

**LAW SCHOOLS ARE PART OF THE PROBLEM—BUT THEY CAN (AND SHOULD) BE PART OF THE SOLUTION.**

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Abstract

*Judicial misconduct against clerks is poorly understood, which enables predatory behavior. By requiring law schools to collect and organize data about misbehaving judges as a condition of their accreditation, law schools can help ensure that students are safe and bring pressure on judges to behave better.*

**I. INTRODUCTION**

Law schools report employment data each year to the American Bar Association (ABA) as a condition of their accreditation, as well as to the National Association for Law Placement (NALP).<sup>1</sup> Troublingly, law schools are not required to collect and report any data about the outcomes of many of their graduates' prestigious first jobs—as judicial law clerks. After law schools receive reports from law clerk alumni about their negative clerkship experiences, institutions are not required to report this data anywhere.<sup>2</sup>

Institutional structures within the legal community discourage law schools from collecting and reporting data about negative clerkship experiences for several reasons. First, no law school wants to appear to publicly antagonize judges, because law schools are incentivized to maintain positive relationships with the judiciary. Second, some law schools would like to remain ignorant of the scope of the problem. Finally, many law schools intend to continue funneling students into clerkships with notoriously misbehaving judges because the clerkships are so prestigious: collecting and reporting data on judicial misconduct could undermine these efforts.

This Article argues that law schools should report to the ABA each year, as a condition of their accreditation: 1) the total number of reports of mistreatment by judges, for the students who clerked the previous year,<sup>3</sup> broken down by gender and race of clerk, by name of judge, and by circuit and courthouse; 2) whether this mistreatment was formally reported (i) internally to the

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See, *Required Disclosures*, AM. BAR ASSOC., [https://www.americanbar.org/groups/legal\\_education/resources/statistics/](https://www.americanbar.org/groups/legal_education/resources/statistics/), [https://perma.cc/95QY-UU7H] (Law schools report the graduating class's first post-graduate jobs to the ABA, meaning that they report the number of graduates who obtained clerkships); see also, *NALP Bulletin, Racial/Ethnic Representation of Class of 2019 Judicial Clerks*, NAT'L ASSOC. L. PLACEMENT (Feb. 2021), <https://www.nalp.org/0221research> [https://perma.cc/XKB9-8SFZ] (Law schools report employment data, including the number of incoming clerks, separated by race and gender, to NALP). While law school reporting to NALP is voluntary, because schools already report this data to the ABA, the NALP response rate is high. Documentation on file with the author.

<sup>2</sup> Documentation on file with the author.

<sup>3</sup> These data will need to reflect whether the clerks are recent alumni or alumni several years out of law school; as well as whether the alumni reporting on their clerkship experiences did so immediately after their clerkships ended, or several years later.

courthouse and/or (ii) to an external judicial regulatory body;<sup>4</sup> and 3) how the law school became aware of the negative clerkship experience. I also critique a 2021 proposal by Professors Leah Litman and Aziz Huq regarding ABA data reporting obligations, arguing that it does not go far enough toward protecting prospective clerks, collecting judicial misconduct data, and holding law schools accountable for institutional failures.

Law schools are currently part of the problem, either perpetuating or outright facilitating judicial misconduct. However, they can be part of the solution. Data reporting and information-sharing obligations are important steps toward both improving the clerkship landscape for the next generation of young attorneys, and ensuring that a new generation of lawyers treats both their colleagues and their subordinates with respect.

## II. SCOPE OF THE PROBLEM

### 1. The legal community lacks comprehensive data about law clerks' negative clerkship experiences.

The limited scholarship on judicial misconduct suggests that many law schools are already aware of the scope of the problem.<sup>5</sup> However, law schools continue to either push students to clerk for notoriously misbehaving judges (because the clerkships are so prestigious), or dissuade certain groups—including women, LGBTQ students, and non-white students—from clerking for certain judges, foreclosing important professional opportunities.

Current data points likely capture only a fraction of the judges engaging in misconduct.<sup>6</sup> This is partially because official mechanisms for reporting misconduct are dysfunctional and underutilized. Federal law clerks rarely file formal complaints against judges under the Judicial Conduct and Disability Act.<sup>7</sup> Law clerks fear retaliation by the judge and reputational harm in

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<sup>4</sup> For federal law clerks, complaints against judges are filed under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351–364 (2018). For state court clerks, complaints are filed with judicial conduct commissions. Cynthia Gray, *How Judicial Conduct Commissions Work*, 28 JUSTICE SYSTEM J. 405, 405-18 (2007). In Washington, DC, where the author clerked, the relevant commission is the D.C. Commission on Judicial Disabilities and Tenure, *see, About CJDT*, COMM'N ON JUD. DISABILITIES AND TENURE, <https://cjdt.dc.gov/page/about-cjdt>, [<https://perma.cc/MW2H-FJ52>].

<sup>5</sup> *See, Protecting Federal Judiciary Employees from Sexual Harassment, Discrimination, and Other Workplace Misconduct: Hearing Before the Subcomm. on Cts., Intell. Prop., and the Internet of the H. Comm. on the Judiciary*, 116th Cong. (Feb. 13, 2020) (testimony of Olivia Warren); Olivia Warren, *Enough is Not Enough: Reflection on Sexual Harassment in the Federal Judiciary*, 134 Harv. L. Rev. 446–455 (2021); Dara E. Purvis, *When Judges Prey on Clerks*, N.Y. TIMES (Dec. 12, 2017), <https://www.nytimes.com/2017/12/12/opinion/law-schools-alex-kozinski.html>, [<https://perma.cc/8DUE-98K4>].

<sup>6</sup> This section focuses on the federal judiciary. However, the ABA should also collect and report data on state court judges and state court clerkship experiences.

