

U.C.L.A. Law Review

The School Civil Rights Vacuum

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ABSTRACT

Recent cases of pervasive sex abuse at universities, including those committed by Larry Nassar at Michigan State University and by Jerry Sandusky at Pennsylvania State University, demonstrate the limitations of Title IX as a tool for protecting college students. What has gone far less recognized is that in the K-12 public school context, Title IX and other civil rights laws, including the Fourteenth Amendment, are at least as ineffective at protecting students from sexual, physical, and verbal abuse and harassment. Public school students rarely succeed on Fourteenth Amendment or Title IX claims, even in some of the most egregious cases. Although these two potentially powerful civil rights laws should protect children from and remedy these harms, there is a civil rights vacuum in public schools.

This Article argues that courts unjustifiably limit public school liability under both the Fourteenth Amendment and Title IX for student physical, verbal, and sexual harassment and abuse. This jurisprudence is limited due to the courts' misconceptions about families and schools. Taken in the aggregate, these laws leave children, particularly low-income children, without protection and vulnerable in school.

In making these arguments, this Article is the first to demonstrate how the courts' evaluations of these civil rights claims are based on misconceptions and are, therefore, unjustified. It also exposes the collective failure of these civil rights laws to protect students. As a remedy, this Article proposes changes to the assessment of these Fourteenth Amendment and Title IX claims that abandon misconceptions, increase schools' potential for liability, and promote the development in schools of processes for preventing, discovering, and remedying students' harms.

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INTRODUCTION

When sisters Emily and Brittany Morrow attended Blackhawk High School in Beaver County, Pennsylvania, they were “verbally, physically, and . . . emotionally tormented” by another student, Shaquana Anderson.¹ Among other things, Shaquana threatened Emily and Brittany, threw Brittany down a flight of stairs in school, and attacked Brittany in the school cafeteria.² Shaquana’s friend, Abbey Harris, also elbowed Emily in the throat.³ Brittany, Emily, and their parents sought help from the school to stop the abuse.⁴ They “requested that the [school] do something to protect Brittany and Emily from the persistent harassment and bullying.”⁵ In response, school officials suggested that “the Morrows consider moving to a different school rather than removing the bully from the school.”⁶ Lacking any other immediate solution, Emily and Brittany enrolled in private school.⁷ They also brought a Fourteenth Amendment claim against the public school, arguing that it had a duty to protect them and failed to do so.⁸ The Third Circuit denied their claim, however, finding no such duty exists for schools under the Fourteenth Amendment.⁹

Emily and Brittany are not alone in their experience.¹⁰ Millions of students suffer physical, verbal, and sexual harassment and abuse in school.¹¹ One of the

1. *Morrow v. Balaski*, 719 F.3d 160, 164–66 (3d Cir. 2013).

2. *Id.* at 164–67.

3. *Id.*

4. *Id.* at 166.

5. *Id.*

6. *Id.*

7. *Id.* at 165; *see also* Kristen Doerschner, Family Seeks Change in Law to Protect Students From Being Bullied, Ellwood City Ledger (Sept. 30, 2013, 12:01 AM), <http://www.ellwoodcityledger.com/article/20130930/News/309309861> [<https://perma.cc/YZT2-XP89>] (“In October 2008, the Morrows made the decision to withdraw their daughters from [public school] and pay tuition to a private school for the remainder of their high school years.”).

8. *Morrow*, 719 F.3d at 165. The Morrows also argued that the public school violated the Fourteenth Amendment under a state-created danger theory. *Id.* The Third Circuit denied this claim. *Id.* at 179.

9. *Id.* at 177.

10. Another example is that of T.M., a Georgia high school student who was sexually assaulted by another student. Nora Caplan-Bricker, “*My School Punished Me*,” SLATE (Sept. 19, 2016, 8:44 PM), http://www.slate.com/articles/double_x/doublex/2016/09/title_ix_sexual_assault_allegations_in_k_12_schools.html [<https://perma.cc/5Y95-5334>]. When she reported the assault to her school, instead of protecting her, the school suspended her. *Id.* Similarly, a Michigan high school student was expelled after reporting her sexual assault in the school parking lot. Emma Brown, *Sexual Violence Isn’t Just a College Problem. It Happens in K-12 Schools, Too.*, WASH. POST (Jan. 17, 2016), <https://www.washingtonpost.com/local/education/sexual-violence-isnt-just-a-college-problem-it-happens-in-k-12-schools-too/2016/01/17/a4a>

most common ways children suffer physical and verbal abuse in school is through bullying.¹² According to the National Center for Education Statistics, in the 2014–15 school year, approximately one out of every five children in grades six through twelve experienced bullying—an estimated five million children.¹³ As disturbingly prevalent as it is, bullying is not the only way children experience physical and verbal abuse in school, and students are not the only perpetrators of it. Teachers and other school staff also physically and verbally abuse children in school.¹⁴ In addition, students and school staff sexually harass and abuse students in school. From 2011 to 2015, approximately 17,000 students reported being sexually assaulted in school.¹⁵

Although certain laws should serve as a bulwark against these harms, counterintuitively they often do not. Both the Fourteenth Amendment and Title

91074-ba2c-11e5-99f3-184bc379b12d_story.html?noredirect=on&utm_term=.f9a25e22c657 [https://perma.cc/G2DP-MUL7].

11. For example, in a 2015 report, over five million students, ages 12 to 18, reported experiencing some form of bullying. DEBORAH LESSNE & CHRISTINA YANEZ, NAT'L CTR. FOR EDUC. STATISTICS, STUDENT REPORTS OF BULLYING: RESULTS FROM THE 2015 SCHOOL CRIME SUPPLEMENT TO THE NATIONAL CRIME VICTIMIZATION SURVEY T-1, tbl.1.1 (2016) [hereinafter REPORTS OF BULLYING 2015]. Of those students, over 1.2 million experienced some form of physical bullying, and over 940,000 experienced threats. *Id.* A 2011 report found that 48 percent of students in grades 7 through 12 experienced some form of sexual harassment. Catherine Hill & Holly Kearn, Am. Ass'n OF Univ. Women, Crossing the Line: Sexual Harassment at School 11 (2011), https://www.aauw.org/files/2013/02/Crossing-the-Line-Sexual-Harassment-at-School.pdf [https://perma.cc/9U5P-CN93].
12. Bullying has severe, sometimes tragic, consequences for children. See, e.g., Lizette Alvarez, *Girl's Suicide Points to Rise in Apps Used by Cyberbullies*, N.Y. TIMES (Sept. 13, 2013), https://www.nytimes.com/2013/09/14/us/suicide-of-girl-after-bullying-raises-worries-on-websites.html (reporting the suicide of twelve-year-old Rebecca Ann Sedwick after being bullied by others in her school); Trevon Milliard, Father: White Middle School Student's Suicide Related to Bullying, Las Vegas Rev. J. (Feb. 28, 2014, 7:26 PM), https://www.reviewjournal.com/news/father-white-middle-school-students-suicide-related-to-bullying [https://perma.cc/NHB3-2PL9] (discussing the suicide of thirteen-year-old Hailee Lamberth, in which her suicide note blamed her suicide on school bullying).
13. REPORTS OF BULLYING 2015, *supra* note 11, at T-1. Other metaanalyses have found the numbers of students who report involvement in bullying to be even higher. One such study found that 35 percent of students in grades 6 through 12 report some form of traditional bullying and 15 percent reported cyber bullying. Kathryn L. Modecki et al., *Bullying Prevalence Across Contexts: A Meta-Analysis Measuring Cyber and Traditional Bullying*, 55 J. ADOLESCENT HEALTH 602, 607 (2014).
14. See *infra* Subpart I.C. The harm by teachers and other school staff can cause serious, long-term consequences. See, e.g., T.W. ex rel. Wilson v. Sch. Bd., 610 F.3d 588, 601 (11th Cir. 2010) (T.W., a student who was abused by his teacher, developed post-traumatic stress disorder (PTSD) and dropped out of school).
15. Robin McDowell et al., *Hidden Horror of School Sex Assaults Revealed by AP*, AP NEWS (May 1, 2017), https://apnews.com/1b74feef88df4475b377dcdd6406ebb7 [https://perma.cc/2JTV-4DTR]. That number, however, is likely under-representative. Sexual assaults are underreported, and some states do not even track the incidences of sexual assault. *Id.*

IX of the Education Amendments of 1972 have powerful potential to protect children and remedy harm.¹⁶ Because claims under these laws can be brought against the school system, and not just the individuals who caused the harm, they offer the promise of both individual remedies and systemwide reforms.¹⁷ Children who are verbally and physically abused by teachers and other students in school generally assert two kinds of claims under the Fourteenth Amendment: (1) a claim alleging that the schools had a duty to protect them and failed, and (2) a claim alleging the schools violated their right to personal liberty and bodily integrity.¹⁸ Children who are sexually harassed and abused in school bring claims under Title IX for sex discrimination.¹⁹ These plaintiffs rarely succeed, however.²⁰ In fact, no federal court of appeals has ever recognized a Fourteenth Amendment duty to protect claim by students against the public schools.²¹ Despite being designed

16. See *infra* Subpart III.A.

17. Tort law might seem an obvious first recourse for claims involving harms to children in school. However, it falls short of the task of protecting students from the harm in the first place. State law immunity and comparable defenses often insulate schools from liability. See *infra* note 31 and accompanying text. Moreover, unlike federal civil rights laws, tort law is not designed to hold public institutions accountable for harms. It generally only holds individual tortfeasors responsible for harm. Thus, it holds less promise as a systemic-reform tool. *Id.* For thoughtful analyses on the limits of tort law to remedy harms to children in schools, see Samantha Neiman et al., *Bullying: A State of Affairs*, 41 J.L. & EDUC. 603, 627 (2012) (“Even when conduct by a school official satisfies the elements of a common law cause of action, various forms of immunity from tort liability often serve as shields to school districts and/or individual school officials.”); Ari Ezra Waldman, *Tormented: Anti-Gay Bullying in Schools*, 84 TEMP. L. REV. 385, 410 (2012) (concluding “the prognosis is also dim” for redress in tort for bullying because of the challenges of proving causation and overcoming immunity); Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMP. L. REV. 641 (2004) (offering a comprehensive analysis of limitations of tort law as a remedy for bullying in school). See also Mark C. Weber, *Disability Harassment in the Public Schools*, 43 WM. & MARY L. REV. 1079, 1145–47 (2002) (explaining how state law immunity bars claims of disability harassment in schools).

18. See *infra* Subparts I.A–I.B.

19. See *infra* Subpart I.C.

20. See *infra* Subparts I.A–I.C.

21. At least eight circuits have considered such claims, and they have all declined to find the schools have a duty to protect students. *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 973 (9th Cir. 2011); *Hasenfus v. LaJeunesse*, 175 F.3d 68, 71 (1st Cir. 1999); *Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412, 1415 (5th Cir. 1997) (en banc); *Sargi v. Kent City Bd. of Educ.*, 70 F.3d 907, 911 (6th Cir. 1995); *Graham v. Indep. Sch. Dist. No. I-89*, 22 F.3d 991, 993–95 (10th Cir. 1994); *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 732 (8th Cir. 1993); *D.R. ex rel. L.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1371 (3d Cir. 1992) (en banc); *J.O. v. Alton Cnty. Unit Sch. Dist.* 11, 909 F.2d 267, 272 (7th Cir. 1990). These claims have not been denied without dissent or question, though. For example, in *Morrow v. Balaski*, Judge Nygaard, who also dissented in *Middle Bucks*, wrote that “more than twenty years ago” he believed that the girls in *Middle Bucks* had “stated viable constitutional claims against the school district.” *Morrow v. Balaski*, 719 F.3d 160, 202–03 (3d Cir. 2013). “My position has not changed, and today, I would hold the same in this case.” *Id.* at 202–03 (Nygaard, J., dissenting); see also *Middle Bucks*, 972

to hold the state accountable for violations of civil rights, nevertheless, the Fourteenth Amendment and Title IX can shield public schools from liability.²²

This Article argues that the courts unjustifiably limit public school liability under these Fourteenth Amendment and Title IX claims for students' verbal, physical, and sexual harassment and abuse.²³ This jurisprudence is limited due in large part to courts' misconceptions about both families and schools.²⁴ More specifically, these misconceptions are that families, not schools, have total responsibility for protecting their children even during the school day; schools have expertise in matters of pedagogy and discipline warranting extraordinary judicial deference to their decisions; and schools labor under substantial burdens, and therefore courts should only very carefully and rarely add to those burdens by imposing liability.²⁵

Further, these laws' anemic reach has three serious, troubling consequences. First, it affords schools substantial discretion to do little, and sometimes nothing, in response to student harms. Second, it shifts the burden of addressing student harms to families, which is a nearly impossible task because families are not at school with their children.²⁶ Third, these effects disproportionately burden low-income families, who now comprise a majority of the public school population. They lack the social and financial resources needed for the task of protecting children from and addressing the harms that occur in school.²⁷

Recognition of the misconceptions that support public school liability limits under the Fourteenth Amendment and Title IX, however, would allow courts to

F.2d at 1377 (Sloviter, C.J., dissenting) (stating "I would hold that the state compulsion that students attend school, the status of most students as minors . . . [and] the discretion extended by the state to schools to control student behavior . . . combine to create the type of special relationship which imposes a constitutional duty on the schools to protect the liberty interests of students while they" are in school); T.K. v. N.Y. City Dep't of Educ., 779 F. Supp. 2d 289, 308 (E.D.N.Y. 2011) ("It is uncertain whether under the Due Process Clause, a public school has the duty to protect an elementary school student from bullying where truancy laws are in effect. This question need not be answered now since students have a right to be secure in school and schools have a duty to prevent students from harassment under IDEA and Title IX.").

22. The Fourteenth Amendment, enforced by way of Section 1983 actions, of course works to constrain the state from violating individual rights. *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) ("The very purpose of § 1983 [is] to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state law."). Title IX's core purpose is to constrain public schools from denying students the benefits of education because of sexual discrimination. 20 U.S.C. § 1681(a) (2018).

23. See *infra* Subpart I.D.

24. See *infra* Part II.

25. See *infra* Part II.

26. See *infra* Subpart III.B.

27. See *infra* Subpart III.C.

abandon them. Abandoning those misconceptions in turn justifies changing the assessment of Fourteenth Amendment and Title IX claims such that they can more effectively protect children from and address their harms in school. This Article proposes these changes. It also makes three contributions to the scholarly discourse on civil rights in schools. First, it is the first to demonstrate how the courts' evaluations of these Fourteenth Amendment and Title IX claims are based on misconceptions and are therefore unjustified.²⁸ Second, it exposes how the collective failures of these civil rights laws to realize their potential for addressing children's harms in school leave children vulnerable. Third, it proposes changes to the assessment of these claims that can better shape schools' responses to those harms and protect children.²⁹

This Article proceeds in four parts. Part I analyzes three civil rights claims that students bring for harms suffered in school: (1) Fourteenth Amendment claims alleging schools had a duty to protect students and failed, (2) Fourteenth Amendment claims that schools violated students' personal liberty and bodily integrity, and (3) Title IX claims for peer sexual harassment. It shows how courts severely limit public schools' liability under all of these claims and how collectively this jurisprudence leaves students with limited legal protections in school. Part II then argues that these liability limits are largely without justification. They are instead based on misconceptions about both schools and families. Part III discusses the consequences of this limited jurisprudence, including that it both

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28. Other scholars have explored the limits of these laws individually. For example, Catharine A. MacKinnon recently critiqued Title IX for its failure to hold schools accountable for sexual harassment. Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038 (2016). Others have analyzed the limits of Fourteenth Amendment claims for personal liberty and bodily integrity claims in the school context. Kathryn R. Urbonya, *Public School Officials' Use of Physical Force As a Fourth Amendment Seizure: Protecting Students From the Constitutional Chasm Between the Fourth and Fourteenth Amendments*, 69 GEO. WASH. L. REV. 1 (2000) (advancing a Fourth Amendment theory for evaluating the constitutionality of school officials' intentional use of force against students). Some have examined the implications of the courts' failure to find a Fourteenth Amendment duty to protect on individuals generally. Sarah L. Swan, *Bystander Interventions*, 2015 WIS. L. REV. 975, 1003–06 (pointing that the lack of a Fourteenth Amendment duty to protect impedes a theory of bystander intervention initiatives). None have considered the collective impact of these laws.
29. This project is part of a broader endeavor to examine the bounds of public schools' responsibilities for students. In a previous article, I critique the expansion of schools' authority over students' online activity through cyberbullying laws. Emily F. Suski, *Beyond the Schoolhouse Gates: The Unprecedented Expansion of School Surveillance Authority Under Cyberbullying Laws*, 65 CASE W. RES. L. REV. 63 (2014). I have also compared schools' responsibility for harms to children with that of their families. Emily F. Suski, *The Privacy of the Public Schools*, 77 MD. L. REV. 427 (2018) [hereinafter Suski, *The Privacy of the Public Schools*]. This Article takes that analysis further by exploring the reasons for and the implications of schools' limited liability under the Fourteenth Amendment and Title IX.

affords schools nearly unbridled discretion to do little or nothing when students are harmed and that it burdens families. Part IV proposes changes to courts' assessment of these claims that would abandon the misconceptions and promote the development by schools of both procedural and substantive responses to students' harms that better protect them. More specifically, it contends that correcting the misconceptions in Fourteenth Amendment and Title IX jurisprudence justifies both a new classification of custody and a burden-shifting framework in Fourteenth Amendment duty to protect cases; a new plausibility standard in Fourteenth Amendment bodily integrity claims; and a reinterpretation of notice and deliberate indifference in the Title IX context. Such changes would better equip courts to find public school liability, protect students who are harmed, and prompt broader reform measures in schools to protect all children. In other words, it proposes changes to the evaluation of these claims that would realize the potential of these civil rights laws to protect children who are harmed in school.

I. SCHOOLS' LIMITED LIABILITY UNDER THE FOURTEENTH AMENDMENT AND TITLE IX

Children suffer many kinds of harms in school, including physical, verbal, and sexual abuse and harassment.³⁰ To the extent schools have any institutional liability under tort for such harms, they often can avoid it because of state law immunity.³¹ Students, therefore, understandably look to federal law, including the

30. See *supra* notes 10–15 and accompanying text.

31. JAMES A. RAPP, EDUCATION LAW § 12.07 (2016). States' laws often grant schools immunity from liability for acts of their employees if the acts constitute discretionary functions. *Id.* Although states differ on which acts fall into the category of such functions, this grant of immunity has served as a significant bar to public school liability. *Id.* Even when schools do not have statutory immunity, they still evade liability by asserting numerous generous defenses. *Id.* § 12.14(5). For example, negligent supervision claims for failing to properly supervise employees or other students require "standards of knowledge [that] are significant and . . . a foreseeable risk of harm." *Id.* § 12.14(5)(b)(iii). Schools, therefore, successfully defend based on lack of knowledge or foreseeability. *E.g.*, Conklin v. Saugerties Cent. Sch. Dist., 966 N.Y.S.2d 575 (N.Y. App. Div. 2013) (holding a school district not liable when a student was assaulted by another student and the school knew the assaulting student had threatened to have the fight). This defense has worked to protect schools from liability when students have shot, stabbed, and in one case fought other students, despite warnings that the fight might occur. RAPP, *supra*, § 12.12(2)(b). Similarly, under vicarious liability claims like respondeat superior claims, schools avoid liability if they can prove that an employee's actions that harmed a student were outside the scope of employment. *Id.* § 12.14(4)(b). This defense operates as a substantial bar to school liability because courts often find that intentional torts fall outside the scope of employment. *E.g.*, John Doe 1 v. Bd. of Educ., 955 N.Y.S.2d 600, 602 (N.Y. 2012) (finding no public school liability in tort where a teacher's aide had a sexual relationship with a student because, among other things, it was outside the scope of employment). *But see* Booth v. Orleans Parish Sch. Bd., 49 So. 3d 919 (La. Ct. App. 2010) (finding a school board could be held liable where a janitor assaulted a

Fourteenth Amendment and Title IX, to seek protection and redress.³² They bring two kinds of claims under the Fourteenth Amendment: One alleging that the schools have a duty to protect them and failed, and another alleging that the schools violated their right to personal liberty and bodily integrity.³³ They also bring claims against schools for sexual harassment under Title IX of the Education Amendments of 1972.³⁴ Students, however, find limited success in their efforts to hold the public schools liable for even significant harms.³⁵ Although these laws exist to protect students' civil rights, the courts' assessment of these claims shields schools from liability.

