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THE EMPEROR'S NEW CLOTHES: HOW THE ACADEMY DEALS WITH SEXUAL HARASSMENT

Anne Lawton†

Sexual harassment is an instance of moral exclusion, whereby members of a relatively powerful group conduct their lives in their own interest, sometimes at the expense of a relatively powerless group, in such a way that any harm is denied, diminished or justified. . . . To exploit this world view, one need not be powerful, one simply needs to be a member of the powerful group.1

INTRODUCTION

Despite increased awareness of and public attention to sexual harassment over the past ten to fifteen years, the incidence of sexual harassment remains disturbingly high both in the workplace and on university campuses. Sexual harassment, in any setting, can have deleterious effects. But on college campuses, sexual harassment creates unique problems. Because colleges and universities serve as the gatekeepers to good jobs, financial security, and professional life, sexual harassment compromises the educational mission of higher education and reinforces existing patterns of job sex segregation.

For more than a decade, many universities have responded to the problem

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This Article is based on my experience with the sexual harassment grievance procedure at Miami University in Oxford, Ohio.

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This Article is critical of many university sexual harassment procedures. I do not, however, wish to attribute fault to individual university attorneys or equal employment opportunity personnel, many of whom were quite willing to provide information to me and answer questions that I had about policies and procedures. I would like to mention the following persons in particular: (1) Denise Andrews, University Counsel, University of Maryland at College Park; (2) Sandy Fagan, Assistant Director, Affirmative Action Office, and Jennifer Aviles, formerly the Senior Program Coordinator, Commission on the Status of Women, University of Arizona; (3) Kristen Gray, Hope College; (4) Annela Lopez and Joe A. Powell, Office of the Vice President for Business Affairs, University of Texas at Austin; (5) Carmen McKines, Title IX Compliance Officer, and Michael R. Smith, Assistant Chancellor of Legal Affairs, University of California at Berkeley; (6) Robin Parker, General Counsel, Miami University; (7) Linda H. Millstone, Director, Equal Employment Opportunity Office, University of Texas at Austin; (8) Jennifer Modestou, Affirmative Action Data Manager, University of Iowa; (9) Steven Prevaux, Associate General Counsel, University of Florida; and (10) Julie Sweitzer, Acting Director, Office of Equal Employment Opportunity and Affirmative Action, University of Minnesota at Twin Cities.

of sexual harassment by drafting internal policies and grievance procedures. In their public policies, colleges and universities express outrage about sexual harassment, stating a firm commitment to eliminating it on campus. Sexual harassment is decried as "reprehensible" and a violation of "the dignity of individuals." Efforts to eliminate such harassment are depicted as "the decent, humane, [and] ethical thing to do." Yet few women invoke these internal sexual harassment grievance procedures. The question is, why? The answer lies, in part, with the policies and procedures themselves.

In Meritor Savings Bank v. Vinson, the Supreme Court made notice to the employer, and hence, procedures on sexual harassment, the focal point in most cases of employer liability for workplace harassment. Prior to the Court's decision in Gebser v. Lago Vista Independent School District, the same standards of liability applied, whether the case involved liability for the harassment of employees under Title VII, or of students under Title IX. As a result, Meritor created incentives for educational institutions to develop sexual harassment policies. Other than exhorting institutions to develop policies that

2. See, e.g., THE UNIVERSITY OF ARIZONA, INTERIM SEXUAL HARASSMENT POLICY [hereinafter ARIZONA POLICY] (on file with author) ("The University of Arizona requires an environment free of sexual harassment as defined in this Sexual Harassment Policy ... ."); UNIVERSITY OF CALIFORNIA, BERKELEY CAMPUS POLICY ON SEXUAL HARASSMENT AND COMPLAINT RESOLUTION PROCEDURES § I [hereinafter BERKELEY POLICY] (on file with author) ("The University is strongly opposed to sexual harassment ... ."); UNIVERSITY OF MARYLAND AT COLLEGE PARK, UMCP POLICY AND PROCEDURES ON SEXUAL HARASSMENT § A (1991) [hereinafter MARYLAND POLICY] (on file with author) ("UMCP is committed to maintaining a working and learning environment in which students, faculty, and staff can develop intellectually, professionally, personally, and socially ... . The Campus prohibits sexual harassment."); UNIVERSITY OF MINNESOTA, SEXUAL HARASSMENT GUIDELINES § I [hereinafter MINNESOTA GUIDELINES] (on file with author) ("Sexual harassment should be everyone's concern."); The Ohio State University, Human Resources Policy and Procedure Manual (1993) (visited July 9, 1998) <http://www.ohr.ohio-state.edu/policy/115pol.htm> [hereinafter OSU Policy] ("Sexual harassment is unlawful and impedes the realization of the University's mission of distinction in education, scholarship, and service."); University of Florida, Sexual Harassment: President's Message (visited July 16, 1998) <http://www.florida.edu/aa/affact/harass/message.htm> ("Sexual harassment at the University of Florida will not be tolerated and should not be ignored."); University of Iowa, Sexual Harassment and Consensual Relationships § 4.1a(1) (visited April 21, 1999) <http://www.uiowa.edu/~our/opmanual/iu/04.htm> [hereinafter Iowa Policy] ("Relationships involving sexual harassment or discrimination have no place within the University.").

The policies on the Internet are current. See E-mail message from Gina Lee, Office Associate, Ohio State University—Human Resources, to Anne Lawton, Assistant Professor, Miami University (Apr. 22, 1999) (on file with author); Telephone conversation between Steven Prevaux, Associate General Counsel, University of Florida, and Anne Lawton, Assistant Professor, Miami University (Apr. 21, 1999) [hereinafter Florida Conversation] (notes on file with author); E-mail message from Grainne Martin, Associate Director and Compliance Officer, University of Iowa, to Anne Lawton, Assistant Professor, Miami University (Apr. 22, 1999) (on file with author). Both Ohio State and Florida are making some revisions to their policies. Changes to the Florida policy will be posted on the University's sexual harassment web site. See Florida Conversation, supra.

3. Iowa Policy, supra note 2, Div. 1, § 4.1a(1).

4. OSU Policy, supra note 2.

5. MINNESOTA GUIDELINES, supra note 2, § 1.

6. While men can be the victims of sexual harassment, the research shows that sexual harassment disproportionately affects women, both at work and at school. In addition, most harassers are male, not female. See INTRA Part I.A. & B. Hence, in this Article, when referring to the victim of harassment, I use "women," "woman," or "female." When referring to the accused or the sexual harasser, I use "men," "man," or "male."


10. The Court's discussion in Meritor of employer liability sent a strong message that employers needed
do not require women to complain to the harasser, the Court provided no guidelines for developing effective sexual harassment policies and procedures. Unfortunately, neither the lower federal courts nor the Equal Employment Opportunity Commission ("EEOC") or Department of Education ("DOE") stepped in to fill the breach.

As a result, the law created no incentives for schools to develop expeditious, effective, and simple procedures for resolving sexual harassment complaints because liability seldom attached for adopting long, complex, and burdensome procedures. Instead, because of the strong tradition of self-governance within academic institutions, sexual harassment policies and procedures reflect the interests of those with the most power, i.e., tenured professors, rather than the results of research on what constitute effective mechanisms for sexual harassment reporting. What has resulted is a system in which lip service is paid to the eradication of sexual harassment, but scant attention is given to evaluating the efficacy of current policies and procedures or determining why so few women officially report harassment.

Unfortunately, the Supreme Court's most recent pronouncements on institutional liability create few incentives for educational institutions to develop procedures that will fulfill the promise to eliminate sexual harassment on campus. In its two most recent Title VII cases, Faragher v. City of Boca Raton and Burlington Industries v. Ellerth, the Court noted that "Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms." But, once again, the Court provided almost no guidance to the lower federal courts about the parameters of an effective grievance procedure. And, in Gebser, the Court effectively insulated educational institutions from liability for student harassment under Title IX by requiring student victims to demonstrate that a school official with authority to remedy the harassment acted with deliberate indifference in handling the student's sexual harassment complaint. For Title IX, then, the presence or absence of a grievance procedure appears to make little difference to a determination of liability.

This Article argues that the law has failed to hold institutions of higher education accountable for developing sexual harassment procedures that simply do not work for the vast majority of women on campus. The absence to develop policies that "address sexual harassment in particular" in order to reduce their exposure to liability for sexual harassment. Meritor, 477 U.S. at 72. In interpreting Title IX, the Department of Education encouraged, but did not require, educational institutions to develop "policies[s] and procedure[s] specifically addressing sexual harassment . . . ." Sexual Harassment Guidance, supra note 9, at 12,038. This meant that schools needed a specific sexual harassment policy and procedure for employees, but not for students.

11. See Meritor, 477 U.S. at 72.
12. See Dana S. Connell, Effective Sexual Harassment Policies: Unexpected Lessons from Jacksonville Shipyards, 17 EMPLOYEE REL. L.J. 191, 191 (1991) ("Unfortunately, the Equal Employment Opportunity Commission (EEOC) and courts have offered little guidance to employers regarding the elements of a competent sexual harassment policy. As a result, many employers have adopted policies that are, at best, ineffective.").
15. Id. at 2270.
of any meaningful external check on procedure means that forces within the
academy shape and define the procedures available for sexual harassment
victims. Yet the tradition of self-governance coupled with the institution of
tenure increase the potential within academia for creating procedures that
disproportionately burden the victims of sexual harassment. These
procedures, in turn, have created strong disincentives to report harassment.

Part I of this Article summarizes the research on the incidence of sexual
harassment both in the workplace and inside academic institutions. The research
demonstrates that the incidence of sexual harassment has not declined over the
past twenty years, despite the adoption of sexual harassment policies and
procedures by corporations and academic institutions. Part II explores the
discrepancy between the actual incidence of harassment and the reporting of
harassment within institutions. The existing research has documented an
underreporting problem in the workplace. Because few institutions of higher
education make public their sexual harassment records, this Article summarizes
the results of a public records request for sexual harassment complaints, policies,
and procedures from ten large public universities. The documents provided
demonstrate that underreporting is also a significant problem on college
campuses. Part III of this Article explores the reasons for underreporting. The
available research indicates that victims rarely report harassment, in large part
due to concerns about the fairness and efficacy of internal reporting procedures.
An examination of university sexual harassment policies and procedures reveals
that most universities erect significant procedural barriers to reporting.

In Part IV, this Article proposes several steps that universities may
undertake in order to increase the likelihood that women will report harassment.
Universities and the courts alike should examine the social science literature on
sexual harassment and underreporting. The value of sexual harassment law is its
influence on the everyday operations of an organization. If procedural barriers
foster underreporting, then the courts need to provide legal incentives for
institutions of higher education to dismantle these barriers.

I. THE INCIDENCE OF SEXUAL HARASSMENT

The statistics on the incidence of sexual harassment in the workplace and
within academic institutions tell a troubling story. While incidence rates vary,
 studies show that anywhere from one-third to one-half of all women report that
they have been sexually harassed on the job.17 The percentage of women

17. See generally James E. Gruber, The Impact of Male Work Environments and Organizational Policies
on Women's Experiences of Sexual Harassment, 12 GENDER & SOC'Y 301, 308 (1998) (43% of a large, random
sample of Canadian women reported experiencing one of 11 forms of unwanted sexual attention, ranging from
sexual jokes and remarks to touching to sexual assault, during the 12 months prior to the survey); James E.
Gruber & Lars Bjorn, Women's Responses to Sexual Harassment: An Analysis of Sociocultural,
Organizational, and Personal Resource Models, 67 SOC. SCI. Q. 814, 818 (1986) (over 36% of a sample of 150
female blue-collar workers in an auto assembly plant reported sexually harassing behaviors at work); Kimberly
T. Schneider et al., Job-Related and Psychological Effects of Sexual Harassment in the Workplace: Empirical
experiencing harassment on campus is similar.\textsuperscript{18} Most troubling is that the incidence of sexual harassment has declined little, if at all, in almost twenty years, despite widespread public attention to the issue.

A. The Workplace

In 1980, the United States Merit Systems Protection Board ("MSPB") conducted the first major survey of sexual harassment in the workplace.\textsuperscript{19} The MSPB report found that within the prior two-year period, forty-two percent of the female employees and fifteen percent of the male employees\textsuperscript{20} had experienced some form of unwanted sexual attention, which the MSPB report labeled "sexual harassment."\textsuperscript{21}

In 1987 and again in 1994, the MSPB conducted follow-up surveys to measure the incidence of sexual harassment in the federal workplace.\textsuperscript{22} The

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\textit{Evidence From Two Organizations}, 82 J. APPLIED PSYCHOL. 401, 402 (1997) ("The prevalence of such harassment in the workplace is now acknowledged to be widespread, with some estimates suggesting that as many as one of every two women will experience a sexually harassing behavior at some point during their working lives.") (citations omitted); Brenda C. Coleman, \textit{A Third of Female Doctors Report Sex Harassment}, \textit{DETROIT FREE PRESS}, Feb. 23, 1998, at 5A (almost 37% of female doctors reported having been sexually harassed).

18. See generally Louise F. Fitzgerald et al., \textit{The Incidence and Dimensions of Sexual Harassment in Academia and the Workplace}, 32 J. VOCATIONAL BEHAV. 152, 170 (1988) (31% of female students in large-scale university study reported experiencing gender harassment); Christina Risley-Curtiss & Walter W. Hudson, \textit{Sexual Harassment of Social Work Students}, 13 AFFILIA 190, 196-202 (1998) (48% of 189 female social work students reported "an occasional episode" of harassing behavior at school or in field placements); Linda J. Rubin & Sherry B. Borgers, \textit{Sexual Harassment in Universities During the 1980s}, 23 SEX ROLES 397, 405 (1990) ("When examining the incidence of sexual harassment in universities a pattern emerges; it exists as a common occurrence in our universities. While reported frequencies vary, it is suggested that 30% may be a reliable estimate.") (citations omitted); Shepela & Levesque, supra note 1, at 592 ("The most extensive surveys of academic sexual harassment report incidence rates of 20% to 40% for gender harassment of women.") (citations omitted) (emphasis in original); Coleman, supra note 17, at A5 (31% of female medical students experience gender harassment and 20% experience sexual harassment in medical school). But see Eric L. Dey et al., \textit{Betrayed by the Academy: The Sexual Harassment of Women College Faculty}, 67 J. HIGHER EDUC. 149, 157 (1996) (15% of women faculty said they had been sexually harassed).

19. U.S. MERIT SYSTEMS PROTECTION BOARD, \textit{SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM?} (1981) [hereinafter MSPB REPORT]. The Merit Systems Protection Board ("MSPB") undertook the study of sexual harassment at the request of the Subcommittee on Investigations of the House of Representatives' Committee on Post Office and Civil Service. See id. at iii. The MSPB compiled its data from questionnaires mailed to 23,964 male and female federal government employees in 1980. It analyzed data from 20,083 returned questionnaires. See id. at A-1, A-4. The MSPB survey asked employees whether they had experienced any of the following seven categories of unwanted sexual attention at work: (1) uninvited sexual teasing, jokes, remarks, or questions; (2) uninvited sexually suggestive looks or gestures; (3) uninvited pressure for dates; (4) uninvited and deliberate touching, leaning over, cornering, or pinching; (5) uninvited pressure for sexual favors; (6) uninvited letters, telephone calls, or materials of a sexual nature; or (7) actual or attempted rape or sexual assault. See id. at B-1, B-2. For a copy of the MSPB questionnaire, see id. at app.C.

20. See id. at 33.

21. In all three of its reports, the MSPB uses the term "sexual harassment," even though it acknowledges that certain behaviors in the survey, e.g., sexual jokes, if infrequent, might not satisfy the legal definition of sexual harassment. Nonetheless, the purpose of the survey, according to the MSPB, was to "not only... avoid[] situations in which a court would find a violation of law, but also [to] prevent[] the creation of an unpleasant, unproductive work atmosphere." U.S. MERIT SYSTEMS PROTECTION BOARD, \textit{SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES} 3 (1995) [hereinafter MSPB UPDATE II].

22. In its 1987 follow-up study, the MSPB mailed questionnaires to approximately 13,000 federal employees; 8523 responded (a response rate of about 66%). See U.S. MERIT SYSTEMS PROTECTION BOARD, \textit{SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: AN UPDATE} 9 (1988) [hereinafter MSPB UPDATE]. The
results of the MSPB studies proved disturbing because they highlighted the persistence of harassing behaviors in the workplace, despite widespread education and training efforts.

In 1994, 44 percent of women and 19 percent of men responding to our survey reported that they had experienced some form of unwanted sexual attention during the preceding 2 years—rates similar to 1987's 42 percent and 14 percent. The fact that the incidence of unwanted sexual attention has not decreased since the last Government-wide survey is naturally a cause for concern. Despite very widespread training and information efforts that have successfully raised workforce sensitivity to the issues surrounding sexual harassment, the persistence of this amount of unwanted sexual attention in the Federal workplace suggests that the Government's programs to eradicate the problem need some serious reexamination.\textsuperscript{23}

The MSPB surveys proved valuable not only because they demonstrated the intractability of sexual harassment, but also because they revealed patterns of behavior in the workplace. In all three surveys, sexual teasing, jokes, questions, and remarks ranked as the most prevalent form of unwanted behavior, with anywhere from thirty-three to thirty-seven percent of the female respondents stating they had experienced this behavior at work during the two years prior to the MSPB survey.\textsuperscript{24} Subsequent surveys, conducted both in the workplace and within educational institutions, demonstrate that this form of behavior, by far, is the most prevalent. Nonetheless, a substantial number of women in the MSPB surveys reported having experienced deliberate touching, leaning, or cornering (between fifteen percent and twenty-four percent),\textsuperscript{25} pressure for dates (between thirteen percent and twenty-six percent),\textsuperscript{26} and pressure for sexual favors (between seven percent

\textsuperscript{23} MSPB UPDATE II, supra note 21, at viii (bold in original).
\textsuperscript{24} See MSPB REPORT, supra note 19, at 37, fig.3-3 (33\% of female respondents in 1980); MSPB UPDATE, supra note 22, at 2-3 (35\% of female respondents in 1987); and MSPB UPDATE II, supra note 21, at 16, tbl.4 (37\% of female respondents in 1994).
\textsuperscript{25} The figures increased for this category of behavior between 1980 and 1994. Compare MSPB REPORT, supra note 19, at 37, fig.3-3 (15\% in 1980) with MSPB UPDATE II, supra note 21, at 16, tbl.4 (24\% in 1994).
\textsuperscript{26} There was a substantial drop in this category of harassment between 1980 and 1994. Compare MSPB
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and nine percent).\textsuperscript{27} Perhaps most disturbing was the four-fold increase among women respondents for actual or attempted rape or assault, climbing from one percent in 1980 to four percent in 1994.\textsuperscript{28}

The MSPB surveys also detected certain traits that characterized victims of sexual harassment. Later studies confirm many of the MSPB findings. First, women are much more likely to experience sexual harassment than are men. For example, the 1994 study found that for every category of unwanted sexual behavior, two to three times more women than men identified having experienced that behavior on the job.\textsuperscript{29}

Second, age and marital status affected the risk of harassment among women. Younger women, i.e., those between the ages of twenty and forty-four, and single or divorced women were more likely targets of sexual harassment.\textsuperscript{30} In addition, women were more at risk for harassment if they held a nontraditional job, worked for a male boss, or worked in a "predominantly male environment."\textsuperscript{31} Finally, co-workers accounted for more than forty-one percent of the harassing behavior experienced by women on the job.\textsuperscript{32}

In its study of federal government employees at the National Institutes of Health ("NIH"), the General Accounting Office ("GAO") found levels and patterns of harassment similar to those found in the MSPB surveys.\textsuperscript{33} The GAO mailed questionnaires to a stratified random sample\textsuperscript{34} of 13,473 white-

\textsuperscript{27} Compare MSPB REPORT, supra note 19, at 37, fig.3-3 (nine percent in 1980) with MSPB UPDATE II, supra note 21, at 16, tbl.4 (seven percent in 1994).

\textsuperscript{28} Compare MSPB REPORT, supra note 19, at 37, fig.3-3 (seven percent in 1994) with MSPB UPDATE II, supra note 21, at 16, tbl.4.

\textsuperscript{29} With the exception of sexual teasing, jokes, remarks, and questions, which 14% of the men identified, no more than nine percent of the male respondents said that they had experienced any of the seven other categories of unwanted sexual attention. (The MSPB added an eighth category, stalking, to its list of behaviors in 1994.) By comparison, between 10% and 37% of the women respondents said that they had experienced five of the eight categories of unwanted sexual behaviors listed on the MSPB questionnaire. See MSPB UPDATE II, supra note 21, app. 2.

\textsuperscript{30} See MSPB REPORT, supra note 19, at 42, tbl.4-1; MSPB UPDATE, supra note 22, at 20; MSPB UPDATE II, supra note 21, at 16-17.

\textsuperscript{31} MSPB REPORT, supra note 19, at 42, tbl.4-1; MSPB UPDATE, supra note 22, at 20; MSPB UPDATE II, supra note 21, at 16-17.

\textsuperscript{32} See MSPB UPDATE, supra note 22, at 20 (69% of women said a co-worker had harassed them, while 29% indicated the harasser was a supervisor); MSPB UPDATE II, supra note 21, at 18-19 (77% of women reported their harasser was a co-worker).

\textsuperscript{33} For an explanation of the General Accounting Office's ("GAO") survey methodology, see GENERAL ACCOUNTING OFFICE, PUB. NO. 95-192, EQUAL EMPLOYMENT OPPORTUNITY: NIH'S HANDLING OF ALLEGED SEXUAL HARASSMENT AND SEX DISCRIMINATION MATTERS app. III (1995) [hereinafter NIH REPORT].

\textsuperscript{34} "A stratified random sample is one obtained by separating the population elements into nonoverlapping groups, called strata, and then selecting a simple random sample from each stratum." RICHARD L. SCHEAFFER ET AL., ELEMENTARY SURVEY SAMPLING 97 (4th ed. 1990) (emphasis in original). For example, in a government organization, responses may vary based on location of office. Therefore, a stratified random sample would divide the entire population of workers for a particular agency and then randomly select participants for the survey from the samples at each office location. In order to obtain a simple random sample, take "a sample of size n . . . drawn from a population of size N in such a way that every possible sample of size n has the same chance of being selected. . . ." id. at 56.
collar NIH employees. The surveys questioned employees about sex discrimination and sexual harassment. Of those employees responding, thirty-two percent reported having experienced some form of unwanted, uninvited sexual attention during the prior year. Women reported harassing behavior at a higher rate than did men: thirty-eight percent of the women and twenty-four percent of the men responded that they had experienced unwanted sexual attention at work in the prior year. This difference in experiencing harassment might account for the survey's finding that women (twenty-one percent of female respondents) were more likely than men (eight percent of male respondents) to view sexual harassment as a serious problem at the NIH. The GAO survey found that the most prevalent form of harassment consisted of gossip about sexual behavior, sexual teasing, jokes, and remarks, and negative sexual comments about certain groups, e.g., women, men, and homosexuals.

B. Academic Institutions

Large-scale studies, such as those by the MSPB or the NIH, of the incidence of sexual harassment on campus are more difficult to find. Congress has requested and obtained a comprehensive study of sexual harassment in the military academies. In 1993, the American Association of University Women ("AAUW") released the results of its survey of 1632 public school students in grades eight through eleven, which found that eighty-one percent of students reported experiencing various harassing behaviors. The Department of Education's Office of Civil Rights ("OCR"), which is responsible for enforcing Title IX, recognizes that sexual harassment affects "significant number[s] of students." And, more recently, the Supreme Court in Gebser noted that sexual harassment "is an all too common aspect of the educational experience."
Over the past twenty years, social science researchers also have produced a number of studies that attempt to measure the incidence of sexual harassment on college campuses. In the 1980s, Fitzgerald and her colleagues undertook a large sample study of sexual harassment at two large universities: one in the Midwest and the other located on the West Coast.

The researchers administered the Sexual Experiences Questionnaire ("SEQ") to the following groups: (1) 1394 female and male undergraduate and graduate students at University 1; (2) 1205 female and male undergraduate and graduate students at University 2; and (3) 307 female faculty, staff, and administrators at University 1. Fitzgerald and her colleagues asked respondents to identify whether they had experienced more than twenty different types of unwanted sexual or sexist behavior, ranging from suggestive stories and crudely sexual remarks to threats of retaliation for failure to cooperate sexually.

