

## JUDICIAL ETHICS IN THE #METOO WORLD

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*This Article examines the judicial role in professional ethics regulation through the lens of the judiciary's own self-governance on sexual misconduct. The #MeToo movement exposed the long-enduring silence of the courts. Headlines featured judges like Alex Kozinski, who retired from the Ninth Circuit in 2018 after numerous former clerks went to the media with credible allegations of sexual misconduct. In 2019, at the instruction of Chief Justice Roberts, the federal judiciary amended the Code of Conduct for United States Judges to make clear that misconduct includes unwanted, offensive, or abusive sexual conduct and to include protections for those who report such behavior. But many argue the reforms do not go far enough. Congress, in the wake of media outcries, held hearings in early 2020. The judiciary's tepid response holds consequences not only for the judges and the survivors of sexual misconduct but also for the legal profession as a whole. Leaving meaningful #MeToo remedies to journalists and lawmakers threatens judicial independence; it sets a precedent that could influence further intervention into other areas of professional conduct governance that is traditionally reserved for the courts. After offering additional reforms for addressing sexual misconduct in the judiciary, this Article concludes by reflecting on lessons that can be drawn about the judicial role in professional ethics regulation more broadly.*

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## INTRODUCTION

The abuse women have suffered in the nation's courthouses has been a largely untold story. And its system for complaints—where judges police fellow judges—is a world so closely controlled and cloaked in secrecy that it defies public scrutiny.

—Joan Biskupic, CNN Legal Analyst, 2018<sup>1</sup>

The power dynamics of the federal judiciary create an environment that, without appropriate procedures in place, unnecessarily place judicial employees, clerks, and interns at risk and foster a culture of silence.

—U.S. House Committee on the Judiciary, 2020<sup>2</sup>

In law school, everyone knew, and women didn't apply to clerk . . . despite his prestige and connections to the Supreme Court.

—Alexandra Brodsky, civil rights attorney, 2017<sup>3</sup>

How is it possible that “everyone knew”<sup>4</sup> what has been reported in the public sphere as an “untold story”<sup>5</sup> hidden in “a culture of silence”<sup>6</sup> about sexual misconduct in the judiciary? The answer to this question cuts to the heart of judicial independence,<sup>7</sup> which is a value so important to notions of separation of powers that the courts historically have been left to govern themselves,<sup>8</sup> even at the expense of abuse sustained by the very individuals who dedicate their careers to service in the law.

1. Joan Biskupic, *CNN Investigation: Sexual Misconduct by Judges Kept Under Wraps*, CNN (Jan. 26, 2018, 12:35 PM), <https://www.cnn.com/2018/01/25/politics/courts-judges-sexual-harassment/index.html> [<https://perma.cc/MF82-V4WX>].

2. Press Release, H. Comm. on the Judiciary, Nadler, Scanlon, Johnson and Sensenbrenner Call for U.S. Courts to Reform & Streamline Handling of Workplace Misconduct in the Courts (Mar. 6, 2020), <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=2856> [<https://perma.cc/D9WX-2CZE>].

3. See Rebecca Traister, *This Moment Isn't (Just) About Sex. It's Really About Work.*, THE CUT (Dec. 10, 2017), <https://www.thecut.com/2017/12/rebecca-traister-this-moment-isnt-just-about-sex.html> [<https://perma.cc/VDU4-K88M>] (quoting a 2017 tweet from civil rights attorney Alexandra Brodsky about Ninth Circuit U.S. Court of Appeals judge Alex Kozinski).

4. *Id.*

5. Biskupic, *supra* note 1.

6. Press Release, H. Comm. on the Judiciary, *supra* note 2.

7. See Michael Traynor, *Some Friendly Suggestions for the Federal Judiciary About Accountability*, 168 U. PA. L. REV. ONLINE 128, 130 (2020) (“Independent federal judges are essential to our democracy and the rule of law.”).

8. See, e.g., Harry T. Edwards, *Regulating Judicial Misconduct and Divining “Good Behavior” for Federal Judges*, 87 MICH. L. REV. 765, 796 (1989) (“[J]udicial self-regulation over matters that do not involve impeachable or criminal action is the proper approach to uphold that tradition of judicial independence.”); Biskupic, *supra* note 1 (“Judges have vigorously fought efforts from Congress to install an inspector general to oversee potential

The #MeToo movement challenged a hallmark of the judicial branch of government—self-regulation. Notably, this challenge arose outside of the legal framework judges are most familiar with for addressing sexual misconduct: the courtroom. What the public knows about sexual misconduct in the judiciary has come to light only after media investigations sparked by #MeToo voices—not from the judges themselves. Accountability, to the extent it occurs, comes from the court of public opinion, not the halls of justice.

Perhaps the best known example is Alex Kozinski, who retired from the Ninth Circuit in 2018 after more than two dozen former clerks went to the media with credible allegations of sexual misconduct.<sup>9</sup> Even with this overwhelming evidence, Kozinski was able to terminate the investigation by choosing to retire (in his case with an annual pension of approximately \$200,000 annually), thus avoiding any official findings—let alone meaningful remedies or discipline.<sup>10</sup> Months later he was back before his court, now as an advocate.<sup>11</sup>

As a student at the University of Chicago Law School in the late 1990s, I specifically recall warnings via the whisper network that, while Alex Kozinski was an excellent feeder for those seeking a U.S. Supreme Court clerkship, he treated women badly. It was understood that applying to be his clerk was, implicitly, preparing to endure sexual harassment as a rite of passage. Or, if one wanted to avoid such treatment, other judges would be a better “fit.” In some ways, it seemed like a badge of honor to tolerate such mistreatment, one that might come with the prize of further professional advancements.<sup>12</sup> At the time, I considered the advice helpful and, unfortunately, not dissimilar to warnings received over the years in other employment settings about certain men to avoid. My understanding at the time was that the federal judiciary viewed this behavior as something that, at

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judicial wrongdoing, based on the constitutional separation of powers and the view that they can root out wrongdoers on their own.”).

9. Biskupic, *supra* note 1.

10. *Id.*

11. See Blake Brittain & Melissa Heelan Stanzione, *Kozinski Argues Case at 9th Circuit After Sex Misconduct Claims*, BLOOMBERG L. (Dec. 9, 2019, 3:35 PM), <https://news.bloomberglaw.com/us-law-week/kozinski-returns-to-9th-cir-to-argue-shape-of-water-case> [<https://perma.cc/7H35-S2YQ>]; Sara Randazzo & Nicole Hong, *At Law Firms, Rainmakers Accused of Harassment Can Switch Jobs with Ease*, WALL ST. J. (July 30, 2018, 11:38 AM), <https://www.wsj.com/articles/at-law-firms-rainmakers-accused-of-harassment-can-switch-jobs-with-ease-1532965126> [<https://perma.cc/C3EP-UJN7>]; see also Claire Atkinson, *Daily Beast Highlights Journalists' Frustrations with High-Powered Lawyers of High-Powered Men*, NBC NEWS (July 20, 2018, 4:21 PM), <https://www.nbcnews.com/card/daily-beast-highlights-journalists-frustrations-high-powered-lawyers-high-powered-n893141> [<https://perma.cc/9XSX-MKSP>].

12. I am not alone in this perception. See, e.g., Leah M. Litman & Deeva Shah, *On Sexual Harassment in the Judiciary*, 115 NW. U. L. REV. 599, 624 (2020) (“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.”).

best, was deliberately ignored and, at worst, actively condoned. If I wanted to avoid it, I need not apply.

Kozinski's avoidance of sanctions for sexual harassment is not an anomaly.<sup>13</sup> For example, after receiving a formal reprimand from the Judicial Council of the Fifth Circuit for "'inappropriate and unwanted physical and nonphysical advances' toward a female courthouse staff member in his court chambers," federal district court judge Walter S. Smith Jr. retired in 2016 with his annual pension, ending any further investigation.<sup>14</sup> Similarly, in 2008, the media exposed federal district court judge Edward Nottingham's "alleged misconduct involving prostitutes" only for the Judicial Council of the Tenth Circuit to end its investigation after his resignation.<sup>15</sup>

This lack of accountability is a problematic aspect of judge-driven professional ethics regulation. Institutional legitimacy is compromised. Judges are able to avoid their own procedures, ostensibly designed to remedy sexual misconduct, by resigning their positions. Two sitting Supreme Court Justices have been credibly accused of sexual misconduct before their appointments, without any formal acknowledgment or resolution.<sup>16</sup>

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13. The judicial misconduct watchdog organization, Fix the Court, maintains a list of federal judges who have retired with their full pensions after being accused of or found to have engaged in misconduct. See *Retiring to Avoid Consequences: Judges Exploit a Loophole to Maintain Pensions in Spite of Misconduct*, FIX THE CT. (May 2, 2019), <https://fixthecourt.com/2019/05/retiring-to-avoid-consequences-judges-exploit-a-loophole-to-maintain-pensions-in-spite-of-misconduct> [<https://perma.cc/YH69-CUQM>].

14. Tommy Witherspoon, *Federal Judge Smith Retires During Ongoing Investigation*, WACO TRIB.-HERALD (Sept. 19, 2016), [https://wacotrib.com/news/local/crime-and-courts/federal-judge-smith-retires-during-ongoing-investigation/article\\_a44e8589-2cfb-5719-97ec-a1362bce08f2.html](https://wacotrib.com/news/local/crime-and-courts/federal-judge-smith-retires-during-ongoing-investigation/article_a44e8589-2cfb-5719-97ec-a1362bce08f2.html) [<https://perma.cc/J5DM-KFXC>] (quoting Order & Memorandum of Reasons, *In re* Complaint of Jud. Misconduct Against U.S. Dist. Judge Walter S. Smith, Jr. Under the Jud. Improvements Act of 2002, No. 05-14-90120 (5th Cir. Jud. Council Sept. 28, 2016)) (stating that Smith retired with his annual pension of \$203,100); see also Wendy N. Hess, *Addressing Sexual Harassment in the Legal Profession: The Opportunity to Use Model Rule 8.4(g) to Protect Women from Harassment*, 96 U. DET. MERCY L. REV. 579, 591 n.92 (2019) (noting an Arizona case in which "a male judge 'repeatedly pursued a sexual relationship [with]' . . . and retaliated against [a lawyer] for rejecting his sexual advances" but "because the judge resigned, the harshest sanction available to the court in its judicial discipline proceeding was censure" (citing and quoting *In re* Abrams, 257 P.3d 167, 168–69 (Ariz. 2011) (en banc))); Bob Egelko, *Judge Richard Cebull Sent Hundreds of Racist E-mails, Panel Says*, S.F. GATE (Jan. 20, 2014, 5:33 PM), <https://www.sfgate.com/nation/article/Judge-Richard-Cebull-sent-hundreds-of-racist-5160325.php> [<https://perma.cc/9P6H-9L4G>].

