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SECTION 1983 AND SEX ABUSE IN SCHOOLS: MAKING A FEDERAL CASE OUT OF IT

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When I accepted the invitation to write for this Symposium, I had in mind a pair of cases decided en banc by a divided Fifth Circuit, authored by the same judge, both involving sexual abuse of school children, but with startlingly different results. In Walton v. Alexander, the Fifth Circuit held that a supervisor's failure to protect a fifteen-year-old deaf boy at a residential state school from sexual assault by another student created no § 1983 liability. In an opinion by Judge Jolly, the Fifth Circuit ruled that DeShaney v. Winnebago Department of Social Services precluded recovery because the child attended the state school "through his own free will (or that of his parents) without any coercion by the state." Less than a year earlier, however, a fifteen-year-old girl who alleged she was the victim of sexual abuse in school had fared far better in the hands of the Fifth Circuit in an opinion written by the same Judge Jolly. In Doe v. Taylor Independent School District, a student alleged that the school's principal and superintendent failed to protect

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1. 44 F.3d 1297 (5th Cir. 1995) (en banc), modifying 20 F.3d 1350 (5th Cir. 1994).
2. See id. at 1305. Christopher Walton was a fifteen-year-old residential student at the Mississippi State School for the Deaf when he was attacked by another student. See Walton v. Alexander, 20 F.3d 1350, 1357 (Garwood, J., concurring). Both children were suspended briefly, but later returned to school. See Walton, 44 F.3d at 1300. A year later, after the school closed one of its dormitories, Walton was thrown together with his aggressor in the remaining unit and was again assaulted. See id. The district court's denial of defendants' motion for summary judgment on the grounds of qualified immunity was appealed to the Fifth Circuit. See id. at 1299. Originally, a Fifth Circuit panel had reversed the district court, but held that the superintendent stood in a "special relationship" to the victim, and therefore had a "duty not to be deliberately indifferent to Walton's due process rights." Id. at 1300. The panel's decision was reheard en banc. See id. at 1297.
4. Walton, 44 F.3d at 1305.
5. 15 F.3d 443 (5th Cir. 1994) (en banc).
her from the sexual predations of a teacher. The biology teacher and coach, who had a history of inappropriate behavior toward female students, aggressively pursued first-year-student Jane Doe, in school and out, until he finally induced her to engage in intercourse with him. The teacher's campaign did not go unremarked: Teachers and parents lodged complaints about his behavior with female students in general and with Jane Doe in particular. Administrators failed to take the allegations seriously or act decisively against the teacher despite numerous warning signs. The Fifth Circuit held that school officials are liable for supervisory failures that result in the molestation of a school child by a teacher if those failures manifest a deliberate indifference to the constitutional rights of that child.

In focusing on supervisory liability, the court consciously avoided becoming trapped in the DeShaney mire. I have written elsewhere to criticize the application of DeShaney to child welfare practice and foster care. In that case, the Supreme Court's preoccupation with

6. See id. at 445, 449-50. Since the case was heard on a motion for summary judgment, the court was obligated to view the facts in a light most favorable to the nonmovant. See id. at 446 n.1.
7. See id. at 447-48.
8. See id. at 446-49.
9. See id. at 446-48.
10. See id. at 445, 453, 456-57.
11. See id. at 451 n.3.
the need to draw a bright line between constitutional and ordinary tort led to an abstract and ideological rejection of a "duty to protect" outside of very limited circumstances. By contrast, Taylor's focus on supervisory liability provides an opportunity to move beyond this essentially negative fixation to a more positive exercise: opening an appropriate dialogue between federal law and the common law of tort.

The structure and past interpretation of § 1983 justifies this approach. The famous statement in *Monroe v. Pape*, the foundation case of § 1983, has been repeated so many times that it is a truism: The civil rights statute "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Even more significant, *Monroe* made it clear that a federal case is still possible even though the injuries inflicted are also covered by state tort or criminal law: Even if the thirteen Chicago police officers who broke into Mr. Monroe's home could be held liable under state law for trespass, false imprisonment, assault and battery, the federal remedy is still available. Overlap between constitutional and ordinary tort is therefore the norm rather than the exception in § 1983.

Of course, the other side to the dialogue between federal and state law is federalism. Because § 1983 litigation by definition constitutes a federal intrusion on the state sphere, the limits imposed by federalism are important. Historians may disagree over the extent of intrusion contemplated by the framers of the Fourteenth Amend-
The Court certainly has grappled with this debate. We all would agree, however, that there are outer limits: Section 1983 should not take over the entire field of state law, even when the harm is inflicted by a state actor. This is so because § 1983 was meant to vindicate federal interests, not simply provide another arena for the pursuit of state tort claims. Section 1983 jurisprudence, therefore, is both an exercise in line-drawing as well as in dialogue.

Three issues were in dispute in Doe v. Taylor. The first controversy which divided the Taylor court was whether the school girl had a constitutionally-protected "liberty interest" at all. This question is important because § 1983 creates no rights itself. Rather, it merely enforces rights derived either from the Constitution of the United States or from other sources of federal law. Jane Doe sought a remedy for the loss of her right to substantive due process under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. That provision prohibits deprivation of life, liberty, or property without due process of law. But in order to qualify for this protection, Doe had to establish a triggering interest, in this case her claim that she had a liberty interest in freedom from arbitrary intrusions by governmental agents on her bodily integrity. This Article contends that, because of what I call the "Ingraham dilemma," Jane Doe clearly suffered a substantive due process deprivation. As a result, the dissent was forced to resort to desperate measures to deny the validity of her claim.

17. For a discussion of the historical background, see Laura Oren, Immunity and Accountability in Civil Rights Litigation: Who Should Pay?, 50 U. PITT. L. REV. 935, 939 n.18 (1989). See also Robert J. Kaczorowski, To Begin the Nation Anew: Congress, Citizenship, and Civil Rights after the Civil War, 92 AM. HIST. REV. 45, 47 (1987) (discussing the various schools of historical thinking and taking the anti-revisionist position that the Fourteenth Amendment and the Civil Rights Act represented a "revolutionary change in American constitutionalism").

18. See, e.g., Younger v. Harris, 401 U.S. 37, 44 (1971) (The concept of "Our Federalism" does not mean "blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts.").

19. See Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 450 (5th Cir. 1994); id. at 476 (Jones, J., dissenting).


21. See U.S. CONST. amend. XIV.

22. See Ingraham v. Wright, 430 U.S. 651, 672 (1977), which recognized that due process claims entailed a "familiar two-stage analysis"—first ascertaining whether a liberty interest was implicated, and then determining what process was due to protect any such interest. It is clear that the two-stage analysis applies to claims of substantive due process violations as well. See Washington v. Harper, 494 U.S. 210 (1990). In Washington, the Court first acknowledged that prison inmates had a liberty interest in remaining free from unconsented medication with psychotropic drugs. Id. at 222. Having found the triggering interest, the Court then engaged in separate substantive and procedural inquiries to determine whether the state's justification was substantively sufficient, and whether the procedures followed satisfied procedural due process. See id. at 220-27 (substantive due process analysis), 228-33 (procedural due process analysis).
The second issue was raised by a dissenting strategy to escape finding the constitutional violation: they engaged in a sub silentio and inappropriate attempt to import common law "scope of employment" doctrine into the unique § 1983 concept of action committed under "color of state law." Section 1983 requires that the defendant have acted under color of state law, a statutory element that closely resembles, but is not identical to, the constitutional concept of "state action." Since Monroe v. Pape, the Court's federal law interpretation of "under color of state law" has transformed a little-used Reconstruction-era statute into the major vehicle for enforcing constitutional rights today. This Article contends that common law "scope of employment" doctrine has no legitimate place in § 1983 "color of law" jurisprudence and can only serve to undermine the central insights of Monroe.

The third issue provides the most interesting opportunity for dialogue between § 1983 and the background of tort liability. The statute grants a remedy against a defendant who "subjects or causes to be subjected" anyone to a deprivation of federally guaranteed rights. The Court has interpreted this language to require personal fault of each defendant. Therefore, the statute precludes vicarious liability, or respondeat superior, which is permitted and even favored in the contemporary common law. While conceding that this is a settled issue under § 1983, this Article contends nonetheless that the background of tort liability should be considered in determining which individual defendants may be held liable for the constitutional injury in the teacher sex abuse cases. The lower courts have erred in applying

26. See infra notes 225-260 and accompanying text.
27. But see St. Louis v. Prapotnik, 485 U.S. 112, 148 n.1 (1988) (Stevens, J., dissenting). Stevens criticizes the Court's decision to exclude respondeat superior from its interpretation of § 1983 and to limit municipal liability in that way. See also Peter H. Schuck, Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages, 1980 Sup. Ct. Rev. 281, 359-60. Professor Schuck was critical of the decision in Owen v. City of Independence, 445 U.S. 622 (1980), which imposed liability on the city for a "discretionary" decision. See Schuck, supra. Generally, however, he favors a contraction of liability for the official coupled with legislation which would impose vicarious liability on the municipality instead. See id. at 360-61. Professor Schuck believes that congressional action is necessary to achieve this change because of the limitations inherent in Monell. See id. at 359. In 1978, before Monell was decided, Judge Jon O. Newman argued that § 1983 reached the wrong defendant when it focused on the employee instead of the employing government. See Jon O. Newman, Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct, 87 Yale L.J. 447, 455-58 (1978). Judge Newman also supported congressional action to permit vicarious liability against municipal and state governments. See id. at 457-58.
to individual liability for the failure to supervise the standard of "deliberate indifference," a formulation developed in *City of Canton v. Harris*\(^\text{28}\) in the different context of *municipal* liability. Instead, the lower courts should consider "notice liability," an approach known to the common law, but which also incorporates the § 1983 requirement of personal responsibility.

The fact that these issues arise in cases that are about children, schools, and sex is of more than incidental significance. It explains some of the odder arguments against liability. It also underpins my own analysis of the abuse of state power that occurs when a supervisory official is responsible for a subordinate's sexual abuse of a child in school.

**LINE-DRAWING AND THE UNDERLYING CONSTITUTIONAL RIGHT: OF “LIBERTY” AND THE INGRAHAM DILEMMA**

Jane Doe sued two supervisors.\(^\text{29}\) The school principal, Eddy Lankford, had received notice of Coach Stroud's inappropriate behavior with female students as early as the fall of 1985.\(^\text{30}\) Rumors circulated in school and around town about the teacher's overt favoritism toward girl students in the classroom.\(^\text{31}\) Parents and teachers complained in the Fall of 1985 and the Spring of 1986.\(^\text{32}\) A school librarian witnessed an incident which she considered child molestation and which she reported to Lankford.\(^\text{33}\) This and other behavior, all of which occurred before the coach began his pursuit of Jane Doe, brought little reaction from the principal.\(^\text{34}\) Indeed, he downplayed the incidents and did not warn or discipline the coach in any way or even bother to document the complaints.\(^\text{35}\) After Jane Doe entered the school, the principal further received notice that Stroud had targeted her in particular for his sexual attentions and abuse.\(^\text{36}\) In "the most striking example of his apathy," however, the principal did nothing even when another student showed him a revealing valentine addressed by the coach to Doe.\(^\text{37}\) Instead of discussing the incident


\(^{29}\) See Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 445 (5th Cir. 1994).

\(^{30}\) See id. at 446.

\(^{31}\) See id.

\(^{32}\) See id. at 446-47.

\(^{33}\) See id. at 447.

\(^{34}\) See id.

\(^{35}\) See id.

\(^{36}\) See id.

\(^{37}\) Id. at 448.
with Stroud, Superintendent Caplinger, or the girl's parents, or pro-
tecting Doe in any way, he transferred out of Stroud's class the other
student, the one who brought to his attention the inappropriately inti-
mate correspondence. Some time after this, the coach's escalating
sexual abuse of Doe culminated in intercourse.

Defendant Mike Caplinger became superintendent of the District
in July of 1986. According to the summary judgment evidence, he
heard nothing about the coach's inappropriate behavior with female
students until January of 1987 when, for the first time, the principal
notified him about complaints from other students. He instructed
Lankford to speak to Stroud. After complaints from parents, Cap-
linger spoke to the school attorney and had the principal contact the
Texas Education Agency to find out if there were any other com-
plaints against the teacher. Six months later, in July of 1987, Doe's
parents discovered photographs with a revealing personal inscription
from the coach to the girl. When confronted, the girl denied a sex-
ual involvement with Stroud. Caplinger called the principal who in
turn spoke to the coach, who also denied anything improper. For
the first time, Lankford warned of disciplinary consequences. The
superintendent and the principal met with the coach and warned him
that he should stay away from the girl. But no further action was
taken and no greater care was exercised for the rest of the school
year. Stroud stayed away from Doe for a while, but when school
resumed in the late summer, the sexual abuse also began again. It
was only halted after Doe's parents found more love letters and took
their daughter to their family attorney. She admitted the truth to
him. On the same day the attorney reported this to the superinten-
dent, Caplinger also received a complaint from the parents of another
child. He ordered Stroud immediately suspended from employ-

38. See id.
39. See id.
40. See id. at 447.
41. See id.
42. See id. at 448.
43. See id. at 448-49.
44. See id. at 449.
45. See id.
46. See id.
47. See id.
48. See id.
49. See id.
50. See id.
51. See id.
52. See id.
53. See id.
The coach subsequently pled guilty to criminal charges stemming from his molestation of Jane Doe.\textsuperscript{55}

Is there a federal interest at stake in this scenario? The Fifth Circuit ruled that there is a well-established right under the Fourteenth Amendment "to be free of state-occasioned damage to a person's bodily integrity."\textsuperscript{56} In his majority opinion in \textit{Taylor}, Judge Jolly observed that the Fifth Circuit recognized the liberty interest in bodily integrity in a 1981 case in which a New Orleans police officer night-sticked a tourist who was trying to take a picture of an arrest during Mardi Gras.\textsuperscript{57} The same court applied this principle in another case, \textit{Jefferson v. Ysleta Independent School District},\textsuperscript{58} in which a school teacher tied a second-grader to a chair for almost two full school days, even denying the child access to the bathroom.\textsuperscript{59} A final case, Judge Jolly noted, "held that the infliction of corporal punishment in public schools is a deprivation of substantive due process when it is arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning."\textsuperscript{60} Considering all these rulings, Judge Jolly concluded that \textit{Taylor} was an easy case:

\begin{itemize}
  \item \textsuperscript{54} See id.
  \item \textsuperscript{55} See id.
  \item \textsuperscript{56} Id. at 450.
  \item \textsuperscript{57} Id. at 451 (citing Shillingford v. Holmes, 634 F.2d 263, 265 (5th Cir. 1981)).
  \item \textsuperscript{58} 817 F.2d 303 (5th Cir. 1987).
  \item \textsuperscript{59} See id. at 305. In \textit{Jefferson}, the teacher's purpose was neither punishment nor discipline, but apparently was intended as an educational exercise. See id. at 304. As a result, the Fifth Circuit found that \textit{Jefferson} was not controlled by the results in cases where discipline was intended, such as \textit{Ingraham v. Wright}, 439 U.S. 651 (1977), "and its progeny." Id. at 305.
  \item \textsuperscript{60} \textit{Taylor}, 15 F.3d at 451 (citing Fee v. Herndon, 900 F.2d 804, 808 (5th Cir. 1990) (quoting Woodard v. Los Fresnos Indep. Sch. Dist., 732 F.2d 1243, 1246 (5th Cir. 1984))) (internal quotations omitted).

In \textit{Fee}, a Fifth Circuit panel held that there was no substantive due process violation arising out of an allegedly severe paddling of a sixth-grade special-education student. \textit{See Fee}, 900 F.2d at 806. The parents claimed that the child was so severely traumatized as a result of the paddling that he required six months of psychiatric hospitalization. \textit{See id.} at 807. The defendants claimed that the parents had consented to the use of corporal punishment, and that any injury was due to the child's thrashing around under the three paddles. \textit{See id.} at 806. The parents admitted that the child's emotional problems predated the punishment. \textit{See id.} at 807. The court quoted \textit{Woodard} for the proposition that reasonable corporal punishment does not violate the Fourteenth Amendment. \textit{See id.} at 808. The \textit{Fee} court considered dispositive \textit{Cunningham v. Beavers}, 858 F.2d 269 (5th Cir. 1988). \textit{Cunningham} upheld punishment administered to a six-year-old on the basis that so long as adequate criminal and tort remedies existed for any excessive corporal punishment, no substantive due process violation could be established. \textit{Id.} at 272. The \textit{Fee} decision suggested that under \textit{Cunningham}, students' recourse for excessive paddling might be restricted to state courts. \textit{See Fee}, 900 F.2d at 809.

The student also lost in \textit{Woodard}, in which three punitive swats given to a high school student at her request in lieu of suspension (but contrary to her parents' instructions) was held to give rise to at most a procedural complaint. \textit{Woodard v. Los Fresnos Indep. Sch. Dist.}, 732 F.2d 1243, 1244 (5th Cir. 1984). The court observed that the Fifth Circuit had held after remand of
If the Constitution protects a schoolchild against being tied to a chair or against arbitrary paddlings, then surely the Constitution protects a schoolchild from physical sexual abuse—here, sexually fondling a fifteen-year old [sic] school girl and statutory rape—by a public schoolteacher. Stroud's sexual abuse of Jane Doe . . . is not contested by the defendants. Thus, Jane Doe clearly was deprived of a liberty interest recognized under the substantive due process component of the Fourteenth Amendment.

The Taylor majority's examination of the liberty interest at stake did not go much further than this. But the Fifth Circuit's response to Jane Doe's claims clearly is related to what I call "the Ingraham dilemma." That difficulty arises because of the similarity, on the one hand, and the difference, on the other, between corporal punishment in the schools and sexual abuse by teachers. In Ingraham v. Wright, the Supreme Court recognized that paddling infringed a school child's "liberty interest." Likewise, Judge Jolly wrote in Taylor, "[i]t is incontrovertible that bodily integrity is necessarily violated when a state actor sexually abuses a schoolchild and that such misconduct deprives the child of rights vouchsafed by the Fourteenth Amendment." Unlike the Ingraham situation, however, the Fifth Circuit could discern no educational purpose for sexual abuse. Judge Jolly observed that "there is never any justification for sexually molesting a schoolchild,

Ingraham that it was not going to examine individual instances of corporal punishment to see whether they conformed with substantive due process. See id. at 1246 & n.12. 61. Taylor, 15 F.3d at 451.
63. See id. at 672. Justice Powell's opinion in Ingraham applied the "familiar two-stage analysis" to the schoolchildren's procedural due process claim: "We must first ask whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of 'life, liberty or property'; if protected interests are implicated, we then must decide what procedures constitute 'due process of law.'" Id.

Ingraham reiterated that not all interests trigger due process protection. See id. at 672-73. Rather, it is the nature of the interest and not its weight which "determine[s] whether due process requirements apply in the first place." Id. at 672 (quoting Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972)). The particular interest at stake in Ingraham, however, constituted a triggering interest under the Fourteenth Amendment. See id. at 673-74. In the Court's words, "[a]mong the historic liberties so protected [from deprivation without due process] was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security." Id. at 673. This historic liberty interest always was "thought to encompass freedom from bodily restraint and punishment." Id. at 673-74. As a consequence, where school authorities, acting under color of state law, "deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, we hold that Fourteenth Amendment liberty interests are implicated." Id. at 674.

Despite finding that constitutional interest, however, the Court also ruled that existing state procedures satisfied procedural due process and that notice and a hearing prior to imposition of corporal punishment in the public schools was not necessary. See id. at 682.
64. Taylor, 15 F.3d at 451-52. For a collection of cases that likewise have extended the liberty interest recognized in Ingraham to include sexual abuse of students, see Plumeau v. Yamhill County Sch. Dist., 907 F. Supp. 1423, 1435 (D. Or. 1995).
and thus, no state interest, analogous to the punitive and disciplinary objectives attendant to corporal punishment, which might support it.\textsuperscript{65}

This complete absence of any justification for a teacher's sexual abuse of a school child creates the \textit{Ingraham} dilemma. Two \textit{Ingraham} opinions contributed to this result: one in the Fifth Circuit and one in the Supreme Court.\textsuperscript{66} The Supreme Court granted certiorari only on the Eighth Amendment and procedural due process challenges to a Florida statute authorizing corporal punishment in schools.\textsuperscript{67} The plaintiffs, however, also alleged that corporal punishment violated substantive due process because it was necessarily unjustified and thus arbitrary and capricious governmental action.\textsuperscript{68} That claim never made it to the Supreme Court. The Court of Appeals for the Fifth Circuit, on the other hand, ruled that corporal punishment was an acceptable "means used to achieve an atmosphere which facilitates the effective transmittal of knowledge."\textsuperscript{69} Paddling did not lack a "real and substantial relation to the object sought to be obtained" and thus passed the minimal substantive due process test: "Only if the regulation bears no reasonable relation to the legitimate end of maintaining an atmosphere conducive to learning can it be held to violate the substantive provision of the due process laws."\textsuperscript{70} The court of appeals also declined to review each individual incident of corporal punishment to determine whether the discipline had been administered appropriately or arbitrarily in that case—noting instead that a remedy was available in state court.\textsuperscript{71}

The Fifth Circuit's elegant \textit{Ingraham} solution may "[bar and bolt] the federal courthouse door to individual students subjected to excessive corporal punishment by public school teachers,"\textsuperscript{72} but it does not

\textsuperscript{65} Taylor, 15 F.3d at 452; see \textit{Ingraham}, 430 U.S. at 681-82, for the disciplinary objectives of corporal punishment.

\textsuperscript{66} See \textit{Ingraham} v. Wright, 525 F.2d 909 (5th Cir. 1976), aff'd, 430 U.S. 651 (1977).

\textsuperscript{67} See \textit{Ingraham}, 430 U.S. at 653, 659.

\textsuperscript{68} See \textit{Ingraham}, 525 F.2d at 915.

\textsuperscript{69} Id. at 917.

\textsuperscript{70} Id.

\textsuperscript{71} See id. The dissent, on the other hand, criticized the idea that regardless of how severe or excessive the corporal punishment, the court would refuse substantive due process review. See \textit{id}. at 925-26 (Rives, J. dissenting). The minority believed that the majority position effectively treated lickings that were more severe than those allowed by the statute as acts not done under color of state law. See \textit{id}. at 925. In the dissent's view, this contravened the meaning of \textit{Monroe}. See \textit{id}. at 925-26. The dissidents further observed that there was a widespread failure to adhere to the paddling policy guidelines in the Florida schools. See \textit{id}. at 926.

