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# GOVERNING DATA MARKETS IN CHINA: FROM COMPETITION LITIGATION AND GOVERNMENT REGULATION TO LEGISLATIVE ORDERING

*Celine Yan Wang*[*]

## I. INTRODUCTION

> "*The things which are naturally everybody's are: air, flowing water, the sea, and the seashore. So nobody can be stopped from going on to the seashore. But he must keep away from houses, monuments, and buildings. Unlike the sea, right to those things are not determined by the law of all peoples*."
>
> — JUSTINIAN I, INSTITUTES[1]

In mid-2017, disagreements over the terms of access to each other's propriety data led two private Chinese companies to a rare public spat that invited unusual intervention by the State's regulatory agency that is supervising their market activities. The tit-for-tat escalations saw a clash of billionaire personalities, but, more importantly, thrust into the limelight the principal question facing China's internet platform economy: who owns the big data of China's US $910 billion online retailing market?[2]

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* Law Clerk, Chaffetz Lindsey LLP. J.D., 2021, New York University School of Law; M.A., 2016, Yale University; B.A., 2015, University of Notre Dame. I am deeply grateful to Professor Benedict Kingsbury for encouraging me to pursue this project and for his invaluable guidance and cheerleading throughout the development of this Article. Additional thanks to Professor Angelina Fisher for introducing me to the topic of data and law in her clinic course and to Professor Thomas Streinz for his teachings and scholarship on China's role in global data governance. This project has also benefited from Professor Shitong Qiao's presentation on data ownership at the 2019 NYU Guarini Global Data Law Conference. I would also like to thank the editors at the *George Mason International Law Journal*, particularly Sally Alghazali, Hope D'Amico, John Allaire, Rachael Griffin, Suzanne Schultz, Shannon Thielen, and Emily Bordelon, for publishing this Article and for all of their thoughtful suggestions throughout the editorial process. The views expressed in this Article, and any errors, are my own.

[1] *See* JUSTINIAN I, JUSTINIAN'S INSTITUTES 55, 55 (Peter Birks & Grant Mcleod Trans., 1987) (533).

[2] *See, e.g.*, Lulu Yilun Chen & Dong Lyu, *Chinese Billionaires Clash Over Alibaba's Parcel Deliveries*, BLOOMBERG (June 1, 2017), https://www.bloomberg.com/news/articles/2017-06-02/chinese-billionaires-clash-over-alibaba-s-parcel-deliveries; Josh Ye, *Cainiao, SF Express in Standoff Over Data, Causing Confusion Among Chinese Online Shoppers*, S. CHINA MORNING POST (June 2, 2017), https://www.scmp.com/business/article/2096631/cainiao-sf-express-standoff-over-data-gumming-deliveries-chinas-online.

SF Express (顺丰), China's largest private carrier by market value,[3] precipitated the standoff in late May against its largest e-commerce partner, Cainiao (菜鸟), who is the logistics arm of e-commerce giant Alibaba Group founded by Jack Ma.[4] The deadlock between the two originated from a decision by SF Express to decline a data-sharing request from Cainiao, which insisted upon unspecified access to propriety data on all packages handled by SF Express.[5] Within this data request, Cainiao had asked for details on SF Express's non-Cainiao and non-Alibaba deliveries; many of which also involved the company's deliveries for other online retailers.[6] Consequent to SF Express's denial of data access, both companies disconnected from each other's data interfaces on SF Express's last-mile delivery solution, Hive Box.[7] Moreover, Alibaba retaliated by entirely blocking SF Express's access to Cainiao through temporarily de-listing the company as a service provider option from all of its online shopping markets, including Taobao and T-mall, which account for three-quarters of total e-commerce market share in China.[8]

The rift threatened to break up one of the largest and most valuable partnerships in China's booming e-commerce market.[9] It also attracted the attention of China's State Post Bureau (国家邮政局), the government agency regulating the postal service in China.[10] The clash between the two e-commerce titans caused a major disruption for the delivery of over a hundred million packages and triggered a 3.54 percent

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[3] Amanda Wang & Philip Glamann, *China's Biggest Courier Firm Could Soon Deliver Parcels by Drone*, BLOOMBERG (Mar. 28, 2018), https://www.bloomberg.com/news/articles/2018-03-28/china-s-biggest-courier-firm-could-soon-deliver-parcels-by-drone.

[4] *See, e.g.*, Louise Lucas et al*., Alibaba Fights with Courier for Control of Customer Data*, FIN. TIMES (June 02, 2017), https://www.ft.com/content/5eb8e094-475c-11e7-8519-9f94ee97d996.

[5] Alyssa Abkowitz, *Crippling China Delivery Dispute is All About the Data*, WALL ST. J. (June 2, 2017), https://www.wsj.com/articles/crippling-china-delivery-dispute-is-all-about-the-data-1496407108.

[6] *Id.*

[7] *Id.*

[8] Willow Wang & Jiaxin Wang, *SF Express: Data Wars*, IVEY BUS. SCH. 1 (Sept. 24, 2018), https://hbsp.harvard.edu/product/W18544-PDF-ENG.

[9] *See* YOUZHENG JU WANGZHAN (邮政局网站) [Post Office Website], *Guojia Youzheng Ju Xietiao Jiejue Cainiao Shunfeng Shuju Hutong Wenti* (国家邮政局协调解决菜鸟顺丰数据互通问题) [*The State Post Bureau Coordinated to Solve the Data Interoperability Problem Between Cainiao and SF Express*], ZHONGHUA RENMIN GONGHEGUO ZHONGYANG RENMIN ZHENGFU (中华人民共和国中央人民政府) [STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA] (June 3, 2017), http://www.gov.cn/xinwen/2017-06/03/content_5199542.htm.

[10] *Id.*

loss in SF Express's share price—or, US$1.2 billion (CN¥ 7.74 billion)—from the Shenzhen Stock Exchange in under a day.[11] The State Post Bureau, in a rare occasion, intervened directly and urged both sides to "take the big picture into consideration" and to "preserve the market order and consumers' rights and benefits."[12] After government-mediated negotiations, SF Express and Cainiao agreed to an armistice and ended a potentially costly data war, which could have impacted many more hundreds of millions of merchants and consumers in China.[13]

This incident reveals at least two important themes related to data commercialization. First, as big data analytics powered by artificial intelligence (AI) become central features of commerce across sectors and worldwide, data have shifted from by-products of industrial, commercial, and consumer activities to prized resources in their own right.[14] Second, as data becomes the "new oil,"[15] the legal concept of data ownership becomes a fundamental issue to be determined. For example, some of the world's largest corporations already treat data as a new type of property—an asset that is "created, manufactured, processed, stored, transferred, licensed, sold, and stolen."[16]

Ownership is an important foundational concept upon which transactions in digital information proceed. Canadian scholar, Teresa Scassa, identifies a number of contexts in which issues of data ownership are fundamental.[17] Principally, the issue of data ownership decides which companies and organizations can extract perpetual commercial value from these data.[18] Secondarily, Scassa also recognizes the complicated relationship between data ownership and competition and antitrust law.[19] For instance, she points out that excessive concentrations of certain types of data controlled by big internet companies can lead to monopolies.[20] Tertiarily, data ownership weighs heavily in the debate on personal data

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[11] *Data Sharing Cut off as SF Express, Alibaba Spat Continues*, CHINA GLOBAL TELEVISION NETWORK (June 2, 2017), https://news.cgtn.com/news/3d67444e7945444e/index.html.

[12] *See* Post Office Website, *supra* note 9.

[13] *Id.*

[14] *See* Teresa Scassa, *Data Ownership*, CIGI Papers No. 187 (Sept. 2018), https://www.cigionline.org/static/documents/documents/Paper%20no.187_2.pdf.

[15] *The World's Most Valuable Resource is No Longer Oil, But Data*, THE ECONOMIST (May 6, 2017), https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data.

[16] Jeffrey Ritter & Anna Mayer, *Regulating Data as Property: A New Construct for Moving Forward*, 16 DUKE LAW & TECH. REV. 220, 221 (2018).

[17] *See* Scassa, *supra* note 14, at 2.

[18] *Id.*

[19] *Id.*

[20] *Id.*

privacy protection.[21] Finally, clarity of data ownership is necessary for particular public policy agendas, such as creating more competitive data-based industries. [22] For example, many governments, as part of the open data movement,[23] are making their data available for reuse under open licenses.[24]

Issues of data ownership are common across multiple jurisdictions and regions. In the United States, ongoing litigation between LinkedIn and companies that scrape LinkedIn's platform data raises a number of critical issues around ownership and control over publicly accessible platform data.[25] In the European Union, the evolving European model of data protection, *i.e.*, the General Data Protection Regulation, grants individuals a series of *sui generis* rights—a quasi-ownership rights regime in data that gives individuals increased control over "their" personal data, including rights of erasure and data portability rights.[26] In Canada, the now-defunct Sidewalk Toronto Project triggered considerable discussion about who will own any data generated by this

[21] *See id; see also* Michelle Dennedy & Sagi Leizerov, *On Monetizing Personal Information: A Series*, THE INT'L ASS. OF PRIVACY ADVISORS (Sept. 26, 2017), https://iapp.org/news/a/on-monetizing-personal-information-a-series/; Michael Haupt, *Introducing Personal Data Exchanges & The Personal Data Economy*, PROJECT 2030 (Dec. 7, 2016), https://medium.com/project-2030/what-is-a-personaldata-exchange-256bcd5bf447.

[22] *See* Scassa, *supra* note 14, at 2.

[23] For a discussion on open data movement, *see, e.g.*, Frederik Zuiderveen Borgesius, Jonathan Gray & Mireille van Eechoud, *Open Data, Privacy, and Fair Information Principles: Towards a Balancing Framework*, 30 BERKELEY TECH. L. J. 2073 (2015); Jonathan Gray, Towards a Genealogy of Open Data (General Conference of the European Consortium for Political Research in Glasgow, 2014), https://ssrn.com/abstract=2605828.

[24] For examples of open data movements and agreements in various jurisdictions, *see, e.g.*, Directive 2019/1024, of the European Parliament and of the Council of 20 June 2019 on Open Data and the Re-Use of Public Sector Information, 2019 O.J. (L 172); FOIA Improvement Act of 2016, 114th Cong. (2016); Decreto No. 8.777, de 11 de Maio de 2016 [Decree No. 8.777, 11 May 2016], Diário Oficial da União [D.O.U.] de 12.05.2016 (Braz.) (establishing the Brazilian Federal Executive Branch's Open Data National Policy); Digital Trade Agreement, Japan-U.S. art. 20, Oct. 7, 2019, T.I.A.S. No. 20-101.1; Digital Economy Partnership Agreement, Chile-N.Z.-Sing., [2020] (signed 11 June 2020, entered into force 7 Jan. 2020), art. 9.5, (N.Z.).

[25] *See, e.g.*, hiQ Labs, Inc. v. LinkedIn Corp., 938 F.3d 985, 990 (9th Cir. 2019).

[26] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data and Repealing Directive 95/46/EC (General Data Protection Regulation), arts. 59, 73, 2016 O.J. (L 119) [hereinafter GDPR].

public-private partnership.[27] In China, ongoing legal battles among the big tech companies over consumer data again highlight this grey area of data ownership.[28] In each of these examples, the growing economic importance of data raises serious questions about who "owns" data and what data "ownership" entails (hereinafter, the "twin questions").

This Article analyzes the question of who "owns" data in China. Despite the growing economic role of data, the current global legal regime lacks a comprehensive framework on data property rights. As Scassa illustrates, the extent to which law recognizes property rights in data is, at best, unsettled, and who owns or should own data is a question without a definitive answer.[29] Nevertheless, control over data can be asserted through a variety of means. On the one hand, technological means, *e.g.*, control over data infrastructures, can be deployed to prevent data access by others.[30] On the other hand, the existing legal regimes, *e.g.*, intellectual property ("IP") rights (copyright and trade secrecy) and competition law, may help protect certain data assets when data ownership in general is not defined.[31] Nevertheless, these existing legal frameworks are increasingly proving insufficient to deal with the challenges of today's big data-driven economy.[32]

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[27] The Sidewalk Toronto Project was a megaproject spearheaded by Waterfront Toronto and a Google-affiliated company pledging to make Toronto "one of the world's first 'smart' cities." Leyland Cecco, *Toronto Swaps Google-Backed, Not-So-Smart City Plans for People-Centered Vision*, THE GUARDIAN (Mar. 12, 2021), https://www.theguardian.com/world/2021/mar/12/toronto-canada-quayside-urban-centre; *see also* Teressa Scassa, *Who Owns All the Data Collected by 'Smart Cities'?*, TORONTO STAR (Nov. 23, 2017), https://www.thestar.com/opinion/contributors/2017/11/23/who-owns-all-the-data-collected-by-smart-cities.html.

[28] *See* discussion *infra* Part II.

[29] *See* Scassa, *supra* note 14, at 1.

[30] As Katharina Pistor notes, data controllers often exploit this legal ambiguity to entrench their *de facto* control over data and protect against compelled disclosures of data through "self-help by way of technological barriers to accessing their databases." Katharina Pistor, *Rule by Data: The End of Markets?*, 83 L. & CONTEM.. PROBS. 101, 107 (2020)*; see also* Angelina Fisher & Thomas Streinz, *Confronting Data Inequality* 35 (World Development Rep. Working Paper No. 2021/1, 2021), https://www.iilj.org/publications/confronting-data-inequality/.

[31] *See, e.g.*, Scassa, *supra* note 14; Fisher & Streinz, *supra* note 30, at 5.

[32] *See, e.g.*, Ritter & Mayer, *supra* note 16, at 222 (arguing that while copyright law framework has evolved to protect data in some contexts, this legal regime is ultimately inadequate for the task of addressing data ownership in a big data economy); Fisher & Streinz, *supra* note 30, at 37 (noting that because the processes of data generation consist of recording facts and most databases do not satisfy the threshold for creative works, these data and most databases cannot be protected under copyrights); Scassa, *supra* note 14, at 12 (arguing that laws of trade secrets or confidential information do not protect all data, because some data are necessarily broadly shared or are even publicly accessible and other data are difficult to keep confidentiality, as the law protects the confidentiality of the data and not the data itself).

Like many other jurisdictions, China has some law under existing legal regimes that protects basic data rights but lacks a comprehensive legal framework that answers the twin questions.[33] The uncertain legal milieu has led to heated disputes between companies and between the private and public sectors over access and control of big data.[34] However, despite the legal ambiguity, the digital economy has boomed in the country without specification of data ownership.[35] How has China managed the massive growth of its data markets and inter-company data disputes without any legal determinations as to who owns data? This Article examines the particular case of data ownership within the Chinese jurisdiction by reviewing the existing legal regimes in China, along with some of the strategies and means in which Chinese private companies and state agencies use to access data or to adjudicate its control. Thus far, China has established a data governance framework through private litigation applying the principle of unfair competition within the court system, with some high-profile cases addressed by direct government mediation or indirect policy regulation under anti-monopoly law and other data-specific legislation.[36] Many unresolved issues remain under legislative and policy experimentation, such as specification of data property rights and establishment of a national data trading market.[37]

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[33] *See, e.g.*, LI YOUXING (李有星) ET AL., SHUJU ZIYUAN QUANYI BAOHU FA LIFA YANJIU (数据资源权益保护法立法研究) [RESEARCH ON LEGISLATION OF DATA RESOURCES PROPERTY RIGHTS PROTECTION LAW], 18–32 (2019) (e-book); Tong Bin (童彬), *Shuju Caichanquan de Lilun Fenxi He Falü Kuangjia* (数据财产权的理论分析和法律框架) [*The Theoretical Analysis and Legal Framework of Data Property Rights*] 31 J. CHONGQING UNIV. POSTS & TELECOMMS. 50, 50, 56 (2019); Wang Youqiang (王佑强), *Shuju de Falü Jieding Jiqi Baohu* (《数据的法律界定及其保护》) [*Legal Definition of Data and Its Protection*], ALLBRIGHT (July 26, 2020), https://www.allbrightlaw.com/CN/10475/93b93cce4e93bddf.aspx.

[34] *See* discussion *infra* Parts II–III.

[35] *See, e.g.*, RESEARCH & MARKETS, COUNTDOWN TO THE CHINESE CENTURY: GLOBAL DIGITAL ECONOMY (July 2021) (e-book), https://www.researchandmarkets.com/reports/5360338/countdown-to-the-chinese-century-global-digital?utm_source=CI&utm_medium=PressRelease&utm_code=f9zxgb&utm_campaign=1590916+-+Countdown+to+the+Chinese+Digital+Century%3a+2021+Report&utm_exec=chdo54prd (estimating that China will become the world's largest economy by 2025 with 55% of that economic output coming from the digital economy, at around US $12 trillion); Jonathan Woetzel et al., *China's Digital Economy: A Leading Global Force* 1, MCKINSEY & COMPANY (Aug. 2017), https://www.mckinsey.com/~/media/mckinsey/featured%20insights/China/Chinas%20digital%20economy% 20A%20leading%20global%20force/MGI-Chinas-digital-economy-A-leading-global-force.ashx.

[36] *See* discussion *infra* Parts II–III.

[37] *See* discussion *infra* Part IV.

The Shenzhen legislative experiment is one of the most prominent Chinese government exercises to address the issue of "ownership" hitherto sidestepped to spur competition, innovation, and growth for future applications of AI and machine learning (ML).[38] However, there remains the risk within this experiment, and other legislative and policy-making efforts by Chinese authorities, that premature specification of data property rights may raise more challenges than it solves. The reason for that is because a status quo bias towards data controllers who have already controlled much of the Chinese consumer data, which have excluded others from accessing that data, may undermine efforts at addressing issues of competition, innovation, and the broader public interest. Therefore, this Article proposes that incremental development and experimentation, in the form of judicial rulings, regulatory guidance, and legislative initiatives, is a promising path forward. As Angelina Fisher and Thomas Streinz observe, "proactively establishing or recognizing legal property rights in data can further entrench infrastructural control with the authority of law by preventing redistributive measures because data holders would use property rights as an additional shield to exclude others from access."[39]

Part II examines the role of the Chinese Anti-Unfair Competition Law in legal battles between various Chinese internet platforms over data ownership, and investigates the ways in which these companies resort to competition litigation to settle data disputes. Part III delves into governmental mediation in high-profile tech-industry conflicts and intervention through antitrust regulatory action. Part IV explores legislative and policy initiatives taken by the Chinese authorities to establish a new data ownership regime. Part V then provides legal analysis of the cases and legal framework presented and proposes that incremental development and prudent experimentation, in the form of judicial rulings, regulatory guidance, and legislative initiatives, is a promising path forward in establishing a comprehensive legal regime on data ownership in China. The final section concludes the Article.

## II. COMPETITION LITIGATION: ANTI-UNFAIR COMPETITION LAW

Litigation has increasingly become the preferred means for Chinese internet platforms to retain access and assert control over their

[38] *See* discussion *infra* Part IV.A.
[39] Fisher & Streinz, *supra* note 30, at 36.

collected consumer data.[40] While this conventional approach invokes legal protections under core IP law (copyrights and trade secrets) and contract law,[41] in Chinese judicial practice, inter-company disputes rely primarily upon competition law—which regulates business operators' conduct and prohibits certain unfair acts that damage their competitors' interests.[42]

On January 1, 2018, the newly amended Anti-Unfair Competition Law ("AUCL") took effect, which was passed in November 2017 by China's highest legislative body, known as the Standing Committee of the National People's Congress.[43] The amended AUCL included new provisions under Article 12 that specifically address internet-related unfair competition.[44] Similar to Article 2 of the superseded AUCL, Article 12 of the amended AUCL required companies to honor the general principles of fairness, honesty, and good faith, and widely recognized business ethics.[45] But, in contrast to Article 2's catch-all clause, the specific language of Article 12 set prohibitions on certain types of conduct that are deemed to constitute internet-related

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[40] *See* Ives Duran, *Tesila Chezhu Weiquan Shijian Beihou, Nanjie de Shuju Zhengduo Zhan* (特斯拉车主维权事件背后，难解的数据争夺战) [*Behind the Tesla Owner's Rights Case, The Inexplicable Data Battle*], TENCENT (Apr. 23, 2021), https://new.qq.com/omn/20210423/20210423A04P6T00.html.

[41] *See* Sharon Liu & Zhangwei Wang, *Recent Privacy Case Law Update in China*, JD SUPRA (Feb. 24, 2020), https://www.jdsupra.com/legalnews/recent-privacy-case-law-update-in-china-25291/; Guanbin Xie & Bin Zhang, *Competition Law Could Give Better Protection to Big Data Than Copyright Law*, MANAGING IP (Mar. 22, 2019), https://www.managingip.com/article/b1kblzh0qht8gh/competition-law-could-give-better-protection-to-big-data-than-copyright-law#:~:text=In%20the%20case%20of%20Taobao,Anhui%20Meijing%20for%20unfair%20competition.&text=The%20court%20held%20that%20unfair,Meijing%20unlawfully%20acquired%20Taobao's%20data.

[42] Xie & Zhang, *supra* note 41.

[43] Fan Bu Zhengdang Jingzheng Fa (反不正当竞争法) (2017) [Anti-Unfair Competition Law (2017)] (promulgated by Standing Comm. Nat'l People's Cong., Nov. 4, 2017, effective Jan. 1, 2018), http://www.gov.cn/xinwen/2017-11/05/content_5237325.htm [hereinafter Anti-Unfair Competition Law (2017)], *translated at* https://www.hongfanglaw.com/wp-content/uploads/2019/10/Anti-Unfair-Competition-Law-of-the-Peoples-Republic-of-China-2019-AmendmentEnglish.pdf. In 2019, the NPC Standing Committee further amended the 2017 AUCL to enhance the protection of trade secrets. This Article only focuses on Article 12 of the 2017 AUCL for the discussion of the internet-related unfair competition.

