

# **UCLA**

## **UCLA Women's Law Journal**

### **Title**

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### **Permalink**

<https://escholarship.org/uc/item/0g81c8xb>

### **Journal**

UCLA Women's Law Journal, 26(1)

### **Author**

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### **Publication Date**

2019

### **DOI**

10.5070/L3261044348

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# USE YOUR PERSONAL LIE DETECTOR TO JUDGE KAVANAUGH

Laura E. Gómez\*<sup>1</sup>

How should we judge Brett Kavanaugh's denials about sexual misbehavior? We can run his assertions through our personal lie detectors, which we all possess based on our life experiences.

I find myself doubting Kavanaugh's truthfulness about what happened to Christine Blasey Ford because I doubt his veracity about something that has gotten lost in the latest news: his testimony during the confirmation hearings when asked about the sexual improprieties of one of his mentors, retired Judge Alex Kozinski of the U.S. 9th Circuit Court of Appeals.

Last year, fifteen women came forward to say Kozinski had harassed them physically or verbally over his four decades as a federal judge.<sup>2</sup> Kozinski chose retirement rather than face an investigation into the allegations.<sup>3</sup> Asked repeatedly by both Republican

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1. This op-ed appears as published except for the title change and addition of footnotes. It appeared prior to Dr. Christine Blasey Ford's testimony before the Senate Judiciary Committee. Laura E. Gómez, *Connecting the Dots on Brett Kavanaugh*, L.A. TIMES (Sept. 20, 2018, 4:10 AM), <https://www.latimes.com/opinion/op-ed/la-oe-gomez-kavanaugh-kozinski-20180920-story.html> [<https://perma.cc/8YUW-D458>].

2. As first reported by *The Washington Post* in December 2017, fifteen women accused Judge Kozinski of inappropriate behavior, including unwanted touching and kissing. Matt Zapotesky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST (Dec. 8, 2017), [https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef\\_story.html](https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html) [<https://perma.cc/E8QP-C8J2>]; Matt Zapotesky, *Nine More Women Say Judge Subjected Them to Inappropriate Behavior, Including Four Who Say He Touched or Kissed Them*, WASH. POST (Dec. 15, 2017), [https://www.washingtonpost.com/world/national-security/nine-more-women-say-judge-subjected-them-to-inappropriate-behavior-including-four-who-say-he-touched-or-kissed-them/2017/12/15/8729b736-e105-11e7-8679-a9728984779c\\_story.html](https://www.washingtonpost.com/world/national-security/nine-more-women-say-judge-subjected-them-to-inappropriate-behavior-including-four-who-say-he-touched-or-kissed-them/2017/12/15/8729b736-e105-11e7-8679-a9728984779c_story.html) [<https://perma.cc/37U6-ZYDC>].

3. Niraj Chokshi, *Federal Judge Alex Kozinski Retires Abruptly After*

and Democrat senators about his knowledge of Kozinski's bad acts, Kavanaugh said he never witnessed Kozinski "engaging in inappropriate behavior of a sexual nature."<sup>4</sup> Along with his insistence that he never assaulted a younger girl when he was 17, these denials lead me to question Kavanaugh's inclination to treat women as the full equals of men under the law.

I first met Kozinski in summer 1992, when I began a clerkship with a different judge on the appeals court.<sup>5</sup> Kavanaugh had completed his clerkship in the intimate Pasadena courthouse just as mine started.

My interactions with Kozinski were comparatively minimal and involved no inappropriate behavior on Kozinski's part, but I did my best to spend as little time around him as possible. He had what I'll call a creepiness factor—an older male authority-figure who expressed too much interest in the young women around him. It is hard for me to imagine that any of the judge's clerks would not have known of reactions like mine, which were commonplace.<sup>6</sup>

Kavanaugh was one of Kozinski's star clerks. Kozinski helped him land a clerkship with Supreme Court Justice Anthony Kennedy. Within a decade, Kavanaugh was appointed a federal judge; then in 2006, President George W. Bush appointed him to the Court of Appeals for the D.C. Circuit, making him an equal of his mentor.

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*Sexual Harassment Allegations*, N.Y. TIMES (Dec. 18, 2017), <https://www.nytimes.com/2017/12/18/us/alex-kozinski-retires.html> [<https://perma.cc/JBK4-M3V4>].

