

Institutional Betrayals as Sex Discrimination

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ABSTRACT: Title IX jurisprudence has a theoretical and doctrinal inadequacy. Title IX's purpose is to protect public school students from sex discrimination in all its forms. Yet, courts have only recognized three relatively narrow forms of sex discrimination under it. Title IX jurisprudence, therefore, cannot effectively recognize as sex discrimination the independent injuries, called institutional betrayals, that schools impose on students because they have suffered sexual harassment. Institutional betrayals occur when schools betray students' trust in or dependency on them by failing to help students in the face of their sexual harassment. These injuries cause harms that can be more severe than those resulting from the original sexual harassment. Further, schools do not passively cause institutional betrayals; they impose them in three affirmative ways: Schools punish students for their sexual harassment, blame them for it, and communicate an automatic, default disbelief of students' harassment.

Because Title IX's statutory mandate is broad—it prohibits sex discrimination without limitation—courts could recognize as sex discrimination the institutional betrayals that schools impose on students because of their status as survivors of sexual harassment. None of the three extant judicially created forms of sex discrimination under Title IX, however, has the capacity to meaningfully do so. When schools impose institutional betrayals, therefore, courts find that they do not violate Title IX.

To remedy this jurisprudential failing, this Article develops a theory of institutional betrayals as a new form of sex discrimination under Title IX. Drawing on empirical research on institutional betrayals, this theory contends that when schools impose institutional betrayals, they knowingly injure students because they have suffered gender-based harm. This Article also offers a framework for evaluating this new type of sex discrimination that would

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compel courts to assess institutional betrayals as sex discrimination. With such changes, Title IX jurisprudence would not only effectively recognize institutional betrayals as sex discrimination but also remedy their harms and better fulfill Title IX's protective purpose.

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I. INTRODUCTION

When high school student T.M. was raped at school by another student in the spring of 2014, her trauma did not end with her rape.¹ T.M.'s school then caused her new, added injuries with its responses to her assault.² First, school officials blamed T.M. for her inaction during the rape, asking her why she did not "bite [her rapist's] penis and squeeze his balls" to end the assault.³ Then, the day after her report, an assistant principal demanded that T.M. reenact the rape in the room where it occurred.⁴ Within days, the school also suspended T.M. for violating rules prohibiting students from engaging in sexual activity at school, effectively punishing her for her own sexual assault.⁵ In addition, the school district subjected T.M. to a jointly held disciplinary hearing with the boy who raped her.⁶ In that seven-hour long hearing, T.M. was forced to testify in front of the boy and hear his testimony, which included an assertion that he could tell from her facial expression that "she wanted to" engage in oral sex.⁷ In the end, the school district found that the assailant was more credible than T.M. because "[s]he 'chose not to scream louder and louder as this was going on' and ha[d] 'no physical injuries.'"⁸

T.M. did, though, experience significant harms following both the trauma of her rape and the trauma of the school's response to it.⁹ T.M. was diagnosed with Post Traumatic Stress Disorder ("PTSD"), developed diarrhea,

1. Nora Caplan-Bricker, "My School Punished Me," SLATE (Sept. 19, 2016, 8:44 PM), <https://slate.com/human-interest/2016/09/title-ix-sexual-assault-allegations-in-k-12-schools.html> [<https://perma.cc/NL7N-4DU3>].

2. *Id.*

3. *Id.*

4. Arlinda Smith Broady, *Ex-Student's Suit Says Gwinnett Violated Her Rights in Sex-Assault Case*, ATLANTA J.-CONST. (Nov. 19, 2018), <https://www.ajc.com/news/local-education/student-suit-says-gwinnett-violated-her-rights-sex-assault-case/VilaPpNXvQBOSSYmmjfucP> [<https://perma.cc/L92E-K69U>].

5. Caplan-Bricker, *supra* note 1.

6. *Id.*

7. *Id.*

8. *Id.* Significantly and just as disturbingly, T.M.'s case also suggests racial discrimination. T.M. is biracial and her assailant is white. *Id.*

9. *Id.*

began severely grinding her teeth at night, and dropped out of school.¹⁰ In late November 2018, T.M. filed a lawsuit alleging that her school's response to her rape violated her rights under Title IX.¹¹ Title IX prohibits sex discrimination in public schools.¹² However, the specific injuries she suffered when her school blamed and punished her and demonstrated an automatic, default disbelief of her sexual assault present no viable Title IX claim.¹³

For over two decades psychologists have developed a body of empirical research on the kinds of injuries that T.M. endured following her rape and the attendant harms they cause, called "institutional betrayals."¹⁴ Institutional betrayals happen when an individual trusts an institution to help in the face of trauma, but the institution fails to help.¹⁵ These responses violate the survivor's dependency on or trust in that institution.¹⁶ Instead of helping the survivor, these responses injure by signaling, among other things, that the survivor's behavior is all or part of the problem.¹⁷ Institutional betrayals,

10. *Id.*

11. *Doe v. Gwinnett Cnty. Pub. Schs.*, No. 18-cv-05278, 2019 WL 12336248, at *1 (N.D. Ga. Aug. 22, 2019).

12. 20 U.S.C. § 1681 (2018). Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." *Id.* § 1681(a).

13. *Infra* Sections II.A–C; *Gwinnett Cnty. Pub. Schs.*, 2019 WL 12336248, at *3. That is not to say that T.M. has not brought a Title IX claim against the school for the injuries it imposed on her. She has asserted claims that the school acted with deliberate indifference to and retaliated against her for her complaint of sexual harassment in violation of Title IX. *Gwinnett Cnty. Pub. Schs.*, 2019 WL 12336248, at *4. These claims, though, face dim prospects. Students who try to fit the kinds of school-imposed harms T.M. suffered into either the deliberate indifference or retaliation framework for Title IX liability regularly do not succeed. *See infra* Section II.B.

14. *See, e.g.*, Sarah E. Ullman & Henrietta H. Filipas, *Correlates of Formal and Informal Support Seeking in Sexual Assault Victims*, 16 J. INTERPERSONAL VIOLENCE 1028, 1040–43 (2001); Carly Parnitzke Smith & Jennifer J. Freyd, *Institutional Betrayal*, 69 AM. PSYCH. 575, 578 (2014) [hereinafter Smith & Freyd, *Institutional Betrayal*]; Alan Carr et al., *Adult Adjustment of Survivors of Institutional Child Abuse in Ireland*, 34 CHILD ABUSE & NEGLECT 477, 477–78 (2010).

15. Carly P. Smith, Jennifer M. Gómez & Jennifer J. Freyd, *The Psychology of Judicial Betrayal*, 19 ROGER WILLIAMS U. L. REV. 451, 459 (2014). Institutional betrayals can happen following almost any traumas, including domestic violence, child abuse, and elder abuse. *See* Smith & Freyd, *Institutional Betrayal*, *supra* note 14, at 577–78.

16. Kristen M. Reinhardt, Carly P. Smith & Jennifer J. Freyd, *Came to Serve, Left Betrayed: Military Sexual Trauma and the Trauma of Betrayal*, in UNDERSTANDING AND TREATING MILITARY SEXUAL TRAUMA 61, 65 (L.S. Katz ed., 2016); Smith & Freyd, *Institutional Betrayal*, *supra* note 14, at 577, 580.

17. Smith & Freyd, *Institutional Betrayal*, *supra* note 14, at 578–79, 583; Reinhardt, et al., *supra* note 16, at 65 (explaining how blaming survivors of military sexual trauma because they were drinking alcohol prior to their sexual assault is a form of institutional betrayal); Smith, Gómez & Freyd, *supra* note 15, at 459 (noting that blaming or questioning a survivor's role in her abuse is a form of institutional betrayal); Jennifer M. Gómez, *Microaggressions and the Enduring Mental Health Disparity: Black Americans at Risk for Institutional Betrayal*, 41 J. BLACK PSYCH. 121, 126, 130 (2015) (describing how racial microaggressions, including those that blame, can constitute institutional betrayals in the clinical setting).

therefore, are not mere extensions of the original trauma.¹⁸ They are fresh injuries, and the harms they generate can be as or more devastating than those stemming from the original trauma.¹⁹ Institutional betrayals cause survivors myriad such harms, including depression, anxiety, dissociation, and, like in T.M., PTSD.²⁰

Students' Title IX claims reflect that schools impose institutional betrayals in response to sexual harassment in three affirmative ways.²¹ First, schools punish survivors of sexual harassment.²² Second, they blame survivors for their sexual harassment.²³ Third, schools communicate their automatic, default disbelief of students' accounts of sexual harassment.²⁴ When schools respond to student sexual harassment in these ways, they signal that the problem lies with the survivors' behavior.²⁵ The schools thus violate the survivors' trust in or dependency on them for help.²⁶

Although Title IX's mandate is broad and should protect students against these injuries, it does not.²⁷ Title IX's purpose is to protect students from sex discrimination in the public schools, and it prohibits such discrimination without limitation.²⁸ When schools perpetrate institutional betrayals in response to student sexual harassment, schools discriminate by injuring students on the basis of sex.²⁹ That is, schools' institutional betrayals injure students precisely because of their status as survivors of the gender-based harm of sexual harassment.³⁰ Title IX's jurisprudence therefore could comprehend

18. Carly P. Smith & Jennifer J. Freyd, *Insult, then Injury: Interpersonal and Institutional Betrayal Linked to Health and Dissociation*, 26 J. AGGRESSION, MALTREATMENT & TRAUMA 1117, 1126 (2017) [hereinafter Smith & Freyd, *Insult, then Injury*].

19. See *id.* at 1118 (“Institutional betrayal is an unwelcome addition to a traumatic experience . . .”); see also generally Rebecca Campbell & Sheela Raja, *The Sexual Assault and Secondary Victimization of Female Veterans: Help-Seeking Experiences with Military and Civilian Social Systems*, 29 PSYCH. WOMEN Q. 97 (2005) (studying predominately African American women veterans who experienced sexual assault).

20. See, e.g., Carly Parnitzke Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 J. TRAUMATIC STRESS 119, 120 (2013) [hereinafter Smith & Freyd, *Dangerous Safe Havens*]; see also Smith et al., *supra* note 15, at 455.

21. *Infra* Section II.B.; see also Smith & Freyd, *Institutional Betrayal*, *supra* note 14, at 579 (explaining that institutional betrayals can “be actively committed by institutions,” and can also “occur via omission”). Note that for the sake of brevity, references to “sexual harassment” in this Article are intended to include both sexual assaults and all other forms of sexual harassment.

22. *Infra* Section II.B.1.

23. *Infra* Section II.B.2.

24. *Infra* Section II.B.3.

25. See *infra* Section II.A.

26. *Infra* Section II.A.

27. *Infra* Sections III.A–C.

28. 20 U.S.C. § 1681(a) (2018). The Supreme Court has said that Congress enacted Title IX “to provide individual citizens effective protection against those [sex discriminatory] practices.” *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979).

29. See *infra* Section IV.A.2.

30. *Infra* Section IV.A.

institutional betrayals as a form of sex discrimination.³¹ Yet courts regularly conclude that only schools' complete failures to respond at all to student sexual harassment violate Title IX.³² Courts find none of the affirmative institutional betrayals that schools impose on students in response to their sexual harassment transgress Title IX.³³ Title IX jurisprudence thus has a theoretical and doctrinal inadequacy.³⁴

Current Title IX jurisprudence cannot meaningfully comprehend institutional betrayals as sex discrimination because courts have only recognized three relatively confined forms of sex discrimination under it: deliberate indifference to sexual harassment;³⁵ retaliation for reporting sexual harassment;³⁶ and quid pro quo sexual harassment.³⁷ None of the theories underlying these types of intentional sex discrimination nor their corresponding evaluation frameworks can effectively capture institutional betrayals as a species of sex discrimination.³⁸

Because sexual harassment occurs with alarming regularity in public schools, the number of students who suffer institutional betrayals following

31. *Infra* Section IV.A.

32. *See, e.g.,* Stinson *ex rel.* K.R. v. Maye, 824 F. App'x 849, 854 (11th Cir. 2020) (finding allegations sufficient to support a Title IX claim where a girl was gang raped at school and the school principal knew about the rape but did nothing, including "not complet[ing] any reports about the gang rape . . . not conduct[ing] any investigation into the gang rape, and . . . not undertak[ing] any further actions relating to the gang rape, including disciplining the boys involved"). Even when courts do find that schools' complete failures to respond to student sexual harassment violate Title IX, though, they do not identify those failures to respond as institutional betrayals. *See id.*; *see also generally* Emily Suski, *Subverting Title IX*, 105 MINN. L. REV. 2259 (2021) (advocating for a new framework for evaluating the Title IX standard that protects students from further sexual harassment). At least one scholar predicted this evolution in Title IX jurisprudence. Deborah L. Brake, *School Liability for Peer Sexual Harassment after Davis: Shifting from Intent to Causation in Discrimination Law*, 12 HASTINGS WOMEN'S L.J. 5, 27–28 (2001) ("There is a danger that courts will apply the deliberate indifference test so strictly as to exclude from liability all but those most egregious cases where schools take no action whatsoever in the face of the most severe forms of harassment.").

33. *See infra* Sections II.B.1–3.

34. *Infra* Sections III.A–C.

35. *Davis ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 648 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292–93 (1998). Courts sometimes refer to this form of sexual harassment as "hostile environment" sex discrimination. *See, e.g.,* *Santiago v. Puerto Rico*, 655 F.3d 61, 73 (1st Cir. 2011) (explaining in its evaluation of a student's Title IX claim that there are "[t]wo types of harassment [that] are actionable under Title IX: quid pro quo harassment and hostile environment"); *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 467 (8th Cir. 1996) ("Courts have generally separated sexual harassment claims into two categories—hostile environment, and quid pro quo cases.").

36. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005).

37. *See, e.g.,* *E.N. v. Susquehanna Twp. Sch. Dist.*, No. 09-CV-1727, 2010 WL 4853700, at *14 (M.D. Pa. Nov. 23, 2010).

38. *Infra* Sections III.A–C.

their sexual harassment is likely vast.³⁹ Nearly half of all middle and high school students alone report experiencing sexual harassment.⁴⁰ Disaggregated by gender, 56 percent of girls and almost 40 percent of boys in grades seven through twelve report incidents of sexual harassment.⁴¹ Further, students of color suffer sexual assaults in school at disproportionately high rates.⁴² Close to one-quarter of Native American, Latina, and Black female students between the ages of 14 and 18 say they have experienced sexual violence in school.⁴³ Female students of color thus face a higher likelihood of suffering institutional betrayals than do other students.⁴⁴ When these students turn to their schools for help following sexual harassment but instead experience the added injury and pain of institutional betrayals, however, they find virtually no recourse or remedy in Title IX.⁴⁵

Drawing on empirical research on institutional betrayals and the theoretical foundations in Supreme Court Title IX cases, this Article offers a corrective for this failure of Title IX jurisprudence. It develops a theory for recognizing institutional betrayals as a new form of sex discrimination under Title IX. More specifically, it contends that when public schools impose institutional betrayals, they intentionally discriminate on the basis of sex by knowingly injuring survivors of sexual harassment because they have suffered sexual harassment.⁴⁶ This proposed theory of sex discrimination, thus, conceives of sex discrimination as the independent injuries that schools

39. In the 2015–16 school year alone, almost 50,000 children reported a rape, attempted rape, or other sexual assault in school. NAT'L CTR. FOR EDUC. STAT., INDICATORS OF SCHOOL CRIME AND SAFETY: 2017, at 161 tbl.6.1 (2018), <https://nces.ed.gov/pubs2018/2018036.pdf> [<https://perma.cc/X7UA-VB3j>].

40. CATHERINE HILL & HOLLY KEARL, AM. ASS'N OF UNIV. WOMEN, CROSSING THE LINE: SEXUAL HARASSMENT AT SCHOOL 2 (2011), <https://www.aauw.org/app/uploads/2020/03/Crossing-the-Line-Sexual-Harassment-at-School.pdf> [<https://perma.cc/4AMN-SQ7C>]. In part because of these high rates of sexual harassment in the K–12 public schools, the United State Department of Education just promulgated rules that require less stringent reporting requirements for K–12 students than for college and university students in Title IX's public enforcement system. See 34 C.F.R. § 106.8 (2020). Under this new rule, schools must act on a student report of sexual harassment made to any school staff member. *Id.* In Title IX's private enforcement scheme through the courts, no such concessions have been made for student reporting. See Emily Suski, *The Title IX Paradox*, 108 CALIF. L. REV. 1147, 1157–63 (2020).

41. HILL & KEARL, *supra* note 40, at 2.

42. KAYLA PATRICK & NEENA CHAUDHRY, NAT'L WOMEN'S L. CTR., LET HER LEARN: STOPPING SCHOOL PUSHOUT FOR GIRLS WHO HAVE SUFFERED HARASSMENT AND SEXUAL VIOLENCE 2–3 (2017), https://nwlc.org/wp-content/uploads/2017/04/final_nwlc_Gates_HarassmentViolence.pdf [<https://perma.cc/HJ8Q-4V4H>].

43. *Id.* at 3. According to a 2017 study by the National Women's Law Center, "24 percent of Latina [g]irls, 23 percent of Native American girls, and 22 percent of Black girls" ages 14–18 reported experiencing sexual violence. *Id.*

44. See *id.*

45. *Infra* Sections III.A–C.

46. *Infra* Section IV.A.2.

impose because of a student's status as a survivor of sexual harassment.⁴⁷ Those injuries occur when, in the face of knowledge of a students' sexual harassment, schools betray students' trust by locating the problem of the sexual harassment in the survivor's behavior.⁴⁸

Given the decades-long, widely available research on institutional betrayals, when schools respond to survivors of sexual harassment in such ways, they knowingly risk injuring, and often do injure, survivors of sexual harassment.⁴⁹ These injuries occur on the basis of sex because they would not happen but for a student's status as a survivor of gender-based harm.⁵⁰ By conceptualizing sex discrimination in this way, this theory builds on the infrastructure of the deliberate indifference model of sex discrimination.⁵¹ That model identifies sexual harassment as a form of sex discrimination because it is a harm rooted in an individual's gender status.⁵² The new theory of institutional betrayals as sex discrimination advanced here refines that conceptualization of gender status-based sex discrimination. It understands an individual's particular status as a survivor of sexual harassment as another basis for sex discrimination.⁵³ With this understanding of sex discrimination, courts will no longer be able to overlook institutional betrayals in assessing students' Title IX claims.⁵⁴ Because they are discrete, where added injuries caused by schools' responses to students' sexual harassment would not happen but for students' status as

47. *Infra* Section IV.A.2. Importantly, whether students have suffered any actionable sexual harassment or simply perceive themselves to have suffered, it does not matter to whether they suffer institutional betrayals or, therefore, sex discrimination in the form of institutional betrayals. *See infra* Sections II.A, IV.B.1.

48. *See infra* Sections IV.A.2, IV.B.

49. *See, e.g.*, Ullman & Filipas, *supra* note 14, at 1041; Smith & Freyd, *Institutional Betrayal*, *supra* note 14, at 578; Carr et al., *supra* note 14, at 478; *see also* Janice Carello & Lisa D. Butler, *Practicing What We Teach: Trauma-Informed Educational Practice*, 35 J. TEACHING IN SOC. WORK 262, 263 (2015) (discussing how "vicarious trauma" can result in posttraumatic stress disorder symptoms); *cf. generally* Karen Rich, *Trauma-Informed Police Responses to Rape Victims*, 28 J. AGGRESSION, MALTREATMENT & TRAUMA 463 (2019) (analogizing police responses to trauma to school response to trauma). In addition to this social science research, ample, readily accessible guidance, including from the U.S. Department of Education and Justice, exists for schools that both recognize the potential for schools' responses to sexual trauma to retraumatize or otherwise add injury and provide information for schools on how to avoid doing so. *See, e.g.*, U.S. DEP'T OF EDUC., SAFE PLACE TO LEARN: IMPLEMENTATION GUIDE 1-3 (2016), https://safesupportivelearning.ed.gov/sites/default/files/SP2L1_E1_ImplementationGuide.pdf [<https://perma.cc/EY3V-VEU3>]; BILLIE-JO GRANT, STEPHANIE B. WILKERSON, DEKOVEN PELTON, ANNE COSBY & MOLLY HENSCHEL, NAT'L CRIM. JUST. REFERENCE SERV., A CASE STUDY OF K-12 SCHOOL EMPLOYEE SEXUAL MISCONDUCT: LESSONS LEARNED FROM TITLE IX POLICY IMPLEMENTATION 11-18 (2017), <https://www.ojp.gov/pdffiles1/nij/grants/252484.pdf> [<https://perma.cc/NQ9F-YZJC>].

50. *Infra* Section IV.A.

51. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 281-83 (1998).

52. *See id.*

53. *Infra* Section IV.A.2.

54. *Infra* Sections IV.A.2-B.

survivors of that harassment, they would fall squarely within the ambit of Title IX's protections.⁵⁵

To operationalize this theory, this Article develops a framework for analyzing claims of institutional betrayals as sex discrimination. It proposes a means for courts to distinguish between necessary investigations into reports of student sexual harassment and responses that amount to institutional betrayals. To that end, this model demands that courts determine whether a school: (1) knew about a student's sexual harassment; (2) unjustifiably blamed the harassment on the survivor's behavior; and (3) consequently caused the student harm. In application, this framework evaluates schools' actions that blame, punish, and disbelieve survivors of sexual harassment as forms of sex discrimination because they are injuries that result from an unjustified focus on survivors' behavior. This paradigm would thus allow courts to fully recognize, evaluate, and remedy the sex discrimination students suffer by schools' institutional betrayals. While these recommendations could apply to all Title IX claims, the need for them is particularly urgent for K–12 students.⁵⁶ K–12 public school students, the majority of whom are low-income and disproportionately students of color, are especially likely to suffer long-term harms from both sexual harassment and schools' institutional betrayals and less likely to have the resources to ameliorate their effects.⁵⁷

In making these arguments, this Article fills a gap in the scholarly literature on Title IX and sex discrimination. In the decades since the Supreme Court and lower courts promulgated the three extant theories of sex discrimination under Title IX, robust empirical research has proliferated on institutional betrayal and betrayal trauma more generally.⁵⁸ Although others have considered the impact of this research in areas including domestic violence law, evidence, and criminal sentencing law, this research has only barely been

55. See Smith & Freyd, *Dangerous Safe Havens*, *supra* note 20, at 123.

56. *Infra* Section III.D.

