

# IGNORANCE, INTENT, AND IDEOLOGY: RETALIATION IN TITLE IX

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As it currently operates, retaliation under Title IX collapses important distinctions between individual action and institutional response together. Intent and causation can help guide how we deal with different kinds of retaliation, but they do not help remedy harm. In this Article, I attempt to confront what I take to be a devastating, and devastatingly common, phenomenon with the nuance it requires. It is difficult to know what to do in the wake of assault and harassment in your community, especially if the facts seem murky, as they almost always do. Schools are in the business of providing a safe educational environment; because of this they have a great responsibility when it comes to preventing and responding to assault and harassment. I argue that educational institutions should be held strictly liable when they fail. Individuals present a harder case. I argue that individuals often act out of active ignorance—ignorance for which they should be held accountable, though what it means to be held to account for one’s ignorance should depend on the circumstances.

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## I. INTRODUCTION

Consider the real case of a former professor in the philosophy department at the University of Colorado in Boulder.<sup>2</sup> A graduate student accused a recently graduated colleague of sexually assaulting her at a party.<sup>3</sup> The University's Office of Discrimination and Harassment (ODH) investigated and found that the accused student had violated the school's policy.<sup>4</sup> A professor who had been an informal advisor to the accused felt that the ODH investigation had been unfair. Seeking to remedy this unfairness and clear the name of the accused in the department, the professor began interviewing the witnesses himself, prepared a report of his own about the information he gathered, and disseminated this information among others in the department.

The professor's "report" is not publicly available, but the faculty panel that later reviewed the events called it "offensive and derogatory," saying that it "unnecessarily paints a very negative picture of the Complainant's behavior and character."<sup>5</sup> Another professor provided testimony that the author of the "report" told her "that the Complainant was very drunk, sitting on the laps of multiple students, [and] making passes at the men at [the party]."<sup>6</sup> The complainant, apparently finding this development distressing, alleged that the professor had retaliated against her for filing her initial complaint. Her notice of claim characterizes the report as "painting [her] as 'sexually promiscuous' and alleging she falsified the report of the assault."<sup>7</sup> She reached a settlement with the University, and the administration moved to fire the professor.<sup>8</sup> A faculty panel reviewed the case and determined that the professor had acted unprofessionally but that he had not retaliated against the complainant. The panel recommended against termination, but the decision ultimately rested with the President of the University.<sup>9</sup> The pro-

<sup>2</sup> While I have some personal knowledge of this case, all of the facts and characterizations presented here come from publicly available sources. See generally, e.g., STEPHEN CASS ET AL., UNIV. OF COLO. FACULTY SENATE COMM. ON PRIVILEGE AND TENURE, INITIAL PANEL REPORT REGARDING DISMISSAL FOR CAUSE OF DAVID BARNETT (2015), <http://www.scribd.com/doc/252618455/CO-committee-report-on-dismissal-of-David-Barnett> [<https://perma.cc/37ZR-QMHG>] (report of faculty panel).

<sup>3</sup> Sarah Kuta, *CU-Boulder Moves to Fire Professor Accused of Retaliating Against Sexual Assault Victim*, DAILY CAMERA (Aug. 7, 2014), [http://www.dailycamera.com/cu-news/ci\\_26294506/cu-firing-professor-david-barnett](http://www.dailycamera.com/cu-news/ci_26294506/cu-firing-professor-david-barnett) [<https://perma.cc/2SY3-3JAK>] [hereinafter *Moves to Fire*].

<sup>4</sup> See *id.* Note that this office at the University is now called the Office of Institutional Equity and Compliance. See *Office of Institutional Equity and Compliance*, U. COLO. BOULDER, <http://www.colorado.edu/institutionalequity> [<https://perma.cc/W9XE-3XYF>].

<sup>5</sup> CASS ET AL., *supra* note 2, at 14.

<sup>6</sup> *Id.* at 9.

<sup>7</sup> *Moves to Fire*, *supra* note 3.

<sup>8</sup> *Id.*

<sup>9</sup> Cf. Sarah Kuta, *CU-Boulder Drops Bid to Fire David Barnett with 290K Settlement Deal*, DAILY CAMERA (May 12, 2015), [http://www.dailycamera.com/cu-news/ci\\_28099593/cu-boulder-drops-bid-fire-david-barnett-210k](http://www.dailycamera.com/cu-news/ci_28099593/cu-boulder-drops-bid-fire-david-barnett-210k) [<https://perma.cc/2SY3-3JAK>] ("[President Benson] also hinted that he would have recommended termination for Barnett,

fessor reached a settlement with the University some time later, resigning with a substantial amount of money for his troubles.<sup>10</sup> He was one of three professors in the department to leave following various allegations of misconduct and scandal.<sup>11</sup>

The faculty panel that considered the question of the professor's retaliation was apparently instructed that retaliation under Title IX<sup>12</sup> requires intent to retaliate.<sup>13</sup> Because the professor's stated motives were not to retaliate but to help the Respondent appeal and reveal problems with ODH,<sup>14</sup> he was found not to have retaliated.<sup>15</sup> Yet, the faculty panel found that he was "not sensitive to the effects his enquiries would have on the [victim];"<sup>16</sup> that his attacks on ODH were made by "disparag[ing] the Complainant;"<sup>17</sup> and that his behavior fell "below minimal standards of professional integrity in several instances."<sup>18</sup> One member of the faculty panel, in dissent as to the ultimate decision whether to recommend termination, said that the professor "carried out a very flawed and incorrect investigation that resulted in a very biased and slanderous report . . . ignor[ing] a number of warnings [that doing so was] inappropriate."<sup>19</sup> Thus, the professor was able to skirt a finding of retaliation by simply asserting that he did not *mean* to retaliate, despite failing professional obligations in a way that was likely to cause distress to a student already in one of the most vulnerable positions in academia.

This case, while banal, raises interesting questions about the legal concepts that ground the law of retaliation. There are several traditional ways of thinking about causation and intent in the law.<sup>20</sup> Both are concepts with which we are intuitively familiar, but they turn out to be very difficult to analyze concisely. With respect to causation, we might think that any of a necessary, sufficient, or merely substantial factor can properly be called a

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saying that he wanted to avoid the possibility of Barnett returning to the campus at the conclusion of a lawsuit.").

<sup>10</sup> *Id.*

<sup>11</sup> Sarah Kuta, *After Year of Scandal, CU-Boulder Philosophy Department Sees Latest Departure*, DAILY CAMERA (Jan. 3, 2015), [http://www.dailycamera.com/cu-news/ci\\_27248228/after-year-scandal-cu-boulder-philosophy-department-sees](http://www.dailycamera.com/cu-news/ci_27248228/after-year-scandal-cu-boulder-philosophy-department-sees) [<https://perma.cc/76DC-E3PZ>].

<sup>12</sup> Title IX was passed in 1972. It is codified at 20 U.S.C. §§ 1681–1688 (2012). It reads: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ." 20 U.S.C. § 1681(a).

<sup>13</sup> *Cf.* CASS ET AL., *supra* note 2, at 6 ("Retaliation is, by definition, an intentional act.").

<sup>14</sup> *Id.* at 2.

<sup>15</sup> *Id.* at 14.

<sup>16</sup> *Id.* at 7.

<sup>17</sup> *Id.* at 11.

<sup>18</sup> *Id.* at 15.

<sup>19</sup> *Id.* at 17.

<sup>20</sup> *See generally, e.g.*, Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735 (1985) (providing a survey of different theories of causation in tort law).

cause of some effect.<sup>21</sup> If an assailant shoots a person who then dies of an infection while recovering from the wound in the hospital, their shot is the cause of death if causation requires only that a cause be a *necessary* condition. This is commonly called “but-for causation” because the effect would not have happened but for the cause. If two assailants shoot a person at the same time, instantly resulting in death, and it is unclear which gunshot did them in, we might be comfortable saying that both shots caused the victim’s death because either would have been *sufficient* to do so, even though neither is necessary.

The relationship between cause and effect is not always so direct, however. Sometimes we think that something that plays a big role in bringing about an outcome counts as a cause of that outcome. This is substantial factor causation. If a government, over many years, cultivates and allows policies that make guns easily available in a society that valorizes violence, we might consider this government and society to be a cause in a gun death that occurs in the society. These institutions had a substantial role in creating the outcome even though the way we traditionally think about the causal chain is too attenuated to say that the complex set of socio-political circumstances were necessary or sufficient in a strong enough way to make legal liability attach.<sup>22</sup>

With respect to intent, we usually think of an intentional act as one done with some purpose, distinguishing it from a mere accident, or even from an outcome one has foreseen will result, but which one does not mean to occur. A stringent view of intent, requiring this kind of purpose, is sometimes built into theories of causation. For example, law professor Richard Wright describes legal theorists Hart and Honoré’s view of causation as requiring “a voluntary human intervention that was intended to produce the consequence.”<sup>23</sup>

The Supreme Court held recently that retaliation under Title VII<sup>24</sup> requires a strong combination of the above notions of causation and intent: not just intent to retaliate, but that desire to retaliate be the but-for cause of the person’s actions.<sup>25</sup> This is stronger than the current Title IX standard, under which intent to retaliate only needs to be sufficient to cause the adverse action. Both of these standards are stricter than other possibilities that either lower the bar for causation by using the substantial factor concept of causation or lower the bar for intent by either expanding what counts as inten-

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<sup>21</sup> See generally Anthony Honoré, *Causation in the Law*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2010), <https://plato.stanford.edu/archives/win2010/entries/causation-law> [<https://perma.cc/696W-J5QN>] (providing a survey of causation in law generally).

<sup>22</sup> However, there may be cases where a substantial factor cause is enough to generate liability.

<sup>23</sup> Wright, *supra* note 20, at 1745.

<sup>24</sup> Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, national origin, and sex. It is codified at 42 U.S.C. § 2000e-2 (2012).

<sup>25</sup> See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S.Ct. 2517, 2525 (2013).

tional conduct or simply not requiring a showing of intent, i.e., imposing strict liability.

