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Cover Page Footnote

J.D. Candidate, 2024, University of Georgia School of Law; B.A., 2021, the University of Texas. I would like to thank the Editorial Board and Executive Board for their assistance in publishing this Note. This Note is dedicated to the two greatest lawyers I know: Ronald Lipshie and Matthew K. Davis.

TITLE IX AT FIFTY: REIMAGINING INSTITUTIONAL LIABILITY UNDER *KARASEK*'S PRE-ASSAULT THEORY

Delaney R. Davis[*]

Unfortunately, sexual misconduct remains a pervasive problem on college campuses throughout the country. While victims of sexual harassment and assault can report these incidents to their university, these institutions often fail to respond adequately. Investigations into the alleged misconduct are often unnecessarily delayed and school officials neglect to inform victims about the status of their cases. Even more troubling, institutions opt to impose informal sanctions on perpetrators without consulting victims.

In such instances, students can hold educational institutions accountable for these deficiencies by suing under Title IX. This is easier said than done. Typically, a plaintiff must prove that their university acted with deliberate indifference in responding to their report. To do so, a plaintiff must show that the institution had actual notice of the reported misconduct. Courts often decline to find that the institution had actual notice, even when the school was aware of the perpetrator's previous misconduct.

A new theory of institutional liability from the Ninth Circuit poses a new avenue for plaintiffs suing universities under Title IX. Under the pre-assault theory, a plaintiff argues that their institution maintained a policy of deliberate indifference to sexual misconduct that heightened their risk of victimization. Thus, a plaintiff does not need to show that the school responded with deliberate indifference to a reported instance of sexual misconduct.

This Note argues that the pre-assault theory presents a better approach to hold institutions accountable than the more typical post-assault theory of liability. Though not without its flaws, the pre-assault theory should be employed by victims across the country to hold their educational institutions accountable.

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I. INTRODUCTION

Title IX promises 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."[1] Fifty years later,[2] it remains to be seen whether the statute has lived up to its original promise.

Though many discussions of Title IX center on the statute's impact on women's sports,[3] Title IX's impact extends far beyond the soccer field or basketball court. The Department of Education has the power to condition federal aid on an institution's adherence to Title IX regulations promulgated by the Department, including standards on responding to reports of sexual misconduct.[4]

Additionally, the Supreme Court has both recognized and defined a private right of action against educational institutions for victims of sexual harassment perpetuated by both school staff and fellow students.[5] An institution's deliberate indifference to a known

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[1] 20 U.S.C. § 1681(a).

[2] *See 50 Years of Title IX: We're Not Done Yet*, WOMEN'S SPORTS FOUND. (May 4, 2022), https://www.womenssportsfoundation.org/articles_and_report/50-years-of-title-ix-were-not-done-yet/ [https://perma.cc/NL2Y-MH7K] ("June 23, 2022 marks the 50th anniversary of the passage of Title IX.").

[3] *See, e.g.*, Maggie Mertens, *50 Years of Title IX: How One Law Changed Women's Sports Forever,* SPORTS ILLUSTRATED (May 19, 2022), https://www.si.com/college/2022/05/19/title-ix-50th-anniversary-womens-sports-impact-daily-cover (discussing the impact Title IX's passage has had on women's participation in organized athletics).

[4] *See* Erin E. Buzuvis, *Title IX and Official Policy Liability: Maximizing the Law's Potential to Hold Education Institutions Accountable for Their Responses to Sexual Misconduct*, 73 OKLA. L. REV. 35, 38–39 (2020) ("The Department investigates complaints of noncompliance and conducts comprehensive investigations at its own initiative. When the Department determines that an institution has not complied with Title IX, as interpreted by its implementing regulations and interpretive policies and guidance, it gives institutions the opportunity to correct noncompliant policies and practices, thereby avoiding penalties. . . . As between [the federal government and educational institutions], the remedy for breach, then, is withdrawal of federal funds." (footnote omitted)).

[5] *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998) (outlining what a claimant must show for a school to be held liable under Title IX for sexual harassment of a student by one of the district's teachers); Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 633 (1999) ("We consider here whether a private damages action may lie against the school board in cases of student-on-student harassment. We conclude that it may, but only where

report of sexual harassment is intentional discrimination under Title IX that can be remedied with damages.[6] The Court's holdings have been extended to cover cases of sexual assault because "[s]exual assault is an obvious subset of sexual harassment because it is unwelcome and severe by definition, and because it often has the effect of interfering with a victim's educational opportunities."[7]

Thus, Title IX serves as a tool to help students hold educational institutions accountable for poor responses to reports of sexual misconduct. Statistics suggest that such a tool is necessary. It is estimated that 13% of college students experience sexual assault during their time on campus.[8] For female undergraduate students, that number jumps to 25.9%.[9] For male undergraduate students, the reported level is 6.8%.[10] LGBTQ+ students experience higher rates of nonconsensual sexual conduct than their heterosexual counterparts.[11]

Prevention of sexual assault among university students (and students in K-12 schools) should be a high priority for schools receiving Title IX funding. However, as the statistics above indicate, sexual violence on college campuses remains a significant problem. As long as the problem persists, there will be students in need of a competent, supportive response from their educational institution.

Many students, however, are not receiving such a response. For example, a 2018 report from the California State Auditor found several long-standing issues with the response to both sexual harassment and assault at The University of California at Berkeley, The University of California at Davis, and The University of

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the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities.").

[6] *See* Buzuvis, *supra* note 4, at 40 (citing *Gebser,* 524 U.S. at 290–93) (stating that, after *Gebser*, courts could remedy Title IX violations by educational institutions with money damages).

[7] *Id.* at 37.

[8] DAVID CANTOR ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND MISCONDUCT, WESTAT, vii (2020), https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20 appendices%201-7_(01-16-2020_FINAL).pdf [https://perma.cc/G7YC-X872].

[9] *Id.* at ix.

[10] *Id.*

[11] *See id.* at 33 (stating that rates of nonconsensual sexual contact among all categories representing non-heterosexual orientations are higher than categories representing heterosexual orientation).

California at Los Angeles.[12] According to the report, the three campuses often did not send all required information to both complainants and respondents, and two campuses exceeded investigation time frames without receiving an approved time extension.[13] Overall, "[u]niversity policy [did] not fully align with federal regulations and best practices."[14]

Accountability for institutions such as these three California universities is lacking. Only universities that fail to resolve their issues risk losing their funding, and a withdrawal of funds only occurs following a formal hearing conducted by the Department of Education.[15] Not surprisingly, no educational institution has lost federal funding due to noncompliance with Title IX.[16]

While students have a private right of action under Title IX, recovering money damages has proven difficult for plaintiffs.[17] Educational institutions are only responsible for intentional conduct in response to reports of sexual violence.[18] This intentional conduct is known as "deliberate indifference" in Title IX jurisprudence.[19] Under the deliberate indifference standard, a

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[12] *See* CALIFORNIA STATE AUDITOR, THE UNIVERSITY OF CALIFORNIA: IT MUST TAKE ADDITIONAL STEPS TO ADDRESS LONG-STANDING ISSUES WITH ITS RESPONSE TO SEXUAL HARASSMENT COMPLAINTS 1–4 (2018), https://www.auditor.ca.gov/pdfs/reports/2017-125.pdf [https://perma.cc/7Q97-TRYS] (highlighting issues found by the California State Auditor following a 2017 investigation into the sexual harassment and sexual violence response policies in three California public universities).

