

Mapping the Title IX Iceberg: Sexual Harassment (Mostly) in Graduate School by College Faculty*

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Introduction

Sexual harassment within academia, as in other sectors of American society, is much in the news these days. Serial harassers, in particular, have long been a worry for legal scholars, who express concern about the extent to which there are serial sexual harassers in the workplace and what should be done to prevent and to remedy the effects of such repeat victimization.¹ More recently, the U.S. Department of Education's Office for Civil Rights (OCR) and the Obama White House placed a greater spotlight on student-on-student campus sexual violence, but the conversation (for years, and more so recently) has hardly excluded harassment by university faculty, including repeat faculty harassers.² Indeed, in 2016 Congresswoman Jackie Speier introduced the Federal Funding Accountability for Sexual Harassers Act, which "would

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* Please note that while this article focuses on graduate and professional students, not all of the cases discussed in it involve only graduate students.

1. Ian Ayres & Cait Unkovic, *Information Escrows*, 111 MICH. L. REV. 145 (2012); Kerri Lynn Stone, *License to Harass: Holding Defendants Accountable for Retaining Recidivist Harassers*, 41 AKRON L. REV. 1059 (2008); Martha S. West, *Preventing Sexual Harassment: The Federal Courts' Wake-Up Call For Women*, 68 BROOKLYN L. REV. 457, 505-07 (2002).
2. STEVEN G. POSKANZER, HIGHER EDUCATION LAW: THE FACULTY 225 (2002); Courtney

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 and development grants in the past 10 years.”³ In introducing the bill, Congresswoman Speier spoke on the floor of the House in criticism of “pass the harasser” cases, in which faculty move from one university to another during or after a sexual harassment investigation without facing any significant discipline, if they face any at all.⁴ This question about repeat harassers looms even larger with respect to the subset of sexual harassment incidents at the more severe end of the spectrum, such as sexual assault, where social scientists have documented disturbing levels of repeat offending.⁵

The recent public attention to campus sexual harassment and violence has led not only to new proposed legislation,⁶ but also to much new empirical research on such harassment, both at the national and institutional levels.⁷ The studies that have measured graduate students’ experiences indicate that graduate students may be particularly vulnerable to faculty sexual harassment. As discussed more below, the largest survey of its kind recently found that one in ten female graduate students at elite U.S. universities reports being sexually

Leatherman, *To Get Rid of a Difficult Employee, a College May Hush Up Problems in a Professor's Past*, CHRON. HIGHER EDUC., Dec. 6, 1996; Tyler Kingkade, *Why It's Harder for Grad Students To Report Sexual Harassment*, HUFFINGTON POST (July 6, 2016, 6:31 PM), http://www.huffingtonpost.com/entry/grad-students-sexual-harassment_us_57714bc6e4bodbb1bbb37c7.

3. *Congresswoman Jackie Speier Introduces Bill to Stop Rampant Sexual Abuse, Harassment in STEM Research*, CONGRESSWOMAN JACKIE SPEIER (Sept. 21, 2016), <https://speier.house.gov/media-center/press-releases/congresswoman-jackie-speier-introduces-bill-stop-rampant-sexual-abuse>.
4. 162 CONG. REC. H287-288 (daily ed. Jan. 12, 2016) (statement of Rep. Speier), <https://www.congress.gov/crec/2016/01/12/CREC-2016-01-12-pt1-PgH286.pdf>.
5. See, e.g., Kevin M. Swartout et al., *Trajectories of Male Sexual Aggression From Adolescence Through College: A Latent Class Growth Analysis*, 41 AGGRESSIVE BEHAV. 467 (2015); Gordon C. Nagayama Hall et al., *Initiation, Desistance, and Persistence of Men's Sexual Coercion*, 74 J. CONSULTING & CLINICAL PSYCHOL. 732, 732 (2006); David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 73 (2002).
6. Campus Accountability and Safety Act, S. 590, 114th Cong. (2015), <https://www.congress.gov/114/bills/s590/BILLS-114s590is.pdf>; HALT Campus Sexual Violence Act, H.R. 2680, 114th Cong. (2015), <https://www.congress.gov/114/bills/hr2680/BILLS-114hr2680ih.pdf>; SOS Campus Act, S. 2695, 113th Cong. (2014), <https://www.congress.gov/bill/113th-congress/senate-bill/2695/text>; ANDREW MORSE, BRIAN A. SPONSNER & MARY FULTON, STATE LEGISLATIVE DEVELOPMENTS ON CAMPUS SEXUAL VIOLENCE: ISSUES IN THE CONTEXT OF SAFETY (Dec. 2015), http://www.naspa.org/images/uploads/main/ECS_NASPA_BRIEF_DOWNLOAD3.pdf.
7. See, e.g., Nick Anderson, Susan Svrluga & Scott Clement, *Survey: More than 1 in 5 Female Undergrads at Top Schools Suffer Sexual Attacks*, WASH. POST: EDUCATION (Sept. 21, 2015), https://www.washingtonpost.com/local/education/survey-more-than-1-in-5-female-undergrads-at-top-schools-suffer-sexual-attacks/2015/09/19/c6c80be2-5e29-11e5-b38e-06883aacba64_story.html?utm_term=.e297704217do; MASS. INST. OF TECH., *Survey Results: 2014 Community Attitudes on Sexual Assault* (Oct. 24, 2014), <http://web.mit.edu/surveys/health/MIT-CASA-Survey-Summary.pdf>.

harassed by a faculty member,⁸ and other smaller studies over several decades have reported even higher numbers. According to the aforementioned recent study, women graduate students face harassment 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).⁹

Although most of these studies do not focus on or separate law students from the other graduate and professional students studied,¹⁰ given the readership interests of the *Journal of Legal Education* we note that multiple cases included in our review *infra* involved one or more law student victims.¹¹ Law students may not face the same constraints as doctoral graduate students (e.g., law school has anonymous grading practices, and students are less beholden on average to one or two professors for their overall scholarly success), but they share a fundamental commonality, which is that the disparity in power (not just in relation to grades, but also in recommendations for law firm jobs and judicial clerkships) can make law students vulnerable to sexual harassment by law faculty.¹² Furthermore, law students looking to become law professors likely face similar pressures as those doctoral students seeking to get tenure-track faculty posts in their chosen disciplines.

Graduate students' greater vulnerability to faculty sexual harassment concerns us for several reasons. First, the length and pedagogical purposes of

8. DAVID CANTOR ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 29, 31 (Sept. 2015), https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU_Campus_Climate_Survey_12_14_15.pdf (in the AAU survey 44.1% of women of graduate students reported being sexually harassed, and of that group 22.4% stated that the harassment was by a faculty member—thus as a percentage of all female graduate students taking the AAU survey 9.9% reported they had been sexually harassed by a faculty member at their university).
9. *Id.* at 31.
10. A recent exception is the Rosenthal et al. survey, which found rates of sexual harassment of female law students by faculty/staff to be higher than those of other female graduate students (57.1% versus 36.1%). But this study covers only one university and has a modest sample size. Marina N. Rosenthal et al., *Still Second Class: Sexual Harassment of Graduate Students*, 40 PSYCHOL. WOMEN Q. 364, 371 (2016).
11. See our discussion below of the faculty termination cases of *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504 (10th Cir. 1998); *Traster v. Ohio Northern Univ.*, No. 3:13 CV 1323, 2015 WL 10739302 (N.D. Ohio 2015 Dec. 18, 2015), *aff'd*, --- Fed.Appx. ---, 2017 WL 1246216 (6th Cir. April 5, 2017); Doug Brown, *Case Western Reserve Settles Lawsuit by Law Professor Who Claimed Retaliation After Reporting Law School Dean's Sexual Harassment*, SCENE (July 8, 2014 10:55 AM), <https://www.clevescene.com/scene-and-heard/archives/2014/07/08/case-western-reserve-settles-lawsuit-by-law-professor-who-claimed-retaliation-after-reporting-law-school-deans-sexual-harassment>. For additional examples involving law students being sexually harassed and/or assaulted, see Maura Dolan et al., *Woman Sought UC Berkeley's Help Before Accusing Dean*, L.A. TIMES, Dec. 3, 2002; Lisa G. Lerman, *First Do No Harm: Law Professor Misconduct Toward Law Students*, 56 J. LEGAL EDUC. 86 (2006).
12. See *infra* note 14 for references to the AAUP ethics standards and OCR guidance. On law students specifically, see, e.g., Caroline Forell, *What's Wrong with Faculty-Student Sex? The Law School Context*, 47 J. LEGAL EDUC. 47 (1997).

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 highly vulnerable to the harms that are likely to come from sexual harassment by faculty.¹³

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 context of a substantial power differential between the faculty member and the student. 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 equality.¹⁴

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 academy in all disciplines, including law. 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 academy. Sexual harassment, especially by serial harassers, must drive some graduate and professional students out of the academy altogether as they endeavor to avoid the harms of such harassment¹⁵ in the future. Both those who protest and/or

13. John M. Braxton, Eve Proper & Alan E. Bayer, *Professionalism in Graduate Teaching and Mentoring*, in *THE AMERICAN ACADEMIC PROFESSION: TRANSFORMATION IN CONTEMPORARY HIGHER EDUCATION* 168, 182 (Joseph C. Hermanowicz ed., 2011) (“In contrast to faculty misconduct in undergraduate college teaching, the stakes are substantially higher for graduate teaching and mentoring.”); Rosenthal et al., *supra* note 10.
14. AAUP STATEMENT OF PROFESSIONAL ETHICS (2009), <https://www.aaup.org/report/statement-professional-ethics>; OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENT BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 7 (2001) [hereinafter OCR REVISED SEXUAL HARASSMENT GUIDANCE], <http://www.ed.gov/offices/OCR/archives/pdf/shguide.pdf>.
15. A voluminous body of social science research documents the harms associated with sexual harassment in the workplace and in educational settings, particularly, but not exclusively, for women. See, e.g., Afroditi Pina et al., *An Overview of the Literature on Sexual Harassment: Perpetrator, Theory, and Treatment Issues*, 14 *AGGRESSION & VIOLENT BEHAV.* 126, 136 (2009) (“Sexual harassment . . . affects a significant proportion of working women and it affects their personal lives and professional functioning, thus preventing them from advancing in the workplace, and affecting one of their fundamental human rights; the right to work with dignity.”). 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 impacts on the mental health and well-being of victims, including symptoms of depression, anxiety, withdrawal, and post-traumatic stress disorder (PTSD). See Chelsea R. Willness et al., *A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment*, 60 *PERSONNEL PSYCHOL.* 127, 148-50 (2007); Victor E. Sojo et al., *Harmful Workplace Experiences and Women’s Occupational Well-Being: A Meta-Analysis*, 40 *PSYCHOL. WOMEN Q.* 10 (2016); Paula McDonald, *Workplace Sexual Harassment 30 Years on: A Review of the Literature*, 14 *INT’L J. MGMT. REV.* 1, 4 (2012). Likewise, student victims of sexual harassment in the university setting can encounter diminished educational experiences and outcomes, including negative global perceptions about

those who have sexual conduct forced upon them are likely to experience well-documented negative health consequences¹⁶ 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.¹⁷ In these instances, faculty misconduct can cause a pernicious form of “divestiture”¹⁸ in which the misconduct causes the graduate student to lose part of her/his sense of self as s/he struggles through ensuing self-blame and shame.