[44] Anti-Unfair Competition Law (2017), *supra* note 43, at art. 12

[45] *Id.*; Fan Bu Zhengdang Jingzheng Fa (反不正当竞争法) (1993) [Anti-Unfair Competition Law (1993)] art. 2 (promulgated by Standing Comm. Nat'l People's Cong., Sept. 2, 1993, effective Dec. 1, 1993), https://www.jetro.go.jp/ext_images/world/asia/cn/ip/law/pdf/origin/2007032859393454.pdf, *translated at* https://www.cecc.gov/resources/legal-provisions/prc-unfair-competition-law-english-and-chinese-text.

unfair competition by obstructing legitimate competitor activities or restricting consumer choice.[46] Article 12 also codified existing judicial practice, which clarified the standards to determine whether an act violated the law.[47] Specifically, the courts would have to rule on whether there was competition between the litigants, whether the data holder's lawful rights and interests were infringed, and whether the infringer's illegal act harmed market order and caused, or might have caused, damage to the competitive interests of the data holder.[48]

The amended AUCL was influenced by several of the rulings discussed in the cases below, and in turn, has influenced the general direction of later rulings. One notable outcome in these court decisions is that data holders enjoy property-like claims to the data already collected and processed if the process was deemed to constitute a substantial investment.[49] These rulings reveal the current analytical framework—unfair competition—that Chinese courts use to assess data ownership and control.[50]

### *A.* Sina Weibo v. Maimai *(Beijing Intellectual Property Court, 2016)*

*Sina Weibo v. Maimai* was the first big data case in China using the unfair competition law. This landmark case recognized the quasi-property rights of data held by platform companies under competition law.[51]

Founded in 2010, Sina is a social networking service ("SNS") provider of the famous micro-blogging platform Weibo (新浪微博), the Chinese equivalent to Twitter.[52] Maimai (脉脉), founded three years later, offers a competing SNS service.[53] The two parties entered into a Developer Agreement ("Open API") that enabled Sina Weibo's login

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[46] Anti-Unfair Competition Law (2017), *supra* note 43, at art. 12

[47] *Id.*

[48] *Id.*

[49] *See infra* discussion Part II.A–E.

[50] *Id.*

[51] *See generally* Beijing Weimeng Chuangke Wangluo Jishu Youxian Gongsi Yu Beijing Taoyoutianxia Jishu Youxian Gongsi Deng Bu Zhengdang Jingzheng Jiufen (北京微梦创科网络技术有限公司与北京淘友天下技术有限公司等不正当竞争纠纷) [Beijing Micro Dream Network Technology Co. Ltd. v. Beijing Taoyou Technology Co. Ltd.], China Judgments Online (Beijing Haidian District People's Ct. Apr. 26, 2016), https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=197fc006635a46f7b8a1a84d00a81fb1 [hereinafter *Sina v. Maimai* I].

[52] *Id.* at 3.

[53] *Id.*

function on Maimai's webpage and mobile application.[54] In return, Maimai received access to Sina Weibo's user profiles subject to certain rules and restrictions with regards to collection and usage of Sina Weibo's data.[55] According to a complaint filed by Sina Weibo in 2013 and 2014, Maimai violated the terms of the API by scraping a variety of public and non-public user information without consent from either Sina Weibo or its users.[56]

The key issue of this case was whether the alleged unauthorized collection and use of data constituted unfair competition under the AUCL.[57] In April 2016, Beijing Haidian District People's Court ("Haidian People's Court") found that Maimai's conduct constituted unfair competition.[58] Maimai scrapped public information on Sina Weibo platform without the consent of Sina Weibo or its users to promote its own SNS services.[59] Consequently, the Haidian People's Court ordered Maimai to pay Sina Weibo US$309,000 (CN¥ 2 million) in damages.[60]

Maimai later appealed the decision to the Beijing Intellectual Property Court ("Beijing IP Court").[61] In December 2016, the intermediate court upheld the original ruling, holding that Maimai violated the AUCL for failing to obtain proper consent from either Sina Weibo or its users.[62] In reaching this decision, the Court indicated that because data had become a critical component of commercial advantage for business operators, the collection and utilization of data conferred a competitive advantage benefiting those who hold it.[63] The decision of the Beijing IP Court advanced the general principle of data as part of the competitive advantage within commercial operations, but demurred to discuss issues related to user data ownership or specify the rights SNS

[54] *Id.* at 5–6.
[55] *Id.*
[56] *Id.*
[57] *Id.* at 31.
[58] *Id.* at 38.
[59] *Id.*
[60] *Id.* at 47.
[61] Beijing Taoyoutianxia Jishu Youxian Gongsi Yu Beijing Weimeng Chuangke Wangluo Jishu Youxian Gongsi Deng Bu Zhengdang Jingzheng Jiufen (北京淘友天下技术有限公司与北京微梦创科网络技术有限公司等不正当竞争纠纷) [Beijing Taoyou Technology Co. Ltd. v. Beijing Micro Dream Network Technology Co. Ltd.], China Judgments Online, at 2 (Beijing Intell. Prop. Ct. Dec. 30, 2016), https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=49854fde619a47d7b772a71d000fcf00 [hereinafter *Sina v. Maimai* II].
[62] *Id.* at 69.
[63] *Id.* at 67.

platforms had over user data legally collected.[64] The Court, however, did find that due to the large investment made by Sina Weibo to collect and maintain its user database, its user data could be regarded as an important "operating interest" and "competitive advantage" for Sina Weibo.[65]

The Beijing IP Court established a "triple authorization" principle (三重同意原则) to determine and offer additional protection for a platform's legitimate interests over user data.[66] Under this principle, a third-party service provider can legally obtain data from the platform only when it obtains: (1) user authorization to the platform; (2) platform authorization to the third-party service provider; and (3) user authorization to the third-party service provider.[67] It appears that this "triple authorization" principle exhibits a pro-platform bias over data control.

### *B.* Dianping.com v. Baidu *(Shanghai Intellectual Property Court, 2016)*

Dianping.com (大众点评网), the Chinese internet platform similar to Yelp, Inc., provides consumer reviews and ratings of local services, including restaurants, hotels, and entertainment venues.[68] Baidu, Inc. (百度) is China's leading search provider, which also provides other online services, including Baidu Map and Baidu Zhidao (or Baidu Q&A).[69] In 2014, Dianping.com sued Baidu under the AUCL for unfair competition alleging that Baidu Maps and Baidu Zhidao

[64] *Id.*; *see also* Susan Ning, *China's Step Forward to Personal Data Protection*, KING & WOOD MALLESONS (Apr. 10, 2017), https://www.kwm.com/en/cn/knowledge/insights/china-s-step-forward-to-personal-data-protection-20170410.

[65] *See id*; *see also Sina v. Maimai* II, at 67 (Beijing Intell. Prop. Ct. Dec. 30, 2016).

[66] *Id.* at 76.

[67] *Id.*

[68] *See generally* DAZHONG DIANPING WANG (大众点评网) [DIANPING.COM], https://www.dianping.com/ (last visited Jan. 30, 2022).

[69] *See generally* BAI DU (百度) [BAIDU], https://www.baidu.com/more/ (last visited Jan. 30, 2022).

scraped customer reviews from Dianping.com to display on their own service platforms without consent.[70]

The court of the first instance, Shanghai Pudong People's Court ("Pudong Court"), held that the unauthorized use of consumer reviews by Baidu violated Article 2 of the AUCL.[71] Specifically, the Court held that for a conduct to constitute an unfair action, the plaintiff needs to prove that: (1) the defendant in question is a competitor; (2) the plaintiff suffered a loss as a result of the conduct; and (3) the conduct was unlawful.[72]

Regarding the first requirement, the Court applied a broad definition of "competitive relationship," finding that companies from different sectors may be considered competitors for the purposes of the AUCL.[73] Therefore, the Court found that since Dianping.com and Baidu both targeted the same group of consumers, they could be viewed as competitors regardless of the specific nature of services each provided.[74] Moreover, the Court found that the practice of Baidu Maps and Baidu Zhidao, in allowing Baidu users to access the consumer reviews without visiting Dianping.com, resulted in a loss of user visits and potential business opportunities for Dianping.com.[75] Finally, the Court considered multiple factors that were necessary to determine whether Baidu's conduct was lawful.[76] These factors included: (1) whether the data at stake had commercial value; (2) whether that data conferred a competitive advantage to Dianping.com; (3) whether there were any reasonable means for Baidu to obtain the data; (4) whether Dianping.com violated the law, commercial ethics, or public interests in its original collection and use of the data; and (5) whether Baidu's end-use of the

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[70] Shanghai Hantao Xinxi Zixun Youxian Gongsi Yu Beijing Baidu Wangxun Keji Youxian Gongsi, Shanghai Jietu Ruanjian Jishu Youxian Gongsi Bu Zhengdang Jingzheng Jiufen Yishen Minshi Panjueshu (上海汉涛信息咨询有限公司与北京百度网讯科技有限公司、上海杰图软件技术有限公司不正当竞争纠纷一审民事判决书) [Shanghai Hantao Information Consulting v. Beijing Baidu Netcom Science Technology, et al.], China Judgments Online, at 2 (Shanghai Pudong New Area People's Ct. May 26, 2016), https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=d563eeaad95949c9bb3fa7f90122dbae [hereinafter *Dianping.com v. Baidu* I].

[71] *Id.* at 18; Anti-Unfair Competition Law (2017), *supra* note 43, at art. 2.

[72] *Dianping.com v. Baidu* I, at 15–17 (Shanghai Pudong New Area People's Ct. May 26, 2016).

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.* at 17.

data was lawful.[77] Here, the Court applied these factors and found that consumer reviews were valuable resources conferring a competitive edge to Dianping.com.[78]

The Court also recognized that Dianping.com invested a significant amount of time and effort to set up a functioning consumer review system to collect these reviews.[79] In addition, the Court held that Dianping.com's original collection and use of the consumer data from its customers had neither violated the law nor business ethics.[80] The Court further found that by scraping customer reviews from Dianping.com, Baidu had "free-ridden" on Dianping.com's investment, breaching business ethics and the principles of honesty and good faith.[81] The Court did note, however, that Baidu would not have violated the law if it displayed only a portion of consumer reviews from Dianping.com and included links to the original reviews.[82]

Baidu later appealed the decision before the Shanghai Intellectual Property Court ("Shanghai IP Court").[83] In 2017, the intermediate court affirmed Pudong Court's ruling, recognizing Dianping.com's legitimate business interest in its customer review data.[84] The Court also noted that the data Baidu scraped from Dianping.com was beyond "proportional,"[85] and that such conduct discourages further investments by companies in data collection and new market entrants and disrupts market order.[86] Therefore, consumers' interests are harmed in the long run.[87]

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[77] *Id.*; *see also* Andy Huang, *Hantao V. Baidu— 'Scraping' Third-Party Information as Unfair Competition*, GLOBAL MEDIA & COMMC'N WATCH (June 30, 2016), https://www.hlmediacomms.com/2016/06/30/hantao-v-baidu-scraping-third-party-information-as-unfair-competition/.

[78] *Dianping.com v. Baidu* I, at 17 (Shanghai Pudong New Area People's Ct. May 26, 2016).

[79] *Id.* at 18.

[80] *Id.*

[81] *Id.*

[82] *Id.* at 19.

[83] Beijing Baidu Wangxun Keji Youxian Gongsi Yu Shanghai Hantao Xinxi Zixun Youxian Gongsi Qita Bu Zhengdang Jingzheng Jiufen Er Shen Minshi Panjueshu (北京百度网讯科技有限公司与上海汉涛信息咨询有限公司其他不正当竞争纠纷二审民事判决书) [Beijing Baidu Netcom Science Technology v. Shanghai Hantao Information Consulting], China Judgments Online, at 1 (Shanghai Intell. Prop. Ct. Aug. 30, 2017), https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=41dbc2267514473886a6a7f90124a13c [hereinafter *Dianping.com v. Baidu* II].

[84] *Id.* at 22.

[85] *Id.* at 24.

[86] *Id.* at 23.

[87] *Id.* at 25.

The *Dianpian.com v. Baidu* rulings reflect important court decisions on data property rights. These rulings held that user-generated data on Dianping.com nevertheless were essential to the company's business and should be counted as among its key assets;[88] and they expanded the scope of data scraping cases that could be brought under the AUCL.[89] A key factor in the courts' reasoning was that Dianping.com had made significant upfront investments in building up the consumer review system.[90] This system allowed for the collection of consumer reviews, and even though the reviews were written by individual contributors, Dianping.com's investment granted the platform certain rights over these comments.[91] It is worth noting that the Shanghai courts' positions were largely consistent with the 2016 issuance of Trial Guidelines on Network Related Intellectual Property Right Cases by the Beijing High People's Court.[92] According to these guidelines, the Beijing courts may hold that the unauthorized use of information constitutes unfair competition under the AUCL if: (1) the scraped information advantages the competitive and commercial opportunities of the data holder; and (2) the scraped information is used to provide users with an effective alternative service to the data source.[93] That is, the guidelines seem to apply irrespective of whether the data in question is generated by the data holder.[94]

[88] *Id.* at 22.

[89] Huang, *supra* note 77.

[90] *Dianping.com v. Baidu* I, at 17–18 (Shanghai Pudong New Area People's Ct. May 26, 2016); *Dianping.com v. Baidu* II, at 22 (Shanghai Intell. Prop. Ct. Aug. 30, 2017).

[91] *Dianping.com v. Baidu* II, at 22 (Shanghai Intell. Prop. Ct. Aug. 30, 2017).

[92] *See Trial Guidelines on Network Related Intellectual Property Right Cases*, CHINA INTELLECTUAL PROPERTY LAWYERS NETWORK (Apr. 4, 2016), https://www.ccpit-patent.com.cn/zh-hans/node/3542; *see also* Paul Ranjard & Jiang Nan, *New Anti-Unfair Competition Guidance for Internet Players from Beijing Court*, LEXOLOGY (May 12, 2016), https://www.lexology.com/library/detail.aspx?g=f11a2a1d-eaef-4b64-aa88-0e33dc3a8a3b.

[93] Ranjard, *supra* note 92.

[94] *See id.*

### *C.* Taobao v. Meijing *(Hangzhou Intermediate People's Court, 2018)*

Alibaba's Taobao (淘宝网), the operator of one of the world's largest e-commerce platforms,[95] developed a market analytics software service to provide Taobao merchants with up-to-date information on their business performances.[96] Meijing operated a competing analytics service to Taobao and purchased from Taobao merchants the analytics data they originally obtained from Taobao, which Meijing then used to sell a cheaper competing service.[97] In 2017, Taobao sued Meijing for unfair competition by scraping that proprietary data from Taobao.[98] In its defense, Meijing argued that the data in question was personal data belonging to Taobao's users and not to the Taobao platform.[99]

The court of the first instance, Hangzhou Railway Transportation Court ("Railway Court"), ruled that Meijing violated the AUCL.[100] Within its ruling, the Court made a key distinction between the individualized user personal data and the "big data" that Taobao had accumulated and analyzed using its investment in algorithmic aggregators.[101] Accordingly, the Court determined that Taobao held a "senior property claim"[102] (竞争性财产权益) to this aggregated and

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[95] *See* John Koetsier, *44% of Global eCommerce is Owned by 4 Chinese Companies*, FORBES (Oct. 21, 2020), https://www.forbes.com/sites/johnkoetsier/2020/10/21/44-of-global-ecommerce-is-owned-by-4-chinese-companies/?sh=3c359ac11645 (noting that Taobao, which owns 15% of the global e-commerce market, remains among the largest digital commerce companies in the world).

[96] Tao Bao (Zhongguo) Ruanjian Youxian Gongsi Su Anhui Meijing Xinxi Keji Youxian Gongsi Bu Zhengdang Jingzheng Jiufen An (淘宝(中国)软件有限公司诉安徽美景信息科技有限公司不正当竞争纠纷案) [Taobao (China) Software Co., Ltd. v. Anhui Meijing Information Technology Co., Ltd.], China Judgments Online, at 2 (Hangzhou Railway Transp. Ct. Aug. 16, 2018), https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=52bffab9fe774da69d5aab0200a272f0 [hereinafter *Taobao v. Meijing* I].

[97] *Id.* at 2.

[98] *See id.* at 2.

[99] *Id.* at 3.

[100] *Id.* at 2.

[101] *Id.* at 17.

[102] In its opinion, the Railway Court used "竞争性财产权益" ("senior property claim") to describe the types of rights that Taobao held for the data product. The Court stressed that these "property rights" were not absolute: Taobao's rights to the data product was more "senior" or "competitive" than those of its data-scraping competitors. Since there does not seem to exist an equivalent concept to "竞争性财产权益" outside of the Chinese legal context, I describe these rights as "senior" or "competitive" property rights. *Id.*

processed data.[103] As such, the platform had an exclusive interest in the commercial value of the data.[104] Meijing did not pay the platform for access to this data; therefore, it unlawfully acquired Taobao's data against business ethics.[105]

A year later, Meijing appealed to the Hangzhou Intermediate People's Court claiming that Taobao's collection of personal data did not comply with privacy laws.[106] In 2018, the Hangzhou People's Court upheld the lower court's ruling, holding that the user information that Taobao collected was not personal data because it "cannot be used to identify the personal identity of individuals, alone or in combination with other data."[107]

### *D.* Gumi v. Yuanguang *(Shenzhen Intermediate People's Court, 2017)*

In the case of *Gumi v. Yuanguang*, the Shenzhen Intermediate People's Court sided with other courts' rulings that a data holder's act of collecting, analyzing, editing, and integrating big data resources with commercial value is protected by the AUCL.[108] As such, an unauthorized use of web crawler technology to misappropriate these big data resources for usage in running similar applications constitutes unfair competition.[109]

Gumi (谷米) and Yuanguang (元光) operated competing real-time transit information apps, "Kumike" and "Chelaile," respectively.[110]

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[103] *Taobao v. Meijing* I, at 17 (Hangzhou Railway Transp. Ct. Aug. 16, 2018).

[104] *Id.*

[105] *Id.* at 19.

[106] Anhui Meijing Xinxi Keji Youxian Gongsi Su Tao Bao (Zhongguo) Ruanjian Youxian Gongsi Bu Zhengdang Jingzheng Jiufen An (安徽美景信息科技有限公司诉淘宝(中国)软件有限公司不正当竞争纠纷案) [Anhui Meijing Information Technology Co., Ltd. v. Taobao (China) Software Co., Ltd.], China Judgments Online, at 1–2 (Hangzhou Intermediate People's Ct. Dec. 18, 2018), https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=42144396b7e84876aa3bac0500aca27c.

[107] *Id.* at 20.

[108] Shenzhen Shi Gumi Keji Youxian Gongsi Yu Wuhan Yuanguang Keji Youxian Gongsi Deng Bu Zhengdang Jingzheng Jiufen (深圳市谷米科技有限公司与武汉元光科技有限公司、陈昴、邵凌霜、刘江红、刘坤朋、张翔不正当竞争纠纷) [Gumi Technology Co. Ltd., v. Yuanguang Technology Co. Ltd.], China Judgments Online, at 13–14 (Shenzhen Intermediate People's Ct. May 23, 2018), https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=48ccfefdb41e48a18055ab03009f13e6.

[109] *Id.* at 14.

[110] *Id.* at 8.

To improve geospatial data accuracy, Gumi partnered with a bus operator, Eastern Bus Company, in Shenzhen and installed location devices on the operator's buses, which then fed data to Gumi's users via the Gumi app.[111] By using a web crawler software, Yuanguang crawled a large amount of Gumi's real-time data and then incorporated that data into its own app.[112]

The Shenzhen Intermediate People's Court found that although Gumi's real-time bus information was made available to individual users for free, Gumi expended considerable effort to collect and analyze this data, and as a result, gained a competitive advantage from it.[113] Due to its investment, Gumi had "intangible property-like interests" (无形财产权益属性) in this data, so that Yuanguang's conduct in accessing the data without Gumi's consent violated Gumi's interests.[114] The Court also found that Yuanguang's conduct breached the principles of good faith under the AUCL and caused a disruption to the market order.[115]

### *E.* ByteDance v. Tencent *(Beijing Intellectual Property Court, 2021)*

After the promulgation of the amended AUCL, the question of who owns user data returned to the spotlight after two Chinese social media giants, ByteDance (字节跳动) and Tencent (腾讯), became embroiled in a legal fight over alleged monopolistic practice in a pending high-profile case.[116]

Since 2019, ByteDance, the Beijing-based tech giant which owns TikTok and its Chinese version Douyin (抖音), has been fighting Tencent, a company that owns the social network and messaging app

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[111] *Id.* at 9.
[112] *Id.* at 9–10.
[113] *Id.* at 14.
[114] *Gumi Technology Co. Ltd., v. Yuanguang Technology Co. Ltd*., at 14 (Shenzhen Intermediate People's Ct. May 23, 2018).
[115] *Id.* at 15.
[116] Beijing Weiboshijie Keji Youxian Gongsi, Bejing Zijietiaodong Keji Youxian Gongsi Su Shenzhen Shi Tengxun Jisuanji Xitong Youxian Gongsi, Tengxun Keji (Shenzhen) Youxian Gongsi, Tengxun Keji (Beijing) Youxian Gongsi, Beijing Litian Wuxian Wangluo Jishu Youxian Gongsi Lanyong Shichang Zhipei Diwei Jiufen An (北京微播视界科技有限公司、北京字节跳动科技有限公司诉深圳市腾讯计算机系统有限公司、腾讯科技（深圳）有限公司、腾讯科技（北京）有限公司、北京力天无限网络技术有限公司滥用市场支配地位纠纷案) [Byte Dance Technology Co. Ltd. v. Tencent Holdings Ltd.], (Beijing Intel. Prop. Ct. 2021), https://www.thepaper.cn/newsDetail_forward_11258634.