15. Biskupic, *supra* note 1 ("In Denver, the 10th Circuit judicial council followed local media when it began looking into alleged misconduct involving prostitutes by District Court Judge Edward Nottingham . . . . As the investigation was being completed, Nottingham resigned. The 10th Circuit judicial council, which repeated the salacious allegations in its report, dismissed the complaint the next day but said his resignation was "in the interest of justice and the judiciary." (quoting Order, *In re* Edward W. Nottingham, No. 2007-10-372-36 (10th Cir. Jud. Council Oct. 30, 2008))). Nottingham served on the U.S. District Court for the District of Colorado from 1989 to 2008. See *Nottingham, Edward Willis, Jr.*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/nottingham-edward-willis-jr> [<https://perma.cc/4YVF-YWJ8>] (last visited Jan. 27, 2021).

16. See Tammy Kupperman et al., *Kansas Federal Judge Publicly Reprimanded Following Sexual Misconduct Allegations*, CNN (Sept. 30, 2019, 9:04 PM),

Headlines regularly continue to expose state<sup>17</sup> and federal<sup>18</sup> judges who have subjected their employees and others to sexual assault, discrimination, and harassment.<sup>19</sup> Congressional hearings feature testimonies of survivors and calls for legislative reform.<sup>20</sup> The dynamics presented in this context reveal larger, systemic concerns about how the judiciary polices itself (or fails to police itself) in all areas of judicial ethics.

In 2019, at the instruction of Chief Justice Roberts,<sup>21</sup> the federal judiciary amended the Code of Conduct for United States Judges (“the Code of Conduct”) to make clear that misconduct includes unwanted, offensive, or abusive sexual conduct and to protect those who report such behavior.<sup>22</sup> Under the new provisions, an investigation can continue after a judge leaves office—though it is still the case that no jurisdiction remains to impose individual sanctions, thus preserving a safe harbor for judges from individual accountability.<sup>23</sup>

This Article examines the judicial role in professional ethics regulation—and the threat of media influence or external legislative control—through the lens of the judiciary’s own self-governance of sexual misconduct. Whisper

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<https://www.cnn.com/2019/09/30/politics/kansas-judge-reprimanded-following-sexual-misconduct-allegations/index.html> [<https://perma.cc/FQ3Z-8M4X>] (“In late 2018, the 10th Circuit judicial council dismissed 83 complaints that had been filed against new Supreme Court Justice Brett Kavanaugh. Its order said that Kavanaugh, as a Supreme Court justice, was no longer covered by the judiciary’s misconduct rules. That decision was affirmed by the federal judiciary’s top panel on judges’ conduct in August.”); *see also* David A. Graham, *The Clarence Thomas Exception*, ATLANTIC (Dec. 20, 2017), <https://www.theatlantic.com/politics/archive/2017/12/clarence-thomas-anita-hill-me-too/548624> [<https://perma.cc/9MFM-AQZN>].

17. Erin Coe, *State of Confusion*, LAW360 (Apr. 16, 2019), <https://www.law360.com/articles/1149753/wall-of-secrecy-surrounds-sexual-harassment-in-state-courts> [<https://perma.cc/G75X-PKG5>]; Andrew Denney & Dan M. Clark, *In #MeToo Era, New York Courts’ New Sexual Misconduct Policy Was Done Too Quietly, Critics Charge*, N.Y.L.J. (Nov. 6, 2018, 4:08 PM), <https://www.law.com/newyorklawjournal/2018/11/06/in-metoo-era-new-york-courts-new-sexual-misconduct-policy-was-done-too-quietly-critics-charge> [<https://perma.cc/X2LK-DDR9>]; Maura Dolan, *Appeals Court Justice Should Be Ousted for Sexual Misconduct, Judicial Watchdog Says*, L.A. TIMES (June 2, 2020, 5:50 PM), <https://www.latimes.com/california/story/2020-06-02/judicial-watchdog-justice-removal> [<https://perma.cc/74AJ-XEYZ>].

18. John Council, *Walter Smith’s Unsatisfying Goodbye*, TEX. LAW. (Nov. 1, 2016, 12:00 AM), <https://www.law.com/texaslawyer/almID/1202770448997/Walter-Smiths-Unsatisfying-Goodbye> [<https://perma.cc/TY83-UQZH>]; Mihir Zaveri, *Federal Judge in Kansas Resigns After Reprimand for Sexual Harassment*, N.Y. TIMES (Feb. 19, 2020), <https://www.nytimes.com/2020/02/19/us/judge-carlos-murguia-sexual-harassment.html> [<https://perma.cc/STGP-UUBG>].

19. *See, e.g., supra* notes 17–18.

20. *See, e.g., Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct: Hearing Before the Subcomm. on Cts., Intell. Prop. & the Internet of the H. Comm. on the Judiciary*, 116th Cong. (2020) [hereinafter *Protecting Federal Judiciary Employees Hearing*].

21. *See* U.S. SUP. CT., 2017 YEAR-END REPORT ON THE FEDERAL JUDICIARY 11 (2017), <https://www.supremecourt.gov/publicinfo/year-end/2017year-endreport.pdf> [<https://perma.cc/7L6D-4LTK>].

22. *See* 2 JUD. CONF. OF THE U.S., GUIDE TO JUDICIARY POLICY pt. A, Canon 3B(4), at 11 (2019).

23. *See id.* at 20.

networks, meant to protect against harm, instead perpetuated a structure that resulted in the sexual harassment and abuse of dozens, if not hundreds, of employees in the federal and state judicial systems. Scholars and commentators have collected numerous anecdotes about the judiciary's sexual misconduct but to date, no one has collected comprehensive data.<sup>24</sup> What we do know, however, is that this behavior has occurred repeatedly—often endured in silence.<sup>25</sup>

Part I of this Article opens with a brief history of judicial ethics, offering an explanation for why the courts traditionally have been left to govern themselves and those who practice before them. Part II then turns to examine how media revelations and legislative responses, in the vacuum of the judiciary's silence on sexual misconduct, became de facto regulators. Part III explores how both the formal and informal structures governing judicial conduct resulted, effectively, in a safe harbor for harassers—in some cases for decades. It describes what I call “whisper networks” and “harassment grooming” as part of the culture of confidentiality that allowed for a world where, once admitted to the legal profession as a law student, “everyone knew” about sexual misconduct and yet, for the survivors and the public, untold stories were consigned to a well-established culture of silence. Part III also considers the burdens and obligations of bystanders. Part IV builds on the recent reforms to federal judicial ethics for addressing sexual misconduct and proposes future steps, looking in part to the Australian experience. This Article concludes by reflecting on lessons from the judiciary's #MeToo reckoning that can be drawn about the judicial role in professional ethics regulation more broadly and calls on the legislature to pass wide-sweeping reforms should the judiciary fail to do so.

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24. Cynthia Gray, *Sexual Harassment and Judicial Discipline*, JUDGES' J., Fall 2018, at 14, 15 (“[T]he Kansas Supreme Court removed a judge from office for repeatedly, over an extended period, looking at adult websites on his office computer in violation of an administrative order. . . . Other judge-specific sexual misconduct that has led to discipline includes beginning a Facebook relationship with a woman met in his official capacity and exchanging sexually explicit messages and photos with her, often during office hours and from the offices of the probate court; having an extramarital affair with another judge and presiding over cases in which the other judge's husband represented a party; signing a consent divorce decree for the secretary with whom the judge was having an affair; attending out-of-town seminars with a staff member with whom the judge was having an affair; discussing the operation of the drug court generally and a particular defendant's case with a staff member before or after sexual encounters and using an official email account to facilitate a sexual encounter; and patting a clerk on the buttocks after telling her he had contacted the city attorney about a ticket she had received.” (footnotes omitted)); see also *York County Judge Faces Charges After Sexual Misconduct Allegations*, ABC27 (June 29, 2020), <https://www.abc27.com/news/local/york/york-county-judge-faces-charges-after-sexual-misconduct-allegations> [<https://perma.cc/BU5K-JTL5>] (“A York County Judge is facing charges after allegations of sexual misconduct from his staff, the Pennsylvania Judicial Conduct Board announced on Monday. . . . The allegations date back to 2014.”).

25. See, e.g., Justine Coleman, *Former Law Clerk Testifies She Feared Reporting Sexual Harassment to Court System*, HILL (Feb. 13, 2020, 4:59 PM), <https://thehill.com/regulation/court-battles/483038-former-law-clerk-testifies-she-feared-reporting-sexual-harassment-to> [<https://perma.cc/PM96-39L3>].

## I. JUDGES (NOT) REGULATING JUDGES

State courts and federal courts subject their judges to different levels of ethical scrutiny, and this is no less true when it comes to sexual misconduct. Part I.A discusses the history of judicial ethics in state courts, and Part I.B then does the same for federal courts.

