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Draft of a Letter of Recommendation to the Honorable Alex Kozinski, Which I Guess I'm Not Going to Send Now

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DRAFT OF A LETTER OF RECOMMENDATION
TO THE HONORABLE ALEX KOZINSKI, WHICH I
GUESS I'M NOT GOING TO SEND NOW

*Yxta Maya Murray**

ABSTRACT

This legal-literary essay engages the current social and jurisprudential moment, encapsulated by the hashtag #metoo.¹ It focuses on the allegations, made in the first week of December 2017, that Ninth Circuit Court of Appeals Judge Alex Kozinski verbally sexually harassed former law clerks Emily Murphy and Heidi Bond. I wrote the lioness's share of the piece during December 10–11—that is, in the days before news outlets reported that other women complained of Kozinski touching them on the thigh or breast while propositioning them for sex or discussing recent sexual encounters²—and concluded that Kozinski was unlikely to face impeachment or meaningful judicial censure, but that he should nevertheless resign because his maintenance of his judicial position was untenable.

What occurred next proved a shocking installation in the annals of American judicial history: After hiring feminist icon Susan Estrich³ as counsel and asserting that the claims against

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- * Professor, Loyola Law School. J.D., Stanford, 1993. Thank you to Deborah Weissman, Deborah Tuerkheimer, Catharine A. MacKinnon, Victor Gold, Kathy Abrams, Hila Keren, and to my wonderful editorial team at the Michigan Journal of Gender & Law.
1. See Jeffrey Tobias Halter, *Corporate America's Dirty Little Secret - Sexual Harassment*, HUFFPOST, Nov. 17, 2017, https://www.huffingtonpost.com/entry/corporate-americas-dirty-little-secret-sexual-harassment_us_5a08be4fe4b0ee8ec36942c4 (“On social media platforms, hundreds of thousands of women are raising their hands and saying #MeToo.”).
 2. Matt Zapotosky, *9 More Women Say 9th Circuit Judge Kozinski Subjected Them to Inappropriate Behavior*, CHIC. TRIB., Dec. 15, 2017, <http://www.chicagotribune.com/news/nationworld/ct-judge-alex-kozinski-harassment-20171215-story.html>.
 3. Susan Estrich, *The Persecution of a Conservative Icon*, NOOZHAWK, Dec. 14, 2017, https://www.noozhawk.com/article/susan_estrich_the_persecution_of_a_conservative_icon (“No rape. No sexual assault. No trading jobs for favors. No forcing women to ‘put out’ to keep their job.”); Marcia Coyle, *Quinn Emanuel Defends Judge Alex*

him were “not true,”⁴ Judge Kozinski did retire on December 18, 2017, explaining that he could not “be an effective judge and simultaneously fight this battle. . . . Nor would such a battle be good for [his] beloved federal judiciary.”⁵

Beyond qualifying me, for the first time in my life, more as a baffled Hildegard von Bingen⁶ than as a grouchy Cassandra,⁷ the most notable aspect of my essay is its form. It is auto-fiction,⁸ composed in the style of a letter of recommendation that an unnamed U.S. law professor attempts to write for a student who seeks a clerkship with Judge Kozinski during those frenzied and confusing first weeks of December. The “letter” also contains editorial comment flags, written by an unidentified colleague.

The “foul papers”⁹ style of this letter permits an expression of the intense emotion catalyzed by the allegations against Judge Kozinski, and also allows us to consider the double bind that law professors and law students find themselves in with regard to clerkship applications tendered within a legal culture shaped by male dominance and white supremacy. Further, the document’s footnotes denote the copious subtext that can lie beneath the

Kozinski as Misconduct Claims Mount, RECORDER, Dec. 15, 2017, <https://www.law.com/therecorder/sites/therecorder/2017/12/15/quinn-emanuel-defends-judge-alex-kozinski-as-misconduct-claims-mount/> (“Federal appeals judge Alex Kozinski has retained Susan Estrich and William Burck of Quinn Emanuel Urquhart & Sullivan to represent him as additional women step forward to accuse him of sexual misconduct.”).

4. Maura Dolan, *Judges to investigate Alex Kozinski as more women allege sexual misconduct*, L.A. TIMES, Dec. 15, 2017, <http://www.latimes.com/local/lanow/la-me-ln-kozinski-misconduct-probe-20171215-story.html>.
5. Maura Dolan, *9th Circuit Judge Alex Kozinski Steps Down After Accusations of Sexual Misconduct*, L.A. TIMES, Dec. 18, 2017, <http://www.latimes.com/politics/la-pol-ca-judge-alex-kozinski-20171218-story.html>.
6. See GEOFFREY ASHE, *Hildegard von Bingen*, in THE ENCYCLOPEDIA OF PROPHECY 103 (2001) (“[H]er glances at the future give her a place in the history of prophecy. She warned of disasters threatening the Church because of its corruption.”).
7. See *Cassandra*, *id.* at 103 (“[W]hile she could foretell the future, no one would believe her. Cassandra uttered her pronouncements in fits of frenzy suggesting insanity.”).
8. Lily Tuck, *True Confessions of an Auto-Fictionist*, LITHUB, Oct. 23, 2015, <http://lithub.com/true-confessions-of-an-auto-fictionist/> (“The term ‘auto-fiction’ was first coined by the French writer, Serge Doubrovsky, in 1977 to describe his novel *Fils* (translated as both *Thread* and *Son*) as well as to describe a genre that was part autobiography and part fiction.”).
9. See E.A.J. HONIGMANN, THE STABILITY OF SHAKESPEARE’S TEXTS 17 (1965) (opining that foul papers are “any kind of draft preceding the first fair [that is, clean] copy”).

surface of oppressed people's sometimes strangled speech. The employment of the comment flags allows for a certain amount of "cross talk" to this outpouring, critiques that mainly express the position of the hegemonic power structure (except for some gadfly citations to Janet Halley, Jacob Gersen, and Jeannie Suk). In these comment flags, we can see how even the most basic aspects of legal discourse (Bluebook conventions; formatting; professionalism) encourage denial of the emotional disorganization and rage that flow from sexual harassment and other kinds of oppression. We also can discern how legal discourse's obsession with "relevance" stymies the engagement of racial, class, and queer intersectionalities. Additionally, it is worth noting that some of these comment flags ask hard and valuable questions.

