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A SYSTEMATIC LOOK AT A SERIAL PROBLEM: SEXUAL HARASSMENT OF STUDENTS BY UNIVERSITY FACULTY

Nancy Chi Cantalupo* and William C. Kidder**

Abstract

One in ten female graduate students at major research universities report being sexually harassed by a faculty member. Many universities face intense media scrutiny regarding faculty sexual harassment, and whether women are being harassed out of academic careers in scientific disciplines is currently a subject of significant public debate. However, to date, scholarship in this area is significantly constrained. Surveys cannot entirely mesh with the legal/policy definition of sexual harassment. Policymakers want to know about serial (repeat) sexual harassers, where answers provided by student surveys are least satisfactory. Strict confidentiality restrictions block most campus sexual harassment cases from public view.

Taking advantage of recent advances in data availability, this Article represents the most comprehensive effort to inventory and analyze actual faculty sexual harassment cases. This review includes over 300 cases obtained from: (1) media reports; (2) federal civil rights investigations by

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** © 2018 William C. Kidder. Interim Associate Vice President and Title IX Director, Sonoma State University; Research Associate, The Civil Rights Project (UCLA); B.A. and J.D, University of California, Berkeley. The views expressed in this Article reflect my scholarly research conclusions and are not intended to represent the official positions of the administrations of either Sonoma State/CSU or my prior employer, the University of California. For purposes of full disclosure, as a UC Riverside administrator, I was involved in a number of faculty discipline cases over the years, including cases ultimately resulting in termination, and for reasons of privacy and decorum I do not discuss those cases in this Article.

the U.S. Departments of Education and Justice; (3) lawsuits by students alleging sexual harassment; and (4) lawsuits by tenure-track faculty fired for sexual harassment. It also situates this review within the available and most relevant social science literature on sexual harassment and violence in education and the workplace, as well as on methodological limitations of litigated case data, which tend to contain a higher concentration of high-severity cases compared to a random sample.

Two key findings emerged from the data. First, contrary to popular assumptions, faculty sexual harassers are not engaged primarily in verbal behavior. Rather, most of the cases reviewed for this study (53%) involved faculty alleged to have engaged in unwelcome physical contact dominated by groping, sexual assault, and domestic abuse-like behaviors. Second, more than half (53%) of cases involved professors allegedly engaged in serial sexual harassment. Thus, this study adds to our understanding of sexual harassment in the university setting and informs a number of related policy and legal questions including academic freedom, prevention, sanctions, and the so-called “pass-the-harasser” phenomenon of serial sexual harassers relocating to new university positions.

I. INTRODUCTION AND CONCEPTUAL FRAMEWORK

The town could be Durham, Baltimore, Greensboro, or Chapel Hill. The very worst part of this story is that it really could be any one of those towns: I have a similar story from all of them. . . .

Each time it happened, I had the same terrible feeling when I realized I’d been duped. I had the same terrible feeling when I realized that my professors believed I only had one thing to contribute to the intellectual life of my community, and it had little to do with the intellectual life of my community.

Katie Rose Guest Pryal¹

A. *The Scope and Dynamics of Serial Sexual Harassment*

The issue of serial sexual harassment has troubled both legal scholars and policymakers for some time, including concern about the extent to which serial sexual harassers exist in the workplace and what should be done to prevent and to remedy the effects of such repeat victimization.² The higher education sector, in

¹ Katie Rose Guest Pryal, *The Consequences of Resisting a Professor’s Advances*, THE TOAST (Mar. 23, 2016), <http://the-toast.net/2016/03/23/the-consequences-of-resisting-a-professors-advances/> [https://perma.cc/9BVT-T6SB].

² See generally Ian Ayres & Cait Unkovic, *Information Escrows*, 111 MICH. L. REV. 145, 146–96 (2012); Kerri Lynn Stone, *License to Harass: Holding Defendants Accountable*

which faculty are for good reasons entrusted with substantial authority and autonomy in their work with students, can hardly be excluded from these concerns about sexual harassment—including general alarm about the potential for repeat faculty harassers and specific concern about “pass-the-harasser” scenarios where harassers evade accountability and get hired at another college or university where sexual harassment is repeated.³ Indeed, these issues have been at the center of a recent federal legislative proposal.⁴

Well-informed and evidence-based discussion of this harassment is hindered, however, by the relative lack of recent, comprehensive research regarding the extent and dynamics of the problem. Accordingly, in this Article we seek to systematically inventory and analyze available legal cases, civil rights investigations and media reports related to college and university faculty sexual harassment, particularly where the victims of the harassment were graduate students. This study represents the most exhaustive collection and analysis of faculty sexual harassment cases, investigations, and reports in the American law journal literature to date, and our hope is that it will inspire others to undertake additional research on this persistent and increasingly urgent problem.⁵

for *Retaining Recidivist Harassers*, 41 AKRON L. REV. 1059, 1074–75 (2008); Martha S. West, *Preventing Sexual Harassment: The Federal Courts’ Wake-Up Call for Women*, 68 BROOK. L. REV. 457, 505 (2002).

³ STEVEN G. POSKANZER, HIGHER EDUCATION LAW—THE FACULTY 225 (2002); Courtney Leatherman, *Some Colleges Hush Up Charges to Get Rid of Problem Professors*, CHRON. HIGHER EDUC. (Dec. 6, 1996), <https://www.chronicle.com/article/Some-Colleges-Hush-Up-Charges/76254> [<https://perma.cc/74AS-L3AR>]; Tyler Kingkade, *Why It’s Harder for Grad Students to Report Sexual Harassment*, HUFFINGTON POST (July 6, 2016, 6:31 PM), http://www.huffingtonpost.com/entry/grad-students-sexual-harassment_us_57714bc6e4b0dbb1bbbb37c7 [<https://perma.cc/3HFH-3DFP>].

⁴ In 2016 California Congresswoman Jackie Speier introduced the proposed Federal Funding Accountability for Sexual Harassers Act, which “would require colleges and universities to report all substantiated findings of sexual assault and harassment by professors to every federal agency that has awarded the institution competitive research.” U.S. Congressional Record—House, Jan. 12, 2016, at H288, <https://www.congress.gov/crec/2016/01/12/CREC-2016-01-12-pt1-PgH286.pdf> [<https://perma.cc/XBQ8-66JU>]; *Congresswoman Jackie Speier Introduces Bill to Stop Rampant Sexual Abuse, Harassment in STEM Research*, CONGRESSWOMAN JACKIE SPEIER (Sept. 21, 2016), <https://speier.house.gov/media-center/press-releases/congresswoman-jackie-speier-introduces-bill-stop-rampant-sexual-abuse> [<https://perma.cc/54RK-CR6E>].

⁵ Compare with the cases reviewed in: WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION 1110–29 (5th ed. 2013); Walter B. Connolly, Jr. & Alison B. Marshall, *Sexual Harassment of University or College Students by Faculty Members*, 15 J.C. & U.L. 381 (1989); John D. Copeland & John W. Murry, Jr., *Getting Tossed from the Ivory Tower: The Legal Implications of Evaluating Faculty Performance*, 61 MO. L. REV. 233 (1996); Donna R. Euben & Barbara A. Lee, *Faculty Discipline: Legal and Policy Issues in Dealing with Faculty Misconduct*, 32 J.C. & U.L. 241 (2006); Anne Lawton, *The Emperor’s New Clothes: How the Academy Deals with Sexual Harassment*, 11 YALE J.L. & FEMINISM

Returning to Dr. Pryal's account, she concludes about one of her own stories, in which she rejected a professor's advances: "I'm lucky. I managed to get help from outside of the department and graduate without anyone standing in my way. The professor quickly moved on from me to start sleeping with a former undergraduate. Last I checked, he still had tenure. . . ."⁶ Our research presented in this Article confirms that Dr. Pryal's experience was both common in several respects and relatively uncommon in one "lucky" aspect, although that adjective is only accurate when her experience is compared—as she herself does—to that of other students who report being harassed by their professors. These commonalities are shared with many other accounts of faculty harassing students from many different sources, including the social science literature, reports of individual allegations of harassment in the press, and three types of legal action commonly resulting from such sexual harassment allegations. These legal actions include: (1) private lawsuits brought by victims under Title IX of the Educational Amendments of 1972 ("Title IX"); (2) Title IX investigations by the Office for Civil Rights ("OCR") in the U.S. Department of Education and/or the Civil Rights Division of the U.S. Department of Justice ("DOJ"); and (3) lawsuits brought by faculty challenging termination, under a variety of laws, by their institutions for sexually harassing students. These sources confirm that reports of faculty harassment of students are more widespread than many may appreciate and—perhaps most importantly—a disturbingly high proportion of those reports indicate evidence of higher severity sexual harassment that includes unwelcome *physical* contact and/or a *pattern* of serial sexual harassment of multiple victims by the same faculty member.

The first commonality that Dr. Pryal's story shares with other accounts of faculty sexual harassment collected here is that she was a graduate student when the sexual harassment allegations about which she writes occurred. Studies that have measured graduate students' experiences indicate that graduate students may be particularly vulnerable to faculty sexual harassment. As discussed more below, the largest survey of its kind recently found that one in ten female graduate students at elite U.S. universities reports being sexually harassed by a faculty member,⁷ and other smaller studies over several decades have reported even higher numbers. According to the aforementioned recent study, women graduate students are harassed by faculty about three times as much as women undergraduates (the only comparative data regarding faculty harassment of different groups of students provided by the study's report)⁸ while female undergraduates encounter greater peer sexual harassment from other college students. While it is impossible to confirm the percentage of graduate versus undergraduate students involved in litigation or

75 (1999); Kimberly A. Mango, *Students Versus Professors: Combating Sexual Harassment Under Title IX of the Education Amendments of 1972*, 23 CONN. L. REV. 355 (1991).

⁶ Pryal, *supra* note 1.

⁷ DAVID CANTOR ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 29 (Oct. 2017) [hereinafter CANTOR ET AL., AAU SURVEY] <https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf> [<https://perma.cc/X7ZV-DY28>].

⁸ *Id.* at 31.

administrative investigations, due to variations in how courts or OCR/DOJ resolution letters describe facts, information gathered from our other data sets is consistent with the social science findings.

Second, Dr. Pryal was targeted by a reported serial harasser—a single faculty harasser who is accused of targeting many victims, including students, junior faculty, and staff. All of the sources collected herein show high rates of multiple individuals accusing the same faculty member of harassment. Because the social science survey literature has a different focus on reports by individual students rather than longitudinal tracking of an individual faculty member's behavior toward many victims over time, the social science surveys are not really adept at capturing the phenomenon of serial harassment. In that respect, our systematic study of legal cases, OCR and DOJ civil rights investigations and media reports addresses a gap in the existing academic literature.⁹

Third, her professor's conduct caused negative and discriminatory effects on Dr. Pryal's education and health, including from rumors that she was a "seducer of professors" and a "slut" despite her *rejection* of the professor's advances, from her fear and anxiety over what the professor might do to prevent her from graduating and/or securing positive references for jobs or other academic appointments, and from the expenses she no doubt incurred in ultimately retaining a lawyer.¹⁰ As detailed mainly by the social science research, these discriminatory impacts are likewise quite common and to the extent that Dr. Pryal's experience is not similar, this is only because studies suggest that many victims of sexual harassment experience much more negative effects.

The one point on which Dr. Pryal's account is relatively *uncommon*, based on our review of these multiple sources, is in the *severity* of the harassment she reports experiencing. By her account, her professor never made physical contact with her,¹¹ and that makes her case quite unusual among the cases collected here. In fact, a majority of the cases that are public in some way (because they have been reported in the press, investigated by OCR or DOJ, or filed in court) allege physical contact rather than purely verbal conduct. These sources show that most faculty whose reported conduct meets the definition for sexual harassment in our data sets are accused of not only initiating physical contact with the student(s) they are reportedly harassing, but that the physical contact alleged tends to be more "severe"—to use the terminology of sexual harassment law, ranging from sexual groping to potentially criminal sexual assault and domestic abuse-like conduct. In fact, several of the features of high "intensity" harassment that studies show generate stronger

⁹ See *infra* Conclusion in Section VI.

¹⁰ Pryal, *supra* note 1. Note that Dr. Pryal's discussion suggests that her lawyer was not working on a contingency fee basis.

¹¹ It does seem clear from the account that his intention was to escalate to physical contact, and he was thwarted when his wife interrupted a private conversation and made Pryal aware of the professor's real agenda for what she thought was a collegial mentor relationship. *Id.*

emotional reactions among victims—perpetrators who possess power, physical contact rather than only verbal behavior, and behavior that prompts an experience of fear rather than annoyance¹²—are characteristic of the behavioral profile and institutional power dynamics documented in the present study of faculty who have been reported as sexually harassing their students.

In sum, the picture that is drawn by bringing all of these sources together suggests that actual accounts and complaints of faculty sexually harassing students may be very different from what we now believe is most accurately described as a stereotype of faculty harassment. This stereotype is evidenced by general perceptions of workplace sexual harassment as consisting mainly of verbal or visual harassment.¹³ In addition, the focus in academia on the potential harm that sexual harassment accusations could do to faculty's academic freedom and speech rights assumes (expressly or tacitly) solely verbal acts, because once physical contact has occurred, the faculty member has engaged in conduct, not speech.¹⁴ This stereotype is so strong in the academy that it can turn attention to physical conduct into discussions about speech.

For instance, in an essay objecting to “sexual paranoia” on college campuses, one professor objected to policies that she said encouraged students “to regard themselves as such exquisitely sensitive creatures that an errant classroom remark could impede their education.”¹⁵ Despite the concern such a comment expresses about how such policies could quell speech, the central case that the essay uses to exemplify the author's objections to sexual harassment prohibitions involves two complaints made by two students (one undergraduate and one graduate student)

¹² Caroline Vaile Wright & Louise F. Fitzgerald, *Angry and Afraid: Women's Appraisal of Sexual Harassment During Litigation*, 31 PSYCHOL. WOMEN Q. 73, 75 (2007) [hereinafter Wright & Fitzgerald, *Angry and Afraid*] (citing research by Fitzgerald et al. and Salisbury & Sebek).

¹³ See, e.g., LESLIE PICKERING FRANCIS, SEXUAL HARASSMENT AS AN ETHICAL ISSUE IN ACADEMIC LIFE 114 (2001) (describing as typical hypothetical scenarios: “If you are a faculty member, imagine that you have just been accused of sexual harassment. A student in one of your classes has gone to your university's antidiscrimination officer, complaining that you ogled her—or him—in class, flattered her—or him—excessively, took her—or him—to coffee, called her—or him—up for a date, and reacted extremely offensively to the refusal.”).

¹⁴ For example, in *Trejo v. Shoben*, discussed in detail in Section III, the Seventh Circuit affirmed the district court's dismissal of the faculty member's free speech/academic freedom claims. 319 F.3d 878, 884–87 (7th Cir. 2003). Moreover, some kinds of egregiously harassing workplace speech can cross the line in a sexual harassment or racial harassment case. See, e.g., *Aguilar v. Avis Rent A Car Sys. Inc.*, 980 P.2d 846, (Cal. 1999); Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, to Honorable James Lankford, Chairman, Subcomm. on Regulatory Affairs and Fed. Mgmt. 1–4 (Feb. 17, 2016), <http://www.chronicle.com/items/biz/pdf/DEPT.%20of%20EDUCATION%20RESPONSE%20TO%20LANKFORD%20LETTER%202-17-16.pdf> [<https://perma.cc/R2RP-7V52>].

¹⁵ Laura Kipnis, *Sexual Paranoia Strikes Academe*, CHRON. HIGHER EDUC. (Feb. 27, 2015), <http://www.chronicle.com/article/Sexual-Paranoia-Strikes/190351> [<https://perma.cc/SP83-G8R3>].

against one professor based on physical conduct. Indeed, the only disagreement between the accused professor and the two students was whether the physical contact was welcomed or consented to by the students, not whether physical conduct occurred. The accused professor's defense to accusations that he groped one student and sexually assaulted the other while the students were incapacitated by alcohol was that he was dating one student and that he was either partying or on a date with the other when the sexual contact occurred. In addition, although the essay author later claimed that students filed a Title IX complaint against her for the ideas expressed in her essay regarding professors and students dating,¹⁶ the students who filed the complaint stated that they filed the complaint because of factual inaccuracies in the author's account of the central sexual groping/assault complaints.¹⁷

Another example is the recent American Association of University Professors ("AAUP") joint committee report on Title IX, which focuses on "critique of the failure to attend to free speech and academic freedom" and associated harms to shared governance that this AAUP committee attributes to Title IX policies and practices in U.S. higher education today.¹⁸ The AAUP report offers brief critiques of a number of cases, including the high-profile sexual harassment allegations involving (now retired) UC Berkeley physicist Geoffrey Marcy, in which multiple students and former students accused Marcy of physical harassment involving kissing and groping via the University of California's internal disciplinary procedures.¹⁹ The crux of the public debate about this case was the failure of the Berkeley administration to take decisive action to sanction Dr. Marcy,²⁰ particularly in light of the multiple complaints filed, with the administration citing to "lengthy

¹⁶ Laura Kipnis, *My Title IX Inquisition*, CHRON. HIGHER EDUC. (May 29, 2015), <http://www.chronicle.com/article/My-Title-IX-Inquisition/230489> [<https://perma.cc/XL2G-V2QX>].

¹⁷ Tyler Kingkade, *How Laura Kipnis' 'Sexual Paranoia' Essay Caused Frenzy at Northwestern University*, HUFFINGTON POST (May 31, 2015, 6:15 PM), http://www.huffingtonpost.com/2015/05/31/laura-kipnis-essay-northwestern-title-ix_n_7470046.html [<https://perma.cc/H5YS-BNVN>].

¹⁸ AM. ASS'N OF U. PROFESSORS, *The History, Uses, and Abuses of Title IX*, 2016 BULLETIN OF THE AAUP 69, 69–70 (2016), <https://www.aup.org/file/TitleIXreport.pdf> [<https://perma.cc/QQ49-UJQC>].

¹⁹ Azeen Ghorayshi, *Here's How Geoff Marcy's Sexual Harassment Went on for Decades*, BUZZFEED NEWS (Nov. 11, 2015, 7:01 PM), https://www.buzzfeed.com/azeenghorayshi/how-harassment-stays-secret?utm_term=.wsldrzkGkJ#.vnQ2mMo0og [<https://perma.cc/4YN3-JC2X>].

²⁰ The authors take up these issues around sanctions in a more detailed way in a companion article currently in development. Nancy Chi Cantalupo & William C. Kidder, Systematically Addressing a Serial Problem: How Universities Respond and Should Respond in Faculty Sexual Harasser Cases, *infra* note 40. (working title, unpublished manuscript) (on file with author).

and uncertain” faculty discipline procedures and a three-year rule as factors.²¹ The AAUP report reaches beyond these facts to claim that “established governance procedures were bypassed in the name of Title IX requirements” and that the University of California (“UC”) president’s call for a reassessment of faculty discipline procedures ought to “instead be *redirected* to protecting due-process rights” of faculty (i.e. creating greater safeguards to protect due process and free speech).²²

But a closer look at the three-year rule for disciplinary charges (modeled after a statute of limitations in legal contexts)²³ shows that, in fact, the Academic Senate committees at UC Berkeley had been applying a common set of UC rules about the limitations period and when to admit or exclude older evidence. However, contrary to what the AAUP language might imply, UC Berkeley was applying these limitations *more*, rather than *less*, stringently in comparison to the Senate committees on several other UC campuses.²⁴ Thus, the Marcy-Berkeley case poses a policy question regarding whether a statute of limitations such as that involved in that case is best accompanied by something akin to a “continuing violation doctrine”²⁵ from civil rights discrimination cases that would allow older evidence outside the limitations period to be admissible in the case if it is sufficiently linked to the same pattern of conduct (sexual harassment, bullying, etc.). So in a hypothetical case where a graduate student makes a complaint of sexual harassment against a faculty member but ultimately declines to participate in an arduous faculty

²¹ Science News Staff, *Geoffrey Marcy, Prominent Berkeley Astronomer, Resigns After Sexual Harassment Judgement*, SCI. MAG. (Oct. 14, 2015, 5:00 PM), <http://www.sciencemag.org/news/2015/10/geoffrey-marcy-prominent-berkeley-astronomer-resigns-after-sexual-harassment-judgement> [<https://perma.cc/2256-3UP5>] (including the following statement from UC Berkeley: “Discipline of a faculty member is a lengthy and uncertain process. It would include a full hearing where the standards of evidence that would be used are higher than those that are applied by the Office for the Prevention of Harassment and Discrimination (“OPHD”) in the course of its investigations. The process would also be subject to a three-year statute of limitations.”).

²² AM. ASS’N OF U. PROFESSORS, *The History, Uses, and Abuses of Title IX*, *supra* note 18, at 88 (emphasis added).

²³ In UC policy this rule is codified in APM-015.III.A.3 and in UC Academic Senate Bylaw 336.B.4; when the Academic Senate modified Bylaw 336.B.4 in 2005 the Senate noted that the Bylaw was intended to be “modeled on statutes of limitations in criminal and civil law.” See Letter from George Blumenthal, Chair Acad. Council, U.C. Berkeley to Robert C. Dynes, President, U.C. Berkeley 2 (Mar. 15, 2005), http://senate.universityofcalifornia.edu/_files/reports/sbl.336.pdf [<https://perma.cc/HU23-Q3XN>].

²⁴ Periodic debate over this issue within several UC campuses predated the disclosure of the Marcy case in the media.

²⁵ Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 112 (2002); Richards v. CH2M Hill, Inc., 26 Cal. 4th 798, 811–24 (Cal. 2001).

disciplinary hearing for whatever reason,²⁶ what may remain in the faculty member's file is a dean's "counseling memo" memorializing concerns and admonishments to the professor about the alleged conduct. In such a case, if another sexual harassment allegation against the same faculty member emerges a few years later, UC Berkeley's faculty committee would tend to exclude the earlier memo from evidence, thus making it difficult to show a larger pattern of serial harassment that may be relevant to the ultimate determination of culpability and sanction, while some other UC campuses would tend to allow counseling memos into evidence at the disciplinary hearing in comparable cases. This is an important evidentiary and due process question over which reasonable minds might disagree, but it is certainly not, as the AAUP committee portrays, an issue of shared governance procedures and protection of academic speech rights being "bypassed in the name of Title IX requirements."²⁷

B. The Vulnerability of Graduate Students and the Pipeline to the Profession

The debunking of the aforementioned stereotype about verbal sexual harassment (as opposed to conduct and unwelcome physical contact) also increases our concern about *both* the individual victims and the institutional and cultural implications of the true scope and dynamics of faculty sexual harassment that could be hidden behind the stereotype. If one focuses only on the graduate student population, for instance, their greater vulnerability to faculty sexual harassment, combined with the severity of that harassment, likely has several deeply concerning results. First, the length and pedagogical purposes of doctoral and professional education, the small disciplinary communities that graduate students inhabit, and the high-stakes ways in which one or a handful of key faculty mentors and advisors can influence future academic career prospects mean that graduate students are very likely to be seriously harmed when sexually harassed by faculty.²⁸ Graduate students

²⁶ For example, the power differential vis-à-vis the faculty member, fear of recrimination, cross-examination by the professor's attorney, the clear and convincing evidence requirement, consideration of mental health and the need to stay on track academically.

²⁷ AM. ASS'N, *The History, Uses, and Abuses of Title IX*, *supra* note 18, at 88.

²⁸ John M. Braxton et al., *Professionalism in Graduate Teaching and Mentoring*, in *THE AMERICAN ACADEMIC PROFESSION: TRANSFORMATION IN CONTEMPORARY HIGHER EDUCATION* 168, 182 (Joseph C. Hermanowicz ed., 2011) ("In contrast to faculty misconduct in undergraduate college teaching, the stakes are substantially higher for graduate teaching and mentoring."); Mark Littleton, *Sexual Harassment of Students by Faculty Members*, in *ENCYCLOPEDIA OF LAW AND HIGHER EDUCATION* 411, 411 (Charles J. Russo Ed., 2010) ("In higher education, the sexual exploitation of students by faculty members is exacerbated by the close working relationships that often develop as a result of shared interests, particularly between graduate students and faculty."); Marina N. Rosenthal et al., *Still Second Class: Sexual Harassment of Graduate Students*, 40 *PSYCHOL. WOMEN Q.* 364, 364–77 (2016).

and postdocs in scientific research laboratories, as well as students and trainees doing scientific field work in remote locales, are vulnerable to sexual harassment for similar reasons.²⁹

Second and related to these expected harms, both types of faculty sexual harassment of students, *quid pro quo* and hostile environment, generally occur in the circumstances of a substantial power differential between the faculty member and the student.³⁰ The fact of power differentials is not unique to graduate students, but it accentuates the risks of harassment given the insular academic communities that doctoral graduate students inhabit and the close relationships they have with some faculty. Consequently, in the contemporary environment, faculty sexual harassment significantly ruptures the bonds of professional ethics and responsibility that are essential preconditions both for academic freedom and for equality.

Third, both the personal and professional harms graduate students are likely to experience and the ethical and cultural damage created by faculty sexual harassment negatively affect the diversity of the professoriate in all disciplines. An important example is the contemporary discourse (both within academia and among policymakers and the public) around scientific disciplines and the extent to which sexual harassment of graduate students, postdocs and assistant professors has driven too many women out of careers in traditionally male-dominated STEM (science, technology, engineering and mathematics) fields.³¹ However, our sources show that

²⁹ Kathryn B. H. Clancy et al., *Survey of Academic Field Experiences (SAFE): Trainees Report Harassment and Assault*, 9 PLOS ONE 1, 5 (2014), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0102172> [<https://perma.cc/4XHV-KGRD>]; Ellen Sekreta, *Sexual Harassment, Misconduct, and the Atmosphere of the Laboratory: The Legal and Professional Challenges Faced by Women Physical Science Researchers at Educational Institutions*, 13 DUKE J. GENDER L. & POL'Y 115, 116 (2006) (“Sexual harassment is of special concern to women scientists at research universities because of the unique dynamics of those workplaces. First, the strictly hierarchical structure inherent to the world of science research makes women vulnerable to abuse, precisely because they tend to hold lower-ranked positions. Second, women researchers are also made more vulnerable by the intimate, one-on-one nature of research work, which can make it less clear whether harassment occurred, and subject women scientists to a dissection of their personal and professional lives when they make claims of sexual harassment.”).

³⁰ *Statement on Professional Ethics*, AAUP (2009), <https://www.aaup.org/report/statement-professional-ethics> [<https://perma.cc/QQ49-UJQC>]; OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 6–7 (2001) [hereinafter OCR REVISED SEXUAL HARASSMENT GUIDANCE], available at <http://www.ed.gov/offices/OCR/archives/pdf/shguide.pdf> [<https://perma.cc/3RNZ-G6N3>]; *Statement on Professional Ethics*, AAUP (2009), <https://www.aaup.org/report/statement-professional-ethics> [<https://perma.cc/SF78-8XNF>].

³¹ See, e.g., Hope Jahren, *She Wanted to Do Her Research. He Wanted to Talk 'Feelings'*, N.Y. TIMES (Mar. 4, 2016), <https://www.nytimes.com/2016/03/06/opinion/sunday/she-wanted-to-do-her-research-he-wanted-to-talk-feelings.html> [<https://perma.cc/F3>].

this problem is hardly limited to STEM fields, and other fields with meaningful numbers of cases in our review (to name just two) include law students and graduate students in the arts and humanities.³² The precise scope of such damage is virtually unknowable, but extensive damage is easy and highly plausible to imagine, since graduate and professional students are literally the pipeline of the profession. Sexual harassment, especially by serial harassers, must drive some graduate and professional students out of the profession altogether as they endeavor to avoid the harms of such harassment³³ in the future. Both those who protest and/or those who have sexual conduct forced upon them are likely to experience well-documented negative health consequences³⁴ and/or retaliation, either of which could be career-ending. Those who feel they should not or cannot protest are also likely to suffer negative psychological effects that have serious, if less visible, professional and career consequences.³⁵ In these instances, faculty misconduct can cause a pernicious

XV-9B3L]; Kristen Renwick Monroe et al., *Gender Equality in the Ivory Tower, and How Best to Achieve It*, 47 PS: POL. SCI. & POL. 418, 418 (2014); Joan C. Williams et al., *Tools for Change: Boosting the Retention of Women in the STEMPipeline*, 6 J. RES. GENDER STUD. 11, 11 (2016); Joan C. Williams & Kate Massinger, *How Women Are Harassed Out of Science*, THE ATLANTIC (July 25, 2016), <https://www.theatlantic.com/science/archive/2016/07/how-women-are-harassed-out-of-science/492521/> [<https://perma.cc/SWB6-P2C>].

³² For example, *infra* Section V, two of the faculty termination cases included law student victims. See *infra* Section V; *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 512 n.3 (10th Cir. 1998); *Traster v. Ohio N. Univ.*, No. 3:13 CV 1323, 2015 WL 12600980, at *1 (N.D. Ohio Jan. 20, 2015), *aff'd*, 685 F. App'x 405, 406 (6th Cir. 2017); see also Lisa G. Lerman, *First Do No Harm: Law Professor Misconduct Toward Law Students*, 56 J. LEGAL EDUC. 86 (2006); Maura Dolan et al., *Woman Sought UC Berkeley's Help Before Accusing Dean*, L.A. TIMES (Dec. 3 2002), <http://articles.latimes.com/2002/dec/03/local/me-boalt3> [<https://perma.cc/9ACT-U9X9>]; Lisa G. Lerman, *First Do No Harm: Law Professor Misconduct Toward Law Students*, 56 J. LEGAL EDUC. 86, 86–105 (2006).

³³ As is detailed further in Section II *infra*, a voluminous body of social science research exists that documents the harms associated with sexual harassment in the workplace and in educational settings, particularly, but not exclusively, for women. See, e.g., Afroditi Pina et al., *An Overview of the Literature on Sexual Harassment: Perpetrator, Theory, and Treatment Issues*, 14 AGGRESSION & VIOLENT BEHAV. 126, 136 (2009) (“Sexual harassment . . . affects a significant proportion of working women and it affects their personal lives and professional functioning, thus preventing them from advancing in the workplace, and affecting one of their fundamental human rights; the right to work with dignity.”).