57. See, e.g., Vanessa M. Jacoby, Elisa Krackow & Joseph R. Scotti, *Betrayal Trauma in Youth and Negative Communication During a Stressful Task: The Mediating Role of Emotion Dysregulation*, 84 INT'L J. AGING & HUM. DEV. 247, 264 (2017) (noting adolescents who suffer betrayal trauma struggle with increased behavioral problems, including aggressive behaviors, as well as post-traumatic stress disorder); see NAT'L CTR. FOR EDUC. STAT., ANNUAL REPORT, at tbl.204.10 (2015) [hereinafter NCES, *Table 204.10*], https://nces.ed.gov/programs/digest/d15/tables/dt15_204_10.asp [<https://perma.cc/JZ3N-FGM5>] (“Number and percentage of public school students eligible for free or reduced-price lunch, by state: Selected years, 2000-01 through 2013-14[.]”); PATRICK & CHAUDHRY, *supra* note 42, at 3; *supra* note 39 and accompanying text; see also Gail S. Goodman, Jodi A. Quas, Josephine Bulkley & Cheryl Shapiro, *Innovations for Child Witnesses: A National Survey*, 5 PSYCH. PUB. POL'Y & L. 255, 255–62 (1999) (discussing the practical legal challenges that children face to vindicate their rights as well as the potential for harmful behavioral consequences).

58. E.g., Smith & Freyd, *Insult, then Injury*, *supra* note 18, at 1118; Gómez, *supra* note 17, at 130–36; Reinhardt et al., *supra* note 16, at 63–75.

accounted for in Title IX literature.⁵⁹ This Article steps into that void to advance a novel theory of institutional betrayals as a species of sex discrimination under Title IX.⁶⁰ It is also the first to recommend a framework for applying this expanded understanding of sex discrimination.⁶¹

This Article proceeds in three parts. Part II explains the empirical research on institutional betrayals. It then describes how schools cause institutional betrayals when they respond to students' sexual harassment by punishing, blaming, and signaling their default disbelief of survivors and how each of these responses causes students additional harms that go unrecognized and unaddressed by Title IX. Part III interrogates why law's currently cognizable theories of sex discrimination and their attendant evaluation schemes cannot recognize and evaluate institutional betrayals as sex discrimination. Part IV offers a solution for this jurisprudential failing. It theorizes institutional betrayals as a new form of sex discrimination under Title IX and proposes a framework for assessing them as such. Recognizing institutional betrayals as a type of sex discrimination will provide courts a way to recognize and remedy the multiple layers of sex discrimination that students suffer in school.

II. INSTITUTIONAL BETRAYALS AND STUDENTS' TITLE IX CLAIMS: ADDED LAYERS OF UNRECOGNIZED TRAUMA

Students who suffer sexual harassment in school confront an impossible conundrum. They must report their harassment to have any hope that schools will address it.⁶² Yet in doing so, they subject themselves to potentially suffering

59. E.g., Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399, 403 (2019) (analyzing "how the justice system and other key institutions of our society systematically discount the credibility of women survivors of domestic violence"); Tanya Asim Cooper, *Sacrificing the Child to Convict the Defendant: Secondary Traumatization of Child Witnesses by Prosecutors, Their Inherent Conflict of Interest, and the Need for Child Witness Counsel*, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 239, 265–68 (2011); Goodman et al., *supra* note 57, at 256–59; Lauren M. De Lilly, Note, "Antithetical to Human Dignity": *Secondary Trauma, Evolving Standards of Decency, and the Unconstitutional Consequences of State-Sanctioned Executions*, 23 S. CAL. INTERDISC. L.J. 107, 109–10 (2014). Although I have previously briefly discussed how courts could fit institutional betrayals into an evaluation of schools' deliberate indifference to sexual harassment, this argument neither allows for recognition of institutional betrayal as new, discrete harms nor fully captures institutional betrayals in all their forms. See Suski, *supra* note 32, at 2259–66; *infra* notes 229–30 and accompanying text.

60. *Infra* Section IV.A.2.

61. In making these arguments, this Article expands on my previous scholarship critiquing the courts' evaluations of Title IX's actual notice and deliberate indifference standards, including that their anemic applications of the deliberate indifference standard subvert students' rights under Title IX. See Suski, *supra* note 32, at 2287–88; Suski, *supra* note 40, at 1169–70 (contending that the particularities of Title IX's actual notice requirements create a paradox for students because they require them to report in ways that they cognitively struggle to do).

62. Students must report their harassment as a practical as well as a legal matter. As a practical matter, if schools know nothing about students' harassment, they cannot do anything about it. As a legal matter, reporting is required because schools must have actual knowledge of

additional injuries imposed by their schools.⁶³ Schools inflict these injuries when they focus their responses to sexual harassment on the survivor's role.⁶⁴ These injurious responses by schools generally take three affirmative forms.⁶⁵ First, schools punish students for their harassment. Second, they blame them for it. Third, schools signal an automatic, default disbelief of students' accounts of their sexual harassment.

Empirical research on trauma demonstrates how these responses to student sexual harassment impose stand-alone injuries on students in the form of institutional betrayals.⁶⁶ They, therefore, are more than mere exacerbations of the original harm.⁶⁷ Consequently, when schools respond to student sexual harassment with institutional betrayals, they impose a new layer of trauma onto the existing trauma students have already suffered because of their sexual harassment.⁶⁸ Schools thus discriminate against students because of their status as survivors of sexual harassment.

Students who suffer these institutional betrayals do attempt to hold schools accountable by asserting Title IX claims against them.⁶⁹ They generally bring these claims based on the deliberate indifference theory of sex discrimination.⁷⁰ These efforts make sense. Title IX's central purpose is to

student harassment before they have an obligation to address it. *See* Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 641, 644 (1999); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998). Although schools can learn about students' sexual harassment in ways other than by student reports, including when schools observe them, they typically do not find out about them in these other ways. *See, e.g.*, Gabrielle M. v. Park Forest-Chi. Heights, Ill. Sch. Dist. 163, 315 F.3d 817, 824 (7th Cir. 2003) ("Nothing in the record shows that . . . school officials observed or that anyone reported sexual behavior by Jason toward Gabrielle (or anyone else) Thus, there is no evidence that the defendants had notice of any harassing conduct"); Kelly *ex rel.* C.K. v. Allen Indep. Sch. Dist., 602 F. App'x 949, 953 (5th Cir. 2015) (noting that because peer sexual harassment "happened 'whenever the teachers weren't looking,'" and "typically took place when the children were unsupervised," the school did not have actual notice of it).

63. Smith & Freyd, *Insult, then Injury*, *supra* note 18, at 1118, 1126; *see infra* Section II.A.

64. *See* Smith & Freyd, *Institutional Betrayal*, *supra* note 14, at 578–79, 583; Reinhardt et al., *supra* note 16, at 65; Smith et al., *supra* note 15, at 459; Gómez, *supra* note 17, at 126, 130; *see also infra* Sections II.B.1–3 (describing school-conduct leading to institutional betrayal of students).

65. Again, institutional betrayals can also take the form of a failure to act. *See* Smith & Freyd, *Institutional Betrayal*, *supra* note 14, at 577, 579; *supra* note 21 and accompanying text. Courts, however, do recognize a total failure to act as a violation of Title IX, albeit without recognizing those failures to act as institutional betrayals. *See, e.g.*, Stinson *ex rel.* K.R. v. Maye, 824 F. App'x 849, 854 (11th Cir. 2020); *supra* note 32 and accompanying text.

66. Smith & Freyd, *Insult, then Injury*, *supra* note 18, at 1118, 1126.

67. *Id.* That said, institutional betrayals do exacerbate the original trauma as well as cause new injuries. *See* Smith & Freyd, *Institutional Betrayal*, *supra* note 14, at 578–79.

68. Smith & Freyd, *Insult, then Injury*, *supra* note 18, at 1118, 1126.

69. *See infra* Sections II.A–C.

70. *See* KF *ex rel.* CF v. Monroe Woodbury Cent. Sch. Dist., 531 F. App'x 132, 133 (2d Cir. 2013); Doe v. Bd. of Educ. of Prince George's Cnty., 605 F. App'x 159, 168 (4th Cir. 2015); Doe v. Dardanelle Sch. Dist., No. 17CV00359, 2018 WL 3795235, at *2–3 (E.D. Ark. Aug. 9, 2018), *aff'd*, 928 F.3d 722 (8th Cir. 2019); JP *ex rel.* GP v. Lee Cnty. Sch. Bd., 737 F. App'x 910, 911

protect students from all forms of sex discrimination in public schools, and the deliberate indifference framework requires courts to examine how schools respond to sexual harassment.⁷¹ These Title IX claims, however, routinely fail to succeed.⁷² Instead of protecting students from the compound injuries inflicted by schools' responses to sexual harassment, the courts permit these institutional betrayals and their consequent harms to occur unchecked by Title IX.⁷³ Title IX's very purpose, therefore, fails.⁷⁴

A. INSTITUTIONAL BETRAYALS

The empirical research on institutional betrayals grew out of research on betrayal traumas more generally.⁷⁵ Betrayal trauma theory recognizes that

(11th Cir. 2018); *Stiles ex rel. D.S. v. Grainger Cnty.*, 819 F.3d 834, 840–45 (6th Cir. 2016); *Stewart v. Waco Indep. Sch. Dist.*, 711 F.3d 513, 516–18 (5th Cir.), *rev'd on other grounds*, 599 F. App'x 534 (5th Cir. 2013); *Lansberry v. Altoona Area Sch. Dist.*, 318 F. Supp. 3d 739, 744–46 (W.D. Pa. 2018); *Gabrielle M. v. Park Forest-Chi. Heights, Ill. Sch. Dist.* 163, 315 F.3d 817, 818–19 (7th Cir. 2003); *Doe ex rel. Doe v. Dall. Indep. Sch. Dist.*, 220 F.3d 380, 387–88 (5th Cir. 2000); *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1118 (10th Cir. 2008). Some students do bring Title IX retaliation claims based on schools' responses to their sexual harassment, or the report of it. *E.g.*, *Sanchez v. Brawley Elementary Sch. Dist.*, No. 14-cv-0564, 2016 WL 2997036, at *4 (S.D. Cal. May 25, 2016); *Saphir ex rel. Saphir v. Broward Cnty. Pub. Schs.*, 744 F. App'x 634, 639 (11th Cir. 2018); *Gordon v. Traverse City Area Pub. Schs.*, 686 F. App'x 315, 316–19 (6th Cir. 2017). These claims, however, also fail. *See Sanchez*, 2016 WL 2997036, at *4; *Saphir*, 744 F. App'x at 639; *Gordon*, 686 F. App'x at 325.

71. *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979); *supra* note 28 and accompanying text.

72. *Infra* Sections II.B.1–3. This Article focuses its inquiry and analysis on federal courts of appeals decisions because of their precedential impact on lower court decisions. *See, e.g.*, *United States v. Rodríguez*, 527 F.3d 221, 224 (1st Cir. 2008) (“[The] law of the circuit doctrine is a corollary of the principle of stare decisis. It preserves and protects the judiciary’s commitment to finality, stability, and certainty in the law.”).

73. *See infra* Section II.C.

74. *See Cannon*, 441 U.S. at 704; *supra* note 28 and accompanying text.

75. Smith & Freyd, *Institutional Betrayal*, *supra* note 14, at 576–77. Betrayal traumas are essentially a species of what is also called secondary trauma. *See Campbell & Raja*, *supra* note 19, at 97 (“Secondary victimization has been defined as the victim-blaming attitudes, behaviors, and practices engaged in by community service providers, which results in additional trauma for sexual assault survivors.”); Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims’ Mental Health*, 23 J. TRAUMATIC STRESS 182, 183 (2010) (“[S]econdary victimization . . . [is] where crime victims feel blamed by the justice system or experience other negative societal reactions as a consequence of their initial (primary) victimization . . .”). Secondary traumas pile additional harm on an already traumatized survivor of some sort of harassment or abuse. *See Lesley Laing*, *Secondary Victimization: Domestic Violence Survivors Navigating the Family Law System*, 23 VIOLENCE AGAINST WOMEN 1314, 1316 (2017) (“Secondary victimization is . . . the additional harm and sense of betrayal experienced by victims of traumatic events when the responses they receive from formal or informal supports are inappropriate”); Isabel Correia & Jorge Vala, *When Will a Victim Be Secondarily Victimized? The Effect of Observer’s Belief in a Just World, Victim’s Innocence and Persistence of Suffering*, 16 SOC. JUST. RSCH. 379, 379–80 (2003) (“[B]esides having to deal with the negative consequences arising from the event that victimized them (*primary victimization*), they are victimized once again (*secondary victimization*)” (citations omitted)).

75. Smith & Freyd, *Institutional Betrayal*, *supra* note 14, at 578.

“[n]ot all traumatic experiences are equal,”⁷⁶ and “abuse perpetrated within close relationships is more harmful than abuse perpetrated by strangers because of the violation of trust” that occurs.⁷⁷ The research on institutional betrayals expands on this understanding of betrayal trauma.⁷⁸ It demonstrates that institutions can also cause similar, particularly harmful betrayal traumas.⁷⁹ Institutional betrayals happen when, following an initial trauma, a survivor seeks help from an institution that she trusts or depends on to help, but the institution does not provide that help.⁸⁰ Further, this trust that institutions violate is not imposed on the institution by survivors in a one-sided way.⁸¹ Rather, the institutions that inflict institutional betrayals deliberately create the “trust or dependency” that they then breach.⁸² Institutional betrayals, therefore, occur because “of individual experiences of violations of trust and dependency” that the institution fostered.⁸³

Institutional betrayals take many forms.⁸⁴ Relevantly, when institutions that survivors depend on or trust to help them in the face of their sexual

76. Smith & Freyd, *Dangerous Safe Havens*, *supra* note 20, at 119.

77. Smith & Freyd, *Institutional Betrayal*, *supra* note 14, at 577; *see also id.* at 576 (noting “the evolution of trauma psychology from a pursuit focused solely on individuals to one increasingly incorporating systemic forces”). All betrayal trauma research recognizes that “[h]umans have evolved as highly dependent species” who have social contracts with “institutions built on trust and provision of needed resources.” Smith et al., *supra* note 15, at 454. These “social contacts [can be] violated by a betrayal of trust.” *Id.*

78. Smith & Freyd, *Institutional Betrayal*, *supra* note 14, at 577–78; Smith & Freyd, *Insult, then Injury*, *supra* note 18, at 1118.

79. Smith & Freyd, *Institutional Betrayal*, *supra* note 14, at 577–78; Smith & Freyd, *Insult, then Injury*, *supra* note 18, at 1118 (“Interpersonal relationships are not the only sources of betrayal; more recent work has indicated that individuals are at risk of being betrayed by trusted or important institutions when those institutions fail to protect them or respond negatively to traumatic events, such as sexual violence.”).

80. Smith & Freyd, *Institutional Betrayal*, *supra* note 14, at 578; Smith & Freyd, *Dangerous Safe Havens*, *supra* note 20, at 123 (explaining institutional betrayals “necessarily occur[] apart from the sexual assault itself . . . in events . . . following it.”).

81. Smith & Freyd, *Institutional Betrayal*, *supra* note 14, at 578.

82. *Id.* (emphasis omitted) (“[I]nstitutions that [perpetrate betrayal trauma] foster a sense of trust or dependency from their members (often both).”).

83. *Id.* at 577. Smith and Freyd explain that “[t]his [dependency] lens helps to account for the potential for betrayal even when an individual may not purport to ‘trust’ an institution (e.g., a member of a marginalized group who does not trust the legal system to take their reports of domestic violence seriously), as the necessity of the institution (e.g., filing for a divorce) may create an unavoidable dependency.” *Id.* at 578.

84. *See id.*; *supra* notes 21–24 and accompanying text. Institutional betrayals happen, for example, when institutions “[n]ormaliz[e] [a]busive [c]ontexts” and “[s]upport[] [c]over-[u]ps.” Smith & Freyd, *Institutional Betrayal*, *supra* note 14, at 582–83. Microaggressions based on race and ethnicity can be a form of institutional betrayal. Gómez, *supra* note 17, at 129–30 (noting that racially based microaggressions can be “apparently isolated” or “systemic, such as . . . creating environments where microaggressions seem normal; this may include making the process of formulating complaints about discriminatory behavior difficult for or unknown to Black” individuals). *See also* Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER, RACE & JUST. 177, 181 (1997) (“[C]onverging

harassment punish those survivors in response to their sexual harassment, such punishments constitute institutional betrayals.⁸⁵ In addition, when those institutions blame survivors for their own sexual harassment, those acts of blaming are also institutional betrayals.⁸⁶ Finally, when those institutions question or do not validate survivors' experiences, those expressions of disbelief are institutional betrayals.⁸⁷ Importantly with respect to this last category, the institutional betrayals do not occur because an institution does not automatically believe the survivor.⁸⁸ Instead, the injury happens when survivors are met with immediate, default disbelief.⁸⁹ In addition, all of these types of institutional betrayals injure, at least in part, because, instead of helping the survivor, they indicate that the problem has to do with the survivor's behavior.⁹⁰

No matter the form, institutional betrayals inflict unique additional traumas on survivors of sexual harassment.⁹¹ That is, they leave their "own mark" of trauma on the survivor.⁹² These marks include both adverse physical

racial and gender stereotypes of [Asian Pacific American] women help constitute what I refer to as 'racialized (hetero)sexual harassment.' This form of harassment denotes a particular set of injuries resulting from the unique complex of power relations" (footnote omitted)).

85. Smith & Freyd, *Institutional Betrayal*, *supra* note 14, at 579. Psychologists who study institutional betrayals note that "[a]lthough institutional betrayal tends to have a broad impact, for the individual experiencing the betrayal the problem may appear at first to be an isolated incident." *Id.*

86. See Shana L. Maier, *Sexual Assault Nurse Examiners' Perceptions of the Revictimization of Rape Victims*, 27 J. INTERPERSONAL VIOLENCE 287, 289-90 (2012) (asserting that victim-blaming is a part of revictimization of survivors of sexual trauma).

87. Smith & Freyd, *Institutional Betrayal*, *supra* note 14, at 578. When reports of experiences with sexual violence and intimate partner violence, among other things, are not taken seriously, this invalidation "by an institution mirrors . . . the development of complex posttraumatic responses." *Id.*; see also Rebecca Campbell, *The Psychological Impact of Rape Victims' Experiences with the Legal, Medical, and Mental Health Systems*, 63 AM. PSYCH. 702, 703 (2008) ("When victims reach out for help, they place a great deal of trust in the legal, medical, and mental health systems as they risk disbelief, blame, and refusals of help.").

88. See Smith & Freyd, *Institutional Betrayal*, *supra* note 14, at 578; Campbell, *supra* note 87, at 703; *supra* note 87 and accompanying text.

89. See Smith & Freyd, *Institutional Betrayal*, *supra* note 14, at 578; Campbell, *supra* note 87, at 703.

90. See Smith & Freyd, *Institutional Betrayal*, *supra* note 14, at 578, 583; Reinhardt et al., *supra* note 16, at 67, 74, 76; Smith et al., *supra* note 15, at 459; Gómez, *supra* note 17, at 126, 130.

91. See Smith & Freyd, *Institutional Betrayal*, *supra* note 14, at 578 ("Institutional betrayal occurs when an institution causes harm to an individual who trusts or depends upon that institution."); see also Reinhardt et al., *supra* note 16, at 65 (discussing institutional betrayals in the military context).

92. Smith & Freyd, *Insult, then Injury*, *supra* note 18, at 1118.

and mental health effects.⁹³ Further, the harms caused by institutional betrayals can be more severe than the harms that result from the original trauma.⁹⁴

Children who experience institutional betrayals following sexual harassment also suffer short- and long-term harms. In the relative near-term, children and adolescents who endure institutional betrayals experience harms including emotional dysregulation, symptoms of PTSD, and increased aggressive communication.⁹⁵ Long-term institutional betrayals cause children and adolescents a wide range of negative psychological effects.⁹⁶ Institutional

93. See Smith & Freyd, *Institutional Betrayal*, *supra* note 14, at 578 (noting that institutional betrayal has “effects . . . on psychological well-being,” including “higher rates of dissociation, anxiety, sexual dysfunction, and other trauma-related outcomes” (citation omitted)).

94. See Smith & Freyd, *Insult, then Injury*, *supra* note 18, at 1126 (explaining that the physical and psychological health effects of college students who experience betrayal trauma were “significantly higher” and “higher still for those who had experienced institutional betrayal”); Smith et al., *supra* note 15, at 455 (“Betrayal in trauma predicts poorer physical health, anxiety, depression, dissociation, borderline personality disorder characteristics, shame, hallucinations, self-harm, and re-victimization.” (footnotes omitted)); Smith & Freyd, *Dangerous Safe Havens*, *supra* note 20, at 123; Smith & Freyd, *Institutional Betrayal*, *supra* note 14, at 577 (“Betrayal trauma is associated with higher rates of . . . posttraumatic stress disorder (PTSD), dissociation, anxiety, depression, and borderline personality disorder, compared to interpersonal trauma perpetrated by strangers.”).

95. See Jacoby et al., *supra* note 57, at 264 (“Adolescents with a betrayal trauma history reported more difficulties regulating their emotions, and reported more severe PTSD symptoms, than their nonbetrayal trauma-exposed peers. Even after controlling PTSD severity, the differences in emotion regulation difficulties remained significant This suggests that a PTSD diagnosis alone does not fully capture the effects of trauma on these adolescents.”); see also Jennifer M. Gómez, *High Betrayal Adolescent Sexual Abuse and Nonsuicidal Self-Injury: The Role of Depersonalization in Emerging Adults*, 28 J. CHILD SEXUAL ABUSE 318, 324 (2019) (“[A]dolescent sexual abuse [and betrayal trauma] (age 13–17) [were] associated with [non-suicidal self-injury], while controlling for child sexual abuse (before age 13) and adult sexual abuse (after age 18) [T]hat suggests that [these injuries] in adolescence specifically [are] harmful.”). When betrayal traumas involve forcing children and adolescents to repeatedly recount the story of their trauma in interviews, in front of the perpetrator, and in formal testimony, which among other things can be a signal of disbelief, they experience “higher anxiety and increased behavioral problems” and an “increased likelihood of teenage pregnancy, school dropout, and attempted suicides.” Goodman et al., *supra* note 57, at 258, 259.

96. See Smith & Freyd, *Dangerous Safe Havens*, *supra* note 20, at 120; Jodi A. Quas & Gail S. Goodman, *Consequences of Criminal Court Involvement for Child Victims*, 18 PSYCH. PUB. POL’Y & L. 392, 401–02 (2012); *infra* note 97 and accompanying text. For example, in a study of the long-term effects of sex abuse in an institutional setting, which results in both primary and institutional betrayal traumas:

The prevalence of psychological disorders among adult survivors of institutional abuse was over 80% and far higher than in the normal population, with anxiety, mood and substance use disorders being the most prevalent diagnoses. Survivors also had high rates of trauma symptoms and insecure adult attachment styles, and these were higher for those who had experienced both institutional and intrafamilial abuse.