Together, this contest of voices and perspectives interrogates why calls for Kozinski's resignation were "off the wall" on December 8—that is, that they were so unthinkable that he could gleefully brush them off during that first week of the month¹⁰—but legitimate on December 18. N.B.: The piece is written as if it is still December 11, just after the allegations of verbal harassment were reported, but before the complaints about physical touching came out in national news. That is, it is "written" in the moments before Judge Kozinski's reputation suffered irreparable blows, and he remained a sought-after clerkship despite long-standing rumors and complaints of his misogyny.

In my efforts to harness the legal-literary style to uncover the effects and constructions of oppression, I take inspiration from DERRICK BELL'S *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1993), Richard Delgado's *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 *MICHIGAN LAW REVIEW* 2411 (1989), and PATRICIA WILLIAMS' *THE ALCHEMY OF RACE AND RIGHTS* (1992). I also build upon Kathryn Abrams and Hila Keren's *Who's Afraid of Law and the Emotions?* 94 *MINN. L. REV.* 1997 (1998).

10. See Dolan *infra* note 24.

December 11, 2017
 Judge Alex Kozinski
 125 S Grand Ave
 Pasadena, CA
 91105

To the Honorable Alex Kozinski, of the Ninth Circuit Court of Appeals,

I write this letter to give my most enthusiastic recommendation that you hire my former student, [NAME REDACTED], for a position in your chambers as a clerk. I have known [NAME REDACTED] since 2015, when she took my Criminal Law class here at [REDACTED] Law School.

[NAME REDACTED] proved from the very first week of the semester to be an extraordinary student: She demonstrated a keen legal mind by asking pressing, articulate questions that tackled the class's most difficult issues, such as why so many men in our casebook seem to get voluntary manslaughter mitigations when they assassinate their wives,¹¹ why battered women have such a difficult time obtaining self-defense claims when they kill their abusers,¹² and whether the mens rea manipulations¹³ that courts engage in when dealing with obtuse defendants will actually protect women from the tsunamis of sexual assault and harassment that they apparently are doomed to endure in this country as a kind of blood inheritance.

Comment [NR1]: Word choice.

Comment [NR2]: You're doing that overcompensation thing we talked about before; there's no need to fn letter of rec

Comment [NR3]: Tone, run-on, relevance

-
11. See, e.g., SANFORD KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 463 (10th ed. 2016) (reproducing an abstract of *Girouard v. State*, 583 A.2d 718 (Md. 1991), which identified adultery as a "traditional" reasonable provocation in other jurisdictions); see also *Knight v. State*, 907 So. 2d 470, 478 (Ala. Crim. App. 2005) (quoting WAYNE LAFAVE & AUSTIN SCOTT, SUBSTANTIVE CRIMINAL LAW § 7.10(b)(5) (2d ed. 1986)) ("We note that '[t]he modern tendency is to extend the rule of mitigation beyond the narrow situation where one spouse actually catches the other in the act of committing adultery.'").
12. See KADISH ET AL., *supra* note 11, at 903 (reproducing an abstract of *State v. Norman*, 378 S.E.2d 8 (N.C. 1989) (refusing a self-defense claim to a woman who killed her husband, who had been severely battering her for years)).
13. See, e.g., *id.* at 415-16 (reproducing an abstract of *Commonwealth v. Sherry*, 437 N.E.2d 224 (1982), which suggested that in a rape case, either the standard rule requiring mens rea would be abrogated, or the mental state of the defendant would be judged from an objective point of view).

[NAME REDACTED] then further demonstrated her intelligence and formidable work ethic to me the next year, when she enrolled in my Women and the Law seminar. In a semester that also saw [NAME REDACTED] volunteer at a battered women's shelter and intern at an immigrant law clinic, she showed up for every class armed with a battery of demanding inquiries about the law's treatment of subordinated people: How, she asked, can we protect women against sexual harassment without negating their agency or violating the principles of due process?¹⁴ Yes, how, Professor—she nearly growled at me in the middle of the seventh week—are we supposed to give voice to women's silenced trauma using the “master's tools,”¹⁵ that is, by safeguarding them with the very same system that hurt and gagged them in the first place?

[NAME REDACTED] then topped off her marvelous in-class performance by awarding me with her final paper, a *tour de force* that combined legal-literary analysis with hard-core doctrinal research: Her interdisciplinary and intersectional manifesto, titled *Toward Reparations for Women in the Age of the Anthropocene*, topped out at 65 pages, contained 267 footnotes, and concluded with an original blank-verse poem that argued for the impeachment of President Donald Trump on the grounds of his sexual harassment of Jessica Leeds, Samantha Holvey, and Rachel Cooks.¹⁶ For this dissertation, she received an A plus.

It is on these bases that I recommend [NAME REDACTED] to your chambers, as she would prove an invaluable addition to any office of the law. Her work ethic, empathy, astonishing capacity for legal exegeses, open-mindedness, and her passion for fairness make her a resource that you would well regret passing on. Moreover, if [NAME REDACTED] could count you as an employer and even a mentor, that would redound beautifully to her career: Since you are universally regarded as one of the most brilliant legal minds on the circuit, you have

Comment [NR4]: Ok but how'd she do in Federal Courts?

Comment [NR5]: He'll probably like that

Comment [NR6]: Tone offputting

Comment [NR7]: Run on; obscure reference

Comment [NR8]: I would emphasize the doctrinal strengths of her paper

Comment [NR9]: Regarding this week's events you might need to “read the room” more in this paragraph

Comment [NR10]: Is she on law review? Hopefully an editorial position? I'd talk more about that

14. We read Tamara Rice Lave's *Ready, Fire, Aim: How Universities Are Failing the Constitution in Sexual Assault Cases*, 48 ARIZ. ST. L.J. 637 (2016).

