A Systematic Look at a Serial Problem:
Sexual Harassment of Students by University Faculty

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ABSTRACT

One in ten female graduate students at major research universities reports 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 nearly three hundred cases obtained from: (1) media reports; (2) federal civil rights investigations by 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

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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 involved faculty alleged to have engaged in unwelcome physical contact ranging from groping to sexual assault to 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.

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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 Pryal,
The Consequences of Resisting a Professor’s Advances

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. The higher education sector, in 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. Indeed, these issues have been at the center of a recent federal legislative proposal. Connected to the opening quote from Dr. Pryal,

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3 STEVEN G. POSKANZER, HIGHER EDUCATION LAW – THE FACULTY 225 (2002); Courtney Leatherman, To Get Rid of a Difficult Employee, a College May Hush Up Problems in a Professor’s Past, CHRON. HIGHER EDUC., December 6, 1996; Tyler Kingkade, Why It’s Harder for Grad Students To Report Sexual Harassment, HUFFINGTON POST (July 6, 2016), http://www.huffingtonpost.com/entry/grad-students-sexual-harassment_us_57714bc6e4b0dbb1bbbb37c7.

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-p1-PgH286.pdf; Congresswoman Jackie Speier Introduces Bill to Stop Rampant Sexual Abuse, Harassment in STEM
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.”

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. 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 other students 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. 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 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 sexual harassing students. These sources confirm that faculty harassment of students is more widespread than many may appreciate and—perhaps most importantly—a disturbingly high proportion of available cases 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 shares with other accounts of faculty sexual harassment collected here is that she was a graduate student when the incidents of sexual harassment about which she writes occurred. Studies that have


Pryal, supra note 1.

Compare with the cases review in e.g., WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION 110-29 (5th ed. 2013); Donna R. Euben & Barbara A. Lee, Faculty Discipline: Legal and Policy Issues in Dealing with Faculty Misconduct, 32 J. COLLEGE & UNIV. LAW 241 (2006); Anne Lawton, The Emperor’s New Clothes: How the Academy Deals with Sexual Harassment, 21 YALE J. LAW & FEMINISM 75 (1999); John D. Copeland and John W. Murry Jr., Getting Tossed from the Ivory Tower: The Legal Implications of Evaluating Faculty Performance, 61 MO. L. REV. 233 (1996); Kimberly A. Mango, Students Versus Professors: Combating Sexual Harassment Under Title IX of the Education Amendments of 1972, 23 CONN. L. REV. 355 (1990); Walter B. Connely, Jr. & Alison B. Marshall, Sexual Harassment of University or College Students by Faculty Members, 15 J. COLLEGE & UNIV. LAW 381 (1989).
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, 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) while female undergraduates encounter greater peer sexual harassment from other college students. While it is impossible, due to variations in how courts or OCR/DOJ resolution letters describe facts, to confirm the percentage of graduate versus undergraduate students involved in litigation or administrative investigations, information gathered from the other three datasets is consistent with the social science findings.

Second, Dr. Pryal was targeted by a serial harasser, i.e. a single faculty harasser who targets many victims, either students or more junior faculty and staff in addition to students. All of the sources collected herein show high rates of serial harassment by faculty. 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.

Third, the harassment caused similar 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. As is 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

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8 Id. at 31.

9 Id., Conclusion in Section VI.

10 Id.
experienced. By her account, her professor never made physical contact with her, and that makes her case unusual—quite unusual—among the cases collected here. In fact, a sizeable 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) involve physical contact rather than purely verbal conduct. These sources show that most faculty whose conduct meets the definition for sexual harassment tend not only to initiate physical contact with the student(s) they are reportedly harassing, but that the physical contact initiated 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 generate stronger 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 annoyance – are characteristic of the behavioral profile and institutional power dynamics documented in the present study of faculty sexual harassers.

In summary, the picture that is drawn by bringing all of these sources together suggests that the reality of faculty sexual harassment of 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, as well as the focus in academia on the potential harm that sexual harassment accusations could do to faculty’s academic freedom and speech rights, which assumes (expressly or tacitly) solely verbal acts, because once physical contact has occurred, the faculty member has engaged in conduct, not speech.

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.
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. Shoeden, 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 at 884–87. Moreover, some kinds of egregiously harassing workplace speech can cross the line in e.g., a sexual harassment or racial harassment case. See, e.g., Aguilar v. Avis Rent a Car System Inc., 21 Cal.4th 121 (1999); see Letter from Catherine E. Lhamon to Honorable James Lankford (Feb. 17, 2016), http://www.chronicle.com/items/biz/pdf/DEPT.%20of%20EDUCATION%20RESPONSE%20TO%20LANKFORD%20LETTER%202-17-16.pdf.
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 are 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. Graduate students 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.

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. The fact of power differentials is not unique to graduate students, but

15 John M. Braxton, Eve Proper & Alan E. Bayer, Professionalism in Graduate Teaching and Mentoring, in JOSEPH C. HERMANOWICZ, ED., THE AMERICAN ACADEMIC PROFESSION: TRANSFORMATION IN CONTEMPORARY HIGHER EDUCATION 168, 182 (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 (2016).

16 Kathryn B.H. Clancy et al, Survey of academic field experiences (SAFE): Trainees report harassment and assault, 7 PLOS ONE 9 (2014), http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0102172; 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. & POLY 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 scientists at research universities more 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.”).

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 professorate 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. However, our sources show that 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. 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 harassment in the future. Both those who protest


18 See e.g., Joan C. Williams & Katherine W. Phillips, Tools for change: boosting the retention of women in the stem pipeline, 6 J. Research in Gender Studies 11 (2016); Kristen Renwick Monroe, Gender Equality in the Ivory Tower, and How Best to Achieve It, 47 PS: Political Science & Politics 418 (2014); A. Hope Jahren, She Wanted to Do Her Research. He Wanted to Talk ‘Feelings’, N.Y. TIMES, March 4, 2016; Joan C. Williams & Kate Massinger, How Women Are Harassed Out of Science, ATLANTIC MONTHLY, July 25, 2016.


20 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 Behavior 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
and/or those who have sexual conduct forced upon them are likely to experience well-documented negative health consequences\(^{21}\) and/or retaliation, either of which could be career-ending. Those who feel they should not or cannot protest are likewise likely to suffer negative psychological effects that have serious, if less visible, professional and career consequences.\(^{22}\) In these instances, faculty misconduct can cause a pernicious form of “divestiture”\(^{23}\) 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.\(^{24}\)

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 forthcoming companion piece on the importance of serious disciplinary sanctions in sexual harassment cases, 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.\(^{25}\)

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 their fundamental human rights; the right to work with dignity.\(^{26}\)


\(^{22}\) Studies looking at less severe (non-assault) sexual harassment of female undergraduate and graduate students find that those targets of sexual harassment experience 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 (2000). See additional discussion in Part II.

\(^{23}\) Melissa S. Anderson et al., Disciplinary and Departmental Effects on Observations of Faculty and Graduate Student Misconduct, 65 J. HIGHER EDUC. 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”).

\(^{24}\) Wright & Fitzgerald, Angry and Afraid, supra note __, 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…”).

\(^{25}\) See also Braxton, Proper & Bayer, supra note __ at 183 (“Graduate student 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.”).
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.26

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, are leading up to important questions about the adequacy of institutional responses, including disciplinary measures and remedies for survivors, in the university setting. Rather than only briefly address 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.27

C. The “Tip of the Iceberg” Model and what we Know about Confidential Cases

As will become evident throughout this article, the multiple data sources that we analyze herein ultimately represent the proverbial tip of the iceberg of faculty sexual harassment of students. The vast majority of cases remain under the water line (i.e., confidential) and are out of public view or only visible in limited ways. Just as confidentiality generally and confidential settlements in particular constrains our public understanding of employment discrimination (including sexual harassment),28 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 water line.” Moreover, we seek to demonstrate reasonably research-based expectations about the contours of the confidential cases “below the water line” that make up the far larger portion of this Title IX iceberg in the college

26 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 JOURNAL OF TRAUMATIC STRESS 119 (2013).

27 Nancy Chi Cantalupo & William C. Kidder, Systematically Addressing a Serial Problem: How Universities Respond and Should Respond in Faculty Sexual Harasser Cases (unpublished manuscript).

and university setting.\textsuperscript{29}

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.\textsuperscript{30} Indeed, that sexual harassment is a significantly and consistently underreported problem, whether on a campus or not, is well-established.\textsuperscript{31} With respect to workplace sexual harassment overall, estimates indicate that “only 1% of victims participate in litigation.”\textsuperscript{32}

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.\textsuperscript{33} 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.\textsuperscript{34} 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.”\textsuperscript{35}

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

\footnotesize{\textsuperscript{29} For a classic discussion of these issues in employment litigation, see Peter Siegelman & John J. Donohue III, \textit{Studying the Iceberg from its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases}, 24 \textit{Law & Society Rev.} \textit{1133} (1990).
\textsuperscript{31} See generally, Nancy Chi Cantalupo, \textit{Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence}, 43 \textit{Loy. U. Chi. L.J.} 205 (2011) (discussing the complex reasons for high rates of non-reporting of sexual violence at colleges and universities); Feldblum & Lipnic, \textit{supra} note __, at 15–17 (discussing victim non-reporting of sexual harassment in workplaces as a whole, not just educational institutions).
\textsuperscript{32} Wright & Fitzgerald, \textit{Angry and Afraid, supra} note __, at 82 (citing Fitzgerald, Swan et al.).
\textsuperscript{34} Theodore Eisenberg & Charlott Lanvers, \textit{What is the Settlement Rate and Why Should We Care?}, 6 \textit{J. Legal Empirical Studies} III, 133-34 (2009).
(UC) campuses during the period of 2012-15. 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.” 36 (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 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).37 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.”38 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 going informal resolution? Too few cases taken to a disciplinary hearing committee?), so our 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. Nevertheless, even looking just at the tip of the iceberg generates several insights. First, the commonalities shared by the limited number of cases discussed here provide important information about the full Title IX iceberg, both above and below the waterline, since they very likely represent many others that will not reach an OCR investigation, be decided by a court, or even receive any news coverage (though cases above the waterline are expected to have a higher concentration of severe cases39). Second, these cases have similar norm-setting functions as verdicts

37 Id.
38 Id.
39 See Wright & Fitzgerald, Angry and Afraid, supra note __, at 82 (surveying women who were targets of sexual harassment and then became plaintiffs in litigation: “[T]he present 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.”).
and can therefore influence the handling of other faculty sexual harassment cases.  

