

# INFORMATION ESCROWS

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*A variety of information escrows—including allegation escrows, suspicion escrows, and shared-interest escrows—hold the promise of reducing the first-mover disadvantage that can deter people with socially valuable private information from disclosing that information to others. Information escrows allow people to transmit sensitive information to a trusted intermediary, an escrow agent, who only forwards the information under prespecified conditions. For example, an allegation escrow for sexual harassment might allow a victim to place a private complaint into escrow with instructions that the complaint be lodged with the proper authorities only if the escrow agent receives at least one additional allegation against the same individual. We assess the benefits and costs of allegation escrows and discuss how they might be applied to a variety of claims, including sexual harassment, date rape, adultery, and corporate and public whistleblowing. We also show how analogous shared-interest escrows might be used in workplace dating and adoption contexts to facilitate the discovery of parties' mutual interest when unintermediated expressions of interest might themselves be harassing.*

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## INTRODUCTION

A familiar narrative of sexual harassment begins with a reluctant initial allegation of abuse that is quickly followed by other accusers stepping forward with similar allegations. A victim of abuse is reluctant to bring the first claim, in part because the accused routinely responds by trying to impeach the credibility of the accuser, characterizing the accuser as “a nut or a slut.”<sup>1</sup> This initial claim aversion is a rational concern. In a “he said / she said” credibility contest, an uncorroborated accusation of harassment is unlikely to prevail. Though initial accusations often inspire additional allegations from other victims that can serve to corroborate the initial claim, isolated claimants deciding whether to make the first accusation often cannot be sure whether other victims exist and whether those other victims will have the courage to make a supporting allegation. Victim reluctance to take on the risk of “going it alone” gives rise to the well-known concern that there might be a substantial underreporting of harassment.<sup>2</sup> Even recidivist harassers may go unchallenged because, among isolated victims, there can be a first-mover disadvantage to making the initial accusation. A challenge for public policy is to seek out ways to encourage victims of sexual harassment to take on the risks associated with making initial allegations.<sup>3</sup>

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1. Susan Estrich, *Teaching Rape Law*, 102 YALE L.J. 509, 518 (1992). In a study conducted by the American Association of University Women (“AAUW”), the AAUW found based on student survey responses that only 7 percent of harassment victims on college campuses report incidents to a school employee, and that 35 percent of harassment victims do not discuss their experience with anyone. CATHERINE HILL & ELENA SILVA, AM. ASS’N OF UNIV. WOMEN, *DRAWING THE LINE: SEXUAL HARASSMENT ON CAMPUS* 32 (2005) [hereinafter AAUW REPORT].

2. See, e.g., RANA SAMPSON, U.S. DEP’T OF JUSTICE, *ACQUAINTANCE RAPE OF COLLEGE STUDENTS* 9–10 (2002) (listing several reasons for victim underreporting, including “[f]ear that the prosecutor will not believe them or will not bring charges”); Louise F. Fitzgerald, Suzanne Swan & Karla Fischer, *Why Didn’t She Just Report Him? The Psychological and Legal Implications of Women’s Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 122–23 (1995) (listing concerns that “nothing can or will be done” as a reason why some victims do not report sexual harassment and documenting the low success rate of victims who ultimately litigate).

3. The stakes in this challenge are high, as the costs associated with continued harassment can be significant. As Chelsea R. Willness and others argue in their 2007 meta-analysis of sexual harassment survey data, sexual harassment in the workplace appears to be negatively correlated with job satisfaction, employee productivity, and organization

Of course, not all accusations are true. The standard narrative can also be read as suggesting that there may be too many accusations. Once one or two accusations of harassment are lodged, it may become too easy for putative victims to make false, copycat accusations based on unsubstantiated accounts of alleged, long-ago events. While it may be comforting to infer guilt from the multiplicity of accusations, policymakers should also be concerned about whether cascades of potential copycat complaints substantially enhance the likelihood of an ill-supported guilty finding.

In this Article, we redeploy the game-theoretic “information escrow” technique to make progress on the twin concerns of underreporting of initial truthful allegations and overreporting of false copycat allegations. We propose the use of an allegation escrow to allow victims to transmit claims information to a trusted intermediary, a centralized escrow agent, who forwards the information to proper authorities if (and only if) certain prespecified conditions are met. Specifically, the escrow agent would keep harassment allegations confidential, unutilized, and unforwarded until the agent has received a prespecified number of complementary harassment allegations concerning the same accused harasser. For example, if the escrow agreement specified the accumulation of two additional allegations as a triggering event, then the agent would wait until the escrow had received three separate allegations concerning a particular alleged harasser before forwarding the information to specified authorities and initiating a complaint on behalf of the three alleging parties.

An allegation escrow holds the promise of mitigating the first-mover disadvantage in making a complaint. A victim can place the first allegation into escrow with diminished fear that she will bear the sole brunt of the adversarial reaction, and with confidence that her escrowed allegation will be released only if accompanied by at least one other allegation against the same individual.<sup>4</sup> Information escrows might thus secure more initial allegations because the alleging victim can rest assured that her initial allegation will not be seen unless it is part of a larger pattern of alleged misconduct.

More precisely and more subtly, an allegation escrow helpfully creates uncertainty for the victim regarding whether she is making the initial allegation. At the time of placing an allegation into escrow, an alleging victim will not know whether any prior allegations against the same offender have already been placed into the escrow. This means that an accuser will not know

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commitment, and positively correlated with task and job withdrawal. Chelsea R. Willness, Piers Steel & Kibeom Lee, *A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment*, 60 PERSONNEL PSYCHOL. 127 (2007).

4. For the sake of simplicity, we refer to a victim of sexual harassment as “she,” and to the wrongdoer as “he.” Of course, men are also victims of harassment, women are also aggressors, and harassment can occur to both genders. AAUW REPORT, *supra* note 1, at 3. Similarly, within the university context, we discuss cases in which a professor is accused of harassing a student, when the reverse is also fairly common. See Eric L. Dey, Jessica S. Korn & Linda J. Sax, *Betrayed by the Academy: The Sexual Harassment of Women College Faculty*, 67 J. HIGHER EDUC. 149, 157–61 (1996); Elizabeth Grauerholz, *Sexual Harassment of Women Professors by Students: Exploring the Dynamics of Power, Authority, and Gender in a University Setting*, 21 SEX ROLES 789 (1989).

at the time of making an escrowed accusation whether she is the first or the second (and triggering) accusation. This incomplete information also helps respond to the copycat concern. Absent collusion among the alлегers,<sup>5</sup> investigating authorities need not be worried that later-in-time allegations placed in escrow are false copycats of an initial escrowed allegation, for the simple reason that the subsequent alлегers would not know that an earlier allegation had been made.

Indeed, the possibility that different victims would independently—behind the veil of the escrow—allege similar details of harassment could enhance the credibility of each allegation. If multiple students independently escrowed allegations that a particular professor's harassment included inappropriate hugging, the very similarity of the professor's modus operandi would be strong evidence that the allegations were true. In contrast, if it is widely known that a student accused a professor of sexually harassing her by inappropriately hugging her, then investigating authorities would need to consider whether subsequent complaints of inappropriate hugging by the same professor were triggered by reports of the first complaint. Besides the possibility of false follow-on allegations, there is also the possibility that subsequent alлегers were inappropriately primed by their knowledge of the first accusation into reinterpreting the behavior of the accused as harassing.<sup>6</sup>

But allegation escrows are not a panacea. While escrows hold the potential for mitigating the twin concerns of initial underreporting of truthful allegations and subsequent overreporting of false allegations, this Article will also discuss a variety of ways in which placing an intermediating escrow mechanism between alлегers and investigating authorities might be counterproductive. Most importantly, we will consider circumstances where allegation escrows may reduce the sheer quantity of actionable complaints. In a world with escrows, some victims' complaints will never exit the escrow mechanism. Therefore, we envision a system in which victims retain the right to go it alone by directly lodging a complaint even if they have previously placed an allegation in escrow. Indeed, we will discuss ways in which escrows can be designed to encourage and facilitate subsequent conversions of escrowed allegations into independent go-it-alone complaints. But there remains the possibility that an escrow system would leave some harassment uninvestigated and some harassers undeterred. Even if, on the whole, escrows would increase the quantity and quality of deterrence, some unpaired escrow allegations could remain forever impounded. An important goal of the subsequent analysis is to determine the circumstances under which the benefits of escrows outweigh their costs.

Allegation escrows come in many shapes and sizes. In the following Sections, we will discuss design issues (including more detail on triggering

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5. We discuss the possibility of collusion below. *See infra* note 69 and accompanying text.

6. As we discuss below, although follow-on allegations based on triggered reinterpretation of the past are a good thing, escrows can also help when individuals are uncertain about whether they are victims. *See infra* text accompanying notes 54–56.

events, interim reporting, and matching criteria) and legal issues (including the legal relationship between the escrow agent and the escrow depositors, and what duties, if any, are owed to the accused). We will also show that information escrows might be applied to many different types of information. At least conceptually, allegation escrows can be applied to almost any context in which victims experience claim aversion because of a reluctance to go it alone.<sup>7</sup> As we'll see, allegation escrows might be used in the workplace not only to respond to instances of sexual and racial harassment, but also as a complementary tool to protect whistle-blowers in making allegations concerning corporate or government misconduct. Outside of the workplace, escrows might be put in place to respond to allegations of date rape, an area in which claim aversion similarly leads to well-recognized problems of underreporting.<sup>8</sup> Indeed, we'll see that it might even be possible to create "suspicion escrows," where mere suspicions of adultery or other misconduct could, if matched, be disclosed.

Ultimately, we will conclude that the case for deploying information escrows is stronger in some contexts than in others. The mere fact that an information escrow attracts deposits does not mean that it is valuable to society. Allegation escrows might unhelpfully reduce deterrence by converting what would have been unintermediated complaints into escrowed allegations. Therefore, we find that allegation escrows are most likely to be valuable when the unescrowed equilibrium includes underreporting of truthful allegations and when wrongdoing is likely to be known by more than one person. Shared-interest escrows are more likely to be valuable when an unintermediated communication would be unwanted or when common knowledge of unilateral interest would damage a preexisting relationship. Our weighing of the pros and cons suggests that allegation escrows for sexual harassment in the university setting is a particularly strong candidate for productive deployment of the escrow mechanism.

The remainder of the Article is organized into two parts. Part I discusses the game-theoretic underpinnings of information escrows and the connections between settlement escrows and other mechanisms that intermediate communication. It lays out the conditions under which allegation escrows are likely to improve the equilibrium that would exist with unintermediated communication. Part II then applies this theory to the facts on the ground to assess whether information escrows are likely to be valuable in different contexts. Part II also focuses more directly on the legal structure of escrow

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7. See, e.g., Brian Martin, *Whistleblowing and Nonviolence*, 24 PEACE & CHANGE 15, 19–20, 23 (1999) (noting how, in the whistle-blowing context, "isolated resistance is ruthlessly crushed" and suggesting that whistle-blowers would gain much from mobilizing and working together with other whistle-blowers); see also William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980) (identifying other barriers to victims bringing claims).

8. See, e.g., SAMPSON, *supra* note 2, at 4; Ian Ayres & Katharine K. Baker, *A Separate Crime of Reckless Sex*, 72 U. CHI. L. REV. 599, 637 (2005).

relationships in these different contexts and the legal consequences of both communicated and uncommunicated escrow information.

### I. INFORMATION ESCROWS IN ACTION

We begin by providing a functional typology of information escrows and their relationship to the previous literature. Most basically, an information escrow is a mechanism of conditional, *intermediated* communication. Information escrows allow the user to deposit information into an escrow lockbox with instructions to the escrow agent that the information only be released to prespecified recipients under prespecified circumstances. While one can imagine instructions that give escrow agents some discretion about when to release the information, real-world applications of information escrows tend to follow the structure of financial escrows by attempting to eliminate the discretion of the agent.<sup>9</sup> Escrow agents need to be trusted, but their function tends to be largely ministerial. While bilateral contracts and the law itself can create duties of conditional disclosure, information escrows are mechanisms for intermediated disclosure that necessarily entail the participation of a third-party intermediary who holds the escrowed information.

At first, it might seem that intermediation would reduce the quantity of transmitted information. After all, the escrowing of information necessarily represents a delay in transmission relative to unintermediated, immediate communication. Moreover, some of the escrow applications—including both the allegation and shared-interest escrows described above—create the possibility of orphaned escrow deposits that remain eternally locked in escrow because the requisite conditions for release are never met. Nonetheless, information escrows can support equilibria that end with greater, higher-quality, and even faster disclosure of information. Though it may seem that delaying the release of information for a potentially indefinite period would degrade the equilibrium quality of communication, contexts in which the amount and quality of information transmitted are not constant could see an overall increase in equilibrium quality. When people are reluctant to be the first person to make an allegation or express interest—in short, when there is a first-mover disadvantage to unintermediated communication—then intermediating information escrows can induce a more informed equilibria. A world with delayed and even orphaned escrow deposits can still have more communication simply because the escrow might encourage many to communicate indirectly what they would have been unwilling to disclose directly.<sup>10</sup>

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9. Escrow mechanisms, however, at times, give escrow agents discretion on whether to accept information deposits. For example, bills have been proposed where convicts may have to petition a court conditionally to expunge a criminal conviction. *See infra* note 16 and accompanying text.

10. The nonintuitive possibility that giving people an option of impeded communication would produce a more informed equilibrium parallels an argument made by Jennifer Gerarda Brown and Ian Ayres in discussing the information-filtering role of caucus mediation

### A. Commitment and Posthumous Escrows

There are at least four different functional classes of information escrows. The bulk of this Article will be devoted to one, as yet unimplemented, class—what we call allegation escrows. But before turning to our theory about how best to structure these devices, we pause briefly in the remainder of this Part to mention the functions of three other types of information escrows that have already seen real-world applications. We call these three broad categories the following: commitment escrows, posthumous escrows, and shared-interest escrows.<sup>11</sup>

In a commitment escrow, the depositor puts into escrow embarrassing or incriminating information that will be released if the depositor fails to keep a commitment. For example, in 1971, the Nobel Prize–winning economist Thomas Schelling wrote about a Denver addiction clinic that used “self-blackmail as part of its therapy”:

The patient may write a self-incriminating letter that is placed in a safe, to be delivered to the addressee if the patient, who is tested on a random schedule, is found to have used cocaine. An example would be a physician who writes to the State Board of Medical Examiners confessing that he has violated state law and professional ethics in the illicit use of cocaine and deserves to lose his license to practice medicine.<sup>12</sup>

In this example, the clinic is the escrow agent with a literal lockbox that will only be opened if the depositor fails to keep his commitment. While depositors to dating escrows hope that the conditions of escrow release are fulfilled, the depositor to a commitment escrow hopes that the conditions of escrow release are *not* fulfilled.<sup>13</sup> Similarly, in 2006, Barry Nalebuff

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mechanisms. See Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323, 357 (1994).

11. As this Article was being edited for publication, Colin Sullivan of Yale University’s Office of Cooperative Development discovered a patent application that relates to some of the escrow implementations discussed in this article. In 1998, John Ogilvie filed a World Intellectual Property Organization (“WIPO”) patent application under the Patent Cooperation Treaty, No. PCT/US98/23841 (filed Nov. 11, 1998), for a business-method invention to use “computer networks to both protect message contents by keeping them secret until a specified condition occurs.” *Id.* at 1. The patent application describes an “information escrow” that might be used, *inter alia*, by “a potential whistle-blower or other witness to some wrongful act or plot.” *Id.* at 1. The patent application describes the implementation of an information escrow with disclosure triggers and a network of dispersed escrow agents that would operate as “a ‘hidden choir’ which will sing when desired and otherwise remain silently ready in the background.” *Id.* at 4. In contradistinction to the allegation escrow described below, the Ogilvie patent does not contemplate escrow disclosure that is triggered by the deposit of a “matching” escrow deposit by another user. We discuss the existence of other information escrow patents *infra* in notes 31 and 40.

12. THOMAS C. SCHELLING, *STRATEGIES OF COMMITMENT AND OTHER ESSAYS* 78–79 (2006); see also IAN AYRES, *CARROTS AND STICKS* 86–89 (2010) (discussing the Denver addiction clinic and other examples of self-blackmail).

13. It would be possible to create a commitment escrow with information that the depositor wants to be communicated but that will only be released by the escrow agent if the depositor achieves some prespecified goal. For example, a commitment escrow might specify

designed a weight loss experiment for ABC's *Primetime*, in which five overweight people deposited with producers (here, serving as escrow agents) unflattering photographs of themselves in skimpy bathing suits with the understanding that the photographs would be broadcast on national television if the participants failed to lose fifteen pounds over the next two months.<sup>14</sup>

Commitment escrows are implemented on a much broader scale in criminal databases, which conditionally expunge criminal records. Notwithstanding the name, expungements generally do not erase information from the criminal database but instead place the information under seal.<sup>15</sup> Some jurisdictions make the nonuse of expunged convictions conditional on the convict avoiding any additional crime for some period in the future.<sup>16</sup> Conditional expungements are forms of commitment escrows, in which the government is the escrow agent threatening to release unwanted information if the convict recidivates.

Game theorists have also imagined the use of commitment escrows to overcome a kind of criminal's dilemma. Imagine that Todd catches his friend Sarah red-handed having just committed murder. Sarah reluctantly feels compelled to kill Todd to make sure he doesn't rat her out to the police. But before she goes to kill him, Todd discloses to her an equally incriminating piece of information about him that she can also reveal.<sup>17</sup> In

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that a desired proposal of marriage will only be forwarded if the depositor loses ten pounds. We have not encountered these "carrot commitment escrows" in practice, though.

