Faculty Sexual Harassment of Students: Intersectional Perspectives
By Nancy Chi Cantalupo

At almost every campus I have been on, both as a student and faculty member, I have encountered appalling cases of sexual harassment against Asian Pacific and Asian Pacific American women.

-- Professor Sumi K. Cho

Professor Cho makes the above-quoted statement in her powerful 1997 article, Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong, after quoting a letter from a faculty member to a Japanese woman student that included the following "directions" to the student:

I’ll get right to the point, since the objective is to give you, in writing, a clear description of what I desire.... Shave between your legs, with an electric razor, and then a hand razor to ensure it is very smooth.... I want to take you out to an underground nightclub.... Like this, to enjoy your presence, envious eyes, to touch you in public.... You will obey me and refuse me nothing... I was dreaming of your possible Tokyo persona since I met you. I hope I can experience it now, the beauty and eroticism.

In the 20 years since Professor Cho published this article, it is disturbing how relevant it still is.

Recent research on faculty sexual harassment of students, in which I and co-author William C. Kidder sought to “map” the problem, confirms that this harassment is indeed appalling, regardless of the race, ethnicity or other intersectional characteristics of the students who are harassed. Contrary to the public conversation about faculty sexual harassment of students, which often focuses on faculty’s academic freedom and student (over)sensitivity to presentations of certain controversial ideas, all of which involves purely verbal conduct, student victims in faculty sexual harassment cases overwhelmingly allege physical sexual conduct. In addition, the physical sexual conduct alleged tends to be severe, with many more cases alleging overtly sexual conduct ranging from groping to criminal rape and domestic abuse-like conduct, and many fewer cases involving hugging, kissing or other physical contact that might be accidental or easily misinterpreted. Finally, the research on actual faculty sexual

1 Cho, 350
harassment cases demonstrates a high rate of serial harassment, meaning cases where a single faculty member is accused of harassing multiple victims, either multiple students or students combined with others, such as junior faculty or staff.

Nevertheless, viewing this harassment through an intersectional lens increases the Appalling-Factor considerably. The evidence presented to support the complaint against the unnamed faculty member in Professor Cho’s chapter on racialized sexual harassment included allegations that the professor targeted multiple Japanese women, including by the student who brought the complaint in the case and who received the letter quoted above, and that he told the vice president of the Japanese student association that he “hangs around campus looking for Japanese girls... because they were easy to have sex with and because they were submissive.” This evidence suggests that the professor was a serial sexual harasser, putting him in the category of highest concern in my and my co-author’s research, for the simple reason that serial harassers harm more victims than single harassers do.

Professor Cho’s focus in her chapter shows that the greater harm that serial harassers inflict is not the only reason why she has “long been haunted” by that case, and it is certainly not the only reason why it haunts me, too, despite only learning of it from a scholarly article. Moreover, this case is not the only case that I read for our faculty harassment mapping project that continues to haunt me—also for multiple reasons, but I am also going to focus here on one: the evidence presented by these cases that women students of color, particularly certain subgroups under the “women of color” umbrella, are particularly vulnerable to and targeted by faculty sexual harassment.

This greater vulnerability and targeting is highly likely to have a deeply distressing disproportionate impact on the equal educational opportunity of women students of color, i.e. their ability to complete and succeed in school. Diminished educational opportunities and success translate...
into diminished employment opportunities, and lifetime lower earnings and socioeconomic status. In addition, sexual harassment, especially in its more severe forms, subjects its victims to trauma and all of the health, educational and economic consequences of that trauma. Such trauma and its consequences are likely to disproportionately impact women students of color because students of color are more likely to be first-generation college students and/or immigrants, including undocumented “dreamers,” and women students are more likely to have greater family responsibilities, including to their own children. These lesser resources and greater responsibilities mean that these students have less time and space to recover from trauma, creating additional barriers to receiving an equal education and the benefits that come from educational achievement.

The remainder of this article will [roadmap].

