

DEMANDING BETTER

An Oral History

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YLS Class of 2019 | Supervised Analytical Writing Project

TABLE OF CONTENTS

I. INTRODUCTION..... IV

1. BACKGROUND 3

2. METHOD 8

i. Selecting Interview Participants 8

ii. Asking Questions11

iii. Reporting Responses.....12

II. ROOTS OF A MOVEMENT14

1. THE KOZINSKI ALLEGATIONS (DECEMBER 18TH, 2017)15

2. THE TRUMP BUMP17

3. THE PLAN, REVIVED (FEBRUARY 2018)20

4. THE PRESS RELEASE (JULY 9, 2018)21

i. Press Release or Endorsement?.....22

ii. The Open Letter25

iii. The (Other) Open Letter26

iv. The Faculty Debate27

5. THE RUBENFELD INVESTIGATION (SUMMER 2018).....29

i. Whispers30

ii. To Speak or Not to Speak32

6. KAVANAUGH ACCUSED (SEPTEMBER 12TH, 2018)34

7. MODELGATE (SEPTEMBER 19TH, 2018)39

8. TITLE IX INVESTIGATION MADE PUBLIC (SEPTEMBER 20TH, 2018).....41

9. THAT #MeToo TALK (SEPTEMBER 20TH, 2018)45

III. DEMANDING BETTER51

1. THE FIRST MEETING (SEPTEMBER 20TH, 2018)51

i. Deciding to Meet51

ii. Who to Include52

iii. Making Things Manageable.....55

2. POSTERS IN THE COURTYARD (SEPTEMBER 21ST, 2018).....58

3. STRATEGY ANNOUNCED (SEPTEMBER 21ST, 2018)60

4. ENGAGING THE DEAN AND FACULTY62

i. Meeting with the Dean62

ii. The Faculty Letter63

5. THE D.C. PROTEST (SEPTEMBER 23RD & 24TH, 2018)67

i. Stepping Forward, Stepping Back.....68

ii. Getting Students to D.C.....69

iii. Following the Leaders71

iv. Students Arrested73

v. The Press Conference76

6. THE SIT-IN (SEPTEMBER 24TH, 2018)78

i. Sharing Stories.....79

ii. The Teach In81

iii. The Walk Out.....83

iv. Managing the Media84

7. THE TOWN HALL (SEPTEMBER 25TH, 2018)86

i. Testimonials & Questions.....88

Demanding Better, An Oral History

- ii. *The Q & A* 91
- 8. ADMINISTRATION, FACULTY & STAFF SUPPORT 97
- 9. THE HEARING (SEPTEMBER 27TH, 2018) 99
- 10. CONTINUING THE CONVERSATION (SEPTEMBER 30TH, 2018) 101
- 11. KAVANAUGH CONFIRMED (OCTOBER 6, 2018) 104
- IV. THE WORKING GROUP 107**
 - 1. WORKING GROUP ANNOUNCED (OCTOBER 9, 2018) 107
 - 2. STAFFING UP (OCTOBER 12 TO OCTOBER 29TH, 2018) 110
 - i. *Deciding to Apply* 111
 - ii. *The Selection Process* 112
 - 3. LISTENING (NOVEMBER 2018) 115
 - A. *Learning from Faculty* 118
 - 4. WORKING (NOVEMBER 2018 TO APRIL 2019) 120
 - i. *Low-Hanging Fruit* 120
 - ii. *Sharing Power* 122
 - 5. REPORTS AND RECOMMENDATIONS (APRIL 16, 2019) 123
- V. REFLECTIONS 128**
 - 1. FINDING THE BARS OF THE CAGE 128
 - i. *Collective Bargaining* 129
 - ii. *Real Student Representation* 131
 - iii. *Making Demands Legible* 132
 - 2. AGAINST AMNESIA 133
 - i. *The Institutional Review Board* 135
 - ii. *Title IX Procedural Hurdles* 143
 - iii. *Managing the Risk of Losing Opportunities* 143
 - iv. *Suggestions for Future Institutional Memory Efforts* 144
 - 3. PARTING SHOTS 146

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I. INTRODUCTION

During the summer and fall of 2018, student protests at Yale Law School were the topic of significant critical press coverage in the local and national media. As the United States Senate debated whether to confirm Brett Kavanaugh to the Supreme Court, the students, faculty and staff of Yale Law School were engaged in equally public debates about the proper role of the law school in the judicial nomination process, the school's duties to protect students seeking judicial clerkships, handling of sexual misconduct allegations on campus, racial and gender inequalities in access to opportunities and faculty accountability to students generally.

Over the course of a few weeks, students would engage in countless acts of defiance of the law school's written and unwritten norms, including organizing a sit-in in the central hallway of the Sterling Law Building, being publicly arrested in acts of civil disobedience, recounting stories of faculty sexual misconduct in the media and erecting banners and posters shaming the law school's administration in the school's central courtyard. Collectively, many of these actions would come to be known as the Demanding Better movement. In response, the law school convened an all-purpose working group that would issue several recommendations to address the student concerns.

This project, based on twenty-five interviews with students who participated in some fashion in the Demanding Better movement and the Working Group that succeeded it, aims to preserve the institutional memory of this unique moment at Yale for future members of the community.

In this introductory chapter, I describe my motivations for pursuing this project and how, with the assistance of my classmates, my supervising professor, and the Office of Student Affairs, it was carried out. In Chapter II: Roots of a Movement, I trace several of the longer-term factors and events that students recall as setting the stage for, and giving rise to, the student movement that would emerge in the Fall of 2018. Chapter III: Demanding Better chronicles the central events of the Demanding Better movement itself through the eyes of students who participated, from an initial organizing meeting on September 20th, 2018, to Brett Kavanaugh's confirmation to the Supreme Court on October 6th, 2019. Chapter IV: The Working Group describes the institutional response to the movement as it was experienced by movement organizers, students who worked alongside faculty on the group and the student body more broadly. Chapter V: Reflections presents a small sampling of the many lessons that students gleaned from the at-times-turbulent experience of the Demanding Better movement and the Working Group and concludes with wisdom each of the twenty-five participants in this project wished to pass on to new members of the Yale Law School community.

1. BACKGROUND

When I returned to Yale Law School in the fall of 2018 to begin my third and final year, revolution was the farthest thing from my mind. My primary feeling was resignation. Like many of my classmates, I'd applied to law school with tremendous respect and reverence for the law as a tool to even the playing field between the powerful and the oppressed. By 3L fall, I was disillusioned and cynical. I had come to see the legal academy, and the law more broadly, as merely another tool in the perpetuation of existing power structures. Much of my disillusionment stemmed from experiences that I'd had during my first two years of law school.

During my first year at Yale, I learned that despite constant exhortations that we were all worthy and there were "no mistakes," some faculty members were more willing to advise and mentor students who already had the external trappings of success. It was impossible to ignore the special interest some professors took in students with famous relatives, students with PhDs and Rhodes Scholarships, and students whose parents had connections in the law. During rounds of introductions, I noticed uneasily how professors' eyes would light up when I mentioned my undergraduate degree from Harvard, and how quickly they went dull again when classmates mentioned their degrees from public universities. During the fall semester, the absence of grades and the inability to apply for RA positions provided a semblance of equality. But in the spring, when RA openings were posted to the wall, although we all ostensibly had identical transcripts coming out of 1L fall some students mysteriously were not given interviews.¹ Courses that ostensibly selected students via "random" lottery were heavily populated by students who had prior relationships with the professor, or who had reached out informally before the course

¹ Yale maintains a uniform pass-fail system of grading for the first-term curriculum.

lottery. Older students constantly advised me of the way things “really” worked, which usually involved some degree of drawing on personal relationships and leveraging privilege.

The clerkship race provided a focal point for these percolating anxieties. At the time, many of the most prestigious feeder judges in the nation insisted on accepting 1L applications in early June. Most of these positions required three letters of recommendation, and as my classmates and I went about securing these letters many of us realized how fragile our bonds with faculty truly were.

As an undergraduate, I’d never before had the experience of being rejected for a letter of recommendation. At Yale, I would come to learn that visiting in office hours, showing a genuine interest in the literature and even writing a paper for a professor were no guarantee of a letter of recommendation. Meanwhile, professors who did choose to recommend students would often adopt a tiered strategy. Some would simply write a letter. Others might send the judge a personal email. The most well connected and passionate would make a call. While concerns about recommendations and references might seem petty or personal, in the legal profession, recommendations are a form of social capital essential to securing a clerkship, a public interest fellowship, and many government jobs. Having spent a year under the fiction of gradeless equality, it was shocking to see resources and privileges allotted among my classmates so arbitrarily when the time came for the law school to interact with the real world.

A similar flareup occurred in my 2L spring when I and several classmates applied to be Coker Fellows. During the process, students submitted resumes, statements and writing samples

through a common application portal to the professors teaching small groups in the fall. However, there was no uniformity among professors regarding the criteria by which students would be selected, if and when they would reach out to students to interview them, whether it should be considered a benefit or detriment to apply to work with the professor who taught your small group, what duties Cokers would be required to perform or when each professor would make their final decision.

The complete incoherence of the selection process combined with the scarcity of positions, a lack of transparency and the pervasive sense that selections were made based on faculty favoritism rather than merit caused lingering acrimony among the students who applied.

Although I was ultimately successful in the process, I remember it as an isolating and demoralizing time of my law school experience. At these moments, I perceived a large gap between the ideals of egalitarianism and meritocracy and a system of informal power distribution that often replicated race-, gender- and class-based power structures present in society more generally.

Perhaps more frustrating than any of these conflicts was the sense of impunity I saw among the professors. If a professor circumvented the supposedly random class lottery to fill a class with his favorite students, or promised to send a letter of recommendation for a student and never followed through, or forced a research assistant to perform personal errands, or singled out a student because of their gender identity, or even made inappropriate sexual overtures toward a student, there was no clear institutional recourse. As a Dean's Advisor and later as a Coker, I

learned to simply warn students what to expect and how to protect themselves. Broader changes seemed out of reach.

Accordingly, when I learned, in the spring of 2018, that the #MeToo movement had finally reached the judiciary, with the resignation of Alex Kozinski, I was pleased but unoptimistic. Like many of my classmates and professors, I'd long been aware of whisperings that a certain judge had a reputation for sexual harassment, or that another maintained a certain racial or gender composition among his clerks. I did not foresee a serious reckoning among the Article III judiciary, who are protected by life tenure, or among the professors who provide a pipeline for students into the judiciary.

Between September 20th and September 25th, this understanding rapidly changed. At a lunch talk meeting on Kavanaugh and the #MeToo movement on September 20th, I for the first time actively saw students directly and vocally criticizing faculty for their specific roles in perpetuating structural violence and this critique being taken seriously. On September 25th, the faculty consented to participate in a student-led town hall that laid bare many of the frustrations students had with the running of the school. One administrator ran to be heard at the microphone and, with tears streaming from her eyes, promised that if she could not make a positive difference for students, she would resign. I still did not believe such a movement would succeed, but I hoped it would, and this hope was a new and refreshing counter to the cynicism that I had expected to graduate with.

Over the several months between September 2018 and February 2019, when I commenced this project, much of that hope has ebbed away. The Demanding Better movement has been funneled into a Yale Law Working Group with several subcommittees, and the series of Demanding Better flyers that once festooned the central hallway have been taken down. By April, when I began to conduct the interviews that form the heart of this project, many of its organizers felt that their efforts were a failure. It seems, at least at the time of this writing, that whatever revolutionary moment arose in September has passed.

Yet, I still believe Demanding Better has lessons to offer future reform movements at this and other law schools. For a brief moment, Demanding Better made real change seem potentially attainable. Such moments are rare and unpredictable, but when they arise, wisdom of past events may help to shape the paths of future movements. In early conversations regarding this movement, I learned more about Yale Law's rich history of social agitation and found myself wondering how greater awareness of these predecessor movements might have informed Demanding Better. Accordingly, in this project, I hope to preserve the collective memory of Demanding Better and reflect on its legacy in hopes of inspiring future generations of law students who are unsatisfied with their educations to see that student-led change is possible, and to reflect on how it is secured.

2. METHOD

I initially considered writing on *Demanding Better* and the working group as early as October of 2018, and I contacted Professor Monica Bell about writing on the movement for my SAW around that time. With this intention, I began to pay more attention to the movement-related events occurring around me and took notes at the Working Group presentations in December 2018 and April 2019. However, institutional hurdles delayed my receiving IRB approval to conduct student interviews until April 15th.² Upon receiving approval, I immediately began to reach out to students who had been involved in the movement and the Working Group to request they participate in an oral history project. This project was constructed around twenty-five interviews that I conducted with Yale Law students between April 17th and May 3rd, 2019. I spent the following three weeks analyzing the major themes of those conversations to complete this report before the faculty voted on degree requirements on May 24th, 2019. With this significantly shortened time horizon, many of the methodological choices I made were as much the result of serendipity as of planning. While this project is by no means comprehensive, I hope it serves as a useful starting point for productive conversations about relationships among students, faculty and the administration at Yale Law School and the law school's role in the country and the world.

i. Selecting Interview Participants

When considering which student perspectives it would be most important to include in this project, I began by writing down the names of the organizers who I remembered as having

² For a detailed discussion, see *infra* ch. IV § 2(A).

assumed salient leadership roles in what were, in my opinion, the pivotal events of the Demanding Better movement. These included students who had emailed the Wall to announce a protest in D.C., a sit-in at Yale, and a student-led town hall as well as students who had given quotes to the press about the movement or who had been the subjects of significant media coverage. I began with these nine or ten students because I felt it was important to understand the decision-making process underlying some of the movement's most high-profile efforts. However, an unintended consequence of this approach is that this oral history may focus disproportionately on the work and experiences of those who were already most publicly recognized for their work in the movement and underrepresent some of the equally important work that was done behind the scenes.

In addition to learning about the Demanding Better movement, I wanted to learn about the students who had participated in the Working Group, so I reached out to several students who I remembered having presented at the Working Group's winter and spring presentations.

Ultimately, I spoke to five students who had been involved in the Working Group. Four of these students were also affiliated with Demanding Better, while a fifth entered the Working Group without prior activism involvement. In hindsight, I would have attempted to include comments from more Working Group members who had not been previously involved in the movement.

In the fall, I discussed my initial list of proposed interviewees with my faculty advisor. She suggested I expand my interview pool to include more stakeholders in the movement than the students most directly involved. Noting that my list was heavily dominated by second-year students, she suggested I also reach out to 1Ls and 3Ls. She also suggested that I reach out to

faculty members and administrators, a possibility I had not previously considered. Finally, she suggested I include the perspectives of students who were critical of or even opposed to the movement.

On this advice, I expanded my interview list to include five 1Ls and three 3Ls. Three of the 1Ls were students I remembered as having participated in the action in D.C. and emailing the Wall. Two others were recommended to me after I specifically asked 2L organizers if they remembered any 1Ls who had played a significant role in the fall's events. In selecting 3Ls, I focused on recruiting students who had formerly served as leaders of campus affinity groups. I felt these perspectives would be particularly useful because many of the most prominent leaders of the Demanding Better movement were also heads of affinity groups. I felt hearing from 3L former leaders would help to compare and contrast the two classes' approaches to resolving issues of equity at the law school and in the legal profession.

In response to my faculty member's suggestion to include critical perspectives, I made a list of students who I recalled having made statements critical of the Demanding Better movement and the Working Group's progress. I reached out to three students in this category and spoke to two.

Finally, over the course of the interviews, several of these participants who I considered "core" recommended that I speak to their friends who had played crucial but less public roles. A few students, who learned by word of mouth that I was conducting interviews, reached out to me directly and volunteered to talk to me about their roles. Four or five of the interviews I performed were a result of this combination of referral and volunteering.

Although I considered my advisor's suggestion to include faculty perspectives, I was ultimately unable to do so. After I received IRB approval, I contacted the three faculty members who chaired the Working Group. To my surprise, two faculty members indicated a desire to participate. However, due to scheduling conflicts, we could not find a time to speak before the project's submission deadline. I ruled out reaching out to other faculty members because I did not believe I would be able to collect a significant number of interviews in the time available. I worried that including a small number of faculty interviews would make it difficult to preserve anonymity and would also fail to provide a diversity of faculty perspectives. As a result, this project focuses solely on the perspectives of students.

ii. Asking Questions

The interviews I conducted for this project were semi-structured with the goal of illuminating both what occurred over the course of the fall of 2018 and how students reacted to and experienced those events. In each interview, I attempted to touch on the four following guiding questions:

1. What were your initial thoughts and reactions when you first heard about the Demanding Better movement?
2. What do you think the movement was about?
3. To what extent do you agree with the criticisms the movement raised?
4. How effective do you think the movement has been at achieving change?"

As I began to conduct interviews, I found that once I asked the first question, students tended to answer the other three questions unprompted as our conversations proceeded naturally. Over the course of the interviews, I became aware of events I had not known about previously—for

example, a faculty panel discussion about the Kozinski allegations that occurred in the spring of 2018, or an internal student effort to pressure faculty to call for an investigation into the allegations against Kavanaugh. I also found that students were often very eager to explicitly pass on wisdom to students going forward and that they found the process of reflecting on the fall's events to be cathartic in itself. To this end, I added to further guiding questions to each interview:

5. What lessons will you take from this experience into your life?
6. What, if anything, would you want new members of this community to know?

iii. Reporting Responses

As a condition of participation, I made a commitment to each student to anonymize their responses to the extent possible without destroying important elements of the response's content. Accordingly, I have removed some identifying references from the quotes reported here. I also gave each student the option of asking to go off the record or having a response redacted after it was given but before the interview was concluded. I hoped in doing so to create a collaborative and supportive atmosphere for students to share their stories. I similarly anonymized most references to actions by specific other students who had participated in the movement in order to make it more difficult to cross-reference potentially identifying statements across interviews.

While I have anonymized most references to specific students, I have not anonymized most references to specific faculty members, except when necessary to protect student anonymity. I seriously considered anonymizing references to faculty members but decided not to for a few reasons. First, I felt that such a step would be dishonest when, in many instances, those familiar with the events of the Demanding Better movement would be readily able to re-identify the faculty members referred to. More compellingly, I considered that one of the primary goals of

the movement was to increase faculty accountability to students. Creating what I hope is an empathetic and accurate accounting of faculty relationships to students may in some small way promote this mission.

Finally, it is worth recognizing that I had personal and professional relationships with the vast majority of the students who participated in this project. Some I knew from classes, others I'd spent time with in affinity groups, and others are close personal friends. Without these relationships, it is unlikely I would have been able to schedule and conduct twenty-five interviews in the space of two weeks. However, it is probable that these personal ties also blinded me to some informants outside of my network and added an additional layer of subjectivity to the interviews I did conduct. I also have worked and interacted closely with many of the faculty and staff members implicated in the movement. While I have attempted to interrogate my own biases in reporting student comments, I also recognize that I am too deeply embedded in this community to make any strong claims to neutrality or objectivity.

This project does not claim to represent the full range of opinions or experiences at Yale Law School or even the full range of opinions within the Demanding Better movement. The voices of faculty, staff and administrators are missing entirely. Nevertheless, it is my hope that I have accurately represented at least a sample of student perspectives of the activism that disrupted Yale Law School in the summer and fall of 2018 and the institutional responses to that activism that shaped the rest of that school year. I hope that students, faculty, administrators and staff members reading this report will feel inspired to continue to work to make their communities kinder, fairer and more equitable.

II. ROOTS OF A MOVEMENT

Although the students who participated in this study almost unanimously agreed that the Demanding Better movement properly got its start in the fall of 2018, and largely pinpointed its onset to a lunch talk that occurred on September 20th, 2018, many of the 2Ls and 3Ls interviewed also felt that some of the movement's core criticisms of the law school had already been prominent topics of conversation among the student body in the spring and summer. These topics included the handling of judicial misconduct, inappropriate faculty-student relationships on campus and concerns over the school's perceived complicity in an increasingly conservative judiciary. In this chapter, I trace a few of the threads of student discontent that would erupt into open defiance in the fall of 2018 as well as some of the shifts in power structures at the law school that may have made such an uprising more likely.

1. THE KOZINSKI ALLEGATIONS (DECEMBER 18TH, 2017)



*Former Ninth Circuit Judge Alex Kozinski*³

One growing point of friction was a debate over the law school’s duty to protect students from predatory judges. On December 18th, 2017, Alex Kozinski, a 9th Circuit judge with a long history of hiring clerks from Yale, resigned from the bench after being accused of sexual harassment by multiple clerks and staffers.⁴ The former judge had had a long pipeline to Yale, having hired at least five YLS clerks between 2011 and his retirement. Two Yale Law students were scheduled to clerk with him after graduation when the allegations surfaced in the press.

Some participants in this project recalled hearing rumors about sexual misconduct related to Judge Kozinski being passed along student “whisper networks” long before the allegations were made public.⁵ One rationale for these whisper networks may have been concern over publicly

³ Ross Todd, *Alex Kozinski Returns to the 9th Circuit (As a Lawyer)*, RECORDER, Dec. 14, 2018, <https://www.law.com/therecorder/2018/12/14/alex-kozinski-returns-to-the-9th-circuit-as-a-lawyer/>.

⁴ Dan Berman & Laura Jarrett, *Judge Alex Kozinski, Accused of Sexual Misconduct, Resigns*, CNN, Dec. 18, 2017, <https://www.cnn.com/2017/12/18/politics/alex-kozinski-resigns/index.html>.

⁵ Confidential Interview in New Haven, Conn. (Apr. 17, 2019).

making negative statements against a sitting, life-tenured judge. Tellingly, all five Kozinski alums who filled out the Career Development Office's judicial clerkship surveys between 2011 and the judge's resignation refused to go on the record about their experiences, instead encouraging students who were considering the judge to reach out to them personally.⁶ Yet, as one male student noted, not everyone had access to these networks: "The spring before when people were talking a lot about Kozinski and whisper networks and how everyone knows this stuff. I remember thinking oh, ok, I don't know this stuff at all. I'm not a part of these whisper networks. They're not there to protect me, I'll be fine."⁷

In the spring, the *Yale Journal of Law and Feminism* invited Heidi Bond, a former Kozinski clerk, to speak on #MeToo in the Judiciary.⁸ When the event was canceled due to snow, the organizers encouraged students to attend a separate event on "Judges and Law Clerks: Perspectives on Life and Work in Chambers."⁹ Despite the anodyne title, organizers promised that the event would also touch on "efforts to better acknowledge and resolve instances of inappropriate behavior."¹⁰

⁶ YALE LAW SCH. CAREER DEV. OFFICE, JUDICIAL CLERKSHIP SURVEYS (last visited May 12, 2019). In my experience accessing Yale's various survey resources, students tend to write positive reviews of positions if they had a good experience, while they ask people to reach out via email or telephone if they have negative or critical comments but do not want to place their careers at risk.

⁷ Confidential Interview in New Haven, Conn. (Apr. 27, 2019).

⁸ Posting of Meghan Brooks to The Wall (Mar. 20, 2018) (on file with author) ("Cancelled: #MeToo in the Judiciary - Weds. 3/21 at 12pm, SLB 129"). The Wall is semi-private. However, many of the events described in this project cannot be understood without reference to emails circulated to the Wall, and Wall emails are visible to all members of the student body. I have cited to Wall emails when other sources are insufficient to describe a given event.

⁹ *Id.*

¹⁰ *Id.*

An attendee who would go on to become a Demanding Better organizer recalled that “part of the panel went fine and part of it was a total disaster”¹¹:

Resnik¹² had started off with saying something like, “faculty aren’t sending students knowingly to work with judges who will harass them. We didn’t know about this.” A student responded, “It seems kind of concerning that students are warning each other and the faculty don’t know. So let me just take it at face value that the faculty don’t know, what can we do to remedy the cultural environment?” Rather than respond to the substance of that concern, Resnik got quite heated and said, “Well, we didn’t know, so what do you want me to do about it?”¹³

The attendee recalled debriefing with several classmates who had witnessed the interaction and felt there had been a disconnect between what the student had expressed and the professor had understood. “It was awkward because it was very defensive and it wasn’t addressing the substance of the student’s question.”¹⁴

2. THE TRUMP BUMP

In addition to the events occurring on campus, students perceived a marked increase in political polarization in the class of 2019 relative to the classes of 2020 and 2021. As the former leader of

¹¹ Confidential Interview in New Haven, Conn. (Apr. 20, 2019).

¹² Professor Judith Resnik.

¹³ *Id.*

¹⁴ *Id.*

one affinity group put it,

I think absolutely that the 2L and 1L classes are more political and more entrenched in their viewpoints than our class. I think you could plop a good portion of [the Class of 2019] in the center between the political polls that the other two classes occupy. In the lower classes the conservatives are more conservative and the progressives are more progressive. We have a lot more centrists and moderates.¹⁵

The student speculated that this shift could be linked to the 2016 election and the number of students who entered law school in response to the Trump administration. “I think it has to do with starting law school before a huge political upheaval.”¹⁶ This perspective had some empirical support, with law schools seeing increased enrollment in 2018 for the first time in a decade.¹⁷ Indeed, a survey conducted in late 2017 found that a third of prelaw students linked their decision to go to law school to the 2016 election.¹⁸ A year later, 45% of students reported being motivated by the political climate.¹⁹

¹⁵ Confidential Interview in New Haven, Conn. (Apr. 28, 2019).