In addition to how these dynamics might impact victims of the harassment, harassment is likely to have a damaging impact on bystanders to the harassment, who make up virtually the entire remainder of the academic pipeline. Some portion of the professors trained by PhD and professional education programs will attain tenure, take on various academic administrative roles with significant control over students’ lives and educations, and achieve promotion into higher education’s most powerful governance roles: full professors, department chairs, provosts, and presidents. Therefore, colleges and universities must consider the training that sexually harassing professors,

academia, lower academic satisfaction, diminished informal networking/mentoring, and lower grade performance. Marisela Huerta, et al., *Sex and Power in the Academy: Modeling Sexual Harassment in the Lives of College Women*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 616, 618 (2006); Lilia M. Cortina et al., *Sexual Harassment and Assault: Chilling the Climate for Women in Academia*, 22 PSYCHOL. WOMEN Q. 419 (1994).

16. For victims of severe sexual harassment such as sexual assault, PTSD and related health, educational, and economic consequences can be even more harmful. See Katharine K. Baker et al., *Title IX & the Preponderance of the Evidence: A White Paper, 3d Edition*, FEMINISTLAWPROFESSORS.COM, nn.5-37 (2016), <http://www.feministlawprofessors.com/wp-content/uploads/2016/11/Title-IX-Preponderance-White-Paper-signed-11.29.16.pdf>; Lisa Fedina et al., *Campus Sexual Assault: A Systematic Review of Prevalence Research From 2000 to 2015*, TRAUMA, VIOLENCE & ABUSE (forthcoming 2017), <http://journals.sagepub.com/doi/abs/10.1177/1524838016631129> (first published online Feb. 22, 2016).
17. Studies looking at less severe (nonassault) 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., Meredith McGinley et al., *Risk Factors and Outcomes of Chronic Sexual Harassment During the Transition to College: Examination of a Two-Part Growth Mixture Model*, 60 SOC. SCI. RES. 297 (2016); Jennifer Fine McDermut et al., *An Evaluation of Stress Symptoms Associated With Academic Sexual Harassment*, 13 J. TRAUMATIC STRESS 397 (2000); Cortina et al., *supra* note 16, at 434-36; Bonnie S. Dansky & Dean G. Kilpatrick, *Effects of Sexual Harassment*, in SEXUAL HARASSMENT: THEORY, RESEARCH AND TREATMENT 152 (William O’Donohue ed., 1997) (employment sector study). Accompanying (and related to) these mental health impacts are the negative workplace and organizational impacts of sexual harassment, including declines in job satisfaction, retention rates, organizational commitment and job performance, as well as increased absenteeism. McDonald, *supra* note 16, at *4; Willness et al., *supra* note 16, at 146-49.
18. Melissa S. Anderson et al., *Disciplinary and Departmental Effects on Observations of Faculty and Graduate Student Misconduct*, 65 J. HIGHER EDUC. 331, 342 (1994) (in a faculty misconduct context, discussing the concept of divestiture as “the student’s experience of losing part of his or her previous sense of self”).

especially repeat harassers, are providing to the students who *remain* in the academy and what kind of academic cultures such training will perpetuate.¹⁹

Despite the above, there has been no comprehensive mapping of faculty harassment problem in the academy. In addition to the empirical research just discussed, our first stop was the social science literature. Next, and for reasons discussed in greater detail below, we looked at Title IX case law and investigation resolutions by the U.S. Department of Education's Office for Civil Rights, since private lawsuits and OCR administrative enforcement are two primary external Title IX enforcement methods. Third, understanding that the Title IX cases and OCR investigations are generally brought by those who report being harassed, we also looked at cases where tenured or tenure-track faculty sued their schools for terminating their employment on the basis of harassment.

When one looks at these varied sources, it becomes clear that faculty sexual harassment is a "tip of the iceberg" phenomenon in which the vast majority of cases remain under the water line and out of view, or visible in only limited ways. Including media coverage of sexual harassment allegations in addition to case law and OCR investigations, for instance, the number of reports and formal complaints of faculty sexual harassment expands exponentially. 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.²⁰ Indeed, it is well-established that sexual harassment is a significantly and consistently underreported problem, whether on a campus or not.²¹ Thus the Title IX court cases, Title IX investigations, 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, via either OCR or a court case.

The aggregate economic costs of sexual harassment in U.S. employment and education sectors present another "tip of the iceberg" problem, as they

19. Some of the important takeaways from the literature on sexual harassment and organizational climate for both victims and third-party bystanders include harms in which organizations exhibit tolerance of sexual harassment, poor leadership, retaliation, and "institutional betrayal." See, e.g., Carly Parnitzke Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 J. TRAUMATIC STRESS 119 (2013).
20. BONNIE S. FISHER ET AL., *THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN* 24 (2000), <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf>; CHAI R. FELDBLUM & VICTORIA A. LIPNIC, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 8-10, 15-17 (June 2016), https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf; Anderson et al., *supra* note 7.
21. See generally Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205 (2011) (discussing the complex reasons for high rates of nonreporting of sexual violence at colleges and universities); FELDBLUM & LIPNIC, *supra* note 20, at 15-17 (discussing victim nonreporting of sexual harassment in workplaces as a whole, not just in educational institutions).

are profound yet somewhat difficult to measure.²² Indeed, several researchers and advocates have identified a “long-term, downward economic and social spiral,”²³ both within education and without, resulting from sexual assault. And although additional research is needed, research and experience suggest that there are proportionally harsher economic costs of sexual harassment among more vulnerable student populations (e.g., immigrant, LGBTQ, low-income, and first-generation college students) with fewer resources to create the time and space that they need to heal.²⁴

The costs employers and educational institutions incur from sexual harassment settlements and litigation are also significant, including those measured by higher education insurance firms²⁵ and by the EEOC.²⁶ It is also

22. FELDBLUM & LIPNIC, *supra* note 20, at v. 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* (2015), <http://wol.iza.org/articles/sexual-harassment-in-workplace-1.pdf>.
23. Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 471-72 (2005). The downward spiral results when the aforementioned negative health consequences feed delays in completing school and/or overall declines in educational performance. See Kathryn M. Reardon, *Acquaintance Rape at Private Colleges and Universities: Providing for Victims' Educational and Civil Rights*, 38 SUFFOLK U. L. REV. 395, 396 (2005) (“The end result for victims is falling grades, prolonged school absence, and for many, eventual school drop out or failure.”). These educational consequences in turn can result in short-term losses of financial aid, tuition dollars, or scholarship money. See Laura Hilgers, *What One Rape Cost Our Family*, N.Y. TIMES (June 24, 2016), http://www.nytimes.com/2016/06/24/opinion/what-one-rape-cost-our-family.html?_r=0.
24. Although it is difficult to find campus sexual violence survivors publicly discussing their parents' income or levels of education, the effect of 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 (Apr. 21, 2016), <http://www.theestablishment.co/2016/04/21/dear-tufts-administrators-who-expelled-me-after-my-sexual-assaults/>.
25. 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 between 2010-2013 United Educators' insureds “spent approximately \$17 million defending and resolving sexual assault claims.” UNITED EDUCATORS, *CONFRONTING CAMPUS SEXUAL ASSAULT: AN EXAMINATION OF HIGHER EDUCATION CLAIMS 14* (2015), http://www.ncdsv.org/ERS_Confronting-Campus-Sexual-Assault_2015.pdf; UNITED EDUCATORS, *STUDENT SEXUAL ASSAULT: WEATHERING THE PERFECT STORM 1* (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.
26. Regarding federal Equal Employment Opportunity Commission (EEOC) complaints, the commission resolved 7,289 sexual harassment complaints in 2015, with employers paying

worth noting that, for many large organizations like universities or companies, in a significant number of cases, the negative reputational costs of sexual harassment cases and their (mis)handling will eclipse the direct economic costs at issue.

Sexual harassment costs the nation as a whole in terms of diminished human and economic potential. In a 2016 study of 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 determined that “violence against women,” which appears to include at least severe sexual harassment,²⁷ is one of several indicators of gender inequality that keep women from achieving their economic potential.²⁸ Violence against women was the only indicator of gender inequality that was extremely high across all fifty states;²⁹ the report concluded that reducing violence against women, along with five other indicators that were less consistently high, is necessary for the nation to achieve its full economic potential.³⁰

These common insights indicate, first, that the limited number of cases discussed here represent many others that will not reach an OCR investigation, be decided by a court, or even receive any news coverage. In addition, the commonalities between these cases provide important information about the full Title IX iceberg, both above and below the waterline. Finally, these cases

\$46 million in employee benefits through the commission’s prelitigation administrative enforcement process. EEOC, *Charges Alleging Sexual Harassment FY 2010-FY 2016*, https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm (last visited Apr. 24, 2017). 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 with equivalent state agencies; (b) many other cases result in litigation-related settlements and 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. Even in cases where employers successfully defend lawsuits brought by employees alleging sexual harassment, employers will commonly pay out six figures in outside attorneys’ fees and investigation costs. Beth Braverman, *The High Cost of Sexual Harassment*, THE FISCAL TIMES (Aug. 22, 2013), <http://www.thefiscaltimes.com/Articles/2013/08/22/The-High-Cost-of-Sexual-Harassment>. A key economic driver behind the prelitigation and/or pretrial litigation posture of both parties in sexual harassment cases is that Title IX, Title VII and many related state laws are (for civil rights policy reasons) statutes that award attorneys’ fees to prevailing plaintiffs but not to prevailing defendants. See, e.g., Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 934 (2005).

