TITLE IX PRE-ASSAULT LIABILITY: EMERGING ENFORCEMENT STANDARDS AND THE NEXT STEPS TO ACCOUNTABILITY

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I. INTRODUCTION

The problem of sexual misconduct on college campuses is not new. In 1957, one of the first studies of the issue in the context of postsecondary educational institutions ("institutions") was conducted.[1] The study found that 20.9% of the women surveyed reported experiencing forceful attempts at sexual intercourse.[2] The study also found that the prevalence of sexual misconduct fell into a U-shaped curve, with highest incident levels occurring early in the fall and late in the spring.[3] Further, the study found that the victims were younger than the general sample, and that women from marginalized groups were more likely to be victims.[4]

Notably, this research reflects many outdated notions about women and sexual misconduct and was conducted on a very limited sample size from a single university.[5] However, later research indicates that the study's findings were likely an accurate reflection of reality.[6] In 1987, researchers conducted the first national study of 6,159 students enrolled across thirty-two institutions.[7] They found that 27.5% of college women reported experiencing attempted rape and 7.7% of college men reported perpetrating this violent misconduct.[8]

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* J.D. Candidate, May 2025, University of Kansas School of Law. Thank you to members of the *Journal* staff and board for all their effort editing this Article. Thank you to my family for all their countless hours spent editing school papers and encouraging me to use my voice.

[1] Eilene Zimmerman, *Campus Sexual Assault: A Timeline of Major Events*, THE NEW YORK TIMES (June 22, 2016), https://www.nytimes.com/2016/06/23/education/campus-sexual-assault-a-timeline-of-major-events.html [https://perma.cc/URN4-6MJ7]; Clifford Kirkpatrick & Eugene Kanin, *Male Sex Aggression on a University Campus*, 22 AM. SOCIO. REV. 52, 52–53 (1957).

[2] Kirkpatrick & Kanin, *supra* note 1, at 53.

[3] *Id.*

[4] *See id.* at 53–54.

[5] *Id.* at 53.

[6] Mary P. Koss, Christine A. Gidycz & Nadine Wisniewski, *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students*, 55 J. CONSULTING AND CLINICAL PSYCH. 162, 162–63 (1987).

[7] *Id.* at 163.

[8] *Id.* at 168.

In fact, those initial statistics bear alarming similarity to statistics on the same issue available today.[9] Among undergraduate females, 26.4% report experiencing rape or sexual assault through physical force, violence, or incapacitation.[10] Still today, there is a heightened risk that students will experience sexual assault in their first few months on campus.[11] And across the board, marginalized groups are more likely to experience this harm.[12]

Faced with the disturbing consistency of these statistics, the question becomes: Why have policy makers not done anything to stop this? At the center of the issue is Title IX of the Higher Education Amendments of 1972 (Title IX).[13] The text of Title IX prohibits discrimination on the basis of sex in any education program or activity that receives federal funds.[14] Despite the statute's current prominence in addressing sexual misconduct, it initially provided no such assistance.[15]

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[9] RAINN, *Campus Sexual Violence: Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://rainn.org/statistics/campus-sexual-violence [https://perma.cc/HG4R-LLBT].

[10] *Id.*

[11] *Id.*

[12] LGBTQ+ students experience a heightened risk and are up to nine times as likely to be victims of college sexual assault. Stephanie Miodus, Samantha Tan, Nicole D. Evangelista, Cynthia Fioriti & Monique Harris, *Campus Sexual Assault: Fact Sheet From an Intersectional Lens*, AM. PSYCH. ASS'N, https://www.apa.org/apags/resources/campus-sexual-assault-fact-sheet#:~:text=Campus%20sexual%20assault%20(CSA)%20makes,students%20(NCES%2C%20 2022) [https://perma.cc/WL65-WS8N]; Mark Beaulieu, Creaig Dunton, LaVerne McQuiller Williams & Judy L. Porter, *The Impact of Sexual Orientation on College Student Victimization: An Examination of Sexual Minority and Non-Sexual Minority Student Populations*, SCI. RSCH. PUBL'G 1728, 1730 (2017); Disabled students are overall 13.2% more likely to be the victims of sexual misconduct involving force or incapacitation. *Not on the Radar: Sexual Assault of College Students with Disabilities,* NAT'L COUNCIL ON DISABILITY 1, 11 (Jan. 30, 2018), https://www.ncd.gov/report/not-on-the-radar-sexual-assault-of-college-students-with-disabilities/ [https://perma.cc/XA9F-R4PE]; Studies have found both Hispanic and Black students to experience sexual assault at the highest rate. David Cantor, Bonnie Fisher, Susan Chibnall, Shauna Harps, Reanne Townsend, Gail Thomas, Hyunshik Lee, Vanessa Kranz, Randy Herbison & Kristin Madden, *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct*, WESTAT (Jan. 17, 2020), https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_(01-16-2020_FINAL).pdf [https://perma.cc/G7AS-TDDT]; Robert W. S. Coulter, Christina Mair, Elizabeth Miller, John R. Blosnich, Derrick D. Matthews & Heather L. McCauley, *Prevalence of Past-Year Sexual Assault Victimization Among Undergraduate Students: Exploring Differences by and Intersections of Gender Identity, Sexual Identity, and Race/Ethnicity*, 18 PREVENTION SCI. 726, 729 (2017); This heightened risk is also experienced by international students, students with lower socioeconomic status, and first-generation students. Ihssane Fethi, Isabelle Daigneault, Manon Bergeron, Martine Hébert & Francine Lavoie, *Campus Sexual Violence: A Comparison of International and Domestic Students*, 13 J. OF INT'L STUDENTS 1, 4 (2023); Claude A. Mellins, Kate Walsh, Aaron L. Sarvet, Melanie Wall, Louisa Gilbert, John S. Santelli, Martie Thompson, Patrick A. Wilson, Shamus Khan, Stephanie Benson, Karimata Bah, Kathy A. Kaufman, Leigh Reardon & Jennifer S. Hirsch, *Sexual assault incidents among college undergraduates: Prevalence and factors associated with risk*, PLOS ONE (Nov. 8, 2017), https://doi.org/10.1371/journal.pone.0186471 [https://perma.cc/8572-G5DN]; *See* Rachel E. Morgan & Barbara A. Oudekerk, *Criminal Victimization, 2018*, U.S. DEP'T OF JUST. (Sep. 2019), https://bjs.ojp.gov/content/pub/pdf/cv18.pdf [https://perma.cc/2DVX-2WN9].

[13] Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688.

[14] 20 U.S.C. § 1681(a).

[15] *See* ELIZABETH KAUFER BUSCH & WILLIAM E. THRO, TITLE IX: THE TRANSFORMATION OF SEX DISCRIMINATION IN EDUCATION 16–17 (2018).

In fact, at the time it passed, Title IX was not revolutionary or particularly controversial, as is evidenced by the lack of public attention.[16] The legislative action was sparked by the activism of Bernice Sandler, a Ph.D. candidate who was dissuaded from applying for a tenure-track position because she came on "too strong for a woman."[17] Unsurprisingly, given the text and background, when Title IX became law, its immediate effects were limited to classroom-based opportunities for students and teachers.[18] The first implementing guidelines, issued in 1975, acted to remove absolute restrictions on participation in educational activities.[19] Despite this limited foundation, decades of judicial and administrative interpretations have made Title IX into a powerful tool to address the sexual misconduct that plagues colleges.[20]

However, as current statistics indicate, sexual misconduct in postsecondary education is still extremely prevalent.[21] This is because, despite the fact that Title IX's scope has grown substantially, it does not do enough to incentivize schools to take proactive steps to protect students from the harms of sexual misconduct. This Article argues for legislative or administrative implementation of a liability standard that penalizes institutions for failing to act despite clear risk of sexual misconduct and procedural safeguards that ensure survivors practical access to vindication.