Like the authors of the MSPB surveys, Fitzgerald and her colleagues found that sex proved to be a potent predictor of who experienced sexual harassment on campus.

Another conclusion, based on the two university data sets, is that men (at least male students) are quite unlikely to be harassed . . . [S]ome have suggested that [sexual harassment] may also be a problem for men. Our findings, like those of other investigators, suggest that this is unlikely to be so . . .[T]he present sample, harassing experiences other than Level 1 (gender harassment) were virtually nonexistent [for male students] . . . While it is clear that sexual behavior in the classroom or workplace is inappropriate no matter the target, it is equally clear that this is overwhelmingly a barrier for women students and workers. . . .

43. See supra note 18.
44. See Fitzgerald et al., supra note 18.
45. The Sexual Experiences Questionnaire ("SEQ") "represents particularly sound work in [the] domain [of sexual harassment research]." Richard D. Arvey & Marcie A. Cavanaugh, Using Surveys to Assess the Prevalence of Sexual Harassment: Some Methodological Problems, 51 J. SOC. ISSUES 39, 49 (1995). Unlike some sexual harassment questionnaires, the SEQ asks respondents about particular kinds of unwanted and uninvited sexual behavior before asking whether respondents have experienced sexual harassment. As a result, researchers can compare the behaviors identified by survey respondents against perceptions of harassing behavior.

In addition, researchers have tested the SEQ cross-culturally—on women in both the United States and Brazil—and on both working women and female students. In 1995, Gelfand and her colleagues concluded that the "SEQ provides a psychometrically sound measurement strategy that can be used instead of the checklist methodology typically employed in most prevalence studies." Michele J. Gelfand et al., The Structure of Sexual Harassment: A Confirmatory Analysis Across Cultures and Settings, 47 J. VOCATIONAL BEHAV. 164, 174 (1995).
46. See Fitzgerald, et al., supra note 18, at 156, 165. The researchers referred to the two universities as University 1 and University 2. They did not identify which school was located in the Midwest and which was on the West Coast.
47. For a complete list of behaviors, see Fitzgerald et al., supra note 18, at 160-61, 166-67, tbls.1 & 2.
48. Id. at 172-73 (emphasis in original) (citations omitted).
The types of sexual behaviors reported by women on campus followed patterns found in the earlier MSPB surveys. Fitzgerald and her colleagues found that approximately one-third of the women had experienced gender harassment, while one in seven female respondents said that either a professor or co-worker had engaged in seductive behavior.

Gender harassment and seductive behaviors are the most common situations experienced by women students and workers... and they are experienced quite widely. On the average, slightly over 31% of women students and 34% of working women reported some form of gender harassment, while about 15% of the students and 17% of the employed women had experienced seductive sexual approaches from their professors or co-workers... Such behaviors constitute what can be called condition of work (or education) harassment, and while not as widely recognized as the more dramatic quid pro quo behaviors discussed below, create an offensive and often intimidating environment in which women must work or study.

A much lower percentage of women students, faculty, staff, and administrators reported experiencing sexual bribery, sexual coercion, or sexual imposition. Nonetheless, the rates reported translate to substantial absolute numbers of women who experience these more severe forms of behavior. For example, between five percent and fourteen percent of the undergraduate and graduate women reported unwanted attempts to fondle or touch them. Extrapolating to the larger university population, using the conservative five percent estimate, means that 1000 women students at these two academic institutions had experienced unwanted attempts to touch or fondle them.

49. The researchers defined “gender harassment” as “generalized sexist remarks and behaviors,” such as telling offensive jokes, making seductive or crudely sexual remarks, leering and ogling, and making sexist remarks. Id. at 157, 160-61, 166-67, tbls.1 & 2.

50. Seductive behavior involved “inappropriate and offensive, but essentially sanction-free, sexual advances” and included unwanted discussion of sexual matters, requests for dates, and sexual propositions. Id.

51. Id. at 170 (emphasis in original).

52. The authors defined sexual bribery as the “solicitation of sexual activity or other sex-linked behavior by promise of rewards.” Id. at 157. For example, if a professor offers a student an “A” in a course in exchange for sexual favors, this behavior constitutes sexual bribery.

53. Sexual coercion involves the threat of punishment in order to obtain sexual favors. See id. An example of sexual coercion is when a male professor tells a female student that he will turn her in for cheating unless she “cooperates” with him sexually.

54. Sexual imposition includes unwanted or forceful attempts to touch or fondle, and forceful attempts to obtain sex. See id. at 160-61, tbl.1.

55. The incidence rate varied by university and by graduate versus undergraduate student status. At University 1, eight percent of the undergraduate and graduate women reported unwanted attempts to touch or fondle them. At University 2, five percent of the undergraduate women and 14% of the graduate women reported such incidents on the survey. See id. at 160-61, tbl.1.

56. Each university enrolled approximately 20,000 students. See id. at 156. The study provides no breakdown of the student population by sex. Assuming, however, that women constitute approximately 50% of the population at each university, five percent of the 10,000 women students equals 500 women students at each university who reported unwanted touching or fondling.
In a more recent study involving university women, Schneider and her colleagues administered the SEQ to two samples of working women, one of which was a group of 115 faculty and 185 staff at a Midwestern university. Neither sample contained students.

The SEQ, revised as a result of prior research, asked participants whether they had experienced any of eighteen different behaviors, which described three types of sexual harassment: (1) gender harassment; (2) unwanted sexual attention; and (3) sexual coercion. If a woman reported having experienced any one of the eighteen items on the SEQ within the previous two-year period, she was then asked to describe the experience. If women identified more than one experience, the questionnaire prompted them to describe the incident that left the "greatest impression."

Of the 300 university women completing the SEQ, 189 or sixty-three percent identified having experienced at least one of the eighteen behavior items on the SEQ within the prior two years. Descriptions of the harassing behaviors provided more information. Sixty-one percent of the women experiencing harassing behaviors said that the incident had occurred only once. In measuring the impact of harassment, however, frequency is not the sole criterion. Even if experienced only one time, some behaviors, such as sexual assault, fondling, or threats for sexual non-cooperation, are severe enough to affect the work environment for women. As a result, it is not surprising that almost half of the women experiencing harassing behaviors (forty-eight percent) described the incident as "offensive or extremely offensive," while forty-four percent found the incident to be "upsetting or extremely upsetting."

II. THE REPORTING PROBLEM

Studies report that between one-third and one-half of women experience sexual harassment on the job. Similar rates of harassment hold true for women at institutions of higher learning. Yet magazine articles and editorials...
query whether the law has gone too far in dealing with sexual harassment.62 Newspapers assert, without citation, that "there is widespread acknowledgment among experts that things have got[ten] better."63 Yet the MSPB surveys demonstrate that the incidence of harassment in the workplace has not declined in almost twenty years, despite increased awareness of and publicity about the problem. Underreporting of sexual harassment partially accounts for this perception gap.64 While a significant percentage of women experience harassment, very few (as low as five percent in the MSPB surveys) officially report sexual harassment to those in authority.65 Underreporting of harassment occurs both in the workplace and on campus. Women fail to report harassment for a number of reasons.66 The end result is that underreporting creates the false impression that the real problem today lies in the abuses of the system rather than in the persistence of sexual harassment in the workplace and on campus.

A. The Workplace

In its surveys on workplace harassment, the MSPB found that most women use informal67 means of dealing with sexual harassment on the job. The most common response of victims is to ignore the harassing incident or to take no action whatsoever against the offender.

[T]he most frequently occurring reaction to sexual harassment is inaction. The single most common response of employees who are targets of sexually harassing behaviors hasn’t changed since the initial administration of MSPB’s survey in 1980. That response has been, and continues to be, to ignore the behavior or do nothing.68

63. Weiss, supra note 62, at 46.
64. A backlash against feminism also accounts, in part, for the perception gap. See Marcia A. Gillespie, The Backlash Boogie, MS., May/June 1998, at 1; see also DEBORAH L. RHODE, SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY 96-107 (1997). It is indeed curious that the media focuses the glare of the “sexual harassment” spotlight on the anomalous, such as an incident in which two elementary school boys were suspended for kissing their female classmates. Concern for the “abuses” of the law of sexual harassment at times outweighs concern for the failure of the law during the past 20 years to eliminate or even reduce the incidence of sexual harassment.
66. See infra Part III.C.1-5.
67. The MSPB defined informal action as a range of behaviors, from ignoring the incident to reporting it to a supervisor. See MSPB UPDATE, supra note 22, at 23-24.
68. MSPB UPDATE II, supra note 21, at 29; see also MSPB UPDATE, supra note 22, at 24.
In the MSPB surveys, more than forty percent of women used other informal means of handling harassment, such as asking or telling the harasser to stop his behavior or avoiding the harasser at work. 69

Few women (between five percent and six percent) 70 who experienced unwanted sexual attention at work reported taking formal action 71 against the offender. Ignorance of available procedures did not account for the low formal reporting rate. At least three-quarters of all respondents knew about three of the four available channels for formal reporting and/or investigation of allegations of sexual harassment within their agency. 72 Perhaps most startling was the finding "that victims were just as likely to change jobs as a result of sexual harassment as they were to take formal action." 73

Similar patterns of reporting behavior surfaced in the NIH report. Approximately thirty-eight percent of female and twenty-four percent of male respondents reported some form of unwanted and uninvited sexual attention. 74 Nonetheless, only four percent of the NIH employees who had experienced harassment took formal action, such as filing a sexual harassment complaint. 75 The overwhelming majority of respondents either ignored the incident or did nothing (forty-five percent) or avoided the offender (forty percent). 76

B. Academic Institutions

It is more difficult to obtain reporting rates for sexual harassment on college campuses. The EEOC has the power to "make such technical studies as are appropriate to effectuate the purposes and policies of [Title VII] and to make the results of such studies available to the public." 77 But the EEOC has conducted no comprehensive studies of workplace sexual harassment, whether in the private sector or within academic institutions. Some researchers, such as Fitzgerald and her colleagues, have conducted large-scale studies of harassment within academic institutions, but many of these studies are limited to one or two universities. In addition, few universities make public the number of sexual harassment complaints filed by faculty, students, and staff. As a result, for those colleges that do release reporting statistics, 78

69. See, e.g., MSPB UPDATE, supra note 22, at 24.
70. See MSPB UPDATE, supra note 22, at 27; MSPB UPDATE II, supra note 21, at 33.
71. The MSPB defined formal action as filing a grievance about or requesting an investigation of the incident of harassment. See MSPB UPDATE, supra note 22, at 25. Based on this definition, the authors of the MSPB report estimate that fewer than five percent of women formally report sexual harassment. Many women considered speaking to their supervisor as formal action, even though this did not satisfy the MSPB’s definition of formal action. See id. at 27.
72. See MSPB UPDATE, supra note 22, at 25-26, fig.3-3; MSPB UPDATE II, supra note 21, at 33.
73. MSPB UPDATE, supra note 22, at 27.
74. See NIH REPORT, supra note 33, at 7.
75. See id. at 5.
76. See id., app.II, at 28 (indicating that 1710 of 4292 respondents (40%) avoided the offender; 1951 of 4292 respondents (45%) ignored the incident or did nothing).
78. Cornell University publishes annual and semi-annual sexual harassment reports, which are located at
"[i]t's difficult to know if [the reporting rate is] similar to other campuses because there aren't any comparable studies." 79

In order to obtain more data regarding reporting of sexual harassment on campus, I requested copies, pursuant to state public records laws, of sexual harassment complaints from ten large public universities. 80 I requested copies of all formal and informal complaints of sexual harassment made during the past three academic years. 81

Many schools maintain separate formal and informal complaint mechanisms. Generally, an investigation, fact-finding, and the possibility of sanctions characterize formal procedures. Many schools require a written complaint to initiate formal sexual harassment proceedings. By comparison, there usually is no investigation, fact-finding, or sanctions involved in an informal sexual harassment procedure. A written complaint is not needed to initiate most informal proceedings. Thus, some universities do not have actual copies of informal complaints. In the event that the university did not have copies of informal complaints, I asked each university to provide the number of informal complaints made between August 1995 and June 1998. Finally, in order to avoid privacy problems, I explained in my records requests that it was acceptable if the university redacted the names of victims and those persons accused of sexual harassment.

I requested sexual harassment records from the following universities: (1) Miami University in Oxford, Ohio ("Miami"); (2) State University of New York at Binghamton ("SUNY"); (3) the University of Arizona ("Arizona"); (4) the University of California at Berkeley ("Berkeley"); (5) the University of Colorado at Boulder ("Colorado"); (6) the University of Florida


80. Because large universities account for approximately half of the total college population, I selected 10 universities with student enrollments exceeding 15,000. See National Center for Education Statistics, Digest of Education Statistics, Postsecondary Education § 8 (last modified Feb. 12, 1998) [hereinafter Education Statistics] ("While 11% of the campuses enrolled 10,000 or more students, they accounted for 50% of total college enrollment.") (citation omitted). The University of Florida ("Florida"), the University of Minnesota ("Minnesota"), and the University of Texas ("Texas") are among the top 10 largest universities, based on student enrollment. See CHRON. OF HIGHER EDUC., ALMANAC ISSUE 17 (1998) [hereinafter ALMANAC] (based on U.S. Department of Education figures for the fall of 1996). Another five of the 10 universities—the University of Arizona ("Arizona"), the University of California at Berkeley ("Berkeley"), the University of Colorado at Boulder ("Colorado"), the University of Iowa ("Iowa"), and the University of Maryland at College Park ("Maryland")—are among the 50 largest in the United States, based on student enrollment. See id. Only Miami University ("Miami") and the State University of New York at Binghamton ("SUNY") do not figure in the top 50. See id. I selected Miami based on my personal experience with Miami’s internal sexual harassment grievance procedures.

I further narrowed my sample by selecting only public universities. I did so because I intended to request records pursuant to state public records laws. As units of state government, public universities are within the purview of public records laws. Finally, I wanted my sample to include universities from different geographical regions. Therefore, I chose universities from the Northeast, Southeast, Midwest, South, Southwest and West in order to have a more representative sampling of large public universities.

81. I requested complaints for the period from August 1, 1995 through early June of 1998. Copies of public records requests are on file with the author.
at Gainesville ("Florida"); (7) the University of Iowa ("Iowa"); (8) the University of Maryland at College Park ("Maryland"); (9) the University of Minnesota at Twin Cities ("Minnesota"); and (10) the University of Texas at Austin ("Texas") [hereinafter "public records schools"]. Table I summarizes the universities' responses to my public records request.

Only two of the ten public records schools (Miami and Texas) provided actual copies of sexual harassment complaints. Miami only disclosed copies of formal sexual harassment complaints; the university does not maintain records of informal complaints.

Four universities (Berkeley, Florida, Maryland, and SUNY) provided neither copies of complaints nor annual summaries of the number of sexual harassment complaints filed on campus. The remaining four schools (Arizona, Colorado, Iowa, and Minnesota) did not produce copies of complaints, but did provide the number of sexual harassment complaints filed per year. Cumulative statistics of the number of complaints filed provides some information about reporting rates. But raw numbers tell us nothing about the time needed to complete an investigation or the sanctions imposed for various transgressions. As a result, critical information necessary to evaluate the effectiveness of grievance procedures is missing.

1. Available Information

Because few large-scale studies of sexual harassment on college and university campuses exist, it is more difficult to document the underreporting problem on campus. In 1994, the GAO released its initial report of sexual harassment at the three military academies charged with educating and training air force, naval, and army cadets. The report found a very high incidence of sexual harassment but a very low level of formal reporting of harassment. During the 1991 academic year, between ninety-three and ninety-seven percent of female cadets reported experiencing harassment, with anywhere from fifty to seventy-six percent reporting harassing behavior on a "recurring basis."\(^2\) During this same academic year, only 3.7% of cadets (twenty-six complaints) reported incidents of sexual harassment.\(^3\)

Of course, studies of underreporting at academic military institutions may not accurately reflect the level of reporting of sexual harassment at civilian colleges and universities. Unfortunately, neither the EEOC nor the DOE has conducted a comprehensive study of the prevalence and reporting of sexual harassment on college campuses. Nonetheless, social science research strongly suggests that both the incidence of sexual harassment and the low

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\(^2\) See id. A follow-up report for the 1993-1994 academic year showed the following percentages of female cadets who reported recurring harassment: (1) Naval Academy: 70%; (2) Military Academy: 80%; and (3) Air Force Academy: 78%. See DOD REPORT II, supra note 39, at 8-11.

\(^3\) There were 1415 female cadets at the three academies during the 1991 academic year. Using the Naval Academy's conservative 50% incidence rate for recurring harassment, 708 female cadets reported experiencing recurring incidents of harassing behavior. Yet only 3.7% filed complaints (26 complaints/708 female cadets). See id. at 20, 26.
level of reporting are similar in both the workplace and in academic settings. And the data provided by some of the public records' schools supports the conclusions of social science researchers that underreporting of harassment is not a phenomenon limited to the workplace. It also is a serious problem at institutions of higher learning.

Only six universities—Arizona, Colorado, Iowa, Miami, Minnesota, and Texas—provided either copies of sexual harassment complaints or numerical breakdowns of harassment complaints. All six of these institutions had reported levels of harassment that fell significantly below the incidence of harassment reported by social science researchers. No college or university in this survey of large public universities had an official reporting rate greater than one percent. Moreover, data constraints result in an exaggeration, for each school, of its official reporting rate. Table II provides official reporting rates for the institutions that released either complaints or reporting statistics.

Data from Arizona demonstrates that even the exaggerated official reporting statistics significantly understate the actual incidence of sexual harassment on campus. During the past three academic years, at best only 0.6% of female students annually reported harassment at Arizona. Yet this figure is nowhere close to the incidence of harassment reported by students at Arizona, according to a report completed by Arizona's Commission on the Status of Women ("Commission"). The survey of faculty, staff, and students...

84. See generally Rudman et al., supra note 65, at 519-20 (detailing high incidence coupled with low reporting of sexual harassment on campus).

85. Fitzgerald and her colleagues found that approximately one-third of female students reported incidents of gender harassment, while 15% reported seductive sexual approaches from professors. Among undergraduate women, between five eight percent reported unwanted attempts to fondle or touch them. See supra Part I.B.

86. Dividing the average number of complaints reported by each university for the past three academic years by the number of full-time female graduate and undergraduate students produces the reporting rate. The calculations do not include complaints by faculty, staff, part-time, or male students, so they overstate the official rate of reporting. Because most of the universities did not provide copies of actual complaints, I could not determine whether students, faculty, or staff made the complaints. I erred on the side of the universities and provided figures based on the assumption that all complaints involved only one subset (female students) of each campus' population.

87. The 0.6% reporting rate is based on 57 formal and 222 informal complaints over a three-year period or an average of 93 complaints per academic year. See Table II. But Arizona does not keep records indicating the nature of informal contacts. See E-mail message from Sandy Fagan, Assistant Director, Affirmative Action Office, University of Arizona, to Anne Lawton, Assistant Professor, Miami University (Aug. 25, 1998) [hereinafter Arizona Letter] (on file with author). Thus, these 222 informal contacts include contacts about other employment discrimination issues, such as race, disability, and sexual orientation discrimination.

It is highly unlikely that all 222 informal complaints involve complaints of sexual harassment. For example, during the 1997-1998 academic year, there were 24 formal complaints of discriminatory behavior at Arizona, but only 10 (or 42%) involved sexual harassment. See Communication from Sandy Fagan, Assistant Director, Affirmative Action Office, University of Arizona (July 15, 1998) (on file with author). If the percentage of sexual harassment complaints out of all discrimination complaints (42%) holds constant for formal and informal contacts, then only 93 of the 222 informal contacts at Arizona involve sexual harassment. This almost halves Arizona's official reporting rate, from 0.6% to 0.34%. (Using the 42% assumption, there were 150 formal complaints and informal contacts about sexual harassment during the past three academic years: 57 formal complaints and 93 informal contacts. Thus, on average, there were 50 sexual harassment complaints per year over this time period. This means that only 0.34% of full-time female students reported sexual harassment per year: 50 complaints out of 14,911 female students.)

88. See UNIVERSITY OF ARIZONA, COMMISSION ON THE STATUS OF WOMEN, RESULTS OF CAMPUS
The Emperor’s New Clothes

asked both male and female respondents about their experiences with sex discrimination and sexual harassment. The survey asked about particular kinds of harassing behavior, e.g., sexual advances, touching, and seductive remarks about appearance.

Of the 1223 students who completed the survey, thirteen percent reported that faculty members had made seductive remarks about the student’s appearance, body, or sexual activity on more than one occasion. Of the 1223 students who completed the survey, thirteen percent reported that faculty members had made seductive remarks about the student’s appearance, body, or sexual activity on more than one occasion. Seven percent of students reported experiencing unwanted sexual attention from a faculty member a “few times or more.” Finally, four percent of students reported that faculty members had made sexual advances to them a “few times or more.”

The Commission’s report also covered harassment of faculty and staff. The Commission found that thirty percent of the 1227 female respondents said that they had experienced sexually insulting comments or “put-downs” from men. Eighteen percent of the women respondents reported that a man had touched them in a sexual way at work. Two percent of the female respondents said that they had left a job at Arizona because of sexual harassment.

The Commission’s report demonstrates that the level of harassment at Arizona is much higher than the number of incidents reported through University channels. This is not to suggest that Arizona has a more serious underreporting problem than do other universities. The difference is that most universities do not conduct climate surveys so there is no mechanism for comparing the incidence of harassment with official reporting rates. The social science research on the incidence of sexual harassment on campus when compared with the reporting rates of public records’ schools demonstrates that the underreporting phenomenon at Arizona is not an anomaly.

The problem with underreporting is that it creates the false impression that sexual harassment is a rare event on campus. Men, who often are not the...
recipients of unwanted sexual attention, view those formal complaints that women actually do make as aberrations, rather than as part of a systemic pattern of harassment.

[D]isturbing numbers of female cadets reported to the Superintendent that instances of sexual assault, improper fondling, and sexual harassment and discrimination had occurred to them while at the Academy. Only a tiny fraction of these instances had ever been reported. Perhaps for that reason, male cadets tended to be far less aware of the extent of such problems than the female cadets were. . . . [S]omething that was relatively common knowledge among female cadets was far less well known by the males.96

Underreporting can create two cultures within a university: those who experience and witness harassment and those who do not.97 Bridging the gap requires universities both to make public their records on harassment and to evaluate why their official reporting rates significantly understate the actual incidence of harassment on campus.

2. What Colleges and Universities Won’t Tell Us

Nondisclosure of sexual harassment complaints at public universities appears to be the rule, not the exception. But nondisclosure creates problems. First, it is difficult for the public to measure the effectiveness of university grievance procedures if they have no information with which to compare official reporting rates with the incidence of harassment on campus. Second, how can universities themselves evaluate the efficacy of their internal grievance procedures if they maintain no records or annual numerical summaries of sexual harassment complaints? The reluctance with which colleges and universities provide information, even pursuant to state public records requests, about sexual harassment complaints makes it difficult to study the incidence and reporting of harassment on campus. The end result is a reporting system that insulates educational institutions from public scrutiny.

a. Failure to Keep Records

Of the ten public records’ schools, five do not keep records that, at a minimum, permit the universities to assess easily the effectiveness of their internal sexual harassment reporting procedures. Three universities—Florida,
Berkeley, and Maryland—maintain neither formal nor informal records in a manner that allows the universities to track easily the numbers of sexual harassment complaints received. Two other universities—Miami and SUNY—maintain no records of informal complaints of sexual harassment.

Florida’s sexual harassment procedure is decentralized, with most complaints starting at the departmental level. Thus, records that are maintained are kept within each of the twenty-six departments of the university. Berkeley has “neither a central index to, nor any way of reasonably retrieving or identifying, [formal] grievances of an [sic] alleged sexual harassment.” As for informal complaints of sexual harassment, Berkeley does not “maintain a statistical breakdown of complaints on the basis of their nature and resolution.” Maryland does not maintain complaint records by subject matter, so the university cannot “identify which files . . . contain sexual harassment complaints as opposed to other matters.” Maryland also does not keep track of “the number of sexual harassment complaints, either formal or informal.”

Universities are not required to keep records of sexual harassment complaints. Public records laws require disclosure of existing records; they do not compel institutions to maintain certain records. In addition, the EEOC “has not adopted any requirement, generally applicable to employers, that records be made or kept.” The EEOC does require institutions of higher education to maintain records necessary to complete the EEO-6, but the information required does not include sexual harassment complaint documentation.