[13] *See id.* at 1 (detailing the communication issues and investigation delays discovered at the three public California universities).

[14] *Id.*

[15] *See* Buzuvis, *supra* note 4, at 38 (describing the process in which the Department of Education investigates institutions for Title IX non-compliance).

[16] *See id.* ("To date, however, the government has never withdrawn federal funding from an educational institution over issues of Title IX compliance.").

[17] *See id.* at 40 ("This deliberate indifference standard has proven difficult for plaintiffs to satisfy for a number of reasons.").

[18] *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998) (holding that in cases not involving an educational institution's official policy, a "damages remedy will not lie under Title IX" unless someone who has the authority to address the alleged discrimination and institute measures in response to the discrimination has knowledge of the incident and does not respond).

[19] *See, e.g.*, Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 651 (1999) ("The district's knowing refusal to take any action in response to such behavior would fly in the face of Title IX's core principles, and such deliberate indifference may appropriately be subject to claims for monetary damages.").

plaintiff must show the following to prevail in a claim for damages under Title IX: "(1) an appropriate person, or someone with authority, had actual notice of sexual harassment or sexual assault; (2) notwithstanding such notice, the institution responded with deliberate indifference; and (3) the sexual harassment was 'so severe, pervasive, and objectively offensive that it effectively bar[red] the victim's access to an educational opportunity or benefit.'"[20] Proving that an educational institution had actual notice of sexual harassment or sexual assault is a huge obstacle for plaintiffs seeking to recover damages.[21] For example, if an institution was aware of a perpetrator's previous conduct that was less severe than that in the instant case, courts will often decline to find that the actual notice requirement was met.[22] Similarly, courts have declined to find actual notice when the school was aware of similar misconduct by a repeat perpetrator toward a different victim.[23]

A new theory of liability, recently endorsed by the Ninth Circuit, may offer a new path for survivors looking to hold their educational institutions responsible for deficient responses to sexual misconduct. In the groundbreaking case *Karasek v. Regents of the University of California*, the Ninth Circuit recognized what has been labeled a "pre-assault claim" of Title IX liability.[24] With a pre-assault claim, a plaintiff argues that the school maintained a policy of deliberate indifference to sexual misconduct that heightened the risk that the plaintiff would be sexually assaulted.[25] Under a pre-assault claim, a plaintiff is alleging that a school's "official policy" is what violated Title IX, and thus proving an official's actual knowledge of an instance of sexual misconduct is not necessary.[26]

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[20] Buzuvis, *supra* note 4, at 40 (alteration in original) (footnote omitted) (quoting *Davis*, 526 U.S. at 633).

[21] *See id.* at 40–41 (explaining that the "gold standard for actual notice" is an official's knowledge of similar sexual misconduct against the same victim by the same perpetrator).

[22] *See id.* at 41 ("Prior misconduct by the same perpetrator that is less severe than the misconduct in the plaintiff's case will often fail to provide actual notice.").

[23] *See id.* (describing trends with actual notice requirement when a repeat perpetrator assaults a different victim).

[24] *See* Karasek v. Regents of the Univ. of Cal., 948 F.3d 1150, 1169 (9th Cir. 2020) (recognizing the plaintiffs' pre-assault claim as a "cognizable theory of Title IX liability").

[25] *See id.* at 1168–69 (quoting the arguments made by plaintiffs in their appellate briefs).

[26] *Id.* (citing Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998)).

Nor is it necessary to show that the educational institution responded with deliberate indifference to a specific instance of sexual misconduct.[27] Thus, the "actual notice" requirement that typically impedes a claimant from successfully stating a claim for damages is eliminated under this theory.

This Note argues that the pre-assault claim upheld by the Ninth Circuit in *Karasek* presents a new theory of Title IX liability that will hold educational institutions accountable more successfully than the typical deliberate indifference standard. Plaintiffs in other regions of the country should attempt to utilize a pre-assault theory to hold their educational institutions accountable. Part II provides an overview of Title IX jurisprudence, including more information on the deliberate indifference standard and the emerging pre-assault theory of liability. Part III details the benefits and disadvantages associated with the pre-assault theory. Part IV looks forward to where Title IX jurisprudence is headed in the wake of *Karasek*.

II. BACKGROUND

A. TITLE IX

The author of Title IX, Senator Birch Bayh of Indiana, modeled the statute after the Civil Rights Act of 1964.[28] In fact, the language of Title VI of the Civil Rights Act is almost identical to that of Title IX, except that Title VI mentions "race, color, or national origin" and not sex.[29] The statute was first introduced in 1971 as an amendment

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[27] *See id.* (mentioning that under a pre-assault theory of liability, a plaintiff does not have to prove deliberate indifference toward a specific instance of sexual misconduct, but rather can show that the school has a policy of responding to all reports of misconduct with deliberate indifference).

[28] *See* 117 CONG. REC. 30,407–08 (1971) (statement of Sen. Birch Bayh) (noting that the Senator took language from Title VI when drafting what would become known as Title IX).

[29] *Compare* 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."), *with* 20 U.S.C. § 1681(a) ("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 . . . ."). *See also* Paul M. Anderson, *Title IX at Forty: An Introduction and Historical*

to the Education Amendments of 1971.[30] When first introduced, the statute provided that "[n]o person in the United States shall, on the ground of sex . . . be subject to discrimination . . . under any program or activity conducted by a public institution of higher education, or any school or department of graduate education, which is a recipient of Federal financial assistance."[31] This initial version of Title IX failed to pass, but Senator Bayh reintroduced the legislation in 1972.[32] Title IX passed that year with the language in place today, which notably does not define "any education program" as thoroughly as the original legislation did.[33]

The law bans sex discrimination in three areas.[34] The first area focuses on making sure that participation opportunities in education programs are not offered in a discriminatory way.[35] The second area ensures that no one is denied the benefits of any educational program or activity.[36] The last area prohibits anyone from being subjected to discrimination based on sex in any education program or activity.[37] Sexual misconduct claims fall under this category, and thus this portion of Title IX is the subject of this Note.[38]

Review of Forty Legal Developments that Shaped Gender Equality Law, 22 MARQ. SPORTS L. REV. 325, 326 (2012) (pointing out that the language of Title VI of the Civil Rights Act is "virtually identical" to the language of Title IX).