4. Kavanaugh also said he "[did] not remember" receiving any sexually explicit emails from Judge Kozinski, who reportedly operated an email list that contained inappropriate content. Brett Kavanaugh, *Responses to Questions for the Record, Hearing on the Nomination of The Honorable Brett Kavanaugh to be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 115th Cong. 25 (2018) [hereinafter *Questions for the Record*] (questions of Sen. Patrick Leahy, Member, S. Comm. on the Judiciary); *Supreme Court Nominee Brett Kavanaugh Confirmation Hearing Day 2, Part 1*, CSPAN (Sept. 5, 2018), <https://www.c-span.org/video/?449705-1/supreme-court-nominee-brett-kavanaugh-confirmation-hearing-day-2-part-1&start=4914>; *Supreme Court Nominee Brett Kavanaugh Confirmation Hearing, Day 2, Part 4*, CSPAN (Sept. 5, 2018), <https://www.c-span.org/video/?449705-14/supreme-court-nominee-brett-kavanaugh-confirmation-hearing-day-2-part-4>.

5. The author clerked for Judge Dorothy Wright Nelson from August 1992 to September 1993.

6. Dara E. Purvis, *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/DL58-83FQ>] (noting that "Almost immediately [upon starting her clerkship], I heard rumors that Alex Kozinski, another judge whose chambers were in the same building, often made inappropriate sexual remarks to female clerks.").

Kavanaugh couldn't possibly have missed the furor over reporting about Kozinski's questionable behavior in the *Los Angeles Times* in 2008.<sup>7</sup> 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." They included a video of a woman shaving her pubic area and a photo of a naked woman on all fours painted to look like a cow.

It simply doesn't ring true to me that, as he asserted during the confirmation process, Kavanaugh would be in the dark about allegations of impropriety related to Kozinski. But in response to a question from Sen. Chris Coons (D-Del.), Kavanaugh wrote:

To the best of my memory, no one ever raised concerns with me regarding inappropriate behavior of a sexual nature on the part of Judge Kozinski. Judge Kozinski worked in a small courthouse in Pasadena with ten other judges, numerous law clerks, and court employees. Apparently, none of them knew of any misconduct, or they presumably would have reported it.<sup>8</sup>

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7. 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>]; Judge Asks Ethics Panel to Review His Website Conduct, L.A. TIMES (June 13, 2008), <https://www.latimes.com/archives/la-xpm-2008-jun-13-me-kozinski13-story.html> [<https://perma.cc/MJ2Z-H8RQ>]; Scott Glover, *U.S. Judge in Obscenity Trial Steps Down*, L.A. TIMES (June 14, 2008), <https://www.latimes.com/archives/la-xpm-2008-jun-14-me-kozinski14-story.html> [<https://perma.cc/DQ7Y-294Q>]; Scott Glover, *Probe of Judge Shifted to Court in East*, L.A. TIMES (June 17, 2018), <https://www.latimes.com/archives/la-xpm-2008-jun-17-me-kozinski17-story.html> [<https://perma.cc/V25R-JJDB>]; Scott Glover, *Judge E-mailed Jokes to 'Gag List'*, L.A. TIMES (Dec. 8, 2008), <https://www.latimes.com/archives/la-xpm-2008-dec-08-me-gaglist8-story.html> [<https://perma.cc/5EET-L76T>].

8. *Questions for the Record*, *supra* note 4, at 157 (questions of Sen. Coons, Member of Sen. Comm. on the Judiciary). First, empirical evidence suggests that much harassment, in fact, is not reported. A report by the Equal Employment Opportunity Commission estimates 70 percent of employees who say they experienced workplace sexual harassment did not report it, oftentimes out of fear of retaliation or concern their superiors would not believe them. See U.S. EQUAL EMP. OPPORTUNITY COMM'N, REPORT OF THE CO-CHAIRS OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (2016), available at [https://www.eeoc.gov/eeoc/task\\_force/harassment/upload/report.pdf](https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf) (describing recent studies); Lilia M. Cortina & Jennifer L. Berdahl, *Sexual Harassment in Organizations: A Decade of Research in Review*, in THE SAGE HANDBOOK OF ORGANIZATIONAL BEHAVIOR 469–497 (2008); Lilia M. Cortina & Vicki J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8 J. OCCUPATIONAL HEALTH PSYCHOL. 247–265 (2003). Second, there is reason to expect allegations against an Article III judge, who has lifetime tenure, would be especially

Ford's account does not strike me as nearly as far-fetched as Kavanaugh's denials about Kozinski's behavior.

