

Reading, Writing, and Sexual Harassment: Finding a Constitutional Remedy When Schools Fail to Address Peer Abuse

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INTRODUCTION

In a Texas middle school, a thirteen-year-old girl allegedly was raped twice in one day by schoolmates.¹ According to a suit filed in federal court, she was first raped in a boys' restroom by four students while three others held her down.² School officials reportedly tried to cover up the incident after the boys begged a coach not to notify his superiors.³ "They basically just told her . . . to go back to class and deal with the problem," the family's attorney asserted.⁴ Later that day, two of the boys allegedly raped the special education student again under a stairwell outside the school.⁵ The complaint alleged that the girl's mother "had to demand" that school officials report the incident to authorities.⁶

In Chicago, a fourteen-year-old boy allegedly raped a ten-year-old girl in a secluded hallway after school officials allowed him to take the girl out of her classroom.⁷ Her aunt voiced the devastating effects of the attack: "To hear her say she doesn't even want to look in a mirror, at her own self, because she's ashamed—to me that's not something a 10-year-old should have to say to herself."⁸ After the attack, the girl's family kept her home while they attempted to transfer her to another school.⁹

In Pennsylvania, a hearing-impaired student charged in a federal lawsuit that she was physically molested and verbally harassed during a graphic arts class at her high school two to four times a week for several months.¹⁰ Another

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1. Jerry Urban & Melanie Markley, *Family of Girl Alleging Rapes Sues HISD*, HOUS. CHRON., Oct. 14, 1992, at A13.

2. *Id.*

3. *Id.*

4. *Id.* (quoting attorney L. Mickele Daniels).

5. *Id.*

6. *Id.* The lawsuit named the school district, school officials, the alleged attackers and their parents as defendants. *Id.*

7. Matt Murray, *Family Puts Rape Blame on School*, CHI. TRIB., Feb. 13, 1992, § 2, at 4.

8. *Id.*

9. *Id.* The girl's family was considering a lawsuit against the school at the time the news story was written. *Id.*

10. *D.R. v. Middle Bucks Area Voc. Tech. Sch.*, 972 F.2d 1364, 1366 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1045 (1993).

girl said she was molested two to three times a week during the same class.¹¹ The girls alleged that several boys forced them into a unisex bathroom and a darkroom, both of which were located in the classroom, where the boys touched their breasts, sodomized them, and forced them to perform acts of fellatio.¹² The female students also claimed they were forced to watch the boys perform similar acts on their classmates.¹³ These events allegedly occurred in a generally rowdy classroom under the supervision of a student teacher who, according to the girls, "was or should have been in the classroom during the time of the acts"¹⁴

Rape and molestation provide drastic examples of the types of sexual harassment students inflict on their peers. Far more widespread, however, are the more "innocent" forms of sexual harassment encountered by students in classrooms, hallways, and playgrounds of schools in the United States. The results of a study published in 1993 by the American Association of University Women ("AAUW") reported that 81% of surveyed students said they had experienced some form of sexual harassment, ranging from sexual remarks to physical contact.¹⁵ A surprising 85% of girls and 76% of boys reported experiencing "unwanted and unwelcome sexual behavior that interferes with their lives."¹⁶ Though some adults have referred to the sexual remarks and touching as harmless adolescent behavior,¹⁷ such conduct can

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. THE AMERICAN ASSOCIATION OF UNIVERSITY WOMEN EDUCATIONAL FOUNDATION, HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS 7 (June 1993) [hereinafter HOSTILE HALLWAYS]. Students in the eighth through eleventh grades in 79 public schools were asked:

During your whole school life, how often, if at all, has anyone (this includes students, teachers, other school employees, or anyone else) done the following things to you *when you did not want them to?*

- * Made sexual comments, jokes, gestures, or looks.
- * Showed, gave, or left you sexual pictures, photographs, illustrations, messages, or notes.
- * Wrote sexual messages/graffiti about you on bathroom walls, in locker rooms, etc.
- * Spread sexual rumors about you.
- * Said you were gay or lesbian.
- * Spied on you as you dressed or showered at school.
- * Flashed or "moonied" you.
- * Touched, grabbed, or pinched you in a sexual way.
- * Pulled at your clothing in a sexual way.
- * Intentionally brushed against you in a sexual way.
- * Pulled your clothing off or down.
- * Blocked your way or cornered you in a sexual way.
- * Forced you to kiss him/her.
- * Forced you to do something sexual, other than kissing.

Id. at 5 (emphasis in original). Students were given the following response choices: often, occasionally, rarely, never, and not sure. *Id.* at 6.

16. *Id.* at 7.

17. See, e.g., Jane Gross, *Schools Are Newest Arenas for Sex-Harassment Issues*, N.Y. TIMES, Mar. 11, 1992, at B8 (reporting that a California principal said that "what may look like harassment is often just harmless adolescent exploration"); Peter Kendall, *Sexual Harassment: Can It Happen in 3rd Grade?*, CHI. TRIB., Nov. 3, 1992, § 1, at 1, 6 (quoting elementary school principal as saying "[c]hildren are going to bother each other, tease each other and make each other feel bad But that is the story

have a serious impact on students, causing some to drop out of a class¹⁸ or school¹⁹ and causing them to view themselves as second-class citizens.²⁰ One mother believes that sexual harassment by classmates caused her daughter to become distraught and fearful of school and to contemplate her own death.²¹ For one young woman who was molested by schoolmates while attending a youth hockey tournament and then cruelly harassed at school for bringing charges against her attackers, the results were far more tragic. On returning to school, she faced students who called her "slut" and "whore" and graffiti on her locker that read, "Kill the bitch, she took our friends to court."²² Reportedly, when the girl complained to a vice principal, he told her that he was too busy to deal with her problem and that she should clean the locker herself.²³ Distraught by the harassment, she ended her life at the age of eighteen.²⁴

Though the AAUW study found that both girls and boys experience sexual harassment in school, more girls reported such harassment than did boys.²⁵ In addition, girls report being harassed more often than boys; and girls, especially African-American girls, report more severe problems associated with the harassment.²⁶ One educator and civil rights specialist has

of man. That's part of growing up. I really think that [calling it sexual harassment] is too far out"); see also Richard Starr, *Harassment Alarm Rings False*, INSIGHT, June 28, 1993, at 40 (criticizing the AAUW study for including in its definition of sexual harassment experiences other than being forced to do something sexual besides kissing and being spied on while dressing or showering). Starr wrote: "Much of what *Hostile Hallways* describes is boorish, brutal, uncivilized behavior. Doubtless it deserves to be punished and suppressed. But in a strictly statistical sense, it's 'normal' behavior for children going through what used to be called the 'awkward age.'" *Id.*

18. See, e.g., Gross, *supra* note 17 (reporting that a high school girl transferred out of a computer class after a group of boys continued to taunt her with suggestive remarks).

19. See, e.g., Sue Ellen Christian & Melita Marie Garza, *For Teens, Child's Play Can Become Sexual Harassment*, CHI. TRIB., Oct. 29, 1991, at 1, 17 (reporting allegations by Chicago students that abusive incidents caused their 16-year-old classmate to quit school).

20. "Girls are learning that they are second-class citizens, only valued for their physical attributes This has a terribly detrimental effect on girls—and on boys. They will never learn equal relationships unless they are told this is not appropriate." Gross, *supra* note 17 (quoting the report of Sharon Schuster, president of the AAUW).

21. John M. Leighty, *When Teasing Goes over the Line*, S.F. CHRON., Nov. 8, 1992, at 12 (discussing the effects of harassment on an eighth-grader who was taunted for several months about the size of her breasts by a group of boys at school).

22. JoAnn Strauss, Note, *Peer Sexual Harassment of High School Students: A Reasonable Student Standard and an Affirmative Duty Imposed on Educational Institutions*, 10 LAW & INEQ. J. 163, 164 (1992) (citing Doug Grow, *Suicide Ended Kathi's 'Fight for Dignity'*, MINN. STAR & TRIB., July 5, 1987, at 1A).

23. *Id.* at 164.

24. *Id.*

25. Fifty-eight percent of all students surveyed said they had experienced at least one form of harassment "often" or "occasionally." HOSTILE HALLWAYS, *supra* note 15, at 7. When broken down by gender, 66% of the girls and 49% of the boys answered this way. Thirty-one percent of the females, contrasted with 18% of the males reported being harassed "often." *Id.*

26. *Id.* at 15. For example, 23% of students who reported harassment said they did not want to attend school as a result; 33% of the girls surveyed said this (African American females: 39%; white females: 33%; and hispanic females: 29%). *Id.* Twelve percent of boys also reported this. *Id.* Twenty-three percent of the students reported not wanting to talk as much in class (girls: 32%; boys: 13%), *Id.* at 15, and 28% of girls and 13% of boys found it harder to pay attention in school. *Id.* at 16. Furthermore, 20% of girls and 6% of boys reported making a lower grade in a class. *Id.*

commented: "Although young men can also be victims of sexual harassment, it occurs less frequently, is usually less severe in form and seems to have less impact on their self-esteem and life choices."²⁷ Earlier studies showed a greater disparity between the number of girls and the number of boys who had been sexually harassed than the AAUW report showed. For example, one study showed that 40% to 60% of girls and 10% of boys say they have been sexually harassed.²⁸ Whatever the exact numbers may be, the studies demonstrate that peer sexual harassment in schools is a serious problem that has a disproportionate effect on female students.

Courts have found sexual harassment of city and state government employees by their fellow employees and supervisors to be a form of sex discrimination and thus violative of the Equal Protection Clause of the Fourteenth Amendment.²⁹ Likewise, courts have held that students may sue school districts for failing to act when teachers have sexually harassed them.³⁰ But when a *private actor* such as a fellow student inflicts the harassment or abuse the issue becomes muddy. This Note argues that when schools improperly or inadequately respond to sexual abuse or harassment inflicted by students on students or where schools create situations in which sexual abuse thrives, they have treated students differently on the basis of sex and are subject to monetary liability under federal civil rights laws. Of course, a school district or employee cannot be held liable for every sexual comment or advance made by a student.³¹

Nevertheless, a child should be able to recover damages if she is repeatedly subjected to offensive remarks or advances or is the victim of a sufficiently

Sixty-four percent of girls and 36% of boys felt embarrassed because of the harassment. *Id.* Forty-three percent of girls and 14% of boys felt less confident about themselves, while 16% of boys, compared to 8% of girls, said the harassment caused them to feel more popular. *Id.* at 17. Thirty-nine percent of girls and 8% of boys said sexual harassment made them feel scared, while 70% of girls, compared with 24% of boys, said the harassment made them "very upset" or "somewhat upset." *Id.*

27. Leighty, *supra* note 21, at 12 (quoting the report of Nan D. Stein). Stein also notes that sexual harassment is a common occurrence for female students who are enrolled in traditionally male courses such as auto mechanics. *Id.* Surveys conducted in Minnesota and Massachusetts suggest that 50% of all females have been victims of sexual harassment in elementary and secondary schools; 70% of the harassment reportedly came from classmates and 30% from teachers. *Id.*

28. Christian & Garza, *supra* note 19, at 17 (quoting the statement of Eleanor Linn, Director of programs for Educational Opportunity based at the University of Michigan).

29. *See, e.g., Volk v. Coler*, 845 F.2d 1422 (7th Cir. 1988); *Bohen v. City of East Chicago*, 799 F.2d 1180 (7th Cir. 1986).

30. *See, e.g., Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720 (3d Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990); *K.L. v. Southeast Delco Sch. Dist.*, 828 F. Supp. 1192 (E.D. Pa. 1993); *C.M. v. Southeast Delco Sch. Dist.*, 828 F. Supp. 1179 (E.D. Pa. 1993).

31. Courts might want to adopt standards similar to those used in employment situations. For example, the Equal Employment Opportunity Commission defines sexual harassment in employment in this way: "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a) (1993). For a discussion of using this hostile environment standard to allow students to recover for sexual harassment, see Monica L. Sherer, Comment, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119 (1993).

harmful incident such as a rape or molestation that would have been avoided had school authorities taken reasonable action.

Because many states clothe local government bodies with immunity under state tort law,³² children who have been injured at school have tried to recover for their damages under the federal Constitution and § 1983 of the Civil Rights Act of 1871.³³ To make out a prima facie case under § 1983 based on a constitutional violation, a plaintiff must show that government conduct was a "cause in fact of plaintiff's constitutional deprivation."³⁴ In addition, the Supreme Court has held that the plaintiff's injury must not be "too remote" a consequence of government action.³⁵

In many cases of physical sexual abuse, plaintiffs have brought substantive due process claims for the deprivation of their liberty interests³⁶ in bodily security under § 1983.³⁷ These schoolchildren have received varying responses from federal district and appellate courts, which are still struggling with a 1989 Supreme Court decision that severely limited recovery from state agencies for injuries inflicted by private parties.³⁸ Part I of this Note examines due process theories proposed on behalf of schoolchildren and assesses their viability under recent case law. Part II discusses the advantages an equal protection claim provides for plaintiffs and explores arguments under § 1983.

Though this Note focuses on constitutional remedies for peer sexual harassment, recent developments under Title IX of the Education Amendments of 1972³⁹ merit mention. Section 1983 might offer benefits for some plaintiffs that Title IX does not. For example, Title IX only applies to

32. Note, however, that legislative and judicial actions have partially eroded the doctrine of governmental immunity for negligent acts in about half of the states. MARTHA M. MCCARTHY & NELDA H. CAMBRON-MCCABE, *PUBLIC SCHOOL LAW: TEACHERS' AND STUDENTS' RIGHTS* 471 (2d ed. 1987). For a more detailed look at state immunity laws which protect schools, see Allan E. Korpela, Annotation, *Modern Status of Doctrine of Sovereign Immunity as Applied to Public Schools and Institutions of Higher Learning*, 33 A.L.R.3d 703 (1970 & Supp. 1993). The federal remedy has the added advantage of allowing attorney's fees for some plaintiffs who might otherwise be financially unable to bring a claim. See 42 U.S.C. § 1988 (1988).

33. 42 U.S.C. § 1983 (1988). The statute provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage; of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Id.

34. 1 SHELDON H. NAHMOD, *CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983* § 2.01, at 52 (3d ed. 1991). For more on the mechanics of § 1983, see *id.*

35. *Martinez v. California*, 444 U.S. 277, 285 (1980). For further discussion of proximate cause, see NAHMOD, *supra* note 34, § 3.24.

36. The Supreme Court has recognized a liberty interest in being "free from . . . unjustified intrusions on personal security." *Ingraham v. Wright*, 430 U.S. 651, 673 (1977) (footnote omitted).

37. 42 U.S.C. § 1983. Plaintiffs may also sue individual government employees to hold them personally liable. MCCARTY & CAMBRON-MCCABE, *supra* note 32, at 305-06. This note, however, will not discuss such claims.

38. *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989).