14. One male worried that he wouldn't be sufficiently self-conscious about having his overweight picture shown on TV, and so he also deposited into escrow an unflattering photograph of his spouse as additional commitment motivation. To this same end, one could easily imagine the commitment website, [www.stickK.com](http://www.stickK.com) (which Ian Ayres cofounded), giving users the option of depositing into escrow embarrassing information that will only be released to the public or prespecified email addresses if the users fail to achieve their committed goals. See STICKK, [www.stickK.com](http://www.stickK.com) (last visited Aug. 16, 2012). The potential disclosure of some wrongdoing would be an additional layer of accountability that might powerfully motivate users to lose weight or complete a dissertation or business plan. While this Article was being edited for publication, a version of Nalebuff's commitment escrow was offered by a new website. See AHERK!, [www.aherk.com](http://www.aherk.com) (last visited Aug. 7, 2012).

15. Michael D. Mayfield, *Revisiting Expungement: Concealing Information in the Information Age*, 1997 UTAH L. REV. 1057, 1057 (1997); Fruqan Mouzon, *Forgive Us Our Trespasses: The Need for Federal Expungement Legislation*, 39 U. MEM. L. REV. 1, 5 n.15 (2008).

16. See, e.g., CAL. PENAL CODE § 1203.4 (2004) ("However, in any subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed."); MICH. COMP. LAWS § 712A.18e (2002) (providing for expungement of juvenile criminal records for one-time offenders lacking felony convictions); H.R. 5393, 92 Leg. Reg. Sess. (Mich. 2003) (bill proposing that expungement be conditional on receiving no subsequent convictions for four years).

17. See, e.g., SCHELLING, *supra* note 12, at 11. This type of dynamic may also be seen in the kidnapping context, where "[b]oth the kidnapper who would like to release his prisoner, and the prisoner, may search desperately for a way to commit the latter against informing on his captor." THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* 43 (1981). A downside of

this example, Todd, to save his life, has created a commitment escrow, making Sarah his escrow agent.

A second broad class of information escrow mechanisms concerns the posthumous disclosure of information. Presidents, Supreme Court justices, and other public figures may deposit into an archive information that will only be disclosed in the future after the death of certain people and/or the passage of a prespecified number of years.<sup>18</sup> Unlike commitment escrows, where the depositors hope that the information is never released, posthumous escrows seek to ensure the eventual disclosure of the information. The goal of such posthumous escrows is both to preserve the deposited information and make sure that the ultimate release of the information is not disrupted by the death, disability, or changed preferences of the information depositor. Anna, for example, may intend to tell Henry when he turns twenty that he is not her biological son, but she may be worried not only about being unable to make the future disclosure, but also about being unwilling to make the disclosure. A depositor's present self may worry that her future self will have different preferences or insufficient willpower to make the disclosure she currently desires, particularly when the disclosure desired is of sensitive information. Placing the information with a trusted, long-lived intermediary can reduce these risks.<sup>19</sup>

Legal wills themselves can serve some of these functions.<sup>20</sup> For example, it might only be at the posthumous reading of a last will and testament that the decedent's attorney (qua escrow agent) for the first time discloses that the decedent had not in fact graduated from college or that the decedent long ago fathered a child. The website Just In Case I Die provides a posthumous escrow service to help clients send time-delayed messages:

[T]here's probably loads of things you would like people to know ("I love you" / "The safe combination is 1432" / "I always thought you smelt of fish") that you simply can't bring yourself to saying whilst you're still alive to suffer the consequences. Imagine the freedom of knowing that they'll only find out if you never return from your trip to Spain!<sup>21</sup>

Some of the website's suggested uses are closer to commitment escrows, but seek to commit a third party from taking an unwanted action: "Going on a blind date? Not sure if he's a mass murderer? Drop an email to help@police.com with his name and address, safe in the knowledge that if

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being without sin is that you may not have the means to resort to this protective strategy. People who have ignoble secrets have something to exchange.

18. Adam Clymer & Don Van Natta Jr., *Family of Robert F. Kennedy Rethinks His Place at Library*, N.Y. TIMES, July 12, 2011, at A1.

19. Time capsules are another example of posthumous escrows—they allow the depositors to preserve the deposited information and communicate with future generations.

20. A future testator may revoke a prior will and leave the information undisclosed.

21. JUSTINCASEIDIE.COM, <http://justincaseidie.com> (last visited Nov. 22, 2011).

true love blossoms, you can safely log in and stop the message!”<sup>22</sup> The website ingeniously presumes by default that the depositor has died and automatically sends the message to the prespecified email address unless the depositor logs on to prevent the transmission.

Another kind of posthumous escrow that helps ensure the disclosure of information regardless of the depositor’s potentially changed future preferences is called the “software escrow.” This type of escrow is in widespread use in business. A software escrow, for instance, might require a software developer to place in escrow the uncompiled code of a program that has been specifically tailored for use by a licensing business.<sup>23</sup> The escrow agent would only release the code to the licensing business if the developer declared bankruptcy or if other prespecified events occurred.

### B. Shared-Interest Escrows

A third broad class of information escrows, what we call “shared-interest escrows” (or more simply “interest escrows”), includes implementations that have been the most formally modeled in the academic literature and the most consciously put into practice. We begin by discussing “settlement escrows,” where the parties express their interest in settling a dispute or negotiation by depositing offers into escrow. In 1983, Kalyan Chatterjee and William Samuelson analyzed a negotiation mechanism in which a potential buyer and seller simultaneously deposited sealed bids to a third party. The third party was to announce a trade if (and only if) the bids overlapped—meaning that the buyer’s bid had been higher than the seller’s bid.<sup>24</sup> This game represents a kind of information escrow, where the offers are the information being deposited and the third party is the escrow agent who is instructed to only release the information under prespecified and nondiscretionary conditions. As with allegation escrows, the private utterances placed into the settlement escrow are conditionally performative.<sup>25</sup> The complaint deposits that we discussed in the last Section might spring into life and launch investigation proceedings. The bid deposits of settlement escrows are formal, conditional offers to trade—conditional on there being overlapping bids—at a price equal to the average of the overlapping

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22. *Id.*; see also FREDERICK FORSYTH, *THE DAY OF THE JACKAL* 64 (1971) (describing how a person who made a gun for an assassin used an escrow to make sure he wasn’t killed by the assassin by giving a letter to others to be opened if he didn’t come home alive).

23. This is also known as “source code escrow.” For a discussion of source code escrow and a summary of arguments for and against its use, see Walter D. Denson, *The Source Code Escrow: A Worthwhile or Worthless Investment?*, 1 *RUTGERS BANKR. L.J.* 1 (2002). There are several companies that provide such services, such as EscrowTech International, ESCROW-TECH, <http://www.escrowtech.com> (last visited May 4, 2012), one of the leading source code escrow companies.

24. Kalyan Chatterjee & William Samuelson, *Bargaining Under Incomplete Information*, 31 *OPERATIONS RES.* 835 (1983).

25. See J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (2d ed. 1975) (introducing the concept of “performative utterances”).

bids.<sup>26</sup> For example, if the buyer deposits a \$100 offer, and the seller deposits an \$80 offer, the escrow agent would announce to them that a contract had been formed at a \$90 price. Shortly after Chatterjee and Samuelson published their article, Roger Myerson and Mark Satterthwaite published a pathbreaking paper, which still stands as one of the most foundational contributions to the mechanism design literature, showing that the Chatterjee and Samuelson mechanism was the most efficient mechanism possible.<sup>27</sup> Myerson and Satterthwaite formally proved that, given the buyer and seller's private valuation information, there are no negotiation procedures that produce higher expected gains of trade.

The power of the Chatterjee and Samuelson mechanism as a practical dispute resolution device is, however, severely limited by the requirement that the potential buyer and seller have only one opportunity to contract by placing single deposits into the settlement escrow mechanism. In 1995, Robert Gertner and Geoffrey Miller argued that settlement escrows could be beneficial even if they were merely a nonexclusive supplement to traditional bargaining and dispute resolution:

We are interested in the effects of adding a settlement escrow to the existing bargaining game, not replacing the bargaining game with a different mechanism. In our approach, there is neither commitment to delay ordinary negotiations pending the outcome of the escrow process nor commitment to avoid further bargaining if the parties fail to settle in the settlement escrow. We argue that, independent of the bargaining game that exists, adding a settlement escrow is likely to improve settlement and unlikely to have any significant costs.<sup>28</sup>

Laboratory experiments with Carnegie Mellon University students conducted by Linda Babcock and Claudia Landeo have shown that just giving disputants a settlement escrow option, even a nonexclusive one, can substantially increase bargaining efficiency.<sup>29</sup>

Nonexclusive settlement escrows have found considerable real-world traction. In 2001, the state of Nebraska mandated that all litigants "in district court civil actions that involve only monetary remedies" be given the opportunity to resolve their dispute by means of a settlement escrow administered by the Nebraska Office of Dispute Resolution.<sup>30</sup> The United States Patent

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26. Chatterjee and Samuelson also posited that the price might be set so as to give a bargainer with greater bargaining power a larger fraction of the overlapping gains from trade (however, with an attendant loss in allocative efficiency). Chatterjee & Samuelson, *supra* note 24, at 841.

27. Roger B. Myerson & Mark A. Satterthwaite, *Efficient Mechanisms for Bilateral Trading*, 29 J. ECON. THEORY 265 (1983).

28. Robert H. Gertner & Geoffrey P. Miller, *Settlement Escrows*, 24 J. LEGAL STUD. 87, 93 (1995).

29. Linda Babcock & Claudia M. Landeo, *Settlement Escrows: An Experimental Study of a Bilateral Bargaining Game*, 53 J. ECON. BEHAV. & ORG. 401 (2004).

30. NEB. REV. STAT. § 25-2924 (2008) (repealed 2009). The statutory provisions governing settlement escrows can be found in NEB. REV. STAT. §§ 25-2922 to -2929 (2008) (repealed 2009). The state's Office of Dispute Resolution made available a useful guide to the

and Trademark Office (“USPTO”) deemed a 1998 patent application for settlement escrows to be novel and nonobvious and in 2001 issued a patent.<sup>31</sup> This patent, which has been licensed to the online (and offline) dispute resolution facility Cybersettle, uses a nonexclusive version of the Chatterjee and Samuelson settlement escrow to facilitate “over \$1.8 billion in claims” arising out of more than 250,000 cases.<sup>32</sup> Several other websites offer or have offered settlement escrows.<sup>33</sup>

Nonexclusive interest escrows have also been used outside of the dispute resolution arena. In a dating escrow, for example, one person deposits into escrow his or her interest in going on a date with another specific person. The escrow remains undisclosed unless the escrow agent receives a matching escrow from the specified person indicating a matching interest to go on

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escrow process. See NEB. OFFICE OF DISPUTE RESOLUTION, A GUIDE FOR SETTLEMENT ESCROW DISTRICT COURT ONLY! (2003), available at <http://forms.justia.com/nebraska/statewide/district-court/miscellaneous/form-for-party-wishing-to-participate-in-24567.html> (last visited May 4, 2012). The program was discontinued in 2004 and the statutory provisions were repealed in 2009. See L.B. 1, 101st Leg., 1st Spec. Sess. (Neb. 2009); Telephone Interview with Rachel Lempka, Dir., Neb. Office of Dispute Resolution (Aug. 5, 2011). While the escrow option was in place, litigants deposited 252 offers, but only one case ever settled using the escrow mechanism (apparently because most of the escrowed settlement offers were unreciprocated). Interview with Rachel Lempka, *supra*.

31. See U.S. Patent No. 6,330,551 col.4 ll.51–56 (filed Aug. 6 1998) (issued Dec. 11, 2001) (“The computer matches the settlement offer against the claimant’s demand and performs its programmed calculations in order to determine whether or not a settlement has been achieved. Where the demand and offer intersect in accordance with preestablished conditions, settlement is reached.”). The patent application was filed three years after the publication of Gertner & Miller, *supra* note 28, but fails to mention Gertner and Miller as prior art. See U.S. Patent No. 6,850,918 (filed Nov. 29, 1999) (issued Feb. 1, 2005); U.S. Patent No. 6,954,741 (filed Aug. 6, 1999) (issued Oct. 11, 2005); U.S. Patent No. 7,249,114 (filed Oct. 10, 2003) (issued July 24, 2007) (failing to reference Gertner & Miller, *supra* note 28). In 2001, the game theorist Barry Nalebuff with a host of coinventors unsuccessfully filed a patent application expressly invoking the concept of “information escrows.” See A Negotiation Protocol Using a Third-Party Information Escrow, PCT/US01/12081 (filed Apr. 12, 2001).

32. *How Cybersettle Works*, CYBERSETTLE, <http://www.cybersettle.com/pub/home/demo.aspx> (last visited Oct. 6, 2011). The Cybersettle mechanism allows each disputant to deposit bids for up to three different rounds of bidding—testing each successive round for overlapping deposits. Russell Weiss, *Some Economic Musings on Cybersettle*, 38 U. Tol. L. Rev. 89, 91 (2006). The Federal Circuit in construing the ‘511 claims concluded that to practice the independent claims would “require the receipt of at least two demands and at least two settlement offers.” *Cybersettle, Inc. v. Nat’l Arbitration Forum, Inc.*, 243 F. App’x 603, 609 (Fed. Cir. 2007). The Cybersettle mechanism also modifies the Chatterjee and Samuelson split-the-overlap price with a “20% exception”: “[T]he final settlement can never exceed the demand by more than 20%. For example, if the offer is \$100,000 and the demand is \$5,000, the case will not settle for the median (\$52,500); it will instead settle for \$6,000 (20% above \$5,000).” Weiss, *supra*, at 91; see also Bruno Deffains & Yannick Gabuthy, *Efficiency of Online Dispute Resolution: A Case Study*, COMM. & STRATEGIES, Oct. 1, 2005, at 201, 201 (arguing that the Cybersettle mechanism “creates some crucial inefficiencies”).

33. See Melissa Conley Tyler & Di Bretherton, *Seventy-Six and Counting: An Analysis of ODR Sites*, in PROCEEDINGS OF THE ODRWORKSHOP.ORG, EDINBURGH, June 28, 2003, at 13 (A.R. Lodder et al. eds., 2003) (providing as additional examples ClickNsettle, InterSettle, e-settle.co.uk, MARS, Settlement Online, WeCanSettle, The Claim Room, WebMediate, and Dispute Manager).

a date. Nonexclusive dating escrows have been used at a number of colleges, giving graduating seniors the opportunity for a “last chance match” using a dating escrow algorithm.<sup>34</sup> For example, at Yale University in 2004, the escrow matched 856 couples for a “last chance dance” from an escrow dataset of 5,143 “crushes” submitted to an online escrow database by 773 people.<sup>35</sup>

The dating escrow is also available to undergraduates more generally at “anonymizing matching” websites, like GoodCrush, where more than 30,000 crush deposits have been placed into escrow.<sup>36</sup> The site’s free “CrushFinder” service allows students at more than two dozen colleges to enter the email addresses of up to five crushes. These objects of affection are invited to submit their own crushes. If (and only if) the email addresses of two similarly inclined people match is the information revealed.<sup>37</sup> CrushFinder by some measures has found the kind of quick adoption reminiscent of Facebook.<sup>38</sup> When Princeton University undergraduate student Josh Weinstein launched the site in the spring of 2007 for his fellow undergraduates, 30 percent of the student body signed up within twenty-four hours.<sup>39</sup> As with settlement escrows, the USPTO has found the crush escrow to be sufficiently novel and nonobvious to warrant patent protection.<sup>40</sup>

Finally, shared-interest escrows have been used by a number of states to help intermediate the potential initial contact between adopted children and their biological parents. In general, state laws governing adoption records may be divided into open and closed systems.<sup>41</sup> In the six states with open

34. See, e.g., *The Last Chance Match*, HARVARD COMPUTER SOC’Y, <http://www.hcs.harvard.edu/class2010/lastchancematch/register.html> (last visited Oct. 6, 2011).

35. Nicholas Zamiska, *Before Graduation at Yale, A Last Chance for Romance*, N.Y. TIMES, May 30, 2004, § 14CN, at 6. The average depositor submitted more than six crushes—leading to more matches than people submitting. See *id.* This suggests that at least some submitters were not looking to connect with that special someone but rather those special someones.

36. *Crushfinder*, GOODCRUSH, <http://www.goodcrush.com/crushes> (last visited May 4, 2012). See generally *Anonymous Matching*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Anonymous\\_matching](http://en.wikipedia.org/wiki/Anonymous_matching) (last visited Oct. 6, 2011) (“Anonymous matching is a matchmaking method facilitated by computer databases, in which each user confidentially selects people they are interested in dating and the computer identifies and reports matches to pairs of users who share a mutual attraction.”). A half-dozen other websites have provided crush escrows—including eCRUSH.com (targeted to the teen market and claiming “more than 1.6 million users and . . . more than 600,000” matches), DoYOU2.com, LiveJournal Secret Crush meme, SecretAdmirer.com (claiming 100,000 successful matches), someoneIlikesyou.com, crush-link.com, and Crush Notifier (Facebook application). *Id.*

37. *Crushfinder*, *supra* note 36; see also Hannah Seligson, *Will My Love Say Yes? College Kids Ask This Website*, WALL ST. J., July 16, 2010, at W9.

38. See THE SOCIAL NETWORK (Columbia Pictures 2010).

39. Patricio Martinez, *Online Dating Site Aims to Aid Lovestruck Cornellians*, CORNELL DAILY SUN, Feb. 12, 2010, <http://cornellsun.com/node/40726>.

40. U.S. Patent No. 5,950,200, at [54] (filed Jan 24, 1997) (issued Sept. 7, 1999) (titled “[m]ethod and apparatus for detection of reciprocal interests or feelings and subsequent notification”).