[30] *See* Anderson, *supra* note 29, at 326 (outlining the early history of Title IX when it was first introduced in 1970, two years before it would ultimately be passed).

[31] *Id.* (alteration and omissions in original) (quoting 117 CONG. REC. 30,156 (1971)).

[32] *See id.* (mentioning that Title IX was rejected when initially introduced in 1971 but was reintroduced and eventually passed in 1972).

[33] *See id.* ("Perhaps if [the original] version of the law had gone into effect, the confusion over the types of entities that are subject to Title IX would not have lasted until 1987.").

[34] *See id.* at 328 (explaining that Title IX prohibits sex discrimination in "three general areas").

[35] *See id.* ("First, no one can 'be excluded from participation in' any education program or activity [on the basis of sex]. . . . This focus centers on making sure that actual participation opportunities are not provided in a discriminatory fashion.").

[36] *See id.* ("Second, no one can 'be denied the benefits of' any education program or activity.").

[37] *See id.* ("Third, no one can be 'subjected to discrimination under' any education program or activity.").

[38] *See id.* ("This area [the portion of Title IX stating no one can be subject to discrimination in any education program or activity] focuses specifically on sexual discrimination and harassment . . . .").

B. THE DELIBERATE INDIFFERENCE STANDARD & CRITICISMS

The Supreme Court formally recognized a private right of action under Title IX in 1979.[39] However, the case that established the private right of action, *Cannon v. University of Chicago*, did not involve an allegation of sexual misconduct; rather, it centered around a female student's allegation that her application to medical school was denied because she was a woman.[40] The contours of the private right of action for students alleging sexual misconduct were not fleshed out until 1998 in *Gebser v. Lago Vista Independent School District*, which addressed a teacher's sexual harassment of a student.[41] *Davis v. Monroe County Board of Education*, which addressed student-on-student sexual harassment, followed a year later.[42]

Gebser laid the foundation for the deliberate indifference standard, articulating that deliberate indifference to a known violation of Title IX was a form of discrimination that courts could choose to remedy with monetary damages.[43] *Davis* went a step beyond *Gebser* and outlined the elements that a plaintiff must satisfy to show that an educational institution was deliberately indifferent to an incident of sexual harassment or assault. Title IX scholar Erin Buzuvis stated the deliberate indifference elements as the following: "(1) an appropriate person, or someone with authority, had actual notice of sexual harassment or sexual assault; (2) notwithstanding such notice, the institution responded with deliberate indifference; and (3) the sexual harassment was 'so

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[39] *See* Cannon v. Univ. of Chi., 441 U.S. 677, 677 (1979) (holding that the petitioner could maintain her private lawsuit, even though Title IX did not explicitly state that students could file actions under the statute).

[40] *See id.* at 680 (detailing the allegations made in the petitioner's complaints, which centered around her denial of admission to medical school).

[41] Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998).

[42] *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 632 ("Petitioner brought suit against the Monroe County Board of Education and other defendants, alleging that her fifth-grade daughter had been the victim of sexual harassment by another student in her class.").

[43] *See* Buzuvis, *supra* note 4, at 40 (stating that, in *Gebser*, the Supreme Court held that deliberate indifference to a known violation of Title IX on the part of a school employee constituted "intentional discrimination that courts may remedy with money damages").

severe, pervasive, and objectively offensive that it effectively barred the victim's access to an education opportunity or benefit.'" [44]

In developing the deliberate indifference standard, the Supreme Court was concerned with the possibility of Title IX funding recipients being held responsible not for their own official decisions but for their "employees' independent actions."[45] Similar concerns prompted the Court to adopt the deliberate indifference standard a year before in a case involving a § 1983 claim asserting that a municipality failed to safeguard against the deprivation of an individual's federal rights.[46]

The deliberate indifference standard has been subject to a host of various criticisms when applied in the Title IX context. Scholars have noticed that the deliberate indifference standard tends to require only the "bare minimum," focusing on "reacting to incidences as they occur[,] not the prevention of future incidents."[47] Because the standard has been applied only to demand the bare minimum, deliberate indifference has not served as an "effective deterrent for schools to improve their Title IX processes."[48] These criticisms of Title IX are more fully addressed in Part III of this Note.

C. *KARASEK*'S PRE-ASSAULT THEORY OF LIABILITY

A new theory of liability upheld by the Ninth Circuit may offer student-plaintiffs seeking to sue their educational institutions a way around the onerous "actual notice" requirement of the mainstream deliberate indifference standard.

Plaintiffs Sofia Karasek, Nicoletta Commins, and Aryle Butler sued the Regents of the University of California for violating Title IX by both "failing to adequately respond to their individual assaults" and "by maintaining a general policy of deliberate indifference to reports of sexual misconduct" while all three were

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[44] *Id.* at 40 (alteration in original) (footnote omitted) (quoting *Davis*, 526 U.S. at 633)

[45] *See Gebser*, 524 U.S. at 290–91.

[46] *Id.* at 291 (citing Bd. of Comm'rs. v. Brown, 520 U.S. 397 (1997)).

[47] Lauren McCoy, *Defining Deliberate Indifference and Institutional Liability Under Title IX*, 32 MARQ. SPORTS L. REV. 141, 154 (2021).

[48] *Id.*

students at the University of California, Berkeley.[49] The alleged failure to respond to the individual assaults states a claim under the deliberate indifference standard, while the alleged general policy of deliberate indifference is a claim under a pre-assault theory of liability.[50]

Karasek was sexually assaulted by another member of a university club that she was in while attending an overnight trip in February 2012.[51] After reporting the assault to the club president, the perpetrator's assaults of two other club members came to light and were reported to a school official.[52] The school official discouraged the club president from removing the perpetrator from the club, suggesting the president opt for a transformative justice approach.[53] The perpetrator was formally removed from the club after assaulting yet another club member.[54]

In April 2012, Karasek met with the university's Title IX Coordinator to formally report her assault.[55] In violation of the University of California's Sexual Harassment policy, "Karasek was not told of the options for resolving her claim, the range of possible outcomes, the availability of interim protective measures, or that UC would not actually investigate unless Karasek submitted a written statement."[56] Karasek submitted a written statement a

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[49] Karasek v. Regents of the Univ. of Cal., 948 F.3d 1150, 1156 (9th Cir. 2020)

[50] *See id.* at 1156–60 (laying out the individual claims under a deliberate indifference theory but raising the separate pre-assault theory as well).

[51] *See id.* at 1156 (setting out the facts of Karasek's claim). For purposes of length, this Note will not go into an in-depth discussion of Nicoletta Commins's and Aryle Butler's claims. To read more about Commins's individual claim, see *id.* at 1158–59. For more information about Butler's individual claim, see *id.* at 1159–60.

[52] *See id.* at 1156 (detailing the other assaults that were reported after Karasek reported her assault to the club's president).

[53] *See id.* (describing the UC official's response to the report of misconduct, which included encouraging the use of a "more informal, transformative justice" approach to deal with the perpetrator).