39. 20 U.S.C. § 1681 (1988).

schools that are receiving federal funds. If a school's funds have been cut off because of a prior violation, plaintiff might have no recourse under Title IX. In addition, § 1983 allows plaintiffs to sue individuals, while Title IX has been held to allow plaintiffs to sue only institutions.⁴⁰ At least one commentator, however, has speculated that Title IX might now provide an easier way to hold school districts liable than § 1983,⁴¹ but the Supreme Court has left this unclear.⁴² Under Title IX, public schools that receive federal funds are required to offer equal services to boys and girls, with some exceptions.⁴³

40. *E.g.*, *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 901 (1st Cir. 1988); *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1576-77 (N.D. Cal. 1993).

41. William D. Valente, *Liability for Teacher's Sexual Misconduct with Students—Closing and Opening Vistas*, 74 Educ. L. Rep. (West) 1021, 1030 (July 30, 1992).

42. See Ralph D. Mawdsley, *Compensation for the Sexually Abused Student*, 84 Educ. L. Rep. (West) 13, 28 (Sept. 23, 1993). For a more detailed discussion of using Title IX to recover from school districts for their failure to respond adequately to peer sexual harassment, see Sherer, *supra* note 31, and Strauss, *supra* note 22.

43. Title IX provides: "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 . . ." 20 U.S.C. § 1681(a). The act then describes nine exceptions. § 1681(a)(1)-(9).

In a few states, plaintiffs may want to turn to Title IX because § 1983 actions against school districts are restricted or barred. In states which consider school districts arms of the state, plaintiffs have been barred from bringing § 1983 actions in federal court because the Eleventh Amendment of the U.S. Constitution prevents states and their agencies from being sued in federal court. *E.g.*, *Petaluma City*, 830 F. Supp. at 1577. Eleventh Amendment immunity for violations of Title IX, however, has been abrogated by 42 U.S.C. § 2000-7(a)(1) (1988). For a discussion of when a school district has been considered an arm of the state for Eleventh Amendment purposes, see David L. Dagley & Lawrence L. Oldaker, *Are School Districts State Actors (Alter Egos)?*, 79 Educ. L. Rep. (West) 367 (Feb. 25, 1993) (stating that courts have held school districts in Utah, New Mexico, and California to be state agencies). In addition, the Supreme Court has held that under § 1983, states are not suable persons, regardless of where they are sued. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). *Will* might, however, have no effect on local school districts. The Supreme Court in *Monell v. Department of Soc. Servs. of the City of New York*, 436 U.S. 658, 695-701 (1978), presumed that, for § 1983 purposes, school boards were more closely related to municipalities than states. Dagley & Oldaker, *supra* at 377 n.68.

Another potential problem for plaintiffs suing under both Title IX and § 1983 is that the equal protection claim might be "subsumed" by Title IX. *Williams v. School Dist. of Bethlehem*, 998 F.2d 168, 176 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 689 (1994). *Pfeiffer v. Marion Center Area Sch. Dist.*, 917 F.2d 779, 789 (3d Cir. 1990). In *Pfeiffer*, the Third Circuit held that Title IX's enforcement scheme was sufficiently comprehensive to indicate that Congress intended to foreclose § 1983 causes of action. *Id.* at 789. The court relied on the doctrine set forth by the Supreme Court in *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), in which the Court held that a plaintiff may not enlarge the remedies of a federal statute by basing a § 1983 claim on that statute under the "and laws" provision of § 1983. See also *Smith v. Robinson*, 468 U.S. 992, 1011-13 (1984) (holding that the comprehensive enforcement scheme of the Education of the Handicapped Act precluded plaintiff's equal protection claim); *Mabry v. State Bd. for Community Colleges and Occupational Educ.*, 597 F. Supp. 1235, 1239 (D. Colo. 1984) (holding that Title IX's enforcement scheme is sufficiently comprehensive to preclude § 1983 claims), *aff'd on other grounds*, 813 F.2d 311 (10th Cir. 1987), *and cert. denied*, 484 U.S. 849 (1987). But see *Leffel v. Wisconsin Interscholastic Athletic Ass'n*, 444 F. Supp. 1117, 1120 (E.D. Wis. 1978) (holding that Title IX cannot foreclose the constitutional claim).

In *Smith v. Robinson*, the Court was concerned that plaintiffs would be able to receive a remedy that Congress did not intend, and that they would be able to bypass important administrative procedures if it allowed equal protection claims. 468 U.S. 992. The main issue was whether plaintiff could recover attorney's fees under 42 U.S.C. § 1988 by bringing a § 1983 equal protection claim. The Education of the Handicapped Act ("EHA"), 20 U.S.C. § 1400-1485 (1988 & Supp. IV 1992), did not provide for attorney's fees. The Court felt this omission meant that Congress did not intend for plaintiffs' to collect

In 1992, the Supreme Court held in *Franklin v. Gwinnett County Public Schools*⁴⁴ that a student who was sexually harassed by a teacher could recover monetary damages from the school district under Title IX.

Recently, a federal district court held that a student could bring a hostile environment claim⁴⁵ against a school district if she alleges that the school or its employees intended to discriminate against her by, for example, failing to adequately address her complaints of peer sexual harassment.⁴⁶ The most interesting aspect of the court's opinion in *Doe v. Petaluma City School District* was that it interpreted the Supreme Court's decision in *Franklin v. Gwinnett County Public Schools* as allowing respondeat superior liability to hold a school district liable under Title IX.⁴⁷ Under this theory, if a teacher intentionally discriminates by failing to act or attempting to cover up sexual harassment, the school district could be liable under Title IX if the employee was acting within the scope of her authority or if the employer knew or should have known about the discrimination.⁴⁸ Arguably, a teacher or principal acts within her authority when she decides whether to discipline a child, recommend discipline, refer a student to counseling, or report abuse to

attorney's fees. In addition, the Court was concerned that allowing a § 1983 action would let plaintiffs go directly to court, bypassing the extensive procedural mechanisms of the EHA. The Court felt this would "run counter to Congress' view that the needs of handicapped children are best accommodated by having the parents and the local education agency work together to formulate an individualized plan for each handicapped child's education." *Id.* 468 U.S. at 1012. The *Smith* decision, however, should not be applied to Title IX because the EHA is much more detailed and comprehensive than Title IX. In addition, attorney's fees are already available to Title IX plaintiffs. 42 U.S.C. § 1988; see *supra* note 32.

Mississippi University for Women v. Hogan, 458 U.S. 718 (1982), offers some evidence that the Supreme Court would not find Title IX to be exclusive. In *Hogan*, the Court allowed a male plaintiff to bring an equal protection claim against an all-female school, even though Title IX would have upheld the denial of his admission. Whereas the Court in *Smith* appeared to base its decision on the idea that Congress was enforcing the Equal Protection Clause when it enacted the EHA, stating that "[t]he EHA is a comprehensive scheme set up by Congress to aid the states in complying with their constitutional obligations" *Smith*, 468 U.S. at 1009, the Court in *Hogan* was not convinced that Congress enacted Title IX in furtherance of its power to enforce the Fourteenth Amendment. *Hogan*, 458 U.S. at 732.

Because Congress responded to *Smith* by amending the EHA to allow plaintiffs to bring equal protection claims along with their EHA claims, Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, § 3, 100 Stat. 796, 797 (1986) (codified at 20 U.S.C. § 1415(f) (1988)), courts should carefully consider whether the legislative history of a statute "unequivocally demonstrate[s]" that Congress intended to foreclose constitutional claims. NAHMOD, *supra* note 34, § 2.12, at 117.

44. *Franklin*, 112 S. Ct. 1028 (1992).

45. Plaintiffs have brought hostile environment sexual harassment claims against employers when they have been subjected to sexual harassment that was "sufficiently severe or pervasive 'to alter the conditions of employment and create an abusive working environment.'" *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 60 (1986) (citation omitted) (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)); see also *Patricia H. v. Berkeley Unified Sch. Dist.*, 836 F. Supp. 1288, 1293 (N.D. Cal. 1993) (holding that hostile environment claims may also be brought under Title IX).

46. *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1576 (N.D. Cal. 1993).

47. "Although not expressly stated in the opinion, the rule laid down by *Franklin* appears to be that, under Title IX, damages are available only for intentional discrimination, but that respondeat superior liability exists, so that an institution is deemed to have intentionally discriminated when one of its agents has done so." *Id.* at 1575.

48. See Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at Meritor Savings Bank, FSB v. Vinson*, 44 VAND. L. REV. 1229, 1244-46 (1991), and sources cited therein for a discussion of the respondeat superior theory.

parents or other administrators. If this is the case, Title IX might provide an easier route to recovery than § 1983 under circumstances in which a plaintiff must show that school employees had a widespread discriminatory custom or practice that caused the violation. The Supreme Court, however, did not explicitly state that it was applying respondeat superior liability to hold the school district liable in *Franklin*. In addition to the teacher's sexual harassment, the plaintiff also alleged that when she told school administrators that the teacher was harassing her they did not act to stop him and they discouraged her from bringing a claim against him.⁴⁹ This has led at least one court to believe that a school district can be liable for an employee's discriminatory acts only if policy-makers were aware of the harassment and did nothing to stop it.⁵⁰ An answer to this controversy is beyond the scope of this Note.

One point, however, seems clear: A plaintiff must show that some school authority intended to discriminate against her on the basis of sex in order to receive monetary damages under Title IX.⁵¹ Therefore, the theories for proving an intent to discriminate posed in Part II are valuable in the context of Title IX, as well as the Equal Protection Clause.

There are several types of activity or inactivity for which a school district might be found to have violated the rights of a student. They include a single decision of a policy-maker such as a school board or administrator;⁵² an official policy of the board or other policy-makers;⁵³ a widespread custom or practice that policy-makers knew or should have known about;⁵⁴ and a failure to train employees to deal with students in a way that will not violate

49. *Franklin v. Gwinett County Pub. Sch.*, 112 S. Ct. 1028, 1031 (1992).

50. *Floyd v. Waiters*, 831 F. Supp. 867, 876 (M.D. Ga. 1993) "In Title IX . . . Congress defined 'program or activity' to mean, among other things, 'operations of . . . a school system.' This definition does not include the agents of such an entity. Thus, common-law agency principles do not apply to claims under Title IX." *Id.*

51. *Franklin*, 112 S. Ct. at 1037; *Cannon v. Univ. of Chicago*, 648 F.2d 1104, 1110 (7th Cir. 1981), *cert. denied*, 454 U.S. 1128 (1981); *Petaluma City*, 830 F. Supp. at 1575.

52. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989). In most cases, governing bodies of educational institutions are considered policy-makers; however, identification of policy-makers is a matter of state law. Jeff Horner, Commentary, *When Is a School District Liable Under 42 U.S.C. § 1983?—The Evolution of the "Policy or Custom" Requirement*, 64 Educ. L. Rep. (West) 339, 347 (1991) (citing *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988)).

Most non-administrative employees such as teachers, drivers, and custodians probably would not be policy-makers because their actions are not "final and unreviewable," but in some cases a superintendent or other high-level administrator may be considered a policy-maker if she has final judgment. Horner, *supra* at 348. This note will not attempt to identify a test for determining which school employees are considered policy-makers.

53. *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).

54. *Praprotnik*, 485 U.S. 112; *Monell*, 436 U.S. 658; *Spell v. McDaniel*, 824 F.2d 1380 (4th Cir. 1987), *cert. denied*, 481 U.S. 1027 (1988). One commentator has explained:

"Policy" involves statements, actions, regulations, bylaws or ordinances officially adopted by a public entity's governing body or individuals who have been delegated policymaking authority by that body. "Custom" relates to abusive practices so persistent that a municipal policymaker has actual or constructive knowledge of the practices and accedes to their continuation.

Horner, *supra* note 52, at 347.

their constitutional rights.⁵⁵ A school board is not likely to issue a rule that students abuse each other or that teachers who view this abuse should ignore the behavior. A board might, however, decide to run a school in such a way as to create a more dangerous school environment by hiring inexperienced teachers, or failing to employ or adhere to proper disciplinary and grievance procedures.

In addition, a policy-maker could make a single decision to try to cover up or ignore harassment or abuse.⁵⁶ Because teachers, counselors, and principals have the most direct contact with students, however, it seems more likely that students will bring their cases under the theory that school employees have a widespread custom or practice that caused or contributed to the constitutional violation or on the theory that the school district has failed to train its employees to deal with students in a manner that will not violate their rights. When a student brings a substantive due process claim against schools for injuries inflicted by other students, the case generally ends when the court finds that the school owes no affirmative duty to protect the child from third parties because the child is not in school custody and the school has not created the danger or put the student in a worse position. Therefore, the courts do not have to determine whether the school is liable for a practice or custom of its employees. Under the Equal Protection Clause, however, this becomes a more critical issue. Therefore, Part II addresses the question of when a school district should be liable for the acts of its employees who are not considered policy-makers.

I. SUBSTANTIVE DUE PROCESS

Finding a duty to protect students' liberty interests under the Due Process Clause of the Fourteenth Amendment⁵⁷ would allow victims of physical abuse and injuries to recover, regardless of whether they were deemed victims of sexual harassment or discrimination. The crucial problem under substantive due process, however, is finding that schools have an affirmative duty to act to prevent injury by private parties.⁵⁸ The United States Supreme Court firmly planted this stumbling block in the paths of plaintiffs in *DeShaney v. Winnebago County Department of Social Services*.⁵⁹

55. *City of Canton v. Harris*, 489 U.S. 378 (1989).

56. *E.g.*, *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720 (3d Cir. 1989), *cert. denied*, 493 U.S. 1044 (1980).

57. Section 1 of the Fourteenth Amendment reads in relevant part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

58. As will be discussed *infra*, an affirmative duty to act can more easily be found under the Equal Protection Clause.

59. *DeShaney*, 489 U.S. 189 (1989).

A. *The Facts and Holding of DeShaney*

When Joshua DeShaney was four, his father beat him so severely that he entered a life-threatening coma. As a result, he is expected to be profoundly retarded for the remainder of his life, which he likely will spend confined in an institution.⁶⁰ His mother brought a civil rights action under § 1983 against Winnebago County, the Winnebago County Department of Social Services ("DSS"), and various employees of the DSS. The DeShaneys claimed that the defendants deprived Joshua of his liberty interest without due process of law in violation of the Fourteenth Amendment because they did not intervene to protect him from his father, who the defendants knew or should have known posed a threat to Joshua.⁶¹ The Court held that the defendants were not liable because the purpose of the Due Process Clause "was to protect the people from the State, not to ensure that the State protected them from each other."⁶² The Court acknowledged, however, that in "limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals."⁶³ The Court cited cases in which it had held that the State is required to provide incarcerated prisoners with adequate medical care⁶⁴ and involuntarily committed mental patients with enough services to ensure their "reasonable safety" from themselves and others.⁶⁵ The Court stated:

In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.⁶⁶

Chief Justice Rehnquist, writing for the majority, said the *Estelle-Youngberg*⁶⁷ affirmative duty analysis was of no help to petitioners because Joshua's injuries did not occur while he was in custody of the government. He suggested, however, that if the local government had placed Joshua in a foster home operated by its agents, it might have had an affirmative duty to protect him.⁶⁸ Chief Justice Rehnquist went on to note that the government played no part in creating the dangers Joshua faced, nor did it render him more

60. *Id.* at 193.

61. *Id.*

62. *Id.* at 196.

63. *Id.* at 198.

