Denver Law Review

Volume 94 | Issue 1 Article 6

December 2020

Vol. 94, no. 1: Full Issue

Denver Law Review

Published by the
University of Denver
Sturm College of Law

DENVER LAW REVIEW

2016 Volume 94 Issue 1

ARTICLES

Denver Law Review (ISSN 2469-6463) Winter 2016

The *Denver Law Review* is published quarterly by the University of Denver Sturm College of Law through the Denver Law Review Association.

Denver Law Review
2255 East Evans Avenue, Suite 425
Denver, Colorado 80208
(303) 871-6172

Cite as: 94 DENV. L. REV. ___ (2016).

Subscriptions: Subscriptions to the *Denver Law Review* are $40.00 per volume (add $5.00 for mailing addresses outside the United States). All subscriptions will be renewed automatically unless the subscriber provides timely notice of cancellation.

Single and Back Issues: Single issues of the current volume are available from the Association at $15.00 per issue. All previous volumes and issues of the *Denver Law Review* are available exclusively from William S. Hein & Co., Inc., 2350 North Forest Road, Getzville, NY 14068, (800) 828-7571, www.heinonline.org.

Form: The *Denver Law Review* generally conforms to *The Bluebook: A Uniform System of Citation* (Columbia Law Review Ass'n et al. eds., 20th ed. 2015) and to *The Chicago Manual of Style* (16th ed. 2010). It is the general policy of the *Denver Law Review* not to keep unpublished sources used in articles, notes, or comments beyond their use for verification of citations. Inquiries as to the location of an unpublished source should be directed to the author of the article, note, or comment in which it is cited.

Manuscripts: Please address manuscripts to the Senior Articles Editor, *Denver Law Review*, 2255 East Evans Avenue, Suite 425, Denver, Colorado 80208. Manuscripts should be double-spaced and cannot be returned unless accompanied by a self-addressed, postage-paid envelope. Manuscripts may also be submitted electronically in Word format via e-mail to lawrev@law.du.edu.

Previous Nomenclature: Published as the *Denver Bar Association Record* from 1923 to 1928, *Dicta* from 1928 to 1965, *Denver Law Journal* from 1966 to 1984, and *Denver University Law Review* from 1985 to 2015.

Postmaster: Please send all address changes to *Denver Law Review*, 2255 East Evans Avenue, Suite 425, Denver, Colorado 80208.

***Denver Law Review Online*:** Recent *Denver Law Review* articles and additional *Denver Law Review* content, including information on past and upcoming *Denver Law Review* symposia, may be accessed online at http://www.denverlawreview.org/.

DENVER LAW REVIEW

94 Years of Excellence

UNIVERSITY OF DENVER
STURM COLLEGE OF LAW

ADMINISTRATIVE OFFICERS

Rebecca Chopp, Ph.D., *Chancellor*
Gregg Kvistad, B.A., M.A., Ph.D., *Provost and Executive Vice Chancellor*
Craig Woody, B.B.A., M.Acc., *Vice Chancellor for Business & Financial Affairs*
Renell Wynn, B.A., *Vice Chancellor of Communications & Marketing*
Barbara J. Wilcots, B.A., M.A., M.A., Ph.D, *Associate Provost for Graduate Studies*
Paul H. Chan, B.A., J.D., *University Counsel*
Bruce P. Smith, B.A., M.A., J.D., Ph.D., *Dean of the Sturm College of Law*
Viva Moffat, B.A., M.A., J.D., *Associate Dean of Academic Affairs and Professor of Law*
Joyce S. Sterling, B.A., M.A., Ph.D., *Associate Dean of Faculty Development and Professor of Law*
Catherine E. Smith, B.A., M.A., J.D., *Associate Dean for Institutional Diversity and Inclusiveness and Professor of Law*
Eric Bono, B.A., J.D., *Assistant Dean for Career Opportunities*
Jessica Boynton, B.S., J.D., *Assistant Dean for Student Affairs*
Iain Davis, M.S., *Assistant Dean of Student Financial Management and Admissions*
Laura E. Dean, B.A., M.S., *Assistant Dean of Alumni Relations*
Clinton R. Emmerich, B.S., M.B.A., *Assistant Dean of Finance and Administration*
Meghan S. Howes, B.A., B.F.A., *Assistant Dean of Communications*
Ricki Kelly, B.S., J.D., *Assistant Dean of Development*

FACULTY

Robert Anderson, B.A., J.D., *Professor of the Practice*
Rachel S. Arnow-Richman, B.A., J.D., LL.M, *Director, Workplace Law Program and Chauncey Wilson Memorial Research Professor*
Debra Austin, B.M.E., J.D., Ph.D., *Professor of the Practice*
Rebecca Aviel, B.A., J.D., *Associate Professor of Law*
Tanya Bartholomew, B.A., J.D., *Associate Professor of the Practice*
Brad Bartlett, B.A., J.D., *Visiting Assistant Professor*
Arthur Best, A.B., J.D., *Professor of Law*
Jerome Borison, B.S., J.D., LL.M., *Associate Professor of Law*
Stacey Bowers, B.S., J.D., MLIS, Ph.D., *Associate Professor of the Practice*
J. Robert Brown, Jr., B.A., M.A., Ph.D., J.D., *Director, Business & Commercial Law Program and Professor of Law*
Phoenix Cai, B.A, J.D., *Director, Roche International Business LLM Program and Associate Professor of Law*
John Campbell, B.A., J.D., *Assistant Professor of the Practice*
Bernard Chao, B.S., J.D., *Associate Professor of Law*
Federico Cheever, B.A., M.A., J.D., *Co-Director, Environmental and National Resources Law Program and Professor of Law*
Alan K. Chen, B.A., J.D., *William M. Beaney Memorial Research Chair and Professor*
Roberto L. Corrada, B.A., J.D., *Mulligan Burleson Chair in Modern Learning and Professor of Law*
Courtney K. Cross, B.A., J.D., LL.M., *Visiting Assistant Professor*
Patience Crowder, B.A., J.D., *Associate Professor of Law*

Susan D. Daggett, B.A., J.D., *Executive Director, Rocky Mountain Land Use Institute and Assistant Professor of the Practice*
Denise DeForest, B.A., J.D., *Visiting Assistant Professor of the Practice*
K.K. DuVivier, B.A., J.D., *Professor of Law*
Nancy S. Ehrenreich, B.A., J.D., LL.M., *Professor of Law*
Ian Farrell, L.L.B., L.L.M., *Associate Professor of Law*
Alexi Freeman, B.A., J.D., *Director, Externships and Public Interest Initiatives and Associate Professor of the Practice*
Samantha Galvin, B.A., J.D., LL.M., *Assistant Professor of the Practice of Taxation*
César Cuauhtémoc García Hernández, A.B., J.D., *Assistant Professor of Law*
Rashmi Goel, B.A., LL.B., J.S.M., J.S.D candidate, *Associate Professor of Law*
Robert M. Hardaway, B.A., J.D., *Professor of Law*
Gregory J. Hobbs, Jr., B.A., J.D., *Co-Director, Environmental and National Resources Law Program and Distinguished Jurist in Residence*
Mark Hughes, A.B., J.D., *Assistant Teaching Professor*
Sheila K. Hyatt, B.A., J.D., *Professor of Law*
Danielle Jefferis, B.A., J.D., *Visiting Assistant Professor of the Practice*
Scott Johns, B.A., J.D., *Director, Bar Passage Program and Professor of the Practice*
José Roberto Juárez, Jr., A.B., J.D., *Professor of Law*
Sam Kamin, B.A., J.D., Ph.D., *Vicente Sederberg Professor of Marijuana Law and Policy*
Martin Katz, A.B., J.D., *Professor of Law*
Michael Kovaka, B.A., J.D., *Visiting Assistant Professor of the Practice*
Tamara L. Kuennen, B.A., J.D., LL.M, *Professor of Law*
Margaret Kwoka, B.A., J.D., *Associate Professor of Law*
Jan G. Laitos, B.A., J.D., S.J.D., *John A. Carver, Jr. Professor of Law*
Christopher Lasch, B.A., J.D., *Associate Professor of Law*
Nancy Leong., B.A., B.Mus., J.D., *Associate Professor of Law*
Isaac Lodico, B.A., J.D., LL.M., *Assistant Professor of the Practice of Taxation*
Kevin Lynch., B.A., J.D., *Assistant Professor of Law*
Justin Marceau, B.A., J.D., *Animal Legal Defense Fund Professor of Law*
Lucy A. Marsh, B.A., J.D., *Professor of Law*
G. Kristian McDaniel-Miccio, B.A., M.A., J.D., LL. M., J.S.D., *Professor of Law*
Amy McLellan, B.A., J.D., LL.M., *Director, Graduate Tax Online Program and Visiting Assistant Professor of the Practice of Taxation*
Viva Moffat, B.A., M.A., J.D., *Associate Dean of Academic Affairs and Professor of Law*
Suzanna Moran, B.A., M.S., J.D., *Associate Professor of the Practice*
Ved P. Nanda, B.A., M.A., LL.B., LL.M, *Thompson G. Marsh Professor of Law*
Colleen O'Laughlin, B.S., B.A., J.D., *Visiting Assistant Professor of the Practice*
Lucas Osborn, B.S., J.D., Visiting Associate Professor
Stephen L. Pepper, A.B., J.D., *Professor of Law*
Justin Pidot, B.A., J.D., *Associate Professor of Law*
Patty Powell, B.A., J.D., *Director, Academic Achievement Program and Assistant Professor of the Practice*
Randy Robinson, B.S., J.D., *Visiting Assistant Professor of the Practice*
Edward J. Roche, Jr., B.B.A., J.D., *Professor of Law*
Tom I. Romero, II, B.A., J.D., Ph.D., *Assistant Provost of IE Research and Curriculum Initiatives and Associate Professor of Law*
Laura L. Rovner, B.A., J.D., LL.M., *Ronald V. Yegge Clinical Director and Professor of Law*

Nantiya Ruan, B.A., J.D., *Hartje & Reese LP Chair and Professor of the Practice of Law*
Thomas Russell, B.A., M.A., J.D., Ph.D., *Professor of Law*
David Schott, B.S., J.D., *Director, Trial Advocacy Program and Professor of the Practice*
Michael Siebecker, B.A., J.D., LL.M., M.Phil., Ph.D., *Professor of Law*
Catherine E. Smith, B.A., M.A., J.D., *Associate Dean for Institutional Diversity and Inclusiveness and Professor of Law*
Don C. Smith, B.S., J.D., LL.M., *Associate Professor of the Practice*
Michael Sousa, B.A., J.D., *Associate Professor of Law*
Erin Stearns, B.A., M.P.H., J.D., LL.M., *Assistant Professor of the Practice of Taxation*
Mary Steefel, B.A., J.D., LL.M., *Professor of the Practice*
Joyce S. Sterling, B.A., M.A., Ph.D., *Associate Dean of Faculty Development and Professor of Law*
Kathryn Stoker, B.A., J.D., *Associate Professor of the Practice*
Celia R. Taylor, B.A., J.D., *Director, International Legal Studies Program, Professor of Law and Nanda Chair*
David I. C. Thomson, B.A., J.D., *Professor of the Practice and John C. Dwan Professor for Online Learning*
Ann Vessels, B.A., J.D., *Director, Veterans Advocacy Project and Professor of the Practice*
Robin Walker Sterling, B.A., J.D., LL.M., *Associate Professor of Law*
Eli Wald, B.A., LL.B., LL.M., S.J.D., *Charles W. Delaney, Jr. Professor of Law*
Lindsey Webb, B.A., J.D., LL.M., *Assistant Professor of Law*
Annecoos Wiersema, B.A., LL.B., LL.M., S.J.D., *Professor of Law*
John R. Wilson, B.S., J.D., *Director, Graduate Tax Program and Professor of the Practice of Taxation*

TRAFFICKING IN NARRATIVES: CONCEPTUALIZING AND RECASTING VICTIMS, OFFENDERS, AND RESCUERS IN THE WAR ON HUMAN TRAFFICKING

SABRINA BALGAMWALLA[†]

ABSTRACT

Anti-trafficking laws emerge from a complex historical context, shaped in no small part by public perception of this highly complex problem. This Article explores and questions the headlines and examples that drove anti-trafficking reforms over the past century. These "trafficking narratives" have stimulated and shaped the response to trafficking both globally and domestically and have powerful implications for the evolving framework of protection and punishment. Specifically, this Article argues that the roles of "victims," "offenders," and "rescuers" serve as proxies for racialized and gendered assumptions about trafficking, which in turn are reflected in anti-trafficking law and enforcement. This Article builds on legal scholarship focused on trafficking victims to consider how public understanding of offenders have unintended consequences in rendering victims—and indeed, entire communities—suspect. It argues that these stark narratives further aggressive, carceral responses to human trafficking as a way of bringing offenders to justice and rescuing victims even though the distinction between victims and offenders is not always clear. It concludes that advocates should reconsider the use of victim narratives in advancing anti-trafficking causes, particularly in association with criminal justice responses.

TABLE OF CONTENTS

---

† Assistant Professor of Law, University of North Dakota. The author wishes to thank Leigh Goodmark, Laura Hand, Anita Sinha, Del Quest, and the roundtable participants of the 2015 Law & Society Conference and 2015 Emerging Immigration Law Teachers and Scholars Conference for their comments. Thank you also to the University of North Dakota School of Law for scholarship support, to the editorial staff of the *Denver Law Review* for their assistance and dedication, and to Lauren Harper for her constant faith and encouragement.

INTRODUCTION: CREATING THE CRIME OF HUMAN TRAFFICKING

Trafficking, once considered a crime concerning sale of illicit goods, is now a broader concept that includes the unlawful movement of people and exploitation of their labor.[1] Human trafficking in fact encompasses a number of crimes; under U.S. law for example, "severe trafficking in persons" includes forced prostitution, involuntary servitude, and exploitation of minors, as well as harbor, transport, or procurement related to these activities.[2] State and local governments further expanded the

1. For an extensive exploration of definitions of "human trafficking," see John Salt & Jennifer Hogarth, *Migrant Trafficking and Human Smuggling in Europe: A Review of the Evidence*, *in* MIGRANT TRAFFICKING AND HUMAN SMUGGLING IN EUROPE 11, 18–24 (Frank Laczko & David Thompson eds., 2000). *See also* Trafficking Victims Protection Act (TVPA) of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1469 (2000) (codified as amended in scattered sections of various titles of U.S.C.); G.A. Res. 55/25, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, annex, United Nations Convention Against Transnational Organized Crime, U.N. Doc. A/RES/55/25, art. 3(a) (Dec. 22, 2003).

2. *See* 22 U.S.C. § 7102(9)(A) (2012) (defining "severe trafficking in persons"). For a critique of this expanding definition of human trafficking and its application, see Janie A. Chuang,

criminalization framework by increasing sentences for trafficking and related offenses and requiring offender registration.[3] This criminalization framework, however, is not unique to the United States. Around the world, anti-trafficking reforms rely heavily on prosecution and incarceration as mechanisms to punish and prevent trafficking—what scholars have described as a "carceral" response to this social phenomenon.

Even as mechanisms to prosecute and punish trafficking have evolved, a growing number of scholars have criticized the lack of quality research on the problem of trafficking. Researchers have pointed out a number of startling misconceptions as to how trafficking is understood, portrayed, and addressed. This Article compares anti-trafficking rhetoric and field research examples to examine the role narratives play in the global understanding of—and response to—the problem of human trafficking. Specifically, this Article argues that trafficking narratives employ tropes of "victims," "offenders," and "rescuers" in a manner that moralizes anti-trafficking discourse and reinforces a legal response largely focused on punishing offenders. Casting these roles in stark terms inhibits a nuanced understanding of a complex social problem and creates distance between the highly idealized realm of law and the lived experiences of individuals who seek its protection.[4] Furthermore, in overly simplifying distinctions between roles, the law may also cast an offender's wrongdoing in severe terms, reinforcing the rationale for a harsher punishment. Where the distinction between victims and offenders is overly simplified, this increases the potential for prosecution of individuals who in fact may be in need of legal protection. This Article also connects human trafficking policy to a broader criminalization framework that serves as a proxy for immigration enforcement and crime control, rendering minority communities as suspect.

I. EVOLUTION OF THE GLOBAL ANTI-TRAFFICKING FRAMEWORK

A. From "White Slavery" to "Sex Trafficking"

Trafficking is frequently referred to as "modern slavery," a moniker suggestive of backwardness and moral repugnance. While this language may resonate in the modern age, it does not represent the historical anti-trafficking movement accurately. In fact, international anti-trafficking

---

Exploitation Creep and the Unmaking of Human Trafficking Law, 108 AM. J. INT'L L. 609 *passim* (2014).

3. *See Human Trafficking Laws in the States*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/research/civil-and-criminal-justice/human-trafficking-laws-in-the-states-updated-nov.aspx (last updated Feb. 14, 2012).

4. For powerful treatment of this topic in gender violence, trafficking, and immigration contexts, see, e.g., Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75, 79–88 (2008); Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207, 209–12 (2012); Jayashri Srikantiah, *Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law*, 87 B.U. L. REV. 157, 205–07 (2007).

instruments borrow very little conceptually from international instruments condemning enslavement of African-Americans.[5] Although early anti-slavery conventions theoretically condemned the African slave trade, current international law on human trafficking is more substantially influenced by early international instruments addressing prostitution.[6] At the turn of the twentieth century, due in part to social anxiety about women's greater freedom to travel, a movement emerged to combat a problem known as "white slavery"—the (presumed involuntary) prostitution of white women in the United States and abroad.[7] Despite the dearth of evidence that American women were being forced into prostitution in great numbers, the public "moral panic" that ensued prompted federal and state legislation. The 1910 Mann Act, also known as the White Slave Traffic Act, criminalized the transport of women for the purpose of engaging in "immoral acts," and still serves as the basis for many claims involving trafficking of minors.[8] Enforcement became a focus of the newly formed Federal Bureau of Investigation (FBI);[9] meanwhile, states began to pass their own laws criminalizing prostitution.[10]

Contemporaneously with the passage of the Mann Act in the United States, the League of Nations developed the 1904 International Agreement for the Suppression of White Slave Traffic (1904 Agreement).[11] This instrument contains the first definition of "traffic"—"the procuring of women or girls for immoral purposes abroad."[12] The 1904 Agreement also alludes to immigration control, calling upon states to monitor railway stations, ports, and routes for trafficked women,[13] as well as obtain

---

5. *See* Cheryl Nelson Butler, *The Racial Roots of Human Trafficking*, 62 UCLA L. REV. 1464, 1489–91 (2015) (describing the historical and persistent racial distinction in human trafficking law between African-American and white victims).

6. Corin Morcom & Andreas Schloenhardt, All About Sex?!: The Evolution of Trafficking in Persons in International Law 11–12 (Mar. 2011) (unpublished research paper) (on file with the University of Queensland, Human Trafficking Working Group), https://law.uq.edu.au/files/4311/Evolution-of-Int-Law-relating-to-Trafficking-in-Persons.pdf.

7. *Id.*; *see also* MAGGY LEE, TRAFFICKING AND GLOBAL CRIME CONTROL 6, 26–27 (2010). Debt bondage was not addressed until the passage of the 1956 U.N. Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery. LEE, *supra* at 6. For an in-depth discussion of the comparison between the modern conception of trafficking in persons and the enslavement of African-Americans, see generally Karen E. Bravo, *Exploring the Analogy Between Modern Trafficking in Humans and the Trans-Atlantic Slave Trade*, 25 B.U. INT'L L.J. 207, 212–13 (2007).

8. 18 U.S.C. §§ 2421–2425 (2012).

9. *See* ATHAN G. THEOHARIS, THE FBI AND AMERICAN DEMOCRACY: A BRIEF CRITICAL HISTORY 18–19 (2004). The Child Exploitation and Obscenity Section of the FBI's Criminal Division now investigates crimes brought under the Mann Act, White Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424). *See* OFFICES OF THE U.S. ATTORNEYS, U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL: CRIMINAL RESOURCE MANUAL § 2027, https://www.justice.gov/usam/criminal-resource-manual-2027-mann-act (last updated 1997).

10. *See Prohibited Consensual Sexual Activity*, 50 STATE STATUTORY SURVEYS: CRIMINAL LAWS, 0030 SURVEYS 14, tbl.13 (Thomson Reuters 2007).

11. International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83.

12. *Id.* art. 1.

13. *Id.* art. 2.

information about foreign women and make efforts to repatriate them.[14] The 1910 International Convention for the Suppression of the White Slave Traffic subsequently introduced elements of violence, threats, and compulsion in the definition of trafficking.[15] It also called on states to share information about perpetrators[16] and extradite them as necessary for prosecution.[17]

Both of these instruments were limited in application to white women involved in prostitution. The 1921 International Convention for the Suppression of the Traffic in Women and Children expanded to include male as well as female children,[18] but this did not necessarily alter the perception that adult men were not in need of protection as victims of trafficking. The 1949 United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others later consolidated the four preceding white slavery instruments, and eliminated specific references to the age and gender of victims.[19]

B. Trafficking as Violence Against Women; Violence Against Women as a Crime

The second wave of international anti-trafficking policy developed in association with the global feminist initiative to address women's rights as human rights.[20] As this framework developed and engaged the problem of trafficking in persons, the law retained a focus on procurement for prostitution.[21] The 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[22] and the expanded scope of the 2000 United Nations Trafficking Protocol again discussed trafficking in gender-specific terms and with particular reference to prostitution.[23]

---

14. *Id.* art. 3.

15. International Convention for the Suppression of the White Slave Traffic, art. 2, May 4, 1910, 211 Consol. T.S. 45, 1912 GR. Brit. T.S. No. 20.

16. *Id.* arts. 6–7.

17. *Id.* art. 5.

18. International Convention for the Suppression of the Traffic in Women and Children art. 5, *opened for signature* Sept. 30, 1921, 9 L.N.T.S. 415. This convention was followed by the International Convention for the Suppression of the Traffic in Women of the Full Age, Oct. 11, 1933, 150 L.N.T.S. 431 (excluding male victims).

19. International Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others pmbl., arts. 1, 5, *opened for signature* Mar. 21, 1950, 96 U.N.T.S. 271 (entered into force July 25, 1951); *see also id.* art. 1 (utilizing the gender-neutral term "person").

20. *See* Berta Esperanza Hernández-Truyol, *Women's Rights as Human Rights—Rules, Realities and the Role of Culture: A Formula for Reform*, 21 BROOK. J. INT'L L. 605, 617 (1996); *see also* Hilary Charlesworth, *The Mid-Life Crisis of the Universal Declaration of Human Rights*, 55 WASH. & LEE L. REV. 781, 789–90 (1998).

21. Charlesworth, *supra* note 20, at 784.

22. G.A. Res. 34/180, annex, Convention on the Elimination of All Forms of Discrimination Against Women art. 6 (Dec. 18, 1979) (requiring states to "take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women").

23. *See supra* Section I.A.

The United Nations Fourth World Conference on Women, held in Beijing in 1995, followed the 1976–1985 United Nations "Decade for Women" and the development of CEDAW.[24] The resulting Beijing Platform for Action included "diagnosis" of twelve problems affecting women; human trafficking was included in the Platform as part of the Violence Against Women diagnosis, which called for the elimination of trafficking in women and assistance to "victims of violence due to prostitution and trafficking" as a strategic objective.[25] The Platform recommended that governments "[c]onsider the ratification and enforcement of international conventions on trafficking in persons and on slavery"[26] and "[s]tep up cooperation and concerted action by all relevant law enforcement authorities and institutions with a view to dismantling national, regional and international networks in trafficking"[27] as a means of addressing the problem.

It is significant that the Beijing Platform presented trafficking as part of the Violence Against Women diagnosis and a phenomenon of gender-based violence. Following the International Labor Organization's international conventions on forced labor—the 1949 Convention Concerning Migration for Employment,[28] the 1957 Abolition of Forced Labor Convention,[29] and the Migrant Workers Supplementary Provisions Convention[30]—it would have been just as viable to make trafficking part of the Women and Poverty diagnosis and frame the issue as a problem of limited economic opportunities for women.[31] Instead, the Beijing Platform made only a cursory reference to the connection between labor and trafficking.[32] As one human rights activist observed, "Beijing is where

---

24. *See* JULIETTA HUA, TRAFFICKING WOMEN'S HUMAN RIGHTS 7–9 (2011).

25. United Nations Fourth World Conference on Women, *Beijing Declaration and Platform for Action* (Sept. 4–15, 1995) [hereinafter *Beijing Platform*], http://www.unwomen.org/~/media/headquarters/attachments/sections/csw/pfa_e_final_web.pdf. Janie Chuang and Elizabeth Bernstein are among the scholars who noted the role of the American neo-feminist anti-prostitution movement in the evolution of this framework. *See* Elizabeth Bernstein, *Carceral Politics as Gender Justice? The "Traffic in Women" and Neoliberal Circuits of Crime, Sex, and Rights*, 41 THEORY & SOC'Y 233, 235–36 (2012); Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1672–77 (2010).

26. *Beijing Platform*, *supra* note 25, ¶ 130(a).

27. *Id.* ¶ 130(e).

28. Int'l Labour Org. [ILO], *Convention Concerning Migration for Employment (Revised)*, C097 (Jan. 22, 1952), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:312242.

29. Int'l Labour Org. [ILO], *Convention Concerning Abolition of Forced Labour Convention*, C105 (Jan. 17, 1959), http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C105.

30. Int'l Labour Org. [ILO], *Convention Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers*, C143 (Dec. 9, 1978), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C143.

31. *See Beijing Platform*, *supra* note 25, ¶¶ 47–57.

32. *See id.* ¶ 130(b) (urging states to "[t]ake appropriate measures to address the root factors, including external factors" that contribute to the problem of trafficking).

trafficking as a labor issue was first transformed into a sexual violence and slavery issue."[33]

C. *United Nations Protocols on Trafficking and Human Smuggling—Solidification of a Criminal Law Framework*

In January 1999, the United Nations Office on Drugs and Crime convened a subcommittee to develop a new protocol on organized crime, including accompanying protocols on human trafficking and human smuggling.[34] Both protocols take a criminalization approach to the issues of trafficking and smuggling though the protocols differ in the assignment of legal culpability for what may essentially be the same conduct.[35] The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol)[36] defines trafficking with reference to the means of recruitment[37] and calls on member states to recognize and meet the special needs of trafficked persons.[38] Article 5 of the Trafficking Protocol, devoted to the subject of "criminalization," specifically calls upon states to enact "legislative and other measures as may be necessary to establish . . . criminal offences"[39] for trafficking and for the related offenses of attempt[40] and conspiracy,[41] which may subject individuals to prosecution even if they have been exploited.[42] The United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air (UN Smuggling Protocol)[43] reinforces a criminal framework to address smuggling ("procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person"), illegal entry, and document fraud.[44] The instrument, however, fails to address the ways in which individuals who are complicit in these acts may be exploited and, hence, be considered "smuggled" as well as "trafficked." The UN Smuggling Protocol does state that individuals who are the "objects" of criminalized activities

33. Bernstein, *supra* note 25, at 252.

34. *See* Melissa Ditmore & Marjan Wijers, *The Negotiations on the UN Protocol on Trafficking in Persons*, 4 NEMESIS 79, 79 (2003).

35. *See infra* notes 36–47 and accompanying text.

36. G.A. Res. 55/25, annex II, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, United Nations Convention Against Transnational Organized Crime (Nov. 15, 2000) [hereinafter U.N. 2000 Trafficking Protocol].

37. *Id.* art. 3(a) (noting that trafficking recruitment takes place "by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation").

38. *Id.* arts. 6–8.

39. *Id.* art. 5(1).

40. *Id.* art. 5(2)(a).

41. *Id.* art. 5(2)(b)–(c).

42. *See* Ditmore & Wijers, *supra* note 34, at 85 (discussing the protection and assistance provisions in the Protocols and recognizing the discretionary nature of such provisions).

43. G.A. Res. 55/25, annex III, Protocol Against the Smuggling of Migrants by Land, Sea and Air, United Nations Convention Against Transnational Organized Crime (Nov. 15, 2000) [hereinafter U.N. 2000 Smuggling Protocol].

44. *Id.* art. 3(a)–(c).

should not be held criminally liable for the conduct,[45] but this framing does not reinforce the agency of migrants, trafficked and otherwise.[46] Through these key international legal instruments, the global community manifestly embraced a border-conscious law enforcement approach to both trafficking and smuggling.[47]

These protocols explicitly linked anti-trafficking initiatives with the larger international legal framework on crime and, by proxy, anxiety about the possible criminogenic effects of globalization.[48] But while these twin Protocols resemble each other in their criminalized approach, they differ in their gendered assumptions about migration. The UN Trafficking Protocol, with its special reference to the protection of women and children, clearly reflects the perspectives on trafficking from Beijing +5 conference.[49] The gendered focus of the Protocol harkens not only to the Beijing Platform's gender-based violence framing but also to the international trafficking instruments that preceded it. By contrast, the UN Smuggling Protocol makes no reference to gender whatsoever.[50] The underlying inference is that women and children are the "objects" of criminalized migration activity in the Trafficking Protocol, while men are willing migrants or traffickers.[51]

Critical scholars attribute the creation of this dichotomy between trafficking (as a problem of gender-based violence) and smuggling (as a problem of border control) to a strategic move by states, as this framing rationalizes harsh immigration and border enforcement measures in the name of combatting trafficking in persons.[52] This linkage between immigration and trafficking control persists, although trafficking schemes regularly override or elude border control measures. Many trafficked individuals have presented valid entry documents at border inspection, and trafficking schemes regularly exploit legitimate visa programs to bring workers to host countries.[53] The role of the global economy and demand for labor never figures into this framework, shifting focus to protection of borders rather than protection of workers.

---

45. *Id.* art. 5.

46. *See infra* Section II.A.2.b.

47. Both protocols make specific reference to the need for increased border control to prevent unauthorized migration. *See* U.N. 2000 Trafficking Protocol, *supra* note 36, art. 11; U.N. 2000 Smuggling Protocol, *supra* note 43, arts. 7–8, 10–15.

48. *See* LEE, *supra* note 7, at 22; *see also* Bravo, *supra* note 7, at 224 n.90.

49. U.N. 2000 Trafficking Protocol, *supra* note 36, pmbl. According to the accounts of those involved with the development of the Protocol, this inclusion of this gender-specific language was tied to the lobbying efforts of a pro-abolitionist NGO coalition; this was a second choice to using "Trafficking in Women and Children" in the title of the document, rather than the gender-neutral reference to trafficked "persons." *See* Ditmore & Wijers, *supra* note 34, at 82.

50. *See* U.N. 2000 Smuggling Protocol, *supra* note 43.

51. *See* U.N. 2000 Trafficking Protocol, *supra* note 36, pmbl., arts. 2–3, 6, 9–10.

52. *See, e.g.*, Jennifer M. Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PA. L. REV. 1609, 1619 (2010).

53. *See id.* at 1637–38.

D. The Trafficking Victims Protection Act and Crime Control Initiatives in the United States

1. Precedent: The Anti-Domestic Violence Movement

The anti-trafficking movement that emerged in the United States in the 1990s is notable in its connection to this theme of gender-based, sexual dominance. The concept of "female sexual slavery" began gaining traction in the 1970s[54] as prostitution and pornography emerged as key issues in the mainstream feminist movement.[55] The contemporary mainstream anti-trafficking movement in the United States drew considerable support from a particular sector of dominant feminist, anti-domestic violence activism.[56] As advocates called for state recognition of the problem of spousal abuse, they enlisted law enforcement as an ally to intervene in these situations and to treat batterers as criminals—a phenomenon that scholar Elizabeth Bernstein refers to as "carceral feminism."[57]

Courts became part of an advocacy strategy to ensure that violence against women was taken seriously.[58] In 1976, two domestic violence cases concerning failure of local law enforcement to respond to calls for help—*Bruno v. Codd*[59] and *Scott v. Hart*[60]—motivated arrest policies for local law enforcement offices.[61] Over the next two decades, law enforcement responses to domestic violence expanded to include police mandatory arrest policies[62] and no-drop prosecution policies in court.[63] These approaches, however, were not without critique within the anti-

---

54. *See, e.g.*, KATHLEEN BARRY, FEMALE SEXUAL SLAVERY 54–59 (1979); KATHLEEN BARRY, THE PROSTITUTION OF SEXUALITY 1–3 (1995).

55. *See* Bravo, *supra* note 7, at 223 (discussing how sex tourism also emerged as an issue in the late 1970's and concerns about how international prostitution arose in the context of the fall of the Soviet Union). For influential works on pornography in the dominance feminist tradition, see ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN 101–03 (1981); CATHARINE A. MACKINNON, WOMEN'S LIVES, MEN'S LAWS 327, 328–29 (2007). For an in-depth discussion of dominance feminism as an influencing force on the movement against domestic violence movement, see LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 9–15 (2013) (discussing dominance feminism as an influential force on the movement against domestic violence).

56. Elizabeth Bernstein, *From "Prostitution" to the "Traffic in Women": Political Implications of the (Re)emergence of a Discourse*, WILSON CTR., Summer 2010, at 12, 12–13 (Middle East Program & United States Studies Occasional Paper Series), https://www.wilsoncenter.org/sites/default/files/Rethinking%20Human%20Trafficking.pdf.

57. Elizabeth Bernstein, *Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns*, 36 SIGNS 45, 52–58 (2010).

58. *See* GOODMARK, *supra* note 55, at 17.

59. 396 N.Y.S.2d 974, 976 (N.Y. Sup. Ct. 1977), *rev'd in part, appeal dismissed in part*, 407 N.Y.S.2d 165 (N.Y. App. Div. 1978), *aff'd*, 47 N.Y.2d 582 (N.Y. 1979).

60. No. C-76-2395 (N.D. Cal. Oct. 28, 1976).

61. *See* Claire Houston, *How Feminist Theory Became (Criminal) Law: Tracing the Path to Mandatory Criminal Intervention in Domestic Violence Cases*, 21 MICH. J. GENDER & L. 217, 255–60 (2014). *See generally* Pauline W. Gee, *Ensuring Police Protection for Battered Women: The* Scott v. Hart *Suit*, 8 SIGNS 554, 554–67 (1983).

62. Houston, *supra* note 61, at 267.

63. *Id.* at 265.

domestic violence movement. Many advocates were concerned about this reliance on law enforcement and the minimizing of survivor agency survivors in these situations.[64] Even so, the Violent Crime Control and Law Enforcement Act of 1994 included a critical victory for the movement—the Violence Against Women Act, which developed key roles for law enforcement and the criminal justice system with respect to the problem of domestic violence.[65]

2. The Anti-Trafficking Movement

The Trafficking Victims Protection Act (TVPA), the first comprehensive federal anti-trafficking law in the United States, came to fruition in association with the Violence Against Women Act of 2000.[66] The TVPA created a new crime known as "severe trafficking in persons,"[67] increased the applicable sentences for trafficking-related crimes,[68] criminalized additional trafficking-related acts,[69] and established the right to mandatory restitution for these crimes.[70] The TVPA, like the UN Trafficking Protocol, rationalized border and immigration control as part of a law enforcement strategy to protect victims.[71] The TVPA also retained the highly-gendered notions of trafficking and migration set forth in the UN protocols, placing particular emphasis on the exploitation of women and girls and the problem of sex trafficking.[72] Senator Paul Wellstone, who introduced the bill, specifically stated that the resolution was intended to address trafficking of women and girls for sexual exploita-

64. *See, e.g.*, Andrea L. Dennis & Carol E. Jordan, *Encouraging Victims: Responding to a Recent Study of Battered Women Who Commit Crimes*, 15 NEV. L.J. 1, 3 (2014); Leigh Goodmark, *Law Is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 8 (2004).

65. Violent Crime Control and Law Enforcement Act of 1994 § 2001, Pub. L. No. 103-322, 108 Stat. 1796, 1910 (codified as amended in scattered sections of 42 U.S.C.). 42 U.S.C. § 13981, which was part of the Violence Against Women Act of 1994, was subsequently declared unconstitutional by the Supreme Court in *United States v. Morrison*, 529 U.S. 598 (2000).

66. *See* Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended in scattered sections of various titles of U.S.C.) (organizing the Victims of Trafficking and Violence Protection Act of 2000 into divisions including the Trafficking Victims Protection Act of 2000 and the Violence Against Women Act of 2000).

67. *Compare* 22 U.S.C. § 7102(9) (2000) (defining "severe forms of trafficking in persons"), *with* U.N. 2000 Trafficking Protocol, *supra* note 36, at 43 (calling on the global community to criminalize trafficking and related activities). Many legal scholars have noted the global practice of criminalizing trafficking in persons. *See, e.g.*, Chacón, *supra* note 52, at 1617–20; Chuang, *supra* note 25, at 1725–26; Jonathan Todres, *Widening Our Lens: Incorporating Essential Perspectives in the Fight Against Human Trafficking*, 33 MICH. J. INT'L L. 53, 58, 61–67 (2011) (noting the prevalent practice of adopting criminal laws as a means of combatting trafficking in persons).

68. 22 U.S.C. § 7109 (2000); 18 U.S.C § 1594 (2000).

69. 18 U.S.C. §§ 1589–1592 (2000).

70. *Id.* § 1593.

71. *See* Bernstein, *supra* note 25, at 251; Chuang, *supra* note 25, at 1697–1703.

72. *See* Trafficking Victims Protection Act of 2000 § 102(b), Pub. L. No. 106-386, 114 Stat. 1464, 1466–69 (2000) (codified at 22 U.S.C. § 7101 (2012)).

tion.[73] A separate proposal, which made broad reference to labor exploitation, did not pass.[74]

As with the Violence Against Women Act, victim advocates hailed some provisions of the TVPA as a much-needed development. The TVPA is noteworthy in that its passage and implementation galvanized a wide range of supporters beyond victim advocates, including groups across the political spectrum, from mainstream feminist organizations to religious abolitionists.[75] Aspects of the bill respond to critical needs of trafficking survivors. For example, the TVPA explicitly addresses the immigration status of survivors by creating a "T" visa that will allow individuals who assist law enforcement to remain in the United States.[76] The TVPA also includes non-physical and psychological aspects in the definition of "coercion," which supersedes the Supreme Court's interpretation of the term.[77] At the same time, this framework bears the mark of the anti-prostitution movement, which became more perceptible under the presidency of George W. Bush.[78] President Bush also authorized the

---

73. 144 CONG. REC. S1702–04 (daily ed. Mar. 10, 1998) (statement of Sen. Wellstone), https://www.congress.gov/crec/1998/03/10/CREC-1998-03-10-pt1-PgS1702-2.pdf; *see also* S. Con. Res. 82, 105th Cong. (1998) (enacted).

74. *See* Comprehensive Antitrafficking in Persons Act of 1999, S. 1842, 106th Cong. (1999), https://www.congress.gov/106/bills/s1842/BILLS-106s1842is.pdf.

75. *See, e.g.*, Jacqueline Berman, *The Left, the Right, and the Prostitute: The Making of U.S. Antitrafficking in Persons Policy*, 14 TUL. J. INT'L & COMP. L. 269, 283 (2006).

76. 8 U.S.C. § 1101(a)(15)(T) (2012). Nonimmigrant visas are available to individuals who can prove: (1) they are victims of severe human trafficking; (2) present in the United States on account of trafficking; (3) either comply with requests to cooperate with law enforcement in the investigation of their trafficking case or are deemed exempted from doing so on the basis of their youth or the trauma they have suffered; and (4) would suffer "extreme hardship involving unusual and severe harm upon removal" from the United States to remain in the United States. *Id.* T visas are valid for four years and carry the benefits of work authorization, derivative status for qualifying family members, and the possibility of adjusting status if certain requirements are met. 8 C.F.R. § 214.11(l)(4), (o)–(p) (2016). Exceptions to the law enforcement requirement are available to individuals who are under fifteen years of age or who are unable to assist due to trauma. *See id.* § 214.11(a) (defining "reasonable request for assistance" with respect to eligibility criteria set forth in § 214.11(b)(3)).

77. *Compare* United States v. Kozminski, 487 U.S. 931, 952–53 (1988) (holding that for purposes of criminal prosecution under 18 U.S.C. § 1584, "the term 'involuntary servitude' necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process"), *superseded by statute*, Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, *as recognized in* United States v. Bell, 761 F.3d 900 (8th Cir. 2014), *with* Trafficking Victims Protection Act of 2000 § 103(2), 22 U.S.C. § 7102 (2000) (defining coercion to include "any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person").

78. *See, e.g.*, U.S. Dep't of State, Bureau of Pub. Affairs, The Link Between Prostitution and Sex Trafficking (2004), https://2001-2009.state.gov/r/pa/ei/rls/38790.htm (stating that trafficking is both the cause and effect of prostitution). The research methods and data supporting this assertion have since been contested by scholars. *See, e.g.*, Sealing Cheng & Eunjung Kim, *The Paradoxes of Neoliberalism: Migrant Korean Sex Workers in the United States and "Sex Trafficking,"* 21 SOC. POL. 355, 356–57 (2014); Chuang, *supra* note 25, at 1683–84 (examining the anti-prostitution legal reforms scaffolded onto anti-trafficking laws following the passage of the TVPA); Rebecca L. Wharton, Note, *A New Paradigm for Human Trafficking: Shifting the Focus from Prostitution to Exploitation in the Trafficking Victims Protection Act*, 16 WM. & MARY J. WOMEN & L. 753, 771 (2010) (discussing the appointment of John Miller, a prostitution abolitionist, as Chairman of the Office to

National Security Presidential Directive in February 2002, which framed trafficking as a national security issue in the wake of the 9/11 attacks.[79] Hence, the anti-trafficking advocacy of the past two decades crystalized century-old narratives featuring women forced into prostitution as trafficking victims, and traffickers as threats to border security and public safety.[80]

This framework also entrenched the criminalization approach to trafficking, advocating for law enforcement as a means to rescue of victims and identify and punish traffickers. When the TVPA was reauthorized in 2008, one of the amended provisions called for the promulgation of Model State Criminal Provisions on pimping, pandering, and prostitution.[81] These provisions, modeled on Chapter 27 of the Criminal Code of the District of Columbia, were intended to supplement existing state criminal frameworks with specific provisions involving commercial sex exploitation of minors and compelled or coerced commercial sex acts.[82] A subsequent amendment clarified (and lessened) the government's burden when proving the age of the victim in commercial sex trafficking prosecutions.[83] Since Congress passed the TVPA, federal and local law enforcement have also become increasingly involved in identifying undocumented individuals and placing them in removal proceedings.[84]

Critics of the TVPA's criminalization provisions point out that the emphasis on criminalization places trafficked individuals at the risk of arrest, prosecution, and deportation. These aspects also make migration itself more dangerous and contribute to the prevalence of trafficking. This criminal framework also brings a greater number of individuals under state scrutiny, particularly people of color.[85] Criminal law aspects of the TVPA have also facilitated aspects of restrictive immigration poli-

---

Monitor and Combat Trafficking in Persons and his anti-prostitution campaign, which further conflated prostitution and trafficking).

79. *See* Press Release, Office of the Press Sec'y, White House, Trafficking in Persons National Security Presidential Directive (Feb. 25, 2003), http://fas.org/irp/offdocs/nspd/trafpers.html.

80. *See* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 382–85 (2006); *see also* Chacón, *supra* note 52, at 1637–43.

81. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 § 225(b), Pub. L. No. 110-457, 122 Stat. 5044, 5072 (2008).

82. *See* U.S. Dep't of Justice, Model State Provisions on Pimping, Pandering, and Prostitution, Explanatory Notes, http://www.justice.gov/olp/model-state-provisions-pimping-pandering-and-prostitution (last updated June 18, 2014).

83. *See* 18 U.S.C. § 1591(c) (2012) (amending the law such that the prosecution need not prove that the defendant knew the victim was under the age of eighteen if the defendant had "a reasonable opportunity to observe the [victim]").

84. *See, e.g.*, Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1290 (2010); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 88, 92 (2005); Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1820–21 (2011).

85. *See, e.g.*, Kamala Kempadoo, *Victims and Agents of Crime: The New Crusade Against Trafficking*, *in* GLOBAL LOCKDOWN: RACE, GENDER, AND THE PRISON-INDUSTRIAL COMPLEX 35, 38–42 (Julia Sudbury ed., 2005); *see also* discussion *infra* Sections II.A.–B., III.B.

cy. These enforcement practices include greater involvement by federal courts[86] and law enforcement, including agencies concerned with immigration and border control. States' adoption of a law enforcement-centered approach is comparable to domestic violence policy in that it demonstrates a commitment to treating these violations as serious offenses. However, many advocates argue that the need to prosecute offenders must be balanced with protection for victims, just as the law has done in the domestic violence context.[87]

II. RECASTING TRAFFICKING NARRATIVES

The phenomenon of human trafficking is enormous and complex, and how it is understood depends heavily on the perspective by which one views it. There is limited evidence available—some of which is based on questionable research—from which to draw conclusions.[88] Media has traditionally played a key role in the public's understanding of the problem.[89] Feature and documentary films, television shows, journalistic accounts, public awareness campaigns, and legislative statements cast the problem of human trafficking in ways that resonate with the public and capture the interest of audiences. These media portrayals, complete with their dramatic narratives and stereotypical characters, become important sources of information for the public about the realities of trafficking in persons, regardless of the accuracy of facts or authenticity of the narratives captured therein.[90] In particular, images of criminality and illegality inform attitudes about actual crimes and the people who commit them, even when this information comes from media other than news, such as entertainment or commercials.[91] These popular narratives,

86. Chacón, *supra* note 52, at 1611.

87. *Id.* at 1626–27.

88. *See, e.g.*, INST. OF MED. & NAT'L RESEARCH COUNCIL, CONFRONTING COMMERCIAL SEXUAL EXPLOITATION AND SEX TRAFFICKING OF MINORS IN THE UNITED STATES 9 (Ellen Wright Clayton et al. eds., 2013) ("The committee's review of commercial sexual exploitation and sex trafficking in minors in the United States was constrained by the extremely limited evidence base related to these crimes, particularly in the areas of prevention and intervention strategies. In addition, the committee found considerable variability in the quality of current research in these areas."); Jonathan Todres, *Human Trafficking and Film: How Popular Portrayals Influence Law and Public Perception*, 101 CORNELL L. REV. ONLINE 1, 19 (2015).

89. *See, e.g.*, Annie Isabel Fukushima & Julietta Hua, *Calling the Consumer Activist, Consuming the Trafficking Subject: Call + Response and the Terms of Legibility*, *in* DOCUMENTING GENDERED VIOLENCE: REPRESENTATIONS, COLLABORATIONS, AND MOVEMENTS 45, 49 (Lisa M. Cuklanz & Heather McIntosh eds., 2015) ("Because trafficking can happen anywhere to anyone, and its exact form is uncertain, trafficking privileges visuality and the trope of revelation. Documentary film, even as it presents a constructed vision, has an element of witness that alongside trafficking's presumed need to *be witnessed* in order to be stopped."); *see also* Todres, *supra* note 88, at 24.

90. Edith Kinney, *Victims, Villains, and Valiant Rescuers: Unpacking Sociolegal Constructions of Human Trafficking and Crimmigration in Popular Culture*, *in* THE ILLEGAL BUSINESS OF HUMAN TRAFFICKING 87, 90 (Maria João Guia ed., 2015) (first citing Linda Heath & Kevin Gilbert, *Mass Media and Fear of Crime*, 39 AM. BEHAV. SCI. 379 (1996); then citing SHANTO IYENGAR & DONALD R. KINDER, NEWS THAT MATTERS: TELEVISION AND AMERICAN OPINION (updated ed. 2010)).

91. *Id.* at 88 ("Official sources explain the paucity of data regarding victims of trafficking in the U.S. by stating: 'we are not finding victims in the United States because we are not looking for

and the policies they inspire, carry baggage from historical debates about the rights of women, racial minorities, and noncitizens. As these tropes persist, so does the rationalization of a law-enforcement driven response.[92]

These forms of public understanding have not only shaped the development of the law, as alluded to previously, but also play a vital role in how the law is applied and enforced. For example, in the context of domestic violence law, clients tell their stories to judges, and elements of those stories make their way into findings of fact and conclusions of law.[93] In immigration courts, images of "good" and "bad" immigrants affect eligibility for immigration relief.[94] In criminal trafficking arrests and prosecutions, local and federal law enforcement are informed by these stories as well.

Popular trafficking narratives tend to feature three stock characters, which this Article will refer to as "the innocent victim," "the evil offender," and "the good rescuer."[95] Congressional debates leading up to the passage of the TVPA featured repeated references to the figure of the innocent victim—individuals lured or forced into trafficking situations, particularly in the sex industry.[96] Offenders in these cases included underhanded recruiters, organized crime bosses, and brutal pimps.[97] Popular portrayals of trafficking frame these acts in association with dangerous criminal enterprise, implying that law enforcement response is the logical (and necessary) response. This prompts public pressure for the state to intervene via the criminal justice system as rescuer.[98]

Critical feminist scholars have noted in these "victimization accounts" the troubling racial and neocolonial themes of naïveté, backwardness, and sexual deviancy as pertaining to women from the global South, as well as the tendency of these stories to "rely on dichotomous framings of 'good' and 'bad' human rights actors."[99] Scholars have also

---

them.' This sets up a dynamic where awareness-raising reports by journalists and others in the 'rescue industry' emphasise [sic] the scope, scale, and suffering of trafficking victims to trigger and justify law enforcement efforts to tackle 'the hidden crime' of trafficking.").

92. *Id.*

93. *See, e.g.*, Goodmark, *supra* note 4, at 81.

94. *See generally* Keyes, *supra* note 4, 226–27.

95. Kinney, *supra* note 90, at 92.

96. 146 CONG. REC. 7293–94 (2000) (statement of Rep. Pitts); *see also Trafficking of Women and Children in the International Sex Trade: Hearing on H.R. 1356 Before the Subcomm. on Int'l Operations & Human Rights of the H. Comm. on Int'l Relations*, 106th Cong. 56 (1999) [hereinafter *Trafficking of Women and Children in the International Sex Trade*] (statement of Rep. Smith), https://www.gpo.gov/fdsys/pkg/CHRG-106hhrg63274/pdf/CHRG-106hhrg63274.pdf; *id.* at 41 (statement of Gary A. Haugen, President and Chief Executive Officer, International Justice Mission); *id.* at 35 (statement of Anita Sharma Bhattari, trafficking survivor).

97. *Trafficking of Women and Children in the International Sex Trade*, *supra* note 96, at 35–36.

98. Kinney, *supra* note 90, at 88.

99. *Id.* at 92 (alteration in original) (internal quotation marks omitted) (noting that anti-trafficking discourses reflect "particular conceptions of migration, female sexuality, and the sex

noted the parallels with the white slavery moral panic, in which public understanding of the dangers posed to white women fueled a campaign that ultimately restricted freedom of movement for women worldwide.[100] Even where individuals benefit from conforming to this idealized image of the "perfect victim," they may do so in ways that deny the realities of their lived experiences and their dignity before the law. Reinforcing these images may also be detrimental to others who might seek relief in the future if they cannot live up to the idealized role of a worthy victim.[101]

These narratives are also troubling because for every victim, there must be a perpetrator, and there is a narrative tendency to make victims more pure or make perpetrators more evil to show contrast between them.[102] A "good victim" is likely to obtain benefits, such as social services and immigration status, and escape prosecution, whereas a "bad offender" is likely to be found guilty and sentenced under the criminal law framework. Unfortunately, when a survivor is not "good" or "pure" enough to be seen as a victim, he or she is likely to be deemed ineligible for relief. Worse yet, he or she may be subject to prosecution for a crime associated with the trafficking situation or removal from the United States for an immigration violation. In this sense, victims may be seen as perpetrators and may be portrayed in the worst possible light to justify punishment under the fullest extent of the law. Particularly in the era of immigration enforcement, these narratives carry tremendous power to shape responses to trafficking. Law enforcement officers, expected to act as rescuers, may rely on narratives in ways that render individuals suspect based on their gender, race, immigration status, or national origin.

A. The Victim Role

1. The "Innocent Victim"

The victim construct in the trafficking narrative emerged in the early days of the white slavery campaign. Legal reformers used images of innocent women, kidnapped and forced into prostitution, as justification for criminal penalties. This quintessential victim was entirely passive in order to show that she had no responsibility for her situation and was

---

industry, reflecting deeper fears and uncertainties, concerning national identity, women's increasing desire for autonomy, foreigners [and] immigrants"); *see also* Julietta Hua & Holly Nigorizawa, *US Sex Trafficking, Women's Human Rights and the Politics of Representation*, 12 INT'L FEMINIST J. POL. 401, 409 (2010); Jo Doezema, *Loose Women or Lost Women? The Re-Emergence of the Myth of 'White Slavery' in Contemporary Discourses of 'Trafficking in Women,'* 18 GENDER ISSUES 23, 34 (2000).

100. Doezema, *supra* note 99, at 41.

101. *See, e.g.*, Rose Broad, *'A Vile and Violent Thing': Female Traffickers and the Criminal Justice Response*, 55 BRIT. J. CRIMINOLOGY 1058, 1068–69 (2015) (describing the harsh sentencing of female traffickers, even though their "relationships and previous victimization [were] significant in their pathways into . . . offending").

102. *See* Michael Kagan, *Immigrant Victims, Immigrant Accusers*, 48 U. MICH. J.L. REFORM 915, 938 (2015).

therefore completely deserving of public sympathy.[103] The victim's innocence was further reinforced by her appearance—specifically her youth, virginity, and whiteness.[104] This image of the victim persists even in contemporary anti-trafficking discourse. The role of the victim in trafficking narratives has not changed—she remains an icon for mobilizing reform to combat "modern-day slavery."[105] She bears resemblance to the prototypical battered woman, an image that played a comparable role in the criminalization of domestic violence[106] and rape.[107]

The iconic trafficking victim of the present day bears a striking resemblance to the "white slave"—she is female, trafficked for sex, and blameless for her plight because of her youth or lack of education; she is rescued by law enforcement instead of escaping on her own, is cooperative in the investigation, and is flawlessly credible as a witness for the prosecution.[108] Just as in the case of the virginal white slave, the rescue of the modern-day trafficking victim "puts a 'soft glove' on the 'punishing fist' of American immigration enforcement," rationalizing criminal enforcement as the necessary means to protect the innocent, feminine subject.[109] Her passivity and blamelessness conceptually separate her from the illegal immigrant or prostitute and render her worthy of legal protection.

A particularly powerful example of the power of the trafficking victim icon is "Christina," a figure invoked in an anti-trafficking rally in the early 2000s, as documented in the field notes of scholar Elizabeth Bernstein. The keynote speaker at an event described Christina as a young woman lured by the promise of a babysitting job, who was ultimately forced to work in a brothel. According to the speaker, Christina found prostitution to be a "disgusting," "degrading," and "traumatic" experience, and tragically discovered that she was infertile once she managed to escape.[110] Bernstein notes that she heard this story retold a number of times with only minor differences, "the only significant alteration being

---

103. Doezema, *supra* note 99, at 28.

104. *Id.*

105. Kinney, *supra* note 90, at 91; *see also* Bernstein, *supra* note 25, at 239 (describing the "victim subject" as the galvanizing figure of what he calls governance through crime, and arguing that "the crime victim has supplanted the rights-bearing citizen as the idealized legal subject of our time").

106. *See, e.g.*, Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 793 (2007); Elizabeth L. MacDowell, *Theorizing from Particularity: Perpetrators and Intersectional Theory on Domestic Violence*, 16 J. GENDER, RACE & JUST. 531, 543 (2013).

107. *See, e.g.*, Aya Gruber, *A "Neo-Feminist" Assessment of Rape and Domestic Violence Law Reform*, 15 J. GENDER, RACE & JUST. 583, 589–90, 592–94 (2012).

108. *See* Srikantiah, *supra* note 4, at 187; *see also* Jennifer Musto, *Domestic Minor Sex Trafficking and the Detention-to-Protection Pipeline*, 37 DIALECTICAL ANTHROPOLOGY 257, 266 (2013) (illustrating that age, gender, and heteronormative behavior all play a role in convincing fact-finders that victimization has actually occurred).

109. Kinney, *supra* note 90, at 94–95.

110. Bernstein, *supra* note 25, at 248.

the victim's name."[111] She also found that the Department of Justice had no record of any prosecuted cases with a victim matching Christina's description.[112] As with the iconic victims of the white slavery epidemic, the facts of Christina's story were less important than her role in a narrative to drive a particular brand of reform.[113]

It remains unclear whether Christina was a real person or a sympathetic composite, but the use of victims as prototypes has troubling implications. Individuals may be pressured, directly or indirectly, to conform to an idealized victim image. Jill Brenneman, a survivor of coerced prostitution who at one point was involved with a sector of the anti-trafficking movement, recalls that she was encouraged to change the narrative of her experiences to conform more closely to a political message.[114] Other scholars have documented the ways in which the charged language of victimhood changes the way in which exploited individuals tell their stories.[115]

This image also plays an influential role in identification of trafficking victims.[116] In discretionary matters of immigration law, for example, categories of relief serve as "proxies for" deeper "questions of worthiness,"[117] and nowhere is that truth more starkly illustrated than in trafficking cases. Immigrants, often times through advocacy by their attorneys, may also find themselves cast as victims to make themselves more eligible for immigration relief, such as T and U visas that are available for survivors of trafficking and labor exploitation.[118] These narratives, however, are fragile and may pose risks to individuals within the justice system. Although Christina has not been a subject of public interrogation, other individuals subject to trafficking or exploitation who have been placed on the "iconic victim" pedestal have later been discredited

111. *Id.*; *see also* Erin Denton, *International News Coverage of Human Trafficking Arrests and Prosecutions: A Content Analysis*, 20 WOMEN & CRIM. JUST. 10, 20 (2010) ("Many such articles [in the study analyzing global media accounts of human trafficking] told stories of young women forced into sexual servitude but frequently failed to mention any specific details regarding a trafficking offense and rarely used real names and locations. Although it is certainly possible that these editorial-style reports were based on actual cases of trafficking, little explanation can be provided for why some articles were specifically related to a trafficking offense and others merely adopted what could be perceived as a scare-tactic approach to addressing sex slavery.").

112. Bernstein, *supra* note 25, at 248–49.

113. *See id.* at 239; *see also* Kinney, *supra* note 90, at 91.

114. *See* Maggie McNeill, *Mind-Witness Testimony: The Unreliability of First-Person Accounts in Sex Trafficking Discourse*, 7 ALB. GOV'T L. REV. 56, 83–84 (2014) (quoting Jill Brenneman as saying that individuals encouraged her to "lie[], which they call 're-framing experiences', to make their point. As difficult and extreme as my experiences were, they wanted me to re-frame them, meaning add things that didn't happen to make it worse.").

115. *Id.* at 70–73.

116. Musto, *supra* note 108, at 266 (quoting a vice detective as saying, "The district attorney is looking to find young trafficked victims chained to beds. It's hard to convince a jury that older women can be victims [of trafficking]. So it's the young victims the DA is after and that's who we look for. But most of our girls aren't perfect victims." (alteration in original)).

117. Elizabeth Keyes, *Race and Immigration, Then and Now: How the Shift to "Worthiness" Undermines the 1965 Immigration Law's Civil Rights Goals*, 57 HOW. L.J. 899, 900 (2014).

118. *See* Keyes, *supra* note 4, at 226–31.

for embellishing their stories.[119] The stakes are much higher for individuals in criminal or immigration proceedings. As narratives fall apart under scrutiny, victims may be discredited as witnesses or deemed ineligible for services, legal relief, or protection from prosecution.

2. Recasting the Victim

a. Age, Gender, Race, and Sexual Exploitation

Popular narratives overwhelmingly portray human trafficking as a crime against women.[120] This is due, in part, to the frequent reduction of trafficking to only the crimes of forced prostitution and sexual exploitation. Many of the victims featured in the Department of Homeland Security's Blue Campaign to combat human trafficking[121] and other public anti-trafficking campaigns are young women, often Latina or Asian, with overt or subtle references to sex trafficking.[122] Scholars have criticized the construct of the "human trafficking victim" as gendered, racialized, and infantilized—imbued with stereotypes about "third world" women.[123] There are relatively few references to the context of labor trafficking. These portrayal of victims also fail to acknowledge the research findings that men and boys are also victims of trafficking, including sex trafficking.[124]

---

119. One high-profile example is the story of Somaly Mam, an anti-trafficking activist in Cambodia, profiled in Nicholas Kristof's documentary *Half the Sky* and selected as one of *Time Magazine*'s "100 Most Influential People" list in 2009. *See* Angelina Jolie, *The 2009 Time 100: Somaly Mam*, TIME MAG. (Apr. 30, 2009), http://content.time.com/time/specials/packages/article/0,28804,1894410_1894289_1894268,00.html. Mam resigned from the head of her foundation in 2014 following a *Newsweek* exposé on inconsistencies in Mam's accounts of her victimization and the experiences of trafficking survivors in Cambodia, many of which were found to have been fabricated. Simon Marks, *Somaly Mam: The Holy Saint (and Sinner) of Sex Trafficking*, NEWSWEEK (May 21, 2014, 5:49 AM), http://www.newsweek.com/2014/05/30/somaly-mam-holy-saint-and-sinner-sex-trafficking-251642.html; Taylor Wofford, *Somaly Mam Foundation Closes*, NEWSWEEK (Oct. 20, 2014, 6:28 PM), http://www.newsweek.com/somaly-mam-foundation-closes-278657.

120. *See, e.g.*, Todres, *supra* note 88, at 11 (analyzing portrayals of trafficking in three popular films and noting, "If you watched these three films, you would think that young women and girls are the only victims of human trafficking. No man or boy is shown as a victim in any of these films.").

121. *See, e.g.*, Annie Isabel Fukushima, Mellon Postdoctoral Assoc., Rutgers Univ., Lecture at the Transnational Feminisms Summer Institute: Caged, Bound, and Shackled: Diasporan Crossings and the Tethering of Subjects to Anti-Violence Iconographies (July 7, 2014); Kasey Carmile Ragan, Rhetoric Constructs Reality: Using Feminist Scholarship to Assess an Anti-Human Trafficking Campaign 14–15, 90–91 (Dec. 2013) (unpublished M.S. thesis, Northern Arizona University).

122. *See* Erin O'Brien, *Human Trafficking Heroes and Villains: Representing the Problem in Anti-Trafficking Awareness Campaigns*, 25 SOC. & LEGAL STUD. 205, 208–09 (2016).

123. *See, e.g.*, Doezema, *supra* note 99, at 37–38; Fukushima & Hua, *supra* note 89, at 53 (noting that the victims in the *Call + Response* campaign materials are largely identified as south or southeast Asian); *see also* Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 1–2 (2002); Kempadoo, *supra* note 85, at 35; Srikantiah, *supra* note 4, at 187. *But see* Butler, *supra* note 5, at 1495–1500 (arguing that iconic victims are still white women and that individuals of color are frequently overlooked as victims of trafficking).

124. *See* SARA ANN FRIEDMAN, ECPAT–USA, AND BOYS TOO 5–6 (2013), http://www.ecpatusa.org/wp-content/uploads/2016/02/and-boys-to-report.pdf.

Popular images of victims have traction with individuals directly tasked with enforcing trafficking laws and identifying victims in need of relief and assistance. There is an impression among some law enforcement officials that most victims are U.S. citizen children, though studies suggest otherwise.[125] Scholar Jennifer Musto observes in her interviews with law enforcement agents that

> it was common for general discussions about human trafficking to veer toward conversations about forced prostitution and invariably, US-born underage girls forced into prostitution by trafficker pimps. Most law enforcement officers agreed that they have come across ever more US-born victims of domestic trafficking. Whether referenced as runaways, throwaways, domestic trafficked minors, or the victims of commercial sexual exploitation, there was a consistent emphasis on the fact that that victims are young (varying from 10 to 17 years of age) and that they keep getting younger.[126]

These perceptions are striking when compared with federal trafficking prosecution patterns. According to the most recent U.S. Department of Justice report, which analyzed 2,515 suspected trafficking cases opened by federally-funded task forces between January 2008 and June 2011, around 82% of trafficking cases involved sex trafficking.[127] The majority of the victims in these cases were women.[128] Most of the sex trafficking victims were U.S. citizens,[129] and many of them were identified as white or black/African-American.[130] Less than half of the cases classified as sex trafficking involved prostitution or sexual exploitation of minors,[131] though most cases involved victims age twenty-four or younger.[132] Numbers suggest, however, that there may be a growing law enforcement focus on pursuing child prostitution and sexual exploitation

---

125. *See, e.g.*, Denton, *supra* note 111, at 17–18.