Ideology pervades and structures our ways of thinking, including our motivations and our ability to reflect accurately on those motivations. The University faculty panel noted in their assessment of the professor's retaliation that, "[r]etaliation is, by definition, an intentional act."<sup>26</sup> However, insights from philosophers of race and gender, along with social psychologists, challenge this seemingly straightforward linguistic analysis. Charles Mills, whose writings on race have applicability to other complex, intersectional systems of oppression, says that:

[A]s a general rule . . . *white misunderstanding, misrepresentation, evasion, and self-deception on matters related to race* are among the most pervasive mental phenomena of the past few hundred years . . . . And these phenomena are in no way *accidental*, but *prescribed* by the terms of Racial Contract, which requires a certain schedule of structured blindnesses<sup>27</sup> and opacities in order to establish and maintain the white polity.<sup>28</sup>

Mills identifies these structured opacities as part of "an epistemology of ignorance."<sup>29</sup>

The same sort of epistemology of ignorance is at work in the context of retaliation for complaints about violations of civil rights statutes. That is, the epistemic landscape is structured to obscure the relationship between our motivations and actions when it comes to social categories like race, gender, disability, and class. As a result, it is perfectly sensible that a person could retaliate against a complainant without intending to do so. Indeed, this may be the paradigm of retaliation, rather than an aberration from the paradigm. When a person complains about a perceived violation of their rights, it is often a complaint about a person in their community—a workplace, school, department, or team—since we spend a lot of time with people in those communities. The person complained about, or others known by both parties, may feel unsettled, conflicted, attacked, or angry about the allegations. They may circle the wagons, attempt to clear the name of the accused, get rid of "trouble-makers," or shun the complainant. Others may simply avoid the complainant to appear like they aren't taking sides. When we act in these ways, we do not necessarily act on well-thought-out reasons; indeed, we may not act consciously on reasons at all. Rather, we act under the influence of cultural narratives and scripts, which are examples of Mills' structured opacities. Justice Scalia wrote perceptively that "[t]he real social impact of workplace behavior often depends on a constellation of surrounding circum-

<sup>26</sup> CASS ET AL., *supra* note 2, at 6.

<sup>27</sup> Some of the material in this literature uses "blindness" as a metaphor. While I quote this language, I do not use it myself on the grounds that it is ableist.

<sup>28</sup> CHARLES W. MILLS, *THE RACIAL CONTRACT* 19 (1997).

<sup>29</sup> *Id.* at 18.

stances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.”<sup>30</sup>

Any of the behaviors discussed above can be devastating to the complainant, who will find themselves the subject of derision or skepticism.<sup>31</sup> Some of these behaviors should be proscribed by law because they discourage vindication of civil rights. Civil rights laws mean nothing in the absence of a strong prohibition on retaliation against those who report possible violations. For an individual complainant, or an individual supporting a complainant, even a relatively limited experience of retaliation can make the reporting process seem unduly onerous. Seeing others experience such retaliation can severely chill reporting—it may seem like less trouble to ignore maltreatment than to undergo a lengthy formal process likely followed by retaliation from one’s institution, colleagues, or superiors.<sup>32</sup> This is particularly true where complainants and those supporting them are in vulnerable positions, such as students, junior and contingent faculty, and others who rely on their tenuous good standing both for social belonging and material security. We may think of the state of retaliation law, then, as the bellwether of civil rights statutes like Titles VII and IX. Without a strong, and strongly enforced, prohibition on retaliation, primary civil rights violations will remain chronically underreported.

This Article proceeds in four parts. First, I give an overview of how retaliation currently works under Title IX but caution that this may change to match recent changes in Title VII retaliation. Then I develop an account of two types of active ignorance that arise under unjust conditions. Next I argue that these two types of ignorance undercut the traditional notions of causation and intent that guide how we think about retaliation. Finally, I propose combating retaliation through two separate tiers of liability: one for institutions and another for individuals. Specifically, I argue that institutions should be held strictly liable for retaliatory harm, while individuals should be held accountable in ways that allow them to overcome their own active ignorance.

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<sup>30</sup> *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81–82 (1998).

<sup>31</sup> In a study of the climate at Harvard, 35.1% of female undergraduate students and 25.4% of female graduate students thought it was very or extremely likely that a victim would face retaliation for a complaint. DAVID CANTOR ET AL., WESTAT, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT: HARVARD UNIVERSITY 9 (2015), [http://sexualassaulttaskforce.harvard.edu/files/taskforce/files/final\\_report\\_harvard\\_9.21.15.pdf](http://sexualassaulttaskforce.harvard.edu/files/taskforce/files/final_report_harvard_9.21.15.pdf) [<https://perma.cc/VN8Y-2LK5>].

<sup>32</sup> See Diane Rosenfeld, *Uncomfortable Conversations: Confronting the Reality of Target Rape on Campus*, 128 HARV. L. REV. F. 359, 362 (Jun. 10, 2015), <http://harvardlawreview.org/2015/06/uncomfortable-conversations-confronting-the-reality-of-target-rape-on-campus/> [<https://perma.cc/3T42-9MUD>] (“[S]tudents know how well their schools respond to allegations of sexual assault, and this knowledge will affect their willingness to report either witnessing or experiencing such behavior. Students are particularly attuned to threats of retaliation by peers, and need to know that the school is obligated to protect them.”).

## II. THE STATE OF PLAY IN RETALIATION LAW

Retaliation is considered a form of intentional discrimination under Title IX.<sup>33</sup> Intentional discrimination can be proved, in the absence of direct evidence (like the smoking gun statement “I’m giving you an F because you made that complaint about my sexual advances” or “I’m going to make sure you never get a job because you complained about my conduct”), through the McDonnell Douglas burden-shifting framework.<sup>34</sup> Under this framework, the plaintiff first has the burden of making out a prima facie case of discrimination.<sup>35</sup> Then, the burden shifts to the defendant to show that it had non-discriminatory reasons for its actions.<sup>36</sup> Next, the plaintiff must show that these reasons were mere pretext.<sup>37</sup>

While I want to focus primarily on Title IX in this Article, this discussion will require an understanding of how retaliation works in Titles VI<sup>38</sup> and VII as well, since they, as the older, more developed, more litigated statutes, often serve as the models on which Title IX develops. Title IX is explicitly modeled on Title VI, and both Titles VI and IX borrow from Title VII jurisprudence where appropriate.<sup>39</sup> Several circuits have adopted the Title VII burden-shifting framework, introduced above, for evaluating retaliation claims under Title IX in the absence of direct evidence.<sup>40</sup>

Under both Titles VI and IX, a plaintiff can make out a prima facie case of retaliation by showing the following elements:

1. The complainant engaged in activities or asserted rights protected under Title IX [or Title VI];

<sup>33</sup> Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173 (2005).

<sup>34</sup> See generally McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (establishing burden-shifting framework in Title VII cases).

<sup>35</sup> *Id.* at 802.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 804.

<sup>38</sup> Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, and national origin in any program receiving federal funds. It is codified at 42 U.S.C. §§ 2000d–2000d-7 (2012).

<sup>39</sup> See U.S. DEP’T OF JUSTICE, TITLE IX LEGAL MANUAL, <https://www.justice.gov/crt/title-ix> [<https://perma.cc/VD7K-BGGW>] [hereinafter TITLE IX LEGAL MANUAL] (“Unlike Title VI which covers employment only in limited circumstances, Title IX clearly covers employment discrimination. Title IXs [sic] availability as an independent basis to attack discriminatory employment practices does not mean, however, that its analytical and evaluative methodology is divorced from that used under Title VII of the Civil Rights Act of 1964. Rather, like Title VI, Title IX borrows heavily from Title VII in its theory and approach to sex-based employment discrimination. It is generally accepted outside the sexual harassment context that the substantive standards and policies developed under Title VII apply with equal force to employment actions brought under Title IX. By contrast, however, it is generally held that Title IX does not incorporate the procedural requirements of Title VII.”).

<sup>40</sup> See *Emeldi v. Univ. of Or.*, 698 F.3d 715, 724–25 (9th Cir. 2012); *Papelino v. Albany Coll. of Pharm. of Union Univ.*, 633 F.3d 81, 91–92 (2d Cir. 2011); *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 67 (1st Cir. 2002); *Clinger v. N.M. Highlands Univ. Bd. of Regents*, 215 F.3d 1162, 1168 (10th Cir. 2000).

2. The recipient knew of the protected activity;
3. The recipient thereafter subjected the person to adverse action, treatment or conditions; and
4. There is a causal connection between the protected activity and the adverse action, treatment or conditions.<sup>41</sup>

A causal connection, for these purposes, can be established either by showing that there was a close temporal connection between the protected activity and the adverse action, by showing that other people in similar circumstances were treated differently, or by showing specific retaliatory animus.<sup>42</sup> Because the plaintiff need only establish a prima facie case of retaliation, the bar for showing causation is low: the plaintiff must show that the adverse action was “not wholly unrelated” to the protected activity.<sup>43</sup>

At the third step in the burden-shifting framework—when the plaintiff must show that the purported reasons of the defendant were mere pretext—the plaintiff’s burden to show causation is higher, though it is not completely clear how much higher. Since defendants will almost always be able to marshal some non-retaliatory reasons for their actions, a lot turns on how high this burden is. Since the plaintiff has already established a prima facie case of retaliation, “[a] showing of pretext may be sufficient to support an inference of retaliation if the fact finder concludes that retaliation was the *real* purpose of the action.”<sup>44</sup>

But what, exactly, does it mean for something to be the *real* purpose of a person’s actions? This is a question central to the law of retaliation, yet it has not been addressed head-on by the federal courts. The Supreme Court has said that retaliation is necessarily intentional; it is a direct response to the assertion of rights under Title IX.

Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX’s private cause of action. Retaliation is, by definition, an intentional act . . . . Moreover, retaliation is discrimination “on the basis of sex” because it is an intentional response to the nature of the complaint: an allegation of sex discrimination. We conclude that when a funding recipient retaliates against a person because he complains of sex discrimina-

<sup>41</sup> TITLE IX LEGAL MANUAL, *supra* note 39; *see also* U.S. DEP’T OF JUSTICE, TITLE VI LEGAL MANUAL, <https://www.justice.gov/crt/fcs/Title-6-Manual> [<https://perma.cc/VSA3-TCBA>] [hereinafter TITLE VI LEGAL MANUAL].

<sup>42</sup> *Davis v. Halpern*, 768 F. Supp. 968, 985 (E.D.N.Y. 1991) (citing *De Cintio v. Westchester Cty. Med. Ctr.*, 821 F.2d 111 (2d Cir. 1987)).

<sup>43</sup> *Bowers v. Bd. of Regents of Univ. Sys. of Ga.*, 509 Fed. Appx. 906, 911 (11th Cir. 2013) (quoting *Shannon v. BellSouth Telecomm., Inc.*, 292 F.3d 712, 716 (11th Cir. 2002)).