64. *Id.* (citing *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976) (holding that the Eighth Amendment's prohibition against cruel and unusual punishment, made applicable to the states through the Due Process Clause, requires states to provide adequate medical care to inmates)).

65. *Id.* at 199 (citing *Youngberg v. Romeo*, 457 U.S. 307, 314-25 (1982) (extending the affirmative duty analysis beyond the Eighth Amendment setting to hold that the Due Process Clause requires a state to provide certain services to involuntarily committed mental patients)).

66. *Id.* at 200.

67. See *supra* notes 64-66 and accompanying text.

68. *DeShaney*, 489 U.S. at 201 n.9.

vulnerable to them.⁶⁹ Courts have interpreted this statement as meaning that creating a danger or putting a plaintiff in a more vulnerable position creates a special relationship between the municipality and the child. From these statements, attorneys for injured schoolchildren have found grounds to argue that schools are responsible for protecting students despite the outcome in *DeShaney*.

In *DeShaney*, the Supreme Court implied that to hold a governmental entity liable for a due process violation when a private party causes the underlying injury, the plaintiff must establish that the government entity had an affirmative duty to protect her because of a special relationship *and* that a direct causal link existed between the constitutional violation and the entity's decision, policy, custom, or practice.⁷⁰ The remainder of Part I looks at how the lower federal courts have grappled with this requirement.

B. Imposing an Affirmative Duty Under Substantive Due Process

Students seeking to recover from school districts and officials have brought three different arguments under § 1983 and the Due Process Clause: a functional custody argument, a state-created danger argument, and a policy or custom argument. The theory that students are in the functional custody of schools for purposes of the Due Process Clause has received a negative reception from several federal appellate courts, though several district courts have accepted it.⁷¹ Though courts generally accept the argument that a state has an affirmative duty to protect when it creates a danger or renders a person more vulnerable, attorneys have had difficulty convincing courts that public schools have created such a danger.⁷² Finally, courts have held that students bringing claims against school districts and employees for injuries inflicted by school personnel can have a cause of action based on the policy or custom argument alone;⁷³ but since *DeShaney*, lower courts have held that this argument is insufficient in due process actions when a private actor committed the underlying violative act.⁷⁴

69. *Id.* But see the dissent written by Justice Brennan and joined by Justices Marshall and Blackmun, focusing on the actions taken by the State to cut off sources of private aid. *Id.* at 205-07.

70. Gail Paulus Sorenson, *School District Liability for Federal Civil Rights Violations Under Section 1983*, 76 Educ. L. Rep. (West) 313, 316 (Oct. 8, 1992). The *DeShaney* Court said that because the Due Process Clause did not require the State to protect the boy from his father, it did not have to address whether individual state actors had the requisite state of mind for a due process violation or whether the allegations supported a § 1983 claim against the county and the local agency under *Monell* and its "progeny." *DeShaney*, 489 U.S. at 202 n.10. *Monell* held that a government could not be liable for its agents' actions on a respondeat superior theory, but that it could be held liable for its customs or policies. *Monell*, 436 U.S. 658. Later cases sketched out how those customs and policies come into existence.

71. See *infra* part I.B.1.

72. See *infra* part I.B.2.

73. *E.g.*, *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720 (3d Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990).

74. *D.R. v. Middle Bucks Area Voc. Tech. Sch.*, 972 F.2d 1364 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1045 (1993); *Elliott v. New Miami Bd. of Educ.*, 799 F. Supp. 818 (S.D. Ohio 1992); *Russell v. Fannin County Sch. Dist.*, 784 F. Supp. 1576 (N.D. Ga. 1992), *aff'd without opinion*, 981 F.2d 1263

1. Functional Custody Theory

Students arguing that they were in a school's custody when they were injured have asserted that "compulsory attendance and the school defendants' exercise of *in loco parentis* authority over their pupils so restrain school children's liberty that plaintiffs can be considered to have been in state 'custody' during school hours for Fourteenth Amendment purposes."⁷⁵ The Third, Seventh, and Tenth Circuits have explicitly rejected the functional custody theory. Though the Fifth Circuit once supported the theory, it has recently backed away from that position.⁷⁶

The Third Circuit took a stand against the theory in *D.R. v. Middle Bucks Area Vocational Technical School* which involved a teenage girl who was repeatedly molested by male students for several months.⁷⁷ The Third Circuit, sitting en banc, held that school defendants did not restrict the special education student's freedom "to the extent that she was prevented from meeting her basic needs."⁷⁸ The court rejected plaintiff's analogy between a schoolchild and a prisoner or an involuntarily committed mental patient, stating that "school children remain resident in their homes. Thus, they may turn to persons unrelated to the state for help on a daily basis."⁷⁹ Addressing the suggestion in *DeShaney* that a municipality might be liable if it had taken Joshua out of his home and placed him in foster care, the court said students are not sufficiently analogous to foster children because foster children depend on the state, through their foster families, to meet their basic needs.⁸⁰

The Third Circuit followed in the footsteps of the Seventh Circuit, which had held in *J.O. v. Alton Community Unit School District 11* that a girl abused by a teacher did not have a cause of action under the functional custody theory because the school had not rendered her unable to care for herself.⁸¹ In *Maldonado v. Josey*,⁸² the Tenth Circuit followed the reasoning of *Middle Bucks* and *Alton Community* and rejected the functional custody theory. Mark Maldonado died of strangulation after his bandana became caught on a coat rack in a cloakroom. The Tenth Circuit held that the boy's parent could not recover from school defendants for their failure to supervise his son because the state's "compulsory attendance laws in no way restrain a child's liberty

(11th Cir. 1992).

75. *Middle Bucks*, 972 F.2d at 1370.

76. The Eleventh Circuit appears to side with the Third, Seventh, and Tenth Circuits. It affirmed *Russell*, but it wrote no opinion to explain its action. 981 F.2d 1263 (11th Cir. 1992).

77. *Middle Bucks*, 972 F.2d at 1366.

78. *Id.* at 1372.

79. *Id.*; see also *J.O. v. Alton Community United Sch. Dist. 11*, 909 F.2d 267, 272 (7th Cir. 1990).

80. *Middle Bucks*, 972 F.2d at 1372. The Supreme Court in *DeShaney* suggested that if Joshua had been taken from his home and placed in a foster home, the agency might have had an affirmative duty to protect him. *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 201 n.9 (1989). The Supreme Court, however, declined to express a definitive view on the foster care analogy. *Id.*

81. *Alton Community*, 909 F.2d 267 (stating, however, that plaintiff might have succeeded in stating a cause of action if she had used the theory that school policies allowed sexual abuse to occur).

82. *Maldonado*, 975 F.2d 727 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1266 (1993).

so as to render the child and his parents unable to care for the child's basic needs."⁸³

In *Doe v. Taylor Independent School District*, the Fifth Circuit supported the functional custody approach, at least in cases where the abuser was a school employee. The functional custody theory was one of two theories the court used to impose liability on school officials who supervised an abusive teacher.⁸⁴ In 1992, the Fifth Circuit wrote that "by compelling a child to attend public school, the state cultivates a special relationship with that child and thus owes him an affirmative duty of protection."⁸⁵ By separating the child from her parent and natural protector, the state takes on a duty to protect that child.⁸⁶ Furthermore:

[I]f state agents responsible for the well-being of the child, know of an asserted danger to such a child yet consciously fail to safeguard the child from that danger, they will be liable for those injuries sustained by the child provided that the injuries are affirmatively linked to the state agents' nonfeasance.⁸⁷

The Fifth Circuit noted that it was not deciding the question of a school official's duty when injuries are inflicted by private parties. The court, however, favorably cited pre-*DeShaney* cases in which it said that a public school assumes a duty to protect schoolchildren from dangers posed by their own anti-social activities and those of other students.⁸⁸ In light of *DeShaney* and cases in which the Supreme Court has held a municipality liable when the plaintiff was injured by private parties while in its custody,⁸⁹ the natural conclusion is that if a student is found to be in the custody of a school, the school must take reasonable steps to protect that child from abuse by other students.⁹⁰ On rehearing, however, the Fifth Circuit did not take the position

83. *Id.* at 731.

84. *Doe v. Taylor Indep. Sch. Dist.*, 975 F.2d 137 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1066 (1993), and *vacated*, 987 F.2d 231 (5th Cir. 1993), *aff'd in part, rev'd in part*, No. 90-8431, 1994 WL 45241 (Mar. 3, 1994).

85. *Id.* at 147 (footnote omitted).

86. *Id.* at 146.

87. *Id.* (citing *Yvonne L. v. New Mexico Dep't of Human Servs.*, 959 F.2d 883, 890 (10th Cir. 1992)).

88. *Id.* at 145 (citing *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 480 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983), and *Lopez v. Houston Indep. Sch. Dist.*, 817 F.2d 351, 356 (5th Cir. 1987)).

89. *See, e.g., Smith v. Wade*, 461 U.S. 30 (1983) (holding prison liable for failure to protect inmate from dangerous prisoner).

90. Cases in which federal district courts have approved of the functional custody analysis include *D.R. v. Middle Bucks Area Voc. Tech. Sch.*, No. Civ.A. 90-3018, No. Civ.A. 90-3060, 1991 WL 14082 (E.D. Pa. Feb. 1, 1991) (holding that students were in school's custody but that plaintiffs failed to prove school district maintained a lax policy), *rev'd*, 972 F.2d 1364 (3d Cir. 1992); *Waechter v. School Dist. No. 14-030*, 773 F. Supp. 1005 (W.D. Mich. 1991); *Robert G. v. Newburgh City Sch. Dist.*, No. 89 Civ. 2978, 1990 U.S. Dist. LEXIS 91 (S.D.N.Y. Jan. 8, 1990); *Pagano v. Massapequa Pub. Sch.*, 714 F. Supp. 641 (E.D.N.Y. 1989) (stating that school situation in which child was repeatedly harassed and assaulted by fellow students was more like foster care than it was like *DeShaney*).

Cases in which federal district courts have disapproved of the custody theory include *B.M.H. v. School Bd. of Chesapeake*, 883 F. Supp. 560 (E.D. Va. 1993); *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560 (N.D. Cal. 1993); *Elliott v. New Miami Bd. of Educ.*, 799 F. Supp. 818 (S.D. Ohio 1992); *Russell v. Fannin County Sch. Dist.*, 784 F. Supp. 1576 (N.D. Ga. 1992), *aff'd*, 981 F.2d 1263 (11th

that school officials had an affirmative duty to protect students because of a custodial relationship. In fact, the majority did not discuss the theory.⁹¹ It did not need to because a local government employee committed the molestation.

Because of the extensive role schools play in the lives of their students, because students often lack the maturity to seek help on their own, and because mandatory attendance laws require that children be separated from their natural protectors,⁹² courts should find that a custodial relationship exists between a school district and its students such that it owes students reasonable protection from acts of teachers and students that violate their constitutional rights.⁹³ If parents cannot be certain that their children will be watched and cared for in school, how can they feel that they are fulfilling their legal and moral obligation to provide supervision for their children when they load them on the school bus five days a week? Parents who do not provide adequate supervision of their children can be subject to state intervention and criminal sanctions.⁹⁴ When parents entrust their children to the state's care for educational purposes, they expect schools to be held to a similar standard. As the Fifth Circuit once stated:

Parents, guardians, and the children themselves have little choice but to rely on the school officials for some measure of protection and security while in school and can reasonably expect that the state will provide a safe school environment. To hold otherwise would call into question the constitutionality of compulsory attendance statutes, for we would be permitting a state to compel parents to surrender their offspring to the tender mercies of school officials without exacting some assurance from the

Cir. 1992); *Stauffer v. Orangeville Sch. Dist.*, No. 89-C-20258, 1990 U.S. Dist. LEXIS 19041 (N.D. Ill. July 31, 1990).

91. *Doe v. Taylor Indep. Sch. Dist.*, No. 90-8431, 1994 WL 45241, at *44 n.3 (Mar. 3, 1994) (stating that *DeShaney* "is possibly relevant to the constitutional duty imposed on [a school superintendent and principal in their supervisory capacity], but only if an affirmative duty to protect students from constitutional violations is placed on them, a duty which even Jane Doe disavows").

92. As the Third Circuit points out, parents can choose to teach their children in their own homes, *Black v. Indiana Area Sch. Dist.*, 985 F.2d 707, 713 (3d Cir. 1993); *Middle Bucks*, 972 F.2d at 1371, but this alternative is not economically feasible for all parents. *See id.* at 1371; Adam M. Greenfield, *Annie Get Your Gun 'Cause Help Ain't Comin': The Need for Constitutional Protection from Peer Abuse in Public Schools*, 43 DUKE L.J. 588, 607 (1993).

93. For similar views and more commentary on the subject, see *Middle Bucks*, 972 F.2d at 1377-84 (Sloviter, C.J., dissenting); Greenfield, *supra* note 92 (arguing legal and functional custody can be found in the school setting); Sorenson, *supra* note 70; Steven F. Huefner, Note, *Affirmative Duties in the Public Schools After DeShaney*, 90 COLUM. L. REV. 1940 (1990).

94. For example, Indiana law allows the state to bring a Child in Need of Services Action when parents do not provide adequate supervision. IND. CODE § 31-6-4-3(a) (1993). The state may also terminate parental rights. IND. CODE § 31-6-5-4 (1993). In addition, the state can bring criminal neglect charges against a parent for failure to supervise. IND. CODE § 35-46-1-4 (1993). Moreover, parents and other private parties who voluntarily assume the care of children are sometimes held to rather high standards. *See, e.g., Johnson v. State*, 555 N.E.2d 1362, 1365 (Ind. App. 1990) (stating that leaving children alone in tub while he got towels could be sufficient evidence to find caregiver guilty of criminal neglect); *Howard v. State*, 481 N.E.2d 1315, 1317 (Ind. 1985) (holding that leaving children in bathtub knowing that very hot water could be supplied to the tub and that children had played with water faucets in the past is evidence of criminal neglect).

state that school officials will undertake the role of guardian that parents might not otherwise relinquish, even temporarily.⁹⁵

Nevertheless, the Supreme Court may have already hinted that it would not accept a functional custody theory in school cases. In *Stoneking v. Bradford Area School District* ("*Stoneking I*"),⁹⁶ the Third Circuit found that a schoolchild who was sexually assaulted by a teacher was in the functional custody of school authorities because she was commanded to attend school by a compulsory education statute.⁹⁷ On appeal, the Supreme Court remanded the case for further consideration in light of *DeShaney*. It is not clear whether the Court objected to the finding of custody, or if it was merely concerned with the fact that the Third Circuit also grounded liability on state tort laws, for in *DeShaney*, the Court stated that not every tort committed by a state actor is transformed into a constitutional violation.⁹⁸ The Court, however, chose not to grant certiorari to resolve the question.