¹⁶ Confidential Interview in New Haven, Conn. (Apr. 28, 2019).

¹⁷ Staci Zaretsky, *Law School Enrollment is Up for the First Time in Nearly a Decade*, ABOVE THE LAW, Dec. 14, 2018, <https://abovethelaw.com/2018/12/law-school-enrollment-is-up-for-the-first-time-in-nearly-a-decade/>.

¹⁸ *Kaplan Test Prep Survey: Over 30 Percent of Pre-Law Students Say the Results of the 2016 Election Impacted Their Decision to Apply to Law School*, KAPLAN, Feb. 22, 2018, <https://www.kaptest.com/blog/press/2018/02/22/kaplan-test-prep-survey-30-percent-pre-law-students-say-results-2016-election-impacted-decision-apply-law-school/>.

¹⁹ *Kaplan Test Prep Survey: Nearly 90 Percent of Law Schools Say the Political Climate Was a Significant Factor in Application Increase*, KAPLAN, Feb. 25, 2019, <https://www.kaptest.com/blog/press/2019/02/25/kaplan-test-prep-survey-nearly-90-percent-of-law-schools-say-the-political-climate-was-a-significant-factor-in-application-increase/>.

As the newer classes became more politicized, they also began to favor more public and confrontational strategies. Students who had led affinity groups the previous year tended to recognize the benefits of privately negotiating with the administration. “You have to play along with the system and know when it’s the right time to call things out. I care about diversity in admissions, but in February I won’t start screaming when there are only 10 admits. I’ll send a calm email. Then in April I’ll scream if it doesn’t increase.”²⁰

Partially, this was a strategic move. “We had a new dean that seemed sensitive to those issues and responsive to the students raising them.”²¹ “Any time you feel that you are the target you are going to be defensive. If you want real change you need to be able to have a conversation where you feel like your guards are down.”²²

But the former leaders’ less confrontational approaches were also based in their understanding that their roles required some degree of political neutrality. “The public facing things that we did were much more neutral with the design to not want to isolate anyone in the community because there was an acknowledgement that people in the community might have different beliefs about things.”²³

This understanding was not shared by many of the rising leaders of affinity groups in the 2018–2019 term:

²⁰ Confidential Interview in New Haven, Conn. (Apr. 17, 2019).

²¹ Confidential Interview in New Haven, Conn. (Apr. 29, 2019).

²² Confidential Interview in New Haven, Conn. (Apr. 17, 2019).

²³ Confidential Interview in New Haven, Conn. (Apr. 28, 2019).

When I took the position as president of [my organization], I was explicitly like, I think we should be more outwardly facing. That was part of my vision for our board. I was like, look, there's a lot of [racist] rhetoric going on in this country and I think we have a lot of power. I don't know why we're not writing op-eds about Trump. I think we could be doing more on the national stage about X or Y just given who we are. . . . It was in my mind that we had this name and this power that we weren't necessarily capitalizing on.²⁴

Another affinity group leader reflected that, even before the events of the summer and fall that would give rise to Demanding Better, she had a sense that the year would be a turning point. "I remember having a conversation before that came out with a friend of mine that was on a board that I was on. I was like, I don't know what's going happen this year, but I think it's going be explosive."²⁵

3. THE PLAN, REVIVED (FEBRUARY 2018)

A 3L suggested that one altered variable that made it easier for students to speak out was the reinstatement of the federal clerkship hiring plan, which was intended to prevent federal judges from hiring law students before they had completed their 2L year. "The plan being reinstated provided enough of a cooling period to allow people to be able to more critically assess the informal structures that run this place."²⁶ Announced in February 2018, the plan called on judges to not seek or accept applications from students in the class of 2018 until June of 2019 and to not

²⁴ Confidential Interview in New Haven, Conn. (Apr. 24, 2019).

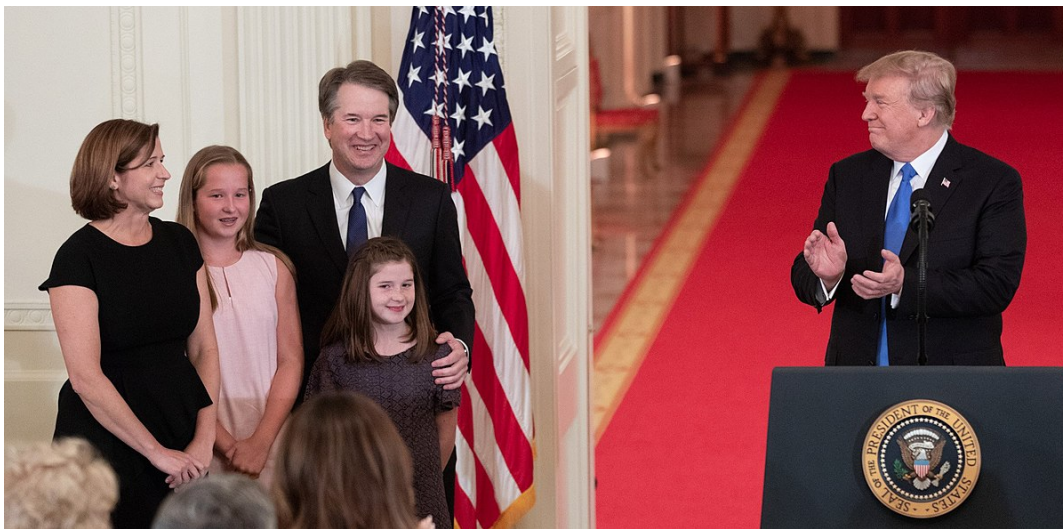
²⁵ Confidential Interview in New Haven, Conn. (May 3, 2019).

²⁶ Confidential Interview in New Haven, Conn. (Apr. 29, 2019).

accept applications from the class of 2021 until June of 2020.²⁷ At Yale, the Dean would strongly urge faculty not to write letters or make calls for students before those deadlines.²⁸

For many members of the 3L class, their 1L year had been spent attempting to forge relationships with professors so that they would have the three letters of recommendation necessary to apply for clerkships. As the rising 2Ls and 1Ls had not yet experienced the process, and the emotional work it entailed, their reactions to abuse or problematic professor conduct may have been less encumbered by the need to stay on good terms with power brokers.

4. THE PRESS RELEASE (JULY 9, 2018)



Donald J. Trump Announces Brett Kavanaugh's Nomination to the Supreme Court²⁹

²⁷ *Federal Law Clerk Hiring Plan*, OSCAR, https://oscar.uscourts.gov/federal_law_clerk_hiring_pilot (last visited May 12, 2019).

²⁸ Email from Dean Heather Gerken to the Yale Law School community (Feb. 28, 2018) (on file with author) (“Update on the Federal Law Clerk Hiring Plan”).

²⁹ The White House (@WhiteHouse), TWITTER (July 9, 2018, 10:52 PM), <https://twitter.com/WhiteHouse/status/1016515361125134336>.

On June 27th, 2018, Justice Anthony Kennedy announced that he would be retiring from the Supreme Court.³⁰ At the time, four of the justices were considered more or less reliably liberal, four were considered more or less reliably conservative and Kennedy had developed a reputation as the “swing justice” on controversial votes.³¹ Liberals worried that Kennedy’s retirement would allow President Trump to secure a consistent conservative majority on the court that would take the nation’s jurisprudence to the right on issues ranging from abortion to gay rights to gun control.

The president had already published a list of potential nominees the previous fall.³² As commentators had then noted, most of these potential nominees were significantly more conservative than a majority of the then-sitting justices.³³ By July 5th, the list had been winnowed down to 3—Brett Kavanaugh, Raymond Kethledge, and Amy Coney Barrett. Of the three, Kavanaugh was viewed by some commentators as the most moderate option.³⁴ On July 9th, 2018, President Donald Trump nominated Kavanaugh to replace Kennedy.

i. Press Release or Endorsement?

The day Kavanaugh was nominated, Yale Law School issued a press release that announced the nomination, noted that Kavanaugh would, if confirmed, be the fourth sitting member of the court

³⁰ Michael D. Shear, *Supreme Court Justice Anthony Kennedy Will Retire*, N.Y. TIMES, June 27, 2018, <https://www.nytimes.com/2018/06/27/us/politics/anthony-kennedy-retire-supreme-court.html>.

³¹ *Id.*

³² President Donald J. Trump’s Supreme Court List, WHITE HOUSE, Nov. 17, 2017, <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-supreme-court-list/>.

³³ Harry Stevens & Andrew Witherspoon, *By the Numbers: Trump’s Supreme Court Shortlist Is Very Conservative*, AXIOS, June 28, 2018, <https://www.axios.com/trumps-supreme-court-shortlist-is-very-conservative-74bf98bb-60b6-45c1-ba8f-de019d437819.html>.

³⁴ Igor Bobic, *Trump’s Supreme Court Shortlist Narrows To 3 Finalists*, HUFFINGTON POST, July 5, 2018, https://www.huffpost.com/entry/supreme-court-trump_n_5b3e27f2e4b05127ccefcd1df.

to attend Yale Law School and included congratulatory remarks from Dean Heather Gerken and Professors Kate Stith, William Eskridge, Akhil Reed Amar and Abbe Gluck.³⁵ The Dean wrote that she “admired” Kavanaugh for “serving as a teacher and mentor to our students and for hiring a diverse set of clerks, in all respects, during his time on the court.” Gluck described him as “a true intellectual,” Stith called him “a terrific judge” and Eskridge lauded him as “one of the most learned judges in America.”³⁶ The statement was quickly seized upon by the White House as further evidence of the “rave reviews” the justice had received from the legal community.³⁷

In later conversations within the law school, the Dean and other members of the administration would often defend the press release as a routine announcement as had been made for past YLS alums who had received the honor of being nominated to the Supreme Court. However, for many students the press release read more like an endorsement than an announcement. As one student argued, “Someone dug up the statements for Sotomayor and Alito. They weren’t at all like that. They were so much more measured in tone.”³⁸

One student recalled the announcement as a betrayal of the school’s supposed commitments to pursuing social justice.

I remembered talking to some friends [about how] the school’s praise of
Kavanaugh came on the same day or the day after Gerken had sent an email

³⁵ Yale Law School, *Brett Kavanaugh '90 Nominated to U.S. Supreme Court*, July 9, 2018, <https://law.yale.edu/yls-today/news/brett-kavanaugh-90-nominated-us-supreme-court>.

³⁶ *Id.*

³⁷ *The Legal Community is Giving Rave Reviews to Judge Brett Kavanaugh’s Nomination to the Supreme Court*, WHITE HOUSE, July 12, 2018, <https://www.whitehouse.gov/briefings-statements/legal-community-giving-rave-reviews-judge-brett-kavanaughs-nomination-supreme-court/>.

³⁸ Confidential Interview in New Haven, Conn. (Apr. 28, 2019) (referencing Andrea N. Sanchez, *Yale’s Endorsement of Brett Kavanaugh Reveals the Legal Establishment’s True Colors*, HUFFINGTON POST, Sept. 8, 2018, https://www.huffpost.com/entry/opinion-kavanaugh-yale-law-school_n_5b93093de4b0cf7b003fc6d3).

praising WIRAC for their work in helping families impacted by family separation, celebrating that work and saying how proud the school was of them and I feel like sort of signaling to alumni Yale is so social-justicey and we help so many people. Well, you can't do that and then at the same time celebrate a nomination that's going to encourage Trump to do more things like family separations. To me it's just beyond hypocritical.³⁹

Some liberal students, particularly 2Ls and 3Ls, based their opposition to Kavanaugh in their familiarity with his jurisprudence, with concerns about his record on reproductive rights especially salient. One student, for example, remembered reading an “incredibly condescending” opinion Kavanaugh had written allowing the government to delay an undocumented minor’s access to an abortion.⁴⁰ Another explained, “I am very involved in the reproductive rights clinic. Kennedy retiring and being replaced by Kavanaugh is despicable. . . . The number of states that are passing these six-week bans and basically tempting the Supreme Court to take the case is directly a result of Kavanaugh being on the Supreme Court.”⁴¹

For others, the calculus was more personal. “It does in a way impact me as a queer person of color . . . *Masterpiece Cakeshop* and the potential return of a similar case like that . . . would blow a hole in every state’s accommodations laws so there would be no place that you could live

³⁹ Confidential Interview in New Haven, Conn. (Apr. 25, 2019).

⁴⁰ Robert Barnes & Ann Marinow, *In Major Abortion Ruling Kavanaugh Offers Clues of How He Might Handle Divisive Issue on the Supreme Court*, July 11, 2018, https://www.washingtonpost.com/politics/courts_law/in-major-abortion-ruling-kavanaugh-offers-clues-of-how-he-might-handle-divisive-issue-on-the-supreme-court/2018/07/11/1acd980a-8515-11e8-9e80-403a221946a7_story.html.

⁴¹ Confidential Interview in New Haven, Conn. (Apr. 25, 2019).

in knowing that you wouldn't face the kind of animus that has deeply damaged you since you were a child."⁴²

Still others saw the nomination as just one more pawn in the overall strategy to politicize the judiciary.

"I wasn't operating as much within a legal realm yet. I was more concerned with the political process surrounding him. The president of the Federalist Society gave this list. This seemed to be this sort of insider-y candidate who was working his way up through the legal system but was still very much part of the radical right-wing establishment. I thought 'this whole thing stinks to high hell of partisan gamesmanship.'"⁴³

ii. *The Open Letter*

After the law school issued its press release, the student response was almost immediate. By the next day, July 10th, liberal members of the student body had begun to circulate an open letter framing the nomination as an "emergency—for democratic life, for our safety and freedom, for the future of our country."⁴⁴ Reviewing Kavanaugh's jurisprudence on reproductive rights, LGBT rights, the administrative state and executive power, the letter characterized the judge as "an intellectually and morally bankrupt ideologue."⁴⁵ The letter would accumulate nearly 700 signatures from current students, alums and a few professors.

⁴² Confidential Interview in New Haven, Conn. (Apr. 25, 2019).

⁴³ Confidential Interview in New Haven, Conn. (Apr. 28, 2019).

⁴⁴ Open Letter from Yale Law Students, Alumni, and Educators Regarding Brett Kavanaugh (July 10, 2018), available at

<https://docs.google.com/forms/d/e/1FAIpQLScUrOBy5sPzw1VGusbYr2VqVqPiNmO5adNdo8mIcsryvgOfrw/viewform>.

⁴⁵ *Id.*

The letter was the brainchild of a small nucleus of current students and alums that had already been closely following the nomination. “I was at a protest in D.C. opposing the nomination when I saw the press release. I came up with the idea with two alums, one of whom I was at the protest with.”⁴⁶ For the drafter, having a counter-statement was a crucial step to avoid Kavanaugh being normalized. “I felt that the law school was being used as a stamp of approval for this guy. That statement from Dean Gerken was being used to suggest that he was in the mainstream or had reasonable views. I thought that it was important to have a group of Yale students, faculty and staff and say ‘no, that’s not the case.’”⁴⁷

While most students who I spoke with who signed the letter did not expect it to derail the nomination, they nevertheless felt it was important to speak out. “To me it was more moral than strategic. I think any person Trump nominated would be disgusting, but I’m a person who very much believes that you have to take a stand and that being silent is taking a position.”⁴⁸

iii. The (Other) Open Letter

However, student opposition to Kavanaugh was far from unanimous. Two days later, on July 12th, a group of students, faculty and alumni wrote to “join Yale Law School in its praise of [the] distinguished alumnus.”⁴⁹ While the letter touched briefly on the length of the judge’s tenure on the bench, his mentorship and his community service, a majority of the letter’s space was used to

⁴⁶ Confidential Interview in New Haven, Conn. (Apr. 28, 2019).

⁴⁷ *Id.*

⁴⁸ Confidential Interview in New Haven, Conn. (Apr. 25, 2019).

⁴⁹ Letter from Yale Students, Alumni, and Faculty in Support of Judge Brett M. Kavanaugh (July 12, 2018), available at <https://docs.google.com/forms/d/e/1FAIpQLSeQCkO-bUO7bgRTYxC0-pN0c414xnh2wmDRDm4ID65zbjqrjw/viewform>.

reproduce the supportive comments that had appeared in the initial YLS press release.⁵⁰ This letter would in turn garner more than 200 YLS-affiliated signatures.

iv. The Faculty Debate

While students were circulating open letters for and against the nomination, faculty members were also staking out positions in the press. Professor Amar would become one of the judge's most full-throated champions on the faculty, publishing a piece in the *New York Times* entitled "A Liberal's Case for Brett Kavanaugh," which highlighted the judge's "wide and deep respect among scholars, lawyers, and jurists," and going on to testify on his behalf before the Senate Judiciary Committee.⁵¹ A centerpiece of the professor's argument was that Kavanaugh was the best candidate on the horizon.⁵² On July 12th, Professor Amy Chua published an opinion piece in the *Wall Street Journal* commending Kavanaugh as "A Mentor to Women."⁵³

On August 1st, three professors submitted a counter-op-ed to the *Los Angeles Times* arguing that there was "no liberal case for Brett Kavanaugh" and obliquely referencing the public support the candidate had received from their "colleagues at Yale Law School."⁵⁴ The professors acknowledged the view among some liberals that Kavanaugh was likely the best possible option

⁵⁰ *Id.*

⁵¹ Akhil R. Amar, *A Liberal's Case for Brett Kavanaugh*, N.Y. TIMES, July 9, 2018, <https://www.nytimes.com/2018/07/09/opinion/brett-kavanaugh-supreme-court-trump.html>; Transcript of Akhil R. Amar, Testimony Before the United States Senate Committee on the Judiciary on the Nomination of Brett Kavanaugh to the United States Supreme Court, Sept. 7, 2018, available at <https://www.judiciary.senate.gov/imo/media/doc/Amar%20Testimony.pdf>.

⁵² Transcript of Akhil R. Amar, *supra* note 51.

⁵³ Amy Chua, *Kavanaugh is a Mentor to Women*, WALL ST. J., July 12, 2018, <https://www.wsj.com/articles/kavanaugh-is-a-mentor-to-women-1531435729>.

⁵⁴ David S. Grewal, Amy Kapczynski, & Issa Kohler-Hausmann, *There Is No Liberal Case for Brett Kavanaugh*, L.A. TIMES, Aug. 1, 2018, <https://www.latimes.com/opinion/op-ed/la-oe-grewal-kapczynski-kohlerhausmann-20180801-story.html>.

but held that such considerations could not excuse “soft-pedaling the record of a far-right nominee.”⁵⁵

⁵⁵ *Id.*

5. THE RUBENFELD INVESTIGATION (SUMMER 2018)



*Professor Jed Rubenfeld*⁵⁶

While the law school was engaged in a very public debate over the Kavanaugh nomination, it was also conducting a very discreet inquiry into potential misconduct by its own Professor Jed Rubenfeld. In spring 2018, the school had hired an independent investigator to collect evidence for a potential Title IX hearing, and over the summer and fall, administrators and the investigator began to reach out to students and alumni who might have stories to share.

In October, after the Demanding Better movement was well underway, *Slate* would publish two student accounts of interactions they'd had with the professor that had felt inappropriate.⁵⁷ In the first account, a student described an uncomfortable late-night meeting with the professor in which she felt he had repeatedly steered the conversation toward her personal and romantic life.

⁵⁶ Daniel Bax, *Attack of the Power Migrants*, QANTARA, Mar. 27, 2014, <https://en.qantara.de/content/book-review-amy-chua-and-jed-rubenfeld-on-immigrant-culture-attack-of-the-power-migrants>.

⁵⁷ Dahlia Lithwick & Susan Matthews, *Investigation at Yale Law School*, SLATE, Oct 5, 2018, <https://slate.com/news-and-politics/2018/10/jed-rubenfeld-amy-chua-yale-law-school.html>.

A second student focused on two conversations that she'd had with the professor at parties in his home in which she felt that he'd invited her to comment on his appearance and joked about tickling her. The *Slate* authors indicated that they had interviewed “more than a dozen recent Yale law students and graduates” as well as “several faculty members” for the article and had found a variety of interpretations of the alleged conduct, with some describing it as “flirtatious” and others labeling it as “harassment.”⁵⁸

i. Whispers

One thing that united all students who participated in this project, regardless of class year or political affiliation, was a total lack of surprise when they learned of the investigation into Professor Rubinfeld. Many referenced a shared awareness that the professor had harassed students. As a 3L put it, “Everyone, and I mean everyone, knew. The joke was that he was holding off while his daughter was in school.”⁵⁹ “People knew Rubinfeld harassed students our 1L and 2L year and there was never any sort of uprising.”⁶⁰ A 2L explained that “[w]e had all been hearing rumors about bad actors on the faculty—some of us since even before orientation, and this seemed like all of that coming to fruition.”⁶¹

For some respondents, the sense that the professor had had improper interactions with students was linked to things they had heard from friends. “I happened to be good friends with people who were in either [Professor Amy] Chua or Rubinfeld’s small group, and from that experience,

⁵⁸ *Id.*

⁵⁹ Confidential Interview in New Haven, Conn. (Apr. 29, 2019).

⁶⁰ Confidential Interview in New Haven, Conn. (Apr. 28, 2019).

⁶¹ Confidential Interview in New Haven, Conn. (Apr. 21, 2019).

I heard about a lot of troubling things going on that I had not personally experienced but was very troubled by.”⁶²

Others recalled personal interactions that had made them uneasy, even if they did not necessarily qualify as harassment. “I and a number of people I knew would talk about how deeply uncomfortable he would make us feel. His office would be dimly lit. He would be in his rolling chair and he would roll up to you. You would just feel that there was something not safe about that environment.”⁶³

“I was in the Rubinfeld small group. So I had thought about it a lot. I had been thinking about the things that happened with Rubinfeld for a year by the time the *Slate* article came out. I knew about at least one of the main stories in the article since I was in his small group.”⁶⁴

At the same time, older students remembered their concerns about Professor Rubinfeld being paired with a deep cynicism about change. “It was something that was laughed about almost, because of the sense that there was never going to be away to attack it truly. The only thing you could do was warn each other, and that was it.”⁶⁵

In addition to the remarks reported here, a student who had experienced more acutely negative interactions with the professor declined to go on record about them for this writing in order to avoid being identified.

⁶² Confidential Interview in New Haven, Conn. (Apr. 25, 2019).

⁶³ Confidential Interview in New Haven, Conn. (Apr. 29, 2019).

⁶⁴ Confidential Interview in New Haven, Conn. (Apr. 24, 2019).

⁶⁵ Confidential Interview in New Haven, Conn. (Apr. 29, 2019).

ii. *To Speak or Not to Speak*

Students who were contacted to participate in the investigation remembered an emphasis placed on secrecy and discretion. Members of the administration had explained that this was necessary to ensure the integrity of the process and any findings made. “There was a real risk that there could be a due process claim on Jed’s side if there was a public cattle call for grievances, because he could say this is a witch hunt.”⁶⁶ Rather than publicize the investigation, the students relied on student and alumni networks to refer friends or colleagues who might wish to participate.

At the same time, some students cooperating with the investigation wondered whether the secrecy and lack of transparency would shield the school from making necessary changes. “There was some discussion of how valid the ask from the administration was about keeping this under wraps and not doing things like talking to the press or blasting all the alumni we could.”⁶⁷ A student recalled one friend suggesting they set up an anonymous repository of grievances and send it to the Wall and another suggesting they pen an op-ed detailing everything they knew. Yet at the moment, action didn’t feel imminent. “I don’t think there was an action plan—at that moment it was just friends griping with friends.”⁶⁸

As the process wore on through the summer, and into the fall, some students began to grow frustrated with a perceived lack of transparency from the administration. “Nothing had happened

⁶⁶ Confidential Interview in New Haven, Conn. (Apr. 19, 2019).

⁶⁷ *Id.*

⁶⁸ *Id.*

by virtue of taking advantage of institutional channels. Cooperating with the administration and buying into their narrative that protecting processes was the only way to make change was really disillusioning over time as increasingly nothing happened and I got less and less access to information to something I was purportedly participating in, and being a valued player in.”⁶⁹

Some students felt a growing desire to pierce the veil of secrecy. “I had thought about going public for a month or two as I was becoming more frustrated. I had written drafts of things that might have been op-eds or might have been Wall emails.”⁷⁰ Meanwhile, members of the press began to reach out to Yale students for comments. “I’d gotten a LinkedIn message from someone who asked to speak about the Rubinfeld stuff because it says Yale Law School on my LinkedIn.”⁷¹ “We had all been contacted by the press, like, do you want to on the low rat out your small group professor.”⁷² Eventually, a few students made the decision to cooperate with the media. Soon, the secret investigation into Jed Rubinfeld would be international news.