Carr et al., *supra* note 14, at 477. See generally Laura A. Kaehler & Jennifer J. Freyd, *Borderline Personality Characteristics: A Betrayal Trauma Approach*, 1 PSYCH. TRAUMA: THEORY, RSCH., PRAC., & POL’Y 261 (2009) (describing the connection between borderline personality disorder characteristics and betrayal trauma experiences).

betrayals in childhood result in, among other things, “adult anxiety, depression, borderline personality disorder, and substance abuse.”⁹⁷

*B. SCHOOL-IMPOSED INSTITUTIONAL BETRAYALS AND STUDENTS’ FAILED
TITLE IX CLAIMS*

Although almost any type of institution could theoretically cause institutional betrayals, schools in particular have significant potential to do so because students depend on them almost exclusively for help when they suffer sexual harassment or other trauma in school.⁹⁸ For students who suffer sexual harassment in school, their schools are the obvious, and sometimes the only, authority they can turn to for help.⁹⁹ When schools respond to students’ sexual harassment by punishing and blaming them for their sexual harassment or automatically disbelieving their accounts of it, they violate students’ dependency.¹⁰⁰ They thus impose institutional betrayals.¹⁰¹

Further, in order to trigger schools’ legal obligations to address their sexual harassment, students must subject themselves to the risk that they will

97. Smith & Freyd, *Dangerous Safe Havens*, *supra* note 20, at 120 (“Even after controlling for other childhood sexual and physical abuse, abuse experienced in an institutional setting was predictive of adult psychological distress.”); *see Carr et al.*, *supra* note 14, at 487; Shian-Ling Keng, Nurulhuda Binte Noorahman, Sukriti Drabu & Chi Meng Chu, *Association Between Betrayal Trauma and Non-Suicidal Self-Injury Among Adolescent Offenders: Shame and Emotion Dysregulation as Mediating Factors*, 18 INT’L J. FORENSIC MENTAL HEALTH 293, 300 (2019); Kaehler & Freyd, *supra* note 96, at 265 (“[B]etrayal is associated with Borderline Personality Disorder. High-betrayal traumas were the largest contributor to explained variance of borderline characteristics and medium-betrayal traumas also significantly predicted borderline features.”).

98. Under mandatory school attendance laws, students must go to school. All states have laws requiring school attendance. *Table 5.1. Compulsory School Attendance Laws, Minimum and Maximum Age Limits for Required Free Education, By State: 2017*, NAT’L CTR. EDUC. STAT. (2017) [hereinafter *Table 5.1*], https://nces.ed.gov/programs/staterreform/tab5_1.asp [<https://perma.cc/AL5A-F7ZV>]. They vary only in the range of ages during which children need to be in school. *See id.* Although some students comply with mandatory attendance laws by attending private schools or with home schooling, the overwhelming majority of students attend public school. In 2016, 50,615,000 children were enrolled in public school. *Table 208.20. Public and Private Elementary and Secondary Teachers, Enrollment, Pupil/Teacher Ratios, and New Teacher Hires: Selected Years, Fall 1955 through Fall 2028*, NAT’L CTR. EDUC. STAT. (2018), https://nces.ed.gov/programs/digest/d18/tables/dt18_208.20.asp [<https://perma.cc/gLT7-YJS7>] (“Public and private elementary and secondary teachers, enrollment, pupil/teacher ratios, and new teacher hires: Selected years, fall 1955 through fall 2028[.]”). That number represents almost ninety percent of overall public-school population. *See id.* While there, students have virtually no authority other than school officials to turn to for help. *See Morrow v. Balaski*, 719 F.3d 160, 190 (3d Cir. 2013) (Fuentes, J., dissenting).

99. *See Table 5.1, supra* note 98; *Morrow*, 719 F.3d at 190. Students’ parents cannot help them because their parents are not present in school. *See Morrow*, 719 F.3d at 190.

100. *See Smith & Freyd, Institutional Betrayal, supra* note 14, at 578; Maier, *supra* note 86, at 289–90.

101. *See Smith & Freyd, Institutional Betrayal, supra* note 14, at 578; Maier, *supra* note 86, at 289–90; *supra* note 91 and accompanying text.

suffer institutional betrayals.¹⁰² Schools have no obligation under Title IX to act in response to student sexual harassment if schools do not have specific knowledge of it.¹⁰³ Students thus expose themselves to the potential harm of institutional betrayals as a structural requirement of Title IX.¹⁰⁴

Given the widely available research on institutional betrayals, and trauma-informed responses more generally, schools should know that when they: (1) punish; (2) blame students for; or (3) demonstrate an automatic, default disbelief of students' sexual harassment, schools risk, if not predictably cause, students institutional betrayals.¹⁰⁵

1. Punishing Survivors of Sexual Harassment

Students' Title IX claims demonstrate that schools regularly impose institutional betrayals by punishing students in response to their sexual harassment.¹⁰⁶ Such punishments generally occur in one of two ways. First, schools punish survivors of sexual harassment through stilted application of student codes of conduct.¹⁰⁷ Second, in ill-judged efforts to separate survivors

102. See *Davis ex rel. Lashonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 641, 644 (1999); *Gebser v. Lago Indep. Sch. Dist.*, 524 U.S. 274, 290 (1997); *supra* note 62 and accompanying text; Suski, *supra* note 40, at 1157-63.

103. *Davis*, 526 U.S. at 641, 644; *Gebser*, 524 U.S. at 290; see Suski, *supra* note 40, at 1157-63; *supra* note 62 and accompanying text. Naturally, students must also report their harassment to make out a claim for retaliation based on it under Title IX. See *Saphir ex rel. Saphir v. Broward Cnty. Pub. Schs.*, 744 F. App'x 634, 639 (11th Cir. 2018). In addition, under new Title IX regulations, this structural dependency exists in the public enforcement scheme through which the United States Department of Education investigates and can withhold federal Title IX funding for its violation. Those regulations also require that schools have actual knowledge of students' harassment before they need to address it. 34 C.F.R. § 106.44(a) (2020).

104. See *Davis*, 526 U.S. at 644; see also Suski, *supra* note 32, at 2286 ("Because the actual notice standard under the Supreme Court's Title IX test relieves schools of any obligation to respond to sexual harassment if they do not have very specific notice of it, students must report their sexual harassment to have any hope of getting help for or redress from it.")

105. See *supra* Section II.A. More generally, research on trauma informed school responses and curricular design are widely disseminated as well as discussed among educators. *E.g.*, Jessica Minahan, *Trauma-Informed Teaching Strategies*, 77 EDUC. LEADERSHIP 30, 31-35 (2019) (identifying trauma informed teaching practices); *Trauma-Informed Schools*, NAT'L EDUC. ASS'N, <https://www.nea.org/professional-excellence/student-engagement/trauma-informed-schools> [<https://perma.cc/MPM3-7TYW>] (advocating the need for trauma-sensitive and trauma-informed approaches to working with students); Alex Shevrin Venet, *The How and Why of Trauma-Informed Teaching*, EDUTOPIA (Aug. 3, 2018), <https://www.edutopia.org/article/how-and-why-trauma-informed-teaching> [<https://perma.cc/5AZU-8XGS>] (discussing the benefits of trauma informed educational approaches). Indeed, entire organizations are devoted to advancing trauma-informed schoolwide approaches. See, *e.g.*, *Support for Students Exposed to Trauma*, TREATMENT & SERVS. ADAPTATION CTR., <http://traumaawareschools.org/sset> [<https://perma.cc/B3PW-3HMZ>].

106. Smith & Freyd, *Institutional Betrayal*, *supra* note 14, at 579.

107. Student codes of conduct prohibit students from engaging in sexual activity and physical violence on campus. For example, in the Title IX case pending in federal district court in Georgia on behalf of high school student T.M., the school suspended her for a week for "violating Rule 9Gof [sic] the school's sexual misconduct policy for participating in oral sex on school property."

of sexual harassment from their perpetrators, schools effectively penalize survivors by relegating the survivors to disciplinary school placements.¹⁰⁸ However, students' Title IX claims based on these responses routinely fail.¹⁰⁹ Courts find that schools' responses that betray students' trust and dependency by punishing them for their sexual harassment, or schools' institutional betrayals, do not violate Title IX.¹¹⁰

K.S. v. Northwest Independent School District offers a striking example of a case in which a school, in a wooden administration of its rules, punished a student for defending himself against sexual harassment.¹¹¹ In *K.S.*, sixth grade student K.S. endured months of sexual harassment by other students.¹¹² Fellow students repeatedly called K.S. names, including "titty boy," "faggot," "girl," and they pinched his breasts.¹¹³ At least twice, the school responded to this harassment by suspending K.S. from school for violating rules prohibiting involvement in physical violence.¹¹⁴ In one such incident, the school suspended K.S. after "three students verbally harassed and pushed K.S. as he walked to class . . . [and] K.S. pushed back."¹¹⁵ When K.S. brought a Title IX claim against the school based on these and other responses to his sexual harassment, however, the claim failed.¹¹⁶ Even though the school punished K.S. in response to his own sexual harassment, and thus imposed an institutional betrayal on him, the Fifth Circuit found that the punishment did not violate Title IX.¹¹⁷ More precisely, the court determined that those responses did not constitute deliberate indifference to K.S.'s harassment because "the record does not show that the District was aware of numerous incidents of sex-based harassment but failed to respond."¹¹⁸ Some response to

Doe v. Gwinnett Cty. Pub. Sch., No. 18-CV-05278-SCJ, 2019 WL 12336248, at *2 (N.D. Ga. Aug. 22, 2019).

108. Further, these responses place the burden on the survivors of sexual harassment to adapt their behavior as a means of addressing that harassment. For instance, in *Doe v. Dardanelle*, high school student Jane Doe was sexually assaulted twice by a fellow student. *Doe v. Dardanelle Sch. Dist.*, No. 17CV00359, 2018 WL 3795235, at *1 (E.D. Ark. Aug. 9, 2018). In response, her principal asked Doe if she wanted to be removed from the class in which one of the incidents happened. *Id.* at *2. Doe, however, "said she liked the class and wished to stay." *Id.* By responding to Doe's harassment in this way, the school placed the onus on Doe to modify her class schedule to address the harassment. *See id.* The court, however, found no Title IX violation. *Id.* at *3-4.

109. *See, e.g.*, *KF ex rel. CF v. Monroe Woodbury Cent. Sch. Dist.*, 531 F. App'x 132, 134 (2d Cir. 2013); *Doe v. Bd. of Educ. of Prince George's Cnty.*, 605 F. App'x 159, 168 (4th Cir. 2015).

110. *See, e.g.*, *CF*, 531 F. App'x at 134; *Bd. of Educ. of Prince George's Cnty.*, 605 F. App'x at 168.

111. *K.S. v. Nw. Indep. Sch. Dist.*, 689 F. App'x 780, 781-82 (5th Cir. 2017).

112. *Id.* at 781.

113. *Id.* at 781 n.2.

114. *Id.* at 782.

115. *Id.*

116. *Id.* at 787.

117. *Id.*

118. *Id.* at 785.

sexual harassment, then, suffices to satisfy Title IX even when it punishes the survivor of the harassment.¹¹⁹

Schools also punish survivors of sexual harassment in apparent attempts to separate them from the perpetrators of the harassment.¹²⁰ For example, in *KF v. Monroe Woodbury Central School District*, student “CF suffered intense and prolonged teasing—indeed, ‘bullying’—and on two occasions was sexually assaulted” during her eighth and ninth grade years in school.¹²¹ In response, C.F.’s school sent C.F. to an alternative program for students with “serious” disciplinary problems.¹²² In other words, it effectively punished C.F. by consigning her to an alternative disciplinary school in response to her sexual harassment.¹²³ Still, the Second Circuit, like the Fifth Circuit in *K.S.*, found no deliberate indifference and therefore no Title IX violation.¹²⁴ Treating a delay in exacting this punishment as the measure of deliberate indifference and Title IX liability, the court said “[t]here is no charge here . . . that the school unreasonably delayed its response.”¹²⁵ It thus determined that C.F. and her parents “have not sufficiently alleged that [the school] . . . violated Title IX.”¹²⁶

119. *See id.* The Fifth Circuit is not alone in finding that when schools blatantly dole out equivalent punishments to both students who suffer sexual harassment and the perpetrators of it, they do not transgress Title IX. *E.g.*, *Stiles ex rel. D.S. v. Grainger Cnty.*, 819 F.3d 834, 841 (6th Cir. 2016) (concluding that a school that gave “warning[s]” to both middle school student D.S., who endured approximately two years of sexual harassment by at least ten other students, as well as his tormenters did not violate Title IX—without acknowledging or addressing the fact that D.S. had effectively been punished for his sexual harassment.).

120. *See, e.g.*, *KF ex rel. CF v. Monroe Woodbury Cent. Sch. Dist.*, 531 F. App’x 132, 133 (2d Cir. 2013); *Doe v. Bd. of Educ. of Prince George’s Cnty.*, 605 F. App’x 159, 168 (4th Cir. 2015).

121. *CF*, 531 F. App’x at 133.

122. *Id.*

123. *Id.* “After the first day [at the disciplinary placement], C.F. returned home crying and informed her parents that the students were out-of-control and she had been offered marijuana.” Appellant’s Reply Brief at 8, *KF ex rel. CF v. Monroe Woodbury Cent. Sch. Dist.*, 531 F. App’x 132 (2d Cir. 2013) (No. 13-516-cv), 2013 WL 1450942, at *8.

124. *CF*, 531 F. App’x at 134.

125. *Id.*

126. *Id.* Similarly, in *Doe v. Board of Education*, the Fourth Circuit determined that a school did not violate Title IX when it essentially punished a fourth-grade student for his own sexual harassment. *See Doe v. Bd. of Educ. of Prince George’s Cnty.*, 605 F. App’x 159, 168 (4th Cir. 2015). In that case, student J.D. suffered months of sexual harassment by student M.O. *Id.* at 161–63. The school responded in a variety of ways, including by “providing J.D. with a student escort to the bathroom.” *Id.* at 163. That response, however, operated as a punishment for J.D. because it caused J.D. more suffering, including when “other students ‘made horrible jokes’ about his use of the escort.” *Id.* Still, the court found no Title IX violation. *Id.* at 168. Without irony and referring to J.D.’s argument that the school also failed to follow its own Title IX procedures without addressing its effective punishment of J.D., the court concluded that “such ‘procedural shortcomings do not diminish the substantive impact of all the steps [the defendants] took in response to’ J.D.’s allegations.” *Id.*

2. Blaming Survivors of Sexual Harassment

In addition to punishing students in response to their sexual harassment, schools also inflict institutional betrayals by blaming them for it.¹²⁷ That is, schools identify the survivors as the cause of the problem. In doing so, schools indicate that some types of behavior warrant such harassment and that students are therefore at fault for their own sexual harassment.¹²⁸ Yet, courts find that these survivor-blaming responses do not contravene Title IX.¹²⁹

For example, in *JP ex rel. GP v. Lee County School Board*, seventh-grade student GP's principal explicitly blamed GP's appearance for her sexual harassment, but the Eleventh Circuit did not find that the school violated Title IX.¹³⁰ One of GP's fellow students, N.M., harassed GP by "teasing, shoving, pushing, and [other] gender-specific conduct," including "pulling her hair, knocking her books out of her hand, [and] shaking a chair as she stood on it."¹³¹ In a meeting with GP's parents to discuss her harassment, the principal said: "But look how your daughter looks. She could provoke [NM] at any moment. She could provoke anyone."¹³² In another meeting about the harassment, the principal again said about GP: "Look how she looks, look at her face, she's so cute. Maybe that provoked something. Maybe he had a crush on her."¹³³ In evaluating these responses to GP's harassment, the court noted that "[t]hose remarks were indeed questionable, and would not have been made if GP were a boy."¹³⁴ Yet, assessing the responses for deliberate indifference, the court went on to say that because the school's responses to the harassment were otherwise "prompt and reasonable[, t]he fact that some individuals made questionable comments along the way does not transform the [school's] response into deliberate indifference."¹³⁵ Some arguably timely,

127. Sometimes this blame also serves as a justification for punishment, as when middle school student D.S.'s school blamed him for his "role in the problem" of his own harassment and disciplined him by "warn[ing] D.S. not to harass other students . . . for trivial teasing." *Stiles ex rel. D.S. v. Grainger Cnty.*, 819 F.3d 834, 843 (6th Cir. 2016).

128. See, e.g., *JP ex rel. GP v. Lee Cnty. Sch. Bd.*, 737 F. App'x 910, 911 (11th Cir. 2018); *Stiles*, 819 F.3d at 840-45; *Gabrielle M. v. Park Forest-Chi. Heights, Ill. Sch. Dist.* 163, 315 F.3d 817, 818-19 (7th Cir. 2003); *Lansberry v. Altoona Area Sch. Dist.*, 318 F. Supp. 3d 739, 745 (W.D. Pa. 2018).

129. See *Stiles*, 819 F.3d at 848-51; *GP*, 737 F. App'x at 913-16; *Stewart v. Waco Indep. Sch. Dist.*, 711 F.3d 513, 519-23 (5th Cir.), *rev'd on other grounds*, 599 F. App'x 534 (5th Cir. 2013); *Gabrielle M.*, 315 F.3d at 821-25; *Lansberry*, 318 F. Supp. 3d at 747-53.

130. *GP*, 737 F. App'x at 916.

131. *Id.* at 914.

132. *Id.* at 912.

133. *Id.*

134. *Id.* at 916.

135. *Id.*

reasonable responses, then, inoculate a school's other survivor-blaming responses and thus do not offend Title IX.¹³⁶

Similarly, in *Stiles ex rel. D.S. v. Grainger County*, middle-school student D.S. faced two years of repeated harassment by at least ten other students, but the Sixth Circuit found that the school did not transgress Title IX when it blamed D.S.'s own behavior for his harassment.¹³⁷ D.S.'s harassment began in his seventh-grade year, when other students called him "names, including 'bitch,' 'faggot,' and, 'queer,' almost every day."¹³⁸ Some of these students also physically harassed him.¹³⁹ In response, teachers implicitly blamed D.S. for his harassment.¹⁴⁰ They said that D.S. "gives as good as he gets."¹⁴¹ The teachers thus not only minimized the harassment, but their responses also suggested that D.S.'s own behavior justified his harassment.¹⁴² Further, a school resource officer, Richard McGinnis, at least twice explicitly blamed D.S. for his harassment.¹⁴³ In D.S.'s seventh grade year, McGinnis told D.S. that he "blam[ed] DS for the incidents [of harassment], stating that DS could defend himself, and recommend[ed] that DS learn martial arts."¹⁴⁴

In considering D.S.'s Title IX claim, though, the court neglected to even evaluate these survivor-blaming responses as bases for finding the school violated Title IX.¹⁴⁵ It instead characterized all of the school's responses, without distinction, as "remedial measures."¹⁴⁶ It thus indicated that virtually any response by a school to student sexual harassment, including a response that constitutes an institutional betrayal, qualifies as "remedial," no matter its substance or nature.¹⁴⁷ With this overly broad and perverted characterization of "remedial" responses, the court found that each of the school's "remedial

136. See *id.*; *Lansberry v. Altoona Area Sch. Dist.*, 318 F. Supp. 3d 739, 744-45, 752-53 (W.D. Pa. 2018) (concluding that a student did not suffer sexual harassment under Title IX although he committed suicide after "suffer[ing] 'intense, persistent, and malicious bullying' from fellow students" that "involved 'unwanted and unwarranted physical contact,' 'persistent and pervasive ridicule,' 'threats of violence,' and statements that [he] was 'better off dead' and should commit suicide," harassment for which a teacher blamed the student, saying "he 'needed to stop being a baby'").

137. *Stiles ex rel. D.S. v. Grainger Cnty.*, 819 F.3d 834, 841-43, 849-51 (6th Cir. 2016).

138. *Id.* at 841.

139. *Id.* at 844. In one representative incident, when D.S. was in eighth grade, another student "ran over to [him], jumped on his chest, and pretended to perform CPR on him." *Id.*

140. See *id.* at 843.

141. *Id.* The school also warned both D.S. and his perpetrators against involvement in any further harassment. *Id.* at 841-45. In this way, the school again treated D.S. as if he were as much to blame for the harassment he suffered as the perpetrators of it. *Id.* at 841, 843.

142. *Id.* at 843.

143. *Id.* at 843-45. McGinnis was also the chief of police, a position of authority that could have easily exacerbated the sense of blame he imposed on D.S. *Id.* at 840, 844.

144. *Id.* at 843.

145. See *id.* at 851.

146. *Id.* at 849-51.

147. *Id.* at 851.

responses were reasonably tailored to” the sexual harassment it investigated.¹⁴⁸ It therefore concluded the school did not violate Title IX.¹⁴⁹

3. Disbelieving by Default Survivors of Sexual Harassment

Schools do not just punish and blame survivors of sexual harassment because of their harassment, but they also disbelieve them by default.¹⁵⁰ Schools express their automatic, default disbelief of student sexual harassment both implicitly and explicitly.¹⁵¹ Whether schools signal this default disbelief explicitly or not, such disbelief constitutes an institutional betrayal.¹⁵² The institutional betrayal occurs not because schools decline to automatically believe students, but because their starting point is disbelief.¹⁵³ Still, courts do not find these responses violate Title IX.¹⁵⁴

148. *Id.*

149. *Id.*; see also *Stewart v. Waco Indep. Sch. Dist.*, 711 F.3d 513, 518, 522 (5th Cir.), *rev'd on other grounds*, 599 F. App'x 534 (5th Cir. 2013) (finding that a student with “mental retardation, [a] speech impairment, and [a] hearing impairment” who was sexually assaulted three times over the course of two years, was described by the school as “at least somewhat complicit” and was subsequently suspended “provide[d] insufficient facts to plausibly state that the [school]’s responses were so clearly unreasonable as to rise to the level of deliberate indifference”); *Gabrielle M. v. Park Forest-Chicago Heights, Ill. Sch. Dist.*, 315 F.3d 817, 818–19, 824–25 (7th Cir. 2003) (concluding that a school’s responses to a kindergartner’s sexual harassment, which included a guidance counselor admonishing both the survivor and the perpetrator, did not constitute deliberate indifference).

150. This disbelief disproportionately affects people of color. See NAT’L ORG. FOR WOMEN, BLACK WOMEN & SEXUAL VIOLENCE (2018), <https://now.org/wpcontent/uploads/2018/02/Black-Women-and-Sexual-Violence-6.pdf> [<https://perma.cc/HSC2-5UU9>] (“[S]tatistics show that Black women who report crimes of sexual assault or violence are less likely to be believed than their white counterparts.”); Maya Finoh & Jasmine Sankofa, *The Legal System Has Failed Black Girls, Women, and Non-Binary Survivors of Violence*, ACLU (Jan. 28, 2019, 12:30 PM), <https://www.aclu.org/blog/racial-justice/race-and-criminal-justice/legal-system-has-failed-black-girls-women-and-non> [<https://perma.cc/5SAH-99VV>]. A related study by Georgetown University Law Center “[found] that adults believe that Black girls do not need protection or nurturing.” REBECCA EPSTEIN, JAMILIA J. BLAKE & THALIA GONZÁLEZ, GEORGETOWN L. CTR. ON POVERTY & INEQ., GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS’ CHILDHOOD 11 (2017), <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf> [<https://perma.cc/G6KZ-EFCQ>]. This misperception could contribute to disbelief that they have been harmed or need help when they are. See *id.*

151. See, e.g., *Doe v. Dall. Indep. Sch. Dist.*, 220 F.3d 380, 387–89 (5th Cir. 2000); *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1116–18 (10th Cir. 2008); *Stiles*, 819 F.3d at 840–45; *Doe v. Dardanelle Sch. Dist.*, No. 17CV00359, 2018 WL 3795235, at *2–4 (E.D. Ark. Aug. 9, 2018), *aff’d*, 928 F.3d 722 (8th Cir. 2019).

