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The Title IX Paradox

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The Title IX Paradox

Emily Suski*

When Christine Blasey Ford explained to the Senate Judiciary Committee why she had not reported her sexual assault at age fifteen, she captured the struggle of many children who must decide whether to make such reports: “For a very long time, I was too afraid and ashamed to tell anyone the details.” Thousands of sexual assaults happen to children in school each year. Title IX, a potentially powerful civil rights law, should protect them. Title IX’s main purpose is to protect individuals from sex discrimination, including in the form of sexual harassment and assault, in public schools. Yet Title IX rarely does so. Title IX’s failure of purpose stems in part from courts’ evaluations of the judicially created “actual notice” standard. That standard requires that students do what Dr. Blasey Ford, out of fear, could not: report their sexual harassment and assaults. Further, courts’ assessments of actual notice mandate that schools receive this notice at particular times, through particular officials, and with particular information. If any of these strict criteria are not met, Title IX allows schools to do nothing in the face of students’ sexual harassment.

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This Article argues that in establishing these particularized actual notice requirements, courts have constructed a paradox for students. Courts demand that students do what they largely cannot in order to access the law’s protections. Applying empirical research in behavioral psychology and child and adolescent neuroscience to the analysis of Title IX for the first time in the academic literature, this Article exposes these flaws in Title IX doctrine and policy and recommends appropriate changes. It proposes a reconceptualization of the actual notice standard, a burden-shifting element to Title IX’s evaluation framework, and statutory modifications that accommodate for psychological and neurodevelopmental impediments in children’s decision-making. Such changes would better motivate schools to act in response to sexual harassment of their students and serve Title IX’s protective purpose.

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INTRODUCTION

Apart from in their homes, children face the greatest risk of sexual assault at school.¹ Title IX, which prohibits sex discrimination in public schools, including in the form of sexual harassment and assault,² is designed to protect students from such harms.³ Yet the law rarely serves this purpose in the K-through-twelve public school context.⁴ Title IX’s failure of purpose results in no small part from courts’ stringent interpretations of its notice requirements.⁵ Under current Title IX jurisprudence, schools need only act in response to students’ sexual harassment if they have actual notice of it.⁶ In determining what constitutes actual notice, courts have set the bar so high that students’ Title IX claims regularly fail.⁷ Courts have thus rendered this potentially powerful civil rights law virtually impotent.

Under the courts’ current approach to actual notice, even a school that knows about a student’s repeated sexual harassment has no obligation to address

1. Robin McDowell et al., *Hidden Horror of School Sex Assaults Revealed by AP*, ASSOCIATED PRESS (May 1, 2017), <https://www.ap.org/explore/schoolhouse-sex-assault/hidden-horror-of-school-sex-assaults-revealed-by-ap.html> [<https://perma.cc/ER2E-2952>]. In finding schools could be liable for the sexual harassment of students, the Supreme Court acknowledged the scope of the problem, writing that “[t]he number of reported cases involving sexual harassment of students in schools confirms that harassment unfortunately is an all too common aspect of the educational experience.” *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998).

2. For the sake of brevity, this Article will use “sexual harassment” as an umbrella term to include sexual harassment, sexual assault, and sexual abuse unless otherwise noted.

3. Title IX broadly prohibits individuals from being “subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a) (2018). The Supreme Court has interpreted this prohibition to mean that Congress, in enacting Title IX, “sought to accomplish two related, but nevertheless somewhat different objectives. First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices.” *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979).

4. See *infra* Parts 0.A–C.

5. See *infra* Parts 0.A–C; *infra* note 46 and accompanying text.

6. In the two cases in which the Supreme Court found that public schools could be liable under Title IX for teacher and peer sexual harassment of students, the Court said that students bringing such claims need to show that the public school both had actual knowledge of the sexual harassment and acted with deliberate indifference to it. *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999); *Gebser*, 524 U.S. at 290. While the deliberate indifference standard is highly problematic and has been critiqued by scholars because of how little it requires of schools in response to student sexual harassment, even that minimal response is not required if students cannot satisfy the stringent actual notice prong of the analysis. See Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038 (2016); Emily Suski, *The School Civil Rights Vacuum*, 66 UCLA L. REV. 720 (2019).

7. See *infra* Parts 0.A–C; *Doe v. Galster*, 768 F.3d 611, 617 (7th Cir. 2014) (“The Supreme Court has set a high bar for plaintiffs seeking to hold schools and school officials liable for student-on-student sexual harassment.”).

the issue, unless the school has very specific and timely information about particular instances.⁸ Courts effectively demand that students show that schools receive contemporaneous notice of each occurrence of their sexual harassment or assault and what it entailed.⁹

Courts' interpretations of Title IX's actual notice standard go beyond just mandating that students give schools sufficiently specific and timely information about their sexual harassment and assaults before schools must address them.¹⁰ Courts also require that particular school officials receive this information.¹¹ Notice to teachers and other lower-level school staff will not suffice.¹² Because student reporting is the primary way that schools learn of sexual harassment, courts' interpretations place the burden on students not only to report their sexual harassment but also to do so with precision before the law will protect them.¹³

These stringent interpretations of actual notice leave public schools free to do nothing in response to sexual harassment, exacerbating the underlying problem that much sexual harassment and abuse goes unreported. Public school students vastly underreport their sexual harassment.¹⁴ Between 2011 and 2015, approximately 17,000 K-through-twelve public school students reported being sexually assaulted in school.¹⁵ Yet the actual number of sexual assault cases during this time was probably closer to 170,000: research suggests that only 9

8. See *infra* Parts 0.A–C.

9. See *infra* Parts 0.A–C.

10. See *infra* Parts 0.A–C.

11. See *infra* Parts 0.A–B.

12. See *infra* notes 90–91, 93 and accompanying text.

13. Either students have to report their sexual harassment or schools have to observe it. See, e.g., *Gabrielle M. v. Park Forest-Chi. Heights, Ill. Sch. Dist.* 163, 315 F.3d 817, 824 (7th Cir. 2003) (“Nothing in the record shows that . . . school officials observed or that anyone reported sexual behavior by Jason toward Gabrielle (or anyone else) . . . Thus, there is no evidence that the defendants had notice of any harassing conduct . . .”). Although it is not unheard of for a school staff member to observe a student being sexually harassed or assaulted, such direct observation is uncommon. Much more typically, the sexual harassment happens where school staff do not see it, and students' claims accordingly are defeated. See, e.g., *Kelly ex rel. C.K. v. Allen Indep. Sch. Dist.*, 602 F. App'x 949, 953 (5th Cir. 2015) (finding that because peer sexual harassment happened “whenever the teachers weren't looking” and “typically took place when the children were unsupervised,” the school did not have actual notice of it).

14. As one study on the incidence of sexual harassment in middle and high school put it, “[t]he prevalence of sexual harassment in grades 7–12 comes as a surprise to many, in part because it is rarely reported.” CATHERINE HILL & HOLLY KEARL, AM. ASS'N UNIV. WOMEN, *CROSSING THE LINE: SEXUAL HARASSMENT AT SCHOOL 2* (2011), <https://www.aauw.org/files/2013/02/Crossing-the-Line-Sexual-Harassment-at-School.pdf> [<https://perma.cc/Z8DV-MGBN>]. Further, research suggests that cyber sexual harassment is even more underreported than other forms of sexual harassment. *Id.* at 8.

15. McDowell et al., *supra* note 1. Even that high number, however, is likely under-representative of the problem. Not only are sexual assaults under-reported, but some states do not even track the incidences of sexual assault in public schools. *Id.*

percent of students who suffer sexual harassment report it to their schools.¹⁶ Half of the students experiencing sexual harassment did not report it to anyone at all.¹⁷

This Article interrogates and critiques courts' assessments of the actual notice standard under Title IX and what it effectively requires of students. Drawing on empirical research in behavioral psychology and child and adolescent brain science, this Article argues that in establishing these notice requirements, courts demand that students do what they often cannot in order to access Title IX's protections.¹⁸ For all practical purposes, courts require children to not only make the decision to report their sexual harassment but also to do so in unrealistically precise ways.¹⁹ They require reports of sexual harassment and abuse at particular times, to particular people, and with particular information.²⁰ Yet behavioral psychology and child and adolescent brain science demonstrate that children will often decide not to report their sexual harassment at all, let alone in the particularized ways courts require.²¹ Both cognitive heuristics and

16. This study also found that 56 percent of girls and 40 percent of boys in grades seven through twelve have experienced some form of sexual harassment in school. HILL & KEARL, *supra* note 14, at 2. Of the students who did report their sexual harassment, one quarter reported it to a family member, but even then, the family member was not always an adult family member. *Id.* at 3.

17. *Id.* To put a finer point on this underreporting, despite the thousands of instances of sexual harassment in schools, in 2017, the United States Department of Education Office of Civil Rights (OCR) had only 154 open Title IX investigations in public elementary, middle, and high schools, with some dating back to 2010. Mark Keierleber, *The Younger Victims of Sexual Violence in School*, ATLANTIC (Aug. 10, 2017), <https://www.theatlantic.com/education/archive/2017/08/the-younger-victims-of-sexual-violence-in-school/536418/> [<https://perma.cc/YW4R-G2NL>]. In 2016, OCR received only eighty-three Title IX complaints regarding sexual harassment in public K-through-twelve schools. *Id.*

18. It cannot go without saying that scholars have sounded cautionary notes about the law's use of empirical evidence. For example, Clare Huntington has pointed out that "[a] central problem with empirical evidence is that it focuses attention on the outcomes of legal rules and the values underlying those outcomes . . . , distracting from the other values." Clare Huntington, *The Empirical Turn in Family Law*, 118 COLUM. L. REV. 227, 283 (2018). These points are important and must be considered in the application of empirical evidence to legal standards and norms. *See id.* Here, though, the point is not to use empirical research to focus on particular legal outcomes but instead to question the stringency of the standard itself as creating a paradox for students by requiring them to do what they cannot. *See infra* Parts 0.A–B.

19. *See supra* note 13 and accompanying text.

20. *See infra* Parts 0.A–C.

21. *See infra* Parts 0.A–B. In the Title VII context, scholars have critiqued the standard for evaluating claims of sexual harassment in employment by persuasively arguing that adults' decisions to delay reporting or not report sexual harassment are often in fact reasonable. *See, e.g.*, Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 900 (2008) ("The widespread failure to confront discrimination publicly—by confronting the perpetrator, lodging an internal complaint, or filing an EEOC charge—is driven largely by an accurate perception that the costs of such responses will likely outweigh the benefits."); L. Camille Hébert, *Why Don't "Reasonable Women" Complain About Sexual Harassment?*, 82 IND. L.J. 711, 742 (2007) ("[W]omen who are reluctant to make formal complaints of sexual harassment often have considerable justification for their failure to take such action or their delays in doing so. Their concerns about the negative consequences of reporting, including the negative effects on themselves, their work relationships, and even their harassers, are not unreasonable, but are in fact often borne out by subsequent events."); Angela

the nascent development of children's brains inhibit the decision-making involved in such reporting.²² Cognitive heuristics are mental shortcuts.²³ When using them, individuals make decisions by substituting simpler evaluations for more complicated ones.²⁴ Although cognitive heuristics impact the decision-making of both children and adults, children's decision-making is further hampered by their immature neurological development.²⁵ Children, therefore, operate under multiple layers of cognitive difficulty when deciding whether to report their sexual harassment and assaults.²⁶ Courts have thus established a paradox for students, requiring them to do the nearly impossible in order to find protection under Title IX.

When the Supreme Court laid out the contours of school liability under Title IX, the research on cognitive heuristics and child and adolescent brain science was not as advanced as it is now, and even the extant research had barely begun to influence law and policy.²⁷ Since then, a body of legal scholarship has analyzed the ways cognitive heuristics and child and adolescent brain science should be considered in varying fields.²⁸ None of this empirical research,

Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J. F. 105, 109 (2018) (“[T]he persistent racial biases reflected in the #MeToo movement illustrate precisely why sexual harassment law must adopt a reasonable person standard that accounts for these different intersectional and multidimensional identities. In other words, they show why courts should employ a standard based on a reasonable person in the complainant’s intersectional and multidimensional shoes, rather than the ostensibly objective reasonable person standard—which some courts have declared to be male biased—when evaluating sexual harassment claims.”). In the Title IX context, the students’ decisions to report or not are not scrutinized for reasonableness. *See infra* Parts 0.A–C. Instead, students must report their sexual harassment at particular times, to particular school officials, and with particular information—regardless of context or reasonableness.

22. *See infra* Parts 0.A–B.

23. Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207 (1973); DANIEL KAHNEMAN, THINKING FAST AND SLOW 91, 129 (2013).

24. Tversky & Kahneman, *supra* note 23; KAHNEMAN, *supra* note 23, at 91, 129.

25. *See infra* Part 0.B.

26. Although both children and adolescents experience decision-making challenges as a result of their immature neurodevelopment, those challenges differ depending on whether a child is an adolescent or is younger. *See infra* Part II.B. For simplicity, references throughout to “children” or “children’s” neurodevelopment include both children and adolescents.

27. *See* Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1473 (1998) (noting in the late 1990s that “[t]he absence of sustained and comprehensive economic analysis of legal rules from a perspective informed by insights about actual human behavior makes for a significant contrast with many other fields of economics, where such ‘behavioral’ analysis has become relatively common”).

28. These fields include administrative law, regulation of social media, environmental law, juvenile justice, and judicial decision-making. Josh Gupta-Kagan, *The Intersection Between Young Adult Sentencing and Mass Incarceration*, 2018 WIS. L. REV. 669 (2018); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001); Huntington, *supra* note 18, at 253–55; Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999); Jeffrey J. Rachlinski, *Selling Heuristics*, 64 ALA. L. REV. 389, 403 (2012) (“The regulation of land-based disposal of hazardous waste in the United States also provides a clear illustration of the power of availability to direct regulation.”); Laurence Steinberg et al., *Age Differences in Future Orientation and*

however, has been applied to the evaluation of Title IX claims.²⁹ This Article is the first to contend that Title IX doctrine and policy should take these developments into account.³⁰

To that end, this Article proposes a reconceptualization of Title IX's actual notice requirement that incorporates findings from the vast empirical research on judgment, heuristics, and children's brain development. It contends that courts should reinterpret what constitutes contemporaneous reports of sexual harassment, to whom those reports should be made, and what information such reports must include in light of this empirical evidence. These revisions would expand the meaning of the actual notice standard to better reflect children's mental processing abilities, ensure that students' best efforts to report are legally sufficient, and prompt school action.³¹ The point is to compel *some* response by the schools in the face of students' sexual harassment, where now the law compels almost none because the actual notice standard has created such a high bar to imposing liability.³²

In addition, this Article suggests reworking the Title IX evaluation framework to incorporate a burden-shifting provision into the assessment of actual notice. Under the current analysis, children bear the sole burden of ensuring that schools have adequate notice of their sexual harassment.³³ Under the framework proposed here, public schools would also shoulder some responsibility for facilitating and encouraging student reporting. Specifically, under the proposed framework, once a student could show that they provided some, even legally inadequate, notice of their sexual harassment to the school, the burden of proof would shift to the schools to demonstrate they had done something to encourage student reporting. If not, the actual notice element of the claim would be deemed met.

Delay Discounting, 80 CHILD DEV. 28 (2009); Cass R. Sunstein, *How Much Would You Pay to Use Facebook? A Behavioral Perspective* (Harvard Public Law Working Paper No. 18-30, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3173687 [<https://perma.cc/5XAA-6NAR>]. Other areas of law to consider cognitive heuristics include tax policy, federal legislation, and tort law. Kuran & Sunstein, *supra*.

29. Title IX has been critiqued on other bases, of course. *See, e.g.*, David S. Cohen, *Limiting Gebser: Institutional Liability for Non-Harassment Sex Discrimination Under Title IX*, 39 WAKE FOREST L. REV. 311, 316 (2004) (arguing *Gebser's* holding should be limited to instances of sexual harassment and not applied to other forms of sex discrimination in public schools); Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755 (1999) (critiquing, among other things, the *Gebser* Court's rejection of a vicarious liability standard under Title IX); MacKinnon, *supra* note 6 (critiquing Title IX's actual notice and deliberate indifference standard as undermining equality principles); Suski, *supra* note 6 (contending Title IX's liability limits are based on courts' misconceptions about families and schools).

30. *See supra* note 29 and accompanying text.

31. The required amount of action would depend on an evaluation of the deliberate indifference standard, which is itself susceptible to critique. *See supra* note 6 and accompanying text.

32. *See supra* notes 6–7 and accompanying text.

33. *See infra* Parts 0.A–C.

Finally, this Article advances Title IX legislative reforms. It contends that the law should be revised to require schools to implement procedures that help students overcome cognitive heuristics and account for the effects of child and adolescent brain development on their decision-making. Those procedures would facilitate and promote student reporting of sexual harassment and, as such, would also work hand-in-hand with this Article's doctrinal proposals.

This Article proceeds in three parts. Part I begins by explaining the purpose of Title IX and describing the Supreme Court's jurisprudence, which at once implied a private cause of action against public schools for students who suffer sexual harassment while also restricting those claims through the development of the actual notice standard under Title IX. Part II argues that this jurisprudence is flawed because it involves a unilateral assessment of whether schools have sufficient information about sexual harassment without regard for students' ability to provide it. Part III calls for a reform of Title IX doctrine and policy to account for the heuristics and neurodevelopmental patterns that make it nearly impossible for children and adolescents to accommodate courts' idealized version of notice in the case of sexual harassment. These proposals are aimed at relieving some of the burden on students to report their sexual harassment and abuse. They will therefore help to reinvigorate the protections that Title IX intended for students who suffer sexual abuse and harassment in school.

I.

TITLE IX NOTICE REQUIREMENTS

Enacted in 1972, Title IX amended the federal Education Act with the purpose of protecting children and others from sex discrimination in public schools.³⁴ Where existing laws failed to provide such protection, Congress enacted Title IX to fill the gap.³⁵ To that end, Title IX states that “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”³⁶

Yet Congress provided no express private right of action for Title IX's enforcement.³⁷ In a series of cases, however, the Supreme Court concluded that sexual harassment constitutes discrimination on the basis of sex and found an

34. See *supra* note 3 and accompanying text.

35. See *supra* note 3 and accompanying text; Cohen, *supra* note 29, at 317–18 (“Congress enacted Title IX in response to the perceived gap created by Title VI and Title VII. Title VI, enacted in 1964, prohibits race discrimination by institutions that receive federal funding. Title VII, also enacted in 1964, prohibits discrimination in employment on a variety of bases, including sex.”).

36. 20 U.S.C. § 1681(a) (2018).

37. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 683 (1979) (“The statute does not, however, expressly authorize a private right of action by a person injured by [its] violation . . .”). Instead, enforcement of Title IX was initially limited to administrative action by the federal government through the Department of Education, which had the authority to withhold federal funding for violations of Title IX. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 280–81 (1998).

implied private right of action under Title IX, including for both teacher and peer sexual harassment of students.³⁸ In doing so, the Court noted Title IX's protective purpose, stating "Title IX focuses more on 'protecting' individuals from discriminatory practices" in public education.³⁹

At the same time, though, the Court hewed to a relatively narrow standard for public school Title IX liability. The Court concluded that public schools could not be held liable for violating Title IX unless a student could show that the school had actual notice of the sexual harassment and acted with deliberate indifference to it.⁴⁰ The Court also explicitly sought to confine public schools' Title IX liability with the actual notice standard.⁴¹ In *Davis v. Monroe County Board of Education*, the Court emphasized that the standard would "limit a [school's] damages liability."⁴²

38. *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 646–47 (1999) ("We thus conclude that recipients of federal funding may be liable for 'subject[ing]' their students to discrimination where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment . . ."); *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 76 (1992) ("In sum, we conclude that a damages remedy is available for an action brought to enforce Title IX."); *Gebser*, 524 U.S. at 292–93 ("[W]e will not hold a school district liable in damages under Title IX for a teacher's sexual harassment of a student absent actual notice and deliberate indifference."); *Cannon*, 441 U.S. at 725 ("The Court further concludes that even if it cannot be persuasively demonstrated that Title VI created a private right of action, nonetheless this remedy should be inferred in Title IX . . .").