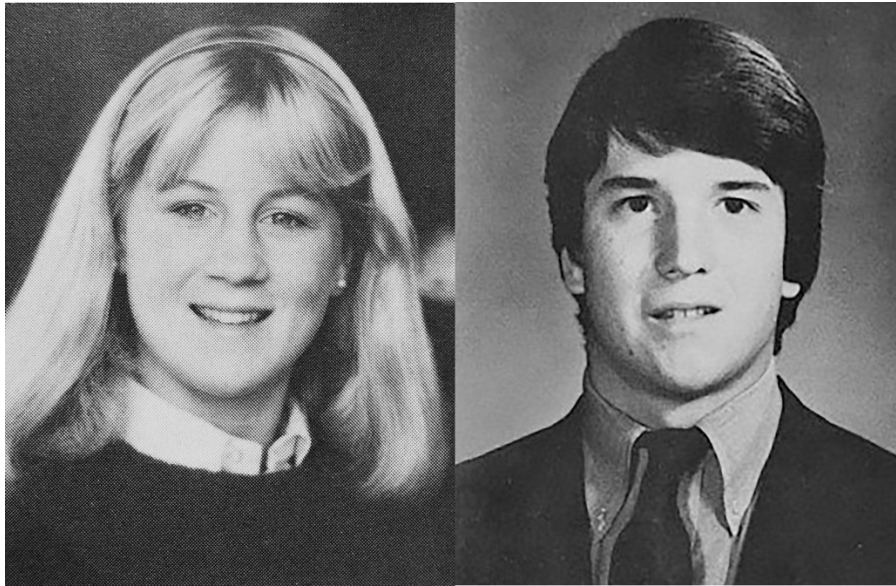
⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Confidential Interview in New Haven, Conn. (May 2, 2019).

⁷² Confidential Interview in New Haven, Conn. (Apr. 24, 2019).

6. KAVANAUGH ACCUSED (SEPTEMBER 12TH, 2018)



*High School Yearbook Photos of Christine Blasey Ford and Brett Kavanaugh*⁷³

Despite mounting opposition from liberals and democrats, by September 2018, Brett Kavanaugh’s confirmation to the Supreme Court seemed all but guaranteed. On September 13th, the Republican Senate Judiciary scheduled a vote on his nomination for the following week, on September 20th; if successful, the nomination would then move to the entire Senate.⁷⁴ With Republicans holding an 11-10 majority in the Committee, and a 51-49 majority in the Senate, the conventional wisdom was that Kavanaugh would be confirmed “barring any surprises.”⁷⁵

On September 12th, the *Intercept* reported that Senator Dianne Feinstein, the highest-ranking Democrat on the Senate Judiciary Committee, had received a letter related to the Kavanaugh

⁷³ Michael Winship, *Brett Kavanaugh, the All-American Privileged Boy*, COMMON DREAMS, Sept. 28, 2018, <https://www.commondreams.org/views/2018/09/28/brett-kavanaugh-all-american-privileged-boy>.

⁷⁴ *Id.*

⁷⁵ *Id.*

nomination that she had refused to share with other members of the Committee.⁷⁶ The following day, Senator Feinstein referred a Kavanaugh-related matter to federal investigators but declined to say what the matter was about.⁷⁷ Anonymous sources claimed that the letter concerned potential sexual misconduct between the judge and a woman while they were both in high school.

On the 14th, the *New Yorker* would publish more details, while keeping the letter's author anonymous.⁷⁸ The letter had been submitted back in July shortly after the judge had been nominated and described an incident at a party in which the judge had held the author down and "attempted to force himself on her."⁷⁹ While the author had been able to free herself, and the event had happened several decades previously, she described it as a "source of ongoing distress."⁸⁰ On the same day, Kavanaugh issued a blanket denial of the allegations, writing "I categorically and unequivocally deny this allegation. I did not do this back in high school or at any time."⁸¹

On September 16th, Dr. Christine Blasey Ford, a research psychologist living in Northern California, came forward publicly as the accuser, via an interview published in the *Washington*

⁷⁶ Ryan Grim, *Dianne Feinstein Withholding Brett Kavanaugh Document from Fellow Judiciary Committee Democrats*, INTERCEPT, Sept. 12, 2018, <https://theintercept.com/2018/09/12/brett-kavanaugh-confirmation-dianne-feinstein/>.

⁷⁷ Nicholas Fandos & Catie Edmondson, *Dianne Feinstein Refers a Kavanaugh Matter to Federal Investigators*, N.Y. TIMES, Sept. 13, 2018, <https://www.nytimes.com/2018/09/13/us/politics/brett-kavanaugh-dianne-feinstein.html>.

⁷⁸ Ronan Farrow & Jane Mayer, *A Sexual-Misconduct Allegation Against the Supreme Court Nominee Brett Kavanaugh Stirs Tension Among Democrats in Congress*, NEW YORKER, Sept. 14, 2018, <https://www.newyorker.com/news/news-desk/a-sexual-misconduct-allegation-against-the-supreme-court-nominee-brett-kavanaugh-stirs-tension-among-democrats-in-congress>.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Deirdre Walsh, *Kavanaugh Denies Allegation of Sexual Misconduct During High School*, NPR, Sept. 14, 2018, <https://www.npr.org/2018/09/14/647864457/kavanaugh-denies-allegation-of-sexual-misconduct-during-high-school>.

Post.⁸² In the piece, she vividly described the fear she felt as Kavanaugh and a friend corralled her into a bedroom, and how Kavanaugh then attempted to remove her bathing suit and put his hand over her mouth when she tried to scream.⁸³ “I thought he might inadvertently kill me,” Ford said, in one of the article’s most chilling details.⁸⁴ Kavanaugh did not release an additional statement beyond his first denial.⁸⁵

As the *Yale Daily News* would report on September 17th, the law school did not initially respond to the allegations, despite student pressure to do so.⁸⁶ For some students, this silence was deeply painful.

I’m also a sexual assault survivor. One of the things that was really striking for me is that I had a meeting with Dean Gerken. She said something to the effect of not thinking it was an appropriate scenario for her to issue a statement on behalf the law school about Kavanaugh. First, she said something like, the law school as a nonprofit can’t engage in political campaigning. We pointed out that there’s a difference between [political campaigning and] issue advocacy, which is totally open to nonprofits to do—saying something like we think it’s important that the judiciary investigate allegations of sexual assault.

Then she said that she didn’t think this was something that was core to the law school’s mission in the same way that something like DACA is, because

⁸² Emma Brown, *California Professor, Writer of Confidential Brett Kavanaugh Letter, Speaks Out About Her Allegation of Sexual Assault*, WASH. POST, Sept. 16, 2018, https://www.washingtonpost.com/investigations/california-professor-writer-of-confidential-brett-kavanaugh-letter-speaks-out-about-her-allegation-of-sexual-assault/2018/09/16/46982194-b846-11e8-94eb-3bd52dfe917b_story.html.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Hailey Fuchs, *YLS Silent on Kavanaugh Allegation*, YALE DAILY NEWS, Sept. 17, 2018, <https://yaledailynews.com/blog/2018/09/17/yls-silent-on-kavanaugh-allegation/>.

DACA obviously covers students. She just didn't think it was appropriate for the law school to insert itself on this issue because it's not related in the right way to the educational mission of the university.

In addition to being a sexual assault survivor, I came to law school after I was a grad student before. I started my PhD at [another university] and ended up having to transfer three years in because I was being sexually harassed by a faculty member there and got g retaliated against when I tried to report it. I transferred, and when you're a PhD student, you don't transfer like you do when you're an undergrad. You have to start over because graduate programs don't take credits from other schools. So I transferred-slash-started-over at [another university], where one of my faculty members was in a whole mess of lawsuits because he had been accused by two separate students of sexual assault.

Which is all to say that my whole educational experience has been sort of infected with the effects of sexual assault and sexual harassment. To say this isn't something that's related to an educational mission of an institution when people get driven out of schools and their education suffers because they're dealing with this—I found that deeply hurtful. I don't think that's how she meant it. It's just that I always think equality and justice are caught up in our education because you can't learn if you're being treated unequally.⁸⁷

In the week after the Christine Blasey Ford allegations were made public, the accuser and her lawyer struggled with the Senate Judiciary Committee over how and to what extent her

⁸⁷ Confidential Interview in New Haven, Conn. (Apr. 20, 2019).

allegations against the judge would be investigated and weighed in determining the fate of his nomination. On September 17th, the Republican chair of the Senate Judiciary Committee agreed to hold public hearings on the allegations on Monday, September 24th, delaying the initial plan for the Committee to vote on the nomination on September 20th.⁸⁸ However, Ford, through her attorney, pushed back on the plan, refusing to testify unless certain conditions were met, including initiating an FBI investigation, being allotted an equal amount of time to speak as Kavanaugh, being provided adequate security, having a witness to the alleged attempted rape subpoenaed and, most crucially, having the hearing delayed until Thursday, the 24th, to give her time to prepare.⁸⁹ The Republican Committee leadership resisted these calls and at one point delivered an ultimatum to Ford—accept their invitation to testify on Monday on their terms, or see the Committee advance the nomination without a hearing.⁹⁰

⁸⁸ Sheryl G. Stolberg & Julie H. Davis, *Hearing Set for Monday to Hear Kavanaugh and His Accuser*, N.Y. TIMES, Sept. 17, 2018, <https://www.nytimes.com/2018/09/17/us/politics/kavanaugh-allegations-ford-palo-alto.html>.

⁸⁹ Kathryn Watson, Emily Tilett, & Grace Segers, *Kavanaugh Accuser Calls for FBI Investigation Before She Testifies*, CBS NEWS, Sept. 18, 2018, <https://www.cbsnews.com/news/the-latest-on-brett-kavanaugh-nominee-denies-accuser-allegation-live-updates/>; Jan Crawford & Adam Verdugo, *Kavanaugh Accuser Christine Blasey Ford Lays Out Conditions for Senate Testimony*, CBS NEWS, Sept. 21, 2018, <https://www.cbsnews.com/news/kavanaugh-accuser-christine-ford-lays-out-conditions-for-senate-testimony/>.

⁹⁰ Kevin Breuninger & Javier E. David, *Senate Judiciary Committee Threatens to Vote on Kavanaugh Nomination If Ford Doesn't Accept Proposal to Testify*, CNBC, Sept. 21, 2018, <https://www.cnbc.com/2018/09/21/gop-counter-offer-to-brett-kavanaugh-accuser-proposes-wednesday-hearing.html>.

7. MODELGATE (SEPTEMBER 19TH, 2018)



Professors Amy Chua and Jed Rubenfeld⁹¹

On September 19th, late in the evening, an article appeared in the *Huffington Post* insinuating that “Brett Kavanaugh Liked Female Clerks Who Looked A ‘Certain Way’”⁹² and that Yale professors were aware of this policy. The article described a clerkship-advising conversation between Professor Jed Rubenfeld and a female student that had taken place a few years earlier. The student reported that Rubenfeld had told her that Kavanaugh was known to hire female clerks that had a “certain look” but that he had heard nothing else untoward.⁹³ The student

⁹¹ Barbara Probst, CONFESSIONS OF A TIGER COUPLE, N.Y. TIMES, Jan. 29, 2014, <https://www.nytimes.com/2014/02/02/magazine/confessions-of-a-tiger-couple.html>.

⁹² Emily Peck, *Brett Kavanaugh Liked Female Clerks Who Looked a ‘Certain Way,’ Yale Student Was Told*, HUFFINGTON POST, Sept. 19, 2018, https://www.huffingtonpost.com/entry/yale-student-brett-kavanaugh-clerkship-look_us_5ba2f051e4b0181540d9e2bb.

⁹³ *Id.*

nevertheless interpreted the words as a warning.⁹⁴ The student also remembered the professor informing her that another judge, Alex Kozinski, was known to sexually harass his clerks.⁹⁵

The article reported that the student received similar information from Professor Amy Chua, Professor Rubinfeld's wife. The article highlighted Professor Chua's "ability to help students land prestigious clerkships with federal judges" and reported that Chua had advised the student to dress in an "outgoing" way and to send the professor pictures so that her outfits could be evaluated.

The article concluded with commentary from Vivia Chen, a columnist at *American Lawyer* magazine, who suggested that, viewed most negatively, the exchange might "sound[s] like the judge has a fetish, frankly, and that the law professors are feeding the fetish," but that in another light the professor was simply trying to help her student.⁹⁶

That evening, the article quickly began to quietly circulate via text messages, email chains and social media threads among students at the law school, who debated how the remarks should be interpreted. Some students believed the report immediately, based on their own troubling interactions with the professor. "I was told by Chua that if I had good grades I should apply to Kavanaugh 'cause I was his type. When I inquired what his type was I was told tall and blonde, so I fully knew that."⁹⁷

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Confidential Interview in New Haven, Conn. (Apr. 27, 2019).

Others placed the report within a larger network of worrisome interactions with the professor. As one 3L described, “One of the things that really struck me was that Chua was kind of lauded for her supposed support of people of color and women in the clerkship process. But I and many other people had felt that she was deeply exploitative of students. . . . This is something that was intrinsic to the mythos of Amy Chua at this school. She would elevate you, but she had to take something from you first.”⁹⁸

However, others, while agreeing with the substance of the articles, felt that the characterization of Chua’s remarks unfairly equated Chua’s actions with the allegations levied against her husband and Judge Kavanaugh. “It gets dangerous when you conflate the two. Sexual assault is in its own issue.”⁹⁹

Another student went further to defend Chua, remembering that “Amy Chua was the only faculty member for a lot of students who would look at you and not think that you weren’t one of the students who should be considered for the fanciest things.”¹⁰⁰

8. TITLE IX INVESTIGATION MADE PUBLIC (SEPTEMBER 20TH, 2018)

Over the morning and afternoon of September 20th, the allegations concerning Yale’s role in facilitating sexual misconduct picked up speed. At 10:16 AM, *The Guardian* published a piece

⁹⁸ Confidential Interview in New Haven, Conn. (Apr. 29, 2019).

⁹⁹ Confidential Interview in New Haven, Conn. (Apr. 17, 2019).

¹⁰⁰ Confidential Interview in New Haven, Conn. (May 3, 2019).

exploring the allegations made in the *Huffington Post* article in greater depth.¹⁰¹ One new development of the *Guardian* article was the revelation that Professor Rubinfeld was the subject of an ongoing investigation into his conduct with female law students. In response, Rubinfeld stated that he had been informed that he was receiving an “informal review” and that “the allegations were not of the kind that would jeopardize [his] position as a long-tenured member of the faculty.”

Some students remembered reading the article shortly after it came out during a break in their clinic and feeling the class atmosphere immediately change:

There were people who already knew about the existence of the Title IX investigation against Rubinfeld, but it was meant to be purposefully quiet, because they were trying to get people on board to speak to this investigator and no one wanted the results to be screwed up by him suing the law school or claiming there was no due process. But in the article, he himself acknowledged that there was an investigation. It was no longer an open secret.¹⁰²

At noon, a Yale Law student forwarded the *Guardian* article to the Wall, the law school’s internal student listserv, and mentioned being told at a clerkship event the previous year that no one on faculty had been previously aware of Alex Kozinski’s harassment issues.¹⁰³

¹⁰¹ Stephanie Kirchaessner & Jessica Glenza, ‘No Accident’ Brett Kavanaugh’s Female Law Clerks ‘Looked Like Models’, *Yale Professor Told Students*, GUARDIAN, Sept. 20, 2018, <https://www.theguardian.com/us-news/2018/sep/20/brett-kavanaugh-supreme-court-yale-amy-chua>.

¹⁰² Confidential Interview in New Haven, Conn. (May 2, 2019).

¹⁰³ Kirchaessner & Glenza, *supra* note 100.

At the same time, the Title IX Working Group convened for a lunch meeting that had already been planned. This meeting soon turned to the *Guardian* piece:

Dean Cosgrove had already planned to be there. We wanted to vent in front of her so she knew how upset people were. . . . There was a line in the *Guardian* article where he said that he was reassured that his tenure wouldn't be taken away. We had a whole agenda and everything but then we were like, fuck it. Like, Dean Cosgrove, what the fuck, tell us what's going on, we're so upset

It became this rant zone. I got more angry because people were making really good points about why it is that professors have so much power here—the lack of mentorship, the lack of accountability. It became clear that all of these things that people had known about would never have been acted on unless someone had gone to the press about it. It really took outside pressure for this to happen. It was the perfect storm of things.¹⁰⁴

At 1:00 PM, *Above the Law* published a piece diving more deeply into the investigation into Professor Rubinfeld.¹⁰⁵ The piece reprinted a letter that had gone out to Yale Law alumni over the summer, provided the name of the outside investigator the law school had hired and indicated that the investigation concerned conduct that “date[d] back decades but that ha[d] persisted to the just concluded school year.” This conduct potentially included “disparate treatment of, or boundary crossing with, women in the YLS community,” “[c]onduct related to excessive

¹⁰⁴ Confidential Interview in New Haven, Conn. (May 2, 2019).

¹⁰⁵ Elie Mystal, *Details on the Allegations Against, and Yale Law School Investigation into, Professor Jed Rubinfeld*, ABOVE THE LAW, Sept. 20, 2018, <https://abovethelaw.com/2018/09/details-on-the-allegations-against-and-yale-law-school-investigation-into-professor-jed-rubinfeld/>.

drinking with students (driving with students while drunk, etc.),” “[i]nappropriate employment practices relating to RAs or Coker Fellows,” and “[r]etaliatiion against students who do not show sufficient loyalty.”

Shortly after 2 PM, the Dean released a statement to members of the Yale Law School community in response to “press reports . . . regarding allegations of faculty misconduct.” While the statement did not directly address the Rubinfeld investigation, it emphasized the Dean’s concern over “the allegations being reported” and assured the community that no options would be taken off the table before the investigation had concluded.

One student recalled having mixed feelings about the coverage of the two professors. “It felt very scandalous in kind of a bad way. The accusations were accurate to my understanding and knowledge, but I felt that the press coverage was kind of salacious and gossip-filled. I felt that that kind of took away that this is important to our community and a lot of our community members. Big picture, I think it’s important that that information got out because it has been an open secret for a long time and that’s not okay.”¹⁰⁶

¹⁰⁶ Confidential Interview in New Haven, Conn. (Apr. 28, 2019).

9. THAT #METOO TALK (SEPTEMBER 20TH, 2018)

#MeToo and the Kavanaugh Confirmation
A Conversation between Professor Judith Resnik and Lecturer Emily Bazelon

Thursday, September 20, 2018
3:00-3:45 pm
Room 129

A Screenshot of the Email Announcing the Coffee Talk that would launch the Demanding Better Movement¹⁰⁷

More than any other event, participants in this project linked the rise of the Demanding Better movement to a YLW panel on #MeToo and the Kavanaugh confirmation held at 3 PM on September 20th, 2018. A member of the YLW board remembered the event starting innocuously enough:

When they decided to delay the hearings to listen to the testimony of Christine Blasey Ford, one of our board members was like, we should host this event about the hearings and have Emily Bazelon and Judith Resnik come and speak. Professor Bazelon has experience reporting, and we trusted her to be a good person to frame the narrative as the moderator. Professor Resnik had experience working on the confirmation hearing for Clarence Thomas. We were like, oh, she can compare and contrast the Anita Hill situation with what's

¹⁰⁷ Posting of Megan Mumford to The Wall (Sept. 20, 2018) (on file with author) (“Reminder: #MeToo and the Kavanaugh Confirmation”).

happening now. . . . It was supposed to be a fairly straightforward thing. We always joke on our board that this board member started the revolution.¹⁰⁸

The email announcing the event pitched it as an opportunity to discuss “topics including the lack of political or legal process in Congress for dealing with sexual harassment allegations during confirmation hearings, the historical parallels with Anita Hill's claims against Justice Thomas, and the role of the #MeToo movement in the confirmation process and going forward.”¹⁰⁹ However, as the event began and law students streamed into Room 129, filling every available seat and sitting on the floor, the radiators, and leaning against the windows, it was increasingly clear that the upcoming hearing was only part of the student concern.

Faculty also seemed to be particularly interested in the talk. Professor Resnik and Emily Bazelon were the only scheduled speakers, but the event included a heavy faculty presence, including Professors Doug Kysar, who was serving as Deputy Dean, Amy Kapczynski, Doug NeJaime and Reva Siegel.

Unavoidably, the conversation turned to the law school's role in confronting harassment on the judiciary. Some students asked whether the law school would withdraw its initial press release announcing the Kavanaugh confirmation, which they viewed as an endorsement. Others asked when faculty members had become aware of the allegations concerning Kozinski. Others still asked faculty how they could keep themselves safe from predatory judges if they did not have access to open information. The responses from faculty seemed to add fuel to the students' anger

¹⁰⁸ Confidential Interview in New Haven, Conn. (Apr. 21, 2019).

¹⁰⁹ Posting of Megan Mumford, *supra* note 107.

rather than relieve it. As one student put it, “I went into the event thinking, this will be reassuring to hear us talk critically about sexual assault and #MeToo and the Kavanaugh issue. I went in there fired up and I expected to leave there fired up. I just left fired up with a different kind of fire.”¹¹⁰

Tracing this emotional journey, the student focused on comments Professor Reva Siegel made as the discussion began to shift from Kozinski and Kavanaugh to the *Guardian* article and the allegations made against Rubinfeld and Chua. Professor Siegel pointed out that as students at Yale Law School, female students were already in a privileged position, and she encouraged the students to consider their own agency and not to act like victims. She also defended Professor Chua, pointing out that she had recently been hospitalized with a serious illness and suggested that the negative news coverage may be hindering Chua’s recovery.

Reva Siegel went on a whole monologue about Amy Chua and about how everyone must be kind at this time since she was sick. About all of the privilege that we have. [It] essentially came off as we should stop complaining so much. Which is true, but I don’t think it should necessarily be used to chastise students that are talking about the allegations that were made about [Chua] or her husband. I don’t think it was fair of her to essentially try to shut that down by saying Amy Chua is not well. Sure, we’re all privileged, but we all have different types of privilege in this space, especially if you’re a woman, especially if you’re a woman of color. That doesn’t mean we can’t be critical of faculty that may be harassing

¹¹⁰ Confidential Interview in New Haven, Conn. (Apr. 18, 2019).

or treating students inappropriately. Especially if you're a woman and especially if you're a woman of color. Going into the event so hopeful that we would all be like, yes, this is bad and we should do better, and the faculty seeming to be on a completely different page is what shook a lot of students.¹¹¹

Another student remembered the exchange very similarly, as illustrative of the professor-student divide. "A professor, I think it was Reva Siegel, was with best intentions trying to defend a friend. It was kind of like this old school, you're all at Yale Law School we've all had to go through shit, but you'll all be fine, there are human lives at stake." What stood out to the student was "that image of just not feeling the energy in the room, not feeling the hurt, the distrust, the fear. I think that everyone in that room was scared of something. There was a lot of fear in the room."¹¹² As a third student put it, "It was basically sort of clear that a lot of the faculty had no idea why people were so upset. Especially because the article had dropped that day, it was very clear that faculty were not on the same wavelength."¹¹³

Among the faculty, students acknowledged that some seemed better able to connect: "There were other professors, two of whom became two of the three co-chairs of the Working Group, who could read the room a bit better and were a little closer, a bit more sympathetic to what they were hearing."¹¹⁴

¹¹¹ Confidential Interview in New Haven, Conn. (Apr. 18, 2019).

¹¹² Confidential Interview in New Haven, Conn. (May 3, 2019).

¹¹³ Confidential Interview in New Haven, Conn. (May 2, 2019).

¹¹⁴ Confidential Interview in New Haven, Conn. (May 3, 2019).

Another point of controversy was a remark from the Deputy Dean, Professor Doug Kysar, acknowledging that he had known for several years that Kozinski was a “sleazeball” but had never sent students to clerk for him for this reason. He also attempted to point out a potential silver lining in the shift in attitudes over time by pointing out that in 2004, when his sister attended law school, it was common for Yale’s career development office to advise women to wear short skirts to their interviews. Kysar would later clarify that he had not known Kozinski was actually harassing female clerks, but that was exactly how many students interpreted his comments.

I think his response was like, “I knew, and I didn’t send students to clerk for him.” And there were two things that were really problematic about that. First is that he would know that this very toxic behavior was going on and he wasn’t reporting it. He was the Title IX coordinator. There’s a lot there that’s very alarming. Secondly, the idea that if there’s a judge that’s sexually harassing women, then professors won’t recommend women to them. That means that men are more likely to get these prestigious jobs and are more likely to get Supreme Court clerkships and all that comes with it. So, it’s basically further marginalizing women within the legal profession.¹¹⁵

While several professors prefaced their responses by stating that they had not personally been aware of the Kozinski allegations, this only increased student irritation. Finally, a student responded that she wanted them to stop saying that because the students didn’t believe them. “It

¹¹⁵ Confidential Interview in New Haven, Conn. (Apr. 24, 2019).

was like, let's just put this on the table. I came here and I didn't know anyone and within three days I knew at least potentially that these eyebrow-raising things were going on. So it's inexcusable if you didn't know. And accepting arguendo that you didn't know, how are you going to make sure that you do know in the future?"¹¹⁶

The student's comment transformed the atmosphere from one of questioning to one of open criticism of the faculty. Students suggested that the law school had not taken responsibility for its role in funneling students to potentially abusive judges and that it was in fact enabling Judge Kavanaugh to become a Supreme Court justice despite the allegations leveled against him. In response, several faculty members said they would take the concerns raised into account. But rather than dissipating, student anger only seemed to condense.

