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# Systematic Prevention of a Serial Problem: Sexual Harassment and Bridging Core Concepts of *Bakke* in the #MeToo Era

Nancy Chi Cantalupo<sup>†\*</sup> & William C. Kidder<sup>\*\*</sup>

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<sup>\*</sup> Associate Professor of Law, Barry University Dwayne O. Andreas School of Law; B.S.F.S., Georgetown University; J.D., Georgetown University Law Center. We thank the other “*Bakke* at 40” symposium participants for helping us to clarify the ideas we present in this Article. We thank Anujan Jeevaprakash and the other law students of the UC Davis Law Review for editorial assistance with this Article.

<sup>\*\*</sup> Special Assistant, Chancellor’s Office, UC Santa Cruz; Research Associate, The Civil Rights Project (UCLA); B.A. and J.D., University of California, Berkeley. The views expressed in this Article reflect my scholarly research conclusions and are not intended to represent the official positions of UCSC or other UC/CSU campuses where I have served as an administrator. For purposes of full disclosure, as a public university administrator I was involved in a number of faculty discipline cases over the years, including cases ultimately resulting in terminations, and for reasons of privacy and decorum I do not discuss these cases in this Article.

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We begin with three quotes (two from the *Bakke* era) related to our themes:

The sooner we get down the road toward accepting and being a part of the real world, and not shutting it out and away from us, the sooner will these difficulties vanish from the scene.

— Justice Blackmun in *Bakke*, June 1978<sup>1</sup>

Up until the time of our conflict [when she rejected a faculty member's sexual advances] he repeatedly told me that the work I was doing for him was good and that he was pleased with it. During the conflict period I was told the complete opposite: that my work was lousy, that I was lazy . . . He tried to make me feel inept and incompetent. He then proceeded to prevent me from obtaining another job in the department. When the sexual conflict arose, my position was suddenly terminated and no explanation was given. As an employee and a student in the department my credibility was completely ruined. For a while, I really worried about the quality of my work. I questioned whether it was good or not, even though I knew it was.

— Female UC Berkeley student in a June 1978  
sexual harassment survey<sup>2</sup>

Permit me to write to you directly to tell you the great surprise, worry, and indignation that I felt upon learning of the allegations [of sexual harassment] made against my friend and colleague [Professor X] and, even more, upon learning of the threatening procedures that the administration seems prepared to use against him. . . .

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<sup>1</sup> Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part).

<sup>2</sup> Donna J. Benson & Gregg E. Thomson, *Sexual Harassment on a University Campus: The Confluence of Authority Relations, Sexual Interest and Gender Stratification*, 29 SOC. PROBS. 236, 245 (1982) (quoting a response to a June 1978 questionnaire of 269 female undergraduate seniors at UC Berkeley).

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[I]f the scandalous procedure initiated against [Professor X] were not to be interrupted or cancelled, for all the reasons I have just laid out, if a sanction of whatever sort were allowed to sully both his honor and the honor of the university, I would sadly be obliged to put an end, immediately, to *all* my relations with UCI.

— Jacques Derrida in a letter to UC Irvine’s Chancellor, July 2004<sup>3</sup>

INTRODUCTION: WHAT HAPPENS AFTER “DIVERSE” STUDENTS ENTER THE DOOR BAKKE OPENED?

In the late-1970s American legal jurisprudence around sexual harassment<sup>4</sup> law developed and began to crystalize at the same time the *Bakke v. Regents of the University of California* decision set forth much of our modern constitutional doctrine regarding race-conscious affirmative action in higher education.<sup>5</sup> Court rulings in both of these areas similarly reflect a complex bundle of tensions between formalistic notions of anti-discrimination and substantive principles of anti-subordination.<sup>6</sup> In *Bakke* the opinions of the Justices aligned 4–1–

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<sup>3</sup> Letter from Jacques Derrida, to Ralph J. Cicerone, Chancellor, Univ. of Cal. Irvine (July 25, 2004) (on file at <http://www.jacques-derrida.org/Cicerone.html>).

<sup>4</sup> Note that we use “sexual harassment” to refer to sexual conduct that is unwelcome to the target of the conduct, including sexual violence as a severe form of harassment. In this usage, sexual harassment is interchangeable with “gender-based violence,” a term that refers both specifically to the “VAWA crimes” incorporated into the Clery Act by the Violence Against Women Act 2013 amendments (dating violence, domestic violence, sexual assault, and stalking) and generally to violence directed at cisgender women or gender minorities, including cisgender men and boys who are targeted because they are perceived as insufficiently masculine, as well as transgender and gender non-conforming persons.

<sup>5</sup> See for example, the first federal appellate ruling recognizing a Title VII cause of action for workplace sexual harassment was *Barnes v. Costle*, 561 F.2d 983, 989-90 (D.C. Cir. 1977), and the first federal ruling recognizing a female student’s cause of action under Title IX for alleged sexual harassment by a university employee was *Alexander v. Yale Univ.*, 459 F. Supp. 1, 4-5, 7 (D. Conn. 1977), *aff’d*, 631 F.2d 178 (2d Cir. 1980). Likewise, the definitive early works on *Bakke* and on sexual harassment both appeared in this period. See generally JOEL DREYFUSS & CHARLES LAWRENCE III, *THE BAKKE CASE: THE POLITICS OF INEQUALITY* (1979); CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979).

<sup>6</sup> One scholar who has delved into both of these areas incisively is Professor Reva Siegel. See Reva B. Siegel, *Introduction: A Short History of Sexual Harassment*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 1, 19-26 (Catherine A. MacKinnon & Reva B. Siegel eds., 2004); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1527-34 (2004)

4; Justice Powell provided the swing vote for two majority rulings, and his opinion symbolizes this fundamental tension between principles of formalistic anti-classification and substantive anti-subordination.<sup>7</sup> Moreover, Justice Powell's opinion evokes visions of diverse campuses where students of all races, geographic regions, genders, sexual orientations, disability, socioeconomic statuses, and more live and study together in an integrated utopia.<sup>8</sup>

Admissions policies play a critical role in either facilitating or hindering such visions, and *Bakke's* enduring importance in protecting admissions policies that assist in making such campuses a reality is clear.<sup>9</sup> Moreover, *Bakke* acknowledges that the goal of diverse, integrated campuses is an acceptable one because of its educational, and through education, societal, benefits. It is constitutionally permissible to engage in racially-conscious admissions not because it will allow the university to create student populations where the students merely *look* diverse, but because students from different backgrounds and experiences will influence individual students' perspectives and contributions to the educational experience itself, not only for themselves, but for other students.<sup>10</sup>

Underlying *Bakke* is the insight that a diverse education is a high quality education because students are in school to learn to navigate and shape workplaces, nations, and a world that are diverse and getting more diverse every year. In addition, *Bakke* implies that diversity goals cannot be reached by faculty and other university employees alone, but depend a great deal on the education students receive, inevitably, from their peers, who powerfully influence the culture and the living and

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[hereinafter *Equality Talk*] (discussing *Bakke*).

<sup>7</sup> See Angelo N. Ancheta, *Bakke, Antidiscrimination Jurisprudence, and the Trajectory of Affirmative Action Law*, in *REALIZING BAKKE'S LEGACY: AFFIRMATIVE ACTION, EQUAL OPPORTUNITY, AND ACCESS TO HIGHER EDUCATION* 15, 15-16 (Patricia Marin & Catherine L. Horn eds., 2008); Siegel, *Equality Talk*, *supra* note 6, at 1531-34.

<sup>8</sup> See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 322-24 (1978) (referencing the Harvard Plan, included in the appendix to Justice Powell's opinion).

<sup>9</sup> See for example *Grutter v. Bollinger*, 539 U.S. 306 (2003) where the several opinions mention Justice Powell's *Bakke* opinion approximately sixty-five times, and years later *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297 (2013) where the Justices mention Powell's *Bakke* opinion approximately fifteen times.

<sup>10</sup> See *Bakke*, 438 U.S. at 311-13 ("The atmosphere of 'speculation, experiment and creation' — so essential to the quality of higher education — is widely believed to be promoted by a diverse student body. As the Court noted in *Keyishian*, it is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." (footnote omitted)).

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learning environment of the campus.<sup>11</sup> However, it is unrealistic to expect that *Bakke* and subsequent affirmative action decisions deal with post-admissions educational environments. Instead, we suggest that an important law and policy conversation with potential to assist colleges in taking the next step to fulfilling *Bakke*'s vision after students are admitted is the one using Title IX of the Educational Amendments of 1972 ("Title IX") and the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act"), as amended by the 2013 Violence Against Women Reauthorization Act ("VAWA"), to prevent sexual harassment.

These federal statutes' requirements that schools take steps to comprehensively prevent sexual harassment provide an important next step in realizing *Bakke*'s vision precisely because these nuances in creating diverse educational experiences make it obvious that admissions policies are only the start. Thus, while the constitutional questions at the core of *Bakke* revolved around the consideration of race at the doorway (i.e., admissions) to selective university programs, equally important (and more so in more recent decades) are questions about what educational environment students inhabit once they are on the other side of that door — in classrooms, faculty offices, and in informal learning spaces.<sup>12</sup> Much must happen, or not happen as the case may be, for a campus to progress from merely admitting students with diverse backgrounds, experiences, perspectives, and potential contributions to university life to offering students a truly diverse intellectual life and campus experience. This reality is complicated by the importance of campus culture and environment and the wide range of factors that influence that environment. Indeed, we posit that to be fully "diverse" in the *Bakke*-ian sense, campuses must be experienced by all students, regardless of race, gender, sexual

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<sup>11</sup> *Id.* at 312 n.48 ("[A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world." (quoting William G. Bowen, *Admissions and the Relevance of Race*, PRINCETON ALUMNI WKLY., Sept. 26, 1977, at 7, 9)).

<sup>12</sup> There was some nascent recognition of this point in *Bakke* where, for instance, the Harvard Plan, included in the appendix to Justice Powell's opinion, noted, "the Committee on Admissions is aware that there is some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted." *Id.* at 323-24.

orientation, disability or socioeconomic statuses, and similar characteristics that often factor into admissions decisions seeking to achieve the goal of a diverse student body, as equally supportive and appreciative of those students' contributions to campus learning.<sup>13</sup>

Moreover, if we deeply value and are committed to the educational benefits of diversity we must continuously “stress test” and rigorously assess with social science and policy research the circumstances under which those benefits are (and are not) robustly realized.<sup>14</sup> For example, there is a substantial social science literature documenting the benefits of college racial diversity in areas such as the quality of classroom discussions, cognitive skill development, cross-racial friendships and attitudes, and pluralistic skills vital to civic society.<sup>15</sup>

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<sup>13</sup> More research is needed on the linkages between sexual harassment and overall campus climate, a fact that animates our attempt in this Article to bridge sexual harassment, *Bakke* and the broader context of campus climate. See Valerie Lundy-Wagner & Rachelle Winkle-Wagner, *A Harassing Climate? Sexual Harassment and Campus Racial Climate Research*, 6 J. DIVERSITY HIGHER EDUC. 51, 59 (2013) (“Unlike campus racial climate research, sexual harassment is rarely linked to the general campus climate. In fact, there is relatively little empirical consideration of how sexual harassment facilitates an environment that negatively influences collegiate experiences and academic outcomes.”).

<sup>14</sup> Likewise, regarding the concept of academic freedom in a *Bakke/Grutter* context, Professor Katyal cautions: “Academic freedom is a sacred concept, but, like most good things in life, it must be properly tended to and cherished. Otherwise, the case for its demise will become too strong.” Neal K. Katyal, *The Promise and Precondition of Educational Autonomy*, 31 HASTINGS CONST. L.Q. 557, 572 (2003).

<sup>15</sup> See, e.g., Nicholas A. Bowman, *College Diversity Experiences and Cognitive Development: A Meta-Analysis*, 80 REV. EDUC. RES. 4, 20-23 (2010) (“College diversity experiences are associated with gains in cognitive skills, cognitive tendencies, and multiple/other cognitive outcomes, which underscores the role that these experiences may play in promoting various forms of student development.”); Kristin Davies et al., *Cross-Group Friendships and Intergroup Attitudes: A Meta-Analytic Review*, 15 PERSONALITY & SOC. PSYCHOL. REV. 332, 342 (2011) (discussing positive impacts of “cross-group” friendships such as anxiety reduction, closeness, IOS, and empathy); Nida Denson, *Do Curricular and Cocurricular Diversity Activities Influence Racial Bias? A Meta-Analysis*, 79 REV. EDUC. RES. 805, 824 (2009) (discussing the benefits of cross-racial interaction for students); Nida Denson & Mitchell J. Chang, *Dynamic Relationships: Identifying Moderators that Maximize Benefits Associated with Diversity*, 86 J. HIGHER EDUC. 1, 1-3, 26-27 (2015) (discussing how cross-racial interaction reduced undergraduate students' racial bias); Meera E. Deo, *The Promise of Grutter: Diverse Interactions at the University of Michigan Law School*, 17 MICH. J. RACE & L. 63, 109-12 (2011) (discussing the relationship between structural and interactional diversity); Mark E. Engberg & Sylvia Hurtado, *Developing Pluralistic Skills and Dispositions in College: Examining Racial/Ethnic Group Differences*, 82 J. HIGHER EDUC. 416, 417, 435-39 (2011); Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCHOL. 751 *passim* (2006) (meta-analytic study of the potential for contact and familiarity to “reduce intergroup

And yet it is also true that under some circumstances the primary beneficiaries of racial diversity can be White students who would otherwise be exposed to narrower educational horizons, and critics (from the Left) worry that the *Bakke/Grutter* diversity rationale can (at least some of the time) result in treating underrepresented Black and brown students as “expendable” in furtherance of paternalistic educational benefits that accrue to White students.<sup>16</sup>

Nearly all campuses have quite far to go before achieving these goals around the benefits of diversity, particularly with regard to ensuring basic equality among students in their experiences with and within the campus environment. It is against this backdrop of educational benefits and risks of educational harms that in this Article we grapple with the difficult topic of sexual harassment in higher education — what one leading researcher in the field aptly describes as “[s]till the last great open secret”<sup>17</sup> in higher education. Given the gendered context of most sexual harassment, we take cognizance of the continuing fact of the underrepresentation of women (and overrepresentation of men) in the most prestigious doctoral degree programs in America.<sup>18</sup> Also animating our present focus on gender and sexual harassment in graduate school is the fact that doctoral education programs typically have much higher attrition rates than professional school programs in law, business, and medicine, and historically there are also notable gender (and racial) disparities in attrition in doctoral education.<sup>19</sup>

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prejudice”); Richard N. Pitt & Josh Packard, *Activating Diversity: The Impact of Student Race on Contributions to Course Discussions*, 53 SOC. Q. 295, 312-13 (2012); Linda R. Tropp & Elizabeth Page-Gould, *Contact Between Groups*, in 2 APA HANDBOOK OF PERSONALITY AND SOCIAL PSYCHOLOGY: GROUP PROCESSES 535 (Mario Mikulincer et al. eds., 2015) (discussing extensive data and research indicating the benefits of intergroup contact, including among racially diverse groups).

<sup>16</sup> See Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 465, 492-96 (2014); Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 946-67 (2001).

<sup>17</sup> Louise F. Fitzgerald, *Still the Last Great Open Secret: Sexual Harassment as Systemic Trauma*, 18 J. TRAUMA & DISSOCIATION 483, 483 (2017) [hereinafter *Still the Last Great Open Secret*]; see also LOUISE F. FITZGERALD, *THE LAST GREAT OPEN SECRET: THE SEXUAL HARASSMENT OF WOMEN IN THE WORKPLACE AND ACADEMIA passim* (1993).

<sup>18</sup> Kim A. Weeden et al., *Degrees of Difference: Gender Segregation of U.S. Doctorates by Field and Program Prestige*, 4 SOC. SCI. 123, 137, 139-42 figs.2, 3, & 4 (2017).

<sup>19</sup> See, e.g., COUNCIL OF GRADUATE SCHS., *PH.D. COMPLETION AND ATTRITION: ANALYSIS OF BASELINE DEMOGRAPHIC DATA FROM THE PH.D. COMPLETION PROJECT (2008)* (discussing differences in Ph.D completion rates based on race, gender, and citizenship); Frim D. Ampaw & Audrey J. Jaeger, *Completing the Three Stages of Doctoral Education: An Event*



Thus, when students drop out of graduate programs and/or leave their chosen field or academia altogether for reasons connected to sexual harassment — like the UC Irvine humanities student elliptically referenced in the opening quote from Derrida,<sup>20</sup> or the astronomy students reportedly harassed at UC Berkeley by a renowned scholar,<sup>21</sup> or the UC Davis employee who came forward thirty years later, inspired by #MeToo, alleging repeated sexual assault by his former professor and conductor of the UC Davis symphony,<sup>22</sup> or the UC Santa Cruz student reportedly raped on the eve of her graduation by her Latin American studies professor<sup>23</sup> — what occurs are much more than barriers to fulfilling *Bakke's* vision. Rather, of even deeper concern is the potential that colleges and universities may end up inadvertently exploiting students who are from marginalized groups and leaving too many of these vulnerable students worse off than before they enrolled in college or graduate schools. These risks include greater student loan indebtedness (especially when students do not complete their degrees) and more broadly “systemic trauma”<sup>24</sup> that can involve multiple negative and mutually reinforcing long-term health and economic effects.

We see the policies, procedures, and insights developed to combat sexual harassment under Title IX and the Clery Act, as amended by VAWA, as providing the most promising doctrinal developments to advance and achieve *Bakke's* as yet unfinished utopian vision. Our

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*History Analysis*, 53 RESEARCH HIGHER EDUC. 640, 640-41 (2012) (discussing doctoral programs' low completion rates compared with professional degree programs and doctoral programs' low attrition rates); *Ph.D. Completion Project — Program Completion Data*, COUNCIL OF GRADUATE SCHS., [http://www.phdcompletion.org/quantitative/PhDC\\_Program\\_Completion\\_Data\\_Demographic.pdf](http://www.phdcompletion.org/quantitative/PhDC_Program_Completion_Data_Demographic.pdf) (last visited Feb. 2, 2019) (presenting data on cumulative Ph.D. completion rates for students broken down by gender and race).

<sup>20</sup> See Letter from Jacques Derrida to Ralph J. Cicerone, Chancellor, Univ. of Cal. Irvine, *supra* note 3.

<sup>21</sup> See OFFICE FOR THE PREVENTION OF HARASSMENT AND DISCRIMINATION, UC BERKELEY, REPORT OF INVESTIGATION AND FINDINGS: GEOFF MARCY, RESPONDENT 1-2 (2015); Robin Wilson, *Geoff Marcy's Downfall*, CHRON. HIGHER EDUC. (Feb. 21, 2016), <https://www.chronicle.com/article/Geoff-Marcy-s-Downfall/235380>.