A. Fourteenth Amendment Duty to Protect Claims

Students who are physically, verbally, and sexually harmed in school bring claims against the public schools under the Fourteenth Amendment for failing to protect them. These claims are based on the theory that the schools have a special relationship with students, giving rise to a duty to protect them.³⁶ The courts, however, do not just limit these claims. They preclude them entirely, finding that the schools have no such relationship with and no such duty to students.³⁷ Their conclusions stem from an assessment of schools' custodial and caretaking relationship with students.

The seminal such case is *D.R. v. Middle Bucks Area Vocational Technical School*.³⁸ *Middle Bucks* involved two high school girls with disabilities who were repeatedly physically and sexually assaulted over a period of approximately five

student). Children seeking redress under tort theories of liability, then, are often caught in the proverbial catch-22. Either the schools have immunity because their employee's actions are discretionary, or they avoid liability because the torts are beyond the scope of employment.

32. Title IX has its own private right of action, whereas a Fourteenth Amendment claim can be brought under Section 1983 claims to enforce constitutional rights and remedy violations. *Memphis Cnty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305–06 (1986) (“We have repeatedly noted that 42 U.S.C. § 1983 creates ‘a species of tort liability’ in favor of persons who are deprived of ‘rights, privileges, or immunities secured’ to them by the Constitution.” (quoting *Carey v. Piphus*, 435 U.S. 247, 253 (1978))). In *Cannon v. University of Chicago*, the U.S. Supreme Court found an implied private right of action under Title IX. 441 U.S. 677, 699 (1979) (“The package of statutes of which Title IX is one part also contains a provision whose language and history demonstrate that Congress itself understood Title VI, and thus its companion, Title IX, as creating a private remedy.”).

33. See *infra* Subparts I.A–I.B.

34. See *infra* Subpart I.C.

35. See *infra* Subparts I.A–I.C.

36. See *infra* notes 45–46 and accompanying text.

37. The Supreme Court has not heard a Fourteenth Amendment duty to protect claim in the public school context, but all the federal courts of appeals that have heard the claims have found that no such duty exists. See *supra* note 21 and accompanying text.

38. 972 F.2d 1364 (3d Cir. 1992).

months by other students in a bathroom inside a school classroom.³⁹ As a result of the assaults, which the public school knew about but did nothing, the girls brought a Fourteenth Amendment claim against the public school.⁴⁰ They alleged that the school had a special relationship with them, giving rise to a duty to protect them.⁴¹

Their theory relied on the special relationship doctrine developed by the U.S. Supreme Court in *Estelle v. Gamble*⁴² and *Youngberg v. Romeo*,⁴³ respectively an Eighth Amendment case involving prison inmates⁴⁴ and a Fourteenth Amendment case involving persons involuntarily committed to mental institutions.⁴⁵ In those cases, the Court concluded that the state has an affirmative duty under the Eighth and Fourteenth Amendments to protect inmates and involuntarily institutionalized people because the state creates a special relationship with them by taking custody of them.⁴⁶ In *Youngberg*, the Court said this special relationship gives rise to an “unquestioned duty to provide reasonable safety for all residents and personnel within the institution.”⁴⁷

In *Middle Bucks*, the girls argued that the public school had a similarly special custodial relationship with them because they were required by law to attend school, and the school had substantial control over them while the students were at school.⁴⁸ The Third Circuit, however, rejected that claim.⁴⁹ The court based its opinion less on the Supreme Court’s decisions in *Estelle* and *Youngberg* than on its decision in *DeShaney v. Winnebago County Department of Social Services*.⁵⁰ In *DeShaney*, the Supreme Court heard the tragic case of a boy whose father had abused him to the point of permanent brain damage.⁵¹ The state

39. *Id.* at 1366.

40. *Id.*

41. *Id.* at 1368.

42. 429 U.S. 97 (1976).

43. 457 U.S. 307 (1982).

44. *Estelle*, 429 U.S. at 97.

45. *Youngberg*, 457 U.S. at 307.

46. *Estelle*, 429 U.S. at 97; *Youngberg*, 457 U.S. at 307. In *Youngberg*, an adult with severe intellectual disabilities was, among other things, suffering injuries while in the care of a state mental health facility. *Youngberg*, 457 U.S. at 309–10. His injuries included a fractured arm. *Id.* at 310. As a result of these injuries and other treatment, he brought a Fourteenth Amendment claim alleging the state had an affirmative duty to protect him. *Id.* at 310. The Court concluded that, “[i]f it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions.” *Id.* at 315–16.

47. *Youngberg*, 457 U.S. at 324.

48. *Middle Bucks*, 972 F.2d at 1371.

49. *Id.* at 1373.

50. *Id.* at 1369; 489 U.S. 189 (1989).

51. *DeShaney*, 489 U.S. at 193.

Department of Social Services (DSS) had been involved in the case.⁵² Among other things, a DSS case worker had been called into the hospital after the boy, Joshua, sustained suspicious injuries.⁵³ The DSS then began making monthly visits to his home, but it did not have custody of the boy at the time of the injury.⁵⁴ Joshua and his mother claimed the state's involvement created a duty to protect him.⁵⁵ The Court concluded otherwise, explaining “[i]t is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the ‘deprivation of liberty’ triggering the protections of the Due Process Clause.”⁵⁶

Drawing on that reasoning, the Third Circuit in *Middle Bucks* said “the school defendants' authority over [the plaintiff] during the school day cannot be said to create the type of physical custody necessary to bring it within the special relationship noted in *DeShaney*.⁵⁷ It found that mandatory attendance requirements do not restrict students' freedom to the extent that it denies them “meaningful access to help.”⁵⁸ It said that the “parents remain the primary caretakers, despite [students'] presence in school.”⁵⁹ Because it found parents responsible for and able to take care of their children while the children were at school, the court concluded that schools have no custodial relationship with students and therefore no duty to protect them.⁶⁰

Other courts to consider the issue have relied on the same rationale to find that public schools have no duty to protect students under the Fourteenth Amendment. In cases where schools know about the harm to students but abdicate any role in addressing it or protecting them from it, courts still find schools have no duty to protect students from those harm imposed by private individuals.⁶¹ In

52. *Id.* at 192.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 200.

57. D.R. *ex rel.* L.R. v. Middle Bucks Area Vocational Technical Sch. 972 F.2d 1364, 1372 (3d Cir. 1992) (en banc).

58. *Id.* For example, the court said that the students' parents “retain the discretion to remove [their children] from classes.” *Id.* at 1371.

59. *Id.*

60. *Id.* at 1371–72.

61. For example, in *Morrow v. Balaski*, the Third Circuit considered another Fourteenth Amendment duty to protect claim in the context of student bullying. 719 F.3d 160 (3d Cir. 2013). The court acknowledged in *Morrow* that the plaintiffs, sisters Emily and Brittany Morrow, were “verbally, physically and—no doubt—emotionally tormented by a fellow student,” and the school did little to prevent the harm or protect them. *Id.* at 166. Instead, the principal told the girls' parents that he “could not guarantee Brittany and Emily's safety” and

addition, even when school staff commit the abuse, courts still find that schools have no Fourteenth Amendment duty to protect students.⁶²

B. Fourteenth Amendment Claims for Violations of Personal Security and Bodily Integrity

When teachers and other school staff members harm students, students also bring Fourteenth Amendment substantive due process claims against the public schools alleging a violation of their right to personal liberty and bodily integrity.⁶³ Though not easy claims to make, they are at least met with more success than students' Fourteenth Amendment duty to protect claims.⁶⁴ The Supreme Court has not heard such a case, but lower courts have recognized the claim.⁶⁵

"advised the Morrows to consider another school for their children." *Id.* at 164–65. Despite the school's abdication of any responsibility for the girls' safety in school, which the girls had to attend under mandatory attendance laws, and their parents' inability to protect them while they were there, the court still found the school had no duty to protect them. *Id.* at 177. It reiterated its conclusion in *Middle Bucks* that compulsory attendance laws do not "so restrain students' liberty that they can be considered to be in state custody" because "parents remain the primary caretakers." *Id.* at 168.

62. *E.g.*, *Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412, 1415 (5th Cir. 1997) (finding no duty where a school custodian raped a thirteen-year-old student in an empty classroom at school and her Fourteenth Amendment duty to protect claim failed because "the student returns home each day" and "[p]arents remain the primary source for the basic needs of their children"); *Sargi v. Kent City Bd. of Educ.*, 70 F.3d 907, 911 (6th Cir. 1995) (finding no duty where a bus driver did not procure medical attention for a child who had collapsed from heart failure, leading to her death because "school attendance does not restrict a student's liberty such that neither the child nor his parents are unable to attend to the child's basic needs. Despite mandatory school attendance laws, the parents, not the state, remain the child's primary caretakers."); *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 732 (8th Cir. 1993) (rejecting a claim that a school had a duty to protect a boy with intellectual disabilities when the boy was sexually assaulted by another boy at school, reasoning that "[p]ublic school attendance does not render a child's guardians unable to care of the child's basic needs. In this regard, public schools are simply not analogous to prisons and mental institutions.").

63. See *Hatfield v. O'Neill*, 534 F. App'x 838 (11th Cir. 2013); *T.W. ex rel. Wilson v. Sch. Bd.*, 610 F.3d 588 (11th Cir. 2010); *Flores v. Sch. Bd.*, 116 F. App'x 504 (5th Cir. 2004).

64. *E.g.*, *Hatfield*, 534 F. App'x at 841–42 (finding a Fourteenth Amendment violation where a teacher struck a student multiple times, including in the location of her head where part of her brain had been removed).

65. The lower courts recognizing these claims have generally followed the Fourth Circuit case, *Hall v. Tawney*, 621 F.2d 607, 611 (4th Cir. 1980), which concluded "that there may be circumstances under which specific corporal punishment administered by state school officials gives rise to an independent federal cause of action to vindicate substantive due process rights." For example, the Second, Sixth, Ninth, and Eleventh Circuits, among others, have all followed the Fourth Circuit's lead. *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 251–52 (2d Cir. 2001) (concluding that students have a "constitutional 'right to be free from the use of excessive force'" (quoting *Rodriguez v. Phillips*, 66 F.3d 470, 476 (2d Cir. 1995))); *Webb v. McCullough*, 828 F.2d 1151, 1158 (6th Cir. 1987) ("It is well established that persons have a fourteenth amendment liberty interest in freedom from bodily injury."); *P.B. v. Koch*, 96 F.3d 1298, 1302–03 (9th Cir.

To determine whether a school has violated a student's right to personal liberty and bodily integrity, the courts apply the "shocks the conscience" standard.⁶⁶ The courts generally agree that an evaluation under this standard requires weighing: (1) the need for the force used against the student; (2) the excessiveness of the force, meaning the proportionality between the need for and the amount of force used; (3) whether the force was applied in a good-faith effort to maintain discipline or instead applied for the purpose of causing harm; and (4) the degree of the injury.⁶⁷ Even for children who have been significantly harmed by teachers and other school staff, this test serves as a significant barrier to success. Courts assess the need and proportionality prongs in ways that limit schools' liability.⁶⁸

First, when courts analyze the need for force used by schools, they accept almost any asserted pedagogical or disciplinary reason for the force.⁶⁹ For example, in *Domingo v. Kowalski*, the court found no Fourteenth Amendment violation

1996) ("[E]xcessive force by a principal against a student violated the student's constitutional rights. The Fourteenth Amendment protects against the government's interference with 'an individual's bodily integrity.'"); *Neal ex rel. Neal v. Fulton Cty. Bd. of Educ.*, 229 F.3d 1069, 1075 (stating that "where an exercise of corporal punishment is 'so brutal, demeaning, and harmful as to literally shock the conscience of the court' . . . a student's substantive due process rights are implicated" (quoting *Hall*, 621 F.2d at 613)). The Fifth Circuit, though recognizing the claim, is the outlier. Unlike the other Circuit Courts, it only recognizes the constitutional claim based on excessive discipline or corporal punishment if there is also no state law remedy available for it. *Moore v. Willis Indep. Sch. Dist.*, 233 F.3d 871 (5th Cir. 2000). It has said "as long as the state provides an adequate remedy, a public school student cannot state a claim for denial of substantive due process through excessive corporal punishment, whether it be against the school system, administrators, or the employee who is alleged to have inflicted the damage . . . 'Educators in states that proscribe student mistreatment and provide a remedy' do not, by definition, act 'arbitrarily,' a necessary predicate for substantive due process relief." *Moore*, 233 F.3d at 874–75 (quoting *Fee v. Herndon*, 900 F.2d 804 (5th Cir. 1990)).

66. *Domingo v. Kowalski*, 810 F.3d 403, 411 (6th Cir. 2016).

67. *E.g., id.* Not all courts use all four factors in analyzing these claims. Some circuit courts do not analyze whether the force was applied in a good-faith effort to maintain discipline as a separate factor or at all. *E.g., T.W. ex rel. Wilson v. Sch. Bd.*, 610 F.3d 588, 599–600 (11th Cir. 2010).

68. These factors do not completely bar success, however. Students do prevail in Fourteenth Amendment cases, but the cases in which they prevail often involve substantial physical harm. For example, the Eleventh Circuit found a school could be liable under the Fourteenth Amendment because a coach hit a student with a metal lock, causing him to lose his eye. *Neal ex rel. Neal v. Fulton Cty. Bd. of Educ.*, 229 F.3d 1069 (11th Cir. 2000). Courts have been far more willing to find schools liable under the Fourteenth Amendment and not excuse the extreme force on pedagogical or disciplinary grounds when physical harm, as opposed to only emotional harm, results. For an analysis of students' substantive due process claims based on emotional harm, see Emily Suski, *Dark Sarcasm in the Classroom: The Failure of the Courts to Recognize Students' Severe Emotional Harm As Unconstitutional*, 62 CLEV. ST. L. REV. 125 (2014).

69. See *Flores v. Sch. Bd. of DeSoto Par.*, 116 F. App'x 504 (5th Cir. 2004); *T.W. ex rel. Wilson v. Sch. Bd. of Seminole Cty., Fla.*, 610 F.3d 588 (11th Cir. 2010).

when teacher Marsha Kowalski strapped students with disabilities to toilets, chairs, and gurneys for extended periods of time.⁷⁰ When she tied one student to a gurney in the hall outside her classroom, she also put a “chewy” cloth in his mouth and left him there alone.⁷¹ Despite this abuse, the court found no Fourteenth Amendment violation in part because it accepted Kowalski’s asserted, though implausible, pedagogical and disciplinary purposes for her treatment of the students.⁷² The court therefore found the first prong of the Fourteenth Amendment analysis satisfied.⁷³

In finding proper purposes, however, the court did not analyze the credibility of Kowalski’s asserted pedagogical and disciplinary goals—toilet training and teaching students to stay on task—in light of the evidence.⁷⁴ It instead simply queried whether toilet training and such discipline themselves are proper purposes in isolation from the rest of the evidence in the case.⁷⁵ Had the court considered whether these could have plausibly been Kowalski’s goals in light of that evidence, it would likely have had more difficulty finding that Kowalski had a proper educational purpose. Because toilet training involves the relatively quick, time-limited activity of using and then exiting a bathroom, Kowalski’s actions belied her stated purpose.⁷⁶ In addition, leaving a child alone tied to a gurney with something in his mouth goes so beyond the bounds of proper discipline as to undermine the credibility of that stated goal.⁷⁷ Yet the court did not delve into this kind of inquiry.⁷⁸ Consequently, it was able to find a need for Kowalski’s force.

70. *Domingo*, 810 F.3d at 416.

71. *Id.* at 407.

72. *Id.* at 412–13.

73. *Id.* at 412.

74. *Id.* at 412–13.

75. *Id.* at 410–12 (“Kowalski’s educational and disciplinary techniques, though certainly questionable, were utilized for a proper educational purpose.”).

76. The American Academy of Pediatrics recommends leaving children with developmental disabilities on the toilet for only five to ten minutes at a time. *Toilet Training Children With Special Needs*, HEALTHYCHILDREN.ORG, <https://www.healthychildren.org/English/ages-stages/toddler/toilet-training/Pages/Toilet-Training-Children-with-Special-Needs.aspx> [https://perma.cc/78X3-VAW9].

77. In contrast to the methods Kowalski used, the U.S. Department of Education has provided guidance on seclusion and restraint in school that states that such methods should not be used for the sake of convenience, should only be used to prevent the risk of imminent harm, and should be discontinued as soon as that risk is gone. U.S. DEP’T OF EDUC., RESTRAINT AND SECLUSION: RESOURCE DOCUMENT 14–15 (2012), <https://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf>.

78. *Domingo v. Kowalski*, 810 F.3d 403, 412 (stating “the . . . test first looks to the ends motivating the teacher’s actions and not the means undertaken to achieve those ends”).

When other courts have evaluated these claims, they have similarly failed to interrogate schools' pedagogical and disciplinary defenses.⁷⁹ Courts almost never question the schools' assertions, no matter how implausible—or, in some cases, nonexistent—they are.⁸⁰ Consequently, schools evade liability for even severe and permanent harm.⁸¹

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79. In *Flores v. School Board of DeSoto Parish*, 116 F. App'x 504 (5th Cir. 2004), the court used the scantest of evidence to find a disciplinary need for the abuse of a student, Kevin Flores, by his coach, Clinton Wysinger. In *Flores*, Wysinger accused Kevin of trying to skip his detention after Kevin used the restroom before returning to the detention room from a school assembly. *Id.* at 506. When Kevin denied that accusation, Wysinger ordered Kevin to eat his lunch in the detention room, an order which Kevin questioned. *Id.* Wysinger then directed the other students out of the room and "took off his tie, rolled up his sleeves, and physically threatened Kevin. When Kevin refused to fight Wysinger, he ordered Kevin to stand up, threw him against the wall, placed his hands around Kevin's neck, and began to choke him while threatening further bodily harm." *Id.* He also warned Kevin not to tell anyone about what had happened. *Id.* Kevin nevertheless told the principal. *Id.* at 507. In response, the principal "volunteered that Wysinger could bench press 400 pounds" and recommended that Kevin be expelled when he refused to recant his story. *Id.* Kevin subsequently filed a Fourteenth Amendment action against the school, alleging a violation of his personal liberty and bodily integrity. *Id.* at 509. The Court of Appeals for the Fifth Circuit affirmed the lower court's denial of his claim. *Id.* at 511. It determined that because Wysinger "believed that Kevin had been purposefully delaying or avoiding his return to the detention room. . . . Wysinger's acts apparently were meant to punish Kevin." *Id.* In so reasoning, the court showed an eagerness to find a need without one actually being established. In other words, the court had evidence before it that Wysinger had a subjective belief about Kevin's misbehavior. However, that subjective belief alone did not in fact establish a need for force. Wysinger's beliefs may have been wholly irrational. Without more, the court simply took Wysinger's subjective beliefs and translated them into an objective need for his assault of Kevin. *Id.* at 511.
80. *T.W. ex rel. Wilson v. School Board of Seminole County*, 610 F.3d 588 (11th Cir. 2010), is another example of a case where a court's failure to interrogate a school's pedagogical and disciplinary defenses resulted in the school evading liability despite the disturbing behavior of a teacher. There, teacher Kathleen Garrett used inappropriate, sometimes dangerous, physical force against student T.W. *Id.* at 594. T.W. consequently brought a Fourteenth Amendment claim against the school. *Id.* at 592–93. T.W.'s claim failed, though, because the court accepted pretextual disciplinary reasons and inferred pedagogical reasons—where none existed—to justify the need for force factor of the analysis. *Id.* at 600. In one instance, for example, Garrett created the need for restraining T.W. when she "said something to T.W. to provoke him," and T.W. responded by acting out. *Id.* at 595. Garrett, who at 300 pounds and nearly six feet tall was twice T.W.'s size, then "put T.W. on the floor with his face to the ground, straddled him so that her pelvic area was on top of his buttocks, and pulled his arms behind his back." *Id.* A teacher's aide in the classroom testified that Garrett would "pick and nag at [T.W.] until he would just get to the point where he just couldn't take it anymore" and then would restrain him. *Id.* at 594. Yet the court found a need for force because T.W. had in fact responded to Garrett's provocations and acted out. *Id.* at 600. The court also went so far as to infer a pedagogical need for another instance of abuse even though none existed. In that instance, Garrett pinned T.W.'s hands behind his back in a manner that could cause asphyxiation for no apparent reason. *Id.* at 596. The court nonetheless inferred a pedagogical reason for Garrett's restraint. *Id.* at 600. It said "[t]here is no evidence as to what prompted Garrett to pin T.W.'s arms behind his back during the . . . incident, but the restraint occurred while Garrett was leading T.W. to the cool down room, which suggests that the restraint served some pedagogical objective." *Id.* at 600.