126. Musto, *supra* note 108, at 265.

127. DUREN BANKS & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CHARACTERISTICS OF SUSPECTED HUMAN TRAFFICKING INCIDENTS, 2008–2010, at 3 (2011) (reporting that 82.1% of trafficking cases opened for investigation in January 2008 and June 2010 were sex trafficking cases, compared to 13.9% which were labor trafficking cases, 2.6% of which were "other suspected trafficking," and 6.8% of which were unknown); *see also* Denton, *supra* note 111, at 20 (arguing, based on an analysis of global media coverage of human trafficking, that sex trafficking is over-reported).

128. BANKS & KYCKELHAHN, *supra* note 127, at 6 (reporting that 432 out of 460 matters classified as sex trafficking cases involved women, compared with 27 that involved men).

129. *Id.* (finding that 345 out of 460 victims in sex trafficking cases were U.S. citizens/nationals, compared to 6 who were legal permanent residents, 64 who were undocumented aliens, 0 who were temporary workers, and 41 whose status was unknown).

130. *Id.* (finding that 102 out of 460 victims in sex trafficking cases were identified as white and 161 were identified as Black/African-American, compared to 95 who were identified as Hispanic/Latino, 17 who were identified as Asian, 23 of which were identified as "other," and 61 whose race was unknown).

131. *Id.* at 3 (reporting that 40% of matters classified as "sex trafficking" involved minors, compared to 48% that involved adults).

132. *Id.* at 6 (reporting that 248 out of 460 individuals identified as victims in sex trafficking cases were age 17 or younger, and 124 were ages 18–24, compared with 46 who were ages 25–34, 12 who were age 35 or older, and 12 whose ages were unknown).

cases because the TVPA does not require proof of force, fraud, or coercion when the victim is a minor.[133] By 2013, prosecutions with a lead charge of sex trafficking of minors had increased from 35 to 203—nearly a five-fold increase.[134] The number of prosecutions for the 2016 fiscal year-to-date is 273 under this lead charge,[135] compared to two prosecutions with a lead charge of sale into involuntary servitude,[136] two prosecutions with a lead charge of trafficking with respect to slavery,[137] and nine prosecutions with a lead charge of forced labor.[138]

These prosecution demographics contrast sharply with the available statistical data on labor trafficking. Internationally, labor trafficking represents a significant percentage of all trafficking cases.[139] The most recent U.S. statistics, however, indicate that a scarce 11% of trafficking cases in the reporting period involved labor trafficking.[140] Interestingly,

---

133. *See* 22 U.S.C. § 7102(9)(A) (2012) (explaining that sex trafficking occurs when the sexual conduct in question is "induced by force, fraud, or coercion, *or* in which the person induced to perform such act has not attained 18 years of age" (emphasis added)).

134. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, FOURFOLD INCREASE IN PROSECUTIONS OF CHILD SEX TRAFFICKING CRIMES SINCE 2008: PROSECUTIONS FOR 18 USC 1591 THROUGH JUNE 2013 (2013), http://trac.syr.edu/tracreports/crim/328/.

135. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, LEAD CHARGE: 18 USC 1591 - SEX TRAFFICKING OF CHILDREN BY FORCE, FRAUD OR COERCION (2016), http://trac.syr.edu/cgi-bin/product/interpreter.pl?tab=criminal&p_series=annual&p_stat=fil&agenrevgrp=&distcode=&proggrp=&progcat=&trac_leadcharge=18+%3A00001591&varlist=&varlist_submit=&countlist=&monthcountlist=&stat_count=133041&stat_monthcount=10090&stat_cost=1&costlist=&month=sep&year=16&t=1482461899&_SERVICE=express9&_DEBUG=0&_PROGRAM=interp.annualreport.sas.

136. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, LEAD CHARGE: 18 USC 1584 - SALE INTO INVOLUNTARY SERVITUDE (2016), http://trac.syr.edu/cgi-bin/product/interpreter.pl?tab=criminal&p_series=annual&p_stat=fil&agenrevgrp=&distcode=&proggrp=&progcat=&trac_leadcharge=18+%3A00001584&varlist=&varlist_submit=&countlist=&monthcountlist=&stat_count=133041&stat_monthcount=10090&stat_cost=1&costlist=&month=sep&year=16&t=1482462061&_SERVICE=express9&_DEBUG=0&_PROGRAM=interp.annualreport.sas.

137. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, LEAD CHARGE: 18 USC 1590 - TRAFFICKING WITH RESPECT TO SLAVERY (2016), http://trac.syr.edu/cgi-bin/product/interpreter.pl?tab=criminal&p_series=annual&p_stat=fil&agenrevgrp=&distcode=&proggrp=&progcat=&trac_leadcharge=18+%3A00001590&varlist=&varlist_submit=&countlist=&monthcountlist=&stat_count=133041&stat_monthcount=10090&stat_cost=1&costlist=&month=sep&year=16&t=1482462315&_SERVICE=express9&_DEBUG=0&_PROGRAM=interp.annualreport.sas.

138. TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, LEAD CHARGE: 18 USC 1589 - FORCED LABOR (2016), http://trac.syr.edu/cgi-bin/product/interpreter.pl?tab=criminal&p_series=annual&p_stat=fil&agenrevgrp=&distcode=&proggrp=&progcat=&trac_leadcharge=18+%3A00001589&varlist=&varlist_submit=&countlist=&monthcountlist=&stat_count=133041&stat_monthcount=10090&stat_cost=1&costlist=&month=sep&year=16&t=1482462315&_SERVICE=express9&_DEBUG=0&_PROGRAM=interp.annualreport.sas.

139. *See* INT'L LABOUR OFFICE, ILO GLOBAL ESTIMATE OF FORCED LABOUR: RESULTS & METHODOLOGY 13 (2012), http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_182004.pdf; *see also* JONATHAN MARTENS & JETTE CHRISTIANSEN ET AL., INT'L ORG. FOR MIGRATION, COUNTER TRAFFICKING AND ASSISTANCE TO VULNERABLE MIGRANTS: ANNUAL REPORT OF ACTIVITIES 2011, at 18 (2012), https://www.iom.int/files/live/sites/iom/files/What-We-Do/docs/Annual_Report_2011_Counter_Trafficking.pdf.

140. BANKS & KYCKELHAHN, *supra* note 127, at 3 & tbl.2 (finding that 278 out of 2515 trafficking cases in the reporting period, or 11.1%, were identified as trafficking cases). It is also worth noting that, for purposes of analysis, matters involving both labor and sex trafficking were classified as sex trafficking cases. *Id.* at 3.

the majority of victims in these cases were also female,[141] which raises questions about the extent to which law enforcement officers identify men as trafficking victims. Individuals identified in labor trafficking cases were predominately Hispanic/ Latino,[142] and most victims were above the age of twenty-five.[143] These statistics suggest that individuals who do not fit the traditional image of victims, such men or older adults, are less likely to be identified as individuals who merit relief.[144]

Critiques of trafficking policy have focused heavily on the danger stereotypes pose to victims who do not fit these images.[145] In the example above, because labor trafficking enterprises are also associated with adult men,[146] gender stereotypes about victims are likely interfere with the successful identification of individuals subject to workplace exploitation. Where an individual is not identified as a victim, it is more likely that he or she will be subject to punishment, as in the case of an unauthorized worker or undocumented immigrant. To assign culpability, the individual's transgressions are more likely to be attributed to choice rather than coercion in the course of a criminal prosecution or removal proceeding.[147]

b. Agency

The innocent victim is an individual who does not wish to be in a trafficking situation, but is incapable of leaving it. This image manifests in law enforcement bias against individuals who self-report after leaving their trafficking situations of their own accord; data suggests that officials are also more likely to believe the accounts of individuals they have rescued through law enforcement operations.[148] This stereotype of help-

141. *Id.* at 6 & tbl.5 (finding that 43 out of 63 matters classified as "labor trafficking" involved a female victim, compared to 20 that involved a male victim).

142. *Id.* at 6 tbl.5 (finding that 34 out of 63 individuals identified as victims of labor trafficking were Hispanic/Latino, compared to one who was white, 6 who were Black/African-American, 9 who were Asian, 11 who were identified as "other," and 2 whose race were unknown).

143. *Id.* (finding that 22 out of 63 individuals identified as victims of labor trafficking were age 25–34 and 15 were age 35 or older, compared with 6 who were age 17 or younger and 17 who were age 18–24).

144. *Id.*; *see also* Denton, *supra* note 111, at 21 (finding that in an analysis of recent news stories on trafficking, 7% of men were identified as exploited and the remaining 93% were identified as voluntarily smuggled and suggesting that "trafficked males are rarely given the victim-status attention in the media that their female and child counterparts receive").

145. *See* Srikantiah, *supra* note 4, at 158, 160–61, 170; *see also* Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 347 (2007).

146. *See* Susan Carroll, *Traffickers Force More Men into Servitude*, HOUS. CHRON. (July 6, 2009, 5:30 AM), http://www.chron.com/news/houston-texas/article/Traffickers-force-more-men-into-servitude-1730660.php (quoting a U.S. Department of Health and Human Services spokesperson who attributed the increase in the number of male victims to an increase in labor trafficking cases).

147. Jennifer Lynne Musto, *What's in a Name?: Conflations and Contradictions in Contemporary U.S. Discourses of Human Trafficking*, 32 WOMEN'S STUD. INT'L F. 281, 283 (2009).

148. Dina Haynes, *Conceptual, Legal and Implementation Gaps in the Protection of Trafficked Persons in the United States*, WILSON CTR., Summer 2010, at 16, 17–18 (Middle East Program & United States Studies Occasional Paper Series),

lessness inhibits effective identification of trafficked people, particularly where they are disinclined to self-identify as "trafficking victims."[149] Where individuals exercise independent capacity for decision-making, their status as victims becomes legally debatable. The law attempts to parse questions of agency in decisions to migrate and undertake risky work arrangements. The Trafficking Protocol and Smuggling Protocol attempt to clearly distinguish the two phenomena, where in fact many migration cases occupy a gray area between them.[150]

The existing legal approach is in tension with migration theory, which posits that the migration process is best understood as a process of free will.[151] As Saskia Sassen observes, migration is a matter of initiative rather than passive osmosis: "only certain people leave, and they travel on highly structured routes to their destinations, rather than gravitate blindly toward any rich country they can enter."[152] The agency of female migrants in particular troubles the dominant narratives about labor migration. Recent studies in migration theory, however, specifically cast the "new migrant" as a female looking to break from social roles and constraints including familial expectations, such as the expectation to care for elderly relatives, to marry, to carry out gender roles determined by society, or to turn over paychecks to male relatives.[153] From this perspective, migrations are matters of choice but never completely voluntary—each decision is influenced by "push" and "pull" factors.[154] Economic, political, and social circumstances contribute to an individual's desire to migrate,[155] blurring the distinction between agency and coercion. In the words of Professor Dina Haynes, "[t]he legal fiction is that one can either be a victim or a capable person of free will, but not both."[156]

---

https://www.wilsoncenter.org/sites/default/files/Rethinking%20Human%20Trafficking.pdf; *see also* Srikantiah, *supra* note 4, at 183 ("[T]he regulations . . . grant preference to victims who are rescued by law enforcement over those who escape from trafficking, a preference that appears nowhere in the statute. Victims whose cases come to light because they escaped from traffickers not only must convince law enforcement to issue an LEA, but also must convince DHS that they could not have left the country after escaping their traffickers.").

149. *See, e.g.*, Cheng & Kim, *supra* note 78, at 363–64.

150. *See supra* Section I.C.

151. Dina Francesca Haynes, *Exploitation Nation: The Thin and Grey Legal Lines Between Trafficked Persons and Abused Migrant Laborers*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 7–8 (2009).

152. SASKIA SASSEN, GUESTS AND ALIENS 2 (1999).

153. *See id.* at 19–20; *see also* Shelley Cavalieri, *Between Victim and Agent: A Third-Way Feminist Account of Trafficking for Sex Work*, 86 IND. L.J. 1409, 1442 (2011) (describing the need for a more nuanced view of coercion that takes into account the marginalizing experiences of women).

154. *See* Carolyn Hoyle, Mary Bosworth & Michelle Dempsey, *Labelling the Victims of Sex Trafficking: Exploring the Borderland Between Rhetoric and Reality*, 20 SOC. & LEGAL STUD. 313, 322 (2011).

155. *See, e.g.*, Nicole Constable, *Migrant Workers, Cross-Border Marriages, and Trafficking*, WILSON CTR., Summer 2010, at 26, 26 (Middle East Program & United States Studies Occasional Paper Series), https://www.wilsoncenter.org/sites/default/files/Rethinking%20Human%20Trafficking.pdf.

156. Haynes, *supra* note 151, at 7.

The narrow conception of a victim permits the state to re-categorize a small number of individuals, particularly (young) women associated with sex work, as victims of abuse rather than as laborers.[157] When trafficking victims are migrants with agency, their lived experience blurs this convenient distinction between "trafficking" and "smuggling for purposes of economic migration," perhaps tipping the scale in favor of designation as an offender rather than a victim.[158] Irregular migration often becomes the only option for people—men and women—to exercise a modicum of choice, increasing the likelihood that people will continue to take risks when accepting employment.[159] For this very reason, scholars argue that the existing anti-trafficking framework, with its emphasis on border control, actually makes it more likely that global migrants will become involved in trafficking.[160]

c. Consent and Coercion

To be identified as a trafficking victim, an individual must be seen as someone who was forced, defrauded, or coerced into labor exploitation.[161] In determining whether an individual has been coerced, one must consider the role of a worker's consent.[162] Those who seek protection as legally-designated trafficking victims must therefore demonstrate their lack of capacity for consent or argue that they were forced, coerced, or deceived into the work arrangement.[163]

Consent in the trafficking context, however, is frequently complicated by a number of factors. Immigration status,[164] youth,[165] gendered oppression,[166] education and experience,[167] and poverty may all play a role in an individual's decision-making.[168] Research on global migration

157. Srikantiah, *supra* note 4, at 194, 197.

158. *See id.* at 197.

159. LEE, *supra* note 7, at 30.

160. *See id.* at 31; *see also* Constable, *supra* note 155, at 26 ("In reality, although economic factors are primary, motivations are often more complex. Women work in Hong Kong for many reasons besides economic need, including escaping marital problems or familial conflicts, or a desire for travel and adventure. Filipina DWs are well educated and do not come from the poorest sector of the Philippine population. If they were, they would not be able to afford the required fees associated with working overseas. Many were under-employed or dissatisfied with opportunities in the Philippines, and their incomes may be higher as DWs in Hong Kong. Many described their decisions as the most desirable 'choice' among the available options.").

161. *See generally* Haynes, *supra* note 151, at 7.

162. *Id.*; *see also* Constable, *supra* note 155, at 26.

163. Constable, *supra* note 155, at 26; Haynes, *supra* note 151, at 7.

164. *See* Haynes, *supra* note 151, at 7.

165. *See* Cheryl Nelson Butler, *Kids for Sale: Does America Recognize Its Own Sexually Exploited Minors as Victims of Human Trafficking?*, 44 SETON HALL L. REV. 833, 835 (2014).

166. *See* Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 29 (2009).

167. *See* Diana Tietjens Meyers, *Feminism and Sex Trafficking: Rethinking Some Aspects of Autonomy and Paternalism*, 17 ETHICAL THEORY & MORAL PRAC. 427, 433–34 (2014).

168. *See* Kay B. Warren, *Troubling the Victim/Trafficker Dichotomy in Efforts to Combat Human Trafficking: The Unintended Consequences of Moralizing Labor Migration*, 19 IND. J. GLOBAL LEGAL STUD. 105, 110 (2012).

shows countless exercises of consent and agency, but at the same time workers regularly assume risks in their employment arrangements.[169] Many workers who decide to migrate understand that work options on the whole are undesirable—whether in the home country or destination country—but work in the destination country is better compensated.[170] There is also a question of type and degree when it comes to the undesirability of an employment opportunity. For migrant workers in the sex industry, some may know beforehand that their job involves a sexual component, but as Laura María Agustín points out, "knowing beforehand is a poor measure of exploitation and unhappiness, since no one can know what working conditions will feel like in any future occupation."[171] Critical to this discussion is the reality that sex work is like any other form of labor, particularly in the informal sector—work that one can consent to, where conditions of exploitation may independently exist, but which is not in itself inherently abusive.[172]

Though human trafficking includes a number of situations of abuse and exploitation, there is tension between the threat of violence within the process and conditions of migration itself and the structural inequality imposed by immigration, labor, and criminal law enforcement frameworks.[173] This makes for a highly individualized, nuanced, and at times ambiguous framework for consent—one that is difficult for the state to standardize and embrace. Aspects of this understanding of consent may also conflict with individual law enforcement officers' beliefs and assumptions about coercion, exploitation, and sex work. For example, in Jennifer Musto's field research, a vice detective interview subject expressed the opinion that

> prostitution is never voluntary. Even if a person says it is, they're not. . . . And whether it be the economics or whatever of the situation, that's coercing them to do it. It's not something they want to do. If they could make money doing something else they

169. Kempadoo, *supra* note 85, at 37–38 ("[Workers] often do not know, or sometimes tacitly accept, . . . the dangers of underground routes they have to take to cross a border; the financial costs; the type of activities; the working and living conditions upon arrival; the high level of dependence on a particular set of recruiters, agents, or employers; the health risks; the duration of the job; their criminalized status once in an overseas location; the enforcement violence; and/or periods of detention or incarceration they may face.").

170. *See, e.g.*, Warren, *supra* note 168, at 110, 112 ("[Many migrant women] see themselves as people who made unfortunate job decisions that resulted in their having to work in exploitative and dangerous conditions with poor pay, both chronic issues in their work lives as a whole whether or not they leave their home communities.").

171. LAURA MARÍA AGUSTÍN, SEX AT THE MARGINS: MIGRATION, LABOUR MARKETS AND THE RESCUE INDUSTRY 30 (2007) (internal quotation marks omitted); *see also* Kempadoo, *supra* note 85, at 38 ("Most trafficked persons . . . express some personal desire to migrate, and about half of women in the global sex trade appear to be conscious of the fact that they will be involved in some form of sex work prior to migration.").

172. *See* Kempadoo, *supra* note 85, at 37.

173. *Id.* at 37–38.

> would. . . . [I]t's very degrading and there's no way a person would do what they would do for money.[174]

Musto specifically notes that this vice detective was speaking in the context of young girls who lacked the age and life experience to fully consent, but in the course of the agent's narrative, these young girls "come to stand in for the entire population of adult female, male, and transgender sex workers."[175]

These distinctions are critical because eliminating the possibility of consent also eliminates meaningful exercise of agency and autonomy. Work, including sex work, may involve aspects of consent and choice, regardless of economic push and pull factors.[176] As Meyers explains, even though these workers may be subject to the constraints of jobless economies, research does not reinforce the notion of "women as passive pawns of economic pressures and criminal gangs," but rather as individuals who are known to "rebuff sex traffickers" and "manipulate the trafficking system to their own advantage."[177] This does not discount the fact that abuse can and does certainly occur under these circumstances, and serious harm may result.[178] Individual experiences of marginalization and desperation may contribute to decisions made around consent.[179] Kamala Kempadoo posits that individuals may use their agency in ways that generate income and permit survival, but the circumstances of travel and work, particularly in informal and underground sectors, may facilitate exploitation.[180] She points out that "[s]ituations in which women are abducted or kidnapped, chained to beds in brothels, and held as sex or other types of slaves are rarely documented," and that labor exploitation and migratory processes are much more common sites of trafficking and other forms of exploitation.[181] The question is, to what extent the state will consider any of these individual factors, including whether individuals who demonstrate agency in the form of consent are eligible for assistance.

The United Nations Office on Drugs and Crime has acknowledged the challenges inherent in assessment of consent and coercion in the law enforcement context, which can create challenges in identifying both

---

174. Musto, *supra* note 108, at 265.
175. *Id.*
176. Meyers, *supra* note 167, at 432.
177. *Id.*
178. Musto, *supra* note 108, at 265.
179. *See* Kempadoo, *supra* note 85, at 37 ("[W]omen are not simply located as victims of terrifying or paralyzing male power or as a homogeneous group. Rather, they are co-located in this perspective as agentic, self-determining, differentially positioned subjects who are capable of negotiating, complying with, as well as consciously opposing and transforming relations of power, whether these are embedded in institutions of slavery, prostitution, marriage, the household, or the labor market.").
180. *Id.*
181. *Id.*

victims and offenders.[182] While a prosecutorial approach under the TVPA would favor a clear case of coercion, deception, or fraud to recruit and retain trafficked workers, the issues of false promises and force are quite complicated and speak to a range of different experiences.[183] Experiences of force, coercion, and deception are equally subjective.[184] Indeed, many scholars view autonomy as episodic and as a matter of degree.[185] The judicial history of coercion in forced labor cases is far from clearly resolved.[186] The TVPA sought to broaden the definition of "psychological coercion" beyond the narrow definition in *United States v. Kozminski*.[187] Unfortunately, the TVPA's non-specific language around coercion, while intended to permit inclusion of psychological and other forms of non-physical coercion, forces a clear designation.[188] This creates space for unfavorable discretion by law enforcement. Where trafficked individuals demonstrate agency and deviate from the image of the passive victim, they do not have defenses or mitigating factors for criminal offenses, such as prostitution, drug use or distribution, unlawful entry, or possession of fraudulent documents.[189]

d. Fallibility

The flip side of agency and consent is that victims cannot always be considered "innocent" of unlawful conduct. Certain individuals are less likely to be "rescued" by law enforcement than to be arrested for having committed another crime.[190] From 2000 to 2007, a total of 298 traffick-

182. *See* U.N. OFFICE ON DRUGS & CRIME, ISSUE PAPER: THE ROLE OF 'CONSENT' IN THE TRAFFICKING IN PERSONS PROTOCOL 15 (2014), https://www.unodc.org/documents/human-trafficking/2014/UNODC_2014_Issue_Paper_Consent.pdf.

183. *See, e.g.*, Julia O'Connell Davidson, *Gender, Migration, 'Trafficking' and the Troublesome Relationship Between Agency and Force*, U. OXFORD FAC. L.: BORDER CRIMINOLOGIES (June 19, 2015), http://bordercriminologies.law.ox.ac.uk/gender-migration-trafficking/ (attributing the emphasis on voluntariness to the dominant liberal paradigm present throughout the antitrafficking legal framework); *see also* AGUSTÍN, *supra* note 171, at 31–32 ("Some intermediaries deceive migrants egregiously, as when the package includes signing a contract whose language and foreign currencies they cannot comprehend. Some overeager travellers [sic] do not investigate what they are promised, and some permit false documents to be prepared which render them vulnerable in ways they cannot imagine.").

184. AGUSTÍN, *supra* note 171, at 32.

185. *See* Meyers, *supra* note 167, at 432.

186. *See* Kathleen Kim, *Psychological Coercion in the Context of Modern-Day Involuntary Labor: Revisiting* United States v. Kozminski *and Understanding Human Trafficking*, 38 U. TOL. L. REV. 941, 943–44 (2007).

187. 487 U.S. 931 (1988), *superseded by statute*, Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, *as recognized in* United States v. Bell, 761 F.3d 900 (8th Cir. 2014); *see also* 22 U.S.C. § 7101(b)(13) (2012).

188. *See* Kim, *supra* note 186, at 966–68.

189. *See* Musto, *supra* note 147, at 283.

190. Haynes, *supra* note 148, at 17; *see also* Musto, *supra* note 108, at 266 ("[S]ome law enforcement conceded that it is much harder to convince people—and especially prosecutors, judges, and juries—that adults are also victimized, since many assume they are complicit in their own victimization or addicted to 'the life' of prostitution").

ing cases were filed in U.S. Federal Appellate and District courts.[191] Most of these cases involved female victims in sex trafficking situations.[192] From the outset, it is clear that these numbers reflect a relatively small percentage of the individuals in trafficking situations in the United States, and that these numbers disproportionately exclude forced labor cases. Prosecutors report a number of challenges to bringing successful cases under these laws including determining who is a victim, obtaining "truthful" testimony from victims in light of fear of traffickers, and ensuring the safety of the victim's family abroad.[193] Ultimately, very few victims testify in trafficking prosecutions.[194] In addition to the ordinary considerations of whether witnesses are willing and able to testify, prosecutors face the challenge of producing "good" victims.[195] As witnesses, trafficking victims may refer to choices such as travelling abroad, knowingly accepting sex work, keeping false passports, and deciding to make money, all of which might undermine their credibility in court.[196] Prosecutors might also anticipate that judges and juries might have stereotypes about who is a victim and may be hesitant to call witnesses who do not conform to this image.[197] The distinction between traffickers and victims may therefore become a matter of selectively-presented evidence where the reality is much more complex.[198]

Lawmakers have attempted to better protect trafficked persons from prosecution. For example, for individuals who have received T visas on account of trafficking, the TVPA makes certain exceptions to the "good moral character" requirement for legal permanent residence.[199] Ordinari-

191. HEATHER J. CLAWSON ET AL., ICF INT'L, PROSECUTING HUMAN TRAFFICKING CASES: LESSONS LEARNED AND PROMISING PRACTICES 12 (2008), https://www.ncjrs.gov/pdffiles1/nij/grants/223972.pdf.

192. *Id.* at v (finding that out of the sample of federal cases prosecuted under the TVPA, 71% of cases involved sex trafficking and 94% involved female victims, whereas 29% involved non-sex-related labor trafficking).

193. *See id.* at vi–vii.

194. *Id.* at vi (finding that out of the sample of federal cases prosecuted under the TVPA, victims testified at the grand jury hearing in 49% of cases, 40% included victim testimony at trial, and 11% involved testimony at the disposition; 89% of cases did not involve victim testimony at the disposition); *see also* Christine Guida, Assistant Dist. Attorney, Nassau Cty. Dist. Attorney's Office, Remarks at the Cardozo Journal of Law and Gender Symposium: Sex Work and the Law: Felony, Fetish, or Free Market? (Nov. 5, 2014), *in* 21 CARDOZO J.L. & GENDER 499, 513 (2015) ("Some [trafficking] cases, many cases, that I do pursue, where the victim is not cooperative with the prosecution, where we either can prove the case evidence-based, photographs, 911 calls, other evidence, eyewitnesses, or we try to go forward and we try to get them services, and we do whatever we can to assist the victim of trafficking, we get them enrolled in a program, we give them a referral, we find them shelter, they get free legal services, job services, whatever we can possibly give them, trauma-based counseling, whatever the programs can give, and we see I [sic] something changes, and it is difficult to pursue a case without a cooperative victim on these cases.").

195. Warren, *supra* note 168, at 118 (citations omitted) (highlighting difficulties in the prosecution of human trafficking cases in the Columbian court system).

196. *Id.*

197. *Cf.* Haynes, *supra* note 151, at 44–45 (distinguishing victims of human trafficking for sex purposes and labor purposes).

198. *See* Warren, *supra* note 168, at 113.

199. 8 U.S.C. § 1255(l)(2)(B) (2012).

ly, the good moral character requirement will disqualify individuals who have committed even a single crime of moral turpitude. Without the waiver exception, individuals with convictions for prostitution, drug offenses, or immigration fraud associated with their trafficking situations would be potentially unable to obtain green cards.[200] Another example of shielding trafficked individuals from prosecution is the series of state "Safe Harbor" laws, which grant minors subject to sex exploitation immunity from prosecution.[201] But these legal exceptions are double-edged swords. While these provisions keep avenues of relief open to individuals who may have engaged in unlawful conduct, they also tend to reinforce the divide between the "guilty" and the "innocent." A claim for an exception will likely downplay individual agency in favor of the argument that the individual was coerced or deceived into the illegal activity. As Jayashri Srikantiah explains, the stereotypical victim who enters the United States under complete control of a trafficker is an "effective prosecutorial story" in that she "allows prosecutors to describe the trafficker as maximally culpable."[202] In addition, "perfect victims" make good witnesses, and individuals may need to conform to this passive stereotype in order to be eligible for relief.[203] "Safe Harbor" prosecutions also retain a focus on victimization of minors, whose testimony is generally not required in trafficking cases because there is no need to prove consent.[204]

B. The Offender Role

1. The "Evil Offender"

Critical scholarship has engaged the troubling stereotypes about trafficking victims, but the other side of the narrative coin is the equally problematic concept of the evil offender.[205] In the cast of characters, this offender is usually the trafficker. Kay Warren notes that this trafficker/victim dichotomy is essential to the trafficking narrative "to harness the power of moralizing, that is both gendered and generational, to produce innocent victims for wider publics, human rights activism, service providers, and the state."[206] As the previous discussion of victims suggests, the complex nature of trafficking and the nature of anti-trafficking laws can make it difficult to distinguish between victims and offenders. The current legal framework, with its emphasis on criminalization, is

200. 8 U.S.C. § 1101(f)(3) (2012).

201. *See* UNIF. ACT ON PREVENTION OF AND REMEDIES FOR HUMAN TRAFFICKING § 15 (UNIF. LAW COMM'N 2013), http://www.uniformlaws.org/shared/docs/Prevention%20of%20and%20Remedies%20for%20Human%20Trafficking/2013AM_UPRHT_As%20approved.pdf.

202. Srikantiah, *supra* note 4, at 160–61.

203. *Id.* at 179 (describing the simultaneous evaluation of the viability of witnesses' testimony alongside individuals' eligibility for immigration relief); *see also* Kinney, *supra* note 90, at 95.

204. *See* BANKS & KYCKELHAHN, *supra* note 127, at 8.

205. *See* Doezema, *supra* note 99, at 24, 28, 47.

206. *See* Warren, *supra* note 168, at 116.

also more likely to attribute wrongdoing to individuals rather than to systemic factors that motivate and facilitate trafficking.

2. Recasting the Offender

a. Troubling the Victim/Offender Dichotomy

Within a narrative, clear distinction between the entirely good/passive conduct of the victim and the thoroughly bad/active conduct of the offender allows for complete assignment of blame and criminal liability. These roles exist in opposition to one another. Nils Christie describes victims and offenders as relative; whereas a victim is "weak[,] [s]ick, old or very young" and "carrying out a respectable project," the offender is "big and bad" and has no personal relationship to the victim.[207]

In reality, however, the distinction between victims and offenders may not be so stark as popular images of trafficking might suggest. In the context of sex work exploitation, for example, supervisors may be hard to distinguish from workers, and individuals in management could easily be considered both complicit and victimized in a trafficking scheme. Traffickers and victims often have similar economic backgrounds, histories of family abuse and drug abuse, and experiences of physical or sexual abuse or family prostitution.[208] Contrast between victims and offenders can be merely a matter of framing; in some cases, individuals have even been charged as co-conspirators in their own trafficking cases.[209]

Personal relationships between offenders and victims are also extremely common. Victims and their traffickers are seldom strangers to each other; many have familial, pseudo-familial, or romantic connections.[210] These relationships that may be characterized by power dynamics, as in the case of individuals who are recruited or supervised by older family members.[211] In some trafficking networks, kinship models are encouraged, including domestic partnerships, mother-daughter dyads, and extended families.[212] Some female traffickers use their friendship and acquaintance networks for recruitment, often at the urging of male

207. *See* Nils Christie, *The Ideal Victim*, *in* FROM CRIME POLICY TO VICTIM POLICY: REORIENTING THE JUSTICE SYSTEM 17, 18–19 (Ezzat A. Fattah ed., 1986).

208. INST. OF MED. & NAT'L RESEARCH COUNCIL, *supra* note 88, at 108–09.

209. *See, e.g.*, Guida, *supra* note 194, at 513, 517 ("[W]e saw one case within our city in the EHTICs, where someone's trafficker had put them down on the lease of the place that they were using as a brother [sic] and I believe she was convicted for trafficking as well.").

210. *See, e.g.*, AGUSTÍN, *supra* note 171, at 1.

211. *See id.*

212. Warren, *supra* note 168, at 114–15, 117–18 (recognizing that "images of trafficking networks as family businesses complicate the vision of solo traffickers and victims in favor of the family basis common to other kinds of organized crime," and the fact that women also work as labor recruiters "contrasts with the image of the predatory male stranger common in antitrafficking media").

counterparts with whom they are intimately involved.[213] Though most trafficking narratives emphasize the fear and psychological manipulation that connects victims and offenders, there is a wide range of experiences among trafficked individuals, and the reality is that some individuals may feel emotional connection, familial obligation, and other complex—and potentially competing—emotions to those implicated in their trafficking situations.

b. State Perceptions of Traffickers

Traffickers are almost always portrayed as male, nonwhite, and noncitizens.[214] These portrayals are not without historical precedent. During the moral panic of the early twentieth century, anti-trafficking reformers frequently depicted offenders as foreigners and immigrants.[215] Jonathan Todres observes that these representations are intentional, drawing on the theme that trafficking is a problem "rooted in other cultures" that are "exploitative by nature."[216] This image of men of color as traffickers persists in current anti-trafficking law enforcement. Jennifer Chacón observes, for example, that public statements by the U.S. Department of Justice generally involve cases with noncitizen or minority defendants.[217]

The demographics of those apprehended and tried for trafficking offenses underscore the disproportionate effects of anti-trafficking law enforcement on communities of color. The U.S. Department of Justice estimates that, between 2008 and 2010, more than 75% of suspects identified in trafficking cases were male.[218] Overwhelmingly, suspects were people of color, predominantly black or African-American.[219] Critics argue criminal anti-trafficking laws contribute to gendered and racialized

213. *See* Broad, *supra* note 101, at 1061.

214. Kinney, *supra* note 90, at 91; *see also* Fukushima & Hua, *supra* note 89, at 53 ("[T]he criminal element is visualized as a Southeast Asian man who enables the transaction of women and children. The man is racialized as similar to the women and children he traffics over and against his presumed difference to the male voice behind the camera (a difference emphasized through the Southeast Asian man's broken and accented English), making the crime seem like a cultural problem of immoral global 'others.'"). *But cf.* U.N. OFFICE ON DRUGS & CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS 10 (2009), http://www.unodc.org/documents/Global_Report_on_TIP.pdf (finding that in a study of trafficking in forty-six countries, women also make up a significant percentage of perpetrators).

215. *See* Doezema, *supra* note 99, at 30, 39–41.

216. *See* Todres, *supra* note 88, at 52–53.

217. Chacón, *supra* note 52, at 1628 (underscoring patterns throughout the Department's annual reports to Congress).

218. *See* BANKS & KYCKELHAHN, *supra* note 127, at 1, 6 (finding that 368 of the 488 suspects in trafficking cases during the reporting period were male, compared to 88 who were female and 32 whose sex was unknown). The arrest and prosecution of male suspects, however, does not necessarily mean that most trafficking cases are in fact committed by men. *See, e.g.*, Denton, *supra* note 111, at 21 (opposing the characterization of "sexual exploitation of trafficked individuals as a male-dominated and male perpetrator-only crime").

219. BANKS & KYCKELHAHN, *supra* note 127, at 6 (reporting that 224 out of 488 suspects were Black/African American, 119 were Latino or Hispanic, and 28 were Asian, compared with 24 who were white, 20 whose race was identified as "other," and 73 whose race was unknown).

perceptions of offenders, "creat[ing] a new 'demon' akin to the black drug dealer or Arab terrorist who not only is depicted as completely disrespectful of women but also is used to justify drastic punitive measures against populations of color."[220]

These racialized images of offenders have larger community effects in the enforcement of anti-trafficking laws, particularly state and local ordinances with low thresholds for police stops. Kate Mogulescu, founder of the New York Legal Aid Society's Trafficking Victims Advocacy Project, has pointed out this problem with respect to New York's anti-prostitution loitering law.[221] Because law enforcement must only have "perceived intention" to make stops for loitering, stops tend to target particular neighborhoods and individuals ("[t]he same people who face arrest for every sort of quality of life offense in New York City") who are then more likely to be prosecuted for trafficking offenses.[222] Mogulescu also cites the New York Police Department's (NYPD) Operation Losing Proposition, a multi-year effort targeting johns, as an example of a street-based operation that results overwhelmingly in the arrest of undocumented men of color.[223] The public's consumption of trafficking narratives takes on new significance in a widely-advertised tool to combat trafficking: the Department of Homeland Security's Investigation Tip Line.[224] Official government statements about trafficking cases tend to be those that involve noncitizen defendants and sex trafficking. In doing so, argues Jennifer Chacón, law enforcement "primes the public to look for—and report—a certain kind of trafficker."[225]

When law enforcement uses anti-trafficking policy as justification to establish a presence in select communities, it facilitates police harassment in the name of protecting victims. Law enforcement sweeps have particularly detrimental effects on individuals in the shadow economy; in the case of the sex industry, for example, suspected sex workers, clients, and pimps all face the possibility of police detainment, arrest, and prosecution.[226] Practices intended to identify offenders disproportionately target immigrants and communities of color by placing them "under extra scrutiny" and "expos[ing] them to the dangers of being apprehended,

220. Kempadoo, *supra* note 85, at 43.

221. *See* Kate Mogulescu, Pub. Def., Legal Aid Soc'y Trafficking Victim's Advocacy Program, Remarks at the Cardozo Journal of Law and Gender Symposium: Sex Work and the Law: Felony, Fetish, or Free Market? (Nov. 5, 2014), *in* 21 CARDOZO J.L. & GENDER 499, 500–01, 510 (2015) (discussing N.Y. PENAL LAW § 240.37 (McKinney 2016)).

222. *Id.* at 510.

223. *Id.* at 524; *see also NYPD Legal Bureau: Civil Enforcement Unit*, NYC, http://www.nyc.gov/html/nypd/html/legal_matters/dclm_civil_enforcement_unit.shtml (last visited Nov. 5, 2016) ("'Operation Losing Proposition,' focuses on the seizure and forfeiture of the cars of 'johns', [sic] the prostitutes' customers, thereby deterring street prostitution.").

224. *See Investigating Illegal Movement of People and Goods*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/tipline#wcm-survey-target-id (last visited Aug. 21, 2016).

225. Chacón, *supra* note 52, at 1629.

226. Bernstein, *supra* note 25, at 253.

harassed, detained, deported, and recycled back into underground, criminalized activities."[227] This phenomenon heightens the perception of immigrants as criminals and fuels immigration enforcement efforts, ironically making trafficking more clandestine and giving abusive employers more leverage in their threats to deport workers who come forward to report trafficking to law enforcement.[228]

The United Nations Office on Drugs and Crime acknowledges in its issue papers that the criminalization framework it endorses will subject offenders "to a different and typically harsher legal regime than would be applicable if that identification had not occurred."[229] In the United States, anti-trafficking reforms contribute to the trend of incarcerating people of color, particularly men, with prescription of heavier sentences. Ironically, scholar Elizabeth Bernstein points out, "young men of color [are] being given 99-year or even life sentences as 'domestic traffickers'—more than they would get if they had killed the woman in question, rather than simply profiting from their labor."[230] Although men are prosecuted at a higher rate than women for trafficking, researcher Rose Broad finds that female offenders are also likely to suffer from gendered portrayals of trafficking. According to her research, female traffickers frequently received harsher penalties than their male counterparts and attributes this to the "doubl[y] devian[t]" nature of female offenders in that they both transgress gender norms and commit crimes "that only the most brutal of men would contemplate."[231]

In the state response to human trafficking through, individual criminal liability ignores the responsibility of other social actors that create the demand for exploited labor. Media coverage and law enforcement training focus on the conduct of "bad actors" rather than culpability for the individuals who demand this labor and consume its results.[232] The demand for cheap labor in the agricultural, manufacturing, and domestic and commercial service industries far exceeds the demand for underground sex work, which suggests that enforcement action against actors in the formal economy might be more effective in curtailing practices of trafficking and exploitation than a street-based dragnet approach.[233]

227. Kempadoo, *supra* note 85, at 47.
228. *See, e.g.*, Chacón, *supra* note 52, at 1632–33.
229. U.N. OFFICE ON DRUGS & CRIME, *supra* note 182, at 15.
230. Bernstein, *supra* note 56, at 13.
231. Broad, *supra* note 101, at 11–12.
232. *Id.*
233. *See* Kempadoo, *supra* note 85, at 43.

C. The Rescuer Role

1. The "Good Rescuer"

As the trafficking narrative goes, the plight of the innocent victim at the hands of the evil offender must be resolved by a third party—the good rescuer.[234] The rescuer in popular trafficking narratives is frequently American, in contrast to the traffickers who are foreign nationals.[235] The state and its laws occupy the rescuer role, with law enforcement officers as proxy.

The youth, naiveté, weakness, and limited capacity of victims, as well as the danger posed by offenders, apparently justifies rescue by the state. The rationale for intervention, as summarized by Jennifer Chacón, is "that trafficking is perpetrated by foreign criminal organizations and is best solved through aggressive policing at the border."[236] The legal anti-trafficking framework, at both a national and international level, reflects and reinforces this need for intervention by law enforcement. But this approach does not always benefit victims. Nor does it always result in the successful identification, arrest, and prosecution of offenders. In Melissa Ditmore's research for the Sex Worker Project, she interviewed a law enforcement agent who at one point thought "victims would be grateful for the rescue," but then realized "that this is not true. It is more complicated."[237]

2. Recasting the Rescuer: Rescue as Harm

a. "Rescue" as Carceral Protectionism

Anti-trafficking reformers frequently point to law enforcement intervention as a means to keep victims safe. As an example of the paternalism of the state's role as rescuer, Jennifer Musto quotes an NGO advocate as saying that the arrest of a 16-year-old sex worker is justifiable because "it's the only way we can help her."[238] In her research, law enforcement officials repeatedly stated that they felt arresting young people in the sex industry is critical to victims' safety.[239] Musto compares these

234. Todres, *supra* note 88, at 15.

235. *Id.*

236. Chacón, *supra* note 52, at 1630–31.

237. MELISSA DITMORE, SEX WORKERS PROJECT, THE USE OF RAIDS TO FIGHT TRAFFICKING IN PERSONS 38 (2009), http://sexworkersproject.org/downloads/swp-2009-raids-and-trafficking-report.pdf; AMY FARRELL ET AL., NE. U. INST. ON RACE & JUST., UNDERSTANDING AND IMPROVING LAW ENFORCEMENT RESPONSES TO HUMAN TRAFFICKING: FINAL REPORT 38 (2008), https://www.ncjrs.gov/pdffiles1/nij/grants/222752.pdf.

238. Musto, *supra* note 108, at 257.

239. *Id.* at 267 (quoting a law enforcement interviewee who stated, "We have to focus on arresting victims as an option because right now we don't have other options. I don't necessarily like putting victims in jail. I recognize that's what we're doing. I'm incarcerating a victim. But I'm doing it for their best interest. . . . Law enforcement as a whole—we don't necessarily want to incarcerate the victim, but we have to work with the tools we have."); *see also id.* at 268 (noting where a law enforcement officer referred to the criminal justice and juvenile justice system as "safety net[s]").

arrests to the history of institutionalizing young women for their protection; in both cases, she argues, these young women were likely to be victimized while in custody.[240] She concludes that the law enforcement approach, particularly in the context of both voluntary and involuntary sex work, embodies a combination of incarceration and paternalism—a "largely uninterrogated combination of law enforcement punishment combined with psychosocial efforts to rehabilitate them"—which she calls "carceral protectionism."[241]

It is not coincidental that raids typically focus on prostitution operations and the practice of arrest as a form of protection for women in particular. The invocation of women's bodies as sites of violence rationalizes state intervention "for their protection" and presumes the state knows what is best for these individuals, even if it means arresting and detaining them. For individuals who consider themselves "workers" as opposed to "victims of trafficking," "rescue" is tantamount to "capture," and the state can appear "not as a savior, but oppressor."[242] Rather than expanding rights for women, migrants, and workers—categories which overlap in meaningful ways—the rescuer may actually constrain their movement and endanger their lives and livelihoods.[243] This phenomenon, ironically, replicates the dynamics of control and coercion within a trafficking situation.

Many law enforcement officials and anti-trafficking advocates believe that rescue is necessary, even when it is unwelcome, because it allows the state to connect vulnerable individuals with important services and benefits. Anti-trafficking reforms have included a number of critical victim services, which are certainly available via law enforcement referrals and certifications. However, state interventions are not always effective in connecting individuals identified as trafficked with the assistance they might need. It is not a regular priority for law enforcement to connect trafficked individuals with benefits and services. There are no overarching due process guidelines to guarantee prompt access to legal assistance or supportive services in association with law enforcement arrests.[244] Service providers have recalled cases where trafficking survivors were denied access to immigration counsel and were deported or interrogated before obtaining access to counsel.[245] This may not happen in eve-

240. *Id.* (citations omitted).

241. *See id.* at 263. In their article about human trafficking intervention courts, Aya Gruber, Amy Cohen, and Kate Mogulescu introduce the similar concept of "penal welfare," which they define as "states' growing practice of provisioning social benefits through criminal court." *See* Aya Gruber, Amy J. Cohen & Kate Mogulescu, *An Experiment in Penal Welfare: The New Human Trafficking Intervention Courts*, 68 FLA. L. REV. (forthcoming 2016).

242. Kempadoo, *supra* note 85, at 41.

243. *See* Kapur, *supra* note 123, at 6.

244. *See* DITMORE, *supra* note 237, at 40–41.

245. Melissa Ditmore & Juhu Thukral, *Accountability and the Use of Raids to Fight Trafficking*, 1 ANTI-TRAFFICKING REV. 134, 144–45 (2012).

ry case; service providers acknowledge positive experiences of collaborating with agents, but also indicated that experiences with law enforcement are "hit or miss," and that well-meaning agents at times found their hands tied by systemic constraints.[246] The policy of arresting individuals in the interest of their own welfare also suggests that benefits cannot be given outside the criminal justice system, although there are a number of programs that seek to deliver their services independently of criminal justice proceedings.[247]

b. Rescue as Community Harm

There is widespread concern about the collateral damage from law enforcement intervention, particularly rescue of victims through law enforcement raids. Although raids and rescues differ in terms of their purposes and targets, the terms are frequently used interchangeably in the law enforcement context, and individuals who are rescued often receive similar treatment to those arrested in raids.[248] In a Sex Worker Project study on law enforcement raids, nine of the fifteen sex workers interviewed were previously arrested by local police at least once (often on multiple occasions), and were never identified as trafficking victims while in law enforcement custody.[249] This does not appear to be an isolated phenomenon. A prominent public example of this phenomenon was the extensive Operation Gilded Cage, a raid of eleven massage parlors owned and staffed by Koreans in the San Francisco Bay area.[250] Law enforcement arrested forty-five people and brought 150 workers into police custody as witnesses.[251] Federal officials did not call in trained service providers for twenty-four hours, during which time the women were interrogated.[252] The operation was heralded as the largest trafficking bust since the passage of the TVPA, and yet none of witnesses were deemed eligible for immigration relief as trafficking victims.[253] "By the time advocates arrived, federal officials had already decided that the majority of women were not legal victims of trafficking, and placed them in immigration detention."[254]

246. DITMORE, *supra* note 237, at 40.
247. *See id.* at 40–41.
248. *Id.* at 20.
249. *Id.* at 8.
250. *See* David Rosenzweig & K. Connie Kang, *Raids on Brothel Rings Net 45 Arrests*, L.A. TIMES (July 2, 2005), http://articles.latimes.com/2005/jul/02/local/me-smuggling2.
251. *Id.* The FBI's website notes that the operation "has resulted in the arrest/detention of approximately 100 illegal/legal aliens, [and] 26 federal convictions," suggesting that some of the individuals detained as witnesses were later classified as immigration enforcement targets. *See Today's FBI: Investigative Programs*, FBI.GOV, https://www2.fbi.gov/facts_and_figures/investigative_programs.htm (last visited Aug. 29, 2016).
252. Grace Chang & Kathleen Kim, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s)*, 3 STAN. J. C.R. & C.L. 317, 333 (2007).
253. *See id.*
254. *Id.*

While rescues are intended to reach victims, there is an additional danger that individuals will be identified as offenders who have run afoul of anti-prostitution, labor, or immigration law. In Operation Gilded Cage, for example, more than half of the workers were ultimately deported after law enforcement officials concluded they had not been coerced and, therefore, had not been subject to trafficking.[255] Another example is Operation Bad Neighbor, another brothel sting in the Bay Area, in which "104 women were arrested [but] only twelve were certified as victims."[256] Sienna Baskin, an attorney for the Sex Workers Project at the Urban Justice Center in New York, recently observed that an attempt to "crack down" on trafficking during the 2014 Super Bowl resulted in arrests of numerous sex workers.[257]

In addition to harming workers in marginalized labor sectors, including underground sex work, law enforcement rescue tactics may disproportionately target marginalized communities. In October 2014, the Red Umbrella Project released its Human Trafficking Intervention Court report—an eight-month study of human trafficking intervention courts in eleven jurisdictions within New York City.[258] Ariel Wolf, a Red Umbrella member and court observer for the project, described "racially motivated tactics by the NYPD, especially in charges like loitering for the purpose of prostitution."[259] She observes, for example, that 94% of the arrested individuals in Brooklyn were black, and that there was a high rate of arrest of trans women in Jackson Heights.[260] In addition, there were "frequent re-arrests also happening in places where it was a known area for prostitution charges," resulting in repeat victimization by law enforcement.[261]

Not only are anti-trafficking raids harmful to victims and non-trafficked persons working in certain marginalized industries, but the beneficial effects of these raids are often overstated. Arrests often do not result in successful identification of trafficked individuals or help with referring them to victim services.[262] Law enforcement officials and advocates also agree that individuals arrested in raids often do not make good witnesses in trafficking prosecution. Although state officials maintain the

255. *Id.* at 333–34.

256. Bernstein, *supra* note 56, at 14.

257. Sienna Baskin, Co-Dir., Sex Workers Project, Urban Justice Ctr., Remarks at the University of Miami Race and Social Justice Law Review Symposium: Converge! Reimagining the Movement to End Gender Violence: Panel on Sex Trafficking (2014), *in* 5 U. MIAMI RACE & SOC. JUST. L. REV. 445, 451 (2015).

258. *See generally* AUDACIA RAY & EMMA CATERINE, RED UMBRELLA PROJECT, CRIMINAL, VICTIM, OR WORKER? (2014), http://www.redumbrellaproject.org/wp-content/uploads/2014/09/RedUP-NYHTIC-FINALweb.pdf.

259. Ariel Wolf, Artist, Sex Worker & Organizer, Red Umbrella Project, Remarks at the Cardozo Journal of Law and Gender Symposium: Sex Work and the Law: Felony, Fetish, or Free Market? (Nov. 5, 2014), *in* 21 CARDOZO J.L. & GENDER 499, 500, 503 (2015).

260. *Id.* at 503.

261. *Id.* at 504.

262. DITMORE, *supra* note 237, at 9.

belief that trafficking is a problem, there are relatively few prosecutions.[263] Most prosecutions are in sex trafficking cases, typically cases involving minors, where proving consent is not an issue.[264] Sienna Baskin observes that these raids can in fact be more traumatizing than the trafficking or exploitation experiences themselves.[265] For these reasons, the federal government has also expressed concerns about raids practices,[266] but the continued pursuit of law enforcement objectives continues to place trafficked people at risk.[267]

III. RECONSIDERING TRAFFICKING NARRATIVES AND THE STATE'S CARCERAL RESPONSE

A. Anti-Trafficking Law as Crime Control

In 2010 Luis CdeBaca, Ambassador-at-Large for the Office to Monitor Combat in Trafficking in Persons at the U.S. Department of State, made the following remarks at a WWICS conference on human trafficking:

> [H]uman trafficking around the world is not something we can address only by ridding the world of sexism and racism, of poverty, conflict, corruption or human rights abuses. Nor is it a cultural phenomenon that can only be tackled with education and awareness building. To put it bluntly, trafficking in persons is a crime. It is a crime akin to murder and rape and kidnapping. We have to confront it not just by addressing root causes that are so far away from the realities of the trafficker and those they enslave, but by using all of our tools. And so the UN Protocol mandates criminalization of trafficking in persons, and the U.S. laws are very focused on law enforcement, because a policy solution to a heinous crime problem must involve freeing the victims and punishing their tormentors.[268]

For individuals who entered the United States unlawfully, interaction with the judicial system also means potentially facing criminal charges, including misdemeanors for entry without inspection or felony charges for illegal reentry or document fraud.[269] The Global Alliance Against the Trafficking of Women (GAATW) has indicated that, despite extensive financial investment in addressing trafficking in persons (the

263. Chacón, *supra* note 52, at 1630.

264. *See id.*

265. Baskin, *supra* note 257, at 451.

266. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 31 (10th ed. 2010), http://www.state.gov/documents/organization/142979.pdf (explaining that wholesale raids are one of ten troubling governmental practices).

267. *Id.* at 40.

268. Luis CdeBaca, Ambassador-at-Large, Office to Monitor & Combat Trafficking in Persons, Remarks at the John F. Kennedy, Jr. Forum, Harvard University's Institute of Politics: From Bondage to Freedom: The Fight to Abolish Modern Slavery (Feb. 18, 2010), http://www.state.gov/j/tip/rls/rm/2010/136918.htm.

269. *See* Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 142, 144 (2009).

United States being the largest investor), there is "substantial evidence to suggest that anti-trafficking measures have had unacceptably negative consequences for marginalized categories of people, such as migrants and refugees and that these measures have been counter-productive for some of the very people they are supposed to benefit most directly."[270] As previously discussed, law enforcement regularly arrest marginalized individuals, such as African-American men and transgendered sex workers that are routinely targeted and as part of local anti-trafficking initiatives. Even where community members are not arrested, neighborhoods may be subject to greater police presence and scrutiny.[271]

Anti-trafficking activism should therefore consider an approach that resists the trend towards criminalization. Dr. Annalee Lepp argues for what she calls a "do no harm" framework as an approach to trafficking.[272] This framework would require the government and all parties involved in anti-trafficking initiatives to consider the possible harmful effects of these strategies, including consequences for the rights and safety of victims.[273] The associated "do no harm" principles includes judicial limitations on rescue and post-rescue activities; protections for a rescued person's human rights and prevention of further violations; adequate care to the person during and after the rescue; and application of "the best interest of the victim/rescued person" principle to guide all actions and decisions in the case.[274]

The role of law enforcement may be reconsidered as part of this "do no harm" framework. Under current anti-trafficking policy, law enforcement intervention is intended to direct trafficked and exploited individuals towards the criminal justice system, but it is worth considering the effectiveness of minimal contact with police.[275] Eisha Jain has suggested that because arrests carry consequences, the law should create mechanisms to expunge arrests from individual records in a similar manner to convictions.[276] Where individuals are arrested in association with trafficking situations and do not wish to be involved in a prosecution, an expungement would help these individuals avoid the law enforcement

---

270. ANNALEE LEPP, LEARNING NETWORK, CTR. FOR RESEARCH & EDUC. ON VIOLENCE AGAINST WOMEN & CHILDREN, DO NOT HARM: A HUMAN RIGHTS APPROACH TO ANTI-TRAFFICKING POLICIES AND INTERVENTIONS IN CANADA (2013) (internal quotation marks omitted), http://www.learningtoendabuse.ca/sites/default/files/AnnaLee_Lepp_Human_Trafficking.pdf; *see also* Bernstein, *supra* note 57, at 57.

271. *See* Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 820 (2015).

272. LEPP, *supra* note 270, at 4.

273. *Id.* at 4–5.

274. U.N. OFFICE ON DRUGS & CRIME & GOV'T OF INDIA, PROTOCOL ON INTER STATE RESCUE AND POST RESCUE ACTIVITIES: RELATING TO PERSONS TRAFFICKED FOR COMMERCIAL SEXUAL EXPLOITATION 7 (2007), https://www.unodc.org/documents/human-trafficking/India_Training_material/Protocol_on_Inter_State_Rescue_and_Post_Rescue_Activities.pdf.

275. *See infra* Section III.B.

276. Jain, *supra* note 271, at 862–63.

scrutiny that may jeopardize their safety and subsistence and help facilitate voluntary interactions with law enforcement in the future.

B. Anti-Trafficking Law as Immigration Control

National and international debates over human trafficking reflect anxieties about the mobility of populations and the phenomenon of migration. The international community took great pains to distinguish trafficking from human smuggling, but remains concerned with the irregular migration aspects of trafficking.[277] In the United States, debates over the TVPA took great pains to distinguish trafficking from smuggling and economic migration.[278] Trafficking is still associated with border security and immigration control.[279] Criminal penalties associated with unlawful migration and presence in the United States have expanded since the 1980s, including federal charges related to unauthorized reentry to the United States and document fraud to facilitate unauthorized work.[280] States and localities have also passed laws and ordinances targeting individuals who may be in the country unlawfully.[281] These laws increase the likelihood that individuals profiled as undocumented immigrants will come into contact with law enforcement.

Many advocates for immigrant women's rights have supported the involvement of law enforcement in trafficking cases as a way of connecting exploited workers to much needed services, including certification for T or U visas.[282] However, there are other angles of this problem that also have implications for immigrant rights. As Michael Kagan recently pointed out in his analysis of the U visa program, it is "the knife's edge that separates good/deserving immigrants from bad/undeserving ones. By distinguishing between deserving and undeserving immigrants, different visa programs often perpetuate preconceived images or narratives of the ideal beneficiary."[283] Employing these narratives on behalf of some clients seeking trafficking relief may ultimately undermine opportunities for others to seek relief.

Jennifer Chacón has also pointed out that parsing the distinction between trafficking victims and abused immigrant workers is part of a larger strategy of immigration control.[284] She pointedly observes that "[t]he invocation of trafficking . . . puts a human rights gloss on a border-

277. *See* Galma Jahic & James O. Finckenauer, *Representations and Misrepresentations of Human Trafficking*, TRENDS ORGANIZED CRIME, Mar. 2005, at 24, 28–30.

278. *See* Srikantiah, *supra* note 4, at 191–92.

279. *See* Chacón, *supra* note 52, at 1637.

280. *See* 8 U.S.C. § 1324(a)(1)(A)–(B) (2012); 18 U.S.C. § 1028(a)(1)–(8) (2012).

281. *See* Chacón, *supra* note 52, at 1643–45; Eagly, *supra* note 84, at 1346.

282. *See, e.g.*, Salima Khakoo, Karl Krooth, & Gail Pendleton, Advanced Issues in T and U Visas 2 (unpublished manuscript), https://cliniclegal.org/sites/default/files/1._advanced_issues_for_ts_and_us.pendleton_1.pdf (last visited Sept. 17, 2016).

283. Kagan, *supra* note 102, at 930.

284. *See* Chacón, *supra* note 52, at 1649.

enforcement model that, in fact, raises a number of serious human rights concerns."[285] Local anti-trafficking laws, adopted in the name of victim protection, have in fact given law enforcement enhanced abilities to identify and arrest undocumented immigrants or immigrants with criminal records.[286]

Advocates should also consider the effects of these narratives on other movements for workers' rights. Advocates on behalf of sex workers and other marginalized laborers are concerned that immigration control enforcement may serve as auspices to crack down on marginalized labor operations.[287] According to one law enforcement agent interviewed for the Sex Worker Project study, "[the U.S. Department of Justice and other law enforcement agencies] have to have probable cause for a criminal case, but ICE [Immigration and Customs Enforcement] can raid whatever they want, if they think there are illegal immigrants."[288] The preamble to the TVPA presents labor trafficking related primarily as an economic threat rather than a practice that is damaging to exploited workers.[289] This suggests that individuals subjected to labor trafficking are "second class victims"[290] less worthy of relief and legal protection. This framing also eclipses the larger realities of abuse of workers in both formal and informal sectors of the economy.

Victim-centered approaches, like those highlighted in both the 2015 Trafficking in Persons Report[291] and the current strategic plan for the Office of Victim Services,[292] are fundamentally incompatible with current immigration law enforcement practices. So long as individuals are recognized as immigration law offenders rather than as victims of exploited labor, the prevention of trafficking and protection of victims will remain subordinate to border control objectives. Conversely, comprehensive immigration reform that offers more individuals the opportunity to migrate would decrease the reliance of low-income migrants on exploitative employers to obtain passage to the United States.[293]

---

285. *Id.* at 1642.

286. *See* Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557, 1594–95 (2008) (describing the efforts of state governments and municipalities to localize immigration control through the use of criminal law, particularly since September 11, 2001); *see also* Jennifer M. Chacón, *Human Trafficking, Immigration Regulation and Sub-Federal Criminalization*, NEW CRIM. L. REV. (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2791792.

287. *See, e.g.*, DITMORE, *supra* note 237.

288. *Id.* at 37.

289. *See* 22 U.S.C. § 7101(b)(12) (2012) (referring to the "impact [trafficking has] on the nationwide employment network and labor market").

290. LEPP, *supra* note 270, at 7.

291. *See* U.S. DEP'T OF STATE, *supra* note 266, at 26.

292. U.S. DEP'T OF JUSTICE ET AL., COORDINATION, COLLABORATION, CAPACITY: FEDERAL STRATEGIC ACTION PLAN ON SERVICES FOR VICTIMS OF HUMAN TRAFFICKING IN THE UNITED STATES 2013–2017, at 10 (2014), https://www.ovc.gov/pubs/FederalHumanTraffickingStrategicPlan.pdf.

293. *See* Meyers, *supra* note 167, at 438.

CONCLUSION

Dominant anti-trafficking discourse, from its historic roots in the United States to its present-day globalized incarnation, relies on images of trafficking victims, offenders, and rescuers to promote and reinforce the need for state intervention through law enforcement. These trafficking narratives and the characters within them are imbued with racialized and gendered assumptions, presenting barriers to effective assistance to exploited workers and evolution of policy to prevent trafficking and enhance community safety. Misguided law enforcement policy intended to rescue victims may replicate the dynamics of coercive control within a trafficking situation, expose real and perceived victims to danger, and justify arrests and higher sentences for populations already disproportionately targeted by the justice system. Moving forward, the anti-trafficking movement—especially advocates who are concerned with larger questions of rights for undocumented and exploited workers—should reconsider the value of the carceral approach to human trafficking based on concern for victims, but also based on the concern for overarching issues of solidarity with other marginalized communities, particularly communities of color.

COUNTING ON QUALITY: THE EFFECTS OF MERITS BRIEF QUALITY ON SUPREME COURT DECISIONS

ADAM FELDMAN†

ABSTRACT

Many legal scholars, academics, and practitioners contend that the quality of merits briefs matters little in the United States Supreme Court. According to this logic, by the time a case has reached the Supreme Court the facts are already clear from the record and experts have meticulously prepared briefs particularly tailored to meet the Justices' informational needs. This Article sets forth a different thesis; specifically that merits brief quality matters even at the upper-echelon of the U.S. Courts. The results of this Article show that merits brief quality affects both case outcomes and the amount of language Supreme Court's opinions share with merits briefs even after controlling for Supreme Court litigation expertise. Due to the lack of existing empirical scholarship on the effects of brief quality, this Article has two objectives. First, it develops a conceptualization of brief quality that can be reliably measured. Second, it tests whether the quality of merits briefs matters by looking at both how this affects case outcomes and the Justices and clerks' likelihood of adopting language from merits briefs in the Court's opinions. To do this, the Article develops a new measure to gauge brief quality and to make comparisons between briefs. The dataset created for this Article consists of 9,498 Supreme Court merits briefs from the 1946 through the 2013 Terms.

TABLE OF CONTENTS

† Postdoctoral Fellow in the Empirical Study of Public Law, Columbia Law School; Ph.D Candidate in Political Science, University of Southern California. I would like to thank Pamela Corley, Justin Wedeking, Paul Collins, as well as many audience members during this Article's

"I'll read good briefs, and I'll understand, that's a good brief. And you'll try to think back at exactly what it was that made it a good brief, and the sentence structure, and how it flowed together. And to a certain extent, your mind internalizes that."[1]

Chief Justice John Roberts

INTRODUCTION

Beginning day-one in law school, aspiring lawyers are taught that success in their future careers is dependent upon becoming good legal writers. This maxim often becomes a reality as attorneys, especially at the appellate level, spend the bulk of their time preparing written documents such as briefs and motions. As mastery of the written word is an essential attribute of a talented attorney, one might expect little variation in the quality of written briefs at the Supreme Court level—the venue of practice for the most talented and experienced legal practitioners. The question of whether the quality of legal briefs affects the Justices' decisions, however, is unexplored scholarly terrain. This is the first article to combine qualitative and quantitative methods to measure brief quality and test its effects on both Supreme Court case outcomes and on opinion content. The dataset consists of nearly 9,500 merits briefs from 1946 through 2013 Supreme Court Terms.