WeChat, after WeChat blocked links to Douyin.[117] The lawsuit alleged that Tencent violated the amended AUCL by restricting access to content from Douyin and asked for US$14 million (CN¥ 90 million) in damages.[118] ByteDance argued that users are the owners of the data they generated, and as such, have "absolute rights" to their own data overriding Tencent's rights to them.[119] In its defense, Tencent insisted that users' personal data were Tencent's "commercial resources," and therefore required the company's consent for commercial use.[120] In response, Tencent claimed that ByteDance's products, including Douyin, obtained WeChat users' data through unfair competition and cited a 2019 court case suggesting Tencent ownership over those data.[121] In that case, Tianjin Binhai New District People's Court ruled that while Tencent authorized Douyin to let users sign up for an account via WeChat, the company did not seek permission from Tencent before passing on user data to Duoshan, another ByteDance app.[122] Therefore, the Court ruled that Duoshan was banned from using WeChat user information obtained from Douyin.[123] In particular, the Court recognized that WeChat has accumulated a large number of user information from its platform, which can be used as core business resources to bring Tencent a competitive advantage.[124]

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[117] *Id.*

[118] *Id.*; *see also* Rebecca Davis, *ByteDance Files $14 Million Suit Against Tencent for Monopolistic Behavior*, VARIETY (Feb. 2, 2021), https://variety.com/2021/digital/news/bytedance-douyin-tencent-lawsuit-monopoly-1234898734/.

[119] *Guanyu Douyin Qisu Tengxun Longduan de Shengming* (关于抖音起诉腾讯垄断的声明) [*Statement on Douyin Suing Tencent for Monopolistic Practice*], SOHU (Feb. 2, 2021), https://www.sohu.com/a/448343319_327908.

[120] *Id.*

[121] *Id.*

[122] *See* Shenzhen Shi Tengxun Jisuanji Xitong Youxian Gongsi, Tengxun Keji (Shenzhen) Youxian Gongsi Shangye Huilu Bu Zhengdang Jingzheng Jiufen Yishen Minshi Caidingshu (深圳市腾讯计算机系统有限公司、腾讯科技（深圳）有限公司商业贿赂不正当竞争纠纷一审民事裁定书) [Tencent Holdings Ltd. v. ByteDance Technology Co. Ltd.], China Judgments Online, at 21–22 (Tianjin Binhai New District People's Ct. Mar. 18, 2019), https://wenshu.court.gov.cn/website/wenshu/181107ANFZ0BXSK4/index.html?docId=1bc6e2edab3248b09030aa470163d9e7 [hereinafter *Tencent v. ByteDance*]; *see also* Sun Ruliang (孙汝亮), "*Tou Teng" Shuju Yinsi Xin Zhanyi: Fayuan Caiding Douyin, Duoshan Tingyong Weixin* ("头腾" 数据隐私新战役：法院裁定抖音，多闪停用微信) [*New Battle for Data Privacy Between Douyin and Tencent: Court Ruled Douyin and Duoshan Stopped Using WeChat*], SHIDAI ZAIXIAN (时代在线) [TIME- WEEKLY] (Mar. 21, 2019), http://www.time-weekly.com/post/257312.

[123] *Tencent v. ByteDance*, at 22 (Tianjin Binhai New District People's Ct. Mar. 18, 2019).

[124] *See id.* at 25.

*ByteDance v. Tencent* is another landmark case given both companies' market share within China's large and booming digital economy.[125] WeChat's monthly active users passed 1.2 billion total users worldwide as of September 2020, although the vast majority of those are in China.[126] Douyin attracted 600 million daily active users by August 2020, compared with the country's overall short video user base of 873 million by the end of 2020.[127] Although China operates under a civil law system where courts are not usually bound by judicial precedents, the Chinese central government is making reform efforts to allow or encourage judges to refer to precedents,[128] which could mean that the outcome of the ByteDance-Tencent litigation may set a benchmark.

## III. GOVERNMENT MEDIATION AND REGULATION: A CRACKDOWN ON BIG TECH

### *A. Government Mediation*

#### i. Cainiao and SF Express Dispute (2017)

In rare cases, the Chinese government intervenes to settle disputes not yet litigated in a court between private commercial entities on the issue of data ownership.[129] One recent illustration is the conflict between SF Express and Cainiao, mentioned in this Article's

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[125] *See, e.g.*, *Mobile Reach in 2021: Tencent, Alibaba, Baidu, ByteDance, Kuaishou*, CHINA INTERNET WATCH (Apr. 7, 2021), https://www.chinainternetwatch.com/30684/batt/; Lulu Yilun Chen, Coco Liu & Zheping Huang, *ByteDance Valued at $250 Billion in Private Trades*, BLOOMBERG (Mar. 29, 2021), https://www.bloomberg.com/news/articles/2021-03-30/bytedance-is-said-valued-at-250-billion-in-private-trades.

[126] Chen Yin (陈银), "*WeChat Economy" Development Report: The Number of Users Reached 1.2 Billion, Driving 29.63 Million Jobs* ("微信经济" 发展报告：用户规模达12亿, 带动就业2963万个), HUAJING QINGBAO WANG (华经情报网) [HUAON.COM] (June 8, 2020), https://m.huaon.com/detail/620184.html.

[127] *Statistical Report on Internet Development in China*, CHINA INTERNET NETWORK INFO. CTR. 42 (Feb. 2021), https://www.cnnic.com.cn/IDR/ReportDownloads/202104/P020210420557302172744.pdf.

[128] Guanyu Tongyi Falü Shiyong Jiaqiang Lei'an Jiansuo de Zhidao Yijian (Shixing) (关于统一法律适用加强类案检索的指导意见(试行)) [Guiding Opinions on Unifying the Application of Laws and on Strengthening Searches for Similar Cases (Trial Implementation)] (promulgated by the Sup. People's Ct., July 27, 2020, effective July 31, 2020), http://www.court.gov.cn/zixun-xiangqing-243981.html.

[129] *See* discussion *infra* Part III.A.1 & 2.

Introduction, which brought the issue of data ownership to the fore of the Chinese public consciousness.[130]

In 2015, SF Express, along with four other courier companies, established Hive Box as a last-mile, smart locker package delivery solution, similar to Amazon Locker, for sending and receiving deliveries to local neighborhoods.[131] In May 2016, Cainiao began collaborating with Hive Box and formed an alliance of logistics firms and self-pickup service providers, which included both SF Express and Hive Box.[132] Under this collaboration, Cainiao would integrate the delivery information provided by its logistics partners with these smart lockers to avoid the customer confusion that resulted when these information systems were independent.[133] This data stream centralization of courier and locker interfaces made it so that package statuses could be tracked only on Cainiao and Alibaba's platforms and, thus, made SF Express and Hive Box increasingly dependent on Alibaba-related systems.[134]

In March 2017, the relationship between SF Express/Hive Box and Cainiao reached a new low when Cainiao proposed new data-sharing terms during negotiations with SF Express.[135] The terms requested data on shipments originating from non-Alibaba's e-commerce marketplaces.[136] SF Express refused the terms and cited breach of consumer privacy and exposure of SF Express's trade secrets as reasons for non-compliance.[137] However, Cainiao insisted upon accessing this data for security verification of self-service pick-up lockers and for prevention of unauthorized third-party access to its customer data, as SF Express already had access to the Cainiao database.[138] Cainiao claimed that some alliance partners had already shared their data, including non-Alibaba shipments on Cainiao's platform,[139] and further proposed a list of solutions for Hive Box to comply with its data security requirements.[140] This included Hive Box to switch its cloud computing service provider from Tencent Cloud to Alibaba Cloud.[141] As the public standoff devolved into acrimony, Alibaba temporarily barred SF Express

[130] *See generally* Wang & Wang, *supra* note 8.
[131] *Id.* at 7.
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.* at 7–8.
[141] *Id.* at 8.

from accepting deliveries from its e-commerce vendors and nudged merchants to select alternative couriers.[142]

While both parties cited "information security" as justifications, the issue of data ownership was the central reason behind the confrontation, as both SF Express and Cainiao vied for monopolistic control over consumer information throughout the entire value chain.[143] On one side, Cainiao commanded valuable upstream supplier and merchant information—such as consumption patterns and delivery courier preferences—and actively sought to expand its access to downstream consumer data—such as time and location of delivery/pickup—held firmly within SF Express's control.[144] On the reverse side, SF Express aimed to maintain tight control over its part of the value chain while also seeking to advance its understanding of upstream operations management for the purposes of increasing its service quality and efficiency.[145]

The State Post Bureau intervened before the two companies could resort to legal means and summoned the CEOs of SF Express and Cainiao to Beijing as the dispute intensified.[146] Aware of the potential consequences of escalating customer frustration in a year of senior Chinese leadership transition,[147] the Bureau issued a notice urging both parties to find the largest possible common ground and to abide by market order and consumer rights.[148] The notice also cautioned both parties against exerting severe and negative social influence because of company feuding.[149]As a controversial move, the Bureau's market intervention foreshadows further government involvement in inter-company disputes if the issue of data ownership remains unresolved and if the impact of data on the economy increases.[150]

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[142] *Id.*

[143] He Xinrong (何欣荣), *Cainiao Shunfeng "Shuju Duanjiao": Xinxi An'quan Weihe Cheng Zhengzhi Chufa Dian?* (菜鸟顺丰 "数据断交": 信息安全为何成争执触发点?) [*Cainiao SF Express "Data Severance:" Why is Information Security A Trigger Point for Disputes?*], XINHUA WANG (新华网) [XINHUANET] (June 2, 2017), http://news.xinhuanet.com/fortune/2017-06/02/c_1121078704.htm.

[144] Wang & Wang, *supra* note 8, at 8.

[145] *Id.*

[146] *See* Post Office Website, *supra* note 9.

[147] Ye, *supra* note 2.

[148] *See* Post Office Website, *supra* note 9.

[149] *Id.*

[150] Li Hanwen (李翰文), *Shunfeng Gen Cainiao Jiufen: Zhongguo Youzheng Chumian Jiejue* (顺丰跟菜鸟纠纷: 中国邮政出面解决) [*Dispute Between SF Express and Cainiao: China Post Came Forward to Resolve*], BBC ZHONG WEN (BBC 中文) [BBC NEWS CHINESE] (June 3, 2017), https://www.bbc.com/zhongwen/simp/chinese-news-40142199.

ii. Tencent and Huawei Dispute (2017)

Another dispute over user data that led to Chinese government intervention was the spat between Chinese internet giant Tencent (腾讯) and telecommunications equipment maker Huawei (华为). Huawei, one of the world's biggest smartphone makers,[151] had begun collecting user-activity data to build up the AI capabilities of its smartphones.[152] In particular, on its advanced smartphone, the Honor Magic, the company accessed sensitive WeChat message histories of users for the purposes of providing user-specific advertisement recommendations.[153] In response, Tencent, the owner of the WeChat app, accused Huawei of stealing Tencent's data, and thereby violating the privacy of its users.[154] Huawei, however, denied violating user privacy, contending that users authorized the data capture through the phone's settings.[155] As Huawei emphasized, "[a]ll user data belongs to the user [. . .] it doesn't belong to WeChat or Honor Magic . . . User data is processed on the Honor Magic device after user authorization."[156]

In resolving this dispute, the two sides elected for China's Ministry of Industry and Information Technology ("MIIT") (中华人民共和国工业和信息化部) to intervene and adjudicate between them, instead of resorting to legal proceedings through the courts.[157] Commenting on the dispute, the regulator responded:

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[151] *See Global Smartphone Market Share: By Quarter*, COUNTERPOINT (Aug. 5, 2021), https://www.counterpointresearch.com/global-smartphone-share/; Arjun Kharpal, *Huawei Overtakes Samsung to Be No. 1 Smartphone Player in the World Thanks to China as Overseas Sales Drop*, CNBC (July 29, 2020), https://www.cnbc.com/2020/07/30/huawei-overtakes-samsung-to-be-no-1-smartphone-maker-thanks-to-china.html.

[152] Yang Jie et al., *Two China Tech Titans Wrestle Over User Data*, WALL ST. J. (Aug. 3, 2017), https://www.wsj.com/articles/two-china-tech-titans-wrestle-over-user-data-1501757738.

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.*; *see also* Xinjie Yang, *Gongxin Bu Huiying Huawei Tengxun Shuju Zhizheng: Zheng Zuzhi Diaocha, Duncu Qiye Guifan Souji* (工信部回应华为腾讯数据之争: 正组织调查，敦促企业规范搜集) [*The Ministry of Industry and Information Technology Responds to Data Dispute Between Huawei and Tencent: Investigation Undergoing While Collection of Data by Relevant Enterprises Urged to Abide by Laws and Regulations*], PENG PAI (澎湃) [THE PAPER] (Aug. 8, 2017), https://www.thepaper.cn/newsDetail_forward_1756038 (reporting that China's Ministry of Industry and Information Technology was investigating into the dispute between Huawei and Tencent).

> "Regarding the dispute between Tencent and Huawei, with respect to the newly introduced mobile functions, in order to protect user personal information, the MIIT will abide by the Provisions on Telecommunications and Protection of Internet User Personal Information and other laws and regulations so as to urge enterprises to strengthen internal management, self-regulate in the collection and use of user personal information, and protect the legitimate rights and interests of users in accordance with the law. As for disagreements and disputes between information and communications enterprises, the MIIT will proactively coordinate and guide industrial self-regulation so as to create sound market order for mass entrepreneurship and innovation."[158]

Following regulator-facilitated reconciliation and private negotiations, Huawei and Tencent reached a settlement.[159] In spite of this reached settlement, the underlying question of data ownership remains unresolved.

### *B. State Regulation*

Around the world, governments are wrestling to manage tech platforms and limit their vast power that comes from these companies' extensive collection and control of an enormous cache of user data. China's regulators, who have long wanted to seize control of the data held by internet platforms as strategic assets, have initiated widening regulatory crackdowns on industry practices, including anticompetitive behaviors.[160] The newly announced data-specific laws and regulations send a strong and a clear message that clarification on data ownership and control becomes a top priority for Chinese authorities along with the development of the country's vast digital economy.[161]

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[158] Yang, *supra* note 157.

[159] *Tencent Games Reinstated on Huawei App Store*, REUTERS (Jan. 1, 2021), https://www.reuters.com/article/china-games-huawei-tencent-holdings-idUKKBN29626R.

[160] *See* discussion *infra* Part III.B.1 & 2.

[161] *Id.*

i. Anti-Monopoly Law & Antitrust Guidelines for the Platform Economy

Over 80 percent of Chinese internet user data is held by the government and large tech corporations, which restricts the scope of the data usage aimed to increase productivity and profit.[162] As Chinese tech giants grow in market influence, the antitrust regulators in China have turned more attention towards ensuring fair competition in the digital economy, and are moving swiftly to address what they view as anticompetitive conduct by the country's tech platform companies.[163] Since November 2020, Beijing began an antitrust enforcement campaign to crack down on monopolistic practices within the Chinese big tech industry as concerns mount over these private institutions' growing control over the country's voluminous data.[164] To maintain competitive markets, the government focused on a stated policy goal to address the concentration of data within these established platforms, particularly to limit platforms' control over user data.[165] Chinese tech titans, Alibaba and Tencent, and large tech startups, ByteDance and Meituan, have all attracted increased government scrutiny for their data collection via social-media apps.[166]

The two main tools that Chinese authorities have deployed are the Anti-Monopoly Law (2007) and the Antitrust Guidelines for the Platform Economy (2021).[167] Together, they provide a set of rules for increasing scrutiny of internet platforms and preventing their market dominance. The Anti-Monopoly Law, promulgated in August 2007 and went to effect a year later, codified the then-existing body of competition-related laws and regulations into the first comprehensive anti-monopoly legislation in China.[168] The Anti-Monopoly Law has been viewed as an "economic constitution" and a "milestone" in promoting

[162] Xiang-Yang Li, Jianwei Qian & Xiaoyang Wang, *Can China Lead the Development of Data Trading and Sharing Markets?*, 61 COMMC'NS OF THE ACM 50, 50 (Nov. 2018).

[163] *See, e.g.*, *Giants Tencent, ByteDance Among Companies Reined in By China*, BBC (Apr. 30, 2021), https://www.bbc.com/news/business-56938864.

[164] *Id.*

[165] *See id.*

[166] Anusuya Lahiri, *China's Key Data Sharing Mandate Wreak Double Whammy for Tech Industry Amidst Increased Antitrust Probe: Bloomberg*, YAHOO (Mar. 5, 2021), https://autos.yahoo.com/chinas-key-data-sharing-mandate-150731332.html.

[167] *See* discussion *infra* Part III.B.1.

[168] Bruce M. Owen, Su Sun & Wentong Zheng, *China's Competition Policy Reforms: The Anti-Monopoly Law and Beyond*, 75 ANTITRUST L.J. 231, 232 (2008).

fair competition and cracking down on monopolistic activities,[169] as it prohibits anticompetitive agreements and abuse of a dominant market position and is able to preempt mergers that eliminate or restrict competition.[170]

In addition to implementing this legal device, Chinese regulators have also issued new policy guidance to assist the application and interpretation of the Anti-Monopoly Law. The Anti-Monopoly Guidelines on Platform Economy Industries issued by the Anti-Monopoly Committee of the State Council ("Guidelines") (国务院反垄断委员会关于平台经济领域的反垄断指南), which were promulgated by China's State Administration for Market Regulation ("SAMR") (国家市场监督管理总局) and went into immediate effect on February 7, 2021,[171] was the first specific piece of antitrust regulation systematically addressing the market dominance of Chinese internet platforms.[172] The final Guidelines do not differ substantially from its initial draft, which was unveiled only two months prior.[173] The quick action by the regulatory agency indicated the heightened concerns by Chinese authorities over China's rapidly growing digital economy and their

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[169] *See* Yijun Tian, *The Impacts of The Chinese Antimonopoly Law on IP Commercialization in China & General Strategies for Technology-Driven Companies and Future Regulators*, 9 DUKE L. & TECH. REV. 1, 4 (2010).

[170] Fan Longduan Fa (反垄断法) (2007) [Anti-Monopoly Law of the People's Republic of China (2007)] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2017, effective Aug. 1, 2018), http://www.gov.cn/flfg/2007-08/30/content_732591.htm [hereinafter AML (2007)], *translated at* http://www.lawinfochina.com/display.aspx?id=6351&lib=law.

[171] Sofia Baruzzi, *China Enforces Antitrust Guidelines on its Online Economy*, CHINA BRIEFING (Feb. 19, 2021), https://www.china-briefing.com/news/china-antitrust-guidelines-enforcement-online-economy/.

[172] Yang Dong (杨东), *Pingtai Jingji Lingyu Fan Longduan Zhinan Jiedu* (《平台经济领域反垄断指南》解读) [*Interpretation of the Antitrust Guidelines for the Platform Economy*], THINK.CHINA.COM.CN (Feb. 22, 2021), http://www.china.com.cn/opinion/think/2021-02/22/content_77235509.htm.

[173] Baruzzi, *supra* note 171; *see also Guanyu Pingtai Jingji Lingyu de Fan Longduan Zhinan (Zhengqiu Yijian Gao)* (《关于平台经济领域的反垄断指南（征求意见稿)》) [*The Anti-Monopoly Guidelines on Platform Economy Industries (Draft for Comments) (2020)*], GUOJIA SHICHANG JIANGUAN JU (国家市场监管局) [STATE ADMIN. FOR MARKET REG.] (Nov. 10, 2021), http://www.samr.gov.cn/hd/zjdc/202011/t20201109_323234.html, *translated at* https://www.concurrences.com/IMG/pdf/samr_antitrust_guidelines_for_the_platform_economy_industry_draft_for_comment_kwdm_13433849v4_.pdf?64652/99f359084eb23ee0a04931f64cff951ac9818e01.

urgency to regulate the country's internet giants to prevent those monopolistic practices from disrupting fair market competition.[174]

The Guidelines consist of twenty-four articles divided into six chapters.[175] Among its new rules include revision of the factors for determining market dominance and prohibition of certain illegal monopolistic practices.[176] In particular, the Guidelines target practices specific to internet platforms, including determinations of whether a transaction discriminates between customers and whether platform algorithms abuse access to big data on consumer purchasing power, consumption preferences, and usage habits to manipulate the market towards a company's own advantage.[177]

SAMR, notably, used its updated arsenal of regulatory weapons to immediate effect by enforcing several high-profile cases shortly thereafter. On April 10, 2021, SAMR fined Alibaba Group a record of US$2.8 billion (CN¥ 18.228 billion) in accordance to the Anti-Monopoly Law.[178] After a four-month investigation into Alibaba, SAMR concluded that the company engaged in monopolistic practices restricting vendors from selling on other e-commerce platforms and for abusing its data and algorithm monopolies.[179] The fine, the equivalent of about four percent of the company's 2019 domestic revenue, was the largest ever imposed

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[174] *See* Guowuyuan Fan Longduan Weiyuanhui Guanyu Pingtai Jingji Lingyu de Fan Longduan Zhinan (国务院反垄断委员会关于平台经济领域的反垄断指南) [*The Anti-Monopoly Guidelines on Platform Economy Industries issued by the Anti-Monopoly Committee of the State Council*], GUOJIA SHICHANG JIANGUAN JU (国家市场监管局) [STATE ADMIN. FOR MARKET REG.] (2021), http://gkml.samr.gov.cn/nsjg/fldj/202102/t20210207_325967.html [hereinafter Anti-Monopoly Guidelines on the Platform Economy (2021)], *translated at* http://www.anjielaw.com/en/uploads/soft/210224/1-210224112247.pdf; *see also* Baruzzi, *supra* note 171.

