Turning a Blind Eye: The Causation Standard for Title IX Peer Sexual Misconduct Claims

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I. INTRODUCTION[1]

President Barack Obama, the first president to adopt sexual assault prevention as a signature issue, once declared that sexual assault "is an affront to our basic decency and humanity."[2] In addition, the "Me Too" movement gave a prominent voice to sexual assault survivors and became a powerful force in American society for sexual assault prevention.[3] But while general awareness to the scourge of sexual misconduct has risen in recent years, legal opportunities to combat sexual assault have been diluted.[4] As a result, the extent of Title IX protections against gender discrimination has become uncertain.

In 2011, the Obama administration bolstered Title IX guidance on sexual misconduct prevention with their Dear Colleague letter issued by the Department of Education's Office for Civil Rights.[5] Realizing that

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1. Please be advised, this Comment contains discussion of sexual misconduct including sexual assault and sexual violence.

2. Carrie Dann, *White House takes up fight against campus sexual assault*, NBC NEWS (Jan. 22, 2014, 1:24 PM), https://www.nbcnews.com/politics/politics-news/white-house-takes-fight-against-campus-sexual-assault-flna2D11970495 [https://perma.cc/5KRP-MWEE].

3. Catharine A. MacKinnon, *Where #MeToo Came From, and Where It's Going*, ATL. (Mar. 24, 2019), https://www.theatlantic.com/ideas/archive/2019/03/catharine-mackinnon-what-metoo-has-changed/585313/ [https://perma.cc/ZVR5-RV6M].

4. The term *sexual misconduct* is used in this Comment as an inclusive term to reference to sexual harassment, sexual assault, sexual violence, and other similar forms of gender discrimination.

5. *See generally* U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE (Apr. 4, 2011) [hereinafter DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE], https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [https://perma.cc/ZFY8-MFMS]; S. Daniel Carter, *In Defense of the Title IX Dear Colleague Letter*, HUFFPOST (Sept. 16, 2017, 10:45 PM), https://www.huffpost.com/entry/in-defense-of-the-title-ix-dear-colleague-

"[e]ducation has long been recognized as the great equalizer in America," the Obama administration sought to strengthen protections against peer sexual misconduct in schools across the United States.[6]

The Trump administration, however, rescinded the Dear Colleague letter in 2017.[7] Then-Secretary of Education, Betsy DeVos, viewed the Obama administration's policies as "failed" and "weaponiz[ing] civil rights."[8] Meanwhile, the Trump administration's Title IX guidance on the sexual misconduct attempted to make it "harder than ever for survivors to understand their legal rights."[9] While the Biden administration will likely take steps to revert back to Obama-era guidance on sexual misconduct[10], this recent trend of executive branch reversals on Title IX guidance leaves its status as a tool to fight sexual misconduct relatively uncertain.

Title IX's status as an effective tool against sexual misconduct is uncertain in the judicial system as well. In 1999, the Supreme Court held in *Davis v. Monroe County Board of Education* that schools face Title IX liability for deliberately indifferent responses to peer sexual misconduct.[11] Under the deliberate indifference standard, the school's response "must, at a minimum, cause [students] to undergo harassment or *make them liable or vulnerable to it*."[12]

Today, most courts view *Davis* claims as arising under two viable causation theories: the school's response either (1) directly caused

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6. DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE, *supra* note 5, at 1.

7. *See generally* U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf [https://perma.cc/5HZG-YTVS]; Valerie Strauss, *DeVos withdraws Obama-era guidance on campus sexual assault. Read the letter.*, WASH. POST (Sept. 22, 2017), https://www.washingtonpost.com/news/answer-sheet/wp/2017/09/22/devos-withdraws-obama-era-guidance-on-campus-sexual-assault-read-the-letter/ [https://perma.cc/P6V6-BW6Z].

8. Kathryn Joyce, *The Takedown of Title IX*, N.Y. TIMES MAG. (Dec. 5, 2017), https://www.nytimes.com/2017/12/05/magazine/the-takedown-of-title-ix.html [https://perma.cc/4BFG-38XY].

9. Nicole Bedera, *Trump's New Rule Governing College Sex Assault Is Nearly Impossible for Survivors to Use. That's the Point*, TIME (May 14, 2020, 1:32 PM), https://time.com/5836774/trump-new-title-ix-rules/ [https://perma.cc/EZW7-WLA9].

10. Sarah Chamberlain, *Biden, Congress Should Reverse Betsy DeVos' Rules on Sexual Assault in Schools*, FORBES (Jan. 12, 2021, 2:53 PM), https://www.forbes.com/sites/sarahchamberlain/2021/01/12/biden-congress-should-reverse-betsy-devos-rules-on-sexual-assault-in-schools/?sh=292ad971551f [https://perma.cc/2LDA-M6UX]; *see also The Biden Agenda for Women*, BIDEN HARRIS, https://joebiden.com/womens-agenda/ [https://perma.cc/P8DT-CALS] (last visited Oct. 8, 2021) (discussing then-candidate Biden's pledge to "immediately put [the Trump's administration's guidance on Title IX] to an end and stand on the side of survivors.").

11. 526 U.S. 629, 643 (1999).

12. *Id.* at 645 (emphasis added) (internal quotation marks and citations omitted).

misconduct or (2) left the student vulnerable to it. However, a recent Sixth Circuit opinion—*Kollaritsch v. Michigan State University Board of Trustees*—repudiated this general understanding and created a circuit split.[13] After the *Kollaritsch* decision, a student must allege *multiple* incidents of sexual misconduct after the school has knowledge to bring a claim under *Davis*.[14] In the Sixth Circuit's view, mere vulnerability alone is never enough; in fact, multiple incidents of sexual misconduct are required before a successful claim can be brought.

Therefore, the remaining circuit courts have two causation standards to adopt for the minimum level of harm a plaintiff must allege when bringing a claim for peer sexual misconduct: the further misconduct standard or the vulnerability standard. The further misconduct standard is wrong as a matter of law for three reasons. First, it misreads the Supreme Court's opinion in *Davis* by ignoring its plain language and treating it as a common law tort—leading to confusing and even cruel results. Second, it ignores the pervasiveness of peer sexual misconduct in education—particularly in higher education. Third, it ignores Congress's intent regarding the goals of Title IX and the larger context of ending gender discrimination as evidenced by Title VII's recent legal expansion.

This Comment proceeds as follows: Section II discusses the background of Title IX, Supreme Court cases leading up to and including *Davis*, and the position of each circuit court that has addressed *Davis*'s causation standard. Section III explains why the vulnerability standard is the correct, and why the further misconduct standard is wrong. Finally, Section IV concludes with a brief summary of why courts should adopt the vulnerability standard.

II. BACKGROUND

Congress passed Title IX in 1972 to prevent gender discrimination and the Supreme Court recognized a private cause of action within Title IX shortly after. Eventually, in *Davis v. Monroe County Board of Education*, the Supreme Court expanded Title IX liability to include peer sexual misconduct; however, circuits courts subsequently split over the causation standard.

13. 944 F.3d 613, 619–20 (6th Cir. 2019) (describing the second prong as a "deliberate-indifference intentional tort by the school").

14. *Id.* at 620.

A. Title IX of the 1972 Education Amendments

In 1972, Title IX became law.[15] The relevant section of Title IX reads: "No person in the United States shall, *on the basis of sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[16]

Senator Birch Bayh, the author of Title IX, stated its purpose: "[to] insure that no American will be denied access to higher education because of race, color, religion, national origin, *or sex*."[17] Congress's intent in passing Title IX was to accomplish two related goals: "avoid[ing] the use of federal resources to support discriminatory practices" and "provid[ing] citizens effective protection against those practices."[18] With its passage came the "guarantee that women, too, enjoy the educational opportunity every American deserves."[19] While such a guarantee has still not been totally met, Title IX still protects millions of students enrolled in elementary, secondary, and post-secondary schools from gender discrimination.[20]

B. Pre-Davis Supreme Court Cases

After Title IX's passage in 1972, the exclusive means of enforcement was held by the government.[21] But in 1979, the Supreme Court first recognized in *Cannon v. University of Chicago* that Title IX contained a private cause of action that also allowed individuals to enforce Title IX.[22] The Supreme Court stated a variety of factors, including congressional intent, supported Title IX's implied private enforcement claim.[23] Over a decade passed before the Supreme Court broached the issue of Title IX's

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15. U.S. DEP'T OF JUST., EQUAL ACCESS TO EDUCATION: FORTY YEARS OF TITLE IX 1 (2012) [hereinafter EQUAL ACCESS TO EDUCATION], https://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf [https://perma.cc/F3A7-EZD4].

16. Title IX of the 1972 Education Amendments, 20 U.S.C. § 1681(a) (emphasis added).

17. Paul C. Sweeney, *Abuse, Misuse, & Abrogation of the Use of Legislative History: Title IX & Peer Sexual Harassment*, 66 UMKC L. REV. 41, 57 n.93 (1997) (citing 117 CONG. REC. 30399 (1971)) (emphasis added).

18. Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979).

19. Sweeney, *supra* note 17, at 57 n.93 (citing 117 CONG. REC. 30399 (1971)).

20. EQUAL ACCESS TO EDUCATION, *supra* note 15, at 1.

21. *See Cannon*, 441 U.S. at 683–84 ("[Title IX] does not, however, expressly authorize a private right of action.").

22. *Id.* at 709.

23. *Id.*

private enforcement claim again.[24] In 1992, the Supreme Court explained in *Franklin v. Gwinnet County Public Schools* that Title IX's private claim included monetary damages as a remedy.[25] Shortly after *Franklin*, the Supreme Court continued to expand its Title IX jurisprudence to include sexual misconduct cases within its private enforcement claim.

In 1998, the Supreme Court held in *Gebser v. Lago Vista Independent School District* that schools could only be liable for teacher-student sexual misconduct with proper notice.[26] The Supreme Court explained, drawing from Title VII principles, that sexual misconduct was gender discrimination under Title IX.[27] The Supreme Court, however, rejected the notion a school could be liable for teacher-student sexual misconduct without actual notice.[28] Although the *Gebser* decision dealt with student-teacher sexual misconduct, the Supreme Court laid the foundation for a school's Title IX liability in cases of peer sexual misconduct.

C. Davis v. Monroe County Board of Education

In 1999, the Supreme Court held schools could face Title IX liability for deliberately indifferent responses to peer sexual misconduct in *Davis v. Monroe County Board of Education*.[29] LaShonda, a fifth grade student, experienced a "pattern of sexual harassment" perpetrated by a classmate.[30] For months, the classmate made inappropriate comments and sexual gestures directed toward her.[31] At one point, the classmate "rubbed his body against LaShonda . . . [in] a sexually suggestive manner."[32] LaShonda and her parents repeatedly notified school officials throughout about the sexual misconduct, yet the classmate was never disciplined for his behavior.[33] Her torment finally ended when the classmate was arrested for sexual battery.[34] LaShonda suffered from the effects of her classmate's

24. *See generally* Franklin v. Gwinnet Cnty. Pub. Schs., 503 U.S. 60 (1992).

25. *Id.* at 76.

26. 524 U.S. 274, 285 (1998).

27. *Id.* at 281 (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986)).

28. *Id.* at 285 ("[W]e conclude that it would frustrate the purposes of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on principles of *respondeat superior* or constructive notice, *i.e.*, without actual notice to a school district official.") (internal quotation marks omitted).

29. 526 U.S. 629, 633 (1999).

30. *Id.*

31. *Id.* at 633–34.

32. *Id.* at 634.

33. *Id.* at 635.

34. *Id.* at 634.

conduct—her previously high grades dropped and she had suicidal thoughts.[35] LaShonda's parents filed a Title IX claim against the school in federal district court.[36] Specifically, they alleged the persistent sexual misconduct interfered with LaShonda's equal access to education and the school's "deliberate indifference" toward her violated Title IX.[37]

The Supreme Court considered the issue before them: whether "deliberate indifference to known acts of [misconduct]—amounts to an intentional violation of Title IX . . . when the harasser is a student."[38] The Supreme Court held that a school could be liable for peer sexual misconduct when the school exhibits deliberate indifference to "severe, pervasive, and objectively offensive" sexual misconduct of which the school had actual knowledge.[39]

The Supreme Court explained that a school's liability is constrained by Title IX's language—a school is not liable unless students are "*subjected* to discrimination" through the school's deliberate indifference.[40] Deliberate indifference "must, at a minimum, cause [students] to undergo harassment or *make them liable or vulnerable to it*."[41] Schools do not need to respond in any prescribed fashion, but they must respond in a way that is not "clearly unreasonable in light of the known circumstances."[42] To be clear, schools are not responsible for the peer sexual misconduct; instead, they are responsible for their *response* to the peer sexual misconduct.

Furthermore, the Supreme Court explained that the underlying sexual misconduct must be "serious enough to have the systemic effect of denying the [student] equal access" to an education.[43] In dictum, the Supreme Court cast doubt on the sufficiency of one incident; liability was limited to only those cases which had a systemic effect.[44] This, according

35. *Id.*

36. *Id.* at 635.

37. *Id.* at 636.

38. *Id.* at 643.

39. *Id.* at 650.

40. *Id.* at 639, 644–45 (emphasis added) (citing 20 U.S.C. 1681(a)).

41. *Id.* at 645 (emphasis added) (internal quotation marks omitted) (citing RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1415 (1966)).

42. *Id.* at 648–49.

43. *Id.* at 652.

44. *Id.* at 652–53 ("Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect, we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment.").

to the Supreme Court, reconciled the principles of Title IX's prohibition against deliberate indifference and practical realities of responding to peer misconduct.[45] Nevertheless, Title IX liability arises when the school is deliberately indifferent to "severe, gender-based mistreatment played out on a *widespread level among students*."[46]

Justice Kennedy, writing in dissent, warned of the "flood of liability" created by the majority's opinion because peer sexual misconduct claims "will not only be easy to allege but also to prove."[47] Specifically, Justice Kennedy was concerned about immature students' conduct—such as teasing, pushing, and grabbing—being labeled as discrimination.[48] In Justice Kennedy's view, the majority's opinion provides little guidance to when "simple acts of teasing and name-calling" is misconduct and when it is not misconduct.[49] The majority opinion, however, directly rebuffed this idea saying, "[d]amages are not available for simple acts of teasing and name-calling."[50] Instead, Title IX claims are reserved for the type of severe, systemic conduct that denies a student "equal access to education."[51]

D. Circuit Split Regarding Davis's Causation Standard

Circuit courts have disagreed over *Davis*'s requirement for deliberate indifference under Title IX claims for peer sexual misconduct. Specifically, the circuit courts are split over the level of harm a plaintiff must suffer because of the school's response: must a school's deliberate indifference, at a minimum, (1) subject the plaintiff to vulnerability of sexual misconduct or (2) further actionable sexual misconduct? Three circuit courts have adopted the vulnerability standard: the Eleventh Circuit, the First Circuit, and the Tenth Circuit.[52] Meanwhile, three circuit courts have adopted the further misconduct standard: the Sixth Circuit, the

45. *Id.* at 653.

46. *Id.* (emphasis added) (internal quotation marks omitted).

47. *Id.* at 680 (Kennedy, J., dissenting). *But see* Corey Rayburn Yung, *Is Relying on Title IX a Mistake?*, 64 U. KAN. L. REV. 891, 897 (2016) (describing the *Davis* standard as a "high burden").

48. *Davis*, 526 U.S. at 672–73 (Kennedy, J., dissenting).

49. *Id.* at 676 (Kennedy, J., dissenting).

50. *Id.* at 652.

51. *Id.*

52. *See generally* Williams v. Bd. of Regents of Univ. Sys. of Ga., 477 F.3d 1282 (11th Cir. 2007); Fitzgerald v. Barnstable Sch. Comm., 504 F.3d 165 (1st Cir. 2007), *rev'd on other grounds*, 555 U.S. 246 (2009); Farmer v. Kan. State Univ., 918 F.3d 1094 (10th Cir. 2019).

Eighth Circuit, and the Ninth Circuit.[53] Remaining circuit courts have not adopted either standard as of yet.

1. Circuit Courts Adopting the Vulnerability Standard

Under the vulnerability standard, a plaintiff bringing a *Davis* claim must allege either that the school's deliberately indifferent response caused further sexual misconduct or left them vulnerable to sexual misconduct.

i. Eleventh Circuit: *Williams v. Board of Regents*

In *Williams v. Board of Regents of the University System of Georgia*, the Eleventh Circuit held a school risked Title IX liability if their deliberate indifference left the student vulnerable to further sexual misconduct.[54] One night Tiffany Williams, a University of Georgia ("UGA") student, "engaged in consensual" sexual intercourse with Tony Cole, a student-athlete. But "unbeknownst to Williams," another student-athlete was "hiding in Cole's closet." After intercourse, Cole left the room and the hidden student-athlete emerged to sexually assault Williams. While the sexual assault occurred, Cole messaged other student-athletes so they could "[run] a train" on Williams. Other student-athletes then arrived and also sexually assaulted Williams. After this horrific incident, Williams filed a police report and withdrew from UGA the next day.[55]

Williams filed a complaint against UGA for violating Title IX—including a peer sexual misconduct claim under *Davis*.[56] The district court dismissed her Title IX complaint because she did not prove deliberate indifference; however, the Eleventh Circuit reversed that decision.[57] Under Title IX, the Eleventh Circuit explained, a school is liable if their deliberate indifference subjects its student to sexual misconduct. Under *Davis*, the school must either "'cause [students] to undergo' [misconduct] or 'make them liable or vulnerable to it.'"[58] The Eleventh Circuit held that

53. *See generally* Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613 (6th Cir. 2019); K.T. v. Culver-Stockton Coll., 865 F.3d 1054 (8th Cir. 2017); Reese v. Jefferson Sch. Dist. No. 14J, 208 F.3d 736 (9th Cir. 2000).