Once courts find a need for force, however credible or incredible, pretextual or not, they then consider the proportionality between the need for force and the amount used. The courts, though, also fail to interrogate proportionality in a meaningful way.⁸² Consequently, students' claims also fail on this prong of this analysis.

In evaluating proportionality, courts examine the methods of discipline in isolation from its purpose.⁸³ Therefore, they find even purposeless discipline proportional if the disciplinary method itself is not severe. This analysis is problematic on two counts. First, it is not a proportionality analysis; it is an analysis of the severity of the method only without regard for its need. Second, it ignores the fact that use of any discipline or force without a purpose is, by definition, excessive.⁸⁴

In *Domingo*, for example, the court considered whether leaving a student strapped to a toilet for hours was excessive.⁸⁵ Because the record contained expert evidence that such techniques were both "improper and counterproductive," the techniques not only exceeded what was necessary to achieve the goal, but they worked against it.⁸⁶ Yet the court found otherwise because "the force that Kowalski applied—if she applied any force at all—was no more than arguably necessary to

Similarly, in a separate incident, Garrett tripped T.W. without cause. *Id.* at 596. The court simply ignored the lack of the need for Garrett to trip T.W. and did not analyze the need for that instance of force at all. *Id.* at 602.

81. T.W., for example, developed PTSD after the treatment he suffered in Kathleen Garrett's class. *Id.* at 596.
82. See *id.* at 601; *Domingo v. Kowalski*, 810 F.3d 403, 413–14 (6th Cir. 2016).
83. In *T.W.*, the court conflated length of time with excessiveness, and it also disregarded the absence of evidence in the record of any need for some instances of force in order to find the proportionality prong satisfied. 610 F.3d at 601. The court found Garrett's straddling of T.W. not excessive because she got off him after he complied with her demands. *Id.* However, time cannot serve as a total substitute for excessiveness. The excessiveness comes from doing more than is necessary. *Id.* In addition, even though the record in the case contained no evidence of a need for Garrett to pin T.W.'s arms behind his back, which made the force wholly unnecessary and therefore excessive, the court found it not to be excessive. *Id.* It did so by ignoring the lack of need for it and focusing on the minimal imposition of physical force. *Id.*
84. Merriam-Webster defines the word "excessive" as "exceeding what is usual, proper, necessary, or normal." *Excessive*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/excessive> [https://perma.cc/B2MP-7VQQ]. In other contexts, notably the prisoners' rights context, courts have concluded that the use of force without purpose is excessive. E.g., *Meredith v. Arizona*, 523 F.2d 481, 484 (9th Cir. 1975) (finding a prisoner's complaint of "an unprovoked assault and battery by a guard upon a prisoner known by the guard to be suffering from an attack of emphysema, by striking him in the solar plexus" stated a claim for a Fourteenth Amendment substantive due process violation of personal liberty because the conduct could "be fairly characterized as intentional, unjustified, brutal, and offensive to human dignity.").
85. *Domingo*, 810 F.3d at 413–14 (6th Cir. 2016).
86. *Id.* at 413.

keep these students safely on their toilets.”⁸⁷ As such, the court found it not excessive.⁸⁸

C. Title IX Claims for Peer Sexual Harassment

Title IX also provides at least a theoretical avenue for students who have suffered peer sexual harassment and abuse in school to hold the schools responsible for it.⁸⁹ Title IX states 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.”⁹⁰ Under Title IX, schools are not held responsible for the students’ harassing or abusive behavior.⁹¹ Rather, in *Davis v. Monroe County Board of Education*, the Supreme Court concluded that public schools are liable for peer sexual harassment when they are “deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”⁹² In other words, they are held responsible for their own failures to intervene and address known, egregious peer sexual harassment.

As a statutory scheme, Title IX fills in gaps in federal and state common law that otherwise leave students without legal protections from sex discrimination in education.⁹³ Yet, the burden on the student to prove liability under the *Davis* standard is a heavy one. Students fail to meet the *Davis* standard because courts’ assessment of the notice requirement demands that students show, among other things, that high-level school officials have very specific actual knowledge of substantial sexual harassment.⁹⁴ In evaluating the deliberate indifference

87. *Id.* at 414.

88. *Id.*

89. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999). Students can also bring Title IX claims for sexual harassment by teachers. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998). I have focused on peer sexual harassment claims because most sexual harassment in school is peer sexual harassment. *MacKinnon, supra* note 28, at 2047.

90. 20 U.S.C. § 1681(a) (2018).

91. *Davis*, 526 U.S. at 641–42.

92. *Id.* at 650.

93. “Congress enacted Title IX in 1972 with two principal objectives in mind: ‘[T]o avoid the use of federal resources to support discriminatory practices’ and ‘to provide individual citizens effective protection against those practices.’” *Gebser*, 524 U.S. at 286 (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979)).

94. See, e.g., *Rost v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114 (10th Cir. 2008); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); *Doe v. Bd. of Educ. of Prince George’s Cty.*, 605 F. App’x 159 (4th Cir. 2015); *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 926 (1999).

requirement, courts accept almost any school response to sexual harassment as sufficient.⁹⁵ As a result, schools' liability under Title IX for peer sexual harassment is severely limited.

Beyond making schools' knowledge of peer sexual harassment a predicate to liability, the Supreme Court gave little guidance in *Davis* as to what constitutes "known acts" of "severe, pervasive, and objectively offensive" peer harassment.⁹⁶ The Court did not say, for example, how precise students have to be in when providing that notice or whether actual knowledge of some sexual harassment gives rise to some obligation to investigate for additional sexual harassment.⁹⁷ Lower federal courts have assessed these issues, however, and they have done so in ways that limit public school liability under Title IX.⁹⁸

In the Tenth Circuit, for example, not only must higher-level administrators have knowledge of students' sexual harassment, but they must have specific information about it.⁹⁹ Consequently, in the Tenth Circuit, Title IX imposes no

95. See *Davis*, 526 U.S. at 629; *Stiles v. Granger*, 819 F.3d 834, 840–45 (6th Cir. 2016).

96. *Davis*, 526 U.S. at 648, 650.

97. See *id.* Although in the predecessor Title IX case, *Gebser v. Lago Vista Independent School District*, the Court made clear that "a complaint from parents of other students charging only that [the teacher] had made inappropriate comments during class...was plainly insufficient to alert the principal to the possibility that [the teacher] was involved in a sexual relationship with a student," it did not indicate what more would be required. *Gebser*, 524 U.S. 274, 292 (1998). In *Davis*, the Court said the "most obvious example" of peer sexual harassment violating Title IX would be "a case in which male students physically threaten their female peers everyday, successfully preventing the female students from using a particular school resource—an athletic field or a computer lab, for instance. District administrators are well aware of the daily ritual, yet they deliberately ignore requests for aid from the female students wishing to use the resource." *Davis*, 526 U.S. at 650–51. Thus, together *Gebser* and *Davis* establish the ends of a continuum on which notice plainly is and is not sufficiently provided but do not elucidate the middle. See also Kelly Dixon Furr, Note, *How Well Are the Nation's Children Protected From Peer Harassment in School? Title IX Liability in the Wake of Davis v. Monroe County Board of Education*, 78 N.C. L. REV. 1573, 1597 (2000) (critiquing the *Davis* standard for failure to articulate its meaning, specifically pointing out that "[t]he *Davis* standard is also problematic because the Court did not give significant guidance regarding: (1) what constitutes severe and pervasive behavior to the point of interfering with education; (2) who must possess actual knowledge of the harassment; or (3) what constitutes reacting with deliberate indifference. Although OCR Guidelines and Title VII provide some guidance in applying the *Davis* standard, substantial uncertainties remain").

98. Catharine MacKinnon provides a compelling critique of public schools' and universities' limited liability in her article. See MacKinnon, *supra* note 28.

99. In *Rost v. Steamboat Springs RE-2 School District*, the Tenth Circuit effectively required that some precision is required to satisfy Title IX's actual notice requirements. 511 F.3d 1114 (10th Cir. 2008). In *Rost*, middle school student K.C. was repeatedly sexually harassed and assaulted by boys at her school. *Id.* at 1117. K.C., who had suffered a brain injury, lacked the language skills to say that the boys were sexually assaulting her. *Id.* Instead, she told the principal that the boys were "bothering" her. K.C.'s mother also suspected a serious problem at school and pleaded with the school social worker and principal to find out what was happening to K.C. *Id.* at 1120. Nevertheless, and despite K.C.'s inability to produce a more precise report, the court

liability for failures to address sexual harassment if students do not complain about it in specific terms.¹⁰⁰ In such cases, schools can simply ignore it.¹⁰¹

The Fourth Circuit has come to a somewhat different, but still stringent, interpretation of the *Davis* notice requirement that leaves students without much recourse in Title IX.¹⁰² It has interpreted the *Davis* notice requirement such that a school's notice of some sexual harassment does not trigger an obligation to uncover potential additional sexual harassment, no matter how much reason a school might have to suspect it.¹⁰³ In the Fourth Circuit, therefore, a school's failure to investigate

concluded that the school had no notice of K.C.'s sexual harassment because K.C.'s report was vague. *Id.* In the Tenth Circuit, therefore, the real possibility exists that large swaths of children—young children and children with disabilities, most notably—who lack the verbal capacity to tell someone of their sexual harassment in sophisticated or specific language will be virtually left without Title IX's protections.

100. See *supra* note 99 and accompanying text.
101. While not every court has determined that knowledge of peer sexual harassment must be so precise, that some—like the Tenth Circuit—have done so reflects a strain of Title IX jurisprudence that strongly unbounds many school officials' decisionmaking. See *infra* note 103 (discussing *Kauhako v. Hawaii Board of Education*).
102. *Doe v. Bd. of Educ.*, 605 F. App'x 159 (4th Cir. 2015). *Doe* involved the sexual harassment of one student, J.D., by another, M.O., that culminated in incidences of forced sexual acts in the school bathroom. *Id.* at 163. The school addressed some, but not all, of the harassment J.D. suffered. *Id.* at 162. The school defended its failure to address every instance of the sexual harassment that J.D. endured on the basis that it did not know of some of the individual instances of harassment. *Id.* at 168. J.D. argued that to the extent the school lacked notice of some of the sexual harassment, that lack of notice was due to the school's failure to investigate after receiving notice of the other sexual harassment. *Id.* at 168. The Fourth Circuit rejected J.D.'s argument. *Id.* at 167–68.
103. *Id.* Not only did the Fourth Circuit limit public school Title IX liability by narrowly interpreting the meaning of the notice requirement, but it also did so by way of problematic reasoning. In *Doe*, the Fourth Circuit limited the public schools' liability by interpreting the *Davis* notice requirement in a way not mandated by *Davis*. In *Davis*, the Supreme Court stated that schools must be “deliberately indifferent to known acts of student-on-student sexual harassment.” *Davis*, 526 U.S. at 647. The Court, however, did not limit the events or circumstances under which that notice can arise once schools know of some sexual harassment. See *id.* Contrary to the Fourth Circuit's conclusion in *Doe*, therefore, the *Davis* standard does not preclude the possibility that notice of some sexual harassment would give rise to schools' obligation to try to determine the existence of additional sexual harassment. *Davis*, 526 U.S. at 646–47. Indeed, requiring that the schools investigate the extent of the problem upon learning of some sexual harassment also makes sense because children are often reluctant to report it. See *supra* note 15 and accompanying text; D.R. *ex rel.* L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1381 (3d Cir. 1992) (“[T]he reluctance of children to disclose sexual abuse is generally acknowledged.”). Moreover, to underscore the point that the *Doe* court's heightened notice requirements is not the mandatory interpretation of *Davis*'s notice requirement, at least one federal district court, the Hawaii District Court in *Kauhako v. Hawaii Board of Education*, adopted a less narrow interpretation. No. CV 13-00567 DKW-KJM, 2015 U.S. Dist. LEXIS 119736, at *7–8 (D. Haw. Dec. 19, 2016). In *Kauhako*, a student, Mariana Doe, was raped repeatedly by another student in school, Ruston Tom. *Id.* at *2. On a motion to dismiss Doe's Title IX claim, the school argued that the first rape did not provide notice of subsequent rapes. *Id.* at *7–8. The court rejected these arguments. *Id.* It said that the amount of information the

the full extent of a student's sexual harassment will insulate it from liability for not addressing any it did not expressly know about, even if it had ample reason to suspect it.¹⁰⁴ Schools can thus effectively decide to cherry pick which sexual harassment they respond to, and Title IX will not constrain them under the Fourth Circuit analysis.

Even when schools have sufficient knowledge of peer sexual harassment, they can easily evade liability based on courts' interpretations of the Title IX deliberate indifference standard. In *Davis*, the Supreme Court said that to meet that standard, a school "must merely respond to known peer harassment in a manner that is not clearly unreasonable."¹⁰⁵ Schools, therefore, can theoretically respond to student sexual harassment in ways that are arguably unreasonable, and they will not be held liable under Title IX.

This low threshold for responding to sexual harassment has meant that courts have found that virtually any action by the schools will satisfy Title IX, regardless of how ineffective or counterproductive they are. In some cases, schools' interventions have done nothing or exacerbated harm.¹⁰⁶ In other cases, schools sometimes responded to the sexual harassment and sometimes did not.¹⁰⁷ Interventions that at best do not work and at worst cause more harm to a child are not reasonable. A school's response to some instances of sexual harassment should not reasonably inoculate its inaction in response to other

school official must possess need only be "enough knowledge" of the harassment that "it reasonably could have responded with remedial measures." *Id.* at *5 (citation omitted).

104. *Doe*, 605 F. App'x at 167–68.
105. *Davis*, 526 U.S. at 649.
106. In *Doe v. Board of Education*, for example, the school responded to M.O.'s repeated harassment of J.D. in both ineffective and counterproductive ways. 605 F. App'x at 162–63. When the boys were in fourth grade, the school moved J.D.'s desk away from M.O.'s desk and gave M.O. an in-school suspension, but the harassment continued. *Id.* Then, although the school knew of the harassment, it created further opportunity for harassment by placing the boys in the same fifth-grade classroom. *Id.* at 162. Also that year, because the school knew the sexual harassment occurred in the bathroom, it gave J.D. a peer escort to the bathroom. *Id.* at 163. That intervention, however, only caused J.D. more suffering because other students teased him about the escort, resulting in humiliation and exacerbating his emotional harm. *Id.*
107. In *Stiles v. Granger*, a student, D.S., was repeatedly harassed over a period of years by multiple other students. 819 F.3d 834, 840–45 (6th Cir. 2016). The school sometimes responded to the harassment and sometimes did not. *Id.* at 840–45. The opinion is replete with instances where the school did almost nothing in response to the harassment. For example, the court noted that the "record does not indicate whether [the assistant principal, who received a report that a student was calling D.S. "gay" and "homo"] investigated the complaint." *Id.* at 841. In another incident, a student called D.S. "'pussy,' jumped on him, and punched him in the mouth." *Id.* at 844–45. The school did not punish this student because the assistant principal "testified that [she] 'assumed... mom handled the situation.'" *Id.* at 845. However, because the school responded sometimes, the court found the school did not act in a clearly unreasonable way. *Id.* at 848–49.

instances of sexual harassment. Yet, courts still find these responses not clearly unreasonable, and they satisfy the deliberate indifference standard.¹⁰⁸ These highly discretionary standards, therefore, create high thresholds for school Title IX liability, and students struggle to hold schools liable for peer sexual harassment.

D. The Resulting Civil Rights Vacuum in Schools

Whether students suffer physical, verbal, or sexual harms in school, the Fourteenth Amendment and Title IX do little to protect them. Collectively, therefore, these laws shield schools from liability instead of protect students. Consequently, students who are sexually assaulted by other students, as in *Middle Bucks*, or strapped for hours to a toilet by their teachers, as in *Domingo*, cannot expect to find legal protection in school. That is not to say, though, that students never succeed on any claim for harms suffered in school. They have at times.¹⁰⁹ However, the law does not consistently—or even often—protect them because the courts assess their claims in ways that make it difficult to hold schools accountable. Civil rights enforcement for students under these laws simply proves elusive. As an aggregate matter, courts' interpretations of students' Fourteenth Amendment and Title IX claims for physical, verbal, and sexual abuse has created a civil rights vacuum in the public schools.

108. To be fair, the courts have also said that schools do not have to remedy the sexual harassment. *Porto v. Town of Tewksbury*, 488 F.3d 67, 73 (1st Cir. 2007) (“[A] claim that the school system could or should have done more is insufficient to establish deliberate indifference”); *Vance v. Spencer Cty. Pub. Sch. Dist.*, 231 F.3d 253, 260 (6th Cir. 2000) (“The recipient is not required to ‘remedy’ sexual harassment nor ensure that students conform their conduct to certain rules, but rather, ‘the recipient must merely respond to known peer harassment in a manner that is not clearly unreasonable.’” (quoting *Davis*, 526 U.S. at 648–49)). This concession has practical value. Even the most thoughtful interventions aimed at addressing and preventing sexual harassment might not work. It is easy to imagine a scenario in which a school responds to sexual harassment by allowing the victim to choose to attend another public school or transferring the perpetrator to another school, which would seemingly work to separate the students such that sexual harassment would not occur in school. It is also easy to imagine the perpetrator tracking the victim down and continuing the harassment at school sporting events or other school-related events. Genuine efforts aimed at ending the sexual harassment, therefore, might not all be effective. Such efforts, though, are a far cry from the patently ineffective, nonexistent, or even counterproductive and harmful interventions used by the schools in *Doe* and *Stiles*. Those efforts nevertheless satisfied Title IX because virtually any intervention is sufficient under the deliberate indifference requirement of *Davis*.

109. See, e.g., *supra* notes 68, 103 and accompanying text.

II. THE MISCONCEPTIONS JUSTIFYING PUBLIC SCHOOLS' LIMITED LIABILITY

Were the justifications for public schools' limited liability satisfactory, then students' limited legal protections in school would be a tragic, but unavoidable, fact of school life. Instead, this limited jurisprudence is rooted in the courts' misconceptions about both families and schools.¹¹⁰ The courts rely heavily on these misconceptions to justify school liability limits. Students' limited legal protections within the school civil rights vacuum, therefore, is unwarranted. As is explained in Part III, these misconceptions and consequent legal limits also result in at least three serious and troubling consequences.