Though the *Stoneking II* court said that finding functional custody in a school setting was arguably not out of line with *DeShaney*,⁹⁹ the Third Circuit thought it more expedient to find liability based on the theory that school authorities caused plaintiff's injuries by establishing and maintaining a policy, practice, or custom that directly caused her constitutional harm. Later, in *D.R. v. Middle Bucks*, a majority of the Third Circuit sitting en banc rejected the functional custody argument, stating that students are not sufficiently restricted because they had the opportunity to seek help from outside the school on a daily basis.¹⁰⁰ Even when young children are passengers on a school bus, where they are unable to receive outside assistance because of the "total custody the driver of a school bus exerts over his passengers,"¹⁰¹ the Third Circuit has held they cannot recover under a functional custody theory. The court in *Black v. Indiana Area School District* maintained:

We find this case indistinguishable from *D.R.* If anything, the plaintiffs here were less affected by state restraints at the time of their alleged injuries than was *D.R.* Neither the state compulsory attendance law nor any other state rule required their presence on the Claypoole school bus. Their parents, their primary caretakers, were free to arrange any other form of alternate transportation or escort them to school personally. . . . Under our analysis in *D.R.*, the relevant consideration is whether the

95. *Doe v. Taylor Indep. Sch. Dist.*, 975 F.2d 137, 147 (5th Cir. 1992), cert. denied, 113 S. Ct. 1066 (1993), and vacated, 987 F.2d 231 (5th Cir. 1993), aff'd in part, rev'd in part, No. 90-8431, 1994 WL 45241 (Mar. 3, 1994)..

96. *Stoneking v. Bradford Area Sch. Dist.*, 856 F.2d 594 (3d Cir. 1988), vacated sub nom., *Smith v. Stoneking*, 489 U.S. 1062, aff'd on other grounds, 882 F.2d 720 (3d Cir. 1989), and cert. denied, 493 U.S. 1044 (1990).

97. *Stoneking*, 856 F.2d at 601.

98. *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 202 (1989).

99. *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 723 (3d Cir. 1989), cert. denied, 493 U.S. 1044 (1990).

100. *D.R. v. Middle Bucks Area Voc. Tech. Sch.*, 972 F.2d 1364, 1372 (3d Cir. 1992), cert. denied, 493 U.S. 1045 (1993).

101. *Black v. Indiana Area Sch. Dist.*, 985 F.2d 707, 715 (3d Cir. 1993) (Scirica, J., concurring).

plaintiffs have been deprived of any avenue of assistance they would have had absent any state involvement.¹⁰²

Though *DeShaney* left open the possibility that schoolchildren could recover under substantive due process using the functional custody argument, three appellate courts have explicitly rejected the theory in a school setting. Though other circuits have yet to speak directly to the issue, the theory's usefulness is in serious doubt.

2. State-Created Danger Theory

In *DeShaney*, the Supreme Court appeared to leave available the argument that when a state creates a danger or makes someone more vulnerable to danger, it has an affirmative duty to protect that individual.¹⁰³ Several federal appellate courts have recognized the state-created danger theory, including the Eleventh,¹⁰⁴ Ninth,¹⁰⁵ Eighth,¹⁰⁶ and Seventh¹⁰⁷ circuits. In distinguishing *D.R. v. Middle Bucks* from cases in those circuits, the Third Circuit pointed out that "[I]iability under the state-created danger theory is predicated upon the states' affirmative acts which work to plaintiffs' detriments in terms of exposure to danger."¹⁰⁸ The court agreed with the Seventh Circuit that "the line between action and inaction, between inflicting and failing to prevent the infliction of harm" is not a clearly drawn one.¹⁰⁹ In fact, the Third Circuit quoted the Seventh Circuit stating, "If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit."¹¹⁰

102. *Id.* at 714. The court found that the school superintendent had no special relationship with the students because the state had not affirmatively restricted their freedom. *Id.* In addition, the bus driver was not liable under 42 U.S.C. § 1983 because he was not considered a state actor—he worked for a private company that contracted with the school district to provide transportation. *Id.*

103. *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 201 (1989).

104. *Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989) (denying summary judgment to the government when inmate laborers abducted and held a town clerk hostage for three days), *cert. denied*, 494 U.S. 1066 (1990).

105. *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989) (holding state liable for injuries caused by rape when a trooper impounded a woman's car and left her to find her way home on foot), *cert. denied*, 498 U.S. 938 (1990).

106. *Freeman v. Ferguson*, 911 F.2d 52 (8th Cir. 1990) (holding that plaintiff could maintain a constitutional claim if plaintiff alleged that the police chief, a close personal friend of a man who killed his wife and her daughter, stopped the police officers from enforcing a restraining order issued in response to the wife's complaints).

107. *Jackson v. City of Joliet*, 715 F.2d 1200 (7th Cir. 1983) (stating that if a public officer had knowingly directed traffic away from a burning car because he did not want the occupants to be saved, he would be liable under § 1983 for depriving plaintiffs of their lives without due process, but holding that an allegation that officer negligently failed to rescue does not constitute a claim under the Constitution), *cert. denied*, 465 U.S. 1049 (1984).

108. *D.R. v. Middle Bucks Area Voc. Tech. Sch.*, 972 F.2d 1364, 1374 (3d Cir. 1992) (emphasis added), *cert. denied*, 113 S. Ct. 1045 (1993).

109. *Id.* (quoting *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982)).

110. *Middle Bucks*, 972 F.2d at 1374 (quoting *Bowers*, 686 F.2d at 618).

Nevertheless, the courts' application of the theory after *DeShaney* demonstrates great reluctance to find that a school or a school official has placed a student in a position of danger. For example, in *Dorothy J. v. Little Rock School District*,¹¹¹ the district court held that no special relationship arose between government entities and the plaintiff's mentally handicapped son, who allegedly had been molested and raped twice by Louis C., a fellow student. Knowing that Louis was disposed to violent and sexually assaultive behavior, social service agencies placed him in a school program with mentally handicapped students. The school defendants also knew about Louis' behavioral problems but nonetheless left him alone with the plaintiff's son. The district court admitted that "[p]utting Louis C. with these students without adequate protective measures created a potentially dangerous situation and may have rendered the students more vulnerable to a violent attack than they otherwise would have been without the state's action."¹¹² Nevertheless, the court found that the government agencies' act of placing Louis in the program two years before the assault was too remote to constitute a substantive due process claim under § 1983.

If Louis C.'s attack had come a few weeks or even months after his placement in the . . . program, the plaintiff might have a stronger case for the existence of a duty to protect. . . . The significant lapse of time between the state's act in placing Louis C. in the program and the attack on Brian B. suggests that the attack "was independently conceived and executed, and the state neither condoned nor encouraged [such] behavior."¹¹³

As for the school defendants, who were not responsible for placing Louis in the program, the court held that their act of leaving the two boys alone was not enough to establish a special relationship between them and Brian B. The court said:

One could argue that leaving Louis C. alone with Brian B. was itself an affirmative act which rendered Brian B. more vulnerable to harm. But the same could be said about the defendants in *DeShaney* [The school defendants] did not place Brian B. in a position of danger; they simply failed to protect Brian B. from a student they supposedly knew to be dangerous.¹¹⁴

The outcome was similar in *Middle Bucks*, where the court dismissed the complaints of D.R. and L.H., two female students in a graphic arts class who were "physically, verbally and sexually molested" by several male

111. *Dorothy J. v. Little Rock Sch. Dist.*, 794 F. Supp. 1405 (E.D. Ark. 1992), *aff'd*, 7 F.3d 729 (8th Cir. 1993). *But see* *Stauffer v. Orangeville Sch. Dist.*, 1990 U.S. Dist. LEXIS 19041 *8 (N.D. Ill. July 31, 1990) (stating that "allowing [a student] . . . to go . . . unsupervised with another student who had a prior history of sexually abusing others and who had threatened Plaintiff" might be enough to find that the teacher took an affirmative act to place student in a dangerous position.) *Id.* at *8.

112. *Dorothy J.*, 794 F. Supp. at 1421.

113. *Id.*

114. *Id.* at 1422.

students.¹¹⁵ D.R. alleged that she was forced or carried into the unisex bathroom or the darkroom, both located within the classroom, two to four times per week for several months. The class was supervised by a student teacher who could not control the class and who allegedly witnessed the student defendants use obscene language, gestures, and physical, though not sexual, offensive touching of females in the class, including herself. In fact, D.R. and L.H. asserted that the teacher was in the classroom when the boys dragged D.R. into the bathroom but did nothing about it. When unpleasant activities were occurring, the teacher generally ignored them or walked away, according to plaintiffs.¹¹⁶ They also asserted that L.H. informed an assistant director of the school that a boy tried to force her into the bathroom to engage in sexual conduct, but the assistant director did not take any action.¹¹⁷ Plaintiffs claimed that school defendants endangered them or increased their risks of harm, by:

- (1) failing to report to the parents or other authorities the misconduct resulting in abuse to plaintiffs; (2) placing the class under the control of an inadequately trained and supervised student teacher; (3) failing to demand proper conduct of the student defendants; and (4) failing to investigate and put a stop to the physical and sexual misconduct.¹¹⁸

The students also claimed that the school's acts of setting up the classroom to include a unisex bathroom with an inside lock and a darkroom created or increased plaintiffs' risk of danger, but the court readily dismissed this argument.¹¹⁹ Though the court found *Middle Bucks* to be "an extremely close case,"¹²⁰ it held that the school defendants did not "create plaintiffs' peril, increase their risks of harm, or act to render them more vulnerable to the student defendants' assaults."¹²¹ The court went on to say that the school defendants' acts of assigning the student teacher to the graphic arts class and failing to supervise her adequately might have created the recognizable risk that students would not receive much education or that they might be injured by non-sexual physical roughhousing. But, it said, plaintiffs' injuries from sexual abuse did not result "from that kind of a foreseeable risk."¹²²

115. *D.R. v. Middle Bucks Area Voc. Tech. Sch.*, 972 F.2d 1364, 1366 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1045 (1993).

116. *Id.* at 1378.

117. *Id.* at 1366.

118. *Id.* at 1373.

119. *Id.* at 1375 (noting the same conduct could have occurred had the school built separate bathrooms; that the darkroom was a necessary part of the classroom; and that neither posed an inherently dangerous environment).

120. *Id.*

121. *Id.* As one commentator has observed:

In cases of peer abuse, courts often limit their focus to the period in which the sexual abuse took place, rather than examining the entire relationship between a school and its students. . . .

This narrow inquiry, however, denies the reality that the school's actions *prior* to that time contributed substantially to the resulting sexual molestation.

Greenfield, *supra* note 92, at 613.

122. *Middle Bucks*, 972 F.2d at 1374.

One can certainly argue with the court's view that liability for one's acts or omissions is limited to specific foreseeable consequences,¹²³ but that does not seem necessary today. In 1989, when D.R. was abused, educators *might* have been able to argue that molestation was not a foreseeable result of leaving an inexperienced student teacher alone to supervise an unruly coed classroom. If this case were to come before a court today, however, educators would have little room to argue that sexual abuse was not a foreseeable result. In light of the highly publicized AAUW study¹²⁴ and the proliferation of news stories regarding peer sexual harassment, sexual abuse should be considered a foreseeable consequence of the school's conduct today.

As *Middle Bucks* demonstrates, courts are indeed drawing a thin line between action and inaction, one that seems unjustified in light of the severity of the harm and the egregious conduct of some school defendants. The Third Circuit has dealt a harsh blow to schoolchildren who attempt to recover for peer sexual assaults under a state-created danger theory. In order to recover under *Middle Bucks*, students must show a more affirmative, direct, and timely link between the schools' actions and their injuries than D.R. could.¹²⁵

3. The Policy or Custom Argument

In *Stoneking v. Bradford Area School District*, a girl who was sexually abused by a teacher argued that the school district was liable for causing her constitutional harm. She claimed that by concealing and discouraging students' claims of abuse, the school district created a climate which allowed teachers to abuse students. She argued that a causal relationship existed between this policy and the teacher's repeated sexual assaults.¹²⁶ The Third Circuit explained that "[l]iability of municipal policymakers for policies or customs chosen or recklessly maintained is not dependent upon the existence of a 'special relationship' between the municipal officials and the individuals harmed."¹²⁷ The Third Circuit held that plaintiff could maintain a § 1983 claim because defendant's policy, practice, or custom directly caused her constitutional harm.¹²⁸

Three years later, in *D.R. v. Middle Bucks*, the Third Circuit said the custom or policy argument does not apply when the case "lacks the linchpin of *Stoneking II*, namely, a violation by state actors."¹²⁹ The court stated:

123. This is a hotly contested question in tort law. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 43, at 280 (5th ed. 1984).

124. HOSTILE HALLWAYS, *supra* note 15.

125. For a more thorough discussion of the state-created danger theory, see Huefner, *supra* note 93, at 1958-65 and 1968-69.

126. *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 724-25 (3d Cir. 1989), *cert. denied*, 493 U.S. 1044 (1990).

127. *Id.* at 725.

128. *Id.*

129. *D.R. v. Middle Bucks Area Voc. Tech. Sch.*, 972 F.2d 1364, 1376 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1045 (1993).

"Sexual molestation committed by an agent of the state is readily distinguishable from the situation present here since the Due Process Clause itself imposes limitations on the state's conduct."¹³⁰ The court seems to be saying that if a teacher instead of students had molested D.R. she might have been able to recover under *Stoneking*.¹³¹ Relying on the Supreme Court's decision in *City of Canton v. Harris*, the *Stoneking II* court stated that a plaintiff can bring a cause of action alleging that the school district "with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused her constitutional harm."¹³² But *Stoneking*'s argument that the school district created an environment that allowed teachers to abuse students is easily transferable to peer harassment cases such as *Middle Bucks*.

A school district, which has the authority to control student behavior and which places students and teachers in certain schools and classrooms, can also be said to have created an atmosphere where students could be abused. The fact that a student rather than a teacher commits the actual molestation does not change the fact that the school may have committed certain acts that helped cause the harm.¹³³ The court in *Middle Bucks* should have limited itself to stating that the customs or policies of the school did not rise to the level of placing a child in danger or worsening her position. Nevertheless, *Middle Bucks* and subsequent cases¹³⁴ suggest that if a school district has no affirmative duty based on a special relationship, it will not be liable under § 1983 for its customs or policies if a private actor inflicts the direct injury and if the court is unwilling to find that a school district's custom or policy created the danger or put the plaintiff in a worse position. Indeed, this is what the Supreme Court teaches in *DeShaney*.¹³⁵

Courts' unwillingness to find that students are in the functional custody of schools, or that schools have created or worsened the danger a student faces leaves schoolchildren injured by fellow students to search for alternative routes to recovery. Part II of this Note will discuss equal protection arguments that might provide an answer for some plaintiffs.

130. *Id.*

131. *Id.*; see also *City of Canton v. Harris*, 489 U.S. 378 (1989) (holding that a city can be liable for failing to train police officers if its "failure to train amounts to deliberate indifference to the rights of persons with whom police come into contact").

132. *Stoneking*, 882 F.2d at 725.

133. See Sorenson, *supra* note 70, at 325-27 (suggesting that the custom or policy theory could be applied even though the molester was a student).

