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### On Sexual Harassment in the Judiciary

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# Essay

## ON SEXUAL HARASSMENT IN THE JUDICIARY

*Leah M. Litman & Deeva Shah*

**ABSTRACT**—This Essay examines the legal profession’s role in sexual harassment, particularly in the federal courts. It argues that individuals in the profession have both an individual and collective responsibility for the professional norms that have allowed harassment to happen with little recourse for the people subject to the harassment. It suggests that the legal profession should engage in a sustained, public reflection about how our words, actions, attitudes, and institutional arrangements allow harassment to happen, and about the many different ways that we can prevent and address harassment.

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INTRODUCTION

When Tarana Burke founded the #MeToo movement, one of her goals was to help Black women who experience sexual violence feel less alone.<sup>1</sup> One way of realizing that goal was to illustrate the shocking frequency of sexual violence against women of color. She also hoped the movement would make survivors feel comfortable enough to share their experiences with sexual violence, which could make it easier for them to access resources to assist them.

When women on social media picked up the #MeToo hashtag, they shared some of these same goals. Alyssa Milano used the hashtag to identify herself as a survivor, and many women followed her lead and voiced their own experiences with sexual violence.<sup>2</sup> Given the number of women who shared #MeToo stories, the scope of the problem was difficult to ignore. It even seemed to catch some people by surprise, despite the fact that women

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<sup>1</sup> Abby Ohlheiser, *The Woman Behind ‘Me Too’ Knew the Power of the Phrase When She Created It—10 Years Ago*, WASH. POST (Oct. 19, 2017, 7:38 AM), <https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago/> [https://perma.cc/WU8F-9HD6]. Tarana Burke began using the phrase “Me Too” on Myspace in 2006, and the hashtag went viral on Twitter and other social media networks more than a decade later. *Id.*; Aisha Harris, *She Founded Me Too. Now She Wants to Move Past the Trauma.*, N.Y. TIMES (Oct. 15, 2018), <https://www.nytimes.com/2018/10/15/arts/tarana-burke-metoo-anniversary.html> [https://perma.cc/8F6E-GWFA].

<sup>2</sup> Alyssa Milano (@Alyssa\_Milano), TWITTER (Oct. 15, 2017, 3:45 PM), [https://twitter.com/Alyssa\\_Milano/status/919665538393083904](https://twitter.com/Alyssa_Milano/status/919665538393083904) [https://perma.cc/7RJ8-MNS5]; see also Harris, *supra* note 1.

had been speaking out for decades about persistent sexual discrimination and sexual harassment.<sup>3</sup>

Yet several years after the hashtag took off, it is not clear that understanding the scope of sexual violence has led to particularly effective solutions. That is cause for concern because without solutions to tackle the structures and norms, rather than the actors, that led to the flood of #MeToo stories, we may be setting ourselves up for a repeat of the past. That is, if our response to hearing women share their experiences with sexual violence is merely to proceed with the same workplace systems that produced #MeToo, we will probably face another #MeToo down the road.

We fear that this stasis is happening in the legal profession. The legal profession has seen several high-profile allegations of sexual harassment, sexual discrimination, and sexual violence. Nevertheless, lawyers, judges, and law students have not critically examined, much less reimagined, their own practices or institutions that made the behaviors possible. In particular, people have not examined their *own* role in a system that allowed harassment to persist while offering little recourse to the people who experience it.

In this Essay, we highlight some of the ways in which the legal profession is an interconnected ecosystem that facilitates sexual harassment. Sexual harassment, its causes, and its contributing forces highlight how we are all part of a unified network that has allowed harassment to continue by virtue of our individual, seemingly insignificant actions.<sup>4</sup>

This conception of sexual harassment as a product of the aggregate behavior of individuals in the legal profession, together with the profession's institutional structures, has some features in common with the law-and-political-economy movement. Law and political economy urges a focus on *structural* features of inequality, which it defines as the ways in which we may “reproduce and even amplify . . . inequality” even if we “d[o] not intentionally treat individuals differently on the basis of a forbidden

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<sup>3</sup> See, e.g., Mario Small, *What 'Me Too' Can Teach Men Who Are Willing to Listen*, TIME (Oct. 19, 2017, 10:46 AM), <https://time.com/4988137/me-too-men-listen/> [<https://perma.cc/XH9X-YB4T>] (describing how many men were surprised to see testimonials around #MeToo).

<sup>4</sup> Networks can work in both positive and negative ways. In some networks, “the collective force of these reputation-based, non-legal sanctions” functions as “network governance,” preventing bad behavior. Claire Stamler-Goody, *A Wider View of Private Ordering*, U. CHI. L. SCH. (Feb. 4, 2020), <https://www.law.uchicago.edu/news/wider-view-private-ordering> [<https://perma.cc/8P95-FLLL>] (recounting Lisa Bernstein's *Coase Lecture* at the law school). But these networks can also fail if they do not provide safe reporting mechanisms for people to report misconduct and do not respond appropriately to those reports.

characteristic.”<sup>5</sup> We think that the legal profession’s sexual harassment problem, particularly in the courts, is about much more than differential treatment by individual state or private actors.<sup>6</sup> Instead the problem arises out of institutional arrangements and a variety of individual behaviors and choices.<sup>7</sup> Although these arrangements were not created to produce sexual harassment, they have allowed it to persist. And while many individual decisions are not intended to facilitate harassment, they have nevertheless done so.<sup>8</sup> In this Essay, we pay particular attention to how seemingly insignificant, isolated choices can, in the aggregate, contribute to a professional environment that allows harassment to occur.<sup>9</sup>

Individual actions matter because of how interconnected the legal profession is. If we understand that our individual behavior both affects others and contributes to the profession’s persistent problem with sexual harassment; if we realize how we have created institutions and structures that enable harassment; and if we internalize the idea that we have obligations to one another because of our interconnectedness, then perhaps we can begin to address the systemic causes behind sexual harassment and, eventually, other system-wide disparities. We hope that by appreciating how we are all part of a system that has failed to confront sexual harassment, we can take the first step toward building solutions that can address the myriad and complex causes of harassment.

## I. THE SYSTEMIC VERSUS INDIVIDUALIST MODEL OF UNDERSTANDING SEXUAL HARASSMENT

We begin by describing the prevailing understanding of sexual harassment in the legal profession. We will call this the narrow, individualist

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<sup>5</sup> Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1808–09 (2020).

<sup>6</sup> See *id.* at 1790–91. Specifically, the law-and-political-economy framework encourages a focus on “policies that predictably and persistently reproduce[] underlying patterns of economic, racial, and gender inequality,” even where such policies do not intentionally discriminate on the basis of a forbidden characteristic. *Id.* at 1808–09.

<sup>7</sup> See, e.g., WILMERHALE, REPORT OF INDEPENDENT INVESTIGATION: ALLEGATIONS OF SEXUAL MISCONDUCT BY MARTIN A. PHILBERT 77–88 (2020), [https://regents.umich.edu/files/meetings/01-01/Report\\_of\\_Independent\\_Investigation\\_WilmerHale.pdf](https://regents.umich.edu/files/meetings/01-01/Report_of_Independent_Investigation_WilmerHale.pdf) [<https://perma.cc/CV5L-2S6W>] (describing institutional structures and arrangements, such as reporting and investigation requirements, that facilitated persistent harassment by Martin Philbert while he was at the University of Michigan).

<sup>8</sup> See Britton-Purdy et al., *supra* note 5, at 1809 (“[T]he defining character of structural inequality [is] that it persists independently of individually disparate treatment.”).

<sup>9</sup> See Paul Farmer, *An Anthropology of Structural Violence*, 45 CURRENT ANTHROPOLOGY 305, 307 (2004) (defining structural causes as features that are “exerted systematically—that is, indirectly—by everyone who belongs to a certain social order” rather than “pinning . . . blame on individual actors”).

model of sexual harassment. Whereas the narrow individualist model focuses purely on a particular subset of individuals, we think there are many other contributing factors, including institutional structures.

Under the narrow individualist view, the responsibility for sexual harassment lies solely with the harasser. Everyone else is innocent and removed from the problem, unless perhaps they personally witnessed an extreme instance of harassment. In the narrow individualist model, no one else needs to acknowledge responsibility for sexual harassment. A narrow individualist view focuses only or primarily on the harasser, the person who was harassed, and people who witnessed extreme instances of harassment. The narrow individualist view maintains that these are the only people positioned to address harassment.

The public discourse surrounding the accusations of sexual harassment against two federal judges, Judge Alex Kozinski and Judge Stephen Reinhardt, is representative of the narrow individualist understanding of harassment that we sketched out above. Both judges were extremely well connected within the legal profession. Both judges participated in academic conferences and events at law schools in addition to formal judicial proceedings. And people would broadcast their connections to the judges because the legal profession treated those personal connections as a professional good.<sup>10</sup>

After the judges were accused of sexual harassment, their friends (including people who studiously portrayed themselves as the judges' friends), colleagues, and former clerks disclaimed responsibility for and association with the allegations. Many of the statements focused on how, as individuals, these friends, colleagues, and clerks had never witnessed the most severe harassment described in the allegations.

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<sup>10</sup> See, e.g., David Lat (@DavidLat), TWITTER (June 5, 2014, 10:48 AM), <https://twitter.com/DavidLat/status/474578603150028800> [<https://perma.cc/V2HE-FGJ5>] (“I would get TONS of interesting emails, including ones from judges like Kozinski . . .”); David Lat (@DavidLat), TWITTER (Jan. 22, 2015, 5:25 PM), <https://twitter.com/DavidLat/status/558405088872370177> [<https://perma.cc/J6ZW-9N5B>] (“Thanks to @gibsondunn for hosting my @FedSoc event w/Judge Kozinski; office has great views! cc: @SCOTUSambitions[.]”); David Lat (@DavidLat), TWITTER (July 30, 2012, 11:56 AM), <https://twitter.com/DavidLat/status/229983899214811136> [<https://perma.cc/V3QN-C5GT>] (“[T]hanks Chief Judge Kozinski for the awesome t-shirts!”); Michelle Olsen (@AppellateDaily), TWITTER (Dec. 7, 2014, 9:51 PM), <https://twitter.com/AppellateDaily/status/541802199383552001> [<https://perma.cc/2QMM-GB8R>] (“@NYTimes review of @DavidLat’s @SCOTUSambitions quotes Judges Wardlaw, O’Scannlain & Kozinski . . .”); see also Heather K. Gerken, *Judge Stories*, 120 YALE L.J. 529, 529 (2010) (“Whenever Judge Reinhardt’s clerks are asked about the clerkship, they tell ‘Judge stories.’ . . . We tell these stories because we are trying to avoid bragging.”).

The most extreme instances of the narrow individualist model occurred in the wake of the allegations against Kozinski. When the allegations became public (allegations that included him showing pornography to a female law clerk and asking if it turned her on, as well as groping and propositioning another federal judge), David Lat, the creator of popular legal blog *Above the Law*, responded with this narrow claim: “I had no clue about all the allegations that would later emerge . . . .”<sup>11</sup> Yet before the allegations became public, Lat acknowledged that Kozinski behaved in both inappropriate and sexualized ways. For example, when a commentator noted that “Kozinski is not famed for his sense of propriety” and described Kozinski as “the inappropriate uncle,”<sup>12</sup> Lat responded: “I adore Judge Kozinski, but yeah . . . .”<sup>13</sup> In 2014, Lat published a book, *Supreme Ambitions*,<sup>14</sup> in which one of the characters, Judge Polanski, was inspired by Judge Kozinski. In Lat’s book, the judge ogled female law clerks, among other things.<sup>15</sup> In his review of the novel, Peter Conti-Brown presciently flagged “Judge ‘Polanski’s’ constant and creepy attention to the beauty of female law clerks” as thinly veiled references to Kozinski three years before the allegations against Kozinski became public.<sup>16</sup>

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<sup>11</sup> David Lat (@DavidLat), TWITTER (Dec. 21, 2017, 11:42 PM), <https://twitter.com/DavidLat/status/944079726997573632> [<https://perma.cc/57LZ-BGEJ>].

<sup>12</sup> Patrick Nonwhite (@NonWhiteHat), TWITTER (Mar. 17, 2017, 11:53 PM), <https://twitter.com/NonWhiteHat/status/842962258548457472> [<https://perma.cc/K52D-SAY7>]. The comments were in response to David Lat defending Kozinski after he dissented from an order regarding the President’s Muslim ban.

<sup>13</sup> David Lat (@DavidLat), TWITTER (Mar. 17, 2017, 11:57 PM), <https://twitter.com/DavidLat/status/842963093361774593> [<https://perma.cc/T9VL-WEY9>].

<sup>14</sup> DAVID B. LAT, *SUPREME AMBITIONS: A NOVEL* (2014).

<sup>15</sup> See Peter Conti-Brown, *Revisiting David Lat’s “Supreme Ambitions” in Light of the Kozinski Scandal*, YALE J. REG.: NOTICE & COMMENT (Dec. 21, 2017) [hereinafter Conti-Brown, *Revisiting*], <https://www.yalejreg.com/nc/revisiting-david-lats-supreme-ambitions-in-light-of-the-kozinski-scandal/> [<https://perma.cc/W7VX-D5CA>]; Peter Conti-Brown, *Book Review – Supreme Ambitions: A Novel*, YALE J. REG.: NOTICE & COMMENT (Dec. 12, 2014) [hereinafter Conti-Brown, *Book Review*], <https://www.yalejreg.com/nc/book-review-supreme-ambitions-a-novel-by-peter-conti-brown/> [<https://perma.cc/K7N9-M6YS>] (“[I]f you clerked in the Ninth Circuit in the last ten years[,] . . . you will almost certainly enjoy reading this book for its barely-veiled caricatures of prominent jurists, including their foibles . . .”).

<sup>16</sup> Conti-Brown, *Book Review*, *supra* note 15. Conti-Brown later elaborated on some of the more troubling passages in *Supreme Ambitions*:

Lat’s Polanski calls a female clerk working for a female judge, upon introduction, “a beautiful clerk for a beautiful judge.” . . . They engage in what Lat calls “vaguely flirtatious” banter about meeting up in Polanski’s chambers.

Or, consider an exchange between a Polanski clerk and Audrey, the book’s protagonist. After discussing the merits of the notoriously hard-charging clerkship, Audrey and the clerk talk about the personal side:

When the allegations came out, Lat maintained that he did not know about the particular incidents contained in the allegations. Lat insisted that it was not relevant—nor did it make him responsible—that he knew about Kozinski’s other, less extreme sexually inappropriate behavior yet continued to compliment and champion the judge. He also maintained that his knowledge about Kozinski’s other behavior did not require any public reflection about his very public relationship with the judge, nor has he offered any such public reflection.<sup>17</sup>

Justice Brett Kavanaugh also issued narrowly framed denials about any knowledge of Kozinski’s alleged harassment. Here too, the relationship between the two men was fairly public. Justice Kavanaugh clerked for Kozinski on the U.S. Court of Appeals for the Ninth Circuit; Kozinski introduced then-Judge Kavanaugh at his confirmation hearing to the U.S. Court of Appeals for the D.C. Circuit;<sup>18</sup> the two men served on a screening committee to select law clerks for Justice Anthony Kennedy (for whom they both clerked); Judge Kavanaugh hired Kozinski’s son as a law clerk (while he was a judge on the D.C. Circuit); and Judge Kavanaugh reached out to Kozinski when the allegations against Kozinski became public.<sup>19</sup> In response

“Judge Polanski sounds like an amazing boss,” I said. “What’s he like as a person?” Lucia paused. I guessed she preferred talking about the professional over the personal.