A. The Family as Totally Responsible for Protecting Children

When evaluating students' Fourteenth Amendment duty to protect claims, courts rely on a misconception about the family's role with respect to their children.¹¹¹ Specifically, they rely on the idea that the family is properly responsible for all the care of children even when children are in school.¹¹² The problem, however, is that the idea that families are in fact solely responsible for and capable of all this care, all the time, even during the school day, is inaccurate and factually untrue.

This misconception is apparent in Fourteenth Amendment duty to protect cases. There, courts tie the state duty to protect individuals to a special relationship arising from physical custody and the consequent need for state caretaking.¹¹³ In

110. The courts at time openly work to limit schools' liability. In the Fourteenth Amendment cases, the courts frequently note that they are looking to limit Fourteenth Amendment liability. *E.g.*, T.W. *ex rel.* Wilson v. Sch. Bd., 610 F.3d 588, 598 (11th Cir. 2010); Lee v. Pine Bluff Sch. Dist., 472 F.3d 1026, 1032 (8th Cir. 2007) ("[T]he Fourteenth Amendment was not designed to provide relief in all cases where the State's functionaries fail to take action that might have averted a serious harm. The constitutional duties derived from substantive due process analysis are carefully circumscribed."). Therefore, the court concluded that the school had no duty to protect and therefore was not liable for the death of a student, who became very ill while on a school-supervised band trip but for whom the school staff sought no medical help despite knowing about the illness. *Lee*, 472 F.3d at 1032. Similarly, in the Title IX context, the Supreme Court once found schools could be liable under Title IX while explaining how its standard served to limit schools' exposure to it. *Davis*, 526 U.S. at 649 (noting that "there is no reason why courts, on a motion to dismiss for summary judgment, or for a directed verdict, could not identify a response as not 'clearly unreasonable' as a matter of law"). Lower courts have followed in these efforts. *See infra* Subpart II.B.

111. *See infra* notes 115–116 and accompanying text.

112. *See infra* notes 115–116 and accompanying text.

113. *E.g.*, *Sargi v. Kent City Bd. of Educ.*, 70 F.3d 907, 911 (6th Cir. 1995) (affirming the denial of a Fourteenth Amendment duty to protect claim, stating "unlike imprisonment or commitment to

the school context, although courts acknowledge some form of physical custody exists because of mandatory attendance laws, they point out that families—and not schools—are still ultimately responsible for and capable of children's care.¹¹⁴ The courts rely on this notion of family caretaking to conclude that schools have neither a caretaking nor, therefore, a custodial relationship with students that gives rise to a duty to protect them.¹¹⁵

The courts thus treat the responsibility for the caretaking and protection of children as a binary choice. Because parents protect and care for children, schools do not have the responsibility to do so. Parents, they say, have this ability to protect children even when they are in school because the children "remain resident in their home . . . [so] they may turn to persons unrelated to the state for help."¹¹⁶ Moreover, parents can protect children because they retain "the discretion to remove the child from classes as they see fit."¹¹⁷ When children are nonetheless harmed in school, parents still have virtually sole responsibility for addressing the harm.

However, the idea that parents can do all the work of protecting and caring for children, even when they are in school, fails for four reasons.¹¹⁸ First, the very

a mental institution, compulsory school attendance does not restrict a student's liberty such that neither the child nor his parents are unable to attend to the child's basic human needs. Despite mandatory school attendance laws, the parents, not the state, remain the child's primary caretakers."); Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729, 732 (8th Cir. 1993) (denying a Fourteenth Amendment duty to protect claim by a boy with intellectual disabilities who was sexually assaulted in the high school shower because "[p]ublic school attendance does not render a child's guardians unable to care of the child's basic needs. In this regard, public schools are simply not analogous to prisons and mental institutions."); *see also infra* notes 115–116.

114. *See infra* notes 115–116.
115. *See, e.g.*, Doe v. Hillsboro Indep. Sch. Dist., 113 F.3d 1412, 1415 (5th Cir. 1997) (rejecting a Fourteenth Amendment duty to protect claim by a student who was raped by a school janitor because "[p]arents remain the primary source of the basic needs of their children"); D.R. *ex rel.* L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1371 (3d Cir. 1992) ("Our view that parents remain the primary caretakers, despite [children's] presence in school, is not affected by Section 13-1317 which grants Pennsylvania teachers and principals *in loco parentis* status."); J.O. v. Alton Cmty. Unit Sch. Dist. 11, 909 F.2d 257, 272 (7th Cir. 1990) (rejecting the Fourteenth Amendment duty to protect claim of students who had been sexually abused by a public school teacher because "parents still retain primary responsibility for feeding, clothing, sheltering, and caring for the child").
116. *Middle Bucks*, 972 F.2d at 1372; *see also Doe v. Hillsboro*, 113 F.3d at 1415 (quoting *Ingraham v. Wright* 430 U.S. 651, 670 (1977)) ("Even while at school, the child brings with him the support of family and friends.").
117. *Middle Bucks*, 972 F.2d at 1371.
118. This concept of families as inhabitants of the private sphere, where caretaking work is done, as opposed to public sphere entities, which do not do caretaking, is also reflective of and integral to the false dichotomy of public and private that has been explored by feminists. MAXINE EICHNER, THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS 5 (2010); MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 151–52

existence of civil rights statutes like Title IX demonstrates that the notion that parents can protect students while they are in school is false. Title IX was enacted for the purpose of protecting children from and “prohibit[ing] sex discrimination at all levels of education.”¹¹⁹ If parents were fully capable of protecting their children from sexual harassment in school, then Title IX would not have been and would not still be needed. Title IX is the embodiment of the idea that parents alone cannot protect their children.¹²⁰

Second, state statutes also require schools to do caretaking.¹²¹ Numerous states have laws explicitly requiring teachers and other school staff to report suspected child abuse and neglect.¹²² In other words, these states require schools to take care of children by acting to protect them from child abuse and neglect.

Third, courts, including the Supreme Court, not only acknowledge that schools take care of and protect children in school, but they also use this caretaking work to justify deference to schools’ suppression of students’ constitutional rights.¹²³ For example, the Supreme Court has said that public schools have a role in protecting students from the ravages of the drug abuse problem.¹²⁴

(2005); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 191–93 (1989); Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 997–1002 (1993); Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835 (1985). Feminists have effectively shown that families are not fully private but instead are highly regulated. *Id.* Similarly, the public/private dichotomy also fails because public schools are private in that they do caretaking work and lack regulation. Suski, *The Privacy of the Public School*, *supra* note 29 (contending that public schools have privacy, in the sense developed in feminist theory, because they lack regulation for failing to address harms to children and because they do caretaking work).

119. 118 CONG. REC. 5807 (daily ed. Feb. 28, 1972) (statement of Sen. Birch Bayh).
120. See *id.*; see also Paul M. Anderson, Symposium, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments That Shaped Gender Equity Law*, 22 MARQ. SPORTS L. REV. 325 (2012) (explaining that Title IX was originally enacted to address sex discrimination in education, not athletics).
121. See *infra* note 122 and accompanying text.
122. These states include Alaska, Alabama, Arkansas, California, Florida, Georgia, Idaho, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Missouri, Montana, New Hampshire, New Mexico, New York, North Dakota, Ohio, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, West Virginia, and Wisconsin. CHILD WELFARE INFO. GATEWAY, MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT (2015).
123. E.g., *Vermonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995) (stating that because a school’s suspicionless search of student athletes was “undertaken in furtherance of the government’s responsibilities, under a public school system, as guardian and tutor of children entrusted to its care,” it was appropriate and did not violate the Fourth Amendment”); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682–83 (1986) (reasoning that because it is the “role and purpose” of the public schools to teach students the “habits and manners of civility,” they can suppress students’ vulgar speech without violating the First Amendment).
124. See, e.g., *Morse v. Frederick*, 551 U.S. 393, 408 (2007) (finding that the protecting students from the problem of drug use justified the suppression of speech that could be construed as drug-promoting); *Acton*, 515 U.S. at 665 (noting that “the most significant element in this case is the

Consequently, public schools can infringe on students' First and Fourth Amendment rights to protect them in ways other state actors could not.¹²⁵ So, while schools do not have the kind of full custody that parents enjoy, they do fall in a middle ground because they are not without custodial and caretaking responsibilities.¹²⁶ The law gives them the benefit of the middle ground to limit student rights, but it does not use that middle ground status to expand student's rights such that schools are obliged to protect them in school.

Fourth, the facts of the cases in which students seek redress for harm in school belie the notion that parents can protect their children while they are in school. Parents cannot do all the protection and caretaking of children because they are not present in school.¹²⁷ If parents were fully able to care for and protect their children while they are in school, then reason suggests both that children would rarely be harmed in school because parents would step in to protect them, and parents would not have to beseech schools to intervene to do it for them.

first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care" to justify its conclusion that the suspicionless search of student athletes did not violate the Fourth Amendment).

125. *Acton*, 515 U.S. at 664–65; *Morse*, 551 U.S. at 408.
126. See D.R. *ex rel.* L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1371 (3d Cir. 1992) ("Although a student is not held in school under shackles, there is substantial compulsion associated with schooling."); *see also* Suski, *The Privacy of the Public School*, *supra* note 29, at 477–80 (discussing schools' custody of children as occupying a middle ground and its implications).
127. *Morrow v. Balaski*, 719 F.3d 160, 190 (2013) ("[A] parent's immediate ability to protect his child is significantly curtailed during the time the child is in the physical custody of school officials. During that time, the State may well be the *only* caregiver to which children may turn to for help.") (dissent). Significantly, parents of children with disabilities face particularly large obstacles to protecting their children in school. Some children with disabilities cannot tell their parents of their harm because their disabilities prevent them from doing so. *E.g.*, *Middle Bucks*, 972 F.2d at 1381; *Domingo*, 810 F.3d at 412–13. For example, one of the girls who was sexually assaulted in *Middle Bucks* had both extremely limited articulation and a severe hearing impairment. *Middle Bucks*, 972 F.2d at 1381. She had literal physical impediments affecting her ability to get a parent to help her. *Middle Bucks*, 972 F.2d at 1381. Similarly, in *Domingo v. Kowalski*, Marsha Kowalski restrained, gagged, and otherwise abused children with severe disabilities who likely would have had difficulty telling their parents of their abuse in school. *Domingo*, 810 F.3d at 412–13. Parents of children like these cannot protect them from harms when they do not know about it. Further, regardless of disability status, children underreport harassment and abuse. *E.g.*, *HILL & KEARL*, *supra* note 11, at 8 (specifically pointing to underreporting of cyber sexual harassment); *see also* *Middle Bucks*, 972 F.2d. at 1382 ("In a poignant revelation of her vulnerability, D.R. stated that she was afraid that if she complained about the brutality to anyone and was removed from the classroom, she would have nowhere to go."). If their children cannot or will not tell them about the abuse, then the parents will not know about it, let alone be able to do anything about it.

Instead, parents, like the parents of Brittany and Emily Morrow, implore the schools to protect their children.¹²⁸

B. The Expertise of the Schools, the Ignorance of the Courts

Courts also rely on the misconception that schools have such particular expertise in matters of pedagogy and discipline that it justifies a near-total deference to public school decisionmaking in these areas.¹²⁹ This expertise-based deference appears explicitly in Title IX cases.¹³⁰ It also manifests implicitly in Fourteenth Amendment cases, where courts accept even the most implausible or nonexistent pedagogical or disciplinary reasons proffered by schools without scrutiny.¹³¹ The reliance on this expertise-based deference is exaggerated, however, because courts justify their refusal to scrutinize schools' defenses even when no such expertise is needed.¹³²

In the Title IX context, the Supreme Court has endorsed a deferential approach to schools' expertise on matters of pedagogy and discipline. In *Davis*, the Court cautioned lower courts to "refrain from second guessing the disciplinary decisions made by school administrators."¹³³ The Court issued this warning

128. *Morrow*, 719 F.3d 160, 166 (2013). When Emily and Brittany Morrow suffered repeated bullying by fellow student Shaquana Anderson, the school simply refused to address it despite their parents' pleas for intervention. *Id.* Even when Emily and Brittany's parents provided the school with a no-contact order that a court imposed against Shaquana in an attempt to get the school to protect the girls, the school did not follow it. *Id.* at 164.

129. See *infra* notes 136, 138 and accompanying text.

130. See *infra* note 136 and accompanying text.

131. See *infra* note 138 and accompanying text.

132. For other critiques of courts' use of this idea to defer to school authority in First and Fourth Amendment cases, see Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441 (1999).

133. *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 648 (1999) (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 342 n.9 (1985)). In *T.L.O.*, the Court decided that schools have more deference to suppress students' Fourth Amendment rights than other state actors and that schools could search students upon reasonable suspicion and without probable cause and a warrant. *T.L.O.*, 469 U.S. at 347. The majority also responded to Justice Stevens's concern that reasonable suspicion might not be a high enough standard to justify a search to uncover violations of "trivial" school rules. *Id.* at 342 n.9. The Court refused to delve into the question of which school rules could be deemed trivial. It said when schools make a rule to prohibit, it "presumably reflects a judgment on the part of school officials that such conduct is destructive of school order or of a proper educational environment. Absent any suggestion that the rule violates some substantive constitutional guarantee, the courts should, as a general matter, defer to that judgment and refrain from attempting to distinguish between rules that are important to the preservation of order in the schools and rules that are not." *Id.* Yet even there the Court imposed some check on schools' discretion, the requirement of individualized suspicion before a search can be lawfully conducted. *Id.*

because it was anxious to avoid hamstringing schools' disciplinary discretion.¹³⁴ This deference to schools' disciplinary decisionmaking thus helped to justify the deliberate indifference standard, which the Court said would be satisfied if schools responded to sexual harassment in ways not clearly unreasonable.¹³⁵ The lower courts have accordingly been mindful of deferring to schools' expertise when assessing whether their responses to sexual harassment were not clearly unreasonable, and this deference has also served to limit public school liability.¹³⁶

The courts also show a reluctance or refusal to question school decisionmaking in Fourteenth Amendment personal liberty and bodily integrity cases.¹³⁷ Although the courts are less explicit about their deference to school decisionmaking in this context, it manifests implicitly when the courts fail to question schools' assertions of even implausible pedagogical or disciplinary goals and methods.¹³⁸ This failure to scrutinize even implausible or nonexistent disciplinary reasons for physical abuse of children leads to their conclusions that the schools are not liable for the harms.¹³⁹

On first consideration, the idea of relying on schools' expertise in matters of pedagogy and discipline seems like a reasonable basis for deferring to school

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134. *Davis*, 526 U.S. at 648 (“We stress that our conclusion here—that recipients may be liable for their deliberate indifference to known acts of peer sexual harassment—does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action.”).
 135. *Id.* at 649.
 136. In *Doe v. Board of Education of Prince George’s County*, 605 F. App’x 159, 165 (2015), for example, the Fourth Circuit showed its reticence to question schools’ decisionmaking. When discussing whether the school could have done more or taken other steps to address the sexual harassment of the student, J.D., it approvingly referenced the district court’s note about courts’ “obligation to refrain from ‘micromanaging’ the school’s operations.” *Id.* at 165 n.9. Based in part on this idea, it concluded that the school’s actions “were not clearly unreasonable.” *Id.* at 168.
 137. See *infra* note 138 and accompanying text.
 138. For example, in *Domingo v. Kowalski*, 810 F.3d 403, 412 (6th Cir. 2016), evidence in the record showed that the teacher’s stated pedagogical and disciplinary reasons for restraining a child to a toilet for hours at a time would work against the goal of toilet training, but the court did not incorporate this information into its reasoning or in any way question the plausibility of the stated goal. In *T.W. ex rel. Wilson v. School Board of Seminole County*, 610 F.3d 588 (11th Cir. 2010), the school staff member, Kathleen Garrett, not only used harmful and potentially life-threatening disciplinary techniques, but she also knew they could be harmful. Yet the court did not question the asserted pedagogical reasons or methods. *Id.* at 600–01. In *Flores v. School Board of DeSoto Parish*, 116 F. App’x 504, 506 (5th Cir. 2004), in which the coach challenged the student to fight, threw him against a wall, choked him, and then threatened him if he told anyone, it takes some imagination to accept these methods as proper or serving a pedagogical or disciplinary goal. Nonetheless, the court said that “so long as it is possible to construe the force as an attempt to serve pedagogical objectives,” it would do so. *Id.* at 510. And so it did. *Id.*
 139. See *supra* Subpart I.B.

decisionmaking. Indeed, it is reasonable in a number of contexts.¹⁴⁰ Schools unquestionably have more experience handling matters of pedagogy and discipline given their daily work on these issues.¹⁴¹ Yet schools' expertise fails to justify the courts' near-total lack of scrutiny into schools' failure to protect children from or their tolerance those harms for at least three reasons.

First, "pedagogy" and "discipline" are such broad categories that they could encompass almost anything. They comprise schools' general purpose for being.¹⁴² So, if courts defer to schools in these areas, they will rarely, if ever, find occasion to scrutinize the actions of schools.¹⁴³

Second, the courts do not need expertise in pedagogy and discipline in order to analyze some such assertions by the schools.¹⁴⁴ No particular expertise is needed to analyze the utter lack of a pedagogical or disciplinary goal or a manufactured one.¹⁴⁵ Take, for example, the case of *Domingo v. Kowalski*, in which teacher Marsha Kowalski gagged and bound her students, leaving some

140. For example, the Every Student Succeeds Act gives states and their educational agencies the flexibility to develop their own challenging educational standards and goals. 20 U.S.C. § 6311. Crafting such goals requires educational expertise and experience. So, deferring to the expertise of state educational experts for the development of these plans makes sense insofar as persons without that expertise would be ill-equipped to create the plans. The courts' acknowledgement and deference to expertise is also justified as a matter of efficiency and error avoidance. See *infra* note 144.

141. *See supra* note 140 and accompanying text.

142. *Tinker v. Des Moines Indep. Sch. Dist.* 393 U.S. 503, 507 (1969) (stating that schools are "educating the young for citizenship" (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943))); *Bd. of Educ. v. Earls*, 536 U.S. 822, 831, 839 (2002) (noting schools are "responsible for maintaining discipline, health, and safety" in upholding suspicionless searches of all students participating in extracurricular activities).

143. For example, the Court of Appeals for the Fifth Circuit will not examine schools' actions that harm children not only when it plausibly is the result of a pedagogical or disciplinary decision, but also when it is merely capable of being construed as such. *Flores*, 116 F. App'x at 510.

144. Scott A. Moss has argued that the reliance on the idea that courts' deference to schools in First Amendment cases is a function of concerns about the information costs and resulting error costs. Scott A. Moss, Symposium, *Students and Workers and Prisoners—Oh, My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 UCLA L. REV. 1635, 1658 (2007). He points out that in "institutions involving specialized knowledge, such as schools and prisons, the information costs of adjudication may be especially high. Litigants must expend more time and expense explaining the case to the court, and the court must expend more time and effort learning the information necessary to make a good ruling. When information costs (or any other transaction costs) are high, then error costs will be high as well, because with the courts likely having less information when making their rulings, the odds of erroneous rulings are greater." *Id.* at 1658. However, no such information costs exist for certain pedagogical or disciplinary decisions, most notably those that lack an implausible basis or any basis at all. For such decisions, judicial review occurs without informational costs.