Finally, the social science studies that we collected and considered for this Article give us some information about what is occurring below the waterline. Thus, by 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 water line), we 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.  

With the aforementioned points in mind, our goal in 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, 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 water line. 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.

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40 See infra Section V.
41 See e.g. James David Jorgensen, Sexual harassment litigation involving instructors: balancing legal rights and responsibilities in the courts, 1993-2013, 112 (2014), University of Iowa Ph.D. Dissertation, available at http://ir.uiowa.edu/cgi/viewcontent.cgi?article=5175&context=etd ("[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.").
42 Siegelman & Donohue, supra note __; Paula McDonald et al., Below the “tip of the iceberg”: Extra-legal responses to workplace sexual harassment, 34 WOMEN’S STUDIES INT’L FORUM 278 (2011).
43 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 (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); see also Heyne v. Caruso, 69 F.3d 1475 (9th Cir. 1993) (quid pro quo sexual harassment case).
Consistent with Figure 1, this article organizes our 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 size 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 48 Title IX enforcement actions (private litigation and OCR/DOJ complaints), and finally to 26 faculty termination cases. Lastly, the percentage of both severe and serial harassment alleged in each dataset increases the higher on the iceberg that dataset is located.
In total, collecting and organizing these diverse sources of information is an integral part of a longer project, in which we explore 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, 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, but also to much new empirical research on such harassment, both at the national and institutional levels. 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.

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 27 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 question of how extensive sexual harassment was 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.47

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.48 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.49 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. 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 member who was the offender and 9.9% reported that the offender was another staff member or administrator.50 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

47 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).
48 DAVID CANTOR ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT xiv (Sept. 2015), https://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/AAU_Campus_Climate_Survey_121415.pdf. 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.
49 Id.
50 Given our 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.
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.\footnote{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 and 5-13 (April 2016), available at https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/Methodology_Report_for_AAU_Climate_Survey_4-12-16.pdf.}

**Figure 2: Graduate and Professional Students’ Reports of Sexual Harassment in the AAU/Westat Sexual Assault Climate Survey\footnote{AAU Survey, supra note __, at tbl.4.1.}**

(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”\(^{53}\) 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.\(^{54}\) These patterns in the AAU survey are important for present purposes given our findings from the cases analyzed further below in Sections III-V where we 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.\(^{55}\) These higher figures may be related to methodological differences in how sexual harassment was defined.\(^{56}\) Nonetheless, a number of earlier survey studies of women undergraduate and graduate students in the 1980s, 1990s and 2000s also report higher levels of sexual harassment\(^{57}\), 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.\(^{58}\)

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53 CANTOR ET AL., METHODOLOGY REPORT supra note __, at 5-10.
54 CANTOR ET AL., AAU Survey, at passim (this conclusion is supported by doing a word search for all references to “faculty” in the AAU 2015 report).
55 Rosenthal et al., supra note 10, at 374.
56 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 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.
57 Michelle L. Kelley and Beth Parsons, Sexual Harassment in the 1990s: A University-Wide Survey of Female Faculty, Administrators, Staff, and Students, 71 J. HIGHER EDUC. 548 (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 (1987) (60% of female graduate students reported being sexually harassed by a male professor); Margaret Schneider, Sexual Harassment Experiences of Psychologists and Psychological Associates During their Graduate School Training, 11 CANADIAN J. HUMAN SEXUALITY 159 (2002) (75% of female and 60% of male psychology doctoral students report sexual harassment by a male faculty member).
58 Regarding faculty norms and attitudes, Fitzgerald et al.’s survey of male faculty at one
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 27 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. In addition, none 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, as well as high rates of repeat offending with regard to criminal sexual violence. Most recently, several studies have also looked at repeat sexual coercion and aggression reported by male college students. Like sexual harassment, the definitions used by researchers for “sexual coercion” and “sexual aggression” generally 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

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 QUARTERLY 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).

59 Margaret A. Lucero et al., Sexual Harassers: Behaviors, Motives, and Change Over Time, 55 SEX ROLES, 331, 340 (2006) (study of arbitration decisions, 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 HUMAN REL. 1461, 1470 (2003).

60 Nagayama Hall et al., supra note 5 (“[T]here is evidence of sexual offenders being at higher risk for reoffense than other types of 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 (2005); Lisak & Miller, supra note __; Cara E. Rabe-Hemp & Jeremy Braithwaite, An Exploration of Recidivism and the Officer Shuffle in Police Sexual Violence (PSV), 16 POLICE QUARTERLY 127 (2013) (finding 41% of police sexual violence cases are committed by recidivist officers who averaged 4 victims each over a three-year span). 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.
sexual contact” up to and including rape, and sexual coercion refers to verbal pressure to obtain sexual contact with an unwilling person. 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 “unwanted sexual contact, sexual coercion, attempted rape, or completed rape”) were repeat offenders.

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 with respect to women victims. 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). At the more extreme end of the continuum of sexual harassment, that sexual assault victims on college campuses

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61 Kevin M. Swartout et al., Trajectories of Male Sexual Aggression From Adolescence Through College: A Latent Class Growth Analysis, 41 AGGRESSIVE BEHAVIOR 467 (2015) (categorized 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. Id. at 473.


63 Heidi M. Zinzow, A Longitudinal Study of Risk Factors for Repeated Sexual Coercion and Assault in US. College Men, 44 ARCHIVES SEXUAL BEHAVIOR 213 (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.

64 Most of the research focuses on sexual harassment of women, given current and historical differences in prevalence rates. Afroditi Pina et al., An Overview of the Literature on Sexual Harassment: Perpetrator, Theory, and Treatment Issues, 14 AGGRESSION & VIOLENT BEHAVIOR 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.”)

grapple with PTSD is hardly surprising. 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.

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. 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. 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.”

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’ insureds paid about $6 million per year to settle sexual assault cases from 2005-2013. Likewise, with respect to federal Equal

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68 McDonald, supra note __, at 4; Willness, et al., supra note __, at 147-48.


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. And these EEOC figures represent only a drop in the bucket in 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 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.

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. A key economic driver behind the pre-litigation and/or pre-trial litigation posture of both parties in sexual harassment cases is that Title IX, Title VII and many related state laws contain – reflective on legislative policy choices around civil rights enforcement – statutes that award attorney’s fees to prevailing plaintiffs but not to prevailing defendants. 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; 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; and a Mid-Atlantic medical school’s settlement for $1.3 million in connection with the

United Educators, Student Sexual Assault: Weathering the Perfect Storm 1-2 (2011), https://www.edurisksolutions.org/templates/template-article.aspx?id=379&pageid=136. 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.


behavior of a department chair. More common would be settlements such as one for $80,000 resolving a student’s sexual harassment complaint against a dean at a Northeast university.

Finally, sexual harassment costs the nation as a whole in terms of diminished human and economic potential. 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, is one of several indicators of gender inequality that are barriers to achieving women’s economic potential. Violence against women was the only indicator of gender inequality that was extremely high across all 50 states, 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.

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. Indeed, several researchers and advocates have identified a “long-term, downward economic and social spiral,” both within

78 Lawsuit Against Neurosurgery Chief at WVU Settled for $1.3M, INSURANCE J., Aug. 21, 2015; Kyla Asbury, Women agree to mediation in lawsuits against WVU for sexual harassment, WEST VIRGINIA RECORD, April 9, 2015.
79 This case settled a few months after the federal court’s denial of a motion to dismiss in Campisi v. City University of New York, 2016 WL 4203549 (S.D.N.Y. Aug. 2016).
80 CHAI R. FELDBLUM & VICTORIA A. LIPNIC (CO-CHAIRS), EEOC SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (JUNE 2016), AVAILABLE AT HTTPS://WWW.EEOC.GOV/EEOC/TASK_FORCE/HARASSMENT/REPORT.CFM.
82 Id. at iv.
83 Id. at 19–22.
84 Id. at iv.
85 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, Sexual Harassment in the Workplace (IZA World of Labor paper series, Oct. 2015), http://wol.iza.org/articles/sexual-harassment-in-workplace-1.pdf. See also FELDBLUM & LIPNIC, supra note __, at v.
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.87 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.88 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 university faculty could be responsible for a disproportionate share of the total sexual harassing incidents directed by faculty at students, junior faculty and staff, incidents which cause enormous harm to individuals, institutions, and the nation as a whole. However, the studies are limited in their ability to answer that question, 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 determination, some amount of the behavior reported in the empirical research just reviewed might not constitute sexual harassment as a legal matter. For instance, as already noted, 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 harassing conduct or the pervasiveness of a combination of multiple instances. Consequently, we next turn to accounts of individual incidents of harassment, first in media reports, then in court opinions in higher education, Title IX enforcement actions (private lawsuits and investigation 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.

87 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. 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 (April 21, 2016), http://www.therestablishment.co/2016/04/21/dear-tufts-administrators-who-expelled-me-after-my-sexual-assaults/.

88 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.
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 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. 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 Our Review**

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 we ultimately concluded that the most comprehensive source of news articles about faculty sexual harassment is Professor Julie Lebarkin’s website entitled “Not a Fluke: That Case of Sexual Harassment or Assault is Not an Isolated Incident,” which collects “publicized sexual harassment stories in academia,” not only by faculty members against students, but also by

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89 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 Thomas Peele, *UC Berkeley Sex Scandals: Records Expose Rampant Violations*, SAN JOSE MERCURY NEWS (April 5, 2016), [http://www.mercurynews.com/2016/04/05/uc-berkeley-sex-scandals-records-expose-rampant-violations/](http://www.mercurynews.com/2016/04/05/uc-berkeley-sex-scandals-records-expose-rampant-violations/).