<sup>22</sup> See Diana Lambert & Benjy Egel, *UC Davis Revokes Titles from Professor After Past Sex Assault Allegations Surface*, SACRAMENTO BEE (Dec. 23, 2017, 1:52 PM), <https://www.sacbee.com/news/local/education/article189465769.html>; Danny Gray, *#MeToo Arrives at the University of California*, DANNY GRAY (Dec. 12, 2017), <https://dannygray0.wixsite.com/metooucdavis/single-post/2017/12/13/MeTooUCDavis>.

<sup>23</sup> See Marjie Lundstrom, *The Details Behind Ten Big Sexual Harassment Payouts by the State of California*, SACRAMENTO BEE (Jan 26, 2018 3:21 PM), <https://www.sacbee.com/news/politics-government/capitol-alert/article196764169.html>.

<sup>24</sup> See Fitzgerald, *Still the Last Great Open Secret*, *supra* note 17, at 485-86.

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belief in the potential of this doctrine is based on this doctrine's recognition of the effects of trauma on equal educational opportunity, as well as the focus on *comprehensive prevention* that we see as explicit and implicit in these doctrines. We see both understanding the effects of trauma on equal educational opportunity and seeking to engage in comprehensive prevention as indispensable tools in moving from shallow notions of "diverse campuses" to deeply meaningful manifestations of diverse educational communities where diverse students' experiences are equally supportive of their success (up to and including completion of their degrees), regardless of gender, race, and similar characteristics.

Implicit in both the trauma-informed and comprehensive prevention-oriented doctrines is the need for each educational institution to commit to the meaningful discipline, including serious sanctions involving temporary and permanent separation from the campus, of those found responsible for sexual harassment, especially if they are faculty holding significantly greater formal and informal power over students. Meaningful discipline of faculty accused of sexual harassment is trauma-informed because it recognizes that most sexual harassment victims<sup>25</sup> find encountering the accused harasser on campus to be re-traumatizing. While many victims will find educational accommodations and supportive measures that do not

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<sup>25</sup> Note the usage of terms like "victim": When discussing other authors' research, we try to use the same terms they use for the subjects of their research. In other cases, we generally use "victim" and "survivor" interchangeably to refer to those who have reported or disclosed in some way that they have experienced harassment. In the context of claims, complaints, lawsuits, etc., involving accusations against a specific person for harassment/violence, we use "accuser," "complainant," or "plaintiff" to refer to victims or survivors and "respondent" to refer to the person accused of harassment/violence. We also use "named," "accused," "alleged," or "reported," either as an adjective or a noun, to designate someone who has been accused of harassing or victimizing someone else. We only use "defendant" when discussing the criminal process. We have selected all of these terms self-consciously with a goal of capturing and respecting, admittedly imperfectly, the self-identification of the people to whom these terms refer. We use "named," "accused" and "victims," "survivors," "accusers," etc. regardless of whether a neutral factfinder has found an accused individual responsible for harassing or victimizing someone. We do so because, based on our collective decades of working on sexual harassment in education, we have observed that those who report or disclose in some way that they have experienced sexual harassment self-identify as victims, survivors, accusers, complainants, and plaintiffs at different points in time and in different contexts, but these self-identities almost never have anything to do with the judgment of a neutral factfinder. Likewise, those who have been named or reported as having harassed or victimized someone else generally refer to themselves as "accused" or similar even when they have been found responsible for such conduct by a neutral factfinder.

require discipline sufficient to heal from their trauma, some victims will need to seek discipline. Moreover, trauma-informed practice requires certain specific policies and procedures, in particular those that provide victims with procedural justice and avoid institutional betrayal's detrimental effects on victims. Meaningful discipline is a method of both secondary and tertiary prevention and is closely linked to primary prevention. It is thus a critical component of the comprehensive prevention approach that we argue Title IX and Clery/VAWA doctrine recognizes and requires educational institutions to adopt.

Although Title IX and Clery/VAWA focus on sexual harassment and discrimination based on gender, their trauma-informed methods and comprehensive prevention goals could be more explicitly incorporated into protections against other discriminatory harassment directed at "diverse" students, such as students of color, students with disabilities, foreign and undocumented students. As with sexual harassment, such harassment has similar long-term detrimental effects on the creation and maintenance of educational environments that are equally supportive of all students. These doctrines, developed in the context of sexual harassment, could therefore be extended to other civil rights contexts, with the combined effect of addressing multiple challenges faced by diverse students, including hostile environments based on race, gender, sexual orientation, disability, and socioeconomic statuses. This address of the effects of hostile educational environments, especially the trauma caused by such environments, is necessary for achieving *Bakke's* deeper meaning of diversity on higher education campuses.

For these reasons, this *Bakke* symposium Article seeks to discuss sexual harassment doctrine in the context of its potential to advance *Bakke's* vision. As co-authors, one of us has written predominantly about Title IX and campus sexual violence prevention<sup>26</sup> while the other has focused mainly on race-conscious college admission policy matters.<sup>27</sup> We draw upon these seemingly divergent areas of civil

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<sup>26</sup> See, e.g., 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) [hereinafter *Burying Our Heads in the Sand*]; Nancy Chi Cantalupo, "Decriminalizing" Campus Institutional Responses to Peer Sexual Violence, 38 J.C. & U.L. 481 (2012) [hereinafter *Decriminalizing Campus Responses*]; Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 YALE L.J.F. 281 (2016).

<sup>27</sup> See, e.g., William C. Kidder, *How Workable Are Class-Based and Race-Neutral Alternatives at Leading American Universities?* 64 UCLA L. REV. DISCOURSE 100 (2016); William C. Kidder, *Misshaping the River: Proposition 209 and Lessons for the Fisher*

rights scholarship to focus on a stubbornly enduring challenge in higher education that has limited the civil rights and educational opportunities of far too many talented students: faculty-on-student sexual harassment in the academy. We laid the empirical groundwork for this Article in our companion study in which we analyzed fact patterns from over three hundred college faculty sexual harassment cases.<sup>28</sup> Our companion study revealed that among sexual harassment complaints in the media, federal civil rights investigations, and litigated cases, a majority of cases involved unwelcome physical contact such as groping or worse, and a majority of the cases also involved faculty allegedly engaged in serial/repeat sexual harassment.<sup>29</sup>

In this Article we cover both descriptive findings and normative evaluation; we attempt to deepen the academic sexual harassment literature through a far-reaching review of accountability, due process standards, sanctions, and prevention strategies in college and university sexual harassment cases. Befitting the multi-dimensional nature of the sexual harassment challenge in the academy, our scholarly approach here is interdisciplinary and we draw from law, social science, educational policy, and other fields.<sup>30</sup>

#### I. THE PUBLIC HEALTH, COMPREHENSIVE PREVENTION APPROACH TO ENDING SEXUAL HARASSMENT IN COLLEGE

The public health model of violence prevention to which this Article looks for the “next steps” in fulfilling *Bakke’s* vision was first articulated by the Centers for Disease Control and Prevention (“CDC”),<sup>31</sup> which undertook to explain how various governmental, institutional, and community responses to sexual violence could and

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Case, 39 J.C. & U.L. 53, 54-56 (2013); see also David Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander’s Study*, 57 STAN. L. REV. 1855, *passim* (2005).

<sup>28</sup> Nancy Chi Cantalupo & William C. Kidder, *A Systematic Look at a Serial Problem: Sexual Harassment of Students by University Faculty*, 2018 UTAH L. REV. 671 *passim*.

<sup>29</sup> *Id.* at 674, 743-44 figs.5A & 5B.

<sup>30</sup> See, e.g., Michael A. Olivas, *Review Essay*, 71 J. HIGHER EDUC. 363, 366 (2000) (book review) (“Sexual harassment is a subject that requires a mix of approaches, including sociology, law, narrative, psychology, and power analysis. It also takes a strong constitution and intolerance for abusiveness. . . . It is strong stuff, and the academy will be better off when the problem is treated with the seriousness it deserves.”).

<sup>31</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, *SEXUAL VIOLENCE PREVENTION: BEGINNING THE DIALOGUE* 3 (2004), <https://www.cdc.gov/violenceprevention/pdf/svprevention-a.pdf>.

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should be viewed as working together to prevent such violence in a comprehensive fashion. Implied by this structure is an evaluative principle: to the extent that a particular response does not appear to help prevent sexual violence, it probably is not an appropriate response to the violence and therefore should not be used. In this manner, the public health model helps focus all those involved in responding to such violence on a common goal (ending the violence) and illuminates unhelpful responses to violence so they can be traded for methods where there is some evidence that the method assists in reaching the goal.

Adapting the CDC framework for the wider range of conduct encompassed by sexual harassment, comprehensive prevention incorporates three forms of prevention: primary, secondary, and tertiary prevention. Primary prevention seeks to prevent sexual harassment before it starts. Secondary prevention includes methods that respond to sexual harassment immediately or very soon after it occurs, often focusing on interventions to address the trauma of sexual harassment and the harms that sexual harassment victims can experience, affecting their health, their relationships with others, and their abilities to work and/or go to school. Tertiary prevention addresses the long-term consequences of sexual harassment, not only on the immediate victims but also secondary victims, those responsible for committing sexual harassment, and the community as a whole.<sup>32</sup> Our adoption of the public health framework of primary, secondary, and tertiary prevention as well as our particular focus on appropriate disciplinary action in faculty harasser cases reflects a recognition that deterrence and detection of sexual harassment in academia are mutually reinforcing phenomena.<sup>33</sup>

As a legal matter in the higher educational institutions and environments with which *Bakke* is concerned, comprehensive sexual harassment prevention is required by U.S. Department of Education (“ED”) regulations under both the Clery Act and under the historic approach to enforcement practiced by ED under Title IX.<sup>34</sup> First, the

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<sup>32</sup> See *id.* at 3, 6.

<sup>33</sup> See John M. Braxton, *The Criticality of Norms to the Functional Imperatives of the Social Action System of College and University Work*, 81 J. HIGHER EDUC. 416, 425 (2010) [hereinafter *The Criticality of Norms*] (“Deterrence and detection function as mutually reinforcing mechanisms of social control. Norm awareness and the internalization of norms also facilitate the detection of norm violations. The likelihood of detection also functions as a deterrent.”).

<sup>34</sup> Note that, as of this writing, the U.S. Department of Education (“ED”) has issued a Notice of Proposed Rulemaking that attempts to change the regulations under which it enforces Title IX in a way that will depart drastically from how ED has

Clery Act requires that institutions of higher education provide “programs to prevent dating violence, domestic violence, sexual assault, and stalking” and defines such programs as “[c]omprehensive, intentional, and integrated programming, initiatives, strategies, and campaigns intended to end dating violence, domestic violence, sexual assault, and stalking.”<sup>35</sup> Because one of us was a Negotiator in the Negotiated Rulemaking that adopted this definition<sup>36</sup> and chaired the subcommittee that drafted several iterations of this language, we can confirm that the use of “comprehensive” in this definition refers to the CDC public health model.

Although Title IX’s regulations, particularly as interpreted by various guidance documents issued by ED’s Office for Civil Rights (“OCR”), do not refer directly to the CDC public health model as the Clery Act regulations do, OCR’s and courts’ interpretations of Title IX for the last twenty-plus years are consistent with a comprehensive prevention approach to gender-based violence. Both court and OCR enforcement of Title IX recognize that the statute requires schools of all kinds, including colleges, to prevent sexual harassment, a legally-

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enforced Title IX since the first regulations were passed in 1975. Writing separately, we analyze and critique aspects of the new proposed Title IX regulations in forthcoming articles. Nancy Chi Cantalupo, *Dog Whistles and Beachheads: The Trump Administration, Sexual Violence & Student Discipline in Education*, 54 WAKE FOREST L. REV. (forthcoming 2019), <https://ssrn.com/abstract=3323432>; William C. Kidder, *(En)forcing a Foolish Consistency?: A Critique and Comparative Analysis of the Trump Administration’s Proposed Standard of Evidence Regulation for Campus Title IX Proceedings*, 45 J. C. & U.L. (forthcoming 2019), <https://ssrn.com/abstract=3323982>.

Based on the public comments regarding Title IX and sexual harassment in a previous call for public comments, in which ninety-nine percent of the commenters expressed support for past Title IX enforcement and urged ED not to change the regulations, this NPRM is likely to face significant enough challenges that whether its proposals will ultimately be passed into law and survive any subsequent legal challenge is uncertain. See Tiffany Buffkin et al., *Widely Welcomed and Supported by the Public: A Report on the Title IX-Related Comments in the U.S. Department of Education’s Executive Order 13777 Comment Call*, 9 CALIF. L. REV. ONLINE 71 (2019). For these reasons, this chapter discusses Title IX’s requirements based on ED’s traditional enforcement of Title IX, not the proposals of the current administration.

<sup>35</sup> 34 C.F.R. § 668.46 (2018).

<sup>36</sup> U.S. DEP’T OF EDUC., VAWA NEGOTIATED RULEMAKING COMMITTEE 2013 (2014), <https://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa-negotiators2014.pdf>. The specific role of the Clery Act as a regulatory tool in sexual violence prevention can be underappreciated when Title IX is (by default) thought of as short-hand for all civil rights legal obligations in the area of sexual violence prevention on campuses. For brief historical accounts, see Jody Jessup Anger et al., *History of Sexual Violence in Higher Education*, 161 NEW DIRECTIONS FOR STUDENT SERVS. 9, 13-14 (2018), and Karen M. Tani, *An Administrative Right to Be Free from Sexual Violence: Title IX Enforcement in Historical and Institutional Perspective*, 66 DUKE L.J. 1847, 1867-69 (2017).

recognized form of sex discrimination, which includes most gender-based violence affecting the higher education community. With regard to OCR's enforcement, a guidance document followed since the Clinton administration and confirmed as recently as September 2017 by the current Secretary of Education, the 2001 *Revised Sexual Harassment Guidance (Revised Guidance)*, states the following: "Schools are responsible for taking prompt and effective action to stop the harassment and prevent its recurrence. A school also may be responsible for remedying the effects of the harassment on the student who was harassed."<sup>37</sup> Similarly, the standard that courts follow under Title IX has been articulated by the Supreme Court in *Davis v. Monroe County Board of Education*<sup>38</sup> as prohibiting schools from acting with "deliberate indifference" to known instances of sexual harassment, defining "deliberate indifference" as actions or failures to act that cause students, at a minimum, "to undergo' harassment or 'make them liable or vulnerable' to it."<sup>39</sup>

In keeping with the broad commitments of Title IX and the VAWA-amended Clery Act,<sup>40</sup> most of what has been required by law or advanced as best practice in responding to sexual harassment, particularly peer sexual harassment, on college campuses prior to September 2017 fits into the comprehensive prevention structure. In keeping with the priorities of Vice President Biden and President Obama, who assured sexual harassment victims when he convened the White House Task Force to Protect Students from Sexual Assault that "We have your back,"<sup>41</sup> many of the prevention methods promoted during the Obama administration were either primary prevention-

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<sup>37</sup> OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES: TITLE IX, U.S. DEPT. OF ED. 10 (2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

<sup>38</sup> 526 U.S. 629 (1999).

<sup>39</sup> *Id.* at 644-45.

<sup>40</sup> 34 C.F.R. § 668 (2015), <https://www.govinfo.gov/content/pkg/FR-2014-10-20/pdf/2014-24284.pdf>.

<sup>41</sup> *Not Alone: Together Against Sexual Assault*, THE WHITE HOUSE: BARACK OBAMA, <https://obamawhitehouse.archives.gov/lis2many/notalone>. Note that we do not view Vice President Biden's comment as a statement against due process for the accused, but rather as a statement about ethical commitments in a civil rights context. As legal historian Karen Tani notes in her review of Title IX campus sexual violence prevention efforts: "When the state speaks to subjects in rights terms, it does not simply say, 'I see you as a rights-bearing individual.' It makes a statement about *jurisdiction*, and invites the individual to invoke that jurisdiction, even as against other powerful actors. It says, 'You are mine and I am yours. Come to me for protection, and hold me to account.' These are potent messages about the content of citizenship and the scope of state power." Tani, *supra* note 36, at 1902.

oriented or, in the secondary and tertiary prevention areas, designed to increase victim reporting. With regard to primary prevention, the White House heavily promoted the “It’s On Us” program, which encouraged a sense of community responsibility for sexual harassment prevention and encouraged bystanders to intervene to prevent sexual violence and support sexual violence survivors, in particular.<sup>42</sup> Bystander intervention programs were instituted at many colleges either through It’s On Us or separately.<sup>43</sup>

With regard to the White House’s emphasis on reporting in its secondary and tertiary prevention recommendations, this focus recognized that reporting is an important prevention method in numerous ways, most obviously as indispensable to identifying accused harassers, especially of the serial variety, so that steps can be taken, if the accused is found responsible for harassment, to prevent that person from engaging in further harassment.<sup>44</sup> Encouraging reporting is an important secondary prevention strategy as well, because reporting is most effective when it occurs in the immediate aftermath of the harassment, but victims’ willingness to report is often influenced by long-term, tertiary prevention methods such as the policies and procedures the college has adopted with regard to sexual harassment.

The amplification of the issue by Vice President Biden and President Obama aside, the recent focus on reporting responds to the extremely low victim reporting rates among students that was first identified as a problem in peer harassment cases,<sup>45</sup> but a phenomenon highlighted in

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<sup>42</sup> See Juliet Eilperin, *Seeking to End Rape on Campus, White House Launches “It’s On Us,”* WASH. POST (Sept. 19, 2014), [https://www.washingtonpost.com/news/post-politics/wp/2014/09/19/seeking-to-end-rape-on-campus-wh-launches-its-on-us/?utm\\_term=.26ca6932a9a1](https://www.washingtonpost.com/news/post-politics/wp/2014/09/19/seeking-to-end-rape-on-campus-wh-launches-its-on-us/?utm_term=.26ca6932a9a1).

<sup>43</sup> See, e.g., Jennifer Katz & Jessica Moore, *Bystander Education Training for Campus Sexual Assault Prevention: An Initial Meta-Analysis*, 28 VIOLENCE & VICTIMS 1054 (2013) (study evaluating the effectiveness of bystander education programs); Sarah McMahon et al., *Campus Sexual Assault: Future Directions for Research*, 31 SEXUAL ABUSE 270, 278-79 (2018) (discussing research related to campus sexual assault and prevention mechanisms); Sarah McMahon et al., *Measuring Bystander Behavior in the Context of Sexual Violence Prevention: Lessons Learned and New Directions*, 32 J. INTERPERSONAL VIOLENCE 2396, 2396-99 (2017) (study comparing different types of bystander intervention programs).

<sup>44</sup> See discussion *infra* Parts V–VI; see also SARAH MICHAL GREATHOUSE ET AL., A REVIEW OF THE LITERATURE ON SEXUAL ASSAULT PERPETRATOR CHARACTERISTICS AND BEHAVIORS 14-15 (2015), [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR1000/RR1082/RAND\\_RR1082.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR1000/RR1082/RAND_RR1082.pdf) (reviewing studies of college sexual assault recidivism).