145. *Id.; see also supra* Part II.B.

restrained on toilets for hours at a time.¹⁴⁶ There, the court needed no particular expertise to find there was no need for that force.¹⁴⁷ Moreover, even if expertise is needed in other, less egregious cases to determine the validity of asserted pedagogical or disciplinary methods, courts could simply hear that evidence instead of taking their current approach of near-total deference.¹⁴⁸

Finally, calling into question schools' baseless or implausible pedagogical and disciplinary justifications does nothing to undermine their broader pedagogical and disciplinary expertise.¹⁴⁹ To the contrary, refusing to defer to implausible or nonexistent pedagogical and disciplinary assertions shows a respect for the valid exercise of such expertise by not grouping the implausible and nonexistent with the actual and the valid. It bolsters the strength of deference to this expertise when it is given.¹⁵⁰ While as a general matter courts' concerns about engaging in matters over which they have little expertise has validity because it could, among other things, lead to decisionmaking errors, they have taken the deference so far in these cases as to make review almost meaningless.¹⁵¹

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146. See *supra* notes 69–70. Similarly, in *T.W. ex rel. Wilson v. School Board of Seminole County*, 610 F.3d 588 (11th Cir. 2010), abusive teacher Kathleen Garrett had only pretextual, or in some instances no, reason for restraining student T.W., who was at least half her size, with her full weight. See *supra* notes 80–83 and accompanying text. Courts need no particular expertise to evaluate such methods as improper.
147. A court does not need expertise to evaluate the need for force so extreme that it violates basic social norms. Even less extreme forms of discipline now violate the disciplinary norms of most parents. For example, a recent study found that far fewer parents spank or otherwise physically discipline their children than did twenty years ago. Rebecca M. Ryan et al., *Socioeconomic Gaps in Parents' Discipline Strategies From 1998–2011*, 138 PEDIATRICS 1 (2016). Twenty years ago, 46 percent of parents at the median income level endorsed physical discipline, but that rate of endorsement dropped to 21 percent by 2011. *Id.* These changes reflect the changing norms that militate against the use of physical discipline on children.
148. However, even when courts do hear this kind of evidence on the validity of pedagogical and disciplinary methods, they ignore it and defer to the schools. See *supra* notes 74–77 and accompanying text.
149. See Chemerinsky, *supra* note 132, at 461 (critiquing, for example, the Supreme Court decision to allow schools to conduct random, suspicionless drug tests of students out of deference to schools' authority and expertise because not "forcing students to submit to drug tests would not undermine the overall authority of the schools").
150. *Id.* ("The Supreme Court's assumption is that virtually any judicial review is inconsistent with the authority of these institutions [prisons, the military, and the public schools]. Yet, there is no reason why this is so, especially because authority and expertise are factors that courts can use as part of judicial analysis.").
151. Moss, *supra* note 144 and accompanying text.

C. The Burdens of Regulations on the Public Schools

In the Title IX context, public schools' limited liability also finds its roots in courts' concerns about imposing burdens on schools.¹⁵² The judicial handwringing over the notion of schools' burdens began in the Supreme Court even as it concluded that schools could be found liable under Title IX for peer harassment.¹⁵³ In *Davis*, the Court expressly worried about the burdens associated with the imposition of Title IX liability on schools.¹⁵⁴ Unsurprisingly, then, these concerns have surfaced in the lower courts and served as a basis for limiting schools' liability under Title IX.¹⁵⁵ Yet, the idea has little merit and none that justifies limiting schools' Title IX liability.¹⁵⁶ Moreover, at this point, there is little risk that more scrutiny into schools' responses to sexual harassment will translate into excess judicial interventionism given that the starting point for such scrutiny is at so low a level now.

In *Davis*, the Supreme Court expressed skepticism about imposing Title IX liability on schools because schools already had to function under the heavy weight of regulations.¹⁵⁷ The Court was clear on this point, stating "we acknowledge that school administrators shoulder substantial burdens as a result of the legal constraints on their disciplinary authority."¹⁵⁸ It consequently took pains to explain repeatedly how it was not adding to these burdens and was limiting schools' Title IX liability.¹⁵⁹ It explained how schools' liability was limited to instances of sexual harassment over which the schools have control.¹⁶⁰ Further, it described that the "standard set out here is sufficiently flexible to account for both the level of disciplinary authority available to the school and for the potential liability arising from certain forms of disciplinary action."¹⁶¹ The standard, therefore, seeks to protect schools from excess liability as much or more than it protects students from sexual harassment.¹⁶²

152. See *supra* Subpart II.B.

153. *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 649 (1999).

154. *Id.*

155. See *supra* Subpart II.B.

156. See *supra* Subpart II.A.

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

158. *Id.*

159. *Id.*

160. *Id.* at 644–45.

161. *Id.* at 649.

162. Catharine MacKinnon notes "[t]he choice of deliberate indifference as a liability standard... rather than being based on equality reasoning, was designed to keep the schools from being taken by surprise in being held responsible when students' education was disrupted or destroyed by sexual harassment." MacKinnon, *supra* note 28, at 2087. "The test is designed

More specifically, the Court sought to limit Title IX liability and preserve schools' disciplinary flexibility through the evaluation of the actual notice and deliberate indifference standard.¹⁶³ With respect to the actual notice standard, the Court said that the standard would "limit a [school's] damages liability to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs."¹⁶⁴ The Court was also explicit about how the deliberate indifference standard would limit public schools' liability. The Court said that to enable schools to "continue to enjoy [disciplinary] flexibility," they need only respond to sexual harassment "in a manner that is not clearly unreasonable."¹⁶⁵ It stressed that its "conclusion here—that recipients may be liable for their deliberate indifference to known acts of peer sexual harassment—does not mean that . . . administrators must engage in any particular disciplinary action."¹⁶⁶

The majority in *Davis* was echoing and responding to the dissent's stronger, bordering-on-apoplectic concerns about the effect of Title IX liability for peer sexual harassment on schools.¹⁶⁷ The dissent viewed the imposition of Title IX liability for peer sexual harassment as sure to result in near-cataclysmic burdens for schools.¹⁶⁸ First, it said the schools would be even more limited in their disciplinary decisions than they already were as a result of the Court's decision in *Goss v. Lopez*, which concluded that schools must provide some procedural due process before suspending or expelling a student from school.¹⁶⁹ Second, it predicted any Title IX liability would lead to a "flood" of litigation against the schools.¹⁷⁰ It said that the schools would be "beset with litigation from every side,"¹⁷¹ and thus would face "crushing financial liability."¹⁷² Finally, the dissent voiced concerns about the

to protect authoritative institutions (which children are in essence compelled to attend) *from* youngsters sexually victimized in, and often by, those institutions." *Id.* at 2089.

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

164. *Id.* at 645.

165. *Id.* at 648–49.

166. *Id.* at 648.

167. *Id.* at 665. Justice Kennedy, who wrote the dissent in *Davis*, also argued that schools do not exert all that much control over the students' behavior and certainly not so much that they should face liability under Title IX for it. *Id.*

168. *Id.* at 681.

169. *Id.* at 665 ("[F]ederal law imposes constraints on school disciplinary actions . . . for example, that due process requires, 'at the very minimum,' that a student facing suspension 'be given some kind of notice and afforded some kind of hearing'" (quoting *Goss v. Lopez*, 419 U.S. 565, 579 (1975))).

170. *Id.* at 680.

171. *Id.* at 682.

172. *Id.* at 672. It critiqued the majority for asserting it had done anything to limit that flood saying its "limitations on peer sexual harassment suits cannot hope to contain" it. *Id.* at 680.

practical burdens the majority decision would impose on schools. It pointedly warned about the “practical obstacles . . . in ensuring that thousands of immature students conform their conduct to acceptable norms.”¹⁷³

Given the cautionary tone of the *Davis* majority and the strident tone of its dissent, lower courts have predictably echoed the Supreme Court’s concerns about the regulatory burdens on schools in evaluating Title IX claims. In one exemplary case, *Hill v. Cundiff*, the Eleventh Circuit worried about adding to schools’ burdens even as it considered whether a school could be held liable for the rape of one student, Doe, by another, CJC, as the result of a school staff member’s plot to use Doe as bait to catch CJC in the act of sexual assault.¹⁷⁴ Similarly, in another case, *Doe v. Board of Education*, in which student M.O. sexually harassed and assaulted another student, J.D., the Fourth Circuit expressed its concerns about the burdens of imposing liability on schools when it considered a student’s Title IX claim.¹⁷⁵ It quoted the lower court’s observation that if the school’s response to the sexual harassment in question, some of which exacerbated the victim’s harm, constituted a clearly unreasonable response, then “nothing short of expulsion of every student accused of misconduct involving sexual overtones would protect school systems from liability or damages.”¹⁷⁶ As such, it affirmed the district court’s ruling in favor of the school.¹⁷⁷

These ideas about schools’ burdens, however, suffer from several misconceptions. First, disciplinary regulations, *Goss*, and *Davis* have not burdened the public schools’ disciplinary flexibility.¹⁷⁸ To the contrary, schools have had such flexibility in their disciplinary decisionmaking that suspensions and expulsions

173. *Id.* at 666.

174. *Hill v. Cundiff*, 797 F.3d 948, 969–70 (11th Cir. 2015). It used the Supreme Court’s concerns in *Davis* about “ensur[ing] school districts are not financially crippled” and its effort to “guard against the imposition of ‘sweeping liability’” to justify its decision that the Title IX actual notice requirement means actual notice of “severe, pervasive, and objectively offensive” sexual harassment,” as opposed to actual knowledge of “substantial risk” of the same. *Id.*

175. *Doe v. Bd. of Educ.*, 605 F. App’x 159, 165–66 (4th Cir. 2015).

176. *Id.* at 165.

177. *Id.* at 170.

178. *Goss v. Lopez*, 419 U.S. 565 (1975); see generally Derek W. Black, *The Constitutional Limit of Zero Tolerance in Schools*, 99 MINN. L. REV. 823, 832–34 (2015). Black notes that in “the years leading up to the Court’s decision in *Goss v. Lopez*, the annual suspension rate for all racial groups, except African Americans, was below ten percent. The total number of annual suspensions was about one and a half million. Since then, the number of suspensions has doubled and the rate for each demographic group has increased significantly.” *Id.* at 832. Further, he points out even the procedural due process requirements of *Goss* have been less than burdensome because schools “routinize process to produce the favored result. Rather than a deliberative or collaborative process aimed at accuracy, justice, or educational lessons, due process is the routine through which a school must run.” *Id.* at 846.

have increased since *Goss* and even *Davis*.¹⁷⁹ The numbers of suspensions and expulsions have at least doubled since *Goss* was decided, and *Davis* did not stem that tide.¹⁸⁰ Moreover, public schools have also increased the use of other strict security measures since *Davis*.¹⁸¹ More and more, schools have used measures such as “metal detectors, random sweeps, surveillance cameras, locked gates, and law enforcement officers” to aid and enforce school discipline.¹⁸²

Further, despite the *Davis* dissent’s predictions that any Title IX liability would usher in a flood of litigation, no such flood has come to pass. Although sexual assault occurs at alarmingly high rates in public schools, complaints and lawsuits against schools based on them do not.¹⁸³ Thousands of sexual assaults were reported in public schools from 2011 to 2015, but in 2016, the U.S. Department of Education Office of Civil Rights opened only 83 sexual harassment investigations in public elementary and secondary schools.¹⁸⁴ The ratio of reported sexual assaults to complaints demonstrates that the *Davis* dissent’s predictions and

179. See DANIEL J. LOSEN & RUSSELL J. SKIBA, SUSPENDED EDUCATION: URBAN MIDDLE SCHOOLS IN CRISIS 2 (2010), https://civilrightsproject.ucla.edu/research/k-12-education/school-discipline/suspended-education-urban-middle-schools-in-crisis/Suspended-Education_FINAL-2.pdf. That the Court worried in *Davis* about the liability from disciplinary action when little such liability exists underscores the flaws in the notion that the imposition of Title IX liability would add to schools’ extant burdens. See *supra* Subparts I.A–I.C.

180. LOSEN & SKIBA, *supra* note 179, at 2; see also DANIEL LOSEN ET AL., CTR. FOR CIVIL RIGHTS REMEDIES, UCLA, ARE WE CLOSING THE SCHOOL DISCIPLINE GAP? (2015), <https://escholarship.org/uc/item/2t36g571>. The rise has occurred even though students’ commission of serious misbehavior in school has gone down slightly. As Derek Black has noted, “schools suspend students for behavior that they have historically ignored or addressed through counseling and minor punishment.” Black, *supra* note 178, at 835.

The increase in suspension and expulsion rates is higher when the rates are broken down by race and ethnicity. In 1973, schools suspended 6 percent of Black middle school children. LOSEN & SKIBA, *supra* note 179, at 3. In 2011–2012, that number had nearly quadrupled to 23.2 percent. LOSEN ET AL., *supra*, at 1; see also Black, *supra* note 178, at 835 (noting “[w]ith regard to the most serious misbehavior—violence—today’s students, according to the data, are slightly better behaved.”); Derek W. Black, *Reforming School Discipline*, 111 N.W.L.REV. 1 (2016) (“By short-term suspension or semester-and year-long expulsion, public schools exclude about three and a half million students a year. Since the 1970s, many students’ chances of exclusion have doubled and tripled.”).

181. Jason P. Nance, *Students, Security, and Race*, 63 EMORY L.J. 1, 13, 41 (2013) (demonstrating the rise in the use of strict security measures in school as the result, at least in part, of encouragement in federal statutory and case law and finding, among other things, that such measures are used more in schools with relatively large percentages of minority students).

182. *Id.* at 13.

183. McDowell et al., *supra* note 15 and accompanying text.

184. Brown, *supra* note 10. Those eighty-three complaints brought the total number of complaints from 2009–2016 in K–12 public schools to 269. Mark Keierleber, *The Younger Victims of Sexual Violence in School*, ATLANTIC (Aug. 10, 2017), <https://www.theatlantic.com/education/archive/2017/08/the-younger-victims-of-sexual-violence-in-school/536418> [https://perma.cc/T2P7-EPYX].

any lower courts' consequent concerns about Title IX liability floods have not borne out.

Finally, the notion that Title IX liability imposes significant practical burdens on schools, as the *Davis* dissent warned, does not survive critical analysis. The *Davis* dissent cautioned against Title IX liability because it would force schools into the impractical position of having to teach behavioral norms to thousands of children.¹⁸⁵ This concern fails on two counts. First, it assumes that any one school must deal with thousands of children who do not conform to behavioral norms, which statistical data do not bear out.¹⁸⁶ While thousands of children across the country may misbehave, individual schools generally do not face such high rates of misbehavior.¹⁸⁷ Second, this alleged "burden" of teaching students behavioral norms is a basic responsibility of the public schools that has justified deference to their suppression of students' constitutional rights.¹⁸⁸

The idea in Title IX cases that schools operate under the burden of regulations, therefore, is exaggerated. But it does not mean that schools do not operate under burdens. Schools shoulder many heavy burdens—regulatory and otherwise.¹⁸⁹ Public schools must educate all students who walk through their

185. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 666 (1999) (Kennedy, J., dissenting).

186. See *infra* note 187 and accompanying text.

187. A recent report assessing discipline data in school districts across the country consistently found "[fights or physical aggression among students . . . to be among the most common reasons for suspension." LOSEN & SKIBA, *supra* note 179, at 9. In the 2009–2010 school year, for example, a total of 24,000 suspensions and expulsions occurred because of fights. NAT'L CTR. EDUC. STATS., DIGEST OF EDUCATION STATISTICS tbl.233.10, https://nces.ed.gov/programs/digest/d14/tables/dt14_233.10.asp [https://perma.cc/733Z-RXWU] (Number and percentage of public schools that took a serious disciplinary action in response to specific offenses, number of serious actions taken, and percentage distribution of actions, by type of offense, school level, and type of action: Selected years, 1999–2000 through 2009–10). While that number is high, it is a nationwide statistic, suggesting that no one school is fending off thousands of fighting students.

188. The Supreme Court has said that schools have a role in teaching students behavioral norms. Schools "must inculcate the habits and manners of civility" including teaching students to "take into account consideration of the sensibilities of others." *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986). The Court further stated:

Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the "fundamental values necessary to the maintenance of a democratic political system" disfavor the use of terms of debate highly offensive . . . to others. The inculcation of these values is truly the "work of the schools." The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.

Id. at 683 (internal citations omitted); see also *infra* Subpart III.B.

189. For example, some have decried the burdens on public schools related to the adoption of the Common Core Standards, which are a set of curricular standards that aim to make students "college and career ready," among other things. Valerie Strauss, *The Coming Common Core Meltdown*, WASH. POST (Jan. 23, 2014), <https://www.washingtonpost.com/news/answer/>

doors, and those students walk through those doors with many varied problems that present educational challenges.¹⁹⁰ These burdens, however, are distinct from those envisioned by courts when limiting schools' Title IX liability.

D. The Unjustified School Civil Rights Vacuum

Because the ideas supporting the limits on public school liability under these civil rights laws are flawed, so too are the liability limits themselves. As justifications for the liability limits, they lack validity. This suggests that public schools could and should be held to more stringent assessment of their liability under these laws. That would not, as some might worry, turn the U.S. Constitution into a "font of tort law."¹⁹¹ It would only hold schools liable for arbitrary exercises of authority that severely harm children.¹⁹² A real difference exists between making a constitutional claim out of any and all bumps and bruises, bad grades, or hurt feelings that occur in school, which would make the Constitution a font of tort law, and, for example, the arbitrary exercise of state authority under a Fourteenth Amendment claim for a violation of personal liberty and bodily integrity that results in egregious student harm.¹⁹³ The critique here of the law's treatment of such claims is not a call for

sheet/wp/2014/01/23/the-coming-common-core-meltdown/?noredirect=on&utm_term=.6f1591a6ee32 [https://perma.cc/9GCP-Z2H3]. The critiques of the Common Core Standards include that their adoption in some states and school districts did not occur alongside a "credible plan to provide—or even to determine—the resources necessary to make every student 'college and career ready' as defined by the [standards]." *Id.*

Others have separately noted the burdens schools face because of budget cuts and teacher shortages. See *infra* note 207 and accompanying text. While the burdens of Common Core implementation are debatable, budget cuts and teacher shortages are inarguably a burden on schools.

190. Poverty, prevalent in public schools, causes numerous problems, including school readiness, social problems, and lack of parental capacity to protect children from or address these problems. Patrice L. Engle & Maureen M. Black, *The Effect of Poverty on Child Development and Educational Outcomes*, 1136 ANNALS N.Y. ACAD. SCI. 243, 244–46 (2008).
191. E.g., *T.W. ex rel. Wilson v. Sch. Bd.*, 610 F.3d 588, 598 (11th Cir. 2010) (quoting *Neal ex rel. Neal v. Fulton Cty. Bd. of Educ.*, 229 F.3d 1069, 1074 (11th Cir. 2000)) ("Both this Court and the Supreme Court have 'said repeatedly that the Fourteenth Amendment is not a 'font of tort law' that can be used, through [S]ection 1983, to convert state tort claims into federal causes of action.'").
192. Cf. Daryl J. Levinson, *Rights, Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 893 (1999) (pointing out that "the Court [in *Paul v. Davis*] may have feared the wholesale federalization of tort claims against state and local government officials and the corresponding prospect of massive damages liability" and would probably have come out differently if the plaintiff had only sought an injunction).
193. See, e.g., *Domingo v. Kowalski*, 810 F.3d 403, 416 (6th Cir. 2016) (finding no conduct that rose to the "conscience-shocking level required of a Fourteenth Amendment substantive due process claim" where teacher Marsha Kowalski's extreme methods, which included tying students with

schools to be liable when a student gets his or her feelings hurt over receiving a detention for misbehavior. It is a critique of the failure of the law to hold public schools accountable when a teacher uses state authority to throw that student against a wall, choke him, and then threaten him to not tell anyone.¹⁹⁴ It is a critique focused on the problems of leaving students without legal recourse and protection when these serious harms occur in school.

III. SERIOUS, TROUBLING CONSEQUENCES

Schools' limited liability under the Fourteenth Amendment and Title IX for harms to children in school not only lacks substantial justification, but it also has three significant consequences. First, it affords schools vast deference to act without much, if any, regard for those harms. Second, it shifts the burden to families to protect children from harms in school when schools exercise their discretion not to.¹⁹⁵ Third, this burden shifting disproportionately impacts low-income families, who now make up a majority of the public school population.¹⁹⁶ Their children, therefore, face compound vulnerabilities. They operate under the vulnerabilities imposed generally by their lack of legal protections in school, which are compounded by their poverty.