“As a person, he has . . . quirks. He is not your typical federal appellate judge. For a judge, he crosses a lot of boundaries. His sense of humor can be . . . irreverent.”

“I sat next to him at the law clerk orientation, and he was very entertaining,” I said. “He regaled me with tales of his childhood growing up in Poland under Communism. Some judges can be distant, but Judge Polanski was so warm and friendly.”

“Of course he was—to you. You’re pretty.”

Conti-Brown, *Revisiting*, *supra* note 15 (second and third ellipses in original).

<sup>17</sup> Kaley Pillinger, *An Interview with David Lat, Legal Scholar and Author of Supreme Ambitions*, POLITIC (Aug. 4, 2018), <https://thepolitic.org/an-interview-with-david-lat-legal-scholar-and-author-of-supreme-ambitions/> [<https://perma.cc/8PQK-Z7WS>] (“I should clarify, because people have asked me this, that I did not know about the allegations against Judge Kozinski until they were reported in *the Washington Post* and other media outlets. There were vague rumors, but rumors are not the same as detailed allegations.”). Given Lat’s self-publicized relationship and friendship with the judge, it is not entirely surprising that people who experienced harassment would not make “detailed allegations” to Lat. See *Did #MeToo Really Bring a Reckoning to the Legal Industry?*, VICE NEWS (Feb. 22, 2018, 12:38 PM), [https://www.vice.com/en\\_us/article/bj57mq/did-metoo-really-bring-a-reckoning-to-the-legal-industry](https://www.vice.com/en_us/article/bj57mq/did-metoo-really-bring-a-reckoning-to-the-legal-industry) (last visited Oct. 11, 2020) (video embedded in webpage) (roundtable discussion with law clerks who knew of, clerked for, or experienced harassment by Judge Kozinski, including David Lat, who failed to reflect on his relationship with the former judge).

<sup>18</sup> Video: Alex Kozinski Introducing Brett Kavanaugh (C-SPAN 2006), <https://www.c-span.org/video/?c4738901/user-clip-alex-kozinski-introducing-brett-kavanaugh-592006-hearing> (last visited Oct. 11, 2020).

<sup>19</sup> Sophie Tatum, *Kavanaugh Contacted Kozinski After Resignation Because He Was ‘Concerned About His Mental Health,’* CNN (Sept. 13, 2018, 7:57 AM),



to questions about Kozinski, Judge Kavanaugh wrote: “I was unaware of any allegation that Judge Kozinski shared pornography with law clerks until I read the story in the news in late 2017.”<sup>20</sup> Judge Kavanaugh did not say whether he had any knowledge of Kozinski’s generally inappropriate behavior that was an “open secret” in the legal community.<sup>21</sup>

This pattern of narrowly worded denials, sometimes with vague allusions to less severe but still inappropriate or problematic behavior, repeated itself after the allegations against Reinhardt surfaced. A former law clerk, Olivia Warren, testified that Reinhardt regularly commented on female clerks’ appearances, disparaged her appearance in front of other employees, and commented on her sexual relationship with her spouse.<sup>22</sup> The statements in response to the allegations about Judge Reinhardt, however, were less individualist than the preceding ones regarding Kozinski. For example, in one of the more reflective statements, Professor Adriaan Lanni wrote to the *Harvard Law Record* that “I don’t remember [Judge Reinhardt] commenting on the physical appearance or the sex life of his clerks or prospective clerks

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<https://www.cnn.com/2018/09/13/politics/kavanaugh-kozinski/index.html> [https://perma.cc/VZG9-V9BA]; Stephanie Kirchgaessner, *Kavanaugh Clerk Hire Casts Light on Link to Judge Forced to Quit in #MeToo Era*, GUARDIAN (Oct. 1, 2018, 1:00 PM), <https://www.theguardian.com/us-news/2018/oct/01/kavanaugh-clerk-hire-casts-light-on-link-to-judge-forced-to-resign-in-metoo-era> [https://perma.cc/67MT-489N]; Elie Mystal, *Did Brett Kavanaugh Know About Alex Kozinski?*, ABOVE THE L. (July 10, 2018), <https://abovethelaw.com/2018/07/did-brett-kavanaugh-know-about-alex-kozinski/> [https://perma.cc/X5M9-TGCK]. When Judge Kavanaugh appeared with Kozinski on a clerkships panel in 2015, Judge Kavanaugh endorsed Kozinski’s paper about law clerk hiring, *Confessions of a Bad Apple*, which contains at least one arguably sexual description of law clerk hiring. See Kirchgaessner, *supra*; *Special Session: Life on the Bench*, THE FEDERALIST SOC’Y (Nov. 12, 2015), <https://fedsoc.org/conferences/2015-national-lawyers-convention/#agenda-item-special-session-life-on-the-bench> [https://perma.cc/BXL4-YRYV]; Alex Kozinski, *Confessions of a Bad Apple*, 100 YALE L.J. 1707, 1723–24 (1991) (describing the moment when a clerk accepts a clerkship offer as “electrifying” and “pleasur[able]”).

<sup>20</sup> Tatum, *supra* note 19; see also Laura E. Gomez, Opinion, *Connecting the Dots on Brett Kavanaugh*, L.A. TIMES (Sept. 20, 2018, 4:10 AM), <https://www.latimes.com/opinion/op-ed/la-oe-gomez-kavanaugh-kozinski-20180920-story.html> [https://perma.cc/2WFG-X45E] (describing how the author, a Ninth Circuit clerk the year after Justice Kavanaugh, did her “best to spend as little time around [Kozinski] as possible” because of his “creepiness factor – an older male authority-figure who expressed too much interest in the young women around him”).

<sup>21</sup> Charlotte Garden, *On Judge Kozinski & Open Secrets*, TAKE CARE (Dec. 13, 2017), <https://takecareblog.com/blog/on-judge-kozinski-and-open-secrets> [https://perma.cc/3UAR-PJNZ]; see also Slate Authors, *Alex Kozinski*, SLATE (July 21, 1996, 1:25 AM), <https://slate.com/human-interest/1996/07/alex-kozinski-10.html> [https://perma.cc/RFP5-KWTQ] (satirical diary entry from Kozinski writing about going to a lingerie party with a law clerk).

<sup>22</sup> See Catie Edmondson, *Former Clerk Alleges Sexual Harassment by Appellate Judge*, N.Y. TIMES (Feb. 13, 2020), <https://www.nytimes.com/2020/02/13/us/politics/judge-reinhardt-sexual-harassment.html> [https://perma.cc/364F-L5Q4].

in the way that he did with Ms. Warren.”<sup>23</sup> Although that portion of Professor Lanni’s statement reflected an individualist understanding of sexual harassment, Professor Lanni also said something that neither Lat nor Justice Kavanaugh did. Going beyond the narrow denials of specific conduct, Professor Lanni acknowledged that the accusations of sexual harassment were consistent with her experience with Judge Reinhardt in some respects, though she did not elaborate beyond that.<sup>24</sup> Another former Judge Reinhardt clerk, Michael Dorf, made similar statements to Professor Lanni’s: “[I]n front of me, [Judge Reinhardt] did not engage in the sort of expressly sexually demeaning behavior that Ms. Warren describes.”<sup>25</sup> And like Professor Lanni, Dorf also gestured toward Judge Reinhardt’s unreasonable demands as a boss and described some rather minor behaviors that revealed an archaic sexist attitude (including asking female law clerks to get coffee and insisting on using male pronouns), which is consistent with Warren’s testimony.<sup>26</sup> A letter signed by more than seventy Judge Reinhardt clerks was similar in these respects.<sup>27</sup> After indicating that the signatories “believe the clerk’s testimony,” the letter went on to say that some of them “experienced or witnessed conduct in chambers that we would call sexist, workplace bullying or mistreatment.”<sup>28</sup> They then urged Congress or the judiciary to

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<sup>23</sup> Adriaan Lanni, *Letter to the Editor: Judge Reinhardt*, HARV. L. REC. (Feb. 16, 2020), <http://hlrecord.org/letter-to-the-editor-judge-reinhardt/> [<https://perma.cc/6C38-5N2G>]. One is left to wonder whether Judge Reinhardt commented on the physical appearance or sex life of his clerks or prospective clerks in ways other than how he did with Olivia Warren. For another welcome reflection, see Michele Dauber (@mldauber), TWITTER (Feb. 14, 2020, 1:21 PM), <https://twitter.com/mldauber/status/1228398938782220288> [<https://perma.cc/KY22-FTDA>].

<sup>24</sup> Lanni, *supra* note 23 (“When I clerked for Judge Reinhardt 20 years ago, I remember him as having sexist assumptions about women (e.g., assuming women would not like sports, asking female clerks to make coffee). And he was not particularly sympathetic to sexual harassment claims, which was disappointing to me. . . . I remember him as a difficult boss who could be demeaning and belittling to his clerks, but not, in my experience, in a sexualized way. Although what Ms. Warren describes is different from my experience, her description is also similar enough to the belittling behavior that I did see that it has the ring of truth to me.”).

<sup>25</sup> Michael Dorf (@DorfOnLaw), TWITTER (Feb. 13, 2020, 10:33 AM), <https://twitter.com/dorfonlaw/status/1227994131068309506> [<https://perma.cc/AFD5-VT5P>]; see also Michael C. Dorf, *Reassessing Judge Reinhardt*, DORF ON L. (Feb. 14, 2020), <http://www.dorfonlaw.org/2020/02/reassessing-judge-reinhardt.html> [<https://perma.cc/8U22-CJ65>] [hereinafter Dorf, *Reassessing Judge Reinhardt*] (“I am shocked because the severity of the mistreatment goes beyond anything I knew about Judge Reinhardt.”). Again, one is left to wonder about the possibility that there was less severe mistreatment or perhaps implicitly sexually demeaning behavior.

<sup>26</sup> Dorf, *Reassessing Judge Reinhardt*, *supra* note 25.

<sup>27</sup> See Kathryn Rubino, *70+ Former Reinhardt Clerks Come Out in Support of Sexual Harassment Accuser*, ABOVE THE L. (Feb. 21, 2020, 10:02 AM), <https://abovethelaw.com/2020/02/reinhardt-clerks/2/> [<https://perma.cc/QVU3-4F69>].

<sup>28</sup> *Id.*

extend Title VII's nondiscrimination and antiretaliation provisions to the federal courts, and to adopt effective training and reporting mechanisms.<sup>29</sup>

We think the Professor Lanni and Dorf statements, as well as the letter on behalf of many Judge Reinhardt clerks, partially reflect the narrow individualist model of sexual harassment because they focus on whether an individual has personally witnessed the most extreme instances of alleged harassment.<sup>30</sup> They do not expand much on the possibility that our collective responsibility for sexual harassment might go beyond those occasions. Yet “[b]y focusing on the bad actors/rotten apples that abuse their authority or openly degrade . . . , our legal approach to sexual harassment misses and renders acceptable many other forms of sexual harassment that impede women.”<sup>31</sup> For example, the statements do not grapple with the possibility (that later became a reality) that a judge who concededly behaved, at least occasionally, like an aggressive bully toward his law clerks, and who also behaved in ways that reflected sexist attitudes, might one day combine those two behaviors into sexist bullying or sexual harassment. Nor do the statements acknowledge that sexist behavior and bullying might be behaviors that harden or worsen over time, especially in people whose powers, reputation, and networks we help to prop up and expand.

The narrow individualist account is not the only way to think about our role in sexual harassment. After the allegations against Kozinski became public—several years before the allegations against Judge Reinhardt did—Dorf wrote more extensively about how our collective responsibility for Kozinski's behavior may be broader than merely acknowledging specific instances of sexual harassment we may have witnessed. Dorf explained:

I am not professing my ignorance of Judge Kozinski's sexual misbehavior as a means of exonerating myself, because I don't think I deserve to be exonerated. Although I was unaware of sexually abusive behavior—which was undoubtedly experienced as substantially worse by women than by men—I was aware of Judge Kozinski's generally controlling behavior. To use a term I learned from Robert Sutton's book *The No Asshole Rule*, I was aware that Judge Kozinski was a “bosshole,” i.e., an asshole of a boss.

I heard stories of Judge Kozinski demanding that his clerks perform tasks that fell far outside of their job descriptions. He treated his clerks, I was led to

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<sup>29</sup> Several Judge Reinhardt clerks did not sign the letter, including those who offered their own public statements or social media engagement.

<sup>30</sup> To some extent, the lack of introspection could be explained by the bystander effect; however, many individuals are more than mere bystanders in these situations. They benefit from not speaking up in a way that typical bystanders rarely do.

<sup>31</sup> Claudia Flores, *Beyond the Bad Apple—Transforming the American Workplace for Women After #MeToo*, 2019 U. CHI. LEGAL F. 85, 95.

understand, more or less as personal assistants, even as he professed what I continue to think was genuine fondness for the young lawyers he seemed to relish subordinating. I heard a story of a clerk who was told by Judge Kozinski to come into work late one Sunday, tried to resist by explaining this was the only brief window during the week when he could do his laundry, and was then told that if he didn't come back to work right then he would be fired.

So I didn't know about sexual harassment or other sexual misconduct but even knowing only what I knew, I should have been much more reluctant to send clerkship applicants to Judge Kozinski than I was.<sup>32</sup>

These passages reflect two ideas that define a broader understanding of the causes of and responsibility for sexual harassment. The first idea is that there are myriad specific behaviors that fall well short of extremely serious or actionable sexual harassment that should nonetheless be red flags. These seemingly tolerable behaviors can be pernicious, as they often have exclusionary or subordinating effects, particularly on historically underrepresented or disadvantaged groups.<sup>33</sup> Perhaps more importantly, small, seemingly insignificant behaviors can normalize other inappropriate behaviors and the attitudes that lead to more severe harassment and discrimination, creating a work culture where inappropriate behavior can easily escalate.<sup>34</sup>

Acknowledging problematic behaviors that fall short of being wildly illegal or deeply cruel might allow us to identify unsafe working environments before they become more severe. But vague statements that a boss was demanding or had sexist attitudes are less helpful to that project. They may even be harmful to the extent they suggest that some amount of misconduct is expected and acceptable in the workplace.<sup>35</sup> To intervene in

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<sup>32</sup> Michael Dorf, *Judges, Bossholes, and Coaches*, DORF ON L. (Dec. 18, 2017), <http://www.dorfonlaw.org/2017/12/judges-bossholes-and-coaches.html> [<https://perma.cc/B9VL-HGWA>].

<sup>33</sup> Unethical behavior begets more unethical behavior. This is especially true when the initial unethical behavior occurs without repercussion. Francesca Gino & Lamar Pierce, *Dishonesty in the Name of Equity*, 20 PSYCH. SCI. 1153, 1159 (2009) (describing how people justify their wrongdoing by referencing what others do). See generally Max H. Bazerman & Francesca Gino, *Behavioral Ethics: Toward a Deeper Understanding of Moral Judgment and Dishonesty*, 8 ANN. REV. L. & SOC. SCI. 85 (2012).

<sup>34</sup> See WILMERHALE, *supra* note 7, at 2, 7, 20, 55, 57 (describing how Philbert made inappropriate sexualized remarks and made women uncomfortable with frequent hugs, which had the effect of creating an environment for Philbert to engage in more misconduct and cross more boundaries without suddenly raising red flags).

<sup>35</sup> See, e.g., *Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Internet*, 116th Cong. 4 (2020) (statement of Olivia Warren), <https://docs.house.gov/meetings/JU/JU03/20200213/110505/HHRG-116-JU03-Wstate-WarrenO->

problematic work environments, and to understand how work environments can devolve into severe, pervasive, cruel harassment, we must identify more specific behaviors.