15. On the “master's tools” conundrum, see AUDRE LORDE, *SISTER OUTSIDER: ESSAYS AND SPEECHES* 110, 111 (1984).

16. ~~These three women are now asking Congress for an investigation. See Dan Merica, *Women Detail Sexual Allegations Against Trump*, CNN, Dec. 11, 2017, <http://www.cnn.com/2017/12/11/politics/donald-trump-women-allegations/index.html>.~~

earned a status as a “feeder” judge¹⁷ who could potentially gain [NAME REDACTED] a Supreme

a Supreme Court clerkship

honorable sadfa,adjk;

You are one of the best and brightest

You have sent several clerks to positions on the Supreme Court, such as the male Alexander (“Sasha”) Volokh, who clerked for Alito before ascending to a professorship at Emory Law,¹⁸ the female Theane Evangelis, who was sent “upstairs” to Sandra Day O’Connor and is now a partner at Gibson Dunn,¹⁹ the female Sandra Segal Ikuta, who also clerked for O’Connor and is now herself a Ninth Circuit Judge,²⁰ and also the female Heidi Bond, a.k.a. Courtney Milan,²¹ who

who

the list goes on

partners judges academics like me but at fancier schools etc²²

It is true that [NAME REDACTED] is a woman, a woman of color, and that in the past several days it has come to the attention of the news media that your honor is accused of verbally sexually harassing a variety of female clerks and/or interns. Like, I guess, making the aforementioned Heidi Bond/Courtney Milan look at porn and then quizzing her about it.²³ Or saying garbage to Emily Murphy about being naked.²⁴ All of the reports of sexual harassment that I have read are race

Comment [NR11]: Alignment problem

Comment [NR12]: typo

Comment [NR13]: No.

Comment [NR14]: No. No.

17. See Lawrence Baum, *Hiring Supreme Court Law Clerks: Probing the Ideological Linkage Between Judges and Justices*, 98 MARQ. L. REV. 333, 342 n.37 (2014) (you have provided twenty-six clerks to Kennedy).

18. See EMORY UNIV. SCH. OF LAW, *Faculty Profiles: Alexander Volokh*, <http://law.emory.edu/faculty-and-scholarship/faculty-profiles/volokh-profile.html> (last visited Apr. 19, 2018).

19. See GIBSON DUNN, *Theane Evangelis, Partner*, <http://www.gibsondunn.com/lawyers/tevangelis> (last visited Apr. 19, 2018).

20. See *Sandra Segal Ikuta*, WIKIPEDIA, https://en.wikipedia.org/wiki/Sandra_Segal_Ikuta (last visited Apr. 19, 2018).

21. See Heidi Bond, *#metoo*, COURTNEY MILAN, <http://www.courtneymilan.com/metoo/kozinski.html> (last modified Dec. 8, 2017). Courtney Bond is the *nom de plume* of Heidi Bond. *Id.*

22. See, e.g., UNIV. OF NOTRE DAME, *Jennifer Mason McAward*, <http://law.nd.edu/directory/jennifer-mason-mcaward/> (last visited Apr. 19, 2018) (clerking for you and then going on to clerk for O’Connor).

23. See David Choi, *Former Clerks Accuse Reagan-Appointed Appeals Court Judge of Sexual Misconduct*, BUSINESS INSIDER, Dec. 8, 2017, <http://www.businessinsider.com/judge-alex-kozinski-porn-sexual-allegation-9th-circuit-2017-12>.

24. See Maura Dolan, *9th Circuit Judge Alex Kozinski Is Accused by Former Clerks of Making Sexual Comments*, L. A. TIMES, Dec. 8, 2017, <http://www.latimes.com/local/lanow/la-me-ln-kozinski-sexual-misconduct-20171208-story.html> (“Murphy, who clerked for a different 9th Circuit Court of Appeals judge, said Kozinski joked to her

neutral so I can't tell about whether it's race and sex harassment or sex harassment specifically pertaining to white women or maybe also differently abled women or queer-wymyn or²⁵—

You don't seem to deny these allegations, but instead have said that you don't remember any of that happening,²⁶ sort of like Reagan did when he had Alzheimer's and was being deposed during the Iran-Contra imbroglio.²⁷ But then maybe you do remember because when asked

Comment [NR15]: Relevance?
Spelling? Clarity?

in front of other people that she should work out naked at a courthouse gym because so few people used it. . . ."). Murphy now teaches at U.C. Hastings. See U.C. HASTINGS, *Faculty, Emily Murphy, Biography*, <http://www.uchastings.edu/faculty/murphy/index.php> (last visited Apr. 19, 2018).

- 25. See for comparison Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989), which explains how the ways that women of color experience workplace bias are erased by dominant approaches to race and gender discrimination. On the intersectional woman's experience of sexual harassment, and the failures of courts to adequately address how race and sex must be considered together in harassment cases, see also Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2501 (1994) ("The acknowledgment . . . that black women may be differently situated than white women with respect to proving a sexual harassment claim reflects a recognition that even as women—that is, those who are claiming sexual harassment—claimants are constructed by race as well as gender. But the incomplete and flawed elaboration of that understanding by the courts has created difficulties.");

We must also, of course, consider the intersections of class, queerness, and disability when deciding how to respond to the muddled newspaper accounts of the complaints made against you. Insofar as clerks are experiencing harassment at the Court of Appeals (at any hands), we cannot marshal a one-size-fits-all outrage or fear, but rather must worry about how the multivalent forms of sexual harassment may be experienced by a class of clerks that hopefully exhibits numerous forms of intersectionality. See, e.g., Sheerine Alemzadeh, *Protecting the Margins: Intersectional Strategies to Protecting Gender Outlaws from Workplace Harassment*, 37 N.Y.U. REV. L. & SOC. CHANGE 339, 368-69 (2013) ("LGBT advocates, feminists and all marginalized workers, should continue to challenge, develop, and transform Title VII sexual harassment jurisprudence to reflect and protect the fluid, evolving, and intersectional gender identities that comprise today's workplace.");

I don't know, though: The other layer of oppression here may be in the paucity of intersectional people who are clerking on the Court of Appeals in the first place, so that we are struggling to get to a position where we can worry about the intersectional experiences of abuse and dominance that we will face once there. See Chambliss, *infra* note 59.