## A. State Courts

State courts self-impose ethical obligations through judicial codes of ethics, most based on the American Bar Association (ABA) Model Code of Judicial Conduct (“the Code”). The ABA adopted the first formal set of judicial rules, known as the Canons of Judicial Ethics (“the Canons”), in 1924. The Canons, mostly aspirational,<sup>26</sup> were a reaction to a scandal involving Kenesaw Mountain Landis, a federal judge who simultaneously acted as the first commissioner of baseball, charged with cleaning up bribery and other illegal activity in major league baseball.<sup>27</sup> Holding the dual roles led to “harsh criticism from lawyers for tarnishing the image of the judiciary by retaining his federal judgeship while serving as Commissioner,” but no specific rules prohibited him from holding public and private offices at the same time.<sup>28</sup> The ABA sanctioned Landis due to its general concern about the appearance of impropriety and then turned its efforts to crafting the Canons.<sup>29</sup> Although adopted by a majority of the states, the Canons contained aspirational goals without prescribing formal mechanisms and applied only to state courts.<sup>30</sup>

The ABA adopted the Code to replace the Canons in 1972, fueled both by controversy surrounding Justice Abe Fortas’s appointment to the Supreme Court<sup>31</sup> and concerns about the lawyers involved in the Watergate affair.<sup>32</sup> Then retiring California Chief Justice Roger Traynor led the drafting of the Code, which focused on updating the Canons and creating enforceable rules (rather than aspirational standards) covering judicial misconduct, including

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26. See, e.g., Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Gets*, 94 MINN. L. REV. 1914, 1925 (2010) (discussing one example of the aspirational nature of Canon 4, entitled “Avoidance of Impropriety,” which stated that “[a] judge’s official conduct should be free from impropriety and the appearance of impropriety” and a judge’s personal behavior “should be beyond reproach” (alteration in original) (quoting CANONS OF JUD. ETHICS Canon 4 (AM. BAR ASS’N 1924))).

27. See Jon P. McClanahan, *Safeguarding the Propriety of the Judiciary*, 91 N.C. L. REV. 1951, 1961–62 (2013).

28. McKoski, *supra* note 26, at 1923.

29. *Id.*

30. See Carolyn A. Dubay, *Public Confidence in the Courts in the Internet Age: The Ethical Landscape for Judges in the Post-Watergate Era*, 40 CAMPBELL L. REV. 531, 542 (2018).

31. See *id.* at 543 (“Justice Fortas’s close relationship to President Lyndon Johnson brought into the spotlight the lack of any ethical rules to protect the perception of judicial independence.”).

32. See McKoski, *supra* note 26, at 1926–28.

disqualification.<sup>33</sup> Revised in 1990 and 2007, most states have adopted the Code, at least in part if not entirely.<sup>34</sup>

The Code states that judges should not “in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment.”<sup>35</sup> The ABA amended its Model Rules of Professional Conduct, which govern lawyers, in 2016 to include a provision banning “conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.”<sup>36</sup> While Vermont quickly adopted a similar rule, several other states affirmatively rejected it—including Texas, where the state’s attorney general issued an opinion challenging its validity on First Amendment grounds.<sup>37</sup> Commentators have suggested that the rule offers an opportunity to protect against sexual harassment.<sup>38</sup> At least one lawsuit has been filed challenging the rule as adopted in Pennsylvania on free speech and vagueness grounds.<sup>39</sup> The Code, however, has not been similarly revised.

### B. Federal Courts

The Code of Conduct for United States Judges, first adopted on April 5, 1973, governs federal judges.<sup>40</sup> The Code of Conduct underwent substantial revisions in 1992, with additional updates over the years.<sup>41</sup> Because Title VII of the Civil Rights Act of 1964<sup>42</sup> is inapplicable to most employees in

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33. *See id.* at 1928.

34. Dubay, *supra* note 30, at 547.

35. MODEL CODE OF JUD. CONDUCT r. 2.3 (AM. BAR ASS’N 2010).

36. MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS’N 2020).

37. *See* David L. Hudson Jr., *States Split on New ABA Model Rule Limiting Harassing or Discriminatory Conduct*, ABA J. (Oct. 1, 2017, 3:30 AM), [https://www.abajournal.com/magazine/article/ethics\\_model\\_rule\\_harassing\\_conduct](https://www.abajournal.com/magazine/article/ethics_model_rule_harassing_conduct) [<https://perma.cc/Y2XQ-G8Z2>].

38. *See* Hess, *supra* note 14, at 596 (arguing that the use of Model Rule 8.4(g) “makes particular sense because the ‘legal profession is largely self-governing’” and noting that “[a]n advantage of using 8.4(g) to address sexually harassing behavior, rather than Title VII or a more restrictive professional ethical rule, is that it protects a broader swath of people with whom a lawyer interacts in a professional capacity” (quoting MODEL RULES OF PRO. CONDUCT pmb1. para. 10)).

39. *See* Debra Cassens Weiss, *Suit Claims Anti-bias Ethics Rule Infringes Lawyer’s Free Speech Rights*, ABA J. (Aug. 11, 2020, 3:23 PM), <https://www.abajournal.com/news/article/suit-claims-anti-bias-ethics-rule-infringes-lawyers-free-speech-rights> [<https://perma.cc/AX4A-E4E7>].

40. ADMIN. OFF. OF THE U.S. CTS., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 9–11 (1973), <https://www.uscourts.gov/file/1619/download> [<https://perma.cc/4P29-BUYW>].

41. *See* 2 JUD. CONF. OF THE U.S., *supra* note 22, at pt. A, intro., at 2 (“This Code applies to United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges.”).

42. 42 U.S.C. § 2000e–2000e-17. Though if Title VII did apply, it would be ineffectual to address much of the conduct discussed in this Article. *See* Deborah L. Rhode, *#MeToo: Why Now?: What Next?*, 69 DUKE L.J. 377, 383–84 (2019) (describing the “limitations in current legal responses to sexual harassment,” including the inadequacies of Title VII).



the judicial branch, the Judicial Conference of the United States<sup>43</sup> operates under its own internal process for handling complaints, leaving to each court the responsibility of creating a “plan tailored to its own needs” based on a model equal employment opportunity plan and a model employment dispute resolution plan.<sup>44</sup> These plans, which are administered by the “circuit judicial council . . . composed of the chief circuit judge and an equal number of circuit and district court judges,” according to former federal district court judge Nancy Gertner, “could not be more general.”<sup>45</sup> Needless to say, this system has not functioned to prevent sexual misconduct and, indeed, seems to have enabled it. In Judge Gertner’s words: “To the extent that the complaint process is supposed to give content to the rules—defining what is or what is not harassment or discrimination—the rules are effectively inaccessible to employees or, for that matter, other judges.”<sup>46</sup>

Chief Justice Roberts, in his 2017 year-end report on the state of the judiciary, acknowledged that “recent months have illuminated the depth of the problem of sexual harassment in the workplace, and events in the past few weeks have made clear that the judicial branch is not immune.”<sup>47</sup> He directed the judiciary to conduct “a careful evaluation of whether its standards of conduct and its procedures for investigating and correcting inappropriate behavior are adequate to ensure an exemplary workplace for every judge and every court employee.”<sup>48</sup> This evaluation included a “working group” charged with making recommendations to reform “our codes of conduct, our guidance to employees—including law clerks—on issues of confidentiality and reporting of instances of misconduct, our educational programs, and our rules for investigating and processing misconduct complaints.”<sup>49</sup>

The most recent adoptions occurred in March 2019,<sup>50</sup> in response to the #MeToo revelations of sexual misconduct involving Alex Kozinski. In 2019, the federal judiciary amended the Code of Conduct to make clear that misconduct includes engaging in “unwanted, offensive, or abusive sexual conduct,”<sup>51</sup> to protect those who report misconduct, and to add more training and an “Office of Judicial Integrity” to facilitate complaints and education—but some argue the reforms do not go far enough.<sup>52</sup> Moreover, those rules

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43. Known as the “Judicial Conference,” this is “the national policy-making body for the federal courts.” *About the Judicial Conference*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference> [https://perma.cc/A4ZZ-5MVW] (last visited Jan. 27, 2021).

44. Nancy Gertner, *Sexual Harassment and the Bench*, 71 STAN. L. REV. ONLINE 88, 89 (2018) (quoting 12 JUD. CONF. OF THE U.S., *supra* note 22, § 240).

45. *Id.* at 89, 90.

46. *Id.* at 90.

47. U.S. SUP. CT., *supra* note 21, at 11.

48. *Id.*

49. *Id.*

50. *See supra* note 22 and accompanying text.

51. 2 JUD. CONF. OF THE U.S., *supra* note 22, at pt. A, at 11.

52. *See Patricia Barnes, Lawmakers’ Verdict: Judiciary Must Do “Much” More to Stop Sexual Harassment by Federal Judges*, FORBES (Mar. 6, 2020, 9:53 PM), <https://www.forbes.com/sites/patriciabarnes/2020/03/06/lawmakers-verdict-judiciary-must->

do not apply to state judges or to the U.S. Supreme Court, which declines to follow any officially adopted ethical obligations, though not without criticism.<sup>53</sup> Congress, believing the reforms to be too weak, held hearings on sexual misconduct in the federal judiciary in early 2020.<sup>54</sup>

Codes of conduct for judges typically focus on fairness, impartiality, and the legitimacy of the judiciary, but this does not mean they should be limited to those goals. A workplace free from harassment supports the public's confidence in the integrity of the judiciary and also sets a model for other institutions of trust. To date, however, the judiciary seems content to leave accountability-inducing measures to journalists and lawmakers rather than crafting meaningful, sustained reform from within.

## II. EXTERNAL REGULATORS: SOCIAL MOVEMENTS, MEDIA, AND LEGISLATORS

The #MeToo movement emerged full force in the fall of 2017. First created by Tarana Burke, a Black woman, in 2006—Burke, incidentally, rarely gets attribution for her significant contributions<sup>55</sup>—the effort went mainstream over a decade later, when celebrity actress Alyssa Milano tweeted about her own experience with sexual assault/harassment on October 15, 2017, and prompted millions of other women to do the same.<sup>56</sup> The #TimesUp movement followed in January 2018 to support women in sexual harassment cases and raised a legal defense fund of more than twenty million dollars.<sup>57</sup> Many women revealed publicly, for the first time, sexual assaults and harassment that they had kept hidden their entire lives. Some published detailed descriptions of the trauma, such as the op-ed penned by journalist Connie Chung in the *Washington Post*<sup>58</sup> and the profiles by actresses Ashley

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do-much-more-to-stop-sexual-harassment-by-federal-judges [https://perma.cc/Z7HX-PBUD].