54. *Williams*, 477 F.3d at 1295.

55. *Id.* at 1288–89.

56. *Id.* at 1290.

57. *Id.* at 1290–91.

58. *Id.* at 1295–96 (quoting Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 644–45 (1999)).

UGA was deliberately indifferent to Williams's peer sexual misconduct claim because of the lengthy period of time UGA waited before taking any disciplinary action.[59]

The Eleventh Circuit explained that UGA acted with deliberate indifference *after* Williams was sexually assaulted by Cole. After the incident, UGA "waited almost eleven months to take [any] corrective action." This failure to take action effectively barred Williams an opportunity to continue to attend UGA.[60] The Eleventh Circuit explained:

> In light of the harrowing ordeal that Williams faced on January 14, her decision to withdraw from UGA was reasonable and expected . . . . UGA failed to take *any precautions that would prevent future attacks* . . . should Williams have decided to return to UGA, either by, for example, removing from student housing or suspending the alleged assailants, or implementing a more protective sexual harassment policy to deal with future incidents.[61]

Thus, a single incident of peer sexual misconduct and UGA's deliberate indifference left Williams vulnerable to further sexual misconduct *even after* she had withdrawn from UGA. Under the Eleventh Circuit's standard, a *Davis* claim can be brought even if the student was merely left vulnerable by the school's response.

ii. First Circuit: *Fitzgerald v. Barnstable School Committee*

In *Fitzgerald v. Barnstable School Committee*, the First Circuit held that leaving a student vulnerable to further peer sexual misconduct satisfied *Davis*'s deliberate indifference requirement.[62] Jacqueline Fitzgerald, an elementary school student, experienced peer sexual misconduct while riding the school bus.[63] Each time Fitzgerald wore a dress, another student forced her to lift it up. Fitzgerald's parents immediately reported this student's behavior to the school; however, the school did nothing in response.[64]

Soon after the first report, the more details about the sexual misconduct came out. The student had also forced Fitzgerald to "[pull]

59. *Id.* at 1296–97.
60. *Id.*
61. *Id.* at 1297 (emphasis added).
62. 504 F.3d 165, 171 (1st Cir. 2007), *rev'd on other grounds*, 555 U.S. 246 (2009).
63. *Id.* at 169.
64. *Id.*

down her underpants and [spread] her legs."[65] The school's solution to this alarming progression was placing Fitzgerald on a different bus—while the perpetrator faced no consequences.[66] Even more unsettling incidents transpired, but still the school did not respond. Fitzgerald's parents brought a Title IX claim for the school's deliberate indifference to these incidents of peer sexual misconduct. But the district court granted summary judgment in favor of the school and Fitzgerald appealed.[67]

The First Circuit explained that a single incident of peer sexual misconduct was sufficient for Title IX liability under *Davis*.[68] The district court was correct in holding that Title IX liability attached when a school's deliberate indifference causes additional harassment. But the district court "overly [distilled] the rule set forth by the *Davis* Court" by ignoring the vulnerability prong.[69] Under *Davis*'s broad formulation, a school risks Title IX liability in two ways: causing harassment or leaving students vulnerable to it.[70] The First Circuit acknowledged a single incident of peer sexual misconduct could "form [the] basis for Title IX liability if that incident were vile enough and the institution's response . . . unreasonable enough to have the combined systemic effect of denying access to a scholastic program or activity."[71] But the First Circuit cast doubt on a high rate of frequency of single incident liability cases—it must be serious enough to systemically deprive a student of equal access to education.[72] Nevertheless, the First Circuit explained, a single incident is enough in sufficiently severe cases.

iii. Tenth Circuit: *Farmer v. Kansas State University*

In *Farmer v. Kansas State University*, the Tenth Circuit held that a school's deliberate response to peer sexual misconduct that left a student vulnerable violated Title IX.[73] Tessa Farmer, a student at Kansas State University ("KSU"), went to a fraternity party with T.R., another KSU

65. *Id.*
66. *Id.* at 170.
67. *Id.*
68. *Id.* at 172 (citing Vance v. Spencer Cnty. Pub. Sch. Dist., 231 F.3d 253, 259 (6th Cir. 2000)).
69. *Id.*
70. *Id.* (quoting Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 645 (1999)).
71. *Id.* at 172–73.
72. *Id.* at 173 n.3 (citing *Davis*, 526 U.S. at 652–53).
73. 918 F.3d 1094, 1097 (10th Cir. 2019).

student she knew from high school.[74] Farmer left the party and consented to sexual intercourse with T.R. in his room.[75] Afterwards, T.R. left the room, but another student "emerged from the closet and [sexually assaulted] Farmer."[76] When T.R. returned, "he was not surprised by [the other student's] presence or by Farmer's being upset and sobbing,"[77] indicating that the sexual assault was planned by T.R. and the other student.

Immediately, Farmer reported the incident to both the police and KSU.[78] KSU told Farmer they could do nothing except report the incident to the fraternity council; but the council only investigated the fraternity generally and not Farmer's specific incident.[79] Farmer later learned that KSU lied to her about her investigatory options. Eventually she reported the assault through other avenues, but she was met with further obstruction by KSU.[80] Ultimately, KSU did not just do nothing about the incident—KSU actually impeded Farmer's ability to gain any meaningful recourse from the incident.

The incident severely affected Farmer; she struggled with school after the incident.[81] Among other things, she "missed classes . . . withdrew from KSU activities . . . fell into a deep depression, slept excessively, and engaged in self-destructive behaviors such as excessive drinking and slitting her wrist."[82] KSU left Farmer vulnerable because they failed to take any protective action, thereby "[sending] a message to fraternity members that students can [sexually assault] other students with no fear of school disciplinary action."[83]

The Tenth Circuit analyzed the legal question before them: "[W]hat harm must Plaintiffs allege that KSU's deliberate indifference caused them?"[84] The answer was simple. Under *Davis*, a school's "deliberate indifference must . . . cause students to undergo harassment *or make them liable or vulnerable to it.*"[85] This plain language presented a dual path to

74. *Id.* at 1099.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 1099–100.
82. *Id.*
83. *Id.* at 1100 (internal citations omitted).
84. *Id.* at 1097 (alterations omitted).
85. *Id.*

liability. Therefore, a viable *Davis* claim does not require a subsequent sexual assault before a plaintiff can sue—vulnerability is enough.[86] To read *Davis* otherwise "simply ignores *Davis*'s clear alternative language."[87]

Furthermore, the Tenth Circuit explained that this theory of liability is consistent with Title IX's goal of ending discriminatory practices. Requiring that "student[s] must be harassed or assaulted a second time before the school's clearly unreasonable response to the initial incident becomes actionable . . . *runs counter to the goals of Title IX* and is not convincing."[88] Once a school has knowledge of actionable peer sexual misconduct, it cannot "turn a blind eye to that" misconduct.[89] To do so would, in effect, create more gender discrimination by enabling an "adverse environment" and denying students their equal access to education.[90] In the Tenth Circuit's opinion, the plain language of *Davis* supports a vulnerability standard for Title IX liability—subjecting a student to gender discrimination includes making them vulnerable to sexual misconduct.

2. Circuit Courts Adopting the Further Misconduct Standard

Under the further misconduct standard, plaintiffs must allege that a school's deliberately indifferent response caused them to actually experience more sexual misconduct. Therefore, vulnerability alone is not enough to bring a successful claim under *Davis*.

i. Sixth Circuit: *Kollaritsch v. Michigan State University*

In *Kollaritsch v. Michigan State University Board of Trustees*, the Sixth Circuit held that Title IX requires a school's deliberate indifference to cause additional incidents of sexual misconduct before a plaintiff can bring a claim.[91] *Kollaritsch* involves four incidents of sexual misconduct

86. *Id.* at 1103.

87. *Id.* at 1104.

88. *Id.* (emphasis added) (citing Karasek v. Regents of the Univ. of Cal., No. 15-cv-03717-WHO, 2015 WL 8527338, at *12 (N.D. Cal. Dec. 11, 2015)).

89. *Id.* (citing Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 641 (1999)).

90. *Id.* at 1106.