Since Title IX has been interpreted to apply to sexual harassment for decades now, the literature analyzing its effectiveness in this area is extensive.[22] Most relevant here are various scholars' analyses of how to use Title IX to motivate institutions to prevent sexual assault.[23] Recently, the liability standard that is evaluated here has been identified as a promising method to hold institutions accountable.[24] This research sets a foundation that this Article further builds upon,

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[16] KAUFER BUSCH, *supra* note 15, at 48.
[17] *Id.* at 5–9.
[18] *Id.* at 1.
[19] *Id.* at 10.
[20] *Id.* at 17.
[21] RAINN, *supra* note 9.
[22] *E.g.*, Michelle J. Harnik, *University Title IX Compliance: A Work in Progress in the Wake of Reform*, 19 NEV. L. J. 647, 649 (2018); Anita M. Moorman & Barbara Osborne, *Are Institutions of Higher Education Failing to Protect Students?: An Anlysis of Title IX's Sexual Violence Protections and College Athletics*, 26 MARQ. SPORTS L. REV. 545, 545 (2016); Rachel N. Stewart, *How the #MeToo Era Can Facilitate Empowerment and Improvements to Title IX Shortcomings in Schools, Colleges, and Universities*, 14 CHARLESTON L. REV. 597, 598 (2020); Emily Suski, *The Title IX Paradox*, 108 CAL. L. REV. 1147, 1148 (2020); Jordyn Sindt, *Title IX's Feeble Efforts Against Sexual Harassment: The Need for Heightened Requirements Within Title IX to Provide Comparable University and Pre-K-12 Policies*, 23 J. GENDER, RACE & JUST. 495, 499 (2020); Katharine Silbaugh, *Reactive to Proative: Title IX's Unrealized Capacity to Prevent Campus Sexual Assault*, 95 B.U. L. REV. 1049, 1049 (2015).
[23] *See, e.g.*, Lauren McCoy, *Defining Deliberate Indifference and Institutional Liability Under Title IX*, 32 MARQ. SPORTS L. REV. 141, 144 (2021); Nick Rammell, *Title IX and the Dear Colleague Letter: An Ounce of Prevention Is Worth a Pound of Cure*, BYU EDUC. & L. J. 135, 136 (2014).
[24] *See, e.g.*, Erin E. Buzuvis, *Title IX and Official Policy Liability: Maximizing the Law's Potential to Hold Education Institutions Accountable for Their Responses to Sexual Misconduct*, 73 OKLA. L. REV. 35, 35 (2020); Keeley B. Gogul, *The Title IX Pendulum: Taking Student Survivors Along for the Ride*, 90 U. CIN. L. REV. 994, 997–98 (2022).

as previous literature fails to adequately consider the procedural rules necessary for this claim to actually incentivize institutions and provide relief to student survivors.

Part II of this Article will provide background as to how Title IX gradually developed into a tool that, with the adoption of emerging liability standards, has the potential to incentivize institutional proactivity. Part III of this Article will turn to analyzing how pre-assault liability, along with the proper procedural safeguards, has the potential to incentivize institutions to take proactive steps to protect students from sexual misconduct. Part IV will then turn to the legislative and administrative policy solutions necessary to ensure that plaintiffs have access to pre-assault liability claims.

II. BACKGROUND

Title IX states "[n]o person in the United States, shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[25] At just thirty-seven words long, the relevant portion of the statute provides little indication of what it would come to mean for institutional liability for sexual misconduct.

A. Evolution of Title IX Institutional Liability

Through judicial interpretation and administrative clarifications, Title IX has morphed into a tool for victims of sexual violence to seek accountability for institutional sexual misconduct policies.[26] One of the most critical, but thus far underutilized, elements of this tool is a theory referred to as pre-assault liability.[27]

1. Establishing a Private Right of Action

A highly pivotal development in the evolution of Title IX was the emergence of the concept that sexual harassment constitutes a form of sex discrimination. While many today would likely automatically associate these terms, the conceptual connection was not established until years after Title IX passed.[28] The theory was initially developed by feminist legal scholar, Catharine MacKinnon, who served as counsel for some of the earliest plaintiffs testing the theory in court.[29] In *Alexander v. Yale University*, the plaintiffs became the first to argue that sexual harassment was

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[25] 20 U.S.C. § 1681(a).

[26] Rachael A. Goldman, *When Is Due Process Due?: The Impact of Title IX Sexual Assault Adjudication on the Rights of University Students*, 47 PEPP. L. REV. 185, 194 (2019).

[27] The term "pre-assault" liability is a convenient and commonly used shorthand for a theory of liability that holds institutions accountable for failure to act before sexual misconduct causes injury. *See, e.g.*, Marisa R. Lincoln & Marisa Montenegro, *Title IX and "Pre-Assault": Closing the Flood Gates* (May 2020), https://www.lozanosmith.com/news/cnb/CNB372020.pdf [https://perma.cc/W6JB-YVFN]. It does not mean that institutions would be liable before an instance of sexual misconduct occurs.

[28] Joseph J. Fischel, *Catharine MacKinnon's Wayward Children*, 30 DIFFERENCES 34, 35–36 (2019).

[29] *Id.* at 36.

sex discrimination under Title IX.[30] The district court remarked favorably on the argument stating, "it is perfectly reasonable to maintain that academic advancement conditioned upon submission to sexual demands constitutes sex discrimination."[31] Many years later, the Supreme Court took the same position for the first time in *Franklin v. Gwinnett County Public Schools*.[32]

However, the developments in *Franklin* came only after the Court resolved the question of whether there even was a judicial path to remedy under Title IX.[33] The only remedy Congress explicitly provided for Title IX violations is administrative leveraging of federal funding.[34] In *Cannon v. University of Chicago*, the Supreme Court grappled with whether this remedy sufficiently served the congressional purpose in enacting Title IX.[35] The Court concluded that it did not and held that Congress intended to create an implied private right of action under Title IX.[36] In reaching this conclusion, the Court reasoned that a private right of action was proper and sometimes necessary to serve the legislative purpose to "provide individual citizens effective protection against those [discriminatory] practices."[37]

2. Developing Post-Assault Liability

Once it became clear that a private right of action against institutions was available, the Court began laying out the necessary conditions for establishing such liability. In *Gebser v. Lago Vista Independent School District*, the Court sought to answer under which conditions an institution may be held liable for sexual misconduct committed by a teacher.[38] More specifically, the opinion analyzes

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[30] KAUFER BUSCH, *supra* note 15, at 48.
[31] Alexander v. Yale Univ., 459 F. Supp. 1, 4 (D. Conn. 1977).
[32] Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 60 (1992).
[33] KAUFER BUSCH, *supra* note 15, at 48.
[34] 20 U.S.C. § 1682.
[35] Cannon v. Univ. of Chi., 441 U.S. 677, 704–05 (1979).
[36] *Id.* at 709.
[37] *Id.* at 704; The question of whether an implied right of action under a federal statute exists presents a separation of powers question. Anthony J. Bellia, *Justice Scalia, Implied Rights of Action, and Historical Practice*, 92 NOTRE DAME L. REV. 2077, 2081 (2017); In *Cannon*, the Court highlighted this concern by saying that where Congress "intends private litigants to have a cause of action," it should confer such a remedy explicitly. *Cannon*, 441 U.S. at 717; Since *Cannon* was decided, the Supreme Court has become much more reluctant to recognize implied rights of action, reasoning that doing so encroaches on congressional authority. Alexander v. Sandoval, 532 U.S. 275, 286 (2001); In *Alexander*, the Court emphasized that Congress alone could create a cause of action to enforce a federal law and that the courts may only find such a right where there is statutory intent to do so. *Id.* Without this statutory intent, the Court reasoned that "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286–87. Although the *Alexander* Court acknowledged that congressional expectations reflecting contemporary legal context was used in reaching the *Cannon* decision, it stated that the examination of congressional intent centers on the text and structure of the statute. *Id.* at 287–88. So, while recognition of an implied right of action has been critical to the development of Title IX, if the same question was before the Supreme Court today, it is unlikely the result would be the same.
[38] Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998).

whether institutions may be held liable on a basis of *respondeat superior* and constructive notice.[39] Under a theory of *respondeat superior*, liability is imputed to an institution whenever a teacher is "aided in carrying out the sexual harassment of students by his or her position of authority with the institution."[40] A theory of constructive notice would allow an institution to be liable "where the district knew or 'should have known' about harassment but failed to uncover and eliminate it."[41]

Since the right of action is implied, the Court based its analysis on inferences of what Congress intended guided by limits of "statutory structure and purpose."[42] The Court then concluded "that it would 'frustrate the purposes' of Title IX" to allow institutional liability under *respondeat superior* or constructive notice.[43] This was based on a finding that Congress did not consider institutional liability "where the recipient is unaware of the discrimination in its programs."[44]

This rationale relied in part on a comparison to the express remedy of administrative enforcement.[45] The Court reasoned that because an agency cannot initiate enforcement proceedings until it has issued actual notice, it would be "unsound" to allow for liability under the private right of action without a similarly high standard.[46] Instead, for cases "that do not involve official policy of the recipient entity," the Court established that an institution cannot be held liable for monetary damages for the conduct of its employee or agent "unless an official who at minimum has authority to address the alleged discrimination and to institute corrective measures on [the university's] behalf has actual knowledge of discrimination in the recipient's programs and fails to adequately respond."[47] The opinion further specifies that the failure to respond must amount to deliberate indifference which is "an official decision by the recipient not to remedy the violation."[48] In *Davis v. Monroe County Board of Education*, the Supreme Court extended *Gebser*'s actual knowledge and deliberate indifference standards to cases involving sexual misconduct by one student against another.[49]

Gebser and *Davis* established the elements of a post-assault claim. It is called a *post*-assault claim because it involves a plaintiff's allegations that institutional conduct *after* an instance of sexual misconduct constitutes deliberate indifference by the institution, therefore subjecting it to liability. The standards explained by the *Gebser* and *Davis* decisions can be synthesized into five elements:

> (1) the school must have "exercise[d] substantial control over both the harasser and the context in which the harassment occu[red];" (2) the alleged harassment must be "so severe, pervasive, and objectively offensive that it can be said to deprive the [plaintiff] of access to the educational opportunities or benefits provided by

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[39] *Gebser*, 524 U.S. at 283.
[40] *Id.* at 282.
[41] *Id.*
[42] *Id.* at 284.
[43] *Id.* at 285.
[44] *Id.*
[45] *Id.* at 289.
[46] *Id.*
[47] *Id.* at 290.
[48] *Id.*
[49] Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 648 (1999).