<sup>45</sup> See generally Cantalupo, *Burying Our Heads in the Sand*, *supra* note 26, at 213



our previous research (and that of several other scholars) is the acute problem of low reporting rates in faculty-student sexual harassment cases.<sup>46</sup> More importantly, decades of social science research on sexual violence victims in the context of the criminal justice system have shown that many victims will not report violence if they anticipate a skeptical, victim-blaming and/or hostile reaction from law enforcement or other authority figures.<sup>47</sup> This is especially true in the immediate aftermath of the violence because the victim is still experiencing the damaging health effects of trauma, an insight that has led to the adoption of various “trauma-informed” practices as important secondary prevention methods.

The use of trauma-informed practices has nevertheless been patchy and in our experience tends to decrease in usage the more a prevention method crosses into the tertiary prevention category. For instance, one relatively non-controversial and therefore more commonly used set of trauma-informed secondary prevention methods deals with services and accommodations colleges can provide to survivors to diminish and remedy the immediate effects of trauma. These methods include assisting survivors in making changes to their classes, housing, employment, etc., giving survivors more time to complete assignments for class, and providing for their health needs.<sup>48</sup> They tend to be less controversial because they do not involve the named harasser; indeed, using these methods, the accused harasser generally need not be informed of the survivor’s disclosure and thus the college can maintain the confidentiality of the survivor’s report, which often is the top priority for survivors.<sup>49</sup> However, in our

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(noting pattern that ninety percent or more of U.S. college sexual assault survivors do not report their assaults).

<sup>46</sup> See Cantalupo & Kidder, *supra* note 28 at 687-94; see also NAT’L ACADS. OF SCIS., ENG’G, & MED., SEXUAL HARASSMENT OF WOMEN: CLIMATE, CULTURE, AND CONSEQUENCES IN ACADEMIC SCIENCES, ENGINEERING, AND MEDICINE 80-81 (Paula A. Johnson et al. eds., 2018) (reviewing several studies, including the recent survey of University of Texas campuses).

<sup>47</sup> See JOANNE ARCHAMBAULT & KIMBERLY A. LONSWAY, REPORTING METHODS FOR SEXUAL ASSAULT CASES 6-7 (2014), <http://www.instituteformativjustice.org/wp-content/uploads/2017/01/ReportingMethodsforSA.pdf>. See generally Kimberly A. Lonsway & Joanne Archambault, *The “Justice Gap” for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145 (2012) (looking at sexual assault reports and criminal justice responses).

<sup>48</sup> NANCY CHI CANTALUPO, FIVE THINGS STUDENT AFFAIRS PROFESSIONALS SHOULD KNOW ABOUT CAMPUS GENDER-BASED VIOLENCE 6-8 (2015), [https://www.naspa.org/images/uploads/main/5Things\\_Gender\\_Based\\_Violence.pdf](https://www.naspa.org/images/uploads/main/5Things_Gender_Based_Violence.pdf).

<sup>49</sup> See Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U.L. REV. 467, 472-74 (2005) (describing

experience, trauma-informed secondary and tertiary prevention methods that require colleges to take action against a reported harasser tend to be less popular. Colleges may be called upon to investigate a complaint of gender-based violence either immediately after the violence occurs or at some later point, and the form and results of their investigations have important short and long-term consequences for many university community members — survivors, accused harassers, individual bystanders — and the school itself. For those survivors who wish to file a formal complaint against an accused harasser, colleges using trauma-informed practices will investigate fully and effectively and, if they find that harassment has occurred, will take appropriate, non-dismissive disciplinary actions, including in the sanctions imposed on the named harasser(s).<sup>50</sup> However, to the extent that serious discipline may be required, pressure often increases to take a non-disciplinary approach, even when that approach is not trauma-informed.

Providing more information regarding the characteristics of trauma-informed, secondary and tertiary prevention-oriented investigations is beyond the scope of this Article, but one of us has delved into those details in a forthcoming book chapter focusing on comprehensive prevention and investigations.<sup>51</sup> Here, our focus is different, concerned with the sanctioning process and the sanctions themselves as forms of prevention. Although the aforementioned book chapter appears in a book about peer harassment cases, its analysis of which investigation methods qualify as secondary and tertiary prevention (and thus contribute to fulfillment of colleges' comprehensive prevention goals and obligations) applies to cases of faculty sexual harassment against students, and feed into the issue of sanctions. Likewise, this Article's analysis of sanctions in the faculty sexual harassment context should be transferrable to peer harassment cases.

Sanctioning is a form of both secondary and tertiary prevention, and potentially has a significant influence on certain primary prevention methods. Sanctions are most obviously a method of tertiary prevention because they potentially establish long-term consequences for students found responsible for gender-based violence. As tertiary and secondary

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privacy as the air that victims breathe).

<sup>50</sup> See our discussion of interim measures and sanctions, *infra* Parts III and V.

<sup>51</sup> Nancy Chi Cantalupo, *Civil Rights Investigations & Comprehensive Prevention of Campus Gender-Based Violence*, in *ADJUDICATING CAMPUS SEXUAL MISCONDUCT: CONTROVERSIES AND CHALLENGES* (Diane R. Follingstad & Claire Renzetti eds.) (forthcoming) [hereinafter *Civil Rights Investigations*], [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3374265](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3374265).

prevention, sanctions should be designed in a trauma-informed manner to serve clear long-term preventive purposes, a goal that is assisted by regulations under the Clery Act,<sup>52</sup> which require college officials to articulate a clear rationale for the sanction they selected. This requirement encourages colleges to think carefully about their sanctions so they can articulate why they selected or created a particular sanction. This rationale should reflect how the college anticipates a sanction will prevent future harassment by both the accused harasser in that case and other potential harassers.

In order to stay focused on sanctioning with preventative goals in place, college professionals should select or design sanctions based on factors such as (1) the complainant's wishes, (2) the severity of respondent's conduct, (3) the respondent's prior conduct history, (4) campus safety and maintenance of a supportive living learning environment, (5) any retaliation post reporting (such as a no contact order violation).<sup>53</sup> Considering such factors will assist college professionals charged with sanctioning to select or design a sanction most likely to fulfill the purposes of remedying the harm to the complainant and/or preventing future harm.

For instance, the college could suspend a respondent found responsible for sexual harassment until the respondent fulfills a rigorous therapeutic treatment program intervening in the cognitive, behavioral, and psychological causes of sexual harassment,<sup>54</sup> a sanction that focuses on preventing future harassment. Such a sanction could be adjusted somewhat if the college also wanted to fulfill secondary prevention purposes of addressing the harms to victims by suspending the respondent until the complainant graduates, an especially useful sanction if the victim experiences trauma as a result of contact with the respondent, as many complainants do. Another similar combined secondary and tertiary prevention-oriented sanction could require a respondent found responsible for sexual harassment to compensate the complainant for the harm caused and the health, educational, and economic consequences of that harm with a significant amount of money

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<sup>52</sup> See 34 C.F.R. § 668.46 (2015) ("Notwithstanding [FERPA], the result must also include the rationale for the result and the sanctions.").

<sup>53</sup> For discussion of these policy considerations at a broad level, see Nathaniel J. Bray & John M. Braxton, *Reflections on Codes of Conduct: Asymmetries, Vulnerabilities, and Institutional Controls*, 160 *NEW DIRECTIONS FOR HIGHER EDUC.* 89, 95-96 (2012).

<sup>54</sup> See *Practice Profile: Adult Sex Offender Treatment*, NAT'L INST. JUST., <https://www.crimesolutions.gov/PracticeDetails.aspx?ID=30> (last visited Dec. 11, 2018).

calculated based on long-term costs (e.g. losses in future earning potential) as well as shorter-term expenses (e.g. medical expenses)

Such sanctions and any others that involve temporary (but often lengthy) separations of the respondent from the campus may be better sanctions than permanent separation through termination of employment, as long as they include serious and seriously-enforced conditions for re-entry into the campus community. These types of sanctions may be more effective at fulfilling prevention goals (in some cases, at least) because the college still has some control and ability to create incentives for accused harassers to fulfill treatment plans, pay compensation, or comply with other sanctions. Sanctions involving potential re-entry into the campus community push in favor of requiring those found responsible for harassment to complete a serious treatment program with a solid reputation. They also should include communication to the campus as whole as to why the college is allowing an accused harasser who has been found responsible and sanctioned for harassment to re-enter the campus.<sup>55</sup>

For sanctions to avoid inhibiting secondary prevention goals, they must be trauma-informed. For instance, the highly controversial proposal to use restorative justice sanctioning processes should only be considered if these restorative justice processes are trauma-informed, which in turn requires that any restorative justice methods used are strictly used for sanctioning only and not as a method of fact-finding.<sup>56</sup>

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<sup>55</sup> See NAT'L ACADS. OF SCIS., ENG'G, & MED., *supra* note 46, at 144 ("The use of a range of disciplinary actions may also increase the likelihood that targets report the behavior, since some targets choose not to report because they do not want to be seen as causing disruption to the status quo and just want the behavior to stop. Determining the appropriate disciplinary sanctions may be best determined based upon a review of the circumstances on a case-by-case basis; however, examples of what behavior would warrant different disciplinary actions could help improve transparency. Where appropriate, the responses could be both educational and focused toward potential rehabilitation. Furthermore, to demonstrate that the institution is not tolerating the sexually harassing behavior, the range of potential sanctions ought to be disclosed and the disciplinary decision should be made in a fair and timely way following an investigative process that is fair to all sides.").

<sup>56</sup> Heavy disagreement exists about whether restorative justice can be used in gender-based violence cases in a manner that will not harm gender-based violence victims further. Restorative justice encompasses a range of non-adversarial techniques used to understand the harm caused by certain conduct (here, sexual harassment) and possible ways to repair that harm. Proponents of its use in campus settings believe that restorative justice, if done well, can "help participants to feel supported by the institution rather than alienated by it." DAVID R. KARP ET AL., A REPORT ON PROMOTING RESTORATIVE INITIATIVES FOR SEXUAL MISCONDUCT ON COLLEGE CAMPUSES 4 (2016), [https://www.skidmore.edu/campusrj/documents/Campus\\_PRISM\\_Report\\_2016.pdf](https://www.skidmore.edu/campusrj/documents/Campus_PRISM_Report_2016.pdf).

The problem of views on appropriate sanctions bleeding into fact-finding leads to a final trauma-informed sanctioning process: separating fact-finding and sanctioning by allocating the power to sanction to a different decision-maker than the decision-maker empowered to engage in fact-finding. If one team of college officials is put in charge of fact-finding and a second team is charged with sanctioning, the risk of considerations related to sanctioning inappropriately influencing fact-finding and changing the facts found is significantly reduced.<sup>57</sup> Such a reduction is important because the chances of the college inadvertently engaging in re-traumatizing victim-blaming are increased if fact-finding and sanctioning are not separated.

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We mention restorative justice processes in the context of sanctions alone and specify that they should not be used as a fact-finding method because the research on restorative justice demonstrates that the only accepted use of restorative justice in cases involving sexual harassment and gender-based violence is when an accused harasser has admitted responsibility before an investigation occurs, as well as where both the complainant and respondent have agreed to use it after being given full and extensive information about what the restorative justice process does and how it operates. We specify that restorative justice can be considered only at the sanctioning, not fact-finding stage because using alternative dispute resolution in the context of campus sexual harassment *fact-finding* always presents power differentials between the accused and the victim. Those power disparities are even more complicated and difficult in faculty-student abuse scenarios because the faculty member is *always* more powerful than the student(s). See, e.g., Jennie Kihnley, *Unraveling the Ivory Fabric: Institutional Obstacles to the Handling of Sexual Harassment Complaints*, 25 LAW & SOC. INQUIRY 69, 72 (2000) (discussing how power disparities between parties with different statuses “may be intensified without formal protections”). Because incorrectly designed or implemented restorative justice processes risk re-traumatizing survivors, moreover, colleges using restorative justice must commit to making a significant investment of time and money, including by hiring or contracting with experienced restorative justice practitioners to assist the college in designing the process, training college staff, negotiating a “use immunity” MOU with the appropriate prosecutor’s office, and providing the resources necessary on an ongoing basis to have trained and capable practitioners lead the process and provide extensive supports to prepare all parties to engage in it. Donna Coker, *Crime Logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH. L. REV. 147, 187-205 (2017); see Kihnley, *supra* note 56, at 71-72.

<sup>57</sup> Using the University of California as an example, the Senate P&T hearing committee makes a recommendation on sanction(s) when it issues its report that carries considerable weight, but ultimately it is the University administration and the Board of Regents (in cases of tenured faculty terminations) that is the final decision-maker on sanctions. See OFFICE OF THE PRESIDENT, UNIV. OF CAL., UC APM-016, GENERAL UNIVERSITY POLICY REGARDING ACADEMIC APPOINTEES, UNIVERSITY POLICY ON FACULTY CONDUCT AND THE ADMINISTRATION OF DISCIPLINE 2, 5 (2017); UNIV. OF CAL. BD. OF REGENTS, REGENTS STANDING ORDER 100.6, DUTIES OF THE CHANCELLORS (the Chancellor “shall be responsible for the organization and operation of the campus, its internal administration, and its discipline . . .”).

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Finally, in addition to being a form of both tertiary and secondary prevention, sanctioning can support or undermine primary prevention efforts. For example, an increasingly popular primary prevention program is bystander intervention, which trains students to recognize situations where a fellow student may be in danger and methods of safely intervening in those situations. However, because the college as an institution is the most important “bystander” to the harassment, if the college seems unwilling to investigate cases, does so using methods that re-victimize the survivor, and/or gives “slap on the wrist” sanctions, students are likely to question why they should be responsible for intervening as bystanders when the college is not willing to do the same.<sup>58</sup> As a result, students will be less likely to take primary prevention educational messages seriously because the college’s investigations and sanctioning process do not appear to be undertaken seriously.

Despite all of these comprehensive prevention-related reasons to levy serious, if somewhat nuanced, sanctions against those found responsible for sexual harassment, experience shows that colleges and universities are hesitant to sanction seriously. This hesitancy is particularly pronounced in faculty sexual harassment cases, to which the next Part turns. Nevertheless, as Part III also demonstrates, there are few liability-related reasons for this timidity. Therefore, we suggest that no compelling legal reasons exist for *not* adopting sanctioning practices that promote comprehensive prevention of sexual harassment, including ones that accused sexual harassers experience as punitive. This defense of serious sanctions, moreover, provides a concrete example for how the public health approach to harassment can address the “next step” in achieving *Bakke’s* vision, not only with regard to preventing the barriers to opportunity created by *sexual* harassment, but also to preventing similar harms arising from other forms of discriminatory harassment.

## II. SANCTIONS IN ACCUSED FACULTY SEXUAL HARASSER CASES AND THEIR CONSEQUENCES

The #MeToo movement is a powerful example confirming the teachings of sociological theorist Emile Durkheim — that ethical norms are most salient when they are being violated, and it is the most serious transgressions of inviolable norms that elicit a sense of moral outrage inside higher education and among the broader public.<sup>59</sup>

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<sup>58</sup> See our discussion and sources *infra* Parts III–V.

<sup>59</sup> See JOHN M. BRAXTON ET AL., PROFESSORS BEHAVING BADLY: FACULTY MISCONDUCT IN

Sexual harassment generates strong opprobrium both in terms of the inviolable norms held by faculty<sup>60</sup> and the values and perceptions of other stakeholders in the academic community and beyond, including students, staff, alumni, parents and lawmakers. As one scholar and college president puts it, “Sexual harassment of students by professors deeply offends our sensibilities because it is a betrayal of time-honored norms and expectations that faculty be committed to advancing their pupils’ academic growth.”<sup>61</sup>

Given such statements, one would expect that colleges would, as a general matter, seriously sanction those found responsible for sexual harassment. Yet Table 1 (based on a synthesis of higher education disciplinary codes/handbooks, review of the cases discussed below, the secondary literature, and first-hand experience) shows that the disciplinary sanctions for faculty (and faculty administrators) typically employed at U.S. colleges and universities can range widely,<sup>62</sup> including light, medium, and heavy sanctions (in terms of their punitive quality). Moreover, in practice there are many cases where colleges essentially impose “no sanctions,” found to the left end of the continuum of sanctions shown in Table 1.

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GRADUATE EDUCATION 2-4, 26, 34 (2011) [hereinafter PROFESSORS BEHAVING BADLY] (citing Durkheim); John M. Braxton & Nathaniel J. Bray, *The Importance of Codes of Conduct in Academia*, 160 NEW DIRECTIONS FOR HIGHER EDUC. 1 *passim* (2012); see also EMILE DURKHEIM, PROFESSIONAL ETHICS AND CIVIC MORALS 6-7 (Cornelia Brookfield trans., 1992); EMILE DURKHEIM, THE ELEMENTARY FORMS OF RELIGIOUS LIFE 418-33 (Karen E. Fields trans., The Free Press 1995). For a discussion regarding social norms and the present historical moment in politics and #MeToo, see Cass R. Sunstein, *Growing Outrage*, 3 BEHAV. PUB. POL’Y 1 *passim* (2018), [https://www.cambridge.org/core/services/aop-cambridge-core/content/view/07A7377940D8BA0E503DDB8C10EEC70F/S2398063X18000088a.pdf/growing\\_outrage.pdf](https://www.cambridge.org/core/services/aop-cambridge-core/content/view/07A7377940D8BA0E503DDB8C10EEC70F/S2398063X18000088a.pdf/growing_outrage.pdf).

<sup>60</sup> BRAXTON ET AL., PROFESSORS BEHAVING BADLY, *supra* note 59, at 101, 124, 202; see JOHN M. BRAXTON & ALAN E. BAYER, FACULTY MISCONDUCT IN COLLEGIATE TEACHING 206 (1999).

<sup>61</sup> STEVEN G. POSKANZER, HIGHER EDUCATION LAW: THE FACULTY 217 (2002).

<sup>62</sup> See, e.g., Braxton, *The Criticality of Norms*, *supra* note 33, at 426-27 (discussing various normative structures in colleges and universities); Donna R. Euben & Barbara A. Lee, *Faculty Discipline: Legal and Policy Issues in Dealing with Faculty Misconduct*, 32 J.C. & U.L. 241, 301-03 (2006) (discussing the variance and flexibility of different types of sanctions); Ann H. Franke, *Faculty Misconduct, Discipline and Dismissal* 5-12 (March 22, 2002) (unpublished NACUA outline) (on file with the author) (discussing alternative punishments to dismissal of faculty).