91. *See* Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613, 624–25 (6th Cir. 2019); *see also* Foster v. Bd. of Regents of Univ. of Mich., 952 F.3d 765, 781–82 (6th Cir. 2020), *vacated on reh'g en banc*, 958 F.3d 540 (6th Cir. 2020); Doe v. Univ. of Ky., 959 F.3d 246, 253 (6th Cir. 2020) (interpreting *Kollaritsch* to require multiple incidents of sexual misconduct).

at Michigan State University ("MSU").[92] These four incidents follow a similar pattern: the plaintiff was sexually assaulted by another student, MSU's response to the incident was allegedly inadequate, and the plaintiff sued under *Davis*.[93] The plaintiffs' alleged that MSU's deliberate indifference deprived them of their of equal access to education.[94] No plaintiff, however, alleged *additional* sexual misconduct after notifying MSU.[95] For this reason, MSU moved to dismiss the claim, which the district court denied leaving MSU the opportunity to file an interlocutory appeal.[96]

The main issue before the Sixth Circuit concerned *Davis*'s pleading standard: "[W]hether a plaintiff must *plead further acts of discrimination* to allege deliberate indifference to peer-on-peer harassment under Title IX."[97] The Sixth Circuit begins with a standard delineation of the *Davis* test.[98] In unorthodox fashion, however, the court begins with the assumption that *Davis* is a judicially-created tort; in fact, *Davis* actually contains two separate, but related, intentional torts: (1) actionable peer misconduct and (2) a deliberate indifference tort.[99] Treating *Davis* as a common law tort in which a plaintiff must prove every element to prevail, the Sixth Circuit explains what each element requires in detail.[100] Pertinent to this discussion, two separate elements of *Davis*'s related torts foreclose claims of single-incident peer sexual misconduct.

First, the Sixth Circuit discusses the meaning of *pervasive* in *Davis*'s "severe, pervasive, and objectively offensive" element in support of a single incident's insufficiency.[101] This element falls within the *Davis*'s first intentional tort—actionable peer misconduct. The Sixth Circuit defines *pervasive* as "*multiple* incidents of [misconduct]; one incident of

92. *Kollaritsch*, 944 F.3d at 618.

93. *Id.*

94. *See id.*

95. *Id.* at 624–26.

96. *Id.* at 619.

97. *Id.*

98. *Id.* ("The school is properly held liable in damages only where [it is] deliberately indifferent to sexual harassment, of which [it] has 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.") (internal citations and quotation marks omitted).

99. *Id.* at 619–20.

100. Id. at 620–24; *see also Civil Rights Law—Title IX—Sixth Circuit Requires Further Harassment in Deliberate Indifference Claims.*—Kollaritsch v. Michigan State University Board of Trustees, *944 F.3d 613 (6th Cir. 2019)*, 133 HARV. L. REV. 2611 (2020).

101. *Kollaritsch*, 944 F.3d at 619–21; Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 652–53 (1999).

[misconduct] is not enough."[102] In support of this definition, the Sixth Circuit quotes *Davis*'s dictum which cast doubt on the sufficiency of a single incident of sexual misconduct as "having a *systematic effect*."[103] Because of this dictum, a single incident of peer sexual misconduct is never enough to survive under *Davis* according to the Sixth Circuit.

Second, the Sixth Circuit discusses the "causation" element as supporting the notion that deliberate indifference must cause further sexual misconduct.[104] The deliberate indifference tort requires: (1) knowledge; (2) an act; (3) injury; and (4) causation.[105] The Sixth Circuit explained that under *Davis*, a plaintiff must be subjected to discrimination because of the school's deliberate indifference which requires "further actionable [misconduct] before a claim can be brought."[106] Therefore, a school's unreasonable response must actually cause further actionable sexual misconduct to constitute "causation." In other words, *but for* the school's deliberately indifferent response, the student would not have suffered from other incidents of misconduct.

The Sixth Circuit dismisses *Davis*'s dual path to liability as a misreading of the opinion's language. In fact, the alleged choice between *causing* the misconduct or leaving the plaintiff *vulnerable* is really no choice at all. Explaining the misreading of *Davis* further:

> The [] Court described wrongful conduct of both *commission* (directly causing further harassment) and *omission* (creating vulnerability that leads to further harassment). The definition presumes that post-notice harassment has taken place; vulnerability is simply an alternative pathway to liability for harassment, not a freestanding alternative ground for liability. In sum, the vulnerability component of the . . . "subjected" definition was not an attempt at creating broad liability for damages for the *possibility* of harassment, but rather an effort to ensure that a student who experiences post-notice harassment may obtain damages regardless of whether the harassment resulted from the institution *placing* the student in a position to experience that harassment or *leaving* the student vulnerable to it.[107]

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102. *Kollaritsch*, 944 F.3d at 620 (quoting *Davis*, 526 U.S. at 652–53).

103. *Id.* (quoting *Davis*, 526 U.S. at 652–53).

104. *Id.* at 622–24.

105. *Id.* at 621.

106. *Id.* at 622 (citing *Davis*, 526 U.S. at 644); *see also* Thompson v. Ohio State Univ., 639 F. App'x 333, 343–44 (6th Cir. 2016) (accounting for any further incidents of harassment when analyzing the university's deliberate indifference).

107. *Kollaritsch*, 944 F.3d at 623 (quoting Zachary Cormier, *Is Vulnerability Enough: Analyzing the Jurisdictional Divide on the Requirement for Post-Notice Harassment in Title IX Litigation*, 29

Therefore, the Sixth Circuit determined that any court interpreting *Davis* as allowing two paths to liability fatally relies on this misreading. *Davis* does not support sweeping Title IX liability; in fact, it is under rather narrow circumstances that a school would be liable.

The concurrence, which joins the majority in full, engaged in statutory interpretation to support the further misconduct standard. In their view, the answer lies within the Supreme Court's definition of *subjects*.[108] *Subjects* can be read two ways: narrow or broad. Under the concurrence's view, Title IX's statutory language supports a narrow reading of *subjects*. Title IX prohibits students being subjected to discrimination; however, a person can't be subjected to discrimination without first experiencing some discrimination.[109] The same line of reasoning applies to *Davis*'s pleading standard regarding causation. A school's deliberately indifferent response cannot be discriminatory without the student first experiencing some discrimination.[110]

Furthermore, Title IX's statutory context supports a narrow reading. The term "subjected to discrimination" appears alongside "excluded from participation" and "denied the benefits."[111] The definitions of *exclusion* and *deny* do not mean that participation was made less likely—it means that participation was not possible.[112] Therefore, *subjects* means that the plaintiff actually experienced discrimination—not that it was made more likely.[113] Thus, Title IX provides very narrow protection in cases of peer sexual misconduct.

ii. Eighth Circuit: *K.T. v. Culver-Stockton College*

In *K.T. v. Culver-Stockton College*, the Eighth Circuit held that a single incident of peer sexual misconduct did not violate Title IX.[114] K.T., a high school soccer player, visited Culver-Stockton on an athletic recruiting trip.[115] She was taken to a fraternity party, given alcohol, and

YALE J.L. & FEMINISM 1, 23–24 (2017)).

108. *Id.* at 628 (Thapar, J., concurring) ("[T]he school's deliberate indifference must cause students to undergo harassment or make them liable or vulnerable to it.") (internal quotation marks omitted).

109. 20 U.S.C. § 1681(a); *Kollaritsch*, 944 F.3d at 629 (Thapar, J., concurring).

110. *Id.* (Thapar, J., concurring).

111. *Id.* (Thapar, J., concurring) (citing 20 U.S.C. 1681(a)).

112. *Id.* (Thapar, J., concurring).

113. *Id.* (Thapar, J., concurring).

114. 865 F.3d 1054, 1059 (8th Cir. 2017).

115. *Id.* at 1056.

sexually assaulted by a Culver-Stockton student.[116] In response to K.T.'s report, Culver-Stockton simply canceled their scheduled meeting with K.T. and took no further action.[117] K.T. sued Culver-Stockton for a violation of Title IX under *Davis*, but the district court dismissed the claim because K.T. was not a student at Culver-Stockton—and therefore lacked standing.[118]

On appeal, the Eighth Circuit agreed that K.T. failed to state a claim.[119] For the sake of argument, however, the Eight Circuit explained that K.T.'s claim also would have been dismissed on the merits because she did not state a valid *Davis* claim. In the Eighth Circuit's opinion, a single incident of sexual misconduct cannot satisfy the "severe, pervasive, and objectively offensive" element of *Davis*.[120] Therefore, a single incident cannot have a systemic effect on the denial of equal access to education.[121] But this discussion was simply for the sake of argument and considered dictum; therefore, the court's "adoption" of the further misconduct standard is non-controlling.

iii. Ninth Circuit: *Reese v. Jefferson School District No. 14J*

In *Reese v. Jefferson School District No. 14J*, the Ninth Circuit held that a single incident of sexual misconduct did not violate Title IX when no further misconduct *could have* happened afterwards.[122] Four high school girls played a water balloon prank on some male students at a senior-day party.[123] Facing punishment, the female students claimed they were retaliating for previous sexual misconduct by the male students.[124] Although school officials had no prior knowledge, they did not investigate

116. *Id.*

117. *Id.*

118. *Id.* at 1056–57 ("[T]he student-on-student harassment doctrine, as its name suggests, applies only in cases where a student sues her own school over harassment by a fellow student.").

119. *Id.* at 1057.