The failure to keep records sends a clear message about a university’s priorities. There is no reason not to keep records other than to protect the institution from outside scrutiny and legal liability. The public cannot obtain

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98. See Memorandum from Robin L. Parker, General Counsel, Miami University, to Anne Lawton, Assistant Professor, Miami University 1 (Oct. 28, 1997) [hereinafter Miami Letter I] (on file with author) (no copies of informal complaints because a written complaint not needed to invoke informal complaint procedure); Memorandum from Robin L. Parker, General Counsel, Miami University, to Anne Lawton, Assistant Professor, Miami University 1 (Sept. 3, 1998) [hereinafter Miami Letter II] (on file with author) (indicating that tabulations of annual numbers of informal complaints currently do not exist).

99. See Letter from Katharine F. Ellis, Director of Media Relations, Binghamton University, to Anne Lawton, Assistant Professor, Miami University 2, ¶¶ 5-6 (July 14, 1998) [hereinafter SUNY Letter] (on file with author) (“The University does not maintain copies of informal complaints of sexual harassment, and I am informed that the number of informal complaints has not been tracked in any formal manner.”).

100. See Telephone Conversation between Steven Prevaux, Associate General Counsel, University of Florida, and Anne Lawton, Assistant Professor, Miami University (July 16, 1998) [hereinafter Florida Conversation] (notes on file with author); see also University of Florida, University Procedures For Handling Sexual Harassment Complaints (visited July 16, 1998) <http://www.aa.ufl.edu/aa/affact/harass/procedures.htm>.

101. Letter from Michael R. Smith, Assistant Chancellor—Legal Affairs, University of California, Berkeley, to Anne Lawton, Assistant Professor, Miami University 1 (July 1, 1998) [hereinafter Berkeley Letter] (on file with author).

102. Id. at 2.

103. Letter from Denise A. Andrews, University Counsel, University of Maryland, to Anne Lawton, Assistant Professor, Miami University 1 (Sept. 23, 1998) [hereinafter Maryland Letter] (on file with author).

104. Id.


copies of records that do not exist. "[T]he Freedom of Information Law provides for access to existing records, but does not require an agency to create a record in response to a request." And, if the public cannot obtain university records on harassment, then it cannot evaluate a university's internal procedures for handling harassment.

A university also protects itself from legal liability by not keeping records. This is especially important in cases of repeat offenders. While many educational institutions have both formal and informal mechanisms for bringing sexual harassment complaints, women more often invoke informal complaint mechanisms. Suppose during each academic year from 1990 until 1997, Professor W harasses a different female student. Each year, the harassed student complains, using the university's informal grievance procedure. And, each year, Professor W escapes with no punishment. The university does not impose sanctions because no fact-finding occurred, which is typical in informal proceedings. The university "knows" that Professor W harasses a different female student. Each year, the harassed student complains, using the university's informal grievance procedure. And, each year, Professor W escapes with no punishment. The university does not impose sanctions because no fact-finding occurred, which is typical in informal proceedings.


108. For example, from January 1 through June 30, 1997, the Office of Equal Opportunity at Cornell University heard 12 employment-related complaints of sexual harassment. All 12 were handled informally, without an investigation. See Cornell University, Office of Equal Opportunity, Spring 1997 Semi-Annual Sexual Harassment Report and Consolidated Report for the 1996-97 Fiscal Year with Five-Year Comparative Data §§ I.A-C (visited Aug. 13, 1998) [hereinafter Cornell Letter] (on file with author) (mediation process, internal procedures for handling harassment). And, each year, Professor W escapes with no punishment. The university does not impose sanctions because no fact-finding occurred, which is typical in informal proceedings. The university "knows" that Professor W harasses a different female student. Each year, the harassed student complains, using the university's informal grievance procedure. And, each year, Professor W escapes with no punishment. The university does not impose sanctions because no fact-finding occurred, which is typical in informal proceedings.
W is a repeat offender, yet has no institutional memory of Professor W's actions. In 1998, a female student decides to file a formal complaint against Professor W, or hires an attorney to bring suit. The university will have no records showing that it had failed to sanction Professor W, even though he had repeatedly harassed other female students for the past seven academic years.

Finally, if a university does not maintain records or statistical compilations of complaints, then how can it monitor the efficacy of its internal grievance procedures? Without records, the university cannot examine how it processes sexual harassment complaints. It cannot calculate the average time required to investigate a complaint, or the average sanction imposed. In addition, the university cannot determine its own internal reporting rate, in order to compare it to social science research on the incidence of sexual harassment. Without this information, universities are woefully ill-equipped to evaluate and revise existing policies and procedures in order to improve internal reporting rates of sexual harassment.

b. Failure to Disclose Existing Records

Many colleges and universities that do maintain records refuse to disclose them. Five of the ten public records schools—Iowa, Berkeley, SUNY, Arizona, and Colorado—refused to disclose some or all of the sexual harassment records that they maintain. The reasons for nondisclosure fall into two broad categories: (1) confidentiality concerns, and (2) exemptions for personnel records.

Three universities—Iowa, Berkeley, and SUNY—refused to provide copies of some or all of their harassment records based on confidentiality or privacy concerns. Iowa refused to provide copies of either its formal or informal sexual harassment complaints, citing university policy on confidentiality. “Pursuant to University policy, the requested complaint files are confidential and not subject to disclosure.” However, Iowa did provide an annual compilation of sexual harassment reports dating back to the 1990-1991 academic year. 

Berkeley and SUNY refused to produce certain harassment records, also citing confidentiality or privacy concerns. Although Berkeley apparently maintains records of informal complaints of sexual harassment, it refused to
disclose those records, claiming that the "documents are maintained as strictly confidential; and . . . it would be unreasonably burdensome to redact each of those complaint files."112 SUNY, on the other hand, maintains no informal records of sexual harassment.113 It does keep formal records, but declined to provide them, claiming that doing so, even in redacted form, "would result in an unwarranted invasion of personal privacy."114

Arizona and Colorado also refused to produce copies of sexual harassment complaints, but based their decision on exemptions for personnel records. Arizona argued that "the information contained in an [Affirmative Action Office] complaint [is] personnel information since the allegations, if proven, can lead to disciplinary action against an employee."115 Colorado also declined to provide copies of either informal or formal complaints, claiming that "this information is part of personnel files that are not allowable under the [Colorado Open Records Act]."116 Although both Arizona and Colorado denied my request for copies of actual complaints, both universities provided numerical summaries of complaints filed. While Arizona provided the number of sexual harassment complaints filed during the past three academic years, Colorado provided figures only for the eighteen-month period from December 1, 1995 through May 31, 1997.117

Although public records laws do not require blanket disclosure of all records maintained by public institutions, the policy underlying public records laws is one favoring disclosure over nondisclosure.118 Viewed in this light, the reasons offered by the public universities that denied access to their sexual harassment records are suspect.

First, some institutions fail to understand the difference between a state law exemption and their institution's policy preferences regarding disclosure. Both Iowa and Berkeley declined my public records request, based on their respective institutions’ policy on confidentiality; neither cited a valid state law exemption in refusing to disclose records. A university cannot trump state public records laws by promising confidentiality and then using that justification to deny access to records that public law makes available.

114. Id. at 1, ¶ 4.
117. See UNIVERSITY OF COLORADO AT BOULDER, REPORT ON SEXUAL HARASSMENT POLICY § I, at 1 [hereinafter COLORADO REPORT I] (on file with author); UNIVERSITY OF COLORADO, UNIVERSITY REPORT ON SEXUAL HARASSMENT 1997 §§ 1-II, at 1-2 [hereinafter COLORADO REPORT II] (on file with author); Letter from Shari J. Robertson, Co-Chair, University of Colorado at Boulder's Sexual Harassment Policy, to Anne Lawton, Assistant Professor, Miami University (Oct. 6, 1998) (on file with author).
118. See, e.g., COLO. REV. STAT. § 24-72-201 (1997) (with certain enumerated exceptions, it is "the public policy of [Colorado] that all public records shall be open for inspection . . .."); Carlson v. Pima County, 687 P.2d 1242,1246 (Ariz. 1984) ("statutory policy favoring disclosure"); Zubeck v. El Paso County Retirement Plan, 961 P.2d 597, 600 (Colo. Ct. App. 1998) ("The general purpose of the [Open Records Act] is to assure that, by providing access to public records, the workings of government are not unduly shielded from the public eye.") (citation omitted); Gould v. New York City Police Dep't, 675 N.E.2d 808, 811 (N.Y. 1996) ("All government records are thus presumptively open for public inspection and copying unless they fall within one of the enumerated exemptions of Public Officers Law § 87(2).").
Second, other universities paint with an extremely broad brush in denying access to sexual harassment records. SUNY claimed that disclosure of sexual harassment records would constitute “an unwarranted invasion of personal privacy.”119 This is a legitimate exemption under New York’s Freedom of Information Law (“FOIL”); however, the courts in New York have held that exemptions under FOIL are to be narrowly construed.120 Overly broad interpretations of terms such as “privacy” contravene FOIL’s presumption of disclosure.121

In addition, FOIL provides that, with certain statutory exceptions, “disclosure shall not be construed to constitute an unwarranted invasion of personal privacy . . . when identifying details are deleted.”122 None of the statutory exceptions apply to disclosure of sexual harassment records, and my request for records specifically stated that SUNY could redact the names of both the complainant and the accused. SUNY’s reliance on the personal privacy exemption effectively insulates the institution from releasing copies of any public records involving discipline. Apparently, SUNY seeks to evade disclosure by asserting that redacting the names of complainants and those accused would still make these persons “easily identifiable” by an academic in another state.123

Arizona and Colorado, like SUNY, also denied disclosure, relying on an exemption for personnel records. Arizona’s public records law, however, contains no such exemption. The law does provide an exemption from disclosure for certain identifying information, e.g., home address and phone number, of peace officers.124 But even this exemption does not protect all information about peace officers from public disclosure, and university professors are not peace officers.

Apparently, Arizona relies on a policy statement by its Board of Regents, which provides, in pertinent part, that “[p]ersonnel records and information are confidential and their disclosure . . . would be contrary to the best interests of the state.”125 Because sexual harassment complaints can lead to disciplinary action, university counsel at Arizona considers such records to be personnel information exempt from disclosure under state law.126 But in Carlson v. Pima County,127 the Arizona Supreme Court confronted this exact dilemma of balancing the right of confidentiality against the right of access to public documents. “[A] practical alternative to the complete denial of access

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119. SUNY Letter, supra note 99, at 1, ¶ 4.
120. See Gould, 675 N.E.2d at 811 (“To ensure maximum access to government documents, the ‘exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption.’”) (citations omitted).
121. See, e.g., id. (“blanket exemptions for particular types of documents are inimical to FOIL’s policy of open government”) (citation omitted).
126. See id.
would be deleting specific personal identifying information, such as names.\textsuperscript{128} Arizona rejected this alternative; instead, it completely denied access to all sexual harassment records. The problem with Arizona's interpretation of state law is that it effectively insulates all disciplinary records from public review. It is unclear how doing so is in the best interests of the state.

Colorado's Open Records Act, unlike Arizona's law, does contain an exemption for personnel files.\textsuperscript{129} In response to an amendment to the Open Records Act in 1985, which made the Act applicable to the Regents of the University of Colorado, Boulder issued an Administrative Policy Statement ("APS") noting that under Colorado law "personnel files are not open to the general public."\textsuperscript{130} The APS provides for the inclusion of disciplinary records in personnel files.\textsuperscript{131} Performance ratings are also included in personnel files, according to Colorado's APS, yet Colorado law expressly exempts performance ratings from the personnel files exemption.\textsuperscript{132} Thus, placing a record in a personnel file does not automatically insulate it from disclosure under the Colorado Open Records Act.\textsuperscript{133}

In fact, the definition of "personnel files" coupled with state policy regarding disclosure of public records strongly suggests that Colorado law does not exempt sexual harassment records from disclosure as personnel records. Performance ratings are excluded from the definition of "personnel records." Yet an evaluation of performance normally includes disciplinary actions. In addition, Colorado state law favors disclosure of public records. The Colorado courts have narrowly construed exemptions to the Open Records Act.\textsuperscript{134} Colorado's interpretation of the personnel files exemption creates a vast exemption for all disciplinary actions against state employees. Such a broad interpretation seems to contravene the legislature's decision to exempt performance ratings from the statutory definition of personnel files.

III. WHY THE DISCREPANCY?

The law shapes the outer limits beyond which universities dare not tread for fear of legal liability in sexual harassment cases. At a minimum, institutions of higher education know that they must have a grievance

\textsuperscript{128} Id. at 491.
\textsuperscript{129} See COLO. REV. STAT. § 24-72-204(3)(a)(II)(A) (1997).
\textsuperscript{131} See id. at § 1.A.1.
\textsuperscript{132} See COLO. REV. STAT. § 24-72-202(4.5) (1997) ("Personnel files' does not include . . . performance ratings . . . .").
\textsuperscript{133} The Colorado Policy Statement recognizes that certain items, although categorized as personnel records for purposes of university policy, do not satisfy the personnel records exemption under state law. See Colorado Policy Statement, supra note 130, § 1.
\textsuperscript{134} See, e.g., Zubek v. El Paso County Retirement Plan, 961 P.2d 597 (Colo. 1998)
procedure available for sexual harassment complaints. But legal liability has rarely attached in cases involving inefficient, ineffective, or inadequate complaint procedures. By broadly defining the boundaries of permissible action, however, the courts, the EEOC, and the DOE have given universities little guidance and great discretion in determining what constitutes an effective sexual harassment policy and procedure.

The result is that the debate over sexual harassment law plays itself out in the development of sexual harassment policies and procedures. In the absence of concrete guidelines and legal constraints on procedure, universities develop policies, procedures, and strategies based on their organization's culture. This, in turn, means that organizational culture and dominant beliefs about sexual harassment, not research on effective procedures, shape and define the relief afforded within academic institutions to victims of sexual harassment.

A. Sexual Harassment in Colleges and Universities: The Legal Framework

Educational institutions are governed both by Title VII, which covers employees, and Title IX, which applies to students. In its recent decision in *Gebser v. Lago Vista Independent School District*, the Supreme Court effectively insulated educational institutions from liability for sexual harassment of their students. The Court, in a five-to-four decision, held that a student victim of harassment cannot hold her school liable for a teacher's sexual harassment unless a school official with "authority to institute corrective measures... has actual notice of, and is deliberately indifferent to, the teacher's misconduct." In its two recent Title VII decisions in *Burlington Industries v. Ellerth* and *Faragher v. City of Baco Raton*, the Court adhered to a much different standard of liability for sexual harassment in the workplace. It is unclear, however, whether the lower federal courts will interpret *Ellerth* and *Faragher* in such a manner as to restrict employer discretion in shaping sexual harassment policies, procedures, and strategies.

135. Until *Gebser*, the DOE held that schools needed a grievance procedure, but not one specifically tailored to sexual harassment complaints. See Sexual Harassment Guidance, supra note 9, at 12,038. *Meritor*, of course, exhorted employers to develop specific policies and procedures for sexual harassment complaints.

136. See Connell, supra note 12, at 192-94 for cases in which courts have found employers liable for having ineffective policies. The problem is that many of these cases involved firms that had sexual harassment policies, but no complaint procedures. Given the Supreme Court's decision in *Meritor*, a finding of liability under such circumstances is not unlikely. Unfortunately, few courts have gone beyond the limited advice given in *Meritor* to determine whether employer procedures actually encourage women to come forward with sexual harassment complaints.


140. Id. at 1993.


1. **Title VII and Sexual Harassment of Employees on Campus**

Title VII proscribes employers from discriminating on the basis of sex "with respect to [] compensation, terms, conditions, or privileges of employment . . . " The phrase "sexual harassment" appears nowhere in the language of Title VII. In fact, the word "sex" was added apparently in a last-ditch effort to defeat passage of the Civil Rights Act of 1964. As a result, virtually no legislative history exists to aid in interpreting Congress' intent with regard to the scope of Title VII's protection against sex discrimination.

Nonetheless, beginning in the 1970s, courts began to interpret Title VII's prohibition against sex discrimination as encompassing sexual harassment in the workplace. In 1976, in *Williams v. Saxbe*, the federal district court for the District of Columbia became the first U.S. court to recognize sexual harassment as a form of sex discrimination cognizable under Title VII. In *Williams*, the court held that the "retaliatory actions of a male supervisor, taken because a female employee declined his sexual advances, constitutes sex discrimination within the definitional parameters of Title VII." Four years later, the EEOC issued guidelines that recognized sexual harassment as a form of sex discrimination under Title VII.

The EEOC guidelines recognize two categories of sexual harassment: (1) quid pro quo; and (2) hostile environment. Quid pro quo literally means "something for something." In the context of sexual harassment law, quid pro quo means that an employee's submission to sexual conduct either is made a condition of employment or is used in making employment decisions about the employee. Hostile environment cases, on the other hand, involve sexual conduct that "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

Although far more common, hostile environment cases posed a greater problem for the courts in the early development of sexual harassment law. Even today, it is far easier to label quid pro quo cases as sexual harassment, no doubt because of the explicit sexual nature of the behavior and the odious conduct involved. Yet studies of sexual harassment indicate that far more
women experience hostile environment harassment in the form of sexist remarks and behaviors, than quid pro quo harassment. The pervasiveness of hostile environment harassment no doubt made it more threatening for the early courts to recognize. To do so meant calling into question structural and systemic inequalities in educational institutions and the workplace. This reluctance on the part of early courts to recognize harassment based on a hostile environment set the stage for the Supreme Court’s decision in Meritor in 1986.

a. Meritor

The Meritor case began when Mechelle Vinson, previously an assistant manager at Meritor Savings Bank (“Bank”), filed suit against the Bank and Sidney Taylor, a Bank vice president and manager of the branch at which Vinson had worked. The Bank terminated Vinson for taking excessive sick leave. Vinson claimed, however, that Taylor had constantly harassed her during her four-year tenure at the Bank in violation of Title VII.

As expected, the testimony at trial was conflicting. Vinson testified that she had acquiesced in Taylor’s repeated demands for sexual relations out of fear of losing her job. She also testified that Taylor had fondled her in front of other employees and raped her on more than one occasion. Taylor denied all of Vinson’s allegations. He claimed that Vinson fabricated her story in retaliation for a work-related dispute.

The district court ruled in favor of the Bank and Taylor, finding no sexual harassment or sex discrimination. The court interpreted Title VII to restrict recovery to cases of quid pro quo sexual harassment. It acknowledged that Title VII unquestionably covers cases of “sexual harassment of female employees in which they are asked or required to submit to sexual demands as a condition to obtain employment or to maintain employment or to obtain promotions,...” But the court found that Taylor had not required Vinson to grant him “sexual favors as a condition of either her employment or in order to obtain promotion.”

On appeal, the United States Court of Appeals for the District of Columbia reversed. The Court of Appeals held that victims of sexual harassment could

154. See supra notes 49-51 and accompanying text.
155. See, e.g., Estrich, supra note 145, at 822 (“To prohibit [sexual harassment] in all cases, rather than in only the most egregious, presented a fundamental challenge to the way business is conducted in America.”). This is not to suggest that federal courts have now successfully risen to the challenge.
157. See id. at 60.
158. See id.
159. See id.
160. See id.
161. See id. at 61.
162. See id.
164. Id. at *7.
pursue two theories in order to demonstrate harassment: (1) quid pro quo; or (2) hostile environment. Consequently, the court remanded the case to the district court for consideration of Vinson’s case under a hostile environment theory.

On appeal, the United States Supreme Court affirmed the Court of Appeals’ reversal of the district court’s decision and remanded the case back to the district court for further proceedings. In a unanimous decision, the Supreme Court agreed with the D.C. Court of Appeals, holding that Title VII provides a remedy for a claim of sexual harassment based on hostile environment.

Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.

By recognizing a cause of action for sexual harassment based on hostile environment, the Supreme Court provided women with a powerful weapon in the fight for equal treatment in the workplace. At the same time, however, the Court’s failure to carefully delineate the rules of employer liability for harassment and the requirement that the employer have knowledge and notice of the harassment weakened women’s ability to effectively challenge sexual harassment.

The three opinions in the Meritor line of cases reflect three different positions on employer liability. Meritor involved harassment by a supervisor and thus raised the issue of whether liability could attach to an employer by virtue of notice to a supervisor, an agent for the employer. The Supreme Court ultimately dodged the issue, instead making vague statements about the applicability of agency law and leaving much confusion in the wake of its decision.

The question of employer liability was first addressed, in dicta, at the district court level. The district court ruled against Vinson on her claim of sexual harassment and thus had no reason to discuss the Bank’s vicarious liability for Taylor’s conduct. Nonetheless, the district court, in dicta, found that liability could not attach absent knowledge of the harassment by the employer. The court noted that the Bank’s employee manual provided a grievance procedure, which Vinson never used. In addition, Vinson had not filed a complaint with

166. See id. at 152.
168. Id. at 67 (quoting Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).
171. See id. at 8.
the EEOC prior to initiating litigation. The district court held that if Taylor had engaged in sexual harassment, notice to Taylor, a member of the Bank’s management team, did not constitute notice to the Bank. The court further stated that the Bank could not be held liable for Taylor’s actions without notice.

Unlike the district court, which required knowledge by the employer for liability, the Court of Appeals held that Title VII imposed liability upon employers for sexual harassment by supervisory personnel, even absent knowledge by the employer itself. Title VII’s definition of employer includes agents. Therefore, notice to the agent constitutes notice to the employer itself because the agent falls within the statutory definition of employer. The Court of Appeals concluded that if Taylor had engaged in sexual harassment, notice to Taylor, a member of the Bank’s management team, did constitute notice to the Bank.

The Supreme Court held to a middle position on the question of employer liability. The Court rejected the Court of Appeals’ strict liability rule, explaining that employers are not “always automatically liable for sexual harassment by their supervisors.” The Court, however, also rejected the district court’s liability rule, concluding that employers may be liable for sexual harassment in some circumstances even without notice from the victim.

There are problems with the Supreme Court’s discussion of employer liability in Meritor. Even though the Court noted that the “debate over the appropriate standard for employer liability [had] a rather abstract quality about it given the state of the record,” it nonetheless decided to speak on the issue. Instead of creating clear-cut rules of liability, however, the Court “decline[d]... to issue a definitive rule on employer liability...” The majority made several statements that have shed little light and caused much confusion on the issue of an employer’s liability for sexual harassment by its employees. In fact, Justice Marshall wrote a separate concurring opinion, in which Justices Brennan, Blackmun, and Stevens joined, because the majority had “[left] open the circumstances in which an employer is responsible under Title VII” for sexual harassment in the workplace.

Moreover, in an otherwise vague discussion of employer liability, the Court provided employers with only two pieces of concrete advice, using the facts of Meritor as an example. The Court exhorted employers to develop specific policies prohibiting sexual harassment. The Bank had an anti-discrimination policy that did not specifically address sexual harassment, and the Court explained that the Bank’s general policy did not alert employees that the Bank

172. See id. at 7.
173. See id.
176. See id.
177. Id.
178. Id.
179. Id. at 74 (Marshall, J., concurring).
had an interest in addressing sexual harassment. Next, the Court noted that an employer could not require an employee complaining of sexual harassment to file her grievance with the person committing the harassment: sexual harassment procedures should provide alternative methods for filing grievances. The Bank’s grievance process required Vinson to first complain to her supervisor, who was the person allegedly harassing her.

The Court ended its discussion of employer liability by noting that the Bank’s “contention that [Vinson’s] failure [to use the Bank’s grievance procedure] should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward.”

The message was clear: develop sexual harassment policies and procedures.

Meritor’s legacy has been one of confusion. For more than a decade, the lower courts grappled with the vague statements about employer liability drafted in Meritor. Not until twelve years later in Ellerth and Faragher did the Court elaborate on its earlier statement in Meritor that “courts [should] look to agency principles for guidance” in determining an employer’s liability for sexual harassment based on a hostile work environment.

b. Ellerth and Faragher

In its most recent Term, the Supreme Court decided two Title VII cases—Ellerth and Faragher—involving the liability of employers for sexual harassment on the job. The Court enunciated and applied the same standard of liability in both cases, expanding on Meritor’s vague exhortation to apply agency law principles in determining employer liability for sexual harassment. In doing so, however, the Court created a standard of liability that differed significantly from that crafted by the Court in cases of sexual harassment of students.

