

‘He who shall remain nameless’: University ethics, confidentiality and sexual harassment

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‘University reputation and income should not take priority over the wellbeing and safety of students, and processes that retraumatise rape victims or deter reporting are only protecting and enabling offenders.

As one victim from Wollongong University said: "Make no mistake, I consider the events of my sexual assault and this university's response to be equally despicable. There is a shocking correlation between someone not listening to you say 'stop' and an organisation not listening to you scream 'help'." Nina Funnell, [*Sydney Morning Herald*](#), 27 February 2017.¹

Feminism is experiencing a #MeToo moment that has mobilised social media against various forms of sexual assault, rape, and harassment (Peters & Besley, 2019). Definitions and laws in many countries describe ‘sexual harassment as conduct of a sexual nature which is unwanted or unwelcome and which has the purpose or effect of being intimidating, hostile, degrading, humiliating or offensive’². Further, the Australian Human Rights Commission (AHRC) points out that

At an international level, sexual harassment has been recognised and addressed by the International Labour Office, the International Confederation of Free Trade Unions, the European Union and the United Nations Committee on the Elimination of Discrimination Against Women.

In one of the world’s highest profile cases, on February 24, 2020, Hollywood Film producer, Harvey Weinstein was found guilty of two felony sex crimes and rape, but acquitted of predatory sexual assault, the most serious charge he faced. He still faces charges in Los Angeles of assaulting two women in 2013. At least 80 women came forward describing decades of sexual misconduct. (see BBC; *New York Times*; *The Guardian*³). Following an inquiry by the American Guild of Music Artists, that concluded that ‘accounts from 27 people showed a clear pattern of sexual misconduct and abuse of power by Domingo spanning at least two decades’ on February 26, 2020, opera singer Placido Domingo

¹ See: Nina Funnell, (2017) quoted in End Rape on Campus, <http://www.endrapeoncampusau.org/>

Also a few days earlier: Nina Funnell, (2017) Sixteen of my students at the University of Sydney told me they were raped, *Sydney Morning Herald*, February 24, 2017. <https://www.smh.com.au/opinion/sixteen-of-my-students-at-the-university-of-sydney-told-me-they-were-raped-20170224-gukz30.html>

² <https://www.humanrights.gov.au/our-work/part-1-sexual-harassment-overview#Heading393>

³ <https://www.bbc.com/news/world-us-canada-51621041>;
<https://www.nytimes.com/2020/02/24/nyregion/harvey-weinstein-verdict.html>
<https://www.theguardian.com/film/live/2020/feb/24/weinstein-guilty-verdict-latest-live-updates>

apologised.⁴ Many other high profile men's careers have ended as a result of such #MeToo revelations as listed in multiple websites.⁵ Many women (because mostly it is women who have been subject to sexual harassment and assault) have been compelled to sign confidentiality or non-disclosure agreements (NDAs) as legally enforceable contracts that bind both parties or they may be sued for breaches. Exclusions could be information considered to be common knowledge before the agreement was signed, but agreeing to these means that not only do victims remain nameless, so do the offenders. It is not just about sex, about relationships, but is about the abuse of power that occurs in multiple locations – social sites, conferences, workplaces, institutions, universities and more. In light of this and other recent cases, we ask:

Are philosophers more moral than other human beings? And...
How do universities deal with allegations of sexual harassment and assault?

There is a popular belief emanating from ancient Greek times with Plato and Aristotle, carried forward by Kant, and last century by Kohlberg and many others, that philosophers are both wiser and more moral than ordinary people. We have come to believe and expect philosophers to be virtuous or at the very least practiced in ethical reasoning and therefore more inclined to be good, knowing what is at stake in pursuing the good life. Call this the 'virtue assumption'. Philosophers are often also teachers of virtue and we have expectations of all teachers to be exemplary role models or meet criteria of being professionals including codes of ethics. But this belief may well be outdated now that teaching and philosophy have become professionalized and academicized to become jobs like any other. In the same way as Illich (1977) argued in *Disabling Professions* that we lost faith and our trust in priests, politicians, doctors, lawyers, police and others in authority, teachers and philosophers have also under scrutiny. What is more, there have been some spectacular examples of philosophers behaving badly. Witness the furor that greeted the rediscovery of Heidegger's Nazism: his letters only recently published as the *Black Notebooks* reveal his antisemitism, his admiration for Volk and Führer, as well a 'world Jewry' and American decadence (Heidegger, trans Rojcewicz, 2016, 2017; Farin & Malpas, 2016; Mitchell & Trawny, 2017). One wonders of the threats to Heidegger's existential hermeneutics of such antisemitism. Yet even a passing acquaintance with the history of philosophy reveals that philosophers have no moral pass and that they are just as likely to abuse their position, power and privilege as any other authority or professional. Victor Fabian Abundez-Guerra and Nathan Nobis (2018) provide a provocative and jaundiced reading:

Many historically-influential philosophers had profoundly wrong moral views or behaved very badly. Aristotle thought women were 'deformed men' and that some

⁴ <https://www.stuff.co.nz/entertainment/119806320/placido-domingo-inquiry-finds-27-alleged-victims-or-witnesses-of-sexual-harassment?cid=app-iPhone>