26. See Dolan, *supra* note 24 ("I have no recollection of that happening.").
27. *Excerpts From Reagan's Testimony on the Iran-Contra Affair*, N.Y. TIMES, Feb. 23, 1990, <http://www.nytimes.com/1990/02/23/us/excerpts-from-reagan-s-testimony-on-the-iran-contra-affair.html?pagewanted=all> ("But that could be my memory. I don't remember."). On the debate about Reagan's mental health, see Jane Mayer,

about these complaints by the LOS ANGELES TIMES you didn't say "huh?" but instead replied, "If this is all they are able to dredge up after 35 years, I am not too worried."²⁸ And then you also said, "I have been a judge for 35 years and during that time have had over 500 employees in my chambers. I treat all of my employees as family and work very closely with most of them. I would never intentionally do anything to offend anyone and it is regrettable that a handful have been offended by something I may have said or done."²⁹

It's cute how you use the passive voice,³⁰ as well as the deflective "may," as if this whole thing were a law school hypothetical—and then also appear to lay blame upon your hypersensitive clerks for not getting the joke in the first place³¹.

It appears that you understand that you are currently as safely ensconced in your position as a feudal lord in 14th century Bohemia,³²

Comment [NR16]: Punctuation; annoying sarcasm. Intro signal for this fn not found in list in BB 1.2(a)

Comment [NR17]: This fn is full of surmise and conjecture!

Worrying About Reagan, NEW YORKER, Feb. 24, 2011, <https://www.newyorker.com/news/news-desk/worrying-about-reagan>.

28. See Dolan, *supra* note 24.

29. Matt Zapotosky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST, Dec. 8, 2017, https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html?utm_term=.1c2a14817dd7.

30. See ANNE STILLMAN, GRAMMATICALLY CORRECT 289 (1997) ("In speech, the passive voice is often adopted by individuals wishing to minimize or evade personal responsibility for something.")

31. OMFG, Anne Lawton, *The Bad Apple Theory in Sexual Harassment Law*, 13 GEO. MASON L. REV. 817, 864 (2005) ("Judicial skepticism of sexual harassment claims is not uncommon. The concern is that absent tight judicial oversight sexual harassment law will become the legal dumping ground of hypersensitive employees.")

32. You are unlikely to be impeached, since at this moment you have not been accused of a misdemeanor, either high or low. See U.S. CONST., art. II, § 4. It is conceivable that you could be ousted for bad behavior, according to Saikrishna Prakash and Steven D. Smith. See Saikrishna Prakash & Steven D. Smith, *Removing Federal Judges Without Impeachment*, 116 YALE L.J. POCKET PART 95 (2006), <https://www.yalelawjournal.org/forum/removing-federal-judges-without-impeachment>. See also U.S. CONST., art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior. . . .")

It's most probable that you will endure an aimless internal investigation, as you apparently did the last time you were found to be indulging in exploitative joshing. See Scott Glover, *9th Circuit's Chief Judge Posted Sexually Explicit Matter on His Website*, L.A. TIMES, June 11, 2008, <http://www.latimes.com/local/la-me-kozinski12-2008jun12-story.html> (addressing your collection of porn stored on a public website, which was the subject of a scandal in 2008). On judicial internal investigations, see Judicial Improvements Act of 2002, Pub. L. No. 107-273, §§ 11041-11044, 116 Stat. 1758 (codified in scattered sections of 28 U.S.C.) (providing the judiciary with the authority to take and investigate complaints of judicial conduct "prejudicial to the effective and expeditious administration" of the bench). On the self-regulating

"Great cases like hard cases make bad law. For great cases are called great, not by reason of their importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgement." OWH Jr, dissenting in *Northern Securities Co. v. United States*, 193 U.S. 197, 400-01 (1904)

character of the protocol, see Arthur D. Hellman, *When Judges Are Accused: An Initial Look at the New Federal Judicial Misconduct Rules*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 325, 333 (2008). On the ineffectiveness of this set-up, see Lara A. Bazelon, *Putting the Mice in Charge of the Cheese: Why Federal Judges Cannot Always Be Trusted to Police Themselves and What Congress Can Do About It*, 97 KY. L.J. 439, 441–42 (2009) (discussing “institutional bias”).

Of course, Judge Kozinski, if you had been alleged to have done more than just talking about pornography or naked Pilates, then it would be at least conceivable that you could be successfully kicked out by Congress. If, for example, you had subjected someone to unwanted sexual touching, then that could qualify as a misdemeanor sexual battery in California, which is where you currently sit on the Ninth Circuit. See Cal. Penal Code § 243.4(e)(1), https://leginfo.ca.gov/faces/codes_displaySection.xhtml?sectionNum=243.4.&lawCode=PEN (“Any person who touches an intimate part of another person, if the touching is against the will of the person touched, and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of misdemeanor sexual battery. . . .”). This offense has a one-year statute of limitations. See Cal. Penal Code § 802(a).

