

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

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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.

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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 letter¹ and your university's official policies, you have an obligation to investigate every instance of sexual misconduct. Yet you

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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 Letter² 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 knowledge³⁷ and evidentiary standards³⁸ 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=ffb39ad426d40b9a0c8bc988b4af3c5&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 education¹⁴⁵

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 economics¹⁶² 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 future¹⁷¹ 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](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 standard²³⁷ 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 words²³⁹ 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 Misconduct²⁴¹ 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.

ture 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. Mieth, *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 archetype 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 entities³⁸⁶ 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 HAMLIN 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; O7B2:3-6.

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 evasion⁴³⁰

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 co-exist 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.*