<sup>7</sup> *See* 28 U.S.C. §§ 351–364 (2018); *Judicial Conduct & Disability*, UNITED STATES CTS., <https://www.uscourts.gov/judges-judgeships/judicial-conduct-disability>, [<https://perma.cc/38ZX-U67P>]; *see also Rules for Judicial-Conduct and Judicial-Disability Proceedings*, UNITED STATES CTS., [https://www.uscourts.gov/sites/default/files/judicial\\_conduct\\_and\\_disability\\_rules\\_effective\\_march\\_12\\_2019.pdf](https://www.uscourts.gov/sites/default/files/judicial_conduct_and_disability_rules_effective_march_12_2019.pdf), [<https://perma.cc/H4FH-DUB7>] (defining abusive or harassing behavior as, “(A) engaging in unwanted, offensive, or abusive sexual conduct, including sexual harassment or assault; (B) treating litigants, attorneys, judicial employees, or others in a demonstrably egregious or hostile manner; or (C) creating a hostile work environment for judicial employees.”)

Between 2020 and 2021, only 11 of the nearly 1300 complaints filed under the Judicial Conduct and Disability Act were filed by judicial employees. *See, Caseload Statistics Data Tables*, UNITED STATES CTS.,

the legal community. Furthermore, the Judicial Conduct and Disability Act is flawed—lacking confidentiality and impartiality—because judges from the circuit where the misbehaving judge and mistreated law clerk work are the ones investigating their judicial colleagues.<sup>8</sup> Additionally, law clerks are actively dissuaded by others in the legal community from filing complaints against judges, especially if they hope to practice law in the jurisdiction where the misbehaving judge presides.

Law clerks can also file Employee Dispute Resolution (EDR) complaints against judges.<sup>9</sup> EDR is the internal courthouse dispute resolution plan, overseen by judges in the courthouse where the complainant law clerk and misbehaving judge work.<sup>10</sup> One of the few remedies available to law clerks through EDR is reassignment to a different judge for the remainder of the clerkship.<sup>11</sup> Troublingly, the federal judiciary does not collect, let alone publicly report, data on employees' use of the EDR Plan, limiting its utility as a mechanism for accountability.<sup>12</sup> Furthermore, the judiciary has historically refused to conduct a workplace culture assessment, which would quantify the scope of judicial misconduct.<sup>13</sup> The legal community discourages law clerk reporting at all stages. I was personally told on numerous occasions that “the right professional decision would have been not to report” the mistreatment I experienced during my clerkship and in the years following it, and that speaking out against the judge who harassed me would “tarnish my reputation.”<sup>14</sup>

## 2. Why Clerk?

A toxic culture of silence pervades the legal profession. Many attorneys deify judges and disbelieve law clerks. “Hero worship” often describes the relationship between judge and

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<https://www.uscourts.gov/statistics/table/s-22/judicial-business/2021/09/30>, [<https://perma.cc/9BFP-8ZAB>]. The “judicial employees” category encompasses both law clerks and permanent courthouse employees. Troublingly, the judiciary only began separating this data into a separate “judicial employees” section during the 2019-2020 term. See, *Caseload Statistics Data Tables*, UNITED STATES CTS, <https://www.uscourts.gov/statistics/table/s-22/judicial-business/2020/09/30>, [<https://perma.cc/2K36-6KKV>].

<sup>8</sup> See, *Rules for Judicial-Conduct and Judicial-Disability Proceedings*, UNITED STATES CTS., at arts. IV-VII, [https://www.uscourts.gov/sites/default/files/judicial\\_conduct\\_and\\_disability\\_rules\\_effective\\_march\\_12\\_2019.pdf](https://www.uscourts.gov/sites/default/files/judicial_conduct_and_disability_rules_effective_march_12_2019.pdf), [<https://perma.cc/H4FH-DUB7>].

<sup>9</sup> See, *Model Employment Dispute Resolution Plan*, UNITED STATES CTS, (Sept. 19 2019) <https://www.uscourts.gov/sites/default/files/guide-vol12-ch02-appx2a-model-eeo-plan.pdf>. [<https://perma.cc/CR4B-ERAN>]. The terms “employment” and “employee” are used interchangeably when referring to EDR plans.

<sup>10</sup> EDR Plans have been criticized for their lack of guaranteed confidentiality, lack of impartiality, and lack of standardization among circuits. See Cara Bayles, *Can US Courts Police Themselves on Workplace Misconduct?*, LAW360, Sept. 22, 2021, <https://www.law360.com/articles/1423474>, [<https://perma.cc/FGJ2-45CJ>]; Brief for Named and Unnamed Current and Former Employees of the Federal Judiciary Who Were Subjected to Or Witnessed Misconduct as Amici Curiae in Supporting Appellant Jane Roe, *Strickland v. United States*, 32 F.4th 311, No. 21–1346, (4th Cir. 2021) (discussing the effects of harassment on former clerks' and public defenders' lives).

<sup>11</sup> See *supra* note 9, at IV(C)(3)(h)(i).

<sup>12</sup> Documentation on file with the author. Employees need to know about use of the EDR Plan, broken down by circuit and by courthouse, in order to determine whether it is effective.

<sup>13</sup> See, Ann E. Marimow, *Federal courts drop survey question about workplace misconduct, but not before judges' staffers said they'd witnessed such problems*, WASHINGTON POST, (Jan. 14, 2022), [https://www.washingtonpost.com/politics/courts\\_law/federal-court-workplace-misconduct/2022/01/13/1c4a0b6e-7481-11ec-bc13-18891499c514\\_story.html](https://www.washingtonpost.com/politics/courts_law/federal-court-workplace-misconduct/2022/01/13/1c4a0b6e-7481-11ec-bc13-18891499c514_story.html), [<https://perma.cc/2ECT-P9JX>].