<sup>44</sup> TITLE IX LEGAL MANUAL, *supra* note 39 (emphasis added); *see also* *Davis*, 768 F. Supp. at 985 (“[A] case may turn completely on the issue of pretext.”).

tion, this constitutes intentional “discrimination” “on the basis of sex,” in violation of Title IX.<sup>45</sup>

However, “because” is ambiguous. It might mean that the retaliatory act was done only, or truly, for the purpose of retaliating; that retaliation was one motive among many, none of which is a necessary cause for the action; or that retaliation was at least one motive, and that this motive is the but-for cause of the action. Thus, the questions of intent and causation are conceptually distinct but linked in practice, particularly in this area. When the law demands an account of causation in the context of retaliation, it is often looking for the actor’s true or real motive and purpose. In the rest of this Article, I argue that such a search is misguided because these motives either do not exist in the way we imagine them, or they are so obscured to us as to be non-existent. Put simply, we often do not know why we do the things we do, and neither do courts. This is not meant to be a trite observation about moral psychology so much as a deep embrace of the extent to which we, as actors and knowers, act and know against a backdrop of unjust power, oppression, and ideology.

The different theories of causation and intent generate very different outcomes in retaliation cases. If retaliation requires that intent, which is assumed to be similar to purpose or at least a strongly foreseen effect, be the but-for (necessary) cause of an adverse action then it will be difficult to prove retaliation where there are plausible alternative explanations for the adverse action. For example, suppose that a professor proposed a quid pro quo arrangement with a student—an A in my class if you go on a date with me—and the student declined, then reported the proposal to the school. If the professor gives the student a D but can show that the student’s work was subpar,<sup>46</sup> worthy of a D, then absent other evidence about the professor’s motivation,<sup>47</sup> the student’s complaint may not be the but-for cause of the grade. If we require only that a possible cause be a sufficient condition for the effect, then the complaint is a cause of the adverse action, even if it is not the only cause.

When the Court took up this question about the causation standard for retaliation recently in *Nassar*, a Title VII case, it held that the desire to retaliate (a strong version of intent) must have been the but-for cause of the adverse action.<sup>48</sup> Relying on traditional tort theories of causation,<sup>49</sup> Justice

<sup>45</sup> *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173–74 (2005).

<sup>46</sup> Incidentally, it is very common for people who have experienced harassment or assault to see their grades drop afterwards. Cari Simon, *On Top of Everything Else, Sexual Assault Hurts the Survivors’ Grades*, WASH. POST (Aug. 6, 2014), [https://www.washingtonpost.com/posteverything/wp/2014/08/06/after-a-sexual-assault-survivors-gpas-plummet-this-is-a-bigger-problem-than-you-think/?utm\\_term=.bc023d2aae19](https://www.washingtonpost.com/posteverything/wp/2014/08/06/after-a-sexual-assault-survivors-gpas-plummet-this-is-a-bigger-problem-than-you-think/?utm_term=.bc023d2aae19) [https://perma.cc/22HC-6FJ8].

<sup>47</sup> As I argue in this Article, this includes not only evidence that might be unavailable not only to us, as third party observers, but also to the professor.

<sup>48</sup> *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2528 (2013).

Kennedy reasoned for the Court that “federal statutory claims of workplace discrimination” also require a showing of causation in fact.<sup>50</sup> This is in contrast to status-based discrimination under Title VII, i.e., discrimination based on race, color, national origin, sex, or religion, which the Court notes has a less demanding causation standard. For a status-based discrimination claim, “[i]t suffices instead to show that the motive to discriminate was one of the employer’s motives, even if the employer also had other, lawful motives for the decision.”<sup>51</sup> Part of what allows the Court to differentiate status-based discrimination from retaliation is the statutory structure of Title VII. Unlike Titles VI and IX, there are specific provisions in Title VII that discuss types of discrimination. As a result, there are also unique legislative histories to these provisions not found in Title IX.<sup>52</sup>

The Court in *Nassar* held that the mixed-motive theory of intent and causation is limited to status-based discrimination because it is specifically mentioned in that section of Title VII § 2000e-2(m), whereas the retaliation provision is in § 2000e-3(a), which makes no mention of the mixed-motive theory, and instead uses the phrase “because of” to describe the causal relationship required for retaliation.<sup>53</sup> Justice Kennedy for the majority drew additional strength for this position from the fact that the statutory structure and language had been adopted in response to a previous Supreme Court case, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which held that a showing of mixed-motives was sufficient to prove status-based discrimination under Title VII.<sup>54</sup> The Civil Rights Act of 1991 was passed shortly after *Price Waterhouse* and, *inter alia*, codified the mixed-motive causation standard with respect to status-based discrimination.<sup>55</sup> It did not, however, make this causation standard clearly applicable to other provisions or types of discrimination. Because status-based discrimination and retaliation are found in

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<sup>49</sup> Courts typically require a showing of duty, breach, causation in fact, proximate cause, and damages. Cf. David G. Owen, *The Five Elements of Negligence*, 35 *HOFSTRA L. REV.* 1271, 1272 (2007) (arguing that the standard four-element formulation of negligence misleadingly groups both factual causation and proximate cause under an umbrella term of “cause”). Causation in fact is an inquiry into “whether the defendant’s conduct actually contributed to the plaintiff’s injury,” Wright, *supra* note 20, at 1737, though it is sometimes conflated with but-for causation, as in Justice Kennedy’s analysis.

<sup>50</sup> *Nassar*, 133 S. Ct. at 2524–25.

<sup>51</sup> *Id.* at 2523. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989) (“Moreover, since we know that the words ‘because of’ do not mean ‘solely because of,’ we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations. When, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was “because of” sex and the other, legitimate considerations—even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account.”).

<sup>52</sup> *But see Nassar*, 133 S. Ct. at 2538–41 (Ginsburg, J., dissenting).

<sup>53</sup> See *id.* at 2525–28.

<sup>54</sup> *Id.* at 2526. While I present the Court’s reasoning in the next two paragraphs as if it were a plausible interpretation of the law and history, the reader is well advised to consult Justice Ginsburg’s dissent in *Nassar* for a very different story.

<sup>55</sup> *Id.*

different parts of Title VII, the Court felt that they were meant to be seen as different sorts of violations. In the meantime, the Court was called upon to interpret “because of” in the context of the Age Discrimination in Employment Act.<sup>56</sup> There, it held that “because of” is indicative of a but-for causal relationship.<sup>57</sup> The Court in *Nassar* thus drew its conclusion that the status-based discrimination and retaliation provisions of Title VII were distinct, and that the use of “because of” demanded but-for causation in the retaliation context.<sup>58</sup>

There are a number of ways that Title IX’s history differs from Title VII’s in this regard. Even the Court in *Nassar* distanced Title VII from Title IX and other statutory schemes that provide broad reach and remedy.<sup>59</sup> Title IX, as mentioned above, includes retaliation as a type of status-based discrimination. Rejecting the argument that this interpretive move elsewhere in antidiscrimination law should guide the Court in interpreting Title VII, Kennedy wrote that Title IX and other statutory provisions “[were] not controlling here” because the laws at issue “were broad, general bars on discrimination.”<sup>60</sup> Unlike Title VII, which is a more specific statutory scheme, the Court has said of Title IX that, “we must accord it a sweep as broad as its language.”<sup>61</sup> Thus, by the Court’s own language, dicta though it is, Title IX is distinct from Title VII in exactly the ways that should matter for interpretation of the prohibition on retaliation.

While the mixed-motive idea of causation may be safe in Title IX retaliation jurisprudence for now, *Nassar* is an ominous sign for people watching the rapid development of, and potential backlash against, Title IX in the federal courts.<sup>62</sup> To be more specific, it is a sign that the courts are likely to impose high burdens on those alleging discrimination, particularly if that discrimination does not fit a traditional mold of intentional, obvious animus. At least one circuit, the Fifth, which also birthed *Nassar*, has recently declined the invitation to rule on whether the *Nassar* rule applies to Title IX retaliation claims made in the context of employment.<sup>63</sup> The Sixth Circuit also recently declined to address the question in a case in which the trial had occurred before the rule in *Nassar* was announced and the jury form, in any

<sup>56</sup> *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175–77 (2009).

<sup>57</sup> *Id.* at 176.

<sup>58</sup> *Nassar*, 133 S. Ct. at 2526–27.

<sup>59</sup> *Id.* at 2529–30.

<sup>60</sup> *Id.* at 2517.

<sup>61</sup> *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)).

<sup>62</sup> *See Doe v. Rutherford Cty. Bd. of Educ.*, No. 3:13-CV-00328, 2014 WL 4080163, at \*14–16 (M.D. Tenn. Aug. 18, 2014) (expressing lack of clarity on whether *Nassar* applies to Title IX retaliation claims).

<sup>63</sup> *Minnis v. Bd. of Supervisors of La. State Univ. & Agric. & Mech. Coll.*, 620 F. App’x 215, 222 (5th Cir. 2015); *see also* Erin Buzuvis, *Fifth Circuit Decision Flags Area of Uncertainty in Future Title IX Retaliation Cases*, TITLE IX BLOG (July 1, 2015), <http://title-ix.blogspot.com/2015/07/fifth-circuit-decision-flags-area-of.html> [https://perma.cc/E2ZH-7DMQ].

case, used *Nassars* “because” phrasing, notwithstanding the district court’s oral instructions that the plaintiff’s complaint was a significant factor in the adverse action against her.<sup>64</sup> It is just a matter of time before the question will be raised squarely and answered.<sup>65</sup>

This moment of uncertainty about the shape and future of retaliation jurisprudence demands a more thoroughgoing investigation of the nature of retaliation, which should then inform the nature of the law. Retaliation, like other acts of discrimination, does not take place in a vacuum. Rather, it is deeply and necessarily embedded in social relations, which are themselves shot through with the effects of injustice. In the next section I explore some of the relationships between power, privilege, and what José Medina calls *active ignorance*, an epistemological phenomenon that will aid in the effort to understand the relationship between retaliation and intent.

### III. POWER, PRIVILEGE, AND ACTIVE IGNORANCE

Philosophers have paid increasing attention to the relationships between power and knowledge in recent decades.<sup>66</sup> This is particularly true of philosophers and others engaged with feminist, anti-racist, and materialist epistemologies. Among the crucial insights of this area of thought is that inequality and injustice have deep effects on our collective ability to understand the world.<sup>67</sup> These effects are multifarious and their distribution across knowers is neither equal nor random. For the purposes of this paper, I want to develop one sort of effect called active ignorance, which comes about chiefly among relatively privileged knowers, whose privilege is more likely to give rise to certain epistemic vices.<sup>68</sup>

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<sup>64</sup> *Varlesi v. Wayne State Univ.*, No. 14-1862, 2016 WL 860326 at \*8 (6th Cir. Mar. 7, 2016).