180. See id. at 72-73.
181. See id. at 73.
182. See id.
183. Id. at 73 (emphasis added).
184. Nonetheless, certain patterns emerged in the lower courts’ decisions following Meritor and prior to the Court’s recent decisions in Ellerth and Faragher. See Phillips, supra note 169. First, courts have held employers strictly liable for quid pro quo harassment by their supervisory personnel regardless of notice or knowledge. Second, in cases of hostile environment sexual harassment, most courts have shielded employers from liability for harassment by supervisory personnel if the employee failed to use an internal grievance procedure that satisfied the rudimentary requirements established in Meritor. Finally, courts have not imposed liability for harassment by fellow employees unless the employer had actual or constructive knowledge of the harassment.
185. 477 U.S. at 72.
186. The Supreme Court heard three other sexual harassment cases during this 12-year period. See Oncale v. Sundowner Offshore Servs., 118 S. Ct. 998 (1998) (same sex harassment violates Title VII’s prohibition against sex discrimination); Landgraf v. USI Film Prods., 511 U.S. 244 (1994) (a Title VII plaintiff whose case was on appeal when Congress passed the Civil Rights Act of 1991 may not avail herself of the monetary damages remedy created by the 1991 Act); Harris v. Forklift Sys., 510 U.S. 17 (1993) (psychological injury to the victim is not a required element of a hostile environment sexual harassment claim).
187. See infra Part III.A.3, 4.
Ellerth and Faragher, decided by the Court on the same day, involved lawsuits by two women, neither of whom complained to upper management about sexual harassment on the job prior to filing suit against their respective employers.\(^{188}\) Kimberly Ellerth worked in sales for Burlington Industries in Chicago.\(^ {189}\) She alleged that during her year of employment with Burlington, Ted Slowik, her supervisor, engaged in a pattern of sexually harassing behavior.\(^ {190}\) Slowik, described as a mid-level manager, hired and promoted people, subject to his supervisor's approval.\(^ {191}\) During her employment at Burlington, Slowik interviewed Ellerth for a promotion, which she received.\(^ {192}\) Ellerth knew that Burlington had a sexual harassment policy, yet lodged no complaint with her immediate supervisor, who reported to Slowik.\(^ {193}\)

For five years, while going to college, Beth Ann Faragher worked part-time as a lifeguard for the City of Boca Raton, Florida ("City").\(^ {194}\) She reported to Bill Terry, David Silverman, and Robert Gordon, her immediate supervisors.\(^ {195}\) Terry and Silverman repeatedly made crude comments and sexist remarks to Faragher and other female lifeguards.\(^ {196}\) On many occasions, Terry touched the female lifeguards without their permission, including putting his hands on Faragher's buttocks.\(^ {197}\) Both Terry and Silverman sexually propositioned women lifeguards, including a woman interviewing for a job with the City.\(^ {198}\)

The City developed a sexual harassment policy in 1986, which it revised in 1990.\(^ {199}\) The trial court found, however, that due to the City's failure to properly disseminate the policy, many of the lifeguards, including Faragher's three immediate supervisors, had no knowledge of the policy.\(^ {200}\) Several of the female lifeguards, including Faragher, discussed Terry's and Silverman's conduct with Gordon, their other supervisor, but Gordon did not report the behavior to anyone in higher management with the City.\(^ {201}\) At trial, Faragher explained that she discussed Terry's and Silverman's behavior with Gordon because she respected his opinion, not because she considered the discussions a formal complaint of sexual harassment to a supervisor.\(^ {202}\) Approximately two months before

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\(^ {188}\) See Ellerth, 118 S. Ct. at 2262-63; Faragher, 118 S. Ct. at 2281.
\(^ {189}\) See Ellerth, 118 S. Ct. at 2262.
\(^ {190}\) See id. at 2262. For example, during her interview for a job promotion, Slowik told Ellerth that "she was not 'loose enough'" and proceeded to lean over and rub her knee. Id. (citation omitted). Slowik also remarked that Ellerth's job would be easier if she wore short skirts. See id. He commented on her breasts, and on one occasion when Ellerth called Slowik regarding a customer, Slowik informed her that he did not have time to talk unless she described her clothing to him. See id.
\(^ {191}\) See id.
\(^ {192}\) See id.
\(^ {193}\) See id. at 2262-63.
\(^ {195}\) See id.
\(^ {196}\) See id. at 2281.
\(^ {197}\) See id.
\(^ {198}\) See id.
\(^ {199}\) See id. at 2280.
\(^ {200}\) See id. at 2280-81.
\(^ {201}\) See id. at 2281.
\(^ {202}\) See id.
Faragher quit her job with the City, another female lifeguard did complain to the City’s Personnel Director about Terry’s and Silverman’s conduct. The City investigated and reprimanded both Terry and Silverman. The City offered Terry and Silverman the option of choosing between suspension without pay and forfeiture of their annual leave as a sanction.

In two seven-to-two decisions, the Supreme Court first addressed the lower courts’ confusion about the standard of employer liability in quid pro quo versus hostile environment cases. Prior to Ellerth and Faragher, lower federal courts had held employers vicariously liable for quid pro quo harassment by their supervisory personnel, regardless of notice or knowledge. In cases of hostile environment sexual harassment, however, most, but not all, courts had shielded employers from liability for hostile environment harassment by supervisory personnel if the employee failed to use an internal grievance procedure. In hostile environment cases, an employer was liable if it knew or should have known of the harassing conduct.

In Ellerth, the Court held that employer liability does not turn on whether the plaintiff’s case involves quid pro quo or hostile environment harassment. “[T]he terms are relevant when there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII.” But, employer liability depends not on these labels, but on whether the supervisor of a harassed employee “takes a tangible employment action against [that employee].” The Court defined a “tangible employment action” as “a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” In most cases, a “tangible employment action” involves “direct economic harm” to the employee.

Having defined a tangible employment action, the Court then proceeded to discuss the standard of employer liability when a Title VII plaintiff can and cannot prove that the employer took such action. In cases involving tangible
negative employment actions, employers are vicariously liable. For example, if a supervisor fires an employee who refuses to engage in sex with him, the employer is vicariously liable for the harassment, even if the employee did not use the employer's internal grievance procedure. But, an employer generally is not vicariously liable for sexual harassment by fellow employees because peers do not have the authority to fire or demote other employees.

In cases in which a Title VII plaintiff cannot demonstrate a negative tangible employment action, e.g., peer harassment, she still may recover damages against her employer. But, in these cases, the employer may assert an affirmative defense. In order to prevail on the liability question, the employer must prove two elements by a preponderance of the evidence. First, the employer must show that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior." Second, it must prove that the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." If the employer fails to prove either element of the affirmative defense, then the Title VII plaintiff prevails on the issue of liability.

2. Liability of Educational Institutions for Employee Harassment

Although some hailed Ellerth and Faragher as victories for employees, it is unclear what impact the decisions will have on the vast majority of women who experience harassment on the job. Most women never report sexual harassment, let alone bring suit in federal court against their employer. Thus, it is important to examine the Supreme Court's pronouncements in Ellerth and Faragher in terms of the incentives they create for employers to reduce the incidence of harassment in the workplace, not simply in terms of the impact these decisions have on the litigation process.

215. See Ellerth, 118 S. Ct. at 2270 (an employer may not invoke the affirmative defense, which requires the employee to take advantage of reasonable corrective or preventive measures, in cases involving tangible employment actions).
216. See id. at 2270; Faragher, 118 S. Ct. at 2293.
217. Faragher, 118 S. Ct. at 2293.
218. Id.
219. See Ellerth, 118 S. Ct. at 2274 (Thomas, J., dissenting) ("Moreover, employers will be liable notwithstanding the affirmative defense, even though they acted reasonably, so long as the plaintiff in question fulfilled her duty of reasonable care to avoid harm.") (citation omitted) (emphasis in original).
220. See, e.g., Dominic Bencivenga, Looking for Guidance: High Court Rulings Leave Key Terms Undefined, N.Y. L.J., July 2, 1998, at 5 (stating that Ellerth and Faragher decisions "clearly support employees"); Marcia Coyle, Sex Harassment Redefined, Nat'l L.J., July 6, 1998, at A1 ("In a trio of decisions this term, the U.S. Supreme Court crafted a new chapter in sexual harassment law, one likely to ease the way for alleged victims to hold employers liable for employee supervisors' acts. . . .").
221. This Article is concerned primarily with the adequacy of internal grievance policies and procedures; thus, I note only in passing two important contributions to sexual harassment litigation brought about by the Court's decisions in Ellerth and Faragher.

In Ellerth and Faragher, the Supreme Court made certain aspects of sexual harassment litigation more difficult for employers. First, the affirmative defense developed by the Court seems to require a fact-intensive
A focus on the incentives for prevention is consistent with Title VII’s purpose. Although Title VII does provide redress for those persons who suffer from employment discrimination, “its ‘primary objective’, like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm.” The question that remains is whether the Court’s decisions in Ellerth and Faragher will alter the day-to-day conduct of employers in preventing and remedying harassment in the workplace. The answer to this question is less than clear for several reasons.

First, have Faragher and Ellerth imposed on employers a duty to prevent harassment that goes beyond the employer’s obligation to develop and disseminate sexual harassment policies and procedures? In Meritor, the Court focused exclusively on procedures for reporting of harassment. Meritor did not require employers to adopt sexual harassment training or prevention programs. Neither did the EEOC or the DOE. And the courts have not held schools liable for failing to develop sexual harassment prevention programs.

The Court’s most recent decisions in Faragher and Ellerth mention both prevention and remedial efforts as part of the employer’s affirmative defense to liability in sexual harassment cases. Yet the Court seems to equate procedures with prevention.

An employer may, for example, have provided a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense. If the plaintiff unreasonably failed to avail herself of the employer’s preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so.

This excerpt from Faragher suggests that a proven, effective complaint procedure satisfies the employer’s burden of both prevention and inquiry regarding the reasonableness of both the employer’s and the employee’s conduct. In addition, the Court provides little guidance on what it means for employers to “exercise[] reasonable care” and what constitutes an unreasonable failure by an employee to use an employer’s grievance procedure. Ellerth, 118 S. Ct. at 2270. Justice Thomas argues, in dissent, that the Court’s “Delphic pronouncements” concerning the employer’s affirmative defense “remain[] a mystery” for lower federal courts “ruling on motions for summary judgment—the critical question for employers now subject to the vicarious liability rule.” Id. at 2274 (Thomas, J., dissenting). As a result, lower courts will have to determine, on a case-by-case basis, what constitutes reasonable behavior on the part of employers and employees. This, in turn, will make it more difficult for employers to prevail on motions for summary judgment.

Second, the affirmative defense requires an employer to prove that it acted reasonably in correcting harassment and that the plaintiff employee acted unreasonably in avoiding harm caused by the harassment. If the employer fails to satisfy either element, then liability for damages attaches. As a result, “employers will be liable... even though they acted reasonably, so long as the plaintiff in question fulfilled her duty of reasonable care to avoid harm.” Id. (Thomas, J., dissenting) (citation omitted). Thus, the Court places the burden of liability on employers in cases in which both the employer and the employee exercise reasonable care.

222. Faragher, 118 S. Ct. at 2292 (citation omitted).
223. The DOE noted that training of administrators, teachers, staff, and students can help students to identify harassment and how to respond to it. But the DOE did not require such training. See Sexual Harassment Guidance, supra note 9, at 12,044.
224. Faragher, 118 S. Ct. at 2292 (emphasis added).
remediation. Coupled with the absence of any discussion of prevention in the Court's opinions in both Faragher and Ellerth, it is possible that lower federal courts will equate sexual harassment complaint procedures with prevention programs.

This interpretation reinforces existing incentives that allow institutions of higher education to focus on passive strategies, such as complaint reporting, to reduce and eliminate sexual harassment. Policies and procedures are necessary; they can affect and modify behavior. But the persistence of harassment on campus, notwithstanding almost two decades of anti-harassment policies in many institutions of higher education, strongly suggests that policies and procedures alone do not work.

Second, how will the lower federal courts interpret key language in Ellerth and Faragher regarding the employer's affirmative defense to liability in sexual harassment cases? What constitutes a "proven, effective" procedure? Suppose the lower federal courts decide that a procedure is proven and effective if a complaint stops harassing behavior. Most women never report sexual harassment. The research suggests that underreporting is directly related to serious shortcomings in grievance policies and procedures. If an employer's policy is proven and effective, even if only one percent of employees officially report harassment while twenty to thirty percent experience it on the job, employers have little incentive to change their existing policies.

Moreover, under what circumstances can a woman avoid a costly or risky internal grievance procedure? The Court makes clear that the expense or risk must be "undue", so a woman cannot bypass an internal grievance procedure simply because it involves some risk or expense. But the Court gives no guidance on what constitutes an "undue risk or expense." Will the lower courts take into account variations in ability to absorb expense and risk? For example, a single mother with three children who has few marketable skills may be unable to absorb any risk or expense while a single professional woman with no children may hire an attorney to assist her during the firm's internal grievance procedure. If the courts take these differences into consideration, however, it means that in each case, the affirmative defense will involve a very fact-specific inquiry. Thus, no woman can afford to bypass an internal procedure; she may end up incorrectly assessing a court's later determination of what constitutes an undue risk or expense.

Finally, as a practical matter, how will women even know that they must use their employers' grievance procedures? Most women subjected to sexual harassment are not attorneys. The Court requires employers to develop a proven, effective sexual harassment procedure that is not unduly risky or expensive. It does not require employers to provide employees with legal advice about pursuing claims against the employer. As a result, women may bypass the

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225. See Gruber, supra note 17, at 316-17.
226. See infra Part III.C.1-5.
internal grievance procedure for several reasons. They may think that the procedure is ineffective, yet a court may later determine that this is not the case. They may quit their job, as Kimberly Ellerth did, and then file for sexual harassment. Once a woman terminates her employment, she may no longer avail herself of her ex-employer's grievance procedure. They may miss the internal filing deadline, which is a problem in some academic institutions with extremely short statutes of limitation, e.g., sixty to ninety days. The Supreme Court's standard requires ordinary working women to know the "ins" and "outs" of sexual harassment law, without having access to an attorney. After all, most women would use an internal grievance procedure in order to avoid filing a lawsuit or filing with the EEOC, both of which would require them to consult with attorneys.

The problem is that the Court in Ellerth and Faragher left important interpretive questions to the lower courts to resolve, on a case-by-case basis. Thus, even though employers have the burden of proving that an employee unreasonably failed to use a proven, effective procedure that is not unduly risky or expensive, lower federal courts may interpret this language in such a fashion as to effect little change in current employment practices. While Ellerth and Faragher raise the issue of effective procedures, they fail to enunciate workable rules for employers in constructing effective procedures. As a result, only time will tell, as the lower courts elaborate on the Court's opinions in Ellerth and Faragher, whether these decisions effectively maintain the status quo or effect a major change in employers' incentives for eliminating sexual harassment in the workplace.

3. Title IX and Sexual Harassment of Students

With certain limited exceptions, Title IX prohibits educational institutions that receive federal financial assistance from discriminating on the basis of sex in the provision of educational programs and activities.

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal

227. See e.g., Arizona Complaint Procedures, supra note 109, at 2 (employees must file a complaint of harassment within 60 days of the incident); University of California at Berkeley, Berkeley Campus Student Grievance Procedure §§ III.A, IV.A, at 4-5 (1998) [hereinafter Berkeley Student Policy] (on file with author) (60-day statute of limitations for filing a formal sexual harassment grievance); University of Maryland at College Park, Human Relations Code art. III.E., at 7 (1998) [hereinafter Maryland Code] (on file with author) (90-day statute of limitations for filing discrimination grievances).

228. Title IX exempts from some or all of its provisions certain organizations, e.g., sororities and educational institutions of religious organizations with contrary religious beliefs. See 20 U.S.C. § 1681(a)(1)-(9) (1990).

229. An educational institution is "any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education . . . ." 20 U.S.C. § 1681(c) (1990).

230. For a definition of federal financial assistance, see 34 C.F.R. § 106.2(g) (1997).
financial assistance . . .

As a form of sex discrimination, sexual harassment is proscribed by Title IX. In evaluating sexual harassment claims by students, the DOE has applied "many of the legal principles applicable to sexual harassment in the workplace developed under Title VII." Thus, Title IX applies to both quid pro quo and hostile environment cases of sexual harassment. As in Title VII cases, the severity and pervasiveness of the harassing conduct are relevant in determining whether sexual harassment based on a hostile environment occurred. And, until Gebser, the DOE's Sexual Harassment Guidance informed educational institutions that the same liability standards applied to sexual harassment cases, whether the case involved a Title VII or a Title IX claim. But in Gebser, the Supreme Court created a standard of institutional liability that, in practice, will make it extraordinarily difficult for a student victim of sexual harassment to recover monetary damages against an educational institution.

Gebser involved a lawsuit by Alida Star Gebser and her mother against the Lago Independent School District for sexual harassment by Frank Waldrop, one of Gebser's high school teachers. Waldrop engaged in an intimate sexual relationship with Gebser, who was then a freshman in high school. Gebser did not report Waldrop. Even though she considered his behavior "improper", she was "uncertain how to react and she wanted to continue having him as a teacher." In addition, the school district had neither a formal sexual harassment policy nor a grievance procedure for sexual harassment complaints. Gebser's mother and the school district learned of the sexual relationship when a police officer found Waldrop and Gebser engaging in sexual intercourse.

Gebser and her mother brought suit against the school district, claiming violations of Title IX, § 1983, and state negligence law. The federal district court granted summary judgment to the school district on all of

232. See Sexual Harassment Guidance, supra note 9, at 12,038.
233. Id. at 12038, n.2 (citations omitted).
234. See id. at 12038.
235. See id. at 12041-42.
236. Gebser also filed suit against Waldrop, claiming primarily violations of Texas state law.
Gebser’s claims. She appealed only the Title IX ruling to the Fifth Circuit. The Fifth Circuit affirmed the lower court’s ruling, limiting a school’s liability for sexual harassment of students to cases in which an employee “with supervisory power over the offending employee actually [knows] of the abuse, ha[s] the power to end the abuse, and fail[es] to do so.”

In a five-to-four decision, the Supreme Court affirmed, focusing on the language of Title IX, which provides no express right to sue for money damages. Prior to Gebser, the Court had held in Franklin v. Gwinnett County Public Schools that a Title IX plaintiff may recover monetary damages pursuant to the implied right of action recognized in Cannon v. University of Chicago. Yet Justice O’Connor, writing for the majority in Gebser, said that Franklin did not establish the circumstances under which liability for monetary damages would attach. Justice O’Connor also noted that with a judicially implied cause of action, the Court has “a measure of latitude to shape a sensible remedial scheme that best comports with the statute.” The Court’s task, then, was to determine the conditions under which liability for monetary damages under Title IX would attach to educational institutions.

The Court concluded that liability for money damages based on either respondeat superior or constructive notice “would ‘frustrate the purposes’ of Title IX.” First, Title IX contains no reference to “agents” as does Title VII’s definition of employer. The Court reasoned that the absence of such language in Title IX, coupled with its presence in Title VII, revealed Congressional intent to apply the doctrine of respondeat superior only to Title VII cases.

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251. Id. at 1996 (citations omitted).

252. Id. at 1997.

253. In his dissent, Justice Stevens explained that Title IX does not use the term “agent” because its focus is on the victim of discrimination, not on the person discriminating as in Title VII. Unlike Title VII . . . , which focuses on the discriminator, making it unlawful for an employer to engage in certain prohibited practices (see 42 U.S.C. § 2000e-2(a)), Title IX is drafted from the perspective of the person discriminated against. . . . And because Title IX as drafted includes no actor at all, it necessarily follows that the statute also would not reference “agents” of that non-existent actor. Id. at 2002 n.5 (Stevens, J., dissenting) (citing Smith v. Metropolitan Sch. Dist. Perry Twp., 128 F.3d 1014, 1047 (7th Cir. 1997) (Rovner, J., dissenting)).

254. See id. at 1996.
Second, the Court believed the contractual nature of Title IX mitigated against the conclusion that Title IX plaintiffs could hold educational institutions liable in money damages based only on constructive notice.

[Title IX] condition[s] an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds.

Title IX’s contractual nature has implications for our construction of the scope of available remedies. When Congress attaches conditions to the award of federal funds under its spending power, U.S. Const., Art. I, § 8, cl. 1, as it has in Title IX and Title VI, we examine closely the propriety of private actions holding the recipient liable in monetary damages for noncompliance with the condition.255

The Court’s examination of the statute and accompanying regulations provided it with “important clues” about Congress’ intent with regard to awards of money damages in Title IX actions.256 Title IX provides that no action to terminate funding be taken against an educational institution “until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement [of nondiscrimination] and has determined that compliance cannot be secured by voluntary means.”257 The regulations also require notice to an educational institution “of its failure to comply” with Title IX prior to taking action to bring the institution into compliance.258 Thus, the Court concluded that Congress, in enacting Title IX, did not intend to create liability against educational institutions for sexual harassment based only on constructive notice.259 Instead, the Court determined that the right to recover monetary damages pursuant to Cannon’s implied right of action should parallel the enforcement scheme created by Congress in Title IX.260

In practice, this means that a Title IX plaintiff must satisfy three requirements prior to recovering money damages under Title IX for sexual harassment. First, she must provide actual notice of the harassing behavior. Second, a school official with the authority to “institute corrective measures” must receive the notice.261 Finally, even if a Title IX plaintiff provides actual

255. Id. at 1997-98 (citations omitted).
256. See id. at 1998.
258. 34 C.F.R. § 100.8(d) (1998).
260. See id.
261. Id. at 1993. The Court does not elaborate on which school officials have such authority; however, it is possible that a school may escape Title IX liability if a teacher learns of harassing behavior by a fellow teacher, but fails to inform other school officials, e.g., the principal. See Canutillo Indep. Sch. Dist. v. Leija, 101 F.3d 393, 400-02 (5th Cir. 1996), cert. denied 117 S. Ct. 2434 (1997) (school district not liable for sexual molestation of second-grade student because the student and her mother only complained to the student’s homeroom teacher, who did not report the incident to “someone in a management-level position.”).
notice to an appropriate school official, she will lose her claim for money damages so long as the school official was not deliberately indifferent to her complaint of sexual harassment.262

4. Liability of Educational Institutions for Harassment of Students After Gebser

The majority in Gebser is technically correct that Franklin’s holding that a Title IX plaintiff has the right to recover money damages does not determine the circumstances under which an educational institution must answer for such damages. Nonetheless, the practical effect of the majority’s decision in Gebser is to eviscerate the Court’s unanimous holding in Franklin.

Presumably, few Title IX plaintiffs who have been victims of intentional discrimination will be able to recover damages under this exceedingly high standard. The Court fails to recognize that its holding will virtually “render inutile causes of action authorized by Congress through a decision that no remedy is available.”263

Theoretically, Title IX plaintiffs still have the right to recover money damages after Gebser. As a practical matter few, if any, Title IX plaintiffs will actually recover such damages under the burdensome standard created by the majority in Gebser. In effect, the Court in Gebser reversed its earlier decision in Franklin, although it did so sub silentio.264

Moreover, as Justice Stevens notes in his dissent, the majority’s opinion in Gebser creates the wrong incentives for educational institutions in handling sexual harassment complaints.

The reason why the common law imposes liability on the principal in such circumstances is the same as the reason why Congress included the prohibition against discrimination on the basis of sex in Title IX: to induce school boards to adopt and enforce practices that will minimize the danger that vulnerable students will be exposed to such odious behavior. The rule that the Court has crafted creates the opposite incentive. As long as school boards can insulate themselves from knowledge about this sort of conduct, they can claim immunity from damages liability. Indeed, the rule that the Court adopts would preclude a

262. The Court noted that a “deliberate indifference” standard “rough[ly] parallel[ed]” Title IX’s enforcement scheme. Gebser, 118 S. Ct. at 1999. “The administrative enforcement scheme presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance. The premise, in other words, is an official decision by the recipient not to remedy the violation.” Id.
263. Id. at 2006 (Stevens, J., dissenting) (citing Franklin v. Gwinnett Pub. Sch., 503 U.S. 60, 74 (1992)).
264. Justice Stevens recognized this point in his dissent. “To the extent that the Court’s reasons for its policy choice have any merit, they suggest that no damages should ever be awarded in a Title IX case—in other words, that our unanimous holding in Franklin should be repudiated.” Id. at 2005 (Stevens, J., dissenting).
damages remedy even if every teacher at the school knew about the harassment but did not have "authority to institute corrective measures on the district's behalf."  