⁵ [https://www.glamour.com/gallery/post-weinstein-these-are-the-powerful-men-facing-sexual-harassment-allegations:](https://www.glamour.com/gallery/post-weinstein-these-are-the-powerful-men-facing-sexual-harassment-allegations)
[https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html?](https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html?mtrref=www.google.com&gwh=467BDE0B8059E7DF3DC6C0EB1EE1FAC3&gwt=pay&assetType=REGIWALL)
[mtrref=www.google.com&gwh=467BDE0B8059E7DF3DC6C0EB1EE1FAC3&gwt=pay&assetType=REGIWALL:](https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html?mtrref=www.google.com&gwh=467BDE0B8059E7DF3DC6C0EB1EE1FAC3&gwt=pay&assetType=REGIWALL) <https://www.axios.com/global-metoo-movement-convictions-charges-382ff226-7ad3-4b26-ac89-451788192578.html>

people were slaves 'by nature.' Descartes had disturbing views about non-human animals. Hume and Kant were racists. Hegel disparaged Africans. Nietzsche despised sick people. Mill condoned colonialism. Fanon was homophobic. Frege was anti-Semitic; Heidegger was a Nazi. Schopenhauer was sexist. Rousseau abandoned his children. Wittgenstein beat his young students. Unfortunately, these examples are just a start⁶.

Despite centuries of expectations (e.g. Plato, Kant, Kohlberg, Searle, Pogge and so on) that people undertaking rational study of ethics and moral behaviour, in particular ethics professors and philosophers, would act more ethically and morally than others, it seems that there is not necessarily any consequent or consistent effect on behaviour of such people. The study by Eric Schwitzgebel and Joshua Rust (2013) which examined

self-reported moral attitudes and moral behavior of 198 ethics professors, 208 non-ethicist philosophers, and 167 professors in departments other than philosophy on eight moral issues: academic society membership, voting, staying in touch with one's mother, vegetarianism, organ and blood donation, responsiveness to student emails, charitable giving, and honesty in responding to survey questionnaires

found that ethicists were unlikely to behave more morally than others. This study was in the English-speaking world and was recently replicated in German speaking countries (Germany, Austria, Switzerland) by Philipp Schönegger & Johannes Wagner (2019) finding similar results. Of 417 professors, the 151 ethics professors expressed stricter moral views, but they did not behave more ethically than other professors. Knowing and doing, seem to remain compartmentalised, often with individual's actions frequently not congruent with their knowledge; ethical and moral knowledge do not equate with ethical and moral behaviour.

These accounts certainly disabuse us the idea that philosophers are better than average human beings who are not morally deficient because of their occupation or because they have been exposed to the moral tradition. And while the profession is very carefully policed there is a structural imbalance in gender. Only recently have we considered the possibility that 'wisdom' and 'moral clarity' are not exclusively male virtues. The female philosopher and sage is a notion that has a contemporary ring to it although we should remember that The Muses were the daughters of Zeus and Mnemosyne, the goddess of memory.

It is as though under the 'virtue assumption' we have conditioned into believing there is a relation between intelligence and virtue, or knowledge and virtue. Despite Socrates' claims, it's not clear that virtue is knowledge or that all things seek the good. Xenophon's Socrates in the *Memorabilia* puts the case in this way:

If someone doesn't know what is good, he can't do what is good (because he will always aim for what he believes to be good -- and thus rather it is their perceived good at which all living things aim -- and his belief about what is good is contrary to what is good), and (for the same reason) if he knows what is good, he can't fail to do what is good. The principles here are that Virtue is knowledge and that All things seek the good.⁷

⁶ <https://1000wordphilosophy.com/2018/07/17/responding-to-morally-flawed-historical-philosophers-and-philosophies/>

⁷ <https://www.roangelo.net/logwitt/xenophon.html#those-ignorant-of-the-good-cannot-do-good>

It certainly does not appear to be the case that either those who are ignorant of the good cannot do what is good, or that he who knows the good cannot fail to do what is good. The case of the bad philosopher demonstrates the falsity of the latter. Those who know the good (such as philosophers) can not only fail to do what is good, but they can do so deliberately, repeatedly and even with intent and malice, and can cause considerable harm and injury.

The *Chronicle of Higher Education* in 2013 broke the story on the British philosopher Colin McGinn agreeing to resign from the University of Miami, Florida following allegations of sexual harassment of a female graduate student by text and email. This became public knowledge in ‘Philosopher’s Downfall, From Star to “Ruin,” Divides a Discipline’⁸ and *The New York Times* followed it with ‘A Star Philosopher Falls, and a Debate Over Sexism Is Set Off’⁹ beginning with the line: ‘Ever since Socrates’ wife was painted as a jealous shrew by one of his pupils, women have had it tough in philosophy.’ Jennifer Schuessler (2013) continues:

Thinkers from Aristotle to Kant questioned whether women were fully capable of reason. Today, many in the field say, gender bias and outright sexual harassment are endemic in philosophy, where women make up less than 20 percent of university faculty members, lower than in any other humanities field, and account for a tiny fraction of citations in top scholarly journals...

Two open letters posted online in mid-July and signed by more than 100 philosophers, including a majority of Mr. McGinn’s colleagues at Miami, criticized some of the posts on his blog as “retaliation” against the student...

The McGinn case is short on undisputed facts, beyond that Mr. McGinn agreed in December 2012 to resign, before the matter was to be put to further inquiry by Miami’s faculty senate. (The university declined to comment on the case, citing confidentiality in personnel matters.)