27. Kweilin Ellingrud et al., *The Power of Parity: Advancing Women’s Equality in the United States*, MCKINSEY & CO. iv (Apr. 2016), <http://www.mckinsey.com/global-themes/employment-and-growth/the-power-of-parity-advancing-womens-equality-in-the-united-states>.

28. *Id.*

29. *Id.* at 19-22.

30. *Id.* at iv.

have similar norm-setting functions as verdicts and can therefore influence the handling of other faculty sexual harassment cases.³¹ Thus, by mapping the tip of the Title IX iceberg using the social science literature, court cases, and OCR investigations, we can provide insights applicable to cases above and below the waterline, as well as update and add to previous legal research and scholarship on this topic in a more systematic way.³² This mapping project, moreover, 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 model³³ that combines primary, secondary, and tertiary forms of prevention.

Finally, we note that at the time of this writing, weeks after a new administration has moved into the White House, a great deal of uncertainty exists about the future of U.S. Department of Education OCR's regulatory standards and priorities related to Title IX enforcement.³⁴ However, even if the new administration were to change direction on its Title IX enforcement, the direction and extent of that change are just as uncertain, and administration officials will have to contend with the barrier to change presented by the historical consistency of OCR enforcement by both Republican and Democratic administrations over the decades since Title IX was passed,³⁵ as well as the strong legal justifications in Title IX's text and regulations dating back to 1975.³⁶ Even if the new administration were to make changes

31. See *infra* Section III.

32. Our longer article analyzing patterns in U.S. faculty sexual harassment cases, including a large number of media cases, is Nancy Chi Cantalupo & William C. Kidder, *A Systematic Look at a Serial Problem: Sexual Harassment of Students by University Faculty*, 68 UTAH L. REV. ____ (forthcoming Spring 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2971447. See also Walter B. Connolly, Jr. & Alison B. Marshall, *Sexual Harassment of University or College Students by Faculty Members*, 15 J.C. & U.L. 381 (1989); Donna R. Euben & Barbara A. Lee, *Faculty Discipline: Legal and Policy Issues in Dealing with Faculty Misconduct*, 32 J.C. & U.L. 241 (2006).

33. Margaret Brome et al., *Sexual Violence Prevention: Beginning the Dialogue*, CENTERS FOR DISEASE CONTROL & PREVENTION 2-3 (2004), <https://www.cdc.gov/violenceprevention/pdf/svprevention-a.pdf>.

34. See, e.g., Jake New, *Do Not Step Away With Uncertainty about how the Trump Administration and the New Congress will Tackle Sexual Violence on Campuses, College Leaders Urge Institutions to Keep Up Sexual Assault Prevention Efforts*, INSIDE HIGHER ED (Jan. 26, 2017), <https://www.insidehighered.com/news/2017/01/26/college-leaders-discuss-future-title-ix-sexual-assault-prevention-efforts>; Jake New, *Trump and GOP Likely to Try to Scale Back Title IX Enforcement on Sexual Assault*, INSIDE HIGHER ED (Nov. 10, 2016), <https://www.insidehighered.com/news/2016/11/10/trump-and-gop-likely-try-scale-back-title-ix-enforcement-sexual-assault>.

35. See Baker, *supra* note 16, at 4-6, 10-12.

36. See Memorandum In Support of Defendants' Motion to Dismiss Amended Complaint, *Doe v. Lhamon*, 2016 WL 8252874 at *21, n.7 (D.D.C. Sept. 1, 2016) (Nos. 1:16-cv-01158). (noting that the United States Department of Justice makes the point, in a slightly different context, that "[s]etting the 2011 DCL aside would not likely lead schools to revise their procedures because schools would remain subject to Title IX and the Department's regulations, including

to longstanding OCR guidance, the Title IX OCR regulatory standards do not change the standards used in private Title IX actions. In addition, although any changes to OCR's interpretation of Title IX and its regulations are potentially relevant to future OCR complaint investigations or in Title IX respondent lawsuits,³⁷ they don't affect this project's analysis, since our focus is primarily on what the factual allegations in the cases considered here tell us about faculty harassment of students, not on the legal standards used in those cases.

Mapping the Faculty Sexual Harassment Problem

1. Social Science Research

We began our mapping project 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 contexts. The most recent large study on graduate students' experiences with sexual harassment was conducted by the Association of American Universities (AAU) and Westat in an extensive sexual assault survey administered in April 2015 at twenty-seven elite private and public research universities. In addition to important data on student sexual assaults, the AAU/Westat survey yielded large-scale results on the extensiveness of sexual harassment at American research universities. This marks a contrast with most previous survey studies on sexual harassment by faculty at U.S. college campuses, which tended to consist of single-institution

the requirement that they maintain 'prompt and equitable' grievance procedures. 34 C.F.R. §106.8(b)"). In addition, the root authority of federal civil rights enforcement agencies to adopt regulatory standards that exceed antidiscrimination standards in private litigation has been repeatedly recognized by the United States Supreme Court. *See, e.g., Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 292 (1998) (declaring in the context of Title IX school grievance procedures: "Of course, the Department of Education could enforce the requirement administratively: Agencies generally have authority to promulgate and enforce requirements that effectuate the statute's nondiscrimination mandate, 20 U. S. C. § 1682, even if those requirements do not purport to represent a definition of discrimination under the statute."). Finally, as the DOJ further points out: "[S]chools may decline to modify their policies for reasons other than compliance with the Department's Title IX regulations, including because schools have their own interests in protecting their students from sexual violence and assuring potential complainants that their grievance procedures are fair." 2016 WL 8252874, at *21-22, n.7.

To a significant extent, questions about possible changes in OCR policies and priorities under the new administration revolve around the "preponderance of evidence" evidentiary standard in campus Title IX investigations. We plan to address this issue in detail in our forthcoming law review article that is a companion to this *Journal of Legal Education* essay. *See also* Baker et al., *supra* note 16.

37. Two recent examples approvingly cite the OCR "Dear Colleague" letter on questions of due process and cross-examination of sexual assault complainants/victims. *Doe v. Univ. of Southern California*, 200 Cal. Rptr. 3d 851, 871 (Cal. Ct. App. 2016); *Doe v. Regents of the Univ. of California*, 210 Cal. Rptr. 3d 479, 505 (2016) (citing *Doe v. Univ. of Southern California*, 200 Cal. Rptr. 3d 851, 871 (Cal. Ct. App. 2016)).

surveys with modest sample sizes that made it difficult to identify generalizable conclusions and robust patterns.³⁸

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 legal guidelines and campus policies.³⁹ 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.⁴⁰

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 1. 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.⁴¹ These AAU data imply that at leading American research universities today, roughly one in ten female graduate students and over one in five transgender/genderqueer graduate students state that they have been sexually harassed by a faculty member at their university (though this is possibly somewhat of an overestimate).⁴²

38. 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).

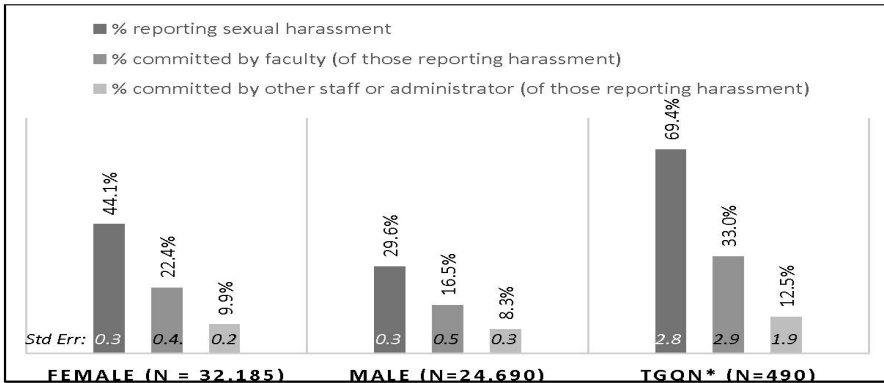
39. CANTOR, *supra* note 8, at xv. Federal law and companion campus policies incorporate a “reasonableness” standard with respect to victims’ experiences with sexual harassment, so it is not realistic for the AAU/Westat survey or other surveys of students’ self-reported perceptions to perfectly mimic federal law standards. For additional discussion of the definition and methodology of the AAU survey, see *infra* footnote 42 below.

40. *Id.* at xvi.

41. 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.

42. One cautionary note is that there may be some level of upward reporting bias on the AAU sexual harassment survey items 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. In a companion report on methodology, the authors

Figure 1: Graduate and Professional Students' Reports of Sexual Harassment in the AAU/Westat Sexual Assault Climate Survey⁴³
(2015 data, time interval reported is "since you have been a student" at your university)



* TGQN = Transgender woman, transgender man, genderqueer, gender nonconforming, questioning, not listed.

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 38.3% of female and 23.4% of male graduate students reported being sexually harassed by a professor or staff member.⁴⁴ It is possible these higher figures are related to methodological differences in how sexual harassment was defined.⁴⁵

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) [hereinafter CANTOR ET AL., METHODOLOGY REPORT], https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/Methodology_Report_for_AAU_Climate_Survey_4-12-16.pdf. For example, at Harvard, which had the highest response rate of the 27 twenty-seven universities (56.0% and 46.3% rates for female and male graduate students, respectively), the results mirrored the overall AAU averages—among those who reported sexual harassment, 21.8% of Harvard's female graduate students and 15.3% of its male graduate students indicated that the offender was a faculty member. *Id.* at tbls. 1, 5.1a.

43. *Id.* at 84-89, tbl.4-1.

44. Rosenthal et al., *supra* note 10, at 367, 370.

45. In this study, 59.1% of the reported sexually harassing incidents "involved sexist or sexually

Nonetheless, a number of earlier survey studies of female undergraduate and graduate students in the 1980s, 1990s, and 2000s also report higher levels of sexual harassment,⁴⁶ 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 with the 1980s.⁴⁷

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 the map we are endeavoring to draw. First, no recent nationally representative studies on graduate student harassment have been conducted. Even though the AAU study was done at twenty-seven universities across the country, those universities are limited to AAU members and are therefore specific types of universities that are not representative of the full range of higher educational institutions in the country. In addition, none of the studies on sexual harassment in educational institutions of which we are aware gathered data on repeat harassers.