³⁴ For victims of severe sexual harassment such as sexual assault, PTSD and related health, educational and economic consequences can be even more harmful. See KATHARINE K. BAKER ET AL., TITLE IX & THE PREPONDERANCE OF THE EVIDENCE: A WHITE PAPER 1–3, available at (2016), <http://www.feministlawprofessors.com/wp-content/uploads/2016/11/Title-IX-Preponderance-White-Paper-signed-11.29.16.pdf> [<https://perma.cc/ZDX9-BDFZ>]; Lisa Fedina et al., *Campus Sexual Assault: A Systematic Review of Prevalence Research from 2000 to 2015*, 19 TRAUMA, VIOLENCE, & ABUSE 76, 76 (2018).

³⁵ Studies looking at less severe (non-assault) sexual harassment of female undergraduate and graduate students find that those targets of sexual harassment experience

form of “divestiture”³⁶ where the misconduct causes the graduate student to lose part of her/his sense of self and s/he can struggle through ensuing self-blame and shame.³⁷

In addition to how these dynamics might affect victims of the harassment, they are likely to have a damaging effect on bystanders to the harassment, who make up virtually the entire remainder of the academic pipeline. As we detail in a future companion piece on addressing and comprehensively preventing this harassment, including how serious disciplinary sanctions in sexual harassment cases are an important aspect of such comprehensive prevention, when graduate students witness sexual harassment of peers and colleagues on campus with little or no consequences, their training in the ethical norms of the profession is being substantially harmed, in some cases irreparably.³⁸

Some portion of the professors trained by Ph.D. and professional education programs will attain tenure, take on various academic administrative roles with significant control over students’ lives and educations, and achieve promotion into higher education’s most powerful governance roles: full professors, department chairs, provosts, and presidents. Therefore, colleges and universities must consider the training that sexually harassing professors, especially repeat harassers, are providing to the students who *remain* in the professoriate and what kind of academic cultures such training will perpetuate.³⁹

The case patterns we analyze below in Sections III–V, plus the evidence on harm to graduate student victims of sexual harassment and to the overall academic community/culture, lead up to important questions about the adequacy of

PTSD and other negative mental health effects. *See, e.g.,* Jennifer Fine McDermut et al., *An Evaluation of Stress Symptoms Associated with Academic Sexual Harassment*, 13 J. TRAUMATIC STRESS 397, 397 (2000). *See* additional discussion in Part II.

³⁶ Melissa S. Anderson et al., *Disciplinary and Departmental Effects on Observations of Faculty and Graduate Student Misconduct*, 65 J. HIGHER EDUC. (SPECIAL ISSUE) 331, 342 (1994) (with regard to faculty misconduct, discussing the concept of divestiture as “the student’s experience of losing part of his or her previous sense of self”).

³⁷ Wright & Fitzgerald, *Angry and Afraid*, *supra* note 12, at 81 (discussing the need for a “better understanding of how and why victims differentially express aspects of demoralization, anxious arousal, fear, and self-blame”).

³⁸ *See also* Braxton et al., *supra* note 28, at 183 (“Graduate students who personally observe or learn of incidents of norm violations may fail to internalize the moral compass needed for stewardship for one’s academic discipline. . . . But [norm violations] are also likely to affect students’ understanding of those norms, whether they are a victim of or witness to such behavior. Depending on the consequences of violating these norms, students may come to believe that a behavior is condoned or at least carries no repercussions.”).

³⁹ Some of the important takeaways from the literature on sexual harassment and organizational climate for both victims and third-party bystanders includes harms when organizations exhibit tolerance of sexual harassment, poor leadership, retaliation and “institutional betrayal.” *See, e.g.,* Carly Parnitzke Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 J. TRAUMATIC STRESS 119, 119 (2013).

institutional responses, including disciplinary measures and remedies for survivors, in the university setting. Rather than only briefly addressing such issues in this Article, we grapple with these issues about serious sanctions, academic freedom, and due process in a fair amount of detail in our companion article.⁴⁰

C. *The “Tip of the Iceberg” Model and What Is Known about Confidential Cases*

As will become evident throughout this Article, the multiple data sources analyzed herein ultimately represent the proverbial tip of the iceberg of faculty sexual harassment of students. The vast majority of cases remain under the waterline (i.e., confidential) and out of public view or only visible in limited ways. Just as confidentiality generally and confidential settlements in particular constrain our public understanding of employment discrimination (including sexual harassment),⁴¹ here too methodological limitations must be worked through and considered in order to know what to make of our findings based on iceberg cases “above the waterline.” Moreover, this Article seeks to demonstrate reasonably research-based expectations about the contours of the confidential cases “below the waterline” that make up the far larger portion of this Title IX iceberg in the college and university setting.⁴²

In addition, the empirical research both inside and outside of academia shows rates of sexual harassment and sexual violence that are much higher than the number of reports of such conduct to anyone in an official capacity.⁴³ Indeed, that sexual

⁴⁰ Cantalupo & Kidder, *supra* note 20.

⁴¹ Linda Hamilton Krieger, *The Watched Variable Improves: On Eliminating Sex Discrimination in Employment*, in *SEX DISCRIMINATION IN THE WORKPLACE: MULTIDISCIPLINARY PERSPECTIVES* 295, 316 (Faye J. Crosby et al. eds., 2007) (noting that in gender discrimination cases, “[g]iven that over 95 percent of civil cases settle before trial, the impact of routine confidentiality agreements in settlements can hardly be overstated”); Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 *WASH. & LEE L. REV.* 111, 112 (2007) (“Nobody really knows what happens to [most] employment discrimination claims in the federal courts.”); Stewart J. Schwab & Michael Heise, *Splitting Logs: An Empirical Perspective on Employment Discrimination Settlements*, 96 *CORNELL L. REV.* 931, 931 (2011); Hila Shamir, *About Not Knowing—Thoughts on Schwab and Heise’s Splitting Logs: An Empirical Perspective on Employment Discrimination and Settlements*, 96 *CORNELL L. REV.* 957, 957 (2011) (“We know absurdly little about employment discrimination settlements.”).

⁴² For a classic discussion of these issues in employment litigation, see generally Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 *L. & SOC’Y REV.* 1133, 1133 (1990).

⁴³ CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP’T OPPORTUNITY COMM’N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 8–10, 15–17 (2016), https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf [<https://perma.cc/5ZM4-ZBFG>]; BONNIE S. FISHER ET AL., U.S. DEP’T OF JUSTICE, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 24 (2000), <https://www.ncjrs.gov/pdffiles1>

harassment is a significantly and consistently underreported problem, whether on a campus or not, is well-established.⁴⁴ With respect to workplace sexual harassment overall, estimates indicate that “only 1% of victims participate in litigation.”⁴⁵

Even outside of sexual harassment specifically, studies show that a small fraction of employment litigation cases actually go to trial. For example, research on federal employment litigation cases shows that 19% of cases are initially dismissed, 50% of cases reach some kind of early settlement, another 18% of cases are knocked out on summary judgment, 8% of cases result in a settlement late in the process and only the remaining 6% of cases go to trial.⁴⁶ Other research likewise finds that about two-thirds of employment lawsuits reach settlements, with most of the remainder decided on summary judgment followed by only a small fraction reaching jury verdicts.⁴⁷ As Marc Galanter trenchantly concluded over three decades ago: “On the contemporary American legal scene the negotiation of disputes is not an alternative to litigation. It is only a slight exaggeration to say that it *is* litigation.”⁴⁸

Consistent with the employment litigation and settlement statistics immediately above, one of the more comprehensive efforts to inventory case outcomes in campus faculty sexual harassment cases comes from a faculty-administration committee report looking at data from eight University of California (“UC”) campuses during the period of 2012–2015. This UC committee looked at 141 cases involving allegations of faculty sexual harassment/misconduct, and reported that three-fourths of cases (107 of 141) “were unsubstantiated or closed by alternative resolution in the Title IX context or early resolution in the discipline context without a formal investigation.”⁴⁹ Ideally, unsubstantiated cases would have been categorized separately from cases closed by alternative resolution, but this UC report seems to be the most comprehensive university data that has recently become publicly

/nij/182369.pdf [https://perma.cc/P7TC-8AN2].

⁴⁴ See generally Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 205 (2011) (discussing the complex reasons for high rates of non-reporting of sexual violence at colleges and universities); FELDBLUM & LIPNIC, *supra* note 43, at 15–17 (discussing victim non-reporting of sexual harassment in workplaces as a whole, not just educational institutions).

⁴⁵ Wright & Fitzgerald, *Angry and Afraid*, *supra* note 12, at 82 (citation omitted).

⁴⁶ Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 187 fig.1 (2010) (analyzing the American Bar Foundation’s database of case outcomes).

⁴⁷ Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. LEGAL EMPIRICAL STUD. 111, 133–34 (2009).

⁴⁸ Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268–69 (1984).

⁴⁹ UNIV. OF CAL., REPORT OF THE JOINT COMMITTEE OF THE ADMINISTRATION AND ACADEMIC SENATE 26 (2016), available at http://sexualviolence.universityofcalifornia.edu/files/documents/Joint-Committee_Report-Faculty-Discipline-Process.040416.pdf [https://perma.cc/25U7-4KQA].

available. Only one-quarter of these UC cases (34 of 141) were investigated, with one third of that subset (11 of 34) resulting in the Title IX investigation substantiating violation(s).⁵⁰ Finally, of the eleven cases both investigated and substantiated “10 (90%) of the faculty respondents accepted a disciplinary sanction or left the University without being formally charged. Only one case went to hearing, and discipline was both recommended by the hearing committee and imposed by the Chancellor.”⁵¹ As the case examples described further below in Section III reinforce, these UC statistics are culled from a university system presently under considerable stress and criticism over its handling of faculty sexual harassment cases (e.g., too many serious cases resolved informally, too few cases taken to a disciplinary hearing committee). So, the point is not to “naturalize” these outcome statistics, but rather to note that in broad terms the funnel-like profile of these cases is presumably similar to higher education administrative case patterns more generally that are not in the public domain.

Thus the media reports, Title IX investigations by OCR or DOJ, Title IX court cases, and faculty termination cases, even combined, very likely represent only a small fraction of the total universe of cases on campuses today that are either “resolved” at some stage of the internal campus administrative process or proceed to a formal complaint against the school, either via OCR or via a court case. In addition, while the cases clearly above the waterline in our iceberg metaphor (e.g., OCR complaint investigations and lawsuits from student victims and from fired faculty) may include a higher proportion of severe conduct cases, this is our best guess based on our data set and expectations derived from the larger literature (see Appendix A on methodology for additional discussion). Thus, it is hard to know with empirical precision how representative the cases above the waterline are of the cases below the waterline. Certainly, empirical research in similar contexts has found significant differences between analyses of, for example, only published court decisions versus all cases filed, regardless of whether they reached a published opinion.⁵² Thus, even if our analysis presents fewer of such problems because our data sets include media reports that may never have resulted in a Title IX court case or even OCR investigation, the extent of similarity or difference between cases above the waterline with those below the waterline is almost entirely unknowable, based on currently available information.

The social science literature presents a number of potential explanations for the central pattern depicted by our iceberg metaphor: that the cases one cannot see below the waterline are *far* more numerous than the visible cases above the waterline. Notably, as Professor Deborah Brake and others have documented, a number of social-psychological patterns shape the circumstances under which people will come forward with formal complaints of sexual harassment or other forms of

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See Siegelman & Donohue, *supra* note 42, at 1156–66.

discrimination and many will not come forward to make complaints at all because of barriers to identifying and perceiving the existence of discrimination itself.⁵³

Indeed, the psychological research's indication that a large range of discrimination is never even *identified* as discrimination, nevermind appearing in a formal complaint, suggests likely commonalities between the complaints above and below the waterline. Common sense suggests that more severe and more pervasive harassment is both more likely to overcome psychological barriers to perceiving discrimination and to cause the victim to file a complaint. Research on victim complaint filing, both that presented here and research conducted in the workplace context, shows that victims do in fact complain more when harassment is more severe,⁵⁴ thus corroborating this common-sense proposition. As already noted above, other situational and organizational factors can also influence when reports of sexual harassment are made (e.g., duration of harassment and status of the accused harasser).⁵⁵ However, the majority of many factors determining whether a complaint, once made, remains confidential (e.g., the institution's confidentiality policies, the reaction of the alleged harasser to the charges, etc.) are unrelated to the severity of the harassment or other situational determinants of complaint filing. Therefore, there is little reason to believe that whether a complaint is found below the waterline or above it on our iceberg is primarily due to differences in the characteristics of the harassment itself.

Thus, at the very least, the cases above the iceberg's waterline are unlikely to be completely *unrepresentative* of those below it (the question is one of degree), and even looking just at the tip of the iceberg generates several insights. First, the commonalities shared by the limited number of cases discussed here, regardless of whether they have been litigated outside the institution or not, provide important information about the full Title IX iceberg, both above and below the waterline. These cases certainly will represent *to some extent* many others that will not reach an OCR investigation, be decided by a court, or even receive any news coverage, even if the cases above the waterline could have a higher concentration of severe cases.⁵⁶ Second, these cases have similar norm-setting functions as verdicts and can

⁵³ See, e.g., Deborah L. Brake, *Perceiving Subtle Sexism: Mapping the Social-Psychological Forces and Legal Narratives that Obscure Legal Bias*, 16 COLUM. J. GENDER & L. 679, 688–99 (2007); Heather M. Clarke, *Predicting the Decision to Report Sexual Harassment: Organizational Influences and the Theory of Planned Behavior*, 14 J. ORG'L PSYCHOL. 52, 52 (2014).

⁵⁴ James E. Gruber & Michael D. Smith, *Women's Responses to Sexual Harassment: A Multivariate Analysis*, 17 BASIC & APPLIED SOC. PSYCHOL. 543, 556 (1995).

⁵⁵ *Id.*; Lilia M. Cortina & S. Arzu Wasti, *Profiles in Coping: Responses to Sexual Harassment Across Persons, Organizations, and Cultures*, 90 J. APPLIED PSYCHOL. 182, 183 (2005); Chelsea R. Willness et al., *A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment*, 60 PERSONNEL PSYCHOL. 127, 127 (2007); Clarke, *supra* note 53, at 55–60.

⁵⁶ See Wright & Fitzgerald, *Angry and Afraid*, *supra* note 12, at 82 (surveying women who were targets of sexual harassment and then became plaintiffs in litigation: “[T]he present

therefore influence the handling of other faculty sexual harassment cases.⁵⁷ Finally, the social science studies that we collected and considered for this Article provide some information about what is occurring below the waterline. Thus, comprehensively reviewing the tip of the Title IX iceberg court cases, OCR investigations, and media reports plus the social science literature (a mixture of above and below the waterline), can provide insights applicable to cases above and below the waterline, as well as update in a more systematic way and add to previous legal research and scholarship on this topic.⁵⁸

With the aforementioned points in mind, the goal of this introductory section is to sketch out the “big picture” in order to provide context and structure for our analysis that follows. Figure 1 below provides a stylized “tip of the iceberg” theoretical model for the distribution of faculty sexual harassment cases in American higher education, consistent with similar metaphors invoked often in the scholarly literature,⁵⁹ as well as the socio-legal research on employment litigation and settlements.

While the core distinction in the Figure 1 model is between public cases and confidential cases, note that to a modest extent the model is not entirely static. Just as pieces of an iceberg break off in the dynamic movement in water and temperature change, so too with media leaks and public records act requests, which will cause an unpredictable subset of cases that were previously confidential to float up to the waterline. Likewise, in some litigated sexual harassment cases the civil discovery process will cause information to come into public view about prior sexual harassment behavior by the same accused faculty member and/or institution.⁶⁰

sample is distinctive and likely not representative of all sexual harassment victims. It is likely that, because these women have made formal reports and filed legal complaints, their experiences were more severe than nonreporting victims.”).

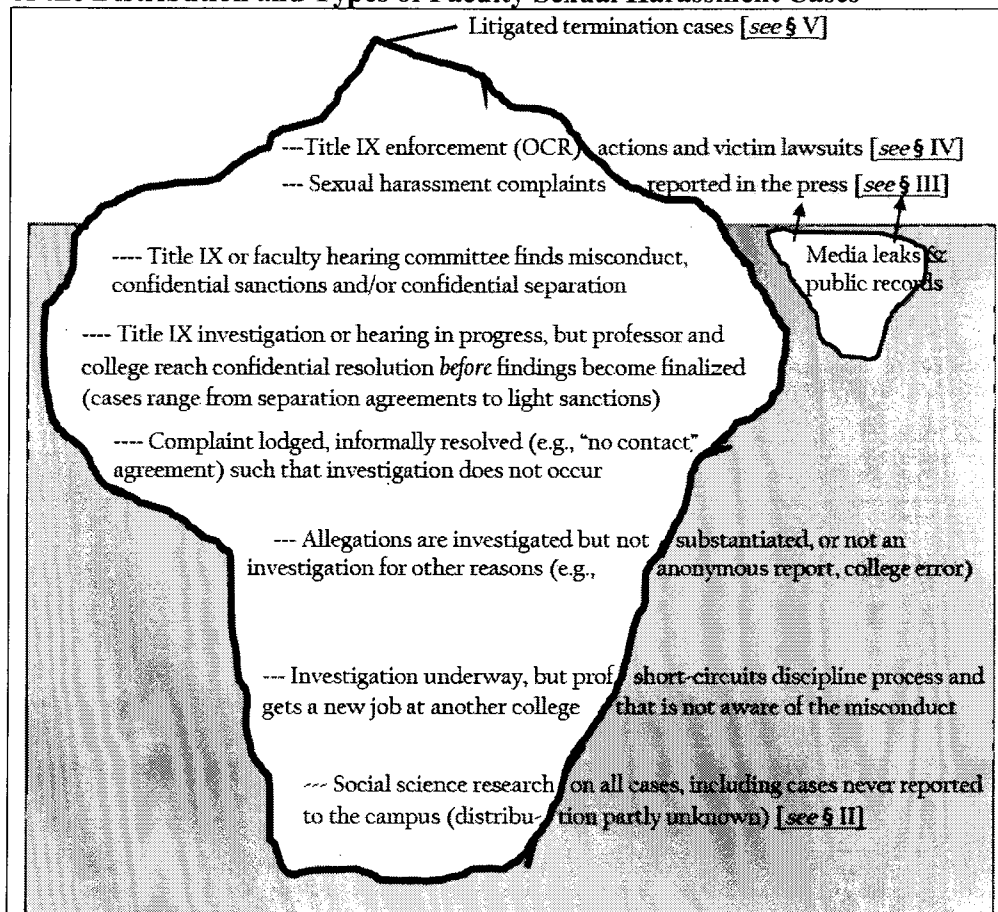
⁵⁷ See *infra* Section V.

⁵⁸ See, e.g., James David Jorgensen, *Sexual Harassment Litigation Involving Instructors: Balancing Legal Rights and Responsibilities in the Courts, 1993–2013*, 112 (May 2014), (unpublished Ph.D. Dissertation, University of Iowa), <http://ir.uiowa.edu/cgi/viewcontent.cgi?article=5175&context=etd> [<https://perma.cc/QVP5-Y83F>] (“[S]exual harassment lawsuits represent only a small fraction of the number of complaints filed with investigatory agencies like the EEOC or the U.S. Department of Education’s Office for Civil Rights. Likewise, such agency complaints represent a small fraction of complaints filed internally with institutions. Research on the nature of such complaints and their resolution would shed additional light on policy development and implementation efforts for administrators.”).

⁵⁹ Siegelman & Donohue, *supra* note 42; Paula McDonald et al., *Below the “Tip of the Iceberg”: Extra-legal Responses to Workplace Sexual Harassment*, 34 *WOMEN’S STUD. INT’L F.* 278, 278–79 (2011); Siegelman & Donohue, *supra* note 42, at 1133–68.

⁶⁰ In sexual harassment litigation the defendant’s prior acts of harassment toward other employees may be admissible, depending on the surrounding circumstances and relevance. See, e.g., *Weeks v. Baker & McKenzie*, 63 Cal. App. 4th 1128, 1162–64 (1998) (evidence of law firm partner’s sexually harassing conduct toward other women employees was admissible in Ms. Weeks’ lawsuit to show state of mind for purposes of punitive damages);

Figure 1: The Sexual Harassment Iceberg – A Theoretical Model of the Distribution and Types of Faculty Sexual Harassment Cases



Consistent with Figure 1, this Article organizes the sources for understanding the faculty sexual harassment problem by starting below the waterline, with the non-reported and nonpublic cases only documented by anonymized social science research (Section II), and moving up the iceberg to the media reports (Section III) just above the waterline, then to the OCR/DOJ investigations and litigated Title IX cases (Section IV), and finally to the faculty termination cases (Section V) at the very apex of the iceberg. This presentation of the collected data also moves from largest to smallest data sources, beginning with the social science literature, which gathered information from at least several thousand people, moving to several hundred media reports, then to forty-eight Title IX enforcement actions (private litigation and OCR/DOJ complaints), and finally to twenty-eight faculty termination

see also Heyne v. Caruso, 69 F.3d 1475, 1477–84 (9th Cir. 1995) (quid pro quo sexual harassment case).

cases. Lastly, the percentage of both severe and serial harassment alleged in each data set increases the higher on the iceberg that data set is located.

In total, collecting and organizing these diverse sources of information is an integral part of a longer project. That project explores solutions and effective ways to prevent faculty harassment of students, including through schools levying serious sanctions on faculty harassers, especially serial harassers, and adopting other prevention strategies pioneered under a comprehensive, public health model,⁶¹ that combines primary, secondary, and tertiary forms of prevention.

II. SOCIAL SCIENCE RESEARCH

The recent public attention to campus sexual harassment and violence has not only led to new proposed legislation,⁶² but also to much new empirical research on such harassment, both at the national and institutional levels.⁶³ Most of this recent research focuses on incidence rates of sexual harassment and sexual violence, but does not track either serial harassment data or information about the harms that victims experience from the harassment. However, these topics have been included in older research and/or research conducted on non-academic workplace sexual harassment or criminal sexual assault. Each of these three groupings of research are synopsized here in subsections A, B, and C.

⁶¹ MARGARET BROME ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, SEXUAL VIOLENCE PREVENTION: BEGINNING THE DIALOGUE 1–12 (2004), <https://www.cdc.gov/violenceprevention/pdf/svprevention-a.pdf> [https://perma.cc/7RJG-SAEB].

⁶² Campus Accountability and Safety Act, S. 590, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/senate-bill/590> [https://perma.cc/2HAN-GMJQ]; HALT Campus Sexual Violence Act, H.R. 2680, 114th Cong. (2015), <https://www.congress.gov/bill/114th-congress/house-bill/2680> [https://perma.cc/SN8X-UL43]; SOS Campus Act, S. 2695, 113th Cong. (2014), <https://www.congress.gov/bill/113th-congress/senate-bill/2695/text> [https://perma.cc/U5XY-C4XK]; ANDREW MORSE ET AL., STATE LEGISLATIVE DEVELOPMENTS ON CAMPUS SEXUAL VIOLENCE: ISSUES IN THE CONTEXT OF SAFETY NASPA RESEARCH AND POL’Y INST. 3–19 (Dec. 2015), http://www.naspa.org/images/uploads/main/ECS_NASPA_BRIEF_DOWNLOAD3.pdf [https://perma.cc/KX3N-5VU7].

⁶³ See, e.g., MASS. INST. OF TECH., SURVEY RESULTS: 2014 COMMUNITY ATTITUDES ON SEXUAL ASSAULT 1–8 (2014), <http://web.mit.edu/surveys/health/MIT-CASA-Survey-Summary.pdf> [https://perma.cc/V5QK-9PE5]; Nick Anderson et al., *Survey: More than 1 in 5 Female Undergrads at Top Schools Suffer Sexual Attacks*, WASH. POST: EDUC. (Sept. 21, 2015), https://www.washingtonpost.com/local/education/survey-more-than-1-in-5-female-undergrads-at-top-schools-suffer-sexual-attacks/2015/09/19/c6c80be2-5e29-11e5-b38e-06883aacba64_story.html?utm_term=.e297704217d0 [https://perma.cc/N9LU-4TXU].

A. Incidence Rates

We began our analysis with the burgeoning, if still limited, social science research on faculty harassment of students as well as the research on serial harassers or offenders in the civil rights or criminal settings. The most recent large study on graduate students' experiences with sexual harassment was conducted by the Association of American Universities ("AAU") and Westat in an extensive sexual assault survey administered in April 2015 at twenty-seven elite private and public research universities. In addition to important data on student sexual assaults, the AAU/Westat survey yielded large-scale results with respect to the extent of sexual harassment at American research universities. This marks a contrast with most of the previous survey studies on sexual harassment by faculty at U.S. college campuses, which tended to consist of single institution surveys with modest sample sizes that made it difficult to identify generalizable conclusions and robust patterns.⁶⁴

The AAU/Westat survey defined sexual harassment as a "series of behaviors that interfered with the victim's academic or professional performances, limited the victims' ability to participate in an academic program, or created an intimidating, hostile, or offensive social, academic, or work environment," which is (and is intended to be) roughly consistent with the "hostile environment" prong of federal Title IX legal guidelines and campus policies.⁶⁵ Specific behaviors about which survey participants were asked included a range of verbal and electronic communications with unwelcome sexual content, such as sexual comments, jokes or stories, remarks about physical appearance or sexual activities, and sexual requests or advances.⁶⁶ Consistent with the broader literature, the AAU survey revealed that graduate students are much more likely than undergraduates to report that they have been sexually harassed by those in positions of authority and trust at the university.⁶⁷ The key findings about graduate students reporting sexual harassment from the AAU survey are displayed below in Figure 2. Female graduate students report higher rates of sexual harassment than men (44.1% versus 29.6%), and transgender and genderqueer graduate students reported the highest rates of sexual harassment (69.4%, n=490). Of those female graduate and professional students reporting they were sexually harassed, 22.4% stated that it was a faculty

⁶⁴ For a cogent review and synthesis of this literature, see Valerie Lundy-Wagner & Rachelle Winkle-Wagner, *A Harassing Climate? Sexual Harassment and Campus Racial Climate Research*, 6 J. DIVERSITY IN HIGHER EDUC. 51, 60 (2013).

⁶⁵ CANTOR ET AL., AAU SURVEY, *supra* note 7, at xv. Federal law and companion campus policies incorporate a "reasonableness" standard with respect to victim's experiences with sexual harassment, so it is not realistic for the AAU/Westat survey or other surveys of student's self-reported perceptions to perfectly mimic federal law standards.

⁶⁶ *Id.*

⁶⁷ *Id.* at 84–85, tbl. 4-1 (indicating female graduate students report being sexually harassed by faculty at nearly three times the rate of female undergraduate students—9.9% versus 3.7%—at the same AAU institutions).

member who was the offender and 9.9% reported that the offender was another staff member or administrator.⁶⁸ These AAU data imply that at leading American research universities today, roughly one in ten female graduate students and over one in five transgender/genderqueer graduate students state that they have been sexually harassed by a faculty member at their university. The AAU estimates of sexual harassment may be somewhat high (i.e., upward reporting bias) for technical reasons connected to survey design and the possibility that survey respondents skimmed past important prefatory instructions specific to the set of sexual harassment questions.⁶⁹

⁶⁸ *Id.* In the discussion below about some high-profile cases of sexual harassment by faculty administrators such as deans, note that the AAU/Westat survey does not provide more nuanced information about the composition of the “other” staff or administrator category. Rather, this is a catch-all category that may include a wide range of individuals, such as a staff academic advisor, an athletic coach, an assistant dean, a staffer processing a student’s visa or financial aid, and so on.

⁶⁹ In a companion report on methodology, the authors of the AAU/Westat survey include these two notable observations:

[1] The estimates of harassment from the AAU survey are consistently higher than those published from several other campus climate surveys. An important reason for the difference is definitional. The AAU survey asked about verbal or written behaviors. A number of the other surveys put more emphasis on particular types of actions

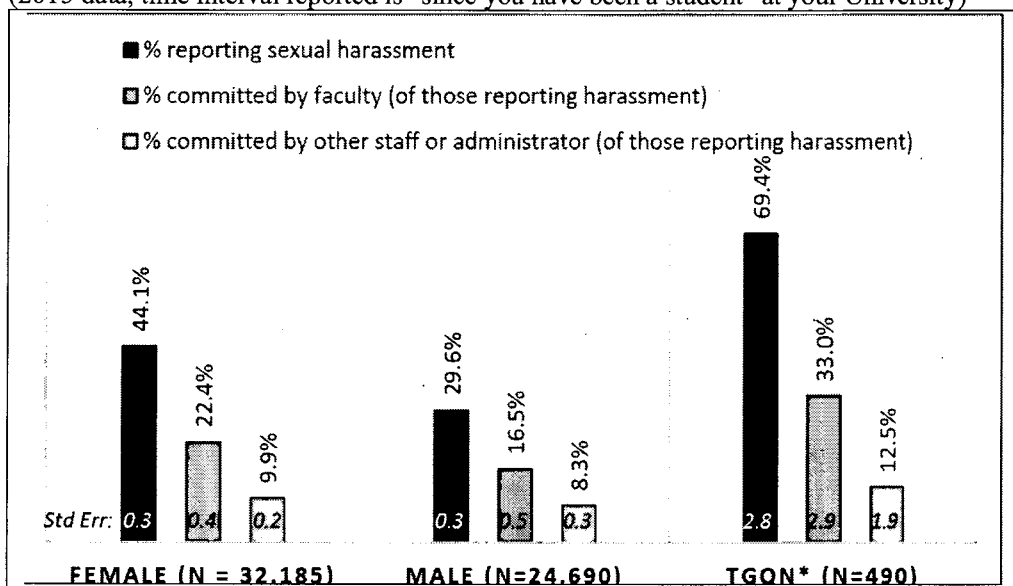
and

[2] “While the effect of linking to legal criteria and students/employees did seem to significantly reduce the prevalence estimates, it is also suspected that respondents did not fully process and use these definitions when answering the questions. The AAU items . . . all carried forward the introduction containing the criteria, as well as specifically linking the behaviors to students or employees of the university. Nonetheless, the relatively high estimates of harassment may also be due to some respondents not reading all of the introductory text when answering the questions.