One reason the quality of writing may affect Supreme Court opinion content is that it can affect the Justices and clerks' perceptions of the strength of a party's case. Chief Justice Roberts acknowledges perceptible gradations in the quality of Supreme Court briefs: "*The quality of briefs varies greatly*. We get some excellent briefs; we get a lot of very, very good briefs. And there are some where the first thing you can tell in many of them is that the lawyer really hasn't spent a lot of time on it."[2] According to the Chief Justice's words, attorneys that wish to gain the Court's attention from the outset of a case must begin by taking the quality of the brief into account.

Justice Alito echoes Justice Robert's exhortations about the consequential nature of briefs' quality: "Certainly, I appreciate good writing. It makes my job so much easier. I've seen briefs that are extremely well written and some that are abysmally written."[3] Justice Scalia makes this

1. Bryan A. Garner, *Interviews with United States Supreme Court Justices*, 13 SCRIBES J. LEGAL WRITING 1, 39 (2010) (interviewing Chief Justice John G. Roberts, Jr.).
2. *Id.* at 6 (emphasis added) (interviewing Chief Justice John G. Roberts, Jr.).
3. *Id.* at 170 (interviewing Justice Samuel A. Alito, Jr.).

point as well: "When you write well, you capture the attention of your audience much better than when you write poorly."[4]

One reason the question of whether brief quality matters remains unanswered is the ambiguity surrounding our conception of "quality." Across disciplines, writing quality is understood as ranging from spelling and word choice to punctuation and ease of readability.[5]

A second reason may have to do with differing views within the legal community about what constitutes a high-quality brief. While judges continuously emphasize the importance of specific aspects of briefs, such as clarity and organization, surveys of lawyers show that they do not accord the same significance to the written argument.[6] This may explain some of the disjuncture about the importance of brief quality within the legal community. Notwithstanding the lack of a clear conceptualization of quality, judges do not dispute that the quality of briefs affects their perceptions of attorneys' cases.[7]

But still we are left with the question of how we measure a concept that has so many potential defining features; a concept that is difficult to measure with any objectivity due to often subjectively defined features such as style.[8] I tackle this question by examining multiple dimensions of briefs to assess a spectrum of features related to the concept of brief quality including sentence length, passivity of writing, use of engaging language, and an overall positive tone. Some of these aspects are particular to legal writing while others are central to writing quality generally.

This Article uses corpus-based techniques to generate an understanding of brief quality. I apply linguistic dictionaries to the texts to measure features of the writing such as passivity. I also measure the sentiment of each brief to analyze the tone of the document.

---

4. *Id.* at 53 (interviewing Justice Antonin Scalia).

5. *See, e.g.*, Tim Loughran & Bill McDonald, *Measuring Readability in Financial Disclosures*, 69 J. FIN. 1643, 1643 (2014) ("We propose defining readability as the effective communication of valuation-relevant information."); K. Sand, N. L. Eik-Nes & J. H. Loge, *Readability of Informed Consent Documents (1987–2007) for Clinical Trials: A Linguistic Analysis*, 7 J. EMPIRICAL RES. ON HUM. RES. ETHICS 67, 74–75 (2012) (examining how the organization of themes in consent agreements impacts readers' comprehension); Yvonne Tsai, *Text Analysis of Patent Abstracts*, J. SPECIALISED TRANSLATION, Jan. 2010, at 61, 78 (explaining that punctuation and word choice affect the readability of patent abstracts).

6. Richard A. Posner & Albert H. Yoon, *What Judges Think of the Quality of Legal Representation*, 63 STAN. L. REV. 317, 340 (2011) ("Overall, the judges' relative emphasis on written argument contrasts with surveys of practicing lawyers, who see legal writing to be of minor importance."); *see also* Kristen K. Robbins, *The Inside Scoop: What Federal Judges Really Think About the Way Lawyers Write*, 8 LEGAL WRITING 257, 261, 284 (2002) (surveying 355 federal judges' views about the quality of lawyers' writing and finding that those judges were often unimpressed with the quality of legal briefs).

7. *See, e.g.*, Robbins, *supra* note 6, at 269 (listing nine varied writing flaws that surveyed judges identified in lawyers' legal writing).

8. Scott A. Moss, *Bad Briefs, Bad Law, Bad Markets: Documenting the Poor Quality of Plaintiffs' Briefs, Its Impact on the Law, and the Market Failure It Reflects*, 63 EMORY L.J. 59, 80–81 (2013) (documenting and demonstrating flaws in the legal writing of a sample of 102 briefs).

With these measurement tools I examine two outcomes. The first model examines decision outcomes to verify that winning parties tend to have higher-quality briefs than the losing parties. The second model examines the language in each of the Court's opinions. The outcome variable in that model is the percentage of the language in the opinion that is generated from overlapping language with the brief (referred to as the brief's "overlap score" or "value"). This Article proceeds as follows: in the next Part, I examine existing conceptualizations of brief quality, then I describe the indicators developed to measure brief quality. In the following Part, I test the measures of brief quality on the set of Supreme Court briefs. I conclude by discussing the relevance of the findings and the implications for future inquiry.

I. UNDERSTANDING QUALITY

How do we know that the quality of merits briefs makes a difference? For one thing, Supreme Court opinions tell us just that. For example, in the case *Zablocki v. Redhail*,[9] Justice Thurgood Marshall writing for the majority stated, "With regard to safeguarding the welfare of the out-of-custody children, appellant's brief does not make clear the connection between the State's interest and the statute's requirements."[10] This case concerned a Wisconsin statute that places specific requirements on parents with previous child support obligations that wish to marry.[11] Here, the Court did not give credence to the State's position because the State did not present a sufficient nexus between points in its brief.[12]

Lack of clarity in a brief can also confuse the Justices regarding a party's argument. In *Atwater v. City of Lago Vista*,[13] Justice Souter writing for the majority stated, "[I]t is unclear from Atwater's briefs whether the rule she proposes would bar custodial arrests for fine-only offenses even when made pursuant to a warrant . . . ."[14] In *Atwater*, the Court did not fully comprehend the petitioner's argument from the brief,[15] which may have ultimately affected the Court's response to the petitioner's pleas and led the Court to question the strength of the petitioner's case.

Finally, when both petitioner and respondent's merits briefs in a case may lack the quality that clearly informs the Justices of the case features, the Justices may not feel properly able to adjudicate claims, especially in cases with far-reaching implications. Justice Blackmun's

9. 434 U.S. 374 (1978).
10. *Id.* at 389.
11. *See id.* at 375.
12. *See id.* at 389–90.
13. 532 U.S. 318 (2001).
14. *Id.* at 346 n.15.
15. *See id.*

dissent in *New York Times Co. v. United States*[16] makes such a point.[17] In his dissent Justice Blackmun wrote,

> I therefore would remand these cases to be developed expeditiously, of course, but on a schedule permitting the orderly presentation of evidence from both sides, with the use of discovery, if necessary, as authorized by the rules, and with the preparation of briefs, oral argument, and court opinions of a quality better than has been seen to this point.[18]

Justice Blackmun sought higher-quality briefing in that instance to make a more informed decision in a case with vast First Amendment implications.[19]

From these examples it is apparent that the Justices are concerned with the quality of merits briefs. The Justices and their clerks also prefer merits briefs that clearly lay out all of the party's points and arguments, and these examples present evidence that the Justices may not rule favorably on a party's contentions without such clarity.[20] But what exactly does quality mean in such cases? To gain leverage on the concept of brief quality, I look at statements from legal scholars and from judges. Based on these statements, I develop testable hypotheses that examine whether the features of brief quality that Justices and judges discuss are actually associated with more successful briefs.

Attorney experience is often anecdotally associated with brief quality. It is possible, for instance, that attorneys make marginal improvements in their brief writing with each successive brief they write for the Supreme Court. Justice Thomas relayed this notion in his statement,

> I think you learn over time. You gain kind of a comfort with it. It's like a jazz musician or something. You get a feel for it. You don't just know the law, but you have a feel for it. You have a feel for what the judges are trying to do. And then you know where you can give a little ground without giving up your case.[21]

Similarly, Judge Robert Baldock from the Tenth Circuit Court of Appeals underscored the importance of multiple drafts of briefs stating,

---

16. 403 U.S. 713 (1971).
17. *See id.* at 759–63 (Blackmun, J., dissenting).
18. *Id.* at 761–62.
19. *See id.* at 760–62.
20. Although infrequent, there are occasionally opportunities for the parties to clarify statements from their briefs in oral argument. In *Illinois v. Caballes*, 543 U.S. 405 (2004), for example, Justice Ginsburg gave the respondent's attorney a chance to clarify a statement from the brief when she began the question, "There was something you said in . . . your brief hat [sic] I thought was unclear. So may I ask you–" Transcript of Oral Argument at 16, Illinois v. Caballes, 543 U.S. 405 (2004) (No. 03-923), 2004 WL 2663949, at *37.
21. Garner, *supra* note 1, at 109 (interviewing Justice Clarence Thomas).

> Now those who have an appellate practice, who appear before us a lot, their briefs are usually very well done. But with the lawyer who only comes once in a great while, often the product is not good and it's no help. That really irritates me when I haven't been helped at all by a brief and it has wasted my time.[22]

Experience may also help develop an attorney's credibility. Experienced Supreme Court litigators tend to be highly successful on the merits.[23] The credibility of Office of the Solicitor General (OSG) attorneys that is developed with repeat appearances before the Supreme Court, for example, is often cited as a reason for the Justices' trust in them.[24] This credibility may generate a presumption of high-quality briefs that in turn benefits the OSG's likelihood of success.

As this is still a "presumption" of credibility often based on an attorney's experience, it may be rebutted by evidence that trust is unwarranted. Attorneys that present inaccurate information in their briefs or that attempt to deceive judges with skewed portrayals of the facts may lose this credibility and develop notoriety for their lack of candor.[25] Accordingly, for Justice Stevens, honesty is the most important quality of a brief.[26] Judges on federal benches at all levels consistently highlight the necessity of honesty in briefs and how deception can lead to the loss of a judge's trust, which may consequently injure the attorney's reputation.[27]

---

22. Robert R. Baldock, Circuit Judge, U.S. Court of Appeals, Tenth Circuit, Carlos F. Lucero, Circuit Judge, U.S. Court of Appeals, Tenth Circuit & Vicki Mandell-King, Chief, Appellate Div., Fed. Pub. Defs. Office, Denver, Colo., What Appellate Advocates Seek from Appellate Judges and What Appellate Judges Seek from Appellate Advocates, Panel Two at the Tenth Circuit Judicial Conference (June 29–July 1, 2000), *in* 31 N.M. L. REV. 265, 274 (2001).

23. Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L.J. 1487, 1539–49 (2008) (describing a trend of favorable Supreme Court outcomes for a group of the most experienced litigators over the past several decades).

24. *Id.* at 1545–47; *see also* RYAN C. BLACK & RYAN J. OWENS, THE SOLICITOR GENERAL AND THE UNITED STATES SUPREME COURT: EXECUTIVE BRANCH INFLUENCE AND JUDICIAL DECISIONS 6–7 (2012); LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW 4–7 (1987); RICHARD L. PACELLE, JR., BETWEEN LAW & POLITICS: THE SOLICITOR GENERAL AND THE STRUCTURING OF RACE, GENDER, AND REPRODUCTIVE RIGHTS LITIGATION 22–23 (2003); REBECCA MAE SALOKAR, THE SOLICITOR GENERAL: THE POLITICS OF LAW 2–3 (1992); Kevin T. McGuire, *Explaining Executive Success in the U.S. Supreme Court*, 51 POL. RES. Q. 505, 506–07 (1998); Matthew Lee Sundquist, *Learned in Litigation: Former Solicitors General in the Supreme Court Bar*, 5 CHARLESTON L. REV. 59, 81–83 (2010); David C. Thompson & Melanie Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237, 270–71 (2009).

25. THOMAS B. MARVELL, APPELLATE COURTS AND LAWYERS: INFORMATION GATHERING IN THE ADVERSARY SYSTEM 35 (1978); Steven Stark, *Why Lawyers Can't Write*, 97 HARV. L. REV. 1389, 1392 (1984).

26. Garner, *supra* note 1, at 46 (interviewing Justice John P. Stevens).

27. *E.g.*, RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT 291 (2d ed. 2003) (quoting Patricia M. Wald, Chief Judge Emeritus, U.S. Court of Appeals for the D.C. Circuit).

Attorneys may also lose credibility through attacks on other parties or entities involved in the case.[28] Since the attorney's goal is to persuade the court, even if the facts are not in the party's favor, attorneys need to tread lightly when trying to portray facts in the most favorable light to their clients while providing accurate statements that do not belittle other actors involved in the litigation.[29]

One feature of a brief that judges repeatedly say can win or lose a case is its clarity.[30] When lawyers do not lay out all of their points clearly, judges may miss important aspects of the party's position. In one instance when Chief Justice Roberts was asked if a bad brief can lose a case, he replied,

> It sure can—because [the Justices] may not see [sic] your strong case. It's not like judges know what the answer is. I mean, we've got to find it out. And so when you say can bad writing lose a strong case, if it's bad writing, we may not see that you've got a strong case.[31]

Answering the same question Justice Alito conveyed, "It can because you may totally fail to convey the point that you want to make to the court. The court just might miss your point. There have been times when I've read a brief, and reread a brief, and I just didn't see what it was saying."[32] The relative clarity of the party's brief may impact the judge's view of the case. Judge Diane Wood from the Seventh Circuit of Appeals explained, "[I]f one side has presented a beautifully organized and written brief, and the other leaves me trying to decide if they've hit the side of the barn or not . . . there's an inherent advantage to the side that's done it well."[33]

The necessity of brief clarity is also one of few factors that has remained of central importance in judges' analyses of advocacy over the last hundred years, and judges describe that the best briefs they read are often the clearest.[34] Along these lines, when writing about judges' expec-

---

28. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 64 (1992) ("[A] top quality brief scratches 'put downs' and indignant remarks about one's adversary, the trial judge or the agency. These are sometimes irresistible in first drafts, but attacks on the competency or integrity of a trial court, agency, or adversary, if left in the finished product, will more likely annoy than make points with the bench.").

29. *See id.* at 63; *cf.* Carter G. Phillips, Partner, Sidley Austin LLP, Advocacy Before the United States Supreme Court, Address at the Krinock Lecture Series (1998), *in* 15 T.M. COOLEY L. REV. 177, 181–84 (1998).

30. *See generally* Garner, *supra* note 1.

31. *Id.* at 22 (interviewing Chief Justice John G. Roberts, Jr.).

32. *Id.* at 177 (interviewing Justice Samuel A. Alito, Jr.).

33. Bryan A. Garner, *Interviews with United States Court of Appeals Judges*, 15 SCRIBES J. LEGAL WRITING 1, 103 (2013) (second alteration in original) (interviewing Chief Judge Diane P. Wood).

34. *See* Helen A. Anderson, *Changing Fashions in Advocacy: 100 Years of Brief-Writing Advice*, 11 J. APP. PRAC. & PROCESS 1, 4 (2010) (describing the evolving expectations for the contents and quality of legal briefs in American courts); *see also* Robbins, *supra* note 6, at 282 ("Many judges also indicated that . . . the worst briefs 'read like a Joycean stream-of-consciousness and seem

tations for briefs, Judge Roger Miner unsurprisingly described, "We . . . expect clarity, well-organized argument, and understandable sentence structure. All too often, we find rambling narratives, repetitive discussions, non sequiturs, and conclusions unsupported by law or logic."[35]

Veteran attorneys tend to be keenly aware of the need to set their points out clearly on the page.[36] Supreme Court advocate Robert Stern described that one of the most common faults from inexperienced brief writers is they do not make their arguments sufficiently coherent for judges to understand.[37] According to this logic, when lawyers' writings are muddled in lengthy, inconsequential prose, judges may lose track of the main point of the argument.

While briefs are argumentative in nature, the tone of the brief is still an element that may affect the chances of the brief's success.[38] Accordingly, surveyed judges requested an "appropriate adversarial tone" from brief writers.[39] This can be a fine line for attorneys to follow, especially when confronting contentious issues. There are several factors that judges point to, however, that may contribute to an overly negative tone.

One clear admonishment concerns written attacks directed towards other attorneys or officers of the court. Judge Harry Edwards and Judge Robert Martineau, for instance, both note that such attacks may immediately detract from a judge's focus on a brief's main points.[40] These are not the only judges to acknowledge the toll a negative tone can have on a brief. Judge Harry Pregerson refers to a "shrill tone in a brief" as "ineffective" and "counterproductive"[41] and Judge Miner explains that personal attacks tend only to "weaken the brief."[42]

Taken together, these judges' remarks convey that briefs which include attacks and a negative tone are detrimental to their persuasive powers. Regular use of intensifiers may also be viewed as "loser language" that can attach to the judge's view of a party's position.[43] While

---

to have no theme or clear purpose,' 'are anything but' clear, 'muddy up the water,' 'cloud the main issues with trivia,' or contain 'fuzzy, imprecise thinking and writing, leaving the reader to guess or assume as to the meaning.'").

35. Roger J. Miner, *Twenty-Five "Dos" for Appellate Brief Writers*, 3 SCRIBES J. LEGAL WRITING 19, 23 (1992).

36. *See, e.g.*, TOM GOLDSTEIN & JETHRO K. LIBERMAN, THE LAWYER'S GUIDE TO WRITING WELL 6 (3d ed. 2016) ("Good lawyers revere English - and edit their work one more time to ensure they have expressed their thoughts with the clarity and felicity that they owe to their clients, to the public, and to themselves.").

37. *See* ROBERT L. STERN, APPELLATE PRACTICE IN THE UNITED STATES 234–35 (1981).

38. Harry Pregerson, *The Seven Sins of Appellate Brief Writing and Other Transgressions*, 34 UCLA L. REV. 431, 436 (1986).

39. *See* Robbins, *supra* note 6, at 264.

40. ROBERT J. MARTINEAU, FUNDAMENTALS OF MODERN APPELLATE ADVOCACY 129 (1985); Edwards, *supra* note 28, at 64.

41. Pregerson, *supra* note 38, at 436.

42. Miner, *supra* note 35, at 24.

43. Lance N. Long & William F. Christensen, *When Justices (Subconsciously) Attack: The Theory of Argumentative Threat and the Supreme Court*, 91 OR. L. REV. 933, 944 (2013) (describing

such language may diminish the effectiveness of the brief, an adversarial tone is still expected. Based on this assessment, judges are looking for a balance between argumentation and overly negative and conflictual statements.

The last two points of brief quality relate to the judge's focus. The first of these factors is brevity. While briefs that lack complete arguments and treatments of the facts will not serve attorneys' purposes, judges do not expect or wish attorneys to expound lengthy prose to make their points. Justice Ginsburg points this out as a flaw in many attorneys' cases: "Lawyers somehow can't give up the extra space, so they fill the brief unnecessarily, not realizing that eye-fatigue and even annoyance will be the response they get for writing an overlong brief."[44] In response to what he finds to be the biggest shortcoming in briefs, Justice Scalia responds, "Prolixity, probably. . . . You don't have to use the 40 pages if that's what you're allotted. Use as much as is necessary to make your point."[45] The Justices clearly demand succinct briefs that only deal with aspects of the case relevant to the Court's inquiry.

The Supreme Court docket has substantially shrunk over the last several decades, and as a consequence the Justices and their clerks may have more time to focus on individual cases.[46] The question on certiorari should be the focus of the brief and straying from this might show the Justices that the attorney is not concerned with issues relevant to the case. Justice Scalia is clear on this point: "The framing of the question is crucial. . . . I have seen that happen: not included within the question presented. So you make that argument and, you know, too bad."[47] Justice Breyer underscored this directive stating, "[W]e've taken the case to decide an issue -- one issue usually, maybe two -- and we are not looking so much at the whole case."[48] Along with a shrinking docket, there has been a substantial growth in the number of amicus briefs filed over recent years.[49] Moreover, there has been stable growth in the rate of petitions for certiorari filed with some notable spikes in filings.[50] The Justic-

---

this language as "a defensive emotional response to an expected . . . adverse result in an appellate case").

44. Garner, *supra* note 1, at 137 (interviewing Justice Ruth Bader Ginsburg).

45. *Id.* at 53 (interviewing Justice Antonin Scalia).

46. *See* Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1225–27, 1263 (2012) (providing evidence of the shrinking docket as well as explanations, including most prominently ideological cohesion among the Justices).

47. Garner, *supra* note 1, at 72–73 (emphasis omitted) (interviewing Justice Antonin Scalia).

48. *Id.* at 161 (interviewing Justice Stephen G. Breyer).

49. Anthony J. Franze & R. Reeves Anderson, *Justices Are Paying More Attention to Amicus Briefs*, NAT'L L.J., Sept. 8, 2014, at 11, http://www.arnoldporter.com/~/media/files/perspectives/publications/2014/09/justices-are-paying-more-attention-to-amicus-bri__/files/publication/fileattachment/nlj_justices-are-paying-more-attention-to-amicus__.pdf.

50. FED. JUDICIAL CTR., SUPREME COURT OF THE UNITED STATES CASELOAD, 1878–2014, http://www.fjc.gov/history/caseload.nsf/page/caseloads_Sup_Ct_totals (last visited Sept. 29, 2016).

es and their clerks need to process this additional information, which counterbalances their lighter caseload.

The Justices and their clerks are not only concerned with the length of briefs. They also prefer interesting over dull writing.[51] Engaging writing may gain the Justices' attention and focus Justices on the statements made in the brief. This further highlights the importance of a coherent rather than a verbose brief.[52] Scholars allude to the paramount significance of good general writing skills that make central points in the brief easy for judges to comprehend.[53]

The Justices generally agree that well-written briefs gain their attention. For Justice Scalia, this ability to focus the Justice's attention is the main advantage to good writing as he explained with the example: "My attention was fixed on that brief. I'd been reading a lot of other briefs, and they did not grab me the way this one did. That's the payoff. That's the payoff. It is clear."[54] Justice Alito connects good writing to the lawyer's persuasive ability, "I think there is a clear relationship between good, clear writing and good, clear thinking. And if you don't have one, it's very hard to have the other."[55]

There are a slew of examples of attorneys using long-winded and hard-to-follow sentences.[56] These may confuse the Justices about the attorneys' objectives and cause the Justices and clerks to lose their focus on such briefs. How do such phrasings in merits briefs look? In the school desegregation case of *Bradley v. School Board*,[57] the School Board's attorneys include a sentence in the brief:

> In this context, any limitations which failed to extend the scope of the award back to the time of this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954) would be arbitrary and productive of the incongruous result that many of the school authorities who, with the massive resources of state treasuries at their disposal, openly defied this Court's earlier mandates against segregated education would escape the reach of any charge for the payment of fees incurred in the

51. *See* Miner, *supra* note 35, at 20 ("Pack the brief with lively arguments, using your own voice and style of expression. We prefer briefs that are not pompous, dull, or bureaucratic.").

52. Girvan Peck, *Strategy of the Brief*, LITIGATION, Winter 1984, at 26, 66.

53. *See* STERN, *supra* note 37, at 233–40; *see also* John D. Feerick, *Writing like a Lawyer*, 21 FORDHAM URB. L.J. 381, 381–83, 386–87 (1994); George D. Gopen, *The State of Legal Writing: Res Ipsa Loquitur*, 86 MICH. L. REV. 333, 335 (1987); Philip C. Kissam, *Thinking (by Writing) About Legal Writing*, 40 VAND. L. REV. 135, 135–36, 138–39 (1987); Mark K. Osbeck, *What Is "Good Legal Writing" and Why Does It Matter?*, 4 DREXEL L. REV. 417, 426 (2012); Harry Pregerson & Suzianne D. Painter-Thorne, *The Seven Virtues of Appellate Brief Writing: An Update from the Bench*, 38 SW. L. REV. 221, 222 (2008); J. Christopher Rideout & Jill J. Ramsfield, Dedication to Marjorie Dick Rombauer, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 37, 39 (1994); Pamela Samuelson, *Good Legal Writing: Of Orwell and Window Panes*, 46 U. PITT. L. REV. 149, 149 (1984).

54. Garner, *supra* note 1, at 73 (interviewing Justice Antonin Scalia).

55. *Id.* at 170, 179 (interviewing Justice Samuel A. Alito, Jr.).

56. *See, e.g.*, *infra* text accompanying note 58.

57. 416 U.S. 696 (1974).

> torturous litigation which those seeking admission to schools on an equal basis were forced to undergo.[58]

This 100-word sentence makes several contentions which, when combined, become quite difficult to follow. Justices and clerks have to parse such convoluted sentences to make sense of the details of the argument and such complexity may diminish the Court's focus on the brief and potentially lead to less consideration of the points therein.

Scholars and judges make clear that the features of high-quality briefs discussed in this Article are often connected. For instance, well-written briefs should be succinct and clear.[59] In this Article's analysis, I expect many of these factors to be connected. Based on the expectations set forth by the Justices themselves, the primary hypothesis of this Article is

Quality Hypothesis: *Higher-quality briefs will (a) win more cases than lower quality briefs, and (b) the Court will share more of its opinion language with higher-quality briefs.*

Attorney credibility should play a large independent role in the Justices' adoption of language from briefs. While attorneys learn more about the Justices' preferences from increased experience in the Court, by the time attorneys begin their practice in the Supreme Court the quality of their legal writing may be fairly solidified.[60] Even if the Justices share more language on the margins with higher-quality briefs, there is evidence that attorneys with more Supreme Court experience win cases more often and the Court shares more language with briefs from these attorneys than it does with briefs from less experienced attorneys.[61] The second hypothesis for this Article is

Credibility Hypothesis: *Controlling for differences in brief quality, Supreme Court opinions will share more language with more experienced attorneys' briefs.*

---

58. Brief of Respondent at 14, Bradley v. Sch. Bd., 416 U.S. 696 (1974) (No. 72-1322), 1973 WL 172306, at *29–30.

59. William H. Rehnquist, *From Webster to Word-Processing: The Ascendance of the Appellate Brief*, 1 J. APP. PRAC. & PROCESS 1, 3 (1999) ("It would seem that inside of a hundred years the written brief has largely taken the place that was once reserved for oral argument. For that reason, an ability to write clearly has become the most important prerequisite for an American appellate lawyer.").

60. Based on available scholarship I would expect greater differences in brief quality based on attorney experience in lower courts. *See, e.g.*, Kevin T. McGuire, Georg Vanberg & Alixandra B. Yanus, Targeting the Median Justice: A Content Analysis of Legal Arguments and Judicial Opinions 11–15 (Jan. 3–7, 2007) (unpublished manuscript) (presented at the Annual Meeting of the Southern Political Science Association), http://mcguire.web.unc.edu/files/2014/01/targeting_median.pdf.

61. *See* Lazarus, *supra* note 23, at 1539–49; *see also* BLACK & OWENS, *supra* note 24, at 34–39, 102–11; Adam Feldman, *Who Wins in the Supreme Court? An Examination of Attorney and Law Firm Influence*, 100 MARQ. L. REV. (forthcoming 2017).

A. Empirical Understandings of Quality

Empirical work in the area of merits brief quality, especially with large-N samples, is quite sparse. Much of the work that purports to analyze brief quality either does so with unclear conceptual definitions or with proxy measures for quality. One example of this is in Kearney and Merrill's article, *The Influence of Amicus Curiae Briefs on the Supreme Court.*[62] In that paper, the section on brief quality begins, "Because reading and assessing the quality of more than 12,000 individual amicus briefs was a task far beyond our endurance, we had to come up with a proxy for briefs that contain information valued highly by the Court."[63] This proxy measure, also adopted in other scholarly works,[64] is based on attorney experience.[65] Such studies of briefs, however, lack measurements based on the actual words of the brief.

Another proxy measure that is designed to account for brief quality is whether the brief is submitted by the OSG. OSG briefs are often touted as the highest quality.[66] The high quality of briefs from the OSG is often suggested without a definition of the concept of brief quality, and so the measure of quality may be wrapped up with the high regard the Justices hold for the Solicitor General's (SG's) credibility.[67] To this point, Justice Ginsburg said, "It's never a problem with the SG. Even if I disagree with the argument, I know that the brief will give an honest account of the authorities. That's very important; I know I can trust the SG's brief."[68]

One area of scholarship that tackles the question of the relationship between brief quality and brief success is experimental in nature. These studies compare judges' responses to different linguistic framings. Several such studies, for instance, determined that judges found similar arguments written in plain English more persuasive than in legal jargon.[69] While these studies focus more precisely on the relationship between

62. Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743 (2000).

63. *Id.* at 810.

64. *E.g.*, Janet M. Box-Steffensmeier, Dino P. Christenson & Matthew P. Hitt, *Quality over Quantity: Amici Influence and Judicial Decision Making*, 107 AM. POL. SCI. REV. 446, 447 (2013); Paul M. Collins Jr., Pamela C. Corley & Jesse Hamner, *The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content*, 49 LAW & SOC'Y REV. 917, 931–32 (2015); Pamela C. Corley, *The Supreme Court and Opinion Content: The Influence of Parties' Briefs*, 61 POL. RES. Q. 468 (2008).

65. *See* Kearney & Merrill, *supra* note 62, at 813.

66. *See, e.g.*, PACELLE, *supra* note 24, at 5–6.

67. *See, e.g.*, BLACK & OWENS, *supra* note 24, at 35–36; *see also* Jeffrey A. Segal, *Amicus Curiae Briefs by the Solicitor General During the Warren and Burger Courts*, 41 W. POL. Q. 135, 138 (1988).

68. Garner, *supra* note 1, at 137 (interviewing Justice Ruth Bader Ginsburg).

69. *See* Sean Flammer, *Persuading Judges: An Empirical Analysis of Writing Style, Persuasion, and the Use of Plain English*, 16 LEGAL WRITING 183, 199 (2010); *see also* Robert W. Benson & Joan B. Kessler, *Legalese v. Plain English: An Empirical Study of Persuasion and Credibility in Appellate Brief Writing*, 20 LOY. L.A. L. REV. 301, 313–14 (1987).

words and judges' decisions, they are still purely hypothetical in nature.[70] This Article moves beyond the hypothetical by investigating the relationship between the quality of existing briefs and success before the Court.

Recent forays into the relationship between brief quality and brief success focus on the readability of briefs. These studies utilize readability algorithms such as Flesch Reading Ease scale to determine the ease of reading of existing briefs.[71] The algorithms generate measures based on the relative numbers of words, sentences, and syllables in a text.[72] Studies have still not found a conclusive relationship between a brief's readability and the chances of a brief's success. In one study utilizing readability measures, for instance, the authors found no correlation between the readability of briefs and case outcomes.[73]

Finally, several papers employ automated content analysis to deduce certain aspects of legal texts.[74] These articles use Linguistic Inquiry and Word Count (LIWC) to gauge the complexity of legal opinions and briefs.[75] LIWC uses word dictionaries to measure aspects of sample texts along multiple categories or dimensions. The program then provides an output that includes the percentage of words in a text that belongs to each category. These studies, for example, cluster several word categories that relate to cognitive complexity to generate their metrics.

B. The Role of Brief Quality

Statements from judges clarify that they focus their attention on high-quality briefs. Higher-quality briefs will not lead to favorable outcomes in all cases however. Justice Breyer is keyed into this point, "[I]f you don't have a sound view as to how these cases should come out, how the law should fit together, I doubt that you could make up for it by good writing. If you're very clear, you might just be very clearly wrong."[76] In close cases, a high-quality brief may persuade the Justices and clerks to focus their attention on the arguments from that particular brief. On the other hand, when the law is clear, the brief is limited in its ability to shift the decision outcome. Even if the law is clear, however, well-written

---

70. *See, e.g.*, Flammer, *supra* note 69, at 191 (describing the study's methodology of sending Plain English and Legalese writing samples to judges asking the judges which sample was more persuasive).

71. Brady Coleman & Quy Phung, *The Language of Supreme Court Briefs: A Large-Scale Quantitative Investigation*, 11 J. APP. PRAC. & PROCESS 75, 83 (2010).

72. I comparatively examine several of these readability measures in the Appendix. *See infra* Tables 5–6.

73. *See* Long & Christensen, *supra* note 43, at 943–44.

74. *See* Collins, Corley & Hamner, *supra* note 64, at 931–32; *see also* Ryan J. Owens & Justin P. Wedeking, *Justices and Legal Clarity: Analyzing the Complexity of U.S. Supreme Court Opinions*, 45 LAW & SOC'Y REV. 1027, 1039–40 (2011); Ryan J. Owens & Justin Wedeking, *Predicting Drift on Politically Insulated Institutions: A Study of Ideological Drift on the United States Supreme Court*, 74 J. POL. 487, 493 (2012).

75. *See generally* sources cited *supra* note 74.

76. Garner, *supra* note 1, at 159 (interviewing Justice Stephen G. Breyer).

briefs can influence the Court to share more language with a particular brief regardless of whether the brief is written for the winning or losing party.[77]

Based on this notion, I generated a second outcome variable (aside from which side wins the case) derived from the percentage of an opinion's language that is shared with a given merits brief. Although winning briefs typically share more language with the Court's opinions, this is not always the case.[78] A high-quality brief should persuade the Justices and clerks to place greater focus on it during their deliberations. In effect, a lawyer may be able to compensate for a position that is not likely to win with a well-written brief that persuades the Court to share a maximum amount of opinion language with the brief. For attorneys and parties concerned with the Court's shifts in the law over time, such incremental benefits can have large downstream payoffs.[79] Persuasion from losing briefs may also involve limiting the magnitude of a negative outcome.

Here, quality may play a similar role to attorney credibility. While credible attorneys with high levels of experience have the ability to discriminate between cases that are more or less likely to win, inevitably they will represent clients with losing cases. While their briefs cannot change the facts or law relevant to the case, they can persuade the Court that their argument is sound. As Justices and clerks are apt to read briefs from experienced counsel more closely, especially those from the OSG, these briefs can persuade the Court to rely on them in resolving issues extraneous to the main outcome. These issues can also blunt the effect of the main outcome if the outcome is so clear to the Court based on factors extraneous to the briefs.

II. METHODS

To test hypotheses regarding the amount of opinion language shared with briefs, I used two-level hierarchical models on a newly developed dataset composed entirely of orally argued cases with exactly two merits briefs for the 1946 through 2013 Supreme Court Terms. The dependent variables are the case outcomes and the percentage of language in the opinion that is also located in a merits brief.

---

77. *See, e.g.*, BLACK & OWENS, *supra* note 24, at 39; Corley, *supra* note 64, at 474–76; Adam Feldman, *A Brief Assessment of Supreme Court Opinion Language, 1946–2013*, 86 MISS. L.J. (forthcoming).

78. *See* Feldman, *supra* note 77.

79. Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 628–29 (2001) ("[W]hen a new precedent emerges, litigants will react to the precedent in ways that further reinforce and contribute to the path indicated by that new precedent: Parties whose favored outcomes become more likely in the wake of the new precedent may be more likely to bring suit and thereby push the law further in that same direction . . . .").

After collecting briefs and opinions for these cases and noting the winning and losing parties, I examined the language overlap between each individual brief and the corresponding opinion. This measure of language overlap suggests that the Court either relied on the language in the brief or found the language sufficiently relevant to be included in the opinion. I created separate text files for each brief and opinion in every case. I then ran the briefs and opinions through the software WCopyfind 4.1.1.[80] This program allows for pairwise comparison of documents to analyze instances of shared language.[81] The user inputs a base document (the opinion) with secondary documents (the case briefs) to locate similarities in the language used. I maintained the program's default settings in a similar manner to Corley and Owens and Black so that the program would highlight exact or extremely similar language.[82] Accordingly, the program was set to pick up phrases of at least 80% overlapping language between the brief and opinion.[83] The minimum length of each phrase was set to six words. These settings were designed to ensure the program focuses on common language in phrases of sufficient length to be meaningful.

I used different model specifications for the two models in the Article, although the models share the same approach. For both models each observation is based on a brief. There tends to be a high level of correlation between the amount of language opinions share with both briefs in the same case. To deal with this feature of brief/opinion relationships, I modeled both briefs in a case as nested in a dyad. I did this by creating separate observations for each brief/opinion relationship, and I also created a common identifier for both briefs in a case. The similarities between briefs in a case can confound standard errors in normal regression models. In these situations multilevel models are appropriate.[84] The dependent variable in the Outcome Model is dichotomous (either the higher-quality brief is associated with the winning or losing model). Due to the dichotomous outcome variable, I applied a multilevel probit model. The outcome in the Language Overlap Model is continuous and so I used a standard multilevel model.

---

80. Louis Bloomfield, *WCopyfind*, PLAGIARISM RESOURCE SITE, http://plagiarism.bloomfieldmedia.com/z-wordpress/software/wcopyfind/ (last visited Sept. 26, 2016).

81. *Id.*

82. *See, e.g.*, Corley, *supra* note 64, at 471 (describing the main WCopyfind parameters as setting the shortest phrase to six words and the minimum percentage of perfect matches that a phrase can contain and still be considered a match at eighty).

83. *See* BLACK & OWENS, *supra* note 24, at 103 (measuring overlapping language between Supreme Court opinions and briefs submitted by the Office of the Solicitor General); *see also* Corley, *supra* note 64, at 471–72 (using WCopyfind to analyze the relationship between briefs submitted to the Supreme Court and Supreme Court opinions).

84. DAVID A. KENNY, DEBORAH A. KASHY & WILLIAM L. COOK, DYADIC DATA ANALYSIS 85–87 (2006).

Since scholars cite multiple aspects of writing as consequential for a brief's quality, I measured the quality of briefs along multiple dimensions. The indicators of quality discussed by scholars break down into two categories: those dealing with word choices and those dealing with sentence structure.[85] Judges and Justices appear to be drawn to language and structure that make writing easily comprehensible.

To move beyond past measures, I used dictionary-based software. The first tool, StyleWriter 4,[86] provides the indicators for the bulk of the factors associated with brief quality including wordiness, lively language, passivity, and sentence complexity.[87] StyleWriter is writing editor software with settings that can be modified for specific industries and purposes such as law.[88] StyleWriter has a built-in 200,000 graded word list and 50,000 word and phrase style and usage checker to analyze the use of plain language.[89]

Although StyleWriter measures the quality of writing, it lacks measurement for one very important dimension—a brief's tone or sentiment. Current works in many academic disciplines utilize sentiment analysis to measure the tone of documents.[90] I used a modified version of the SentiWordNet corpus-based dictionary to measure the sentiment of the briefs in the dataset.[91]

To focus on the importance of the factors relating to a brief's quality, I generated multiple control variables.[92] Due to the relationship of the control variables to the dependent variables, some are used in both models while others are used only in the Language Overlap Model. The first of these controls is *Complexity*. *Complexity* is a measure of the number

85. *See generally* ALDISERT, *supra* note 27, at 277–78, 282.

86. *StyleWriter's Features*, EDITOR SOFTWARE, http://www.editorsoftware.com/StyleWriter_Features.html#advance_writing_statistics_software (last visited Sept. 25, 2016).

87. *Id.*

88. *Id.*

89. *Id.*

90. *See, e.g.*, AFFECTIVE COMPUTING AND SENTIMENT ANALYSIS: EMOTION, METAPHOR AND TERMINOLOGY (Khurshid Ahmad ed., 2011) (describing the use of sentiment analysis in domains ranging from film reviews to homeland security); Cheng-Jun Wang, Pian-Pian Wang & Jonathan J.H. Zhu, *Discussing Occupy Wall Street on Twitter: Longitudinal Network Analysis of Equality, Emotion, and Stability of Public Discussion*, 16 CYBERPSYCHOLOGY, BEHAV. & SOC. NETWORKING 679 (2013) (examining the public discussion about social movements on Twitter with the use of sentiment analysis); Saif Mohammad, From Once upon a Time to Happily Ever After: Tracking Emotions in Novels and Fairy Tales 105–14 (June 24, 2011) (unpublished manuscript) (presented at the 5th ACL-HLT Workshop on Language Technology for Cultural Heritage, Social Sciences, and Humanities), http://dl.acm.org/citation.cfm?id=2107650&CFID=705966001&CFTOKEN=21985198 (using sentiment analysis to track emotions in mail and books).

91. Stefano Baccianella, Andrea Esuli & Fabrizio Sebastiani, SentiWordNet 3.0: An Enhanced Lexical Resource for Sentiment Analysis and Opinion Mining 2200–01, 2204 (May 17–23, 2010) (unpublished manuscript) (presented at the Seventh International Conference on Language Resources and Evaluation), http://www.lrec-conf.org/proceedings/lrec2010/pdf/769_Paper.pdf.

92. Some of the variables are based on those used in previous studies looking at similar relationships. *See, e.g.*, Corley, *supra* note 64, at 474.

of legal provisions relied upon and issues raised in the case as coded in the Supreme Court Database.[93] As case complexity rises, the Justices may look to a larger pool of resources in drafting the opinion. Additional complexity should decrease a brief's overlap value.

Next, *Legal Salience* is a dummy variable that is coded as 1 in cases where the Court strikes down a law as unconstitutional or overturns its own precedent (as coded in the Supreme Court Database).[94] *Political Salience* examines when the case is salient to the public and to elites. When a case is discussed on the front page of the *New York Times* the day after the decision is handed down, I coded *Political Salience* as 1.[95] Both salience factors should also lead the Justices to focus on a larger pool of resources and lower the briefs' overlap values.

The next variables relate to party type and issue area. The first is *Solicitor General.* It is coded as 1 when the party on the brief is the United States or an executive branch agency represented by the OSG. It does not account for individual government employees. The other government variable is *State.* While I expect federal government briefs to carry a strong positive coefficient, the *State* variable should move in the negative direction due to the documented, poor-quality of states' briefs and the often overloaded dockets that states' attorneys face.[96] To combine constitutional issue areas, I clustered the *Civil Liberties* variables together.[97] Based on the assessment that many civil liberties cases are highly salient for the Justices and that the Justices have distinct preferences in such cases, I expect this variable to carry a negative coefficient.[98]

I coded a variable for briefs associated with parties that won by a unanimous decision of the Justices as 1. This is due to the expectation that the role of ideology is minimized in unanimous cases thus enabling the Justices to reach consensus on the opinion's language with fewer conflicting voices.[99] *Unanimous* should carry a positive coefficient. In contrast, I expect ideological friction among the Justices to play a larger role in contested decisions. I coded a dummy variable for cases where

93. Sara C. Benesh & Malia Reddick, *Overruled: An Event History Analysis of Lower Court Reaction to Supreme Court Alteration of Precedent*, 64 J. POL. 534, 538–39 (2002).

94. FORREST MALTZMAN, JAMES F. SPRIGGS II & PAUL J. WAHLBECK, CRAFTING LAW ON THE SUPREME COURT: THE COLLEGIAL GAME 46 (2000).

95. Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66, 72–73 (2000).

96. Thomas R. Morris, *States Before the U.S. Supreme Court: State Attorneys General as Amicus Curiae*, 70 JUDICATURE 298, 300, 304–05 (1987).

97. *The Supreme Court Database: Issue Area*, WASH. U. L., http://scdb.wustl.edu/documentation.php?var=issueArea (last visited Aug. 21, 2016) (indicating that the Supreme Court Database issue areas include: Criminal Procedure, Civil Rights, First Amendment, Due Process, and Privacy).

98. Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134, 138, 147 (2002).

99. *See* Lee Epstein, William M. Landes & Richard A. Posner, *Are Even Unanimous Decisions in the United States Supreme Court Ideological?*, 106 NW. U. L. REV. 699, 712–13 (2012); *see also* Owens & Simon, *supra* note 46, at 1224.

the split of the Justices' votes is *Five to Four Vote*, and I expect this variable to carry a negative coefficient.

Next, to account for the petitioners' advantage due to the certiorari process and aggressive grants, I coded a dummy variable, *Petitioner's Brief*, as 1 for each brief for the petitioning party, and I expect this variable to carry a positive coefficient.[100] Based on the Justices' votes on the merits, I coded a dummy variable *Winning Brief* for the winning party in a case. As the Justices decide the winner of the case in conference prior to drafting the opinion, I expect the winning brief to generally set the bar for the amount of language the Court will share with the briefs in the case.

To measure an attorney's experience in the Supreme Court, the *Attorney Experience* variable tracks the number of times an attorney is listed as the attorney of record on Supreme Court briefs.[101] I generated this variable based on a Westlaw search of briefs for each attorney. Because the distribution of experience is skewed to the low end with a few significant outliers, I used the natural log of this experience variable. The pre-logged number increases by 1 each time the attorney is listed as attorney of record on a merits brief.

I next included a control variable for the Justices' *Ideological Compatibility* with the briefs. This variable accounts for the ideological compatibility between the Justice and brief and controls for the ideological direction of the brief. To code this variable, I used Martin-Quinn (MQ) Scores that measure the Justices' ideological preferences based on their prior votes.[102] I coded the dummy variable 1 when the majority opinion writer's ideological direction accorded with the ideological direction of the brief in the observation and 0 otherwise.[103]

To control for a Justice's relative workload and for the possibility that the number of clerks in a Justice's chamber affects the amount of overlap in a Justice's opinions, I added the variable *Clerks-Per-Chamber*.[104] I expect that the addition of more clerks over time functions as a resource to help gather greater amounts of information so that the

---

100. LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 80 (1998).

101. This is coded similarly to the brief quality variable in Kearney & Merrill, *supra* note 62, at 814.

102. These scores vary by Supreme Court Term. The scores are negative for liberal and positive for conservative and range from approximately negative six on the liberal side to near six on the conservative side. I only coded for ideological compatibility when the Justices' scores were either less than negative one or more than one indicating that the Justice is not ideologically neutral.

103. This is based on the direction of the lower court decision as coded in the Supreme Court Database. *The Supreme Court Database: Lower Court Disposition Direction*, WASH. U. L., http://scdb.wustl.edu/documentation.php?var=lcDispositionDirection (last visited Aug. 26, 2016).

104. While the majority of the Justices utilize the clerk pool to review certiorari petitions, they engage in their assessment of cases on the merits by individual chamber. *Supreme Court Procedure*, SCOTUSBLOG, http://www.scotusblog.com/reference/educational-resources/supreme-court-procedure/ (last visited Aug. 26, 2016).

overlap value should decrease as the number of clerks increase.[105] Although clerks may have subjective views on the utility of briefs for constructing opinions, multiple clerks in the same chamber should lead to opinion construction based on a greater diversity of sources, notwithstanding the tradition that individual clerks are generally assigned to focus on particular cases.[106]

Central to the analyses in this Article, I generated several indicators to measure the quality of briefs. As these are all indicators of the same overall concept, I used factor analysis to collapse the factors into a latent variable called *Brief Quality*.[107] All but one of the quality indicators were derived using StyleWriter's dictionary-based indices that measure characteristics of writing quality.[108]

The first indicator, *Passivity*, measures the number of passive verbs in the document based on the total number of sentences. *Passivity* makes writing less clear and incoherent. Examples of passivity include verbs preceded by "are" and "be."

The next two measures based on StyleWriter's term dictionaries are *Lively Language* and *Wordiness*.[109] Wordiness measures the inclusion of some of the most common non-pronoun words that are often used to link parts of speech.[110] Overuse of these words may detract from the writing quality. Many of these are also known as stopwords that are often removed from other forms of text analysis.[111] These words include "the," "and," "to," "of," "is," and "for."

Because StyleWriter's indices are term-based, I have a count variable that measures *Sentence Complexity*. This variable is a simple average of the number of words per sentence across a document. Increased sen-

105. There is an underlying issue of a Justice's supervision of clerks in this process. Although there is a possibility of "rogue" clerks that do tend to rely more or less on brief language when assisting in opinion drafting, I expect that as a general matter an increasing number of clerks will also function as a check on other clerks to ensure they are performing their duties in the manner expected of them. *See generally* Corley, *supra* note 64, at 468–69 (discussing the tendency for clerks and judges to borrow language from persuasive briefs).

106. *See* Terry Baynes, *Insight: The Secret Keepers: Meet the U.S. Supreme Court Clerks*, REUTERS (June 14, 2012, 6:18 PM), http://www.reuters.com/article/us-usa-healthcare-court-clerks-idUSBRE85D17120120614 (describing the practice of individual clerks focusing on particular cases).

107. Factor analysis was also used to validate this approach showing that all the brief quality indicators break down to a single factor.

108. For information regarding the disaggregated effects from the brief quality variables, see *infra* Appendix.

109. StyleWriter refers to these as "Pep" words. *StyleWriter's Editions*, EDITOR SOFTWARE, http://www.editorsoftware.com/StyleWriter_Editions.html (last visited Sept. 25, 2016).

110. *See id.*

111. *See* Justin Grimmer & Brandon M. Stewart, *Text as Data: The Promise and Pitfalls of Automatic Content Analysis Methods for Political Texts*, 21 POL. ANALYSIS 267, 273 (2013) ("Often we remove 'stop' words, or function words that do not convey meaning but primarily serve grammatical functions.").

tence complexity tends to create sentences that are dry and harder to follow.

Finally, with SentiWordNet I was able to measure the overall sentiment or tone of each brief. SentiWordNet measures whether a document has a positive or negative polarity based on the WordNet database of synsets (synsets are synonymous terms grouped together in the database).[112] SentiWordNet determines the sentiment of a document by the proportion of positively and negatively classified words assigned a label within it.[113]

Although SentiWordNet has been validated in a variety of studies as a sentiment classifier, it lacks one essential tool for sentiment classification: negation identification.[114] Negation identification is essential to sentiment classification due to a negation's ability to change the meaning of terms immediately following it. A simple example is the comparison of the phrases "the verdict was accurate" and "the verdict was not very accurate." Although "accurate" can convey a positive sentiment, the negation changes the meaning of the term.

To deal with negations, I created a regular expression that eliminates negated terms from sentiment classification in order to prevent these negations from confounding the results.[115] The sentiment scores are, therefore, based solely on non-negated terms, both positive and negative in polarity.

III. RESULTS

To test the importance of brief quality, Table 1 looks at the impact of brief quality on winning in the Supreme Court.

Table 1: Outcome Model
Multilevel Probit Estimates of Likelihood of Winning

Variable		
Petitioner's Brief	0.551^{***}	(0.0325)
Solicitor General	0.402^{***}	(0.0631)
State	0.220^{***}	(0.0343)
Ideological Compatibility	0.378^{***}	(0.0381)

112. *See* Baccianella, Esuli & Sebastiani, *supra* note 91.

113. *See id.* at 2200.

114. *See, e.g.*, Fazal Masud Kundi, Shakeel Ahmad, Aurangzeb Khan & Muhammad Zubair Asghar, *Detection and Scoring of Internet Slangs for Sentiment Analysis Using SentiWordNet*, LIFE SCI. J., May 2014, at 66, 68.

115. For the regular expression code, see *infra* Appendix.

Attorney Experience (Log)	0.0635***	(0.0160)
Brief Quality	0.0373**	(0.0137)
Constant	-0.538***	(0.0225)
N	9498	

Robust standard errors in parentheses

*$p<0.05$, **$p<0.01$, ***$p<0.001$

The dependent variable in Table 1 is dichotomous as it is coded 1 if the brief is for the winning party and 0 if the brief is for the losing party. The results of this model show that the quality of briefs is in fact significant in winning cases as brief quality positively affects the likelihood of winning. The likelihood of winning a case increases by approximately 20% by moving from the low end of the brief quality spectrum to the high end.[116]

Table 2 presents the multilevel model results of the relationship between brief quality and the overlapping language between opinions and briefs.

Table 2: Language Overlap Multilevel Model

Variable		
Complexity	-0.253***	(0.0722)
Legal Salience	-0.724***	(0.200)
Political Salience	-1.379***	(0.188)
Solicitor General	4.006***	(0.279)
State	-0.518***	(0.110)
Civil Liberties	-0.398**	(0.146)
Petitioner's Brief	1.100***	(0.101)
Attorney Experience (Log)	0.315***	(0.0889)
Winning Brief	1.880***	(0.165)
Ideological Compatibility	0.479**	(0.168)
Unanimous	0.654**	(0.207)

116. This is based on predicted probabilities where all other variables in the models are set to their mean values.

Five to Four Vote	-0.765***	(0.179)
Clerks Per Chamber	-0.0818	(0.0772)
Brief Quality	0.794***	(0.0700)
Constant	8.019***	(0.296)
Variance of Constant	1.279***	(0.0305)
Variance of Residual	1.467***	(0.0285)
N	9498	
ICC	.408	
PRE	.2005	

Robust standard errors in parentheses clustered on Supreme Court Term.

*$p<0.05$, **$p<0.01$, ***$p<0.001$

Model fit using maximum likelihood

Before examining the results, there are several checks I performed to ensure that the model is correctly specified and that the multilevel model accounts for the presumed correlation between merits briefs' overlap values in a case. First, a likelihood ratio test between each multilevel model and a linear regression is significant at the 0.001 level. The variance of the residuals is significant at the 0.001 level, which also helps support the presumption that the model is accurately specified. The reduction of error (PRE) in the two-level model over the one-level model is 20.05%. Finally, the intraclass correlation coefficient (ICC) is .408.[117]

As Table 2 shows, brief quality affects the amount of opinion language the Court shares with merits. The control variables all move in the predicted directions. The variables with the greatest magnitudes are for winning briefs, the presence of the Solicitor General, and for petitioner's briefs. These three variables have positive coefficients indicating they lead to a likelihood of more shared language between briefs and opinions.

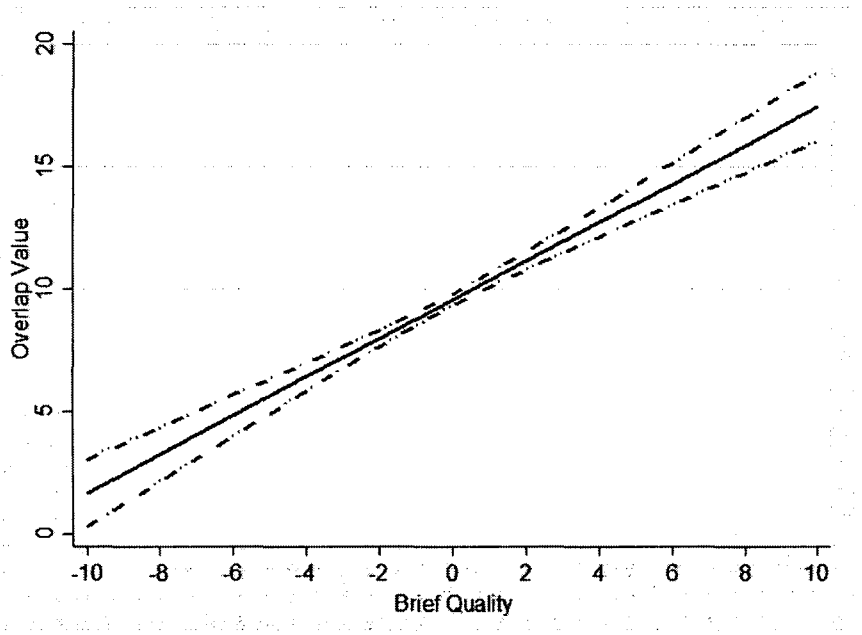
Both politically and legally salient cases, as well as more complex cases lead, as predicted, to decreased shared language between briefs and opinions. This is not surprising given the expectation that the Justices and clerks look to additional sources in drafting opinions when these factors are present. Also, as predicted, the Court shares less language with states' briefs.

117. This measure was derived with non-robust standard errors, yet its magnitude suggests a substantial portion (over forty percent) of the residual variance is due to the dyadic pairs conditional on the top-level factors of the two-level model.

Increased attorney experience positively affects the amount of language opinions shared with merits briefs. This finding supports the proposition that credibility plays a role in the amount of language the Justices and clerks share in their opinions with the briefs. Excluding the quality factors, the Justices share more language with more experienced attorneys' briefs. Opinions also share more language with briefs for winning parties in unanimous decisions and tend to share less language with both briefs in cases decided by five-to-four votes. Finally, and as expected, the Justices tend to share more language with briefs based on their ideological compatibility with the direction of the briefs.

Most importantly, the result for brief quality is significant and moves in the predicted direction. To understand the magnitude of the effect of brief quality, Figure 1 below depicts the marginal effects of increased brief quality on opinions' overlap values.

Figure 1: Marginal Effects of Brief Quality on Overlap Values



Note: Dashed outer lines represent 95% confidence intervals.

The figure shows that as brief quality increases, so does the amount of language the Justices and clerks share with briefs. There is more than a fourfold increase in the amount of language that opinions tend to share with briefs that meet the upper bounds of the brief quality when com-

pared with briefs at the lower bounds.[118] This suggests that an increased focus on writing quality does indeed enhance the Court's focus and reliance on particular merits briefs.

Table 3 underscores the difference between the amount of language the Court shares with high and low quality briefs. This table examines statistics from the top 100 and bottom 100 briefs based on the quality measure.

Table 3: Overlap Score Statistics for Top and Bottom 100 Brief Quality Scores

Statistic	Top 100	Bottom 100
Mean	10.32	5.67
Median	9.00	4.50
Variance	28.60	38.85
Skewness	1.37	2.91

Table 3 shows that the average amount of language that the Court shares with the top 100 briefs in the dataset based on brief quality is almost double that for the bottom 100. The overlap values for the top 100 briefs based on brief quality are also less dispersed as the variance and skewness are both smaller than those for the bottom 100 briefs. These values indicate that the top 100 briefs' overlap values are less driven by outliers than the bottom 100 briefs' values.

IV. ATTORNEY EXPERIENCE

Do more experienced Supreme Court attorneys draft higher-quality briefs? On one hand, one might expect that by the time attorneys file briefs in Supreme Court cases they have already honed their legal writing skills through appellate legal practice. Without additional input and writing training, an attorney's writing ability should be well defined by the time practitioners begin writing Supreme Court briefs. On the other hand, experienced Supreme Court practitioners may have gained a skillset, based on their specific knowledge of the Justices, which only those with such experience can acquire. The results in Table 4 provide evidence of the relationship between Supreme Court attorney experience and brief quality and show that to some extent both suppositions are correct.

118. The margins command in Stata bases its results on mean values for all other variables.

Table 4: Overlap Values and Quality Index by Attorney Experience Level

	Overlap Value (mean)	Brief Quality (mean)	N
Overall	9.55	0.00	9498
Repeat Player	11.54	0.05	3415
Non-Repeat Player	8.44	-.03	6063
Difference	3.10	0.08	

Note: Difference in means tests for overlap and quality both show the means are statistically different from each other at the .001 level. Repeat Player refers to attorneys with more than one brief filed in the Supreme Court.

According to Table 4, there is a slight difference in the quality of briefs from more experienced attorneys whose briefs are, on average, higher quality. This may be attributed to their increased Supreme Court brief writing experience. The difference in mean overlap scores between these two groups, however, is quite large at over three-percent per opinion. Differences in brief quality alone cannot account for this large difference in overlap values. This leads to the conclusion that an experienced attorney's credibility before the Court enhances the overlap values of their briefs more than quality alone would indicate.

CONCLUSION

This Article is the first attempt to empirically trace the effects of merits brief writing quality on Supreme Court case outcomes as well as on the amount of language majority opinions share with merits briefs.[119] Perhaps not surprisingly, the main finding is that quality does indeed matter. Higher-quality writing increases the likelihood of winning and increases the amount of language the Court shares with briefs. Low quality writing can have the opposite effect.

These findings are significant in our understanding of the role of Supreme Court advocacy. Well-written briefs may help win otherwise close cases by focusing the Court on a particular party's argument in the merits brief. Even when a party is likely to lose on the merits, however, the insights about increased brief quality can benefit the party on the

119. *See* Ryan C. Black, Matthew E. K. Hall, Ryan J. Owens & Eve M. Ringsmuth, *The Role of Emotional Language in Briefs Before the U.S. Supreme Court*, 4 J.L. & CTS. 377, 378 (2016) (examining whether emotional language in briefs affects a brief's likelihood of success).

margins by leading the Justices and clerks to insert a greater amount of language from the brief in the opinion.

Attorney experience and credibility also play large roles in the Justices' decisions, and their effects are augmented by higher-quality brief writing. When we observe the Court sharing more language with losing rather than winning briefs, the losing brief is often from more experienced attorneys. While the Court may not agree with the losing party's argument on the merits, the attorney's credibility can still lead the Court to share more language with this party's brief. A prime example of this relationship often occurs when the SG loses cases on the merits.

Based on this Article's results, which correspond with the Justices statements, the Justices appear to practice what they preach by favoring and awarding more shared language to higher-quality briefs.

APPENDIX

A. Readability Algorithms

The algorithms found below are alternative readability algorithms that are used in other linguistic studies. The data comparisons below, based on a random sample of 1,000 briefs, show how well these measures compare to the readability measure used in this Article.

Flesch Reading Ease (FRE)

$$FRE=206.835-1.015(W/S)-84.6(Y/W) \quad (1)$$

W=total words, S=total sentences, Y=syllables

Flesch Kincaid Grade Level (FGL)

$$FGL=.39(W/S)+11.8(Y/W)-15.59 \quad (2)$$

Gunning Fog Index (GFI)

$$GFI=.4[(W/S)+100(CW/W)] \quad (3)$$

CW= complex words

Table 5: Comparison of Readability Measures' R2 Values

Metric	R2
Quality Measure in this Article	**.0237**
Flesch reading ease	.0072
Flesch Kincaid grade level	.0033
Gunning Fog	.0021

Note: R2 values computed based on linear regression of readability measure on the outcome of overlap value with values clustered on Supreme Court term.

B. Regular Expression Code

\b(never|no|nothing|nowhere|noone|none|not|havent|hasnt|hadnt|cant|couldnt|shouldnt|wont|wouldnt|dont|doesnt|didnt|isnt|arent|aint)(?:\W+\w+){0,3}?\W+(.*)\b

C. Quality Variables Multilevel Model

Table 6: Multilevel Model with Quality Variables

Variable	Coefficient	Standard Error
Complexity	-0.177*	(0.0719)
Legal Salience	-0.808***	(0.197)
Political Salience	-1.172***	(0.198)
Solicitor General	3.638***	(0.291)
State	-0.712***	(0.115)
Civil Liberties	-0.188	(0.147)
Petitioner's Brief	1.079***	(0.105)
Attorney Experience (Log)	0.344***	(0.0891)
Winning Brief	1.912***	(0.166)
Ideological Compatibility	0.472**	(0.168)
Unanimous	0.679***	(0.205)
Five to Four Vote	-0.688***	(0.177)
Clerks Per Chamber	-0.205*	(0.0804)
Passivity	-0.0289*	(0.0117)
Wordiness	-0.0748*	(0.0326)
Lively Language	0.0261	(0.0329)
Sentence Complexity	-0.285***	(0.0841)
Sentiment	0.143***	(0.0316)
Constant	12.85***	(1.691)
Variance of Constant	1.251***	(0.0304)
Variance of Residual	1.487***	(0.0285)

N	9498

Robust standard errors in parentheses clustered on Supreme Court term.

$^{*}p<0.05$, $^{**}p<0.01$, $^{***}p<0.001$

Model fit using maximum likelihood

OUT FROM THE SHADOWS: TITLE IX, UNIVERSITY OMBUDS, AND THE REPORTING OF CAMPUS SEXUAL MISCONDUCT

BRIAN A. PAPPAS[†]

ABSTRACT

Confidentiality is a challenge and an opportunity for university administrators in charge of resolving campus sexual misconduct. As an opportunity, confidentiality can be used to build trust, provide self-determination, and ensure privacy for survivors and alleged perpetrators. Confidentiality also presents significant challenges because it may prevent people from the reporting of all known instances of sexual misconduct. Without knowing about an instance of sexual misconduct, university officials are unable to investigate and remedy problems, potentially exposing the institution to liability. Title IX Coordinators oversee a compliance regime that mandates reporting but in practice results in widespread underreporting of campus sexual misconduct. Both formal and informal reporting mechanisms are necessary to manage sexual misconduct disputes, but currently neither Ombuds nor Title IX Coordinators adhere to their respective archetypes. The result is increased liability risk to the institution, fewer procedural choices for survivors and alleged perpetrators, and processes that lack legitimacy. In order to fulfill the mandates of Title IX, universities must implement and utilize organizational Ombuds offices that adhere to the International Ombudsman Association's (IOA) standards of practice. Non-conforming Ombuds must be mandatory reporters, as only a true alternative reporting mechanism can overcome the current ineffectiveness of the formal complaint system.

TABLE OF CONTENTS

---

† Brian A. Pappas, Ph.D., LL.M., J.D., M.P.P., Associate Clinical Professor of Law, Associate Director of Alternative Dispute Resolution, and Title IX Coordinator at Michigan State University College of Law. The author gratefully acknowledges the able research assistance of Lorena Valencia and the helpful comments of John Bonine and members of the MSU Law Faculty. Any errors are mine alone.