\textsuperscript{72} Irene Merker Rosenberg, \textit{A Study in Irrationality: Refusal to Grant Substantive Due Process Protection Against Excessive Corporal Punishment in the Public Schools}, 27 Hous. L. Rev. 399, 400 (1990).
destroy a federal claim based on sexual abuse by school teachers. Judge Jolly himself was on the panel that declined to review individual instances of egregious corporal punishment. Nevertheless, he found it easy to pen the opinion in Doe v. Taylor.

The absolute absence of justification creates a problem for the Taylor dissenters. The Supreme Court’s Ingraham decision recognizes an “historic liberty interest” in freedom from “unjustified intrusions on [a school child’s] personal security.” On the other hand, the dissenters cannot rely on the Fifth Circuit’s Ingraham opinion to eliminate a case the minority apparently does not view as any more than an ordinary tort. Nor can they rely on DeShaney, that other bulwark against public responsibility. Jane Doe confined her suit against the principal and superintendent to § 1983 supervisory liability. She did not rely on any claim that the defendants had a constitutional duty to protect her from the predations of Coach Stroud.

So why did the dissenters not see a federal case in Jane Doe’s situation? It has something to do with a general unhappiness with the constitutional jurisprudence of “fundamental rights,” and it has something to do with sex. In her dissent Judge Jones conflated Jane Doe’s significantly different claim with complaints implicating funda-

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73. See Cunningham v. Beavers, 858 F.2d 269, 270, 272 (5th Cir. 1988).


75. See Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 451 n.3 (5th Cir. 1994).

76. See id. The majority conceded that if the lawsuit against the principal and the superintendent were based on some constitutional duty to protect, DeShaney would be relevant. See id. Judge Jolly noted, however, that even Jane Doe herself disavowed any such claim. See id. Instead, the lawsuit was founded on supervisory liability for the misconduct of a subordinate teacher. See id. at 451 n.3, 452. The coach who affirmatively injured Jane Doe was a state actor. See id. at 452 n.4. As a result, it was immaterial whether compulsory school attendance laws created a “duty to protect.” See id. at 451 n.3. It did not matter whether the teacher stood in a “special relationship” to the school child as a result of some restraint of her liberty by the state. See id. He had no right to violate her due process rights by his own actions. See id.


77. See Doe, 15 F.3d at 465 (Garwood, J., dissenting); id. at 475 (Jones, J., dissenting); id. at 479 (Garza, J., dissenting). All six dissenters joined the opinions by Judges Garwood and Jones. See id. at 465, 475. Judge Garza’s opinion is cited with approval in Judge Jones’ opinion. See id. at 476 n.3.
mental liberties. This (con)fusion allowed her to tap a vein of hostility to the creation of new fundamental rights. Referencing Daniels v. Williams by implication, and Paul v. Davis expressly, Judge Jones writes that "it is not obvious why this 'right' [not to be seduced by her teacher] should be more 'fundamental' than Doe's right to her reputation or her right not to be negligently run over by a state employee, neither of which enjoys constitutional protection." In both of those cases, however, fundamentality was not the defect which precluded a finding of a constitutional violation. In Daniels, the Court found no Fourteenth Amendment deprivation where a pillow left on the stairs of a prison caused an inmate to slip and fall and be injured. In a companion case, Davidson v. Cannon, the Court similarly held that negligence in preventing an assault on an inmate could not violate

78. See, e.g., id. at 476 n.2 (debating the view of Judge Higginbotham's concurrence that Doe's "fundamental right" was implicated); id. at 478 n.6 (listing the few cases since 1977 in which rights have been found to be "fundamental, and therefore, worthy of strict judicial scrutiny" and contrasting the long list of cases in which the Court has "rejected novel fundamental rights claims"). Judge Higginbotham's concurrence slips into the same error of confusing all liberty interests with fundamental liberty interests. See id. at 460 (Higginbotham, J., concurring) (citing Michael H. v. Gerald D., 491 U.S. 110, 122 (1989)) ("The deeper the mark of disapproval that state and federal civil and criminal law have placed on Stroud's acts, the stronger the case that Doe's liberty interest is fundamental."); see also Taylor, 15 F.3d at 461 (Higginbotham, J., concurring) (misciting Ingraham, 430 U.S. at 672) ("Only after we have recognized a fundamental liberty interest do we look to state law to see if an infringement of that interest has occurred without due process."). Ingraham actually says:

The Fourteenth Amendment prohibits any state deprivation of life, liberty, or property without due process of law. Application of this prohibition requires the familiar two-stage analysis: We must first ask whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of 'life, liberty or property'; if protected interests are implicated, we then must decide what procedures constitute 'due process of law' . . . . Due process is required only when a decision of the State implicates an interest within the protection of the Fourteenth Amendment.

430 U.S. at 672.

79. See, e.g., Compassion in Dying v. Washington, 79 F.3d 790, 803 (9th Cir. 1996) (en banc) (citing Collins v. City of Harker Heights, 503 U.S. 115, 123 (1992)) ("The Court has also recently expressed a strong reluctance to find new fundamental rights."). Fundamentally right are those that are "implicit in the concept of ordered liberty." Bowers v. Hardwick, 478 U.S. 186, 191 (quoting Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)). These are the ones that are eligible for heightened judicial protection. See also Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (fundamental liberties are those deeply rooted in this Nation's history and tradition).

82. Taylor, 15 F.3d at 479 (Jones, J. dissenting). Judge Jones apparently equates the claim recognized by the Taylor majority with the unsuccessful argument in Michael H. that a biological father has a fundamental liberty interest in establishing his relationship to his child, born during the mother's marriage to another man. See id. (quoting Michael H., 491 U.S. at 122) ("The majority apparently believe that Doe's substantive due process right to 'bodily integrity' is self-evidently 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'").

83. See Daniels, 474 U.S. at 332.
84. 474 U.S. 344 (1986).
the Constitution. In each case, the Court essentially conceded that a liberty interest in personal security was at stake, but nonetheless ruled that the injury failed to rise to a constitutional level because mere negligence cannot violate the Fourteenth Amendment.

It is true that the Supreme Court declined to find any triggering liberty interest in Paul v. Davis, a suit brought by a man whose name was included in a police flyer listing "active shoplifters" which was circulated to merchants. The Court ruled in Davis that the defamation alone, the injury to the plaintiff's reputation, was neither "liberty" nor "property" and, therefore, failed to merit any level of protection under the Due Process Clause. On the other hand, "stigma plus" does implicate a protected liberty interest. If some further damage such as the loss of a job is added to the defamatory statement, due process is required. Clearly, stigma plus is no more fundamental than stigma, but it is a federally recognized liberty interest and not just a state-protected right. Once the claim is recognized as involving a triggering liberty interest, due process applies.

Similarly, there are other liberty interests to which the Court affords some protection even though they are not "fundamental."
Premier among them is the "historic" interest in freedom from "unjustified intrusions on personal security" recognized in *Ingraham*.*94* It is neither necessary to defend this as a "fundamental" right*95* in order to garner *some* substantive protection nor useful to attack this liberty interest for failing to reach those rarefied heights.*96*

Admittedly, as Michael Wells discusses elsewhere in this issue, the Court's decisions sometimes obscure the basis for line-drawing between constitutional and nonconstitutional interests.*97* The plurality opinion in *Michael H. v. Gerald D.*,*98* on which Judge Jones relied...
in part in *Taylor*, for example, maintained that the Due Process Clause affords substantive protection only to liberties "so rooted in the traditions and conscience of our people as to be ranked as fundamental." As Justice Scalia implicitly acknowledged elsewhere, however, it is more accurate to say that since 1937, in deference to the legislature, substantive review is only cursory unless the liberty involved is held to be fundamental. As discussed above, and in contrast to *Michael H.*, Jane Doe does not require heightened scrutiny in order to prevail on her claim of entirely arbitrary conduct by school officials. The fundamental rights cases therefore offer no way out of the *Ingraham* dilemma.

**OF LIBERTY AND SEX**

The dissenters in *Doe v. Taylor* had another (perhaps more telling) problem with the liberty interest recognized by the majority. Dis-
resents by Judges Jones and Garwood emphasized what they characterized as the "consensual" nature of the sex that the teacher extracted from his fifteen-year-old student. The way Judge Jones formulated Jane Doe's claim is revealing: She described it as "Doe's 'right' not to be seduced by her teacher." This language suggests that, in Jones' opinion, the problem was sex. Even more revealing, Judge Garwood criticized what he thought was an unduly broad definition of "physical sexual abuse" by a school employee. He would agree only that where a child is "sufficiently immature," "consensual sexual relations or fondling of private parts by an adult constitutes physical sexual abuse." But, he says, for that also to be actionable under § 1983, the child must be young enough, and the abuse must be "under color of state law." Judge Garwood was not convinced that it was clearly established in 1987 that age fifteen is "per se, sufficiently immature." Why not? Almost sheepishly, he explained that Jane Doe was old enough to bear children!

The fact that the teacher's intrusion on the student's bodily integrity took the form of sex should not remove it from the circle of constitutional protection. To the contrary, it is the abuse of power that characterizes sexual imposition of this kind, which demonstrates even more clearly that Coach Stroud deprived Jane Doe of her liberty. This teacher was a habitual sexual harasser. It was no coincidence that this forty-year-old man picked on a fourteen-year-old freshman girl. Stroud already had a reputation for being "too friendly," in the words of the principal who failed to intervene, with other students like Jane Doe. The administration was aware of complaints that the coach

101. See Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 467-68 & n.5 (Garwood, J., dissenting), 479 & n.8 (Jones, J., dissenting).
102. Id. at 479 (Jones, J., dissenting).
103. See id. at 467 (Garwood, J., dissenting).
104. Id.
105. See id.
106. Id.
107. See id. at 468. He observed that the common law set different ages of consent for statutory rape and marriage, varying from 10 to 18 years old. See id. at 467 n.5.
108. See id. at 446, 448 (detailing his relationships with other students). The Texas Monthly reported that Coach Stroud was a popular teacher who at the beginning of each year "liked to pick out a few pretty girls and make them his teacher's pets." The article continued: The girls were allowed to grade the class's test papers and put whatever mark they wished in Stroud's grade book. They didn't have to do their homework, and they could walk out of class and go to the rest room whenever they wanted. If they wanted a tardy pass so they could be late to another class, he'd write it for them. Meanwhile, Stroud would make the wallflower girls and the boys—well, at least those who weren't stars on the football team—do all the assigned work. Skip Hollandsworth, The Seduction of Jane Doe, Texas Monthly, Nov. 1995, at 118.
109. See Taylor, 15 F.3d at 446.
had an inappropriate relationship with a freshman girl in 1984-85.\textsuperscript{110} When that girl became a sophomore, however, Stroud focused his attention on a new freshman.\textsuperscript{111} The next year, Jane Doe entered the school, found herself in the teacher’s biology class, and became his next young target.\textsuperscript{112} He intentionally misused his access to and power and authority over school girls to give favors and to cultivate trust and dependence.\textsuperscript{113} He pressed his sexual advances on a girl who was in his charge by virtue of his school-teacher role. As is often the case, he targeted a freshman for his sexual importunings and pursued her with his friendship, favoritism, and escalating sexual pressure until she finally stopped saying no to complete intercourse.\textsuperscript{114} Eventually, she yielded and he prevailed. That he did not have to assault her violently does not turn this scenario into a harmless “seduction.”\textsuperscript{115}

\begin{itemize}
\item \textsuperscript{110} See id.
\item \textsuperscript{111} See id.
\item \textsuperscript{112} See id. at 447.
\item \textsuperscript{113} See id. at 446-47.
\item \textsuperscript{114} See id. at 447-48. The facts alleged in this case give a sense of the mixture of favors, attention, and threats that a teacher may wield in his campaign to obtain sex from a young student: The popular coach walked Doe to class and took her out of school with her friends during the day, buying them alcoholic beverages. See id. at 447. He did not require her to do classwork or take tests, and rewarded her with high grades. See id. He took her out of other classes to be alone with him in his room. See id. He wrote her flattering notes and swore her to secrecy. See Hollandsworth, supra note 108, at 135. Doe stated in an affidavit that she never told the teacher “‘No’ because I just did not know what to say and I was scared. If I told him ‘No’ I really did not know what he would do. I guess I thought [sic] Coach Stroud would just turn on me completely. Coach Stroud did tell me that if anyone knew about us that he could lose [sic] his job, family.” Petition for Writ of Certiorari at C-14, Doe v. Taylor Indep. Sch. Dist., 975 F.2d 137 (5th Cir. 1994) (No. 92-908).

See also Doe v. Claiborne County, 103 F.3d 495 (6th Cir. 1996). The sexual abuse began when the girl was a fourteen-year-old freshman. See id. at 501. After the first time the teacher reached into her blouse and fondled her breasts, the girl avoided him for the rest of the school year. See id. But the following year, he pursued her with harassing phone calls and offers to let her be scorekeeper for his team. See id. When she acceded to that “favor,” he touched her again. See id. He escalated his phone calls and pressure in school and out, and finally had intercourse with the student. See id. The girl never reported the ongoing abuse to anyone and it continued until the teacher was caught. See id.

\item \textsuperscript{115} See Taylor, 15 F.3d at 475 (Jones, J., dissenting); cf. Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992) (Title IX action brought by high school student seeking damages for alleged sexual harassment and abuse by coach-teacher). The teacher in Franklin similarly was a habitual harasser who actively pursued a student until she fell prey to his campaign. Beginning in her 10th grade year, the coach and teacher began “continual sexual harassment” of the student. See id. at 63. He engaged her in sexually oriented conversations; asked whether she would consider having a relationship with an older man; telephoned her at home; and persisted until culmination in what the Supreme Court called coercive intercourse. See id. The court of appeals described the course of events as follows: The teacher befriended the girl; he allowed her to grade class papers; he called her out to private meetings during and between classes; he gave her notes to excuse her from attendance in other classes; and he initiated conversations of a sexual nature. See Franklin v. Gwinnett County Pub. Sch., 911 F.2d 617, 618 (11th Cir. 1990), rev’d, 503 U.S. 60 (1992). When the teacher grabbed the girl and kissed her in the parking lot, the student
In other contexts, courts have found that the coerced imposition of sex by a state actor who possesses law-enforcement power over the victim is a violation of constitutional rights. The Fifth Circuit recently affirmed a judgment against a sheriff who raped a woman suspected in a murder he was investigating. Appellate courts generally uphold prosecutions under 18 U.S.C. § 242, which criminally punishes anyone who, under color of law, willfully subjects any person to a deprivation of federally-guaranteed rights. In United States v.

was admonished. See id. Other female students complained to a school counselor that the teacher was directing sexual remarks at them too. See id. Ultimately, several instances of intercourse with the plaintiff schoolgirl occurred on campus. See id. When the principal was told, that official allegedly tried to discourage the student from making a complaint that would attract negative publicity. See id. In the end, there was an investigation, the teacher resigned, and the principal retired. See id. 619.

116. See Bennett v. Pippin, 74 F.3d 578, 590 (5th Cir.), cert. denied, 117 S. Ct. 68 (1996). After shooting her husband in the midst of a violent domestic dispute, the woman had turned herself in, made a statement, and then was released from custody. See id. at 583. The sheriff went to her home and invaded her bedroom, where he threatened her with his power as a law enforcement officer in order to gain her compliance. See id. He unsuccessfully argued that they talked and she gave only token resistance to his request for sex, willingly entering the house with him. See id. at 584. She testified that she found him standing over her bed naked and that he told her that he was the sheriff, he could do anything, he could have her tossed into jail, and it would only be sorted out later. See id. at 583.

Compare equal protection to these due process claims. Courts have held that sexual harassment of female employees by state defendants may constitute sex discrimination in employment in violation of the Equal Protection Clause of the Fourteenth Amendment. See, e.g., Bohen v. City of East Chicago, 799 F.2d 1180, 1185 (7th Cir. 1986) (following the equal protection analysis under the Fifth Amendment in Davis v. Passman, 442 U.S. 228, 234-35 (1979)); Saulpaugh v. Monroe Community Hosp., 4 F.3d 134 (2d Cir. 1993); Annis v. County of Westchester, 36 F.3d 251 (2d Cir. 1994) (harassment has to be more than merely boorish for an equal protection violation to be stated); Starrett v. Wadley, 876 F.2d 808, 814 (10th Cir. 1989); Pontarelli v. Stone, 930 F.2d 104, 113-14 (1st Cir. 1991); Beardsley v. Webb, 30 F.3d 524, 529 (4th Cir. 1994).

117. See United States v. Sanchez, 74 F.3d 562 (5th Cir. 1996) (police officer used the threat of arrest to coerce five suspected prostitutes to engage in various sexual acts with him). Although the convictions were reversed on other grounds, Judge Edith Jones' opinion raised no question that the allegations would be sufficient to support a criminal indictment. In United States v. Contreras, 950 F.2d 232, 235, 244 (5th Cir. 1991), the court upheld the conviction of an on-duty police officer in Laredo who stopped a woman and when she could not produce citizenship papers said he would take her to the Immigration and Naturalization Service, but instead removed her to an isolated place where he sexually assaulted her. She testified that his gun was on the hood of the car during the incident and that she was afraid to disobey him or run away; he claimed she consented to sex. See id. at 235. After the woman brought a complaint, the officer made threats against her life. See id.; see also United States v. Davila, 704 F.2d 749 (5th Cir. 1983) (border patrol charged with depriving illegal aliens of their liberty by coercing sexual favors from them).

But see United States v. Lanier, 73 F.3d 1380, 1394 (6th Cir.) (en banc), rev'd and remanded, 117 S. Ct. 1219 (1997) (holding that after consideration of the legislative history of § 242, the case law, the long established tradition of judicial restraint in the extension of criminal statutes, and the lack of any notice to the public that this ambiguous criminal statute included within its coverage simple or sexual assault crimes, that the sexual harassment and assault indictment brought under § 242 should have been dismissed).

18 U.S.C. § 242 provides in relevant part:

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant in any State, Territory, or District to the deprivation of any
Lanier," the Supreme Court reversed the sole significant exception to this consensus about the scope of § 242. The jury in Lanier had convicted an influential Tennessee judge of misusing his power both as a judicial officer and as an employer to coerce women sexually. The trial court instructed the jury on the theory that the sexual assaults could be found to be interferences with bodily integrity that shock the conscience, thereby violating the victims' substantive due process rights. A divided Sixth Circuit reversed because it found that the right alleged was not specific enough to satisfy the strictures of the federal criminal statute. A strong dissent authored by Judge Martha Craig Daughtrey, on the other hand, found that the right to be free from rape and sexual assault and harassment easily fell within the enforceable constitutional right to bodily integrity.

As a criminal civil rights case, Lanier must satisfy the standard of Screws v. United States. Although constitutional rights change and evolve, in order to afford due process criminal statutes must give adequate notice of the specific behavior that is prohibited. Consequently, a narrow majority of the Supreme Court held in Screws that § 242 was constitutional only if it was interpreted to require specific content for prosecutions alleging violations of due process rights. The statute was saved because the Court found that the word "willfully" in the statute effectively required proof of "specific intent" to purposefully violate protected rights. The defendant must have acted with the intent "to deprive a person of a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." This means more than merely intending to do an act, but less than requiring the defendant to be thinking in self-consciously constitutional terms.

118. 117 S. Ct. 1219 (1997).
119. See id. at 1224.
120. See Lanier, 73 F.3d at 1384.
121. See id.
122. See id. at 1393-94.
123. See id. at 1412-13 (Daughtrey, J., dissenting).
124. 325 U.S. 91 (1945).
125. See id. at 95-96.
126. Id. at 95-100.
127. See id. at 101.
128. Id. at 103.
129. See id. at 106-07.
Rather, this standard encompasses the acts of an official who willfully continues to do acts which have been previously held to violate a constitutional right. 130

In reversing the Sixth Circuit's decision in *Lanier*, the Supreme Court held that the appellate court "used the wrong gauge" to determine whether the judge willfully violated rights which had been made specific by previous decisions interpreting the constitutional right to bodily integrity protected by the Due Process Clause. 131 The Court ruled that rights are made specific for the purposes of § 242 in the same way that constitutional rights are found to be "clearly established" for the purposes of the defense of qualified immunity under the civil statute, 42 U.S.C. § 1983. 132 After reversing on the grounds of a mistaken definition of specific intent, the Supreme Court remanded *Lanier* to the Sixth Circuit, leaving it free to consider other issues that might remain open. 133

It is unclear how any ruling in *Lanier* on remand will influence the Sixth Circuit's analysis of whether a liberty interest is implicated when sex abuse goes to school. 134 An understanding of the dynamic

130. See id. at 104.


132. See id.

133. See id. The Court agreed that three issues raised by Kentucky were foreclosed on remand. First, it rejected the argument that *Screws* somehow excludes from the ambit of § 242 any rights deriving from the Due Process Clause. See *id.* at 1228 n.7. Second, the Court made it clear that Lanier was not controlled by *DeShaney v. Winnebago County of Social Services*, 489 U.S. 189 (1989), which "generally limits the constitutional duty of officials to protect against assault by private parties to cases where the victim is in custody." *Id.* But where the state official is himself guilty of the assault, an argument based on the *DeShaney* custodial limit is apparently "without merit." *Id.* Finally, the Court rejected the claim that all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendments and may never be considered "under the rubric of substantive due process." *Id.* In delineating the closed issues, the Court kept silent about another issue not reached in its decision—the argument that the sexual assaults were not taken "under color of state law": "To the extent the issue remains open, we leave its consideration in the first instance to the Court of Appeals on remand." *Id.* at 1224 n.2. Oral argument in *Lanier* suggested that the Court might be divided on this critical issue. See Transcript of Oral Argument, U.S. v. Lanier No. 95-1717, 1997 WL 7587 (U.S. Oral Arg.). For a discussion of the "under color of state law" requirement incorporated into both § 242 and § 1983, the criminal and civil rights statutes respectively, see infra notes 147-223 and accompanying text.