120. *Id.* at 1059 (quoting Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 651 (1999)).

121. *Id.* (quoting *Davis*, 526 U.S. at 652).

122. 208 F.3d 736, 740 (9th Cir. 2000). *But see* Karasek v. Regents of the Univ. of Cal., No. 15-CV-03717, 2015 WL 8527338, at *10 n.9 (N.D. Cal. Dec. 11, 2015) (concluding that *Reese* does not support the proposition that there must be further sexual harassment because the recipient's response was not deliberately indifferent); Takla v. Regents of the Univ. of Cal., No. 215CV04418CASSHX, 2015 WL 6755190, at *5 n.3 (C.D. Cal. Nov. 2, 2015) (stating that *Reese* does not address vulnerability).

123. *Reese*, 208 F.3d at 737–38.

124. *Id.* at 738.

the claim and took no further action.[125] The female students sued the school under *Davis* for a violating Title IX.[126]

The Ninth Circuit explained that the female students did not state a viable *Davis* claim because there was "no evidence that any [misconduct] occurred after the school district learned of the plaintiffs' allegations."[127] It is notable, however, that no school officials had actual knowledge of the alleged misconduct until *after the* school year had ended. Whether this case is controlling on the causation standard for deliberate indifference claims is highly questioned by the district courts.[128] The district courts believe that the Ninth Circuit did not adopt the further misconduct standard because vulnerability was not addressed in *Reese*; in fact, the school in *Reese* could not have been deliberately indifferent because they lacked knowledge of the incident until after the school year had ended—which made any causation analysis a moot point.[129]

III. ANALYSIS

Courts should adopt the vulnerability standard for three reasons. First, a plain reading of Title IX and *Davis* supports a broad definition of what *subjecting to discrimination* means. Second, a single incident of sexual misconduct can be part of a widespread and systemic effect, thus, making it *pervasive* even if no further sexual misconduct occurs to a single plaintiff. And third, the vulnerability standard aligns with both Congress's intent regarding Title IX and Title VII—the latter of which protects against sexual misconduct in the workplace.

A. Scope of Subjecting to Discrimination

A plain reading of Title IX and *Davis* supports two paths to liability—which includes vulnerability. But tortification—the treatment of a

125. *Id.*

126. *Id.*

127. *Id.* at 740.

128. *See, e.g.*, Karasek v. Regents of the Univ. of Cal., No. 15-CV-03717, 2015 WL 8527338, at *10 n.9 (N.D. Cal. Dec. 11, 2015) (concluding that *Reese* does not support the proposition that there must be further sexual harassment because the recipient's response was not deliberately indifferent); Takla v. Regents of the Univ. of Cal., No. 215-CV-04418CASSHX, 2015 WL 6755190, at *5 n.3 (C.D. Cal. Nov. 2, 2015) (noting that *Reese* does not address vulnerability).

129. *See Karasek*, 2015 WL 8527338, at *10 n.9; *Takla*, 2015 WL 6755190, at *5 n.3 ("Moreover, the harassment there ended only because by that time, the school year had ended. In other words, even if the school had done nothing, plaintiffs could not have been subjected to further harassment nor be made vulnerable to it.") (internal citations and quotation marks omitted).

judicially-created remedy as a common law tort—confuses *Davis*'s requirements which leads to misguided and cruel results.

1. Plain Language Reading

Title IX's mandate is very clear: no student should be "*subjected* to discrimination" on the basis of sex.[130] One way a student can be subjected to gender discrimination is through a school's deliberate indifference to sexual misconduct. A school can be liable for peer sexual misconduct if they are deliberately indifferent to a plaintiff's incident of sexual misconduct of which they had actual knowledge. The *Davis* Court held that "if a [school] does not engage in [misconduct] directly" its deliberate indifference must either cause the students to undergo misconduct or simply leave them vulnerable to it.[131] Therefore, schools can be liable under two causation theories when they display deliberate indifference: causing further misconduct or leaving a student vulnerable to misconduct.

Under the first path, a school can cause further misconduct indirectly through its deliberate indifference. For example, a student reports a credible threat of peer sexual misconduct to school officials. Through the school's careless investigation, the names of the students involved are inadvertently released to every other student in the school by a mass emailing of the investigation report. The reporting student is targeted in the school because of the now-widely known incident of peer sexual misconduct. Eventually, the reporting student is sexually harassed by other students because of the careless release of the investigation report. In effect, a school's deliberate indifference indirectly *caused* gender discrimination by depriving the student of their equal access to education.

A school's deliberate indifference, however, could also leave a student *vulnerable* to sexual misconduct—and therefore gender discrimination—that deprives them of their equal access to education. The Supreme Court's meaning of vulnerability coincides with the phrases "lay open" or "expose."[132] For instance, a student again reports an incident of peer sexual misconduct. The school does nothing; meanwhile, the perpetrator goes undisciplined and undeterred. The student feels unsafe on campus, not knowing if another incident could occur. In fact, the student lives in fear of the perpetrator who the student has seen on campus since the incident. Due to this potential situation, the student is unable to focus on

130. 20 U.S.C. § 1681(a) (emphasis added).
131. Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 644–45 (1999).
132. *Id.* at 645.

studying and tends to avoid other school-related activities due to the lack of support from the school. This leaves the student open to retaliation from the perpetrator for reporting the incident. Under this scenario, leaving the student unprotected and vulnerable *subjects* them to gender discrimination. Under *Davis*, either of the two previous scenarios would be sufficient to bring a Title IX claim because the student was subjected to gender discrimination both times.[133]

Courts that do not read *Davis* as allowing two separate and distinct paths to institutional liability are wrong as a matter of legal interpretation. A plain reading is the appropriate place to begin in the legal interpretation of text.[134] The plain language in *Davis* should be interpreted according to its natural and ordinary meaning.[135] In fact, this is the most basic premise interpreting legal text.[136] Very clearly, a natural and ordinary reading of *Davis* offers two paths to liability: "causing the students to undergo [misconduct]" or simply "making them liable or vulnerable to it."[137] This is supported by another rule of legal interpretation, which states: "If possible, every word should be given effect; no word should be read as surplusage."[138] Courts must give full effect to each path of liability put forth by *Davis*.[139]

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133. An opposing argument to this viewpoint believes that Title IX would be transformed into a "strict-liability statute for hypothetical or potential harassment" in which it would be "extremely difficult for [schools] to fend off lawsuits . . . even if the [schools] did not cause or allow any actual harassment." Zachary Cormier, *Is Vulnerability Enough? Analyzing the Jurisdictional Divide on the Requirement for Post-Notice Harassment in Title IX Litigation*, 29 YALE J.L. & FEMINISM 1, 25 (2017). This argument, however, distorts the reality of a plaintiff's burden under *Davis* in which the plaintiff must prove that the school was deliberately indifferent—which is a relatively easy requirement for a school to meet (essentially, they must avoid doing nothing in response to the student-survivor) and therefore a difficult one for a plaintiff to prove. Additionally, this argument ignores the fact that there are other components to *Davis* which are difficult to meet and often heavily contested. *See, e.g.*, 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, 227–33 (2011) (discussing the "knowledge" problem that many plaintiffs face when bringing a *Davis* claim). Therefore, it is disingenuous to say that *Davis* claims would be treated as a strict-liability tort under the vulnerability standard.

134. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1749 (2020) ("The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration.").

135. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 69 (2012).

136. *Id.* ("The ordinary-meaning rule is the most fundamental semantic rule of interpretation.").

137. *Davis*, 526 U.S. at 645 (cleaned up).

138. ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 44 (2008) [hereinafter MAKING YOUR CASE].

139. Farmer v. Kan. State Univ., 918 F.3d 1094, 1104 (10th Cir. 2019) ("KSU's contrary argument, that Plaintiffs must allege (and eventually prove) that KSU's deliberate indifference to their

Ignoring *Davis*'s vulnerability prong does not give full effect to its natural and ordinary meaning. To be interpreted according to its natural and ordinary meaning, the clause before the word "or" and the clause after should be given distinct meanings from each other.[140] Courts that collapse the Supreme Court's definition of *subjects* into one meaning—requiring further misconduct—eliminate the clauses' distinct meanings; now, a school can only be liable if they indirectly cause further sexual misconduct.

Courts adopting the further misconduct standard render the *vulnerability* clause as surplusage. In reality, a person can be left vulnerable to sexual misconduct without actually experiencing it. A common sense example of leaving a person vulnerable to sexual misconduct does not require them to actually experience misconduct—it just means that they were unprotected from the possibility of sexual misconduct.[141] Thus, courts, such as the Sixth Circuit, that adopt the further misconduct standard ignore the Supreme Court's own language that supports *vulnerability* as a viable path to liability. Courts that do so are substituting their own definition of what the word *subjects* means and ignoring the Supreme Court's own definition.