A. The Discretion to Do Very Little When Students Are Harmed in School

The anemic reach of the Fourteenth Amendment and Title IX means that courts have afforded schools the discretion to ignore student harms or, when they cannot ignore them, do little or nothing in response.¹⁹⁷ In the Fourteenth Amendment context, schools' total lack of liability for failing to protect students means that they can ignore harms, since they will not be responsible for their failure to discover them.¹⁹⁸ Similarly, the liability limits under Fourteenth Amendment bodily integrity claims allow, and even incentivize, schools to overlook student harms even though they theoretically could be held liable for them. This is because they can avoid that liability with the assertion of even implausible pedagogical and

disabilities to chairs, gurneys, and toilets for hours and gagging them, far exceeded the kinds of actions that result in mere bumps and mildly hurt feelings).

194. See, e.g., *Flores v. Sch. Bd.*, 116 F. App'x 504, 506 (5th Cir. 2004).

195. See *infra* Subparts I.A–I.C.

196. S. Educ. Found., A New Majority: Low Income Students Now a Majority in the Nation's Public Schools 2 (2015).

197. See *supra* notes 106–107 and accompanying text.

198. See *supra* Subpart I.A.

disciplinary goals.¹⁹⁹ In the Title IX context, the courts' assessment of the notice requirement, as Catharine MacKinnon has pointed out, incentivizes schools to look away from harms because it only holds schools liable for harms for which they have actual knowledge.²⁰⁰ If schools do not know of the harms, then they will not be held liable for them.²⁰¹ So, ignoring suspected harms allows a school to evade liability for it.²⁰²

Even when schools know about harms, these laws afford them the discretion to do very little, if anything, about it. Because schools have no liability for failing to protect students under the Fourteenth Amendment even if they know about harms, they have no obligation to do anything about such harms.²⁰³ The deference afforded to schools' pedagogical and disciplinary assertions in Fourteenth Amendment bodily integrity claims allows schools to do nothing in response to harms, if they so choose.²⁰⁴ They can defend their inaction by asserting even implausible pedagogical and disciplinary reasons for it and therefore their lack of response.²⁰⁵ Because Title IX only requires schools' responses to sexual harassment be "not clearly unreasonable," it too allows schools to do little in response to it.²⁰⁶ Indeed, it arguably provides "an incentive for schools to go through the motions with an eye primarily to looking as if action is being taken, rather than to redressing the injury, stopping the abuse, or addressing the climate in the environment that produced and permitted it."²⁰⁷

Schools, therefore, can literally and figuratively throw up their hands and tell parents and students that they can do nothing about the harm. Such responses are rational in the face of schools' limited liability. Schools, notoriously resource-poor, have to make choices about where to use those scarce resources.²⁰⁸ By giving

199. See *supra* Subpart I.B.

200. See MacKinnon, *supra* note 28, at 2069–72; and *supra* Subpart I.C.

201. MacKinnon, *supra* note 28, at 2090–92.

202. *Id.* at 2069–72, 2091 (discussing the interrelationship of the actual notice and deliberate indifference prongs of the Title IX standard and pointing out how they encourage "schools not to know and to avoid learning about sexual atrocities so as to avoid notice of them, so no response, however indifferent, can be deliberate").

203. See *supra* Subpart I.A.

204. See *supra* Subpart I.B.

205. See *supra* Subpart I.B.

206. *Davis*, 526 U.S. at 649; see also MacKinnon, *supra* note 28, at 2091.

207. *Id.* at 2092.

208. See Derek W. Black, *Averting Educational Crisis: Funding Cuts, Teacher Shortages, and the Dwindling Commitment to Public Education*, 94 WASH. U. L. REV. 423, 431–34 (2016) ("Over the past decade, public education has reached the point of crisis, much of which is the result of intentional state and federal action. States enacted massive funding cuts to education budgets and services during the 2008 recession. The funding cuts reached levels that would, based on social science research, have substantial negative effects on student achievement."); see also MICHAEL LEACHMAN ET AL., CTR. ON BUDGET & POLICY PRIORITIES, MOST STATES HAVE CUT

schools the discretion to not respond much, or at all, to student harms, the courts have allowed, even encouraged, them to choose to place those scant resources elsewhere.

B. Shifting the Burden of Addressing Student Harms to Families

By not constraining schools' discretion and allowing, even arguably incentivizing, schools' limited responses to student harms, the courts effectively shift the burden of addressing those harms to families. By not requiring more of schools when children are harmed, the Fourteenth Amendment and Title IX relieve schools of responsibility to protect children from and to address their harms in school. That shifts the burden of doing so to families. Because schools do not have to protect children from harm in school and address its effects, their families must.²⁰⁹ Placing the burden on families for protecting children and addressing their harms in school is a burden for any family because the family members are not present in school.²¹⁰ Therefore, they cannot be available to protect students from or address immediate harms there.²¹¹

SCHOOL FUNDING AND SOME CONTINUE CUTTING 1 (2016) ("At least 31 states provided less state funding per student in the 2014 school year (that is, the school year ending in 2014) than in the 2008 school year, before the recession took hold. In at least 15 states, the cuts exceeded 10 percent."); Nicole Amato, *A Lack of Resources for Many Classrooms*, N.Y. TIMES (Mar. 26, 2015, 6:51 AM), <https://www.nytimes.com/roomfordebate/2015/03/26/is-improving-schools-all-about-money/a-lack-of-resources-for-many-classrooms> ("Many teachers, especially in urban schools, are working with at-risk students with very few of the necessary resources to support them.").

209. Indeed, the courts expect parents to care for and protect their children even though they are at school. *E.g.*, *Morrow v. Balaski*, 719 F.3d 160, 173 (3d Cir. 2013) ("[S]tudents in public schools continue to be primarily dependent on their parents for their care and protection, not on their school. Despite the students' compulsory attendance in school during the school day and the school's authority to act *in loco parentis* during that time, the school's authority and responsibility neither supplants nor replaces the parent's ultimate responsibility for the student absent more than is alleged here."). *J.O. v. Alton Cmty. United Sch. Dist.*, 909 F.2d 267, 272 (7th Cir. 1990) ("[I]t cannot be suggested that compulsory school attendance makes a child unable to care for basic human needs. The parents still retain primary responsibility for feeding, clothing, sheltering, and caring for the child.").
210. Some states, such as those with substantial influence over education policy, like California and Texas, do not allow parents to be present in school whenever they want, which of course limits their ability to be present in school and protect their children there. In California, parents generally cannot visit schools without prior permission of and coordination with school officials. CAL SCH. BDS. ASS'N, *CBSA Sample Board Policy—Visitors/Outsiders* (BP 1250(a)) (201); *General Inquiry—General Questions FAQ*, TEX. EDUC. AGENCY, http://tea.texas.gov/About_TEA>Contact_Us/General_Inquiry/General_Inquiry_-_General_Questions_FAQ/#visit [<https://perma.cc/P5ZH-AQ4S>] ("Question 8. What are my rights as a parent to visit a school during school hours?").
211. For example, Brittany Morrow's parents could not be available to protect her when another student "attacked her" in the school lunchroom or when she separately tried to throw her down

Although it is arguably reasonable to place the responsibility on families for taking care of children while they are in school in certain contexts, it is not reasonable in the context of harms imposed on students in school. For example, parents, not schools, have the responsibility for taking their children to the doctor when they are sick at school. The families, though, can effectively act to care for their children in such instances because they can pick them up from school and take them to get the medical attention they need.²¹² In the case of contemporaneous harms happening to children in school, families lack the same capacity to care for their children by virtue of their absence from school.²¹³ Their absence means they do not know about and can therefore do nothing about the harms.²¹⁴ Even if a school were to alert a parent to harms that happen at school, the notice would be too late because the harm would already have occurred. The only way for a parent to truly prevent and protect a child from harm at school would be to constantly be present with them at school, which is both impractical and often prohibited.²¹⁵

Moreover, this burden shifting, borne from the vast deference courts give schools, is not necessary. First, the standards that offer schools this discretion are,

a staircase in school. *Morrow*, 719 F.3d at 164. Lacking the ability to be with and protect the girls in school, the Morrows told the school that they would keep the girls home from school to protect them. Doerschner, *supra* note 7. In response, the school threatened the Morrows with a truancy action. *Id.* Similarly, because the parents of the students with disabilities who Marsha Kowalski tied for hours to toilets and gagged were not present in school at the time of the abuse, they could not know about the abuse in time to protect them from it and prevent it from happening. *Domingo v. Kowalski*, 810 F.3d 403, 408 (6th Cir. 2016) (“Neither the students’ parents nor Kowalski’s supervisors were aware of the full extent of Brant’s concerns until after the end of the 2004 school year...Kowalski’s class met in a church where Kowalski went largely unobserved by other teachers or her direct supervisors, aside from a few weekly visits from behavioral and therapeutic specialists. Further, due to the students’ limited verbal capacities, their parents relied on Kowalski’s daily classroom “journal” to keep them informed of the students’ progress. Kowalski did not reference any of the above-described teaching techniques in her classroom journal, or otherwise share them with the students’ parents.”); *see also supra* notes 209–210 and accompanying text.

212. Even in these instances, however, schools still have a role in caring for and protecting children. They often have to alert parents to the need to come get the children and address their illnesses. To that point, the Centers for Disease Control recommends that parents or other caregivers take children home from school if they develop flu-like symptoms. *Guidance for School Administrators to Help Reduce the Spread of Seasonal Influenza in K-12 Schools*, CDC, <https://www.cdc.gov/flu/school/guidance.htm> [<https://perma.cc/BB3J-3DTJ>].
213. Parental absence from school is expected, school-imposed, structural, and top-down. Nancy E. Hill & Kathryn Torres, *Negotiating the American Dream: The Paradox of Aspirations and Achievement Among Latino Students and Engagement Between Their Families and Schools*, 66 J. SOC. ISSUES 95, 98 (2010) (“[M]ost principals are trained to manage their schools without regard for parental involvement.”).
214. *See supra* note 210 and accompanying text.
215. *See supra* note 210 and accompanying text.

as previously discussed, based on misconceptions. Second, neither the Fourteenth Amendment nor Title IX precludes the imposition of more constraints on schools' discretion for responding to students' harms by requiring schools do more to protect students. To the contrary, the Fourteenth Amendment and Title IX could limit schools' discretion for responding to students' harms. The Fourteenth Amendment holds this promise in part because it arguably was ratified "to incorporate the right of protection into the Federal Constitution, and thereby . . . compel the states to fulfill their duty of protection."²¹⁶ As Robin West has contended, the Fourteenth Amendment:

[E]nsures that all citizens equally enjoy the basic terms of the social contract, that the state protects all from private assault, that the state protects all from their own vulnerability, that the state recognizes the equality of all citizens under law, and that the state assures that they live under no separate sovereign authority. Only with such protection may persons construct the public, productive, responsible, autonomous lives that the liberal state and its rule of law ideal envisions.²¹⁷

Similarly, Title IX's very purpose is to protect students from sexual harassment and all other forms of sexual discrimination in the public schools.²¹⁸ Nowhere is this promise and purpose more in need of fulfillment than in the public school context, where children need protections from harm to benefit from the education being provided there.²¹⁹

The Fourteenth Amendment and Title IX, therefore, could require schools to implement processes for discovering, or obtaining notice, of students' harms. They could also shape schools' substantive responses to those harms by requiring schools to meet particular standards when responding to them. In short, they could help meaningfully shape school responses to student harms, but they do not.

216. Steven J. Heyman, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment*, 41 DUKE L.J. 507, 571 (1991).

217. Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 70 (1990) (footnote omitted).

218. See *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979) ("Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices. Both of these purposes were repeatedly identified in the debates on the two statutes.").

219. When children are harmed in school, they face educational losses that are sometimes total. See *infra* notes 230–231 and accompanying text.

C. Particularly Burdening Families With Low Incomes and Low Social Capital

Not only is this public school deference and the consequent burden shift to families unnecessary, it operates as a particular burden for low-income families and families with low social capital.²²⁰ They lack the very resources they need to protect students from and address their harms.²²¹ Further, because low-income families, who often also have low social capital,²²² now make up a majority of the public school population, this particular burden affects the majority of public school students.²²³

To the extent families can do anything to protect children while they are in school, they need social and financial capital for the task. Social capital is “the material and immaterial resources that individuals and families are able to access through their social ties.”²²⁴ It includes the sense of agency and the capacity to interact with school professionals.²²⁵ Families need social capital to protect children in school because one way of doing that is by intervening in school to try to get the schools to act.²²⁶ Families also need financial capital to protect children from harms

220. See *infra* notes 224–226, 232–233 and accompanying text.

221. See *infra* notes 224–226, 232–233 and accompanying text.

222. Erin McNamara Horvat et al., *From Social Ties to Social Capital: Class Differences in the Relations Between Schools and Parent Networks*, 40 AM. EDUC. RES. J. 319, 331 (2003). Social capital also includes the ability to access information about school, which can be complex and hard to access. Families with low social capital have a harder time getting and using information about schools. Valerie E. Lee, *Educational Choice: The Stratifying Effects of Selecting Schools and Courses*, 7 EDUC. POL’Y 125, 141–42 (1993).

223. According to a report by the Southern Education Foundation, which analyzed public data from the National Center for Education Statistics, 51 percent of students in public schools came from low-income families in 2013. S. EDUC. FOUND., *supra* note 195, at 2. In forty states, low-income students comprised 40 percent or more of the public school population, and in twenty-one of those states, the majority of the students were low-income. *Id.* To count as “low-income” for the purposes of this data set, families’ income made students eligible for free or reduced lunch at school. *Id.* That means these families are extremely poor. Students are eligible for free lunch if their family income is no more than 135 percent of the federal poverty line and reduced lunch if their family income is no more than 185 percent of the federal poverty line. *Id.* In 2013, at the time the data was compiled in 2013, a child in a two-person family of one adult and one child qualified for free lunch if the family had “an annual income of less than \$19,669” and reduced lunch if the family had an income of \$27,991 or less. *Id.*

224. Horvat et al., *supra* note 222, at 323.

225. Carol Vincent & Jane Martin, *Class, Culture and Agency: Researching Parental Voice*, 23 DISCOURSE 109, 113 (2002). In a study on parental “voice,” the authors found that wealthier parents have more social capital and consequently are more likely to exercise their voice by intervening in school on their children’s behalf. *Id.* at 125.

226. See, e.g., *Morrow v. Balaski*, 719 F.3d 160, 165 (3d Cir. 2013) (when another student repeatedly physically and verbally harassed high school students Emily and Brittany Morrow, their parents met with school officials to try to get them to act to address the problem, albeit to no avail); see also *Doerschner*, *supra* note 7 (describing the efforts Mr. and Mrs. Morrow made to prod their daughters’ school to act to protect them from harassment, including presenting the school with

in school because they would otherwise not be able to remove students from school and enroll them in private school when their public school-based interventions fail.²²⁷ Some families even relocate in order to enroll their children in another school district, which also of course comes at a financial cost.²²⁸

Families also need financial capital to address the consequences of the harms that children suffer when schools do not and families cannot protect them. Children suffer educational losses and emotional and psychological harms as a result of abuse and harassment in school.²²⁹ Students suffer depression, contemplate suicide, and develop psychological disorders, notably PTSD, as the result of abuse in school.²³⁰ In response, families seek therapy, medication, and

a court imposed no-contact order prohibiting the harassing student from contacting the Morrow girls).

227. Lee, *supra* note 222, at 141–42. According to the most recent data available from the National Center for Education Statistics, in 2011–2012 the average cost of private school tuition was \$10,740. NAT'L CTR. FOR EDUC. STATISTICS, PRIVATE ELEMENTARY AND SECONDARY ENROLLMENT, NUMBER OF SCHOOLS, AND AVERAGE TUITION, BY SCHOOL LEVEL, ORIENTATION, AND TUITION: SELECTED YEARS, 1999–2000 THROUGH 2011–2012 (2013), https://nces.ed.gov/programs/digest/d13/tables/dt13_205.50.asp [https://perma.cc/BK34-5ZCH]. That the majority of children in public schools come from low-income families means that their families' incomes are less than 185 percent of the federal poverty level. S. EDUC. FOUND., *supra* note 196. In 2012, a family of four met that threshold if they made less than \$42,624.50 per year. 77 Fed. Reg. 4034 (Jan. 26, 2012). That family of four, therefore, would have to spend approximately one quarter of their total annual family income to pay the average annual tuition for just one child to go to private school.
228. In *T.K. v. New York City Department of Education*, the parents of a child with a disability who was bullied could not get the principal to address the problem. 779 F. Supp. 2d 289 (E.D.N.Y. 2011). So, they enrolled her in a private school and then moved to another school district. *Id.* at 295. In *Bridges v. Scranton School District*, the parents of another child who was bullied withdrew their child from school and enrolled him in a cyber school, which children attend from home. 644 F. App'x 172, 175 (3d Cir. 2016).
229. E.g., *T.W. ex rel. Wilson v. Sch. Bd.*, 610 F.3d 588, 596 (11th Cir. 2010) (noting that due to the verbal abuse and inappropriate physical restraints inflicted on him by his teachers, T.W. dropped out of school, which was a decision that a psychologist who evaluated T.W. said could “be directly traced back to his experiences with [his teacher] Ms. Garrett”); *Costello v. Mitchell Pub. Sch. Dist.* 79, 266 F.3d 916, 920 (8th Cir. 2001) (quoting a psychiatrist who evaluated plaintiff Sadonya Costello, a student who was repeatedly verbally abused as well as physically assaulted by a teacher, concluding that “if Sadonya ‘returns to school at this point her situation would only worsen, both physically and mentally.’”).
230. E.g., *Hill v. Cundiff*, 797 F.3d 948, 965 (11th Cir. 2015) (noting the student who was raped as a result of the school-planned, rape-bait scheme experienced an exacerbation of her depression); *T.W.*, 610 F.3d at 601 (noting that because of his abuse in school T.W. experienced an exacerbation of his extant developmental disabilities and developed PTSD); *Costello*, 266 F.3d at 920 (noting that Sadonya Costello experienced depression and suicidal ideation related to her abuse in school).

sometimes residential mental health treatment for their children, all of which require financial resources.²³¹

Families with low incomes and low social capital often simply do not have the ability to meet these costs.²³² The burden, then, of protecting children and addressing their harms in school is particularly acute for them. The families of the majority of the public school population, therefore, are expected to protect their children from and address harms in school but lack the resources to do so.²³³

Consequently, a majority of the public school population is not only left largely without recourse in the Fourteenth Amendment and Title IX for harms

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231. E.g., *Hill*, 797 F.3d at 965 (the student, who was raped in school, underwent mental health counseling and took medication for her depression); J.P.M. v. Palm Beach Cty. Sch. Bd., 916 F. Supp. 2d 1314, 1315–16 (S.D. Fla. 2013) (parents enrolled their son, who had a disability and was restrained in school, in residential treatment to “overcome the trauma” of the restraints); *Costello*, 266 F.3d at 920 (Sadonya Costello received psychiatric treatment and counseling to deal with it).
232. Low-income families already experience much higher rates of homelessness, food insecurity, and lack of insurance, among other things. According to the Children’s Defense Fund, in 2011–2012, “nearly 1.2 million public school students were homeless.” Marian Wright Edelman, *Forward to Children’s Def. Fund, The State of America’s Children* 4 (2017). To put a finer point on it, the Children’s Defense Fund report states that “[o]n a single night in January 2013, 138,149 children were homeless in shelters, transitional housing, or on the streets” CHILDREN’S DEF. FUND, THE STATE OF AMERICA’S CHILDREN 26 (2014). In 2012, more than one in nine children were in households that were food insecure. *Id.* at 4. Additionally, despite increased insurance enrollment rates, in 2012, nearly 7.2 million children were uninsured. *Id.* at 6. These problems make it more difficult for low-income families to seek out the therapies and other services needed to address the effects of harms in schools. Struggling to meet basic needs, they will be hard-pressed to protect their children from or address their harms in school. Significantly, there is also a strong racial and ethnic component to these statistics and these problems. Over 11 million, or almost one in three, children of color were low-income in 2012. *Id.* at 4. “Black children were the poorest (39.6 percent) followed by American Indian/Native Alaskan children (36.8 percent) and Hispanic children (33.7 percent).” *Id.* These problems of poverty and the difficulties they create for families in protecting them and addressing their harms in school, therefore, disproportionately affect children of color.
233. Studies have found that families with low social capital are less likely to intervene in their child’s education and school experience. Horvat et al., *supra* note 222, at 331. Significantly, a study has found this reticence to specifically affect families’ inclinations to intervene when teachers behaved inappropriately. *Id.* at 334 (“Our observations confirm that, on occasion, school officials or teachers would manhandle a student, by shoving or vigorously shaking him or her, or twisting an arm. Thus events that created an explosion of collective outrage among middle-class families tended to generate isolated anger or resigned acceptance within working-class and poor families.”). Latino families in particular face obstacles to engaging in public schools. They often feel “unwelcome and misunderstood.” Nancy E. Hill & Kathryn Torres, *Negotiating the American Dream: The Paradox of Aspirations and Achievement Among Latino Students and Engagement Between Their Families and Schools*, 66 J. SOC. ISSUES 95, 98 (2010). “Even when Latino parents engage in activities designed to increase parental involvement (e.g., PTA, volunteering), they often come away feeling confused by the school structure and implicit expectations. . . . They often find that their attempts to garner information are thwarted, and they feel abandoned.” *Id.* at 99.

suffered in school, but their families also lack the resources to fill the gaps. By failing in their potential to put bounds around schools' decisions, therefore, these civil rights laws leave students unprotected and vulnerable in school. They allow schools to respond almost however they want to student harms, which means sometimes they respond ineffectively, counterproductively, or not at all.²³⁴ When the law requires so little of schools when children are harmed, their families must step in to bear the burden of protecting them in school. Because the majority of public school children come from low-income families, bearing the burden of this work is nearly impossible. They have fewer avenues for recourse than children whose families have the resources to do what the law says schools need not. The inadequacies of the law and their families' income status leave these children unprotected and vulnerable in school.