134. Even before the Supreme Court overturned its ruling, the Sixth Circuit itself apparently did not feel that its own decision in *Lanier* determined the result in a civil § 1983 lawsuit arising from a teacher's abuse of a student. In *Doe v. Claiborne*, 103 F.3d 495 (6th Cir. 1996), the Sixth Circuit held that a schoolchild's right to personal security and to bodily integrity manifestly embraces the right to be free from sexual abuse at the hands of a public school employee. The substantive component of the Due Process Clause protects students against abusive governmental power as exercised by a school, . . . This conduct is so contrary to fundamental notions of liberty and so lacking of any redeeming social value, that no rational individual could believe that sexual abuse by a state actor is constitutionally permissible under the Due Process Clause.
of sexual harassment, however, helps us decide that a teacher's "seduction" of a young student subject to his authority constitutes the kind of abuse of state power that offends the Constitution. Experts on sexual harassment in education teach that "sexual harassment is essentially about the abuse of power in relationships." Stated another way, "[s]exual harassment involves manifestations of power or violence which use sexuality to control the behavior of others." Neither flirtation nor seduction, sexual harassment is defined as "unwelcome sexual attention that a victim is powerless to stop," a form of aggression rather than sex. It is "almost always perpetrated by males and typically directed against females." As a result, it also constitutes sex discrimination, prohibited in the workplace under Title VII and in schools under Title IX. Insofar as intentional discrimination on the grounds of gender is established, such conduct by school officials, of course, also violates the Equal Protection Clause of the Fourteenth Amendment.

Catherine MacKinnon first exposed sexual harassment in the workplace as sex discrimination which exploited mutually reinforcing systems of power in order to maintain a gender hierarchy and keep women in their place. Sexual harassment on the job melds the sexual power of males over females in our culture and the power of employers or supervisors over subordinates. The United States Court of

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Id. at 506. The panel somewhat blithely insisted that the en banc decision of Lanier was "not to the contrary," insofar as it stated that the Supreme Court had never "explicitly held that the 'right to be free from rape and sexual assault and harassment' was 'a component of an enforceable general constitutional right to bodily integrity'":

This is no doubt a true statement. The Supreme Court has never so held; and until today, this court has not had the opportunity to consider the question. In any case, Lanier's reasoning on this issue is of limited applicability in the civil context, where the constitutional concerns underlying the Lanier decision are simply nonexistent.

Id. at 507; see also Archie v. Lanier, 95 F.3d 438, 439 n.1 (6th Cir. 1996) (affirming denial of judicial immunity in companion § 1983 case against Judge Lanier on the grounds that his nonjudicial acts were not entitled to the statute's qualified immunity, while remarking that the criminal conviction under § 242 was vacated "for reasons that are not important to this appeal").


136. Karen Bogart & Nan Stein, Breaking the Silence: Sexual Harassment in Education, 64 PEABODY J. OF EDUC. 146, 146 (1987). Nan Stein, currently affiliated with the Wellesley College Center for Research on Women, previously was a civil rights equity specialist with the Massachusetts Department of Education. Karen Bogart is the president of the Anne Steinmann Institute of Maferr Foundation, Inc., a nonprofit center for applied social research in Washington D.C. My thanks to Nan Stein for sharing her insights with me.

137. Id. at 147.

138. Id.


140. Compare the employment cases supra note 116.

141. See CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979).
Appeals for the Eleventh Circuit held in a Title IX case that the distinctions between the workplace and schools underscore the even greater need to protect against such discrimination in education:

The ability to control and influence behavior exists to an even greater extent in the classroom than in the workplace, as students look to their teachers for guidance as well as for protection. The damage caused by sexual harassment also is arguably greater in the classroom than in the workplace, because the harassment has a greater and longer lasting impact on its young victims, and institutionalizes sexual harassment as accepted behavior. Moreover, as economically difficult as it may be for adults to leave a hostile workplace, it is virtually impossible for children to leave their assigned school. Finally, "a nondiscriminatory environment is essential to maximum intellectual growth and is therefore an integral part of the educational benefits that a student receives. A sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential and receiving the most from the academic program." \(^{142}\)

In other words, children who are sexually harassed (or abused) in school are denied the intended benefits of their education that other students receive.

The injuries inflicted by sexual harassment in schools, moreover, may extend beyond the immediate victims. Expert commentators report that "[b]ystanders and witnesses to incidents of harassment express cynicism about education and a loss of confidence in the effectiveness of school policies." \(^{143}\) Finally, sexual harassment "is maintained by silence"—the silence of victims, of observers who overlook or do not report, and of the educational community. \(^{144}\)

These insights about sexual harassment (which includes noncontact and contact conduct) are not meant to suggest that the liberty interest invoked by Jane Doe derives from Title VII or Title IX, or to gloss over the differences between milder forms of sexual harassment and the rape committed by the school teacher in \textit{Taylor}. \(^{145}\) Rather, the sexual assault on a minor involved in \textit{Taylor} implicates the bodily

\(^{142}\) Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1193 (11th Cir.), \textit{vacated}, 91 F.3d 1418 (11th Cir. 1996) (en banc) (quoting Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1293 (N.D. Cal. 1993)) (talking about damages under Title IX for hostile environment created by peers when supervising authorities know about it and do not stop it).

\(^{143}\) Bogart & Stein, \textit{supra} note 136, at 147.

\(^{144}\) \textit{See id.}

\(^{145}\) The Sixth Circuit has used "shock the conscience" as the dividing line between ordinary sexual harassment in schools and that which goes so far as to infringe a liberty interest. \textit{See} Lillard v. Shelby County Bd. of Educ., 76 F.3d 716, 725-26 (6th Cir. 1996) (teacher's conduct which was held not to "shock the conscience" included rubbing the student's stomach in the hallway and making suggestive remarks, which was part of a pattern and practice of similar behavior with other students). But the conduct at issue in \textit{Taylor} went far beyond, culminating
integrity line of liberty interests. The analysis of sexual harassment, however, highlights the context of power exploited by teachers who sexually abuse school children in their charge. While law enforcement authorities may have the power of arrest and a gun in their belt, teachers also exercise significant power over children in school, albeit in a more benign guise. The two systems of power of the school and of sexuality mutually reinforce each other, putting girls in their place and poisoning their first experience with government in a democratic society.

Under "Color of State Law" and "Scope of Employment": Federal and State Law Distinguished

Judge Garwood acknowledges in his dissent that Stroud "use[d] and abuse[d] his position as a teacher" in "worming his way into [Jane

in intercourse and statutory rape. See Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 448 (5th Cir. 1994).

The school sex abuse cases generally involve contact conduct which constitutes criminal assault on a minor. See, e.g., Taylor, 15 F.3d at 449 (sex acts and statutory rape by teacher who pled guilty to criminal charges); Jojola v. Chavez, 55 F.3d 488, 490 (10th Cir. 1995) (school custodian pled guilty to forcible sexual penetration of a high school child); Larson v. Miller, 55 F.3d 1343, 1347 (8th Cir. 1995) (nine-year-old handicapped student fondled and assaulted by bus driver); Gonzalez v. Ysleta Indep. Sch. Dist., 996 F.2d 745, 750 (5th Cir. 1993) (teacher who molested first grader convicted of indecency with a child); Black v. Indiana Area Sch. Dist., 985 F.2d 707, 709 (3d Cir. 1993) (bus driver's sexual assault on schoolchildren aged six, seven, and eight); Thelma D. v. Board of Educ., 934 F.2d 929, 931 (8th Cir. 1991) (teacher's fondling, assault, and/or sodomy of six elementary school children); Jane Doe "A" v. Special Sch. Dist., 901 F.2d 720, 722 (3d Cir. 1989) (sex acts by high school teacher with student which led to criminal prosecution).

Interestingly, given the right context, noncontact purely verbal conduct has been held to violate the standards of the Eighth Amendment's proscription on "cruel and unusual punishment," presumably a much tougher standard than the Fourteenth Amendment's protection of "liberty." In Women Prisoners of the District of Columbia Dep't of Corrections v. District of Columbia, the district court held (in a ruling that was not changed by the subsequent history of the case) that under the objective standard of the Eighth Amendment, the women prisoners established a "deprivation which amounts to a wanton and unnecessary infliction of pain. The evidence revealed a level of sexual harassment which is so malicious that it violates contemporary standards of decency." 877 F. Supp. 634, 664-65 (D.C. 1994), modified and vacated in part on other grounds, 899 F. Supp. 659 (D.C. 1995), vacated in part on other grounds and remanded, 93 F.3d 910 (D.C. Cir. 1996). The physical assaults including "rape, coerced sodomy, unsolicited touching of women prisoners' vaginas, breasts and buttocks by prison employees are simply not part of the penalty that criminal offenders pay for their offenses against society." Women Prisoners, 877 F. Supp. at 665 (citing Farmer v. Brennan, 114 S. Ct. 1970, 1977 (1994)). Furthermore, taken in combination, the "vulgar sexual remarks of prison officers, the lack of privacy within CTF cells and the refusal of some male guards to announce their presence in the living areas of women prisoners constitute a violation of the Eighth Amendment since they mutually heightened the psychological injury of women prisoners." Id.

See Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2392 (1995) (upholding urinalysis of student athletes on grounds that schools exercise power that is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults).
Doe's] affections." But the intercourse, which was the culmination of Stroud's campaign, he observed, "came later, albeit doubtless in some sense as an ultimate result of the former conduct." Judge Garwood questioned, however, whether the "causal connection between the earlier 'under color of law' conduct and the later otherwise purely personal and consensual relationship between this fifteen-year-old girl and Stroud caused the latter conduct to also be 'under color of law.'" If she was old enough, (capable of bearing children), then the sex (abuse) became consensual and private, and was not inflicted "under color of state law."

This extraordinary argument privatizes both the teacher's conduct and Jane Doe's injuries. According to this view, a state actor who used and abused his position as a teacher would be immunized in large part because of the dissent's view of sex and young women. Girls who are in their first year of high school will be held to a high standard of responsibility for their sexual behavior. It is up to them to control their teacher by saying "no" that one last time. Teachers, on the other hand, have little responsibility to act like teachers. They can misuse the trust and authority granted to them as guardians of their charges, and so long as they succeed without overt violence, they have committed only private wrongs.

Caught in the Ingraham dilemma, the dissenters thus produced a novel, and very dangerous, solution. Injury to a school child's personal security in the form of corporal punishment is clearly state action taken under color of state law, even when it is excessive, egregious, and motivated by personal malice. School officials in the Fifth Circuit are proof against any kind of substantive due process claim only because of the underlying disciplinary objective and privilege to punish schoolchildren in this way. But make the assault on the child's personal security totally unjustified and the dissent suddenly finds another fault: this arbitrary injury is somehow not perpetrated "under color of state law" (as required by the civil rights statute), or perhaps is not even "state action" at all.

147. Taylor, 15 F.3d at 468 (Garwood, J., dissenting).
148. Id.
149. Id.
150. See id.
152. See Cunningham v. Beavers, 858 F.2d 269, 273 (5th Cir. 1988); Ingraham v. Wright, 525 F.2d 909, 916-17 (5th Cir. 1976), aff'd, 430 U.S. 651 (1977).
153. See Taylor, 15 F.3d at 476 (Jones, J., dissenting) (contending that the coach's conduct "by no stretch of the imagination was ever undertaken in the scope of a teacher's pedagogical
The dissenting opinions arrive at this conclusion by a sub silentio importation of the common law doctrine of "scope of employment" into § 1983 jurisprudence, effectively undermining the unique meaning of "under color of state law" in the Reconstruction-era civil rights statute.154 In the 1961 case, Monroe v. Pape,155 the Court's interpretation of the "under color of state law" language in § 1983 "resuscitated" a statute which had been virtually moribund since its enactment in 1871.156 The Court had already interpreted the congressional intent behind that phrase when considering a related criminal statute, 18 U.S.C. § 242.157 In United States v. Classic,158 the Court first defined "under color of state law" to include "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."159 In criminal prosecutions under this statute, courts have treated extraction of sexual favors by law enforcement authorities as conduct "under color of state law."160

The majority and concurring opinions in Monroe adopted the criminal statute's misuse of state power construction.161 Frankly, I have always found Justice Douglas' explanation of the legislative history of the "under color of state law" provision less than persuasive.162

authority" and is therefore not covered by § 1983); id. at 487-88 (Garza, J., dissenting) (contending that the coach did not act under color of state law).

154. Section 1983 provides in pertinent 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.


157. Section 242 derives from § 2 of the Civil Rights Act of 1866, which was reenacted after the passage of the Fourteenth Amendment as part of the 1870 Force Act. See Monroe, 365 U.S. at 183.

158. 313 U.S. 299, 326 (1941) (interpreting 18 U.S.C. § 242 which provides criminal punishment for anyone who "under color of any law, statute, ordinance, regulation, or custom" subjects any inhabitant of a State to the deprivation of any federally secured rights).

159. Monroe, 365 U.S. at 184 (citing United States v. Classic, 313 U.S. 299, 326 (1941)). The Monroe Court also observed that the Court adhered to this definition of "under color of state law" subsequently. See id. at 184-85 (citing Screws v. United States, 325 U.S. 91, 108-13 (1945); Williams v. United States, 341 U.S. 70, 99 (1951)). Justice Douglas remarked that despite ample opportunity to repudiate this interpretation, Congress made no effort to do so. See Monroe, 365 U.S. at 186-87.

160. See supra note 117 and accompanying text.

161. See 365 U.S. at 183-87; id. at 192-94 (Harlan, J., concurring).

162. See Monroe, 365 U.S. at 171-83.
At the same time, I am very fond of Justice Harlan’s concurring explanation. Although he agreed with Justice Frankfurter’s dissent that Congress “had no intention of taking over the whole field of ordinary state torts and crimes,” he ended up siding with the majority. Justice Harlan wrote that Congress might well have “regarded actions by an official, made possible by his position, as far more serious than an ordinary state tort, and therefore as a matter of federal concern.”

Monroe established that individual lawlessness of those clothed with state authority creates a federal case. But the dissenters in Taylor either cannot see the distinction between harm at the hands of ordinary thugs and injury inflicted by representatives of the state, or they do not care for its implications. As a result, in one way or another, all the dissenting opinions obscured that important difference. Judge Garwood improperly conflated “scope of employment” doctrine, which in the common law serves to place limits on the vicarious liability of employers for the torts of their agents, with § 1983’s “under color of state law” concept. In derogation of the teachings of Monroe, Judge Jones found that a sexual assault by a school teacher on a student is no more serious than an “ordinary crime,” which it was “just as surely as if he had stolen Doe’s watch.” Judge Garza’s opinion went even further: he reinvented a discredited distinction between state officials who merely “exceed the limits of authority, as in Monroe” and those who “[act] in the complete absence of authority.” He even questioned whether the coach’s conduct amounted to state action.

Judge Garwood’s dissent cited City of Green Cove Springs v. Donaldson for the proposition that Stroud’s “fondling and statutory rape” could not be said to be in the “course and scope of his employment.” In Green Cove Springs, a police officer raped a woman whom he had arrested. The case, however, had nothing to do with “color of state law.” It was not even brought under § 1983. In—

163. Id. at 193 (Harlan, J., concurring).
164. Id.
165. See Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 468 (5th Cir. 1994) (Garwood, J., dissenting); see also id. at 488 (Garwood, J., dissenting).
166. Id. at 477 (Jones, J., dissenting).
167. Id. at 486 (Garza, J., dissenting).
168. See id.
169. Id. at 468 n.7 (Garwood, J., dissenting) (citing City of Green Cove Springs v. Donaldson, 348 F.2d 197, 202 (5th Cir. 1965) (holding that a police officer’s rape of an arrestee is not within the scope of his employment)); see also id. at 488 (Garza, J., dissenting).
170. 348 F.2d at 199.
171. Compare Jones v. Welham, 104 F.3d 620, 628 (4th Cir. 1997) (section 1983 claim against police officer who detained woman for alleged traffic violation and then raped her is in the
stead, the issue was whether plaintiffs could recover under state law from the city for its own negligence in not posting a matron, or on a respondeat superior basis, for the intentional tort of its employee.\textsuperscript{172}

Plaintiffs lost their ordinary tort claim in \textit{Green Cove Springs} because, although generally available, vicarious liability does not apply where the employee is not acting within the course and scope of his employment.\textsuperscript{173} The traditional (and narrowest) common-law interpretation holds that conduct is "not within the scope of employment if it is different in kind from that authorized [by the employer], far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master."\textsuperscript{174} As a result, many state courts have held that sexual assaults committed by employees are \textit{not} in the scope of employment.\textsuperscript{175} Scope of employment doctrine limits the strict lia-

nature of a violation of the substantive due process right under the Fourteenth Amendment not to be subjected to the wanton infliction of physical harm by anyone acting under color of state law), \textit{with} Andrews \textit{v.} Fowler, 98 F.3d 1069, 1072-74, 1079-80 (8th Cir. 1996) (remanding trial for § 1983 claims against a police officer alleged to have raped a minor he drove home from the scene of a complaint about a party, while affirming summary judgment for the city defendant because there was insufficient evidence that the officer's sexual misconduct was caused by a custom or policy of the municipality), and Almand \textit{v.} DeKalb County, 103 F.3d 1510, 1513 (11th Cir. 1997) ("We accept that, under certain circumstances, a rape of a person by a police officer or other state actor could violate the Constitution."). The majority in \textit{Almand} denied the plaintiff's § 1983 claim because the officer forcibly broke into the victim's house. \textit{See id.} at 1514-15. Although the off-duty and ununiformed officer initially gained access to the plaintiff under pretense of police business, the plaintiff was able to persuade him to leave at first. \textit{See id.} at 1514. He immediately turned around, however, and broke down her door, committing the rape inside. \textit{See id.} Although the majority of the court considered that the original entry into the home was "probably . . . under color of state law," it distinguished the forcible break-in as similar to the private act of any other "ruffian." \textit{Id.} at 1515. A dissent, on the other hand, found sufficient facts to suggest that the break-in also was facilitated by the officer's abuse of his position. \textit{See id.} at 1516-17 (Aldrich, J., dissenting).

Compare also, \textit{supra} note 117, for the numerous sexual assaults by law enforcement officers found to be "under color of state law" for purposes of a criminal indictment under 18 U.S.C. § 242 (1994).

\textsuperscript{172} \textit{See Green Cove Springs}, 348 F.2d at 200, 202; \textit{see also} Taylor, 15 F.3d at 488 n.24 (Garza, J., dissenting) (citing McLaren \textit{v.} Imperial Cas. & Indem. Co., 767 F. Supp. 1364, 1370-71 (N.D. Tex. 1991) (finding that for purposes of construing scope of insurance policy for law enforcement professional liability, sexual assault by police officer was outside the scope of his employment under Texas law).

\textsuperscript{173} \textit{See Green Cove Springs}, 348 F.2d at 202-03.


\textsuperscript{175} \textit{See Green Cove Springs}, 348 F.2d at 203 (applying Florida law to a sexual assault committed by a police officer); Gutierrez \textit{v.} Thorne, 537 A.2d 527, 530-31 (Conn. App. Ct. 1988) (applying Connecticut law to a sexual assault committed by a Department of Mental Retardation employee); Webb \textit{v.} Jewel Cos., 485 N.E.2d 409, 412-13 (Ill. App. Ct. 1985) (applying Illinois law to a sexual assault committed by a grocery store security guard); Weber, \textit{supra} note 174, at 1513 n.2 (citing and quoting parentheticals of Rabon \textit{v.} Guardsmark, Inc., 571 F.2d 1277, 1279 (4th Cir. 1978) (applying South Carolina law to a rape committed by a private security officer).
bility of respondeat superior to circumstances arguably more in line with its purpose: allocating risks to the enterprise that gives rise to them. However, the Supreme Court has ruled that there is no vicarious liability or respondeat superior in § 1983. Thus, there is no need to borrow the scope of employment limitation from the common law because there is no strict liability to limit.

Ironically, even the common law sometimes recognizes that an abuse of power can be within the scope of employment. The California Supreme Court recently ruled in Mary M. v. City of Los Angeles that a jury could decide that a police officer’s rape of a woman he detained was in the scope of his employment for purposes of holding the city vicariously liable. The court emphasized the great power and control granted to police officers and found it foreseeable that on occasion some of them would “misuse that authority by engaging in assaultive conduct.” The potential for abuse was “[i]nherent in this formidable power.”

In a strange quirk, the California Supreme Court had to distinguish Mary M. from John R., an earlier case involving sexual assault by a school teacher. I find the distinctions made by the court outlandish.

Other courts, however, have found employer liability for sexual assaults committed by employees. See Weber, supra note 174, at 1513 n.2 (citing and quoting parentheticals of Simmons v. United States, 805 F.2d 1363, 1369-70 (9th Cir. 1986) (applying Washington law to a sexual encounter between a counselor and a patient); Mary M. v. City of Los Angeles, 814 P.2d 1341, 1349-52 (Cal. 1991) (applying California law to a rape by a police officer); Applewhite v. City of Baton Rouge, 380 So.2d 119, 121-22 (La. Ct. App. 1979) (applying Louisiana law to a rape committed by a police officer)).

176. See Weber, supra note 174. at 1518-19; see, e.g., Farmers Ins. Group v. County of Santa Clara, 906 P.2d 440, 448 (Cal. 1995) (distinguishing foreseeability for respondeat superior in light of doctrine’s purposes of allocating costs to the enterprise); id. at 463 (Mosk, J., dissenting) (citing Justice Traynor on the purposes of scope of employment doctrine).


178. 814 P.2d at 1341, 1352 (Cal. 1991). It may be no accident that rape is being reconstructed as an abuse of power in the 1990s. See Justice Arabian’s concurring opinion on the changing attitudes toward rape. See id. at 1353-54 (Arabian, J., concurring) (“When the police officer’s special edge—the shield, gun and baton, the aura of command and the irresistible power of arrest—is employed to further a rape, the betrayal suffered by the victim is an especially bitter one.”). Justice Arabian has been an activist involved with rape crisis groups. See Justice Arabian’s biography, available in WestLaw, WLD-Judge Library.


179. Mary M., 814 P.2d at 1350.

180. Id. at 1349.

181. See John R. v. Oakland Unified Sch. Dist., 769 P.2d 948, 956-57 (Cal. 1989) (holding that sexual assault at teacher’s apartment as part of sanctioned extracurricular activity is not within the scope of employment). According to the Mary M. court, John R. emphasized that to impose vicarious liability in that particular circumstance would be a case of the prevention being worse than the harm. See Mary M., 814 P.2d at 1347. It would effectively halt all extracurricular and one-on-one activities in the school. See id. The court further distinguished John R. because the nexus between the authority given to teachers and sexual abuse was too attenuated to fall within
in Mary M. somewhat questionable and think that the John R. teacher decision could have benefitted from some of the insights about rape and power reflected in Justice Arabian's concurring opinion in Mary M.\textsuperscript{182} Be that as it may, honest dialogue with the common law would be superior to disingenuous conflation. The "color of state law" doctrine serves different purposes than the varying degrees of limitation placed on vicarious liability in the common law.