I. Faculty Sexual Harassment of Students: the Evidence

The full map of faculty sexually harassing students takes into consideration a number of different sources for determining what kinds of conduct are challenged as harassment, including: (1) social science research; (2) court cases involving claims under Title IX of the Educational Amendments of 1972, the primary federal statute under which students can bring claims against their schools for not adequately responding to or protecting them from sexual harassment; (3) investigations under Title IX by the Office for Civil Rights (OCR) in the U.S. Department of Education; (4) cases under a variety of state and federal laws where a faculty member found responsible for sexually harassing a student is challenging the college’s termination of that faculty member’s employment; and (5) media reports on individual cases of faculty harassing students. Because only the court cases and OCR investigations give information that can sometimes identify the race or ethnicity of the student, this article discusses only data gathered from sources two, three and four listed above.

a. Methodology

The larger mapping project included 164 individual cases that were considered either by a court
or by the Office for Civil Rights and involved faculty sexual harassment, which we narrowed, based on a variety of factors, to 74 cases that we considered in close detail and discuss at greater length in the larger mapping project. Of the 164 total cases, we reviewed 68 cases brought by college or university students, faculty or staff asserting claims of sexual harassment by faculty or staff, 70 OCR or U.S. Department of Justice (“DOJ”) letters of finding involving allegations of faculty harassment of students from 1998 (the year the Supreme Court issued Gebser, the case marking the modern era of Title IX liability\(^4\)) until the present, and 26 cases where tenured or tenure-track faculty were terminated by their institution at least in part for sexually harassing at least one student. We identified the Title IX court cases by shepardizing Gebser and reading all cases citing to Gebser that referred to harassment by a faculty member or another employee, as well as supplementing this list with federal circuit court cases brought by victims alleging sexual harassment between 1998-2013, as collected in Dr. James David Jorgenson’s dissertation.\(^5\) 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 1998-2011 that are available to the public in an online database maintained by the National Center for Higher Education Risk Management.\(^6\) We read any resolution letter that Dr. Johnson coded as alleging faculty harassment of students. For cases in 2011 or afterward, we read all of the resolution letters dated 2011-October

\(^4\) As discussed further below, Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998) involved a teacher’s sexual harassment of a student. The cut-off of 1998 is also the year after OCR first issued sexual harassment guidelines (guidelines that are important even though in Gebser the majority accorded no deference to OCR’s guidance for purposes of damages liability in a Title IX litigation context), discussed infra. 


2016 that were available in the “Title IX Tracker” database developed by the Chronicle of Higher Education, which includes all materials that the Chronicle of Higher Education has received (including other documents besides only resolution letters) in response to its Freedom of Information Act requests of the Department of Education. Of the 18 cases in the Title IX Tracker database as of December 2016, six mentioned faculty harassment and were included in the 70 OCR or DOJ resolutions we reviewed for this project.

We narrowed the 138 Title IX enforcement actions (68 court opinions plus 70 OCR resolution letters) based on two baseline criteria that they had to have in order to be useful to this project. First, they had to discuss the complained-of conduct in sufficient detail to determine at least enough factual allegations to know faculty harassment of a student or students was involved. Second, the allegations discussed in the opinions or letters had to support either an explicit or implied finding that the alleged conduct was sufficiently severe or pervasive to constitute sexual harassment under Title IX.

Based on these criteria, we found that 42 of the 68 court cases 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 non-faculty administrator (but not in the configuration of a student plaintiff accusing a faculty member). The 42 student plaintiff cases included 35 that presented factual allegations of severe or pervasive sexual harassment by faculty. Of the 70 OCR resolution letters involving allegations of faculty harassment of students, again going back to 1998, only thirteen met the two aforementioned baseline criteria. Some

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8 The facts of these court cases or OCR investigations often lacked sufficient detail to determine whether the accused harassers were tenured or tenure-track faculty. Therefore, we included all cases involving university employees who were instructors of students, regardless of whether we could determine if the accused instructor was tenured or tenure-track. We did exclude employees such as administrative staff or coaches who did not appear to play roles primarily involving teaching, with the one exception being deans and other similar high-level administrators who are generally tenured faculty members holding their administrative appointment for a set number of years while they remain a member of the faculty.
of these cases involved reports of faculty harassment in conjunction with peer harassment. The 42 court cases and the 70 OCR or DOJ resolution letters are listed in Table 1 and 2, respectively.