 Table 1: Continuum of Actions/Sanctions for Sexual Harassment

“Light” Sanctions	“Medium” Sanctions	“Heavy” Sanctions
<ul style="list-style-type: none"> <li>• Counseling memo, reprimand (where not formal discipline)</li> <li>• Mandatory Title IX training class</li> <li>• Restrictions on conditions of teaching/mentoring</li> <li>• Withhold salary increases</li> <li>• Department transfer (involuntary)</li> <li>• Suspension with pay</li> <li>• Require apology</li> </ul>	<ul style="list-style-type: none"> <li>• Formal censure letter (sometimes public)</li> <li>• Salary reduction (for one semester, year, etc.)</li> <li>• Monetary restitution (to victims)</li> <li>• Removal from “at will” administrative position (e.g., dept. chair, dean)</li> <li>• Unpaid suspension (duration matters)</li> <li>• Demotion (*contra AAUP norms)</li> </ul>	<ul style="list-style-type: none"> <li>• Termination (referred to the governing board)</li> <li>• Negotiated resignation (confidential agreement)</li> <li>• Faculty member resigns on eve of hearing or the governing board vote on sanction (may or may not be confidential)</li> <li>• Denial of emeritus status (at retirement or in combo with termination)</li> </ul>

Indeed, although a number of major American universities have had cases of faculty resigning in the face of the anticipated disciplinary consequences,<sup>63</sup> often, but not always, confidentially, many have never

<sup>63</sup> For examples at Harvard, see David Armstrong, *Noted Medical Researcher Quit amid Sexual Harassment Inquiry*, BOS. GLOBE, May 9, 1999, at A1; Fox Butterfield, *Professor Quits on Sex Complaint*, N.Y. TIMES (Feb. 6, 1985), <https://www.nytimes.com/1985/02/06/us/professor-quits-on-sex-complaint.html> (“A tenured professor at Harvard University has resigned after a complaint of sexual harassment was made against him, the school disclosed today. Harvard officials said they believed it was the



formally terminated a tenured faculty member for sexual harassment or any other type of misconduct. This is true of approximately half of the University of California campuses over the last half century.<sup>64</sup> Moreover, multiple sources indicate that Harvard University has never fired a tenured professor for any type of misconduct in its storied history stretching back to 1638, even in the infamous nineteenth century case of a faculty member who was hanged for murdering another Harvard professor.<sup>65</sup>

In other cases it is not administrators but faculty hearing committees that can exhibit a questionable reluctance when faced with the prospect of recommending the firing of a colleague.<sup>66</sup> As one

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first time in the university's 348-year history that a professor had left the faculty after charges of sexual misconduct were made.”).

<sup>64</sup> This is based partly on Mr. Kidder's specific personal knowledge about UC and experience participating in faculty termination litigation. *See also* Christina Hoag, *UC Regents Fire Tenured Riverside Professor*, SAN DIEGO UNION-TRIB. (Jan. 19, 2012, 4:58 PM), <https://www.sandiegouniontribune.com/sdut-uc-regents-fire-tenured-riverside-professor-2012jan19-story.html> (“Firing tenured professors is highly unusual. ‘It’s rare, it almost never happens,’ said university spokeswoman Dianne Klein. Klein was hard-pressed to come up with a number of tenured dismissals, saying it had happened about a half-dozen times over the past 30 years.”).

<sup>65</sup> Since definitive evidence for this particular claim might seem elusive, note these multiple convergent sources. Mark L. Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 CATH. U. L. REV. 67, 75 (2006) (“Harvard University has never dismissed a professor for cause in over 300 years, even in the infamous case in which a professor [John W. Webster, in 1849] murdered a colleague over a debt and was later hanged for the crime.”); James J. Fishman, *Tenure and Its Discontents: The Worst Form of Employment Relationship Save All of the Others*, 21 PACE L. REV. 159, 173 (2000) (“In over 300 years Harvard University has never stripped a professor of tenure. Even though one [John W. Webster] murdered a colleague, he went to the gallows with his tenure intact.”); *see* Naveen N. Srivatsa & William N. White, *Hauser Losing Tenure Not Likely, Harvard's History Shows*, HARV. CRIMSON (Sept. 9, 2010), <https://www.thecrimson.com/article/2010/9/9/professor-faculty-misconduct-tenure/> (“[A] review of Harvard's recent history of faculty scandals suggests those calling for the University to dismiss Hauser [for research misconduct] should not hold their breath. The Faculty of Arts and Sciences has never begun dismissal proceedings against a faculty member because of research misconduct, according to FAS spokesman Jeff Neal.”); The Crimson Staff, Editorial, *Fire Mark Hauser*, HARV. CRIMSON (Apr. 27, 2011), <https://www.thecrimson.com/article/2011/4/27/harvard-faculty-academic-university/> (“For a bizarre and unjustifiable set of reasons, Harvard seems to have a historical aversion to dismissing tenured faculty in any circumstance.”).

<sup>66</sup> POSKANZER, *supra* note 61, at 216 (“[O]nce the damning charges have been circulated and supported by evidence — and in spite of the principle underlying peer review that ‘faculty must be willing to recommend the dismissal of a colleague when necessary’ — faculty are often singularly lenient towards their colleagues and balk at actual firings.” (citing AM. ASS'N OF UNIV. PROFESSORS, STATEMENT ON PROCEDURAL STANDARDS IN FACULTY DISMISSAL PROCEEDINGS (1958))).

American Association of University Professors (“AAUP”) leader colorfully noted years ago in a related termination context (and as a point of self-criticism), in the end his faculty committee “shrank from the sight of blood.”<sup>67</sup> For example, the case of Professor Marder at the University of Wisconsin Superior, involved egregious sexual misconduct and also bullying colleagues, but the faculty committee recommended only counseling and transferring him to another department.<sup>68</sup> The chancellor ultimately rejected those tepid measures in favor of taking the case to termination before the board of regents.<sup>69</sup> More so than most other kinds of misconduct like plagiarism, in the context of professors accused of sexual harassment, the work of the faculty investigative or hearing committees entails greater levels of distrust by student victims/witnesses, perhaps especially in cases where women faculty are underrepresented on those committees.<sup>70</sup>

Some scholars assert that placing too much emphasis on disciplinary sanctions in academic sexual harassment cases is misguided.<sup>71</sup> We disagree, and build here on our companion article’s findings,<sup>72</sup> as well as the literature on the dynamic process around stakeholder

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<sup>67</sup> Ralph S. Brown Jr., *Financial Exigency*, 62 AAUP BULL. 5, 5, 8 (1976) (discussing faculty terminations in the context of financial exigency).

<sup>68</sup> *Marder v. Bd. of Regents of Univ. of Wis. Sys.*, 286 Wis. 2d 252, 259 (Wis. 2005).

<sup>69</sup> *Id.* at 260; Mary Ann Connell et al., *Collegiality in Higher Education Employment Decisions: The Evolving Law*, 37 J.C. & U.L. 529, 550-51 (2011) (“Lastly, this [Marder] case is telling for the resistance and difficulty that university administration typically faces in firing a tenured faculty member, as even with eighteen charges of misconduct that amounted to a ‘near total breakdown in collegiality’ in Marder’s department, the faculty and board review committees recommended against termination. Despite these hurdles, the University was able to garner enough evidence of Marder’s non-collegial behavior for a Board vote of eleven to three in favor of terminating Marder.”).

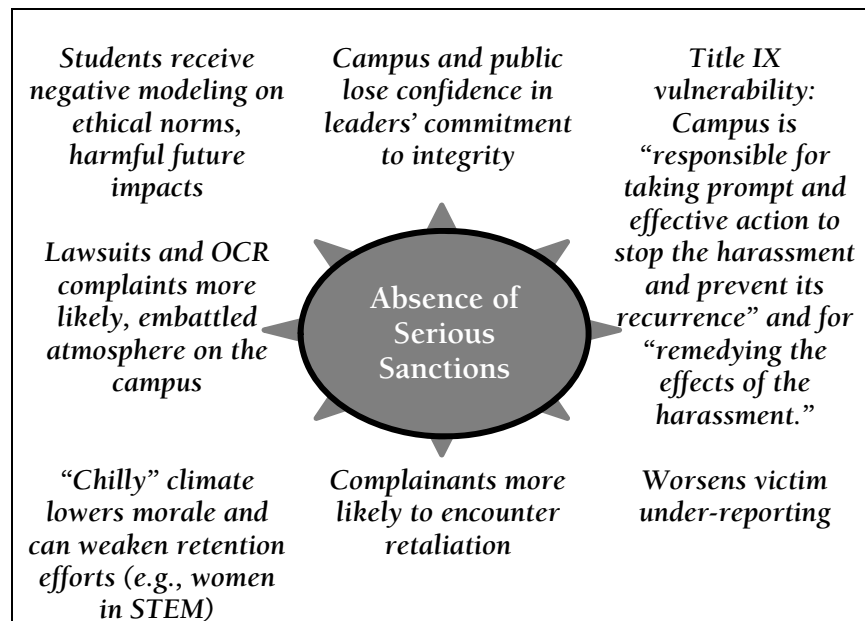
<sup>70</sup> Comprehensive data on this point is very difficult to collect. Jonathan Knight of the AAUP wrote (over twenty years ago, though it still rings true today): “Sexual harassment, unlike other kinds of professional misconduct for which a faculty member can be sanctioned, raises significant institution-wide issues of faculty authority and trust. Traditionally and still to a great extent today, men occupy most senior faculty positions and most positions on key university committees. It is men, not women, who are principally responsible for the policies of the university and for their interpretation, but it is women who are almost always the victims of sexual harassment. Men have a more restrictive view of what constitutes sexual harassment than do women, and they seem to believe that less of it occurs.” Jonathan Knight, *The Composition of Hearing Committees in Sexual Harassment Cases*, ACADEME, Sept.-Oct. 1995, at 55, 57.

<sup>71</sup> See LESLIE PICKERING FRANCIS, SEXUAL HARASSMENT AS AN ETHICAL ISSUE IN ACADEMIC LIFE 115-17, 124-26 (2001).

<sup>72</sup> Cantalupo & Kidder, *supra* note 28, at 683-746.

confidence in Title IX adjudicative policies (the ethics of demonstrating accountability versus perceived lack of confidence and institutional betrayal). For reasons detailed further below, the absence of serious sanctions for faculty sexual harassment is associated with a syndrome that renders comprehensive prevention impossible. We summarize this syndrome in Figure 2.

Figure 2: Sexual Harassment and the Anti-Prevention Syndrome Surrounding the Conspicuous Absence of Serious Sanctions



Consistent with Figure 2, there are a number of mutually reinforcing reasons (which are not rooted in retribution) why it is important for colleges and universities to both have and be seen as having a firm commitment to serious sanctions in faculty sexual harassment cases. These reasons are most evident (à la the discussion above regarding Durkheim) in terms of the negative syndrome of risks associated with the *absence* of serious sanctions for Title IX sexual harassment violations:

First, in many cases, the absence of serious sanctions can reflect institutional failure to protect the welfare of sexual harassment victims, including students and junior faculty members.<sup>73</sup> This is

<sup>73</sup> Carly Parnitzke Smith & Jennifer J. Freyd, *Institutional Betrayal*, 69 AM. PSYCHOLOGIST 575, 579-80 (2014) (“Psychological and organizational research has

important in its own right, but it is also the exact opposite of the public health, comprehensive prevention approach. As discussed above, comprehensive prevention includes secondary prevention, which requires trauma-informed practices. Demonstrating indifference to student survivors' welfare, and students who are in a protected class because that class faces widespread and regular discrimination, is not trauma-informed or secondary prevention-oriented.

Second, when the campus community and the public see evidence that a college or university imposes only so-called "slap on the wrist" sanctions, the result can be a foreseeable loss of confidence in the institution's integrity and commitment to its stated values.<sup>74</sup> An example is the 2015–16 set of sexual harassment cases at UC Berkeley, which were widely viewed by campus stakeholders and external constituents as revealing a "broken" system with a "double-standard" such that none of the half-dozen or so faculty and faculty administrators faced serious sanctions like termination (unlike lower level staff).<sup>75</sup> Note that even more recent cases at UC Berkeley in 2017–18 suggest a turning of the tide, including with serious sanctions

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identified the institutional factors that contribute to this hostile environment, thus perpetrating institutional betrayal. These include acts of omission such as organizational tolerance for harassment, a lack of standard or serious sanctions, and management that does not take reports of harassment seriously . . ." (citation omitted)); see Margaret A. Lucero et al., *Sexual Harassers: Behaviors, Motives, and Change Over Time*, 55 *SEX ROLES* 331, 339 (2006) ("These results support the importance of discipline in reducing the severity of repeated incidents of harassment. As hypothesized, harassers who had been disciplined in the past demonstrated less severe current harassment than did those who had not been disciplined in the past."); see also Fitzgerald, *Still the Last Open Secret*, *supra* note 17, at 486.

<sup>74</sup> See Camille Gallivan Nelson et al., *Organizational Responses for Preventing and Stopping Sexual Harassment: Effective Deterrents or Continued Endurance?*, 56 *SEX ROLES* 811, 812 (2007) ("If the organization's response is ineffective in ending the harassment, the well-documented physical and emotional effects of sexual harassment will continue to put employees' well-being and future productivity at risk. Further, responses perceived as ineffective may decrease victims' satisfaction with their employer's response and thereby increase the likelihood that they will take legal action . . ." (citation omitted)).

<sup>75</sup> See, e.g., Nanette Asimov, *UC Berkeley Has History of Tolerating Sexual Harassment*, S.F. CHRON. (Mar. 14, 2016, 1:37 PM), <https://www.sfchronicle.com/education/article/UC-Berkeley-has-history-of-tolerating-sexual-6886611.php>; Katy Murphy, *UC Berkeley Sex Harassment Scandal Exposes 'Double Standard' Over Professor Protections*, SAN JOSE MERCURY NEWS (Aug. 11, 2016, 11:32 PM), <https://www.mercurynews.com/2016/04/09/uc-berkeley-sex-harassment-scandal-exposes-double-standard-over-professor-protections/>; Editorial, *Sexual Harassment Scandal at UC Berkeley Shows a Broken System*, SAN JOSE MERCURY NEWS (Oct. 23, 2015), <https://www.mercurynews.com/2015/10/23/mercury-news-editorial-sexual-harassment-scandal-at-uc-berkeley-shows-a-broken-system/>.

for faculty harassers.<sup>76</sup> The leadership role of college presidents/chancellors and upper-level administrators should not be underestimated, as leaders' signaling has powerful effects (positive and negative) for sexual harassment victims and for bystanders in the campus community.<sup>77</sup> Consistent with external reaction in the recent high-profile cases at UC Berkeley, Northwestern, and elsewhere, surveys of college students confirm that light sanctions such as issuing a verbal or written reprimand to the sexual harasser or making him/her apologize are viewed as among the least effective responses.<sup>78</sup> "Slap on the wrist" responses lack credibility and contribute to the syndrome about stakeholders' having a lack of confidence in university Title IX procedures.<sup>79</sup>

In some cases it is university leaders who have been accused and/or found responsible for sexual harassment or sexual misconduct, as in three law school dean cases that led to resignations at UC Berkeley in 2016<sup>80</sup> and 2002<sup>81</sup> and at Case Western Reserve in 2014,<sup>82</sup> as well as

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<sup>76</sup> See, e.g., Nanette Asimov, *UC Berkeley Fires Instructor Following Sexual Harassment Claims*, S.F. CHRON. (May 26, 2017, 6:29 PM PDT), <https://www.sfgate.com/news/article/UC-Berkeley-fires-instructor-following-sexual-11171932.php>.

<sup>77</sup> Camille Gallivan Nelson & Keith A. Carroll, *Sexual Harassment: "Is It Just Me or Are You Hot?"*, in WORK AND QUALITY OF LIFE 395, 406 (Nora P. Reilly et al. eds., 2012) ("Paramount to avoiding workplace sexual harassment is the attitude of organizational leadership. Leaders act as role models for employees and set the tone for employees' interpretation of how sexual harassment will be handled."); see Heather M. Clarke, *Predicting the Decision to Report Sexual Harassment: Organizational Influences and the Theory of Planned Behavior*, 14 J. ORG. PSYCHOL. 52, 56 (2014) ("Subordinates who perceive that their leaders make honest efforts to stop harassment feel significantly freer to report harassment than those viewing leaders as more harassment tolerant. Employees are also more likely to report sexual harassment when previous complainants are still employed by the company, prompt and thorough investigations are carried out, and when harassers and managers who allow harassment to continue are appropriately disciplined." (citations omitted)).

<sup>78</sup> Nelson et al., *supra* note 74, at 820 ("[F]orcing perpetrators to apologize and giving them verbal/written reprimands were perceived as significantly less severe and significantly less effective in communicating intolerance of harassment than all other responses.").

<sup>79</sup> BILLIE WRIGHT DZIECH & LINDA WEINER, *THE LECHEROUS PROFESSOR: SEXUAL HARASSMENT ON CAMPUS* 177 (2d ed. 1990) ("A grievance that finds fault with faculty behavior should never end in token sanctions or meaningless slaps on the wrist. Compromise and vacillation defeat all of a college's good intentions by implying to victims and offenders that no one is really committed to stopping sexual harassment.").

<sup>80</sup> Susan Svrluga, *Berkeley Law School Dean Resigns After Sexual Harassment Complaint*, WASH. POST (Mar. 10, 2016), [https://www.washingtonpost.com/news/grade-point/wp/2016/03/10/berkeley-law-school-dean-resigns-after-sexual-harassment-complaint/?utm\\_term=.91f638ad0220](https://www.washingtonpost.com/news/grade-point/wp/2016/03/10/berkeley-law-school-dean-resigns-after-sexual-harassment-complaint/?utm_term=.91f638ad0220).

the architecture dean case at CUNY that was recently in litigation.<sup>83</sup> Such cases are especially damaging with respect to campus faculty, students, and staff having confidence in the university leader's stance and values regarding sexual harassment, and so it is in these cases especially that swift and appropriate action by chancellors, presidents and provosts is sorely needed.<sup>84</sup>

Third, and relatedly, serious sanctions for sexual harassment serve the function of deterrence, both in terms of preventing future victims by the same harasser and lessening the likelihood of other faculty crossing the line into transgressive behavior.<sup>85</sup> This is so notwithstanding the fact that it is the *internalization* of moral and professional norms (as opposed to instrumental responses to the risk of getting caught and sanctioned) that is generally a more powerful force pushing adherence to conduct rules for the vast majority of faculty.<sup>86</sup> Serious sanctions are widely viewed as the most effective institutional responses in the workplace.<sup>87</sup> It is naïve to assume that

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<sup>81</sup> Linda Hamilton Krieger, *Sexual Harassment on Campus/Moving Forward at Boalt Hall*, S.F. GATE (Dec. 13, 2002, 4:00 AM PST), <https://www.sfgate.com/opinion/openforum/article/Sexual-Harassment-on-Campus-Moving-forward-at-2711502.php>.

<sup>82</sup> Elie Mystal, *Dean No More: Lawrence Mitchell Has Resigned*, ABOVE THE LAW (Mar. 4, 2014, 11:05 AM), <http://abovethelaw.com/2014/03/dean-no-more-lawrence-mitchell-has-resigned/>.