41. See generally U.S. DEP’T OF HEALTH & HUM. SERVS., ACCESS TO ADOPTION RECORDS: SUMMARY OF STATE LAWS (2009), available at <http://www.childwelfare.gov/systemwide/>

systems,<sup>42</sup> an adoptee is entitled to view his or her original birth certificate (containing the names of his or her biological parents) upon reaching the age of majority.<sup>43</sup> In open states, adoptees are free to directly contact their biological parents. All other forty-four states have a closed system, under which the adoptee lacks the right to see her birth certificate and consequently lacks the means to directly contact her biological parents.

However, forty-one of the forty-four closed states have implemented some version of shared-interest escrows that allows adoptees to initiate inter-mediated contact.<sup>44</sup> Approximately thirty of the closed states maintain a “mutual consent registry,” essentially a shared-interest escrow, which permits the exchange of identifying information upon the mutual consent of the biological parent and adoptee. Approximately twenty-two of the state mutual consent registries presume the biological parent’s nonconsent.<sup>45</sup> In these states, identifying information is not released unless the biological parent files an affidavit in advance affirmatively consenting to disclosure. Eight of the state mutual consent registries presume consent, requiring the parent to file an affidavit to prevent the release of identifying information at the adoptee’s request.<sup>46</sup> Nine of the closed states plus Michigan and Alabama permit appointing a “confidential intermediary” to contact biological parents on behalf of an adoptee upon application by the adoptee. The intermediaries only forward contact information if a biological parent indicates a willingness to make contact with the adoptee.<sup>47</sup>

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laws\_policies/statutes/infoaccessapall.pdf (surveying the approaches of various states with regard to access to adoption records and showing that some states allow access for adult adoptees while others are more restrictive).

42. See *id.* at 5 & n.13 (listing “Alabama, Alaska, Maine, [and] Oregon” as allowing adult adoptee access to original birth certificate upon request). Kansas and New Hampshire allow access to birth records as well. KAN. STAT. ANN. § 65-2423(b) (2002) (providing that an adoptee’s original birth certificate “may be opened by the state registrar only upon the demand of the adopted person if of legal age or by an order of court”); N.H. REV. STAT. ANN. § 5-C:9 (Supp. 2011) (“Upon written application by an adult adoptee, who was born in this state and who has had an original birth certificate removed from vital statistics records due to an adoption, the registrar shall issue to such applicant a non-certified copy of the unaltered, original certificate of birth of the adoptee . . .”).

43. See, e.g., ALA. CODE § 22-9A-12(c) (LexisNexis 2006) (granting adoptees nineteen years or older access to original birth certificate).

44. Two of those forty-one states, Alabama and Michigan, are open adoption states. In these states the shared-interest escrows may serve as a middle ground between no contact and direct contact.

45. See U.S. DEP’T OF HEALTH & HUM. SERVS., *supra* note 41, at 4 (“Approximately 30 States have established some form of a mutual consent registry . . . . However, eight States will release information from the registry upon request unless the affected party has filed an affidavit requesting nondisclosure.”).

46. *Id.*

47. See *id.* at 5 & n.9. Private (or public) information escrows might provide additional options to adoptees and biological parents contemplating contact. For example, in open states, a nonexclusive escrow might facilitate contact between adoptees and biological parents in a more discrete and privacy-respecting manner than direct, unsolicited contact by the adoptee. Indeed, an escrow could allow the biological parent to indicate in advance that he or she

The shared-interest escrow is more than just an intriguing game-theoretic curiosity. Shared-interest escrows have been shown to be workable in a variety of contexts. Indeed, the dramatic success of interest escrows in the three different contexts of dispute resolution, dating, and adoption is one impetus for us asking where else the technique might be usefully employed.

## II. USING ALLEGATION ESCROWS TO MITIGATE INITIAL CLAIM AVERSION

Our fourth and final class of information escrows, and one that is a central focus of this Article, is allegation escrows. As introduced above, allegation escrows allow people to place actionable claims into escrow that will only be filed against a potential defendant by the escrow agent if a pre-specified number of allegations are lodged against the same defendant.

Allegation escrows share some of the same attributes as shared-interest escrows. With allegation escrows, the allegation depositor is trying to discover whether someone else exists who has a shared interest in filing a complaint against the same harasser. But unlike with settlement or dating escrows, the allegation depositor doesn't know the identity of the person with whom she is trying to discover a shared interest or even whether such another person exists. Moreover, allegation escrows and shared-interest escrows have distinct rationales. Shared-interest escrows can help speakers overcome their reluctance of expressing interest directly to other potential depositors who may not share their interest. In contrast, the reluctance of allegation depositors to make direct claims does not stem from a fear about the response of other potential depositors. Rather, allegation depositors are worried about potential retaliation from nondepositors such as the accused harasser.

The central function of allegation escrows is to respond to the possibility that there will be a first-mover disadvantage in claiming. This Part will argue that in some contexts—such as sexual harassment, our central motivating example—there will be victims who want to make a claim and are willing to file follow-on claims, but who are nonetheless unwilling to be the first and potentially only person to make a claim against a wrongdoer. A first-mover disadvantage of this kind can make the sexual harassment complaint processes akin to a variety of other strategic contexts that exhibit

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would prefer not to be contacted, thereby preventing the invasion of privacy that might result from even receiving notice that the adoptee would like to establish contact. Similarly, while existing websites often allow adoptees to contact their biological parents, an independent escrow could facilitate contact in the reverse direction as well. Through the escrow, biological parents could notify adoptees of the parents' willingness to exchange information. Finally, though difficult, shared-interest escrows could support connections between adoptees and biological parents in the three pure "closed" states. Matching would need to occur among adult adoptees only, and would require sufficient information to match on bases other than name, such as date and place of birth. These practical realities might limit the number of successful matches in closed-adoption states. The high emotional, medical, and other stakes might nevertheless justify the effort of developing and maintaining the adoption escrow mechanism.

“excessive inertia.”<sup>48</sup> Sexual harassment can produce a kind of “claimant’s dilemma”—a dynamic version of the classic stag hunt game, in which sexual harassment victims prefer to coordinate and jointly file claims, but where each victim nevertheless individually chooses to defect by not filing a claim.<sup>49</sup> In the original stag hunt game, two hunters are separated so that they cannot try to coordinate their behavior. But the claimant’s dilemma in some ways is even more severe because a sexual harassment victim often does not know the identity of other victims, or indeed whether there are any other victims.

Economists refer to games with this kind of first-mover disadvantage as exhibiting the “penguin problem” based on the stylized interaction of a flock of penguins trying to fish:

Hungry penguins gather at the edge of an ice floe, reluctant to dive into the water. There is food in the water, but a killer whale might be lurking, so no penguin wants to dive first. In such circumstances, individual rationality may lead a group to forfeit attractive opportunities, for example, a predator-free meal or an innovative new networked product.<sup>50</sup>

In such circumstances, “[n]o one moves unless everyone moves, so no one moves.”<sup>51</sup> A recidivist sexual harasser’s wrongdoing might go unchallenged because no one is willing to be the first (and potentially only) claimant to lodge a complaint.<sup>52</sup>

But why exactly would victims of sexual harassment be more reluctant to bring an initial claim than a follow-on claim? We suggest that there are two related reasons. First, follow-on claimants face a reduced risk of retaliation. A lone claimant’s credibility is more susceptible to attack. Initial claimants are more likely to be disparaged as liars who have either fantasized or fabricated their harassments. Sexual harassment claims are a circumstance where claimants can find some measure of safety in numbers. A lone claimant of sexual harassment often presents adjudicators with a “he

48. Joseph Farrell & Garth Saloner, *Installed Base and Compatibility: Innovation, Product Preannouncements, and Predation*, 76 AM. ECON. REV. 940, 940 (1986).

49. In a “stag hunt” game, two hunters must individually decide whether to hunt for a stag or a hare. Unlike a prisoner’s dilemma, it is a pure game of coordination, where each player would prefer to match the other player’s strategy. See John B. Van Huyck, Raymond C. Battalio & Richard O. Beil, *Tacit Coordination Games, Strategic Uncertainty, and Coordination Failure*, 80 AM. ECON. REV. 234, 235 (1990).

50. THOMAS R. EISENMANN, PLATFORM-MEDIATED NETWORKS: DEFINITIONS AND CORE CONCEPTS 7 (2006) (discussing Farrell & Saloner, *supra* note 48).

51. Vince Kuraitis, *Overcoming the Penguin Problem: Setting Expectations for EHR Adoption*, E-CAREMANAGEMENT BLOG (Aug. 2, 2009), <http://e-caremanagement.com/overcoming-the-penguin-problem-setting-expectations-for-ehr-adoption>.

52. As the disturbing example of former Pennsylvania State University coach Jerry Sandusky (which we describe in detail below) indicates, the need to mitigate these first-mover disadvantages is real and urgent. Many boys endured years of sexual abuse at the hands of an oft-repeat offender. It wasn’t until a first mover finally made some of the charges sufficiently public—years after the alleged abuse began—that the full scope of the allegations became known. See *infra* note 123 and accompanying text.

said / she said” choice of crediting either the account of the accuser or that of the accused. This credibility contest can become stacked in the harasser’s favor if the harasser has intentionally preyed on vulnerable victims who may worry that their allegations will not be believed. Even without overt retaliation, initial claimants run the reputational risk that their contested claim will be rejected. In contrast, a follow-on claim presents the adjudicator with a “he said / they said” choice. As the size of the claimant pool increases, it may become more difficult for the accused to argue that the claimants are all crazed or disgruntled. A central risk to bringing an initial claim is that an initial claimant often cannot be sure that follow-on claimants will materialize to lend credence to her initial claim.<sup>53</sup>

A second and subtler reason for initial claim aversion is that some potential claimants may be uncertain about whether what they experienced was in fact harassment.<sup>54</sup> A student, for example, might be uncertain whether a professor’s lingering hug crossed the line. This uncertainty might turn on whether a reasonable student would find the hug unwanted or whether the professor possessed the requisite mens rea to make the act wrongful in the claimant’s mind (regardless of whether it was sufficient for the law). However, this same student might feel very differently about bringing a follow-on claim upon learning that other students had also found the professor’s behavior objectionable. In short, waiting to be a follow-on claimant can reduce “wrongdoing uncertainty.” Potential claimants will experience different degrees of wrongdoing uncertainty—in part because of differences in disposition, but especially because of differences in the type of wrongdoing they have experienced. Blatant forms of sexual quid pro quo or sexual assault are unlikely to leave a victim uncertain that a harm has been perpetrated. But at times, even the victims of acquaintance rape report being uncertain about whether a sexual encounter was sufficiently nonconsensual.<sup>55</sup> Victims may find follow-on complaints more attractive than first-mover allegations because knowing that others have found similar actions by the accused wrongful can increase confidence in their own claims.<sup>56</sup>

#### A. Modeling the Impact of Escrows on the Communication Equilibrium

If all of the potential victims of a harasser hesitate to bring an initial claim because of retaliation risk or wrongdoer uncertainty, even the harassment of repeat offenders may go unchallenged. The first-mover disadvantage to

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53. And even when follow-on claimants do come through, the first accuser might experience relatively greater overt and reputational harm.

54. See AAUW REPORT, *supra* note 1, at 38.

55. See Bonnie S. Fisher et al., *Reporting Sexual Victimization to the Police and Others: Results from a National-Level Study of College Women*, 30 CRIM. JUST. & BEHAV. 6, 8 (2003).

56. Similarly, in less egregious cases of harassment, complainants may be more willing to excuse a harasser if the harassment appears to be a one-time incident or mistake. Knowledge of repeated episodes might thus make complainants both more certain of and more offended by improper behavior.

claiming can lead to the oft-discussed underreporting problem.<sup>57</sup> Allegation escrows can mitigate the first-mover disadvantage by reducing retaliation risk, reputational risk, and wrongdoer uncertainty. A victim making a deposit to an allegation escrow does not know whether she is the first victim to make such a deposit, but she can rest assured that her complaint will only be passed on to authorities if at least one other person lodges a similar complaint. Instead of forcing a claimant to decide whether she wants to make a claim before or after potential fellow victims, allegation escrows allow victims to make what is informationally equivalent to simultaneous claims. Even though the escrow will receive allegations over time, the escrow agent will only release them simultaneously.

A claimant can further rest assured that, if her complaint is forwarded, it will not just be her word against that of the accused. She knows there will be a formal complaint if and only if at least one other person found something about the accused's conduct worthy of investigation. At the time of making the allegation, she does not know whether there are other claimants, but she does know that she will not be alone in any formal complaint that is filed. Accordingly, some sexual harassment victims who would have preferred silence to filing an initial complaint may be willing to deposit their allegation in escrow.

But to be clear, there is no *a priori* reason why giving victims the escrow option would increase the number of harassment investigations. In a world with escrows, some victims who otherwise would have been willing to go it alone and file an initial allegation will instead prefer to place that allegation in escrow. Some of these escrow allegations will never see the light of day. Indeed, a one-off harasser unambiguously faces less risk of investigation as long as there is some probability that the sole victim will make her claim ineffectual by sending it into escrow. Thus, the case for allegation escrows will be weaker if a larger proportion of potential escrow users would otherwise be willing to go it alone with initial unescrowed claims, or if a smaller proportion of harassers are repeat offenders.

To explore more precisely the circumstances under which the escrow option will increase the probability of lodged complaints, this Section analyzes a highly stylized model of sexual harassment in a university setting. First, imagine a three-stage harassment/claiming game without escrows. In stage 1, professors have an opportunity to harass 0, 1, 2, 3, or 4 students. In stage 2, victims of harassment have the option of remaining silent or simultaneously bringing independent claims.<sup>58</sup> In stage 3, victims who remained silent

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57. See AAUW REPORT, *supra* note 1, at 32–33 (discussing underreporting by students).

58. In the real world, harassment takes place over time and victims choose over time whether to file complaints. However, to allow for more tractable estimation, we've assumed that the harassment takes place in an initial stage that might span five years, while victims (uninformed about whether other students were harassed by the same professor) must simultaneously and independently choose whether to file an initial complaint. While the assumption of simultaneity abstracts from reality, many universities keep the identity of harassment defendants nonpublic, see discussion *infra* accompanying notes 60–61, so that students are often

in stage 2 can bring follow-on complaints. This model requires parameters for the following:

- $F(x)$  the probability that a professor at the school will harass  $x = 0, 1, 2, 3,$  or 4 students;
- $p_d$  the probability that a victim will bring an initial stage 2 *direct* complaint; and
- $p_f$  the probability that a victim who was silent in stage 2 but sees that a complaint was filed in stage 2 against her harasser will bring a stage 3 *follow-on* complaint.

This simple model captures two stylized facts about harassment claimants: (1) not all victims are willing to file initial claims ( $p_d < 1$ ); and (2) some victims who are not willing to bring initial claims are willing to claim if they learn that another claim has been filed against their harasser ( $p_f > 0$ ). With values for these parameters, it is possible to simulate the probability that a harassing professor will be investigated.

To construct an alternative world in which escrows are allowed, assume that in stage 2 victims have the additional option of filing their allegation in escrow. If at least the triggering number of escrowed allegations is lodged against a professor in stage 2, then the escrow agent makes the professor's identity public by formally lodging a complaint. In stage 3, previously silent victims may come forward and file follow-on complaints to either the stage 2 direct complaints or the stage 2 escrowed allegations that have reached the requisite numerosity for release. To simulate this escrow alternative, we need to additionally provide parameter values for the following:

- $T$  the number of escrowed allegations against a specific professor that triggers the release of those escrows in stage 2;
- $\alpha_d$  the proportion of victims who in a world without escrows would have filed direct claims in stage 2 but in a world with escrows choose to escrow their allegations; and
- $\alpha_s$  the proportion of victims who in a world without escrows would have remained silent in stage 2 but in a world with escrows choose to escrow their allegations.

Producing plausible values for these parameters is no easy task. Estimates about victim preferences in an as-of-yet counterfactual world in which escrowed reporting is available is, of course, speculative at best. As a starting point, we relied on the wisdom of the crowd, informally asking a mixture of professors and students for their assessment, and simulated the equilibrium with and without the escrow option using the typical response for each parameter. To aid the reader in estimating alternative parameter values, we

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uninformed about whether a prior complaint has in fact been filed—which creates an analogous strategic setting for potential complainants.

have put on the internet an Excel file that allows users to run their own simulations.<sup>59</sup>

Table 1 reports the results of this simulation and shows that for these assumed parameter values, the escrow option increases both the probability that a harassing professor will be investigated and the quantity of evidence available for the investigation:

TABLE 1  
SIMULATION EXAMPLE IN WHICH ESCROW OPTION INCREASES  
THE NUMBER OF INVESTIGATIONS AND THE EXPECTED  
NUMBER OF COMPLAINTS PER INVESTIGATION

Professor type (i.e., number of students harassed)	With Escrow				Without Escrow			Percent Improvement (With Escrow Relative to Without Escrow)		
	Prob. harassing prof. will be investigated	Expected number of complaints per investigated prof. after stage 2	Expected number of complaints per investigated prof. after stage 3	Prob. that escrow will be orphaned	Prob. harassing prof. will be investigated	Expected number of complaints per investigated prof. after stage 2	Expected number of complaints per investigated prof. after stage 3	In probability harassing professor will be investigated	In expected number of complaints per investigated professor after stage 2	In expected number of complaints per investigated professor after stage 3
1	9.5%	1.00	1.00	100.0%	10.0%	1.000	1.000	-5.0%	0.0%	0.0%
2	20.1%	1.14	1.29	86.0%	19.0%	1.053	1.242	5.6%	8.6%	3.7%
3	30.7%	1.29	1.59	74.0%	27.1%	1.107	1.486	13.1%	16.2%	6.8%
4	40.7%	1.44	1.90	63.6%	34.4%	1.163	1.731	18.3%	23.4%	9.6%
Weighted Average	31.2%	1.35	1.71	74.0%	27.3%	1.13	1.58	14.4%	19.5%	8.9%

Based on simulation described in accompanying text with  $F(1) = .01$ ;  $F(2) = .03$ ;  $F(3) = .03$ ;  $F(4) = .06$ ;  $p_1 = .1$ ;  $p_2 = .2$ ;  $T = 2$ ;  $\alpha_1 = .5$ ;  $\alpha_2 = .15$ .

