Still work to do on sexual misconduct laws

By Jeremy Pasternak

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Anita Hill testifies during the confirmation hearing for Justice Clarence Thomas on Capitol Hill in Washington, Oct. 11, 1991. Sexual harassment has been unlawful since before the hearings; in other words, for a long time. And yet in the last several months, story after story has broken about sexual harassment at the University of California, Berkeley.

When, during law school in the early 90s, I expressed to my mother an interest in plaintiff-side employment law, she expressed concern that there might not be sufficient work for me to make a career. Twenty years later, it is clear that her social optimism was misplaced.

This October marks the 25th anniversary of the Clarence Thomas/Anita Hill hearings in the Senate Judiciary Committee. They will surely be — along with Justice Clarence Thomas' 10-year streak of silence on the bench — his legacy. HBO is currently airing a movie about those hearings, titled "Confirmation," providing a reminder to those who remember them and an education to those who do not. Sexual harassment has been unlawful since before the hearings; in other words, for a long time. And yet in the last several months, story after story has broken about sexual harassment at the University of California, Berkeley.

The cases, some of which were substantiated by Berkeley's own internal investigations, even include the dean of the law school. Although our society's understanding of these issues has improved, these stories make the present seem not far from the past, a past in which a powerful institution — the Senate Judiciary Committee — attacked Anita Hill, who was doing nothing more than risking her own career to speak out against behavior that was against the law, perpetrated by the very person charged to enforce it.

Sen. Alan Simpson's own wife noted that her husband, and the other white men who so vehemently went after Hill's credibility, looked like "a bunch of bullies." I would like to think that her view would be wider held now, and that those hearings would be different if held today.

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So what to make of UC Berkeley School of Law, and especially its dean, Sujit Choudhry? How does it fit into a larger context? I posed the question to Jon Winer, who represents Tyann Sorrell in her case against Dean Choudhry and the university. He responded by saying that "the sexual harassment and abuse epidemic at UC Berkeley arises out of an institutional failure to send the proper message to potential perpetrators that sexual misconduct will not be tolerated. The university's failures in many ways mirrors those of the Catholic Church: covering up cases of sexual harassment and abuse, protecting high-ranking faculty and administrative perpetrators at the sake of low level employees and students, and moving perpetrators around rather than eliminating them from the system."

That response is at once astute and also unsurprising to those who practice in this area of law. "Why did they let this happen" is the question I hear most often from my clients, whether their cases involve sexual harassment, failure to accommodate disability, disparate pay or any of the other types of employment cases where management had the opportunity to correct something but did not do so.

What Winer's remarks remind us is this: Institutions tend to protect their members, not their constituents. Doctors too often protect one another in response to malpractice allegations, protecting a health care institution's members at the expense of its real constituents, the patients. Members of law enforcement organizations too often close ranks to protect each other from the citizen-constituents whom they are supposed to protect and serve, when accused of police brutality. Perhaps most famously, as Winer notes, the Catholic Church chose to protect its clergy instead of its congregants.

We as a body politic understand the importance of the laws that protect our employees, students and others. After all, the laws that are being broken are on the books. Focusing again on the rights of women in the workplace, the last few years have seen strides. In 2009, Congress passed the Lilly Ledbetter Act, albeit split along party lines; the result today would not be the same. More recently, California's new Equal Pay Act has significantly broadened corporate liability for disparate pay. Our laws continue to improve to remedy bad practices.

But at the same time, when it comes to management's and institutions' day-to-day reactions to bad behavior, little seems to have changed.

Some of this is surely due to what those in charge, and particularly many human resources personnel, might see as the "starting point." When an incident is brought to their attention, the next thing they see in their mental time line is a messy investigation followed by damage to a colleague's career. The injured party has "started" that process by complaining of unlawful behavior. But surely, (at least, hopefully) had management or human resource personnel personally witnessed an act of sexual harassment or abuse, that would be what they inherently understood to be the "starting point."

But that explanation is only a theory of how on an individual level those in charge might start down the wrong path. It does not explain the broader problem of why institutions can so often be expected to protect their members at the expense of their constituents. The answer may simply be that they do it because they just care more about the institution than the individual. Surely, that is their job, isn't it? To serve the institution?

And whether or not that is true, the notion points us towards a solution. If members and institutions will inherently protect one another, real change would seem to result only when it is clear to the members that their actions or willful inactions risk doing even more harm to the institution. Again, the laws are already on the books. They just need to be repeatedly applied. If these laws are to have any deterrent effect, we must pursue and publicize these cases and their verdicts, especially punitive verdicts. And perhaps the law should be amended to make punitive damages easier to secure against institutions who repeatedly err in ways that, in isolation, do not lead to punitive liability. If we reach a tipping point where institutions' failures to properly respond to these events create greater liability than is avoided in aggregate by cover-ups and willful ignorance, decision-makers will finally do the "right thing," not because they care, but because it achieves the goals they have been serving all along.

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