<sup>83</sup> *Campisi v. City Univ. of N.Y.*, No. 15 Civ. 4859, 2016 WL 4203549, at \*1-2, 7-9 (S.D.N.Y. Aug. 9, 2016) (denying CUNY's motion to dismiss student's complaint, largely because the university officials allegedly did not promptly report and investigate student employee's verbal report of sexual harassment). After the judge's ruling, this case reached a moderate settlement.

<sup>84</sup> See Lynn R. Offermann & Adam B. Malamut, *When Leaders Harass: The Impact of Target Perceptions of Organizational Leadership and Climate on Harassment Reporting and Outcomes*, 87 J. APPLIED PSYCHOL. 885, 885, 892-93 (2002).

<sup>85</sup> Nelson et al., *supra* note 74, at 812 ("In addition, research suggests that the perception that remedial actions will be taken to punish perpetrators and enforce anti-harassment policies often results in significant decreases in sexual harassment frequency. Specifically, when potential perpetrators do not fear investigation or punishment, preventative actions (e.g., sexual harassment training, publicized anti-harassment policies) have no effect on harassment frequency." (citation omitted)). On a more general level, see Nathaniel J. Bray & Marietta Del Favero, *Sociological Explanations for Faculty and Student Classroom Incivilities*, in ADDRESSING FACULTY AND STUDENT CLASSROOM IMPROPRIETIES 11-12 (John M. Braxton & Alan E. Bayer eds., 2004); Braxton, *The Criticality of Norms*, *supra* note 33, at 426; Bray & Braxton, *supra* note 53, at 95.

<sup>86</sup> See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 24 (2d ed. 2006); Bray & Favero, *supra* note 85, at 15.

<sup>87</sup> See Lilia M. Cortina & S. Arzu Wasti, *Profiles in Coping: Responses to Sexual Harassment Across Persons, Organizations, and Cultures*, 90 J. APPLIED PSYCHOL. 182, 183 (2005) ("Leaders can communicate such intolerance [to sexual harassment] by

effective training can prevent all sexual harassment and more so for the more severe and harmful forms of abuse,<sup>88</sup> research shows that for serial sexual harassers light sanctions like reprimands and sexual harassment training will be largely ineffective,<sup>89</sup> thus putting additional students, junior untenured faculty, and staff potentially in harm's way.

For example, in the case involving the UC Berkeley astronomer, the publicly released Title IX investigation report shows that there were earlier allegations against Professor Marcy, (some anonymous), resolved through "early resolution" in 2011, 2013, and 2014, prior to the four victim witnesses who were interviewed in 2014.<sup>90</sup> This investigation report and related media coverage noted the numerous sexual harassment complaints about the professor stretching back twenty years, including before he joined the Berkeley faculty,<sup>91</sup> and the investigator found that "the pervasiveness of Respondent's behavior is unusually high."<sup>92</sup> This episode echoed aspects of UC Berkeley's first high-profile sexual harassment case that arose around the time of *Bakke*, where thirteen female students reported being sexually harassed by an assistant sociology professor who received only a one-quarter suspension for misconduct spanning a decade, leading to campus protests.<sup>93</sup>

Fourth, graduate students are already likely to fear retaliation for reporting faculty misconduct,<sup>94</sup> so the absence of serious sanctions can

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taking complaints seriously, correcting harassing behavior, and sanctioning harassers. Consistent, proactive leadership behavior of this kind may even be more important than anti-harassment policies . . . "); Nelson et al., *supra* note 74, at 819-20.

<sup>88</sup> Nelson & Carroll, *supra* note 77, at 405 (Based on their review of the research literature, "a strong possibility exists that even well-designed preventative measures cannot change the inclination of potential perpetrators to harass. As a result, the risk of sexual harassment occurring will always exist, and organizations must constantly work to create an organizational climate that demonstrates a commitment to eliminate sexual harassment and to take action against it wherever it occurs.").

<sup>89</sup> See Lucero et al., *supra* note 73, at 339-40.

<sup>90</sup> OFFICE FOR THE PREVENTION OF HARASSMENT AND DISCRIMINATION, *supra* note 21, at 4-6, 8, 10, 20.

<sup>91</sup> *Id.* at 1-12; Wilson, *supra* note 21.

<sup>92</sup> OFFICE FOR THE PREVENTION OF HARASSMENT AND DISCRIMINATION, *supra* note 21, at 24.

<sup>93</sup> Teresa Watanabe, *At UC Berkeley, Promises of a Crackdown on Sexual Misconduct Are Met with Skepticism by Students*, L.A. TIMES (Mar. 25, 2016, 3:00 AM), <https://www.latimes.com/local/education/la-me-berkeley-sexual-harassment-20160325-story.html>; see *Sexual Harassment*, HARV. CRIMSON (Feb. 2, 1980), <http://www.thecrimson.com/article/1980/2/2/sexual-harassment-psan-jose-cal-two-eay/>.

<sup>94</sup> See Melissa S. Anderson et al., *Disciplinary and Departmental Effects on*

worsen risks of a retaliatory climate for victims bringing forward Title IX complaints. It can also signal to others (via word of mouth, social media, etc.) that there may be an unsafe environment in which to bring forward complaints of harassment.<sup>95</sup>

Fifth and finally, student victims of and witnesses to sexual harassment will, if the conduct is not addressed swiftly and appropriately, receive a distorted education about ethical norms in higher education, which fosters cynicism and stunts their growth as potential future members of the professoriate.<sup>96</sup> And especially in traditionally male-dominated fields like STEM (science, technology, engineering and mathematics), part of the current national dialogue about sexual harassment is that such behavior if unsanctioned creates an inhospitable climate for women and erodes retention efforts.<sup>97</sup> Intertwined with our fourth and fifth points, there are significantly greater risks of harming third-parties such as other students, faculty, and staff, when colleges and universities do not take appropriate actions in sanctioning faculty sexual harassers.<sup>98</sup> Moreover, the high

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*Observations of Faculty and Graduate Student Misconduct*, 65 J. HIGHER EDUC. 331, 342 (1994) (surveying 2,000 graduate students at research universities and finding that “53 percent of our respondents say they probably or definitely could not report cases of suspected misconduct by faculty without expecting retaliation”).

<sup>95</sup> Clarke, *supra* note 77, at 56-57; see Laurie A. Rudman et al., *Suffering in Silence: Procedural Justice Versus Gender Socialization Issues in University Sexual Harassment Grievance Procedures*, 17 BASIC & APPLIED SOC. PSYCHOL. 519, 537 (1995); Smith & Freyd, *supra* note 73, at 579-80.

<sup>96</sup> See John M. Braxton et al., *Professionalism in Graduate Teaching and Mentoring*, in *THE AMERICAN ACADEMIC PROFESSION: TRANSFORMATION IN CONTEMPORARY HIGHER EDUCATION* 168, 183 (Joseph C. Hermanowicz ed., 2011).

<sup>97</sup> See, e.g., NAT'L ACADS. OF SCIS., ENG'G & MED., *supra* note 46, at 83 (“To illustrate how sexual harassment impacts the careers of women in science, engineering, and medicine in higher education, our committee commissioned RTI International to conduct a series of interviews with female faculty who experienced sexually harassing behaviors. . . . Several respondents indicated that they were forced to make major transitions in their career as a result of these experiences. Three themes emerged from this discussion regarding the impacts on their job opportunities, advancement, and tenure: stepping down from leadership opportunities to avoid the perpetrator, leaving their institution, and leaving their field altogether.”).

For journalistic accounts of some of these cases, see Ross Andersen, *The Consequences of Sexual Harassment in Astronomy*, ATLANTIC (Oct. 10, 2015), <https://www.theatlantic.com/science/archive/2015/10/sexual-harassment-geoff-marcy/410089/>; Hope Jahren, *She Wanted to Do Her Research. He Wanted to Talk “Feelings,”* N.Y. TIMES (Mar. 4, 2016), <https://www.nytimes.com/2016/03/06/opinion/sunday/she-wanted-to-do-her-research-he-wanted-to-talk-feelings.html>.

<sup>98</sup> For discussion of this important set of considerations, see Nancy Leong, *Them Too*, 96 WASH. U. L. REV. (forthcoming 2019) (manuscript at 5-7), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3118040](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3118040).



level of toxicity that faculty harassers can impose on their peers was abundantly clear from the reactions of astronomy department faculty in the Marcy case at UC Berkeley and the history department faculty in the Piterberg case at UCLA.<sup>99</sup>

Our conclusions immediately above are consistent with the 2018 National Academies committee report on sexual harassment of women in the sciences, which found:

The two characteristics of environments most associated with higher rates of sexual harassment are (a) male-dominated gender ratios and leadership and (b) an organizational climate that communicates tolerance of sexual harassment (e.g., leadership that fails to take complaints seriously, fails to sanction perpetrators, or fails to protect complainants from retaliation) . . . .

Organizational climate is, by far, the greatest predictor of the occurrence of sexual harassment, and ameliorating it can prevent people from sexually harassing others. A person more likely to engage in harassing behaviors is significantly less likely to do so in an environment that does not support harassing behaviors and/or has strong, clear, transparent consequences for these behaviors.<sup>100</sup>

### III. SHINING A LIGHT ON “PASS THE HARASSER” CASES AS PART OF PREVENTION

Looking back at Table 1, it is important to remember that the light, medium, and heavy sanction labels are approximate and cannot capture the case-specific details that would be necessary to provide a more nuanced evaluation of the severity of a sanction(s) in an individual harassment case. The categories also attempt to aggregate the perspectives of the three primary players in these cases: the harassment survivor or survivors, the faculty member who has been found responsible for sexual harassment, and the college. This aggregation is highly imperfect in several respects, including that these groups do not always agree about the level of seriousness with which a

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<sup>99</sup> See Letter from UCLA History Dep’t Faculty to Gene Block, UCLA Chancellor et al. (Feb. 18, 2016), <https://www.documentcloud.org/documents/2737319-UCLA-History-Faculty-Letter-022316-1.html>; Statement from UC Berkeley Astronomy Faculty (Oct. 12, 2015), <https://www.documentcloud.org/documents/2456336-ucb-astro-faculty-statement-1.html>.

<sup>100</sup> NAT’L ACADS. OF SCIS., ENG’G, & MED., *supra* note 46, at 50.

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particular sanction should be viewed (e.g., student survivors and members of the public will often regard formal censure as a “light” sanction). In addition, individuals within these groups may not agree about the level of seriousness.

These problems of aggregation are probably most acute when it comes to one of the sanctions classified above as “heavy”: the negotiated resignation by confidential agreement. Although named faculty harassers and colleges likely regard negotiated resignations as heavy sanctions in terms of their cost to the accused faculty member and the college, survivors are more likely to perceive such agreements as “golden parachutes” where a faculty member reported for sexual harassment is rewarded for doing so with a monetary settlement whereas the survivor gets no compensation. In addition, survivors and others are often legitimately concerned about the ways in which confidentiality will allow an accused faculty member to go to another college without the new campus being aware of the sexual harassment reports and/or findings at the original college.

This transitions our discussion to the topic of “pass the harasser” situations, whereby a faculty member is reported and/or found to have sexually harassed someone at one college, leaves/resigns with a confidentiality agreement, and after being hired at a second college is again found responsible for sexual harassment. These instances present one of the most vexing challenges associated with respect to faculty sexual harassment from a public health and prevention standpoint. The issue has attracted occasional attention for many years,<sup>101</sup> but there is no question that recent political and social shifts associated with the #MeToo movement have led to a dramatic rise in public attention to this issue across academia,<sup>102</sup> just as in other sectors of society where there are imbalances of power between sexual harassers and victims (e.g., Bill O’Reilly at Fox News,<sup>103</sup> Hollywood

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<sup>101</sup> See, e.g., POSKANZER, *supra* note 61, at 225; Thomas A. Wright & Laurie Larwood, *Another View on Reaffirming Our Scholarly Values: A Response to Richard Mowday*, 23 ACAD. MGMT. REV. 9, 10-11 (1998); Tyler Kingkade, *Universities Are Facing a “Passing the Trash” Scandal People Are Comparing to the Catholic Church*, BUZZFEED (June 28, 2017, 12:38 PM) [hereinafter “*Passing the Trash*”], <https://www.buzzfeednews.com/article/tylerkingkade/professors-change-jobs-sexual-assault-allegations>; Courtney Leatherman, *Some Colleges Hush Up Charges to Get Rid of Problem Professors*, CHRON. HIGHER EDUC. (Dec. 6, 1996), <https://www.chronicle.com/article/Some-Colleges-Hush-Up-Charges/76254>.

<sup>102</sup> See, e.g., Colleen Flaherty, *Harassment in the Field*, INSIDE HIGHER ED (Oct. 17, 2017), <https://www.insidehighered.com/news/2017/10/17/follow-study-misconduct-academic-field-sites-says-clear-rules-conduct-and>.

<sup>103</sup> See, e.g., Christina Cauterucci, *The Fox News Sexual Harassment Scandal Is*

Mogul Harvey Weinstein,<sup>104</sup> Silicon Valley tech companies and venture capital firms,<sup>105</sup> judges' chambers,<sup>106</sup> and the halls of Congress and state legislatures<sup>107</sup>). Many states have pending legislation to modify workplace rules about non-disclosure agreements ("NDAs") in sexual harassment and assault cases.<sup>108</sup> And pass the harasser faculty cases have been the focus of recent criticism and controversy in Congress.<sup>109</sup> Aside from these prominent and controversial cases,

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*Looking Worse by the Minute*, SLATE (Apr. 3, 2017, 4:29 PM), <https://slate.com/human-interest/2017/04/the-fox-news-sexual-harassment-scandal-is-looking-worse-by-the-minute.html>; Emily Steel & Michael S. Schmidt, *Bill O'Reilly Thrives at Fox News, Even as Harassment Settlements Add Up*, N.Y. TIMES (Apr. 1, 2017), <https://www.nytimes.com/2017/04/01/business/media/bill-oreilly-sexual-harassment-fox-news.html>.

<sup>104</sup> See, e.g., Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 23, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories>.

<sup>105</sup> See, e.g., COVINGTON & BURLING, REPORT AND RECOMMENDATIONS TO UBER (2017), [https://www.scribd.com/document/351186221/Covington-Recommendations-for-Uber#from\\_embed](https://www.scribd.com/document/351186221/Covington-Recommendations-for-Uber#from_embed); Katie Benner, *Women in Tech Reveal Culture of Harassment*, N.Y. TIMES (June 30, 2017), <https://www.nytimes.com/2017/06/30/technology/women-entrepreneurs-speak-out-sexual-harassment.html>; Randall Stross, *Why Companies Like Uber Get Away With Bad Behavior*, N.Y. TIMES (June 13, 2017), <https://www.nytimes.com/2017/06/13/opinion/travis-kalanick-uber-bad-behavior.html>.

<sup>106</sup> See, e.g., Nancy Gertner, *Sexual Harassment and the Bench*, 71 STAN. L. REV. ONLINE 88 *passim* (2018), <https://www.stanfordlawreview.org/online/sexual-harassment-and-the-bench/>; Matt Zapposky, *Judge Who Quit Over Harassment Allegations Reemerges, Dismaying Those Who Accused Him*, WASH. POST (July 24, 2018, 7:39 AM), [https://www.washingtonpost.com/world/national-security/judge-who-quit-over-harassment-allegations-reemerges-dismaying-those-who-accused-him/2018/07/23/750a02f2-89db-11e8-a345-a1bf7847b375\\_story.html?utm\\_term=.769fd8e6f11b](https://www.washingtonpost.com/world/national-security/judge-who-quit-over-harassment-allegations-reemerges-dismaying-those-who-accused-him/2018/07/23/750a02f2-89db-11e8-a345-a1bf7847b375_story.html?utm_term=.769fd8e6f11b).

<sup>107</sup> See, e.g., Alexei Koseff, *After Women Said #MeToo, Here's How California Lawmakers Confronted Sexual Harassment*, SACRAMENTO BEE (Sept. 1, 2018, 2:14 PM), <https://www.sacbee.com/news/politics-government/capitol-alert/article217710025.html>.

<sup>108</sup> Elizabeth C. Tippet, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 255-58 (2018); Lisa Nagele-Piazza, *California Lawmakers Want to Ban Confidential Sexual Harassment Settlements*, SOC'Y HUM. RESOURCE MGMT. (Feb. 14, 2018), <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/california-proposed-ban-confidential-harassment-settlements.aspx>; Emma J Roth, *Is a Nondisclosure Agreement Silencing You From Sharing Your "Me Too" Story? Four Reasons It Might Be Illegal*, ACLU BLOG (Jan. 24, 2018, 9:45 AM), <https://www.aclu.org/blog/womens-rights/womens-rights-workplace/nondisclosure-agreement-silencing-you-sharing-your-me-too>.

<sup>109</sup> Colleen Flaherty, *Public Shaming*, INSIDE HIGHER ED (Jan. 13, 2016), <https://www.insidehighered.com/news/2016/01/13/politician-proposes-law-prevent-harassers-being-passed-one-institution-another>; Tyler Kingkade, *A Professor's Sexual Harassment Case Came Out in Congress, And He's Fighting Back*, BUZZFEED (May 24, 2017, 10:14 AM ET), <https://www.buzzfeednews.com/article/tylerkingkade/a-professors-sexual-harassment-case-came-out-in-congress>.

confidentiality agreements in academia are also important because they are very likely to be quite common. As we show in our companion article, the field of sexual harassment in academia is a “tip of the iceberg” phenomenon such that the likely volume of faculty sexual harassment settlements are orders of magnitude more numerous than cases involving terminations and other post-disciplinary sanctions.<sup>110</sup> Confidential separation agreements are one area (unlike most due process standards, discussed below) where there is a meaningful gap between public and private institutions, since the forcing mechanism for public disclosure and scrutiny is typically a state public records act/sunshine law that only applies to public institutions.<sup>111</sup>

Historically there are few legal cases where universities faced liability for “passing the harasser” to another institution, though time will tell if this changes in the wake of #MeToo. This is also a domain where reputational harms may loom larger than monetary damages. An early example case that reached a significant settlement in the 1990s involved a female undergraduate at Penn who was in a sexually and physically abusive relationship with her English professor, and in addition to her legal claims against Penn, she also sued Bates College — where the professor had taught a few years earlier and reportedly faced sexual harassment allegations and/or investigations — for “fobbing him off” on Penn.<sup>112</sup> A more recent case from the K-12 context that is directly on point is *Doe-2 v. McLean County Unit District No. 5 Board of Directors*, in which a school teacher was engaged in widespread sexual harassment and sexual misconduct toward girls; the parents of one victim sued the prior school district under Title IX for “passing” the teacher on to the second district (where their daughter was abused) through a confidential settlement agreement and a falsely positive letter of reference.<sup>113</sup> The Seventh

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<sup>110</sup> Cantalupo & Kidder, *supra* note 28, at 683-89. This comports with the civil justice system more generally. See Linda Hamilton Krieger, *The Watched Variable Improves: On Eliminating Sex Discrimination in Employment*, in *SEX DISCRIMINATION IN THE WORKPLACE: MULTIDISCIPLINARY PERSPECTIVES* 295, 316 (Faye J. Crosby et al. eds., 2007) (“Given that over [ninety-five] percent of civil cases settle before trial, the impact of routine confidentiality agreements in settlements can hardly be overstated.”).