<sup>14</sup> Documentation on file with the author.

clerk.<sup>15</sup> Young attorneys are taught, beginning in law school, that judges deserve absolute respect and total unquestioning deference. The former clerks who pen public tributes to retiring judges go further than fondly referring to their former employers, decades later, in cult-like fashion as “my judge.”<sup>16</sup> Troublingly, young attorneys are inculcated to believe that relationships in chambers should be familial.<sup>17</sup> This creates pressure to work late into the night and on weekends, to the exclusion of family and personal obligations; as well as a belief that to report on a judge’s misconduct would violate confidentiality.<sup>18</sup> To many, a clerkship is more than just a job; it is a lifestyle.<sup>19</sup>

The clerkship application process itself remains shrouded in secrecy, making it distinct from other legal jobs. Many judges enjoy the lack of oversight in their hiring (and firing) decisions.<sup>20</sup> Some are notoriously unwilling to disclose their hiring data.<sup>21</sup> Many more reject efforts to standardize application processes.<sup>22</sup> Federal clerkship applicants apply via the Online System for Clerkship Application and Review (OSCAR), whereas state court applicants apply to individual judges.<sup>23</sup> However, there is currently no easy, transparent way for law clerks to avoid judges with a history of misconduct during the application process. Prospective clerks are encouraged to reach out to current or former clerks, particularly alumni from their law schools, to inquire about a judge’s work style, chambers culture, and workplace treatment. This disorganized, informal process of information-sharing creates a series of whisper networks. Some students are warned to avoid certain judges; others are not.

Current practices do not effectively warn prospective clerks on a consistent or equitable basis. Not all prospective clerks are able to connect with former clerks and receive accurate information prior to applying, or prior to interviewing. While law schools with stronger clerkship program might also have more robust alumni networks, this does not mean that their students are effectively warned to avoid misbehaving judges. Additionally, current or former clerks are placed in the difficult position of potentially reporting on powerful, often life-tenured federal judges: enormous power disparities disincentivize clerks from disclosing accurate information about their misbehaving supervisors to prospective clerks who contact them. Judicial misconduct perpetuates because information is not properly disclosed.

Despite what we know about the challenges law clerks face in the workplace, many legal employers continue to treat a judicial clerkship as a necessary “check box” for one’s next job. Today’s law clerks are tomorrow’s U.S. Attorneys, Federal Defenders, BigLaw partners, law school professors, and judges. Incoming law firm associates who opt for a pay cut in order to spend a year or two learning from a judge receive substantial bonuses from their firms.<sup>24</sup> Each

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<sup>15</sup> See Paul Horwitz, *Clerking for Grown-Ups: A Tribute to Judge Ed Carnes*, 69 ALA. L. REV. 663 at 663-87 (2018).

<sup>16</sup> *Id.* at 664.

<sup>17</sup> *Id.* at 672.

<sup>18</sup> See Letter from Heidi S. Bond, Former Law Clerk, U.S. Ct. App. for the 9th Cir., to the Senate Comm. on the Judiciary (June 11, 2018) [hereinafter Letter from Heidi S. Bond], available at <http://www.courtneymilan.com/metoo/workinggroupletter.pdf> [<https://perma.cc/VSX4-ES42>].

<sup>19</sup> See, Horwitz, *supra* note 15, at 664.

<sup>20</sup> Documentation on file with the author.

<sup>21</sup> Documentation on file with the author.

<sup>22</sup> Documentation on file with the author.

<sup>23</sup> See ONLINE SYSTEM FOR CLERKSHIP APPLICATION AND REVIEW, <https://oscar.uscourts.gov/>, [<https://perma.cc/KBE5-SKAD>].

<sup>24</sup> See Kathryn Rubino, *Elite Law Firm Will Offer \$150,000 In Clerkship Bonuses*, ABOVE THE LAW (Apr. 26, 2022), <https://abovethelaw.com/2022/04/elite-law-firm-will-offer-150000-in-clerkship-bonuses/>,

clerkship application cycle, attorneys and law school career services representatives write articles and social media posts about the necessity of clerking.<sup>25</sup> Commentary typically highlights the best of circumstances—in which a judge becomes a lifelong mentor, supporting the clerk throughout their career. Little ink is spilled to discuss the worst of circumstances—when chambers become rife with harassment. What starts as mistreatment can devolve into a long-term negative relationship between judge and clerk. Law clerks depend on judges for references and career advancement. A negative—or even a lukewarm—reference can make or break a law clerk’s career.<sup>26</sup> This makes it exceedingly difficult for law clerks to speak out against mistreatment.

**3. A proposal by Professors Litman and Huq provides a starting point from which to build.**

Professors Leah Litman and Aziz Huq proposed some reforms in *The Washington Post* in 2021, arguing that law schools should be required to collect and report some data to the ABA as a condition of schools’ accreditation.<sup>27</sup> These data would replace the “ad hoc whisper networks” which are currently the main way prospective clerks know to watch out for judges with a history of misconduct.<sup>28</sup> Professors Litman and Huq concede that schools with robust clerkship networks are able to warn some prospective clerks about misbehaving judges, whereas students from less well-connected schools do not benefit from this institutional knowledge, thereby potentially entering dangerous work environments.<sup>29</sup> Professors Litman and Huq propose that law schools should disclose every reported instance of misconduct to a central repository.<sup>30</sup> These data would identify the judge, courthouse, and circuit in which the misconduct occurred.<sup>31</sup> However, they would disclose neither information about the law clerk, nor the identity of the law school.<sup>32</sup> The ABA would then make these data—about allegations of misconduct against specific judges—available to all clerkship applicants.<sup>33</sup>

**III. MY EXPERIENCE WITH JUDICIAL MISCONDUCT**

**IV.**

My experience with gender discrimination, harassment, and retaliation by a former D.C. Superior Court judge, as well as my law school’s disheartening response, underscore why ABA

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[<https://perma.cc/CG5N-NQHF>].

<sup>25</sup> See Nicholas Alexiou, To Clerk Or Not To Clerk...It’s Actually Not Much Of A Question, *ABOVE THE LAW* (June 7, 2018), <https://abovethelaw.com/2018/06/to-clerk-or-not-to-clerk-its-actually-not-much-of-a-question/>, [<https://perma.cc/WL66-VZTP>].

<sup>26</sup> See Leah M. Litman & Deeva Shah, *On Sexual Harassment in the Judiciary*, 115 *NW. U. L. REV.* 599, 616 (2020) (explaining the implications of a judge’s reference on a law clerk’s career).