¹¹⁶ Confidential Interview in New Haven, Conn. (Apr. 20, 2019).

III. DEMANDING BETTER

1. THE FIRST MEETING (SEPTEMBER 20TH, 2018)

i. Deciding to Meet

Before the #MeToo panel, YLW had already invited leaders of affinity groups to a meeting at 5 PM to discuss the troubling allegations that had appeared in the *Guardian*. There is some debate over how this meeting arose, and who was to be included, which would become a point of tension for the movement.

One affinity group leader remembered having a similar idea on the morning of the 20th, when she stepped out of her clinic to discuss the *Guardian* article with another student of color. “I was like, I think we should do something, and we saw another member of YLW walking in the hallway. I said I think we should all organize.”¹¹⁷ Shortly after having this conversation, the student received an email addressed to the heads of various affinity groups calling them to a meeting at 5 PM in the auditorium. “We went back to class and when we came out YLW had done its YLW thing and organized on behalf of women of color who had made up the idea. So, I was like kind of pissed actually.”¹¹⁸

Because she had been left out of the planning of the meeting, she was confronted by a member of her affinity group for a lack of transparency. Nevertheless, in the end, the student felt that the student organizers in YLW were thoughtful about their interactions moving forward and focused on centering the voices of women of color throughout the process.

¹¹⁷ Confidential Interview in New Haven, Conn. (Apr. 24, 2019).

¹¹⁸ *Id.*

Another student remembered the interaction somewhat differently. “Another student turned to me and was like, we should be doing something about this, and I was like, we totally should but I don’t know what. . . . We ran into [a member of YLW] in the hallway and she was like, YLW has been discussing getting all the affinity leaders in a room together and discussing what to do about the whole situation. We were like, great, great, great, put us in the calendar for whatever time today. . . . It was like the stars had aligned. We were upset because of [our clinic], and YLW had already thought, let’s convene people.”¹¹⁹

ii. Who to Include

The initial email from YLW was addressed to the various leaders of affinity groups. As one board member recalled, “We decided to include only affinity groups because we felt like that was a line we could draw in some kind of way. It was somewhat arbitrary, but it sort of made the most sense because marginalized people were the most affected by this kind of behavior.”¹²⁰

However, for some students, it was never clear in what capacity they had been invited. “I think it might have just been because I’m on the Title IX working group, and I’m on the board of [an affinity group]. It might have also been because we’re friendly and I would have been sympathetic, I’m not sure.”¹²¹

As word spread of the meeting, students who weren’t on the boards of affinity groups began to hear about it. One student remembered learning of the meeting from a message sent on a group

¹¹⁹ Confidential Interview in New Haven, Conn. (May 2, 2019).

¹²⁰ Confidential Interview in New Haven, Conn. (Apr. 21, 2019).

¹²¹ Confidential Interview in New Haven, Conn. (Apr. 20, 2019).

messaging thread that she was on with other reform-minded YLS students. “A message came out saying, “in case affinity group leaders haven’t heard, we’re having this meeting.”¹²² The student reached out to a member of the YLW board to express interest in attending and remembered being told that the meeting had been limited to the affinity groups in order to avoid the prospect of picking and choosing among which other student groups could attend. Nevertheless, the student remembers the board member leaving the door open for her to join, saying, “I don’t really know what to say, you can come if you want.”¹²³ Ultimately, the student decided to attend.

Other students remember being specifically invited to the meeting in the conversations occurring after the #MeToo talk. “I was nervous about going to that. We had gathered in the hall and we were talking about what the professors had been saying [at the #MeToo talk]. People said, ‘Are you going to the organizing meeting?’ I said, ‘I wasn’t invited.’ Someone said all of the affinity groups are showing up. I said, ‘I’m not on the board of any affinity group. I was on the board of JLSA last year, I don’t know if they were invited to this or if this is that vibe and I would really not like to invade.’ Folks said ‘Come, just come, we promise.’”

As more non-affinity leaders were invited, the barrier for each additional attendee decreased. “People invited me to the meeting afterwards and at first, I felt kind of weird because I was not on the board of an affinity group. Then it sounded like enough people who weren’t on the boards of affinity groups had attended so I showed up halfway through.”¹²⁴

¹²² Confidential Interview in New Haven, Conn. (Apr. 23, 2019).

¹²³ Confidential Interview in New Haven, Conn. (Apr. 23, 2019).

¹²⁴ Confidential Interview in New Haven, Conn. (Apr. 20, 2019).

One of the students who had reached out to ask if she could attend later reflected that this may have perpetuated one of the criticisms the movement had attempted to make of the school and administration. “There was this piece about trying to change the culture and norms of the institution and yet the organizing happened through those very same channels of friends telling their friends about this meeting happening. So, I felt kind of strange about that coming out of that meeting.”¹²⁵

One of the conveners agreed that the opening up of the meeting was harmful to the movement’s legitimacy. “The word had gotten out about the meeting, and so I think there were some people there who weren’t on boards, which was unfortunate just because I think it presented an image that certain people were invited and that’s not how it was at all.”¹²⁶

At the same time, the convener noted that, as with many of the other events that occurred that day, chance played an outsized role in how the meeting came together. “There was a lot of happenstance happening because no one planned this. This is not what was supposed to happen. I kid you not, no one could have planned what we heard in that Thursday meeting. Happenstance often leads to the people in the room happening to be in the room, even if that’s not necessarily what one would hope for.”¹²⁷

¹²⁵ Confidential Interview in New Haven, Conn. (Apr. 23, 2019).

¹²⁶ Confidential Interview in New Haven, Conn. (May 3, 2019).

¹²⁷ Confidential Interview in New Haven, Conn. (May 3, 2019).

iii. Making Things Manageable

One of the original invitees remembers feeling surprise when she walked into the auditorium and saw more than sixty students assembled. “I just thought it was a meeting of all the presidents of all these orgs because that was the people they sent on the email. I definitely thought it would be smaller than it was. Then I got there and it was like this huge meeting in the auditorium.”¹²⁸

YLW had held a brief meeting between the #MeToo talk and the affinity group meeting in order to figure out how they would facilitate the conversation among the students. “We were not the lead on this. But this event is happening. For the first three minutes of the meeting, we can make our ask and then do the admin labor of calling on people. That might be helpful. We all need to get somewhat on the same page.”¹²⁹

With YLW moderating, it quickly became apparent that there were a few related but separate threads driving the majority of student anger. “I felt like there are three different things happening here. The Rubinfeld track pertinent in this building. The Kavanaugh track, which is relevant to the whole country. And the Kozinski track, which is somewhere in between. I felt we needed to tear these things apart to make them manageable.”¹³⁰ As a result, “[w]e broke out into basically different groups that were working on, how are we going to address the national conversation and how are we going to address conversations within the school.”¹³¹

¹²⁸ Confidential Interview in New Haven, Conn. (Apr. 24, 2019).

¹²⁹ Confidential Interview in New Haven, Conn. (May 3, 2019).

¹³⁰ Confidential Interview in New Haven, Conn. (Apr. 27, 2019).

¹³¹ Confidential Interview in New Haven, Conn. (Apr. 18, 2019).

On the national front, some students had already been organizing a trip to D.C. to protest at a hearing on Kavanaugh's sexual harassment allegations that the Senate Judiciary Committee had scheduled for Monday, September 24th. "At this point, there had already been students asking folks to come down to D.C. to protest during the hearing, before this event happened. That had seemed like it would be a small group of students."¹³² Thursday's events gave added urgency to the D.C. trip, and organizers agreed that they would make it a priority to help students attend. "We're going to elevate this call for people to go down to Washington, D.C. It is clear that this is an issue that, as Yale Law Students, because this is a Yale alum, we need to show up for. We need to make sure there's space for people to show up and support that as best we can."¹³³

At the same time, organizers realized that it was likely that many students would not be able to attend. "While members of our student body were going down to protest, we would have a simultaneous sit-in here in solidarity with folks who were unable to do so."¹³⁴ Initially, some worried that having two options on Monday would be confusing to students. "I was like, 'Well, it's gonna look weird if we like send people to do D.C. and here.'¹³⁵ But the two-location strategy ultimately won out. "[Another student] was like, 'no there's two things, you either Option 1, go to D.C., or Option 2, stay here!'"¹³⁶

Organizers were also brainstorming what to do to tackle the internal issues. "I wanted to do a walkout or something. I want a vote of no confidence in the faculty. Someone else was like, we

¹³² Confidential Interview in New Haven, Conn. (Apr. 18, 2019).

¹³³ Confidential Interview in New Haven, Conn. (Apr. 18, 2019).

¹³⁴ Confidential Interview in New Haven, Conn. (Apr. 18, 2019).

¹³⁵ Confidential Interview in New Haven, Conn. (May 2, 2019).

¹³⁶ *Id.*

need a town hall. We need spaces for people to care for each other and be there for each other.”¹³⁷

The town hall idea would ultimately gain the most traction. An organizer remembered the idea coming to her before the #MeToo meeting had finished. “I sent a text to a board that I was on saying ‘we need to have a town hall.’ People’s emotions were high. There was a need for a space and I had no confidence that the law school was going to call it and if they did call it that they were going to call it well. If it needed to happen, it would be on the students to make it happen.”

Temporarily, the organizers would work to keep the internal and external activism separate. “We had the Monday sit-in and D.C. protest and the Tuesday town hall. . . . The way that I rationalized it is, Monday is about Kavanaugh and our political process. Period. Tuesday is about how our school influences that political process and about how our school has other deeper things like professors harassing students. I separated them in my mind while recognizing the overlaps between them. That helped me decide what I was going to do and when.”¹³⁸ This tripartite approach worried some organizers initially. “I was worried that no one was gonna come, which would have made it worse.”

Having decided on three core events—a protest in D.C., a sit-in on campus, and a town hall—the students transitioned from the auditorium to the courtyard, where they began to break into smaller circles. “There were groups of students that had basically assembled in the courtyard. The two groups that had split up were a large circle working on what we would want out of a

¹³⁷ Confidential Interview in New Haven, Conn. (May 2, 2019).

¹³⁸ Confidential Interview in New Haven, Conn. (Apr. 24, 2019).

town hall, and there was a separate, smaller group that was working on the D.C. protest.”¹³⁹

“Meanwhile, a few students planned to reach out to the faculty about releasing a statement about the Blasey Ford allegations. At the same time, I think some people in WIRAC were working on a faculty letter.”¹⁴⁰ Work would continue into the night and over the rest of the weekend, as the students planned for Monday and Tuesday.

2. POSTERS IN THE COURTYARD (SEPTEMBER 21ST, 2018)



Two of the posters erected in the Courtyard on Sept. 21, 2018¹⁴¹

The same night, a group of students decided to make posters highlighting problematic statements members of the faculty had made. “The posters were an effort to unify people around the different themes, both lack of accountability here and Kavanaugh.” Among the quotes selected were the previously reported quote from Rubinfeld about the assurance he had received that his

¹³⁹ Confidential Interview in New Haven, Conn. (May 2, 2019).

¹⁴⁰ *Id.*

¹⁴¹ Staci Zaretsky, *Yale Law Students Protest, Referring to School as ‘Model Of Complicity’ When It Comes to Sexual Harassment*, ABOVE THE LAW, Sept. 21, 2018, <https://abovethelaw.com/2018/09/yale-law-students-protest-referring-to-school-as-model-of-complicity-when-it-comes-to-sexual-harassment/>.

tenure would not be jeopardized, Chua's words about Kavanaugh's preference for attractive clerks, and Kysar's supposed admission that he had known about Kozinski. As one student put it, "let's just put up their words and let them speak for themselves." As a central question, the posters asked if there was "nothing more important to YLS than its proximity to power and prestige."

Early the next morning, the students put some of the posters up in the courtyard and then placed two more posters on either side of a portrait of Kavanaugh within the law school. "We wanted something that would be shareable and visual." They then took pictures of the arrays and posted them on social media as well as to the Wall. The reaction was immediate and intense. Within a few hours, a tweet of the protest had been retweeted more than 700 times¹⁴² and had been covered in *Above the Law*¹⁴³ and *The Cut*.¹⁴⁴

The Deputy Dean quickly went into damage-control mode, issuing a statement to the law school that clarified his comments of the previous afternoon. He shared that during his own time as a law student, he had learned of Judge Kozinski requesting "an evening of billiards and cigars with 'no girls,'" and had developed a negative view of the judge from that moment on, but had not known of the judge's reputation for sexual harassment "until news broke" the previous year. The Dean recognized the way his statement had been interpreted, and vowed that he wished he had done more.

¹⁴² Dana Bolger (@DanaBolger), TWITTER (Sept. 21, 2018, 9:05 AM), <https://twitter.com/danabolger/status/1043124175941066757>.

¹⁴³ Zaretsky, *supra* note 141.

¹⁴⁴ Amanda Arnold, *Yale Law Students Cover School in Posters Protesting Support of Kavanaugh*, CUT, Sept. 21, 2018, <https://www.thecut.com/2018/09/yale-students-cover-school-in-posters-protesting-kavanaugh.html>.

For one of the organizers of the poster protest, a longer-term benefit of the protest was demonstrating that it was possible to directly challenge the law school without retaliation. “I was trying to create a space where people felt that they could be openly defiant.” In the next phases of the movement, countless meetings would take place in the courtyard in plain view of the faculty and administration. With numbers and media attention on their side, students were free to pursue more aggressive strategies.

3. STRATEGY ANNOUNCED (SEPTEMBER 21ST, 2018)

At noon, 2L Dianne Lake emailed the Wall on behalf of a group of “YLS Student Leaders” who had organized in response to the previous day’s #MeToo panel.¹⁴⁵ Lake explained that many students had left the discussion “feeling alienated, disillusioned, and frustrated with the ambivalence and moral abdication of this institution, its faculty, and its administration” and had spent the prior evening organizing a response.

While the email identified the “complicity of YLS faculty members in perpetuating a culture of sexism and discrimination on our campus and throughout the legal profession” as the immediate source of student outrage, it suggested that the problems at Yale could be traced even deeper to the “entire school’s culture of legal elitism and fixation on proximity to power.” While acknowledging that the culture created the possibility of abuse by professors and judges, the email did not entirely absolve the student body, instead claiming that “we are all responsible for perpetuating this culture.”

¹⁴⁵ Posting of Dianne Lake to The Wall (Sept. 21, 2018) (on file with author) (“Protesting Kavanaugh on Monday”).

As an immediate step, the email called upon the community to protest Judge Kavanaugh's potential appointment on Monday, September 24th, by either traveling to D.C. to participate in direct actions or by participating in a sit-in at Yale. The organizers planned to turn to addressing internal issues at YLS on the 25th, with details to be provided. Finally, the student leaders copied every professor with a lecture on Monday and called upon them to cancel class and affirm their support by replying to the email publicly indicating their intent to do so. With an expansive but clear formulation of the "problem," preliminary steps toward solutions and an initial demand to faculty, what had begun as student outrage had condensed into a social movement.

Professors immediately began to respond to the organizers' requests to cancel classes. Within the first hour after the message was sent, six professors had indicated their intent to cancel classes. Responses continued to arrive throughout the afternoon and evening, and by Saturday morning, 23 instructors had separately written in to indicate that they would be canceling classes. Some went further, specifying that they would be cancelling their classes out of "solidarity with students" or offering their thanks to Dianne and the organizers for the note. The Deputy Dean sent a note to the Wall indicating that he too would be canceling classes, and noting that a large portion of the student body would be "engaged in direct action on Monday," but emphasized that the decision to cancel class was an "individual faculty decision."

Behind the scenes, organizers had contacted students to reach out to individual professors they were close to who had class on Monday to appeal to them to cancel class.¹⁴⁶ When more than

¹⁴⁶ Confidential Interview in New Haven, Conn. (May 2, 2019).

one student was close to a professor, they would CC each other to build pressure, but also to diminish the risk of awkwardness for any one student.¹⁴⁷ Students also strategized with sympathetic professors to build momentum among the faculty.¹⁴⁸ “Someone had gotten a confirmation from James Forman in advance to ensure that he would reply-all and say that he was cancelling his class so that other faculty would feel compelled to reply to the chain.”¹⁴⁹

While faculty response to the demand letter was significant, it was by no means unanimous. Lake’s initial note had been addressed to 32 professors. Of this group, only 21 indicated to the Wall their intent to cancel classes. It is possible that some of the remaining professors reached out to students privately to cancel class; however, in doing so they would not be complying completely with organizers’ demands that professors respond publicly.

4. ENGAGING THE DEAN AND FACULTY

While the movement was making public demands on the faculty and members of the administration, students were also meeting with the Dean and professors behind the scenes to build support for the movement’s objectives.

i. Meeting with the Dean

On Friday, YLW had a pre-arranged meeting with Dean Gerken. In the wake of the ongoing controversies, they re-worked the agenda to focus on asking the Dean to support the town hall and reached out to the Title IX Working Group to join them. “We were like, let’s ask for a town

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

hall in that meeting. We were like, it has to be a student-hosted town hall, because we need her to agree to come and corral faculty to come, because we want to be the ones leading it.”¹⁵⁰

Additionally, the students would ask Dean Gerken to retract the July press release concerning Kavanaugh. A student remembered the Dean agreeing to the first ask without much prodding: “She agreed pretty easily to the town hall stuff. We thought it was going to be much harder, but I think everyone was on red alert because of what had happened to Kysar with his quotes being leaked.”¹⁵¹ However, the students received pushback on getting the statement retracted. “We were also pretty upset about the statement that she had made on Kavanaugh. Particularly because it was being used by the White House as a sign of support. She was very much not inclined to do something about the press release, which we kind of expected.”¹⁵²

ii. *The Faculty Letter*

One of the proposals that emerged from the movement’s first meeting on September 20th was to reach out to the faculty to sign an open letter requesting that the Senate conduct a full and fair investigation of the sexual assault allegations against Kavanaugh before putting his nomination to a vote.¹⁵³ As one of the students who took the lead on this action described it:

Immediately after the assembly, I took charge of a group that was going to force the faculty’s hand. The proposal was, let’s write a letter for them. We’ll send it to the faculty and we’ll say, are you in or are you out? It will be a letter they will want to sign. And we will say, look, individually . . . if you’re in, or out, we will publish your response

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ Confidential Interview in New Haven, Conn. (Apr. 27, 2019).

or non-response within 24 hours. There were a group of four or five of us in a room for forty-five minutes, drafting the letter and trying to figure out what we were going to demand and how we were going to make it eminently reasonable.¹⁵⁴

Like the organizers of the class cancellation campaign, the drafters of the faculty letters felt it would be strategic to build buy-in among sympathetic faculty members before approaching the wider faculty. “Ultimately, we decided that we would put it before some professors that we knew well first. So, we emailed Mike Wishnie, Muneer Ahmad, Amy Kapczynski and maybe one other person.”

However, upon reaching out to the faculty members, the students were immediately asked to cede a degree of control over the process to the faculty, who were already organizing a response. “They got back to us twenty minutes later or something and said, actually, we’re working on our own letter. We said, okay, can we see it? They said, tell you what, come by in the morning.”

The surprising development raised some eyebrows for the organizers, who weren’t sure to what degree they could trust their faculty allies.

We weren’t sure how much to believe that they were working on this letter. And we didn’t love the way that this delayed us because we were interested in throwing something together as fast as possible. There was no explanation of when or how they had started writing it. It seemed entirely possible that they read

¹⁵⁴ *Id.*

ours and decided, we have to write one ourselves or else we'll be stuck with what the kids are writing.¹⁵⁵

The students ultimately decided to trust the faculty members and found they largely agreed on the substance of the letter when it was shown to them at the next morning's meeting: "It was very, very similar to our letter."¹⁵⁶

However, the faculty resisted some stylistic changes that the students felt would increase the letter's impact:

We said, "Can you put, 'signed, the YLS faculty?'" They said, "No." We said, "Why? You have the majority." They said, "We've never done that, we can't do that." We said, "Put your titles." They said, "No." We said "Why?" They said, "That makes it about status." I said, "The whole point of this is status! It doesn't matter that Mike Wishnie signs this letter, it matters to me that it's Mike Wishnie, Special Advisor to the Dean at the Yale Law School, William O. Douglas Professor of Law—that's what makes this pertinent."¹⁵⁷

The students were similarly mystified as to how the letter would be distributed to faculty for them to sign or refuse to sign.

When we had passed over the quibbles, they suggested that they were on their way to having nearly unanimous signing from the faculty. I said, "Can we

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

call a faculty meeting?” They said, “That doesn’t exist.” We said, “Can we get a list of all the faculty?” They said, “There is no list.” I said, “Are there committees?” They said, “They’re all ad hoc.” I said, “How do you people make decisions together?” and they said, “We don’t.”¹⁵⁸

Despite these gaps in understanding about the faculty’s role and function at the law school, within hours, the faculty open letter was complete and ready for publication. At 11:21 AM on Friday, shortly before Dianne Lake would email the Wall to announce the movement’s strategy, Professor Amy Kapczynski emailed the Wall alerting the community to an “Open Letter to the Senate Judiciary from Yale Faculty” that had been signed by 47 faculty members and posted to the Yale website.¹⁵⁹ The letter acknowledged that the result of the Kavanaugh nomination would “yield a deciding vote on women’s rights and myriad other questions of immense consequence in American lives” and called for “a fair and deliberate confirmation process” that would include, at a minimum, an investigation, a neutral fact finder and respect for “all of those who testify, and particularly women testifying about sexual assault.”¹⁶⁰

¹⁵⁸ *Id.*

¹⁵⁹ Yale Law School, *Open Letter to Senate Judiciary Committee from Yale Law Faculty*, Sept. 21, 2018, <https://law.yale.edu/yls-today/news/open-letter-senate-judiciary-committee-yale-law-faculty>.

¹⁶⁰ *Id.*

5. THE D.C. PROTEST (SEPTEMBER 23RD & 24TH, 2018)



Yale Law Students Protest on the Steps of the Supreme Court¹⁶¹

The idea for a protest in D.C. began externally as the result of communications Ady Barkan, a Yale alum and activist, had made to the Yale faculty. “Amy Kapczynski had put us in touch with Ady Barkan and the Center for Popular Democracy, and I think that was cool because that’s a way that faculty are constructively involved with student activism.”¹⁶²

Before the events of Thursday afternoon, a few students had already been contemplating a trip to D.C. to protest, but they had not anticipated more than a handful of YLS students joining in. However, the energy sparked by the *Guardian* article and the #MeToo talk quickly changed the

¹⁶¹ Pilar Melendez, *Yale Students Stage Protests Against Alum Brett Kavanaugh’s Nomination*, DAILY BEAST, Sept. 24, 2018, <https://www.thedailybeast.com/yale-students-stage-protests-against-kavanaugh-nomination>.

¹⁶² Confidential Interview in New Haven, Conn. (Apr. 18, 2019).

calculus. In the email that Dianne Lake circulated to the Wall on September 21st, the organizers included links to learn about the D.C. action and sign up for transportation.¹⁶³ By Sunday afternoon, 117 Yale Law students had signed up.¹⁶⁴

i. Stepping Forward, Stepping Back

Compared to the internally focused protests, the contingent in D.C. had more significant participation from the 1Ls, males and white people. For some 1Ls, a lack of knowledge made it difficult to jump into the other organizing efforts on campus. As one student put it, “I was adjusting to this place on so many different levels that even if I had wanted to help with the actual organizing I wouldn’t have been equipped to. . . . I was just looking to the students who I knew were older than me and just trusting their ability to organize.”¹⁶⁵

Other 1Ls noted that the organizing structure of the movement had not made opportunities for them to be involved. “The interaction between 2Ls and 1Ls . . . I’ve talked to a lot of 2Ls since who said they kind of messed that up. With as much respect as I can give them, I agree. There wasn’t enough of an organized reaching out and pulling in of a wider swath of 1Ls who wanted to be involved but sort of didn’t know what was going on and wanted to help. I think a lot of my fellow 1Ls didn’t feel like they knew enough of what was happening to get involved.”¹⁶⁶

A white male organizer indicated that for him as well, focusing his energies in D.C. was in part based on his relative lack of knowledge of power structures at YLS. As he put it, “I didn’t want

¹⁶³ Posting by Dianne Lake to The Wall (Sept. 21, 2018) (on file with author) (“Protesting Kavanaugh on Monday”).

¹⁶⁴ Richard Zacharias, *Take Action on the Kavanaugh Nomination*, GOOGLE FORMS.