Research on recidivism in related contexts is available, however, and shows high rates of serial sexual harassment in the workplace,⁴⁸ as well as high rates

offensive language, gestures, or pictures” compared with 6.4% involving “unwanted sexual attention,” 4.7% involving “unwanted touching,” and 3.5% involving “subtle or explicit bribes or threats.” *Id.* at 370. It is these smaller categories that more typically rise to the level of faculty disciplinary action and meeting 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 context-dependent factors 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.

46. Michelle L. Kelley & Beth Parsons, *Sexual Harassment in the 1990s: A University-Wide Survey of Female Faculty, Administrators, Staff, and Students*, 71 J. HIGHER EDUC. 548, 549 (2000) (summarizing eight studies from the 1980s and 1990s: “Most studies report that between 20% and 40% of undergraduate and graduate women experience some form of sexual harassment while a student.”). Other graduate student studies report still higher levels. Beth E. Schneider, *Graduate Women, Sexual Harassment, and University Policy*, 58 J. HIGHER EDUC. 46, 51 (1987) (60% of female graduate students reported being sexually harassed by a male professor); Margaret Schneider, et al., *Sexual Harassment Experiences of Psychologists and Psychological Associates During their Graduate School Training*, 11 CANADIAN J. HUM. SEXUALITY 159, 164 (2002) (75% of female and 60% of male psychology doctoral students reported at least one type of sexual harassment by a male faculty member).
47. Regarding faculty norms and attitudes, Fitzgerald et al.’s survey of male faculty at one research university found that twenty-six of 235 respondents (11%) admitted they had “attempted to stroke, caress or touch female students” but only one of 235 respondents (0.4%) “believed he had ever sexually harassed a student.” Louise F. Fitzgerald et al., *Academic Harassment—Sex and Denial in Scholarly Garb*, 12 PSYCHOL. WOMEN Q. 329, 332 (1988). In academia today, faculty norms disapproving of sexual harassment of students appear to be both deeper and more widespread. *See, e.g.*, JOHN M. BRAXTON ET AL., PROFESSORS BEHAVING BADLY: FACULTY MISCONDUCT IN GRADUATE EDUCATION 101, 124-25 (2011).
48. 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

of repeat offending with regard to criminal sexual violence.⁴⁹ 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 sexual contact” up to and including rape,⁵⁰ and sexual coercion refers to verbal pressure to obtain sexual contact with an unwilling person.⁵¹ 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.⁵²

Taken together, these studies raise a serious question 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. 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

did not stop the repeated offenders in our sample. Perhaps the discipline costs associated with management’s actions are not sufficient to outweigh the satisfaction of the sexual harasser’s goal attainment”); see also Margaret A. Lucero et al., *An Empirical Investigation of Sexual Harassers: Toward a Perpetrator Typology*, 56 HUM. REL. 1461, 1470 (2003).

49. Nagayama Hall et al., *supra* note 5, at 732 (“[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 5; Cara E. Rabe-Hemp & Jeremy Braithwaite, *An Exploration of Recidivism and the Officer Shuffle in Police Sexual Violence*, 16 POLICE Q. 127, 127 (2013) (finding 41% of police sexual violence cases are committed by recidivist officers who averaged four victims each over a three-year span).
50. Kevin M. Swartout et al., *Trajectories of Male Sexual Aggression From Adolescence Through College: A Latent Class Growth Analysis*, 41 AGGRESSIVE BEHAV. 467, 467 (2015). The article 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. The authors 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.
51. Sarah DeGue et al., *Are All Perpetrators Alike? Comparing Risk Factors for Sexual Coercion and Aggression*, 22 SEXUAL ABUSE 402 (2010).
52. Heidi M. Zinzow, *A Longitudinal Study of Risk Factors for Repeated Sexual Coercion and Assault in U.S. College Men*, 44 ARCHIVES SEXUAL BEHAV. 213, 217 (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.* Repeat offenders were more likely than single-time offenders to engage in SCA of higher severity, and 56% committed subsequent SCA at similar level, or 26% for higher severity levels. *Id.*

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 turned to court opinions in higher education sexual harassment cases, as well as the letters of finding issued by OCR when it completes an investigation under Title IX, to see if these sources could round out the picture provided by the social science literature.

II. Title IX Enforcement Actions Through Private Lawsuits and Office for Civil Rights Investigations

We reviewed sixty-eight cases brought by college or university students, faculty or staff asserting claims of sexual harassment by faculty or staff, as well as seventy OCR or 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*, a seminal case on Title IX liability⁵³) until the present. We identified the court cases by 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.⁵⁴ We identified the OCR investigations by relying first on work done by Dr. Laura Johnson for her dissertation, which coded all OCR investigation resolutions from 1997 to 2011 that are available to the public in an online database maintained by the National Center for Higher Education Risk Management.⁵⁵ We read any resolution letter that Dr.

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

54. JAMES DAVID JORGENSEN, SEXUAL HARASSMENT LITIGATION INVOLVING INSTRUCTORS: BALANCING LEGAL RIGHTS AND RESPONSIBILITIES IN THE COURTS 1993-2013 (2014), <http://ir.uiowa.edu/cgi/viewcontent.cgi?article=5175&context=etd>.

55. LAURA S. JOHNSON, GENDER DISCRIMINATION AND TITLE IX IMPLEMENTATION: LESSONS FROM THE OFFICE FOR CIVIL RIGHTS RESOLUTION LETTERS 1997-2011 (2015), http://uknowledge.uky.edu/cgi/viewcontent.cgi?article=1034&context=epc_etds. Through a Freedom of Information Act request, the National Council for Higher Education Risk Management collected and has made available a data set with a large number of OCR Title IX sexual-misconduct-related resolution letters issued between 1997 and 2011, and Dr. Johnson examined 141 useable OCR resolution letters in the NCHERM data set for her dissertation. NCHERM, *U.S. Department of Education: Title IX Office for Civil Rights (OCR) Case Letter Database*, <https://www.ncher.org/resources/legal-resources/ocr-database/> (last visited Apr. 27, 2017).

Johnson coded as alleging faculty harassment of students. For cases in 2011 and afterward, we read all of the resolution letters dated from then to October 2016 that were available in the *Chronicle of Higher Education's* "Title IX Tracker" database.⁵⁶ Of the eighteen cases in the Title IX Tracker database, six mentioned faculty harassment and were included in the seventy OCR or DOJ resolutions we reviewed for this project.

Of the sixty-eight court cases, forty-two involved accusations by student plaintiffs against faculty, and the remainder involved faculty, staff, or students bringing claims of sexual harassment against either a faculty member or other employee such as a coach or nonfaculty administrator (but not in the configuration of a student plaintiff accusing a faculty member).⁵⁷ The forty-two student plaintiff cases included thirty-five that met two baseline criteria required for them to be useful to this project. First, these thirty-five cases discussed the complained-of conduct in sufficient detail to allow us to collect at least enough factual allegations to analyze the type of harassment involved. Second, in each of these thirty-five cases, the court discussed at least some evidence supporting the plaintiff's allegations.

Of the seventy OCR 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 forty-two court cases and the seventy OCR or DOJ resolution letters are listed in Tables 1A and 1B, respectively, at the end of this article.

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 reported harassment.

56. *Title IX: Tracking Sexual Assault Investigations*, TITLE IX: THE CHRONICLE OF HIGHER EDUCATION, <http://projects.chronicle.com/titleix/> (last visited Dec. 15, 2016). This resource includes all materials that the *Chronicle of Higher Education* has received (including other documents besides resolution letters) in response to its Freedom of Information Act requests of the Department of Education.

57. 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 their tenure status. 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 appointments for a set number of years while they remain members of the faculty.

In considering these cases, we focused on the factual allegations made by the plaintiffs, rather than the courts' legal conclusions, for several reasons. First, 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, it is difficult if not impossible to draw general legal conclusions from the group of cases as a whole,⁵⁸ a difficulty exacerbated by the liability standard adopted by the 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 VII 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.⁵⁹ The cases among the thirty-five discussed here where the court applies the *Gebser* standard do not add anything new to that discussion or critique, other than providing additional examples confirming the accuracy of the critique. Third, OCR investigations use a different standard than *Gebser*,⁶⁰ so the OCR investigations would present yet another standard to factor into the mix.

Last and most significant, hostile environment sexual harassment 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 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

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

59. See, e.g., Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038 (2016); 2 WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION 1118-124 (5th ed. 2013); Cantalupo, *supra* note 22; Deborah L. Brake, *Title IX as Pragmatic Feminism*, 55 CLEV. ST. L. REV. 513 (2007). Many of these critiques reference the eloquent dissenting opinion in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 293 (1998) (Stevens, J., dissenting).

60. See OCR REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 14, at 12-14; KAPLIN & LEE, *supra* note 60, at 1124.

not sufficiently severe or pervasive to constitute hostile environment sexual harassment, the school's response was still inadequate. For all these reasons, in mapping the iceberg of faculty sexual harassment, it is most 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.⁶¹

The factual allegations demonstrated 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 sixty-seven percent (forty-eight specific incidents) of the seventy-two reported incidents involved allegations of sexual harassment that included unwelcome sexual touching ranging from hugs and kisses to sexual groping, coercive sexual intercourse, forcible rape, and the kinds of physical assaults and/or psychologically abusive and controlling behavior often associated with domestic violence (see Figure 2A).⁶² When categorized based on the severity of the physical conduct discussed in each case, the fewest number of cases (only seven, or fifteen percent of the forty-eight 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).⁶³ The midrange of the conduct spectrum, often described as inappropriate touching or groping, makes up twenty-four (fifty percent) of the forty incidents.⁶⁴ At the most severe end, thirty-five percent, or seventeen cases, involved reports of potentially

61. Because both the legal cases and OCR/DOJ investigations we reviewed represent the tip of the iceberg, it is not safe to assume that these data are drawn from representative (random) samples in American society. See Cass R. Sunstein & Judy M. Shih, *Damages in Sexual Harassment Cases*, in *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 seventy 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.”); John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 *STAN. L. REV.* 983 (1991). Thus, it is quite plausible that these litigated cases resulting in judicial opinions may contain higher proportions of recidivist and high-severity cases compared with cases that reached early settlement without a judicial opinion, and all litigated cases may differ in aggregate patterns compared with cases that were never litigated, and so on. Likewise, in the OCR investigations it is possible that the cases with sufficient factual description to determine the presence/absence of recidivism may differ from the OCR investigations where the factual description is too sparse to include in our analysis of recidivism patterns. See Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 *CORNELL L. REV.* 548, 559 (2001) (underscoring a very similar point about litigated sexual harassment cases and what information judges decide to include/exclude in their legal opinions).