The second idea is that we have a broader responsibility for sexual harassment beyond merely witnessing specific instances of sexual harassment. The passages in Dorf's piece acknowledge that we should treat young lawyers as people with dignity who deserve respect. He encourages us to view young lawyers as people who should not be subject to inappropriate or demeaning behaviors, even when those behaviors do not rise to the level of groping or propositioning someone. And, most importantly, he suggests that we all have a role to play in making those ideals a reality, even if we did not personally witness or hear about the most extreme instances of sexual harassment.

## II. CONTRIBUTING FORCES IN A STRUCTURAL UNDERSTANDING OF SEXUAL HARASSMENT

This Part analyzes the forces that contribute to sexual harassment, with a specific focus on the courts. It starts with the federal judiciary's institutional structures, including the rules governing clerkships and the clerkship hiring process. It then considers how the larger legal profession also contributes to the systemic problem of sexual harassment, again with a particular focus on the courts. Next, it focuses on individual members of the legal profession who contribute to systemic problems of sexual harassment through seemingly small behaviors and how certain work allocations—i.e., what we allow others to do—may also contribute to harassment. Finally, we apply these lessons to examine how responses, and the lack thereof, to harassment contribute to a collective, systemic problem.

### A. *Clerkships and Perverse Incentives*

To understand our collective responsibility for sexual harassment in the federal judiciary and in our profession generally, this Section begins by explaining the judicial clerkship hiring process and why clerkships are valued in our profession.<sup>36</sup> This Section then explains how the structure of the federal courts creates an environment that is conducive to sexual harassment.

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20200213-U2.pdf [https://perma.cc/HF9A-GPJL] [hereinafter Warren Testimony] (Warren was told to brace herself for an "intense" year and for her "grandfather's sexism").

<sup>36</sup> This Essay focuses on the federal judiciary and federal clerkships. Although clerkships frequently differ, there are enough similarities within the federal clerkship system to discuss these issues together. Further, the federal clerkship model is sufficiently representative that our analysis can be applied to many different state courts, where the same problems persist, as well.

### 1. *Applying to Federal Judicial Clerkships: Why*

Judicial law clerks are assistants to judges who can perform a wide range of tasks. Although clerkship experiences vary by judge and by court, clerks typically share the same basic responsibilities: researching legal issues, distilling briefs filed by the parties, and helping their judge come to a legal conclusion. Although some judges may have law clerks draft opinions, others draft their own. Some judges hire permanent law clerks, but most judges still hire some clerks on an annual basis.<sup>37</sup> Each law clerk typically works in chambers with their co-clerks for that year.

Clerkships can provide several personal and professional benefits. Whereas typical “Big Law” associates (associates at major law firms) who are one year out of law school may conduct document review for specific cases, their peers who are clerking may help determine the final outcomes in those same cases.<sup>38</sup> Past clerks note that clerking improved their writing and analytical abilities on a wide range of legal issues, especially procedural ones.<sup>39</sup> Clerks may “gain unique behind-the-scenes insights into how chambers function and how judges make decisions” and “learn from and receive mentorship from a judge,” both of which can be invaluable early on in a lawyer’s career.<sup>40</sup> Clerkships provide “a sense of what is, and what is not, effective advocacy.”<sup>41</sup> Potential employers view clerkships, particularly at the federal level, as prestigious. Indeed, clerkships can offer seemingly unparalleled access to the world in which many young attorneys will eventually practice.

The perceived prestige and value of clerkships is partially due to how courts work. Many of the internal procedures of a particular court are easily accessible only to people within the system.<sup>42</sup> A clerk will quickly learn internal operating procedures, including how cases are assigned, which cases

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<sup>37</sup> Susan Harp, *Clerking—Something Every First Year Law Student Should Know*, 29 STETSON L. REV. 1291, 1291–92 (2000).

<sup>38</sup> Nicholas Alexiou, *To Clerk or Not to Clerk... It’s Actually Not Much of a Question*, ABOVE THE L. (June 7, 2018, 11:33 AM), <https://abovethelaw.com/2018/06/to-clerk-or-not-to-clerk-its-actually-not-much-of-a-question/?rf=1> [<https://perma.cc/B3B3-LZM6>].

<sup>39</sup> Harp, *supra* note 37, at 1293.

<sup>40</sup> Mishkah Ismail, Andrew Kim, David E. Hackett & Michelle L. Tran, *How to Apply for a Clerkship—And What to Expect*, 32 GPSOLO 46, 47 (2015).

<sup>41</sup> Mark D. Killian, *Court Staff Attorneys, Clerks Lack Diversity*, FLA. BAR NEWS (Mar. 1, 2006), <https://www.floridabar.org/the-florida-bar-news/court-staff-attorneys-clerks-lack-diversity/> [<https://perma.cc/5TRC-YVZP>].

<sup>42</sup> See, e.g., Jaime Santos (@Jaime\_ASantos), TWITTER (May 29, 2020, 8:36 PM), [https://twitter.com/Jaime\\_ASantos/status/1266544015002030083](https://twitter.com/Jaime_ASantos/status/1266544015002030083) [<https://perma.cc/F4DR-LKML>] (describing how the author was able to understand the pitfalls of filing for a temporary restraining order specifically because of her clerkship and information that may not be easily available to others).

make it to oral argument, how and when judges vote (or how a district judge will rule), and how opinions are drafted. Clerks are privy to other inside information as well: what arguments are likely to persuade a judge, which judges are most respected by their colleagues (and which judges are not), and which judges are—or are not—good bosses. One might hope that law students will figure out whether a particular judge will be belittling, demeaning, or abusive to his clerks before accepting a clerkship;<sup>43</sup> however, that is frequently not the case. People outside of chambers, and especially outside of a particular court, often do not know whether a judge is temperamental, abusive, or even harasses his clerks.

That brings us to the downsides of clerking, which are discussed less frequently. Financially, if a student plans to work at a law firm after graduation, clerking results in a significant pay cut. While that may not deter students who come from higher socioeconomic status, many law students—especially first-generation students and students of color—may not have the ability to take a significant pay cut in the face of student loans. Because a federal clerkship is so difficult to obtain, applicants may have to either forego opportunities due to geographic limitations or make a difficult decision to be separated from their families or partners. One-year clerkship positions frequently do not come with vacation time, making it difficult for people to commit to a year without any time off. Clerkships also may not come with accessibility provisions for applicants with disabilities.

Additionally, incoming clerks have no control over who their future co-clerks will be. Because co-clerks work in very close quarters, a bad co-clerk or a bad relationship with a co-clerk can be quite taxing. Finally, issues may arise in a clerk's relationship with the judge and the judge's judicial assistants (who are different from the clerks). Occasionally, ideological differences may get in the way of a judge-clerk work relationship. In other cases, judges may be difficult, demeaning, or even abusive.<sup>44</sup> Although

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<sup>43</sup> There are ways for people to learn this information, but students must know who to ask or where to look. *See, e.g.*, PEOPLE'S PARITY PROJECT, A STUDENT'S GUIDE TO JUDICIAL CLERKSHIPS: HOW TO LOOK OUT FOR YOURSELF IN A BROKEN SYSTEM 3 (2020), <https://www.peoplesparity.org/clerkshipsguide/> [<https://perma.cc/Z8KP-6FTP>] (compiling resources and advice for the clerkship application process that may not be widely disseminated at all law schools).

<sup>44</sup> Kozinski showed pornographic images to his female clerk and displayed other controlling behaviors, such as ordering a clerk to stop reading romance novels. *See* Heidi Bond, Comment to *MeToo: Kozinski*, COURTNEY MILAN, <http://www.courtneymilan.com/metoo/kozinski.html#4> [<https://perma.cc/E276-DXBV>]. Kozinski displayed a "callous disregard for people," including insulting and belittling staff. Garden, *supra* note 21 (quoting John Hollingsworth, former director in the Office of Special Counsel). Judge Reinhardt constantly commented on the appearance of women and used homophobic slurs to refer to certain clerks. Warren Testimony, *supra* note 35, at 6–7. He also commented on the physical appearance of his clerks and their sexual relationships. *Id.*

professors and former clerks may be able to provide some of that information to a student before the student applies, the information may not be easily available, or it may only be available to those who are in certain legal circles or know the right people. Professors and former clerks may also lack incentives to share this information; former clerks typically do not bad-mouth their judges or their clerkship experience. To the contrary, some professors and former clerks may have a vested interest in placing as many students in clerkships as possible, regardless of possible abuse or misconduct.<sup>45</sup>

## 2. *Applying to Clerkships: How*

The hiring process varies by judge and by court; however, most lawyers who choose to clerk will do so either immediately after law school or within a few years of graduation. Most candidates' clerkship application materials will be the same: they rely on their résumé, law school record, and recommendations from law professors, as well as one or two writing samples. Some candidates will likely have more information than others about the judges they are applying to, either because of friends or family in the legal community or from doing research or talking to past clerks.

Judges in highly sought-after districts and circuits will get hundreds of applications for each hiring cycle.<sup>46</sup> To help students stand out from the other hundreds of applications, many law schools have clerkship committees that help students navigate the clerkship application process. These committees help students gain connections to certain judges, review application materials, and coordinate professors' phone calls to specific judges.<sup>47</sup> The

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<sup>45</sup> See *infra* Section II.B.2.

<sup>46</sup> For example, in 2017, judges in the Southern District of New York received almost 10,000 applications for sixty-four listed positions on the Online System for Clerkship Application and Review (OSCAR), while the Central District of California (located in Los Angeles) received over 5,000 applications for thirty-nine positions. *CY 2017 Online Positions and Applications by District*, OSCAR, [https://oscar.uscourts.gov/2017\\_district\\_map](https://oscar.uscourts.gov/2017_district_map) [<https://perma.cc/V2S5-BMZY>]. For that same year, the D.C. Circuit received over 4,000 applications for nine positions listed on OSCAR and the Ninth Circuit received almost 7,000 applications for thirty-four positions. *CY 2017 Online Positions and Applications by Circuit Judge*, OSCAR, [https://oscar.uscourts.gov/2017\\_circuit\\_map](https://oscar.uscourts.gov/2017_circuit_map) [<https://perma.cc/YT5H-FECJ>]. These numbers can also change based on the popularity of a judge. For example, "the number of applications received by . . . judges on the Third Circuit in 2005 ranged from 150 to 675. . . . A random sampling of active judges in the Ninth Circuit showed 228, 400 and 784 applications." Ruggero J. Aldisert, Ryan C. Kirkpatrick & James R. Stevens III, *Rat Race: Insider Advice on Landing Judicial Clerkships*, 110 PENN. ST. L. REV. 835, 837 (2006).

<sup>47</sup> See, e.g., *Judicial Clerkships*, CORNELL L. SCH., [https://www.lawschool.cornell.edu/careers/judicial-clerkships/Judicial-Clerkships\\_Main.cfm](https://www.lawschool.cornell.edu/careers/judicial-clerkships/Judicial-Clerkships_Main.cfm) [<https://perma.cc/U9AD-G8JZ>] ("We encourage you to talk to Dean Peck or other members of the clerkship committee to learn more about your possibilities and to begin developing an application strategy that will work for you."); *Judicial Clerkships*, U. CHI. L. SCH., <https://www.law.uchicago.edu/clerkships>



committee may also help students apply to judges with commonalities, e.g., similar political leanings, a bond over an alma mater, or perhaps shared interests.<sup>48</sup> Many judges rely on calls from faculty members they trust to sift through the hundreds of applications they receive, and judges report that “[a]ll things being equal, it is always better to have prominent tenured faculty” as recommenders.<sup>49</sup> As discussed below, certain professors become known as “feeders” because they help their preferred students gain clerkships.

Once a candidate’s application is picked out of the pile, the candidate will likely go through an interview process with the judge and her clerks. As with other parts of the process, interview procedures vary by judge. Some consist of multiple stages and are highly substantive, some are a single get-to-know-you conversation, and others are somewhere in between. These decisions are entirely up to each judge. Most schools offer little to no financial assistance to help students attend these interviews, even though the interviews may require purchasing a cross-country flight on short notice.<sup>50</sup> If a candidate is successful, she may get an offer on the spot or a few hours or days after; if she is not successful, she may hear back weeks or months later (or not at all).

The access that clerkships provide to the legal profession and the secrecy surrounding and within clerkships replicate systems of inequality that already exist within the legal profession. Although judges may “approach the clerkship selection process with a sense of weariness, law students approach it with a sense of awe. Through this process, [students] will interact with the powerful men and women whose work they have been

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[<https://perma.cc/SE6B-8H3P>] (“Students interested in applying for judicial clerkships are aided by a faculty committee, the Office of Career Services, faculty and their assistants, programs, and resources in the Office of Career Services.”); *Judicial Clerkships*, NYU SCH. L., <https://www.law.nyu.edu/careerservices/jdstudents/judicialclerkships> [<https://perma.cc/W7A5-ML7B>] (“A faculty clerkship committee led by the Dean identifies clerkship opportunities and supports students and alumni including by writing recommendation letters and contacting judges.”).

<sup>48</sup> Harp, *supra* note 37, at 1294.

<sup>49</sup> Aldisert et al., *supra* note 46, at 842; *see also id.* at 842 n.14 (quoting an unnamed judge as saying “the applications no longer mean anything to me. I react only to a judge or professor or lawyer friend who has experience with a student and makes an effort to contact me and strongly recommend the person. Only then will I follow up with the application and possibly an interview.”); Ismail et al., *supra* note 40, at 49 (“When an application is in a stack of thousands, a phone call from a familiar voice may go a long way in persuading a judge to take the application out of the pile.”).

<sup>50</sup> *See Courting the Clerkship: Perspectives on the Opportunities and Obstacles for Judicial Clerkships*, 40 JUDGES’ J. 10, 11 (2001). Some qualified candidates may lack the means to buy a last-minute flight and will either have to forego the opportunity or incur debt for these opportunities.

reading and discussing in school.”<sup>51</sup> This reverence seeps into the clerkship application process, the clerkship itself, and the student’s role as a lawyer afterwards.

### 3. *Secrecy and Working as a Clerk*

There is an atmosphere of secrecy that surrounds clerking, one that is bolstered by a clerk’s duty of confidentiality. As the Federal Judicial Center’s *Law Clerk Handbook* explains, clerks cannot “disclose confidential information received in the course of official duties, except as required in the performance of their duties.”<sup>52</sup> Clerks are specifically instructed not to discuss their judge’s personal views and are warned to be particularly careful before discussing any activities related to chambers.<sup>53</sup> Only after former Kozinski clerk Heidi Bond made public allegations of sexual harassment did the handbook “clarify” that clerks are permitted to reveal “misconduct, including sexual or other forms of harassment, by their judge.”<sup>54</sup> Clerkships are premised on secrecy: even after the handbook’s clarification, clerks are *permitted*, but not *required*, to report instances of harassment. This misplaced emphasis ensures that secrecy and confidentiality pervade the clerkship experience.

### 4. *Risk Factors for Harassment and the Judiciary*

In 2016, the Equal Employment Opportunity Commission (EEOC) published a report from its Task Force on the Study of Harassment in the Workplace (the Report). The Report aimed to prevent unwelcome and illegal

<sup>51</sup> Trenton H. Norris, *The Judicial Clerkship Selection Process: An Applicant’s Perspective on Bad Apples, Sour Grapes, and Fruitful Reform*, 81 CALIF. L. REV. 765, 776 (1993).