<sup>27</sup> See Leah Litman & Aziz Huq, *How to stop judges from sexually harassing law clerks*, *WASHINGTON POST* (June 9, 2021), <https://www.washingtonpost.com/outlook/2021/06/09/law-school-clerks-harassment-reform>, [<https://perma.cc/3JRG-SLX>]. This proposed system is similar to systems employed for lodging, documenting, and tracking complaints against police officers.

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

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

data reporting obligations are so urgently needed. I wish my law school had been required to collect and report data about judicial misconduct when I was applying for clerkships.

In early September 2018, I walked across the street from my office at the U.S. Department of Justice (DOJ), where I was serving as a semester intern, and hand-delivered clerkship applications to several dozen judges in the Superior Court of the District of Columbia (D.C. Superior Court). I aspired to become an Assistant U.S. Attorney (AUSA) with the D.C. U.S. Attorney’s Office (USAO), and I knew that D.C. AUSAs often appeared before D.C. Superior Court judges. D.C. Superior Court seemed like a particularly appealing place to clerk—local crime was prosecuted and adjudicated with federal resources.

I had just left the courthouse that afternoon when I received a call from one of the judge’s then-clerks, inviting me to interview for a clerkship position. I was thrilled. Over the next few weeks, professors from my law school made calls on my behalf to help me secure the clerkship. My law school had advised me to accept the first clerkship I was offered, so I accepted the position on the spot when it was offered.

Between September 2018, when I accepted the clerkship, and August 2019, when I started clerking, I recall multiple law school professors and administrators telling me what a “nice man” the then-judge was. No one suggested to me that this judge might have a history of misconduct, nor did my law school have an internal database where I could read reports about other clerks’ experiences. I was excited to have secured a clerkship; proud to contribute to my law school’s list of 2019 law clerks; and eager to launch my career as a homicide prosecutor in D.C.

Unfortunately, as I explained in March 2022 in my Statement for the Record to a House Judiciary Subcommittee, my clerkship experience destroyed these career aspirations, and set me on a totally different career path.<sup>34</sup> Beginning just weeks into my clerkship, the judge for whom I clerked began to harass me and discriminate against me based on my gender. He would kick me out of the courtroom, telling me that I made him “uncomfortable” and he “just felt more comfortable” with my male co-clerk. He told me I was “bossy,” “aggressive,” “nasty,” and “a disappointment,” and that I had “personality issues.”<sup>35</sup> On the day I found out I passed the D.C. Bar Exam, the judge called me into his inner chambers and told me, “You’re bossy. And I know bossy because my *wife* is bossy!”

I cried in the bathroom at work and cried myself to sleep at night. I wanted to be reassigned to a different judge, but my courthouse did not have an EDR Plan in place at the time that might have enabled me to be reassigned.<sup>36</sup> If I reported the mistreatment, the judge could have retaliated against me and fired me. It would be my word against his. He was a Senate-

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<sup>34</sup> See Statement for the Record of Aliza Shatzman Before the Subcomm. on Cts., Intell. Prop., and the Internet of the H. Comm. on the Judiciary, Workplace Protections for Federal Judiciary Employees: Flaws in the Current System and the Need for Statutory Change, 117th Cong. (March 17, 2022) (available at <https://docs.house.gov/meetings/JU/JU03/20220317/114503/HHRG-117-JU03-20220317-SD005.pdf>, [<https://perma.cc/F2MA-NH7D>]).

<sup>35</sup> Documentation for this and the following statements on file with the author.

<sup>36</sup> The DC Courts implemented an EDR Plan in May 2021, one year after the author’s clerkship ended. See, *District of Columbia Courts Announce New Employment Dispute Resolution Plan*, (May 20, 2021), <https://newsroom.dccourts.gov/press-releases/district-of-columbia-courts-announce-new-employment-dispute-resolution-plan>, [<https://perma.cc/J3PA-CNGR>]; *DC Courts Employment Dispute Resolution Plan*, DC CTS., [https://www.dccourts.gov/sites/default/files/divisionspdfs/DC\\_Courts\\_Employment\\_Dispute\\_Resolution\\_Plan.pdf](https://www.dccourts.gov/sites/default/files/divisionspdfs/DC_Courts_Employment_Dispute_Resolution_Plan.pdf), [<https://perma.cc/2HMD-9CF3>].

confirmed judge. I was just a law clerk a few months out of law school. He had the power to destroy my career.

Eventually, the judge ended my clerkship early, telling me that I “made him uncomfortable” and “lacked respect for” him, but he “didn’t want to get into it.” I contacted Human Resources (HR) for the DC Courts, but they told me there was nothing they could do because “HR doesn’t regulate judges” and that judges and law clerks have a “unique relationship.” They asked me whether I knew that I was an “at-will employee,” and they rebuffed my requests for a reassignment.

I reached out to my law school for support and assistance. I discovered that the judge had a history of misconduct, and that several law school officials had been aware of this misconduct for several years—well before I accepted the clerkship. However, no one affiliated with the law school ever warned me of the judge’s reputation for misbehavior.

One year later, I had secured my dream job at the D.C. USAO as a Special Assistant U.S. Attorney (SAUSA). I was two weeks into training when I received devastating news that altered the course of my life. I was told that the judge had made negative statements about me during my background investigation, that I “would not be able to obtain a security clearance,” and that my job offer was being revoked.<sup>37</sup> One week later, the D.C. USAO also revoked an interview offer for a different position with the office, based on the judge’s same negative reference. I was only two years out of law school, and the judge appeared to have limitless power to ruin my reputation and destroy my career.

My story of harassment and retaliation by a former judge underscores that institutional failures perpetuate judicial misconduct.<sup>38</sup> The first institution that failed me was my law school. Law schools should be required to collect and report data on law clerk alumni’s negative clerkship experiences. However, many schools do not collect any data. Even the schools that do compile data internally are not required to report it anywhere. This creates a silo effect where law students at certain schools may be warned about misbehaving judges, but students whose schools lack institutional knowledge may walk into hostile work environments without any warning.