Justice Stevens' comments are instructive in light of the facts of the Gebser case. The Lago Vista Independent School District had neither a formal sexual harassment policy nor a grievance procedure. While the facts of the case are unclear, it appears from the majority's opinion that the school district was in violation of the DOE's requirement to adopt and disseminate a grievance procedure for sex discrimination complaints, including sexual harassment claims.  

The majority in Gebser, however, tells schools that such policies and procedures are not necessary to protect the institution from financial liability. Instead, the onus rests on the students, even grade school students, to correctly identify sexual harassment as a form of sex discrimination and to notify the "appropriate" school official about the harassing conduct. Apparently, having no mechanism for bringing a sexual harassment complaint amounts only to an administrative violation that only the overburdened DOE can redress.  

Gebser also has quashed any hope that educational institutions will freely create and adopt specific policies and procedures to govern sexual harassment, even though the DOE recognizes the value of such procedures.  

Policies and procedures specifically designed to address sexual harassment, if age appropriate, are a very effective means of making students and employees aware of what constitutes sexual harassment, that that conduct is prohibited sex discrimination, and that it will not be tolerated by the school. That awareness, in turn, can be a key element in preventing sexual harassment.  

But schools have no incentive to develop such sexual harassment policies or procedures in the wake of Gebser. After all, a school may escape liability for

265. Id. at 2004 (Stevens, J., dissenting) (footnote and citation omitted).

266. See id. at 2000. Justice O'Connor acknowledges that the school district had no formal harassment policy or grievance procedure for complaints of sexual harassment. Yet the DOE has never required educational institutions to adopt separate policies and procedures specific to complaints of sexual harassment. See Sexual Harassment Guidance, supra note 9, at 12,038. If the school had a sex discrimination policy and grievance procedure, but not a procedure tailored specifically for complaints of sexual harassment, it would not be in violation of the DOE regulations. Because Justice O'Connor as much as admits that the Lago Independent School District had violated the DOE's administrative regulations, it appears that the school either had no sex discrimination policy, or the policy and procedure did not adequately address sexual harassment complaints.


268. See Coyle, supra note 220 (citing Charles Carver, George Washington University National Law Center) ("What this does is reward school districts who refuse to have meaningful anti-harassment policies for students. . . . In fact, if I were a lawyer, I'd be hard-pressed to tell the district to have a policy.") (internal quotations omitted).

269. See Gebser, 118 S. Ct. at 2000 ("We have never held, however, that the implied private right of action under Title IX allows recovery in damages for violation of those sorts of administrative requirements.").

270. Sexual Harassment Guidance, supra note 9, at 12,038.
sexual harassment of a student even if the school has no sexual harassment policy or procedure, all of a victim's teachers know of the harassing behavior, and the school is grossly negligent in its handling of the sexual harassment complaint.

The end result is a decision that gives school officials no incentive to adopt effective mechanisms for tackling the persistent problem of sexual harassment. "[T]he decision creates a disincentive for school districts to take steps to discover harassment, since they can avoid liability through an 'ostrich defense.'"\textsuperscript{271} Gebser protects educational institutions from liability even if their Title IX administrator is incompetent and even if their grievance procedure is complicated, onerous, and burdensome to student victims. The DOE, with thousands of grade schools, high schools, colleges, and universities to monitor, is unlikely to catch a school without a sex discrimination policy and procedure in place. It is even more unlikely that the DOE will take any action against schools with ineffective policies and procedures. In effect then, student victims of sexual harassment have the right to be protected from sexually harassing behavior but no remedy to effectively enforce that right.

B. Sexual Harassment in Colleges and Universities: Institutional Context

Without concrete requirements for preventing and correcting sexual harassment, universities are left to their own devices in developing preventive strategies and remedial procedures. This is problematic. Research, not institutional norms and biases, should guide the development of sexual harassment procedures.

Several characteristics peculiar to colleges and universities make it more likely that academic institutions will adopt sexual harassment grievance procedures that protect the accused but offer little protection to the victim. The tradition of self-governance within academic institutions, the institution of tenure, and the distribution of power in the academic population combine to limit the accountability of academic institutions to the most vulnerable members of their community—staff, untenured faculty, and students.

1. Self-Governance

Many academic institutions have a strong tradition of faculty governance. This can include the drafting of grievance procedures and policies on sexual harassment. Thus, faculty members participate in drafting and/or voting on the policies and grievance procedures that govern their behavior.\textsuperscript{272} In corporations, 

\begin{footnotesize}
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\item \textsuperscript{272} See, \textit{e.g.}, MUPIM, \textit{supra} note 109 (University Senate approved changes to sexual harassment policy
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the employees do not draft the procedures that govern their potential misconduct. Faculty members have an incentive to create procedures that protect them from grievances, not ones that make them more susceptible to grievances. This is particularly a problem if a university’s sexual harassment procedure is tied to the regular grievance process, as it is in many universities. At these universities, even those faculty members sympathetic to concerns of sexual harassment may have incentives to protect themselves from other types of grievances by creating a more complex grievance procedure.

The gender composition of academic faculties also plays a role in the shaping of procedure. As mentioned, faculty members at many universities participate in the drafting and/or adoption of sexual harassment policies and procedures. But men and women do not participate equally in the governance process for two reasons. First, women comprise less than one-third (thirty percent) of all tenured or tenure-track positions at American colleges and universities. At several of the public records schools the percentage is even lower, with women comprising as little as twenty-four percent of tenured or tenure-track faculty members. Thus even based on random selection, fewer...
women will be represented on college and university governance or policy-drafting committees.

Second, men are disproportionately represented in the ranks of tenured full and associate professors. While forty-four percent of all untenured assistant professors are women, less than a quarter (twenty-four percent) of all tenured full and associate professors are women. In academia, all opinions are not created equal.

There is a "hierarchy of credibility" in organizations and that credibility and the right to be heard are differentially distributed: "In any system of ranked groups, participants take it as given that members of the highest group have the right to define the way things really are."

The sex ratio disparity in academia, especially among the highest ranked members of the academy, gives men greater opportunity for shaping university governance documents, policies, and procedures.

Of course, not all women are sympathetic to sexual harassment nor do all men turn a deaf ear to harassment complaints within the university. Nonetheless, the profile of the typical victim and perpetrator of sexual harassment runs strongly along sex lines: most victims are women and most harassers are men.

Because women are more vulnerable to harassment in the workplace, they are more likely to place themselves in the position of the victim of harassment. Most men, on the other hand, will never encounter sexual harassment during their working lives; thus they are more likely to worry that they will be falsely accused of harassing behavior. These differences in perspective influence the procedures that faculty members draft and adopt for dealing with sexual harassment in the academy. The procedures are not neutral; they reflect the

Ohio, Detail Faculty Profile as of October 16, 1997 (on file with author).

Colorado refused my request to provide the number of tenured and tenure-track female faculty compared to total tenured and tenure-track faculty on the grounds that my question was not a record and, hence, not available under Colorado's Open Records Act. See Letter from L. Louise Romero, Senior Associate University Counsel, University of Colorado (June 30, 1998) to Anne Lawton, Assistant Professor, Miami University. SUNY tracks faculty by gender, but not by tenured versus tenure-track status. See SUNY Letter, supra note 99, ¶ 8, at 2. Minnesota did not have the 1997-1998 figures available as of August 3, 1998. See Letter from Susan McKinney, CRM, Records & Information Management, University of Minnesota, to Anne Lawton, Assistant Professor, Miami University 1, 6 [hereinafter Minnesota Letter] (on file with author).

276. See ALMANAC, supra note 80, at 30. Of 159,333 full professors, 28,393 are women; 39,769 associate professors are women out of a total of 125,082.


278. With few exceptions, women report experiencing harassing behaviors at significantly higher rates than do men. "The strongest predictor [of sexual harassment] is sex. Most victims of harassment are women ... ." Lach & Gwartney-Gibbs, supra note 108, at 107. See also ANNE C. LEVY & MICHELE A. PALUDI, WORKPLACE SEXUAL HARASSMENT 55-56 (1997) (women unlikely to harass men); MSPB UPDATE II, supra note 21, at 16-18, app.2 at 69 (women experience all harassing behaviors at two to three times the rate of their male colleagues; 93% of all female victims are harassed by men); NIH REPORT, supra note 33, at 7 ("Women reported being harassed more often than men (37.7 percent compared to 23.8 percent) ... ."); Dey et al., supra note 18, at 157 ("[T]here are large gender differences in the reported incidence of harassment."); Fitzgerald et al., supra note 18, at 172-73 (men are unlikely to be harassed).
interests, concerns, and biases of the most powerful and influential members of the academic community, who are overwhelmingly male.

2. Tenure

It is difficult to fire a tenured professor. In the corporate world, where most employees work “at will”, the employer may terminate a supervisor who harasses his subordinates. Of course, the corporation faces the possibility that a terminated employee will sue for wrongful discharge. But in academia, tenure adds another layer of complexity. Tenure gives the academic employee protection from termination, absent a showing of “cause”. Requiring a college or university to demonstrate “cause” erects a much higher burden of proof than corporate employers must demonstrate in order to terminate an employee-at-will.

The problem is exacerbated in public institutions. “Tenure has the status of a property right.” In a public college or university, that means that constitutional guarantees of due process apply by virtue of the Fifth and Fourteenth Amendments, which protect against deprivations of property “without due process of law.” The Supreme Court has not required, as a constitutional matter, extensive pre-termination process for deprivations of property, so long as a full post-termination hearing is available. Nonetheless, the tenured faculty member at a public institution of higher learning has a constitutionally protected right to some degree of process prior to termination. And some tenured professors found liable for sexual harassment do not hesitate to use procedure as grounds for challenging a university’s sexual harassment findings and sanctions.

279. See, e.g., Chan v. Miami Univ., 652 N.E.2d 644, 649 (Ohio 1995) (“There is no dispute that the granting of tenure creates an expectation of continued employment subject to discharge for cause.”); UNIVERSITY OF TEXAS, HANDBOOK OF OPERATING PROCEDURES §§ 3.18.I.C, III-20 (1973) [hereafter TEXAS GRIEVANCE PROCEDURES] (on file with author) (“The administration through appropriate officials reserves the right to discipline and to terminate the employment of a faculty member for stated good cause shown.”); see also STATE UNIVERSITY OF NEW YORK AT BINGHAMTON, STATE UNIVERSITY PROFESSIONAL SERVICES NEGOTIATING UNIT TENTATIVE AGREEMENT § 19.1 [hereinafter UUP AGREEMENT] (on file with author) (discipline imposed for “just cause”). The UUP Agreement “is no longer tentative, but [is now] in effect.” E-mail message from Katharine Ellis, Director of Media Relations, Binghamton University, to Anne Lawton, Assistant Professor, Miami University (Apr. 26, 1999) (on file with author).

280. Chan, 652 N.E.2d at 649 (citations omitted); see Perry v. Sinderman, 408 U.S. 593, 599 (1972) (absence of contract or tenure is “highly relevant” to teacher’s procedural due process claim); Board of Regents v. Roth, 408 U.S. 564, 576-77 (1972) (“[I]n the area of public employment, the Court has held that a public college professor dismissed from an office held under tenure provisions . . . [has] [an] interest [] in continued employment that [is] safeguarded by due process.”).


282. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985) (citations omitted) (“The 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. To require more than this prior to termination would intrude to an unwarranted extent on the government’s interest in quickly removing an unsatisfactory employee.”).

283. See, e.g., Chan, 652 N.E.2d 644 (Ohio Supreme Court ruled in favor of F. Gilbert Chan, a Miami University professor dismissed for sexual harassment based on procedural grounds); Julianne Basinger, State Supreme Court Orders N.H. Institute to Reinstate Professor, CHRON. OF HIGHER EDUC., Mar. 20, 1998, at A15
Sexual harassment proceedings than untenured faculty or students, who have no comparable constitutional right to a minimum level of process in such proceedings. Tenured faculty members may challenge both the substantive finding of harassment and the procedures used to make that finding. By comparison, the courts have not recognized the right of untenured faculty or students to minimum fair procedures in the context of internal sexual harassment investigations.

Some faculty members have also argued that the First Amendment protects their right to academic freedom, thus insulating their behavior in the classroom from outside scrutiny.284 They argue that universities have no business investigating sexual harassment complaints stemming from discourse conducted within the classroom. Unlike professors, students have no constitutional claim to learn in an environment free from sexist discourse and improper sexualizing of the classroom experience.

At public universities then, the most powerful—those with life employment—are constitutionally guaranteed certain minimum levels of process. This complicates the decision of a public university to terminate a professor for sexual harassment. Administrators may shy away from terminating a tenured professor (or imposing other harsh sanctions), fearing litigation.285 Students and untenured faculty members do not possess this bargaining chip. First, the Constitution does not accord any procedural protections to the victims of sexual harassment. Second, there is almost no case law, under either Title VII or Title IX, imposing liability on institutions for adopting sexual harassment procedures that favor harassers over victims.

Practical considerations stemming from the nature of tenure also create power imbalances within academic institutions. Tenure provides faculty members with a life-long connection to their academic institutions. Students, on the other hand, pass through the institution in two to four years, depending on the nature of the college or university. Students also are significantly younger than tenured faculty members and less established in the community. Filing a claim of sexual harassment takes time, energy, and sometimes money. A faculty

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284. See, e.g., Courtney Leatherman, Court Finds That College Violated Professor’s First Amendment Rights, CHRON. OF HIGHER EDUC., Sept. 6, 1996, at A16 (Ninth Circuit held that San Bernardino Valley College violated the First Amendment rights of Dean Cohen, whom the university found liable for sexual harassment based on sexually explicit classroom discussions and assignments); Alison Schneider, Appeals Court Upholds U. of Hawaii’s Handling of a Sexual-Harassment Complaint, CHRON. OF HIGHER EDUC., June 19, 1998, at A12 (Ramdas Lamb lost lawsuit against University of Hawaii, in which he claimed that the University’s investigation of a sexual harassment complaint infringed on his right to academic freedom under the First Amendment.).

285. This fear is not unjustified. A number of professors recently have sued universities that have terminated, suspended, or disciplined them based on charges of sexual harassment. See, e.g., Chan, 652 N.E.2d 644; Basinger, supra note 283; Haworth, supra note 283; Schneider, supra note 284.
member faced with harassment may hire an attorney to defend himself. The stakes are high for the faculty member, and he is much more likely to have the sophistication, connections, and resources necessary to locate competent legal counsel. Many students cannot afford to hire attorneys to use internal grievance procedures, and even if they could do so, would not understand the importance of having a lawyer present during a formal or informal grievance procedure. Instead, students may decide that it is simply not worth the time and effort to pursue a grievance, especially if the professor is not sanctioned for his behavior. Failure to complain does not mean that the professor’s behavior did not have detrimental effects. Some students drop classes, avoid taking certain courses, and change majors simply to avoid particular professors.286

3. Distribution of Power in the Academic Population

Several characteristics about women’s experience with sexual harassment emerge from the literature. These common themes pose a special challenge for academic institutions, whose mission is to provide equal educational opportunities for men and women.

First, harassment is an issue of power. The more vulnerable the woman, the more likely she is to experience harassment. Harassers disproportionately select younger, unmarried women as victims,287 which describes the majority of college-aged women.288

Individual differences in age and status need to be addressed [by universities]. In academia, the majority of persons with occupational prestige are males who are older than their students. The differential power and status between educators and students is a central component in sexual harassment and must be addressed by educators and policymakers. Institutions need to be alert to the possible misuse of this status and power.289

Although untenured women may not necessarily be younger than their tenured counterparts, the potential for tenured faculty, who are disproportionately male, to misuse their status and power still exists. Untenured faculty are especially vulnerable given the role of discretion in the tenure review process. As an abuse of power, then, sexual harassment also poses a threat to untenured female faculty members.

286. See Fitzgerald et al., supra note 18, at 159, 162.
287. See Gruber, supra note 17, at 311; Hesson-McInnis & Fitzgerald, supra note 108, at 887, 890.
288. Almost 40% of female college and university students are 21 years of age or younger, and 54% are 24 years of age or younger. See ALMANAC, supra note 80, at 18 (based on Fall 1995 enrollment figures). For women, the average age for first marriage is 24. See Hank Ezell, Do You Take This... Prenuptial: More Are Signing the Agreements Before Taking Vows, ATLANTA J. & CONST., May 3, 1998, at 3H. The average age is based on the most recent United States Census, obtained in 1990.
289. Rubin & Borgers, supra note 18, at 410.
Second, between 1985 and 1995, enrollment in institutions of higher education increased by sixteen percent, due in large part to increases in enrollment of part-time and female students.290 Beginning in 1984 and continuing to the present, female graduate students have outnumbered male graduate students.291 With increased enrollment of female students, especially in graduate programs in which faculty and students work more closely, universities should expect sexual harassment to continue to be a problem on campus.

Third, peer harassment, both in the workplace and on campus, appears more common than does sexual harassment by supervisors.292 Unlike the typical workplace, however, a female faculty member's peers vote on her tenure. The academic co-worker, in effect, acts in a supervisory role. As a result, the distinction between co-worker and supervisor blurs for female faculty in academic settings, creating a problem unique to academic institutions.

Finally, two different workplace studies published subsequent to the MSPB surveys on sexual harassment have confirmed the MSPB's findings that women who work in nontraditional jobs or who have a high degree of contact with men at work are at greater risk of experiencing sexual harassment on the job. Hesson-McInnis and Fitzgerald found that three factors operate jointly to predict those women who experience harassing behavior on the job. Job gender context, which the researchers defined as a "[c]omposite indicator based on gender traditionality, gender ratio in the work group, and gender of supervisor,"293 is one of the three predictors of sexual harassment.

[T]he victims' overall experience of sexual harassment over the past 24 months was jointly predicted by the gender context of their jobs, their own relative vulnerability, and the tolerance of their organizational unit for harassing behavior. In other words, female employees who were considered a priori to be most vulnerable (i.e., younger, unmarried, and with less education), who worked in a male-dominated job context, and whose organizations were more tolerant of sexual harassment were more likely to have experienced some form of sexual harassment during the previous 24 months.294

In his survey of 1990 Canadian women, Gruber made similar findings. His research showed that age and workplace contact with men are the two strongest predictors of whether a woman had experienced a sexually

290. See Education Statistics, supra note 80, ¶ 4.
291. See id. ¶ 6.
292. See supra note 32 and accompanying text.
294. Id. at 887, 890.
The Emperor's New Clothes

harassing event at work during the previous year. He also found a significant, though weaker, relationship between "occupation sex composition," which measured the ratio of men and women in particular occupations, and the likelihood of sexual harassment. Gruber concluded that three groups of women are most likely to experience sexual harassment on the job: (1) women whose work brings them into contact with men on a regular basis (workplace contact); (2) women who work in nontraditional fields (occupation sex composition); and (3) women who hold nontraditional jobs in which there is high workplace contact with men (gender predominance).

These findings are significant for educational institutions. Unlike some workplaces (e.g., day care centers), all large universities have colleges (e.g., engineering, medicine, and business) in which there is gender predominance. Women in such fields are more likely to be viewed as threats to the predominant male culture, and hence are more likely to be harassed on the job.

Gender predominance is an important predictor of both physical threat and sexual materials. First, predominantly male environments are more physically hostile and intimidating than other work environments. Women are more apt to be touched, grabbed, or stalked. Second, men are more apt to physically mark their work environments with sexually objectifying material.

The gender imbalance within certain professions and occupations within the university exacerbates the problem of sexual harassment. This, in turn, may affect the retention of women professors in certain fields and the willingness of female students to undertake particular fields of study.

Moreover, despite the increasing numbers of female professors, men still comprise more than half of all professors at American four-year colleges and

295. See Gruber, supra note 17, at 311.
296. Women may hold traditional jobs, such as secretarial positions, but work primarily for men, thus having a high degree of daily contact with men at work.
297. Gruber separated workplace contact from occupation sex composition in his study because not all women in nontraditional jobs necessarily have high workplace contact with men. For example, a female obstetrician has a nontraditional job, but also has little contact with men at work.
298. Gruber used the term gender predominance for job categories in which women hold nontraditional jobs and have high workplace contact with men. See Gruber, supra note 17, at 310. An example is a female police officer, who holds a nontraditional job and has high daily contact with men in the workplace.
Gruber also found that women experience different types of harassment depending on whether they hold nontraditional jobs (occupation sex composition), have high workplace contact with men (workplace contact), or hold nontraditional jobs in which there is high workplace contact with men (gender predominance). See id. at 314. For example, for women whose work regularly brings them into contact with men, harassment more likely takes the form of sexual materials at work or sexual categorical remarks (comments about women in general). See id. at 313. Women in nontraditional jobs tend to experience harassment as sexual comments and sexual categorical remarks. See id. at 314. Finally, women who hold nontraditional jobs in male-dominated environments, such as female professors of engineering, are more likely to experience harassment in the form of physical threats or sexual materials in the workplace. See id.
299. Gruber, supra note 17, at 314.
Men also comprise approximately half of all students at American colleges and universities. Thus, women on most campuses have regular contact with male students and professors during their academic careers. Undergraduate institutions serve as the gatekeepers for graduate and professional degree programs, which in turn provide entrée to the academy and the professions. If a hostile educational environment discourages women from pursuing certain academic degrees, then an academic institution has failed in its mission to provide a safe environment for both women and men.

C. Sexual Harassment in Colleges and Universities: What Really Happens?

An evaluation of university policies and procedures on sexual harassment reveals a number of procedural hurdles that effectively deter reporting. Some provisions clearly advantage the accused at the expense of the victim. Others merely make it more difficult for victims to file complaints of sexual harassment. These procedural barriers effectively chill the reporting of sexual harassment on campus.

1. False Claims Provisions

Language providing penalties for bringing false claims of sexual harassment is a common feature in many university sexual harassment policies and procedures. Six of the ten public records schools—Arizona, Colorado, Florida, Iowa, Miami, and SUNY—have policies that provide penalties for faculty, students, or staff who bring forward false claims of harassment. Colorado’s sexual harassment policy even includes “false complaints” as one of the three outcomes of its formal complaint process. False claims language in sexual harassment policies, however, is problematic for several reasons.

First and foremost, such language contributes to the perception that false complaints of sexual harassment are common. Yet one reason given by women for not reporting harassment is fear of not being believed. False claims provisions reinforce this fear. There is little research on false claims of harassment. Therefore, no evidence exists that false claims of sexual harassment outnumber false grievances of any other sort within the academy. Many

300. See supra notes 274-77 and accompanying text.
301. See, e.g., ARIZONA COMPLAINT PROCEDURES, supra note 109, at 5; Iowa Policy, supra note 2, § 4.3(3); MUPIM, supra note 109, § 3.6.F; STATE UNIVERSITY OF NEW YORK AT BINGHAMTON, SEXUAL HARASSMENT: DEFINITION, POLICY, RESPONSE, AND PREVENTION—A GUIDE FOR STUDENTS, FACULTY AND STAFF OF BINGHAMTON UNIVERSITY (on file with author); Colorado Policy, supra note 109, § II.D; Cornell Policy, supra note 109; OSU Policy, supra note 2, § II.D; University of Florida, Who is Responsible for Reporting Sexual Harassment? (visited July 16, 1998) <http://www.aa.ufl.edu/aa/affact/harass/who.htm>.
302. Colorado Policy, supra note 109, § III.D.5. The formal complaint procedure has three possible outcomes: (1) cases in which the complaint is substantiated; (2) cases in which the complaint is not substantiated; and (3) cases in which the allegations are found to be "intentionally false and malicious." Id.
303. See Hulin et al., supra note 97, at 140; Lach & Gwartney-Gibbs, supra note 108, at 110.
304. According to the American Psychological Association, "[r]esearch shows that less than one percent
universities do not provide sanctions for filing other kinds of false grievances.\(^{305}\) Providing punishment for only one kind of false complaint sends a strong message: false complaints of sexual harassment are a problem within academia.

Second, most universities that penalize complainants for filing false allegations of harassment do not impose similar penalties against harassers who lie during university proceedings.\(^{306}\) This creates the false impression that only complainants lie during sexual harassment proceedings and creates a definite procedural bias in favor of the accused.