53. See Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEGAL ETHICS 443, 446–48 (2013); Nan Aron, Opinion, *An Ethics Code for the High Court*, WASH. POST (Mar. 13, 2011), [https://www.washingtonpost.com/opinions/an-ethics-code-for-the-high-court/2011/03/11/ABILNzT\\_story.html](https://www.washingtonpost.com/opinions/an-ethics-code-for-the-high-court/2011/03/11/ABILNzT_story.html) [https://perma.cc/SY6J-ETVK]; Alicia Bannon & Johanna Kalb, *Why We Need a Code of Ethics for the Supreme Court*, TIME (Oct. 1, 2019, 4:57 PM), <https://time.com/5690513/code-ethics-supreme-court> [https://perma.cc/BCU9-BTHZ].

54. See, e.g., *Protecting Federal Judiciary Employees Hearing*, *supra* note 20.

55. In 2017, *Time* magazine named Burke, among a group of other prominent activists dubbed “the silence breakers,” as its “Person of the Year.” Stephanie Zacharek et al., *The Silence Breakers*, TIME (Dec. 18, 2017), <http://time.com/time-person-of-the-year-2017-silence-breakers> [https://perma.cc/2232-2J5F].

56. Alyssa Milano (@Alyssa\_Milano), TWITTER (Oct. 15, 2017, 4:21 PM), [https://twitter.com/alyssa\\_milano/status/919659438700670976?lang=en](https://twitter.com/alyssa_milano/status/919659438700670976?lang=en) [https://perma.cc/2ECK-TRKL]; Nadja Sayej, *Alyssa Milano on the #MeToo Movement: “We’re Not Going to Stand for It Any More.”* GUARDIAN (Dec. 1, 2017, 7:00 AM), <https://www.theguardian.com/culture/2017/dec/01/alyssa-milano-mee-too-sexual-harassment-abuse> [https://perma.cc/5BBB-233X].

57. See RENEE KNAKE JEFFERSON & HANNAH BRENNER JOHNSON, *SHORTLISTED: WOMEN IN THE SHADOWS OF THE SUPREME COURT* 13 (2020).

58. Connie Chung, Opinion, *Dear Christine Blasey Ford: I, Too, Was Sexually Assaulted—and It’s Seared into My Memory Forever*, WASH. POST (Oct. 3, 2018, 12:47 PM),

Judd and Gwyneth Paltrow featured in the *New York Times*, along with eighteen other victims.<sup>59</sup> Not only did the effort bring women together to share their experiences but it also brought prominent men down, literally, from their positions of power.

One year after the #MeToo movement went viral, the *New York Times* inventoried the number of “high-profile men and women in the United States who permanently lost their jobs or significant roles, professional ties or projects (e.g., concert tours, book deals) within the [previous] year after publicly reported accusations of sexual misconduct.”<sup>60</sup> The list featured more than 200 men and three women.<sup>61</sup> Only two men on the list were practicing lawyers or judges—Eric Schneiderman, the former attorney general of New York, and Alex Kozinski<sup>62</sup>—a statistic that is more reflective of the legal profession’s culture of silence than a culture free of sexual misconduct.<sup>63</sup> Indeed, we know from a 2018 study by the International Bar Association, “the largest-ever global survey on bullying and sexual harassment in the profession,” that “[o]ne in three female respondents had been sexually harassed in a workplace context, as had one in 14 male respondents.”<sup>64</sup> Similarly, CNN’s 2018 investigation compiled and reviewed “nearly 5,000 judicial orders related to misconduct complaints” going back a decade and concluded that “the judiciary itself is hiding the depth of the problem of misconduct by judges.”<sup>65</sup> Specifically, the study found that “[v]ery few cases against judges are deeply investigated, and very few judges are disciplined in any way. In many years, not a single judge is sanctioned.”<sup>66</sup>

On February 6, 2020, the bipartisan leadership of the U.S. House of Representatives Committee on the Judiciary sent a highly unusual letter to the chief judges of the Tenth Circuit and the U.S. District Court for the District of Kansas, as well as the secretary of the Judicial Conference of the

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[https://www.washingtonpost.com/opinions/dear-christine-blasey-ford-i-too-was-sexually-assaulted-and-its-seared-into-my-memory-forever/2018/10/03/2449ed3c-c68a-11e8-9b1c-a90f1daae309\\_story.html](https://www.washingtonpost.com/opinions/dear-christine-blasey-ford-i-too-was-sexually-assaulted-and-its-seared-into-my-memory-forever/2018/10/03/2449ed3c-c68a-11e8-9b1c-a90f1daae309_story.html) [<https://perma.cc/WDA4-GNRY>].

59. *How Saying #MeToo Changed Their Lives*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/interactive/2018/06/28/arts/metoo-movement-stories.html> [<https://perma.cc/5GJH-K7RN>].

60. Audrey Carlsen et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women.*, N.Y. TIMES (Oct. 29, 2018), <https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html> [<https://perma.cc/SD8X-HB25>].

61. *See id.*

62. *See id.*

63. *See* INT’L BAR ASS’N, US TOO?: BULLYING AND SEXUAL HARASSMENT IN THE LEGAL PROFESSION 11 (2019), <https://www.ibanet.org/bullying-and-sexual-harassment.aspx> [<https://perma.cc/K9KR-QPY8>]; *see also* ABA COMM. ON WOMEN IN THE PRO., YOU CAN’T CHANGE WHAT YOU CAN’T SEE: INTERRUPTING RACIAL & GENDER BIAS IN THE LEGAL PROFESSION: EXECUTIVE SUMMARY 9–10 (2018), <https://www.americanbar.org/content/dam/aba/administrative/women/you-cant-change-what-you-cant-see-print.pdf> [<https://perma.cc/VK92-JX8U>].

64. INT’L BAR ASS’N, *supra* note 63, at 11 (stating that the survey included approximately 7000 respondents from 135 countries “from across the spectrum of legal workplaces: law firms, in-house, barristers’ chambers, government and the judiciary”).

65. Biskupic, *supra* note 1.

66. *Id.*

United States. The congressmembers questioned “the adequacy of the rules and statutes” covering sexual misconduct by the federal judiciary.<sup>67</sup> The letter noted “serious, longstanding, unaddressed harm,” which the judiciary “failed to stop,” that occurred over “a long period of time.”<sup>68</sup> It was provoked after an investigation found that federal district court judge Carlos Murguia “had made sexually suggestive comments and sent inappropriate text messages to some employees . . . [and] continued to harass employees even after one of them told him to stop.”<sup>69</sup> The judge also “engaged in an affair with a felon,” leading him to resign.<sup>70</sup>

The House Judiciary Committee letter was unusual not only because it called the judiciary to account for its “culture of silence”<sup>71</sup> but also—importantly—because Congress historically leaves the courts to govern themselves.<sup>72</sup> Notably, it was written *after* the judiciary adopted new policies and procedures in 2019 specifically designed to address sexual misconduct and other workplace harassment, reforms that the committee acknowledged but still found lacking.<sup>73</sup> The lawmakers’ letter declared “that systemic problems are at the heart of this issue.”<sup>74</sup> A February 2020 hearing saw even more revelations about long-standing sexual misconduct in judicial chambers.<sup>75</sup>

Legislative intervention into the professional conduct of lawyers is rare and even more so for the judiciary. Unsurprisingly, it typically surfaces as a reaction to highly public scandals brought to light by the media. Legislative interest in lawyer and judicial regulation followed scandals like the collapse of Enron<sup>76</sup> and, before that, scandals surrounding Abe Fortas’s tenure on the

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67. See Letter from Rep. Jerrold Nadler, Chair, H. Comm. on the Judiciary, Rep. Mary Gay Scanlon, Vice Chair, H. Comm. on the Judiciary, Rep. F. James Sensenbrenner Jr. & Rep. Henry C. Johnson, Chairman, Subcomm. on Cts., Intell. Prop. & the Internet, to James C. Duff, Sec’y, Jud. Conf. of the U.S., the Hon. Julie A. Robinson, C.J., U.S. Dist. Ct. for the Dist. of Kan. & the Hon. Timothy M. Tymkovich, C.J., U.S. Ct. of Appeals for the Tenth Cir. (Feb. 6, 2020) [hereinafter Judiciary Committee Letter], [https://judiciary.house.gov/uploadedfiles/02.06.2020\\_murguia\\_letter.pdf?utm\\_campaign=2580-519](https://judiciary.house.gov/uploadedfiles/02.06.2020_murguia_letter.pdf?utm_campaign=2580-519) [https://perma.cc/332K-JNNM].

68. *Id.* at 2.

69. Zaveri, *supra* note 18.

70. *Id.*

71. Litman & Shah, *supra* note 12, at 644.

72. See Anthony J. Scirica, *Judicial Governance and Judicial Independence*, 90 N.Y.U. L. REV. 779, 780 (2015) (“Congress has fostered and validated the federal judiciary’s capacity for self-governance.”).

73. See Judiciary Committee Letter, *supra* note 67 (questioning “the effectiveness of the Judiciary’s recent reforms to address workplace harassment”).

74. *Id.*

75. See *Protecting Federal Judiciary Employees Hearing*, *supra* note 20 (statement of Olivia Warren, former clerk to U.S. Court of Appeals J. Stephen Reinhardt) (revealing publicly for the first time sexual harassment that occurred during her tenure as a clerk for Judge Stephen Reinhardt and how the harassment “indelibly colored my view of the judiciary and its ability to comprehend and adjudicate harm”).

76. *Role of Attorneys in Corporate Governance: Hearing Before the Subcomm. on Cap. Mkts., Ins. & Gov’t Sponsored Enters. of the H. Comm. on Fin. Servs.*, 108th Cong. 1–2 (2004) [hereinafter *Role of Attorneys in Corporate Governance Hearing*].

Supreme Court.<sup>77</sup> In recent years, Congress has also stepped in to regulate legal advice, for example, controlling information given about bankruptcy filings<sup>78</sup> or prohibiting designated terrorist organizations from receiving any legal advice at all.<sup>79</sup> From time to time, hearings have examined lawyer and judicial ethics.<sup>80</sup>

When the judiciary fails to discipline itself, it leaves governance to external forces like lawmakers and journalists. As one scholar has observed, “[t]he judiciary is most responsive, and perhaps only responsive, when there’s some kind of media attention.”<sup>81</sup> But even the media microscope of the #MeToo movement has not inspired national, systemic sexual harassment reforms within the federal or state judiciaries.