Chief Justice John Marshall's oft-repeated words echo throughout the American legal system: "It is emphatically the province and the duty of the judicial department to *say what the law is*."[142] In this case, the Supreme Court has said what the law is: the vulnerability standard. Since the Supreme Court is the highest court in the United States, lower courts adopting the further misconduct standard ignore a view of the law that they are required to follow.[143] Instead of ignoring the Supreme Court's clear language that *Davis* includes two alternative paths to institutional liability, lower courts should give the full force and effect to the Supreme Court's opinion under a plain reading of the text. Therefore, a plain reading not

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reports of rape caused each Plaintiff to endure further actual incidents of sexual harassment simply ignores *Davis*'s clear alternative language recognizing that a funding recipient's deliberate indifference must, at a minimum, cause students to undergo harassment *or* make them liable or vulnerable to sexual harassment. *We must give effect to each part of that sentence*.") (emphasis added) (internal citations and quotation marks omitted).

140. *See* Loughrin v. United States, 573 U.S. 351, 357 (2014) ("As we have recognized, [or's] 'ordinary use is almost always disjunctive, that is, the words it connects are to be given separate meanings.'") (quoting United States v. Woods, 571 U.S. 31, 45 (2013)).

141. *See Davis*, 526 U.S. at 645.

142. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added).

143. *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one *supreme* Court, and in such *inferior* Courts as the Congress may from time to time ordain and establish.") (emphasis added).

only supports, but demands the vulnerability standard for Title IX peer sexual misconduct claims.

2. Tortification Reading

Courts who narrowly define *Davis*'s definition of *subjects* are wrong. Their narrow view is wrong because of a reliance on tortification.[144] Tortification is the concept of invoking common law tort principles while engaging in statutory interpretation. In appropriate instances, it can be a helpful tool. Tortification, however, is often problematic in many statutory interpretation situations because statutes and common law torts are not developed the same way.[145] In fact, many statutes are not drafted in a way that allows courts to follow the strict system found in tort law in which a plaintiff must plead every delineated "element" in a claim.[146]

Furthermore, many discrimination statutes, such as Title IX, do not employ tort "terms of art."[147] The tortification of discrimination statutes has led to courts declining pragmatic outcomes for—what might seem like—more consistent outcomes based on tort law.[148] Instead, tortification outcomes often lead to confusing interpretations of the law resulting in cruel outcomes for the people that the law is supposed to protect.

For example, the *Kollaritsch* decision relies on tortification while interpreting *Davis* but reaches a confusing—and even cruel—result in doing so. In *Kollaritsch*, the Sixth Circuit treats *Davis* as requiring a plaintiff to plead two separate torts in which they meet every single element to claim relief.[149] It should be noted, however, that Title IX or *Davis* itself contain no tort terms of art. This leaves the Sixth Circuit to ignore the plain language while imputing tort principles where it sees fit, which is somewhat problematic because there is a potential that congressional intent will be ignored.[150]

The Sixth Circuit's problem stems from treating the "causation" element, in which a school's deliberate indifference must cause harassment or make a student vulnerable to it, as a cause-in-fact standard.

144. See generally CIVIL RIGHTS LAW, *supra* note 100.

145. *See* Sandra F. Sperino, *Let's Pretend Discrimination Is a Tort*, 75 OHIO STATE L.J. 1107, 1108–09 (2015) ("Tortification poses a threat to modern statutory interpretation.").

146. *See Civil Rights Law*, *supra* note 100, at 2616.

147. Sandra F. Sperino, *The Tort Label*, 66 FLA. L. REV. 1051, 1053 (2014) [hereinafter *The Tort Label*].

148. *See id.* at 1067.

149. 944 F.3d 613, 619 (6th Cir. 2019).

150. *See* discussion *infra* Section III.C.1.

Under this standard, *but for* the school's deliberate indifference, the further misconduct would not have happened. But applying the cause-in-fact standard adopted by the Sixth Circuit is questionable; the Sixth Circuit never explains its reasoning for adopting such a standard—it just adopts it. This is problematic because the cause-in-fact standard is not even the only causation standard within tort law and the Sixth Circuit gives no compelling reasons for why this is the appropriate standard.[151] Ultimately, this is a misguided interpretation of Title IX, something that was not written for the purposes of being treated as a strict common law tort.

Viewing the Sixth Circuit's analysis through the lens of tortification explains why its causation standard for a Title IX claim under *Davis* is not only high, but nearly impossible and borderline cruel. Instead of reading the plain language of *Davis*, the Sixth Circuit awkwardly contorts the standard behind *Davis* to require a common law tort causation test. But this awkward contortion of *Davis* even confuses the Sixth Circuit's own analysis by misinterpreting tort law principles. As any first-year law school student knows, there are general principles that apply to the two basic tort concepts of causation and injury.[152] One of these general principles is the fact that causation and injury are linked—the conduct must be the "legal cause of the other's harm."[153] However, the Sixth Circuit's causation standard for *Davis* is not linked to the injury that Title IX seeks to remedy.

Very clearly, the injury that Title IX seeks to remedy is deprivation of "access to the educational opportunities or benefits provided by the school."[154] Thus, a tort-based analysis of *Davis* requires the school's deliberate indifference to be the legal cause of the plaintiff's deprivation of equal access to education. The Sixth Circuit, however, muddies the water between causation and injury under *Davis*. Under its analysis, the school's deliberate indifference must be the legal cause of *further incidents of sexual misconduct*—a totally different injury than the one Title IX is meant to remedy. The Sixth Circuit's view would allow a school to be deliberately indifferent to a plaintiff who was actually deprived of their equal access to education, but the school would still face no liability because the plaintiff did not suffer additional incidents of sexual misconduct. The Sixth Circuit's contortion of *Davis* allows Title IX injuries to go ignored and leaves survivors without legal redress.

151. *The Tort Label*, *supra* note 147, at 1078–79.

152. RESTATEMENT (SECOND) OF TORTS § 430 (AM. L. INST. 1965).

153. *Id.*

154. Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 650 (1999).

Nevertheless, the Sixth Circuit's tortification of peer sexual misconduct claims ignores other circuit court opinions because those courts did not analyze *Davis* under a strict tort lens; those courts read *Davis*'s plain language which supports dual paths to liability. Instead of engaging in tortification, which often results in confusing and cruel results, courts should simply read the plain language of *Davis*, which clearly supports the vulnerability standard.

B. The Meaning of Pervasive

The legally correct definition of "pervasive" is having an effect at a widespread level which is how the Supreme Court defined it in *Davis*.[155] Sexual assault on college campuses is one example of sexual misconduct on a widespread level; however, the further misconduct standard's definition of "pervasive" reflects a necessary change to how often courts, a male-dominant institution, view the problem of sexual assault.

1. Defining Pervasive

Under *Davis*, a school must be deliberately indifferent to severe, *pervasive*, and objectively offensive sexual misconduct in order for a plaintiff to bring a successful claim. The Sixth Circuit in *Kollaritsch* interpreted the *Davis* Court's use of *pervasive* as support for requiring multiple incidents of misconduct.[156] In their view, pervasive is defined as *multiple*. No controlling reasoning, however, is given to support this definition.

In an effort to support this definition, the Sixth Circuit cites *Davis* dictum; however, it elevates the status of this dictum and treats it as controlling. The dictum's relevant portion reads: "[I]n theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect, [but] we think it unlikely that Congress would have thought such behavior sufficient."[157] In isolation, this somewhat confusing line of dictum seems to deny a single incident of sexual misconduct as sufficient. But the greater context of *Davis* lends support to a more expansive meaning of pervasive which is more in line with the

155. *Id.* at 653 (internal quotation marks omitted).

156. The Sixth Circuit decision in *Kollaritsch* is really the only circuit court opinion to discuss the definition of the word "pervasive" in-depth as a basis for requiring multiple incidents. The Eighth Circuit's discussion is perfunctory, and the Ninth Circuit's discussion is non-existent.

157. *Davis*, 526 U.S. at 652–53.

vulnerability standard.

Within *Davis*, the Supreme Court, in fact, explained the meaning behind *pervasive*. In the very same paragraph as the dictum above, both the majority and dissent agree that "Title IX liability may arise when a funding recipient remains indifferent to severe, gender-based mistreatment played out on a *widespread level* among students."[158] Under this definition, a single *isolated* incident may or may not be enough for Title IX liability; however, gender-based discrimination occurring on a *widespread level* within the educational context is sufficiently pervasive under *Davis*.

Therefore, for something to be pervasive, it does not require multiple incidents happen to a single student. Rather, multiple incidents happening to multiple students over time can also be sufficient. This widespread effect creates a systemic effect that denies equal access to education based on a student's gender. This definition better comports with the Supreme Court's view of what *pervasive* means. Meanwhile, it also avoids the cruel requirement that a single student must experience multiple incidents of peer sexual misconduct for a *Davis* claim to succeed.