INTRODUCTION

Imagine you are a University Title IX Coordinator who uses formalized processes modeled in some ways on procedures used by prosecutors and courts in order to ensure a hostility-free educational environment. A female undergraduate student is in your office telling you she was a victim of a sexual assault. You believe her, but you believe it is a coin toss as to whether the evidence will be enough to prove the assault occurred. She never wants to see the perpetrator again, she does not want her parents to find out, and she is wary of going through a public hearing. She is very emotional and simply wants someone to know what happened. She tells you, "I knew it was a mistake coming here!" According to the 2011 Dear Colleague letter[1] and your university's official policies, you have an obligation to investigate every instance of sexual misconduct. Yet you

---

Editors' Note: Portions of this Article reference, quote, and discuss confidential interviews as part of the Author's qualitative dissertation research. The Editors of the *Denver Law Review* did not verify this content due to the Author's Confidential Disclosure Agreements with the Interviewees. Conducted using widely accepted research methods, the Author's research was supervised by the School of Public Affairs and Administration and approved by the University of Kansas Institutional Review Board.

1. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER (Apr. 4, 2011) [hereinafter OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER], http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf. The Department of Education determined that this letter was a "significant guidance document" under the Office of Management and Budget's Final Bulletin for Agency Good Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007).

also know that the hearing process in this case would be arduous and could generate considerable publicity. Further, if you begin even the first step of the formal process of investigation and hearings as required by the 2011 Dear Colleague Letter[2] and university policy,[3] you will be unable to guarantee confidentiality to this distraught student. What do you do?

Consider another scenario. Imagine you are a University Ombuds tasked with providing an informal means for hearing complaints. The same student is in your office telling you she was a victim of a sexual assault. Your institution is under investigation for the mishandling of prior sexual assault complaints.[4] Because of this investigation and the heightened attention to adhering strictly to the guidelines in the U.S. Department of Education, Office for Civil Rights 2011 Dear Colleague Letter,[5] you face considerable pressure to report any instances of sexual misconduct. To do otherwise would seem to the investigators, and your university superiors, as an instance of sweeping abuses under the rug.[6] But, as an Ombuds, you are bound by a commitment requiring you to maintain the confidentiality of every person who makes a complaint to you.[7] The student before you asks you about the investigation and hearing process, which you know to be difficult for victims and often does not result in a finding of misconduct. Hearing your description of the process, she says that she does not want to be dragged through such an ordeal. This is the second person over the past year to come into your office and make an allegation against this particular perpetrator. The two complaints are quite similar. They seem to you to be quite credible and compelling evidence that the university has a sexual predator on campus. What do you do?

As illustrated by the above scenarios, sexual misconduct is an ongoing problem on university campuses,[8] and universities are scrambling to

---

2. *Id.* at 4.

3. *See, e.g.*, OFFICE OF THE PRESIDENT, MICH. STATE UNIV., UNIVERSITY POLICY ON RELATIONSHIP VIOLENCE & SEXUAL MISCONDUCT 24–25 (rev. ed. Aug. 31, 2016), https://www.hr.msu.edu/documents/uwidepolproc/RVSMPolicy.pdf.

4. *Title IX: Tracking Sexual Assault Investigations*, CHRON. HIGHER EDUC., http://projects.chronicle.com/titleix/ (last updated Sept. 9, 2016) (listing 282 open federal investigations).

5. *See* OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER, *supra* note 1, at 2.

6. Kirsten Gillibrand, *We Will Not Allow These Crimes to Be Swept Under the Rug Any Longer*, TIME (May 15, 2014), http://time.com/100144/kirsten-gillibrand-campus-sexual-assault/.

7. IOA STANDARDS OF PRACTICE §§ 3.1–3.8 (INT'L OMBUDSMAN ASS'N 2009), http://www.ombudsassociation.org/IOA_Main/media/SiteFiles/IOA_Standards_of_Practice_Oct09.pdf.

8. *See* DAVID CANTOR ET AL., WESTAT, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 57 tbl.3-2 (2015), https://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/Report%20on%20the%20AAU%20Campus%20Climate%20Survey%20on%20Sexual%20Assault%20and%20Sexual%20Misconduct.pdf (stating that since entering college, 23.1% of female undergraduates surveyed reported experiencing nonconsensual penetration or sexual touching in-

address it.[9] This Article focuses on two alternative structures for addressing university sexual misconduct. The first of these university structures is the Title IX Coordinator, an official charged with enforcing the law through law-informed procedures.[10] The second is the Ombuds, an official who, although given no formally defined responsibility, is available to hear all manner of complaints and usually performs this role through no law-like procedures.[11] Each of these structures hears and responds to complaints in an increasingly legalized environment plagued by an epidemic of peer sexual violence.

A. The Problem of Campus Sexual Misconduct

The difficulty facing universities in the area of sexual misconduct, and the high stakes accompanying the tension between these two alternative procedures, is compounded by sharp crosscutting pressures. There is an epidemic of peer sexual violence occurring on campuses across the nation.[12] A recent study found one-third of undergraduate female seniors report being a victim of nonconsensual sexual contact at least once during college.[13] Drugs and alcohol surely contribute to many of these assaults, accentuating the problem as so many college students drink to excess.[14] Evidence indicates sexual misconduct is widely underreported.[15] Non-reporting occurs due to a fear of reprisal and a belief the process will not work or not be fair.[16] The problem especially occurs within relationships (romantic as well as hierarchical), making it more difficult for survivors to come forward.[17] In part, the problem is a product of the university context itself, requiring that institutions take action to remediate the effects of sexual misconduct.[18] Perceptions of organizational tolerance to sexual harassment are significantly related to the frequency of sexual harassment incidents and the effectiveness in combating the problem.[19] Organizationally, studies reveal that where a choice of sanctions

---

volving physical force or incapacitation); *Title IX: Tracking Sexual Assault Investigations*, *supra* note 4.

9. *About ATIXA and Title IX*, ATIXA, https://atixa.org/about/ (last visited Jan. 26, 2016) ("Now, schools are scrambling to update policies, implement training, and understand the Office for Civil Rights' (OCR) expectations for prevention.").

10. OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER, *supra* note 1, at 7.

11. IOA STANDARDS OF PRACTICE, *supra* note 7, §§ 4.1–4.5.

12. *See generally* CHRISTOPHER P. KREBS ET AL., NAT'L INST. OF JUSTICE, THE CAMPUS SEXUAL ASSAULT (CSA) STUDY (2007), http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf; David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 73 (2002).

13. CANTOR ET AL., *supra* note 8, at xiv.

14. William DeJong, *The Impact of Alcohol on Campus Life*, *in* RESTORATIVE JUSTICE ON THE COLLEGE CAMPUS: PROMOTING STUDENT GROWTH AND RESPONSIBILITY, AND REAWAKENING THE SPIRIT OF CAMPUS COMMUNITY 101, 104 (David R. Karp & Thom Alena eds., 2004).

15. *See infra* notes 168–71 and accompanying text.

16. *See infra* notes 172–73 and accompanying text.

17. *See infra* notes 174–75 and accompanying text.

18. *See infra* notes 176–78 and accompanying text.

19. Camille Gallivan Nelson, Jane A. Halpert & Douglas F. Cellar, *Organizational Responses for Preventing and Stopping Sexual Harassment: Effective Deterrents or Continued Endurance?*, 56

for harassment is available, it is common for the least stringent to be selected, such as a formal or informal warning without further action.[20] Such responses indicate a deflection of organizational responsibility and may indicate a "climate of tolerance."[21]

In sum, Title IX Coordinators face a context in which there is a lot of sexual misconduct, misconduct especially occurs within romantic and other relationships involving power dynamics, and survivors are very hesitant to come forward. Universities must implement processes that facilitate rather than discourage individuals to make complaints. Furthermore, these processes must fairly adjudicate responsibility for misconduct. Finally, universities need mechanisms for ensuring that university leaders know about significant problems and must develop ways to address these problems.

B. The Legal Context of Campus Sexual Misconduct

The legal environment puts pressure on universities to address the problem of sexual misconduct through the lens of individual complaints.[22] The Department of Education's Office for Civil Rights (OCR) is tasked with enforcing Title IX of the Educational Amendments of 1972.[23] Title IX promotes equity in academic and athletics programs, prohibits hostile environments on the basis of sex, prohibits sexual harassment and sexual violence, and directs universities to protect complainants against retaliation and to remedy the effects of other gender-based forms of discrimination.[24] Originally codified in the Title IX implementing regulations, federal funding recipients are required to "designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under [Title IX], including any investigation of any complaint communicated to such recipient alleging its noncompliance with [Title IX] or alleging any actions which would be prohibited by [Title IX]."[25] In response to Title IX, universities created Title IX compliance officers and organizational mechanisms for addressing indi-

---

SEX ROLES 811, 811 (2007); *see also* Kathi Miner-Rubino & Lilia M. Cortina, *Working in a Context of Hostility Toward Women: Implications for Employees' Well-Being*, 9 J. OCCUPATIONAL HEALTH PSYCHOL. 107, 107 (2004).

20. Denise Salin, *Organisational Responses to Workplace Harassment: An Exploratory Study*, 38 PERSONNEL REV. 26, 39–40 (2008).

21. Paula McDonald, *Workplace Sexual Harassment 30 Years on: A Review of the Literature*, 14 INT'L J. MGMT. REVIEWS 1, 21 (2012) (internal quotation marks omitted).

22. Julie Novkov, *Equality, Process, and Campus Sexual Assault*, 75 MD. L. REV. 590, 614 (2016) ("I observe here that, thus far, we have been thinking of campus sexual assault as a private and individualized criminal or quasi-criminal wrong in which campus authorities become involved because of the need to resolve disputes between and among students.").

23. *Title IX and Sex Discrimination*, U.S. DEP'T EDUC., http://www2.ed.gov/print/about/offices/list/ocr/docs/tix_dis.html (last modified Apr. 29, 2015).

24. *See* 20 U.S.C. § 1681 (2012); *see also* OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., TITLE IX RESOURCE GUIDE 3, 11, 15–16, 24 (2015) [hereinafter OFFICE FOR CIVIL RIGHTS, TITLE IX RESOURCE GUIDE], http://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf.

25. 34 C.F.R. § 106.8(a) (2016).

vidual complaints of sexual harassment and gender inequities.[26] Over thirty years after Title IX's implementation, compliance officers are now known as Title IX Coordinators.[27]

According to the Association for Title IX Administrators (ATIXA), there are 25,000 individuals who assure Title IX compliance in schools, colleges, and universities across the country.[28] This means coordinating investigations and providing information and consultation to potential complainants, and receiving formal notice of complaints.[29] Title IX Coordinators or their staff schedule, coordinate or oversee grievance hearings, conduct investigations, make findings of violations of Title IX, notify parties of decisions, and provide information of the right and procedures of appeal.[30] They also train staff, maintain records, ensure that timelines and procedures are followed, and provide ongoing training, consultation, and technical assistance.[31] The authority of a Title IX coordinator is to conduct a formal and defined process to determine whether there has been a violation of the law.[32] All educational institutions are bound by their own policies and procedures, constitutional due process mandates, state contract and civil rights law, federal education laws, and the oversight of the Department of Education Office for Civil Rights.[33] Dear Colleague Letters, issued through OCR, specify and clarify the requirements of Title IX.[34] While these Dear Colleague Letters lack the force of law, courts pay them great attention.[35] The legal standards for compliance by universities remained unclear until OCR issued a Dear Colleague Letter on April 4, 2011.[36]

The Dear Colleague Letter issued on April 4, 2011 dramatically shifted the interpretation of Title IX enforcement by prescribing the knowledge[37] and evidentiary standards[38] for handling sexual misconduct

---

26. RISA L. LIEBERWITZ ET AL., AM. ASS'N OF UNIV. PROFESSORS, THE HISTORY, USES, AND ABUSES OF TITLE IX 102 (2016), https://www.aaup.org/file/TitleIXreport.pdf.

27. OFFICE FOR CIVIL RIGHTS, TITLE IX RESOURCE GUIDE, *supra* note 24, at 1.

28. *About ATIXA and Title IX*, *supra* note 9.

29. OFFICE FOR CIVIL RIGHTS, TITLE IX RESOURCE GUIDE, *supra* note 24, at 2, 4, 16.

30. *About ATIXA and Title IX*, *supra* note 9, at 2, 5.

31. *Id.*

32. *Id.* at 2.

33. *See generally* Mathew R. Triplett, Note, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L.J. 487, 492 (2012).

34. OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER, *supra* note 1, at 2.

35. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984) (directing courts to defer to administrative interpretations of their authorizing legislation except when those interpretations contravene the law).

36. OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER, *supra* note 1, at 2–3.

37. *Id.* at 4 (providing that a university must take action "[i]f a school knows or reasonably should know about student-on-student harassment that creates a hostile environment"). This interpretation represented a sharp departure from the "actual knowledge and deliberate indifference" standard for private lawsuits for monetary damages. *See id.* at 4 n.12. Schools can no longer avoid knowledge of sexual harassment, and it is much easier to show that responsible university employees knew or should have known of the misconduct.

disputes and by requiring universities to address student-to-student sexual misconduct on or off campus.[39] The letter also provides guidance on what constitutes fair procedures, including discouraging schools from allowing the parties to question or cross-examine one another, giving institutions discretion to determine whether to permit parties to have counsel (provided both sides are treated equally), and mandating that both parties have the right to invoke an appeal process.[40]

The Letter also requires educational training for employees,[41] implementation of preventative education programs, and provision of comprehensive survivor resources.[42] Finally, the 2011 Dear Colleague Letter affirms the requirement that universities are required to employ a Title IX Coordinator and clarifies Title IX Coordinators should not have other job responsibilities that may create a conflict of interest.[43]

OCR released a Question and Answers document in 2014 and a Resource Guide in 2015 to provide further clarification on what constitutes compliance with Title IX.[44] Title VII of the Civil Rights Act of 1964,[45] the "Campus SaVE Act" within the 2013 reauthorization of the Violence Against Women Act,[46] the Clery Act,[47] FERPA,[48] due process rights,[49]

---

38. *Id.* at 11 (requiring the use of a preponderance of the evidence standard and noting that "[t]he 'clear and convincing' standard . . . currently used by some schools, is a higher [and improper] standard of proof").

39. *Id.* at 4 (dramatically increasing the scope of cases for which Title IX Coordinators are responsible by providing that "[s]chools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school's education program or activity" and that "[i]f a student files a complaint with the school, regardless of where the conduct occurred, the school must process the complaint in accordance with its established procedures").

40. *Id.* at 12.

41. *Id.* at 4, 12 (requiring training for employees likely to witness or receive reports of sexual misconduct and declaring that in sexual violence cases the fact-finder and the decision-maker should have adequate training or knowledge regarding sexual violence).

42. *Id.* at 14.

43. *Id.* at 7 ("[S]erving as the Title IX coordinator and a disciplinary hearing board member or general counsel may create a conflict of interest.").

44. OFFICE FOR CIVIL RIGHTS, TITLE IX RESOURCE GUIDE, *supra* note 24; OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014) [hereinafter OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS], http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf. The Department of Education determined that the questions and answers document was a "significant guidance document" under the Office of Management and Budget's Final Bulletin for Agency Good Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007).

45. 42 U.S.C. § 2000e-2(a) (2012) (prohibiting employers from discriminating in the terms and conditions of employment based upon "race, color, religion, sex, or national origin"), *limited on constitutional grounds by* Rweyemamu v. Cote, 520 F.3d 198 (2d Cir. 2008).

46. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 54, 89–92 (2013) (codified as amended at 20 U.S.C. § 1092(f) (2012)). The Campus Sexual Violence Elimination Act of 2013, or "Campus SaVE Act," is embedded within the 2013 reauthorization of 1994's Violence Against Women Act. *Id.*

47. Jeanne Clery Disclosure of Campus Security Policy and Campus Crimes Statistics (Clery) Act, 20 U.S.C. § 1092(f) (2012). The Clery Act was originally called the Crime Awareness and Campus Security Act of 1990, Pub. L. No. 105-542, 104 Stat. 2381, 2384–87, and was amended by the Campus SaVE Act, Pub. L. No 113-4, § 304, 127 Stat. 54, 89–92.

48. Family Educational Rights and Privacy Act (FERPA) of 1974, Pub. L. No. 93-380, § 513, 88 Stat. 484, 571–74 (codified at 20 U.S.C. § 1232g (2012)).

and administrative law all add additional legal requirements. Further, survivors may enforce their rights via private action initiated against her school.[50]

In concert with the new law, federal administrators are making it clear that preventing and handling campus sexual assaults must be a university priority. In January 2014, President Obama pledged to develop a coordinated federal response to combat campus sexual assault.[51] President Obama created a White House Task Force on Protecting Students From Sexual Assault, designed to provide colleges with information on best practices, to ensure compliance with legal obligations, to increase the transparency of federal enforcement, to increase the public's awareness of individual college's compliance with the law, and to facilitate coordination among federal agencies.[52] The White House Task Force (WHTF) issued its first report, "Not Alone," in April 2014, and created a website, NotAlone.gov, to provide resources for schools and students.[53] The task force report recommends campus climate surveys,[54] actively engaging with men, and actively creating campus bystander programs to change campus cultures.[55] The report also recommends giving survivors more control over the process by ensuring a place to go for confidential advice and support.[56] It recommends training officials in how to address the trauma that attends sexual assault.[57]

Since OCR began tracking sexual misconduct Title IX complaints in 2009, the number of complaints filed against colleges has tripled from eleven in 2009 to thirty-three through April of 2014.[58] As of November 29, 2016, there were 287 open federal Title IX investigations underway.[59] Despite this trend, an analysis of Title IX complaints filed with

---

49. U.S. CONST. amend. V ("No person shall be held . . . nor be deprived of life, liberty, or property, without due process of law . . . ."); U.S. CONST. amend. XIV, § 1 (binding the states to the same language).

50. Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 633 (1999) (holding a private damages action for sexual harassment may proceed on Title IX grounds only where the funding recipient acts with deliberate indifference to known acts of harassment and the harassment is "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit").

51. Libby Sander, *Obama Promises Governmentwide Scrutiny of Campus Rape*, CHRON. HIGHER EDUC. (Jan. 23, 2014), http://www.chronicle.com/article/Obama-Promises-Governmentwide/144147/.

52. *Id.*

53. *See* THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, NOT ALONE: THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT (2014), http://www.whitehouse.gov/sites/default/files/docs/report_0.pdf.

54. *Id.* at 8.

55. *Id.* at 2.

56. *Id.* at 11.

57. *Id.* at 3.

58. Jonah Newman & Libby Sander, *A Promise Unfulfilled*, CHRON. HIGHER EDUC., May 9, 2014, at A20, A24.

59. *Title IX: Tracking Sexual Assault Investigations*, *supra* note 4.

the Department of Education from 2003 to 2013 found that fewer than one in ten led to a formal agreement to change campus policies.[60]

Increased attention to sexual misconduct has also led to a proliferation of complaints and lawsuits. In January of 2013, student Andrea Pino and four other complainants made a federal complaint against the University of North Carolina at Chapel Hill accusing the university of negligently handling its responses to rape.[61] Students elsewhere filed similar complaints against Amherst, Berkeley, Dartmouth, Occidental, Swarthmore, and Vanderbilt and other universities.[62] Students accused of sexual misconduct are also finding success after filing complaints. In 2015, Middlebury College, the University of Southern California, and University of California, San Diego were all ordered to reinstate expelled students.[63] Nearly fifty lawsuits by accused students are in process, an increase from roughly twelve in 2013.[64] Young men are as unhappy with the outcome of college investigations as their accusers, and often, both sides find the process unfair.[65] In a June, 2016 report issued by the American Association of University Professors (AAUP), incorrect OCR interpretation and overzealous administrative implementation were described as the cause of undue restrictions on teaching, research, speech, academic freedom, and due process.[66] The AAUP argued that both the university response and the criminal justice system serve "neither survivors nor alleged perpetrators with any notable degree of fairness."[67] The core due process arguments advanced include (1) a lack of a hearing with (2) the right to confrontation and cross-examination and (3) incorrect use of the preponderance of evidence standard of proof.[68]

An additional criticism against current Title IX enforcement is that the Dear Colleague Letters are not merely interpretive, but instead promulgate new rules and requirements in violation of the Administrative Procedure Act.[69] Considered interpretive rules, the Dear Colleague Letters

60. Newman & Sander, *supra* note 58, at A21.

61. *See* Libby Sander, *Anti-Rape Activist, in The Chronicle List: This Year's Newsmakers*, CHRON. HIGHER EDUC., Dec. 9, 2013, at A20.

62. *Id.*

63. Tovia Smith, *For Students Accused of Campus Rape, Legal Victories Win Back Rights*, NPR.ORG (Oct. 15, 2015, 4:45 AM), http://www.npr.org/2015/10/15/446083439/for-students-accused-of-campus-rape-legal-victories-win-back-rights.

64. *Id.*

65. Robin Wilson, *On New Front in Rape Debate, Student Tells Education Dept. His Side*, CHRON. HIGHER EDUC., June 20, 2014, at A11.

66. LIEBERWITZ ET AL., *supra* note 26, at 69, 82–87 (describing the use of role playing exercises in a Deviance in U.S. Society course and other content that could trigger victims, mandating reporting requirements in sexual harassment research activities, and describing freedom of speech issues with anonymous technology apps and student publications).

67. *Id.* at 90.

68. *Id.* at 79.

69. *See* Letter from Senator James Lankford to the Honorable John B. King, Jr., Acting Sec'y, U.S. Dep't of Educ. (Jan. 7, 2016), http://www.lankford.senate.gov/imo/media/doc/Sen.%20Lankford%20letter%20to%20Dept.%20of%20Education%201.7.16.pdf (discussing the rulemaking provision of the Administrative Procedure

are defined by the Supreme Court as those "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers" that otherwise "do not have the force and effect of law."[70] Despite lacking the force of law, courts pay them great attention.[71] Recent letters from Oklahoma Senator James Lankford to the U.S. Department of Education challenges the legitimacy of recent Dear Colleague Letters by arguing they create substantive changes and require the use of the Administrative Procedure Act's rulemaking procedures.[72]

With the election of Donald Trump, federal oversight of how colleges and universities handle sexual assault will likely subside or disappear.[73] The Republican Platform notes that sexual assault should be "investigated by civil authorities and prosecuted in a courtroom, not a faculty lounge."[74] Despite facing less enforcement from the federal government, universities and colleges will likely still follow the letter and spirit of Title IX as Title IX and the accompanying regulations will still be obligatory.[75] In sum, Title IX Coordinators address campus sexual misconduct in an unstable but legalized environment that is characterized by growing complaints, liability pressure, and specific directives from the U.S. Department of Education's OCR.

Universities face a dilemma in determining how to create fair, consistent, and reliable processes that respect the rights of both alleged perpetrators and victims, while at the same time encouraging people to bring complaints forward. Without active reporting and effective processes for handling complaints, universities are unable to maintain a safe environment for all students. The difficulty of the dilemma is compounded by the fact that universities are increasingly expected to change the culture and norms shaping campus sexual misconduct so as to reduce the extent of the problem. As will be described below, some measures to achieve

---

Act (APA), Pub. L. No. 79-404, § 553, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. § 553 (2012)).

70. Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1204 (2015).

71. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) (directing courts to defer to administrative interpretations of their authorizing legislation except when those interpretations contravene the law).

72. Letter from Senator James Lankford to the Honorable John B. King, Jr., Acting Sec'y, U.S. Dep't of Educ. (Mar. 4, 2016), http://www.lankford.senate.gov/imo/media/doc/3.4.16%20Lankford%20letter%20to%20Dept.%20of%20Education.pdf; Letter from Senator James Lankford to the Honorable John B. King, Jr., *supra* note 69.

73. Robin Wilson, *Trump Administration May Back Away from Title IX, but Campuses Won't*, CHRON. HIGHER EDUC. (Nov. 11, 2016), http://www.chronicle.com/article/Trump-Administration-May-Back/238382?elqTrackId=ffbf39ad426d40b9a0c8bc988b4af3c5&elq=1a834a475d714e53817f10d78bfa4245&elqaid=11452&elqat=1&elqCampaignId=4477.

74. Jake New, *Campus Sexual Assault in a Trump Era*, INSIDE HIGHER ED (Nov. 10, 2016), https://www.insidehighered.com/news/2016/11/10/trump-and-gop-likely-try-scale-back-title-ix-enforcement-sexual-assault.

75. Wilson, *supra* note 73.

these goals seem to require greater formality in procedures; some seem to require greater informality.

C. Compliance Requires Both Formal and Informal Mechanisms

This Article examines how two university offices respond to the confidentiality challenge of campus sexual misconduct. One is the long-standing office of Ombuds, which by tradition and ethical norms has been committed to using informal processes for hearing complaints. The other is the office of Title IX Coordinator, which uses formalized processes modeled in some ways on procedures used by prosecutors and courts. Data collection comprised of a review of 1,200 documents and interviews with fourteen Ombuds and thirteen Title IX Coordinators from twenty-two large institutions of higher education. Conducted between 2011 and 2014, the research methods consisted of open-ended interviews, content analysis of these interviews, and the analysis of documents relating to Title IX. The participants were from every region of the country. Participants were primarily from large doctoral degree granting public and private research institutions, but several master's level institutions were also included. The sensitive nature of the topic restricted the sample size. As the numbers interviewed grew, the stories and commentary became repetitive. While it is possible that the twenty-seven officials who agreed to be interviewed were somehow systematically different from others who declined, I suspect that they were more typical than unique. The participants, while relatively small in number, do not appear to be systematically skewed in any obvious ways. These interviews provide insight into the nature of Title IX compliance between 2011 and 2014.

First, this Article describes the mandatory reporting requirements, the current compliance regime in place at universities, and the Title IX archetype that must, by nature, prioritize the interests of compliance over those of confidentiality. Next the Article describes the limits of a compliance regime, including the tensions between individual self-determination and community safety and managerial efficiency versus legal compliance. In each of these areas, Title IX Coordinators frequently depart from the legal requirements of the role. Third, Ombuds are promoted as a means of satisfying the underlying aims of Title IX. The benefits of informal reporting options are described—specifically, the benefits to the formal processes for providing individuals with confidentiality and protecting the formal mechanism's independence and impartiality. Essentially, Title IX Coordinators can retain their compliance function with a well-designed informal mechanism. As described below, in reality many Ombuds do not practice to the standards of the archetype, necessitating reforms to ensure effective compliance.

The Article concludes that both formal and informal reporting mechanisms are necessary and required to manage sexual misconduct

disputes. Currently neither Ombuds nor Title IX Coordinators adhere to their respective archetypes, resulting in increased liability risk to universities, fewer procedural choices for survivors and alleged perpetrators, and processes that lack legitimacy. Fundamentally, in order to bring complaints of misconduct out of the shadows, universities require properly designed and executed formal and informal administrative mechanisms. Simply put, universities require Ombuds—adhering to their professional norms—in order to comply with Title IX.

I. REPORTING MISCONDUCT IN A COMPLIANCE REGIME

Title IX Coordinators promise confidentiality, but only to the extent that it does not interfere with the law and interests of compliance.[76] Put simply, Coordinators give priority to reporting and compliance.[77] As an office of notice, for Coordinators, confidentiality is a relative concept and is not given priority over compliance with mandatory reporting.[78] This Section describes the Title IX Coordinator's archetypal obligations and provides evidence of Title IX Coordinators complying with the model.

A. The Title IX Coordinator Archetype: Mandatory Reporting in a Compliance Regime

Universities encourage mandatory reporting to support their interest in bringing forward complaints of sexual misconduct, so the complaints can be investigated, the perpetrators punished, and abuses deterred.[79] Additionally, mandatory reporting limits potential exposure to liability. The key question for Title IX Coordinators is whether it is appropriate for organizational members without a recognized privilege (medical, legal, religious, or psychological) to be exempt from mandatory reporting requirements. In order to bring as many complaints forward as possible, organizations often impose zero tolerance mandatory reporting requirements.[80] There is tension between preserving privacy and requiring reporting by every employee so no complaint "slips through the cracks."[81] Specifically addressing the reporting question, David Miller notes:

> [W]ho could not want to see perpetrators of sexual violence or any other kind of violence . . . exposed to the full consequence of their

76. *See infra* notes 102–04 and accompanying text.

77. *See infra* text accompanying notes 147–49.

78. *See infra* text accompanying note 153.

79. *See, e.g.*, OFFICE OF THE PRESIDENT, MICH. STATE UNIV., *supra* note 3, at 17; *see also infra* text accompanying notes 83–88.

80. *See, e.g.*, OFFICE OF THE PRESIDENT, MICH. STATE UNIV., *supra* note 3, at 19–20.

81. W. SCOTT LEWIS, SAUNDRA K. SCHUSTER, BRETT A. SOKOLOW & DANIEL C. SWINTON, THE TOP TEN THINGS WE NEED TO KNOW ABOUT TITLE IX (THAT THE DCL DIDN'T TELL US) 10 (2013) (internal quotation marks omitted), https://www.ncherm.org/wordpress/wp-content/uploads/2012/01/2013-NCHERM-Whitepaper-FINAL-1.18.13.pdf.

> actions, along with those who knowingly abet their horrible behavior? Knowledge is responsibility, and those in the know must also be held responsible for not acting on what they know if not acting betrays the public trust.[82]

In order to combat a culture of non-reporting, Title IX Coordinators typically do not promise confidentiality to complainants. Confidentiality impedes the public's right to know,[83] contravenes the transparency of courts, keeps critical information from people who most need to know, and shields the institution from needing to provide oversight and accountability.[84] The Title IX Coordinator ensures compliance with Title IX and reflects a compliance regime that seeks to prevent, elicit reports of, and eliminate instances of sexual misconduct. All of this, in the view of the Title IX model, requires disclosing information about complaints to those who can act on that information. The Title IX Coordinator archetype must be informed of all reports raising Title IX issues, even if originally filed with or handled by another individual or office.[85] Reporting requirements are waived for employees who are in a recognized counseling relationship with a potential complainant.[86]

Most university policies provide for confidentiality to the extent allowed by law, prohibit retaliation for making complaints, and allow the institution to investigate incidents of which it has become aware without a formal complaint.[87] Further, in order to ensure that no incident goes unattended, many colleges impose mandatory reporting requirements on all faculty, staff, and employees.[88] Title IX requires reporting from "responsible employees" or those with the authority to address and remedy gender based discrimination, those with responsibility to report sexual misconduct to a supervisor, or those a student would reasonably believe must do either of the above.[89] As an example of mandatory reporting requirements, the Discrimination Complaint Resolution Process at the University of Kansas specifies that all "unit heads and others who serve in leadership roles in the university" are required to report discriminatory

---

82. David Miller, *In Whom Can We Trust?*, J. INT'L OMBUDSMAN ASS'N, 2011, at 6, 6.

83. Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 947 (2006).

84. Laurie Kratky Doré, *Public Courts Versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463, 465–66, 518–19 (2006).

85. OFFICE FOR CIVIL RIGHTS, TITLE IX RESOURCE GUIDE, *supra* note 24, at 16; OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS, *supra* note 44, at 10–11.

86. OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS, *supra* note 44, at 22.

87. *See, e.g.*, OFFICE OF THE PRESIDENT, MICH. STATE UNIV., *supra* note 3, at 14, 32, 34.

88. ATIXA Presentation: The 2013 ATIXA Campus Title IX Coordinator and Administrator Training & Certification Course Materials 15 (Sept. 19–22, 2013) [hereinafter ATIXA Training & Certification Course Materials], https://www.atixa.org/wordpress/wp-content/uploads/2013/09/Title-IX-Coordinator-Certification-Course-Materials.doc.

89. *Id.* at 107.

actions.[90] All deans, directors, administrators, supervisors, faculty members, graduate teaching assistants, and academic advisors are required to contact the Office of Institutional Opportunity and Access to initiate an investigation if "they know or have reason to believe that discriminatory practice(s) may have occurred."[91] Similarly, Pennsylvania State University requires "with the exception of confidential support providers, all Penn State employees are responsible employees and are obligated to pass along information they learn about incidents of sexual misconduct to the University's Title IX Coordinator."[92] Harvard University notes:

> [U]niversity officers, other than those who are prohibited from reporting because of a legal confidentiality obligation or prohibition against reporting, must promptly notify the School or unit Title IX Coordinator about possible sexual or gender-based harassment, regardless of whether a complaint is filed. Such reporting is necessary for various reasons, including to ensure that persons possibly subjected to such conduct receive appropriate services and information; that the University can track incidents and identify patterns; and that, where appropriate, the University can take steps to protect the Harvard community.[93]

Mandatory reporting requirements put pressure on faculty members, resident advisors, and others lacking a privilege, yet who promise privacy or confidentiality to students approaching them for assistance. ATIXA recommends that all employees report incidents of misconduct to the Title IX Coordinator within twenty-four hours.[94] Some non-supervisory or non-responsible employees may be able to make anonymous reports initially but may need to provide details later at the direction of the Title IX Coordinator. OCR considers this category of reporter as "non-professional counselors or advocates" and describes them as individuals who work or volunteer in on-campus sexual assault centers, victim advocacy offices, women's centers, or health centers, including front desk staff and students.[95] These individuals are required to "report only general information about incidents of sexual violence such as the nature, date, time, and general location of the incident and should take care to avoid reporting personally identifiable information about a student."[96]

---

90. *Discrimination Complaint Resolution Process: Who Must Report Discriminatory Actions?*, U. KAN. POL'Y LIBR., http://policy.ku.edu/IOA/discrimination-complaint-resolution#WhoMustReport (last updated Aug. 31, 2016).

91. *Id.*

92. *A Note About Confidentiality*, PA. ST. U., http://titleix.psu.edu/filing-a-report/ (last visited Nov. 30, 2016).

93. FACULTY OF ARTS & SCIS., HARVARD UNIV., SEXUAL AND GENDER-BASED HARASSMENT POLICY AND PROCEDURES FOR THE FACULTY OF ARTS AND SCIENCES HARVARD UNIVERSITY 6 (Jan. 13, 2016), http://www.fas.harvard.edu/files/fas/files/fas_sexual_and_gender-based_harassment_policy_and_procedures-1-13-16.pdf?m=1453319539.

94. ATIXA Training & Certification Course Materials, *supra* note 88, at 108.

95. OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS, *supra* note 44, at 23.

96. *Id.* at 24.

Notably, ATIXA's Training Manual notes: "No employee should ever promise absolute confidentiality, though some (such as licensed counselors) are better able to protect information than others (though even licensed counselors, etc. have some situations where they must report if they have a duty to warn). Ombuds are not exempt from expectations of reporting."[97] The ATIXA Training Manual further states that all employees should be trained that "reports are private, but not confidential (unless made to a confidential resource)" and how to "convey this to victims without chilling the victim's willingness to report. It takes tact, but it can be done."[98] As a result, the model Title IX Coordinator is a private, but not necessarily confidential, office of notice and investigation.

Fundamentally, Title IX Coordinators cannot guarantee confidentiality. A directive in the University of Kansas Discrimination Complaint Resolution Process notes

> The Office of Institutional Opportunity and Access will handle all discrimination and harassment complaints discreetly but cannot guarantee confidentiality or anonymity because the University has an obligation to investigate complaints of discrimination and harassment and to maintain a safe environment, free from harassment and discrimination. Because of its obligations under the law, KU will not be able to honor all requests for confidentiality or all requests that a complaint not be pursued.[99]

Harvard's Title IX procedures state, "Information will be disclosed in this manner only to those at the University who, in the judgment of the Title IX Officer or School or unit Title IX Coordinator, have a need to know."[100]

Therefore, complainants wishing to report, but not participate in the ensuing investigation—or avoid an investigation altogether—may not have a choice to not participate. The ATIXA Training Manual notes that colleges are required "at minimum [to conduct] an investigation in all cases, to determine the extent of the harassment, the acuity of the threat it represents to students, and what might be necessary to put an end to it."[101] Confidentiality is thus a secondary goal to following and complying with the law. Coordinator archetypes are offices of notice, which officially makes the institution they represent aware of, and thus responsible for, any complaints or reports of sexual misconduct. The ATIXA Training Manual describes these confidentiality responsibilities as a "co-

97. ATIXA Training & Certification Course Materials, *supra* note 88, at 108–09.

98. *Id.* at 109.

99. *Discrimination Complaint Resolution Process: Confidentiality*, U. KAN. POL'Y LIBR., http://policy.ku.edu/IOA/discrimination-complaint-resolution#confidentiality (last updated Aug. 31, 2016).

100. FACULTY OF ARTS & SCIS., *supra* note 93, at 6.

101. ATIXA Training & Certification Course Materials, *supra* note 88, at 14.

nundrum" because "[i]nstitutional authorities who have notice of alleged sexual assaults/harassment are not likely to be able to keep those incidents completely confidential, as a result of the institution's affirmative obligation to investigate and act to resolve the incident."[102] This tension between protecting confidentiality and fulfilling the obligations of Title IX is evident in the ATIXA Training Manual: "The privacy of all parties to a complaint of sexual misconduct must be respected, except insofar as it interferes with the university's obligation to fully investigate allegations of sexual misconduct."[103]

While complainant's confidentiality must be considered, it is secondary to the goal of compliance and campus safety. The OCR 2014 Q&A document states, "OCR strongly supports a student's interest in confidentiality in cases involving sexual violence. There are situations in which a school must override a student's request for confidentiality in order to meet its Title IX obligations."[104] Such instances should be "limited and the information should only be shared with individuals who are responsible for handling the school's response to incidents of sexual violence."[105] Recognizing the potential for damage to the integrity and trust in the process, OCR mandates that, "[t]o improve trust in the process for investigating sexual violence complaints, a school must notify students of the information that will be disclosed, to whom it will be disclosed, and why."[106] Most notably, OCR recognizes the detrimental impact of breaching confidentiality: "A school should be aware that disregarding requests for confidentiality can have a chilling effect and discourage other students from reporting sexual violence."[107]

When complainants insist their identifiable information not be disclosed, schools must inform survivors of its limited ability to respond and of a prohibition against retaliation.[108] Complainants still preferring anonymity require schools to "evaluate the request in the context of the school's responsibility to provide a safe and nondiscriminatory environment for all students."[109] Because the Title IX Coordinator must have knowledge of all complaints, OCR notes that this individual is in the best position "to evaluate a student's request for confidentiality in the context of the school's responsibility to provide a safe and nondiscriminatory environment for all students."[110]

---

102. *Id.* at 15.
103. *Id.* at 31.
104. OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS, *supra* note 44, at 18–19.
105. *Id.* at 19.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 17.
110. *Id.* at 11.

The ATIXA Training Manual also provides guidance to Title IX Coordinators on how to handle requests for confidentiality. Where survivors are reluctant to make formal complaints, or withdraw formal complaints, the request should be honored and efforts need to be made "to persuade (not coerce) the alleged victim to reconsider," including reminding the person that (1) the institution will vigorously enforce its retaliation policy, (2) if he/she does not act, the perpetrator may harm someone else, (3) they can take time to consider and come back to make a decision, and (4) interim accommodations can be used to make reporting easier.[111] If a survivor refuses to file a formal complaint or will not allow his or her name to be revealed, a decision must be made "on whether sufficient threat is present to warrant an investigation independent of the cooperation of the alleged victim."[112]

Confidentiality is related to the Title IX Coordinator archetype's reporting requirements. The Clery Act requires all colleges and universities that participate in federal financial aid programs to keep and disclose information about crime on and near their respective campuses.[113] For example, schools must publish policies designed to prevent sexual violence and respond to it once it occurs.[114] These policies must include specific information about (1) reporting,[115] (2) the survivor's right to notify law enforcement and receive school assistance in doing so,[116] (3) instructions to survivors as how to preserve evidence of sexual violence,[117] (4) information about options and assistance for changing living and educational arrangement,[118] and (5) disciplinary procedures that explicitly treat accuser and accused equally in terms of having others present at hearings and to know disciplinary outcomes.[119]

In 2014, federal regulations clarified the 2013 Violence Against Women Act (VAWA) reauthorization requirements relating to confidentiality.[120] Specifically, they require institutions to maintain statistics (including numbers of unfounded crime reports), to educate incoming students and new employees, to engage in ongoing awareness campaigns, to describe disciplinary proceedings in detail, to detail a list of possible sanctions, and to indicate the range of protective measures the institution may offer.[121]

---

111. ATIXA Training & Certification Course Materials, *supra* note 88, at 53–54.
112. *Id.* at 54.
113. 20 U.S.C. § 1092(a)(1), (a)(1)(O) (2012).
114. *Id.* § 1092(f)(8)(A)(i)–(ii).
115. *Id.* § 1092(f)(8)(B)(iii).
116. *Id.* § 1092(f)(8)(B)(iii)(III)(aa)–(bb).
117. *Id.* § 1092(f)(8)(B)(iii)(I).
118. *Id.* § 1092(f)(8)(B)(vii).
119. *Id.* § 1092(f)(8)(B)(iv).
120. *See* 34 C.F.R. § 668.46 (2015).
121. *Id.*

The Family Educational Rights and Privacy Act (FERPA) guarantees student rights to confidentiality and impacts the handling of sexual misconduct complaints.[122] Specifically, FERPA protects against the unauthorized disclosure of confidential student education records. It grants parents of minor-aged students and students eighteen and older the right to access educational records, to challenge the records' contents, and to have control over disclosure of personally identifiable information in the records.[123] In terms of its impact on campus sexual misconduct, schools must inform the complainant that if she (or he) wishes to file a formal complaint, the school cannot ensure confidentiality. Conversely, if the complainant wishes to maintain her (or his) confidentiality, the school must inform the complainant that the school's ability to address the problem may be limited because investigators will be precluded from giving the complainant's identity to the alleged perpetrator and this will foreclose a full investigation of the complaint.[124] Accordingly, the school should weigh complainant requests for confidentiality against the following factors: the seriousness of the alleged misconduct, the complainant's age, any complaints about the same individual, and the alleged harasser's right to receive information about the allegations if the information is maintained as an "education record" under FERPA.[125] The Federal Government provides specific guidance on the intersection between Title IX, FERPA, and the Clery Act.[126] Notably, where FERPA and Title IX conflict, "the requirements of title IX override any conflicting FERPA provision."[127]

To comply with this maze of regulation, the ATIXA Training Manual notes Coordinators are to "[o]rganize and maintain grievance files, disposition reports, and other records regarding Title IX compliance, including annual reports of the number and nature of filed complaints and the disposition of said complaints, data collection, climate assessment, [and] pattern monitoring."[128] This reporting and data collection requirement affects the confidentiality of shared information and requires formal record keeping relating to confidentiality. For example, the ATIXA Training Manual notes that interviewers should not promise absolute confidentiality, that complainants should sign a statement that they understand the process and that complainants should sign a consent

122. 20 U.S.C. § 1232g (2012); *see also* 34 C.F.R. § 99.33 (2012).

123. 20 U.S.C. § 1232g; *see also* 34 C.F.R. § 99.33.

124. Gary Pavela & Daniel Swinton, Presentation for Magna Online Seminars: Resolving Sexual Violence Allegations: OCR Guidance and the Law 3 (June 16, 2011).

125. *Id.* at 2.

126. *Intersection of Title IX and the Clery Act*, NAT'L CTR. CAMPUS PUB. SAFETY, http://www.nccpsafety.org/assets/files/library/Intersection_of_Title_IX_Clery.pdf (last visited Nov. 13, 2016) (outlining a side-by-side comparison, the purpose of which is "to clarify the reporting requirements of Title IX and the Clery Act in cases of sexual violence and to resolve any concerns about apparent conflicts between the two laws").

127. *Id.*

128. ATIXA Training & Certification Course Materials, *supra* note 88, at 5–6.

statement acknowledging that the complaint may be revealed to the accused student and to witnesses as necessary.[129] The person making the complaint should sign this consent, and "[i]f s/he does not, s/he is not entitled to view the complaint."[130] Further, intake officers "should stress the need to get the complaint in writing, and can write the complaint, solicit the written complaint from the complainant, or assist the complainant in writing the complaint."[131]

Where the individual's privacy is not absolutely protected by the model Title IX Coordinator, it will be controlled on a "need-to-know" basis.[132] Report of an allegation that includes evidence that a felony has occurred must be reported to the local police (although this does not mean that charges will automatically be filed or that the survivor must speak with police).[133] Where there is not conclusive evidence of a felony, victims have

> [t]he right to be informed by university officials of options to notify proper law enforcement authorities, including on-campus and local police, and the option to be assisted by campus authorities in notifying such authorities, if the [victim] so chooses. This also includes the right not to report, if this is the victim's desire.[134]

This right not to report does not include the institutional requirement to report any incidents without personally identifiable information in its campus crime report.[135]

In situations where the survivor does not want the institution to pursue an investigation, the threat must be low enough to not require adjudication. Nonetheless, ATIXA guidance cautions "college officials would be well advised to fully document their conclusion, supported by an appropriate investigation, and ask the victim to acknowledge that he/she concurs with the college's conclusion, and asks that no further action be taken."[136] Further, a letter to the survivor "should indicate that his/her refusal to cooperate with investigators and campus conduct personnel may prevent the college from pursuing the complaint to resolution."[137]

In sum, the Title IX Coordinator archetype does not promise absolute confidentiality because there is a responsibility to address known problems, which requires sharing information with others who can address the problem. The model Title IX Coordinator addresses complain-

129. *Id.* at 53.
130. *Id.* at 56.
131. *Id.* at 52.
132. *Id.* at 31–32.
133. *Id.* at 32.
134. *Id.* at 46.
135. *Id.* at 31–32.
136. *Id.* at 14.
137. *Id.*

ants' interest in confidentiality by seeking as much as possible to respect complainants' wishes and to provide privacy—but where these interests conflict with addressing a known and serious problem, the Title IX Coordinator archetype is to give priority to addressing the problem. Title IX Coordinators reflect a compliance regime that seeks to elicit formal complaints and then discipline, prevent, and eliminate instances of sexual misconduct. The next Part provides evidence that many Title IX Coordinators adhere to the compliance archetype.

B. Compliance over Confidentiality: Title IX Coordinators Adhering to the Archetype

Title IX Coordinators who adhere to the archetype act as offices of notice and investigation and require employees who are designated as mandatory reporters to provide the office with information. These Title IX Coordinators also prioritize compliance over confidentiality and maintain and use records necessary to ensure a quality investigation. First, these Title IX Coordinators emphasize their role as offices of notice. For example, one Title IX Coordinator explained, "[T]his is not the office to come and vent. We have those offices. . . . If you want to talk, you go there, because you're putting the university on notice when you come to me [and I need to do something about it]. So I make that distinction upfront."[138]

Second, Title IX Coordinators who adhere to the archetype require other university employees to provide their office with information about violations. In order to comply with Title IX, Coordinators must actively seek to elicit reports about any and all incidents of sexual misconduct. This requires that all employees be informed of the obligation to report information about sexual misconduct. For example, a Coordinator described mandatory reporters as "[a]nybody with any information [including an Ombuds], [who must make a report] on anything associated with discrimination [or] sexual misconduct [or anything required by law] . . . ."[139] Title IX Coordinators described these reporting requirements as mandatory for an effective institutional response:

> If [a complainant] start[s] at the police department, [the police] have a connection and work very closely with us to make sure we get the information we need once that person makes contact with them . . . [and the] dean of students does the same [for the police]. So we have a very good collaborative working relationship that all of us

138. Interviewee 1, T10A9:35-41. Note that the latter part of citations referring to "Interviewees" as part of my confidential study indicate page and line numbers of transcripts and are included for my own records.

139. Interviewee 2, T4A8:28-30.

> at some point will be notified of a concern so that we can all do what we need to do to resolve it.[140]

Title IX Coordinators observed that there is growing interest in reporting on their campuses due to the increasing importance of the issue. Thus, one said,

> Every time anybody says anything that just is remotely connected to some sort of Title IX issue, [administrators had] all read the Dear Colleague Letter, but they didn't really know what we were doing before. . . . [and] it just put everyone in a tizzy and it's sort of been interesting politically because . . . you can feel a political tug there where they really want to be in charge of it. Kind of . . . because it's a new and scary frontier and that's a career maker if you're 35 [years old] and have your PhD and you're looking to move up in the organization . . . . They call me about the slightest thing that any young woman says. Any little thing, "We just thought we should refer this [to] you."[141]

Title IX Coordinators who adhere to the archetype do not exempt anyone from reporting unless it is required by law—and this includes Ombuds. For example, an Ombuds noted a requirement to call the Title IX Coordinator and say "'Here is the situation, would you be comfortable if we try to resolve it informally?' And if [the Title IX Coordinator] thinks that it's okay, we can do it and if [the Title IX Coordinator] doesn't, we can't."[142] Another Ombuds noted the lack of a good working relationship with the Title IX Coordinator because "they think we're on their turf. . . . [t]hey think they should be handling it all."[143]

Coordinators following the archetype prefer anonymous complaints to not reporting. As one observed,

> [E]ven if we are unable to use the situation directly, [f]irst thing we try to do is make sure that there's an education that comes on the heels of [a complaint]. . . . [To ask] "when are you having your next faculty meeting?" or staff meeting if it's involving staff, or if it's not, if it's a fraternity or something like that, "when can we provide some education around [sexual misconduct]?"[144]

Another Coordinator described creating a system that allows for anonymous reporting and how the Title IX office investigates anonymous complaints:

> We'll go as far as we can go [investigating anonymous complaints], but if we receive information, and we think we have enough infor-

140. Interviewee 3, T13A10:12-18.
141. Interviewee 4, T12A11:22-32.
142. Interviewee 5, O14B9:16-18.
143. Interviewee 6, O9B13:16-18.
144. Interviewee 7, T5A9:18-22.

> mation to take some action in terms of looking into some of the concerns, we'll definitely do that. And we'll go as far as we can go. It's very difficult not having the person [who complained], so, in terms of resolution there may not be very much that can be done, but certainly we'll investigate it, we'll look into it and we'll see if there's any evidence to suggest that what the person has claimed . . . has validity. If so, we'll maybe try to take some action [to remediate, even if only providing] some education . . . .[145]

Other Coordinators who adhere to the compliance archetype prefer detailed rather than general information. For example, an Ombuds described the Title IX Coordinator's preferences:

> The [formal office director] is an attorney [who] just wants the facts. I can't single out . . . three departments [with one being the potential culprit]. If [I am asked] how come they got singled out, what am I going to say? [The formal office director] tells me, "[e]ither we give training to the whole campus or we don't, and we don't have the resources to do it for the whole campus so it ain't gonna happen. Now, if you have a victim, I want to see them, you send them to me, and we'll start an investigation and we'll follow the numbers, but in the absence of that I don't want to hear about it."[146]

Third, Title IX Coordinators who adhere to the archetype give priority to compliance over confidentiality because they must, above all else, comply with Title IX law and policy. Compliance requires that they give priority to compliance over confidentiality. For example, a Coordinator said she tells visitors "[w]hat you say here is confidential to the extent allowable by law."[147] Another Coordinator explained,

> [It's important to inform] the person that you're not a confidential resource and there are times when the institution has to act or chooses to act even if it's not what he or she wants. I do my best to explain why and keep their concerns at the center of what our plan is so they can inform [our approach] as we move forward.[148]

Another Coordinator echoed the above observations:

> I tell people that I cannot guarantee confidentiality, but I can promise them discretion and that only those with a need to know will know that we have confidential records, [and] that I take their privacy very seriously. But because there are some issues involved I cannot guarantee that I will not have to tell someone.[149]

---

145. Interviewee 3, T13A7:42-8:5.
146. Interviewee 8, O10B13:22-29.
147. Interviewee 1, T10A7:19-20.
148. Interviewee 9, T8A5:31-34.
149. Interviewee 4, T12A9:8-11.

Many Coordinators attempt to provide a "warning" to visitors about the Coordinator's obligation to conduct an investigation. Thus, one observed,

> [W]e let them know that we have an obligation to the institution to conduct an investigation if we learn something that we think needs to be investigated, whether they want to file a complaint or not. It's very common for people to come here and say "I want to tell you about something, but I don't want an investigation done." We stop them in their tracks and tell them "look, it's not up to you whether we conduct an investigation or not." So it's very clear to them what the obligations [are] on our part. Sometimes people walk away. We try to have them not walk away, we want to investigate if something's wrong, but sometimes we have no choice.[150]

Title IX Coordinators who adhere to the archetype require participation in the investigation. As one observed,

> We have in our policy that failure to cooperate with an investigation can [result in] disciplinary action. And that is in there for people who either falsify information [or] flat out refuse to cooperate with an investigation . . . . So if someone [has] information, [and] I know they have information, [and] they refuse to cooperate or come in and don't provide full cooperation and I [can] prove [it], then you're going to be disciplined for it. In other words . . . this is a responsibility . . . to make sure the process works. So if you're not going to be part of the process, then we're going to have to deal with that. I don't want to have to deal with the discipline, I just want . . . you cooperating and giving me the information and giving me true and accurate information. Then you're done. I'm giving you the word that no one is going to know what you told me until and unless it is subpoenaed. I rarely [have that happen as] . . . most attorneys . . . want to do their own depositions and everything. . . . We're going to protect your information, but you're going to give me that information. If you don't give me the information, and you're just refusing to do that, I'm going to discipline you because you're not going to put a spoke in the wheel of this process.[151]

There are, of course, exceptions to the requirement to participate in the process, but these illustrate the general rule described by a Coordinator:

> [I]f a person is named in any way in an investigation, yes, they are required to participate in the process. . . . [Although] sometimes we make exceptions for the complainant, it depends on the situation. . . . [W]ith Title IX cases if we do an investigation, there is the possibility that the investigator can go to the hearing and testify

150. Interviewee 10, T7A9:17-29.
151. Interviewee 1, T10A12:1-22.

> based on their investigation and their findings, which would not force the complainant to have to [testify]. So there are ways, depending on the situation . . . in which the complainant may not have to participate in the [formal] process if they do not wish to. Of course, if they don't want to pursue a case, then we are bound to support their wishes unless there's some threat to the campus why we must move forward.[152]

Another Coordinator sums up the priority of investigation over confidentiality:

> I never promise them confidentiality. But I still investigate as much as I possibly can, with or without their cooperation, because if they tell me, and I do nothing, then they can come back and say "hey, [that person is] the office of notice and I told [them], and whether I participated or not, [she is] showing deliberate indifference to my complaint. [She] didn't check to see if I was telling the truth, [She] didn't check to see if there were other people," so I'm not going down that road. I'm not going to jail for anybody.[153]

Fourth, Title IX Coordinators who adhere to the archetype use and maintain records in order to ensure a documented investigation. A Title IX Coordinator described effective record keeping as necessary to ensuring correct information: "We summarize [the complainant's statement] and then we send them a summary of their allegations and ask them if they agree with them, if they have anything they want to add."[154] A similar process is used by other Coordinators, who "write [the allegations] down, then type it up, we send it out, [and ask the respondent to] please make any corrections . . . ."[155] Typically the name of the complainant and the summary of the complaint are then provided to the alleged offender, to make them "fully aware" of the situation.[156] Several Coordinators expressed frustration at the gossip and breaches of confidentiality that make investigating difficult:

> [E]ven though the campus is huge, it's still small [and] people hear everything. There is no confidentiality on this campus. Let me repeat that: none. None at all. As soon as a phone call is made, as soon as somebody makes a complaint, every-fricken-body on campus knows about it. . . . It makes my investigation hard because I have to figure out what is it you know and what it is you were told and I have to separate opinion from fact.[157]

In sum, Title IX Coordinators who adhere to the archetypal model give priority to the organizational interest in investigation and enforce-

152. Interviewee 3, T13A8:10-21.
153. Interviewee 11, T11A7:12-19.
154. Interviewee 3, T13A9:18-19.
155. Interviewee 1, T10A8:20-21.
156. Interviewee 1, T10A8:13.
157. Interviewee 11, T11A13:36-39, 15:11-13.

ment over the complainant's interest in influencing the course of the process and confidentiality. In reality, just as many Title IX Coordinators interviewed between 2011 and 2014 departed from the compliance archetype. The next Section describes the limits of coercive compliance and the tension between individual and organizational interests.

II. THE LIMITS OF COERCIVE COMPLIANCE

A. The Limited Effectiveness of Coercive Compliance

In their conceptualization of power as the ability to influence, John French and Bertram Raven identified legitimacy as one of five bases of power; the other four were reward, coercion, expertise, and reference.[158] Raven later included information as an additional basis of power.[159] Using coercion as the basis of power, the deterrence model of compliance dominates law and public policy.[160] Focusing on the power of legal authorities to shape behavior through the use of negative sanctions for rule breaking, punishment is seen as critical to deter people from criminal behavior.[161] The deterrence model is closely related to rational choice theory and neoclassical economics[162] as it creates the prospect of heavy losses that will outweigh any anticipated gains of engaging in criminal behavior. While research shows that people's behavior is often shaped by their estimate of the likelihood of being caught and punished if they disobey the law,[163] research also shows these likelihood perceptions have a relatively minor influence on behavior and, thus, the deterrence model has had limited success.[164]

The main problem with the deterrence model is that it requires near-constant surveillance of individual behavior as rule breakers have a strong motivation to hide illegal behavior.[165] The use of surveillance leads people to experience such intrusions as unjust and to create adver-

158. John R. P. French, Jr. & Bertram Raven, *The Bases of Social Power*, *in* STUDIES IN SOCIAL POWER 150, 150–67 (Dorwin Cartwright ed., 1959).

159. *See* Jojanneke van der Toorn, Tom R. Tyler & John T. Jost, *More than Fair: Outcome Dependence, System Justification, and the Perceived Legitimacy of Authority Figures*, 47 J. EXPERIMENTAL SOC. PSYCHOL. 127, 128–29, 129 n.4 (2011).

160. Tom R. Tyler & John T. Jost, *Psychology and the Law: Reconciling Normative and Descriptive Accounts of Social Justice and System Legitimacy*, *in* SOCIAL PSYCHOLOGY: HANDBOOK OF BASIC PRINCIPLES 807, 809 (Arie W. Kruglanski & E. Tory Higgins eds., 2d ed. 2007).

161. *See, e.g.*, Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 425, 436 (1999).

162. *See generally* ALFRED BLUMSTEIN, JACQUELINE COHEN & DANIEL NAGIN, DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES (1978).

163. *See, e.g.*, Daniel S. Nagin & Raymond Paternoster, *The Preventive Effects of the Perceived Risk of Arrest: Testing an Expanded Concept of Deterrence*, 29 CRIMINOLOGY 561, 562 (1991); Raymond Paternoster, *Decisions to Participate in and Desist from Four Types of Common Delinquency: Deterrence and the Rational Choice Perspective*, 23 LAW & SOC'Y REV. 7, 8 (1989).

164. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 460–63 (1997); Tyler & Jost, *supra* note 160, at 810.

165. Tyler & Jost, *supra* note 160, at 810.

sarial relationships between legal authorities and community members, especially racial and ethnic minorities.[166] The result is a public less compliant with both the law and assisting the police.[167] Evidence indicates the deterrence model works best for crimes in which a prospective rule breaker weighs the expected costs and benefits.[168] Short-term reductions in crime have been observed due to changes in laws that create greater media exposure and thus increased estimates of being caught and punished.[169] Crimes committed while intoxicated are likewise unaffected by deterrence strategies.[170] Ultimately, people complying only with coercive power are seen to be less likely to obey the law in the future[171] as it diminishes internal motivation to obey the law.[172]

The legal system depends on the consent of citizens to cooperate with legal authorities.[173] Cooperation is most likely to occur if people view the law as (1) determined and implemented through procedurally fair means, and (2) consistent with moral values.[174] Ultimately the legitimacy of legal authorities is essential to greater compliance and cooperation. Fundamentally a "law enforcement frame" requires a focus on the "adequacy of the prosecution of perpetrators of sexual assault."[175]

The current compliance regime is ineffective due to (1) the fundamental tension between individual self-determination and organizational interests in safety and avoiding liability, (2) the current university culture of non-reporting, and (3) a crisis of legitimacy as neither survivors nor alleged perpetrators trust universities to effectively handle sexual misconduct disputes. Each of these issues is now reviewed in turn.

1. The Fundamental Tension

Confidentiality and the reporting of sexual misconduct illustrate the tension between self-determination and organizational interests. By ensuring confidentiality, officials serve the values of encouraging people to report misconduct, assisting survivors in getting any needed support, and providing survivors with self-determination in maintaining control regarding what will happen with the complaint. This view was best ex-

166. *See* TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 204–08 (2002).

167. *See* Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513, 534–37 (2003).

168. Tyler & Jost, *supra* note 160, at 809–10.

169. *See id.* at 810.

170. *See id.* at 811.

171. *Id.* at 812.

172. TOM R. TYLER & STEVEN L. BLADER, COOPERATION IN GROUPS: PROCEDURAL JUSTICE, SOCIAL IDENTITY, AND BEHAVIORAL ENGAGEMENT 44 (2000).

173. Tyler & Jost, *supra* note 160, at 813.

174. *Id.*

175. Katharine Silbaugh, *Reactive to Proactive: Title IX's Unrealized Capacity to Prevent Campus Sexual Assault*, 95 B.U. L. REV. 1049, 1068 (2015).

pressed in the Report of the White House Task Force to Protect Students from Sexual Assault:

> Sexual assault survivors respond in different ways. Some are ready to make a formal complaint right away, and want their school to move swiftly to hold the perpetrator accountable. Others, however, aren't so sure. Sexual assault can leave victims feeling powerless—and they need support from the beginning to regain a sense of control. Some, at least at first, don't want their assailant (or the assailant's friends, classmates, teammates or club members) to know they've reported what happened. But they do want someone on campus to talk to—and many want to talk in confidence, so they can sort through their options at their own pace. If victims don't have a confidential place to go, or think a school will launch a full-scale investigation against their wishes, many will stay silent. In recent years, some schools have directed nearly all their employees (including those who typically offer confidential services, like rape crisis and women's centers) to report all the details of an incident to school officials—which can mean that a survivor quickly loses control over what happens next. That practice, however well-intentioned, leaves survivors with fewer places to turn.[176]

On the one hand, an individual who feels she has been subjected to sexual harassment or assault has a strong interest in shaping whether and how the university pursues an investigation and disciplinary action in response to her grievance. Often, these individuals do not even file a complaint because they fear losing control of the process.

By contrast, universities have a strong interest in vigorously investigating these cases and carrying out discipline when it is merited. This interest serves the value of setting clear norms, punishing bad actors, and deterring future misconduct. Each university holds an interest in protecting the broader university community from sexual misconduct. That interest also serves the value of protecting the university from liability for failing to do enough to stamp out misconduct. In pursuit of these goals, a university will often want to investigate and discipline even if the complainant does not. Reconciling these tensions is difficult.

The benefits of confidentiality especially conflict with the principle of mandatory reporting. The values served by mandatory reporting are to set clear norms against sexual violence by encouraging reporting, punishing bad behavior, and deterring future misconduct. These organizational values also serve to protect the organization from liability. Confidentiality and control over the complaint encourages individuals to report, but a culture of under-reporting requires the institution to surface as many

176. THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, *supra* note 53, at 11.

complaints as possible in order to ensure compliance and change cultural norms.

Mandatory reporting policies are often designed to trigger the use of formal mechanisms.[177] Zero tolerance policies often create a tension between efficiently solving problems at the lowest level (e.g., "by helping people act on their own") and establishing "complete control over all unacceptable behavior by centralizing conflict management."[178] Essentially, the question of settlement versus precedent is also one about individual self-determination versus organizational interests. Settling a complaint through a mutual agreement rather than an official determination serves the interests of individual self-determination over how a dispute is handled, privacy, and efficiency. Settlement may also serve an institutional interest in avoiding publicity and public liability. By contrast, making an official decision regarding a complaint establishes a precedent and this serves the interest in setting clear norms regarding sexual misconduct. These precedents may clearly send the message that misconduct will not be tolerated. Navigating the tension between individual self-determination and organizational interests in safety and avoiding liability places Title IX Coordinators in difficult situations given the current culture of non-reporting.