The faculty termination cases listed in Table 3 were selected on slightly different criteria. First, because one of the concerns of the larger mapping project was the extent of termination of the most projected members of the academy, we excluded all those cases involving university employees other than tenure-track or tenured faculty, including:

- Athletic coaches with academic appointments fired for sexually inappropriate behavior;9
- Cases where a harasser was removed as dean or other administrative position but was not fired as a faculty member;10
- Cases where the initial disciplinary charges alleged sexual harassment, but where the termination was ultimately based only upon other misconduct;11
- Cases where the faculty member preemptively initiates litigation defending against sexual harassment allegations while still an employee, then eventually resigns when termination appears to be inevitable. However, we included two cases that had characteristics of constructive discharge—where the faculty member was charged with sexual harassment, then resigned, and later challenged the resignation before or after it became effective.13

Because of the small number of faculty termination cases with which these criteria left us as well as the fact that 1998 does not have the special significance in these cases as with the Title IX enforcement actions, we did not limit inclusion of the faculty termination cases to 1998 or afterwards and have included cases as early as 1978.

Table 1: Title IX Court Decisions and OCR or DOJ Letters of Finding, 1998–2016
(alphabetically by plaintiff or educational institution)

<table>
<thead>
<tr>
<th>Title IX Court Cases</th>
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<tr>
<td>Deli v. Univ. of Minn., 511 N.W. 2d 46 (Minn. App. 1994) (coaches terminated under academic staff policy, university found to have &quot;just cause&quot; for the terminations).</td>
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<td>See, e.g., McLaurin v. Clarke, 133 F.3d 928, 1997 WL 800243 (9th Cir. 1997) (unpublished table decision). The logic for this exclusion is that faculty administrative appointments are typically &quot;at will&quot; or approximately so, and do not implicate rights and privileges of an underlying faculty appointment.</td>
</tr>
<tr>
<td>Levenstein v. Salafsky, 414 F.3d 767 (7th Cir. 2005); see also 164 F.3d 345 (7th Cir. 1998); Van Arsdel v. Tex. A&amp;M Univ., 628 F.2d 344 (5th Cir. 1980).</td>
</tr>
</tbody>
</table>
6. Cox v. Sugg, 484 F. 3d 1062 (8th Cir. 2007).
16. Gretzinger v. Univ. of Haw. Prof'l Assembly, 156 F.3d 1236 (9th Cir. 1998).
31. Morse v. Regents of the Univ. of Colo., 154 F.3d 1124 (10th Cir. 1998).
33. Oden v. N. Marianas Coll., 440 F.3d 1085 (9th Cir. 2006).
35. Papelino v. Albany Coll. of Pharm. of Union Univ., 653 F.3d 81 (2d Cir. 2011).

Table 2: 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.ncherm.org/resources/legal-resources/ocr-database/)