<sup>65</sup> *Cf. Miller v. Kutztown Univ.*, No. CIV.A. 13-3993, 2013 WL 6506321, at \*3 (E.D. Pa. Dec. 11, 2013) (rejecting argument that *Nassar* applies to Title IX claims).

<sup>66</sup> *See generally, e.g.*, ALISON JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* (1983); PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT* (1991); MIRANDA FRICKER, *EPISTEMIC INJUSTICE* (2007); SALLY HASLANGER, *RESISTING REALITY* (2012); JOSÉ MEDINA, *THE EPISTEMOLOGY OF RESISTANCE* (2013).

<sup>67</sup> *Compare* FRICKER, *supra* note 66, at 148 (“One way of taking the epistemological suggestion that social power has an unfair impact on collective forms of social understanding is to think of our shared understandings as reflecting the perspectives of different social groups, and to entertain the idea that relations of unequal power can skew shared hermeneutical resources so that the powerful tend to have appropriate understandings of their experiences ready to draw on as they make sense of their social experiences, whereas the powerless are more likely to find themselves having some social experiences through a glass darkly, with at best ill-fitting meanings to draw on in the effort to render them intelligible.”), *with* MEDINA, *supra* note 66, at 72 (“Although hermeneutical injustices affect all members of the epistemic community, they do not affect everybody equally . . . . [I]n an important sense, the hermeneutically privileged (or non-disadvantaged) are epistemically worse off *as interlocutors* because *their epistemic characters* tend to become more corrupted . . . .”).

<sup>68</sup> In the epistemology literature, talk of vices and virtues is relatively common. *See, e.g.*, John Greco & John Turri, *Virtue Epistemology*, in *STANFORD ENCYCLOPEDIA OF PHI-*

The epistemic vices of arrogance, laziness, and closed-mindedness greatly contribute to the production of a particular form of ignorance: *active ignorance*, an ignorance that occurs with the active participation of the subject and with a battery of defense mechanisms, an ignorance that is not easy to undo and correct, for this requires retraining—the reconfiguration of epistemic attitudes and habits—as well as social change. Those who are epistemically arrogant, lazy, and closed-minded are *actively ignorant*. Actively ignorant subjects are those who can be blamed not just for lacking particular pieces of knowledge, but also for having epistemic attitudes and habits that contribute to create and maintain bodies of ignorance. These subjects are at fault for their complicity (often unconscious and involuntary) with epistemic injustices that support and contribute to situations of oppression.<sup>69</sup>

Medina urges that “[o]ne’s participation in the collective bodies of ignorance one has inherited becomes *active*, because one acts on it and fails to act against it.”<sup>70</sup> Note that this account still does not require a person to know or have realized this failing before it becomes a failing. It is simply the unfortunate epistemic position in which we find ourselves.

It may help to begin with a relatively depoliticized example. Cricket is a sport. It’s quite popular in the United Kingdom, as well as in some former British colonies,<sup>71</sup> such as India, Pakistan, Australia. I know that it has very complicated rules, is sort of like baseball, but also very different, and that games can last a long time. The previous three sentences are the sum of my knowledge about cricket. Yet, by some estimations, cricket is the second most-popular sport worldwide.<sup>72</sup> It’s significantly more popular than other sports I know more about, like American football, hockey, basketball, baseball, and volleyball.<sup>73</sup> There are lots of obvious reasons for my lack of knowledge. I live in the United States, one of the places in the world where cricket is not popular. I have never lived in a place where cricket is popular, and the media to which I am regularly exposed does not show cricket as it

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LOSOPHY (2016), <https://plato.stanford.edu/entries/epistemology-virtue/> [<https://perma.cc/JY5Y-MF9J>]. For purposes of reading this Article, the reader probably would not lose any meaning by thinking of a virtue simply as a good characteristic to have and a vice as a bad characteristic to have. I have criticized the vice/virtue language briefly elsewhere on the grounds that it is too individualistic and does not work well in describing problems in social epistemology, like the topic of this Article. See Annaleigh Curtis, Book Note, <http://hypatiaphilosophy.org/HRO/reviews/content/182> [<https://perma.cc/B2VJ-76YF>] (reviewing JOSÉ MEDINA, *THE EPISTEMOLOGY OF RESISTANCE: GENDER, AND RACIAL OPPRESSION, EPISTEMIC INJUSTICE, AND RESISTANT IMAGINATIONS* (2013)).

<sup>69</sup> MEDINA, *supra* note 66, at 39.

<sup>70</sup> *Id.* at 140–41.

<sup>71</sup> It really didn’t take long for this example to become political, did it?

<sup>72</sup> Khabir U. Mughal, *Top 10 Most Popular Sports in the World*, SPORTEOLOGY (Feb. 24, 2017), <http://sporteology.com/top-10-popular-sports-world> [<https://perma.cc/Q7CK-AME9>].

<sup>73</sup> *Id.*

does other sports. It makes as much sense that I am ignorant about cricket as it does that I am ignorant about many things with which I do not regularly come into contact.

Of course, my ignorance is also an effect of mild versions of the epistemic vices Medina mentions above: arrogance, laziness, and close-mindedness. The fact that I can get by just fine without knowing much about cricket is arrogance of a benign sort.<sup>74</sup> No one challenges my ignorance of cricket, so I have no need to learn about it. As Medina argues, this lack of contestation encourages and maintains my ignorance.<sup>75</sup> Likewise, I exhibit a lot of laziness with respect to cricket. I could easily learn about cricket, even watch matches, through the Internet. I have friends who like cricket (mostly because they have lived in other countries where it is popular), and I could seek out their help in understanding. But ultimately, I do not really care to learn about cricket when I could do other things with my time. This choice is, again, mostly benign, though it is also a “socially produced and carefully orchestrated lack of curiosity.”<sup>76</sup> Finally, my ignorance is also a result of the vice of close-mindedness. Again, it may be a benign sort of close-mindedness in that we cannot expect each other to learn about everything, particularly about things that rarely become relevant in our everyday lives.

Now quickly take another relatively apolitical example of active ignorance related to a different kind of cricket. I have a terrible phobia of grasshoppers. For most of my life I have lived in places where there are a lot of grasshoppers outside during the late summer months. In order to get myself out of the house at one particular place I lived, I followed a complex ritual. First, I would look out the window to see if there were any grasshoppers visible on the sidewalk. If there were, I would quickly open the front door and fire at them with a water gun so they would jump out of the sidewalk path. Then, I would gather my things and sprint out the door and into my car, trying my best to look at as little of the ground or other surfaces as possible. I was hoping not to know, not to see if there were any grasshoppers near me until I was safely inside. This ritual, which must have utterly confounded any neighbors or passers-by, was a way of coping with my environment through active ignorance. If I had stopped to find every grasshopper in my yard, it would have been utterly crippling, both in terms of time and my mental health.

These two examples of active ignorance are very different, but they help to demonstrate two modes of ignorance. “[S]ometimes there is ignorance out of luxury—when one does not need to know. But sometimes there is also ignorance out of necessity—when one needs not to know. There is

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<sup>74</sup> I think it is benign in the sense that my ignorance does not tend to affect anyone negatively. It is easy to imagine that my ignorance would be more malignant if I occupied a different social role—as an expat professor in Pakistan, a U.S. ambassador to South Africa, etc.

<sup>75</sup> MEDINA, *supra* note 66, at 32.

<sup>76</sup> *Id.* at 33.

*not needing to know* and there is *needing not to know*.”<sup>77</sup> My ignorance of cricket is a result largely of *not needing to know* about cricket. It simply does not come up for me in a way that requires any action on my part of become knowledgeable. My ignorance and avoidance of grasshoppers, by contrast, is *needing not to know*. I need not to know that there are, say, fifty grasshoppers in the yard mere feet from me as I sprint to my car. If I knew, I would never leave the house.

Now let’s get political. We have seen several examples of how active ignorance can develop in benign ways, so now we can explore some of the troubling ways active ignorance tends to manifest itself in those with social power and privilege. Throughout this paper, when I talk about social power and privilege, I am largely relying on the reader to understand what I mean. It is an unfortunate fact of our world that there currently exist deeply unjust social relationships on which, for example, men have more social power and privilege than women and white people have more social power and privilege than people of color. This picture is complicated further by the fact that these and many other identities intersect, such that the social power and privilege exercised by a poor white man is very different from that of a wealthy Latina woman or a disabled Black man.<sup>78</sup> The level of social power and privilege a person has will also vary with her context. A young white man philosopher may be treated with suspicion in the context of a feminist conference, while a young white woman philosopher might be welcomed and included more fully. This fact does not undermine the general sweep of how power and privilege operate. When the young philosophers return to their home department, it will likely be the man who feels welcome there, while the woman is treated with suspicion or worse.<sup>79</sup>

One effect of this social power and privilege is that those who have it tend to be taken as more credible knowers. This is not mere speculation; research on implicit bias suggests that we take as more credible those who are, or are perceived to be, from relatively advantaged groups. In a study of science faculty, for example, “both male and female faculty judged a female student to be less competent and less worthy of being hired than an identical

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<sup>77</sup> *Id.* at 34.

<sup>78</sup> See generally Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (explaining the concept of intersectionality and arguing that the intersections of gender and race shape responses to violence against women of color).

<sup>79</sup> For those unfamiliar with the ongoing issues in philosophy, I recommend diving into the blog, *What Is It Like to Be a Woman in Philosophy?*, which catalogues the experiences of women in philosophy. See WHAT IS IT LIKE TO BE A WOMAN IN PHILOSOPHY?, <https://beingawomaninphilosophy.wordpress.com/> [https://perma.cc/F9JG-WYUY]; see also Linda Martín Alcoff, *A Call for Climate Change in Philosophy*, ALCOFF, <http://alcoff.com/articles/call-climate-change-women-philosophy> [https://perma.cc/X46H-RDDQ]. See generally Andrew Higgins, *Relational Mapping of Minorities in Philosophy*, UPDIRECTORY (2014), <http://www.theupdirectory.com/wp-content/uploads/2015/01/Relational-Mapping-of-Minorities-in-Philosophy.pdf> [https://perma.cc/QPH5-GF9L] (providing statistical analyses of demographics in professional philosophy).

male student, and also offered her a smaller starting salary and less career mentoring.”<sup>80</sup> Iterated across time and other decisions, these biases—themselves a result of the social structure—can have huge effects on people. Under such conditions, it is easy to see how men, particularly those men who are privileged along other axes, would develop an inflated sense of confidence in their capacities as knowers while women would develop a correspondingly deflated sense of confidence.<sup>81</sup> After all, we do not develop confidence or other epistemic capacities randomly—we do so through feedback from others in our community.<sup>82</sup> If a group is systematically told that they have misunderstood or misinterpreted something, they will likely believe it without some validation from elsewhere.<sup>83</sup> As Catharine MacKinnon says of the value of consciousness-raising groups, “[i]t is validating to comprehend oneself as devalidated rather than [sic] as invalid.”<sup>84</sup>

Meanwhile, those with power and privilege are likely to face much less pushback on their ideas, which can lead to an overvaluing of their credibility.