134. *Elliott v. New Miami Bd. of Educ.*, 799 F. Supp. 818, 823-24 (S.D. Ohio 1992) ("In the matter before this court, Faith Elliott's classmates committed the underlying violative acts. These students were private actors, and thus were not in any way connected with the State of Ohio. Therefore, this Court cannot impose liability upon New Miami for its policies, customs, or practices."); see, *Russell v. Fannin County Sch. Dist.*, 784 F. Supp. 1576 (N.D. Ga. 1992) (holding that the school district was not liable for custom or policy where injuries were inflicted by a private actor, but stating that its decision might have been different if the student had notified teachers or administrators before he was injured that he feared assault by another student), *aff'd per curiam*, 981 F.2d 1263 (11th Cir. 1992).

135. See *supra* notes 59-70 and accompanying text.

II. EQUAL PROTECTION

The Supreme Court in *DeShaney* said that, while a state has no general duty to protect its citizens, it cannot "selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause."¹³⁶ The Court has interpreted the Equal Protection Clause of the Fourteenth Amendment¹³⁷ to prohibit gender discrimination unless the government can show the discrimination has a "close and substantial relationship to important governmental objectives."¹³⁸ Courts have held that sexual harassment is a form of sex discrimination prohibited by the Equal Protection Clause.¹³⁹ Plaintiffs seeking to hold school districts responsible for their acts or omissions regarding peer sexual harassment have a greater chance of recovery under the Equal Protection Clause than under the Due Process Clause. Under substantive due process, the state must have the child in its custody or must have created or worsened the danger she faces in order to have an affirmative duty to act. But under equal protection, if a state offers a service to one class of persons, it has an affirmative duty to offer equal services to other classes unless it can justify the differential treatment by meeting the heightened scrutiny test.

In addition, in certain circumstances, plaintiffs will find it easier to prove that the school's actions caused the violation under equal protection than under substantive due process. For example, when a plaintiff shows that the school has a custom of treating complaints by girls differently from complaints by boys, that in itself is the constitutional violation. "When a . . . 'policy or custom' is itself unconstitutional, i.e., when it directly commands or authorizes constitutional violations . . . the causal connection between policy and violation is manifest and does not require independent proof."¹⁴⁰ Under substantive due process, if a plaintiff argues that a government agency has created a danger by placing a violent student in a classroom, for example, the plaintiff might have trouble showing a direct causal relationship between the

136. *DeShaney v. Wiunebago County Dep't of Social Servs.*, 489 U.S. 189, 197 n.3 (1989).

137. "No State shall . . . deny to any person the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

138. *Personnel Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 273 (1979) (citing *Craig v. Boren*, 429 U.S. 190 (1976), *aff'd*, 445 U.S. 901 (1980)). This test is referred to as heightened or intermediate scrutiny, as opposed to the strict scrutiny that is imposed on racial classifications, and the rational basis test which is used to judge laws that do not classify on the basis of race, national origin, gender, or illegitimacy. Strict scrutiny requires that a classification based on race be necessary to a compelling state purpose, while rational basis analysis requires that a classification be rationally related to a legitimate government purpose.

139. *E.g.*, *Volk v. Coler*, 845 F.2d 1422, 1431 (7th Cir. 1988) (citing as support *Davis v. Passman*, 442 U.S. 228, 234-35 (1979)); *Bohen v. City of East Chicago*, 799 F.2d 1180, 1185-86 (7th Cir. 1986); *Scott v. DeLeon*, 603 F. Supp. 1328, 1332 (E.D. Mich. 1985). *Cf.* *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (holding that hostile environment sexual harassment is a form of sex discrimination actionable under Title VII employment discrimination statute).

140. *Spell v. McDaniel*, 824 F.2d 1380, 1387 (1987) (citing *Oklahoma City v. Tuttle*, 471 U.S. 808, 822 (1985)), *cert. denied*, 484 U.S. 1027 (1988).

government act and the deprivation of liberty inflicted by the violent classmate.¹⁴¹

The Equal Protection Clause poses a significant hurdle of its own, however. The Supreme Court has held that plaintiffs bringing equal protection claims must prove that the government actors intended to discriminate against them.¹⁴² Students bringing claims against school districts or personnel are burdened with the task of showing that, by failing to respond to sexual harassment problems or by creating an atmosphere where sexual harassment can thrive, they are intentionally discriminating against them on the basis of sex. It seems unlikely that students will be able to point to a specific school policy that states sexual harassment claims should be ignored or treated less seriously than other behavior problems. Rather, they will have to show that the school district or school personnel discriminated by failing to address complaints or by failing to train its employees to deal with complaints in a nondiscriminatory manner, for example.

The question of intent is the "ultimate inquiry"¹⁴³ in an equal protection claim, and one that has generated much debate and confusion. The intent analysis is easier to comprehend when an actual statute or written policy is involved than when only governmental conduct is at issue. If a statute distinguishes between men and women on its face, intent is clear and the law will be struck down unless it meets the heightened scrutiny test.¹⁴⁴ For statutes that are facially gender-neutral, the Supreme Court set out the following test in *Personnel Administrator of Massachusetts v. Feeney*:¹⁴⁵

The first question is whether the statutory classification is indeed neutral in the sense that it is not gender based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. In this second inquiry, impact provides an "important starting point," . . . but purposeful discrimination is "the condition that offends the Constitution."¹⁴⁶

The Court found that the statute in *Feeney*, which gave preference to veterans applying for civil service jobs, was neutral on its face because it defined veterans as including females. It also stated that the distinction between veterans and nonveterans was not a pretext for gender discrimination because many men who were not veterans were adversely affected as well as women.¹⁴⁷ The Court then went on to ask the "dispositive question," which was "whether the appellee has shown that a gender-based discriminatory

141. See *Dorothy J. v. Little Rock Sch. Dist.*, 794 F. Supp. 1405 (E.D. Ark. 1992) (holding that a student who is a ward of the Department of Human Services is not a state actor, and thus school officials had no constitutional duty to protect a mentally handicapped student raped by the ward), *aff'd*, 7 F.3d 729 (1993); see also *supra* notes 111-22 and accompanying text.

142. *E.g.*, *Washington v. Davis*, 426 U.S. 229 (1976).

143. *Bohen*, 799 F.2d at 1187.

144. *E.g.*, *Craig v. Boren*, 429 U.S. 190 (1976).

145. *Feeney*, 442 U.S. 256 (1979) (holding that a statute that gave preference to veterans, including female veterans, did not violate equal protection), *aff'd*, 445 U.S. 901 (1980).

146. *Id.* at 274 (citations omitted).

147. *Id.* at 274-75.

purpose has, at least in some measure, shaped the Massachusetts veterans' preference legislation."¹⁴⁸

Justice Stewart, writing for the majority, then suggested that if the preference was originally created or subsequently reaffirmed because it would "accomplish the collateral goal of keeping women in a stereotypic and predefined place," it would violate the Equal Protection Clause.¹⁴⁹ He explained that the plaintiff must show the "decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."¹⁵⁰ It is not clear, however, that the *Feeney* standard requires a malicious intent to allow females to be harmed.¹⁵¹ Rather, one can argue that "[a]cting upon . . . a stereotypic view of sex roles directly harms women[] . . . and thus should be interpreted to indicate discriminatory intent,"¹⁵² and "[i]f a Court . . . finds that prejudicial attitudes toward a group influenced the state's policy choices, it should find an equal protection violation."¹⁵³ Indeed, *Feeney*'s two-part test for facially neutral statutes seems to have this kind of deep-seated prejudice or bias in mind. If not, the *Feeney* Court would have had no reason to ask the second question—whether the adverse effect reflects invidious gender-based discrimination—having already asked if the classification was covertly based on gender.

Courts have long held that discriminatory treatment, as well as enacted law, is subject to the Equal Protection Clause.¹⁵⁴ Conceptually, however, the intent analysis is somewhat more difficult to grasp. Circuit Judge Goldberg, in a partial concurrence and partial dissent in *McKee v. City of Rockwall, Texas*,¹⁵⁵ sets out a useful framework based on *Feeney*:

Because the exact words of a statute cannot be examined in a discriminatory treatment case, one must analyze the policies, customs, attitudes, understandings and practices of the entity or persons making the alleged distinctions. Is the treatment gender neutral from the viewpoint of

148. *Id.* at 276.

149. *Id.* at 279.

150. *Id.*; see also *Washington v. Davis*, 426 U.S. 229 (1976); *Volk v. Coler*, 845 F.2d 1422, 1430-31 (7th Cir. 1988); *Bohen v. City of East Chicago*, 799 F.2d 1180, 1186 (7th Cir. 1986).

151. Amy Eppler, Note, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?*, 95 YALE L.J. 788, 798 (1986). "Discriminatory intent should also be found if it can be shown that the police's seemingly benign support for the privacy of the family is actually premised on the belief that men should be in charge of the home. Acting upon such a stereotypic view of sex roles directly harms women, and thus should be interpreted to indicate discriminatory intent." *Id.* Judge Richard Posner equated a city's failure to address women's claims of sexual harassment with the hypothetical case of a city deciding to provide restrooms for men but not for women, "and when pressed for a reason [the city saying] it simply didn't care whether its female employees were comfortable or not." *Bohen*, 799 F.2d at 1191 (Posner, J., concurring). In *Bohen*, Posner noted that "[h]ostility to women was not shown, but did not have to be; indifference to their welfare was enough." *Id.* at 1191.

152. Eppler, *supra* note 151, at 798.

153. *Id.* at 803 (citing Larry G. Simon, *Racially Prejudiced Governmental Actions: A Motivational Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041, 1109 (1978)).

154. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

155. *McKee*, 877 F.2d 409 (5th Cir. 1989), *cert. denied*, 493 U.S. 23 (1990).

the persons or entity making the distinction? If so, an examining court must engage in a secondary line of inquiry and examine any alleged discriminatory impact to determine whether the "adverse effect reflects invidious gender-based discrimination."¹⁵⁶

If the entity or persons making the alleged classification understand that they are purposefully treating males and females differently, then the court can conclude that the different treatment is gender-based.¹⁵⁷ But this is not the only kind of purposeful discrimination. "A person who consciously believes in the truth of the stereotype acts purposefully when the person implements the stereotype in a particular situation."¹⁵⁸ Judge Goldberg cited *Mississippi University for Women v. Hogan*,¹⁵⁹ in which the Supreme Court said that "[c]are must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions."¹⁶⁰ In *Hogan*, the Court struck down a policy that prevented men from enrolling in a nursing school in part because the Court felt that keeping men out perpetuated the notion that nursing was a woman's profession, which the Court contended would actually harm women by keeping wages low.¹⁶¹ Following the *Hogan* analysis, Judge Goldberg commented in *McKee v. City of Rockwall*: "Continuity of a stereotype through the generations combined with a person's action pursuant to the alleged 'truth,' may be purposeful action on the person's part within the meaning of the Equal Protection Clause."¹⁶² Therefore, if plaintiffs can show that their teachers or school administrators have an underlying prejudice in favor of boys or they believe certain stereotypes—that it is fine for boys to be sexually aggressive, that a girl who has been sexually harassed has asked for that treatment, that boys are more honest than girls, or that the education of boys is more important than the education of girls—and they act on these prejudices or beliefs their actions should qualify as purposeful discrimination.

If defining intent is a tenuous business, proving it is equally taxing. It is often difficult to know what constitutes a prima facie case for intent¹⁶³ because the Supreme Court has fashioned seemingly different tests for various types of cases. As Professor Daniel Ortiz wrote, "The nature of the case makes all the difference."¹⁶⁴ For example, the intent test in a case in which plaintiff claims a prosecutor has discriminated against prospective jurors on the basis of race places a lighter burden on the individual and a greater burden of rebuttal on the state than the intent tests in other types of cases.¹⁶⁵

156. *Id.* at 421 (Goldberg, J., concurring in part and dissenting in part) (quoting *Personnel Adm'r v. Feeney*, 442 U.S. 274 (1979), *aff'd*, 445 U.S. 901 (1980)).

157. *Id.*

158. *Id.* at 422.

159. *Hogan*, 458 U.S. 718 (1982) (holding that a university policy which prevented men from enrolling in nursing school violated equal protection).

160. *Id.* at 725.

161. *Id.* at 729-30 & n.15. Note, however, that the Court denounced the policy because of both discrimination against men and subordination of women.

162. *McKee*, 877 F.2d at 422 (Goldberg, J., concurring in part and dissenting in part).

163. NORMAN VIEIRA, *CONSTITUTIONAL RIGHTS IN A NUTSHELL* 66 (2d ed. 1990).

164. Daniel Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105, 1108 (1989).

165. *Id.* at 1122; see *Batson v. Kentucky*, 476 U.S. 79 (1986).

The individual challenging the selection procedure need only show that the procedures have had a racially disparate impact on a minority group and that the procedures were open to abuse to make out a prima facie case and force the state to show "that 'permissible racially neutral selection criteria and procedures' led to the underrepresentation."¹⁶⁶ A plurality in *Davis v. Bandemer*,¹⁶⁷ a gerrymandering case, also allowed plaintiff to make out a prima facie case on weak evidence of intent. In voting cases, it has been enough to show disparate impact and evidence that the jurisdiction engaged in other kinds of discrimination in the past.¹⁶⁸

When considering racial discrimination in education, the Court has held that purposeful intent to segregate one part of the school system is evidence of intent to segregate the whole.¹⁶⁹ In contrast, Professor Ortiz argued, the Court has required more substantial proof of intent—"evidence of actual discriminatory motivation"—in employment and housing cases.¹⁷⁰

The Court does not vary review according to the size of the individual penalties, but it does distinguish between various categories of interests. In particular it appears to follow the familiar hierarchy the Court employs in the fundamental rights strand of equal protection in deciding what level of scrutiny to accord various kinds of interests. In that area, voting and certain criminal process rights, along with the right to travel, receive heightened scrutiny; education receives somewhat elevated scrutiny, in practice, if not in theory; and traditional economic interests receive reduced scrutiny.¹⁷¹

Thus, Professor Ortiz concluded that "intent takes into account not only the invidiousness of the government's classification but also the importance of the individual interest at stake."¹⁷²

When a plaintiff tries to hold a government entity liable for an unofficial discriminatory practice of its employees, such as ignoring female students' complaints of sexual harassment, the plot thickens.¹⁷³ The Supreme Court in *City of Canton v. Harris* stated, "[T]he proper standard for determining when a municipality will be liable under § 1983 for constitutional wrongs does not turn on any underlying culpability test that determines when such wrongs have occurred."¹⁷⁴

In *City of Canton*, the Court held that a government could be liable for failing to train its employees to conduct their jobs in ways that did not violate citizens' substantive due process rights if the government's failure amounted

166. *Batson*, 476 U.S. 79 (quoting *Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).

167. *Davis*, 478 U.S. 109, 128-29 (1986).

168. Ortiz, *supra* note 164, at 1122.

169. *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973).

170. Ortiz, *supra* note 164, at 1122.

171. *Id.* at 1136-37 (footnotes omitted).

172. *Id.* at 1136.