My experiences ultimately led me to found The Legal Accountability Project in June 2022.<sup>39</sup> The Legal Accountability Project is a nonprofit aimed at ensuring that law clerks have positive clerkship experiences, while extending support and resources to those who do not.<sup>40</sup> The nonprofit will be launching several initiatives in collaboration with law schools beginning in fall 2022, including a centralized Clerkship Reporting Database and a wide-scale Judiciary Workplace Culture Assessment.<sup>41</sup> The Legal Accountability Project is the resource that I wish

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<sup>37</sup> Documentation on file with the author.

<sup>38</sup> In 2021, the judge for whom the author clerked was “involuntarily retired” from the DC bench pursuant to D.C. Code § 11-1526(b) for reasons other than how he mistreated the author during her clerkship and in the years following it.

<sup>39</sup> See Kimberly Robinson, *Judicial Law Clerk Harassment Is Focus Of New Nonprofit Group*, BLOOMBERG LAW (June 1, 2022), <https://news.bloomberglaw.com/us-law-week/judicial-law-clerk-harassment-is-focus-of-new-non-profit-group>, [<https://perma.cc/8BXB-QFKT>].

<sup>40</sup> See, THE LEGAL ACCOUNTABILITY PROJECT, <https://www.legalaccountabilityproject.org/>, [<https://perma.cc/3DYH-9VEW>].

<sup>41</sup> The author engaged in productive conversations with approximately fifty law schools in preparation for The Legal Accountability Project’s initiatives. This article offers a broad overview of the author’s reflections after numerous conversations with deans and administrators, including several troubling patterns the author identified. Documentation on file with the author.

existed when I was a law student applying for clerkships; when I was a law clerk facing mistreatment and unsure where to turn for help; and when I was a former clerk engaging in the formal judicial complaint process. My nonprofit work led me to reconsider whether Professors Litman and Huq’s proposal should be implemented as part of a larger strategy to protect law clerks from harassment.

## V. EXISTING PROPOSALS DO NOT GO FAR ENOUGH

The proposal advanced by Professors Litman and Huq in 2021 is an important starting point in a notoriously under-scrutinized area. However, it does not go far enough toward protecting prospective clerks from misbehaving judges, nor does it hold law schools accountable for their failure to warn prospective clerks about judges with a history of misconduct. Additionally, their proposal would only require schools to report the most basic data about the number of incidents of mistreatment. This limits the ability of advocates to quantify the scope of the problem of judicial misconduct.

Professors Litman and Huq argue that the ABA should not collect data about the identity of the mistreated clerks, nor should the reported data identify individual law schools. It is important to respect law clerks’ privacy concerns. Former clerks face ongoing fears about retaliation by the judges who mistreated them, as well as concerns about reputational harm in the legal community, for their decision to report on their powerful superiors. These are legitimate concerns: data reporting should conceal law clerks’ identities. However, judicial misconduct data are more instructive if they identify the types of clerks facing mistreatment.

Professors Litman and Huq’s proposal seems to assume that institutions will be more inclined to report accurately if the ABA does not identify individual law schools. It is clear that the goal of their proposal is not to “name and shame” law schools that continue to funnel students into clerkships with notoriously misbehaving judges. The most important goal is to incentivize law schools to collect and report data on alumni’s negative experience. They may subsequently change their problematic behaviors, thereby protecting future generations of clerks.

However, some law schools require a healthy dose of public shame, in order to change the troubling behaviors in which they have been engaging for decades. In this respect, Professors Litman and Huq’s proposal obfuscates law schools’ role in the problem. Unless law schools face repercussions, some will continue funneling students into clerkships with misbehaving judges, with little regard for the diverse prospective clerks who opt against clerking because they fear mistreatment, as well as the law clerk alumni who are harassed, retaliated against, and driven from the profession.<sup>42</sup>

Additionally, Professors Litman and Huq’s proposal does not address two important questions. First, how did the law school become aware of the law clerk alumni’s negative experience? Second, did the law clerk file a complaint after experiencing mistreatment? An effective proposal should elucidate data on these topics. These data would enable advocates to (1) assess whether law school internal reporting channels are effectively capturing the scope of judicial misconduct, and (2) begin to quantify the gulf that exists between the number of law clerks experiencing mistreatment, and the number who file complaints.<sup>43</sup>

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<sup>42</sup> Survey data to quantify the number of law clerk alumni who leave the legal profession following a negative clerkship experience would be instructive here. Either the ABA or some outside group should conduct a survey of law school alumni several years after graduation to determine what percentage of alumni have left the legal profession.



## VI. ABA PROPOSAL: DATA COLLECTION AND REPORTING OBLIGATIONS

Law schools should report to the ABA each year, as a condition of their accreditation: 1) the total number of reports of mistreatment by judges, for the students who clerked the previous year, separated by gender and race of clerk, by name of judge, and by circuit and courthouse (whether state or federal); 2) whether this mistreatment was formally reported (i) internally to the courthouse and/or (ii) to an external judicial regulatory body; and 3) the method by which the law school became aware of the negative clerkship experience—either by the law clerk alumnus filing an online report, by reaching out to a law school official directly to report, or both.

### 1. Conversations with Law Schools

#### a. Conversations with law schools revealed troubling patterns of concealment and refusal to address the problem.

Over the past few months, in preparation for The Legal Accountability Project’s initiatives, I have engaged in conversations with law school officials from dozens of institutions, spanning the geographic and law school rankings spectra. In addition to discussing The Legal Accountability Project’s initiatives, including a centralized Clerkship Reporting Database and a Judiciary Workplace Culture Assessment, these conversations gauged administrators’ and deans’ awareness of the scope of the problem, law schools’ current data collection practices, their interest in making changes, and their concerns.<sup>44</sup> Law schools offered candid assessments on these topics. Troublingly, many schools are either sitting on substantial amounts of data about judicial misconduct that *should* be used to warn all prospective clerks, or they are burying their heads in the sand and refusing to collect any data at all.

All law schools have room to improve. They have received a free pass in the conversation about judicial accountability. However, they are the source by which students secure clerkships, making them the ideal vector for change.