Congress and state legislatures should step up to fill this void. Part IV offers a list of reforms that could be instituted by the judiciary itself or legislatively. But, before turning to those recommendations, it is important to examine the historical dynamics at play that led to courts harboring harassers.

### III. HARBORING HARASSERS

No official, comprehensive list or database exists cataloging complaints of sexual misconduct against judges.<sup>82</sup> But enough cases have come to light in the #MeToo world to demonstrate that the judiciary has harbored harassers over years and, in some cases, decades. This is not a uniquely American phenomenon. Rather, it stems from the power dynamic inherent in the role of the judge,<sup>83</sup> which is reflected in court policies and practices.<sup>84</sup> To

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77. CHARLES GARDNER GEYH ET AL., *JUDICIAL CONDUCT AND ETHICS* § 1.04 (5th ed. 2018) (noting that in the 1960s, members of Congress promoted increased federal regulation of judicial conduct due to the Fortas controversy and other scandals).

78. *See generally* Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229 (2010) (holding that a state may mandate an advertising disclosure for lawyers providing bankruptcy-related services).

79. *See, e.g.*, Holder v. Humanitarian L. Project, 561 U.S. 1 (2010) (holding that Congress may limit legal advice to designated foreign terrorist organizations).

80. *See, e.g.*, *Protecting Federal Judiciary Employees Hearing*, *supra* note 20; *Examining Ethical Responsibilities Regarding Attorney Advertising: Hearing Before the Subcomm. on Const. & Civ. Just. of the H. Comm. on the Judiciary*, 115th Cong. (2017); *Role of Attorneys in Corporate Governance Hearing*, *supra* note 76; *Judicial Independence: Discipline and Conduct: Hearings on H.R. 1620, H.R. 1930, and H.R. 2181 Before the Subcomm. on Cts., Intell. Prop. & the Admin. of Just. of the H. Comm. on the Judiciary*, 101st Cong. (1989); *The Organized Bar: Self-Serving or Serving the Public?: Hearing Before the Subcomm. on Representation of Citizen Ints. of the S. Comm. on the Judiciary*, 93rd Cong. (1974).

81. Biskupic, *supra* note 1 (“Much of the known judicial action related to sexual misconduct was taken because of forces outside the established system, such as media coverage.”).

82. *See id.*

83. *See, e.g.*, *Protecting Federal Judiciary Employees Hearing*, *supra* note 20 (statement of Deeva V. Shah, founder, Law Clerks for Workplace Accountability) (explaining that the “power dynamic alone—with judges seeming larger-than-life—can make it feel near impossible to speak up against a life-tenured federal judge”).

84. *See* Helen Hershkoff & Elizabeth M. Schneider, *Sex, Trump, and Constitutional Change*, 34 CONST. COMMENT. 43, 86–87 (2019) (“By design or omission the federal courts likewise had wrapped judicial sexual misconduct in a cloak of confidentiality. In particular,

illustrate the tensions at play and the failings of the existing structures intended to prevent harassment, this Article focuses on three judges, two from the U.S. federal judiciary and one from the High Court of Australia—Australia’s equivalent to the Supreme Court. This list is by no means exhaustive and more cases surfaced even as this Article was in its final stages.<sup>85</sup>

A. “Everyone Knew”: *Whisper Networks and Harassment Grooming*

A core value of the legal profession, and the judiciary especially, is confidentiality. The only other profession that enjoys such strong protections against disclosure of information is the clergy. Perhaps for this reason, the judiciary has been described by clerks as a place of “worshipful silence.”<sup>86</sup> Professional conduct rules require lawyers to keep all information related to a client confidential,<sup>87</sup> and law students learn early on that this secrecy is highly valued. The norms of confidentiality associated with clients spill over into interactions among lawyers and judges themselves.<sup>88</sup> Discretion is prioritized, especially in hierarchical relationships between students and professors, associates and partners, and clerks and judges. The Federal Judicial Center’s *Law Clerk Handbook* specifically prohibits clerks from sharing “information received in the course of official duties, except as required in the performance of their duties.”<sup>89</sup> Only after allegations of Kozinski’s harassment became public was the handbook revised so that “clerks are *permitted*, but not *required*, to report instances of harassment.”<sup>90</sup>

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the employment agreements of judicial clerks and other court personnel contained confidentiality provisions that could be understood to bar or at least to discourage victims from reporting . . . and information about the judiciary’s Employment Dispute Resolution Plan was not publicized, was difficult to locate, and restricted the filing of a complaint to a 30-day limitations period.”).

85. See, e.g., Pilar Melendez, *Fox News’ Judge Andrew Napolitano Faces Second Sexual-Assault Lawsuit*, DAILY BEAST (Sept. 28, 2020), <https://www.thedailybeast.com/fox-news-judge-andrew-napolitano-faces-second-sexual-assault-lawsuit> [https://perma.cc/Q5J2-WKJ4]; John Seasley, *Judge Mauricio Araujo Quits Before Panel Could Remove Him Over Sexual Harassment Accusations*, CHI. SUN TIMES (Oct. 1, 2020), <https://chicago.suntimes.com/politics/2020/10/1/21497986/mauricio-araujo-judge-resigns-sexual-harassment-cook-county-illinois-courts-commission> [https://perma.cc/W689-YMBL]; Debra Cassens Weiss, *California Appeals Judge Is Removed from Bench for Sexual Harassment and Unwanted Touching*, ABA J. (June 3, 2020), <https://www.abajournal.com/news/article/california-appeals-judge-is-removed-from-bench-for-sexual-harassment-and-unwanted-touching> [https://perma.cc/R8GU-B2NZ].

86. Dahlia Lithwick, *He Made Us All Victims and Accomplices*, SLATE (Dec. 13, 2017), <https://slate.com/news-and-politics/2017/12/judge-alex-kozinski-made-us-all-victims-and-accomplices.html> [https://perma.cc/8USY-XKH3].

87. See, e.g., MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS’N 2020).

88. See Lithwick, *supra* note 86 (“Some of these clerks are still encumbered by the . . . norms that stipulate that clerks must not speak out against or question their judges, norms to which Kozinski insisted strict adherence.”).

89. Litman & Shah, *supra* note 12, at 615 (quoting FED. JUD. CTR., LAW CLERK HANDBOOK: A HANDBOOK FOR LAW CLERKS TO FEDERAL JUDGES 7 (3d rev. 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/T7AL-AVX2]).

90. *Id.*

The pressure to maintain confidentiality is especially acute for “judicial clerks who serve for one or two years as a stepping-stone”<sup>91</sup> to the most elite spaces in the legal profession, like the law school professoriate, the Office of Legal Counsel, or private practice, where Supreme Court clerkship bonuses of as much as \$400,000 await.<sup>92</sup> “Unlike many places of employment, a judge’s chambers are highly intimate”<sup>93</sup> and what happens within them stays within.<sup>94</sup> “In many ways, the relationship is more similar to that of a professor and a student than a traditional employment relationship.”<sup>95</sup> This power dynamic justifies greater structural protections, a point I return to in Part IV. Judicial clerks are few in number and rely heavily on the recommendations from their judges for the next step in their career paths. The pressure not to report misconduct is fierce; indeed, a decision to report likely will be life altering. An unfavorable reference letter, or even the mere absence of a reference, can compromise or destroy career prospects.

Yet, even in this culture of silence, everyone knew about sexual misconduct in the judiciary.<sup>96</sup> Information like this flows through whisper

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91. Comms. on Codes of Conduct & Jud. Conduct & Disability, *Public Hearing on Proposed Changes to Code of Conduct for U.S. Judges and Judicial Conduct and Disability Rules*, U.S. CTS., at 01:44 (Oct. 30, 2018) [hereinafter *Proposed Changes Testimony*], <https://www.uscourts.gov/rules-policies/judiciary-policies/proposed-changes-code-conduct-judges-judicial-conduct-disability-rules> [<https://perma.cc/G8KZ-AE4Y>] (statement of Renee Newman Knake, Doherty Chair in Legal Ethics and Professor of Law, University of Houston Law Center).

92. See Staci Zaretsky, *Elite Biglaw Firms Are Offering \$400K Bonuses to Supreme Court Clerks*, ABOVE THE L. (Sept. 16, 2020, 12:41 PM), <https://abovethelaw.com/2020/09/elite-biglaw-firms-are-offering-400k-bonuses-to-supreme-court-clerks> [<https://perma.cc/XX8K-3JTE>].

93. *Proposed Changes Testimony*, *supra* note 91.

94. See Gertner, *supra* note 44, at 92 (“It is as if each chambers is a fiefdom, with its own rules and norms. There may have been rumors about the judge who bullied his clerks, but we—the judges, employees, and clerks—rarely say anything about it.”).

95. *Proposed Changes Testimony*, *supra* note 91.