<sup>111</sup> An illustrative state law example is Iowa’s laws and regulations covering public records and personnel separation agreements. IOWA CODE § 22.13A (2018).

<sup>112</sup> POSKANZER, *supra* note 61, at 225, 328 n.351; Nancy Gibbs, *Romancing the Student*, *TIME* (June 24, 2001), <http://content.time.com/time/magazine/article/0,9171,133975,00.html>; Leatherman, *supra* note 101.

<sup>113</sup> *Doe-2 v. McLean Cty. Unit Dist. No. 5 Bd. of Dir.*, 593 F.3d 507, 510 (7th Cir.

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Circuit, though sympathetic on a policy level, decided that current Title IX standards would not permit such a theory of liability and suggested the appropriate vehicle for reform would be congressional action to expand Title IX's implied right of action.<sup>114</sup>

Various settlement agreements are the result of both good and bad reasons (indeed, there can be a mixture of good and bad reasons within the same case), and present underlying tradeoffs and dilemmas.<sup>115</sup> Sometimes university administrators and faculty may be too cheerful in extolling the virtues of harassment settlement agreements,<sup>116</sup> and conversely, simplistic condemnations of all settlement agreements as “protecting the abusers” may incorrectly discount the benefits of such settlements to harassment victims who prioritize prompt separation of the accused faculty member from the institution and their accompanying removal from campus.

As an example of the varied risk calculations one must entertain when considering settlement, suppose that a faculty member has sexually harassed one or more graduate students. In many circumstances, a formal faculty disciplinary hearing process, for all its difficulties, may actually help the student victims make progress toward graduation and psychological recovery because of the salutary signaling about the university “living its values” and these students getting a fundamental sense that what happened to them is worthy of institutional response and action. In the sexual harassment research literature Dr. Jennifer Freyd and her colleagues call this “leader

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2010). We thank Professor Rachel Moran for discussing these cases with us in connection with our earlier article, Cantalupo & Kidder, *supra* note 28.

<sup>114</sup> *Doe-2*, 593 F. 3d at 513.

<sup>115</sup> See Tippett, *supra* note 108, at 253-55 (discussing pros and cons of sexual harassment settlement agreements).

<sup>116</sup> See, e.g., UNIV. OF CAL., REPORT OF THE JOINT COMMITTEE OF THE ADMINISTRATION AND ACADEMIC SENATE 17 (2016), [http://sexualviolence.universityofcalifornia.edu/files/documents/Joint-Committee\\_Report-Faculty-Discipline-Process.040416.pdf](http://sexualviolence.universityofcalifornia.edu/files/documents/Joint-Committee_Report-Faculty-Discipline-Process.040416.pdf) (“When considering UC’s faculty discipline system, high levels of settlement or early resolution should not unduly concern us. At the Title IX level this may well reflect effective investigation and the success of intermediate measures to protect and satisfy complainants. At the discipline level this could reflect the weight of the evidence against responding faculty members, their own recognition of responsibility, and their desire to avoid the potential embarrassment of a quasi-public hearing.”).

trust,”<sup>117</sup> and it marks the other end of the continuum compared to when victims experience “institutional betrayal.”<sup>118</sup>

At the same time, it would be naïve to assert that such beneficial outcomes of formal discipline will necessarily be the most likely or desired outcome for all victims/complainants. In many cases a confidential settlement agreement may be the “least worst” option, especially if either the victim or the administration is concerned that the victim is already struggling with the mental health effects associated with trauma and may suffer lasting additional harm in an adversarial disciplinary hearing that may involve aggressive and lengthy questioning by the accused professor’s lawyer.<sup>119</sup> A related and important consideration is time;<sup>120</sup> faculty discipline processes can often take over a year to reach completion, during which time there is a heavy toll taken on victims, the accused, and everyone else in the affected department. Some of these issues may be addressed through the institution using a civil rights investigation rather than an adversarial hearing model, the subject of the book chapter mentioned *supra*,<sup>121</sup> but even a civil rights investigation approach may not achieve the speed of some settlements.

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<sup>117</sup> See, e.g., Clarke, *supra* note 77, at 52 (“This conceptual paper identifies several organizational factors, namely climate of tolerance of sexual harassment, organizational justice, leader trust, and coworker support, which may influence target reporting behaviors.”).

<sup>118</sup> See, e.g., Smith & Freyd, *supra* note 73 *passim*; see also Nelson et al., *supra* note 74, at 819 (“[O]rganizations that are ineffective in communicating intolerance for harassment have higher incidence rates of sexual harassment.” (citation omitted)).

<sup>119</sup> An especially egregious example is the “run away” sexual harassment hearing in *Tonkovich v. Kansas Board of Regents*, 159 F.3d 504 (10th Cir. 1998) as described in Cantalupo & Kidder, *supra* note 28, at 736-37. However, it should not be inferred from this statement that we support a college overriding a survivor’s desire to complete a formal process, especially not for paternalistic reasons related to a college’s determination that the survivor will not be able to handle the proceeding. Under circumstances where the college has concerns for the survivor’s mental health, the college should fully inform the survivor of how s/he/they should expect the process to go, including with regard to likely re-traumatizing effects, and ultimately respect the survivor’s decision to move forward.

<sup>120</sup> See CAL. STATE AUDITOR, REPORT NO. 2017-125, THE UNIVERSITY OF CALIFORNIA 13 (2018), <https://www.auditor.ca.gov/pdfs/reports/2017-125.pdf> (“The three campuses we reviewed — Berkeley, Davis, and Los Angeles — took much longer to discipline Senate faculty than staff and non-Senate faculty. When we reviewed 23 cases, we found that on average staff received discipline in 43 days, non-Senate faculty in 74 days, and Senate faculty in 220 days. Because Senate faculty play a role in governing the university, they have a right to a hearing process that takes longer to determine discipline as it involves many steps and does not always specify time frames for completion.”).

<sup>121</sup> Cantalupo, *Civil Rights Investigations*, *supra* note 51.

Finally, related to our theme of comprehensive prevention, pass the harasser scenarios raise thorny “collective action” problems in the academy. Namely, campus officials might reasonably conclude that a confidential separation agreement is the quickest way to protect *their* students and staff from the risk of additional sexual harassment, but making such a choice can increase the risk of future sexual harassment to students at *other* campuses.<sup>122</sup> Again, adopting trauma-informed, comprehensive prevention-oriented practices in which the victim is included directly or indirectly — at the victim’s option — in such negotiations may be a way to improve how an institution makes such decisions (a suggestion that we acknowledge raises potential complexities regarding, e.g., the timing of formal fact-finding vis-à-vis settlement negotiations and therefore is offered as an addition to the toolkit rather than a one-size-fits-all remedy). Including the survivor has the potential for empowering the survivor and drastically lessening the likelihood that the school will make a decision that the survivor views as paternalistic and/or is subject to student protest. Recent shifts in public awareness and expectations associated with #MeToo may be beneficial in this regard,<sup>123</sup> by making more visible and more costly for universities the reputational and third party impacts of settlements with faculty harassers, as well as helping them to see the benefits of involving survivors in such negotiations, whose priorities may be to get the named harasser off campus and therefore favor the quicker confidential settlement option. Similarly, a departed professor with a confidential settlement agreement has more incentive not to engage in flagrant acts of retaliation against survivors months or years later such as when the survivors are on the academic/professional job market.<sup>124</sup> Although survivors rarely favor this option in our experience when they think there is a possibility of serial harassment, because many survivors prioritize preventing future harassment directed at other victims above all else, a survivor may not have reason to believe that the reported harasser has targeted or will target other victims.

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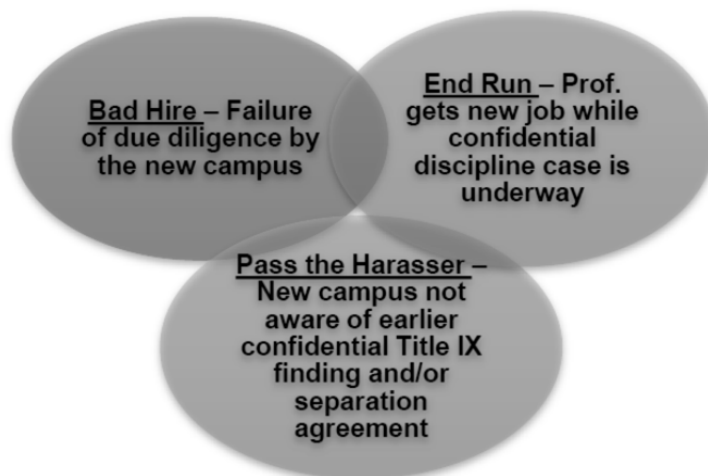
<sup>122</sup> Regarding similar issues with respect to K–12 employee settlement agreements and the sexual abuse of school children, see Richard T. Geisel et al., *Employee Settlement Agreements: Effective Employment Practice or Public Relations Nightmare?*, 36 J. SCH. PUB. REL. 194, 211-13 (2015).

<sup>123</sup> See Tippett, *supra* note 108, at 278-80 (noting potential positive shifts after #MeToo).

<sup>124</sup> This is so as a matter of rational self-interest, but observing how many sexual harasser faculty behave in litigation (admittedly not a random sample) is a reminder that many sexual harassers seem to be unable to stop themselves from acting in self-destructive ways that depart from their own rational self-interest. See Cantalupo & Kidder, *supra* note 28, at 739-40.

“Pass the harasser” cases result from several types of faculty hiring and settlement scenarios that tend to arise again and again in the U.S. higher education sexual harassment context. Immediately below, Figure 3 provides a basic typology of the three types of cases (including settlements), all of which are related to the overall pass the harasser phenomenon (despite “pass the harasser” being the name of only one of the categories below).

Figure 3: Typology of Problematic Sexual Harasser New Hire Scenarios



The first category in our typology are simple “bad hire” situations that sound a cautionary theme about universities that fail to exercise due diligence in their hiring decisions. For example, a chemistry faculty member Nenad Kostic left Iowa State University in 2004–05 when two female graduate students filed sexual harassment complaints against him (one complaint also alleged stalking/intimidation for Kostic trying to coerce one student, who he impregnated, to get an abortion). Two months later Iowa State’s faculty review board reportedly found that “Kostic ‘engaged in serious and repeated misconduct’ and recommended that [the university] proceed with ‘major sanctions’ against him.”<sup>125</sup> Dr. Kostic resigned in 2004–05 (coincidentally, after being named that year as a fellow of the prestigious American Association for the Advancement of Science<sup>126</sup>)

<sup>125</sup> Adam Graaf, *Students Accuse Iowa State of Violating Civil Rights*, IOWA ST. DAILY (Aug. 23, 2005), [http://www.iowastatedaily.com/news/students-accuse-iowa-state-of-violating-civil-rights/article\\_d6e8d192-6b3e-50dc-8cda-d3298b3aaef.html](http://www.iowastatedaily.com/news/students-accuse-iowa-state-of-violating-civil-rights/article_d6e8d192-6b3e-50dc-8cda-d3298b3aaef.html).

<sup>126</sup> Press Release, Iowa State Univ., Three ISU Faculty Names Fellows of Leading Scientific Society (Dec. 16, 2004), <https://www.news.iastate.edu/news/2004/Dec/aaas.shtml>.



and he landed a position as a faculty member and department chair at Texas A&M Commerce.

By 2010 Texas A&M Commerce put Kostic on notice that it would be seeking termination for an assortment of violations plus allegations of sexual harassment against two female students. The campus appeal committee noted that it was remarkable “that any one individual could provoke the number of complaints from students, faculty, and staff.”<sup>127</sup> Soon thereafter Kostic was fired and sued in court for retaliation and alleged that the university did not adhere to its due process policies. When Kostic won his jury trial (for reasons unrelated to Title IX) and the university tried to argue against front pay by relying on the after-acquired evidence rule and that it would have fired him anyway for failure to disclose pertinent employment facts about his sexually harassing conduct at Iowa State, the federal judge summarily rejected the university’s position:

The Court heard testimony that before TAMUC hired Kostic, Kostic disclosed his history at Iowa State to certain TAMUC employees. Furthermore, information about Kostic’s past at Iowa State was publicly available on the Internet, obtainable through a simple Google search. TAMUC cannot claim it had no knowledge of Kostic’s past, nor that Kostic hid his wrongdoing from TAMUC during the hiring process . . . .<sup>128</sup>

The Kostic case cautions that when universities knowingly hire a faculty member previously found responsible for sexual harassment they do so at their own peril. It is clear from all the court filings that Kostic caused widespread harm at Texas A&M Commerce and the university deeply regretted his hiring. But in the often-decentralized faculty search/hiring processes appropriate officials inside and outside the chemistry department did not “connect the dots” (or were too enamored with his star research credentials and grants) until it was too late.

These “bad hire” cases come into public view so rarely that there is apparently not higher education case law precisely on point, but there are highly analogous cases in the university setting (e.g., special admission of a star student athlete with a history of sexual assault<sup>129</sup>)

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<sup>127</sup> Kostic v. Tex. A&M Univ. at Commerce, No. 3:10-cv-2265-M, 2013 WL 1293901, at \*4 (N.D. Tex. Feb. 1, 2013).

<sup>128</sup> Kostic v. Tex. A&M Univ. at Commerce, No. 3:10-cv-2265-M, 2015 WL 4475398, at \*3 (N.D. Tex. Aug. 13, 2015).

<sup>129</sup> See, e.g., *Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 477 F.3d 1282, 1295-99 (11th Cir. 2007). For further discussion, see Grayson Sang Walker, *The Evolution*

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and other sectors<sup>130</sup> suggesting a university would face significant legal vulnerability even under the “deliberate indifference” standard if sued by victims of sexual harassment.

The second category of “end run” cases is actually a variation on the third category of “pass the harasser” cases, since in both situations the new hiring campus may not know about the sexual harassment allegations or findings. Because of confidentiality, the difference between “end run” and “pass the harasser” cases is often not publicly visible,<sup>131</sup> but the distinction is meaningful given that down the road cases where there was an affirmative finding of sexual harassment will be viewed differently than cases that were left pending/ambiguous.

One example of a pass the harasser case is connected to the very troubling opening quote by Jacques Derrida at the beginning of this Article. In that case, Dr. Derrida’s friend and colleague at UC Irvine was suspended for two quarters without pay and ordered to undergo counseling in 2004 and he reportedly reached a confidential settlement while serving out this suspension, in 2005 he obtained a tenured faculty position as department chair at the University of Florida.<sup>132</sup> In his first year at Florida, this professor was ousted as

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*and Limits of Title IX Doctrine on Peer Sexual Assault*, 45 HARV. C.R.-C.L. L. REV. 95, 95-101 (2010).

<sup>130</sup> See, e.g., *Doe v. Holy See*, 434 F. Supp. 2d 925, 931, 957 (D. Or. 2006) (denying defendant’s motion to dismiss by Archdiocese of Portland in case involving a sexually abusive priest who transferred to Portland).

<sup>131</sup> See Kingkade, *supra* note 101.

<sup>132</sup> The article by journalist Jack Stripling is worth quoting at length:

Dragan Kujundzic, who was ousted as chair of UF’s department of Germanic and Slavic studies just nine months after being hired, was sanctioned by the University of California, Irvine, in 2004 amid allegations that he sexually harassed a graduate student, according to court documents.

A UCI investigator found that the relationship between Kujundzic, then [forty-three], and the student, then [twenty-five], was consensual. But Kujundzic was still banned from campus for two quarters without pay because he violated a university policy that bars professors from dating students they supervise, according to court documents.

Kujundzic, who remains a tenured professor at UF, was sued for sexual harassment by the student in 2004, and settled the case in January for an undisclosed sum. The University of California was also named as a defendant in the suit.

Michael Gorham, who chaired the UF search committee that recommended Kujundzic, said the committee knew nothing of the allegations. In conversations with Kujundzic’s references — along with other colleagues that he hadn’t listed as references — the committee failed to learn of a series

department chair, but he remains a faculty member there to this day.<sup>133</sup>

A second “pass the harasser” example where the core details are in the public domain involves a professor at the University of Delaware and then San Diego State University (“SDSU”). This professor of Spanish was in the middle of sexual harassment discipline proceedings when, as alleged by the former chair of the faculty Privilege and Tenure committee, a deal was struck that allowed him to quietly leave in 2010–11 without an adverse disciplinary finding and with a confidentiality agreement.<sup>134</sup> He was then hired at San Diego State, where he again sexually harassed students. An arbitrator found that the university had met its preponderance of evidence burden that the professor had sexually harassed several female undergraduates in 2011–13, noting that his second chance after Delaware (which SDSU did not learn about until much later) should have been cause for him to “have redoubled his efforts at professionalism. Instead, within a few months of his arrival at SDSU strikingly similar behavior reemerged.”<sup>135</sup>

Wrestling with the confidential settlement problem with comprehensive prevention goals in mind may provide some ways out of the dilemmas discussed above. For instance, a comprehensive prevention-based approach to a confidential agreement in a highly publicized case involving a history professor at UCLA may have kept the case from “breaking bad” and turning into an institutional liability.

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of sanctions UCI had levied against Kujundzic, Gorham said. The sanctions included a demotion and mandated sexual harassment counseling, according to court documents.

“This information was nowhere near the radar screen of the search committee,” Gorham said.

Jack Stripling, *UF Hired Professor Unaware of His Past*, GAINESVILLE SUN (Mar. 8, 2007, 12:03 AM), <https://www.gainesville.com/article/LK/20070318/News/604156115/GS/>. The graduate student in this case dropped out of her doctoral program at UCI, went to law school and later founded Atlanta Women for Equality to provide free representation to campus rape survivors.

<sup>133</sup> *Directory*, UNIV. OF FLA., <https://directory.ufl.edu/indv/PIACYCTODLBBK&f=&l=Kujundzic&re=&a=staff> (last visited Jan. 24, 2019); see also Stripling, *supra* note 132.

<sup>134</sup> Matt Butler, *Professor’s Mysterious Exit Included Confidentiality Pact*, REV. (Feb. 22, 2016, 11:58 PM), <http://udreview.com/professors-mysterious-exit-included-confidentiality-pact>; Colleen Flaherty, *New Job, Old Habits*, INSIDE HIGHER ED (Dec. 3, 2015), <https://www.insidehighered.com/news/2015/12/03/did-u-delaware-pass-harasser>.

<sup>135</sup> *Martin v. San Diego State Univ.*, JAMS, Arb. 1, 8 (2015) (Haden, Arb.), <https://www.documentcloud.org/documents/2573931-sharpcpy-mail-sdsu-edu-20151120-184817.html> (ruling affirming discipline).