2. A Culture of Non-Reporting and a Crisis of Legitimacy

Despite the Title IX compliance regime, evidence indicates sexual misconduct is widely underreported. A 2007 survey indicated that only 16% of physically forced survivors and 8% of incapacitated sexual assault survivors contacted a survivor's, crisis, or health care center after the incident.[179] Only 2% of incapacitated survivors and 13% of physically forced survivors report the incident to law enforcement.[180] Other studies estimate that 90% or more of survivors of campus sexual assault do not report the incident.[181] A 2015 study of twenty-seven institutions of higher education found "[a] relatively small percentage (e.g., 28% or less) of even the most serious incidents are reported."[182]

Evidence indicates non-reporting occurs due to a fear of reprisal and a belief the process will not work or not be fair.[183] In a 2001 survey of graduate students, 21% of those experiencing harassment reported the behavior, 30% experienced retaliation after reporting, and 58% believed

177. OFFICE FOR CIVIL RIGHTS, TITLE IX RESOURCE GUIDE, *supra* note 24, at 2.

178. Mary Rowe, Linda Wilcox & Howard Gadlin, *Dealing with—or Reporting—"Unacceptable" Behavior*, J. INT'L OMBUDSMAN ASS'N, 2009, at 52, 57.

179. KREBS ET AL., *supra* note 12, at xvii.

180. *Id.*

181. BONNIE S. FISHER ET AL., NAT'L INST. JUSTICE & BUREAU JUSTICE STATISTICS, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 23–24 (2000), https://www.ncjrs.gov/pdffiles1/nij/182369.pdf.

182. CANTOR ET AL., *supra* note 8, at iv.

183. FISHER ET AL., *supra* note 181, at 23–24.

the reporting process and complaint handling could be improved.[184] According to a 2015 study, "[m]ore than 50% of victims of even the most serious incidents (e.g., forced penetration) do not report because they do not consider it serious enough."[185]

Relationship dynamics make it more difficult for survivors to come forward. Most perpetrators of rape or attempted rape are known to the survivor, including classmates and friends (70% of completed rapes), and boyfriends or ex-boyfriends (23.7% of completed rates and 14.5% of attempted rapes).[186] The decentralized environment, the focus on academic pursuits, and the hierarchical intellectual environment allow harassing behaviors to go unchecked in academic institutions.[187]

In part, the problem is due to a crisis of legitimacy. Neither survivors nor alleged perpetrators trust universities to effectively handle sexual misconduct disputes. The university context for sexual misconduct requires institutions take action to remediate the effects of sexual misconduct. In a 2014 survey of more than 300 schools, commissioned by Senator Claire McCaskill, "[m]ore than 40% of U.S. colleges and universities have conducted no investigations of sexual assault[] [allegations] over the last five years."[188] Further, the survey found that only 16% of schools conduct "climate surveys" to determine the prevalence of sexual assault on campus, and only about half of colleges have a hotline that survivors can call to report a sexual assault.[189] Nearly 73% of schools do not have protocols for how campus authorities and local law enforcement should work together on cases.[190]

Perceptions of organizational tolerance to sexual harassment are significantly related to the frequency of sexual harassment incidents and the effectiveness in combating the problem.[191] Organizationally, studies reveal that where a choice of sanctions for harassment is available, it is common for the least stringent to be selected, such as a formal or informal warning without further action.[192] Such responses indicate a deflec-

184. STUDENT CONFLICT RESOLUTION CTR., UNIV. OF MINN., ACADEMIC INCIVILITY AND THE GRADUATE/PROFESSIONAL STUDENT EXPERIENCE: SUMMARY OF SPRING 2011 SURVEY OF UMN-TC GRADUATE AND PROFESSIONAL STUDENTS 5 (2011), http://www.sos.umn.edu/assets/pdf/Survey%20Summary%202011%20(revised%208-12-11).pdf.

185. CANTOR ET AL., *supra* note 8, at iv (internal quotation marks omitted).

186. FISHER ET AL., *supra* note 181, at 19.

187. Robert J. Tepper & Craig G. White, *Workplace Harassment in the Academic Environment*, 56 ST. LOUIS U. L.J. 81, 83 (2011).

188. Mary Beth Marklein & Deirdre Shesgreen, *Colleges Ignoring Sexual Assault, Senator Charges*, USA TODAY (July 9, 2014, 5:51 PM), http://usat.ly/1mfL6Cf.

189. *Id.*

190. *Id.*

191. Miner-Rubino & Cortina, *supra* note 19, at 109; Nelson, Halpert & Cellar, *supra* note 19, at 812.

192. Salin, *supra* note 20, at 40.

tion of organizational responsibility and may indicate a "climate of tolerance."[193]

The legitimacy crisis has also led to a proliferation of complaints and lawsuits. In January of 2013, student Andrea Pino, two other students, an alumna, and a former administrator made a federal complaint against the University of North Carolina at Chapel Hill accusing the university of negligently handling its responses to rape.[194] Students elsewhere filed similar complaints against Amherst, Berkeley, Dartmouth, Occidental, Swarthmore, Vanderbilt and other universities.[195] In 2014, the University of Connecticut announced it would pay nearly $1.3 million to settle a federal lawsuit filed by five current and former female undergraduate students claiming the university had mishandled their sexual assault complaints.[196] In 2016, Florida State agreed to pay $950,000 to settle a federal lawsuit with an accuser of quarterback Jameis Winston.[197]

Students accused of sexual misconduct are also filing complaints. Daniel Kopin, a former student at Brown University, sent a letter to the U.S. Department of Education's Office for Civil Rights, sharing his side of a sexual encounter that resulted in his suspension.[198] In June 2013, Peter Yu sued Vassar College, arguing that the college denied him due process throughout the sexual misconduct disciplinary process and had discriminated against him because of his sex.[199] Specifically, Yu claimed officials did not properly advise him of grievance policies and did not allow him legal representation at the disciplinary hearing.[200] Similar complaints were filed against St. Joseph's University in July 2013, and a federal lawsuit was filed against Xavier University in August 2013, claiming that the university conducted a fundamentally unfair hearing.[201] These three lawsuits all share several allegations in common: campus officials withheld key evidence in hearings, were hasty to rush to judgment, and a general presumption of guilt prevailed.[202] In 2015, Middlebury College, the University of Southern California, and University of California, San Diego were all ordered to reinstate expelled students.[203]

193. McDonald, *supra* note 21, at 8.
194. Sander, *supra* note 61.
195. *Id.*
196. Monica Vendituoli, *UConn Will Pay $1.3-Million to Settle 5 Women's Sexual-Assault Lawsuit*, CHRON. HIGHER EDUC., Aug. 1, 2014, at A4.
197. Rachel Axon, *Florida State Agrees to Pay Winston Accuser $950,000 to Settle Suit*, USA TODAY (Jan. 25, 2016, 6:29 PM), http://www.usatoday.com/story/sports/ncaaf/2016/01/25/florida-state-settles-title-ix-lawsuit-erica-kinsman-jameis-winston/79299304/.
198. Wilson, *supra* note 65.
199. Libby Sander, *3 Accused of Sexual Misconduct Say Colleges Acted Hastily and Assumed Guilt*, CHRON. HIGHER EDUC. (Sept. 11, 2013), http://www.chronicle.com/article/3-Accused-of-Sexual-Misconduct/141551.
200. *Id.*
201. *Id.*
202. *Id.*
203. Smith, *supra* note 63.

Nearly fifty lawsuits by accused students are in process, an increase from roughly twelve in 2013.[204] In sum, young men are as unhappy with the outcome of college investigations as their accusers, and often both sides, find the process unfair.[205]

Attorneys representing both survivors and the accused report they are seeing an uptick in cases. Brett Sokolow, president of the National Center for Higher Education Risk Management, which also oversees ATIXA, notes receiving nearly sixty calls from accused students and their parents, of which he is now representing roughly a dozen.[206] Another attorney, Andrew Miltenberg, reported receiving fifteen calls each month in 2014.[207] Recent changes in Title IX compliance are designed to reform formal complaint systems that are not seen as safe, accessible, and credible, or that ignore "ugly behavior that is not overtly illegal."[208] This includes bullying, hazing, or any activities that may be seen as "traditional high jinks," "everyone does it," or "no harm was intended."[209]

Title IX compliance efforts must reform systems that discourage people from making complaints. Common complaint system problems also include confidentiality violations, requiring written complaints, lengthy time periods to resolve complaints, officials with little understanding of the law or inadequate training on proper procedures, perceptions that important people are treated differently, or that the system itself is overseen by the people seen as the source of the problem.[210] Inherently the culture of non-reporting and the tension between individual and organizational interests result in a compliance regime that is severely limited in its effectiveness. As evidenced in the next Part, in seeking to navigate these tensions, Title IX Coordinators frequently depart from the compliance archetype. Reasons for the departure include efforts to seek substantive justice for both survivors and alleged perpetrators and concerns that the formal system is too formalistic and rigid.

B. Title IX Coordinators Depart from Compliance to Address the Ineffectiveness of the Compliance Regime

Departures from the archetype occur primarily to address the needs of survivors or alleged perpetrators, out of frustration with the inefficien-

204. *Id.*
205. Wilson, *supra* note 65.
206. Robin Wilson, *Presumed Guilty*, CHRON. HIGHER EDUC. (Sept. 1, 2014), http://www.chronicle.com/article/Presumed-Guilty/148529.
207. *Id.*
208. Rowe, Wilcox & Gadlin, *supra* note 178, at 56.
209. *Id.*
210. *Id.* at 57.

cies of excessive formalism, and to address the organization's interest in resolving disputes and avoiding liability.[211]

One Coordinator poignantly describes frustration with the formal system:

> [T]he part that makes [it] really difficult is that the . . . conduct hearing is very formal [and] the victim is expected to mount her own defense. She must call her own witnesses. She must question her own witnesses. She must answer questions from the panel. . . . It's very problematic, and I will tell you . . . [the conduct panel gives the complainant] X number of days to get their documentation in while [a complainant may be] grieving over the loss of her virginity and feeling frightened for her physical safety and all these things are going on. The dad [is] trying to help get the paperwork together and gather the names of the witnesses and get witness statements. There's all these requirements. . . . Here, we don't even make you fill out a form. You come in, we take notes. . . . I struggled when you said positive outcome because there's not a young woman that's been through this process that has not said to me "the process was worse [than what happened to me]." It is re-victimization. The one that went [to the next step] said "I don't want money, I just don't want another girl to have to go through this."[212]

Further, some Title IX Coordinators depart from the archetype because they see the formal process as too confrontational and thus harmful to survivors. For example,

> You don't know how it's burdened my heart. I often see them right after, the day after. They're traumatized. They cry. . . . They [are often] furious . . . . Furious. [She] said that everyone over there was incompetent, unfeeling . . . our process is so victim unfriendly.[213]

Coordinators often expressed strong dissatisfaction with the formal process. For example, "knowing what our adjudication process is like . . . when they first come [in], I just dread it. Because I know what's coming. I just think 'oh my God, how can I do this to this person?'"[214] Another Coordinator concurred:

> I think once you're into a process such as a Title IX process, it's so formal at that particular point, and the requirements are so different that it's hard to maintain that sense of safety and security of why you came to university. . . . I really try to make it as non-intrusive as I can when we're doing complaints with students. That's not what they really signed up for, so we try to get through them quicker than the

211. Brian Pappas, *Dear Colleague: Title IX Coordinators and Inconsistent Compliance with the Laws Governing Campus Sexual Misconduct*, 52 TULSA L. REV. (forthcoming 2017).

212. Interviewee 4, T12B3:8-11; 7:33-39; 3:39-43.

213. Interviewee 4, T12B48:13, 23, 19.

214. Interviewee 4, T12B8:17-18.

> employees, let's get in there, let's find out the facts and get out so that they can finish their studies.[215]

Specifically, regarding confidentiality, the departure from formality is evidenced by Title IX Coordinators' respect for Ombuds commitment to confidentiality. By not insisting that all offices must provide the Coordinator with information about complaints, Title IX Coordinators depart from the archetypal model. A Coordinator notes, "Ombuds don't have the legal [confidentiality] privilege, but they have that code and our campus completely respects that."[216] Yet another Coordinator explained,

> [W]e recognize [the Ombuds Office] as being a place where employees or students can come and get things off their chests, share with someone, and maybe get some good advice where they will know that the information that they share doesn't necessarily have to be acted upon. That's important for individuals who are afraid to go through the process. The [formal] process can be very intimidating, depending on the circumstance, so again I think that's a valuable outlet for employees and students. Years ago when we established [the Ombuds] Office there was a ground swelling of support from staff and students to say "we need something like this on our campus," so it was established. So I think it definitely serves a great purpose but I think those individuals have to be very knowledgeable [about] the campus in order to give people really good advice.[217]

Title IX Coordinators also depart from the compliance archetype with the understanding that gaining complainants' trust will lead complainants to be more willing to participate in the formal process. Some of these Coordinators depart from Coordinator archetype in ways that are aimed at building complainants' trust. For example,

> If the information comes to us and they've not shared the name of the accused with the first responder, meaning if it happens on campus and they share that information with one of our resident assistants . . . but they don't give a name, and they don't want to, then of course they haven't told them, they haven't told the police, they're not going to tell us. Sometimes they might [if we establish a relationship]. You want to see if you can build enough trust in the conversation or support in the conversation that the person will [see this as a safe place to report].[218]

Typically, resident assistants are mandatory reporters, indicating that the above Title IX Coordinator is departing from the compliance archetype in favor of building trust and legitimacy. Over deferring to individuals' control over confidentiality is one type of departure.

---

215. Interviewee 1, T10A14:3-10.
216. Interviewee 4, T12B4:9-10.
217. Interviewee 3, T13A5:42-6:7.
218. Interviewee 12, T2B4:17-26.

Often a Coordinator may truly want to provide the visitor with control. In the clearest example, a Title IX Coordinator described conversations with students but taking no notes:

> I do not take notes . . . [and make] [n]o record of the conversation. So in that way, it's kind of like the Ombuds experience. I give people an opportunity to state their case. What is the problem, what do they think the problem is, how do they want to resolve it? . . . [I do not provide any initial statement before students start talking] I'm just letting [the student] get it off [their] chest and see where we're going with this. . . . Because a lot of times they just want to vent. They just want somebody else to hear what's going on and tell them whether or not they're crazy. If they are serious about it, I have a formal intake form to fill where they can file a complaint. It's pretty simple and straightforward. . . . Usually when it's sexual in nature . . . there are some key things that a person will come in and tell me that will lead me to believe that something was not consensual and now we've got to do something. I tell them, "I need to stop you. I need to review what I've heard, and I need you to know that this is no longer a 'what do I do conversation,' this is a 'what are we going to do' conversation." Because there's just too much information, there's too many things going on making my skin crawl, and now we've got to address it. I don't care if they tell me they want to investigate it or not, if I've got evidence, I'm investigating, especially sexual harassment. There are no ifs, ands, or buts about it. If they have evidence to prove that something unseemly was going on and it wasn't consensual, I'm checking it out.[219]

Other Coordinators also depart from the archetype by not documenting visitors' statements:

> We have a complaint form, but . . . I am loathe to require that they complete it until we talk. . . . I'm also loathe to tape record because it changes the tenor of a meeting when you put that thing between the two of you, and [on that point] the general counsel and I [disagree].[220]

Still other Title IX Coordinators provide complainants with control over whether the Title IX Coordinator will investigate—a clear departure from the archetypal model. For example, a Coordinator noted "the goal of the meeting is to give [visitors] their options and to hear if they made a decision about a complaint. What do they want to have happen?"[221] Another Coordinator described the decision to go forward with a complaint as a "collaborative decision" in which anything said by the visitor

219. Interviewee 11, T11A45:8-14, 20-24, 29-34; 13:1-10; 7:4-8.
220. Interviewee 4, T12A6:37-42.
221. Interviewee 9, T8A12:28-29.

could be used for their detriment.[222] Other Coordinators described telling visitors their options:

> [Does the visitor want to use the] Ombuds or [Title IX Coordinator], or [do they] want to deal with it on their own, because that's always an option, or do they just want to drop it? They always have options. Once they tell me where they want to go with it, because some of them are adamant about "no, I want to nail him to the wall, so you're the person I want to talk to." I tell them "here's the form" because I never want them to make a decision in the heat of the moment. "Here's my . . . complaint form, my intake form." . . . And I ask them to write out or type up their complaint, which requires them to go away, think about what they've said, what they want to do, and come back. Sometimes I never see them again because once they put it in writing and they see it they change their minds.[223]

While some Title IX Coordinators provide more confidentiality and control to survivors than the compliance archetype requires, other Title IX Coordinators do not adequately protect confidentiality. Many Title IX Coordinators reveal more information to more officials than may be absolutely necessary to ensure effective enforcement. For example, an Ombuds critically described the university's Title IX Coordinator:

> Well, they don't keep confidentiality. I mean, they always say "of course we keep confidentiality except on a need to know basis," but their idea of who needs to know is wide and broad, so you can be fairly certain that if you go to [a formal office] that everybody will know that you went and what you said. If you go you can [also] be fairly certain that their bias will be for the university, no questions asked.[224]

Another Coordinator described reporting to the president and other administrators on "everything and anything that could be a potential embarrassment to the institution, that could be a headline tomorrow morning. I don't want them being blindsided by anything. It's what any good subordinate does for [his or her] boss."[225]

Still other Title IX Coordinators depart from the archetype by making pre-conversation statements that provide basic information but not enough to educate visitors about their options.

> [We try to explain this] before we've heard the complainant's entire story, so it allows the complainant to kind of decide how much they're going to share with us and how detailed we're going to get, [and] that's where we can give them some control. . . . If what you

222. Interviewee 9, T8A13:1-6.
223. Interviewee 11, T11A6:1-13.
224. Interviewee 6, O9A9:21-26.
225. Interviewee 10, T7A4:4-8.

> tell us on its face violates a policy, then we're going to be doing a full investigation.[226]

Many Coordinators attempt to provide a "warning" to visitors about the Coordinator's obligation to conduct an investigation, albeit ineffectively. Thus, one observed,

> I do an investigation based upon the information you give me. My role is not to talk and give you options. Unless there is nothing in your conversation to suggest that you're being subjected to discrimination, and it is just bad behavior that you don't like and it doesn't rise to the level of protected activity, of course I won't do anything. But, for students who come in and say, "I've been sexually harassed in the last month, but I don't want you to say anything," I stop them and say, "I can't. This isn't the place for you."[227]

Another Coordinator noted using a hypothetical that then also takes control away from the survivor.

> In our office we generally don't use a form. . . . [w]e just collect basic information: name, if the person was a student, faculty, or staff, the nature of their complaint, who the witnesses may have been, if there were any witnesses, what the complaint is in reference to. Usually, we'll have a conversation even before we get started, before the person starts talking. We'll talk to them a little bit about our office and what we do and let them know our obligations to move forward if we have enough information to indicate that something is potentially a violation of our policy [and] we have an obligation to investigate. So if a person feels that they don't want to engage in that we say you can give us a hypothetical, but if we have names and information we may have to move forward. We try to advise them on the front end before they begin to share information and try to gain their confidence in our process and explain how our process works.[228]

In sum, in sharp contrast to the Title IX Coordinators who strictly adhere to the archetypal model by giving top priority to investigation and enforcement, some Coordinators grant more—or less—confidentiality than the archetype demands, seek to build trust but only to entice complainants into divulging more information than they seem to be willing to provide, or provide complainants with control over whether to investigate that directly undermines the commitment to investigation and enforcement.

226. Interviewee 13, T1B19:35-10:2.
227. Interviewee 1, T10A9:42-10:2.
228. Interviewee 3, T13A8:31-45.

C. Reconciling Compliance with Cooperation

Title IX law and policy recognizes the limits of a compliance regime. The White House Task Force Report recommends that university officials should give the survivors of sexual misconduct more control over the process by ensuring a place to go for confidential advice and support.[229] The Report observes that survivors are especially concerned about maintaining their confidentiality and are hesitant to come forward with allegations.[230] While many survivors want the school to respond quickly, others are not so sure and want someone to talk to before they lose control of what happens next. Mandating that all employees report sexual misconduct leaves survivors with fewer places to turn, and the Task Force recommends that "[s]chools should identify trained, confidential survivor advocates who can provide emergency and ongoing support."[231] It recommends that these confidential resources should include on-campus counselors and advocates, survivor advocacy offices, women's and health centers, and licensed and pastoral counselors.[232] Ombuds offices are not included in the list of confidential resources.

In order to reconcile compliance with cooperation and address the crisis of legitimacy facing Title IX Coordinators, universities must provide clear and understandable grievance policies and processes. The difficulty in achieving clarity is illustrated by fundamental disagreements about issues of due process. There are concerns about what constitutes a "hearing" and whether Title IX enforcement is being interpreted consistently, as required, with federally guaranteed due process rights.[233] There are also questions of the equality of interim accommodations. Recent OCR guidance indicates that interim measures to address a complaint—e.g., to ensure that misconduct is stopped—should be taken immediately and should "minimize the burden on the complainant."[234] Proponents of respondent rights argue this is harmful to the due process rights of the accused as "alleged perpetrators [would thus face] expulsion from their residences upon accusation."[235] Survivors' advocates argue "innocent until proven guilty" is beneficial to the accused, harmful to the rights of the survivor, and an indication of the depth to which the criminal law mindset still pervades institutional responses.[236] Burden of proof questions also persist, with commenters and one federal court suggesting that

229. THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, *supra* note 53, at 10–11.

230. *Id.* at 11.

231. *Id.*

232. *Id.* at 3.

233. OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS, *supra* note 44, at 13.

234. *Id.* at 32–33.

235. Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 62 (2013).

236. Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary Through the Ordinary*, 35 J.C. & U.L. 613, 686 (2009).

the required preponderance of the evidence standard[237] is inappropriate and that clear and convincing proof is a necessary standard to ensure adequate protection of the accused student's right to procedural due process.[238]

Regardless of the correct legal standards applied, grievance procedures today are difficult for anyone to follow and understand, especially undergraduates experiencing sexual misconduct or facing misconduct allegations. For example, the University of Kansas Sexual Harassment and Sexual Violence Policy is a document of over 8,000 words[239] that links to a Student Non-Academic Conduct Procedures Policy of over 5,000 words.[240] The Michigan State University Policy on Relationship Violence and Sexual Misconduct[241] is nearly 14,000 words and contains nine appendixes.[242] By comparison, Pennsylvania State University's website describes Title IX Procedures is under 2,000 words,[243] but links to the Code of Conduct and Student Conduct Procedures document of nearly 10,000 words, nearly 2,000 of which are devoted to sexual misconduct across multiple sections.[244] Notably, Pennsylvania State University provides for both a hearing and investigative model, contributing to a lack of clarity.[245] Complicated grievance policies may provide for certainty and predictability, but may be of little use to victims and alleged perpetrators when they are difficult to understand and follow.

Confidential resources like on-campus counselors and advocates, survivor advocacy offices, women's and health centers, and licensed and pastoral counselors must be able to help survivors and alleged perpetrators understand the range of options available to them. Given the ineffectiveness of the compliance regime, universities require an impartial, independent, and confidential resource that can help to surface complaints while providing individuals with clear guidance on options. This resource exists in the form of university Ombuds who practice to the standards of their professional archetype. The next Section describes

237. OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS, *supra* note 44, at 26.

238. Barclay Sutton Hendrix, Note, *A Feather on One Side, a Brick on the Other: Tilting the Scale Against Males Accused of Sexual Assault in Campus Disciplinary Proceedings*, 47 GA. L. REV. 591, 614 (2013); Lavinia M. Weizel, Note, *The Process That Is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1639 (2012).

239. *Sexual Harassment and Sexual Violence*, U. KAN. POL'Y LIBR., https://policy.ku.edu/IOA/sexual-harassment-sexual-violence-procedures (last updated Aug. 31, 2016).

240. *Student Non-Academic Conduct Procedures*, U. KAN. POL'Y LIBR., https://policy.ku.edu/student-affairs/non-academic-student-conduct (follow "Nonacademic Misconduct Procedures_8.22.2016.pdf" hyperlink) (last updated Aug. 22, 2016).

241. OFFICE OF THE PRESIDENT, MICH. ST. UNIV., *supra* note 3.

242. *Id.* Appendix H, describing the student conduct hearing procedures, is nearly three thousand words. *Id.* app. H.

243. *Title IX Procedures*, *supra* note 92.

244. OFFICE OF STUDENT CONDUCT, PA. STATE UNIV., CODE OF CONDUCT & STUDENT CONDUCT PROCEDURES (2016), http://studentaffairs.psu.edu/conduct/docs/OSCProcedures.docx.

245. *Id.* at 13–14.

university Ombuds as a prerequisite for compliance with Title IX law and policy.

III. OMBUDS: A REQUIREMENT FOR TITLE IX COMPLIANCE

As Title IX Coordinators are a key element of the formal mechanism for ensuring compliance with Title IX, the archetypal Title IX Coordinator model treats confidentiality very differently than the model Ombuds. Instead of utilizing confidentiality to encourage reporting, Title IX law and policy works to strengthen protections for complainants from retaliation and to educate potential complainants about where confidentiality can and cannot be maintained. This is in stark contrast to the model Ombuds, whose confidentiality requirements provide their visitors with control over the extent of the intervention. First, this Section describes the confidentiality obligations as detailed by the Office for Civil Rights. Ombuds are then described as a mechanism to strengthen the work of Title IX Compliance offices. Specifically, the Ombuds model and the guidelines for confidentiality are discussed, followed by examples of Ombuds adhering to the archetype. Ombuds impartiality and independence guidelines are then analyzed as they relate to confidentiality. As the compliance regime is not effectively encouraging reports of sexual misconduct, informal alternatives that provide confidentiality can augment and strengthen the formal reporting mechanisms.

The formal system's general lack of legitimacy and broader ineffectiveness in encouraging reports is addressed in recent OCR guidance. The 2014 OCR Q&A document provides guidance on how to balance the conflicting goal of providing self-determination yet encouraging reporting.[246] First, OCR directs universities to "make clear to all of its employees and students which staff members are responsible employees so that students can make informed decisions about whether to disclose information to those employees."[247] Second, employees are required to provide an initial warning, and "[b]efore a student reveals information that he or she may wish to keep confidential, [the employee] should make every effort to ensure that the student understands."[248] Information that should be shared includes the employee's reporting obligations (including the names of the survivor and perpetrator and relevant facts regarding the incident), where the employee must report, and the individual's right to request confidentiality.[249] The responsible employee must specifically inform the student of his ability "to share the information confidentially with counseling, advocacy, health, mental health, or sexual-assault-related services (e.g., sexual assault resource centers, campus health cen-

246. *See infra* notes 247–48 and accompanying text.
247. OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS, *supra* note 44, at 15.
248. *Id.* at 16.
249. *Id.*

ters, pastoral counselors, and campus mental health centers)."[250] In terms of the different levels of confidentiality that may be provided, professional and pastoral counselors have the ability to provide completely confidential support services to victims of sexual violence.[251] Non-professional counselors are allowed to maintain the confidentiality of personally identifiable information about incidents of sexual violence, but must make reports.[252] Non-professional counselors are defined as individuals who "work or volunteer in on-campus sexual assault centers, victim advocacy offices, women's centers, or health centers."[253] Non-professional counselors must report "aggregate data" of general information (nature, date, time, and general location of the incident) and "should take care to avoid reporting information that would personally identify a student."[254] Non-professional counselors are advised to "consult with students regarding what information needs to be withheld to protect their identity."[255] Ombuds are presumably non-professional counselors and must provide general information about any incident of which they become aware.[256]

There are three reasons the OCR guidance is ineffective at best. First, efforts to educate large campuses about reporting requirements tend to include online trainings that serve to reduce the universities' prospective liability but do not indicate increased knowledge of the requirements. Checking the box of completing training does not mean the training is effective. Second, individuals reporting sexual misconduct do not always signal the responsible employee of what they are about to say. To require an initial warning is neither realistic nor always possible. Third, complicated grievance policies are a challenge for individuals serving in a counseling or professional role.[257] Professional counselors may not understand or desire to provide survivors and alleged perpetrators with unbiased or complete information about their options. Given the challenge of balancing individual self-determination with organizational interests in safety and avoiding liability, how can institutions encourage survivors to come forward? Mary Rowe, Linda Wilcox, and Howard Gadlin encourage the use of Ombuds offices as "[t]here is no single policy that will make an organization seem trustworthy and no single proce-

250. *Id.*
251. *Intersection of Title IX and the Clery Act*, *supra* note 126.
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.*
256. Violence Against Women Reauthorization Act of 2013, Pub. L. No 113-4, 127 Stat. 54 (codified as amended in scattered sections of 42 U.S.C.) (providing no change to Ombuds status as a mandatory reporter); Rick Koepke, Exec. Dir., Int'l Ombudsman Ass'n, Comment Letter on FR Doc# 2014-14384 (July 14, 2014), https://www.ombudsassociation.org/IOA_Main/media/SiteFiles/IOA-Public-Comment-for-FR-Doc-2014-14384.pdf (requesting that colleges and universities be permitted to designate Ombuds as a "confidential resource" rather than as a "responsible employee").
257. *See supra* notes 229–34 and accompanying text.

dure or practice that will guarantee that people will overcome all the barriers to coming forward."[258]

A. What is an Ombuds?

Charles Howard, author of *The Organizational Ombudsman*, describes the origins of the Ombuds' function as a response to the ineffectiveness of formal complaint systems.[259] As legal, compliance, and human resources personnel are unable to provide confidentiality to employees seeking to report misconduct or other conflicts,[260] legislators and organizations sought other means of complying with the law and resolving interorganizational conflict. The Ombudsman role is the least understood option in the alternative dispute resolution field.[261] There is significant confusion about what an Ombuds is and significant dispute on the issue among Ombuds themselves.[262] There is basic confusion resulting from a lack of a common "definition of the term *Ombudsman*, how it is interpreted, and who uses it."[263] There is also confusion as to whether the term "Ombudsman" is gender-specific.[264]

There are many different types of Ombuds. "Classical Ombuds" are those originating from the Swedish parliament in the early 1800s and which have statutory independence, the authority to investigate complaints, and the authority to issue reports or recommendations.[265] By contrast, Organizational Ombuds are established not by statute but by their organization's institutional governance structure and do not typically have a formal investigative function.[266] While the first university and corporate Ombuds were "truly amateurs" selected on the basis of their knowledge of the institution and their personal reputations for integrity, fairness, and sympathy, over time the Ombuds' role became institutionalized and standards of practice developed.[267]

Many organizations founded Ombuds programs as a means of providing alternatives to formal grievance systems and for attending to the underlying interests that give rise to disputes, which often are not well addressed by formal rules and organizational guidelines.[268] Ombuds are now common mechanisms in both the private and public sector. One survey found that 20 federal agencies and over 1,000 U.S. corporations

258. Rowe, Wilcox & Gadlin, *supra* note 178, at 63.
259. CHARLES L. HOWARD, THE ORGANIZATIONAL OMBUDSMAN: ORIGINS, ROLES, AND OPERATIONS--A LEGAL GUIDE 144 (2010).
260. *Id.*
261. Howard Gadlin, *The Ombudsman: What's in a Name?*, 16 NEGOT. J. 37, 37 (2000).
262. *Id.*
263. Samantha Levine-Finley & John S. Carter, *Then and Now: Interviews with Expert U.S. Organizational Ombudsmen*, 28 CONFLICT RESOL. Q. 111, 127 (2010).
264. This Article uses the term "Ombuds" except in quotations that use another term.
265. Gadlin, *supra* note 261, at 38.
266. *Id.* at 39.
267. *Id.* at 40.
268. *Id.* at 43.

use Ombuds.[269] Educational Ombuds first appeared in the 1960s with the establishment of offices at Michigan State University and Eastern Montana College to hear student and faculty complaints during a time of widespread student unrest.[270] Today, there are at least 200 college and university Ombuds in the United States who handle problems affecting students, faculty, and staff.[271]

Functionally, a university or college Ombuds is a confidential resource for anyone who has a complaint or concern about a university employee or policy. Ombuds are intended to help defuse situations before they become larger problems by helping individuals think through options, clarify goals, and improve communication. Ombuds do not tell people what to do. Instead, they are intended to listen without judgment. Most importantly, Ombuds provide confidentiality to individuals and do not put the institution on "notice" for purposes of creating a legal responsibility to act. Ombuds do not duplicate any services, in the sense that they have no authority to formally resolve a dispute, impose a sanction, or order a remedy. Instead, they merely provide a place for people to turn if they don't know where to go.

B. Confidentiality Encourages Reporting

As confidentiality encourages the filing of complaints, Ombuds are an ideal mechanism for encouraging reporting of sexual misconduct. [272] The most common reasons individuals decide not to make a complaint or take other steps to stop behavior they find unacceptable includes "fear of loss of relationships, and loss of privacy, fear of unspecified 'bad consequences' or retaliation, and insufficient evidence."[273] A 2002 *Time*/CNN Survey/Harris Interactive poll revealed that 87% of the public perceived that whistleblowers face retaliation some or most of the time.[274] In a 1999 survey of whistleblowers, 69% stated that they lost their jobs or were forced to retire as a result of coming forward, and another 69% reported that they were criticized or avoided by their co-workers.[275] Fear of retaliation is a common reason to avoid reporting, but forbidding retaliation is not very effective because "few people understand or trust such

269. Jeffrey S. Lubbers, *Ombudsman Offices in the Federal Government—An Emerging Trend?*, AM. B. ASS'N ADMIN. & REG. L. NEWS, Summer 1997, at 6.

270. Scott C. Van Soye, *Illusory Ethics: Legal Barriers to an Ombudsman's Compliance with Accepted Ethical Standards*, 8 PEPP. DISP. RESOL. L.J. 117, 123 (2007).

271. DOUGLAS H. YARN, GEORGIA ALTERNATIVE DISPUTE RESOLUTION PRACTICE & PROCEDURE § 2:14 (2016).

272. Koepke, *supra* note 256 ("Organizational Ombudsman, without breaching the confidence of any individual inquirer, can often provide options for surfacing systemic issues or concerns that can greatly benefit their institutions.").

273. Rowe, Wilcox & Gadlin, *supra* note 178, at 52.

274. THE CONFERENCE BD. COMM'N ON PUB. TR. & PRIVATE ENTER., FINDINGS AND RECOMMENDATIONS 23 (2003), https://www.conference-board.org/pdf_free/SR-03-04.pdf.

275. Joyce Rothschild & Terance D. Miethe, *Whistle-Blower Disclosures and Management Retaliation: The Battle to Control Information About Organization Corruption*, 26 WORK & OCCUPATIONS 107, 120 (1999).

a policy," and retaliation is hard to prove and prevent where "delayed, indirect, diffuse, outside the workplace, or covert."[276]

Anonymous hotlines or reporting mechanisms are sometimes proposed as a way of encouraging the making of complaints, but some research suggests that these mechanisms are not as effective for this purpose as sometimes believed.[277] Despite a 2007 survey indicating that half of employees had personally observed violations of "company ethics standards, policy, or the law,"[278] a 2007 survey of over 650 companies revealed reporting rates were less than 1%.[279]

A possible explanation for why anonymous reporting mechanisms do not encourage reporting is because survivors want someone they can talk to confidentially before deciding whether to make an official report. In a 2007 study, 39% of college students indicated that students had conflicts they wanted to pursue but did not, most commonly due to fear of retribution (37%), expectation of a negative outcome (38%), and lack of knowledge of how to pursue the conflict (33%).[280] Several dozen reasons explain why people do not act directly and effectively when they see unacceptable behavior and do not use conflict management systems in timely and appropriate ways.[281] Reasons include fear of loss of relationships, fear of retaliation or other bad consequences, fear that they will not appear credible to management, and inaccessibility or lack of credibility of those who might make a difference.[282] Additional factors include (1) a belief that people lack "enough evidence" to pursue an issue, (2) lack of knowledge about relevant resources or policies, (3) distrust of senior management, (4) shame, and (5) a belief that no one will listen.[283] Hesitance with anonymous, impersonal reporting is echoed in the data on bystander interventions, noting over half of respondents in a national survey of adults suspected a friend, family member, or co-worker was a survivor of domestic violence, but 65% wanted more information about what to do.[284] Further, 58% of college students surveyed did not know how to help a survivor.[285]

---

276. Rowe, Wilcox & Gadlin, *supra* note 178, at 54.

277. HOWARD, *supra* note 259, at 161 (summarizing the research indicating limitations on hotline effectiveness).

278. *Id.* at 167 (internal quotation marks omitted).

279. SEC. EXEC. COUNCIL, CORPORATE GOVERNANCE AND COMPLIANCE HOTLINE BENCHMARKING REPORT 11 (2007).

280. Tyler R. Harrison, *My Professor Is So Unfair: Student Attitudes and Experiences of Conflict with Faculty*, 24 CONFLICT RESOL. Q. 349, 356–57 (2007).

281. Mary Rowe, *An Organizational Ombuds Office in a System for Dealing with Conflict and Learning from Conflict, or "Conflict Management System,"* 14 HARV. NEGOT. L. REV. 279, 280 (2009).

282. *Id.*

283. *Id.*

284. THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, *supra* note 53, at 3.

285. *Id.*

Ombuds are the ideal mechanism for restoring individuals' beliefs in the legitimacy of the organization. The organizational context can be a barrier to reporting when the complaint system is not seen as safe, accessible, and credible.[286] Further, there could be the perception that important people get treated differently or the system's procedures are not accessible, take a long period of time, do not respect privacy, or are overseen by the people seen as the source of the problem.[287]

In contrast to anonymous hotlines, in-person mechanisms that promise confidentiality, like Ombuds, have been shown to increase trust in the organization and possibly encourage the making of complaints.[288] A study of campus Ombuds, by Tyler Harrison and Marya Doerfel, found that over 50% of students bringing an issue to an Ombuds received favorable or somewhat favorable outcomes.[289] Of students who did not receive a favorable outcome, a majority still thought the process was fair and contributed to feeling trust and commitment toward the organization.[290]

Ombuds are capable of providing survivors with confidentiality and self-determination, and research indicates student satisfaction rates of 60%[291] to 90% after using an Ombuds on a range of student-faculty disputes from grading policies to harassment.[292] Most importantly, prior research indicates female students may especially benefit from speaking with an Ombuds. A survey of students who used an Ombuds found female students were significantly more likely to pursue a future grievance of harassment.[293] Women were also significantly more concerned than men about confidentiality, specifically the effect of pursuing a grievance on their department standing, potential retribution, and they were more likely than men to expect negative outcomes.[294]

Mandatory reporting policies may inhibit reporting because individuals do not want to get other people fired or in trouble and do not trust the employer to do a fair investigation.[295] Rowe, Wilcox, and Gadlin state it best, "If the dilemmas are managed badly by providing too few

286. Rowe, Wilcox & Gadlin, *supra* note 178, at 56.
287. *Id.* at 57.
288. Michael L. Sulkowski, *An Investigation of Students' Willingness to Report Threats of Violence in Campus Communities*, 1 PSYCHOL. VIOLENCE 53, 61 (2011).
289. Tyler R. Harrison & Marya L. Doerfel, *Competitive and Cooperative Conflict Communication Climates: The Influence of Ombuds Processes on Trust and Commitment to the Organization*, 17 INT'L J. CONFLICT MGMT. 129, 145 (2006).
290. *Id.*
291. Mary P. Rowe, *Case 3: Academic Ombudsman Cost Estimates*, 15 J. HEALTH & HUM. RESOURCES ADMIN. 299, 300 (1993).
292. Tyler R. Harrison, *What Is Success in Ombuds Processes? Evaluation of a University Ombudsman*, 21 CONFLICT RESOL. Q. 313, 315 (2004).
293. *Id.* at 358.
294. *Id.* at 359.
295. Rowe, Wilcox & Gadlin, *supra* note 178, at 58.

options (and zero tolerance may offer no options), fewer people will come forward."[296] Miller echoes this view:

> [T]he provision of a safe place in which options for action and response can safely be heard, away from the clamor of police sirens and media-fuelled public approbation, can help to protect the individual and public interest by ensuring that matters have a greater likelihood of swift resolution. . . . [An Ombuds'] very informality, neutrality and confidentiality enable the exercise of justice by ensuring that alleged victims and perpetrators can safely and more fully consider their options for exercising their rights.[297]

Providing confidentiality to visitors is necessary in order to allow students and employees to feel comfortable asking for help or making a complaint. Noted Ombuds Brian Bloch, David Miller, and Mary Rowe believe that promising confidentiality helps people come forward.

> Our experience is that only a relatively small proportion of the population is comfortable with formal actions (although importantly, some in this group are satisfied only by formal investigations and formal action). But most people, most of the time, are quite reluctant to act on the spot, or report unacceptable behavior, if they believe this will result in formal action. This is one of the reasons why options are needed in a complaint system.[298]

Ombuds are ideal for individuals who do not know where to go, need help understanding the maze of options, want complete confidentiality, and want to retain their control over the next steps. Instead of requiring Title IX Coordinators to be flexible in their formal compliance function, Ombuds can be utilized to realize the best of both formal and informal dispute mechanisms. The next Part describes the model Ombuds' confidentiality requirements.

C. Ombuds' Confidentiality Requirements

The model Ombuds is not an office of notice, meaning that any communications made to the Ombuds would constitute making the university officially aware of the complaint and thus responsible for remedying the misconduct. The principles of the Ombuds model require that these offices maintain the confidentiality of visitors' identities and any information that could lead to their identification.[299] Ombuds give priority to confidentiality over compliance. They promise absolute confidentiality and do not make reports about specific individuals. Ombuds only

---

296. *Id.*

297. Miller, *supra* note 82, at 6–7.

298. Brian Bloch, David Miller & Mary Rowe, *Systems for Dealing with Conflict and Learning from Conflict—Options for Complaint-Handling: An Illustrative Case*, 14 HARV. NEGOT. L. REV. 239, 240 (2009) (alteration in original).

299. IOA STANDARDS OF PRACTICE, *supra* note 7, § 3.1.

make reports about trends when the complete anonymity of the visitor can be ensured.[300]

Confidentiality is an International Ombudsman Association (IOA) Standard of Practice, with Standard 3.1 requiring Ombuds hold communications in strict confidence by not revealing, or being required to reveal (without express permission), the identity or information that could lead to identification of any visitors contacting the office.[301] Further, the Ombuds only takes action with the individual's express permission. This is done at the discretion of the Ombuds and only when it can be done safeguarding the individual's identity. Describing confidentiality as a privilege, the standard provides an exception where there appears to be imminent risk of serious harm, which is an assessment that is to be made by the Ombuds.[302] Standard 3.2 specifically states that communication between the Ombuds and others is privileged, with the privilege held by (and thus only waivable by) the Ombuds.[303] Confidentiality should be discussed with visitors prior to them sharing their concerns.[304] The IOA Best Practices states that the Ombuds may negotiate with the organization to be exempt from mandatory reporting requirements, and imminent risk of serious harm should be construed as narrowly as possible.[305]

IOA Standard 3.3 extends the principle of confidentiality to prohibit Ombuds from testifying in any formal process within or outside the organization.[306] This prohibition operates whether the individual provides permission or requests the Ombuds come forward.[307] Other IOA Standards regarding confidentiality include 3.5, requiring the Ombuds to keep no records containing identifying information on behalf of the organization,[308] and 3.6, requiring the Ombuds to maintain information such as notes, phone messages, calendars, in a secure location, protected from inspection, with a standard, consistent practice for destroying information.[309] IOA Standard 3.8 dictates that the communications made to Ombuds are not considered notice to the organization, Ombuds are not agents of the organization, Ombuds should not be designated as agents, and Ombuds will not accept notice to the institution.[310]

---

300. *Id.* § 3.7.
301. *Id.* § 3.1.
302. *Id.*
303. *Id.* § 3.2.
304. IOA BEST PRACTICES: A SUPPLEMENT TO IOA'S STANDARDS OF PRACTICE § 3.2 cmt. at 6 (INT'L OMBUDSMAN ASS'N, Version 3, Supp. 2009), http://www.ombudsassociation.org/IOA_Main/media/SiteFiles/IOA_Best_Practices_Version3_101309_0.pdf.
305. *Id.* § 3.1 cmt. at 6.
306. IOA STANDARDS OF PRACTICE, *supra* note 7, § 3.3.
307. *Id.*
308. *Id.* § 3.5.
309. *Id.* § 3.6.
310. *Id.* § 3.8.

The IOA Best Practices specifies that even in situations in which the visitor provides permission to the Ombuds to discuss a concern, the model Ombuds should only discuss the issue in general terms and should not specify names, dates, or events.[311] If the Ombuds receives permission to share, notice occurs via the conversation between the Ombuds and the organizational representative, not when the visitor communicates with the Ombuds.[312] As a result, there are "no circumstances [in which] the original communication to the Ombudsman [becomes] part of the notice communication."[313]

Further, the IOA Best Practices recommends that Ombuds publicize their promises of confidentiality, be situated in a location designed to protect visitors' privacy, and that permission to reveal information should not be provided once the issue is being handled in a formal process.[314] Often, visitors will grant permission for an Ombuds to reveal their identity or other information as they work to help them resolve the issue. Once a visitor uses a formal process, an Ombuds should not agree to release any information learned while working with that visitor.[315] Despite the specific confidentiality restrictions of the role, Ombuds may identify trends and issues about policies and procedures without breaching confidentiality or anonymity.[316]

D. Ombuds as a Reporting Safety Net

Despite the stringent confidentiality requirements, Ombuds are able to make reports about trends, policy issues, and any report as long as an individual's anonymity is safeguarded. Two IOA provisions address reporting. First, Standard 3.4 requires that the Ombuds safeguard individuals' identities when providing systematic, upward feedback.[317] Second, Standard 3.7 requires the Ombuds to prepare reports and data in a way that protects confidentiality.[318] Under these constraints, an Ombuds may act as a safety net ensuring that complaints are addressed, even in the aggregate. The IOA Best Practices states that if issues cannot be raised in confidence, individuals may be unwilling to raise them, thereby "depriving the organization of an opportunity to address issues and rectify misconduct that has not yet surfaced through other channels."[319] Organizations need confidential and anonymous channels of communication to resolve workplace conflict and help people report misconduct.

311. IOA BEST PRACTICES, *supra* note 304, § 3.8 cmt. at 8.
312. *Id.*
313. *Id.*
314. *Id.* § 3.1 cmt. at 6.
315. *Id.* § 3.2 cmt. at 6.
316. IOA STANDARDS OF PRACTICE, *supra* note 7, § 4.6.
317. *Id.* § 3.4.
318. *Id.* § 3.7.
319. *Id.* § 3.2 cmt. at 7.

Ombuds also assist with larger organizational issues because "[t]he freedom from management responsibility, combined with the everyday process of speaking with people from any and all levels or locations of the organization, give the ombuds a unique perspective on how the organization is performing and what problems it and its people face."[320] Armed with this information, an Ombuds can provide recommendations to organizational leaders on how to address broad institutional problems. This is done anonymously in order to protect confidentiality. Through feedback, improvements can be instituted, but these are neither suggested nor administered by the Ombuds. By presenting the data that help to identify trends, Ombuds can persuade managers to buy into system change.[321] As a result, Ombuds have many roles including "an institutional response to curb wrongdoing or unethical behavior, a facilitator of appropriate conduct by both individuals and the organization itself, and an agent for promoting systemic change where necessary."[322]

Through these organizational activities, Ombuds serve an important function of identifying problems missed by other processes due to the ability to provide confidentiality and to bring issues identified as trends to the forefront. The Ombuds mechanism may be an effective alternative, as research indicates that individuals are often hesitant to file formal complaints.[323] Ombuds issue annual or biannual reports, and the 2009–2011 report from the University of Kansas Ombuds echoes the need for informal options.[324] The report notes, "[n]o one solution, department, or university unit can respond effectively to all situations. It is important that the University of Kansas provides both formal and informal options for campus members to address their concerns."[325] The report describes the results of a user survey of 102 of the 786 individuals meeting with the Ombuds during the 2009 to 2011 reporting period.[326] Individuals accessing the Ombuds Office included faculty, students, and staff with issues ranging from grade disputes to promotion issues and tenure conflicts.[327] When asked what they would have done without the Ombuds Office, a sample of the survey respondents indicated they would have done the following: resigned, hired an attorney, left the university, escalated the problem at additional time and cost, and nothing as they had

320. HOWARD, *supra* note 259, at 80.

321. Marsha L. Wagner, *The Organizational Ombudsman as Change Agent*, 16 NEGOT. J. 99, 108 (2000).

322. HOWARD, *supra* note 259, at 80–81.

323. *See supra* notes 168–71 and accompanying text.

324. KELLIE HARMON, MARIA ORIVE & STEPHEN GRABOW, UNIV. OMBUDS OFFICE, UNIV. OF KAN., UNIVERSITY OMBUDS OFFICE BIENNIAL REPORT 2009–2011 (2011), https://ombuds.ku.edu/sites/ombuds.ku.edu/files/docs/2009-2011%20biennial%20report.pdf.

325. *Id.* at 15.

326. *Id.* at 6–9, 15.

327. *See id.* at 10.

nowhere else to go.[328] In the 2011–2013 report, whistleblowing and fear of retaliation are described as an issue of ongoing concern.[329]

For purposes of a direct comparison of reporting rates for one campus, the Title IX Coordinator at the University of Michigan released an inaugural annual report indicating that 129 instances of sexual misconduct were reported between 2013 and 2014.[330] Of the 129 reports, fifty-eight, or 45%, were deemed to not fall under the purview of the sexual misconduct policy.[331] By comparison, the report of the Ombuds at the University of Michigan for the same timeframe (2012–2013) indicates the Ombuds met with 217 visitors, 86% of whom were students.[332] Of ninety-eight non-academic concerns brought to the Ombuds attention, twenty-five concerned harassment and discrimination.[333]

Noted Ombuds Mary Rowe observed that "there are options other than (a) keeping silent or (b) breaching confidentiality."[334] These options include discussing the facts, laws, and rules and, in doing so, encouraging the visitor to decide to act responsibly to prevent future harm to others.[335] Further, many visitors may be willing to come forward after time has passed and circumstances have changed.[336] Other visitors may be willing to provide an anonymous note or give the Ombuds permission to act in place of the visitor as long as the visitor's anonymity can be maintained.[337] With the visitor's information, the Ombuds may be able to instigate a "generic approach," like a routine safety audit and follow-up training and catch the problem.[338] Another option includes helping the visitor prepare for the conversations and aiding them in learning the skills necessary for acting effectively.[339] Further, understanding whistleblower protection laws and policies against retaliation and finding an "accompanying person" who shares their concerns may make the visitors more likely to come forward.[340]

In addition to identifying problems and restoring individuals' views that the institution cares about their concerns, much of the basis for the use of Ombuds offices is related to confidentiality and avoiding legal

328. *Id.* at 15.
329. *Id.* at 7.
330. OFFICE FOR INSTITUTIONAL EQUAL., UNIV. OF MICH., UNIVERSITY OF MICHIGAN STUDENT SEXUAL MISCONDUCT ANNUAL REPORT JULY 2013–JUNE 2014, at 2 (rev. ed. 2015), https://hr.umich.edu/sites/default/files/student-sexual-misconduct-annual-report-2014.pdf.
331. *Id.* at 3.
332. TOM LEHKER, OFFICE OF THE OMBUDSMAN, UNIV. OF MICH., ANNUAL REPORT 2012–2013, at 2–3 (2013), https://studentlife.umich.edu/files/ombuds/OmbudsReport2013.pdf.
333. *Id.* at 5.
334. Mary Rowe, *What Happens to Confidentiality If the Visitor Refuses to Report Unacceptable Behavior?*, J. INT'L OMBUDSMAN ASS'N, 2011, at 40, 40.
335. *Id.* at 41.
336. *Id.* at 42.
337. *Id.*
338. *Id.* (internal quotation marks omitted).
339. *Id.*
340. *Id.*

liability. Ombuds are able to provide an "early warning" to "'consult . . . front-line staff or . . . direct reports about morale or behavior or procedures in a certain area" as long as they protect the anonymity of the individuals involved.[341] Remedial steps such as focused training, department level surveys to determine specific issues, and other such mechanisms can be used to address misconduct.[342] Ombuds can provide these services if confidentiality can be maintained and, thus, can ameliorate the effects of conflict that often linger within the organization. A survey of government workers indicated the damages caused by sexual harassment are not limited to the initial event but instead can hurt the target, harasser, and organization members for an extended period.[343] In sum, Ombuds provide confidentiality to visitors but may report upwards in ways that protect the institution from liability.

E. Ombuds Complying with the Archetype

Archetypal Ombuds are offices of informal deliberation and confidentiality that use the principle of confidentiality to provide self-determination to visitors as they consider whether or how to invoke more formal organizational processes that typically promise much less—or no—confidentiality. Many particular Ombuds offices emphasize the principle of confidentiality in their documents or statements of practice. For example, the University Senate Rules and Regulations at the University of Kansas specifically provide confidentiality as a power granted to the Ombuds Office: "All proceedings in individual cases shall be held confidential by the Ombudsman unless otherwise authorized by the complainant."[344] Notably, this contravenes IOA Standard 3.2, which specifically states that communication between the Ombuds, while serving in that capacity, and others is privileged with the privilege held by the Ombuds and the Ombuds office and not any other person.[345] The University of Kansas Ombuds Office provides that it has no power to receive notice for the University and "all communications with an Ombuds are made with the understanding that communication is confidential, off-the-record, and that no one from the Omsbud Office will be called to testify as a witness in any formal or legal proceeding to reveal confidential communications, unless compelled by judicial subpoena or court order."[346] Michigan State University's Ombuds website echoes this view and notes, "[i]nformation concerning any visit will not be disclosed

341. Wagner, *supra* note 321, at 107 (internal quotation marks omitted).

342. *See id.*

343. Jeong-Yeon Lee, Sharon Gibson Heilmann & Janet P. Near, *Blowing the Whistle on Sexual Harassment: Test of a Model of Predictors and Outcomes*, 57 HUM. REL. 297, 318 (2004).

344. *University Senate Rules and Regulations (USRR)* § 6.2.2.1, U. KAN. POL'Y LIBR., http://policy.ku.edu/governance/USRR#art6sect2 (last updated Oct. 25, 2016).

345. IOA STANDARDS OF PRACTICE, *supra* note 7, § 3.2.

346. *Authority and Limits of the Ombuds Office*, U. KAN. OMBUDS OFF., https://ombuds.ku.edu/authority#receiving (last visited Feb. 19, 2016).

without the visitor's permission, absent compelling reasons (e.g., a court order or potential risk to safety)."[347]

More generally, Ombuds who follow the archetype are not offices of "notice" or compliance and maintain visitors' confidentiality and the confidentiality of information that may lead to identifying a visitor. Adherence to these principles includes maintaining confidentiality in difficult environments in which others are violating confidentiality, maintaining the confidentiality of e-mail and phone communications, and reporting responsibly according to the archetypal model. Ombuds practicing to the archetype also provide their visitors with control over whether and how to report allegations of sexual misconduct.

Ombuds who adhere to the archetype face a series of dilemmas in maintaining the confidentiality standard. Ombuds must subordinate other values in order to maintain their commitment to confidentiality, and Ombuds are very aware of the required tradeoff. For example, Ombuds who adhere to the confidentiality standard are unable to report a sexual misconduct violation even when it is egregious and done by a repeat violator who is a professor and is preying on vulnerable students. One Ombuds described maintaining confidentiality, even at the expense of the Ombud's preference for reporting:

> I really do, again, think that it is a critical part of the service that I offer that it is confidential and would really protect that value, even at the risk of some others. If someone were the victim of a sexual assault and came here, I assume they came here because I was obligated to keep that confidential. If they wanted [someone to be] more active in terms of a response, [the visitor] would have gone to the police or they would have gone to the Title IX Coordinator, neither of whom are obligated to keep that confidential and both of whom are obligated to be more active in investigating that claim. . . . I really would encourage . . . and work with [the visitor] in terms of what it is they're so afraid about to actually [report] . . . . [I]f they're a victim of sexual assault I would say go to the police first. I'd be happy to support them in doing that. I would even go with them if they needed me to. I'd walk them over, I'd call for them, something. Same with the Title IX Coordinator if that's the way they wanted to go. I would really encourage them as strongly as I could. [But at] the end of the day, if they came here because of the protection of confidentiality, I would honor that.[348]

Ombuds who adhere to the achetype must do so at the expense of other values. For example, an Ombuds first described the situation,

---

347. *About the Office of the University Ombudsperson*, MICH. ST. U., https://www.msu.edu/unit/ombud/About/index.html (last visited Feb. 19, 2016).

348. Interviewee 14, O4A10:1-5, 7:27-8:2.

> [O]n any . . . research university campus . . . there are a number of faculty who take advantage of their positions to . . . develop amorous relationships with their students, particularly their graduate students. [One in particular had] a habit of inviting students to co-author [something, which] . . . is going to look really great on their resume when they go out to look for a job. [This offer always came with an] invit[ation] to engage in sexual acts . . . [that created] the perception on the part of the graduate student, "if I say no, I will lose this professional opportunity." I have had any number of [this faculty member's] students come to me [over the years].[349]

Next the Ombuds described their own preferences.

> I would have loved . . . to [have any of them be] the first one to step forward. I would have loved to say if [the visitor] says "oh, no, I don't want to go through all that, I'll just find another job" . . . "you realize that by doing that you are sealing the fate of somebody else that's going to be in here . . . the next person he's going to proposition, you realize that, right?" . . . I'd like to be able to say that, but I can't in my role.[350]

Then the Ombuds explained when it is possible to raise the issue.

> I have been to both the chair of [the] department and the dean and I have told them, not during the time that anyone that I'm aware of is actively being solicited, but I'll wait for the last person to see me to leave, and then I'll go [talk to the department chair and the dean].[351]

What the Ombuds communicated to the chair or dean is next described:

> Look, over the last [several] years I've had [a number of] different people come to me and tell me this general kind of story about [this faculty member's] behavior . . . . Now I don't do investigations, I don't apply lie detector tests, but [numerous people] telling me an almost identical pattern of behavior . . . . I am concerned and I hope that you are too, Ms. Chair or Mr. Dean, that sooner or later one of these people is going to take one of the formal options I'm [telling] them [about] and [that will result in] an investigation, embarrassment, and hassle that could be avoided if this . . . behavior were to be altered. So whether there's any truth to these allegations or not, and I'm not saying there is, I'm just saying that even if they're all made up, my job is to tell them that one of their options is to go to the [formal] office and file a charge and ultimately to the [government] . . . and [that will result in] federal investigators poking

349. Interviewee 8, O10B5:41-6:17.
350. Interviewee 8, O10B11:19-27.
351. Interviewee 8, O10B11:44-48.

> around . . . and I assume that you would prefer to avoid that. So I just thought you'd want to know.[352]

Finally, the Ombuds noted how she maintained confidentiality and also impartiality in the face of very difficult circumstances.

> The hardest part of this job is knowing that in the next year or two there will be another one of [the faculty member's] victims in my office, and there's an innocent person out there who may not be in the program yet who's going to be victimized . . . if somebody doesn't stand up and stop it. The only people that have . . . [the] standing to do that is a victim . . . . I will tell people . . . "if you choose to leave . . . you'll be out from under this person's control, please consider writing down your experiences and sending them to the dean or appropriate individual so that some kind of record exists of these behaviors." But frankly, that almost never happens . . . . They want to start a new chapter in their life and put this behind them. . . . But yeah, my preference is that these people stand up to these victimizers and call them out for what they are and put them and the people responsible for their behavior on notice so that we can reduce the chances of future innocent victims. Do I ever make a consultee aware that that's my preference? Absolutely not. That would not be being neutral on my part.[353]

Ombuds who want to stop egregious sexual misconduct may only report under an exception for danger of imminent harm. One Ombuds noted, "I would not be comfortable with [reporting while keeping the visitor's identity anonymous], unless there [is] imminent risk of harm to somebody . . . ."[354] Sexual misconduct in particular presents a significant challenge to Ombuds' confidentiality and determining when there is imminent risk of harm. Again following the archetypal model, an Ombuds noted that risk of serious or imminent harm must be understood narrowly:

> [It] can be harm to oneself or someone else [but] typically what we are more concerned about is someone hurting themselves. . . . [T]hey'll mention they've thought about suicide and those sorts of things and you have to quickly . . . coordinate some support for them. . . . I have [also] had someone make a terrorist threat in my office before, so that happens too.[355]

When Ombuds maintain confidentiality, they often also must sacrifice the goal of stopping misconduct. One Ombuds described educating his visitor about his options but secretly wanting the person to report the misconduct.

---

352. Interviewee 8, O10B11:47-12:13.
353. Interviewee 8, O10B8:13-34.
354. Interviewee 15, O11A12:1-2.
355. Interviewee 16, O8A5:6-10.

> [W]hen a difficult case comes forward, and I would say that sexual harassment is to me the hardest . . . I want it to be reported. I want the behavior to stop, and I do everything I can to educate my visitors about what their options are. . . . That's problematic in our field because if you take sexual harassment as an example, if we report it, or we come forward with the information or even part of the meeting where someone else talks about it, we're part of putting the organization on notice. From a purist [sic] point of view, Ombuds are not supposed to do that.[356]

Ombuds who resist organizational efforts to encourage reporting even must subordinate their professional reputations to their commitment to the confidentiality standard. They also potentially endanger the perceived usefulness of their Ombuds offices. With increased pressure favoring a collaborative institutional approach to identifying and addressing sexual misconduct, protecting confidentiality is increasingly a challenge for Ombuds.

> Even if I don't use . . . [the visitor's] name on the phone, the [visitor] is going to go right over [to that office] and engage in that procedure. [The personnel in that office will] assume it was that [visitor] that I called about . . . [and] that compromises confidentiality.[357]

Given the lack of certain protection for confidentiality, Ombuds are often dependent on their institutions acting in good faith to uphold the promise of confidentiality. "[My] [u]niversity basically says, '[Y]ou are not an office of notice and the University is allowing you to offer confidentiality to the extent permitted by law.'"[358] Often, Ombuds practicing to the archetype must defend against being required or mandated to make specific reports that will put the institution on notice.

> I was vehemently opposed to being a mandated reporter. In fact, my arguments were persuasive and the University has agreed that I can be a confidential [office], even in regard to [sexual misconduct].[359]

> [T[he whole cornerstone of Ombudsing is confidentiality, . . . [i]f you don't have confidentiality and you're not off-the-record and informal there's no reason to have an Ombud[s] Office. . . . So I honestly would resign in protest if I had to [be a mandatory reporter on issues of sexual misconduct].[360]

Further, because of Title IX requirements and the resulting institutional interest in reporting all known instances of sexual misconduct, other administrators may view Ombuds who refuse to report violations as

356. Interviewee 5, O14A9:34-10:2.
357. Interviewee 8, O10A8:1-4.
358. Interviewee 6, O9A5:18-20.
359. Interviewee 14, O4A10:23-26.
360. Interviewee 17, O12A8:26, 28-30.

an impediment to stopping sexual misconduct. Ombuds who adhere to the confidentiality standard and who do not serve as an office of notice often must sacrifice their professional reputations. One Ombuds described helping a visitor think through the confidentiality of a situation and how the administration might see the conversation:

> [I will say to visitors] "Let's talk about retaliation. . . What might happen to you if he or she can put two and two together?" . . . [W]e're not an office of . . . notice. I think the [administrators] would say "no, don't say anything that might discourage [visitors] from coming forward."[361]

Ombuds who adhere to the archetype do, however, make some reports to universities. The question of when and how an Ombuds may reveal communication is fundamental to the role itself. Ombuds who follow the archetype draft an annual report detailing numbers of cases falling into general categories specified by the IOA. These reports may not provide any information that would identify a visitor. For example, "things . . . specific to a particular procedure or particular office I do not report publicly in my annual report. . . . I do report the number of [cases] I engaged in, but I do not specify . . . what individuals or departments were involved . . . ."[362] Another Ombuds noted not using any intake form for visitors to complete, and in terms of collection of demographic information, "it is visual, whatever I see [in order to avoid records and maintain anonymity]."[363] Many Ombuds adhering to the archetype also provide periodic feedback to administrators on trends and potential process improvements. For example, an Ombuds explained that she meets with the president quarterly to talk about the state of the campus, but that she doesn't provide any information about her cases.[364]

Ombuds who give priority to confidentiality often must do so as a detriment to developing relationships. One Ombuds described being careful not to put the institution on notice by communicating any information from the Ombuds to a university agent capable of receiving notice.

> I think that an Ombuds always needs to be aware that unless they're talking to another Ombudsperson, anybody else they talk with at their institution they're putting them on notice if they talk about certain things.[365]

---

361. Interviewee 18, O1B13:30, 32-37.
362. Interviewee 8, O10A3:3-6.
363. Interviewee 19, O7A11:34-35.
364. Interviewee 5, O14A7:12-14 ("[We have a] meeting with [the president] quarterly [to] talk about the state of the campus, [but] [w]e don't [provide] any information about our cases at all.").
365. Interviewee 17, O12A7:38-41.