[175] *See generally* Anti-Monopoly Guidelines on the Platform Economy (2021), *supra* note 174.

[176] *See id.*

[177] *Id.*

[178] AML (2007), *supra* note 170, at arts. 17, 47, 49.

[179] *Shichang Jianguan Zongju Yifa Dui A Li Ba Ba Jituan Konggu Youxian Gongsi Zai Zhongguo Jingnei Wangluo Lingshou Pingtai Fuwu Shichang Shishi "Er Xuan Yi" Longduan Xingwei Zuochu Xingzheng Chufa* (市场监管总局依法对阿里巴巴集团控股有限公司在中国境内网络零售平台服务市场实施 "二选一" 垄断行为作出行政处罚) [*The State Administration for Market Regulation Imposes Administrative Penaltieson Alibaba Group in Accordance with the Law for Implementing the "Two-Choose-One" Monopolistic Practice on Online Retail Platform Services within China's Domestic Market*], GUOJIA SHICHANG JIANGUAN JU (国家市场监管局) [STATE ADMIN. FOR MARKET REG.] (Apr. 10, 2021), https://www.samr.gov.cn/xw/zj/202104/t20210410_327702.html.

by Chinese antitrust regulators.[180] Subsequently, Chinese regulators warned Ant Group—an Alibaba financial affiliate whose planned US$37 billion initial public offering ("IPO") was suspended on November 3 of 2020— that the government would closely scrutinize the company's lucrative online lending business and ordered the company to refashion itself into a financial holding company subject to the Chinese central bank's supervision.[181]

The Alibaba fine and the Ant Group reorganization heralded further antitrust actions. Later in April 2021, SAMR ordered thirty-four of the country's largest tech companies, including ByteDance, JD.com, Meituan, and Kuaishou, to each conduct comprehensive self-inspection identifying and addressing potentially anticompetitive practices and pledging publicly to comply with the country's Anti-Monopoly Law.[182] SAMR urged that these platforms learn from the Alibaba case and warned specifically against the practice of forced exclusivity, abuse of market dominance, anticompetitive acquisitions, and predatory pricing.[183] After a follow-up meeting in May 2021 to inspect and evaluate these platforms' compliance,[184] SAMR assessed a US$ 77,000 (CN¥ 500,000) fine on each of the twenty-two internet companies, including Didi Chuxing, Tencent, Suning, and Meituan, for actions in

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[180] *Id.*; *see also A Li Ba Ba Jie Zhongguo Fan Longduan Shi Shang Zuida Fadan, Chuandi Chu Shenme Xinhao?* (阿里巴巴接中国反垄断史上最大罚单，传递出什么信号?) [*What Signal Does Alibaba Send After Receiving the Largest Penalty in China's Antitrust History?*],DABAI CAIJING GUANCHA (大白财经观察) [DA BAI FIN.] (Apr. 10, 2021), https://posts.careerengine.us/p/60713519b691a12299454e28?from=latest-posts-panel&type=title.

[181] Lingling Wei, *Ant IPO-Approval Process Under Investigation by Beijing*, WALL ST. J. (Apr. 27, 2021), https://www.wsj.com/articles/ant-ipo-approval-process-under-investigation-by-beijing-11619532022.

[182] *Shichang Jianguan Zongju, Zhongyang Wangxin Ban, Shuiwu Zongju Lianhe Zhaokai Hulianwang Pingtai Qiye Xingzheng Zhidao Hui*(市场监管总局、中央网信办、税务总局联合召开互联网平台企业行政指导会) [*The State Administration for Market Regulation, the Cyberspace Administration of China, and the State Administration of Taxation Jointly Convened an Administrative Guidance Meeting for Internet Platform Companies*], XINHUA WANG (新华网) [XINHUANET] (Apr. 13, 2021), http://www.xinhuanet.com/politics/2021-04/13/c_1127324619.htm; *see also* Zheping Huang*, China Warns 34 Tech Firms to Curb Excess in Antitrust Review*, BLOOMBERG (Apr. 13, 2021), https://www.bloomberg.com/news/articles/2021-04-13/china-orders-34-tech-firms-to-curb-excesses-in-antitrust-review.

[183] *Id.*

[184] *Shichang Jianguan Zongju Zhaokai Hulianwang Pingtai Qiye Zhenggai Ducha Zhuanti Hui* (市场监管总局召开互联网平台企业整改督查专题会) [*The State Administration for Market Regulation Held a Special Meeting on the Supervision and Inspection of Internet Platform Companies*], GUOJIA SHICHANG JIANGUAN JU (国家市场监管局) [STATE ADMIN. FOR MARKET REG.] (May 7, 2021), http://www.samr.gov.cn/xw/zj/202105/t20210507_329242.html.

violation of the regulatory guidance, such as attempting to improperly increase market power through acquisitions without seeking prior regulatory approval.[185]

ii. Didi Chuxing Case & Cybersecurity Review Measures

When Chinese regulators initiated a cybersecurity review of Didi Chuxing (滴滴出行)— China's ride-hailing giant that has over 493 million annual active users and possesses significant amounts of users' personal data[186]—just days after its huge IPO at the New York Stock Exchange, it marked another move in a widening crackdown on the country's once-freewheeling technology sector.[187] In July 2021, China's top cyberspace regulator, Cyberspace Administration of China ("CAC") (国家互联网信息办公室), launched a cybersecurity investigation into Didi for alleged illegal collection and use of user data after the company failed to take CAC's suggestions to conduct a data security assessment and forced its way to a U.S. IPO.[188] Right after the CAC ordered Chinese

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[185] *Shichang Jianguan Zongju Yifa Dui Hulianwang Lingyu Er Shi Er Qi Weifa Shishi Jingyingzhe Jizhong An Zuochu Xingzheng Chufa Jueding* (市场监管总局依法对互联网领域二十二起违法实施经营者集中案作出行政处罚决定) [*The State Administration for Market Regulation Has Made Administrative Punishment Decisions on 22 Cases of Illegal Implementation of Operator Concentration in the Internet Sector in Accordance with Law*], GUO JIA SHI CHANG JIAN GUAN JU (国家市场监管局) [STATE ADMIN. FOR MARKET REG.] (July 7, 2021), http://www.samr.gov.cn/xw/zj/202107/t20210707_332396.html.

[186] *See, e.g.*, Raymond Zhong & Li Yuan, *The Rise and Fall of the World's Ride-Hailing Giant*, N.Y. TIMES (Aug. 27, 2021), https://www.nytimes.com/2021/08/27/technology/china-didi-crackdown.html.

[187] Didi Global Inc., Registration Statement (Form F-1/A) (June 28, 2021), https://sec.report/Document/0001047469-21-001221/a2243298zf-1a.htm.

[188] *See Wangluo An'quan Shencha Bangongshi Dui "Didi Chu Xing" Qidong Wangluo An'quan Shencha de Gonggao*(网络安全审查办公室关于对"滴滴出行"启动网络安全审查的公告) [*Announcement of the Cybersecurity Review Office on Launching a Cybersecurity Review of Didi Chuxing*], GUOJIA HULIANWANG XINXI BANGONGSHI (国家互联网信息办公室) [CYBERSPACE ADMIN. OF CHINA] (July 2, 2021), http://www.cac.gov.cn/2021-07/02/c_1626811521011934.htm; *Guojia Hulianwang Xinxi Bangongshi Deng Qi Bumen Jinzhu Didi Chuxing Keji Youxian Gongsi Kaizhan Wangluo An'quan Shencha* (国家互联网信息办公室等七部门进驻滴滴出行科技有限公司开展网络安全审查) [*Seven Departments Including the Cyberspace Administration of China Launch an On-Site Investigation at Didi Chuxing*], GUOJIA HULIANWANG XINXI BANGONGSHI (国家互联网信息办公室) [CYBERSPACE ADMIN. OF CHINA] (July 16, 2021), http://www.cac.gov.cn/2021-07/16/c_1628023601191804.htm; *see also* Xinmei Shen, *China Issues Tighter Data Security Rules for Ride-Hailing Firms Amid Didi Probe, But More Clarity Still Needed*, S. CHINA MORNING POST (Aug. 23, 2021), https://www.scmp.com/tech/policy/article/3146051/china-issues-tighter-data-security-rules-ride-hailing-firms-amid-didi.

app stores to remove twenty-five Didi-related apps[189] and required the company to suspend new user registration,[190] the CAC issued draft Cybersecurity Review Measures (Draft Revision for Comment) (网络安全审查办法 (修订草案征求意见稿)) for public comment.[191] The Measures purport to protect data and national security by making mandatory cybersecurity reviews for certain companies in particular circumstances.[192] Notably, Article 6 of the Measures sharpens scrutiny of overseas listings by requiring that any data operator/processor, that is in possession of the personal information of more than one million users and that seeks overseas listings, will be subject to a mandatory cybersecurity review.[193] Article 14 of the Measures further extends the period of the review procedure from the original forty-five working days to three months, and even longer under complicated cases.[194]

China's sweeping regulatory action against internet giants is part of a broader national crackdown that targets internet companies' handling of voluminous data following years of a laissez-faire approach.[195] This move will not only ease Beijing's growing concerns that a foreign listing might force Chinese data-rich companies to hand over their data to foreign entities undermining national security, but will

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[189] *See Guanyu Xiajia "Didi Qiye Ban" Deng 25 Kuan APP de Tongbao* (关于下架 "滴滴企业版" 等25款App的通报) [*Announcement on the Removal of 25 Apps Including Didi Enterprise Solution*], GUOJIA HULIANWANG XINXI BANGONGSHI (国家互联网信息办公室) [CYBERSPACE ADMIN. OF CHINA] (July 9, 2021), http://www.cac.gov.cn/2021-07/09/c_1627415870012872.htm.

[190] *See Wangluo An'quan Shencha Bangongshi Guanyu Dui "Didi Chuxing" Qidong Wangluo An'quan Shencha de Gonggao* (网络安全审查办公室关于对 "滴滴出行" 启动网络安全审查的公告) [*Announcement of the Cybersecurity Review Office on Launching a Cybersecurity Review of Didi Chuxing*], GUOJIA HULIANWANG XINXI BANGONGSHI (国家互联网信息办公室) [CYBERSPACE ADMIN. OF CHINA] (July 2, 2021), http://www.cac.gov.cn/2021-07/02/c_1626811521011934.htm.

[191] *See generally Guojia Hulianwang Xinxi Bangongshi Guanyu 《Wangluo An'quan Shencha Banfa (Xiuding Cao'an Zhengqiu Yijian Gao)》 Gongkai Zhengqiu Yijian de Tongzhi* (国家互联网信息办公室关于《网络安全审查办法（修订草案征求意见稿）》公开征求意见的通知) [*A Notice on Seeking Public Comments on the Cybersecurity Review Measures (Draft Revision for Comment)*], GUOJIA HULIANWANG XINXI BANGONGSHI (国家互联网信息办公室) [CYBERSPACE ADMIN. OF CHINA] (July 10, 2021), http://www.cac.gov.cn/2021-07/10/c_1627503724456684.htm.

[192] *Id.*

[193] *Id.* at art. 6.

[194] *Id.* at art. 14.

[195] *See, e.g.*, Liu Jiang (刘江), *Pingtai Jingji Gaobie Yeman Shengzhang* (平台经济告别野蛮生长) [*Platform Economy Bid Farewell to Brutal Growth*], ZHONGGUO JINGJI WANG (中国经济网) [CHINA ECONOMY] (Sept. 13, 2021), http://www.ce.cn/xwzx/gnsz/gdxw/202109/13/t20210913_36905995.shtml.

also help Chinese authorities significantly tighten their control over data gathered by internet giants.[196]

## IV. LEGISLATIVE ORDERING: PRC EXPERIMENTS ON DATA PROPERTY RIGHTS

Court rulings and administrative actions are only part of China's foray into addressing the issue of data ownership and property rights; legislative experiments are also ongoing. Current discussions and legal reforms underway highlight the necessity of some property rights specification to promote innovation in a data-driven economy, since the importance of data as a new "production factor" was highlighted in an April 2020 State Council opinion listing them alongside land, labor, capital, and technological knowledge.[197]

As early as 2016, the Chinese government began to weigh in on the issue of data ownership and property rights.[198] The addendum to the State Council's Thirteenth Five-Year National Informatization Plan (“十三五”国家信息化规划) first revealed the Chinese political authorities' concern for data ownership by including language establishing, as a priority, policies and standards regarding the protection of "data ownership rights" (数据产权).[199] Since then, many other guidelines and legislative materials have been issued by the State Council and various provincial governments have referred to the importance of establishing and improving protection mechanisms for data ownership rights.[200] Recently, at the ninth meeting of the Central

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[196] *Id.*

[197] *See Zhonggong Zhongyang, Guowuyuan Guanyu Goujian Gengjia Wanshan De Yaosu Shichanghua Peizhi Tizhi Jizhi de Yijian* (中共中央, 国务院关于构建更加完善的要素市场化配置体制机制的意见) [*Opinions on Building a More Complete System and Mechanism for the Market-oriented Allocation of Factors*], ZHONGGUO GONGCHANDANG ZHONGYANG WEIYUANHUI GUOWUYUAN BANGONGTING (中国共产党中央委员会国务院办公厅) [GENERAL OFF. OF THE CENT. COMMITTEE OF THE COMMUNIST PARTY OF CHINA AND THE GENERAL OFF. OF THE STATE COUNCIL] (2020), http://www.gov.cn/zhengce/2020-04/09/content_5500622.htm.

[198] *See Guowuyuan Guanyu Yinfa "Shisanwu" Guojia Xinxi Hua Guihua de Tongzhi* (国务院关于印发 “十三五” 国家信息化规划的通知) [*State Council on Printing and Distributing Notice of the 13th Five-Year National Informatization Plan*], ZHONGHUA RENMIN GONGHEGUO ZHONGYANG RENMIN ZHENGFU (中华人民共和国中央人民政府) [THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA] (Dec. 27, 2016), http://www.gov.cn/zhengce/content/2016-12/27/content_5153411.htm.

[199] *Id.*

[200] *See* discussion *infra* Part IV.A–F; *see also China- Data Protection Overview*, DATA GUIDANCE (Nov. 2021), https://www.dataguidance.com/notes/china-data-protection-overview.

Committee for Financial and Economic Affairs, Chinese President, Xi Jinping, emphasized the need to improve laws and regulations around internet platforms to "fill in the gaps and loopholes in rules."[201] President Xi also advanced, as one of the priorities, the setting up of regulatory frameworks on data ownership (加强数据产权制度建设),[202] and urged internet platforms to increase their data security responsibilities.[203]

This section examines China's major legislative developments in data ownership, data property rights, and control over data. Such developments have been adopted amid a broader regulatory tightening on tech industry from Chinese regulators that enforces antitrust measures to address the concentration of data within internet platforms.

### *A. Data Regulations of Shenzhen Special Economic Zone (2021)*

In addition to high-profile calls for national level reforms, significant local legislative developments are taking place in China. The Shenzhen legislative experiment in data ownership and data property rights is a pioneering effort.[204] In October 2020, the General Office of the Central Committee of the Chinese Communist Party, jointly with the State Council, released the Implementation Plan for the Pilot Comprehensive Reform of Building a Pilot Demonstration Zone of Socialism with Chinese Characteristics in Shenzhen (2020–2025) (深圳建设中国特色社会主义先行示范区综合改革试点实施方案 (2020–

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[201] *See Xijinping Zhuchi Zhaokai Zhongyang Caijing Weiyuanhui Di Jiu Ci Huiyi Qiangdiao Tuidong Pingtai Jingji Guifan Jiankang Chixu Fazhan Ba Tan DafengTan Zhonghe Naru Shengtai Wenming Jianshe Zhengti Buju* (习近平主持召开中央财经委员会第九次会议强调 推动平台经济规范健康持续发展 把碳达峰碳中和纳入生态文明建设整体布局) [*Xi Focus: Xi Stresses Healthy Growth of Platform Economy, Efforts for Peak Emission and Carbon Neutrality*], XINHUA WANG (新华网) [XINHUANET] (Mar. 15, 2021), http://www.xinhuanet.com/politics/leaders/2021-03/15/c_1127214324.htm.

[202] *See id.*

[203] *Id.*

[204] *See* Xinhua She (新华社) [Xinhua News Agency], *Zhonggong Zhongyang Bangong Ting, Guowuyuan Bangong Ting Yinfa "Shenzhen Jianshe Zhongguo Tese Shehui Zhuyi Xianxing Shifan Qu Zonghe Gaige Shidian Shishi Fang'an (2020–2025 Nian)"* (中共中央办公厅，国务院办公厅印发《深圳建设中国特色社会主义先行示范区综合改革试点实施方案（2020–2025年）》) [*The General Office of the Central Committee of the Communist Party of China and the General Office of the State Council Issued the Implementation Plan for the Pilot Comprehensive Reform of Building a Pilot Demonstration Zone of Socialism with Chinese Characteristics in Shenzhen (2020–2025)*], ZHONGHUA RENMIN GONGHEGUO ZHONGYANG RENMIN ZHENGFU (中华人民共和国中央人民政府) [THE STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA] (Oct. 11, 2020), http://www.gov.cn/zhengce/2020-10/11/content_5550408.htm.

2025年)).[205] The plan authorized Shenzhen to take the lead in a number of initiatives, including "establishing the data property rights system," "exploring new mechanisms for data property rights protection," and so on.[206] Known as China's Silicon Valley and for its leading role in the country's early economic reforms, the municipality of Shenzhen is often entrusted with the task of spearheading new reforms and landmark regulations.[207] On July 15, 2020, the Shenzhen municipal government published an initial draft of the Data Regulations of Shenzhen Special Economic Zone (Draft for Comments) ("Shenzhen Data Regulations") (深圳经济特区数据条例 (征求意见稿)),[208] which was the first far-reaching legislative bill on data.[209] The Standing Committee of People's Congress in Shenzhen released a second draft on May 31, 2021.[210] On June 29, 2021, the Standing Committee of People's Congress in Shenzhen formally promulgated the Shenzhen Data Regulations into law, which came into force on January 1, 2022.[211] The Shenzhen Data Regulations was hailed not only as the first local effort to legalize the

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[205] *Id.*

[206] *Id.*

[207] *See, e.g.*, FU JUN (傅军), BEN XIAOKANG GUSHI: ZHONGGUO JINGJI ZENGZHANG DE LUOJI YU BIANZHENG (奔小康故事：中国经济增长的逻辑与辩证) [THE STORY OF XIAOKANG: THE LOGIC AND DIALECTICS OF CHINA'S ECONOMIC GROWTH] 152–222 (2021).

[208] *Shenzhen Shi Sifa Ju Guanyu Gongkai Zhengqiu "Shenzhen Jingji Tequ Shuju Tiaoli (Zhengqiu Yijian Gao)" Yijian de Tonggao* (深圳市司法局关于公开征求《深圳经济特区数据条例（征求意见稿）》意见的通告) [*The Data Regulations of Shenzhen Special Economic Zone (First Draft for Comments)*], SHENZHEN SHI SIFA JU (深圳市司法局) [JUSTICE BUREAU OF SHENZHEN MUN.] (July 15, 2020), http://sf.sz.gov.cn/xxgk/xxgkml/gsgg/content/post_7892072.html [hereinafter Shenzhen Data Regulations First Draft (2020)].

[209] *Shenzhen Unveils China's First "Comprehensive" Data Legislation, Requires Express Consent for Gathering of Personal Data*, CHINA BANKING NEWS (Dec. 31, 2020), https://www.chinabankingnews.com/2020/12/31/shenzhen-unveils-chinas-first-comprehensive-data-legislation-requires-express-consent-for-gathering-of-personal-data/ [hereinafter *Shenzhen Unveils China's First "Comprehensive" Data Legislation*].

[210] *Guanyu "Shenzhen Jingji Tequ Shuju Tiaoli (Zhengqiu Yijian Gao)" Gongkai Zhengqiu Yijian de Gonggao* (关于《深圳经济特区数据条例（征求意见稿）》公开征求意见的公告) [*The Data Regulations of Shenzhen Special Economic Zone (Second Draft for Comments)*], SHENZHEN SHI RENDA CHANGWEI HUI (深圳市人大常委会) [SHENZHEN MUN. PEOPLE'S CONG.] (May 31, 2021), http://www.szrd.gov.cn/rdyw/fgcayjzj/content/post_691275.html [hereinafter Shenzhen Data Regulations Second Draft (2021)].