McGinn agreed to resign and many academics worried that the student was not adequately protected by the procedures, such that in an open, signed ‘Letter from Concerned Philosophers’ they asked the University to protect the student:

We are members of the philosophy profession concerned for the graduate student at the University of Miami who filed a complaint about the conduct of Dr. Colin McGinn. We are also concerned for other graduate students who may conclude from this case that, although a student pursues a complaint against a professor through the proper channels while purportedly retaining anonymity, she may have her scholarship, work performance, or conduct negatively characterized in a public forum by a powerful professor with no response or defense from her university. We write to urge the University of Miami to protect this student from negative public assessments of her work or character by or on behalf of Dr. McGinn.

⁸ Seth Zweifler (2013) Philosopher’s Downfall, From Star to ‘Ruin,’ Divides a Discipline, *The Chronicle of Higher Education*, 01 July, 2013.

[https://www.chronicle.com/article/A-Prominent-Philosophers/140071/;](https://www.chronicle.com/article/A-Prominent-Philosophers/140071/)

Jennifer Schuessler, (2013) A Star Philosopher falls and Debate over sexism is set off, *New York Times*. 2 August 2013. <https://www.nytimes.com/2013/08/03/arts/colin-mcginn-philosopher-to-leave-his-post.html>

⁹ https://www.nytimes.com/2013/08/03/arts/colin-mcginn-philosopher-to-leave-his-post.html?pagewanted=all&_r=0

Whether or not Dr. McGinn's observations on his blog are intended to be retaliatory, they have some of the same deleterious effects as intended retaliation. We recognize Dr. McGinn's right to free speech and his right to criticize whatever treatment he may have received by his employer, and we appreciate his stated desire to defend himself. However, the student is not in a position to defend herself publicly. We ask that her university discharge its duty to protect its students from acts that amount to *de facto* retaliation from professors about whom they have complained.¹⁰

Subsequently in 2015, a legal 'Complaint And Demand For Jury Trial (Injunctive Relief Sought)' has been made in 'United States District Court Southern District Of Florida Miami Division, Case 1:15-cv-23856-XXXX Document 1 Entered on FLSD Docket 10/15/2015 Page 1 of 66; by Monica Ainhorn Morrison, vs University of Miami, a not-for-profit corporation, Colin McGinn, in his official and individual capacities, and Edward Erwin, in his official and individual capacities'.¹¹ The suit was settled in 2016, with non-disclosure agreements for all parties in effect. Olivia Goldhill, reports that in 2019, McGinn established a new company, Philosophical Applications¹² with himself as Chief Executive, intending to apply philosophical analysis to corporate concerns, including ethics and sexual harassment. The article for Quartz noted, that 'the University of Miami administration investigated the complaint and called for McGinn's resignation on the basis of his "unprofessional" amorous relationship with a student... noting that "I've never been found guilty of anything by any institutional proceeding. According to the law in this land, that's the same as innocence," McGinn told Quartz.'¹³

In the same decade, accusations have arisen against Thomas Pogge, world renowned ethicist, moral philosopher and a 'star professor', who was hired by Yale in 2008 despite them allegedly knowing that in the 1990s when at Columbia University he had been disciplined for sexual harassment of a minority student. In 2011 a formal complaint was laid by another minority student, Fernanda Lopez Aguilar, alleging that Pogge sexually harassed and assaulted her the summer after her senior year. According to the *Yale Daily News* article in 2019,

The University's adjudicative panel found that Pogge had engaged in "unprofessional conduct" that could have made Aguilar feel "confused, anxious or uncomfortable." Yet, despite these findings, the panel did not find Pogge responsibility for sexual harassment. He remains at Yale today.¹⁴

¹⁰ See 'Letter from Concerned Philosophers' at <https://feministphilosophers.wordpress.com/2013/07/18/letter-from-concerned-philosophers/>

¹¹

<https://www.themiamihurricane.com/wp-content/uploads/2015/10/Morrison-Complaint-2.pdf>

¹² <http://www.colinmcginn.net/new-company-philosophical-applications/#.XlxmJJMzZ0s>

¹³ Olivia Goldhill (2019) A philosopher accused of sexual harassment started a company to advise on business ethics. *Quartz*, July 2019. <https://qz.com/1668502/colin-mcginn-started-a-philosophy-consultancy-to-advise-on-business-ethics/>

¹⁴ Carly Wanna, (2019) Three Disturbing Results: Investigating the culture within Yale's Philosophy Department, *Yale Daily News*, Sep 20, 2019 <https://yaledailynews.com/blog/2019/09/20/three-disturbing-results/>

There have subsequently been several articles that address the allegations against Pogge and even an open letter signed by some 160 professors including some from his own philosophy department strongly condemning his behaviour¹⁵:

We, the undersigned, are writing in the wake of the recent reports of allegations against the Leitner Professor of Philosophy and Professor of Political Science at Yale, Thomas Pogge, to express our opposition to sexual harassment and sexual misconduct in higher education. Such behavior undermines efforts to create an inclusive and respectful climate for education and research.