[54] *See id.* ("Several months later, [the perpetrator—identified as TH—]assaulted another Club member. The Club president notified UC that more women had reported that TH sexually assaulted them. The president then removed TH from the Club altogether.").

[55] *See id.* (setting out the facts of Karasek's formal report to UC's Title IX Coordinator).

[56] *Id.*

month later—a step she took only after hearing that another of the perpetrator's victims had filed a written report.[57]

In May, the assistant director of the university's Center for Student Conduct met with the perpetrator who reportedly admitted that he "acted foolishly."[58] No formal consequences were enacted following this meeting, and the next day, the assistant director emailed the perpetrator and told him to simply "please stay away from alcohol," while also warning him, "[i]f you do drink, do so responsibly."[59]

In September 2012, the Title IX Coordinator met with the perpetrator.[60] A few weeks after this meeting, the Title IX Coordinator emailed the Center for Student Conduct and said that she had "determined that this situation could be resolved without a formal investigation by [the Title IX] office."[61] The Center for Student Conduct then began an informal resolution process with the perpetrator.[62] As a part of this process, the perpetrator voluntarily agreed to sanctions which included being placed on disciplinary probation until he graduated, one consultation with a mental health professional of his choice, and one meeting with an alcohol and drugs counselor in the university's social services department.[63]

Karasek, on the other hand, received no communications from the university after filing her written statement in May 2012.[64] She was not made aware that the Title IX office had opted for an informal resolution process, nor was she aware that her complaint

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[57] *See id.* ("One month later, Karasek learned that one of [the perpetrator]'s other victims had submitted a written statement. She 'thought it was a good idea,' so she also submitted a written report . . . .").

[58] *Id.*

[59] *Id.* at 1157. The assistant director further told the perpetrator to "[m]ake the decision now to not put yourself in situations to be alone with other women specifically if you are drinking. Until you can better understand what you are experiencing, it is in your best interest to not put yourself in that situation." *Id.*

[60] *See id.* (outlining the Title IX coordinator's first meeting with the perpetrator).

[61] *Id.* (alteration in original).

[62] *See id.* ("CSC then began an informal process with [the perpetrator].").

[63] *See id.* (enumerating the sanctions the perpetrator agreed to as a part of the university's informal resolution process).

[64] *See id.* ("Meanwhile, Karasek had received no communications from UC since filing her written statement in May 2012.").

had been resolved and the perpetrator had been informally sanctioned.[65]

Shortly after, Karasek learned that the perpetrator would soon graduate from the University of California, Berkeley.[66] After sending several emails, Karasek was finally contacted by someone from the university's Title IX Office via email in December 2012.[67] The email informed Karasek that "this matter had been explored and resolved using an early resolution process outlined in our campus procedures for responding to sexual harassment complaints," and that the Title IX Office had communicated the outcome of the informal resolution process to the Center for Student Conduct.[68] Karasek was not informed of the outcome of the informal resolution process in that December 2012 email.[69] In fact, Karasek did not learn of the informal sanctions entered against the perpetrator until almost a year after they were imposed.[70]

Keeping in line with most deliberate indifference jurisprudence, the Ninth Circuit affirmed the district court's dismissal of Karasek's individual claim against the Regents of the University of California.[71] The Ninth Circuit agreed with the Northern District of California that Karasek had failed to adequately show that the university had acted with deliberate indifference.[72]

Karasek argued that the University of California, Berkeley's response to her report was deliberately indifferent in four ways: "(a) UC unjustifiably delayed its investigation, (b) UC violated its own

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[65] *See id.* ("She was not informed that [the Title IX Coordinator] opted not to formally investigate. Nor was Karasek told that her complaint against [the perpetrator] had been resolved informally or that [the perpetrator] was sanctioned.").

[66] *See id.* (mentioning that Karasek discovered that the perpetrator would be graduating in December 2012).

[67] *See id.* ("After Karasek sent several more emails, someone in UC's Title IX office finally responded on December 12, 2012.").

[68] *Id.*

[69] *See id.* (quoting the email from the Title IX Office to Karasek which did not mention the outcome of the informal resolution process, just that the matter had been "resolved").

[70] *See id.* (stating that Karasek did not learn of the informal sanctions until September of 2013).

[71] *See id.* at 1156 (affirming the dismissal of Karasek's individual claim and Commins's individual claim and affirming the grant of summary judgment on Butler's individual claim).

[72] *See id.* at 1162 (stating that the district court dismissed Karasek's claim for failing to adequately allege deliberate indifference); *see also id.* at 1162–66 (providing the elements of a deliberate indifference claim and analyzing Karasek's claim in that framework).

policies . . . when responding to Karasek's report, (c) UC took no steps to prevent [the perpetrator] from continuing to harass Karasek, and (d) the substance of UC's response was inequitable."[73]

The Ninth Circuit found that the eight-and-a-half-month delay between the university receiving actual notice of the assault and the perpetrator accepting sanctions did not constitute deliberate indifference because the university was not "idle" during those months.[74] The court found it important that the university communicated with the club president following the report and that two university officials met with the perpetrator in the months following the report.[75] Though the university could have acted more promptly, the delay did not constitute deliberate indifference.[76]

The university's violations of both its own policies and policies of the Department of Education similarly did not constitute deliberate indifference according to the Ninth Circuit.[77] The court noted that failure to comply with these policies is not dispositive of whether a school acted with deliberate indifference.[78] The court rested its decision on a statement from the Department of Education, via a Dear Colleague Letter, that the policies promulgated enact a less exacting standard than the deliberate indifference standard used in private lawsuits.[79] Therefore, according to the court, a school could

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[73] *Id.* at 1163.

[74] *Id.*

[75] *See id.* (describing the university's communication with both the club president and the perpetrator as not constituting deliberate indifference). In reaching this conclusion regarding the delay, the Ninth Circuit relied on *Oden v. Northern Marianas College,* 440 F.3d 1085, 1089 (9th Cir. 2006), which found that a school's delay did not qualify as deliberate indifference because it did not prejudice the plaintiff and was not a "deliberate attempt to sabotage [the p]laintiff's complaint or its orderly resolution."

[76] *Karasek*, 948 F.3d at 1163 ("[T]hough UC could have acted more quickly, UC's delay did not constitute deliberate indifference.").

[77] *See id.* at 1164 (stating that UC's failure to follow both its own policies and the policies of the Department of Education do "not constitute deliberate indifference per se").

[78] *See id.* at 1163–64 ("Ordinarily, a school's 'failure to comply with [DOE] regulations . . . does not establish . . . deliberate indifference.' The same is true of a school's violations of its own policies." (alteration in original) (quoting Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 291–92)).