152. E.g., *Dall. Indep. Sch. Dist.*, 220 F.3d at 387–89; *Rost*, 511 F.3d at 1116–18; *Stiles*, 819 F.3d at 840–45; *Dardanelle Sch. Dist.*, 2018 WL 3795235, at *2–4.

153. See *supra* notes 24, 87–90 and accompanying text; see also *Campbell*, *supra* note 87, at 703 (illustrating that, when victims are not believed, “system personnel can magnify victims’ feelings of powerlessness, shame, and guilt”).

154. *Dall. Indep. Sch. Dist.*, 220 F.3d at 387–89; *Rost*, 511 F.3d at 1116–18, 1126; *Stiles*, 819 F.3d at 840–45, 856; *Dardanelle Sch. Dist.*, 2018 WL 3795235, at *2–4, *11–13. In *Stiles*, Richard McGinnis, the school resource officer who investigated D.S.’s claims of repeated sexual harassment by fellow students, disbelieved D.S.’s reports of harassment to the point of

In *Doe v. Dallas Independent School District*, an elementary school demonstrated both implicit and explicit default disbelief of a student's sexual harassment.¹⁵⁵ In that case, teacher John Earl McGrew sexually assaulted elementary school student J.H.¹⁵⁶ When J.H.'s mother, Sandra Thomas, reported to his school that "McGrew . . . had fondled J.H.," the school principal questioned whether the assault occurred at all.¹⁵⁷ She first did so by forcing "J.H. to repeat his accusation to McGrew" in a meeting with J.H., his mother, and McGrew.¹⁵⁸ By making this gratuitous demand, the principal impliedly communicated that she was trying to test the truth of J.H.'s claim by testing his willingness to repeat it out loud to the perpetrator.¹⁵⁹ Although the principal unquestionably had an obligation to investigate J.H.'s report of sexual assault, she could have conducted that investigation without insisting that J.H. repeat his accusation to McGrew.¹⁶⁰ By choosing a tactic that at minimum could be perceived as an effort to interrogate J.H.'s credibility, the principal's unnecessary actions insinuated her default disbelief of J.H.'s account of sexual harassment.¹⁶¹

Then, as if to resolve any potential question about the existence of her disbelief, the principal expressed it explicitly.¹⁶² She bluntly told J.H.'s mother that she "knew J.H. was lying."¹⁶³ The principal had no basis for either this

threatening him. *Stiles*, 819 F.3d at 843-44. He "told [D.S.] he would throw [D.S.] and his mother in jail if they were lying about the bullying." *Id.* at 844. McGinnis offered no reason for disbelieving D.S. other than that he blamed D.S. for not doing more to stop the harassment. *Id.* at 843-44.

155. *Dall. Indep. Sch. Dist.*, 220 F.3d at 387-89.

156. *Id.*

157. *Id.* at 387.

158. *Id.* What is more, this response seemingly prioritized McGrew's interests in hearing the accusation directly from J.H. over the likely negative impact having to make that accusation would have on J.H. *See id.*

159. *See id.* at 387-89. Had the principal done nothing more to message disbelief, this instance of suggesting such disbelief could conceivably be interpreted as unintentional. Yet, she soon thereafter communicated her disbelief plainly, thus making it less likely that her implicit communication of disbelief was not rooted in actual disbelief. *See id.* at 388.

160. It was hardly impossible, to say the least, to question J.H. and McGrew separately, for example. Empirical research has shown that such practices can reduce child stress and increase their willingness to participate in such questioning. *See Goodman et al., supra* note 57, at 259 (noting "children [survivors of sexual abuse] are less distressed about testifying and more willing to testify when allowed to speak via closed-circuit technology rather than in open court" in front of the defendant accused of committing the abuse).

161. *See Dall. Indep. Sch. Dist.*, 220 F.3d at 387.

162. *See id.* at 388.

163. *Id.*; *See also Doe v. Dardanelle Sch. Dist.*, No. 17CV00359, 2018 WL 3795235, at *2-4, *12, *aff'd*, 928 F.3d 722 (8th Cir. 2019) (finding that, although the school evidenced its disbelief of the survivor of at least two sexual assaults by concluding "it was very much a he said she said situation" and despite noting that the assaults "evidently [have] happened several times," the school's responses were not deliberately indifferent).

statement or for her prior actions implying the same disbelief.¹⁶⁴ To the contrary, the principal had reason to believe J.H., including because she had received reports by other students that McGrew had assaulted them.¹⁶⁵ Yet, in a triumph of process over substance, when deciding whether this treatment demonstrated deliberate indifference to J.H.'s sexual harassment, the Fifth Circuit only considered the fact that the school conducted an investigation.¹⁶⁶ It did not, however, evaluate the particulars of that investigation, including whether the repeated, unwarranted demonstrations of incredulity by the principal constituted a Title IX violation.¹⁶⁷ The Court simply noted that the principal "spoke with [J.H.'s] mother, spoke with J.H.'s teacher, [and] spoke with McGrew."¹⁶⁸ It therefore found that the school's actions, which amounted to institutional betrayals, did not violate Title IX.¹⁶⁹

C. THE ADDED, UNREMEDIED HARMS CAUSED BY SCHOOLS' INSTITUTIONAL
BETRAYALS

When schools mete out institutional betrayals, students suffer added layers of harm on top of the harms wrought by their sexual harassment.¹⁷⁰ These damaging effects do not constitute mere exacerbations of the harm stemming

164. See *Dall. Indep. Sch. Dist.*, 220 F.3d at 388. The principal did praise McGrew as a good teacher, but since any pedagogical efficacy can coexist with sexual predation, this statement does not offer any valid substantiation for the principal's claim that J.H. was lying. See *id.*

165. See *id.*

166. See *id.* The court also noted that the principal "warned [McGrew] he would be 'dealt with' if the accusations were founded or that he should avoid acting in a way that could be misconstrued." *Id.* However, it failed to consider that the principal wholly undercut this warning by also telling McGrew before even meeting with J.H.'s mother that she did not "think [the accusation is] true, but we have to meet with the parent and discuss it." *Id.* (alteration in original).

167. See *id.*

168. *Id.*

169. The only intervention the principal made other than these investigatory meetings was her empty warning to McGrew followed by reassurance of her belief in his innocence. See *id.*; *supra* note 166 and accompanying text. Other courts have also found schools' default signals of disbelief in student accounts of sexual harassment do not transgress Title IX. *E.g.*, *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1117-18, 1124 (10th Cir. 2008) (finding that a school responded to repeated sexual harassment of a student by questioning the student for one to two hours, and never questioning the boys who harassed her, thus sending the message that her story alone was the one that was questionable and required interrogation, but the court concluded the schools' responses sufficed and did not transgress Title IX).

170. See, *e.g.*, Appellant's Brief on the Merits at 8, *K.S. v. Nw. Indep. Sch. Dist.*, 689 F. App'x 780 (5th Cir. 2017) (No. 16-40093), 2016 WL 1715073, at *8 [hereinafter *K.S. Brief*]; Brief of Appellant at 5, *Stiles ex rel. D.S. v. Grainger Cnty.*, 819 F.3d 834 (6th Cir. 2016) (No. 15-5438), 2015 WL 4910738, at *5 [hereinafter *Stiles ex rel. D.S. Brief*]; *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1118 (10th Cir. 2008).

from students' sexual harassment.¹⁷¹ They are new harms.¹⁷² Among other things, students report experiencing a variety of psychological harms, including anxiety, depression, and suicidality as a consequence of the institutional betrayals inflicted by their schools.¹⁷³

All three kinds of affirmative institutional betrayals that schools impose on students following their sexual harassment cause these harms. When schools punish students for their sexual harassment, students report experiencing these harms and attest that the harms derive not from the initial sexual harassment but from the schools' responses to it.¹⁷⁴ For example, sixth grade student K.S., whose school suspended him following the repeated sexual harassment and assaults by fellow students, said that the punishment he received from his school in response to his harassment left him depressed and suicidal.¹⁷⁵ He said that "it was the feeling that there was nobody there to help, that people felt he was the cause of the problems he was experiencing, that finally caused him to overdose and attempt suicide . . . [and] because [school administrators] said that he was the cause of all the problems"¹⁷⁶

Other students who suffer institutional betrayals in the form of blame by their schools report similarly pernicious effects. For instance, middle school student D.S., whose school blamed him for the repeated sexual harassment he endured over a two-year period, endured both physical and psychological harms from the institutional betrayals he suffered.¹⁷⁷ He recounted his feelings of abandonment and depression in his appellate brief to the Sixth Circuit, stating that "[n]o matter who he talked to, the bullying never stopped until he left in January of 2012; it didn't matter who he told, teachers, the principals, the police chief, nothing ever changed."¹⁷⁸ Specifically regarding the blame he faced from the school for his harassment, D.S. said, "I was too little to be a bully. It wasn't fair of him to do that."¹⁷⁹ As a result of this treatment, D.S. "had diarrhea, . . . would beg not to go to school[,] . . . [and his mother was] afraid he was going to commit suicide."¹⁸⁰

Students whose institutional betrayals take the form of an automatic, default disbelief of their sexual harassment also experience these kinds of

171. See Smith & Freyd, *Insult, then Injury*, *supra* note 18, at 1125; *supra* notes 14–20 and accompanying text.

172. Smith & Freyd, *Insult, then Injury*, *supra* note 18, at 1127 ("[I]nstitutional betrayal represents a unique source of added harm that is an altogether too common experience among trauma victims . . .").

173. See, e.g., K.S. Brief, *supra* note 170, at *8; Stiles *ex rel.* D.S. Brief, *supra* note 170, at 5; Rost, 511 F.3d at 1118.

174. See, e.g., K.S. Brief, *supra* note 170, at *7–8.

175. *Id.* at *7–8, *12–13.

176. *Id.*

177. Stiles *ex rel.* D.S. Brief, *supra* note 170, at 4–5.

178. *Id.*

179. *Id.* at 12.

180. *Id.* at 5.

harms. When middle school student K.C.'s school insinuated such disbelief by subjecting K.C. to "one to two hours" of questioning regarding her sexual assault without ever questioning the perpetrators of it, she then, within "a couple weeks," suffered an "acute psychotic episode that required hospitalization."¹⁸¹ While it is difficult, if not impossible, to fully disentangle whether K.C.'s sexual assault or her subsequent institutional betrayal caused her psychotic episode, the body of empirical evidence demonstrating the powerful harms that result from institutional betrayals strongly suggests that the institutional betrayals K.C. suffered, at least in part caused her significant psychological harm.¹⁸²

Yet, because courts routinely deny Title IX claims based on these harms, students suffer these intensely injurious institutional betrayals, and Title IX has nothing to say about it.¹⁸³ Although Title IX's core purpose is to protect students from sex discrimination in all its forms, students endure not only sexual harassment but then also the additional layer of trauma from institutional betrayals without recognition, let alone redress, in Title IX.¹⁸⁴ Schools can mete out these cumulative harms, and Title IX tolerates it.¹⁸⁵

III. THE CURRENT INCAPACITY OF TITLE IX JURISPRUDENCE TO RECOGNIZE INSTITUTIONAL BETRAYALS AS SEX DISCRIMINATION

Title IX's present failure to protect students from schools' institutional betrayals is not only devastating for students, but it is practically preordained.¹⁸⁶ Current Title IX jurisprudence has a near-total theoretical and doctrinal incapacity to comprehend the institutional betrayals that follow sexual harassment as a form of sex discrimination.¹⁸⁷ Although Title IX prohibits sex discrimination in public schools without qualification, courts have developed only three relatively confined forms of intentional sex discrimination.¹⁸⁸ First,

181. Rost *ex rel.* K.C. v. Steamboat Springs RE-2 Sch. Dist., 511 F.3d 1114, 1118 (10th Cir. 2008).

182. See, e.g., Jacoby et al., *supra* note 57, at 264; Gómez, *supra* note 95, at 324; *supra* note 95 and accompanying text.

183. See *supra* Sections II.B.1–3.

184. See Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979); *supra* note 28 and accompanying text.

185. See *supra* Sections II.B.1–3.

186. See *infra* Sections III.A–C.

187. See *infra* Sections III.A–C. To be sure, when students bring Title IX claims based on their institutional betrayals, they generally do not assert that they have suffered something called "institutional betrayals." See, e.g., K.S. Brief, *supra* note 170, at 8; Stiles *ex rel.* D.S. Brief, *supra* note 170, at 4–5; Rost *ex rel.* K.C. v. Steamboat Springs RE-2 Sch. Dist., 511 F.3d 1114, 1118 (10th Cir. 2008). They do, though, raise the facts of their institutional betrayals as part of their claims. See *infra* Sections III.A–C.

188. See Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 648 (1999); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998); Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 171 (2005); see also, E.N. v. Susquehanna Twp. Sch. Dist., No. 09-CV-1727, 2010 WL 4853700, at *14–18 (M.D. Pa. Nov. 23, 2010) (analyzing whether a school district committed one of the three forms of intentional sex discrimination).

the Supreme Court has concluded that schools' deliberate indifference to sexual harassment constitutes intentional sex discrimination.¹⁸⁹ Second, the Court has also found that retaliation for making a report of sexual harassment is a type of intentional sex discrimination.¹⁹⁰ Third, lower courts have determined that quid pro quo sexual harassment is intentional sex discrimination.¹⁹¹ However, these theories of sex discrimination do not recognize affirmative institutional betrayals as sex discrimination.¹⁹²

A. *THE INADEQUACIES OF THE DELIBERATE INDIFFERENCE THEORY
AND EVALUATION FRAMEWORK*

The Supreme Court adopted the deliberate indifference theory of intentional sex discrimination under Title IX over 20 years ago.¹⁹³ It did so in two cases involving the sexual harassment of public school students.¹⁹⁴ In *Gebser v. Lago Vista Independent School District*, the Court found that a school could be liable for a teacher's sexual harassment of a student if it was deliberately indifferent to the harassment.¹⁹⁵ Then, the following year, in *Davis v. Monroe County Board of Education*, the Court again embraced deliberate indifference as the theory supporting schools' liability for peer sexual harassment under Title IX.¹⁹⁶ Although this theory of sex discrimination assesses schools' responses to sexual harassment, it cannot capture institutional betrayals.¹⁹⁷ Interpreted to its fullest extent, this theory and its corresponding evaluation framework only demand that courts evaluate whether schools' responses to sexual harassment risked or caused further harassment of the type that has already occurred.¹⁹⁸ Because institutional betrayals are independent

189. See *Davis*, 526 U.S. at 648; *Gebser*, 524 U.S. at 277.

190. See *Jackson*, 544 U.S. at 171.

191. See, e.g., *E.N.*, 2010 WL 4853700, at *14-15.

192. See *infra* Sections IIIA-C.

193. See *Gebser*, 524 U.S. at 277.

194. See *Davis*, 526 U.S. at 648; *Gebser*, 524 U.S. at 290.

195. *Gebser*, 524 U.S. at 284. This Article refers to "teacher" sexual harassment of students as a shorthand for sexual harassment of students by any school employee.

196. *Davis*, 526 U.S. at 646-47.

197. See *id.* at 644-45.

198. See *id.* at 650; see also *Gebser*, 524 U.S. at 290 ("[I]n cases like this one that do not involve official policy of the recipient entity, we hold that a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond."). Although the Supreme Court's guidance on deliberate indifference describes its meaning in this way, courts generally do not apply its full meaning when evaluating K-12 students' Title IX claims. See *Suski*, *supra* note 32, at 2259-63. Courts do, however, apply the standard consistent with its full meaning in college and university cases. See, e.g., *Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1103-04 (10th Cir. 2019). Even if courts applied the standard in accord with the Court's complete explanation of it in all Title IX deliberate indifference cases, though, it still could not effectively capture institutional betrayals as sex discrimination. See *Davis*, 526 U.S. at 644; *Gebser*, 524 U.S. at 290; *McCoy v. Bd. of Educ., Columbus City Schs.*, 515 F. App'x 387, 392 (6th Cir. 2013); *K.S. v. Nw. Indep. Sch.*

injuries that can occur regardless of whether schools act in ways that risk or cause a recurrence of prior harassment, institutional betrayals evade recognition by courts applying the deliberate indifference theory and evaluation framework.¹⁹⁹

Conceptually, the Supreme Court described deliberate indifference in both *Gebser* and *Davis* as a form of intentional discrimination because it risks or indirectly causes further sexual harassment.²⁰⁰ The Court said that a school “may not be liable [for sexual harassment] unless its deliberate indifference ‘subject[s]’ its students to harassment. That is, the deliberate indifference must, at a minimum, ‘cause [students] to undergo’ harassment or ‘make them liable or vulnerable’ to it.”²⁰¹ As a predicate matter, though, the Court said that to have acted intentionally in these ways, schools must actually know about some prior harassment.²⁰² Without actually knowing about sexual harassment, the Court reasoned, schools cannot be held responsible for intentionally failing to take adequate action in response to it.²⁰³

Dist., 689 F. App’x 780, 784 (5th Cir. 2017) (finding no deliberate indifference because the school “took some action in response to the specific incidents alleged by [student] K.S.”); *infra* notes 229–34 and accompanying text.

199. See Smith & Freyd, *Insult, then Injury*, *supra* note 18, at 1118.

200. See *Davis*, 526 U.S. at 642–43 (“[W]e concluded in *Gebser* that recipients could be liable in damages only where their own deliberate indifference effectively ‘cause[d]’ the discrimination.” (second alteration in original) (quoting *Gesber*, 524 U.S. at 291)).

201. *Id.* at 644–45 (second and third alteration in original) (first quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1415 (1966); and then quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2275 (1961)).

202. *Id.* at 642; *Gebser*, 524 U.S. at 289. Further, the Court declared that constructive notice of sexual harassment does not suffice. *Gebser*, 524 U.S. at 288 (“Congress did not intend to allow recovery in damages where liability rests solely on principles of vicarious liability or constructive notice.”). The Court equated constructive notice with no notice at all. *Id.* at 287 (“If a school district’s liability for a teacher’s sexual harassment rests on principles of constructive notice or *respondeat superior*, it will likewise be the case that the recipient of funds was unaware of the discrimination.”). This actual notice standard and lower courts’ applications of it are highly problematic. They significantly limit the scope of Title IX’s protections. See Suski, *supra* note 40, at 1160; *supra* note 61 and accompanying text.

203. *Gebser*, 524 U.S. at 289 (explaining that if a school district does not know about the harassment it will “of course, [not] . . . have an opportunity to take action to end the harassment or to limit further harassment”). This reasoning, though, is susceptible to critique. Under a constructive notice standard, for example, where schools have some reason to suspect, but do not actually know, about sexual harassment, they could act on those suspicions. Schools could, for example, investigate their suspicions to determine if any sexual harassment is actually happening and then, if so, address it. See Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038, 2096–97 (2016) (recommending a due diligence standard, which is not unlike a constructive notice standard, for Title IX); Kelly Dixon Furr, *How Well Are the Nation’s Children Protected from Peer Harassment at School: Title IX Liability in the Wake of Davis v. Monroe County Board of Education*, 78 N.C. L. REV. 1573, 1596 (2000) (arguing that “a constructive notice standard [in Title IX claims] would force schools to develop policies against harassment and to monitor more closely student interaction in the classroom, arguably leading to the earlier detection of and, perhaps, prevention of harassment”); see also Martha McCarthy, *Students as Targets and Perpetrators of Sexual Harassment: Title IX and*

The framework the Court laid out for evaluating this form of sex discrimination establishes that schools are not liable for indirectly causing or risking further sexual harassment.²⁰⁴ Under this paradigm, schools can only be liable for indirectly causing or risking further harassment of the type they already actually know about.²⁰⁵ School liability is so limited because the deliberate indifference evaluation framework merely requires courts to determine whether a school had actual notice of a student's sexual harassment and then acted with deliberate indifference to that known harassment.²⁰⁶ This framework, then, just requires courts make a retrospective, proportionality assessment.²⁰⁷ Courts determine the degree to which schools' responses to prior, known harassment effectively caused or risked further such harassment.²⁰⁸

Beyond, 12 HASTINGS WOMEN'S L.J. 177, 207 (2001) (contending that "the contractual nature of Title IX might actually strengthen the contention that school authorities' failure to act on constructive notice of the harassment provides sufficient grounds for a Title IX violation").

204. See *Davis*, 526 U.S. at 650; *Gebser*, 524 U.S. at 290.

205. *Davis*, 526 U.S. at 644-45, 648; *Gebser*, 524 U.S. at 290. The Supreme Court made this point explicitly when it said that schools will be evaluated for their deliberate indifference "in light of the known circumstances." *Davis*, 526 U.S. at 648, 650-51 (identifying "the most obvious example" of deliberate indifference to be a case where "male students physically threaten their female peers every day," or, in other words, repeat the same type of harassment, and "[school] administrators are well aware of the daily ritual, yet they deliberately ignore requests for aid"). Scholars have critiqued the actual notice standard for allowing courts to ignore schools' failures to address sexual harassment that they strongly suspect is occurring but do nothing about. See, e.g., MacKinnon, *supra* note 203, at 2085 ("As things stand, schools have an incentive not to know about sexual harassment in their institutions, and when they do, to do little to nothing about it."); see also Emily Suski, *The School Civil Rights Vacuum*, 66 UCLA L. REV. 720, 750 (2019) (explaining how the deliberate indifference standard limits public school liability).

206. See *Davis*, 526 U.S. at 650; *Gebser*, 524 U.S. at 290; *infra* note 346 and accompanying text. The Court adopted this standard for both sexual harassment by other students as well as by teachers and other school staff. *Davis*, 526 U.S. at 650; *Gebser*, 524 U.S. at 290.

207. See *Davis*, 526 U.S. at 644-45, 648; see also MacKinnon, *supra* note 203, at 2068 ("The relation between the two facets of the [Title IX actual notice-deliberate indifference] standard is, observably, proportionality: the appropriateness of the response measured against facts known when the institution acted or failed to act.").

208. See *Davis*, 526 U.S. at 644-45, 648; *Gebser*, 524 U.S. at 290. This dependent relationship between deliberate indifference and a school's actual knowledge of past harm in this evaluation scheme is a feature unique to Title IX doctrine. See *City of Canton v. Harris*, 489 U.S. 378, 388 (1989); *Bd. of the Cnty. Comm'rs v. Brown*, 520 U.S. 397, 411 (1997). Even, notably, in the police liability context from which the Supreme Court borrowed the deliberate indifference theory of liability, courts do not need to interrogate whether police officials knew of some past, similar misconduct before they can find that police actions demonstrate deliberate indifference to the risk of future harm from police misconduct. *Gebser*, 524 U.S. at 291; *Davis*, 526 U.S. at 642; *Brown*, 520 U.S. at 411 ("A plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision."); *Canton*, 489 U.S. at 392 ("[W]hile claims such as respondent's—alleging that the city's failure to provide training to municipal employees resulted in the constitutional deprivation she suffered—are cognizable under § 1983, they can only yield liability against a municipality where that city's failure to train reflects deliberate indifference to the constitutional rights of its inhabitants.").