<sup>52</sup> FED. JUD. CTR., LAW CLERK HANDBOOK: A HANDBOOK FOR LAW CLERKS TO FEDERAL JUDGES 7 (rev. 3d ed. 2017), [https://www.fjc.gov/sites/default/files/materials/26/Law\\_Clerk\\_Handbook\\_Revised\\_3d\\_Ed\\_2017.pdf](https://www.fjc.gov/sites/default/files/materials/26/Law_Clerk_Handbook_Revised_3d_Ed_2017.pdf) [<https://perma.cc/Rf98-ELBL>].

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 8. The Federal Judicial Center (FJC) made this change to its handbook in December 2017, shortly after Heidi Bond, a former clerk to then-Judge Alex Kozinski, accused Kozinski of sexually harassing her during her clerkship. Ms. Bond specifically asked the FJC to clarify that the duty of confidentiality does not apply to misconduct; before then, this language did not exist. See Matt Zapotosky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST (Dec. 8, 2017), [https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef\\_story.html](https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html) [<https://perma.cc/KX8P-J6RG>]; *Law Clerk Handbook: A Handbook for Law Clerks to Federal Judges, Revised Third Edition [Superseded]*, FED. JUD. CTR. (Dec. 18, 2017), <https://www.fjc.gov/content/334796/law-clerk-handbook-revised-third-edition> [<https://perma.cc/2BNW-ZDF4>] (“The revised third edition contains updates to § 2.2 of the handbook, which include clarifying language regarding workplace harassment.”).

conduct in the workplace.<sup>55</sup> One specific section focused on structural factors that may increase the likelihood of harassment; these conditions “are the most powerful predictors of whether harassment will happen.”<sup>56</sup> The Report provided twelve nonexhaustive conditions and concluded that “the presence of *one or more* [of the] risk factors suggests there may be fertile ground for harassment to occur.”<sup>57</sup> The federal judiciary exhibits *five* of those conditions, sometimes in extreme forms. We discuss each below.

*a. Workplaces with significant power disparity*

Workplaces with significant power disparity between executives and staff pose risks for harassment.<sup>58</sup> Staff workers “may be particularly susceptible to harassment, as high-status workers may feel emboldened to exploit them.”<sup>59</sup> These workers “may also be particularly concerned about the ramifications of reporting harassment (*e.g.*, retaliation or job loss).”<sup>60</sup> These disparities are exacerbated by gender differences: When “most of the support staff are women and most of the executives are men[], more harassment may occur.”<sup>61</sup>

The judiciary has always had significant power disparity between judges and clerks. Judges can fire clerks at will and clerks fear retaliation because losing a clerkship may reflect poorly on their competence and employability, particularly for candidates early in their careers. A judge can both help a clerk find a job and tank a clerk’s prospects with just one call. And unlike other professions, clerkships—despite being the first job for many lawyers—will never move off a résumé. Decades after a clerkship, people will still list the judges they clerked for at the top of their résumé.

Most significantly, however, the power differences in the judiciary are exacerbated by gender and racial disparities. As of August 2019, 73% of sitting federal judges were men.<sup>62</sup> President Trump has also made little effort

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<sup>55</sup> CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP. OPPORTUNITY COMM’N, REPORT OF THE CO-CHAIRS OF THE EEOC’S SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE, at iii (2016), [https://www.eeoc.gov/sites/default/files/migrated\\_files/eeoc/task\\_force/harassment/report.pdf](https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf) [<https://perma.cc/9YCT-KT43>].

<sup>56</sup> *Id.* at 25.

<sup>57</sup> *Id.* at 25–30 (emphasis added).

<sup>58</sup> *Id.* at 28.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Danielle Root, Jake Faleschini & Grace Oyenubi, *Building a More Inclusive Federal Judiciary*, CTR. FOR AM. PROGRESS (Oct. 3, 2019, 8:15 AM), <https://www.americanprogress.org/issues/courts/reports/2019/10/03/475359/building-inclusive-federal-judiciary/> [<https://perma.cc/7YAT-MUJT>]; see also Ashley Badesch, *Lady Justice: The Ethical*

to diversify his judicial nominees by gender.<sup>63</sup> Nor has he made any effort to nominate racially diverse judges: nearly four years into his presidency, he has appointed zero Black court of appeals judges and only one Hispanic judge.<sup>64</sup>

*b. Workplaces with high-value employees*

In workforces where some employees are perceived as particularly valuable, “senior management may be reluctant to challenge the behavior of their high value employees.”<sup>65</sup> These “high value employees, themselves, may believe that the general rules of the workplace do not apply to them.”<sup>66</sup>

The judiciary is a workplace with high-value employees because of Article III protections for federal judges. Federal judges are appointed for life and can be removed only by impeachment.<sup>67</sup> Although federal judges may be the object of disciplinary action under the Judicial Conduct and Disability Act, removal is quite uncommon.<sup>68</sup> Moreover, the revelations about Kozinski and others over the last few years indicate that some federal judges believe that the general rules of the workplace do not, in fact, apply to them.<sup>69</sup>

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*Considerations and Impacts of Gender-Bias and Sexual Harassment in the Legal Profession on Equal Access to Justice for Women*, 31 GEO. J. LEGAL ETHICS 497, 504–05 (2018) (“Disproportionately low representation of women on the bench thus creates barriers to equal justice for women, especially those who are victims of gender bias and sexual harassment. Further, low representation of women on the bench undermines the credibility and confidence women have in the justice system, which may discourage participation. And in the growing numbers of studies and commissions dedicated to getting to the bottom of the ‘gavel gap’ and propensity of women to leave the legal profession, gender bias, ranging from overt and obvious to implicit forms, consistently emerges as a culprit.” (footnotes omitted)).

<sup>63</sup> See Carrie Johnson & Renee Klahr, *Trump Is Reshaping the Judiciary. A Breakdown by Race, Gender and Qualification*, NPR (Nov. 15, 2018, 5:00 AM), <https://www.npr.org/2018/11/15/667483587/trump-is-reshaping-the-judiciary-a-breakdown-by-race-gender-and-qualification> [https://perma.cc/8LN8-ECJF].

<sup>64</sup> Madison Alder & Jasmine Ye Han, *Trump Nears Post-Nixon First: No Black Circuit Judges (Corrected)*, BLOOMBERG L. (June 25, 2020, 12:44 PM), <https://news.bloomberglaw.com/us-law-week/no-black-judges-among-trumps-appeals-court-confirmations> [https://perma.cc/M8CP-VQTG].

<sup>65</sup> FELDBLUM & LIPNIC, *supra* note 55, at 27.

<sup>66</sup> *Id.*

<sup>67</sup> U.S. CONST. art. III, § 2.

<sup>68</sup> Judicial Conduct and Disability Act, 28 U.S.C. §§ 351–64.

<sup>69</sup> See generally Bond, *supra* note 44; Emily Nitcher, *Outspoken Nebraska Judge Draws Criticism for Tweets About Harassment*, OMAHA WORLD-HERALD (July 27, 2018), [https://www.omaha.com/news/state\\_and\\_regional/outspoken-nebraska-judge-draws-criticism-for-tweets-about-harassment/article\\_d3819308-625e-5b77-941d-b42d587bc7f9.html](https://www.omaha.com/news/state_and_regional/outspoken-nebraska-judge-draws-criticism-for-tweets-about-harassment/article_d3819308-625e-5b77-941d-b42d587bc7f9.html) [https://perma.cc/6AFM-6UER]; Warren Testimony, *supra* note 35.

*c. Isolated workspaces*

“Harassment is also more likely to occur in isolated workspaces, where the workers are physically isolated or have few opportunities to work with others. Harassers have easy access to such individuals, and there generally are no witnesses to the harassment.”<sup>70</sup>

Judicial chambers are entirely isolated. For security purposes, even court staff cannot walk in and out of chambers without a key card. Judges can also impose restrictions on clerks, such as preventing them from having court-issued email addresses or from eating lunch with or even talking to other clerks. As Heidi Bond noted, Kozinski forbade his clerks from socializing with each other or any other court staff without his explicit permission or supervision.<sup>71</sup> Clerks were required to arrive in chambers by 9:30 AM on weekdays and 12 PM on weekends and stay until 1:30 AM each night.<sup>72</sup> Because each judge is allowed to run chambers as he sees fit, no one questioned these practices.

*d. Decentralized workplace*

“Decentralized workplaces, marked by limited communication between organizational levels, may foster a climate in which harassment may go unchecked. Such workplaces include . . . enterprises where . . . representatives of senior management are not present.”<sup>73</sup>

As a workplace, the judiciary is almost entirely decentralized. To the extent that chief judges or the Judicial Conference do actually constitute senior management—a classification effectively mooted by Article III<sup>74</sup>—communication between organizational levels is highly limited. There also does not appear to be any rule requiring judges to report on employment issues (e.g., hiring, firing, or disciplinary action) to the chief judge or some other body.

Judges also have incentives not to act as checks on one another, which further encourages the decentralization and isolation of judges’ chambers.

<sup>70</sup> FELDBLUM & LIPNIC, *supra* note 55, at 29 (footnote omitted).

<sup>71</sup> Letter from Heidi S. Bond to the Senate Comm. on the Judiciary (June 11, 2018), <http://www.courtneymilan.com/metoo/workinggroupletter.pdf> [https://perma.cc/S969-89LD].

<sup>72</sup> *Id.*

<sup>73</sup> FELDBLUM & LIPNIC, *supra* note 55, at 29 (footnote omitted).

<sup>74</sup> Article III effectively makes judges unmanageable because managers cannot really impose consequences: judges hold their offices during good behavior. The only deterrent is collegiality, which generally has the opposite effect: judges do not want to step on each other’s toes by interfering in intra-chambers matters.

Even when a particular judge's abusive behavior is an "open secret,"<sup>75</sup> other judges are unlikely to address that behavior unless it is egregious and reported. Judges provide one another informal courtesies. When it comes to decision-making, some commentators suggest judges are reluctant to challenge colleagues and may even join opinions with which they do not entirely agree just to preserve personal relationships.<sup>76</sup> Judges may be even more reluctant to tell another judge how to run his chambers or manage his clerks. Not saying anything may help maintain a personal relationship, and it may also preserve the possibility of finding a way to work together toward agreement on cases. Thus, even when judges are aware of misconduct by their peers, they may not have an incentive to report.

Judicial chambers are "hierarchical fiefdoms" that lead to "judicial insularity."<sup>77</sup> Judges manage their own chambers, from work assignments to most disciplinary actions, and other judges do not interfere.<sup>78</sup> While the purported rationale for this arrangement is judicial independence in decision-making, the result is unchecked judicial power in an employment context.

*e. Homogenous workforces*

According to the Report, "harassment is more likely to occur where there is a lack of diversity in the workplace," e.g., where there are "primarily male employees" or "where one race or ethnicity is predominant."<sup>79</sup> Although current hiring statistics for clerks are difficult to find, a National

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<sup>75</sup> See, e.g., Claire Madill, *Blind Justices*, SLATE (Dec. 15, 2017, 12:35 PM), <https://slate.com/news-and-politics/2017/12/how-the-supreme-court-justices-abetted-judge-alex-kozinski-inappropriate-behavior.html> [<https://perma.cc/SFM3-HLHR>] ("Judge Kozinski's behavior was no secret when I was at the 9<sup>th</sup> Circuit. Although I did not clerk for him or even work in the same city as he did, his conduct was a frequent topic of discussion amongst my peers. I had heard about Judge Kozinski's harassment even before I started applying for clerkships.").

<sup>76</sup> See William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 324 (1996) ("Judges who know, like, and depend on each other might be less likely to risk their relationship by disagreeing on matters of importance to one or the other. Over time, colleagues might accumulate debts of deference on key issues, and subtle, unarticulated vote trading could occur."). *But see* Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1675 (2003) (discussing how collegiality could increase the ability to engage in discussions).

<sup>77</sup> *Id.* at 1677.

<sup>78</sup> There are dispute resolution procedures that any court employee may use in federal courts to attempt to resolve conflicts. In practice, these do not seem to be used with any frequency. See JUD. CONF. OF THE U.S., MODEL EMPLOYMENT DISPUTE RESOLUTION (EDR) PLAN (2018), <https://www.uscourts.gov/sites/default/files/guide-vol12-ch02-appx2b-model-edr-plan.pdf> [<https://perma.cc/BY3S-D5GH>]. Based on the authors' personal knowledge, many judges actively dissuade employees from using these methods and insist on dealing with interpersonal conflict informally.

<sup>79</sup> FELDBLUM & LIPNIC, *supra* note 55, at 26.

Association for Law Placement (NALP) study from 2000 found that between 1994 and 1998, over 85% of federal clerks were white.<sup>80</sup>

Each of these conditions for harassment has the potential to affect the other conditions and exacerbate them. For example, the decentralized nature of chambers becomes particularly acute when a judge isolates his clerks and prevents them from interacting with other clerks and courthouse staff. Those clerks are far less likely to report because they are likely unaware of the reporting mechanisms and also fear retaliation from a highly valued person in the system—their judge.

As these five factors indicate, the judiciary’s composition provides an environment that is ripe for harassment and disincentivizes reporting. That harassment can have significant effects on people about to enter the legal profession.

[S]exual harassment is often not an isolated event nor one disconnected from other features of a workplace, but a tactic that defines certain workplaces and is a critical component of them. Sexual harassment is not merely the experience of a few unlucky women but a practice that advances, entrenches, and preserves workplace inequalities, discouraging women from pursuing higher-level positions or even entering certain industries.<sup>81</sup>

### B. *Things We Do Ourselves*

This Section considers how we, as individuals, collectively contribute to the problem of harassment in the courts. As this Section explains, we do so first by propagating sanitized or overhyped stories about courts, and second by placing significant weight on the value of clerkships in a variety of professional and personal settings, frequently without acknowledging how that shapes the diversity of thought and leadership in our profession.

#### 1. *The Stories We Tell*

The stories that we tell about judges are one of the ways we are all connected to the problem of sexual harassment in the courts.<sup>82</sup> Stories about

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<sup>80</sup> *Courting Clerkships: The NALP Judicial Clerkship Study*, NAT’L ASS’N OF L. PLACEMENT (Oct. 2000), [https://www.nalp.org/clrktb1\\_8#04](https://www.nalp.org/clrktb1_8#04) [<https://perma.cc/FD9C-LDU9>]. In their book *Shortlisted: Women in the Shadows of the Supreme Court*, Renee Knake Jefferson and Hannah Brenner Johnson explore the harms of tokenism that may contribute to sexual harassment. Tokenism foists additional burdens on women and people of color, and it also excuses institutions and people in power from undertaking more systemic change. RENEE KNAKE JEFFERSON & HANNAH BRENNER JOHNSON, *SHORTLISTED: WOMEN IN THE SHADOWS OF THE SUPREME COURT* 129–67 (2020).

<sup>81</sup> Flores, *supra* note 31, at 95.

<sup>82</sup> *Cf.* Gerken, *supra* note 10, at 529 (“Whenever Judge Reinhardt’s clerks are asked about the clerkship, they tell ‘Judge stories.’”).

judges are transmitted in many different ways—professors might tell stories in the classroom or when advising students about clerkships; lawyers will share stories with one another in the workplace; and occasionally the stories will find their way into more public spheres, such as social media or law reviews, for more people to digest.