¹⁶⁵ Confidential Interview in New Haven, Conn. (Apr. 19, 2019).

¹⁶⁶ Confidential Interview in New Haven, Conn. (Apr. 28, 2019).

any role that required interpreting or understanding how things work here, designing a policy or thinking about how things could be different. I haven't been thinking about this all day long that I've been a law student. It hasn't been staring me in the face. I was just worried about just embarrassing myself."¹⁶⁷ For that organizer, focusing on the national scale was more comfortable and felt like a better fit.

As 1Ls, white people and males were stepping forward, 3Ls in particular were stepping back, a development one organizer linked to burnout. "It was super annoying going to D.C. on a bus. It wasn't comfortable and it wasn't pleasant. A lot of 3Ls are sort of done doing unpleasant things. Tonight, a lot of people who ran organizations as 2Ls are having a 'retirement party.' A lot of 3Ls feel like they put in their time."¹⁶⁸

For some, getting involved was, at least in part, a social decision. "One of my friends said, 'You know, why I organize is to meet people'—I was already friends with people who were doing this and wanted to be even closer friends with them."¹⁶⁹

ii. Getting Students to D.C.

A major challenge of the D.C. protests was managing the logistics of transportation and housing. On the housing front, the organizers relied heavily on alumni support. "[Another organizer] and I made a Google Form which we sent out to alums who we knew and said, do you know anybody

¹⁶⁷ Confidential Interview in New Haven, Conn. (Apr. 27, 2019).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

in D.C., ask them to fill out this form. I think we got 40 people who had some place to stay. There were professors here who also chipped in.”

For transportation, the organizers coordinated rideshares among the students on campus who had cars and planned to go down and the many students who needed rides. In calculating whether to go down to D.C. or stay in New Haven, many students took transport into account. “I think I probably asked some 2Ls where I could be the most useful. They said ‘If you can, go to D.C.’ . . . I also had a car, so that felt pretty easy. I remember hearing that it would be somewhat helpful if I could drive.”¹⁷⁰

For the students who could not be sorted into cars, the organizers rented a few “very expensive” buses, with the generous help of student organizations that pitched in money.¹⁷¹ One organizer felt that this show of solidarity among “people who don’t normally organize together” was one of the best things to come out of the movement.¹⁷² “It’s sad because we failed but this was my favorite part of law school because it showed what the law school can be.”¹⁷³

¹⁷⁰ Confidential Interview in New Haven, Conn. (Apr. 28, 2019).

¹⁷¹ Confidential Interview in New Haven, Conn. (Apr. 27, 2019).

¹⁷² Confidential Interview in New Haven, Conn. (Apr. 18, 2019).

¹⁷³ *Id.*

iii. *Following the Leaders*



*Ady Barkan and Be a Hero activists rally at the Russell Senate Building*¹⁷⁴

On Sunday evening, the students assembled with Ady Barkan’s organization, Be a Hero, at a local church for a ninety-minute training. The following day, at 8 AM the students met for a photo shoot on the steps of the Supreme Court.¹⁷⁵ From there, the students walked to the Hart Senate Office Building, where they largely followed the lead of Ady Barkan’s organization. “The Be a Hero folks were calling the shots; it was up to us to herd the students.”¹⁷⁶

From 9 AM to 12 PM, alongside thousands of other protesters from around the country, the students tramped from office to office to place pressure on senators to oppose the Kavanaugh nomination.¹⁷⁷ Along the way, students had many opportunities to speak to the press. One

¹⁷⁴ Ady Barkan (@AdyBarkan), TWITTER (Sept. 24, 2018, 3:39 PM), <https://twitter.com/AdyBarkan/status/1044310468238745600>.

¹⁷⁵ Author Unknown, *YLS DC ACTION: KEY INFO*, GOOGLE DOCS.

¹⁷⁶ Confidential Interview in New Haven, Conn. (Apr. 27, 2019).

¹⁷⁷ *YLS DC ACTION: KEY INFO*, *supra* note 175.

student who did choose to do so remembers it with a measure of regret. One source of this regret arose from feeling that in putting himself forward to be photographed, he had shifted the narrative away from the people most impacted:

One of the mistakes I made was a photographer had decided take a photo of me, when he asked me for my name I had explicitly asked him, had he also taken photos of women at the protest. He said he was going to do it and of course and things like that. I ended up showing up in a lot of articles around YLS and the Kavanaugh protest.

The only other image that I saw being used was a photo of protesters from their back who were predominantly women. But that was just another moment of the media emphasizing the voices of people who are not disproportionately impacted by sexual violence. And I knew that as a concern in the back of my head, which is why I asked that question. I thought the reporter would have followed through on that, but now I'm much more cynical of what they say.¹⁷⁸

Another source of regret was becoming the target of online harassment after the photo was shared online:

My perceptions of risk changed afterward because someone had looked up my LinkedIn profile and they had commented on a *Fox News* article saying this

¹⁷⁸ Confidential Interview in New Haven, Conn. (Apr. 25, 2019).

Canadian is here having an opinion on our politics and he shouldn't be allowed to do that. I was like, I'm a dual citizen and this is a weird comment, but it is sort of scary having someone looking you up online and commenting these things. The privacy you would think you'd have attending an institution has largely disappeared in my mind.¹⁷⁹

iv. Students Arrested



Yale Law Students Participate in an Act of Civil Disobedience in the Russell Senate Building¹⁸⁰

One moment of the protests that won outsized media attention was the arrest of two Yale Law students in the Russell Senate Building's rotunda. Both of the students had volunteered to participate after learning on Sunday night, September 23rd, that a direct action would be occurring and that Yale law students were invited.

¹⁷⁹ Confidential Interview in New Haven, Conn. (Apr. 25, 2019).

¹⁸⁰ David W. Chen, *Yale Law School Boasted About Kavanaugh; Now Comes 'a Moment of Reckoning'*, N.Y. TIMES, Sept. 26, 2018, <https://www.nytimes.com/2018/09/26/nyregion/yale-touted-kavanaugh-now-comes-a-moment-of-reckoning.html>.

I heard mention that Ady had asked if any students would be willing to participate in a direct action, and it seemed that no one had responded. I turned to [another student], who was right near me, who I knew decently well, not that well, but seemed pretty radical like myself. One of the 2Ls, who was encouraging us to think about it, emailed Dean Cosgrove. She put us in touch with Professor Wishnie, who over email said ‘I really don’t encourage anyone to do this last minute, but I think the consequences will be pretty light.’¹⁸¹

With this assurance from Professor Wishnie, the two students felt that that their privilege as males and Yale Law students created an impetus to act.

We’re new here. We don’t know if this will fuck up our careers. Both of us felt that there are good reasons why a lot of the students we’re fighting for won’t be able to do this. For women who might feel less safe and for black students for whom an arrest record may be interpreted way differently than for us. I think we felt like we were some of the people for whom this would have the least possible ramifications and that might come with a sense of obligation.¹⁸²

Both students recalled feeling encouraged by having each other to rely on during the action. “It was still early [in our 1L year], but we’d gotten to know each other a bit. My guess would be that

¹⁸¹ Confidential Interview in New Haven, Conn. (Apr. 28, 2019).

¹⁸² *Id.*

we went through a very similar process on an individual level. We had some conversations over text the night before and some conversations the day of.”¹⁸³

At the appointed moment, sometime in the afternoon, the two students joined Barkan in the rotunda of the Senate building and began to chant alongside other protesters who had also planned to be arrested. The Capitol police issued a few warnings to notify the protesters of their coming arrest and then proceeded to methodically arrest them one by one, restraining their hands with plastic zip ties. As one student described it, “If you’re going to get arrested, doing it in the Senate building is probably the way to go.”¹⁸⁴ After being transported to a warehouse in a “very nice bus,” waiting four hours, and paying 40 dollars in fees, the students were free to go.¹⁸⁵

One of the two students described the relative ease of their arrest with a note of uneasiness. “This is not what it’s really like getting arrested for most people. This not even what it’s like most of the time getting arrested at a protest. There’s almost a bit of a lie going on. I was willing to get arrested because Kavanaugh sucks that much. I don’t want to claim any credit for anything. I almost don’t even think about it as really being arrested.”¹⁸⁶

After the protest, as media began to emphasize the two men’s roles, one wondered if the picture amplified or subverted attention from those at the center of the movement. “We made this

¹⁸³ Confidential Interview in New Haven, Conn. (Apr. 19, 2019).

¹⁸⁴ Confidential Interview in New Haven, Conn. (Apr. 28, 2019).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

decision to show solidarity and center something mainly experienced by women. But the optics felt in tension with the initial reason. Some of it became about us.”¹⁸⁷

v. *The Press Conference*



*Senator Richard Blumenthal gives remarks before a group of Yale Law students.*¹⁸⁸

Arguably, the centerpiece of the D.C. protest was a press conference that the students convened at 3 PM with the assistance of Senator Richard Blumenthal, a Democrat from Connecticut. The Senator had made an appearance at the law school in the morning before taking a flight to D.C. to participate in the D.C. press conference.¹⁸⁹

During the press conference, students who had been personally affected by Kavanaugh’s jurisprudence shared their stories. One student shared her experience with college sexual assault.

¹⁸⁷ *Id.*

¹⁸⁸ Ana Radelat, *Yale Students at U.S. Capitol Protest Kavanaugh, Demand Investigation*, CT MIRROR, Sept. 24, 2018, <https://ctmirror.org/2018/09/24/yale-students-u-s-capitol-protest-kavanaugh-demand-investigation/>.

¹⁸⁹ Catherine McCarthy, *Yale Law Students Demanding Better - Senator Blumenthal Remarks*, YOUTUBE (Sept. 24, 2018), <https://www.youtube.com/watch?v=owJNEKII3RM&feature=youtu.be>.

Another spoke out about her mother's experience surviving a mass shooting. A third shared about his experiences of stigma as a person with a disability. The students linked their various experiences of trauma back to Kavanaugh's jurisprudence and the accusations of sexual misconduct that had been levied against him.

As the students shared, cameras both professional and amateur pumped their stories across the nation. "We were doing it on Facebook Live from the YLS [Demanding Better] page. . . . Right before the press conference it was like, 'Oh, we need somebody to film this.' So there's a picture of me with Blumenthal standing over me and I'm filming it. . . . Even during the press conference I was holding two phones." Paired with the sit-in happening on campus at the same time, the D.C. action made a significant splash in the media.

6. THE SIT-IN (SEPTEMBER 24TH, 2018)



Students line the central hallway of the Sterling Law Building¹⁹⁰

One of the major challenges that the organizers of the Monday sit-in faced was structuring an entire day of protests. It was important to organizers that the sit-in be not merely a day off, but a day where students were actually meaningfully engaged. Ultimately, the organizers decided to begin the day with a teach-in, where students would learn more about Kavanaugh's harmful policies, followed by an opportunity for students to speak out, a walk out to the courtyard and then time to decompress and take further action. While students vaguely remembered the structure of the day, equally important for many were the interactions they were having with one another.

¹⁹⁰ Jacob Stern & David Yaffe-Bellany, *Yale Law School's Reckoning Over Brett Kavanaugh*, ATLANTIC, Sept. 25, 2018, <https://www.theatlantic.com/politics/archive/2018/09/protests-grow-yale-law-school-over-brett-kavanaugh/571225/>.

i. Sharing Stories

One student described the sit-in as a radically vulnerable departure from the rest of her time at

YLS:

Coming to the law school and seeing students in the courtyard making posters was pretty powerful. It just felt like everyone was really emotionally fragile. There were so many times that day when I would run into a friend in the hallway or someone I barely knew and they just looked exhausted and we would just sigh and hug each other. And people were crying, which might sound on the retelling a little bit extreme if this is a student protest about two faculty members most students have probably never interacted with.

I just think that the moment brought out every sensitivity in every person here about every type of injustice they feel like they've experienced in this place. I think for a lot of women any type of gender injustice they've ever experienced in their life was very acute in that particular moment. It just felt like everyone was extremely tender and raw. And I remember feeling very exposed because this is a place where we are always discouraged from being vulnerable and having emotion and vulnerability on display here, and having everyone do that all at once was extremely jarring.

I felt very exposed all the time that whole week. Going from a space where there would be a lot of people crying for who knows what reason. Maybe it's because they personally had a bad experience with a professor. Maybe it was because in a totally different environment, a long, long time ago, they experienced some kind of sexual trauma that it brought out for them. Who knows the full

range of why people were feeling the fullness of what they were feeling that day. But to go from that to running into a faculty member in the hallway, someone with whom you are always buttoned up and on your best behavior, was a very stark and very jarring experience.¹⁹¹

Another student remembered the day as a transformative one in her understanding of her own experiences of sexual assault:

The Monday sit-in changed everything for me. I think up until Monday, I think I saw myself as sort of an ally to YLS [Demanding Better]. I was trying to support them in my institutional capacity and also in my personal capacity. At the sit-in I was very inspired to share my personal experience and I accidentally came out as a survivor even to myself. I was raped when I was five, but even to myself, I never thought of it as rape. But I think for me it was always, something weird happened. I'd framed it as sexual assault before. But being there and hearing those stories, something clicked for me that that was rape. . . . The rest of the week was very traumatizing for me; school was the least of my worries.¹⁹²

For some less personally affected students, and for male students in particular, the event was an opportunity to reflect on how they could better support their classmates:

¹⁹¹ Confidential Interview in New Haven, Conn. (Apr. 19, 2019).

¹⁹² Confidential Interview in New Haven, Conn. (Apr. 17, 2019).

I participated after I had heard people giving testimony about their experiences of sexual assault, and seeing as there were not any men speaking, I wanted to say something in that moment to acknowledge that this demonstration was primarily led by women of color and there are many things men can be doing to not be complicit in other men's actions. And the importance of taking a path of most resistance versus the least when you are in an all-male space and those sorts of comments, jokes, stories are told about harassment or assault or romantic interactions with women that are impermissible.¹⁹³

ii. The Teach In

While the organizers of the sit-in primarily focused the event on the importance of standing in solidarity with survivors of sexual violence and sexual harassment, they also found it important to highlight the negative side effects of Kavanaugh's jurisprudence:

Everyone's scared that Roe's gonna go away, but he also has jurisprudence about the black community, about gun rights, about the LGBT community, that people weren't talking about as much and were getting overshadowed, perhaps rightly so. I think a lot of us didn't want us to forget that there was discomfort with him before the allegations were made.¹⁹⁴

To this end, they had speakers within the community educate their classmates on how some of Kavanaugh's rulings might affect them. "Someone did a discussion about his jurisprudence on

¹⁹³ Confidential Interview in New Haven, Conn. (Apr. 25, 2019).

¹⁹⁴ Confidential Interview in New Haven, Conn. (Apr. 24, 2019).

gun rights, I led one on the African American community with affirmative action, and policing, because his stuff is bad, he said it was okay to taze a pregnant woman for not signing a traffic ticket!”¹⁹⁵ LGBT rights and reproductive justice filled the rest of the schedule.¹⁹⁶

This framing alienated some conservative students, who were concerned about the sexual misconduct allegations but otherwise supported the judge’s jurisprudence, from participating. “As soon as I saw that people would be talking about Second Amendment issues and business interests, I thought, ‘This is not my scene.’”¹⁹⁷

Even students who chose to attend remember there being some ambiguity around the decision. “Some students felt conflicted about whether to wear black on Monday. Some people felt it meant solidarity with survivors. But then some people can say that wearing black means that you are with this YLS [Demanding Better], which might have another agenda that you don’t subscribe to necessarily. Does wearing black mean you’re with this group, or you’re with survivors, or you’re anti-Kavanaugh?”¹⁹⁸

However, some students remembered feeling heartened by the presence of conservative students who nevertheless chose to participate. “I was surrounded at one point by people in Fed Soc, which to me was a really moving moment that here there was some actual allyship happening in ways I wouldn’t have expected.”¹⁹⁹

¹⁹⁵ Confidential Interview in New Haven, Conn. (Apr. 24, 2019).

¹⁹⁶ *Id.*

¹⁹⁷ Confidential Interview in New Haven, Conn. (Apr. 27, 2019).

¹⁹⁸ Confidential Interview in New Haven, Conn. (Apr. 17, 2019).

¹⁹⁹ Confidential Interview in New Haven, Conn. (Apr. 20, 2019).

iii. *The Walk Out*

At 1 PM, after the teach-in and the speakout portions of the day, organizers led the students out into the courtyard. The activity was performed in conjunction with an estimated 20,000 other participants across the country.²⁰⁰ With the students in the courtyard, organizers realized they did not have any remarks planned. Two of the organized seized on the moment to do a call-and-response with the students, faculty and staff assembled.

We were like, everyone's assembled in the courtyard, we have to do something. We'll do a call and response. We just have to believe it. So, completely unplanned we hop out into the middle of [the] courtyard circle and we start yelling, "Why do you care!?", "What are you gonna do to support your classmates?" As two of the organizers posed questions to gathered protesters, people began to step forward to answer. It went really well because people were stepping out and speaking and sharing their frustration. Faculty stepped out! And while they were stepping out and speaking, we were like, "*what should we ask next?*"²⁰¹

Despite the unplanned nature of the event, the organizer recalled hearing other students describe it as one of the highlights of the day as they committed to working to improve their community.²⁰²

²⁰⁰ Abigail Hess & Marilyn Haigh, *Why Thousands Joined Today's #BelieveSurvivors Walkout in Support of Brett Kavanaugh's Accusers*, CNBC, Sept. 24, 2018, <https://www.cnbc.com/2018/09/24/why-they-walked-believesurvivors-walkout-protests-supreme-court-nominee-brett-kavanaugh-.html>.

²⁰¹ Confidential Interview in New Haven, Conn. (May 2, 2019).

²⁰² *Id.*

iv. Managing the Media

While the organizers were coordinating activities internally, they were also working with press and the students in D.C. to make sure they had a united media message. Uniting the two protests was Senator Blumenthal, a Democrat from Connecticut.

A student who coordinated the press strategy remembers being thrust into the role with only a moderate level of past experience:

My role in this was to run the national press strategy for the protests. We ran a much smaller but national media campaign for one of my clinical cases 1L spring. And I have a lot of friends from before law school who are journalists who I relied heavily upon during that time. I remember Senator Blumenthal came to New Haven in the morning, and then he flew to D.C. and was at the D.C. protest in the afternoon. I remember his press people, who we'd been talking to, she came up to me and said, it's your first time doing this, huh? It was very amateur. When I initially sent the press release to the list of I think 250 reporters, it looked like it had emailed them all 250 times. There were 5 minutes where I was like I just spammed the shit out of 250 national news reporters.²⁰³

Other students remember stepping up to volunteer to give clips to the media.

²⁰³ Confidential Interview in New Haven, Conn. (Apr. 21, 2019).

Someone posted in the Slack, press wants to talk to people. They can't come inside. We need for someone to go out and talk to them to keep them from coming in . . . I went out, I was in the double doors and someone was like, "Are you sure about this, do you want to do this? You have your talking points, but you don't have to do this if you don't want to." I was like, "I'm ready."²⁰⁴

As the day wore on, organizers recalled feeling constant pressure to keep the media's curiosity satisfied in order to ensure no unauthorized reporters would enter the law school.

"One way to navigate the press waters was to just continuously go out there and give them updates so they wouldn't feel the need to come in. Especially during the time that survivors were sharing their stories, we were making sure that people were out there telling them, this is why we're here, this is what we're doing, so that inside was protected."²⁰⁵

Supplementing the official media interviews and photos were pictures the organizers took with their cellphones and then posted to social media. Pictures of the law school's central hallway packed with students clad in black would make a major impact in the media, appearing in the *New York Times*,²⁰⁶ the *Atlantic*,²⁰⁷ and the *Huffington Post*.²⁰⁸

²⁰⁴ Confidential Interview in New Haven, Conn. (Apr. 24, 2019).

²⁰⁵ *Id.*

²⁰⁶ David W. Chen, *Yale Law School Boasted About Kavanaugh; Now Comes 'a Moment of Reckoning'*, N.Y. TIMES, Sept. 26, 2018, <https://www.nytimes.com/2018/09/26/nyregion/yale-touted-kavanaugh-now-comes-a-moment-of-reckoning.html>.

²⁰⁷ Jacob Stern & David Yaffe-Bellany, *Yale Law School's Reckoning Over Brett Kavanaugh*, ATLANTIC, Sept. 25, 2018, <https://www.theatlantic.com/politics/archive/2018/09/protests-grow-yale-law-school-over-brett-kavanaugh/571225/>.

²⁰⁸ Nina Golgowski, *Hundreds of Yale Students Protest Kavanaugh, Demand Investigation*, HUFFINGTON POST, Sept. 25, 2018, https://www.huffpost.com/entry/yale-students-protest-kavanaughs_n_5ba8fa09e4b0375f8f9f1e18.

7. THE TOWN HALL (SEPTEMBER 25TH, 2018)



An Interior View of Battell Chapel²⁰⁹

The day of the town hall, it rained heavily. Drenched students, faculty and staff filed into Battell Chapel, past signs warning that it was a private, off-the-record event closed to the press. Student volunteers flanked each door, ready to check identification, although they waived this formality for classmates, staff and professors who they recognized. As they crossed the threshold into the chapel, students and faculty tended to automatically lower their speech a few decibels.

For one organizer, even having attendance for the event was a kind of victory. “We were kind of afraid no one would come. To get there and have the 600 seats of Battell Chapel largely be full on a rainy Thursday that was kind of cold was like, even if people aren’t on board with what we’re saying, this felt important enough to this many people in our community that they showed up, and that was really powerful.”²¹⁰

²⁰⁹ Battell Chapel at Yale University, A. THOMPSON-ALLEN COMPANY, <http://www.thompson-allen.com/battell> (last visited June 9, 2019).

²¹⁰ Confidential Interview in New Haven, Conn. (Apr. 20, 2019).

The chapel had been selected after organizers considered various other venues, including the law school's largest lecture hall, Room 127; the law school auditorium and the dining hall.

Ultimately, the Chapel was suggested by a student who had gone to Yale as an undergrad and who was familiar with the space who believed it would both offer the necessary capacity and add an air of solemnity to the town hall.²¹¹

Organizers and volunteers distributed flyers to each attendee describing the afternoon's agenda.²¹² The event would begin with 10 minutes of "Entrance and Reflection Time," followed by 10 minutes of "Testimonials" and 10 minutes of "Framing Remarks." From there, the organizers had provided for an hour and 10 minutes of "Structured Q & A" followed by 20 minutes of "Open Dialogue" and, finally, "Closing Remarks." The flyer again encouraged participants to respect each other's privacy by refraining from taking photos or sharing each other's remarks on social media.

The reverse of the flyer suggested four guiding questions:

1. What are the values that YLS stands for? What is the YLS culture that you want to see?
2. How will this institution be accountable for unequal power dynamics between faculty and students in their career prospects, ranging from clerkships to academia and legal employment?

²¹¹ Confidential Interview in New Haven, Conn. (Apr. 18, 2019).

²¹² YALE LAW STUDENTS DEMANDING BETTER, TOWN HALL FLYER (distributed Sept. 25, 2018).

3. What will YLS do to eliminate its culture of misogyny, racism, elitism, ableism, and all forms of discrimination?
4. What is one thing you are willing to do to address the concerns and questions raised today?

Finally, the flyer asked faculty and students to “save the date” for a subsequent town hall to be convened on November 7th in order to hear from the faculty and administration “about the progress made and thinking developed” following the student-led session.

i. Testimonials & Questions

True to the agenda, the town hall began promptly at 12:10 PM with testimonials. The testimonials had been gathered over the past three days via a Google Form circulated to the Wall and then curated by a small group of organizers. Students had volunteered to read the comments, but the identities of the authors would be kept private. In selecting the testimonials to be read, the organizers had worked to give a more or less representative sampling of the broad range of concerns they had received. As one student described the process:

We opened up submissions for questions to be asked in the town hall or testimonials to be read. And I was part of a team of like five students that spent like six hours going through all of them figuring out which 20 or so of them were going to be read or asked. . . . I told my admin law professor later it was like

responding to notice and comment trying to fairly represent the range of questions we'd been asked.²¹³

For several of the organizers, representing a wide range of comments and questions seemed necessary to shore up the legitimacy of the movement.

The movement had done all this work. We were going to make sure that all of our concerns were represented. But, for example, we got a ton of questions that were like, “what happened to the presumption of innocence”? And, like, nothing happened to the presumption of innocence. But we got enough questions that were not something that YLS [Demanding Better] was asking that it felt sort of important. We didn't want the accusation that this is only a one-sided thing that only reflects a certain portion of the student body's concerns.²¹⁴

Questions of legitimacy would be on many organizers' minds as they aimed to both elevate student concerns and win over skeptics of the movement:

Thinking about the town hall, it was not just, what do we want to get out of this, but also, what do we need to respond to in order to get there. We had to respond to people calling us whiny babies. We had to respond to faculty saying

²¹³ Confidential Interview in New Haven, Conn. (Apr. 20, 2019).