96. See Joanna Grossman (@JoannaGrossman), TWITTER (Dec. 9, 2017, 12:09 PM), <https://twitter.com/joannagrossman/status/939542418638147584?lang=en> [<https://perma.cc/GV3Y-MNL4>] (“When I clerked on the Ninth Circuit, Kozinski sent a memo to all the judges suggesting that a rule prohibiting female attorneys from wearing push-up bras would be more effective than the newly convened Gender Bias Task Force. His disrespect for women is legendary.”); Dara E. Purvis, Opinion, *When Judges Prey on Clerks*, N.Y. TIMES (Dec. 13, 2017), <https://www.nytimes.com/2017/12/12/opinion/law-schools-alex-kozinski.html> [<https://perma.cc/BV3M-2ZAZ>] (“Almost immediately [upon starting my clerkship], I heard rumors that Alex Kozinski, another judge whose chambers were in the same building, often made inappropriate sexual remarks to female clerks.”); see also Laura E. Gómez, *Use Your Personal Lie Detector to Judge Kavanaugh*, 26 UCLA WOMEN’S L.J. 29, 31 (2019) (“Kavanaugh couldn’t possibly have missed the furor over reporting about Kozinski’s questionable behavior in the *Los Angeles Times* in 2008. According to what Kozinski told the *Times*, he had maintained ‘for years’ a website filled with sexually explicit images, and he had invited ‘friends’ to view the images. Kozinski described what he uploaded to the site as ‘funny’ and ‘interesting.’” (quoting Scott Glover, *Porn Trial in L.A. Is Halted*, L.A. TIMES (June 12, 2008), <https://www.latimes.com/archives/la-xpm-2008-jun-12-me-kozinski12-story.html> [<https://perma.cc/G5J2-SAJR>])); Lithwick, *supra* note 86 (“The former Kozinski and 9th Circuit clerks I’ve spoken to in recent days feel heartsick, as I do, that for the sake of our own careers and professional legitimacy we continued to go to the dinners and moderate

networks. The desire to avoid offending a particular judge—“[f]or a law clerk, at the precipice of his or her legal career, alienating a federal judge can spell doom for their life in the law”<sup>97</sup>—leads those with knowledge to share it through informal channels. While sharing information this way may help an individual recipient avoid harassment,<sup>98</sup> it also permits the harmful behavior to endure. Even worse, it can derail careers. In the case of Kozinski, many women counseled other women “not to apply for clerkships with him, sidestepping an opportunity to get within close range of a coveted Supreme Court clerkship.”<sup>99</sup> Whisper networks also take the form of guidance like this from Harvard Law School for students when interviewing for clerkships:

Most importantly, trust your instincts at the interview/offer stage, which may reveal first-hand insight you could not have discovered during your advance research. If anything during an interview makes you uncomfortable about the prospect of working for that judge, politely withdraw your application (ideally) or decline an offer (if necessary because you received the offer during the interview). Phrase your decision as you think the judge would be better served by someone else.

. . . .

Also, please always complete an interview evaluation form, so that future HLS applicants can benefit and learn from what you learned from your interview experience, whether positive or negative.<sup>100</sup>

What should the applicant do if a judge engages in sexual harassment? Policies like this, albeit well intentioned, place the burden on the victim. As one commentator observed, this guidance “make[s] it clear the most important thing to the school is making sure the judge isn’t upset about the rejection” rather than focusing on “how the applicant might feel after a powerful judge has taken it upon themselves to act inappropriately with them. And the recommended phrasing of the declination of a job as a ‘fit’ issue, when the real issue is harassment seems to be underplaying it in the extreme.”<sup>101</sup>

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the panels, all the while hoping this story would break someday and we’d be off the hook.”); Traister, *supra* note 3.

97. *Protecting Federal Judiciary Employees Hearing*, *supra* note 20 (statement of Olivia Warren, former clerk to U.S. Court of Appeals J. Stephen Reinhardt).

98. See *There Are Likely Several More Stories to Come*, NANCY RAPOPORT’S BLOG (Dec. 9, 2017), <https://nancyrapoport.com/blog/2017/12/09/there-are-likely-several-more-stories-to-come> [<https://perma.cc/MVZ9-GJUE>] (“But I have told countless female law students that I would never write them a letter of recommendation for a clerkship with him, and I have told them why. I didn’t want them ever to be at risk of being sexually harassed by him.”).

99. See Lithwick, *supra* note 86 (“Like others who have now come forward, I had told young female law students not to clerk for him.”).

100. Kathryn Rubino, *Harvard Law School Gives Terrible Sexual Harassment Advice*, ABOVE THE L. (July 31, 2018, 12:46 PM), <https://abovethelaw.com/2018/07/harvard-law-school-gives-terrible-sexual-harassment-advice> [<https://perma.cc/V837-ETZA>] (quoting *Sexual Harrassment*, THE BENCH: HLS CLERKSHIP BLOG (Jan. 8, 2018), <https://blogs.harvard.edu/thebench/2018/01/08/sexual-harrassment> [<https://perma.cc/Q7BB-JEY9>]).

101. *Id.*



A phenomenon related to the whisper network is harassment grooming, which does not provide advice to avoid the situation but instead conditions one to endure it. This happens in subtle ways, such as coaching a candidate how to dress to be more appealing or how to join in on activities that “suspend rules for how judges talk and behave.”<sup>102</sup> In 2018, Yale Law School students complained about advice from Professors Amy Chua and Jed Rubenfeld that a “certain look” was required for clerking with Brett Kavanaugh, at the time an appellate court judge.<sup>103</sup> One student told the *Huffington Post*, “[i]t was very clear to me that [Rubenfeld] was talking about physical appearance, because it was phrased as a warning—and because it came after the warning about Judge Kozinski” and harassment.<sup>104</sup> *The Guardian* reported that Professor Chua “privately told a group of law students last year that it was ‘not an accident’ that Kavanaugh’s female law clerks all ‘looked like models’ and would provide advice to students about their physical appearance if they wanted to work for him.”<sup>105</sup> It should be noted that Chua and Rubenfeld categorically deny having ever given this advice.<sup>106</sup> Regardless of the source, it is problematic that students receive “guidance” like this.

Another form of harassment grooming occurs when faculty members are removed from teaching obligations due to sexual misconduct. A “solution” after findings of sexual harassment or abuse is to prohibit the perpetrator from teaching required courses but to allow continued teaching of optional courses, apparently under a misguided belief that it is acceptable for students to “choose” conditions in which they will be subjected to sexual misconduct. For instance, returning to the example of Yale Law School, Professor Rubenfeld was placed on leave in 2020 for two years due to sexual misconduct.<sup>107</sup> When he returns, he will not be permitted to teach required or small group courses because of that misconduct.<sup>108</sup> This practice is not

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102. Lithwick, *supra* note 86 (“All the clerks and former clerks in Kozinski’s ambit knew and understood that you assumed the risk and accepted the responsibilities of secrecy. Once you acceded to the poker games and the movies and the ritualized sex talk, you helped give it cover and license. . . . Our silence became tacit approval of that chambers’ gleeful rejection of the strictures of political correctness and of the social imperative to police oneself.”).

103. Betty Cracker, *Tiger Clerk-Model Pipeline*, BALLOON JUICE BLOG (Sept. 20, 2018), <https://www.balloon-juice.com/2018/09/20/tiger-clerk-model-pipeline> [<https://perma.cc/BZ8M-GC3G>]; see also Litman & Shah, *supra* note 12, at 626–28 (discussing the influence of Chua and Rubenfeld on clerkship hiring for Yale Law School students).

104. Cracker, *supra* note 103.

105. Stephanie Kirchgaessner & Jessica Glenza, “No Accident” Brett Kavanaugh’s Female Law Clerks “Looked Like Models,” *Yale Professor Told Students*, *GUARDIAN* (Sept. 20, 2018), <https://www.theguardian.com/us-news/2018/sep/20/brett-kavanaugh-supreme-court-yale-amy-chua> [<https://perma.cc/UL8W-3SE2>].

106. See Eugene Volokh, *Yale Law Prof. Amy Chua’s Statement on Her Advice to Clerkship Applicants*, *REASON: THE VOLOKH CONSPIRACY* (Sept. 22, 2018), <https://reason.com/2018/09/22/yale-law-prof-amy-chuas-statement-on-her> [<https://perma.cc/6V8X-HQQU>].

107. Litman & Shah, *supra* note 12, at 627.

108. Colleen Flaherty, *Yale Law Professor and Title IX Critic Suspended in Title IX Case*, *INSIDE HIGHER ED* (Aug. 28, 2020), <https://www.insidehighered.com/quicktakes/2020/08/28/yale-law-professor-and-title-ix-critic-suspended-title-ix-case> [<https://perma.cc/E2FT-BB8F>].

uncommon.<sup>109</sup> Students are, effectively, groomed to “consent” to a teaching environment with a known perpetrator of sexual misconduct if they want to take the courses that a faculty member offers, which may be a pipeline to professional opportunities. Or the student may opt out of the potential harassment and, possibly, valuable experiences that could lead to a clerkship or other employment.

This sort of grooming causes some to avoid the professional opportunity entirely. For example, on Chua and Rubinfeld’s reported advice to potential clerks:

One source said that in at least one case, a law student was so put off by Chua’s advice about how she needed to look, and its implications, that she decided not to pursue a clerkship with Kavanaugh, a powerful member of the judiciary who had a formal role in vetting clerks who served in the US supreme court.<sup>110</sup>

Kavanaugh would, of course, go on to become a Justice himself.

### *B. Bystander Burdens and Obligations*

There is no name or label for the burden placed on bystanders who, perhaps not harassed directly, are unwittingly made complicit by their silence.<sup>111</sup> But the burden they feel is real. As one clerk wrote about her complicity in Kozinski’s behavior:

Kozinski forced us all into this mess with him. And still, I am aware as I write this that I should have found my footing, that the women who came up after me, and who spoke up, are manifestly braver than I was. I am further aware that my failure to speak up over the course of my career is part of the reason why it was possible for the women who came after me to be treated as disrespectfully as they were.<sup>112</sup>

Other clerks have expressed similar concerns: “#MeToo requires some retrospection from people who are not harassers themselves. What should people do when there are rumors that a friend, colleague or mentor acts inappropriately toward women in professional settings? And now, what

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109. See, e.g., Donna R. Euben & Barbara A. Lee, *Faculty Discipline: Legal and Policy Issues in Dealing with Faculty Misconduct*, 32 J. COLL. & U.L. 241, 268 (2006) (“Many, but not all, of the cases arise in the sexual harassment context, where modified teaching assignments or removal from the classroom are employed as ways to discipline the faculty member and to avoid future potential problems with students.”). Though beyond the scope of this Article, it is notable that this form of “discipline,” where a sexual harasser receives a lighter teaching load, burdens other faculty members (especially female faculty members) who must then provide coverage for required courses with greater numbers of students.

110. Kirchgaessner & Glenza, *supra* note 105.

111. For a discussion of bystander obligations in the context of sexual crimes, see Zachary D. Kaufman, *Protectors of Predators or Prey: Bystanders and Upstanders Amid Sexual Crimes*, 92 S. CAL. L. REV. 1317, 1325 (2019) (“I suggest a more holistic, aggressive approach to prompt involvement by third parties who are aware of specific instances of sexual crimes in the United States.”).