[211] Shenzhen Jingji Tequ Shuju Tiaoli (深圳经济特区数据条例) [The Data Regulations of Shenzhen Special Economic Zone] (promulgated by the Standing Comm. of Shenzhen Mun. People's Cong., June 29, 2021, effective Jan. 1, 2022), http://www.szrd.gov.cn/szrd_zlda/szrd_zlda_flfg/flfg_szfg/content/post_706636.html [hereinafter Shenzhen Data Regulations (2021)].

processing of data and personal information,[212] but by many as China's first "foundational, comprehensive legislation in the data sphere."[213]

The Shenzhen Data Regulations consist of 100 articles under seven chapters.[214] Importantly, the Regulations recognize for the first time the concept of "data ownership" and/or "data property rights and interests."[215] Specifically, the Regulations state that "natural persons, legal persons, and unincorporated organizations are entitled to property rights and interests (财产权益) to the data products and services they created through lawful data handling and processing in accordance with provisions of laws, administrative regulations, and these Regulations."[216] Moreover, the Shenzhen Data Regulations provide that "individuals are entitled to personality rights and interests (人格权益) over their personal data, including the rights to informed consent, supplementation and correction, erasure, inspection and reproduction, etc."[217]

The new legislation, along with two earlier draft versions, are not without its limitations. In the Commentaries (解读) appended to the Regulations, the Regulators admitted the difficulty in establishing a comprehensive system of data property rights through local legislation in the absence of a common understanding of data ownership.[218] The Regulators also acknowledged that the new legislation only intended to codify the existing consensus that "'personal data has the attribute of personality rights,'" and that "'companies enjoy property rights over data products and services as a result of their investment.'"[219]

Many of these concerns echo similar challenges present within earlier draft versions of the Regulations. The earlier drafts, for instance, created a new type of state-owned asset,[220] but were sparce in detail on

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[212] *See* Galaad Delval, *China: Draft Data Regulations of the Shenzhen Special Economic Zone*, DATA GUIDANCE (Feb. 2021), https://www.dataguidance.com/opinion/china-draft-data-regulations-shenzhen-special.

[213] *See Shenzhen Unveils China's First "Comprehensive" Data Legislation*, *supra* note 209; *see also* Lin Hanyao (林汉垚), *Zhong Bang! Shoubu Shuju Lingyu Zonghe Xing Lifa Jijiang Chutai Zai Shuju Baohu Jichu Shang Wajue Jingji Jiazhi* (重磅！首部数据领域综合性立法即将出台 在数据保护基础上挖掘经济价值) [*The First Comprehensive Legislation in the Field of Data is about to be Introduced, Mining Economic Value on the Basis of Data Protection*], TENGXUN (腾讯) [TENCENT] (Dec. 29, 2020), https://new.qq.com/omn/20201229/20201229A0IHS200.html.

[214] Shenzhen Data Regulations (2021), *supra* note 211.

[215] *Id.* at art. 4.

[216] *Id.*

[217] *Id.* at art. 3.

[218] *Id.* at Commentaries 2(1).

[219] *Id*.

[220] Shenzhen Data Regulations First Draft (2020), *supra* note 208, at arts. 11, 21.

how to demark the data rights between individuals, corporations, and the state, or how data usage rights could be allocated once ownership was determined.[221] As an example, the earlier draft versions created a dichotomous concept of ownership by ascribing personal data to individuals and public data to the state.[222] Nevertheless, these drafts did not provide any specific guidance in determining which specific types of real-world data should be owned nor by which category of actor, *i.e.*, individuals, corporations, or the state.[223] Therefore, these drafts did not offer the concrete means to determine the subject (or the owner) of certain data, nor how to use these data rights once ownership was determined.[224] This inadequacy would inevitably present the challenge of demarking data rights and engender conflicts amongst these multiple parties claiming rights to the same data.

Another limitation present in earlier drafts was finding the appropriate balance between maintaining market stability and promoting innovation. The vague concept of data ownership within earlier drafts set up the Shenzhen municipal government as a key beneficiary.[225] In particular, the earlier draft legislation designated the Shenzhen government as a state executor able to exercise public data rights and delegate to lesser authorities the task of formulating public data asset management measures and organizing their implementation.[226] The Shenzhen authorities wielded these and other powers to adopt a status quo approach to data ownership by creating a framework protecting large internet platforms without sufficiently addressing user rights.[227] For example, when the Standing Committee of the Shenzhen People's

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[221] *See id.*; *see also* Xuanfeng Ning et al., *Ganwei Tianxia Xian— Tequ Peiyu Shuju Yaosu Shichang de Qiji Yu Hegui Yaodian* (敢为天下先—特区培育数据要素市场的契机与合规要点) [*Opportunities for the Special Economic Zone to Cultivate the Data Element Market*], JING DU (金杜) [KING & WOOD MALLESONS] (Oct. 23, 2020), https://www.chinalawinsight.com/2020/10/articles/intellectual-property/%e6%95%a2%e4%b8%ba%e5%a4%a9%e4%b8%8b%e5%85%88-%e7%89%b9%e5%8c%ba%e5%9f%b9%e8%82%b2%e6%95%b0%e6%8d%ae%e8%a6%81%e7%b4%a0%e5%b8%82%e5%9c%ba%e7%9a%84%e5%a5%91%e6%9c%ba%e4%b8%8e%e5%90%88/#more-29132.

[222] Shenzhen Data Regulations First Draft (2020), *supra* note 208, at arts. 11, 21.

[223] *Id.*

[224] *See* Ning et al., *supra* note 221.

[225] *See* Shenzhen Data Regulations First Draft (2020), *supra* note 208, at art. 21.

[226] *Id.*

[227] *Shenzhen Jiang Chutai Guonei Shuju Lingyu Shoubu Zonghexing Lifa* (深圳将出台国内数据领域首部综合性立法) [*Shenzhen Will Introduce the Country's First Comprehensive Legislation in the Data Field*]), GUANGDONGSHENG ZHENGFU FUWU SHUJU GUANLIJU (广东省政府服务数据管理局) [SERVICE DATA ADMIN. OF GUANGDONG PROVINCIAL GOVT.] (Dec. 29, 2020), http://zfsg.gd.gov.cn/xxfb/dsdt/content/post_3161961.html.

Congress reviewed the first draft of the Regulations on December 28, 2020, the body made modifications by removing reference to provisions on "personal enjoyment of data rights."[228] In addition, the newly promulgated Regulations provided legal loopholes to the requirement that individual users must consent to any collection and processing of their personal data, which were stipulated under Article 27 as grounds to acquire data without user's consent, such as public service, legal obligations, and contract fulfilment.[229]

Given the historical role of Shenzhen as a hotbed for successful technological development and innovation, it is unsurprising that the draft legislation attempts to preserve the interests and enhance the local capabilities of Shenzhen-based tech companies by strengthening platforms' access to and control over consumer data.[230] In this sense, the status quo bias within the structure of the early draft versions of the Regulations also reveals a pro-business bias.[231] For instance, within the full text of the first draft of the Regulations, only nine of the 103 articles relate to provisions for personal information protection.[232] The core articles consider issues relating to the administration of public data, the regulation of data security on an open data infrastructure, and the acceleration of high quality development within the digital economy.[233]

For these reasons, the early draft versions of the Regulations triggered controversy in the Chinese legal community. Some scholars find controversy in the fact that the concept of data ownership/usage rights in the draft Regulations are not clear, and that ownership and usage rights should be treated as separate concepts—so that the subject of the data would own them, while the collectors of the data would use the data

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[228] *See id.*; Lin, *supra* note 213; Fan Wang, *Shenzhen Jiang Chutai Guonei Shoubu Shuju Lingyu Zonghexing Lifa, Shouji Chuli Geren Yinsi Shuju Xu Dedao Mingshi Tongyi* (深圳将出台国内首部数据领域综合性立法，收集处理个人隐私数据须得到明示同意) [*Shenzhen Will Introduce the Country's First Comprehensive Legislation in the Field of Data, and the Collection and Processing of Personal Data Requires Express Consent*], 21 SHIJI JINGJI BAODAO (21世纪经济报道) [21ST CENTURY BUS. HERALD] (Dec. 30, 2020), https://m.21jingji.com/article/20201230/4b7c4634f8fb8ed73cf2a72640ac38b3.html.

[229] Shenzhen Data Regulations (2021), *supra* note 211, at art. 27.

[230] Delval, *supra* note 212.

[231] *See infra* text accompanying notes 231–32.

[232] Delval, *supra* note 212.

[233] *Id.*; Shenzhen Data Regulations First Draft (2020), *supra* note 208, at arts. 11–19.

without infringing upon the subject's ownership rights.[234] Other scholars have taken issue with the status quo bias in Article 52 of the draft Regulations.[235] Specifically, they take issue with the language that "no organization or individual shall infringe on these rights [to these data]," as some scholars believe this restriction may impede the flow of data from the few large platforms where data has been "legally collected" to smaller companies where innovation occurs.[236] While the Shenzhen Data Regulations are limited in scope to the Shenzhen Special Economic Zone, the Regulations are widely regarded as a trial for the creation of other similar rules nationwide, as the city has a reputation for pioneering national reform.[237] However, this has not prevented a third group of scholars from challenging the legislative authority of Shenzhen in determining whether the issue of data rights is a basic civil right.[238] Many of them believe that the Shenzhen Data Regulations will likely to come into conflict with personal information protection and data security laws formulated at the national level, and do not wish that these laws be formulated prematurely by local governments.[239] Finally, a fourth group has expressed concerns about potential conflicts arising between individual and collective data ownership and their implications on public interests.[240]

In sum, the Shenzhen legislative experiments in data ownership remain a subject of legal controversy as the challenge of demarking data rights and the conflicts amongst data claimants remain yet unresolved.

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[234] *See Shenzhen Jingji Tequ Shuju Tiaoli (Zhengqiu Yijian Gao) Yantaohui Zai Huace Shuke Zhaokai* (《深圳经济特区数据条例（征求意见稿）》研讨会在华策数科召开) [*Seminar on the Data Regulations of Shenzhen Special Economic Zone (Draft for Comments) Was Held in Smart Decision*], WANG YI (网易) [163.COM] (Aug. 24, 2020), https://www.163.com/dy/article/FKQCGVGS05385KVG.html.

[235] *See* Shenzhen Data Regulations First Draft (2020), *supra* note 208, at art. 52 (providing that the subjects of data elements have data rights to the data they legally collect and generate, and no organization or individual shall infringe on these rights).

[236] *See Difang Wuquan Dui "Shuju Quan" Lifa? Shenzhen Shuju Tiaoli Yijian Gao Yin Zhuanjia Reyi* (地方无权对"数据权"立法？深圳数据条例意见稿引专家热议) [*Local Governments Have No Right to Legislate On "Data Ownership"? Shenzhen Data Regulations Led to Hot Debate Among Experts*], NANFANG DUSHI BAO (南方都市报) [S. METROPOLIS DAILY] (July 20, 2020), https://www.sohu.com/a/408645953_161795.

[237] Arendse Huld, *Shenzhen's New Data Regulations Explained*, CHINA BRIEFING (Aug. 2, 2021), https://www.china-briefing.com/news/shenzhen-new-data-regulations-explained-impact-china-personal-data-protection/.

[238] *See Local Governments Have No Right to Legislate On "Data Ownership"? Shenzhen Data Regulations Led to Hot Debate Among Experts*, *supra* note 236.

[239] *Id.*

[240] *Id.*

### *B. Action Plan for Building a High-Standard Market System (2021)*

Data ownership also requires establishing standards and mechanisms for its determination. The State Council recognized this need when it released the Action Plan for Building a High-Standard Market System (建设高标准市场体系行动方案) on January 31, 2021, which provided guidance for building a high-standard market system, covering fifty-one specific measures to be implemented with the Fourteenth Five-Year Plan.[241]

The Action Plan confirms the Chinese leadership's focus on emerging technologies and the digital economy, and echoes the Fourteenth Five-Year Plan Recommendations' emphasis on achieving technological self-reliance as a key underpinning of the national strategy.[242] Its enumerated development goals include strengthening property rights, reducing local protectionism, improving competition, and increasing efficiency of resource allocation.[243]

Importantly, the Action Plan reiterates the Chinese central government's emphasis on clarifying issues of data ownership rights by directing relevant authorities to "establish[ ] a basic system and standards regarding data resource property rights (数据资源产权)" for the purposes of establishing a high-standard market system to drive high-quality economic development.[244] The Action Plan conveys the seriousness with which Chinese authorities treat enforcement of competition laws, as it aims to reduce the asymmetric advantages that large platforms have accumulated, and to open up access to the digital market for new entrants.[245]

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[241] *Jianshe Gao Biaozhun Shichang Tixi Xingdong Fang'an* (《建设高标准市场体系行动方案》) [*The General Office of the Central Committee of the Communist Party of China and the General Office of the State Council Issued the Action Plan for Building a High-Standard Market System*], ZHONGGUO GONGCHANDANG ZHONGYANG WEIYUANHUI GUOWUYUAN BANGONGTING (中国共产党中央委员会国务院办公厅) [GENERAL OFF. OF THE CENT. COMMITTEE OF THE COMMUNIST PARTY OF CHINA AND THE GENERAL OFF. OF THE STATE COUNCIL] (Jan. 31, 2021), http://www.gov.cn/zhengce/2021-01/31/content_5583936.htm [hereinafter Action Plan].

[242] Timothy Brightbill, Alan Price & Adam Teslik, *China Action Plan Targets Enhancement of Digital Economy*, JD SUPRA (Feb. 4, 2021), https://www.jdsupra.com/legalnews/china-action-plan-targets-enhancement-5706249/.

[243] *See* Action Plan, *supra* note 241, at ¶¶ 1–4, 8–13, 38.

[244] *See id.* at ¶ 22.

[245] *See id.* at ¶ 9.

### *C. The Anti-Monopoly Law (Draft Amendment) (2021)*

The challenges posed by new digital monopolies possessing big data require that existing antitrust legislation be updated. On January 2, 2020, SAMR, in its efforts to strengthen existing antitrust legislation, published a preliminary draft of an amended 2007 Anti-Monopoly Law for public comment.[246] On October 19, 2021, the thirty-first session of the Standing Committee of the National People's Congress reviewed the State Council's submitted proposal for the draft amendment to the Anti-Monopoly Law, indicating the heightened emphasis on accelerating such regulatory efforts, and shortly after that review, the formal version of the Anti-Monopoly Law (Draft Amendment) ("Draft AML Amendment") (中华人民共和国反垄断法(修正草案)) was released.[247] Since the law's initial promulgation in 2008, this draft legislation marked the first time that Chinese authorities had proposed major changes to the types and severity of fines and legal liabilities, including criminal, for violators of antitrust law.[248]

The Draft AML Amendment proposes many substantive changes to the regulation of anticompetitive conduct. Article 18, for example, included new provisions that expand the scope of antitrust enforcement to include indirect conspirators.[249] In particular, the proposed article prohibits any business operator from facilitating or

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[246] *Shichang Jianguan Zongju Jiu Fan Longduan Fa Xiuding Cao'an (Gongkai Zhengqiu Yijian Gao) Gongkai Zhengqiu Yijian de Gonggao* (市场监管总局就《<反垄断法>修订草案 （公开征求意见稿）》公开征求意见的公告) [*Announcement of the State Administration for Market Regulation on Public Comment on the Draft Revision of the Anti-Monopoly Law (Draft for Public Comment)*], GUOJIA SHICHANG JIANGUAN JU (国家市场监管局) [STATE ADMIN. FOR MARKET REG.] (Jan. 2, 2020), http://www.samr.gov.cn/hd/zjdc/202001/t20200102_310120.html.

[247] *Shisan Jie Quanguo Renda Changweihui Di Sanshiyi Ci Huiyi Zai Jing Juxing, Shenyi Jiating Jiaoyu Cujing Fa Cao'an, Fan Dianxing Wangluo Zhapian Fa Cao'an Deng, Li Zhanshu Zhuchi* (十三届全国人大常委会第三十一次会议在京举行 审议家庭教育促进法草案、反电信网络诈骗法草案等 栗战书主持) [The Thirty-First Session of the Standing Committee of the Thirteenth National People's Congress Held in Beijing; Reviewed the Draft Law on the Promotion of Family Education, the Draft Law on Anti-Telecom and Network Fraud, etc.; Hosted by Li Zhanshu], REN DA (人大) [NAT'L PEOPLE'S CONG. OF THE PEOPLE'S REPUBLIC OF CHINA] (Oct. 19, 2021), http://www.npc.gov.cn/npc/kgfb/202110/2788b5f506e54979a54058f67b5eceff.shtml; *Zhonghua Renmin Gongheguo Fan Longduan Fa (Xiuzheng Cao'an)* (中华人民共和国反垄断法 (修正草案)) [*Draft Amendment to the Anti-Monopoly Law*], REN DA (人大) [NAT'L PEOPLE'S CONG. OF THE PEOPLE'S REPUBLIC OF CHINA] (Oct. 23, 2021), http://www.npc.gov.cn/flcaw/flca/ff8081817ca258e9017ca5fa67290806/attachment.pdf [hereinafter Draft AML Amendment].

[248] Draft AML Amendment, arts. 53–56.

[249] *Id.* at art. 18

abetting other business operators in concluding anticompetitive agreements.[250] Importantly, this new legal language extends regulation of behaviors beyond those present within the 2007 AML,[251] making it illegal for third parties as well as the cartelists themselves, to help orchestrate a cartel and/or to aid in the conclusion of similar agreements.[252] Furthermore, the text of the Draft AML Amendment specifically targets enforcement within the digital economy, explicating that undertakings shall not exclude or restrict competition by abusing the advantages in data and algorithms, technology, and capital and platform rules,[253] and that one express objective of the Draft AML Amendment is to "encourage innovation."[254]

### *D. Personal Information Protection Law (2021)*

The Personal Information Protection Law (中华人民共和国个人信息保护法), China's first comprehensive data protection regulation, is another measure taken by the Chinese authorities to clarify data property rights and access to data.[255] It increasingly reins in the power of the country's internet giants and pushes back against their exploitative practices and control over personal data.[256] Existing laws covering cybersecurity and data security exercise lax controls over the collection, storage, and use of individual data, and therefore, do not specifically

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[250] *Id.*

[251] Sébastien Evrard & Kelly Austin, *China Publishes Draft Amendment to the Anti-Monopoly Law*, GIBSON, DUNN & CRUTCHER LLP (Oct. 27, 2021), https://www.gibsondunn.com/china-publishes-draft-amendment-to-the-anti-monopoly-law/.

[252] *Id.*; Draft AML Amendment, *supra* note 247.

[253] Draft AML Amendment, *supra* note 247, at arts. 10, 22.

[254] *Id.* at art. 1.

[255] *Zhuanjia Jiedu: Quanmian Baohu Geren Xinxi Quanyi de Zhongyao Falü* (专家解读丨全面保护个人信息权益的重要法律) [*Expert Opinion: Important Law for the Comprehensive Protection of Personal Information Rights*], GUOJIA HULIANWANG XINXI BANGONGSHI (国家互联网信息办公室) [CYBERSPACE ADMIN. OF CHINA] (Aug. 25, 2021), http://www.cac.gov.cn/2021-08/25/c_1631491543035763.htm.

[256] *See* Arjun Kharpal*, In A Quest to Rein in Its Tech Giants, China Turns to Data Protection*, CNBC (Apr. 11, 2021), https://www.cnbc.com/2021/04/12/china-data-protection-laws-aim-to-help-rein-in-countrys-tech-giants.html.

address personal data protection.[257] Amid growing public concerns over user privacy and cybersecurity, on August 20, 2021, after two rounds of draft versions,[258] the Standing Committee of the National People's Congress finally passed the long-awaited privacy law, the Personal Information Protection Law ("PIPL"), which went into effect on November 1, 2021.[259]

This legislation, seen as China's version of the European Union's General Data Protection Regulation ("GDPR"),[260] marks the country's first attempt to establish a comprehensive legal framework for the regulation of personal data collection, process, usage, storage, transfer, and protection that will curb data abuses by internet platforms.[261] Similar to the GDPR, the PIPL is designed to give citizens more control over their personal data.[262] Specifically, the new law grants data subjects with various rights to their personal information, including the rights to access, inspect, copy, correct, supplement, and delete their

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[257] *See, e.g.*, *Geren Xinxi Baohu Fa de Shenyuan Yiyi: Zhongguo Yu Shijie* (个人信息保护法的深远意义: 中国与世界) [*The Far-Reaching Significance of Personal Information Protection Law: China and the World*], REN DA (人大) [NAT'L PEOPLE'S CONG. OF THE PEOPLE'S REPUBLIC OF CHINA] (Aug. 24, 2021), http://www.npc.gov.cn/npc/c30834/202108/1fee8d19bae14f9f9766c50ab1e53c0f.shtml; Zhiyi Chen, Jinxia Sun & Zhongxiao Wang, *Jujiao Shuzi Jingji Jianguan: Ruhe Baohu Geren Xinxi?* (聚焦数字经济监管：如何保护个人信息?) [*Focus on Digital Economy Supervision: How to Protect Personal Information?*], DONGFANG ZHENGQUAN (东方证券) [ORIENT SECURITIES] (Jan. 4, 2021), https://pdf.dfcfw.com/pdf/H3_AP202101051447426133_1.pdf?1609866465000.pdf.

[258] *See generally Geren Xinxi Baohu Fa Cao'an* (个人信息保护法(草案)) [*Personal Information Protection Law (First Draft)*], REN DA (人大) [NAT'L PEOPLE'S CONG. OF THE PEOPLE'S REPUBLIC OF CHINA] (Oct. 21, 2020), https://www.dataguidance.com/sites/default/files/china_draft_personal_data_law.pdf [hereinafter PIPL First Draft (2020)]; *Geren Xinxi Baohu Fa Cao'an (Er'ci Shenyi Gao*) (个人信息保护法（草案）（二次审议稿）) [*Personal Information Protection Law (Second Deliberation Draft*)], REN DA (人大) [NAT'L PEOPLE'S CONG. OF THE PEOPLE'S REPUBLIC OF CHINA] (Apr. 29, 2021), https://www.civillaw.com.cn/gg/t/?id=37701.