39. *Gebser*, 524 U.S. at 287. Courts have also rejected any claim of sovereign immunity under Title IX. They have rejected it under one of two rationales. David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 234 (2005). First, they point out that Title IX is a Spending Clause statute and that it contains an express abrogation of Eleventh Amendment immunity. *Id.* at 234–35. Second, others have come to the same conclusion because Title IX was enacted under Congress's authority under Section Five of the Fourteenth Amendment and therefore abrogates states' Eleventh Amendment immunity. *Id.* at 236.

40. *Davis*, 526 U.S. at 646–47; *Gebser*, 524 U.S. at 293. The Court made clear that public schools are not liable under Title IX for the sexual harassment itself but for their own deliberate indifference to it. *Davis*, 526 U.S. at 641 ("We disagree with respondents' assertion, however, that petitioner seeks to hold the Board liable for *G.F.*'s actions instead of its own. Here, petitioner attempts to hold the Board liable for its *own* decision to remain idle in the face of known student-on-student harassment in its schools."). The Court therefore explicitly rejected a constructive notice standard for public school liability. *Id.* at 642 ("[In *Gebser*,] we declined the invitation to impose liability under what amounted to a negligence standard—holding the district liable for its failure to react to teacher–student harassment of which it knew or should have known."). The Court stated that a constructive notice standard would not afford the school the opportunity "to take action to end the harassment or limit further harassment." *Gebser*, 524 U.S. at 289.

41. *Davis*, 526 U.S. at 649 ("We believe, however, that the standard set out here is sufficiently flexible to account both for the level of disciplinary authority available to the school and for the potential liability arising from certain forms of disciplinary action."); *Gebser*, 524 U.S. at 290 ("Where a statute's express enforcement scheme hinges its most severe sanction on notice and unsuccessful efforts to obtain compliance, we cannot attribute to Congress the intention to have implied an enforcement scheme that allows imposition of greater liability without comparable conditions.").

42. 526 U.S. at 645. Specifically, the Court said that the actual notice and deliberate indifference standards would together limit public school liability. *Id.*

The Court reasoned that this narrow, liability-limiting standard better comported with the statute's protective purpose.⁴³ Yet rather than furthering the statute's protective purpose, this effort to shield public schools from liability under Title IX ultimately set its jurisprudence on a collision course with its purpose.⁴⁴ Because public schools are not liable for any sexual harassment in schools absent actual notice of it, the law does not require them to act to address the harassment in any way.⁴⁵ The law's protections are simply not triggered without actual notice.

Cases in the lower courts applying the actual notice standard have borne out this collision. In interpreting this standard, courts have set the bar so high that Title IX protects very few students in K-through-twelve public schools.⁴⁶ For all practical purposes, in order to access Title IX's protections, students must report their sexual harassment with a high level of specificity in ways that involve a complicated set of assessments.⁴⁷ Unless these students successfully navigate this decision-making terrain, schools have no obligation to respond at all to students' reports of sexual harassment and abuse.⁴⁸ They may even escape

43. The Court compared Title IX to Title VII, which prohibits employment discrimination, as follows: "whereas Title VII aims centrally to compensate victims of discrimination, Title IX focuses more on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds." *Gebser*, 524 U.S. at 287. Further, the Court reasoned that Title IX's spending clause and "contractual framework distinguishes Title IX from Title VII," which allows for a damages remedy under agency principles. *Id.* at 286; *see also* Derek W. Black, *The Mysteriously Reappearing Cause of Action: The Court's Expanded Concept of Intentional Gender and Race Discrimination in Federally Funded Programs*, 67 MD. L. REV. 358, 375 (2008) (noting the Court concluded that "imposing liability on schools that are neither aware of discrimination, nor contribute to its continuation, would not serve to protect students from the schools' discriminatory actions"). *But see Gebser*, 524 U.S. at 301; *infra* note 129 and accompanying text.

44. *See Suski*, *supra* note 6, at 759.

45. *See supra* note 38 (citing *Gebser* and *Davis*).

46. *See infra* Parts 0.A–C. Further, in their treatment of actual notice under Title IX, courts go beyond traditional common law requirements for actual notice. Under those standards, a plaintiff can establish actual notice by offering evidence that a defendant had either express or implied notice of an event. 58 AM. JUR. 2D *Notice* § 4 (2012). "Actual notice' can be divided into two categories: (1) express, which includes direct communication, and (2) implied, which is inferred from the fact that the person charged had the means of obtaining knowledge that he or she did not use. Express notice is actual notice consisting of knowledge brought personally home while implied notice is knowledge imputed and charged because of the surrounding facts and circumstances, which would lead one to discover or learn the fact by exercising ordinary care. . . . [I]mplied notice is also actual notice of facts or circumstances that, if properly followed up, would have led to knowledge of the particular fact in question." *Id.* § 5. By contrast, constructive notice is when a person "could have discovered the fact by proper diligence, and his or her situation was such as to cast upon him or her the duty of inquiring into it." *Id.* § 4. Implied actual notice and constructive notice, therefore, are close cousins. *Id.* § 4; *see also* *Radiology Ctr., S.C. v. Stifel, Nicolaus & Co.*, 919 F.2d 1216, 1222 (7th Cir. 1990); *Potash Co. of Am. v. Int'l Minerals & Chem. Corp.*, 213 F.2d 153, 155 (10th Cir. 1954); *Latta v. W. Inv. Co.*, 173 F.2d 99, 106 (9th Cir. 1949); *Sapp v. Warner*, 141 So. 124, 127 (Fla. 1932). In the Title IX context, courts mandate that students show evidence of express notice to schools to the exclusion of any implied notice. *See supra* note 40 and accompanying text.

47. *See supra* note 13 and accompanying text.

48. *See supra* note 6 and accompanying text.

Title IX liability by remaining deliberately indifferent to such reports.⁴⁹ Unsurprisingly, then, many Title IX claims fail, leaving students who suffer sexual harassment in public schools simply unprotected by the law.⁵⁰

A. Notice at Particular Times

Although the Supreme Court set forth the actual notice standard in two landmark cases, the question of when schools must have that notice has only been addressed by lower courts.⁵¹ Lower courts effectively require contemporaneous reporting of student sexual harassment.⁵² Courts find that both delays in reporting and prior warnings of probable sexual harassment fail to meet the actual notice requirement.⁵³

When students delay reporting of sexual harassment by virtually any measure of time, this proves fatal to their Title IX claims.⁵⁴ For example, in the Seventh Circuit case *Davis ex rel. M.D. v. Carmel Clay Schools*, high school freshman M.D. was subjected to verbal and physical sexual harassment, including assaults on his buttocks and genitals, by members of the boys' basketball team.⁵⁵ The harassment happened almost daily from November of M.D.'s freshman year through the following January or February.⁵⁶ In one incident, four senior boys assaulted M.D. on a bus.⁵⁷ However, M.D. did not immediately report that incident or any of the other harassment he suffered.⁵⁸ Instead, some weeks later the mother of another student heard about the assaults and reported them to the school.⁵⁹ Because the school learned of these instances of harassment and assault a few weeks to a few months after they occurred, the court concluded the school lacked actual notice of the abuse.⁶⁰ Therefore, M.D.'s

49. See *supra* note 6 and accompanying text. Courts also limit schools' liability under Title IX through the application and interpretation of the deliberate indifference requirement. Problems with the justifications for that standard, as well as its perverse incentives, have been addressed in recent scholarship. See Suski, *supra* note 6; MacKinnon, *supra* note 6.

50. See *infra* Parts 0.A–C.

51. See *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 646–47 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 293 (1998). The term “teacher” is used throughout as a shorthand for any school staff member or employee. The public schools can potentially be liable under Title IX for any school employee who sexually harasses a student, whether that employee is a teacher, administrator, or other school staff member. *Gebser*, 524 U.S. at 293.

52. See *infra* notes 54, 69, 80 and accompanying text.

53. See *infra* notes 54, 69, 80 and accompanying text.

54. Similarly, in *Doe v. Galster*, a middle school girl reported some harassment close in time to its occurrence but delayed reporting the most severe sexual harassment she suffered until the last day of her seventh-grade year in school. 768 F.3d 611 (7th Cir. 2014). Because the school did not learn of that sexual harassment until the last day of school, the Seventh Circuit found that the school did not have actual notice of the sexual harassment. *Id.* at 617–18.

55. 570 F. App'x 602, 603–04 (7th Cir. 2014).

56. *Id.* at 603–04.

57. *Id.* at 604.

58. *Id.* at 603–04.

59. *Id.* at 604.

60. *Id.* at 605.

Title IX claim could not succeed.⁶¹ The school, consequently, had no obligation to address the assaults' effects or prevent further assaults; Title IX posed no obstacle to complete inaction by the school.⁶²

At the same time, a school's prior awareness of one student's history and pattern of sexually assaulting and harassing another student does not constitute notice of other, even intervening, sexual assaults by the same student.⁶³ In *Doe v. Board of Education of Prince George's County*, for instance, fellow student M.O. repeatedly sexually harassed and assaulted nine-year-old J.D. over the course of two years.⁶⁴ The school knew, among other things, that M.O. had exposed himself to J.D. and, separately, tried to climb into J.D.'s bathroom stall while M.O.'s pants were down.⁶⁵ However, J.D. did not report three intervening sexual assaults that M.O. committed against him until approximately one year after they occurred.⁶⁶ The Fourth Circuit found that the school's notice of some of the harassment and assaults neither served as notice of the others nor imposed any obligation to investigate whether they were occurring.⁶⁷ The court stated that imposing such an obligation on the school would mean "substitut[ing] a negligence standard for the deliberate indifference standard" that requires schools to act with something more than deliberate indifference in response to sexual harassment of which they are aware.⁶⁸

The Fourth Circuit's treatment of the actual notice standard, however, is problematic for at least two reasons. First, it conflates the actual notice and deliberate indifference prongs of the Title IX standard.⁶⁹ It does so by counting

61. *Id.*

62. *See id.*

63. *Doe v. Bd. of Educ.*, 605 F. App'x 159, 161–63 (4th Cir. 2015); *see also infra* note 67 and accompanying text.

64. *Doe*, 605 F. App'x at 161–63.

65. *Id.*

66. *Id.* at 163.

67. *Id.* at 167–68. The Fourth Circuit is not alone in these conclusions. The Fifth and Seventh Circuits have also required students to show that the schools had direct, near-simultaneous evidence of both peer and teacher sexual harassment. In *Kelly ex rel. C.K. v. Allen Independent School District*, the father of middle school student C.K. wrote the school district superintendent to express concern that another middle school boy, B.H.—who had sexually assaulted a student a few months earlier—would repeat the offense when he returned to school. 602 F. App'x 949, 950 (5th Cir. 2015). The school did nothing in response to protect C.K. or address his father's concerns. *Id.* at 951. When B.H. then did sexually harass and assault C.K., the Fifth Circuit found that neither the parent's written concerns nor C.K.'s report of the assault a few weeks afterward established actual notice. *Id.* at 951–53. The court stated that the evidence "falls far short of Title IX's stringent actual-knowledge standard" and, almost incredibly, concluded that the school district "had no knowledge of facts that would permit the inference that C.K. faced a substantial risk of serious harassment." *Id.* at 953–54. The Seventh Circuit has also required contemporaneous notice of each incident of sexual harassment. *See supra* note 54 and accompanying text; *infra* note 70 and accompanying text.

68. *Doe*, 605 F. App'x 159, 168.

69. On this point, the Fourth Circuit cited a 2015 Seventh Circuit decision, *Doe v. Galster*, 768 F.3d 611 (7th Cir. 2014). In *Galster*, the student—who was sexually harassed repeatedly over a period of time—reported some, but not all, of the harassment and argued that her school should have

any action a school might take to discover potential sexual harassment as an action to address the sexual harassment that it already knows about.⁷⁰ In other words, the court treats any school action to obtain actual notice of potential sexual harassment as an action that satisfies the deliberate indifference standard for responding to known sexual harassment.⁷¹ The Supreme Court, however, designated the deliberate indifference standard as a threshold for schools' responses to known sexual harassment, not one that restricts any notice obligations on the part of schools.⁷² Thus, the deliberate indifference standard should not operate as a limit on what schools must do to uncover any other potential sexual harassment.⁷³

Second, although the Supreme Court did place limits on public schools' obligation to discover potential sexual harassment, the Fourth Circuit's assessment exceeds the bounds contemplated by the Court.⁷⁴ When the Supreme Court adopted the actual notice standard in *Gebser* and *Davis*, it "declined [to hold] the district liable for its failure to react to . . . harassment of which it knew or *should have* known."⁷⁵ However, the Court did not consider in either case whether that limitation applied to instances in which the school already has actual notice of some, or even extensive, sexual harassment.⁷⁶ The *Davis* standard thus does not preclude the possibility that notice of some sexual harassment may give rise to an obligation on the part of schools to try to determine the full extent of the problem.⁷⁷ In failing to acknowledge or grapple with these points, the Fourth Circuit's evaluation means that a school's notice of

investigated the reported instances of her harassment to determine the full extent of the problem. *Id.* at 619. Rejecting that argument, the Seventh Circuit reasoned that to do otherwise would amount to "substituting a negligence standard for the . . . deliberate indifference standard[] . . . under *Davis*." *Id.* Both courts thus not only conflate notice with deliberate indifference but also treat the distinction between actual and constructive notice as a self-evident binary: actual notice requires express, direct evidence; constructive notice does not. Under the common law, however, that particular binary has not existed; actual notice has encompassed implied notice. *See supra* note 46 and accompanying text.

70. *See Davis ex rel. M.D. v. Carmel Clay Sch.*, 570 F. App'x 602, 605–06 (7th Cir. 2014).

71. *See id.*

72. *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 648 (1999) (emphasizing that the deliberate indifference standard operates to provide schools with "flexibility" in their reactions to known sexual harassment and "stress[ing] that our conclusion here—that recipients may be liable for their deliberate indifference to known acts of peer sexual harassment—does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action").

73. *See id.* at 647–48.

74. *Id.* at 642.

75. *Id.*

76. *See id.* at 646–47. The Court did not, for example, say whether a school with notice of sexual harassment occurring on Mondays, Wednesdays, and Fridays but not on Tuesdays and Thursdays would have no actual notice of the Tuesday and Thursday harassment—or bear any obligation to determine whether the Monday, Wednesday, Friday harassment extended to Tuesday and Thursday. *See id.* Indeed, at least one federal district court has concluded that repeated sexual harassment can serve as notice of other sexual harassment, potentially amounting to an arguable pattern. *See infra* note 80 and accompanying text.

77. *See Davis*, 526 U.S. at 646–47.

some sexual harassment triggers no obligation by the school to uncover potential additional sexual harassment—no matter how much reason a school might have to suspect it.⁷⁸ Nor is the Fourth Circuit alone in imposing these restrictions on schools' obligations to investigate student sexual harassment: in fact, it followed the lead of the Seventh Circuit in imposing them.⁷⁹

By employing such problematic reasoning, courts transform the Title IX actual notice requirement into one that demands that notice of sexual harassment occur almost simultaneously with the harassment itself before schools bear any responsibility to address it.⁸⁰ Courts, therefore, require students to walk a reporting tightrope because their reports can fail at both ends of the timing spectrum.⁸¹ When students delay reporting sexual harassment to schools, courts may deem the notice untimely.⁸² When schools receive prior warnings of the likelihood that sexual harassment will occur, that may also constitute untimely notice.⁸³ In either scenario, schools would have no obligation to address or prevent sexual harassment.⁸⁴

B. Notice to Particular Individuals

Not only must students bringing Title IX claims establish that schools have contemporaneous notice of their sexual harassment, they must also show that particular, higher-up individuals in the school receive that notice. In *Gebser*, the Supreme Court said that notice of sexual harassment for Title IX purposes could not be provided to just any staff member of the public schools.⁸⁵ Instead, a public school could only be held liable for teacher sexual harassment of students if an “appropriate person” in the public school received that notice.⁸⁶ The Court defined an “appropriate person” as “at a minimum . . . [a school official] with

78. *Doe v. Bd. of Educ.*, 605 F. App'x 159, 167–68 (4th Cir. 2015).

79. *See Doe v. Galster*, 768 F.3d 611 (7th Cir. 2014); *supra* note 76 and accompanying text.

80. This treatment of what constitutes contemporaneous notice is not mandatory: at least one district court has adopted a less narrow interpretation. *Kauhako v. Haw. Bd. of Educ.*, No. 13-00567 DKW-BMK, 2015 U.S. Dist. LEXIS 12753, at *7–10 (D. Haw. Feb. 3, 2015) (“[T]he Court rejects Defendant’s suggestion that prior notice of the initial off campus sexual assault was not sufficient to alert school officials to the subsequent assaults that occurred on campus.”). In *Kauhako*, student Mariana Doe was raped repeatedly by another student in school. *Id.* at *2–3. On a motion to dismiss Doe’s Title IX claim, the school argued that the first rape did not provide notice of subsequent rapes. *Id.* at *8. The court rejected these arguments. *Id.* at *8–10. Stating that the school official need only have “enough knowledge” of the harassment that “it reasonably could have responded with remedial measures,” it effectively found that some sexual harassment gives notice of other sexual harassment. *Id.* Yet at least three federal circuits treat contemporaneous notice differently, demonstrating the difficult needle-threading many courts find students must engage in to establish a Title IX claim. *See supra* note 67 and accompanying text.

81. *See supra* notes 54, 78 and accompanying text.

82. *See supra* note 76 and accompanying text.

83. *See supra* notes 54, 69, 78 and accompanying text.

84. *See supra* notes 54, 69, 78 and accompanying text.

85. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

86. *Id.*

authority to take corrective action to end the discrimination.”⁸⁷ When the Court subsequently decided in *Davis* that public schools could also be liable for peer sexual harassment, the Court was not so explicit about who should have actual notice of the sexual harassment.⁸⁸ However, lower courts assessing peer sexual harassment claims under Title IX follow the Court’s lead in *Gebser* and require that an “appropriate person” have this actual notice.⁸⁹ Absent notice to such persons, schools are not obligated to address student sexual harassment.

When assessing students’ Title IX claims, courts generally find that the categories of “appropriate persons”—those with “authority to take corrective action to end the discrimination”—are limited to such school administrators as assistant principals, principals, and even higher-level administrators.⁹⁰ School teachers and other non-administrative school staff generally do not qualify.⁹¹ In the context of peer sexual harassment, lower-level school staff can know about and even facilitate the harassment: as long as they do not inform the school administrators about it, the actual notice requirement is not met.⁹² In fact, the Eleventh Circuit has suggested that even when a teacher actively instigates one student’s sexual assault of another, that teacher’s knowledge does not constitute adequate notice because a teacher is not a school administrator.⁹³

87. *Id.*

88. *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651–52 (1999) (suggesting that “[d]istrict administrators” are appropriate officials to receive notice). The Court focused more instead on how the standard it set forth limited school liability, repeatedly explaining that schools would not be beset by Title IX litigation. *Id.* The Court pointedly noted, for example, that the standard precluded a successful Title IX action for “simple acts of teasing and name calling among school children.” *Id.* at 652.

89. *E.g.*, *Hill ex rel. BHJ v. Cundiff*, 797 F.3d 948, 971 (11th Cir. 2015) (limiting the definition of “appropriate person” to those school administrators with the “authority to discipline students for sexual harassment”).

90. *See infra* note 97 and accompanying text. For example, in *Stiles ex rel. D.S. v. Grainger County*, multiple students sexually harassed student D.S. during his seventh and eighth grade years in school. The court found that because the principal and assistant principal knew, the actual knowledge requirement “that a single school administrator with authority to take corrective action had actual knowledge” was indisputably met without further analysis. 819 F.3d 834, 848 (6th Cir. 2016).

91. *See Santiago v. Puerto Rico*, 655 F.3d 61, 74 (1st Cir. 2011).