112. Lithwick, *supra* note 86.

should people do when there are corroborated allegations?”<sup>113</sup> At some point, neutrality becomes complicity, leading some to call for greater obligations for bystanders in sexual harassment reporting.<sup>114</sup>

A judge’s ability to end an investigation by resigning or retiring means any bystander complicity also goes unaddressed.<sup>115</sup> Returning to the example of Walter S. Smith—who retired in 2016 after a formal reprimand for sexual harassment—a complaint was also filed against another judge who had been informed of Smith’s behavior and failed to follow up.<sup>116</sup> This judge, Harry Lee Hudspeth, retired from the U.S. District Court for the Western District of Texas with a full pension, which ended the investigation that might have imposed sanctions for his failure to properly handle Smith’s improprieties.<sup>117</sup>

#### IV. MEANINGFUL #METOO REFORM

The overarching goal for any reform should be to “promote a culture free of sexual harassment” rather than simply identifying the misconduct and forcing the victim to report it.<sup>118</sup> Too often the system settles for the latter, setting the stage for future harm rather than a world where the harm never occurs in the first instance. Part IV explores two aspects of reform with an eye toward culture change: first, the power of apologies; and second, a series of concrete steps that can be taken to move beyond a reporting system that only further injures the victim.

##### A. Apologies: A Lesson from Australia

Australia’s High Court faced similar #MeToo revelations when former associates (i.e., law clerks) of the highly regarded former justice Dyson Heydon, who served on the court between 2003 and 2013, revealed years of sexual harassment.<sup>119</sup> Further, a judge alleged that Heydon had sexually

113. Leah Litman et al., *Opinion, A Comeback but No Reckoning*, N.Y. TIMES (Aug. 2, 2018), <https://www.nytimes.com/2018/08/02/opinion/sunday/alex-kozinski-harassment-allegations-comeback.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer> [<https://perma.cc/EH2J-7ZH9>].

114. *See, e.g.*, Litman & Shah, *supra* note 12, at 609–10 (“[W]e have a broader responsibility for sexual harassment beyond merely witnessing specific instances of sexual harassment. . . . [W]e should treat young lawyers as people with dignity who deserve respect. . . . [W]e 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.” (citing 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/NDC4-H25Q>])).

115. Biskupic, *supra* note 1.

116. *See Retiring to Avoid Consequences: Judges Exploit a Loophole to Maintain Pensions in Spite of Misconduct*, *supra* note 13.

117. *See id.*

118. *Proposed Changes Testimony*, *supra* note 91.

119. Kcasey McLouglin, *Dyson Heydon Finding May Spark a #MeToo Moment for the Legal Profession*, THE CONVERSATION (June 22, 2020), <https://theconversation.com/dyson-heydon-finding-may-spark-a-metoo-moment-for-the-legal-profession-141212> [<https://perma.cc/3GQE-N57G>] (“An investigation commissioned by the High Court of Australia has found six former court staff members who were judges’ associates were sexually

assaulted her.<sup>120</sup> The High Court's chief justice Susan Kiefel launched an investigation that

unveiled a pattern of predatory behaviour and sexual harassment over many years towards young female associates Heydon employed . . . . "The women he employed were in their early 20s and often straight out of university. He was one of the most powerful men in the country, who could make or break their future careers in the law."<sup>121</sup>

Like the Supreme Court, the High Court lacks any sort of concrete rules for holding judges to account for behavior like this.<sup>122</sup> Instead, an informal whisper network developed: "[O]utgoing female associates felt a duty to try and warn incoming female associates of Mr. Heydon's behaviour and to give advice about how to try and protect themselves."<sup>123</sup> The harassment caused several of the victims to abandon their legal careers entirely.<sup>124</sup>

Like Kozinski, Dyson denied the allegations and issued a quasi-apology through his lawyers, essentially blaming the victims for not understanding his intentions: "[O]ur client says that if any conduct of his has caused offence, that result was inadvertent and unintended, and he apologises for any offence caused."<sup>125</sup> Apologies like these, which place blame on the victim's "misunderstanding," only cause further harm.

Chief Justice Kiefel's reaction stands in remarkable contrast to the (non)apologies of Dyson and Kozinski, as well as that of Chief Justice Roberts. Chief Justice Kiefel issued an official acknowledgement that the

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harassed by former High Court Justice Dyson Heydon."); *see also* Kate McClymont & Jacqueline Maley, *High Court Inquiry Finds Former Justice Dyson Heydon Sexually Harassed Associates*, SYDNEY MORNING HERALD (June 22, 2020), <https://www.smh.com.au/national/high-court-inquiry-finds-former-justice-dyson-heydon-sexually-harassed-associates-20200622-p5550w.html> [<https://perma.cc/U55L-7FTJ>].

120. McLouglin, *supra* note 119.

121. Michelle Grattan, *High Court Apologises for Dyson Heydon's Sexual Harassment of Six Associates*, THE CONVERSATION (June 22, 2020), <https://theconversation.com/high-court-apologises-for-dyson-heydons-sexual-harassment-of-six-associates-141215> [<https://perma.cc/22XB-6FYJ>] (quoting Telephone Interview by Virginia Trioli with Josh Bornstein, Principal Law., Maurice Blackburn (June 22, 2020), <https://www.abc.net.au/radio/melbourne/programs/mornings/dyson-heydon-shattered-associates-career-aspirations/12383230> [<https://perma.cc/4ZRH-WEHL>]).

122. *See* Gabrielle Appleby, *Australia Urgently Needs an Independent Body to Hold Powerful Judges to Account*, THE CONVERSATION (June 23, 2020), <https://theconversation.com/australia-urgently-needs-an-independent-body-to-hold-powerful-judges-to-account-141272> [<https://perma.cc/9R5K-KGSU>]; Gabrielle Appleby, *Deep Cultural Shifts Required: Open Letter from 500 Legal Women Calls for Reform of Way Judges Are Appointed and Disciplined*, THE CONVERSATION (July 5, 2020), <https://theconversation.com/deep-cultural-shifts-required-open-letter-from-500-legal-women-calls-for-reform-of-way-judges-are-appointed-and-disciplined-142042> [<https://perma.cc/GAC5-7QMD>].

123. *See* Grattan, *supra* note 121.

124. *Id.*

125. *See* McLouglin, *supra* note 119.

individual women were treated wrongfully.<sup>126</sup> Incredibly, she also delivered a formal apology:

The findings are of extreme concern to me, my fellow Justices, our Chief Executive and the staff of the Court. We're ashamed that this could have happened at the High Court of Australia.

We have made a sincere apology to the six women whose complaints were borne out. We know it would have been difficult to come forward . . . . I have appreciated the opportunity to talk with a number of the women about their experiences and to apologise to them in person. I have also valued their insights and suggestions for change that they have shared with the Court.<sup>127</sup>

The chief justice also made a special point to validate that the women's "accounts of their experiences at the time have been believed."<sup>128</sup> Writing on behalf of twenty-five women sexually harassed by Kozinski, three former clerks penned an op-ed expressing distress that a similar validation has *not* come from the U.S. federal judiciary:

We are three of the many women who publicly accused Mr. Kozinski of misconduct. We are also lawyers, and our allegations were made after careful consideration and with supporting corroboration. Yet we cannot now point to findings of an official investigation that establish validated, agreed-upon hard truths of what happened.<sup>129</sup>

The difference in the responses of the chief justices is notable. Both called for commissions to investigate and propose reforms. But Chief Justice Roberts did not take the additional, significant step that Chief Justice Kiefel did of meeting with victims, acknowledging that the behavior was wrong, affirming that the victims had been believed, and issuing an official apology on behalf of the judiciary. The closest the U.S. federal judiciary came to an official acknowledgement of Kozinski's transgressions was when the Judicial Council of the Second Circuit recognized "that the complaint references grave allegations of inappropriate misconduct, which the federal judiciary cannot tolerate."<sup>130</sup> That same council, however, refused to do more when Kozinski retired because it concluded that it no longer had authority over the matter.<sup>131</sup> The federal judiciary should consider

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126. *See Statement by the Hon. Susan Kiefel AC, Chief Justice of the High Court of Australia* 1, <https://cdn.hcourt.gov.au/assets/news/Statement%20by%20Chief%20Justice%20Susan%20Kiefel%20AC.pdf> [<https://perma.cc/65ZQ-UZW3>] (last visited Jan. 27, 2021).

127. *Id.* Chief Justice Kiefel's statement also included a list of reforms to prevent similar circumstances in the future, all of which were adopted. *See id.* at 1–2.

128. *See id.* at 1.

129. Litman et al., *supra* note 113.

130. *In re Complaint of Jud. Misconduct*, No. 17-90118-jm, at 1–2 (2d Cir. Jud. Council Feb. 5, 2018).

131. *See id.*

restorative justice models to allow for formal acknowledgment and apologies,<sup>132</sup> following the Australian example.<sup>133</sup>

### B. Other Suggestions

Listed below are several concrete steps that the judiciary—state and federal courts—should take. There is an important role for organizations like the National Center for State Courts to play in advancing this reform nationwide. But, if the judiciary fails to act, Congress should intervene at the federal level and state legislatures should consider adopting uniform protections. Unlike other areas of judicial conduct, which should *not* be regulated by another branch of government to preserve judicial independence, the rule of law, and separation of powers, sexual harassment regulation is different. It covers harmful behavior that is not related to the role or duties of the judge, and it is also an area of the law where legislatures are likely to have had some experience regulating.

First, a comprehensive harassment policy must be implemented along with a confidential reporting system. This also should include a regular, uniform, anonymous survey of current and former clerks regarding sexual harassment administered by an independent third party. An annual “survey of this nature would indicate that the judiciary values the reporting of misconduct and create an environment more favorable to reporting.”<sup>134</sup>

Second, to ensure accountability, a national clearinghouse should be established to make procedures and policies clear and transparent, with regular auditing of training<sup>135</sup> and processing of complaints, including formal follow-up on investigations, even after a judge resigns or retires.

