.88 In contrast, Title IX holds schools liable for damages only for deliberate indifference in responding to harassment where responsible school officials had actual notice of the harassment.89 It is difficult to understand why, as a matter of policy, discrimination law should set a higher threshold for liability for sexual harassment in schools in comparison with the workplace.90 Indeed,

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88. See, e.g., Henson v. City of Dundee, 682 F.2d 897, 903-905 (11th Cir. 1982) (adopting liability standard holding employers liable when they knew or should have known of the harassment and failed to take “prompt remedial action”); De Grace v. Rumsfeld, 614 F.2d 796, 803 (1st Cir. 1980) (same); Snell v. Suffolk County, 782 F.2d 1094, 1103-1104 (2d Cir. 1986) (same); Sventek v. USAir, Inc., 830 F.2d 552, 557 (4th Cir. 1987) (same); Hall v. Gus Constr. Co., 842 F.2d 1010, 1014-15 (8th Cir. 1988) (same); Ellison v. Brady, 924 F.2d 872, 881 (9th Cir. 1991) (same); see also EEOC Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11(e) (2000) (interpreting Title VII to hold employers liable for failure to take prompt and appropriate corrective action once they knew or should have known of sexual harassment by coworkers).

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

90. See Verna L. Williams & Deborah L. Brake, *When a Kiss Isn’t Just a Kiss: Title IX and Student-to-Student Harassment*, 30 CREIGHTON L. REV. 423, 451-52 (1997) (urging courts to apply Title VII-type standards to peer sexual harassment claims under Title IX so that students will have as much protection from sexual harassment in school as employees have in the workplace).
important considerations point in the opposite direction, since students are less likely to be able to discern the proper channels for communicating notice and to comprehend and report sexual harassment when they experience it. At the same time, the different liability standards provide more of an incentive to employers than to schools to discover and eliminate sexual harassment within their institutions, despite the arguably greater vulnerability of children and young adults to sexual misconduct and harassment.

Moreover, there is a danger that lower courts will apply the actual notice and deliberate indifference standards strictly to further limit the ability of students to recover for the harms that result from a school’s failure to respond to sexual harassment. The level of protection from sexual harassment that Title IX affords students depends to a large extent on how lower courts interpret and apply the actual notice requirement. By manipulating the type of facts necessary to establish actual notice and the persons who may receive notice, lower courts can greatly influence the level of protection available to students under Title IX. For example, in the teacher-student harassment context, some courts have required that actual notice be given to the school superintendent or members of the school board, rather than to the principal or other persons who exercise control over the harasser. A similar ambiguity exists with respect to peer harassment.

91. See Kelly Titus, Students, Beware: Gebser v. Lago Vista Independent School District, 60 LA. L. Rev. 321, 344 (1999) (explaining that younger students have a greater tendency to view more people as authority figures); see, e.g., Joan Schaffner, supra note 87, at 200-201 (discussing policy arguments for providing students with greater protection from sexual harassment in school than employees receive in the workplace); Redmond, supra note 87, at 414-15 (noting that “[m]any students and parents will not always report the incident to the most powerful official at the school,” and that “a child may not have the ability to identify the conduct as harassment.”).

92. See, e.g., Leading Cases, supra note 26, at 375-78 (discussing the disincentive for schools to discover and investigate possible sexual harassment under the Davis standard); Furr, supra note 87, at 1600 (arguing that the Davis standard encourages schools to close lines of communication with teachers so that administrators can argue that school authorities did not have actual notice of the harassment); Titus, supra note 91, at 334 (discussing the incentives that the actual notice standard places on schools to “insulate themselves from knowledge” and keep any grievance procedures under cover); see also Furr, supra note 87, at 1595 (“Children are more easily intimidated by the harassing behavior, . . . may fear isolation from their peers in retaliation, . . . may blame themselves for the harassment.”); Titus, supra note 91, at 338 (“Students are transient and less likely to seek remedial action . . . .”)

93. Compare Soper v. Hoben, 195 F.3d 845, 848-49, 855 (6th Cir. 1999) (notice of prior kissing incident involving male student and a mentally impaired female student did not put school on notice so as to hold school liable for its failure to take precautionary measures to avoid subsequent rape involving same two students), with id. at 857 (Moore, J., dissenting) (arguing that notice of prior incident should have put school on notice of danger of sexual assault and prompted more careful supervision), and Doe v. School Admin. Dist. No. 19, 66 F. Supp. 2d 57, 64 (D. Me. 1999) (notice of rumors of teacher’s sexual relationship with student was sufficient to establish actual notice and trigger school’s duty to investigate).