Had the university taken several secondary and tertiary prevention-oriented steps in coming to that agreement, it may have avoided a lawsuit by two graduate students resulting in a \$460,000 settlement after their federal lawsuit survived UCLA's motion to dismiss,<sup>136</sup> as well as protests two years later over the named harasser's return to classroom instruction.<sup>137</sup>

In this case, the university reached a settlement agreement with the professor with regard to a 2013 sexual harassment complaint by the first graduate student that included provisions for:

- (1) Suspension without pay for one quarter (three months) deferred for nearly a year;
- (2) Continued payment of a \$40,000 stipend for service as a research center director prior to imposition of the one-quarter leave;
- (3) The University's promise not to file charges with the faculty senate;
- (4) The professor's participation in one-on-one sexual harassment training;
- (5) A fine of \$3,000 paid to UCLA;
- (6) A provision of a letter of recommendation to the first graduate student;
- (7) And restrictions on meeting with students off-campus or with his office door closed.<sup>138</sup>

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<sup>136</sup> See *Takla v. Regents of the Univ. of Cal.*, 2015 WL 6755190, at \*9 (C.D. Cal. Nov. 2015); Katherine Knott, *UCLA Will Pay \$460,000 to 2 Graduate Students Who Said They Were Harassed*, CHRON. HIGHER EDUC. (Sept. 12, 2016), <https://www.chronicle.com/blogs/ticker/ucla-will-pay-460000-to-2-graduate-students-who-said-they-were-harassed/114185>. See generally Defendant's Answer to Plaintiffs' First Amended Complaint, *Takla v. Regents of the Univ. of Cal.*, No. 2:15-CV-4418 (C.D. Cal. 2015), <http://dailybruin.com/2015/09/30/uc-denies-allegations-in-students-sexual-assault-lawsuit/> (Defendant arguing that UCLA did not act with deliberate indifference and that the University did not cause either of the two plaintiffs to lose educational benefits or opportunities).

<sup>137</sup> See Teresa Avila, *Protests at UCLA Force Professor Accused of Sexual Harassment to Cancel Classes*, CUT (Jan. 10, 2017), <https://www.thecut.com/2017/01/ucla-professor-accused-of-sexual-harassment-returns-to-post.html>.

<sup>138</sup> Teresa Watanabe, *UCLA-Piterberg Settlement*, L.A. TIMES (Mar. 2, 2016), <http://documents.latimes.com/ucla-piterberg-settlement/>.

Only those aspects of the settlement that directly related to the first graduate student were shared with her contemporaneously with the settlement.<sup>139</sup>

Several aspects of the settlement could have been changed by a comprehensive prevention approach. First, as noted above, a secondary prevention, trauma-informed approach would have involved both survivors, as long as they wished to be involved, in determining the settlement terms. Had the survivors been involved, many of the negative events that unfolded later may not have occurred, or occurred in the same manner or intensity. In addition, the survivors may have suggested/demanded a number of more trauma-informed resolutions in the settlement's terms, including not allowing a deferral that would keep the professor on campus and in potential or actual contact with the victims. Similarly, a trauma-informed suspension would have lasted significantly more than three months, ideally until the survivors had graduated, and/or included other protective measures to support the complainants' continuation of their doctoral education in the department. A third trauma-informed provision that we — and likely the survivors in case — would have negotiated, could have charged the faculty member money to be paid to the victims in compensation for the harassment, either instead of or in addition to the \$3,000 that only “compensated” the university for specially tailored sexual harassment training for the professor.

In addition to the provisions suggested above, a tertiary prevention-driven approach would have included a reintegration plan that potentially addressed with the campus community why and how the named faculty harasser would return to campus. Had UCLA handled this case with more serious sanctions and given greater consideration to the third party harms foisted upon other history department faculty, it might have had a way to defuse the protests that ensued on the faculty member's return to campus.<sup>140</sup> Instead, the unhappy situation

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<sup>139</sup> See Roberto Luna Jr., *UCLA Allows Professor in Ongoing Title IX Lawsuit to Resume Teaching*, DAILY BRUIN (Feb. 10, 2016, 6:10 PM), <http://dailybruin.com/2016/02/10/ucla-allows-professor-in-ongoing-title-ix-lawsuit-to-resume-teaching/>.

<sup>140</sup> See Teresa Watanabe, *UCLA Community Protests Professor's Punishment for Sex Harassment: \$3,000 Fine and 11-Week Suspension*, L.A. TIMES (Mar. 2, 2016, 7:34 PM), <https://www.latimes.com/local/lanow/la-me-ln-ucla-sex-harass-20160302-story.html> (mentioning a letter signed by thirty-eight history department faculty); Teresa Watanabe, *UCLA Professor Sanctioned over Sexual Misconduct Allegations Returns to Teaching, Sparking Protests*, L.A. TIMES (Jan. 10, 2017, 7:15 PM), <https://www.latimes.com/local/lanow/la-me-ln-ucla-sexual-harass-20170109-story.html>; see also Memorandum from the UCLA History Department Faculty to Gene Block, UCLA Chancellor, Scott

on campus persisted for two more years, with the faculty member having a pariah status, until UCLA reached a finding in its investigation of the second graduate student complaint, causing the faculty member to leave in the face of what likely would have been a termination proceeding.<sup>141</sup> One silver lining consistent with the theme of “leader trust” discussed earlier, is that under the leadership of a new vice chancellor and new Title IX organizational structure at UCLA, the second graduate student had enough confidence in the prevention systems in place to refile her formal complaint that had earlier been allegedly mishandled, which is what ultimately resulted in the professor’s resignation.<sup>142</sup>

While pointing out all of the things UCLA could have done may seem a bit like “Monday-morning quarterbacking,” had the university’s negotiation with the faculty member been informed by considerations based in comprehensive sexual harassment prevention, we fully believe that the university would have been led in these directions on its own, even without the benefit of 20/20 hindsight, and that the involvement of the survivors would have pushed the university in these directions even if it had not gone there on its own. In addition, had the confidential agreement been more prevention oriented, it might have helped the university to strike a balance between the downsides and upsides of confidential agreements as sanctions. Moreover, as long as it followed procedures for the investigation itself that complied with Title IX, the Clery Act/VAWA, and constitutional or contractual process requirements, both how and why it selected these sanctions would almost certainly have also complied with these laws.

As this suggests, poorly selected sanctions and remedies have much greater potential cost in terms of public image than in terms of liability. Nevertheless, in the next Part, we address briefly the role that academic freedom and “due process” for faculty who are reported for

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Waugh, Executive Vice-Chancellor & Provost, and Jerry Kang, Vice-Chancellor for Equity, Diversity and Inclusion (Feb. 18, 2016), <https://www.documentcloud.org/documents/2737319-UCLA-History-Faculty-Letter-022316-1.html>.

<sup>141</sup> See Teresa Watanabe, *UCLA Student Wins Sexual Misconduct Claim Against Professor*, L.A. TIMES (Mar. 18, 2018, 5:00 AM), <https://www.latimes.com/local/education/la-me-ucla-sexual-misconduct-piterberg-20180318-story.html>. Here we rely on general experience with separation agreements and media reports; we do not have insider knowledge of the UCLA/Piterberg case.

<sup>142</sup> See *id.* (“But even after that validation [of a six figure litigation settlement], UCLA’s initial response to her charges still gnawed at Glasgow — as did the fact that Piterberg still had his job. When UCLA hired a new Title IX coordinator, Glasgow filed a complaint again, in 2016. This time, she won.”).

sexual harassment play in taking a comprehensive prevention approach to sanctions.

#### IV. DUE PROCESS, ACADEMIC FREEDOM AND DISCIPLINING FACULTY

Justice Powell's pivotal opinion in *Bakke* has been recognized as one of the most important Supreme Court opinions regarding academic freedom jurisprudence,<sup>143</sup> and Powell's deference to academic freedom is also the forebearer of Justice O'Connor's majority opinion in *Grutter v. Bollinger*.<sup>144</sup> Powell grounds his discussion of academic freedom in Justice Frankfurter's famous articulation in *Sweezy v. New Hampshire* of the "four essential freedoms" of a university — to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study,<sup>145</sup> which includes by implication the right of a university to discipline its faculty for misconduct.

Putting aside the complex issues of university governance and faculty roles therein,<sup>146</sup> our companion study demonstrates why the vast majority of faculty sexual harassment — at least the cases that we were able to study because they made it above the waterline on our iceberg — does not challenge Frankfurter's essential freedoms regarding "who may teach, what may be taught, how it shall be taught." The primary reason academic freedom is not implicated is because, with the exception of certain disciplines mainly in the arts, teaching does not require physical contact between professor and student. Yet our empirical research shows that a significant majority of the reported sexual harassment by faculty involves physical contact. In other words, it does *not* involve the purely verbal conduct that *might* implicate academic freedom, although even non-physical contact sexual harassment is generally not constitutionally-protected free speech and therefore its regulation would not threaten academic freedom.<sup>147</sup>

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<sup>143</sup> Paul Horwitz, *Grutter's First Amendment*, 46 B.C. L. REV. 461, 491-94 (2005); William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONTEMP. PROBS. 79, 138 (1990).

<sup>144</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 323-25 (2003).

<sup>145</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Powell, J., concurring in result)).

<sup>146</sup> See generally Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 985-1000 (2009).

<sup>147</sup> See Frederick Schauer, *The Speech-ing of Sexual Harassment*, in DIRECTIONS IN

In addition, academic freedom is too often “poorly understood and ill-defined”<sup>148</sup> and some of the leading scholars on academic freedom caution that an over-expansive defense of academic freedom with respect to professionally questionable conduct can ultimately undermine the cause of academic freedom and weaken public support for the academy.<sup>149</sup> Nevertheless, in this Part we take seriously the due process aspects of academic freedom in a Title IX faculty misconduct setting. We do so by situating the contours of “what process is due”<sup>150</sup> in university internal faculty sexual harassment discipline proceedings.

Courts consistently recognize that tenured faculty members have property rights, and for that reason they possess associated procedural due process rights connected to their expectations of continued employment at their college or university.<sup>151</sup> We are somewhat more

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SEXUAL HARASSMENT LAW, *supra* note 6 *passim*.

<sup>148</sup> Michael A. Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the Third “Essential Freedom,”* 45 STAN. L. REV. 1835, 1835 (1993).

<sup>149</sup> E.g., Robert Post, *Discipline and Freedom in the Academy*, 65 ARK. L. REV. 203, 215 (2012) (arguing that “if an individual faculty member acts in ways inconsistent with disciplinary standards, she does not merit the protection of academic freedom”); Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907, 927 (2006) (arguing that academic institutions’ demand for special treatment may open them to more criticism); William W. Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberties*, 404 ANNALS AM. ACAD. 140, 142 (1972). Regarding sexual harassment specifically, years ago one longtime affiliate of the AAUP wisely noted, “It is my belief that the furor over the excesses of the policing of sexual harassment comes from those who resist any oversight of their conduct toward students or colleagues. Those who persist in unethical behavior — be it harassment, other discrimination, plagiarism, scientific misconduct, or other transgressions — cannot hide behind academic freedom.” Mary W. Gray, *It’s Power, Stupid!*, 88 NEW DIRECTIONS FOR HIGHER EDUC. 21, 30 (1994).

<sup>150</sup> *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

<sup>151</sup> See, e.g., *Bd. of Regents v. Roth*, 408 U.S. 564 (1972) (finding that a state university assistant professor (untentured) had neither a Fourteenth Amendment property interest nor a liberty interest when the university simply did not rehire him and where there was no indication the non-renewal was based on a disciplinary charge that could damage the professor’s reputation); *Perry v. Sindermann*, 408 U.S. 593 (1972) (remanding for factfinding on whether a junior college instructor who taught for a decade at the college (the last five years on a series of one-year contracts) could establish a property right in “de facto tenure” by virtue of his length of service, the unusual language in the college’s faculty guide as well as college officials’ broader rules and understandings); *McDaniels v. Flick*, 59 F.3d 446, 454, 457 (3d Cir. 1995) (determination that the college that fired a tenured professor for sexual harassment satisfied procedural due process guidelines); *Cotnoir v. Univ. of Me.*, 35 F.3d 6, 10-11 (1st Cir. 1994) (post-termination hearing was not sufficient to satisfy due process procedures for a tenured professor who was fired); *Collins v. Univ. of N.H.*, 746 F. Supp. 2d 358, 368-71 (D.N.H. 2010) (university was not required to provide tenured



attentive in this Article to property interests than liberty interests for the simple reason that property interests tend to generate more frequent and salient legal disputes in academia. Nonetheless, liberty interests are relevant too because sexual harassment generally falls within the category of “moral turpitude” — a term of art with specific import legally<sup>152</sup> and with regard to professional norms in higher education<sup>153</sup> — so as to implicate an accused faculty member’s liberty interests for reasons related to stigmatic harm.<sup>154</sup>

These constitutional requirements only apply to state actors, thus setting up a dichotomy between public versus private colleges.<sup>155</sup> But, potentially unlike in the peer harassment context,<sup>156</sup> there is less than

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faculty member with due process because the ban was temporary, and therefore did not violate any liberty interests).

<sup>152</sup> See *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 513-14 (10th Cir. 1998) (fired professor’s sexual harassment of a student constituted grounds for termination in the KU faculty handbook for “moral turpitude.”).

<sup>153</sup> See, e.g., POSKANZER, *supra* note 61, at 213 (“Sexual or racial harassment of students or faculty colleagues would qualify as moral turpitude.”); Gregory M. Saltzman, *Dismissals, Layoffs, and Tenure Denials in Colleges and Universities*, in NEA 2008 ALMANAC OF HIGHER EDUCATION 51, 60 (2008) (“Grounds for moral turpitude charges include sexual harassment, fraudulent research, plagiarism, and theft of college funds.”). In terms of professional norms in academia, moral turpitude means that the AAUP’s recommended paid transitional year (i.e., severance pay) does not apply. AM. ASS’N OF UNIV. PROFESSORS, RECOMMENDED INSTITUTIONAL REGULATIONS ON ACADEMIC FREEDOM AND TENURE 67 (2013), <https://www.aaup.org/sites/default/files/files/2013%20Bulletin/2013RIRs.pdf> (“This provision for terminal notice or salary need not apply in the event that there has been a finding that the conduct which justified dismissal involved moral turpitude.”).

<sup>154</sup> *Fed. Deposit Ins. Corp. v. Henderson*, 940 F.2d 465, 477 (9th Cir. 1991) (“Only the stigma of dishonesty or moral turpitude gives rise to a liberty interest; charges of incompetence do not.”).

<sup>155</sup> See Michael J. Phillips, *The Substantive Due Process Rights of College and University Faculty*, 28 AM. BUS. L.J. 567, 575, 604 n.41 (1991). There are narrow exceptions to the rule, where private universities were held to be state actors covered by the Fourteenth Amendment. See, e.g., *Isaacs v. Bd. of Trs. of Temple Univ.*, 385 F. Supp. 473 (E.D. Pa. 1974) (court determined that a private institution’s actions should be designated as state actions under the Fourteenth Amendment).

<sup>156</sup> See generally Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary Through the Ordinary*, 35 J.C. & U.L. 613 (2009) [hereinafter *Campus Violence*] (comparing cases where students have been found responsible for sexual violence versus other forms of misconduct, at both public and private institutions); Cantalupo, *Decriminalizing Campus Responses*, *supra* note 26 (discussing cases where students found responsible for sexual violence have sued their schools for disciplining them using “due process” claims at public institutions as opposed to state contract law claims at private institutions); Perry A. Zirkel, *Procedural and Substantive Student Challenges to Disciplinary Sanctions at Private — as Compared with Public — Institutions of Higher Education: A Glaring Gap*, 83 MISS. L.J. 863 (2014) (systematic

meets the eye with this public-private divide. Bridging the divide is the fact that most U.S. public and private universities and colleges have employment contracts enforceable under state contract law, plus institutional policy statements designed to be consistent with broader academic norms and standards, and state laws applicable at private institutions.<sup>157</sup> Indeed, in an important faculty termination case, the defendant, Stanford University, voluntarily relinquished its strongest non-state actor defense because Stanford saw its long-term institutional interests and obligations as a private university as being equivalent to the constitutional obligations at leading public universities.<sup>158</sup>

Due process for accused faculty, like students accused of misconduct,<sup>159</sup> can be fairly basic, certainly not arising to the level of criminal due process. *Cleveland Board of Education v. Loudermill* explains that “[t]he tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer’s evidence, and an opportunity to present his side of the story,”<sup>160</sup> and “official(s) considering the dispute do not have to follow the Federal Rules of Evidence or Civil Procedure.”<sup>161</sup> Thus, strong legal authority supports the proposition that the due process hearing required before a college can terminate a tenured faculty appointment need not be a comprehensive court-like proceeding.

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review of student misconduct litigated cases).

<sup>157</sup> POSKANZER, *supra* note 61, at 248-49; see WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 659 (5th ed. 2013) (“The rights of faculty employed by private colleges and universities are governed primarily by state contract law and occasionally by state constitutions or statutes.”); Euben & Lee, *supra* note 62, at 241-42. For a pertinent example of a state law enforceable at private colleges in California, see *Gutkin v. Univ. of S. Cal.*, 101 Cal. App. 4th 967, 970-81 (Ct. App. 2002).

<sup>158</sup> See *Franklin v. Leland Stanford Jr. Univ.*, 172 Cal. App. 3d 322, 324, 351 n.3 (Ct. App. 1985).

<sup>159</sup> See generally Cantalupo, *Campus Violence*, *supra* note 156 (discussing longstanding legal frameworks for due process involving students accused of misconduct); Cantalupo, *Decriminalizing Campus Responses*, *supra* note 26 (discussing cases where students found responsible for sexual violence have sued their schools for disciplining them using “due process” claims at public institutions as opposed to state contract law claims at private institutions).

<sup>160</sup> *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985).

<sup>161</sup> POSKANZER, *supra* note 61, at 245; see also *Levitt v. Univ. of Tex. at El Paso*, 759 F.2d 1224, 1227-33 (5th Cir. 1985); *Garrett v. Matthews*, 625 F.2d 658, 660 (5th Cir. 1980) (University of Alabama professor dismissed for insubordination and dereliction of duty, the court rejected plaintiff’s argument that the “adequate cause” provision in the faculty handbook was too vague to pass muster); *Chung v. Park*, 514 F.2d 382, 386 (3rd Cir. 1975).