For example, Table 1 shows that in a world without escrows, harassing professors faced on average a 27.3% chance of being investigated, but that with escrows this probability increases to 31.2%—a 14.4% increase. The table also shows, however, that the probability of investigation varies for different types of professors. Professors who harass fewer students have a smaller chance of being investigated. We can also see the counterproductive impact of the escrow option with regard to professors who harass only a single student. These one-off harassers face a 5% lower probability of being investigated in a world with escrows than without, because in this simulation 5% of victims who would have brought a direct claim choose instead to file an escrow claim that never sees the light of day.

Table 1 also shows that giving victims the escrow option increases the expected number of complaints per investigation. We see in particular that the expected number of complaints increases for professors who harass more students. For example, without escrows, one-off harassers who are investigated will face just one complaint, while those who harass four students and are investigated can expect to face 1.44 complaints after stage 2 (based on the possibility of multiple direct complaints), and 1.9 complaints after stage 3 (based on the possibility of follow-on suits). The number of suits after stage 3 seems the most policy relevant because it represents the

59. Ian Ayres & Cait Unkovic, <http://www.ianayres.com/escrowsimulation.xls> (last updated 2012).

total set of claims for investigation. But as we mention below, many university policies on the identity of accused harassers are opaque,<sup>60</sup> and there is little interschool consistency with respect to the accused's right to confidentiality during and after a formal investigation.<sup>61</sup> Failure to publicly disclose the identity of the accused effectively forecloses the opportunity for follow-on claims, unless the initial claimants are willing and able to publicize their claims. In such situations, the expected number of claims after stage 2 becomes a more relevant measure of the expected evidence that will be available to investigators.

Table 1 also shows the potential value of giving victims the escrow option. The escrow option increases the expected number of complaints after stage 3 by nearly 9 percent and after stage 2 by nearly 20 percent.<sup>62</sup> The escrow option in this example thus increases both the probability of investigation and the expected quantity of evidence that is before the investigator. But this simulation at most suggests the possibility that escrow regimes can enhance the probability of deterrence. Our admittedly crude model does not allow for the possibility of false claims and makes a host of other restrictive assumptions.<sup>63</sup>

Nonetheless, the exercise is instructive because it may provide a heuristic sense of how the results would be impacted by alternative assumptions. For example, Table 1 also calculates the proportion of escrow complaints that remain unmatched and unreported, or what we call "orphaned." We see that 100% of escrow complaints lodged against one-off harassers are orphaned, and though this percentage declines for recidivist harassers, the overall probability that an escrow claim will be orphaned is nearly 75%. If the simulation is reestimated with a trigger of 3, this probability balloons to 97.1% while the probability of harasser investigation falls by 2.7%. The theory is agnostic about the appropriate trigger. But our exploration of

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60. See, e.g., REPORT OF THE COMMITTEE ON SEXUAL HARASSMENT AND ASSAULT PREVENTION EDUCATION IN YALE COLLEGE app. (2008) (providing a survey of Yale University reporting policies).

61. For one school policy that deals explicitly with the privacy rights of the accused and the general interest in confidentiality, see BROWN UNIVERSITY, BROWN SEXUAL HARASSMENT POLICY (2012), available at <http://www.brown.edu/about/administration/institutional-diversity/sites/brown.edu/about/administration/institutional-diversity/files/uploads/SexualHarassmentPolicy.pdf>.

62. After stage 3, the escrow advantage declines because the larger proportion of silent victims in the "no-escrow" regime catch up by bringing more follow-on claims.

63. For example, the simulation does not allow for different propensities of silent victims to file stage 3 follow-on claims in escrow and no-escrow regimes. We also hold the distribution of harassing professors constant in the two regimes, even though the higher likelihoods of investigation and higher number of expected claims might deter some recidivist harassers. We also assume perfect or nearly perfect information with respect to reporting options. Relatedly the necessary publicity might inform some professors that their behavior is reportable, and potentially deter their harassing behavior. However, insofar as one ultimate goal is to reduce the prevalence of sexual harassment, such deterrence might nevertheless justify the use of an escrow system.

hundreds of alternative parameter values suggests to us that a trigger of 2 is likely to produce better results than a higher trigger.<sup>64</sup>

The model also helps illustrate that giving victims the escrow option is not always a good idea. Table 2 resimulates claiming and investigating assuming the same parameter values as in Table 1, except increasing the probability that a victim will bring a direct complaint ( $p_d$ ) from 10 percent to 70 percent.<sup>65</sup>

TABLE 2  
SIMULATION EXAMPLE IN WHICH ESCROW OPTION DECREASES THE  
NUMBER OF INVESTIGATIONS AND THE EXPECTED NUMBER OF  
COMPLAINTS PER INVESTIGATION

Professor type (i.e., number of students harassed)	With Escrow				Without Escrow			Percent Improvement (With Escrow Relative to Without Escrow)		
	Prob. harassing prof. will be investigated	Expected number of complaints per investigated prof. after stage 2	Expected number of complaints per investigated prof. after stage 3	Prob. that escrow will be orphaned	Prob. harassing prof. will be investigated	Expected number of complaints per investigated prof. after stage 2	Expected number of complaints per investigated prof. after stage 3	In probability harassing professor will be investigated	In expected number of complaints per investigated professor after stage 2	In expected number of complaints per investigated professor after stage 3
1	66.5%	1.00	1.00	100.0%	70.0%	1.000	1.000	-5.0%	0.0%	0.0%
2	89.4%	1.50	1.58	92.0%	91.0%	1.538	1.631	-1.7%	-2.4%	-3.3%
3	96.8%	2.10	2.24	84.6%	97.3%	2.158	2.327	-0.5%	-2.7%	-3.7%
4	99.0%	2.76	2.96	77.9%	99.2%	2.823	3.058	-0.1%	-2.3%	-3.3%
Weighted Average	93.8%	2.23	2.38	84.4%	94.6%	2.28	2.45	-0.9%	-2.1%	-3.0%

Based on simulation described in accompanying text with  $F(1)=.01$ ;  $F(2)=.03$ ;  $F(3)=.03$ ;  $F(4)=.06$ ;  $p_c=.7$ ;  $p_e=.2$ ;  $T=2$ ;  $\alpha_c=.5$ ;  $\alpha_e=.15$ .

From Table 2, we see that a world with a relatively small underreporting problem is less likely to produce net escrow benefits. When most victims bring complaints, the escrow option is more likely to convert direct complaint victims into escrows (thereby retarding deterrence) than to convert silent victims into escrows (thereby enhancing deterrence). Table 2 shows that it is also possible for the escrow option to reduce the probability that a harassing professor will be investigated and reduce the expected number of complaints per investigation. Table 3 goes a step further in exploring the conditions under which an escrow regime enhances deterrence by reporting the relative improvement in the investigation probability for eighty-one different simulations:

64. It is of course possible that a higher trigger will induce more silent victims to file escrowed allegations. However, our investigation suggests that the increased probability of converting "silents" to "escrows" would have to be unreasonably large to offset the increased orphaning effect of a larger trigger. For example, we estimate, using the parameters of Table 1, that  $\alpha_c$  would need to approach 36 percent (more than double our current assumption) in order to offset an increase in the trigger from 2 to 3.

65. Available survey data suggest that 10 percent is closer to reality, but the sensitive context and vast secrecy make accurate estimates difficult. See AAUW REPORT, *supra* note 1, at 33 fig.10. The purpose of the table is to make clear that for certain parameter values the escrow option would degrade the information equilibrium.

TABLE 3  
 PERCENT IMPROVEMENT IN PROBABILITY THAT HARASSING PROFESSOR WILL  
 BE INVESTIGATED IN A REGIME THAT ALLOWS ESCROWS RELATIVE TO A  
 REGIME THAT DOESN'T ALLOW ESCROWS

		Probability that Direct Complainant Will Instead Escrow Allegation ( $\alpha_d$ )								
		5%	10%	15%	20%	25%	30%	35%	40%	45%
Probability that Victim Would Bring a Direct Complaint in Escrowless World ( $p_d$ )	5%	37%	33%	30%	27%	24%	21%	17%	14%	11%
	10%	14%	11%	8%	5%	2%	-1%	-4%	-7%	-10%
	15%	7%	4%	1%	-1%	-4%	-7%	-10%	-13%	-16%
	20%	4%	1%	-2%	-4%	-7%	-10%	-12%	-15%	-18%
	25%	2%	-1%	-3%	-6%	-8%	-11%	-13%	-16%	-18%
	30%	1%	-2%	-4%	-6%	-8%	-11%	-13%	-15%	-18%
	35%	0%	-2%	-4%	-6%	-8%	-11%	-13%	-15%	-17%
	40%	0%	-2%	-4%	-6%	-8%	-10%	-12%	-14%	-16%
	45%	1%	-2%	-4%	-6%	-8%	-10%	-11%	-13%	-15%

Based on same analysis as Tables 1 and 2. Holding constant the parameters  $F(1)=.01$ ;  $F(2)=.03$ ;  $F(3)=.03$ ;  $F(4)=.06$ ;  $p=.2$ ;  $T=2$ ; and  $\alpha_s=5$ , but varying  $p_d$  and  $\alpha_d$ .

The simulations in Table 3 simultaneously vary the probability that victims would bring a direct complaint in an escrow world ( $p_d$ ) and the probability that these direct complainants would instead escrow their complaint if given the escrow option ( $\alpha_d$ ) (holding constant all of the other parameter assumptions of Table 1). Table 3 corroborates our previous discussion, in that to enhance deterrence, the escrow option is best deployed in contexts where underreporting is more severe or in which direct claims are unlikely to be converted to escrowed claims.

These simulations at best scratch the surface of the possible permutation of parameter values that might be evaluated. More generally, we find that escrows are more likely to enhance deterrence as follows:

- (i) the probability of one-off harassers ( $F(0)$ ) declines;
- (ii) the probability of direct complaining ( $p_d$ ) declines;
- (iii) the escrow release trigger ( $T$ ) declines;
- (iv) the direct-to-escrow conversion probability ( $\alpha_d$ ) declines; or
- (v) the silence-to-escrow conversion probability ( $\alpha_s$ ) increases.

In contrast, the relative level of deterrence from regimes with and without the escrow option is largely independent of the probability that silent victims will lodge follow-on complaints ( $p_f$ ).

### B. Additional Costs and Benefits of an Allegation Escrow Regime

The foregoing simulations abstract away or simply ignore a variety of impacts that escrows might have on the claiming, investigating, and ultimately the sanctioning of sexual harassment. For example, the model implicitly assumes that victims experienced similar types of sexual harassment and had similar propensities toward bringing a direct claim. But we know that sexual harassment comes in a variety of forms. It's possible that

victims will be more likely to bring direct complaints when the harassment is blatant and the harasser cannot preserve substantial plausible deniability. Hence, we expect that giving victims an escrow option would have a channeling impact on claim selection, which is related to our previous discussion of wrongdoer uncertainty. This channeling effect might be a social good by fostering an equilibrium in which egregious forms of harassment are more quickly brought to the authorities, while less egregious forms would remain in escrow until they were buttressed with additional support. Indeed, under this reading, the fact that some escrowed claims remain orphaned might not be an unalloyed bad.

More poetically, an escrow option might also increase the quantity and quality of claims simply by providing a single, straightforward venue to lodge complaints. Grievance procedures at some universities have been criticized for being confusing and opaque.<sup>66</sup> A poorly implemented escrow system might add to the confusion and thereby deter victims from taking any action. But a well-designed escrow mechanism might provide victims of harassment with the ability to log on to a single portal and lodge either a direct or escrowed allegation. Creating a focal location on the internet with transparent, easily understood options might itself go a long way toward facilitating complaints from victims of sexual harassment,<sup>67</sup> when it comes to inducing victims to engage in what Bill Felstiner, Richard Abel, and Austin Sarat have termed “naming, blaming and claiming,” framing matters.<sup>68</sup>

Giving victims the escrow option is also likely to enhance the quality of evidence that is made available for investigation. In equilibrium, some victims who would have filed follow-on complaints (after learning of another complaint against the same harasser) will instead be moved to escrow their allegation. Escrowed allegations can provide superior evidence of harassment to investigators for two independent reasons. First, the escrowed complaint reduces the risk of copycat allegations. Once an allegation of harassment is made public, it is possible for subsequent claimants to falsely mimic, either intentionally or unintentionally, the details of a harassment claim. Escrowed claims reduce this risk of piling on.<sup>69</sup> Second, giving vic-

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66. See *supra* notes 60–61 and accompanying text.

67. Indeed, we can imagine making participation in the escrow system a first-stage requirement for even those victims who choose to lodge direct complaints. Such primacy might help to publicize the system, and generate trust and interest for those victims who are reluctant to report harassment directly.

68. See Felstiner et al., *supra* note 7 (introducing the distinct requirements of naming and blaming as prerequisites to claiming); see generally Judith Berman Brandenburg, *Sexual Harassment in the University: Guidelines for Establishing a Grievance Procedure*, 8 SIGNS 320 (1982) (providing a guideline for establishing a grievance procedure and an evaluation of the Yale College Grievance Procedure).

69. Of course, the risk of collusion may be higher in escrowed complaints than in direct, public complaints. This risk of collusion might be treated with other types of evidence—for example, evidence that the two escrow complainants attended school at different times and live in different cities would make it less likely that they colluded in escrowing allegations against the same professor. In contrast, the risk of copycat allegations can occur without collusion, and collusion can occur in the absence of allegation escrow systems.

tims an escrow option gives them the opportunity to create a contemporaneous record of their abuse. An escrowed allegation might take years to come to light, but may be based on an account that is recorded much closer to the harassing events.

Even without escrows, many victims preserve contemporaneous evidence of their harassment through analogous, though more informal, mechanisms. Some victims tell a friend or relative what happened soon after the event. Telling a friend is itself a kind of allegation escrow. It is routine for investigators to rely on this kind of corroborating evidence to mitigate both the stale-evidence risk and the copycat risk. But even here allegation escrows offer important evidentiary advantages. An investigator or adjudicator may worry that the testimony of a friend or relative, who would also be called on to remember a conversation from the past, is inaccurate or biased. In contrast, the evidence placed in escrow might include affidavits, photographs, and even video testimony, none of which alter or degrade with time. An escrowed allegation is more likely to contain the exact dates of harassment than a victim or friend trying to recall what happened months or even years before.

In addition, escrowed allegations are likely to be more detailed than those made to a friend. An entry in a personal diary or an email to a friend can, like a formal escrow, eliminate the faulty-memory concern, but these unaided, privately created records are more likely to leave important evidentiary elements unaddressed. Lawyers, police, and rape-trauma counselors conducting intake interviews with victims proactively solicit information regarding evidentiary details of the wrongdoing. An escrow mechanism can be structured to guide victim depositors through a series of questions that are more likely to address all the elements of a sexual harassment claim. Indeed, an escrow mechanism might even give victims the option of depositing a sworn video deposition taken by an interrogator trained in the field. For all these reasons, an escrow regime might not only produce an equilibrium with more complaints per investigation, but also a better evidentiary foundation by providing better plaintiff evidence per complaint.

But while allegation escrows are likely to mitigate the problem of stale plaintiff evidence, they do not solve the problem of stale defendant evidence. Escrows can create asymmetric staleness. A professor who is falsely accused of harassing a student years ago will have a harder time presenting evidence of a valid alibi than a professor who receives more contemporaneous notice of the allegation. From the perspective of procedural fairness, allegation escrows can thus create an uneven playing field. An accused must rely on his fading memories, while the accuser has the possibility of presenting a fixed record of her near-contemporaneous narrative. Moreover, the accused cannot confront the complainant's prior self. He can only ask the complainant's present self, who may no longer remember other issues relevant to the defense. These kinds of concerns underlay statutes of limitations

and a host of evidentiary and criminal procedure protections.<sup>70</sup> These familiar concerns are heightened, however, in an escrow regime because the asymmetries are also heightened. An accused harasser might need to suddenly respond to multiple, well-preserved, near-contemporaneous allegations.

One way forward is to provide the accused with an analogous escrow option. What we call a “defendant’s escrow” or an “anti-allegation escrow” would give potential defendants the option of making information deposits that give near-contemporaneous accounts of their own narrative. Some might, at first, interpret a professor making a deposit as itself evidence of a guilty mind. But there are circumstances in which a professor who is innocent of harassment may nonetheless want to make a deposit because he is concerned that a student might make a claim based on a misconstrued remark or action, or because the student has become disgruntled.

This analogous escrow option can of course be misused by harassers to try to create false evidentiary records of the “she came on to me” defense. But such evidentiary manipulation is less likely to be effective as a response to multiple escrowed harassment allegations—for the simple reason that it becomes less plausible that there would be multiple people who independently chose to punish their unrequited advances by making false accusations. Giving potential defendants an escrow option can help level the evidentiary playing field for at least some accused. But for others, the problem of asymmetric access to contemporaneous narratives will remain an issue with which adjudicators must grapple.<sup>71</sup>

This scenario also raises<sup>72</sup> a legitimate concern that the escrow option might increase the number of false complaints. It’s hard to construct a story where the escrow option would increase the number of false direct complaints.<sup>73</sup> But one might imagine a world where disgruntled students felt safer depositing a false complaint of harassment in escrow. The “safety in numbers” argument discussed above might apply as well to false claims. Or one might fear that bad-faith depositors might upload fabricated complaints in an effort to discover whether other students have submitted deposits for

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70. See generally David S. Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378 (1972).