Allegations against Pogge contained in a federal civil rights complaint were recently reported in *BuzzFeed News* and subsequently independently reviewed by the *Huffington Post*.^{[1],[2]} According to those who have reviewed the complaint, it includes dozens of pages of supporting documents alleging that Pogge has engaged in a long-term pattern of discriminatory conduct, including unwanted sexual advances, quid pro quo offers of letters of recommendation and other perks, employment retaliation in response to charges of sexual misconduct, and sexual assault. Included in the complaint are affidavits from former colleagues at Columbia University, ^[3] who attest that Pogge was accused of sexual harassment by a student in his department, and disciplined for this.^{[4],[5]} In the wake of the recent reports, at least one other allegation has surfaced.^[6] All of the public allegations to date have been made by women of color.^[7] (<https://sites.google.com/site/thomaspoggeopenletter/>)

As Katie Baker reports on the allegations:

In October 2015, Lopez Aguilar filed a federal civil rights complaint, alleging that Yale violated Title IX, the statute that holds schools responsible for eliminating hostile educational environments caused by sexual harassment. Lopez Aguilar is asking the government to investigate whether Yale has ignored the “exhaustive attempts” she and others have made to prove Pogge is a danger to female students.

Her complaint also accuses Yale of violating Title VI, which prohibits race discrimination, on the grounds that Pogge specifically targets foreign women of color who are unfamiliar with how to navigate power in the United States.

The claims against Pogge pose critical questions about how universities manage the power dynamic between faculty members and students.

But they also raise questions that are more, well, philosophical.

Can someone fight tirelessly to balance the inequities of global power while at the same time abusing his own power? And can a discipline built on the quest to describe a just society — and suffering from a major diversity problem — afford to ignore these issues?

¹⁵Open Letter Regarding Thomas Pogge, (2013)
<https://sites.google.com/site/thomaspoggeopenletter/>

A spectacular recent example is the case of John Searle, one of the leading philosophers of his generation with his theory of speech acts, the title of one of his well-known books, and brilliant contributions to philosophy across a wide front: intentionality, consciousness, subjectivity, artificial intelligence, rationality and social reality. Nicholas Fotians' biographical entry for Searle in the *Encyclopedia Britannica* reads:

Searle's father was a business executive and his mother a physician. After moving several times, the family finally settled in Wisconsin. As a 19-year-old junior at the [University of Wisconsin](#), Searle was awarded a [Rhodes scholarship](#) to study at the [University of Oxford](#). After receiving a doctorate in [philosophy](#) in 1959, he left Oxford to join the faculty of philosophy at the [University of California](#), Berkeley, where he was eventually appointed Mills Professor of Philosophy and later Slusser Professor of Philosophy. In 2019 Searle was stripped of his emeritus status at Berkeley after it was determined that he had violated the University of California's policies regarding [sexual harassment](#) and retaliation.¹⁶

In 2017 84 year old John Searle, Willis S. and Marion Slusser Professor Emeritus of the Philosophy of Mind and Language at the University of California, Berkeley, was sued for sexual harassment, assault, and retaliation by Joanna Ong, a 24 year old Asian American undergraduate and former student who was engaged as a personal assistant to Searle at the then newly established but now defunct John Searle Center for Social Ontology. The legal case is Joanna Ong, plaintiff v. the Regents of the University of California et al., John Searle, and DOES 1-100, inclusive; case number RG-17-854053, in the Superior Court of the State of California, County of Alameda, claiming five counts for damages:

1. Sexual Harassment – quid pro quo
2. Sexual Harassment – hostile work environment
3. Retaliation in violation of FEHA
4. Wrongful termination against public policy
5. Assault and Battery¹⁷

Ong's lawyer's case notes summarized the action she took and the reasons for it:

While Ong was employed at U.C. Berkeley, Searle sexually assaulted Ong and then continued to harass her as her employment continued, creating a hostile work environment. Although Ong rejected Searle's sexual advances and reported the assault and harassment to Hudin and others employed by U.C. Berkeley, no action was taken to address the assault or to protect Ong from further illegal conduct by Searle. Furthermore, U.C. Berkeley was well aware of Searle's prior similar behavior with other young women, including but not limited to his students and research assistants. Instead, Defendants took steps [to] protect and cover up Searle's assault and harassment of Ong, as they have done in Searle's past history of similar conduct to other students and employees of U.C. Berkeley. Ong subsequently retaliated against by Defendants when her salary was cut by 50% or more, without cause, and they took adverse actions against Ong that impacted her work, career and image to others.

¹⁶ <https://www.britannica.com/biography/John-Searle>

¹⁷ See: <https://www.sfchronicle.com/file/203/5/2035-Ong%20Complaint.pdf>
<https://www.law360.com/articles/905619?scroll=1&related=1?copied=1>
<https://www.law360.com/articles/1007129/uc-regents-fight-harassment-suit-against-star-professor>

The University of California President, Janet Napolitano, approved a recommendation to revoke Searle's emeritus status on 19 June 2019, after a determination that he violated university policies against sexual harassment following campus disciplinary proceedings by the UC Berkeley Office for the Prevention of Harassment and Discrimination. On 21 June 2019 the *Daily Nous* provided a verbatim copy of the letter a UC Berkeley spokesperson sent, detailing that this is the most extreme disciplinary action that the university can take against an emeritus professor.¹⁸ Once the lawsuit was filed, the story broke publicly in 2017, when Katie Baker, Senior National Reporter for *Buzzfeed* reported, 'A Former Student Says UC Berkeley's Star Philosophy Professor Groped Her And Watched Porn At Work':

A renowned philosopher and longtime University of California, Berkeley, professor groped a former student who worked for him, according to a lawsuit filed in Alameda County Superior Court, which also claims the student was fired after she declined his advances. The professor, John R. Searle, abruptly stepped down from teaching his undergraduate philosophy course in March but still enjoys emeritus status at the university, which has been rocked by professor-student sexual misconduct scandals since 2015.