Based on Kavanaugh's senior-year yearbook, his all-boys Catholic school, Georgetown Prep, featured a culture of heavy drinking and misogyny. Photo captions brag about partying ("100 Kegs or Bust") and make cringe-worthy jokes about violence against women ("Do these guys beat their wives?").<sup>9</sup> Georgetown Prep graduate Mark Judge, whom Ford implicates, along with Kavanaugh, in her assault, wrote a memoir of his debauched high school days, including drinking with a buddy he called "Bart O'Kavanaugh."<sup>10</sup>

Had Ford gone to the police at the time with her story, authorities would have taken it seriously.<sup>11</sup> She describes a house party where everyone was engaged in illegal, underage drinking, an aggravating factor under the law. Two older boys together pushed her into a bedroom, which could be seen as conspiracy to commit a

under-reported given the manner in which the Senate Judiciary Committee in 1991 received Professor Anita Hill's complaints of sexual harassment by her boss Clarence Thomas. *See generally* Julia Jacobs, *Anita Hill's Testimony and Other Key Moments From the Clarence Thomas Hearings*, N.Y. TIMES (Sept. 20, 2018), <https://www.nytimes.com/2018/09/20/us/politics/anita-hill-testimony-clarence-thomas.html> [<https://perma.cc/J3MS-MLQK>]; Adrienne D. Davis & Stephanie M. Wildman, *The Legacy of Doubt: Treatment of Sex and Race in the Hill-Thomas Hearings*, 65 S. CAL. L. REV. 1367 (1992).

9. *See* Avi Selk, *What the Man Accused of Being Part of Kavanaugh's Alleged Sexual Assault Had to Say About Women's Sexuality*, WASH. POST (Sept. 18, 2018), [https://www.washingtonpost.com/news/arts-and-entertainment/wp/2018/09/17/what-the-man-accused-of-helping-kavanaugh-assault-a-woman-wrote-about-female-sexuality/?utm\\_term=.9797c70c24c8](https://www.washingtonpost.com/news/arts-and-entertainment/wp/2018/09/17/what-the-man-accused-of-helping-kavanaugh-assault-a-woman-wrote-about-female-sexuality/?utm_term=.9797c70c24c8) [<https://perma.cc/8ZJ6-VYFU>]; Marc Fisher & Perry Stein, "100 Kegs or Bust": *Kavanaugh Friend, Mark Judge, Has Spent Years Writing About High School Debauchery*, WASH. POST (Sept. 21, 2018), [https://www.washingtonpost.com/local/100-kegs-or-bust-kavanaugh-friend-has-spent-years-writing-about-high-school-debauchery/2018/09/21/a8e0fe22-bb55-11e8-a8aa-860695e7f3fc\\_story.html?utm\\_term=.7ded5c4ec753](https://www.washingtonpost.com/local/100-kegs-or-bust-kavanaugh-friend-has-spent-years-writing-about-high-school-debauchery/2018/09/21/a8e0fe22-bb55-11e8-a8aa-860695e7f3fc_story.html?utm_term=.7ded5c4ec753) [<https://perma.cc/34Z7-UMAU>].

10. Seth Kaufman, *Good Luck Finding a Copy of Mark Judge's "Wasted: Tales of a Gen X Drunk"*, NEW YORKER (Sept. 29, 2018), <https://www.newyorker.com/culture/culture-desk/good-luck-finding-a-copy-of-mark-judges-wasted-tales-of-a-gen-x-drunk> [<https://perma.cc/X89T-WALT>].