[259] Geren Xinxi Baohu Fa (个人信息保护法) [Personal Information Protection Law (2021)] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 20, 2021, effective, Nov. 1, 2021), http://www.npc.gov.cn/npc/c30834/202108/a8c4e3672c74491a80b53a172bb753fe.shtml [hereinafter PIPL (2021)].

[260] Todd Liao et al., *Personal Information Protection Law: China's GDPR is Coming*, MORGAN LEWIS (Aug. 24, 2021), https://www.morganlewis.com/pubs/2021/08/personal-information-protection-law-chinas-gdpr-is-coming.

[261] *Id.*

[262] Arjun Kharpal*, In A Quest to Rein in Its Tech Giants, China Turns to Data Protection*, CNBC (Apr. 11, 2021), https://www.cnbc.com/2021/04/12/china-data-protection-laws-aim-to-help-rein-in-countrys-tech-giants.html.

personal information.[263] In addition, the PIPL grants data subjects the right to withdraw their consent, the right to restrict or refuse the processing of their personal information, and the right to refuse automated decision-making.[264] Simultaneously, the PIPL emphasizes that personal information gathered by a company must be limited to the minimum amount necessary to achieve the goals of handling data to prohibit abuses of such information.[265] The legislation also stipulates that companies processing data cannot refuse to provide services to users who do not consent to sharing data, unless that data is necessary for the provision of that product or service.[266]

Notably, the PIPL imposes additional requirements for internet platforms that have a large number of users.[267] Article 58 requires these internet platforms to set up systems and independent oversight bodies to ensure compliance.[268] Moreover, it demands these companies to formulate standards for intra-platform product or service providers' handling of personal information.[269] The legislation further prevents the internet platforms from providing services to product or service providers that seriously violate laws or administrative regulations in handling personal information.[270] It also asks the companies to regularly release social responsibility reports on their information privacy practices to allow for public scrutiny.[271]

The PIPL significantly increases penalties for companies in violation of the new legislation, proposing fines of up to US$7.6 million (CN¥ 50 million), or five percent of the company's annual revenue.[272] The violators could also be forced to suspend or cease their business operations for rectification.[273] Nevertheless, given the huge size of the Chinese big data market that will be worth US$22.49 billion (CN¥ 91.52

[263] *See* PIPL (2021), *supra* note 259, at arts. 44–48.
[264] *Id.* at arts. 13–15.
[265] *Id.* at art. 6.
[266] *Id.* at art. 16.
[267] *Id.* at art. 58.
[268] *Id.*
[269] *Id.*
[270] *Id.*
[271] *Id.*
[272] *See* PIPL First Draft (2020), *supra* note 257, at art. 62.
[273] *Id.*

billion) by 2023,[274] some believe that the penalties under the new law are too light.[275]

For many legal experts, China's new data privacy law could see the beginning of the end of the country's "wild era" of internet development, where in the past two decades, big tech platforms have been free to collect and use citizens' personal information with few rules to regulate their behaviors.[276] However, the PIPL falls short on details of what companies must do to be compliant, placing the burden on companies to be extra cautious when handling user data. Future governmental regulations and guidance are expected to clear up some of the law's ambiguities.

### *E. Data Security Law (2021)*

In addition to the PIPL, the Chinese regulators have adopted another measure that tightens their control of data by restricting cross-border data flows. On June 10, 2021, the National People's Congress promulgated the Data Security Law ("DSL") (中华人民共和国数据安全法), effective since September 1, 2021, after three rounds of deliberations.[277] Notably, the new legislation contains sweeping requirements for the protection of data and severe penalties for violations.[278] The DSL further strengthens the Chinese government's control over data by restricting data transfers from both foreign and domestic companies operating in China to foreign governments.[279] It sets a framework for companies to classify data based on its economic value and relevance to China's national security.[280]

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[274] Celia Chen, *China's 'Wild Era' of Internet May Be Ending as New Personal Data Protection Law Seeks to Curb Big Tech's Control Over User Data*, THE STAR (Nov. 26, 2020), https://www.thestar.com.my/tech/tech-news/2020/11/26/chinas-wild-era-of-internet-may-be-ending-as-new-personal-data-protection-law-seeks-to-curb-big-techs-control-over-user-data.

[275] *Id.* ("Compared with what the tech giants benefit from in mining users' personal data, I don't see the punishment as that significant.").

[276] *Id.*

[277] Colin Zick, *China Adopts New Data Security Law*, JD SUPRA (Aug. 4, 2021), https://www.jdsupra.com/legalnews/china-adopts-new-data-security-law-7739585/; Shuju An'quan Fa (数据安全法) [Data Security Law (2021)] (promulgated by the Standing Comm. Nat'l People's Cong., June 10, 2021, effective Sept. 1, 2021), http://www.npc.gov.cn/npc/c30834/202106/7c9af12f51334a73b56d7938f99a788a.shtml [hereinafter Data Security law (2021)], *translated at* https://www.chinalawtranslate.com/en/datasecuritylaw/.

[278] Zick, *supra* note 277.

[279] *See, e.g.*, Data Security law (2021), *supra* note 277, at arts. 21, 30, 36, 48.

[280] *Id.* at art. 21.

Based on this classification, the DSL requires companies that process "critical data" and "national core data"— data that are pertinent to national security, national economy, public interests, or legal rights and legitimate interests of Chinese citizens and organizations—to conduct risk assessments to gain regulators' approval before sending any of that data overseas.[281] The DSL explicitly prohibits data processors within China from providing any data stored within China to any foreign judicial departments or law enforcement bodies without prior approval from the Chinese authorities.[282] Failure to obtain such prior authorization may subject data processors to severe penalties, *i.e.*, a fine of up to US$ 154,800 (CN¥ 1 million) or US$ 774,000 (CN¥ 5 million), as well as suspension or revocation of their business licenses in cases their actions cause "serious consequences" (such as a large-scale data leak).[283]

### *F. National Markets for Data Trading (2020)*

China is estimated to be the single most prolific producer of big data in the world by 2025, overtaking the United States.[284] With the huge potential the commercialization of data offers, the Chinese authorities not only aim to take over supervision of the county's vast data assets through regulation and legislation, but also to commoditize them by creating a state-supervised nationwide marketplace for data trading.[285] Such ambitions are supported by the State Council's Implementation Plan for the Pilot Comprehensive Reform of Building a Pilot Demonstration Zone of Socialism with Chinese Characteristics in

[281] *Id.* at arts. 21, 30.

[282] *Id.* at art. 36.

[283] *Id.* at art. 48; *see also* Zick, *supra* note 277.

[284] Saheli Roy Choudhury, *As Information Increasingly Drives Economies, China is Set to Overtake the US in Race for Data*, CNBC (Feb. 13, 2019), https://www.cnbc.com/2019/02/14/china-will-create-more-data-than-the-us-by-2025-idc-report.html.

[285] *See* Cate Cadell, *Analysis: Beyond Security Crackdown, Beijing Charts State-Controlled Data Market*, REUTERS (July 20, 2021), https://www.reuters.com/technology/beyond-security-crackdown-beijing-charts-state-controlled-data-market-2021-07-20/.

Shenzhen (2020–2025) (深圳建设中国特色社会主义先行示范区综合改革试点实施方案 (2020–2025年)).[286]

According to the Plan, Shenzhen will lay the groundwork for establishing a national data trading market and lead efforts to explore new mechanisms for protecting and utilizing data property rights (数据产权制度).[287] Under the Plan, regulators will also draw up a list of responsibilities to strengthen the sharing and exchanging of data among regions and government departments.[288] While the Plan does not specify who owns the data, what kind of data can be traded, or what the trading mechanism will be like, the answers to these questions are fundamental to the long-term success of this proposed nationwide market for data.[289]

As a result of the Plan, Shenzhen's new regulation—Data Regulations of Shenzhen Special Economic Zone—makes efforts to address some of these issues. Among others, the establishment of a data trading system is one of the highlights of the new legislation.[290] The Regulations expressly clarify that data products and services that have been created through the legal processing of data can be traded on the market.[291] The Regulations also outline new mechanisms for data trading in efforts to create a fairer playing field for the highly under-regulated data trading market.[292] For instance, to facilitate data trading, the Shenzhen Data Regulations urge the expansion of data trading channels to allow market players to freely trade data through legal and regulated platforms.[293] Specifically, the Regulations provide that companies may

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[286] *See Zhonggong Zhongyang Bangongting, Guowuyuan Bangongting Yinfa Shenzhen Jianshe Zhongguo Tese Shehui Zhuyi Xianxing Shifanqu Zonghe Gaige Shidian Shishi Fang'an (2020–2025 Nian)* (《中共中央办公厅，国务院办公厅印发《深圳建设中国特色社会主义先行示范区综合改革试点实施方案（2020–2025年）》) [*The General Office of the Central Committee of the Communist Party of China and the General Office of the State Council Issued the Implementation Plan for the Pilot Comprehensive Reform of Building a Pilot Demonstration Zone of Socialism with Chinese Characteristics in Shenzhen (2020–2025)*], ZHONGHUA RENMIN GONGHEGUO GUOWUYUAN (中华人民共和国国务院) [STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA] (Oct. 11, 2020), http://www.gov.cn/zhengce/2020-10/11/content_5550408.htm.

[287] *Id.* at art. 2.

[288] *Id.* at art. 8.

[289] *See* Iris Deng & Che Pan, *Beijing Wants A Market for Data Trading: The Question is How?*, S. CHINA MORNING POST (Feb. 2, 2021), https://www.scmp.com/tech/policy/article/3120091/beijing-wants-market-data-trading-question-how.

[290] Shenzhen Data Regulations (2021), *supra* note 211, at art. 56.

[291] *Id.* at art. 58.

[292] *Id.* at arts. 68–70.

[293] *Id.*

not use illegal means to obtain data from another company or use data collected illegally from another company to provide alternative products or services.[294] The Regulations also prohibit companies from using big data analytics to engage in price discrimination.[295]

To date, twenty data markets, including those in Beijing, Shanghai, and Guiyang, have been established by various local government authorities and private enterprises in China,[296] which allow for the trade of whole datasets, analytical results, and application programming interfaces, among other data commodities.[297]

## V. LEGAL ANALYSIS

### *A. Common Patterns of Competition Litigation Cases*

In many jurisdictions around the world, private sector actors increasingly rely on the legal regime of competition law to resolve and adjudicate disputes over data resources. Large platform companies, where large datasets are already concentrated, utilize competition law as the legal grounds both to consolidate control over their existing data resources and to pry additional data resources from their rivals' grasps.[298] Smaller start-up companies also rely upon competition law to justify their aggressive acquisition of established data resources from their

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[294] *Id.* at art. 68.

[295] *Id.* at art. 69.

[296] *See, e.g.*, *Beijing Guoji Da Shuju Jiaoyi Suo Chengli* (北京国际大数据交易所成立) [*Beijing International Big Data Exchange Market Was Established*], BEIJING LOCAL FIN. SUPERVISION & ADMIN. (Apr. 1, 2021), http://jrj.beijing.gov.cn/jrgzdt/202104/t20210401_2342064.html; SHANGHAI SHUJU JIAOYI SUO (上海数据交易所) [SHANGHAI DATA EXCHANGE CORP.], https://www.chinadep.com/ (last visited Mar. 2, 2022); Luo Man & Tian Mu (罗曼) & (田牧), *Lixiang Hen Fengman, Xianshi Hen Gugan, Guiyang Da Shuju Jiaoyi Suo Zhe Liunian* (理想很丰满，现实很骨感，贵阳大数据交易所这六年) [*The Ideal is Beautiful, The Reality is Ugly: The Six Years of Guiyang Global Big Data Exchange Market*], ZHENGQUAN SHIBAO (证券时报) [SEC. TIMES] (July 12, 2021), https://news.stcn.com/sd/202107/t20210712_3426762.html (discussing the establishment and the recent development of Guiyang Global Big Data Exchange Market).

[297] Li et al., *supra* note 162, at 50.

[298] *See, e.g.*, hiQ Labs, Inc. v. LinkedIn Corp., 938 F.3d 985, 995 (9th Cir. 2019).

larger digital market brethren.[299] They argue that, as nimble actors, the new or improved products and services that they provide benefit from greater access to the data resources of these large digital platforms and, in some cases, offsets the means by which they close the disparity between their capabilities to gather and use data vis-à-vis their larger competitors.[300] Thus, they claim that competition law helps correct some of the market imbalances that arise from the larger platform companies' lack of motivation to grant their potential competitors access to previously produced or collected data.[301]

Similarly, within the Chinese jurisdiction, competition law is the primary legal weapon of choice that homegrown internet platforms use to fight for legal control of big data. The most common thread linking the various cases on inter-company disputes over data resources is that most of them had been filed under the Anti-Unfair Competition Law for unfair competition. Previously, for similar types of cases, the conventional approach adopted by Chinese companies was to invoke protection under trade secrets law and contract law.[302] However, the ambiguity in ownership of user-generated content, for example in *Dianping.com v. Baidu*, made it difficult to rely on the conventional approach. Indeed, the issue of data ownership in these emerging cases has revealed the inadequacy of earlier approaches to deciding where to draw the line between fair and unfair competition involving data collection and use.

Currently, Chinese courts have relied heavily upon Article 2 of the AUCL in deciding many of these new cases involving disputes over data ownership among large platform companies.[303] One reason for courts' reliance on this legal tool can be explained by "the catch-all

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[299] *Id.* (hiQ arguing that LinkedIn's conduct in banning potential competitors from accessing and using otherwise public data constituted unfair competition under California's Unfair Competition Law); *see also* Josef Drexl et al., *Data Ownership and Access to Data–Position Statement of the Max Planck Institute for Innovation and Competition of 16 August 2016 on the Current European Debate* 9 (Max Planck Inst. for Innovation & Competition Res., Paper No. 16-10, 2018), available at https://ssrn.com/abstract=2833165.

[300] *See, e.g.*, *hiO Labs Inc.*, 938 F.3d at 955.

[301] *Id.*

[302] *See* Mei Xiaying (梅夏英), *Qiye Shuju Quanyi Yuanlun: Cong Caichan Dao Kongzhi* (企业数据权益原论：从财产到控制) [*The Original Theory of Corporation's Data Property Rights: From Property to Control*], 33 PEKING U. L. J. 1188, 1189–1193, 1204 (2021), http://journal.pkulaw.cn/PDFFiles/%E4%BC%81%E4%B8%9A%E6%95%B0%E6%8D%AE%E6%9D%83%E7%9B%8A%E5%8E%9F%E8%AE%BA%EF%BC%9A%E4%BB%8E%E8%B4%A2%E4%BA%A7%E5%88%B0%E6%8E%A7%E5%88%B6.pdf.

[303] *See* discussion *supra* Part II.A–E.

nature" of Article 2, which makes it potentially applicable to all kinds of data practices. Using this approach, Chinese courts usually assess the overall impact of their decisions on market competition through a balancing test before issuing a final ruling on a case.[304]

Importantly, Chinese courts have refrained from issuing decisive rulings in cases that require them to opine on business models that rely on novel technology and data analytics.[305] As most of the cases discussed in this Article were decided before the AUCL was amended in 2017, and because post-amendment cases have been limited, it remains to be seen whether and how Chinese courts will apply Article 12 of the amended AUCL, which is intended to address internet-related unfair competition. In light of the pivotal function of data resources in the new digital economy, it may not be too long before a case is brought forward to test how data-related competition would be analyzed under Article 12—including establishing the standards by which to evaluate whether competition exists between litigants, whether the lawful rights and interests of the data holder were infringed, and whether the infringer's illegal act harmed market order and caused, or might have caused, damage to the competitive interests of the data holder.[306]

Finally, one critical and unresolved question remains: what is the appropriate balance between market stability and digital innovation? Notably, the use of internet robots to crawl and scrap the data of other companies poses challenging situations for the new digital economy. The issue arises as to the extent this behavior should be allowed for the sake of encouraging innovation and to the extent it should be prohibited for the sake of ensuring fair competition. The line in-between is becoming increasingly blurred, and the complexity of the issue may also suggest that Chinese courts will likely take a cautious approach: avoiding premature rulings that may further entrench the monopoly control of data resources by large internet platforms and those that may discourage market competition and the growth of new market participants.

### *B. State Regulation: Anti-Monopoly and Antitrust Enforcement*

Private litigation is only one part of the enforcement of competition law across many jurisdictions. In the public sector across

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[304] *Id.*

[305] *Id.*; s*ee also* Calvin Chiu et al., *Recent Privacy Case Law Update in China*, DENTONS (Feb. 24, 2020), https://www.dentons.com/en/insights/articles/2020/february/24/recent-privacy-case-law-update-in-china.

[306] Anti-Unfair Competition Law (2017), *supra* note 43, at art. 12

regions and jurisdictions, antitrust authorities have increased regulatory scrutiny of big tech firms in terms of their control over customer data.[307] For instance, in recent years, antitrust regulators in the European Union and the United States have routinely considered the role of big data in reviewing potential mergers and acquisitions.[308] In these cases, due consideration is given to mergers between an upstream market player with large datasets and a downstream user of related data, which could result in foreclosure of other downstream players who require access to this data to compete.[309] Regulatory authorities in these jurisdictions have also initiated a number of high profile investigations. For example, there are investigations into Google/Fitbit,[310] Facebook/Instagram/WhatsApp,[311] Microsoft/LinkedIn,[312] and among others.[313] Regulatory authorities have not only required powerful internet firms to share data, but also have imposed penalties on companies that violate competition law. For example, the European Union, under Article 102 of the Treaty on the Functioning of the European Union, has levied fines of up to 10 percent of the global turnover of these big tech

[307] *See* John D. McKinnon & Deepa Seetharaman, *FTC Expands Antitrust Investigation into Big Tech*, WALL ST. J. (Feb. 11, 2020), https://www.wsj.com/articles/ftc-plans-to-examine-past-acquisitions-by-big-tech-companies-11581440270; Graham Hyman, *Antitrust M&A Snapshot | Q2 2021*, NAT'L L. REV. (Aug. 5, 2021), https://www.natlawreview.com/article/antitrust-ma-snapshot-q2-2021; Jennifer Huddleston, *Mergers and Acquisitions Amid Calls for Increasing Antitrust Enforcement*, AM. ACTION F. (May 27, 2021), https://www.americanactionforum.org/insight/mergers-and-acquisitions-amidst-calls-for-increasing-antitrust-enforcement/.

[308] Ben Gris & Sara Ashall, *European Union and United States: Antitrust and Data*, GLOB. DATA REV. (Dec. 2020), https://www.lexology.com/library/detail.aspx?g=4f0d3e3e-18e6-4be0-a59d-7f0772f8340d.

[309] *Id.*

[310] *See* Initiation of Proceedings (Case M.9660 – Google/Fitbit), 2020 O.J. (C 268/3) 3, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2020:268:FULL&from=EN.

[311] *See* Fed. Trade Comm'n v. Facebook, No. CV 20-3590 (JEB), 2021 U.S. Dist. LEXIS 119540 (D.D.C. June 28, 2021); Commission Regulation 139/2004, 2014 O.J. (C 417/02) 4, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2014:417:FULL&from=EN.

[312] *See* Natalia Drozdiak, *EU Sent Questionnaires about Microsoft-LinkedIn Deal to Rivals*, WALL ST. J. (Oct. 22, 2016), https://www.wsj.com/articles/eu-sent-questionnaires-about-microsoft-linkedin-deal-to-rivals-1477144129; Mark Scott & Nick Wingfield, *Salesforce is Said to Question Microsoft-LinkedIn Deal in Europe*, N.Y. TIMES (Sept. 29, 2016), https://www.nytimes.com/2016/09/30/technology/salesforce-is-said-to-question-microsoft-linkedin-deal-in-europe.html.

[313] *See, e.g.*, Complaint, United States v. Visa Inc., (N.D. Cal. Nov. 5, 2020) (No. 3:20-cv-07810), https://www.justice.gov/opa/press-release/file/1334726/download (attempting to block Visa's proposed acquisition of Plaid).

platforms,[314] and the United States has also sanctioned these monopolies under Section 2 of the Sherman Act.[315]

In China, while the overall data regulatory landscape remains in a state of flux, regulatory authorities have resorted to anti-monopoly and antitrust laws to regulate data and turn their attention to the country's large internet platformsafter many years of allowing their laissez-faire development. These laws offer the Chinese regulatory authorities the legal mechanisms to prevent data monopoly, and thus, encourage market competition within the digital realm. These rules also seem to have teeth—several leading Chinese internet companies, including Tencent, Alibaba, Didi Chuxing, were each fined per violations of anti-monopoly laws.[316] China has thus stepped up its crackdown campaign against monopolistic behaviors that threaten to stifle market vitality.

It appears that the Chinese authorities are much more ambitious than their American and European counterparts in how they centralize and restructure China's cybersecurity policymaking.[317] Accordingly, the internet regulatory agency, CAC, has taken a more active role in enforcing antitrust and anti-monopoly regulations and has accumulated more power.[318] It is interesting to note that compared to China, neither the European Union nor the United States "has a single regulatory department that can be compared to the CAC in terms of authority," and that "such power is more scattered" within these two major jurisdictions.[319] Given the growing importance of data, these rules will very likely continue to be enforced well into the future.