²¹⁴ *Id.*

this is silly. We had to respond to other students saying this is a partisan, leftist attack.²¹⁵

Additionally, there were some issues organizers explicitly ruled out discussing. One such issue was the investigation into Professor Rubinfeld. As one organizer put it, “That was not something we could talk about. It didn’t seem prudent for anybody if the response was going to be, ‘I can’t confirm or deny the existence of an investigation because it would jeopardize the investigation.’”²¹⁶

At the end of the curating process, organizers felt they had managed to elevate a good range of concerns. “It was a ton of negotiation and back and forth and a really draining process but I felt like the issues we ended up raising were good and important. . . . it was issues like whisper networks. Questions about FGP students feeling totally welcome at this school. There was a question that was like, how do I get a Supreme Court clerkship, and we were like, we’re not including that one.”²¹⁷

Some of the testimonials were critical of the movement itself. One reflected on the pressures the movement was placing on conservative students. For a moment, each remark was allowed to float in the space.

²¹⁵ Confidential Interview in New Haven, Conn. (May 3, 2019).

²¹⁶ *Id.*

²¹⁷ Confidential Interview in New Haven, Conn. (Apr. 20, 2019).

ii. *The Q & A*

After the testimonials, an organizer came forward to give brief framing remarks, which touched on the complicated emotions many in the community were experiencing and called on all assembled to reflect on the values they wanted the law school to uphold. Then the organizers turned to what would be the main portion of the town hall, a structured Q&A in which students would read pre-selected questions and any faculty member would have the opportunity to volunteer respond.

For one of the organizers, this format was crucial to give students an opportunity to hear from a broader sampling of faculty than they were usually exposed to. “That I think did come out of the [Room] 129 event. Because Dean Gerken is the one to lead the faculty, she’s always the one to speak. I think it was kind of serendipity that she wasn’t at that event on Thursday because Baker [Hall] was opening and she couldn’t be there. We didn’t want to just hear from Dean Gerken. We wanted to hear from the 60+ other community members who we don’t normally hear from.”²¹⁸

At the same time, the organizers worked to make sure that even the students reading the testimonials represented the diversity of the student body. “We were emailing random people because we wanted a good array of 1Ls, 2Ls and 3Ls. We wanted a good array of men and women; people of all colors.”²¹⁹

²¹⁸ Confidential Interview in New Haven, Conn. (May 3, 2019).

²¹⁹ Confidential Interview in New Haven, Conn. (May 2, 2019).

In practice, students varied in their assessment of the faculty responses, with some feeling that the faculty still had not grasped underlying student concerns. One salient point for many students was that the faculty spent too much time discussing the desirability and obtainability of clerkships, when compared to other questions students had raised.

As many things do here, it turned into a conversation about clerkships for such a large period of time. In terms of judicial misconduct and that being a thing that the university needs to take a stance on, that's good to talk about and obviously deeply affects students who are clerking. But then a lot of other comments were about the power of professors and students' relationships with professors and RA abuse and things like that. But a lot of the responses were like, "anyone can get a clerkship," or "you don't have to get a clerkship if you don't want one."²²⁰

One organizer linked the conversation's trajectory to the unique way in which the clerkship process brings other inequities into focus.

I think the crux of the issue was toxic relationships between faculty and students and the way in which the structure of YLS enables that and the way in which the structure of YLS enables inequities particularly for women and students of color. That issue is hard to address concretely in two hours with the whole school. I think what ended up happening was still a positive convening, but in a lot of ways, the way we talked about this issue of inequity was directed through the

²²⁰ Confidential Interview in New Haven, Conn. (Apr. 23, 2019).

vessel of clerkships, and clerkships just dominated the conversation because all of the issues I talked about manifest in the clerkship process. How people get information, who has the most power to recommend people, the whisper networks. . . . Basically of the things that are bad are heightened when it comes to clerkships.²²¹

In a way it made it seem like there's something YLS students aren't getting and they want to get it. But it was really all about fairness broadly.

For some students, the responses of professors that de-emphasized the importance of clerking did not do enough to acknowledge the ways the clerking process interacted with other inequalities.

There was a response sort of immediately from a lot of professors saying, guys, everyone cares too much about clerkships. Saying, sure, there might be some issues, but chill. I remember wanting to point out that, as the number 1 law school in the country, which has as its selling point that we're going to funnel students to the highest echelons of traditional legal power . . . if Yale is consistently sending students from a certain demographic background or just who hold certain views into these positions of power, that affects the country and the world.²²²

Others felt that faculty criticism of students for being clerkship-obsessed ignored the ways students were socialized to value certain benchmarks.

²²¹ Confidential Interview in New Haven, Conn. (Apr. 18, 2019).

²²² Confidential Interview in New Haven, Conn. (Apr. 28, 2019).

It's no surprise at all that students get obsessed with gold stars when the whole culture of the law school is directed at training us to want and to achieve gold stars. When I got here, my Coker Fellows were both really fabulous people but also already had double clerkships lined up before the start of their 3L [years]. So my very first introduction to the law school is, here are these people who are supposed to be my mentors, and both of them have this very clerkship-or-die kind of mentality.²²³

Other students levied a very different critique of the Q&A, as they felt that the theme of de-emphasizing prestigious things would ultimately hurt marginalized communities the most.

When you say things like, "you don't need clerkships," the people susceptible to taking that and internalizing that are the already underrepresented people who already probably feel like they can't go for these things or don't know where to begin with these things. They're talking about dismantling secrecy and the currency of it but I think that it actually just reinforces it. Because when you say clerkships don't matter, only a subset of people are actually going to listen.²²⁴

Meanwhile, students who had initially been drawn to the movement because they perceived the university was failing to address faculty sexual misconduct were particularly surprised by the turn of the conversation.

²²³ Confidential Interview in New Haven, Conn. (Apr. 20, 2019).

²²⁴ Confidential Interview in New Haven, Conn. (Apr. 17, 2019).

The town hall struck me. Things changed really quickly from Monday to Tuesday. On Monday I felt like it was a lot about survivors' stories and the sexual climate and sexual culture. The Tuesday town hall was suddenly taken over by concerns about clerkships, RAs, TAs and the various things that people want at YLS and the un-transparent processes here.²²⁵

While recognizing that the town hall could not have weighed in on specific allegations, some students nevertheless felt that failing to tackle sexual misconduct was a missed opportunity.

We can't as a community talk about individual Title IX complaints and we shouldn't be adjudicating them as a town hall in a chapel. I'm keenly sympathetic to the university's concerns about not doing things that would raise the specter of liability. I have every expectation that if the university doesn't handle a Title IX complaint against Chua or Rubinfeld well, they would sue.

But all of that said, there is something over and above the individual allegations against Chua and against Rubinfeld that should be addressed as a community and publicly, and we haven't yet, which is, why is it that students feel that their concerns will be taken more seriously if they go to the media than if they go to the Title IX officer? That's a problem. Regardless of the content or the truth of the underlying allegations that is a symptom of community dysfunction. Why is it that students don't trust the Title IX procedures here?

²²⁵ Confidential Interview in New Haven, Conn. (Apr. 17, 2019).

I don't think it's a secret. It's because people won't be held accountable. So how can we create more transparency around the Title IX process without hurting individuals' privacy rights? That's a conversation that we're totally capable of having without talking about individual people, and it just didn't happen at all the entire year. I find that kind of shocking.²²⁶

While holding varying criticisms of the discussion, many students nevertheless felt that the town hall was a meaningful and powerful experience.

I was impressed with the movement's ability to even get the professors in the door because in my experience you hear so much as a student leader that the faculty are unmanageable and you can't get them to do anything. Getting them to even attend and be in the room I thought was kind of a feat in and of itself, even though that shouldn't be the case.

I've heard criticism of it as being all over the map and calling out all these different problems in all these different spheres, of different magnitudes and questions, of how helpful that can be. But I think it was important as a cathartic experience if nothing else because the faculty won't know there's an issue unless they hear it. So I think the voicing of all those issues and problems and concerns is really important.²²⁷

²²⁶ Confidential Interview in New Haven, Conn. (Apr. 20, 2019).

²²⁷ Confidential Interview in New Haven, Conn. (Apr. 28, 2019).

Later that afternoon, the troubles at Yale Law School received their most comprehensive coverage yet, in a *Mother Jones* article which would describe the upheaval as a “reckoning.”²²⁸ Several of the student grievances that the author described had been reported separately in prior outlets: the statements from the law school’s “best-known faculty showering praise on Kavanaugh,” the allegations that professors had given improper advice to students, the ongoing investigations into Professor Rubinfeld, and the doubt among students that faculty members were not aware of Kozinski’s reputation for harassment. Yet the author recognized that for many students the controversies had a central theme: “Yale, consistently ranked the number-one law school in the country, ha[d] not found a way to hold powerful men accountable.”

8. ADMINISTRATION, FACULTY & STAFF SUPPORT

Although the law school as an institution was, to some extent, framed as the target of the protest movement, the students involved in organizing the Monday and Tuesday protests recognized that they would not have been possible without significant support from members of the administration, faculty and staff.

The type of support we had as we were putting everything together made it clear that this school was not a monolith. There were a lot of people in the faculty that supported what we were doing. There were a lot of administrators that supported what we were doing. The way that we were able to so easily set up all of the

²²⁸ Pema Levy, *Kavanaugh Allegations Bring a Reckoning at Yale Law School*, MOTHER JONES, Sept. 25, 2018, <https://www.motherjones.com/politics/2018/09/kavanaugh-allegations-bring-a-reckoning-at-yale-law-school/>.

protests on Monday and on Tuesday would not have been possible if we did not have the backing and support of staff.²²⁹

We would not have had mics and speakers at the teach-in. We wouldn't have known to organize the sit-in so that it wouldn't be a fire hazard and we wouldn't get the fire department called on us. We wouldn't have known to avoid certain classes that hadn't been canceled. We would not have been able to easily pull together the money. We wouldn't have been able to book Battell with like a day's notice had a staff member not assisted with that and made sure there were mics and speakers and bag lunches that people could take when they headed to Battell for the town hall to the chapel. We did a lot by ourselves, but there's only so much you can do when you're fighting against a whole entire school. Having that kind of support was really integral to making the protest run smoothly.²³⁰

²²⁹ Confidential Interview in New Haven, Conn. (Apr. 18, 2019).

²³⁰ Confidential Interview in New Haven, Conn. (Apr. 18, 2019).

9. THE HEARING (SEPTEMBER 27TH, 2018)



*Christine Blasey Ford and Brett Kavanaugh Are Sworn in*²³¹

On the day of the hearing, a hush fell over the law school as students prepared to hear Blasey Ford’s testimony and Kavanaugh’s response. For many students, there was a strong sense that they were living a historical moment. As one student reflected, “I was born the year of Anita Hill (I think that was 1991). I really hoped something had changed in the 27 years since then.”²³²

For the Demanding Better organizers, the hearing posed a dilemma. On the one hand, the hearing created another opportunity to put media pressure on both the Kavanaugh nomination and the law school for its role in facilitating Kavanaugh’s rise. At the same time, the movement had

²³¹ Getty Images, Photograph of Christine Blasey Ford and Brett Kavanaugh Testifying Before the Senate Judiciary Committee, in Jonathan V. Last, *Six Takeaways from the Ford-Kavanaugh Hearings*, WEEKLY STANDARD, Sept. 27, 2018, <https://www.weeklystandard.com/jonathan-v-last/six-takeaways-from-the-christine-blasey-ford-brett-kavanaugh-senate-judiciary-hearing>.

²³² Confidential Interview in New Haven, Conn. (Apr. 28, 2019).

committed to creating a safe space for students to watch the hearing and process their feelings about it.

That was probably the most contentious thing that happened within the group. People were like, we think it's really important that the press have photos of this, but we had said in an email to the Wall that it would be closed to the outside. So we were trying to figure out what to do. We on the one hand were still trying to push this national message and on the other hand were mindful that there might be survivors in the room and other things like that. We went back and forth and we ultimately during a break let the press come in and take pictures of people from behind so that nobody's face was shown in any of the photos.²³³

The hearing created further pressure on the Dean and professors to rethink prior statements they had made in support of the nominee. In the evening after the hearing, one 1L emailed the Wall with an open plea to Professor Amar, asking him to retract his endorsement of Kavanaugh “in light of Dr. Christine Ford’s credible allegations, the partiality Judge Kavanaugh would surely bring to the Court after today’s events, and the myriad reasons he would harm marginalized communities across the United States.”²³⁴

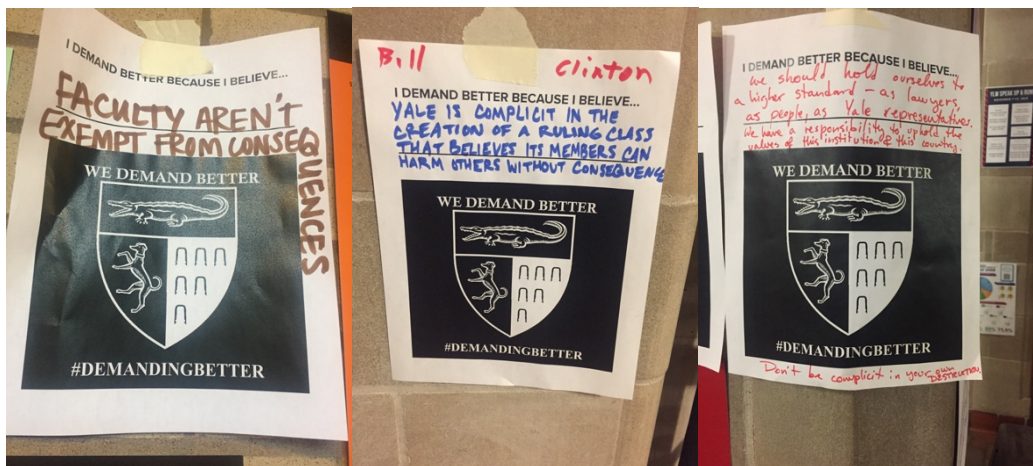
The same day, another group of 98 law students circulated an open letter to the Dean, calling on her to delete the July 9th press release in light of concerns from the many students who had come to view him as “very probably a perpetrator of sexual violence, as well as a grave threat to the

²³³ Confidential Interview in New Haven, Conn. (Apr. 24, 2019).

²³⁴ Posting of Jishian Ravinthiran to The Wall (Sept. 27, 2018) (on file with author) (“A Plea”).

rights of marginalized and vulnerable populations.”²³⁵ While neither Amar nor the Dean would retract their supportive statements, by Friday morning, the law school had appended a disclaimer to the press release recognizing that it had been “interpreted by some, understandably, as an endorsement of Brett Kavanaugh.” The disclaimer further clarified that “It was not intended as such, and [did] not constitute an endorsement” and expressing the school’s regret for “any confusion over this issue.”²³⁶

10. CONTINUING THE CONVERSATION (SEPTEMBER 30TH, 2018)



A few of the posters put up in a 1L-led action in October²³⁷

As intense as the first week of the Demanding Better movement was for 3Ls and 2Ls, in some ways it was even more intense for 1Ls, as it revealed very early in their legal education the gaps between what they might have expected from their professors and the reality of what would be provided. One 1L remembered her small group asking their professor why he hadn’t signed the

²³⁵ Posting of Jeff Zalesin to The Wall (Sept. 27, 2018) (on file with author) (“Letter from 98 YLS Students”).

²³⁶ Yale Law School, *Brett Kavanaugh ’90 Nominated to U.S. Supreme Court*, Sept. 28, 2018, <https://law.yale.edu/yls-today/news/brett-kavanaugh-90-nominated-us-supreme-court>.

²³⁷ Taonga Leslie, Personal Photos, Oct. 31–Nov. 12, 2018.

letter requesting an investigation into the assault allegations.²³⁸ The professor responded that he felt it was irrelevant to his role as a professor and explained that such issues didn't even come up at faculty meetings.²³⁹ "It was another level of disillusionment where people were hoping to connect with their small group professor and realized they were never going to connect to him on that level."²⁴⁰ For some students, this sense of disconnect between expectations and reality motivated them to get more involved. "It made me want to make this place the place I thought it would be."²⁴¹

The same 1L recalled Professor Harold Koh holding a meeting at his home in order to give students space to process their emotions. At the meeting, he gave more background information on the various controversies with the overall message that everyone was doing their best and there wasn't a sinister conspiracy to keep the students down.²⁴² After the meeting, a small group of 1Ls felt energized to continue the discussion and to "try to do something to help everyone in our community heal."²⁴³ The group hoped that creating more spaces for student dialogue and for people to air their grievances could lead to healing. They began to brainstorm how they might be able to accomplish it, and one student suggested a flyer campaign in which people could express why they wanted to demand better. She designed a poster that incorporated the YLS Demanding Better logo and the unfinished sentence "I Demand Better Because I believe . . ."²⁴⁴

²³⁸ Confidential Interview in New Haven, Conn. (Apr. 24, 2019).

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

With permission from the Office of Student Affairs, they printed 50 or 60 copies and emailed the Wall, inviting people to come grab a flyer, a marker and some tape to express what they wanted from the movement.²⁴⁵ “We were worried that if people stopped talking, the impression of ill will would kind of fester. Or maybe to figure out what other grievances there were in order to flesh things out instead of just letting things die.”²⁴⁶

For a couple of weeks, the center of the main law school hallway was covered in posters in different-colored inks setting forth different grievances. One focused on the importance of making sure faculty were not immune from consequences; another focused on Yale’s complicity in creating an unaccountable ruling class; a third called on Yale to hold itself to a higher standard.

One of the organizers of the action recalled it as a partial success. On the one hand, “It was a reminder of how many layers of things were going on and how complicated everything was.”²⁴⁷ On the other, “It put a lot of thoughts out there, but there was no plan for how to reconcile or process all of them.”²⁴⁸ Ultimately, the action was short-lived. By October 10th, the Office of Student Affairs had asked the group to take them down.²⁴⁹

Ironically, while the student who emailed the Wall to advertise the action did so without any coordination with YLS Demanding Better proper—the group that had planned the town hall, sit-

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

in, and D.C. protests (indeed the group was still holding closed meetings)—once the posters were up, people assumed that she was part of the movement as well.²⁵⁰

11. KAVANAUGH CONFIRMED (OCTOBER 6, 2018)



Retiring Justice Kennedy Swears Kavanaugh in As a Supreme Court Justice²⁵¹

Despite massive opposition from Democrats, and growing hesitance from independents, the Senate voted to confirm Kavanaugh to the Supreme Court on October 6th, 2018.²⁵² Many students described experiencing the confirmation with an overwhelming sense of defeat. One student described hearing the news while traveling in Boston:

²⁵⁰ *Id.*

²⁵¹ Fred Schilling, *Brett Kavanaugh Sworn in As Supreme Court Justice in Private Ceremony*, REFINERY 29, Oct. 6, 2018, <https://www.refinery29.com/en-us/2018/10/213301/brett-kavanaugh-supreme-court-secret-ceremony>.

²⁵² Janie Velencia & Dhruvil Mehta, *A Final Look at Where Voters Stand on Kavanaugh Before the Senate Votes*, FIVETHIRTYEIGHT, Oct. 5, 2018, <https://fivethirtyeight.com/features/a-final-look-at-where-voters-stand-on-kavanaugh-before-the-senate-votes/>.

It was my birthday when he was confirmed. I was inside the Boston aquarium. We left and I felt really despondent. I'd spent all this time doing this stuff and it felt like it was all for nothing. I remember speaking with my sister during and after the hearings. It felt like people had needlessly been retraumatized and it didn't seem to move the needle in any kind of real way. He's gonna just kind of go into the canon and this will all be whitewashed with time.²⁵³

Despite this failure to achieve the Demanding Better movement's major external goal, internal organizing efforts continued. Leaders took time to assess what their goals and operating structure would be going forward. One major challenge would be creating a more sustainable organizing model. As one student put it during a press interview: "[Yale Law Students Demanding Better] went from not existing to putting on three huge events in 48 hours. No one did their class work, no one slept, no one ate anything besides pizza and it was remarkable. I feel so lucky to have been part of it, but that's not a sustainable model [in the long run]."²⁵⁴

Another challenge would be building legitimacy within the broader law student community. Much of the organizing that had occurred in mid-September had been coordinated by a small nucleus of students who had pre-existing relationships with each other. As many Demanding Better leaders leveled critiques at the school's whisper networks, they noted the hypocrisy of maintaining such informal and, to some extent, exclusive relationships within the movement: "Other people who weren't involved in the original organizing wanted to get involved, and there

²⁵³ Confidential Interview in New Haven, Conn. (Apr. 21, 2019).

²⁵⁴ Asha Prihar, *Law School Organizers Reflect, Plan Post-Kavanaugh*, YALE DAILY NEWS, Oct. 9, 2018, <https://yaledailynews.com/blog/2018/10/09/law-school-organizers-reflect-plan-post-kavanaugh/>.

was not really a group consensus about how to get involved or who can get involved. I think that created a kind of exclusivity for some that shed some bad light on the movement.”²⁵⁵

In the days following the town hall, Demanding Better had already begun to take its own steps toward institutional reform. The group had started to hold open community meetings that any student could participate in.²⁵⁶ Smaller subcommittees were being formed to address the issues that had been raised at the town hall.²⁵⁷ At the same time, the students who had led the charge in mid-September were beginning to feel burnt out and stretched too thin. The same students who had played the most visible roles in the initial protests were also the leaders of student groups that had their own pressing concerns. Meanwhile, students who had not found a way to take ownership in the movement began to fall away. As one organizer reflected:

In the time between the first meeting and the D.C. protest and the town hall there were a lot of people there. There were 30 or 35 people sitting on the lawn out in the courtyard, saying, “How can I help? How can I get involved?” But we did a really bad job of empowering people to be in positions of leadership. I don’t mean like lead the movement. I mean empowering people with tasks. There were a lot of people who wanted to help but there were only like two or three people saying I’ll do this, I’ll do this; then you had like 30 people sitting there saying, “I want to be involved in this,” and not a good job distributing power such that people felt buy-in to be part of the movement going forward.

²⁵⁵ Confidential Interview in New Haven, Conn. (Apr. 23, 2019).

²⁵⁶ *Id.*

²⁵⁷ *Id.*

What that did is that after the town hall there were way fewer people organizing at that point and it led to everyone being exhausted.²⁵⁸

IV. THE WORKING GROUP

1. WORKING GROUP ANNOUNCED (OCTOBER 9, 2018)

On October 9th, 2018, the Dean’s office released an official, comprehensive email announcing responses to the various demands that students had surfaced in the prior weeks.²⁵⁹ As a first step, the Dean noted that she had convened two meetings of the faculty, which had resulted in “serious, engaged, and extremely productive conversations.”²⁶⁰ Second, the Dean announced a convening of a working group focused on “transparency and judicial misconduct” that would be led by Professor Gluck.²⁶¹ The group would specifically engage with the Judicial Conference and look into internal advising practices.²⁶² Finally, a more general student-faculty working group had been designed to conduct outreach sessions and consult broadly with students and faculty in order to “move forward on these issues.”²⁶³

Professors Doug NeJaime, Amy Kapczynski and Muneer Ahmad were named as the chairs of the Working Group, with students to be selected to serve alongside them.²⁶⁴ The Dean recognized the “wide range of opinion among the student body” and assured the students that the Working

²⁵⁸ *Id.*

²⁵⁹ Email from the Office of the Dean to the Yale Law School community (Oct. 9, 2018) (on file with author) (“Memo to the Community”).

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

Group would “work toward building a broad community consensus on these questions.”²⁶⁵

Interestingly, the email itself did not actually refer specifically to any of the questions the Working Group was designed to address or that had been raised at the town hall. Instead, the Dean took a broader view of the movement as “a call to live up to and articulate our best values.”²⁶⁶

Among the students who participated in this project, several recalled learning of the Working Group’s announcement with some degree of skepticism. As one student put it bluntly: “I think I thought it was bullshit in the beginning, and I think it’s more bullshit now than I thought in the beginning.”²⁶⁷ Another student quipped: “When you have something where it doesn’t even have an official name . . . I don’t even take that seriously.”²⁶⁸

“I’d seen from my undergrad how committees solely serve institutional ends. You have all of this power and anger and public pressure that comes out of public pressure that comes out of student activism. When an institution proposes a committee that instantly sucks all the energy out of it. It takes student activists’ time and their energy, and it’s uncompensated, and it burns them out, and at the end of the day it’s just recommendations.”²⁶⁹

“I’d talked to some students that had graduated before that were on the fellowship committee and the diversity committee and were like, we had good student energy, and this committee structure

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ Confidential Interview in New Haven, Conn. (Apr. 23, 2019).