These constraints preclude courts from effectively recognizing schools' institutional betrayals as sex discrimination for two reasons.²⁰⁹ First, because schools can respond to student sexual harassment in ways that at once prevent a recurrence of prior harassment and impose institutional betrayals, the deliberate indifference framework cannot capture schools' institutional betrayals.²¹⁰ For example, when schools punish survivors of sexual harassment, those punishments, though appalling, misguided, and harmful, can prevent further harassment if, say, they separate the survivor from the harasser.²¹¹ Such punishments, then, would constitute institutional betrayals, but they would not amount to deliberate indifference to the harassment because they operate to prevent more harassment from occurring.²¹²

Second, by limiting the conceptualization and analysis of sex discrimination to a question of whether schools' responses to sexual harassment risked or effectively caused prior harassment to recur, this theory and framework make irrelevant courts' consideration of whether those responses caused other types of new, added injuries.²¹³ Because institutional betrayals are independent

209. See *Davis*, 526 U.S. at 642; *Gebser*, 524 U.S. at 289; *Brown*, 520 U.S. at 411; *Canton*, 489 U.S. at 392; *infra* text accompanying note 241. The Court was explicit about its efforts to limit the circumstances under which schools could be held responsible for sexual harassment. It said that “both the ‘deliberate indifference’ standard and the language of Title IX narrowly circumscribe the set of parties whose known acts of sexual harassment can trigger some duty to respond on the part of [schools].” *Davis*, 526 U.S. at 644. The Court also limited the requirements Title IX places on schools in other ways. For example, it drastically restricted the category of individuals who are required to do any such protecting. It said that only school officials with the authority to address a student’s sexual harassment have an obligation to do anything to address it. See *Gebser*, 524 U.S. at 290. Lower courts have interpreted this limitation to mean that only school officials with some administrative authority, such as principals or assistant principals but not teachers, have an obligation provide this protection. See *Suski*, *supra* note 40, at 1160–63; *supra* note 198 and accompanying text.

210. See, e.g., *KF ex rel CF v. Monroe Woodbury Cent. Sch. Dist.*, 531 F. App’x 132, 134 (2d Cir. 2013).

211. See, e.g., *id.* In *Monroe Woodbury*, for instance, a school relegated student C.F. to an alternative disciplinary placement. *Id.* In doing so, it took action to prevent a recurrence of the harassment by separating her from her harasser. See *id.* Yet, it did so in a way that unnecessarily and effectively punished C.F., thus imposing an institutional betrayal. Surely, the school could have not only given C.F. the option to transfer schools but also offered her other school placement. See *Smith & Freyd*, *Institutional Betrayal*, *supra* note 14, at 579. Because the school acted to prevent the harassment, though, the school’s response could not be deemed deliberate indifference under Title IX. See *Davis*, 526 U.S. at 644–45, 648.

212. See *Monroe Woodbury*, 531 F. App’x at 134 (“[T]he allegations demonstrate that whatever response KF and AF might have hoped for, Monroe–Woodbury was not ‘deliberately indifferent’ such that it ‘cause[d CF] to undergo harassment or [made her] liable or vulnerable to it.’” (alterations in original) (quoting *Davis*, 526 U.S. at 645)).

213. Accordingly, lower courts deploy this proportional actual notice-deliberate indifference analysis to find no deliberate indifference on the part of schools. See, e.g., *McCoy v. Bd. of Educ., Columbus City Schs.*, 515 F. App’x 387, 392 (6th Cir. 2013) (finding that because “the [school]’s response is measured by the known circumstances—i.e., there is a connection between what school officials know and whether their response is clearly unreasonable” the school’s response to teacher’s sexual abuse of a student was not deliberately indifferent); *K.S. v. Nw. Indep. Sch.*

injuries that occur as a result of a school's response to sexual harassment, they do not fit with this theory of sex discrimination or its evaluation framework.²¹⁴ Consequently, courts can and do evaluate schools' responses to student sexual harassment for deliberate indifference without addressing the question of whether those responses also constitute institutional betrayals.²¹⁵

That is not to say, however, that there is no overlap between schools' deliberate indifference and their institutional betrayals. If a school does not respond at all to sexual harassment, then that non-response constitutes both an institutional betrayal and a deliberately indifferent response to prior sexual harassment.²¹⁶ Even then, though, such a failure to act also inflicts novel, discrete injuries on survivors of sexual harassment in the form of an institutional betrayal.²¹⁷ Under the deliberate indifference paradigm, though, these institutional betrayals cannot be recognized for the added, independent injuries that they are.²¹⁸

B. THE INADEQUACIES OF THE RETALIATION THEORY AND EVALUATION FRAMEWORK

The Supreme Court has also recognized retaliation for reporting sexual harassment as a form of intentional sex discrimination under Title IX.²¹⁹ The

Dist., 689 F. App'x 780, 784 (5th Cir. 2017) (finding no deliberate indifference because the school "took some action in response to the specific incidents alleged by [student] K.S.>").

214. See Smith & Freyd, *Insult, then Injury*, *supra* note 18, at 1126; *supra* note 172 and accompanying text. That said, institutional betrayals could be recognized as deliberate indifference. Elsewhere I have made this very argument. See Suski, *supra* note 32, at 2326–27 (arguing that courts could find these responses that constitute institutional betrayals are deliberately indifferent because they make students vulnerable to further sexual harassment). Even then, though, schools' institutional betrayals could not be recognized for the additive injuries they are. They would only constitute an injury insofar as it risks or causes a recurrence of past harassment. See *Davis*, 526 U.S. at 644–45, 648; *Gebser*, 524 U.S. at 290. No matter whether a school's affirmative institutional betrayal takes the form of punishment, blaming, or default disbelieving survivors of sexual harassment, then, those institutional betrayals do not get recognized as independent injuries in this paradigm. See Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 235 (2011) ("[T]he deliberate indifference standard only reaches the worst school behaviors.").

215. See, e.g., *K.S.*, 689 F. App'x at 784; *JP ex rel. GP v. Lee Cnty. Sch. Bd.*, 737 F. App'x 910, 915–16 (11th Cir. 2018); *Doe ex rel. Doe v. Dall. Indep. Sch. Dist.*, 220 F.3d 380, 387–88 (5th Cir. 2000).

216. See e.g., *Stinson ex rel. K.R. v. Maye*, 824 F. App'x 849, 854 (11th Cir. 2020); see Smith & Freyd, *Institutional Betrayal*, *supra* note 14, at 577, 579; *supra* note 32 and accompanying text.

217. See Smith & Freyd, *Insult, then Injury*, *supra* note 18, at 1126; *supra* text accompanying note 183.

218. See Smith & Freyd, *Insult, then Injury*, *supra* note 18, at 1126; *supra* note 187 and accompanying text.

219. See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005). Students sometimes bring retaliation claims based on schools' responses to their sexual harassment, including those responses that amount to institutional betrayals. See, e.g., *Saphir ex rel. Saphir v. Broward Cnty.*

Court first concluded that schools' retaliatory actions against reporters of sex discrimination constitute intentional sex discrimination over ten years ago in *Jackson v. Birmingham Board of Education*.²²⁰ In that case, a high school teacher alleged that the Birmingham Board of Education retaliated against him for complaining about sex discrimination in the Birmingham public schools' athletic programs.²²¹ The Court found that Title IX proscribes such actions, saying "[r]etaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action."²²² As much as this theory might seem capable of comprehending at least the institutional betrayals that occur when schools punish students following their reports of sexual harassment, the limitations embodied in the causal component of this theory and its evaluation framework leave it incapable of doing so.²²³ Thus, even when schools punish students following their reports of sexual harassment, those institutional betrayals do not violate Title IX's proscription on retaliation.²²⁴

Under the retaliation theory, any punitive response taken by a school against someone because they report sexual harassment is a form of sex discrimination.²²⁵ It does not matter whether the person who reports is also the subject of that sexual harassment.²²⁶ To that point, the Supreme Court said that "[w]here the retaliation occurs because the complainant speaks out about sex discrimination, the 'on the basis of sex' requirement [for sex discrimination under Title IX] is satisfied."²²⁷ This theory thus also locates sex discrimination in the causal connection between a report of sexual harassment and a harm imposed by the school because of the report, no matter who the reporter is.²²⁸

Beyond emphasizing the causal component of this form of sex discrimination, however, the Supreme Court did not provide a framework for its analysis.²²⁹ Lower courts have filled this doctrinal gap, developing largely

Pub. Schs., 744 F. App'x 634, 639-40 (11th Cir. 2018); *Gordon v. Traverse City Area Pub. Schs.*, 686 F. App'x 315, 316 (6th Cir. 2017).

220. *Jackson*, 544 U.S. at 171.

221. *Id.*

222. *Id.* at 173.

223. See, e.g., *Sanchez v. Brawley Elementary Sch. Dist.*, No. 14-cv-0564, 2016 WL 2997036, at *4 (S.D. Cal. May 25, 2016); *Saphir*, 744 F. App'x at 639; *Gordon*, 686 F. App'x at 319-21.

224. E.g., *Sanchez*, 2016 WL 2997036, at *2-4; *Saphir*, 744 F. App'x at 639; *Gordon*, 686 F. App'x at 319-22.

225. See *Jackson*, 544 U.S. at 173-74, 179.

226. In *Jackson*, the coach who experienced retaliation for reporting sexual harassment did not actually suffer any such harassment himself. *Id.* at 171.

227. *Id.* at 179.

228. See *id.*

229. See *id.* at 174 ("[W]hen a [school] retaliates against a person *because* he complains of sex discrimination, this constitutes intentional 'discrimination' 'on the basis of sex,' in violation of

similar frameworks for assessing Title IX claims of retaliation.²³⁰ Following the Court's lead, these frameworks seek a causal link between retaliation and reports of harassment.²³¹ They thus all call for courts to determine: (1) whether an individual reported harassment; (2) whether that individual suffered some adverse action following their report; and (3) the causal connection between the adverse action and their report.²³² An assessment of causal connection between the retaliation and the report of sex discrimination, thus, is critical to evaluation of this form of sex discrimination.²³³

This theory of retaliation as sex discrimination and the framework that the lower courts have developed for its assessment are no more adequate to the task of evaluating institutional betrayals as sex discrimination than the deliberate indifference theory. Both the theory and evaluation framework of Title IX retaliation claims allow courts to avoid finding that schools' institutional betrayals constitute retaliation-based sex discrimination.²³⁴ By focusing on the causal relationship between a report of sexual harassment and schools' adverse actions against the reporter allows courts to sidestep such findings in two ways.

First, when someone other than the student who was harassed reports the harassment, any subsequent institutional betrayals imposed by the school on the survivor cannot constitute retaliation since the survivor did not make the

Title IX."); *see also* *Bose v. Bea*, 947 F.3d 983, 988 (6th Cir. 2020) ("The Supreme Court's decision in *Jackson* did not spell out the elements of a Title IX retaliation claim, and no published case in this circuit has decided the question.").

230. *See, e.g.*, *Sanchez v. Brawley Elementary Sch. Dist.*, No. 14-cv-0564, 2016 WL 2997036, at *4 (S.D. Cal. May 25, 2016); *Saphir ex rel. Saphir v. Broward Cnty. Pub. Schs.*, 744 F. App'x 634, 639 (11th Cir. 2018); *Gordon v. Traverse City Area Pub. Schs.*, 686 F. App'x 315, 320 (6th Cir. 2017).

231. *See Sanchez*, 2016 WL 2997036, at *4; *Gordon*, 686 F. App'x at 320. Courts also draw on the elements of a Title VII sex discrimination in employment claims. *Bose*, 947 F.3d at 988 ("[W]e have analogized to Title VII retaliation claims, stating that a Title IX plaintiff must show 'that (1) [s]he engaged in protected activity, (2) [the funding recipient] knew of the protected activity, (3) [s]he suffered an adverse school-related action, and (4) a causal connection exists between the protected activity and the adverse action.'" (second, third, and fourth alteration in original)).

232. *See, e.g.*, *Saphir*, 744 F. App'x at 639 (explaining that to prevail on a claim of retaliation under Title IX, a plaintiff "must show that (1) he reported the harassment; (2) he suffered an adverse action; and (3) there is a causal connection between the two"); *Gordon*, 686 F. App'x at 320 ("To establish a prima facie case of retaliation, [a plaintiff] must show that (1) he engaged in protected activity, (2) [the school] knew of the protected activity, (3) he suffered an adverse school-related action, and (4) a causal connection exists between the protected activity and the adverse action."); *Sanchez*, 2016 WL 2997036, at *4 ("To claim retaliation under Title IX, a plaintiff must first establish a prima facie case by showing: (1) protected activity by the plaintiff; (2) adverse school-related action; and (3) a causal connection between the protected activity and the adverse action." (citing *Emeldi v. Univ. of Or.*, 698 F.3d 715, 724 (9th Cir. 2012))).

233. *See Jackson*, 544 U.S. at 179; *Sanchez*, 2016 WL 2997036, at *4; *Saphir*, 744 F. App'x at 639; *Gordon*, 686 F. App'x at 320.

234. *See, e.g.*, *Sanchez*, 2016 WL 2997036, at *4; *Gordon*, 686 F. App'x at 321–22; *infra* note 238 and accompanying text.

report.²³⁵ Second, even when students do report their own harassment and then suffer institutional betrayals, the retaliation theory and framework's insistence that the punitive response be causally connected to the report of harassment allows schools generous space to defend against any Title IX claim based on an institutional betrayal.²³⁶ That is, schools can simply assert a reason for those injurious responses other than the report of sexual harassment and so successfully defend against students' Title IX retaliation claims.²³⁷ For example, when schools punish students for their own sexual harassment and thereby subject them to institutional betrayals, courts find that schools imposed those punishments because the students violated school codes of conduct prohibiting sexual activity or physical altercations on campus, not because they reported their harassment.²³⁸ It does not matter whether the school's reason for punishing the survivor is pretextual.²³⁹ The retaliation theory and framework do not demand that courts uncover the real reasons for the schools' punitive responses.²⁴⁰ When schools point to a reason for their punitive responses to students' reports of their own sexual harassment, courts conclude that the schools have not violated Title IX's prohibition on sex discrimination by retaliation.²⁴¹ In this way, then, schools' institutional betrayals go unrecognized by the retaliation theory of Title IX sex discrimination.

C. THE INADEQUACIES OF THE QUID PRO QUO THEORY AND EVALUATION
FRAMEWORK

Although the Supreme Court has not yet had cause to consider whether quid pro quo sexual harassment constitutes sex discrimination under Title IX,

235. See *Jackson*, 544 U.S. at 179.

236. See, e.g., *Sanchez*, 2016 WL 2997036, at *1, *4; *Gordon*, 686 F. App'x at 323; *infra* note 238 and accompanying text.

237. E.g., *Sanchez*, 2016 WL 2997036, at *1-4; *Saphir*, 744 F. App'x at 639; *Gordon*, 686 F. App'x at 323.

238. See *Sanchez*, 2016 WL 2997036, at *2-4 (holding that a student's retaliation claim failed because she was punished for kneeling the boy who sexually assaulted her in response to her assault and not for reporting the assault). In cases like that of T.M.'s, the Gwinnett County student who was suspended for being sexually assaulted by another student on campus, schools can follow this theory of defense. See *Doe v. Gwinnett Cnty. Pub. Schs.*, No. 18-cv-05278, 2019 WL 12336248, at *1-2 (N.D. Ga. Aug. 22, 2019). Although T.M. alleged that she was retaliated against for reporting the harassment, the school can, and in T.M.'s case successfully did, defend against this claim by asserting that it suspended her not for reporting her sexual assault, but for violating the student code of conduct prohibiting sexual activity on campus. *Doe v. Gwinnett Cnty. Sch. Dist.*, No. 18-cv-05278, 2021 WL 4531082, at *15-18 (N.D. Ga. Sept. 1, 2021). Because this defense severs the causal connection between a report of harassment and the punishment received, it can and does succeed. See *id.*; *Sanchez*, 2016 WL 2997036, at *2-4; *Saphir*, 744 F. App'x at 639; *Gordon*, 686 F. App'x at 323.

239. See *Jackson*, 544 U.S. at 179; *Sanchez*, 2016 WL 2997036, at *2-3, *11; *Saphir*, 744 F. App'x at 639; *Gordon*, 686 F. App'x at 321-22.

240. See *Jackson*, 544 U.S. at 179; *Sanchez*, 2016 WL 2997036, at *4; *Saphir*, 744 F. App'x at 639; *Gordon*, 686 F. App'x at 320.

241. See, e.g., *Sanchez*, 2016 WL 2997036, at *4; *infra* note 292 and accompanying text.

lower courts have.²⁴² Drawing on Title VII doctrine, which prohibits sex discrimination in employment, lower courts have adopted quid pro quo sexual harassment as a theory of intentional sex discrimination in the Title IX context.²⁴³ Of the cognizable forms of sex discrimination under Title IX, this theory is the most inapt for evaluating institutional betrayals as intentional sex discrimination.²⁴⁴

The quid pro quo theory of sex discrimination understands intentional sex discrimination as a transactional affair.²⁴⁵ The sex discrimination occurs when an individual with some power over a student offers the student an educational benefit or penalty for submitting to, or not, respectively, sexual advances.²⁴⁶ Its evaluation framework thus seeks to uncover such exchanges.²⁴⁷ To prove quid pro quo sexual harassment, a student “must show (1) that [they] belong[] to a protected group; (2) that [they were] subject to unwelcome sexual harassment; (3) that the harassment was based on [their] sex; and (4) that a tangible educational action resulted from [their] refusal to submission to or rejection of the sexual harassment.”²⁴⁸

By every metric, then, quid pro quo discrimination is devoid of the ability to assess institutional betrayals as sex discrimination. To the extent the evaluation of quid pro quo sexual discrimination seeks to uncover a benefit offered or received as part of such transactions, it cannot identify institutional betrayals.²⁴⁹ Institutional betrayals exact harms, not benefits, upon survivors of sexual harassment.²⁵⁰ Even when quid pro quo sex discrimination results in a punitive outcome for students, though, this framework still cannot evaluate institutional betrayals as independent injuries that violate Title IX because they do not occur as the result of the kinds of transactional exchanges inherent to quid pro quo harassment.²⁵¹ Rather, they happen when students seek help from school staff following sexual harassment but do not receive

242. *E.g.*, *E.N. v. Susquehanna Twp. Sch. Dist.*, No. 09-cv-1727, 2010 WL 4853700, at *14 (M.D. Pa. Nov. 23, 2010); *Lam v. Curators of Univ. Mo., at Kan. City Dental Sch.*, 122 F.3d 654, 657 (8th Cir. 1997).

243. *E.g.*, *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 467 (8th Cir. 1996) (citing a Title VII case for the proposition that “[q]uid pro quo harassment arises when the receipt of benefits or the maintenance of the status quo is conditioned on acquiescence to sexual advances”); *E.N.*, 2010 WL 4853700, at *14; *Lam*, 122 F.3d at 657.

244. *See Kinman*, 94 F.3d at 467; *infra* note 251 and accompanying text.

245. *See E.N.*, 2010 WL 4853700, at *14; *Lam*, 122 F.3d. at 657.

246. *See E.N.*, 2010 WL 4853700, at *14; *Kinman*, 94 F.3d at 467 (“Quid pro quo harassment arises when the receipt of benefits or the maintenance of the status quo is conditioned on acquiescence to sexual advances.”).

247. *See Kinman*, 94 F.3d at 467; *E.N.*, 2010 WL 4853700, at *14.

248. *E.N.*, 2010 WL 4853700, at *14.

249. *See Kinman*, 94 F.3d at 467.

250. *See Smith & Freyd, Insult, then Injury, supra* note 18, at 1118; *see also generally supra* Section II.C (discussing institutional betrayals).

251. *See E.N.*, 2010 WL 4853700, at *14.

it.²⁵² This form of intentional sex discrimination by its own terms, therefore, cannot contemplate, let alone evaluate, institutional betrayals.

D. *THE DISTINCT EXIGENCIES ATTENDANT TO LEAVING K-12 STUDENTS WITHOUT RECOURSE IN TITLE IX FOR INSTITUTIONAL BETRAYALS*

The current incompetence of Title IX jurisprudence to acknowledge and remedy institutional betrayals as a form of sex discrimination is a particularly critical matter for students in the K-12 public schools. Studies show that the long-term harms caused by institutional betrayals are remarkably severe in children.²⁵³ Further, these harms can be even more severe for students of color, who experience sexual harassment in school at disproportionately high rates, because of their status as persons of color.²⁵⁴

Yet, these public school are also among the least able to address the harmful effects of those institutional betrayals.²⁵⁵ The mental health problems caused by institutional betrayals require treatment, including sometimes psychiatric hospitalization, that can be extremely costly.²⁵⁶ The majority of

252. See Smith et al., *supra* note 15, at 459; Reinhardt et al., *supra* note 16, at 65.

253. See Carr et al., *supra* note 14, at 487. This study of the harms of institutional abuse, or betrayals, suffered by children found that a staggering “81.78% of participants at some point in their lives had met the diagnostic criteria for an anxiety, mood, alcohol or substance use, or personality disorder.” *Id.*

254. See PATRICK & CHAUDHRY, *supra* note 42, at 2-3; *supra* note 43 and accompanying text; Gómez, *supra* note 17, at 131 (“[I]nstitutional betrayal may have exacerbated effects on Black Americans who experience microaggressions . . .” (citation omitted)).

255. See generally Naomi S. Bardach et al., *Common and Costly Hospitalizations for Pediatric Mental Health Disorders*, 133 PEDIATRICS 602 (2014) (analyzing costs for a variety of pediatric mental health hospitalizations); S. EDUC. FOUND., A NEW MAJORITY: LOW INCOME STUDENTS NOW A MAJORITY IN THE NATION’S PUBLIC SCHOOLS (2015), <https://www.southermeducation.org/wp-content/uploads/2019/02/New-Majority-Update-Bulletin.pdf> [<https://perma.cc/7EU3-AEQX>] (discussing the percentage of low income students in public schools); see *infra* notes 258-59 and accompanying text.