| 1. | Art Institute of Fort Lauderdale: Letter from Thomas Falkinburg to Charles J. Nagele (June 3, 2008)* |
| 2. | Bridgewater State College: Letter from Robert L. Pierce to Dr. Dana Mohler-Faria (Feb. 21, 2003)* |
| 3. | California State University, East Bay: Letter from Stella Klugman to Richard Metz (June 30, 2005)* |
| 4. | California State University, Los Angeles: Letter from H. Stephen Deering to Dr. James M. Rosser (Oct. 27, 1999)* |
| 5. | Central Georgia Technical College: Letter from Gary S. Walker to Dr. Melton Palmer, Jr. (Dec. 16, 2003)* |
| 6. | Central Missouri State University: Letter from Jody A. Van Wey to Judith Penrod Siminoe (Nov. 14, 2001)* |
| 9. | Des Moines University Osteopathic Medical Center: Letter from John E. Nigro to Richard M. Ryan, Jr. (Jan. 3, 2002)* |
| 10. | Florida International University: Letter from Timothry Noonan to Dr. Modesto A. Maidique (Feb. 7, 2008)* |
| 11. | Florida Southern College: Letter from Gary S. Walker to Dr. Thomas Rauschling (Nov. 8, 1999)* |
| 12. | Florida State University: Letter from Arthur Manigault to Dr. Talbot D. Alemberte (Oct. 14, 1999)* |
| 13. | Fox Valley Technical College: Letter from Algis Tamuzsiunas to Dr. H. Victor Baldi (Apr. 26, 1999)* |
| 14. | Full Sail Real World Education: Letter from Doris N. Shields to Gary Jones (Apr. 28, 2003)* |
| 15. | Georgia State University: Letter from Laura M. Hitt to Carl V. Patton (May 27, 2003)* |
| 16. | Houston Community College System: Letter from John Stephens to Cathy Douse-Harris (June 29, 1998)* |
| 17. | Interdenominational Theological Center: Letter from Cynthia M. Stewart to Dr. Oliver J. Haney (July 2, 2002)* |
| 18. | Lassen Community College: Letter from Robert E. Scott to Dr. Homer Cissell (Mar. 21, 2007)* |
| 19. | Las Vegas College: Letter from Gary D. Jackson to Sharon Miller (Nov. 22, 2006)* |
| 20. | Los Angeles Pierce College: Letter from Adriana Cardenas to Maria Soria-Gomes (Dec. 8, 1999)* |
| 22. | Louisiana Technical College: Letter from Sandra W. Stephens to Dr. Margaret Montgomery-Richards (June 9, 2006)* |
| 23. | Marian College of Fond du Lac: Letter from Madonna T. Lechner to Dr. Richard Ridlenour (June 29, 2005)* |
| 24. | Maryland Institute College of Art: Letter from Brenda Johnson to Fred Lazuras, IV (Oct. 24, 2000)* |
| 25. | Merced College: Letter from Arthur Zeidman to Dr. Benjamin Duran (Oct. 29, 2008)* |
| 27. | Missouri Southern State University: Letter from Alan D. Hughes to Dr. Julio S. Leon (July 27, 2005)* |
| 28. | Monmouth College (Illinois): Letter from Jeffrey Turnbull to Dr. Mauri A. Ditkowsky (Nov. 19, 2006)* |
| 29. | National Louis University: Letter from Sharon Solomon to Dr. Curtis McCray (Aug. 8, 2003)* |
| 31. | North Central Texas College: Letter from Sandra W. Stephens to Dr. Eddie Hadlock (Oct. 26, 2005)* |
| 33. | Olympia College: Letter from Madonna T. Lechner to Jeanette Prickett (Mar. 8, 2007)* |
| 34. | Sam Houston State University: Letter from Robert Ramirez to [redacted] (July 27, 1999)* |
| 35. | San Bernardino Valley College: Letter from Robert E. Scott to Denise Whittaker (June 30, 2003)* |
| 37. | South College: Letter from Gary S. Walker to [redacted] (Jan. 24, 2007)* |
| 40. | Tacoma Community College: Letter from Gary D. Jackson to Dr. Pamela Transue (Oct. 9, 1998)* |
| 41. | Tarrant County College District: Letter from Timothy C. J. Blanchard to Dr. Leonardo de la Garza (Apr. 21,
icy, and the investigators found the professor was "not truthful" during their interviews with him.

The factual description is a little thin, but the district court opinion notes that the first informal complaints about the professor's text messages to be a separate violation of the sexual harassment policy. 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.