90 *Not a Fluke: That Case of Academic Sexual Harassment or Assault is Not an Isolated Incident!*, Geocognition Res. Lab (Feb. 6, 2016), [https://geocognitionresearchlaboratory.wordpress.com/2016/02/03/not-a-fluke-that-case-of-sexual-harassment-is-not-an-isolated-incident/](https://geocognitionresearchlaboratory.wordpress.com/2016/02/03/not-a-fluke-that-case-of-sexual-harassment-is-not-an-isolated-incident/) (last updated Mar. 28, 2017). We were aided tremendously in analyzing these media reports by Barry Law student, Michelle Scott, who read and synopsized 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 our 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
faculty who harass colleagues and by upper level administrators who 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. 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 221 news reports that involved faculty harassing students (excluding cases where junior faculty or staff were the main targets of 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 being harassed were undergraduate, graduate, or professional students. Therefore, we included in the 221 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 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. In Appendix A, we provide additional details on our 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 221 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.);

listed on the site over the course of December 2016.

91 Not a Fluke, supra note ___.

(6) “welcome” or consensual sexual relationships; and
(7) *quid pro quo* sexual harassment.

With regard to the last two categories, although much of the press coverage heavily implied that there were questions about whether a sexual relationship was welcome, fully consensual, and/or coerced due to a *quid pro quo* arrangement, we categorized it 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 media. We only categorized a relationship or a refusal to engage in a relationship as *quid pro quo* if the news coverage made clear that no unwelcome physical contact was alleged and that the victim had either 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 221 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 a sexual harassment allegation is received by the campus (see Section V and discussion of *Gebser*), 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.

Table 1: Institutions Included in Our Review of Media Cases

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<tr>
<td>2. U. of Alabama (2016)</td>
</tr>
<tr>
<td>21. Calvin College (2011)</td>
</tr>
<tr>
<td>22. Case Western Res. (2013)</td>
</tr>
<tr>
<td>27. College Central Florida (2016)</td>
</tr>
<tr>
<td>44-45. Columbus St. CC (2008-10)</td>
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<tr>
<td>47. Columbus St. U. (2016)</td>
</tr>
<tr>
<td>48. Dartmouth Medical (1997)</td>
</tr>
<tr>
<td>49. U. Delaware (2014)</td>
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<tr>
<td>50. Delta College (2011)</td>
</tr>
<tr>
<td>55. F. Dickinson U. (2009)</td>
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<tr>
<td>56-60. U. of Florida (2007-14)</td>
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<tr>
<td>61. Florida Gulf Coast (2009)</td>
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<tr>
<td>63-64. Florida St. (1998-2002)</td>
</tr>
<tr>
<td>68. Georgia So. U. (2016)</td>
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<tr>
<td>69. Georgia So. U. (2014)</td>
</tr>
<tr>
<td>71-80. U. Georgia (1999-2013)</td>
</tr>
<tr>
<td>82-84. Harvard U. (1979-85)</td>
</tr>
<tr>
<td>85-86. U. of Hawai'i (2002-15)</td>
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92 When a faculty member has academic responsibility/oversight over a college student, the concept of “welcome” conduct is fraught with complexity. *Infra* Section I.b.
We also 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. If the accused faculty member was alleged to have harassed more than one victim, we included the case 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, we consolidated the articles into one report for purposes of categorizing them.

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93 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%.

94 Note that we also collected data on the school’s response to the harassment allegation, Set
B. Themes and Patterns

With regard to the types of sexual harassment alleged, our tracking system showed that 51% (n=113 individual cases accounting for at least 131 incidents) of the 221 cases covered in the press involved unwelcome sexual conduct where physical contact occurred, including categories (3), (4), and (5) above and ranging from unwelcome hugs and kisses all the way to 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.”95

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 221 cases accounting for 51 incidents),96 unwelcome verbal conduct (14% or 31 out of 221),97 unwelcome indecent exposure, gift-giving, photographing, or filming (8% or 17 out of 221),98 or quid pro quo sexual harassment (6% or 14 out of 221).99 In addition, within the 131 incidents involving physical sexual harassment, the less severe cases involving unwelcome hugs or kisses made up only 8% (10 out of 131),100 whereas the remainder of reports involved groping (47% or 62 out of 131)101 and criminal acts such as sexual assault, stalking and domestic violence (45% or 59 out of 131).102 Figure 3 displays

Appendix A.

95 Media report 171.
96 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.
98 Media reports 6, 7, 29, 35, 59, 64, 113, 114, 125, 133, 139, 141, 143, 148, 169, 190, 220.
99 Media reports 21, 26, 30, 49, 65, 82, 94, 158, 159, 191, 197, 205, 210, 218.
100 Media reports 60, 74, 83, 99, 112, 134, 165, 173, 185, 209.
101 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.
themes for the physical sexual harassment cases.

Figure 3: Media Cases Involving Physical Contact Sexual Harassment
(on left side n = 113 of 221, for subcategory cases on the right side n = 131)

As a whole, in a substantial percentage of the 221 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 48% (n=105) of the cases reported in the news articles. Several of these cases, especially those that came to light in 2014-2016, have received extensive coverage consisting of many news articles. Although as already noted we have consolidated this coverage for purposes of counting these cases in Categories (1) through (7), the extensive coverage of these cases 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 cases involving faculty and faculty administrators, including one involving serial faculty harassment of 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 four victims/witnesses who were interviewed in 2015. There were also several prior allegations (some anonymous) against the professor in 2011-14.  

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104 UC Berkeley Title IX Investigation Report, Geoff Marcy—Respondent 4, 20-12 (June 2015).
105 Id. at 24.
Additional allegations then surfaced stretching back to the mid-1990s, at this astronomer’s previous university.106

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.107

The press coverage demonstrates that serial sexual harassment can be an “open secret” 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 East Coast 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.108 Some years 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.109 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.110

110 Remnick, supra note 143; Tyler Kingkade, How Feminist Academics Deal With An Ethics Professor Accused Of Harassment, HUFFINGTON POST (June 19, 2016), http://www.huffingtonpost.com/entry/thomas-pogge-shunned_us_5764301e4b0bbbc8bea39eb; Monica Wang & Victor Wang, Without Clear Procedures, Yale Hired Pogge Amid Allegations of Sexual Misconduct, YALE DAILY NEWS (July 26,
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. Those women who were targeted, the lawsuit later detailed, included six professors, four staff members, and one law student, 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. 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.”

The press coverage also suggests that certain institutions may have a faculty harassment-supportive culture. Sixteen schools with cases in the 221 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 case: where faculty harassment of students is practiced openly, by multiple faculty members, may be joined by certain students, and permeates the environment of the campus as a whole or a particular sub-community of the university, such as a single academic department. The media reports of these sexual harassment-saturated academic environments suggest that such “pattern or practice” fact patterns may be more

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111 For reasons that will be discussed in Section __, 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. Cf., Caroline Vaile Wright & Louise F. Fitzgerald, Correlates of Joining a Sexual Harassment Class Action, 33 L. & HUMAN BEHAVIOR 265, 278 (2009) (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].”).
114 Id.
115 Brown, supra note 146.
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” school, the press reported allegations that multiple male faculty in the 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 the women faculty to leave the department.¹¹⁷

In another example, a western state university had six reports on the Geocognition site, at least four of which were in the same department. 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.¹¹⁸ Spec ific findings in the report included that at least 15 sexual

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, EEOC Pattern or Practice Litigation, A.B.A. NATIONAL CONFERENCE ON EEO LAW, http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2010/2010_eeo_016.authcheckdam.pdf (last visited Dec. 15, 2016). See also discussion of the cases and literature in EEOC 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 __. 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.” U.S. Dep’t of Justice, Title IX and Title IV Investigation of the University of New Mexico 19-20, 21, 30 (April 2016), available at https://www.justice.gov/opa/file/843901/download.


harassment complaints had been lodged against department faculty,\textsuperscript{119} that some male faculty had been “observed ogling undergraduate women students,”\textsuperscript{120} that there were “numerous reports of faculty... incivility... verbalized disrespect... and sexism,”\textsuperscript{121} 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.\textsuperscript{122}

Within 18 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 full 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.\textsuperscript{123} Lastly, an associate professor resigned after the university moved to fire him for retaliating against a woman graduate student who the university found to have been sexual assaulted by the associate professor’s former student.\textsuperscript{124} 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.\textsuperscript{125}

In this series of cases as in others, although several lawsuits were threatened, ultimately few cases are generally litigated, consistent with our earlier more general discussion in Section 1.c than 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,\textsuperscript{126} and in October 2015, twenty faculty members in the astronomer’s department signed an open letter

\textsuperscript{119} APA University of Colorado Boulder Report, \textit{supra} note 162, at 5.
\textsuperscript{120} \textit{Id.} at 7.
\textsuperscript{121} \textit{Id.} at 6.
\textsuperscript{122} \textit{Id.} at 7.
\textsuperscript{125} Kuta, \textit{CU-Boulder Moves to Fire Professor}, \textit{supra} note __.
declaring him to be unfit to return to his professorial duties, which is what prompted his resignation. The system-wide President for the university ordered sweeping changes.

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. Ultimately, the university’s administration decided to terminate the anthropologist’s probationary contract (he was in his first two years at the university).

Finally, ten of the media reports included explicit coverage of the 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 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

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aware that the same professor had a history 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 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.]” 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 221 cases discussed here likely include many more than ten pass-the-harasser cases. Rather, we believe 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 our 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 our faculty sexual harassment iceberg because a good deal of the information about those individual cases remains out of site 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, we put any case partially or fully resolved by legal action 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.