DAVID CANTOR ET AL., METHODOLOGY REPORT FOR THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 5-12 to 5-13–14 (Apr. 2016) [hereinafter CANTOR ET AL., METHODOLOGY REPORT], available at https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/Methodology_Report_for_AAU_Climate_Survey_4-12-16.pdf [https://perma.cc/36K4-B63K].

Figure 2: Graduate and Professional Students' Reports of Sexual Harassment in the AAU/Westat Sexual Assault Climate Survey⁷⁰

(2015 data, time interval reported is "since you have been a student" at your University)



* TGQN = Transgender woman, Transgender man, Genderqueer, gender non-conforming, questioning, not listed.

We also note that the sexual harassment questions in the AAU survey "put more emphasis on verbal and written behaviors than the other surveys"⁷¹ and issues like groping, sexual assault, and stalking were addressed in different question sets, with variability regarding the extent to which granular details were provided specifically about faculty perpetrators.⁷² These patterns in the AAU survey are important for present purposes given our findings from the cases analyzed further below in Sections III–V which found a greater number of physical conduct/contact cases.

The AAU/Westat survey reinforces a number of smaller sexual harassment survey studies, spanning decades, focusing on graduate students at U.S. colleges and universities. A recent study by Rosenthal, Smidt, and Freyd at a public university in the Pacific Northwest (n=539) found that 38% of female and 23% of male graduate students reported being sexually harassed by a professor or staff member.⁷³ These higher figures may be related to methodological differences in how sexual harassment was defined.⁷⁴ Nonetheless, a number of earlier survey studies of women

⁷⁰ CANTOR ET AL., AAU Survey, *supra* note 7, at 84, tbl. 4-1.

⁷¹ CANTOR ET AL., METHODOLOGY REPORT, *supra* note 69, at 5-10.

⁷² CANTOR ET AL., AAU Survey, *supra* note 7 (this conclusion is supported by doing a word search for all references to "faculty" in the AAU 2017 report).

⁷³ Rosenthal et al., *supra* note 28, at 370.

⁷⁴ In this study, 59.1% of the reported sexually harassing incidents "involved sexist or sexually offensive language, gestures, or pictures" compared to 6.4% involving "unwanted

undergraduate and graduate students in the 1980s, 1990s, and 2000s also report higher levels of sexual harassment,⁷⁵ which might reflect a combination of factors, including methodological issues (response rates, sample size) and a gradual change in faculty attitudes and norms of disapproval toward sexual harassment compared to the 1980s.⁷⁶

These studies are broadly consistent with the National Intimate Partner & Sexual Violence Survey (“NISVS”). The NISVS does not depend on the filing of official complaints or other formal reporting to gather information about sexual harassment and other forms of gender-based violence. Instead, it asks whether the survey respondent has experienced certain kinds of conduct over the course of the respondent’s lifetime, then sorts the respondent’s answers into categories such as rape, sexual coercion, forced penetration, unwanted sexual contact, and non-contact unwanted sexual experiences.⁷⁷ These experiences may never have been formally reported to any officials and by asking questions about conduct, the survey does not

sexual attention,” 4.7% involving “unwanted touching” and 3.5% involving “subtle or explicit bribes or threats.” *Id.* at 370. These smaller categories more typically rise to the level of faculty disciplinary action and meet the “severe or pervasive” threshold for hostile environment sexual harassment that negatively affects a student’s educational opportunities. Sexist or sexually offensive language (or gestures etc.) can also be very serious, but is much more likely to require repetition and similar facts to formally constitute sexual harassment under university policies or federal/state law, factors that (even if the report is assumed to be true) do not appear to have been measured here.

⁷⁵ Michelle L. Kelley & Beth Parsons, *Sexual Harassment in the 1990s: A University-Wide Survey of Female Faculty, Administrators, Staff, and Students*, 71 J. HIGHER EDUC. 548, 549 (2000) (summarizing eight studies from the 1980s and 1990s: “Most studies report that between 20% and 40% of undergraduate and graduate women experience some form of sexual harassment while a student.”). Other graduate student studies report still higher levels. Beth E. Schneider, *Graduate Women, Sexual Harassment, and University Policy*, 58 J. HIGHER EDUC. 46, 51 (1987) (60% of female graduate students reported being sexually harassed by a male professor); Margaret Schneider et al., *Sexual Harassment Experiences of Psychologists and Psychological Associates During Their Graduate School Training*, 11 CAN. J. HUMAN SEXUALITY 159, 164 (2002) (67% of female and 21% of male psychology doctoral students report sexual harassment by a male faculty member, when excluding “suggestive stories or jokes” from the definition of sexual harassment).

⁷⁶ Regarding faculty norms and attitudes, Fitzgerald et al.’s survey of male faculty at one research university found that 26 of 235 respondents (11%) admitted they had “attempted to stroke, caress or touch female students” but only one of 235 respondents (0.4%) “believed he had ever sexually harassed a student.” Louise F. Fitzgerald et al., *Academic Harassment—Sex and Denial in Scholarly Garb*, 12 PSYCHOL. WOMEN Q. 329, 332 (1988). In academia today, it appears that faculty norms disapproving of sexual harassment of students are both deeper and more widespread. See, e.g., JOHN M. BRAXTON ET AL., PROFESSORS BEHAVING BADLY: FACULTY MISCONDUCT IN GRADUATE EDUCATION 101, 124 (2011).

⁷⁷ See Matthew J. Breiding et al., *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization—National Intimate Partner and Sexual Violence Survey (NISVS), United States, 2011*, 63 CDC MMWR 1, 3 (Sep. 5, 2014), <https://www.cdc.gov/mmwr/pdf/ss/ss6308.pdf> [<https://perma.cc/D9DL-7UGB>].

rely on respondents to identify any conduct as a legal violation. The NISVS is a very large scale, national-sample phone survey that was conducted in 2011. It provides a broader perspective on the base rates of sexual violence and sexual harassment for the general U.S. population over age eighteen. However, it does not focus on undergraduate/graduate students, and by extension it does not provide data specifically about faculty-on-student sexual harassment or violence. Nonetheless, the NISVS surveys a number of scenarios on the continuum from verbal harassment to nonconsensual sexual activity, such as groping or verbal harassment in public places that made the victim “feel unsafe.”⁷⁸ The NISVS data adds to our picture, including that 19.3% of women have been raped in their lifetime and 43.9% have experienced what the NISVS refers to as sexual violence other than rape.

Although this empirical research gives us some insight into the scope of the sexual harassment experienced by graduate students, including at the hands of faculty members, it is only one part of our review for a number of reasons. First, no recent nationally representative studies on graduate student harassment have been conducted. Even though the AAU study was done at twenty-seven universities across the country, those universities are limited to AAU members and are therefore specific types of universities that are not representative of the full range of higher educational institutions in the country. The NISVS is national but not focused on students. In addition, neither the NISVS nor any of the studies on sexual harassment in educational institutions of which we are aware gathered data on repeat harassers (this is so because the reporting student is the unit of analysis, not the harassing faculty member).

B. Serial Harassment

Research on recidivism in related circumstances is available however and shows high rates of serial sexual harassment in the workplace,⁷⁹ as well as high rates of repeat offending with regard to criminal sexual violence.⁸⁰ Most recently, several

⁷⁸ See CDC STACKS, NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS), 2011 VICTIMIZATION QUESTIONS 3 (2014), <https://stacks.cdc.gov/view/cdc/24726> [<https://perma.cc/J77E-NZG3>].

⁷⁹ Margaret A. Lucero et al., *Sexual Harassers: Behaviors, Motives, and Change Over Time*, 55 SEX ROLES, 331, 340 (2006) [hereinafter Lucero et al., *Sexual Harassers*] (studying arbitration decisions and finding that for male sexual harassers “discipline appears to be useful. It is unfortunate, however, that the imposition of discipline did not stop the repeated offenders in our sample. Perhaps the discipline costs associated with management’s actions are not sufficient to outweigh the satisfaction of the sexual harasser’s goal attainment”); see also Margaret A. Lucero et al., *An Empirical Investigation of Sexual Harassers: Toward a Perpetrator Typology*, 56 HUM. REL. 1461, 1469–70 (2003) (finding that “Type I and Type II [harassers] appeared to be encouraged if there was a sexual ambience in the workplace.”).

⁸⁰ Gordon C. Nagayama Hall et al., *Initiation, Desistance, and Persistence of Men’s Sexual Coercion*, 74 J. CONSULTING & CLINICAL PSYCHOL. 732, 732 (2006) (“[T]here is evidence of sexual offenders being at higher risk for reoffense than other types of

studies have also looked at repeat sexual coercion and aggression reported by male college students, the closest population to college faculty in the existing research. Like legal definitions of sexual harassment, the definitions used by researchers for “sexual coercion” and “sexual aggression” commonly refer to a wider range of sexually victimizing conduct than just completed, criminal rape. Sexual aggression generally refers to “unwanted, verbally-coerced, or alcohol- and drug-assisted sexual contact” up to and including rape,⁸¹ and sexual coercion refers to verbal pressure to obtain sexual contact with an unwilling person.⁸² One study recently looked at levels of repeat offending among college men and found that 68% of the men who reported committing at least one act of “sexual coercion and assault (SCA)” (defined as “(1) unwanted sexual contact, (2) sexual coercion, (3) attempted rape, and (4) completed rape”) were repeat offenders.⁸³

C. Harms to Victims, Institutions, and Society from Sexual Harassment

A substantial body of social science research documents the harms associated with sexual harassment in the workplace and in educational settings, particularly

offenders.”); R. Karl Hanson & Kelly E. Morton-Bourgon, *The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies*, 73 J. CONSULTING & CLINICAL PSYCHOL. 1154, 1154 (2005); David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 73 (2002); Cara E. Rabe-Hemp & Jeremy Braithwaite, *An Exploration of Recidivism and the Officer Shuffle in Police Sexual Violence*, 16 POLICE Q. 127, 127 (2013) (finding 41% of police sexual violence cases are committed by recidivist officers who averaged 4 victims each over a three-year span).

⁸¹ Kevin M. Swartout et al., *Trajectories of Male Sexual Aggression from Adolescence Through College: A Latent Class Growth Analysis*, 41 AGGRESSIVE BEHAV. 467, 472–73 (2015) (categorizing college men who participated in the study by four trajectories of sexual aggression: a) low/no sexual aggression over the full time period; b) moderate sexual aggression that was consistent over the time period; c) decreasing sexual aggression; and d) increasing sexual aggression. *Id.* at 472. Found that those in the category likely “to perpetrate moderately extreme forms of sexual aggression such as unwanted and coercive sexual contact consistently across time” made up 21.2% of the sample). As better data gradually become available and more sophisticated and divergent modeling techniques are adopted, estimates of serial rape by male college students have come down somewhat compared to Lisak’s 2002 study.

⁸² Sarah DeGue et al., *Are All Perpetrators Alike? Comparing Risk Factors for Sexual Coercion and Aggression*, 22 SEXUAL ABUSE: A J. OF RES. & TREATMENT 402, 403 (2010).

⁸³ Heidi M. Zinzow & Martie Thompson, *A Longitudinal Study of Risk Factors for Repeated Sexual Coercion and Assault in U.S. College Men*, 44 ARCHIVES SEXUAL BEHAV. 213, 215 (2015). The authors found that of that 68%, 42% reported committing two instances of SCA, 22% offended three times, 14% four times and 23% five or more times. *Id.* at 217. Repeat offenders were more likely than single-time offenders to engage in SCA of higher severity, and 82% committed subsequent SCA at similar or higher severity levels. *Id.* at 218.

with respect to women victims.⁸⁴ Meta-analytic studies—which synthesize the cumulative state of the research and overcome many limitations often found in any given study such as sampling error and small sample size—show that sexual harassment has substantial negative consequences for the mental health and wellbeing of victims, including symptoms of depression, anxiety, withdrawal and post-traumatic stress disorder (“PTSD”).⁸⁵ It is hardly surprising that sexual assault (the more extreme end of the continuum of sexual harassment) victims on college campuses grapple with PTSD.⁸⁶ Yet, other studies show that in less severe (non-assault) sexual harassment cases, women undergraduate and graduate student targets of the harassment also encounter PTSD and other negative mental health effects.⁸⁷

⁸⁴ Most of the research focuses on sexual harassment of women, given current and historical differences in prevalence rates. Pina et al., *supra* note 33, at 136 (“Sexual harassment . . . affects a significant proportion of working women and it affects their personal lives and professional functioning, thus preventing them from advancing in the workplace, and affecting one of their fundamental human rights; the right to work with dignity.”).

⁸⁵ Willness et al., *supra* note 55, at 148–49; Victor E. Sojo et al., *Harmful Workplace Experiences and Women’s Occupational Well-Being: A Meta-Analysis*, 40 PSYCHOL. OF WOMEN Q. 10, 10 (2016); see also Paula McDonald, *Workplace Sexual Harassment 30 Years on: A Review of the Literature*, 14 INT’L J. MGMT. REV. 1, 4 (2012) (“Studies consistently demonstrate that targets of [sexual harassment] experience a range of significant negative psychological, health and job-related outcomes.”).

⁸⁶ See, e.g., Lisa Fedina, et al., *Campus Sexual Assault: A Systematic Review of Prevalence Research from 2000 to 2015*, 19 TRAUMA, VIOLENCE & ABUSE 76, 76 (2018) (“The health consequences of sexual violence are well documented and include both short-term and long-term health problems such as depression, anxiety, eating disorders, post-traumatic stress disorder, and suicidal ideation.”); PATRICIA TJADEN & NANCY THOENNES, NAT’L INST. OF JUST., EXTENT, NATURE, AND CONSEQUENCES OF RAPE VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 29 (Jan. 2006), <https://www.ncjrs.gov/pdffiles1/nij/210346.pdf> [<https://perma.cc/C2BH-QFNZ>] (“[The National Violence Against Women Survey] strongly confirms the negative mental health and social costs of rape victimization.”); Fedina et al., *supra* note 34, at 76 (“The health consequences of sexual violence are well documented and include both short-term and long-term health problems such as depression, anxiety, eating disorders, post-traumatic stress disorder, and suicidal ideation.”).

⁸⁷ See, e.g., Lilia M. Cortina et al., *Sexual Harassment and Assault: Chilling the Climate for Women in Academia*, 22 PSYCHOL. WOMEN Q. 419, 435–36 (1998); Meredith McGinley et al., *Risk Factors and Outcomes of Chronic Sexual Harassment During the Transition to College: Examination of a Two-part Growth Mixture Model*, 60 SOC. SCI. RES. 297, 298 (2016) (“Experiencing [sexual harassment] victimization during a period of already heightened duress, i.e., when coping resources are already taxed, may have particularly deleterious consequences for mental and behavioral health. In particular, students may turn to maladaptive or avoidant forms of coping, which include problematic drinking and drug use.”) (citations omitted); McDermut et al., *supra* note 35, at 397; see also Bonnie S. Dansky & Dean G. Kilpatrick, *Effects of Sexual Harassment*, in SEXUAL HARASSMENT: THEORY,

Accompanying (and related to) these mental health costs are the negative workplace and organizational effects of sexual harassment, including declines in job satisfaction, retention rates, organizational commitment and job performance, as well as increased absenteeism.⁸⁸ Likewise, student victims of sexual harassment in the university setting can encounter diminished educational experiences and outcomes, including negative global perceptions about academia, lower academic satisfaction, diminished informal networking/mentoring, and lower grade performance.⁸⁹ Some of the important takeaways from the literature on sexual harassment and organizational climate for both victims and third-party bystanders includes the harms when organizations exhibit tolerance of sexual harassment, poor leadership, retaliation and the concept of “institutional betrayal.”⁹⁰

Substantial economic costs are associated with all of the aforementioned harms to sexual harassment victims, not to mention the costs employers and educational institutions incur with sexual harassment settlements and litigation. For example, recent research conducted by United Educators, an educational insurer, on the costs for colleges and universities resulting from either court-based litigation, OCR investigations, or demand letters threatening either or both kinds of actions shows that United Educators’ insured paid about \$6 million per year to settle sexual assault cases from 2005–2013.⁹¹ Likewise, with respect to federal Equal Employment Opportunity Commission (“EEOC”) complaints, the Commission resolved about 7,300 sexual harassment complaints in 2015, with employers paying \$46 million in employee benefits through the Commission’s pre-litigation administrative enforcement process.⁹² These EEOC figures represent only a drop in the bucket in

RESEARCH AND TREATMENT 152, 152–71 (William O’Donohue, ed., 1997) (employment sector study).

⁸⁸ McDonald, *supra* note 85, at 4; Willness et al., *supra* note 55, at 147–48.

⁸⁹ Marisela Huerta et al., *Sex and Power in the Academy: Modeling Sexual Harassment in the Lives of College Women*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 616, 618 (2006); Cortina et al., *supra* note 87, at 419.

⁹⁰ See, e.g., Carly Parnitzke Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 J. OF TRAUMATIC STRESS 119, 119 (2013) (“Those women who reported institutional betrayal surrounding their unwanted sexual experience reported increased levels of anxiety.”).

⁹¹ See EDURISK, CONFRONTING CAMPUS SEXUAL ASSAULT: AN EXAMINATION OF HIGHER EDUCATION CLAIMS 14 (2015), http://www.ncdsv.org/ERS_Confronting-Campus-Sexual-Assault_2015.pdf [<https://perma.cc/NDX8-XXZ4>]; EDURISK, STUDENT SEXUAL ASSAULT: WEATHERING THE PERFECT STORM 1–2 (2011), <https://atixa.org/wordpress/wp-content/uploads/2012/01/ATIXA-Resource2.pdf> [<https://perma.cc/4GWR-CX2F>]. We believe that student peer sexual assault cases represent the lion’s share of these aggregate settlement statistics; unfortunately, disaggregated statistics for cases by faculty harassers are not available.

⁹² U.S. Equal Emp’t Opportunity Comm’n, *Charges Alleging Sexual Harassment (Charges filed with EEOC) FY 2010 - FY 2017*, https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm [<https://perma.cc/6M65-VF54>] (last visited Jan. 22, 2018).

terms of the aggregated economic costs of disputed sexual harassment claims in the U.S. given that (a) complaints can alternatively be lodged with other federal agencies like the Department of Labor Office of Federal Contract Compliance Programs (“OFCCP”) or the Department of Education OCR or with equivalent state agencies; (b) many other cases can result in litigation-related settlements or a smaller number of jury verdicts in federal or state court; and (c) cases that involve an agency complaint or litigation will typically generate substantial defense costs for employers irrespective of outcomes. Widespread confidentiality practices at the EEOC and in the broader federal and state court systems where most cases reach settlement tend to weaken the ability to accurately measure the economic losses resulting from sexual harassment.⁹³

Even in cases where employers successfully defend lawsuits brought by employees alleging sexual harassment, employers will commonly pay out six figures in outside attorney’s fees and investigation costs.⁹⁴ A key economic driver behind the pre-litigation and/or pretrial litigation posture of both parties in sexual harassment cases is that Title IX, Title VII and many related state laws contain—reflective of legislative policy choices around civil rights enforcement—statutes that award attorney’s fees to prevailing plaintiffs but not to prevailing defendants.⁹⁵ Recent examples of substantial settlements include a West Coast university settling for \$1.15 million with a student allegedly sexually assaulted by a since-departed faculty member on the eve of her graduation ceremony,⁹⁶ two graduate students at a different West Coast university settling their sexual harassment lawsuit for \$460,000 after withstanding the university’s motion to dismiss;⁹⁷ and a Mid-Atlantic medical

⁹³ Krieger, *supra* note 41, at 314–7.

⁹⁴ Beth Braverman, *The High Cost of Sexual Harassment*, FISCAL TIMES (Aug. 22, 2013), <http://www.thefiscaltimes.com/Articles/2013/08/22/The-High-Cost-of-Sexual-Harassment> [<https://perma.cc/CZE3-ZZSL>].

⁹⁵ See, e.g., Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 933 (2005) (“One significant indicator of the public nature of employment discrimination claims was Congress’s decision to depart from the ‘American rule’ and require employers to pay attorney’s fees to prevailing plaintiffs.”).

⁹⁶ Ryan Masters, *After Landmark Settlement, Questions Remain in UC Santa Cruz Rape Case*, THE MERCURY NEWS (FEB. 7, 2017), <https://www.mercurynews.com/2017/02/07/questions-remain-in-uc-santa-cruz-rape-case/> [<https://perma.cc/4KG2-9SS8>].

⁹⁷ Katherine Knott, *UCLA Will Pay \$460,000 to 2 Graduate Students Who Said They Were Harassed*, CHRON. OF HIGHER EDUC. (Sept. 12, 2016), <https://www.chronicle.com/blogs/ticker/ucla-will-pay-460000-to-2-graduate-students-who-said-they-were-harassed/114185> [<https://perma.cc/9B4K-PVP5>]; *Takla v. Regents of the Univ. of Cal.*, No. 2:15-cv-04418-CAS (SHx), 2015 WL 6755190 (C.D. Cal. 2015).

school's settlement for \$1.3 million in connection with the behavior of a department chair.⁹⁸ More common would be settlements such as one for \$80,000 resolving a student's sexual harassment complaint against a dean at a university in the Northeast.⁹⁹

Finally, sexual harassment costs the nation as a whole in terms of diminished human and economic potential.¹⁰⁰ In a 2016 study on the effects of gender inequality on economic productivity of the entire nation, the McKinsey Global Institute concluded that "[a]chieving the economic potential of women in work could add \$2.1 trillion in GDP in 2025 or 0.8 percent in GDP growth in the United States over the next decade," but concludes that "violence against women," which appears to include at least severe sexual harassment,¹⁰¹ is one of several indicators of gender inequality that are barriers to achieving women's economic potential.¹⁰² Violence against women was the only indicator of gender inequality that was extremely high across all fifty states,¹⁰³ and, the report concluded, reducing violence against women along with five other indicators that were less consistently high was necessary for achieving the nation's full economic potential.¹⁰⁴

In summary, the aggregate economic costs of sexual harassment in U.S. employment and education sectors are, for all the reasons noted above, profound yet somewhat difficult to measure.¹⁰⁵ Indeed, several researchers and advocates have

⁹⁸ Kyla Asbury, *Women Agree to Mediation in Lawsuits Against WVU for Sexual Harassment*, W. VA. REC. (Apr. 9, 2015), <https://wvrecord.com/stories/510588734-women-agree-to-mediation-in-lawsuits-against-wvu-for-sexual-harassment> [<https://perma.cc/L5LD-X3VP>]; *Lawsuit Against Neurosurgery Chief at WVU Settled for \$1.3M*, INS. J. (Aug. 21, 2015), <https://www.insurancejournal.com/news/southeast/2015/08/21/379291.htm> [<https://perma.cc/E4L3-Z96W>].

⁹⁹ This case settled a few months after the federal court's denial of a motion to dismiss in *Campisi v. City Univ. of New York*, No. 15 Civ. 4859 (KPF), 2016 WL 4203549, at *9 (S.D.N.Y. 2016).

¹⁰⁰ FELDBLUM & LIPNIC, *supra* note 43, at 23.

¹⁰¹ KWEILIN ELLINGRUD ET AL., *THE POWER OF PARITY: ADVANCING WOMEN'S EQUALITY IN THE UNITED STATES*, MCKINSEY GLOBAL INST. 42 (Apr. 2016), <https://www.mckinsey.com/~media/McKinsey/Global%20Themes/Employment%20and%20Growth/The%20power%20of%20parity%20Advancing%20womens%20equality%20in%20the%20United%20States/MGI-Power-of-Parity-in-US-Full-report-April-2016.ashx> [<https://perma.cc/98HT-S5R9>].

¹⁰² *Id.* at iv.

¹⁰³ *Id.* at 19–22.

¹⁰⁴ *Id.* at iv.

¹⁰⁵ The econometric literature estimating the aggregate costs of sexual harassment in U.S. society is less robust than we would have thought, and we encourage additional research in this area. For a short summary, see JONI HERSCH, IZA WORLD OF LABOR, *SEXUAL HARASSMENT IN THE WORKPLACE* 1–10 (2015), <https://wol.iza.org/uploads/articles/188/pdfs/sexual-harassment-in-workplace.pdf> [<https://perma.cc/G9Y9-F5S9>]; *see also* FELDBLUM & LIPNIC, *supra* note 43, at v.

identified a “long-term, downward economic and social spiral,”¹⁰⁶ both within education and without, resulting from sexual assault. Moreover, both logic and evidence suggest that the risks of entering that spiral are greater for certain groups of student victims who are likely to have fewer resources to create the time and space that they need to heal from negative health effects.¹⁰⁷ The experiences of these student victims show how students from groups that already face intersectional and multidimensional disadvantages can unfairly experience even greater negative consequences and economic costs after suffering from sexual harassment.¹⁰⁸ Likewise, the AAU survey is also suggestive of sexual harassment having a disparate impact within higher education on LGBT graduate students.

Taken together, the studies reviewed here in subsections A, B, and C raise serious questions about whether a small minority of college faculty could be responsible for a disproportionate share of numerous sexual harassing incidents causing enormous harm to individuals, institutions, and the nation as a whole. However, the studies are limited in their ability to answer those questions, due to the incompatibility of their particular social science methodology with the legal standard for sexual harassment. Because the standard for what constitutes legally actionable harassment is a fact-intensive, case-by-case, totality of the circumstances

¹⁰⁶ Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 471–72 (2005). The downward spiral results when the aforementioned negative health consequences feed delays in completing school and/or overall declines in educational performance. See Kathryn M. Reardon, *Acquaintance Rape at Private Colleges and Universities: Providing for Victims’ Educational and Civil Rights*, 38 SUFFOLK U. L. REV. 395, 396 (2005) (“The end result for victims is falling grades, prolonged school absence, and for many, eventual school drop out or failure.”). These educational consequences in turn can result in short-term losses of financial aid, tuition dollars, or scholarship money. See Laura Hilgers, *What One Rape Cost Our Family*, N.Y. TIMES (June 24, 2016), <https://www.nytimes.com/2016/06/24/opinion/what-one-rape-cost-our-family.html>, [<https://perma.cc/K5GZ-NU5W>].

¹⁰⁷ Although campus sexual violence survivors do not often publicly discuss their parents’ income or levels of education, the effect of such individual and income disparities is hinted at in several public accounts of victimization and its aftermath. See Dana Bolger, *Gender Violence Costs: Schools’ Financial Obligations Under Title IX*, 125 YALE L.J. 2106, 2106 (2016). Writings by and interviews with prominent survivor activist, Wagatwe Wanjuki, for instance, make clear that she was largely on her own when it came to paying for college. As a result, when she was raped and abused by a fellow student, then reportedly given no accommodations and instead expelled by her school for poor grades in violation of Title IX, Wanjuki was left in serious debt. Wagatwe Wanjuki, *Dear Tufts Administrators Who Expelled Me After My Sexual Assaults*, THE ESTABLISHMENT (Apr. 21, 2016), <http://www.theestablishment.co/2016/04/21/dear-tufts-administrators-who-expelled-me-after-my-sexual-assaults/> [<https://perma.cc/6PV9-JMUR>].

¹⁰⁸ More systematic research on the economic effects of sexual assault and sexual harassment for victims in postsecondary education, including economic modeling of long-term consequences and damages, is sorely needed.

determination, some amount of the behavior reported in the empirical research just reviewed might not constitute sexual harassment as a legal matter.

For instance, one type of actionable sexual harassment—hostile environment sexual harassment—occurs when one or more instances of harassing conduct, considered together, are sufficiently severe or pervasive to create a hostile educational environment. The existing social science literature does not fully measure the severity of each instance of reported harassing conduct or the pervasiveness of a combination of multiple instances. Consequently, this Article next turns to accounts of individual incidents of harassment, first in media reports, then in court opinions in Title IX enforcement actions in higher education (private lawsuits and investigation resolution letters by OCR or DOJ), and lastly in faculty termination cases, to round out the picture provided by the social science literature.

III. INDIVIDUAL SEXUAL HARASSMENT COMPLAINTS REPORTED IN THE PRESS

The source of information about individual cases found just above the waterline in our iceberg model are media reports of allegations regarding faculty sexually harassing students. Such reports are limited to just that: allegations, and they therefore must be viewed with major caveats in mind. Many of these allegations are contested but never adjudicated, and the news coverage of these cases could be partial, asymmetrical, or even inaccurate due to “no comment” institutional responses and the advocacy posture of some reporting parties.¹⁰⁹ A portion of these media reports describe imposed disciplinary sanctions, from which a substantiated finding of misconduct by campus officials can be inferred even if the contours of the reported findings might be disputed, inaccurate, or unclear. With those limitations in mind, however, our interest is in overall thematic patterns across hundreds of cases rather than the veracity of any specific allegation in a case.

A. Methodology for Cases Included in the Study

We surveyed the online media landscape, including sources that have decent coverage going back to the 1980s or 1990s (e.g., LexisNexis, *Chronicle of Higher Education*, *New York Times*) and ultimately concluded that the most comprehensive source of news articles about faculty sexual harassment is Professor Julie Lebarbin’s website “Not a Fluke: That Case of . . . Sexual Harassment [or] . . . Assault . . . is

¹⁰⁹ Some of the more recent news articles we looked at were accompanied by lightly redacted official investigation reports at the universities obtained through public records act requests, and such news articles have a different posture as compared to articles where one party (an accused faculty member or an accuser) is trying to advance their side of the story in the court of public opinion in the absence of such investigation/hearing reports. A summary of a half-dozen such investigation reports is provided in Katy Murphy et al., *UC Berkeley Sex Scandals: Records Expose Rampant Violations*, SAN JOSE MERCURY NEWS (Apr. 5, 2016), <http://www.mercurynews.com/2016/04/05/uc-berkeley-sex-scandals-records-expose-rampant-violations/>, [<https://perma.cc/6XKQ-PETD>].