Does that mean that you would then be impeached and removed? Unlikely—only fifteen federal judges have been impeached, and of those, only eight were convicted by the Senate. See Kenneth A. Klukowski, *Severability Doctrine: How Much of a Statute Should Federal Courts Invalidate?*, 16 TEX. REV. L. & POL. 1, 111 (2011). Those removed have been accused of accepting bribes, perjury, federal tax evasion, corrupt dealing with litigants, treason, crappy administration of an admiralty case, impressive intoxication, and heretical profanity. See *Senate Removes Federal Judge in Impeachment Conviction*, CNN, Dec. 8, 2010, <http://www.cnn.com/2010/POLITICS/12/08/washington.impeach.judge/index.html> (G. Thomas Porteous of the Eastern District of Louisiana, removed in 2010 for perjury); *Judge Walter L. Nixon Impeached After Perjury Conviction*, CONST. L. REP., <https://constitutionallawreporter.com/2017/06/21/judge-walter-nixon-impeached-perjury-conviction/> (last visited Apr. 19, 2018) (Nixon, from the Southern District of Mississippi, removed in 1989 for perjury); Ruth Marcus, *Senate Removes Hastings*, WASH. POST, Oct. 21, 1989, <http://www.washingtonpost.com/wp-srv/politics/campaigns/junkie/links/hastings102189.htm> (Alcee Hastings, of the Southern District of Florida, removed in 1989 for conspiracy to extort a bribe); *Harry Claiborne, 86, is Dead; was Removed as U.S. Judge*, N.Y. TIMES, Jan. 22, 2004, http://www.nytimes.com/2004/01/22/us/harry-claiborne-86-is-dead-was-removed-as-us-judge.html?_r=0 (Claiborne, of the District of Nevada, convicted of tax evasion in 1984 and impeached in 1986); Michael J. Broyde, *Expediting Impeachment: Removing Article III Federal Judges After Criminal Conviction*, 17 HARV. J.L. & PUB. POL'Y 157, 186 (1994) (Halstead L. Ritter, of the Southern District of Florida, was accused of bribery and evasion of taxes, but was ultimately only removed for having brought disrespect to his court and having rendered himself unfit to serve as a judge, as a consequence of the alleged behavior); *id.* at 222, n.16 (Robert Wodrow Archbald, of the United States Commerce Court, removed in 1913 for improper business dealings with litigants); Michael J. Gerhardt & Michael Ashley Stein, *The Politics of Early Justice: Federal Judicial Selection, 1789–1861*, 100 IOWA L. REV. 551, 600 (2015) (West Hughes Humphreys, of the United States District Courts for the Middle, Eastern, and Western Districts of Tennessee, removed for treason in 1863 after leaving the bench to serve as a judge for the Confederacy); Jason J. Vicente, *Impeachment: A Constitutional Primer*, 3 TEX. REV. L. & POL. 117, 135 (1998) (John Pickering, of the District of New Hampshire,

and that is why you are not warbling about how ashamed you are³³ or desperately attempting to blackmail your victims with “dirt” that failed journalists dig up after being paid a hefty retainer³⁴

I mean I don't get it because you've sent all of these women like Theane Evangelis and Sandra Segal Ikuta to the highest realms of our professional stratosphere which must mean that you think women are

Comment [NR18]: informal

removed in 1802 for refusing to hear testimony and grant an appeal in an admiralty case, as well as for being drunk and cursing upon the bench).

None of these cases involve physical, and certainly not verbal, sexual harassment. There was one case where the House of Representatives passed impeachment articles involving physically venereal misbehavior—a.k.a. maybe rape: Samuel Kent of the Southern District of Texas was indicted in 2008 and 2009 on charges of abusive sexual contact, aggravated sexual abuse, attempted aggravated sexual abuse, and obstruction of justice. See Frederik, *Impeaching Samuel B. Kent, Judge of the U.S. District Court for the Southern District of Texas*, DAILY KOS, June 21, 2009, <https://www.dailykos.com/stories/2009/6/21/745120/>. Kent allegedly pinned his secretary against his door and kissed her on the mouth, put her hand on his crotch, touched and groped her “outside and inside [of her] clothes,” and committed unspecified “worse” acts. See Tom Cohen, *Victims Allege Years of Sexual Misconduct by Federal Judge*, CNN, June 3, 2009, <http://www.cnn.com/2009/POLITICS/06/03/judge.impeachment/index.html> (“Details of what [a victim] called ‘worse sexual assault’ were included in her written statement to judicial investigators.”). However, Kent resigned before he could be removed. See Glenn Thrush, *Impeachment Judge Resigns*, POLITICO, June 26, 2009, <https://www.politico.com/blogs/on-congress/2009/06/impeachment-judge-resigns-019392>. It also bears observing that Kent's demise happened in the Golden Age of 2009, one year after Barack Obama had been elected President—and not during the current hell-pit of an era where the President himself stands accused of sexual harassment, see Merica, *supra* note 16, and where the Republican National Committee helped fund alleged child molester Roy Moore's bid in the Alabama Senate special election after Donald Trump endorsed him on December 4, 2017. See Rebecca Berg & Sophie Tatum, *RNC Is Getting Back into Alabama Senate Race*, CNN, Dec. 4, 2017, <http://www.cnn.com/2017/12/04/politics/rnc-roy-moore-alabama/index.html>.

Also, the Senate needs a two-thirds vote for conviction. See Jason J. Vicente, *Impeachment: A Constitutional Primer*, 3 TEX. REV. L. & POL. 117, 128 (1998) (citing U.S. CONST. art. I, § 3, cl. 6). But the Republicans currently enjoy a shaky 52-48 majority. See Megan Trimble, *Obama Robocall: Support Doug Jones, Don't Vote for Roy Moore*, U.S. NEWS & WORLD REPORT, Dec. 11, 2017, <https://www.usnews.com/news/national-news/articles/2017-12-11/barack-obama-records-robocall-urging-alabama-voters-to-reject-roy-moore>. So it seems you'd be ok if things ever got to that level.

33. See Mallory Shelbourne, *Franken Says He's 'Ashamed' by Allegations, Will Return to Work Monday*, HILL, Nov. 26, 2017, <http://thehill.com/homenews/senate/361869-franken-says-hes-embarrassed-and-ashamed-by-allegations-will-return-to-work>.
34. See Oil Coleman, *Weinstein Tried to Hire Gossip Writer to Get Dirt on Accusers*, PAGE SIX, Dec. 2, 2017, <https://pagesix.com/2017/12/02/weinstein-tried-to-hire-gossip-writer-to-get-dirt-on-accusers/>.

all right intellectually and not some kind of subspecies who are not entitled

The thing is that I'm pretty confident that you're not going to be impeached or investigated much or run out of town like Weinstein or sent to sex rehab like Kevin Spacey³⁵ because no women have said that you impermissibly touched them,³⁶ which renders your behavior only so much "bad taste,"³⁷ which is far less *troublant* than other evidently unnoteworthy behavior like possibly molesting children³⁸ or grabbing women's vaginas³⁹

And what this means is, if someone doesn't soon say a magic phrase—like "sexual assault," or whatever people might care about these days—then this tempest will most likely die down, and you'll emerge from the scandal as powerful and as adulated as ever. Indeed, even after we learned of your "funny jokes"⁴⁰ back in 2008, we here at [REDACTED] Law have invited you to speak, and you have arrived amidst much excitement and preening and kowtowing by the faculty including by me myself in the hopes that you would hire one of my students as a clerk and we could network⁴¹

35. *Amid Harvey Weinstein, Kevin Spacey Scandals, Founder of Sex Rehab Center Defends Program*, CBS, Nov. 13, 2017, <https://www.cbsnews.com/news/harvey-weinstein-kevin-spacey-scandals-founder-sex-rehab-center/>.