When whatever one says, goes—because one’s word is the law or the truth others are bound to uphold and abide by—there is a complete lack of resistance from the world and from others that gets in the way of knowledge acquisition, that is, in the way of discovering facts without prejudging, of articulating and justifying one’s claim properly, of responding to objections responsibly, of being genuinely open to contrary evidence, and so on.<sup>85</sup>

Thus, part of the privilege one enjoys as a member of a socially powerful group is that one is acknowledged more readily and more credibly as a knower. To wit, a recent study found that male students overestimate their fellow male students’ mastery of class material after controlling for exam

<sup>80</sup> Corinne A. Moss-Racusin, et al., *Science Faculty’s Subtle Gender Biases Favor Male Students*, 109 *PROC. NAT’L ACAD. SCI.* 16474, 16477 (2012).

<sup>81</sup> See generally FRICKER, *supra* note 66 (arguing for the existence of two forms of distinctly epistemic injustices: testimonial injustice and hermeneutical injustice).

<sup>82</sup> Think about someone learning to use a concept, like a child learning body parts. When I was little, I had trouble accurately naming shoulders and elbows. I would get them mixed up because my concept of both involved them being a part of an arm that bends. As people corrected me and tested me, I was able to develop a more fine-grained and accurate concept of each so that I could correctly apply the concept to the world in a way that would cohere with the concept others used.

<sup>83</sup> Suppose, following up on the previous footnote, that after I gained confidence in my concepts of elbow and shoulder, some members of my community with some authority—older kids, teachers, or just friends—decided to play a trick on me by telling me that I had gotten it wrong again, that what I was calling ‘shoulder’ is actually called ‘wrist.’ Absent intervention from another authority, I would have to think I had gotten it wrong. It is not as if these concepts or names are living inside our brains or out in the ether (*pace* Plato), waiting to be discovered and immediately verified as true. We have no basis for confidence in our knowledge and conceptual framework outside of feedback, both positive and negative, from people around us.

<sup>84</sup> CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 100 (1989).

<sup>85</sup> MEDINA, *supra* note 66, at 32.

performance.<sup>86</sup> While this is a privilege in some important senses, as Medina argues, it also makes the privileged epistemically *worse off* in that they are more likely to develop epistemic vices that stand in the way of knowledge, understanding, and other epistemic goods.<sup>87</sup>

While any person, regardless of their social position at any given time, is susceptible to epistemic vices, there are good reasons to suppose that those with social power in a particular context are more likely to develop epistemic arrogance, laziness, and closed-mindedness (among other vices). Medina argues that people with power are challenged less, and thus have less insight into their own epistemic limitations.<sup>88</sup> With this framework of two types of ignorance in mind, we can now consider some examples of how social power and privilege generate active ignorance in troubling ways.

First, consider a few examples of not needing to know. Medina uses the example of upper-class people and most men, historically, not needing to know about various domestic duties.<sup>89</sup> He notes that the ability to ignore “housecleaning, meal preparation, and the care of the children” confers benefits in that it frees those people up for other pursuits, but also generates serious areas of epistemic dependence on care-takers.<sup>90</sup> Another compelling example provided by Medina is an incident that occurred at Vanderbilt University, in which a drunken fraternity brother took the head from a pig that had been eaten at a party and put it on the doorstep of the campus Jewish cultural center, which also housed a vegetarian café.<sup>91</sup> The student plausibly claimed that he did not understand how offensive this would be.<sup>92</sup> The ability to get by without knowing a host of relevant facts about the context of his university and country allowed this student both to commit the offensive act and to apologize and receive some absolution on the basis of his ignorance.<sup>93</sup> However tempting it is to offer absolution based on ignorance, doing so in cases where ignorance arises out of power and privilege is dangerous because it leaves unchallenged the very structures that make further violations possible.

Second, consider an example of needing not to know. Charles Mills gives an extended account of the role dehumanizing racial myths have

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<sup>86</sup> Daniel Grunspan, et al., *Males Under-Estimate Academic Performance of Their Female Peers in Undergraduate Biology Classrooms*, 11 PLOS ONE 1, 11 (2016). Cf. PhotoFeeler, [STUDY] *Do Men Just Look More Competent? Gender Bias & LinkedIn Photos*, PROFILED BY PHOTOFEELEER (Jan. 11, 2016), <https://blog.photofeeler.com/gender-bias-study/> [<https://perma.cc/9VMP-PN3J>] (finding the demographic group judged most competent and influential was men over thirty-five years old and that perceptions of competence for men and women increase with age, but that men’s perceived competence increases six times faster than women’s).

<sup>87</sup> See MEDINA, *supra* note 66, at 30–31.

<sup>88</sup> See *id.*

<sup>89</sup> *Id.* at 32.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 135.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 135–37.

played in legitimizing slavery, colonialism and other effects of racial hierarchy.<sup>94</sup> For example, Mills discusses the gap between the United States' understanding of its own history as one of noble democracy, rather than brutal subjugation.<sup>95</sup>

[T]he United States itself, of course, is a white settler state on territory expropriated from its aboriginal [sic] inhabitants through a combination of military force, disease, and a "century of dishonor" of broken treaties. The expropriation involved literal genocide . . . . Washington, Father of the Nation, was, understandably, known somewhat differently to the Senecas as "Town Destroyer." In the Declaration of Independence, Jefferson characterized Native Americans as "merciless Indian Savages," and in the Constitution, blacks, of course, appear only obliquely, through the famous "60 percent solution."<sup>96</sup>

These myths of natural inferiority, contrasted with generally applicable ideals of freedom, democracy, and the rule of law, come about as a result of needing not to know about the "mechanisms of oppression that create marginalization, subjugation, and social death."<sup>97</sup> Needing not to know about inequality and injustice, and generating narratives to legitimize them, is one of the dominant intellectual exercises of human history.<sup>98</sup> Hence Mills' claim that, "Part of what it means to be constructed as 'white' . . . is a cognitive model that precludes self-transparency and genuine understanding of social realities."<sup>99</sup>

Think of the challenge to affirmative action brought by Abigail Fisher<sup>100</sup> as a microcosm of this kind of needing not to know. Fisher is a white woman whose theory of the case essentially depends on the myth that affirmative action gives unearned benefits to Black and Latino people instead of more

<sup>94</sup> MILLS, *supra* note 28, at 19–31.

<sup>95</sup> *Cf. id.* at 30 ("That we [live in a world built on the Racial Contract] is simultaneously quite obvious. . . and nonobvious, since most whites *don't* think about it or don't think about it as the outcome of a history of political oppression but rather as just 'the way things are.'").

<sup>96</sup> *Id.* at 28.

<sup>97</sup> MEDINA, *supra* note 66, at 33.

<sup>98</sup> *See, e.g.,* Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413, 415 (2006) ("More generally, our history reveals a set of disconcerting truths. The first is that every moment of American history evinces vast disparities of wealth, power, and privilege among groups identified by salient characteristics such as race and gender. The second is that, instead of perceiving those inequalities as conflicting with American ideals, groups with power (and often even groups without) have justified and legitimized those disparities with an arsenal of arguments, assumptions, and stereotypes.").

<sup>99</sup> MILLS, *supra* note 28, at 18.

<sup>100</sup> *See* Fisher v. Univ. of Tex. at Austin (*Fisher I*), 133 S. Ct. 2411 (2013); Fisher v. Univ. of Tex. at Austin (*Fisher II*), 136 S. Ct. 2198 (2016).

qualified white people.<sup>101</sup> Yet the facts of her case reveal that Fisher was manifestly unqualified for a spot at the highly selective University of Texas: (1) she would not have been admitted to the Fall class even if she had been Black or Latino herself, (2) among students with worse scores who were admitted over her for the provisional Summer program, five were Black or Latino, but 42 were also white, and (3) 168 Black or Latino applicants with scores equal to or better than Fisher's were also denied summer admission.<sup>102</sup> Yet Fisher was quoted by NPR as saying, "There were people in my class with lower grades who weren't in all the activities I was in, and who were being accepted into UT, and the only other difference between us was the color of our skin."<sup>103</sup> How can a person be so unaware of the very things most local and peculiar to them, yet speak with such authority on them? And how could a case with so little merit have made it so far? In a legal system in which many people with legitimate grievances fail to get their day in court, Abigail Fisher's basically hopeless case was in front of the Supreme Court twice.<sup>104</sup> Abigail Fisher needed not to know how poor her qualifications were. To maintain her narrative, she needed to be ignorant of the broader picture about admissions, just in terms of the numbers game, to say nothing of her need to be ignorant of the general context of past and present racial oppression or the fact that affirmative action also benefits women. There's simply no way to press the claim if she admits to herself that race was a non-factor in her case; the only way to proceed is with a sense of racial entitlement divorced from the facts.

This analysis carries over to the context of harassment. A distinguished philosopher at CU-Boulder, Michael Tooley, wrote an extended post on the

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<sup>101</sup> Cf. *Fisher II*, 136 S. Ct. at 2207 ("Petitioner then filed suit alleging that the University's consideration of race as part of its holistic-review process disadvantaged her and other Caucasian applicants, in violation of the Equal Protection Clause."); see also Stephanie Mencimer, *Meet the Brains Behind the Effort to Get the Supreme Court to Rethink Civil Rights*, MOTHER JONES (Mar.-Apr. 2016), <http://www.motherjones.com/politics/2016/04/edward-blum-supreme-court-affirmative-action-civil-rights> [https://perma.cc/A2SP-AQ2C] ("Fisher has said she filed her suit because UT-Austin rejected her while letting in her black and Hispanic high school classmates with lower grades.")

<sup>102</sup> Brief for Respondents at 15-16, *Fisher v. Univ. of Tex. at Austin*, et al., 133 S. Ct. 2411 (2013) (No. 11-345).