Table 3: 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 |
|---|---|
| 3. | **Francis v. Lehigh Univ.,** 561 Fed. Appx. 208 (3rd Cir. 2014) |
| 5. | **Hagerty v. Univ. of Evansville,** 797 N.E.2d 924 (Ind. 2012) |

 Francis is a bit of a “wobbler” case: at first blush this case appears to revolve around consensual romantic/sexual relationships. The factual description is a little thin, but the district court opinion notes that the first informal complaint about the professor came from the “first” student he had an affair with, who reported being concerned about the “second” student “being taken advantage of.” The faculty committee also found the professor's text messages to be a separate violation of the sexual harassment policy, and the investigators found the professor was “not truthful” during their interviews with him.
7. Marder v. Board of Regents of University of Wisconsin System, 286 Wis.2d 252 (Wis. 2005)
8. Levenstein v. Salafsky, 414 F.3d 767 (7th Cir. 2005)
9. Tejada v. Shobe, 319 F.3d 878 (7th Cir. 2003)
10. Murphy v. Duquesne University Of The Holy Ghost, 565 Pa. 571 (Pa. 2001)
11. Tonkovich v. Kansas Bd. of Regents, 159 F.3d 304 (10th Cir. 1998); see also 254 F.3d 941 (10th Cir. 2001)
16. Corstvet v. Boger, 737 F.2d 223 (10th Cir. 1985)
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)

Our focus in considering these cases was on the factual allegations made by the reporting victims in the cases, rather than the courts’ legal holdings, for several reasons. First, with regard to just the court cases brought by plaintiffs alleging harassment, those cases involve multiple legal theories, sometimes in the same case, including Title VII and state tort law or anti-sex discrimination statutes in addition to or instead of Title IX. As a result, it is difficult if not impossible to find any unifying legal doctrine in the group of cases as a whole, 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 VII16 and state tort laws. Second, the “actual knowledge” and “deliberate indifference”

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

16 David Oppenheimer, Employer Liability For Sexual Harassment by Supervisors, in DIRECTIONS IN SEXUAL HARASSMENT LAW 272–89 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).
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.\textsuperscript{17} The cases among the 35 discussed here where the court applies the Gebser standard do not add anything new to that discussion or critique, other than providing additional examples confirming the accuracy of the critique. Third, OCR investigations use a different standard than Gebser,\textsuperscript{18} so the OCR investigations would present still another standard to factor into the mix.

Even more significantly, when analyzing the Title IX enforcement actions (even without the further legal differentiation brought by the faculty termination cases), the actions overwhelmingly involve hostile environment and not quid pro quo claims. 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


\textsuperscript{18} See OCR Revised Sexual Harassment Guidance, \textit{supra} note 11 at 12–14; Kaplin & Lee, \textit{supra} note 56 at 1124.
adequate and effective. A court or OCR may also find that, although the complained-of conduct was not sufficiently severe or pervasive to constitute hostile environment sexual harassment, the school’s response was still inadequate.

The faculty termination cases both share and add to these difficulties. First, like the Title IX enforcement actions, they are almost guaranteed to be making different legal claims, since the faculty termination cases often proceed under state tort and contract laws, and obviously would be unlikely to make a claim of sex discrimination under Titles VII or IX. Second, these cases have very different procedural postures from the Title IX enforcement actions, resulting in less information about the underlying allegations of sexual harassment than the Title IX enforcement actions have. For one thing, as the plaintiffs in these cases are the terminated faculty members, their complaints and other pleadings will likely minimize focus on the conduct for which they have been terminated. For another, the court opinions in these cases often decide a motion to dismiss or a summary judgment motion by the defendant college, so the facts will be construed in favor of the faculty member terminated for sexual harassment. An example of both of these factors and how they affect the amount of information available in the case can be found in the Plymouth State faculty termination case. This case includes more factual description than most of the faculty termination cases because it included a legal claim for false light defamation. It was also a case where the former student received a substantial jury verdict award (stemming from the professor’s conduct) that was upheld by the New Hampshire Supreme Court. The differences in the information regarding the underlying accusation of sexual harassment between the student victim’s case and the termination case are quite large:

19 Note on students found responsible for sexual assault bringing reverse discrimination Title IX lawsuits
20 Schneider v. Plymouth State Coll., 144 N.H. 458, 460–62 (1999). The case is unusual in other respects, including that Young was initially fired and then had a post-termination disciplinary hearing eighteen months later. The faculty hearing committee also made the controversial decision that it lacked jurisdiction over Schneider’s Title IX complaint because she was no longer a student. Schneider is a bit of a “wobbler” in categorizing it as a case where the college prevailed because the district court granted a motion for summary judgement on key substantive due process, Section 1983 and breach of contract claims, but denied summary judgment on some other claims. There is
**Faculty SH: Intersectional Perspectives**

Nancy Chi Cantulupo

****WORK-IN-PROGRESS: Please do not circulate, quote or cite without permission.****

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<tr>
<th>Student Victim Case:</th>
<th>Faculty Termination Case:</th>
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<tr>
<td>&quot;The defendants do not dispute that in the summer of 1990, Professor Young began a pattern of sexual harassment and intimidation of the plaintiff. Young’s behavior included pressuring the plaintiff to accompany him on trips to various locations off campus, kissing her, sending her flowers, taking off her shirt, and placing her hand on his genitalia. Young’s conduct escalated to the point that in January 1991, he completely disrobed in his office while the plaintiff was working on his computer. When the plaintiff attempted to rebuff Professor Young’s advances, he would become angry, yell at her, and threaten to make her life very difficult. Young withheld academic support for her academic work and ridiculed her in front of faculty. He also gave the plaintiff a grade of ‘C-’ for her work as an intern at a graphic design company without ever consulting with her supervisor at the company.&quot;</td>
<td>&quot;[General Counsel] Rodgers and Dean of Students Hage met with Schneider at Brown’s office on December 1, 1993. Schneider related a series of events of a sexual nature with Young between the fall of 1990 and the summer of 1992.&quot;</td>
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<td>Faculty Termination Case:</td>
<td>Faculty Termination Case:</td>
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| **For all of these reasons, in mapping the problem of faculty sexual harassment, it is more productive to look at the underlying factual allegations regarding the sexually harassing conduct itself, and to separate those allegations analytically from the question of whether the school is liable.** | **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 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 70 sexual harassment legal cases, "[T]he data set may be skewed; most of the cases were appealed, and perhaps this made for an unrepresentative sample."); Siegelman & Donohue, supra note 30. Thus, it quite plausible that these litigated cases resulting in judicial opinions may contain higher proportions of recidivist and high-severity cases compared to cases that reached early settlement without a judicial opinion, and all litigated cases may differ in aggregate patterns compared to cases that were never litigated, and so on. Likewise, 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 Juliano & Schwab, supra note 30, at 559 (underscoring a very similar point about litigated sexual harassment cases and what information judges decide to include/exclude in their legal opinions).**

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enforcement actions and in the faculty termination cases. In the latter category, because of the
allegation-suppressing facts discussed above, we include the faculty termination cases in some of the
categories discussed below but not in others.

b. The Harassing Conduct

The factual allegations demonstrate several patterns of behavior among the cases that were
surprisingly common yet departed from the typical image of workplace sexual harassment (keeping in
mind that faculty are employees and many students are employees in addition to being students,
making the campus at least in part a workplace). These patterns also departed from the assumed
conduct at the root of many public controversies regarding faculty sexual harassment, such as the
recent controversy over trigger warnings, which tend to focus on conflicts between academic freedom
and speech restrictions, thus assuming the alleged harassment is verbal in nature. First, 66 to 69
percent (n. 49-51) of the 74 Title IX court cases, OCR/DOJ investigation resolutions and faculty
termination cases involved allegations of sexual harassment that include unwelcome sexual touching
ranging from hugs and kisses to sexual groping, coercive sexual intercourse, forcible rape, and the kinds
of physical assaults and/or psychologically abusive and controlling behavior often associated with
domestic violence (see Figure 2A).