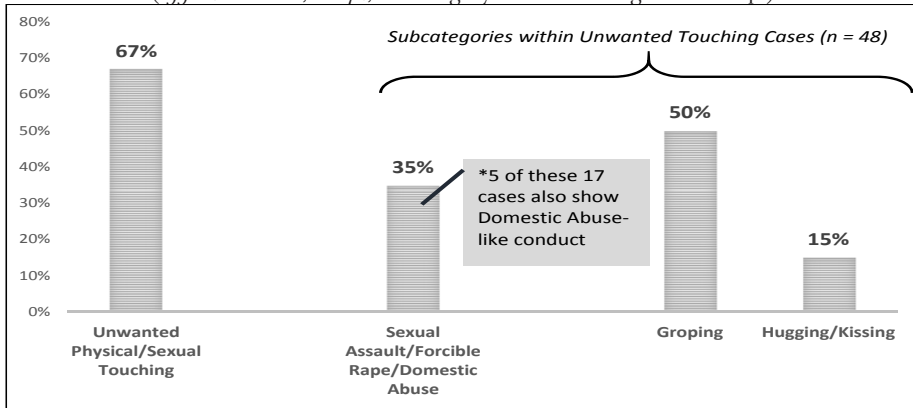
62. Title IX court cases 3, 4, 5, 6, 8, 9 (counted as one case, but includes separate lawsuits claiming sexual harassment by nine plaintiffs, ranging from sexual comments to forcible rape by one professor and one other employee who might be a professor), 11, 13, 15, 17, 21, 23, 26, 27, 29, 32, 33, 37, 39, 40, 41. OCR/DOJ Letters of Finding 1, 8, 22, 23, 26, 27, 43, 49, 51, 52, 60.

63. Title IX court cases 3, 8, 13.

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

criminal sexual and physical violence.⁶⁵ In five of these seventeen cases, the victims alleged facts that looked similar to those typical of domestic abuse: physical assaults, such as punching,⁶⁶ verbal, psychological and emotional abuse,⁶⁷ sexual abuse,⁶⁸ and controlling behaviors.⁶⁹

Figure 2A: 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 cases⁷⁰ and forty-eight OCR resolutions⁷¹ 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 the unwelcome sexual conduct did not rise to the level of severity or pervasiveness considered to create a hostile environment. 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.⁷²

Finally, and most importantly for this article, within this set of court cases and OCR resolutions the rates of reported serial harassment by faculty are quite high (see Figure 2B). When we include two court cases⁷³ and three OCR

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

66. Title IX court case 26.

67. Title IX court cases 26, 27, 37.

68. Title IX court cases 4, 27, 37.

69. Title IX court cases 4, 27, 29.

70. Title IX court cases 2, 7, 10, 24, 25, 34, 38.

71. OCR/DOJ Letters of Finding 2, 4-7, 9-11, 13-15, 18-19, 21, 24, 28-36, 38, 40-42, 44-48, 50, 53-59, 61-63, 65-68.

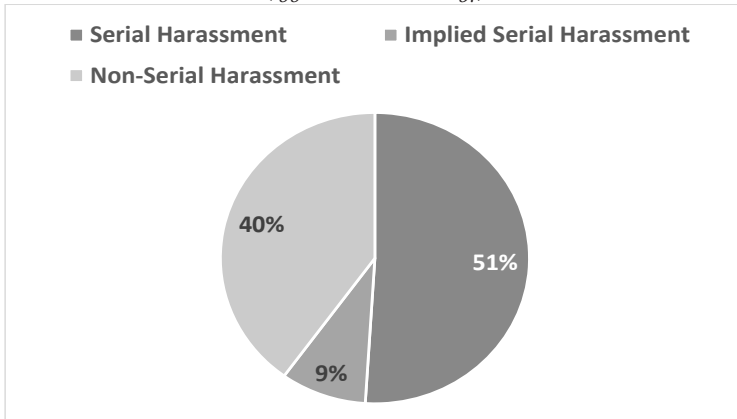
72. Somewhat in parallel, in Section III below on termination cases, a fair number of fired professors who sue claim discrimination and they too have low probabilities of success on such claims.

73. Title IX court cases 13, 23.

cases⁷⁴ 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,⁷⁵ 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 harassment⁷⁶ and three more complained of conduct from which serial harassment could be inferred.⁷⁷ 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 reported 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 2B: Prevalence of Serial Harassment by Faculty in Litigated Cases and OCR Complaints

(1998-2016 cases, n = 57)



These cases often show that the alleged harasser has a standard method for targeting victims.⁷⁸ In addition, in several of these cases, the faculty member's reported tendencies to harass appear to be "open secrets," with some harassers going as far as making public statements to classes of students that they would face no discipline for their harassment.⁷⁹ Third, the courts or OCR often noted

74. OCR/DOJ Letters of Finding 37, 64, 70.

75. 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.

76. OCR/DOJ Letters of Finding 3, 8, 26, 49, 51, 60.

77. OCR: 27, 64, 70.

78. Title IX court cases 4, 9, 39, 41.

79. Title IX court cases 22, 28. OCR/DOJ Letters of Finding 3, 8, 24, 26. Likewise, Lerman's *Journal of Legal Education* essay on misconduct toward law students includes anecdotal examples of law professors who don't make any "effort to hide" their inappropriate sexual behavior with students, causing a corresponding lack of confidence in the integrity of the university administrators at that law school. Lerman, *supra* note 11, at 94-95.

the alleged serial harassers' generally sexist attitudes in these cases.⁸⁰ Finally, in several cases the reported faculty harasser was allowed to resign before any disciplinary action could be taken, or the school's response facilitated the accused harasser's move to another school, demonstrating the "pass the harasser" phenomenon discussed in the hearings on Congresswoman Speier's bill, discussed above.⁸¹

III. Litigated Faculty Termination Cases

In this section we look at cases in which faculty members were terminated (in part or entirely) for sexually harassing conduct. Once again, we focused in these cases on the factual allegations that gave rise to college and university termination proceedings rather than the court's legal findings. As in the Title IX enforcement section above, we emphasize the underlying facts because the legal analysis of plaintiffs' claims alleging breach of contract, due process violations, or discrimination suggests they generally are not germane to the underlying facts about sexually harassing conduct. There are exceptions to this generalization that we note along the way (e.g., where the court comments on Title IX), but we found that such instances were not frequent enough to justify taking an approach different from the one in Section II.

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) are among the most difficult experiences one is likely to encounter in the academy,⁸² so it is perhaps not surprising that faculty terminations are rare in U.S. higher education; the reasons extend beyond the mere fact that faculty are generally afforded high levels of due process protections.

Table 2 at the end of this article 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 Table 2 we tried not to "pad the stats" with the significant number of doctrinally easier sexual harassment termination cases that withstood

80. Title IX court cases 11, 18, 20, 22, 23. OCR/DOJ Letters of Finding 26, 64

81. 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, 8:44 PM), <http://www.cnn.com/2016/09/30/us/astronomy-sexual-harassment/>.

82. 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.C. & U.L. 419, 419 (1983-1984) ("One of the most difficult personnel actions that a college or university can take is to terminate the employment of a tenured faculty member for cause. The emotional repercussions of such actions often extend far beyond the terminated faculty member.").

legal challenges from non-tenure-track faculty or part-time instructors.⁸³ We included a few “wobbler” cases, noted in the footnotes, and we excluded the following types of cases from Table 2:

- Athletic coaches with academic appointments fired for sexually inappropriate behavior;⁸⁴
- Cases in which a harasser was removed from a dean’s position or other administrative position but was not fired as a faculty member;⁸⁵
- Cases in which the initial disciplinary charges alleged sexual harassment, but the termination was ultimately based only upon other misconduct;⁸⁶
- Cases in which the faculty member preemptively initiated litigation defending against sexual harassment allegations while still an employee, then eventually resigned when termination appeared inevitable.⁸⁷ However, we included two cases that had characteristics of constructive discharge—in which the faculty member was charged with sexual harassment, then resigned, and later challenged the resignation before or after it became effective.⁸⁸

Turning to factual patterns in the cases, here our presentation does not exactly mirror Section II because it is the fired faculty member who is driving the presentation of the facts in the lawsuit, and therefore it is not surprising if details about the underlying conduct are 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 nonmoving party.

A late 1990s case included in both Sections II and III illustrates this divergence. It is exceptional in that there happened to be a lawsuit from one of the student victims of sexual harassment as well as a lawsuit from

83. *See, e.g.*, *Scallett v. Rosenblum*, No. 96-1138, 1997 WL 33077 (4th Cir. Jan. 29, 1997); *Vega v. Miller*, 273 F.3d 460 (2d Cir. 2001); *Salinas v. Univ. of Tex. Pan Am.*, 74 Fed. App’x 311 (5th Cir. 2003); *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667 (7th Cir. 2006); *Cockburn v. Santa Monica Cmty. Coll. Dist. Pers. Comm’n.*, 207 Cal. Rptr. 589 (Cal. Ct. App. 1984).
84. *Deli v. Univ. of Minn.*, 511 N.W. 2d 46 (Minn. Ct. App. 1994) (finding the university had “just cause” under the academic staff policy to terminate employment).
85. *See, e.g.*, *McLaurin v. Clarke*, No. 96-16823, 1997 WL 800243 (9th Cir. Dec. 17, 1997). 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.
86. *Kostic v. Tex. A&M Univ.-Commerce*, 11 F.Supp.3d 699, 731 (N.D. Texas 2014).
87. Jason Meisner, *Northwestern Professor Accused of Sexual Harassment Resigns*, CHICAGO TRIBUNE (Nov. 3, 2015, 8:04 PM), <http://www.chicagotribune.com/news/local/breaking/ct-northwestern-university-peter-ludlow-resigns-20151103-story.html>; *Ludlow v. Northwestern Univ.*, 79 F. Supp. 3d 824 (N.D. Ill. 2015) (dismissing the Professor’s Title IX, defamation and false light claims against the University).
88. *Levenstein v. Salafsky*, 414 F.3d 767 (7th Cir. 2005) (discussing due process and constructive discharge claims); *Levenstein v. Salafsky*, 164 F.3d 345 (7th Cir. 1998) (discussing whether there was qualified immunity); *Van Arsdel v. Tex. A&M Univ.*, 628 F.2d 344 (5th Cir. 1980).