92. *See id.*

93. In *Hill*, one student raped another in a school bathroom as the result of a scheme devised by a teacher’s aide, yet the court described the aide’s knowledge and development of the plan as insufficient to satisfy the actual notice standard. 797 F.3d at 963–64, 971. The teacher’s aide concocted a plan to use student Jane Doe as bait to catch student C.J.C. in the act of sexual harassment; C.J.C. then raped Doe, who brought a Title IX action against the school. *Id.* In evaluating the claim, the court found that the teacher’s knowledge and facilitation of the rape did not satisfy Title IX’s actual notice requirement. *Id.* at 971. Instead, the student’s Title IX claim survived on an alternate ground: the court found that the evidence *could* establish that the principal or assistant principal had knowledge of the sexual harassment and rape-bait scheme. *Id.* at 971–72. Because the facts, construed in the light most favorable to the plaintiff, sufficed to show that the school principal knew about the rape-bait scheme, the principal’s knowledge satisfied the Title IX actual notice requirements for summary judgment purposes. *Id.* Had the principal or assistant principal not had that information, then the court’s opinion all but concluded that the actual notice requirement would not have been met. *See id.*

When sexual harassment is perpetrated by teachers or other school staff, the notice requirements are arguably and counterintuitively even more stringent and context specific. First, if the sexual harassment is perpetrated by a school employee, the harasser's own knowledge does not suffice to meet the actual notice requirements under Title IX.⁹⁴ A student still must report any sexual harassment or abuse to a school administrator.⁹⁵

Second, even when the wrongdoer is a school administrator, leaving the student with no higher-level person in the school building to whom to report, the wrongdoer's knowledge still does not suffice to satisfy the actual notice standard.⁹⁶ Someone else with authority to remedy the sexual harassment must be told.⁹⁷

Third, when the wrongdoer is a school employee, courts have determined that who constitutes an "appropriate person" also depends on how and where the harassment occurred.⁹⁸ For example, if the sexual harassment or assault happens off-campus but still under the purview of the school, a report to a principal or assistant principal may not suffice to satisfy Title IX's actual notice requirement.⁹⁹ In *Santiago v. Puerto Rico*, where a bus driver molested six-year-old Jherald, a student with bilateral hearing loss, the First Circuit concluded that reports to the school social worker, teacher, and attempts to report to the principal did not satisfy the actual notice standard.¹⁰⁰ The court found that those reports failed because none of those individuals had the authority to take corrective action against the bus driver, whose employment the Puerto Rico Department of

94. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 291 (1998). The Court in *Gebser* was explicit on this point: "where a school district's liability rests on actual notice principles . . . the knowledge of the wrongdoer himself is not pertinent to the analysis." *Id.*

95. *See Salazar v. S. San Antonio Indep. Sch. Dist.*, 953 F.3d 273, 275 (5th Cir. 2017); *Stiles*, 819 F.3d at 848; *Hill*, 797 F.3d at 963–64, 971; *Santiago*, 655 F.3d at 73–74.

96. Such was the case in *Salazar*, where Michael Alcoser—the school's vice principal and then principal—began molesting third grade student Adrian Salazar. 953 F.3d at 274–75. The abuse continued through Adrian's fifth grade year. *Id.* at 275. The parties stipulated that Alcoser had the authority to remedy the abuse and was the highest-level authority in the school to whom Adrian could report the abuse; yet because he was also the perpetrator, the court concluded that Adrian did not meet the actual notice requirement under Title IX. *Id.* at 275, 278.

97. *Id.* at 278. In his dissent in *Gebser*, Justice Stevens noted that this standard departed drastically from settled principles of agency law. He argued that the teacher's sexual harassment of a student in *Gebser* "present[ed] a paradigmatic example of a tort that was made possible, that was effected, and that was repeated over a prolonged period because of the powerful influence that Waldrop had over Gebser by reason of the authority that his employer, the school district, had delegated to him. As a secondary school teacher, Waldrop exercised even greater authority and control over his students than employers and supervisors exercise over their employees. His gross misuse of that authority allowed him to abuse his young student's trust." *Gebser*, 524 U.S. at 299 (Stevens, J., dissenting).

98. *See Santiago v. Puerto Rico*, 655 F.3d 61, 73–74 (1st Cir. 2011).

99. *Id.* at 66, 74.

100. *Id.* at 74–75.

Education supervised.¹⁰¹ “This defect alone is fatal to the plaintiff’s Title IX claim,” the court concluded.¹⁰²

C. Notice with Particular Information

Finally, courts require that reports of sexual harassment include particular information to satisfy the Title IX actual notice standard. In *Gebser*, the information provided to the principal about student Alida Star Gebser’s sexual relationship with a high school teacher consisted of “a complaint from parents of other students charging only that [the teacher] had made inappropriate comments during class”¹⁰³ The Supreme Court found this information “plainly insufficient to alert the principal to the possibility that Waldrop was involved in a sexual relationship with a student.”¹⁰⁴ The Court did not specify, though, how much more information must be reported to satisfy the actual notice standard.¹⁰⁵ In *Davis*, the Court stated that the “most obvious example” of peer sexual harassment violating Title IX would be “a case in which male students physically threaten their female peers every day, successfully preventing the female students from using a particular school resource—an athletic field or a computer lab, for instance.”¹⁰⁶ However, the Court did not specify how much less information on harassment would suffice.¹⁰⁷ The Court thus has established the ends of the informational continuum but has not drawn any guiding lines in between the two poles.

In assessing the actual notice standard, however, the lower courts draw these lines themselves. They require very specific information about each instance of sexual harassment and what it entails to establish actual notice.¹⁰⁸ In cases of peer sexual harassment, courts find even multiple reports of sexual harassment insufficient to establish actual notice of the full extent of severe harassment and abuse if other instances go unreported.¹⁰⁹ Courts require the

101. *Id.* at 74 (“A school principal may, in at least some instances, be considered an appropriate person for the receipt of such notice. But where, as here, the alleged harasser is not a person subject to the principal’s customary disciplinary authority, the principal may not qualify as an appropriate person.” (citations omitted)).

102. *Id.*

103. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 291 (1998).

104. *Id.*

105. *See id.*

106. *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650–51 (1999).

107. *See id.*

108. *See infra* notes 109, 111 and accompanying text. As Catherine MacKinnon notes regarding courts’ assessment of Title IX’s notice requirement, “[t]he implicit rule often appears to be that schools do not know enough for actual notice standards until they are informed of an exact specific possibility that then becomes an actuality.” MacKinnon, *supra* note 6, at 2070.

109. For example, in *Doe v. Board of Education*, where student M.O. sexually harassed and assaulted student J.D. throughout J.D.’s fourth and fifth grade years in school, the court found the school had no notice of three sexual assaults despite the school’s knowledge of the persistent and ongoing sexual harassment. 605 F. App’x 159, 166–170 (4th Cir. 2015). The court affirmed the lower court’s

schools have direct, explicit knowledge about each instance of sexual harassment.¹¹⁰ Similarly, in cases of teacher sexual harassment of students, students have to effectively show that the school had notice of the sexual acts themselves to establish actual notice.¹¹¹ Reports of credible suspicions about the harassment by parents, other school staff, and students are even collectively insufficient.¹¹²

Further, courts still find that schools have no actual notice of the sexual harassment when students try to directly and explicitly report it but use vague language. Even when students' inability to be more specific results from disability-related language problems, the inability has not mattered.¹¹³ For example, in *Rost ex rel. K.C. v. Steamboat Springs RE-2 School District*, a Tenth Circuit case, middle school student K.C. reported that "these boys were bothering me" in the second year of the three years during which she endured

conclusion that the Title IX claim based on the sexual assaults could not stand because J.D. had not told the school about those precise sexual assaults until a year after they occurred. *Id.* Similarly, in *Doe v. Galster*, middle school student Jane Doe faced harassment based on both her sex and national origin consistently during her sixth and seventh grade years in school; yet the court found that Doe did not establish actual notice under Title IX because, although the school knew of the verbal harassment, it did not learn about Doe's physical harassment and assaults until "the evening of the last day of her seventh grade year." 768 F.3d 611, 617–18 (7th Cir. 2014).

110. See *supra* note 109 and accompanying text.

111. In *Campbell v. Dundee Community Schools*, a middle school basketball coach engaged in a sexual relationship with student Jane Doe. 661 F. App'x 884, 886–89 (6th Cir. 2016). Despite repeated complaints to school administrators about the coach's behavior toward and relationship with Jane Doe, the court found the school did not have actual notice of the harassment. *Id.* The court said, "the plaintiff must be able to show that the authority figures were on notice of a substantial risk of the actual type of harassment that occurred." *Id.* at 888. In *Doe v. Flaherty*, an Eighth Circuit case, a high school basketball coach, Chad Smith, had a sexual relationship with high school student Jane Doe. 623 F.3d 577, 580–82 (8th Cir. 2010). Smith sent inappropriate texts to students, including "are you drunk yet?" and "OMG [oh my god] you look good today." *Id.* at 580–81. The school superintendent's secretary, a relative of Jane Doe, reported concerns to the superintendent and to Jane's mother about Smith's relationship with Jane, including that "something was going on" with them. *Id.* at 581. Because Jane did not report the sexual relationship at the time it was happening, the court concluded that the other evidence, warnings, and expressions of concern about Smith's behavior and relationship with Jane failed to meet the actual notice standard. See *id.* at 584–85. Jane's failure to disclose the relationship at the time it was occurring therefore proved fatal to her claim. Similarly, in *J.F.K. ex rel. O.K.K. v. Troup County School District*, substantial evidence—from parents, teachers, and students—of a teacher's behavior with a student that was "inappropriate, devoid of professionalism, and reek[ing] of immaturity" failed to satisfy the actual notice standard because neither the student nor anyone else reported the sexual relationship with this teacher. 678 F.3d 1254, 1261 (11th Cir. 2012). More specifically, the school principal knew from parents that the teacher, Elizabeth Gaddy, was "possessive" of twelve-year-old male student O.K.K. *Id.* at 1258. The principal also knew that Gaddy "constantly" sent text messages to O.K.K. *Id.* Further, O.K.K.'s father expressed concerns to the principal about Gaddy's attentions to his son, and another parent told the principal that she had seen Gaddy at her home sitting on a couch with O.K.K. under a blanket with their bodies touching. *Id.* at 1258–59. Yet O.K.K. never reported the sexual relationship while it was occurring, and the court concluded that the school "was never put on notice of any single act, or combination of acts, of actual sexual harassment by Gaddy." *Id.* at 1260. The school's failure to intervene or protect O.K.K. therefore did not constitute a violation of Title IX. *Id.*

112. See *supra* note 111 and accompanying text.

113. See, e.g., *infra* notes 119–120 and accompanying text.

sexual harassment and assaults by those boys.¹¹⁴ Notably, K.C. had a disability related to a childhood brain injury.¹¹⁵ Although the boys had “persistently and continuously pestered her for oral sex” and coerced her into performing oral sex starting in seventh grade, K.C. lacked the language skills to specifically report this information.¹¹⁶ K.C. testified that she did not know the word “assault.”¹¹⁷ In response to K.C.’s complaints about the boys bothering her, the school did virtually nothing to protect K.C. or address her complaints.¹¹⁸ Nor did the school even follow up on K.C.’s complaints to determine how the boys were bothering her, or what she meant by her complaints.¹¹⁹ K.C.’s Title IX claims still failed, though, because despite her reporting to the best of her abilities, the court deemed K.C.’s reports insufficient to establish that the school had actual notice of her sexual harassment.¹²⁰

Children whose young age limits their reporting capacity fare no better. Their age-related lack of language skills does not make up for the failure to provide a clear report of their sexual harassment.¹²¹ For example, in *Gabrielle M. v. Park Forest-Chicago Heights*, the Seventh Circuit found kindergartner Gabrielle M.’s testimony about her classmate “bothering” her and doing “nasty stuff” inadequate to establish notice of severe sexual harassment.¹²² Even though Gabrielle was only in kindergarten, the court found Gabrielle’s statements too

114. 511 F.3d 1114, 1117 (10th Cir. 2008).

115. *Id.*

116. *Id.* In addition, the boys called K.C. “retard” and “stupid” while threatening to spread rumors about her sexual activity and distribute naked pictures of her. *Id.*

117. *Id.*

118. *Id.* at 1120. K.C. also suffered harassment because she had to have a one-on-one aide in her math class. *Id.* at 1117. The school did act to address that disability-related harassment, but it did nothing to address or look into her sexual harassment complaints. *Id.* at 1120.

119. *Id.* at 1120. As the partial dissent in *Rost* points out, “K.C. was attempting to communicate what was happening to the counselor but did not have the words. One would think a trained middle school counselor, faced with a mildly retarded young student who was severely distressed about being ‘bothered’ by some boys in her class, would ask the obvious follow-up question—in what way are they bothering you?” *Id.* at 1127. (McConnell, J., concurring in part and dissenting in part).

120. K.C. suffered an acute psychotic episode as a result of her assaults and harassment in school. *Id.* at 1118.

121. A not-insignificant proportion of sexual harassment and assault is perpetrated against very young children: approximately 5 percent of sexual violence happens to five- and six-year-old children. McDowell et al., *supra* note 1. For more stories of children using vague language, see Reese Dunklin & Emily Schmall, *Kindergartners Among Youngest Schoolhouse Assault Victims*, ASSOCIATED PRESS (May 1, 2017), <https://www.ap.org/explore/schoolhouse-sex-assault/kindergartners-among-youngest-schoolhouse-assault-victims.html> [<https://perma.cc/7F5K-AR9D>] (reporting on a kindergartner who reported a “gross thing”).

122. 315 F.3d 817, 822-23 (7th Cir. 2003); *see also, e.g.*, *McCoy v. Bd. of Educ., Columbus City Sch.*, 515 Fed. App’x 387, 392 (6th Cir. 2013) (unpublished table decision) (finding elementary school students’ repeated reports of inappropriate touching by teacher John Stroup over a six-year period—including that Stroup touched, as one student wrote, the student’s “‘public’ areas”—insufficiently precise to alert the school to “the nature and severity of Stroup’s misconduct”).

“vague and unspecified” to establish notice.¹²³ Consequently, such young students do not establish actual notice, and their Title IX claims fail.¹²⁴

*D. The Decision-Making Required by Title IX: Rendering the Law
“Inutile”*

Courts thus require that students in K-through-twelve public schools not only report their sexual harassment and abuse to access Title IX’s protections, but also that they do so in unrealistically particular ways.¹²⁵ Students must show that the public schools know of the sexual harassment at particular times, that particular officials receive that information, and that they have particular information.¹²⁶ Without such notice, schools have no obligation to respond to or to address student sexual harassment.¹²⁷ These particularized requirements, therefore, preclude a substantial portion of claims from satisfying the actual notice standard.¹²⁸ The nature of reporting justifies some level of actual notice, but these burdensome, highly specific notice requirements all but eviscerate the law’s protective purpose.¹²⁹

For students, that reporting thus involves overcoming nearly impossible hurdles, including the weighing of numerous complicated factors. Students must not only decide to report their sexual harassment and abuse to schools but also must make their reports contemporaneously.¹³⁰ Delays defeat claims.¹³¹ The window of permissible reporting time varies to some extent among the federal

123. *Gabrielle M.*, 315 F.3d at 822–23.

124. *See supra* notes 109, 111 and accompanying text.

125. *See supra* Parts I.A–C.

126. *See supra* Parts 0.A–C. To be sure, schools could learn of even this very specific information by ways other than student reporting, including through observation or by a report from another person, such as a parent, who knows about other harassment. Direct observation, however, is exceedingly rare. *See supra* note 13 and accompanying text. Reporting from others requires either the same rare third-party observation or a student report to a third party that is then relayed to the school, which is nearly as unusual. *See supra* note 16 and accompanying text. Though uncommon, student reports to parents and others do occur. *See, e.g.*, *Salazar v. S. San Antonio Indep. Sch. Dist.*, 953 F.3d 273 (5th Cir. 2017). For all practical purposes, though, Title IX requires particularized student reporting. *See supra* Parts 0.A–C.

127. *See supra* Parts 0.A–C.

128. *See supra* note 13 and accompanying text.

129. Even the application of any level of actual notice is subject to at least some debate. In his dissent in *Gebser*, Justice Stevens disputed that the actual notice requirement was the inevitable standard: “The majority’s inappropriate reliance on Title IX’s administrative enforcement scheme to limit the availability of a damages remedy leads the Court to require . . . actual knowledge on the part of ‘an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient’s behalf.’” *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 304 (1998) (Stevens, J., dissenting). Justice Stevens also contended that “[a]s the Court acknowledges . . . the two principal purposes that motivated the enactment of Title IX were: (1) ‘to avoid the use of federal resources to support discriminatory practices’; and (2) ‘to provide individual citizens effective protection against those practices.’ It seems quite obvious that both of those purposes would be served—not frustrated—by providing a damages remedy in a case of this kind” where the school did not have actual notice. *Id.* at 301 (citations omitted).

130. *See supra* notes 54, 69, 76 and accompanying text.

131. *See supra* notes 54, 69, 76 and accompanying text.

circuits, which further complicates matters.¹³² In short, students who are hesitant to immediately report their sexual harassment cannot delay reporting for very long, if at all, without risking running afoul of the actual notice standard.

Even if students timely report their sexual harassment, they must make their reports to the correct administrative official in the school or school district.¹³³ This requires that a student know whether, given the circumstances and context of their particular sexual harassment, an assistant principal or principal is the appropriate person to whom to report.¹³⁴ If not, the student must report to the school district-level employee who has authority over the perpetrator and who could take corrective measures.¹³⁵

Finally, even if students successfully overcome these reporting requirements, they must still provide the proper amount of information when making the report.¹³⁶ Students have to report each instance, including the most severe, of their sexual harassment and abuse.¹³⁷ They also cannot use vague language when reporting.¹³⁸ No matter how much a student's age or disability status may hinder her language skills, reporting in language that is too vague will not suffice.¹³⁹ If students falter at any stage of this reporting process, then they will be unable to access the protections of Title IX, and schools need not act to protect the students from nor address their sexual harassment in school.¹⁴⁰

Yet students rarely report properly.¹⁴¹ First, as the data on student reporting demonstrates, half of students who experience sexual harassment never report it

132. See *supra* notes 54, 69, 76 and accompanying text.

133. See *supra* Part 0.B.

134. See *supra* note 96 and accompanying text.

135. See *Santiago v. Puerto Rico*, 655 F.3d 61, 74 (1st Cir. 2011) (concluding six-year-old Jerald's report of a sexual assault by a school district bus driver had to be reported to a school district-level official to satisfy actual notice; a report to the principal was insufficient).

136. See *supra* Part 0.C.

137. See *supra* notes 109, 111 and accompanying text.

138. See *supra* notes 114–120 and accompanying text.

139. See *supra* Parts 0.A–C.

140. See *supra* Parts 0.A–C.

141. See *supra* Parts 0.A–C. Moreover, as limited a tool as Title IX is for students generally, it is arguably far more limited for students of color and other marginalized students. Although older statistics suggest that students of color report sexual harassment and assault at somewhat higher rates than white students, they face the further discrimination of not being believed based on racial stereotypes. See Sonja C. Tonnenson, "Hit It and Quit It": Responses to Black Girls' Victimization in Schools, 28 BERKELEY J. GENDER L. & JUST. 1, 24 (2013) ("Teachers rarely invoke Title IX grievance procedures because they often fail to label sexually harassing behavior by its proper name, especially due to implicit biases that Black girls are unworthy or blameworthy."). Similar points have been made in the context of Title VII claims for sexual harassment in employment. *E.g.*, Onwuachi-Willig, *supra* note 21, at 110 ("[A]ntidiscrimination law employs what courts deem an objective victim standard to analyze sexual harassment claims. In so doing, the law ignores the complexities of how gender and racial subordination, stereotype, and bias can shape a victim's vulnerability to harassment, her credibility in the eyes of factfinders, and others' perceptions about whether she is harmed by the undesired conduct."). Although addressing the many intersectional ways marginalized students face such biases—including those based on race, gender, socioeconomic status, and disability—is beyond the scope of this Article, the effects of

at all.¹⁴² Second, even those students who do decide to report their sexual harassment often miss some required reporting nuance and make legally imperfect reports of sexual harassment and abuse.¹⁴³ Students delay their reporting.¹⁴⁴ They also make their reports to teachers, school staff members, and parents instead of to school and higher-level administrators.¹⁴⁵ Finally, students may fail to report the worst of their sexual harassment and abuse, or they may use imprecise language when reporting.¹⁴⁶ For all these reasons, students' decision-making about reporting their sexual harassment and abuse regularly conflicts with the reporting particularities required by courts under their assessments of Title IX's actual notice standard. Thus, they rarely have the benefit of the protections Title IX exists to provide. Therefore, Title IX's notice requirements render the law, as Justice Stevens predicted in his dissent in *Gebser*, largely "inutile."¹⁴⁷

such intersectional biases on student sexual harassment reporting cannot go unstated. *See, e.g.*, *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1118 (holding that student K.C., who had an intellectual disability related to a brain injury, reported her sexual harassment in insufficiently precise language to make out a successful Title IX claim); *see also supra* notes 116, 118–120.