71. The most concerning context is one in which the accuser lodges a complaint based on entirely fictional events. In such cases, the professor would have no reason to fear charges or make a defense escrow submission.

72. In the extreme biblical example from Genesis, Joseph might have had an inkling that Potiphar’s wife would make a false accusation of harassment after Joseph spurned her advances. See *Genesis* 39:7–20. Similarly, in *To Kill a Mockingbird*, Tom Robinson might have reasonably worried that Mayella Ewell would falsely accuse him after he spurned her advances. HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

73. Although if an escrowed world radically increased the salience and publicity of harassment allegations, one might imagine that even false claimants would come to see direct, initial complaints as more “available.” See generally Russell Korobkin & Chris Guthrie, *Heuristics and Biases at the Bargaining Table*, 87 MARQ. L. REV. 795, 800 (2004) (discussing the availability heuristic).

the same professor.<sup>74</sup> It will be harder for a wrongfully accused professor to respond to a multifront war. Collusion among bad-faith complainants might also be more difficult to detect in a world with escrows than in a world in which direct complaints are the only option. Even the increase in escrowed reports of less egregious or less clearly violative conduct, which was discussed above as a benefit of the system, could become harmful if these negligible or unworthy claims are converted from silence to escrow.

If the number of inappropriate escrowed or follow-on complaints increases, the escrow option could increase the net Type II errors—that is, the number of factually innocent defendants who are mistakenly sanctioned. Although false claims would not automatically lead to sanctioning, a world with more false claims is likely, because of errors in adjudication, to lead to an increase in mistaken sanctions.<sup>75</sup> The possibility of increased Type II errors is especially worrisome because this possibility turns on information that is difficult to know in advance of or even after adopting the escrow option. As with interventions that seek to encourage date-rape prosecutions,<sup>76</sup> the net impact of escrows on Type I and Type II errors may turn on our perceptions about the preexisting propensity of students and employees to bring truthful versus false complaints. If one believes that the primary existing problem of sexual harassment is Type I error—the nonsanctioning of harassers—prompted in large part by the underreporting of valid complaints, the escrow option may be justified as a means of inducing more reporting.

On the other hand, some might argue that the escrow option will exacerbate the problem of Type I errors, even more than suggested by Table 2 above. We showed that orphaned escrows could reduce the net quantity of true harassers who are investigated.<sup>77</sup> One-off harassers are effectively immunized if the object of their harassment files only an escrowed claim. But the problem of Type I errors could also be exacerbated if, in a world with escrows, investigating and adjudicating bodies treated direct complaints by individual claimants less seriously. A concern with creating a new mechanism for victim corroboration is that authorities might give less weight to uncorroborated claims. In a world with more “he said / they said” disputes, there may be insufficient attention paid to “he said / she said” adjudication. In the extreme, this concern might lead to a *de facto* two-bite rule—where harassers are effectively immune from sanction unless accused by more than

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74. As we’ll discuss in more detail below, allegation escrow systems can and should employ techniques to prevent such fishing expeditions, in large part because they can result in premature identification of the complainant and accused. No system is entirely impervious to bad-faith actors, however.

75. However, the social disutility of false escrow claims in a world with first-mover claim disadvantages is less clear. The maid, Nafissatou Diallo, who falsely accused Dominique Strauss-Kahn in some way improved social welfare because her false accusation was a but-for cause of Tristane Banon’s subsequent accusation which had lain dormant. *See generally infra* notes 123–124 and accompanying text. A world in which a false escrow deposit triggers release of a truthful deposit has, at a minimum, more complicated welfare effects.

76. *See* Ayres & Baker, *supra* note 8, at 637–40.

77. *See supra* Part II.

one woman. In part, this concern is likely to be mitigated by other sources of corroboration (e.g., witnesses or emails from the accused) that will at times be available to individual claimants. Moreover, the potential for increases in this type of error is likely limited by the difficulties that go-it-alone claimants already face. In a world where unsupported claims are already treated with suspicion, it is less likely that the sudden existence of corroborated escrowed claims would noticeably decrease perceived complaint credibility. Still, authorities reacting to a world with escrowed complaints should be on guard against diminishing the worth of unescrowed claims.<sup>78</sup>

Stepping back, we see that the escrow options can produce a mixture of salutary and deleterious social impacts. While it will be impossible to precisely know when the positives will outweigh the negatives, this Section has shown that allegation escrows are more likely to have a net positive influence when (1) many instances of wrongdoing go unreported, (2) many wrongdoers are recidivists, (3) the proportion of false claims in the victim class is relatively small, and (4) potential defendants are given the offsetting option of depositing anti-allegation narratives into escrow.

### 1. Legal Issues

Moving beyond theory, the remainder of this Part grapples with difficult questions of implementation. We begin in this Section with the relationship between allegation escrows and the antidiscrimination mandates of Title IX and Title VII, and then turn to the legal relationship between the escrow “agent,” the depositor, and the sponsoring institution.

#### a. *Allegation Escrows in Post-Secondary Schools and Title IX*

Any mechanism for reporting sexual harassment in colleges and universities receiving federal funds operates against the background of Title IX of the Education Amendments of 1972, which prohibits gender-based discrimination in federally supported educational programs.<sup>79</sup> In *Franklin v.*

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78. Indeed, many institutions resist the idea of any seemingly anonymous complaint mechanisms. At Yale, for example, a 2010 report issued by the specially convened Sexual Misconduct Committee said the following:

We do not recommend the creation of a specific website, hotline, or other venues through which anonymous reports are encouraged. Instead, we want to encourage confidential reporting; and, indeed, we worry that the explicit provision for anonymous reporting might discourage non-anonymous reporting. Non-anonymous (but still confidential) reporting is more useful both to the complainant and to the University.

*Report from the Sexual Misconduct Committee*, YALE UNIV. OFFICE OF THE PROVOST (July 9, 2010), <http://provost.yale.edu/news-announcements/report-sexual-misconduct-committee>.

79. 20 U.S.C. §§ 1681–1688 (2006).

*Gwinnett County Public Schools*, the Supreme Court interpreted gender discrimination under Title IX to include sexual harassment.<sup>80</sup>

While *Franklin* declared that schools may be held liable when officials intentionally fail to end harassment,<sup>81</sup> the Department of Education (“DOE”) has developed a complex regulatory scheme to ensure compliance with Title IX.<sup>82</sup> Specifically, school officials must (1) investigate and address harassment when they reasonably should know about the conduct, even prenotice, and (2) undertake some investigations even when victim confidentiality cannot be assured.<sup>83</sup> These requirements may make schools reluctant to implement escrowed reporting systems, but may also increase the potential benefits of such systems to victims. Risk-averse schools may fear that federal investigators would view any conduct related to an escrowed complaint as within those “reasonably should know” bounds, leading schools to incentivize public reporting as much as possible and to resist any “official” mechanism that fails to inform the school of alleged harassment. On the other hand, the requirement that all such complaints be investigated without guaranteeing confidentiality may heighten the concerns that keep victims silent in the first place.<sup>84</sup>

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80. 503 U.S. 60, 75 (1992). *Franklin* addresses the claim of a female student that she had been repeatedly harassed by a male teacher, and that the school administration had both failed to remedy the situation and had pressured her to forego litigation. *Id.* at 75. *Franklin* builds on an earlier case, *Cannon v. University of Chicago*, in which the Court held that Title IX creates an implied cause of action for victims of sex discrimination, and that students need not exhaust administrative remedies before pursuing private litigation. 441 U.S. 677 (1979). In *Cannon*, the Court addressed Geraldine Cannon’s allegation that she had been denied admission to medical school on the basis of her gender. *Id.* at 690.

81. See *Franklin*, 503 U.S. at 74–75. The intentional-failure-to-act standard imposed in private suits is higher than the standard imposed in administrative enforcement cases. In actions seeking administrative enforcement, injunctive relief can be granted on the basis that school officials knew or reasonably should have known that sexual harassment was occurring. See RUSSLYNN ALI, U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE 4 & n.12 (2011), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>. The letter is identified as “a ‘significant guidance document’ under the Office of Management and Budget’s Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432.” *Id.* at 1 n.1; see also OFFICE OF CIVIL RIGHTS, U.S. DEP’T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 12–13 (2001) [hereinafter REVISED SEXUAL HARASSMENT GUIDANCE], available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

The requirement that a school or its responsible administrators demonstrate some intentional failure to remedy issues of harassment distinguishes private suits alleging Title IX violations from private suits in the employment context (under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2006)). As we discuss below, the regulatory implementation and judicial interpretation of Title VII establish a slightly lower standard of liability for employers facing private litigation for monetary damages.

82. See REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 81.

83. ALI, *supra* note 81, at 5–6.

84. See AAUW REPORT, *supra* note 1, at 4 (noting that fear of embarrassment is a reason for underreporting); Nicole Allan, *Confusion and Silence*, YALE ALUMNI MAG., July–Aug. 2011, at 38, available at [http://www.yalealumnimagazine.com/issues/2011\\_07/feature\\_titleix.html](http://www.yalealumnimagazine.com/issues/2011_07/feature_titleix.html). The 2001 DOE Revised Sexual Harassment Guidance and other official

Nonetheless, an allegation escrow system might help schools fulfill their Title IX obligations. The Department of Education has suggested that one “reasonable” method of identifying harassment prenotice is seeking out cases that resemble previously submitted complaints.<sup>85</sup> Schools could utilize escrow systems to fulfill that obligation by submitting any claim received, and in the case of a triggered complaint, contacting the users whose escrowed allegations match. Administrators might further pursue their Title IX obligations by responding to aggregate data suggesting that a particular department, fraternity, or physical location on campus repeatedly engages in misconduct. While the specifics of unmatched deposits would not be released, the interim disclosure that a certain number of allegations of sexual misconduct had been deposited relating to a particular department might provide an impetus for administrators to take corrective action.

*b. Allegation Escrows in the Workplace and Title VII*

Closely related to harassment in colleges and universities is sexual harassment in the workplace, which is governed primarily by Title VII of the Civil Rights Act.<sup>86</sup> While Titles VII and IX share a common goal of preventing discrimination, differences in standards of liability and affirmative defenses may make employers even more reluctant to implement information escrow systems than schools. Under Title VII, employers are required to take a much more active role than schools in the prevention and investigation of sexual harassment in the workplace.<sup>87</sup> Indeed, the leading cases in Title VII suits for sexual harassment, *Faragher v. City of Boca Raton*<sup>88</sup> and *Burlington Industries, Inc. v. Ellerth*,<sup>89</sup> indicate that a primary aim of Title VII is encouraging employers to prevent and quickly address sexual harassment. Much of Title VII jurisprudence focuses on whether employers have taken reasonable steps to prevent and promptly remedy harassment in their workplaces. Reasonable steps are often interpreted to mean providing harassment awareness training and reasonably accessible mechanisms for

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documents direct schools to consult complainants’ wishes with respect to confidentiality and honor them where possible. See REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 81, at 17–18. However, the documents acknowledge that schools may not be able to maintain complainant confidentiality. *Id.* Furthermore, the DOE acknowledges that the accused’s due process rights may force a school to choose between breaching the victim’s confidentiality and being unable to pursue the investigation at all, which itself may carry administrative penalties. *See id.*

85. See REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 81, at 13 & n.77.

86. 42 U.S.C. §§ 2000e to 2000e-17.

87. That is not to say that employers operate under significant liability burdens, however. As we discuss here, the existing Title VII framework, while less friendly to employers than Title IX is to schools, is still nevertheless very employer friendly.

88. 524 U.S. 775, 807 (1998) (noting “Title VII’s . . . basic policies of encouraging forethought by employers and saving action by objecting employees”).

89. 524 U.S. 742, 764 (1998) (“Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms.”).

lodging harassment complaints.<sup>90</sup> If an employee establishes evidence of a hostile work environment (which does not rise to the level of tangible employment action), the employer can avoid both compensatory and punitive damages by establishing the affirmative defense that the employer exercised reasonable care to address sexual harassment and that the subordinate complainant unreasonably failed to take advantage of remedies available in the workplace.<sup>91</sup> Such a focus on the employer's actions and the get-out-of-jail-free card that reasonable, employer-provided complaint mechanisms represent understandably make employers eager to uncover as quickly as possible any cases of harassment that could lead to litigation.<sup>92</sup>

*Pennsylvania State Police v. Suders*<sup>93</sup> gives large-scale employers even more reason to focus on demonstrable steps to prevent and correct harassment as a means of avoiding liability, and thus to fear unreported cases of harassment. Seemingly forging a middle path between the strict liability of tangible employment-action cases and the avoided liability of hostile environment cases, the Supreme Court held in *Suders* that Title VII allows constructive discharge claims, and that such claims can, in the most severe cases, rise to the level of tangible employment actions.<sup>94</sup> The Court also held, however, that in all but the most egregious constructive discharge cases, employers will have recourse to the affirmative defense that the employee unreasonably failed to take advantage of employer-sponsored steps to prevent and correct harassment.<sup>95</sup> This approach to constructive discharge claims broadens employee access to courts in Title VII suits, as it removes the affirmative defense as a basis for summary judgment where there is a reasonable question as to whether the employee quit in response to harassment that constituted both a hostile work environment and a tangible

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90. Indeed, Lauren Edelman and colleagues argue that employers played an active role in shaping this area of Title VII law, and that the focus on employee sensitivity training and other internal mechanisms became entrenched in the law after first beginning in industry. For one of her first pieces on this issue, see Lauren B. Edelman, Christopher Uggen & Howard S. Erlanger, *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406 (1999).

91. *Ellerth*, 524 U.S. at 765 (“[A] defending employer may raise an affirmative defense . . . (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”).

92. What's more, employers also operate under some pressure to identify cases of harassment as soon as possible, as the amount of monetary and punitive damages are dependent in part on the duration of harassment of which the employer should have been aware. See, e.g., *Blackmon v. Pinkerton Sec. & Investigative Servs.*, 182 F.3d 629, 636 (8th Cir. 1999) (“[D]uration of harassment [is a] relevant factor[] when determining the appropriateness of punitive damages . . .”).

93. 542 U.S. 129 (2004).

94. See *Suders*, 542 U.S. at 148.

95. *Id.* at 148 (“To be sure, a constructive discharge is functionally the same as an actual termination in damages-enhancing respects.”).

employment action.<sup>96</sup> At the same time, however, by limiting the strictest standards of liability to only the most grave constructive discharge cases, the Court also increased the importance and prevalence of the reasonable-employer-actions affirmative defense in Title VII cases. *Suders* thus serves to increase an employer's interest in having publicly demonstrated mechanisms for reporting harassment, but may also increase employer resistance to escrow-based reporting systems which do not automatically notify the employer of complaints.

As with schools, employers should be able to develop allegation escrow systems that help, rather than hinder, their effort to comply with the requirements of Title VII. The escrow service would merely represent an additional option for victims who are uncomfortable bringing forward direct allegations. But as long as victims could easily bring direct complaints and had the option of subsequently converting escrow deposits into go-it-alone direct complaints, an employer sponsoring an escrow service should be able to avoid *Suders* liability for failure to have adequate harassment reporting mechanisms. However, given the increasingly narrow focus on an employer's reasonable efforts to prevent and correct harassment, employers may nevertheless resist implementing escrow systems for fear that they will lead to a perception of employer indifference or even that employers are actively obstructing victims' claims from seeing the light of day. These concerns might be allayed by evidence that harassment investigations increase after the introduction of the escrow option. But employers may nonetheless be concerned that courts would focus on the large proportion of orphaned complaints that would eventuate in even successful implementations of the escrow. Whether or not their reluctance to implement escrowed reporting mechanisms is reasonable, employers may ultimately find the current Title VII framework too comfortable to risk changing.

### c. *The Escrow System's Relationship with Sponsoring Institutions*

Though specific requirements vary by jurisdiction and job sector, nearly all employees enjoy a legal or contractual right to review documents used by an employer in making hiring or employment decisions.<sup>97</sup> As a result, any escrow system should be clearly and legally distinct from the companies that it serves. Before any escrowed allegations are accepted, the escrow service should establish that the employer has no claim to any of the complaints lodged with the service. Indeed, the escrow service might not even have a contractual relationship with the companies at all. The service

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96. The Court also makes clear in *Suders* that even when the affirmative defense is available to the employer, the burden of showing that the employee unreasonably failed to take advantage of existing employer-provided systems falls on the employer. *Id.* at 146 (“*Ellerth* [and] *Faragher* . . . place the burden squarely on the defendant to prove that the plaintiff unreasonably failed to avoid or reduce harm.”). This burden allocation further limits the utility of the affirmative defense in summary judgment and other pretrial motions.

97. *E.g.*, WISC. STAT. ANN. § 103.13(2) (West 2012) (granting employees broad right to access personnel records subject to narrow exceptions).

might only enter into contracts with depositors to forward complaints under prespecified conditions. Regardless of whether the employer sponsors the escrow service, the employer should only be granted access to complaints when the escrow service chooses, in its judgment, to forward a match generated by the system.

The independent juridical status of the escrow service would further insulate the service from being held liable for the employer's lack of response to gender inequality in the workplace. In addition, the escrow service would benefit from making explicit its right to use its judgment regarding matched complaints and whether they are suitable for forwarding to the employer or the authorities. Because there will inevitably be error in a process that operates in a realm of unproven allegations and vague descriptions, the escrow service should avoid any implication that it has an obligation to forward complaints that happen to meet certain criteria. Similarly, the legal independence of the escrow service can help insulate employers from potential liability for failure to respond to deposited allegations awaiting a match, since with an independent escrow service the employer will be unaware of such allegations.