94. See, e.g., Floyd v. Waiters, 133 F.3d 786, 791 (11th Cir. 1998), aff’d on
sexual harassment. It is not yet clear whether giving a teacher notice of student-on-student sexual harassment satisfies the Davis standard, even if the teacher clearly had authority to discipline the harassing student. Issues surrounding what facts suffice to establish actual notice also influence the scope of Title IX in this area. For example, courts are divided over whether notice of the harasser's sexual misconduct with respect to other students may establish actual notice of the danger posed to students generally. How broadly or narrowly courts interpret the actual notice standard will greatly affect Title IX's effectiveness in providing meaningful redress for sexual harassment of students.

Likewise, the deliberate indifference standard is susceptible to varying interpretations that will affect the ability of students to find meaningful protection from sexual harassment under Title IX. There is a danger that

reconsideration, 171 F.3d 1264 (1999) (requiring school superintendent to have notice of the harassment in teacher-student harassment case in order to support a damages claim against the school); see also Joan E. Schaffner, Davis v. Monroe County Board of Education: The Unresolved Questions, 21 WOMEN'S RTS. L. REP. 79, 88-90 (2000) (criticizing Floyd's overly restrictive application of Title IX's actual notice standard).

95. Compare Morlock v. West Cent. Educ. Dist., 46 F. Supp. 2d 892, 908-909 (D. Minn. 1999) (suggesting that a teacher's actual notice of student-to-student harassment counts as notice to the school), and Murrell v. School Dist. No. 1, Denver, Colo., 186 F.3d 1238, 1248 (10th Cir. 1999) (assuming that a teacher's actual notice of student-to-student harassment places the school on notice of the harassment), with id. at 1252 (Anderson, J., concurring) (questioning whether notice to a teacher can establish actual notice on the part of the school); and Adusumilli v. Illinois Inst. of Tech., No. 97-C8507, 1998 U.S. Dist. LEXIS 14413, at *8-9 (N.D. Ill. Sept. 8, 1998) (treating notice to professor of harassment by students as insufficient to establish notice on the part of the school), aff'd on other grounds, No. 98-3561, 1999 U.S. App. LEXIS 17954 (7th Cir. July 20, 1999). See also Redmond, supra note 87, at 414 (noting that the Davis standard leaves open the question of who must have actual knowledge of the harassment).

96. Cf. Crandell v. New York College of Osteopathic Med., 87 F. Supp. 2d 304, 320 (S.D.N.Y. 2000) (“Clearly, the institution must have actual knowledge of at least some incidents of harassment in order for liability to attach . . . . It is equally evident, however, that actual knowledge of every incident could not possibly be required, as this would burden the plaintiff unfairly in cases of frequent harassment . . . . Suffice it to say . . . that the institution at a minimum must have possessed enough knowledge of the harassment that it reasonably could have responded with remedial measures to address the kind of harassment upon which plaintiff's legal claim is based.”) (citation omitted).

courts will apply the deliberate indifference test so strictly as to exclude from liability all but those most egregious cases where schools take no action whatsoever in the face of the most severe forms of harassment. To date, however, that danger has not materialized. Certainly, in those cases where schools officials have failed to take any action in response to student-on-student harassment, courts have easily found the deliberate indifference standard satisfied. But courts have not limited Title IX damages liability to only those cases involving a complete failure to respond to known sexual harassment. In a number of recent decisions, courts have upheld Title IX claims where schools have taken some remedial steps in response to sexual harassment by students, but the action was clearly inadequate and ineffective. Courts have likewise found deliberate indifference to be satisfied in teacher-student harassment cases where the school imposed some disciplinary action, albeit inadequate.

98. See, e.g., Kinman v. Omaha Pub. Sch. Dist., 171 F.3d 607, 610 (8th Cir. 1999) (stating that deliberate indifference may not be shown where the school district “did not ‘turn a blind eye and do nothing’”) (quoting Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 467 (8th Cir. 1996)).