IV. STRENGTHENING THE LAW TO REDUCE STUDENTS' VULNERABILITY

Because the courts' evaluations of students' Fourteenth Amendment and Title IX claims are rooted in misconceptions, those misconceptions should be abandoned. Doing so would justify changing the courts' evaluations of these claims so that schools are held to an effectively higher legal standard and receive less deference in their decisionmaking when students are harmed. Such changes would bolster students' legal protections in school and reduce their vulnerability. Further, such changes offer the promise of broader systemic reforms. The imposition of liability on the public schools for the serious harms to individual students discussed here can spur broader systemic change as a result of the deterrent and fault-fixing effects of liability, which would help even those students who suffer less severe harms.²³⁵

These proposed changes, however, are not without possible critiques. One such serious critique is that increasing schools' liability creates inefficiencies and breeds a moral hazard. I will respond to that and other critiques in Subpart IV.E below.

234. See *supra* Part I.

235. Significantly, these proposed changes to the evaluation of students' claims are relatively modest in at least one sense. They would better protect students who suffer severe harm. See *infra* Subparts IV.B–IV.D. That alone would be a vast improvement over the state of the law currently because even those students have little recourse in the law. See *supra* Subparts I.A–I.C. That said, they also offer the potential for spurring more systemic reforms as well.

A. School Liability as a Deterrent to and a “Fault Fixer” for Ignoring Harms or Meaninglessly Responding to Them

As an initial matter, it is worth addressing how increasing the potential for public schools’ liability in the ways proposed here will deter schools from ignoring harms to children or responding meaninglessly to them on a systemic level. First, scholars generally agree that government liability has a deterrent effect.²³⁶ As the Supreme Court has said about Section 1983, which provides a mechanism for asserting claims for constitutional violations, it “presupposes that damages that compensate for actual harm ordinarily suffice to deter constitutional violations.”²³⁷ The deterrent effect results from not wanting to be sued.²³⁸ Individual government employees and the government entities want to avoid lawsuits for a variety of reasons, including financial.²³⁹ Lawsuits also cause embarrassment for individuals and government bodies, which also serves as a deterrent.²⁴⁰ In addition, lawsuits have “immense political costs (in the sense of everyday workplace politics) associated with a finding of liability and exposing [it] to budgetary pay-outs.”²⁴¹

Relatedly, liability also has, as Myriam Gilles terms it, a “fault-fixing” effect.²⁴² Gilles describes this effect in the municipal liability context as “localizing culpability

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236. Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755, 796 (1999) (“Moreover, allowing local governments to be held vicariously liable for the acts of their employees would advance the compensation and deterrence goals of Section 1983.”); Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 854 (2001) (“The question of whether constitutional tort remedies serve any deterrent effect is, I think, easily answered in the affirmative.”); John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1547 (2017) (“[I]nsurers transform vague, uncertain liability exposure into finely grained policies backed by differentiated premiums and the threat of coverage denial. *That* is a substantial part of how civil liability deters misconduct in insured jurisdictions.”); Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1151 (2016) (noting there is general agreement among scholars that liability has a deterrent effect). *But see* Daryl J. Levinson, *Making Government Pay: Markets, Politics and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 346 (2000) (questioning liability’s deterrent effect in the realm of eminent domain authority of the state).
237. Memphis Cnty. Sch. Dist. v. Stachura, 477 U.S. 299, 310 (1986) (regarding an action to vindicate a teacher’s First Amendment rights after the teacher was suspended for using a textbook that included a chapter on human reproduction).
238. See *infra* notes 239, 241, 245 and accompanying text.
239. Schwartz, *supra* note 236, at 1151; Gilles, *supra* note 236, at 854 (“No police officer wants to be sued, particularly where there is no absolute guarantee that his municipal employer will pay for his defense and indemnify him for damages.”).
240. Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1681 (2003).
241. Gilles, *supra* note 236, at 854–55. As Margo Schlanger has noted, “media coverage of abuses or administrative failures can trigger embarrassing political inquiry and even firings, resignations, or election losses.” Schlanger, *supra* note 240, at 1681.
242. Gilles, *supra* note 236, at 861.

in the municipality itself and forcing municipal policymakers to consider reformative measures.”²⁴³ A judgment against a government entity offers claimants “symbolic vindication from the municipality as well as the individual official for violations of constitutional rights. This symbolic vindication is at the very core of the fault-fixing function of municipal liability claims, and, together with the information function of such claims, can reasonably be expected to have a deterrent effect on municipal policymakers.”²⁴⁴ It offers an “incentive to monitor, supervise, and control the acts of their employees.”²⁴⁵

School districts, as arms of the state, are susceptible to all of these pressures.²⁴⁶ They face budgetary constraints and are subjected to media scrutiny when they are sued.²⁴⁷ So, increasing their potential liability for meaningless, ineffectual responses to student harms would deter those responses. Although Gilles’s discussion of the fault-fixing function of liability focused on municipality liability, that effect is no different on schools.²⁴⁸ They too can be encouraged to reform by way of liability and to better monitor students, their harm, and patterns and practices that led to such harm.²⁴⁹

243. *Id.* at 861.

244. *Id.* at 865 (Gilles quotes *Amato v. City of Saratoga Springs*, where the Third Circuit noted that liability “not only holds that entity responsible for its actions and inactions, but also can encourage [it] to reform the patterns and practices that led to constitutional violations, as well as alert the municipality and its citizenry to the issue” to support this point).

245. Fisk & Chemerinsky, *supra* note 236, at 796 (arguing in favor of vicarious liability for municipalities under Section 1983, the authors note “[l]ocal governments, with inherently scarce resources, obviously want to minimize the amount of their budget that is lost to paying damages”).

246. See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (calling boards of education “creatures” of the state); *see also Comm. for Educ. Equal. v. State*, 878 S.W.2d 446, 457 (Mo. 1994) (Robertson, J., concurring in result) (“School districts are creatures of state law established to carry out governmental functions. . . .”).

247. See, e.g., McDowell et al., *supra* note 15; Caplan-Bricker, *supra* note 10; Brown, *supra* note 10.

248. Significantly, the Supreme Court has noted the deterrent effect of Section 1983 liability in the context of lawsuits against schools. *Memphis Cnty. Sch. Dist. v. Stachura*, 477 U.S. 299, 310 (1986) (“Section 1983 presupposes that damages that compensate for actual harm ordinarily suffice to deter constitutional violations.”).

249. One issue worth considering in an assessment of the deterrent effects of liability is the role of insurance. John Rappaport persuasively argues in his significant piece on the regulatory capacity of private insurance over police that the insurer “develops a financial incentive to reduce that risk through loss prevention.” Rappaport, *supra* note 236, at 1543. Rappaport demonstrates how these loss prevention efforts, among other things, can play a significant role in affecting police behavior. *Id.* at 1573–74. Although there is substantial room for scholarly research on the degree to which insurers can play a similar role in the public school context, that inquiry is beyond the scope of this Article.

B. Changing the Evaluation of Fourteenth Amendment Duty to Protect Claims

With respect to Fourteenth Amendment duty to protect claims, schools currently feel no such pressure from the threat of liability because courts have consistently found they have no duty to protect students.²⁵⁰ Although schools have some measure of physical custody over students as the result of mandatory attendance laws, courts find that the public schools have no duty to protect students because they tie the custodial relationship giving rise to a duty to protect students to physical custody that necessitates caretaking.²⁵¹ Abandoning the misconception that parents can exclusively do the caretaking of their children even when they are at school, therefore, justifies the development of a new classification of custody as between students and schools. That in turn justifies both the conclusion that schools have a Fourteenth Amendment duty to protect students and a burden-shifting framework for evaluating it.

Acknowledging that parents cannot do all the caretaking of children in school and that schools also do caretaking, as courts have acknowledged in other contexts, justifies finding that schools have a custodial relationship with students.²⁵² They have a custodial relationship because they have physical control of students by way of mandatory attendance laws that require students' physical presence in school, and they must and do take care of them while they are there. Schools, therefore, have a duty under the Fourteenth Amendment to protect students.

This duty, however, is necessarily limited by the nature of the custodial relationship between schools and students. It falls between the custodial relationships in the *Estelle*-*Youngberg* and the *DeShaney* scenarios.²⁵³ Although schools do not have full-time control over students in the same way the state does over prisoners and institutionalized persons as in *Estelle* and *Youngberg*, they have more control over students and their wellbeing than when they are physically with their parents, as was the case in *DeShaney*.²⁵⁴ A school's duty to protect students is, therefore,

250. See *supra* Subpart I.A.

251. See *supra* notes 57–60 and accompanying text.

252. See *supra* notes 123–124 and accompanying text.

253. D.R. *ex rel.* L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1383 (3d Cir. 1992) (Sloviter, C.J., dissenting) (“There is no doubt that this case falls between *DeShaney* and *Estelle/Youngberg*.”).

254. See *supra* notes 51–55 and accompanying text. In rejecting these claims, the federal courts of appeals acknowledge the compulsory nature of school attendance but argue that it is nothing like imprisonment or institutionalization because schools do not have full-time custody, and parents still retain caretaking responsibility over their children. See, e.g., Doe v. Hillsboro Indep. Sch. Dist., 113 F.3d 1412, 1415 (5th Cir. 1997) (“The restrictions imposed by attendance laws upon students and their parents are not analogous to the restraints of prisons and mental

limited and specific, as compared to parents' general duty to protect their children. It is limited because the schools' custody and caretaking of students is limited to the time they are in school. So, schools only have a duty to protect students when they are in school. Although limited and specific, this duty on the part of schools to protect students would nonetheless serve to reduce students' vulnerability while they are in school.²⁵⁵

One could argue, however, that custody is binary—all or nothing. So, if parents have physical custody, schools cannot. Yet, custody is not binary even with respect to parents. Parents regularly split custody between themselves and with others.²⁵⁶ So, if custody is divisible among parents and nonparents, schools too can, and in actuality do, have some physical custody of children. Moreover, courts have evaluated physical custody under the auspices of the Fourteenth Amendment in a particular way, distinct from the assessments under state family law. Under the Fourteenth Amendment duty to protect analysis, the state takes custody of an individual when it restrains the person's liberty such that the individual cannot take care of basic needs.²⁵⁷ When the state requires students to be in school, it takes

institutions. The custody is intermittent and the student returns home each day."); *Sargi v. Kent City Bd. of Educ.*, 70 F.3d 907, 911 (6th Cir. 1995) ("[C]ompulsory school attendance does not restrict a student's liberty such that neither the child nor his parents are unable to attend to the child's basic human needs."); *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729, 732 (8th Cir. 1993) ("Public school attendance does not render a child's guardians unable to care for the child's basic needs. In this regard, public schools are simply not analogous to prisons and mental institutions."); *Middle Bucks*, 972 F.2d at 1371 ("The state's duty to prisoners and involuntarily committed patients exists because of the fulltime severe and continuous restriction of liberty in both [prisons and mental health facilities]."); *J.O. v. Alton Cnty. Unit Sch. Dist. 11*, 909 F.2d 267, 272 (7th Cir. 1990) ("By mandating school attendance . . . the state of Illinois has not assumed responsibility for [students'] entire personal lives."). Notably, the dissents in some cases do note that mandatory attendance laws fall somewhere between the full-time state custody of imprisoned and institutionalized persons and the total lack of state custody of children who are physically with their parents. See *Morrow v. Balaski*, 719 F.3d 160, 188–89 (3d Cir. 2013) (Fuentes, J., dissenting) (critiquing the majority decision by pointing out that "*Middle Bucks* provides no basis to conclude that *DeShaney* endorses an all-or-nothing approach that turns on the existence of 'round-the-clock' physical custody or on who remained the primary caregiver."); *Middle Bucks*, 972 F.2d at 1379 (Sloviter, C.J., dissenting) ("*DeShaney* contains no language to support the majority's holding that the duty to protect can be triggered only by involuntary, round-the-clock, legal custody.").

255. In a previous project, I made alternative, though related, arguments supporting the recognition of a Fourteenth Amendment duty of schools to protect students. Suski, *The Privacy of the Public Schools*, *supra* note 29. I do not abandon those arguments here. Indeed, this argument for a more nuanced understanding of custody that acknowledges that schools, and not just the family, take care of children complements those earlier arguments.
256. Standby guardianship laws serve as just one example. They allow for parents to retain legal and physical custody while another person serves as a temporary guardian caring for a child's legal and physical needs. E.g., GA. CODE ANN. § 29-2-11 (2019).
257. See *supra* Subpart I.A. The form of custody the courts discuss is akin to state custody under the Fourth and Eighth Amendments, which is defined as being "subject to a number of restrictive

physical custody of them such that the students cannot take care of their basic needs. Students cannot independently take care of basic needs, including their own safety, while in school.²⁵⁸ Their parents, by virtue of their absence from the school, also cannot take care of these basic needs. Schools, therefore, have to take care of them.²⁵⁹ As such, they have custody as the courts have defined it under the Fourteenth Amendment.²⁶⁰

Recognizing a Fourteenth Amendment duty of schools to protect students would of course increase the potential for public school liability. For example, the inactions of a school in a case like *Morrow v. Balaski*, in which the school knew of the “torment” that Emily and Brittany Morrow endured and abdicated a role in responding to it, would likely violate the Fourteenth Amendment.²⁶¹ Cases where the schools know about the harm and do nothing offer the clearest example of when Fourteenth Amendment liability would incur.

In such cases, the recognition of a Fourteenth Amendment duty on the part of schools would put bounds around their discretion regarding whether to protect students. Elsewhere I have advocated for a Fourteenth Amendment duty to protect based on an alternative but complementary theory to the one advanced here and proposed a framework for evaluating the claims.²⁶² That framework applies equally well here with the addition of a burden-shifting provision. In short, that framework calls for schools to respond reasonably, meaning in ways aimed at remedying and preventing the harms, to protect students from harms that they

conditions governing various aspects of his life” for federal habeas corpus purposes and “formal arrest or restraint on freedom of movement” for *Miranda* purposes. *Minnesota v. Murphy*, 465 U.S. 420, 430 (1984) (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam)).

258. See *supra* Subpart II.A.
259. In addition, as noted previously, the courts and statutes have recognized and imposed, respectively, these caretaking responsibilities. See *supra* notes 121, 123–124 and accompanying text.
260. Another critique is that as much as schools may do some caretaking, that does not change the legal custodial relationship between parents and children or shift it temporarily to schools. In my earlier article, I address this critique. In brief, the response to this critique is that custody of parents is qualitatively changed by their lack of control over their children in school, and those changes create an obligation on the part of schools to fill the gap. Suski, *The Privacy of the Public Schools*, *supra* note 29. That said, the response made here about conceptualization of custody under the Fourteenth Amendment also helps answer this critique.
261. 719 F.3d 160, 164 (3d Cir. 2013).
262. See Suski, *The Privacy of the Public Schools*, *supra* note 29. In this framework, the circumstances under which a school would be held liable for harms to children was limited to situations in which it reasonably should have known of them or actually knew about them. *Id.* at 482–83. Although I only advance a more limited version of such a constructive notice standard in the Title IX context, the reasoning for the more limited standard there—that the actual notice standard was justified by more than just misconceptions about public schools and families—do not apply in this context. See *infra* Subpart IV.D. and accompanying text.

knew or should have known of.²⁶³ The re-envisioning of the student-school custodial relationship advanced here justifies the addition of a burden-shifting component to this framework. Because the school's custodial relationship with students is special, a presumption that the school breached its duty to protect students should arise once a student plaintiff offers some affirmative evidence that the school knew or should have known of the student's harm and did little or nothing to remedy it. The burden would then be on the school to rebut that presumption with a showing that they had acted reasonably to protect the student.

If adopted, such a framework could require schools to implement processes for ensuring they meet its notice requirements. Requiring schools to respond reasonably to students' harms would compel them to develop meaningful substantive responses by schools to student harms.²⁶⁴ In addition, the recognition of a Fourteenth Amendment duty to protect students would increase the potential for deterrent and fault-fixing effects.²⁶⁵ Because these claims are not recognized now, they have no hope of promoting such effects. Recognizing the claims, therefore, can only increase the potential for promoting systemwide school reforms.

C. Changing the Evaluation of Fourteenth Amendment Personal Liberty and Bodily Integrity Claims

As in the Fourteenth Amendment duty to protect context, abandoning the exaggerated justifications for public schools' limited liability in Fourteenth Amendment personal liberty and bodily integrity claims justifies changing the evaluation of those claims such that schools' liability is increased. Currently, courts show extreme reticence or outright refusal to inquire at all into schools' pedagogical and disciplinary goals and methods out of exaggerated notions about schools' special expertise and courts' concomitant lack thereof.²⁶⁶ They do not even examine them for objective plausibility.²⁶⁷ Because, however, courts need no particular expertise to scrutinize a nonexistent or implausible pedagogical or disciplinary goal or method, they can and should examine those goals and methods.²⁶⁸ Requiring courts to inquire into the objective plausibility of schools'

263. See Suski, *The Privacy of the Public Schools*, *supra* note 29, at 482–83.

264. *Id.*

265. *Id.*

266. See *supra* Subpart II.B.

267. See *supra* Subpart I.B.

268. In a previous article, I also called for a change to the standard for evaluating these claims so that courts can better evaluate whether schools' actions—including verbal assaults—that cause

pedagogical and disciplinary goals and methods would reduce their deference to such assertions and limit school discretion to respond however they want, or not at all, to student harms. The determination of objective plausibility also provides a limiting principle for judicial inquiries. It allows for courts to defer to school expertise when established by plausible evidence, but preserves the protection of the law when evidence cannot establish even the plausibility of the asserted pedagogical and disciplinary methods.