the faculty member fired for that very same sexual harassment. 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 context, the faculty termination case includes more factual description than several of the cases because it included a legal claim for false light defamation. Also, the former student received a substantial jury verdict award (stemming from the professor's conduct) that was upheld by the state Supreme Court.⁸⁹

Student Victim Case:	Faculty Termination Case:
<p>Title IX Court Case 37, Table 1A:90 “The defendants do not dispute that in the summer of 1990, [the professor] began a pattern of sexual harassment and intimidation of the plaintiff. [His] 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. [His] 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 [the professor’s] advances, he would become angry, yell at her, and threaten to make her life very difficult. [He] 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.”</p>	<p><i>Faculty Termination Case 12, Table 2:91</i> “[General Counsel and the Dean of Students] met with [the student] at [] office on December 1, 1993. [the student] related a series of events of a sexual nature with [the professor] between the fall of 1990 and the summer of 1992.” The professor “argues that [the President’s] decision to dismiss him based on [the student’s] charges, and influenced by [other complainants’] charges, was lacking in factual support and was therefore arbitrary. He contends that his polygraph results so undermined [the student’s] credibility that [the President] had no basis to believe her. [The President] also characterizes [the student’s] charges as trivial: ‘a tepid, almost bumbling affair’⁹²</p>

89. Faculty Termination Case 12, Table 2. The case is unusual in other respects, including that the faculty member 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 the student’s Title IX complaint because she was no longer a student. This case is a bit of a “wobbler” in categorizing it as a case in which 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. There is no record of an ultimate court action and presumably the case settled at some point without the faculty member being reappointed to the faculty.
90. *Schneider v. Plymouth State Coll.*, 144 N.H. 458, 460 (1999).
91. *Young v. Plymouth State Coll.*, No. 96-75-JD, 1999 WL 813887, at *2 (D.N.H. 1999).
92. *Id.* at *9.

With the aforementioned provisos, the primary theme of the Title IX enforcement actions in Section II that we found repeated here was the tendency for the faculty accused of sexual harassment to face accusations of serial harassment. Indeed, twenty-three of the twenty-six termination cases (eighty-eight percent) in Table 2 included indicators of serial sexual harassment by the fired faculty member, with only three cases involving single victims.⁹³ That does not mean that in all twenty-three cases the professor was fired *because* evidence of repeat sexual harassment went before the board of trustees or final decision-maker. Rather, given our focus (noted earlier) on the factual descriptions rather than legally relevant findings in the cases, we also included in the twenty-three a handful of cases in which termination occurred because of one substantiated charge of sexual harassment but earlier incidents and student victims were mentioned in the record (e.g., an earlier reprimand letter, other student reports and complaints that were or were not investigated).⁹⁴ 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 of the continuum (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.

The sparse factual descriptions in the Table 2 termination cases also made it somewhat less feasible to repeat the category typology used earlier in Figure 2A (groping, domestic-abuse-like conduct, etc.). Rather, we simply note that in only three to five of the twenty-six cases (eleven percent to nineteen percent) does it appear more likely than not that the sexual harassment comprised verbal conduct alone.⁹⁵ In addition, whereas a couple of Title IX

93. Faculty Termination Cases 1, 19, 24.

94. For example, the *Haegert* case (Faculty Termination Case 5) stands for the doctrinal proposition that a single incident of sexual harassment can be sufficient to warrant termination. *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.”). However, we categorize *Haegert* as a serial harassment case based on the factual description that makes clear there were many earlier student complaints of varying degrees of formality. *Haegert* involved a senior faculty member in the English department who sexually harassed and humiliated his younger female department chair. None of the earlier student's 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.

95. Faculty Termination Cases 4, 9, and 15 are pure verbal conduct cases, whereas Faculty Termination Cases 10 and 24 are more ambiguous. For example, in Faculty Termination Case 4, the conduct in 2010 at a Madrid study-abroad trip was verbal, including the remark 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 (Pa. Commw. Ct. 2013). But in an earlier incident in 2006, the faculty member is simply described as having been “reprimanded for sexually harassing a student,” *id.* at 356,

actions discussed above indicated that the alleged faculty harasser bragged to his classes about his institution not disciplining him,⁹⁶ the apparent power of many faculty harassers within their institutions seems to have led them to feel both invulnerable and safe in engaging in bullying behaviors toward both victims and bystanders.⁹⁷ This willingness to pursue failing claims for as long as a decade undoubtedly fuels the “pass the harasser” phenomenon mentioned earlier in the introduction, as it is likely much quicker and cheaper to get rid of faculty harassers in this way than to deal with years of litigation brought by terminated faculty.

The psychological inclinations 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, even in light of the highly unfavorable (to terminated faculty) win-loss record of these cases. Indeed, one key finding from Table 2 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 seventy-seven percent). It is also highly significant⁹⁸ that ten federal appellate court rulings affirm faculty terminations for sexual harassment (eleven if counting a Sixth Circuit slip opinion issued in April 2017, after our initial cut-off date), versus zero federal appellate cases in the other direction. Our conclusion that cases upholding faculty sexual harassment terminations strongly predominate is consistent with earlier reviews based on a much smaller number of cases.⁹⁹

In the empirical and economic literature on litigation, one exception to the classic Priest-Klein¹⁰⁰ hypothesis that equilibrium win-loss rates should approximate fifty-fifty is found when there are systemic asymmetries in information (or the ability to process and be influenced by objective information) such that a party is consistently and stubbornly unrealistic

so it is not clear if that was also only verbal harassment. Whether the conduct in Faculty Termination Cases 10 and 24 was only verbal is less certain. Three dissenting justice in the *Chan* (Faculty Termination Case 24) case noted that the professor engaged in “both *quid pro quo* and hostile environment sexual harassment” that was “blatant” and a “grievous abuse of power” with a vulnerable female foreign student, which is suggestive of conduct that may be more than just verbal. *Chan v. Miami Univ.*, 652 N.E.2d 644, 651 (Ohio 1995).

96. See OCR/DOJ Letter of Finding 26, at 9.
97. 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).
98. We refer to jurisprudence and practical significance, not statistical significance.
99. See, e.g., Walter B. Connelly, Jr. & Alison B. Marshall, *Sexual Harassment of University or College Students by Faculty Members*, 15 J.C. & U.L. 381, 395 (1989); Burton M. Leiser, *Threats to Academic Freedom and Tenure*, 15 PACE L. REV. 15, 17 (1994).
100. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

in evaluating the prospects of a success in the courts.¹⁰¹ Given the brazen quality of the serial harassment shown in these cases and hinted at in Section II, as well as some faculty harassers' overconfidence about being immune from punishment, it is not surprising that faculty members fired for sexual harassment will frequently cling to unrealistic notions that they will be and deserve to be vindicated in the courts. Likewise, 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 than fired sexual harassers in other “at will” employment sectors.¹⁰²

Conclusion

The map we've drawn of faculty sexual harassment of students, drawing from the cases visible above the waterline on our iceberg, shows a picture at odds with assumptions about what faculty sexual harassment of students looks like. First, a sizable majority of the cases resolved by OCR investigations or decided in court involve physical contact rather than purely verbal conduct, contrasting somewhat with the AAU survey in which the large bulk of sexual harassment is purely verbal conduct and/or electronic communication.¹⁰³ Our samples of court cases and OCR complaints are modest in number (especially compared with the large-scale AAU survey), and the 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 selection effects and like phenomena may plausibly explain this paradoxical divide between our case findings and the patterns observed in the AAU survey. But it is still noteworthy that the court and OCR cases show that most

101. Steven Shavell, *Any Frequency of Plaintiff Victory at Trial is Possible*, 25 J. LEGAL STUD. 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 & Henry S. Farber, *The Litigious Plaintiff Hypothesis: Case Selection and Resolution*, 28 RAND J. ECON. S92 (1997) (analyzing case selection); Theodore Eisenberg & Michael Heise, *Plaintiphobia in State Courts? An Empirical Study of State Court Trials on Appeal*, 39 J. LEGAL STUD. 121 (2009) (analyzing appellate selection).

102. Priest & Klein, *supra* note 100, 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.”). To be clear, our observation here refers to cases at the far edge of the misconduct continuum, and we do not intend this point to be a reason to attack the institution of faculty tenure.

103. In the AAU methodology report the authors emphasize that “[m]ore globally, the AAU survey put more emphasis on verbal and written behaviors than the other surveys” and that other behaviors are pushed into different categories of unwanted sexual contact/coercion and stalking rather than being folded into the sexual harassment category. CANTOR ET AL., METHODOLOGY REPORT *supra* note 42, at 5-10 and 5-11. These points are consistent with our more general observation that the difference between our study and the AAU sexual harassment survey presents a paradox but not a contradiction.

faculty whose conduct meets the definition for sexual harassment tend not to perpetrate purely verbal harassment but to initiate physical contact with the student(s) they are reportedly harassing. This finding questions the extent to which the reporting of faculty sexual harassment has the negative impact on faculty's academic freedom and speech rights that such reporting is often assumed to have, since once physical contact has occurred, the faculty member has engaged in conduct, not speech.¹⁰⁴

Second, that so many of these cases involve serial harassers, bullying, intimidation and/or "open secret" environments indicates a need, in particular, for colleges and universities to take reports of faculty harassment very seriously, to track reports in such a way that repeat harassers can be identified, and to meaningfully sanction faculty found to have sexually harassed a student. This map should also aid a reexamination of our conceptions of whether and what type of sanctions should be adopted in these cases and help us 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 larger project. Finally, we hope that this project will inspire more empirical research on graduate students' experiences generally and on measuring sexually harassing conduct that meets the criteria of sexual harassment's legal standard.