99. See, e.g.,Murrell, 186 F.3d at 1243-44, 1247-48 (school’s failure to take any corrective action in response to known rape of mentally disabled student by another student, and its efforts to conceal the attack, established deliberate indifference); Ray v. Antioch Unified Sch. Dist., 107 F. Supp. 2d 1165, 1169-72 (N.D. Cal. 2000) (school’s complete failure to respond to notice of student-on-student harassment constituted deliberate indifference); Carroll v. Fayette County Bd. of Educ., 19 F. Supp. 2d 618, 622 (S.D. W. Va. 1998) (allegation that teacher stood by and said, “[h]ere we go again,” while student physically assaulted another student sufficed to allege deliberate indifference); Morse v. Regents of the Univ. of Colo., 154 F.3d 1124, 1128 (10th Cir. 1998) (allegation that plaintiff reported “acts of sexual harassment and gender bias . . . to [University representatives] without any remedial action taken by the University in response to the complaints” sufficiently alleged deliberate indifference).

100. See Montgomery v. Independent Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1086, 1095 (D. Minn. 2000) (inconsistent and ineffective disciplinary measures in response to severe and long-term student-to-student harassment could establish deliberate indifference); Morlock, 46 F. Supp. 2d at 909-10 (finding that the school’s imposition of disciplinary measures for some incidents of student-on-student harassment did not prevent the court from finding deliberate indifference based on the school’s failure to respond to other incidents of such harassment); Haines v. Metropolitan Gov’t of Davidson County, 32 F. Supp. 2d 991, 995-96, 999-1000 (M.D. Tenn. 1998) (finding the allegation that the school imposed an in-school suspension of only one day on the boys who sexually harassed the plaintiff sufficient to establish deliberate indifference).

101. See Massey, 82 F. Supp. 2d at 738-42, 746-47 (finding mere warnings and reprimand of teacher who engaged in inappropriate sexual conduct with students constituted deliberate indifference where school officials failed to remove teacher from school environment); Baynard v. Lawson, 112 F. Supp. 2d 524, 529-30 (E.D. Va. 2000) (mere counseling of teacher in response to lap-sitting incident could establish deliberate indifference); Canty v. Old Rochester Reg’l Sch. Dist., 66 F. Supp. 2d 114, 116-17 (D. Mass. 1999) (school’s responsive action consisting of three letters of reprimand and order restricting contact was plainly inadequate under the circumstances and could establish deliberate indifference); Flores v. Saulpaugh, 115 F. Supp. 2d 319, 323-24 (N.D.N.Y. 2000) (school’s removal of harasser from Dean of Students position after formal complaint was filed did not keep plaintiff from proving deliberate indifference); Chontos, 29 F. Supp. 2d at 936-37 (university’s written reprimand and requirement that the harasser obtain counseling did not
do not mean to suggest that deliberate indifference as applied in Title IX cases is a lenient standard—or even, for that matter, a sufficiently protective standard. In some cases, courts have found deliberate indifference lacking despite evidence that the school’s responsive action was flawed and insufficient to stop the harassment. Nevertheless, the *Davis* standard permits plaintiffs to recover for clearly unreasonable responses to sexual harassment on the part of the school without having to demonstrate that a discriminatory animus or bias motivated the school’s response. In this respect, the *Davis* standard marks a step forward for discrimination law.

**III. DAVIS IN CONTEXT: A MODEST BUT SIGNIFICANT DEPARTURE FROM DISCRIMINATORY INTENT AS THE TOUCHSTONE OF DISCRIMINATION**

As noted above, the *Davis* standard has been justly criticized for setting too high a threshold for school liability, particularly when compared to the more easily satisfied standard for employer liability in sexual harassment cases. Yet, it is important to recognize the significant development in the meaning of discrimination that *Davis* represents. Despite its flaws, the *Davis* test for school liability moves beyond an intent standard that purports to evaluate the subjective motivations underlying an institution’s response to sexual harassment.

In this respect, *Davis* stands in some tension with the line drawn in discrimination law between intentional discrimination and disparate impact—a line often rigidly enforced by requiring strict proof of a discriminatory motivation underlying the challenged action. For example, in *Personnel Administrator of Massachusetts v. Feeney*, the Court rejected an equal protection challenge to a state veterans’ preference law that had a “severe” foreseeable impact on women’s civil service job opportunities because the plaintiff failed to prove that the legislature enacted the statute to preclude finding of deliberate indifference.