<sup>103</sup> Nina Totenberg, *Affirmative Action Fight Returns to the U.S. Supreme Court*, N.P.R. (Dec. 9, 2015), <http://www.npr.org/2015/12/09/459016970/affirmative-action-fight-returns-to-the-u-s-supreme-court> [https://perma.cc/E2P7-BUMT].

<sup>104</sup> The skeptical reader might object that the case did not, ultimately, make it that far at all. It was dismissed on summary judgment and appealed, summary judgment was affirmed by the Fifth Circuit, the Supreme Court remanded, the Fifth Circuit affirmed again, and the Supreme Court affirmed. But along the way there were many strong dissents, and the Supreme Court only affirmed 4-3, Justice Kagan having recused herself and Justice Scalia having died shortly before. If Justice Scalia had lived to decide the case, it would have at least been 4-4, which would have affirmed the Fifth Circuit's decision without precedential value, essentially pushing off the issue for another time, and possibly a different bench. In saying this, I just want to point out that this case was hotly contested at every stage *despite* the fact that the plaintiff was the wrong vehicle for this sort of challenge.

gender climate in the Philosophy department in the midst of the scandal there, saying:

I have been in half a dozen philosophy departments over the course of my career, and it does not seem to me that female members of those departments were treated differently in any way than male members. I did not, for example, see any differences between, on the one hand, the way in which male philosophers interacted with female philosophers and, on the other, the way in which they interacted with each other. Nor did I see any prejudice against women faculty when it came to decisions to hire, to tenure, or to promote, or against female students when it came to admission to graduate school. Indeed, in recent years, I have seen cases involving bias in the opposite direction, both as regards hiring, and with respect to graduate admissions.<sup>105</sup>

Remember that this is the sincere statement of one of the most prestigious philosophers in a department that an outside report said “maintains an environment with unacceptable sexual harassment, inappropriate sexualized unprofessional behavior, and divisive uncivil behavior. Members of most groups we talked to report directly observing inappropriate behavior.”<sup>106</sup> How is it possible that a person embedded for decades in professional philosophy, a discipline notable for its pervasive hostile gender climate and sexual harassment issues,<sup>107</sup> can maintain that he has never witnessed disparate treatment of women students or faculty members?

Suppose he is correct that he has not witnessed disparate treatment. If he has not, there are at least three explanations for this: there was no disparate treatment, there was but he just happened not to see first-hand disparate treatment (but would have noticed it if he had been in the right place at the right time), or there was but his social position generated a systematic area of active ignorance with respect to sexual harassment and other gendered climate issues. I think it’s fair to dismiss the first explanation, given all the evidence to the contrary. It is possible that Professor Tooley simply got lucky, in a sense, in going decades without noticing any disparate treatment,

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<sup>105</sup> Michael Tooley, *The Site Visit Report: Why Hasn’t the Philosophy Department Strongly Criticized the Site Visit Report?*, THE SITE VISIT REPORT, [http://spot.colorado.edu/~tooley/Why\\_No\\_Criticism\\_of\\_the\\_Site\\_Visit\\_Report.html](http://spot.colorado.edu/~tooley/Why_No_Criticism_of_the_Site_Visit_Report.html) [<https://perma.cc/2T3E-GMAM>]. Of course, Professor Tooley’s point in writing is to attack the report, so it is not without its detractors, but the differences in how Professor Tooley views the situation from the way the authors of the report do—which is based on the input of other people in the department and University—is striking.

<sup>106</sup> VALERIE HARDCASTLE, ET AL., THE AMERICAN PHILOSOPHICAL ASSOCIATION COMMITTEE ON THE STATUS OF WOMEN, REPORT ON SITE VISIT 3 (2013), <https://www.scribd.com/doc/203684450/American-Philosophical-Association-s-Committee-on-the-Status-of-Women-report-on-CU-Boulder-philosophy-department> [<https://perma.cc/GFN3-MX37>].

<sup>107</sup> See *supra* note 79.

but surely it would be a strange result if many more men than women, and many more white than Black philosophers, got lucky in this way and simply failed to be in the places where harassing behavior or microaggressions were taking place. It seems to me that the most likely explanation is that Professor Tooley, like many people who occupy relatively privileged social positions, is revealing an area of deep ignorance about the material conditions of, in this case, women in his department(s).

Regardless of the best explanation for Professor Tooley's self-reported ignorance, the fact that he offers this statement at all in the broader context of expressing skepticism about the problem is notable. One might think that of all the testimony we might take on the status of women and other marginalized groups in philosophy, the testimony of a well-established, white man is likely among the least reliable. Professor Tooley implies that if the incidence of harassment in philosophy is not higher than the incidence of harassment in other professions, then it is unremarkable.<sup>108</sup> This is a puzzling response to the testimony of many other people across the profession with first-hand stories of harassment or other misconduct unless one understands the role that active ignorance plays in shaping the epistemic experience of many members of socially powerful groups.

The case of Professor Tooley arises, I think, out of both not needing to know and needing not to know about the experience of women in philosophy. It is an example of not needing to know because straight, white, cis-gendered men in philosophy are not apparently hurt (of course, they are hurt in the sense Medina identifies—they have systematic epistemic gaps—and in other ways) by their ignorance of the experiences of philosophers from marginalized groups. Just as many men have not historically needed to know about how to use vinegar as a cleaning agent or how to darn socks, these philosophers have long excelled in life partially because of, not in spite of, their ignorance of something so intimately tied to their experiences, yet also quite divorced from them. But it is also an example of needing not to know because Philosophy as a discipline has been built on the same sorts of myths as white supremacy and other systems of domination—natural inferiority, self-selection, and so on.<sup>109</sup> The stakes in finding a non-discriminatory hypothesis are perhaps highest for the members of the profession who have

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<sup>108</sup> Tooley, *supra* note 105 (“First of all, the blog [*What is it Like to be a Woman in Philosophy?*] doesn't enable us to figure out how many women have negative experiences, as compared to the number who have no negative experiences, and for whom everything is fine. The blog selects for negative experiences, because if nothing unusual has happened to you having to do with your being a woman in philosophy, then you wouldn't post on that blog. In addition, the blog also doesn't enable us to tell how many women in philosophy have negative experiences, as compared with women in any other walk of life, or in other academic fields, such as physics or psychology.”).

<sup>109</sup> Cf. Minna Salami, *Philosophy Has to be About More than White Men*, THE GUARDIAN (Mar. 23, 2015), <https://www.theguardian.com/education/commentisfree/2015/mar/23/philosophy-white-men-university-courses> [<https://perma.cc/5UBY-BKLY>] (explaining that the work of white males should not dominate modern-day Philosophy).

excelled the most, and who have the most to gain from thinking their successes do not lay on the false starts or ruined or abandoned careers of untold women, philosophers of color, and other members of groups traditionally excluded from philosophical study.

In the next section, I take this analysis one step further. It may be easy enough to see how people are ignorant of harassment going on in even in their immediate surroundings, but I am suggesting here that the very people engaging in harassment and retaliation may be similarly ignorant of their own conduct. Bystanders may be clueless, but can perpetrators be so clueless?

#### IV. RETHINKING RETALIATION

I have argued in the previous two sections that (1) establishing a retaliation claim under Title IX requires both the intent to retaliate and some causal relationship between that intent and one's actions and (2) that people with social power and privilege are likely to have developed areas of active ignorance, particularly with respect to oppressive relationships. In this section, I will bring the latter to bear on the former, arguing that systematic active ignorance makes such individualized analyses of intent and causation in retaliation cases deeply misguided. Most people who retaliate against others for exercising their rights under Title IX will not have any intent to do so—that is, they (and others) will be unable to see themselves as having such an intent—because they have cultivated a zone of active ignorance around the very areas of knowledge that would allow them to see their actions *as* retaliatory (and courts are in an even worse position to assess their intentions). They are instead likely to see themselves as preserving order, helping the downtrodden, exposing injustice, or standing up for themselves. I want to suggest that these beliefs are genuine and deeply-held, but that this simply does not bear on whether their actions are retaliatory. Whereas retaliation has been thought to be fundamentally about intent, I argue that it is fundamentally about impact.

One way to think about how ideology guides our understanding of retaliation is to reveal the distance between the imagined and actual retaliator and between the influence of the individual and structural views. Prohibitions on retaliation are generally very vague, presumably to be flexible and allow the determination to fit the facts. The OCR resolution letter for Harvard Law School, for example, says only that “[p]rohibited retaliatory acts include intimidation, threats, coercion, or discrimination against [a covered individual].”<sup>110</sup> This, of course, leaves everything to be decided. What

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<sup>110</sup> Letter from Joel J. Berner, Regional Dir., Region 1, Office for Civil Rights, U.S. Dep't of Educ., to Martha C. Minow, Dean, Harvard Law School 5 (Dec. 30, 2014), <http://www2.ed.gov/documents/press-releases/harvard-law-letter.pdf> [<https://perma.cc/5UBY-BKLY>].

seems like coercion or discrimination to one may seem like reasonable response to another. And often, because people do not tend to act in ways they cannot ultimately rationalize for themselves, this divide will reflect that a person accused of retaliation thinks they have acted reasonably, while the person who feels they have been the target of retaliation feels discriminated against or coerced. It is no shocking fact that two (or more) people involved in an interaction can interpret the same event differently—this is the stuff of human relationships.

When we think of retaliation, however, the paradigmatic case seems to be an angry, conniving person who is upset that someone has complained about the violation of her rights<sup>111</sup> or a shrewd institution trying to squash the complaints of perceived trouble-makers. No doubt that both of these scenarios play out. In *Jackson v. Birmingham Board of Education*, for example, the plaintiff was the coach of the girls' basketball team.<sup>112</sup> Jackson complained about the unequal funding, equipment, and facilities provided to the team vis-à-vis the boys' team.<sup>113</sup> After complaining about the inequality with no response, he began getting poor work evaluations and was removed as the team's coach, though he remained a teacher.<sup>114</sup> The facts of *Jackson* fit into the latter paradigm of retaliation: the shrewd institution. The experience of Erica Kinsman, who accused then-Florida State University quarterback Jameis Winston of assaulting her, fits the angry individual paradigm. Following her report, she was called "slut" and "whore" by other students, and the police officer to whom she reported the alleged assault told her to "think long and hard" about whether she wanted to proceed in accusing Winston.<sup>115</sup> The problem with our paradigms is not a disagreement about the type of conduct that can constitute retaliation, but rather that the paradigm imposes a causation requirement that is based on the assumption that our actions are *caused* by our having some fairly clear and accessible *intention* to cause them. It is the anger or shrewdness that does the work in these visions of retaliation, rather than the adverse action.