> the school;" (3) the school must have had actual knowledge of the harassment; (4) the school's response to the harassment was deliberately indifferent, meaning it was "clearly unreasonable in light of the known circumstances;" and (5) that indifferent response must have "cause[d] [the plaintiff] to undergo harassment or ma[d]e [the plaintiff] liable or vulnerable to it."[50]

The factors most relevant to this analysis are actual knowledge and deliberate indifference. These factors are most relevant here because they have been adapted by courts to create emerging Title IX liability standards.[51]

3. Downfalls of Post-Assault Liability

Deliberate indifference and actual knowledge standards provide a high bar for plaintiffs seeking to hold institutions accountable.[52] Because the deliberate indifference line is set at clearly unreasonable behavior, the courts give institutions significant deference.[53] This leeway fails to incentivize institutions to effectively respond to Title IX complaints because the standard only requires minimal responses to reports of past incidents.[54] In practice, the result is that plaintiffs are successful in showing deliberate indifference only where "a school did not respond to a sexual misconduct claim *at all*."[55] This provides a shield from liability so long as institutions do something promptly and in good faith.[56] In effect, this allows institutions to escape liability in most cases and does little to incentivize "institutions to proactively or reactively respond to sexual misconduct on their campuses and in their communities."[57] This is inconsistent with the Congressional purpose to "provide individual citizens *effective* protection" under Title IX.[58] The answer to this dilemma may lie in emerging standards of Title IX liability.

4. Emerging Standards of Title IX Liability

Surmounting the high bar of deliberate indifference may require going around rather than over. Another type of Title IX liability, one that holds schools accountable for certain conduct *before* sexual misconduct occurs, has gained traction throughout the federal circuit courts in recent years. The concept of pre-assault Title

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[50] Karasek v. Regents of the Univ. of Cal., 956 F.3d 1093, 1105 (9th Cir. 2020) (quoting *Davis*, 526 U.S. at 644–50).
[51] *See* Gogul, *supra* note 24, at 1007 (explaining how the Ninth Circuit clarified the elements of a pre-assault claim including that plaintiffs did not need to prove actual knowledge or deliberate indifference to survive a motion to dismiss).
[52] Buzuvis, *supra* note 24.
[53] McCoy, *supra* note 23, at 149.
[54] *Id.* at 154.
[55] *Id.* at 153 (emphasis added).
[56] *Id.*
[57] Buzuvis, *supra* note 24.
[58] Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979) (emphasis added).

IX liability is not a new theory. In 2007, it was acknowledged by the Eleventh Circuit and adopted by the Tenth Circuit.[59] However, until recently, the theory gained only minimal traction.[60]

a. Inception of Pre-Assault Liability

In the seminal pre-assault case, *Simpson v. University of Colorado Boulder*, the Tenth Circuit used a path left open by *Gebser* and *Davis* to articulate a new standard for institutional liability.[61] To understand the legal theory, it is helpful to discuss the underlying facts and allegations. The key is that all the events supporting the plaintiffs' claim happened *before* their assaults.[62]

Rather than alleging that the University of Colorado (CU) failed to adequately respond to the plaintiffs' reports of sexual misconduct, the plaintiffs claimed that the institution knew of the risk to the plaintiffs and "failed to take any action to prevent further harassment."[63] The Tenth Circuit explained that the allegations did not merely involve an assault that occurred in connection with CU, but rather that it arose out of an official school program.[64] The program at issue was the football team and specifically, its recruitment of high school athletes.[65]

The recruiting program's policy was to show recruits visiting campus a "good time" and the program specifically chose player hosts who were likely to provide this experience.[66] In 1990, two CU football players were criminally charged with rape and sexual assault.[67] In 1997, the recruiting program was implicated in similar misconduct when a high school girl reported she was sexually assaulted by two recruits at a party hosted by a CU football player.[68] The responses to this incident show CU was well aware of the danger posed by the football recruiting program. First, the chancellor of the university wrote an email to the athletic director saying he was concerned about oversight of recruits and thought the school should be clearer about rules and expectations.[69]

Next, the district attorney requested to meet with CU officials.[70] At the meeting, a state official communicated that "she was concerned about women being made available to recruits for sex" and told CU that the most recent event was not isolated.[71] She advised CU make changes regarding sex and alcohol in the recruiting program.[72] Despite these explicit warnings of trouble to come, CU's main response was merely applied to the individual actors involved.[73] CU denied admittance to the

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[59] *See* Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1178 (10th Cir. 2007); Williams v. Bd. of Regents, 477 F.3d 1282, 1295–96 (11th Cir. 2007).
[60] Buzuvis, *supra* note 24, at 36.
[61] *Simpson*, 500 F.3d at 1177.
[62] *Id.* at 1174.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.* at 1180.
[67] *Id.* at 1181.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.* at 1182.
[72] *Id.*
[73] *Id.*

two recruits and suspended a player.[74] Importantly, no changes addressed the use of sex in the football program's recruiting efforts or the duties of player-hosts.[75]

Predictably, sexual misconduct continued to plague the program. In 2001, a student employee in the athletic department was raped by a player on the team.[76] She met with the coach shortly after and he responded by telling her he would do nothing; he was true to his word.[77] That same year, CU hired an assistant coach who was previously accused of assault and banned from CU's campus.[78] Toward the end of the same year, the *Simpson* plaintiffs were assaulted during a recruiting visit by recruits and players.[79]

Even with these facts, CU almost escaped liability because the situation does not fit within the post-assault liability framework.[80] The plaintiffs could not identify a risk sufficiently "well-defined and focused" to trigger actual notice because the perpetrators and victims were different, in classification and identity, than in the previous incidents.[81] Instead of dismissing the claim or distorting the traditional post-assault liability theory, the Tenth Circuit identified a new pathway.

b. Legal Foundation of Pre-Assault Liability

This path was left open by the Supreme Court in *Gebser*.[82] There, the Court specified that actual knowledge was required in cases "that do *not* involve official policy" of the institution.[83] In *Simpson*, the Tenth Circuit reasoned the language used by the Supreme Court leaves open the possibility that the actual knowledge requirement does not apply where plaintiffs do claim that the Title IX violation occurred because of an official policy or custom of the institution.[84] Based on the facts before them, the *Simpson* court concluded that the plaintiffs' claims did not require allegations of actual knowledge to succeed because "the gist of the complaint is that CU sanctioned, supported, even funded a program" that resulted in Title IX violations.[85] The Tenth Circuit then returned to *Gebser* for guidance on the proper standard.[86]

What the Tenth Circuit found was reliance on the principles of municipal liability for civil rights violations under Section 1983 of Title 42 of the United States

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[74] *Simpson*, 500 F.3d at 1182.
[75] *Id.*
[76] *Id.* at 1183.
[77] *Id.*
[78] *Id.* at 1183–84.
[79] *Id.* at 1172.
[80] Buzuvis, *supra* note 24, at 50.
[81] Buzuvis, *supra* note 24, at 50 (quoting Simpson v. Univ. of Colo., 372 F. Supp. 2d 1229, 1236 (D. Colo. 2005), *rev'd sub nom.* Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170 (10th Cir. 2007)).
[82] Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998).
[83] *Id.* (emphasis added).
[84] *Simpson*, 500 F.3d at 1177.
[85] *Id.*
[86] *Id.*

Code (§ 1983).[87] The critical similarity between Title IX and § 1983 is that neither allows liability for the entity under a theory of *respondeat superior*.[88] Instead, both require "that the institution itself, rather than its employees (or students) be the wrongdoer."[89] This standard means that plaintiffs must show that their injury was the result of action by the entity even though the conduct closest in the causal chain was individual action.

In § 1983 actions, plaintiffs may satisfy the standard by alleging that an entity acting under color of state law is either indifferent to the actions of its employees *or* has discriminatory policies or customs.[90] In *Gebser*, the Supreme Court relied on the former option. By imposing the high-bar causation standard of deliberate indifference, the Supreme Court ensured that liability was premised not on the employee's action but on the institution's deliberate indifference to a sexual harassment report.[91] In sum, the analogy to § 1983 led to the establishment of the post-assault claim requirements of actual knowledge and deliberate indifference.