A. Methodology for Cases Included in Our Review

For this Section, we reviewed 68 court cases brought by college or university students, faculty or staff asserting claims of sexual harassment by faculty or staff, as well as 70 OCR or U.S. Department of Justice (“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, 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 68 court cases, 42 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). The 42 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 70 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 35 court cases and the 22 OCR or DOJ resolution letters are listed in Table 2A and 2B, respectively.

Table 2A: Title IX Court Decisions, 1998-2016 (alphabetically by plaintiff)

| Case                                                                                           |
|--------|------------------------------------------------------|
| 1. Abramova v. Albert Einstein Coll. of Med., 278 F. App x 30 (2d Cir. 2008)                  |
| 6. Cox v. Sugg, 484 F.3d 1062 (8th Cir. 2007).                                                 |

As discussed further below, Gebser v. Lago Vista Independent School District, 524 U.S. 174 (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.

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.

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.
from those brought by eight plaintiffs).
16. Gretzinger v. Univ. of Haw. Prof'l Assembly, 156 F.3d 1236 (9th Cir. 1998).
29. Morse v. Regents of the Univ. of Colo., 154 F.3d 1124 (10th Cir. 1998).
31. Oden v. N. Marianas Coll., 154 F.3d 1124 (9th Cir. 2007).
32. Papelino v. Albany Coll. of Pharm. of Union Univ., 633 F.3d 81 (2d Cir. 2011).

Table 2B: Title IX OCR/DOJ Resolution Letters, 1998-2016 **135**
(alphabetically by educational institution; see Appendix C for full citations)

| Institution                                      | Date Range | Notes
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<tbody>
<tr>
<td>Art Institute of Fort Lauderdale</td>
<td>Falkinburg to Nagle (June 3, 2008)</td>
<td></td>
</tr>
<tr>
<td>California State University, East Bay</td>
<td>Klugman to Metz (June 30, 2005)</td>
<td></td>
</tr>
<tr>
<td>City University of New York, Hunter College</td>
<td>Blanchard to Raab (Oct. 31, 2016)</td>
<td></td>
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<tr>
<td>Florida Southern College</td>
<td>Walker to Reuschling (Nov. 8, 1999)</td>
<td></td>
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<tr>
<td>Georgia State University</td>
<td>Hitt to Patton (May 27, 2005)</td>
<td></td>
</tr>
<tr>
<td>Houston Community College System</td>
<td>Stephens to Doucet-Harris (June 29, 1998)</td>
<td></td>
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<tr>
<td>Las Vegas College</td>
<td>Jackson to Miller (Nov. 22, 2006)</td>
<td></td>
</tr>
<tr>
<td>Louisiana Technical College</td>
<td>Stephens to Montgomery-Richards (June 9, 2006)</td>
<td></td>
</tr>
<tr>
<td>Maryland Institute College of Art</td>
<td>Johnson to Lazuras, IV (Oct. 24, 2000)</td>
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<tr>
<td>Merced College</td>
<td>Zeidman to Duran (Oct. 29, 2008)</td>
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**135** 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.
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 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 important 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, a difficulty exacerbated by the liability standard adopted by the U.S. Supreme Court 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 VII136 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,137 and the cases among the 35 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, 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 57 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) will depend 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 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 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.

138 See OCR REVISED SEXUAL HARASSMENT GUIDANCE, supra note __ at 12–14; KAPLIN & LEE, supra note __ at 1124.

139 When a faculty member has academic responsibility/oversight over a college student, the
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). First, at least seventy-five percent (fifty-
four specific incidents) of the seventy-two incidents involved allegations of sexual
harassment that include 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 4A below). When categorized
based on the severity of the physical conduct discussed in each case, the fewest
number of cases (only seven, or thirteen percent of the fifty-four incidents involving
unwelcome sexual touching) alleged conduct on the less invasive end of the
spectrum (hugging, kissing or other touching asserted to be non-sexual or
accidental). The midrange of the conduct spectrum, often described as
inappropriate touching or groping, makes up thirty (fifty-six percent) of the fifty-
seven incidents. At the most severe end, thirty-one percent, or seventeen cases,
involved potentially criminal sexual and physical violence. In five of these
seventeen cases, the victims alleged facts that looked similar to those typical of
domestic abuse: physical assaults, such as punching, verbal, psychological and
emotional abuse, and controlling behaviors.

An example of the extremely severe, domestic abuse-like cases is Liu v.
Striulli, where a foreign exchange student was coerced into conducting a sexual
relationship with a professor who had responsibility for helping foreign students

concept of “welcome” conduct is fraught with complexity. Infra Sections II, V.

140 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 prof and one other employee who might be a prof), 11, 13, 15, 17, 21, 23, 26, 27, 29, 32,
33, 37, 39, 40, 41. OCR/DOJ Letters of Finding 8, 23, 26, 27, 49, 51, 60.

141 Title IX court cases 3, 8, 13.

142 Title IX court cases 5, 11, 23, 33, 39-41. OCR/DOJ Letters of Finding 8, 23,
26, 51.

143 Title IX court cases 4, 6, 9, 17, 21, 26, 27, 29, 32, 37. OCR Letter of Finding
49.

144 Title IX court case 26.

145 Title IX court cases 26, 27, 37.

146 Title IX court cases 4, 27, 37.

147 Title IX court cases 4, 27, 29.
with their visas and who told the student that he could and would get her deported. 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. Also in this category but among the cases not involving intimate partner abuse is a series of lawsuits filed by nine separate plaintiffs against Rust College. Three plaintiffs sued for two completed rapes and one attempted rape by one professor, who also subjected three other plaintiffs to lower level sexual harassment such as sexual advances and groping. Two additional plaintiffs alleged unwanted touching and indecent exposure by another employee whose position was not specified but who could have been a professor.

Figure 4A: Types of Unwelcome Conduct by Faculty in Litigated Cases and OCR Complaints (1998-2016 cases, n - 72, subcategory cases on the right side n - 48)

At the opposite end from the domestic-abuse-like cases are the seven court cases and forty-eight OCR resolutions 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

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148 Title IX court case 27.
149 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 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/.
150 Title IX court case 9.
151 Title IX court cases 2, 7, 10, 24, 25, 34, 38.
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.  

In a third category of cases, although less numerous than the others, the faculty harassment appears to have enabled peer student or third-party harassment.  

For instance, in Burtner v. Hiram College, a professor of Philosophy operated a summer course at an isolated location in Michigan’s Upper Peninsula, where Emerson was the only University employee. During the program, he supplied the students with alcohol and engaged in sexual harassment towards the plaintiff and at least one other female student, consisting of “comments, innuendos, the singing of sexually suggestive songs, and some touching.”  

After a year’s worth of sexual advances, 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 sex from [her] in his Hiram College office.”  

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...” and when she “asked, no begged, Professor Emerson to please make [name deleted] put his clothes 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.”  

Stating that “[i]t was pitch dark up where [Emerson] was sitting and the tone of his voice truly frightened [her],” the student simply allowed the naked male student to remain on top of her until he chose to get off.

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,” a suggestion that requires a full analysis using

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153 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.

154 Title IX court cases 4, 40 (Faculty of a trucking program in which Plaintiff was the only woman student allowed male classmates to bring in pornographic film and made Plaintiff watch it); 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).

155 Title IX court case 4, p. 854.

156 Id.

157 Id. at 854.

158 Id. at 855.

159 Id.

Professor Kimberley Crenshaw’s intersectional approach.161 Because such an analysis is beyond the scope of this article, one of us takes up that analysis in a separate article.162

Finally, and most importantly for this article, within this set of court cases and OCR resolutions the rates of serial harassment by faculty are quite high (see Figure 4B). When we include two court cases163 and three OCR cases164 where serial harassment is arguably but not certainly presented, sixty-six percent of the accused faculty in the thirty-five court cases faced accusations of serial harassment,165 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 harassment166 and three more complained of conduct from which serial harassment could be inferred.167 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 of the cases (if the five enforcement actions where serial harassment is only implied are not counted as serial harassment cases) and sixty percent of the cases (if those five cases are included) present complaints of serial harassment.

Figure 4B: Prevalence of Serial Harassment by Faculty in Litigated Cases and OCR Complaints
(1998-2016 cases, n = 57)

162 See Nancy Chi Cantalupo, Faculty Sexual Harassment of Students: Intersectional Perspectives (unpublished manuscript).
163 Title IX court cases 13, 23.
164 OCR/DOJ Letters of Finding 37, 64, 70.
165 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.
166 OCR/DOJ Letters of Finding 3, 8, 26, 49, 51, 60.
167 OCR: 27, 64, 70.
Some of the patterns evident in the media report cases were repeated in the Title IX cases but some new types of cases emerged in the Title IX enforcement actions. With regard to the “open secret” cases discussed in Section II, 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. An OCR investigation of Merced College presented such facts, with OCR discussing how students believed the professor’s behavior had been “historically tolerated,” how the professor had told a class the college would never discipline him, 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.”

Related to the “open secret” phenomenon but only occurring once in the Title IX enforcement action dataset are the “pattern and practice” cases discussed in Section III, where faculty harassment of students is practiced by multiple faculty members and permeates the environment of the campus or one academic department. We nevertheless highlight this single Title 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-\textit{Gebser} case of \textit{Alexander v. Yale University}, an important early attempt at certifying a class of female university

\begin{itemize}
\item \textsuperscript{168} Title IX court cases 22, 28. OCR/DOJ Letters of Finding 3, 8, 24, 26. Likewise, Lerman’s \textit{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, \textit{supra} note \_\_\_, at 94.
\item \textsuperscript{169} OCR/DOJ Letter of Finding 26, p. 6.
\item \textsuperscript{170} \textit{Id.} at 9.
\item \textsuperscript{171} \textit{Id.} at 13.
\item \textsuperscript{172} 631 F. 2d 178 (2\textsuperscript{nd} Cir. 1980). For additional discussion of the \textit{Alexander} case, see Walter B.
students as Title IX sexual harassment victims failed, and ensured that future Title IX lawsuits would overwhelmingly be brought by individual plaintiffs.