Instead, our paradigm of retaliation should be able to make sense of the deep opacity people confront with respect to their own motivations. To understand how retaliation works is to understand sexism, racism, and oppression for the structures they are—structures that *structure us* and our actions.

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<sup>111</sup> See, e.g., Tyler Kingkade, *Why Don't Sexual Assault Victims Report? Ask These College Women*, BUZZFEED (Nov. 5, 2016), <https://www.buzzfeed.com/tylerkingkade/retaliation-reporting-sexual-assault> [https://perma.cc/RF88-VYDN] (reporting on stories of women who face retaliation from individuals after they report assaults).

<sup>112</sup> See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005).

<sup>113</sup> See *id.*

<sup>114</sup> See *id.* at 171–72.

<sup>115</sup> Marissa Payne, *Erica Kinsman, Who Accused Jameis Winston of Rape, Tells Her Story in New Documentary 'The Hunting Ground'*, WASHINGTON POST (Feb. 19, 2015), <https://www.washingtonpost.com/news/early-lead/wp/2015/02/19/erica-kinsman-who-accused-jameis-winston-of-rape-tells-her-story-in-new-documentary-the-hunting-ground> [https://perma.cc/4MKL-T6GN].

MacKinnon argues that the absence of an intent requirement in judge-made sexual harassment law has been one of its chief benefits for this very reason.

A requirement of proof of intent or bad motive—rooted in ancient superstitions concerning the animism of inanimate objects that underlie tort law—continues to plague constitutional and statutory equality alike, despite its irrelevance to the injury inequality does and to the dynamics of its infliction by often incompletely self-conscious human actors. As developed case by case, sexual harassment law has been essentially indifferent to intent requirements as they are known elsewhere in equality law, possibly because asking whether a perpetrator meant to discriminate against a woman or only meant to impose sex on her at work looks as beside the point of her inequality injury as it is. Partly as a result of this practical vitiation of “motive,” burden of proof in sexual harassment cases is less tortured and torturing to plaintiffs than rote application of disparate treatment standards would be.<sup>116</sup>

Part of MacKinnon’s insight in this passage is the recognition that discrimination often does not depend on motive, but rather on the impact of our actions. In other words, discrimination is an area where strict liability makes sense because discrimination is a quintessentially social, rather than individual, act. It is the participation in a social script with harmful consequences—both directly and because it discourages reporting—for a member or members of a socially-disfavored group. Discrimination has a social meaning that is not reducible to any particular actor’s internal motivations. What makes class-based discrimination *discrimination* is that it relies on social scripts for its unique force.

One way to approach the gulf between competing interpretations of ostensibly retaliatory behavior is to take seriously these scripts. Kristie Dotson has developed a theory of “contributory injustice” on which a person participates in a kind of epistemic injustice by actively refusing to draw on counter-hegemonic hermeneutical resources even when they are available.<sup>117</sup> By hermeneutical resources I mean narratives, social scripts, stereotypes, facts, arguments, etc.—the sort of stuff that makes up conceptual frameworks. What makes something a counter-hegemonic hermeneutical resource is its being in opposition to the dominant set of hermeneutical resources. For example, there was a time where the dominant hermeneutical resources were designed with the assumption that the Earth was flat. The science that challenged these resources could fairly be called a set of counter-hegemonic hermeneutical resources. Yet today the dominant set of resources holds that the Earth is round-ish. Thus, hermeneutical resources

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<sup>116</sup> CATHARINE MACKINNON, *WOMEN’S LIVES, MEN’S LAWS* 173–74 (2005).

<sup>117</sup> See Kristie Dotson, *A Cautionary Tale: On Limiting Epistemic Oppression*, 33 *FRONTIERS* 24, 31–32 (2012).

can change over time, and they gain and lose influence. Simply because a set of resources is dominant does not mean it is incorrect, and not all counter-hegemonic hermeneutical resources are liberatory, even if they run counter to an oppressive set of dominant resources. For example, the hermeneutical resources of suffragettes in the United States who also held racist beliefs were plausibly counter-hegemonic with respect to some aspects of gendered oppression, while failing to challenge the dominant racist hermeneutical resources of the time.

One method of refusing to draw on counter-hegemonic hermeneutical resources is by having (and having developed) a set of social scripts that is shaped by one's social position through active ignorance. To bring this point back to Medina's example of the Vanderbilt pig incident, the fraternity brother who dropped the pig in front of the Jewish center and vegetarian café was participating in a certain kind of social script at the expense of others in a way that implicates him in a contributory injustice. His sincerely pleaded ignorance of the social significance of his act reveals a sustained failure to engage with other social scripts. That is, his personal failure to engage, but also the community's failure to encourage engagement, with the kind of knowledge of the Jewish community that would have made his ignorance impossible.<sup>118</sup> Medina says that even if the act was meant as a joke, made in ignorance, it is also "a *political* action, for it takes place in social spaces traveled by many and can affect entire groups, as in fact it did."<sup>119</sup>

Drawing on the discussion of active ignorance above, we can now make sense of unintentional retaliation, like that of the professor who felt compelled to investigate the student's claim of assault. We can also make sense of other subpar—though not retaliatory—reactions, like that of Professor Tooley, which arise out of a failure to engage with the experiences of others. The unwitting retaliator's actions arise out of both not needing to know and needing not to know how their behavior will affect the person retaliated against, as well as others, like those who may be deterred from reporting violations in the future for fear of similar treatment. They opt for the hegemonic social scripts that come most naturally to them,<sup>120</sup> encouraged by the legal view on the matter, instead of investigating and taking seriously the perspective of others, who have lived intimately within other narratives.

Law has often been about creating agreement out of disagreement and dispute—the imposition of simple order out of chaos and complexity. However, this kind of order is not always desirable because it smooths over the messy reality.

Agreement and disagreement are not always the only choices available when differences are encountered. When significantly different perspectives come into contact, their interaction may not

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<sup>118</sup> See MEDINA, *supra* note 66, at 137–40.

<sup>119</sup> *Id.* at 138.

<sup>120</sup> This clause is not meant to be normative.

necessarily aim at agreement or disagreement; their coexistence could be regulated by something different and perhaps deeper: *being accountable and responsive to another*, and developing the kind of mutual understanding that makes that responsiveness possible.<sup>121</sup>

The current approaches to intent and causation, which rely on such a simplistic order, are failing both victims of campus harassment and assault and those around them, from friends and family to faculty and staff, who are often left confused about how best to respond. The law can incentivize accountability in a way that makes this sort of mutual understanding possible.

The apparent incompatibility of the retaliator's and victim's interpretations of the events may evaporate when we end the search for a simplistic understanding of intent and causation and instead ask how we can understand each other. This is not to impose a neutral obligation on both parties to do this work. Rather, the retaliator's interpretation, being the dominant one, is likely well understood by both already.<sup>122</sup> Instead, accountability and understanding must begin with those of us who are faced with the uncomfortable news that someone in our community feels as though they have been harassed or assaulted. The work to build a community that encourages accountability to one another cannot be *imposed* by any legal regime; it has to be won out of mutual trust and hard work.

## V. TOWARD A STRUCTURAL ANALYSIS OF RETALIATION: TWO TIERS OF LIABILITY

In this section, I propose two tiers of liability for retaliation under Title IX: (1) strict liability for institutions when retaliation occurs, and (2) a flexible approach to determining the correct way to deal with individual retaliators, which aims at responsive, accountable community-building.

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<sup>121</sup> MEDINA, *supra* note 66, at 276 (emphasis added).

<sup>122</sup> This is evidenced by, among other things, the very low reporting rates of harassment, assault, and retaliation on campuses. *Cf.* CHRISTOPHER KREBS, ET AL., DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CAMPUS CLIMATE SURVEY VALIDATION STUDY FINAL TECHNICAL REPORT, 107 (2016), [http://www.nccpsafety.org/assets/files/library/Campus\\_Climate\\_Survey\\_Validation\\_Study.pdf](http://www.nccpsafety.org/assets/files/library/Campus_Climate_Survey_Validation_Study.pdf) [<https://perma.cc/9Q9Q-59P9>] ("About 2.7% of sexual battery incidents and 7.0% of rape incidents were reported by the victim to any school official."). The social risks of reporting are high for anyone in part because there is a very real risk of being misunderstood, misinterpreted, and retaliated against. *Cf.* Rosenfeld, *supra* note 32, at 362 ("[S]tudents know how well their schools respond to allegations of sexual assault, and this knowledge will affect their willingness to report either witnessing or experiencing such behavior. Students are particularly attuned to threats of retaliation by peers, and need to know that the school is obligated to protect them.").

### A. *Strict Liability for Institutions*

As a small point to begin this discussion, recall that the law is always distributing benefits and burdens. When a person is harmed by harassment or retaliation, they have suffered a loss that will go uncompensated in the absence of some assessment of liability. Even where the party who causes harm does so unintentionally, we may impose liability on the theory that the victim ought not have to bear that burden. Hence, we have strict liability for some legal injuries.

With respect to compensation and accommodations for victims, intent and causation are largely irrelevant. What matters is that an injury has occurred, and the burdens should not be borne entirely by the victim. Medina notes that in a case like the one with the fraternity brother and the pig's head, social harm is entirely independent of intent.

[I]f the vulnerabilities of a group have been violated and an injury has been inflicted, a social wound has been opened whatever the executing hand happens to know or ignore. There is an important truth here: in the incident we are examining, the phenomenon of social harm did occur and was experienced as such; and, therefore, there was the unquestionable duty to acknowledge and respond to the harm and to try to prevent future incidents of this kind. A lack of response to this incident could have been construed to express a lack of concern for the vulnerabilities of the group that felt insulted, as well as an inadmissible tolerance and complicity with acts of that kind—signaling to the community that such acts can happen with impunity.<sup>123</sup>

Particularly in cases that involve severe behavior on the part of an unwitting retaliator, where insult is piled on to existing injury in such a complete way, the victim should have access to some recourse. That recourse does not need to be direct punishment of the retaliator. Indeed, many victims may not wish to see the retaliator punished.<sup>124</sup> They may simply want (1) some accommodations to help them manage the stress of the situation; (2) help with their educational situation, which is often compromised in these cases; (3) compensation in those cases where serious damage has occurred; and (4) perhaps most of all, for the retaliator to understand what they have done in the hope that they will not do it to someone else.

<sup>123</sup> MEDINA, *supra* note 66, at 137.