104. For example, in Faculty Termination Case 9, 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.,* *Aguilar v. Avis Rent a Car System Inc.*, 2187 Cal. Rptr 2d 132 (Cal. 1999); *see* Letter from Catherine E. Lhamon to Honorable James Lankford, U.S. DEP'T OF EDUC. (Feb. 17, 2016), <http://www.chronicle.com/items/biz/pdf/DEPT.%20of%20EDUCATION%20RESPONSE%20TO%20LANKFORD%20LETTER%202-17-16.pdf>.

Table 1A: Title IX Court Decisions and OCR or DOJ Letters of Finding, 1998-2016

(alphabetically by plaintiff or educational institution)

Title IX Court Cases	
1.	<i>Abramova v. Albert Einstein Coll. of Med.</i> , 278 F. App'x 30 (2d Cir. 2008)
2.	<i>Adusumilli v. Illinois Inst. of Tech.</i> , No. 98-3561, 1999 WL 528169 (7th Cir. 1999)
3.	<i>Aguilar v. Corral</i> , No. Civ. S-07-1601 lkk/kjm2007 WL 2947557 (E.D. Cal. Oct. 9, 2007)
4.	<i>Burtner v. Hiram Coll.</i> , 9 F. Supp. 2d 852 (N.D. Ohio 1998)
5.	<i>Campisi v. City Univ. of N.Y.</i> , No. 15 Civ. 4859 (KPF), 2016 WL 4203549 (S.D.N.Y. Aug. 9, 2016)
6.	<i>Cox v. Sugg</i> , 484 F.3d 1062 (8th Cir. 2007)
7.	<i>Currie v. Maricopa Cty. Cmty. Col. Dist.</i> , No. CV-07-2093-PHX-FJM, 2008 WL 2512841 (D. Ariz. Nov. 12, 2008)
8.	<i>Delgado v. Stegall</i> , 367 F.3d 668 (7th Cir. 2004)
9.	<i>Does v. Rust Coll.</i> , 2015 U.S. Dist. LEXIS 72312 (N.D. Miss. June 4, 2015 (surviving case from those brought by eight plaintiffs in decisions: <i>Doe v. Rust Coll.</i> , 2015 U.S. Dist. LEXIS 129232 (N.D. Miss. Sept. 25, 2015); <i>Doe v. Rust Coll.</i> , 2015 U.S. Dist. LEXIS 34363 (N.D. Miss. Mar. 19, 2015)); <i>Doe v. Rust Coll.</i> , 2015 U.S. Dist. LEXIS 34371 (N.D. Miss. Mar. 19, 2015); <i>Doe v. Rust Coll.</i> , 2015 U.S. Dist. LEXIS 34368 (N.D. Miss. Mar. 19, 2015); <i>Doe v. Rust Coll.</i> , 2015 U.S. Dist. LEXIS 34397 (N.D. Miss. Mar. 19, 2015); <i>Doe v. Rust Coll.</i> , 2015 U.S. Dist. LEXIS 34398 (N.D. Miss. Mar. 19, 2015); <i>Doe v. Rust Coll.</i> , 2015 U.S. Dist. LEXIS 34399 (N.D. Miss. Mar. 19, 2015); <i>Doe v. Rust Coll.</i> , 2015 U.S. Dist. LEXIS 34416 (N.D. Miss. Mar. 19, 2015))
10.	<i>Elgamil v. Syracuse Univ.</i> , No. 99-CV-611 NPMGLS, 2000 WL 1264122 (N.D.N.Y. Aug. 21, 2000)
11.	<i>Escue v. N. Okla. Coll.</i> , 450 F.3d 1146 (10th Cir. 2006)
12.	<i>Esposito v. Hofstra Univ.</i> , No. CV 11-2364, 2012 WL 607671 (E.D.N.Y. Feb. 24, 2012)
13.	<i>Frederick v. Simpson Coll.</i> , 149 F. Supp. 2d 826 (S.D. Iowa 2001)
14.	<i>Gjeka v. Del. Cty. Cmty. Coll.</i> , No. 12-4548, 2013 WL 2257727 (E.D. Pa. May 23, 2013)
15.	<i>Gonzales v. N.C. State Univ.</i> , 659 S.E.2D 9 (N.C. CT. APP. 2008)
16.	<i>Gretzinger v. Univ. of Haw. Profl Assembly</i> , No. 97-15123, 1998 WL 403357 (9th Cir. July 7, 1998)
17.	<i>Ha v. Northwestern Univ.</i> , 2014 WL 5893292 (N.D. Ill. Nov. 13, 2014)
18.	<i>Hayut v. State Univ. of N.Y.</i> , 352 F.3d 733 (2d Cir. 2003)
19.	<i>Hendrichsen v. Ball State Univ.</i> , 107 Fed. App'x. 680 (7th Cir. 2004)
20.	<i>Hernandez-Loring v. Universidad Metropolitana</i> , 233 F.3d 49 (1st Cir. 2000)
21.	<i>Hunt v. Forbes</i> , No. 07-1095, 2010 WL 1687863 (C.D. Ill. Apr. 26, 2010)
22.	<i>Hurd v. Del. State Univ.</i> , No. 07-117-MPT, 2008 WL 4369983 (D. Del. Sept. 25, 2008)
23.	<i>Johnson v. Galen Health Insts., Inc.</i> , 267 F. Supp. 2d 679 (W.D. Ky. 2003)
24.	<i>Johnson v. N. Idaho Coll.</i> , 350 Fed. App'x 110 (9th Cir. 2009)
25.	<i>Kraft v. Yeshiva Univ.</i> , No. 00 Civ. 4899(RCO), 2001 WL 1191003 (S.D.N.Y. Oct. 5, 2001)
26.	<i>Large v. Regents of the Univ. of Cal.</i> , No. 2:08-cv-02835-MCE-DAD, 2012 WL 3647455 (E.D. Cal. Aug. 22, 2012)
27.	<i>Liu v. Striuli</i> , 36 F. Supp. 2d 452 (D.R.I. 1999)
28.	<i>Mandsager v. Univ. of N.C. at Greensboro</i> , 269 F. Supp. 2d 662 (M.D.N.C. 2003)
29.	<i>Miller v. Kutztown Univ.</i> , No. 13-3993, 2013 WL 6506321 (E.D. Pa. Dec. 11, 2013)
30.	<i>Miles v. N.Y. Univ.</i> , No. 98-9128, 1999 WL 464974 (2d Cir. June 23, 1999)
31.	<i>Morse v. Regents of the Univ. of Colo.</i> , 154 F.3d 1124 (10th Cir. 1998)
32.	<i>Doe v. Norwalk Cmty. Coll.</i> , No. 3:04-cv-1976, 2007 WL 2066496 (D. Conn. July 16, 2007)
33.	<i>Oden v. N. Marianas Coll.</i> , 440 F.3d 1085 (9th Cir. 2006)
34.	<i>Owens v. Dillard Univ.</i> , No. CIV.A. 01-3432, 2002 WL 1822932 (E.D. La. Aug. 8, 2002)
35.	<i>Papelino v. Albany Coll. of Pharm. of Union Univ.</i> , 633 F.3d 81 (2d Cir. 2011)
36.	<i>Pociute v. W. Chester Univ.</i> , 117 Fed. App'x 832 (3d Cir. 2004)

Title IX Court Cases	
37.	<i>Schneider v. Plymouth State Coll.</i> , 144 N.H. 458 (1999)
38.	<i>Shalom v. Hunter Coll. of the City Univ. of N.Y.</i> , No. 13-cv-4667 (SAS), 2014 WL 3955167 (S.D.N.Y. Aug. 13, 2014), aff'g 645 Fed. App'x 60 (2d Cir. 2016)
39.	<i>Takla v. Regents of the Univ. of Cal.</i> , No. 2:15-cv-04418-CAS(SHX), 2015 WL 6755190 (C.D. Cal. Nov. 2, 2015)
40.	<i>Wilborn v. S. Union State Cmty. Coll.</i> , 720 F. Supp. 2d 1274 (M.D. Ala. 2010)
41.	<i>Wills v. Brown Univ.</i> , 184 F.3d 20 (1st Cir. 1999)
42.	<i>Yap v. Northwestern Univ.</i> , 119 F. Supp. 3d 841 (N.D. Ill. 2015)

Table 1B: Faculty Harasser Title IX OCR or DOJ Resolution Letters, 1998-2016

(alphabetically by plaintiff or educational institution)

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

Faculty Harasser Title IX OCR or DOJ Resolution Letters	
1.	<i>Art Institute of Fort Lauderdale</i> : Letter from Thomas Falkinburg to Charles J. Nagele (June 3, 2008)*
2.	<i>Bridgewater State College</i> : Letter from Robert L. Pierce to Dr. Dana Mohler-Faria (Feb. 21, 2003)*
3.	<i>California State University, East Bay</i> : Letter from Stella Klugman to Richard Metz (June 30, 2005)*
4.	<i>California State University, Los Angeles</i> : Letter from H. Stephen Deering to Dr. James M. Rosser (Oct. 27, 1999)*
5.	<i>California State University, Northridge</i> : Letter from Robert E. Scott to Jolene Koester (July 4, 2004)*
6.	<i>Central Georgia Technical College</i> : Letter from Gary S. Walker to Dr. Melton Palmer, Jr. (Dec. 16, 2003)*
7.	<i>Central Missouri State University</i> : Letter from Jody A. Van Wey to Judith Penrod Siminoe (Nov. 14, 2001)*
8.	<i>City University of New York, Hunter College</i> : Letter from Timothy C.J. Blanchard to Jennifer J. Raab (Oct. 31, 2016), https://www.documentcloud.org/documents/3211278-Hunter-College-Letter-of-Findings.html
9.	<i>Claremont Graduate School</i> : Letter from Alphas B. Scoggins to Dr. John D. Niaguire (Dec. 31, 1998)
10.	<i>Des Moines University Osteopathic Medical Center</i> : Letter from John E. Nigro to Richard M. Ryan, Jr. (Jan. 3, 2002)*
11.	<i>Florida International University</i> : Letter from Timothy Noonan to Dr. Modesto A. Maidique (Nov. 7, 2008)*
12.	<i>Florida Southern College</i> : Letter from Gary S. Walker to Dr. Thomas Reuschling (Nov. 8, 1999)*
13.	<i>Florida State University</i> : Letter from Arthur Manigault to Dr. Talbot D' Alemberte (Oct. 14, 1999)*
14.	<i>Fox Valley Technical College</i> : Letter from Algis Tamosiunas to Dr. H. Victor Baldi (Apr. 26, 1999)*
15.	<i>Full Sail Real World Education</i> : Letter from Doris N. Shields to Gary Jones (Apr. 28, 2003)*
16.	<i>Georgia State University</i> : Letter from Laura M. Hitt to Carl V. Patton (May 27, 2005)*
17.	<i>Houston Community College System</i> : Letter from John Stephens to Cathy Douse-Harris (June 29, 1998)*
18.	<i>Interdenominational Theological Center</i> : Letter from Cynthia M. Stewart to Dr. Oliver J. Haney (July 2, 2002)*
19.	<i>Lassen Community College</i> : Letter from Charles R. Love to Dr. Homer Cissell (Nov. 28, 2003)*
20.	<i>Las Vegas College</i> : Letter from Gary D. Jackson to Sharon Miller (Nov. 22, 2006)*
21.	<i>Los Angeles Pierce College</i> : Letter from Adriana Cardenas to Maria Soria-Gomes (Dec. 8, 1999)*
22.	<i>Los Angeles Unified School District</i> : Letter from Charles R. Love to Roy Romer (Oct. 31, 2000)*