Not an Isolated Incident,” which collects “publicized sexual harassment . . . stories in academia,”¹¹⁰ not only by faculty members against students, but also by faculty who are accused of harassing colleagues and by upper level administrators who reportedly harass students and/or colleagues. This webpage is one of several making up Professor Libarkin’s Geocognition Research Laboratory website at Michigan State University. Excluded from the website are news stories involving “accusations alone,” without discussion of one or more of the following circumstances: (1) an institutional finding of sexual harassment, (2) the resignation (or death) of the accused faculty member before an investigation was completed, (3) a settlement of the harassment allegations between the institution and an accused faculty member or an accuser, (4) “documented evidence of sexual harassment . . . by a faculty [member],” and/or (5) “a [legal] finding . . . that sexual harassment . . . had occurred” by a court.¹¹¹ Thus, Dr. Libarkin excludes cases involving a determination of false accusations or a lack of tangible evidence to support the allegation(s), but she does not screen out substantiated cases simply because of where they fall in terms of severity of conduct (low to high).

We began with approximately 450 media reports that were aggregated in the “Not a Fluke” website as of December 2016. We then narrowed this list further to 219 news reports that involved reports of faculty harassing students (excluding cases where junior faculty or staff were the main targets of the reported harassment or cases where it was unclear). The stories generally lacked sufficient detail to determine both whether the accused harassers were tenured or tenure-track faculty and whether the student or students complaining of harassment were undergraduate, graduate, or professional students. Therefore, we included in the 219 cases discussed here all cases where the coverage provided enough detail to determine that the accused harassers were college or university employees who were instructors of students, and that they were alleged to have harassed at least one student. These cases disproportionately occurred in recent years (only a few dozen from the 1980s and early 1990s are included here), reflecting what is available from online media sources. By implication, the policy repercussions of our analysis are very contemporary, rather than being rooted in patterns from the distant past. Appendix

¹¹⁰ *Not a Fluke: That Case of Academic Sexual Harassment or, Sexual Assault, Sexual Misconduct, Stalking, Violation of Dating Policies, Violations of Campus Pornography Policies, and Similar Violations Is Not an Isolated Incident!*, GEOCOGNITION RES. LABORATORY (Feb. 3, 2018), <https://geocognitionresearchlaboratory.wordpress.com/2016/02/03/not-a-fluke-that-case-of-sexual-harassment-is-not-an-isolated-incident/> (last updated Jan. 19, 2018), [<https://perma.cc/RJ9Q-KZDX>]. We were aided tremendously in analyzing these media reports by Barry Law student, Michelle Scott, who read and synopsised the vast majority of the cases. Because of the sheer number of cases listed on the website and the fact that it is constantly being updated, however, Ms. Scott, even with support, was not able to read and analyze all of the stories in a single day. Nor did we track whether updates were made and when during the time that we were making our way through the list. Therefore, our best estimate is that there were approximately 450 listed on the site over the course of December 2016.

¹¹¹ *Id.*

A provides additional details on methodology for including cases as well as Professor Libarkin's methodology for collecting and posting sexual harassment cases on her website.

We developed seven categories of sexually harassing conduct based on the allegations discussed in the 219 news articles:

- (1) unwelcome verbal conduct only;
- (2) unwelcome conduct not purely verbal but stopping short of physical contact between the harasser and victim (e.g., indecent exposure, excessive or sexually-themed gifts to the victim, photographing or filming the victim);
- (3) unwelcome hugs, kisses, and other forms of physical conduct that could be characterized as nonsexual or accidental;
- (4) unwelcome groping and clearly sexual, inappropriate touching;
- (5) unwelcome conduct that could also violate criminal laws (sexual assault, domestic violence or domestic violence-like abuse, stalking behaviors, etc.);
- (6) "welcome" or consensual sexual relationships;¹¹²
- (7) *quid pro quo* sexual harassment, and
- (8) serial harassment.

With regard to the categories (6) and (7), although much of the press coverage impliedly questioned whether a particular sexual relationship was welcome, fully consensual, and/or coerced due to a *quid pro quo* arrangement, that relationship was categorized in category (6) as long as the claims that it was welcome and consensual were not explicitly or directly contested by other statements or events reported by the particular media accounts we read of that case. We only categorized a relationship or a refusal to engage in a relationship as *quid pro quo* (category (7)) if the news coverage made clear that no unwelcome physical contact was alleged and that the victim had either allegedly exchanged sexual favors for benefits (or promised benefits) such as higher grades or that a victim experienced negative consequences for refusing such an exchange.

Table 1 provides a simple alphabetical list of the institutions and dates connected to the 219 cases reviewed herein. The full documentation of sources is very long and can be found at the end of this Article in Appendix B. To be clear, Table 1 should not be thought of as a "shame" list of institutions for several reasons, including that colleges and universities are ultimately judged (legally and in the court of public opinion) by how they respond *after* they receive a sexual harassment allegation (see Section IV and discussion of *Gebser v. Lago Vista Independent School District*), and because a larger number of confidential sexual harassment cases at *other universities* were never reported in the media for some arbitrary combination of reasons (see Section I.C.). Rather, the intent of Table 1 is to provide readers with a sense of the profile and scope of our coverage of cases analyzed in this section.

¹¹² When a faculty member has academic responsibility/oversight over a college student, the concept of "welcome" conduct is fraught with complexity. *Infra* Section III.B.

Table 1: Institutions Included in Our Review of Media Cases
(Alphabetical and Dates)

1. University of Akron (2015)	2. University of Alabama (2016)	3. Alabama A&M University (2016)
4. Albany State University (2009)	5. Antelope Valley College (2000)	6. University of Arizona (2016)
7–9. Arizona State University (2014–2015)	10. Arkansas State University (2007)	11. Ball State University (1991)
12. Baylor University (1997)	13–16. University of California, Berkeley (1980–2015)	17. Brevard Community College (1993)
18. Boston University (1995)	19. Brooklyn College and the Franklin Career Institute (2007)	20. California Institute of Technology (2016)
21. California State University (1982)	22. Calvin College (2011)	23. Case Western Reserve University (2015)
24–26. Central Conn. State University (2011–2015)	27. College of Central Florida (2016)	28. University of Central Florida (2015)
29–30. University of Central Oklahoma (1999, 2012)	31. University of Charleston (2007)	32. College of Charleston (2013)
33. University of Chicago (2016)	34. Christopher Newport University (1993)	35. Colby College (2011)
36–41. University of Colorado (2006–2015)	42–43. Columbia University (1986, 2014)	44–45. Columbus State Community College (2008–2010)
46. Columbus State University (2016)	47. University of Connecticut (2014)	48. Dartmouth Medical School (1997)
49. University of Delaware (2014)	50. Delta College (2011)	51. Eastern Michigan University (2012)
52. Eastern Washington University (1998)	53. East Stroudsburg University (2008)	54. Elon University (2014)
55. Fairleigh Dickinson University (2009)	56–60. University of Florida (2007–2014)	61. Florida Gulf Coast University (2009)
62. Florida International University (2016)	63–64. Florida State University (1998–2002)	65. Foothill-De Anza Community College (1995)
66. Fordham University (2004)	67. George Mason University (1993)	68. ** ¹¹³
69. Georgia Southern University (2016)	70. Georgia State University (2006)	71–80. University of Georgia (1999–2013)
81. Grand Rapids Community College (2016)	82–84. Harvard University (1979–1985)	85–86. University of Hawai'i (2002–2015)

¹¹³ As noted in more detail in the Appendix, we did not want to duplicate or “double-count” cases and this case involving Georgia Southern University was moved to Section V (fired faculty litigation) very late in our research project when a state supreme court ruling suddenly appeared. For efficiency reasons, we left the number blank in this section rather than re-doing our whole coding scheme for this article.

87–89. Indiana University (1991–2016)	90. Indiana State University (2003)	91. Inver Hills Community College (2007)
92–94. University of Iowa (2008–2016)	95–97. Iowa State University (1997–2005)	98. Johnson State College (2012)
99. Julliard (2015)	100. University of Kansas (2014)	101. Kansas State University (2007)
102. Kaplan College (2010)	103–104. University of Kentucky (2016)	105. Kilgore College (2016)
106. Kutztown University (2014)	107. Lafayette College (2015)	108. Lanier Technical College (2016)
109. Liberty University (2010)	110. Loma Linda University (2016)	111. Manatee Community College (2007)
112. Massachusetts Institute of Technology (2015)	113. University of Memphis (2015–2016)	114. University of Miami (2015)
115. University of Michigan (1983)	116–117. Montana State University (2016)	118. Montgomery College (2014)
119. United States Naval Academy (2016)	120. University of Nebraska (2003)	121. University of New Mexico (2016)
122. New Mexico State University (2014)	123. State University of New York (2005)	124. New York Institute of Technology (2016)
125. Norfolk State U. (2003)	126. University of North Carolina at Chapel Hill (2010)	127. North Carolina State University (2005) (2005)
128. University of North Dakota (1993)	129. University of North Texas (2015)	130. University of North Alabama (2016)
131. Northern Arizona University (2015)	132. University of Northern Colorado (2009)	133. Northern Kentucky University (2016)
134. Northwestern University (2014)	135. University of Notre Dame (1991)	136. Oakland University (2011)
137. Oberlin College (1997)	138–140. Ohio University (2007–2015)	141. Ohio State University (2015)
142. Oklahoma State University (2014)	143. Oregon State University (2008)	144. Otterbein University (2013)
145. Pace University (1996)	146. Paradise Valley Community College (2008)	147–148. Pasadena Community College (2013)
149. Pasco-Hernando Community College (2013)	150. Peninsula College (2012)	151–152. Pennsylvania State University (1998, 2015)
153. Philander Smith College (1999)	154. Pierce College (1987)	155–157. University of Pittsburg (1997–2014)
158. Prairie View A&M University (2015)	159. Princeton University (1989)	160. Roane State Community College (2003)
161. Rockefeller University (2002)	162–163. Rutgers University (1998, 2015)	164. Sacramento State University (2011)
165. Salisbury University (2010)	166. Salt Lake Community College (2007)	167. San Diego State University (2015)
168. San Francisco State University (2016)	169–171. San Jose State University (1980–2016)	172. Southern Connecticut State University (2013)

173–175. University of South Florida (1984, 2016)	176. University of Southern Mississippi (2017)	177. South Texas College of Law (2004)
178. Spokane Community College (2016)	179. Standish University (2011)	180–181. Stanford University (1995, 2017)
182. Stetson University (2000)	183–185. Syracuse University (2006–2014)	186. University of Texas, San Antonio (2008)
187. Texas Tech University (2013)	188. T. Nelson Community College (1992)	189. Tulsa Community College (2014)
190. Virginia Commonwealth University (1995)	191. Volunteer State Community College (2014)	192. Washington State University (2007)
193. Washington University (2006)	194. Weatherford College (2014)	195. Weber State University (2006)
196. Western Oregon University (2005)	197. Western Washington University (2014)	198. Westfield State University (1986)
199. West Virginia State University (2016)	200–201. West Virginia University (2008–2016)	202. Wilkes University (1997)
203–204. College of William & Mary (1995, 2001)	205. William Mitchell College of Law (2012)	206. Winona State University (2013)
207–209. University of Wisconsin (1992–1997)	210–219. Yale University (1992–2016)	220. Youngstown State University (2004)

The “serial harassment” category tracked how many accused harassers were alleged to have harassed multiple victims. We categorized each media report by placing it in the category corresponding to the most severe form of harassment reported in the news article, unless the same harasser was alleged to have harassed more than one person, in which case we counted multiple instances of conduct based on how many victims were specified.¹¹⁴ If the accused faculty member was alleged to have harassed more than one victim, the case was included in the “repeat harassment” category as well as whichever of the seven conduct categories were applicable. Where many news articles covered the same set of allegations or events, which was often the case with the reports on alleged serial harassers, the articles were consolidated into one report for purposes of categorizing them.¹¹⁵

B. Themes and Patterns

With regard to the types of sexual harassment alleged, our tracking system showed that 51% (n=112 individual cases accounting for at least 130 incidents) of the 219 cases covered in the press involved complaints of unwelcome sexual conduct where physical contact occurred, including categories (3), (4), and (5) above. Those categories include conduct ranging from unwelcome hugs and kisses all the way to

¹¹⁴ Because a news report of an alleged repeat harasser would be “counted” in more than one category, the percentages in Categories (1) through (7) do not add up to 100%.

¹¹⁵ Note that we also collected data on the school’s response to the harassment allegation. See Appendix A.

criminal rape, stalking and domestic abuse or domestic abuse-like conduct such as controlling behaviors accomplished through a combination of physical, sexual, verbal, psychological, and emotional abuse. An illustrative example of groping at a state university is a 2013 case where the student victim told an interviewer:

He looked at me and touched me and said, “How do you want to better your grade?” the student said in the recorded television interview. “He kept coming closer to me and my body completely shut down. He continued to touch me and try to talk about the ways that I could better my grade.”¹¹⁶

Significantly smaller percentages of the cases were reported as involving sexual relationships that the news coverage characterized as welcome and did not include any contradictory allegations (19% or 42 out of 219 cases accounting for 51 incidents),¹¹⁷ unwelcome verbal conduct (14% or 31 out of 219),¹¹⁸ unwelcome indecent exposure, gift-giving, photographing, or filming (8% or 17 out of 219),¹¹⁹ or *quid pro quo* sexual harassment (6% or 14 out of 219).¹²⁰ In addition, within the 130 incidents complaining of physical sexual harassment, the less severe incidents involving unwelcome hugs, kisses, or other touching that could be accidental or affectionate made up only 8% (10 out of 130),¹²¹ whereas the remainder of reports involved groping (47% or 62 out of 130)¹²² and potentially criminal acts such as sexual assault, stalking, and domestic violence (45% or 58 out of 130).¹²³ Figure 3 displays themes for the physical sexual harassment cases.

¹¹⁶ Katy Murphy, *San Jose State Lecturer Jeffrey Mathis, Accused Sexual Assault, No Longer Working at the University*, MERCURY NEWS (June 13, 2013), <https://www.mercurynews.com/2013/06/13/san-jose-state-lecturer-jeffrey-mathis-accused-of-sexual-assault-no-longer-working-at-the-university/> [<https://perma.cc/G4SK-2RPY>].

¹¹⁷ Appendix B, Media reports 3, 8, 9 (three incidents), 13, 22, 23, 31, 34, 36, 39, 44, 48, 57, 58, 73, 76, 80, 88 (two incidents), 93, 97, 105, 120, 127, 131, 140 (four incidents), 147, 149, 156, 162, 163, 164, 175, 181, 184, 198, 201 (two incidents), 204, 207 (two incidents), 211, 213, 215, 218.

¹¹⁸ Appendix B, Media reports 18, 28, 41, 42, 45, 45, 51, 54, 56, 61, 65, 69, 72, 76, 77, 86, 87, 93, 105, 117, 138, 151, 153, 167, 170, 179, 183, 188, 193, 203, 214, 217.

¹¹⁹ Appendix B, Media reports 6, 7, 29, 35, 59, 64, 113, 114, 125, 133, 139, 141, 143, 148, 169, 190, 220.

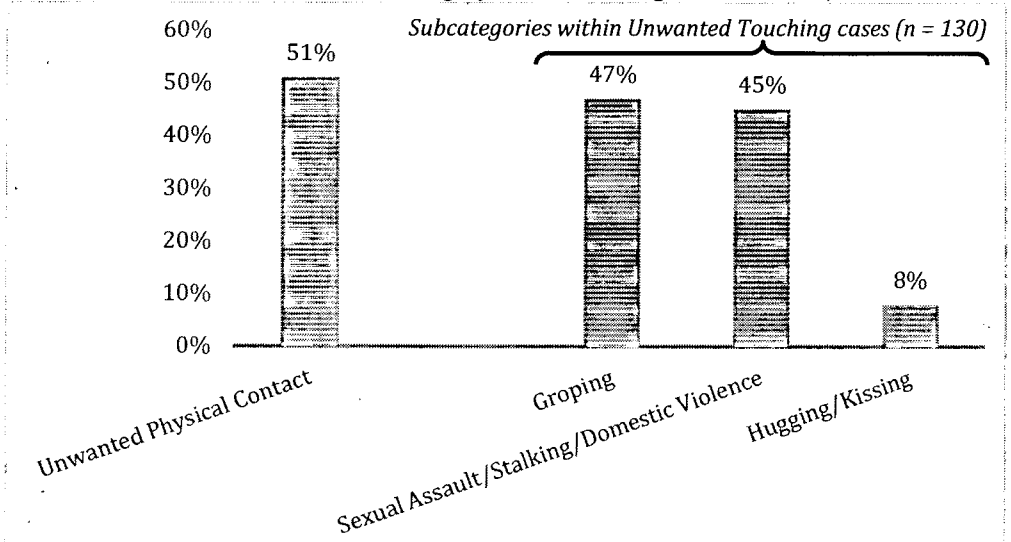
¹²⁰ Appendix B, Media reports 21, 26, 30, 49, 65, 82, 94, 158, 159, 191, 197, 205, 210, 218.

¹²¹ Appendix B, Media reports 60, 74, 83, 99, 112, 134, 165, 173, 185, 209.

¹²² Appendix B, Media reports 1 (two incidents), 2, 11 (five incidents), 13, 14, 15, 16, 19 (two incidents), 23, 37, 47, 51, 52, 63, 70 (two incidents), 71 (two incidents), 75, 76, 78, 79, 85, 90, 91, 94, 100, 103, 106, 109, 110, 111, 119, 122, 128 (two incidents), 136, 138, 145, 161, 166, 171, 172, 180, 182 (two incidents), 187, 189, 192, 194, 196, 200, 208, 213, 218, 221.

¹²³ Appendix B, Media reports 4 (two incidents), 5, 10, 17, 18, 24, 25, 27, 32, 33, 37, 40, 50, 52, 53, 55, 62, 66, 67, 81, 89, 90, 95, 101, 102 (three incidents), 104, 107, 115, 118,

Figure 3: Media Cases Involving Physical Contact Sexual Harassment
(on left side n = 112 of 219, for subcategory cases on the right side n = 130)



As a whole, in a substantial percentage of the 219 media reports regarding faculty sexual harassment of students, the press covered allegations of serial sexual harassment. Faculty were accused of harassing multiple students or a combination of students and others in 47% (n=104) of the cases reported in the news articles.¹²⁴ Several of these cases—especially those that came to light in 2014–2016—have received extensive coverage consisting of many news articles. As already noted, we have consolidated this coverage for purposes of counting these cases in Categories (1) through (7), although the extensive coverage of these allegations has allowed us to learn more about the dynamics of faculty sexual harassment of students at a quite granular level, especially with regard to serial harassment.

For instance, one west coast public research university campus was beset by an unfolding series of complaints involving faculty and faculty administrators, including one involving reports of a faculty member serially harassing students. A leading astronomy professor, reportedly on the short list for a Nobel Prize, was found in a university Title IX investigation to have sexually harassed female students including unwelcome kisses, groping, and massages. The publicly-released investigation was based on evidence gathered from four victims/witnesses who were

120, 121, 123, 124, 128, 129, 130, 132, 133, 135, 137, 139, 142, 152, 154, 157, 160, 164, 168, 176, 178, 186, 199 (two incidents), 206, 219.

¹²⁴ See *infra* Appendix B, Media reports 1, 3, 4, 5, 6, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 30, 32, 33, 37, 38, 45, 47, 51, 52, 54, 57, 60, 61, 62, 63, 67, 69, 70, 71, 74, 76, 77, 78, 79, 80, 84, 85, 87, 88, 90, 92, 93, 94, 95, 97, 102, 108, 112, 116, 117, 118, 120, 122, 123, 125, 128, 129, 130, 131, 132, 133, 134, 135, 136, 138, 140, 144, 146, 149, 155, 165, 167, 168, 169, 170, 172, 173, 174, 175, 181, 186, 187, 189, 190, 194, 199, 201, 205, 207, 208, 209, 210, 213, 214, 215, 218, 220, 221.

interviewed in 2015.¹²⁵ There were also several prior allegations (some anonymous) against the professor in 2011–2014.¹²⁶ Additional allegations then surfaced stretching back to the mid-1990s, at this astronomer’s previous university.¹²⁷

Similarly, an assistant professor of anthropology at a state university in the southwest was found to have engaged in sexual harassment by recruiting those he perceived as attractive heterosexual female students as advisees and treating those students more favorably than other students (including LGBTQ women). He also reportedly made lewd comments about students and engaged in unwelcome touching and sexual advances toward female students in the department.¹²⁸

The press coverage demonstrates that reports of serial sexual harassment can surface what was previously an “open secret”¹²⁹ at least within the tight-knit department or specialty discipline on the campuses where it occurs. An example of such an open secret can be found in a case at an Ivy League institution that began in 2011 when a recent graduate lodged a campus sexual harassment complaint against a philosophy professor. The complaint alleged that he groped her, made a series of inappropriate sexualized remarks, and misled her with illusory promises of a postgraduate job at a global justice center he directed at the university.¹³⁰ Some years

¹²⁵ UC BERKELEY TITLE IX INVESTIGATION REPORT, GEOFF MARCY—RESPONDENT 4, 20-120 (June 2015), <http://projects.dailyca.org/misconduct/case/berkeley-geoffrey-marcy-17/> [<https://perma.cc/HL5X-YRHV>].

¹²⁶ See *id.* at 4.

¹²⁷ Ghorayshi, *supra* note 19; Robin Wilson, *Geoff Marcy’s Downfall*, CHRON. HIGHER EDUC. (Feb. 21, 2016), <http://www.chronicle.com/article/Geoff-Marcy-s-Downfall/235380> [<https://perma.cc/LPS8-DQ8G>].

¹²⁸ Sara MacNeil, *Report Sheds Details on Valencia Case*, DAILY LOBO.COM (Aug. 13, 2016), <http://www.dailylobo.com/article/2016/08/investigative-report> [<https://perma.cc/3X45-QPHU>]; Chris Quintana, *Censured Professor Returns to UNM After Sex Harassment Investigation*, ALBUQUERQUE J. (Aug. 4, 2016, 12:05 AM), <https://www.abqjournal.com/820000/censured-prof-returns-after-sex-harassment-probe.html> [<https://perma.cc/MX9F-B5CL>]; Sara MacNeil, *Report Sheds Details on Valencia Case*, DAILY LOBO (Aug. 13, 2016, 3:48 PM), <http://www.dailylobo.com/article/2016/08/investigative-report> [<https://perma.cc/3X45-QPHU>].

¹²⁹ Ann Scales discusses the literature on “open secrets” in *Student Gladiators and Sexual Assault: A New Analysis of Liability for Injuries Inflicted by College Athletes*, explaining that an open secret is a kind of “socially organized ignorance [that protects a range of] interests . . . always includ[ing] avoiding accountability,” 15 MICH. J. GENDER & L. 205, 208–09 (2009) (quoting Eve Kosofsky Sedgwick’s “core grammar” of the open secret: “Don’t ask. You shouldn’t know. It didn’t happen; it doesn’t make any difference; it didn’t mean anything; it doesn’t have interpretive consequences. Stop asking just here; stop asking just now; we know in advance the kind of difference that could be made by the invocation of this difference; it makes no difference; it doesn’t mean.”).

¹³⁰ Noah Remnick, *After a Professor Is Cleared of Sexual Harassment, Critics Fear ‘Cultural Silence’ at Yale*, N.Y. TIMES (July 8, 2016), <http://www.nytimes.com/2016/07/09/nyregion/a-yale-professor-is-cleared-of-sexual-harassment-but-concerns-linger.html> [<https://perma.cc/59NE-J228>].

after the university found “insufficient evidence to support the charge of sexual harassment” in that case, media attention spotlighted what was apparently already known in many philosophy circles: that an anonymously posted essay by a different graduate student describing in detail her former mentor’s pattern of seducing young and admiring female students (more often, students not enrolled in his class) was in fact about this same professor.¹³¹ The reporting also confirmed an earlier allegation of sexual harassment against the professor when he was at a different east coast university earlier in his career.¹³²

In another open secret example, a law faculty member who became dean at a private, midwestern university resigned during a lawsuit brought by one of the law faculty for retaliation because that faculty member had reported to university officials his observations of the dean’s sexually harassing conduct towards women at the law school.¹³³ Those women who were targeted, the lawsuit later detailed, included six professors, four staff members, and one law student.¹³⁴ But the media coverage includes an enormous amount of open sexual conduct, much of it involving students or women who appeared to be students, ranging from inappropriate and/or possibly unwelcome to wildly inappropriate and/or clearly unwelcome behavior.¹³⁵ The conduct was so open that, according to one student, by the time the retaliation lawsuit was filed, the allegations in it were “common knowledge” that was “all out there” and “[t]he student body was all talking about it.”¹³⁶

¹³¹ *Id.*; Anonymous, *I Had an Affair with My Hero, A Philosopher Who’s Famous for Being ‘Moral,’* THOUGHT CATALOG (Apr. 27, 2014), <http://thoughtcatalog.com/anonymous/2014/04/i-had-an-affair-with-my-hero-a-philosopher-whos-famous-for-being-moral/> [<https://perma.cc/YLE9-WL7S>].

¹³² Remnick, *supra* note 130; Tyler Kingkade, *How Feminist Academics Deal with an Ethics Professor Accused of Harassment*, HUFFINGTON POST (June 19, 2016, 8:11 AM), http://www.huffingtonpost.com/entry/thomas-pogge-shunned_us_57643011e4b0fbbc8bea39eb [<https://perma.cc/X45J-C8GB>]; Monica Wang & Victor Wang, *Without Clear Procedures, Yale Hired Pogge Amid Allegations of Sexual Misconduct*, YALE DAILY NEWS (July 26, 2016, 11:16 AM), <http://yaledailynews.com/blog/2016/07/26/without-clear-procedures-yale-hired-pogge-amid-allegations-of-sexual-misconduct/> [<https://perma.cc/GF-N6-5BY3>]; Remnick, *supra* note 130. This case is also somewhat unusual for the lengthy rebuttals that Professor Pogge posts on his website. See *Thomas Pogge*, <http://thomaspogge.com> [<https://perma.cc/R2XS-QPW8>] (last visited Jan. 22, 2018).

¹³³ Doug Brown, *Sex, Politics and Revenge: Lawrence Mitchell Was Supposed to Bring Stability to Case Western Reserve University’s Law School, Not Treat It as His Personal Pickup Playground*, SCENE (May 7, 2014), <http://www.clevescene.com/cleveland/sex-politics-and-revenge-lawrence-mitchell-was-supposed-to-bring-stability-to-case-western-reserve-universitys-law-school-not-treat-it-as/Content?oid=4307875&showFullText=true> [<https://perma.cc/ZTJ7-AV2V>].

¹³⁴ Paul L. Caron, *Case Western Purchased Home of Former Dean in Settlement of Law Prof’s Retaliation Lawsuit*, TAXPROF BLOG (Feb. 7, 2015), http://taxprof.typepad.com/taxprof_blog/2015/02/case-western-purchased-home.html [<https://perma.cc/JW2B-TQYF>].

¹³⁵ Brown, *supra* note 133.

¹³⁶ *Id.*

The press coverage also includes suggestions that certain institutions may have a faculty harassment-supportive culture. Sixteen schools with cases in the 219 examined here had three or more media reports of faculty sexually harassing students. In addition, within this group of cases is an additional type of allegation: where faculty harassment of students is reported as being practiced openly by multiple faculty members with certain students reportedly joining in, and as permeating the environment of the campus as a whole or a particular sub-community of the university, such as a single academic department.¹³⁷ The media reports of such complaints (that certain academic environments are saturated by sexual harassment) suggest that a kind of “pattern or practice”¹³⁸ fact pattern may be more common in higher education than many educators would assume.

For instance, at a state university in the Rust Belt, described in the coverage as an “old boys’ club,” the press reported allegations that multiple male faculty in the

¹³⁷ For reasons that will be discussed in Section IV, *infra*, this type of case is almost never found in the social science literature or individual cases resolved by a court, OCR, or DOJ, despite including evidence showing a pattern or practice of harassment by individual harassers that is or has been tolerated by the school. *C.f.*, Caroline Vaile Wright & Louise F. Fitzgerald, *Correlates of Joining a Sexual Harassment Class Action*, 33 L. & HUM. BEHAV. 265, 278 (2009) (conducting a study of professional women in the financial services industry finding: “Employees in the present study who perceived that the defendant organization did not tolerate sexually harassing behavior and took the issue seriously were less likely to join the class [action litigation] . . .”).

¹³⁸ Note that “pattern or practice” here is not used to describe the specific type of claim that the Equal Employment Opportunity Commission is empowered to bring in Title VII cases, as such Title VII claims are governed by very specific doctrinal rules that depend on the structure of EEOC enforcement, which is quite different from Title IX’s administrative enforcement by OCR and DOJ. DONALD R. LIVINGSTON, AKIN, EEOC PATTERN OR PRACTICE LITIGATION, A.B.A. NAT’L CONF. ON EEO LAW, 1–14 (2010), http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2010/2010_eeo_016.authcheckdam.pdf [<https://perma.cc/9NCW-PB42>] (last visited Jan. 22, 2018). See also a discussion of the cases and literature in *E.E.O.C. v. CRST Van Expedited, Inc.*, 611 F. Supp. 2d 918, 934 (N.D. Iowa 2009). Rather, “pattern or practice” as used here is not a term of art but merely used to describe situations where the school has evidence that an individual harasser or group of harassers are harassing multiple victims. Generally, if such evidence is at issue in a Title IX enforcement action, the plaintiff will also allege that the school failed to address the pattern of harassing conduct, and this failure constituted a violation of the school’s obligations under Title IX. See discussion of the two tiers of analysis in Title IX enforcement actions noted in Section IV. For instance, in a recent investigation of the University of New Mexico, DOJ notes three different instances in which the university failed to adequately investigate evidence of “pattern behavior” by an individual harasser, ultimately concluding that, in order to comply with Title IX, “UNM must keep full and accurate records of complaints to identify repeat offenders and examine patterns of sexual harassment.” Letter from U.S. Dep’t of Justice, to Robert G. Frank, President, Univ. of New Mexico, Re: Title IX and Title IV Investigation of the University of New Mexico 19–20, 21, 30 (Apr. 22, 2016), <https://www.justice.gov/opa/file/843901/download> [<https://perma.cc/XHU3-3NQU>].