Most, if not all, of these stories about judges or Justices tend to be “piece[s] of schmaltz” and “milquetoast stor[ies]” “about saints who have never made a wrong decision and who always follow the law, free of any preconceived beliefs about the world or experiences in their lives.”<sup>83</sup> Fawning stories about judges can prime students and incoming clerks to glorify judges and defer to them even when judges misbehave. As the *Harvard Law Review* observed in a post about the congressional hearing into workplace misconduct in the courts, stories about judges played a role

in lionizing and even idolizing such figures and, as an unanticipated result, possibly making it more difficult for victims of abuse of any kind to come forward. . . . By overly elevating judges and erasing their complexity, as people and as employers, legal institutions have a hand in perpetuating the profound injustices that continue to plague our profession.<sup>84</sup>

Someone who has been harassed, mistreated, or abused might choose not to report that if they have been led to believe that the person who is mistreating them is a Great Person who does Great Things and is revered by other Great People in the profession, who they probably do not want to offend or alienate, particularly early in their careers. Survivors and bystanders may blame themselves or worry about who might help them if they choose to report.<sup>85</sup> Deifying stories can also minimize the importance of

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<sup>83</sup> Leah Litman, *Tribute: Justice Kennedy’s Counter-Clerks*, SCOTUSBLOG (June 29, 2018, 4:09 PM), <https://www.scotusblog.com/2018/06/tribute-justice-kennedys-counter-clerks/> [https://perma.cc/KB52-389Z]; see also Leah M. Litman, *In Tribute: Justice Anthony M. Kennedy*, 132 HARV. L. REV. 17, 22–23 (2018) (noting that most judge tributes tend to be “piece[s] of schmaltz”).

<sup>84</sup> Harvard L. Rev., *Recent Events: House Judiciary Committee Hearing on Harassment and the Judiciary*, HARV. L. REV. BLOG (Mar. 25, 2020), <https://blog.harvardlawreview.org/recent-event-house-judiciary-committee-hearing-on-harassment-and-the-judiciary/> [https://perma.cc/LN6M-EBRP].

<sup>85</sup> In this Essay, we use the terms “victim” and “survivor” interchangeably. We recognize that both terms have connotations that do not fully encompass the “wide range of responses to violence and trauma.” Alexandra Brodsky, *“Rape-Adjacent”*: *Imagining Legal Responses to Nonconsensual Condom Removal*, 32 COLUM. J. GENDER & L. 183, 184 n.3 (2017); see also Alyssa R. Leader, *A “SLAPP” in the Face of Free Speech: Protecting Survivors’ Rights to Speak Up in the “Me Too” Era*, 17 FIRST AMEND. L. REV. 441, 442 n.12 (2019) (noting that the use of the term “survivor” is “intended to reflect language those who have reported sexual violence are likely to use to describe themselves”). But see Parul Sehgal, *The Forced Heroism of the ‘Survivor,’* N.Y. TIMES MAG. (May 3, 2016), [http://www.nytimes.com/2016/05/08/magazine/the-forced-heroism-of-the-survivor.html?\\_r=0](http://www.nytimes.com/2016/05/08/magazine/the-forced-heroism-of-the-survivor.html?_r=0)



harassment allegations because people may be less likely to believe that “great” judges can act in incongruous ways. These stories further minimize harassment and its consequences because when measured against the heroic accomplishments of a judge, the harassment might seem less significant since it siphons off the time, energy, and dignity of only one person or several persons who are early in their legal careers.

The language we use to describe judges who misbehave also has the effect of minimizing harassment. Before the sexual harassment allegations became public in 2017, Kozinski was often described as quirky, irreverent, or inappropriate.<sup>86</sup> But those words conceal the more specific and painful details of his misconduct. The phenomenon of using sanitized and even positive language to describe men who harm others is not unique to judges. Men who misbehave are described as quirky or unique or even funny and amusing.<sup>87</sup> Louis C.K., who masturbated in front of several women without their consent, still has his comedy described as irreverent.<sup>88</sup> These words are odd and unfitting ways to describe someone who made sexually inappropriate remarks and who engaged in sexually inappropriate behavior, and they signal to the harasser’s victims that such behavior is within acceptable bounds. The descriptors also obscure the harasser’s behavior to the public and to future victims. Few people would interpret the word “irreverent” to mean masturbating in front of someone else or “quirky” to include showing pornography to a female law clerk and asking if it turns her on.

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[<https://perma.cc/E285-GL4D>] (discussing the limiting function of the word “survivor” as compared to “victim”).

<sup>86</sup> See, e.g., SovernNation (@SovernNation), TWITTER (Dec. 18, 2017, 9:46 AM), <https://twitter.com/SovernNation/status/942783084973277185> [<https://perma.cc/99MK-SCD5>]; Patrick Nonwhite (@NonWhiteHat), TWITTER (Mar. 17, 2017, 11:53 PM), <https://twitter.com/NonWhiteHat/status/842962258548457472> [<https://perma.cc/XJ8S-TEPE>].

<sup>87</sup> See, e.g., Edward Lazarus, *The Controversy over Judge Alex Kozinski and His Website: Why the Facts, as We Now Know Them, Do Not Provide Reason for This Talented Jurist to Step Down*, FINDLAW (June 19, 2008), <https://supreme.findlaw.com/legal-commentary/the-controversy-over-judge-alex-kozinski-and-his-website-why-the-facts-as-we-now-know-them-do-not-provide-reason-for-this-talented-jurist-to-step-down.html> [<https://perma.cc/88ZV-3HCS>] (“That’s a price I would hate to pay. And Judge Kozinski proves the point. He’s quirky, irrepressible, and possessed of a remarkably restless and wide-ranging intellect that is well-suited to his brand of libertarian conservatism.”).

<sup>88</sup> Hannah Yasharoff, *Louis C.K. Acknowledges 2017 #MeToo Scandal in First Stand-Up Comedy Special Since Allegations*, USA TODAY (Apr. 5, 2020, 2:21 PM), <https://www.usatoday.com/story/entertainment/celebrities/2020/04/05/louis-c-k-returns-first-comedy-special-since-me-too-allegations/2950526001/> [<https://perma.cc/U2DL-YJLL>]; Nicole Sperling, *Louis C.K.’s Scrapped Animated Series Has Left Its Staffers High, Dry, and Scrambling*, VANITY FAIR (Nov. 29, 2017), <https://www.vanityfair.com/hollywood/2017/11/louis-ck-the-cops-show-fallout-amid-sexual-harassment-allegations> [<https://perma.cc/HW3J-4XM6>]; *Louis C.K. Biography*, BIOGRAPHY (Apr. 6, 2020), <https://www.biography.com/performer/louis-ck> [<https://perma.cc/42KV-ATQ3>].

Other aspects of judge stories further minimize harassment. Former clerks may describe a clerkship in vague terms such as demanding, intense, or unreasonable, or even describe particular incidents but also state their overall assessment that the clerkship was “worth it.” These statements communicate to students that accepting abusive or harassing behavior is worth the costs because accepting the behavior is professionally and personally advantageous.<sup>89</sup> Students will hear these stories from more experienced and successful alumni and professors, which conveys the message that enduring some amount of harassment is a necessary cost of professional success. Conveying that other people endured misconduct, which normalizes harassment, also implies that good lawyers and clerks should be able to endure an abusive workplace.

Of course, there is nothing wrong with praising someone who gave you a wonderful professional opportunity, as judges do for their clerks. Nor is there anything wrong about praising someone whose professional work you admire and who treated you well. But the aggregation of these stories has created an environment where over-the-top praise is the norm even when the reality is much more complicated. And we have all been complicit in preserving that status quo by telling these stories, repeating them, and failing to question the facially implausible implication that every judge is the greatest judge and best person on the face of the earth.<sup>90</sup>

## 2. Clerkships as Professional Proxy

The legal profession prizes access to judges and uses clerkships as a professional proxy to determine employment viability. This props up problematic judges and creates a profession that replicates and rewards their problematic behavior.

Most obviously, clerkships serve as professional proxies for other judges. Judges assume that if a certain judge hired a candidate and worked with a candidate, the candidate must be qualified. Supreme Court Justices in

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<sup>89</sup> See Gerken, *supra* note 10, at 532 (describing Judge Reinhardt with the following statements:

- “The Judge’s current clerks might think that kindness lies pretty deep beneath the surface.”
- “Clerks quickly become accustomed to the rough-and-tumble style of the chambers. I began the clerkship a bit shy and deferential to those higher up. But it wasn’t long before I found myself yelling (at? with?) an Article III judge.”
- “The Judge always called me into his office whenever he wanted to tussle over a gender issue. I now realize he did it just for his own amusement, but I engaged in those discussions with all the seriousness and idealism of a twenty-four-year-old who knew nothing of the world.”
- “The Judge had an endless number of rules that were mostly designed to keep the clerks working . . .”).

<sup>90</sup> A few people—if asked in person—would tell you not to clerk for their judges. But most, if not all, former clerks tend not to speak negatively about their judge or clerkship experience.

particular rely on this methodology to hire clerks. Justices look to “a select few appellate court judges to feed them their best clerks.”<sup>91</sup> For example, from 2007 to 2017, twelve out of the forty clerks Justice Kennedy hired were former clerks for Kozinski.<sup>92</sup> Kozinski likely received highly competitive clerkship applicants year after year because he could realistically dangle the possibility of a Supreme Court clerkship in front of applicants. Even though some law school students likely knew about Kozinski’s abusive behavior, they may have been willing to tolerate his well-known harassment in exchange for the opportunity to clerk on the Supreme Court.

*a. Financial incentives*

Many post-clerkship employers also reward clerking by treating it as a proxy for legal talent. Employers, especially firms that focus on trial or appellate litigation, target outgoing clerks and offer exorbitant bonuses. In 2018, at least six different firms were willing to offer \$400,000 bonuses to Supreme Court clerks.<sup>93</sup> One commentator noted that these firms “can no longer credibly argue they are compensating these former clerks for the additional education and training obtained during their Supreme Court clerkships.”<sup>94</sup> The more likely explanation is that firms are paying for the “access and insight into the individual chambers,”<sup>95</sup> which they can sell to prospective clients. Both clerks and judges benefit from the bonus model. For most law students who are headed to firms after graduation, clerkship bonuses can cover the pay gap between clerking and private practice. For judges, clerkship bonuses allow more applicants to clerk without significant financial concern.

*b. Institutional incentives*

Law schools also prize clerkships in hiring; clerkships serve as a credential for professors. Most faculty members at top law schools clerked for a federal judge (or multiple federal judges). As Judge Trenton Norris put it, “[L]aw schools consider clerkships a plus because former clerks have already been screened, have gained experience in researching and writing about legal issues, and bring with them the prestige of having worked closely with respected jurists.”<sup>96</sup>

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<sup>91</sup> See, e.g., Madill, *supra* note 75.

<sup>92</sup> *Id.*

<sup>93</sup> Staci Zaretsky, *\$400K Is Now the Official Market Rate for Supreme Court Clerk Bonuses*, ABOVE THE L. (Nov. 15, 2018, 10:42 AM), <https://abovethelaw.com/2018/11/400k-is-now-the-official-market-rate-for-supreme-court-clerk-bonuses/> [<https://perma.cc/YP9P-X8WH>].

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Norris, *supra* note 51, at 768.

A clerk's connection to her judge, and her understanding of other judges in that district or circuit, also becomes a professional tool. Law firms tout an associate's recent clerkships in pitch materials to woo clients by demonstrating a potential "in" for a specific case. Younger attorneys use their clerk network to refer work to each other and ask each other questions, reinforcing the importance of clerking and creating a circle of privilege among those who clerked. Law professors can provide a service to their schools by placing graduates in clerkships, either with their own judge or by providing information about other judges in that district or circuit. Schools care because their reputation and ranking are "tied, at least in part, to their ability to place clerks, particularly in prestigious clerkships."<sup>97</sup>

Part of what is odd about relying on judges as employment screeners is that it blurs the deference given to judges in their role as jurists with deference that is given to judges in their role as employers. Our constitutional system involves some amount of deference to judges as jurists. Judges create controlling law that forms the basis of legal education, scholarship, and attorney work product. But the deference to how a judge decides cases and views legal issues can bleed into other, unjustified kinds of deference, including deference to how a judge acts as an employer. Talented legal minds and skilled lawyers might have no experience being a boss, and their views about cases or legal issues might not translate to how they behave interpersonally.<sup>98</sup> Indeed, there is no reason to think these skills travel together; being good at legal reasoning has no bearing on whether someone treats their employees with respect. Nevertheless, our profession does not distinguish between deference to the judge as jurist and deference to the judge as employer. And some of that is probably because judges want deference on all things, and access to judges and relationships with judges is a professional asset.

While none of the benefits from clerking are inherently bad, they prop up the clerkship system and the deference given to jurists regardless of their actual behavior. These benefits encourage students to place a disproportionate amount of weight on clerking for certain judges and to ignore or minimize the potential problems of clerking for an abusive judge. If our profession does not recognize how it props up judges who engage in

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<sup>97</sup> Aaron L. Nielson, *The Future of Federal Law Clerk Hiring*, 98 MARQ. L. REV. 181, 188 (2014) (footnote omitted).

<sup>98</sup> This may be especially true as younger and younger judges are appointed, which means they have less time to acquire management experience. See, e.g., Russell Wheeler, *Judicial Appointments in Trump's First Three Years: Myths and Realities*, BROOKINGS (Jan. 28, 2020), <https://www.brookings.edu/blog/fixgov/2020/01/28/judicial-appointments-in-trumps-first-three-years-myths-and-realities/> [<https://perma.cc/VD8J-BTDF>] (describing how the median age of Trump appointees is lower than the median age for the previous eight presidents' judicial appointees).

misconduct, then we will continue to fail to recognize how the clerkship process also entrenches some of the most problematic parts of an unequal profession.

### C. Reifying Power Structures Through Tastemakers

The clerkship process relies on tastemakers by outsourcing job-selection functions to other people. This Section explains how that allocation of responsibility happens and how it reproduces hierarchies and creates the potential for abuse in the legal profession.

#### 1. Outsourcing Job-Selection Functions

Certain professors and judges have significant power to influence decision-making and to help a judge determine which students are good clerkship candidates. One example of this is “feeder” judges. Supreme Court Justices recognize that specific judges are likely to hire clerks who do good work; the Justices then continue hiring from those judges.

But “feeder” professors also exist, although people may not use that specific term.<sup>99</sup> Yale Law School provides a helpful example. Because Yale does not have grades, obtaining a clerkship is just as much (if not more) about networking with professors.<sup>100</sup> Students are more likely to clerk for a feeder judge if they cultivate a relationship with certain influential professors. Even within the law school faculty, there may be shades of competition for which professors are more or less influential.<sup>101</sup> Until recently, two of the most visible professors who possessed that kind of influence were Jed Rubenfeld and Amy Chua, who are also married to each other. Yale Law students “felt they had to maintain a good relationship with Chua and Rubenfeld, so as not to screw up their chances.”<sup>102</sup>

In 2014, Rubenfeld published an op-ed criticizing universities’ efforts to adjudicate sexual assault claims. The op-ed included an assertion that “sex with someone under the influence is not automatically rape.”<sup>103</sup> Law students

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<sup>99</sup> Cf. Sandy Levinson, *Mark Tushnet and the “Next Age” Struggling to Be Born*, BALKINIZATION (Aug. 1, 2020, 9:30 AM), <https://balkin.blogspot.com/2020/08/mark-tushnet-and-next-age-struggling-to.html> [<https://perma.cc/G6QK-CHZP>] (referring to “feeder faculty”).

<sup>100</sup> See Dahlia Lithwick & Susan Matthews, *Investigation at Yale Law School*, SLATE (Oct. 5, 2018, 3:58 PM), <https://slate.com/news-and-politics/2018/10/jed-rubenfeld-amy-chua-yale-law-school.html> [<https://perma.cc/7WFC-YP9G>].

<sup>101</sup> Nielson, *supra* note 97, at 190.

<sup>102</sup> Lithwick & Matthews, *supra* note 100.