A strong separation between the sponsoring institution and the escrow system is also important to protect the integrity of the allegation escrow system. Both schools and employers have an interest in identifying potentially damaging types of behavior as soon as feasible, and in the absence of proper separation, these institutions may put pressure on the allegation escrow agents to look for and share evidence of that behavior. Both schools and employers may seek information about illegal activity, for example. Schools might want to know about academically dishonest or risk-taking behavior, while employers would be eager to know about employees embezzling or mishandling company resources. Nonetheless, using submitted allegations to identify such information would be a significant subversion and abuse of the system, as well as of the trust users had placed in the allegation escrow mechanism. The best defense against such unacceptable institutional encroachment is a firm and clearly delineated distinction between the third-party escrow provider and the sponsoring school or employer.

#### *d. The Escrow System's Relationship with Users*

*Tailoring the Service's Core Ministerial Duties.* In any allegation escrow mechanism, managing the relationship between the escrow system and the user is of critical importance. At a minimum, the escrow agent would owe to a depositor the duty of making good-faith efforts (1) to preserve the deposit; (2) to keep the deposit confidential both prerelease and postrelease (with regard to all except the prespecified recipients); (3) to inquire whether the deposit matches with other deposits (and meets the requisite for release); and (4) if the release is triggered, to forward matching deposits to the prespecified recipients. While game theorists tend to refer to the escrow service as an "agent" of the depositor, we tentatively think that the nonfiduciary contractual duties of good faith better balance the interest of the escrow

agent and the multiple depositors rather than turning the service into an agent with multiple principals.<sup>98</sup> The escrow agreement between the depositor and the escrow service should establish the perception that the service is simply a ministerial channel through which allegations may pass. As with traditional escrows, these core duties are ministerial and largely nondiscretionary. Indeed, one could imagine an escrow contract that minimized escrow release discretion. Under such a system, the service would not substantively review (or even access) the content of the complaints. It would merely test whether two deposits were directed toward an accused with the same identifying information, such as an email address, and only then release the deposits to the prespecified investigative entity. We tentatively reject such a pure ministerial system.

To preserve the integrity of the escrow process, we recommend that the escrow contract specify that the escrow service have sole discretion to substantively review the content of deposits and have discretion not to forward deposits that the escrow service deems to be made in bad faith or to be insufficient in substance to warrant matching. The purpose of such discretion is to protect both bona fide depositors and the accused from a release triggered by complaints that the escrow agent deems to have been made in bad faith. Therefore, the contract ought to require complainants to acknowledge that the only way to ensure that someone will read the complaint is to pursue a stand-alone complaint. The escrow agent should develop, but keep confidential, processes to help ensure that the deposits are made by bona fide complainants. For instance, by requiring depositors to demonstrate that they have access to a valid student or alumni email, the escrow agent can begin to ensure that the depositors have not misrepresented their names and have at one time been in residence at the university. Finally, the escrow system should explicitly and clearly disclaim any responsibility for the content of the submissions and emphasize that depositors are warranting their repre-

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98. See *Mkt. St. Assocs. Ltd. P'ship v. Frey*, 941 F.2d 588, 595 (7th Cir. 1991). The *Frey* court notes that,

[t]his duty [of good faith] is, as it were, halfway between a fiduciary duty (the duty of *utmost* good faith) and the duty merely to refrain from active fraud. . . . The concept of the duty of good faith like the concept of fiduciary duty is a stab at approximating the terms the parties would have negotiated had they foreseen the circumstances that have given rise to their dispute.

*Id.* Fiduciary relationships are ill advised in part because different depositors might have conflicting views about whether two deposits are sufficiently matching to trigger an escrow release. As one author explains,

[t]he flat commission custom can thus be understood as a kind of compromise which offers the agent more of a return on marginal effort than does a flat-fee arrangement because it gives the agent a financial incentive to produce a higher rather than lower sale price, while greatly—but not entirely—reducing the conflict among principals, each of whom must still wonder whether the agent is maximizing joint revenue by preferring another principal's (more expensive) property.

Saul Levmore, *Commissions and Conflicts in Agency Arrangements: Lawyers, Real Estate Brokers, Underwriters, and Other Agents' Rewards*, 36 J.L. & Econ. 503, 508 (1993).

sentations to be true. Making clear that the escrow's obligations are dominantly ministerial will serve to minimize the risk that the escrow itself would be held liable for defamation.<sup>99</sup> Moreover, the independence of the escrow from the employer may allay some victim concerns of institutional bias.<sup>100</sup>

In a longer working paper version of this Article, we address in more detail the legal and programming issues involved in our attempt to bring a harassment allegation escrow into being as a nonprofit internet website.<sup>101</sup> But here we focus on a few game-theoretic choices about how to design the escrow agreement—choices concerning the escrow trigger and interim reporting—that might powerfully impact the escrow equilibrium. The triggering mechanisms determine the conditions under which the escrow deposits will be released, to whom the deposits will be released, and potentially for what purposes. Since the escrow mechanism is in essence a contract specifying the contractual duties of the escrow agent (who might or might not be a fiduciary of the depositor), escrow depositors might specify the contract in a variety of different ways—giving the depositors *ex ante* freedom and even various aspects of *ex post* freedom. One approach to choose among these particular design options would be to speculate about the types of contractual terms that are most likely to be favored by the victim class.

*Tailoring the Disclosure Recipient.* The mechanism might specify that upon receiving the prespecified number of matching deposits, the escrow agent would merely reveal the identity of the claimants to one another (or reveal their identity and their underlying claims) and let the claimants

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99. An escrow system would likely be immune from liability for defamation under section 230 the Communications Decency Act as an “interactive computer service provider” as long as it was clear that the submissions were provided by third parties and the website was not requiring or inducing users to post defamatory statements. *See* 47 U.S.C. § 230(c)(1) (2006) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (online bulletin board provider not liable for users’ defamatory messages). Even if section 230 immunity did not apply, it is likely that the qualified-privilege defense would shield the escrow service from defamation liability. This common-law defense to defamation protects speech made “to someone who may reasonably be expected to take official action to protect a public interest.” John Jay Fossett, *Defamation in the Workplace: “The New Workhorse in Termination Litigation”*, 15 N. KY. L. REV. 93, 105 (1988) (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 115 (W. Page Keeton ed., 5th ed. 1984)).

100. As Jennie Kihnley points out in her 2000 article, schools in particular often express two semicontradictory aims of their sexual harassment-reporting processes: (1) to empower victims and reduce sexual harassment, and (2) to limit their own liability in any relevant litigation. Jennie Kihnley, *Unraveling the Ivory Fabric: Institutional Obstacles to the Handling of Sexual Harassment Complaints*, 25 LAW & SOC. INQUIRY 69, 70 (2000). The potential tension between these two goals can force complainants to navigate a confusing maze of administrators and procedural rules. A relatively distant relationship between the complainant and the third-party escrow agent should help to clarify at least one part of the harassment grievance process. *See id.* at 72–73.

101. Ian Ayres & Cait Unkovic, *You Are Not Alone* (2012) (working paper) (on file with authors).

decide postmatch whether and how to proceed. Granting claimants this kind of ex post power might induce more deposits. On the other hand, it might also induce more fallacious deposits from individuals who merely make a deposit to learn the identity of other claimants. Because we want depositors to take the process seriously, and because we want to protect good-faith depositors from subversion of the system, we prefer a design where matched deposits are automatically forwarded to the proper authorities as actionable complaints. Potential depositors lose their own freedom not to proceed, but they gain the assurance that the claims of other depositors will be available for investigation. The relative inflexibility of automatic forwarding combined with the formal or social consequences visited upon fallacious complaints may also reduce the number of false deposits and resulting Type II errors.

*Tailoring the Trigger.* The mechanism must also specify the number of deposits lodged against a particular harasser that will trigger disclosure. We have thus far focused on an implementation where the escrow agent offers an across-the-board trigger of 2 (or possibly 3) deposits. But it would be possible to allow individual depositors to choose the trigger with which they are most comfortable. Under such a system, escrowed deposits would only be released if the set of deposits existed for which the trigger conditions were met for all the depositors in the set. For example, imagine a succession of deposits against a particular accused, where the claimants choose triggers of 4, 99, 2, 3, and 4. The third deposit would not trigger release, even though that depositor is comfortable with just two matching deposits, because there is not another depositor with a trigger of 2. The fourth deposit also would not trigger release because there are not three depositors with triggers of 3 or fewer (or subsets of two depositors with triggers of 2).<sup>102</sup> Like ex post control, we can imagine that an ex ante choice of trigger might increase deposits, and in particular might attract deposits from those complainants who are the most reluctant to go it alone and feel secure only with many co-complainants. But it would be difficult to communicate the workings of this escrow adequately to depositors—who might not realize that their escrow could be orphaned even though their personally chosen trigger requirement had been met. Moreover, our simulation leads us to think that depositor-chosen triggers are likely to lead in equilibrium to fewer harassment investigations on net (even if there are more escrow deposits).<sup>103</sup>

*Tailoring Depositor Acceleration and Withdrawal Rights.* The escrow contract must also specify whether a depositor can rescind or potentially accelerate the release of an as-of-yet unmatched claim deposit. Rescission and acceleration can be thought of as midstream alteration of the trigger

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102. It is possible that the first depositor (with a trigger of 4) would be happy to have her complaint released so long as four deposits had been placed in deposit, even though only three are releasable at the time of the match.

103. See *supra* Section II.A (discussing simulation with escrow trigger of 3 instead of 2). In addition, as with irretrievable complaints, the relative formality of a system-determined trigger might reduce the number of bad faith “fishing” and frivolous complaints deposited.

number. Rescission effectively increases the trigger number to some unreachably high number to ensure that the deposit would never be released. Acceleration has the effect of decreasing the trigger number—potentially to 1, meaning that the claimant would be willing to “go it alone” and have her claim deposit forwarded immediately, unaccompanied by even a second claim. This is yet another dimension where theory and current data do not provide a clear, a priori solution. But we tentatively prefer an asymmetric system, in which a depositor can, anytime after making a deposit, accelerate her trigger to make a direct go-it-alone claim but cannot decelerate (or rescind) her deposit. We favor the acceleration option, because of the positive externalities of released claims. If a victim, after making a deposit, is willing to “go it alone,” it furthers her private interest and the public interest in adjudication and deterrence to immediately lodge the complaint on her behalf.<sup>104</sup> Indeed, another advantage of the escrow system is that it can provide complainants with a simple method of creating a contemporaneous account of their allegations with the continuing possibility of turning the deposit into a go-it-alone complaint at any point in the future. Just the process of privately giving voice to their narratives as part of making a deposit might be sufficient to make some victims willing to move forward by themselves. The process of naming and blaming can itself be transformative and lead to claiming.<sup>105</sup>

The acceleration option might also be used by depositors who, over time, find themselves in a more empowered position. Indeed, because sexual harassment claims are subject to statutes of limitations, a depositor might eventually face a choice between submitting a direct complaint and foregoing the possibility of future litigation. By notifying depositors that the statute of limitations is about to run against the accused with regard to their claims, escrow agents might prompt depositors to transform an escrowed allegation into a go-it-alone complaint. Because we assume that most allegation escrow users would remain silent in the absence of an escrow system, that transformation also encourages the submission of official complaints regarding incidents that would otherwise likely have gone unreported. Creating the acceleration option can thus mitigate the problem of orphaned deposits, which stands as a chief contraindication of implementing an escrow regime.

The problem of orphaned escrows is also a chief reason why we (by a slight margin) prefer an asymmetric system where depositors cannot change their minds and rescind or cancel their deposit. Rescission or cancellation would effectively ensure that claims remain orphaned. Society would be deprived of the deterrence value of rescinded complaints. Moreover, we worry that rescindable deposits might be taken less seriously by depositors who retain the right to cancel if their deposit does not immediately match. We also worry that some depositors might too readily rescind if they find

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104. Owen M. Fiss famously wrote about the social values of public adjudication in Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

105. See Felstiner et al., *supra* note 7, at 635–37.

that their deposits did not trigger an escrow release.<sup>106</sup> These depositors would only make a short-term deposit to find out (by the immediate release) if another deposit was already outstanding against a particular professor. On the other hand, the requirement that escrows be nonrescindable might dampen the initial deposit rate more than the rescission option depresses the amount of deposits for potential match. In the absence of persuasive evidence on this issue, we have a slight preference for making deposits nonrescindable for a period of one or two years. Temporary nonrescindability makes clear to victims at the time of deposit that they cannot simply place a temporary deposit to test whether someone else has claimed against a particular professor. Depositors must be serious in making an escrow deposit because they will not be able to immediately change their minds about the fact of the matter at a later time.<sup>107</sup> Depositors should be exposed to some negative scrutiny if they make a deposit that investigators later judge to be fallacious.

*Tailoring Interim Disclosures.* Finally, the escrow contract should clearly delineate the uses, if any, that might be made of deposit information while the complaint remains unmatched. For example, it would be possible for the escrow agent to inform the accused that an escrowed allegation had been levied against him without revealing the name of the accuser making the deposit. The goal of such interim disclosure would be to potentially deter the accuser from harassing other students because the accused would be on notice of a potential future investigation. An additional benefit would be that such a warning might induce an innocent defendant to submit a defense escrow report, should he be concerned that a particular disgruntled student might have submitted a false claim. However, the downside behind such interim disclosure to the accused is that it might trigger accuser retaliation against harassment victims.<sup>108</sup> Accordingly, we propose a regime where interim anonymous reports to the accused are not made, and indeed in which deposits are treated as if they are in a black box until matching. However, this treatment might merely be a default that individual depositors could contract around if they were comfortable in interim notice being made, such as when a student depositor limits her complaint to inappropriate professorial conduct in a large, lecture-based class. In that case, the complainant may be unwilling to make her allegations public in a go-it-alone fashion, but she may also feel confident that the accused will be unable to identify her after learning that a student in the lecture has submitted an escrowed complaint.

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106. There may be a first-mover disadvantage to making deposits to an escrow. The rescission option makes it potentially too easy for depositors who come to learn that they were the first to make an allegation deposit against a particular person to withdraw that deposit.

107. It would also be possible to construct a mechanism where deposits would become void if unmatched after a certain number of years—possibly tied to the relevant statute of limitations.

108. If interim disclosures to the harasser were made, it would be useful to only disclose with some randomized lag time so that the accused might have a harder time identifying who was making the allegation. But even with randomized lag times, harassers might be able to infer that a complaint was made by the student who was most recently harassed.

As we discuss in greater detail below, interim reports of varying granularity might also be revealed to the public or the university to further other interests besides specific deterrence of the individual harasser. We favor disclosing to the public aggregate information on the number of allegation escrows that have been deposited with respect to employers with a sufficiently substantial number of employees (combined with information on the number of deposits released from escrow). By letting victims know that other people have been making use of the escrow mechanism, disclosure can raise the salience of the mechanism, and perhaps lead to limited general deterrence by maintaining a visible enforcement presence on campus. It might even be possible to disclose the number of deposits for subgroups of workers (for example, for different schools within a university). The factors limiting the degree of granularity should be whether a harasser is likely to infer that a complaint has been deposited against him, and whether any member of the university is likely to infer who is submitting complaints. The total number of Yale University deposits increasing by one deposit tells a particular professor very little. But the total number of Yale Law School deposits increasing by one deposit might tell a harassing law professor (shortly after an episode of harassment) that he has been accused.<sup>109</sup>

In thinking about interim reporting, we should distinguish between individual malfeasance and institutional malfunction. Besides deterring individual acts of harassment, the escrows might be designed with an eye toward alerting human resource administrators about a more systemic problem. Instead of designing an escrow system to solely respond to the problem of repeated harassment by particular professors, it might also be possible to design a system to respond to more pervasively hostile educational or employment environments. For example, imagine that the escrow agent learns that seven harassment deposits have been received accusing different professors in the math department. Even if the individual deposits are not sufficient to sanction any of the individual professors, good-faith administrators might, if informed of the separate allegations, have sufficient evidence to take other kinds of action to mitigate a hostile atmosphere in the department.<sup>110</sup> Escrow designers should contemplate whether there could be different release triggers and potentially different triggers for different types of proceedings or uses.<sup>111</sup> Thus,

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109. For this reason, we also support regular and scheduled periods of aggregate reporting, such as twice per semester, so harassers are less likely to know specifically when complained-of conduct occurred. Similarly, we also support centralized reporting of such aggregate data, so the accused cannot be identified on the basis of their supervisor reporting incidents of harassment.

110. For example, administrators may employ sensitivity training to prevent sexual harassment. Kenneth M. York, Elizabeth A. Barclay & Amy B. Zajack, *Preventing Sexual Harassment: The Effect of Multiple Training Methods*, 10 EMP. RESPS. & RTS. J. 277 (1997).

111. The Internal Revenue Service, for example, has successfully completed detailed audits of taxpayers with the understanding that the audits would only be used to assess the system levels of tax underpayment and not used to sanction those audited for any discovered underpayment of taxes. See Ian Ayres & Barry Nalebuff, *Why Not? Winning the Audit Lottery*, FORBES, Nov. 30, 2009, at 116. While we would argue strenuously against removing sanctions of the accused as a way of extracting aggregate or nontraditional data from escrowed

while the escrow agent might not publicly report department-specific escrow amounts, it might be useful to reveal these counts to administrators for departments that display an inordinate number of deposits. It would be possible for the escrow agent to go beyond these more granular department-specific counts and reveal to the administration the allegations themselves. Indeed, the escrow mechanism might even include a second trigger specifying release if a certain number of deposits were received relating to a department during a particular period of time. Thus, a victim depositing an allegation against a math professor might know that the allegation will be made public if either (1) another allegation deposit is received relating to the same professor, or (2) three other allegation deposits are received relating to harassment in the math department during any three-year period. This second trigger would be better tailored to investigate and root out more pervasive atmospheres of harassment or discrimination. And as before, depositors could rest assured that they were not alone in making their allegation in the sense that the second trigger would only be met if four relatively contemporaneous claims of department harassment were being made. We tentatively conclude against secondary triggers that complicate both agents' matching process and the explanation that must be made to potential depositors.