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, most of whom are children, 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, 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). 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, 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 faculty member, it is not surprising that cases involving multiple 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 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. Investigating at a time when the rigor of OCR investigations has been called into question,

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Connolly Jr., & Alison B. Marshall, Sexual Harassment of University or College Students by Faculty Members, 15 J. COLL. & UNIV. L. 381 (1988).

173 Wills v. Brown Univ., 184 F.3d 20, 24 (1st Cir. 1999). This court case has received a fair amount of criticism, including MacKinnon, supra note __, at 2038.


175 See OCR/DOJ Letter of Finding 64.

176 Kristin Jones, Lax Enforcement of Title IX in Campus Sexual Assault Cases, THE CENTER FOR
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.\footnote{See OCR/DOJ Letter of Finding 64.}

A third pattern that was repeated in both the Title IX enforcement action and the media report datasets 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 harasser’s move to another school.\footnote{Title IX court cases 15, 21, 39. 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/.} As we alluded to in the Introduction, “pass the harasser” cases, including associated litigation from student victims, has been a concern in higher education for decades.\footnote{POSKANZER, supra note __, at 225; Leatherman, supra note __.}

Newer patterns were also presented. First, these cases often show that the harasser has a standard method for targeting victims.\footnote{Title IX court cases 4, 9, 39, 41.} For instance, in Wills v. Brown University, the court suggests that the accused professor targeted undergraduate students who sought him out for academic support.\footnote{Title IX court case 41, pp. 24–25.} In addition, the courts or OCR often noted the serial harassers’ generally sexist attitudes in these cases, as the court in Johnson v. Galen Health Insts., Inc. 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.\footnote{Title IX court cases 11, 18, 20, 22, 23. OCR/DOJ Letters of Finding 26, 64}

To complete the comparison of the media reports and Title IX enforcement actions, the aggregate percentages of our categories of sexual harassment types drawn from these Title IX enforcement actions are almost exactly the same as the percentages reported for the news stories. In 58 percent of the Title IX cases student victims alleged physical contact as opposed to purely verbal conduct, compared to the 51 percent of the media report cases. Within the category of cases involving physical contact, the percentage of cases involving groping allegations was 4 percent less (43 percent) for Title IX enforcement actions versus the media reports (47 percent). Potentially criminal sexual assault and domestic-abuse-like harassment accounts for only 1 percent more in this dataset (46 percent) than in the media reports dataset, whereas harassment involving hugging and/or kissing was again three percentage points apart (media reports at 8 percent and Title IX actions at 11 percent).

Only the category of serial harassment differed significantly between
datasets, and this is consistent with the discussion of the iceberg model in Section I.c and the notion that cases farther above the water line can have higher concentrations of severe cases. Whereas serial sexual harassment included 48 percent of the total media reports, in Title IX enforcement actions accused serial harassers accounted for 56 to 66 percent. 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 to report as a group or (2) additional victims 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 cases — 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 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. In addition, evidence of a single faculty member harassing multiple students interrupts victim-blaming narratives in which victims or third parties may engage, and to identify 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.

V. LITIGATED FACULTY TERMINATION CASES

Our final dataset, located at the very top of our iceberg collects cases where faculty members were terminated (in part or entirely) for sexually harassing conduct. Turning to these cases, once again our focus was on the factual allegations that gave rise to college and university termination proceedings rather than the court’s legal findings. Here our 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 we found that such instances were not so frequent in number as to justify a different approach between Sections III and IV.

183 Ayres & Unkovic, supra note __, at 160 (applying the concept, from economics, of first-mover disadvantage and commenting, “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.”).

184 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, Correlates of Joining a Sexual Harassment Class Action, supra note __, at 278.
In this section, in addition to tracking the types of sexual harassment allegations, we provide information on win-loss rates 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.  

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, so unsurprisingly 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 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 Lexis searches. Because of the centrality of tenure for our present 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 a few “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

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185 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.”).

186 POSKANZER, supra note 2 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. COLLEGE & UNIV. LAW 419 (1983–84) (“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.”).
cases – where the faculty member was charged with sexual harassment, then resigned, and later challenged the resignation before or after it became effective.187

*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)*

<table>
<thead>
<tr>
<th>Terminusions Upheld Against Legal Challenge by the Accused Professor</th>
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<tbody>
<tr>
<td>5. Haegert v. Univ. of Evansville, 977 N.E.2d 924 (Ind. 2012)</td>
</tr>
<tr>
<td>7. Marder v. Board of Regents of University of Wisconsin System, 286 Wis.2d 252 (Wis. 2005)</td>
</tr>
<tr>
<td>8. Levenstein v. Salafsky, 414 F.3d 767 (7th Cir. 2005)</td>
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<tr>
<td>10. Murphy v. Duquesne University Of The Holy Ghost, 565 Pa. 571 (Pa. 2001)</td>
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<tr>
<td>11. Tonkovich v. Kansas Bd. of Regents, 159 F.3d 504 (10th Cir. 1998); see also 254 F.3d 941 (10th Cir. 2001)</td>
</tr>
<tr>
<td>16. Corsvet v. Boger, 757 F.2d 223 (10th Cir. 1985)</td>
</tr>
<tr>
<td>17. Levitt v. Univ. of Texas at El Paso, 759 F.2d 1224 (5th Cir. 1985), cert. denied, 474 U.S. 1034 (1986)</td>
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<tr>
<td>18. Korf v. Ball State Univ., 726 F.2d 1222 (7th Cir. 1984)</td>
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<tr>
<td>19. Van Arsdel v. Texas A&amp;M Univ., 628 F.2d 344 (5th Cir. 1980)</td>
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<tr>
<th>Terminations Overturned and/or Judgment for the Accused Professor</th>
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187 Levenstein v. Salafsky, 414 F.3d 767 (7th Cir. 2005); see also 164 F.3d 345 (7th Cir. 1998); Van Arsdel v. Texas A&M Univ., 628 F.2d 344 (5th Cir. 1980).

188 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.” The faculty committee also found the professor’s text messages to be a separate violation of the sexual harassment policy, and the investigators found the professor was “not truthful” during their interviews with him.
A. Factual themes and patterns

Turning to factual patterns in the cases, here our presentation does not exactly mirror Section 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 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 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.¹⁸⁰

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<th>Student Victim Case:</th>
<th>Faculty Termination Case:</th>
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¹⁸⁰ 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.

¹⁸¹ Schneider v. Plymouth State Coll., 144 N.H. 458, 460–62 (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. 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.
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.”

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.” At “9: “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.”’

With the aforementioned provisos, the primary theme of the Title IX enforcement actions in Section III that we found repeated here was the tendency for the faculty accused of sexual harassment to face accusations of serial harassment. Indeed, 23 of the 26 termination cases (88%) in Table 3 included indicators of serial sexual harassment by the fired faculty member, with only three cases, Van Arsdel, Chan and Winter, involving single victims. That does not mean that in all 23 cases the professor was fired because evidence of repeat sexual harassment went before the board of trustees or final decisionmaker. Rather, given our focus (noted earlier) on the factual descriptions rather than legally relevant findings in the cases, we also included in the 23 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 stands for the doctrinal proposition that a single incident of sexual harassment can be sufficient to warrant termination191 but we categorize it as a serial harassment case based on the factual

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191 Haegert v. Univ. of Evansville, 977 N.E.2d 924, 939 (Ind. 2012) (“[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. 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,
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 serial harassment found among fired professors.

Both Haegert and two other cases, Motzkin and Lehmann demonstrate that serial harassers often target other (usually more junior) faculty and staff, as well as students. In addition to sexually harassing 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. Lehmann is an early case of many students, staff and spouses of faculty, all victims.

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 sexual harassment comprised of verbal conduct alone, including three to five cases (Slippery Rock University, Wexley, Trejo, and perhaps Chan and Murphy) or only 11 to 19 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.

192 Motzkin v. Trustees of Boston Univ., 938 F. Supp. 983, 985 (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.


194 For example, in Slippery Rock University, the conduct in 2010 at a Madrid study abroad trip was verbal, including 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 in 2006 is simply described as “he was reprimanded for sexually harassing a student,” id. at 356, so whether that was also only 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 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, Chan v. Miami Univ., 1995-Ohio-226, 73 Ohio St. 3d 52, 62, which is suggestive of conduct that may be more than just verbal.
percent of the 26 cases. The recent case of *Traster v. Ohio Northern University* presents factual allegations that are representative of many of the 21-23 faculty termination cases involving 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 35 years, and he asked to come over to a female staff member’s home and then 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.”

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 Section III. In *Marder*, a journalism professor and the faculty advisor to the student newspaper at the University of Wisconsin-Superior became “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 masturbated in front of her. Similarly, Marder pursued a personal relationship with an international student who was being recruited to (and later enrolled at) the university and again masturbated in front of her in a shared hotel room.

Even in the cases where the 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

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197 This case has a lengthy history from the faculty member’s failed effort to block release of the Title IX investigation report (*Marder v. Bd. of Regents*, 226 Wis. 2d 563 (Ct. App. 1999)) to the penultimate denial the professor’s attempt at a rehearing, 334 Wis. 2d 145 (Wis. App. 2011).
198 Marder v. Bd. of Regents of the Univ. of Wis. Sys., 2005 WI 159, 286 Wis. 2d 252, 262.
simply referred to the paragraph number in Trejo’s papers. Similarly, in *McDaniels v. Flick* the professor massaged the student’s neck and touched the student’s face while verbally harassing the student. In this case, a 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. 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 about to cry & said, “I really want to help you.”

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

In addition to confirming several of the themes we found in Section II, the threats of retaliation that the faculty harasser made against the student in *McDaniels* begin to develop another common characteristic of faculty harassment of 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

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199 Trejo v. Shoben, 319 F.3d 878, 882 and n.1 (7th Cir. 2003).
200 *McDaniels v. Flick*, 59 F.3d 446, 450–51 (3d Cir. 1995).
201 *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 important early examples of serial same-sex sexual harassment of students (see also 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, 1222–24 (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 1226. *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 1227–29.
to his classes about his institution not disciplining him, in the faculty termination cases many faculty harassers’ apparent power within their institutions seems to lead them to feel both invulnerable themselves and to engage in bullying behaviors towards both victims and bystanders.