<sup>103</sup> Jed Rubenfeld, Opinion, *Mishandling Rape*, N.Y. TIMES (Nov. 15, 2014), <https://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html> [<https://perma.cc/29VD-EG9E>].

at Yale drafted an open letter and organized a town hall to criticize the op-ed. Multiple sources noted that Chua was offended by the criticism of her husband and “said she would ‘call every justice on the Supreme Court’ to ensure one of the student organizers behind the open letter did not get a clerkship.”<sup>104</sup> Students believed that upsetting Chua or Rubinfeld would be detrimental to their clerkship prospects and their careers.<sup>105</sup>

But students did not just fear angering Chua or Rubinfeld over ideological differences; they also feared upsetting them by refusing to agree to inappropriate interpersonal relationships or reporting sexual harassment. Female students at Yale Law School have anonymously stated that Rubinfeld repeatedly engaged in uncomfortable, inappropriate interactions.<sup>106</sup> When one student sought advice on engaging Yale’s Title IX process, she was told her anonymity could not be guaranteed. The student decided to wait another year to file a complaint because Rubinfeld was a necessary reference for her clerkship application and she could not afford to lose his support.<sup>107</sup> Three years later, another student decided not to file a complaint against Rubinfeld for the same reasons. Multiple students corroborated these accounts, although none were willing to be named “for fear of hurting their clerkship chances, or, for those who already are or were law clerks, for fear of embarrassing the prestigious judges they work or have worked for.”<sup>108</sup> Some dismissed Rubinfeld’s behavior as “borderline” or “creepy,” while others labeled it harassment. What unified these stories was how Rubinfeld’s enormous influence in the clerkship process made students uncomfortable reporting his behavior.<sup>109</sup>

In August 2020, Yale Law School announced that Rubinfeld would “leave his position as a member of the YLS faculty for a two-year period, effective immediately, and that upon his return, Rubinfeld would be barred from teaching small group or required courses” and “restricted in social gatherings with students.”<sup>110</sup> Yale Law School removed references to

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<sup>104</sup> Lithwick & Matthews, *supra* note 100 (Chua denies the allegation).

<sup>105</sup> *See id.*

<sup>106</sup> *Id.* (describing the allegations that Rubinfeld asked multiple women in his section to join him for late-night drinks, steered conversations toward inappropriate topics about relationships, and forced female students to talk about his physical characteristics).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Yale Law School hired an independent investigator to look into Rubinfeld’s actions. *Id.*

<sup>110</sup> Irin Carmon, *Yale Law Professor Jed Rubinfeld Has Been Suspended for Sexual Harassment*, N.Y. MAG. (Aug. 26, 2020), <https://nymag.com/intelligencer/2020/08/yale-professor-jed-rubinfeld-suspended-for-sexual-harassment.html> [<https://perma.cc/7QEC-46CU>] (internal quotation marks omitted).

Rubinfeld from its faculty site.<sup>111</sup> Rubinfeld denied the allegations as false and claimed he did not know who made the accusations. However, Yale Law School’s Title IX procedures required the complainant to identify herself to Rubinfeld.<sup>112</sup> At least one complainant explained that Rubinfeld’s statement was false, and that she had disclosed her identity to him despite the “considerable risk given his influence in the legal community.”<sup>113</sup> Yale Law School did not provide any comment on Rubinfeld’s or Chua’s role in grooming students for clerkships;<sup>114</sup> Chua apparently no longer has a role on the clerkship committee and told the *Guardian* that she was not investigated as part of the Title IX proceeding.<sup>115</sup>

## 2. *Replicating Hierarchies*

The problems with tastemakers—like Chua and Rubinfeld—are two-fold. On a basic level, providing that much power to any specific individual creates a situation that is rife for abuse and fear of retaliation.

But providing that level of power also allows tastemakers to replicate their views and gain influence on a much larger scale. If a student agrees with Rubinfeld’s positions and conduct (or at least does not speak out against him), he is more likely to clerk for a feeder judge, possibly clerk for a Supreme Court Justice, and then be in a position of power down the road.<sup>116</sup> Most law students are probably “eager to experience a relationship with a mentor” which makes them “prone to over-identify with such figures at the expense of their own independent growth and development.”<sup>117</sup> And because professors who are in the best position to help students get clerkships may help students who are similar to them, the structure of the legal profession

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> In a statement to faculty and the Yale Law School community regarding Rubinfeld’s leave on the morning it took effect, Dean Heather Gerken wrote that Yale Law School could not “comment on the existence of investigations or complaints.” *Id.*

<sup>115</sup> Stephanie Kirchgaessner, *Prominent Yale Law Professor Suspended After Sexual Harassment Inquiry*, *GUARDIAN* (Aug. 26, 2020, 5:49 PM), [https://www.theguardian.com/education/2020/aug/26/jed-rubinfeld-yale-law-school-suspended?CMP=share\\_btn\\_tw](https://www.theguardian.com/education/2020/aug/26/jed-rubinfeld-yale-law-school-suspended?CMP=share_btn_tw) [<https://perma.cc/BU2Q-W543>].

<sup>116</sup> See Leah Litman, *Redefining Reproductive Rights and Justice*, 118 *MICH. L. REV.* 1095, 1114–17 (2020) (discussing how the combined phenomenon of harassment and gatekeepers influences the law). See generally CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989) (identifying the male orientation of the law, which is created by men, as creating a feedback loop between who benefits from the law and writes it); Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 *SIGNS* 635 (1983) (same).

<sup>117</sup> Paul Horwitz, *Clerking for Grown-Ups: A Tribute to Judge Ed Carnes*, 69 *ALA. L. REV.* 663, 674 (2018). See generally Olufunmilayo B. Arewa, Andrew P. Morriss & William D. Henderson, *Enduring Hierarchies in American Legal Education*, 89 *IND. L.J.* 941 (2014).

replicates itself.<sup>118</sup> One important concern with this tendency to self-replicate is that the professors who are in a position to help students get clerkships “are overwhelmingly white, male, and middle class.”<sup>119</sup>

As we described above regarding Rubinfeld, some students might accept their professor’s behavior or adopt the professor’s views (or at least not challenge them) out of concerns about retaliation. But there are also other, more subtle incentives for students to mimic the behaviors of their professors. Assimilation might seem to provide the path of least resistance, and so students who are women or people of color may adapt to their white male professor’s style. Some students might do so just because they want to follow their role models. For others, assimilation might hold out the promise of future gain: matching the tone and style of a professor may make a student more likeable to the professor.<sup>120</sup> Students learn how a professor is unique and will try “to be supportive of those [attitudinal] differences” to create a better connection.<sup>121</sup>

It is not that this assimilation always happens, or even that assimilation is necessary for students to obtain recommendations or clerkships. But the incentive structures of the clerkship system and people’s implicit bias toward others like them might nonetheless produce some assimilation, particularly where there are not countervailing incentives. By way of a counterexample, while the legal academy tends to have more Democratic-leaning professors, the federal courts include fairly equal numbers of Democratic and Republican appointees.<sup>122</sup> More importantly, many of the Republican

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<sup>118</sup> See Ismail et al., *supra* note 40, at 47–48 (“Letters of recommendation can make or break an applicant’s chance at success during the application process.”).

<sup>119</sup> Catharine W. Hantzis, *Kingsfield and Kennedy: Reappraising the Male Models of Law School Teaching*, 38 J. LEGAL EDUC. 155, 161 (1988); MEERA E. DEO, *UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA* 4 (2019). Some women professors or professors of color at least “give the impression of thorough assimilation to” the same teaching style as their white, male colleagues. Hantzis, *supra*, at 161.

<sup>120</sup> As discussed below, this assimilation also alienates those who want to think differently. Students tend not to challenge a professor in a classroom setting because of these fears and concerns. See Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 605 (1982) (“[W]hen some teacher, at least once in some class, makes a remark that seems sexist or racist, or seems unwilling to treat black or women students in quite as ‘challenging’ a way as white students, or treats them in a more challenging way, or cuts off discussion when a woman student gets mad at a male student’s joke, . . . it is unlikely that the typical student will do anything then either.”).

<sup>121</sup> Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 54, 68 (David Kairys ed., 3d ed. 1998).

<sup>122</sup> See Wheeler, *supra* note 98 (noting that 54% of judges at the time of publication were appointed by Republican presidents).



appointees select candidates with Republican ideologies.<sup>123</sup> So students have little incentive to adopt more liberal ideologies in order to secure a clerkship; if anything, they have the opposite incentive to adopt more conservative ones (or at least not to outwardly embrace particularly liberal views). The same cannot be said for the issue of sexual harassment. There is no similar countervailing incentive for students to speak out about sexual harassment to counteract the incentive to assimilate with a profession that has been largely silent about misconduct.

As we have suggested, parroting the likes and dislikes of a judge also may help the student receive a clerkship, even if that parroting requires adopting a certain legal viewpoint or dressing a certain way.<sup>124</sup> The more successful the applicant is at assimilating, the more entrenched the “tendency toward ideological kinship between judges or Justices and their law clerks”<sup>125</sup> becomes.

This incentive system is one factor that replicates hierarchies within the profession. “[T]he reproduction of inequality in the profession is often guised under notions of meritocracy, which allows legal actors to explain inequality away due to the lack of specific animus towards diversity.”<sup>126</sup> Hiring practices can rely on criteria that discriminate based on gender and race while masquerading as objective factors. For example, some people have suggested that Justice Antonin Scalia preferred candidates with a law-and-economics background, which is far more prevalent among white men.<sup>127</sup> Grades can also be skewed by gender and race, especially if they are influenced by who speaks up in class and who appears more confident in his understanding of the material.<sup>128</sup> Clerkship interviews may select for the

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<sup>123</sup> See John Besche, *YLS Students Speak About Clerking for Trump Appointees*, YALE DAILY NEWS (Jan. 30, 2020, 11:54 PM), <https://yaledailynews.com/blog/2020/01/30/progressive-law-students-speak-about-clerking-for-trump-appointees/> [<https://perma.cc/YVJ5-P27P>]; Amy Bach, *Movin' On Up with the Federalist Society*, NATION (Sept. 13, 2001), <https://www.thenation.com/article/archive/movin-federalist-society/> [<https://perma.cc/8T7N-HPE5>].

<sup>124</sup> See Lithwick & Matthews, *supra* note 100 (noting that Rubinfeld and Chua told their students that Justice “Kavanaugh liked his female clerks to have ‘a certain look’”).

<sup>125</sup> Horwitz, *supra* note 117, at 673.

<sup>126</sup> Christopher Williams, *Gatekeeping the Profession*, 26 CARDOZO J. EQUAL RTS. & SOC. JUST. 171, 173 (2020).

<sup>127</sup> See David H. Kaye & Joseph L. Gastwirth, *Where Have All the Women Gone? The Gender Gap in Supreme Court Clerkships*, 49 JURIMETRICS J. 411, 432 (2009).

<sup>128</sup> See Mallika Balachandran, Roisin Duffy-Gideon & Hannah Gelbort, *Speak Now: Results of a One-Year Study of Women’s Experiences at the University of Chicago Law School*, 2019 U. CHI. LEGAL F. 647, 675. See generally Anna Parkman, *The Imposter Phenomenon in Higher Education: Incidence and Impact*, 16 J. HIGHER EDUC. THEORY & PRAC. 51 (2016) (noting that high achieving women often exhibit the imposter phenomenon or syndrome, lacking confidence despite their successes and doubting their abilities and the legitimacy of their accomplishments); Prue Brady, Katie McKay & Sarah Parker,

same traits. Judges and Justices may even explicitly select law clerks based on ideology and professional goals, which means they will select clerks who are similarly inclined to them. Some judges and Justices may also look at other proxies for ideology, such as a student's affiliation with the Federalist Society, or perhaps the mentorship of certain professors.

These structures have ripple effects throughout the profession. As we have explained, the clerkship system reproduces hierarchy in the legal profession.<sup>129</sup> By incentivizing assimilation with a primarily white male judiciary and academy, it perpetuates certain outlooks on sexual harassment and reporting—specifically, the federal courts' and legal profession's indifference and lack of sustained attention to sexual harassment.<sup>130</sup>

Many clerks also continue in the ideological paths of their judges after the clerkship. As Professor Paul Horwitz recognizes, judges may even “deliberately select for and mold law clerks with a tendency to become lifelong acolytes and advocates for their views and their reputation as judges.”<sup>131</sup> Clerks are likely to “absorb, and perpetuate, the system and the pathways that were responsible for their own clerkships rather than stand outside and critique them.”<sup>132</sup>

This system reproduces itself. One of the problems with relying on tastemakers for clerkships is that tastemakers' views are replicated in the legal profession. The next generation of tastemakers comes from the group that was selected by prior tastemakers. The views, the thoughts, and the actions of the prior tastemakers are then reproduced with few questions.

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Opinion, *Shattering Harvard Law School's Glass Ceilings*, HARV. L. REC. (Apr. 28, 2020), [hlrecord.org/shattering-harvard-law-schools-glass-ceilings/](https://hlrecord.org/shattering-harvard-law-schools-glass-ceilings/) [https://perma.cc/9NXW-6A75] (discussing the gender gap in 2019 for Latin honors). The Harvard Law School Women's Law Association now issues a yearly study documenting disparities in honors. See Women's L. Ass'n Admin., *Annual WLA Study Reveals Disparities in Latin Honors Awards Persist*, HARV. L. SCH. WOMEN'S L. ASS'N (Apr. 28, 2020), <https://orgs.law.harvard.edu/wla/shatterreport2020/> [https://perma.cc/4WAX-KGJ4].

<sup>129</sup> Kennedy, *supra* note 120, at 591.

<sup>130</sup> This Essay does not address the other ways in which the structure of the judiciary fosters a power imbalance. For example, the clerkship system requires many law students to pick up and move across the country, often to places where they have never lived before and do not know anyone. Clerks are isolated from their friends, family, and support networks. The isolation may make clerks more vulnerable to abuse and more financially vulnerable. Those sacrifices may make clerks more inclined to look back on their experiences fondly and claim the experiences are worth it. The system is structured to condition people to accept less than ideal treatment—working late hours and facing abusive comments becomes more reasonable when clerks have already been asked to leave their support systems, move away from family and friends, and live in an area that may even be hostile to their sexual orientation or racial identity.

<sup>131</sup> Horwitz, *supra* note 117, at 667, 672 (describing how obligations to a judge also do not disappear at the end of a clerkship—clerks are expected to keep in touch with chambers, attend reunions, and help their clerk “famil[ies]”).

<sup>132</sup> *Id.* at 667.

Certain voices continue to be heard and others—such as those of survivors and underrepresented minorities—continue to be stifled.

*D. Responses to Harassment*

This Section focuses on how our collective, tacit acceptance of harassment plays out with respect to our responses to incidents or allegations of harassment. It analyzes how individual silence forgoes an opportunity to forge new professional norms and reproduces inequities in the profession, and how common responses to harassment can do the same.

*1. Silence*

Before any harassment occurs in the courts, people who are likely to speak out against harassment are frequently siphoned off from the pool of clerkship candidates. People who do not conform to certain schools of thought or more deferential norms of behavior may not receive recommendations and mentorship from certain professors. People who do not receive those recommendations may not receive opportunities to clerk, let alone to clerk for influential or feeder judges. People who do not clerk are not given the same range of opportunities in post-employment positions. And so on. By elevating the voices of people who are similar to those already in power, we exclude the people who are more likely to have experienced harassment before—mostly women and people of color—from conversations and professional networks.