36. On what might happen if they did, see *supra* note 32.

37. See Karen Thalaker, "Have You Heard the One About the Judge Who Told Ribald Jokes . . .", HUFFPOST, Mar. 18, 2010, https://www.huffingtonpost.com/karen-thalaker/have-you-heard-the-one-ab_b_337789.html ("[T]he Judicial Council of the U.S. Third Circuit Court of Appeals has decided to take no action against Chief Judge Kozinski for emailing jokes to a group of friends and associates, some of which allegedly included 'tasteless' material."). Cf. Susan Estrich, "Me, too"—It's Not All the Same, NOOZHAWK, Nov. 10, 2017, https://www.noozhawk.com/article/susan_estrich_me_too_its_not_all_the_same

("And then there's the rest of the stuff: bad jokes, bad taste, bad talk, the kind of stuff we tell our kids not to say in the backseat when they're younger.")

38. See Michael Finnegan, *Roy Moore Dismisses Sexual Misconduct Allegations as 'Ritual Defamation'*, L.A. TIMES, Dec. 10, 2017, <http://www.latimes.com/politics/washington/la-na-pol-essential-washington-updates-roy-moore-dismisses-sexual-abuse-4512942626.htmlstory.html>.

39. See Max Blau, *These Women Have Accused Trump of Sexual Harassment*, CNN, Oct. 24, 2016, <http://www.cnn.com/2016/10/14/politics/trump-women-accusers/index.html>.

40. Dan Glaister, *US Judge Postpones Pornography Trial After Personal Sex Photos Emerge*, GUARDIAN, June 12, 2008, <https://www.theguardian.com/world/2008/jun/12/usa2> ("He defended an image of two women exposing their crotches in a café before a sign reading 'Bush for President', saying, 'That is a funny joke.'").

41. See *id.* (reporting that your predilection for consuming and sharing pornography that demeans women was disseminated as early as 2008). See also Scott Glover, *Judge E-mailed Jokes to 'Gag List'*, L.A. TIMES, Dec. 8, 2008, <http://articles.latimes.com/2008/>

Comment [NR19]: informal

Comment [NR20]: Really? You're going to make this parallel to Trump and Moore? See *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 178, 71 S. Ct. 624, 652, 95 L. Ed. 817 (1951) ("The technique is one of guilt by association—[is] one of the most odious institutions of history.") (Douglas, J., concurring).

Comment [NR21]: Be very careful: What you are doing is dangerous. See AP, *Family of UC Davis Official Who Killed Himself After Sexual Harassment Accusation Sues University*, L.A. TIMES, Oct. 26, 2017, <http://www.latimes.com/local/lanow/la-me-uc-davis-suicide-20171026-story.html>. See also Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* 33 (2008) ("Any force as powerful as feminism must find itself occasionally looking down at its own bloody hands.").

Comment [NR22]: Your suggestion that Kozinski is impeachable based on a few awkward japes is profoundly "off the wall," in good Jack Balkin's phrasing. See Jack M. Balkin, *Idolatry and Faith: The Jurisprudence of Sanford Levinson*, 38 TULSA L. REV. 553, 567 (2003). Kozinski is a powerful, well-respected jurist. All he reportedly did was make a few off color comments. This is not enough to make a federal case. Do you really think it should be? Haven't you made mistakes yourself before? Why are you being so pitiless?

Comment [NR23]: Since no one really knows what sexual harassment *really* is, see *Hathaway v. Runyon*, 132 F.3d 1214, 1221 (8th Cir. 1997) ("There is no bright line between sexual harassment and merely unpleasant conduct"), how can you argue for zero tolerance? You don't even know what to be intolerant about and in your prophylactic mania, you'll be creating a terror-stricken, banal society. See Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 Cal. L. Rev. 881, 881–82 (2016) ("We call this bureaucratic sex creep—the enlargement of bureaucratic regulation of sexual conduct that is voluntary, non-harassing, nonviolent, and does not harm others.").

Comment [NR24]: Re fn 40: you are now targeting your own home, and so I suggest that you be very, very careful.

And so if you're still going to be almightily deciding huge cases and vaulting clerks to the Supreme Court and Emory Law School and Gibson Dunn and the Ninth Circuit itself then shouldn't [NAME REDACTED] have the chance of clerking for you? And so then shouldn't I be writing her this letter of recommendation so that you can hire her and "may[be]"⁴² honorably ask her about pornography while at the same time providing her with exquisite legal training? Or am I abusing her myself by encouraging her to apply to clerk in your chambers which is false consciousness⁴³ and an abjectly doomed use of the master's tools?⁴⁴

But then she can make her own decisions it's not like I'm forcing her and we all have to make compromises in this life⁴⁵

I mean not only have I endured sex jokes and bullshit but I have been sexually assaulted myself which is why I got into the "Women and the Law" racket in the first place. I got beaten up in the back seat of a taxi by an employer and he spat all over me and it's only because the driver intervened that he didn't⁴⁶

I actually completely forgot about that for years until this #metoo⁴⁵ thing started happening and then I remembered again which is making this letter hard to write because I am becoming blindingly enraged.

But it's worth emphasizing that you didn't do that to the clerks. That is, I should give you due process⁴⁶ like [NAME REDACTED] says

Comment [NR25]: Writing her this letter of recommendation is PART OF YOUR JOB

Comment [NR26]: Exactly.

Comment [NR27]: word choice see Chicago Manual of Style rule 5.223 ("Careful writers avoid language that reasonable readers might find offensive or distracting").