Courts' evaluation of students' Fourteenth Amendment personal liberty and bodily integrity claims, therefore, can and should lift the veil over schools' pedagogical and disciplinary defenses. They should not simply defer to and accept as valid any asserted pedagogical or disciplinary goal. When assessing the need for force used by the school, they should instead inquire into the objective plausibility of the asserted pedagogical and disciplinary needs.²⁶⁹ When assessing the proportionality between the amount of force and its need, they should again inquire into whether the amount of force could, from an objective standpoint, plausibly have been required to meet the need.²⁷⁰ Such an inquiry would still allow the schools discretion because it still gives schools a wide berth for discipline—it need only be objectively plausible.²⁷¹ Placing the parameter of objective plausibility around that berth, though, would nonetheless increase schools' potential liability and therefore have the deterrent and fault-fixing effects discussed above.²⁷² It would reduce the deference courts currently afford schools to ignore or not respond to student harm. Instead, public schools would have to respond when such harm occurs without objectively plausible pedagogical or disciplinary cause.

One critique of these proposed changes, however, is that it would result in error costs to judges and the courts.²⁷³ Scholars have raised concerns about the error costs associated with requiring courts to evaluate matters that require expertise.²⁷⁴ Those matters call for courts to develop specialized knowledge, which

emotional harm, which can be more severe and longer-lasting than physical harm, violates the Fourteenth Amendment. Suski, *supra* note 68.

269. See *supra* Subpart I.B.

270. See *supra* Subpart I.B.

271. This proposed change to the Fourteenth Amendment standard is not unlike the ineffective assistance of counsel standard in that it offers room for deference and discretion to the public schools even though it also ratchets up the scrutiny of schools' actions. Overcoming a challenge to a conviction based on ineffective assistance of counsel only requires a showing of deficient performance that prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The Supreme Court admonished that under this standard, "scrutiny of counsel's performance must be highly deferential." *Id.* at 689. Yet, it still requires that counsel's performance be objectively reasonable to overcome a claim that it was deficient. *Id.* at 688–90.

272. See *supra* Subpart IV.A.

273. Moss, *supra* note 144 and accompanying text.

274. *Id.*

increases the risk that courts will make errors in judgment.²⁷⁵ Because inquiring into implausible or nonexistent pedagogical and disciplinary goals requires no such specialized knowledge, however, changing the evaluation of Fourteenth Amendment claims in the ways proposed here does not increase the risk of such error costs.²⁷⁶

Requiring courts to scrutinize the plausibility of pedagogical or disciplinary goals would change the outcomes in some of the most tragic of cases in which students suffered substantial harm and could prompt school reforms on a systemwide level aimed at protecting students. Take, for example, *Domingo v. Kowalski*, where students with disabilities were strapped, sometimes for hours, to toilets, chairs, and a gurney.²⁷⁷ The outcome of the students' claims likely would have been different had the court had to inquire into the plausibility of the asserted pedagogical and disciplinary goals and methods.²⁷⁸ While toilet training itself is a proper pedagogical goal, the notion that the teacher strapped a student to a toilet for hours at a time for that purpose is implausible.²⁷⁹ Lacking a plausible goal for an hours-long restraint of a child also makes it an excessive method or use of force. Assessing the plausibility of the need for the restraint in *Domingo*, therefore, would have called into question two prongs of the Fourteenth Amendment bodily integrity standard—the need for force and the excessiveness of the force—and would have made a finding of a Fourteenth Amendment violation more likely, if not inevitable. That, in turn, would increase the likelihood of such liability having both deterrent and fault-fixing effects on the school. It would set a standard for when such schools would have to intervene—and develop processes for doing so—when harms to children result from actions that have no real pedagogical or disciplinary purpose.

D. Changing the Evaluation of Title IX Claims

Finally, abandoning the flawed justifications for public schools' limited liability under Title IX would support a change to the evaluation of those claims as well. Title IX's liability limits for peer sexual harassment, embodied in the assessment of its actual notice and deliberate indifference standard, arose in part out of concerns about both the need for substantial deference to schools' pedagogical and disciplinary decisions, as well as the potential burdens that Title IX

275. *Id.*

276. See *supra* Subpart II.B.

277. *Domingo v. Kowalski*, 810 F.3d 403, 407 (6th Cir. 2016).

278. See *supra* note 70 and accompanying text.

279. See *supra* notes 76–77 and accompanying text.

liability would impose on schools.²⁸⁰ Recognizing the flaws in these ideas justifies changing the evaluation of the *Davis* actual notice and deliberate indifference requirements such that they do not so strongly shield schools from Title IX liability. The Supreme Court, therefore, should reevaluate the actual notice requirement so that schools will incur liability with a hybrid actual-constructive notice standard.²⁸¹ Such a standard would hold the schools responsible for sexual harassment when they knew about some of it, even if the amount they knew of was not severe, and failed to determine the extent of it. The Court should alter the deliberate indifference evaluation so that it requires an assessment of whether schools acted reasonably, as opposed to not clearly unreasonably, in response to the sexual harassment. Assessing Title IX in these ways would limit schools' discretion and shape school decisionmaking by requiring reasonable responses of schools in the face of notice of some peer sexual harassment. It would therefore limit schools' deference in determining whether and how to respond to it.

Under the current Title IX regime, schools are not liable for peer sexual harassment unless they have actual notice of severe, pervasive levels of harassment. Abandoning the notion that schools will be burdened without such notice justifies a lesser standard of notice. More specifically, it justifies a standard requiring that, when schools know of some sexual harassment, they must inquire into it, including into how severe and pervasive it is.

Others scholars who have proposed changes to the Title IX standard have advocated for a pure constructive notice standard for Title IX violations.²⁸² They have grounded their arguments in Title VII liability for employers for employee-on-employee sexual harassment, which holds employers liable for employees' sexual harassment that the employer knew or should have known about.²⁸³ However, the Supreme Court rejected that very argument in *Gebser v. Lago Vista Independent School District*, its predecessor teacher sexual harassment case.²⁸⁴ The *Gebser* Court did so primarily on the basis of its interpretation of the Title IX statutory and

280. See *supra* Subpart II.C.

281. Title VII, which prohibits sexual harassment in employment, holds employers to a constructive notice standard for employee-on-employee sexual harassment. 29 C.F.R. § 1604.11(d) (2018) ("With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.").

282. See, e.g., MacKinnon, *supra* note 28, at 2096–97 (calling for something akin to a constructive notice standard—a due diligence standard); Furr, *supra* note 97 (calling for a constructive notice standard for Title IX peer harassment).

283. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 281–82 (1998).

284. *Id.* at 288–89.

administrative enforcement scheme.²⁸⁵ Setting aside the arguable flaws in that reasoning, the courts' misconceptions about schools' burdens do not cut to the heart of those *Gebser* rationales for rejecting a constructive notice standard.²⁸⁶ Consequently, abandoning those misconceptions does not alone justify an adoption of a pure constructive notice standard. However, because the courts' misconceptions do underlie the *Davis* Court's justifications for its actual notice standard, the abandonment of those misconceptions justifies at least a moderate change to the actual notice standard.²⁸⁷ The hybrid constructive-actual notice proposed here is such a standard.²⁸⁸ Although more tempered than a pure

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285. *Id.* at 289 ("It would be unsound, we think, for a statute's *express* system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance while a judicially *implied* system of enforcement permits substantial liability without regard to the recipient's knowledge or its corrective actions upon receiving notice.").
286. Justice Stevens pointed out some of these flaws in his dissent in *Gebser*. *Gebser*, 524 U.S. at 301–04 (Stevens, J., dissenting). Among other things, Justice Stevens noted that allowing a recovery in damages absent actual notice would not, as the majority contended, frustrate the purposes of Title IX. *Id.* at 301. Instead, Justice Stevens said it "seems quite obvious that [Title IX's] purposes would be served—not frustrated—by providing a damages remedy in a case of this kind." *Id.* Further to that point, Justice Stevens said the majority's justification for requiring actual notice, which was "that Congress has specified a particular administrative procedure to be followed when a [Title IX] subsidy is to be terminated, however, does not illuminate the question of what the victim of discrimination on the basis of sex must prove in order to recover damages in an implied private right of action." *Id.* at 303. See also Amy Busa, *Two Steps Forward, One Step Back: The Supreme Court's Treatment of Teacher-Student Sexual Harassment in Gebser v. Lago Vista Independent School District*, 34 HARV. C.R.-C.L. L. REV. 279, 299 (1999) ("[E]ven if Title IX were an exercise of Congress' Spending Clause power, the Court still would not have been precluded from establishing liability as broad as that in Title VII cases. Since Title IX, according to this view, affects only those institutions that accept federal funds, it stands to reason that those fund recipients would be required to undertake greater obligations to prevent intentional discrimination than an institution whose liability is established through a comprehensive regulatory program like Title VII.").
287. Although the *Davis* Court relied on *Gebser* in setting the actual notice and deliberate indifference standard for peer sexual harassment under Title IX, stating "we declined [in *Gebser*] the invitation to impose liability under what amounted to a negligence standard—holding the district liable for its failure to react to teacher-student harassment of which it knew or *should have known*," the *Davis* Court did not explicitly adopt the *Gebser* Court's rationale. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 642. Instead the *Davis* Court focused on schools' need for control over students as a predicate to and a limit on their liability to justify the actual notice standard. See *supra* Subpart II.C. That said, because the *Davis* Court did not reject the *Gebser* rationale, and so implicitly adopted it when it adopted the same actual notice standard, the full abandonment of the actual notice standard in favor of a pure constructive notice standard cannot be justified by abandoning only the stated rationales in the *Davis* decision. While more tempered, the approach proposed here has application outside of peer sexual harassment claims. Because it accommodates for even the *Gebser* rationales that are not based on misconceptions about the burdens of liability on the schools, it justifies the change in standard for any kind of sexual harassment in schools, whether by students or teachers.
288. The notice standard proposed here is a departure from how the courts have treated actual notice under Title IX but not a departure from traditional notions of actual notice. Under the

constructive notice standard in that it would not involve holding schools liable under Title IX for any sexual harassment that they should have conceivably known about, it would require schools to investigate peer sexual harassment when they have direct notice of some sexual harassment.²⁸⁹

Although holding schools liable for children's behavior in ways that are similar—even if not identical—to the way that employers are held responsible for adults' behavior could be criticized as unfair, since children cannot be expected to behave as well as adults, this criticism misses the point.²⁹⁰ Whether a child is more likely or not to engage in inappropriate behavior is irrelevant to whether and how a school finds out about it. Children unquestionably are more likely to engage in inappropriate behavior, but that does not make schools less able to discover it. Indeed, given that children require more supervision than adults, schools should have more opportunities to discover student sexual harassment than an employer would have for employee sexual harassment.

In addition, instead of evaluating deliberate indifference by inquiring into whether a school's response was not clearly unreasonable, courts should ask whether a school acted reasonably. Changing the evaluation of the deliberate indifference standard this way would effectively strengthen schools' responses to peer sexual harassment. It would not, however, require schools to cure or fully remedy the sexual harassment. But it would require them to do something intended to remedy the sexual harassment because that is the reasonable response to such harms to children in school. Of course, even interventions intended to remedy the harms can go awry or cause more harm. In that instance, a school would act reasonably if it then tried to implement a better response. The reasonable response, therefore, is not a perfect remedy but an honest attempt at a remedy. Requiring schools to act reasonably does more, too, to shape their decisionmaking regarding their responses to sexual harassment than does the current standard, which requires far less of schools in response to sexual harassment.

The change in this Title IX standard would also likely yield different results in some of the more egregious Title IX cases.²⁹¹ For example, in *Doe v. Board of Education*, the schools' awareness of some sexual harassment of student J.D. by student M.O., who climbed into J.D.'s bathroom stall and sexually assaulted him,

common law, actual notice is comprised of both express and implied actual notice. While express notice involves "actual notice consisting of knowledge brought personally home," implied actual notice is "knowledge imputed and charged because of the surrounding facts and circumstances, which would lead one to discover or learn the fact by exercising ordinary care." 58 AM. JUR. 2D *Notice* § 5.

289. See 45B AM. JUR. 2D *Job Discrimination* § 860.

290. *Davis*, 526 U.S. at 675 (Kennedy, J., dissenting).

291. See *infra* note 292 and accompanying text.

among other things, would give rise to an obligation to investigate whether any additional sexual harassment was occurring.²⁹² Also, requiring that the school act reasonably in response to sexual harassment as proposed here would likely have resulted in a finding that the schools' interventions that caused J.D. more harm were not reasonable and constituted deliberate indifference, particularly if the school did nothing to try to improve upon the counterproductive interventions. These likely changed results would also then foster the deterrent and fault-fixing effects of liability. It would promote the implementation of better strategies for discovering and addressing the harms in order to avoid future liability.²⁹³

E. A Critique and Its Answer

One serious critique of these proposals is that they lack efficiency and breed a moral hazard.²⁹⁴ This concern derives from understandable worries over the cost of school liability on resource-poor schools. A judgment in favor of one student could cost a school so much that it ultimately drains resources in a way that harms many more students.²⁹⁵ The dissent in *Davis* voiced essentially this concern when it

292. 605 F. App'x 159, 162–63 (4th Cir. 2015). Similarly, such a standard could help prevent the rape that happened in *Hill v. Cundiff*, 797 F.3d 948 (11th Cir. 2015). There, student CJC raped another student as the result of a plot devised by a school staff member to catch CJC in the act of sexual harassment. *Id.* at 962–63. The staff member concocted this plot because the school principal had implemented a “catch in the act” policy under which sexual harassment would be addressed if school staff caught a student in the act of harassment. *Id.* at 957. Under the standard proposed here, such a policy would violate Title IX because the Title IX standard would require action when schools know of some sexual harassment, including acting to investigate into the extent of it. Further, in *Hill*, the school had repeated reports of sexual harassment by CJC. *Id.* at 959–60. Those reports under the proposed hybrid actual-construtive notice standard would suffice to address CJC's behavior and would require it be addressed in a way that aimed at preventing it.

293. See *supra* Subpart IV.A.

294. Moral hazard has been defined as “the perverse consequences of well-intentioned efforts to share the burdens of life.” Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 239 (1996). This concern is in addition to the concern, addressed earlier, about the U.S. Constitution becoming a font of tort law. See *supra* note 188 and accompanying text.

295. Another potential moral hazard is that increasing schools' potential liability in the ways proposed here will cause them to respond by suspending and expelling and otherwise harshly punishing students to avoid liability. This concern also has validity and is serious because schools have increasingly turned to these harsh punishments even without increased potential liability under the Fourteenth Amendment and Title IX. See *supra* notes 178–180 and accompanying text. However, while related, that problem is separate. The law should not allow schools to evade responsibility for violating students' civil and constitutional rights for fear they might respond by harshly punishing students. Instead, other legal and policy mechanisms should be instituted to encourage schools to use more effective methods of discipline, such as those that emphasize positive, empathetic relationships between students and adults. See, e.g., Jason A. Okonofua et al., *Brief Intervention to Encourage Empathic Discipline Cuts Suspension Rates in Half Among Adolescents*, 113 PROC. NAT'L ACADS. SCI. 5221 (2016).

noted how liability in one Title IX case could overwhelm a small school district's entire budget.²⁹⁶ Such concerns are not limited to the Title IX context. They apply to any instance in which a school could be held liable for harms to a student.

The first response to this critique is that, while schools undoubtedly labor under the burdens of financial constraints, the answer to these constraints should not be to leave children vulnerable to harms in school by limiting school liability. Allowing schools' financial concerns to overcome student safety concerns privileges school finances over student safety, which is an untenable trade-off for a number of reasons. First, students and their education are schools' reason for being. To sacrifice students' safety and wellbeing undermines the whole enterprise. Second, allowing even one student to suffer harm to protect the greater good—that is, the greater financial good that benefits other students more generally—raises significant policy, not to mention moral, concerns. These concerns include line-drawing questions about how many students the law will allow to be harmed before the school is liable. Finally, the answer to schools' financial concerns should not come at the expense of students' safety and wellbeing but instead should be addressed through the states' legislative and budgetary processes.²⁹⁷

The second response to this critique is that liability under any theory could overwhelm a school district, especially a small one. Therefore, the only way to really avoid the problems of efficiency and moral hazard is to limit schools' liability entirely. Completely limiting public school liability, though, would mean immunizing schools from liability under any provision of constitutional, statutory, or common law for which schools might have to pay damages. These claims would include claims of racial or disability discrimination. Eliminating the possibility of liability for all of these claims would leave students totally unprotected by the law and at the mercy of an all-powerful state while they are at school. Such a result is absurd and, beyond that, unnecessary. Schools already have protection from the ravages of liability on their budgets through insurance.²⁹⁸ These policies insulate

296. *Davis*, 526 U.S. at 681 (Kennedy, J., dissenting) ("The cost of defending against peer sexual harassment suits alone could overwhelm many school districts . . .").

297. Not that doing so is easy or without its problems. See, e.g., Black, *supra* note 208, at 431–32 (pointing out that school funding cuts resulted not just from financial exigencies but also from state legislatures' policy decisions).

298. School districts do buy insurance to cover liability. See Malia Herman, *Threat of Data-Privacy Litigation Fuels District Insurance Purchases*, EDUC. WEEK (Oct. 19, 2015), <https://www.edweek.org/ew/articles/2015/10/21/threat-of-data-privacy-litigation-fuels-district-insurance.html>; see also Dave Arnold, *Insuring Your Good Name*, NAT'L EDUC. ASS'N, <http://www.nea.org/home/14629.htm> [<https://perma.cc/7TAF-VQPU>]; *Risk Management Fund*, GA. SCH. BDS. ASS'N, <https://gsba.com/member-services/risk-management/about-rms/risk-management-fund/#school> [<https://perma.cc/34Y5-L7K5>]; *Errors & Omissions/General Liability*

schools and their general population of students from the potential inefficiencies and moral hazard associated with liability for individual claims.²⁹⁹

The third response to this critique is that the financial burden on schools may not be a relevant issue at all. Students can seek injunctive relief under these civil rights claims.³⁰⁰ Such relief might require schools to change policies and procedures. That kind of relief might result in some implementation cost to the schools, but it would not benefit one student disproportionately. To the contrary, it would have the profound, lasting, “fault-fixing” effect of systemwide, institutional change that benefits students as a whole.

CONCLUSION

The Fourteenth Amendment and Title IX can fulfill their potential for protecting public school children. In the current analysis, however, they do not. The courts unjustifiably limit public school liability under these claims based on misconceptions and, further, provide schools with practically unbridled discretion to respond in meaningless, ineffective ways—if at all. Collectively, these laws also leave students with limited legal recourse or protection in school and therefore vulnerable to harms. They also shift the burden for protecting children from harm to the children’s families, a burden shifting that disproportionately impacts low-income families.

Reducing these vulnerabilities and realizing these laws’ potential requires abandoning the misconceptions justifying limits to public school liability under these civil rights laws. That in turn justifies increasing the public schools’ liability for their violations. Holding public schools accountable for violations of the Fourteenth Amendment and Title IX in the ways proposed here would make the protections of these civil rights laws meaningful for public school students and thus help fill the civil rights vacuum in school.

Fund, N.C. SCH. BDS. ASS’N, <http://www.ncsba.org/risk-management/errors-omissions-general-liability-fund> [<https://perma.cc/RQY9-XTHT>].

299. As already noted, there may also be potential for insurers to regulate school behavior to better protect students in ways analogous to those articulated by John Rappaport. *Supra* note 236.
300. Injunctive relief has become far less available for some constitutional claims, notably those against police departments. Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1398–99 (2000). However, they still survive in the school context. E.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 714–15, 718–19 (2007) (considering and ultimately reversing the Ninth Circuit’s en banc decision not to enjoin Seattle School District No. 1’s student assignment plan based on its consideration of race).