142. HILL & KEARL, *supra* note 14, at 3.

143. *See supra* Parts 0.A–C.

144. *See supra* notes 54, 69 and accompanying text.

145. *See, e.g.*, *Santiago v. Puerto Rico*, 655 F.3d 61, 74 (1st Cir. 2011) (holding that even though six-year-old Jherald's mother made successful reports to a schoolteacher and school social worker, as well as attempted reports to the school principal, all those efforts still failed to satisfy the actual notice standard).

146. *See supra* notes 109, 111, 121 and accompanying text.

147. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 304 (1998) (Stevens, J., dissenting) ("Presumably, few Title IX plaintiffs who have been victims of intentional discrimination will be able to recover damages under this exceedingly high standard. The Court fails to recognize that its holding will virtually 'render inutile causes of action authorized by Congress through a decision that no remedy is available.'" (citation omitted)). That said, Title IX is not the exclusive remedy for students suffering sexual harassment and assault in school. Claims of sex discrimination can also be made by way of a § 1983 action for sex discrimination in violation of the Equal Protection Clause. *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258 (2009). However, those claims are narrower than Title IX claims in that a student "must show that the harassment was the result of municipal custom, policy, or practice." *Id.* at 257–58. Tort law offers another possible recourse for the students who cannot satisfy Title IX's notice requirements, but tort relief may be limited by generous defenses and immunities. 5 JAMES A. RAPP, *EDUCATION LAW* § 12.07 (2016). Many states' laws offer schools immunity from liability for acts of their employees when the acts constitute discretionary functions. *Id.* Even absent statutory immunity, schools may still evade liability by asserting any number of generous defenses. *Id.* § 12.14(5). For example, negligent supervision claims require "standards of knowledge [that] are significant and . . . a foreseeable risk of harm." *Id.* § 12.14(5)(b)(iii). Schools, therefore, successfully defend based on lack of knowledge or foreseeability. *E.g.*, *Conklin v. Saugerties Cent. Sch. Dist.*, 106 A.D.3d 1424 (N.Y. App. Div. 2013) (finding no liability in tort for a school district when one student assaulted another, even though the school knew the assaulting student had threatened to fight). Similarly, when facing *respondeat superior* or other vicarious liability claims, schools can avoid liability by showing that an employee's actions fell outside the scope of liability. RAPP, *supra*, § 12.14(4)(b). Further, neither tort nor criminal law provide a remedy against the school or school district as an institution; these options thus hold less, if any, promise of prompting systemic reforms to better protect students from sexual harassment. For thoughtful analyses on the limits of tort law to remedy similar kinds of harms to children in schools, see Samantha Neiman et al., *Bullying: A State of Affairs*, 41 J.L. & EDUC. 603, 627 (2012)

II.

THE TITLE IX PARADOX

In establishing this particularized notice regime, courts engage in an essentially unilateral assessment of notice.¹⁴⁸ They inquire into whether public schools receive sufficient information about students' sexual harassment, without regard for children's capacity to provide such information.¹⁴⁹ Empirical evidence, however, has demonstrated that children naturally have substantial trouble complying with these notice requirements.¹⁵⁰ Both behavioral psychology and developmental neuroscience indicate that children face significant obstacles in making such complex decisions as to whether to report their sexual harassment at all, let alone in the particularized ways required by Title IX jurisprudence.¹⁵¹ Cognitive heuristics and their still-developing brains inhibit this decision-making.¹⁵² This Section explores cognitive heuristics and children's nascent neurodevelopment, describing how they impede children's ability to report their sexual harassment and comply with courts' stringent Title IX notice standard.

As a threshold and purely descriptive matter, a student's failure to report their sexual harassment represents what behavioral psychologists call a judgment or decision error insofar as it does nothing to compel schools to address the harassment.¹⁵³ Such decisions mean that students have no protection under Title

("Even when conduct by a school official satisfies the elements of a common law cause of action, various forms of immunity from tort liability often serve as shields to school districts and/or individual school officials."), Mark C. Weber, *Disability Harassment in the Public Schools*, 43 WM. & MARY L. REV. 1079, 1145–47 (2002) (explaining the ways state law immunity bars claims of disability harassment in schools), and Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMP. L. REV. 641 (2004) (offering a comprehensive analysis of limitations of tort law as a remedy for bullying in school). Nothing in these analyses suggests that sexual harassment would be immune to these problems.

148. See *supra* Parts 0.A–C.

149. Courts do not consider why students might not have reported their sexual harassment. Even when presented with evidence suggesting such reasons, they do not grapple with it. *E.g.*, *Doe v. Bd. of Educ.*, 605 F. App'x 159, 163–64, 168 (4th Cir. 2015) (failing to consider in its assessment of actual notice student J.D.'s explanation that he told then recanted his story "because he was 'nervous,'" thought the school would believe the perpetrator over him, and "thought that [changing my story] would just be the end of it"); *Doe v. Galster*, 768 F.3d 611, 615, 617–18 (7th Cir. 2014) (failing to consider in its assessment of actual notice that student Jane Doe "declined to tell [school counselor] Lakatos who harassed her on the bus, explaining that she wanted to put the issue behind her").

150. See *infra* Parts 0.A–B.

151. See *infra* Parts 0.A–B.

152. See *infra* Parts 0.A–B.

153. See, e.g., R. Scott Tindale, *Decision Errors Made by Individuals and Groups*, in *INDIVIDUAL AND GROUP DECISION MAKING* 109 (N. John Castellan, Jr., ed., 1993). In behavioral psychology, a rational decision is defined as one that is internally consistent. Valerie F. Reyna & Frank Farley, *Risk and Rationality in Adolescent Decision Making*, 7 PSYCHOL. SCI. PUB. INT. 1, 4 (2006). For example, if one has an evidentiary basis for predicting a negative or risky outcome from an activity, such as the serious health-harming effects from smoking, then the decision to avoid the activity is rational. *Id.* at 4. In this sense, because students must report their sexual harassment to trigger school action, their

IX, and that schools need not act to protect them from or address their sexual harassment.¹⁵⁴ The consequences of these decisions, therefore, are profound.¹⁵⁵ Decisional errors themselves, though, are common.¹⁵⁶ Behavioral psychology demonstrates that both children and adults regularly make inadvertent judgment errors by deploying cognitive heuristics, or mental shortcuts, to make decisions.¹⁵⁷ Further, neuroscientific research reveals that children's immature brain development also inhibits their decision-making.¹⁵⁸ So while children's decision-making, like that of adults, is prone to judgment errors because of cognitive heuristics, children's decision-making faces a second, additional set of obstacles stemming from their developmental immaturities. By requiring children to make decisions to report their sexual harassment and abuse, courts create a paradox for children, requiring them to do what they often cannot in order to enjoy the protections of Title IX.

A. Two Cognitive Heuristics: The Availability Heuristic and the Affect Heuristic

In order to understand how both children and adults routinely make decisional errors, the ways the brain generally makes decisions must be understood first. The human brain relies on two systems for decision-making.¹⁵⁹ "System One" is automatic, experiential, intuitive, and susceptible to judgment errors.¹⁶⁰ In assessing things like the probability of events, people frequently rely

failure to report operates as a decisional error in that it does not trigger that school action. Again, this point is purely descriptive. Whether this failure to report sexual harassment normatively constitutes an error in judgment is a different question. In the Title VII context, other scholars have persuasively argued it is not, and those arguments have salience here. *See supra* note 21 and accompanying text.

154. *See supra* note 6 and accompanying text.

155. *See supra* note 6 and accompanying text.

156. KAHNEMAN, *supra* note 23, at 25–26. The use of heuristics results in part from the effort and consequent fatigue of thinking carefully through decisions. As Kahneman describes: "[Studies have] repeatedly found that an effort of will or self-control is tiring; if you have had to force yourself to do something, you are less willing or less able to exert self-control when the next challenge comes around. The phenomenon has been named ego depletion." *Id.* at 41–42.

157. Janis E. Jacobs & Paul A. Klaczynski, *The Development of Judgment and Decision Making During Childhood and Adolescence*, 11 CURRENT DIRECTIONS PSYCHOL. SCI. 145, 147–48 (2002) ("[E]ven young children use many of the same rules of thumb, or heuristics, that adults use in their decisions and are susceptible to many of the same judgment biases[,] . . . [and] judgment heuristics and other biases appear to be linked to increases in knowledge (e.g., stereotypes) and to preservation of social beliefs (e.g., religious beliefs). Thus, the number of heuristics and the situations in which they are applied increase with age.").

158. *See infra* Part 0.B.

159. KAHNEMAN, *supra* note 23, at 20–21, 25–26; Dustin Albert & Laurence Steinberg, *Judgment and Decision Making in Adolescence*, 21 J. RES. ON ADOLESCENCE 211, 215 (2011); Paul A. Klaczynski, *Analytic and Heuristic Processing Influences on Adolescent Reasoning and Decision-Making*, 72 CHILD DEV. 844 (2001); Reyna & Farley, *supra* note 153, at 15.

160. KAHNEMAN, *supra* note 23; Albert & Steinberg, *supra* note 159, at 215; Klaczynski, *supra* note 159, at 844; Reyna & Farley, *supra* note 153, at 15.

on the first system and make automatic, intuitive decisions.¹⁶¹ These quick decisions are useful, but they are also prone to mistakes.¹⁶² “System Two” makes decisions more slowly, deliberately, and analytically.¹⁶³ It can referee the decisions of System One but doing so takes conscious effort.¹⁶⁴ Consequently, System Two does not always intercede in System One’s decisions.¹⁶⁵ Therefore, seemingly good but still incorrect or even irrational decisions automatically happen without any intervention by the deliberative brain.¹⁶⁶

One way that these judgment errors happen is by the use of cognitive heuristics.¹⁶⁷ Daniel Kahneman, who with his research partner, Amos Tversky, pioneered substantial research on judgment heuristics, defines a heuristic as “a simple procedure that helps find adequate, though often imperfect, answers to difficult questions.”¹⁶⁸ System One deploys heuristics to make judgments in the face of such questions, and System Two regularly allows those judgments to go unchecked because they seem adequate.¹⁶⁹ For example, when asked the complicated question “How happy are you with your life these days?,” individuals are prone to instead answer the far simpler question “What is my mood right now?”¹⁷⁰ Individuals’ feelings about their present mood may or may

161. For example, System One routinely detects “that one object is more distant than another,” “complete[s] the phrase ‘bread and . . . ,’” and “detect[s] hostility in a voice.” KAHNEMAN, *supra* note 23, at 21.

162. Jolls et al., *supra* note 27, at 1477 (noting that although cognitive heuristics are “useful on average (which explains how they become adopted), they lead to errors in particular circumstances.”).

163. KAHNEMAN, *supra* note 23, at 21 (describing how System Two “allocates attention to the effortful mental activities that demand it”); Albert & Steinberg, *supra* note 159, at 215; Klaczynski, *supra* note 159, at 844; Reyna & Farley, *supra* note 153, at 15. One of System Two’s main tasks is to “monitor and control thoughts ‘suggested’” by System One. KAHNEMAN, *supra* note 23, at 44. This work—attending to and filtering the automatic, intuitive judgments of the first system—is not easy and takes effort. *Id.* at 41–44. It thus frequently fails to do so. *See supra* note 156 and accompanying text.

164. *See supra* note 156 and accompanying text.

165. KAHNEMAN, *supra* note 23, at 24, 44.

166. *Id.* at 24, 44, 98; *see also* Jolls et al., *supra* note 27, at 1477 (discussing the simultaneous utility and incorrectness of cognitive heuristics).

167. KAHNEMAN, *supra* note 23, at 89, 97–98. The use of heuristics in judgment is a part of what scholars have called “bounded rationality,” or “the obvious fact that human cognitive abilities are not infinite.” Jolls et al., *supra* note 27, at 1477; *see also id.* at 1480 (“[B]ounded rationality as it relates to decisionmaking behavior will come into play whenever actors are valuing outcomes.”).

168. KAHNEMAN, *supra* note 23, at 98; *see also supra* note 162 and accompanying text.

169. *See* KAHNEMAN, *supra* note 23, at 98. System One’s use of a heuristic involves the substitution of a simpler question for a more complicated or difficult one. *Id.* at 26. As Kahneman puts it, “[i]f a satisfactory answer to a hard question is not found quickly, System 1 will find a related question that is easier and will answer it.” *Id.* at 97. “When all goes smoothly, which is most of the time, System 2 adopts the suggestions of System 1 with little or no modification. You generally believe your impressions and act on your desires, and that is fine—usually.” *Id.* at 24. Errors, however, do happen. For example, research shows that people quickly judge whether a person is friendly and trustworthy by their facial features. *Id.* at 90. A dominant chin and a frown indicate a person is threatening and untrustworthy. *Id.* Thus, quick, seconds-long System One decisions are made on that basis. *Id.* While these assessments are useful in evaluating whether and how to interact with strangers, they are prone to error. *Id.* A person’s smile may be fake, and people with stronger chins can certainly be friendly and trustworthy. *Id.*

170. *Id.* at 98.

not be adequate to address the more complicated question.¹⁷¹ Regardless, System Two will likely allow System One to use the individual's current mood to provide the answer.¹⁷² As Kahneman notes, people "may not even notice that [they] did not answer the question . . . asked . . . [or] that the target question was difficult, because an intuitive answer to it came readily to mind."¹⁷³

Children, like adults, use cognitive heuristics in decision-making.¹⁷⁴ Research shows that even children as young as four use cognitive heuristics.¹⁷⁵ Further, research demonstrates that the use of some heuristics increases as children mature and their social schemas become more developed; this makes it easier for them to automatically rely on those schema for decision-making.¹⁷⁶ Two such heuristics particularly bear on children's decision-making in the Title IX context: the availability heuristic and the affect heuristic.¹⁷⁷ These two mental shortcuts have formidable capacity to undermine the decision-making called for by Title IX jurisprudence.

1. The Availability (or Unavailability) Heuristic and Decisions About Reporting Sexual Harassment and Abuse

The availability heuristic is the mechanism by which people judge the probability or frequency of events by the ease or difficulty with which information about similar events comes to mind.¹⁷⁸ That is, instead of judging

171. *Id.* at 98–99.

172. *Id.* at 99.

173. *Id.*

174. Likewise, the field of psychology that studies judgment and decision-making in adolescents "has seen widespread adoption dual-process models of cognitive development. These models describe two relatively independent modes of information processing, typically contrasting an analytic (deliberative, controlled, reasoned, "cold") system with an experiential (intuitive, automatic, reactive, "hot") system." Albert & Steinberg, *supra* note 159, at 212 (citation omitted); *see also* Reyna & Farley, *supra* note 153, at 15.

175. Jacobs & Klaczynski, *supra* note 157, at 147. Children begin to use different heuristics at different ages. *Id.* at 148. For example, as children age in adolescence, they "show less . . . use of the 'sunk cost' fallacy," whereby they figuratively throw good money after bad, but they show more "use of the representativeness heuristic . . . [or] the tendency to rely on salient features of a scenario rather than base rate information to inform likelihood judgments." Albert & Steinberg, *supra* note 159, at 215. These findings upend previous understandings of children's rational development. *Id.* at 214. Prior to the mid-1990s, psychologists believed that child and adolescent decision-making developed along a "linear trajectory progressing from childhood intuition to mature, deliberative thinking in adulthood." *Id.* To the contrary, even adults reach no such end; they too regularly make judgment errors. *Id.* Indeed, "developmental studies suggest that certain heuristics and biases become *more* prevalent over the course of childhood and adolescence." *Id.* That is, "[d]espite increasing competence in reasoning, some biases in judgment and decision making grow with age, producing more 'irrational' violations of coherence among adults than among adolescents and younger children." Reyna & Farley, *supra* note 153, at 34.

176. Jacobs & Klaczynski, *supra* note 157, at 147–48; *see also supra* note 156 and accompanying text. Dustin Albert and Lawrence Steinberg, who have done substantial research child and adolescent brain development, write that "if the road of normative development leads to logically rigorous decision making, most adults fail to reach the destination." Albert & Steinberg, *supra* note 159, at 214.

177. *See infra* Parts 0.A–B.

178. *See* KAHNEMAN, *supra* note 23, at 129; Tversky & Kahneman, *supra* note 23, at 208.

probability based on substantively relevant information, a person makes a decision based on the ease of retrieving apparently needed information from memory.¹⁷⁹ The availability heuristic thus substitutes one question for another.¹⁸⁰ It substitutes a predictive assessment, such as “what should I do” or “what will happen,” for an assessment about the ease with which examples of like scenarios come to mind.¹⁸¹ For example, in judging the probability of a particular couple’s divorce, a person using the availability heuristic will think it more likely that the particular couple will divorce if the person can easily generate examples of similar couples who also got divorced.¹⁸²

Behavioral psychologists have repeatedly demonstrated that such a prediction is based on the ease of retrieving the examples from memory, leading to errors in adults.¹⁸³ Because the ease of coming up with relevant examples of similar divorced couples has virtually no bearing on whether a particular couple will actually divorce, the availability heuristic causes judgment errors.¹⁸⁴ Kahneman and Tversky demonstrated both that the ease of retrieving examples formed the basis of predictive judgments and the consequent judgment errors in one of their first groundbreaking research studies.¹⁸⁵ They asked participants to listen to recorded lists of thirty-nine names.¹⁸⁶ Some participants heard a list with the names of nineteen famous women and twenty less famous men; others heard a list of names of nineteen famous men and twenty less famous women.¹⁸⁷ By a large majority, the participants judged the lists containing more famous names of women to have more women on the list, even though those lists in fact had fewer women’s names.¹⁸⁸ Likewise, they judged the lists containing the names of more famous men to have more men listed, when they in fact had fewer.¹⁸⁹ In other words, the greater ease of remembering famous names led people to

179. Tversky & Kahneman, *supra* note 23, at 208. The study of the availability heuristic breaks down decisions into two component parts: (1) the ease of retrieving information by which to make a judgment and (2) the content, or substance, of that information itself. *Id.*

180. KAHNEMAN, *supra* note 23, at 130. Cass Sunstein, among others, has argued persuasively that the availability heuristic plays a dramatic role in risk regulation, resulting in misguided rules and laws. In this view, the strength of this heuristic’s effect is such that “[a]s with George Orwell’s ‘equal animals’ of which ‘some animals are more equal than others,’ one heuristic is more fundamental than the rest—at least in social contexts where people, lacking reliable information of their own, look to others for interpretations of events.” Kuran & Sunstein, *supra* note 28, at 711.

181. KAHNEMAN, *supra* note 23, at 130.

182. Tversky & Kahneman, *supra* note 23, at 228.

183. Psychologists have shown that people “believe that they use their bicycles less often after recalling many rather than few instances; are less confident in a choice when they are asked to produce more arguments to support it; are less confident that an event was avoidable after listing more ways it could have been avoided; are less impressed by a car after listing many of its advantages.” KAHNEMAN, *supra* note 23, at 133.

184. Tversky & Kahneman, *supra* note 23, at 208, 228.

185. *Id.* at 207.