The faculty termination cases do not provide sufficient factual information to do a more
granular analysis of the physical conduct involved in those 21-23 cases (the cases of the total 26 faculty
termination cases involving allegations of harassment that included physical contact), but the Title IX
enforcement actions do include enough information, in general, to do such an analysis. Of the 48 Title
IX enforcement actions in court or by OCR/DOJ considered, 28 (58 percent) involved physical

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22 Cite to coverage of U Chicago policy
23 Title IX court cases 3, 4, 5, 6, 8, 9 (counted as 1 case, but includes separate lawsuits claiming sexual harassment
by 9 plaintiffs, ranging from sexual comments to forcible rape by one prof and one other employee who might be a
prof), 11, 13, 15, 17, 21, 23, 26, 27, 29, 32, 33, 37, 39, 40, 41. OCR/DOJ Letters of Finding 8, 23, 26, 27, 49, 51, 60.
harassment, and the type of physical conduct tended to be severe. Indeed, the fewest number of cases (only three or 11 percent) alleged conduct on the less invasive end of the spectrum (hugging and kissing). The mid-range of the conduct spectrum, often described as inappropriate touching or groping, makes up 12 (43 percent) of the 28 cases, whereas a full 46 percent, or 13 cases, involved very severe physical harassment, such as potentially criminal sexual and physical violence. In five of these 13 cases, the victims alleged facts that looked similar to those typical of domestic abuse: physical assaults, such as punching, verbal, psychological and emotional abuse, sexual abuse, and controlling behaviors.

Figure 2A: Types of Unwelcome Conduct by Faculty in Litigated Cases and OCR Complaints (1998-2016 cases, n = 48, subcategory cases on the right side n = 28a)

At the polar opposite end from the domestic abuse-like cases are the seven court cases and 56

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24 Title IX court cases 3, 8, 13.
26 Title IX court cases 4, 6, 9, 17, 21, 26, 27, 29, 32, 37. OCR Letter of Finding 49.
27 Title IX court case 26.
28 Title IX court cases 26, 27, 37.
29 Title IX court cases 4, 27, 37.
30 Title IX court cases 4, 27, 29.
31 Title IX court cases 2, 7, 10, 12, 19, 34, 38.
OCR resolutions\(^{32}\) that are excluded from the 48 cases discussed in detail here. In those cases, the court or OCR 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 these plaintiffs or complainants 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.\(^{33}\)

In a third category of cases, although less numerous than the others, the faculty harassment appears to have enabled peer student or third-party harassment.\(^{34}\) For instance, in *Burtner v. Hiram College*, a professor of Philosophy (Emerson) operated a summer course at an isolated location in Michigan’s Upper Peninsula, where Emerson was the only University employee. During the program, he supplied the students with alcohol and engaged in sexual harassment towards the plaintiff and at least one other female student, consisting of “comments, innuendos, the singing of sexually suggestive songs, and some touching.”\(^{35}\) After a year’s worth of sexual advances, Emerson began a sexual relationship with the plaintiff that quickly became controlling and abusive, as he “insisted that she enroll in his courses, [I] was angry and upset with her when she considered courses others taught[,]… insisted on [her] presence in his office on a daily basis, and … demand sex from [her] in his Hiram College office.”\(^{36}\)

When another student complained about Emerson’s sexual harassment of her during the same summer program, she alleged that Emerson had watched a male student “jump on top of me naked for


\(^{33}\) 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.

\(^{34}\) Title IX court cases 4, 40 (Faculty of a trucking program in which Plaintiff was the only woman student allowed male classmates to bring in pornographic film and made Plaintiff watch it); OCR/DOJ Letter of Finding 70 (faculty member called three female, African-American students, made sexually and racially charged remarks and then suggested they have sex with her male cousin and/or put her male cousin on the phone to proposition the student).