11. In part, police would have paid her attention as a victim because she is white and lived in an affluent suburban neighborhood. For the contrast in how women of color experience the legal system, *see* Michelle Jacobs, *The Violent State: Black Women's Invisible Struggle Against Police Violence*, 24 WM. & MARY J. WOMEN & L. 39 (2017) (examining African American women's experiences reporting crimes and concluding they face discrimination); Rachel Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEOC Litigation*, L. & SOC'Y REV. 991, 1009 tbl.4 (2011) (concluding that Title VII plaintiffs who were women of color experienced longer odds than white women and men of color plaintiffs).

crime. One of them clawed at her clothes and kept her from screaming with his hand over her mouth. She says she feared for her life.<sup>12</sup>

Against Ford's memory, we have seen a line-up of Kavanaugh's former female clerks testifying to his outstanding mentorship.<sup>13</sup> In addition, 65 women who "knew Brett well" in high school signed a letter attesting to his decency.<sup>14</sup> On the personal side, stories about his devotion to his daughters, including coaching his older daughter's basketball team, likewise affirm him as an enlightened father who seeks to give his girls equal opportunities.<sup>15</sup>

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12. *Professor Christine Blasey Ford Opening Statement*, CSPAN (Sept. 27, 2018), <https://www.c-span.org/video/?c4751690/professor-christine-blasey-ford-opening-statement>. These facts would have led police to investigate Ford's complaint with some rigor since, if they were true, they could support the crimes of statutory rape, forcible rape, aggravated assault, and kidnapping. Indeed, around the time Ford alleges she was raped by Kavanaugh, Maryland's law of forcible rape was undergoing a dramatic shift from the traditional standard of force requiring "a reasonable fear which overcame [the victim's] ability to resist" to the post-women's liberation standard of force as "the reasonableness of [the victim's] apprehension of fear" to be decided by the jury. *State v. Rusk*, 424 A.2d 720 727 (Md. 1981) (overruling *Rusk v. State*, 404 A.2d 624 (Md. Ct. Spec. App. 1979)); see also Jeannie Suk, "The Look in His Eyes": The Story of *Rusk* and Rape Reform, in *CRIMINAL LAW STORIES* 171, 171–72 (Donna Coker & Robert Weisberg eds., 2013) (noting that defendant Rusk "was convicted at the cusp of legal transformation, when sexual behavior that had been commonplace and tolerated by the law was rapidly being recast as criminal. The story of *State v. Rusk* is the story of when and how a set of social norms of sex and dating became unacceptable.").

13. Elizabeth Williamson, *Judge Kavanaugh's Former Clerks: Diverse, and Deployed to Vouch for Him*, N.Y. TIMES (July 11, 2018), <https://www.nytimes.com/2018/07/11/us/politics/kavanaugh-supreme-court-clerks.html> [<https://perma.cc/8MCH-P56W>].

14. Letter from Jennifer Syle Aniskovich, et al., to Sen. Charles Grassley, Chairman, S. Comm. on the Judiciary and Sen. Dianne Feinstein, Ranking Member, S. Comm. on the Judiciary (Sept. 14, 2018), available at <https://www.judiciary.senate.gov/imo/media/doc/2018-09-14%2065%20Women%20who%20know%20Kavanaugh%20from%20High%20School%20-%20Kavanaugh%20Nomination.pdf> [<https://perma.cc/DSP4-F79F>]. When asked to comment, only seven out of the sixty-five women from the letter stated their support. Josh Gerstein, Andrew Restuccia, & Daniel Lippman, 'I Do Not Know This Woman': Trump Allies Rally to Kavanaugh's Defense, POLITICO (Sept. 17, 2018, 4:52 PM), <https://www.politico.com/story/2018/09/16/trump-kavanaugh-allegations-response-826069> [<https://perma.cc/DF6D-H3PU>].

15. Julie O' Brien, *I Don't Know Kavanaugh the Judge. But Kavanaugh the Carpool Dad is One Great Guy*, WASH. POST (July 10, 2018), [https://www.washingtonpost.com/opinions/i-dont-know-kavanaugh-the-judge-but-kavanaugh-the-carpool-dad-is-one-great-guy/2018/07/10/a1866a2c-8446-11e8-9e80-403a221946a7\\_story.html?utm\\_term=.880de6963a15](https://www.washingtonpost.com/opinions/i-dont-know-kavanaugh-the-judge-but-kavanaugh-the-carpool-dad-is-one-great-guy/2018/07/10/a1866a2c-8446-11e8-9e80-403a221946a7_story.html?utm_term=.880de6963a15) [<https://perma.cc/HCE4-6XRN>].

But I can't help connecting the dots between a boys-will-be-boys high school culture, socialization into the legal profession by a ribald mentor, and what appears to be a convenient, willful blindness to that mentor's obvious missteps. Perhaps Kavanaugh can't identify harassment, and possibly assault, or he doesn't want to. Either way, I don't trust him to protect women's rights.