186. *Id.* at 220. They read the names one-by-one with a pause between names. *Id.*

187. *Id.*

188. *Id.* at 221. Eighty out of ninety-nine participants made this judgment error. *Id.*

189. *Id.*

erroneously judge lists with more famous women or men to have more women or men, respectively, overall.¹⁹⁰ The ease of recall led to a judgment error.¹⁹¹

Further, and crucially for the decision to report sexual harassment or not, psychologists have demonstrated that the inverse is also true: adults use an unavailability heuristic.¹⁹² When individuals have difficulty generating salient examples about how to make a decision, they make negative predictions or judgments.¹⁹³ In one study, researchers asked female subjects to list either six or twelve examples of their own assertiveness and unassertiveness.¹⁹⁴ Those who listed six examples reported having an easier time identifying examples than the people who had to list twelve.¹⁹⁵ The people who listed only six examples also rated themselves as more assertive than the people who listed twelve examples of their own assertiveness.¹⁹⁶ The difficulty of generating examples led the people in the list-of-twelve group to be significantly less likely to identify themselves as assertive despite identifying more evidence of their own assertiveness.¹⁹⁷

Children also use the availability, or unavailability, heuristic when making predictive judgments.¹⁹⁸ In one experiment demonstrating the unavailability heuristic, researchers asked children aged four, six, and eight to generate either

190. *Id.* at 220–21. The availability heuristic can play out in other settings, too. Tversky and Kahneman offered the example of a clinical psychologist assessing the suicidality of a patient. *Id.* at 228. They explained that the difficult judgment about the likelihood of a suicide attempt will be substituted for relevant other examples that come to mind. *Id.* If the psychologist could easily retrieve from memory examples of similar patients who committed or attempted to commit suicide—which would be easy to do should such examples exist because they are “dramatic and salient”—the psychologist could quite easily judge this patient also likely to commit suicide. *Id.* Yet such a judgment is irrational given that relatively few patients with depression actually do attempt suicide. *Id.* at 229.

191. *Id.* at 221. Studies of the availability heuristic have further refined its use and application. One such study concluded that ease of recall is paramount when the assessment is about the self; if the assessment is about others, the content has more influence. Eugene M. Caruso, *Use of Experienced Retrieval Ease in Self and Social Judgments*, 44 J. EXPERIMENTAL SOC. PSYCHOL. 148, 148–50 (2008). In this study, psychologist Eugene Caruso asked one group of college students to list two or eight examples of their own assertiveness and another group to list two or eight examples of the average college student’s assertiveness. *Id.* at 149. He found that those who listed fewer examples of their own assertiveness judged themselves more assertive. *Id.* at 150. However, the participants who listed more examples of the average student’s assertiveness judged the average student more assertive. *Id.* at 150. Caruso concluded that because judgments about others may feel inherently more difficult than judgments about the self, people might be especially likely to rely on the number of instances instead of the ease of retrieval. *Id.* at 149.

192. See KAHNEMAN, *supra* note 23, at 133; Norbert Schwarz et al., *Ease of Retrieval as Information: Another Look at the Availability Heuristic*, 61 J. PERSONALITY & SOC. PSYCHOL. 195, 199–200 (1991).

193. Schwarz et al., *supra* note 192, at 199–200.

194. *Id.* at 199.

195. *Id.* at 200.

196. *Id.*

197. *Id.*

198. Jacobs & Klaczynski, *supra* note 157, at 147–48; see also *infra* notes 199, 201 and accompanying text.

a short or long list of boys' or girls' names.¹⁹⁹ The results replicated the results of the adult version of the study. Even the four-year-old children who generated more names, but with difficulty, judged their memory for names as worse than the children who generated fewer names more easily.²⁰⁰ That is, the children judged their memories by ease of recall instead of by the substance and volume of that recall.²⁰¹

In the Title IX context, the decision-making required of children when reporting sexual harassment and abuse is susceptible to the availability, or more precisely, the unavailability heuristic. As other scholars who write on the topic of heuristics in the law note, "whenever actors in the legal system are called upon to assess the probability of an uncertain event," judgment heuristics come into play.²⁰² When deciding whether to report sexual harassment and assault, children are those actors in the legal system, and they must make predictive judgments, including what will happen if they make a report and how to do it.²⁰³ Because children have little information to draw on when making those decisions, their inevitable difficulty in generating that information leaves them susceptible to negative predictions about reporting the sexual harassment and abuse. Those

199. Marie Geurten et al., *Less is More: The Availability Heuristic in Early Childhood*, 33 BRIT. J. DEV. PSYCHOL. 405, 407 (2015). The number of names each group had to generate varied by age, so the shorter, easier list as well as the longer, harder list for a four-year-old were both shorter than the corresponding lists for six- and eight-year-olds. *Id.*

200. *Id.* at 409. Here, researchers asked seventy-one four-, six-, and eight-year-old children to generate a list of boys' or girls' names. *Id.* at 407. Some four-year-olds were told to list four names; the others were told to list eight. *Id.* Six-year-olds were similarly told to list either six or ten names, and eight-year-olds were told to list either eight or twelve names. *Id.* In each age category, the first group—the group asked to list fewer names—judged themselves to know more names than the latter. *Id.* at 408. Twice as many children made this judgment in the eight-year-old group; ten times as many made this judgment in the six-year-old group; and three times as many made this judgment in the four-year-old group. *Id.* at 408.

201. *Id.* at 409. Researchers have replicated these findings in other children, confirming that the availability heuristic is acquired and used at an early age. Mary Davies & Peter A. White, *Use of the Availability Heuristic by Children*, 12 BRIT. J. DEV. PSYCHOL. 503, 503–05 (1994). For example, in one study, seven- and ten-year-old students each heard a list of names: some of animal characters, some of human characters. *Id.* at 504. Each list had nineteen names: nine famous names from one category and ten less famous names from the other. *Id.* When asked whether the list contained more animals or people, twice as many ten-year-old students inaccurately reported that the slightly smaller category with more famous names was larger, and nearly six times as many seven-year-old students did. *Id.*

202. Jolls et al., *supra* note 27, at 1480.

203. As Cass Sunstein argued, "the availability heuristic is most important for purposes of understanding the law relating to risks." *Beyond the Precautionary Principle*, 151 U. PA. L. REV. 1003, 1041 (2003). Jolls, Sunstein, and Thaler made the further point that "the availability heuristic can lead to under- as well as over-regulation. People sometimes (although not always) underestimate the likelihood of low-probability events because these threats simply do not make it onto people's 'radar screens.'" Jolls et al., *supra* note 27, at 1519. In the Title IX context, the threat is not one of large-scale disaster but one of personal disaster that may result from offering information about one's harm into the void of the unknown. That threat can leave students disinclined to report their sexual harassment. *See infra* notes 215–223 and accompanying text.

negative predictions can easily inhibit or prevent reporting both generally and in the particularized ways that courts' interpretations of Title IX require.²⁰⁴

Children have little such information to draw on for two reasons. First, students are unlikely to directly observe or otherwise learn about what has happened to other students who have reported sexual harassment.²⁰⁵ Federal privacy laws governing and protecting the privacy of student discipline records keep any information about those complaints, or complaints of any other kinds of harms in school, from being publicly available.²⁰⁶ Even were the information not protected by law from disclosure, the extraordinarily low number of reports of sexual harassment and assault means that any particular school may have handled such reports only rarely, if ever.²⁰⁷ Students, therefore, might have no access to such information on which to draw.²⁰⁸

Second, children often have little or no guidance from the schools about how to make a proper, legally sufficient report of sexual harassment. To make such a report, students must comply with the nuanced decision-making that Title IX's actual notice standard requires.²⁰⁹ But it is nearly impossible for students to know to report at particular times, to particular people, and, in doing so, to provide particular information.²¹⁰ Unless they are reading the various federal court opinions on Title IX, they have almost no way of learning these

204. See *supra* notes 191, 200–201 and accompanying text.

205. See *infra* note 206 and accompanying text.

206. The Family Education Rights Privacy Act (FERPA) prohibits the disclosure of student records, including student disciplinary records, without the consent of a parent or eligible student except in certain limited circumstances. 34 C.F.R. § 99.31(a) (2019). Those circumstances include disclosures for the purposes of public health, but do not include disclosures to the survivors of sexual harassment. See *id.* Although school staff members of course also sexually harass and assault students, they do so at far lower numbers. See MacKinnon, *supra* note 6, at 2047. Thus, FERPA's privacy requirements protect the large majority of information about what happens to all perpetrators of sexual harassment and assault of schoolchildren. That said, public employee records are also sometimes protected by state laws. For example, Washington's open records law has been interpreted to mean that "a teacher's identity should be released . . . only when alleged sexual misconduct has been substantiated or when that teacher's conduct results in some form of discipline." *Bellevue John Does 1-11 v. Bellevue Sch. Dist.* #405, 189 P.3d 139, 153 (Wash. 2008). Although the fact of an investigation into a teacher's misconduct may be disclosed, the details of it may not be. See *Predisik v. Spokane Sch. Dist.* No. 81, 346 P.3d 737, 742 (Wash. 2015). California courts have also allowed for disclosure of teacher records when a teacher was reprimanded for sexual misconduct but not for other disclosures, such as teacher ratings. See *L.A. Unified Sch. Dist. v. Superior Court*, 228 Cal. App. 4th 222 (2014); *Marken v. Santa Monica–Malibu Unified Sch. Dist.*, 202 Cal. App. 4th 1250 (2012). Teacher records, therefore, may also be protected depending on the stage at which any investigation into misconduct is in. Further, accessing those records, even when they are subject to open records laws, may very well involve a legal battle. Importantly, the point here is not to argue against the privacy of student records or to take a position on when to disclose teachers' records. The point, rather, is that getting information about what happens to students and teachers accused of sexual harassment and assault is generally not possible in the case of students and difficult in the case of teachers.

207. Simply because student sexual harassment goes largely underreported, any given school might never have responded to a report. See *supra* notes 15–16 and accompanying text.

208. See *supra* note 206 and accompanying text.

209. See *supra* Part 0.D.

210. See *supra* Part 0.D.

requirements. Although the U.S. Department of Education has admonished schools to develop Title IX policies and procedures, the guidance is at best general and often vague.²¹¹ For example, it lays out five compliance steps that public schools should take under Title IX.²¹² These include developing procedures for reporting violations of Title IX in age-appropriate language.²¹³ However, the Department of Education says nothing about what those procedures should include or how the procedures themselves might be tailored to the age of the student audience.²¹⁴ This guidance, consequently, offers substantial flexibility but little specificity about how much information is needed to ensure that students know how to comply with courts' jurisprudence on actual notice.

This flexibility can also lead to the dissemination of incorrect information. In *Hill ex rel. BHJ v. Cundiff*, in which a student was raped when she was used as bait by a teacher's aide in a plot to catch another student in the act of sexual harassment, the school's Title IX procedures called for students to report to, among other people, teachers.²¹⁵ Yet such a report would not have satisfied Title IX's actual notice requirement.²¹⁶ Unsurprisingly, therefore, public school districts offer little or no specific direction in their individual Title IX procedural guidance materials.²¹⁷ Thus, students face an informational void that inhibits

211. See OFFICE FOR CIVIL RTS., U.S. DEP'T OF EDUC., TITLE IX RESOURCE GUIDE 4–5 (2015), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf> [<https://perma.cc/X92D-VAW8>].

212. *Id.*

213. *Id.* at 4.

214. See *id.* Additionally, this guide suggests that the school's Title IX coordinator should communicate with parents and students about these procedures but provides no guidance on when, how, or how often this communication should occur. *Id.* at 5.

215. 797 F.3d 948, 957 (11th Cir. 2015).

216. See *supra* Part 0.B.

217. Further, as in *Hill*, students appear to have had no useful sources to draw on in order to determine how or to whom to report sexual harassment. See 797 F.3d at 957. In addition to the school district's erroneous Title IX procedures, the court noted that the principal could not "remember the identity of the Title IX coordinator in 2010; [did] not know how employees would discover the identity of the Title IX coordinator; and testified students were not told the identity of the Title IX coordinator. Rather than give each teacher a copy of the sexual harassment policy, a large binder containing the entire Policy Manual was kept on file at the media center and principals' office." 797 F.3d at 957. The same procedural obscurity exists in other, large school districts. For example, Los Angeles Unified School District's Title IX policy simply states that complaints of sexual harassment should be made to the Title IX coordinator within sixty days. *Title IX - Sex Based Nondiscrimination Statute*, L.A. UNIFIED SCH. DIST., <https://achieve.lausd.net/Page/3654> [<https://perma.cc/J62C-9TG7>]. It does not state who the coordinator is, when or how such complaints should be made, or what information should be provided. In another large school district, the City School District of the City of New York, the complaint must be made through an online form. *Non-Discrimination Policy*, N.Y.C. DEP'T OF EDUC., <https://www.schools.nyc.gov/about-us/vision-and-mission/non-discrimination-policy> [<https://perma.cc/5DAP-WRK7>]. While that form prompts some specificity of information by inquiring where the harassment occurred and when it happened, a student would have to have access to the Internet to use it and then be able to find it to even make a complaint. See *Complaint Form*, N.Y.C. DEP'T OF EDUC., <https://www.nycenet.edu/oeo> [<https://perma.cc/PU5U-W2RF>]. Unsurprisingly, then, at least

their decision-making process for reporting sexual harassment and assault under Title IX.

Lacking this information, children, prone to the use of the availability and unavailability heuristics, tend to not report their sexual harassment.²¹⁸ Instead of answering the complicated question of *whether* to report their sexual harassment, they can substitute simpler questions such as whether they know *how* to report or whether they know what has happened to other students who have reported sexual harassment.²¹⁹ Students' lack of information about these simpler questions can easily lead them to a negative conclusion about the question they are really answering: whether to report their sexual harassment.²²⁰

The decision-making of student Alida Star Gebser, the plaintiff in *Gebser v. Lago Vista Independent School District*, offers an apt example. Alida Star Gebser engaged in a sexual relationship with a teacher in her high school.²²¹ She never reported the abuse, and it was only discovered when a police officer found Gebser and the teacher having sex.²²² Explaining her failure to report the abuse despite knowing it was inappropriate, Gebser said "she was uncertain how to react."²²³ She therefore substituted the question of whether she knew what to do for the far more complicated question of what to do about her sexual harassment. In other words, she relied on the availability heuristic to make her decision, and it inhibited her report.

2. *The Affect Heuristic and Decisions About Reporting Sexual Harassment and Abuse*

Even in the unusual event that students do have information available to inform their decision about how to report sexual harassment and abuse, a second heuristic—the affect heuristic—can still inhibit the kind of decision-making Title IX requires.²²⁴ The affect heuristic involves the use of emotions to make

one study has found that even identifying a school Title IX coordinator in public schools can be difficult or impossible. See Elizabeth J. Meyer, et al., *Title IX Coordinators as Street-Level Bureaucrats in U.S. Schools: Challenges Addressing Sex Discrimination in the #MeToo Era*, 26 EDUC. POL'Y ANALYSIS ARCHIVES, no. 68, 2018, at 1, 7.

218. For example, students who have faced some of the most severe sexual assaults, including rape, hesitate to report it. See, e.g., *Doe v. Bd. of Educ.*, 605 F. App'x 159, 161–63 (4th Cir. 2015) (discussing how student J.D. did not report for almost a year that he was sexually assaulted by another student); *Davis ex rel. M.D. v. Carmel Clay Sch.*, 570 F. App'x 602, 603–04 (4th Cir. 2014) (discussing how student M.D. did not report his daily sexual assaults and harassment, though they went on for months).

219. See *supra* notes 201, 202, 207 and accompanying text.

220. See *supra* notes 207, 218 and accompanying text.

221. 524 U.S. 274, 277–78 (1998).

222. *Id.* at 278.

223. *Id.* Gebser also said that she wanted to "continue having [the teacher] as a teacher." *Id.*

224. Albert & Steinberg, *supra* note 159, at 216–17. It also affects adults. Paul Slovic, *Trust, Emotion, Sex, Politics, and Science: Surveying the Risk-Assessment Battlefield*, 19 RISK ANALYSIS 689, 694 (1999) [hereinafter Slovic, *Trust*].

decisions.²²⁵ Like the availability heuristic, it automatically substitutes a complex evaluation for a different, less difficult evaluation.²²⁶ It deputizes an assessment of affect for the more complicated predictive assessment about what to do in a given scenario.²²⁷

When relying on the affect heuristic, instead of weighing various advantages, disadvantages, and other factors to determine what to do, individuals assess how they feel about the situation to make the substantive decision.²²⁸ The better someone feels about a question or an issue, the lower they perceive the risk or negative outcomes to be.²²⁹ Likewise, the worse someone feels about an issue or question, the worse they perceive the risk or negative outcomes to be.²³⁰

225. KAHNEMAN, *supra* note 23, at 138–89; Slovic, *Trust, supra* note 224, at 694.

226. KAHNEMAN, *supra* note 23, at 139; Slovic, *Trust, supra* note 224, at 695. Affect “plays a central role in . . . [the] ‘dual-process theories’ of thinking, knowing, and information processing.” Paul Slovic, *Cigarette Smokers: Rational Actors or Rational Fools?*, in *SMOKING: RISK, PERCEPTION, AND POLICY* 97, 99 (Paul Slovic ed., 2001) [hereinafter Slovic, *Cigarette Smokers*]. Risk management is also dependent on trust, which is fragile. Slovic, *Trust, supra* note 224, at 698. Trust-destroying events are more visible and salient than trust-building events. *Id.*

227. See KAHNEMAN, *supra* note 23, at 139; Slovic, *Trust, supra* note 224, at 695. Affect, as used here, means a positive or negative feeling. Behavioral psychologists generally define affect as a form of emotion by which individuals assess something as positive or negative. Slovic, *Trust, supra* note 224, at 694 (defining affect as “a subtle form of emotion . . . [that is] positive (like) or negative (dislike) evaluative feeling toward an external stimulus”).

228. KAHNEMAN, *supra* note 23, at 139–41; Slovic, *Trust, supra* note 224, at 695. It is easier and more expedient to rely on affect to make a judgment than to retrieve as much information as possible from memory to evaluate each option’s advantages and disadvantages. Paul Slovic, *Do Adolescent Smokers Know the Risks?*, 47 *DUKE L.J.* 1133, 1136 (1998) [hereinafter Slovic, *Adolescent Smokers*].

229. Slovic, *Trust, supra* note 224, at 695. Kahneman called this phenomenon “associative coherence,” and consistent affect is an element of it: positive feelings translate into an assessment of low risk. KAHNEMAN, *supra* note 23, at 139.