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. 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. In the background of the case was another student’s anonymous allegation that Tonkovich committed rape/sexual battery. All told, the Chancellor recommended dismissal because eighteen alleged incidents between 1982-91 represented a “pattern of conduct of moral turpitude.” Ultimately, the faculty discipline committee recommended termination, 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. During the investigation, Tonkovich 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 reportedly because of Tonkovich’s conservative political views, and he also had faculty allies testify at the hearing and attempt to minimize the seriousness/harmfulness of his behavior. Once he was

203 For further discussion of these interrelationships, see, e.g. Alyssa M. Gibbons et al., Sexual Harassment and Bullying at Work, in, BULLYING IN THE WORKPLACE: CAUSES, SYMPTOMS, AND REMEDIES 193 (John Lipinski & Laura M. Crothers, Eds., 2014).
206 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.
208 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.
209 Tonkovich, 159 F.3d at 511, 533; Tonkovich Story From 5-8-93, LAWRENCE JOURNAL-WORLD (May 8, 1993), http://www2.ljworld.com/news/1993/may/08/tonkovich_story_from_5893/; Tim Carpenter, Former Dean Calls Tonkovich Excellent Teacher, LAWRENCE JOURNAL-WORLD
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 31 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. It took several years for all claims to be dismissed and all appeals to be exhausted in the case.

Another example of 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 sexually harassing a female employee, 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.” 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.”

Finally, the Marder case, like Cohen and Tonkovich each in slightly different ways, could be termed a “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 manipulated the classroom teaching evaluation process to further his ends in disputes with campus colleagues. He also pursued for many years fruitless legal claims, so that a full decade after his termination and after multiple losses in Wisconsin state courts, (Feb. 19, 1993), http://www2.liworld.com/news/1993/feb/19/former_dean_calls_tonkovich/.


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

202 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. 3, 2009), http://www.chronicle.com/article/Court-Throws-Out-Lawsuit-by-a/47915/.


204 Id.

205 Id. at 259.
Marder was quoted as saying he was still searching for someone who was “going to do the right thing” and “We start anew in federal court.”

This 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 legislation by a California Congresswoman, as 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, and then lands a new job at another university. However, the cases in Table 3 show that “passing the harasser” is not necessarily limited to those circumstances. In fact, to our surprise we found a few instances in Table 3 where a publicly fired professor obtained another tenured university position (after Slippery Rock) or a much higher paid job as a researcher with a federal agency (after Trejo) or a staff job with significant supervisory responsibilities at another university (after Francis), and two of those three cases are very recent ones.

B. Win-loss rates and contributing determinants

The psychological dispositions of 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 determination of terminated faculty not only to keep litigation going past a reasonable point, 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 key finding is that twenty cases uphold termination and only six cases overturn or otherwise rule in favor of the terminated faculty member (university win/faculty loss rate of 77%). 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

217 Professor Ammon obtained an associate professor position at a university in the Midwest, probably while his termination was in arbitration.
218 The Seventh Circuit noted that Trejo left his assistant professor position and obtained a “supervisory position paying $81,000 a year with a research laboratory managed by a federal agency. This is an increase of $32,000 over his salary as an assistant professor.” Trejo, 319 F.3d at 889. It appears this job was at the NASA Ames Research Center and Trejo also later had another federal job performing Navy personnel research.
219 Francis was formerly a theater professor and now is a production manager in the arts and theater area at a prominent Northeast university and also does adjunct teaching at other universities in the same region.
zero federal appellate cases in the other direction is also highly significant. Our conclusion that cases upholding faculty sexual harassment terminations strongly predominate is consistent with earlier reviews based on a much smaller number of cases.

In the empirical and economic literature on litigation, one exception to the classic Priest-Klein 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. Given the brazen quality of serial harassment and many faculty harassers’ overconfidence about being immune from punishment, faculty members fired for sexual harassment will 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 – will tend to drive terminated faculty members to persist in civil litigation longer compared to fired sexual harassers in other “at will” employment sectors.

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

The analysis we’ve conducted of faculty sexual harassment of students, drawing from the cases visible above the waterline on our iceberg model, questions assumptions about the profile of this harassment. All told, we collected and analyzed nearly three hundred faculty sexual harassments cases 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 involve physical contact rather than purely verbal conduct, contrasting with the AAU survey in which the large bulk of sexual harassment reported was purely verbal or involving electronic

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220 We refer to jurisprudence and practical significance, not statistical significance.
221 See, e.g., Walter B. Connelly, Jr. & Alison B. Marshall, Sexual Harassment of University or College Students by Faculty Members, 15 J. COLLEGE & UNIV. LAW 381, 395 (1989); Burton M. Leiser, Threats to Academic Freedom and Tenure, 15 PACE L. REV. 15, 17 (1994).
223 Steven Shavell, Any Frequency of Plaintiff Victory at Trial is Possible, 25 J. LEGAL STUDIES 493 (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).
224 Priest & Klein, supra note 222, 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.”).
communications. 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”\textsuperscript{225} for this paradoxical divide between our case findings and the patterns in the AAU survey. Nevertheless, the media reports show similar patterns to the court cases and OCR/DOJ investigations, and it is still noteworthy that 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 freedom and speech rights is less significant of a concern than it appears such reporting is generally assumed to be, since once physical contact has occurred, the faculty member has engaged in conduct, not speech.\textsuperscript{226}

Figure 5 demonstrates that, out of these 295 faculty sexual harassment cases a solid majority (53\%) involved professors engaged in patterns of serial sexual harassment with multiple targets/victims. Our finding is particularly 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 the serial harasser phenomenon.


\textsuperscript{226} For example, in \textit{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 at 884–87. Moreover, some kinds of egregiously harassing workplace speech can cross the line in e.g., a sexual harassment or racial harassment context. See, e.g., see Letter from Catherine E. Lhamon to Honorable James Lankford (Feb. 17, 2016), \url{http://www.chronicle.com/items/biz/pdf/DEPT%20OF%20EDUCATION%20RESPONSE%20TO%20LANKFORD%20LETTER%202-17-16.pdf}. Cf. Aguilar v. Avis Rent a Car System Inc., 21 Cal.4th 121 (1999) (repeated offensive racial epithets represent workplace racial harassment rather than protected speech).
The frequency demonstrated in a majority of these cases of serial harasser, “open secret,” and accused harasser’s aggressively 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 (CCRTs), ensuring independent and effective Title IX Coordinators and campus victim services professionals, 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 our conceptions of whether and which best practices being developed as a result of recent attention to peer sexual harassment and violence in higher education 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, all subjects discussed in much greater detail in our companion project. We attempt such a detailed analysis in our forthcoming companion article, with a particular focus on questions around whether many universities

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228 Nancy Chi Cantalupo & William C. Kidder, Systematically Addressing a Serial Problem: How Universities Respond and Should Respond in Faculty Sexual Harasser
and colleges have uneven and/or inadequate disciplinary responses and around the contours of a fair and equitable process for faculty-on-student sexual harassment cases. Finally, we hope that this project will inspire our social science colleagues to conduct more empirical research on graduate students’ experiences generally and on measuring sexually harassing conduct that meets the criteria of sexual harassment’s legal standard.

Cases (unpublished manuscript).
APPENDIX A: ADDITIONAL DETAILS ON METHODOLOGY IN SECTIONS III-V

Connected to our 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 Section 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 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. Secondarily, 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:

- **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 LexusNexus (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”
  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

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229 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 Section IV and V.
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. LexusNexus and FindLaw are searched every 2 months, although that will stop since I think I have found all the cases available in LexusNexus 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 ~450 to 221, 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 221 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 221 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.  

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 under Title IX) 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 Jorgenson’s dissertation.

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. We read all of the OCR resolution letters that Dr. Johnson coded as alleging faculty harassment of students.

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230 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.

231 As discussed further below, Gebser v. Lago Vista Independent School District, 524 U.S. 174 (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 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.


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.\textsuperscript{234} Of the 18 cases that had been resolved in the Title IX Tracker database, six mentioned faculty harassment and were included in the 70 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.\textsuperscript{235} Thus, these litigated cases resulting in judicial opinions may plausibly contain higher proportions of recidivist 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.\textsuperscript{236}

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 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.

\textit{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

\begin{itemize}
\item \textsuperscript{234} Title IX: Tracking Sexual Assault Investigations, \textit{Title IX: The Chronicle of Higher Education}, \url{http://projects.chronicle.com/titleix/} (last visited Dec. 15, 2016).
\item \textsuperscript{235} See Cass R. Sunstein & Judy Shih, \textit{Damages in Sexual Harassment Cases}, in \textit{Directions in Sexual Harassment Law} 324, 332 (Catharine A. MacKinnon & Reva B. Siegel, eds. 2004) (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, \textit{supra} note __.
\item \textsuperscript{236} See Juliano & Schwab, \textit{supra} note 30, at 559 (underscoring a very similar point about litigated sexual harassment cases and what information judges decide to include/exclude in their legal opinions).
\end{itemize}
“nuisance” level settlement amounts, state trial court rulings that may not be captured even in unpublished Westlaw or Lexis 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 Lexis 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 graveman 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 NACUA (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 have included such non-tenure cases would also 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;237
- Athletic coaches with academic appointments (but without tenure) fired for sexually inappropriate behavior;238
- Cases where a harasser was removed as dean or other administrative position but was not fired as a faculty member;239
- Cases where the initial disciplinary charges alleged sexual harassment, but where the termination was ultimately based only upon other misconduct;240
- Cases where the faculty member preemptively initiates litigation defending against sexual harassment allegations while still an employee, then

238 Deli v. Univ. of Minn., 511 N.W. 2d 46 (Minn. App. 1994) (coaches terminated under academic staff policy, university found to have “just cause” for the terminations).
239 See, e.g., McLaurin v. Clarke, 133 F.3d 928, 1997 WL 802243 (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.
eventually resigns when termination appears to be inevitable.241

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.242 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.