Communications department were having sexual relationships with female students. At the same time, women faculty and graduate students were alleged to have been treated unfairly, and an outside review had found that the department's environment was unhealthy for women, causing all of the women faculty to leave the department.¹³⁹

In another example, a western state university had six reports on the Geocognition site, at least four of which were in the same department.¹⁴⁰ That department was the subject of a lengthy assessment resulting in a damning outside review report, which found that the department was rife with "unacceptable sexual harassment, inappropriate sexualized unprofessional behavior, and divisive uncivil behavior" which contributed to departures by female faculty and graduate students.¹⁴¹ Specific findings in the report included that at least fifteen sexual harassment complaints had been lodged against department faculty,¹⁴² that some male faculty had been "observed ogling undergraduate women students,"¹⁴³ that there were "numerous reports of faculty . . . incivility . . . verbalized disrespect . . . and sexism,"¹⁴⁴ and that those in the department held an "inappropriate expectation" of after-hours socializing between graduate students and faculty, which typically included "excessive drinking" and reports of sexual harassment and assault.¹⁴⁵

Within eighteen months of this report's publication, several male faculty accused of sexual harassment and bullying had been pushed out via a combination of discipline, retirement, and separation agreements. One professor who had previously been suspended for sexual harassment retired; a second philosopher agreed to resign for a \$185,000 settlement; and a third professor was not allowed back on campus until he was evaluated by a workplace violence expert.¹⁴⁶ Lastly, an

¹³⁹ Marty Levine, *Communication Breakdown: With the Resignation of the Final Two Active Graduate Faculty in Pitt's Communication Department Come Renewed Questions*, PITTSBURGH CITY PAPER (Oct. 13, 2005), <http://www.pghcitypaper.com/pittsburgh/communication-breakdown/Content?oid=1338247> [<https://perma.cc/WPW7-XY52>].

¹⁴⁰ Sarah Kuta, *After Year of Scandal, CU-Boulder Philosophy Department Sees Latest Departure*, DAILY CAMERA (Jan. 3, 2015) [hereinafter Kuta, *After Year of Scandal*] http://www.dailycamera.com/cu-news/ci_27248228/after-year-scandal-cu-boulder-philosophy-department-sees [<https://perma.cc/5NG5-QPKX>].

¹⁴¹ SUMMARY OF REPORT BY THE AMERICAN PHILOSOPHICAL ASSOCIATION TO THE UNIVERSITY OF COLORADO BOULDER i (2014) [hereinafter SUMMARY OF REPORT] http://spot.colorado.edu/~tooley/The_Site_Visit_Report_and_Administration_Summary.pdf [<https://perma.cc/K2PF-S8E5>]; see also Matt Ferner, *Sexual Harassment Report Rocks University of Colorado Boulder Philosophy Department*, HUFFINGTON POST (Feb. 4, 2014, 5:10 PM), http://www.huffingtonpost.com/2014/02/04/sexual-harassment-colorado-philosophy_n_4725583.html [<https://perma.cc/8JTT-EG8F>].

¹⁴² SUMMARY OF REPORT, *supra* note 141, at 5.

¹⁴³ *Id.* at 7.

¹⁴⁴ *Id.* at 6.

¹⁴⁵ *Id.* at 7.

¹⁴⁶ Kuta, *After Year of Scandal*, *supra* note 140.

associate professor resigned after the university moved to fire him for retaliating against a woman graduate student who the university found to have been sexually assaulted by the associate professor's former student.¹⁴⁷ The university reached a settlement of \$825,000 with the graduate student sexual assault victim who alleged that the professor retaliated against her via his unauthorized investigation.¹⁴⁸

In this series of cases as in others, although several lawsuits were threatened, ultimately few cases were generally litigated. This is consistent with our earlier general discussion in Section I.C. that only about one percent of sexual harassment victims sue their employers. Indeed, the majority of the changes made were not the result of litigation—a phenomenon that was repeated several times in other cases receiving extensive media attention. For instance, the astronomer case unleashed a torrent of discussion about the inhospitable climate for women in (and aspiring to be in) a number of fields within academic science.¹⁴⁹ As a result, in October 2015, twenty faculty members in the astronomer's department signed an open letter declaring him to be unfit to return to his professorial duties, prompting his

¹⁴⁷ Sarah Kuta, *CU-Boulder Drops Bid to Fire David Barnett with \$290K Settlement Deal*, DAILY CAMERA (May 12, 2015, 5:16 PM), http://www.dailycamera.com/cu-news/ci_28099593/cu-boulder-drops-bid-fire-david-barnett-210k [<https://perma.cc/LDD3-ZTJF>].

¹⁴⁸ Sarah Kuta, *CU-Boulder Moves to Fire Professor Accused of Retaliating Against Sexual Assault Victim*, DAILY CAMERA (Aug. 7, 2014, 3:03 PM), http://www.dailycamera.com/cu-news/ci_26294506/cu-firing-professor-david-barnett [<https://perma.cc/4LB9-2NWP>].

¹⁴⁹ See, e.g., Ross Andersen, *The Consequences of Sexual Harassment in Astronomy*, ATLANTIC MONTHLY (Oct. 10, 2015), <http://www.theatlantic.com/science/archive/2015/10/sexual-harassment-geoff-marcy/410089/> [<https://perma.cc/Q9SF-RBHN>]; Daniel Clery, *Q&A: Shining a Light on Sexual Harassment in Astronomy*, SCI. MAG. (Oct. 21, 2015), <http://www.sciencemag.org/news/2015/10/qa-shining-light-sexual-harassment-astronomy> [<https://perma.cc/JTF5-XNDR>].

resignation.¹⁵⁰ The system-wide President for the university ordered sweeping changes.¹⁵¹

Like with the complaints regarding the astronomer, the ultimate resolution of the anthropologist's case may also have been influenced by colleague pressure. Although he was initially only issued a censure sanction, his scheduled return to teaching prompted three female faculty in the anthropology department to refuse to teach in protest. In addition, the very same week that the professor was fired, the U.S. Department of Justice reached a conciliation agreement with the university to improve its sexual harassment and assault prevention and response systems.¹⁵² Ultimately, the university's administration decided to terminate the anthropologist's probationary contract (he was in his first two years at the university).¹⁵³

Finally, ten of the media reports included explicit coverage of a school being on one end of an alleged "pass-the-harasser" situation: either by hiring the accused harasser from another school where harassment allegations against that faculty member had been investigated or by investigating sexual harassment allegations against a faculty member who then moved to another school (usually after resigning

¹⁵⁰ *Statement by Astronomy Faculty of the University of California, Berkeley, on Geoffrey Marcy*, N.Y. TIMES (Oct. 14, 2015), <http://www.nytimes.com/interactive/2015/10/14/science/updated-berkeley-astronomy-statement.html> [<https://perma.cc/R6MX-W3WY>]. Note that there have been many additional cases involving faculty and faculty administrators at this school, with two others receiving significant media coverage where the harassment included unwelcome sexual contact by upper level faculty administrators towards subordinate staff. See Phillip Matier & Andrew Ross, *UC Bigwig, Bounced in Sex-Harass Scandal, Is Pulled from New Job*, S.F. CHRON. (Mar. 12, 2016), <http://www.sfchronicle.com/bayarea/article/UC-bigwig-bounced-in-sex-harass-scandal-is-6886519.php> [<https://perma.cc/MMR9-LRLB>]; Katy Murphy, *UC Berkeley Draws Fire over Sexual Harassment Case, Law School Dean Steps Down*, MERCURY NEWS (Mar. 9, 2016), <http://www.mercurynews.com/2016/03/09/uc-berkeley-draws-fire-over-sex-harassment-case-law-school-dean-steps-down/> [<https://perma.cc/QB3N-FLGL>]; Susan Svrluga *Berkeley Law School Dean Resigns After Sexual Harassment Complaint*, WASH. POST (Mar. 10, 2016), https://www.washingtonpost.com/news/grade-point/wp/2016/03/10/berkeley-law-school-dean-resigns-after-sexual-harassment-complaint/?utm_term=.0be27040849c [<https://perma.cc/MV9M-DPDG>]. The detailed findings are contained in a 50-page outside investigation report by employment lawyer Mary Topliff dated October 2014 and released to news agencies in 2016.

¹⁵¹ Teresa Watanabe, *UC President Napolitano to Keep Close Tabs on Berkeley's Actions Against Sexual Misconduct*, L.A. TIMES (Mar. 26, 2016), <http://www.latimes.com/local/lanow/la-me-ln-napolitano-sexual-misconduct-20160326-story.html> [<https://perma.cc/GX9E-2YSQ>].

¹⁵² Press Release, U.S. Dep't of Justice, *Justice Department Reaches Agreement with University of New Mexico to Protect Students from Sexual Assault and Harassment* (Oct. 17, 2016), <https://www.justice.gov/opa/pr/justice-department-reaches-agreement-university-new-mexico-protect-students-sexual-assault> [<https://perma.cc/3786-VDBV>].

¹⁵³ Chris Quintana, *UNM Fires Professor Tied to Sexual Misconduct Allegations*, ALBUQUERQUE J. (Oct. 20, 2016), <https://www.abqjournal.com/871508/unm-to-fire-professor-tied-to-sexual-misconduct-allegations.html> [<https://perma.cc/4P56-GZVA>].

prior to being disciplined by the first school). A telling recent example involved a Spanish professor hired at a west coast university that was not aware that the same professor had faced complaints of sexual harassment at his previous university on the east coast. In fact, when the west coast institution was disciplining this professor in 2015 for repeated inappropriate conduct toward students, it would not have learned of the earlier allegations of serial harassment but for the faculty member's own admission. Later the professor's attorney threatened that his client's privacy rights had been infringed upon, to which the west coast university responded: "Of greater concern . . . is that your client has engaged in predatory behavior on multiple occasions at [this university] and, based on [his] own admissions, had engaged in similar behavior at [his previous university.]"¹⁵⁴

In this case, the combination of a publicly available arbitration ruling and the faculty member's own admission provided an unusually rich level of detail about the pass-the-harasser phenomenon that is typically part of the iceberg well below the waterline. Given the high percentages of accused serial harassers and the significant percentage of accused faculty who resign prior to discipline, the 219 cases discussed here likely include many more than ten pass-the-harasser cases. Rather, it is likely that news coverage of a faculty member's alleged sexual harassment will commonly not include evidence of prior investigations and/or allegations at the professor's previous university for reasons that parallel the larger discussion of confidentiality (see Section I.C.).

IV. TITLE IX ENFORCEMENT ACTIONS THROUGH PRIVATE LAWSUITS AND OFFICE FOR CIVIL RIGHTS OR DEPARTMENT OF JUSTICE INVESTIGATIONS

As noted above, news reports sit at the waterline on the faculty sexual harassment iceberg because a good deal of the information about those individual cases remains out of sight and is potentially somewhat one-sided due to factors such as the perspective of the reporter covering the case, the accused faculty members' and student victims' varying degrees of willingness to speak to the press, and "no comment" responses from institutions. In comparison, any case partially or fully resolved by legal action is higher above the waterline, since those cases involve a neutral fact-finding process that is absent from the media reports. Of the cases resulting in legal actions by either the student victim(s) or the accused faculty member, this Section turns first to the legal actions brought by student victims under Title IX and other federal or state laws, either via the administrative enforcement process of the applicable agencies (OCR and DOJ) or via private litigation.

¹⁵⁴ Paul Krueger, *Lawyer for Ex-SDSU Prof Who Sexually Harassed Students Threatens Lawsuit Against SDSU*, NBC NEWS SAN DIEGO (Dec. 2, 2015), <https://www.nbc.com/sandiego.com/news/local/Lawyer-of-Ex-SDSU-Prof-Vincent-Martin-Who-Sexually-Harassed-Students-Threatens-Lawsuit-360203131.html> [<https://perma.cc/YCP2-6QBL>].

A. *Methodology for Cases Included in Our Review*

For this Section, we reviewed sixty-eight court cases brought by college or university students, faculty, or staff asserting claims of sexual harassment by faculty or staff, as well as seventy OCR or DOJ letters of finding involving allegations of faculty harassment of students from 1998 (the year the Supreme Court issued *Gebser v. Lago Vista Independent School District*,¹⁵⁵ which confirmed the standard a plaintiff must reach to sue for damages under Title IX) until the present. Additional details on our selection process can be found in Appendix A.

Of the sixty-eight court cases, forty-two involved accusations by student plaintiffs against faculty, and the remainder involved faculty, staff, or students bringing claims of sexual harassment against either an employee such as a coach or non-faculty administrator or a faculty member (but not in the configuration of a student plaintiff accusing a faculty member).¹⁵⁶ The forty-two student plaintiff cases included thirty-five that met two baseline criteria required for them to be useful to this project. First, these thirty-five cases discussed the complained-of conduct in sufficient detail to allow us to collect at least enough factual allegations to analyze the type of harassment involved. Second, in each of these thirty-five cases, the court discussed at least some evidence supporting the plaintiff's allegations.

Of the seventy OCR or DOJ resolution letters involving allegations of faculty harassment of students, again going back to 1998, twenty-two met the two baseline criteria listed above. Some of these cases involved reports of faculty harassment in conjunction with peer harassment. The thirty-five court cases and the twenty-two OCR or DOJ resolution letters are listed in Table 2A and 2B, respectively.

¹⁵⁵ As discussed further below, *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) involved a teacher's sexual harassment of a student. The cut-off of 1998 is also the year after OCR first issued sexual harassment guidelines (guidelines that are important even though in *Gebser* the majority accorded no deference to OCR's guidance for purposes of damages liability in Title IX litigation), discussed *infra*.

¹⁵⁶ The facts of these court cases or OCR investigations often lacked sufficient detail to determine whether the accused harassers were tenured or tenure-track faculty. Therefore, we included all cases involving university employees who were instructors of students, regardless of whether we could determine if the accused instructor was tenured or tenure-track. We did exclude employees such as administrative staff or coaches who did not appear to play roles primarily involving teaching, with the one exception being deans and other similar high-level administrators who are generally tenured faculty members holding their administrative appointment for a set number of years while they remain a member of the faculty.

Table 2A: Title IX Court Decisions, 1998–2016¹⁵⁷

(alphabetically by plaintiff)

1. *Abramova v. Albert Einstein College of Medicine of Yeshiva University*, 278 F. App'x 30 (2d Cir. 2008)
3. *Aguilar v. Corral*, No. CIV. S-07-1601 LKK/KJM, 2007 WL 2947557 (E.D. Cal. Oct. 9, 2007)
4. *Burtner v. Hiram College*, 9 F. Supp. 2d 852 (N.D. Ohio 1998)
5. *Campisi v. City University of New York*, 15 Civ. 4859 (KPF), 2016 WL 4203549 (S.D.N.Y. Aug. 9, 2016)
6. *Cox v. Sugg*, 484 F.3d 1062 (8th Cir. 2007)
8. *Delgado v. Stegall*, 367 F.3d 668 (7th Cir. 2004)
9. *Does v. Rust College*, No. 3:13-cv-220-NBB-SAA, 2015 U.S. Dist. LEXIS 72312 (N.D. Miss. June 4, 2015) (surviving case from those brought by eight plaintiffs)
11. *Escue v. N. Oklahoma College*, 450 F.3d 1146 (10th Cir. 2006)
12. *Esposito v. Hofstra University*, No. CV 11-2364, 2012 WL 607671 (E.D.N.Y. Feb. 24, 2012)
13. *Frederick v. Simpson College*, 149 F. Supp. 2d 826 (S.D. Iowa 2001)
14. *Gjeka v. Delaware County Community College*, No. 12-4548, 2013 WL 2257727 (E.D. Pa. May 23, 2013)
15. *Gonzales v. North Carolina State University*, 659 S.E.2d 9 (N.C. App. 2008)
16. *Gretzinger v. University of Hawai'i*, 156 F.3d 1236 (9th Cir. 1998)
17. *Ha v. Northwestern University*, No. 14 C 895, 2014 WL 5893292 (N.D. Ill. Nov. 13, 2014)
18. *Hayut v. State University of New York*, 352 F.3d 733 (2d Cir. 2003)
19. *Hendrichsen v. Ball State University*, 107 F. App'x 680 (7th Cir. 2004)
20. *Hernandez-Loring v. Universidad Metropolitana*, 233 F.3d 49 (1st Cir. 2000)
21. *Hunt v. Forbes*, No. 07-1095, 2010 WL 1687863 (C.D. Ill. Apr. 26, 2010)
22. *Hurd v. Delaware State University*, No. 07-117-MPT, 2008 WL 4369983 (D. Del. Sept. 25, 2008)
23. *Johnson v. Galen Health Institutes, Inc.*, 267 F. Supp. 2d 679 (W.D. Ky. 2003)
26. *Large v. Regents of the University of California*, No. 2:08-cv-02835-MCE-DAD, 2012 WL 3647455 (E.D. Cal. Aug. 22, 2012)
27. *Liu v. Striuli*, 36 F. Supp. 2d 452 (D. R.I. 1999)
28. *Mandsager v. University of North Carolina*, 269 F. Supp. 2d 662 (M.D.N.C. 2003)
29. *Miles v. New York University*, No. 98-9128, 1999 U.S. App. LEXIS 13964 (2d Cir. June 23, 1999)
30. *Miller v. Kutztown University*, No. 13-3993, 2013 WL 6506321 (E.D. Pa. Dec. 11, 2013)
31. *Morse v. Regents of the University of Colorado*, 154 F.3d 1124 (10th Cir. 1998)
32. *Doe v. Norwalk Community College*, No. 3:04-cv-1976 (JCH), 2007 WL 2066496 (D. Conn. July 16, 2007)
33. *Oden v. Northern Marianas College*, 440 F.3d 1085 (9th Cir. 2006)

¹⁵⁷ This table includes only the cases discussed in detail in this section. A full table of cases can be found in Appendix C, and the numbers for the cases listed here correspond to the numbers of the cases in the full table of cases.

35. *Papelino v. Albany College of Pharmacy of Union University*, 633 F.3d 81 (2d Cir. 2011)
36. *Pociute v. West Chester University*, 117 F. App'x 832 (3d Cir. 2004)
37. *Schneider v. Plymouth State College*, 744 A.2d 101 (N.H. 1999)
39. *Takla v. Regents of the University of California*, No. 2:15-cv-04418-CAS (SHx), 2015 WL 6755190 (C.D. Cal. Nov. 2, 2015)
40. *Wilborn v. Southern Union State Community College*, 720 F. Supp. 2d 1274 (M.D. Ala. 2010)
41. *Wills v. Brown University*, 184 F.3d 20 (1st Cir. 1999)
42. *Yap v. Northwestern University*, 119 F. Supp. 3d 841 (N.D. Ill. 2015)

Table 2B: Title IX OCR/DOJ Resolution Letters, 1998–2016¹⁵⁸

(alphabetically by educational institution; see Appendix C for full citations)

1. *Art Institute of Fort Lauderdale*: Falkinburg to Nagele (June 3, 2008)
3. *California State University, East Bay*: Klugman to Metz (June 30, 2005)
8. *City University of New York, Hunter College*: Blanchard to Raab (Oct. 31, 2016)
12. *Florida Southern College*: Walker to Reuschling (Nov. 8, 1999)
16. *Georgia State University*: Hitt to Patton (May 27, 2005)
17. *Houston Community College System*: Stephens to Douse-Harris (June 29, 1998)
20. *Las Vegas College*: Jackson to Miller (Nov. 22, 2006)
22. *Los Angeles Unified School District*: Love to Romer (Oct. 31, 2000)
23. *Louisiana Technical College*: Stephens to Montgomery-Richards (June 9, 2006)
25. *Maryland Institute College of Art*: Johnson to Lazuras, IV (Oct. 24, 2000)
26. *Merced College*: Zeidman to Duran (Dec. 29, 2008)
27. *Minot State University*: Rapport to Shirley (July 7, 2016)
37. *Skyline College*: Klugman to Salter (Sept. 4, 1998)
39. *Southern Methodist University*: Furr to Turner (Aug. 1, 2007)
43. *Texas Southern University*: Stephens to Slade (May 13, 2002)
49. *University of California, Berkeley*: Klugman to Birgeneau (Jan. 31, 2006)
51. *University of California, Los Angeles*: Love to Carnesale (June 30, 2000)
52. *University of California, Santa Barbara*: Scott to Yang (July 11, 2000)
60. *University of New Mexico*: Simons & Martinez to Frank (Apr. 22, 2016)
64. *University of Texas at Austin*: Johnson to Faulkner (Sept. 27, 2002)
69. *Worcester State College*: Burns to Ghosh (Apr. 11, 2001)
70. *Wright Business School* (three complaints from related events): Van Wey to Mucci (Aug. 4, 2006), Van Wey to Mucci (Aug. 9, 2006), Van Wey to Mucci (Sept. 29, 2006)

We chose to study in detail the fifty-seven enforcement actions in which faculty were accused of harassing students because these cases are the ones most relevant to our central concern about harassment of graduate students. While not all of the fifty-seven cases involved graduate student victims, we considered all fifty-seven because some cases do not give information sufficient to categorize the plaintiff as

¹⁵⁸ This table includes only the resolution letters discussed in detail in this section. A full table of resolution letters can be found in Appendix C, and the numbers for the cases listed here correspond to the numbers of the cases in the full table of cases.

a graduate or undergraduate student; and in others, the professor was accused of harassing both graduate and undergraduate students. In addition, because many of the faculty were accused of serial harassment, as discussed more below, these fifty-seven cases account for seventy-two specific incidents of harassment.

In considering these cases, we focused on the factual allegations made by the plaintiffs, rather than the courts' legal conclusions, for several reasons related to Title IX doctrine. First, as already noted, plaintiffs in the court cases brought suit under multiple laws, either in addition to or instead of Title IX, including Title VII and state tort law or anti-sex discrimination statutes. As a result, drawing general legal conclusions from the group of cases as a whole is difficult, if not impossible. This difficulty is exacerbated by the U.S. Supreme Court's liability standard, adopted in *Gebser*, which sets a much higher bar for student victims of sexual harassment than the negligence or between-negligence-and-strict-liability standards that harassed employees must meet under Title VII¹⁵⁹ and state tort laws. Second, the "actual knowledge" and "deliberate indifference" standards required by *Gebser* have been widely discussed and criticized for reducing the number of otherwise legitimate claims, creating disincentives for potential student plaintiffs to bring suit.¹⁶⁰ The cases among the thirty-five discussed here where the court applies the *Gebser* standard do not add anything new to that discussion or critique, other than providing additional examples confirming the accuracy of the critique. Third, OCR and DOJ investigations use a different standard than *Gebser*,¹⁶¹ so the OCR/DOJ investigations would present still another standard to factor into the mix.

Lastly and most significantly, hostile environment sexual harassment cases, which make up the vast majority of these fifty-seven cases, require two separate analyses: (1) an analysis of the sexual harassment directed at one or more individual members of the school by another or others, and (2) an analysis of the school's response to knowledge (actual or constructive, depending on whether the *Gebser*, OCR/DOJ and/or Title VII standard is applicable) of the underlying sexually harassing conduct. A determination of whether the school has violated Title IX (or Title VII) depends on the second of these analyses, whereas the school itself must conduct the first analysis through its Title IX investigation and grievance procedures. Thus, in order to escape liability, a school must show that it conducted the first analysis and, if the sexual harassment was sufficiently severe or pervasive to create a hostile environment, that the school took additional effective steps to

¹⁵⁹ David Oppenheimer, *Employer Liability For Sexual Harassment by Supervisors*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 272, 272–89 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

¹⁶⁰ See, e.g., KAPLIN & LEE, *supra* note 5, at 1120; Deborah L. Brake, *Title IX as Pragmatic Feminism*, 55 CLEV. ST. L. REV. 513, 513–45 (2007); Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038, 2067–79 (2016); Cantalupo, *supra* note 44. Many of these critiques reference the eloquent dissenting opinion in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 293–306 (1998) (Stevens, J., dissenting).

¹⁶¹ See KAPLIN & LEE, *supra* note 5, at 1124; OCR REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 30, at 12–14.

address and eliminate that hostile environment. Therefore, where a court or OCR finds that certain conduct is sufficiently severe or pervasive to constitute hostile environment sexual harassment, it may still find a school not to have violated Title IX because the school's response to the conduct was adequate and effective. A court or OCR may also find that, although the complained-of conduct was not sufficiently severe or pervasive to constitute hostile environment sexual harassment, the school's response was still inadequate. For all of these reasons, in our effort to chronicle and analyze the problem of faculty sexual harassment, it is more productive to look at the underlying factual allegations regarding the sexually harassing conduct itself, and to separate those allegations analytically from the question of whether the school is liable. Moreover, this approach is consistent with our analysis of the earlier media cases in Section III.

In categorizing the allegations in these cases, we used the same categories as we used in analyzing the media reports:

- (1) unwelcome verbal conduct only;
- (2) unwelcome conduct not purely verbal but stopping short of physical contact between the harasser and victim (e.g., indecent exposure, excessive or sexually-themed gifts to the victim, photographing or filming the victim);
- (3) unwelcome hugs, kisses and other forms of physical conduct that could be characterized as nonsexual or accidental;
- (4) unwelcome groping and clearly sexual, inappropriate touching;
- (5) unwelcome conduct that could also violate criminal laws (sexual assault, domestic violence or domestic violence-like abuse, stalking behaviors, etc.);
- (6) "welcome" or consensual sexual relationships;¹⁶²
- (7) *quid pro quo* sexual harassment; and
- (8) serial harassment.

Consistent with the rest of this article's analysis, this section does not focus on disciplinary consequences because we plan to address those issues in-depth in a companion article.

B. Themes and Patterns

The factual allegations demonstrate several patterns of behavior among the cases that were surprisingly common yet departed from the typical image of workplace sexual harassment (keeping in mind that faculty are employees and therefore the campus is their workplace). Beginning first with the fifty-seven cases accounting for seventy-two specific alleged incidents of harassment (because many of the faculty in the fifty-seven cases were accused of serial harassment, some of the fifty-seven cases included allegations by multiple victims), at least sixty-seven percent (forty-eight specific incidents) of the seventy-two incidents involved allegations of sexual harassment that include unwelcome sexual touching ranging

¹⁶² When a faculty member has academic responsibility/oversight over a college student, the concept of "welcome" conduct is fraught with complexity. *Infra* Sections II, V.

from hugs and kisses to sexual groping, coercive sexual intercourse, forcible rape, and the kinds of physical assaults and/or psychologically abusive and controlling behavior often associated with domestic violence (see Figure 4A below).¹⁶³ When categorized based on the severity of the physical conduct reported in each case, the fewest number of cases (only seven, or fifteen percent of the fifty-four incidents involving unwelcome sexual touching) complained of conduct on the less invasive end of the spectrum (hugging, kissing or other touching asserted to be non-sexual or accidental).¹⁶⁴ Allegations in the midrange of the conduct spectrum, often described as inappropriate touching or groping, make up twenty-four (fifty percent) of the forty-eight incidents.¹⁶⁵ At the most severe end, thirty-five percent, or seventeen cases, involved reports of potentially criminal sexual and physical violence.¹⁶⁶ In five of these seventeen cases, the victims alleged facts that looked similar to those typical of domestic abuse: physical assaults, such as punching;¹⁶⁷ verbal, psychological and emotional abuse;¹⁶⁸ sexual abuse;¹⁶⁹ and controlling behaviors.¹⁷⁰

An example of a case with accusations of extremely severe, domestic abuse-like conduct is *Liu v. Striuli*,¹⁷¹ where a foreign exchange student presented evidence that she was coerced into conducting a sexual relationship with a professor who had responsibility for helping foreign students with their visas and who told the student that he could and would get her deported.¹⁷² After nearly a year of sexual, physical, and verbal abuse, the student was only able to exit the abusive relationship when she obtained a civil protection order against the professor.¹⁷³ Also in this category but among the cases not alleging intimate partner abuse is a series of lawsuits filed by nine separate plaintiffs against Rust College.¹⁷⁴ Three plaintiffs claimed two

¹⁶³ See Table 2A and Table 2B, Title IX court cases 3, 4, 5, 6, 8, 9 (counted as 1 case, but includes separate lawsuits claiming sexual harassment by 9 plaintiffs, ranging from sexual comments to forcible rape by one professor and one other employee who might be a professor), 11, 13, 15, 17, 21, 23, 26, 27, 29, 32, 33, 37, 39, 40, 41; Table 2B, OCR/DOJ Letters of Finding 8, 23, 26, 27, 49, 51, 60.

¹⁶⁴ See Table 2A, Title IX court cases 3, 8, 13.

¹⁶⁵ See Table 2A and 2B, Title IX court cases 5, 11, 23, 33, 39-41; Table 2B, OCR/DOJ Letters of Finding 8, 23, 26, 51.

¹⁶⁶ See Table 2A and 2B, Title IX court cases 4, 6, 9, 17, 21, 26, 27, 29, 32, 37; Table 2B, OCR Letter of Finding 49.

¹⁶⁷ See Table 2A, Title IX court case 26.

¹⁶⁸ See Table 2A, Title IX court cases 26, 27, 37.

¹⁶⁹ See Table 2A, Title IX court cases 4, 27, 37.

¹⁷⁰ See Table 2A, Title IX court cases 4, 27, 29.

¹⁷¹ See Table 2A, Title IX court case 27.