What the Tenth Circuit in *Simpson* did was use a "parallel interpretation" under the latter option for § 1983 liability.[92] The court reasoned that when an official policy is alleged under § 1983, the analysis changes.[93] For § 1983 claims, alleging harm because of an official policy or custom allows a court to conclude that the entity itself caused the harm because of a policy or custom it maintained, rather than its deliberate indifference to the acts of an individual under its control. The primary inquiry under this standard is whether there is a direct causal relationship between the municipal custom and the violation.[94] Importing this standard to the Title IX context, the Tenth Circuit held that an institution may be said to have intentionally violated Title IX when the injury is caused by an official policy.[95]

c. Distinctions Between Pre-Assault and Post-Assault Liability

The Tenth Circuit's holding created a form of Title IX liability which differs in two significant ways from post-assault liability as established by *Gebser* and *Davis*.[96] The first change is that deliberate indifference is established via the policy itself, rather than via the reaction to a report of sexual misconduct.[97]

Second, the analysis impacts the actual knowledge requirement.[98] There are multiple ways to characterize this alteration. One option is to conclude that the actual notice standard is inapplicable because the institution itself, through its official

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[87] *Simpson*, 500 F.3d at 1177.
[88] *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 289 (1998); *See* City of Canton v. Harris, 489 U.S. 378, 385 (1989).
[89] *Simpson*, 500 F.3d at 1177.
[90] Buzuvis, *supra* note 24, at 48.
[91] *Gebser*, 524 U.S. at 290.
[92] Buzuvis, *supra* note 24, at 48.
[93] *Simpson*, 500 F.3d at 1178.
[94] Wes. R. McCart, Simpson v. University of Colorado*: Title IX Crashes the Party in College Athletic Recruiting*, 58 DEPAUL L. REV. 153, 170 (2008).
[95] *Simpson*, 500 F.3d at 1178.
[96] Gogul, *supra* note 24, at 1006.
[97] *Id.*
[98] *Id.*

policy or custom, is the wrongdoer.[99] Alternatively, one may conclude actual knowledge is still required in a different way.[100] Some scholars pose that instead of requiring actual knowledge of ongoing harassment, the Tenth Circuit's analysis requires actual knowledge of the risk created by the official policy or custom.[101]

d. Expanding Pre-Assault Liability

Pre-assault liability was not adopted by a circuit court again until 2020. In *Karasek v. Regents of the University of California*, the Ninth Circuit held that pre-assault claims are supported by a cognizable theory of Title IX liability, clearly set out the required elements, and expanded upon *Simpson's* holding.[102] To survive a motion to dismiss, the Ninth Circuit specified that a plaintiff must plausibly allege that:

> (1) the school maintained a policy of deliberate indifference to reports of sexual misconduct, (2) which created a heightened risk of sexual harassment that was known or obvious (3) in a context subject to the school's control, and (4) as a result, the plaintiff suffered harassment that was "so severe, pervasive, and objectively offensive that it can be said to [have] deprive[d] the [plaintiff] of access to the educational opportunities or benefits provided by the school."[103]

The first two elements are the adaptations to the standards of deliberate indifference and actual knowledge.

The most significant contribution to pre-assault liability this case offers is its expansion of *Simpson*. In *Simpson*, the court's holding was limited to a known risk of further sexual misconduct within a specific program, football recruitment.[104] But the Ninth Circuit in *Karasek* said that the same reasoning may support liability where an institution has a policy of deliberate indifference to a risk of sexual misconduct "in any context subject to the school's control."[105]

The facts of *Karasek* paint a picture of decades of inadequate response to sexual harassment by the University of California, Berkeley (Berkeley).[106] The plaintiffs cited a report by a state agency which found that over a five-year period, Berkeley resolved 76% of Title IX complaints using an early resolution process and in a

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[99] Gogul, *supra* note 24, at 1006.
[100] McCart, *supra* note 94, at 173.
[101] *E.g.*, *id.*
[102] Karasek v. Regents of the Univ. of Cal., 956 F.3d 1093, 1112–13 (9th Cir. 2020).
[103] *Id.* at 1112 (quoting Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 650 (1999)).
[104] Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1184 (10th Cir. 2007).
[105] *Karasek*, 956 F.3d at 1113.
[106] *Id.* at 1101–03.

generally inadequate manner.[107] Despite this reality, Berkeley's Title IX officer stated publicly that early resolution was inappropriate for cases involving sexual assault.[108] The plaintiffs also cited an administrative complaint filed by thirty-one women alleging that this failure to adequately respond to complaints of sexual assault existed since 1979.[109] The court acknowledged that the facts point to a broader problem than in *Simpson*, but left it to the trial court to determine whether this particular campus-wide situation could satisfy the pre-assault framework.[110]

In 2022, pre-assault Title IX liability picked up more traction when the Sixth Circuit adopted *Karasek's* test in *Doe ex rel. Doe #2 v. Metro. Government of Nashville & Davidson County.*[111] The increasing acceptance of pre-assault liability is most significant when viewed in light of its potential to incentivize institutions to take proactive action to prevent sexual misconduct.

III. ANALYSIS

Because pre-assault liability forces schools to examine their policies and practices that allow sexual misconduct to continue rather than merely respond to incidents once they have already occurred, it has the potential to incentivize schools to correct their policies and practices before injury can occur. In order for this potential to be realized, procedural rules that protect survivors' access to these claims must be implemented.

A. Pre-Assault Liability's Potential to Incentivize Proactivity

A significant theme in literature discussing pre-assault liability is its potential to incentivize institutions to take proactive action to protect its students from sexual misconduct.[112] Using the facts of *Simpson* as a touchpoint, scholars suggest that with only post-assault liability, institutions lack motivation to take proactive action even when they are clearly aware of a problem.[113] This failure can be characterized by unwillingness to take preventative action.[114] Pre-assault liability takes a step towards a solution because it is forward-facing and can reach first-time perpetrators.[115]

1. Motivating Injury Prevention

As their names indicate, pre-assault and post-assault liability differ primarily in the time period during which they hold institutions accountable for inaction.[116] Traditional post-assault liability examines what an institution does in response to a

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[107] *Karasek*, 956 F.3d at 1113.
[108] *Id.* at 1114.
[109] *Id.* at 1103.
[110] *Id.* at 1114.
[111] Doe *ex rel.* Doe #2 v. Metro. Gov't of Nashville & Davidson Cnty., 35 F.4th 459, 465 (6th Cir. 2022).
[112] Buzuvis, *supra* note 24; A.J. Bolan, *Deliberate Indifference: Why Universities Must Do More to Protect Students from Sexual Assault*, 86 GEO. WASH. L. REV. 804, 818 (2018); Rammell, *supra* note 23, at 141.
[113] Bolan, *supra* note 112, at 817.
[114] Rammell, *supra* note 23, at 141.
[115] *See Doe*, 35 F.4th 459.
[116] *See id.* at 465–66.

report of sexual misconduct.[117] While this form of liability has played a significant role in ensuring institutions take prompt action to resolve the consequences of sexual misconduct, it does not similarly impact institutional motivation to look at their overall approach to sexual misconduct on campus.[118]

Instead, the prominence of post-assault liability has allowed institutions to avoid responsibility in most cases because they are shielded by minimal responses to past incidents of sexual misconduct.[119] So long as institutions respond to reports they receive, they avoid penalty because post-assault liability permits only limited inferences on what that incident may mean for the future safety of other students.[120] In other words, institutions are permitted to only look backward at what they may do to remedy specific harms while ignoring the obvious risks to other students that can be inferred from the incident.

Conversely, the focus of pre-assault liability is institutional failure to address risks that existed before a student was the target of sexual misconduct.[121] This means that the key inquiry under a pre-assault standard is whether an institution's policies were sufficient to address known risks that were likely to materialize if left ignored.[122] The result is a greater emphasis on institutional polices rather than narrow responses to prior events.[123] Because pre-assault liability's structure requires that schools look forward to what harms may occur if deficiencies in their programs and activities are not corrected, it inherently requires proactive response to sexual misconduct on campus.[124]

2. Reaching First-Time Perpetrators

Pre-assault liability also encourages proactivity by closing the accountability gap for first-time offenders.[125] Under a theory of post-assault liability, the gold standard of notice is satisfied only when the institution had knowledge that the perpetrator had committed sexual misconduct before against the same victim, in the same manner.[126] As a result, accountability under Title IX is focused on cases where there is an identified victim and harasser who remain the same throughout the period of sexual misconduct.[127] This allows institutions to avoid liability even where the risk of sexual misconduct is obvious when the identities of the parties were not known before the sexual misconduct at issue occurred.[128]

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[117] *See* Buzuvis, *supra* note 24.
[118] Delaney R. Davis, *Title IX at Fifty: Reimagining Institutional Liability Under Karasek's Pre-Assault Theory*, 58 GA. L. REV. 313, 334–35 (2023).
[119] Buzuvis, *supra* note 24, at 35–36.
[120] *Id.* at 50.
[121] Karasek v. Regents of the Univ. of Cal., 956 F.3d 1093, 1099 (9th Cir. 2020).
[122] McCart, *supra* note 94, at 177.
[123] Buzuvis, *supra* note 24, at 51.
[124] McCart, *supra* note 94, at 182.
[125] *Id.* at 174.
[126] Buzuvis, *supra* note 24, at 40–41.
[127] McCart, *supra* note 94, at 167.
[128] *Id.* at 174.