By centering the voices of white, male tastemakers who do not speak out against harassment and are less likely to have experienced it, the profession silences survivors of harassment and other forms of bias. It also discourages future victims, allies, and advocates from speaking up. Future victims are more likely to feel isolated if they do not see other victims come forward. Silence reinforces the lack of support for future victims; it insinuates that if victims do report, their reports will not be taken seriously. And when sexual harassment claims are made and no action is taken, the lack of accountability deflates victims and discourages them from coming forward in the future.<sup>133</sup>

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<sup>133</sup> The impact of gender bias and sexual harassment in the legal profession goes beyond lawyers' interactions with each other. When clients experience or observe sexual harassment and gender bias within the judiciary, they are far more likely to lose confidence in the justice system and decrease their own participation. Badesch, *supra* note 62, at 504; *see also* Warren Testimony, *supra* note 35, at 2 (“[T]he harassment that I experienced shaped my view of both the judiciary and the law more generally. The harm and pain that sexual harassment causes, and the aggravation of that harm when victims have no recourse and feel they cannot say or do anything about it, has long-term costs to the profession.”).

When the profession minimizes survivors' voices, we also prevent others from learning about potential discriminatory actions and events. "[L]eaders are left unable to properly assess and address the full breadth of discriminatory conduct within the profession."<sup>134</sup> This is why the EEOC recommends that organizations survey their employees to determine the prevalence of sexual harassment and bias as well as their sources.<sup>135</sup> Unfortunately, the judiciary has failed to engage in a backwards-looking survey to understand the sources and impact of sexual harassment on past clerks.

Silencing survivors of harassment and bias also limits what allies can do. When it seems as if a problem does not exist or is extremely limited in scope, allies may feel like they do not have to speak up. In the #MeToo movement, some people were inspired to provide support for their peers because of the volume of stories that were being shared. Those conversations are less likely to happen when harassment is not reported.<sup>136</sup>

Allyship is particularly important because "women and nonwhite executives are judged negatively when they engage in 'diversity-valuing behavior,' such as hiring diverse employees."<sup>137</sup> Without reports of misconduct or some acknowledgement about the prevalence of harassment or discrimination, allies who are already judged for their diversity efforts may be even less likely to speak up. And allies who are less likely to be judged for their diversity efforts, particularly white men, may not have personal experiences with harassment to draw upon.

## 2. *Silence and Reifying Hierarchies*

Silence in the face of harassment reproduces hierarchies in the profession in other ways as well. In addition to disproportionately silencing women and people of color, it also forces those same groups to shoulder the work of addressing harassment—work that is not currently rewarded or valued professionally.

Professor Veronica Root Martinez has explained how the disparities in demographic groups at major law firms are "tied directly to the profession's history of granting privilege to some groups while exercising discriminatory policies towards others, which has led to the current subordination and exclusion of women and persons of color from the most revered areas of the

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<sup>134</sup> Veronica Root Martinez, *Combating Silence in the Profession*, 105 VA. L. REV. 805, 843 (2019).

<sup>135</sup> See FELDBLUM & LIPNIC, *supra* note 55, at 37.

<sup>136</sup> See Root Martinez, *supra* note 134, at 842–43.

<sup>137</sup> *Id.* (internal quotation marks omitted).

profession.”<sup>138</sup> Women, people of color, and first-generation professionals are more likely to be excluded from the upper echelons of the legal profession.<sup>139</sup> That means their voices are more likely to be left out of important conversations. People who choose to report harassment typically lose opportunities for experience and mentorship in the legal profession, opportunities already “reserved for those who have traditionally been granted a large amount of privilege within the profession.”<sup>140</sup> “[S]purned harassers create barriers to female lawyers obtaining leadership positions, retaliating for rejections of advances or accusations of misconduct by refusing to give work to victims, turning partners in [a] firm against victims, and firing or refusing to promote victims.”<sup>141</sup> Although Professor Root Martinez’s analysis pertains to the entire legal profession, the professional incentives to remain silent are particularly acute in the context of the judiciary and clerkships.<sup>142</sup>

Professor Root Martinez further explains the professional reasons to remain silent and the professional costs<sup>143</sup> incurred by people who report or speak out against harassment:

When a member of an organization encounters a discriminatory event, they have a minimum of two choices: they can exercise voice and acknowledge the event or they can choose silence. . . . Attorneys within the legal profession, particularly those on the receiving end of discriminatory events, have often chosen silence over the exercise of voice. . . . “Women and minorities who experience bias are often reluctant to complain about it publicly. They don’t want to ‘rock the boat,’ seem ‘too aggressive’ or ‘confrontational,’ look like a ‘bitch,’ or be typecast as an ‘angry black.’ When lawyers do express concerns, the consequences are frequently negative, so many are advised to: ‘[L]et bygones be bygones,’ or just ‘move on.’”<sup>144</sup>

The institutional and professional norms that reward silence also deprive people of equal opportunities, which only further entrenches existing hierarchies. Some people will know how a judge treats their clerks

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<sup>138</sup> *Id.* at 818.

<sup>139</sup> *Id.*; see also JEFFERSON & JOHNSON, *supra* note 80, at 129–67 (describing how tokenism creates additional burdens on women and people of color, further isolating them while also excusing institutions from undertaking substantive changes).

<sup>140</sup> Root Martinez, *supra* note 134, at 819.

<sup>141</sup> Badesch, *supra* note 62, at 503.

<sup>142</sup> See *supra* Section II.B.2.

<sup>143</sup> “Loss of career status, pursuit of claims resulting in job losses, personal investments, cost of legal representation, and the emotional drain of the process all make harassment claims a burdensome pursuit.” Flores, *supra* note 31, at 93–94.

<sup>144</sup> Root Martinez, *supra* note 134, at 841–42 (quoting Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1056 (2011)).

and others will not. Relying on whisper networks to convey that information can have the effect of cluing in the people who are already in the know and already in privileged positions.

The best way to ensure more freely shared information would be through the courts, which could survey all current and recent clerks. Law schools can do some of that, but most law schools will not have students serving as clerks on every circuit, every district, much less in every judge's chambers. While schools may be able to aggregate information that is currently confined to individual professors or students, they do not have the courts' ability to conduct workplace surveys.

### 3. *Breaking the Silence: Norm Development*

What would using one's voice to challenge harassment and other forms of discrimination and inequity look like? It can be something as simple as a public statement along the lines of "this behavior is unacceptable, and I'm sorry [the victims] had to endure this." (People can of course expand on why certain behaviors are problematic and harmful!) Or it can be a bystander intervention in the moment or shortly afterwards—a corrective or challenge to a statement, or a suggestion or explanation about why someone's words or behavior were misguided.

What do these statements do, or what might they do? They have the potential to create new anti-harassment and anti-exclusionary norms. Groups and professional networks, especially in the legal profession, shape norms by policing the behavior of their members.<sup>145</sup> If enough group members say that particular behaviors are unacceptable, then people within that group come to understand that the behavior is unacceptable and act accordingly. Those shared understandings can make it easier to report the behavior when it does happen and prevent the behavior from happening again.

Developing norms against harassment and norms in favor of speaking up can make it easier for bystanders to speak up when harassment or abuse happens. Speaking up in the moment can feel awkward or uncomfortable; strong people have described themselves as feeling paralyzed or unable to

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<sup>145</sup> See Thomas Baumgartner, Lorenz Götte, Rahel Gügler & Ernst Fehr, *The Mentalizing Network Orchestrates the Impact of Parochial Altruism on Social Norm Enforcement*, 33 HUMAN BRAIN MAPPING 1452, 1453 (2012) (outlining the phenomenon of parochial altruism, which means "a preference for altruistic behavior towards" ingroup members); see also Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2279–80 (2018) ("Civil society actors similarly police presidential norms . . . . Other legal elites, including those in the academy, have long played a role articulating and critiquing the norms . . .").

speak up in the moment when they experience misconduct or observe it.<sup>146</sup> Getting in the habit of speaking up when misconduct occurs is like practicing any behavior. It gets easier if you have conditioned yourself through practice to act and to think as though sexual harassment is unacceptable. If everyone developing the habit of saying that harassing behavior is inappropriate, particularly in the moment, then the stakes are lower for any one individual to say so.

Speaking up alongside a survivor—and reaffirming their professional worth—is a way of counteracting the negative professional consequences that follow from reporting harassment. At a minimum, speaking up attempts to ameliorate the harm to the person who experienced harassment. Imagine if we spent as much time highlighting the professional accomplishments and the potential of women and people of color who experience harassment as we do highlighting the professional accomplishments of the people who harass them. Not only might that mitigate some of the harmful professional consequences of reporting and experiencing harassment, it could also lead us to better understand the costs of harassment by emphasizing the people who are derailed or distracted because of harassment.

Not speaking up has the unfortunate consequence of forcing a small number of individuals to expend their credibility and professional energies combatting sexual harassment rather than evenly distributing these costs among many different people. A broader network and coalition may have an easier time lobbying for legislative reform or administrative changes. Having more people speak up and speak out reduces the additional costs that harassment can impose, including shifting time and focus away from work that generates more professional advancement and professional capital.

When we delegate the issue of harassment to a small number of committed individuals, we also force those individuals into a box. They become people who are known or expected to speak out about harassment, which minimizes the force of their statements. That identity minimizes their work in other areas, since they become known as individuals focused on harassment and workplace misconduct, rather than for their other professional accomplishments.

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<sup>146</sup> See Jake Tapper, *Comey Was Taken Aback by Trump Request for Loyalty Pledge*, CNN (May 12, 2017, 4:43 PM), <https://www.cnn.com/2017/05/12/politics/james-comey-donald-trump-loyalty-pledge/index.html> [<https://perma.cc/4UND-THBA>]; Nicole Serratore, Opinion, *James Comey and the Predator in Chief*, N.Y. TIMES (June 8, 2017), <https://www.nytimes.com/2017/06/08/opinion/james-comey-and-the-predator-in-chief.html> [<https://perma.cc/7XJL-E4AB>]; Nell Scovell, *What It Feels Like for a Woman, and James Comey*, W MAG. (June 8, 2017, 11:10 PM), <https://www.wmagazine.com/story/james-comey-donald-trump-harassment-abuse-of-power/> [<https://perma.cc/8EAA-WKMW>].

Consider, for example, the letter signed by more than seventy of Judge Reinhardt's former clerks.<sup>147</sup> The letter indicated the signatories' support for extending the protections of Title VII to the Judicial Branch and implementing effective reporting and training systems in the courts. What if all seventy of those signatories, who include prominent practicing lawyers, law professors, and deans, made those goals some of their consistent focal points? The costs of speaking out on this issue might be shared by some of the members of our profession who are better able to bear them.

#### 4. Isolation and Minimization

One common reaction to allegations of harassment is to focus on if a colleague or friend who has been accused of harassment harassed you. If they did not, this idea is channeled in statements along the lines of "the person described in the allegations of harassment is not the person that I know."<sup>148</sup>

On some level, this response means only to convey that we did not personally see the most extreme instances of misconduct. But as we have explained, our responsibility for harassment goes beyond merely witnessing the most extreme instances of harassment. This particular response also obscures the reality that the person who harassed someone else *is* the friend or colleague that we know. They are not some completely different person. People who engage in sexual harassment do not always constantly behave badly, nor are they all cartoonishly evil predators with no redeeming qualities. The few people like that mostly appear on television shows like *Law and Order: Special Victims Unit*. Few people embody the most extreme version of their worst attributes all of the time. #MeToo has revealed how pervasive the problem of sexual harassment is, even among men who can be and have been good to other people.

The idea that only people who are bad to their core harass other people artificially and unnecessarily raises the stakes of reporting harassment. It means that to effectively accuse someone of sexual harassment, a victim

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<sup>147</sup> Rubino, *supra* note 27.

<sup>148</sup> See, e.g., Sam Bagenstos (@SBagen), TWITTER (Feb. 18, 2020, 4:35 AM), <https://twitter.com/sbagen/status/1229716016260952064> [<https://perma.cc/4M34-DVRT>] ("I'm not likely to say more about this, except: I believe Olivia Warren. What she describes does not reflect the man I knew. I support her courage in speaking out."); see also Kate Andrias (@KateAndrias), TWITTER (Feb. 18, 2020, 5:12 AM), <https://twitter.com/kateandrias/status/1229725371240714240> [<https://perma.cc/VMG7-4M4H>]; Ahilan Arulanantham (@Ahilan\_TooLong), TWITTER (Feb. 21, 2020, 3:00 AM) [https://twitter.com/ahilan\\_toolong/status/1230779278847025152](https://twitter.com/ahilan_toolong/status/1230779278847025152) [<https://perma.cc/7TSQ-QYUA>] ("I will always love Judge Reinhardt. I learned more from him in one year clerking than in three years of law school combined. He was a wonderful mentor too. He was a demanding boss, but always respectful of me. And I know the same is true for many women who worked for him.").



must overcome the additional bar of somehow proving the person is a “bad” person too. The false dichotomy between the cartoon villain sexual harasser and everyone else also allows us to ignore the many ways that well-intentioned people, including people who do good in this world, and institutional arrangements can facilitate harassment too. And it facilitates the quick reentry into professional networks and rehabilitation of harassers who have not reformed themselves or attempted to compensate for the harms they caused.

People also sometimes respond to allegations of harassment by pointing out all of the good things that a harasser has done throughout his career.<sup>149</sup> We think this choice exacerbates the professional costs of reporting harassment. We should focus equally, if not more, on the professional accomplishments and the potential of the people who experience and report harassment, as well as the people who support them.<sup>150</sup> Statements highlighting the good work of people accused of harassment also make addressing harassment more difficult by implying that some number of people are irreplaceable geniuses. That misconception contributes to a mindset that excuses harassment by powerful men, who are in positions to do a lot of things, good and bad. And it recasts their misconduct as the necessary cost or even associated quirks of geniuses or bosses with high standards.<sup>151</sup>

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<sup>149</sup> See, e.g., Eve Brensike Primus, *Some Thoughts from a Former Reinhardt Clerk*, [https://docs.google.com/document/d/1wJlyzAuuR6CiXJMca41mxhBKXn0xXMYQII\\_64D-rtI/edit](https://docs.google.com/document/d/1wJlyzAuuR6CiXJMca41mxhBKXn0xXMYQII_64D-rtI/edit) [<https://perma.cc/S9UM-7WP2>]; Rubino, *supra* note 27 (“The conduct the clerk described is totally unacceptable in any workplace. It is particularly unfortunate that this conduct occurred in the chambers of a preeminent judge who made pursuing justice his lifelong goal and who wrote countless opinions advancing the cause of gender equality, civil rights, and labor rights.”). Statements like these might be some evidence of why, in the letter’s words, “the clerk did not feel secure in reaching out to the network of Reinhardt clerks.” *Id.*

Some of the statements by former Reinhardt clerks included speculation into what might have led such a great man to engage in sexual harassment, such as the judge’s age as well as the poor health of the judge’s wife. See Primus, *supra*. Some attempted to portray Judge Reinhardt’s sadness about Kozinski’s resignation in light of sexual harassment accusations as an impetus for him to engage in harassment. These statements all overlook or willfully ignore Olivia Warren’s testimony, which referenced a drawing that Judge Reinhardt had made of breasts the year before she began her clerkship. See Warren Testimony, *supra* note 35, at 5–6.

<sup>150</sup> See, e.g., *id.* at 17 (“It also took countless hours of many other friends and mentors in the legal profession who spoke with and supported me. This is precious time that I and others in my network could have used for professional development, scholarship, or personal leisure activities and family.”).

<sup>151</sup> See e.g., Lazarus, *supra* note 87 (describing Kozinski as a quirky, irreplaceable genius).