Third, false claims language has a chilling effect on victims of harassment. Such language may weed out false complaints, but at the expense of deterring many legitimate complainants from coming forward.

Because of this need to encourage victims to come forward, it is not a good idea to specifically include in any sexual harassment policy a statement about false claims. Although no organization will want to encourage false claims, such a statement has been shown to have what the law calls a “chilling” effect. This means that such a statement’s discouraging effect on the reporting of true claims far outweighs its value in eliminating untrue claims. It is often very difficult for an employee to come forward, and studies show that women in particular often do not expect to be believed when they report harassing behavior. Statements about retribution for false claims may reinforce feelings by some harassed employees that the harasser will accuse them of lying, the higher-ups will believe the perpetrator, and severe consequences will follow.\(^{307}\)

The possibility of chilling legitimate claims is heightened when universities fail to adequately define what constitutes a false complaint of sexual harassment. Most universities fail to explain that a finding against the complainant is not the equivalent of a false complaint of sexual harassment. Students, in particular, may prove reluctant to bring charges of harassment if they believe that the university will sanction them in the event that the university finds in favor of the accused. This is particularly important in hostile environment cases, where the law emphasizes the severity and pervasiveness of the conduct. A woman may complain about several incidents of improper behavior on the part of a professor, that the university determines do not rise to the level of a hostile environment. A finding of no cause in such a case does not mean that the complainant lied; it simply means that the facts of her case do not currently fit the legal definition of sexual harassment.

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305. My thanks to Dr. Mary McDonald for bringing this point to my attention.

306. Arizona is an exception. Arizona provides penalties both for false complaints and false statements made during a university investigation or inquiry. See ARIZONA COMPLAINT PROCEDURES, supra note 109, at 5.

307. LEVY & PALUDI, supra note 278, at 76 (emphasis in original).
2. Fear of Retaliation

Most sexual harassment grievance procedures contain language offering complainants protection against retaliation. Whether an institution protects against retaliation in practice is another story. Many women view official reporting as a dangerous strategy. In its report on sexual harassment in the military service academies, the GAO found that more than one-third of all women who had experienced harassment at one of the three military academies did not report the incident for fear of reprisal. \[309\] \"[T]here was... general consensus that there would be negative consequences to reporting the harassment, such as being viewed as a 'crybaby', being viewed less favorably by the student and officer chains of command, or receiving lower military performance grades.\" As a result, most women at the academies handled harassment informally due to the "negative consequences" associated with formal reporting. \[311\]

The research suggests that women's fears of retaliation for formal reporting of sexual harassment are justified. Hesson-McInnis and Fitzgerald, who designed and tested a model of the predictors and outcomes of sexual harassment using MSPB data, found that women who used more "assertive and formal responses" to harassment experienced "more negative outcomes of every sort." In addition to experiencing negative medical and psychological effects, formal reporters of harassment were "more likely to quit, be fired, or be transferred." \[312\]

Organizational justice research supports the findings of Hesson-McInnis and Fitzgerald. In a study of grievance procedures in three large non-union companies, Lewin found that firms punished workers who used their firm's internal grievance procedures. Each of the firms had multi-step procedures ("appeals") initiated by an employee appeal to either the immediate supervisor or the firm's personnel officer. \[314\] Lewin made several interesting

\[308\] See, e.g., ARIZONA POLICY, supra note 2, at 2 ¶ 5 (prohibiting retaliation against complainants and witnesses); BERKELEY POLICY, supra note 2, § V ("No person shall be subject to reprisal for using or participating in the mediation or complaint resolution processes, or for using or participating in the formal complaint policies."); MINNESOTA GUIDELINES, supra note 2, § IV.C ("[T]he policy and state law forbid retaliation of any kind."); MUPIM, supra note 109, § 3.6.E ("It is a violation of University policy to retaliate against any member of the University community who reports or files a complaint of sexual harassment or anyone else who participates in the complaint process."); Colorado Policy, supra note 109, § II.C ("Retaliation of any kind . . . is prohibited."); OSU Policy, supra note 2, § II.B ("Retaliation is a serious violation that can subject the offender to sanctions independent of the merits of the sexual harassment allegation.").

\[309\] The percentage of women fearing reprisal varied by academy. At the Naval Academy, 37% of women feared retaliation, while 53% of women at the Air Force Academy reported fear of reprisal for reporting harassment. See DOD REPORT, supra note 39, at 25; DOD REPORT II, supra note 39, at 17-23.

\[310\] DOD REPORT, supra note 39, at 28.

\[311\] Id.

\[312\] Hesson-McInnis & Fitzgerald, supra note 108, at 896 (emphasis added).

\[313\] Id.

\[314\] Two firms had four-step procedures. The third had a five-step grievance procedure. See David Lewin, Dispute Resolution in the Nonunion Firm: A Theoretical and Empirical Analysis, 31 J. CONFLICT
findings that are relevant to retaliation in the context of sexual harassment cases.

First, while men filed more appeals than did women, women filed more cases alleging discrimination than did men. Appeals alleging discrimination, however, were much more likely to be settled only at the higher stages of the firms’ appeals process. The problem is that employees who used the higher stages of the appeals process were more likely after the appeal to have lower rates of promotion and higher rates of involuntary turnover, e.g., layoffs, than employees whose appeals settled at the first stage of the appeals process. As a result, because women are more likely than men to file discrimination claims, women are more likely to experience negative consequences for using their firms’ internal grievance procedures.

Second, Lewin discovered that employees who won their appeals, at any level of their firm’s multi-step procedure, had significantly lower rates of promotion and significantly higher rates of termination and lay-offs than similarly situated employees who had lost their appeals. Lewin’s findings suggest that employers penalize employees who use their firm’s internal grievance procedure and win, creating a Hobson’s choice for the employee. She can use the firm’s grievance procedure, but if she “wins” her case she will suffer longer-term negative consequences at work. Or, she can ignore discriminatory treatment in the workplace. Neither result is satisfactory.

Subsequent research involving unionized firms confirms that employers penalize employees who use internal grievance procedures. Lewin and Peterson, in a study of four unionized companies, found that “grievance filers were more likely than nonfilers to experience lower promotion rates, lower performance ratings, and higher turnover.” Klass and DeNisi made similar findings in research involving a “unionized public agency.” Their research also indicates that the nature of the grievance has a significant impact on whether the employee experiences negative job consequences. “[G]rievants who filed grievances against their own supervisors received significantly lower performance ratings from these same supervisors in the years following their filing of a grievance, compared not only to nongrievants but also to employees who filed grievances against organizational policies (rather than against specific supervisors).” Because sexual harassment may involve claims against a supervisor, women who use internal procedures to resolve such complaints against their superiors run the risk of subsequent retaliation.

315. See id. at 474-76, 478.
316. See id. at 484.
317. See id. at 491, 493.
318. See id. at 493.
320. Id. at 221-22 (citing B.S. Klass & A.S. DeNisi, Managerial Reactions to Employee Dissent: The Impact of Grievance Activity on Performance Ratings, 32 ACAD. OF MGMT. J. 705 (1989)).
321. Id.
Employees apparently can “read” the signals that a firm communicates regarding use of internal grievance procedures. Confidential surveys of employees at major U.S. corporations found that more than half of the employees who had experienced harassment cited fear of reprisal as a reason for not reporting harassment. The three non-union firms studied by Lewin conducted an internal workplace survey, asking employees why they would not use their firm’s internal appeals procedures. The most frequent response among managers and administrators was “‘fear of management reprisal.’”

A different survey by a school district of its unionized teachers’ attitudes about the district’s internal grievance procedure revealed that fear of retaliation figured prominently in decisions not to use the district’s procedures.

In conclusion, the research strongly suggests that women who use internal grievance procedures run a significant risk of retaliation for invoking those procedures. Complaints about supervisors, which include some sexual harassment grievances, are more likely to result in negative consequences for complainants. In addition, if a woman wins her sexual harassment grievance, it is more likely that the organization will punish her later for filing and prevailing on her complaint.

3. Mediation

More than half of the public schools—Arizona, Berkeley, Colorado, Iowa, Maryland, and Miami—include mediation or conciliation either in the investigation or disciplinary phases of their sexual harassment procedures.

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323. Lewin, supra note 314, at 500 (explaining that 27% of those who responded to the survey cited this reason).
325. See Arizona Complaint Procedures, supra note 109, at 3 (explaining that mediation and negotiation are preferred methods for resolving formal complaints of harassment).
326. See Berkeley Disciplinary Procedures, supra note 273, § III.5-6, at 83E (providing for informal mediation during early stages of disciplinary procedure); Berkeley Student Policy, supra note 227, § IV.C, at 6 (explaining that complaint resolution officer may “mediate a resolution or negotiate an administrative settlement” of a student’s formal grievance at any time during the investigation).
327. See Colorado Policy, supra note 109, § III (explaining that informal complaints are “resolved through means (e.g., mediation) other than formal investigation”).
328. See University of Iowa, Faculty Dispute Procedures, § 29.7.d (last modified Dec. 1998) <http://www.uiowa.edu/~our/opmanual/iii/29b.htm> [hereinafter Iowa Faculty Procedures] (mediation in disciplinary proceedings).
329. See Maryland Grievance Procedure, supra note 272, § II.B.2 (providing for mediation in grievance procedure for faculty complaints of sexual harassment); Maryland Code, supra note 227, § III.K (directs that upon a finding of probable cause that discrimination has occurred, attempt to resolve by conciliation, persuasion, and conference). At Maryland, faculty, students, and staff may make formal complaints of sexual harassment under the Human Relations Code. Only faculty members may invoke the Faculty Grievances Procedure. See Maryland Policy, supra note 2, §§ B.2.a, e.
330. See MUPIM, supra note 109, §§ 3.6.1, 8.3.E (providing for mediation as informal method for resolving sexual harassment complaints and mediation during disciplinary procedure).
331. See infra note 357. Many universities have a two-part sexual harassment procedure: (1)
The Emperor's New Clothes

Some universities, such as Berkeley[332] and Miami,[333] include mediation in both the investigation and disciplinary phases. Mediation, in the context of either an investigation of sexual harassment or the imposition of discipline for such harassment, is inappropriate in most sexual harassment cases within the academy.

First, even those commentators who recommend mediation for sexual harassment disputes[334] recognize that it cannot work where "an extreme power imbalance exists that cannot be addressed adequately in mediation."[335] Yet sexual harassment often involves serious power imbalances, especially in an academic setting. Faculty members have great power over student grades and recommendations. While co-worker harassment is more common than supervisory harassment, the co-workers of untenured female faculty often are tenured male faculty, who vote on her tenure decision. Short of removing faculty members from tenure committees, for example, it is difficult to determine how the university can adequately address this power imbalance in a mediation setting.

Second, some cases of sexual harassment involve sexual coercion or other forms of forced physical attention, such as kissing or touching of intimate parts of the body. Mediation requires both parties to participate.[336] This means that the victim must sit down with the harasser in an effort to mediate the dispute. Such a meeting could be traumatic or even threatening to the victim.

In recent years, some institutions have built into their grievance procedures a mediation technique, whereby grievances can be resolved informally between the individuals involved... However, such sessions very often become volatile. Individuals have very powerful emotions associated with the situation. Furthermore, such a procedure assumes both individuals are of equal bargaining power in the organization. Research has suggested, however, that most victims of sexual harassment hold less organizational power than the harassers. Perhaps most importantly, most individuals who have experienced sexual harassment want to flee the harasser, not sit with this person face-to-face. They fear the mediation session will become an extension of the sexual harassment.[337]

[332] See supra note 326.
[335] Id. at 634 (footnote omitted).
[336] The victim does not have to participate in mediation during some disciplinary proceedings. Instead, the university acts as the plaintiff in the disciplinary case against the harasser. See, e.g., Iowa Faculty Procedures, supra note 328, § 29.7d (stipulating that complainant need not participate in mediation; mediation occurs between faculty member and a high-ranking university official).
Yet several university sexual harassment policies encourage victims either to first attempt to resolve the dispute informally with the harasser or to try mediation. "The decision to enter mediation, however, may not be truly voluntary if dictated by an unequal power balance in the relationship as it existed prior to the mediation. Thus even voluntary mediation can be coercive." At a minimum, a university policy should be neutral as to how victims ought to proceed. University officials can set forth the options. The victim should then proceed as she sees fit, free of subtle pressures that currently reside in university policies.

Third, the prevalence of mediation and other informal mechanisms for resolving sexual harassment complaints suggests a gender stereotype about women's preferences for resolving conflict.

It has been suggested that affirmative action offices concentrate on informal mediational procedures rather than conducting formal hearings. However, such a shift in focus is problematic because it typically results in unpunished and undeterred offenders. It may also portray women as reluctant consumers of adversarial justice systems and infer that women neither deserve nor demand restitution for infractions of their civil rights.

The argument that women prefer informal resolution mechanisms is flawed. Women do use informal resolution methods much more often than formal ones. The research, however, suggests that they do so not out of personal preference, but out of frustration with formal complaint mechanisms.

Fourth, none of the universities that use mediation as a means to resolve sexual harassment complaints allows the complainant to select the mediator. "One of the obvious advantages of mediation is that the parties may choose the mediator." In a university sexual harassment case, however, the victim must make do with the university official selected to mediate the case. This creates a conflict. The university mediator works for and is paid by the university. The university has an interest in addressing sexual harassment complaints, but the university's interest is not necessarily co-extensive with that of the victim's. In
fact, the victim’s and the university’s interests may diverge, especially if the harasser is a repeat offender whom the university previously has failed to sanction.

Finally, what is most interesting about mediation in university sexual harassment cases is how it is used in the disciplinary phase of the case. At two of the three universities that allow mediation during the disciplinary phase (Iowa and Miami), the faculty member participates in the selection of the mediator or mediation committee. At Iowa, the faculty member states his preference of mediators from a list provided to him. At Miami, the faculty member selects one of the three mediators to serve on the faculty member’s mediation committee. And, at both Iowa and Miami, the university affords the faculty member the right to participate in mediation concerning the discipline to be imposed upon him, even though the university already has determined that the faculty member has engaged in sexual harassment. For example, at Iowa, the mediation proceeding occurs after the university has found that a reasonable basis exists for believing that sexual harassment has occurred. At Miami, a faculty member may invoke mediation even though the Office of Affirmative Action has found reasonable cause to believe that sexual harassment has occurred and the faculty member either has failed to appeal to or lost an appeal before the university’s Sexual Harassment Panel.

To begin with, it is unclear why mediation is part of the disciplinary phase of any sexual harassment proceeding. Once a faculty member is found liable for sexual harassment, why does he have a right, sanctioned by university procedure, to participate in his discipline? Moreover, why does a faculty member who has violated university policy have the right to select his mediator, while victims of sexual harassment have no control over the person who mediates their case? The answer lies in the power relationships within universities. Faculty members devise the grievance and disciplinary proceedings available to them. Thus, they insert procedural protections, such as the right to mediation, that operate to benefit them at the expense of less powerful members of the university community.

4. Length and Clarity of Procedures

344. See Iowa Faculty Procedures, supra note 328, § 29.7.d(2).
345. See MUPIM, supra note 109, § 8.3.E.1.
346. See Iowa Faculty Procedures, supra note 328, at § 29.7.d; see also University of Iowa, Sexual Harassment Complaint Procedures § 5.9b(9) (visited Apr. 21, 1999) <http://www.uiowa.edu/~our/opmanual/ii/05.htm> [hereinafter Iowa Complaint Procedures]; Letter from Grainne Martin, Associate Director and Compliance Officer, University of Iowa, to Anne Lawton, Assistant Professor, Miami University (Jan. 26, 1999) (copy on file with author) (“If [the Provost] agrees [that a reasonable basis exists for believing the policy has been violated], he then attempts to obtain a negotiated settlement. . . . If this effort fails, the Provost then imposes formal sanctions and the faculty member may appeal that action pursuant to the Faculty Dispute Procedures. . . .”).
347. See generally MUPIM, supra note 109, § 8.3 (mediation is part of disciplinary proceedings, which are invoked only after a finding that a faculty member has engaged in sexual harassment).
No one can use a procedure that she does not understand. A review of university sexual harassment procedures, however, reveals several consistent problems that make understanding the formal procedures difficult and using them burdensome. Many formal procedures involve multiple stages; following the process often requires diagramming it. The length of the written procedure, as well as the time it takes to complete it, operates as a barrier to entry. In addition, many procedures leave key terms or critical time periods undefined. This makes the procedures ambiguous.

a. Lengthy Procedures

First, the sheer length of a written document setting forth a procedure is a deterrent to reporting, especially if the writing is "legalistic" or the document requires multiple references to other sections of university policy. Several universities have very long sexual harassment policies and procedures. Cornell's policy is twenty-seven pages long. The documents that describe the formal sexual harassment investigation and disciplinary procedures at Berkeley, Iowa, and Miami range from sixteen to twenty-five pages in length. It is misleading to look only at the documents that govern the sexual harassment investigation procedure because, at many universities, a faculty member may attack the factual finding of harassment in a separate disciplinary or faculty grievance phase. As a result, there can be no relief until the entire formal process, including the disciplinary or grievance proceedings, is completed.

Second, the longer it takes to complete an investigation of sexual harassment, the less likely victims are to invoke the procedure. This is especially

348. At Berkeley, the procedures describing the steps involved in a formal investigation of sexual harassment by a student are 21 pages long. The formal complaint procedures for students consist of nine pages of text. See BERKELEY STUDENT POLICY, supra note 227. Prior to filing a formal complaint, however, "[s]tudents are encouraged to consult . . . the [BERKELEY POLICY]", which is 12 pages long. BERKELEY STUDENT POLICY, supra note 227, § I.C. See also Letter from Carmen McKines, Title IX Compliance Officer, University of California at Berkeley, to Anne Lawton, Assistant Professor, Miami University 2 (Aug. 27, 1998) [hereinafter Berkeley Letter II] (on file with author) (stating that the Berkeley Policy is "the first step of the 'formal process' which encourages informal resolution").

In order to understand Iowa's formal complaint procedure, three different documents must be examined. The first is the sexual harassment policy, which is six pages long. See Iowa Policy, supra note 2. The complaint procedures are nine pages long, four of which govern formal complaints. See Iowa Complaint Procedures, supra note 346, §§ 5.9-5.13. Finally, discipline against a faculty member for violating the sexual harassment policy is imposed pursuant to the Faculty Dispute Procedures, which are 50 pages long. Of course, not all 50 pages are relevant; only seven pages of definitions and other general provisions, and § 29.7, which is eight pages long, apply to discipline against a faculty member in sexual harassment cases. See Iowa Faculty Procedures, supra note 328, §§ 29.1-29.4, 29.7. But because the complaint procedures do not specifically cross-reference the subsection of the disciplinary procedures that apply in sexual harassment cases, a student or faculty member must wade through 50 pages of faculty dispute procedures in order to determine which procedures govern their case. Even if a student or faculty member immediately determines which procedures are relevant for discipline, she must read 25 pages in order to understand the complete formal complaint procedure: a six-page policy, four pages on formal complaints, and 15 pages of disciplinary procedures.

Miami's formal complaint procedure is shorter, but still is 16 pages long. The sexual harassment policy and formal complaint procedures are six pages long. See MUPIM, supra note 109, § 3.6. The disciplinary procedures are 10 pages long. See MUPIM, supra note 109, § 8.3.

349. See infra note 425 and accompanying text.
true for students who typically spend only nine months of each year on campus. For graduating seniors, lengthy procedures mean they may not obtain a resolution of their complaint prior to graduation. Few would wish to return to campus in order to pursue a sexual harassment complaint.

At a number of the public records schools, e.g., Arizona, Berkeley, Iowa, Miami, SUNY, and Texas, it can take from six months to one

350. The formal complaint procedure will take at least 180 days or six months at Arizona. The Affirmative Action Office ("AAO") has 120 days from the filing of a formal complaint to "provide both the complainant and the respondent a written summary of findings, determination of CAUSE or NO CAUSE, and if appropriate any necessary correction action." ARIZONA COMPLAINT PROCEDURES, supra note 109, at 4. Either party may then appeal to the president within 30 calendar days from receiving the AAO's report. See id. Finally, the president appoints an "ad hoc discrimination appeal officer," who must provide "the president with written findings and recommendations within 30 calendar days of appointment." Id. The president's decision is final. See id. The procedures do not set time limits for the president; thus, he does not have to appoint the ad hoc discrimination officer or reach a final decision after receiving that officer's findings within any particular time frame. As a result, the formal complaint procedure at Arizona may take more than 180 days.

351. A complaint of sexual harassment by one faculty member against another, in which discipline is imposed, can take more than nine months to complete at Berkeley. (A copy of the timeline is on file with the author.) The procedure may take longer for students because the student grievance procedure does not operate during "summer term and inter-semester recesses." BERKELEY STUDENT POLICY, supra note 227, § II.E.

The Complaint Resolution Process ("CRO") at Berkeley—an investigation that can result in discipline—can take 105 working days or just over five months to complete: (1) up to 90 working days to complete the sexual harassment investigation; and (2) up to 15 working days for a decision by the "appropriate campus official or Senate Committee." BERKELEY POLICY, supra note 2, § V.B.4.b, c, at 8.

Discipline against faculty members is imposed pursuant to separate procedures contained in the Manual of the Academic Senate. See generally BERKELEY DISCIPLINARY PROCEDURES, supra note 273. If the faculty member avails himself of all rights offered under the disciplinary procedures, it will take a minimum of 119 days; and if the faculty member invokes all of his procedural rights, it can take more than nine months to complete the investigation of the complaint and impose discipline. (In order to determine the total time needed to complete the disciplinary procedure, I had to assume time periods for a number of stages that were not specified in the procedure. I used either seven or 14 days, times that were comparable to time periods provided for in other portions of the disciplinary procedure.)

352. It may take seven months to impose discipline against an Iowa faculty member who violates the university's sexual harassment policy. (A copy of the timeline is on file with the author.) The investigation stage takes no more than 45 days. See Iowa Complaint Procedures, supra note 346, § 5.9b(6). The length of time to complete the disciplinary phase varies, depending on whether mediation is successful. Assuming mediation is not successful, it can take another 158 days to impose discipline. See Iowa Faculty Procedures, supra note 328, § 29.7. At Iowa, then, it can take 203 days or almost seven months to complete a formal sexual harassment investigation and subsequently impose discipline against a faculty member. (Because certain times were not specified, I assumed time periods, ranging from 10 to 20 calendar days, which are comparable to other periods stated in the procedures.)

353. See infra notes 361-81 and accompanying text.
year to formally investigate a sexual harassment complaint and impose discipline against a faculty member.356 One reason for the lengthy process is that

354. Depending on which procedure governs the investigation of a sexual harassment complaint, it can take nine months at SUNY to complete the formal complaint procedure. SUNY's sexual harassment procedure has two stages: (1) investigation of the sexual harassment complaint; and (2) hearing a faculty member's grievance over recommended discipline. The disciplinary grievance procedure is provided at Article 19 of the Agreement between the State of New York and the United University Professions. See UUP AGREEMENT, supra note 279, art. 19. SUNY may impose discipline only pursuant to Article 19 of the UUP Agreement. See id. § 19.3. If the faculty member takes advantage of all rights provided to him pursuant to the disciplinary grievance procedures at SUNY, it can take 105 working days or 5.25 months to complete the proceedings. The UUP Agreement defines "days" as working days. Id. § 19.2b. (This assumes that it takes no more than 10 working days to issue a notice of discipline, as provided by § 19.4c, and another 10 working days to select a disciplinary arbitrator, as provided by § 19.4e of the UUP Agreement. The UUP Agreement does not specify time periods for these two elements of the disciplinary grievance procedure. See id. §§ 19.4a, 19.4e. Because the disciplinary arbitrator makes "determinations of guilt or innocence," the sexual harassment fact-finding is not complete until the end of the disciplinary grievance proceeding at SUNY. Id. § 19.4h.) The disciplinary phase alone, then, takes more than five months.