An extreme example of this standard is the Sixth Circuit's same-victim requirement. In *Kollaritsch v. Michigan State University*, the court held that victims alleging post-assault liability must show "that the school had actual knowledge of some actionable sexual harassment and that the school's deliberate indifference to it resulted in *further* actionable harassment of *the [same] student-victim*." [129] This means that a post-assault theory is not viable until the same victim was subjected to harassment multiple times.[130] The Sixth Circuit's rule makes it obvious that post-assault liability is not fit to address situations where, although the risk was known, the parties involved in the sexual misconduct are not identical to those in the situation which gave rise to the awareness.

Pre-assault liability closes this accountability gap.[131] In *Doe ex rel Doe #2 v. Metro Government of Nashville & Davidson County*, the Sixth Circuit recognized pre-assault liability as a cognizable theory of liability.[132] In that same case, the Sixth Circuit held that its post-assault same-victim requirement does not extend to pre-assault claims.[133] The court reasoned that the causation considerations that gave rise to the same-victim requirement are satisfied by pre-assault liability's focus on a pattern of sexual misconduct before the victim was subjected to the conduct.[134] Thus, pre-assault liability holds institutions accountable for ignoring the risk a particular actor or group of actors poses to the campus community rather than only for ignoring the risk that an actor or group of actors poses after they have already offended.

For these reasons, most scholars agree that pre-assault liability is a step in the right direction to alleviating the sexual misconduct that plagues college campus.[135] However, one possible concern is that a pre-assault liability standard puts institutions at risk of constant liability for failure to prevent sexual misconduct on their campuses. Specifically, one scholar remarked that pre-assault liability "sounds in negligence," and asserted that the Tenth Circuit merely reasoned that "the university should have known of the sexual harassment because it was a foreseeable result."[136] This line of reasoning, the author remarks, shows the court resorting to a constructive notice standard rejected by the *Gebser* Court.[137]

While it is true that a pre-assault liability standard would require "unprecedented" institutional responsiveness to the risk of sexual misconduct on campus, it does not follow that the theory abandons the knowledge or causation standards required by the Supreme Court in *Gebser* and *Davis*.[138] In fact, the Ninth Circuit in *Karasek* responded specifically to this concern saying:

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[129] Kollaritsch v. Mich. State Univ., 944 F.3d 613, 620 (6th Cir. 2019) (emphasis added).
[130] *Id.* at 625.
[131] McCart, *supra* note 94, at 174.
[132] Doe *ex rel.* Doe #2 v. Metro. Gov't of Nashville & Davidson Cnty., 35 F.4th 459, 465 (6th Cir. 2022).
[133] *Id.*
[134] *Id.*
[135] *E.g.*, Buzuvis, *supra* note 24; Bolan, *supra* note 112; Rammell, *supra* note 23, at 141; McCart, *supra* note 94, at 184.
[136] Justin F. Paget, *Did Gebser Cause the Metastasization of the Sexual Harassment Epidemic in Educational Institutions? A Critical Review of Sexual Harassment Under Title IX Ten Years Later*, 42 U. RICH. L. REV. 1257, 1298 (2008).
[137] *Id.*
[138] *See* McCart, *supra* note 94, at 180–81.

> Title IX does not require [Berkeley] to purge its campus of sexual misconduct to avoid liability. A university is not responsible for guaranteeing the good behavior of its students. The element of causation ensures that Title IX liability remains within proper bounds. To that end, adequately alleging a causal link between a plaintiff's harassment and a school's deliberate indifference to sexual misconduct across campus is difficult.[139]

Further, the court was so careful to ensure that the pre-assault liability standard it put forward complied with the *Gebser*/*Davis* requirement that it amended its initial opinion to clarify that heightened standards remained.[140] The amended decision specified that the policy or custom at issue must be one of deliberate indifference to reports of sexual misconduct and that the risk was known or obvious to the institution.[141] Practitioners have highlighted that these clarifications foreclose the possibility that institutions would be subjected to frequent liability for campus sexual misconduct the institution was unaware of.[142] This standard strikes the proper balance of holding institutions liable when they refuse to amend policies they know make student abuse more likely while retaining the safeguards of the post-assault framework.[143]

B. Procedural Practicality

The emerging availability of pre-assault claims is a good step toward accountability. But to reach its full potential, the standard must be accompanied by procedural rules that allow survivors practical access to these claims. Since Title IX does not expressly provide for a private cause of action, it also lacks built-in procedural rules for timeliness.[144] To fill the gap, courts use standards from both state and federal law.[145] The statutes of limitation applicable to Title IX claims are borrowed from state personal injury law.[146] On the other hand, the date the cause of action accrues for a Title IX action is a question of federal law.[147]

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[139] Karasek v. Regents of the Univ. of Cal., 956 F.3d 1093, 1114 (9th Cir. 2020).
[140] Lincoln & Montenegro, *supra* note 27.
[141] *Id.*
[142] *Id.*
[143] McCart, *supra* note 94, at 181.
[144] Sheridan Hendrix, *OSU Wants US Supreme Court to Hear Title IX Case; Petition Asks Justices to Review Earlier Decision*, THE COLUMBUS DISPATCH (Mar. 15, 2023) at A1.
[145] *Id.*
[146] Megan C. Maynhart, *Why Title IX Matters: The Key to Breaking the Glass Ceiling in Medicine*, 51 U. TOL. L. REV. 531, 538 (2020).
[147] Hendrix, *supra* note 144.

1. Alleged Circuit Split on Accrual Rule

The question of pre-assault claim accrual is important and has been the source of recent controversy.[148] A claim accrues when the plaintiff has a complete cause of action such that the plaintiff could file suit and be awarded relief.[149] There are two theories of accrual that may apply to Title IX.[150]

The first is the occurrence rule which provides that a cause of action accrues at the moment the injury occurs.[151] Application of this rule has resulted in different outcomes. In a Tenth Circuit case, the court considered it important to adhere to general principles of tort law.[152] The court analogized the Title IX claim to the offense of battery and reasoned that both give rise to a complete cause of action upon physical contact.[153] Therefore, the court held that the plaintiff's Title IX claim could accrue no later than the last instance of sexual abuse.[154] Alternatively, as will be discussed further below, a district court within the Sixth Circuit reasoned that because the injury at issue in a Title IX claim is the deprivation of educational opportunities, the latest the injury could have occurred is the plaintiffs' graduation dates.[155]

The second theory is the discovery rule which provides that a Title IX claim accrues "when a plaintiff knows or has reason to know of the injury which is the basis of his action."[156] Until recently, the discovery rule was applied to Title IX deliberate indifference claims without much resistance from institutions. In fact, the discovery rule, while appearing plaintiff friendly, has led to many outcomes favorable to defendants.[157] A controversy has developed, however, after a court applied the rule in a case involving a scandal at Ohio State University (OSU).[158] In *Snyder Hill v. Ohio State University*, the application of the discovery rule led the court to conclude that, although some of the alleged abuse happened decades earlier, the plaintiffs' claims were not time-barred.[159]

The case involved extensive abuse by Dr. Richard Strauss, who was employed as a physician at OSU from 1978 to 1998 in the athletic department and student health centers.[160] In March of 2018, a former student-athlete came forward with