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132. See, e.g., Lesley Wexler et al., *#MeToo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 75–76 (“Those accused of wrongdoing are concerned that to acknowledge and take responsibility for wrongful conduct is to admit legal liability. . . . A number of states have passed legislation to make some forms of apology inadmissible in civil cases.” (footnote omitted)); Nora Stewart, Note, *The Light We Shine into the Grey: A Restorative #MeToo Solution and an Acknowledgment of Those #MeToo Leaves in the Dark*, 87 FORDHAM L. REV. 1693, 1693 (2019) (proposing a “restorative justice response to grey area #MeToo misconduct, based on indigenous jurisprudential models” and stating that “[w]hat is new about #MeToo, and what likely will be the through line that defines its historical importance, has been its sensitivity to nuance” and “[t]he grey range of #MeToo misconduct is not a new problem” but “[i]t is emphatically new, however, as a subject of public discourse”).

133. See Wexler et al., *supra* note 132, at 74 (“Responsibility-taking is a central feature of restorative justice. Indeed, most restorative justice programs are specifically designed to be available only in cases in which the offender has acknowledged having engaged in the wrongful acts at issue. Responsibility-taking is also the central feature of apologies—distinguishing apologies from other forms of accounting for wrongful behavior like denial, excuse, or justification—and is central to their potential.”).

134. *Proposed Changes Testimony*, *supra* note 91.

135. Gertner, *supra* note 44, at 94 (“Training is not enough without tests to see if the training is efficacious. The fact that a company has few formal complaints is not the measure of whether there is sexual harassment in ordinary employment. This measure is particularly inaccurate in the judiciary, given the nature of chambers relationships.”).

Transparency can help act as a deterrent and also identify systemic improvements that may be needed.<sup>136</sup>

Third, the courts should include in their year-end reports the number, nature, and resolution of sexual misconduct complaints (anonymized); Chief Justice Roberts should include such information for the entire federal judiciary.<sup>137</sup>

Fourth, rules and policies should shift the burden from the victim to the perpetrator and the institution. “One important shift is holding employers to account through the imposition of a positive duty, rather than placing the onus on the very individuals who have been subjected to it.”<sup>138</sup> To this end, one step could incorporate the inclusion of metrics in the performance evaluations of judges and other supervisory employees in the handling of sexual harassment complaints and prevention efforts.

Fifth, the judiciary should prohibit consensual romantic or sexual relationships between judges and their clerks and other employees who serve for only a year or two. Such prohibitions are increasingly common at colleges and universities. The University of Houston, where I teach, adopted a new policy in 2018 prohibiting “[a]ny consensual dating, intimate, romantic, and/or sexual relationship between: a) An employee . . . and b) An individual that the employee has responsibility as part of their job duties to teach, instruct, supervise, advise, counsel, oversee, grade, coach, train, treat, or evaluate in any way.”<sup>139</sup> This prohibition is intended to prevent “conflicts of interest, favoritism, and exploitation”<sup>140</sup> but it also requires a “workplace culture free from any sexual overtures,” which “may be viewed as consensual by the more powerful person and at the same time unwanted by the target who acquiesces only because of the power differential or because [the law clerk] soon will be moving on to another job.”<sup>141</sup> The prohibition need not remove all autonomy from the actors, however:

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136. See, e.g., Martha S. West, *Preventing Sexual Harassment: The Federal Courts’ Wake-Up Call for Women*, 68 BROOK. L. REV. 457, 498 (2002) (recommending that employers “be required to publish, on a regular basis, an aggregate listing of prior sexual harassment complaints and what remedial action the employer took to resolve the complaints” to give confidence to those who report and to “prevent future sexual harassment, deterring would-be harassers by informing them that such behavior could result in discipline or discharge”).

137. See *id.* at 500 (“An annual report on the number, type and resolution of sexual harassment complaints would assist the employer in changing workplace norms . . .”).

138. McLouglin, *supra* note 119; see *Under New Texas Law, College Employees Could Be Fired and Charged for Not Reporting Sexual Misconduct*, DALL. MORNING NEWS (Dec. 30, 2019), <https://www.dallasnews.com/news/politics/2019/12/30/under-new-texas-law-college-employees-could-be-fired-and-charged-for-not-reporting-sexual-misconduct> [<https://perma.cc/5B9Z-CCEB>] (“Under Senate Bill 212 starting Jan. 1, employees at Texas universities could face criminal charges and lose their jobs if they fail to report incidents of sexual harassment, assault, stalking or dating violence.”); see also Grattan, *supra* note 121.

139. Memorandum from the Univ. of Hous. Sys., Gen Admin. 1 (May 15, 2018), [https://uhsystem.edu/compliance-ethics/\\_docs/sam/01/1d10.pdf](https://uhsystem.edu/compliance-ethics/_docs/sam/01/1d10.pdf) [<https://perma.cc/7VAH-4ZPL>].

140. *Id.*

141. *Proposed Changes Testimony*, *supra* note 91.

For example, Houston's policy contains an exception to the prohibition if granted by the Assistant Vice Chancellor/Vice President for Equal Opportunity. A provision like this for the federal judiciary would help curtail sexual overtures that may feel consensual on the part of the instigator but harassing on the part of the target. It also removes the potential for a "he said—she said" dynamic where a victim bears the burden of showing that sexual conduct is unwelcome.<sup>142</sup>

Colleges and universities across the country and around the globe have adopted similar policies.<sup>143</sup>

Sixth, data on clerkship hiring from all courts should be reported regularly and made publicly available, including the number of individuals interviewed for judicial clerkships and the number hired, disaggregated by sex, disability, and ethnicity/race.

Finally, and importantly, reforms must account for intersectional and multidimensional identities. One way to do so is to "employ a standard based on a reasonable person in the complainant's intersectional and multidimensional shoes, rather than the ostensibly objective reasonable person standard—which some courts have declared to be male biased—when evaluating sexual harassment claims."<sup>144</sup>

#### CONCLUSION

Judicial ethics as a source of remedying sexual misconduct has the potential to offer greater protections than other state or federal law<sup>145</sup> and to set a model for other professions. The whisper networks are now exposed and the most egregious offenders have been removed, slowly, from their posts. But necessary systemic reforms remain to be implemented. Perhaps,

142. *Id.*

143. *See, e.g., Consensual Relationships Policy*, BOS. COLL. (May 2019), [https://www.bc.edu/content/dam/bc1/top-tier/academics/provost/facultyhandbook/Consensual%20Relationships%20Policy%20\(1\).pdf](https://www.bc.edu/content/dam/bc1/top-tier/academics/provost/facultyhandbook/Consensual%20Relationships%20Policy%20(1).pdf) [<https://perma.cc/KK6G-D8JL>]; *Consensual Relationships Policy*, OR. STATE UNIV., <https://coa.oregonstate.edu/consensual-relationships-policy> [<https://perma.cc/9VBK-QYXP>] (last visited Jan. 27, 2021); *Consensual Relationships Policy*, TULANE UNIV., <https://tulane.edu/consensual-relationships-policy> [<https://perma.cc/M4CT-NNCQ>] (last visited Jan. 27, 2021); Dean of Fac., *Consensual Relationships Policy*, CORNELL UNIV., <http://theuniversityfaculty.cornell.edu/dean/report-archive/consensual-relationships-policy-committee/final-6-x> [<https://perma.cc/FS6P-34NN>] (last visited Jan. 27, 2021).

144. *See* Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J.F. 105, 109 (2018) (emphasis omitted) (footnote omitted) (arguing "that the persistent racial biases reflected in the #MeToo movement illustrate precisely why sexual harassment law must adopt a reasonable person standard"); *see also* Wexler et al., *supra* note 132, at 48 ("Past #MeToo victims deserve justice, accountability, and attention to their harms just as reformers must set their sights on transforming society going forward. . . . An inclusive approach is necessary because it is important to know about, acknowledge, and address specific intersectional harms.").

145. *See, e.g.,* Deborah Tuerkheimer, *Beyond #MeToo*, 94 N.Y.U. L. REV. 1146, 1150–51 (2019) ("As the #MeToo movement has gathered force, the law has remained largely missing in action . . . . By creating a next generation of official reporting channels, we can breathe new life into the law of sexual misconduct, along with the protections it offers victims and accused alike.").



finally, we are at a tipping point.<sup>146</sup> The judiciary's attention to reforms proposed here not only will keep more women in the pipeline to positions of power in the legal profession but also will preserve judicial independence and integrity.

Looking back at my twenty-something self, a law student wondering how to navigate a successful legal career, I wish, instead of whispered warnings, there had been meaningful structures in place so that weighing the toll of enduring sexual harassment was not part of the calculation when deciding whether to pursue a judicial clerkship—an experience widely viewed as an essential stepping-stone for the career I sought in the legal academy.

When I testified before the Judicial Conference of the United States in 2018 to advocate for reforms, I shared my personal story about the impact of whisper networks deterring me from pursuing clerkships. U.S. District Court judge Sarah Evans Barker, a member of the committee presiding over the testimony, offered an apology: "I'm sure that you would have been a wonderful law clerk and I'm sorry that we lost you."<sup>147</sup> I had not anticipated her reaction, but it resonated. The judiciary owes all of us an acknowledgment and an apology for the past sexual misconduct, as well as the enactment of concrete reforms.

The judiciary's slow, ineffectual response to the #MeToo movement has consequences not only for the judges and the survivors of sexual misconduct but also for the regulation of the legal profession as a whole. The media, lawmakers, and other regulatory bodies outside of the courts loom if the judiciary does not appropriately address sexual misconduct through professional ethics rules. The reforms proposed by this Article, all within the judiciary's control, would help strengthen judicial independence and establish courts as examples for other professions to follow in their own ethics governance for handling sexual misconduct and beyond. But if the courts will not police their own, legislatures should step in and do so.

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146. See, e.g., Rhode, *supra* note 42, at 380 ("In the thirty-five years I have spent studying gender issues, this moment seems to me unique in its potential for lasting change.").

147. *Review of Sexual Harassment Policy, Part 2*, C-SPAN, at 18:27 (Oct. 30, 2018), <https://www.c-span.org/video/?453832-2/judicial-committee-holds-public-hearing-sexual-harassment-policy> [<https://perma.cc/Q2RH-WZDF>].