[79] *See id.* at 1164 (citing Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter: Sexual Violence 11 (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [https://perma.cc/7HBY-HNX7] (explaining that the standard applied by the DCL is "less exacting than the deliberate-indifference test").

seemingly fail to follow the Dear Colleague Letter's provisions yet still not violate the deliberate indifference standard.[80]

Karasek further argued that the university was deliberately indifferent in not taking steps to prevent her perpetrator from harassing her again after she formally reported the assault.[81] Karasek noted that the university could have imposed interim sanctions, such as banning the perpetrator from campus or initiating a no-contact order between him and Karasek.[82] Relying on the Supreme Court's decision in *Davis*, the Ninth Circuit found that the university's actions were not "clearly unreasonable."[83] The court reached this determination by noting that Karasek never interacted with the perpetrator after the assault except for seeing him on one occasion, and Karasek never communicated that she regularly interacted with him to university officials.[84]

Karasek's last argument that the university's response was deliberately indifferent centered around her belief that the university's response was inequitable.[85] The inequity of the response, according to Karasek, was rooted in her perpetrator's ability to participate in the "Cal in the Capitol" program during the investigation and that school officials communicated with the perpetrator while leaving her in the dark about her own investigation.[86] The court quickly dismissed Karasek's argument regarding her perpetrator's participation in the "Cal in the Capitol" program, highlighting that Karasek did not allege that she would

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[80] *See id.* ("In other words, in DOE's view, a school could fail to abide by the DCL's provisions and yet not violate the deliberate-indifference standard.").

[81] *See id.* at 1165 (describing Karasek's third argument that the university was deliberately indifferent because it did not take measures to preclude the possibility of continued harassment from the perpetrator).

[82] *See id.* (highlighting interim measures that Karasek suggested that the university should have taken, such as the initiation of a no-contact order).

[83] *Id.* at 1165–66 (quoting Davis v. Monroe Cnty. Bd. of Educ, 526 U.S. 629, 648 (1999)).

[84] *See id.* at 1166 (holding that because Karasek never interacted with the perpetrator again, or at least never told the university she did, the failure to impose any interim measures to prevent contact was not clearly unreasonable).

[85] *See id.* (detailing Karasek's final argument that the university's response to her report was inequitable and thus constituted deliberate indifference).

[86] *See id.* ("Karasek argues that 'UC's response was wholly inequitable' because UC allowed TH to participate in the 'Cal in the Capitol' event and communicated with TH while ignoring Karasek.").

have attended the program if her perpetrator did not.[87] In regard to the lack of communication, the Ninth Circuit called the school's conduct "an inexcusable omission by UC's officials."[88] But because the university acted on the plaintiff's complaint and did impose sanctions—though informal—the university was not deliberately indifferent to the report of sexual misconduct.[89]

Though the Ninth Circuit affirmed the dismissal of Karasek's individual claim under the "post-assault" deliberate indifference theory, the court vacated the dismissal of her pre-assault claim and remanded it back to the district court for further proceedings.[90] Karasek, along with the two other appellants, argued that the university "maintained a 'policy of deliberate indifference to sexual misconduct' that 'created a sexually hostile environment for [Appellants].'"[91] The pre-assault claim was rejected at the district court because it was "without sufficient basis in our case law."[92] While the Ninth Circuit did agree that it has never addressed a pre-assault claim, the court nevertheless held that such a claim is a valid theory of liability under Title IX.[93] Additionally, though the Ninth Circuit had never addressed a pre-assault theory of liability, the Supreme Court never held that the mainstream deliberate indifference standard was the only applicable standard for sexual harassment.[94]

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[87] *See id.* ("Indeed, Karasek does not allege that she would have attended 'Cal in the Capitol' but for TH's presence, so it is unclear that UC's decision not to forbid TH from attending while UC's investigation continued was clearly unreasonable.").

[88] *Id.* The court continued, stating that "[k]eeping a victim of sexual assault largely in the dark about the investigation of her assailant and the ultimate sanctions imposed is not only inappropriate, but also deprives the school of information that might be crucial to its investigation." *Id.*

[89] *See id.* (noting that even if the university did not promptly communicate with Karasek, it still imposed "arguably appropriate sanctions" and was therefore not deliberately indifferent).

[90] *See id.* at 1156 ("However, we vacate the dismissal of the pre-assault claim and remand for further proceedings.").

[91] *Id.* at 1168 (alteration in original) (quoting the Appellants' briefing).

[92] *Id.* at 1169.

[93] *See id.* ("To the district court's credit, we have never directly addressed pre-assault Title IX claims. We hold that such a claim is a cognizable theory of Title IX liability.").

[94] *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998) ("Consequently, *in 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

In establishing this new theory of liability, the court first noted that the analysis shifts when a plaintiff argues that an institution's official policy violates Title IX.[95] Because the plaintiff is alleging the university's official policy is violative of Title IX, there is no need to show that the institution had actual knowledge of a specific instance of sexual misconduct and responded to that misconduct with deliberate indifference.[96]

The court then turned approvingly to the Tenth Circuit's decision in *Simpson v. University of Colorado Boulder*.[97] There, the Tenth Circuit reversed a district court's ruling and held that the plaintiffs, two women who had been sexually assaulted by football recruits, could proceed with their pre-assault claim against the university.[98] The recruits were paired with female ambassadors and promised a "good time."[99] Some recruits were even promised sex,[100] and there was proof that the coaching staff knew of this conduct and encouraged it.[101] Because the plaintiffs were alleging that the university's official policy violated Title IX, the notice standards formulated in both *Gebser* and *Davis* did not apply, because the

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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." (emphasis added)).

[95] *See Karasek*, 948 F.3d at 1169 (stating that the "calculus shifts" when a plaintiff alleges that a university's official policy is violative of Title IX).

[96] In reaching this conclusion, the Ninth Circuit relied on one of its previous cases, *Mansourian v. Regents of the University of California*. *Id.* There, the Ninth Circuit noted that "where the official policy is one of deliberate indifference to a known overall risk of sexual harassment, notice of a particular harassment situation and an opportunity to cure it are not predicates for liability." Mansourian v. Regents of the Univ. of Cal., 602 F.3d 957, 967 (9th Cir. 2010).

[97] *See Karasek*, 948 F.3d 1150 at 1169 (finding *Simpson* to be persuasive).

[98] *See* Simpson v. Univ. of Col. Boulder 500 F.3d 1170, 1173 (10th Cir. 2007) (holding that the university was not entitled to summary judgment on the pre-assault claim).

[99] *See id.* ("Part of the sales effort was to show recruits 'a good time.' To this end, recruits were paired with female 'Ambassadors,' who showed them around campus, and player-hosts, who were responsible for the recruits' entertainment.").

[100] *See id.* ("At least some of the recruits who came to Ms. Simpson's apartment had been promised an opportunity to have sex.").

[101] *See id.* at 1173–74 ("Not only was the coaching staff informed of sexual harassment and assault by players, but it responded in ways that were more likely to encourage than eliminate such misconduct.").