¹⁷² *Id.*

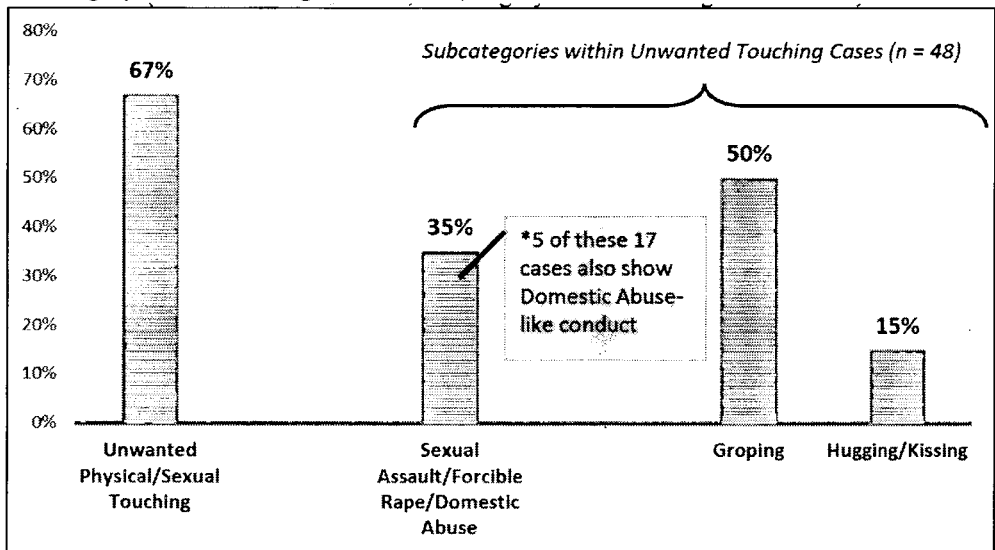
¹⁷³ *Id.*

¹⁷⁴ Somewhat like the recent public uproar over the light six-month jail sentence received by former Stanford swimmer Brock Turner for committing sexual battery, the fired Rust College professor obtained a plea agreement that allowed him to receive a suspended sentence instead of jail time. Michael Quander, *People Upset Former Rust College Professor*

completed rapes and one attempted rape by one professor, who also was accused of subjecting three other plaintiffs to lower-level sexual harassment, such as sexual advances and groping. Two additional plaintiffs complained of unwanted touching and indecent exposure by another employee whose position was not specified but who could have been a professor.¹⁷⁵

Figure 4A: Types of Unwelcome Conduct by Faculty in Litigated Cases and OCR Complaints

(Allegations of sexual harassment, n = 72, made in cases from 1998–2016, n = 57; subcategory cases on the right side n = 48)



Gets No Jail Time, WREG TV NEWS (Nov. 18, 2014), <http://wreg.com/2014/11/18/people-upset-former-rust-college-professor-gets-no-jail-time/> [<https://perma.cc/6R7M-AJC5>].

¹⁷⁵ See Table 2A, Title IX court case 9.

At the opposite end from the cases involving domestic-abuse-like allegations are the seven court cases¹⁷⁶ and forty-eight OCR resolutions¹⁷⁷ that are excluded from the fifty-seven cases discussed in detail here. In those cases, the court, OCR, or DOJ either did not specify enough facts to know what the alleged conduct was or found that there was insufficient evidence that the accused faculty member had sexually harassed the student. Indeed, many of the plaintiffs or complainants in these cases appear to be using a sexual harassment complaint as a pretext for another agenda, such as challenging their dismissal from the school for poor academic performance.¹⁷⁸

In a third category of cases, although less numerous than the others, the accusations of faculty harassment suggest that the reported conduct enabled peer student or third-party harassment.¹⁷⁹ For instance, in *Burtner v. Hiram College*,¹⁸⁰ the court's review of the facts states that a professor of Philosophy operated a summer course at an isolated location in Michigan's Upper Peninsula, where Emerson was the only University employee.¹⁸¹ During the program, he reportedly supplied the students with alcohol and was accused of directing "comments, innuendos, the singing of sexually suggestive songs, and some touching" at the plaintiff and at least one other female student.¹⁸² After a year's worth of sexual advances, the court states, the professor began a sexual relationship with the plaintiff that quickly became controlling and abusive, as he "insisted that she enroll in his courses, . . . was angry and upset with her when she considered courses others taught[,] . . . insisted on [her] presence in his office on a daily basis, and . . . demand[ed] sex from [her] in his Hiram [College] office."¹⁸³ When another student complained about the same professor's sexual harassment of her during the same summer program, she alleged that Emerson had watched a male student "jump on top of me naked for approximately two minutes"¹⁸⁴ and when she "asked, no begged, Professor Emerson to please make [name deleted] put his clothes

¹⁷⁶ See Appendix C, Table 2A, Title IX court cases 2, 7, 10, 24, 25, 34, 38.

¹⁷⁷ See Appendix C, Table 2A and 2B, OCR/DOJ Letters of Finding 2, 4-7, 9-11, 13-15, 18-19, 21, 24, 28-36, 38, 40-42, 44-48, 50, 53-59, 61-63, 65-68.

¹⁷⁸ Somewhat in parallel, in Section III below on termination cases, a fair number of fired professors who sue claim discrimination and they too have low probabilities of success on such claims.

¹⁷⁹ See Table 2A, Title IX court cases 4, 40 (Faculty of a trucking program, in which Plaintiff was the only female student, allowed male classmates to bring in pornographic film and made Plaintiff watch it); see Table 2B, OCR/DOJ Letter of Finding 70 (faculty member called three female, African-American students, made sexually and racially charged remarks and then suggested they have sex with her male cousin and/or put her male cousin on the phone to proposition the student).

¹⁸⁰ 9 F. Supp. 2d 852 (N.D. Ohio 1998).

¹⁸¹ *Id.* at 857.

¹⁸² *Id.* at 854.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 854.

on . . . Emerson . . . responded with smug laughter and then said, if you don't like it, tell him yourself, or else you can come up here with me."¹⁸⁵ Stating that "[i]t was pitch dark up where [Emerson] was sitting and the tone of his voice truly frightened [her],"¹⁸⁶ the student said that she simply allowed the naked male student to remain on top of her until he chose to get off.¹⁸⁷

Fourth, these cases suggest that women students of color may be at particular risk of what Professor Sumi Cho described over two decades ago as "racialized sexual harassment,"¹⁸⁸ a suggestion that requires a full analysis using an approach first identified by Professor Kimberle Crenshaw as "intersectional."¹⁸⁹ Because such an analysis is beyond the scope of this Article, one of us takes up that analysis in a separate project.¹⁹⁰

Finally, and most importantly for this Article, within this set of court cases and OCR resolutions the number of allegations that faculty are serially harassing students or other employees is quite high (see Figure 4B). When we include two court cases¹⁹¹ where the accusations arguably—but not certainly—present facts suggesting serial harassment, sixty-six percent (n=23) of the accused faculty in the thirty-five court cases faced accusations of serial harassment,¹⁹² with the remainder of the cases not presenting allegations or evidence of harassment directed at more than one victim. Of the twenty-two OCR or DOJ cases, eight involved allegations of clear serial harassment¹⁹³ and three more complained of conduct from which serial harassment could be inferred.¹⁹⁴ When the thirty-five court cases are combined with the twenty-two OCR or DOJ investigations, for a total of fifty-seven enforcement actions involving faculty harassment of students, somewhere between fifty-one percent (n=29) of the cases (if the five enforcement actions where serial harassment is only implied are not counted as reported serial harassment cases) and sixty percent (n=34) of the cases (if those five cases are included) present complaints of serial harassment.

¹⁸⁵ *Id.* at 855.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ See Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER RACE & JUST. 177, 177–211 (1997).

¹⁸⁹ See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1249–99 (1991).

¹⁹⁰ See generally Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality, Multiracialism & Sexual Harassment of Women Students of Color* (placing women of color's experiences with sexual harassment and violence at the center of analysis and solutions to the problem) (forthcoming in the HARVARD JOURNAL OF LAW & GENDER: manuscript available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3168909 [<https://perma.cc/3ZY6-LFDY>]).

¹⁹¹ Table 2A, Title IX court cases 13, 23.

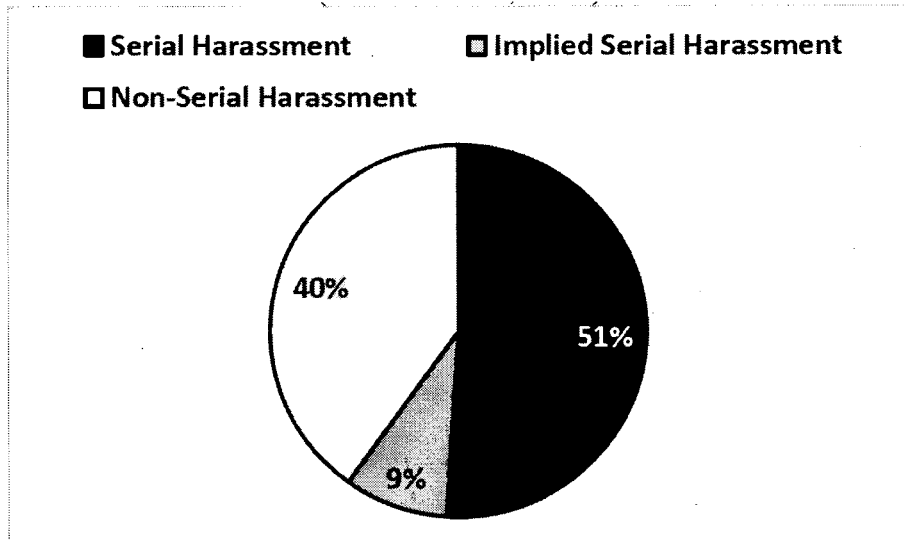
¹⁹² Table 2A, Title IX court cases 3, 4, 6, 8, 9, 11, 15, 17, 18, 20, 21, 22, 28, 30, 31, 32, 36, 37, 39, 41, 42.

¹⁹³ Table 2B, OCR/DOJ Letters of Finding 3, 8, 26, 49, 51, 60.

¹⁹⁴ Table 2B, OCR/DOJ Letters of Finding 37, 64, 70.

Figure 4B: Prevalence of Serial Harassment by Faculty in Litigated Cases and OCR Complaints

(1998–2016 cases, n = 57)



Some of the patterns evident in the media report cases were repeated in the Title IX cases but some new types of cases also emerged in the Title IX enforcement actions. With regard to the “open secret” type of case discussed in Section III, in several of these Title IX cases, the accused faculty member went as far as making public statements to classes of students that they would face no discipline for their harassment.¹⁹⁵ An OCR investigation of Merced College presented such facts, with OCR discussing how students believed the professor’s behavior had been “historically tolerated,”¹⁹⁶ how the professor had told a class the college would never discipline him,¹⁹⁷ and how the professor had been removed from a lab in the past because “students were not comfortable with the way he was touching them.”¹⁹⁸

Related to the “open secret” phenomenon but only reported once in the Title IX enforcement action data set are the “pattern and practice” cases discussed in Section III, where complaints point to multiple faculty members harassing students in the context of a reportedly sexual harassment-permeated environment on the campus or in one academic department. We nevertheless highlight this single Title

¹⁹⁵ Table 2A, Title IX court cases 22, 28; Table 2B, OCR/DOJ Letters of Finding 3, 8, 24, 26. Likewise, Lerman’s *Journal of Legal Education* essay on misconduct toward law students includes anecdotal examples of law professors who don’t make any “effort to hide” their inappropriate sexual behavior with students, causing a corresponding lack of confidence in the integrity of the university administrators at that law school. Lerman, *supra* note 32, at 94.

¹⁹⁶ Table 2B, OCR/DOJ Letter of Finding 26, at 6.

¹⁹⁷ *Id.* at 9.

¹⁹⁸ *Id.* at 13.

IX enforcement case because we believe the absence of similar cases is likely due to doctrinal developments under Title IX case law in particular that have artificially suppressed the filing of such claims under Title IX. First, in the pre-*Gebser* case of *Alexander v. Yale University*,¹⁹⁹ an important early attempt at certifying a class of female university students as Title IX sexual harassment victims failed, and ensured that future Title IX lawsuits would overwhelmingly be brought by individual plaintiffs.²⁰⁰

Since *Alexander*, other cases have not made it easier to demonstrate pattern or practice-type hostile environments within the confines of an individual case, including because of the much-criticized “deliberate indifference” standard that requires students to satisfy a higher burden in Title IX lawsuits against their schools than adult employees must satisfy against their employers under the comparable Title VII civil rights regime. For instance, in *Wills v. Brown University*,²⁰¹ the student plaintiff was denied a new trial when the district court refused to consider over half a dozen complaints of sexual harassment filed with the university against the same visiting professor (who had groped the plaintiff) because those complaints were filed *after* the plaintiff’s complaint (i.e., post-event evidence).²⁰² Even though these reports tended to show a pattern or practice of serial harassment by the professor, since that harassment continued for several years after the plaintiff and another female student had reported harassment by the professor (in December and October 1992 respectively), the decision essentially upholds a refusal by the district court to consider evidence that would show such a pattern or practice. While not all cases are as unfriendly to student plaintiffs as *Wills*,²⁰³ overall, higher education student victims seeking to show that their institution was deliberately indifferent because the campus turned a blind eye to repeat sexual harassment face a difficult legal landscape.

In light of difficulties such as those *Wills* experienced in establishing a pattern of serial harassment by one accused faculty member, it is not surprising that cases involving multiple reported harassers and an environment permeated with harassing conduct would be difficult to advance in typical Title IX litigation. In addition, although the administrative enforcement mechanisms for Title IX could consider

¹⁹⁹ *Alexander v. Yale Univ.*, 631 F.2d 178 (2d Cir. 1980). For additional discussion of the *Alexander* case, see generally Walter B. Connolly Jr. & Alison B. Marshall, *Sexual Harassment of University or College Students by Faculty Members*, 15 J.C. & U.L. 381 (1988) (devoting a section to examining and analyzing the *Alexander* case).

²⁰⁰ See, e.g., Mango, *supra* note 5, at 391–97 (reviewing class certification difficulties and other barriers to student plaintiffs/victims bringing Title IX sexual harassment lawsuits).

²⁰¹ *Wills v. Brown Univ.*, 184 F.3d 20 (1st Cir. 1999). This court case has received a fair amount of criticism, including MacKinnon, *supra* note 160, at 2038.

²⁰² *Wills*, 184 F.3d at 24.

²⁰³ See generally *Gonzales v. North Carolina State Univ.*, 659 S.E. 2d 9 (N.C. Ct. App. 2008) (finding failure to act on an incomplete complaint of sexual harassment by an instructor ten years earlier contributed to proximate causation of that instructor’s sexual harassment of the plaintiff).

allegations demonstrating a pattern or practice of harassment, in practice we found only one OCR investigation focusing on these types of allegations. In that investigation, the complainant alleged eight instances of professors engaging in inappropriate and sexualized behavior, including behaviors such as professors promoting faculty dating students, rumors that such dating was actually occurring, suggestions that complainant was a stripper, comments about women baring their breasts in public to contribute to a breast milk drive, and professors rating female students' physical attractiveness at student musical performances.²⁰⁴ Investigating at a time when the rigor of OCR investigations has been called into question,²⁰⁵ OCR could not find evidence supporting most of these allegations, and the few that it did corroborate it viewed as not severe or pervasive enough to constitute sexual harassment.²⁰⁶

A third pattern that was repeated in both the Title IX enforcement action and the media report data sets was the “pass-the-harasser” phenomenon, where an accused faculty harasser was allowed to resign prior to receiving any disciplinary sanction or the school's response facilitated the accused harasser's move to another school.²⁰⁷ As alluded to in the Introduction, reported “pass-the-harasser” cases, including associated litigation from student victims, has been a concern in higher education for decades.²⁰⁸

Newer patterns were also presented. First, these cases often show that the accused harasser has a standard method for targeting victims.²⁰⁹ For instance, in *Wills v. Brown University*,²¹⁰ the court suggests that the accused professor targeted undergraduate students who sought him out for academic support.²¹¹ In addition, the courts or OCR often noted in these cases the accused serial harassers' generally sexist attitudes, as the court in *Johnson v. Galen Health Insts., Inc.*²¹² did when multiple people complained of the professor's conduct such as questioning the morality of a single, unwed mother or speaking condescendingly or abusively towards women.²¹³

²⁰⁴ See Table 2B, OCR/DOJ Letter of Finding 64.

²⁰⁵ Kristin Jones, *Lax Enforcement of Title IX in Campus Sexual Assault Cases*, CTR. FOR PUB. INTEGRITY (Feb. 25, 2010), <https://www.publicintegrity.org/2010/02/25/4374/lax-enforcement-title-ix-campus-sexual-assault-cases-0> [<https://perma.cc/3WGS-9ZBH>].

²⁰⁶ See Table 2B, OCR/DOJ Letter of Finding 64.

²⁰⁷ Table 2A, Title IX court cases 15, 21, 39; Table 2B, OCR/DOJ Letter of Finding 49; Sara Ganim, *Sexual Harassment in STEM: 'It's Tragic for Society'*, CNN (Sept. 30, 2016), <http://www.cnn.com/2016/09/30/us/astronomy-sexual-harassment/> [<https://perma.cc/NDX4-QFY5>].

²⁰⁸ See POSKANZER, *supra* note 3, at 225; see generally Leatherman, *supra* note 3 (detailing several colleges' practice of “passing the harasser” on to the next university without disclosing allegations).

²⁰⁹ Table 2A, Title IX court cases 4, 9, 39, 41.

²¹⁰ Table 2A, Title IX court case 41.

²¹¹ Table 2A, Title IX court case 41, at 24–25.

²¹² Table 2A, Title IX court case 23.

²¹³ Table 2A, Title IX court cases 11, 18, 20, 22, 23; Table 2B, OCR/DOJ Letters of Finding 26, 64.

V. LITIGATED FACULTY TERMINATION CASES

The final data set, located at the very top of the iceberg, collects cases where faculty members were terminated (in part or entirely) for sexually harassing conduct. Turning to these cases, once again the focus was on the factual allegations that gave rise to college and university termination proceedings rather than the court's legal findings. Here, the reasons for an emphasis on the underlying facts parallel the reasons in the Title IX enforcement section above because the legal analysis of plaintiffs' claims alleging breach of contract, due process violations, or discrimination generally are not germane to the underlying facts about sexually harassing conduct. We note exceptions to this generalization along the way (e.g., where the court comments on Title IX), but found that such instances were not so frequent in number as to justify a different approach between Sections IV and V.

In this section, in addition to tracking the types of sexual harassment allegations, we provide information on win-loss rates for educational institutions in faculty termination legal challenges. Since faculty termination cases represent the upper limit of disciplinary consequences, the question about win-loss rates for universities in litigated termination cases is important even with the small number of published cases for a host of normative questions about Title IX enforcement and misconduct sanctions in academia that we plan to address in a future article.²¹⁴

It bears noting that both the cases and the secondary literature confirm that the investigative and hearing proceedings culminating in the termination of a faculty member (typically by the college's board of trustees) represent one of the most difficult experiences one is likely to encounter in the academy,²¹⁵ so unsurprisingly

²¹⁴ Professor Oppenheimer asks and answers a very similar question about why employment jury verdicts (including sexual harassment verdicts) matter despite well-known "tip of the iceberg" problems. David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 513 (2003) ("Verdicts matter. They matter not only to the parties and their counsel in those few cases where verdicts are rendered, but also to public policy makers and lawyers evaluating that vast majority of cases that never go to trial. Because they represent only the tip of the iceberg, because trial and/or appellate judges so often reduce them, because the plaintiff may actually receive only a small part of the judgment, and because they may be the product of atypical cases, it may be a mistake to rely on verdicts to make such decisions. But rely on them we do. Stories about jury verdicts can have a profound effect on public opinion and public policy.").

²¹⁵ POSKANZER, *supra* note 3, at 216 ("Under any circumstances, faculty termination proceedings are extraordinarily painful for everyone involved. Such public washings of personal and institutional 'dirty laundry' get quite ugly, with considerable potential for embarrassment."); Timothy B. Lovain, *Grounds for Dismissing Tenured Postsecondary Faculty for Cause*, 10 J.C. & U.L. 419, 419 (1983-1984) ("One of the most difficult personnel actions that a college or university can take is to terminate the employment of a tenured faculty member for cause. The emotional repercussions of such actions often extend far beyond the terminated faculty member.").

faculty terminations are rare in U.S. higher education for reasons that extend beyond the mere fact that faculty are generally afforded high levels of due process protections.

Table 3 below provides an inventory of federal and state legal challenges brought by faculty fired in part or entirely for being found responsible for engaging in sexual harassment. This inventory is derived from a review of roughly a dozen higher education law secondary sources in combination with Westlaw and LexisNexis searches. Because of the centrality of tenure for the analytical purposes in our larger research project, in Table 3 we tried not to “pad the stats” with the significant number of doctrinally easier sexual harassment termination cases that withstood legal challenges from non-tenure track faculty or part-time instructors. There were several “wobbler” cases and other exclusions noted in Appendix A. We made a judgment call to include two cases in Table 3 that were essentially constructive discharge cases—where the faculty member was charged with sexual harassment, then resigned, and later challenged the resignation before or after it became effective.²¹⁶

Table 3: Outcomes of Federal & State Judicial Rulings in U.S. Tenure Faculty Sexual Harassment Termination Cases Contested by the Faculty Member
(reverse chronological order)

Terminations Upheld Against Legal Challenge by the Accused Professor
1. <i>Wolfe v. Regents of the University System of Georgia</i> , 794 S.E.2d 85 (Ga. 2016) ²¹⁷
2. <i>Winter v. Pennsylvania State University</i> , 172 F. Supp. 3d 756 (M.D. Penn. 2016)
3. <i>Traster v. Ohio Northern University</i> , No. 3:13 CV 1323, 2015 U.S. Dist. LEXIS 170190 (N.D. Ohio 2015 Dec. 18, 2015), <i>aff'd</i> , 685 F. App'x 405 (6th Cir. 2017)
4. <i>Francis v. Lehigh University</i> , 561 F. App'x 208 (3d Cir. 2014) ²¹⁸
5. <i>Slippery Rock University of Pennsylvania v. Association of Pennsylvania State College and University Faculty</i> , 71 A.3d 353 (Pa. Commw. Ct. 2013)
6. <i>Haegert v. University of Evansville</i> , 977 N.E.2d 924 (Ind. 2012)

²¹⁶ See *Levenstein v. Salafsky*, 414 F.3d 767, 768–76 (7th Cir. 2005); *Levenstein v. Salafsky*, 164 F.3d 345, 346–53 (7th Cir. 1998); *Van Arsdell v. Texas A&M Univ.*, 628 F.2d 344, 345–46 (5th Cir. 1980).

²¹⁷ The *Wolfe* case appeared out of the blue at the tail end of our case collection period as a State Supreme Court ruling without a previously available appellate court ruling, which is why it is not included in our related *Journal of Legal Education* essay. We subtracted this case from our media section when we shifted it to this section.

²¹⁸ *Francis* is a bit of a “wobbler” case: at first blush this case appears to revolve around consensual romantic/sexual relationships. The factual description is a little thin, but the district court opinion notes that the first informal complaint about the professor came from the “first” student he had an affair with, who reported being concerned about the “second” student being taken advantage of. *Francis v. Lehigh Univ.*, 561 Fed. Appx. 208, 209 (3d Cir. 2014). The faculty committee also found the professor’s communications to be a separate violation of the sexual harassment policy, and the investigators found the professor was “not truthful” during their interviews with him. *Id.* at 210.

7. <i>Trustees of Indiana University v. Cohen</i> , 910 N.E.2d 251 (Ind. App. 2009)
8. <i>Marder v. Board of Regents of University of Wisconsin System</i> , 706 N.W.2d 110 (Wis. 2005)
9. <i>Levenstein v. Salafsky</i> , 414 F.3d 767 (7th Cir. 2005)
10. <i>Trejo v. Shoben</i> , 319 F.3d 878 (7th Cir. 2003)
11. <i>Murphy v. Duquesne University of the Holy Ghost</i> , 777 A.2d 418 (Pa. 2001)
12. <i>Tonkovich v. Kansas Board of Regents</i> , 159 F.3d 504 (10th Cir. 1998); <i>see also</i> 254 F.3d 941 (10th Cir. 2001)
13. <i>Anderson v. Ohio State University</i> , No. C-2-00-123, 2001 WL 99858 (S.D. Ohio Jan. 22, 2001) ²¹⁹
14. <i>Young v. Plymouth State College</i> , No. 96-75-JD, 1999 WL 813887 (D. N.H. Sept. 21, 1999)
15. <i>Motzkin v. Trustees of Boston University</i> , 938 F. Supp. 983 (D. Mass. 1996)
16. <i>McDaniels v. Flick</i> , 59 F.3d 446 (3d Cir. 1995), <i>cert. denied</i> , 516 U.S. 1146 (1996)
17. <i>Wexley v. Michigan State University</i> , 821 F. Supp. 479 (W.D. Mich. 1993), <i>aff'd</i> , 25 F.3d 1052 (6th Cir. 1994)
18. <i>Corstvet v. Boger</i> , 757 F.2d 223 (10th Cir. 1985)
19. <i>Levitt v. University of Texas at El Paso</i> , 759 F.2d 1224 (5th Cir. 1985), <i>cert. denied</i> , 474 U.S. 1034 (1986)
20. <i>Korf v. Ball State University</i> , 726 F.2d 1222 (7th Cir. 1984)
21. <i>Van Arsdell v. Texas A&M University</i> , 628 F.2d 344 (5th Cir. 1980)
22. <i>Lehmann v. Board of Trustees of Whitman College</i> , 576 P.2d 397 (Wash. 1978)
Terminations Overturned and/or Judgment for the Accused Professor
23. <i>Farahani v. San Diego Community College District</i> , 96 Cal. Rptr. 3d 900 (Cal. Ct. App. 2009)
24. <i>Goad v. Virginia Board of Medicine</i> , 580 S.E.2d 494 (Va. Ct. App. 2003)
25. <i>Wilson v. University of Tennessee at Chattanooga</i> , No. M2000-02573-COA-R3-CV, 2001 WL 1660832, (Tenn. Ct. App. Dec. 28, 2001)
26. <i>Chan v. Miami University</i> , 652 N.E.2d 644 (Ohio 1995)
27. <i>Brown v. State Personnel Board</i> , 213 Cal. Rptr. 53 (Cal. Ct. App. 1985)
28. <i>Texton v. Hancock</i> , 359 So. 2d 895 (Fla. Dist. Ct. App. 1978) ²²⁰

²¹⁹ This is also a bit of “wobbler” and was a late addition to our table (not included in our related *Journal of Legal Education* essay) because it did not come up in traditional searches of sexual harassment cases. Anderson was a tenured professor who sexually coerced and exploited a vulnerable sixteen-year-old high school student enrolled in a university outreach program that the professor directed as part of his job duties, plus some of the misconduct occurred on university grounds.

²²⁰ Including the *Texton* case from the 1970s was also a close call—we did so in order to err on the side of including cases that go against our “win rate” conclusions—but this case is not like the others and it involved a female professor accused of some objectionable and intrusive sexual and gender-based comments in human development class as well as off-hours drinking with students (and her spouse), but no real signs of directing unwelcome sexual advances toward her students. *Texton v. Hancock*, 359 So. 2d 895, 896 (Fla. 1978).

A. Factual Themes and Patterns

Turning to factual patterns in the cases, here the presentation does not exactly mirror Sections III and IV because the fired faculty member drives the presentation of the facts in the lawsuit and therefore details about the underlying conduct are usually—and unsurprisingly—not in the opinion. In addition, the posture of many of the cases is one in which the court has before it a college’s motion to dismiss or motion for summary judgment, and is therefore casting the (already blanched and minimalist) facts in a manner most favorable to the faculty member as the non-moving party. Plymouth State College (“Plymouth State”) illustrates this divergence, and is the exceptional case included in both Sections IV and V because there happened to be a lawsuit from one of the student victims of sexual harassment as well as a lawsuit from the faculty member fired for that very same sexual harassment at Plymouth State. Immediately below we juxtapose the most vivid and descriptive passages about the sexual harassment of the student victim referred to in these two companion court cases (facts about other student victims were not described in both opinions). And for additional background and explanation, the Plymouth State faculty termination case includes more factual description than several of the cases because it included a legal claim for false light defamation. It was also a case where the former student received a substantial jury verdict award (stemming from the professor’s conduct) that was upheld by the New Hampshire Supreme Court.²²¹

²²¹ *Schneider v. Plymouth State Coll.*, 744 A.2d 101, 103–05 (N.H. 1999). The case is unusual in other respects, including that Young was initially fired and then had a post-termination disciplinary hearing eighteen months later. The faculty hearing committee also made the controversial decision that it lacked jurisdiction over Schneider’s Title IX complaint because she was no longer a student. *Young v. Plymouth State College*, 1999 WL 813887 (D. N.H. 1999). Schneider is a bit of a “wobbler” in categorizing it as a case where the college prevailed because the district court granted a motion for summary judgment on key substantive due process, Section 1983 and breach of contract claims, but denied summary judgment on some other claims. We could find no record of an ultimate court action and presumably the case settled at some point without Dr. Young being reappointed to the faculty.