Another Ombuds noted the challenge of working at a big university in a small town.

> I think I'm excellent at confidentiality . . . [but I have] neighbors on my block who work at the university, everyone I meet is affiliated . . . [T]here was no one I could talk to about anything I'm doing other than [with] people [who work] in my office. I would get questions . . . all the time . . . even [from] people who [understand] the [functions of an Ombuds] office [but still] say "[c]an you tell me about this case?" Someone would read an article in the paper and say, "Are you involved in this?" Constantly, people were . . . asking me if I knew something about [a] situation and I had to figure out appropriate ways of responding.[366]

This observation is echoed by another Ombuds who stated, "When they see [me] walking around, . . . the[y] look [at me and seem to say] . . . 'I wonder what [he or she] knows' and if they did something . . . they're wondering, 'Well, I wonder if he or she knows about something that I don't want them to know.'"[367]

While maintaining confidentiality requires tradeoffs, Ombuds who adhere to the confidentiality standard also protect impartiality and informality and support other values, such as trust, safety, reputation, and self-determination. An Ombuds described his informal process providing confidentiality and control as key to establishing trust with visitors:

> [S]he felt like it was a place she could trust, that it was a place she could go, have a confidential, off the record discussion, and brainstorm with someone who knows the university policies and procedures and could advise her on the policy and what to expect and that type of thing. And I think it really helped her to be able to talk to someone without fear that it would not be confidential. I think she did fear [a lack of] confidentiality . . . [and] it meant a lot to her that she had a place to go . . . without giving up that control, and that that she had time to decide. It felt safe to her and she didn't have to feel like by coming to me it would automatically get reported. She had time to process and decide what she wanted to do. I do think the brainstorming process and just letting her have some time was beneficial.[368]

Another Ombuds clearly articulated the same benefits, but by distinguishing the informal Ombuds practice from more formal processes.

> You can't have it both ways. If you're not going to be an agent of notice, and you're going to participate in formal [processes] . . . you start crossing those other lines. You do not have the right to claim no

366. Interviewee 5, O14A3:25-34.
367. Interviewee 18, O1A11:23-26.
368. Interviewee 17, O12B3:40-52.

> notice and you are not really Ombudsing. . . . Many of the people who come to me to talk about sexual harassment . . . come to me first and foremost for a reality check. "This happened to me. It feels like that. Does that make sense? Is that rational? Do you think someone else to whom this had occurred might feel that way?" Those are what draw people here, and if they have to compromise their confidentiality and provide notice and [be forced into] formal [processes], just to get those questions answered, they're not going to come. They want a safe place to come and discuss first, to use the words that some of them use: "Am I crazy, or is this sexual harassment?" And then a safe and trusted place to come to say, "ok, if I wanted to do something about it, what are the kinds of things I might consider doing?" Without obligating themselves to do any of them. And those are two functions that we as Ombudsmen can perform only because we are not agents of notice and we are confidential.[369]

Many Ombuds described safety as the reason they would only report on an individual situation if the visitor provides them with permission.

> [I]f someone came to me about a sexual harassment issue and didn't want to deal with it until they left the organization, either graduated as a student or got another job or something like that and then they gave me permission to go forward I would figure out a way to do that even if it's just one person. Sexual harassment, you don't peck at numbers, [someone might say] "it's just one." But if I [do not have permission, and I] have to maintain . . . anonymity, I'm never going to be able to go forward. These situations are too unique . . . . 99.9% of the time all I can do is try to work with my visitor to try to see if there's a way that they're comfortable going forward themselves . . . . I just feel like that person is very vulnerable, and I can't do anything to endanger them. It really ties my hands . . . . I don't think I've ever been in a situation where I felt I could provide enough anonymity for my visitors that I could go forward with those issues.[370]

Ombuds widely discussed their views on how and when they might share confidential communications, with many discussing the level of anonymity necessary in order to make a disclosure. One Ombuds commented,

> The only way we can [report], and I think it would almost never happen with racial discrimination or sexual harassment, is if we had enough complaints that we felt we could go forward with the report without identifying any individual visitor. It's extremely rare that that

369. Interviewee 8, O10A11:41-12:19.
370. Interviewee 5, O14A11:27-34, 16-18; 9:1-2.

> happens in my experience . . . because typically it's only one person who's being affected at a time.[371]

Another Ombuds who adheres to the archetype indicated only reporting on general trends: "[I] provide upward feedback on trends and patterns I have seen . . . ."[372] The same Ombuds further notes,

> [I]f it's an isolated incident, I won't report it. And I don't know where that line is honestly, but when I feel it's a trend, [and] I feel like I've heard enough of the complaints . . . I can say to the Dean, "I've had several students come to me and here is the theme that I'm hearing. This . . . might constitute a pattern or trend, and . . . you might want to look into [the situation]. But know that I have not talked to the [unit director]." And saying it in that way, there's no way that the Dean would know who came to see me, and who they came to see me about. Especially in a big unit, you know, that deals with students from all over the university.[373]

Reporting on general trends becomes even easier for the adhering-to-the-archetype Ombuds when the issue is one of policy or procedural irregularity.

> I would certainly bring [a systemic issue] to the attention of the people I report to or to the unit . . . even if it's sexual harassment . . . . [I]f it is a problem with the policy and it's not a problem with a certain person . . . I would certainly bring [it] up to the person who deals with sexual harassment.[374]

An Ombuds described confidentiality and the trust and safety it engenders as a motivating factor that leads people to seek out the office.

> Well, I know why they came to me; they came to me because I'm trusted. They knew it was a safe place to come and that they wouldn't be outed and that their confidentiality would be honored here, and there aren't a whole lot of place [sic] on this campus [where that is the case].[375]

> I've said this to our [formal offices] . . . "[t]here are ticking time bombs out there that you're never going to find out about because people are afraid to come forward because they can't go someplace and just talk about it and feel safe about having that conversation."[376]

Maintaining confidentiality and building trust is also a way for Ombuds who adhere to the archetype to develop reputations as safe, reliable

371. Interviewee 5, O14A8:29-33.
372. Interviewee 17, O12A5:41-43.
373. Interviewee 17, O12B13:29-36.
374. Interviewee 17, O12A8:8-13.
375. Interviewee 8, O10B3:33-36.
376. Interviewee 19, O7A17:21-26.

offices to bring concerns. This is especially important given misconceptions about confidentiality are commonplace, as indicated by an Ombuds who explained, "[t]here are misconceptions about confidentiality. A lot of people think that we automatically call the supervisor involved or [other formal office], and we'll report things."[377] Another Ombuds discussed the importance of building a reputation for maintaining confidentiality:

> [I]f you're one step removed from the back channel that has a lot of control over information going upwards or not at all, then you're not compromised by it. But it's dangerous because this is where knowledge is power, and people want to know what you know, because if you maintain your confidentiality, your principles and your self-discipline, you don't divulge who comes to your office, what is said, [and] people know that's your function. And they know you're not one to talk.[378]

Helping visitors explore potential options without requiring them to pursue any particular avenue is a common activity of Ombuds who follow the archetype.

> I'm really showing [the visitor] "look, I'm not a little naïve, here. I understand that there's politics and people who can get nasty. . . . [The institution] can only protect you to a point. So I want to make sure that if you want me to go forward, and I'm more than happy to go forward, I want to make sure that you're thinking about all the other angles that you may not have thought about."[379]

Another Ombuds noted,

> I just talk it through with the visitor to see if they have any other ideas about how [they might come forward in a way that is acceptable to them] . . . so I do [pose hypotheticals] but . . . I do not have any kind of rules written down or anything like that.[380]

Ultimately, the same Ombuds concluded,

> [A] lot of time people are bothered by something but they can't quite put their finger on what they're bothered about. . . . [Visitors] just [want] a place to figure [it] out . . . without worrying about having to [take the issue further] if [they don't] want [it] to.[381]

For Ombuds who comply with the archetype, discussion about options includes both informal and formal methods. The following Ombuds

377. Interviewee 5, O14A17:35-37.
378. Interviewee 18, O1A11:15-22.
379. Interviewee 18, O1B13:39-14:3.
380. Interviewee 19, O7A12:32-13:4.
381. Interviewee 19, O7B2:43-3:6.

described how confidentiality impacts the ability of Title IX Coordinators to provide informal coaching.

> One distinction, one important distinction is that in the course of [a] conversation, if [you] say for example . . . "[H]e made a sexual gesture towards me" . . . [the Title IX Coordinator] may be obligated . . . to respond to that [and force you into a formal process] . . . . Well, I can hear [those things] and have that conversation [but] leave [you] in control of how . . . to proceed.[382]

One Ombuds wrestling with this distinction articulated the priority of maintaining confidentiality over reporting sexual misconduct.

> I would hope that I could be persuasive enough with one or more of the victims here that would put them in a place where they would be willing to speak to our Title IX coordinators or the police to go ahead and file reports about that or request a release from their confidentiality promise so I could do something on their behalf. I really do, again, think that it is a critical part of the service that I offer that it is confidential and would really protect that value, even at the risk of some others.[383]

One Ombuds described the role as "a keeper of secrets" and confidentiality as the aspect "where [Ombuds] start to [earn their] trust and that's where [the Ombuds'] power comes, because people . . . know that you keep your word and you preserve their confidences."[384] In sum, Ombuds who adhere to the archetype seem deeply committed to the principle of confidentiality, even though maintaining this commitment requires a tradeoff of other values like relationships, access, efficiency, reputation, and stopping egregious behavior. Maintaining confidentiality also protects other standards like impartiality and informality and supports values like trust, safety, reputation, and self-determination. The next Part describes the impartiality and independence requirements of Ombuds and the resulting benefits to the university.

F. Ombuds' Impartiality and Independence Obligations

Title IX Coordinators are to be impartial to the interests of both the complainant and the respondent but partial to the goals and requirements of the law. Ombuds' impartiality and independence provides the larger compliance system with legitimacy and supports the formal compliance offices in their missions. For example, one Ombuds described a visitor who wanted her to resolve their issue formally:

> I talked about [formal options and told her] "there are plenty of people on campus that can do that" . . . and [I] referred this person to

382. Interviewee 20, O13B4:26-32.
383. Interviewee 14, O4A9:39-10:5.
384. Interviewee 18, O1A5:4, 7-10.

> some of those people if she wanted to exercise that option. There is nobody else on campus that has confidentiality, independence, and neutrality, so if I [handle complaints formally], not only am I duplicating an existing service, I am negating the unique and essential function of my role.[385]

Independence requires that Ombuds and their offices are independent from other organizational entities[386] and hold no other organizational position that might compromise independence.[387] Specifically, independence requires that the Ombuds report directly to the highest level of the organization, with an employment status indicating that they are not subordinate to senior officials. Functionally, independence means operating "independently from control, limitation, or interference."[388] Although employed by the university and typically reporting to the president, Ombuds sit outside the formal administrative structure. A survey of higher education Ombuds found that most university Ombuds report high up in the organization and are independent of lower-level supervisors.[389] Ombuds have several sources of authority other than managerial position. These include the ability to gain access to information, the ability to establish professional relationships with the very top of the organization, the ability to recommend cases to more formal options, their problem-solving skills, and their personal credibility based in charisma and moral authority.[390] Because extensive knowledge of the organization and its operations is important, most Ombuds are picked from within the organization.[391] Ombuds' independence also requires the Ombuds to retain sole discretion with how to act regarding specific concerns or observed trends,[392] to have access to all organizational information and individuals as permitted by law,[393] and to have the ability to select their own staff and manage their budget and operations.[394]

Impartiality requires Ombuds to be "neutral, impartial, and unaligned," while "striv[ing] for impartiality, fairness and objectivity in the treatment of people and the consideration of issues."[395] This includes not

---

385. Interviewee 8, O10B5:17-22.
386. IOA STANDARDS OF PRACTICE, *supra* note 7, at § 1.1.
387. *Id.* § 1.2.
388. IOA BEST PRACTICES, *supra* note 304, § 1.1 cmt. at 2.
389. SANDRA R. HAYDEN, THE OMBUDS OFFICE IN HIGHER EDUCATION 4 (Educ. Res. Info. Ctr., U.S. Dep't of Educ. photo. reprint 1998) (1997), http://files.eric.ed.gov/fulltext/ED415784.pdf (finding that thirty-eight of the fifty-eight responding Ombuds reported to the President, Chancellor, or Vice-President and Provost levels of the organization).
390. Andrea McGrath, *The Corporate Ombuds Office: An ADR Tool No Company Should Be Without*, 18 HAMLINE J. PUB. L. & POL'Y 452, 473–74 (1997).
391. *Id.* at 471; Mary P. Rowe, *The Corporate Ombudsman: An Overview and Analysis*, 3 NEGOT. J. 127, 137 (1987).
392. IOA STANDARDS OF PRACTICE, *supra* note 7, § 1.3.
393. *Id.* § 1.4.
394. *Id.* § 1.5.
395. *Id.* §§ 2.1, 2.2; *see also* IOA BEST PRACTICES, *supra* note 304, §§ 2.1, 2.2.

advocating on behalf of any individual within the organization and advocating for processes that are fair and equitably administered.

Impartiality and independence are strongly related to the confidentiality obligation. Maintaining confidentiality can also be a means of ensuring impartiality, as indicated by one Ombuds:

> I explain [to visitors] that I don't keep records and if they want me to read something I will, but [afterwards] I'll either shred it or give it back to them. So I'm really clear about that. And I explain one of the reasons is because we are neutral and I don't want to have documents that could result in having to become a witness in [a formal process] . . . . That would mean I'm not a neutral person. I would have to be on one side of a case or another. I don't want to do that.[396]

Another Ombuds echoed the advantage to impartiality of maintaining confidentiality:

> I would not report it naming any student ever without their permission, nor would I name the individual about whom a complaint has been made multiple times. However, one tool that I know some of my colleagues use occasionally is the sort of generic option . . . [of] going to an administrator with responsibility over the alleged harasser and suggest that some sort of training effort might be advantageous for the entire unit. But I think it's important that Ombuds remain neutral and not be in that leading the lynch mob kind of role.[397]

In order to provide confidentiality, Ombuds must protect both their impartiality and independence. Used incorrectly, Ombuds' confidentiality, impartiality, and independence can be used to protect perpetrators. Ombuds David Miller notes,

> Knowledge is responsibility, and those in the know must also be held responsible for not acting on what they know if not acting betrays the public trust. . . . [F]or some, Ombudsman informality offers too much ambiguity, and confidentiality is seen as conspiracy to preserve the interests of such perpetrators against the exercise of justice . . . . Who could not want to see perpetrators of sexual violence or any other kind of violence . . . exposed to the full consequence of their actions, along with those who knowingly abet their horrible behavior?[398]

Proponents of formal reporting mechanisms see the archetypal Ombuds model's informality and confidentiality as a Band-Aid for the failures in formal processes and prefer to solve the problem at its source by improving the formal process. The ultimate weakness of the Ombuds archetype's confidentiality system occurs when individuals decide not to

396. Interviewee 19, O7A11:27-33.
397. Interviewee 21, O2A7:32-8:2.
398. Miller, *supra* note 82, at 6.

pursue their complaints. While many conflicts do not involve allegations of legal wrongdoing, sexual harassment can involve organizational liability and the violation of individuals' rights. To what extent does the Ombuds archetype's principle against reporting such behaviors and lack of notice to the institution exacerbate efforts to elicit complaints of and prevent illegal behavior? The next Section describes Ombuds departing from the archetype and prescribes ways of ensuring Ombuds adhere to the model's obligations. Ombuds conforming to the model provide essential support to the formal compliance mechanism and ensure individual self-determination and autonomy. Ombuds non-conforming to the IOA Standards harm compliance efforts and assist in sweeping abuses under the rug. Ombuds non-conforming to the standards must be mandatory reporters for the purposes of sexual misconduct.

IV. UNIVERSITIES NEED ORGANIZATIONAL OMBUDS THAT ADHERE TO THE IOA STANDARDS OF PRACTICE

Confidentiality encourages and supports victims in coming forward, but it also masks problems and may inhibit an institution's ability to address serious issues. On one hand is the Ombuds: "[A] silky-voiced character who manipulates the hapless, under resourced Employee or Consumer through various cognitive heuristics into willingly foregoing meritorious claims, thus protecting the organization from shouldering costs associated with investigation, procedure and possible impacts on human resources."[399] Inherently the question of Ombuds' confidentiality is one of whether it simply becomes a mechanism by which universities may insulate themselves from liability.

On the other hand is the Title IX Coordinator set on establishing an official precedent and dragging hapless individuals through an official process that they may greatly wish to avoid and which further harms their emotional health. The ultimate question is how can institutions encourage victims to come forward? Both formal and informal mechanisms are valuable for encouraging reporting but no one mechanism can provide for confidentiality and at the same time bring forward complaints for appropriate disposition. Because currently neither Ombuds nor Coordinators adhere to their respective archetypes, universities face increased liability risks, survivors and alleged perpetrators have fewer procedural choices, and processes lack legitimacy.

A. Ombuds Departing From the Archetype

Ombuds interviewed were frequently observed to depart from the confidentiality guidelines and the related impartiality guidelines. One

399. Jennifer W. Reynolds, *Games, Dystopia, and ADR*, 27 OHIO ST. J. ON DISP. RESOL. 477, 532 (2012).

Ombuds described the difficulty in remaining impartial while providing the visitor with control:

> I've never [sent something] through a grievance procedure [because I have] never seen anybody win their case. I don't want to say that I deter people from [formal options]. What I do is I usually recommend that they talk to the [formal personnel] confidentially to get a feel for what that process might be like, and then decide if that's something that they'll want to do or if it's something that I can help them out with. [Right now the formal process is] . . . a system of frustration for students and staff and faculty to utilize [as] I've never seen any[one] [win a case against a victimizer].[400]

One Ombuds described a clear departure from the impartiality standard:

> [If a policy has been violated] we'll try to talk to the offending person and see if there was a mistake made and if they want to correct [it]. And if they don't want to correct that and we think that it was a violation of policy and we give them an opportunity to make it right and they don't, then we'll probably go on to their supervisor and work our way up the chain.[401]

> Whenever we get into something that looks like it truly is sexual harassment or borderline sexual harassment or racial discrimination, I always try to involve [the formal office]. I try to get the person in my office to walk over [to the formal office] and file a complaint with them, because as much as I'm willing to entertain people's complaints about that and will promise them confidentiality, if they insist on it, I really think that everybody's better served by going on the record with all that.[402]

Ombuds also noted a goal of making sure the administration is aware of problems that could cause damage to the institution, which is a departure from the impartiality and independent guidelines:

> [T]here are three [exceptions to confidentiality]. One is any time somebody discloses bodily harm to self or others, we can't keep that in confidence, or any disclosures of child or elder abuse, that can't be kept in confidence, and then the other, the third area is if someone was to disclose that they had knowledge of somebody's life or health being at risk, then we would have to disclose that to the appropriate authorities. . . . Sometimes I have to make an executive decision. If something doesn't fall in those domains but if I think about it and over time it's going to do significant damage to the institution I might decide to do something with that information. But I have to be careful because people didn't give me express permission to go forward . . . . [So] if I [go forward it is] because I weighed it and I said

400. Interviewee 16, O8A12:20-26, 13:11-14.
401. Interviewee 6, O9A14:3-9.
402. Interviewee 6, O9B1:29-34.

> "you know, this office needs to be aware of this, it may cause significant damage to the institution" and so part of my job as an Ombudsman is to give decision makers a head's up.[403]

Regarding confidentiality, Ombuds who depart from the archetype often serve as notice to the institution, both in their ability to receive notice and in reporting in ways that violate confidentiality and anonymity. Ombuds often described visitors' expectations about confidentiality:

> Most people think, almost invariably, when people come to me about discrimination, that they're coming to get something on the record. In fact, about a third of the people that come through the office think they [are] putting something on the record. . . . They want me to make note, put it on the record, put it in [my] files because down the road when they are fired or something else happens [someone will know] this happened.[404]

Sometimes universities require Ombuds to report any instances of sexual harassment that they learn about. This policy directly violates the norm of confidentiality and places the Ombuds in a difficult position:

> [Mandatory reporting is] [t]he nightmare for an Ombuds Office, and there are [many] Ombuds offices who have to deal with this . . . [I]f a sexual harassment complaint is reported we have to report it [and] . . . put the campus on [notice]. So basically the university is being put on notice . . . by the visitor coming to us.[405]

Often Ombuds are required to report all instances of sexual misconduct. One Ombuds noted, "I know some Ombuds Offices have to report sexual harassment but to me that's against the standards of practice and what's the point of having an Ombuds Office if it's going to be treated like a formal office."[406] Another Ombuds described his general counsel as "not feel[ing] good at all about the privilege of the Ombudsperson, and of course most forms of harassment are not illegal . . . but you've got to go with [what] each organization and general counsel feels comfortable with."[407] This observation is echoed by other Ombuds who have an organizational obligation to report issues of sexual misconduct. For example, a Title IX Coordinator explained when a visitor's statements must be reported:

> [I]f it's something that I really do need to know about, [the Ombuds] will advise [the visitor] that they . . . speak to me or, depending upon the nature of it, there's a duty for [the Ombuds] to report it if it [is]

403. Interviewee 18, O1A9:33-40, 10:10-18.
404. Interviewee 6, O9B3:6-7, 27-29.
405. Interviewee 5, O14B10:39-11:3.
406. Interviewee 17, O12A8:22-24.
407. Interviewee 16, O8A5:15-19.

> something . . . illegal or immoral or indecent the Ombuds [has] to report it.[408]

An Ombuds added, "if there's anything that comes to me that is sexual harassment in nature I do contact our [Title IX Coordinator] to let them know, as well [when] there's anything that is clearly reportable . . . ."[409] Ombuds who are required by their universities to report instances of sexual misconduct often seek to limit this obligation:

> I used the hierarchical arrangement as my justification for not reporting [sexual harassment]. I didn't want to [report] unless I absolutely had to. If push came to shove and for some reason we ended up in litigation or something like that I would have taken the position that I didn't tell anybody because I didn't see it as . . . [involving a] power disparity. . . .[410]

Other Ombuds depart from the archetype by participating in informational meetings with other formal offices. A Title IX Coordinator described periodic meetings with general counsel, other formal offices, and the Ombuds where everyone "go[es] around the room and talk[s] about what's going on, cases in a general sense, just kind of bounce things off [one another] so we're in the loop on what's going on."[411] Another Ombuds noted,

> I can go to [the formal office] and say 'are you hearing from the staff in this department too? Is there anything we can do, maybe we can go talk to the director of that area. Which one of us has the best rapport with that person to give them a heads up that there's something brewing . . . that they might want to look at.'[412]

Some Ombuds report to an upper level administrator and have administrative functions but do not see themselves as offices of notice. For example, one Ombuds, despite reporting directly to a member of the President's Cabinet and having a "very close-knit" relationship, stated that "[N]otice would have to go either through our Dean of Students office or through our legal [counsel]."[413] The Ombuds then clarified that the privilege of confidentiality does not belong to the visitor or the Ombuds, but rather to the office. As a result the Ombuds believed he could maintain confidentiality while sitting in that role.[414]

---

408. Interviewee 2, T4A8:18-22.
409. Interviewee 22, O6A4:19-21.
410. Interviewee 19, O7B12:3-17.
411. Interviewee 3, T13A5:22-25.
412. Interviewee 8, O10A10:37-41.
413. Interviewee 22, O6A6:26, 18-19.
414. Interviewee 15, O11A 4:19-22, 12:17 ("The [privilege of] confidentiality belongs not to [the visitor] or to me, it belongs to the office, [providing me with the ability to maintain confidentiality when in that role].").

Many of the examples discussed above illustrate how Ombuds respond to pressure from superiors to give a report, thereby violating the archetype by breaching confidentiality or failing to protect visitors' anonymity. For example, one Ombuds noted that when the formal office "call[s] me . . . and they ask me if somebody's come to [my] office I will let them know. If I would say 'I can't tell you, I'm not going to tell you,' that would not go over very well."[415] In another example, a Title IX Coordinator reported hearing rumors from faculty members, but explained, "I didn't know who and I didn't know what exactly. . . . [T]hen the Ombuds came to me and gave me the who and the what and I took it . . . from there."[416]

Ombuds who depart from the archetype give priority to reporting over confidentiality obligations. For example, Ombuds described providing hypotheticals: "[W]hen I have . . . conversation[s] with our [Title IX Coordinator], I'll [provide] a list of . . . [three] hypothetical offices [with one of them being the actual office]. [The Coordinator] may have already heard [about which office it is], and [the Coordinator] has told me that [it's] very helpful . . . ."[417] Another Ombuds noted the point at which they value stopping misconduct over adhering to the archetype:

> [W]hen multiple people have reported to me . . . [and] when I see the same thing from a few different perspectives, I'll begin to believe that there might be something going on, and I might say to a department chair, "You know, I don't know that this is really true, but you might want to sensitize yourself to this, there might be something out there."[418]

Another noted breaking confidentiality to take credit for a successful outcome and thus build their professional worth:

> [E]verything that I had recommended to the student, unbeknownst to me, the student followed through [with] in terms of . . . making [it] happen. I specifically [told] my boss, "[E]ven though there's no mention of the Ombudsman . . . this started in [my] office and I will unabashedly take credit for it."[419]

Perhaps paradoxically, examples indicate Ombuds often breach confidentiality in order to build relationships:

> So a tough part of this job, listening to some of these things, not being able to share confidences . . . . I follow[ed] up with the [Title IX Coordinator to say], "I'm aware this student brought [an issue] to my

415. Interviewee 19, O7A7:44-46.
416. Interviewee 11, T11A17:11-15.
417. Interviewee 20, O13B6:32-38.
418. Interviewee 23, O3A7:6-7, 14-18.
419. Interviewee 15, O11B7:24-29.

> attention that your office handled, [because the student was] upset because he felt like there was no response that was helpful . . . ."[420]

> The Title IX Coordinator is an attorney . . . [who] takes a very legalistic approach . . . [and] is not one of the people that I can go to and say "have you been hearing things about [this] department? What's going on over there? Have we got a faculty member losing it over there? Do we need as an institution to think about stepping in and doing something over there? Would it help if I went and talked with the chair or you went and talked with the chair?" [There are a few staff members in these offices] with whom I have a relationship like that . . . [but their bosses] don't know . . . . [The staff] trust me and know that I won't out them and need my input.[421]

Other Ombuds are clear about confidentiality boundaries, "As far as sexual assault, which I would consider a serious crime, I say I can't guarantee confidentiality."[422] The lack of certainty regarding confidentiality and the lack of control provided to visitors was often cited as a reason for declining numbers of visitors. For example,

> [W]e're not getting as many people coming to this office because we can't provide them with a level of confidentiality that would ensure that if they don't want the information disclosed if they were to report sexual harassment, for example, that we would be duty bound to respect that. . . . I believe that's one of the reasons . . . they don't come to our office because we can't offer them that blanket confidentiality that they're looking for.[423]

Ombuds who depart from the archetype undermine visitors' self-determination as to whether to use formal processes. Many Ombuds do not offer a choice and directly refer visitors to the Title IX Coordinator. For example, an Ombuds noted, "Any time that I've dealt with [sexual misconduct] I've worked with the individual really to get to the [Title IX Coordinator] and file a complaint."[424] This is echoed by another Ombuds: "We [can] explore the different ways to surface the issue, but ultimately I would make it clear [to visitors] that [sexual misconduct] did have to [be reported] for [everyone's] . . . benefit."[425] Other Ombuds attempt to secure their visitors' permission to report or to report the information anonymously. Often in doing so this "anonymous" information makes it possible to identify the individuals involved. Ombuds also make decisions about when to report that fall outside of their reporting requirements:

---

420. Interviewee 16, O8B9:40-43.
421. Interviewee 8, O10A9:45-10:20.
422. Interviewee 16, O8A6:16-17.
423. Interviewee 19, O7A6:12-16; 07B2:3-6.
424. Interviewee 23, O3A7:19-21.
425. Interviewee 19, O7B4:28-31.

> [T]here are three [exceptions to confidentiality]. One is any time somebody discloses bodily harm to self or others, we can't keep that in confidence, or any disclosures of child or elder abuse, that can't be kept in confidence, and then the other, the third area is if someone was to disclose that they had knowledge of somebody's life or health being at risk, then we would have to disclose that to the appropriate authorities. . . . Sometimes I have to make an executive decision. If something doesn't falls in those domains but if I think about it and over time it's going to do significant damage to the institution I might decide to do something with that information. But I have to be careful because people didn't give me express permission to go forward . . . . [So] if I [go forward it is] because I weighed it and I said "you know, this office needs to be aware of this, it may cause significant damage to the institution" and so part of my job as an Ombudsman is to give decision-makers a heads up.[426]

Another Ombuds similarly described subordinating confidentiality to anything that would cause "massive disruption" to the institution:

> [E]verything is confidential unless there is any sort of self-harm that is reported or anything that would cause any massive disruption to the institution. So those are the things that I often say to a student, "I won't go forward unless you give me permission to use your name, but if there is any talk of [those] particular things, then I do have to report it [regardless of your permission]."[427]

Ombuds frequently described seeking the survivor's permission to take an anonymous approach, but many expressed ultimately doing whatever was necessary to get the complaint filed:

> [If I were unable to convince a potential victim of sexual misconduct to come forward] the [next step] would be [to say] "[O]kay, so you're not willing to do this, can you allow me to, in an indirect way, go to the department chair and say '[Y]ou need to go to the [Title IX Coordinator] and let them know that there are allegations that this faculty member is engaging in this kind of behavior.'" Kind of going in an indirect way. . . . [Another] Ombuds . . . told me that we would never do nothing, we would keep moving forward until this thing got addressed. That would be my commitment. I would do whatever it would take.[428]

Another Ombuds described trying to marshal multiple complaints, not for the purpose of protecting each individual's confidentiality, but to provide proof of what might be occurring:

> [U]nless some other people come and tell me the same thing I'm not going to be able to go to the supervisor and have a lot of influence

426. Interviewee 18, O1A9:33-40, 10:10-18.
427. Interviewee 22, O6A4:8-13.
428. Interviewee 19, O7A9:2-9, 13-16.

> because I'm going to be saying "one person told me this and I can't tell you who it was, and I can't offer you any proof without identifying this one person." [I tell the visitor], "[I]f you've got other [individuals who have experienced this] . . . have them call me and tell me that they would like to be included as part of a class who are complaining about this, then I can go to the supervisor and say 'well, I've had [multiple] people [tell] me the same thing.'"[429]

When handling new cases, Ombuds often require visitors to fill out intake forms that this Ombuds described as "formal":

> There [is] a formal intake process. The student . . . come[s] to my office and [we have] intake forms . . . . Basically their basic information, student information. We . . . ask them [about] the [type] of complaint, was it academic, was it judicial, [which] department, [which] faculty person, was it personal, was it a hostile evasion . . . .[430]

Ombuds who depart from the archetype also often require visitors' sign written waivers of their confidentiality rights:

> Sometimes students will waive their right to confidentiality, and I have them sign a specific waiver . . . that says [the visitor] allow[s] [and permits me] to speak to person X and Y, sometimes it's as specific as a name, [and] I can speak to that person and that person alone. Sometimes they don't know [who I should talk to], they just say "anyone over in the department," or "anyone you need to [speak with] to fix this."[431]

Ombuds who require visitors to sign a waiver of confidentiality often do so during the intake:

> [W]hen a student [comes] in to see me I ask them to first sign a waiver . . . and I would tell them "based on whatever you tell me, based on your particular situation I may need to talk to people," and I would ask them to sign off, giving me permission to talk to particular people or offices about their situation.[432]

In sum, my interviews with Ombuds thus reveal a complex tug-of-war between competing impulses. On the one hand, the archetypal Ombuds model motivates many Ombuds to strictly honor their visitors' confidentiality and interest in self-determination, even when doing so seems deeply frustrating as abusive sexual predators seem to get away with misconduct again and again. On the other hand, many Ombuds find ways to get information to responsible authorities within their institutions—or

429. Interviewee 6, O9B4:14-22.
430. Interviewee 24, O5A9:12-17.
431. Interviewee 14, O4A7:4-9.
432. Interviewee 24, O5A7:2-6.

are required by their institutions to do so—even though this sometimes exposes their visitors to the loss of confidentiality that they sought to avoid by coming to the Ombuds. To encourage reports of sexual misconduct, IOA-conforming Ombuds are essential for compliance with Title IX.

B. How to Reform University Ombuds

Many years ago, Paul Verkuil noted how the pervasive model of legal formality is likely to push Ombuds toward greater formality:

> The ombudsman's potential as a procedural system is largely bound up with our commitment to the adversary system. The ombudsman and adversary systems are substantially competing procedures for the regularization of informal processes; each is based on a different conception of the dispute resolution process and reflects different underlying social and political values. While the two systems could coexist in harmony if spheres of influence were delineated reflecting the appropriateness of their respective procedures, the spread of the adversary system, in response to the perceived commands of procedural due process, into many areas of administrative decisionmaking has stymied the development of the ombudsman alternative.[433]

University Ombuds need reform in order to avoid the push of formality.

First, Title IX law and policy must require non-conforming Ombuds to be mandatory reporters. Non-conforming Ombuds increase the risk of liability and provide no true alternative to the formal reporting system. This is especially important given recent evidence that universities only offer a more accurate portrayal of campus sexual assault during a Department of Education audit.[434] The research also demonstrates that audits have "no long-term effect on the reported levels of sexual assault, as those crime rates returned to previous levels after an audit was completed."[435] Ombuds conforming to the IOA Standards, however, should not be mandatory reporters. An IOA *ad hoc* Title IX Task Force, created to "draw attention to the vital role the confidential ombuds can play on college campuses," reached the same conclusion.[436] Fighting the label of "responsible employee,"[437] the Task Force commissioned a report, au-

433. Paul R. Verkuil, *The Ombudsman and the Limits of the Adversary System*, 75 COLUM. L. REV. 845, 846 (1975).

434. Corey Rayburn Yung, *Concealing Campus Sexual Assault: An Empirical Examination*, PSYCHOL., PUB. POL'Y & L., Feb. 2015, at 1, 1 (describing an increase in reports of sexual assault of approximately 44% during audit periods).

435. *Id.* at 5 (noting previous levels of reporting returned even in instances when fines were issued for non-compliance).

436. Letter from IOA Bd. of Dirs. to IOA Membership (Apr. 1, 2016) (reproducing Memorandum from Bruce M. Berman, Partner, Wilmer Hale, to Bd. of Dirs., Int'l Ombudsman Ass'n (Mar. 14, 2016)), https://www.ombudsassociation.org/IOA_Main/media/SiteFiles/docs/Wilmer-Hale-memo-and-cover-March-2016.pdf.

437. *See supra* notes 238–43 and accompanying text.

thored by Attorney Bruce Berman, titled Campus Ombuds as Confidential Resource for Purposes of Title IX and Clery Act Reporting.[438] The report argues the Ombuds role need not be structured to meet OCR's definition of "responsible employee," and that OCR's definition of confidential resources does not require an Ombuds be a member of any certain profession or hold a legal privilege.[439]

For Ombuds conforming to the IOA Standards, universities need to push for clear confidentiality protections. OCR's Q&A document does not specifically mention Ombuds and does not provide Ombuds with the ability to maintain confidentiality.[440] Even assuming OCR approval, significant liability concerns arise when organizational actors like Ombuds are independent of the organizational structure and not mandated to report, yet are able to hear and informally handle sexual misconduct concerns. Although Ombuds promise confidentiality, whether this promise is legally enforceable beyond OCR requirements remains unclear. The June, 2016 edition of the Department of Education's Handbook for Campus Safety and Reporting lists Ombuds in the list of examples of positions meeting the criteria for being campus security authorities and thus mandatory reporters.[441] Additionally, there is little case law protecting the confidentiality of communications with Ombuds, and often the level of confidentiality is controlled by the organization itself. No U.S. state embraces the ombudsman privilege as it is envisioned under the IOA Standards.[442] A federal court common law privilege is sometimes recognized for employee communications with an Ombuds.[443] To receive protection, Ombuds must widely and consistently publicize information in print and online that consistently asserts the office's confidentiality.[444] Such publications may form the basis for an "implied contract" that implies using an Ombuds program is conditioned on acceptance of the office's principles.[445] Confidentiality is complicated as the level of confidentiality is controlled by the organization employing the Ombuds, creating potential problems of conflicts of interests and potential breaches of confidentiality.[446] Universities and their Ombuds must work together to

438. Letter from IOA Bd. of Dirs. to IOA Membership, *supra* note 436.

439. OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS, *supra* note 44, at 15 (defining responsible employee as any employee with the authority to take action to redress sexual violence; who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX Coordinator; or whom a student could reasonably believe has this authority or duty); Letter from IOA Bd. of Dirs. to IOA Membership, *supra* note 436, at 5–7.

440. OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS, *supra* note 44, at 16–17.

441. U.S. DEP'T OF EDUC., THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING: 2016 EDITION 4-3 (2016), https://www2.ed.gov/admins/lead/safety/handbook.pdf.

442. Van Soye, *supra* note 270, at 128.

443. Kendall D. Isaac, *The Organizational Ombudsman's Quest for Privileged Communications*, 32 HOFSTRA LAB. & EMP. L.J. 31, 36–39 (2014).

444. HOWARD, *supra* note 259, at 282–88.

445. *Id.* at 252–53.

446. Jessica Oser, Note, *The Unguided Use of International ADR Programs to Resolve Sexual Harassment Controversies in the Workplace*, 6 CARDOZO J. CONFLICT RESOL. 283, 295–97 (2005).

craft the contours of the role in a way that ensures confidentiality without exposing the institution to liability.

To do so, universities must develop specific sexual misconduct reporting guidelines for Ombuds. Allowing people to make anonymous reports of incidents of sexual misconduct may fulfill both Coordinators' and Ombuds' core goals as long as the reports do not identify, or can lead to the identification of, any specific person or department. Anonymous reporting may enable Ombuds to collect otherwise unreported incidents of sexual misconduct. Title IX Coordinators will then gain important feedback about weaknesses in policy, procedures, or where improvements can be made to better educate the campus about sexual misconduct. Instead of asking questions about their reporting obligations to reporting authorities, Mandatory Reporters on campus gain an additional resource to consult regarding their obligations prior to actually reporting. Ombuds' ability to help visitors think through their informal and formal resolution options may lead more visitors to make formal reports. In sum, University Title IX Coordinators and Ombuds must work together to define the contours of reporting requirements.

CONCLUSION

Although both Title IX Coordinator and Ombuds models presumably share a preference for eliminating sexual misconduct, the archetypal offices reflect very different philosophies and mechanisms for handling complaints. Where Ombuds see absolute confidentiality and the self-determination it provides as a necessary condition for eliciting and handling complaints in the face of retaliation, Title IX Coordinators reflect a compliance regime that seeks to elicit formal complaints and then discipline, prevent, and eliminate instances of sexual misconduct.

While some Ombuds and Title IX Coordinators adhere strictly to their respective archetypes on the matter of confidentiality, many depart considerably from these commitments. These Ombuds breach confidentiality in the interest of nabbing a perpetrator or reforming a departmental environment. The Title IX Coordinators naturally depart in the other direction. Some give priority to the individual complainant's wishes or feelings over the institutional interest in investigation and enforcement. Others misleadingly give the impression of being prepared to maintain confidences, but only to draw the complainant into letting down her guard to reveal information that she might not otherwise divulge. As a result, confidentiality illustrates the tension between individual self-determination and broader organizational interests.

Universities are struggling to balance institutional concerns with individual rights. Donna Shestowsky notes self-determination and institutional efficiency often work at cross-purposes, making justice difficult to

obtain.[447] While the Trump Administration will change the contours of enforcement, colleges and universities must continue to determine the best practices for complying with Title IX. Until universities (1) find reliable mechanisms for drawing out complaints and (2) develop consistent, fair means of handling disputes, it will be impossible to address the deeper rooted social norms related to alcohol abuse and sexual misconduct. Instead of a zero-sum game of reporting or not reporting, providing confidential sources of reporting can be a means of encouraging greater reporting and providing survivors and alleged perpetrators with self-determination. Universities need both Ombuds and Title IX Coordinators.

ATIXA's website describes the confusion surrounding Title IX work: "[Thirty] years after the Department of Education mandated that school districts and colleges designate Title IX Coordinators, we're still not entirely sure what the appropriate role, functions, and expectations of Coordinators are."[448] The website continues to note the 2011 Dear Colleague Letter "created a new profession and a new field."[449] Given the current ineffectiveness of the compliance approach, the field needs further redefinition. Likewise, Ombuds need to determine whether the IOA Standards are requirements or merely aspirations. Inconsistent application of the IOA Standards of Practice creates significant questions regarding the value of university Ombuds. Correctly designed, both formal and informal complaint mechanisms are necessary to bring campus sexual assault out from the shadows.

447. Donna Shestowsky, *Disputants' Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little*, 23 OHIO ST. J. ON DISP. RESOL. 549, 551 (2008).

448. *About ATIXA and Title IX*, *supra* note 9.

449. *Id.*

TRANSACTING IN DATA: TAX, PRIVACY, AND THE NEW ECONOMY

ADAM B. THIMMESCH[†]

ABSTRACT

The technological developments of recent decades have allowed companies to collect staggering amounts of consumer data by offering "free" access to digital products like search engines and social-media platforms. Scholars in a variety of fields recognize that this practice represents a new type of market exchange, but our tax laws and tax scholars have thus far ignored this aspect of the new economy. That inattention means that transactions in data currently benefit from an implicit exemption from tax. This Article brings light to that issue by providing the first analysis of the relationship between the personal-data market and our domestic tax instruments. That analysis shows that personal-data transactions do fit within those tax instruments, but that several factors will prevent them from actually being taxed. The resulting tax preference for data creates a distortion in the market that results in lost tax revenue and that undermines efforts to reform the personal-data market to better account for individual privacy interests. This Article considers those issues and concludes by urging the recognition of the tax preference for data in the broader U.S. regulatory structure related to data and personal privacy.

TABLE OF CONTENTS

† Assistant Professor of Law, University of Nebraska College of Law. I would like to thank the participants at the 2015 Junior Tax Scholars' Conference, at the 2015 Southeastern Association of Law Schools Annual Conference, and at the 2015 Big Ten Junior Faculty Conference for their helpful comments and suggestions. I am also greatly appreciative of the generous comments given by participants at multiple workshops at the University of Nebraska College of Law. All errors and omissions are my own.

INTRODUCTION

The modern Internet ecosystem is largely built on the collection, analysis, and monetization of consumer data. The business model popularized by companies like Facebook and Google operates by offering consumers access to desirable digital products in exchange for the opportunity to collect their personal information. Google, for example, provides access to its search engine, Gmail, and Google Docs without charging a cash fee. Instead, it makes money by monitoring consumers' use of those products and by using the resulting data to sell targeted advertising.[1] Of course, Google is just the tip of the iceberg. Individuals now create data for a wide range of companies in every industry and of every size. Consumer information is the fuel of the "big data" era.[2]

---

1. *See Privacy Policy*, GOOGLE.COM, https://www.google.com/policies/privacy/ (last modified Aug. 29, 2016) (indicating that Google "use[s] various technologies to collect and store information when you visit a Google service" for purposes such as generating advertising revenue); *Privacy: Your Data*, GOOGLE.COM, https://privacy.google.com/data-we-collect.html (last visited Aug. 31, 2016) (indicating that Google "store[s] and protect[s] what you create using [its] services"); *see also* ANNA BERNASEK & D. T. MONGAN, ALL YOU CAN PAY: HOW COMPANIES USE OUR DATA TO EMPTY OUR WALLETS 61–66 (2015) (discussing Google's scanning practices with respect to its Gmail service).

2. Some uses of those data are positive and some are negative. Just as data can improve how we address problems in the energy and health sectors, they can be used to discriminate against individuals or to exploit their personal psychological traits to sell them more widgets. Michael Mattioli, *Disclosing Big Data*, 99 MINN. L. REV. 535, 539–44 (2014) (discussing the potential benefits of big data); Lior Jacob Strahilevitz, *Toward a Positive Theory of Privacy Law*, 126 HARV. L. REV. 2010, 2021–31 (2013) (discussing the information that is gleaned from the collection of data); Omer Tene & Jules Polonetsky, *Big Data for All: Privacy and User Control in the Age of Analytics*, 11 NW. J. TECH. & INTELL. PROP. 239, 243–56 (2013) (discussing the range of potential costs and benefits of

This market reality is well known by technologists and privacy scholars who have long recognized that data function as an asset, or even as a currency, in today's world.[3] These scholars accept that the digital products of today's economy are not free even though they are provided without a cash charge. Instead, consumers buy access to those products with their data.[4] Some analysts even explicitly characterize this practice as a new form of barter transaction.[5]

The recognition of this market reality and the growth and proliferation of the market in personal data have spawned a significant literature regarding the intersection of personal data, privacy, and the Internet.[6] Scholars have also evaluated the impact of this data economy on our nation's consumer-protection and antitrust laws.[7] Others have looked at

---

big data); Adrienne LaFrance, *People's Deepest, Darkest Google Searches Are Being Used Against Them*, ATLANTIC (Nov. 3, 2015), http://www.theatlantic.com/technology/archive/2015/11/google-searches-privacy-danger/413614.

3. WORLD ECON. FORUM, PERSONAL DATA: THE EMERGENCE OF A NEW ASSET CLASS 18–19 (2011) [hereinafter WORLD ECON. FORUM, PERSONAL DATA], http://www3.weforum.org/docs/WEF_ITTC_PersonalDataNewAsset_Report_2011.pdf; WORLD ECON. FORUM, RETHINKING PERSONAL DATA: STRENGTHENING TRUST 7 (2012) [hereinafter WORLD ECON. FORUM, TRUST], http://www3.weforum.org/docs/WEF_IT_RethinkingPersonalData_Report_2012.pdf; James C. Cooper, *Privacy and Antitrust: Underpants Gnomes, the First Amendment, and Subjectivity*, 20 GEO. MASON L. REV. 1129, 1130 (2013). The role of personal data in the new economy has been long recognized. *See* JOHN HAGEL III & MARC SINGER, NET WORTH: SHAPING MARKETS WHEN CUSTOMERS MAKE THE RULES, at xiii (1999) ("In many respects, we are moving from an era of competition on the Internet, which represented the battle for traffic, into a new era in which the defining battle is that for customer profiles. The winners and losers in this new era will be determined by who has rights to on-line [sic] customer profiles.").

4. *See, e.g.*, Cooper, *supra* note 3, at 1129–31; Chris Jay Hoofnagle & Jan Whittington, *Free: Accounting for the Costs of the Internet's Most Popular Price*, 61 UCLA L. REV. 606, 608 (2014).

5. Erin Bernstein & Theresa J. Lee, *Where the Consumer Is the Commodity: The Difficulty with the Current Definition of Commercial Speech*, 2013 MICH. ST. L. REV. 39, 82 (2013); Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2055, 2056 (2004); Tene & Polonetsky, *supra* note 2, at 255. This recognition goes well beyond the academe. *See* Brad Meehan, *Responsible Personalization: How Brands Can Build Trust with Consumers*, ADVERTISINGAGE (Aug. 7, 2015), http://adage.com/article/digitalnext/responsible-personalization-brands-build-trust/299843/AdvertisingAge (labeling the exchange of information for access to web services as "the bartering of information" and noting that personal data are used "as a currency to 'pay for' information"); Press Release, Canadian Council of Pub. Relations Firms, Personal Data and Brand Trust: A Modern-Day Barter System (July 15, 2015, 16:08), http://www.prnewswire.com/news-releases/personal-data-and-brand-trust-a-modern-day-barter-system-515487331.html (discussing consumers' willingness to barter with their data); Doug Laney, *The (Possible) Tax Advantages of Bartering with Information*, GARTNER BLOG NETWORK (Aug. 10, 2014), http://blogs.gartner.com/doug-laney/the-possible-tax-advantages-of-bartering-with-information/.

6. *See, e.g.*, Julie E. Cohen, *Examined Lives, Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1374–75 (2000); James P. Nehf, *Recognizing the Societal Value in Information Privacy*, 78 WASH. L. REV. 1, 1–4 (2003); Scott R. Peppet, *Unraveling Privacy: The Personal Prospectus and the Threat of a Full-Disclosure Future*, 105 NW. U. L. REV. 1153, 1154–56 (2011); Paula Samuelson, *Privacy as Intellectual Property?*, 52 STAN. L. REV. 1125, 1126–28 (2000); Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609, 1610–13 (1999); Schwartz, *supra* note 5, at 2056–59; Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1088–90 (2002); Tene & Polonetsky, *supra* note 2, at 240–41.

7. *See, e.g.*, Ryan Calo, *Consumer Subject Review Boards: A Thought Experiment*, 66 STAN. L. REV. ONLINE 97, 97–100 (2013) (discussing consumer privacy law and big data); Cooper, *supra* note 3, at 1129–30 (discussing privacy considerations in antitrust issues); Hoofnagle & Whittington,

the impact of this use of data on our Fourth Amendment protections.[8] Notwithstanding this vast literature and the broad recognition of the role of data as an asset in today's economy, however, the market for personal data has been virtually invisible to our tax system and to our tax scholars. The only meaningful analyses of the tax consequences of the personal-data economy have occurred in the international arena, but those analyses have largely focused on the digital economy, writ large, rather than on the specific impact of the use of data in that economy.[9] They have also focused narrowly on the ability of firms to shift value to jurisdictions with low or no tax and the resulting impact on the global allocation of the corporate income-tax base.[10] That more limited focus has meant that some very basic questions have gone unexplored. Are personal-data transactions taxable events under U.S. tax laws? If so, would it be possible to tax them? Should we tax them? Are there consequences that stem from not taxing them?

The failure to consider these questions is remarkable. The personal-data market is one in which nearly every U.S. taxpayer is taking part and one from which they derive great value. The unique aspects of the personal-data economy also raise critical questions regarding the design of our tax systems for the future. The purpose of this Article is to explore those issues by analyzing how the personal-data economy intersects with the U.S. tax system. Doing so serves several purposes. First, it introduces the tax community and tax scholarship to the personal-data market. Second, it introduces tax considerations to those evaluating the personal-data market. Finally, it evaluates the dynamic relationship between the tax and data worlds. In that vein, it demonstrates how the personal-data market is escaping and undermining our domestic tax instruments and how we might change those tax instruments to compensate. It also evaluates how our taxes might impact the evolution of the personal-data market. To the extent that the current system provides a tax preference for the use of data,[11] that tax preference might well work as a tax penalty on the development of a data market that is more protective of individual

supra note 4, at 657–59 (evaluating consumer-protection and privacy issues); John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. PA. L. REV. 149, 151–52 (2015) [hereinafter Newman, *Zero-Price*] (discussing antitrust issues in "zero-price markets"); Nathan Newman, *Search, Antitrust, and the Economics of the Control of User Data*, 31 YALE J. ON REG. 401, 402–05 (2014) (evaluating antitrust implications in Google's use of user data).

8. *See generally* Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 STAN. L. REV. 1005 (2010); Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801 (2004); Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083 (2002) [hereinafter Solove, *Digital Dossiers*]; Daniel J. Solove, *Reconstructing Electronic Surveillance Law*, 72 GEO. WASH. L. REV. 1264 (2004). *See also* Omer Tene, *What Google Knows: Privacy and Internet Search Engines*, 2008 UTAH L. REV. 1433, 1470–72 (2008).

9. *See infra* Section II.A (discussing recent reports published by the Organization for Economic Co-operation and Development and researchers hired by the French government).

10. *See infra* Section II.A.

11. A "tax preference" in this context means a tax-favored status in the form of an implicit tax exemption for transactions involving data. *See infra* Section III.B.

privacy interests. This Article is therefore important both for those interested in tax policy and for those interested in the structure and evolution of the personal-data economy. The two are inextricably intertwined, for better or for worse.

This Article proceeds in three main Parts. Part I provides background information on the personal-data market and the existing non-tax analyses of that market. Part II then looks at how the international tax community has analyzed personal-data exchanges and at how those exchanges should be characterized for domestic tax purposes. It disagrees with the construct that the international community has adopted and argues that a market-exchange model is appropriate. It then analyzes the theoretical tax consequences of that characterization and evaluates the practical impediments that will prevent the taxation of those transactions under that construct. The conclusion of that analysis is that there is, and will likely continue to be, a tax preference for the use of data as a currency.

Part III turns to the available options for addressing the unavoidable intersection between tax, privacy, and the personal-data economy. It first looks at how we might either (1) modify our current tax instruments to best ameliorate the tax preference for data, or (2) use new tax instruments to address that preference or to promote beneficial data practices. That analysis necessarily evaluates the tax system against the current personal-data economy. This Article also, however, examines how our tax systems will likely impact the data economy of the future. It discusses several current movements to modify the personal-data economy to better account for individuals' privacy interests and analyzes how they interact with the current personal-data tax exemption. Part III calls for a more comprehensive approach to privacy and data regulation in the United States, and Part IV concludes.

I. BACKGROUND

A. The Personal-Data Market

Data collection is ubiquitous in today's society. The technological advancements of recent decades have allowed companies to collect and monetize a staggering amount of data on individual consumers. We now create data when we go online, drive, exercise, turn on the lights, and even wash our clothes.[12] The data market is not new, of course. Compa-

12. *See, e.g.*, THERESA M. PAYTON & THEODORE CLAYPOOLE, PRIVACY IN THE AGE OF BIG DATA 77, 87, 127–28, 173–74 (2014); Scott R. Peppet, *Regulating the Internet of Things: First Steps Toward Managing Discrimination, Privacy, Security, and Consent*, 93 TEX. L. REV. 85, 98–104, 108, 112, 114–15, 117 (2014) (discussing the extensive data created by the "Internet of Things"); Kyle Vanhemert, *This Brilliant Washing Machine Is a Roadmap for the Internet of Things*, WIRED (Apr. 7, 2014, 6:30 AM), http://www.wired.com/2014/04/this-brilliant-internet-connected-washer-is-a-roadmap-for-the-internet-of-things/.

nies have long collected consumer data like names, addresses, and telephone numbers. The data collection of today's economy is simply more efficient and varied. Instead of asking consumers to fill out notebooks tracking their television viewing habits, for example, consumers are directly tracked through their cable boxes.[13] Similarly, Internet Service Providers and websites can collect consumer data as individuals use the Internet.[14] Retailers also directly track consumer behavior through the use of store loyalty cards and checkout scanners.[15]

This modern data collection serves many different functions. There are some data aggregators that collect data only to resell it. Those firms, often referred to as data brokers, gather data directly from consumers, from other data aggregators, or from publicly available sources and then sell access to those data to other firms.[16] There are also some data aggregators that collect and use customer data solely to better market their own products. For example, a local grocery store might collect data simply to better understand its customers and how they respond to coupons or sales. One of the most significant data-collection practices in the modern economy is done by businesses whose activities fall somewhere between these two extremes. That type of data collection occurs as part of a multi-sided platform and is the business model used by companies like Google and Facebook.

---

13. Shalini Ramachandran & Suzanne Vranica, *Comcast Seeks to Harness Trove of TV Data*, WALL STREET J. (Oct. 20, 2015, 5:30 AM), http://www.wsj.com/articles/comcast-seeks-to-harness-trove-of-tv-data-1445333401; *Time Warner Cable Subscriber Privacy Notice*, TIME WARNER CABLE (Apr. 2016), http://help.twcable.com/twc_privacy_notice.html (indicating that the company collects many types of data from subscribers, including "the programs, features and services" that they use).

14. LORI ANDREWS, I KNOW WHO YOU ARE AND I SAW WHAT YOU DID: SOCIAL NETWORKS AND THE DEATH OF PRIVACY 19 (2012) (discussing a lawsuit against an internet service provider that allowed the monitoring of its subscriber's internet usage); PAYTON & CLAYPOOLE, *supra* note 12, at 189–91, 205–06; *see also* Solove, *Digital Dossier*, *supra* note 8, at 1098–1100 (discussing the ramifications of the collection of personal information by, among others, cable companies and Internet Service Providers on the government's ability to gather information); *Privacy Policy*, NETZERO.NET, https://www.netzero.net/start/landing.do?page=www/legal/privacy#I (last updated Nov. 12, 2014) (listing the vast amounts of information collected by the company including a user's browser, software on computers and mobile devices, processor type, operating system, IP address, websites visited, and location data); *Website Privacy Policy*, TIME WARNER CABLE, https://www.timewarnercable.com/en/our-company/legal/privacy-policy.html (last updated Sept. 2012) (noting that the company collects information on the websites that customers visit, their IP addresses, computer hardware and software, and "other Web usage activity and data," among other classes of data).

15. BERNASEK & MONGAN, *supra* note 1, at 76–79; Timothy R. Graeff & Susan Harmon, *Collecting and Using Personal Data: Consumers' Awareness and Concerns*, 19 J. CONSUMER MARKETING 302, 304 (2002) (discussing the use of store loyalty cards to collect personal data).

16. FED. TRADE COMM'N, DATA BROKERS: A CALL FOR TRANSPARENCY AND ACCOUNTABILITY 1–3 (May 2014), https://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf (discussing the data-broker industry). The data-broker industry includes companies like Acxiom, which licenses business data (e.g., names, telephone numbers, business classification code, location information, etc.) and personal residential data (e.g., telephone numbers, names, addresses, mobile use, etc.). *See Business Data*, ACXIOM, http://www.databyacxiom.com/business-data.html (last visited Aug. 29, 2016); *Residential Data*, ACXIOM, http://www.databyacxiom.com/residential-data.html (last visited Aug. 29, 2016).

The multi-sided platform is at the heart of the digital economy and is defined by a business that serves two distinct but complementary customer bases: (1) consumers who use a digital product, and (2) advertisers who pay for access to those consumers.[17] Google, for example, provides a wide range of products to consumers, including its e-mail service, digital mapping software, online word-processing software, web browser, search engine, social-media sites, and media offerings.[18] Instead of charging users a cash fee for access to those services, it collects data from them, and it uses those data to sell targeted advertising.[19] It thus uses one side of its business model, the provision of digital goods to consumers, to facilitate another side of its business model, the generation of advertising income.

The importance of this business model is reflected in Google's financial performance. In 2015, Google derived approximately 90% of its revenue, over $67 billion, from advertising.[20] This has led some to opine that Google's product is actually its users and not its digital software offerings.[21] Google is not alone in this of course. Popular social-media platforms like Facebook, Twitter, and Instagram all operate in the same way. They offer "free" products but generate revenue by collecting and monetizing users' information. Other websites, like many news websites, operate similarly, with customer data and advertising as the revenue drivers.[22]

---

17. *See* David S. Evans, *Antitrust Issues Raised by the Emerging Global Internet Economy*, 102 NW. U. L. REV. 1987, 1994–96 (2008) (discussing the multisided platform).

18. *Products*, GOOGLE.COM, http://www.google.com/about/products/ (last visited Aug. 29. 2009).

19. Evans, *supra* note 17, at 1997–2002 (discussing Google's advertising revenue and business model).

20. Alphabet Inc. & Google Inc., Annual Report (Form 10-K) (Feb. 11, 2016) [hereinafter Google Annual Report], https://www.sec.gov/Archives/edgar/data/1288776/000165204416000012/goog10-k2015.htm (reporting that approximately $67 billion of Google's $75 billion in revenue in 2015 resulted from advertising). This has led some to the conclusion that individual users are Internet companies' products, rather than their customers.

21. PAYTON & CLAYPOOLE, *supra* note 12, at 33–34 ("In most instances, when you use free services, what's really for sale is you and all the digital data nuggets you provide when you use the service."); Scott Goodson, *If You're Not Paying for It, You Become the Product*, FORBES (Mar. 5, 2012, 12:34 PM), http://www.forbes.com/sites/marketshare/2012/03/05/if-youre-not-paying-for-it-you-become-the-product/ ("If you're not paying for it; you are the product." (citation omitted)); Jonathan Zittrain, *Meme Patrol: "When Something Online is Free, You're Not the Customer, You're the Product,"* HARV. BLOGS: FUTURE OF THE INTERNET (Mar. 21, 2012), http://blogs.law.harvard.edu/futureoftheinternet/2012/03/21/meme-patrol-when-something-online-is-free-youre-not-the-customer-youre-the-product/ (exploring the source of this sentiment).

22. Some online newspapers have even started using so-called "survey walls" to collect data as payment for access. Under the survey-wall method, a consumer is required to answer some basic research questions before she is granted access to a website. Unsurprisingly, Google is at the forefront of this method of data acquisition. PAUL MCDONALD, MATT MOHEBBI & BRETT SLATKIN, GOOGLE INC., COMPARING GOOGLE CONSUMER SURVEYS TO EXISTING PROBABILITY AND NON-PROBABILITY BASED INTERNET SURVEYS 3, https://www.google.com/insights/consumersurveys/static/consumer_surveys_whitepaper_v2.pdf (last visited Sept. 18, 2016). Google even competes for this business by touting its ability to ask fewer questions of users because it can infer information about a respondent by using the respond-

The data being collected by these firms are often classified into three types—volunteered data, observed data, and inferred data.[23] Volunteered data are the data that consumers actively provide to data aggregators.[24] This can be their names, birthdays, addresses, places of work, and the things that they "like."[25] Observed data include data that are gathered based on a consumer's behaviors and activities and are collected without the knowledge or special effort of the consumer.[26] They are collected through the use of various technological tools, like cookies, flash cookies, browser fingerprinting, GPS tracking, deep packet inspection, and history sniffing.[27] Some companies are even tracking users through smartphone applications that "listen" for ultrasonic pitches that are embedded into television advertisements.[28] Given the variety of these data-collection tools, there are many different types of observed data. Those include information regarding what individuals purchase, the Internet links that they click on, what they search for, the Internet browser that they use, what music they listen to, how long they hover over articles or headlines, and the types of advertisements to which they respond.[29]

The final category of data, inferred data, is comprised of data that can be inferred based solely on a consumer's information profile.[30] For example, a data aggregator may be able to infer that an individual is

---

ent's IP address and a cookie that it places on the respondent's machine to track the respondent's web history. *Id.*

23. WORLD ECON. FORUM, PERSONAL DATA, *supra* note 3, at 7.

24. *Id.* at 14.

25. Of course, some data that users contribute are not necessarily personal at all. When a user discloses a relationship or a meal with another person, for example, he or she discloses personal information of that other person as well. We could thus question how effectively the law can be tailored to allow individuals full control over their data or whether those data are really worthy of protection at all. *See* Michael Birnhack, *Reverse Engineering Informational Privacy Law*, 15 YALE J.L. & TECH. 24, 86 (2013) (recognizing that European Union (EU) privacy protections fail to take this issue into account); Steven L. Willborn, *Notice, Consent, and Nonconsent: Employee Privacy in the Restatement*, 100 CORNELL L. REV. 1423, 1423, 1425–27 (2015) (noting that some information is simply not "private" and worthy of legal protection).

26. WORLD ECON. FORUM, PERSONAL DATA, *supra* note 3, at 14.

27. Omer Tene & Jules Polonetsky, *To Track or "Do Not Track": Advancing Transparency and Individual Control in Online Behavioral Advertising*, 13 MINN. J.L. SCI. & TECH. 281, 288–89, 292–96, 298–99 (2012) (discussing these different online-tracking technologies).

28. Dan Goodin, *Beware of Ads That Use Inaudible Sound to Link Your Phone, TV, Tablet, and PC*, ARS TECHNICA (Nov. 13, 2015, 11:00 AM), http://arstechnica.com/tech-policy/2015/11/beware-of-ads-that-use-inaudible-sound-to-link-your-phone-tv-tablet-and-pc/.

29. *See, e.g.*, WORLD ECON. FORUM, TRUST, *supra* note 3, at 18 ("Observed data is created as a result of a transaction between an individual and an organization—location data from a mobile phone, credit card transactions, purchase history at a retailer, etc."); Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995, 1003–04 (2014) (providing a list of information that websites can collect from consumers); Andrew Griffin, *Facebook News Feed Algorithm to Track How Long Users Spend Reading Stories*, INDEPENDENT (June 15, 2015), http://www.independent.co.uk/life-style/gadgets-and-tech/news/facebook-news-feed-algorithm-to-track-how-long-users-spend-reading-stories-10320715.html; Steve Rosenbush, *Facebook Tests Software to Track Your Cursor on Screen*, WALL STREET J.: CIO J., (Oct. 30, 2013, 7:15 AM), http://blogs.wsj.com/cio/2013/10/30/facebook-considers-vast-increase-in-data-collection/ (discussing the types of tracking that Facebook and other online websites perform).