### *C. The PRC Legislative Experimentation*

As the discussion above shows, in addition to regulatory actions, the Chinese authorities have conducted legislative and policy

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[314] *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 102, May 9, 2008, 2008 O.J. (C 115) 47; Henry Mostyn, *The Dominance and Monopolies Review: European Union*, THE LAW REVS. (June 21, 2021), https://thelawreviews.co.uk/title/the-dominance-and-monopolies-review/european-union.

[315] Sherman Antitrust Act of 1890, 15 U.S.C. § 2.

[316] Che Pan, *China's Antitrust Watchdog Punishes Alibaba, Tencent and Didi for Merger Irregularities After Digging into Old Deals*, S. CHINA MORNING POST (July 7, 2021), https://www.scmp.com/tech/policy/article/3140224/chinas-antitrust-watchdog-punishes-alibaba-tencent-and-didi-merger.

[317] *See* Jane Li, *How China's Top Internet Regulator Became Chinese Tech Giants' Worst Enemy*, QUARTZ (Aug. 23, 2021), https://qz.com/2039292/how-did-chinas-top-internet-regulator-become-so-powerful/.

[318] *Id.*

[319] *Id.*

experiments to clarify data property rights. Policy and legislative experimentation are not a unique feature in the area of data ownership; it has always been the standard operating procedure of China.[320] Since Reform and Opening in the late 1970s, the Chinese government has managed complex, rapid, and intersecting reforms across many policy areas.[321] The speed of development, and the complexity and interconnectedness of reforms have led to the emergence of the "Chinese model" of development.[322] Consequently, experimental policy making and innovation have become part of the Chinese government's policy toolbox.[323] There is increasing understanding of the importance of policy and legislative experimentation and innovation in many of China's reforms.[324] As with reforms and legislation in other policy areas, so far clarification of data property rights has been through a process of trial and error (*i.e.*, Shenzhen experiment). This process of incremental development and prudent experimentation is a promising path forward in establishing a comprehensive legal regime on data ownership in China, as any premature legislation deepening monopolistic control of data resources by internet companies risks stifling innovation and competition.

As Fisher and Streinz have noted, assertions of property claim over data are often invoked by internet companies, and became contentious in response to demands for transparency and calls to share data with broader constituencies.[325] Thus, while new ownership rights over data for data controllers can facilitate contracting over data and can incentivize data generation, prematurely establishing or recognizing legal property rights in data can further entrench the large internet platforms' control with the authority of law by preventing redistributive measures.[326] This is because existing data holders would use property rights as a shield to exclude others from access.[327] In other words, it will reward those who have already accumulated data and treated data

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[320] *See, e.g.*, YONGNIAN ZHENG, DE FACTO FEDERALISM IN CHINA: REFORMS AND DYNAMICS OF CENTRAL-LOCAL RELATIONS (2007); Sebastian Heilmann, *From Local Experiments to National Policy: The Origins of China's Distinctive Policy Process*, 59 THE CHINA J. 1 (2008); Sebastian Heilmann, *Policy Experimentation in China's Economic Rise*, 43 STUD. COMPARATIVE INT'L DEV. 1 (2008).

[321] Sebastian Heilmann, *From Local Experiments to National Policy: The Origins of China's Distinctive Policy Process*, 59 CHINA J. 1 (2008).

[322] *Id.*

[323] *Id.*

[324] *Id.*

[325] Fisher & Streinz, *supra* note 30, at 36.

[326] *Id.*

[327] *Id.*

essentially as a *res nullius*, "things that belong to no one but can be claimed by whoever catches them first."[328]

Due to the risks of entrenchment, a more cautious "wait-and-see" approach, in the form of judicial rulings, state regulatory guidance, and legislative and policy experiments, is preferable to immature legislation on data property rights. As much of the Chinese consumer data is already controlled by large internet platforms, any new legislation or proposed reforms on data ownership that upholds the status quo could run the risk of stifling innovation and competition.

This more cautious approach does not mean that nothing can or should be done. As noted earlier, there is room for the legislature, the executive agencies, and the courts to provide more structure and guidance on the issue as to how the existing rules of competition law, along with other legal regimes, should apply to data. Attention should also be paid to ensuring that any monopoly rights on data access and control should be carefully limited to ensure fair rights of access and reuse in the public interest.

## VI. CONCLUSION

For many years, powerful internet platforms have taken economic advantage of the "new resource" of data, and society has muddled through without raising serious questions about who "owns" the data and what data "ownership" entails. To date, there is yet a comprehensive, global legal framework on data property rights. Therefore, data holders are often left to rely upon a thin patchwork of laws, including IP law and competition law, to defend their rights. However, in recent years, as today's economy becomes increasingly big data driven, these existing legal frameworks are proving increasingly insufficient.

In China, as in many other jurisdictions, the issue of data ownership remains unsettled and has provoked heated disputes by private entities over access and control of consumer data. Thus far, the digital economy in China has boomed without clear specification of data ownership. However, the issue of "ownership" can no longer be sidestepped as new and more efficient markets require new rules promoting competition, innovation, and growth for applications of AI and ML. While basic rules have been developed through litigation between private companies under the precepts of anti-unfair competition

[328] *Id.*

law, through government mediation and regulation in high-profile disputes, and through legislative and policy experiments, much work remains to be done before China's ambitions of a nationwide data market are to be realized.

In the Shenzhen legislative experiment, a pioneering attempt at addressing issues of data ownership, early efforts towards ownership recognition raise more questions than solutions. Therefore, it is advisable for the government to take on a cautious "wait-and-see" approach before premature legislation upholding the status quo risks stifling both innovation and competition. The current pattern of allowing judicial rulings by the courts, regulatory guidance by state agencies, and evidence from legislative and policy experiments to accumulate before codification is a promising strategy to allay these concerns without becoming too conservative. The Chinese cases presented herein highlight the present absence of effective and unified legal regimes on data ownership and suggest that the lacuna would benefit from careful study of existing rules as well as prudent experimentation.

# APPLYING SOURCE CLASSIFICATION RULES TO CLOUD COMPUTING TRANSACTIONS: LEASE OR SERVICE?

*Christopher Winters**

## I. INTRODUCTION

Over the past decade, cloud computing and cloud storage have transformed the way we think about computer infrastructure, processing capacity, and data storage.[1] The genesis of cloud computing came from an idea analogous to the way we view the power grid: what if computing power was a utility just as electricity?[2] In the 1990s, this so-called grid aimed to coordinate decentralized computing resources, implement standard network protocols, and deliver some level of computing services.[3] What has evolved, cloud computing, operates on a scale unimagined by the grid, providing a service oriented environment that unlocks unlimited computing power and resources at the swipe of a credit card.[4]

Prior to the advent of the cloud, service providers (those who provide online services to users via the internet) and businesses required the hardware infrastructure necessary to store and manage the software and data they provided.[5] Further, individuals and organizations that required voluminous data storage were required to keep and maintain the infrastructure necessary to store that data.[6] This model demanded high

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[1] *See* Sean Marston et al., *Cloud Computing—The Business Perspective*, 51 DECISION SUPPORT SYS. 176, 176 (2011); Luis M. Vaquero et al., *A Break in the Clouds: Towards a Cloud Definition*, 39 ACM SIGCOMM COMPUTER COMM. REV. 50, 50 (2009); Ian Foster et al., *Cloud Computing and Grid Computing 360-Degree Compared*, 2008 GRID COMPUTING ENVIRONMENTS WORKSHOP 1, 1 (2008).

[2] MICHAEL ARMBRUST ET AL., *Above the Clouds: A Berkeley View of Cloud Computing*, UC BERKELEY RELIABLE ADAPTIVE DISTRIBUTED SYSTEMS LABORATORY 2–3 (2009), http://www2.eecs.berkeley.edu/Pubs/TechRpts/2009/EECS-2009-28.pdf [https://perma.cc/KMK2-TGE4].

[3] Foster et al., *supra* note 1, at 11.

[4] *Id.* at 2-3.

[5] *See* Marston et al., *supra* note 1, at 176–77; ARMBRUST ET AL., *supra* note 2, at 1-2.

[6] *Cloud Storage*, AMAZON WEB SERVICES, https://aws.amazon.com/what-is-cloud-storage/ (last visited July 15, 2020) [https://perma.cc/2GAM-2DR3]; Marston et al., *supra* note 2, at 177.

costs which stood as a barrier for those trying to break into the internet service market or any activity that required immense data storage or powerful computing.[7] A prospective internet service provider with an innovative new idea had to purchase the computer hardware and software necessary to deploy their service, and scale that hardware to meet maximum demand, however infrequent.[8]

Cloud computing providers resolve this capital obstacle by offering remote on-demand network access to hardware and digital content so that the hardware and software is not required to be housed on the premises of the customer.[9] The rise of cloud computing severed the physical hardware requirement from innovative internet service ideas, as third-party infrastructure providers now offer access to the necessary hardware and software at pay-per-use rates.[10] Cloud computing and cloud storage allow developers to create new innovative ideas and simply purchase the hardware and software access necessary, and nothing more, to deploy those ideas, while enjoying limitless on-demand scalability.[11] The various clouds can be used to store remote data, to run applications that are housed in the cloud, or to deliver services, such as streaming video. [12] Rather than accessing data or applications locally on a hard drive in the individual's possession, the cloud allows remote access to hardware held by a cloud provider via the internet.[13]

The innovative and novel solution that is "the cloud" carries with it novel international taxation challenges. The source of income is important because it will impact several important taxation determinations, namely whether income is subject to taxation in the United States and whether income generates potential foreign tax credits, among various other tax determinations.[14] Although at its heart, this source question is a U.S. taxation issue, the broader global implications of income source and taxation rights are staggering, especially for

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[7] *See* Marston et al., *supra* note 1, at 176; ARMBRUST ET AL., *supra* note 2, at 1.

[8] *See* Marston et al., *supra* note 1, at 177; ARMBRUST ET AL., *supra* note 2, at 1.

[9] *See* Peter Mell & Timothy Grance, *The NIST Definition of Cloud Computing*, NIST SPECIAL PUBLICATION 800-145, Sept. 2011, at 2.

[10] ARMBRUST ET AL., *supra* note 2, at 2.

[11] *Id.* at 3.

[12] *What is the Cloud?*, MICROSOFT AZURE, https://azure.microsoft.com/en-us/overview/what-is-the-cloud/ (last visited June 19, 2020) [https://perma.cc/3ZEH-KEH5].

[13] *Id.*

[14] *See* Orly Mazur, *Taxing the Cloud*, 103 CALIF. L. REV. 1, 14-15 (2015).

developing nations.[15] Globalization and the spread of mega multinational enterprises raises many questions that both influence and stem from U.S. taxation concerns. If the United States asserts that income generated from foreign customers of U.S. cloud providers is U.S. source income, it will assert a primary residence-based taxing right and refuse to grant foreign tax credits to offset any foreign taxation asserted by a foreign taxing jurisdiction.[16] The U.S. taxing rules thus ripple through international taxing jurisdictions: a foreign jurisdiction must consider the economic consequences of imposing double taxation on U.S. cloud providers.[17] Practically speaking, the developing foreign jurisdictions have given up on asserting source-based taxation rights to preserve investment in their country.[18] All this is to say that U.S. source determinations may determine whether a foreign taxing jurisdiction will assert source-based taxing rights on U.S. cloud provider's income from foreign customers, and under U.S. law, one must begin by determining what set of source rules apply.[19]

The abstract nature of cloud computing raises several classification questions that will ultimately form the basis for determining the source of these multi-nation transactions.[20] A cloud transaction typically combines some combination of storage space, computing resources, hardware and software maintenance, applications, interfaces, and data analytics.[21] This multifaceted nature requires inquiry into a uniform classification as to the type of transaction into which cloud computing falls. In 2019, the U.S. Treasury issued proposed regulations titled, Classification of Cloud Transactions and Transactions Involving Digital Content ("Proposed Regulations").[22] The regulation provides a

[15] *See* Yariv Brauner, *What the BEPS*, 10 FLA. TAX REV. 55, 65 (2014) (explaining that the assertion of taxing rights by developed nations relegates the claims of developing nations to mere concessions).

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] To determine the source of income under I.R.C. § 862(a), the taxpayer first must determine which of categories one through nine applies. These categories provide a rule for each type of income. Thus, if the taxpayer does not first know what type of income they have, they cannot place it in the proper category, and cannot determine the proper source rule to apply.

[20] *See* Gary D. Sprague, Commentary, *Crowdsourced Guidance for Source of Income Rules for Cloud Transactions*, 49 TAX MGMT. INT'L J. 43, 43 (2020).

[21] *See* Marston et al., *supra* note 1, at 179–80 tbl.1; Mell & Grance, *supra* note 9, at 2 (noting that pooled computing resources include networks, servers, storage, applications, and services).

[22] Classification of Cloud Transactions and Transactions Involving Digital Content, 84 Fed. Reg. 40317 (proposed Aug. 14, 2019) (to be codified at 26 C.F.R. pt. 1).

nine-factor balancing test[23] set to determine whether a cloud transaction constitutes the provision of services or a lease of property.[24]

This Article argues that the balancing test is cumbersome, complicated, and unnecessary; this issue stems from the overly broad definition of a cloud transaction used in the Proposed Regulations. Working through the factors in this balancing test, as explained below and in the examples within the Proposed Regulations, true cloud transactions will always constitute the provision of services.[25] This Article argues that, as simplicity leads to ease in application, the Proposed Regulations must adopt a narrow definition which properly encompasses cloud transactions alone, followed by a clear statement that cloud transactions constitute the provision of services.[26]

The remainder of this Article proceeds as follows: Section II of this Article discusses the four different models of cloud computing to familiarize the reader with the wide array of available products and the common nature of these models. Section III outlines the international tax source rules, classification considerations, and reclassification of a transaction based on an evolving map of factors used to differentiate between a lease and the provision of services. Section IV applies these factors, from existing I.R.C. § 7701(e) and the new Proposed

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[23] The nine factors suggesting the provision of service are:

> (i) The customer is not in physical possession of the property; (ii) The customer does not control the property, beyond the customer's network access and use of the property; (iii) The provider has the right to determine the specific property used in the cloud transaction and replace such property with comparable property; (iv) The property is a component of an integrated operation in which the provider has other responsibilities including ensuring the property is maintained and updated; (v) The customer does not have a significant economic or possessory interest in the property; (vi) The provider bears any risk of substantially diminished receipts or substantially increased expenditures if there is nonperformance under the contract; (vii) The provider uses the property concurrently to provide services to entities unrelated to the customer; (viii) The provider's fee is primarily based on a measure of work performed or the level of the customer's use rather than the mere passage of time; and (ix) The total contract price substantially exceeds the rental value of the property for the contract period.

*Id.* at 40326.

[24] *Id.*

[25] *See, e.g., id.* at 40326–29 (illustrating that none of the examples result in a lease transaction).

[26] This simple approach can also be used to narrowly define streaming transactions and classify them as the provision of services as well.

Regulations to cloud transactions, analyzing each factor for fit and applicability. Section V takes a detailed look at current cloud offerings, ultimately concluding that none of the products currently available resemble a lease. In section VI, the Article attempts, but fails, to devise a true cloud transaction that is properly classified as a lease. Finally, in section VII, the Article concludes by proposing a solution, which is a definitional refinement that properly encompasses true cloud computing transactions and allows for a definitive classification—all cloud computing transactions constitute the provision of services.

## II. THE FOUR MODELS OF CLOUD COMPUTING

Cloud transactions can manifest in several forms geared toward accomplishing the above purposes of cloud computing and storage; namely, Infrastructure as a Service ("IaaS"), Platform as a Service ("PaaS"), Software as a Service ("SaaS"), and Function as a Service ("FaaS"). IaaS provides virtual networking, machines, and storage space on-demand so individuals and organizations are not required to purchase their own machines or infrastructure.[27] The provider offering IaaS typically maintains and houses the servers while the customer can deploy and manage software and data on those servers.[28] An IaaS deployment acts as the customer's own datacenter that is housed remotely and free of maintenance. Amazon EC2 and S3, popular cloud computing products, are examples of IaaS.[29]

PaaS provides an additional layer on top of IaaS— a development environment housed in the cloud.[30] Via the PaaS model, developers can pay for all the tools they need to build applications.[31] PaaS is often geared toward application development, including virtual

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[27] *See* Sushil Bhardwaj et al., *Cloud Computing: A Study of Infrastructure as a Service (IaaS)* 2.1 INT'L J. ENGINEERING & INFO. TECH. 60, 62 (2010); *see also What is IaaS?*, MICROSOFT AZURE, https://azure.microsoft.com/en-us/overview/what-is-iaas/ (last visited March 6, 2020) [https://perma.cc/GP6J-VMQ8]; *Types of Cloud Computing*, AMAZON WEB SERVICES, https://aws.amazon.com/what-is-cloud-computing/?nc2=h_ql_le_int_cc (last visited June 18, 2020) [https://perma.cc/5GJA-6CQU].

[28] *See* Bhardwaj, *supra* note 27, at 62–63.

[29] *Id.* Additional, parallel examples of IaaS products include Microsoft Azure and Google Cloud.

[30] *What is PaaS?*, MICROSOFT AZURE, https://azure.microsoft.com/en-us/overview/what-is-paas/ (last visited March 6, 2020) [https://perma.cc/LDH3-2ED5]; *Types of Cloud Computing*, *supra* note 27.

[31] *What is Platform-as-a-Service (PaaS)?*, CLOUDFLARE, https://www.cloudflare.com/learning/serverless/glossary/platform-as-a-service-paas/ (last visited June 19, 2020).

machines and server storage (like IaaS), as well as development tools, operating systems, and services necessary for building, testing, deploying, managing, and updating web applications.[32] The Google App Engine is a well-known example of PaaS.[33]

The most comprehensive cloud form, SaaS, adds a third level of abstraction.[34] SaaS takes cloud computing beyond storage and application development and provides complete software solutions in which the software is stored on the provider's infrastructure.[35] The average person may be most familiar with this cloud model, and may not realize that they use cloud computing resources daily.[36] Email services like Gmail and Outlook are examples of SaaS models.[37] The software and data that run these email systems are located on the provider's servers; the customer is simply accessing it remotely when logging in to send and retrieve emails.[38]

Finally, lesser-known serverless cloud computing, sometimes called Function as a Service ("FaaS"), is a fourth cloud computing model.[39] FaaS eliminates the need for customers to pay for idle computing time.[40] With the FaaS model, developers can write a piece of modular code and execute it in response to an event.[41] In other words, unlike other models where the customer pays for an instance whether it

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[32] *Id.*

[33] Vaquero, *supra* note 1, at 51; *see also App Engine*, GOOGLE CLOUD, https://cloud.google.com/appengine (last visited July 15, 2020) [https://perma.cc/M8FZ-GKYZ]; Amrita Sekhon, *PAAS Framework Implementation of Cloud Computing with Google Application Engine - A Review*, 6 INT'L J. COMPUTER SCI. ENGINEERING & TECH. 218 (2016).

[34] *See SaaS vs. PaaS vs. IaaS: What's the Difference & How to Choose*, BMC BLOGS, https://www.bmc.com/blogs/saas-vs-paas-vs-iaas-whats-the-difference-and-how-to-choose/ (last visited October 21, 2021) [https://perma.cc/A5KG-QVN5]; *Cloud Computing Environment*, IRS, https://www.irs.gov/privacy-disclosure/cloud-computing-environment (last visited January 16, 2022) [https://perma.cc/NTE2-9G79].

[35] *What is SaaS?*, MICROSOFT AZURE, https://azure.microsoft.com/en-us/overview/what-is-saas/ (last visited March 6, 2020) [https://perma.cc/2EGE-PEHU]; *Types of Cloud Computing*, *supra* note 27.

[36] *Id.*

[37] *See* C.G. Lynch, *Why Enterprises are Moving to Google Apps, Gmail*, INFO WORLD (June 10, 2009), https://www.infoworld.com/article/2632917/why-enterprises-are-moving-to-google-apps--gmail.html [https://perma.cc/C98E-5GV7].

[38] *What is SaaS? SaaS Definition*, CLOUDFLARE, https://www.cloudflare.com/learning/cloud/what-is-saas/ (last visited June 19, 2020).

[39] *Faas (Function-as-a-Service)*, IBM CLOUD EDUCATIONS, https://www.ibm.com/cloud/learn/faas (July 30, 2019) [https://perma.cc/D9GE-R8BX].

[40] *What is Function as a Service (FaaS)?*, CLOUDFLARE, https://www.cloudflare.com/learning/serverless/glossary/function-as-a-service-faas/ (last visited June 19, 2020).

[41] *Id.*

is active or idle, under an FaaS model, the customer only pays when the code is triggered.[42] When this happens, an instance spins up, executes the code, and then shuts down.[43] AWS Lambda is an example of a serverless FaaS product.[44]

The above models can be deployed in private, public, or hybrid environments.[45] Private cloud deployments are developed for single organizations and may be located on that organization's premises or the premises of a third-party provider.[46] A public cloud is offered to multiple customers who share computing services.[47] Despite sharing servers and computing resources, a customer's data and applications are hidden from other cloud users.[48] There are also hybrid deployments that feature a private cloud paired with a public cloud.[49] Such developments provide the security benefits of a private cloud and the scalability and cost savings of a public cloud.[50]

When utilizing cloud computing technology, one may wonder where their data is physically stored. When accessing software, a similar question arises: Where is a copy of the application stored? This question is not easily answered. Often a single "cloud" consists of many data centers spread throughout various geographic areas worldwide.[51] For example, Microsoft Azure and Office 360 data centers are spread across ten regions in the Americas, fifteen regions in Europe, seventeen Asia Pacific regions, and six regions in the Middle East and Africa.[52] For certain products, Azure allows the user to select which region their data will be stored and may copy the data to any other region in that

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[42] *Id.*

[43] *Id.*

[44] *AWS Lambda*, AMAZON WEB SERVICES, https://aws.amazon.com/lambda/?nc2=h_ql_prod_fs_lbd (last visited July 15, 2020) [https://perma.cc/5H2R-32DJ].