173. *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978), held that although a government could not be held liable under a respondeat superior theory, it could be liable for "practices of state officials so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Id.*

174. *City of Canton v. Harris*, 489 U.S. 378, 389 n.8. (1989).

to "deliberate indifference."¹⁷⁵ If a reasonable person would know that some activity required action to prevent violation of a constitutional right, yet the defendant fails to take that action, then the defendant is deliberately indifferent.¹⁷⁶ It remains unclear, however, whether the Court meant to impose the deliberate indifference standard on all § 1983 causes of action, including those under the Equal Protection Clause.¹⁷⁷ Therefore, the question arises whether the government must have purposefully discriminated against students by failing to take action, or whether they must only be deliberately indifferent to the purposeful discrimination of their employees.¹⁷⁸

Lower federal courts have held that where public employees have a history of widespread intentional discrimination, their employer may be held liable under § 1983 if it knew or had reason to know of the practice.¹⁷⁹

Actual knowledge may be evidenced by recorded reports to or discussions by a municipal governing body. Constructive knowledge may be evidenced by the fact that the practices have been so widespread or flagrant that in the proper exercise of its official responsibilities the governing body should have known about them.¹⁸⁰

Thus, a government entity can be liable if a discriminatory practice is so "manifest as to imply the constructive acquiescence of senior policymaking officials."¹⁸¹

Without explicitly discussing who the city policy-makers were or what they actually knew, the Seventh Circuit in 1986 held that a widespread practice of sexual harassment by fire department employees was enough to find the city liable. In *Bohen v. City of East Chicago*,¹⁸² the Seventh Circuit examined municipal liability and reversed a decision that sexual harassment inflicted by plaintiff's supervisors and coworkers did not constitute sex discrimination under the Equal Protection Clause. The court found the city liable under § 1983, stating:

175. *Id.* at 388.

176. 1 CIVIL ACTIONS AGAINST STATE AND LOCAL GOVERNMENT ITS DIVISIONS, AGENCIES AND OFFICERS § 7.68, at 613 (Jon L. Craig ed. 1992) (citing *Howell v. Evans*, 922 F.2d 712 (11th Cir. 1991), *vacated on other grounds*, 931 F.2d 711 (11th Cir. 1991)); see *Berry v. Muskogee*, 900 F.2d 1489 (10th Cir. 1990).

177. See NAHMOD, *supra* note 34, at 487.

178. *Id.*

179. *E.g.*, *Brown v. City of Fort Lauderdale*, 923 F.2d 1474 (11th Cir. 1991) (holding that "a longstanding and widespread practice is deemed authorized by the policymaking officials because they must have known about it but failed to stop it"); *Spell v. McDaniel*, 824 F.2d 1380, 1387 (4th Cir. 1987) (holding custom or usage attributable to the government body when the "duration and frequency of the practices warrants a finding of either actual or constructive knowledge by the . . . governing body that the practices have become customary among its employees"), *cert. denied*, 484 U.S. 1027 (1988).

180. *Spell*, 824 F.2d at 1386.

181. *Sorlucco v. New York City Police Dep't*, 971 F.2d 864 (2d Cir. 1992) (citing *St. Louis v. Praprotnik*, 485 U.S. 112, 130 (1988) (plurality opinion) (stating supervisor can be deemed to have adopted policy if a "series of decisions by a subordinate official manifested a 'custom or usage' of which the supervisor must have been aware") and *Krulik v. Board of Educ. of the City of New York*, 781 F.2d 15, 23 (2d Cir. 1986) ("[A]n individual official's acts can rise to the level of 'policy' when 'senior personnel' knowingly 'acquiesce' in their subordinates' behavior.") (citation omitted)).

182. *Bohen*, 799 F.2d 1180 (7th Cir. 1986).

Under § 1983, actions of a state entity's employees are attributed to the state entity itself if those actions are in furtherance of the entity's "policy or custom." . . . A single act of a sufficiently high-ranking policymaker is sufficient to establish an entity's policy or custom. . . . A policy or custom may also be established by proving that the conduct complained of is a "well-settled . . . practice . . . even though such a custom has not received formal approval through the body's decisionmaking channels. . . . An entity may be liable even for "informal actions, if they reflect a general policy, custom, or pattern of official conduct which even tacitly encourages conduct depriving citizens of their constitutionally protected rights."¹⁸³

The court went on to state that "management officials"¹⁸⁴ responsible for working conditions at the department 'knew the general picture if not the details' of the pattern of sexual harassment.¹⁸⁵ In addition, the department addressed harassment complaints superficially and had no policy against sexual harassment. "In sum, sexual harassment was the general on-going, and accepted practice at the East Chicago Fire Department, and high-ranking, supervisory, and management officials responsible for working conditions at the department knew of, tolerated, and participated in the harassment. This satisfies § 1983's requirement that the actions complained of be the policy or custom of the state entity."¹⁸⁶

In 1992, the Second Circuit rendered a decision in which it held that a municipality's constructive acquiescence was enough to hold it liable. In *Sorlucco v. New York City Police Department*,¹⁸⁷ the court said, "[A] § 1983 plaintiff may establish a municipality's liability by demonstrating that the actions of subordinate officers are sufficiently widespread to constitute the constructive acquiescence of senior policymakers."¹⁸⁸ The court stressed that discrimination by the commissioner, the top policy maker in this case, was not necessary. The Second Circuit reinstated a jury verdict for Sorlucco on her equal protection claim against her employer, the police department. Sorlucco, a new officer at the department, claimed that she was treated in a discriminatory manner because of her gender after she reported being raped by a fellow officer. Sorlucco was disciplined and eventually fired because she had been

183. *Id.* at 1188-89 (citations omitted).

184. The court did not discuss whether these management officials were policy-makers under a § 1983 analysis.

185. *Bohen*, 799 F.2d at 1189 (footnote omitted) (quoting *Bohen v. City of East Chicago*, 622 F. Supp. 1234, 1240 (N.D. Ind. 1985)).

186. *Id.*

187. *Sorlucco*, 971 F.2d 864 (2d Cir. 1992).

188. *Id.* at 871 (citing *St. Louis v. Praprotnik*, 485 U.S. 112 (1988)). A custom will be attributed to the government entity due to either actual or constructive knowledge when its agents have a longstanding and frequent practice. See *Bouman v. Block*, 940 F.2d 1211 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 640 (1991); *Gentile v. County of Suffolk*, 926 F.2d 142, 152 & n.5, 153 (2d Cir. 1991); *Bordanaro v. McLeod*, 871 F.2d 1151, 1155-58 (1st Cir. 1989), *cert. denied*, 493 U.S. 820 (1989); *Watson v. Kansas City*, 857 F.2d 690, 695-96 (10th Cir. 1988); *Jones v. City of Chicago*, 856 F.2d 985, 995-96 (7th Cir. 1988); *Spell v. McDaniel*, 824 F.2d 1380, 1387 (4th Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988); Karen M. Blum, *Monell, DeShaney, and Zinnermon Official Policy, Affirmative Duty, Established State Procedure and Local Government Liability Under Section 1983*, 24 CREIGHTON L. REV. 1, 5-6 (1990).

arrested for falsely reporting to county police officers that she did not know her assailant. Her evidence of discriminatory behavior consisted of the facts of her specific case and a five-year study that showed a greater percentage of new female officers who were arrested during their probationary periods were fired than were new male officers who were arrested.¹⁸⁹

The statistics could be criticized because of the small numbers available for comparison. But even though the appellate court said the statistics alone might not have been enough to sufficiently prove gender discrimination, it found that they had probative value, especially when combined with the specific facts of the case. The plaintiff presented "ample facts concerning her treatment at the hands of her supervisors from which the jury, in conjunction with the statistical evidence, could have reasonably inferred that there was a custom of sex bias operating within the NYPD and governing its disciplinary decisions."¹⁹⁰ That evidence included testimony from a former NYPD lieutenant with Internal Affairs who described the department's investigation of the officer who allegedly raped plaintiff as dilatory and negligent. The jury also heard evidence that two internal offices of the department, working independently, acted in a manner that could reasonably indicate that they reflexively believed Ms. Sorlucco was lying and that her male attacker was telling the truth. The court found this particularly egregious case, coupled with statistical evidence of other discriminatory acts was enough to justify a jury's finding of a department practice of gender discrimination.¹⁹¹

The remainder of this Part will advance four equal protection theories under which students who are sexually harassed or abused by their classmates might be able to recover from school authorities. Because the case law says little about students' equal protection claims under § 1983 against schools for injuries inflicted by their classmates,¹⁹² this Note relies on gender discrimination claims made against employers and police departments. These cases seem particularly appropriate because of the similarities between the teacher-student relationship and the employer-employee and police officer-citizen relationships. Students are under the direction and authority of teachers and other school personnel, similar to the way employees are under the

189. *Sorlucco*, 971 F.2d at 871. The study showed that 47 probationary officers were arrested from 1980-85. Twelve of them resigned. Thirty-one of the remaining officers were men of which nine were reinstated and 22 were fired. All four of the remaining women who were arrested were fired. *Id.*

190. *Id.* at 871; see also, *Watson*, 857 F.2d 690 (holding that small statistical evidence combined with other evidence showing bias was enough to support inference of discriminatory practice).

191. *Sorlucco*, 971 F.2d at 872-73.

192. At least one court has held that a girl who allegedly was sexually harassed by a high school principal stated a claim under the Equal Protection Clause and § 1983. *Brenner v. Sch. Dist. 47*, No. 86-1343, 1987 WL 18819 (E.D. Mo. Jan. 12, 1987). In addition, the plaintiffs in *D.T. v. Indep. Sch. Dist. No. 16 of Pawnee County*, 894 F.2d 1176 (10th Cir. 1990), *cert. denied*, 498 U.S. 879 (1990), brought § 1983 claims charging violations of rights under the Due Process Clause, the Equal Protection Clause, and the First, Fourth, Fifth, and Ninth Amendments. Plaintiffs sought to recover from the school district after a teacher/coach molested them. The court overturned a jury verdict for plaintiffs, finding that the district's acts of hiring a teacher without investigating his criminal past were too remote from the assaults, which occurred three years later. The court did not specifically discuss the equal protection argument.

control of their employers. While employers can affect employees' actions by asserting economic control over them, public school officials can control students through legally vested authority. For example, public schools ordinarily have the authority to reasonably discipline students.¹⁹³ Public schools also may restrict students' rights¹⁹⁴ to maintain an orderly environment conducive to education. In the microcosm of a school, employees also take on roles similar to police officers in the adult world. School teachers and administrators sometimes break up fights, investigate complaints, and generally keep the peace.

The Equal Protection Clause requires public employers to treat male and female employees equally unless they have a reason for discrimination that bears a "close and substantial relationship to important governmental objectives."¹⁹⁵ Likewise, police departments are required to carry out their duties in a nondiscriminatory manner unless their actions meet the heightened scrutiny test.¹⁹⁶ Public schools should be held to the same standard. Therefore, they should be required to respond to complaints made by girls and boys in a nondiscriminatory manner, and they should be required to use their authority to effect a just end: equal educational opportunities for girls and boys.

Part II.A. presents the argument that if schools consistently give less attention to complaints from girls than to complaints from boys, then they are discriminating on the basis of gender in violation of the Equal Protection Clause. Part II.B. analogizes schools' customs of ignoring sexual harassment complaints with police departments' policies of not interfering in domestic disputes and finds that such a custom, though it may be facially neutral, violates the Equal Protection Clause. Part II.C. explores a failure-to-train claim in a school setting.¹⁹⁷ Part II.D. argues that some school practices pose more severe problems to girls than boys, and that when schools ignore this difference, they do not provide an equal educational experience for females because of their gender.

A. When Gender Discrimination Is the Only Explanation

If a female plaintiff can show that teachers or other school officials act on boys' complaints of mistreatment by other classmates in a more satisfactory

193. MCCARTHY & CAMBRON-MCCABE, *supra* note 32, at 201-39.

194. *E.g.*, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) (holding that school could restrict student's speech in school).

195. Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979) (citing Craig v. Boren, 429 U.S. 190, 197 (1976)), *aff'd*, 445 U.S. 901 (1980).

196. *E.g.*, Balistreri v. Pacifica Police Dep't, 901 F.2d 696 (9th Cir. 1990); *see also* Collins v. City of Harker Heights, 112 S. Ct. 1061, 1065-66 (1992) ("[T]he Equal Protection and Due Process Clauses of the Fourteenth Amendment, and other provisions of the Federal Constitution afford protection to employees who serve the government as well as to those who are served by them, and § 1983 provides a cause of action for all citizens injured by an abridgement of those protections.").

197. In *City of Canton v. Harris*, 489 U.S. 378 (1989), the Court held that a plaintiff can make a claim under § 1983 that a city failed to train its employees, and that this deliberately indifferent failure to train caused employees to violate a constitutional right.

manner than they respond to girls' complaints, courts should consider that those authorities have violated equal protection principles unless school defendants can show that the reason for the different treatment was something other than the victim's gender. If school officials consistently respond more satisfactorily to boys' complaints than they do to girls' equally severe complaints, gender must be the deciding factor.¹⁹⁸ When no neutral, legitimate explanation for disparate treatment of boys and girls exists, gender discrimination is apparent.¹⁹⁹

In *Bohen v. City of East Chicago*,²⁰⁰ for example, Judge Posner stated in his concurrence that where the evidence showed that male employees could get a response to any complaint of misconduct by coworkers, but females could get no response, and where the city had put forth no other explanation for such a difference, then Ms. Bohem had shown that the city allowed her to be harassed "for no other reason than that she was a woman."²⁰¹ To hold the school district liable for such behavior, a plaintiff must show that a policy-maker with final authority in such matters made the decision to dispense the disparate treatment with intent to discriminate or that a discriminatory policy, custom, or practice can be attributed to the school district.²⁰² Section 1983 case law suggests that girls should have a viable claim against school districts that allow their employees to consistently treat girls' complaints less adequately than boys' complaints. A plaintiff could use statistical evidence to show that girls' complaints are consistently treated differently. Unfortunately, this could be harder to find in a school setting where such records probably are not maintained on a daily basis. Testimony by other girls who experienced the discriminatory treatment, however, could serve the same purpose. In addition, *Sorlucco* shows that if a plaintiff's own case depicts sufficiently egregious behavior on the part of school officials, her statistical evidence might not need to be as compelling as otherwise.²⁰³ Also under *Sorlucco*, a court would find evidence of discrimination in other circumstances, such as

198. Another commentator has recently posed that such conduct should violate Title IX.

A school denies services to its female students, and provides services in a different manner if it fails to investigate and punish peer sexual harassment as swiftly and thoroughly as it does other misconduct such as fighting, swearing, and cheating. Not punishing student harassers, or punishing them very lightly, indicates that a school treats these students with "different rules of behavior [and] sanctions."

Sherer, *supra* note 31, at 2155 (quoting Department of Education regulations, 34 C.F.R. § 106.31(b)(4) (1993)).

199. See *Feeney*, 442 U.S. at 275.

200. *Bohen*, 799 F.2d 1180, 1192 (1986) (Posner, J., concurring). In this case, plaintiff was a female fire department dispatcher who claimed she was sexually harassed and assaulted by her superior, and verbally harassed by other employees. *Id.*

201. *Id.*

202. Governing bodies of educational institutions are policy-makers in most cases. Horner, *supra* note 52, at 347. Most non-administrative employees such as teachers, drivers, and custodians are probably not policy-makers because their actions are not final and unreviewable; in some cases, however, a superintendent or other high-level administrator might be considered a policy-maker if he has final judgment. *Id.* at 348. But identification of policy-makers is a matter of state law. *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988).