<p>Student Victim Case: <i>Schneider v. Plymouth State College</i>, 744 A.2d 101 (N.H. 1999). “The defendants do not dispute that in the summer of 1990, Professor Young began a pattern of sexual harassment and intimidation of the plaintiff. Young’s behavior included pressuring the plaintiff to accompany him on trips to various locations off campus, kissing her, sending her flowers, taking off her shirt, and placing her hand on his genitalia. Young’s conduct escalated to the point that in January 1991, he completely disrobed in his office while the plaintiff was working on his computer. When the plaintiff attempted to rebuff Professor Young’s advances, he would become angry, yell at her, and threaten to make her life very difficult. Young withheld academic support for her academic work and ridiculed her in front of faculty. He also gave the plaintiff a grade of ‘C-’ for her work as an intern at a graphic design company without ever consulting with her supervisor at the company.” <i>Id.</i> at 103–04.</p>	<p>Faculty Termination Case: <i>Young v. Plymouth State College</i>, No. 96-75-JD, 1999 WL 813887 (D. N.H. Sept. 21, 1999). “[General Counsel] Rodgers and Dean of Students Hage met with Schneider at Brown’s office on December 1, 1993. Schneider related a series of events of a sexual nature with Young between the fall of 1990 and the summer of 1992.” <i>Id.</i> at *2. “Young argues that Wharton’s decision to dismiss him based on Schneider’s charges, and influenced by Otten’s and Bente’s charges, was lacking in factual support and was therefore arbitrary. He contends that his polygraph results so undermined Schneider’s credibility that Wharton had no basis to believe her. Wharton also characterizes Schneider’s charges as trivial: ‘a tepid, almost bumbling affair.’” <i>Id.</i> at *9.</p>
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With the aforementioned provisos, the primary theme of the Title IX enforcement actions in Section IV that repeated here was the tendency for the faculty accused of sexual harassment to face accusations of serial harassment. Indeed, twenty-four of the twenty-eight termination cases (86%) in Table 3 included indicators of serial sexual harassment by the fired faculty member, with only four cases—*Van Arsdell*, *Chan*, *Anderson*, and *Winter*—involving single victims. That does not mean that in all twenty-four cases the professor was fired *because* evidence of repeat sexual harassment went before the board of trustees or final decision maker. Rather, given our focus (noted earlier) on the factual descriptions rather than legally relevant findings in the cases, we also included in the twenty-four a handful of cases where termination occurred because of one substantiated charge of sexual harassment but where earlier incidents and student victims are mentioned in the record (e.g., an earlier reprimand letter, other student reports and complaints that were or were not investigated). For example, *Haegert v. University of Evansville*²²² stands for the doctrinal proposition that a single incident of sexual harassment can

²²² *Haegert v. Univ. of Evansville*, 977 N.E.2d 924 (Ind. 2012).

be sufficient to warrant termination,²²³ but we categorize it as a serial harassment case based on the factual description that makes clear there were many earlier student complaints of varying degrees of formality. This errs on the side of over-inclusiveness, but the manner in which the underlying facts of sexual harassment may not correspond with some of the fired professor's legal theories (due process and breach of contract) made it difficult to apply a more stringent rule and have any confidence that it would have a consistent meaning across the cases. Nevertheless, because these are termination cases at one extreme—the very, very tip of the iceberg, and a small number of cases at that—we strongly caution against generalizing more broadly based on the very high rate of reported serial harassment found among fired professors.

Both *Haegert* and two other cases, *Motzkin* and *Lehmann*, demonstrate that accused serial harassers often reported as targeting other (usually more junior) faculty and staff, as well as students. In addition to being found to have sexually harassed multiple female students, *Motzkin* was found by a faculty disciplinary committee to have sexually assaulted a junior female professor and frequently intimated he would provide *quid pro quo* help influencing her tenure decision in exchange for sexual favors.²²⁴ *Lehmann* is an early case of many students, staff, and spouses of faculty—all victims.²²⁵

The sparse factual descriptions in the Table 3 termination cases also made it somewhat less feasible to repeat the category typology used earlier in Figure 4A (groping, domestic-abuse like conduct, etc.). Rather, we simply note that there were only a small number of cases where it appears more likely than not that the reported sexual harassment comprised of verbal conduct alone, including four to six cases

²²³ *Id.* at 939 (“[A] single, stand-alone action by an individual can be sufficient to constitute harassment and/or sexual harassment and lead to dismissal, regardless of any other influences on (or by) the complainant.”). *Haegert* involved a senior faculty member in the English department who sexually harassed and humiliated his younger female department chair. The chair was in the English department lounge hosting a prospective female freshman student and her family, when *Haegert* entered and caressed his department chair's neck, chin and face with his fingers and loudly said “Hi Sweetie,” at which point the family abruptly ended their recruitment visit and interview. *Id.* at 929. In the *Haegert* case there were several informal complaints and second-hand reports in prior years from students about *Haegert*'s misogynistic behavior toward women (e.g., inappropriate touching, derogatory comments, “crude and scary” language, calling women “Hon,” “Babe” and “Sweetie”), but none of these allegations had ever resulted in formal complaints/investigations, so the single incident of misconduct toward the department chair was the sole basis for the termination, with the Indiana Supreme Court affirming the university's decision (vacating a split appellate court decision). *Id.* at 931–32.

²²⁴ *Motzkin v. Trs. of Bos. Univ.*, 938 F. Supp. 983, 987 (D. Mass. 1996). *Motzkin* is a “wobbler” regarding our tenure-track focus, but he had an associate professor “special appointment” allowing him to focus on preferred area of teaching rather than research, the “record is unclear” if he was previously tenure track, and his special appointment was a three-year contract (an unusual duration compared to non-tenure positions). *Id.* at 986.

²²⁵ *Lehmann v. Bd. of Trs. of Whitman Coll.*, 576 P.2d 397, 398 (Wash. 1978).

Slippery Rock University, *Wexley*, *Trejo*, and perhaps *Chan*²²⁶ and *Murphy*) or only 1 to 19 percent of the twenty-six cases. The recent case of *Traster v. Ohio Northern University*²²⁷ presents factual allegations that are representative of many of the twenty-one to twenty-three faculty termination cases complaining of physical contact, and, based on the professional experiences of one of us, is also typical of the kinds of cases that might also result in lesser sanctions or confidential internal resolutions—cases that we have excluded here. Traster was a law professor in his sixties who had been at ONU for thirty-five years when he asked to come over to a female staff member's home. There, he allegedly tried to inappropriately touch and kiss her. A student likewise alleged that she was asked to come over to the professor's home for university-related matters and then he "asked her questions of a sexual nature and inappropriately touched her."²²⁸

In addition, cases like the *Marder* case show that this group of cases has a similar range of severity of harassing behavior as the group of cases in Sections III and IV. In *Marder*, a journalism professor and the faculty advisor to the student

²²⁶ For example, in *Slippery Rock University*, the conduct in 2010 at a Madrid study abroad trip was verbal, including reportedly saying to a group of students that Student X "would be his favorite student if she s---d his d---k." *Slippery Rock Univ. of Pa. v. Ass'n of Pa. State Coll. & Univ. Faculty*, 71 A.3d 353, 355–56 (Pa. Commw. Ct. 2013). But an earlier incident reported in 2006 is simply described as "he was reprimanded for sexually harassing a student," *id.* at 356, so whether that was also only an allegation of verbal harassment is not clear. Likewise, in *McDaniels* the district court and appellate rulings reference an earlier sexual harassment violation but the "record divulges nothing else" about this earlier conduct that resulted in a written warning. *McDaniels v. Flick*, No. CIV. A. 92-0932, 1993 WL 171270, at *1 n.4 (E.D. Pa. May 20, 1993). The dissenting opinion by three justices notes that Chan engaged in "both *quid pro quo* and hostile environment sexual harassment" that was "blatant" and a "grievous abuse of power" with a vulnerable female foreign student, which is suggestive of alleged conduct that may be more than just verbal. *Chan v. Miami Univ.*, 652 N.E. 2d 644, 651 (Ohio 1995) (Sweeney, J., dissenting).

²²⁷ *Traster v. Ohio N. Univ.*, No. 3:13 CV 1323, 2015 WL 10739302 (N.D. Ohio Dec. 18, 2015).

²²⁸ Elie Mystal, *Law Professor Sues School for Putting Him on 'Keep It in Your Pants' Leave*, ABOVE L. BLOG (Jan. 11, 2013), <http://abovethelaw.com/2013/01/law-professor-sues-school-for-putting-him-on-keep-it-in-your-pants-leave/> [https://perma.cc/5UNQ-J9DA]; Abby Rogers, *Professor Sues Law School that Called Him a Safety Risk for Students*, BUS. INSIDER AUSTL. (Jan. 15, 2013), <http://www.businessinsider.com.au/vernon-traster-suing-ohio-nothern-law-2013-1> [https://perma.cc/BST2-JWEJ]. Note that the ONU president and provost immediately placed Professor Traster on interim suspension pending his disciplinary hearing (somewhat more controversially, this was an unpaid suspension) because of the immediate threat of repeat behavior. *Traster*, 2015 WL 10739302, at *9–10. Traster's lawsuit claimed breach of contract, due process violations and allegations that he was targeted because his high salary, but after a bench trial in federal court ONU prevailed on all claims (at the time of this writing the appeal before the Sixth Circuit is currently pending). *Id.*

newspaper at the University of Wisconsin-Superior²²⁹ was alleged to have become “black out” drunk at a school-related trip to New York for a journalism conference where he shared a hotel room with a female student and reportedly masturbated in front of her. Similarly, an international student who was being recruited to (and later enrolled at) the university complained that Marder pursued her for a personal relationship, and again was accused of masturbating in front of her in a shared hotel room.²³⁰

Even in the cases where the reported harassment was purely verbal or accompanied by relatively low-level physical contact did not preclude the conduct from being considered severe. In *Trejo*, for instance, the Seventh Circuit panel stated that the plaintiff’s “vulgar and disgusting comments and jokes about women” were so offensive that the panel refused to say in the opinion what the language was and simply referred to the paragraph number in Trejo’s papers.²³¹ Similarly, in *McDaniels v. Flick*²³² the professor was accused of massaging the student’s neck and touching the student’s face while verbally harassing the student. In this case, the student victim was struggling to complete school and needed to receive a “C” instead of a “D” in a community college class in order to successfully transfer the credits toward a nearly completed bachelor’s degree.²³³ The faculty interviewer notes the following account of one instance of harassment:

John made an appointment to speak with McDaniels in McDaniels’ office about the added class work to improve his grade. McDaniels repeatedly said he wanted to help John & counsel him. McDaniels asked if John had heard of tough love & John said no. With this, McDaniels proceed (sic) to say that he would help him & ‘If I need to I will hug you, beat the crap out of you or put my penis in your mouth.’ McDaniels reached over & put both of his hands on John’s face & seemed to be about to cry & said, ‘I really want to help you.’²³⁴

The *McDaniels* case also included allegations that the faculty member told the student he would “get him” if he disclosed their conversations with anyone.²³⁵

²²⁹ This case has a lengthy history from the faculty member’s failed effort to block release of the Title IX investigation report, to the penultimate denial of the professor’s attempt at a rehearing. *Marder v. Bd. of Regents of Univ. of Wis. Sys.*, 799 N.W.2d 928, 2011 WL 1367632, at *1–4 (Wis. Ct. App. 2011); *Marder v. Bd. of Regents of Univ. of Wis. Sys.*, 596 N.W.2d 502, 1999 WL 191585, at *1–2 (Wis. Ct. App. 1999).

²³⁰ *Marder v. Bd. of Regents of Univ. of Wis. Sys.*, 706 N.W. 2d 110, 115–16 (Wis. 2005).

²³¹ *Trejo v. Shoben*, 319 F.3d 878, 882 & n.1 (7th Cir. 2003).

²³² 59 F.3d 446 (3d Cir. 1995).

²³³ *Id.* at 450.

²³⁴ *Id.* at 450–51.

²³⁵ *Id.* at 451. While the vast majority of cases involve male faculty members sexually harassing female students, *McDaniels* and the case of *Korf v. Ball State University* are

In addition to confirming several of the themes found in previous Sections, the threats of retaliation that the faculty harasser made against the student in *McDaniels* begin to develop another common characteristic of allegations directed at faculty accused of harassing students that was only hinted at in the Title IX enforcement actions. Whereas a couple of Title IX actions discussed above indicated that the alleged faculty harasser bragged to his classes about his institution not disciplining him,²³⁶ in the faculty termination cases many accused faculty harassers' apparent power within their institutions seems to lead them to feel both invulnerable themselves and get further accused of engaging in bullying behaviors towards both victims and bystanders.²³⁷

An example involving this common characteristic is the *Tonkovich* case, in which the chancellor at the University of Kansas fired a tenured law professor who was found to have intimidated a female first-year law student in his class into performing oral sex on him in his car after the professor took her for a drive, repeatedly emphasizing how important it was for her to get good grades.²³⁸ Other former students testified at the hearing that Tonkovich used his power and influence with grades and job recommendations to coerce female students into having sex with him.²³⁹ In the background of the case was another student's anonymous allegation

important early examples of serial same-sex sexual harassment of students (see discussion of *McDaniels* above). Korf was a music professor who made unwelcome sexual advances and promises of good grades toward approximately eight of his male students in exchange for sexual involvement. *Korf v. Ball State Univ.*, 726 F.2d 1222, 1223–24 (7th Cir. 1984). Dr. Korf did not deny having sexual relationships with current and former students, but he tried to characterize these as private consensual relationships and claimed he was targeted for harsher treatment because of his homosexuality. The faculty hearing committee recommended a three-year suspension (rather than termination) and found that Dr. Korf “used his position and influence as a teacher to exploit students for his private advantage.” *Id.* at 1224. *Korf* is also significant doctrinally, and is cited more than any other faculty sexual harassment termination case (561 cites in Westlaw). The Seventh Circuit affirmed the board of trustees' decision to terminate in *Korf* by approvingly citing the AAUP ethical principles (in the faculty handbook at Ball State and countless other American universities and colleges) that emphasized a faculty member's “special responsibilities” and obligation to demonstrate “respect for the student as an individual and adheres to his proper role as intellectual guide and counselor.” *Id.* at 1227–28.

²³⁶ See Table 2B, OCR/DOJ Letter of Finding 26, at 9.

²³⁷ For further discussion of these interrelationships, see Alyssa M. Gibbons et al., *Sexual Harassment and Bullying at Work*, in *BULLYING IN THE WORKPLACE: CAUSES, SYMPTOMS, AND REMEDIES* 193, 193 (John Lipinski & Laura M. Crothers eds., 2014).

²³⁸ Mike Shields, *S Lawsuit Drags On*, LAWRENCE J.-WORLD (Dec. 6, 1998), http://www2.ljworld.com/news/1998/dec/06/s_lawsuit_drags_on/ [<https://perma.cc/759Q-CHVJ>].

²³⁹ Tim Carpenter, *Law Prof Testifies on Sexual Harassment*, LAWRENCE J.-WORLD (Oct. 9, 1992), http://www2.ljworld.com/news/1992/oct/09/law_prof_testifies_on/ [<https://perma.cc/FFA3-K5PB>].

that Tonkovich committed rape/sexual battery.²⁴⁰ All told, the Chancellor recommended dismissal because eighteen alleged incidents between 1982–91 represented a “pattern of conduct of moral turpitude.”²⁴¹ Ultimately, the faculty discipline committee recommended termination,²⁴² but only by a split 3–2 vote. Tonkovich apparently possessed a certain amount of charismatic authority at his university and that power was brought to bear on the victim.²⁴³ During the investigation, Tonkovich reportedly had other faculty allies (surrogates) circulating the view that the student alleging coerced oral sex was “unstable” and that “the accusations were part of a conspiracy” against him allegedly because of Tonkovich’s conservative political views.²⁴⁴ He also had faculty allies testify at the hearing and attempt to minimize the seriousness/harmfulness of his behavior.²⁴⁵ Once he was terminated, Tonkovich challenged his termination and unsuccessfully sought \$10 million in damages. The lawsuit was filed not only against the Kansas Board of Regents and the University of Kansas but also thirty-one individual defendants named in both their official and individual capacities that included administrators, other faculty members at the Law School and on the hearing committee.²⁴⁶ It took several years for all claims to be dismissed and all appeals to be exhausted in the case.²⁴⁷

²⁴⁰ The faculty members who received this student allegation of nonconsensual digital penetration categorized it as a rape based on Kansas state criminal law definitions. *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 512 n.3 (10th Cir. 1998). Some states’ criminal laws may characterize this as sexual battery rather than rape.

²⁴¹ *Tonkovich v. Kan. Bd. of Regents*, No. 95–2199–GTV, 1996 WL 705777, at *5 (D. Kan. Nov. 22, 1996), *rev’d*, 159 F.3d 504 (10th Cir. 1998); Tim Carpenter, *S Dating Very Open, Woman Testifies*, LAWRENCE J.-WORLD (Apr. 11, 1993), http://www2.ljworld.com/news/1993/apr/11/s_dating_very_open/ [<https://perma.cc/PUH4-WTB6>].

²⁴² The court materials and news accounts do not specify, but given other procedural protections in this case, this was likely under the “clear and convincing” evidence standard.

²⁴³ *See, e.g., Tonkovich*, 159 F.3d 504 at passim; Shields, *supra* note 238 (noting faculty supporters of professor Tonkovich, including one who resigned from a chancellor chair position in protest).

²⁴⁴ *Tonkovich*, 159 F.3d at 511.

²⁴⁵ *Id.* at 511, 533; Tim Carpenter, *Former Dean Calls Tonkovich Excellent Teacher*, LAWRENCE J.-WORLD (Feb. 19, 1993), http://www2.ljworld.com/news/1993/feb/19/former_dean_calls_tonkovich/ [<https://perma.cc/U6RR-68RM>]; *Tonkovich Story from 5-8-93*, LAWRENCE J.-WORLD (May 8, 1993), http://www2.ljworld.com/news/1993/may/08/tonkovich_story_from_5893/ [<https://perma.cc/TC2K-FKTQ>].

²⁴⁶ *Tonkovich*, 1996 WL 705777, at *1; Tim Carpenter, *Fired Law Professor Seeks \$10 Million in Damages*, LAWRENCE J.-WORLD (Apr. 28, 1995), http://www2.ljworld.com/news/1995/apr/28/fired_law_professor_seeks/ [<https://perma.cc/NDB4-N3FB>]; Shields, *supra* note 238.

²⁴⁷ *See Tonkovich v. Kan. Bd. of Regents*, 254 F.3d 941, 946 (10th Cir. 2001). *Tonkovich* also highlights some procedural problems, as the faculty discipline committee became mired in the quicksand created by its decisions and efforts to protect due process.

Another example of accused harasser overconfidence about being immune to sanctions is *Cohen*, in which the former chancellor, who had been forced to step down, returned to his faculty position after reportedly sexually harassing a female employee,²⁴⁸ then was fired a few years later for hostile environment sexual harassment violations with students. The investigator's report found that Cohen "follows a pattern of harassment and denial. . . . This denial goes beyond defending himself. It is personal, confrontational, and antagonistic toward women who complain about sexual harassment."²⁴⁹ This finding referenced the fact that Dr. Cohen had written a letter to the editor of the local paper defending himself by stating, "By the way, have you ever noticed that almost all the women who claim to have been sexually harassed are physically ugly? I guess they . . . use this method to get the attention and money they cannot otherwise command."²⁵⁰

Finally, the *Marder*²⁵¹ case, like *Cohen*, *Anderson*,²⁵² and *Tonkovich* each in slightly different ways, could be termed an "accused sexual harasser + bully" case. Marder was also alleged to have engaged in a chronic pattern of *non-sexual* harassment toward his faculty colleagues and the department support staff, and he reportedly manipulated the classroom teaching evaluation process to further his ends in disputes with campus colleagues.²⁵³ He also pursued fruitless legal claims for many years, so that a full decade after his termination and after multiple losses in Wisconsin state courts, Marder was quoted as saying he was still searching for someone who was "going to do the right thing" and "[w]e start anew in federal court."²⁵⁴

The hearing was held one day per week and dragged on for a full academic year from August to May, the committee granted Tonkovich's request for a hearing in open session (thus it was covered extensively in the local newspaper), and the committee allowed Tonkovich and not just his lawyer to directly cross-examine witnesses (which departs from modern trauma-informed standards such as OCR's 2014 Title IX guidance). *Cf. supra* notes 241–246, and accompanying text.

²⁴⁸ While Cohen was the chancellor he reportedly groped and kissed a female employee against her will, and then she won a sexual harassment jury award in 1998 with \$800,000 in punitive damages later reduced to \$50,000. Andrew Mytelka, *Court Throws Out Lawsuit by a Fired Professor and Former Chancellor Against Indiana U.*, CHRON. HIGHER EDUC. (Aug. 2, 2009), <http://www.chronicle.com/article/Court-Throws-Out-Lawsuit-by-a/47915/> [<https://perma.cc/RM3J-8T3N>].

²⁴⁹ *Trs. of Ind. Univ. v. Cohen*, 910 N.E.2d 251, 254 (Ind. Ct. App. 2009).

²⁵⁰ *Id.*

²⁵¹ *Marder v. Bd. of Regents of Univ. of Wis. Sys.*, 706 N.W. 2d 110 (Wis. 2005).

²⁵² *Anderson* brought a decade's worth of unsuccessful claims of malicious prosecution and intentional infliction of emotional distress against the victim and her parents (claiming that the student was a "liar" and mentally troubled). *See Anderson v. Eyman*, 907 N.E. 2d 730, 732 (Ohio Ct. App. 2009).

²⁵³ *Marder*, 706 N.W.2d at 114.

²⁵⁴ Maria Lockwood, *Appeals Court Upholds Dismissal of UWS Prof*, SUPERIOR TELEGRAM (Apr. 12, 2011), <http://www.superiortelegam.com/content/appeals-court-upholds-dismissal-uws-prof> [<https://perma.cc/SJL6-EVXL>].

This apparent willingness to pursue failing claims for as long as a decade, alongside the strict confidentiality norms and rules for cases that have not reached litigation, undoubtedly fuels the “pass-the-harasser” phenomenon mentioned earlier (Section I) in connection with proposed federal legislation by a California Congresswoman, because getting rid of faculty harassers in this way is likely much quicker and cheaper than dealing with years of litigation brought by terminated faculty. For this reason, this phenomenon would especially tend to occur in instances where a faculty member may have been disciplined (but not terminated) or reaches a confidential separate agreement connected to sexual harassment allegations, and then lands a new job at another university.

B. Win-Loss Rates and Contributing Determinants

The psychological dispositions of accused sexual harassers that make them more indifferent to the information feedback loops (via their lawyers and the larger civil justice system) may also explain the apparent determination of terminated faculty not only to keep litigation going as long as possible, but to file suit in the first place, given the highly unfavorable (to terminated faculty) win-loss record of these cases. Indeed, Table 3’s most obvious point is that twenty-two cases uphold termination and only six cases overturn or otherwise rule in favor of the terminated faculty member (university win/faculty loss rate of 79%). The contrast between the ten federal appellate court rulings affirming faculty terminations for sexual harassment (eleven if counting a Sixth Circuit ruling issued in April 2017, after our cut-off) versus the zero federal appellate cases in the other direction is also highly significant.²⁵⁵ The conclusion that cases upholding faculty sexual harassment terminations strongly predominate is consistent with earlier reviews based on a much smaller number of cases.²⁵⁶

In the empirical and economic literature on litigation, one exception to the classic Priest-Klein²⁵⁷ hypothesis that equilibrium win-loss rates should approximate 50-50 is when systemic asymmetries in information (or the ability to process and be influenced by objective information) exist, such that a party is consistently and stubbornly unrealistic in evaluating the prospects of a success in the courts.²⁵⁸ Given the brazen quality of much reported serial harassment and many accused faculty

²⁵⁵ We refer to jurisprudence and practical significance, not statistical significance.

²⁵⁶ See, e.g., Walter B. Connolly, Jr. & Alison B. Marshall, *Sexual Harassment of University or College Students by Faculty Members*, 15 J.C. & U.L. 381, 395 (1989); Burton M. Leiser, *Threats to Academic Freedom and Tenure*, 15 PACE L. REV. 15, 17 (1994).

²⁵⁷ George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 21 n.48 (1984).

²⁵⁸ Steven Shavell, *Any Frequency of Plaintiff Victory at Trial Is Possible*, 25 J. LEGAL STUD. 493, 500 (1996) (asymmetries in information about the validity of claims among the parties can also lead to varying levels of plaintiff success rates at trial). See also Theodore Eisenberg & Michael Heise, *The Litigious Plaintiff Hypothesis: Case Selection and Resolution*, 38 J. LEGAL STUDIES 121 (2009).

harassers' seeming overconfidence about being immune from punishment, faculty members fired for sexual harassment may frequently—if not surprisingly—cling to unrealistic notions that they will be and deserve to be vindicated in the courts. Relatedly, the institution of tenure as applied to this narrow context of terminated wrongdoers—creating for them a stark choice between guaranteed employment for another twenty or thirty years versus an uncertain economic future likely outside academia—creates incentives for terminated faculty members to persist in civil litigation longer compared to those fired after being found responsible for sexual harassment in other “at will” employment sectors.²⁵⁹

VI. CONCLUSION: WHAT TO DO ABOUT HIGH LEVELS OF SERIAL HARASSMENT AND SEVERE CASES

This analysis of faculty sexual harassment of students, drawing from the cases visible above the waterline on the iceberg model, questions assumptions about the profile of this harassment. All told, we collected and analyzed over three hundred cases alleging faculty sexual harassment, including media cases, OCR/DOJ investigations, victim lawsuits, and faculty termination lawsuits. This review shows that a clear majority of the cases resolved by OCR/DOJ investigations, decided in court, or reported in the press allege physical contact rather than purely verbal conduct, contrasting with the AAU survey in which the large bulk of sexual harassment reports collected as a result of the survey methodology were strictly verbal or involved electronic communications. Within academic and popular discourse, a number of individuals and organizations—including Greg Lukianoff of Foundation for Individual Rights in Education (“FIRE”), a committee of the AAUP, and Laura Kipnis—have recently constructed alarmist narratives about Title IX threatening academic freedom based upon anecdotal cases like Dr. Buchanan’s termination at University of Louisiana at Monroe or questionable forms of storytelling.²⁶⁰

²⁵⁹ Priest & Klein, *supra* note 257, at 40 (“The second and alternative condition under which the rate of plaintiff victories will differ from 50 percent is some systematic difference in the stakes to the parties from litigation.”).

²⁶⁰ *First Amendment Protections on Public College and University Campuses: Hearing Before the H. Comm. on the Judiciary, Subcomm. on the Constitution and Civil Justice*, 7–8 (2017) (written testimony of Greg Lukianoff), <https://judiciary.house.gov/wp-content/uploads/2017/03/Testimony-Lukianoff-04.04.2017.pdf> [<https://perma.cc/3GTQ-UVKM>]; Michelle Goldberg, *She’s Not Like Those Other Feminists*, SLATE (May 22, 2017), http://www.slate.com/articles/arts/books/2017/05/unwanted_advances_by_laura_kipnis_reviewed.html [<https://perma.cc/6BFA-MYDX>] (reviewing Laura Kipnis’ book *UNWANTED ADVANCES: SEXUAL PARANOIA COMES TO CAMPUS*, and concluding, “*Unwanted Advances* takes an insouciant approach to matters of fact and regularly passes along rumor as evidence” and “she’s willing to make sweeping statements on the basis of what is essentially gossip”); *The History, Uses, and Abuses of Title IX*, *supra* note 18, at 82.

In stark contrast to these anecdotes, both of our major findings indicate that the majority of the reported faculty sexual harassment of students that makes it above the waterline is not about academic freedom or free speech and expression issues. Rather, it tends to happen at the hands of accused serial harassers and the alleged conduct tends to be more severe, including reported groping and criminal sexual and non-sexual physical violence. Moreover, our findings on serial harassment are also important because of the nature of the social science survey research like the AAU/Westat survey (capturing cases below the waterline of the iceberg), which is not structured in such a way to allow for meaningful measurement of alleged serial harassment.

Certainly, our samples of court cases and OCR/DOJ complaints are modest in number (especially compared to the large-scale AAU survey). In addition, civil litigation and civil rights enforcement processes would, by their very nature, tend to disproportionately produce cases at the more extreme end of the sexual harassment misconduct continuum rather than a random distribution. So we believe there may be plausible explanations like “selection effects”²⁶¹ for this paradoxical divide between our case findings and the patterns in the AAU survey. Nevertheless, as stated earlier in connection with research on psychological barriers to perceiving and therefore complaining of various forms of discrimination, including sexual harassment, there are equally plausible explanations for why the sexual harassment *complaints* that are hidden from view below the waterline on the iceberg are more, rather than less, similar to the complaints above the waterline. That is, the AAU survey is designed to collect all victims’ experiences with sexual harassment, regardless of whether they result in a complaint, whereas our data sets only collect the experiences with sexual harassment *that lead to* complaints. Thus, our data sets are not necessarily inconsistent with the AAU study. Furthermore, if the important moment is the victim’s decision to informally or formally report or complain of the harassment, and if that decision responds primarily to factors relating to the character of the harassment itself, as opposed to the significantly different factors relevant to complaint confidentiality, our findings could be representative of *complaints* below the waterline without contradicting the AAU results.

In addition to such interpretive questions, the data sets are consistent with each other. The media reports show similar patterns to the court cases and OCR/DOJ investigations; and all three sources show that most faculty whose conduct meets the definition for sexual harassment tend not to be engaged in purely verbal harassment but to initiate physical contact with the student(s) they are reportedly harassing. This suggests that the harm done by reporting sexual harassment to faculty’s academic

²⁶¹ See *supra* Section I.C; see also Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1104–10 (1992) (discussing and testing several possible selection effects).