"institution itself, rather than its employees (or students), [was] the wrongdoer."[102]

The Ninth Circuit outlined the elements that a plaintiff must plausibly allege to survive a motion to dismiss: "(1) a school maintained a policy[103] of deliberate indifference to reports of sexual misconduct, (2) which created a heightened risk of sexual harassment (3) in a context subject to the school's control, and (4) the plaintiff was harassed as a result."[104] In April 2020, the Ninth Circuit released an opinion amending the language of the pre-assault theory test outlined in *Karasek*. The amended opinion kept the pre-assault theory intact but clarified that the heightened risk of sexual harassment must be known or obvious, and the plaintiff must have suffered harassment that was "so severe, pervasive, and objectively offensive" that the plaintiff was deprived of educational benefits and/or opportunities.[105]

Thus, a new theory of Title IX liability was born—or rather, fleshed out at a greater magnitude than in *Simpson*[106]—and the impact on Title IX jurisprudence remains to be seen.

III. ANALYZING *KARASEK*'S PRE-ASSAULT THEORY

A. THE GOOD

The pre-assault theory outlined in *Karasek* offers a novel way to hold institutions responsible for noncompliance with Title IX. The

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[102] *Id.* at 1177.

[103] It is important to note that the term "policy" has been held to encompass both a university's official policy and its unofficial custom. *See* Buzuvis, *supra* note 4, at 58 (citing Doe 12 v. Baylor Univ., 336 F. Supp. 3d 763, 782 (W.D. Tex. 2018)) (analogizing to 42 U.S.C. § 1983's municipal liability context where both policy and custom can make a municipality liable).

[104] Karasek v. Regents of the Univ. of Cal., 948 F.3d 1150, 1169 (9th Circ. 2020) (footnote omitted).

[105] *See* Karasek v. Regents of the Univ. of California, 956 F.3d 1093, 1098 (9th Cir. 2020) (ordering the amendments to the original opinion).

[106] In *Karasek*, the Regents of the University of California argued that *Simpson*'s endorsement of a pre-assault claim was narrowed to a specific program: the university football program. The Ninth Circuit rejected this claim, holding that "*Simpson*'s reasoning, and the reasoning of *Gebser* and *Davis*, supports imposing Title IX liability when a school's official policy is one of deliberate indifference to sexual harassment in any context subject to the school's control." *Karasek,* 948 F.3d at 1170.

elimination of the actual notice requirement under the pre-assault theory strengthens a plaintiff's ability to successfully plead a case against their educational institution, which is crucial when other mechanisms of Title IX enforcement are lacking.[107] Additionally, as the pre-assault theory alleges a general policy of deliberate indifference, the defendant educational institution must examine their Title IX responses more critically, looking beyond the plaintiff's report and at their response to misconduct generally.[108]

1. Elimination of the Actual Notice Requirement & The Need for Title IX Litigation. Perhaps the most attractive aspect of the pre-assault theory developed in *Karasek* is that it circumvents the *Gebser*/*Davis* actual notice requirement in its entirety.[109] Thus, the many roadblocks posed by the actual notice requirement are avoided.

Actual notice has been construed narrowly, with courts often holding that actual notice requires that the institution have knowledge that the perpetrator committed identical conduct against the same victim.[110] For example, in a case centered around a teacher's affair with a student, a court held that the educational institution had no actual notice of the conduct, despite having received complaints of the teacher's inappropriate verbal and physical conduct toward other female students.[111] Similarly, courts have held that the actual notice requirement is not met if the school has knowledge of similar conduct by the same perpetrator that was directed at another victim.[112]

Without the actual notice requirement standing in their way, plaintiffs may be more likely to survive a motion to dismiss under a

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[107] *See* discussion *supra* section II.C.

[108] *See* discussion *supra* section II.C.

[109] *See* discussion *supra* section II.C.

[110] *See* Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038, 2070 (2016) (noting that many courts have held that actual notice requires "notice of the risk the particular perpetrator would sexually abuse the particular victim before he does, in the way he does").

[111] *See id.* (citing Harden v. Rosie, 99 A.3d 950, 954–63 (Pa. 2014)) (describing a case where numerous complaints of a teacher's conduct towards female students are "stale" if too much time has passed or "too different" to constitute actual notice to the school).

[112] *See id.* (citing Wills v. Brown Univ., 184 F.3d 20 (1st Cir. 1999)) (describing a case where the court held that the school had no notice even though there was a prior complaint of near identical conduct against an adult coworker by the same teacher).

pre-assault theory of liability.[113] Thus, plaintiffs may secure more wins at the trial level or leverage during the settlement negotiation process, resulting in "untapped potential" to hold educational institutions accountable under Title IX for deficient responses to sexual misconduct.[114]

Holding educational institutions accountable via private lawsuits should be a desirable goal for all wishing to ensure that reports of sexual misconduct on college campuses are handled appropriately. Perhaps most obviously, an institution that is slapped with a hefty verdict following a trial or that is forced to agree to a substantial settlement with a plaintiff is more likely to look internally and fix whatever deficiencies gave rise to a legal dispute to begin with.[115] The publicity following a lawsuit that moves beyond a motion to dismiss may even be enough to force an educational institution to look inward and reform their campus sexual misconduct policies.

Some may critique the use of private lawsuits to hold educational institutions accountable for poor responses to reports of sexual violence on campus. Many would be correct in pointing out that lawsuits are not only expensive, but time-consuming as well.[116] Why should plaintiffs bear the time and monetary costs of holding the institutions that wronged them accountable? After all, the Department of Education oversees the Title IX compliance of federal funding recipients and has the power to pull federal funding in the event of a violation.[117] Why not use the power of the federal

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[113] *See* Buzuvis, *supra* note 4, at 40–41 (describing the difficulties in meeting the actual notice requirement under the *Gebser*/*Davis* standard).

[114] *Id.* at 67.

[115] *See, e.g.*, Caitlin Schmidt, *Baylor Officials Open Up About Extensive Title IX Reform,* ARIZ. DAILY STAR (Jan. 13, 2020), https://tucson.com/news/local/baylor-officials-open-up-about-extensive-title-ix-reform/article_957ad472-3f97-11e9-b0a9-eb1124c7d197.html [https://perma.cc/C97R-G7AH] (detailing Title IX reforms at Baylor University following multiple federal lawsuits, four of which were "resolved").

[116] *See* Arthur R. Miller, *Widening the Lens: Refocusing the Litigation Cost-and-Delay Narrative*, 40 CARDOZO L. REV. 57, 59 (2018) ("No one can deny that many aspects of litigation today are expensive and time-consuming or that lawyers are at least partially to blame for that; some lawyers have never met a motion they don't like to make, while others insist on leaving no stone unturned in discovery.").

[117] *See* 34 C.F.R. § 100.8(a) (granting the Department of Education authority to terminate or suspend federal assistance to recipients found to be in violation of Title IX).

government to encourage compliance, rather than the willingness of private citizens to file actions against funding recipients?