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[148] Hendrix, *supra* note 144.
[149] Wallace v. Kato, 549 U.S. 384, 388 (2007).
[150] Hailey Martin, *UnSOLved: The Competing Policies of SOL, Title IX, and Everything In Between*, 91 U. CIN. L. REV. (Nov. 8, 2022).
[151] Snyder-Hill v. Ohio State Univ., 48 F.4th 686, 698 (6th Cir. 2022).
[152] Varnell v. Dora Consol. Sch. Dist., 756 F.3d 1208, 1215–16 (10th Cir. 2014).
[153] *Id.* at 1216.
[154] *Id.*
[155] Garrett v. Ohio State Univ., 561 F. Supp. 3d 747, 756 (S.D. Ohio 2021).
[156] Stanley v. Trs. of the Cal. State Univ., 433 F.3d 1129, 1136 (9th Cir. 2006) (citing Hoesterey v. Cathedral City, 945 F.2d 317, 319 (9th Cir. 1991)).
[157] *E.g.*, King-White v. Humble Indep. Sch. Dist., 803 F.3d 754, 762 (5th Cir. 2015); *Stanley*, 433 F.3d at 1137; Twersky v. Yeshiva Univ., 579 Fed. App'x. 7, 10 (2d Cir. 2014).
[158] *High Court Denies Review of Title IX Statute of Limitations in Sexual Assault Cases*, 19 MEALEY'S PERS. INJ. REP. 30, June 26, 2023.
[159] Snyder-Hill v. Ohio State Univ., 48 F.4th 686, 698, 706–07 (6th Cir. 2022).
[160] Brendan Rand, *Former Ohio State Athletes Sue School Over Team Physician's Alleged Sexual Abuse*, ABC NEWS (May 30, 2019, 5:20 PM), https://abcnews.go.com/US/ohio-state-athletes-sue-school-team-physicians-alleged/story?id=63372794 [https://perma.cc/T424-TSUM].

allegations that Strauss abused him and his teammates.[161] Shortly after, OSU launched an independent investigation.[162] The resulting report concluded that Strauss abused at least 177 male students, mostly through the guise of medical treatment.[163] In July, the first of several lawsuits alleging misconduct on the part of OSU was filed in district court.[164]

In analyzing the timeliness of the plaintiffs' claims, the district court applied both the occurrence rule and the discovery rule.[165] Under the occurrence rule analysis, as is explained above, the court concluded the latest the claim could have accrued was the plaintiffs' graduation day.[166] Under the discovery rule, the court considered the claim to accrue when the plaintiff knew or had reason to know of the sexual harassment or abuse.[167] Using this articulation of the discovery rule, the court held that even under the discovery rule, plaintiffs' claims were time-barred because they knew or should have known of their abuse when it happened and therefore, the claims accrued on the last date of abuse for each plaintiff.[168] The plaintiffs' claims were subsequently dismissed for failure to bring them within the statute of limitations.[169]

On appeal, this decision was reversed.[170] The Sixth Circuit held that the discovery rule was proper for Title IX claims[171] and that the district court's articulation of the discovery rule was flawed.[172] The court justified this conclusion by saying that it was in line with the purpose of both the discovery rule and Title IX.[173] The opinion explains that the purpose of the discovery rule is to protect plaintiffs who, although not due to their own fault, lack information to form a claim and reiterates that the purpose of Title IX is to provide relief to those discriminated against on the basis of sex.[174]

The key to understanding why the Sixth Circuit reached a different conclusion than its district court even though both claimed to apply the discovery rule is in the

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[161] Corky Siemaszko, *Faced With More Lawsuits, Ohio State Denies Covering Up Sex Abuse Scandal Years After Paying Out Millions in Damages*, NBC NEWS (Oct. 13, 2023, 4:49 PM), https://www.nbcnews.com/news/us-news/faced-lawsuits-ohio-state-denies-covering-sex-abuse-scandal-years-payi-rcna120200 [https://perma.cc/2AW8-H74E].

[162] The Ohio State University, *Strauss Investigation: Timeline*, https://straussinvestigation.osu.edu/strauss-investigation/timeline [https://perma.cc/3SBY-6ND5].

[163] Rand, *supra* note 160.

[164] The Ohio State University, *supra* note 162.

[165] Garrett v. Ohio State Univ., 561 F. Supp. 3d 747, 755–58 (S.D. Ohio 2021).

[166] *Id.* at 756.

[167] *Id.* 757–58.

[168] *Id.*

[169] *Id.* at 762.

[170] Snyder-Hill v. Ohio State Univ., 48 F.4th 686, 690 (6th Cir. 2022).

[171] *Id.* at 701.

[172] *Id.* at 704 (holding that the discovery rule provides that a claim only accrues when the plaintiff is aware "the defendant caused their injury," not merely when "the plaintiffs knew or had reason to know that they were injured at the time the abuse occurred" as the district court held).

[173] *Id.* at 701.

[174] *Id.* at 698–99.

higher court's articulation of the discovery rule.[175] The opinion states that "a claim accrues when the plaintiff knows or has reason to know that they were injured *and that the defendant caused their injury*."[176] The difference between this standard and that articulated by the lower court is the Sixth Circuit's focus on knowledge of causation.[177] In order for plaintiffs to know they have a complete cause of action in the Title IX context, the court concluded that the plaintiffs must know or have reason to know that their injury was caused by the institution.[178]

As the facts were alleged, the court concluded the claims were not time barred under the discovery rule because all of the plaintiffs asserted that even if they knew about Strauss's abuse, they did not know that OSU was responsible for the harm inflicted on them.[179] Specifically, they argued that they could not have known that others had previously complained about Strauss or about how OSU responded to those complaints.[180] The circuit court concluded that these allegations were plausible and that plaintiffs' claims should not have been dismissed for timeliness.[181]

This decision was met with strong opposition from both OSU and twenty-three other higher education institutions that joined the petition for certiorari via amicus brief.[182] OSU argued that the result worsened a circuit split over the proper accrual rule for Title IX claims.[183] OSU says that the Tenth Circuit applied the occurrence rule, the Second, Fifth, and Ninth Circuits applied the standard discovery rule, and the Sixth Circuit applied what OSU refers to as an "extreme" version of the discovery rule.[184]

At first glance, it appears the dispute as laid out by OSU exists. The Tenth Circuit, as discussed above, says that the claim occurs no later than when the injury last occurred.[185] Further, the Fifth, Ninth, and Second Circuits articulate standards of the discovery rule that sound very similar to that applied by the district court in the OSU case.[186] However, OSU is missing the key distinction between all of those cases and the facts before the Sixth Circuit. While those cases involved post-assault claims, the plaintiffs in *Snyder-Hill* properly alleged pre-assault claims.[187] This distinction is critical because the Sixth Circuit's articulation of the discovery rule is necessary for the survival of many pre-assault claims.

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[175] *Snyder-Hill*, 48 F.4th at 704.
[176] *Id.* (emphasis added).
[177] *Id.* at 701.
[178] *Id.* at 704.
[179] *Id.* at 704–05.
[180] *Id.* at 694.
[181] *Id.* at 706–07.
[182] Hendrix, *supra* note 144; Brief Amici Curiae of the Association of American Universities and Twenty-Three Institutions of Higher Education in Support of Petitioner at 1–2, Snyder-Hill v. Ohio State Univ., 48 F.4th 686, 708 (6th Cir. 2022) (No. 22-896).
[183] Petition for A Writ of Certiorari at 13, Ohio State Univ. v. Snyder-Hill, 143 S.Ct. 2659 (2023) (No. 22-896).
[184] *Id.* at 13–16.
[185] *Cf.* Varnell v. Dora Consol. Sch. Dist., 756 F.3d 1208, 1216–17 (10th Cir. 2014).
[186] *See* King-White v. Humble Indep. Sch. Dist., 803 F.3d 754, 764 (5th Cir. 2015); *see* Stanley v. Trs. of the Cal. State Univ., 433 F.3d 1129, 1136 (9th Cir. 2006); *see* Twersky v. Yeshiva Univ., 579 F. App'x. 7, 9 (2d Cir. 2014).
[187] *Snyder-Hill*, 48 F.4th at 704.

2. Discovery Rule's Potential to Protect Plaintiff Access to Institutional Accountability

The unique contours of Title IX pre-assault liability require careful attention to the procedural rules necessary to ensure that student victims have access to vindicate their rights. The Sixth Circuit's discovery rule with its focus on knowledge of causation is essential to the survival of many pre-assault claims due to the reality that institutions intentionally conceal individual instances and patterns of sexual misconduct on campus.[188]

There are two key considerations when analyzing the proper procedural rules for pre-assault liability. The first, which applies equally to all Title IX claims, is that the party who commits the act of sexual misconduct is not the party against whom liability is sought.[189] Instead, although it is specific actors who commit the sexual misconduct, it is the institutional failure to provide equal educational opportunities to the victim that provides the basis for liability.[190]

The second key consideration, which presents a distinction between pre-assault and post-assault claims, is the time period over which the plaintiff must have knowledge of institutional response to bring a successful claim. In a typical post-assault claim, the underlying events would be that the victim made a report of sexual misconduct to the institution and the institution failed to respond in accordance with the law.[191] Under this framework, for a post-assault plaintiff to have the knowledge required to state a cause of action, the plaintiff would need only to be aware that the institution failed to act properly in response to the student's individual Title IX complaint.

In contrast, the underlying timeline of a pre-assault situation would generally be that there was an obvious risk of sexual misconduct, the institution failed to alleviate this risk, and then an instance of sexual misconduct caused by that indifference occurs.[192] This means pre-assault claims inherently require the plaintiffs have knowledge of events that took place before they were targeted, including knowledge of the obvious risk that existed and the institution's response to that risk.