²⁶⁸ Confidential Interview in New Haven, Conn. (Apr. 17, 2019)

²⁶⁹ Confidential Interview in New Haven, Conn. (Apr. 28, 2019).

just totally sapped all of that energy out and ruined all momentum. That was a concern I had going into it.”²⁷⁰

Shortly after the announcement, YLS Demanding Better convened a meeting to decide how the organizers would respond. There was strong resistance on the part of some students who sensed a trap. At the same time, some students felt pressure to engage so that the process would include their voices. “I think our YLSness was like, we need to engage. We need to be at the table,” one organizer reflected.²⁷¹

Some students acknowledged that while the committee structure would likely slow the student momentum, it might nevertheless be necessary to implement changes. “I think we’re all kind of cautious of committees. Ideas die a slow death in committees. But I also don’t think it’s feasible to have town halls every month. I’m not entirely sure what a better alternative would be.”²⁷²

Perhaps the strongest reason to cooperate was that many of the students themselves were burnt out. “When the Working Group idea happened, we were all totally exhausted. We were organizing in a way that was totally unsustainable. In some ways the administration coopted that. Oh, you’re tired of organizing? Let us do it for you, come to the Working Group.”²⁷³

Ultimately, the students decided on a compromise strategy. Some organizers would be encouraged to join the Working Group so that the movement would have a voice on the inside,

²⁷⁰ Confidential Interview in New Haven, Conn. (Apr. 28, 2019).

²⁷¹ Confidential Interview in New Haven, Conn. (Apr. 18, 2019).

²⁷² Confidential Interview in New Haven, Conn. (Apr. 28, 2019).

²⁷³ Confidential Interview in New Haven, Conn. (Apr. 18, 2019).

as well as a view into the group's workings. Other leaders would remain outside the group in order to hold it accountable. Those within the group would report regularly on its decisions and progress so the external movement could provide pressure as needed.

For a few, there was genuine hope that the Working Group would lead to positive changes. "I think people were kind of cynical about the possibility that it would achieve anything, and I was like, 'It might! We should try!' And then they were kind of right."²⁷⁴

2. STAFFING UP (OCTOBER 12 TO OCTOBER 29TH, 2018)

On October 15th, 2018, Professors Ahmad, Kapczynski and NeJaime, the faculty chairs of the Working Group, emailed the Wall to invite students to apply to join the group. Like the Dean, the chairs expressed hope that the working group would "be broadly representative of our community, engage productively with disagreement, and work toward building a broad community consensus on these important questions," but it did not explicitly state the topics the group would be working on.²⁷⁵

The chairs explained that in order to participate, students should submit a brief statement of interest and a letter of support from a peer. Selections would then be made by the three chairs in consultation with the student representatives.²⁷⁶ 1Ls would not be eligible to participate.²⁷⁷ In total, 20 students would ultimately submit applications.

²⁷⁴ Confidential Interview in New Haven, Conn. (Apr. 20, 2019).

²⁷⁵ Posting from the Law School Dean's Office to The Wall (Oct. 15, 2018) (on file with author) ("Email From Professors Ahmad, Kapczynski, and NeJaime).

²⁷⁶ *Id.*

²⁷⁷ *Id.*

i. Deciding to Apply

Students expressed various motivations for applying to join the Working Group. For some who had been involved in the Demanding Better movement, it was an extension of their prior activism.

I was asked to apply by DB folks. I felt something of an obligation to advance this, because I felt that a lot of folks who had done a lot of the work at the get go shouldn't be continually burdened. I think it was helped that I'm a guy and so much of the organizing had been from women of color.²⁷⁸

For others, and particularly conservative students, participating in the Working Group was a chance to respond to perceived harmful dynamics that had been heightened by the movement.

Initially there was definitely a sense that it was going to be YLS Demanding Better. Then, at the same time, conservative students were surfacing a lot of concerns about hostility in the classroom. There were issues that spun off from the protest—reportedly a Coker told their Cokees that at the sit-in they should look around and take note of which of their classmates weren't there and make a list.

Some of the things conservative students were experiencing had existed for a long time, and some were just in this period. Dean Gerken's response to that was to be like, "the Working Group will take care of it." So then, I think there was

²⁷⁸ Confidential Interview in New Haven, Conn. (Apr. 25, 2019).

more conservative buy-in about having our seat at the table and having our issues addressed as well.²⁷⁹

In addition to feeling an impetus to make sure conservative concerns were taken into account, some conservative students remembered being specifically encouraged to apply to add ideological diversity to the working group. “[A professor] asked me to apply to the working group. I hadn’t really previously considered it because I hadn’t been involved at all in the organizing. . . . He specifically said he thought it was important that there was ideological diversity on the committee, and he knew that I had ties to Fed Soc and more conservative circles.”²⁸⁰

ii. The Selection Process

Ultimately, the faculty chairs would receive 20 applications. Of these, 10 were selected into one group, called “Group 1,” and the other half were placed in “Group 2”. One student read this as an attempt to include as many voices as possible but also noted that Group 1 was far more influential going forward. “I think everyone who didn’t get into Group 1 was in Group 2. I think nobody was turned away. What I learned from the initial email is that they tried to involve everyone. But my understanding is that Group 1 is the one that set the agenda. Group 2 had the opportunity to sign up for different buckets, but they’re not the agenda-setting group.”²⁸¹ Some participants expressed dissatisfaction with various aspects of the selection process, which they

²⁷⁹ Confidential Interview in New Haven, Conn. (Apr. 27, 2019).

²⁸⁰ *Id.*

²⁸¹ Confidential Interview in New Haven, Conn. (Apr. 17, 2019).

felt replicated some of the power dynamics the Demanding Better movement was attempting to criticize.

Initial criticisms arose in response to the aspects of the selection process that reinforced hierarchies among students and faculty supremacy over students. For some, the very existence of a selection process was objectionable. “You had to apply to be on the Working Group, which is also horseshit,” put one student bluntly.²⁸² For others, it was problematic that the student participants would be chosen by professors, which deviated from the norm of the law school’s Student Representatives appointing students to serve on student-faculty committees (for example, the Student Faculty Advisory Hiring Committee, or the Mental Health Working Group). As one student recalled, “The Student Reps were not happy at all about kind of having that process taken out of their hands.”²⁸³

Additional criticisms emerged once selections had been made from students who felt that there had been a lack of transparency in determining how students were selected for Group 1. “The Working Group official line is that it’s a combination of random lottery, balancing for class, and balancing for different interests.”²⁸⁴ “Allegedly, they randomly selected 10 people to be on it and then they changed it around a little to account for some representation they wanted. It was very unclear, very black box. No one really knows how or why that happened.”²⁸⁵

²⁸² Confidential Interview in New Haven, Conn. (Apr. 23, 2019).

²⁸³ Confidential Interview in New Haven, Conn. (Apr. 27, 2019).

²⁸⁴ Confidential Interview in New Haven, Conn. (Apr. 17, 2019).

²⁸⁵ Confidential Interview in New Haven, Conn. (Apr. 27, 2019).

The Student Representatives felt that they were not given the window into the selection process they had been promised. “I guess the co-chairs had gone to the Student Reps and said, ok, we’re going to do this with your input, and then once they’d gotten the applications and said, oh, never mind, we’re going to do it this random way. So that was very divisive initially.”²⁸⁶

Further conflicts would emerge when the Working Group did not have procedures in place to sort out allegations of sexual misconduct among its members:

I was part of the original 10 people who were on the Working Group. But there was one individual on the Working Group who I felt uncomfortable with because they had touched me inappropriately my 1L year. I brought this up with the faculty chairs. It was so new they actually didn’t have any procedure about dealing with things like this. . . . I was told, if you really think it’s inappropriate, you can file a Title IX complaint. I was like, it’s been more than a year, and the reason I didn’t file a Title IX right then is the same reason I wouldn’t file one now—I don’t have the energy to deal with this.²⁸⁷

Ultimately, the student transferred from Group 1 to Group 2 to avoid the individual they had a conflict with before exiting the Working Group entirely.²⁸⁸

²⁸⁶ Confidential Interview in New Haven, Conn. (Apr. 27, 2019).

²⁸⁷ Confidential Interview in New Haven, Conn. (Apr. 17, 2019).

²⁸⁸ *Id.*

3. LISTENING (NOVEMBER 2018)

During its first month in operation, one of the Working Group's missions was to gather more information about how people were experiencing various systems in the law school. "In order to create multiple avenues for feedback," the Working Group held a series of listening sessions and office hours while also soliciting anonymous feedback through a form circulated over the Wall.²⁸⁹ In addition to a "general" listening session, sessions were organized around four subject areas: professional development, Coker Fellows and teaching assistants, clinics, and clerkships.²⁹⁰

In hindsight, a student member of the Working Group questioned if gathering more information from students was the most valuable use of the group's time:

I think we spent too much time laying the groundwork for things that students already knew but professors did not. I understood the perceptions of why the listening session were important because it gave us a sense of inclusivity and showed the desire on the part of the Working Group to elicit student opinions. But I think it replicated a lot of information that was redundant that students had provided either YLW or the student working groups in YLS [Demanding Better]. I think that really hobbled us as we got further along because it meant that we

²⁸⁹ Posting of Yale Law School Announcements to The Wall (Nov. 16, 2018) (on file with author) ("Email from Professors Ahmad, Kapczynski, and NeJaime").

²⁹⁰ Posting of Yale Law School Announcements to The Wall (Nov. 12, 2018) (on file with author) ("Email from the Yale Law School Working Group").

only really had a semester to flesh out what the recommendations would look like.²⁹¹

Another student member of the Working Group questioned the value of the listening sessions, on the grounds that they failed to achieve significant student engagement.

I didn't feel like they were super helpful, mostly because we had abysmal turnout. . . . It hit at a point in the semester when people were really busy. The fact that they had them thematically organized made it feel like I don't want to waste an hour of my time talking about xyz small issue. There was also the fact that they weren't anonymous. The notes we took were anonymized, but whoever was in the room knew what you were saying.²⁹²

At the same time, the student recognized that the listening sessions were more effective than other forms of feedback at getting faculty to believe student concerns:

We had a lot of issues with faculty believing things students said. . . . So, with the anonymous submissions, they were like, "We don't know who this was, we can't have a follow up conversation, this could entirely be made up."

They'd believe it a little more if you were able to say this happened to me. So, for a very small example, regarding first-semester RA hiring, if a person in a listening session was able to say, "Hi, I RA'd as a 1L, here's my smoking gun,"

²⁹¹ Confidential Interview in New Haven, Conn. (Apr. 25, 2019).

²⁹² Confidential Interview in New Haven, Conn. (Apr. 27, 2019).

then they'd believe them. But if it was like, I have three classmates that are doing this, they'd be like, oh, no, that's not true.²⁹³

While recognizing these frustrations, some students did see the listening sessions as genuinely eye-opening for some faculty members.

It was crazy because there are a lot of really great faculty here that are doing their best and assume their colleagues are doing the same or that people aren't [for example] hiring RAs during the 1L fall term. People were completely flabbergasted that that was happening. Students were like, we all know that's happening! What do you mean? It really demonstrated to me that everything would have to be a much longer, in-depth conversation because students and faculty are not on the same page. Faculty are just not aware of the things that are really deeply impacting students.²⁹⁴

Yet, for at least one student on the Working Group, the faculty's surprise was an indication that they had not made caring for students a priority.

I was quite shocked by how many times professors were aghast at things that I thought all students knew. Stuff like all of the work that affinity groups do. Professors did not have a conception of the favoritism among different professors or which professors were violating RA hiring processes.

²⁹³ *Id.*

²⁹⁴ Confidential Interview in New Haven, Conn. (Apr. 18, 2019).

It just kind of reminded me that, while there were professors that cared immensely about students and teaching, there were I'm sure an equal number who see their roles as teachers and mentors as secondary or tertiary to producing scholarship and research. I think the fact that they don't know demonstrates that they don't care or have not availed themselves to know these things.²⁹⁵

A. Learning from Faculty

As faculty were learning from students, students were also learning from them, which in some moments created greater empathy for faculty and the administration.

One important lesson was understanding of the limitations to the Dean's powers:

What I didn't understand until the Working Group is that it's much more like Congress and the President than the Dean being the queen of the school. There's stuff Dean Gerken cannot make the faculty do for better or for worse. It's a maddening system. We had a lot of anger that was really well founded, [but I'm] not sure we placed it in the correct spots.²⁹⁶

Another was reckoning with the different time horizons students and faculty were operating on:

²⁹⁵ Confidential Interview in New Haven, Conn. (Apr. 25, 2019).

²⁹⁶ Confidential Interview in New Haven, Conn. (Apr. 20, 2019).

I think it's very fair to say that the faculty learned a lot from students and students learned a lot from faculty. Faculty operate on a very different sense of time. Academic time is very different from law student time, because we kind of just have one year when you're in charge of things and not burnt out. So a fast-paced change on the faculty scale is a slow change on the student scale. No student wants to hear that, I didn't want to hear that, but that's very much how it played out.²⁹⁷

Yet for some students, gaining knowledge about how the school operated was also indicative of how poor communications between faculty and students usually were. As one student described it, "Some of that information was helpful to have, but a big issue that persisted from that is that even though we were being given the background and context, none of this is ever really communicated to students. I don't think for professors it was a priority."²⁹⁸

This perspective was reiterated by another student who suggested that faculty were, to some extent, invested in maintaining a degree of secrecy around their operations:

They have so many governing documents, and we're not allowed to see any of them. There's all kinds of committees, and there's a lot of secrecy around it. . . .

One of the recommendations was to release the name of who's on what

²⁹⁷ Confidential Interview in New Haven, Conn. (Apr. 20, 2019).

²⁹⁸ Confidential Interview in New Haven, Conn. (Apr. 25, 2019).

committee, and that was controversial because for some reason, they seem to want to preserve some level of opacity around the governance structure.²⁹⁹

4. WORKING (NOVEMBER 2018 TO APRIL 2019)

i. Low-Hanging Fruit

While the Working Group needed to gather information, the faculty and students involved also perceived an intense pressure to achieve tangible results in order to shore up the group's legitimacy in the eyes of the students. "The feeling was, what can we get started on so people don't think we're twiddling our thumbs. . . . Everyone was aware that students were pissed off."³⁰⁰

As a result of this time pressure, both students and faculty agreed to start by focusing on simple and more tractable issues. "A phrase that came up a lot was, 'We'll tackle low-hanging fruit first.'"³⁰¹ Following this approach, the Working Group was able to achieve relatively uncontroversial goals such as creating a centralized RA-hiring platform, encouraging all professors to use syllabi in their courses and reiterating the prohibition on hiring RAs during 1L fall.

While recognizing the impetus for the low-hanging fruit approach, many students who served on the Working Group also acknowledged that this may have prevented them from dealing with

²⁹⁹ Confidential Interview in New Haven, Conn. (Apr. 27, 2019).

³⁰⁰ Confidential Interview in New Haven, Conn. (Apr. 20, 2019).

³⁰¹ *Id.*

more deeply rooted issues. “We didn’t get to the heart of what are the acceptable and unacceptable activities of faculty and students towards each other.”³⁰²

However, even these proposals, which had consensus support from all students regardless of political affiliation, ran into (from the student perspective) a surprising degree of resistance from some faculty members who worried that they would limit faculty freedoms. As one student recalled, “We had a lot of big fights about things that should not have been big fights at all. The professors are very hesitant to increase bureaucracy or any sort of requirements for themselves.”³⁰³

In another student’s analysis, the faculty’s anxieties about ceding control may have stemmed from a lack of understanding of how informality could give rise to toxic dynamics.

A lot of the good faculty, the ones that are generally on students’ side, the ones that teach their small groups well, and make sure that [students are] actually getting feedback on the memos, and are doing all the great classroom environment stuff, are also bought into the faculty governance structure. They see it as something that enables them to be great faculty members and enables them to have rich intellectual discussions and connect with students in a meaningful way.

But they don’t necessarily realize that their peers are not being great professors in the same way as they are. And in a system in which they have the

³⁰² *Id.*

³⁰³ Confidential Interview in New Haven, Conn. (Apr. 27, 2019).

freedom and power to be the great professors they are, other professors have the freedom to do less and abuse that power.³⁰⁴

ii. Sharing Power

For some students on the Working Group, it was a challenge to navigate the power dynamics between themselves and professors.

It was very interesting to sit with professors and not take a backseat. Professors can be very intimidating, and when you have a number of them criticizing your ideas, that can be hard. . . . I think sometimes the faculty were really receptive and supportive, and other times it felt like the chairs had held internal conversations amongst themselves presenting policies that they felt strongly about but we had not fully considered. If I could do it over again, I think students could have been more bold and organized internally better as a counterforce to the faculty chairs of the Working Group.

I think it's interesting that there were no student chairs. If we're trying to create a flat space or consensus-driven space, it's interesting that we weren't given a similar role. From my understanding the chairs were compensated for being chairs, but the students didn't receive anything similar to that.³⁰⁵

³⁰⁴ Confidential Interview in New Haven, Conn. (Apr. 18, 2019).

³⁰⁵ Confidential Interview in New Haven, Conn. (Apr. 25, 2019).

One student remembers ideological and class divisions among the students largely fading into the background as students united behind a shared set of concerns.³⁰⁶ “For the most part the students were generally on the same page. A lot of the stuff that was controversial was either inter-faculty or between students and faculty. There were minutiae that students would disagree about, but I don’t think there were ever times when someone would say this is really important to me and someone would disagree with them.”³⁰⁷

5. REPORTS AND RECOMMENDATIONS (APRIL 16, 2019)

After working together for the better part of the year, the Working Group presented its findings to students at a lunch talk in Room 127 on Tuesday, April 16th, 2019. The previous day, the group had circulated its final report to the Wall.³⁰⁸ The report’s preface, authored by the group’s three faculty co-chairs, acknowledged that the group had emerged out of “a strong tradition of students at the Law School pushing the community to live up to our highest values.”³⁰⁹ The chairs explained that, in pursuing those goals, the group had utilized a consensus-based model that was “time-consuming and challenging” and “unlikely to yield transformative change.”³¹⁰ Nevertheless, the chairs expressed hope that they had achieved “meaningful progress in addressing a number of concerns.”³¹¹

³⁰⁶ A notable, and rather public, exception to this rule was an effort by one conservative member’s poorly received efforts to begin a conversation about ideological issues in the classroom. Confidential Interview in New Haven, Conn. (Apr. 27, 2019).

³⁰⁷ Confidential Interview in New Haven, Conn. (Apr. 27, 2019).

³⁰⁸ Posting of Yale Law School Announcements to The Wall (Apr. 15, 2019) (on file with author) (“Report of the Yale Law School Working Group”).

³⁰⁹ THE YALE LAW WORKING GROUP, WORKING GROUP REPORT § 1 (2019), *available at* <https://yale.app.box.com/file/440155854557>.

³¹⁰ *Id.*

³¹¹ *Id.*

The full Working Group report was made available to students and other members of the YLS Community via a private link sent to the Wall.³¹² Additionally, the Working Group submitted an appendix of explanatory and supportive documents, including a list of 60 of the group’s top-line recommendations.³¹³ Among the wide-ranging recommendations were proposals for the school to more clearly delineate reporting mechanisms, a call for better faculty adherence to the Coker Fellow selection schedule and to best practices in mentoring students regarding clerkships and engaging RAs and guidance for classroom management and fostering an inclusive pedagogical atmosphere for transgender and non-binary students.³¹⁴ While the proposals touched on many aspects of faculty-student relationships, the vast majority were phrased either in terms of “the Law School should” or “the Dean should,” with implementation left in the hands of those bodies.³¹⁵ As the co-chairs acknowledged in the report itself, “given the prominent role of the faculty in the school’s governance,” implementation of the majority of recommendations would require the Dean to “consult with appropriate faculty committees or the faculty as a whole.”³¹⁶

During the April 16th Working Group presentation, several students asked questions remarking on the lack of clear enforcement mechanisms for most of the norms enunciated.

Recommendations that professors utilize a newly launched RA hiring platform, or provide syllabi, or refrain from using RAs to perform personal errands, were, at least at the time of the presentation, non-binding on the faculty. One notable exception was the requirement that professors not hire students as research assistants during their 1L fall.

³¹² *Id.*

³¹³ THE YALE LAW WORKING GROUP, APPENDICES TO THE REPORT OF THE YALE LAW SCHOOL WORKING GROUP app. § A (2019), available at <https://yale.app.box.com/file/440128403543>.

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ THE YALE LAW WORKING GROUP, WORKING GROUP REPORT § 2 (2019), available at <https://yale.app.box.com/file/440155854557>.

However, while several students questioned the efficacy of the group's proposals, the energy and anger that had been so palpable at the fall's #MeToo talk and town hall seemed to have dissipated. One student encouraged his classmates to focus some of their frustrations about the law school into improving their own mental health. Engagement among the faculty appeared to have similarly declined. While the presentation's organizers had reserved two rows of chairs for faculty to attend, the rows remained stubbornly empty for the presentation.

At the conclusion of what had been a largely uneventful presentation, a student came forward to the microphone to give a final comment. Her voice trembling with emotion, she thanked the students and faculty members who had worked on the report but then pivoted to draw out the huge difference in tone and content between the issues that had been raised at the town hall and the issues that were included in the report. How, she asked, did a working group that arose in response to serious allegations of faculty misconduct and abuses of power ultimately settle on a list of largely non-binding best practices, with no enforcement mechanisms? Finally, she excoriated the faculty for their lack of attendance, which she felt underlined a continued lack of concern for students.

The Dean quickly arose to give a response and reiterated that she encouraged students to reach out to her if they knew of any faculty behaving badly and that she would do anything in her power to make things right. The student who had spoken seemed unfazed. She picked up her bag and walked out of the room after the Dean's comments. The meeting had a few minutes left, but for her the conversation was already over.

6. STUDENTS DEBRIEF

The following morning, Dianne Lake, the organizer who had initially emailed the Wall in September to announce the first actions of the Demanding Better movement, wrote again on behalf of the students on the Working Group to ask students to offer their feedback on the group's report and recommendations:³¹⁷

The futility of student advocacy is one of the most demoralizing aspects of this school. We raise so many issues year round and nothing comes of it because the faculty don't get on board with proposed recommendations or changes. We hope to create space on this Wall thread for students to address publicly what faculty accountability means to them, to present feedback on the report, and to express how you hope to see the faculty and the school move forward with addressing the recommendations of the report and more broadly the issues that led to the creation of the Working Group in the first place.

Twenty-five students responded to the thread weighing in with their frustrations, hopes and proposals to improve the school.³¹⁸ Some of the responses focused on specific problems with the Working Group, most notably the lack of enforceability for the norms articulated and the sense that many of the norms and recommendations, while valid, had been repeatedly articulated by students in the past. However, for many other students, the problem of the Working Group and the administrative response to student protest was a deeper question of values. In light of the

³¹⁷ Posting of Dianne Lake to The Wall (Apr. 17, 2019) (on file with author) (“Student Feedback on Working Group Report and Recommendations”).

³¹⁸ Out of respect for the semi-private nature of the Wall, I will not directly quote their responses here.

profound expressions of pain and disappointment that had surfaced in the fall, students called on the faculty to engage as mentors to ensure that all students felt cared for and to view their teaching and mentorship responsibilities as co-equal with their scholarship.

V. REFLECTIONS

1. FINDING THE BARS OF THE CAGE

Looking back, a majority of the organizers and students who participated in this project saw the Demanding Better movement as having failed to meet its goals. Justice Kavanaugh was confirmed to the Supreme Court despite substantive objections to his policies and the credible allegations of sexual assault that had been leveled against him. No one felt, in the short term, that the movement had succeeded in ensuring faculty accountability to students. Some wondered if in the long term, the gains that the movement had made would be concretized. As one student pondered, somewhat bleakly:

I don't mean to say YLS [Demanding Better] was a failure. I don't think it was. It started a really important conversation. The problem is once the 1Ls leave in three years that conversation's erased. That feeling, the understanding of that feeling, the true, in-your-heart knowing what that was like, is definitely gone when the 1Ls leave, and it starts over again. I was talking to alums about the advocacy work that they did when they were at YLS, and it's eerily similar.³¹⁹

As the students reflected on what they'd learned from their experiences, they offered wisdom and potential strategies for next generations. Presented here is a sampling of the myriad recommendations they made.

³¹⁹ Confidential Interview in New Haven, Conn. (Apr. 21, 2019).

i. Collective Bargaining

One proposal that was raised by several students was the possibility of forming a collective bargaining unit that could then negotiate with faculty. The advantage of such a unit would be to hold student concerns with some level of parity to the faculty.

One student in favor of the model recognized that, “in a lot of ways, students are different than workers,” given the diversity of student interests. However, even this student mused that there would likely be some issues that could build consensus support among students.³²⁰

Key to this proposal was a recognition of the power of students in their labor relationships with professors, in their relationships with alumni, and in their relationships to the media. On the labor front, a student opined on the role of students in professor production:

In some ways we are a student body, but we are also a major labor force. We are workers, right? I RA for this professor who is able to be 10 to 15 times more prolific because of the army of RAs that he has. That’s not true for every professor, but in order for people to churn out books in the way that they do, they rely on student labor. The legal profession is that in general. You work hard and you stay in the profession long enough to become a principal, and then you direct your agents. That is the hierarchical structure of this profession. The school reproduces that in full.³²¹

³²⁰ Confidential Interview in New Haven, Conn. (Apr. 21, 2019).