Comment [NR28]: fragment, run-on; professionalism; relevance; your story is sad, but letters of recommendation are not confessionals

dec/08/local/me-gaglist8 (reporting that your gag list contained sexist and racist content). Nevertheless, you remain a star on the contemporary academic circuit. From YouTube videos, it appears that you held forth to great acclaim at NYU Law School in 2014, see *The Future of Class Action Litigation: Keynote by Chief Judge Alex Kozinski*, YOUTUBE, Nov. 11, 2014,

<https://www.youtube.com/watch?v=zipvHeC42Lw>; in 2012, you gave a keynote at Stanford Law School's law and internet society, see *Stanford Law Review Symposium | Keynote: Chief Judge Alex Kozinski*, YOUTUBE, May 1, 2012, <https://www.youtube.com/watch?v=oDcAnNORGR8>; and in 2013, you gave a keynote at Emory Law School, see *Thrower Symposium 2013 Keynote Lecture: The Honorable Alex Kozinski*, YOUTUBE, Feb. 12, 2013 <https://www.youtube.com/watch?v=DEm4Vckx2rs>.

42. See Zapotosky, *supra* note 29 ("[I]t is regrettable that a handful have been offended by something I may have said or done.") (emphasis added).

43. Cf. Shalyn Wells, *Feminism, False Consciousness, & Consent: A Third Way*, 18 GEO. J. GENDER & L. 251, 254 (2017) ("Under [Catharine MacKinnon's] theory, the social and cultural conditions of patriarchy and compulsory heterosexuality condition women to consent to sex that they do not authentically desire and that is often against their physical, dignitary, and political interests.")

44. See LORDE, *supra* note 15.

45. Sandee Lamotte, *How #MeToo Could Move from Social Campaign to Social Change*, CNN, Nov. 9, 2017, <http://www.cnn.com/2017/10/30/health/metoo-legacy/index.html>.

46. See, *c.f.*, Rice Lave, *supra* note 14, at 66.

even though this letter of recommendation is not a trial. Which is to say I should acknowledge yet again that you are not said to have touched anyone on the breast⁴⁷ or thigh or molested them as children⁴⁸ or raped them⁴⁹ or asked them to be your surrogate⁵⁰ or to have sex with you⁵¹ you just “may” have just said horrible gross things that make women feel infinitesimally small and insignificant and powerless⁵² which

Comment [NR29]: ipse dixit

47. Lindsey Bever & Paul Kane, *Sen. Al Franken Accused of Groping Again—This Time by an Army Veteran*, WASH. POST, Nov. 30, 2017, https://www.washingtonpost.com/news/powerpost/wp/2017/11/30/sen-al-franken-accused-of-groping-again-this-time-by-an-army-veteran/?utm_term=.50e979ff121d (“As Kemplin, then 27, posed for a photo with [Franken], she said, he put his arm around her and grabbed her breast, holding onto her for up to 10 seconds.”); Nina Burleigh, *How Donald Trump Rules America’s Garden of Dicks and Sparked the #metoo Movement*, NEWSWEEK, Nov. 9, 2017, <http://www.newsweek.com/2017/11/17/me-too-donald-trump-harvey-weinstein-powerful-predators-facing-accusers-704658.html> (“Trump allegedly touched the breast of Karen Virginia while she waited for a car outside the U.S. Open. ‘Don’t you know who I am? Don’t you know who I am?’ she said he told her after she recoiled.”).
48. See *supra* note 38.
49. See Rebecca Keegan, *Paz de la Huerta Says Harvey Weinstein Raped Her Twice. Will That Bring Him to Justice?*, VANITY FAIR, Nov. 2, 2017, <https://www.vanityfair.com/hollywood/2017/11/paz-de-la-huerta-harvey-weinstein-allegations>; Winnie M. Li, *As a Survivor of Violent Rape, I Believe #MeToo is a Powerful Force for Victims*, THE JOURNALIE, Nov. 16, 2017, <http://www.thejournal.ie/readme/social-media-sexual-abuse-impact-opinion-3701269-Nov2017/>; Halee Gray Scott, *#MeToo: I Was Raped by My Pastor*, WASH. POST, Oct. 16, 2017, https://www.washingtonpost.com/news/acts-of-faith/wp/2017/10/16/metoo-i-was-raped-by-my-pastor/?utm_term=.83139ed36300.
50. See Katie Rogers, *Trent Franks, Accused of Offering \$5 Million to Aide for Surrogacy, Resigns*, N.Y. TIMES, Dec. 8, 2017, <https://www.nytimes.com/2017/12/08/us/politics/trent-franks-sexual-surrogacy-harassment.html>.
51. See Michael Levinson & Cristela Guerra, *Sexual Harrassment Allegation Lead Millions of Women to Say #MeToo*, BOS. GLOBE, Oct. 16, 2017, <https://www.bostonglobe.com/metro/2017/10/16/metoo-campaign-highlights-prevalence-harassment/NH4hDAFk6F7XXKgETSo0j/story.html> (“One woman recalled a man in a park jamming his hand down her pants when she was 16. Another said she was accosted by her resident adviser in college. Still another said her boss told her he would give her a raise in exchange for oral sex.”); *U.S. Rep John Conyers, Civil Rights Icon, Allegedly Demanded Sex from Female Staffers*, WOMEN IN THE WORLD, Nov. 21, 2017, <https://womenintheworld.com/2017/11/21/u-s-rep-john-conyers-civil-rights-icon-allegedly-demanded-sex-from-female-staffers/>.
52. Cf. Allison Westfall, *The Forgotten Provision: How the Courts Have Misapplied Title VII in Cases of Express Rejection of Sexual Advances*, 81 U. CIN. L. REV. 269, 287 (2012) (“Sexual harassment makes women feel ‘humiliated . . . embarrassed, and . . . angry.’”) (quoting CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 47 (1979)). On MacKinnon’s reorientation of the problem, see her argument that we should focus on inequality of power, not on women’s states of mind, in Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. & POL’Y REV. 440, 441 (2016) (“Like one wing flapping, consent analysis focuses endlessly on B—what she has in her mind or lets someone do to her

is a kind of spirit murder⁵³ for which you are at this point likely be accorded either a mitigation⁵⁴ or a complete defense⁵⁵ and also you don't have to worry about retaliation of other kinds because we exist in a law and society that systematically denies women the promise of self-help⁵⁶.