102. See Wilson v. Webb, 2000 U.S. App. LEXIS 23585, at *5-12, *18 (6th Cir. Sept. 13, 2000) (ruling that deliberate indifference was not established where the school investigated rumors of teacher-student relationship, even though the investigation was flawed); Doe v. Dallas Indep. Sch. Dist., 220 F.3d 380, 388-89 (5th Cir. 2000) (finding that deliberate indifference was not satisfied where the school investigated allegations of harassment, although the investigator’s finding that harassment did not occur turned out to be false); Wills v. Brown Univ., 184 F.3d 20, 27 (1st Cir. 1999) (finding that the university’s “reasonably firm” reprimand of the harasser was sufficient to avoid liability under Title IX’s deliberate indifference standard, even though it did not stop the harasser from subsequently harassing other students). But see id. at 41-42 (Lipez, J., dissenting) (contending that the university’s failure to respond sufficiently to the same harasser’s subsequent harassment of other students should be considered in establishing deliberate indifference with respect to the university’s response to harassment of plaintiff). See also Canty, 66 F. Supp. 2d at 116 n.3 (noting that the Fifth and Eighth Circuits seem to be applying a more stringent standard of deliberate indifference in Title IX cases than the First Circuit).
"'because of,' not merely 'in spite of,' its adverse effects" upon women. In the absence of proof that the statute was enacted with the "collateral goal of keeping women in a stereotypic and predefined place," the Court upheld the statute even though its negative impact on women's job opportunities was a known and unavoidable consequence of the state's law, and even though this impact was traceable to discrimination that had limited women's opportunities for military service. As in the Feeney case, the discriminatory intent requirement has often worked to protect institutional structures and practices that disadvantage women for want of proof that the decision was motivated by a sex-based animus.

The Davis standard, on the other hand, permits courts to hold schools accountable in damages—damages which are available under Title IX only for intentional discrimination—for their non-responsiveness in the face of known sexual harassment, wholly apart from the school's motivation for its actions. Thus, courts after Davis have easily found that where responsible school officials have actual notice of sexual harassment and take no action, schools are liable under Title IX. Courts would not necessarily reach this conclusion if they had to inquire into whether school officials actually intended to discriminate on the basis of sex.

Yet, looking at the larger body of discrimination law, Davis does not represent a dramatic change in direction or an anomalous departure from a clear intent standard. For several decades, courts have been inconsistent in the weight accorded to an actor's motivation in a discrimination analysis. In some contexts, as in Davis, the Court has not required proof of

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103. 442 U.S. 256, 260, 279 (1979); see also Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (1993) (requiring proof of animus against women to succeed on claim under 42 U.S.C. section 1985(3) for conspiring to deprive women of equal protection of the laws); McCleskey v. Kemp, 481 U.S. 279 (1987) (rejecting equal protection challenge to the application of the death penalty to a black male in Georgia for failure to prove that a racially discriminatory intent motivated the death sentence).

104.  Feeney, 442 U.S. at 278, 279.

105.  See, e.g., Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779, 780, 783 (3d Cir. 1990) (finding that dismissal of pregnant student from National Honor Society on the grounds that she had premarital sex was not necessarily intentional discrimination, even though no males had ever been dismissed from the society for engaging in premarital sex, where plaintiff failed to prove that school officials were motivated by bias against women); Ricketts v. City of Columbia, 36 F.3d 775, 781 (8th Cir. 1994) (concluding that plaintiff's proof that the city made fewer arrests in domestic violence cases did not raise an inference of discriminatory intent against women, even though over ninety percent of the victims of domestic violence were female); Soto v. Carrasquillo, 878 F. Supp. 324, 330 (D.P.R. 1995) (evidence of discriminatory policy towards domestic violence victims did not, as a matter of law, establish the existence of a discriminatory animus against women), aff'd sub nom., Soto v. Flores, 103 F.3d 1056 (1st Cir. 1997); Horner v. Kentucky High Sch. Athletic Ass'n, 206 F.3d 685, 696-97 (6th Cir. 2000) (ruling that plaintiff failed to show that athletic association's policy of not sanctioning girls' fast-pitch softball was motivated by discriminatory animus).