203. *Sorlucco v. New York City Police Dep't*, 971 F.2d 864, 872 (2d Cir. 1992).

where school employees instinctively believe a male attacker was telling the truth and that the girl was lying.²⁰⁴

B. Analogy to Battered Spouses' Claims Against Police Department

If a school district argues that it has not discriminated against girls because it does not act to prevent sexual harassment by students against girls or boys, the plaintiff stands in a similar position as a woman who claims a police policy of not interfering in domestic disputes is gender-based discrimination. Plaintiff must show that school authorities are purposefully discriminating against females by failing to address sexual harassment. Battered women who bring equal protection claims against police departments argue that police treat domestic violence cases differently, and thus classify and discriminate against women, who ordinarily are the victims.²⁰⁵ Girls might likewise argue that schools pay less attention to sexual harassment and abuse than they do to other disciplinary problems and that schools are thus classifying and discriminating against girls, who are more often the victims of such behavior.

Police policies or customs of not arresting men for beating their wives or girlfriends stem, in part, from societal attitudes about family life.²⁰⁶ At least one commentator has suggested that these policies or customs are rooted in the common law attitude that a man, as head of his household, had the right to discipline his wife by beating her, within limits.²⁰⁷ Police departments have also justified their policies on grounds that they should not invade the family's privacy.²⁰⁸ In addition, police sometimes fail to arrest alleged wife beaters because they believe the wife will eventually drop the charges against her husband,²⁰⁹ or because they do not consider violence by spouses to be as dangerous or harmful as violence by strangers.²¹⁰ Still others might believe the woman deserves the abuse.²¹¹ Though attitudes behind schools' treatment of sexual harassment cases might not be identical to the attitudes

204. *Id.* at 872-73.

205. Eppler, *supra* note 151; Laura S. Harper, Note, *Battered Women Suing Police for Failure to Intervene: Viable Legal Avenues After DeShaney v. Winnebago County Department of Social Services*, 75 CORNELL L. REV. 1393 (1990) (suggesting that despite the burden of proving intent, battered women who bring claims against police departments for failing to protect them may have more success under the Equal Protection Clause than the Due Process Clause).

206. Eppler, *supra* note 151, at 792.

207. *Id.* at 792-93.

208. *Id.* at 792.

209. *See, e.g.*, *McKee v. City of Rockwall*, 877 F.2d 409, 411 (5th Cir. 1989) (stating that a police chief allegedly told the victim's mother that police officers "[do] not like to make arrests in domestic assault cases since the women involved either wouldn't file charges or would drop them prior to trial"), *cert. denied*, 493 U.S. 1023 (1990).

210. *See, e.g.*, *Dudosh v. City of Allentown*, 665 F. Supp. 381, 393-94 (E.D. Pa. 1987) (testimony of patrolman explaining that different procedures are used when an intruder is an unknown burglar and when an intruder is someone the victim knows, implying that strangers are more dangerous), *vacated*, 853 F.2d 917 (3d Cir.), *and cert. denied*, 488 U.S. 942 (1988).

211. *See, e.g.*, *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 701 (9th Cir. 1990) (officer allegedly told plaintiff he "did not blame plaintiff's husband for hitting her, because of the way she was carrying on").

behind police treatment of domestic violence, similar stereotypical thinking might be at work. For example, educators might believe that sexual harassment is not a serious problem nor as harmful as other types of behavioral problems. They might adhere to the belief that "boys will be boys" and need not be punished for their adolescent conduct.²¹² Some might even think that girls who are sexually harassed desire such attention.²¹³ Evidence that boys receive more favorable treatment from educators²¹⁴ supports the notion that educators might feel boys are more important than girls and they should be sheltered from accusations of sexual misconduct. This societal attitude was certainly prevalent in Minnesota, where students and members of the community harassed a girl because she brought charges against members of a star hockey team.²¹⁵

Courts have held that a police practice of failing to respond to domestic violence may give rise to § 1983 liability if plaintiff shows that: (1) it is the policy or custom of the police to give less protection to domestic violence victims than to others; (2) discrimination against women is the motivating factor; and (3) plaintiff was injured by the policy or custom.²¹⁶ Likewise, a student should be able to recover if she can show it is the policy or custom of school personnel to pay less attention to sexual harassment complaints; discrimination based on sex is the motivating factor; and plaintiff was injured by the custom.

The distinction over whether an entity is classifying on the basis of gender or on the nature of the incident amounts to a matter of what scrutiny a court will apply to the government action. If the classification is based on gender, the defendant must show the classification is substantially related to an important government interest. But if the distinction is based on the nature of the complaint, the classification need only be rationally related to a legitimate government interest.²¹⁷ Though the rational basis test is normally fatal to plaintiff's case, it might not be here. Because sexual harassment can result in great physical and emotional harm, schools might have a difficult time

212. See, e.g., *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560, 1564-65 (N.D. Cal. 1993) (statement of school counselor that "boys will be boys" and that he did not report verbal harassment to Title IX representative because he did not feel it was important); *supra* note 17 (comments of school officials).

213. See, e.g., Strauss, *supra* note 22, at 164 (reciting that a caller told molestation victim's mother that girls like such treatment: "My sons bring girls to the house all the time and I know they do that and I know the girls like it"); *The Mud Slinger*, N.Y. TIMES, § 4, at 22 (Apr. 26, 1981) (editorial recounting that Phyllis Schlafly, leader of group which opposed the Equal Rights Amendment, told the Senate Labor Committee, "[w]hen a woman walks across the room . . . she speaks with a universal body language that most men intuitively understand. . . . Virtuous women are seldom accosted by unwelcome sexual propositions or familiarities, obscene talk or profane language").

214. AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, *HOW SCHOOLS SHORTCHANGE GIRLS* (1992) [hereinafter *HOW SCHOOLS SHORTCHANGE GIRLS*]; see also *infra* notes 252-56 and accompanying text.

215. Strauss, *supra* note 22, at 163-64.

216. *Hynson v. City of Chester*, Legal Dep't, 864 F.2d 1026, 1031 (3d Cir. 1988) (remanding to allow plaintiff to amend complaint to clarify equal protection claim); *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696 (9th Cir. 1990) (reversing dismissal of equal protection claim because evidence suggested animus against abused women).

217. See, e.g., *Heller v. Doe*, 113 S. Ct. 2637, 2642 (1993) (discussing the rational basis standard).

arguing they have a legitimate governmental interest in treating such behavior as a lesser offense than other punishable student behavior.

In any event, a plaintiff is much more likely to succeed if she can show the classification was based on gender. Evidence that girls are generally the victims of sexual harassment is an appropriate starting place. In the words of Judge Posner: "[S]exual harassment of men by women is extremely rare. . . . A policy of never responding to complaints about sexual harassment can therefore be analogized to a police department's policy of never responding to complaints of rape."²¹⁸ As Judge Posner points out, plaintiff must show a policy or custom of nonresponse or an "authoritative decision not to respond"²¹⁹ to hold a government entity liable.²²⁰

Under Professor Ortiz's analysis of the Supreme Court's intent doctrine, a less stringent intent test should be applied than is used in less critical settings because education is so important to individuals. In addition, under *Keyes*,²²¹ purposeful racial discrimination in a meaningful portion of the school district can imply purposeful discrimination in another part. By analogy, purposeful discrimination against girls in other areas of the education program might imply purposeful discrimination as to sexual harassment cases. As discussed earlier,²²² courts should find purposeful discrimination not only when school personnel maliciously treat girls unequally, but also when teachers and educators act on ingrained biases that favor boys. If failing to respond to sexual harassment reflects this kind of harmful gender-based discrimination, one should consider it purposeful discrimination that violates the Equal Protection Clause.

C. Failure to Train as Basis for Liability

In a substantive due process case, the Supreme Court held that government bodies can be liable when their failure to train causes employees to violate individuals' constitutional rights.²²³ In *City of Canton*, the Court unanimously held that municipal liability can be imposed even though the challenged policy itself did not violate the Constitution. The Court held that "the inadequacy of police training may serve as the basis for section 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."²²⁴ The Court explained that the "deliberate indifference" standard has nothing to do with the level of culpability that may be required to make out the underlying constitutional

218. *Bohen v. City of East Chicago*, 799 F.2d 1180, 1190 (7th Cir. 1986).

219. *Id.*

220. For further discussion of what a plaintiff must show to hold a government entity liable, see *supra* notes 53-56 and 179-91 and accompanying text.

221. *Keyes v. School Dist. No. 1*, 413 U.S. 189, 208 (1973) ("[W]e hold that a finding of intentionally segregative school board actions in a meaningful portion of the school system . . . creates a presumption that other segregated schooling within the system is not adventitious.")

222. See *supra* notes 151-62 and accompanying text.

223. *City of Canton v. Harris*, 489 U.S. 378 (1989).

224. *Id.* at 388.

violation.²²⁵ The crucial determination in finding municipal liability is whether a policy or custom was the "moving force" behind the violation.²²⁶ The Court elaborated on when a failure to train can be deemed a policy:

[I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.²²⁷

As an example, the Court said, "[T]he need to train [police] officers in the constitutional limitations on the use of deadly force . . . can be said to be 'so obvious,' that failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights."²²⁸ Also, when officers violate constitutional rights so often that the need for more training is obvious, a city can be held deliberately indifferent if it fails to answer the need.²²⁹ The Court added that the plaintiff would have to identify a particular deficiency in the training program and show that the deficiency was the actual cause of her constitutional injury.

Although Ms. Sorlucco did not bring a failure-to-train claim, the Second Circuit wrote in dicta that such a claim was feasible because the police department "tragically failed to show any sensitivity to the physical trauma and the resulting psychological manifestations commonly experienced by rape victims. It is not too much to expect that public agents charged with the investigation of devastating sexual crimes appreciate the nature of the casualties inflicted."²³⁰ An analogous claim could be made against school districts that fail to train their employees to deal with students' complaints of abuse. One could argue that it is obvious that schoolteachers and administrators will have to deal with students' complaints of sexual abuse, and it is likely that without training they will do so in a way that violates the Equal Protection Clause. When school employees deal with such complaints in a discriminatory manner and the school district does not offer corrective training, the school district could be found to fail the deliberate indifference standard of *City of Canton*.

225. *Id.* at 389 n.8.

226. *Id.* at 389 (citing *Polk County v. Dodson*, 454 U.S. 312, 316 (1981)).

227. *Id.* at 390.

228. *Id.* at 390 n.10. Under the *City of Canton* decision, a plaintiff apparently would not have to show that the government unit acted with purposeful discrimination. Rather, it could be liable under § 1983 for its deliberate indifference to the discriminatory acts of its employees. *NAHMOD*, *supra* note 34, at 487.

229. *City of Canton*, 489 U.S. at 390.

230. *Sorlucco v. New York City Police Dep't*, 971 F.2d 864 (2d Cir. 1992).

*D. School Liability When Sexual Harassment
Denies Girls Equal Education*

Students in public schools endure sexual harassment ranging from humiliating comments to physical abuse,²³¹ and studies show that girls are more often and more severely affected by such behavior.²³² Experts have noted that girls enrolled in traditionally male classes are especially likely to be harassed, causing them to drop those courses or avoid them.²³³ Sexual harassment also prevents girls from participating in classroom discussions. Equity researcher Carol Shakeshaft of Hofstra University School of Education commented: “[P]eer sexual harassment makes girls less willing to stand in front of the class. Girls don’t want to speak up, because the boys are going to say they have big breasts. Girls we have studied have said, ‘I won’t go to the front of the class,’ because boys say things like they can smell their period. The result of this kind of verbal and physical harassment is that girls contain themselves.”²³⁴ In some cases, girls have even changed schools²³⁵ or dropped out because of harassment.²³⁶ These cases show that sexual harassment limits girls in their educational pursuits.²³⁷ This argument is analogous to Judge Posner’s statement in his *Bohen* concurrence that “by taking no steps to prevent sexual harassment, the city created a worse working environment for women than for men, and this lowered the women’s wages (net of all disamenities and other costs of work) relative to the men’s.”²³⁸

Therefore, a school district which does not make reasonable efforts to prevent verbal and physical harassment is not providing equal education to females and males. Although education is not a fundamental right,²³⁹ girls are deprived of equal protection of the laws that provide for public schooling if they do not receive the same benefits that boys get.²⁴⁰ Thus, though a school offers the same courses and activities to girls, it discriminates against them if it ignores the fact that girls are being deprived the full benefit of them because of physical and verbal harassment. Professor Tribe points out: “[T]he characteristic injury of sex discrimination lies not in the failure to be treated

231. See *supra* notes 1-23 and accompanying text.

232. See *supra* notes 25-27 and accompanying text.

233. Leighty, *supra* note 21, at 12.

234. Liza N. Burby, *Girls Should Be Treated Equally*, N.Y. TIMES, Aug. 8, 1993 (Long Island Weekly), § 13, at 2.

235. See *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560 (N.D. Cal. 1993).

236. See *supra* note 19; see also Burby, *supra* note 234 (quoting equity researcher as saying girls who are sexually abused by teachers often drop out of school and move away).

237. Sherer, *supra* note 31, at 2134, 2153.

238. *Bohen v. City of East Chicago*, 799 F.2d 1180, 1191 (7th Cir. 1986) (Posner, J., concurring).

239. *Rodriguez v. San Antonio Indep. Sch. Dist.*, 411 U.S. 1, 37 (1973).

240. *Brenden v. Independent Sch. Dist.*, 477 F.2d 1292 (8th Cir. 1973) (holding that whether or not there is an absolute right to engage in athletics, female students are denied equal protection if they do not get the benefits of participation in sports that boys get).

on a gender-blind basis, but rather in being deprived of liberty or opportunity *because* one is a woman, or *because* one is a man."²⁴¹

Schools might respond that they do not discriminate against girls because their employees have not themselves sexually harassed them or because they do not respond differently to complaints made by girls and complaints by boys. That is, their response is inadequate in both situations. In fact, they may argue that they treat boys and girls exactly the same. But when schools fail to provide adequate supervision of students, as in *D.R. v. Middle Bucks Area Vocational Technical School*,²⁴² or fail to address sexual harassment in other ways, they ignore the real differences between boys and girls. Girls are more prone to physical and verbal sexual attack, which arguably carries greater emotional trauma and stigma for girls than for boys;²⁴³ such abuse limits girls in their educational pursuits; and such abuse leads to subordination of girls and may lead to their subordination as women.

According to one sociologist who has studied teasing and insulting in children eleven through thirteen years of age, some girls have not developed the kind of self-defense skills that their male peers have, making the sexist messages sent to girls especially difficult to handle. "Boys teach each other how to deal with it," said Donna Eder, professor of sociology at Indiana University. "At first I thought it would be best if kids learned how to respond, but then I saw that there is no easy way to challenge the implicit sexist message in these insults. . . . At one point I would have said you should teach your daughter how to take it. Now I don't think that's enough."²⁴⁴

This gives all the more reason to hold schools responsible when they fail to deal with sexual harassment problems. According to Professor Tribe, "[E]quality can be denied when government *fails* to classify, with the result that its rules or programs do *not* distinguish between persons who, for equal protection purposes, should be regarded as differently situated."²⁴⁵ This Note does not suggest, however, that a school necessarily must "classify" its students to provide equal education. Rather, schools should consider a custom's disparate consequences for a group and adjust it to put students on equal grounds. Students would not necessarily have to be treated differently in most cases. For example, providing inadequate supervision might have worse consequences for girls, but correcting the situation would not treat girls and boys differently and would not disadvantage boys.