Judge Jones' dissent added another justification for characterizing the teacher's assault as a private act, not inflicted under color of state law. She argued that without some state policy behind the state actor, the range of risks allocable to a teacher's employer. See id. at 1349. Police officers, on the other hand, enjoyed much more authority with potential for abuse. See id.

For a different view of sexual abuse by teachers and the "scope of employment," see P.L. v. Aubert, 527 N.W.2d 142, 146 (Minn. Ct. App. 1995) (whether the district will be vicariously liable for teacher's sexual abuse of 11th grader depends on the fact questions of whether the abuse was related to the teacher's duties and whether it occurred within the work-related limits of time and place). The Aubert court recognized that as a result of her position the teacher "was able to exert influence and control over P.L. who was particularly susceptible to being manipulated." Id. at 147. The school district was aware of other sexual contact between teachers and students and "[i]n any event, the unfortunate reality is that sexual abuse of students by teachers has become a well-known hazard. Aubert's conduct is not so unusual or startling that it would seem unfair to include the resulting loss from among other costs associated with operating the school district." Id. The court of appeals' decision was reversed by the Minnesota Supreme Court in P.L. v. Aubert, 545 N.W.2d 666 (Minn. 1996). The court held that although the acts occurred within work-related limits of time and place, the employer was not liable because the misconduct was unforeseeable and unrelated to the duties of the employee. See id. at 668. The student and teacher both did their best to conceal the relationship, which was even carried on in the classroom with other students present. See id. at 667. The Minnesota Supreme Court distinguished this case from an earlier case finding that a psychologist's sexual relationship with his patient occurred in the course and scope of his employment because there was evidence that such relationships were a "well-known hazard" in that situation. See id. at 667-68. Here, however, there was no evidence of the hazard and thus no foreseeability. "While it is true that teachers have power and authority over students, no expert testimony or affidavits were presented regarding the potential for abuse of such power in these situations; thus there can be no implied foreseeability." Id. at 668. This statement implies that the result might have been different if the plaintiff had done a better job with the evidence.


Compare Doe v. Estes, 926 F. Supp. 979, 989 (D. Nev. 1996), which ruled that respondent superior was available against a school district on the common law claim arising out of a school teacher's sexual assault on a six-year-old child. The court held that this result was dictated by Prell Hotel Corp. v. Antonacci, 469 P.2d 399 (Nev. 1970), in which vicarious liability was imposed on a casino for the assault on a patron by a blackjack operator. The court stated:

This court fails to discern any principled legal distinction between a battery claim against a casino whose blackjack dealer slugs a patron and the same claim against a school district whose teacher fondles a student. In both cases the plaintiff was on the defendant's premises for the purpose of enjoying the defendant's services. In neither case can it reasonably be argued that the employee's duties included acts of common law battery.

Estes, 926 F. Supp. at 989.
the coach's motive was only "crass self-gratification." But, Judge Jones continued,

The Constitution has little to say about state actors who commit ordinary crimes for their own benefit. Compare Hudson v. Palmer, 468 U.S. 517 (1984). That task is better left to statutory and common law. "It is no reflection on either the breadth of the United States Constitution or the importance of traditional tort law to say that they do not address the same concerns." Daniels, 474 U.S. at 333.

Although I agree that traditional tort law and the United States Constitution address different concerns, I do not see how that transforms the depredations of a state official into private conduct. As has already been discussed, even if it does not rank as a fundamental right, the liberty interest in bodily integrity nonetheless is substantially protected under the Due Process Clause of the Fourteenth Amendment from totally arbitrary state deprivations. Thus, there is a federally guaranteed right at stake, not simply a traditional tort law concern. Moreover, the loss was at the hands of a state employee who "use[d] and abuse[d] his position as a teacher" to gain access to and power over the student he targeted for his sexual imposition. That is abuse of power and therefore is precisely the kind of situation § 1983 is designed to address. The Supreme Court has acknowledged many times that school teachers exercise state power over the children consigned to their care by compulsory education laws. When they

184. Id. In Hudson, the Court ruled that even an intentional deprivation of an inmate's property did not violate procedural due process so long as it was "random and unauthorized." See Hudson v. Palmer, 468 U.S. 517, 553 (1984). Since the state could not anticipate such deprivations in advance, no predeprivation hearing could be held and "due process of law" would be satisfied by adequate postdeprivation state tort remedies. See id. The Hudson ruling extended the Parratt v. Taylor, 451 U.S. 527 (1981), "adequate state remedy" line of cases to intentional deprivations. See id. Subsequently, the Court clearly ruled that the "random and unauthorized" limitation applied to procedural due process only, and not to substantive claims. See Zinermon v. Burch, 494 U.S. 113, 125 (1990). For a discussion of Zinermon, see Oren, supra note 93.
185. See supra notes 57-100 and accompanying text.
186. Taylor, 15 F.3d at 468 (Garwood, J., dissenting).
187. See, e.g., Vernonia Sch. Dist. 471 v. Acton, 115 S. Ct. 2386, 2391–93 (1995). The Court acknowledged that an earlier case rejected the notion that public schools merely exercise parental-type power over the children within their walls. The Court in New Jersey v. T.L.O., 469 U.S. 325, 336 (1985), found such a notion inconsistent with compulsory education laws. The Court's decisions on due process and free speech in schools also reflect a belief that the state's power over school children is more than just the delegated power of their parents. Rather, it is "custodial" and "tutelary," thereby permitting a degree of supervision and control that could not be exercised over free adults. See Acton, 115 S. Ct. at 2392. The Acton Court was careful, however, to disavow any DeShaney-type consequences of this reality. Justice Scalia wrote that they were not suggesting that the degree of control exercised over school children was sufficient to give rise to a DeShaney constitutional duty to protect. See id. at 2391-92. Taylor, however, does not
abuse that authority by violating constitutional rights, they must answer in § 1983.

Judge Garza’s opinion also minimized the fact that the perpetrator in Taylor was a teacher who sexually assaulted his student and not just any passing private party. He did so by reinventing a distinction between state officials who merely “exceed the limits of authority, as in Monroe” and those who “[act] in the complete absence of authority,” a distinction based on a lapsed and discredited state action doctrine. Judge Garza resurrected an old state action case, Barney v. City of New York, for the proposition that “state action does not exist when the act complained of ‘was not only not authorized, but was forbidden by [state] legislation.’” But Judge Garza quite rightly recognized that subsequent Supreme Court decisions questioned the continuing validity of Barney. Moreover, the basic position taken in Barney, i.e., that “it is for the state courts to remedy acts of state officers done without the authority of, or contrary to, state law,” was essentially repudiated in the § 1983 context by Monroe v. Pape.

Section 1983 cases addressing the circumstances under which judges forfeit their absolute immunity merely underline the meaninglessness for “under color of state law” of any distinction between acts done in the excess of jurisdiction and conduct in the absence of jurisdiction. Under the statute as interpreted by the Supreme Court, judges enjoy a defense of absolute immunity from individual liability involve a DeShaney duty to protect against harm inflicted by private actors. Rather, it concerns a supervisor’s responsibility for the misconduct of a subordinate who is a state actor himself.

188. Taylor, 15 F.3d at 486, (Garza, J., dissenting).
189. 193 U.S. 430 (1904).
190. Taylor, 15 F.3d at 481 (quoting Barney, 193 U.S. at 437).
191. See id. at 484-85 (quoting United States v. Raines, 362 U.S. 17, 26 (1960)) (“Barney must be regarded as having been worn away by the erosion of time . . . and of contrary authority.”) (internal quotations omitted).
192. Id. at 481 (quoting Barney, 193 U.S. at 438).
193. 365 U.S. 167 (1960), overruled in part by Monell v. Department of Soc. Servs. 436 U.S. 658 (1978). In fact, Justice Frankfurter’s dissent unsuccessfully argued that very point. In the name of “our federalism,” Justice Frankfurter wanted to define conduct “under color of state law” as action which was officially authorized in some sense, either because the state approved of it or refused redress to the victims in state court. See id. at 237 (Frankfurter, J., dissenting). But the Court rejected this interpretation of the statute. Instead, it opted for the broader misuse of state power construction already established in § 242 criminal jurisprudence and in state action doctrine since Home Telephone and Telegraph v. City of Los Angeles, 227 U.S. 278 (1913). Monroe, 365 U.S. at 172, 183-87; see id. at 194-202 (Harlan, J., concurring). Home Telephone and Telegraph held that “where an officer or other representative of a State, in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the State has authorized the wrong is irrelevant.” 227 U.S. at 287.
for their judicial acts, "even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." As a consequence, the Court ruled that a judge who signed an order for sterilization of a young woman on her mother's bare request and without any pretense of engaging in a judicial-type proceeding was absolutely immune from a suit for damages. On the other hand, judges who act in the complete absence of jurisdiction, such as the traffic judge who had a vendor brought before him in handcuffs because the coffee that he sold was "putrid," are still state actors, but they lose the defense of absolute immunity.

This is not to say that there may not be a rare instance in which a state official acts in a purely private capacity and thus may not be held to be a state actor or, since the two concepts largely coincide, someone acting "under color of state law." For example, some § 1983 cases cited by the dissent involved altercations with friends or relatives of the state official, a continuation of private disputes arising outside of their use of state authority. Sometimes the actions were not "under color of state law" because they arose out of facts that were too unrelated (in time, place, or kind) to the exercise of that official's authority.

195. See id. at 351-55. For trenchant criticism of this decision, see Irene Merker Rosenberg, Stump v. Sparkman: The Doctrine of Judicial Impunity, 64 VA. L. REV. 833 (1978).
196. See Zarcone v. Perry, 572 F.2d 52, 57 (2d Cir. 1978) (upholding award of punitive damages against the judge), cited with approval in Harper v. Merckle, 638 F.2d 848, 858 n.17 (5th Cir. 1981). Harper involved a judge who unilaterally decided to detain a man who happened to enter his office in order to leave a child support payment for his ex-wife who was employed there as a secretary to another judge. See id. at 850-51. When the ex-husband walked out on the judge, bailiffs chased and captured him, bringing him before the judge who then held an ersatz "hearing" based on the judge's own "complaint" and sent him off to jail. See id. at 851-54; see also, Mireles v. Waco, 502 U.S. 9, 11-12 (1991) (judge not immune from liability for nonjudicial actions or for actions, though judicial in nature, taken in the complete absence of all jurisdiction).
197. In virtually all situations where the defendant being sued is a state employee, the constitutional concept of "state action" under the Fourteenth Amendment and the statutory concept of "under color of state law" under § 1983 coincide. See Lugar v. Edmondson Oil Co., 457 U.S. 922, 929 (1982). But see Polk v. Dodson County, 454 U.S. 312, 320 (1981) (holding that a public defender who was a state actor nonetheless was not acting "under color of state law" because in representing his client he was ethically bound to act independently, even adversely to the interests of his state employer).
198. See, e.g., Bonsignore v. City of New York, 683 F.2d 635, 638-39 (2d Cir. 1982) (off-duty police officer shot his wife with his service revolver); Delcambre v. Delcambre, 635 F.2d 407, 408 (5th Cir. 1981) (police officer's altercation with his sister-in-law while he was on duty). But see United States v. Tarpley, 945 F.2d 806, 809 (5th Cir. 1991) (sheriff acted under color of state law during assault on wife's former lover which occurred in the sheriff's home but where the "presence of police and air of official authority pervaded the entire incident").
199. See, e.g., Thomas v. Cannon, 751 F. Supp. 765, 767 (N.D. Ill. 1990) (worker offered two girls waiting at a bus stop a lift in his county-provided car and then he raped them); Morgan v. Tice, 862 F.2d 1495, 1499 (11th Cir. 1989) (a town manager did not act under color of state law when making allegedly defamatory statements about the plaintiff who was running for mayor;
The Court of Appeals for the Fifth Circuit recently stretched this concern with remoteness to include an eleven-year-old boy who was molested "more than five months after [the child] withdrew from the school where [the teacher] taught." Although the music teacher (who had previously been acquitted of a prior indecency-with-a-child charge and had subsequently been transferred to a new school after new allegations surfaced) initially gained access to the child in the classroom, the parents permitted the relationship to continue after the child left the school. The court concluded that the sexual assaults were not under color of state law because of the lack of a nexus between the "activity out of which the violation arises" and the teacher's duties and obligations as a teacher. The assaults first occurred at the child's home, more than five months after the child left the teacher's classroom. The court emphasized that "Asher's contacts with Juan thereafter were in no way part of his duties as a state employee, were not school-sponsored, and were not reported to any school official." Conceding that there was evidence that the teacher "befriended" and showed "a special interest" in the child at school, the Fifth Circuit noted that there was no evidence of physical sexual abuse at the school: "Unlike in Doe [v. Taylor], Asher was not Juan's teacher 'before, during and after' the sexual abuse, nor was this wrongful conduct 'on and off school grounds.'" In spirit, this ruling owes something to the proximate cause reasoning of Martinez v. California, which held that a parole board was not constitutionally responsible for the murder of a fifteen-year-old girl some five months after the parolee's release.

By contrast to the cases where the state actor's conduct is too remote from the exercise of his state authority, sexual assaults by school teachers who locate and pursue their prey on school grounds and use their position to win compliance are easy cases. It is perhaps no coincidence that coaches and band directors figure prominently in

the statement was made during a stopover on his own time in another town). Judge Garwood cited a case in which a teacher assaulted boys staying at his home with the permission of their parents during the summer when the teacher had no teaching or coaching duties for the school. See D.T. v. Independent Sch. Dist. No. 16, 894 F.2d 1176, 1192 (10th Cir. 1990) (finding no state action and no action under color of state law); Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 466-67 (5th Cir. 1994) (Garwood, J., dissenting).

201. See id. at 1044.
202. See id. at 1047.
203. See id.
204. Id.
205. Id.
these cases. Teachers who can grant passes and special favors and meet their students outside of the regular classroom are in the best position to exploit their power. In light of the incidence of school bus drivers who target young or handicapped children in their charge by virtue of their state position, those also are easy cases.

The custodian cases admittedly require more analysis to determine whether they implicate action under color of state law or may fairly be characterized as private conduct instead. In Doe v. Hillsboro Independent School District, the Court of Appeals for the Fifth Circuit considered the liability of a school district and its supervisory personnel who "hired convicted criminals and then failed to supervise them adequately." The case involved wholesale defaults by the school district in hiring and in investigating reports of sexual abuse which the court found amounted to "deliberate indifference" to the girl's right to bodily integrity. Although the custodian who perpetrated the assault was not a defendant in the lawsuit, the Fifth Circuit held that he was a state actor and not a third party: "[W]hen a school employee is rightfully on the premises, during school hours, ostensibly performing his assigned duties, and—predictably—finds himself alone with a student, constitutional deprivations perpetrated by that school employee on the person of that student might be found to have occurred in the course of employment." The majority, however, apparently was not comfortable relying on this holding alone. It repeatedly emphasized that the status of the custodian was not the relevant question. Rather, they focused on the school officials who "creat[ed] the circumstances that brought him in contact with Doe" and who "did so under color of state law."

208. See, e.g., Larson v. Miller, 55 F.3d 1343, 1347 (8th Cir. 1995) (bus driver assaulted nine-year-old handicapped student with minimal communicative abilities); Black v. Indiana Area Sch. Dist., 985 F.2d 707, 708 (3d Cir. 1993) (bus driver molested several six- to eight-year-old girls); Doe A. v. Special Sch. Dist., 901 F.2d 642, 643 (8th Cir. 1990) (school bus driver molested 11 handicapped children).
209. 81 F.3d 1395, 1398 (5th Cir. 1996) (custodian raped school child).
210. See id. at 1403.
211. See id. at 1402.
212. Id. at 1407.
213. See id. at 1406.
214. Id. at 1407. Compare the facts in Jojola v. Chavez, 55 F.3d 488 (10th Cir. 1995). In Jojola, the complaint alleged that a parent told the principal that the custodian drilled a hole in the wall of the girls' locker room so that he could observe them. See id. at 491. Rumors circulated in school which the plaintiffs alleged the supervisors should have investigated. See id. Another parent supposedly complained to a principal of a high school where the custodian
Judge Garza's dissent in *Hillsborough* is right, in part, to take the panel to task for evading the question of the custodian's status.\textsuperscript{215} To do so is to move away from the straightforward issue of supervisory liability for the conduct of someone else who is clearly a state actor.\textsuperscript{216} If custodians are not state actors or acting under color of state law, then a *DeShaney* problem may arise. In *DeShaney*, the Supreme Court strictly limited the circumstances under which state child welfare officials could be held liable for failing to protect a child from assault by his father, a private party in the "free" world.\textsuperscript{217} Since it is not clear that schools would satisfy the exceptions to the no-duty-to-protect rule of *DeShaney*,\textsuperscript{218} if custodians were found to be private parties in the free world just like the father in *DeShaney*, there would be no underlying constitutional violation. Having stated the difficulty that way, however, the distinction from *DeShaney* seems clear. Custodians are not private parties in the "free world." Rather, they are state employees who gained access to their victims through their state positions.

Judge Jones' dissenting opinion also observed that Jane Doe had other remedies available instead of § 1983: The coach went to jail for the statutory rape; Doe could bring state-law tort claims for assault and battery and intentional infliction of emotional distress; and "most significant," Doe could bring a Title IX claim against the school district and had done so.\textsuperscript{219} So, asked Judge Jones, why invoke a new...
constitutional theory? Unless Congress makes a federal statutory remedy exclusive, however, there is no bar to pleading a related constitutional claim. Further, unlike § 1983, Title IX probably does not permit suits against individual defendants. Finally, and most important, Judge Jones misunderstands the relationship between state and federal law. It is immaterial to constitutional tort remedies that the proscribed conduct also violates state law. As the Court held in Monroe: "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." Section 1983 protects citizens from rogue cops and rogue teachers alike. The Ingraham dilemma is not so easily escaped.

**Supervisory Liability: Section 1983 Personal Fault Doctrine and the Dialogue With the Background of Tort Liability**

Having explored the limits of liberty interests under the Constitution, and exposed the Doe v. Taylor dissents' sub silentio attack on the special meaning of "under color of state law" in the statute, the

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remaining issue is supervisory liability: What is the appropriate standard under § 1983 for holding supervisory officials individually liable for constitutional violations committed by subordinates? The answer requires interpretation of language in the statute which affixes liability on any person who "subjects, or causes to be subjected" any citizen to deprivations of federally-guaranteed rights. The Supreme Court also has interpreted the "causes to be subjected" clause of the statute with a unique § 1983 twist by departing from the ordinary rule of vicarious liability or respondeat superior that is found in the common law. Yet, of all the issues discussed in this Article, this is the one which nonetheless provides the greatest opportunity for dialogue with the "background of tort liability" which "informs" interpretation of the statutory elements of § 1983. The relationship is not a simple one, but that is nothing new in § 1983 jurisprudence.

The Court has held that the "subjects, or causes to be subjected" element of § 1983 requires proof of some kind of personal fault or direct responsibility by each individual or governmental defendant. Vicarious liability is not permitted under § 1983 and it is also very difficult to find the government employer otherwise responsible for constitutional wrongs committed by state officials. Establishing personal fault on the part of individual supervisors is a distinct issue and should not require the same level of proof necessary to reach the governmental entity itself. But in the sex abuse in schools cases, federal courts have held officials liable only if their defaults in supervision met the heightened standard of causation and culpability developed for municipal liability. The lower federal courts generally have borrowed "deliberate indifference," the test the Court adopted in City of Canton v. Harris for municipal liability for the failure to train its officers. However, this is an inappropriate transposition of standards. Even if "deliberate indifference" is the correct formula, the Court of Appeals for the Fifth Circuit's three-part test is superior to the four-

226. For the background of tort liability and statutory interpretation in § 1983, see Nahmod, supra note 15, at 956.
227. For example, the Court read immunity defenses into § 1983 on the basis that the 1871 Congress could not have intended to abolish well-recognized common law defenses sub silentio. See Pierson v. Ray, 386 U.S. 547, 554 (1967). But in Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Court significantly departed from the common law framework. See Anderson v. Creighton, 483 U.S. 635, 645 (1987) (admitting that Harlow was a departure from the common law). Furthermore, the Court failed to read the common law accurately in the first place. See Oren, supra note 17, at 944-45.
step approach of other circuits. In any case, the courts also have been requiring too much from the facts of teacher sexual abuse cases.

The unsatisfactory treatment of supervisory liability in the school sex abuse cases is further illuminated when viewed against the relevant background of tort liability. It is true that contemporary common law incorporates vicarious liability, a theory of recovery which imputes the employee's wrong to the employer, but which is forbidden under § 1983 jurisprudence. To a degree that is still disputed, modern civil rights statutes such as Title VII and Title IX also may require the employer or institution to answer for violations perpetrated by its agents. On the other hand, the common law is not about vicarious liability alone. Instead, it also includes theories of direct liability. Thus, it is possible to reconcile a part of the background of tort liability with the § 1983 mandate that each individual defendant must be personally responsible for the actionable deprivation. Dialogue between federal and state law, therefore, can help point the way toward a new standard of liability for supervisory school officials who are responsible for constitutional violations inflicted by their subordinates.

A. Monell, Rizzo, and City of Canton: Personal Responsibility, Municipal Liability, and Heightened Causation in Section 1983

The Court's interpretation of § 1983 has made it very difficult to reach the governmental employer. It is easier to enforce the statute against individual defendants who are alleged to have misused or abused their state-granted authority. This displacement of § 1983 liability onto individual officials, whom Peter Schuck calls "street-level" bureaucrats, originated in *Monroe v. Pape.* In addition to defining "under color of state law" so that individual defendants were liable even if their misconduct was unauthorized by official policy, *Monroe* also ruled that governments could not be sued under the statute at all.* Some fifteen years later, however, *Monell v. Department of Social Services* reversed the second ruling of *Monroe,* thereby opening a window to claims against municipalities.*

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231. See id. at 187.
233. See id. at 663.
In the meantime, however, *Rizzo v. Goode* was decided, the only "supervisory liability" case to reach the Supreme Court. Although *Rizzo* introduced a causation problem into § 1983 jurisprudence, it is best understood as a pre-*Monell*, *Monell* case. Like *Ex Parte Young*, the suit was a legal fiction. In 1975, *Monroe* still prevented the plaintiffs from reaching the city itself in order to obtain broad systemic injunctive relief; the lawsuit consequently named a number of high-level officials as individual defendants. Citizens' groups sued the mayor, city manager, and police commission, seeking to improve police procedures for handling civilian complaints. They complained of dozens of incidents of police mistreatment. The citizens alleged that departmental procedures discouraged the filing of civilian complaints and minimized the consequences of this misconduct.