107. See cases cited supra note 79.
discriminatory intent or motive to establish what it has nonetheless termed intentional discrimination. One prominent example is the courts' treatment of sexual harassment cases under Title VII. Since the enactment of the Civil Rights Act of 1991, it has been necessary to categorize Title VII claims in which plaintiffs seek damages as involving either intentional discrimination or disparate impact, since jury trials and damages are available under Title VII only for claims of intentional discrimination.\(^8\) In sorting such claims, courts have quietly but consistently treated sexual harassment, including coworker and third party harassment, as a species of intentional discrimination by the employer.\(^9\) Without much in the way of analysis or explanation, courts have assumed that an employer’s failure to adequately respond to sexual harassment of which it had actual or constructive notice constitutes intentional discrimination *per se.*\(^10\)

\(^8\) 42 U.S.C. § 2000e to 2000e-17 (2000) (adding a damages remedy under Title VII for intentional discrimination). Prior to the Act, when no damages remedy was available for any type of discrimination under Title VII, such categorization was not necessary because Title VII reaches both disparate impact and intentional discrimination. *See generally* Griggs v. Duke Power Co., 401 U.S. 424 (1971).


\(^10\) Statements to this effect first surfaced in sexual harassment cases decided well before the 1991 Act, describing sexual harassment as a species of intentional discrimination or disparate treatment, as opposed to disparate impact. *See, e.g.,* Henson v. City of Dundee, 682 F.2d 897, 903, 905 (11th Cir. 1982) (treating hostile environment harassment as a form of intentional discrimination under Title VII, whether perpetrated by supervisors, coworkers or third parties); Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990) (assuming, in sexual harassment claim brought under Title VII for employer's failure to remedy coworker harassment, that employer intended to discriminate); Bohen v. City of Chicago, 799 F.2d 1180, 1187, 1190 (7th Cir. 1986) (same); Bator v. Hawaii, 39 F.3d 1021, 1029 (9th Cir. 1994) (same); *see also* Erebia v. Chrysler Plastic Prod. Corp., 772 F.2d 1250, 1258 (6th Cir. 1985) ("An employer intends discrimination where he condones racial harassment of employees."); Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1421 (7th Cir. 1986) (assuming that employer's tolerance of racial harassment by coworkers established intentional discrimination by employer in claim brought under 42 U.S.C. section 1981, which requires proof of intentional discrimination).
Certainly, this result could be explained by the rationale discussed above in connection with *Davis* that the employer's response causes the discrimination by exacerbating the harm of the underlying harassment.\(^{111}\) Indeed, a similar relationship between harassers' actions and employers' tolerance of sexual harassment has been documented in the workplace.\(^{112}\) Yet, courts have not explicitly embraced this or any other explanation for why employer inaction in the face of coworker harassment constitutes intentional discrimination by the employer; they have simply asserted it.\(^{113}\) Similarly, in certain other contexts besides sexual harassment, courts have applied a nominal intent requirement that focuses on whether institutions governed by discrimination laws cause or perpetuate discriminatory harm. Professor Daniel Ortiz has pointed out that in areas of law characterized by greater government regulation and less free market control, such as education, voting rights and jury selection, courts have abandoned any actual search for discriminatory intent while retaining in nominal form a discriminatory intent standard.\(^{114}\) Ortiz argues that instead of applying an intent standard in such cases, courts more carefully scrutinize government practices that perpetuate inequality, applying something closer to an effects standard.\(^{115}\) As indicated from the above

\(^{111}\) One court's discussion of employer liability in a case decided before the enactment of the 1991 Civil Rights Act suggested the appropriateness of such a rationale. See *Hansel v. Public Serv. Co. of Colo.*, 778 F. Supp. 1126, 1132, 1133 (D. Colo. 1991) (noting that "[e]mployers send the wrong message to potential harassers when they do not discipline employees for sexual harassment") (quoting *Ellison v. Brady*, 924 F.2d 872, 882 (9th Cir. 1991)). However, the court nevertheless described the employer's misconduct as a form of "employer negligence," as opposed to intentional discrimination. *Id.* at 1132 (quoting *Hirschfield v. New Mexico Corrections Dep't*, 916 F.2d 572, 577 (10th Cir. 1990)).