Conceivably, some might suggest that recognizing and acting to compensate for these differences will tend to continue the stereotype that girls are weak

241. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-29, at 1580 (2d ed. 1988) (emphasis in original).

242. *Middle Bucks*, 972 F.2d 1364 (3d Cir. 1992), cert. denied, 113 S. Ct. 1045 (1993).

243. *Supra* notes 25-27 and accompanying text.

244. Dave Matheny, *Girl's Sexual-Harassment Charge Has Experts Taking Closer Look at Kids' Behavior*, STAR TRIB., Nov. 12, 1992, at 1E.

245. TRIBE, *supra* note 241, § 16-1, at 1438.

and need to be protected.²⁴⁶ They might analogize to Professor Tribe's suggestion that keeping women out of the military to protect them from sexual attacks by the enemy or their male comrades perpetuates "the image of women less as hardy citizens willing and able to pull their own weight than as vulnerable creatures who must be sequestered at home for their own safety."²⁴⁷ This Note, however, does not suggest that girls should be sequestered from males, only that schools should take reasonable efforts to prevent sexual harassment and thus remove what has become an obstacle in the paths of girls seeking equal education. Requiring schools to provide adequate supervision of students, to implement and follow adequate investigatory and disciplinary procedures, or to educate students about appropriate behavior would not privilege girls to the detriment of boys. Rather, it would put them on more equal footing and would help provide for more civil relationships between the sexes.²⁴⁸ In fact, boys would benefit by the extra measures taken to provide an environment more conducive to learning.

There are differences between boys and girls—how they are socialized, and how they react to various situations.²⁴⁹ Physical, sociological, or psychological differences might make boys less adversely affected by a condition than a girl would be. It is unfair to expect a girl to react to physical abuse or verbal harassment in the same way a boy might. "Insistence upon the 'sameness' of men and women in the face of undeniable differences between them and the social subordination of women by men enshrines male attributes as the 'norm' and denies the existence and value of female attributes, pursuits, and ways of life."²⁵⁰ As one commentator has suggested, "[R]ecognizing that we are all different from one another is the only way to break the cycle of discrimination."²⁵¹ School, in fact, can be seen as a place where that cycle begins, for it is at school where boys and girls learn much about what is appropriate behavior. Moreover, school is where children begin to see how the sexes relate to one another and where children begin to define roles for themselves. But at school, girls repeatedly receive messages that they are inferior to boys. For example, studies show that teachers pay more attention to boys²⁵² and give boys more praise, criticism, and more detailed instructions.²⁵³ Textbooks stereotype or ignore females,²⁵⁴ and most standardized

246. Sherer, *supra* note 31, at 2166 (stating that "[s]ome critics argue that permitting a cause of action for peer sexual harassment sends a harmful message that females are victims and encourages them to let the court fight their battles for them").

247. TRIBE, *supra* note 241, § 16-28, at 1573.

248. See Sherer, *supra* note 31, at 2168.

249. *Supra* notes 25-27 and accompanying text. For example, girls are four to five times more likely to commit suicide than boys, and girls are twice as likely to feel sad and hopeless. HOW SCHOOLS SHORTCHANGE GIRLS, *supra* note 214, at 79.

250. Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 58 (1990).

251. Martha Minow, *Making All the Difference: Three Lessons in Equality, Neutrality, and Tolerance*, 39 DEPAUL L. REV. 1, 12 (1989).

252. HOW SCHOOLS SHORTCHANGE GIRLS, *supra* note 214, at 68-69.

253. Glen Harvey, *Finding Reality Among the Myths: Why What You Thought About Sex Equity in Education Isn't So*, 67 PHI DELTA KAPPAN 509, 510-11 (1986). "Studies also indicate that the classroom

tests are biased against girls.²⁵⁵ In preschool, teachers give boys more attention and more hugs than girls.²⁵⁶ Finally, many girls must deal with the sexually offensive behavior of some classmates.

By failing to provide a safe school environment and by failing to prohibit sexual harassment and assault, schools allow subordination of and discrimination against females to begin anew with each generation. A boy who harasses and molests girls in schools may grow into a man who does the same in the office or on the street.²⁵⁷ He could be the man who causes a woman to take a less prestigious job or who causes her to restrict her life in order to prevent assault. As one commentator has aptly stated, "The perpetuation of sexual assault is inseparable from traditional female oppression, and is both an expression of male dominance, and a method of maintaining it."²⁵⁸

In today's legal environment, courts might not easily accept this type of equal protection argument because a plaintiff such as D.R.²⁵⁹ will have to prove that the school district or school employees by their actions or inactions *intended* to discriminate against her because of her sex. It might be true that a school does not intend to discriminate when it puts an ill-trained student teacher in charge of a generally rowdy classroom or when it designs a classroom in such a way that students can escape supervision and assault their classmates. But school officials may be allowing rampant sexual abuse and harassment to occur, doing nothing to stop it, when they know or should know that girls will be injured disparately. One could argue that lack of action is a result of an ingrained bias, and that girls are valued less than boys. If school authorities shrug off sexual harassment with comments such as "boys will be boys," they are continuing the stereotypical notion that boys are not

environment experienced by female students discourages their classroom participation, lowers their self-esteem, and has a negative influence on their course and career choices." *Id.* at 511 (footnote omitted). See also Myra Sadker & David Sadker, *Sexism in the Classroom: From Grade School to Graduate School*, 67 PHI DELTA KAPPAN 512, 513 (1986) ("When boys call out, teachers tend to accept their answers. When girls call out, teachers remediate their behavior and advise them to raise their hands. Boys are being trained to be assertive; girls are being trained to be passive—spectators relegated to the sidelines of classroom discussion.").

254. HOW SCHOOLS SHORTCHANGE GIRLS, *supra* note 214, at 61-63.

255. *Id.* at 52-57.

256. *Id.* at 68.

257. "Sexual harassment starts with little boys picking on little girls and adults saying, 'Boys will be boys' . . . If you allow that to occur, then you get at the water cooler at work the sexual innuendo and all the things women have to tolerate." Peter Kendall, *Sexual Harassment: Can It Happen in 3rd Grade?*, CHI. TRIB., Nov. 3, 1992, § 1, at 6 (quoting school Superintendent Griff Powell).

258. Wendy Rae Willis, *The Gun Is Always Pointed: Sexual Violence and Title III of the Violence Against Women Act*, 80 GEO. L.J. 2197-99 (1992) (citing Senate reports which show that violence against women continues to increase, with the number of assaults rising almost 50% in 15 years).

259. Although D.R. did not bring an equal protection claim under § 1983, she brought a claim under 42 U.S.C. § 1985 (1988), charging that school officials conspired to deprive her of equal protection. The Third Circuit rejected the claim, finding that she had not proven a conspiracy and her pleadings did not adequately "establish that the alleged discriminatory policies or practices were due to plaintiff's membership in the class of female students." *D.R. v. Middle Bucks Area Voc. Tech. Sch.*, 972 F.2d 1364, 1377 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 1045 (1993). Although § 1985 is a useful tool for bringing discrimination claims, discussion of this statute is beyond the scope of this Note.

responsible for their sexual aggressiveness and that girls must learn to handle such harassment on their own.

The Supreme Court stated in *Jenness v. Fortson*²⁶⁰ that “[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike.”²⁶¹ In *Jenness*, the Court upheld a positive law that accounted for differences. The Court did not find a government entity liable for a failure to account for real differences, something that courts are more unlikely to do.²⁶² Liability for treating girls and boys alike through inadequate policies, customs, or practices that allow sexual abuse to flourish falls into the latter category. By ignoring the fact that such practices can lead to adverse effects on girls, schools fail to account for real differences. Unfortunately, the courts have not favored such arguments because of a “reluctance . . . to recognize and especially to enforce affirmative governmental duties to redress disadvantages or injuries not thought to be actively engineered by government itself.”²⁶³

If courts should adopt the antijudgment approach to equal protection, as Professor Tribe and other commentators have suggested, the “real differences” argument would be more readily accepted. The antijudgment theory “aims to break down legally created or legally reinforced systems of subordination that treat some people as second-class citizens.”²⁶⁴ Currently, the courts most often apply the antidiscrimination principle,²⁶⁵ which requires “the purposeful, affirmative adoption or use of rules that disadvantage the target group.”²⁶⁶ The antijudgment approach looks at the “victim’s state of existence,” while the antidiscrimination principle looks at the actor’s state of mind.²⁶⁷ Requiring plaintiffs to show that government officials took an action *because* of its adverse effects on a group “overlooks the fact that minorities can also be injured when the government is ‘only’ indifferent to their suffering or ‘merely’ blind to how prior official discrimination contributed to it and how current official acts will perpetuate it.”²⁶⁸

The Court voices antijudgment principles at times, as in *Mississippi University for Women v. Hogan*.²⁶⁹ Since its 1976 decision in *Washington*

260. *Jenness*, 403 U.S. 431 (1971) (upholding state election laws that imposed different ballot access requirements on minor parties than it imposed on more established parties).

261. *Id.* at 442.

262. TRIBE, *supra* note 241, § 16-1, at 1439.

263. *Id.* § 16-1, 1439 n.21.

264. *Id.* § 16-21, at 1515.

265. *Id.* § 16-21, at 1514.

266. *Id.* § 16-21, at 1518.

267. *Id.* § 16-21, at 1519. For more on antijudgment principles, see Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986).

268. TRIBE, *supra* note 241, § 16-21, at 1517.

269. *Hogan*, 458 U.S. 718 (1982) (striking down a single-sex policy in part because it furthered archaic views of women and caused nursing wages to remain low). Tribe points out that in addition to *Hogan*, the Court applied antijudgment principles to some extent in several cases, including *Brown v. Board of Education*, 347 U.S. 483 (1954), *Plyler v. Doe*, 457 U.S. 202 (1982), and *Skinner v. Oklahoma*, 316 U.S. 535 (1942). TRIBE, *supra* note 241, § 16-21, at 1516-18.

v. *Davis*,²⁷⁰ however, it has been wedded to the idea that purposeful discrimination by government officials is necessary to find a violation of the Equal Protection Clause. As has been demonstrated above, however, the Court has allowed plaintiffs some leeway in proving purposeful discrimination when the rights involved have been deemed particularly important.²⁷¹ Because education is crucial to advancing the lives of women and helping them to overcome the subordinated roles women have held in society, courts should hold school districts liable when they are conscious of situations that deprive females of an equal education and they fail to take reasonable steps to correct the problems.

CONCLUSION

Students seeking to hold schools responsible for physical sexual abuse inflicted by other students might be able to do so under the Due Process Clause, providing they bring their cases in jurisdictions that can still adopt the functional custody theory. Alternatively, plaintiffs may seek to establish that a special relationship exists because school officials created a danger or placed the student in a worse position. If a plaintiff is unable to satisfy these requirements, she might have a better argument under the Equal Protection Clause because schools must offer equal educational opportunities to girls and boys. Similarly, recent developments suggest that Title IX is a plausible route to recover for injuries caused by student-inflicted physical and verbal sexual harassment. In the latter two arguments, however, the likelihood of recovery varies, depending on who must have the required intent to discriminate and what is required to prove that intent.

While two states have required schools to establish sexual harassment policies,²⁷² it appears that many school systems are still not adequately addressing the problem.²⁷³ It is unfortunate that legislation or litigation is necessary to prompt schools to act. However, fears that recognizing peer sexual harassment claims against school districts will cause excessive litigation, unwarranted awards, and rising insurance premiums, might not be

270. *Washington*, 426 U.S. 229 (1976) (holding that disproportionate impact without a discriminatory purpose was not enough to invalidate a test a police department gave to applicants).

271. See *supra* notes 164-72 and accompanying text.

272. Minnesota and California have passed legislation requiring sexual harassment policies in schools. The Minnesota statute required all schools to have sexual harassment policies in place for the 1991 school year. MINN. STAT. ANN. § 127.46 (West 1989). The Minnesota statute includes "physical conduct or communication of a sexual nature" that creates "an intimidating, hostile, or offensive . . . environment" at work or school in its definition of discrimination. MINN. STAT. ANN. § 363.01.41 (West 1991). The California law requires schools to adopt and distribute a written sexual harassment policy. CAL. EDUC. CODE § 212.6 (West Supp. 1993). The California code defines sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the work or educational setting." *Id.* § 215.5 (West Supp. 1993). For further discussion of these provisions, see Sherer, *supra* note 31, at 2139-42.

273. The AAUW report stated that 57% of students surveyed did not know if their school had a sexual harassment policy. HOSTILE HALLWAYS, *supra* note 15, at 21. Even if these schools have such policies, if the students are unaware of them, one can assume they are not being adequately enforced.

well-founded.²⁷⁴ But even if such results are possible, are they more distasteful to society than allowing girls to be subjected to rape, molestation, or severe verbal harassment in school only to be told by a court that they cannot hold schools responsible for their injuries? When courts so hold, they echo the school administration's message that girls must learn to deal with sexual harassment on their own.

The effects of sexual harassment can be devastating, as the AAUW study and numerous newspaper reports demonstrate;²⁷⁵ school authorities' failure to deal with the problem compounds the emotional impact. This is evident from one sixteen-year-old girl's statement: "I wasn't dressed very provocative and I gave them no reason to harass me. I was upset the administration didn't respond immediately after I complained. I was told to ignore the harassers."²⁷⁶ This teenager deserved more from her school, as did D.R. and L.H. They deserved an opportunity to learn, unmolested by their peers; they deserved to have their concerns and fears addressed by teachers and administrators. They did not deserve to bear the full physical, emotional, and economic impact of unforgettable injuries that school authorities could have prevented, or at least alleviated.

274. Huefner writes:

Courts also have resisted widening the scope of constitutional torts out of fear of overlitigation and court crowding. But recent studies of constitutional tort litigation in the federal courts suggest that, contrary to popular perception, the advantages of section 1983 suits have not led to an unusual increase either in filings of such suits or in judgments costly to government bodies. One possible interpretation is that section 1983 may be playing at least as important a role in deterring government misconduct as in providing relief in those exceptional cases in which extreme misconduct actually occurs.

Huefner, *supra* note 93, at 1961-62 (citing Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641 (1987)); see also Sherer, *supra* note 31, at 2167 ("Contrary to the contention of critics, the availability of a peer sexual harassment claim under Title IX will not lead to a litigation explosion or frivolous awards" if a school's liability is limited to "only those claims where the student can prove both that a hostile environment exists and that the school has failed to take prompt and appropriate corrective action.") (footnotes omitted).

275. HOSTILE HALLWAYS, *supra* note 15, at 15-18.

276. *Id.* at 14.