In a perfect world, the Department of Education would be a strong safeguard of students' Title IX rights, and the threat of lost federal funding would scare institutions into compliance. Unfortunately, however, this is not the current reality. Once the Department of Education has concluded an investigation (if an investigation is even launched) and has found that an institution is not in compliance with Title IX standards, said institutions are given a chance to correct their policies to conform with the demands of the statute.[118] Only after failing to resolve these issues are educational institutions actually at risk of losing funding, and loss of funding only occurs after a formal hearing.[119] In Title IX's fifty year history, the federal government has not withdrawn funding from an educational institution due to failure to comply with Title IX policies and regulations.[120]

The fact that the Department of Education has not pulled funding from an educational institution for noncompliance is not evidence that schools are actually complying with Title IX policies. As the well-publicized Baylor University sexual assault scandal illustrates, this is unfortunately far from the truth.[121]

With a Department of Education that has not held schools accountable for noncompliance during Title IX's entire lifespan, the burden has fallen on plaintiffs to ensure that schools are responding appropriately to reports of sexual misconduct. The elimination of the actual notice requirement under a pre-assault theory of liability makes that burden a bit easier for plaintiffs to bear.

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[118] See Buzuvis, *supra* note 4, at 38 (footnotes omitted) (citing 34 C.F.R. §§ 106.71, 100.7, 100.8) (describing the Department of Education's Title IX enforcement process and the opportunity it gives for institutions to voluntarily comply).

[119] *See id.* (citing 34 C.F.R. §§ 106.71, 100.8, 100.9) (stating that losing funding only occurs after failing to comply and a formal hearing).

[120] *See id.* (pointing out that no educational institution has lost funding due to Title IX noncompliance).

[121] For more information about the various sexual assault allegations at Baylor University and the investigation that uncovered several areas of Title IX noncompliance at the school, see BAYLOR UNIV. BD. OF REGENTS, FINDINGS OF FACT (May 26, 2016), https://thefacts.web.baylor.edu/sites/g/files/ecbvkj1406/files/2023-01/FINDINGS%20OF%20FACT.pdf [https://perma.cc/T9NF-X76R].

2. Encouraging a Deeper Look Inward. One of the other advantages that *Karasek's* pre-assault theory offers is that it encourages educational institutions to take a deeper look inward at their own Title IX policies and compliance, instead of focusing on the institutional response to one particular case.

In stating their pre-assault claim against the Regents of the University of California, the appellants in *Karasek* argued that their university "maintained 'a policy of deliberate indifference to sexual misconduct'" and that this general policy "created a 'sexually hostile environment'" for the appellants.[122] Unlike the deliberate indifference standard formulated in *Gebser/Davis*, the pre-assault theory does not focus solely on the institution's response to sexual misconduct involving the plaintiff, but rather the institution's response to sexual misconduct overall.[123]

Thus, when defending against a pre-assault claim, institutions are confronted not only with evidence relating to their response to the plaintiff's report of sexual misconduct, but also evidence relating to their response to sexual misconduct overall.[124] For example, in *Karasek*, the appellants pointed to a 2014 report from the California State Auditor that outlined several deficiencies in the university system's approach to sexual misconduct.[125]

The report is full of statistics and information that the Regents of the University of California must thoughtfully grapple with and respond to when the case is sent back to the district court. For example, the report indicates that 76% of reported Title IX cases at the University of California, Berkeley were settled through an early resolution process.[126] Yet, in an interview with the Los Angeles Times, Denise Oldham—the Title IX Officer that Karasek communicated with during her case—said she could "not imagine a

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[122] Karasek v. Regents of the Univ. of Cal., 948 F.3d 1150, 1160 (9th Cir. 2020).

[123] *See* discussion *supra* section II.B.

[124] *Id.*

[125] *See* CALIFORNIA STATE AUDITOR, SEXUAL HARASSMENT AND SEXUAL VIOLENCE: CALIFORNIA UNIVERSITIES MUST BETTER PROTECT STUDENTS BY DOING MORE TO PREVENT, RESPOND TO, AND RESOLVE INCIDENTS (2014), https://www.auditor.ca.gov/pdfs/reports/2013-124.pdf [https://perma.cc/ES22-H7MZ] (reporting on various issues in the University of California System's response to sexual harassment and violence), *cited in Karasek*, 948 F.3d at 1160.

[126] *See id.* at 53 (presenting data regarding the university system's sexual misconduct complaint resolution process).

situation" in which use of early resolution of cases would be appropriate.[127] Such reliance on the informal process is troubling in light of the plaintiffs' allegations that the university had an incentive to opt for the informal process in order to skirt other laws that require campuses to report and publish crime statistics.

Pre-assault claims allow for the introduction of evidence such as the California State Auditor's 2014 report. In the typical deliberate indifference standard outlined in *Gebser/Davis*, what happens to students other than the plaintiff is irrelevant because the plaintiff is alleging an inadequate response to *their own* report of sexual misconduct.[128]

Educational institutions can no longer focus solely on their response to the plaintiff's individual report of misconduct. These entities must take a harder look at how their Title IX response functions *overall*. Forcing institutions to take such an approach is more conducive to lasting change than the hyperfocus demanded by the *Davis/Gebser* standard.

B. THE BAD

While the pre-assault theory formulated in *Karasek* presents an intriguing new means to hold educational institutions accountable, plaintiffs and their advocates should resist the urge to fall headfirst into their optimism and view the pre-assault theory as the panacea to their pleading woes. First, the pre-assault theory still requires the showing of a general policy of deliberate indifference. As discussed below, this standard has been difficult for plaintiffs to meet. Second, even if a plaintiff can show a general policy of deliberate indifference, showing that this policy resulted in their harassment will likely prove difficult.

1. Difficulty of the Deliberate Indifference Definition. In *Davis*, the Supreme Court asserted that educational institutions are deemed deliberately indifferent only when the institution's response is "clearly unreasonable in light of the known circumstances."[129]

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[127] Jason Felch & Jason Song, *UC Berkeley Students File Federal Complaints Over Sexual Assault*, L.A. TIMES (Feb. 26, 2014, 1:37 PM), https://www.latimes.com/local/lanow/la-me-ln-berkeley-students-complaint-20140226-story.html [https://perma.cc/GW9P-S64M].

[128] *See* discussion *supra* section II.B.

[129] Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 648 (1999).