2. Sexual Assault on College Campuses

Unfortunately, one of the most common examples of systemic peer sexual misconduct today is sexual assault on college campuses.[159] While sexual assault on college campuses often goes unreported, the reported statistics are still alarming.[160] During a four-year undergraduate career, around 26.4% of women will be sexually assaulted.[161] Of those survivors, 34% will experience post-traumatic stress disorder and 33% will endure depression.[162] Many perpetrators will go on to act again, committing an average of six sexual assaults.[163]

In addition to the obvious psychological harm, sexual assault also

158. *Id.* at 653 (emphasis added) (internal quotation marks omitted).

159. *See generally* BONNIE S. FISCHER, FRANCIS T. CULLEN & MICHAEL G. TURNER, U.S. DEP'T OF JUST., THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN (2000), https://www.ncjrs.gov/pdffiles1/nij/182369.pdf [https://perma.cc/WP8F-8CV6].

160. *Sexual Assault on College Campuses*, OFF. ON WOMEN'S HEALTH, https://www.womenshealth.gov/relationships-and-safety/sexual-assault-and-rape/college-sexual-assault (last visited Oct. 8, 2021).

161. *Campus Sexual Violence: Statistics*, RAINN, https://www.rainn.org/statistics/campus-sexual-violence [https://perma.cc/XB46-DPYY] (last visited Oct. 8, 2021).

162. *Statistics*, KNOW YOUR IX, https://www.knowyourix.org/issues/statistics/ [https://perma.cc/78PL-NHWV] (last visited Oct. 8, 2021).

163. *Id.*

creates less-obvious barriers to education. In most cases, sexual assault survivors bear financial costs from their incidents, creating even more gender-based barrier to education.[164] It is estimated that each survivor suffers anywhere from $87,000 to $240,000 in costs associated with incidents of sexual assault.[165] These costs include: "lost productivity, medical and mental health care, property loss, and lost quality of life."[166] These psychological and financial costs force many survivors of campus sexual assault to lose their equal access to education.

In any circumstance, a sexual assault is traumatic for the survivor; however, the overwhelming majority of sexual assaults on college campuses happen to females.[167] Conversely, the majority of perpetrators are overwhelming male.[168] It is essentially an undeniable fact that female sexual assault occurs on a *widespread* level within the higher-education system. This widespread sexual assault problem creates a systemic effect of denying equal access of education to many college women, thereby creating massive gender-based discrimination. Courts who ignore the statistics ignore the reality—"sexual violence on campus is *pervasive*."[169] This sexual assault endemic on college campuses, which affects mostly women, is clearly the type of gender-based injustice that Title IX seeks to rectify.

3. A Necessary Change in the Judiciary

As a pervasive endemic which affects students at all levels of education, courts need to alter their own mindsets to better reflect that

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164. *See generally* Dana Bolger, *Gender Violence Costs: Schools' Financial Obligations Under Title IX*, 125 YALE L.J. 2106 (2016).

165. THE WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION 5 (2014) [hereinafter WHITE HOUSE COUNCIL], https://www.knowyourix.org/wp-content/uploads/2017/01/sexual_assault_report_1-21-14.pdf [https://perma.cc/3KEJ-R9XW].

166. Bolger, *supra* note 164, at 2115 (describing costs associated with sexual assault and rape as a "rape tax").

167. The statistics are even higher for members of the LGBTQ+ community. *See* WHITE HOUSE COUNCIL, *supra* note 165, at 1. After the Supreme Court's decision in *Bostock v. Clayton County* and a recent executive order issued by the Biden administration, Title IX will be applicable to members of the LGBTQ+ community. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020) (holding that Title VII's prohibition against "sex discrimination" includes LGBTQ+ individuals); *see also* Exec. Order No. 13,988, 86 Fed. Reg. 7,023 (Jan. 20, 2021) ("Under *Bostock*'s reasoning, laws that prohibit sex discrimination—including Title IX . . . prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary.").

168. WHITE HOUSE COUNCIL, *supra* note 165, at 9.

169. RAINN, *supra* note 161 (emphasis added).

reality. One of the biggest tools for fighting sexual misconduct within our schools is adjusting views on sexual misconduct within the larger legal profession. A 2014 White House report on the problems of rape and sexual assault within the United States education system recognized that, "[s]exual assault is pervasive because our culture still allows it to persist."[170] Courts adopting the further misconduct standard are part of that cultural problem allowing sexual misconduct to run rampant on college campuses all while denying many students their guarantee to equal access to education under the law.

Adopting the further misconduct standard sends the wrong signal to schools: sexual misconduct does not need to be taken as seriously as it should because the chances of facing liability under *Davis* are remote. Then-Senator Joe Biden's words in support of the Violence Against Women Act[171] apply to how the legal profession *should* view sexual misconduct on college campuses: "We are helpless to change the course of [sexual] violence unless, and until, we achieve a national consensus that it deserves our profound public outrage."[172]

The lack of public outrage, in part, lies with male attitudes toward sexual violence and other abusive behaviors. The typical male attitude toward abusive behavior often allows the perpetuation of abusive behavior.[173] Men tend to think that their peers are accepting of sexist or abusive behavior, even if they personally are not.[174] This abusive behavior persists because males then lack confidence to take action against male abusers.[175] This silence, in turn, allows the male abuser to believe that his behavior is acceptable (thus making it more likely that he will display abusive behavior in the future). Perhaps then, a federal court system that is overwhelmingly dominated by men should take notice of the sheer magnitude of sexual misconduct on college campuses and view it as a pervasive problem. Otherwise, they continue the trend of males *allowing* abusive behavior to persist.[176]

If the courts allow schools to bury their heads in the sand and not take sexual misconduct seriously, then the problem will continue, and many

170. WHITE HOUSE COUNCIL, *supra* note 165, at 5.

171. The Violence Against Women Act of 1994, 42 U.S.C. §§ 13701–14040.

172. WHITE HOUSE COUNCIL, *supra* note 165, at 33–34.

173. *See id.* at 27.

174. *Id.*

175. *Id.*

176. In 2020, there were 1436 total Article III judges. 1048 were male, while only 388 were female. So in the federal judicial system, nearly 73% of all Article III judges are male. *Demography of Article III Judges, 1787–2020*, FED. JUD. CTR., https://www.fjc.gov/history/exhibits/graphs-and-maps/gender [https://perma.cc/QA7N-5SDC] (last visited Oct. 8, 2021).

women will be denied their right to education. A cultural change, however, can occur by correctly reading the law which supports a broad definition of pervasive and not a myopic definition that is applied on an individual basis.

Title IX's broad mandate against gender discrimination does not have to mean that pervasive requires multiple incidents of sexual misconduct to only the single plaintiff in court. As a matter of law and as a matter of public policy, this view is wrong and cruel. Title IX and *Davis* are legal tools to hold schools accountable for their gender discrimination. But under the further misconduct standard, *Davis* only provides a false light of glimmering hope by placing a nearly impossible legal burden on plaintiffs. The further misconduct standard tells students that their singular traumatic experience was not enough to afford them a legal remedy just because this traumatic experience did not happen twice—even if the school was deliberately indifferent.

Essentially, a school can risk being deliberately indifferent to the rampant sexual misconduct on their campus and—as long as it does not happen to the same student twice—the school will face no liability. Students across the United States deserve to have their voices heard in court; they should not be denied based on a narrow and archaic definition of pervasive. With overwhelming statistics showing that sexual misconduct is a serious problem, a further misconduct standard makes little sense in legal terms, public policy, or even common sense. A serial sexual predator is unlikely to change their behavior without serious consequences.[177] Similarly, a school that consistently allows sexual misconduct to go unchecked on campus will not take action until it is faced with the consequence of serious liability for its deliberate indifference. As a matter of law—the further misconduct standard is clearly wrong; however, as a matter of public policy, the further misconduct's nearly-impossible standards lead to cruel results for survivors of sexual assault.

The vulnerability standard reflects a better understanding of the law and public policy. It sends a much needed message to schools that sexual misconduct *is a pervasive problem* and that schools need to take it seriously or risk facing Title IX liability. The vulnerability standard allows schools to better understand what is required of it by Title IX because it must now act when confronted with situations of gender discrimination.

177. *See* Stanton E. Samenow, *The Thinking Processes of Sexual Predators*, PSYCH. TODAY (Dec. 15, 2017), https://www.psychologytoday.com/us/blog/inside-the-criminal-mind/201712/the-thinking-processes-sexual-predators [https://perma.cc/WU9Q-T58D].

Furthermore, under this standard, students trying to remedy the gender discrimination they faced would be able to actually have a chance to hold a school accountable for the school's deliberate indifference, even if the student only experienced a singular incident of serious sexual misconduct. The school's responsibility under the deliberate indifference standard is already a low threshold to maintain—to avoid being deliberately indifferent, the school's response must avoid being "clearly unreasonable in light of the known circumstances."[178]

A vulnerability standard sends the proper message: the law takes gender discrimination seriously and schools who allow pervasive sexual misconduct to persist will face consequences for their deliberate indifference. The rampant sexual misconduct in the educational system deserves public outrage—and the law should reflect that.