\(^{112}\) See John B. Pryor & Nora J. Whalen, *A Typology of Sexual Harassment; Characteristics of Harassers and the Social Circumstances Under Which Sexual Harassment Occurs*, in *SEXUAL HARASSMENT; THEORY, RESEARCH, AND TREATMENT* 133-34 (William O'Donohue ed., 1997) (describing research demonstrating that whether local social norms condoned or permitted sexual harassment is an important factor in whether individuals sexually harass).

\(^{113}\) The question of why sexual harassment is a form of intentional discrimination by employers is more easily explained in cases involving harassment by a supervisor, where vicarious liability attaches to the employer. The harasser in a sexual harassment case is presumed to engage in intentional discrimination against the target. See, e.g., *Burlington Indus. v. Ellerth*, 524 U.S. 742, 756 (1998) ("Sexual harassment under Title VII presupposes intentional conduct."). Thus, in supervisor harassment cases, the harasser's discriminatory intent is attributed to the employer under agency principles. See *id.* at 764-65 (adopting standard of vicarious liability for supervisor harassment, with an affirmative defense in cases not involving any tangible adverse employment action). This is not the case in co-worker harassment cases, where the employer's liability is based on its own responsive action rather than an agency relationship with the harasser.


\(^{115}\) See *id.* at 1119-34. Affirmative action could be seen as another context in which the Court does not require proof of intent to establish "intentional discrimination." See Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 288-89 (1997) (using the example of affirmative action to argue that the Court
discussion of courts’ treatment of sexual harassment at work, Ortiz’s theory
does not completely explain the rationale for the absence of a serious intent
requirement in some contexts, since employment falls on the market side of
his schemata. Nevertheless, Ortiz’s analysis demonstrates the existence of
several contexts, in addition to those involving sexual harassment, in which
intent is not strictly required for proof of what is termed intentional
discrimination.

Davis provides yet another opportunity to rethink the use of
discriminatory intent as a dividing line in discrimination law and the use of
a discriminatory motive analysis as the touchstone for discrimination that
occurs on the basis of sex. The Court’s precedents with respect to an intent
requirement are difficult to reconcile. Rather than attempting
reconciliation, the best approach would be to give up the search for intent,
and instead focus on whether the actors and institutions in question have
cauased persons to be disadvantaged on the basis of sex. Sex discrimination
law is ill-suited to a legal standard that focuses on animus against women
or a discriminatory intent. Much sex inequality in American society has
been premised on a paternalistic protectionism rather than an explicit
ideology of inferiority or animus.6

In the real world, sex discrimination
frequently operates through institutional structures that enforce women’s
inequality, rather than as a product of individuals acting out animus against
women. The Court’s definition of intentional discrimination, as reflected
in Feeney, leaves out too much conduct that perpetuates sex inequality,
where proof of a conscious desire to harm women is lacking.

The move away from a discriminatory intent requirement in favor of a
causation-based analysis would better position discrimination law to
address the multi-faceted ways in which institutions perpetuate sex-based
inequality. Courts have been notoriously reluctant to attribute policies and
practices that disadvantage women to a discriminatory intent or motive. In
the context of peer sexual harassment, for example, cases decided prior to
Davis under an intent standard demonstrate the pitfalls of a legal test that
treats discriminatory intent as the linchpin of discrimination. While many
plaintiffs were able to survive motions to dismiss peer sexual harassment
complaints under this standard, in the final analysis, convincing a factfinder
does not actually require proof of a discriminatory motive to establish discrimination). However, the Court’s failure to require proof of intent in the affirmative action context can be explained by the Court’s general rule that proof of intent is not required in discrimination cases challenging facial classifications. See UAW v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991) (ruling that “the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect”). Thus, the intent requirement is only potentially problematic in those cases that do not involve classifications that facially differentiate on the basis of suspect criteria.

that intentional sex bias ultimately motivated a school’s failure to respond to sexual harassment proved to be very difficult.117 The reluctance of courts to attribute school inaction in the face of sexual harassment to a discriminatory intent by school officials parallels the tendency of courts in other contexts to exude a cautious reluctance to brand decision-makers as intentional discriminators.118 As a result, the discriminatory intent standard impedes the ability of discrimination law to remedy institutional actions that disadvantage women on the basis of sex. By replacing the legal inquiry into intent and animus with a more objective search for causation, Davis represents a welcome move toward a more workable and theoretically sound approach to discrimination.119