30. WORLD ECON. FORUM, PERSONAL DATA, *supra* note 3, at 7, 14.

pregnant based on her recent web searches and her in-store purchases.[31] It may also be able to determine a person's credit worthiness based upon whether he purchased felt pads for the bottom of the legs of his kitchen chairs.[32] Inferred data thus represent a type of educated guess about an individual.

The different types of data collected and their different uses raise a number of questions regarding the personal-data market. These include whether consumers understand the implications of that market and whether consumers are being adequately compensated for their data. These aspects of the personal-data market have been explored in the technology and privacy literature as well as in the popular press. The following Section provides some background on that literature with a specific focus on how it has viewed the personal-data exchange and the evolution of the personal-data economy.

B. Existing Analyses of the Personal-Data Market

The scope and importance of the personal-data market is well known in the technology and privacy sectors. The World Economic Forum, for example, has a long-running project called "Rethinking Personal Data,"[33] which has resulted in a series of reports that evaluate the personal-data market and its impact on society.[34] Those reports broadly recognize that personal data has emerged as a new asset class that impacts our entire society.[35] They also recognize that personal data are becoming "a primary currency of the digital economy."[36] Other analysts repeat these observations. Some have gone so far as to call data the "lifeblood of the new economy,"[37] and there is a widespread recognition that personal data are being used as consideration for access to the digital products of today's economy.[38] Both academics[39] and the popular press[40] recognize

31. Charles Duhigg, *How Companies Learn Your Secrets*, N.Y. TIMES MAG. (Feb. 16, 2012), http://www.nytimes.com/2012/02/19/magazine/shopping-habits.html? (discussing how retailers use inferred data and relaying the remarkable story of the father who became aware that his high-school-aged daughter was pregnant when Target sent her coupons for baby-related items).

32. WORLD ECON. FORUM, PERSONAL DATA, *supra* note 3, at 14; Strahilevitz, *supra* note 2, at 2021.

33. WORLD ECON. FORUM, PERSONAL DATA, *supra* note 3.

34. *Id.*

35. *Id.* at 5.

36. *Id.* at 18.

37. PIERRE COLLIN & NICOLAS COLIN, TASK FORCE ON TAXATION OF THE DIGITAL ECONOMY 33 (Jan. 2013) [hereinafter FRENCH REPORT], http://www.hldataprotection.com/files/2013/06/Taxation_Digital_Economy.pdf; EUROPEAN DATA PROTECTION: COMING OF AGE 191 (Serge Gutwirth et al. eds., 2013); WORLD ECON. FORUM, TRUST, *supra* note 3, at 7; GEORGE O. M. YEE, PRIVACY PROTECTION MEASURES AND TECHNOLOGIES IN BUSINESS ORGANIZATIONS: ASPECTS AND STANDARDS 173 (2012); Anupam Chander & Uyên P. Lê, *Data Nationalism*, 64 EMORY L.J. 677, 721 (2015); Schwartz, *supra* note 5, at 2069–70; Joe Callahan, *Data: The Oil in Today's New Economy*, FIRST INSIGHT: BLOG (July 17, 2015), http://www.firstinsight.com/blog/data-the-oil-in-todays-new-economy.

38. *See, e.g.*, European Data Protection Supervisor, Preliminary Opinion on Privacy and Competitiveness in the Age of Big Data 8–10 (Mar. 2014), https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opini

that access to "free" digital products online is not free at all, but that consumers pay for that access by relinquishing their data.[41] Some analysts even recognize that consumers are involved in a new type of barter exchange.[42]

The growth of this new type of personal-data exchange has led to broad discussions regarding the inherent tradeoffs between maintaining personal privacy and the benefits that individuals receive from disclosing their personal information.[43] Theoretically, consumers can make economically rational decisions to exchange their data or their privacy for access to digital products, and some scholars feel that government need

---

ons/2014/14-03-26_competitition_law_big_data_EN.pdf; Schwartz, *supra* note 5, at 2056–57; Viviane Reding, Vice President, European Comm'n, Speech at the Innovation Conference Digital, Life, Design: The EU Data Protection Reform 2012: Making Europe the Standard Setter for Modern Data Protection Rules in the Digital Age (Jan. 22, 2012), http://europa.eu/rapid/press-release_SPEECH-12-26_en.htm ("Personal data is the currency of today's digital market."); Adam Fisch, *There's a New Currency in Town and It's Not the Malawian Kwacha or Azerbaijani Manat*, HUFFPOST TECH. U.K.: THE BLOG (Feb. 23, 2015, 11:04), http://www.huffingtonpost.co.uk/adam-fisch/new-currency_b_6721866.html; David Zax, *Is Personal Data the New Currency?*, MIT TECH. REV. (Nov. 30, 2011), http://www.technologyreview.com/view/426235/is-personal-data-the-new-currency/.

39. Hoofnagle & Whittington, *supra* note 4, at 608 (noting that "free" online services "carry a hidden charge: the forfeit of one's personal information"); Juan Pablo Carrascal et al., Your Browsing Behavior for a Big Mac: Economics of Personal Information Online 189 (May 13–17, 2013) (research paper prepared for the Twenty-Second International World Wide Web Conference), http://www2013.wwwconference.org/proceedings/p189.pdf; Christopher Riederer et al., For Sale: Your Data by: You (Nov. 14–15, 2011) (research paper prepared for the Tenth ACM Workshop Hot Topics in Networks (HotNets-X)), http://www.cs.columbia.edu/~mani/hotnetsX-final85.pdf.

40. For example, when Microsoft released Windows 10 in mid-2015, it provided the software to existing Windows customers without charge. Commentators had no trouble recognizing that the software was not actually free, but that consumers were paying for this new software with their data. Geoffrey A. Fowler, *Windows 10 Isn't Spyware but It Wants Your Data*, WALL STREET J. (Aug. 5, 2015, 8:00 AM), http://blogs.wsj.com/personal-technology/2015/08/05/windows-10-isnt-spyware-but-it-wants-your-data/; Laurie Segall, *Your Private Data Pays for 'Free' Facebook and Google*, CNN MONEY (Jan. 28, 2011, 6:56 PM), http://money.cnn.com/2011/01/28/technology/google_data_privacy_day/; Natasha Singer, *Sharing Data, but Not Happily*, N.Y. TIMES (June 4, 2015), http://www.nytimes.com/2015/06/05/technology/consumers-conflicted-over-data-mining-policies-report-finds.html; Ben Wright, *Do You Want Free Facebook or a Say in Where Your Personal Data Are Stored? It's Unlikely You Will Have Both*, TELEGRAPH (Oct. 7, 2015, 9:30 AM), http://www.telegraph.co.uk/finance/newsbysector/mediatechnologyandtelecoms/digital-media/11915673/Do-you-want-free-Facebook-or-a-say-in-where-your-personal-data-is-stored-its-unlikely-you-will-have-both.html.

41. A recent Pew Research Center study found that consumers did seem to understand that they were trading data for benefits. LEE RAINIE & MAEVE DUGGAN, PEW RESEARCH CTR., PRIVACY AND INFORMATION SHARING 6–7 (2016), http://www.pewinternet.org/2016/01/14/2016/Privacy-and-Information-Sharing/.

42. *See* sources cited *supra* note 5.

43. *See* Laura Brandimarte & Alessandro Acquisti, *The Economics of Privacy*, *in* THE OXFORD HANDBOOK OF THE DIGITAL ECONOMY 547 (Martin Peitz & Joel Waldfogel eds., 2012) (discussing the "economics of privacy"); JOSEPH TUROW, MICHAEL HENNESSY & NORA DRAPER, ANNENBERG SCH. FOR COMMC'N UNIV. OF PA., THE TRADEOFF FALLACY 4–9 (2015), https://www.asc.upenn.edu/sites/default/files/TradeoffFallacy_1.pdf; Ryan Calo, *Privacy and Markets: A Love Story*, 91 NOTRE DAME L. REV. 649, 658 (2015); Jules Polonetsky & Omer Tene, *Privacy and Big Data: Making Ends Meet*, 66 STAN. L. REV. ONLINE 25, 26 (2013) ("Finding the right balance between privacy risks and big data rewards may very well be the biggest public policy challenge of our time.").

not interfere to mandate particular data-protection practices.[44] Others, however, feel that individuals are not able to fully participate in the market for their data. They argue that informational asymmetries, behavioral biases, and structural problems in the data market prevent that market from functioning effectively.[45]

Recent research tends to suggest that consumers are indeed unhappy with how their personal data are being collected and utilized.[46] Consumers have continued to allow that collection and use, however, because they have felt that they had to do so if they wanted to be fully engaged members of today's society.[47] That is beginning to change though, and there are significant efforts being directed toward modifying how Internet commerce is conducted. The Berkman Klein Center for Internet & Society at Harvard, for example, runs a project named ProjectVRM.[48] That project focuses on the concept of vendor relationship management (VRM) which is focused on making consumers empowered economic actors with respect to their data.[49] The project urges the development of technology that allows individuals to more fully control their own data and how others use those data.[50] The focus is on giving consumers control of their relationships with vendors instead of simply being economic units for vendors to capture.[51] Consumers could do this if they could collect and control their own data, if they had the ability to selectively share those data, or if they could control the conditions under which others

44. *See* Brandimarte & Acquisti, *supra* note 43, at 552–55; Calo, *supra* note 43, at 655–57 (discussing these propositions).

45. *See* Alessandro Acquisti & Jens Grossklags, *Privacy Attitudes and Privacy Behavior*, *in* THE ECONOMICS OF INFORMATION SECURITY 165, 165–66 (L. Jean Camp & Stephen Lewis eds., 2004); Alessandro Acquisti & Jens Grossklags, *What Can Behavioral Economics Teach Us About Privacy?*, *in* DIGITAL PRIVACY 363, 364–65 (Alessandro Acquisti et al. eds., 2008); Brandimarte & Acquisti, *supra* note 43, at 555–57, 564; Calo, *supra* note 29, at 1013–15; Calo, *supra* note 43, at 650–51; A. Michael Froomkin, *Regulating Mass Surveillance as Privacy Pollution: Learning from Environmental Impact Statements*, 2015 U. ILL. L. REV. 1713, 1728–37 (2015); Daniel J. Solove, *Introduction: Privacy Self-Management and the Consent Dilemma*, 126 HARV. L. REV. 1879, 1880–81 (2013).

46. MARY MADDEN, PEW RESEARCH CTR., PUBLIC PERCEPTIONS OF PRIVACY AND SECURITY IN THE POST-SNOWDEN ERA (2014), http://www.pewinternet.org/2014/11/12/public-privacy-perceptions/; TUROW, HENNESSY & DRAPER, *supra* note 43, at 3.

47. TUROW, HENNESSY & DRAPER, *supra* note 43, at 4 ("[T]he larger percentages of people in the population who are resigned compared to people who believe in . . . tradeoffs . . . indicate that in the real world people who [exchange] their data [for benefits] are more likely to do it while resigned rather than as the result of cost-benefit analysis."); *see also* Solove, *Digital Dossiers*, *supra* note 8, at 1158 (concluding that people would have to live "as Information Age hermits, without credit cards, banks, Internet service, phones and television" if they did not want to share their information with third parties).

48. *Project VRM*, BERKMAN KLEIN CTR., https://cyber.law.harvard.edu/research/projectvrm (last updated July 5, 2016).

49. *Id.* (vendor relationship management is in contrast to "customer relationship management," which focuses on how vendors can best capture consumers).

50. *See* PROJECT VRM, http://cyber.law.harvard.edu/projectvrm/Main_Page (last updated Sept. 4, 2016).

51. DOC SEARLS, THE INTENTION ECONOMY: WHEN CUSTOMERS TAKE CHARGE 164–65 (2012).

could use their data.[52] A number of digital products currently incorporate these VRM concepts.[53]

One specific VRM-like proposal is to create cash markets in which individuals can sell their personal data. For example, noted author and computer scientist Jaron Lanier has suggested a world where individuals receive micro-payments each time their data are used.[54] Others focus on the development of personal-data banks or vaults where consumers store and sell access to their data.[55] Scholars have explored this type of market development by experimenting with cash markets for data in laboratory experiments.[56] Others have created, or are creating, firms that actually provide that service.[57] Some businesses also have developed platforms that provide compensation for data without using the data-bank model. The now-defunct social-media platform "tsu," for example, shared its advertising revenue with users based on their activities on the site.[58] A similar platform, Bonzo Me, pays users 80% of the advertising revenue that is derived from their posts.[59]

Those changes to the data economy are being explored as responses to generalized concerns regarding personal privacy, but they might also be compelled due to individuals' increased use of technology that blocks tracking and online advertising.[60] Those actions directly undercut the advertising side of the multi-sided business model and could require that businesses move towards a cash-subscription model or a model that al-

---

52. *Id.*

53. *VRM Development Work*, PROJECT VRM, http://cyber.law.harvard.edu/projectvrm/VRM_Development_Work (last updated Oct. 4, 2016).

54. JARON LANIER, WHO OWNS THE FUTURE 317 (2013).

55. *See* Kenneth C. Laudon, *Markets and Privacy*, COMM. ACM, Sept. 1996, at 92, 99–100; Tom Simonite, *Sell Your Personal Data for $8 a Month*, MIT TECH. REV. (Feb. 12, 2014), http://www.technologyreview.com/news/524621/sell-your-personal-data-for-8-a-month/.

56. *See* Christina Aperjis & Bernardo A. Huberman, *A Market for Unbiased Private Data: Paying Individuals According to Their Privacy Attitudes*, FIRST MONDAY (May 2012), http://journals.uic.edu/ojs/index.php/fm/article/view/4013/3209#p1; Riederer et. al., *supra* note 39, at 1; Jacopo Staiano et al., Money Walks: A Human-Centric Study on the Economics of Personal Mobile Data 1 (Sept. 13–17, 2014) (research paper prepared for the 2014 ACM International Joint Conference on Pervasive and Ubiquitous Computing (UbiComp 2014)), https://arxiv.org/pdf/1407.0566.pdf.

57. *Consumers Could License Their Data*, WARC (Jan. 28, 2016), http://www.warc.com/LatestNews/News/Consumers_could_license_their_data.news?ID=36111; Zax, *supra* note 38. Companies that offer this service include DATACOUP, https://datacoup.com (last visited Oct. 16, 2016), and PERSONAL BLACKBOX, http://pbb.me/ (last visited Oct. 16, 2016).

58. TSŪ, https://www.tsu.co/about (last visited Jan. 27, 2016).

59. *What Can You Do on BonzoMe?*, BONZO ME (Sept. 17, 2014), http://bonzome.com/what-can-you-do-on-bonzome/.

60. *See* PAGEFAIR & ADOBE, THE COST OF AD BLOCKING: 2015 AD BLOCKING REPORT (2015), https://downloads.pagefair.com/wp-content/uploads/2016/05/2015_report-the_cost_of_ad_blocking.pdf; Ted McConnell, *Don't Let Viewers Renege on the Social Contract*, MEDIAPOST (Sept. 9, 2015, 12:17 AM), http://www.mediapost.com/publications/article/257938/dont-let-viewers-renege-on-the-social-contract.html (discussing ways to discourage ad-blocking); *With Ad Blocking Use on the Rise, What Happens to Online Publishers?*, NPR.ORG: ALL TECH CONSIDERED (July 20, 2015, 6:14 PM), http://www.npr.org/sections/alltechconsidered/2015/07/20/424630545/with-ad-blocking-use-on-the-rise-what-happens-to-online-publishers.

lows users to take more control of their data. Regardless of the approach taken, though, individuals will have to pay for their desired digital products one way or another. Along these lines, some have advocated for cash-subscription options for websites, including Facebook.[61] Those individuals would rather pay with cash than with their data. One research firm even predicted that 2016 would be a "tipping point," with more companies offering paid, ad-free subscription models.[62]

In sum, it is clear that the personal-data market is of great economic importance and that it raises significant issues regarding personal privacy. The market is receiving considerable attention by consumers, privacy scholars, and technologists. It has thus far, however, gone largely unnoticed by our tax system and by our tax scholars. Part II of this Article remedies that omission.

II. PERSONAL-DATA TAXATION

The personal-data market is a critical part of today's economy, but that market has largely escaped the attention of the tax community. The only real tax analysis of the personal-data market has been done by the international tax community in the context of reports regarding the taxation of the digital economy more broadly. This Section explores that analysis and discusses how transactions in data should be treated for U.S. tax purposes. The latter discussion includes analyses of (1) the theoretical tax consequences to individual consumers as data providers; (2) the theoretical tax consequences to businesses as data aggregators; and (3) the pragmatic factors that will impede the taxation of personal-data transactions as they occur today.[63]

A. The Personal-Data Market, the Digital Economy, and Global Taxation

The modern economy presents many challenges for our global tax systems. Multi-national firms are able to use complex corporate structures and international tax rules to direct their profits into jurisdictions

61. *See* Calo, *supra* note 29, at 1047–48 (considering this option for consumer-protection reasons); Zeynep Tufekci, *Mark Zuckerberg, Let Me Pay for Facebook*, N.Y. TIMES (June 4, 2015), http://www.nytimes.com/2015/06/04/opinion/zeynep-tufekci-mark-zuckerberg-let-me-pay-for-facebook.html; *Dear Software Companies, Please Let Me Pay You Money*, CREATIVE REALIST (Dec. 18, 2012), http://www.creativerealist.com/post/38234666233/dear-software-companies-please-let-me-pay-you; Mark Schaefer, *Dear Facebook. Please Let Me Pay You.*, BUSINESSGROW.COM, http://www.businessesgrow.com/2013/02/07/dear-facebook-please-let-me-pay-you/ (last visited Sept. 3, 2016).

62. Harriet Taylor, *Privacy Will Hit Tipping Point in 2016*, CNBC (Nov. 9, 2015, 8:35 AM), http://www.cnbc.com/2015/11/09/privacy-will-hit-tipping-point-in-2016.html (discussing a privacy report issued by Forrester Research).

63. The tax analysis of this article presumes that data aggregators are subject to corporate income tax and that data providers are individuals subject to the personal income tax. This is done for the purpose of simplicity only.

with low or no tax.[64] This has motivated significant tax scholarship that analyzes how to best modify our international tax rules to ensure that multi-national firms' profits are taxed at some desired level.[65] The use of personal data in the modern economy adds to the general challenges facing global taxation because it gives firms another way to build value that is difficult to assign to a particular activity or jurisdiction. For this reason, the commercialization of personal data has been recognized in two recent reports that more generally analyze the global tax issues created by the digital economy—a report issued by the Organization for Economic Co-Operation and Development in 2015 (the OECD Report)[66] and an earlier 2013 report commissioned by the French government (the French Report).[67] Both of those Reports recognize that personal-data transactions are a key component of the digital economy and address the difficulty of determining how those transactions should be characterized for tax purposes.[68]

The OECD Report very briefly does the latter and notes that those transactions could be seen either as taxable barter transactions or as "free goods" transactions.[69] The Report does not detail the tax consequences of those constructs or analyze whether one is preferred over the other.[70] Instead, the Report suggests that the characterization issue is not of great importance because the value that personal-data transactions create will

---

64. *See* Chris William Sanchirico, *As American as Apple Inc.: International Tax and Ownership Nationality*, 68 TAX L. REV. 207, 207–10 (2015) (referencing the general scholarship and debate regarding U.S. corporate tax avoidance). *See generally* JANE G. GRAVELLE, CONG. RESEARCH SERV., TAX HAVENS: INTERNATIONAL TAX AVOIDANCE AND EVASION 9–10 (2015), https://www.fas.org/sgp/crs/misc/R40623.pdf; J. Clifton Fleming, Jr., Robert J. Peroni & Stephen E. Shay, *Getting Serious About Cross-Border Earnings Stripping: Establishing an Analytical Framework*, 93 N.C. L. REV. 673, 675 (2015); Edward D. Kleinbard, *Stateless Income*, 11 FLA. TAX REV. 699, 701–02 (2011).

65. *See generally* ARTHUR COCKFIELD ET AL., TAXING GLOBAL DIGITAL COMMERCE (3d rev. ed. 2013) (broadly evaluating the impact of the digital economy on global tax systems); Fleming, Peroni & Shay, *supra* note 64; Kleinbard, *supra* note 64; Edward D. Kleinbard, *The Lessons of Stateless Income*, 65 TAX L. REV. 99 (2011).

66. ORG. FOR ECON. CO-OPERATION & DEV., ADDRESSING THE TAX CHALLENGES OF THE DIGITAL ECONOMY, ACTION 1: 2015 FINAL REPORT (2015) [hereinafter OECD REPORT], http://www.oecd-ilibrary.org/taxation/addressing-the-tax-challenges-of-the-digital-economy-action-1-2015-final-report_9789264241046-en. The OECD Report was issued as part of its Base Erosion and Profits Shifting Project that it initiated in 2013. *Id.* at 3. That project included a 15-point Action Plan to "ensure that profits are taxed where economic activities take place and value is created." *Id.* Action 1 of that Action Plan called for research into ways to "address the tax challenges of the digital economy." *Id.* at 11. One outcome of that call was the publication of the 285-page OECD Report. *See generally id.* That report discusses much more than just personal data of course. It broadly discusses the challenges that the digital economy, including the use of personal data in that economy, presents with respect to both direct taxes like income taxes, and to indirect taxes like consumption taxes. *See generally id.*

67. In 2012, the French government commissioned a comprehensive report on the impacts of the digital economy on that country's tax system. The resulting report, the French Report, was issued in January 2013, and specifically identified personal data as the "common denominator" and the "core of value creation" in the digital economy. FRENCH REPORT, *supra* note 37, at 35.

68. *See generally id.*; OECD REPORT, *supra* note 66.

69. OECD REPORT, *supra* note 66, at 104.

70. *See id.*

ultimately be taxed when data aggregators convert it into advertising income.[71] For reasons discussed below, this is not a satisfactory way of handling the issue.[72]

The French Report provides a relatively more robust analysis. It details how the modern economy has been built on the "regular and systematic monitoring" of consumers who are not being provided with any monetary payment for the resulting data.[73] It also reasons that those data are "free or nearly free" to data aggregators because the data are collected as a "positive externalit[y]" of an online application that can be provided by those firms at a near-zero marginal cost.[74] The Report's focus on these factors results in its adoption of a "free-labour construct" under which consumers are treated as unpaid laborers—and not as beneficiaries of a market exchange.[75] This is not to say that the Report does not consider other potential tax constructs. It does.[76] Among the models considered are those that would incorporate some sort of taxable-exchange theory, but the Report concluded that none of those constructs fit the personal-data exchange in a workable way.[77] The Report did also specifically raise the question of whether individual users would have tax consequences under a market-exchange theory if one took that construct to the "extreme."[78] That possibility was dismissed quickly even though the Report did recognize that individual consumers do get access to online applications in exchange for their data.[79]

The adoption of the free-labor model seems to be best explained by the motivation for the Report. The authors of the Report were focused on determining how France could best respond to the new economy and multi-national firms' aggressive tax planning.[80] They were not asked to find a model that best reflected economic reality. It is thus not surprising that the authors would adopt a model that narrowed the inquiry to data aggregators and that ignored the tax consequences to consumers.[81] In doing so, however, the Report was far more limited in scope than this Article is intended to be, and we can fairly question the extent to which its analysis is helpful to that goal.

---

71. *Id.*
72. *See infra* Section III.A.1.
73. FRENCH REPORT, *supra* note 37, at 2.
74. *Id.* at 49.
75. *Id.* at 2, 49–54, 79, 102, 114–16.
76. *Id.* at 79–80.
77. *Id.* at 79–84.
78. *Id.* at 116. This was done in the span of one sentence in the text and in one sentence in a footnote. *Id.*
79. *Id.* at 81. This, of course, creates an inconsistency. The report posits that consumers are not being paid for their data, that companies are not being paid for their digital products, but that both are receiving something valuable from the other. *See generally id.*
80. *Id.* at 1–3.
81. *Id.* at 2–3.

Properly categorizing personal-data transactions requires us to recognize that consumers actually do receive compensation for their data. They generally do not receive cash, but they benefit immensely in other ways. The wide range of "free" digital products that are available today is staggering. We live in a world where all of humanity's accumulated information—and Pokémon Go—is readily available at a moment's notice. We pay for hardware to access that information, but the information and entertainment is provided without a cash fee. Consumers are undeniably getting something in return for their data. In fact, economists have valued the consumer welfare gains from "free" online products at approximately $100 billion per year in the U.S. alone.[82] To claim that consumers are getting nothing from the deal is thus inaccurate.[83]

It is equally inaccurate to say that data aggregators are getting free labor from consumers. Although Google does get each additional user's data for a very low cost, its near-zero marginal cost is a function of providing a digital product, not of the personal-data market. Digital goods are largely non-rivalrous; they can be replicated infinitely, at low cost, and without any drain on the primary resource.[84] The marginal cost of selling software on a CD-ROM includes the cost of a disk, manufacturing time, and packaging. The marginal cost of providing another person access to online software involves some incremental burden on server space, but that is it. Having a near-zero marginal cost, though, does not mean that digital goods have no cost.[85] Firms spend significant sums to develop products that consumers will use repeatedly.[86] It is critical that

82. Erik Brynjolfsson & Joo Hee Oh, The Attention Economy: Measuring the Value of Free Digital Services on the Internet 3 (Dec. 16–19, 2012) (research paper prepared for the Thirty-Third International Conference on Information Systems), http://aisel.aisnet.org/cgi/viewcontent.cgi?article=1045&context=icis2012.

83. This is, of course, not to say that consumers are being adequately compensated for their data, just that they are being compensated in some amount. *See supra* notes 44–45 and accompanying text (discussing the challenges preventing a perfectly functioning market for personal data).

84. COCKFIELD ET AL., *supra* note 65, at 30; Hoofnagle & Whittington, *supra* note 4, at 620–22; Samuelson, *supra* note 6, at 1138. The nonrivalrous nature of digital goods is consistent with the nonrivalrous nature of intellectual property and data. *See* Mark A. Hall, *Property, Privacy, and the Pursuit of Interconnected Electronic Medical Records*, 95 IOWA L. REV. 631, 661 (2010) ("Information by its nature is nonrivalrous, meaning it can be used by many people at once without depletion."); Eric E. Johnson, *The Economics and Sociality of Sharing Intellectual Property Rights*, 94 B.U. L. REV. 1935, 1940–42 (2014) (describing the nonrivalrous nature of intellectual property); Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1050–51 (2005) ("Information is what economists call a pure 'public good,' which means both that its consumption is nonrivalrous—my use of an idea does not impose any direct cost on you—and that it is not something from which others can easily be excluded."); *see also* Mark A. Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460, 466–71 (2015) (discussing the impact of technology on scarcity).

85. COCKFIELD ET AL., *supra* note 65, at 29–30 (noting that information goods do not have fixed, marginal costs and that the fixed costs can be "quite high"); Hoofnagle & Whittington, *supra* note 4, at 622–24.

86. Google Annual Report, *supra* note 20 (revealing that Google and its parent company spent over $16 billion on research and development in 2015); *see also* Facebook, Annual Report (Form 10-K) (Jan. 28, 2016), https://www.sec.gov/Archives/edgar/data/1326801/000132680116000043/fb-12312015x10k.htm (revealing that Facebook had a "cost of revenue" of almost $2.9 billion in 2015

a business using a multi-sided platform provide users "with a fluid, reassuring and stimulating experience."[87] Absent those factors, its flow of data ceases and its business will fail. It is therefore incorrect to claim that data aggregators receive data for free. They might have great economies of scale, but they *do pay* for their data. The free-labor construct is thus inappropriate, at least for data aggregators who utilize a multi-sided business model.[88]

The sum of this analysis is that the utilization of a free-labor model in international tax analyses should not guide how we think about personal-data transactions for domestic tax purposes. The actual functioning of the personal-data market supports the adoption of a market-exchange model under which we recognize that firms acquire data by providing consumers with access to desirable digital products and that consumers use their data to acquire access to those products.[89]

---

and also spent nearly $5 billion on research and development; Facebook's cost of revenue "consists primarily of expenses associated with the delivery and distribution of [its] products").

87. FRENCH REPORT, *supra* note 37, at 53 (such a service "makes it possible to infiltrate the data-to-day activities and even the private life of individuals"); Nadezhda Purtova, *The Illusion of Personal Data as No One's Property*, 7 LAW INNOVATION & TECH. 83, 107 (2015).

88. The free-labor construct might be more apt for data aggregation that occurs in connection with other types of exchanges. A consumer purchasing internet or cable television access, for example, will pay a cash subscription charge, but he or she will also likely be monitored and will transfer personal data to the service provider as he or she uses its product. ANDREWS, *supra* note 14, at 19 (discussing a lawsuit against an internet service provider that allowed the monitoring of its subscribers' internet usage); PAYTON & CLAYPOOLE, *supra* note 12, at 189–91; Ramachandran & Vranica, *supra* note 13. In this situation, the traditional commercial exchange might incorporate the exchange of data into the cash price charged. It is also possible, however, that the data exchange might be unknown to the consumer and that the consumer might not be able to understand or be able to extract the value of the data that he or she is transferring. This would be consistent with scholarship showing that consumers are poorly informed participants in the data market, are often unaware that they are market participants at all, or are simply resigned to providing their data. *See supra* notes 43–47 and accompanying text; *see also* Nathan Newman, *The Costs of Lost Privacy: Consumer Harm and Rising Economic Inequality in the Age of Google*, 40 WM. MITCHELL L. REV. 849, 860–63 (2014) (discussing the many forces working against a competitive market for personal data). We thus might be more comfortable with the free-labor construct in the context of exchanges where consumers are paying a cash price for their benefit of choice.

89. This article has thus far focused on individuals as exchanging their personal data for access to digital goods, but it is not necessarily clear that this characterization is accurate. To start, it is not clear that personal data is something that can be owned or that such ownership is transferable. The proper characterization of data has been discussed for years in the property and privacy literature, and some advocate for a property construct for personal data, but those data do not necessarily fall within our classical conception of property. They certainly are not currently protected as property. *See, e.g.*, BERNASEK & MONGAN, *supra* note 1, at 194–200; Cohen, *supra* note 6, at 1374–77; Samuelson, *supra* note 6, at 1130–52; Schwartz, *supra* note 5, at 2094–2116; Solove, *Digital Dossiers*, *supra* note 8, at 1112–15. Data also share some qualities with goods and some qualities with services. Like goods they can be stored and delivered from a location other than where they are produced. Like services, however, they are intangible. MICHAEL MANDEL, PROGRESSIVE POLICY INST., BEYOND GOODS AND SERVICES: THE (UNMEASURED) RISE OF THE DATA-DRIVEN ECONOMY 1–2 (2012), http://www.progressivepolicy.org/wp-content/uploads/2012/10/10.2012-Mandel_Beyond-Goods-and-Services_The-Unmeasured-Rise-of-the-Data-Driven-Economy.pdf. The uncertainties regarding how to characterize data make it a bit uneasy to accept a construct under which individuals are transferring those data as payment for access to digital goods.

The type of data involved might also further undermine a construct under which consumers are deemed to be selling their data. Volunteered data, for example, certainly look like something that an individual transfers to an aggregator. Those data represent information held by the individual

B. The Personal-Data Market and Domestic Taxation

1. Personal-Data Transactions and the Income Tax

Determining whether a particular event results in taxable income begins with Internal Revenue Code (the Code) § 61, which provides that gross income includes "all income."[90] The Supreme Court has noted that Congress intended to "exert . . . the full measure of its taxing power" in enacting that definition and has interpreted it to mean that income includes all "accessions to wealth, clearly realized, and over which the taxpayers have complete dominion."[91] That is a very broad formulation,[92] and the fact that money does not exchange hands is not dispositive.[93] Indeed, barter transactions are clearly taxable under the Code.[94] Our income tax laws treat a party to such an exchange as if she had traded her goods or services for cash and then used those funds to purchase the good or service from the other party to the exchange.[95] The key to understanding and evaluating the tax consequences of a barter transaction is to break it into its component parts. For example, a lawyer who trades her

---

and purposefully given to the aggregator. Observed data, on the other hand, look much different. Those data are captured through the effort of the aggregator and may have been previously unknown to the individual—the speed at which they type in a comments section or their responses to behavioral prompts for example. The individual as data transferor looks less apt on those facts. They look much more like a service provider.

This characterization issue is interesting in the abstract but becomes important only if one determines that individuals have income from engaging in personal-data transactions. That issue is considered in depth below. *See infra* Section II.B.1.

90. 26 U.S.C. § 61(a) (2012). "Gross income" ultimately becomes "taxable income" after the application of deductions and personal exemptions. 26 U.S.C. § 63 (2012). The tax analysis of this Article presumes that data aggregators are subject to corporate income tax and that data providers are individuals subject to the personal income tax. This is done for simplicity only.

91. Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 429–31 (1955). State income taxes generally defer to the Code in determining a taxpayer's income that is subject to tax. *See* 2 JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION ¶ 20.02 (3d ed. 2000). This Section will therefore focus on the federal income-tax laws, but taxpayers with federal taxable income would likely have state income-tax consequences as well, to the extent that they were subject to such a tax.

92. There is an academic debate about whether the § 61 formulation provides a rule or a standard. *See* Alice G. Abreu & Richard K. Greenstein, *Defining Income*, 11 FLA. TAX REV. 295, 330 (2011) [hereinafter Abreu & Greenstein, *Defining Income*]; Alice G. Abreu & Richard K. Greenstein, *It's Not a Rule: A Better Way to Understand the Definition of Income*, 13 FLA. TAX REV. 101, 101–02 (2012); Alice G. Abreu & Richard K. Greenstein, *The Rule of Law as a Law of Standards: Interpreting the Internal Revenue Code*, 64 DUKE L.J. ONLINE 53, 55 (2015); Lawrence Zelenak, *Custom and the Rule of Law in the Administration of the Income Tax*, 62 DUKE L.J. 829, 829–30 (2012). This debate and its implications for the taxation of personal-data transactions will be discussed in greater detail below with respect to the taxation of data providers under the barter-exchange model. *See infra* Section II.B.1.

93. Section 1031 of the Internal Revenue Code does allow for the deferral of gain on certain exchanges of property, but multiple conditions must be met for that deferral provision to apply. *See* 26 U.S.C. § 1031 (2012).

94. *See* 26 U.S.C. § 83(a), (b) (2012) (providing rules for the inclusion in gross income of gains from the receipt of property in exchange for services); Treas. Reg. § 1.61-2(d)(1) (as amended in 2003) (providing that the fair market value of property or services received in exchange for services is included in gross income); Rev. Rul. 79-24, 1979-1 C.B. 60. *See generally* Robert I. Keller, *The Taxation of Barter Transactions*, 67 MINN. L. REV. 441 (1982) (broadly discussing the taxation of barter exchanges).

95. Rev. Rul. 79-24, 1979-1 C.B. 60.

legal services for painting services is treated as if she had provided legal services for a cash fee and then used that income to purchase the painting services.[96] Her tax consequences from engaging in the barter are the same as if she had engaged in those two separate transactions.

This barter model applies easily to the personal-data transactions of today's economy. Under a market-exchange model, data aggregators sell access to their digital products in exchange for personal data, and consumers sell their data in exchange for access to digital products. No cash is exchanged in those transactions, but each side transfers something of value to the other. As a result, our tax laws dictate that data providers should report income on the sale of their data and that data aggregators should report income on the sale of access to their digital products. The occurrence of a taxable event is relatively clear as a conceptual matter.

This basic analysis is not meant to suggest that the tax analysis is that limited. Many other considerations come into play, both for data providers and for data aggregators, and the following Parts look more closely at the particular issues that arise on each side of the exchange.

a. Income Tax, Data Providers, and the Market-Exchange Model

The practical impact of the conclusions above should not be lost on readers. Treating personal-data transactions as barter exchanges means that individuals who post something on Facebook or who use Gmail are engaged in taxable transactions. It means that each entry into a search engine is a taxable sale of data and a taxable sale of access to that digital product. That result may be surprising at first, but should not be particularly provocative to those familiar with economic or tax analyses. Individual personal-data exchanges are the equivalent of two separate market transactions, and we would absolutely tax them if they occurred in those two steps. For example, Facebook could run two independent businesses—one that paid individuals to take part in experiments and another that sold access to its social-media platform. If it ran those two distinct businesses, we would have no trouble saying that individuals who received compensation for participating in the experiments had taxable income.[97] The analysis should be no different when the steps are combined and individual users are paid for their data with direct access to the website.

This conclusion is at the heart of the entire barter-exchange doctrine. Exchanges of value have tax consequences regardless of whether

96. *Id.*; Keller, *supra* note 94, at 443 (discussing the "two-payment approach" to characterizing barter transactions).

97. *See* O'Connor v. Comm'r, 104 T.C.M. (CCH) 571 (2012) (finding that compensation received for participating in a medical research study was includable in the recipient's gross income under Code § 61).

the exchange is facilitated by currency.[98] Any other rule would make tax avoidance too simple. Service providers, whether employees or independent contractors, could just demand payments of tax-free, in-kind benefits rather than of taxable cash compensation. That result would clearly be problematic—except as an intended subsidy.

The conclusion that individuals generate income from personal-data barters is straightforward once one adopts the market-exchange model. More broadly, however, that conclusion is the same under general tax principles, even if one does not feel comfortable with using the barter-exchange characterization.[99] Under a more general analysis, the basic question is still whether an individual consumer who receives access to a "free" digital product has received an "accession to wealth" in the *Glenshaw Glass* sense.[100] As noted above, that formulation appears incredibly broad, and there is some resulting discussion regarding whether "income" under the Tax Code is as broad as an economic concept of income or whether pragmatic factors result in a tax definition of "income" that is more narrow.

Under a broad, economic theory of income, though, the ability to access Google Docs or Facebook is a benefit that is clearly realized without the taxpayer having paid for its value in cash. If the benefit received were a copy of Microsoft Word, we would have no problem identifying the fact of a taxable event. The answer should be no different, as a conceptual matter, simply because the benefit is provided digitally. A consumer who receives a free digital product is in an economically superior position to one who has to pay cash for that same product.

This conclusion is fine as a normative matter, but our positive law does provide a number of exclusions from gross income for gains that constitute income in the economic sense. Gifts, for example, are accessions to wealth in the broad sense, but they are not taxed.[101] Certain fringe benefits are treated the same way.[102] Indeed, the statutory exclu-

98. This is clear as an abstract normative matter, but the receipt of in-kind benefits has always presented troubles for discussions of how to define and measure income. *See* HENRY C. SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY 53 (1938).

99. Some might, for example, contest that individuals can enter into a taxable exchange if they are unaware that it is occurring or if they did not actually possess the information being bartered. Some may just reject the idea that individuals are engaged in a market transaction out of hand.

100. Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955).

101. 26 U.S.C. § 102(a) (2012). This statutory exclusion might come to mind for certain readers that are not intimately familiar with the tax laws. One could argue that companies are effectively making a gift to users when they give them access to their products without charge. For tax purposes, though, gifts are transfers made with "detached and disinterested generosity," and the intent of the donor controls in making that determination. Comm'r v. Duberstein, 363 U.S. 278, 285 (1960) (citing Comm'r v. Lo Bue, 351 U.S. 243, 246 (1956)). A transfer of access to a digital product in exchange for data is not a gift under that standard. The transferor of access to the product is doing so out of self-interest.

102. 26 U.S.C. §§ 119, 132 (2012). Courts have also allowed certain non-statutory exclusions from gross income that are more consistent with a standard-based conception of § 61. In *United*

sion for *de minimis* fringe benefits under Code § 132 appears to be a close fit for the gains derived by individuals in personal-data transactions.[103]

The *de-minimis* exclusion applies to "any property or service the value of which is . . . so small as to make accounting for it unreasonable or administratively impracticable."[104] That standard takes into account the frequency with which the benefit is provided.[105] As a result, a single meal might have *de minimis* value, but might fail to be *de minimis* if provided every day.[106] That construct could apply well to consumer gains from data transfers because of the values involved and the difficulties inherent in tracking those exchanges. The value of a single visit to Pinterest or WebMD hardly seems large enough to make accounting for it reasonable or practicable. The analysis is different, of course, for users who log into their Gmail accounts daily or who store a large number of photographs on Facebook's servers. Nonetheless, some might still feel that the *de minimis* exemption should apply in those situations because of the values and administrative difficulties that would be involved with taxing the resulting gains.

The *de minimis* construct is certainly appealing, but it is not perfectly applicable to personal-data barters. First, there are qualitative differences between the typical *de minimis* fringe benefit and personal-data gains. The former are generally provided either (1) as a side benefit of an existing relationship (as in the case of coffee in an employer's break

---

States v. Gotcher, for example, the Fifth Circuit evaluated a case in which a married couple received a free trip to Germany. 401 F.2d 118, 119 (5th Cir. 1968). The cost of that trip was paid by Mr. Gotcher's employer and by the Volkswagen Company, which was attempting to induce him into investing in a Volkswagen dealership. *Id.* at 119–23. The court determined that no statutory exclusion from gross income applied, but that the receipt of the trip was not taxable regardless. *Id.* at 124. The court reasoned that the benefit was not taxable because Volkswagen provided the trip for its own benefit and not to personally benefit Mr. Gotcher. *Id.* at 123–24. The court also relied on the fact that the benefit was business in nature—Mr. Gotcher's activities were oriented around business matters, not pleasure. *Id.* at 122. The court also found it compelling that Mr. Gotcher did not have a choice to go on the trip. *Id.* at 123.

One could argue that taxpayers engaged in personal-data barters should not have income under a *Gotcher*-like analysis. The providers of digital products do so to benefit themselves and not their users. The most significant problem with applying *Gotcher*, however, is that the benefits that individuals receive in personal-data barters are not like the highly controlled business trip that Mr. Gotcher received. They are inherently personal and controlled by those individuals. *See* Abreu & Greenstein, *Defining Income*, *supra* note 92, at 311–12 (critiquing *Gotcher* as "not withstand[ing] rigorous analysis" and thus providing more reasons why its analysis should not be extended to personal-data transactions). Facebook does not guide users through its social media site to show off its capabilities. Consumers use that product at their leisure and as they wish to derive some personal benefit. For these reasons, a *Gotcher*-like analysis should not result in the conclusion that personal-data gains are not includable in a taxpayer's gross income even though that case did apply an extra-statutory exclusion from gross income. *See Gotcher*, 401 F.2d at 123–24.

103. 26 U.S.C. § 132(a)(4), (e)(1) (2012).

104. *Id.* That Code provision is specifically directed at benefits provided to employees, but a Treasury Regulation issued under that section extends the term "employee" to include all recipients of such a benefit. 26 C.F.R. § 1.132–1(b)(4) (as amended in 1993).

105. 26 U.S.C. § 132(e)(1); 26 C.F.R. § 1.132–6 (as amended in 1992).

106. 26 C.F.R. § 1.132–6.

room) or (2) in an effort to induce the creation of a new business relationship (as in the case of free samples at your local grocery store). Personal-data exchanges typically do not fall within either situation. The benefit received by a data provider is the entirety of the compensation that she receives for engaging in a business relationship with a data aggregator—it is not received as incident to an existing commercial relationship. Additionally, the "free" digital products of the Internet are often not provided to induce a future purchase of that very product.[107] Facebook does not give a free month of access to its social-media site in order for it to sell a year's worth of access. It provides ongoing access as part of a continuous data exchange.

We must also recognize that looking at each individual instance of a personal-data barter fails to account for the aggregate value of the digital products received by taxpayers over the course of a year. Treasury Regulations explaining the *de minimis* rule give examples like "occasional cocktail parties" or "coffee, doughnuts, and soft drinks."[108] Digital products that are continuously available are different. First, they are not an occasional splurge; they represent a significant aspect of the economy and how we spend our free time. Again, economists have estimated that the free services of the Internet create over $100 billion of consumer surplus in the United States each year.[109] The issue is not that personal-data transactions have no or *de minimis* value; it is that the value is spread among many micro-transactions.[110] That makes administering a tax on those transactions very difficult, but it does not change the fact that those transactions do generate value for data providers.[111]

---

107. This is different for businesses that offer free applications as an incentive for users to purchase in-app upgrades or improvements. That business model is labeled as the "freemium" model. *See* Vineet Kumar, *Making "Freemium" Work*, HARV. BUS. REV., May 2014, at 27–29, https://hbr.org/2014/05/making-freemium-work (explaining the "freemium" business model). The game "Clash of Clans" is an incredible example of this business model. The game can be downloaded for free, but players can purchase in-game upgrades. That approach has been wildly successful as the game generated $1.8 billion of revenue in 2014. Stuart Dredge, *Clash of Clans Heads 2014's Billion-Dollar Mobile Games – Open Thread*, GUARDIAN (Dec. 9, 2014, 2:30 PM), http://www.theguardian.com/technology/2014/dec/09/clash-of-clans-billion-dollar-mobile-games. How the Tax Code should apply to the provision and receipt of these freemium services is certainly worth considering, but cannot be undertaken within the confines of this Article.

108. 26 C.F.R. § 1.132–6.

109. Brynjolfsson & Oh, *supra* note 82, at 3. Others have valued a single Gmail account at over $3500 and have estimated that its value grows by over $1000 each year. Jay Garmon, *What is My Gmail Account Actually Worth?*, BOSTINNO (July 25, 2012, 4:56 PM), http://bostinno.streetwise.co/channels/what-is-my-gmail-account-actually-worth/. The valuation method used was based upon the time that it would take for a person to recreate the data in one account and uses U.S. Department of Labor statistics on the average annual salary in the United States. *Id.* That method is obviously questionable because much of an e-mail account is data that is of no value to a person. In that vein, it is worth noting that the company providing this estimate is in the business of selling data-backup services. Nonetheless, the time that we spend using digital products does evidence how important and, hence, how valuable they are to us.

110. Thanks to Shu-Yi Oei for this observation.

111. There is, admittedly, some tension between this analysis and how *de minimis* fringe benefits are often defined in practice. Continuously available coffee or tea in an office breakroom certainly shares many of these same characteristics. They are provided in a number of micro transactions

This issue is central to broader discussions regarding how technology has changed the generation of income in the modern economy. Technology allows individuals to sell slivers of their time or their assets to various parties rather than simply working for one employer or dedicating their assets solely to business use. They can drive for Uber at night or on the weekends. They can use Airbnb to rent out their homes when they are traveling. The result is that income is generated in smaller sums and in greater numbers of transactions than when one has a single source of compensation. The value of those transactions might be insignificant alone, but meaningful in the aggregate. This does not mean, however, that we exempt the income from each transaction as *de minimis*. Rather, we tax their aggregate value.[112]

None of this analysis is meant to suggest that personal-data transactions should be taxed like income from the sharing economy. Rather, the point of discussing these issues is to recognize that we cannot simply raise our hands in defeat as income generation becomes fragmented or fails to be mediated by large players. We cannot allow technology to erode our tax bases by default in this way. It is thus no answer to say that we can do nothing because personal-data gains are *de minimis*. Those gains still constitute income in the broadest sense, and we must consider their impact on our tax system.

This point applies equally to the application of a more flexible conception of income under the Code. The analysis provided to this point has assumed that Code § 61 extends to all economic income, as suggested by the *Glenshaw Glass* formulation.[113] Some argue, however, that Code § 61 does not extend to all income despite the broad language used by the Supreme Court in that case. Professors Alice Abreu and Richard Greenstein, for example, have argued that the concept of "income" under Code § 61 is more malleable and subject to societal influences.[114] They point to the failure of the Internal Revenue Service (the IRS) to tax the receipt of child support payments, free samples, and record-breaking home run balls as evidence that the definition of "income" is a standard

---

and their collective value might be quite high at the end of the year. Perhaps, then, personal-data gains are not so different than existing *de minimis* fringe benefits. That observation is apt, but is not necessarily problematic for the preceding analysis. First, scholars recognize that the concept of tax-free fringe benefits has expanded in recent years and may need to be reconsidered. *See* Jay A. Soled & Kathleen DeLaney Thomas, *Revisiting the Taxation of Fringe Benefits*, 91 WASH. L. REV. 761, 764–65 (2016) (discussing the expansion of employer-provided fringe benefits in recent years). Second, personal-data gains are different from free cups of coffee for other reasons. Again, the typical cup of coffee is provided incident to an existing commercial relationship, as noted above. Further, tracking personal-data gains may be much more practicable than tracking how many cups of tea an employee drinks. The very nature of the digital economy means that the required information is being collected and stored in some fashion. *But see infra* Section II.C.4 (discussing the potential challenges created by the ability of Internet users to hide their true identity).

112. This is achieved, practically, through the imposition of information-reporting mechanisms. Shu-Yi Oei & Diane M. Ring, *Can Sharing Be Taxed?*, 93 WASH. U. L. REV. 989 (2016).

113. Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 431 (1955).

114. Abreu & Greenstein, *Defining Income*, *supra* note 92, at 339–48.

that is much different than the broad rule suggested by *Glenshaw Glass*.[115] They conclude instead that noneconomic values impact the definition of income.[116] Under their theory, the IRS must consider equity, efficiency, and administrability in determining what benefits constitute income under the Code.[117]

One could easily conclude that the receipt of "free" digital products in today's society does not generate income under this standard-based conception. The theoretical income that results from accessing those products would seem to be income that the federal government would have difficulty taxing without creating a "firestorm of controversy" much like the theoretical income realized when one catches a record-breaking home run ball.[118] More specifically, we might reasonably conclude that the benefits being received by individuals are not taxable transactions given concerns of equity, efficiency, and administrability. Indeed, those concerns are discussed below in this Article's analysis of why individuals' gains from personal-data transactions ultimately will not be subject to tax.[119] It may very well be, then, that personal-data gains will not be included in taxpayers' gross incomes, even though they constitute income in an economic sense. It is imperative to recognize, though, that excluding them from income under that theory is excluding them due to practical concessions and not because they are not accessions to wealth. That is a critical distinction for purposes of this Article and will be discussed in much greater detail below.

In the end, personal-data transactions appear to plainly result in economic income to individual taxpayers because the benefits received by taxpayers in those transactions are accessions to wealth in a broad sense. Those transactions would therefore be taxable if Code § 61 is as broad as *Glenshaw Glass* suggests.[120] If, however, Code § 61 provides a more flexible standard, it might be that those transactions would not result in income that is taxable, but they would generate income nonetheless.

---

115. *Id.* at 298–99, 344.

116. *Id.* at 346.

117. *Id.* at 345; *see also* Adam S. Chodorow, *Ability to Pay and the Taxation of Virtual Income*, 75 TENN. L. REV. 695, 736–41 (2008) (discussing the ability to pay as a pragmatic limitation on the economic income that should be subject to federal income tax); Leandra Lederman, *"Stranger than Fiction": Taxing Virtual Worlds*, 82 N.Y.U. L. REV. 1620, 1658–70 (2007) (applying similar considerations to the question of whether income from activities in "virtual worlds" like Second Life should be taxable).

118. Abreu & Greenstein, *Defining Income*, *supra* note 92, at 342.

119. *See infra* Section II.C. The lack of a fair market value, or the incredibly small value, for the benefits received in personal-data barters might be enough for some to conclude that they do not result in gross income under the Code. *See* Bryan T. Camp, *The Play's the Thing: A Theory of Taxing Virtual Worlds*, 59 HASTINGS L.J. 1, 25–28 (2007).

120. *See* Comm'r v. Glenshaw Glass Co., 348 U.S. 426, 429–31 (1955) (concluding that the term "income" includes all "accessions to wealth, clearly realized, and over which the taxpayers have complete dominion").

b. Income Tax, Data Aggregators, and the Market-Exchange Model

Just as the market-exchange model has tax consequences for individual taxpayers, it has tax consequences for data aggregators as well. As described above, application of that model suggests that data aggregators should be viewed as engaging in taxable barter exchanges through which they sell access to their digital products in exchange for consumer data. Theoretically, they would report income on the sale of that access and take a tax-cost basis in the data that they acquire.[121] Those conclusions follow naturally from established law and do not seem quite as troubling as the conclusion that individual consumers should be taxed on their personal-data gains. Data aggregators are, after all, engaged in intentional commercial behavior.

The more difficult question that arises with respect to the data aggregators' income is *where* it should be reported. Data aggregators will most often operate in multiple jurisdictions, which means that they will be subject to various rules dictating how to divide their income among those jurisdictions.[122] Those rules effectively apportion taxing power based on how that income is characterized. For example, the Code provides that income derived from the performance of services is sourced to the place where the services are performed, while the sourcing of income

---

121. A taxpayer's basis in an asset is generally his "cost" for that asset. 26 U.S.C. § 1012 (2012). When taxpayers obtain an asset in a taxable transaction, the taxpayers obtain a tax-cost basis equal to the amount included in their income even though they do not necessarily pay a cash price for that asset. *See* 26 C.F.R. § 1.61–2 (as amended in 2003) (providing that a taxpayer has a basis in property acquired in exchange for the performance of services equal to the fair market value of the property received); 26 C.F.R. § 1.83–1(e) (as amended in 2003) (recognizing that taxpayers obtain basis in an asset when they pay tax on the receipt of that asset); 26 C.F.R. § 1.83–2(a) (as amended in 2016).

122. The mechanics by which income is divided among jurisdictions go well beyond what is needed in this Article, but some basic information will assist one who is new to international or multistate taxation. To begin, the Tax Code generally taxes U.S. citizens and residents on their worldwide income. *See* 26 U.S.C. §§ 1, 61 (2012); *see also* JOEL D. KUNTZ & ROBERT J. PERONI, U.S. INTERNATIONAL TAXATION ¶ B1.03 (25th ed. 2016). They are allowed foreign tax credits, however, for foreign taxes that they pay on their foreign-source income. 26 U.S.C. § 904 (2012); KUNTZ & PERONI, *supra* ¶ B4.01. The result of those rules is that the U.S. essentially cedes taxing power over that income to the foreign jurisdiction. When the taxpayer is not a U.S. citizen or resident, the U.S. only taxes the taxpayer's U.S.-source income or income that is effectively connected with a U.S. trade or business. KUNTZ & PERONI, *supra* ¶ C1.02[1]. These rules are often modified by tax treaties that provide rules particular to residents of the contracting countries. *Id.* ¶ C4.01[1]. Regardless, the function of the source rules is to effectively divide taxing power over a taxpayer's income among the jurisdictions involved.

In contrast to this method of dividing taxing power at the national level, U.S. state corporate income taxes generally divide a taxpayer's income by the use of an apportionment method. Under that system, income is not generally attributed to a particular jurisdiction and taxed by that jurisdiction. 2 HELLERSTEIN & HELLERSTEIN, *supra* note 91, ¶¶ 8.01, 8.04. *But see id.* ¶ 8.04 (explaining that certain types of income are "allocated"). Rather, a business's income is apportioned among the states by looking at the mix of a taxpayer's property, payroll, and sales around the country. *Id.* ¶¶ 8.05, 8.15. The precise weight given to each particular factor differs by state and can sometimes be zero. The result is that 100% of a taxpayer's sales could be attributed to State A, but if 100% of its property and payroll are in State B, it could pay tax on only one-third of its income to State A.

from the sale of physical inventory depends on a number of factors, including whether the inventory was created or acquired.[123] U.S. states apportion income according to different rules as well, and states' rules are not consistent with one another. For example, different rules apply to the apportionment of income from services,[124] but states generally apportion income from inventory sales to the state where the property is delivered.[125]

That issue is of critical importance to our understanding of the taxation of data aggregators' gains from personal-data transactions. A typical personal-data transaction is one in which a consumer uses a cloud-based website in exchange for personal data.[126] The data aggregator in that situation should be viewed as selling access to its software for data. The resulting income would therefore be taxed in accordance with where income from the sale of that type of access is sourced. The problem, however, is that the proper tax classification of income from the sale of access to cloud-computing services is unclear under international and state tax laws. Scholars recognize that such income could be treated as being derived from the sale of a service, a sale of a product, a lease, a license, or some mixture thereof.[127] That issue has not yet been resolved, so we cannot be sure where a data aggregator would source its income from a personal-data barter. Obviously, the resolution of that issue will impact

123. 26 U.S.C. §§ 861(a)(3), (a)(6), 862(a)(3), (a)(6), 863, 865 (2012); *see also* KUNTZ & PERONI, *supra* note 122, ¶ A2.03 (discussing the sourcing rules that apply to different types of income).

124. COCKFIELD ET AL., *supra* note 65, at 411–23.

125. 2 HELLERSTEIN & HELLERSTEIN, *supra* note 91, ¶12.02.

126. This is often labeled as a transaction involving "software as a service," or "SaaS." PETER MELL & TIMOTHY GRANCE, NAT'L INST. OF STANDARDS & TECH., U.S. DEP'T OF COMMERCE, THE NIST DEFINITION OF CLOUD COMPUTING 2 (2011), http://nvlpubs.nist.gov/nistpubs/Legacy/SP/nistspecialpublication800-145.pdf.

127. *See* COCKFIELD ET AL., *supra* note 65, at 242–43, 300–02; OECD REPORT, *supra* note 66, at 104–05; Walter Hellerstein & John Sedon, *State Taxation of Cloud Computing*, J. TAX'N, July 2012, at 27–31; David J. Shakow, *The Taxation of Cloud Computing and Digital Content*, 140 TAX NOTES 333, 333–50 (2013). *See generally* Orly Mazur, *Taxing the Cloud*, 103 CALIF. L. REV. 1 (2015). The question of how the tax rules should characterize and source income from the sale of digital products is important, but beyond the scope of this Article. It is worth mentioning, however, that income from personal-data transactions differs from the income from other sales of cloud computing or software as a service transaction in many ways. For example, in the cash market, consumers generally purchase access to a digital product for some set period of time, and the price is fixed for that period. In a personal-data transaction, however, the transaction is ongoing, and the purchase price rises with each use. Professor Mazur has recently reasoned that characterizing the sale of access to online software as services income may be appropriate, in part, because of the retailer's ongoing responsibility to maintain its software and its concomitant shouldering of the risk of software failure. *See* Mazur, *supra* at 24–25. Part of the access fee thus looks like an upfront payment for technical services to keep the website or software operations. That component is not generally a part of the usual personal-data transaction, however, because users do not prepay for future use. Individuals generally have no ongoing right of use, and they pay with new data each time they use a digital product. This is important not because it suggests that personal-data transactions should not result in services income to the data aggregator, but to highlight that the analysis of how to source that income might be different when we discuss transactions involving data rather than cash. The market transactions are not the same.

how those barters are taxed, and that consequence should be kept in mind as those analyses move forward.

2. Personal-Data Transactions and the State Sales Tax

Income taxes are obviously of great importance in the United States, but sales taxes also play a critical role in most states' finances. It is thus worth briefly considering whether personal-data transactions are theoretically subject to those taxes. To start, state laws are generally drafted broadly enough to apply to sales of taxable products for consideration of any kind, so barter transactions are taxable if the items being swapped are taxable.[128] The question therefore becomes whether personal data or digital products are taxable when sold. Those are more difficult questions.[129] Sales of data and digital products have historically not been in the tax base because state sales taxes were adopted in the 1930s[130] and thus applied primarily to the sale of tangible personal property and to some services.[131] Obviously, though, the rise of the Internet and digital commerce have caused sales of digital products and services to displace sales of tangible goods, and states have struggled with whether and how to reform their taxes in response.[132]

To date, sales of data have escaped legislative attention, but many states have now extended their consumption taxes to include digital versions of goods that would be taxable if sold in physical form.[133] That has generally included digital books, music, and video games.[134] Some apply very technical rules to digital software transactions generally.[135] A few states have more recently considered expanding those taxes to specifically cover cloud-computing transactions more broadly.[136] In 2015, for ex-

128. 2 HELLERSTEIN & HELLERSTEIN, *supra* note 91, ¶ 19A.04[2][c]–[d].

129. *See* COCKFIELD ET AL., *supra* note 65, at 411–21, 423 (broadly discussing the issues involved when determining whether and where cloud computing services are subject to state sales tax).

130. 2 HELLERSTEIN & HELLERSTEIN, *supra* note 91, ¶ 12.02.

131. *Id.* ¶ 12.04[1].

132. *Id.* ¶ 13.06[1]. *See generally* Martin Eisenstein & Michael Carey, *Transaction Taxes on Information Technologies: The Threat*, 74 ST. TAX NOTES 689 (2014).

133. *See, e.g.*, ARK. CODE ANN. § 26-52-301(3)(C)(iii)(a) (2016); KY. REV. STAT. ANN. § 139.200(1)(b) (West 2016); MISS. CODE ANN. § 27-65-26 (2016); NEB. REV. STAT. § 77-2701.16(9) (2016); N.J. STAT. ANN. § 54:32B-3(a) (West 2014) (amended 2016); TENN. CODE ANN. § 67-6-233(a) (2015); WIS. STAT. § 77.52(1)(d) (2015); WYO. STAT. ANN. § 39-15-103(a)(i)(P) (2016); *see also* 2 HELLERSTEIN & HELLERSTEIN, *supra* note 91, ¶¶ 13.06[1], 19A.04[2][c][vii] (discussing the application of sales tax to digital products under states' laws and under the Streamlined Sales and Use Tax Agreement).

134. *See, e.g.*, ARK. CODE ANN. § 26-52-301(3)(C)(iii); KY. REV. STAT. ANN. §§ 139.010(9), 139.200(1)(b) (West 2016); MISS. CODE ANN. § 27-65-26(3)(a); NEB. REV. STAT. § 77-2701.16(9); N.J. STAT. ANN. §§ 54:32B-2(zz), 54:32B-3(a) (West 2014) (amended 2016); TENN. CODE ANN. § 67-6-233(a)–(b); WIS. STAT. § 77.51(1a), (3p)–(3pc), (17x) (2016); WYO. STAT. ANN. §§ 39-15-101(a)(xliii), 39-15-103(a)(i)(P) (2016).

135. *See, e.g.*, statutes cited *supra* note 134.

136. Arthur R. Rosen & Hayes R. Holderness, *Cloud Computing: An Update*, 77 ST. TAX NOTES 355 *passim* (2015); Mark Peters & Greg Bensinger, *States Eye Taxes on Streaming Video and Cloud Computing*, WALL STREET J. (Aug. 20, 2015, 3:13 PM), http://www.wsj.com/articles/states-eye-taxes-on-streaming-video-and-cloud-computing-

ample, the City of Chicago extended its personal property lease transaction tax to certain cloud-based services through an administrative ruling by the city's Department of Finance.[137] It also extended its transaction tax on "amusements" to digital services like Netflix.[138] Tennessee has extended its sales-tax statutes to apply specifically to remotely accessed software.[139] The Washington Business & Occupations Tax—a gross receipts tax—applies similarly.[140] Other states have acted to the contrary and completely exempt cloud-based software from their sales taxes.[141]

The debates about whether and how to tax these transactions are ongoing and multifaceted.[142] We can be sure, however, that attention to this issue will only grow as the economy shifts further into the cloud. Once states *do* extend their sales taxes to those digital products, the question will be whether and how to tax that access when it is provided in exchange for data rather than for cash. Again, bartering for a taxable good or service does not eliminate the state sales tax, so personal-data transactions would be taxable unless some other statutory exclusion applied.[143]

1440095146; Jeff John Roberts, *The Taxman Comes for Cloud Companies like Netflix, and Confusion Reigns*, FORTUNE (Sept. 8, 2015, 8:33 AM), http://fortune.com/2015/09/08/cloud-computing-tax/. Most states' laws have not specifically addressed cloud computing, but some states do exclude cloud-computing transactions from their tax base, whether by statute, regulation, or administrative guidance. *See* 2 HELLERSTEIN & HELLERSTEIN, *supra* note 91, ¶ 13.06A[2] (comprehensively analyzing the application of state sales taxes to cloud-computing transactions).

137. CITY OF CHI., DEP'T OF FIN., PERSONAL PROPERTY LEASE TRANSACTION TAX RULING NO. 12 (2015), http://www.cityofchicago.org/content/dam/city/depts/rev/supp_info/TaxRulingsandRegulations/LeaseTaxRuling12-06092015.pdf. The City has delayed implementation of that tax. *See generally* David Sawyer, *Chicago Delays Lease Tax Implementation for Cloud Computing*, 77 ST. TAX NOTES 596 (2015).

138. CITY OF CHI., DEP'T OF FIN., AMUSEMENT TAX RULING NO. 5 (2015), http://www.cityofchicago.org/content/dam/city/depts/rev/supp_info/TaxRulingsandRegulations/AmusementTaxRuling5-06092015.pdf.