<sup>124</sup> For example, of people reporting sexual assaults to police between 2005–2010, only 17% claimed they did so to “catch/punish/prevent offender from reoffending,” and 7% of those who did *not* report an assault did so because they did not want to get the offender in trouble. MICHAEL PLANTY, ET AL., DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994–2010, 7 (2013), <https://www.bjs.gov/content/pub/pdf/fvsv9410.pdf> [<https://perma.cc/KN8H-RDMM>].

Educational institutions can provide (1)-(3), and they should do so already under Title IX, though they often fall short.<sup>125</sup> Practically speaking, there are barriers to getting schools to provide accommodations,<sup>126</sup> and the only way they will provide compensation is if they are sued and either settle or lose the suit.<sup>127</sup> Many people with meritorious claims may not wish to subject themselves to the emotional, physical, and monetary risks involved in filing such a claim. But the intent/causation standard is another barrier. Currently, the plaintiff in a retaliation claim has to show not only that she suffered an injury, but that the thing that caused the injury was done intentionally.<sup>128</sup> Not only does doing so have the problems I have already noted with respect to making sense of retaliation, it does not fit with the language and purpose of Title IX. Title IX, at its core, is meant to protect people from “be[ing] excluded from participation in, be[ing] denied the benefits of, or be[ing] subjected to discrimination” in education on the basis of sex.<sup>129</sup> Retaliation, whether it is done on purpose or simply out of ignorance, ends up excluding people from participating in educational activities. Imposing strict liability on educational institutions should theoretically encourage them to be more proactive in preventing retaliation and quicker to provide accommodations when asked, while also lowering the bar to suing to enforce when they fail.

But even with ideal actions by the educational institution, those who have been retaliated against may still want something the institution cannot always provide for them, which is to hold the individual retaliator to account in a way that makes them understand why their actions were harmful.

### B. *Flexible Accountability for Individuals*

For many, particularly for those with social power and privilege who are used to being taken at their word, the idea that they could retaliate against another person without meaning to do so may seem deeply absurd.

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<sup>125</sup> See generally, e.g., Letter from Timothy C.J. Blanchard, Dir., N.Y. Office, Office for Civil Rights, U.S. Dep’t of Educ., to Christopher L. Eisgruber, President, Princeton Univ. (Nov. 5, 2014), <https://www2.ed.gov/documents/press-releases/princeton-letter.pdf> [<https://perma.cc/2M5F-ZDR8>] (resolution letter for Title IX investigation of Princeton University); Letter from Meena Morey Chandra, Dir., Region XV, Office for Civil Rights, U.S. Dep’t of Educ., to Kristine Zayko, Deputy Gen. Counsel, Mich. State Univ. (Sept. 1, 2015), <https://www2.ed.gov/documents/press-releases/michigan-state-letter.pdf> [<https://perma.cc/Z4J3-WLFG>] (resolution letter for Title IX investigation of Michigan State University).

<sup>126</sup> Failing to provide accommodations is itself retaliation by the school. See *Dealing with School Retaliation*, KNOW YOUR IX, <http://knowyourix.org/dealing-with/dealing-with-school-retaliation/> [<https://perma.cc/WDQ3-VDG6>].

<sup>127</sup> Title IX does not require compensation for victims, but courts may impose damages arising out of individual violations. See *How to Pursue a Title IX Lawsuit*, KNOW YOUR IX, <http://knowyourix.org/title-ix/how-to-pursue-a-title-ix-lawsuit/> [<https://perma.cc/H3RG-88LP>].

<sup>128</sup> See Part II, *supra*.

<sup>129</sup> 20 U.S.C. § 1681(a) (2012).

Or, if it is not absurd, it is at least troubling in the following way: retaliation, as a type of discrimination, is a serious moral charge and, in many cases, may carry serious material implications. It could result in termination from a job or reduction in pay, even for a tenured professor.<sup>130</sup> But particularly where a person genuinely had motives other than retaliation—indeed, where they had otherwise “good” motives—how could it be fair to hold them responsible for the outcome they neither intended nor, apparently, foresaw? I am somewhat sympathetic to this view. I think people with good intentions can always do better if they are given the opportunity and the necessary support.

Blame, arising out of the traditional understandings of intent and causation, may be more relevant in deciding how to deal with a retaliator on an individual level than it is at the institutional level. It is the somewhat dicey, but understandable, contention of the law that punishment can deter only intentional behavior.<sup>131</sup> In the case of ignorant retaliation, that sort of punishment may be inapposite and counter-productive.

However, other sorts of incentives, whether punishment or something else, may be appropriate as ways of nudging individual behavior. What is desperately needed is genuine engagement, which could be encouraged by mandatory training programs that expose people to counter-hegemonic narratives and provide them with tools for responding to claims of misconduct in non-retaliatory ways. This education might also come from other places in the educational community: professors, students, friends, and colleagues. Restorative justice or alternative dispute resolution may also be promising ways of trying to get retaliators to understand the impact of their actions.<sup>132</sup> However, mediation is currently disfavored as a way of dealing with Title IX violations.<sup>133</sup>

As discussed above, this sort of two-tiered system is already the basic scheme of Title IX, which imposes liability on the school for failing to pro-

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<sup>130</sup> See, e.g., Adam Grosbard, *Baylor Sexual Assault Scandal Timeline: From Football Convictions to Title IX Investigation*, SPORTSDAY (Oct. 28, 2016), <http://sportsday.dallasnews.com/college-sports/baylorbears/2016/10/20/baylor-sexual-assault-scandal-timeline-football-convictions-title-ix-investigation> [<https://perma.cc/3F7E-ZHDM>] (laying out the timeline in the Baylor Football case, showing that longtime coach Art Briles was fired and Ken Starr stripped of his title as President in the wake of the investigation).

<sup>131</sup> See generally, e.g., Kevin Saunders, *Voluntary Acts and the Criminal Law: Justifying Culpability Based on the Existence of Volition*, 49 U. PITT. L. REV. 443 (1988) (discussing the role of volition in criminal law generally).

<sup>132</sup> See generally Patricia L. Brown, *Opening Up, Students Transform a Vicious Circle*, N.Y. TIMES (April 3, 2013), <http://www.nytimes.com/2013/04/04/education/restorative-justice-programs-take-root-in-schools.html> [<https://perma.cc/QXB5-LMA5>] (describing school-based restorative justice programs).

<sup>133</sup> See, e.g., Russlynn Ali, Office for Civil Rights, U.S. Dep’t of Educ., Dear Colleague Letter: Sexual Violence 9 (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/6AGQ-63WX>]; Brian Sokolow, *Mediation and Title IX*, NAT’L CTR. FOR HIGHER EDUC. RISK MGMT., [https://www.nchem.org/pdfs/MEDIATION\\_AND\\_TITLE\\_IX.pdf](https://www.nchem.org/pdfs/MEDIATION_AND_TITLE_IX.pdf) [<https://perma.cc/JPA8-BWYZ>].

tect students, not directly on individuals.<sup>134</sup> Thus, accommodations and compensation come from the institution, obviously, not the retaliator.<sup>135</sup> The retaliator, in turn, may be punished by the institution as they see fit in light of their obligations under Title IX and other legal and non-legal regimes. There is currently little incentive to build an accountable community on campus. Instead, the incentives all appear to be toward either pushing problems under the rug<sup>136</sup> or taking extreme measures to make an example out of certain violations.<sup>137</sup> While educational institutions should be empowered to discipline where appropriate, they should also embrace their special role as a community for students, staff, and faculty. In turn, the community should take it upon itself to nurture the kinds of counter-hegemonic hermeneutical resources that may help retaliators (1) understand their actions as informed by active ignorance, and (2) correct that active ignorance.

The danger of the reasoning in cases like *Nassar* is that it collapses the individual and structural questions of intent into a single question of liability, which leaves the structural elements of retaliation at both the institutional and individual levels largely unexplored. The law must maintain, and in some cases return to, a focus on the structural aspects of retaliation. It is entirely possible, even likely, that significant portions of what victims of assault and harassment experience following reporting is experienced as retaliatory. Far from being an illusory experience, it probably *is* retaliatory, but to see it as retaliatory, we must abandon the singular focus on individual, simplistic ideas of causation and intent that currently dominate the legal landscape.

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<sup>134</sup> The ultimate punishment for a violation of Title IX is removal of federal funding to the institution. See *supra* note 12.

<sup>135</sup> See, e.g., *Protections for Students Experiencing Financial Harm as a Result of Gender-Based Violence*, KNOW YOUR IX, <http://knowyourix.org/violence-costs/> [<https://perma.cc/U2FQ-53GY>].

<sup>136</sup> Cf. *Woman Who Led Baylor Sex Assault Investigation Speaks Out After Resigning*, CBS NEWS (Oct. 5, 2016), <http://www.cbsnews.com/news/baylor-university-sexual-assault-scandal-title-ix-coordinator-patty-crawford-resigns/> [<https://perma.cc/RW67-MJXN>] (quoting a former Complainant, who stated “I think it’s even more tragic that the university has been aware of all of these instances and had the opportunity to do the right thing and yet, they choose time and time again to do the wrong thing”).

<sup>137</sup> There is, at least, a theory advanced by some that the ‘pendulum’ has now swung too far in the adjudication of sexual misconduct on campus, and that schools are now punishing some alleged violators to look tough on Title IX issues. See, e.g., Jake New, *Out of Balance*, INSIDE HIGHER ED (April 14, 2016), <https://www.insidehighered.com/news/2016/04/14/several-students-win-recent-lawsuits-against-colleges-punished-them-sexual-assault> [<https://perma.cc/NK3Z-DKV9>]; Jake New, *A Title IX Win for Accused Students*, INSIDE HIGHER ED (Apr. 14, 2016), <https://www.insidehighered.com/news/2016/10/13/us-says-wesley-college-violated-rights-students-punished-over-sexual-misconduct> [<https://perma.cc/663U-PDDM>].

## VI. CONCLUSION

In a case like the one at CU Boulder, it is hard to say whether there is an ideal outcome. The ideal is always that violations never occur in the first place. In the unjust meantime, we must fashion remedial schemes to deal with violations in ways that justify trust on the part of victims when they come forward. Thus, while moving to fire the professor may or may not have been the appropriate move on the part of the university, the law must have a way to understand the professor's behavior as retaliatory regardless. Indeed, failing to lay this sort of blame at the feet of the unwitting retaliator does them a disservice because it encourages the development of active ignorance. Blame alone, however, may not help. Active ignorance is still *ignorance*, which requires learning to overcome.