Thus, the Davis decision is best seen as a modest step toward breaking down a narrow, animus-based approach to discrimination and replacing it with a standard that holds institutions accountable for causing sex-based harm. Equally important, the Court’s understanding of discrimination in Davis sheds light on the related issue of how to judge whether an institution that is subject to discrimination law “caused” discrimination. There is a

117. See, e.g., Bosley v. Kearney R-1 Sch. Dist., 140 F.3d 776, 780 (8th Cir. 1998) (affirming district court ruling setting aside jury verdict for plaintiff because evidence did not support an inference that the school district’s response to plaintiff’s sexual harassment complaint was “impermissibly motivated by [her] sex”); Wright v. Mason City Community Sch. Dist., 940 F. Supp. 1412 (N.D. Iowa 1996) (setting aside jury verdict for plaintiff because she failed to prove that school district intentionally discriminated against her on the basis of sex when it failed to adequately respond to the harassment). Not all Title IX claims even got to juries on the question of the school’s intent under this standard. See, e.g., Linson v. Trustees of Univ. of Pa., No. CIV.A.95-3681, 1996 U.S. Dist. LEXIS 12243, at *12-13 (E.D. Pa. Aug. 21, 1996) (granting defendant’s motion to dismiss Title IX claim on the ground that plaintiff failed to show that the school district’s “‘inaction (or insufficient action) in the face of complaints of student-to-student sexual harassment was a result of an actual intent to discriminate against the student on the basis of sex’”) (quoting Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560, 1576 (N.D. Cal. 1993), rev’d on other grounds, 949 F. Supp. 1415 (N.D. Cal. 1996); Seamons v. Snow, 84 F.3d 1226 (10th Cir. 1996) (affirming defendant’s successful motion to dismiss Title IX claim because plaintiff failed to show that school’s response to harassment reflected an intent to discriminate against him on the basis of sex).

118. See, e.g., St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502 (1993) (upholding district court’s finding of absence of intent to discriminate where supervisor engaged in a personal crusade against black employee and employer gave pretextual reason for terminating the employee that did not withstand scrutiny). See generally Charles R. Lawrence, III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317 (1987) (discussing the limits of a legal approach centered on conscious, intentional discrimination, and analyzing the cultural and psychological forces that hinder consciousness of bias).

sharp division in the law between discrimination by third parties who are not governed by discrimination laws and discrimination by actors and institutions that are barred from discriminating. Courts have often enforced this line in a way that demonstrates their reluctance to find that a covered entity engaged in discrimination by enabling, facilitating, endorsing or giving added effect to discrimination by others.

Perhaps the most famous example of judicial reluctance to hold actors accountable for actions perceived as being more directly caused by others is DeShaney v. Winnebago County Department of Social Services. In the DeShaney case, the Court ruled that the failure of a state social services agency to intervene to prevent the severe abuse of a child by his parent, despite the agency’s notice of the likelihood of such abuse and its assumption of the responsibility to protect children from such abuse, did not deprive the severely injured child of any right guaranteed by the Due Process Clause. The key to the Court’s ruling lay in its determination that the child’s parent, not the state, caused the deprivation of the child’s liberty. Although DeShaney involved a claim for violation of due process rather than discrimination, the same state action requirement applies in equal protection challenges to discrimination under the Fourteenth Amendment. Similarly, statutes prohibiting discrimination apply only to a limited set of actors who have an obligation to comply with the substantive demands of the non-discrimination provision. Thus, the DeShaney “problem” of cutting off causation where a third party initiates the underlying harm is as potentially problematic in discrimination law,

121. See, e.g., Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (holding state’s grant of liquor license to private lodge which refused to serve blacks did not violate the Equal Protection Clause); Personnel Adm’r of Mass. v. Feeney, 442 U.S. 256, 278 (1979) (holding that the state’s veteran’s preference for civil service jobs did not discriminate against women, even though the federal government had limited military service, and thus the category of veterans, by sex; “the [federal government’s] history of discrimination against women in the military is not on trial in this case.”); Soto v. Carrasquillo, 878 F. Supp. 324, 331-32 (D.P.R. 1995) (rejecting plaintiff’s argument that the failure of the police to respond to repeated reports of domestic violence could legally cause the harm because perpetrator’s violence would be an intervening cause); cf. Ellen M. Bublick, Citizen No-Duty Rules: Rape Victims and Comparative Fault, 99 COLUM. L. REV. 1413, 1420 (1999) (discussing the reluctance of courts to hold landlords, hotels and employers civilly liable to rape victims for negligence in facilitating and failing to deter rape, as manifested in comparative fault rules that enable such defendants to raise the defense that the rape victim’s own conduct was the legal cause of the rape).
123. See, e.g., The Civil Rights Cases, 109 U.S. 3 (1883).
constitutional or statutory, as it is under the Due Process Clause.