#### b. “Institutional knowledge” may protect some students, but it does not protect everyone.

Some law school career centers and clerkship offices administer online post-interview and post-clerkship surveys for students and alumni to report on their experiences—either positive or negative.<sup>45</sup> These are password-protected, so students and alumni (as well as deans and administrators) can read the reports. An internal law school database would currently be considered the “gold standard” for protecting prospective clerks, since so few schools even engage in this basic level of alumni-to-student information sharing. At some institutions, these

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<sup>43</sup> Separating this data by source of complaint—whether filed in an internal law school database, or made verbally to a law school official—might also help to address law school officials’ concerns about qualifying what constitutes a “negative” clerkship experience.

<sup>44</sup> Documentation for this statement, and the following statements in this section, on file with the author. To protect law school officials’ anonymity and respect their concerns about confidentiality, the author offers a broad overview of the information gleaned from numerous conversations, without identifying any particular law schools. These observations reflect strong patterns that emerged.

<sup>45</sup> The most thorough questionnaires separate these questions into interview experience, offer experience, and clerkship experience. The “offer” questions aim to elucidate data on exploding offers and instances in which a judge does not give prospective clerks sufficient time to consider the job offer. While judges are dissuaded from engaging in the practice of exploding offers, some insist on doing so.

reports are compiled in a centralized database, so prospective clerks can read through them before submitting their applications. At other institutions, the reports are compiled by clerkship directors, and students are forced to inquire directly about specific judges. However, administrators concede that these online reports do not fully reflect the scope of the problem. Either students fear retaliation or reputational harm and downplay their negative experiences in the reports, or they are so fearful and traumatized that they do not report at all.<sup>46</sup> Other students reach out to law school officials to report verbally, but these verbal reports are not entered into the internal reporting databases, either by custom, or because the law clerk alumnus specifically asked that the report not be documented.<sup>47</sup>

Law school officials refer to this as “institutional knowledge”—the idea that they can internally warn prospective clerks about misbehaving judges, either before the clerks apply, before they interview, between the interview and the offer, or even after an offer has been extended.<sup>48</sup> However, if this institutional knowledge is not collected and reported anywhere, it will not adequately protect prospective clerks. First, law school officials may not adequately warn all prospective clerks before they accept clerkships with misbehaving judges. Second, even if they are warned, some prospective clerks might assume they can handle it—but they should not have to. Finally, even if law schools effectively warn their own students, this institutional knowledge does nothing to protect the thousands of other applicants from more than one hundred other law schools who apply for clerkships each year.<sup>49</sup>

Law schools should not be permitted to conceal judicial misconduct data or otherwise maintain exclusive access to it. Students from neighboring institutions, who lack access to this institutional knowledge, will continue to apply for clerkships with powerful, oftentimes life-tenured, harassers, thereby subjecting law clerks to dangerous work environments year after year. For law school officials (and law clerks) who do not report, we can assume that the judges who harassed their alumni, will harass future clerks as well. Law school data-sharing obligations protect everyone. They ensure that no law school has to be the lone institution speaking out against judicial harassment and placing its own reputation—and its ability to facilitate a strong clerkship program—on the line.

**c. Some law schools still do not collect any data on negative clerkship experiences.**

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<sup>46</sup> This ongoing and pervasive fear, even once the clerkship has ended, of retaliation and reputational harm by either the judge or the larger legal community, is a consistent theme in my conversations with current and former clerks.

<sup>47</sup> Some mistreated clerks remove their contact information from law clerk alumni databases or note in their clerkship reports that they do not wish to be contacted by prospective clerks. These practices should be red flags for administrators. Additionally, this makes it even more challenging for prospective clerks to connect with former clerks who will provide honest assessments of their clerkships.

<sup>48</sup> The quick turnaround time between when judges extend offers and when they expect answers—applicants are often afforded only twenty-four or forty-eight hours to make this major career decision—does not provide prospective clerks with enough time to make informed decisions.

<sup>49</sup> Many of the same law schools that benefit from this institutional knowledge due to their established clerkship programs and esteemed alumni networks are also highly-ranked. However, these schools still have a perverse incentive to encourage their students to clerk for notoriously misbehaving judges, when the clerkships are prestigious, in order to maintain both their high formal rankings, and informal public perceptions about law schools’ success at placing law clerks.

Even after several years' worth of substantiated public allegations of judicial misconduct,<sup>50</sup> some law schools still do not collect any data about students' negative clerkship experiences. Several longtime officials expressed surprise, claiming that former students have "never" reached out to them to report on their negative clerkship experiences.<sup>51</sup> This does not mean judicial misconduct does not occur. Rather, it suggests that alumni did not feel comfortable reporting to their law schools, due to feelings of shame or to ongoing fears of reputational harm or retaliation.

## 2. Why Don't Law Schools Collect These Data?

Based on my conversations with law school officials, only a handful of law schools conduct post-clerkship surveys or maintain clerkship reports in internal databases.<sup>52</sup> Because of these institutional failures, both the clerkship application process and the judicial workplace remain shrouded in secrecy. Law schools have offered several reasons for this.

First, conducting post-clerkship surveys, and compiling the reports in a database, takes time, money, resources, and staff.<sup>53</sup> Some law schools struggle to afford this. However, deciding not to invest resources in protecting students against misbehaving judges is a statement about the law school's values. Many schools have made the wrong decision.

Second, collecting and reviewing clerkship surveys would require clerkship directors to read all the reports; judge their veracity; and weigh conflicting information.<sup>54</sup> Questions arise like, Was this harassment, or just a poor fit between judge and clerk? Was this mistreatment, or should the judge just not have asked his clerk to do non-judicial tasks?<sup>55</sup> Was this bullying, or is the judge just "demanding"? What if one law clerk had a fantastic experience, and another clerk had a horrible one? Should the law school make both reports available to prospective clerks, or neither? The answer to these questions is that judges should act as if they are above reproach in their day-to-day dealings with clerks. They should be held to the highest ethical standards, not the lowest. And prospective clerks should have access to all the information—good, bad, and everything in between—when making enormously important decisions about their careers.