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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 Ridenour (June 29, 2005)*
25. *Maryland Institute College of Art*: Letter from Brenda E. Johnson to Fred Lazuras, IV (Oct. 24, 2000)*
26. *Merced College*: Letter from Arthur Zeidman to Dr. Benjamin Duran (Dec. 29, 2008)*
27. *Minot State University*: Letter from Adele Rapport to Dr. Steven Shirley (July 7, 2016), <https://www.documentcloud.org/documents/2943508-Minot-State-University-Letter-of-Findings.html>
28. *Missouri Southern State University*: Letter from Alan D. Hughes to Dr. Julio S. Léon (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)*
31. *Newbridge College*: Letter from David Rolandelli to Lisa Rhodes (Oct. 16, 2008)*
32. *North Central Texas College*: Letter from Sandra W. Stephens to Dr. Eddie Hadlock (Oct. 26, 2005)*
33. *Occidental College*: Letter from Laura Faer to Jonathan Veitch (June 9, 2016), <https://www.documentcloud.org/documents/2858210-Occidental-College-Letter-of-Findings.html>
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, 2001)*
39. *Southern Methodist University*: Letter from Charlene F. Furr to R. Gerald Turner (Aug. 1, 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 F. 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 (Jan. 31, 2006)*
50. *University of California, Davis*: Letter from Stephen Chen to Larry N. Vanderhoef (Jan. 9, 2008)*
51. *University of California, Los Angeles*: Letter from Charles R. Love to Albert Carnesale (June 30, 2000)*
52. *University of California, Santa Barbara*: Letter from Robert E. Scott to Dr. Henry T. Yang (July 11, 2000)*
53. *University of Colorado, Boulder*: Letter from L. Thomas Close to Dr. Elizabeth Hofman (Nov. 8, 2000)*
54. *University of Illinois at Springfield*: Letter from Jeffrey Turnbull to Dr. Richard D. Ringeisen (Oct. 10, 2008)*
55. *University of Maryland, Baltimore Campus*: Letter from Wendella P. Fox to Dr. David J. Ramsay (July 16, 2008)*
56. *University of Maryland, Baltimore Campus*: Letter from LouAnn Pearthree to Dr. David J. Ramsay (Feb. 13, 2009)*
57. *University of Maryland, University College*: Letter from Robert Ford to [redacted] (Aug. 15, 2002)*
58. *University of Montana*: Letter from Anurima Bhargava & Gary Jackson to Royce Engstrom (May 9, 2013), <https://www.documentcloud.org/documents/2644791-OCR-Letter-to-the-University-of-Montana.html>

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59.	<i>University of Missouri System</i> : Letter from Jody A. Van Wey to Kathleen Murphy-Markie (April 15, 2003)*
60.	<i>University of New Mexico</i> : Letter from Shaheena Simons & Damon Martinez to Robert G. Frank (Apr. 22, 2016)
61.	<i>University of North Carolina at Chapel Hill</i> : Letter from Sheralyn Goldbecker to Susan Ehringhaus (Dec. 20, 2000)*
62.	<i>University of Southwestern Louisiana</i> : Letter from Charlene F. Furr to Dr. Ray Authement (June 26, 1998)*
63.	<i>University of Tennessee, Knoxville</i> : Letter from Vickie A. Barrows to Catherine Mizell (Nov. 8, 2000)*
64.	<i>University of Texas at Austin</i> : Letter from Vickie L. Johnson to Dr. Larry R. Faulkner (Sept. 27, 2002)*
65.	<i>University of West Florida</i> : Letter from Cynthia M. Stewart to Dr. Morris Marx (Sept. 21, 2000)*
66.	<i>University of West Florida</i> : Letter from Doris N. Shields to Dr. Morris L. Marx (June 25, 2002)*
67.	<i>Vatterott College</i> : Letter from Michael B. Hamilton to John C. Vatterott, Sr. (Dec. 6, 2002)*
68.	<i>Westfield State College</i> : Letter from Robert L. Pierce to Dr. Frederick W. Woodward (Mar. 21, 2003)*
69.	<i>Worcester State College</i> : Letter from J. Michael Burns to Dr. Kalyan K. Ghosh (Apr. 11, 2001)*
70.	<i>Wright Business School (three complaints from related events)</i> : Letter from Jody A. Van Wey to John Mucci (Aug. 4, 2006)*, Letter from Jody A. Van Wey to John Mucci (Aug. 9, 2006)*, Letter from Jody A. Van Wey to John Mucci (Sept. 29, 2006)*

Table 2: Outcomes of Federal and State Judicial Rulings in U.S. Tenure Faculty Sexual Harassment Termination Cases Contested by the Faculty Member
(reverse chronological order)

Terminations Upheld Against Legal Challenge by the Accused Professor	
1.	<i>Winter v. Pa. State Univ.</i> , 172 F. Supp. 3d 756 (M.D. Penn. 2016)
2.	<i>Traster v. Ohio Northern Univ.</i> , No. 3:13 CV 1323, 2015 WL 10739302 (N.D. Ohio Dec. 18, 2015), aff'd, --- Fed.Appx. ---, 2017 WL 1246216 (6th Cir. April 5, 2017)
3.	<i>Francis v. Lehigh Univ.</i> , 561 Fed. Appx. 208 (3d Cir. 2014) ¹⁰⁵
4.	<i>Slippery Rock Univ. of Pa. v. Assn. of Pa. State College and Univ. Faculty</i> , 71 A.3d 353 (Pa. Cmwlth. 2013)
5.	<i>Haegert v. Univ. of Evansville</i> , 977 N.E.2d 924 (Ind. 2012)
6.	<i>Tr. of Ind. Univ. v. Cohen</i> , 910 N.E.2d 251 (Ind. Ct. App. 2009)
7.	<i>Marder v. Board of Regents of Univ. of Wis. System</i> , 706 N.W.2d 110 (Wis. 2005)
8.	<i>Levenstein v. Salafsky</i> , 414 F.3d 767 (7th Cir. 2005)
9.	<i>Trejo v. Shoben</i> , 319 F.3d 878 (7th Cir. 2003)
10.	<i>Murphy v. Duquesne Univ. of The Holy Ghost</i> , 777 A.2d 418 (Pa. 2001)
11.	<i>Tonkovich v. Kansas Bd. of Regents</i> , 159 F.3d 504 (10th Cir. 1998); see also 254 F.3d 941 (10th Cir. 2001)
12.	<i>Young v. Plymouth State College</i> , No. 96-75-JD, 1999 WL 813887 (D.N.H. Sept. 21, 1999)

105. *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 was being taken “advantage of.” *Francis v. Lehigh Univ.*, 561 Fed. Appx. 208, 209 (3d Cir. 2014). 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. *Id.* at 210.

**Terminations Upheld Against Legal Challenge
by the Accused Professor**

13. *Motzkin v. Tr. of Boston Univ.*, 938 F. Supp. 983 (D. Mass. 1996)¹⁰⁶
14. *McDaniels v. Flick*, 59 F.3d 446 (3d Cir. 1995), cert. denied, 516 U.S. 1146 (1996)
15. *Wexley v. Michigan State Univ.* 821 F. Supp. 479 (W.D. Mich. 1993), aff'd 25 F.3d 1052 (6th Cir. 1994)
16. *Corstvet v. Boger*, 757 F.2d 223 (10th Cir. 1985)
17. *Levitt v. Univ. of Texas at El Paso*, 759 F.2d 1224 (5th Cir. 1985), cert. denied, 474 U.S. 1034 (1986)
18. *Korf v. Ball State Univ.*, 726 F.2d 1222 (7th Cir. 1984)
19. *Van Arsdell v. Texas A&M Univ.*, 628 F.2d 344 (5th Cir. 1980)
20. *Lehmann v. Bd. of Trustees of Whitman College*, 576 P.2d 397 (Wash. 1978)

Terminations Overturned and/or Judgment for the Accused Professor

21. *Farahani v. San Diego Cmty. Coll. Dist.*, 96 Cal. Rptr. 3d 900 (Cal. Ct. App. 2009)
22. *Goad v. Virginia Bd. of Medicine*, 580 S.E. 2d 494 (Va. Ct. App. 2003)
23. *Wilson v. Univ. of Tenn. at Chattanooga*, No. M2000-02573-COA-R3-CV, 2001 Tenn. App. LEXIS 942 (Tenn. Ct. App. Dec. 28, 2001)
24. *Chan v. Miami Univ.*, 652 N.E.2d 644 (Ohio 1995)
25. *Brown v. Cal. State Personnel Bd.*, 213 Cal. Rptr. 53 (Cal. Ct. App. 1985)
26. *Téxton v. Hancock*, 359 So. 2d 895 (Fla. Dist. Ct. App. 1978)¹⁰⁷

106. *Motzkin* is also a “wobbler” regarding our tenure-track focus, but he had an associate professor “special appointment” allowing him to focus on a preferred area of teaching rather than research, the “record is unclear” if he was previously on a tenure track, and his special appointment was a three-year contract (an unusual duration compared with nontenured positions). *Motzkin v. Tr. of Boston Univ.*, 938 F. Supp. 983, 986 (D. Mass. 1996).
107. Including the *Téxton* 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.