It was clear from the plain language of the statute, and conceded by the majority and dissent alike, that § 1983 remedies encompassed supervisors who "cause[d] to be subjected" someone to a deprivation of their federal rights. Reversing the injunctive relief granted by the district court, however, the majority in *Rizzo* objected to the plaintiffs' failure to show any affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners—express or otherwise—showing their authorization or approval of such misconduct. Instead, the sole causal connection found by the District Court between petitioners and the individual respondents was that in the absence of a change in police disciplinary procedures, the incidents were likely to continue to occur, not with respect to them, but as to the members of the classes they represented.

Writing for the majority, then-Justice Rehnquist distinguished the mere failure to act in the face of nothing more than a statistical pattern of incidents (which he did not find to be very frequent in any case), from more active conduct. He was not persuaded that the

235. 209 U.S. 123 (1908) (holding that although the Eleventh Amendment bars suits for money damages against "the state" in federal court, officials may nonetheless be sued for injunctive relief which costs the state money, because when the officials violate the Constitution they act "ultra vires" and therefore no longer represent "the state").
236. See *Rizzo*, 423 U.S. at 364-65 n.1.
237. See id. at 364-65.
238. See id. at 366-67.
239. See id. at 368-69.
240. Id. at 370.
241. Id. at 371.
242. See id. at 376.
statistics alone somehow created a duty to create particular prophylactic measures to deter speculative future abuses.\textsuperscript{243} He emphasized that these defendants had not done anything affirmative to justify injunctive relief against them.\textsuperscript{244}

The \textit{Rizzo} dissent, on the other hand, emphasized the plain language of the statute and accepted principles of tort law. Justice Blackmun observed that § 1983, "[b]y its very words, . . . reaches not only the acts of an official, but also the acts of subordinates for whom he is responsible."\textsuperscript{245} He recalled the precepts of \textit{Monroe v. Pape}, which advised that the civil rights statute "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."\textsuperscript{246} Leaving to another day the questions of availability of money damages and whether or not liability could be imposed on supervisors without any consciousness of the wrongs committed by subordinates,\textsuperscript{247} the dissent would have \textit{enjoined} these officials from consciously permitting their subordinates to continue violating the constitution.\textsuperscript{248}

So much was going on in \textit{Rizzo} that it is hard to tell what was dispositive.\textsuperscript{249} But along with \textit{Monell}, it came to stand for the proposition that § 1983 did not incorporate vicarious liability.\textsuperscript{250} Moreover, when \textit{Monell} reversed the no-government-liability ruling of \textit{Monroe}, the Court acknowledged the cogent common law justifications for \textit{respondeat superior}\textsuperscript{251} but explained that it felt bound by the legislative history of the failed Sherman Amendment.\textsuperscript{252} For a provision that did not pass and was not really on point, the Sherman Amendment has played an oversized, and perhaps unfortunate, role in the interpreta-

\textsuperscript{243} See \textit{id.}.
\textsuperscript{244} See \textit{id.} at 377.
\textsuperscript{245} \textit{Id.} at 384 (Blackmun, J., dissenting).
\textsuperscript{246} \textit{Id.}
\textsuperscript{247} See \textit{id.} at 385.
\textsuperscript{248} See \textit{id.}
\textsuperscript{249} See, e.g., \textit{id.} at 372 (the Court's views on standing); \textit{id.} at 377 (the use of the federal equity power). In \textit{Los Angeles v. Lyons}, 461 U.S. 95, 103 (1983), the Court explained \textit{Rizzo} as a decision about standing for equitable relief.
\textsuperscript{250} See \textit{Monell v. Department of Soc. Servs.}, 436 U.S. 658, 694 n.58 (1978) (citing \textit{Rizzo}, 423 U.S. at 370-71) ("[W]e would appear to have decided that the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability.").
\textsuperscript{251} \textit{Monell}, 436 U.S. at 693-94, 694 n.58. The three justifications that the common law adumbrated for imputing liability to the employer were as follows: first is the notion that putting the cost of accidents on employers makes them more vigilant and helps prevent injuries; second is an insurance theory which spreads the cost of accidents to the whole community; and third is the argument that "liability follows the right to control the actions of a tortfeasor." \textit{Id.} The final justification apparently was rejected for § 1983 law in \textit{Rizzo}. See \textit{id.} at 694 n.58.
\textsuperscript{252} \textit{Id.} at 694.
tion of § 1983. From the slender reed of the legislative history of the Sherman Amendment, the Court first concluded in *Monroe v. Pape* that § 1983 did not include municipal governments in the definition of “persons” subject to suit under the statute. Revisiting this question little more than fifteen years later, the *Monell* Court later concluded that the same oblique evidence meant something different: Municipalities were § 1983 persons, but they could not be held vicariously liable simply because they employed a tortfeasor.

The Court conceded its conclusions were somewhat indirect: “Strictly speaking, of course, the fact that Congress refused to impose vicarious liability for the wrongs of a few private citizens does not conclusively establish that it would similarly have refused to impose vicarious liability for the torts of a municipality’s employees.” But this “rejection of the only form of vicarious liability presented to it,” coupled with another negative, “the absence of any language in § 1983 which can easily be construed to create respondeat superior liability,” gave rise to a strong “inference that Congress did not intend to impose such liability.” On this shaky foundation, and without ever coming to terms with the background of tort liability, the Court thereafter built a specialized § 1983 doctrine of municipal liability.

*Monell* held that local governments are not liable for an injury solely because they employ a tortfeasor: “Instead, it is when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.” The local government in some way must be the

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253. The Sherman Amendment would have created a kind of strict liability along the lines of other riot acts known to English and American law. “[T]he inhabitants of the county, city, or parish” in which certain acts of [Klan] violence occurred [would have] ‘to pay full compensation’ to the victim or her family. *Monroe v. Pape*, 365 U.S. 167, 188 (1961) (quoting *CONG. GLOBE*, 42d Cong., 1st Sess. 663 (1871)), overruled in part by *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978). Judgment could be taken against the local government and levied on the property of any local inhabitant. *See id.* at 188 n.38. The city, however, could seek indemnification against those responsible for the riot. *See id.* Under the Sherman proposal, “even if [the municipality] had done everything in its power to curb the riot” by *private* parties, it would be held vicariously and strictly liable. *Monell*, 436 U.S. at 692 n.57. The government could then attempt to recover the judgment from the individuals responsible for the riot. *See id.* The provision provoked heated debate over the constitutionality of imposing law enforcement responsibilities on local governments which they did not have under state law. *See Monroe*, 365 U.S. at 190. The amendment was defeated in favor of a provision that extended liability only to persons with a specific knowledge of the enumerated wrongs. *See id.* at 189-90.

254. 365 U.S. at 190-91.
256. *Id.* at 693 n.57.
257. *Id.*
258. *Id.* at 694.
"moving force" of the constitutional violation. This is the essence of municipal liability; all the rest is commentary.

As the Court has pursued the implications of Monell for municipal liability, it has created a jurisprudence of what one might call heightened causation. Governments have no existence apart from their agents, yet Monell requires a finding that the government itself was to blame because it was the "moving force" behind the constitutional violation. This has launched an ever-narrowing and more formalistic search for actions by policymakers or extremely high-level defendants whose acts or edicts may be said to represent final authority or for widely persistent custom.

The Monell municipal liability quest culminated in the articulation of a standard in a failure-to-train case, City of Canton v. Harris, which has had an untoward influence on the supervisory liability cases that concern sexual abuse by teachers in schools. Harris complained of defaults that occurred relatively far back in the causal chain. Although the city's official policy regarding medical treatment for detainees was constitutional on its face, it delegated to the jailer the decision to take any person needing medical treatment to a hospital, with the permission of his supervisor. The Court observed that to hold the city responsible any time an employee "happened to apply the policy in an unconstitutional manner" would resurrect respondeat superior. It would make the employer automatically liable just because it employed a tortfeasor, without regard to the city's role in the

259. Id.
260. "[T]he full contours of municipal liability" were left to be addressed in subsequent cases. Id. at 695.

There is a famous story of a fellow named Ben Bag Bag who goes up to the Shamai and asks him to teach him all that there is to know about Jewish law while standing on one leg, but the Shamai brushes him off. Then Ben Bag Bag goes up to Hillel, Shamai's great rival (as a teacher of Jewish law), and Hillel says, "do not do unto others what you would not have them do unto you; all the rest is commentary." Thanks to my colleague David Dow for teaching me the full story behind the familiar punchline. See generally Israel Konowitz, Beit Shamai U-Veit Hillel 9-13 (1965).

261. Monell was itself an easy case because the government's action was in the form of a policy enacted by the Board of Education of the City of New York. Monell, 436 U.S. at 660-61. The Court has found it more difficult to identify the individual official who exercises "final authority." Compare Pembaur v. Cincinnati, 475 U.S. 469 (1986), with St. Louis v. Prapotnik, 108 S. Ct. 915 (1988). The High Court has never defined "custom."

262. 489 U.S. 378 (1989). In this case, Mrs. Harris was arrested by the Canton Police Department and brought to the station in a daze. She slumped over several times and was left "lying on the floor to prevent her from falling again." Id. at 381. No medical care was summoned. See id. After she left police custody she ended up in a nearby hospital where she was diagnosed as suffering from a severe emotional ailment. See id. Her § 1983 lawsuit complained that full discretion to make medical judgments was left to an untrained shift commander. See id. at 381-82.

263. See id. at 386-87.
264. Id. at 387.
But according to the jurisprudence that developed under *Monell*, that is forbidden in § 1983. Mrs. Harris, therefore, relied on a more remote assertion of causation, claiming that the constitutional injury would never have occurred if the city had trained its jailers in the first place. That original failure to train (a policy not unconstitutional in itself) was alleged to have been the “moving force” behind the violation of her rights that occurred when the jailer failed to take her to the hospital.

The Court’s dilemma in *City of Canton* was this: How was it to find that a faceless city’s failure to anticipate and act before the situation even arose, “caused” the injury later inflicted by its low-level employee? The solution to this problem of remote causation was to focus instead on culpability, the “degree of fault . . . evidenced by the municipality’s inaction.” The *Canton* Court therefore held that “the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.” City policymakers must have made “a deliberate . . . choice” among alternatives to follow a course of failing to train its employees. This takes a lot—the deficiencies must be so obvious and so likely to lead to the constitutional injury that the policymakers may be considered to be “deliberately indifferent” to the probable outcome. In addition to this high degree of fault, the link between the deficiency in the training and the ultimate injury must be clear. However, an “otherwise sound” program of training that has been negligently administered will not trigger municipal liability.

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265. See id.
266. See id. at 385.
267. See id. at 387.
268. See id.
269. Id. at 388; see also id. at 391 (“To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under §1983.”).
270. Id. at 388.
271. Id. at 389.
272. Id. at 390. The Court’s example demonstrates that “deliberate indifference” is an extremely stringent standard: Cities who give firearms to police officers in order to stop fleeing felons, but fail to train them at all in the use of deadly force, would be liable. Id. at 390 n.10. Alternatively, the city might learn of the obviousness of the need for training from a pattern of police misbehavior: “It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers . . . .” Id.
273. See id. at 391.
274. Id.
The Court feared that "lesser standards of fault and causation would open [cities] to unprecedented liability."275 Cities could always be criticized for not doing something more to better train their employees.276 Justice White's majority opinion warned that permitting this would invite "de facto respondeat superior liability on municipalities—a result we rejected in Monell."277 In fear of these remote first causes arising from the failure to train, the Court imposed what amounted to a heightened causation standard, defined primarily in terms of culpability.278

From Monell to City of Canton, a specialized doctrine of municipal liability developed which rested on three propositions: (1) because of the legislative history of the Sherman Amendment, respondeat superior was not possible under § 1983; (2) municipalities could be found liable only under limited circumstances where their customs or policies were shown to be the moving force behind the constitutional violation; and (3) municipalities are liable only for those failures to train their employees that demonstrate deliberate indifference to the need for training. This progression arises out of the peculiar tension in a legal doctrine which rejects the modern common law trend toward vicarious enterprise liability and instead demands personal fault from a nonperson, a faceless governmental entity. It also, no doubt, reflects the Court's reluctance to expose municipalities to seemingly unlimited liability for the misconduct of their many employees. But this line of cases does not contain the answer to the quite distinct question of when individual supervisory officials who are personally at fault may be held liable for constitutional violations committed by their subordinates.

B. Degrees of Indifference: The Lower Courts Apply City of Canton's Heightened Causation to Supervisory Liability

Despite the different histories and purposes of municipal liability and individual supervisory liability, the lower courts have borrowed the "deliberate indifference" standard of Canton wholesale. Albeit with significant variations, all the circuits appear to require some form of deliberate indifference for supervisory liability in the school sex

275. Id.
276. See id. at 392.
277. Id. (citation omitted).
278. See id.
abuse cases. The choice of that formula, however, merely invites confusion of supervisory liability with other issues and also unnecessarily shuts off dialogue with the background of tort liability.

The development of standards for supervisory liability for sexual abuse by teachers began with Stoneking II, the Court of Appeals for the Third Circuit’s response on remand to the Supreme Court’s vacation of Stoneking I. The Third Circuit had founded its first Stoneking decision permitting the lawsuit to proceed on a theory of “special relationship” or an affirmative duty to protect students arising out of statutory and common law in the state of Pennsylvania. But DeShaney called into question the existence of such a constitutional duty outside of circumstances where the state had deprived the victim of her liberty and was holding her in “custody.” Unfortunately, the Supreme Court did not clarify whether schools qualified as the kind of state-imposed custody that gives rise to a duty to protect.

Although the Third Circuit thought that compulsory education arguably met that requirement of DeShaney, it was unwilling to risk further delay by relying on the theory of special relationships again. Instead, the court noted the significant difference between DeShaney and Stoneking and went off in another direction. While DeShaney involved the failure to protect a young child from beatings by his father, a private actor in the free world, “Stoneking’s [injuries] resulted from the actions of a state employee.” In DeShaney, the Supreme Court

279. See Larson v. Miller, 55 F.3d 1343, 1349 (8th Cir. 1995) (plaintiffs must demonstrate deliberate indifference or tacit authorization); Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 454 (5th Cir. 1994) (deliberate indifference shown by failing to take remedial action); Gates v. Unified Sch. Dist. No. 449, 996 F.2d 1035, 1041 (10th Cir. 1993) (plaintiffs must demonstrate deliberate indifference or tacit authorization); Black v. Indiana Area Sch. Dist., 985 F.2d 707, 712-13 (3d Cir. 1993) (plaintiffs failed to demonstrate deliberate indifference to the abuse); Jane Doe “A” v. Special Sch. Dist., 901 F.2d 642, 646 (8th Cir. 1990) (plaintiffs must demonstrate deliberate indifference or tacit authorization); Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 725-26 (3d Cir. 1989) (Stoneking II) (plaintiff’s claim viable where she alleged deliberate indifference); see also Jojola v. Chavez, 55 F.3d 488, 491 (10th Cir. 1995) (complaint failed to show actual knowledge of improper contact with the student). The Court of Appeals for the Seventh Circuit dismissed a case, observing that the complaint did not contain Stoneking allegations that the “defendants promoted school policies that ‘encourag[ed] a climate to flourish where innocent [children] were victimized.’” J.O. v. Alton Community Unit Sch. Dist. 11, 909 F.2d 267, 271-72 (7th Cir. 1990) (quoting Stoneking II, 882 F.2d at 730).


281. See id. at 723.

282. See id.

283. See id. at 724; see also Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2392 (1995) (dicta stating that “we do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional ‘duty to protect,’ see DeShaney v. Winnebago County Dep’t of Soc. Servs., . . . .”).

284. See Stoneking II, 882 F.2d at 724.

285. Id.
repeatedly emphasized the significance of the private nature of the
injury. In Stoneking II, however, it was a teacher, a “school district
employee subject to defendants' immediate control,” who inflicted
the sexual abuse, often “in the course of his performance of his official
responsibilities, such as during school-sponsored events and trips, and
sometimes on school property.” The issue, therefore, was not one
of special relationships or duties to protect. Rather, it was the same
issue as in Doe v. Taylor, that is, when may a supervisor be held liable
under § 1983's “subjects, or causes to be subjected” language.

The Court of Appeals for the Third Circuit's answer to the super-
visory liability question was that to be liable, the individual defend-
ants, with deliberate indifference to the consequences, must have
established and maintained a policy, custom, or practice that directly
caused the constitutional harm. This requirement would be satis-
fied if the defendants communicated condonation by encouraging a
climate in which sexual abuse flourished. The Third Circuit held
that the allegations met the standard with respect to two of the three
defendants. Stoneking involved “at least five complaints about sex-
ual assaults of female students by teachers and staff members” be-
tween 1978 and 1982. In what perhaps can be seen as evidence of
guilty knowledge, the supervisor kept these allegations in a secret file
at home, rather than recording them in the teachers' personnel files.
As a consequence, the court discounted the fact that the young wo-
man who was coerced into a continuing sexual relationship with the
teacher had never complained about the molestation. For qualified

286. See id.
287. Id.
288. See id. at 724-25.
289. See id. at 725. The custom or policy language of Stoneking sounds suspiciously like the
criteria that must be satisfied to establish liability against municipalities rather than individual
290. See Stoneking II, 882 F.2d at 730-31.
291. See id.
292. Id. at 728-29.
293. See id. at 729.
294. See id. Even adult women may not complain about sexual harassment at the time of the
incidents. See generally Susan Gilmore et al., Why Women Are Reluctant to Accuse Powerful
Men, The Seattle Times, March 1, 1992, at A4. Consider Professor Anita Hill's testimony
before the Senate Judiciary Committee concerning the nomination of now-Justice Clarence
Thomas. When Professor Hill came forward years after the incidents she testified about, there
was much discussion of why she did not say anything at the time of the alleged misconduct. See,
e.g., Edwin Chen, Hill Doesn't Regret Sex Harassment Charges, Los Angeles Times, Oct. 20,
1991, at A-7 (Hill's response to those who questioned her delay in making allegations of harass-
ment). Professor Hill subsequently addressed a breakfast of the Women and Law Section of the
AALS at which she was the honoree. See Ken Meyers, Hill Watch, The Nat'l L. J., Jan. 20,
1992, at 4. She reminded the audience that however difficult it may have been for her, it was far
immunity purposes, "it is sufficient that there is adequate evidence that defendants were on notice of complaints of sexual harassment of students by teachers and staff at the school." A jury could believe the plaintiffs' testimony that the supervisors "discouraged and minimized reports of sexual misconduct by teachers," thereby showing deliberate indifference and "encouraging a climate to flourish where innocent girls were victimized."

On the other hand, the Third Circuit let stand the summary judgment in favor of the defendants in *Black v. Indiana Area School District.* The superintendent of schools showed that he acted quickly to investigate the two complaints of sexual molestation he received. Even though the supervisor was mistaken and the bus driver had been abusing several six- to eight-year-old girls, shortcomings in the investigation did not make the supervisor deliberately indifferent.

As expressed in *Doe v. Taylor*, the Fifth Circuit's version of the test for supervisory liability in teacher sex abuse cases also requires "deliberate indifference." The court of appeals applied a three-step test:

1. the defendant learned of facts or a pattern of inappropriate sexual behavior by a subordinate pointing plainly toward the conclusion that the subordinate was sexually abusing the student;
2. the defendant demonstrated deliberate indifference toward the constitutional rights of the student by failing to take action that was obviously necessary to prevent or stop the abuse; and
3. such failure caused a constitutional injury to the student.

In light of this standard, the court held that the girl's allegations against the principal were sufficient to survive a motion for summary

more intimidating for an economically more vulnerable pink collar worker to complain about sexual harassment in the workplace. See Notes of author (on file with author). A high school freshman is in an even worse position to report unwanted sexual attention from a teacher. As a consequence, supervisory toleration of a climate in which sexual abuse by teachers blossoms may create the kind of problem identified by the Third Circuit in *Stoneking II.*

296. Id. at 730.
297. 985 F.2d 707, 709 (3d Cir. 1993).
298. See id.
299. *See id.* at 713. In *Doe v. Methacton Sch. Dist.*, 880 F. Supp. 380, 384 (E.D. Pa. 1995), a district court found deliberate indifference in a case in which a school district actively covered up the teacher's "pedophilic predilections." Although it took them awhile to respond, the school district eventually demanded that the teacher resign because of his abuse of a twelve-year-old child. *See id.* However, they encouraged him to sign a letter citing "personal reasons" for the resignation and told the new employer that his performance had been "satisfactory." *Id.* Fourteen years later (and after the second school had long since learned about the first incident), the teacher was caught abusing a nine-year-old child in his new job. *See id.* at 384-85; *see also* C.M. v. Southeast Delco Sch. Dist., 828 F. Supp. 1179 (E.D. Pa. 1993) (special education student sexually and physically abused by teacher).
judgment, but it dismissed claims against the superintendent. Judge Jolly found that the principal “had certainly received notice of a pattern of inappropriate behavior that had been committed by [Coach] Stroud that suggested misconduct of a sexual nature.” Two years before, the principal had spoken to his subordinate about “being too friendly” with another female student. He had received complaints from parents, and from a school librarian who described one incident she witnessed as “child molestation.” Even more important, the principal “received knowledge” that the Coach had targeted Jane Doe particularly. A variety of reports should have alerted him to the coach’s sexual attentions to the girl providing ample time to act before the abuse escalated to statutory rape. As the facts unreeled before the eyes of the principal in Taylor, his response was to turn against the complainants and to suppress the complaints:

Lankford demonstrated deliberate indifference to the offensive acts by failing to take action that was obviously necessary to prevent or stop Stroud’s abuse. When certain parents complained about Stroud’s favoritism, Lankford suggested that their children were “jealous” of the favorite students. Lankford similarly dismissed the librarian’s report of “child molestation.” In perhaps the most striking example of his apathy, he responded to Brittani B.’s presentation of the valentine—which he admitted appeared to bear Stroud’s handwriting—by transferring Brittani (not Jane Doe) out of Stroud’s class. He never bothered to discuss the valentine incident with Caplinger, Stroud, Doe, or Doe’s parents. He did not record any of these complaints of inappropriate conduct in Stroud’s personnel file. He did not take the obvious steps of removing Doe from Stroud’s class and directing Stroud to stay away from Doe.