Although such bare minimum due process standards are all that are required by most courts,<sup>162</sup> the large majority of institutions have chosen to adopt institutional policies that afford many to most (but not necessarily all) of the AAUP's recommended policies.<sup>163</sup> For instance, section 5.c of the AAUP guidelines includes a list of sixteen specific recommendations, including several related to fair process in misconduct investigations (e.g., access to an academic advisor or counsel, cross-examination of witnesses at the hearing, clear and convincing evidence standard).<sup>164</sup> The AAUP has generally taken the position that procedures for discipline and due process in sexual harassment (and sexual violence) cases should be the same as other kinds of faculty discipline cases.<sup>165</sup>

As a practical matter, the more that important hallmarks of due process are provided, the greater the likelihood that faculty terminations and other serious sanctions will be defensible in the face of legal challenges. In our study of litigated faculty termination cases, universities prevailed seventy-nine percent of the time<sup>166</sup> and the cases can be summarized by Leo Tolstoy's famous line in *Anna Karenina*, "All happy families are alike; each unhappy family is unhappy in its own way."<sup>167</sup> In the cases where universities prevailed, the differences between cases did not matter much, and what comes through are two common themes: that sexual harassment is ample justification for termination and that the cornerstones of legal due process rights were satisfied (even when such legal standards were less than the full panoply of AAUP-recommended procedures). In the six cases where fired sexually harassing professors prevailed in the courts, there was some unique factual or due process issue that took on significance.<sup>168</sup>

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<sup>162</sup> See, e.g., *Levitt*, 759 F.2d at 1227-33 (determining that a university's violation of its own rules do not violate due process rights as long as the procedures given are constitutionally adequate).

<sup>163</sup> See KAPLIN & LEE, *supra* note 157, at 614-22.

<sup>164</sup> *Id.*; DONNA R. EUBEN, AM. ASS'N OF UNIV. PROFESSORS, TERMINATION & DISCIPLINE 11 (2004), [https://www.aaup.org/file/Termination\\_Discipline\\_2004.pdf](https://www.aaup.org/file/Termination_Discipline_2004.pdf) ("AAUP policy encompasses the following components of academic due process: a statement of charges in reasonable particularity; opportunity for a hearing before a faculty hearing body; the right of counsel if desired; the right to present evidence and to cross-examine; record of the hearing; and opportunity to the governing board.").

<sup>165</sup> AM. ASS'N OF UNIV. PROFESSORS, DUE PROCESS IN SEXUAL-HARASSMENT COMPLAINTS 248 (1994), <https://www.aaup.org/file/due-process-in-sexual-harassment-complaints.pdf>; see AM. ASS'N OF UNIV. PROFESSORS, CAMPUS SEXUAL ASSAULT: SUGGESTED POLICIES AND PROCEDURES 370-71 (2012), [https://www.aaup.org/file/Sexual\\_Assault\\_Policies.pdf](https://www.aaup.org/file/Sexual_Assault_Policies.pdf).

<sup>166</sup> Cantalupo & Kidder, *supra* note 28, at 729-31 tbl.3, 739.

<sup>167</sup> LEO TOLSTOY, ANNA KARENINA 3 (Rosamund Bartlett trans., 2014).

<sup>168</sup> See, e.g., *Brown v. Cal. State Personnel Bd.*, 166 Cal. App. 3d 1151, 1161-63 (Ct.

In addition to supporting serious sanctions up to and including termination of employment for a tenured faculty member, courts have supported interim suspensions of faculty while an investigation of misconduct allegations is pending. Such interim suspensions are not sanctions per se, but they are often perceived as such and do implicate accused faculty's due process rights to the extent that they are perceived as inhibiting a faculty member's activities taken prior to completion of an investigation. Therefore, court support of colleges' use of interim suspensions in faculty sexual harassment cases is an important part of the due process analysis.

This support is also important because it enables colleges to use the critical secondary prevention strategy of providing student victims with accommodations in the aftermath of harassment/violence. Interim suspensions of accused faculty harassers during an investigation of a complaint can be an important accommodation for student survivors, often referred to by OCR in Title IX enforcement documents as an "interim measure."<sup>169</sup> Colleges and universities fare very well in state and federal courts when defending legal challenges to such interim suspensions if the suspension is paid and if colleges seek to prevent an immediate harm such as protecting a student from sexual harassment or retaliation by taking a reported faculty harasser

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App. 1985) (doctrine of laches applied where faculty member was formally fired for "a series and pattern of sexual harassment" but two of the three incidents were ones that the college administration sat on for four years before taking disciplinary action); *Chan v. Miami Univ.*, 73 Ohio St. 3d 52, 56, 59-60 (Ohio 1995) (4-3 decision in which the Ohio Supreme Court found that it was a violation of the employment contract and due process for the university to fire Professor Chan based upon a sexual harassment grievance procedure without initiating the faculty termination disciplinary procedures that included the right to be represented by legal counsel or to cross-examine witnesses). One of the more troubling cases is *Wilson v. Univ. of Tenn. at Chattanooga*, in which a faculty member who had a history three years earlier of being admonished by the university for inviting a student to his home and acting inappropriately and was fired when he again had a female student in his house and rubbed her shoulders and ankle (and later he accosted the student in the parking lot after learning she filed a Title IX complaint against him). *Wilson v. Univ. of Tenn. at Chattanooga*, 2001 Tenn. App. LEXIS 942, \*3-6 (Tenn. Ct. App. Dec. 28, 2001). In *Wilson*, the appellate court strained to reach the conclusion that it was not convinced that "Dr. Wilson was provided with adequate information from which he could have inferred that his behavior toward [the student complainant] would violate UTC's policy against sexual harassment." *Id.* at \*21-22.

<sup>169</sup> OFFICE FOR CIVIL RIGHTS, *supra* note 37, at 16 ("It may be appropriate for a school to take interim measures during the investigation of a complaint . . . . Similarly, if the alleged harasser is a teacher, allowing the student to transfer to a different class may be appropriate.").

out of the classroom.<sup>170</sup> Court approval of *unpaid* interim suspensions prior to an investigation is more murky, but even there some such suspensions have been upheld.<sup>171</sup>

Appreciation of the importance of interim measures is aided by studying cases where colleges clearly failed to take adequate steps to protect students or other complainants in the course of handling sexual harassment complaints. *George v. University of Idaho* presents such a case, illustrates the great retaliatory lengths that some faculty abusers can go in sexual harassment cases,<sup>172</sup> and provides a reminder of why, as stated by OCR, “doing nothing is always the wrong response”<sup>173</sup> (as well as being a “deliberately indifferent” response).<sup>174</sup> In this case a female law student broke off a sexual/romantic relationship with her instructor, Professor Eckhardt, a powerful faculty member who had been president of the university’s faculty union.<sup>175</sup> The appellate court, in reversing a summary judgment motion in favor of the university, noted that Eckhardt’s efforts to “resume the relationship became increasingly threatening and coercive. Once it became clear the relationship would not be resumed,

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<sup>170</sup> Euben & Lee, *supra* note 62, at 277 (“Faculty members who have been suspended with pay occasionally seek legal redress. Courts generally rule that suspensions with pay do not trigger constitutional due process concerns at public institutions.”); e.g., *McLaurin v. Clarke*, No. 96 16823, 1997 WL 800243, at \*3 (9th Cir. Dec. 17, 1997) (unpublished table decision); *Wasson v. Sonoma Cty. Jr. Coll. Dist.*, 4 F. Supp. 2d 893, 906 (N.D. Cal. 1997) (“Wasson, by acknowledging that she was placed on paid administrative leave, cannot claim that she was deprived of a property interest in her employment, as a matter of law.”); *Simonson v. Iowa State Univ.*, 603 N.W.2d 557, 565 (Iowa 1999) (paid interim suspension justified in sexual harassment case); see AM. ASS’N UNIV. PROFESSORS, RECOMMENDED INSTITUTIONAL REGULATIONS ON ACADEMIC FREEDOM AND TENURE, *supra* note 153, at 65-66 (describing conditions of paid interim suspension in Section 5.c.1).

<sup>171</sup> *Compare* *Silva v. Univ. of N.H.*, 888 F. Supp. 293 (D.N.H. 1994) (university was ordered to reinstate faculty who was suspended without pay); and *Delahoussaye v. Bd. of Supervisors of Cmty. and Tech. Colls.*, 906 So. 2d 646 (La. Ct. App. 2005) (university’s unpaid suspension of faculty member was reversed in part with regard to unpaid provision); with *Haegert v. Univ. of Evansville*, 977 N.E.2d 924 (Ind. 2012) (court upheld a private university’s unpaid suspension of a professor).

<sup>172</sup> *George v. Univ. of Idaho*, 822 P.2d 549, 550-51 (Ct. App. Idaho 1991).

<sup>173</sup> OFFICE FOR CIVIL RIGHTS, *supra* note 37, at iii.

<sup>174</sup> Cantalupo, “Decriminalizing” *Campus Institutional Responses to Peer Sexual Violence*, *supra* note 26, at 524 n.71; see Cantalupo, *Campus Violence*, *supra* note 156, at 641-42.

<sup>175</sup> *Sexual Charge Causes UI Law Prof to Quit*, IDAHO ARGONAUT, Feb. 4, 1986, at 1, [https://digital.lib.uidaho.edu/digital/collection/argonaut/id/9431?\\_ga=2.149215222.1912774415.1548952396-1694452127.1548952396](https://digital.lib.uidaho.edu/digital/collection/argonaut/id/9431?_ga=2.149215222.1912774415.1548952396-1694452127.1548952396).

Eckhardt's conduct became retaliatory.<sup>176</sup> The threats and retaliation continued even after the student filed a complaint with the Title IX officer, until the University president and dean arranged for a separation agreement between the professor and the university that included eighteen months of paid leave, an agreement that he would not harass or disparage the student (George) and the student's agreement that she would waive all claims against the university and Eckhardt.<sup>177</sup>

The professor failed to uphold his end of the bargain during the transition while he was on paid leave when he: (1) "engaged in a course of conduct to disparage George's character within the law school community;" (2) sent a letter *to every lawyer* who was a member of the Idaho Bar "advising them that George was neither competent nor morally fit to practice law;"<sup>178</sup> and (3) opposed her candidacy with the state bar examiners. Stated more bluntly, Eckhardt "slut-shamed" George on a massive scale throughout the Idaho legal community.<sup>179</sup> The court of appeal concluded that George's breach of contract claims should proceed to a jury trial because "[n]o facts in the record indicate that . . . the University took any action either *to prevent Eckhardt's conduct* or *to counteract its harmful effects* on George."<sup>180</sup> The Court reached this conclusion after finding that the University of Idaho "had a good faith obligation to take reasonable measures to ensure that George obtained the benefits of the non-contact provision of the release agreement."<sup>181</sup>

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<sup>176</sup> *George*, 822 P.2d at 550. These facts are cast in the light more favorable to Ms. George as the non-moving party relative to the motion for summary judgment before the court.

<sup>177</sup> *Id.* at 551-52.

<sup>178</sup> *Id.* at 552-53.

<sup>179</sup> Elizabeth M. Iglesias et al., *Labor and Employment in the Academy: A Critical Look at the Ivory Tower*, 6 EMP. RTS. & EMP. POL'Y J. 129, 159 (2002) (Professor Michael A. Olivas commenting on the George case: "[A] University of Idaho law professor who, after he had an affair with a student that had gone bad, wrote a letter to every lawyer in the state of Idaho and the State Bar saying that she was a slut. He, of course, lost this case although he claimed he was protected by academic freedom.").

<sup>180</sup> *George*, 822 P.2d at 553 (emphasis added). George went on to a successful career as an attorney, city council member and probate court judge in another part of the country.

<sup>181</sup> *Id.* at 556. A couple years later the university prevailed at trial in the George case. Reportedly former professor Eckhardt was known to be a "volatile" individual who had "gone off the deep end" and was missing and presumed dead by the time of the trial. See David Johnson, *UI Suit Jury Finds in Favor of School*, LEWISTON TRIB. (Dec. 11, 1993), [https://lntribune.com/education/ui-suit-jury-finds-in-favor-of-school-university-isn/article\\_17119000-7762-5d91-b43b-640b701a5c5a.html](https://lntribune.com/education/ui-suit-jury-finds-in-favor-of-school-university-isn/article_17119000-7762-5d91-b43b-640b701a5c5a.html). We cite the George case

This Part's analyses demonstrate that neither academic freedom nor due process restrict colleges' wide discretion regarding sanctioning. They also do not restrict Title IX's and Clery/VAWA's requirements that schools engage in comprehensive prevention of sexual harassment, discussed in Part II. In addition, as Parts III and IV make clear, the practical, public image, and reputational consequences for the college of getting a sanction wrong can be much worse than any liability consequences (although there may be both), and in the age of #MeToo, such consequences are much more likely to be serious and amplified in a way that they rarely have been in the past. Using the public health, comprehensive prevention approach to guide a college's sanctioning decision is much more likely to lead to supportable decisions both in actual court and in the court of public opinion.

#### CONCLUSION: IMPLICATIONS FOR BAKKE'S VISION AND BEYOND

By now, the complexity of sexual harassment, especially by faculty, and its potential destructiveness to the living and learning environment of a campus community should be evident. #MeToo is likely to keep such harassment and its connections to gender inequality in our minds. However, sexual harassment is only one example of the kinds of inequality and discrimination that "diverse" students face once they are admitted to college, once they enter the door that *Bakke* seeks to open. Especially since the 2016 election, reports of white supremacist violence (up to and including murder)<sup>182</sup> and harassment based on race, national origin, and religion<sup>183</sup> have been climbing on campus, but the reality is that incidents such as the surreptitious hanging of nooses and other similar visual or verbal symbols happen distressingly frequently on college campuses.<sup>184</sup>

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primarily for its factual circumstances (under modern Title IX deliberate indifference standards it would seem George's chances of prevailing at trial or in settlement would be better).

<sup>182</sup> See, e.g., Catherine Rentz, *Former Maryland Student Charged with Killing Bowie State Student Wants Murder, Hate Crime Charges Separated*, BALT. SUN (July 31, 2018, 9:15 AM), <https://www.baltimoresun.com/news/maryland/crime/bs-md-urbanski-filing-20180725-story.html>.

<sup>183</sup> Scott Jaschik, *The Incidents Since Election Day*, INSIDE HIGHER ED. (Nov. 11, 2016), <https://www.insidehighered.com/news/2016/11/11/students-many-colleges-reporting-ethnic-or-racial-harassment-election-day>; Susan Svrluga, *Black UPenn Freshmen Added to Racist Social Media Account with "Daily Lynching" Calendar*, WASH. POST (Nov. 11, 2016), [https://www.washingtonpost.com/news/grade-point/wp/2016/11/11/black-upenn-freshmen-added-to-racist-social-media-account-with-daily-lynching-calendar/?utm\\_term=.8242bf8c03a2](https://www.washingtonpost.com/news/grade-point/wp/2016/11/11/black-upenn-freshmen-added-to-racist-social-media-account-with-daily-lynching-calendar/?utm_term=.8242bf8c03a2).

<sup>184</sup> E.g., Mariah Bohanon, *Three Incidents Involving Nooses on College Campuses are*

Federal Clery Act data shows that hate crimes on U.S. college campuses increased by one-quarter in 2016, and 2016 and 2017 combined (the latest years for which data are available) reflect the highest two-year period in campus hate crimes going back a decade or more.<sup>185</sup> And even short of such incidents, the research on the effect of regular exposure to microaggressions (“brief and commonplace daily verbal, behavioral and environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative racial slights and insults to the target person or group”<sup>186</sup>) on people of color shows that “subtle discrimination can, over time, elicit similar symptoms to severe trauma.”<sup>187</sup> Finally, one of us has recently collected decades of research, as well as conducted a limited original study, showing that intersectional groups such as women students of color definitely experience more discriminatory harassment overall, and probably experience more sexual harassment than White women.<sup>188</sup>

In light of these facts, fulfilling *Bakke’s* vision of diverse higher educational communities, ones in which all students benefit from the education that living and learning with those who are different from them provides, appears significantly harder and more complicated

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*Being Investigated as Hate Crimes*, INSIGHT INTO DIVERSITY (May 9, 2017), <http://www.insightintodiversity.com/three-incidents-involving-nooses-on-college-campus-are-being-investigated-as-hate-crimes/>; Rachel Chason, *Student Admits to Hanging Noose on Duke Campus*, USA TODAY (Apr. 3, 2015, 10:56 AM ET), <http://college.usatoday.com/2015/04/03/duke-investigation-underway-after-noose-found-on-campus/>; Veronica Hilbring, *It Never Stopped: Here Are Five Recent Cases of Attempted Lynchings and Noose Intimidation*, ESSENCE (Sept. 15, 2017), <https://www.essence.com/news/recent-cases-lynching-noose-intimidation>; Jingwen Zhang, *Noose Discovery Sparks Campuswide Response*, AMHERST STUDENT (Sept. 12, 2017, 11:15 PM), <https://amherststudent.amherst.edu/?q=article/2017/09/12/noose-discovery-sparks-campus-wide-response>.

<sup>185</sup> See *Campus Safety and Security (CSS): Hate Crimes*, U.S. DEP’T EDUC., <https://ope.ed.gov/campussafety/Trend/public/#/answer/2/201/trend/-1/-1/-1/-1> (last visited Feb. 15, 2019).

<sup>186</sup> Derald Wing Sue et al., *Racial Microaggressions Against Black Americans: Implications for Counseling*, 86 J. COUNSELING & DEV. 330, 330 (2008) (quoting Sue et al.’s earlier 2007 article); see Sylvia Hurtado & Adriana Ruiz Alvarado, *Discrimination and Bias, Underrepresentation, and Sense of Belonging on Campus*, UCLA HIGHER EDUC. RES. INST. (Oct. 2015), <https://www.heri.ucla.edu/PDFs/Discrimination-and-Bias-Underrepresentation-and-Sense-of-Belonging-on-Campus.pdf>.

<sup>187</sup> Kevin L. Nadal, *Microaggressions and Traumatic Stress: Theory, Research, and Clinical Treatment*, AM. PSYCHOL. ASS’N, <https://www.apa.org/pubs/books/4317475.aspx> (last visited Feb. 3, 2019).

<sup>188</sup> Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARV. J. L. & GENDER (forthcoming 2019).



than *Bakke* implies. As one might expect of the opinion of a Justice or Justices in an *admissions* case, *Bakke* simply does not address what happens after a student is admitted, and certainly not what happens when students experience trauma due to harassment, violence, and other discrimination linked to their “diverse” identities. For that, we should look to laws dealing with sexual harassment and gender-based violence in education, and specifically to the public health, comprehensive prevention approach they adopt. In particular, we should adopt trauma-informed, secondary prevention practices for working with victims of all forms of discrimination, especially discriminatory harassment and violence, and we should not shy away from assigning serious sanctions for such conduct because of their influence, both direct and indirect on successful tertiary, secondary, and even primary prevention strategies. Students who face either (or both) repeated small and single large instances of discrimination in the form of aggressive, harassing and violent conduct experience trauma, so our institutional responses should respond to that reality. The comprehensive prevention of sexual harassment required by Title IX and Clery/VAWA builds a better future for the next generation of academic scholars and thus provides a way to consider and select the most effective responses for ending such discrimination and fulfilling, in reality, the vision that *Bakke* presented in theory.