230. Slovic, *Trust, supra* note 224, at 695. For example, in one study, individuals’ feelings about a nuclear waste disposal site, as shown by their response to an image of such a site, strongly correlated to their decision about whether to vote for or against it. *Id.* 90 percent of people who felt negatively about the site said they would vote against it without regard for whether any data or substantive evidence showed such a site to be a risk. *Id.* The affect heuristic is so strong that even experts in their own fields have demonstrated use of the affect heuristic over their own specialized knowledge. KAHNEMAN, *supra* note 23, at 139 (noting that even toxicologists “found little benefit in substances or technologies that they thought risky, and vice versa”). In addition, when individuals rely on the affect heuristic to make decisions, they make little or no probability judgments. Sunstein, *supra* note 203, at 1044–45. Cass Sunstein, who has extensively studied heuristics in legal regulation, called this failure to judge probability “probability neglect.” *Id.* Sunstein identified how emotions may either lead to neglecting probabilities or influence their assessment in other ways that do not correspond to the actual probabilities. *Id.* To the extent individuals do make some sort of probability assessment, their probability assessments are distorted such that they overweigh small probabilities and underweigh large probabilities. Yuval Rottenstreich & Christopher K. Hsee, *Money, Kisses, and Electric Shocks: On the Affective Psychology of Risk*, 12 *PSYCHOL. SCI.* 185, 185–87 (2001). In an experiment in which researchers asked participants how much they would pay for a coupon for a European vacation or a tuition payment, both valued at \$500 and both having a 1 percent chance of redemption, the participants on average were willing to pay four times as much for the affect-rich vacation coupon as for the affect-poor tuition coupon. *Id.* at 187. In other words, the individuals overweighed the chance of redeeming the affect-rich European vacation coupon by a factor of four. *Id.* They did so even though, as a rational

When children use the affect heuristic to make predictions and decisions, they consult their feelings about a situation.²³¹ In studies of smoking among children and adolescents, for example, how children feel about the *decision* to smoke affects, even dictates, both their judgment about whether to smoke and their assessments of its probable effects.²³² Their positive feelings about smoking—be they feelings of excitement, the thrill of defying adults who warn of the risks, or inclusion in a group, among others—lead them to decide to smoke.²³³

Because reporting sexual harassment and assault is an affect-rich, or emotionally laden, area of decision-making, students are susceptible to using the affect heuristic when making decisions regarding what to do about their sexual harassment and assault.²³⁴ Students report many negative emotions associated with the notion of reporting their sexual harassment and abuse.²³⁵ They report fear of social rejection, condemnation,²³⁶ and being blamed;²³⁷ mistrust about

matter, that coupon had the exact same monetary value and probability of redemption as the affect-poor tuition coupon. *Id.* The same finding holds when the question involves negative-affect scenarios. *Id.* at 188. In one experiment involving negative affect, participants were asked how much they would pay to avoid risk of electric shock and how much they would pay to avoid a twenty-dollar penalty. *Id.* In both cases, the negative result had the same 1 percent chance. *Id.* Yet the median price paid to avoid the negative affect-rich shock was many times larger than the median payment to avoid the twenty-dollar penalty: seven dollars to one dollar, respectively. *Id.* In other words, in the negative-affect scenario, people overweighed the small possibility of having a shock to the point of paying nearly several times as much to avoid it as to avoid the affect-poor twenty-dollar penalty. *Id.* Individuals still overweigh small probabilities and underweigh large ones. *Id.*

231. See Albert & Steinberg, *supra* note 159, at 317; Slovic, *Trust*, *supra* note 224.

232. Slovic, *Adolescent Smokers*, *supra* note 228, at 1148; Slovic, *Cigarette Smokers*, *supra* note 226, at 122.

233. Slovic, *Cigarette Smokers*, *supra* note 226, at 122. As Paul Slovic compellingly states, “young smokers act[] experientially in the sense of giving little or no conscious thought to risks or to the amount of smoking they will be doing. Instead, they are driven by the affective impulses of the moment, enjoying smoking as something new and exciting, a way to have fun with their friends.” Paul Slovic et al., *Risk as Analysis and Risk as Feelings: Some Thought About Affect, Reason, Risk, and Rationality*, 24 RISK ANALYSIS 311, 319 (2004); see also Slovic, *Cigarette Smokers*, *supra* note 226, at 112 (“Far more [young] beginning smokers were thinking about ‘trying something new and exciting’ than were thinking about health.”). In addition, and for the same affect-related reasons, children and adolescents judge the short-term harmful effects to be minimal or non-existent. Slovic, *Cigarette Smokers*, *supra* note 226, at 110. Indeed, children believe the short-term use of cigarettes is safe, and they conclude that they will stop smoking before any health-harming effects happen. See *id.*; Slovic, *Adolescent Smokers*, *supra* note 228, at 1141. To the contrary, however, research shows that children actually get addicted to nicotine quickly and struggle to stop smoking after even short-term cigarette use. Slovic, *Cigarette Smokers*, *supra* note 226, at 109. Children’s affect-based decisions about smoking, therefore, result in error. *Id.*

234. See *infra* notes 236–237 and accompanying text.

235. See *infra* notes 236–237 and accompanying text.

236. Eli Somer & Sharona Swarcberg, *Variables in Delayed Disclosure of Child Sexual Abuse*, 71 AM. J. ORTHOPSYCHIATRY 332, 338 (2001) (discussing factors that cause delayed disclosure, including “fears of social rejection and condemnation, mistrust of people, and adoption of family-indoctrinated values of obedience”).

237. Jessie Anderson et al., *Prevalence of Childhood Sexual Abuse Experiences in a Community Sample of Women*, 3 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 911, 915 (1993). Twenty-nine percent of children report fear of being blamed. *Id.*

reporting and its effects,²³⁸ and embarrassment or shame with reporting.²³⁹ The complicated nature of assessing how to report or what will happen as the result of a report, coupled with all of these negative feelings, can lead students to automatically make the decision about whether to report their sexual harassment based on how they feel about it.²⁴⁰ Their many negative feelings around such reporting can inhibit or prevent reporting in general, let alone in the particularized ways required by courts' evaluations of Title IX's actual notice requirement.²⁴¹

Students' accounts of why they delay reporting some of their sexual harassment, along with inconsistent accounts of their feelings about harassment, demonstrate the affect heuristic. Students often cite fears of people not believing them and such negative emotions as "nervousness" as reasons for their decisions to delay or deny reporting.²⁴² They also describe feelings of aversion regarding the idea of reporting.²⁴³ They say they do not report because they strongly want the harassment to end and be behind them.²⁴⁴ The students' feelings about their harassment and reporting it, therefore, serve as the basis for their decisions to report. Instead of determining whether those feelings are justified in fact, and then even if they are, whether those facts warrant a non-report, these students make the decision about reporting simply based on how they feel about it.²⁴⁵ Much like decisions about smoking, where children's positive feelings are determinative rather than merely informative of their decision, children's

238. See Somer & Szwarcberg, *supra* note 236, at 338.

239. Further, their fears have a foundation in reality. In one study, 25 percent of perpetrators of sexual assault admitted to using threats to instill fear and prevent the survivors from reporting the assault. Lee Eric Budin & Charles Felzen Johnson, *Sex Abuse Prevention Programs: Offenders' Attitudes About Their Efficacy*, 13 CHILD ABUSE & NEGLECT 77, 80 (1989). In addition, some school staff hear of sexual harassment and assault but do not report it because, among other things, they place some of the blame on the survivors. See Lisa Hinkelman & Michelle Bruno, *Identification and Reporting of Child Sexual Abuse: The Role of Elementary School Professionals*, 108 ELEMENTARY SCH. J. 376, 380–81 (2008).

240. See *supra* notes 230, 233, 236–237 and accompanying text; *infra* notes 241–243 and accompanying text.

241. Further, the affect-rich nature of the decision to report makes children susceptible to overweighing relatively small probabilities, such as the probability that nothing will come of reporting; this can also deter their reporting. See Rottenstreich & Hsee, *supra* note 230, at 185–87. That said, whether the possibility of such negative repercussions is small is debatable. Some students who have reported their sexual harassment and assault have seen negative consequences, including that the survivors themselves get punished. Keierleber, *supra* note 17.

242. In *Doe v. Board of Education*, for example, student J.D. delayed reporting the sexual assaults perpetrated by fellow student M.O. and then recanted before reasserting that the assaults happened. 605 F. App'x 159, 163–64 (4th Cir. 2015). J.D. explained that he recanted because he was "nervous," did not think his story would be believed, and felt that if he recanted then that "would . . . be the end" of the investigation and ordeal. *Id.* (citations omitted).

243. When middle-schooler Jane Doe suffered approximately two years of harassment by other students, she explained her failure to report all of it as resulting from the feeling of just wanting "to put the issue behind her." *Doe v. Galster*, 768 F.3d 611, 615 (7th Cir. 2014).

244. See *supra* notes 242–243 and accompanying text.

245. That is not to say that such decisions cannot be fully warranted. See Brake & Grossman, *supra* note 21, at 900. It is to say, though, that the students describe a purely emotional basis for their decision without mentioning any assessment of whether those emotions had basis in fact.

negative feelings about reporting control their decision. They thus substitute the question of how they feel emotionally about reporting their sexual harassment for the more involved question of whether they should report it, taking all relevant information and feelings into account. They therefore exhibit use of the affect heuristic.

B. They Are Also Children: Child and Adolescent Brain Science

While both children and adults fall prey to these cognitive heuristics, the immaturities of children's and adolescents' developing brains offer still another set of impediments to their compliance with the decision-making that current Title IX jurisprudence requires.²⁴⁶ Children's brains develop over time, and how children's brain development affects their decision-making depends on their age.²⁴⁷ Younger children lack some of the reasoning and future-oriented decision-making capacity of older children, who have more brain development and therefore more advanced decision-making capacity than younger children.²⁴⁸ Even the brains of older adolescents, though, are not fully formed.²⁴⁹ Although older children acquire these skills, their still uneven brain development causes them to make more emotional instead of reasoned choices, particularly in social contexts.²⁵⁰ The immaturities in the neurodevelopment of children of all ages constrain their decision-making capabilities. This adds yet another layer of difficulty to the process of making complex decisions like the courts' assessments of Title IX's actual notice standard demand.²⁵¹

1. Child and Early Adolescent Brain Development

Complying with Title IX's actual notice requirements means that children must make future-oriented decisions that they lack the neurological capacity to fully assess. Younger children's incomplete brain development affects their ability to make the kinds of decisions that courts require under Title IX in at least two ways. First, younger children have difficulty with future orientation,

246. See *infra* Parts 0.B.1–2.

247. Steinberg et al., *supra* note 28, at 35–39; Albert & Steinberg, *supra* note 159, at 212–13; Reyna & Farley, *supra* note 153, at 25 (adolescents understand risks, including those of high-risk behavior).

248. Research shows that, as children age, their “cognitive maturation entails not only growth in reasoning capacity, but also the increasing application of intuition to [judgment and decision-making].” Albert & Steinberg, *supra* note 159, at 216.

249. In one study, children showed an increase in planning at age fifteen. Steinberg et al., *supra* note 28, at 35. With respect to delay discounting, age fourteen or fifteen was a “near-consistent break point across all delay intervals.” *Id.* at 36.

250. Adolescents, then, “show developmental gains [in reasoning through] the use of base-rate information on parallel problems that do not involve social content . . . , but in contexts that activate their increasingly rich and salient social schemas, heuristic processing appears to gain influence over the course of adolescent development.” Albert & Steinberg, *supra* note 159, at 216.

251. Steinberg et al., *supra* note 28, at 36–37.

planning, and understanding future consequences.²⁵² Second, they have less capacity for delay discounting, which is an exercise similar to delayed gratification.²⁵³ For purposes of these future-oriented decision-making challenges, “younger” children here means children under the age of fourteen or fifteen.²⁵⁴ After that age, children’s brains have matured to the point of no longer experiencing these problems with future orientation and planning.²⁵⁵

Younger children encounter multifaceted difficulties with future orientation.²⁵⁶ Future orientation refers to a variety of perspectives about the future, including how far one can project into the future, the degree to which one thinks about the future, and the ability to link present decisions to future consequences.²⁵⁷ Children under the age of fifteen are significantly less able to be future-oriented and to plan ahead than older children are.²⁵⁸ In addition, younger children display substantial challenges with time perspective: the ability to think about the future and oneself in it.²⁵⁹ Younger children also have trouble anticipating future consequences.²⁶⁰ Importantly, these difficulties get worse before they get better. Children between the ages of ten and fifteen demonstrate less planning capacity than even younger children.²⁶¹

On top of these challenges, younger children show significant deficits in delay discounting.²⁶² Delay discounting is similar to delayed gratification in that it involves delaying a reward.²⁶³ The two concepts are distinct, however.²⁶⁴ Delayed gratification requires delaying a specific reward for a set period of time.²⁶⁵ Delay discounting measures the increments of delay a person will tolerate before getting a reward that increases in value the longer one waits.²⁶⁶ Younger children have less ability to delay receipt of the ever-increasing reward than older children.²⁶⁷ They show a greater willingness to accept smaller rewards

252. *Id.* at 35.

253. *Id.* at 36–37.

254. *See supra* note 249.

255. *See supra* note 249.

256. Steinberg et al., *supra* note 28, at 39–40.

257. *Id.* at 28.

258. *Id.* at 35.

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.* at 36–37.

263. *Id.* at 30. There are two components to developing the capacity to delay discount: impulse control, and the brain development that regulates abstract, deliberative, future-oriented reasoning. *Id.* The brain development mediates the impulse control. *See id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.* at 36.

to obtain the reward sooner than do older children.²⁶⁸ After age sixteen, age has no significant impact on children's delay discounting capabilities.²⁶⁹

In deciding whether to report their sexual harassment and abuse, students must contemplate the future and how they will function in it to decide whom to tell about their harassment.²⁷⁰ They must also evaluate how events will unfold in the future as a consequence of their report, which requires both planning ahead and anticipating future consequences.²⁷¹ Finally, they have to delay the tantalizing and immediate, though often false, reward of silence, whereby students hope that remaining silent will make their problems disappear.²⁷² Younger students struggle with all of these cognitive processes.²⁷³ They explicitly say that they do not report their sexual harassment so they can ignore the problem in the hope that it will just go away.²⁷⁴ Reporting decisions in the sexual harassment context thus present future-oriented concerns that younger children are ill-equipped to consider.

2. Older Adolescent Brain Development

As children age, they show vast improvements in future orientation in general, and their ability to delay discount in particular. Moreover, they have the reasoning capacities of adults by the ages of fifteen or sixteen.²⁷⁵ This does not mean, however, that their brains have fully matured by that point: while some parts of their brains have reached nearly full or full maturity, other parts have not.²⁷⁶ This imbalance in brain maturation leads to decision-making problems.²⁷⁷

Relevantly, the limbic system develops earlier in childhood than the prefrontal cortex develops.²⁷⁸ The limbic system is involved in incentive and reward processing, while the prefrontal cortex is associated with cognitive control.²⁷⁹ The limbic system development begins with the onset of puberty.²⁸⁰

268. *Id.* Children aged fourteen and fifteen showed delay discounting capabilities between those of the younger and older groups of children. *Id.* at 37. Notably, this effect remained after controlling for gender, ethnicity, and socioeconomic status, none of which impacted children's ability to delay discount. *Id.*

269. *Id.* Significantly, these are the ages when much bullying happens.

270. For example, Alida Gebser wondered whether the teacher who sexually harassed her would continue to be her teacher in deciding whether to report the harassment. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 278 (1998). In addition to these sorts of future-oriented calculations, students also need to consider how the process should and will proceed, which is no small matter given the difficulty with even ascertaining what those processes are. *See supra* notes 214, 217 and accompanying text.

271. *See supra* notes 214, 217 and accompanying text.

272. *See supra* notes 242–243 and accompanying text.

273. *See supra* Part II.B.1.

274. *See supra* notes 242–243 and accompanying text.

275. Albert & Steinberg, *supra* note 159, at 219.

276. B.J. Casey et al., *The Adolescent Brain*, 28 DEVELOPMENTAL REV. 62, 69–70 (2008).

277. *Id.*

278. *Id.* at 63–64.

279. *Id.* at 69.

280. Albert & Steinberg, *supra* note 159, at 217.

Puberty generally occurs before the age of thirteen in girls and before the age of fourteen in boys.²⁸¹ Because of changes in dopamine and oxytocin in the brain associated with limbic system development, the adolescent brain experiences exaggerated sensitivity to both rewards and social stimuli.²⁸² Studies show that adolescents respond more strongly to rewards and social stimuli than do younger children or adults and so seek them out.²⁸³

At the same time, adolescents' prefrontal cortices have not fully developed.²⁸⁴ The prefrontal cortex is associated with cognitive control,²⁸⁵ including the capacity to "suppress inappropriate thoughts and actions in favor of goal-directed ones, especially in the presence of compelling incentives."²⁸⁶ This area of the brain develops throughout adolescence, but not as early as the limbic system.²⁸⁷

This uneven neurodevelopment offers an explanation for why adolescents demonstrate increases in risk taking, sensation seeking, and socioemotional stimuli with seemingly little regard for the repercussions.²⁸⁸ Even though adolescents are able to reason through and understand the effects of their decisions, they often disregard this reasoning and engage in behavior that is dangerous or otherwise against their rational self-interest.²⁸⁹ They do so because, as one study put it, "in emotionally salient situations, the limbic system will win over control systems given its maturity relative to the prefrontal control system."²⁹⁰ Adolescent decision-making therefore systematically skews toward impulsively seeking the emotional and social reward, even when doing so could be harmful.²⁹¹

Just such self-control over immediate emotional rewards, however, is what adolescents would require to report sexual harassment and abuse. They need the self-control offered by a mature prefrontal cortex to overcome their emotional

281. See Cynthia K. Snyder, *Puberty: An Overview for Pediatric Nurses*, 31 J. PEDIATRIC NURSING 757, 758 (2016); Risa M. Wolf & Dominique Long, *Pubertal Development*, 37 PEDIATRICS REV. 292, 294–95 (2016).

282. Albert & Steinberg, *supra* note 159, at 217.

283. Casey et al., *supra* note 276, at 63–64; *see also* Albert & Steinberg, *supra* note 159, at 217.

284. Casey et al., *supra* note 276, at 64; *see also* Albert & Steinberg, *supra* note 159, at 217.

285. Albert & Steinberg, *supra* note 159, at 217.

286. Casey et al., *supra* note 276, at 64;

287. Casey et al., *supra* note 276, at 63–64; *see also* Albert & Steinberg, *supra* note 159, at 217.

288. *See* Albert & Steinberg, *supra* note 159, at 217; Casey et al., *supra* note 276, at 64. A socioemotional stimulus is a social stimulus that causes an emotional response. *See* Albert & Steinberg, *supra* note 159, at 217. For example, a crowd of smiling faces at a party may cause a positive emotional response. *Id.*

289. "[A]dolescents at higher risk because of their behavior often accurately perceive that they are at higher risk . . ." Reyna & Farley, *supra* note 153, at 26. However, "perceived benefits may drive adolescents' reactive behaviors and behavioral intentions, thereby accounting for risk-taking behaviors." *Id.* at 29.

290. Casey et al., *supra* note 276, at 64.

291. Albert & Steinberg, *supra* note 159, at 217 ("[T]o the degree that adolescents are primed to seek out and respond to rewards, and at the same time possess immature self-regulatory skills, the influence of socioemotional stimuli is likely to loom large for their decision making.").

impulses that lead them to not report the harassment.²⁹² Yet adolescents largely lack the prefrontal cortex development to overcome such emotions.²⁹³ Instead, their emotional impulses will more likely control their reason and inhibit reporting of sexual harassment, especially in the social context of school.²⁹⁴

C. Title IX's Paradoxical Standard

Courts' assessments of actual notice under Title IX create a paradox: students must do what they largely cannot in order to access Title IX's protections.²⁹⁵ Children and adolescents, just like adults, are susceptible to using the unavailability heuristic and the affect heuristic as decision-making shortcuts.²⁹⁶ Both heuristics inhibit their ability to make the kinds of decisions required by Title IX jurisprudence.²⁹⁷ For children and adolescents deciding whether to report their sexual harassment, the immaturities of their brain development create another set of obstacles.²⁹⁸ Therefore, while cognitive heuristics make the kinds of sexual harassment reporting required for a successful Title IX claim challenging for anyone, the immaturities of children's brain development make those decisions particularly unrealizable.²⁹⁹ These multi-layered challenges render largely out of reach for children the decision to report in the particularized ways required by courts' assessments of actual notice.

Instead of considering these factors, though, courts either assume children have the capacity to make the decisions they require under Title IX or implicitly deem lack of such capacity irrelevant.³⁰⁰ They do so by confining their actual notice inquiries to unilateral assessments of whether schools have received sufficient notice of student sexual harassment.³⁰¹ Courts, therefore, effectively

292. These emotions include shame, embarrassment, and fear of being blamed or of reprisal by the perpetrator. *See supra* notes 236–237 and accompanying text; *e.g.*, *Doe v. Flaherty*, 623 F.3d 577, 582 (8th Cir. 2010) (Coach Chad Smith, who engaged in a sexual relationship with high school student Jane Doe, threatened students “to prevent them from talking to their parents about him”).

293. *See supra* notes 284–285.

294. *See supra* notes 242–243 and accompanying text.

295. *See supra* Parts 0.A–B.

296. *See supra* Part 0.A.

297. *See supra* Part 0.A.

298. *See supra* Part 0.B.

299. *See supra* Part 0.B.

300. “Every policy question involves assumptions about human nature, in particular about the choices that people may make and the consequences of their choices for themselves and for society.” KAHNEMAN, *supra* note 23, at 141. Title IX is no different. Courts therefore assume a choice that children can, should, and will, if they want legal protection, make.

301. *E.g.*, *Doe v. Galster*, 768 F.3d 611, 617 (7th Cir. 2014) (finding no actual notice because “[s]chool administrators learned of some of the more minor incidents between Doe and other students contemporaneously, but it is undisputed that they did not witness and were not told about the violent incidents until the evening of the last day of her seventh grade year at the earliest.”); *Doe v. Flaherty*, 623 F.3d 577, 585 (8th Cir. 2010) (“We agree with the district court that [Coach] Smith’s text messages to female students did not provide [Principal] Wilcher with actual notice of sexual abuse. The inappropriate comments in those messages, without more, did not alert Wilcher that Smith was involved in a sexual relationship with a student.”).

require children to make the decision to report their sexual harassment and abuse without consideration of whether such decisions even lie within the realm of possibilities for real-world children.³⁰²

Because courts' development of actual notice under Title IX sets a nearly impossible standard for students to meet, Title IX offers little protection to students in the K-through-twelve public school setting. Public schools have no obligation under Title IX to act without such notice.³⁰³ Courts' evaluations of Title IX, therefore, favor ensuring that schools have contemporaneous, timely, and full notice of sexual harassment over considering students' capabilities to provide that notice or students' need for protection from sexual harassment and abuse. Despite Title IX's protective purpose, therefore, courts' evaluations of actual notice eviscerate much of its power to protect students from sexual harassment and abuse in school.³⁰⁴

III.