The superintendent, on the other hand, acted (albeit ineffectively) as soon as he heard about the “potential misconduct by Stroud.” He could not be said to be “deliberately indifferent.”

In contrast to the Courts of Appeals for the Third and Fifth Circuits, plaintiffs did not fare as well in the Courts of Appeals for the
Eighth and Tenth Circuits. These courts of appeals have adopted a variant of the deliberate indifference standard that includes an extra step and seems harder to satisfy.\textsuperscript{310} First, the plaintiff must show that the supervisor had notice of a pattern of unconstitutional acts. Second, deliberate indifference or tacit authorization on the part of the supervisory official is required. Third, the supervisor must fail to take steps to remediate the misconduct. Fourth, the remedial failure must be a proximate cause of the constitutional injury.\textsuperscript{311}

In \textit{Jane Doe “A” v. Special School District},\textsuperscript{312} the Court of Appeals for the Eighth Circuit ruled that there was insufficient summary judgment evidence that the supervisors had notice of a pattern of unconstitutional acts by a bus driver of handicapped children.\textsuperscript{313} Eleven handicapped school children brought this unsuccessful § 1983 lawsuit after the driver pled guilty to charges involving five children.\textsuperscript{314} The superintendent had “received a single complaint from a parent that [the bus driver] had cursed at her . . . in front of the children,” and perhaps another complaint that the driver had kissed a child on the bus.\textsuperscript{315} The bus supervisors were notified that the driver used profanity, kissed a boy on the bus, and pushed another child.\textsuperscript{316} One of them also heard that the driver failed to follow a child’s behavior modification program and “had kissed and kicked a child and had given him a ‘snuggle.’”\textsuperscript{317} The area coordinator knew about some of this and also about a complaint from parents that the bus driver put his hand down a boy’s pants, pulled down a child’s pants, and spanked him.\textsuperscript{318} Shortly before his arrest for child molestation, it was also reported that the driver was touching boys’ crotches.\textsuperscript{319}

The Court of Appeals for the Eighth Circuit apparently agreed with the district court that no rational trier of fact could conclude that the area coordinator had notice of a pattern of unconstitutional

\textsuperscript{310} See \textit{Jojola v. Chavez}, 55 F.3d 488, 490 & n.1 (10th Cir. 1995); \textit{Larson v. Miller}, 55 F.3d 1343, 1349 (8th Cir. 1995); \textit{Gates v. Unified Sch. Dist. No. 449}, 996 F.2d 1035, 1041 (10th Cir. 1993); \textit{Jane Doe “A” v. Special Sch. Dist.}, 901 F.2d 642, 645 (8th Cir. 1990) (citing \textit{Wilson v. City of North Little Rock}, 801 F.2d 316, 322 (8th Cir. 1986)).

\textsuperscript{311} See \textit{Jojola}, 55 F.3d at 490 & n.1; \textit{Larson}, 55 F.3d at 1349 (citing \textit{Jane Doe “A”}, 901 F.2d at 646); \textit{Gates}, 996 F.2d at 1041; \textit{Jane Doe “A”}, 901 F.2d at 645 (citing \textit{Wilson}, 801 F.2d at 322).

\textsuperscript{312} 901 F.2d 642.

\textsuperscript{313} See \textit{id.} at 646.

\textsuperscript{314} See \textit{id.} at 643.

\textsuperscript{315} \textit{Id.} at 644.

\textsuperscript{316} See \textit{id.}

\textsuperscript{317} \textit{Id.}

\textsuperscript{318} See \textit{id.}

\textsuperscript{319} See \textit{id.}
acts. Instead, the lower court concluded that the incidents reported to the bus supervisors only concerned common law torts. The court of appeals ruled that the area coordinator's failure to respond to the parents' complaints was "at most... negligence." Such negligence, the Eighth Circuit opined, "does not implicate fourteenth amendment protections." That the driver turned out to be "a sexual reprobate" after the fact should not result in the imposition of liability. "Measured against the deliberate indifference-official policy standard of liability," the plaintiffs' case against the individual supervisors did not survive summary judgment.

The Court of Appeals for the Eighth Circuit was equally unmoved in Larson v. Miller. A bus driver sexually assaulted a nine-year-old handicapped student with minimal communicative abilities. The driver had been hired with no background check. The child initially reported that the driver asked her "whether she had been breast fed and whether she was wearing silk panties." Supervisors warned him not to make inappropriate comments, but left him in charge of her bus. Throughout the fall, she became withdrawn, and finally told her mother that the driver had fondled her vaginal area. The immediate response of school officials to her parents' report was to warn them that they could be in trouble for slander. The court of appeals in Larson found it dispositive that there had been only one previous complaint, much less than "far more extensive records of unheeded prior complaints [found] insufficient to constitute a pattern of unconstitutional behavior."

320. See id. at 644, 646.
321. See id.
322. Id. at 646.
323. Id.
324. Id. at 646-47.
325. Id. at 647. Summary judgment was also entered in favor of the defendant school district. See id. at 646. To prevail against the District, plaintiffs would have had to show the existence of a widespread, persistent pattern of unconstitutional misconduct by the District's employees; deliberate indifference or tacit authorization of such conduct by the District's policymaking officials after notice to the officials of such misconduct; and injury from acts pursuant to the District's custom, i.e., the custom was the moving force behind the constitutional violation. See id.
326. 55 F.3d 1343 (8th Cir. 1995).
327. See id. at 1346-48.
328. See id. at 1347. A background check would have revealed that the driver had been arrested but not convicted for sexual abuse of his step-daughter. See id. at 1348.
329. Id. at 1347.
330. See id.
331. See id.
332. See id.
333. Id. at 1349.
The Court of Appeals for the Eighth Circuit’s requirement of a pattern of violations also characterized the Court of Appeals for the Tenth Circuit’s approach in *Gates v. Unified School District No. 44*[^334] and *Jojola v. Chavez.*[^335] The *Gates* court distinguished *Stoneking II,* where the principal had “received, repressed and concealed at least five complaints.”[^336] In *Jojola,* the complaint alleged that a parent told the principal that the custodian drilled a hole in the wall of the girls’ locker room so that he could observe them.[^337] The plaintiffs also alleged that “rumors had circulated at the school concerning [the custodian’s] improper sexual behavior.”[^338] Another parent supposedly “complained to a previous principal of the high school that [the custodian] had made sexual comments to girls at the school.”[^339] The petition stated that he was removed from his job as a bus driver “because of inappropriate behavior with a preteen female student, and [was] transferred to the high school after he had unhooked brassieres of junior high school girls.”[^340] But the court of appeals found that four

[^334]: 996 F.2d 1035 (10th Cir. 1993).

[^335]: 55 F.3d 488 (10th Cir. 1995); see also, Doe v. Claiborne, 103 F.3d 495, 513 (6th Cir. 1996) (the supervisory defendants were “simply not confronted with such a widespread pattern of constitutional violations that their actions or inactions amounted to a deliberate indifference to the danger of [the teacher] sexually abusing students”). In what is perhaps an understatement, the court conceded that the defendants’ actions “left a lot to be desired.” *Id.* The school superintendent had received notice from DHS that the teacher was alleged to be sexually abusing nine different girls at a middle school. *See id.* at 502. Upon the advice of DHS, the teacher was removed from student contact for the balance of the school year. *See id.* Subsequently, DHS concluded that four of the charges were “founded.” *See id.* After DHS negotiated what was termed a “pretrial agreement” with the teacher in which they agreed not to pursue criminal proceedings against him themselves or to seek the suspension of his license, a high school principal sought out the teacher and hired him to teach and coach without further consultation or consideration of the contents of the lengthy personnel file. *See id.* The Board confirmed the rehiring. *See id.* at 503. The principal thereafter heard rumors, received complaints, and observed inappropriate behavior himself, but he relied on a further DHS investigation that found the last complaint “unfounded.” *See id.* Reluctantly, he acquiesced to a request to allow Doe to keep score for the coach’s team. *See id.* It was after this that the harassment and abuse of the 14-year-old girl began which culminated in statutory rape. *See id.* The teacher ultimately pled guilty to criminal charges and the girl required psychological counseling. *See id.* at 501.

[^336]: Gates, 996 F.2d at 1042. The *Gates* principal knew about an incident in which another high-school girl, Cheryl Parker, “was infatuated with [the teacher] and . . . [the teacher] had encouraged her.” *Id.* While inappropriate, that incident did not rise to a violation of Parker’s constitutional rights. *See id.* The principal, however, had personally attended the executive session of the school board in 1985 at which allegations about an inappropriate “romantic” relationship between the teacher and Parker were aired by her tearful father. *See id.* at 1037, 1039. Even though the principal conceded that it was obvious that they were involved because Parker married the teacher as soon as she turned 18, the principal continued to evaluate the teacher highly. *See id.* at 1039. Moreover, he testified that he would not hold the “romantic” involvement with a student in the school against the teacher on his job. *See id.*

[^337]: *Jojola,* 55 F.3d at 491.

[^338]: *Id.*

[^339]: *Id.*

[^340]: *Id.*
incidents and other rumors over nineteen years of employment were insufficient as a matter of law to demonstrate "the requisite pattern of behavior" to satisfy the notice requirement and to impose liability.\(^3\)

As a parent, I find it strange that a school employee can merely be transferred to a new field of operations for inappropriate sexual contact with children or that the comments in *Larson* do not raise a red flag when an employee has complete control of a profoundly handicapped child in his bus. The reluctance to bring these issues out, however, is familiar to me from my own experience.\(^3\) Supervisors may not believe children, may not like to talk about such things, or may fear that they would face a lawsuit from the affected employee.\(^3\)

"Deliberate indifference" is an unnecessarily confusing and limiting standard for supervisory liability in general. Moreover, some courts of appeals have applied their versions of that formula in a particularly unsatisfactory fashion.\(^3\) The confusion is introduced by the use of the same language of "deliberate indifference" for three separate issues: (1) the state of mind demanded by the *underlying constitutional right* that is being enforced; (2) the degree of *fault* required by \(\S\) 1983 to prove the heightened *causation* necessary for some claims of *municipal* liability; and (3) the standard for liability of *individual supervisory* officials under the statute.

The Court of Appeals for the Eighth Circuit's *Jane Doe "A"* opinion provides an example of the first confusion, which conflates the underlying constitutional right at stake with the statutory element that allocates responsibility between defendants. Citing *Daniels* and *Davidson*, the court of appeals mistakenly argued that supervisory liability required "deliberate indifference" because the Fourteenth

\(^3\) Id. The court compared the number of incidents to a case in which the district was the defendant. In *Thelma D. ex rel. Delores A. v. Board of Educ.*, 934 F.2d 929, 933 (8th Cir. 1991), five complaints scattered over 16 years did not comprise a "persistent and widespread pattern of unconstitutional misconduct" sufficient to give notice to policymakers and to create governmental liability.

\(^3\) I served as "Ombudsperson" for the University of Houston Sexual Harassment Grievance Board and as a Member of the University of Houston Sexual Harassment Policy and Procedure Implementation Committee, with responsibilities for drafting, disseminating, and monitoring the effectiveness of sexual harassment policies and procedures on campus. I was also a member of the University of Houston Sexual Assault Task Force.

\(^3\) See, e.g., *Gonzalez v. Ysleta Indep. Sch. Dist.*, 996 F.2d 745, 749 (5th Cir. 1993) (school board thought "'the testimony of a little girl' was not enough to hold a hearing in the face of a teacher's denials"). After the teacher in *Gonzalez* was transferred to another school, he molested another child and ultimately was convicted on criminal charges arising out of the second incident. *See id.* at 749-50. For the fear of litigation, see *Larson v. Miller*, 55 F.3d 1343, 1347 (8th Cir. 1995) (school official's response to parents' complaint was to warn them that they could be sued for slander).

\(^3\) See, e.g., *Jane Doe "A" v. Special Sch. Dist.*, 901 F.2d 642 (8th Cir. 1990).
Amendment cannot be violated by mere negligence.\textsuperscript{345} It is possible that the Supreme Court ultimately will decide that "deliberate indifference" is the minimum state of mind necessary under the Fourteenth Amendment. The Court has already done so for the Eighth Amendment, ruling in Farmer v. Brennan\textsuperscript{346} that the proscription on "cruel and unusual punishment" may be transgressed if prison officials display "deliberate indifference" to risk of harm to inmates.\textsuperscript{347} The crux of the constitutional violation in the teacher sex abuse cases, however, goes beyond deliberate indifference: The claim is that the teacher \textit{arbitrarily and capriciously} deprived the student of her constitutional right to bodily integrity.\textsuperscript{348} Thus, there is no danger in these cases that the Fourteenth Amendment will be violated by mere negligence. Accordingly, Daniels, Davidson, and even Farmer are irrelevant.

While each constitutional provision imposes its own state of mind requirement,\textsuperscript{349} \textsection 1983 itself does not incorporate a separate state of mind element.\textsuperscript{350} As discussed above, however, the Court in City of Canton decided that under its construction of the statute, municipal defendants could not be held liable for their failures to train without a showing of "deliberate indifference." This use of "deliberate indifference" is the second source of confusion introduced into the law of supervisory liability.\textsuperscript{351} In some of the cases, this confusion produces an undue emphasis on repetition or a pattern of unconstitutional behavior. Municipal liability for a failure to train demands two requisites. First, like any claim against a local government defendant, the

\textsuperscript{345} See id. at 646 (citing Daniels v. Williams, 474 U.S. 327 (1986); Davidson v. Cannon, 474 U.S. 344 (1986)).

\textsuperscript{346} 114 S. Ct. 1970 (1994) (failure to protect inmate from assault and homosexual rape).

\textsuperscript{347} See id. at 1974-79. But the Court redefined the Eighth Amendment's "deliberate indifference" in Farmer to make it a clearly subjective rather than an objective test. See id. at 1979. Justice Souter's opinion required more than negligence, but less than deliberate purpose to cause the harm. See id. at 1979-80. Rather, the Court chose subjective recklessness, as used in criminal law, as the appropriate standard. See id. at 1980. This means that constitutional liability in a failure to protect an inmate claim cannot be premised on obviousness or constructive notice; prison officials must recklessly disregard a risk of harm of which they were aware. See id.

\textsuperscript{348} See, e.g., Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 451-52 (5th Cir. 1994).

\textsuperscript{349} See Canton v. Harris, 489 U.S. 378, 388 n.8 (1989); Daniels, 474 U.S. at 329-31.


\textsuperscript{351} The Court of Appeals for the Fifth Circuit was at least aware of the distinctions between individual liability and the deliberate indifference standard for municipal failure to train adopted in City of Canton. See Doe, 15 F.3d at 454. Nonetheless, the court borrowed the "deliberate indifference" standard from a case involving liability against the school board alone. See id. (citing Gonzalez v. Ysleta Indep. Sch. Dist., 996 F.2d 745, 753-60 (5th Cir. 1993) (reversing judgment against school district that left teacher in the classroom after complaints about his sexual misbehavior with elementary school children)).
municipality is only liable if it engaged in a custom or policy of constitutional violation.\textsuperscript{352} "Custom" requires a "continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees" which policymaking officials ignored.\textsuperscript{353} This custom, moreover, must be the moving force behind the constitutional violation.\textsuperscript{354} On top of that, according to City of Canton, to establish § 1983 causation, a failure to train claim against a municipality must also demonstrate a high degree of culpability on the part of city officials, i.e., deliberate indifference.\textsuperscript{355}

Some of the courts of appeals have acknowledged distinctions between proof of municipal custom liability and individual defendant liability,\textsuperscript{356} contrasting a "continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees" to "a pattern of unconstitutional acts" committed by subordinates.\textsuperscript{357} Yet because of the "deliberate indifference" standard, it is not clear that this works out any different in practice. The number and persistence of the complaints greatly influence whether or not individual supervisory liability may be found.\textsuperscript{358} This seems especially true in circuits that express the supervisory deliberate indifference test in four steps, with the first requiring notice of a pattern of unconstitutional behavior and the second and third elements separating proof of deliberate indifference from a failure to take sufficient remedial action.\textsuperscript{359} By contrast, the Fifth Circuit in Doe v. Taylor asked only that the supervisor have notice of "facts or a pattern of inappropriate sexual behavior . . . pointing plainly toward the conclusion that the subordinate was sexually abusing the student."\textsuperscript{360} It also telescoped the two middle steps into one, thereby assuming that the failure "to take action

\textsuperscript{352} See City of Canton, 489 U.S. at 389.

\textsuperscript{353} Thelma D. v. Board of Educ., 934 F.2d 929, 932-33 (8th Cir. 1991) (five complaints of sexual abuse lodged against teacher over a 16-year period did not comprise persistent and widespread pattern of unconstitutional misconduct, such as would warrant holding school board liable for failure to act before occurrence of misconduct).

\textsuperscript{354} See id.

\textsuperscript{355} See City of Canton, 489 U.S. at 389.

\textsuperscript{356} See, e.g., Larson v. Miller, 55 F.3d at 1343, 1349–50 (8th Cir. 1995); Gates v. Unified Sch. Dist. No. 449, 996 F.2d 1035, 1041-42 (10th Cir. 1993); Jane Doe "A" v. Special Sch. Dist., 901 F.2d 643, 645-46 (8th Cir. 1990); cf. Gonzalez v. Ysleta Indep. Sch. Dist., 996 F.2d 745 (5th Cir. 1993) (against school district only); Thelma D., 934 F.2d at 933 (against school board only).

\textsuperscript{357} See, e.g., Jane Doe "A", 901 F.2d at 645-46.

\textsuperscript{358} See, e.g., Jojola v. Chavez, 55 F.3d 488 (10th Cir. 1995). The Jojola court emphasized that four incidents and other rumors about the defendant custodial was not enough of a pattern by contrast to the numerous complaints in Doe v. Taylor. Id. at 491.

\textsuperscript{359} See, e.g., Larson, 55 F.3d at 1349; Gates, 996 F.2d at 1041; Jane Doe "A", 901 F.2d at 645.

\textsuperscript{360} Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 454 (5th Cir. 1994).
that was obviously necessary to prevent or stop the abuse" constituted deliberate indifference per se.\textsuperscript{361}

I am not convinced that the formulas adopted by the Courts of Appeals for the Fifth, Third, Eighth, and Tenth Circuits respectively explain the different results in the circuits so far. But the embrace of "deliberate indifference" may adversely influence courts that require too much from the facts of teacher sexual abuse cases. Many of the decisions seem to demand evidence of a pattern of misconduct or that the supervisor actively suppressed or covered up the complaints. This is unresponsive to the realities of sexual abuse by school personnel. A number of these cases involved ample notice of inappropriate behavior with children.\textsuperscript{362} At the same time, the ultimate injury is almost always performed secretively. For a variety of reasons, asymmetrical incentives operate on supervisors. They have more reason to avoid the issue than they have to uncover misconduct. As a result, they may tolerate a climate in which sexual abuse flourishes. Such supervisory default further compounds the harm of the constitutional violation. It demonstrates to school children, who are subject to their first experience with governmental authority, that potential abuses are not taken seriously. Certain misbehavior becomes so accepted and unremarkable that the children may not even recognize it as abuse.\textsuperscript{363} Perhaps there is only a nuance of difference at issue here, but once on notice of suspicious facts, supervisors should lose for failing to investigate further and remediate, and not just if their actions are totally outrageous.

Supervisory liability is individual liability. It has little to do with the legislative history of the Sherman Amendment, a critical concern

\textsuperscript{361} See id. The final component of both tests was the same: the supervisory failure proximately caused the injury to the student. See, e.g., id.; Jane Doe "A", 901 F.2d at 645.

\textsuperscript{362} In one instance, the problem teacher even had a well-known sobriquet, "Lester the Molester." See Nan D. Stein, Sexual Harassment in Schools: Administrators Must Break the Casual Approach to Objectionable Behavior, 50 SCH. ADMIN. 14, 15 (1993) (reporting deposition testimony in J.O. v. Alton Community Unit School District).

\textsuperscript{363} A Title IX case involving student-to-student harassment demonstrates how children may not even recognize sexual abuse if it is tolerated by authority figures. In Mennone v. Gordon, a girl was subjected to almost daily insults and assaults by another student who made remarks about her breasts, grabbed her hair, legs, breasts, and buttocks and threatened to rape her. 889 F. Supp. 53, 54-55 (D. Conn. 1995). This was all done in the presence of the teacher, who refused to help. See id. at 55. But in May of the academic year, a rape crisis counselor came to address a class and for the first time the girl learned that the behavior was inappropriate and perhaps criminal. See id. Then and only then did she go to school guidance counselors. See id. School administrators referred her to a rape crisis center where she finally learned that she could file criminal charges with the police. See id. In the face of the school's continuing inaction, the girl eventually had to leave school in order to avoid her harasser. See id. As bad as this situation is, how much worse is it when it is the state-sanctioned authority figure inflicting the abuse and a principal or other supervisor turns a blind eye to it?
for the Court’s interpretation of municipal liability.\textsuperscript{364} Unlike municipalities, moreover, supervisors enjoy qualified immunity.\textsuperscript{365} The \textit{City of Canton’s} “deliberate indifference” standard is thus both confusing and unnecessary in supervisory liability law. Instead, the guidelines for individual defendants should be derived in the first instance from Monell’s gloss on \textit{Rizzo}: Liability may not be imputed to individual defendants just because as supervisors they have a nominal right to control the actions of their subordinate.\textsuperscript{366} They must be \textit{personally} responsible through their own supervisory defaults.\textsuperscript{367} Stated this way, the principle has two big advantages. It avoids confusion with the tortured interpretations of municipal liability. It also creates the opportunity at last for appropriate dialogue with the background of tort liability.

\textbf{C. Personal Responsibility In the Background of Tort Liability}

The dialogue is possible because, despite the modern tort trend toward enterprise liability,\textsuperscript{368} personal responsibility doctrines persist. Thus, it is possible to look to the common law directly, and to Title VII and Title IX, two contemporary civil rights statutes that have been held to incorporate common law approaches, to inform our interpretation of § 1983 and to do so without transgressing the older civil rights statute’s requirement of personal fault.