Additionally, for law schools where many alumni become judges, these judges often hire alumni from their alma maters as law clerks.<sup>56</sup> These institutions may fear alienating their

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<sup>50</sup> See Ann E. Marimow, *Former judiciary workers urge Congress to protect court employees from discrimination and harassment*, WASHINGTON POST (Mar. 17, 2022), <https://www.washingtonpost.com/politics/2022/03/17/court-workers-harassment-discrimination/>, [https://perma.cc/YXZ8-KC8Y]; see also 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/3ABK-UY2A] (reporting on former Reinhardt clerk Olivia Warren's February 2020 testimony before the House Judiciary Committee); and see Matt Zapotosky, *Federal appeals judge announces immediate retirement amid probe of sexual misconduct allegations*, WASHINGTON POST (Dec. 18, 2017), [https://www.washingtonpost.com/world/national-security/federal-appeals-judge-announces-immediate-retirement-amid-investigation-prompted-by-accusations-of-sexual-misconduct/2017/12/18/6e38ada4-e3fd-11e7-a65d-1ac0fd7f097e\\_story.html?utm\\_term=.28aa64b012fb&itid=lk\\_inline\\_manual\\_11](https://www.washingtonpost.com/world/national-security/federal-appeals-judge-announces-immediate-retirement-amid-investigation-prompted-by-accusations-of-sexual-misconduct/2017/12/18/6e38ada4-e3fd-11e7-a65d-1ac0fd7f097e_story.html?utm_term=.28aa64b012fb&itid=lk_inline_manual_11), [https://perma.cc/W3B7-535H] (reporting on substantiated allegations of misconduct against former judge Alex Kozinski).

<sup>51</sup> Documentation on file with the author.

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<sup>54</sup> Documentation on file with the author.

<sup>55</sup> Common "non-judicial tasks" that show up in post-clerkship surveys include walking the judge's dog and picking up the judge's dry cleaning. Documentation on file with the author.

<sup>56</sup> Documentation on file with the author.

alumni—who bring honor, prestige, and donations to the school. Furthermore, if the law school were to warn students about one misbehaving judge, perhaps other alumni in the judiciary would defend their sibling in robes, and stop hiring clerks from their alma mater.

The final reason why law schools do not collect this information—or, for schools that do, why they still do not adequately warn and support their students—is more nefarious. Some institutions intend to continue funneling law students into clerkships with misbehaving judges, because the clerkships are so prestigious.<sup>57</sup> Some of the misbehavers are also feeder judges to higher-level appellate and Supreme Court clerkships, and their elite clerks proceed to prestigious positions in government, academia, and private practice. To change course would jeopardize the prestige of these schools' clerkship programs. They are not willing to risk that for a few clerks who get tossed aside in the process.

Law clerk alumni should criticize their alma maters for this poor behavior when it is warranted. It reflects poorly on law schools to be known for not protecting their students. This might ultimately jeopardize institutions' clerkship numbers, if students decide not to clerk because they do not want to subject themselves to hostile work environments. However, the alternative is just as bad, if not worse. If alumni are driven from the profession following their clerkships, and it becomes publicly clear that law schools have invested three years training their students, only for them to leave the law after one or two years, this reflects poorly on them as well.

**3. Argument: Law schools should be required to collect and report data on judicial misconduct annually to the ABA, as a condition of their accreditation.**

The ABA should require law schools to collect and report annual data on students' negative clerkship experiences as a condition of their accreditation. The ABA should publicly disclose this data online, broken down by circuit, courthouse, and judge. It is worth considering whether public data reporting would unfairly prejudice certain law schools making a good-faith effort to comply with the new guidance. However, law schools must prioritize a positive clerkship experience over the prestige of the position. They have historically failed to do so.

The first year could be a pilot program. The ABA could randomly identify twenty schools from a variety of ranking tiers and geographic locations, and send surveys to those schools, requesting data about law clerk alumni's negative clerkship experiences. Additionally, the ABA should send a separate survey to all law schools, querying them about their concerns, should this reporting requirement become mandatory for law schools' accreditation.

The ABA should consider several goals for this data collection. First, it would quantify the scope of the problem. Collecting data from law schools will finally enable interested parties to understand the scope of judicial misconduct, which is the first step toward crafting effective solutions. The lack of data in this area has enabled judges to evade scrutiny over their day-to-day dealings with clerks and avoid accountability for misconduct for far too long. Second, it would finally hold law schools accountable for placing their students in abusive workplaces. Requiring law schools to collect these data will force them to grapple with their roles in perpetuating both judicial misconduct and toxic workplace norms within the legal field. Additionally, some will stop pushing students into dangerous clerkships, because they will have to report these data. This will pressure law schools to start prioritizing positive clerkship experiences over prestige. Third, it will protect prospective clerks. Collecting and reporting

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<sup>57</sup> Documentation on file with the author.

these data is the first step toward warning prospective clerks about judges with a history of misconduct, so that all prospective clerks—not just those who benefit from law schools’ institutional knowledge—can look out for misbehaving judges. All prospective clerks will be able to search for basic information in the ABA’s database. Finally, it will identify misbehaving judges. These data will enable interested parties to identify judges with a history of misconduct. While these data will not be used for disciplinary purposes, it could ultimately assist the judiciary in identifying misbehaving judges for corrective action.

**a. This proposal should consider law schools’ concerns about additional ABA data reporting obligations.**

The ABA should consider and address several law school concerns about this type of proposal. First, law schools do not want to antagonize the judiciary—no school will want to be the first to implement such reforms. That is why this program should be mandatory for law schools’ accreditation: every institution should be required to participate.

Law schools might also worry that reporting a high number of incidents of mistreatment among their law clerk alumni will negatively affect their reputations. The ABA should clarify that all schools are culpable, and that accurately reporting these data does not necessarily reflect poorly on the schools.<sup>58</sup> However, law schools must also accept their roles in the problem. Law schools should stop pressuring students to clerk for misbehaving judges at the expense of students’ well-being. If they refuse to stop this problematic behavior, shining full sunlight on this practice might push them to change. Otherwise, these law schools’ reputations might—and should—suffer.