This brief discussion of triggers and interim reporting only scratches the surface of the manifold possibilities of escrow design. While allegation escrows initially seem as though they might be designed by a simple act of deposit and a subsequent release if prespecified conditions are met, we have shown that there are literally dozens of permutations on this basic design, as well as critical issues of judgment and context-specific tailoring. In the remainder of this Part, we explore in greater detail some of the more practical issues in designing and launching an information escrow mechanism.

## 2. Managing Salience

Allegation escrow systems depend on sufficient user participation in order to fulfill the objective of lowering first-actor barriers to action and assisting communication. Perhaps the worst outcome for an allegation escrow system would be having all or nearly all submissions orphaned, as any complaints that would otherwise have been submitted directly would represent a net loss in the number of official allegations submitted by sexual harassment victims.<sup>112</sup> Maximizing the number of users<sup>113</sup> is thus

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complaints, we can imagine that many schools could find analogous ways of utilizing the information in escrowed complaints even before they were matched. Assuming sufficient complainant protections could be assured, such early uses of the complaints should serve current and future harassment victims, as well as the sponsoring institutions.

112. We consider such a negative net effect to be unlikely, even if few submissions are successfully matched. As with all areas of research on the underreporting of sexual harassment, however, there is no way to be entirely certain in such predictions, and as a result we cannot discount the possibility entirely.

113. To be more precise, developers should seek to maximize the number of escrowed submissions from those harassment victims who would otherwise not submit go-it-alone complaints.

critical to minimizing the likelihood of an overall negative impact and maximizing the social and user utility of information escrows.

Attracting submissions from complainants who would otherwise have remained silent presents two primary obstacles: exposure and user-perceived inertia. The success of an allegation escrow depends on a sufficient number of harassment victims being aware of the system and how to use it. Similarly, it is critical to publicize effectively the confidentiality and other benefits of escrows to potential victims. However, escrow developers may also need to overcome a lack of faith in the system. Many complainants might consider the hassle and emotional strain of submitting an escrowed allegation worthwhile only if there is a reasonable probability that other victims will participate. Users who perceive the escrow to be untried or unpopular may thus neglect to submit an allegation for fear that the system will not generate matches when appropriate. This inertia problem is self-perpetuating. To combat this risk, allegation escrow developers should address the marketing aspect of introducing the new system, as well as the problem of user-confidence inertia.

In our view, the first iterations of allegation escrows should follow the model established by the popular social networking site Facebook. Facebook's successful rollout strategy began by limiting the site to individual college campuses.<sup>114</sup> The site was originally located at Harvard University where it was an immediate local sensation.<sup>115</sup> It then moved to other Ivy League schools before being introduced at all U.S. and some non-U.S. universities.<sup>116</sup> By the time Facebook was introduced to the general public, its popularity and reputation were well established.<sup>117</sup> Following that pattern of success, allegation escrow systems should begin by targeting well-known universities, such as Yale, that are already publicly addressing Title IX, harassment reporting, and other gender-based issues. Having (hopefully) gained some public attention as a result, the allegation escrow system should then be introduced to other universities and educational communities. Finally, if the escrow systems are well received and their utility demonstrated, they should be expanded to groups, communities, and sectors beyond education.

The purpose of a narrowly targeted rollout model is not to achieve or even aspire to the wild popularity of websites like Facebook and GMail, but rather is to take advantage of the built-in benefits that accompany locally tailored site introductions. Targeting universities for the first wave of allegation escrows reduces the likelihood and severity of institutional resistance. As we mention above, many universities are already revamping their

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114. Sarah Phillips, *A Brief History of Facebook*, GUARDIAN, Jul. 24, 2007, <http://www.guardian.co.uk/technology/2007/jul/25/media.newmedia>.

115. *See id.*

116. *Id.*

117. *See id.*

harassment reporting processes or could benefit from doing so.<sup>118</sup> Large-scale employers, on the other hand, have several legal and practical reasons to resist allegation escrows for as long as possible. More importantly, targeting schools likely to respond positively to allegation escrows mitigates both marketing and inertia concerns. A closed universe of potential complainants and targets makes it easier to inform potential participants about the new escrow system and its benefits. Similarly, a limited population of participants and targets would reassure complainants that any potentially matching targets are almost certainly aware of the escrow system. Finally, beginning at schools that are already addressing Title IX, harassment reporting, and other gender-based issues fosters the recognition, enthusiasm, and energy that can lead to widespread use of allegation escrows.

### 3. The Matching Algorithm

Design of an algorithm to determine when two deposits match is an essential part of escrow design. For example, while the foregoing examples concern matching of escrow deposits based on the identity of the individual harassers, one might instead design the escrow to allow matching on the basis of group identity, such as conduct by an entire department. Allowing group-based matching complicates any allegation escrow mechanism, but may be necessary to establish patterns of conduct for a proper investigation. However, group-based matching may require an increased level of participation by an escrow system agent, thereby introducing labor costs and the possibility of human error. Escrow developers would also have to decide whether to infer a group complaint from an individual complaint. For example, six complaints each identifying a different faculty member in the math department could be forwarded as an anonymous group-based complaint. Finally, group-based matching would also probably require a separate and difficult-to-define triggering threshold for forwarding to officials and authorities.<sup>119</sup>

Perhaps the most difficult challenge for the escrow agent reviewing matched allegations is ensuring that the allegations are similar enough to warrant forwarding. In the university context, for example, an allegation of a faculty member requesting sexual favors on the threat of grade retaliation is fundamentally different from a complaint that describes the same faculty member's pattern of making inappropriate jokes in lecture. Both complaints

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118. Yale University is currently revamping its sexual harassment-reporting processes in response to recent complaints from students and Title IX investigators. As a result, Yale and similarly situated schools might be prime candidates for early rollout locations.

119. This difficulty results from differing group characteristics: should the large history department be subject to the same threshold as the tiny classics department? Should sports teams and student organizations be subject to a threshold applied to faculty? While selecting a blanket group-threshold would be difficult and perhaps ultimately unfair, so too would pre-defining an appropriate threshold for all possible groups. Group matching might, however, be a realistic goal for subsequent iterations of allegation escrow systems that can benefit from early experiences at a given institution.

are entirely valid and legitimate, but describe behavior of vastly different severity. Many escrow systems may treat the two claims as different enough that they fail to trigger a forwarded match, for fear that the complainant alleging the more serious conduct would essentially be placed in a position very similar to the one she avoided by refusing to submit a go-it-alone complaint.<sup>120</sup> The difficulty in making this judgment is determining where to draw the line between matched allegations that are similar enough to trigger official reporting and those that are not. Inevitably, many of the matched allegations will present close calls, significantly complicating the review process.<sup>121</sup>

The consequences of delaying matched allegations are potentially significant. At minimum, a screener's choice to treat two matched allegations as fundamentally different increases the risk that both allegations will be functionally orphaned. In addition, because this dilemma implies that one of the complaints alleges serious harassment, even a short delay in forwarding matched allegations exposes the complainants and others to the risk of continued harm. On the other hand, the screener must assume that but for the option of waiting for a sufficient match, the complainant would have chosen to remain silent. To the extent that officially submitting two vastly different claims effectively forces the users to go it alone, forwarding poorly matched allegations subverts the aims of the allegation escrow system and directly harms complainants. Ultimately, the screener should decide whether to err on the side of over- or underreporting matched allegations, and then accept that some controversial or regrettable decisions are inevitable.<sup>122</sup>

### III. APPLICATIONS

Information escrows have a broad range of potential applications in addition to our central example of sexual harassment complaints. In this Part, we will rely on the theoretical foundation developed in Part II to explore whether the prerequisites for useful application of the escrow tool exist. The goal of this Part then is to identify new potential applications and to assess whether an escrow is likely to be on net socially beneficial.

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120. Of course, some escrow system developers might forward any matched, good-faith allegations. Such a decision would simplify the review process significantly and lower the risk of unnecessarily orphaned claims. At worst, however, it could also lead to go-it-alone style harms for some users, thus negating the purpose of the system as a whole. A pattern of such harms might ultimately also have a chilling effect on submissions.

121. Of particular relevance in this decisionmaking process would be the screener's guess as to the preferences of the complainant submitting the more serious allegation.

122. As with information security here too, independence from the sponsoring institution and its liability-generating responsibilities becomes important.

### A. Applications for Allegation Escrows

#### 1. Sexual Harassment, Date Rape, and Other Sexual Assaults

It is common in high-profile incidents of sexual harassment to have other victims step forward with similar accusations. Perhaps the most currently salient and disturbing is the story of Jerry Sandusky, who was a popular defensive coordinator for the Pennsylvania State University football team. After Sandusky's arrest in early November 2011 on charges of child molestation, ten additional victims came forward and alleged similar abuse.<sup>123</sup> The tremendous damage that the university suffered as a result of the sheer number of accusations, to say nothing of the harm to the children, highlights both why schools might feel pressure to uncover as many claims of abuse as possible, and why they might benefit from the use of allegation escrow systems in that effort.

Stories of high-profile follow-on complaints are also common in national and global politics. Shortly after Nafissatou Diallo's accusation led to Dominique Strauss-Kahn being charged with sexual assault,<sup>124</sup> Tristane Banon, a French journalist, publicly accused Strauss-Kahn of attempted rape.<sup>125</sup> We saw this same pattern when Bill Clinton was accused of multiple instances of sexual misconduct throughout the 1990s in the wake of the Paula Jones sexual harassment lawsuit.<sup>126</sup>

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123. See Mark Viera & Jo Becker, *Ex-Coach Denies Charges Amid New Accusations*, N.Y. TIMES, Nov. 15, 2011, at B13, <http://www.nytimes.com/2011/11/15/sports/ncaafootball/jack-raykovitz-chief-of-second-mile-resigns-amid-penn-state-scandal.html>. If true, the charges against Sandusky suggest that he repeatedly and severely sexually abused young boys in his care. Beyond the indescribable tragedy of the harm done to the children, the scandal surrounding Sandusky's arrest has already had a profound impact on Penn State as an institution. See *id.*

124. See Al Baker & Steven Erlanger, *I.M.F. Chief, Apprehended at Airport, Is Accused of Sexual Attack*, N.Y. TIMES, May 14, 2011, at A1, <http://www.nytimes.com/2011/05/15/nyregion/imf-head-is-arrested-and-accused-of-sexual-attack.html>.

125. See Maïa de la Baume, *A Writer Frees Herself by Speaking Out*, N.Y. TIMES, July 23, 2011, at A6, <http://www.nytimes.com/2011/07/23/world/europe/23banon.html>. Neither case was successful, as U.S. prosecutors eventually dropped all charges against Strauss-Kahn and French prosecutors declined to pursue criminal charges as well. See Steven Erlanger & Maïa de la Baume, *Strauss-Kahn Is Not Charged in French Case*, N.Y. TIMES, Oct. 14, 2011, at A1, <http://www.nytimes.com/2011/10/14/world/europe/dominique-strauss-kahn-cleared-of-attempted-rape-of-tristane-banon.html>. John Eligon, *Strauss-Kahn Drama Ends with Short Final Scene*, N.Y. TIMES, Aug. 24, 2011, at A1, <http://www.nytimes.com/2011/08/24/nyregion/charges-against-strauss-kahn-dismissed.html>.

126. See Francis X. Clines, *Testing of a President: The Accuser; Jones Lawyers Issue Files Alleging Clinton Pattern of Harassment of Women*, N.Y. TIMES, Mar. 14, 1998, at A1, <http://www.nytimes.com/1998/03/14/us/testing-president-accuser-jones-lawyers-issue-files-alleging-clinton-pattern.html> (reporting attempt "to portray Mr. Clinton as repeatedly engaging in sexual harassment of female underlings from his executive positions in government," including testimony from Kathleen Willey); Francis X. Clines & Jeff Gerth, *The President Under Fire: The Overview; Subpoenas Sent as Clinton Denies Reports of an Affair with Aide at White House*, N.Y. TIMES, Jan. 22, 1998, at A1, <http://www.nytimes.com/1998/01/22/us/president-under-fire-overview-subpoenas-sent-clinton-denies-reports-affair-with.html> (reporting the Monica Lewinsky scandal); *Woman Says Clinton*

Beyond these high-profile cases, however, empirical studies on sexual harassment support the idea that information escrow systems can add value to current reporting systems. Escrow systems are of course useful only inasmuch as a perpetrator is likely to harass multiple victims. An early study on sexual harassment in the federal government found that “many women and men reported that their harasser had also bothered others at work.”<sup>127</sup> A more recent statistical study based on labor arbitration decisions summarized the number of victims per perpetrator:<sup>128</sup>

#### DESCRIPTIVE STATISTICS AND CORRELATIONS

Variables	M	SD	N	1	2	3	4	5	6	7	8
1. Number of targets	2.32	2.12	92	-							
...											
8. Number of incidents	4.77	3.58	92	.32	.09	.18	.30	.42	.38	.55	-

Data from Margaret A. Lucero et al., *An Empirical Investigation of Sexual Harassers: Toward a Perpetrator Typology*, 56 Hum. Rel. 1461, 1470 (2003).

This data indicates that perpetrators of sexual harassment typically harass multiple victims, comporting with research that has found a recidivism rate for general sex offenders of 61.1 percent.<sup>129</sup>

Nonetheless, there are significant barriers to reporting sexual harassment, thus making it difficult to assess the extent of the problem. Studies seeking to measure the incidence and prevalence of sexual harassment tend to rely on surveys that, while useful, are subject to selective response, lack of response, and other methodological issues.<sup>130</sup> A leading direct survey suggests that the prevalence of sexual harassment on postsecondary campuses remains shockingly high.<sup>131</sup> Of those students surveyed, 62% indicated that they had been sexually harassed in some way.<sup>132</sup> Even more alarming, in a phone survey, 2.8% of the college women respondents indicated that they had

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*Made Advance in '91*, N.Y. TIMES, Feb. 12, 1994, at A8, <http://www.nytimes.com/1994/02/12/us/woman-says-clinton-made-advance-in-91.html> (reporting the Paula Jones sexual harassment lawsuit).

127. U.S. MERIT SYS. PROT. BD., *SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM?* 25 (1981), available at <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=240744&version=241014&application=ACROBAT>.

128. Margaret A. Lucero et al., *An Empirical Investigation of Sexual Harassers: Toward a Perpetrator Typology*, 56 HUM. REL. 1461, 1470 (2003).

129. Ron Langevin et al., *Lifetime Sex Offender Recidivism: A 25-Year Follow-Up Study*, 46 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 531, 545 (2004).

130. For a discussion of the concerns associated with direct surveys asking questions about sensitive topics, see ARIJIT CHAUDHURI & RAHUL MUKERJEE, *RANDOMIZED RESPONSE: THEORY AND TECHNIQUES* 2–24 (1988). We also imagine that the data available from surveys seeking to identify perpetrators of sexual harassment on college campuses is particularly vulnerable to such concerns.

131. See AAUW REPORT, *supra* note 1.

132. *Id.* at 15 fig.2.

experienced either an attempted or a completed rape<sup>133</sup> in the previous 6.91 months.<sup>134</sup> A follow-up study further found that just 4% of rape victims inform a college official, while only 2.1% of victims report incidents to police.<sup>135</sup> Finally, a 2007 study found that college rape victims are more likely than victims of other types of crime to be repeat victims.<sup>136</sup> Such repeat victimization may contribute to a high rate of underreporting, particularly when measured on an incident-by-incident basis.

There is reason to be skeptical of the conclusions in both of these studies, since the very factors that make underreporting a problem may also lead to unreliable responses to a direct survey. Studies focusing on existing reports are clearly insufficient, and surveys are both highly sensitive to design issues and notoriously inaccurate.<sup>137</sup> School administrators and policymakers do not need to know the full and precise extent of sexual harassment on campus, however, to recognize that both harassment and underreporting are serious problems. Because the likelihood that matched reporting will augment total reports increases as the prevalence and underreporting<sup>138</sup> of harassment rise, the data above suggest that colleges and universities are good candidates for allegation escrow systems.

Studies addressing sexual harassment among working adults indicate that the prevalence of sexual harassment in the workplace is equally alarming. Some studies suggest that perhaps as many as 50 percent of women in the workplace have experienced some type of sexual harassment and that harassment targets tend to be repeat victims.<sup>139</sup> Female employees also often decline to apply the “harassment” label to incidents that otherwise meet all definitions of sexual harassment, perhaps in an effort to improve their working environments by ignoring inappropriate conduct, or because they are reluctant to acknowledge that the incidents have upset them.<sup>140</sup> As with edu-

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133. Under Title IX, rape and sexual assault are considered serious, violent forms of sexual harassment.

134. BONNIE S. FISHER, FRANCIS T. CULLEN & MICHAEL G. TURNER, U.S. DEP'T OF JUSTICE, NCJ 182369, *THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN* 10 (2000).

135. Fisher et al., *supra* note 55, at 24.

136. CHRISTOPHER P. KREBS, CHRISTINE H. LINDQUIST, TARA D. WARNER, BONNIE S. FISHER & SANDRA L. MARTIN, U.S. DEP'T OF JUSTICE, *THE CAMPUS SEXUAL ASSAULT (CSA) STUDY 2-5 to -6* (2007), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>.

137. For a discussion of surveys and studies measuring the prevalence of rape, see BONNIE S. FISHER, *MEASURING RAPE AGAINST WOMEN: THE SIGNIFICANCE OF SURVEY QUESTIONS* (2004), available at <https://www.ncjrs.gov/pdffiles1/nij/199705.pdf>.

138. Or, more accurately, the likelihood that information escrow systems will support reporting increases as the rate of underreporting that *would* be reported via allegation escrow systems rises.