Another implication of these statements, which is sometimes made explicit,<sup>152</sup> is that a harasser's legacy and work should be evaluated by weighing the harasser's work against his sexual harassment.<sup>153</sup> That too can deter survivors from reporting powerful harassers. People in power are in a position to do a lot of things—many more things than young lawyers at the beginning of their careers. To weigh a harasser's life work against his harassment is to stack the deck in favor of harassers and harassment. That calculation isolates survivors of harassment and retaliation, as the statements convey support for the harasser or retaliator, in addition to the person they harassed. It also contributes to feelings of alienation among people who experience harassment or retaliation, and it can cause reasonable fears of retaliation in people who are considering reporting harassment and even the people who are supporting others who choose to report harassment. It will also lead to the reemergence of harassers before they have adequately addressed the harms they caused or adjusted their attitudes and behaviors.

The statements also create other costs of reporting harassment. By highlighting the burdens and difficulties that reports of harassment create for the friends and colleagues of someone who is accused of harassment, the statements demand that people who are considering whether to report harassment incorporate those burdens and difficulties into their decision-making calculus. It is true that allegations of harassment can generate difficult and complicated feelings among the friends and colleagues of someone who has been accused of harassment. But dwelling on those feelings, and choosing to highlight them in response to the allegations of harassment, can reasonably raise fears about possible retaliation. It also contributes to feelings of alienation in the people who experienced harassment or retaliation who will feel isolated from the people and networks

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<sup>152</sup> See Primus, *supra* note 149 (“I also feel sad for Judge Reinhardt, his family, and what this will mean for his legacy.”).

<sup>153</sup> Other statements bought into this framework for understanding sexual harassment by suggesting that it was somehow fair for a prominent liberal judge to be accused of sexual harassment after a prominent conservative judge had been. These statements likewise suggest that what matters in assessing harassment claims is a judge's politics and the consequences for the judge—not the judge's victims. See Jonathan H. Adler (@JAdler1969), TWITTER (Feb. 13, 2020, 10:00 AM), <https://twitter.com/jadler1969/status/1227985826379792384> [<https://perma.cc/UXL8-Z33W>] (“And what about all the people who (rightly) criticized Kozinski and yet remained silent about Reinhardt's worse behavior?”); Jonathan H. Adler (@JAdler1969), TWITTER (Feb. 13, 2020, 10:15 AM), <https://twitter.com/jadler1969/status/1227989594710274048> [<https://perma.cc/5QK4-PV6W>] (“I nonetheless have questions about those who were savaging Kozinski while simultaneously covering for Reinhardt.”); Marin K Levy (@MarinKLevy), TWITTER (Feb. 13, 2020, 3:42 PM), <https://twitter.com/marinklevy/status/1228072087186759686> [<https://perma.cc/R6YN-D2VA>] (“[T]he arguments about ‘consistency’ read a lot like, ‘our guy was taken down and it’s not fair that yours wasn’t, too.’ As if the one who was harmed was the judge or those of his political persuasion.”).

who are expressing how difficult it was to hear about the harassment or retaliation. For law clerks experiencing harassment, reporting misconduct may alienate them from the very clerk networks they had hoped to gain access to by clerking in the first place.

Statements along these lines also invite people who are watching and listening to conversations about harassment to feel for and to empathize with the harasser as much as, if not more than, the person they harassed. That is part of how we excuse harassment and isolate the people who experience it—by minimizing the effects of harassment on people who experience it and maximizing our empathy for powerful men.

There are, of course, different ways that one might engage with accused harassers and their work. One is by reevaluating and revisiting someone's work in light of the knowledge that they subjected someone or several people to sexual harassment.<sup>154</sup> Another is to consider whether to continue buying or supporting their work (where that is applicable). In law, we can also reevaluate how we talk about a person who has been accused of sexual harassment and their work. Some people have chosen to include references to allegations of harassment when they present or share work that is authored by someone accused of harassment; doing that, at least, gives people a fuller picture without erasing someone's misconduct or sending the message that the misconduct does not matter in the grand scheme of things.<sup>155</sup> Another quite reasonable response is to rethink whether we should fall back on unqualified positive references to someone accused of harassment or unnecessary references to their views. For example, do we continue to have to say, "As Judge Kozinski once remarked . . . .?"

#### *E. Pernicious Effects of Our Clerkship System on Other Equities*

The structural issues that allow sexual harassment to flourish in the judiciary also affect the lack of diversity in the judiciary. The clerkship pipeline rewards assimilation, including remaining silent about sexual

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<sup>154</sup> *E.g.*, A.O. Scott, *My Woody Allen Problem*, N.Y. TIMES (Jan. 31, 2018), <https://www.nytimes.com/2018/01/31/movies/woody-allen.html> [<https://perma.cc/97TC-PKNT>]; Jeet Heer & Josephine Livingstone, *Woody Allen, #MeToo, and the Separation of Art and Artist*, NEW REPUBLIC (Feb. 2, 2018), <https://newrepublic.com/article/146876/woody-allen-metoo-separation-art-artist> [<https://perma.cc/HF9H-UKF5>].

<sup>155</sup> *See e.g.*, Emily Murphy (@ProfEmilyMurphy), TWITTER (Aug. 2, 2018, 6:05 PM), <https://twitter.com/ProfEmilyMurphy/status/1025155534108876800> [<https://perma.cc/ABQ7-6QHB>].

harassment. But assimilation also impacts and reproduces other equities along the lines of race, sexuality, and socioeconomic status.<sup>156</sup>

Recent events on the D.C. Circuit exemplify how certain voices can be silenced, both through hiring practices and the deference afforded to judges as employers and thought leaders. “Judge Laurence Silberman of the U.S. Court of Appeals for the District of Columbia Circuit opposed an early version of” Senator Elizabeth Warren’s proposal to ban “Confederate markers at gravesites in military cemeteries.”<sup>157</sup> Judge Silberman shared his views with a mailing list of hundreds of people—judges, law clerks, and staff.<sup>158</sup> He referenced the “madness proposed by Senator Warren” as “the desecration of Confederate graves” and reminded readers that “his ancestors had fought on both sides during the Civil War.”<sup>159</sup> Judge Silberman continued: “It’s important to remember that Lincoln did not fight the war to free the slaves . . . . Indeed he was willing to put up with slavery if the Confederate states returned.”<sup>160</sup>

For two days, no one responded to Judge Silberman’s email, which he sent after weeks of Black Lives Matter protests around the nation and amidst the possible start of a national reckoning with race relations, systemic and institutional racism, and Confederate history.<sup>161</sup> The first person to respond was not a judge, but Derrick Petit, “one of only five [B]lack law clerks in the entire circuit” (including the district courts).<sup>162</sup> Petit incisively responded:

As people considered to be property, my ancestors would not have been involved in the philosophical and political debates about Lincoln’s true intentions or his view on racial equality . . . . For them, and myself, race is not an abstract topic to be debated, so in my view anything that was built to represent white racial superiority, or named after someone who fought to maintain white supremacy (or the Southern economy of slavery) . . . should be

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<sup>156</sup> See William H. Simon, *Judicial Clerkships and Elite Professional Culture*, 36 J. LEGAL EDUC. 129, 133 (1986) (“The main function of clerkships is to reproduce certain aspects of elite professional culture.”).

<sup>157</sup> Debra Cassens Weiss, *Law Clerk Speaks Up After Judge’s Courtwide Email Sparks Debate over Removing Confederate Symbols*, ABA J. (June 18, 2020, 4:00 PM), <https://www.abajournal.com/news/article/law-clerk-speaks-up-after-us-appeals-judge-opines-on-lincolns-civil-war-intentions> [<https://perma.cc/MU4C-U3SP>].

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* (internal quotation marks omitted).

<sup>161</sup> Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/89DF-X8VT>] (detailing the Black Lives Matter protests in 2020).

<sup>162</sup> Cassens Weiss, *supra* note 157.

removed from high trafficked areas of prominence and placed in museums where they can be part of lessons that put them in context. . . . This moment of confronting our nation's racial history is too big to be disregarded based on familial ties.<sup>163</sup>

Petit noted that he sent the email “[s]ince no one in the court’s leadership ha[d] responded to [Silberman’s] message.”<sup>164</sup> Eventually, two Black judges responded and thanked Petit for speaking up. A third judge attempted to give Judge Silberman an out by suggesting that Judge Silberman’s email, despite its wording, may have been limited in its intended scope. Judge Silberman eventually thanked Petit and said that his concern was limited only to cemeteries. Judge Silberman did not explain why, if that was the case, he decided to state that the Civil War was not really about slavery.<sup>165</sup>

Although a law clerk did eventually speak up against Judge Silberman’s problematic email, the clerk took a serious risk by doing so. And even then, another judge attempted to provide Judge Silberman with an out instead of challenging the substance of Judge Silberman’s defense of the Confederacy and minimization of the role of slavery in the Southern states. Judge Silberman’s words were problematic, but the system in which Judge Silberman’s comments occurred is even more so.

The judiciary already lacks Black voices, both in its judges and in its employees. From 2006 to 2010, the percentage of African-American appellate clerks dropped from an already low 3.5% to 2.4%.<sup>166</sup> At the district court level, only 3.2% of clerks are African-American.<sup>167</sup> For those who experience microaggressions in law school and the workplace such as Judge Silberman’s email, the decision about whether to speak up is a difficult one. Black clerks face a lack of support from their non-Black peers. Black clerks will likely fear either retaliation or judgment or both for reporting. And these

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<sup>163</sup> *Id.* (second and third omissions in original) (internal quotation marks omitted).

<sup>164</sup> Ann E. Marimow, *A Judge’s All-Courthouse Email Sparks Debate over Removal of Confederate Symbols*, WASH. POST (June 16, 2020, 3:25 PM), [https://www.washingtonpost.com/local/legal-issues/a-judges-all-courthouse-email-sparks-debate-over-removal-of-confederate-symbols/2020/06/16/477f58c4-aff3-11ea-8758-bfd1d045525a\\_story.html](https://www.washingtonpost.com/local/legal-issues/a-judges-all-courthouse-email-sparks-debate-over-removal-of-confederate-symbols/2020/06/16/477f58c4-aff3-11ea-8758-bfd1d045525a_story.html) [<https://perma.cc/8M4A-MJWN>] (internal quotation marks omitted).

<sup>165</sup> *Id.*

<sup>166</sup> Todd Ruger, *Statistics Show No Progress in Federal Court Law Clerk Diversity*, NAT’L L.J. (May 2, 2012), <https://www.law.com/nationallawjournal/almID/1202551008298&et=editorial&bu=National%2520Law%2520Journal&cn=20120503nlj&src=EMC-Email&pt=NLI.com-%2520Daily%2520Headlines&kw=Statistics%2520show%2520no%2520progress%2520in%2520federal%2520court%2520law%2520clerk%2520diversity&slreturn=1/?slreturn=20200522164928> [<https://perma.cc/RVS9-5YT2>].

<sup>167</sup> *Id.*

same Black clerks have already been told by law schools that they must assimilate in order to succeed.<sup>168</sup> Every part of the profession tells them that their voices are not important, and that asking for reform or even an apology would fall on deaf ears. That may be why no one spoke up before Derrick Petit felt forced to respond to a federal judge's email which insinuated that the Civil War was not about slavery. And that may be why, when Derrick Petit bravely used his voice, another judge chose to minimize the substance of the exchange by offering Judge Silberman a way to explain his words rather than apologize for them.

If we collectively do not take responsibility for the failures of the clerkship system, every individual within that system can easily opt out of advocating for change. Preferential hiring practices will continue, and certain types of people and voices will continue to be replicated under the guise of a merits-based hiring system. And when another judge makes a public or even private comment along the lines of Judge Silberman's (or Kozinski's or Judge Reinhardt's), there may not be another Derrick Petit or Heidi Bond or Olivia Warren in the room willing to call out that behavior.

#### CONCLUSION

Problems of collective action are notoriously difficult to solve.<sup>169</sup> If everyone has some stake in the problem, then the affected, interested group is so large that it can be difficult to coordinate that group to do anything. A large group may also limit individual group members' feelings of personal responsibility. If everyone is part of or contributes to a problem, then our own role may seem insignificant, which makes it easier for us to sit on the sidelines. But that means harassment will continue.

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<sup>168</sup> See Hannah Taylor, *The Empty Promise of the Supreme Court's Landmark Affirmative Action Case*, SLATE (June 12, 2020, 1:50 PM), <https://slate.com/news-and-politics/2020/06/grutter-v-bollinger-michigan-law-diversity-racism.html> [<https://perma.cc/UDQ7-36YV>] ("Academia pays us lip service without addressing why there are so few Black voices in the first place: its own perpetuation of a racist system."); see also Courtney Liss, *Want to Change the Law? Change Law School*, ABA (June 17, 2020), <https://abaforlawstudents.com/2020/06/17/want-to-change-the-law-change-law-school/> [<https://perma.cc/7XMU-D5B4>] ("It took each of us sharing heartbreaking personal narratives, demanding the public and the administration look into our wounds directly for administrators to be great lawyers who could understand the purpose of the old precedent (to help foster a diverse and inclusive educational environment) and create new methods of achieving that purpose, including saying publicly that Black Lives Matter and sharing the Black Law Student Association's demands with students and alumni to drive accountability.").

<sup>169</sup> See generally A. C. PIGOU, *THE ECONOMICS OF WELFARE* (4th ed. 1932) (arguing that individual actors are ill-equipped to internalize all negative externalities of their activities due to collective action problems); R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (describing how transaction costs lead to collective action problems).

We like to think that the collective, interconnected nature of sexual harassment also provides an opportunity to address it. Dahlia Lithwick's essay on Kozinski highlighted how widespread understandings and observations about the judge's inappropriate behavior led people to do nothing about the judge's conduct.<sup>170</sup> Everyone observed the behavior, and because it was out in the open, people convinced themselves that the behavior was not worth doing anything about.

What if, instead, understanding our collective responsibility for sexual harassment freed us all to acknowledge our own role in a system that perpetuates sexual harassment? If everyone is responsible for the system that enables sexual harassment and if everyone participates in that system, then it is harder to condemn any one person for their behavior. Our collective responsibility, in other words, might eliminate some of the discomfort with acknowledging our fault. If everyone is responsible, then no one is particularly responsible,<sup>171</sup> and acknowledging our responsibility does not expose us to any particular blame. That collective responsibility and fault-free zone might provide people with the space to be honest about our collective responsibility for sexual harassment, to do the right things, and to push back against the current culture of silence.

As daunting as systemic problems may seem, this may be one of the potential upshots to them. Yet it is not lost on us that, to date, the only people who have done any real reflection on their role in this particular structural problem are second- and third-year law students: those who devoted space in the *Harvard Law Review* blog to examine their institution's practice of judge tributes and those who have given space in the *Northwestern University Law Review* to address this topic. Our profession should follow these students' leads and engage in a wide-ranging and public introspection about our own individual roles in this systemic problem.

We are not asking for public self-flagellation, nor are we asking people to gratuitously throw their friends, colleagues, or mentors under the bus. What we are asking for is public reflection that would allow people to learn from the mistakes that got us to where we are today. Without that, we will be left in the dark. Public commitments to being more attuned to misogyny and harassment may also prevent us from finding ourselves in this same place all over again.

Sexual harassment is a serious problem, and sexual harassment in the legal profession is no exception. We should treat sexual harassment like we

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<sup>170</sup> Dahlia Lithwick, *Judge Kozinski Made Us All Victims and Accomplices*, SLATE (Dec. 13, 2017, 3:11 PM), <https://slate.com/news-and-politics/2017/12/judge-alex-kozinski-made-us-all-victims-and-accomplices.html> [<https://perma.cc/RHL7-GTF9>].

<sup>171</sup> There are, of course, some notable exceptions to this.

treat other serious problems—as worthy of our attention, as demanding sustained study into its causes, and as requiring our own involvement in fixing it.