Some law school officials have voiced concerns about the public nature of these data.<sup>59</sup> They have asked whether judges should be able to contest allegations made against them. This is a hollow argument. First, there is no evidence that law clerks are raising false allegations of harassment and retaliation against judges. There is a culture of gross underreporting and understating the severity of the harm that law clerks experienced, not a culture of false allegations. Furthermore, as Professors Litman and Huq argued in their *Washington Post* article last year, a threshold number of allegations could trigger an internal investigation into a judge—thereby both affording judges the opportunity to defend themselves, and also serving as a backstop against false allegations.<sup>60</sup>

Additionally, some administrators have questioned what constitutes a “negative” clerkship experience for data reporting purposes.<sup>61</sup> The full spectrum of a less-than-positive clerkship experience—everything from a report that the judge was “challenging” to work for, to specific allegations of harassment—should qualify as negative experiences. This is because law clerks notoriously downplay the severity of the harm they experienced in their reports. Mistreated clerks are often hesitant to report on their negative experiences. A former clerk who decides to fill out an evaluation and then labels the clerkship as “challenging” may use the word as a euphemism to indicate more severe mistreatment.

Furthermore, it is important to consider whether law clerk alumni will report fully and accurately to their law schools after experiencing mistreatment, or whether the number of reports

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<sup>58</sup> For law schools that continue to report a high number of incidents of mistreatment in successive years, this could reflect these institutions’ ongoing failure to address the problem.

<sup>59</sup> Documentation on file with the author.

<sup>60</sup> See Litman & Huq, *supra* note 27.

<sup>61</sup> Documentation on file with the author.

made to law school officials represents only a fraction of the law clerks facing mistreatment in chambers (and whether the alumni downplay the severity of the harm in their reports).<sup>62</sup> The ABA cannot be the only organization collecting these data. Other organizations, including The Legal Accountability Project, will also collect data from law clerk alumni in order to quantify the scope of the problem.

**b. This proposal would protect prospective clerks and hold law schools accountable for perpetuating judicial misconduct.**

Professors Litman and Huq’s proposal provides an important starting point. However, the proposal outlined here, which would collect and report data about mistreated clerks and law schools, and would also separate data by source of report and whether a formal complaint was filed, would better protect law clerks and hold law schools accountable. Disclosing demographic data might incentivize judges to hire more diverse clerks. At the very least, it will publicly highlight some judges’ sexism and racism. Additionally, through this proposal, the ABA would finally collect urgently needed data about whether mistreatment leads to formal complaints, and whether existing law school reporting channels are effective. The legal community’s collective failure to compile data in this area makes a striking statement about its priorities—valuing judges over the next generation of young attorneys, and prioritizing prestige of clerkship over positive experience. Robust reporting requirements might even tackle the pervasive problem of law schools downplaying abusive clerkships. The lack of data about judiciary workplace culture has allowed judges to get away with misconduct, and it has enabled law schools to evade calls for reform.

**VII. LARGER EFFECTS OF TRANSPARENCY ON LEGAL WORKPLACES**  
**VIII.**

If data on misbehaving judges were publicly available, a legal employer could take a more discerning view of a judge’s negative reference about an applicant. We should quantify not only the number of law clerks who are harassed by judges, but also the number who are subsequently driven from the profession.

In my case, the D.C. USAO received an outrageous negative reference from the judge for whom I clerked. The statements made therein were not consistent with the rest of my application. The USAO did not ask any follow-up questions of the judge. They did not afford me the opportunity to defend myself. They simply tossed me aside, with no regard for how their actions would affect my life, reputation, and career. The USAO was not alerted by the D.C. Courts, the Commission investigating the judge, or the judge himself that he was on administrative leave, pending an investigation into other allegations, at the time he filed the negative reference. The former judge did not make a clarifying statement to the USAO, addressing some but not all of his claims about me, until eight months later. By then, it was too late. The damage had been done.

Legal employers should interrogate negative references, since former employers rarely give them.<sup>63</sup> If data about misbehaving judges were publicly available, it would provide a red flag for employers reading references, and it would offer context to the judges’ statements. However,

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<sup>62</sup> It is also worth considering whether law clerks who do report, in fact downplay the severity of the mistreatment, due to ongoing feelings of shame or fears of retaliation and reputational harm.

<sup>63</sup> Many employers told the author they would just give a former employee a lukewarm reference, to avoid liability. Documentation on file with the author.

legal employers should go much further. They should stop catering to the actual or perceived whims of judges in their hiring decisions. Right now, legal employers are incentivized to maintain positive relationships with judges. For law firms, prosecutors' offices, and public defenders' offices, employers fear that angering a judge by disregarding their reference could cause the judge to rule against their clients in the future. Whether the employer fears judges or deifies them, it sends a dangerous message: that the judge can say anything, and they will not be questioned. No judge is above the law—yet in my work, I continually encounter attorneys who treat judges this way, as well as judges who see themselves this way.

## IX. CONCLUSION

The ABA should begin collecting data from law schools about their graduates' negative clerkship experiences during the 2022-23 school year or as soon as possible. After analyzing these data, advocates can craft effective long-term solutions. Until we understand the scope of the problem, reform will remain out of reach. Ultimately, all law schools should be required to collect and report these data to the ABA annually, as a condition of their accreditation.

Law clerks cannot wait any longer for these urgently needed reforms. Attorneys—whether they clerked or not, whether they appear before judges in their practice or not—owe it to the next generation of young lawyers to ensure that their workplaces are safe and free from discrimination and harassment. Data reporting obligations for all law schools, as a condition of their ABA accreditation, would be a forceful step toward address this problem. These reporting obligations will ensure that *all* law clerks benefit from data collection and information-sharing, and that it is not just a few schools that can warn prospective clerks about misbehaving judges. Law schools have historically enabled judicial misconduct. Now, they should be the first to step forward and embrace reforms.