APPENDIX B:
FULL SOURCES FOR MEDIA CASES IN SECTION III
(Media Reports Alphabetically by Institution)
[*Note to Readers: Appendix B is provided online for data transparency purposes but is unlikely to appear in the print edition of this article due to its excessive length]


242 Naumov v. McDaniel College, Inc. (D. Md. Mar. 31, 2017), https://apps.fastcase.com/Research/Public/ExViewer.aspx?LTID=D+X1J0aa4asFzGR2rDj/NO6H18hZWmo4BQSnJ6fMBlu4veoC+BGBLVSQLSs0UXf7Ys6eu0aMf4TiBLEBMy9kZ17Bj0KZkTA4TBXZpoez2X3aTdf2c5s04KkHXCF5J7EcgHe7QQVry+nkt7exICFcICR4MNd2q0viragqw8kJ3pAmso9kJW8Q5.


21. (California State University) Sex Professor Resigns Post, UPI (June 3, 1982), http://www.upi.com/Archives/1982/06/03/Sex-professor-resigns-post/4188391924800/.


23. (Case Western Reserve University) Vince Grzegorek, Former CWRU Law School Dean Lawrence Mitchell Was Supposed to Return to CWRU Faculty This Year; Thankfully That Didn’t Happen, SCENE.COM (Sept. 23, 2015), http://www.clevescene.com/scene-and-heard/archives/2015/09/23/former-cwru-law-school-dean-lawrence-mitchell-was-supposed-to-return-to-cwru-faculty-this-year-thankfully-that-didnt-happen.


32. (College of Charleston) Paul Bowers, Cafe Piano Prof Resigns After Intensive Sexual

34. (Christopher Newport University) Professor Reaches Accord with College Over Firing, FREE LANCE STAR (June 24, 1993), https://news.google.com/newspapers?id=1298&dat=19930624&id=u1YzAAAAIBAJ&sjid=jAcGAAAAIBAJ&pg=3974,4399813&chl=en.


39. Id.

40. Id.


42. (Columbia University) Amy Bayer, CU Prof Bialer Charged with Sexual Harassment, COLUMBIA SPECTATOR (Nov. 19, 1986), http://spectatorarchive.library.columbia.edu/cgi-bin/columbia?a=d&cd=cs19861119-01.2.2&ce=--------en-20--61--txt-IN-orientation----.


44. (Columbus State Community College) State Official Under Scrutiny For Job History, COLUMBUS Dispatch.com (June 12, 2010), http://www.dispatch.com/content/stories/local/2010/06/12/state-official-under-scrutiny-for-job-history.html.

45. Professor Accused of Seeking Date with Student Fired, 10TV.COM (May 8, 2008), http://www.10tv.com/article/professor-accused-seeking-date-student-fired.


48. (Dartmouth Medical School) Elysa L. Jacobs, Former DMS Prof’s License Suspended, THE DARTMOUTH.COM (June 23/1997),


60. Elizabeth Behrman, Music Professor Fired for Kissing Student, ALLIGATOR.ORG (Sept. 16, 2011), http://www.alligator.org/news/campus/article_1128b58e-c0f1-11e0-b3eb-001cc4c002e0.html.


64. Thomas B. Plankuch, FSU President Handles Heated Criticisms with Ease, THE FLORIDA TIMES-UNION (Sept. 12, 2000). See also Lenora LaPeter & Gary Fineout, Sex Harassment Charges Latest for FSU Professor, THE TALLAHASSEE DEMOCRAT (June 11, 1998).


70. (Georgia State University) Professor Arrested For Alleged Sexual Assault of Student, SAVANNAHNOW.COM (May 1, 2006), http://savannahnow.com/stories/050106/3834764.shtml#.WM7cD6OZN-W.


88. Robert Niles, Professor’s Suite (sic) Dropped; Case Lacking Evidence, MAURER L. REPOSITORY (Dec. 11, 1991), http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1017&context=garth


124. (State University of New York) Piper Fogg, SUNY Professor Charged with Assault, CHRON. OF HIGHER ED. (May 13, 2005), http://www.chronicle.com/article/SUNY-Professor-Charged-With/26361.


132. (Northern Arizona University) Cait Munro, **Art Professor Found Dead Accused of Sexual Assault and Hosting Orgies with Students**, ARTNET NEWS (Dec. 9, 2015), https://news.artnet.com/art-world/wild-allegations-emerge-deceased-artist-professor-jeriah-hildwine-389327.


135. (Northwestern University) Rebecca Schuman, **Northwestern University Found that a Star Professor Violated the Sexual Harassment Code in his Treatment of a Student. Why is He Still Teaching**, SLATE.COM (Feb. 23, 2014), http://www.slate.com/articles/news_and_politics/education/2014/02/northwestern_university_found_professor_peter_ludlow_violated_the_sexual.html.


140. (Ohio University) **Ohio University-Lancaster Professor Resigns Amid Sexual Harassment Complaint**, 10TV.COM (Feb. 8, 2011), http://www.10tv.com/article/ohio-university-lancaster-professor-
resigns amid sexual harassment complaint.

142. (Ohio State University) Glenn McEntyre, Charged in Death Threat Also Harassed Student, Records Show, 10TV.COM (May 26, 2015), http://www.10tv.com/article/ohio-state-professor-charged-death-threat-also-harassed-student-records-show.

143. (Oklahoma State University) Megan Sando, Retired Oklahoma State University Professor Charged with Indecent Exposure, Sexual Battery, OUDAILY.COM (June 30, 2014), http://www.oudaily.com/curated/retired-oklahoma-state-university-professor-charged-with-indecen-exposure-sexual/article_a5f81bf0-00a1-1le4-b0b2-001a4bce6878.html.


155. (Pierce College) Instructor Accused of Sexual Harassment Quits, THE SPOKESMAN REVIEW (May 28, 1987),
https://news.google.com/newspapers?id=ls1314&dat=19870528&id=ESdXAAAIBAJ
&sjid=hO8DAAAIBAJ&pg=4980,6663783&hl=en.

156. (University of Pittsburgh) 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),

157. Colleen Flaherty, Bad Romance, INSIDE HIGHER ED. (May 5, 2014),

158. Sexual Harassment Suit Against University and Professor is Settled, UNIVERSITY TIMES (Jan. 9, 1997),
http://www.utimes.pitt.edu/?p=5189.

159. (Prairie View A&M University) Christian Spencer, Prof. Accused of Offering Failing Student Passing Grade for
Sex, CAMPUSREFORM.COM (Apr. 3, 2015),

160. (Princeton University) Accused Princeton Professor to Retire Early, N.Y. TIMES (May 27, 1989),

161. (Roane State Community College) Stephens v. Roane St. Cmty. Coll., COURT LISTENER
(Aug. 12, 2003),

162. (Rockefeller University) Karen Arenson, Amid Inquiry, President of Rockefeller U. Resigns, N.Y. TIMES
(Feb 11, 2002),

163. (Rutgers University) Ronald Smothers, Rutgers Settles with Professor Accused of Sex Harassment, N.Y. TIMES
(June 25, 1998),

164. Daniel Engber, The Strange Case of Anna Stubblefield, N.Y. TIMES (Oct. 20, 2015),

165. (Sacramento State College) Dr. Ari Novick, Sacramento Professor Accused of Sexual Harassment Drops Lawsuit,
SEXUAL HARASSMENT CLASS (Sept. 18, 2011),

166. (Salisbury University) Salisbury University Panel Sanctions Professor for Sexually Harassing Student, eBOSSWATCH.COM
(Oct. 17, 2010),

167. (Salt Lake Community College) Syrian-born Adjunct Instructor Loses Discrimination Suit Against Utah College,
THE FREE LIBRARY (Apr. 23, 2007),

168. (San Diego State University) Paul Krueger, SDSU Prof Who Sexually Harassed Students No Longer Works at School,
NBC SAN DIEGO (Nov. 24, 2015),
http://www.nbcсмерdigo.com/news/local/SDSU-Prof-Accused-of-Sexual-


170. (San Jose State University) Katy Murphy, San Jose State Under Fire in Sexual Harassment Scandal, SANTA CRUZ SENTINEL CRIME (Sept. 6, 2016), http://www.santacruzensentinel.com/article/NE/20160906/NEWS/160909842.


182. Don Kazak, Stanford: University Settles Sex Claims, PALOALTOONLINE.COM (Apr. 28,

184. (Syracuse University) Dave Tobin, Syracuse University Professor Fired for Consensual Relationship with Female Student, SYRACUSE.COM (June 17, 2014), http://www.syracuse.com/news/index.ssf/2014/06/syracuse_university_professor_d


**APPENDIX C**

**Title IX Court Decisions, 1998-2016**

(alphabetically by plaintiff or educational institution)

<table>
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<tr>
<th>Title</th>
<th>Citation</th>
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<tbody>
<tr>
<td>Abramova v. Albert Einstein Coll. of Med.</td>
<td>278 F. App'x 30 (2d Cir. 2008)</td>
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<tr>
<td>Adusumilli v. Ill. Inst. of Tech.</td>
<td>191 F. 3d 455 (7th Cir. 1999)</td>
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<tr>
<td>Cox v. Sugg</td>
<td>484 F. 3d 1062 (8th Cir. 2007).</td>
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<tr>
<td>Delgado v. Stegall</td>
<td>367 F.3d 668 (7th Cir. 2004).</td>
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16. Gretzinger v. Univ. of Haw. Prof'l Assembly, 156 F.3d 1236 (9th Cir. 1998).