The most recent example of this problem in a discrimination context is the Supreme Court's recent decision striking down the Violence Against Women Act as an unconstitutional exercise of Congress's power to enforce the Equal Protection Clause of the Fourteenth Amendment. In United States v. Morrison, the Court viewed gender-motivated violence against women as purely private conduct unconnected to the Fourteenth Amendment guarantee of equal protection, despite evidence that state court systems failed to respond to such crimes with sufficient seriousness. In the view of the Court, only the assailant who engages in gender-motivated violence causes discrimination; the state's failure to respond seriously to that violence does not violate the anti-discrimination principle.

The Court's discrimination analysis in Davis provides an alternative to the approach to causation taken in the DeShaney and Morrison decisions. In contrast to these decisions, the Davis Court held schools accountable under Title IX's anti-discrimination principle for effectively condoning the discriminatory conduct of the harasser. Had the Court in Morrison employed an analysis similar to the one it adopted in Davis, it might have recognized the states' role in causing secondary harm to the victims of gender-motivated violence and encouraging the perpetrators of gender-motivated violence, and therefore viewed the statute as intricately connected with the Fourteenth Amendment's anti-discrimination principle. Instead, the Davis insight that institutions may "effectively
cause" discrimination that is, in the first instance, initiated by others was lost on the Court in *Morrison*.

*Davis* highlights the need to take a closer look at causation in cases alleging institutional endorsement of discrimination. The *DeShaney* and *Morrison* approaches are not the only models to work with in litigating and deciding discrimination cases that involve complex questions of whether the actor subject to discrimination law caused the discrimination. Perhaps one key to the Court's broader view of causation in *Davis* is the presence in that case of a discrete institution (a school) with immediate power over the lives of both harassers and harassment victims. State social service agencies and state criminal justice systems may be thought to be more diffuse institutions than schools and workplaces in terms of their power to inflict harm on discrimination victims and empower its perpetrators. Such a distinction may or may not prove useful in trying to extend the *Davis* causation analysis without being thwarted by the *DeShaney* and *Morrison* holdings. Nevertheless, the *Davis* ruling should challenge scholars, litigators and judges to think more deeply about the meaning of causation in discrimination cases, rather than simply stopping the analysis because a private party more immediately caused the harm. In this respect, the decision's greatest significance may lie in its potential to enhance legal accountability for institutional structures that effectively endorse and give added effect to so-called "private" discrimination, particularly where the expressive message conveyed by the institution itself has power over both the persons harmed by and those who engage in discrimination.

**CONCLUSION**

*Davis* is a decision that implicates important questions about the meaning of discrimination. It rejects an inquiry into the subjective animus or bias of the decision-makers involved, while treating as intentional discrimination a school's deliberate indifference in the face of known sexual harassment by students. Yet, the deliberate indifference requirement does not require any subjective intent of school officials other than their subjective knowledge of the harassment, coupled with their objectively insufficient response. In addition to the rejection of a subjective intent standard, the *Davis* decision eschews narrower approaches to causation, finding that schools in such cases cause their students to be subjected to discrimination when they knowingly ignore discrimination by other students. With this ruling, the Court has furthered the law's recognition that institutional acquiescence in gender-based harm can serve as an active instrument of sex inequality. *Davis* by no means solves the longstanding violence against women is engaged in by non-state actors, . . . they do act with the virtually total assurance that . . . their acts will be officially tolerated, they themselves will be officially invisible, and their victims will be officially silenced.

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problems of how to define and give significance to intent and causation in discrimination law. But perhaps the glow that it casts on these issues can lead to the development of new and useful accounts of the proper meaning and role of intent and causation in discrimination law.