As a practical matter, this means that a post-assault plaintiff would have an opportunity to learn of institutional failure in the normal course of the school's Title IX process while a pre-assault plaintiff would not. Research supports the proposition that those who go through the institution's Title IX process are able to identify the

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[188] *See* Corey Rayburn Yung, *Concealing Campus Sexual Assault: An Empirical Examination*, 21 PSYCH. PUB. POL'Y & L. 1, 5 (2015).

[189] Brief of Law Professors as Amici Curiae in Support of Plaintiffs-Appellants at 15, Snyder-Hill v. Ohio State Univ., 48 F.4th 686, 708 (6th Cir. 2022) (No. 21-3981).

[190] Karasek v. Regents of the Univ. of Cal., 956 F.3d 1093, 1105 (9th Cir. 2020) (quoting Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 650 (1999)).

[191] *See Davis*, 526 U.S. at 648 (defining deliberate indifference as a "clearly unreasonable" response to a threat the institution has notice of).

[192] *E.g.*, Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1173, 1184–85 (10th Cir. 2007); *e.g.*, *Karasek*, 956 F.3d at 1112.

possibility of institutional failure required to bring a claim.[193] A qualitative study done on a small sample of student survivors found that every participant experienced some form of institutional betrayal during the Title IX investigation.[194] One theme researchers identified was victims' perception that "their complaints were ignored, dismissed, or met with inaction by the institution."[195] Further, a study revealed that one-fourth of students who filed Title IX complaints within their institutions subsequently filed lawsuits or complaints through the federal administrative process.[196] Given that post-assault liability is the primary framework used, this research shows that student survivors in post-assault liability circumstances are able to both identify institutional failures and take action to vindicate their rights. Thus, potential post-assault plaintiffs are often gaining enough information about institutional failures to state a claim for relief.

The same likely cannot be said about potential pre-assault plaintiffs. This is because institutions intentionally conceal instances and patterns of sexual misconduct.[197] One study found that institutions generally undercount the incidents of sexual assault under mandatory reporting requirements.[198] During investigations by the Department of Education, institutions submitted reports of sexual assault at a 44% higher rate than when they were not being investigated.[199] This statistic shows that institutions conceal instances of campus sexual misconduct. The result of institutional concealment of sexual misconduct on campus is that potential pre-assault plaintiffs are unlikely to promptly discover that the institution was indifferent to obvious patterns of sexual misconduct that led to their injury. These obstacles come in many forms.

First, students do not have a right to learn anything about the alleged perpetrators' past conduct through the formal Title IX institutional grievance process.[200] Under the current regulations, parties are only entitled to seek evidence "that is relevant to the allegations of sex discrimination," meaning only evidence that "may aid a decisionmaker in determining whether the alleged sex discrimination occurred."[201] This allowance is narrow and would only let a victim discover evidence directly related to the incident the victim complained of. Consequently, it would not allow victims to learn that their injury may have been part of the

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[193] *See* Katherine Lorenz, Rebecca Hayes & Cathrine Jacobsen, *"Title IX Isn't for You, It's for the University": Sexual Violence Survivors' Experiences of Institutional Betrayal in Title IX Investigations*, 12 J. QUALITATIVE CRIM. JUST. & CRIMINOLOGY 96, 105 (2023) (finding that all study participants "experienced at least one form of institutional betrayal, which occurs when the Title IX office failed to acknowledge, adequately respond to, or act on behalf of the survivors' interests"); *see* Greta Anderson, *More Title IX Lawsuits by Accusers and Accused*, INSIDE HIGHER ED (Oct. 2, 2019), (reporting that higher education institutions are experiencing a trend of increasing legal challenges to their Title IX enforcement procedures by victims who allege unfair treatment during their Title IX enforcement processes), https://www.insidehighered.com/news/2019/10/03/students-look-federal-courts-challenge-title-ix-proceedings [https://perma.cc/MQ6F-JF7E].

[194] Lorenz et al., *supra* note 193 at 105.

[195] *Id.* at 107.

[196] Anderson, *supra* note 193.

[197] *See* Yung, *supra* note 188, at 5–7.

[198] *Id.* at 7.

[199] *Id.* at 6.

[200] 34 C.F.R. § 106.45(b)(7)(iii) (2024).

[201] 34 C.F.R. §§ 106.2, 106.45(f)(4) (2024).

institution's broader policy or custom of deliberate indifference. For example, there would be no way to learn of past complaints against the same perpetrator or a pattern of sexual misconduct within a group the perpetrator belongs to.

Student victims would also be unable to learn about the contents of past complaints made against their institution through the administrative agency process.[202] Requests made under the Freedom of Information Act (FOIA) are typically denied to protect the privacy of past victims.[203] Additionally, the Family Educational Rights and Privacy Act (FERPA), which prohibits the release of student information, also blocks access to full administrative complaints.[204]

Information would likely even be concealed where there is a lawsuit between a student already determined to be responsible for an act of sexual misconduct and the institution that made that finding.[205] This reality has emerged against the increasing commonality of student perpetrators suing for inadequate Title IX process.[206] The publicity that comes along with a lawsuit would seem to illuminate institutional handling of sexual misconduct, but the existence of secret settlements merely adds another layer of cover.[207] Under such agreements, even when the suing perpetrator poses a threat to others, that student could be reinstated at the university without the knowledge of the accuser or the broader campus community.[208]

These statutory protections and settlement agreements provide important student privacy protections, and this Article does not argue for their limitation. Instead, it argues merely that these realities should be considered when formulating procedural rules for pre-assault claims.

Without these tools to compel disclosure of institutional action regarding past allegations and findings of sexual misconduct, students are left with little else than to hope that the conscience of institutional officials leads them to admit past wrongdoing. This is not a realistic safeguard. In well-known college sexual misconduct scandals, the prevalent pattern is that "key leaders failed to act on abuse reports until it was too late."[209] The answer to why such inaction continues is, ironically, the fear of bad publicity.[210] Much of the public outcry in response to these scandals revolves around potential pre-assault liability circumstances, meaning that the focus is on "abuse cases discovered after someone should have recognized and

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[202] Jordi Gassó, *Can the Title IX Complaint Go Public?*, YALE DAILY NEWS (Apr. 5, 2011, 1:39 AM), https://yaledailynews.com/blog/2011/04/05/can-title-ix-complaint-go-public/ [https://perma.cc/9EQY-DPQJ].
[203] *Id.*
[204] *Id.*
[205] *See* Lorenz et al., *supra* note 193, at 115.
[206] Anderson, *supra* note 193.
[207] *Id.*
[208] *Id.*
[209] Greg Toppo, *Why Do Colleges Keep Failing to Prevent Abuse*?, INSIDE HIGHER ED (June 4, 2018), https://www.insidehighered.com/news/2018/06/05/why-do-campus-abuse-cases-keep-falling-through-cracks [https://perma.cc/2MNC-A48L].
[210] *Id.*

reported the problem."[211] This shows that officials have increased motivation to conceal circumstances that would give rise to pre-assault liability.

In sum, the problematic dynamic is twofold. First, pre-assault liability requires potential plaintiffs to have knowledge of broader circumstances and institutional conduct that happened before they were assaulted. This is as opposed to merely knowing that the institution failed to respond properly to their own Title IX complaint. Second, student victims are extremely limited in the ways in which they may be able to uncover information about risks on campus and institutional responses to those risks. These realities necessitate a pre-assault liability standard that ensures potential plaintiffs have practical access to vindicate their rights.

The Sixth Circuit's discovery rule provides this practical access. The key is the Sixth Circuit's acknowledgement that in order to know they have a pre-assault Title IX claim, student survivors must have knowledge that their institution played a part in their injury.[212] Given the difficulties of uncovering this information on their own, the Sixth Circuit's discovery rule is necessary. The discovery rule would allow pre-assault claims to proceed even where significant time passed between when the plaintiff was injured by the institution's deliberate indifference to an obvious risk and when the news of this failure broke.