31. Morse v. Regents of the Univ. of Colo., 154 F.3d 1124 (10th Cir. 1998).


33. Oden v. N. Marianas Coll., 440 F.3d 1085 (9th Cir. 2006).


35. Papelino v. Albany Coll. of Pharm. of Union Univ., 633 F.3d 81 (2d Cir. 2011).


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 ssrn.com)
1. **Art Institute of Fort Lauderdale**: Letter from Thomas Falkinburg to Charles J. Nagele (June 3, 2008)*
2. **Bridgewater State College**: Letter from Robert L. Pierce to Dr. Dana Mohler-Faria (Feb. 21, 2003)*
3. **California State University, East Bay**: Letter from Stella Klugman to Richard Metz (June 30, 2005)*
4. **California State University, Los Angeles**: Letter from H. Stephen Deering to Dr. James M. Rosser (Oct. 27, 1999)*
5. **California State University, Northridge**: Letter from Robert E. Scott to Jolene Koester (July 4, 2004)*
6. **Central Georgia Technical College**: Letter from Gary S. Walker to Dr. Melton Palmer, Jr. (Dec. 16, 2003)*
7. **Central Missouri State University**: Letter from Jody A. Van Wey to Judith Penrod Simine (Nov. 14, 2001)*
9. **Claremont Graduate School**: Letter from Alphas B. Scoggins to Dr. John D. Niaguire (Dec. 31, 1998)
10. **Des Moines University Osteopathic Medical Center**: Letter from John E. Nigro to Richard M. Ryan, Jr. (Jan. 3, 2002)*
11. **Florida International University**: Letter from Timothy Noonan to Dr. Modesto A. Maidique (Feb. 7, 2008)*
12. **Florida Southern College**: Letter from Gary S. Walker to Dr. Thomas Reuschling (Nov. 8, 1999)*
13. **Florida State University**: Letter from Arthur Manigault to Dr. Talbot D’Alemberte (Oct. 14, 1999)*
14. **Fox Valley Technical College**: Letter from Algis Tamosiunas to Dr. H. Victor Baldi (Apr. 26, 1999)*
15. **Full Sail Real World Education**: Letter from Doris N. Shields to Gary Jones (Apr. 28, 2003)*
16. **Georgia State University**: Letter from Laura M. Hitt to Carl V. Patton (May 27, 2005)*
17. **Houston Community College System**: Letter from John Stephens to Cathy Douse-Harris (June 29, 1998)*
18. **Interdenominational Theological Center**: Letter from Cynthia M. Stewart to Dr. Oliver J. Haney (July 2, 2002)*
19. **Lassen Community College**: Letter from Robert E. Scott to Dr. Homer Cissell (Mar. 21, 2007)*
20. **Las Vegas College**: Letter from Gary D. Jackson to Sharon Miller (Nov. 22, 2006)*
21. **Los Angeles Pierce College**: Letter from Adriana Cardenas to Maria Soria-Gomes (Dec. 8, 1999)*
23. **Louisiana Technical College**: Letter from Sandra W. Stephens to Dr. Margaret Montgomery-Richards (June 9, 2006)*
24. **Marian College of Fond du Lac**: Letter from Madonna T. Lechner to Dr. Richard Ridcnour (June 29, 2005)*
<p>| 25. | Maryland Institute College of Art: Letter from Brenda Johnson to Fred Lazuras, IV (Oct. 24, 2000)* |
| 26. | Merced College: Letter from Arthur Zeidman to Dr. Benjamin Duran (Oct. 29, 2008)* |
| 27. | Minot State University: Letter from Adele Rapport to Dr. Steven Shirley (July 7, 2016), <a href="https://www.documentcloud.org/documents/2943508-Minot-State-University-Letter-of-Findings.html">Link</a> |
| 28. | Missouri Southern State University: Letter from Alan D. Hughes to Dr. Julio S. Leon (July 27, 2005)* |
| 29. | Monmouth College (Illinois): Letter from Jeffrey Turnbull to Dr. Mauri A. Ditzler (Nov. 19, 2008)* |
| 30. | National Louis University: Letter from Sharon Solomon to Dr. Curtis McCray (Aug. 8, 2003)* |
| 32. | North Central Texas College: Letter from Sandra W. Stephens to Dr. Eddie Hadlock (Oct. 26, 2005)* |
| 34. | Olympia College: Letter from Madonna T. Lechner to Jeanette Prickett (Mar. 8, 2007)* |
| 35. | Sam Houston State University: Letter from Robert Ramirez to [redacted] (July 27, 1999)* |
| 36. | San Bernardino Valley College: Letter from Robert E. Scott to Denise Whittacker (June 30, 2003)* |
| 37. | Skyline College: Letter from Stella B. Klugman to Linda Salter (Sept. 4, 1998)* |
| 38. | South College: Letter from Gary S. Walker to [redacted] (Jan. 24, 2007)* |
| 40. | Southwest Missouri State University: Letter from Jody A. Van Wey to John F. Black (Apr. 10, 2000)* |
| 41. | Tacoma Community College: Letter from Gary D. Jackson to Dr. Pamela J. Transue (Oct. 9, 1998)* |
| 42. | Tarrant County College District: Letter from Timothy C. J. Blanchard to Dr. Leonardo de la Garza (Apr. 21, 2000)* |
| 43. | Texas Southern University: Letter from Sandra W. Stephens to Dr. Priscilla Slade (May 13, 2002)* |
| 44. | Texas Vocational School: Letter from John Stephens to [redacted] (Feb. 10, 2005)* |
| 45. | The Art Center Design College: Letter from Linda Howard-Kurent to Dr. Sharmon Woods (undated)* |
| 46. | Tuskegee University: Letter from Arinita M. Ballard to Benjamin F. Payton (Apr. 29, 1999)* |
| 47. | University of Arizona: Letter from Nicole A. Huggins to Dr. Pete Likins (July 15, 2005)* |
| 48. | University of Arkansas at Little Rock: Letter from Sandra W. Stephens to Dr. Joel E. Anderson (Nov. 21, 2005)* |
| 49. | University of California, Berkeley: Letter from Stella Klugman to Dr. Robert J. Birgeneau (July 31, 2006)* |
| 50. | University of California, Davis: Letter from Stephen Chen to Larry N. Vanderhoef (Jan. 9, 2008)* |</p>
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<th>No.</th>
<th>Institution, Location</th>
<th>Letter Recipient 1</th>
<th>Letter Recipient 2</th>
<th>Date</th>
<th>Note</th>
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<td>51.</td>
<td>University of California, Los Angeles</td>
<td>Charles R. Love</td>
<td>Albert Carnesale</td>
<td>June 30, 2000</td>
<td>*</td>
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<tr>
<td>52.</td>
<td>University of California, Santa Barbara</td>
<td>Robert E. Scott</td>
<td>Dr. Henry T. Yang</td>
<td>July 11, 2000</td>
<td>*</td>
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<td>53.</td>
<td>University of Colorado, Boulder</td>
<td>L. Thomas Close</td>
<td>Dr. Elizabeth Hofman</td>
<td>Nov. 2000</td>
<td>*</td>
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<tr>
<td>54.</td>
<td>University of Illinois at Springfield</td>
<td>Jeffrey Turnbull</td>
<td>Dr. Richard D. Ringeisen</td>
<td>Oct. 10, 2008</td>
<td>*</td>
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<td>55.</td>
<td>University of Maryland, Baltimore Campus</td>
<td>Wendella P. Fox</td>
<td>Dr. David J. Ramsay</td>
<td>July 16, 2008</td>
<td>*</td>
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<tr>
<td>56.</td>
<td>University of Maryland, Baltimore Campus</td>
<td>LouAnn Pearthree</td>
<td>Dr. David J. Ramsay</td>
<td>Feb. 13, 2009</td>
<td>*</td>
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<td>57.</td>
<td>University of Maryland, University College</td>
<td>Robert Ford</td>
<td>[redacted]</td>
<td>Aug. 15, 2002</td>
<td>*</td>
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<td>59.</td>
<td>University of Missouri System</td>
<td>Jody A. Van Wey</td>
<td>Kathleen Murphy-Markie</td>
<td>April 15, 2003</td>
<td>*</td>
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<td>60.</td>
<td>University of New Mexico</td>
<td>Shaheena Simons &amp; Damon Martinez</td>
<td>Robert G. Frank</td>
<td>Apr. 22, 2016</td>
<td>*</td>
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<tr>
<td>61.</td>
<td>University of North Carolina at Chapel Hill</td>
<td>Sheralyn Goldbecker</td>
<td>Susan Ehringhaus</td>
<td>Dec. 20, 2000</td>
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<tr>
<td>62.</td>
<td>University of Southwestern Louisiana</td>
<td>Charlene F. Furr</td>
<td>Dr. Ray Authement</td>
<td>June 26, 1998</td>
<td>*</td>
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<tr>
<td>63.</td>
<td>University of Tennessee, Knoxville</td>
<td>Vickie A. Barrows</td>
<td>Catherine Mizell</td>
<td>Nov. 8, 2000</td>
<td>*</td>
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<td>64.</td>
<td>University of Texas at Austin</td>
<td>Vickie L. Johnson</td>
<td>Dr. Larry R. Faulkner</td>
<td>Sept. 27, 2002</td>
<td>*</td>
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<tr>
<td>65.</td>
<td>University of West Florida</td>
<td>Cynthia M. Stewart</td>
<td>Dr. Morris Marx</td>
<td>Sept. 21, 2000</td>
<td>*</td>
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<tr>
<td>66.</td>
<td>University of West Florida</td>
<td>Doris N. Shields</td>
<td>Dr. Morris L. Marx</td>
<td>June 25, 2002</td>
<td>*</td>
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<td>67.</td>
<td>Vatterott College</td>
<td>Michael B. Hamilton</td>
<td>John C. Vatterott, Sr.</td>
<td>Dec. 6, 2002</td>
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<td>68.</td>
<td>Westfield State College</td>
<td>Robert L. Pierce</td>
<td>Dr. Frederick W. Woodward</td>
<td>Mar. 21, 2003</td>
<td>*</td>
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<td>69.</td>
<td>Worcester State College</td>
<td>J. Michael Burns</td>
<td>Dr. Kalyan K. Ghosh</td>
<td>Apr. 11, 2001</td>
<td>*</td>
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