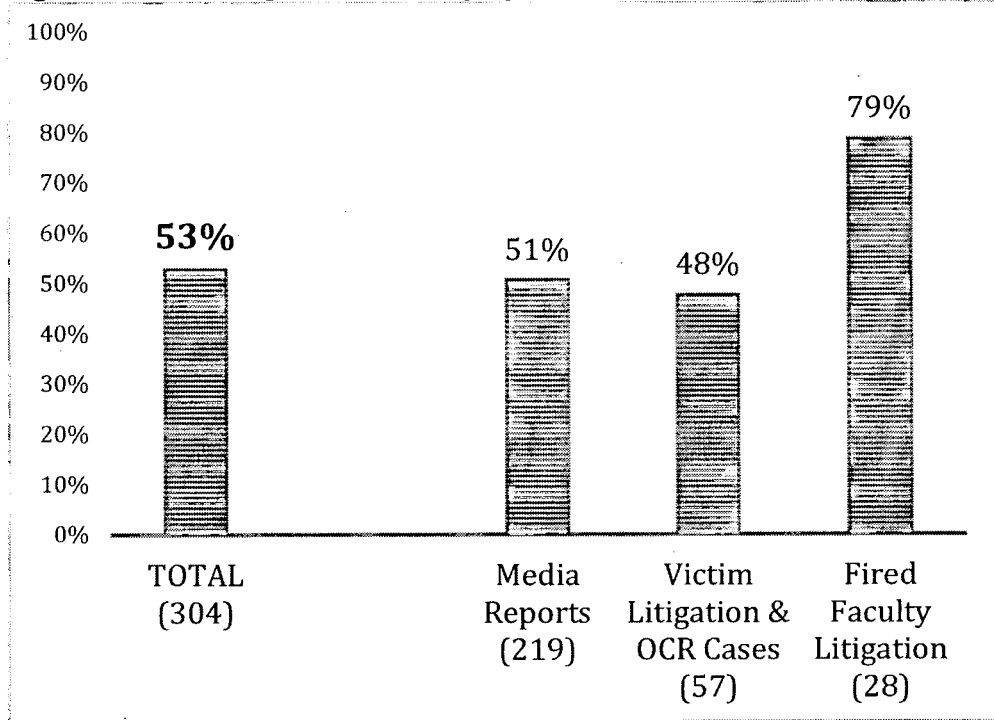
freedom and speech rights is less significant of a concern than it appears such reporting is generally assumed to be.²⁶²

The factual allegations demonstrate several patterns of behavior among the cases that were surprisingly common yet departed from the typical image of workplace sexual harassment (relevant not only because faculty are employees, but because many students are also employees, making the campus at least in part a workplace). First, 53 percent (n=162) of the 304 combined number of media reports (112/219), Title IX enforcement actions (28/57), and faculty termination cases (22/28) involved allegations of sexual harassment that included unwelcome sexual touching ranging from hugs and kisses to sexual groping, coercive sexual intercourse, forcible rape, and the kinds of physical assaults and/or psychologically abusive and controlling behavior often associated with domestic violence (see Figure 5A). In addition, in only 14 percent (n=42) of the 304 cases was the conduct alleged purely verbal,²⁶³ with the remaining third split between alleged unwelcome conduct not purely verbal but stopping short of physical contact between the harasser and victim (e.g., indecent exposure, excessive or sexually-themed gifts to the victim, photographing or filming the victim), alleged (usually by the accused faculty member) “welcome” or consensual sexual relationships, and alleged propositions that amount to *quid pro quo* sexual harassment.

²⁶² For example, in *Trejo v. Shoeben*, discussed in detail in Section III, the Seventh Circuit affirmed the district court’s dismissal of the faculty member’s free speech/academic freedom claims. 319 F.3d 878, 884–88 (7th Cir. 2003). Moreover, some kinds of egregiously harassing workplace speech can cross the line in a sexual harassment or racial harassment context. See, e.g., Letter from Catherine E. Lhamon, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ. to Honorable James Lankford, Chairman, Subcomm. on Reg. Affairs & Fed. Mgmt., Comm. on Homeland Sec. & Gov. Affairs, U.S. Senate 1–4 (Feb. 17, 2016), <http://www.chronicle.com/items/biz/pdf/DEPT.%20of%20EDUCATION%20RESPONSE%20TO%20LANKFORD%20LETTER%202-17-16.pdf> [<https://perma.cc/R9ZA-3PNP>]; cf. *Aguilar v. Avis Rent a Car Sys. Inc.*, 980 P.2d 846, 853–59 (Cal. 1999) (finding that repeated offensive racial epithets represent workplace racial harassment rather than protected speech).

²⁶³ Appendix B, Media reports: 21, 29, 42, 43, 46, 55, 57, 62, 66, 72, 77, 87, 88, 89, 121, 155, 157, 171, 174, 183, 187, 192, 196, 206, 217, 220; Table 2A, Title IX court cases: 12, 14, 16, 18, 19, 20, 22, 28, 35, 42; Table 3, Faculty termination cases: 4, 9, 10, 15, 24.

Figure 5A: Percentage of Cases Alleging Unwanted Physical/Sexual Touching

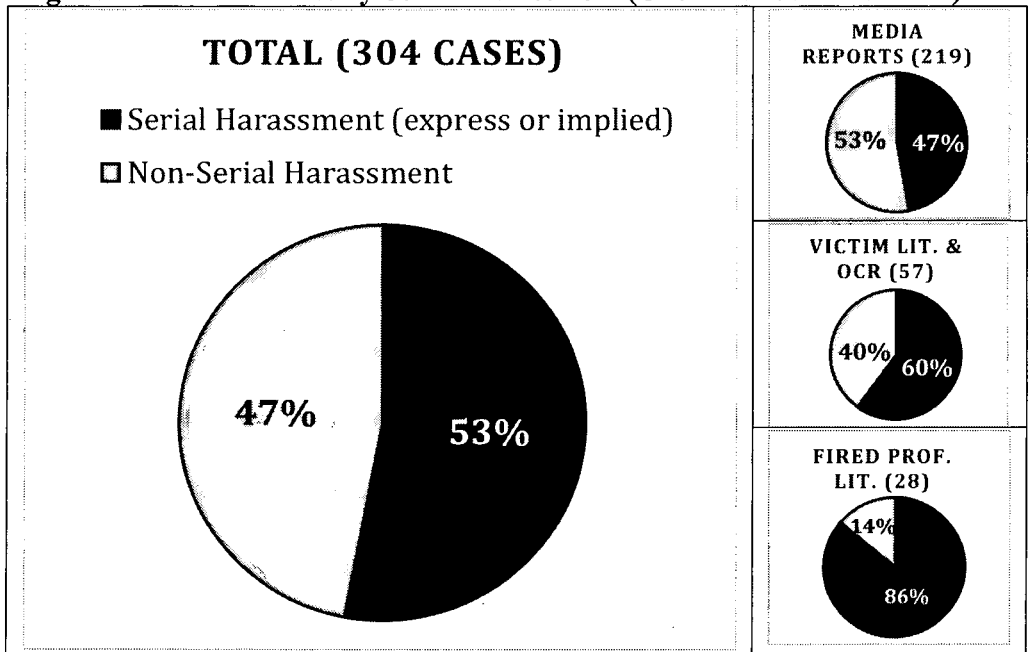


Second, as Figure 5B demonstrates, out of the 304 faculty sexual harassment cases, another solid majority (53%, 161/304) involved allegations that accused professors engaged in patterns of serial sexual harassment with multiple targets/victims. Moreover, a case is more likely to involve allegations of serial sexual harassment the higher above the waterline the case is located on our iceberg. Based on our collective experience working with student sexual harassment survivors, there could be many reasons why cases involving official complaints would have a greater percentage of cases where multiple victims report. These possible reasons could cause multiple victims to come forward in two ways: (1) victims who learn of others targeted by the same harasser before any single victim comes forward could report as a group or (2) additional victims could come forward after learning of a previous complaint by another victim or victims. Ayres and Unkovic describe this as the “first mover” problem in serial sexual harassment cases²⁶⁴—the added risks and burdens of being the first to lodge the formal sexual harassment complaint or lawsuit—and a correlate is that once the first-mover burden has been overcome, a second, third, or fourth report can come forward with

²⁶⁴ Ayres & Unkovic, *supra* note 2, at 160 (applying the concept, from economics, of first-mover disadvantage and commenting that “[a] recidivist sexual harasser’s wrongdoing might go unchallenged because no one is willing to be the first (and potentially only) claimant to lodge a complaint”).

progressively less reluctance. The discovery phase of civil litigation is, for related reasons, likely to bring forward other “me too” examples of prior sexual harassment.²⁶⁵ In addition, evidence of a single faculty member harassing multiple students interrupts victim-blaming narratives in which victims or third parties may engage, identifying the harassment as generating from a harmful characteristic of the professor, thus allaying concerns that third parties will not believe the victim and that disbelief will lead to secondary victimization. Victims may also complain in the hopes that doing so will keep an accused serial harasser from harming additional victims.

Figure 5B: Rates of Faculty Serial Harassment (Overall & Sections III–V)



The frequency demonstrated in a majority of these cases of alleged serial harassers, “open secret,” and accused harasser’s bullying and intimidating characteristics indicates a need, in particular, for improved college and university responses to this harassment. These responses must take reports of faculty harassment very seriously and fulfill a clear role in a coordinated and comprehensive sexual harassment prevention system that includes primary, secondary, and tertiary prevention approaches. Such an approach requires institutions to take such steps as convening and empowering Coordinated Community Response Teams

²⁶⁵ As noted in Section II, research outside higher education also shows that when sexual harassment victims perceive their employer as not responding appropriately and not taking the issue seriously, they are more likely to become plaintiffs in a class action lawsuit. Wright & Fitzgerald, *supra* note 137, at 278.

(“CCRTs”),²⁶⁶ ensuring independent and effective Title IX Coordinators and campus victim services professionals, providing accommodations to victims, properly investigating victim reports of harassment, and disciplining the accused where appropriate. Skilled and knowledgeable Title IX Coordinators, strong CCRTs, and proper investigations/disciplinary procedures are particularly important to tracking victims’ reports in such a way that repeat harassers can be identified. This analysis should also aid a reexamination of whether and which best practices should be adopted to address faculty harassment, as well as to draw connections between sanctions, the prevention and deterrence of sexual harassment, and the protection of academic freedom. We attempt such a detailed analysis in our companion project,²⁶⁷ with a particular focus on such questions as whether many universities and colleges have uneven and/or inadequate disciplinary responses and what the contours of a fair and equitable process for faculty-on-student sexual harassment cases should be.

Finally, having embarked on this comprehensive sociolegal research project, we offer a brief reflection on the state of the research literature, if only to cajole more researchers to consider working in this space. Given the depth and prominence of civil rights and gender equality commitments within U.S. legal scholarship more generally, we were frankly surprised by the paucity of contemporary sociolegal research specifically addressing faculty-on-student sexual harassment within the academy. The high volume of press coverage on this issue in the past three years made the absence of robust scholarly and policy-relevant research all the more conspicuous and puzzling. Greater scholarly progress on sexual harassment in academia appears to have occurred in other psychology- and feminist-allied disciplines in the past ten or fifteen years, while sociolegal research on this same topic seems to have lagged behind. Just as more scholarship is helping us gain a better understanding of employment litigation settlements²⁶⁸ and sexual harassment cases in other employment sectors,²⁶⁹ we hope this study spurs other scholars to think

²⁶⁶ For a definition of CCRTs, see U.S. DEP’T OF JUSTICE, MINIMUM STANDARDS FOR CREATING A COORDINATED COMMUNITY RESPONSE TO VIOLENCE AGAINST WOMEN ON CAMPUS 1–2 (2008), <https://www.justice.gov/sites/default/files/ovw/legacy/2008/01/11/standards-for-ccr.pdf> [<https://perma.cc/BS8K-LYKP>].

²⁶⁷ Cantalupo & Kidder, *supra* note 20.

²⁶⁸ See, e.g., Kotkin, *supra* note 95, at 927–33; Schwab & Heise, *supra* note 41, at 931–36; Shamir, *supra* note 41, at 957–65.

²⁶⁹ Cass R. Sunstein & Judy Shih, *Damages in Sexual Harassment Cases*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 324, 332–33 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004); Catherine M. Sharkey, *Dissecting Damages: An Empirical Exploration of Sexual Harassment Awards*, 3 J. EMPIRICAL LEGAL STUD. 1, 15–39 (2006); Lucero et al., *Sexual Harassers*, *supra* note 79, at 335–41.

about novel data sets and methodologies than can be utilized to enhance the generalizability and reliability of sociolegal research on the phenomenon of faculty sexual harassment of students as well as other sexual harassment taking place in a context where a power imbalance exists between the accused harasser and the victim.²⁷⁰

In the end, engaging in the well-informed and evidence-based discussions for which we wished at the beginning of this Article and that we are endeavoring to support with both parts of this project requires more empirical study. Therefore, we hope that this project will especially inspire our social science colleagues to conduct more empirical research on graduate students' experiences in general and to seek to empirically measure sexually harassing conduct that meets the criteria of sexual harassment's legal standard in particular.

APPENDIX A: ADDITIONAL DETAILS ON METHODOLOGY IN SECTIONS III–V

Connected to the discussion of the “tip-of-the-iceberg” model in Section II.C., some of the methodological details below are intended to provide readers with additional information about factors that can shape the distribution of available cases included in our analyses in Sections III–V, including factors that may indirectly contribute to a certain amount of the inevitable non-randomness in the case samples.

Section III Summary

In Section II.C. we characterized media cases as right at the waterline of visibility in our “tip-of-the-iceberg” model, meaning that the facts in many of these cases are not as fully developed or reliable as litigated cases. One faculty reviewer of this manuscript pondered whether the media cases on Dr. Libarkin's website might oversample high-severity sexual harassment (assault) cases relative to other data sources like LexisNexis. In the future we might test for convergent validity/reliability of source data (and encourage other scholars to pursue this too, since we are transparent about our case inclusion/exclusion rules). Overall we think some tug in the media cases toward higher-severity conduct is plausible (although not certain), but not for reasons connected to Dr. Libarkin's selection protocols, which are noted below.

The more plausible explanation would be what could be termed “newsworthiness bias” such that news reporters' time and effort is disproportionately spent on cases of a certain severity threshold because those are

²⁷⁰ See, e.g., Barbara Schneider, *Building a Scientific Community: The Need for Replication*, 106 TEACHERS C. REC. 1471, 1473 (2004) (“Without convergence of results from multiple studies, the objectivity, neutrality, and generalizability of research is questionable.”).

the cases that would foreseeably spark reader/community interest. Cases where victims or third-parties (including anonymously) initiate the first contact with a reporter would be included here too, since reporters must make decisions about what leads are worth following-up on and which ones are not. One can think of the recent massive public records act requests about University of California as providing modest “natural experiment” support for this hypothesis—less severe cases came forward later as part of a sweep of more than one hundred faculty and staff substantiated cases—but that is attenuated by the fact that cases reported in the media by virtue of public records act requests are part of our theoretical model and are part the universe of reported cases. Secondly, the cases we excluded due to lack of details or there not being a student victim (e.g., when a professor verbally or visually harasses the department’s administrative assistant) could conceivably have a higher share of lower-severity cases—but on that count we are comfortable with the tradeoffs we have chosen because of our research commitment to reporting on cases with better reliability and cases focusing on students.

We corresponded with Dr. Libarkin about her procedures for searching and posting cases. Here is a condensed summary of her methodology, excluding aspects that related to legal case searches since we elected to exclude cases that only cited to a legal opinion (so as to not overlap or create inconsistent inclusion rules vis-à-vis our own legal case analyses in Sections IV and V):²⁷¹

- **The cases** on the website are all of the cases I could find through searching specific terms (see list below). The search is done in three spaces: Google, FindLaw, and LexisNexis (latter two to identify cases not findable via regular web search). Once I find a case or a reference to a case, I search the individual’s name to find more recent case law or news items. This allows me to hunt down specific details and to ensure that no cases are included which shouldn’t be.
- **The search terms:** I list the modifiers first and the search terms second. Note: I generated the first 100 or so cases as a protest against the lack of transparency about these cases. Afterwards, I turned the process into an academic research process. Getting the core list of pre-2016 cases took about six months because cases are so well-hidden and the search process is cumbersome.
- **Academia specific modifiers:**
 1. “professor and”
 2. “instructor and” [modified with “university and college” to reduce]
 3. “dean and”
 - 4 “university or college” and “president and”

²⁷¹ Some of the cases in the Geocognition website only linked to a court opinion rather than a news article, and so we attempted to minimize such “derivative overlap” with the legal cases in Sections IV–V by excluding any case on Geocognition’s website that linked to a court opinion as opposed to a journalistic account or that dealt with the same facts and events as a court case or an OCR investigation that we identify and discuss in Sections IV and V.

5. “university or college” and “provost and”
 6. “university or college” and “administrator and”
 7. “university or college” and “employee and”
- I search google for 1 and 2 above weekly—I set the search dates from the last date I searched to current; I search google for 3–7 above minimum every two months.
 - Additional modifiers added to academia modifiers above:
 1. “community college”
 2. “tribal college”
 3. [the name of each state and territory, e.g., “Alabama”]
 - **Search terms used** with each of the modifiers above:
 - sexual harassment
 - sexual misconduct
 - sexual assault
 - inappropriate relationship
 - peeping
 - voyeur
 - rape
 - kidnap
 - murder
 - Depending on the number of search hits, I may also add one of these modifiers to narrow the list: “student,” “colleague.” Since I search at least twice a week, I don’t usually need to do this. [I left coaches off of the list, although I am rethinking that decision].
 - I also clear my history/cache to ensure that the search algorithms aren’t masking cases. LexisNexis and FindLaw are searched every 2 months, although that will stop since I think I have found all the cases available in LexisNexis and as many as I can find in FindLaw.
 - I ONLY post cases for which I can find some sort of documentation. I have had a number of people contacting me asking me to include their own harassers on the list, but there is no tangible evidence (no news reports, no court documents, confidential settlements). I can only include a case when there is some level of tangible evidence.

With respect to which Geocognition website cases we included in narrowing the cases from approximately 450 to 219, note that the news articles aggregated here should be regarded as snapshots of those cases—the website provides a link to one article in a given case, and while we looked for additional articles on a subset of cases where more information would be helpful, we did not do so for all 219 cases. Accordingly, one caveat is that because of this reliance to some extent on single articles, some cases will be inaccurately excluded because the article we considered did not mention a student victim but other news coverage outside our purview (possibly including coverage that is not available online) might show that a student was in fact targeted for sexual harassment. We excluded media reports on accused employees such as administrative staff or coaches who did not appear to play roles

primarily involving teaching, with the one exception being deans and other similar high-level administrators who are usually tenured faculty members holding their administrative appointment for a set number of years while they remain a member of the faculty.

We did not limit the media reports that we included by year as we did with the Title IX case law and OCR investigations because the faculty discipline court cases discussed in Section V include cases older than any of the Geocognition news reports. As a result, we analyze a couple notable features of the 219 cases below. First, the cases are not evenly distributed across the past three decades—cases from recent years are strongly overrepresented while only a few dozen cases from the 1980s and early 1990s are included. This pattern among the cases is not at all surprising given the proliferation of online media outlets in combination with the fact that some of the older news articles gradually “sank below the waterline” when links expired and the articles were not permanently archived online. To a lesser extent—and as a corollary of the skew toward recent cases—those older cases that we included from the Geocognition website tend to oversample elite institutions for reasons that are an artifact of the news coverage sources.²⁷²

Section IV Summary

Because this is part of a larger research project in which we review both fact patterns and legal/doctrinal patterns, for the legal cases and OCR/DOJ letters of finding involving allegations of faculty harassment of students we used a time frame of 1998 (the year the Supreme Court issued *Gebser v. Lago Vista Independent School District*, the case confirming the standard a plaintiff must reach to sue for damages in sexual harassment cases under Title IX²⁷³) through September 2016. We identified the court cases by shepardizing *Gebser* and reading all cases citing to *Gebser* that referred to harassment by a faculty member or another employee, as well as supplementing this list with federal circuit court cases brought by victims alleging sexual harassment between 1998 and 2013, as collected in James David Jorgensen’s dissertation.²⁷⁴

²⁷² For example, the *New York Times* archives for the 1980s tends to cover major sexual harassment scandals at Harvard and Yale, but did not devote similar levels of coverage to equivalent cases at non-elite state universities or community colleges. Likewise, elite institutions tend to have student papers (e.g., *Harvard Crimson*) with deeper online archives going back several decades.

²⁷³ As discussed further below, *Gebser v. Lago Vista Indep. Sch. Dist.*, involved a teacher’s sexual harassment of a student. 524 U.S. 274, 277–78 (1998). The cut-off of 1998 is also the year after OCR first issued sexual harassment guidelines (guidelines that are important to the second major enforcement method under Title IX: administrative enforcement by the Office for Civil Rights in the U.S. Department of Education), discussed *infra*.

²⁷⁴ See generally Jorgensen, *supra* note 58 (discussing sexual harassment litigation involving instructors).

For the OCR investigations we relied first on work done by Dr. Laura Johnson for her dissertation, which coded all OCR investigation resolutions from 1998–2011 that are available to the public in an online database maintained by the National Center for Higher Education Risk Management.²⁷⁵ We read all of the OCR resolution letters that Dr. Johnson coded as alleging faculty harassment of students. For cases in 2011 or afterward, we read all of the resolution letters dated 2011–October 2016 that were available in the “Title IX Tracker” database developed by the *Chronicle of Higher Education*, which includes all materials that the *Chronicle of Higher Education* has received (including other documents besides only resolution letters) in response to its Freedom of Information Act requests of the Department of Education.²⁷⁶ Of the eighteen cases that had been resolved in the Title IX Tracker database, six mentioned faculty harassment and were included in the seventy OCR or DOJ resolutions we reviewed for this project.

Because both the legal cases and OCR/DOJ investigations we reviewed represent the tip of the iceberg, we cannot safely assume that these data are drawn from representative (random) samples in American society.²⁷⁷ Thus, these litigated cases resulting in judicial opinions may plausibly contain higher proportions of serial and high-severity cases compared to cases that reached early settlement without a judicial opinion, and all litigated cases may differ in aggregate patterns compared to cases that were never litigated, and so on. Likewise, the OCR investigation resolutions with sufficient factual description to determine the presence/absence of serial harassment may differ from the OCR resolutions where the factual description is too sparse to include in our analysis of recidivism patterns.²⁷⁸

We did not track the disciplinary consequences in Section IV for two reasons. First, the specific kind of discipline used by a school is not central (although certainly not irrelevant) to determining whether Title IX is violated, and therefore is

²⁷⁵ Laura S. Johnson, *Gender Discrimination and Title IX Implementation: Lessons from the Office for Civil Rights Resolution Letters 1997–2011* (2015) (unpublished dissertation, University of Kentucky), http://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1034&context=epe_etds [<https://perma.cc/9MVL-R5HX>]. Through a Freedom of Information Act request, the National Council for Higher Education Risk Management collected and has made available a data set with a large number of OCR Title IX sexual misconduct-related resolution letters issued between 1997 and 2011, and Dr. Johnson examined 141 useable OCR resolution letters in the NCHERM data set for her dissertation.

²⁷⁶ *Title IX: Tracking Sexual Assault Investigations*, CHRON. HIGHER EDUC., <http://projects.chronicle.com/titleix/> [<https://perma.cc/M3Q7-GG54>] (last visited Jan. 22, 2018).

²⁷⁷ See Sunstein & Shih, *supra* note 269, at 332 (making a similar point in a modest-sized study of 70 sexual harassment legal cases, “[T]he data set may be skewed; most of the cases were appealed, and perhaps this made for an unrepresentative sample.”); Siegelman & Donohue, *supra* note 42, at 1165.

²⁷⁸ Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 559 (2001) (underscoring a very similar point about litigated sexual harassment cases and what information judges decide to include/exclude in their legal opinions).

rarely discussed by courts or investigators. Second, as noted above, the disciplinary actions of institutions are not the focus of this Article but will be addressed in our subsequent project on appropriate institutional responses to faculty harassing students, including meaningful disciplinary measures and sanctions for faculty found responsible for harassing students and/or others.

Section V Summary

As outlined in Section II.C., sexual harassment cases in which a faculty member is both terminated and then litigates are the tip of the proverbial iceberg, and even then, many of these cases will not yield a judicial opinion given patterns that hold more generally in employment litigation (e.g., early settlements including “nuisance” level settlement amounts, state trial court rulings that may not be captured even in unpublished Westlaw or LexisNexis coverage). Given the small number of tip-of-the-iceberg cases as described above, we avoided further restricting the cases by year, especially since the logic for doing so in Section IV was related to the 1998 *Gebser* case and no analogous doctrinal rationale exists here, given that basic contours of due process (in federal case law) have been more stable since the 1970s and 1980s.

The cases we included were derived from Westlaw and LexisNexis searches. In order to ensure an exhaustive and inclusive inventory—and because not all judicial opinions will use the term “sexual harassment” even when that is the gravamen of the basis for termination—we also looked at any cases cited in Kaplin & Lee’s two-volume casebook on higher education law and other books summarizing discipline cases, the National Association of College and University Attorneys’ case website and archives, plus over a half-dozen law journal articles addressing faculty misconduct discipline cases.

The cases we excluded were ones that did not fit our focus on tenure-track sexual harassers in academia. To include such non-tenure cases would have skewed our win-loss rates further in favor of colleges and universities. Here are the kinds of sexual harassment cases we ended up excluding (with citations in the footnotes):

- Lecturers or part-time (adjunct) instructors;²⁷⁹
- Athletic coaches with academic appointments (but without tenure) fired for sexually inappropriate behavior;²⁸⁰

²⁷⁹ See, e.g., *Scallett v. Rosenblum*, 106 F.3d 391, 392 (4th Cir. 1997); *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 668 (7th Cir. 2006); *Salinas v. Univ. of Texas Pan Am.*, 74 Fed. App’x 311, 312 (5th Cir. 2003); *Vega v. Miller*, 273 F.3d 460, 462–63 (2d Cir. 2001); *Cockburn v. Santa Monica Cmty. Coll. Dist.*, 161 Cal. App. 3d 734, 736–37 (Cal. Ct. App. 1984).

²⁸⁰ *Deli v. Univ. of Minnesota*, 511 N.W. 2d 46, 53–54 (Minn. Ct. App. 1994) (coaches terminated under academic staff policy, university found to have “just cause” for the terminations).

- Cases where a harasser was removed as dean or other administrative position but was not fired as a faculty member;²⁸¹
- Cases where the initial disciplinary charges alleged sexual harassment, but where the termination was ultimately based only upon other misconduct;²⁸²
- Cases where the faculty member preemptively initiates litigation defending against sexual harassment allegations while still an employee, then eventually resigns when termination appears to be inevitable.²⁸³

Our coverage of cases extended through a cut-off of 2016, though we later added in the table that the *Traster* case was affirmed by the Sixth Circuit in April 2017. We also became aware of one new case months after our cut-off. In *Naumov v. McDaniel College* the federal district court partly granted and partly denied the college's motion for summary judgment, finding a question for the jury in whether the administration's filing of a discipline case where the victim wanted to remain anonymous was (in)consistent with the college's faculty handbook and Title IX policy.²⁸⁴ It is too early to know the outcome in *Naumov* (e.g., jury trial, decision on appeal) so we did not change our time cut-off in order to add this new case.

²⁸¹ See, e.g., *McLaurin v. Clarke*, 133 F.3d 928, 1997 WL 800243, at *1 (9th Cir. 1997) (unpublished table decision). The logic for this exclusion is that faculty administrative appointments are typically "at will" or approximately so, and do not implicate rights and privileges of an underlying faculty appointment.

²⁸² *Kostic v. Texas A&M Univ. at Commerce*, No. 3:10-cv-2265-M, 2015 WL 4775398, at *4 (N.D. Tex. Aug. 13, 2015).

²⁸³ *Ludlow v. Northwestern Univ.*, 79 F. Supp. 3d 824, 845 (N.D. Ill. 2015) (granting the university's motion to dismiss); Jason Meisner, *Northwestern Professor Accused of Sexual Harassment Resigns*, CHI. TRIB. (Nov. 3, 2015), <http://www.chicagotribune.com/news/local/breaking/ct-northwestern-university-peter-ludlow-resigns-20151103-story.html> [<https://perma.cc/2G94-8XGD>].

²⁸⁴ *Naumov v. McDaniel Coll., Inc.*, No. GJH-15-482, 2017 WL 1214406, at *3-13 (D. Md. Mar. 31, 2017).

APPENDIX B: FULL SOURCES FOR MEDIA CASES IN SECTION III

(Media Reports Alphabetically by Institution)*University of Akron*

1. Rick Armon, *University of Akron Professor Who Violated Sexual Harassment Policy Allowed to Continue Teaching*, AKRON BEACON J. (Dec. 6, 2015, 12:00 PM), <http://www.ohio.com/news/local/university-of-akron-professor-who-violated-sexual-harassment-policy-allowed-to-continue-teaching-1.645615> [<https://perma.cc/NX7W-PVE2>].

University of Alabama

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APPENDIX C

Table 2A: Title IX Court Decisions, 1998–2016

(alphabetically by plaintiff or educational institution)

1. *Abramova v. Albert Einstein Coll. of Med.*, 278 F. App'x 30 (2d Cir. 2008).
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3. *Aguilar v. Corral*, No. CIV. S-07-1601 LKK/KJM, 2007 WL 2947557 (E.D. Cal. Oct. 9, 2007).
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11. *Escue v. N. Okla. Coll.*, 450 F.3d 1146 (10th Cir. 2006).

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14. *Gjeka v. Del. Cty. Cmty. Coll.*, No. 12-4548, 2013 WL 2257727 (E.D. Pa. May 23, 2013).
15. *Gonzales v. N.C. State Univ.*, 659 S.E.2d 9 (N.C. App. 2008).
16. *Gretzinger v. Univ. of Haw. Prof'l Assembly*, 156 F.3d 1236 (9th Cir. 1998).
17. *Ha v. Nw. Univ.*, No. 14 C 895, 2014 WL 5893292 (N.D. Ill. Nov. 13, 2014).
18. *Hayut v. State Univ. of N.Y.*, 352 F.3d 733 (2d Cir. 2003).
19. *Hendrichsen v. Ball State Univ.*, 107 F. App'x 680 (7th Cir. 2004).
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21. *Hunt v. Forbes*, No. 07-1095, 2010 WL 1687863 (C.D. Ill. Apr. 26, 2010).
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24. *Johnson v. N. Idaho Coll.*, 350 F. App'x 110 (9th Cir. 2009).
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28. *Mandsager v. Univ. of N.C.*, 269 F. Supp. 2d 662 (M.D.N.C. 2003).
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30. *Miller v. Kutztown Univ.*, No. 13-3993, 2013 WL 6506321 (E.D. Pa. Dec. 11, 2013).
31. *Morse v. Regents of the Univ. of Colo.*, 154 F.3d 1124 (10th Cir. 1998).
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37. *Schneider v. Plymouth State Coll.*, 744 A.2d 101 (N.H. 1999).
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40. *Wilborn v. S. Union State Cmty. Coll.*, 720 F. Supp. 2d 1274 (M.D. Ala. 2010).
41. *Wills v. Brown Univ.*, 184 F.3d 20 (1st Cir. 1999).
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Table 2B: Faculty Harasser Title IX OCR/DOJ Resolution Letters, 1998–2016

(alphabetically by educational institution)

(* indicates case is in the NCHERM database, *available at*<https://www.ncherp.org/resources/legal-resources/ocr-database/>)

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<i>California State University, East Bay</i>	
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