"As a philosopher, Searle should be familiar with the concept of coercion," Ong told BuzzFeed News. Instead, she said, he and the university have "used their power and platform to abuse others."¹⁹

Ong's lawsuit suggested that UC Berkeley management ought to have known of Searle's history of sexual misconduct but when approached, a university spokesperson said the school's policy was to not comment on individual cases and declined BuzzFeed's approach for further public information on the basis of privacy grounds. UC Berkeley, despite high-sounding rhetoric against sexual harassment on campus did not support the student, and in defending the case, arguably obstructed justice for the student rather than enabling it. The details of the case against Searle are now well known and he is publicly disgraced. UC Berkeley only reacted when its hand was forced. At every turn it sought to cover up and protect Searle's stellar reputation and their own even at the ruthless dismissal of Ong. UC Berkeley's institutional ability to protect young female students, despite institutional ethics, appeared flawed.

It has been under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (hereinafter, "Title IX") that many of these US based cases have been pursued. The extreme irony is that in many cases they involved male philosophers who had a professional interest in ethics. These cases and the history of reporting of sexual harassment (and other ethical issues) demonstrate the complicity of universities in covering up harassment claims and protecting their own reputations using Human Resource policies, due process, natural justice, confidentiality and privacy as grounds to withhold information that is actually in the public interest. The very clear issue of totally unequal power relations between professor and student in such situations seems to be ignored.

¹⁸ <http://dailynous.com/2019/06/21/searle-found-violated-sexual-harassment-policies/>; Discussed by Sasha Langholz, reporter for *The Daily Californian*, an independent student-run newsroom,

<https://www.dailycal.org/2019/07/02/former-professor-john-searle-loses-emeritus-status-over-violation-of-sexual-harassment-retaliation-policies/>

¹⁹ <https://www.buzzfeednews.com/article/katiejmbaker/famous-philosophy-professor-accused-sexual-harassment>

Closer to home, a couple of university professors of philosophy of education have been removed from their positions, compelled to resign or retire due to sexual harassment of students at Australian universities with their cases hushed up and covered by confidentiality arrangements that leave them free to engage in ongoing predatory sexual behaviour in other arenas. Another example that has led to complaints is of a plausible older male member inflating his importance and networked connections within PESA and making some much younger Asian women feel unsafe yet unsure of how to deal with this unwarranted attention – something of a classic gender/ethnic power play. PESA Executive now has female and male member allies for people to talk with confidentially and is currently developing policy and strategies to ensure and maintain a safe environment for all members and conference attendees.

What is interesting about these cases is that they represent only the very tip of the iceberg, a point that a comprehensive survey by Nancy Chi Cantalupo and William C. Kidder (2018) in ‘A Systematic Look at a Serial Problem: Sexual Harassment of Students by University Faculty.’ They reviewed

over 300 cases obtained from: (1) media reports; (2) federal civil rights investigations (3) lawsuits by students alleging sexual harassment; and (4) lawsuits by tenure-track faculty fired for sexual harassment. It also situates this review within the available and most relevant social science literature on sexual harassment and violence in education and the workplace, as well as on methodological limitations of litigated case data, which tend to contain a higher concentration of high-severity cases compared to a random sample. Two key findings emerged from the data. First, contrary to popular assumptions, faculty sexual harassers are not engaged primarily in verbal behavior. Rather, most of the cases reviewed for this study (53%) involved faculty alleged to have engaged in unwelcome physical contact dominated by groping, sexual assault, and domestic abuse-like behaviors. Second, more than half (53%) of cases involved professors allegedly engaged in serial sexual harassment. Thus, this study adds to our understanding of sexual harassment in the university setting and informs a number of related policy and legal questions including academic freedom, prevention, sanctions, and the so-called “pass-the-harasser” phenomenon of serial sexual harassers relocating to new university positions. As will become evident throughout this Article, the multiple data sources analyzed herein ultimately represent the proverbial tip of the iceberg of faculty sexual harassment of students. The vast majority of cases remain under the waterline (i.e., confidential) and out of public view or only visible in limited ways. Just as confidentiality generally and confidential settlements in particular constrain our public understanding of employment discrimination (including sexual harassment), here too methodological limitations must be worked through and considered in order to know what to make of our findings based on iceberg cases “above the waterline.” Moreover, this Article seeks to demonstrate reasonably research-based expectations about the contours of the confidential cases “below the waterline” that make up the far larger portion of this Title IX iceberg in the college and university setting.

In addition, the empirical research both inside and outside of academia shows rates of sexual harassment and sexual violence that are much higher than the number of reports of such conduct to anyone in an official capacity. Indeed, that sexual harassment is a significantly and consistently underreported problem, whether on a campus or not, is well-established.⁴⁴ With respect to workplace sexual harassment overall, estimates indicate that “only 1% of victims participate in litigation”.

For example, imagine this situation: a well-known professor who acted as Dean in a prominent Australian university who apparently had been known for years to have been involved in sexual improprieties and harassment against his Asian women PhD students suddenly retired, before being fired on the basis of a university dossier discovered when a new Dean took over. The professor suddenly stood down, but signed a confidentiality agreement with the university such that no details could be released of his sexual misconduct or even his being banned from his faculty and the university campus. Being called out for sexual harassment within a university does not require a court case and legal suit to prove guilt, but is covered by university HR policies related to staff behavior and discipline and sometimes even to professional codes of ethics if they exist.