It is unclear whether the procedures for the investigation stage are contained in the Administrative Guidelines in § IV of The Faculty Handbook, or in Article 7, Grievance Procedure, of the UUP Agreement. Compare State University of New York at Binghamton, Policies and Procedures for Faculty, Administrative Guidelines (visited June 22, 1998) <http://www.binghamton.edu/publications/facstaff-handbook/facstaff_body_4.html> (for faculty cases potentially subject to discipline under Article 19 of the UUP Agreement) with State University of New York at Binghamton, Policies and Procedures for Faculty, Policy on Sexual Harassment and Consensual Relationships (visited June 22, 1998) <http://www.binghamton.edu/publications/facstaff-handbook/facstaff_body_4.html> (four-step grievance procedure available under UUP Agreement). SUNY did not respond to a request to clarify which grievance procedure applies to sexual harassment complaints and did not provide a copy of Article 7 of the UUP Agreement. See Facsimile from Anne Lawton, Assistant Professor, Miami University, to Katharine F. Ellis, Director of Media Relations, State University of New York at Binghamton 1, ¶ 4 (July 26, 1998) (on file with author). Therefore, it is difficult to determine the minimum time necessary to complete the formal sexual harassment complaint procedure.

Unlike the UUP Agreement, the Administrative Guidelines are available on the Internet. Assuming the Administrative Guidelines govern the investigation phase of a sexual harassment complaint, the investigation will take a minimum of three months. The president appoints a fact-finder, who must report back to the president with findings, "no later than 120 days after initiation of the complaint." State University of New York at Binghamton, Policies and Procedures for Faculty, Administrative Guidelines § IV (visited June 22, 1998) <http://www.binghamton.edu/publications/facstaff-handbook/facstaff_body_4.html>. The president then may consult with other persons about the "alleged misconduct" and determine whether to impose discipline. See id. § V. No time period is provided for the president's deliberations; hence, the investigation normally will take more than 120 days. See id. §§ V, VI.

Using the Administrative Guidelines and assuming the faculty member takes advantage of all rights provided to him, it can take 120 calendar days (investigation) and 105 working days (disciplinary grievance) to complete the entire formal complaint process. This is the equivalent of 9.25 months.

355. Imposition of discipline against a faculty member at Texas can take between five and seven months, depending on how the grievance procedure is interpreted in appeals of discipline in sexual harassment cases. (A copy of the timeline is on file with the author.) Texas currently has no written procedure for investigating sexual harassment complaints involving two faculty members. See Texas Conversation, supra note 273. I assumed it would take a minimum of 20 working days to complete an investigation. If it actually takes longer, then the entire process for resolving complaints in which discipline is imposed will take longer.

If discipline is imposed in a sexual harassment case, the faculty member may invoke the university's grievance procedure. See TEXAS GRIEVANCE PROCEDURES, supra note 279, § 3.18. That procedure, when coupled with the sexual harassment investigation itself, can take 105 working days or a little more than five months to complete if the Faculty Grievance Committee determines that the faculty member can bypass §§ 3.18.IV.C.2 & 3, which consume an additional 30 working days. See id. §§ 3.18.IV.C.1-3. If the faculty member does not bypass §§ IV.C.2-3, then the sexual harassment investigation and disciplinary determination can take as long as 135 working days, or almost seven months to complete. (The disciplinary procedures did not specify all relevant time periods; hence, I assumed time periods, ranging from 10 to 20 working days, which are comparable to those given for other stages of the procedure.)

356. The universities named are not necessarily the only schools with lengthy procedures. It was difficult to determine time periods for some universities, e.g., Florida, because the sexual harassment complaint
a majority of the public records schools have a two-step formal complaint procedure: (1) the sexual harassment investigation; and (2) the imposition of discipline.\textsuperscript{357} At some universities, e.g., Arizona\textsuperscript{358} and Berkeley,\textsuperscript{359} the sexual harassment investigation itself is lengthy, ranging from five to six months. But at many universities, it is the disciplinary phase that adds months to the sexual harassment complaint process. At a number of the public records schools, e.g., Berkeley, Iowa, Miami, SUNY, and Texas, the factual finding of sexual harassment made against a faculty member during the investigation phase can be overturned during the disciplinary procedure.\textsuperscript{360} As a result, the procedure really is not finished until the university makes a final factual determination that sexual harassment occurred. An example, using one of the lengthier sexual harassment procedures (Miami), shows how complicated and difficult a process it is for students to get the university to discipline a professor found liable for sexual harassment.

Mary is a senior at Miami University. She plans to attend graduate school beginning in the fall of 1999 and currently is asking professors for letters of reference. Mary has earned two semesters of independent study credit for working in the lab with Professor Z. Nonetheless, Mary is hesitant to ask Professor Z for a recommendation. She decided not to work in the lab her senior year because Professor Z had repeatedly propositioned her during her junior year. Professor Z is a well-known researcher, so Mary finally relents and asks him for a letter of reference, which he agrees to write. In late October of 1998, Mary discovers that Professor Z has written her a very negative letter of recommendation. On Friday, November 6, 1998, Mary initiates Miami's formal sexual harassment procedure by filing a written complaint against Professor Z.\textsuperscript{361}

\textsuperscript{357} See, e.g., ARIZONA COMPLAINT PROCEDURES, supra note 109, at 3-4 (formal resolution of complaints) and Arizona Faculty Handbook, supra note 350, ch. 6 (grievance procedure for discipline); BERKELEY POLICY, supra note 2, § IV.B.3, at 4 ("disciplinary action against the alleged harasser may be initiated only through established disciplinary procedures"), BERKELEY STUDENT POLICY, supra note 227, § 1.C. ("used for complaints of sexual harassment"), and BERKELEY DISCIPLINARY PROCEDURES, supra note 273 (for imposition of discipline); Colorado Policy, supra note 109, § III.F ("If the investigation report concludes that a violation of [the sexual harassment policy] has occurred, it must be determined whether disciplinary action is warranted. . . . Disciplinary actions will be implemented using the procedures applicable to the respondent."); Iowa Complaint Procedures, supra note 346, § 5.9 (formal complaints) and Iowa Faculty Procedures, supra note 328, § 29.7 (procedure for imposing discipline); MUPIM, supra note 109, §§ 3.6J-P, 8.3 (formal complaint investigation and procedure for disciplinary action); and UNIVERSITY OF TEXAS, SEXUAL HARASSMENT OF STUDENTS (on file with author) (formal complaint investigation) and TEXAS GRIEVANCE PROCEDURES, supra note 279, § 3.18.IIA.3 (discipline subject to faculty grievance procedure).

SUNY has a two-step procedure. See supra note 354. Minnesota also has separate procedures by which employees can grieve the discipline imposed. The procedures vary depending on the status of the person disciplined, e.g., student, faculty, staff. See Letter from Julie A. Sweitzer, Acting Director, Office of Equal Opportunity and Affirmative Action, University of Minnesota, to Anne Lawton, Assistant Professor, Miami University 1-2, ¶ 4 (Sept. 14, 1998) [hereinafter Minnesota Letter I] (on file with author).

\textsuperscript{358} See supra note 350.

\textsuperscript{359} See supra note 351.

\textsuperscript{360} See infra note 425.

\textsuperscript{361} See MUPIM, supra note 109, § 3.6K.
Miami’s Affirmative Action Office ("AAO") now has fourteen days\(^{362}\) to complete its investigation of Mary’s complaint.\(^{363}\) Suppose the AAO finds in Mary’s favor. Professor Z then has fourteen days to appeal the AAO’s findings to the Sexual Harassment Panel ("SHP").\(^{364}\) He decides to do so. Miami’s policy gives the SHP fourteen days to complete its review of Professor Z’s appeal and to issue its written report.\(^{365}\) The SHP’s review is de novo.\(^{366}\) On Friday, December 18, 1998, the SHP affirms the AAO’s findings in Mary’s favor. The investigation phase is complete forty-two days after Mary filed her formal complaint, which is a fairly quick process compared to some institutions.\(^{367}\)

At Miami, the disciplinary procedure does not operate at certain times, the two longest periods being the fifteen weeks of summer and the month-long winter recess.\(^{368}\) Because the SHP reached its decision on December 18, 1998, the last day of classes before Miami’s winter recess, disciplinary proceedings may not begin until classes resume on Monday, January 11, 1999.\(^{369}\) At this juncture, the University takes over the case. The SHP sends its report to the Provost, who decides to initiate discipline against the harassing faculty member.\(^{370}\) Miami’s procedure fails to provide a time frame within which the Provost must act. For the sake of this example, however, suppose the Provost moves to impose discipline within fourteen days of the start of the new semester Monday, January 25, 1999.

The faculty member then has seven days to request either mediation or a hearing before the Committee on Faculty Rights and Responsibilities ("R&R").\(^{371}\) Most faculty members will likely choose mediation at this juncture. Mediation offers them an opportunity to participate in discussions about the discipline to be imposed. Miami’s policy provides for mediation by a committee of three tenured faculty members or administrators, one of whom the faculty member gets to select.\(^{372}\) Moreover, even if mediation fails, the faculty member can request a hearing before R&R later in the procedure. Thus, the faculty member loses nothing by invoking his right to mediate.

Mediation conceivably can take sixty-five days to complete under Miami’s

\(^{362}\) The time periods are calendar, not working, days. See id. at § 3.6M-P.
\(^{363}\) See id. § 3.6M
\(^{364}\) See id. § 3.6N.
\(^{365}\) See id. § 3.6O.
\(^{366}\) The Sexual Harassment Panel may take any of the following actions: (1) affirm the AAO’s decision; (2) reverse the AAO’s decision; (3) remand to the AAO for additional investigation; or (4) modify the AAO’s recommendations. See id. § 3.6O.
\(^{367}\) See supra notes 358-59 and accompanying text.
\(^{368}\) See MUPIM, supra note 109, § 8.3.L.2. Miami’s disciplinary procedure does not operate during summer, Thanksgiving break, and the winter and spring recesses. Berkeley also suspends the operation of a portion of its sexual harassment procedure. The student sexual harassment complaint procedure does not operate during the "summer term and inter-semester recesses." BERKELEY STUDENT POLICY, supra note 227, § II.E, at 3.
\(^{369}\) See MIAMI UNIVERSITY, FIRST SEMESTER 1998-99 COURSE SCHEDULE 2-3 [hereinafter MIAMI COURSE SCHEDULE] (on file with author).
\(^{370}\) See MUPIM, supra note 109, § 8.3.D.4.
\(^{371}\) See id.
\(^{372}\) See id. § 8.3.E.1.
policy. It is now April 16, 1999, less than one month before the summer recess begins. If the faculty member and the Mediation Committee fail to reach an agreement, the Mediation Committee notifies the Provost, who then has fourteen days within which to act. Miami’s procedure provides the Provost with a pocket veto. Should she fail to act within those fourteen days, the entire case ends, even if there has been a prior finding of sexual harassment by the SHP.

If the Provost does proceed with discipline in those fourteen days, the faculty member still has the right to request a hearing before R&R. The faculty member has seven days to make this request. It is now May 7, 1999, the end of the spring semester, when the disciplinary procedure once again is suspended, this time for the entire summer.

As a result, Mary will graduate without learning if Miami intends to discipline Professor Z for his behavior. Even more unfortunate, she has lost six months to a procedure that has provided her with no relief. Moreover, it is not clear whether the procedure can go forward unless Mary returns to campus for the hearing before R&R. Miami is the “complainant” during the disciplinary phase. But the hearing before R&R is de novo: the hearing procedures specifically provide that the faculty member may present evidence in response to the university’s “claim that misconduct has occurred.” The procedure provides both parties, the university and the faculty member, with the right to “submit evidence and cross-examine all adverse witnesses who testify in the matter.” R&R may “accept a witness’ written statement in lieu of live testimony,” but this lies within R&R’s discretion. In addition, Professor Z could argue that not being able to cross-examine Mary, the key witness against him, renders the hearing fundamentally unfair.

No matter what happens, however, Mary clearly is the loser. Because the university cannot take action against Professor Z until there is a final determination of sexual harassment against him, any remedy that Mary sought

373. See id. § 8.3.E.2-3. It actually may take longer than 65 days because MUPIM is not clear in defining its time limits. MUPIM provides that “[t]he Mediation Committee will convene within a time period specified by the Provost, not to exceed thirty (30) calendar days.” Id. § 8.3.E.2. But the procedure does not specify whether the 30 days runs from the selection of the mediators, see id. § 8.3.E.1, or from the original request for mediation, see id. § 8.3.D.4. This calculation uses the shorter period 30 days from the request for mediation.

A second mediation meeting may be held 14 days after the first, and the faculty member has 21 days to consider offers made during mediation. See id. § 8.3.E.3. If the Committee holds a second meeting, at which an offer is made, then the mediation procedure will take 65 days.

374. April 16, 1999 is more than 65 days from February 2, 1999, when the faculty member chose mediation. However, Miami’s policy does not operate during the spring recess March 7 through March 14, 1999. See Miami Course Schedule, supra note 369, at 3.

375. See MUPIM, supra note 109, § 8.3.F.

376. See id. § 8.3.F.

377. See id. § 8.3.G.

378. See MIAMI COURSE SCHEDULE, supra note 369, at 3.

379. MUPIM, supra note 109, § 8.3.H.4 (11). In addition, R&R operates as a fact-finder. Its final report includes “findings of fact, conclusions drawn from these facts and recommendations.” Id. § 8.3.H.4 (13).

380. Id. § 8.3.H.4 (5).

381. Id. § 8.3.H.4 (5).
when filing her formal complaint must wait until the end of the disciplinary phase. For example, Mary might have requested that the university intervene to undo the damage caused by Professor Z’s adverse letter of recommendation. If Mary must wait until some time in the fall of 1999, when she originally intended to attend graduate school, to receive this relief, the university certainly cannot claim that such relief is timely. Some universities already may have rejected her, in part based on Professor Z’s negative recommendation. Professor Z’s actions and the university’s untimely and burdensome procedures have caused irreparable harm to Mary’s reputation and her chances for graduate school.

b. Lack of Clarity

Not only are many university sexual harassment procedures needlessly long, they also are very unclear. Many procedures leave critical terms and time periods undefined and unspecified, creating ambiguity. Others are so complicated that understanding how the procedure operates is difficult. The combination of long and unclear procedures creates confusion for women who wish to invoke them.

Many universities fail to define critical terms in their sexual harassment policies and procedures. Two examples are “sexual harassment” and “retaliation”. Three of the public records schools—Arizona, Berkeley, and Texas—use the EEOC’s definition of sexual harassment, but provide no examples of harassing behavior.382 While the EEOC’s definition is a good starting point, it uses fact-dependent terms, such as “hostile” and “offensive.” Providing examples of prohibited behaviors gives men and women alike a better idea of what conduct falls within the definition of sexual harassment.

The need to define sexual harassment in the policy in non-legalese is paramount. Examples should be given of various behaviors that have been identified by the courts as sexual harassment, particularly in the area of hostile environment harassment. This conveys a clearer picture to male employees of what constitutes harassment, and identifies for female employees what activities they do not have to tolerate in the workplace.383

Likewise, few universities provide examples of retaliatory behavior. Most sexual harassment policies contain a short statement prohibiting retaliatory conduct. Yet retaliatory behavior, like sexual harassment itself, is a fact-specific inquiry. Providing concrete examples, as does Florida in its

382. See ARIZONA POLICY, supra note 2, at 1; BERKELEY POLICY, supra note 2, § II; TEXAS STUDENT POLICY, supra note 109. But see UNIVERSITY OF MINNESOTA, SEXUAL HARASSMENT 3-5 (1994) (on file with author) [hereinafter MINNESOTA HARASSMENT].
policy, helps students, faculty, and staff alike to identify the more subtle forms of retaliation.

Another problem with sexual harassment policies and procedures is the use of legal jargon. Some universities use terms such as "respondent", "jurisdiction", "preponderance of the evidence", "probable cause", "evidence of probative value", "hearsay", "summary disposition", and "rebuttal evidence", in both their sexual harassment policies and disciplinary procedures. Unlike Colorado and Cornell, most universities do not provide definitional sections in their policies and procedures. Most non-lawyers, however, do not know the meanings of these terms. The purpose of an internal sexual harassment grievance proceeding is to provide an expedited resolution of a complaint; using terminology that makes it difficult to understand the procedures without consulting an attorney erodes that purpose.

Finally, there are significant time "gaps" in many university sexual harassment procedures. For example, Florida's procedure provides no time periods for completing the sexual harassment investigation. A number of other universities, e.g., Arizona, Berkeley, Iowa, Miami, SUNY, and Texas, leave unclear or unspecified the time within which critical phases of either the investigation or disciplinary phase must be completed. As a result, the complainant has no leverage to force the process forward to completion. Because a complainant cannot obtain relief until there is a final determination made in her case, these "gaps" in the procedure operate to her detriment by potentially delaying a final resolution in the case even longer.

5. Conclusion


385. Much of the legal jargon appears in the disciplinary procedures. However, as noted before, the facts are not final in most sexual harassment procedures until the disciplinary proceeding is completed. Thus, women who are contemplating use of the formal sexual harassment grievance procedures need to understand the workings of their institution's disciplinary procedure.


387. See BERKELEY STUDENT POLICY, supra note 227, § IV.B. ("If the [Complaint Resolution Officer] determines that the grievance is [ ] outside the jurisdiction [of the procedure] . . . the grievance will be dismissed.")

388. See MARYLAND CODE, supra note 227, § III.L. ("All findings, recommendations and conclusions . . . shall be based on a preponderance of the evidence having probative effect."); TEXAS GRIEVANCE PROCEDURES, supra note 279, § V.A.1 ("In all other cases, the burden of proof shall rest with the grievant to prove, by a preponderance of the evidence . . .").

389. See BERKELEY POLICY, supra note 2, § V.B.2.d ("[c]onclusion as to whether there is probable cause to believe that the conduct found to have occurred falls within the definition of sexual harassment . . .").

390. See TEXAS GRIEVANCE PROCEDURES, supra note 279, § V.A.2 ("The rules of evidence . . . need not be strictly observed when . . . evidence of probative value is being offered . . .").

391. See BERKELEY DISCIPLINARY PROCEDURES, supra note 273, tit.VI, ¶ 14 ("Mere uncorroborated hearsay, however, shall not constitute substantial evidence.").

392. See MUPIM, supra note 109, § 8.3.H.3.

393. See BERKELEY DISCIPLINARY PROCEDURES, supra note 273, tit.VI, ¶ 14 ("Every party shall have the right . . . to submit rebuttal evidence . . .").


395. See supra notes 350-52, 354-55, 370, 373 and accompanying text.
Is it worth the time and effort, given the cost involved, to pursue a complaint of sexual harassment? The research suggests, that for many women, it is not.

Rudman and her colleagues conducted a study of victims of sexual harassment at the University of Minnesota in order to determine the reasons why victims fail to use university grievance procedures. The researchers found that procedural justice, i.e., fairness of the procedure, is the "main deterrent to reporting," not gender socialization, i.e., women dislike confrontation.

The results indicated that procedural justice, rather than gender socialization, was a superior explicator of the reliably low reporting rate found for sexual harassment in a large, public research university. Specifically, the most important attitudinal predictor of nonreporting was a factor-derived, futility index assessing uncertainty about the response efficacy of filing a grievance. Compared to reporters, nonreporters were more likely to agree that (a) positive results were not likely to come of reporting, (b) the benefits of reporting would not outweigh the repercussions, (c) they had no control over the procedure, (d) their complaint would be trivialized, and (e) reporting would exacerbate rather than relieve their situation.

Hulin and his colleagues made similar findings. They found that the likelihood that the organization would take the victim seriously and the perception by students and employees that the organization would punish the harasser significantly affected the willingness to report harassment. The risk of reporting also affected the decision to report, but to a lesser extent.

Hesson-McInnis and Fitzgerald's findings also support the theory that an organization's response to sexual harassment shapes women's willingness to report harassment. Hesson-McInnis and Fitzgerald tested their model of the predictors and outcomes of sexual harassment, using the MSPB's 1987 survey data. They found that women who used "assertive and formal responses" to harassment were more likely to suffer negative work outcomes.

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396. Rudman et al., supra note 65, at 537.
397. Id. at 534.
398. See Hulin et al., supra note 97, at 135-41. Hulin and his colleagues developed a scale entitled the Organizational Tolerance for Sexual Harassment Inventory ("OTSHI") in order to measure how students and employees perceive their institution will respond to allegations of sexual harassment. The researchers conducted a preliminary test of the OTSHI on graduate students at a large midwestern university. Next, they administered the OTSHI to a large-scale sample of employees at a public utility company located on the West Coast. Hulin and his associates developed several scenarios, varying both the type of harassment, e.g., gender harassment versus sexual coercion, and the organizational status of the harasser, e.g., supervisor versus colleague. Part of the study asked respondents to rate three factors for each scenario: (1) the risk of reporting; (2) the likelihood that the organization would take the complaint seriously; and (3) the likely consequences for the harasser.
399. See id. at 140, 142.
400. See id.
e.g., termination or transfer, and negative physical and psychological outcomes, e.g., need for counseling. Not surprisingly, the researchers also found that negative job outcomes result from the organization's response to harassment, not from the intensity and duration of the harassment itself.

It is interesting, however, to note that the severity, frequency, and duration of the most significant harassment event did not exacerbate objective work outcomes, although it did exert a negative impact on the psychological and physiological consequences to the victim. This suggests that the etiology of negative job outcomes may derive more from retaliation and negative organizational response (e.g., victim blaming) than from the sexually harassing behavior itself. This is not the case with psychological and physical symptoms; the intensity of harassment directly as well as indirectly affected the perceived emotional and physical stress these victims experienced.

But by penalizing women who come forward with complaints or making the sexual harassment process burdensome, an organization effectively "chills" other women from complaining. Hulin and his colleagues found that women's perceptions of their organization's tolerance for sexual harassment proved a stronger predictor of job withdrawal, as well as women's physical and psychological well-being, than having personally experienced sexual harassment.

These findings were unexpected; although we had thought that a tolerant climate might affect women negatively, we had assumed that sexual harassment would be by far the more powerful variable. Our results may reflect apprehension and fear on the part of women who perceived they are working in a hostile and threatening work environment, feelings that may be triggered by a perception that the organization tolerates harassment and the inference of managerial values consistent with this kind of climate, without the necessity of being personally harassed. [The findings] may also reflect reactions to beliefs that female employees who complain about harassment are treated as "whistle-blowers" whereas little is done to their harassers.

The findings of Hulin and his colleagues provide the link between an organization's response to sexual harassment and the likelihood that women will use internal grievance mechanisms to register complaints of harassment. An organization communicates to its members through written procedures

402. Id.
403. See Hulin et al., supra note 97, at 145-46.
404. Id.
and actions whether it takes sexual harassment seriously. For example, procedures that provide preferential treatment for the accused send a strong signal to victims about who the university values. But even if a university has an even-handed written policy, failing to punish repeat offenders and doling out light sanctions for egregious behavior tells women that the organization will not deal appropriately with their complaints. When coupled with the prospect of retaliation, such ineffective procedures will deter many women from coming forward with legitimate complaints of sexual harassment.

IV. RECOMMENDATIONS: WHERE DO WE GO FROM HERE?

First and foremost, Congress needs to amend Title IX in order to bring the standards for liability for sexual harassment of students in line with those for employees. The Court in Gebser created a different standard of liability for sexual harassment of students based on its interpretation of Congress' intent regarding schools' liability for Title IX violations. "Until Congress speaks directly on the subject, we will not hold a school district liable in damages under Title IX for a teacher's sexual harassment of a student absent actual notice and deliberate indifference." If Congress remains silent in the wake of the Court's decision in Gebser, then educational institutions will have no incentive to create any sexual harassment policies and procedures for students, let alone good policies and procedures.

Second, the lower federal courts and the EEOC, in interpreting the affirmative defense created by the Court in Ellerth and Faragher, need to examine the literature on sexual harassment. The federal government and academic researchers alike have conducted numerous studies demonstrating the persistence of sexual harassment at work and on campus, as well as the problem of underreporting. Research in management and psychology indicates that organizational factors, such as tolerance for harassment and procedural barriers to reporting, strongly influence the level of reporting. Yet universities modify their sexual harassment procedures based on the interests of those drafting the procedures, not on the basis of the existing research.