256. In 2016, the average cost of a pediatric hospitalization for mental health reasons was nearly \$6,000. Brian J. Moore, William J. Freeman & H. Joanna Jiang, *Costs of Pediatric Hospital Stays, 2016*, AGENCY FOR HEALTHCARE RSCH. & QUALITY (Aug. 2019), <https://www.hcup-us.ahrq.gov/reports/statbriefs/sb250-Pediatric-Stays-Costs-2016.jsp> [<https://perma.cc/7VCM-NHC3>]. The kinds of mental health disorders caused by institutional betrayals, including mood and personality disorders, are among the most costly of the pediatric mental health disorders requiring hospitalization. See Bardach et al., *supra* note 255, at 602 (“We identified the child mental health inpatient diagnoses with the highest frequency and highest costs as depression, bipolar disorder, and psychosis, with substance abuse an important comorbid diagnosis.”). The costs of obtaining mental health care to address the harms of institutional betrayals, therefore, can easily exceed the average cost of health care for children. Children with chronic health conditions and mental health disorders also have insurance payments that are three times the amount of payments for children with chronic health conditions without mental health disorders. James M. Perrin, Joan Rosenbaum Asarnow, Terry Stancin, Stephen P. Melek & Gregory K. Fritz, *Mental Health Conditions and Health Care Payments for Children with Chronic Medical Conditions*, 19 ACAD. PEDIATRICS 44, 48 (2019) (“This study shows that commercially insured children with chronic medical conditions who have co-existing mental health and substance use disorders have much higher health care paid claims than those with chronic medical conditions alone. Per-child

public school students, though, are low income.²⁵⁷ These students, by virtue of their low-income and otherwise marginalized status, are thus ill-equipped to manage these costs.²⁵⁸ Even if they have some form of insurance to help cover the costs of mental health treatment, additional barriers to treatment, including a dearth of available mental health providers, prevent the majority of children from obtaining needed mental health counseling.²⁵⁹

If these students could obtain treatment to address the harms wrought by schools' institutional betrayals, however, research suggests the treatment can successfully mitigate or resolve the severely harmful short- and long-term effects.²⁶⁰ Were Title IX to recognize institutional betrayals as sex discrimination

payments are approximately 3 times higher than payments for children who have a chronic medical condition but no MH/SUD.”).

257. In 2013–14, the most recent years for which data is available, more than half of the overall public-school population qualifies for free and reduced-price lunch. See NCES, *Table 204.10*, *supra* note 57; S. EDUC. FOUND., *supra* note 255, at 6. In order to qualify for free lunch, a student's family must be under 130 percent of the federal poverty level, and for reduced price lunch in school, a student's family income must be under either 185 percent of the federal poverty level. Child Nutrition Programs: Income Eligibility Guidelines, 85 Fed. Reg. 16050, 16051 (Mar. 20, 2020). For a family of four in most states, that means their income cannot exceed \$34,060 for their children to qualify for free lunch. See Annual Update of the HHS Poverty Guidelines, 85 Fed. Reg. 3060, 3060 (Jan. 17, 2020). Similarly, those same families' incomes cannot exceed \$48,470 for their children to qualify for reduced price lunch. See *id.*

258. See Child Nutrition Programs: Income Eligibility Guidelines, 85 Fed. Reg. at 16050–51. In addition to being more likely to experience sexual harassment in school, children of color make up a disproportionately high percentage of children in poverty. PATRICK & CHAUDHRY, *supra* note 42, at 3. According to the National Center for Childhood Poverty, in 2016, 34 percent of Black children and 28 percent of Latino children came from families in poverty. See HEATHER KOBALL & YANG JIANG, BASIC FACTS ABOUT LOW-INCOME CHILDREN: CHILDREN UNDER 18 YEARS, 2016, at 4 (2018), https://www.nccp.org/wp-content/uploads/2018/01/text_1194.pdf [<https://perma.cc/Z3GP-S5MV>].

259. Although low-income children may qualify for Medicaid, they still often cannot obtain mental health treatment. More than half of children and adolescents who need mental health treatment do not receive it for reasons including a lack of available mental health providers who accept Medicaid payments. See DAVID MURPHEY, BRIGITTE VAUGHN & MEGAN BARRY, ACCESS TO MENTAL HEALTH CARE 1 (2013), https://www.childtrends.org/wp-content/uploads/2013/04/Child_Trends-2013_01_01_AHH_MHAccess1.pdf [<https://perma.cc/49S6-M7GP>]; SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMIN., U.S. DEP'T OF HEALTH & HUM. SERV., REPORT TO CONGRESS ON THE NATION'S SUBSTANCE ABUSE AND MENTAL HEALTH WORKFORCE ISSUES 19–20 (2013), http://www.cimh.org/sites/main/files/file-attachments/samhsa_bhwork_o.pdf [<https://perma.cc/PM6D-gWJN>].

260. Therapy and social supports of all forms can help alleviate the effects of institutional betrayals. See, e.g., David M. Lawson & Sinem Akay-Sullivan, *Considerations of Dissociation, Betrayal Trauma, and Complex Trauma in the Treatment of Incest*, 29 J. CHILD SEXUAL ABUSE 677, 690 (2020) (describing successful treatments for survivors of “betrayal trauma, dissociation, and complex trauma” and noting “it is critical to help clients learn to better discern safe from unsafe people, due to their reduced ability to identify risks in social contexts”); Lindsey L. Monteith, Nazanin H. Bahraini, Bridget B. Matarazzo, Kelly A. Soberay & Carly Parnitzke Smith, *Perceptions of Institutional Betrayal Predict Suicidal Self-Directed Violence Among Veterans Exposed to Military Sexual Trauma*, 72 J. CLINICAL PSYCH. 743, 750 (2016) (noting in the context of military institutional betrayals that “social support is protective”). Even when the institution that caused the institutional betrayal then works to address the trauma in a productive way, it can ameliorate the

and remedy their added injuries, it could enable this treatment through the award of monetary damages.²⁶¹ Instead, Title IX's failure to capture these injuries leaves students to deal with these harms on their own.²⁶²

IV. RECOGNIZING INSTITUTIONAL BETRAYALS AS SEX DISCRIMINATION

Although Title IX's central purpose is to protect students from sex discrimination in the public schools, only three judicially developed forms of sex discrimination currently exist under it.²⁶³ The law's protective capacity thus has significant limits.²⁶⁴ If the statutory language of Title IX cabined its reach such that its jurisprudence could only comprehend three limited forms of sex discrimination, then the present incapacity of Title IX jurisprudence to designate institutional betrayals as sex discrimination might be understandable, if tragic.²⁶⁵ Title IX's language, however, contains no such limitations.²⁶⁶ Its proscription on sex discrimination is expansive.²⁶⁷ Title IX prohibits public schools from subjecting any person to discrimination "on the basis of sex" without limitation.²⁶⁸ The Supreme Court has therefore repeatedly said that courts' interpretations of "Title IX should be accorded 'a sweep as broad as its language.'"²⁶⁹

effects of the institutional betrayal. Jennifer J. Freyd, *Preventing Betrayal*, 14 J. TRAUMA & DISSOCIATION 495, 498 (2013).

261. *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 75–76 (1992) (concluding that damages are available to enforce Title IX and rejecting that equitable relief was more appropriate, stating "it is axiomatic that a court should determine the adequacy of a remedy in law before resorting to equitable relief. . . . Moreover, in this case the equitable remedies suggested by respondent and the Federal Government are clearly inadequate," because neither the perpetrator of the harassment nor the student survivor attend the school anymore and "prospective relief accords [the survivor] no remedy at all").

262. See *supra* Sections III.A–C.

263. See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979); *supra* note 28 and accompanying text; *supra* Sections III.A–C. Students can at least theoretically assert claims of discrimination through Title IX's public enforcement scheme by way of a complaint to the United States Department of Education's Office of Civil Rights based on allegations that do not fit into one of these three judicially recognized forms of discrimination, such as sex discrimination in athletic programs. See 34 C.F.R. § 106.44 (2020). In that system, however, students cannot get money damages. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 288–89 (1998) (explaining that the Title IX regulations laying out its public enforcement system "do not appear to contemplate . . . ordering payment [by schools] of monetary damages"). To receive an award of damages, students have to bring claims through Title IX's private enforcement mechanism in the courts. See *Franklin*, 503 U.S. at 76. The only original Title IX claims they can bring for damages, then, are claims for sex discrimination based on deliberate indifference, retaliation, or quid pro quo harassment. See *supra* Sections III.A–C.

264. See *supra* Sections III.A–C.

265. See *supra* Sections III.A–C.

266. See 20 U.S.C. § 1681 (2018).

267. See *id.*; *Gebser*, 524 U.S. at 284, 296; *infra* note 316 and accompanying text.

268. 20 U.S.C. § 1681.

269. *Gebser*, 524 U.S. at 296 (Stevens, J., dissenting) (quoting *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982)). The Court further said:

Title IX's failure to recognize the institutional betrayals that follow sexual harassment as a form sex discrimination, then, is a jurisprudential problem, not a statutory one.²⁷⁰ Title IX can admit to other forms of intentional discrimination beyond the three narrow forms already cognizable under it.²⁷¹ Courts, therefore, can and should recognize institutional betrayals as a new form of intentional sex discrimination under Title IX and remedy them.²⁷² Courts should acknowledge that because institutional betrayals constitute injuries knowingly imposed by schools because of a student's status as a survivor of sexual harassment, they are a type of sex discrimination.²⁷³

Recognizing institutional betrayals as sex discrimination in this way would require courts to account for the body of empirical research demonstrating that institutional betrayals following sex discrimination constitute unique injuries.²⁷⁴ Decades have passed since the Supreme Court and lower courts adopted the three extant types of Title IX sex discrimination, and in that time this research in psychology has significantly advanced understandings about the gravity of the injuries that schools and other institutions impose in response to sexual harassment.²⁷⁵ Title IX jurisprudence should incorporate these developments. It should understand that when schools locate the problem of sexual harassment in the behavior of the survivor, they knowingly risk or cause students an injury.²⁷⁶ That is, they risk or cause institutional betrayals.²⁷⁷

Distinguishing institutional betrayals as sex discrimination in this way would require expanding the current meaning of discrimination "on the basis of sex" under Title IX. It would require understanding such discrimination as

That sweep is broad indeed. "No person . . . shall, on the basis of sex, . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ." As Judge Rovner has correctly observed, the use of passive verbs in Title IX, focusing on the victim of the discrimination rather than the particular wrongdoer, gives this statute broader coverage than Title VII.

Id. (quoting 20 U.S.C. § 1681(a)). Further, the Court has noted that courts have latitude in finding private rights of action for enforcing this wide-ranging prohibition on sex discrimination. *Id.* at 284 (majority opinion) ("Because the private right of action under Title IX is judicially implied, we have a measure of latitude to shape a sensible remedial scheme that best comports with the statute.").

270. See *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 645 (1999); *Gebser*, 524 U.S. at 284; *infra* note 316 and accompanying text.

271. See *Davis*, 526 U.S. at 645; *Gebser*, 524 U.S. at 284; *infra* note 316 and accompanying text.

272. See *infra* Section IV.A.2.

273. *Infra* Section IV.A.

274. See, e.g., Smith & Freyd, *Institutional Betrayal*, *supra* note 14, at 577–78; see Smith & Freyd, *Insult, then Injury*, *supra* note 18, at 1121; Carr et al., *supra* note 14, at 487; Jacoby et al., *supra* note 57, at 264; Gómez, *supra* note 95, at 324; Keng et al., *supra* note 97, at 300.

275. See *Gebser*, 524 U.S. at 277; *Davis*, 526 U.S. at 633; *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 184 (2005).

276. See *supra* Section II.A.

277. See *supra* Section II.A.

occurring not just because of an individual's gender status but, more precisely, because of an individual's status as a survivor of sexual harassment.²⁷⁸ By acknowledging this unique subcategory of gender status, courts could no longer overlook the injuries schools impose because of it.²⁷⁹ Courts could not avoid evaluating institutional betrayals as sex discrimination.²⁸⁰ The theoretical foundations of the deliberate indifference and retaliation forms of sex discrimination, which in application now preclude courts from contemplating institutional betrayals as sex discrimination with their focus on schools' actions that perpetuate prior harassment and penalize individuals for reporting it, respectively, justify this revised understanding.²⁸¹

Although this proposal recommends designating a new form of sex discrimination under Title IX, it still does not amount to a radical approach to reform.²⁸² Rather than calling for a wholesale reworking of Title IX's statutory provisions, it proposes extending the statute's interpretation in ways that find footing in current Title IX jurisprudence. Modest or not, though, both the developed research on the significance of the harms students suffer from schools' institutional betrayals and Title IX's current failure to classify these injuries as sex discrimination demand this change.²⁸³ Although these proposals could apply in both the K-12 and the higher education context, the focus here is on the K-12 population because of the exigencies attendant to the institutional betrayals experienced by that population.²⁸⁴

This proposal to recognize institutional betrayals as a new form of intentional sex discrimination under Title IX is, of course, not unsusceptible to critique. Several critiques can be leveled at the recommendations made here.²⁸⁵ I address these critiques in the final subsection below.

A. INSTITUTIONAL BETRAYAL AS SEX DISCRIMINATION

As broad as Title IX's proscription on sex discrimination in public education is, any new theory of sex discrimination must still fit within its basic parameters. At the risk of stating the obvious, it must involve not just

278. See *infra* Section IV.A.2.

279. See *infra* Sections IV.A-C.

280. See *infra* Section IV.A.2.

281. See *supra* Sections III.A-B.

282. It could also be argued that this approach, however, is also not radical enough because it does not propose reforming the conceptualization of sex discrimination in a broader way. See *infra* Section IV.D.

283. See *supra* Sections II.C, III.D.

284. See *supra* Section III.D. The relative lack of protections afforded K-12 public school students under Title IX and other law as compared to college and university students warrants exploration. See 20 U.S.C. § 1092(f) (2018). To do such an exploration justice, it is more properly left for another article.

285. See *infra* Section IV.D.

discrimination, but also intentional discrimination on the basis of sex.²⁸⁶ The Supreme Court has recognized that both individual gender status-based discrimination and discrimination that furthers structures of gender discrimination constitute discrimination “on the basis of sex” under Title IX.²⁸⁷ New theories of sex discrimination can therefore be either.²⁸⁸ Drawing on the theoretical underpinnings of the recognized forms of sex discrimination to extend the meaning of “on the basis of sex,” institutional betrayals are both.²⁸⁹

1. The Existing Theoretical Foundations of Intentional Sex Discrimination Under Title IX

The Supreme Court has not theorized at great length about why a school’s deliberate indifference to sexual harassment or its retaliation for such harassment constitutes discrimination that both is intentional and based on sex.²⁹⁰ The general theoretical foundations the Court has staked out, however, establish capacious bounds for what it means to intentionally discriminate on the basis of sex under Title IX.²⁹¹ First, both of these forms of

286. See *infra* Section IV.A.1. Recognizing any form of sex discrimination as intentional sex discrimination is critical. Only when schools intentionally discriminate on the basis of sex can survivors recover in damages. See, e.g., *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 641–42 (1999) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981) (citations omitted)) (“We recognized [in our prior Title IX decisions] that the scope of liability in private damages actions under Title IX is circumscribed by *Pennhurst’s* requirement that funding recipients have notice of their potential liability. . . . We also recognized, however, that this limitation on private damages actions is not a bar to liability where a funding recipient intentionally violates the statute.”).

287. See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) (“[Retaliation] is a form of ‘discrimination’ because the complainant is being subjected to differential treatment.”); *Davis*, 526 U.S. at 650 (“The statute makes clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender.”).

288. See *infra* Section IV.A.2. Of course, new theories of sex discrimination arguably could be something else entirely without regard for, or any basis in, current theories of sex discrimination under Title IX. See, e.g., Noah D. Zatz, *Managing the Macaw: Third-party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1362 (2009); *infra* notes 316–31 and accompanying text.

289. *Infra* Section IV.A.2.

290. See *Davis*, 526 U.S. at 645–49; *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 281 (1998); *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 74–75 (1992); *Jackson*, 544 U.S. at 173–74; Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 51 (2005). Expanding on this lack of direction, Deborah Brake has noted:

The *Jackson* Court’s “failure to engage or acknowledge the distance between retaliation for a person’s actions and the dominant status-based framework of intentional discrimination, the *Jackson* decision is remarkably undertheorized. Neither the *Jackson* majority nor lower court decisions recognizing an implied right of action for retaliation have satisfactorily explained why retaliation counts as a form of intentional discrimination based on protected class status.

Id.

291. See *supra* Sections III.A–.B.

recognized sex discrimination consider schools' knowingly injurious conduct to be intentionally discriminatory treatment.²⁹² Second, the Court has explained such conduct as discriminating on the basis of sex when it occurs because of an individual's gender status or when it perpetuates systems that allow for gender-based harm.²⁹³

Both the Supreme Court's Title IX deliberate indifference and retaliation schemes establish that when a school knowingly injures an individual, it intentionally discriminates.²⁹⁴ In *Davis v. Monroe County Board of Education*, the Court concluded "that a [school] intentionally violates Title IX . . . where the [school] is deliberately indifferent to known acts of [sexual harassment,]" and "their own deliberate indifference effectively 'cause[d]' the discrimination" or risked it by "'mak[ing students] liable or vulnerable' to it."²⁹⁵ Schools' actions thus amount to intentional discrimination when they

292. See *Davis*, 526 U.S. at 643; *Gebser*, 524 U.S. at 281; *Franklin*, 503 U.S. at 74-75; *Jackson*, 544 U.S. at 173-74. Such knowingly injurious conduct will not always amount to unlawful discrimination. It might amount to morally and socially repugnant intentional injuries, but if it does not occur on the basis of some protected status, then it is not unlawful discrimination. See Brake, *supra* note 290, at 48. Take, for example, a scenario in which one student persistently makes fun of another student based on her weight. The school has full knowledge of it. Teachers and staff not only act indifferently to this harmful behavior, but they also encourage it. These actions by the school would be knowingly injurious and so intentionally discriminatory. Because they do not occur on the basis of sex (or any other protected legal status), they are not unlawful sex discrimination.

293. See *Gebser*, 524 U.S. at 275; *Jackson*, 544 U.S. at 179; Brake, *supra* note 290, at 59; *infra* note 325 and accompanying text.

294. See *Jackson*, 544 U.S. at 173-74; *Davis*, 526 U.S. at 643. Scholars have debated the meaning of the Supreme Court's explanations of intentional discrimination in its Title IX decisions, but they generally agree that Title IX does not demand a subjective intent to discriminate on the part of schools. See Brake, *supra* note 32, at 18 (explaining intent in the context of a Title IX deliberate indifference claims is not about "a specific state of mind or an intent to violate the rights of others"). Deborah Brake has contended that the Court transformed the intentionality requirement into a causation requirement. *Id.* at 7 ("The *Davis* Court adopted a broad understanding of discrimination, one focused not on intent but causation, and a broad view of causation at that."). Derek Black has argued that the Court expanded the meaning of "intentionality" with its Title IX cases. Derek W. Black, *The Mysteriously Reappearing Cause of Action: The Court's Expanded Concept of Intentional Gender and Race Discrimination in Federally Funded Programs*, 67 MD. L. REV. 358, 379 (2008) ("The *Gebser* line of cases demonstrates that the statutory bar of discrimination in federally funded programs—which the Court has interpreted to mean 'intentional' discrimination—also prohibits volitional actions that effectively perpetuate discrimination, undermine congressional intent, or subject individuals to inequality.").

295. *Davis*, 526 U.S. at 642-43, 645 (fourth alteration in original) (first quoting *Gebser*, 524 U.S. at 291; and then quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1415 (1966)). In *Davis*, the Court adopted its rationale in *Gebser v. Lago Vista Independent School District* in finding the school could be liable under Title IX for a teacher's sexual harassment of a student. *Id.* at 643 ("We consider here whether the misconduct identified in *Gebser*—deliberate indifference to known acts of harassment—amounts to an intentional violation of Title IX, capable of supporting a private damages action, when the harasser is a student rather than a teacher. . . . [I]n certain limited circumstances, it does."). See also Suski, *supra* note 32, at 2290 (explaining that deliberate indifference embraces both a causal and a risk component).

knowingly, or deliberately, injure a student in this way.²⁹⁶ In *Jackson v. Birmingham Board of Education*, the Court was no less insistent that a school intentionally discriminates when it knowingly injures a person.²⁹⁷ In this discrimination construct, however, the injury happens because a school's punitive response to a report of sexual harassment is inherently knowingly made.²⁹⁸ The Court said retaliation is a knowing injury "because it is an intentional response to the nature of the complaint: an allegation of sex discrimination."²⁹⁹

The Supreme Court has also described this knowingly injurious conduct as occurring on the basis of sex because it is rooted either in an individual's gender status or in systems that enable individual gender status-based harms.³⁰⁰ In *Gebser v. Lago Vista Independent School District*, the Court identified a student's individual gender status as the basis for the discrimination and therefore Title IX's protection against it.³⁰¹ To do so, it relied on its Title VII cases prohibiting sexual harassment in employment to conclude that a school's deliberate indifference to a teacher's sexual harassment of a student constitutes discrimination on the basis of sex.³⁰² It said "Title IX placed on the . . . Public Schools the duty not to discriminate on the basis of sex, and 'when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis of sex.' We

296. *Davis*, 526 U.S. at 642–43 ("By employing the 'deliberate indifference' theory already used to establish municipal liability . . . we concluded in *Gebser* that recipients could be liable in damages only where their own deliberate indifference effectively 'cause[d]' the discrimination." (alteration in original) (citation omitted) (quoting *Gebser*, 524 U.S. at 291)).

297. See *Jackson*, 544 U.S. at 173–74, 179.

298. See *id.*

299. *Id.* at 174. The debate about whether the Supreme Court's Title IX deliberate indifference jurisprudence expanded the meaning of intent or transformed it into a causal standard, see *supra* note 294 and accompanying text, could also be answered by an analogy on to the Title VII "membership causation" model of discrimination theorized by Noah Zatz. See Zatz, *supra* note 288, at 1362. Zatz has argued that the common thread between disparate treatment and discrimination in the Title VII context is that "both accomplish a single end: preventing membership causation." *Id.* Zatz defines this as:

[W]hen an employee suffers workplace harm due to her membership in a protected class. . . . In a disparate treatment case, the employer decides to impose (or not to prevent) workplace harm based on whether the worker belongs to one group or another. In such cases, the employee's protected class membership plays a causal role within the employer's decisionmaking process. . . . [So] membership causation . . . is equivalent to what ordinarily is termed "discriminatory intent."

Id. Similarly, a school's indifference to a student's individual status as a member of a protected gender class causes the discrimination and substitutes for or, as Zatz would say, is equivalent to discriminatory intent in other discrimination contexts. See *id.*

300. *Jackson*, 544 U.S. at 174, 179; *Gebser*, 524 U.S. at 282–83.