It is our experience that university institutional ethics often work as an indemnification policy rather than primarily to promote and protect staff and students. In another instance, Otago University denied lack of support for sexual assault complainants when a student on a NZTV Sunday programme claimed that the university prioritised its reputation over her wellbeing.²⁰ The university subsequently published its new Sexual Misconduct Policy in April 2019: ‘The University of Otago is committed to creating an environment in which no form of sexual misconduct is tolerated and to having processes in place that reduce the likelihood of sexual misconduct.’²¹

A similar situation is seen in higher education in Chile, where women academics engaged in a feminist strike across all universities in 2018, against well known sexual harassment scandals and the lack of protection of victims.²² Again, the universities’ response was to introduce new protocols that effectively decrease their own liability, before engaging in any more critical investigations of the structures and practices which have enabled multiple scandals to take place across the higher education up to this point.

The problem with this self-serving reputational protection is that it still leaves the said professor free in other contexts, such as participation in learned societies to which he belongs, to continue his predatory sexual behavior (Jackson, 2019). The university is unconcerned. Its first priority is to protect itself and everyone is reduced to silence on pain of legal proceedings. The university thereby becomes complicit in the hush-hush cover-up at the expense of further potential victims of sexual misconduct. It is like: we are concerned only with what happens on our campus, and do not accept responsibility for the indictment of predatory behaviour that occurs elsewhere by this individual: We don’t really care as long as it doesn’t happen on our campus’. Such confidentiality means for a learned society like PESA, that they can remain members, and unless they admit it to us, PESA cannot expel them.

What can we expect? What can we do to make universities more publicly accountable for institutional ethics that are selectively applied? How can we become aware of the academic staff involved yet support and protect the students who are subject to sexual harassment? (“due process” and “natural justice” seemed only to serve to re-victimise and silence the colleague). What of the academic who everyone else (except the student affected) ‘knows’ harasses students (as per Weinstein or Searle), of the student who complains or discusses

²⁰ <https://www.tvnz.co.nz/one-news/new-zealand/otago-university-denies-lack-support-sexual-assault-complainants>

²¹ <https://www.otago.ac.nz/administration/policies/otago711781.html>

²² <https://onlinelibrary.wiley.com/doi/abs/10.1111/edth.12357>

with an advisor or counsellor, but nothing can or will be done to discipline the academic because the student refuses to testify. There are likely to be multiple reasons for this – fear, shame, possible complicity – themes that crop up again and again outside academia as well.

As Jackson and Garcia (2019) argue, efforts to decrease sexual harassment in universities depend crucially on how they conceive of sexual harassment and respond to it. For one, ambiguity regarding what constitutes misconduct or harassment enables it to take place. As they note, in surveys of students, '78 percent of students experienced professor behaviors that could be characterized as sexual harassment,' yet only 3 percent asserted that they had been harassed.'²³ This is due to stringent definitional requirements for identifying harassment. These requirements stem from a genealogy of the concept rooted in employment law, while in higher education relationships are not traditionally bound by such kinds of rigid enforced hierarchies.

On the contrary, students and teachers in universities, and particularly star professors, are encouraged and applauded specifically for blurring such lines, making it in some cases difficult to defend that a case is sexual harassment. Academics with a long history of experience in university life—like star professors—know this terrain far better than those younger initiates to the academy, and may take careful steps to induce complicity, first to borderline and vague boundary-crossing behaviour, before moving into more threatening and harmful terrain. By the time a new and impressionable student realises a line has been crossed, they may already see themselves as compromised, and be rightfully worried that a burden of proof will be put upon them in deciding a case, to prove they did not comply with behaviour all along. Those who have been accused before or are engaged in such grooming techniques understand and take advantage of the ambiguity of legal definitions of harassment, and the challenges identifying harassment creates for victims, and their actions of harassment are informed by understanding this contested terrain and greater experience with it than their students.

This brings us to the issue of institutional response. As Jackson and Garcia (2019) note in their review of research in higher education, prevention is more useful than reaction after the fact, given that this is complicated terrain that is known better and can be more effectively used by predatory professors than their less experienced students in many cases. As they argue,

a focus on prevention requires making harassment visible and speakable, foregrounding the institutional, and communal, over the individual. Policies that do not emphasize prevention, in contrast, fail to recognize sexual harassment as embedded and normalized in a social and cultural context, and also how institutions reproduce injustices and inequalities through mechanisms that enable and naturalize unjust practices. Instead, the problem and responsibility is put on the individual to know and act against harassment. The related discourse of victims and wrongdoers also presents danger as something that exists outside the institution or community.²⁴

When universities react rather than work to prevent sexual harassment, they reduce a structured and patterned phenomena into multiple singular cases of 'he said, she said'. This instantly puts a burden of proof on the accuser, as the accused is treated as innocent until proven guilty. At the same time, the accuser is nearly if not always less powerful and adept at

²³ <https://onlinelibrary.wiley.com/doi/abs/10.1111/edth.12357>

²⁴ <https://onlinelibrary.wiley.com/doi/abs/10.1111/edth.12357>

accessing various social and institutional resources and knowledges than the accused, who can easily use their social and cultural resources to discredit the accuser, particularly if they are star professors. In Chile, as at Berkeley, high-visibility cases have involved professors who have long been known by their institutions to be engaging in problematic behaviours. Yet high profile men, such as Gabriel Salazar, a Chilean National Prize of History recipient, has defended accused professors *en masse* against their victims, stating:

I didn't see them [the complainants] so destroyed psychologically. Those who are destroyed are the two accused professors. They are screwed. I do not know if a stupid harassment is enough for the loss that was produced by this situation [the dismissal of both professors]. You have to see a balance here.²⁵

Crucially, it is in the interest of institutions to work to protect themselves before individuals and communities they are apparently working to support, and treat harassment as a matter of individuals that has nothing to do with the institution, which indeed provides the means for such negative and harmful interpersonal relationships (and toxic cultures enabling them) to flourish. That universities work to defend themselves over others can be seen in the practices of universities in relation to sexual harassment. Multiple studies show that in diverse contexts, from the USA to South America to Asia, university students commonly report experiences of sexual harassment by instructors in open surveys, particularly in surveys which measure everyday minor offences (which are nearly always the foundations leading to more severe and harmful cases), but they rarely report to their institutions about harassment at a minor or major scale. But by individualising the experiences to singular cases, and simply putting in place policy discourse or protocols for reaction, universities evade critical questions about their own ethics and their possible complicity. And they exacerbate social inequities and vulnerabilities given the unequal power of complainants and the accused in most cases.

We know that high-profile ethicists are hardly more virtuous than their students, in such cases. For this reason, we can appeal to universities to try to enact a more virtuous treatment of different members of its community when it comes to issues such as harassment. Jackson and Garcia argue that this means:

Epistemic authority can be granted more equitably, as senior and more powerful parties seek to learn systematically from junior and the less powerful parties. At the level of protocols, greater contextualization of vulnerability and of the top-down views that often shape conceptualizations of harassment can help ensure that practices and processes do not ultimately protect and make convenient a privileged position in contexts that have not been safe for all. It can help circumvent a situation in which policies and practices isolate or increase the vulnerability of underprivileged stakeholders, despite policymakers' intentions.²⁶

Bad behaviour is enabled or disabled by institutions, and those which seek the cultivation of academic superstars like Searle over safety and community virtue are also to blame in this case for enabling horrific harms to young students, as a neglect of their education. Universities must do more soul searching and consider themselves as virtuous or unethical actors in this case, as they provide the foundation for creating environments of harm and general unease among young students, including many silent students who will simply opt

²⁵ <https://onlinelibrary.wiley.com/doi/abs/10.1111/edth.12357>

²⁶ <https://onlinelibrary.wiley.com/doi/abs/10.1111/edth.12357>

out of learning in such cases, or environments where learning and opportunities can be assured in a more fair and beneficial manner.

Other academic communities must also practice more vigilance and begin to consider more reflexively the type of atmosphere which they uphold when it comes to junior versus senior scholars. In philosophy of education there have also been concerns about sexual harassment of young women, which may lead to them not attending conferences or activities due to concerns over predatory behaviour such as certain kinds of grooming, wherein an older professor will encourage them to discuss their work and ideas, and maybe even suggest publication together or collaboration, and then begin to talk to them about their looks or start touching them in inappropriate ways. That this happens in academic conferences is shocking to some, but can be regarded as a not uncommon experience for younger and women academics, especially those from ethnic minority groups.²⁷

Not all cases are bound by confidentiality and in the #MeToo era, some students are going public, for example, at Trinity College, Cambridge, UK, 22 February 2020:

Hundreds of Cambridge students have accused the university of “a complete failure” to deal with complaints of sexual misconduct after an investigation that raised concerns about a conflict of interest among academics.

In a letter signed by more than 500 current and former students, Cambridge University Students’ Union Women’s Campaign has called for colleges to be stripped of their powers to investigate sexual misconduct complaints against their own members.

It comes after it emerged that Dr William O’Reilly, the don then in charge of student welfare at Trinity Hall, Cambridge’s fifth oldest college, appointed a panel to investigate rape allegations against a male student, then gave evidence to the panel in support of the accused.

On Friday night, Trinity Hall announced that both O’Reilly and the college’s master, the Rev Canon Dr Jeremy Morris, were stepping back from their duties until a separate panel of Cambridge fellows issues a report on 2 March on what the college should do.

Needless to say a fairly standard response has been made by the university and the professor in question has pointed to confidentiality issues:

A Cambridge University spokesman said: “The faculty takes its safeguarding responsibilities extremely seriously. It regards the welfare of its students as its highest priority. It also has a duty of care to a member of staff who is not under investigation for any offence and who protests his innocence. At the present time, Dr William O’Reilly has voluntarily and temporarily stepped back from his teaching and supervising.”