OVERCOMING THE PARADOX: ACCOUNTING FOR STUDENTS' INEVITABLE DECISION-MAKING ERRORS AND IMMATURE BRAIN DEVELOPMENT

For Title IX to fulfill its purpose of protecting students from sexual harassment in public schools, it must consider how cognitive heuristics and brain development affect the decision-making of children and adolescents. At the time Title IX jurisprudence developed, scholars had only begun to analyze how empirical research on cognitive heuristics should be incorporated into doctrine and policy.³⁰⁵ Child and adolescent brain research was also not as advanced.³⁰⁶ Now, both behavioral psychology and child and adolescent neuroscientific research are far more developed and understood, and such knowledge has been applied to many varied areas of law.³⁰⁷ Title IX jurisprudence, therefore, can no longer justify failing to consider these understandings.

Title IX's actual notice standard must be reconceptualized to account for these new understandings. This Section proposes an appropriately revised notice standard and a framework for evaluating it.³⁰⁸ In addition, legislative and policy changes should compel schools to facilitate and encourage the reporting of sexual harassment and abuse. Because cognitive heuristics affect the decision-making of both adults and children, the changes proposed here could apply to any Title IX claim.³⁰⁹ But because immature neurodevelopment creates an added

302. See *supra* Parts 0.A–C.

303. See *supra* note 6 and accompanying text.

304. See *supra* Part 0.D.

305. See *supra* notes 6, 27 and accompanying text.

306. See *supra* notes 6, 29 and accompanying text; *supra* Part 0.B.

307. See *supra* notes 27–28 and accompanying text.

308. See *infra* Part 0.A.

309. See *supra* Part 0.A.

layer of difficulty for children, these proposed changes are particularly urgent for the K-through-twelve public school population.³¹⁰

Significantly, these proposed changes are not radical. They do not call for a new standard or a complete overhaul of existing legal frameworks.³¹¹ Instead, they work within those frameworks. Still, these changes will broaden the scope of actual notice and more readily compel schools to respond to children's sexual harassment.³¹² These changes will address students' incapacity to meet Title IX's particularized reporting requirements and stop shifting the heavy burden to report onto students. These proposals would resurrect Title IX from its nearly impotent state and restore its power to protect children.

The Supreme Court's rationale in its most recent Title IX decision, *Jackson v. Birmingham Board of Education*, mirrors and supports the change in the thinking this Article calls for.³¹³ In *Jackson*, the Court found that Title IX protections extend to claims of retaliation for reporting alleged violations, reasoning that Title IX's protective purpose would be "difficult, if not impossible, to achieve if persons who complain about sex discrimination did not have effective protection against retaliation."³¹⁴ The Court went on to explain, "[r]eporting incidents of discrimination is integral to Title IX enforcement and . . . if retaliation were not prohibited, Title IX's enforcement scheme would unravel."³¹⁵ Title IX's actual notice regime, though, has already largely unraveled the law's enforcement scheme in the K-through-twelve public school context.³¹⁶ Title IX relies heavily on students to report their own harassment even though making compliant reports may be nearly impossible. Therefore, Title IX doctrine and policy must change to avoid the problems associated with the existing reporting system.

These proposals are of course open to critique. I grapple with those critiques that apply to specific proposals in the following subparts. The final subpart will address three critiques that apply generally to all of these proposals.

310. See *supra* Part 0.B.

311. See *infra* Parts 0.A–C.

312. Under these proposals, students would more easily be able to satisfy actual notice; thus, courts would be more likely to find schools liable under Title IX for failure to respond. To avoid such liability, schools therefore would have to act to address or prevent the sexual harassment in more circumstances than they do now. See Fisk & Chemerinsky, *supra* note 29, at 796 (arguing that liability offers a government agency the "incentive to monitor, supervise, and control the acts of their employees"); see also Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 854–55 (2001) (contending that liability or its potential has a fault-fixing effect that can promote institutional change).

313. 544 U.S. 167 (2005).

314. *Id.* at 171, 180 (citation omitted).

315. *Id.* at 180.

316. See *supra* Part 0.C.

A. *Reconceptualizing the Actual Notice Standard*

The actual notice standard must be reconceptualized to incorporate modern understandings of cognitive heuristics and child and adolescent brain development into Title IX doctrine. This standard has been rightly criticized as, among other things, creating perverse incentives and being rooted in misconceptions.³¹⁷ While abandoning the actual notice standard altogether might correct these flaws, another avenue would reconceptualize the standard instead. More specifically, reconceptualizing actual notice would mean using empirical research in behavioral psychology and child and adolescent neuroscience to inform what it means to (1) report contemporaneously, (2) to appropriate persons, and (3) with particular information.

1. *Reconceptualizing Notions of “Contemporaneous” Reporting*

Currently, courts base their assessments of contemporaneous notice on the proximity in time of the report to the sexual harassment.³¹⁸ These interpretations fail to consider the cognitive heuristics and the immaturities of children’s brains that inhibit what courts presently define as contemporaneous reporting.³¹⁹ Incorporating the understandings of this empirical research into the actual notice standard would require accommodating for students’ almost-inevitable delays in reporting. More specifically, this change would warrant interpreting “contemporaneous” reporting to mean reporting that happens whenever the child is capable of making the report, irrespective of when the harassment occurred. That is, the shift would change the metric for measuring contemporaneous reporting. The proposed change would reconceptualize Title IX to measure

317. MacKinnon, *supra* note 6, at 2091 (“From the perspective of educational equality, the deliberate indifference standard creates perverse incentives. It encourages schools not to know and to avoid learning about sexual atrocities so as to avoid notice of them, so no response, however indifferent, can be deliberate.”); Suski, *supra* note 6, at 725 (arguing that Title IX’s liability limits are based, among other things, on courts’ misconceptions about how Title IX liability would unduly burden schools). I neither take issue with MacKinnon’s proposals for Title IX reform nor abandon my previous hybrid actual-constructive notice proposal. Although these proposals take a different tack, they would achieve similar or the same ends as my previous proposals. The reconceptualization of the actual notice standard advanced here serves as an alternate, even complementary, route to achieving the goal of increasing protection for students by strengthening Title IX standards. In distinct though not unrelated critiques, others have called for revisions to the standard for evaluating claims of sexual harassment in employment under Title VII. For example, Angela Onwuachi-Willig writes, “To ensure that judicial analyses of sexual harassment claims leave room for the experiences of women of color, courts should adopt a standard based on a reasonable person with the complainant’s intersectional and multidimensional identity, rather than the ostensibly objective reasonable person standard, or even the presumably more inclusive reasonable women’s standard.” Onwuachi-Willig, *supra* note 21, at 119. Deborah Brake and Joanna Grossman have persuasively argued that women delay reporting sexual harassment and discrimination in the workplace because of difficulties both perceiving the discrimination and challenging it. *See Brake & Grossman, supra* note 21, at 887.

318. *See supra* Part 0.A.

319. *See supra* Part 0.C.

contemporaneity by when the child becomes ready to report rather than when the harassment or abuse occurred.

As a practical matter, this proposed change would mean holding schools responsible for responding to student reports of sexual harassment and abuse even if those reports occurred months or years later. In such cases, the notice should only be deemed untimely if a school could show that the report occurred beyond the time a student had the capacity to report, and the student could not provide a good reason for the delay. For example, a school could show that a student reported the harassment to parents and friends but then waited a year to inform the school. The evidence of the student's reports to parents and friends would indicate that the student had the capacity to report the harassment but neglected to tell the school. If the student could not demonstrate a good reason for the year-long delay between the report to others and the report to the school, the student's report to the school would not be contemporaneous even under this revised actual notice metric.³²⁰

Barring such evidence, if a student reported sexual harassment six months after it occurred, then the public school must reasonably respond to the sexual harassment at that time. The school would not incur liability for its past failure to act at the time of the harassment if no report had been made yet. The exemption would satisfy one of the strongest concerns underlying courts' establishment of the stringent actual notice standard: the unfairness in requiring schools to address sexual harassment when they do not know about it.³²¹ The time the child reports will dictate when and how the school must respond. If a child reported several months or more after an assault, for example, a school could not possibly be expected to prevent the harassment that already occurred. However, if the harassment is likely to reoccur, then the school would need to take reasonable steps to prevent that reoccurrence. In addition, the school could also determine whether to punish the perpetrator at that time. Finally, public schools could offer students who have suffered sexual harassment and assault services to address the harms associated with the abuse.³²² The point of reconceptualizing contemporaneous notice, though, is not to prescribe precise

320. For instance, evidence that the school somehow impeded reporting of the harassment could theoretically demonstrate a good reason for the delay. While the likelihood of students successfully showing such good reason might be small, the evaluation framework should nevertheless accommodate for its potential existence.

321. See *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 644 (1999) ("A recipient cannot be directly liable for its indifference where it lacks the authority to take remedial action.").

322. These might include counseling or a school transfer for either the survivor or the perpetrator, all at the survivor's option. Schools would have to proceed with caution here to avoid imposing services on the survivor that might be unwanted, unhelpful, or counterproductive. See, e.g., Sandra E. Gibson, *Legal Caring: Preventing Retraumatization of Abused Children Through the Caring Nursing Interview Using Roach's Six Cs*, 12 INT'L J. FOR HUM. CARING 32, 33–36 (2008) (noting that because children experience re-traumatization of past sexual assaults when reminded or asked about them, it can be helpful to use open-ended questions that do not lead but instead allow the child to lead).

actions that schools must take in response to reported sexual harassment.³²³ Rather, the reconceptualization would require schools to act in some reasonable way upon receiving such reports, even ones made well after the time of the harassment itself.

Under this conceptualization of contemporaneity, outcomes in some Title IX cases would have been different. For example, in *Doe v. Board of Education of Prince George's County*, J.D.'s report of M.O.'s sexual assaults would meet this reconceptualized actual notice standard even though J.D. made the report more than a year after the assaults began.³²⁴ J.D. reported those assaults contemporaneously with the time he had the capability to do so.³²⁵ J.D. said that he did not report earlier because he hoped that by ignoring the assaults, they would stop.³²⁶ That is, he demonstrated use of the affect heuristic and the immaturities of his brain development in his decision-making.³²⁷ It took more than a year for him to overcome that thinking.³²⁸ Because he made the report when he had the ability to do so, J.D. would satisfy the reconceptualized definition of contemporaneous notice.³²⁹ J.D.'s report would thus require that his school respond to his report at the time of the report, for example, by potentially providing J.D. services to address the trauma resulting from his assaults. If the school did not respond to J.D.'s report, the school would be liable for the failure to act but not the failure to act when the assaults happened. Holding schools responsible for addressing sexual harassment and abuse whenever they learn of the harassment would help overcome the problems associated with the cognitive heuristics and child brain development that inhibit reporting of sexual harassment. Further, it would lend greater protection to developmentally challenged or otherwise marginalized students, who are less capable of expressing themselves.³³⁰

Notwithstanding how these changes would help overcome the cognitive and developmental problems that inhibit reporting of sexual harassment, critics could argue that holding schools responsible for addressing sexual harassment and abuse whenever they learn of the harassment would expose public schools to open-ended liability.³³¹ Public schools could face liability for sexual

323. That is the framework of the much-criticized deliberate indifference standard. *See supra* notes 6, 49 and accompanying text.

324. *See Doe v. Bd. of Educ.*, 605 F. App'x 159, 163–64 (4th Cir. 2015).

325. *Id.* at 163.

326. *Id.* at 164.

327. *See supra* Parts 0.A–B.

328. *Doe*, 605 F. App'x at 163–64.

329. *See id.*

330. *See, e.g.*, *Rost v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1117 (10th Cir. 2008); *supra* note 119 and accompanying text.

331. Statutes of limitations, after all, exist in part to serve justice through predictability and the preservation of evidence. *See* Jessica E. Mindlin, *Child Sexual Abuse and Criminal Statutes of Limitation: A Model for Reform*, 65 WASH. L. REV. 189, 201–02 (1990).

harassment that happened years prior to a student's report.³³² This concern, however, misses the point. Public schools would not be responsible for the sexual harassment that happened long ago if they had taken reasonable steps to address it when they did find out about it. Under this standard, a reasonable response to a report that occurs years after the abuse could potentially be to do little or nothing. Case-by-case analysis would be required to determine what would be reasonable, allowing the Title IX machinery to better address past sexual harassment and protect students from future harassment. Further, such critiques have regularly surfaced against extending or eliminating statutes of limitations on the prosecutions of sex offenders.³³³ Yet recognizing the difficulties survivors have faced in coming forward, states are increasingly eliminating statutes of limitations for such criminal prosecutions.³³⁴ The same policy principles support holding schools responsible for doing something to address sexual harassment and abuse when they do learn about the harassment.

2. *Reconceptualizing "Appropriate Persons"*

Similarly, empirical research on cognitive heuristics and child and adolescent brain science should inform court assessments of actual notice by reconceptualizing the meaning of "appropriate persons" to whom students report the sexual harassment.³³⁵ This reconceptualization would involve abandoning interpretations of "appropriate persons" as particular categories of school officials, like administrators and those with the authority to bind the school.³³⁶ It would mean redefining "appropriate persons" to include any adult who works for a school.³³⁷

332. *Id.*

333. *See, e.g.*, Jill Filipovic, Opinion, *No More Statutes of Limitations for Rapes*, N.Y. TIMES (Dec. 31, 2015), <https://www.nytimes.com/2016/01/01/opinion/no-more-statutes-of-limitations-for-rape.html> [<https://perma.cc/X7WE-69NT>] (acknowledging that the goals of statutes of limitations are laudable but, for practical purposes, do not work—or are outweighed by countervailing benefits from eliminating statutes of limitations—in cases of sexual assault and rape).

334. At least twenty states have eliminated some statutes of limitations for some child sex abuse crimes. MARCI A. HAMILTON, CHILD USA, CHILD SEX ABUSE STATUTE OF LIMITATIONS REFORM IN THE WAKE OF THE BOSTON ARCHDIOCESE CLERGY SEX ABUSE SCANDAL 25–28 (2002), https://static1.squarespace.com/static/5a120b962aeba581dd692cd4/t/5ad929f3758d466f749214e8/1524181553971/2018_CHILDUSA_SOLReport4.19.18.pdf [<https://perma.cc/JUS7-C22A>]. Fifteen states have no limitations on when a prosecution of a felony sexual assault of a minor can occur. Ruth Padawer, *Should Statutes of Limitations for Rape Be Abolished?*, N.Y. TIMES MAG. (June 19, 2018), <https://www.nytimes.com/2018/06/19/magazine/should-statutes-of-limitations-for-rape-be-abolished.html> [<https://perma.cc/QV73-R3TY>].

335. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998).

336. *See supra* Part 0.B.

337. Arguably, this conceptualization conflicts with the *Gebser* Court's Spending Clause rationale, which was central to its requirement that persons with authority to bind the school know about the sexual harassment. *See supra* note 43 and accompanying text. However, those persons have full authority to—and should under this revised conceptualization—require their staff to report any and all reports that can conceivably be interpreted as a report of sexual harassment to an administrator. This

Conceiving of “appropriate persons” in this way overcomes the problems with availability and affect heuristics as well as children’s immature brain development.³³⁸ The reconceptualization allows students to report to the adult at school with whom they feel most comfortable, thus negating the affect heuristic. Interpreting “appropriate persons” to mean any adult employed by the school also simplifies the reporting assessment for students.³³⁹ The new interpretation thus helps to avoid the availability heuristic, which operates in the face of complicated decisions.³⁴⁰

Such a reconceptualization arguably also still fits within the parameters set forth by the Supreme Court’s own definition of “appropriate person.”³⁴¹ In *Gebser*, the Court said an appropriate person is someone “with authority to take corrective action to end the discrimination.”³⁴² The Court established this requirement partially because of Title IX’s contractual nature, a statute enacted under Congress’s Spending Clause authority.³⁴³ Concerned about imposing liability for a problem a school did not know about and could not address, the Court defined “appropriate persons” as those with authority to take action to correct the problem.³⁴⁴ Yet any adult employee of the school has the authority to take corrective action regarding sexual harassment because any adult can notify the school or higher-level administrator. Further, even were that an insufficient answer to the Court’s concerns, under this reconceptualized definition of “appropriate persons,” administrators can also mandate that lower level staff inform them of any reports of sexual harassment so that they can act to remedy it.

For students like Jherald, the boy assaulted by the bus driver in *Santiago v. Puerto Rico*, this revised understanding of “appropriate persons” would mean that the report of the assault to the school teachers and social workers at his school would satisfy the actual notice standard.³⁴⁵ Even those staff members without supervisory authority over the bus driver could report the assault to proper authorities.³⁴⁶ Thus, they could take action to ensure the assault was addressed and prevent further assaults.

would address the Court’s concerns about notice while still accounting for the vagaries of student reporting.

338. See *supra* Parts 0.A–B.

339. See *supra* Part 0.D.

340. See *supra* Part 0.D.

341. *Gebser*, 524 U.S. at 290.

342. *Id.*

343. *Id.* at 286–88. See *supra* note 43 and accompanying text.

344. *Gebser*, 524 U.S. at 290.

345. See 655 F.3d 61, 74 (1st Cir. 2011).

346. See *id.*

3. *Reconceptualizing What Information Must Be Reported*

Finally, the impact of cognitive heuristics and child and adolescent brain development justifies the revisiting of what information about sexual harassment must be reported. In the present evaluation, courts focus on whether public schools receive sufficiently specific information to hold them liable under Title IX.³⁴⁷ They fail to consider that the affect heuristic and the students' immature brain development inhibit such detailed reporting, as can other factors such as a child's disability status.³⁴⁸

Considering these inhibitors allows for reconceptualizing actual notice in this way: students will have provided sufficient information to satisfy the Title IX standard when they intended to make the report and provided as much information as possible given the communication skills available to them. Assessing actual notice in this way makes the assessment more individualized, child-centric, and context-specific. This revision requires an inquiry into what each child can do given the impact of cognitive heuristics and immature brain development as well as factors such as disability.³⁴⁹ Put another way, this revision calls for courts to evaluate why a student may have made a less-than-perfectly-specific report. To do so, courts would need to consider evidence about reporting protocols at the school and how easy (or not) they were to navigate. In addition, courts might need to hear from experts about psychological or other obstacles that might have affected the child's reporting. If such evidence established that a child's report was not specific because of reasons beyond the control of the child, then the child's report should be deemed to have provided sufficient information to establish actual notice.

To be sure, such an inquiry would be intensely fact-specific, but it would not be beyond the capacity of courts. Courts already make exceedingly fact-specific evaluations, including in the K-through-twelve school context.³⁵⁰ All that said, if a child could not establish a reason for making either a less-than-precise report of sexual harassment or not making a report at all, despite clear,

347. *See supra* Part 0.C.

348. *See supra* Parts I.C., 0.A.2.–B; *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1117 (10th Cir. 2008); *supra* notes 119, 122 and accompanying text.

349. Cases reflect that children who are abused may make incomplete reports of their abuse or use vague words. *See supra* Part 0.C. Lacking the precise language of sexual assault, they may say, for example, that other children are “bothering” them. *See, e.g., Rost*, 511 F.3d at 1117. Any such expressions could compel schools to take some action: for example, monitoring the situation and investigating to learn more so that they can respond appropriately. School action might also involve intervening to remove the perpetrator from any interaction with the survivor. Responses could vary depending on the report. Again, the point is to compel some response by schools. *See supra* notes 6, 49 and accompanying text.

350. For example, when evaluating claims brought by children under the Individuals with Disabilities Education Act, courts must determine the effects of the individual child's disability on their education and whether the individualized education plan offered by the school to address those effects is appropriate. 34 C.F.R. §§ 300.320, .516 (2019).

easy reporting protocols developed with psychological or other obstacles in mind, then the child could not satisfy the actual notice standard.