C. Congressional Intent

The vulnerability standard is supported by Congress's goals when passing Title IX which sought to end gender discrimination in education settings. Additionally, the vulnerability standard better aligns with Title VII which also sought to end gender discrimination in the workplace.

1. Title IX's Goals

Congressional intent behind Title IX's passage supports the vulnerability standard. Legislative history should always be taken into account, even if the meaning of the text is unambiguous—as is the case with *Davis*.[179] Congress passed Title IX in 1972 with two goals in mind: to "avoid the use of federal resources to support discriminatory practices" and "provide individual citizens effective protection against those practices."[180] The further misconduct standard frustrates both of those goals; therefore, it does not fulfill Congress's intent.

First, courts adopting a further misconduct standard support gender discrimination. The Supreme Court, in a Title VII case, first declared: "Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the

178. Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 648 (1999).

179. *See* MAKING YOUR CASE, *supra* note 138, at 48–49 ("You cannot rely on . . . statements that legislative history should never be consulted when the text is clear.").

180. Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979).

basis of sex."[181] Later, the Supreme Court affirmed that those same principles apply to Title IX.[182] Therefore, peer sexual misconduct is undeniably a form of gender discrimination.

Practical realities, however, must be balanced with a school's responsibility for peer sexual misconduct.[183] Schools are not responsible for every instance of peer sexual misconduct; however, they are responsible for their deliberately indifferent responses. At a minimum, the law requires them to respond.[184] While there is no prescribed response, doing nothing is always unreasonable because it leaves students vulnerable to further sexual misconduct.[185] Directly or indirectly, these schools are supporting gender discrimination. Schools that require a further misconduct standard support discriminatory practices and therefore, courts should not adopt it.[186]

Second, courts adopting the further misconduct standard do not provide students with effective protection against gender discrimination. Under a further misconduct standard, a school can be deliberately indifferent and face no liability. A student can inform their school of sufficient sexual misconduct to bring a claim. In response, the school can do nothing. The school will face no liability as long as another incident of sexual misconduct does not occur.

The entire point of Title IX and *Davis* is to give students a remedy to gender discrimination. Under a further misconduct standard, the only way to obtain a remedy is to suffer sexual misconduct *multiple* times. For students to protect themselves against gender discrimination, they must face a cruel obstacle—more sexual misconduct. A further misconduct standard does not align itself with Title IX's congressional intent of providing an effective remedy by requiring more sexual misconduct.

A vulnerability standard better supports Congress's goal of effective protection under Title IX. Under a vulnerability standard, school are not allowed to do nothing in the face of a valid peer sexual misconduct claim. Because if they do, they face Title IX liability regardless of whether sexual

181. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (alteration in original).

182. *See, e.g.*, Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 280 (1998); Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 75 (1992).

183. This was a consideration of the Supreme Court when deciding the proper liability for peer sexual misconduct. *Davis*, 526 U.S. at 653 (reconciling the "general principle that Title IX prohibits official indifference to known peer sexual harassment with the practical realities of responding to student behavior").

184. *See* Farmer v. Kan. State Univ., 918 F.3d 1094, 1104 (10th Cir. 2019).

185. *See* Vance v. Spencer Cnty. Pub. Sch. Dist., 231 F.3d 253, 260 (6th Cir. 2000).

186. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979).

misconduct happens again. A vulnerability standard is more supportive of Congress's intent because it forces schools to afford students effective protection against gender discrimination.

Some argue that Congress never intended Title IX liability to be so broad as to include peer sexual misconduct; therefore, its conditions should be construed narrowly.[187] But the *Davis* Court supported Title IX liability for peer sexual misconduct and courts have routinely supported a vulnerability standard. Title IX should be construed broadly, however, because "if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language."[188] Congress intended Title IX to be as broad as necessary to end gender discrimination. Therefore, the vulnerability standard supports Congress's broad goals of ending gender discrimination because it makes it easier to achieve that goal.

2. Title IX's Relation to Title VII

From a larger perspective, Title IX's relation to Title VII[189] supports a vulnerability standard. Title IX was passed "in response to the perceived gap created by . . . Title VII" because Title VII did not cover academic institutions.[190] The legislative history shows that "Congress intended Title IX to mirror Title VII."[191] Both pieces of legislation sought to end gender discrimination in different settings: Title VII in the workplace[192], and Title IX in education. Although Title IX and Title VII have not shared the same exact trajectory[193], Title VII cases are heavily influential in Title IX cases.[194]

But while Title VII liability has seen dramatic expansion in recent years[195], the further misconduct standard would severely limit Title IX

187. Sweeney, *supra* note 17, at 45.

188. N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982) (alteration in original) (quoting United States v. Price, 383 U.S. 787, 801 (1966)).

189. Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e.

190. David S. Cohen, *Limiting Gebser: Institutional Liability for Non-Harassment Sex Discrimination Under Title IX*, 39 WAKE FOREST L. REV. 311, 317–18 (2004).

191. *Id.* at 326 (citing Doe v. Claiborne Cnty., 103 F.3d 495, 513–15 (6th Cir. 1996)).

192. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).

193. *Compare* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986) (applying common law agency principles to Title VII), *with* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 285 (1998) (rejecting common law agency principles for Title IX).

194. *See, e.g.*, Franklin v. Gwinnet Cnty. Pub. Sch., 503 U.S. 60, 75 (1992) (relying on a Title VII case to hold that sexual misconduct is gender discrimination in Title IX cases).

195. *Bostock*, 140 S. Ct. at 1737 (holding that Title VII's prohibition on the "sex" discrimination

liability for the same behavior in comparison. The judicial system's trend of limiting Title IX has led some to view Title IX as an "empty promise" instead of an effective tool for fighting gender discrimination. [196] This trend, however, goes against Congress's intent (and common sense).

Congress sought to end gender discrimination with Title IX and Title VII. To continually make it more difficult to remedy gender discrimination in education, but not in the workplace confounds both Title VII and IX's purposes. Particularly in light of the fact that Title IX covers a more vulnerable population—from children in primary school to young adults in higher education. A further misconduct standard makes it more difficult to remedy gender discrimination by providing less overall protection to a population that already has less ability to protect themselves.

By continuing to exacerbate the divergence between Title IX and Title VII, Congress's larger goal of ending gender discrimination becomes more and more frustrated. Congress's tools in the effort against gender discrimination are Title VII and Title IX. But as once recognized by the Supreme Court, "[o]ur nation has had a long and unfortunate history of sex discrimination."[197] That history continues when Title IX is severely limited even as Title VII has expanded. Schools need to be held just as accountable as employers for sexual misconduct that happens under their watch. Thus, courts should adopt the vulnerability standard to continue Congress's goal of ending this nation's history of gender discrimination.

IV. CONCLUSION

Courts should adopt the vulnerability standard for peer sexual misconduct claims. The vulnerability standard is correct for three reasons. First, it comports with Title IX and the plain language of *Davis*. Second, gender discrimination can still be pervasive even if a student only experiences one incident of sexual misconduct but is left vulnerable to more due to the school's deliberate indifference. Third, it follows Congress's intent with the passage of Title IX and aligns with Title VII.

Courts adopting the further misconduct standard are wrong. Not only

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prevents employers from firing employees solely because they are homosexual or transgender).

196. See Megan Cherner-Ranft, Comment, *The Empty Promise of Title IX: Why Girls Need Courts to Reconsider Liability Standards and Preemption in School Sexual Harassment Cases*, 97 NW. U. L. REV. 1891, 1895 (2003) ("[J]udicial interpretations of Title IX have so significantly narrowed the conditions under which a plaintiff can succeed in court that Title IX does not provide meaningful relief to sexually harassed girls.").

197. United States v. Virginia, 518 U.S. 515, 531 (1996) (quoting Frontiero v. Richardson, 411 U.S. 677, 684 (1973)).

does it make it nearly impossible to bring a peer sexual misconduct claim, but it is also cruel because it requires multiple incidents of sexual misconduct. The *Davis* Court intended for schools who were deliberately indifferent to their students to face Title IX liability. Instead, under a further misconduct standard, a school can be deliberately indifferent to a student—as long as the student does not undergo any additional sexual misconduct, the school faces no liability. This is wrong for many reasons and is a cruel distortion of "justice" in our legal system.

But most importantly, the burden should be placed on the schools—not the students. An appropriate response requires schools to do the bare minimum; essentially, the schools cannot just turn a blind eye. The further misconduct standard, however, allows them to do exactly that. But a vulnerability standard justly views these schools as potentially liable because they were, in fact, deliberately indifferent. In the end, Title IX is a legal tool to prevent gender discrimination; however, a tool that is impossible to use creates false hope for plaintiffs who wish to assert their legal rights. The vulnerability standard makes Title IX's unwieldiness a realistic tool to guarantee equal access to education.