A spokesperson for O’Reilly said: “Dr O’Reilly believes he acted with integrity and followed appropriate safeguarding advice throughout the various internal processes at Trinity Hall. He rejects any suggestion that he behaved improperly and is appalled that what should have been confidential procedures have been made public.”²⁸

²⁷ <https://www.tandfonline.com/doi/abs/10.1080/00131857.2017.1343112>

²⁸ https://www.theguardian.com/education/2020/feb/22/cambridge-university-sexual-misconduct-cases?CMP=Share_iOSApp_Other

Largely since 2015, following ‘The Hunting Ground’ video about sexual harassment in US college campuses was shown,²⁹ Australian universities have begun to confront and address issues of the wider situation of sexual assault and harassment on campus, not just sexual harassment in the faculty-student relationship. There have been several reports, audits and work by Universities Australia, the Australian Human Rights Commission (AHRC), and End Rape on Campus Australia and ABC News (2017). These include: the Respect. Now. Always. initiative (2016); The Red Zone Report: An investigation into sexual violence and hazing in Australian university residential colleges (2018); Change The Course: National Report on Sexual Assault and Sexual Harassment at Australian Universities (2017); AHRC Audit of University Responses (2017 & 2018); University sexual assault and sexual harassment project (2018); Change the course - 18 month milestone (May 2019); Nicola Henry in The Conversation (2019).³⁰

The AHRC reports that as of July 2018, the majority of universities have implemented the following measures, or are committed to doing so in the future:

- establish an advisory body or working group to develop an action plan
- implement training and education for students in relation to sexual assault, sexual harassment and respectful relationships
- take steps to increase the availability and visibility of support services
- implement a review of existing university policies and response pathways
- identify and train staff members and student representatives who are most likely to receive disclosures
- implement practices to ensure information about disclosures and reports is collected and stored confidentially
- express commitment to conduct the national survey on sexual assault and sexual harassment every three years (AHRC, 2019).

²⁹ The Hunting Ground documentary, 2015, https://en.wikipedia.org/wiki/The_Hunting_Ground

³⁰ Universities Australia, (2016) Respect. Now. Always.

<https://www.universitiesaustralia.edu.au/project/respect-now-always/>

<https://www.abc.net.au/news/2017-08-01/uni-sexual-assault-hrc-report-released/8762638>

AHRC (2017a) <https://www.humanrights.gov.au/our-work/sex-discrimination/publications/change-course-national-report-sexual-assault-and-sexual>

AHRC (2017b)

<https://www.humanrights.gov.au/sites/default/files/17.12.20%20FINAL%20University%20Response%20Audit%20with%20responses.pdf>

AHRC (2018a) <https://www.humanrights.gov.au/our-work/sex-discrimination/projects/university-sexual-assault-and-sexual-harassment-project>

AHRC (2018b)

https://www.humanrights.gov.au/sites/default/files/AHRC_Aug2018_Uni_Audit_snapshot.pdf

AHRC (2019) <https://www.humanrights.gov.au/our-work/sex-discrimination/change-course-18-month-milestone>

Nicola Henry, (2019), <https://theconversation.com/universities-have-made-progress-on-responding-to-sexual-assault-but-theres-more-to-be-done-111343>

ABC News, (2017) University sexual assault report: Half of students harassed at least once in 2016, ABC News, 1 Aug 2017.

By 2019, Nicola Henry (2019) and AHRC both note that despite progress, more needs to be done. Several themes emerged. First, sexual harassment and assault are widespread in the community, so attitudes and behaviours everywhere need to change – a cultural change. Second, the AHRC survey here is under-reporting: ‘The AHRC survey found sexual assault and sexual harassment were rarely reported to universities. The survey found 87% of students who were sexually assaulted, and 94% of those who were sexually harassed, didn’t make a formal report or complaint to their university’ - i.e. ‘the tip of the iceberg’; third, ‘domestic students were more likely than international students to report experiencing sexual assault and sexual harassment. But international students were almost two times less likely to seek support from someone in their faculty or school’; fourth, ‘only 4% of students thought their university was doing enough to provide clear and accessible information on sexual assault procedures, policies and support services’ (see Henry, 2019).

In this context academic societies, such as the American Educational Research Association, PESA and the Philosophy of Education Society (PES) have started implementing policies to discourage these experiences and prevent them. Recently PES surveyed its members to discover how common experiences of sexual (as well as gendered and ethnic/racial) harassment were, to develop a better understanding of the issues faced at the community level, after it discovered some ‘troubling behavior towards female PES members and PES members of color.’³¹ Philosophers of education must also now grapple with the fact that being philosophical about ethics and virtue does not make you a better person, and that academic societies are not sealed off from the rest of the world, of universities and societies where harassment and bullying is not a rarity, but is in fact often a norm.

We conclude with the words of Professor Catherine Lumby, Macquarie University, Australia in her Foreword to *The Red Zone Report* (2018):

As an academic, my first responsibility is always to my students and a primary part of that is ensuring they feel safe on their campus. Like the vast majority of my colleagues I care deeply about equity for all students. Yet how can there be educational equity for women, members of the LGBTI community or any male regarded as not appropriately masculine if they have to face harassment and assault on campus and in their residences?

This report details data on residential colleges and halls gathered from 12 universities, including all GO8 universities. It relies on reports which have also detailed the systemic problem in colleges and other residences, including the recent Broderick report on college culture at the University of Sydney. But it goes much further than any report to date. It gives a graphic and detailed account of bullying, harassment and assault in these residences. It makes for sickening reading.

As the #MeToo movement has shown, those who fail to act immediately and transparently on the systemic problem of sexual harassment, sexual assault and bullying detailed in this report will be called out. All organisations across every sector are now on notice about these issues. Calling in a public relations firm no longer works. The only solution is to confront the truth and act on it by researching the culture and implementing evidence based education programs.

³¹ <https://onlinelibrary.wiley.com/doi/abs/10.1111/edth.12357>

No one can learn if they live under the shadow of violence or abuse.

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