Admittedly, vicarious liability dominates state tort law today. The California Supreme Court recently explained again why it favored the doctrine of respondeat superior: Holding the master strictly liable for the wrongs of the servant creates incentives for deterrence, gives greater assurance of full compensation to the victim through cost-spreading insurance principles, and ensures that the business will bear the costs arising from its own enterprise.\textsuperscript{369} Under this doctrine

\begin{itemize}
\item \textsuperscript{364} See Monell v. Dep’t of Soc. Servs., 436 U.S. 658, 666-67 (1978).
\item \textsuperscript{366} See Monell, 436 U.S. at 694 n.58 (citing Rizzo v. Goode, 423 U.S. 362, 370-71 (1976)).
\item \textsuperscript{367} See id.
\item \textsuperscript{368} On the trend toward enterprise liability, see Verkerke, supra note 178, at 299 n.69 (citing George L. Priest, \textit{The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law}, 14 J. LEGAL STUD. 461 (1985)). Verkerke describes the doctrine, “[i]n its most rudimentary form, [as a demand] that the law impose on each employer all costs that are attributable to its enterprise.” \textit{Id.} at 308.
\item \textsuperscript{369} See Mary M. v. Los Angeles, 814 P.2d 1341, 1343 (Cal. 1991) (permitting vicarious liability to be imposed on city for rape by police officer of woman he stopped). See also Monell, 436 U.S. at 693-94, 694 n.58 (articulating three common-law justifications for vicarious employer liability: (1) the deterrence idea that imputing the cost of accidents to employers will make them
of enterprise liability, however, limits are imposed through the "scope of employment" requirement.\textsuperscript{370} The employer is not liable if the employee's conduct falls outside the scope of employment and has nothing to do with the enterprise.

As a result of the development of vicarious liability, the scope of operation of personal responsibility doctrines is somewhat shrunked. They may even be viewed as auxiliary theories that serve as an alternative vehicle to reach the employer when the low-level employee's tort is held to be outside the scope of employment.\textsuperscript{371} But personal fault can make a big difference to the result, in the common law, and especially in the law of hostile environment sexual harassment that has developed under Title VII and Title IX.

The \textit{Restatement (Second) of Agency} and the \textit{Restatement (Second) of Torts} both reflect theories of negligent hiring, negligent retention, and negligent supervision which impose liability on supervisors who are personally at fault.\textsuperscript{372} Such supervisors are not automatically responsible for the injury inflicted by subordinates. Instead, the supervisor herself must have violated a duty of care.\textsuperscript{373} The key to these cases is foreseeability and causation. Hiring claims require knowledge more vigilant and help prevent injuries; (2) the insurance theory that spreads the cost of accidents to the whole community; and (3) the idea that "liability follows the right to control the actions of a tortfeasor").

\textsuperscript{370} See \textit{Mary M.}, 814 P.2d at 1344.
\textsuperscript{371} See Verkerke, \textit{supra} note 178, at 305.
\textsuperscript{372} See, \textit{e.g.}, \textit{Restatement (Second) of Agency} \S 219(2)(b) (1958) (master not liable for torts of his servants committed outside the scope of their employment unless the master was negligent or reckless); \textit{Restatement (Second) of Agency} \S 213 (principal liable for harm resulting from his conduct if he is negligent or reckless in the supervision of the activity). Punitive damages may be awarded against a master because of an act done by an agent if "the principal or a managerial agent authorized the doing and the manner of the act," if "the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him," if "the agent was employed in a managerial capacity and was acting within the scope of employment," or if "the principal or a managerial agent of the principal ratified or approved the act." \textit{Restatement (Second) of Torts} \S 909 (1979).
\textsuperscript{373} See, \textit{e.g.}, Kansas State Bank \& Trust Co. v. Specialized Transp. Servs., Inc., 819 P.2d 587, 592, 598 (Kan. 1991) (material issue of fact whether school and school bus service should have foreseen risk of sexual molestation as a result of their employment and retention of the "out of control" driver who allegedly molested six-year-old Downs-syndrome girl). The Kansas court ruled that in a negligent retention and supervision claim against the employer, "liability results not because of the employer-employee relationship, but because the employer had reason to believe that an undue risk of harm to others would exist as a result of the employment of the alleged tortfeasor." \textit{Id.} at 598; see also Marquay v. Eno, 662 A.2d 272, 280 (N.H. 1995) (cause of action for hiring or retaining an employee that the employer knew or should have known was unfit for the job so as to create a danger of harm to third persons "is distinct from one based upon the doctrine of respondeat superior and is a theory of direct, not vicarious, liability"); cf. Boykin v. District of Columbia, 484 A.2d 560, 565 (D.C. 1984) (finding no issue of fact raised where only allegation was that school was negligent to let special education program director meet one-on-one with blind, deaf, and mute student; and where there was no evidence that the school knew he posed any greater danger than any other teacher).
of the dangerous propensities of the employee given the type of job. After hiring, a failure to respond to facts that indicate a special danger posed by the employee may lead to negligent retention or supervision causes of action.

Like contemporary common law theories of enterprise liability, the modern civil rights statutes, Title VII (prohibiting discrimination in employment) and Title IX (prohibiting discrimination in federally-aided education), focus primarily on the liability of the employer or the institution. However, personal responsibility becomes an issue even in these cases because of a distinction between the two kinds of sexual harassment prohibited by federal law. In Meritor Savings Bank v. Vinson the Supreme Court held that two forms of sexual harassment violate Title VII's prohibitions against workplace equality: (1) *quid pro quo*, and (2) hostile work environment harassment. In *quid pro quo* harassment an agent of the employer demands sexual favors in return for more favorable treatment in the workplace or threatens retaliation if sex is denied. But the Meritor Court found that "[s]exual harassment which creates a hostile or offensive environment for members of one sex" also can be an "arbitrary barrier to

374. Title VII of the Civil Rights Act of 1964 makes it unlawful for any "employer" to engage in certain prohibited employment practices. 42 U.S.C. § 2000e-2 (1994). "Employer" is defined as a "person engaged in an industry affecting commerce who has fifteen or more employees . . . , and any agent of such a person." *Id.* at § 2000e(b). Since the Civil Rights Act of 1991 became effective, in cases where "intentional discrimination" is shown (i.e., not disparate impact), in addition to equitable relief such as reinstatement, the plaintiff now can recover compensatory and even punitive damages (which are capped according to a schedule related to the size of the employer) against the "respondent" in a Title VII lawsuit. *See* 42 U.S.C. § 1981a (1994). It is not even clear whether any action may be had against individual defendants at all. The court continued to be split as to whether managers and supervisors may be found individually liable as "agents" of the employer. *See* Rebecca Hanner White, *Vicarious and Personal Liability for Employment Discrimination*, 30 GA. L. REV. 509 (1996); Davida H. Isaacs, "It's Nothing Personal"—But Should It Be?: Finding Agent Liability for Violation of the Federal Employment Discrimination Statutes, 22 N.Y.U. REV. L. & SOC. CHANGE 505 (1996); Comment, Workplace Sexual Harassment and Individual Liability, 69 TEMPLE L. REV. 303 (1996).

Title IX is a funding statute which the Supreme Court held gives rise to a private right of action for money damages for sex discrimination in federally-aided education. *See* Franklin v. Gwinnett County Pub. Schs., 112 S. Ct. 1028, 1037 (1992); *see also* 20 U.S.C. § 1681. The damages actions brought since Franklin typically seek recovery against the school district. A number of courts have ruled that there is no individual defendant claim available under Title IX. *See*, e.g., Leija v. Canutillo Indep. Sch. Dist., 887 F. Supp. 947, 953 (W.D. Tex. 1995), *rev'd on other grounds*, Canutillo Indep. Sch. Dist. v. Leija, 101 F.3d 393 (5th Cir. 1996). *But see* Oona R.-S v. Santa Rosa City Schs., 890 F. Supp. 1452, 1462 (N.D. Cal. 1995) (Title IX may be enforced against individual defendants through § 1983); Mennone v. Gordon, 889 F. Supp. 53, 56 (D. Conn. 1995) (Title IX applicable to individual defendants "who exercise some level of control over the program or activity that the discrimination occurs under.").

376. *See* id. at 65.
377. *See* id.
sexual equality at the workplace." It recognized that a man or a woman should not be required to "run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living . . ." To be actionable, "[hostile environment] sexual harassment . . . must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' The allegations in Meritor "which include[d] not only pervasive harassment but also criminal conduct of the most serious nature" were sufficient to state a claim for hostile environment sexual harassment.

Meritor's recognition of hostile environment sexual harassment introduced a distinction which has made a difference in the lower courts' interpretation of Title VII. The Supreme Court refused to give a definitive answer about whether employers would be strictly and vicariously liable for sexual harassment by supervisors, or whether some other rule would obtain. In Meritor, a vice-president of the bank was the harasser and the employer allegedly had no notice of his misconduct. This lack of notice led the district court to conclude that the bank was absolved from liability for the actions of its vice-president. The court of appeals, on the other hand, "took the opposite view." It held that "an employer is strictly liable for a hostile environment created by a supervisor's sexual advances, even though the employer neither knew nor reasonably could have known of the alleged misconduct.

The Meritor Supreme Court rejected the views of the district court and the court of appeals alike and instead invoked common law agency principles:

We therefore decline the parties' invitation to issue a definitive rule on employer liability, but we do agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area. While such common-law principles may not be transferable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts

378. Id. at 67 (quoting Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).
379. Id.
380. Id. (quoting Henson, 682 F.2d at 904).
381. Id. The plaintiff alleged that her supervisor subjected her to unwanted sexual intercourse over a long period of time, some of it assaultive. See id. at 60.
382. See id. at 72.
383. See id. at 59, 62.
384. See id. at 69.
385. Id.
386. Id. at 69-70 (emphasis added).
of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. See generally Restatement (Second) of Agency §§ 219-237 (1958). For the same reason, absence of notice to an employer does not necessarily insulate that employer from liability. 387

This instruction in Meritor means that the lower courts were told to look to the common law of agency for resolution of the unanswered employer liability question. Furthermore, the Court clearly indicated that it would not approve strict or vicarious liability as the governing principle. 388 As reflected in the passages of the Restatement referenced by the Court, some kind of personal responsibility would be required under some circumstances. 389

Adhering to the Supreme Court's instruction that they look to the common law as a guide, lower courts have reached a veritable babel of conclusions. 390 But those decisions make distinctions which emphasize the need to find personal fault for some claims. Post-Meritor rulings hold that although the employer is absolutely liable for quid pro quo sexual harassment by a supervisor, 391 pure hostile envi-

387. Id. at 72.
388. Id. The Court indicated that a course must be steered between the Scylla of excusing the bank for its supervisor's misconduct so long as it had some kind of grievance policy in place, and the Charybdis of "entirely disregard[ing] agency principles and impos[ing] absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case." Id. at 73.
389. The Restatement contemplates two basic circumstances: either the servant committing the tort is acting within the scope of employment, or the employee is acting outside the scope of employment. While the master is responsible for all torts in the first instance, there are significant limits to the employer's responsibility under the latter situation:

(1) A master is subject to liability for the torts of his servants committed while acting in the scope of their employment.
(2) A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
   (a) the master intended the conduct or the consequences, or
   (b) the master was negligent or reckless, or
   (c) the conduct violated a nondelegable duty of the master, or
   (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relationship.

Restatement (Second) of Agency § 219 (1958). Sections 228-237 define when a servant's torts are within the scope of employment. See id. at §§ 228-37.
391. See, e.g., Ellerth v. Burlington Indus., 102 F.3d 848, 859-60 (7th Cir. 1996) (recognizing liability without notice to employer for quid pro quo sexual harassment where high level supervisor's conduct at the workplace, during working hours, directed toward an employee over whom he had substantial authority, was within the scope of employment, although declining to characterize this as "strict liability").
enronment harassment claims are different. The circuits split over whether the employer may ever be held liable for the supervisor's hostile environment harassment unless the corporate defendant knew or should have known of the supervisor's actions and failed to take action which was reasonably calculated to end the harassment. The developing consensus, however, seems to be "notice liability," a type of negligence standard which requires that the employer knew or should have known of the harassment in order to be held responsible for hostile environment harassment perpetrated by either a supervisor or by a lower-level employee.

392. See Andrade v. Mayfair Mgmt., Inc., 88 F.3d 258, 261 (4th Cir. 1996) (employer liable only if the employer knew or should have known of harassment by supervisor or any other employee and failed to take remedial action) (citing Spicer v. Virginia Dep't of Corrections, 66 F.3d 705, 710 (4th Cir. 1995) (en banc); Tomka v. Seller Corp., 66 F.3d 1295, 1305 (2d Cir. 1995) (employer will be liable if a supervisor "uses his actual or apparent authority to further the harassment, or if [the supervisor] was otherwise aided in accomplishing the harassment by the existence of the agency relationship"); but where "a low-level supervisor does not rely on his supervisory authority to carry out the harassment, or a co-employee of the plaintiff is the alleged harasser, an employer will generally not be liable 'unless the employer either provided no reasonable avenue of complaint or knew of the harassment but did nothing about it'" (citations omitted)); Karibian v. Columbia Univ., 14 F.3d 773, 780 (2d Cir. 1994) (contrasting employment decisions based on an employee's response to a supervisor's sexual overtures to a discriminatorily abusive work environment created by a supervisor); Garcia v. Elf Atochem N. Am., 28 F.3d 446, 451 (5th Cir. 1994) (employer liable for sexual harassment by coworker "only if he knew or should have known of the harassment and failed to take prompt remedial action which was 'reasonably calculated' to end the harassment") (citation omitted); Pierce v. Commonwealth Life Ins. Co., 40 F.3d 796, 803 (6th Cir. 1994) ("In a hostile . . . environment claim, the determination of whether an employer is liable for its supervisor's actions depends on (1) whether the supervisor's harassing actions were foreseeable or fell within the scope of his employment and (2) even if they were, whether the employer responded adequately and effectively to negate liability.") (citing Kauffman v. Allied Signal, Inc., 970 F.2d 178, 183 (6th Cir. 1992) (holding but for quid pro quo harassment the employer is strictly liable under a respondeat superior theory)); Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 (11th Cir. 1989) (strict liability for quid pro quo cases, but in a pure hostile environment setting, liability imposed only "where the corporate defendant knew or should have known of the harassment and failed to take prompt remedial action against the supervisor").

393. See, e.g., Steele, 867 F.2d at 1316 (11th Cir. 1989) (strict liability for quid pro quo, but in a pure hostile environment setting, liability imposed only "where the corporate defendant knew or should have known of the harassment and failed to take prompt remedial action against the supervisor").

394. See Garcia, 28 F.3d at 451 (employer liable for sexual harassment by coworker only if he knew or should have known of the harassment and failed to take prompt remedial action which was reasonably calculated to end the harassment); Pierce, 40 F.3d at 803 (in a hostile environment claim, the determination of whether an employer is liable for its supervisor's conduct depends on: (1) whether the supervisor's harassing actions were foreseeable or fell within the scope of his employment; and (2) if they were, whether the employer responded adequately and effectively to negate liability. For quid pro quo harassment, the employer is strictly liable under a respondeat superior theory); Steele, 867 F.2d at 1316 (strict liability for quid pro quo; but where supervisor is guilty of a pure hostile environment charge, there is liability only where the corporate defendant knew or should have known of the harassment and failed to take prompt remedial action against the supervisor).

Professor Verkerke uses the term "notice liability" to describe these developments in Title VII. See Verkerke, supra note 178, at 277. For criticisms of the way this notice liability standard
When sex abuse goes to school, the decisions get even more confusing. But most courts apply Title VII agency principles and read this same notice requirement into Title IX claims of hostile environment sexual harassment in schools. Title IX was first held to create

is developing, see id.; Justin S. Weddle, Title VII Sexual Harassment: Recognizing an Employer’s Non-Delegable Duty to Prevent a Hostile Workplace, 95 COLUMBIA L. REV. 724 (1995).

Some courts distinguish notice liability from those rare instances in which a supervisor uses his actual or apparent authority to accomplish the harassment, thus imposing vicarious liability on the employer. See supra note 392.

395. The Court of Appeals for the Eighth Circuit observed that the “divergence of views” about the appropriate standard to support liability against the school district or officials for sexual harassment “stems in part from the factual disparity in the cases.” Kinman v. Omaha Pub. Sch. Dist., 94 F.3d 463, 468 (8th Cir. 1996). The variations include the type of discrimination alleged (“hostile environment, quid pro quo, sexual abuse, discriminatory hiring/firing or some combination”), and “the identity of the perpetrators and victims (teacher/student harassment, student/student harassment, or school official/teacher harassment).” Id. But even courts facing similar fact patterns do not reach the same conclusions. See id. This is not the place to attempt to resolve the intricacies of Title IX.

396. See Doe v. Claiborne, 103 F.3d 495, 514 (6th Cir. 1996) (applying Title VII agency principles to resolve teacher/student hostile environment sexual harassment claim under Title IX); Kinman, 94 F.3d at 469 (applying Title VII “knew or should have known” standard of institutional liability for hostile environment sexual harassment to cases involving teacher's hostile environment harassment of a student under Title IX); Kadiki v. Virginia Commonwealth Univ., 892 F. Supp. 746, 755 n.8 (E.D. Va. 1995) (although notice is required, where supervisor engages in quid pro quo harassment, the notice element is automatically satisfied); Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1291, 1296 (N.D. Cal. 1993) (looking to Title VII to analyze claims that continuing presence of a teacher who had sexually molested two students created hostile environment in the school district for those girls; district's liability conditioned on their knowing failure to act); Hastings v. Hancock, 842 F. Supp. 1315, 1319 (D. Kan. 1993) (as in Title VII, negligence or recklessness generally will provide basis of liability for hostile environment harassment of beauty school student by teacher). Without actually determining the issue conclusively, the Court of Appeals for the Seventh Circuit held that “at the very least” a student who claims to have been sexually harassed must show that the school “knew or should have known about the harassment and yet failed to take appropriate remedial action” in order to meet the standard that the “[district] itself intentionally discriminated on the basis of the plaintiff's sex.” Deborah O. v. Lake Cen. Sch. Corp., No. 94-3804, 1995 LEXIS 19194, at *10 (7th Cir. July 21, 1995).

Some courts, however, require more. After evading the issue of the applicable standard in Canutillo Independent School District v. Leijsa, the Court of Appeals for the Fifth Circuit has ruled in Rosa H. v. San Elizario Independent School District, that Title VI rather than Title VII is the appropriate analogue for Title IX. Compare Canutillo Indep. Sch. Dist. v. Leijsa, 101 F.3d 393, 402-03 (5th Cir. 1996) (claim fails even under assumption that standards akin to Title VII or Restatement § 219 apply), with Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 657 (5th Cir. 1997) (rejecting the Title VII constructive-notice standard which is essentially grounded in negligence in favor of a required showing of “actual intentional discrimination on the part of the school district”). Rosa H. reversed a contrary ruling by the lower court. See Rosa H. v. San Elizario Indep. Sch. Dist., 887 F. Supp. 140, 143 (W.D. Tex. 1995), rev'd, 106 F.3d 648 (5th Cir. 1997) (school district liable for teacher's sexual abuse on a negligence standard; the school district must have either actual or constructive notice of the sexual harassment or abuse and negligently fail to take prompt, effective remedial measures); see also Nelson v. Almont Community Schs., 931 F. Supp. 1345, 1355 (E.D. Mich. 1996) (applying Title VII intentional discrimination standard); Howard v. Board of Educ., 876 F. Supp. 959, 973-74 (N.D. Ill. 1995) (common-law agency principles under Title VII do not apply to Title IX and school board only liable if it had direct knowledge or involvement); Floyd v. Waiters, 831 F. Supp. 867, 876 (M.D. Ga. 1993) (for school board to be liable, it had to have taken part in and failed to stop the molestation by security guards).
a private right of action in 1992. In *Franklin v. Gwinnett County Public Schools*,\(^{397}\) the Supreme Court ruled that a high school student who was subjected to sexual harassment and "coercive intercourse" by a teacher (yet another coach) could sue for money damages for her Title IX claim.\(^{398}\) The school teacher's abuse of the student constituted discrimination on the basis of sex just as surely as harassment of a subordinate by a supervisor violated Title VII in an employment context.\(^{399}\)

Impressed by the secretive nature of sexual abuse in schools, some courts may be willing to impute vicarious liability to the school district for the teacher's intentional misconduct.\(^{400}\) On the other ex-

For different approaches, see *Bolon v. Rolla Public Schools*, 917 F. Supp. 1423, 1427 (E.D. Mo. 1996), which held that intentional discrimination by teachers is imputed to the school district under the principles of respondeat superior, regardless of whether hostile environment, demand for sexual favors, or removal of females from classroom; and *Oona R.-S. v. Santa Rosa City Schools*, 890 F. Supp. 1452, 1459-61 (N.D. Cal. 1995), which enforced Title IX against individual defendants through § 1983.


398. *See id.* at 63, 65-66, 76. She also alleged that although the school district became aware of and investigated the teacher's harassment, "teachers and administrators took no action to halt it and discouraged Franklin from pressing charges against Hill [the harasser.]" *Id.* at 63 (alteration in the original). The teacher resigned on the condition that all matters pending against him be dropped and the school thereafter closed its investigation. *See id.* at 64. Franklin brought a complaint to the Office of Civil Rights of the United States Department of Education ("OCR") before filing a federal lawsuit. *See id.* at 65 n.3. But no relief was available from that office due to the fact that the teacher had resigned and the district had implemented a grievance procedure. *See id.* at 65. After the termination of the OCR investigation, Franklin filed her federal lawsuit seeking money damages. *See id.* at 65 n.3.

The Supreme Court analyzed the available remedies which it considered distinct from the issue already determined by prior cases that Title IX creates an implied right of action. *See id.* at 65-66. The Court implicitly recognized that Franklin's allegations amounted to a violation of federally guaranteed rights under Title IX. *See id.* at 66-67.

The Court further refused to apply *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 28-29 (1981), which limited damages for unintentional violations of Spending Clause provisions. *See Franklin*, 503 U.S. at 74. The *Franklin* Court distinguished the concern of *Pennhurst*, where the recipient of federal funds had no notice of unintentional violations, from the intentional violations alleged in *Franklin*:

This notice problem does not arise in a case such as this, in which intentional discrimination is alleged. Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." We believe the same rule should apply when a teacher sexually harasses and abuses a student. Congress surely did not intend for federal monies to be expended to support the intentional actions it sought by statute to proscribe.

*Id.* at 74-75 (citation omitted).

399. *See Franklin*, 563 U.S. at 74-75.