[P]rocedural justice (rather than gender socialization issues) are [sic] the main deterrent to reporting (and, we hope, alleviating) sexual harassment problems on campus. Consequently, promoting informal grievance

406. The ensuing discussion mentions only the EEOC, not the DOE, because of the Court's recent decision in Gebser. Nonetheless, if Congress acts to bring the standards of liability for harassment of students in line with those for harassment of employees, the suggestions provided apply with equal measure to the DOE.
407. See supra Part II.C.5; see also notes 293-300 and accompanying text.
408. See generally DOD REPORT, supra note 39, at 52 (noting a failure by the service academies to systematically evaluate their sexual harassment programs); Connell, supra note 12; Phillips, supra note 169, at 126 n.202 (citing Champagne & McAfee, Auditing Sexual Harassment, PERSONNEL J. 124, 132 (June 1989)) (Few employers "have systematically evaluated the effectiveness of their [sexual harassment] programs").
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procedures or providing victim advocates to bolster confrontation likelihood may not be the most efficient way to increase reporting rates (such persons may, however, provide social support). People who have been sexually harassed may be rightfully angry, and they may require no encouragement to seek redress and pursue their rights—provided the formal grievance system is trustworthy, neutral, and committed to preserving their dignity. Therefore, modifications to the grievance procedure itself may be the most worthwhile approach to consider.\textsuperscript{409}

For more than a decade the lower federal courts and the EEOC have left universities to their own devices in developing sexual harassment policies and procedures. If the procedures available at the public records schools are any indication, many universities have failed in their responsibility to draft clear, timely, and accessible procedures for reporting sexual harassment. It is time for the EEOC to step in and develop very specific guidelines for universities to follow in drafting their policies. Based on the existing research, the following are suggestions to improve existing university policies and procedures on sexual harassment.

A. Documentation and Reporting of Harassment

First, federal law should require universities to keep internal records of all sexual harassment complaints brought to the universities’ attention, whether through formal or informal complaint channels. If a university does not keep internal records of the number of sexual harassment complaints filed over time, how can it determine whether harassment complaints are increasing or decreasing over time?\textsuperscript{410} Internal trend data furnishes information about the level of reporting within the institution, which, in turn, provides a base of comparison with the incidence of harassment on campus.

Internal records should include both formal and informal complaints. Women use informal mechanisms more often than formal—keeping records of only the latter understates the actual reporting rate. In addition, the law should not create incentives for universities to funnel complainants into procedures in which no paper trail exists. If a woman reports harassment to university officials, whether “formally” or “informally”, the university should keep a record of that report. This is particularly important in cases of repeat offenders. Without records, the university can disclaim knowledge of prior incidents of harassment.

Second, the records maintained should include the corresponding disposition of the complaint. If a university investigates harassment

\textsuperscript{409} Rudman et al., \textit{supra} note 65, at 537-38 (citation omitted).

\textsuperscript{410} See DOD \textit{REPORT}, \textit{supra} note 39, at 52 (“Without trend data, the academies have no way of knowing whether the level of sexual harassment is decreasing.”); \textit{but see} Colorado Policy, \textit{supra} note 109, at § III.I (requiring sexual harassment co-chairs to “establish and maintain a centralized system for gathering statistics and tracking information on sexual harassment and related retaliation claims”).
complaints, but never imposes sanctions for harassing behavior, then women may prove reluctant to invoke the university’s procedures. Raw numbers of complaints alone do not provide sufficient information by which to judge the efficacy of a university’s procedures.

Third, in measuring the effectiveness of university grievance procedures, the courts need to look beyond the four corners of the grievance document. As the Supreme Court noted in Faragher, Title VII’s primary goal is harm avoidance. If women rarely file internal sexual harassment grievances, then sexual harassment becomes a low-risk activity. Procedures that are rarely used have little, if any, deterrent effect on harassment.

Moreover, the research indicates that procedural barriers create a potent deterrent to reporting. Burdensome procedures can deter reporting and create a perception that the university tolerates harassing behavior. As a result, a university involved in sexual harassment litigation should not benefit from a presumption that the majority of women on campus voluntarily choose not to file sexual harassment complaints. Rather, the lower federal courts should require the university to provide empirical data demonstrating that the majority of women on its campus who fail to invoke internal procedures do so because they believe the incident is minor and does not merit reporting. In Faragher, the Court noted that a victim who unreasonably failed to invoke “a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense” should not recover damages under Title VII. It makes sense, then, for the lower federal courts to require a university employer to demonstrate more than the mere existence of a sexual harassment policy and procedure. To do otherwise renders the Court’s use of the words “proven” and “effective” superfluous. Consequently, the courts should require proof that the university has periodically surveyed its own faculty, staff, and students about the incidence of harassment on campus and the efficacy of its internal sexual harassment grievance procedures, and revised its internal procedures in light of these climate survey results, as well as the growing body of research on effective procedures.

B. Eliminate False Claims Language

False claims language may deter legitimate reporting. There is no evidence to suggest that false claims of harassment are rampant on college campuses. Rather, false claims language is an example of drafter bias: university procedures provide penalties for false claims, but not for men who

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412. See supra Part III.C.5.
413. See Gruber, supra note 17, at 316; Hulin et al., supra note 97, at 145-46.
414. Faragher, 118 S. Ct. at 2292.
415. See, e.g., NIH REPORT, supra note 33, at 16 (recommending periodic “employee attitude survey[s]” to identify “sexual harassment and sex discrimination trends and problems”).
416. See supra notes 303-05 and accompanying text.
lie during university proceedings on sexual harassment. Universities should eliminate such language from their policies and procedures.

C. Protection from Retaliation

If universities wish to reduce and eliminate sexual harassment, they need to develop procedures that significantly reduce the risk of retaliation against victims. There are two possibilities. University procedures can require periodic follow-up with both victims and harassers, especially in cases involving supervisory harassment. This removes the burden from the complainant of initiating contact with university officials about retaliation. If periodic review by the equal employment opportunity office reveals questionable reviews, grades, or pay raises, the university, not the complainant, should initiate retaliation proceedings in the name of the victim. University-initiated proceedings send a stronger message to the community about the seriousness of retaliation.

An alternative is to create a rebuttable presumption for cases in which the complainant prevails on her sexual harassment complaint. A complainant would satisfy her prima facie case by demonstrating two things: (1) she won her sexual harassment case; and (2) she alleges a behavior that falls within a category of behaviors defined by the policy as retaliatory; e.g., negative grade or performance review. The harasser would have the burden of proving that his actions were not retaliatory. In making his case, however, the harasser should have to demonstrate that he would have made the same decision even if the complainant had not brought and won a sexual harassment complaint against him. The advantage of adopting this presumption is that it gives women an incentive to file formal grievances. Most informal procedures do not involve fact-finding, so women could not satisfy the prima facie case for retaliation if they previously had used an informal resolution mechanism.

Some might argue that a rebuttable presumption of retaliation turns on its head the notion of “innocent until proven guilty.” Sexual harassment cases, however, are not criminal, but rather civil proceedings. In addition, internal grievance procedures are not even civil court proceedings—they are mechanisms intended for the quick resolution of sexual harassment problems. The procedure can protect the harasser’s rights by providing him with an opportunity to be heard and to present evidence rebutting the presumption. Given the research on the likelihood of retaliation, a rebuttable presumption better protects victims and more accurately reflects the real-world consequences of filing sexual harassment complaints.

D. Minimize the Use of Mediation

417. See supra Part II.B.
418. See supra Part III.C.2.
A number of universities include mediation as part of their internal grievance procedures. Yet two important conditions for the success of mediation—power parity and party selection of the mediator—are not obtainable in university settings. As a result, the inclusion of mediation in university sexual harassment procedures is questionable.

At a minimum, universities should not include preferences for mediation in their policies and procedures. Such language suggests to victims that they must exhaust informal mechanisms of resolution prior to using formal complaint procedures. This decision should be left to the complainant.

In addition, mediation simply does not belong in the disciplinary phase of a sexual harassment proceeding. Once a faculty member has been found liable for sexual harassment, it is unclear why he has the right to engage in discussions about what is appropriate discipline for his behavior. Mediation offers the faculty member leverage to negotiate his discipline, especially when he has the opportunity to reject any suggested discipline and continue to challenge disciplinary findings through other university channels.

Moreover, universities should not offer faculty members found liable for harassment the right to select their mediators, while denying that right to victims of harassment. Such differential treatment suggests drafter bias.

Finally, universities should exercise caution in recommending mediation, particularly for certain types of sexual harassment. Forced touching, grabbing, and fondling constitute not only harassing behavior, but also assault. It is unrealistic to expect a woman who has been assaulted to sit down with the harasser in order to mediate the dispute. While mediation may work in cases involving true misunderstandings, it may deter many women from reporting harassment out of fear of confronting the harasser.

E. Reduce the Length and Complexity of Procedures

First, with the exception of dismissal, there is no reason it should take a university six months to one year to discipline a professor for sexual harassment. Most students are on campus each academic year for no more than nine months. Formal procedures that take most of an academic year, or even longer, to complete serve as a deterrent to reporting. Students who do complain will use informal channels, which often do not involve the imposition of discipline and, hence, take less time to complete. As a result, any conclusions drawn about women’s preference for informal methods of resolution are suspect, given the incentives created within institutions to select informal over formal complaint mechanisms.
At universities where the formal procedures are lengthy because of the disciplinary phase, there is a simple solution: make the factual determination of sexual harassment final at the end of the investigation phase. A number of universities bifurcate their sexual harassment procedures into separate investigation and disciplinary phases, but then allow the factual determination of sexual harassment to be reopened and potentially overturned during the disciplinary proceedings. If universities must bifurcate their sexual harassment procedures, then the bifurcation should be clean—faculty should not have the opportunity to appeal facts in both the investigation and disciplinary phases. Otherwise, the disciplinary phase becomes a second investigation phase.

Finalizing the facts at the end of the investigation phase also protects the victim. A final factual determination of harassment allows the university to redress any harm done to the victim as a result of the harassment. The university then can proceed, on its own initiative, with discipline against the harasser. If the determination of harassment is not at issue in the disciplinary phase, then the victim’s need to participate in the proceedings necessarily ends.

Second, there is no reason why a university must afford a professor multiple opportunities to appeal either a finding that he engaged in sexual harassment or the discipline imposed. Multiple appeals delay the imposition of discipline. They also provide the professor with leverage to negotiate—the university or the victim of harassment may agree to lighter sanctions in exchange for the harasser foregoing his right to further appeals. Because no sanctions apply for frivolous internal appeals, pursuing such appeals is a low-cost endeavor for the harasser.

Finally, universities need to make their policies more user-friendly. Many colleges and universities have put their policies and procedures on the Internet. But accessibility means more than obtaining a copy of the

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423. See supra notes 350-57 and accompanying text.
424. See supra note 357 and accompanying text.
425. See, e.g., BERKELEY DISCIPLINARY PROCEDURES, supra note 273, tit.VI, ¶ 14, tit.VII, ¶¶ 16-17, at 83G-H (after investigation has determined faculty member engaged in sexual harassment, disciplinary committee hears evidence, determines the facts, and decides whether cause exists for discipline); Iowa Faculty Procedures, supra note 328, §§ 29.7g-h (university has burden of proving by clear and convincing evidence during disciplinary proceeding that faculty member already found liable for sexual harassment has violated university policy); MUPIM, supra note 109, § 8.3.H.4 & 8.3.1 (after determination of sexual harassment made and one appeal exhausted, disciplinary hearing committee hears evidence to determine whether misconduct occurred; president subsequently may overturn factual finding of sexual harassment if "against the greater weight of the evidence"); TEXAS GRIEVANCE PROCEDURES, supra note 279, §§ IV.C.5, V (faculty member grieving discipline has right to formal hearing, at which the facts are heard; hearing panel sends report of "findings, determinations, and recommendations" to president); UUP AGREEMENT, supra note 279, § 19.4h (disciplinary arbitrator at SUNY makes "determinations of guilt or innocence," as well as the "appropriateness of proposed penalties.").
426. See, e.g., MUPIM, supra note 109 (complainant who loses at the Office of Affirmative Action ("OAA") and subsequently before the Sexual Harassment Panel ("SHP") has no further recourse within the university; faculty member who loses before OAA and subsequently before the SHP may appeal the determination of sexual harassment during the disciplinary phase).
427. See supra note 2 for the Internet addresses for Florida’s, Iowa’s and Ohio State’s sexual harassment policies and procedures. See supra note 109 for the addresses for Colorado’s and Cornell’s procedures.
procedure; it also means being able to understand the language of the procedure, and the steps involved in bringing a sexual harassment complaint. To that end, universities need to eliminate legal jargon from, or define terms used in, their policies. In addition, universities should provide complaint forms rather than requiring women to draft their own complaints. Diagrams or flowcharts showing the steps of the procedure also help make the procedure easier to follow and understand. But most important, universities need to revisit their procedures and simplify them. Women should not have to hire attorneys in order to understand how a university’s internal procedures operate.

V. CONCLUSION

If colleges and universities wish to curtail the incidence of sexual harassment on campus, then they must develop policies and procedures that are “better calculated to encourage victims of harassment to come forward.” Despite the strongly worded condemnations of harassment found in many university sexual harassment policies, most universities have placed substantial procedural hurdles in the path of women who wish to file sexual harassment complaints, especially complaints that result in discipline against faculty members.

Unfortunately, the law has created few incentives for institutions of higher education to develop balanced procedures that encourage internal reporting. An examination of the policies and procedures at ten large public universities reveals that these institutions, for the most part, are responding only to the requirements imposed by law. Because most victims of sexual harassment, e.g., students or untenured faculty members, have no protected legal right to a fair or balanced harassment procedure, few institutions provide processes that are fair to both the victim and the accused. Instead, the procedures favor tenured faculty members, who are disproportionately male, because they draft or vote on their institution’s sexual harassment disciplinary procedures, and at public universities, they have a constitutional right to due process.

The law’s experiment with a laissez-faire approach to internal sexual harassment procedures has failed. The courts must hold academic institutions

MUPIM, which includes Miami’s sexual harassment policy and its disciplinary procedures, is available at <http://www.muohio.edu:80/mupim/3_6.html> (sexual harassment policy) and <http://www.muohio.edu:80/mupim/8_3.html> (disciplinary procedures). See supra note 272 for the Internet address for Minnesota’s sexual harassment policy.

428. See supra Part III.C.4.b.

429. See, e.g., ARIZONA COMPLAINT PROCEDURES, supra note 109, at 3 (complaint form available at Affirmative Action Office); BERKELEY STUDENT POLICY, supra note 227, at 10 (student grievance form attached to policy).

430. See BERKELEY STUDENT POLICY, supra note 227 (flowchart attached to end of policy); Cornell Policy, supra note 109, app.C (flowchart of complaint process).


432. See supra notes 2-5 and accompanying text.
accountable for drafting burdensome, complex, and lengthy procedures that deter women from reporting incidents of sexual harassment. The EEOC and the DOE must develop specific procedural guidelines for academic institutions to follow in drafting internal grievance procedures. Until the law makes educational institutions liable for bad procedures, colleges and universities will continue to develop policies and procedures that protect them from liability, while doing little to increase the reporting and decrease the incidence of sexual harassment on campus. Only time will tell if the promise of "proven, effective mechanism[s] for reporting and resolving complaints of sexual harassment"\textsuperscript{433} is fulfilled, or simply becomes another hollow phrase in the history of sexual harassment law.

\textsuperscript{433} Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2292 (1998).
<table>
<thead>
<tr>
<th>UNIVERSITY</th>
<th>DISCLOSED COMPLAINTS</th>
<th>PROVIDED INFORMATION RE: # OF COMPLAINTS</th>
<th>REASONS FOR DENYING PUBLIC RECORDS' REQUEST</th>
</tr>
</thead>
<tbody>
<tr>
<td>ARIZONA</td>
<td>No</td>
<td>Yes</td>
<td>Personnel records exemption</td>
</tr>
<tr>
<td>BERKELEY</td>
<td>No</td>
<td>No</td>
<td>FORMAL: No way to retrieve or identify INFORMAL: &quot;Strictly confidential&quot;; too hard to redact names; no &quot;statistical breakdown of complaints&quot; based on nature and resolution⁴³⁴</td>
</tr>
<tr>
<td>COLORADO</td>
<td>No</td>
<td>Yes†</td>
<td>Personnel records exemption</td>
</tr>
<tr>
<td>FLORIDA</td>
<td>No</td>
<td>No</td>
<td>Records not kept in centralized location</td>
</tr>
<tr>
<td>IOWA</td>
<td>No</td>
<td>Yes‡</td>
<td>Confidential</td>
</tr>
<tr>
<td>MARYLAND</td>
<td>No</td>
<td>No</td>
<td>No record of numbers of complaints, either formal or informal; Maryland does not keep records by subject matter so no way to retrieve sexual harassment complaints⁴³⁵</td>
</tr>
<tr>
<td>MIAMI</td>
<td>Yes, only formal</td>
<td>No</td>
<td>Maintain neither informal records nor numbers of informal complaints filed⁴³⁶</td>
</tr>
<tr>
<td>MINNESOTA</td>
<td>No</td>
<td>Yes††</td>
<td>FORMAL: Most involve no written complaint⁴³⁷</td>
</tr>
</tbody>
</table>

⁴³⁵ See Maryland Letter, supra note 103, ¶ 2, 3.
⁴³⁶ See Miami Letter II, supra note 98.
⁴³⁷ See Minnesota Letter, supra note 275, ¶ 3.
⁴³⁸ See id. at ¶ 4; see also Minnesota Letter II, supra note 357, ¶ 1, at 1.
<table>
<thead>
<tr>
<th></th>
<th>INFORMAL: Most involve no written complaint(^\text{438})</th>
</tr>
</thead>
<tbody>
<tr>
<td>SUNY</td>
<td>No</td>
</tr>
<tr>
<td>TEXAS</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td><strong>FORMAL:</strong> Unwarranted invasion of personal privacy exemption</td>
</tr>
<tr>
<td></td>
<td><strong>INFORMAL:</strong> Neither records nor numbers of complaints maintained</td>
</tr>
<tr>
<td></td>
<td>Not applicable</td>
</tr>
</tbody>
</table>

†Colorado only provided filing numbers for the period December 1, 1995 through May 31, 1997.
‡Iowa provided reporting statistics back to the 1990-91 academic year.
+++Minnesota only provided filing numbers dating back to the 1996 calendar year.
### TABLE II: REPORTING STATISTICS

<table>
<thead>
<tr>
<th>UNIVERSITY</th>
<th>FULL-TIME FEMALE STUDENTS†</th>
<th>NO. OF INFORMAL COMPLAINTS</th>
<th>NO. OF FORMAL COMPLAINTS</th>
<th>AVERAGE NO. OF COMPLAINTS PER YEAR‡</th>
<th>OFFICIAL REPORTING RATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>14,911</td>
<td>Total = 222441</td>
<td>Total = 57442</td>
<td>93</td>
<td>.6%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Average per year = 74</td>
<td>Average per year = 19</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Colorado</td>
<td>11,057</td>
<td>Total = 39</td>
<td>Total = 12</td>
<td>34</td>
<td>.3%445</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Average per year = 26443</td>
<td>Average per year = 8444</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cornell†</td>
<td>8445</td>
<td></td>
<td></td>
<td>41446</td>
<td>.5%447</td>
</tr>
</tbody>
</table>

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439. Enrollment figures are for the fall of 1997. See BARRON'S PROFILES OF AMERICAN COLLEGES 273 (Arizona), 372 (Colorado), 594 (Iowa), 812 (Minnesota), 969 (Cornell), 1127 (Miami), 1411 (Texas) (1998).

440. Unless otherwise indicated, the averages are based on academic year reporting statistics.

441. See Arizona Letter, supra note 87.

442. See id. The data provided was for the period from August 1, 1995, to the date of the follow-up public records request, which was August 18, 1998. See id.

443. The Colorado figures are based on an 18 month, not an academic-year, reporting period. For the period December 1, 1995 through May 31, 1997, there were 51 complaints of sexual harassment filed on the Boulder campus. See COLORADO REPORT I, supra note 117, § I. Of those 51 complaints, 12 were formal and 39 were informal. See id. I arrived at the annual number of informal complaints by dividing 39 complaints by 18 months (the length of the reporting period), which provides the average number of monthly complaints. I took that figure (2.17 per month) and multiplied it by 12 months to arrive at the annual average number of informal complaints.

444. I arrived at the annual average number of formal complaints of sexual harassment by dividing the total number of formal complaints (12) by 18 (the number of months in the reporting period). I multiplied that number (.67 per month) by 12 months to arrive at the annual average. See supra note 443.

445. I arrived at this figure by dividing the average number of complaints per year (34) by the number of female full-time students (11,057). See supra note 443.

446. See Cornell Report, supra note 108. The actual number of complaints per academic year is as follows: (1) 57 for 1992-1993; (2) 51 for 1993-1994; (3) 44 for 1994-1995; (4) 17 for 1995-1996; and (5) 34 for 1996-1997. See id. at § II. The University acknowledges that the 17 complaints for the 1995-1996 academic year were “an anomaly due to campus-wide debates surrounding the sexual harassment procedures.” Id.

447. I arrived at this figure by dividing the average number of complaints per academic year (41) by the number of female students (8445 women students).
<table>
<thead>
<tr>
<th>State</th>
<th>Number</th>
<th>Total Complaints</th>
<th>Total by Type</th>
<th>Average per Year</th>
<th>Reporting Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>IOWA</td>
<td>13,245</td>
<td>No breakdown by type</td>
<td>No breakdown by type</td>
<td>45(^{448}) 45&lt;sup&gt;††&lt;/sup&gt;</td>
<td>.34%&lt;sup&gt;449&lt;/sup&gt;</td>
</tr>
<tr>
<td>MIAMI</td>
<td>8689</td>
<td>Not maintained</td>
<td>&lt;1</td>
<td>.05%&lt;sup&gt;451&lt;/sup&gt;</td>
<td></td>
</tr>
<tr>
<td>MINNESOTA</td>
<td>16,300</td>
<td>No breakdown by type</td>
<td>No breakdown by type</td>
<td>56&lt;sup&gt;452&lt;/sup&gt;</td>
<td>.34%&lt;sup&gt;453&lt;/sup&gt;</td>
</tr>
<tr>
<td>TEXAS</td>
<td>21,903</td>
<td>Total = 15&lt;sup&gt;454&lt;/sup&gt; Average per year = 5</td>
<td>Total = 5 Average per year = 6.67</td>
<td>Total = 20 Average per year = .03%&lt;sup&gt;455&lt;/sup&gt;</td>
<td></td>
</tr>
</tbody>
</table>


449. Dividing the average number of annual complaints (45) by the number of full-time female students (13,245) produces a reporting rate of .34%.

450. Miami produced formal records involving faculty, students, and staff. Over the past three academic years, there have been five formal complaints of sexual harassment; only two involved students. The complainants in both cases were women. To maintain uniformity across universities, the figures in Table II reflect only complaints by female students.

451. One of the formal complaints involved three graduate students. As a result, I calculated the reporting rate based on four students, not two complaints. The reporting rate using two complaints is even lower (.02%).

452. Minnesota provided data on the basis of calendar, not academic, years. The information provided dates back only to the 1996 calendar year because "Minnesota does not currently have the data on contacts available earlier than 1996." Minnesota Letter, supra note 275. But Minnesota offered to compile the data for the 1995 academic year for approximately $40—the cost of two hours of time at $20 per hour. See id.

The following are the total number of contacts made with Minnesota's Office of Equal Opportunity and Affirmative Action since the beginning of 1996: (1) 75 for 1996; (2) 88 for 1997; and (3) 32 through June of 1998. These figures, however, reflect complaints by employees and students, as well as complaints handled by administrators and supervisors. In order to maintain some uniformity across universities, I subtracted the number of employee complaints from the total for each year. This still produces an exaggerated reporting rate because it is impossible to tell from the cumulative statistics whether complaints handled by units, e.g., by administrators or supervisors, involved students or employees. After subtracting employee complaints, the number of complaints per year at Minnesota since 1996 is as follows: (1) 49 for 1996; (2) 64 for 1997; and (3) 28 through June of 1998. With these assumptions in mind, Minnesota had 141 complaints in the past 2.5 calendar years, for an average of 56 complaints per year.

453. Dividing the average number of contacts made during the 1996, 1997, and 1998 calendar years (56) by the number of full-time female graduate and undergraduate women (16,300) produces the reporting rate.

454. I assumed that female students made all of the informal complaints. Informal records were handwritten; coupled with redaction, it was hard to accurately identify who had made each complaint.

455. Dividing the average number of contacts per year (6.67) by the total number of female students (21,903) gives a reporting rate of approximately .03%.
† Includes both undergraduate and graduate students.
‡ Cornell University ("Cornell") was not one of the institutions from which I sought public records; however, it publishes an annual sexual harassment report, which is available on the Internet.456

††Based on reporting statistics from the 1992-93 to the 1996-97 academic years.
†††Based on reporting statistics from the 1990-91 to the 1996-97 academic years.