Under this reconceptualization of what constitutes sufficient information to satisfy actual notice, children like middle-school student K.C. in *Rost v. Steamboat Springs RE-2 School*, who reported her sexual assaults by saying boys were “bothering” her, would be able to meet the actual notice standard.³⁵¹ Because K.C., who had an intellectual disability, intended to report her sexual harassment and used the only language she knew and had available to make the report, she would meet the actual notice standard, and the school therefore would be required to act on her report.³⁵² That report should trigger at least a thorough inquiry into how the boys were bothering K.C.

Critics may argue that this interpretation of sufficient notice effectively remakes actual notice into a constructive notice standard.³⁵³ While, to be sure, this interpretation is a less stringent interpretation of the actual notice standard than courts currently apply, it still differs from constructive notice in that it relies on the school being provided some information before incurring any obligation to act.³⁵⁴ Thus, unlike constructive notice, it does not impute notice to the schools without some express, if imprecise, information being provided to the school.³⁵⁵ So, if a child reports a problem involving sexual harassment even in a vague way, the school would have an obligation to look into whether and how much sexual harassment is happening. The school would not, however, be required to do so before it learns of such information. This standard would not require schools to be on a constant search for sexual harassment without any provocation. However, it would also not completely insulate a school burying its head in the sand because a report of sexual harassment is not sufficiently precise.

351. 511 F.3d at 1119–20.

352. *See id.*; *see also supra* notes 6, 49 and accompanying text.

353. The Supreme Court rejected the constructive notice standard for varying reasons in *Gebser* and *Davis*. In *Gebser*, the Court concluded that the actual notice standard would better meet the protective purpose of Title IX. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286–87 (1998). In *Davis*, the Court expressed concern that holding schools liable under such a standard would not allow them sufficient control over students and would create a veritable flood of Title IX liability. *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 647–48 (1999).

354. *See supra* notes 40, 46 and accompanying text.

355. *See supra* note 46 and accompanying text. Title VII has such a constructive notice standard, allowing for employer liability for sexual harassment without the employer having received any express information of sexual harassment at all. 29 C.F.R. § 1604.11(d) (2019). Under this standard, employers are liable “for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.” *Id.*; *see also, e.g.*, *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 906 (1st Cir. 1988) (“[W]e find that there was sufficient evidence in the record from which it could be inferred that the atmosphere described by the plaintiff was so blatant as to put the defendants on constructive notice that sex discrimination permeated the Program. The most obvious example of the offensive atmosphere was the constant attack by male residents on the capabilities of the plaintiff and other female residents.”).

B. *Revising the Title IX Evaluation Framework*

This proposed broadening of the actual notice standard should be coupled with a revision to the framework for evaluating Title IX claims. More specifically, the evaluation of actual notice should include an evidentiary burden-shifting element. This burden-shifting component would operate such that once students offer some evidence that a school had notice—even legally insufficient notice—of their sexual harassment, then the burden of proof would shift to the public schools to establish that they did something to encourage and to facilitate reporting of sexual harassment.³⁵⁶ Failure to meet this burden would satisfy the actual notice element of the Title IX claim.

This change to the evaluation framework of Title IX claims would take some of the responsibility off students for ensuring that schools have the information they need to take action under Title IX. Currently, this burden falls exclusively on the students bringing claims under Title IX.³⁵⁷ By instead sharing that responsibility with the schools, courts' evaluations of students' Title IX claims would no longer privilege schools' passive, one-sided receipt of information over students' capacity to provide it.³⁵⁸

In addition, this revised analysis still offers schools substantial flexibility. It requires no specific steps to promote student reporting. Public schools, therefore, could develop detailed procedures for reporting sexual harassment and abuse and broadly publicize them to students and staff in accessible language. Alternatively, schools could require that administrators regularly inquire into whether any school employee has received a conceivable report of sexual harassment. Any such steps would satisfy the burden in this revised framework because they do something to encourage student reporting of sexual harassment.

C. *Title IX Policy Reforms*

Finally, to accommodate the challenges students face in reporting sexual harassment generally and in the particularized ways that courts require, Title IX should be revised to require affirmative steps by schools that address and account for the effects of cognitive heuristics and child and adolescents' immature neurodevelopment. As the law now stands, although Title IX prohibits discrimination on the basis of sex, neither it nor the courts' assessments of it requires anything affirmative of schools.³⁵⁹ The burden to report sexual harassment falls almost exclusively on the student who suffered the

356. See Fleming James, Jr., *Burdens of Proof*, 47 VA. L. REV. 51, 51 (1961) (“[B]urden of proof . . . refer[s] to two separate and quite different concepts[:] . . . (1) the risk of non-persuasion, or the burden of persuasion or simply persuasion burden; (2) the duty of producing evidence, the burden of going forward with the evidence, or simply the production burden . . .”).

357. See *supra* Part 0.C.

358. See *supra* Part 0.C.

359. See *supra* Parts 0.A–C.

harassment.³⁶⁰ Instead, Title IX should require that public schools implement policies and procedures to help children overcome the inhibitions resulting from cognitive heuristics and children's immature brain development. It should mandate that schools develop policies and programs to encourage and facilitate reporting of sexual harassment and abuse.

First, Title IX should require schools to train all students at least annually on how to report sexual harassment, on what information to provide when making such a report, and to whom reports should be made.³⁶¹ This training would directly combat the problems presented by the availability heuristic and the interrelated lack of information on how to report. Further, this training should include reassurances to students that the school will support, believe, and address their reports of sexual harassment in concrete ways. This training would therefore also diminish the problems of the availability heuristic. Such training would work to address the problems associated with students' immature brain development by informing students, many of whom naturally have difficulty planning ahead, how a report will play out in the future.³⁶² Further, it would help to reassure emotionally wrought older children whose fears and emotions can overwhelm their decision-making.³⁶³

Second, Title IX should compel schools to train all staff on sexual harassment and abuse. This training would need to include what constitutes sexual harassment and abuse, the many varied and sometimes imprecise ways students report or display symptoms of it, and what to do about it. That way, staff who receive imprecise reports of sexual harassment and abuse will be better able to recognize such reports and respond appropriately, including by informing higher-level school administrators with the authority to address the problem. This training would also, therefore, dovetail with and reinforce the revised conceptualization of "appropriate persons" under the actual notice standard.

One potential concern with this proposal is that it relies heavily on training, which may burden schools. However, schools regularly train broadly on issues

360. See *supra* note 13 and accompanying text.

361. In a recent report on the effectiveness of workplace sexual harassment training, the Equal Employment Opportunity Commission concluded that such training could increase awareness of what constitutes inappropriate or unwelcome behavior and increase the frequency of complaints. CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, REPORT OF THE CO-CHAIRS OF THE EEOC SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 46–49 (2016), https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf [<https://perma.cc/P5TC-DABA>] (“[I]t appears that training can increase the ability of attendees to understand the type of conduct that is considered harassment and hence unacceptable in the workplace.”). In addition, public schools’ purpose for being, of course, is to train and educate students, so their existence supports the idea that training is effective and beneficial. See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969) (stating schools are “educating the young for citizenship”).

362. See *supra* Part 0.B.1.

363. See *supra* Part 0.B.2. Further, such training should be publicly available online and through any online school information-sharing system, such as Infinite Campus. INFINITE CAMPUS, <https://www.infinitecampus.com> [<https://perma.cc/2PZN-9EEE>].

such as bullying.³⁶⁴ Further, educating large populations is the essence of what schools do.³⁶⁵ These policy prescriptions, therefore, align precisely with schools' very purpose and work.

A different, more serious concern about these policy proposals is that they could create a vehicle for courts to fashion an affirmative defense for schools to students' Title IX claims.³⁶⁶ This concern derives from the evolution of Title VII jurisprudence, which prohibits sex discrimination in employment.³⁶⁷ There, an employer has an affirmative defense to a Title VII action if the employer can show that it implemented reasonable procedures to prevent and correct sexual harassment, and that the employee unreasonably failed to avail herself of them.³⁶⁸ Some courts have interpreted this defense to mean that once an employer shows that such procedures exist, the burden shifts back to the plaintiff-employee to show why they did not take advantage of those procedures.³⁶⁹ The purpose of these proposed procedures here, however, is to do the opposite: to shift some of the burden to the schools. Thus, any such changes to Title IX must be accompanied by proscriptions against interpretations allowing for such burden-shifting back to students. More specifically, these proposed changes to Title IX should expressly state that they do not create any affirmative defense for schools or burden-shifting back to students.³⁷⁰

D. Three General Critiques

Because these proposals find their roots in empirical research on behavioral psychology and child and adolescent neuroscience, future research may affect

364. See, e.g., *Prevention at School*, STOPBULLYING.GOV, <https://www.stopbullying.gov/prevention/at-school/index.html> [<https://perma.cc/6MWE-SSZZ>] (showing the federal government's guidance on training student populations and school staff on bullying).

365. See *supra* note 361 and accompanying text. Even institutions whose purpose is not teaching regularly train large staff populations on legal requirements. For example, hospitals train all staff and volunteers on the Health Insurance Portability and Accountability Act (HIPAA). E.g., 45 C.F.R. § 164.530(b)(1) (2019) ("A covered entity must train all members of its workforce on the policies and procedures with respect to protected health information required by this subpart and subpart D of this part, as necessary and appropriate for the members of the workforce to carry out their functions within the covered entity."). This proposal, therefore, is neither unique in the law nor does it require schools to step outside of their skill sets.

366. Justice Ginsburg proposed such an affirmative defense in her dissent in *Gebser*. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 307 (1998) (Ginsburg, J., dissenting) ("I would recognize as an affirmative defense to a Title IX charge of sexual harassment, an effective policy for reporting and redressing such misconduct."). Given how the affirmative defense has been interpreted under Title VII since then, though, one has to wonder whether Justice Ginsburg would make such a proposal now. See *infra* note 369 and accompanying text.

367. Hébert, *supra* note 21, at 715–16.

368. *Id.* at 714.

369. *Id.* at 716 ("[A]fter the employer has shown that the employee completely failed to use a complaint process, the plaintiff has been required to come forward with reasons for the failure to use that process, and the courts have considered the adequacy of those reasons in determining whether the employer's burden of persuasion has been carried.")

370. See *id.*

their findings. One critique of these proposals, therefore, is that they leave the doctrine susceptible to changing research. However, the cognitive heuristics research is decades old.³⁷¹ Since cognitive heuristics were first identified and their existence proven in the early 1970s, studies have repeatedly replicated the findings.³⁷² So, while the understanding of cognitive heuristics have been and, in all likelihood, will continue to be refined, the basic concepts underlying the proposals have firm roots. The neuroscientific research, however, is not so old and well-established.³⁷³ That said, the fundamental ideas about children's difficulties with decision-making are clear.³⁷⁴ The neuroscience works to explain the cause of those problems, not uncover the problems themselves.³⁷⁵ Finally, even were all that not the case, the alternative to trying to refine the law to accommodate for new understandings would be to leave the law intact despite new scientific developments. The law should not remain ignorant for the sake of consistency.

A second critique of these proposals is that they may exacerbate the problems associated with the overuse of harsh school discipline and the now infamously problematic school-to-prison pipeline, which disproportionately impacts students of color and students with disabilities.³⁷⁶ In other words, if

371. Kahneman and Tversky first published their research on the availability heuristic in 1971. Tversky & Kahneman, *supra* note 23, at 208; *see also supra* note 190 and accompanying text.

372. *See supra* note 190 and accompanying text.

373. It dates back only twenty years or fewer. *See, e.g.,* Albert & Steinberg, *supra* note 159 (2011); Steinberg et al., *supra* note 28 (2009); Reyna & Farley, *supra* note 153 (2006).

374. *E.g.,* Albert & Steinberg, *supra* note 159, at 217 (“[R]ecent research suggests that two broad patterns in adolescent neurobehavioral development may combine to confer unique adolescent susceptibility to socioemotional influences on [judgment and decision-making].”); Casey et al., *supra* note 276, at 63, 73 (explaining that “[a] number of cognitive and neurobiological hypotheses have been postulated for why adolescents engage in suboptimal choice behavior” and finding that “increased risk-taking behavior in adolescence is associated with different developmental trajectories of subcortical pleasure and cortical control regions”).

375. *See id.*

376. A recent study found that in the 2011 to 2012 academic year, at the high school level, 23.8 percent of Black students and 10.8 percent of Latinx students were suspended from school, as compared to only 6.7 percent of white students. Daniel Losen et al., CTR. FOR CIVIL RIGHTS REMEDIES, *Are We Closing the School Discipline Gap?* 6, <https://scholarship.org/uc/item/2t36g571> [<https://perma.cc/JHX7-5T3K>]. The same study found that Black males with disabilities had the highest rate of suspensions at 33.8 percent and Latinx males with disabilities the second-highest rate at 23.2 percent. *Id.* Although white males with disabilities were also suspended at a high rate—16.2 percent—this rate was low compared to their Black and Latinx counterparts. *See id.* The authors of the study noted that these findings “should . . . raise alarms because of the negative impact high suspension rates have on graduation rates, the learning environment, and rates of juvenile crime and delinquency in the larger community. We commonly call this impact the school-to-prison pipeline.” *Id.* at 2; *see also, e.g.,* JUDITH A. BROWNE, ADVANCEMENT PROJECT, *DERAILED!: THE SCHOOLHOUSE TO JAILHOUSE TRACK* 12 (2003), <https://files.eric.ed.gov/fulltext/ED480206.pdf> [<https://perma.cc/N54X-WZ9V>] (“Criminalizing trivial offences pushes children out of the school system and into the juvenile justice system. Even in cases where punishments are mild, students are less likely to graduate and more likely to end up back in the court system than their peers.”); Derek W. Black, *Reforming School Discipline*, 111 NW. U. L. REV. 1, 5 (2016) (describing the problems with the school-to-prison pipeline and arguing for a “broad legal theory for holistically reforming school discipline”).

schools are required to do more in response to student sexual harassment, then schools will comply with that mandate by suspending and expelling student perpetrators of sexual harassment. That, in turn, could easily exacerbate the school-to-prison pipeline and its attendant disproportionate effects.³⁷⁷ That critique assumes, though, that the only response to uncovering peer sexual harassment is to suspend and expel those perpetrators.³⁷⁸ Nothing proposed here mandates any particular form of discipline. To the contrary, children who subject other children to sexual harassment and abuse often have been victimized themselves.³⁷⁹ Those children who themselves perpetrate sexual harassment and abuse likely need treatment, not punishment.³⁸⁰

The third critique is that because these recommendations would likely expand liability for public schools, they would propagate a sort of moral hazard.³⁸¹ That is, if a student brought a successful Title IX action for damages under this reconceptualization of actual notice and reformulated Title IX evaluation framework, the effect could be to allocate limited public school resources to one student while simultaneously reducing the resources available to students more generally. Although I have addressed this critique in my previous scholarship, the point is serious enough that those responses bear repeating.³⁸² Although public schools without question work under financial constraints, the answer to such constraints should not be to leave children who have suffered sexual harassment and abuse in school with hollow, ineffective legal recourse and protection.³⁸³ In addition, even under the current Title IX regime, students have the potential to recover damages.³⁸⁴ The only real way, then, to avoid the concern about holding public schools liable for money damages would be to provide for blanket immunity in all claims. Since that would mean schools would have no liability even in egregious cases of sex discrimination, race discrimination, or intentional harms to students, that option

377. See Losen et al., *supra* note 376.

378. In *Doe*, the Fourth Circuit expressed this very concern, saying “nothing short of expulsion of every student accused of misconduct involving sexual overtones would protect school systems from [Title IX] liability or damages.” *Doe v. Bd. of Educ.*, 605 F. App’x 159, 165 (4th Cir. 2015) (citation omitted).

379. Empirical research has shown that victims of sex abuse, particularly male victims, disproportionately become perpetrators. M. Glasser et al., *Cycle of Child Sexual Abuse: Links Between Being a Victim and Becoming a Perpetrator*, 179 BRIT. J. PSYCHIATRY 482, 488 (2001) (“Of all reported victims 59% were also perpetrators . . .”).

380. See *id.*

381. Moral hazard is defined as “the perverse consequences of well-intentioned efforts to share the burdens of life.” Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 239 (1996). Generalizing the concept from its origins in the potential hazards of insurance coverage, Baker further explains a moral hazard as existing “any time that one party’s actions have consequences for the risk of loss borne by another.” *Id.* at 272.

382. Suski, *supra* note 6, at 775–77.

383. See *id.* at 776 (“[T]he answer to schools’ financial concerns should not come at the expense of students’ safety and wellbeing but instead should be addressed through the states’ legislative and budgetary processes.”).

384. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290–91 (1998).

is untenable.³⁸⁵ Finally, because schools carry liability insurance, schools have protection from the potential financial consequences of liability.³⁸⁶

CONCLUSION

In the current evaluation, courts effectively require students who suffer sexual harassment and abuse in school to do what they largely cannot in order to access Title IX's protections. Through their development of the actual notice standard, courts essentially demand that students not only report their sexual harassment but also do so at particular times, to particular school officials, and with particular information. Yet empirical research on cognitive heuristics and child and adolescent neuroscience demonstrate that children will naturally face significant difficulties in making the decision to report their sexual harassment at all, let alone in the precise ways the courts require. Absent such reporting, however, schools have no obligation under Title IX to address student sexual harassment and abuse. Title IX's protections thus remain simply unavailable to most students who are sexually harassed or abused.

To remedy this legal impotence, Title IX doctrine and policy should account for the impact of cognitive heuristics and the immaturities of children's and adolescents' neurodevelopment on their decision-making. More specifically, courts should reconceptualize the actual notice standard to incorporate understandings from empirical research on children's mental processing. Further, courts should incorporate a burden-shifting framework in its evaluation

385. *See id.*

386. Malia Herman, *Threat of Data-Privacy Litigation Fuels District Insurance Purchases*, EDUC. WEEK (Oct. 19, 2015), <https://www.edweek.org/ew/articles/2015/10/21/threat-of-data-privacy-litigation-fuels-district-insurance.html> [<https://perma.cc/EY8H-MEE8>]; *see also* Dave Arnold, *Insuring Your Good Name*, NAT'L EDUC. ASS'N, <http://www.nea.org/home/14629.htm> [<https://perma.cc/P7D2-9PKP>]; *Errors & Omissions/General Liability Fund*, N.C. SCH. BOARDS ASS'N, <http://www.ncsba.org/risk-management/errors-omissionsgeneral-liability-fund/> [<https://perma.cc/VW34-72VT>]; *Risk Management Fund*, GA. SCH. BOARDS ASS'N, <https://gsba.com/member-services/risk-management/about-rms/risk-management-fund/#school> [<https://perma.cc/GCM8-XUCE>]. With such insurance, schools' operating resources are not used to pay civil claims, at least not directly, because such claims are paid by insurance policies. *See* Arnold, *supra*; *Errors & Omissions/General Liability Fund*, *supra*; *Risk Management Fund*, *supra*. Those policies thus protect the student population at large from experiencing any disadvantages as a result of the school having to pay an award in damages to any individual student. *See* Arnold, *supra*; *Errors & Omissions/General Liability Fund*, *supra*; *Risk Management Fund*, *supra*. While such insurance itself could generate a classic moral hazard by reducing schools' incentives to protect against sexual harassment because they will not have to pay for it, insurance companies can and do guard against those effects by not covering such claims. *See* Baker, *supra* note 381, at 280–81 (“[G]eneral controls over an insured’s ability to recover loss reflect the widespread agreement that insurance has a significant effect on what people do to recover from loss.”). Relatedly, in the context of police regulation, John Rappaport cogently contends that through the use of original empirical research, private insurance can have a significant role in part because the insurer “develops a financial incentive to reduce that risk through loss prevention.” John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1543–53 (2017). Although this is beyond the scope of this Article, much could be gained from similar empirical research to determine the full extent of the role private insurance could play in the public school context.

of actual notice to remedy the present unilateral assessment of whether schools have received sufficient information without regard for children's capacity to provide such information. Finally, Title IX should be amended to require schools to facilitate and encourage student reporting of sexual harassment and abuse. These changes would not only help eliminate the paradox that lies at the heart of Title IX's actual notice standard, but they would also reinvigorate Title IX's central purpose: to protect students who suffer sexual harassment and abuse in school.