400. *See Bolon*, 917 F. Supp. at 1427-29. But the Court of Appeals for the Fifth Circuit reversed a similar ruling by a Texas court and ultimately held in another case that proof of intentional discrimination is required to hold the school liable. *Compare Leija v. Canutillo Independent Sch. Dist.*, 887 F. Supp. 947, 953 (W.D. Tex. 1995), with *Canutillo*, 101 F.3d at 402-03. *See also Rosa H.*, 106 F.3d at 656 (Title IX must be interpreted like Title VI, requiring proof of intentional discrimination by the institution receiving federal funds).
treme, some courts may demand proof of actual intentional discrimination on the part of the school. But many courts follow the signals in Franklin and borrow Title VII standards for Title IX lawsuits, creating a "knew or should have known" standard for hostile environment sexual harassment in schools.

On March 13, 1997, the Office of Civil Rights released a final Sexual Harassment Guidance which covers harassment by teachers as well as peers. The OCR found it appropriate to apply many of the principles developed in the case law of Title VII to the Title IX context, including agency rules to determine a school's liability for harassment by its employees. As in employment litigation, the result is a mixture of imputed and personal fault liability. Under this approach, "a school will always be liable for even one instance of quid pro quo harassment by a school employee in a position of authority, such as a teacher or administrator, whether or not it knew, should have known or approved of the harassment at issue." Taking the lead from the common law and Restatement of Agency § 219(2), however, a school will not be liable for hostile environment sexual harassment unless one of the prerequisites pertains: the employee acted with apparent authority, or was aided in carrying out the sexual harassment by his position of authority, or the school had notice (knew or should have known) about the harassment. The complexities of the factual situations mean that it is not always easy to determine whether sexual harassment is of the quid pro quo or hostile environment sexual harassment type, or whether the school employee was otherwise acting with apparent authority or was assisted by his position of authority in inflicting the harassment. But insofar as personal fault may be re-

401. See Rosa H., 106 F.3d at 657.
402. See supra note 396.
404. See id. at 12,039.
405. Id.
406. See id.
407. The Guidance notes that "the line between quid pro quo and hostile environment harassment will be blurred" in many cases, and the conduct may constitute both. Id. For example, a teacher who uses the authority that he or she has to assign grades in order to force a student to submit to sexual demands, engages in quid pro quo harassment, making the school liable for this conduct. See id. But a teacher who explicitly or implicitly threatens to fail a student unless the student responds to his or her sexual advances also creates a hostile environment, even if the teacher does not follow through on the threats. See id. Other school employees, such as janitors or cafeteria workers, may or may not be in a position of authority such that it is reasonable for a student to believe they can impose educational sanctions if sexual favors are refused. See id. The Guidance notes that the age of the student will affect the reasonableness of her or his belief. See id.
quired under some circumstances, *notice* (knew or should have known) satisfies the standard.408

The background of tort liability, as it may be discerned directly from the common law or indirectly from Title VII and Title IX cases, is somewhat muddled. But even in lawsuits against employers or institutions, courts often require proof of *personal responsibility* for failing to prevent or halt sexual harassment or abuse in workplaces and schools. The notice liability standard, therefore, has a legitimate place in the dialogue with § 1983.

**D. Notice Liability and Section 1983**

As a preliminary and somewhat cautious proposal, this Article suggests that “notice liability” should be the standard under § 1983 for finding a supervisor *individually* liable for sexual abuse by a teacher or other school official with power and authority over a student. This notice liability would require proof of personal responsibility by the supervisor. It incorporates foreseeability and causation. If the supervisor has sufficient “notice” of the likelihood of constitutional harm, he must respond. Personal liability will only be imposed on a supervisor who knew or should have known there was a problem, but did nothing to remediate. The failure to take remedial steps, in turn, must have proximately caused the injury.

It may help to think about this standard by explaining what it does *not* include: A supervisor would not be liable under § 1983 simply because he or she is the head of a department, a principal, or a school board member and consequently has a statutory or common-law duty or right of control over subordinates. In other words, no supervisor would become liable merely because the sexual abuse took place on his watch. This may be contrasted to potentially much more liberal interpretation of the modern civil rights statutes, Title IX or Title VII. The Office of Civil Rights notes in its latest guidance on sexual harassment in schools that the line between quid pro quo and hostile environment sexual harassment is often a difficult one to draw.409 A teacher who gives out unearned “A”s and passes out of class in exchange for sex and who commits statutory rape as the price for that indulgence no doubt creates a “hostile environment” within the meaning of Title IX. But this conduct may also constitute quid pro quo sexual harassment, which courts construing Title VII have as-

408. *See id.*
The teacher is in effect the supervisor of the student with the power to "explicitly or implicitly condition a student's participation in an education program or school activity or base an educational decision on the student's submission to unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature." Furthermore, the agency principles of Restatement (Second) § 219(2) imply that even if the sex abuse is treated as hostile environment harassment, the educational institution is likely to be liable whenever a teacher is the perpetrator. As the Court of Appeals for the Fifth Circuit rationalized in its explanation for why it rejected the Title VII analogue and its incorporated agency principles, teachers are almost always "aided in accomplishing the tort by the existence of an agency relationship":

The teacher's status as a teacher often enables the teacher to abuse the student. Whether this power came from the aura of an instructor's authority, the trust that we encourage children to place in their teachers, or merely the opportunity that teachers have to spend time with children, [the teacher's] chances of initiating a sexual relationship with an adolescent . . . were enhanced when the school district hired him.

So even if the sexual abuse was outside the scope of employment and therefore not covered by the first agency principle of § 219, it would

410. See, e.g., Ellerth v. Burlington Indus., 102 F.3d 848, 860 (7th Cir. 1996) (collecting cases). In recognizing the two types of sexual harassment in Meritor v. Vinson, 477 U.S. 57 (1986), the Supreme Court left open the exact standards of supervisory liability, but indicated that the principles reflected in Restatement (Second) of Agency §§ 219-37 would apply. See Meritor, 477 U.S. at 72. The Restatement distinguishes between the agent's conduct within the scope of employment and outside the scope of employment, making the employer automatically liable only for the former. See Restatement (Second) of Agency § 219(1) (1958). The Court of Appeals for the Seventh Circuit concluded in Ellerth that quid pro quo harassment is always within the scope of employment because "the tangible employment benefit that is the 'quid' lies within the supervisor's power to give or withhold only because the employer, as principal, entrusted the supervisor with that particular power." Ellerth, 102 F.3d at 860. Thus, the supervisor's quid pro quo harassment is imputed to the employer without any further requirement.

411. Guidance, supra note 403, at 12038, 12046 n.5 (citing Alexander v. Yale Univ., 459 F. Supp. 1, 4 (D. Conn. 1977), aff'd, 631 F.2d 178 (2d Cir. 1980) (claiming that academic advancement was conditioned upon submission to sexual demands constitutes a claim of sex discrimination in education); see also Kadiki v. Virginia Commonwealth Univ., 892 F. Supp. 746, 752 (E.D. Va. 1995) (reexamination in a course conditioned on college student's agreeing to be spanked should she not attain a certain grade may constitute quid pro quo harassment)).

412. Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 655 (5th Cir. 1997); see also Doe v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223, 1226 (5th Cir. 1997) ("We rejected this agency theory [finding liability if the employee was "aided in accomplishing the tort by the existence of the agency realtionship"] in Rosa H. v. San Elizario Independent School District. Under Rosa H., school districts are not liable in tort for teacher-student harassment under Title IX unless an employee who has been invested by the school board with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so.").
trigger employer liability under the second principle of the Restatement. To avoid this result, the Court of Appeals for the Fifth Circuit refused to follow the agency model. By contrast, the notice liability standard advanced here contains no such principle of imputed liability. Regardless of whether the teacher offered grades in exchange for sex or was assisted in extracting the sex by his role and authority as a teacher, the supervisor could not be individually liable unless he was personally at fault.

The proposed notice liability standard also does not include an action based solely on the school supervisor’s “failure to protect” the child from sexual abuse by a peer or other “private” party not within the control of the school. That would be in the nature of a special relationship claim seeking to impose liability on the supervisor directly for his own allegedly unconstitutional acts, raising all the problems of DeShaney that were so carefully eschewed by the Court of Appeals for the Fifth Circuit in Doe v. Taylor. This is both easier from a supervisory liability viewpoint, and much harder with respect to the underlying issue of constitutional liability. Instead of involving a clearly established intentional deprivation of liberty by a teacher acting under color of state law, this type of claim first has to resolve whether the school child is sufficiently in the “custody” of the school to create a new constitutional duty on the part of supervisory personnel to protect her. If the duty exists, on the other hand, it belongs to the supervisor who may be held personally responsible for its violation.

Nor would a generalized “failure to train” satisfy the proposed standard for personal supervisory liability. In Deborah O. v. Lake Central School Corp., the school and supervisory defendants were charged with negligence in failing to supervise and train school personnel to detect sexual abuse. But the “failure to train” allegation

413. See Rosa H., 106 F.3d at 655.

414. Commentators who wish to see the scope of “notice liability” standards either extended under Title VII or restricted, respectively, implicitly acknowledge that it is a tougher standard requiring personal responsibility. Compare Verkerke, supra note 178, at 380 (“Advocates of uncompromisingly vigorous enforcement of civil rights statutes would undoubtedly attack any decision to impose new notice requirements as a condition for employer liability.”), with Weddle, supra note 394, at 737-38 (The “knew-or-should-have-known standard, which is characterized by some as direct liability on the part of the employer, fails to ensure that workplaces are nondiscriminatory toward certain groups. . . . The employer is virtually able to ignore the possibility of workplace harassment until it is reported. This fact creates an incentive that runs counter to the preventive purposes of Title VII.”).

415. See supra notes 11-13 and accompanying text.

must be measured against the standard of City of Canton v. Harris, which requires a high degree of culpability for this remote first cause by an impersonal entity. Either the need for the training must be so obvious that the failure amounts to deliberate indifference, or the pattern and frequency of constitutional violations must be so pervasive that the failure to train amounts to acquiescence in that pattern. Even against individual defendants, who are not subject to Canton's concerns, when the claim is based on "failure to train" alone, there may be reasons to require more than simple notice liability. Perhaps it is more correct to say, however, that the issue will be subsumed in the more difficult task of proving proximate cause under those circumstances. Similarly, situations with a generalized danger of sexual abuse, without notice of either a likely perpetrator or a likely victim, should be analyzed as problems of proximate cause.

But notice liability should not require proof of the kind of persistent pattern of constitutional violations which is necessary to establish governmental liability. Nor should it permit supervisory officials to escape liability if they do anything at all, no matter how little, how late, regardless of the age of the children involved, or the inappropriateness of the behavior that was observed by or reported to the school officials.

The Court of Appeals for the Fifth Circuit's three-part test may be closer in practice to notice liability than those circuits which make "deliberate indifference" or "tacit authorization" into a separate step. In the Fifth Circuit, when the supervisor learns of "facts or a

418. See id. at 388-89.
419. See, e.g., Doe v. Claiborne, 103 F.3d 495, 513 (6th Cir. 1996) ("It may be freely conceded that the actions of these individuals left a lot to be desired. They may have been sloppy, reckless, or neglectful in the performance of their duties. But that is not enough for section 1983 liability under the precedent laid down in Bellamy... and Barber."). School officials in Claiborne had notice that the teacher was accused of sexually abusing nine different girls. Id. at 502. The DHS instructed them to remove him from classroom contact while they investigated, which the school did for that school year. See id. After DHS found four of the charges "founded," but reached a "pretrial agreement" with the teacher in which they undertook neither to press nor to hinder criminal charges against him or the revocation of his license, the school officials abdicated their responsibilities. See id. Washing their hands of any independent judgment, the school officials decided to view this as a total vindication of the teacher and they sought him out in order to rehire him. See id. at 503. Although the principal was nervous in light of the old charges, new rumors, and inappropriate behavior he himself observed, after one of the new reports was found to be "unfounded" by the DHS, he let the victim ride on the team bus at which point the harassment began, leading to abuse and statutory rape. See id.
420. But see Gonzalez v. Ysleta Indep. Sch. Dist., 996 F.2d 745, 762 (5th Cir. 1993) (reversing jury verdict and judgment on grounds of insufficient evidence of "deliberate indifference" on the part of the school board that transferred teacher to another school after the first incident but left
pattern of inappropriate sexual behavior” pointing plainly to the likelihood that a teacher is sexually abusing a school child, the failure to take action that is “obviously necessary to prevent or stop” the abuse is deliberate indifference by definition. But the Courts of Appeals for the Eighth and Tenth Circuits require more. The supervisor apparently must have knowledge of a pattern of unconstitutional sexual abuse itself, and not just of sufficient facts that would raise red flags and alert them to the likelihood of a problem. The failure to remediate, in turn, may not itself constitute deliberate indifference. Repressing and concealing complaints counts, but the mere failure to investigate or act in the face of warning signals does not.

I am aware that the tenor of these remarks runs somewhat counter to what the lower courts do with supervisory liability generally. I also am under no illusions about any attempt these days to make it easier to recover against § 1983 defendants. But I suggest a more tort-like approach to supervisory liability in part to provoke discussion. Notice liability does not run the risks of confusion inherent in

him in the classroom where he molested an elementary-school girl). Gonzalez, of course, is quite different than individual supervisory liability cases because it involved municipal liability under Monell. Judge Jolly, however, cited it with approval in Doe v. Taylor. The board in Gonzalez investigated and took some action after the first incident. See Gonzalez, 996 F.2d at 748-49.

421. Doe, 15 F.3d at 454.

422. See supra notes 310-41 and accompanying text. Compare Claiborne, 103 F.3d at 513 (“A plaintiff must show that, in light of the information the defendants possessed, the teacher who engaged in sexual abuse ‘showed a strong likelihood that he would attempt to’ sexually abuse other students, such that the ‘failure to take adequate precautions amounted to deliberate indifference’ to the constitutional rights of students. . . . [A]nother way of analyzing this claim [is] whether defendants’ conduct amounted to a tacit authorization of the abuse.”).

423. See, e.g., Gates v. Unified Sch. Dist. No. 449, 996 F.3d F.2d 1035, 1042 (10th Cir. 1993) (distinguishing from Stoneking II which involved five complaints received, repressed and concealed). Stoneking II, 882 F.2d at 730 (citing Chinchello v. Fenton, 805 F.2d 126, 133-34 (3d. Cir. 1996)), held that the mere failure of supervisory officials to act or investigate cannot be the basis of liability. On the other hand, officials cannot maintain a custom, practice, or usage that condons or authorizes assaultive behavior. The Court of Appeals for the Third Circuit distinguished the principal, who engaged in affirmative acts of keeping complaints against teachers at home in a secret file and accusing one child victim of framing the teacher and forcing her to publicly apologize for the charges, from the superintendent, who knew something about the complaints but at most displayed inaction and insensitivity. See also Black v. Indiana Area Sch. Dist., 985 F.2d 707, 712-13 (3d Cir. 1993) (even if could have done a more thorough investigation, distinguished from Stoneking II with its concealing complaints, discouraging, failing to investigate, requiring complainants to apologize to accused teachers). The mere failure to investigate rumors has not subjected a supervisor to liability. See Jojola v. Chavez, 55 F.3d 488, 491 (10th Cir. 1995).

424. Some lower courts even require proof of active approval of the constitutional violation. See, e.g., Kernats v. O’Sullivan, 35 F.3d 1171, 1182 (7th Cir. 1994) (supervisor with knowledge of subordinate’s conduct has to approve of it and of the basis of it).

For a widely-cited discussion of supervisory liability in general, see Maldonado-Denis v. Castillo Rodriguez, 23 F.3d 576, 581-83 (1st Cir. 1994).
the use of "deliberate indifference," a phrase with many roles in constitutional and § 1983 jurisprudence. Notice liability also permits a less constrained consideration of what is basically a tort question: Who should pay for an admitted constitutional deprivation? Section 1983 jurisprudence typically does not address risk management, insurance, or the economic effect of alternate liability rules. It might be interesting to think about some of this in what may be considered a noncore area of § 1983. Supervisory liability is peripheral in a sense quite unlike the first two issues of this paper. It neither implicates the definition of the underlying constitutional values nor does it undermine "under color of state law," the key concept in Monroe's rediscovery and reconstruction of the Ku Klux Klan Act of 1871. Instead, it concerns allocation of liability between two levels of individual defendants, once the initial constitutional violation under color of state law has already been established.

The nature and consequences of sexual abuse by teachers in school also prompts me to favor a more inclusive rule of individual liability. Instead of imposing liability only under limited circumstances where administrators actively suppress complaints and intimidate witnesses, I would like to see school officials held to a more realistic duty of care and investigation of obviously inappropriate behavior. Sexual abuse in schools is often repetitive. Inappropriate behavior may be open and rumors may circulate, but the ultimate con-

425. See supra notes 262-78 and accompanying text (on the significance of the heightened culpability of "deliberate indifference" in the test for municipal liability for a failure to train); notes 345-48 and accompanying text (the court of appeal's confusion of the underlying constitutional state of mind requirement and the test for supervisory liability); see also Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648, 658 (5th Cir. 1997) (court of appeals seems to confuse the statutory and constitutional dimensions: in interpreting what it holds to be an "intentional discrimination" requirement of Title IX, the court looks to Eighth Amendment doctrine which requires that prison conditions constitute "cruel and unusual punishment" only if prison officials acted with subjective recklessness).

426. The Court has never considered the effect of rules making it relatively easier to target the lowest-level government agent involved and more difficult to recover against a supervisor. But see Schuck, supra note 27, at 324-27.

427. But see cases holding that although a supervisor, if found liable, might be acting under color of state law, the perpetrator was not. See, e.g., Jojola, 55 F.3d at 490-94.

428. See, e.g., Doe v. Board of Educ., 833 F. Supp. 1366, 1370 (N.D. Ill. 1993) (13 girls affected during the time the supervisor failed to respond to complaints); see also J.O. v. Alton, 909 F.2d 267 (7th Cir. 1990) (case was settled after a number of depositions testified to the commonly-known reputation of the abuser as "Lester the Molester"); Stein, supra note 362, at 15. In Doe v. Taylor, Coach Stroud had pursued another first-year high school girl before he targeted plaintiff Doe successfully. See Doe, 15 F.3d at 446. The bus driver in Black allegedly molested a number of six- to eight-year-old girls over a four year period. See Black v. Indiana Area Sch. Dist., 985 F.2d at 708-09. Twelve children brought the § 1983 lawsuit in Jane Doe "A," after the bus driver pled guilty to sexual abuse inflicted on five handicapped kids. See 901 F.2d at 642-43.
stitutional injury is inflicted in secret.\textsuperscript{429} Just like the courts, supervisors may be squeamish about sexual abuse complaints or not take a child’s word.\textsuperscript{430} School officials are well aware, on the other hand, that permanent employees possess due process rights. They may be reluctant to investigate or confront allegations that they believe may involve them in litigation.\textsuperscript{431} Without an adequate doctrine of supervisory liability, the incentives are all on one side. There is every reason to ignore the warning signs, and none to beard even “Lester the Molester.” No one wants to put supervisors on the “razor’s edge.”\textsuperscript{432} But there is ample space between active suppression of complaints and panicky firing of employees. There is room to revise the statutory standard of supervisory care away from “deliberate indifference” and toward “notice liability.”

**Conclusion**

Line-drawing and dialogue—this Article promotes both exercises in § 1983 jurisprudence. But both also must be done with care. The rights which are enforceable under § 1983 have their origin in federal and not state law. Thus, it is necessary to derive the claims of students sexually abused by their teachers from the Constitution of the United States, and not from ordinary crimes and torts. But that necessary line-drawing should not be confused with another proposition that is quite misleading. As Monroe taught, just because the same facts also constitute violations of state law, an action for deprivation of federal rights is not precluded. Overlapping claims are common and the fed-

\textsuperscript{429} See, e.g., Hollandsworth, supra note 109, at 118, 135. The coach who molested Jane Doe had a reputation for being “too friendly,” the librarian had complained to the principal about the coach’s behavior which she considered “child molestation,” the coach had openly treated another girl like his girlfriend, and rumors circulated in the high school about Jane Doe and Coach Stroud. At the same time, while escalating his advances, the coach swore the school girl to secrecy, telling her that he would lose his job and family if anyone found out about their relationship. See id. at 135.

\textsuperscript{430} See e.g., Stoneking \textit{II}, 882 F.2d at 728, in which school officials forced one girl to publicly apologize for framing the teacher.

\textsuperscript{431} Perhaps the fear of litigation by employees explains why the principal in Stoneking \textit{II} recorded complaints in a secret file he maintained at home. See Stoneking \textit{II}, 882 F.2d at 729.

\textsuperscript{432} See DeShaney v. Winnebago County Dep’t of Soc. Servs., 489 U.S. 189 (1989) (rejecting cause of action for the failure to protect child against his father’s violence in part on grounds would place child welfare workers on razor’s edge of constitutional liability for taking a child from their parents and liability of leaving a child in place). I have argued elsewhere that “deliberate indifference” is an appropriate resolution of the constitutional razor’s edge created by the confluence of two important rights. See Oren, DeShaney in Context, supra note 12. This is a significantly different issue, however, than the allocation of responsibility for an unquestioned constitutional violation. See McDonnell v. Cisneros, 84 F.3d 256, 261 (7th Cir. 1996) (refusing to extend Title VII to claim that improper investigation of sexual harassment claim itself constituted sexual harassment, because this would place employers on a “razor’s edge”).
eral remedy is supplementary to whatever is available by virtue of state law.

The federal remedy also protects federal interests through its "under color of state law" requirement. Wrongs inflicted by state officials are treated differently than the crimes and torts of private thugs. As a result, "scope of employment" precedent from the common law neither addresses nor illuminates the meaning of under color of state law in § 1983. Officials who act without the state's authorization nonetheless wield the power and authority of the state. Whether or not their actions were in the "scope of employment," if they abused or misused the power granted by virtue of their state positions, they are answerable in § 1983.

Federal law obviously also defines the limits of which defendants are liable under the statute. This means that personal fault is the sine qua non for finding any person liable for a violation of § 1983. But the Court also has told us that the statute must be read against the background of tort liability. It is possible to do this for supervisory liability without trampling any federal interests. The question, after all, is simply who will pay for an already established constitutional violation which has been committed under color of state law. The answer does not lie in reflexively seizing the toughest-sounding standard from other areas of § 1983 jurisprudence. Rather, courts should consider common law-sounding doctrines such as "notice liability," which make an effort to balance the incentives so that supervisory officials in school will have some reason to take seriously inappropriate behavior with children and to uncover sexual abuse.