You are untouchable with your coolness and despite the current female uprising that threatens to demolish your privilege right down to its "studs" I fear the coming backlash will save you you will probably die on the bench elegantly shrugging off stories of your lechery as if they actually burnished your nerdy reputation into a high gloss⁵⁷ that reflects the kind of regnant Casanova who always leaves in his wake a trail of broken disappointed woebegone bitter harridans who make baseless accusations.

Judge Kozinski, despite all the terrible things that are currently being said about your conduct and character, I am still writing you this letter of recommendation in order that you hire [NAME REDACTED] to your prestigious chambers. I do this because I want [NAME REDACTED] to have the same glittering opportunities that you have enjoyed. You clerked for Justice Anthony Kennedy on the Ninth Circuit, and then Justice Warren Earl Burger at the Supreme Court. You were elevated to the Ninth Circuit by President Ronald Reagan in 1985 at the age of 35, which made you the youngest person serving as a federal judge in the country. And then in 2007 you were named chief judge of the Ninth Circuit, a laurel that has brought you national

Comment [NR30]: Hyperbole

Comment [NR31]: This supra cite is not relevant.

Comment [NR32]: Re notes 54 and 55, why are you connecting domestic violence and failed self defense claims to Kozinski's fumbblings? This is not one huge related system of bad judgment or a vast conspiracy of omnipotent horrible men. Non tali causa pro tali.

Comment [NR33]: punctuation, hysteria

body. Inequality analysis, even in narrow form, starts where the interactions in question temporally start: with A, and what he does with his power.").

53. See Deborah Tuerkheimer, *Street Harassment as Sexual Subordination: The Phenomenology of Gender-Specific Harm*, 12 WIS. WOMEN'S L.J. 167, 190 (1997) ("[T]he harasser has caused me to suffer a spirit murder.") (quoting Deirdre Davis, *The Harm That Has No Name: Street Harassment, Embodiment, and African American Women*, 4 U.C.L.A. WOMEN'S L.J. 133, 176-177 (1994)).

54. See, *cf.*, supra text accompanying note 11.

55. See supra note 32.

56. See KADISH ET AL., supra note 12, at 903.

57. On your Wikipedia page, for example, Wikipedia crowd-sourcers have cited your infamous 1980's appearance on the Dating Game game show where you appeared to force a woman to kiss you but the Wikipedia people only smilingly call this a "surprise kiss," probably because your date was giggling, which under male supremacy always means not agonized disgust but instead consent. See, *e.g.*, *Alex Kozinski*, WIKIPEDIA, https://en.wikipedia.org/wiki/Alex_Kozinski (last visited Apr. 19, 2018). See the clip at *Kozinski on the Dating Game (and Squiggy, too!)*, YOUTUBE, Nov. 2, 2006 (last visited Apr. 19, 2018).

recognition and puissance.⁵⁸ [NAME REDACTED] is a brilliant lawyer-in-training, and I know she could achieve similar herculean feats if she were given half the life chances as you, and that is just one reason why she should be toiling away for you in Pasadena next year.

But I also want you to hire [NAME REDACTED], a woman of color, for three additional reasons. First, because the presence of minority women clerks in the esteemed halls of the Ninth Circuit, or any federal clerkship, proves increasingly rare, and the scarcity of their influence at your level probably helps explain the damaged state of the law and nation at the present time.⁵⁹ Second, if feminist law professors didn't recommend female clerks to you, then that would leave you with no other "choice" than to hire solely male clerks, which itself would create a disparate impact⁶⁰ and in its own way be like a harassment for every woman working in this field. And, relatedly, if you did not regularly hire clerks like [NAME REDACTED], then you, in your all-male sanctum, would grow all the more emboldened to replicate self-serving Title VII decisions like *Swenson v. Potter*, where you set aside a jury verdict in a sexual harassment case involving a hearing-impaired Postal Service employee who worried that a co-worker was going to rape her.⁶¹

Perhaps you have been able to tell from the foregoing, your honor, that I am finding it difficult to write a clear and ethical letter that might also persuade you. My training in logic and legal writing appear to have failed me today—or maybe, somewhere in this cascade of typing and tears something else has succeeded—I can't yet tell. All I know for sure is that while I must remain open-minded about unproven allegations against you, and while I also seek to obtain for [NAME REDACTED] every professional advantage that I can, I find myself thrashing and strangling within the double bind that is you. In short, I find that I

Comment [NR34]: run-on; character assassination

58. For the accomplishments listed in this paragraph, see Bio information on Alex Kozinski, ASSOCIATED PRESS, June 11, 2008.

59. See ELIZABETH CHAMBLISS, ILLP REVIEW 2017: THE STATE OF DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION 16 (2017), http://www.theilp.com/resources/Pictures/ILLP_2017_Demographic_Survey.pdf ("The percentage of minority graduates with judicial clerkships, in particular, has dropped, from 10.2% in 1998 to 6.5% in 2014."). See also Crenshaw, *supra* note 25, at 140.

60. See, *c.f.*, Olga Khazan, *How Pence's Dudely Dinners Hurt Women*, ATLANTIC, Mar. 30, 2017, <https://www.theatlantic.com/science/archive/2017/03/pences-gender-segregated-dinners/521286/> ("When men avoid professional relationships with women, even if for noble reasons, it actually hurts women in the end.")

61. *Swenson v. Potter*, 271 F.3d 1184, 1198 (9th Cir. 2001). On Melody Swenson's hearing impairment, see *id.* at 1193. On her fears of being raped, see *id.* at 1189. See also *id.* at 1200, 1204 (Fletcher, J., dissenting).

cannot write a letter of recommendation that might deliver [NAME REDACTED] into your authority, because I am losing faith in the institution that is supposed to protect the rights of women, and in the establishment to which I aspire to entrust my gifted and beloved students.

So your honor
Judge Kozinski
you see
you see that all of this is untenable
and you should resign.
[NAME REDACTED]

§

Comment [NR35]: My dear, you appear to have forgotten that "the law is reason, free from passion." Aristotle, *The Politics of Aristotle* 146 (Ernest Baker trans., 1946).

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