This "clearly unreasonable" definition has allowed even institutions that fail to respond at all to a notice of harassment to avoid liability under Title IX.[130] For example, the U.S. District Court for the Northern District of California held that a school's failure to launch an investigation into known misconduct did not constitute deliberate indifference because the school believed that a Title IX investigation would impede local law enforcement's criminal investigation.[131] The school would be able to escape liability even if their belief that their internal investigation would hinder a criminal investigation was incorrect.[132]

This case is not an anomaly—as the deliberate indifference standard has allowed schools to "avoid liability in most cases."[133] This is especially true when an educational institution does respond, but that response is impartial or incomplete.[134] Institutions that have violated policies promulgated by the Office of Civil Rights or even their own policies have avoided liability under the deliberate indifference standard.[135]

A pre-assault theory of liability does not avoid the deliberate indifference standard, but rather, it embraces it. As announced by the Ninth Circuit, the first element of the pre-assault theory of liability is that "a school maintained a policy of deliberate indifference to reports of sexual misconduct."[136] Under this new standard, a plaintiff is not responsible for showing that the school's response to their report of sexual misconduct was deliberately indifferent but that the school has a general policy of responding to

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[130] *See* Buzuvis, *supra* note 4, at 42, 42 nn.39–40 (providing examples of institutions that failed to respond to sexual misconduct but were not found to have acted in a way that was "clearly unreasonable").

[131] *See* Moore v. Regents of the Univ. of Cal., No. 15-cv-05779, 2016 WL 2961984, at *6 (N.D. Cal. May 23, 2016) ("Further, she avers the university believed a school investigation 'would likely interfere with' the criminal investigation, yet even if it was wrong, that mistake likely does not rise above negligence, as in *Oden*.").

[132] *Id.*

[133] Buzuvis, *supra* note 4, at 42.

[134] *See id.* ("Incomplete and partial responses are even more likely to survive challenge.").

[135] *See id.* at 42–43 (mentioning that schools that violate both federal rules and their own policies have escaped liability).

[136] Karasek v. Regents of the Univ. of Cal., 948 F.3d 1150, 1169 (9th Cir. 2020).

these reports with deliberate indifference.[137] The school's alleged policy must still be clearly unreasonable.

Plainly, deliberate indifference is a tough standard to meet.[138] Even though it is perfectly acceptable to hold institutions responsible for negligence in other contexts, a "negligent, lazy, or careless" response does not qualify as deliberate indifference.[139] The plaintiff must demonstrate that the school's conduct constituted an "official decision" not to address the discrimination.[140] Given that the Ninth Circuit itself did not view the fact that the University of California at Berkeley did not communicate with Karasek at all during the investigation into her report as deliberate indifference, this standard will likely prove difficult for plaintiffs to meet even under a pre-assault theory.[141]

2. The Challenges of Causation. The challenges of causation remain for plaintiffs under a pre-assault theory. Under this new standard, a plaintiff must show that the institution's general policy of deliberate indifference created a heightened risk of sexual misconduct and that the plaintiff was harassed as a result of this heightened risk.[142]

In *Simpson,* the Tenth Circuit found that there was enough evidence to survive a motion for summary judgment when the plaintiffs alleged that the university had a general policy of deliberate indifference within their football recruiting program that led to their assaults.[143] Because the plaintiffs were alleging the official policy of deliberate indifference existed only within the confines of the football program, showing that the policy resulted in their harassment was more simple than it would be otherwise. As the Ninth Circuit noted in *Karasek*, "the allegations [in this case]

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[137] *Id.*

[138] *See id.* at 1162 (labeling deliberate indifference a "high standard").

[139] Oden v. N. Marianas Coll., 440 F.3d 1085, 1089 (9th Cir. 2006).

[140] Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998).

[141] *See Karasek*, 948 F.3d at 1166 (holding that the lack of communication between Karasek and university officials throughout the course of her investigation did not constitute deliberate indifference because the university still imposed sanctions on her perpetrator).

[142] *See id.* at 1169 (articulating the elements of a pre-assault claim).

[143] For a more detailed discussion of the *Simpson* case, see *supra* notes 97–102 and accompanying text.

are much broader than the specific problem of sexual assault in the University of Colorado's football recruiting program."[144]

Broader allegations that reach beyond a specific problem in a specific program, like what the appellants alleged in *Karasek*, will pose harder causation challenges for plaintiffs. The bigger the alleged problem, the harder it will be to prove that the problem not only impacted the plaintiff directly but also led to their assault.[145]

C. THE VERDICT

Despite these challenges, it is important to remember that the *Karasek* decision was published in 2020—just three years ago.[146] The true extent of the implications of the pre-assault theory remains to be seen, and it will likely take time for the theory to truly develop. The issues highlighted in Section III.B are not confined to the pre-assault theory. In fact, both issues have their roots in the elements of the deliberate indifference standard outlined in *Gebser/Davis*.[147] Unfortunately, there does not appear to be a way for plaintiffs to completely avoid these issues, whether under the *Gebser/Davis* standard or *Karasek*'s pre-assault theory. A more effective theory would rethink the deliberate indifference entirely—including examining if it is the proper standard to apply in Title IX jurisprudence at all.

Even if these issues cannot be completely avoided for now, they can be mitigated under the pre-assault theory. Because the plaintiff does not have the burden of demonstrating actual notice, more effort can be put into the discovery process to locate evidence probative of deliberate indifference and causation. Moreover, forcing institutions to look beyond just the plaintiff's individual report of assault and at their institution-wide policies instead is more likely to result in the reform that many Title IX offices so desperately need.

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[144] *Karasek,* 948 F.3d at 1171.

[145] Of course, the Ninth Circuit was addressing a motion to dismiss, which means that discovery had not yet occurred. Perhaps following the discovery process, causation may be easier for the *Karasek* plaintiffs to prove. *See id.* ("We are here on a motion to dismiss.").

[146] *See id.* at 1150.

[147] *See* discussion *supra* section II.B.

IV. CONCLUSION

It is estimated that around 19.4 million students attended colleges and universities in the fall of 2020.[148] Most of these students will attend an institution that receives federal funding and is thus subject to Title IX obligations.[149] In the event that any of these students are sexually assaulted, an appropriate, Title IX-compliant response from their university is crucial.

Though the impact of *Karasek*'s pre-assault theory remains to be seen, its endorsement by the Ninth Circuit represents the potential beginning of a new era of Title IX jurisprudence and institutional accountability. While the pre-assault theory is not without its own complications, it has the potential to strengthen the ability of plaintiffs to bring cases against their institutions in a time where the Department of Education's enforcement power is not being fully exercised.

Until the deliberate indifference standard outlined in *Gebser/Davis* is fundamentally altered (if ever), the pre-assault theory may prove to be the best tool to fight the epidemic of sexual assault on college campuses.

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[148] *See Fast Facts: Back to School Statistics,* NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/fastfacts/display.asp?id=372 [https://perma.cc/532Q-FN95] (summarizing data related to student enrollment in higher education).

[149] *See What Do Universities Do with the Billions They Receive from the Government?,* USA FACTS (Mar. 28, 2023 2:55 PM), https://usafacts.org/articles/what-do-universities-do-with-the-billions-they-receive-from-the-government/ [https://perma.cc/ZQ4T-BWVK] (highlighting the $149 billion the federal government gave to over 3,000 schools in fiscal year 2018, which covered 17.5 million students).