IV. POLICY SOLUTIONS

Making legislative or administrative adaptations to Title IX in line with these considerations is the next step to institutional accountability for the college sexual misconduct crisis. Going forward, the ideal solution would be legislative implementation of an express right of action, including the standard for pre-assault liability as articulated by the Ninth Circuit in *Karasek*, accompanied by the discovery accrual rule as articulated by the Sixth Circuit in *Snyder-Hill*.[213] In sum, this would allow student victims to bring a claim under Title IX seeking redress for deprivation of educational opportunities in connection with institutional "indifference to reports of sexual misconduct" which "created a heightened risk of sexual harassment that was known or obvious."[214] Further, the statute of limitations period for potential pre-assault claims would not begin to run until the "plaintiff knows or has reason to know that they were injured and that the defendant caused their injury."[215]

The primary justification for implementation of these standards is that they advance the central policy goal of Title IX to "provide individual citizens effective protection against those [discriminatory] practices."[216] This goal was of critical importance to the *Cannon* Court in first recognizing an implied private right of action and should hold similar weight today in an effort to adapt the legal standards to modern realities.[217] Given the continuing prevalence of sexual misconduct within campus cultures and institutional efforts to conceal the problem, new strategies are

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[211] Toppo, *supra* note 209.
[212] Snyder-Hill v. Ohio State Univ., 48 F.4th 686, 704 (6th Cir. 2022).
[213] Karasek v. Regents of the Univ. of Cal., 956 F.3d 1093, 1112 (9th Cir. 2020); *Snyder-Hill*, 48 F.4th at 704.
[214] *Karasek*, 956 F.3d at 1112.
[215] *Snyder-Hill*, 48 F.4th at 704.
[216] Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979).
[217] *Id.* at 702–03.

needed to give student victims an effective path to vindicate their rights.[218] Congress should be responsive to the necessity of the situation and take action.

The reason why Congressional action, rather than further action by the Court, is preferrable, is the Supreme Court's current distaste for implied private rights of action. In the 1960s and 1970s, the Court could be characterized as "generous" with its decisions to declare opportunities for private citizens to seek their own redress for injuries caused in violation of federal statutes.[219] However, today, the Court's view of implied private rights of action can be summed up as "disfavored."[220] This negative treatment was heavily influenced by Justice Powell's dissent in *Cannon*.[221] Powell criticized the majority for encroaching on congressional legislative power.[222] The Court's sentiment today is in line with Powell's conclusion. The modern Supreme Court considers deciding whether a private right of action exists, an act of statutory construction based on its reasoning that Congress alone can provide for such a remedy.[223] Under this treatment, it is very unlikely the Court would be willing to legitimize a new theory of liability under a cause of action that was only ever implied.

Although Congress did not include an express right of action in Title IX, it has at least twice ratified the Court's decision in *Cannon* to find an implied right of action.[224] If the current Congress wishes Title IX to have continuing relevance in the fight against sexual misconduct in schools, it must act to create an express cause of action that fits the current reality.

Of course, given congressional dysfunction, creation of an express remedy is unlikely. For this reason, administrative adoption of pre-assault liability and the discovery accrual rule is a more reasonable alternative. The provisions of Title IX take shape through "[d]ual [e]nforcement [m]echanisms" of private litigation and action taken by the Office of Civil Rights (OCR), the subdivision of the Department of Education tasked with overseeing Title IX compliance.[225] The OCR performs its role both through response to external complaints and conducting investigations on its own initiative.[226] Due to its prominent part in Title IX enforcement, the OCR, like Congress, has an opportunity to adapt Title IX standards to advance institutional accountability.

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[218] RAINN, *supra* note 9; *see* Yung, *supra* note 188, at 5–6.
[219] Vikram David Amar, *How Important is the Eighth Circuit's Recent Ruling that the Voting Rights Act Does Not Contain a Private Right of Action? Section 1983 and* Ex Parte Young *as Workarounds*, VERDICT JUSTIA (Dec. 1, 2023), https://verdict.justia.com/2023/12/01/how-important-is-the-eighth-circuits-recent-ruling-that-the-voting-rights-act-does-not-contain-a-private-right-of-action-section-1983-and-ex-parte-young-as-workarounds [https://perma.cc/4HVU-8SL9].
[220] Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 12 (2014).
[221] *Id.* at 5, 12.
[222] *Cannon*, 441 U.S. at 730 (Powell, J., dissenting).
[223] Davis, *supra* note 220; Amar, *supra* note 219.
[224] Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 72–73 (1992) (first citing 100 Stat. 1845, 42 U.S.C. § 2000d–7; and then citing Pub. L. No. 100-259, 102 Stat. 28).
[225] Buzuvis, *supra* note 24, at 37–38, 43.
[226] *Id.* at 38.

The OCR has recently taken steps in the right direction. Previous Title IX regulations, which took effect in August 2020, incorporated the *Gebser/Davis* post-assault liability framework.[227] Specifically, the regulations adopted the Supreme Court's interpretation of actionable sexual harassment, actual knowledge, and deliberate indifference.[228] Institutions with actual knowledge of sexual harassment were required to act promptly in a way that was not deliberately indifferent to the harm.[229] The 2020 final rule stated that although the agency had the power to select different enforcement standards, it chose to adopt those espoused by the Supreme Court "to provide consistency between the rubrics for judicial and administrative enforcement."[230]

In August 2024, new Title IX regulations went into effect.[231] These regulations compromise consistency between judicial and administrative standards in favor of institutional accountability for failure to act to prevent sexual harassment. The preamble to the new regulations explains that broader standards are appropriate in the administrative context where "educational access is the goal and private damages are not at issue."[232] The regulations aim to serve this goal by imposing significant additional responsibilities on institutions.[233]

These duties are imposed primarily through two changes. First, the OCR eliminated the deliberate indifference standard for complaint response procedures.[234] Now, an institution "with knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity must respond promptly and effectively."[235] This change serves institutional accountability by making it clear that institutions are not only responsible for responding to complaints of sexual misconduct, but also for taking proactive steps to alleviate existing risks.

The latter half of those dual responsibilities is made explicit through the second change. Now, when a Title IX coordinator is notified of potential sex discrimination, the coordinator must act to "end any sex discrimination in its educational program or activity, prevent is recurrence, and remedy its effects."[236] The regulations list several specific steps that a Title IX coordinator must take to do so.[237] Most relevant here is the requirement that the coordinator consider initiating a complaint, even

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[227] Gogul, *supra* note 24, at 998.
[228] *Id.*
[229] JARED P. COLE, CONG. RSCH. SERV., LSB11200, EDUCATION DEPARTMENT UPDATES TITLE IX REGULATIONS: RESPONDING TO SEX DISCRIMINATION AND HARASSMENT AT SCHOOL 4 (2024), https://crsreports.congress.gov/product/pdf/LSB/LSB11200#:~:text=Those%202020%20regulations%20added%20a,for%20schools%20when%20responding%20to [https://perma.cc/45PE-MESR].
[230] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30034 (May 19, 2020) (codified at 34 C.F.R. pt. 106).
[231] CONG. RSCH. SERV., *supra* note 229, at 1.
[232] *Id.* at 4.
[233] Patrick Mathis, *New Title IX Regulations Impose New Responsibilities and Risks on Schools*, UNIV. RISK MGMT. & INS. ASS'N (May 24, 2024, 1:10 PM), https://www.urmia.org/blogs/patrick-mathis-jd-llm-mba/2024/05/24/new-title-ix-regulations-impose-new-responsibiliti [https://perma.cc/D5P2-KABX].
[234] CONG. RSCH. SERV., *supra* note 2, at 5.
[235] 34 C.F.R. § 106.44(a)(1) (2024).
[236] 34 C.F.R. § 106.44(f)(1) (2024).
[237] *Id.* §§ 106.44(f)(1)(i)–(vii).

where none has been filed, when the coordinator "determines that the conduct…presents an imminent and serious threat to… health and safety."[238] In reaching this determination the coordinator must evaluate, among other things, the "risk that additional acts of sex discrimination would occur if a complaint is not initiated" and "information suggesting a pattern, ongoing sex discrimination, or sex discrimination alleged to have impacted multiple individuals."[239]

These two changes have the potential to work in harmony to require institutions to both take action to remedy harm caused by past sexual misconduct and to reduce the risk that future sexual misconduct will cause harm. However, they lack a clear mandate to respond to obvious or known risks of sexual misconduct. For future regulations, the OCR should clarify that its standards for finding an institution liable under Title IX encompass a pre-assault standard. This would make clear to institutions institutions that a failure to respond to a known or obvious risk of sexual misconduct on campus that leads to student injuries is itself an act of sex discrimination that violates Title IX. While the ultimate goal should be legislative enactment of the standards, administrative adoption of a pre-assault responsibility framework allows the scheme to be tested on a smaller scale and is a good step toward institutional accountability.

V. CONCLUSION

The problem of sexual misconduct has plagued college campuses for decades. Despite Title IX's evolution into a tool to address the crisis, it still fails to incentivize institutions to adequately protect their students. It is time to hold institutions liable for their inaction. Pre-assault liability is a step in the right direction because it motivates schools to look forward to how they can prevent an instance of sexual misconduct rather than merely respond once the damage is done. The emerging availability of pre-assault claims is a step forward, but to have its full potential benefit, this standard must be accompanied by an accrual rule that actually allows survivors to bring these claims. Congress or the OCR should act to fulfill Title IX's purpose in today's realities.

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[238] 34 C.F.R. § 106.44(f)(1)(v)(B).
[239] *Id.* §§ 106.44(f)(1)(v)(A)(3), (6).