301. See *Gebser*, 524 U.S. at 281–83 (citing *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992)).

302. See *id.* (citing *Franklin*, 503 U.S. at 75).

believe the same rule should apply when a teacher sexually harasses and abuses a student.”³⁰³

In contrast, in *Jackson*, the Supreme Court did not center its reasoning on an individual’s gender status when it found that retaliation for reporting sex discrimination is also discrimination “on the basis of sex.”³⁰⁴ Rather, the Court concluded that schools discriminate on the basis of sex for retaliating against reporters of sexual harassment regardless of whether the reporter personally suffered any harm based on their individual gender status.³⁰⁵ The Court said that “[Title IX] does not require that the victim of the retaliation must also be the victim of the discrimination that is the subject of the original complaint.”³⁰⁶ These retaliatory harms constitute discrimination on the basis of sex instead because they perpetuate systems that allow sex discrimination to occur.³⁰⁷ As Deborah Brake has explained in unpacking this theory of retaliation as discrimination, “[t]he touchstone of the retaliation claim . . . is that the complainant was retaliated against for his or her actions opposing discrimination.”³⁰⁸ The retaliation operates as a system-level tool for quashing that opposition and, in turn, reinforcing the discrimination.³⁰⁹ In *Jackson*, then, the Court thus adopts a theory of sex discrimination that proscribes injuries that structurally enable sex discrimination.³¹⁰

303. *Gebser*, 524 U.S. at 281 (alteration in original) (citation omitted) (first quoting *Franklin*, 503 U.S. at 75; and then quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)). The Court went on, saying that statement “was made with regard to the general proposition that sexual harassment can constitute discrimination on the basis of sex under Title IX” *Gebser*, 524 U.S. at 283.

304. *See Jackson*, 544 U.S. at 173–74 (“Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX’s private cause of action.”).

305. *See id.* at 179; Brake, *supra* note 290, at 51, 59 (“The Court’s primary, if not fully articulated, rationale for situating retaliation under the intentional discrimination umbrella rests on the premise that opposition to intentional discrimination triggered the retaliation.”).

306. *Jackson*, 544 U.S. at 179. The Court said that “[i]f the statute provided instead that ‘no person shall be subjected to discrimination on the basis of *such individual’s* sex,’” then the Court would demand that the person retaliated against for reporting harassment also be the subject of the harassment. *Id.* *See also* Brake, *supra* note 290, at 51 (noting that the majority opinion in *Jackson* “repeatedly and insistently assert[ed] that retaliation for complaining about sex discrimination is a form of intentional discrimination on the basis of sex”).

307. Brake, *supra* note 290, at 59. As Brake has also pointed out, though, the Court did not thoroughly flesh out this theory. *Id.* She notes that “the majority opinion in *Jackson* . . . [never] fully engaged the complexity of situating retaliation as a form of intentional discrimination.” *Id.* She argues that the Court’s move to prohibit structural sex discrimination in this way, however, under-theorized as it is, “pushes the boundaries of . . . discrimination law in productive ways, both in terms of the scope of the antidiscrimination project and the values underlying discrimination law.” *Id.* at 42.

308. *Id.* at 48.

309. *Id.* at 41 (“Retaliation . . . serves as a mechanism to maintain hierarchies within institutions and restore the social norms that are challenged by claims of wrongdoing. . . . [R]etaliation is a product of an organization’s existing climate and structures.”).

310. *See Jackson*, 544 U.S. at 174, 179; Brake, *supra* note 290, at 41.

2. Theorizing Institutional Betrayals as Intentional Discrimination on the Basis of Sex Under Title IX

Although the Supreme Court has conceptualized expansively the fundamental elements of Title IX sex discrimination in these ways, the three cognizable forms of sex discrimination it currently supports are narrowly drawn.³¹¹ These recognized forms of sex discrimination thus are almost entirely incapable of understanding institutional betrayals as sex discrimination.³¹² Extending the meaning of what constitutes discrimination on the basis of sex would correct this failure of Title IX jurisprudence. To that end, courts should deem schools' responses to student sexual harassment that knowingly injure a student because of the student's status as a survivor of sexual harassment as intentional sex discrimination that violates Title IX. More specifically, such responses knowingly injure and therefore constitute intentional sex discrimination because they betray a student's trust or dependency and identify the student's behavior as the problem.³¹³ Understanding discrimination that occurs on the basis of sex in this more specific way, courts could not avoid finding that institutional betrayals constitute intentional sex discrimination in violation of Title IX.³¹⁴

Significantly, the Supreme Court has already acknowledged that Title IX jurisprudence has room for expansion. The Court has said the forms of sex discrimination Title IX now comprehends do not comprise the outer limits of Title IX's protections.³¹⁵ It has explained that "[b]ecause Congress did not list *any* specific discriminatory practices when it wrote Title IX, its failure to mention one such practice does not tell us anything about whether it intended that practice to be covered."³¹⁶ Space thus exists for courts to comprehend intentional discrimination "on the basis of sex" under Title IX more comprehensively than they currently do.³¹⁷ Courts should consequently extend the understanding of discrimination on the basis of sex under Title IX such that they can effectively recognize institutional betrayals as sex discrimination.

Although designating institutional betrayals as sex discrimination requires broadening the current meaning of what constitutes discrimination "on the basis of sex" under Title IX, it does not require adjusting Title IX's

311. See *supra* Sections III.A–C.

312. See *supra* Sections III.A–C.

313. See *supra* Section II.A.

314. See *supra* Part IV.

315. See *Jackson*, 544 U.S. at 174–75; *infra* note 316 and accompanying text.

316. *Jackson*, 544 U.S. at 175. The Court repeatedly emphasized the wide scope of Title IX's protections in *Jackson*. It also said as it compares to Title VII. "Title IX, which, subject to a list of narrow exceptions not at issue here, broadly prohibits a funding recipient from subjecting any person to 'discrimination' 'on the basis of sex.'" *Id.* at 173.

317. See *id.* at 175; see also Brake, *supra* note 290, at 59 (noting "the malleability of intentional discrimination in legal discourse").

present theories regarding what amounts to intentionally discriminatory conduct.³¹⁸ Institutional betrayals already fit within the auspices of Title IX's conception of intentional discrimination for two reasons.³¹⁹ First, when schools punish and blame survivors of sexual harassment and immediately discredit them, they do not act inadvertently.³²⁰ Even when schools express disbelief of students' sexual harassment, their responses by nature necessitate an intentional action—that is, the expression itself cannot happen without some intent to act.³²¹ All such acts by schools thus are inherently “intentional responses” to gender-based complaints of the type that the Supreme Court has already determined to be sufficient to establish intentional discrimination under its retaliation theory of Title IX liability.³²² Second, because the empirical literature and guidance on institutional betrayals specifically and trauma responses generally is broad and widely available, when schools respond to student sexual harassment in ways that locate the problem of sexual harassment in the survivors' behavior, schools can readily be deemed to have knowingly risked or caused injury in the form of institutional betrayals.³²³

Title IX jurisprudence's present conceptualizations of discrimination “on the basis of sex,” however, do need to be adjusted to include a more specific understanding of gender status-based discrimination than it currently contemplates.³²⁴ More specifically, courts need to recognize the harms that schools impose because of an individual's status as a survivor of sexual harassment as discrimination on the basis of sex. Extant Title IX theory, however, does not need to be stretched far for courts to embrace this more precise gender status-based category. Institutional betrayals following sexual harassment are inherently gender-based because they would not happen

318. See *supra* notes 292, 294–95, 299 and accompanying text.

319. See *infra* notes 320–23 and accompanying text.

320. See, e.g., *Stiles ex rel. D.S. v. Grainger Cnty.*, 819 F.3d 834, 844 (6th Cir. 2016) (noting that the school resource officer threatened to put student D.S. in jail if he was concocting tales of his multi-year experiences with harassment); *K.S. v. Nw. Indep. Sch. Dist.*, 689 F. App'x 780, 782 (5th Cir. 2017) (detailing student K.S.'s suspension following his harassment); *KF ex rel. CF v. Monroe Woodbury Cent. Sch. Dist.*, 531 F. App'x 132, 133 (2d Cir. 2013) (describing the circumstances of a school referral for student CF to attend a disciplinary alternative school following her harassment, effectively punishing her). While these acts may sometimes implicitly punish, the acts themselves, including sending students to alternative disciplinary placements, are intrinsically intentional. See *CF*, 531 F. App'x at 133. Even communicating disbelief automatically or by default is still a necessarily intentional act in much the same way that retaliation is because, as the Supreme Court said, such acts are “intentional response[s] to the nature of the [sexual harassment] complaint.” *Jackson*, 544 U.S. at 174.

321. *Jackson*, 544 U.S. at 174.

322. *Id.*

323. See *Jacoby et al.*, *supra* note 57, at 264; *Gómez*, *supra* note 95, at 324; *Minahan*, *supra* note 105, at 31–35; *Venet*, *supra* note 105; *Support for Students Exposed to Trauma*, *supra* note 105.

324. See *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 75 (1992); *supra* note 299 and accompanying text.

absent the gender status-based harm of sexual harassment.³²⁵ Institutional betrayals, therefore, constitute a particular subcategory of gender status-based harms.³²⁶ If harming individuals because of their gender status constitutes an injury based on sex, then it follows that harming them because of their consequent status as survivors of such gender-based harm is also an injury based on sex.³²⁷ By embracing this particular subcategory of gender status, courts can evaluate institutional betrayals as intentionally injurious conduct that occurs on the basis of sex.³²⁸ That is, they can recognize institutional betrayals as sex discrimination under Title IX.³²⁹

Recognizing institutional betrayals as discrimination in this way would also allow courts to denote institutional betrayals as a form of structural sex discrimination.³³⁰ When schools impose institutional betrayals by punishing, blaming, or disbelieving by default a survivor of sexual harassment, they train their attention on survivors' roles in their own sexual harassment, to the partial or total exclusion of focusing on the causes of that harassment.³³¹ Thus,

325. See Smith & Freyd, *Insult, then Injury*, *supra* note 18, at 1118. Gender-based harm, including sexual harassment, injures because, among other things, it reinforces gender hierarchies. See Brian Soucek & Vicki Schultz, *Sexual Harassment by Any Other Name*, 2019 U. CHI. LEGAL F. 227, 232 (“[S]exual harassment law should aim at gender hierarchy, not sexuality alone.”); see also Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1762 (1998) (“The definition of a hostile work environment should be broadened to cover all conduct that is rooted in gender-based expectations—not simply conduct that is sexual in nature.”); Brake, *supra* note 290, at 51; *infra* text accompanying notes 334–37 (discussing how unpunished institutional betrayal can reinforce gender-based hierarchies).

326. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 281 (1998) (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)).

327. See *id.*

328. See *id.*; Brake, *supra* note 290, at 48; *infra* text accompanying notes 334–37.

329. Democratic theory also supports this notion of protecting students from institutional betrayals as sex discrimination. Some scholars of democratic theory recognize that when vulnerable populations cannot exit a context, government protections of those populations should strengthen. See, e.g., Ian Shapiro, *On Non-Domination*, 62 U. TORONTO L.J. 293, 333 (2012) (“[T]here is a trade-off between the importance of enhancing democratic voice and that of reducing the costs of exit for the vulnerable. In employment relations, for instance, I argue that where exit costs for the vulnerable are high due to the lack of a robust social wage, then government should insist on more voice within the firm: stronger safeguards for unions and other protections for workers.”). Students in school have no exit strategy. They are legally required to attend school. See *Table 5.1*, *supra* note 98. Therefore, under this vision of democratic theory, they are particularly vulnerable to harms imposed by schools and deserve strong protections from them.

330. See *infra* text accompanying notes 334–39.

331. For example, in *K.S. v. Northwest Independent School District*, student K.S. was suspended for defending himself against sexual harassment by another student, but the “record is unclear whether and to what extent the other student was disciplined.” *K.S. v. Nw. Indep. Sch. Dist.*, 689 F. App'x 780, 782 (5th Cir. 2017). Similarly, in *Rost v. Steamboat Springs*, student K.C. was sexually assaulted by students at her school. Although the school subjected K.C. to hours of questioning about the incident, it neither questioned her assailants nor punished them. *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1123 (10th Cir. 2008). Consequently, K.C. did not return to school, and, as the dissent notes, “[t]he record suggests that it was the

the very systems that should protect students instead allow their sexual harassment, not to mention any additional institutional betrayals, to continue virtually unimpeded.³³² Schools' institutional betrayals, then, advance sex discrimination on a structural, as well as an individual, level.³³³

One could reasonably question whether separating an individual's status as a survivor of sexual harassment from the individual's more general gender status makes a distinction without a difference. If this distinction made no difference to students' claims of sex discrimination, though, then current Title IX theory and doctrine should have already recognized institutional betrayals and the injuries they cause because a student has suffered sexual harassment as discrimination based on an individual's gender status.³³⁴ However, it has not.³³⁵ Eliding the distinctions between gender status generally and an individual's status as a survivor of gender-based harm specifically, courts recognize only three narrow forms of sex discrimination and therefore routinely find students' claims based on institutional betrayals do not amount to sex discrimination.³³⁶ They thus allow schools to impose institutional betrayals without transgressing Title IX.³³⁷ These distinctions between the harm students suffer because of their student gender status, including sexual harassment, and the harm they suffer because they are survivors of sexual harassment are, therefore, necessary. Recognizing these distinctions, courts will no longer be able to overlook the unique added injuries schools impose on students in the forms of institutional betrayals.³³⁸ By recognizing these injuries, Title IX can then provide students remedies for them.³³⁹

B. A FRAMEWORK FOR ANALYZING INSTITUTIONAL BETRAYALS AS SEX
DISCRIMINATION

Theorizing institutional betrayals as a form of sex discrimination and evaluating them as such are of course two different matters. A framework for assessing institutional betrayals as sex discrimination therefore is required. This framework should understand that schools intentionally discriminate against students when they know about their sexual harassment and then

undeterred presence of the boys that kept K.C. from returning to school." *Id.* at 1131 (McConnell, J., dissenting).

332. See, e.g., *Rost*, 511 F.3d at 1131 (McConnell, J., dissenting); *supra* note 331 and accompanying text.

333. See, e.g., *Rost*, 511 F.3d at 1131 (McConnell, J., dissenting); *K.S.*, 689 F. App'x at 782; *supra* note 331 and accompanying text.

334. See Smith & Freyd, *Institutional Betrayal*, *supra* note 14, at 577; Smith et al., *supra* note 15, at 459.

335. See *supra* Sections II.A–C, III.A–C.

336. See *supra* Sections III.A–C.

337. See *supra* Sections II.C, III.A–C.

338. See *infra* Section IV.C.

339. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 288–89 (1998); *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 75–76 (1992); *supra* note 286 and accompanying text.

injure them by unjustifiably treating the problem as having to do with the survivor's behavior. Such responses betray students' dependency on schools for help in the face of their harassment.³⁴⁰

However, such injuries do not occur simply because a school responds to student sexual harassment by, for example, investigating a report. The fact that a school conducted such an investigation does not constitute an institutional betrayal.³⁴¹ When investigations and other schools' responses to student sexual harassment unjustifiably focus on survivors' role in their harassment, however, they do.³⁴²

Courts, therefore, need to make this distinction. To that end, courts first must determine if schools have some knowledge of a student's sexual harassment. Second, courts should assess whether schools focused their responses on the survivor's behavior without reasonable justification. Third, courts must find that the institutional betrayals caused discernible harm.

This framework and its elements allow courts to distinguish between schools' responses that constitute institutional betrayals and their necessary investigations into and their inadequate responses to student sexual harassment. In addition, this evaluation framework has the capacity to disaggregate procedural and substantive institutional betrayals. While both forms cause substantive harm, including depression, anxiety, and suicidality, distinguishing them as procedural or substantive singles them out and prevents courts from failing to perceive them.³⁴³

1. Knowledge of the Sexual Harassment

First, this framework should require that courts determine whether a school has some knowledge of a student's sexual harassment. Absent some knowledge of a student's sexual harassment, a school cannot impose an institutional betrayal.³⁴⁴ Institutional betrayals necessarily occur as a response to harassment or other trauma.³⁴⁵ Thus, courts should inquire into whether a student has reported some sexual harassment or schools have otherwise learned about a student's sexual harassment. Because some knowledge of sexual harassment is sufficient to trigger a response that causes institutional

340. See Smith & Freyd, *Institutional Betrayal*, *supra* note 14, at 577; Smith et al., *supra* note 15, at 459.

341. See Smith & Freyd, *Institutional Betrayal*, *supra* note 14, at 577–78; Smith et al., *supra* note 15, at 459–60.

342. See Smith & Freyd, *Institutional Betrayal*, *supra* note 14, at 577–79; Smith et al., *supra* note 15, at 459–61.

343. See *supra* Section II.C.

344. Institutional betrayal occurs as a function of a school's response to sexual harassment and so follows knowledge of the harassment. See Smith & Freyd, *Dangerous Safe Havens*, *supra* note 20, at 123 (“[B]etrayal necessarily occur[s] apart from the sexual assault itself . . . in events . . . following it.”).

345. See *id.*

betrayals, courts need not look for actual knowledge or any other heightened standard of knowing.³⁴⁶

Further, courts do not need to interrogate whether students have in fact suffered sexual harassment in violation of Title IX to evaluate for institutional betrayals. They happen because of a survivor's subjective experience of sexual harassment, not because it legally constitutes such harassment.³⁴⁷ Courts therefore need not assess for the legal sufficiency of the underlying harassment in this framework.³⁴⁸ Rather, courts should assess whether schools were responding to students' accounts of what students earnestly believed to be sexual harassment.

2. Responses to Sexual Harassment that Unjustifiably Focus on the Survivor's Behavior

Second, courts will need to identify schools' responses that constitute institutional betrayals because they focus on the survivor's behavior without reasonable justification. Such responses betray students' dependency on or trust in the schools because they communicate that the problem is not the harassment but the survivor of it.³⁴⁹ At the very least, therefore, courts should determine whether a school's response to a student's sexual harassment concentrated on the survivor's role in or responsibility for the harassment, including by punishing, blaming, or signaling a default disbelief of survivors' accounts of their harassment, without reasonable justification. In identifying these institutional betrayals, courts should also recognize that they happen as a matter of process in addition to schools' substantive responses.³⁵⁰

Under this framework, then, when schools subject students to investigatory procedures that unjustifiably focus on their role in their own harassment,

346. Thus, this framework would avoid the many problems involved in Title IX's actual notice standard for evaluating a school's deliberate indifference to sexual harassment under Title IX. See MacKinnon, *supra* note 203, at 2078; *supra* note 203 and accompanying text; see also Suski, *supra* note 40, at 1169–86 (explaining why children struggle to report sexual harassment in a manner that complies with courts' Title IX notice requirements).

347. See Smith & Freyd, *Institutional Betrayal*, *supra* note 14, at 576–78 (explaining that institutional betrayals are “individual experiences”).

348. See *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999) (“We thus conclude that funding recipients are properly held liable in damages only where 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.”).

349. See Smith & Freyd, *Institutional Betrayal*, *supra* note 14, at 578–79, 583; Reinhardt et al., *supra* note 16, at 65 (identifying soldiers' dependency on the military and explaining the intersectionality between military sexual trauma soldiers may experience and the institutional betrayal survivors may endure); Smith et al., *supra* note 15, at 459; Gómez, *supra* note 17, at 126, 130; *supra* note 17 and accompanying text.

350. Schools perpetrate institutional betrayals both when they communicate their default disbelief of students' sexual harassment in the process of investigating that sexual harassment and as a substantive matter when they punish students for their own sexual harassment. See *supra* Sections II.B.1–3.

including by communicating a default, or automatic, disbelief of their accounts of the harassment, they have perpetrated institutional betrayals.³⁵¹ That said, assessing these process harms as institutional betrayals does not mean that schools can never investigate whether the student played some role in their own harassment or question the veracity of a student's report. A proscription on defaulting to disbelief does not mean schools must instead automatically believe student accounts of their sexual harassment. To the contrary, schools often have good reason to investigate students' accounts of harassment. Upon learning of sexual harassment, a school can have ample justification to question students, including the survivor of that harassment, about sexual harassment it knows about.³⁵² Questioning a survivor alone does not express a default disbelief. When that questioning communicates that the school's starting point is rank incredulity, though, it would. Such responses might be warranted if false reports of sexual harassment were a common phenomenon. However, false reports are rare.³⁵³

When the school in *Rost ex rel. K.C. v. Steamboat Springs RE-2 School District* questioned student K.C. for one to two hours about her rape but never questioned the boys who raped her, it expressed just this kind of unwarranted

351. See *supra* Section II.A. Although institutional betrayals in the form of a total failure by a school to respond at all to a student report of sexual harassment can, if the school had sufficient knowledge of the harassment, constitute deliberate indifference and therefore sex discrimination under Title IX, they would also constitute sex discrimination in the form of an institutional betrayal under this framework. See, e.g., *Stinson ex rel. K.R. v. Maye*, 824 F. App'x 849, 854 (11th Cir. 2020); *supra* text accompanying note 216. When a school fails to respond to students' sexual harassment, that non-response can communicate not only that the problem does not warrant a response but that the student who suffered the harassment should manage the problem. It thus locates both the problem and the responsibility for its solution with the student survivor. As such, it would qualify as sex discrimination under this proposed paradigm. Further, because this proposal does not have the exacting notice requirements of the deliberate indifference framework, courts could more readily find schools' inaction in the face of student sexual harassment is sex discrimination. See Suski, *supra* note 40, at 1157–66.

352. Procedural due process may demand these actions. A school cannot discipline by way of suspending or expelling a student perpetrator of sexual harassment without any process, and such process might very reasonably require questioning the survivor to understand from the survivor's perspective what occurred. See *Goss v. Lopez*, 419 U.S. 565, 581 (1975) (finding that the Fourteenth Amendment requires "at least . . . rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school").

353. No more than two to ten percent of all reported sexual assaults are false. NAT'L SEXUAL VIOLENCE RES. CTR., FALSE REPORTING 3 (2012), https://www.nsvrc.org/sites/default/files/2012-03/Publications_NSVRC_Overview_False-Reporting.pdf [<https://perma.cc/KGD4-C298>]. However, most sexual assaults go unreported. Cameron Kimble & Inimai M. Chettiar, *Sexual Assault Remains Dramatically Underreported*, BRENNAN CTR. FOR JUST. (Oct. 4, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/sexual-assault-remains-dramatically-underreported> [<https://perma.cc/JJN6-YGAN>] (noting 80 percent of rapes go unreported). Therefore, accounting for total reported and unreported assaults, the number of false reports is closer to .002 to .008 percent. Jackie Fielding, *Men Fear False Allegations. Women Fear Sexual Misconduct, Assault, and Rape*, MINN. L. REV.: DE NOVO BLOG (Nov. 25, 2018), <https://minnesotalawreview.org/2018/11/25/men-fear-false-allegations-women-fear-sexual-misconduct-assault-and-rape> [<https://perma.cc/Y4R8-KCYD>].

default blatant disbelief.³⁵⁴ The school had no reason for not questioning the boys other than it found K.C.'s claims incredible.³⁵⁵ The school's protracted questioning of K.C., coupled with its failure to question her rapists, indicated its disbelief of K.C.'s claims despite its lack of any basis for that disbelief.³⁵⁶ As the partial dissent in *Rost* noted, "[i]t is a bit unclear why the majority concludes that this total inaction was reasonable under the circumstances."³⁵⁷ The school's immediate disbelief would have been warranted if the school had a reasonable justification, for instance, that K.C. had unequivocally lied about prior sexual harassment. As it was, though, no such justification existed.³⁵⁸ When schools express default disbelief without reasonable justification, that disbelief constitutes institutional betrayals that discriminate against students on the basis of their status as survivors of sexual harassment.