\(^{35}\) Title IX court case 4, p. 854.

\(^{36}\) Id.
approximately two minutes...”37 and when she “asked, no begged, Professor Emerson to please make [name deleted] put his clothes on... Emerson ... responded with smug laughter and then said, if you don’t like it, tell him yourself, or else you can come up here with me.”38 Stating that “[i]t was pitch dark up where [Emerson] was sitting and the tone of his voice truly frightened [her],”39 the student simply allowed the naked male student to remain on top of her until he chose to get off.

Finally, once again combining all three of the datasets discussed above, we found that the rates of serial harassment by faculty are quite high (see Figure 2B). Depending on whether we include two Title IX court cases40 and three OCR/DOJ resolution letters41 where serial harassment is arguably but not certainly presented, 68 to 74 percent of the accused faculty in the 74 cases faced accusations of serial harassment, with the remainder of the cases not presenting allegations or evidence of harassment directed at more than one victim. By dataset, 23 of the 26 faculty termination cases,42 21 to 23 of the 35 Title IX court cases,43 and six to nine of the thirteen OCR/DOJ resolutions involved allegations of serial harassment,44 whereas in only four cases is discussion of serial harassment absent.

Figure 2B: Prevalence of Serial Harassment by Faculty in Litigated Cases & OCR/DOJ Complaints
(n = 55)

37 Id. at 854.
38 Id. at 855.
39 Id.
40 Title IX court cases 13, 23.
41 OCR/DOJ Letters of Finding 27, 64, 70.
42 Faculty termination cases 2-18, 20-23, 25, 26.
43 Title IX court cases 3, 4, 6, 8, 9, 11, 15, 17, 18, 20, 21, 22, 23, 28, 30, 31, 32, 36, 37, 39, 41, 42.
These cases often show that the serial harasser has a standard method for targeting victims.45

For instance, in Wills v. Brown University, the court suggests that the accused professor targeted undergraduate students who sought him out for academic support.46 In addition, in several of these cases, the faculty member’s 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.47 An OCR investigation of Merced College presented such facts, with OCR discussing how students believed the professor’s behavior had been “historically tolerated,”48 how the professor had told a class the college would never discipline him;49 and how the professor had been removed from a lab in the past because “students were not comfortable with the way he was touching them.”50 Third, as evidenced by Johnson v. Galen Health Insts., Inc., where multiple people complained of the professor’s conduct such as questioning the morality of a single, unwed mother or speaking condescendingly or abusively towards women, the courts or OCR often noted the serial harassers’ generally sexist attitudes in these cases.51 Finally, in several cases the faculty harasser was allowed to resign prior to receiving any disciplinary sanction or the school’s response facilitated the harasser’s move to another school, demonstrating the “pass the harasser” phenomenon discussed in the hearings on Representative Speier’s bill, discussed above.52 In Takla v. Regents of the University of California, for instance, the university delayed discipline for the faculty harasser so he could take a prestigious

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45 Title IX court cases 4, 9, 39, 41.
46 Title IX court case 41, pp. 24–25.
47 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 __, at 94.
49 Id. at 9.
50 Id. at 13.
51 Title IX court cases 11, 18, 20, 22, 23. OCR/DOJ Letters of Finding 26, 64
fellowship during the time he was supposedly being sanctioned for sexual harassment, and he has since returned to the faculty.\textsuperscript{53}

II. Are Women Students of Color at Particular Risk of Harassment by Faculty?

III. Conclusion

\textsuperscript{53} The settlement agreement was disclosed with permission of the parties, and indicates that it was signed in March 2014 with the unpaid suspension of one quarter (3 months) “shall be deferred and shall be implemented and in effect in Spring Quarter 2015.” Settlement available at https://assets.documentcloud.org/documents/2737318/Piterberg-Settlement.pdf. It was widely reported in the press that the suspension was deferred so that the professor could secure a paid fellowship at an institute in Italy for that quarter, thus defraying the economic costs of being suspended.