³²¹ *Id.* For more detailed discussion of this perspective see Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY* 54–75 (1983), available at

Another student supporting the collective bargaining ideal suggested that the bargaining unit be expanded farther:

The Harvard group for HLS is RAs, and I think that's a terrible relationship group to organize around because people have such a close relationship with the faculty and they're afraid that if they organize they're impugning their faculty person. I think you would need the bargaining unit to be much larger than the RAs because that would be a less sensitive relationship to organize around. So we need more student employees.

I think the Cokers and the TAs, though again these are people indebted to the faculty. Like do I really want to organize against [the professor I am Coking for]? No, I love [them] so I don't, because that would be awkward and weird. But the peer advocates are people who are disconnected from faculty. If they start paying the heads of the affinity groups, that's another group disconnected from faculty. So, I think we just need to get more people paid to set up the bargaining unit.

https://duncankennedy.net/documents/Legal%20Education%20as%20Training%20for%20Hierarchy_Politics%20of%20Law.pdf.

ii. *Real Student Representation*

Potentially related to the collective bargaining idea was a call for a more representative student government that could legitimately claim to speak for the students as a collectivity. As one of the students forwarding this proposal described it:

One of the great things about YLS is there are so many different groups on campus which are supposed to collect so many different types of activity and interest. But YLS [Demanding Better] came together, and it had enormous power, and it showed that the unification of students can create substantive change. I don't know if this means that we have to create a real student government in which every student group on campus is represented. Some sort of like student congress or student body that speaks with the full weight of student voice or at least the majority of student voice.³²²

While acknowledging that the students did have at least some level of representation via the Student Representatives, the student argued that the Reps were a relatively weak institution:

Yes, they're elected, but I don't think students completely understand what they do, and the fact that they do not have a constitution or a clear set of norms means that it fluctuates pretty wildly from year to year. I think there's also a sense that all of their meetings are not necessarily transparent to students. And

³²² Confidential Interview in New Haven, Conn. (Apr. 25, 2019).

fundamentally, their impact is really dwarfed by the impact of other groups on campus, like YLW and other affinity groups.³²³

iii. Making Demands Legible

An organizer mused that another way to hold the faculty accountable would have been to make the movement's demands clearer and more central:

In that first meeting, we had a set of demands written on that chalkboard. We were talking about publishing the demands on the Wall every single week. Someone had suggested hanging a banner in the hallway with a list of the demands and crossing them out as the faculty met them. It would have been a visual manifestation of student outrage and the law school's unwillingness to meet the demands of students.³²⁴

Consistent across a majority of the proposals was a sense that students needed to build power separate from and if necessary in opposition to the faculty in order to achieve their goals. However, as discussed in Chapter II § 2, this perspective was stronger among 2Ls and 1Ls than the departing 3L class.

One 3L wondered if a shift to a more oppositional stance toward faculty could actually be productive in solving student issues. As the student framed it, "You're not going to get progress without honesty, and you're not going to get honesty if you feel like your back is against the

³²³ *Id.*

³²⁴ Confidential Interview in New Haven, Conn. (Apr. 23, 2019).

wall. It furthers this us-versus-them mentality. In all my three years here the animosity between the faculty and the students has never been this bad.”³²⁵

2. AGAINST AMNESIA

Many of the students involved in YLS Demanding Better and the subsequent Working Group acknowledged that their protest efforts were part of a much larger tradition of student activism at YLS.

As one organizer described it:

After all of this happened, during Alumni Weekend, we talked to alums about some of the things that were going on and their experiences during their time here. Hearing the kinds of things they were saying, I was like, oh man, we really didn't do anything! Y'all were out here canceling the whole school. Y'all went on strike. Y'all got Yale to pay for alternative instructors because you refused to take instruction from the people who were already teaching here.

But where do we go to see the website of all YLS student protests? I think looking back at the past can be a way to see that we don't have to just bow our heads down and go through here. This place actually has a rich history of students shaking things up. I think that's something that can be inspiring.³²⁶

³²⁵ Confidential Interview in New Haven, Conn. (Apr. 17, 2019).

³²⁶ Confidential Interview in New Haven, Conn. (Apr. 18, 2019).

One of the primary barriers that students face when organizing for changes at the law school is that they have a much shorter time window to strategize within. Every three years, the entire student body turns over. Each spring, the students most familiar with the law school's operating structure, student grievances and faculty power dynamics are replaced by a group of students completely unfamiliar with the legal profession. This disadvantage may be further exacerbated by the power structures of most student organizations—the executive boards of most affinity groups (e.g., APALSA, BLSA, LLSA,³²⁷FGP,³²⁸ YLW³²⁹) as well as of the two primary left-wing political organizations (ACS and NLG³³⁰) are primarily staffed by 2L students with a few positions set aside for 1L and 3L representatives. The Federalist Society is a notable exception to this rule (its President and two Executive Vice Presidents are traditionally 3Ls). Because most student leaders have only one year to familiarize themselves with the school's structure, students often rely on wisdom gathered from older students and alums.

The passage of wisdom from one generation of students to the next takes many forms. Many student organizations maintain institutional memory documents that are updated by outgoing board members and then circulated to newly elected boards. Sometimes students have created more comprehensive documents: for example, NLG's *Disoriented at YLS*, a guide to “Finding Leftist Solidarity, Building Community, Addressing Elitism, and Self-Care,” or *Yale Law Secrets: An Outsider's Guide to YLS*, created by Adrien Weibgen '14 in collaboration with other students. Yet much institutional knowledge is passed in more ephemeral forms—by word of mouth, and by texts, emails and calls to former students. This chapter explores some of the

³²⁷ Respectively, the Asian Pacific American, Black, and Latinx Law Student Associations.

³²⁸ First Generation Professionals

³²⁹ Yale Law Women

³³⁰ The American Constitutional Society and National Lawyers Guild.

barriers that I and the students I spoke with encountered in attempting to preserve institutional memory of the Demanding Better movement and the Working Group it evolved into. These obstacles ranged from the legal and regulatory barriers posed by Yale's Institutional Review Board and Title IX procedures to the more informal barriers posed by community norms and power relationships between students and faculty.

i. The Institutional Review Board

The most significant barrier I faced in carrying out this project was the resistance of Yale's Institutional Review Board. In order to be able to reimburse student participants for their participation in interviews, I pursued funding from the Oscar M. Ruebhausen Fund. One of the purposes of the fund is to support "productive interaction among the students and the Yale Law School faculty." On December 4th, 2018, about two weeks after I applied for funding, I was awarded \$600. However, because the project involved student interviews, the Office of Student Affairs required that I first obtain approval or an exemption from the Institutional Review Board as a condition of disbursing the funds. I ultimately spent four months struggling with the IRB before the board recognized that the project was outside of its jurisdiction.

Under federal regulations, "all research involving human subjects conducted, supported, or otherwise subject to regulation by any Federal department or agency" must be reviewed to meet certain ethical standards.³³¹ Research is defined as "a systematic investigation, including research development, testing, and evaluation, designed to develop or contribute to generalizable knowledge."³³² Notably, "oral history interviewing activities, in general, are not designed to

³³¹ 45 C.F.R. § 46.101(a).

³³² 45 C.F.R. § 46.102(l).

contribute to generalizable knowledge and therefore do not involve research as defined by Department of Health and Human Services (HHS) regulations at 45 C.F.R. § 46.102(d) and do not need to be reviewed by an institutional review board (IRB).”³³³

Because this project was not intended to contribute to “generalizable knowledge,” it was by definition not subject to IRB review. In theory, this meant that I could proceed without input from the IRB. However, because my funding depended on securing an exemption from the IRB, I called the Yale Human Research Protection Program (HRPP) to get verbal confirmation that the project was not subject to review. In hindsight, this was a mistake.

In my initial call to the IRB, the analyst I spoke to said that, in her opinion, the project as described would not qualify as an oral history because at that time the Demanding Better movement and Working Group were still in operation and, in her understanding, oral histories only concerned events that had been completed in the past. I called back to call her attention to a Yale guidance document that indicated their understanding that oral histories are not subject to review and also emailed HRPP a short description of my project to clarify the scope and intention of the project.³³⁴ During this period, I sent two emails to HRPP that went without response. A third email received a response about a week after it was sent and advised me to submit an IRB proposal for an exemption. By now, a month had passed from my initial contact with HRPP. Worried about losing more time, I consulted with my advisor, and we decided that I

³³³ Linda Shopes & Donald Ritchie, *Exclusion of Oral History from IRB Reviews: An Update*, HISTORIANS, Mar. 1, 2004, <https://www.historians.org/publications-and-directories/perspectives-on-history/march-2004/exclusion-of-oral-history-from-irb-reviews-an-update>.

³³⁴ YALE UNIVERSITY INSTITUTIONAL REVIEW BOARDS § 100 GD.1 (2013), *available at* <https://your.yale.edu/sites/default/files/100gd1humanities-final-1-22-13.pdf>.

should submit a proposal immediately and hope for expedited review or that an oral history determination would be made further down the road.

My HRPP analyst directed me to apply for an exemption under Category 2, which provides that “research involving the use of . . . interview procedures or observation of public behavior” is exempted from IRB review provided that human subjects cannot be identified and disclosure of the responses outside the research not be “damaging to the subjects’ financial standing, employability or reputation.” As I reviewed the category’s requirements, I felt a sinking feeling in my gut. Because of the intimacy of the Yale Law community and the very public nature of my respondents’ advocacy efforts, I knew I could not reasonably guarantee that responses would not be identifiable. Those familiar with the movement might be easily able to reconnect a given response to a statement in the press, an email to the Wall or activities on campus. Further, because of the nature of the activities being described I could in no way guarantee that participating in the project was without risk. Ultimately, several of my respondents described being survivors of sexual assault and harassment; some talked about being arrested; others described breaking school rules or leveled accusations against prominent professors and members of the judiciary. None of these admissions were without risk. Having failed to get an oral history determination, and falling outside of any exempt category, my only hope for a speedy process was expedited review. Otherwise, my analyst informed me, my project would need to go before the full IRB, which only met once a month.

As I attempted to procure an expedited review, I went through multiple rounds of negotiations with my assigned analyst—the same person who had determined that my project was not an oral

history in the first place. This ongoing relationship with the person who would have ultimate power to greenlight or further delay my project was a fraught power dynamic. As I understood it, maintaining a positive relationship with my analyst and acquiescing to her demands would lead to approval more quickly. At the same time, some of her requests seems unfounded or erroneous or would in my view have hurt the project.

One sticking point was my initial instinct to allow respondents to go on record non-anonymously. At the time, I felt that allowing student activists to take ownership of their roles in the movement would be empowering, especially as many had already begun to share their stories with the national media. HRPP disagreed, feeling it would pose an unjustifiable risk, and I ultimately acquiesced to making the project anonymous.

A more fundamental disagreement arose over my decision to allow respondents to go on record as having experienced sexual harassment or sexual assault. My analyst advised that such information “should not at all be collected and if someone were to bring it up the recording should stop and the data should not be written down.” Given that sexual violence was a central grievance of the Demanding Better movement, I thought that excluding this information would deeply impoverish the project. When I expressed this to my analyst, she said that she would need to speak with her chair, further delaying the project’s approval.

Three weeks later, on April 15th, my analyst sheepishly reached out and explained that her chair and supervisor had jointly determined that the project was, after all, an oral history and thus did not require further IRB review. At this point four months had passed, I had yet to complete a

single interview, and I had spent approximately 40 hours preparing unnecessary submissions to HRPP. Dissatisfied by this outcome, I asked the analyst to put me in contact with her superiors. When after a week I had received no response, I went to the physical location of HRPP.

In follow-up face-to-face conversations at HRPP the next week, I learned that my assigned analyst had never before raised the issue of securing an oral history determination with her supervisor or chair. Her initial determination that my project was not an oral history was based solely on her past experiences with oral histories that concerned more distant events—for example, the Vietnam War. She had shared this perspective with her coworkers, who had learned to redirect my inquiries back to my initial analyst. But she had never had an independent decision-maker take a second look at the issue.

Having this experience with HRPP taught me several lessons that I would hope to pass on to future members of the Yale community attempting to do similar institutional memory work. First, I would advise them to consider the costs and benefits of seeking funding from institutionalized sources. Next, I would underline the important scope of the humanities and oral-history exceptions to IRB jurisdiction. Third, I would note the importance of escalating decisions early in the IRB process. Finally, I would note the aspects of the IRB process itself that tend to silence and discourage investigation into campus power struggles.

The first decision point I would draw future student historians' attention to is whether or not to secure institutional funding. This report was supported by the Oscar M. Ruebhausen Fund, which allowed me to compensate my interview participants for their time. However, it also necessitated

that I secure approval from HRPP. Looking back, it's not clear that being able to pay my subjects outweighed the costs of undergoing the IRB system.

Almost unanimously, the students I spoke to attempted to refuse payment at the completion of our interviews, until I informed them that the funds were coming not from myself but from an institutional fund. From this, I understood that the students would have been as happy to speak with me for free. In the context of social movements especially, personal relationships with the interviewer and the desire for institutional memory of the movement to live on may outweigh financial gains to participation.

One countervailing impulse is the urge to compensate students for their time. Several of the students I spoke with noted that student organizing is often thankless. As one student noted specifically in the context of oral histories, "there needs to be institutional support for this work." Paying students who participate in oral histories may have a symbolic component of recognizing hard work done and in a small way make it more sustainable. Still, in the context of this particular project, I think the loss of time occasioned by the IRB process may have outweighed the benefit to students.

Should students choose to secure institutional funding, they should be well versed in the oral history exemption to research. The question of whether a project is "research" is a jurisdictional one. Just as journalists conduct interviews for newspapers without bothering to secure IRB funding, oral historians should feel equally liberated in attempting to document social movements without seeking the IRB's input. Unlike the numbered "exemption" categories,

which are research that can be conducted without review, oral histories are not research at all, and thus one should be able to undergo an oral history project without IRB input.

The question of whether a project is research or not should be raised at the first stage of the project with the funding entity. I suspect it would have been easier to point out the oral history guidelines with administrators of the Ruebhausen Fund than it was to raise the issue with the IRB. This is because to a hammer, everything looks like a nail. To the Human Research Protection Program, everything looked like research.

If you are required to seek an oral history determination from the IRB, stay firm in your position that your project is not subject to review and escalate the issue as necessary until the determination is granted. The issues I had gaining an oral history determination were all, ultimately, posed by one analyst, who did not speak for her supervisor or chair. I was so eager to stay in her good graces that I did not force a second opinion when she issued her rejection.

When escalating issues up the chain of command, do not hesitate to go to HRPP in person. I went to HRPP physically only after four months of frustration, but once I was there I secured immediate responses. I was able to on the spot secure one-on-one meetings with both my analyst and her supervisor. My analyst's supervisor assured me that it was not uncommon for people to come to HRPP in person and that this would be a viable way to get clear answers on future projects. Given how unresponsive HRPP was to calls and emails, I wish I'd availed myself of this option far sooner.

Finally, while the above strategies apply to students conducting oral histories, I also observed several aspects of the IRB process that may tend to disempower students who are attempting to conduct research on campus social movements. As I completed HRPP's standard Protocol for Social or Behavioral Science, I noticed that Yale students are classified (alongside children, pregnant women and prisoners) as a "population of participants requiring special safeguards." While I never learned what such special safeguards might be, or the rationale behind them, I suspect that because I checked that box, my project was flagged for more exacting review. While I could see potentially legitimate reasons for this inquiry (for example, a professor using her influence to coerce students into participating in her studies), it also did not seem quite right to describe Yale students generally as a vulnerable population. An overly solicitous attitude toward Yale students would in some cases impede research into campus movements.

Another aspect of the process that surprised me was HRPP's attempt to suppress the collection of information about sexual assault and sexual harassment. While this may have stemmed from a lack of understanding on the part of my analyst, I interpreted it as reflective of a broader paternalism toward research subjects. While the regulations of human research are designed to prevent exploitation, they also may prevent subjects from taking on informed and calculated risks for the benefit of themselves and their communities. Assuming an active and potentially menacing role on the part of the researcher and a passive, potentially victimized role on the part of the subject may prevent more collaborative research from taking place. Ultimately, the confidentiality design of this project evolved with input from my interview participants. This collaborative effort would not have been possible within the more rigid structure of the IRB, which may be less conducive to more participatory investigation models.

ii. *Title IX Procedural Hurdles*

Another barrier to institutional memory that was particularly salient in this movement was concern that press or other coverage of any ongoing investigation might feed into arguments of an unfair adjudication, which would give the person being investigated ammunition to challenge an adverse ruling.³³⁵ Present in the minds of some students familiar with the Title IX process who agreed to speak on background was an ongoing lawsuit by a former University of Michigan student against the school after he was expelled following an allegation of sexual assault.³³⁶ The student had sued the university for violating his due process rights and his rights against gender discrimination under Title IX, and the Sixth Circuit had allowed the suit to proceed.³³⁷

However, while worries about due process may have restrained Yale from taking more public stances on the Rubinfeld investigation in particular, they need not necessarily serve as a restraint to students, especially students raising concerns about faculty sexual misconduct generally.

iii. *Managing the Risk of Losing Opportunities*

As significant as the institutional hurdles to this project were, they paled in comparison to the informal pressures many students expressed feeling to keep silent. At the most extreme end of the spectrum, students expressed concerns about being retaliation. Others noted the potential to lose out on relationships with powerful professors. Almost uniformly, the students who spoke

³³⁵ For greater discussion see *supra* ch. II § 5.

³³⁶ Jonathan Stempel, *Lawsuit by Ex-University of Michigan Student Accused of Sexual Assault Is Revived*, REUTERS, Sept. 7, 2018, <https://www.reuters.com/article/us-michigan-lawsuit-sexcrimes/lawsuit-by-ex-university-of-michigan-student-accused-of-sexual-assault-is-revived-idUSKCN1LN2HS>.

³³⁷ *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018).

out publicly against the injustices they perceived took a measure of pride in their actions while acknowledging that they felt comfortable doing so because they had forgone certain opportunities. As one student described the decision to step forward, “I decided for myself that if you can’t vocalize a legitimate concern, that’s not a place I would want to be.”³³⁸ As another put it, “A lot of us still need recommendations. But a lot of us put the risks on hold. Kind of a good thing to some extent. The person who I was when I wasn’t thinking about the risk. I like that person a lot.”³³⁹

iv. Suggestions for Future Institutional Memory Efforts

Several of the participants in this project spoke at length about the urgent need to preserve institutional memory of student mobilization at YLS. One student proposed the possibility of hiring someone in the library who would be charged with archiving student protests. “It’s not so much that students need someone advocating for them. It’s that they need to come in with the same knowledge of students who just graduated.”³⁴⁰ As the student envisioned the role, the library archivist would both collect and preserve the physical traces of student work through the affinity groups and serve as a repository of wisdom about what students had done in the past.

While the person in this role would not necessarily be explicitly labeled an ally to students, they would serve as a meaningful counterweight to the depth of wisdom on the side of the faculty.

But in the absence of such a role, the student urged other students to come to continue to record their history at the school: “I’m doing the history of the Latinx community on campus; I think

³³⁸ Confidential Interview in New Haven, Conn. (Apr. 20, 2019).

³³⁹ Confidential Interview in New Haven, Conn. (Apr. 24, 2019).

³⁴⁰ Confidential Interview in New Haven, Conn. (Apr. 29, 2019).

there should be one for the Black community, the Asian community, the LGBT community. There should be one for every community on this campus. They should be creating historical memory and that should be supported by the school... There needs to be institutional support for this work to be done.”

3. PARTING SHOTS

At the end of each of the interviews I conducted, I asked participants what, if anything, they would want new members of our community to know. This is a sampling of their responses:

1. You can change the world by changing a very small part of it.³⁴¹
2. At the end of the day you probably won't feel the changes that you made.³⁴²
3. It's okay to piss faculty off. Most of us pissed a lot of faculty off, and most of us are still okay.³⁴³
4. Unless you give a reason why someone in a position of power should stick their neck out or change things or do things, they're not going to, even if their heart is with you.³⁴⁴
5. You have to look at good-faith reasons not to do something and say, so what? I'm not gonna take that.³⁴⁵
6. Check in at the beginning about how you will support other students who are suffering from an event that is particular to their identities. It shouldn't fall to MLSA [the Muslim Law Students Association] to organize a vigil after a mosque shooting; it shouldn't fall on fall on YLW when sexual harassment claims come to light in the wake of Kavanaugh; it shouldn't fall on Outlaws when a hate group comes to campus.³⁴⁶
7. Everyone has their ministry, and there's a lot of different ways to participate in change, all of which are equally important.³⁴⁷

³⁴¹ Confidential Interview in New Haven, Conn. (Apr. 19, 2019).

³⁴² Confidential Interview in New Haven, Conn. (May 3, 2019).

³⁴³ Confidential Interview in New Haven, Conn. (Apr. 20, 2019).

³⁴⁴ Confidential Interview in New Haven, Conn. (Apr. 17, 2019).

³⁴⁵ Confidential Interview in New Haven, Conn. (Apr. 28, 2019).

³⁴⁶ Confidential Interview in New Haven, Conn. (Apr. 25, 2019).

³⁴⁷ Confidential Interview in New Haven, Conn. (Apr. 19, 2019).

8. Make sure that you hold people accountable in the long term. It's so easy to create momentum in the short term, but creating a structure for long-term change is really difficult.³⁴⁸
9. When you're organizing a protest, empower people not just to show up but to feel like the protest is theirs.³⁴⁹
10. Pay attention to who is at the table. And make sure it's not all white people.³⁵⁰
11. As Harold Koh likes to say, don't let the means become the end.³⁵¹
12. It's very important that people have a sense of the very rich history of student activism at this school.³⁵²
13. As much as we advocate for change we know the system is resistant to it.³⁵³
14. Don't trust the faculty when they tell you that they're surprised or that this is a new issue.³⁵⁴
15. There are people here who really want to get things right. That care so much about individual members of the community and community as a whole. It might not be evident, but there are people who will work every day to improve it.³⁵⁵
16. Almost the entire value of this place is that your peers are incredible.³⁵⁶
17. If you're a loud, white guy, try not being loud.³⁵⁷

³⁴⁸ Confidential Interview in New Haven, Conn. (Apr. 24, 2019).

³⁴⁹ Confidential Interview in New Haven, Conn. (Apr. 23, 2019).

³⁵⁰ Confidential Interview in New Haven, Conn. (Apr. 20, 2019).

³⁵¹ Confidential Interview in New Haven, Conn. (Apr. 23, 2019).

³⁵² Confidential Interview in New Haven, Conn. (Apr. 18, 2019).

³⁵³ Confidential Interview in New Haven, Conn. (Apr. 17, 2019).

³⁵⁴ Confidential Interview in New Haven, Conn. (Apr. 19, 2019).

³⁵⁵ Confidential Interview in New Haven, Conn. (Apr. 27, 2019).

³⁵⁶ Confidential Interview in New Haven, Conn. (Apr. 23, 2019).

³⁵⁷ Confidential Interview in New Haven, Conn. (Apr. 27, 2019).

18. In the end, there are real issues happening outside of these walls. If the amount of energy that's being poured into trying to equalize things among Yale Law students is energy that could be expended elsewhere, should it be?³⁵⁸
19. To what extent is using our eliteness helpful?³⁵⁹
20. Things change really quickly, and you have to be flexible and recognize that the way things are now is not the way things were before or the way they will be.³⁶⁰
21. It doesn't take a law degree and 20 years of being a tenured professor to know when something isn't right.³⁶¹
22. Keep finding power amongst your peers. And organizing amongst yourselves. Don't allow something like a working group or a committee to be enough to dampen those efforts and that energy.³⁶²
23. The power of the people is really incredible. The hard part is how to sustain the power of the people.³⁶³
24. Don't give too much of yourself to this place. Figure out how to take the resources this school offers and take them to do good in the world.³⁶⁴
25. Don't come here jaded. Don't start off cynical. That's the biggest sadness that I have for the current 1Ls. Because this was all happening at the beginning, they didn't have the chance to fall in love with this place. We wouldn't have put as much effort as we did into

³⁵⁸ Confidential Interview in New Haven, Conn. (Apr. 24, 2019).

³⁵⁹ Confidential Interview in New Haven, Conn. (Apr. 18, 2019).

³⁶⁰ Confidential Interview in New Haven, Conn. (Apr. 28, 2019).

³⁶¹ Confidential Interview in New Haven, Conn. (Apr. 24, 2019).

³⁶² Confidential Interview in New Haven, Conn. (Apr. 25, 2019).

³⁶³ Confidential Interview in New Haven, Conn. (May 2, 2019).

³⁶⁴ Confidential Interview in New Haven, Conn. (Apr. 28, 2019).

this place if we didn't love it to some extent... The only way to make this a better place is to believe that it can be.³⁶⁵

³⁶⁵ Confidential Interview in New Haven, Conn. (Apr. 29, 2019).