139. TENN. CODE ANN. § 67-6-231(a) (2016).

140. WASH. REV. CODE § 82.04.050(6)(c)(i) (2016); WASH. ADMIN. CODE § 458-20-15503(203)(a) (2016).

141. This has occurred through statute, regulation, or other administrative guidance. *See, e.g.*, COLO. REV. STAT. § 39-26-102(15)(c)(I)(C) (2016); IDAHO CODE § 63-3616(b) (2016); MO. CODE REGS. ANN. tit. 12, § 10-109.050(3)(I) (2016); NEB. DEP'T OF REVENUE, NEBRASKA SALES AND USE TAX GUIDE FOR COMPUTER SOFTWARE 3 (2011), http://www.revenue.nebraska.gov/info/6-511.pdf; WYO. DEP'T OF REVENUE, COMPUTER SALES AND SERVICES (2014), http://revenue.wyo.gov/ComputerSalesandServices.pdf.

142. *See generally* Paul Jones, *Online Services Tax Trend Raises Concerns*, 77 ST. TAX NOTES 916 (2015).

143. Including personal-data barters in the tax base does not mean, of course, that taxing them would be easy. Issues of valuation, identification, and enforcement would be prominent. *See infra* Section II.C. Determining how states would tax multijurisdictional consumption of digital products would similarly be an issue. *See* COCKFIELD ET AL., *supra* note 65, at 298–99 (providing examples that illustrate the difficulty of imposing a consumption tax on the cross-border consumption of digital goods). Collecting the tax would also be significantly impacted by the constitutional limitations imposed on state taxing power under the Dormant Commerce Clause. The Supreme Court has long held that states do not have the power to compel vendors to collect their sales taxes unless the vendors have a physical presence within their boundaries. *See* Quill Corp. v. North Dakota, 504 U.S. 298, 309–19 (1992) (discussing the Court's nexus standard under the Dormant Commerce Clause). This has given rise to the issues related to the collection of sales tax on sales completed on the Inter-

3. Summary

The preceding analyses established that personal-data transactions generate tax consequences for individual consumers and for data aggregators, at least at a theoretical level. Whether they will generate *actual* tax consequences depends on several other factors, and that issue is discussed further below. Notwithstanding that analysis, the theoretical account of personal-data taxation that has been presented herein is important for many reasons. First, as discussed above with respect to the taxation of individual data providers, the structure of the data market provides a nice glimpse into the broader pressures that the modern economy is placing on our traditional tax instruments. Just as the sharing economy and the decentralization of income generation have placed pressure on tax reporting, the ability of individuals to consume leisure goods by selling slivers of their data or time puts structural pressure on our income tax. As an offshoot of that idea, personal-data transactions represent a further blurring of the line between business and personal activities, which is a critical distinction in our current Tax Code.[144] Finally, personal-data transactions provide companies with an immense opportunity to shift their tax burdens among jurisdictions or to avoid tax all together. To the extent that the sale of digital products is not taxed until the acquired data are monetized, companies have a greater ability to determine their own tax obligations by intentionally planning where and how that monetization occurs. These consequences are explored more fully in Part III.

C. Practical Impediments to Taxing Personal-Data Transfers

Notwithstanding the previous analysis, it is not particularly difficult to appreciate that personal-data transactions are unlikely be taxed, at

net. *See* David Gamage & Devin J. Heckman, *A Better Way Forward for State Taxation of E-Commerce*, 92 B.U. L. REV. 483, 484–86 (2012); Adam B. Thimmesch, *Testing the Models of Tax Compliance: The Use-Tax Experiment*, 2015 UTAH L. REV. 1107, 1107–10, 1114 (2015). Congress is currently evaluating legislation that would change that rule, but it continues to restrict state authority and the outlook for Congressional intervention is bleak. A data aggregator that sold access to its digital good in exchange for personal data might therefore be outside the reach of the state taxing authority even if the transaction were included in the tax base.

It is also important to note that current rules in the U.S. might place a burden on individual taxpayers to report and pay the tax of their own accord in this situation. Every state with a sales tax has a compensating use tax, which applies when the purchaser does not remit the required amount of tax to the vendor. Adam B. Thimmesch, *Taxing Honesty*, 118 W. VA. L. REV. 147, 151–60 (2015) (comprehensively discussing the state use tax). That can occur when a purchase was originally tax exempt, when the vendor fails to collect the tax as legally required, or when the Constitution protects the vendor from the state's authority to require the collection of that tax as discussed above. *Id.* at 155–57 (discussing the various situations in which use taxes apply). Individual consumers would thus have an obligation to pay use tax on the access of digital goods in exchange for their personal data if their state's laws were drafted broadly enough. Of course, few individuals know of or pay the use tax. *Id.* at 153–54 (discussing current data on use-tax compliance). Thus, it is fair to expect that virtually no one would pay a use tax on their personal-data transactions if those transactions were, indeed, subject to tax.

144. *Compare* 26 U.S.C. § 162 (2012) (providing a deduction for business expenses), *with* 26 U.S.C. § 262 (2012) (denying deductions for personal expenses).

least in their current form, in the United States. There are a host of practical impediments to taxing those transactions under the theoretical construct outlined above. Many of those impediments mirror the factors that make taxing the digital economy difficult more generally (e.g., sourcing, jurisdiction, administration, etc.). This Section, however, focuses on some of the major obstacles and policy considerations that apply specifically to implementing a tax on data transactions. Some of those apply equally to the imposition of tax on data aggregators and on data providers, while others apply more clearly only to the latter. In total, these include (1) seemingly insurmountable valuation problems; (2) the difficulties of line drawing; (3) the distribution of the resulting tax burden; (4) the anonymous Internet; and (5) the lack of political will. These factors collectively undermine the ability of a tax on personal-data transactions to meet the equity, efficiency, and administrability goals that are the hallmarks of tax-policy analyses.[145]

1. The Uncertain Value of Personal Data and the Digital Products That They Buy

Perhaps the biggest barrier to applying our existing tax instruments to personal-data transactions is the problem of how to value the personal data and the digital products being traded. One obvious requirement for the reporting of income is that the amount of income be determinable.[146] Reporting income based upon an objective "fair market value" is well engrained in our tax system.[147] That can be difficult in the barter context, however, because no cash is used.[148] The tax law generally resolves that problem by having taxpayers reference market transactions in the same goods or services. Thus, if a lawyer generally charges $250 an hour, a barter including an hour of her services would generate $250 of income.[149] This approach does not apply cleanly to personal-data barters, however, because there has often never been a cash market for the benefits traded on either side. There have never been real cash markets for personal data and no one has ever paid to Google something or to use Facebook or Instagram.[150]

---

145. Victor Fleischer, *A Theory of Taxing Sovereign Wealth*, 84 N.Y.U. L. REV. 440, 497–98 (2009) (labeling these three factors as "the traditional tax policy goals"); Lederman, *supra* note 117, at 1658 (noting that these three factors are "[t]he tax policy concerns usually considered in evaluating the appropriateness of a tax or provision"); Shu-Yi Oei, *Getting More by Asking Less: Justifying and Reforming Tax Law's Offer-in-Compromise Procedure*, 160 U. PA. L. REV. 1071, 1082 (2012) (identifying these factors as the "three traditional criteria of tax policy analysis").

146. *See* Camp, *supra* note 119, at 25 ("Taxpayers cannot report as 'gross income' an economic abstraction.").

147. *Id.*

148. *See* Keller, *supra* note 94, at 448–51, 454–55, 457 (discussing a variety of valuation theories in the barter context).

149. *Id.* at 443–44.

150. The lack of a cash price for such products has resulted in some confusion regarding the nature of the economic exchange outside of the tax area as well. For example, at least one court has determined that state consumer-protection laws do not apply to individuals engaged in personal-data

Valuing those products is also difficult because personal-data transactions are generally ongoing rather than static. Even though a consumer might get a similar benefit from Microsoft Word as she does from Google Docs, she purchases those products in very different types of transactions. A purchase of Microsoft Word involves an initial cash outlay that entitles her to access the software for some set period of time.[151] Google Docs, in contrast, is purchased on a pay-as-you-go basis. A user creates an account with an initial outlay of data, but need pay nothing more if she does not use the product. Each time she does use the product, though, she receives a greater benefit and compensates Google with more data. That dynamic makes it difficult for us to make direct comparisons between the value of old economy goods and their digital, bartered-for-data counterparts. The products may be similar, but the commercial transactions underlying their sale are not. It is thus difficult to take valuation guidance from transactions in the old economy.

One method that economists have used to value the "free" digital products of the Internet is to value consumers' access to those products by valuing the time that they spend using them.[152] That approach works well in getting a rough idea of the value that individuals place on those online products. It does not tell us, however, what Google or Facebook could charge in a cash market. Under the economists' approach, we view consumers as paying differential amounts based on the value of their time,[153] but cash markets do not operate in that way. Generally, a seller demands a fixed price, and people who demand the good at or above that price buy. The method used by economists measures the consumer surplus, not the market price.[154] The method also fails to recognize the different values that individuals might place on their time in different contexts. A person who makes $20 an hour at her job might use Facebook

transactions because they did not pay for the resulting service. *See* Hoofnagle & Whittington, *supra* note 4, at 658. This has led some to argue that companies like Facebook should have to declare a price for its product. *Id.* at 661–62. The zero-price construct also creates confusion for antitrust analyses. *See generally* Newman, *Zero-Price*, *supra* note 7, at 198–206.

151. Historically, that period of use would be perpetuity, but Microsoft now markets cloud-based access through which a consumer purchases the right to access the product for a more limited duration. For example, one can purchase a year's worth of access to Microsoft's Office 365 for seventy dollars a year. *Buy Office*, MICROSOFT.COM, https://products.office.com/en-us/buy/office (last visited Aug. 20, 2016).

152. *E.g.*, Brynjolfsson & Oh, *supra* note 82, at 2–6; Austan Goolsbee & Peter J. Klenow, *Valuing Consumer Products by the Time Spent Using Them*, 96 AM. ECON. REV. 108, 108 (2006); Jacques Bughin, *The Web's €100 Billion Surplus*, MCKINSEY Q. (Jan. 2011), http://www.mckinsey.com/insights/media_entertainment/the_webs_and_8364100_billion_surplus.

153. Brynjolfsson & Oh, *supra* note 82, at 5 (stating that their model assumes "that the opportunity cost of leisure is higher for high income people").

154. Consumer surplus is the aggregate value of the difference between what consumers are willing to pay for a product and the amount that the market demands. N. GREGORY MANKIW, PRINCIPLES OF MICROECONOMICS 135–41 (6th ed. 2012). The market price, in contrast, is based on the aggregate supply and demand curves in the relevant market. *Id.* at 77–78. A consumer might therefore value an item at $20, but the market overall might demand a price of only $15. In that situation, we would say that the product has a market value of $15, a subjective value of $20, and that a purchase of the product results in a consumer surplus of $5 for our one consumer.

for half of an hour to get a reprieve from work, but it is unlikely that she would pay $10 for that pleasure. She just needs a break. It is a matter of biology, not market preference. Determining a value under this method therefore might be informative of the massive importance of the digital products that are provided in today's economy, but it does not help establish market values for those products for tax purposes. Placing a market value on the "free" digital products of the Internet is thus very difficult.

It is equally difficult to value the personal-data involved in those exchanges. To start, each individual datum is largely worthless to an aggregator. It is the network effects that result in significant gains to the aggregator when enough data are collected.[155] Further complicating matters is the fact that the ultimate value of personal data to an aggregator includes the value generated by that aggregator through the use of its algorithms or other data-management tools.[156] The monetized value of those data is not the value of the raw data, and isolating the value of the raw data may be impossible. Indeed, none of the economists interviewed in connection with the French Report were able to provide a method for determining that value.[157] An OECD report issued in 2013 explored the variety of available methods for valuing personal data but noted significant differences and potential difficulties with each.[158] Ultimately, the report looked to new developments that would create market-based estimates of data's value.[159] Amusingly, the report noted that "[b]etter data is needed to understand the economic value of personal data."[160]

Valuing data barters is also difficult because of the non-rivalrous nature of the data involved.[161] Data can be replicated infinitely without any loss to the original source. That factor makes it impossible to apply our traditional valuation metrics. Again, to value barter exchanges, we generally look at the price at which the bartered goods or services are traded in the cash market. An asset that sells for $50 is bartered for $50 worth of goods or services. A person would not barter that asset for $15 worth of services and deprive herself of the other $35 of value. With personal data, however, she may have no qualms providing her $50 of data for a benefit worth $35. She can simultaneously sell her data to another buyer to generate more benefit. This makes it impossible to deter-

155. *See* OECD REPORT, *supra* note 66, at 101 (discussing the importance of network effects in the digital economy).

156. Solove, *Digital Dossiers*, *supra* note 8, at 1113.

157. FRENCH REPORT, *supra* note 37, at 117.

158. ORG. FOR ECON. CO-OPERATION & DEV., EXPLORING THE ECONOMICS OF PERSONAL DATA: A SURVEY OF METHODOLOGIES FOR MEASURING MONETARY VALUE 4 (2013) [hereinafter OECD 2013 REPORT], http://www.oecd-ilibrary.org/science-and-technology/exploring-the-economics-of-personal-data_5k486qtxldmq-en; *see also* Jeff Lawton, *Can You Quantify the Value of Your Data?*, COST MGMT., Mar.–Apr. 2015, 2015 WL 3456813.

159. OECD 2013 REPORT, *supra* note 158, at 33.

160. *Id.* at 5.

161. *But see* Purtova, *supra* note 87, at 99–109 (arguing that data are rivalrous based on the current data market).

mine *the* value for personal data, and to apply the traditional approach to valuing barter exchanges. Data do not have a singular value.

Overall, the valuation issues with respect to personal-data transactions seem to effectively preclude their taxation, at least on an individual-transaction basis. Unless and until a market price develops for personal data or for the digital products that are the tools of data collection, it may be impossible to set their value. That means that we will likely be unable to apply our traditional tax instruments directly to those exchanges despite their theoretical inclusion in the tax base.[162]

2. The Expansive Scope of Data Transactions

Taxing personal-data transactions would also be difficult due to the challenges of defining the transactions to which such a tax applied. The mind can run wild once one starts thinking about taxing data transactions and in-kind benefits. Two academics discussing their papers at a conference are engaged in a data barter. So are two parents exchanging ideas about which children's shoes are the most durable. Are those taxable exchanges of data? What about a person who watches television? Does he have a taxable accession to wealth?[163]

This is clearly a problem if one seeks absolute academic tidiness. As a practical matter, we will never tax two individuals who share tips on how to best mow their lawns or how to cook a favorite dish, so how can we ever tax an individual who shares that same information in exchange for access to a web forum? Realistically, however, we draw lines all of the time in tax law.[164] An underinclusive rule is better than a woefully underinclusive rule or no rule at all. We might thus say that sharing ideas at a conference is as much of a taxable transaction, theoretically, as using Google Docs, but we might feel that it is okay to tax the latter and not the former.

As a concept, then, drawing lines is fine. The difficulty is drawing lines that actually capture the transactions that we want to tax (presuma-

---

162. It is worth recognizing that existing law already accounts for situations where directly valuing the barter exchange is impossible. Keller, *supra* note 94, at 495 (discussing the application of the open-transaction doctrine to this situation). In that situation, the taxation is delayed until a barter participant monetizes the asset that was obtained. *Id.* Our current tax rules applicable to data aggregators effectively provide this result. They are taxed when they monetize the data by selling more products, selling advertising, or by generating gain in some other way. The open-transaction doctrine does not apply so well to data providers, however, because they do not monetize the digital products that they receive in the barter exchange. They consume them.

163. Many jurisdictions across the globe do impose taxes based on the receipt of public television. Kimberly Massey, *License Fee*, *in* ENCYCLOPEDIA OF TELEVISION 1358–59 (Horace Newcomb ed., 2d ed. 2004); Tim Masters, *How is TV Funded Around the World?*, BBC NEWS (Mar. 31, 2014), http://www.bbc.com/news/entertainment-arts-26546570. Those taxes are nominally a payment in exchange for the television programming, but they function the same as a tax on the benefit that the television provides.

164. *See generally* David A. Weisbach, *Line Drawing, Doctrine, and Efficiency in the Tax Law*, 84 CORNELL L. REV. 1627, 1632 (1999).

bly transactions with large data aggregators) while leaving the others untouched (perhaps personal exchanges of information). For example, we could limit a personal-data tax to transactions (1) that involve digital transfers of data and (2) that are commercial in nature. Under that type of standard, a transfer of data for access to Facebook would be taxable whereas the transfer of knowledge by two doctors having lunch would not be taxable. What if, however, the doctors e-mailed to share information about their recent results with a particular treatment method? That would suddenly be taxable as an electronic transfer of information in exchange for a commercial benefit. Limiting our view to digital transfers of business information may therefore not be limited enough.

A more restrained approach might be to exclude data-for-data transfers and only capture transfers of data for other benefits, like access to digital products. The Code already defers the recognition of gain on certain transfers of "like kind" assets.[165] We could extend that statutory exclusion to include all personal-data exchanges that involve data on both sides. That would work to exclude our doctors from taxation, but again the devil is in the details. Could Facebook argue that it is merely providing data to its users? What about CNN.com? A data-for-data exemption might exempt too much.

None of this analysis is intended to indicate that lines could not be drawn. However, the task would be difficult and the "safest" lines to draw would be the most tightly drawn and thus potentially underinclusive. If we were to travel down this road, significant work would need to be done to properly determine the personal-data transactions that were subject to tax and how to define them. That task could prove immensely difficult in practice.

3. The Impact of a Tax on Data Providers

The valuation and line-drawing issues discussed above will likely prevent the direct taxation of either side involved in the personal-data barter. It is worth recognizing, however, that the imposition of tax on individuals' personal-data gains would be particularly problematic because such a tax would likely be (1) one that disproportionately impacts lower-income taxpayers and (2) inefficient from an economic perspective.

To start, a tax on individuals' personal-data gains would likely impact lower-income taxpayers to a greater degree than higher-income tax-

165. 26 U.S.C. § 1031(a)(1) (2012). That section applies to particular assets and they must be held for investment of business purposes. *Id.* Section 1031 would therefore not apply on its terms to the personal-data barters discussed in this Article. It is the concept, however, that could be extended to those transactions.

payers because, as adjusted for access,[166] they use the Internet more for leisure purposes.[167] To the extent that their leisure time is spent using the "free" digital products received in personal-data barters, a personal-data tax would thus likely impact them to a greater degree.[168] Their leisure time would be taxable whereas the leisure time of wealthier individuals would not be taxed.[169] The result is a tax that would be regressive, at least among taxpayers with access to the Internet.[170]

It seems fair to expect that the use of digital products would decline dramatically in the face of such a tax. The appeal of wishing a friend "Happy Birthday" on Facebook would be significantly reduced if it were accompanied with a tax bill. This would be especially true for users who have little disposable income. The result would be that higher-income individuals would continue to enjoy those products at a greater clip than our lower-income individuals.[171]

This impact might suggest that a tax on personal data would be largely inefficient as a reverse Ramsey tax.[172] The demand for the "free" digital products of the Internet is likely incredibly elastic, especially

166. Our very lowest-income citizens may not have any access to Internet beyond that provided at public libraries. Usage among that population would naturally be low, but any existing usage would likely be directed primarily to free digital products.

167. Scott Wallsten, *What Are We Not Doing When We're Online?*, *in* ECONOMIC ANALYSIS OF THE DIGITAL ECONOMY 68–70 (Avi Goldfarb et al. eds., 2015); Avi Goldfarb & Jeff Prince, *Internet Adoption and Usage Patterns Are Different: Implications for the Digital Divide*, INFO. ECON. & POL'Y, Mar. 2008, at 2, 14; Austan Goolsbee & Peter J. Klenow, *supra* note 152, at 110–11.

168. Of course, the actual impact of a tax on data barters would likely be nonexistent for taxpayers with very low income levels due to the presence of the standard deduction and personal exemptions. 26 U.S.C. §§ 63(b), 151(a)–(c) (2012).

169. In this way, a tax on data would be a close approximation to taxing the imputed leisure income of low-income taxpayers, but leave high-income taxpayers without a tax on the imputed value of their leisure time. *See* SIMONS, *supra* note 98, at 52–53 (discussing the imputation of income from individuals' leisure time). The vertical inequity of that result is clear.

170. The actual regressivity of a personal-data tax would depend on the current levels of Internet access among income groups, the use of the "free" digital goods that would generate that tax, and how many of the impacted individuals were subject to the tax. An empirical assessment of those factors is well beyond the conceptual goals of this Article.

171. This impact actually highlights one benefit of the current personal-data market—it is largely egalitarian. Individuals of every income level generally have the same purchasing power in that market. A high-income individual obtains the same access to Google as a low-income individual. They similarly obtain the same access to Facebook and to Instagram. If we taxed those benefits, however, they might be taken out of the reach of low-income individuals. The tax cost of those products would likely have a disproportionate impact on our poorest citizens.

172. A Ramsey tax is a tax directed at goods or services that have the lowest elasticities of demand. The goal of such a tax is to reduce the distortions that taxes create in the market. *See* Joseph Bankman & David A. Weisbach, *The Superiority of an Ideal Consumption Tax over an Ideal Income Tax*, 58 STAN. L. REV. 1413, 1420 n.10 (2006) ("Under Ramsey taxation, we should levy a tax on goods with low elasticity of demand because the quantities consumed are likely to change less when subject to taxation as compared to goods with high elasticities . . . ."); Terrance O'Reilly, *Principles of Efficient Tax Law: Apocrypha*, 27 VA. TAX REV. 583, 593–94 (2008) (discussing the inverse elasticity rule); *see also* F. P. Ramsey, *A Contribution to the Theory of Taxation*, 37 ECON. J. 47, 47 (1927) (analyzing how to design taxes so as to minimize utility losses). A reverse Ramsey tax would thus be a tax on items with very high elasticities of demand and would maximize market distortions.

among less-affluent citizens. We can thus fairly question whether such a tax would serve any role at all.[173]

4. The Anonymous Internet

Another practical impediment to taxing individuals on their personal-data gains is the fact that the Internet operates largely anonymously.[174] Some websites do require individuals to provide their identity in exchange for services, and users can intentionally give up their anonymity to access those sites. Users can falsify that information, though, so we may not be certain that their identities are truly known. Further, it seems that it is more often the case that individuals can access digital products without disclosing their identities at all. Many websites do not require a customer account, and those that do often allow the use of pseudonyms.

Of course, one basic principal underlying this Article is that data aggregators are able to identify individuals and obtain highly detailed information based only on their online activities even without the users' knowledge or consent.[175] Websites can track users through their IP addresses, for example, and combine that information with other known information to identify the particular user.[176] For the majority of users, then, there may be no true anonymity in a general sense. Knowing an individual user's identity for marketing purposes, though, is not the same as knowing that identity for tax purposes. Google might know that your IP address is being used to conduct a web search, but it does not neces-

---

173. The efficiency analysis in this paragraph does not even touch on the incredibly high administrative costs that would be involved with a tax on personal-data gains. Taxpayer compliance with such a tax would hinge on the existence of a third-party reporting structure for those transactions. *See* Leandra Lederman, *Reducing Information Gaps to Reduce the Tax Gap: When Is Information Reporting Warranted?*, 78 FORDHAM L. REV. 1733, 1737–41 (2010) (discussing the importance of third-party information reporting for tax compliance and when its costs are warranted); *see also* Leandra Lederman, *Statutory Speed Bumps: The Roles Third Parties Play in Tax Compliance*, 60 STAN. L. REV. 695, 697–98 (2007). *See generally* Susan C. Morse, *Tax Compliance and Norm Formation Under High-Penalty Regimes*, 44 CONN. L. REV. 675, 679 (2012). The compliance rate for income that is not subject to third-party withholding or information reporting is estimated to be less than fifty percent. Theodore Black et al., Federal Tax Compliance Research: Tax Year 2006 Tax Gap Estimation 1, 3 (Mar. 2012) (Internal Revenue Serv., Research, Analysis, and Statistics Working Paper), http://www.irs.gov/pub/irs-soi/06rastg12workppr.pdf (reporting an estimated voluntary compliance rate of forty-four percent for income that is not subject to information reporting or withholding). That would likely involve either the data aggregator or potentially the data provider's Internet Service Provider. Either would have difficulty both valuing the personal-data transactions and identifying the person to whom the information report should be directed. *See supra* Section II.C.1 (discussing the valuation difficulties with taxing personal-data transactions); *see also infra* Section II.C.4 (discussing the difficulties of the anonymous internet). The sheer volume of the personal-data transactions that occurs would also create extreme administrative difficulties. In the end, then, the administrative costs of imposing a tax directly on personal-data transactions would counsel against the adoption of such a tax unless technological advances significantly reduced these concerns.

174. *See* COCKFIELD ET AL., *supra* note 65, at 31–32 (discussing the challenges that online anonymity presents for tax compliance in the digital economy).

175. *See supra* Section I.A (discussing observed and inferred data).

176. As noted above, Google touts its ability to identify individual users without having to ask for identifying information. *See* MCDONALD, MOHEBBI & SLATKIN, *supra* note 22, at 3.

sarily know that it was a visitor in your home who entered the inquiry. Users can also make their IP addresses virtually meaningless for identification purposes through the use of technological tools like proxy servers or by using services like Tor.[177] Data aggregators (assisted by government) could perhaps get through those tools of obfuscation in many cases,[178] but the process would likely be too costly to be reasonably practicable as a requirement of tax administration.[179]

It can be debated whether the anonymous Internet is a net benefit or detriment. What cannot be debated, however, is that the anonymous Internet precludes the comprehensive taxation of individuals' personal-data gains. We may be able to capture some of them, and maybe the most valuable among them, but we cannot capture them all. It is simply impractical to assume that we can reasonably require digital-service providers to accurately identify all of their users and those users' access to their digital products.

5. Political Will

One final impediment to the extension of our current tax instruments to personal-data transactions is the American public's lack of appetite for new taxes, especially those on Internet-based activities. The public seems to abhor the expansion of the tax base to incorporate digital forms of "old economy" transactions. We see this in the form of the Internet Tax Freedom Act, which prevents the imposition of tax on Internet access.[180] We see this in opposition to the collection of sales tax on Internet purchases.[181] We have more recently seen this in the disapproval of

177. Anupam Chander, *Googling Freedom*, 99 CALIF. L. REV. 1, 15 (2011) (discussing the use of anonymizing technologies to assist individuals in speaking out against repressive governments); Ira S. Rubinstein, Ronald D. Lee & Paul M. Schwartz, *Data Mining and Internet Profiling: Emerging Regulatory and Technological Approaches*, 75 U. CHI. L. REV. 261, 274–78 (2008) (discussing available anonymizing technologies); *About Tor*, TORPROJECT.ORG, https://www.torproject.org/about/overview.html.en (last visited Aug. 21, 2016) (providing information about the Tor network).

178. The term "obfuscation" is not used pejoratively in this context. The ability to hide one's IP address can have significant benefits, whether one is reporting or accessing the Internet from within a repressive regime or whether one wants to retain their privacy in an overly intrusive Internet culture. *See generally* Chander, *supra* note 177, at 15; Jason Koebler, *Public Libraries Will Operate Tor Exit Nodes to Make the Service More Secure*, MOTHERBOARD (July 30, 2015, 11:23 AM), http://motherboard.vice.com/read/public-libraries-will-operate-tor-exit-nodes-to-make-the-service-more-secure (discussing the debates surrounding, and the benefits of, Tor).

179. Of course, individuals could be taxed on these transactions *indirectly* through a tax on the data aggregators. That approach would not require individual users to be personally identified. This type of indirect-taxation approach is more fully discussed below. This Section, however, is focused specifically on the difficulties that would be encountered if one desired to directly tax individuals on their personal-data gains.

180. Internet Tax Freedom Act, Pub. L. No. 105–277, § 1101(a)(1), 112 Stat. 2681, 719 (1998) (codified at 47 U.S.C. § 151 (2012)).

181. *See Conservatives Oppose So-Called Marketplace Fairness Act*, HEARTLAND INST., https://www.heartland.org/no-net-tax [https://perma.cc/P2PY-W3NB] (last updated Sept. 18, 2015, 2:43 PM) (listing a wide range of individuals and groups opposed to a federal bill that would allow states greater authority to require online retailers to collect their taxes); *see also* DON'T TAX THE

the expansion of the state sales taxes to streaming services like Netflix or Spotify.[182] The American public cares little for the theoretical completeness of the tax system and seems to care deeply that the Internet be a tax-free zone. Promoting a tax on Facebook access might just get one blackballed from the political class. The politics in this area will thus likely prevent any tax on individuals' or aggregators' personal-data gains.[183]

III. TAX, PRIVACY, AND THE NEW ECONOMY

The preceding Sections establish that personal-data transactions are technically taxable transactions, but that practical and political issues will prevent them being taxed directly.[184] That means that our tax system currently provides, and will continue to provide, an implicit tax preference for those transactions. Transactions that would be taxable if engaged in for cash consideration are nontaxable because they are done as digital barters. That implicit tax exemption has implications both within and without the field of taxation, and appreciating its existence is thus critically important for tax and non-tax scholars alike.

Within the tax field, the first takeaway from this conclusion is that the digital economy has created a new way of generating income that cannot be effectively taxed, and we must be cognizant of this fact as the personal-data market continues to evolve. We have already seen significant attention paid to the so-called sharing economy and the challenges that it presents for our current tax instruments.[185] Technology will undoubtedly continue to create further opportunities for tax-base erosion

---

INTERNET, https://donttaxtheinter.net/ (last visited Sept. 3, 2016) (compiling news stories and articles opposing efforts to grant states greater authority to require online retailers to collect their taxes).

182. Kacey Drescher, *State Dept. of Revenue to Tax Online Streaming Services*, WFSA 12 NEWS (Aug. 1, 2015, 9:30 PM), http://www.wsfa.com/story/29467470/state-dept-of-revenue-to-tax-online-streaming-services#.VZfRI9QBBLI; John Pletz, *Chicago Tax on Streaming, Cloud Services Raises Tech Entrepreneurs' Ire*, CRAIN'S CHI. BUS. (July 7, 2015), http://www.chicagobusiness.com/article/20150707/BLOGS11/150709902/fear-and-loathing-over-chicagos-new-cloud-tax.

183. Political pressure might also come as a result of the economic consequences of a unilateral tax on personal-data transactions by the U.S. government. A tax on data aggregators, specifically, might be viewed as just one more tax measure undermining the competitiveness of the United States in the global economy. A market-based tax might eliminate those concerns to some extent, given the importance of the U.S. populace to the data aggregation economy, but these considerations should be taken into account. Thanks to Matt Schaefer for raising this point.

184. It is worth repeating that the analysis provided above has focused solely on personal-data transactions that occur as a part of the multi-sided platform business model of companies like Facebook and Google. As noted above, there are many personal-data transactions that occur outside of that business model, and the taxation of those types of data transactions might not present the same conceptual difficulties. One prominent example is where cash discounts are given in exchange for data, like in the context of customer-loyalty programs. Those discounts could easily be tracked and subjected to information reporting for income-tax purposes. They might also be taken into account for purposes of state sales taxes. *See* Gregg D. Barton & Andrea Templeton, *The Price of Customer Loyalty: Rewards Programs and Sales and Use Tax Issues*, JDSUPRA BUS. ADVISOR (Sept. 23, 2015), http://www.jdsupra.com/legalnews/the-price-of-customer-loyalty-rewards-46017/ (introducing the sales-and-use-tax issues presented by customer-loyalty programs).

185. *See generally* Oei & Ring, *supra* note 112, at 1027–30 (analyzing the tax consequences of the sharing economy).

within the context of the personal-data economy—and more broadly. Recognizing the personal-data exemption is thus an important part of taking stock of the tax base in the new economy.[186]

The current tax preference for the use of data as a currency also has implications beyond the erosion of the tax base. Research suggests that the market for data suffers from significant inefficiencies and creates legal issues in the privacy, consumer protection, and antitrust contexts.[187] Some scholars have even shown that large-scale data aggregation and behavioral psychology could be combined to influence elections globally.[188] The U.S. government also frequently requests that companies provide them with information that they have gathered from users of their applications.[189]

The ramifications of personal-data transactions are thus widespread, and the tax exemption for data has equally broad implications. To the extent that the tax system aids in the lack of consumer salience of the commercial exchange, implicitly promotes the use of personal data, or effectively prevents the development of consumer-favorable data practices, we must evaluate whether and how to account for those impacts. The following Sections address those issues. We may not be able to directly tax personal-data transactions, but that does not mean that we can do nothing or that we can ignore the impact of our tax system on the market for personal data. The two are intertwined. Section A provides insight into how our tax system could best account for the current personal-data economy. That includes a discussion of (1) how to reform our current tax instruments to at least indirectly account for the value created by personal-data transactions and (2) the merit of creating new tax instruments that might supplement our current taxes and help to promote beneficial data practices.

Section B changes the focus. Instead of looking at how the current personal-data economy should drive changes to our tax system, it looks at how the current tax system will impact the evolution of the personal-

186. *See id.* at 1027–29; Soled & Thomas, *supra* note 111, at 786–90 (analyzing how the taxation of fringe benefits should be reformed for the modern economy).

187. *See generally* Calo, *supra* note 29, at 1003–04 (discussing the potential for market manipulation); Hoofnagle & Whittington, *supra* note 4, at 608–09 (discussing the impacts of zero-price market on consumers); Newman, *Zero-Price*, *supra* note 7, at 169–70 (discussing the role of antitrust law in zero-price markets). *See also* sources cited *supra* note 43 (listing a number of articles that discuss the legal implications of the personal-data market).

188. *See* Robert Epstein & Ronald E. Robertson, *The Search Engine Manipulation Effect (SEME) and Its Possible Impact on the Outcomes of Elections*, 2015 PROC. NAT'L ACAD. SCI. U.S. E4512, E4512, http://www.pnas.org/content/112/33/E4512.full.pdf.

189. GOOGLE TRANSPARENCY REPORT, GOOGLE, https://www.google.com/transparencyreport/userdatarequests/ (last visited Aug. 21, 2016); Nick Bilton, *Tech Companies Offer Update on Government Data Requests*, N.Y. TIMES: BITS (Feb. 3, 2014, 4:29 PM), http://bits.blogs.nytimes.com/2014/02/03/tech-companies-release-government-data-requests/; Kia Kokalitcheva, *Twitter Sees 52% Spike in Government and Copyright Info Requests*, FORTUNE (Aug. 11, 2015, 5:07 PM), http://fortune.com/2015/08/11/twitter-transparency-report/.

data economy. The current tax preference for the use of personal data is equally a tax penalty on other types of market exchanges.[190] More specifically, it is a tax penalty on a transfer of data for cash. As a result, even if we would favor the latter for privacy or other reasons, our current tax system will discourage it. That impact has thus far gone unrecognized in the current debates regarding the personal-data economy. Section B remedies the resulting void by looking at some predominant visions for the future of the personal-data market and by analyzing how the tax system will impact those visions. Section C concludes by calling for the recognition of the personal-data tax exemption in the broader U.S. regulatory approach to personal data.

A. Tax and the Current Personal-Data Economy

1. The Role of Existing Tax Instruments

One way to respond to our inability to directly tax personal-data transactions is to tax them *indirectly*. The way to do that in the context of our existing tax instruments is through a tax on the monetization of personal data by the data aggregators or by their shareholders. Those monetization events would generally include (1) an aggregator's sale of additional products or advertising based upon those data and (2) the sale of stock by a shareholder of an aggregator.[191] Notwithstanding the ease of taxing those monetization events, however, it is not a perfect substitute for taxing the initial personal-data barter.

Deferring the taxation of personal-data gains until a monetization event could distort the taxes that are paid in several ways, including (1) if the jurisdiction that would tax the personal-data transaction does not have jurisdiction to tax the monetization event; (2) if the income from the monetization event is not sourced to the same jurisdiction as would income from the personal-data barter; and (3) if the monetization event is subject to a different tax rate than the rate at which the personal-data gains would be taxed.

To illustrate, assume that a data aggregator makes a taxable sale of a digital product in the United States in a personal-data barter. Assume further that the United States would tax the aggregator's income from that sale if it could conceivably do so. Instead, however, the aggregator is able to collect the personal data on a tax-free basis—given the limitations

190. Tax scholarship generally recognizes that the difference between a penalty for engaging in an activity and a bonus for not engaging in that activity is one of framing. Edward J. McCaffery & Jonathan Baron, *Thinking About Tax*, 12 PSYCHOL. PUB. POL'Y & L. 106, 115 (2006).

191. The receipt of a dividend from an aggregator would also be a monetization event, but one that seems less likely than the others. *See* FRENCH REPORT, *supra* note 37, at 2 (noting the pressure against issuing dividends in the digital economy). Recall also that the OECD Report minimized the concerns related to the proper characterization of the personal-data transaction because taxing jurisdictions' taxation of data aggregators' advertising revenue would match their taxation of the barter transactions. OECD REPORT, *supra* note 66, at 104.

discussed above—and its shareholders experience a concomitant increase in the value of their stock. One of its foreign shareholders then sells her shares and monetizes a portion of the value created by the personal-data barter. In that situation, taxing that shareholder's monetization event will indirectly tax the personal-data barter, but in a distorted way. Instead of the United States taxing the aggregator's gains, the foreign country will tax its residents' gains.[192] That country might also have a preferential rate for those gains, so even the *amount* of tax would be lower.[193] Taxing the monetization event as a proxy for taxing the personal-data barter would thus result in the tax revenue being shifted among jurisdictions and potentially being reduced in amount.[194]

We could further illustrate these issues by assuming that the data aggregator used a foreign entity to collect the data and to monetize the value of those collected data by selling advertising. Under current United States tax treaties, the U.S. might not have jurisdiction to tax the advertising income of the foreign entity because the firm does not have a "permanent establishment" within the U.S.[195] Further, even if the company did have a permanent establishment in the country, our tax rules might not treat that particular income as subject to U.S. tax. That income could be classified as foreign-source income under the rules applicable to services income.[196] Due to these rules, taxing the monetization event would not be a proxy for taxing the personal-data barter. The value created by that barter would escape U.S. taxation completely.

---

192. KUNTZ & PERONI, *supra* note 122, ¶ C3.09. A foreign shareholder is generally protected from U.S. taxation of its gains on the sale of stock in a U.S. company. *Id.* Under certain conditions, however, that gain may be subject to U.S. tax. *Id.*

193. *See* ROBERT CARROLL & GERALD PRANTE, ERNST & YOUNG LLP, CORPORATE DIVIDEND AND CAPITAL GAINS TAXATION: A COMPARISON OF THE UNITED STATES TO OTHER DEVELOPED NATIONS 12 (2012), http://www.theasi.org/assets/EY_ASI_Dividend_and_Capital_Gains_International_Comparison_Report_2012-02-03.pdf (reporting that "[a]bout four-fifths of the OECD and BRIC countries tax capital gains at rates below the rates applied to ordinary income").

194. This might be true even if the shareholder is a U.S. shareholder. A U.S. individual's gain on the sale of an aggregator's stock might well qualify as long-term capital gain, which is subject to a preferential rate of taxation. 26 U.S.C. § 1(h)(1) (2012). A shareholder could also be tax exempt of course.

195. KUNTZ & PERONI, *supra* note 122, ¶¶ A1.04. Countries' tax jurisdiction is often determined by reference to bi-lateral tax treaties, which typically limit a country's taxing power to firms that have established a "permanent establishment" within it. *Id.* ¶¶ A1.04, C4.05. Historically, establishing a permanent establishment has required certain types of physical presence within a taxing jurisdiction. *Id.* ¶ C4.05[2].

196. The Code does not provide a sourcing rule that specifically addresses advertising income. In the context of "old economy" advertising, advertising revenue has been sourced according to the U.S. tax rules applicable to services income. *See* Peidras Negras Broad. Co. v. Comm'r, 43 B.T.A. 297, 312 (1941), *nonacq.*, 1941-1 C.B. 18, *aff'd*, 127 F.2d 260 (5th Cir. 1942); *see also* Gary D. Sprague et al., *Federal Taxation of Software and E-Commerce*, Tax Mgmt. Portfolio (BNA) [U.S. Income Portfolios Library] No. 555, pt. II, § B.3. Under that rule, advertising income is sourced to the location where the services are performed. 26 U.S.C. §§ 861(a)(3), 862(a)(3) (2012). That rule, of course, may not be appropriate in the digital economy if we desire to shift to a more complete market-based sourcing regime. *See* Assaf Y. Prussak, *The Income of the Twenty-First Century: Online Advertising as a Case Study for the Implications of Technology for Source-Based Taxation*, 16 TUL. J. TECH. & INTELL. PROP. 39, 62–70 (2013).

These illustrations are not meant to suggest that giving attention to indirectly taxing personal-data barters would be pointless. To the contrary, the issues regarding taxing jurisdiction and the proper sourcing of income from digital transactions are at the core of the discussions currently being undertaken with respect to how to tax digital transactions more generally. Recognizing the role of personal-data transactions in that economy, however, both adds to the importance of those discussions and colors how we view those issues. The personal-data barter particularly adds to the discussions regarding expanding the permanent-establishment concept beyond physical presences.[197] It also informs our discussions of how to tax transactions involving cloud-based services. Those transactions often include a payment with data, which means that taxing those transactions will be done indirectly through the taxation of the data aggregators' sales or advertising revenue. The result might be that we need to align the rules for sourcing those categories of income as a way to reduce the tax distortions created by the personal-data exemption.

The sum of this analysis is that discussions regarding how to best reform our tax systems for the digital age should consider how to best account for the fact that personal-data transactions are going untaxed. If we are going to use the corporate income tax on advertising revenue as a proxy for taxing those transactions, we will need to ensure that the jurisdictional and sourcing rules reflect that role. Critically, we will also need to maintain that tax. That realization is one important takeaway from this analysis—the corporate income tax will play a critical role in the tax system of the future because it is likely the most direct and comprehensive way of taxing the value derived by personal-data transactions. Its elimination would significantly reduce the opportunities for our tax system to capture that value. A consumption tax is not going to fill that role.

This realization is important because it cuts against a significant body of work that is aimed at critiquing the corporate income tax as a normative matter and that often does so in connection with a call for greater reliance on consumption taxes.[198] It does, however, support the

197. *See, e.g.*, COCKFIELD ET AL., *supra* note 65, at 468 (discussing potential expansion of the permanent-establishment concept to reflect modern business realities); FRENCH REPORT, *supra* note 37, at 4, 63–64, 113–15 (discussing the challenges that the digital economy creates under traditional conceptions of a permanent establishment); OECD REPORT, *supra* note 66, at 78–79, 88, 100–02, 106–11, 147–48 (discussing the potential expansion of the permanent-establishment concept to include digital presences). It is important to note, of course, that the OECD rejected the adoption of an economic-nexus type permanent-establishment rule in its recent BEPS Project. *Id.* at 148 (noting that a digital permanent-establishment concept was not recommended due to the anticipated benefits from other proposals).

198. The literature critiquing the corporate income tax is voluminous. *See* Rueven S. Avi-Yonah, *Corporations, Society, and the State: A Defense of the Corporate Tax*, 90 VA. L. REV. 1193, 1197 (2004) (noting the extensive critique of corporate income tax and that "no academic has in recent years mounted a serious, convincing normative defense of why this cumbersome tax should be retained"); Omri Marian, *Jurisdiction to Tax Corporations*, 54 B.C. L. REV. 1613, 1622–23 (2013) ("[O]ne thing that legal scholars and public finance economists agree upon (a rare occasion indeed), is that corporate taxation, as a legal model, is absolutely inefficient."); Darien Shanske, *A*

idea that reliance on different tax instruments is beneficial as a way of controlling for the weaknesses inherent in each tax.[199] The conclusion is therefore important as we continue to analyze optimal tax design. We may not like the corporate income tax as a matter of economic efficiency, but it can be used to address the challenges that the digital economy creates for our personal income taxes and consumption taxes. Further attention to capital-gains preferences, jurisdictional limits, and the proper sourcing of income are thus warranted given the continued growth of the personal-data economy.[200]

2. The Potential Role for Alternative Tax Instruments

The preceding Part has focused on how current tax instruments could be modified to address the personal-data economy. It may be, though, that the best way to approach the current personal-data exemption is to adopt completely new tax instruments that more directly address the personal-data market. Those new tax instruments could help both to offset lost tax revenue and to encourage the development of beneficial data-protection practices and technology. This approach is considered in the French Report, the OECD Report, and to an extent by governments worldwide.

The French Report specifically suggests a special tax on companies that collect data through the "regular and systematic monitoring of users' activity."[201] The tax would apply only to aggregators who monitor more than a particular number of users, and the report specifically suggests that such a tax could be an actual charge per monitored user.[202] The OECD Report proposed consideration of an "equalization levy . . . as an alternative way to address the broader direct tax challenges of the digital economy."[203] The report proposed alternative bases for such a tax, in-

New Theory of the State Corporate Income Tax: The State Corporate Income Tax as Retail Sales Tax Complement, 66 TAX L. REV. 305, 327 (2013) (noting the "ferocious debate" regarding whether consumption or income taxes are ideal).

199. *See generally* David Gamage, *The Case for Taxing (All of) Labor Income, Consumption, Capital Income, and Wealth*, 68 TAX L. REV. 355, 357–58 (2015) (arguing that the weaknesses in one form of taxation can be mitigated through the application of a different form of taxation that does not suffer the same weaknesses).

200. One other interesting caveat to this discussion is that states' tax systems are currently much better structured to handle these issues than our federal tax system. This is largely because states have a greater ability than the federal government to tax firms that have no physical presence within their boundaries and many already use market-state sourcing methods. 2 HELLERSTEIN & HELLERSTEIN, *supra* note 91, ¶¶ 6.11[1], 9.18[3][a], 10.07 (discussing U.S. states' taxing jurisdiction, the use of market-state sourcing rules, and the move away from the cost-of-performance standard); Adam B. Thimmesch, *The Illusory Promise of Economic Nexus*, 13 FLA. TAX REV. 157, 161–87 (2012) (discussing the economic-nexus standard for state taxing jurisdiction); Douglas A. Wick, *A Categorization of State Market Sourcing Rules*, 74 ST. TAX NOTES 351, 351 (2014) ("The cost of performance method is waning, and market sourcing is taking its place."). In addition, the structure of the state corporate income tax may allow it to be a rough proxy for the consumption taxes that are going uncollected on personal-data transactions. Shanske, *supra* note 198, at 308, 315–17.

201. FRENCH REPORT, *supra* note 37, at 121–23.

202. *Id.* at 123.

203. OECD REPORT, *supra* note 66, at 115–17.

cluding data gathered from in-country users.[204] An excise tax on data transfers starts to look indistinguishable from a "bit tax," which has been proposed for years.[205]

Several countries have also implemented or discussed diverted profits taxes—often referred to as "Google taxes"—that seek to ensure that corporations do not escape taxation through the use of clever corporate structuring.[206] Those diverted profits taxes operate by imposing some minimum level of tax on companies who are deemed to have engaged in abusive activities to artificially lower their tax burden.[207] Although those taxes are not specifically tied to the personal-data economy, they would impact firms that operate in that space and use international tax structuring to avoid income tax on their gains. Other forms of alternative tax instruments are undoubtedly possible and further thought should be given to those options.

It is also worth recognizing that a new tax could be used not only to raise revenue, but also—or alternatively—to positively influence how data are collected and used. For example, a tax could be structured so that the actual tax rate is tied to the adoption of certain prescribed standards.[208] For example, the tax rate could be reduced for taxpayers that implemented best practices published by the government or who provided more consumer control over their data. The particular tax-rate "trigger" could also be used to help to spur positive technological developments that might allow greater data protection. In that vein, some have posited that the technology behind Bitcoin—blockchain—could be used to allow individuals better control over access to their data.[209] An alterna-

204. *Id.* at 116. This type of tax could be viewed as the new-economy version of a severance tax. U.S. states have long imposed those taxes on the extraction of resources like coal, oil, and timber. 2 HELLERSTEIN & HELLERSTEIN, *supra* note 91, ¶¶ 4.18, 4.18[1]. It might be fair to view personal data as a natural resource of a source jurisdiction in the digital economy and tax its extraction consistent with these historic taxes.

205. A bit tax is a transactional tax on the "transmission of digital information." COCKFIELD ET AL., *supra* note 65, at 480 n.45. The bit tax proposals have been largely undermined by the practical concerns inherent in such a tax. *Id.*

206. *Budget 2015: 'Google Tax' Introduction Confirmed*, BBC NEWS (Mar. 18, 2015), http://www.bbc.com/news/business-31942639; Giuseppe Fonte & Gavin Jones, *Italy's Renzi Faces Uphill Struggle over Google Tax Plan*, REUTERS (Sept. 30, 2015, 11:38 AM), http://www.reuters.com/article/2015/09/30/us-italy-tax-internet-analysis-idUSKCN0RU1HS20150930; Michael Herh, *Taxing Google: Government to Introduce Google Tax Next Year*, BUSINESSKOREA (Oct. 19, 2015, 6:15 PM), http://www.businesskorea.co.kr/english/news/ict/12539-taxing-google-government-introduce-google-tax-next-year.

207. Karen Hughes et al., *The U.K. Diverted Profits Tax*, 123 J. TAX'N 37, 37–39 (2015); J. Harold McClure & Saumyanil Deb, *The Google Tax: Transfer Pricing or Formulary Apportionment?*, J. INT'L TAX'N, June 2015, at 61.

208. This approach was also recommended in the French Report. FRENCH REPORT, *supra* note 37, at 123.

209. Guy Zyskind et al., Decentralizing Privacy: Using Blockchain to Protect Personal Data 180–84 (May 21–22, 2015) (research paper prepared for 2015 IEEE CS Security and Privacy Workshops), http://ieeexplore.ieee.org/stamp/stamp.jsp?arnumber=7163223; Guy Zyskind et al., Enigma: Decentralized Computation Platform with Guaranteed Privacy 1, 9, 12 (n.d.) (unpublished manuscript), http://enigma.media.mit.edu/enigma_full.pdf.

tive tax that did not apply where that technology was used might give a nice nudge to support its development and implementation.[210] The law would not require it, but it would promote it.

In the end, this is not the place to promote particular policy goals or to suggest particular tax instruments to achieve those goals. Further scholarship should explore those issues. What is important is that we recognize the interplay between the tax system and our broader policy goals related to data and data protection. It is possible that we could craft alternative tax instruments to address both the tax and privacy concerns raised by the personal-data market.

B. Tax and the Personal-Data Economy of the Future

Many scholars and individual consumers have been unhappy with the current state of the data market, and they have pushed for a market in which individuals have greater control over the collection and use of their data.[211] Those efforts have begun to have effect. For example, consumers are now taking advantage of applications that allow them to easily see and block particular tracking programs.[212] Consumers are also adopting ad blockers in greater numbers.[213] Those efforts impede the collection of observed data and undermine the multi-sided business model by preventing websites from offering better-identified "targets" for advertising. A recent study suggests that the use of those blockers will result in the loss of nearly $22 billion of ad revenue per year.[214]

Of course, when consumers block online tracking and the advertising that results, data aggregators fail to benefit from offering their digital products. This has not gone without notice, and that changed value proposition has very recently been recognized as a threat to the "free" Internet.[215] Some sites have responded by blocking users who use ad block-

---

210. Importantly, that type of "trigger" might well tie into traditional tax concepts. If a user has the right to unilaterally and completely revoke their data at any time, we can fairly question the value of the barter to the aggregator. The aggregator receives an asset, but also grants the provider with a unilateral call option with a zero strike price.

211. *See supra* Section I.B.

212. *Add-ons*, MOZILLA.ORG, https://addons.mozilla.org/en-US/firefox/extensions/?sort=users (last visited Oct. 23, 2016) (listing a Ghostery, an add-on that blocks tracking programs, as a most popular extension for the Firefox browser); Owen Williams, *You Should Be Using These Browser Extensions to Keep Yourself Safe Online*, TNW (May 18, 2015), http://thenextweb.com/apps/2015/05/18/you-should-be-using-these-browser-extensions-to-keep-yourself-safe-online/ (discussing several programs that block tracking programs online).

213. PAGEFAIR & ADOBE, *supra* note 60, at 1, 4.

214. *Id.* at 3; Elizabeth Dwoskin, *Ad-Blocking Software Will Cost the Ad Industry $22 Billion This Year*, WALL STREET J.: DIGITS (Aug. 10, 2015, 6:28 PM), http://blogs.wsj.com/digits/2015/08/10/ad-blocking-software-will-cost-the-ad-industry-22-billion-this-year/?mod=e2tw; Mark Scott, *Study of Ad-Blocking Software Suggests Wide Use*, N.Y. TIMES: BITS (Aug. 10, 2015, 12:01 AM), http://bits.blogs.nytimes.com/2015/08/10/study-of-ad-blocking-software-suggests-wide-use/.

215. Hayley Tsukayama, *Online Ad-Blocking Is on the Rise. That's Bad News for Everyone.*, WASH. POST: THE SWITCH (Aug. 10, 2015), https://www.washingtonpost.com/news/the-switch/wp/2015/08/10/online-ad-blocking-is-on-the-rise-thats-bad-news-for-everyone/. *See general-*

ers.[216] Others have moved to a subscription model, and one research firm posited that 2016 would be a tipping point in that regard.[217] Its analysis suggests that more firms might begin implementing a "freemium" model where consumers can continue to use a basic service for free but also pay a fee to avoid tracking and/or advertising.[218]

Some have responded to the personal-data market by pushing for change in the other direction. Instead of working towards a model where individuals pay to not be tracked, they have focused on a model under which consumers are paid cash compensation for their data. This includes the payment for data stored in "personal data banks" or "personal data vaults"[219] and micropayments based upon the use of data without the same centralization of control.[220]

All of these models address the privacy concerns inherent in the current personal-data market,[221] but they could suffer from a significant tax disadvantage. To start, the freemium model removes perhaps the most critical impediment to taxing personal-data barters—the valuation problem. If Facebook determines a price for accessing its service without being tracked or subjected to advertising, it sets a value that could be used for tax purposes. A tax administrator could argue that the fee represents the market price for the digital product or the personal data normally traded for that product and that a consumer who purchases that good with their data or their time has an accession to wealth in that amount.

---

ly PAGEFAIR, https://pagefair.com/about/ (last visited Oct. 23, 2016) (providing information about PageFair, which is a company that seeks to address the interests of advertisers, consumers, and publishers).

216. Molly Brown, *Use an Ad Blocker? The Washington Post Is Now Probably Blocking You*, GEEKWIRE (Sept. 10, 2015, 9:49 AM), http://www.geekwire.com/2015/use-an-ad-blocker-the-washington-post-is-now-probably-blocking-you/.

217. *See* Daniel Heppner, *AdBlock Pressuring YouTube into a Paid Subscription Model*, GAZETTE REV. (Sept. 27, 2015), http://gazettereview.com/2015/09/adblock-pressuring-youtube-into-a-paid-subscription-model/; Taylor, *supra* note 62.

218. *See* Taylor, *supra* note 62.

219. Jerry Kang et al., *Self-Surveillance Privacy*, 97 IOWA L. REV. 809, 828–29 (2012) (proposing "personal data guardians" to curate the personal data vaults); Thomas Heath, *Web Site Helps People Profit from Information Collected About Them*, WASH. POST (June 26, 2011), http://www.washingtonpost.com/business/economy/web-site-helps-people-profit-from-information-collected-aboutthem/2011/06/24/AGPgkRmH_story.html; Min Mun et al., Personal Data Vaults: A Locus of Control for Personal Data Streams (Nov. 30–Dec. 3, 2010) (research paper prepared for the Sixth International Conference on Emerging Networking Experiments and Technologies (CoNEXT)), http://conferences.sigcomm.org/co-next/2010/CoNEXT_papers/17-Mun.pdf; *How It Works*, DATACOUP, https://datacoup.com/docs (last visited Oct. 23, 2016); POWR OF YOU, https://www.powrofyou.com/ (last visited Oct. 23, 2016); TEAMDATA, https://personal.com (last visited Oct. 23, 2016).

220. LANIER, *supra* note 54, at 20, 274–75, 286–87 (discussing the nano-payment approach).

221. They address the privacy concerns only to the extent that (1) personal data are no longer collected by the data aggregators or (2) consumers are adequately paid for their personal data or, alternatively stated, their privacy loss. Under a freemium model where consumers merely pay to avoid advertising, the privacy implications of data collection would not be addressed.

The introduction of a cash option could thus make it easier to tax those who do not take that option.[222]

The data-bank model presents a similar tax problem because it removes several of the key impediments to taxing personal-data sales. First, it centralizes the transfer of an individual's data so that those transfers are easily identifiable. It also ensures that we know exactly when and how an individual's data were accessed and what the individual got in return for that access. Finally, it removes a layer of anonymity and establishes a third party—the data bank operator—that can be subject to information-reporting and withholding obligations. These factors might very well prevent the widespread adoption of the data-bank model. They could turn a non-taxable barter into a taxable sale with the result that individuals could see the purchasing power of their data decline by up to 40% or more.[223]

These results highlight the distortion that the current tax exemption creates in the market for data and reveal one simple, but critical insight of this Article—that the current tax preference for personal-data barters is equally a tax penalty on other forms of market transactions. All else being equal, the tax law favors the former and places a burden on any move to the latter. Any suggested change to the personal-data market will have to take that into account.

These considerations apply even if we assume a personal-data market that does not evolve to introduce cash compensation somewhere in the exchange. The Vendor Relationship Management (VRM) approach, for example, allows consumers to more effectively barter with their data rather than allowing them to be paid in cash.[224] Doc Searls, a noted technology author, lays out his view of a VRM world in detail in his book titled *The Intention Economy*.[225] In that book, he envisions a world where users take a very active role in the use and dissemination of their data. For example, they might agree to share their location, purchase history, and payment data with a coffee shop in order to ensure that their lattes

222. Of course, users who opt to take the "free" version could credibly argue that the benefit that they receive is worth less than the value of the premium product. To begin, a free version that suffered from intrusive advertising would certainly have a lower intrinsic value to a consumer. Second, a user who declined the premium version would necessarily not value that version at its asking price—they would have purchased it otherwise. The actual valuation would thus depend on the precise product offering. A subscription fee that only preempted data collection—and not advertising—would be most likely to represent the taxable value of the personal data generally collected by the aggregator. A subscription fee that only preempted advertising would be least likely to represent the value of that personal data. The fee in that case would be most related to the negative value of viewing advertising and not the value of personal data.

223. The top marginal tax rate for the federal income tax is currently 39.6%. 26 U.S.C. § 1 (2012). Many individuals would also have to pay state income taxes on their cash payments, and some might have to pay sales taxes on the goods that they purchased with that cash.

224. *See supra* Section I.B (discussing the VRM Project at Harvard's Berkman Klein Center).

225. *See generally* SEARLS, *supra* note 51.

are waiting for them at the counter when they arrive.[226] They agree to share those data, however, only if the vendor agrees with how they will be used.

A data approach where users control their data is one that is consistent with the current expanded use of ad blockers, Do Not Track technology, and other methods of depriving aggregators of their data or the benefits of those data. Data providers and data aggregators might find the VRM approach more palatable than those other approaches, however, because it might allow for more acceptable advertising, which would allow the continued use of the advertising-funding model.[227] Consumers, in turn, might not feel the need to block advertising or all tracking if they had more control.[228]

The tax consequences of a VRM approach that focuses on user control rather than on cash remuneration are more complicated than those discussed above. To the extent that the personal-data market evolves to give users more control, but without introducing cash transactions, the tax system may be unable to tax them for the lack of a method of valuation. However, to the extent that individuals more purposefully use their data and do so to greater personal benefit, taxation might become more compelling and perhaps more realistic. Further, to the extent that a VRM approach relies on a central access point for one's data, then there would again be one single source of information on the extent of an individual's data bartering. We would no longer drop data like breadcrumbs as we travel across the Internet. We would sell them from a storefront.

This Section has discussed only some of the possible futures for the personal-data market. Regardless of which way the commercial Internet ecosystem evolves, however, there are at least two questions that we will need to ask ourselves. First, do the technologies that we are considering undercut any of the current impediments to the taxation of the personal-data economy? Second, do those strategies or technologies make it more compelling that transactions in data be taxed as a normative matter? If the answer to either is "yes," then proponents of those developments must address how to handle the potential tax penalty on that type of market evolution. For better or worse, the tax system currently provides a preference for the voluminous, anonymous, obfuscated data-collection practices that occur online. The impact of that tax preference may very well be to work against otherwise beneficial developments in the personal-data economy, and we must keep that factor in mind as we consider how to best reform that economy.

---

226. *Id.* at 11–12.

227. *See* Doc Searls, *How #adblocking Matures from #NoAds to #SafeAds*, HARV. BLOGS: DOC SEARLS WEBLOG (Oct. 22, 2015), https://blogs.law.harvard.edu/doc/2015/10/22/how-adblocking-matures-from-noads-to-safeads/.

228. *See id.*

C. A Unified Regulatory Approach to Personal Data

The personal-data economy impacts many areas of our lives and, as a result, the effects of the tax exemption for personal data extend far beyond our revenue system. The final policy proposal of this Article is therefore that this tax exemption be taken into account in the broader U.S. regulatory structure related to personal data and personal privacy. The tax exemption for transactions in data is a regulatory benefit provided to the personal-data market, and it should be recognized as such.

The government clearly has non-tax interests in regulating the personal-data market. The Federal Trade Commission, for example, regulates the data market to protect consumer privacy and data security.[229] It is thus reasonable for the nation's regulatory policies to take a holistic view of the government's role in that market. As noted above, the personal-data tax exemption represents nothing more than a regulatory benefit provided to those operating in the personal-data economy. It thus functions to promote the use of data as a payment method rather than the use of cash. Viewed in this way, it seems advisable for the government to take that benefit into account as it evaluates the merits of regulating other aspects of the personal-data economy. For example, privacy regulations imposed by Congress or actions taken by the FTC might impose costs on the data industry, and viewed alone, those regulations might not survive a typical cost-benefit analysis. Viewed in context, however, those costs might merely offset the current regulatory benefit provided to that industry by our tax system and thus might function well to offset the inefficiency that the personal-data exemption represents. Taking into account the tax benefit provided by the personal-data exemption might therefore tip the scales in favor of other regulatory approaches to data protection.[230]

CONCLUSION

Scholars in a number of fields have evaluated the impact of the wide-scale data collection, analysis, and commodification that nearly

229. *See generally* FED. TRADE COMM'N, 2014 PRIVACY AND DATA SECURITY UPDATE (Jan. 2015), https://www.ftc.gov/system/files/documents/reports/privacy-data-security-update-2014/privacydatasecurityupdate_2014.pdf (discussing the Commission's efforts to protect consumer privacy and data security); Calo, *supra* note 43, at 681–85 (discussing the role of the FTC in this area).

230. A comprehensive cost-benefit approach for data regulation would also be entirely consistent with how the federal government evaluates regulatory action by executive agencies. *See* Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011), *reprinted in* 5 U.S.C. § 601 app. at 102–03 (2012); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 3–4, 6–7 (1995) (describing the origins of the federal government's use of cost-benefit analyses with respect to evaluating federal regulations); Amy Sinden, *Formality and Informality in Cost-Benefit Analysis*, 2015 UTAH L. REV. 93, 148–52 (2015) (discussing the current status of the federal rules regarding cost-benefit analyses). Notably, Executive Order 13,563 recognizes that economic activities are regulated by multiple agencies and calls for coordination across those agencies. Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011), *reprinted in* 5 U.S.C. § 601 app. at 102–03 (2012).

defines the modern economy. To date, however, tax scholars and our tax laws have ignored this market. This Article addresses that void by providing a comprehensive analysis of how transactions in data should be viewed for purposes of our domestic tax laws. That analysis shows that personal-data transactions are market exchanges that fall within the reach of our nation's tax laws. There are, however, many practical impediments to actually taxing those transactions. The result is that there now exists, and will continue to exist, an implicit tax preference for the use of data as a currency.

Our inability—and perhaps unwillingness---to directly tax personal-data transactions does not mean that those exchanges should be ignored though. Those exchanges impact how we view and address the broader challenges that the modern economy presents for our taxing systems. They might also justify alternative forms of tax instruments that would indirectly tax their value or that would promote positive social goals with respect to data collection and protection.

The tax exemption for personal-data transactions also impacts how we address the market for data more broadly. First, privacy scholars and technologists working on how to best modify that market to better protect individual interests must understand that they are working against a tax system that will promote the status quo. Positive data-management practices or technologies that allow users to better control or benefit from their data might very well also reduce the factors that currently preclude the taxation of personal-data transactions. Finally, at a very basic level, the tax exemption for those transactions operates as a regulatory benefit for those transactions. That benefit should be taken into account in the broader U.S. regulatory structure surrounding personal data, privacy, and the new economy.