139. Kimberly T. Schneider, Suzanne Swan & Louise F. Fitzgerald, *Job-Related and Psychological Effects of Sexual Harassment in the Workplace: Empirical Evidence from Two Organizations*, 82 J. APPLIED PSYCHOL. 401, 402 (1997).

140. *E.g.*, Beth A. Quinn, *The Paradox of Complaining: Law, Humor, and Harassment in the Everyday Work World*, 25 LAW & SOC. INQUIRY 1151, 1151, 1167, 1181 (2000). However, because the experience of sexually harassing behavior is formed in large part by the reactions

cational settings, data indicating a high prevalence of sexual harassment in the workplace suggest that workplace harassment reporting may be a particularly promising application for information escrow systems.

## 2. Whistle-blowing and Allegations of Nonsexual Wrongdoing

Beyond our principal examples of sexual harassment reporting in universities and workplaces, properly tailored allegation escrow systems have the potential to significantly and positively impact information sharing not only with regard to other types of harassment and discrimination, but also with regard to a wide variety of other types of misconduct. The allegation escrow tool could be deployed to ameliorate potential first-mover claiming disadvantages regarding whistle-blowing. The antiretaliation protections afforded to whistle-blowers<sup>141</sup> are not always sufficient to allay a potential whistle-blower's concerns that she will be subjected to serious social and economic consequences if she reports. For example, the Los Angeles Police Department ("LAPD") formerly had a practice of assigning reporting officers to "freeway therapy," whereby the offending reporters would encounter punitive transfer far from their homes and colleagues, thereby also significantly extending their commutes.<sup>142</sup> Unofficial retaliation need not be so blatant to effectively deter reports of wrongdoing. Whistle-blowers often worry that they will be labeled "troublemakers," passed over for promotion when more than one equally qualified candidate exists, and suffer social consequences in the workplace.<sup>143</sup> Matched reports of wrongdoing in the workplace would benefit from the credibility enhancing and group-safety functions of allegation escrows. While an escrow would probably not

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of the recipient, it is exceedingly difficult, if not impossible, to identify which of those women who resist the term "harassment" do so for which reasons.

141. *E.g.*, 15 U.S.C. § 2087 (2006) (protecting employees from retaliation for reporting violations of safety rules under jurisdiction of Consumer Product Safety Commission); 18 U.S.C. § 1514A (2006) (establishing broad protections for whistle-blowers complaining of fraud or violations of securities laws); 29 U.S.C. § 660(c) (2006) (prohibiting retaliation against employees who complain or testify about violations of the Occupational Safety and Health Act). See generally *Employment Law Guide: Whistleblower and Retaliation Protections*, U.S. DEP'T OF LABOR, <http://www.dol.gov/compliance/guide/whistle.htm> (last visited Oct. 2, 2011).

142. One veteran LAPD officer claimed in 2008 that he'd been demoted and subjected to freeway therapy for defending a female colleague after she was harassed and discriminated against on the basis of her gender. In a lawsuit about the retaliation, he described being removed from his K-9 unit and assigned to a division that was a four-hour commute from his home. A Los Angeles jury awarded him \$3.6 million in damages, and he agreed to collect \$2.5 million from the city in return for the city's agreement to forgo appeals. Victoria Kim, *Jury Awards Damages to Officer*, L.A. TIMES, Nov. 13, 2008, at B1, <http://articles.latimes.com/2008/nov/15/10cal/me-lapd13>.

143. See generally Janet P. Near & Marcia P. Miceli, *Retaliation Against Whistle Blowers: Predictors and Effects*, 71 J. APPLIED PSYCHOL. 137-45 (1986) (discussing relationship between whistle-blowing and retaliation); Marcia A. Parmerlee, Janet P. Near & Tamila C. Jensen, *Correlates of Whistle-Blowers' Perceptions of Organizational Retaliation*, 27 ADMIN. SCI. Q. 17 (1982) (exploring organizational responses to whistle-blowing and identifying factors that increase likelihood of retaliation).

eliminate unofficial retribution, it would make egregious patterns easier to prevent, identify, and prove.

Moreover, directed allegation escrow systems could benefit users anytime there is reason to establish a credible record of repeated conduct before making a public complaint. For example, individual citizen oversight of complaints of police or other government misconduct may fail to attract attention in the absence of strong community support. What's more, state authorities have been criticized for making little more than perfunctory investigations of citizen complaints unless and until a pattern of misconduct has been established.<sup>144</sup> Establishing such a pattern presents a problem to complainants, however, since allegations lodged after an initial go-it-alone complaint can be accused of copycatting. Escrow systems that allow communities or groups to collect a set of complaints before making them public might thus help to both establish a pattern of wrongdoing and support the credibility of the individual complaints.

Allegation escrows could also ameliorate first-mover disadvantages when bringing private *qui tam* actions. Under the False Claims Act, a private party may bring a civil action in the name of the United States against a defendant for defrauding the government.<sup>145</sup> To encourage such private suits, the Act establishes an award of up to 30 percent of the proceeds of the action, depending on whether the Department of Justice subsequently intervenes in the case.<sup>146</sup> Moreover, the Act expressly limits this right to the first person to bring the claim.<sup>147</sup> Similarly, the Dodd-Frank Act established a whistle-blower program awarding 10 to 30 percent of the proceeds obtained from original information leading to the successful enforcement of securities laws.<sup>148</sup> Thus at first glance, these Acts seem to establish a first-mover *advantage*. However, a complainant might worry that she lacks sufficient proof to prevail alone, and may wish to proceed only with other plaintiffs. This is a particularly poignant concern because despite statutory antiretaliation protections,<sup>149</sup> case law has recognized the right of *qui tam* defendants to bring counterclaims against whistle-blowers.<sup>150</sup> A potential *qui*

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144. See, e.g., Christine Hauser, *Embattled Chief Leaves Police Review Board*, N.Y. TIMES, Apr. 2, 2009, at A24. The New York City Civilian Complaint Review Board has a mandate to investigate every complaint received and refers the complaint to the New York Police Department if found to be substantiated. See N.Y.C. CIVILIAN COMPLAINT REVIEW BD., *Frequently Asked Questions*, <http://www.nyc.gov/html/ccrb/html/faq.html> (last visited Oct. 2, 2011).

145. 31 U.S.C. § 3730(b) (2006).

146. *Id.* § 3730(d).

147. *Id.* § 3730(b)(5).

148. 15 U.S.C.A. § 78u-6 (West Supp. 2012).

149. *Id.* § 78u-6(h)(1); 31 U.S.C. § 3730(h).

150. E.g., *United States ex rel. Mikes v. Straus*, 931 F. Supp. 248, 263 (S.D.N.Y. 1996) (“[T]he modern trend does not support a ban on compulsory counterclaims which are based on damages which are ‘independent’ of the *qui tam* claim.” (citing *United States ex rel. Madden v. Gen. Dynamics Corp.*, 4 F.3d 827 (9th Cir. 1993))); *Burch ex rel. United States v. Piqua Eng’g, Inc.*, 145 F.R.D. 452, 455–57 (S.D. Ohio 1992) (compulsory counterclaims must be

tam plaintiff might justifiably worry that she could be exposed to substantial liability were she not to prevail. Allegation escrows thus provide “safety in numbers.”

While whistle-blowers are often insiders employed by an entity engaged in wrongful conduct, the example of adverse drug events (“ADE”s) shows that escrows might encourage reports of different kinds of information by corporate outsiders. Pharmaceutical manufacturers are required to report adverse reactions reasonably related to the use of a drug.<sup>151</sup> But patients and physicians are often reluctant to submit voluntary ADE reports because they lack incentive to report and fear negative repercussions or embarrassment if prescription error or patient noncompliance is blamed.<sup>152</sup> An allegation escrow could lead to greater reporting of ADEs by reducing the risk of embarrassment or negative consequences from direct communication. Moreover, an allegation escrow system could also take into account individual reports of the severity and types of reactions, addressing the concern that current reporting leads to little continuity of care when physicians assess the severity of reactions.<sup>153</sup> Nonetheless, ADE escrows would require a significantly higher threshold to trigger the release of allegations, perhaps a level similar to the 10,000 ADEs submitted to the FDA when physicians began to publicize concerns with the controversial diabetes medicine Avandia.<sup>154</sup> Finally, because ADE submissions are controlled by the Health Insurance

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permitted for due process reasons despite the seemingly contradictory intent of the False Claims Act).

151. See *MedWatch: The FDA Safety Information and Adverse Event Reporting Program*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/Safety/MedWatch/default.htm> (last visited Oct. 3, 2011); *EudraVigilance*, EUR. MEDS. AGENCY, [http://www.ema.europa.eu/ema/index.jsp?curl=pages/regulation/document\\_listing/document\\_listing\\_000239.jsp&menu=menus/regulations/regulations.jsp&mid=WC0b01ac05800250b5](http://www.ema.europa.eu/ema/index.jsp?curl=pages/regulation/document_listing/document_listing_000239.jsp&menu=menus/regulations/regulations.jsp&mid=WC0b01ac05800250b5) (last visited Oct. 3, 2011). In December 2010, the European Parliament and European Council adopted a regulation and directive updating the adverse drug reaction reporting system in the European Union. The new legislation went into effect in July 2012 and will change the way that both pharmaceutical manufacturers and physicians report adverse reactions. The basic system will remain voluntary for physicians, and thus should still be considered “passive oversight.” Both Regulation (EU) No. 1235/2010 and Directive 2010/84/EU are available at *2010 Pharmacovigilance Legislation*, EUR. MEDS. AGENCY, [http://www.ema.europa.eu/ema/index.jsp?curl=pages/regulation/general/general\\_content\\_000492.jsp&mid=WC0b01ac058033e8ad](http://www.ema.europa.eu/ema/index.jsp?curl=pages/regulation/general/general_content_000492.jsp&mid=WC0b01ac058033e8ad) (last visited May 6, 2012).

152. Patient noncompliance, both intentional and unintentional, is exceedingly common and is also responsible for a nontrivial proportion of ADEs. Prescription error is much less common but by no means unheard of. Drugs with similar sounding names, for example, can lead to prescription errors. See U.S. GEN. ACCOUNTING OFFICE, *ADVERSE DRUG EFFECTS*, GAO/HEHS-00-21 at 6–8 (2000), available at <http://www.gao.gov/new.items/he00021.pdf>.

153. For more on the disparity of judgments among physicians, see Jeffrey A. Linder et al., *Secondary Use of Electronic Health Record Data: Spontaneous Triggered Adverse Drug Event Reporting*, 19 *PHARMACOEPIDEMIOLOGY & DRUG SAFETY* 1211 (2010).

154. Based on a search of FDABLE.com, a private, for-profit website that makes the FDA’s ADE database publicly available. See *Search MedWatch Drug Adverse Events (AERS)*, FDABLE, [http://www.fdable.com/advanced\\_aers\\_query](http://www.fdable.com/advanced_aers_query) (last searched Aug. 28, 2011).

Portability and Accountability Act of 1996 (“HIPAA”),<sup>155</sup> patients would benefit from legal protections against the use of their medical information outside of the safety-review context, but the potentially serious consequences of an accidental or bad-faith breach of confidentiality significantly increases the importance of information security measures.<sup>156</sup> Nonetheless, given the current underreporting of ADEs, an ADE escrow may ultimately prove worthwhile.

In some settings, insider or outsider whistle-blowers might prefer to create informant escrows, which prespecify conditions of release of allegations to newspapers or other media outlets to ensure further protection against retaliation.<sup>157</sup> When government or corporate actors are unwilling or are perceived to be unwilling to take appropriate action, whistle-blowers may prefer to spark a public debate by prompting news coverage of some controversial set of facts. Informant escrows can analogously allay the retaliation fears of potential sources by adding to a reporter’s anonymity the assurance that the reporter has multiple sources.

### 3. Suspicion Escrows

Allegation escrows might also be useful where individuals suspect misconduct on the part of another. For example, mutual friends of a married couple might be aware of one spouse’s unfaithfulness, but hesitate to tell the other spouse for fear of having mistakenly construed the situation. This type of situation demonstrates the problem of wrongdoing uncertainty discussed above.<sup>158</sup> An allegation escrow would permit friends to report a suspicion of adultery that would only be forwarded if a triggering number of other suspicion reports were received. Setting the appropriate threshold for forwarding such suspicion reports would seem to present a challenge, but an average of users’ estimates of the number of other individuals aware of the misconduct might be the best approach. Moreover, suspicion escrows might benefit from optional reporting anonymity to encourage friends to share their suspicions without the risk of endangering their relationships with either spouse.

In designing suspicion escrows, it is important to keep in mind that the intended beneficiary may not wish to receive the information. Some spouses may prefer ignorance to unproven allegations of adultery. As discussed

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155. For more information on HIPAA and its scope, see *The Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy and Security Rules*, U.S. DEP’T OF HEALTH & HUM. SERVS., <http://www.hhs.gov/ocr/privacy/> (last visited Oct. 3, 2011).

156. See generally *MedWatch Online Voluntary Reporting Form*, U.S. FOOD & DRUG ADMIN., <https://www.accessdata.fda.gov/scripts/medwatch/medwatch-online.htm> (last visited Oct. 3, 2011). Despite the fairly strict HIPAA requirements governing the release of patient information, drug manufacturers are still required to submit some types of ADE reports, and encouraged to submit as many as possible. See *id.*

157. However, releasing reports to media outlets might expose the escrow service to defamation liability for abuse of the qualified privilege. See *supra* note 99 (discussing defamation and privilege).

158. See *supra* text accompanying notes 54–56.

above, suspicion escrows could be designed with either a presumption of victim interest or disinterest—allowing the victim spouses to “opt-in” or “opt-out” of receiving suspicion reports. To preserve the victim spouse’s interest in not knowing, we favor suspicion escrows that presume disinterest and accordingly require victims to affirmatively opt in to receiving escrow disclosures. As such, suspicion escrows combine aspects of both allegation and shared-interest approaches. A related approach might notify users that the threshold number of reports has been reached, thereby enabling any user to notify the beneficiary that she may wish to opt in and learn of the suspicion. Finally, as the example of Iago teaches,<sup>159</sup> the harm resulting from collusive or bad-faith suspicions could be substantial: a spouse may be unable to repair the damage to the relationship. As with shared-interest escrows, an opt-in approach can minimize this harm by ensuring that spouses voluntarily expose themselves to suspicion information with full knowledge of the risk of bad-faith or collusive reports.

#### 4. Insecurity Escrows

A variation on suspicion escrows could ease communication in sensitive group settings. Often delicate questions arise for which one might desire honest feedback from trusted friends and colleagues, but social customs, insecurities, and concerns about awkwardness prevent a forthright conversation. For example, a professor might wonder if his colleagues think it is time for him to retire, or if his lectures are boring. On a more personal level, a person might want to ask friends whether his recent weight gain is noticeable, or whether he has bad breath. Often, his friends, for fear of provoking hurt feelings, anger, or awkwardness in the relationship, will offer nothing by means of direct communication but politically correct platitudes or tempered opinions.

One way to gather information ambiguously and indirectly is through anonymous surveys such as Survey Monkey and Google Surveys. While perhaps better than a direct conversation, such web-based and purportedly anonymous surveys also include several drawbacks. A colleague might fear that his responses would be identifiable. For example, if everyone who receives the survey gives the same answer, then the professor would be able to infer that all of his colleagues think it is time for him to retire. The colleague might also worry that if nobody responds, the professor would be able to infer that each colleague failed to respond to the survey request.

An insecurity escrow could minimize these concerns. For example, an insecurity escrow might (1) only report a random subset of anonymous responses and (2) only report the random subset if a minimum number of responses is received. Thus, if a professor asked ten colleagues for an opinion, the escrow would only report the anonymous results if at least five

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159. See WILLIAM SHAKESPEARE, *OTHELLO, THE MOORE OF VENICE* act 3, sc. 3, where Iago engineers a scheme to convince Othello that his wife Desdemona is having an affair with Cassio by planting Desdemona’s handkerchief in Cassio’s room.

colleagues responded and only send on five responses—choosing five at random from the submitted responses. Unlike other shared-interest escrows, an insecurity escrow seeks to fulfill a shared interest while preserving a lack of common knowledge as to respondents' identities and opinions. The triggering threshold ensures that the requesting party could never conclude that no one had responded to his request for information. Similarly, to preserve this ambiguity, respondents would never know whether their feedback was actually forwarded. Finally, the random sampling process would ensure that only a subset of actual responses would be reported to the requesting party. This random subsampling would preserve ambiguity as to whether the results reflected the entire group invited to respond.

#### CONCLUSION

This Article has tried to do three things. First, in providing a metatheory for information escrows, we have tried to reveal relationships between a wide array of existing practices. Seen through the lens of information escrows, one can see connections among the disparate practices of everything from Cybersettle and criminal expungements, to adoption consent registries and even GoodCrush. In each of these contexts, private information is deposited with an escrow agent who is only to pass on the information under prespecified conditions.

Second, we have tried to suggest other contexts where information escrows might provide value. In addition to explaining existing practice, we have tried to show that a better understanding of information escrows can help generate new areas where they might be beneficially deployed. We have suggested a dizzying array of possibilities—including insecurity escrows, shared-interest escrows, and even suspicion escrows—as well as highlighting a number of crosscutting design choices—including, for example, presumed consent and interim reporting—which give greater flexibility in managing the potentially disruptive impacts of common knowledge.

Third, we have gone beyond a cataloging of mere possibilities to provide sustained arguments for deploying sexual-harassment-complaint escrows and workplace-dating escrows. Our theory provides no a priori arguments in favor of escrows, but it does suggest conditions when intermediated communication by escrow agents can produce socially enhanced equilibria. Our core application of allegation escrows concerning sexual-harassment-complaint escrows might alleviate the currently significant underreporting problem and trigger more investigations with more credible evidence. Extending the information escrow idea to this new context might play a role in improving the quality of life in our places of work.

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