Schools' substantive responses to student sexual harassment can likewise constitute institutional betrayals under this paradigm. They do so as a matter of course when they penalize and blame students because they have suffered sexual harassment.³⁵⁹ Punishing and blaming a student for their own sexual harassment by definition focuses on the survivor's role in and responsibility for their own harassment.³⁶⁰

It does not matter in this evaluation if the school has some justification for such punishment or blame, including, for example, that the student physically defended against the harassment and so violated school rules.³⁶¹ As the Supreme Court noted in *Bostock v. Clayton County*, a landmark Title VII case, when an employer discriminates on the basis of sex, it is not relevant that an employer can identify "other factors [that] may contribute to the decision. . . . If an employer would not have discharged an employee but for

354. *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1118 (10th Cir. 2008).

355. *Id.* at 1129–30 (McConnell, J., concurring in part and dissenting in part). To be fair, at first the school held off questioning the boys until a criminal investigation was complete. *See id.* However, even after it was complete, the school still declined to question, let alone impose consequences, on K.C.'s rapists. *Id.*

356. *Id.*

357. *Id.* at 1129.

358. *Id.* at 1129–30.

359. *See supra* Sections II.A–B.2.

360. Merriam-Webster defines a "punishment" as "suffering, pain, or loss that serves as retribution" for prior conduct. *Punishment*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/punishment> [<https://perma.cc/Y8YN-ALWR>]. Many school discipline practices constitute just that, despite the problems they create—including the now infamous school-to-prison pipeline. *See* CHRISTOPHER A. MALLETT, THE SCHOOL-TO-PRISON PIPELINE: A COMPREHENSIVE ASSESSMENT 1, 4 (2016) ("[O]ver the past 30 years, a partnership between schools and courts has developed through a punitive and harmful framework, to the detriment of many vulnerable children and adolescents. This phenomenon is often referred to as the 'school-to-prison pipeline' [I]n the 2011 to 2012 academic year, 3.5 million students experienced in-school detention, 1.9 million students were suspended for at least 1 day, 1.6 million students were suspended more than once, and 130,000 students were expelled." (citation omitted)).

361. *See, e.g., K.S. v. Nw. Indep. Sch. Dist.*, 689 F. App'x 780, 782 (5th Cir. 2017).

that individual's sex, the statute's causation standard is met, and liability may attach."³⁶² In the case of T.M., for example, who was raped at school and suspended as a result, it would not matter, therefore, that the school could point to a rule prohibiting involvement in sexual activity on campus as justification for its decision to punish her for her rape.³⁶³ Because such punishments focus on the survivors' involvement in their own harassment, and the punishment would not occur but for the student's status as a survivor of sexual harassment, they would constitute sex discrimination in violation of Title IX.³⁶⁴

If, however, a school could show that it punished a student for behavior that can be clearly distinguished from the sexual harassment claim, then that punishment would not constitute sex discrimination under this paradigm. Such a punishment would be justified as having been imposed for behavior separate from the harassment. Take, for example, a scenario in which two students leave the school building during school hours to sit in a car in the school parking lot to avoid class. While in the car, one of the students sexually assaults the other. The survivor of the assault could reasonably be punished for skipping class because that behavior can be clearly distinguished from the sexual assault.

3. Causing Discernable Harm

Finally, courts will need to determine whether schools' institutional betrayals caused a discernable harm. To make this assessment, courts will need to distinguish between schools' merely inadequate responses to sexual harassment and their injurious and harmful ones. Inadequate responses might do little to address the effects of harassment, but they do not cause harm. For example, a school might offer a survivor of sexual harassment counseling to address the effects of the harassment that does little to that end. If that counseling does not unjustifiably focus on the survivor's role in the harassment and therefore cause harm, though, then it would represent no more than an inadequate response to the sexual harassment.³⁶⁵ If, however, the approaches used in that counseling caused new traumas by almost exclusively focusing on the survivor's role in the harassment with little or no

362. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1742 (2020).

363. See Caplan-Bricker, *supra* note 1.

364. See *id.*

365. As such, it likely would not violate Title IX as things currently stand or under this proffered new theory of institutional betrayals as sexual harassment. Courts repeatedly emphasize that schools' responses do not violate Title IX simply because they are ineffective. See, e.g., *JP ex rel. GP v. Lee Cnty. Sch. Bd.*, 737 F. App'x 910, 915 (11th Cir. 2018) ("A school is not deliberately indifferent if it takes remedial measures and those measures are ultimately ineffective."); *K.S.*, 689 F. App'x at 786–87 ("Title IX does not require flawless investigations or perfect solutions." Even when a school's efforts are ineffective, the responses need to have been clearly unreasonable in light of the allegations." (citation omitted) (quoting *Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 170 (5th Cir. 2011))).

basis for doing so, then that response would be more than inadequate. In that case, it would communicate the “deep . . . [in]validation” of the student’s account that would amount to an “institutional betrayal.”³⁶⁶

Further, the causal connection between a school’s unjustified focus on the survivor’s role in or responsibility for the harassment and the harm is critical. Any investigation into a student’s sexual harassment could involve retraumatizing the student and causing harm, no matter how carefully a school might conduct its process.³⁶⁷ The fact that a student suffered harm is, therefore, a necessary, but not a sufficient, factor in the determination of whether a school caused a student an institutional betrayal. If courts also find that schools caused that harm because their responses to student sexual harassment unjustifiably focused on the survivor’s role in the harassment, then they will have harmed them because of their status as survivors of sex discrimination. Therefore, these schools will have imposed an institutional betrayal in violation of Title IX.

C. CHANGED OUTCOMES

If courts adopted this new sex discrimination paradigm, it would change the outcomes of some Title IX claims based on schools’ institutional betrayals. At the very least, courts would be constrained to find that when schools punish, blame, and by default disbelieve students following knowledge of their sexual harassment, those institutional betrayals violate Title IX. For example, in *K.S. v. Northwest Independent School District*, middle school student K.S. endured repeated sexual harassment by other students.³⁶⁸ When he tried to defend himself against it, he was suspended for his involvement in the incidence of his harassment.³⁶⁹ K.S. consequently became depressed and suicidal because of the school’s responses to his sexual harassment.³⁷⁰ The school thus knew about and responded to K.S.’s harassment in a way that focused on his role in the harassment and ultimately injured him. Because a school never has a reasonable basis for punishing a student for their own sexual harassment, this institutional betrayal would transgress Title IX.

Similarly, in *Stiles ex rel. D.S. v. Grainger County*, a court would be constrained to find that the school’s responses to middle school student D.S.’s sexual harassment violated this new form of sex discrimination under Title IX.³⁷¹ Among other things, teachers blamed D.S. for his harassment, suggesting that he provoked some of it, and the school resource officer who investigated

366. Smith & Freyd, *Institutional Betrayal*, *supra* note 14, at 578.

367. See, e.g., Carello & Butler, *supra* note 49, at 263 (explaining retraumatization happens because of an experience that “reactivate[s] trauma-related symptoms . . . by exposure to material reminiscent of an earlier traumatic event”).

368. See *K.S.*, 689 F. App’x at 784.

369. *Id.* at 782.

370. *K.S. Brief*, *supra* note 170, at *8.

371. See *Stiles ex rel. D.S. v. Grainger Cnty.*, 819 F.3d 834, 840–45 (6th Cir. 2016).

his harassment threatened to prosecute D.S. because he disbelieved D.S.³⁷² By pointing to D.S.'s provoking behaviors as a rationalization for D.S.'s harassment, the school unjustifiably blamed D.S. for it.³⁷³ Even assuming the school rightly concluded that D.S. provoked other students, such provocation does not justify or excuse consequent sexual harassment. If a student's actions could justify their harassment, then Title IX would prohibit sexual discrimination except on such a condition.³⁷⁴ It does not.³⁷⁵ In addition, the school resource officer had no basis for disbelieving D.S. To the contrary, the repeated sexual harassment D.S. suffered bolstered the credibility of his report.³⁷⁶ As a consequence of these wholly unjustified responses by the school, D.S. suffered school avoidance, depression, and his mother feared he would commit suicide.³⁷⁷ As in *K.S.*, this school, then, knew about the harassment, and its responses to it focused on D.S.'s role in his harassment without any basis and so caused him concrete injuries.³⁷⁸ These injuries thus constitute institutional betrayals that would violate the reconceptualized version of Title IX sex discrimination proposed here.

That is not to say, though, that anytime a school harms a student who has suffered sexual harassment, including by punishing the student, it would violate Title IX. If a school could demonstrate a reasonable basis for its action that caused harm, such as that the punishment was for behavior clearly distinguishable from the harassment, then it would not. In *Gordon v. Traverse City Area Public Schools*, for instance, student Keegan Gordon was punished following his sexual harassment by a teacher, and Gordon's school knew about the harassment.³⁷⁹ Among other things, Gordon's school suspended him.³⁸⁰ Although Gordon claimed his suspension constituted retaliation for his prior report of sexual harassment, the school could show that it did not suspend Gordon as retaliation in violation of Title IX.³⁸¹ Gordon's suspension occurred because of an incident wholly unrelated to the harassment by his teacher.³⁸² Gordon was suspended for chewing tobacco in school with another student.³⁸³ Gordon's school could thus demonstrate, even under the revised of sex discrimination proposed here, that it had a reasonable justification for

372. *Id.* at 843-44.

373. *Id.*

374. *But see supra* text accompanying note 28 ("Title IX's purpose is to protect students from sex discrimination in the public schools, and it prohibits such discrimination without limitation.")

375. *See supra* note 28 and accompanying text.

376. *Stiles*, 819 F.3d at 843-44.

377. *Stiles ex rel. D.S. Brief, supra* note 170, at 5.

378. *Id.*

379. *Gordon v. Traverse City Area Pub. Schs.*, 686 F. App'x 315, 322-23 (6th Cir. 2017).

380. *Id.* at 317.

381. *See id.* at 322.

382. *Id.* at 317.

383. *Id.*

this punishment.³⁸⁴ This punishment, therefore, still would not amount to sex discrimination and so would not violate Title IX.

D. CRITIQUES AND RESPONSES TO THEM

Any proposal that recommends a new conceptualization of discrimination cannot escape critique. This proposal is no different. Reconceptualizing sex discrimination such that courts recognize institutional betrayals as violating Title IX can be critiqued in multiple ways.

First, these proposed changes can be critiqued as misidentifying the problem with Title IX jurisprudence and as therefore unnecessary. This critique takes two separate but closely related forms. It identifies Title IX's current failure to recognize institutional betrayals as either a problem with the reach of current standards for assessing schools' responses to sexual harassment or with courts' application of those standards.³⁸⁵ The former iteration of this critique contends that if Title IX embraced a stronger, more comprehensive standard than deliberate indifference for evaluating schools' responses to past sexual harassment, then courts would be better equipped to recognize institutional betrayals as violating it. Certainly, calls for changes to Title IX's current standards of evaluation have been made.³⁸⁶ For example, Catharine MacKinnon has persuasively argued that courts should use a due diligence, rather than a deliberate indifference, standard for assessing schools' responses to sexual harassment.³⁸⁷ However, even that more rigorous standard concentrates courts' inquiries on the adequacy of schools' responses to prior sexual harassment.³⁸⁸ It, therefore, cannot be relied on to recognize the new injuries they impose in responding to that harassment as independent forms of sex discrimination.³⁸⁹

The latter version of this critique suggests that if courts properly applied current theories of sex discrimination under Title IX, they would be more

384. See *id.* at 322.

385. Certainly, problems exist with courts' applications of Title IX doctrine. See MacKinnon, *supra* note 203, at 2041; Suski, *supra* note 32, at 2263. See generally Suski, *supra* note 40 (applying empirical research to expose flaws on Title IX doctrine and policy). Addressing those problems would improve Title IX's protective capacity but would not require courts to recognize institutional betrayals as independent forms of sex discrimination. See Suski, *supra* note 32, at 2315–16.

386. See, e.g., MacKinnon, *supra* note 203, at 2041.

387. *Id.* (“The ‘due diligence’ standard as applied in international human rights law, including in international law against violence against women, provides a promising doctrine for institutional liability for sexual harassment in schools.”).

388. See *id.* (“Due diligence, adopted as a liability standard, would hold schools accountable to survivors for failure to prevent, adequately investigate, effectively respond to, and transformatively remediate sexual violation on campuses, so that sex equality in education is delivered in reality.”).

389. See *id.* at 2100–04.

able to recognize institutional betrayals as violating Title IX.³⁹⁰ Recommendations for such reforms have also been made.³⁹¹ These include calls for courts to apply the deliberate indifference standard with fidelity to the Supreme Court's complete explanation of its meaning.³⁹² Like the former version of this critique, this version also misses the point that institutional betrayals do not conform to extant theories of sex discrimination because they constitute new, original harms not contemplated by these theories.³⁹³ Standards that better or more scrupulously evaluate whether schools' deliberate indifference to sexual harassment risked a recurrence of prior sexual harassment, though needed, would still strain to recognize these unique harms. Likewise, a more rigorous application of the retaliation framework that would interrogate schools' pretextual reasons for penalizing students who report their sexual harassment would also not fully capture institutional betrayals.³⁹⁴ Such inquiries could designate some institutional betrayals as sex discrimination, but they would still not effectively capture all institutional betrayals, including those that schools impose when students do not report their own sexual harassment.³⁹⁵ Thus, only a new conceptualization of sex discrimination based on a student's status as a survivor of sexual harassment can fully comprehend institutional betrayals.³⁹⁶

390. Scholars have stringently critiqued courts' evaluations of extant forms of sex discrimination under Title IX. *See, e.g.*, Mackinnon, *supra* note 203, at 2085–96; Cantalupo, *supra* note 214, at 224–44.

391. *See* Suski, *supra* note 32, at 2265.

392. *See id.* at 2327.

393. *See* Smith & Freyd, *Insult, Then Injury*, *supra* note 18, at 1126; *supra* note 91 accompanying text.

394. *See* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 179 (2005); Sanchez v. Brawley Elementary Sch. Dist., No. 14-cv-0564, 2016 WL 2997036, at *3–4 (S.D. Cal. May 25, 2016); Saphir *ex rel.* Saphir v. Broward Cnty. Pub. Schs., 744 F. App'x 634, 639 (11th Cir. 2018); Gordon v. Traverse City Area Pub. Schs., 686 F. App'x 315, 320 (6th Cir. 2017).

395. *See* Jackson, 544 U.S. at 171.

396. A related critique is that tort law could remedy students' claims of harassment. Tort law, however, is an almost useless vehicle for achieving this end. Students' claims against schools for personal injuries of any sort often do not succeed for at least two reasons. First, tort law offers schools immunity from many such claims. *See* JAMES A. RAPP, EDUCATION LAW § 12.07(2)(a) (2021). Second, it provides generous defenses that allow schools to avoid liability. In negligent supervision claims, for instance, schools defend against students' claims by asserting a lack of foreseeability of the harm. For example, in *Conklin v. Saugerties Central School District*, a school knew that one student had threatened to fight another. *Conklin v. Saugerties Cent. Sch. Dist.*, 966 N.Y.S.2d 575, 576 (App. Div. 2013). When the school failed to protect the other student and the fight happened, the school successfully defended against a negligent supervision claim based on lack of foreseeability. *Id.* at 577–78. Schools find equally effective defenses against claims based on sexual harassment. *See generally, e.g.*, Doe 1 v. Bd. of Educ. of Greenport Union Free Sch. Dist., 955 N.Y.S.2d 600 (App. Div. 2012) (finding no liability on the part of the school where a teacher's aide engaged in a sexual relationship with a student because it was outside the scope of employment). For more thorough explorations of these limits of tort law. *See* Ari Ezra Waldman, *Tormented: Antigay Bullying in Schools*, 84 TEMP. L. REV. 385, 410 (2012); Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*,

Second, these recommendations could be criticized as hamstringing schools' powers to investigate and address sexual harassment. If these proposals prevented schools from making any inquiries into students' claims of harassment, then this worry would be justified.³⁹⁷ Instead, they only preclude schools from responding to students in ways that unreasonably focus on survivors' own roles in their sexual harassment and so cause them harm. Avoiding these approaches, schools still have wide berth to make justified inquiries into and take steps to meaningfully address the causes and harms of sexual harassment.³⁹⁸ In any event, current Title IX theory and doctrine provides so little in the way of protecting to K-12 students, that any changes run little risk of going too far.³⁹⁹

In addition, the changes proposed here could be accused of not going far enough. Reconceiving of sex discrimination in education more broadly than in the ways proposed here to include, for example, any harm that reinforces a gender hierarchy of any sort, would capture institutional betrayals and arguably do more to protect students.⁴⁰⁰ These proposals here, though, do not preclude these kinds of more expansive changes. They do, however, take a more incremental approach because of the urgencies attendant to institutional betrayals.⁴⁰¹ By focusing initially on how Title IX can recognize and remedy those harms, these recommendations take steps in the direction of and do not preclude more wide-sweeping reforms.⁴⁰²

Further, revising sex discrimination theory and doctrine based on social science research could render Title IX susceptible to the need for ongoing change based on developments in that research. This proposed theory of

77 TEMP. L. REV. 641, 682-83 (2004). See generally Mark C. Weber, *Disability Harassment in the Public Schools*, 43 WM. & MARY L. REV. 1079 (2002) (describing patterns of harassing behavior targeting the disabled in public schools).

397. This critique echoes the critique Justice Kennedy made of imposing any Title IX liability on schools for peer sexual harassment. In *Davis*, Kennedy worried about the constraints this liability placed on schools that already have to operate under the constraints "federal law imposes . . . on school disciplinary actions." *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 665 (1999) (Kennedy, J., dissenting). Justice Kennedy's concerns were unfounded. In the twenty years since the *Davis* decision, schools have had no trouble exacting punishments for all manners of student disciplinary problems. See Suski, *supra* note 205, at 751. See generally Derek W. Black, *The Constitutional Limit of Zero Tolerance in Schools*, 99 MINN. L. REV. 823 (2015) (explaining the constitutional implications of the zero-tolerance policy in schools).

398. See Suski, *supra* note 32, at 2318; Black, *supra* note 397, at 889-92; *supra* notes 331-42 and accompanying text.

399. See Mackinnon, *supra* note 203, at 2085; Suski, *supra* note 32, at 2287-88; Suski, *supra* note 40, at 1169-70.

400. Vicki Schultz has persuasively argued for decades that workplace sexual harassment needs to be broadly understood not merely as "unwanted sexual advances" or other sexualized behavior, but as "a wide range of nonsexual actions . . . used to denigrate women and label them as 'different' because of their sex." Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J. F. 22, 33 (2018).

401. See *supra* Section III.D.

402. See *supra* Section III.D.

institutional betrayals as sex discrimination, however, does not depend on the most recent developments in the empirical data on institutional betrayals but on well-established understandings about it.⁴⁰³ Because those understandings stand on firm, decades-long research grounds, so too do any changes to Title IX jurisprudence based on them.⁴⁰⁴

Finally, because expanding the conceptualization of sex discrimination in the ways proposed here would enable new Title IX claims based on schools' institutional betrayals, these changes would expand the scope of schools' potential Title IX liability. That in turn risks something of a moral hazard.⁴⁰⁵ Such a moral hazard-like effect could occur if a school's need to pay damages to a student for imposing institutional betrayals reduces the resources it has available for its student population as a whole.⁴⁰⁶ This critique, though, falters for at least two reasons. First, it suggests that schools should be allowed to discriminate against students who already have suffered sexual harassment because of schools' financial concerns. Title IX's unconditional proscription on such discrimination, not to mention any questions about the morality of such reasoning that would permit severe uncompensated state harms, undermines this contention.⁴⁰⁷ Second, public schools carry liability insurance to offset the financial impact of this very kind of liability.⁴⁰⁸ Imposing such liability, then, would pose little likelihood of causing such moral hazard-like effects.⁴⁰⁹

403. Although this research, like any social science research, is evolving, its foundations are over two decades old. *See, e.g.*, Goodman et al., *supra* note 57, at 255–59.

404. *See id.*

405. Tom Baker has defined a “moral hazard” 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).

406. *See id.*

407. *See* 20 U.S.C. § 1681(a) (2018); *supra* note 28 and accompanying text.

408. *See* Malia Herman, *Threat of Data-Privacy Litigation Fuels District Insurance Purchases*, *EDUC. WK.* (Oct. 19, 2015), <https://www.edweek.org/technology/threat-of-data-privacy-litigation-fuels-district-insurance-purchases/2015/10?qs=liability%20insurance> [<https://perma.cc/NUR2-6QB9>]; Dave Arnold, *Insuring Your Good Name*, *NAT'L EDUC. ASS'N*, <http://www.nea.org/home/14629.htm> [<https://perma.cc/P7D2-9PKP>]; *Risk Management Fund*, *GA. SCH. BDS. ASS'N*, <https://gsba.com/members-services/risk-management/about-rms/risk-management-fund/#school> [<https://perma.cc/N6J2-VS6L>]; *Errors & Omissions/General Liability Fund*, *N.C. SCH. BDS. ASS'N*, <http://www.ncsba.org/risk-management/errors-omissions-general-liability-fund> [<https://perma.cc/3VLD-S3YG>].

409. In the context of police regulation, John Rappaport has explained by analyzing original empirical data that private insurance can have a significant role in offsetting these concerns partly because the insurer “develops a financial incentive to reduce . . . risk [of liability] through loss prevention.” John Rappaport, *How Private Insurers Regulate Public Police*, 130 *HARV. L. REV.* 1539, 1543 (2017). In other words, the private insurance companies can regulate institutional behavior by requiring them to act in ways to reduce the risk of insurance. *See id.* at 1543–44. Given that schools carry liability insurance, exploring the ways insurance companies could regulate schools so they more effectively protect students from sexual harassment would be a worthy project, as I have previously noted. *See* Suski, *supra* note 40, at 1166–70. Now as then, though, it is beyond the scope of this Article.

V. CONCLUSION

Although Title IX broadly proscribes sex discrimination in public education without qualification, currently courts only recognize three confined forms of such discrimination. Public schools, therefore, can discriminate on the basis of sex in other ways without transgressing Title IX. Schools can thus impose new injuries in the form of institutional betrayals on students who suffer sexual harassment, and they do not violate Title IX. These institutional betrayals occur when schools punish and blame students for and by default disbelieve students' reports of sexual harassment, causing them added harms that are often more severe than the harms wrought by their sexual harassment itself. Yet, Title IX has nothing to say about these school-imposed injuries.

To remedy this theoretical and doctrinal deficiency, this Article develops a theory of institutional betrayals as a new form of sex discrimination and offers a framework for its evaluation. Adopting this theory and framework would allow courts to assess the injuries that schools impose on students because of their status as survivors of sexual harassment as intentional sex discrimination. It would also enable courts to distinguish between schools' inadequate responses from their harmful, discriminatory responses to student sexual harassment. More importantly, it would provide a remedy to students who suffer the harms of institutional betrayals when they seek help from schools following their sexual harassment but instead are met with further harm.