[45] Mell & Grance, *supra* note 9, at 3.

[46] *What are Public, Private, and Hybrid Clouds?*, MICROSOFT AZURE, https://azure.microsoft.com/en-us/overview/what-are-private-public-hybrid-clouds/ (last visited June 21, 2020) [https://perma.cc/M3KD-TYWQ].

[47] *What is a Public Cloud? Public vs. Private Cloud*, CLOUDFLARE, https://www.cloudflare.com/learning/cloud/what-is-a-public-cloud/ (last visited June 21, 2020).

[48] *Id.*

[49] *What are Public, Private, and Hybrid Clouds?*, *supra* note 46.

[50] *Id.*

[51] *See* Gil Vernik et al., *Data On-boarding in Federated Storage Clouds*, *in* IEEE SIXTH INT'L CONF. ON CLOUD COMPUTING & SCI. 245 (2013); E.K. Kolodner et al., *A Cloud Environment for Data-Intensive Storage Services*, *in* IEEE THIRD INT'L CONF. ON CLOUD COMPUTING & SCI. 357–66 (2011).

[52] *Azure Locations*, MICROSOFT AZURE, https://azure.microsoft.com/en-us/global-infrastructure/locations/ (last visited June 19, 2020) [https://perma.cc/8X6R-VF99].

geographic area.[53] Under this model, a user could choose to have their data stored in the Northern Europe data center located in Ireland and Azure may copy that data to the Western Europe data center in the Netherlands.[54] Azure could even move the data to the Netherlands all together.[55] Other products do not allow the user to choose the location of their data, and Azure may use any of their global data centers.[56] In this instance and under certain circumstances, the user may not know where their data is stored.[57]

Amazon Web Services ("AWS") has a similar global structure with data centers located around the world.[58] AWS allows users to deploy applications via any of their data centers worldwide.[59] Users can replicate their content and store it in data centers in several regions as well.[60] Google Cloud allows users to select a single region where data is to be stored or a redundant distribution of data across the United States, European Union, or Asia.[61]

These various examples raise several questions concerning geography. Where exactly is the digital content housed?[62] On how many servers, and in how many countries, is the data currently stored? Even if the user knows exactly where applications, content, and data are located, does it matter for tax purposes considering the user's ability to access it worldwide and move it between regions arbitrarily?

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[53] *Microsoft Azure—Where is my Customer Data*, MICROSOFT AZURE, https://azuredatacentermap.azurewebsites.net (last visited June 19, 2020) [https://perma.cc/RRF9-MA2E].

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Global Infrastructure*, AMAZON WEB SERVICES, https://aws.amazon.com/about-aws/global-infrastructure/ (last visited June 19, 2020) [https://perma.cc/G3FE-UYAB].

[59] *Id.*

[60] *Data Privacy FAQ*, AMAZON WEB SERVICES, https://aws.amazon.com/compliance/data-privacy-faq/ (last visited June 19, 2020) [https://perma.cc/C7YQ-GKZZ].

[61] *Storage and Data Transfer*, GOOGLE CLOUD, https://cloud.google.com/blog/products/storage-data-transfer/google-cloud-expands-storage-portfolio-with-latest-launches (last visited Jan. 2, 2022) [https://perma.cc/7QBY-CBGB].

[62] Or more precisely, where should the law consider the data to be?

## III. SOURCE RULES AND TRANSACTION CLASSIFICATION

The United States taxes its residents on their worldwide income regardless of its source.[63] This is not to say that source is unimportant for United States residents, as foreign source income that is taxed by a foreign state may give rise to foreign tax credits.[64] The foreign tax credit subordinates the United States' residence-based taxing right to the foreign country's source-based taxing right.[65] For non-residents, the source of their income may dictate whether the United States can tax it at all, as a non-resident's foreign source income generally is not taxed by the United States.[66] Further, from an international perspective, when the United States asserts a residence-based taxing right, it becomes difficult for developing nations to simultaneously assert a source-based taxing right because the additional layer of taxation may deter economic growth in that developing nation[67]. For this reason, income source determinations under U.S. law truly affect a global taxing dilemma.[68]

Internal Revenue Code Section 861 provides the source rules for various categories of transactions.[69] Because of these rules, the form and substance of a transaction will determine whether the income from that transaction is U.S. source or foreign source income.[70] For instance, personal services are sourced under the "place of performance" rule.[71] Compensation for services that are performed in the United States is U.S. source income, while compensation for services that are performed outside of the United States is foreign source income.[72] Rental income from tangible property is sourced according to where the tangible property is located.[73] Royalty income generated from the licensing of intangibles is sourced according to where the intangibles are used, which is typically determined by the legal protection the licensee is paying

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[63] I.R.C. Publication 54; *see also,* I.R.C. § 1.

[64] I.R.C. § 901(b).

[65] *See* Hugh J. Ault & David F. Bradford, *Taxing International Income: An Analysis of the U.S. System and its Economic Premises, in* TAXATION IN THE GLOBAL ECONOMY 11, 12 (Assaf Razin & Joel Slemrod eds., 1990).

[66] I.R.C. § 864(c)(4)(A).

[67] Sebastian Beer & Geerten Michielse, *Strengthening Source-Based Taxation*, *in* CORPORATE INCOME TAXES UNDER PRESSURE 229, 245, 247–48 (2021).

[68] *See* Brauner, *supra* note 16, at 65.

[69] I.R.C. § 861.

[70] *See* Andrew Walker, *Exceptions in Search of a Rule: The Source and Taxability of "None of the Above" Income*, COLUM. L. SCH. TAX POL'Y COLLOQUIUM, Oct. 8, 2009, at 14-18.

[71] I.R.C. § 861(a)(3).

[72] I.R.C. §§ 861(a)(3), 862(a)(3).

[73] I.R.C. §§ 861(a)(4), 862(a)(4).

for.[74] Accordingly, if a licensee is paying to use software in the United States, the amount paid to the licensor is U.S. source income.

Personal services are subject to their own sourcing rule.[75] However, simply calling a transaction a service contract does not automatically classify the transaction as a service since the true substance of the transaction may require reclassification.[76] The foundation of this potential reclassification was built upon the Investment Tax Credit of the Internal Revenue Code of 1962 ("ITC") and a series of administrative determinations, rulings, and memoranda relating to the application of that credit.[77] In 1962, the ITC was created to allow a credit for taxpayers who purchased machinery, equipment, and certain other property, to encourage modernization and expanded investment in capital equipment.[78] The property that qualified for the ITC was referred to as "section 38 property" which excluded "property used by a tax-exempt organization."[79] This meant that if a taxpayer purchased tangible personal property and leased it to a tax-exempt organization, that property would not be eligible for the ITC.[80] But, if a taxpayer purchased tangible personal property and used it in its own business to provide services to a tax-exempt organization, it may still qualify for the ITC.[81] Thus, the distinction between whether a transaction was classified as a lease or service had significant tax implications.

Soon after the enactment of the ITC, guidance in the form of Revenue Rulings and Private Letter Rulings began to emerge, containing factors that the IRS would use to determine if a purported service contract was actually a lease of property to a tax-exempt organization.[82]

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[74] *Id.*

[75] § 861(a)(3).

[76] I.R.C. § 7701(e).

[77] *See, e.g.*, I.R.S. Tech. Adv. Mem. 79-13-003 (Nov. 28, 1978); I.R.S. Priv. Ltr. Rul. 78-47-075 (Aug. 28, 1978); I.R.S. Priv. Ltr. Rul. 78-29-066 (Apr. 21, 1978); Rev. Rul. 72-407, 1972-2 C.B. 10; Rev. Rul. 71-397, 1971-2 C.B. 63; Rev. Rul. 70-313, 1970-1 C.B. 9; Rev. Rul. 68-109, 1968-1 C.B. 10.

[78] *See* S. Rep. No. 1881, 87th Cong., 2d Sess.

[79] *Id.* at 16.

[80] Treas. Reg. § 1.48-1(j) (1964).

[81] *See* Rev. Rul. 68-109, 1968-1 C.B. 10 for the first ruling in which the I.R.S. noted the distinction between the provision of services and a lease of property to a tax-exempt organization.

[82] *See generally*, I.R.S. Tech. Adv. Mem. 79-13-003 (Nov. 28, 1978); I.R.S. Priv. Ltr. Rul. 78-47-075 (Aug. 28, 1978) (integrated operation, risk of loss); I.R.S. Priv. Ltr. Rul. 78-29-066 (Apr. 21, 1978) (maintenance and repairs); Rev. Rul. 72-407, 1972-2 C.B. 10 (integrated operation); Rev. Rul. 71-397, 1971-2 C.B. 63 (possession and control, payment based on passage of time or work performed, maintenance and repairs); Rev. Rul. 70-313, 1970-1 C.B. 9 (ability to move and replace); Rev. Rul. 68-109, 1968-1 C.B. 10 (possession and control, integrated operation, risk of loss).

In the 1980s, courts began compiling these factors into a balancing test, the first being the Court of Claims in 1981.[83] In *Xerox Corp. v. United States*, that court denoted two categories of factors that distinguish between leases and service contracts: (1) possessory interest factors,[84] and (2) integrated operation factors.[85]

Congress addressed the distinction between a lease and a service contract in the Deficit Reduction Act of 1984, including the new section 7701(e), which encompassed many of the factors raised by the IRS and the Court of Claims.[86] Section 7701(e)(1) provides six factors used to determine if a service contract (or other arrangement) must be reclassified as a lease of property.[87] The factors look at whether or not (1) the service recipient is in physical possession of the property, (2) the service recipient controls the property, (3) the service recipient has a significant economic or possessory interest in the property, (4) the service provider does not bear any risk of substantially diminished receipts or substantially increased expenditures if there is nonperformance under the contract, (5) the service provider does not use the property concurrently to provide significant services to entities unrelated to the service recipient, and (6) the total contract price does not substantially exceed the rental value of the property for the contract period.[88]

In 1989, the Tax Court tackled an ITC case under the guidance of section 7701(e).[89] In *Smith v. Comm'r,* the court determined that an agreement in which Compscan placed xeroxographic equipment on the premises of a hospital was a lease, not a service contract.[90] Applying each of the six factors, the court concluded that: (1) the hospital had possession of the equipment because it was located on the hospital's

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[83] *See generally* Xerox Corp. v. United States, 656 F.2d 659 (Cl. Ct. 1981).

[84] *Id.* at 674-75 (This category contained four factors: (1) retention of property ownership, (2) retention of possession and control, (3) retention of risk of loss, and (4) reservation of the right to remove and replace property.).

[85] *Id.* at 675 (The distinction here is whether the property is used by the taxpayer to provide service to the customer or whether the customer is using the property to provide service to itself.).

[86] *See* STAFF OF THE J. COMM. ON TAX'N, 98TH CONG., GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE DEFICIT REDUCTION ACT OF 1984 26-29 (Comm. Print 1984).

[87] I.R.C. § 7701(e)(2); *see also* Tidewater Inc. v. United States, 565 F.3d 299, 304 (5th Cir. 2009).

[88] I.R.C. § 7701(e)(1).

[89] *See generally* Smith v. Comm'r, 57 T.C.M. (CCH) 826 (1989).

[90] In *Smith*, the Tax Court also analyzed agreements involving a scanner and a camera but applied pre-section 7701(e) law as those agreements were entered into prior to the enactment of section 7701(e). *See Smith*, 57 T.C.M. (CCH) at 826, 832-33.

premises, (2) the hospital controlled the equipment because the hospital's technicians and physicians operated it, (3) the hospital had a significant economic or possessory interest in the property because it leased the equipment for a large part of its useful life, (4) Compscan did not bear the risk of diminished receipts if it failed to perform under the contract because Compscan did not operate the equipment itself, (5) Compscan did not use the equipment to provide concurrent services to other customers, and (6) the monthly payment constituted the rental value of the equipment.[91] All of the six factors in *Smith* indicated that the agreement was a lease.[92]

The following year in *Musco Sports Lighting, Inc. v. Comm'r*, the Tax Court was tasked with classifying an agreement in which the taxpayer installed sports lighting on the premises of governmental and tax-exempt organizations.[93] The contracts required that customers pay for the lighting via a "service agreement" in which they paid an annual fee for 4–5 years with the option to purchase the lighting out right at the end of that period.[94] The court, applying a pre-section 7701(e) formulation, [95] held that: (1) the taxpayer did not have possession or control of the lights because they were installed on the customers' athletic fields and the customers operated the lights, (2) the cost was calculated on an annual basis, and (3) the lights were not part of an integrated operation of equipment and services.[96] Thus, the agreements were leases.[97]

These two Tax Court cases provide insight into three of the more difficult classification factors. First, both cases appear to assign possession to the party that physically holds the property and control to the party who operates the property.[98] This distinction may prove useful in the cloud computing context because a provider may physically possess a server while a customer exercises some degree of control over

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[91] *Id.*

[92] *Id.*

[93] Musco Sports Lighting, Inc. v. Comm'r, 60 T.C.M. (CCH) 18, 18 (1990).

[94] *Id.* at 19.

[95] The transactions occurred prior to the implementation of §7701(e), therefore the court was required to apply pre-§7701(e) law. *Id.*at 19-20.

[96] *Id.* at 20.

[97] *Id.*

[98] Note that although *Musco Sports Lighting* uses the pre-section 7701(e) formulation in which possession and control are combined into a single element, the court appears to be stating that the customers had possession of the lights because they physically had the lights on their athletic fields and the customers also had control over the lights because they were responsible for operating them. This discrete bifurcation of possession and control parallels the section 7701(e) analysis in *Smith*, and in fact, the bifurcated nature of the possession factor and control factor in section 7701(e) itself.

its operation.[99] The Tax Court cases (and *Xerox*) also explain that the "part of an integrated operation" factor looks to whether the taxpayer is providing an integrated package of services and equipment rather than just equipment.[100]

It was not until 2009 that a court considered the application of section 7701(e) outside the ITC context.[101] In *Tidewater Inc. v. United States*, the Fifth Circuit first determined whether section 7701(e) is constrained to determinations involving the ITC, or whether section 7701(e) applies to any situation in which a transaction must be classified as a lease or service agreement.[102] The court found that because the prefatory language of section 7701(e) expressly stated that the section is "[f]or [the] purposes of chapter 1," it was clear that section 7701(e) is applicable beyond ITC determinations.[103]

The court then applied the above six factors to determine whether provider Tidewater's ocean-going vessel charters were service contracts or leases of the vessels.[104] The charters were time-based and included a crew provided by Tidewater; otherwise, the recipient controlled when and where the boats traveled, as well as what cargo the ship carried.[105] First, the court held that despite the presence of the crew provided by Tidewater, the customer was in physical possession of the vessel because the customer could dictate when and where the vessel traveled.[106] Second, the customer controlled the vessel because it "directed the movement of the vessel, cargo, and passengers."[107] The

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[99] Though, as I note below, this is unlikely as the cloud provider will typically exercise superior control above whatever measure of control the customer is afforded.

[100] *See Musco*, 60 T.C.M. (CCH) at 19; *Smith*, 57 T.C.M. (CCH) at 830; *see also* Xerox Corp. v. United States, 656 F.2d 659, 676–77 (Cl. Ct. 1981).

[101] Tidewater Inc. v. United States, 565 F.3d 299, 303 (5th Cir. 2009); *see also* Gary D. Sprague, *Characterizing Cloud Transactions—Applying §7701(e) to Remote Access Transactions: Part I*, 42.9 TAX MGMT. INT'L J. 559, 559 (2013).

[102] *Tidewater*, 565 F.3d at 303.

[103] *Id.* at 303–04.

[104] *Id.* at 304.

[105] *Id.* at 300.

[106] *Id.* at 305. "This control was sufficient to give the customer constructive possession of the vessel. Although Tidewater's crew was in physical possession of the vessel, this fact is relatively unimportant in light of the customer's constructive control of the vessel." *Id.* This analysis is problematic as it uses control as a proxy for possession while the next factor is actually control. In *Tidewater*, control was counted twice when the court held that the possession factor and the control factor weighed in favor of a lease because the customer had control of the vessel. As I will argue later, the possession factor must be simple—who is actually holding the property—not a compounding of other factors that leads to some concept of constructive possession rather than pure physical possession.

[107] *Id.* at 305.

control that the crew exercised over "the details of routine operation and maintenance" was outweighed by the control exercised by the customer.[108] Third, weighing in favor of a service contract, Tidewater retained economic and possessory interest in the vessel.[109] Fourth, weighing in favor of a service contract, Tidewater bore the risk of substantially diminished receipts in the case of nonperformance under the charters.[110] Fifth, Tidewater did not use the vessel concurrently to provide services to other customers.[111] Finally, Tidewater was compensated in excess of the rental value of the vessel, indicating that the customers were also paying for services.[112]

Ultimately, the court determined that three factors suggested a lease and three factors suggested a service.[113] The court concluded that, in this factual circumstance, the crucial factor was control; therefore, the charters were leases.[114] A major takeaway for *Tidewater*, beyond just analysis of the factors, is the conclusion that section 7701(e) applies to all transactions; paving the way for an existing body of law to classify cloud transactions.[115]

## IV. APPLYING THE CLASSIFICATION RULES TO THE CLOUD

When it comes to cloud transactions, classification has proved elusive due to the intangible and unconventional nature of the cloud.[116] When a customer launches an instance on Amazon AWS, [117] they are paying for access to the physical server(s) on which it is stored and are

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[108] *Id.* at 306.
[109] *Id.*
[110] *Id.* at 307.
[111] *Id.*
[112] *Id.*
[113] *Id.* at 308.
[114] *Id.*
[115] *See* Sprague, *supra* note 101, at 559.
[116] *See Tutorial: Get Started with Amazon EC2 Linux Instances*, AMAZON WEB SERVICES, https://docs.aws.amazon.com/AWSEC2/latest/UserGuide/EC2_GetStarted.html (last visited Jan. 16, 2022) [https://perma.cc/828M-TGJA].
[117] Typically, an instance is a virtual computer running within the larger cloud infrastructure. Think of it like this: in your home you have a single computer that has its own CPU, RAM, and storage. This computer is a single machine. Cloud providers can replicate this through a virtual environment by using hardware to create several virtual machines on a single server of set of servers. *See generally Overview of the Compute Services*, ORACLE CLOUD INFRASTRUCTURE, https://docs.oracle.com/en-us/iaas/Content/Compute/Concepts/computeoverview.htm (last visited May 10, 2021) [https://perma.cc/M7EF-PETS]; *see Tutorial: Get Started with Amazon EC2 Linux Instances, supra* note 116.

paying for Amazon's upkeep and maintenance of the server(s), the development of the interface, the scalability of the product, software, and various other services and benefits that accompany the physical space on a server.[118] Does access to the physical server look like a lease? If so, what effect do the accompanying (and possibly more valuable) services have on classification? Despite this suggested duality, case law demands a single classification for integrated transaction.[119] This illustrates the root of the balancing test of section 7701(e)—that is to determine whether the single transaction leans more towards the provision of services or more toward the lease of property. What exactly is the customer paying for? Is it the use of some physical property, namely access to servers? Or are the servers ancillary to the service that the provider sells, as in the hardware is just a necessary instrument for the provision of service?[120]

In 2019, the Treasury issued proposed section 1.861–19 regulations ("Proposed Regulations") to resolve the classification of cloud transactions.[121] To accomplish this classification, the Proposed Regulations adapt the existing balancing test found in section 7701(e) to the world of cloud computing.[122] The Proposed Regulations recognize that cloud transactions present a unique nature, as the network access inherent to cloud transactions differs from physical access to property.[123] Due to these differences, the Proposed Regulations expand the multi-factor balancing test of section 7701(e) to a total of nine factors that indicate a service over a lease.[124] The nine factors suggesting the provision of service are:

> (i) The customer is not in physical possession of the property; (ii) The customer does not control the property, beyond the customer's network access and use of the property; (iii) The provider has the right to

[118] *See AWS Compute*, AMAZON WEB SERVICES, https://aws.amazon.com/products/compute/?nc2=h_ql_prod_cp (last visited December 30, 2021) [https://perma.cc/FMK6-AA25].

[119] Tidewater Inc. v. United States, 565 F.3d 299, 300 (5th Cir. 2009). *Tidewater* split the transactions into a rental component and a service component—the court reclassified the transaction into a single characterization. *See also* Gary D. Sprague, *Characterizing Cloud Transactions—Applying §7701(e) to Remote Access Transactions: Part II*, 42.11 TAX MGMT. INT'L J. 701, 702 (2013).

[120] *See e.g.*, Rev. Rul. 68-109, 1968-1 C.B. 10 (explaining that switchboards provided the means by which a service was provided).

[121] *See generally* Classification of Cloud Transactions and Transactions Involving Digital Content, *supra* note 22.

[122] *Id.* at 40319.

[123] *Id.*

[124] *Id.*

> determine the specific property used in the cloud transaction and replace such property with comparable property; (iv) The property is a component of an integrated operation in which the provider has other responsibilities, including ensuring the property is maintained and updated; (v) The customer does not have a significant economic or possessory interest in the property; (vi) The provider bears any risk of substantially diminished receipts or substantially increased expenditures if there is nonperformance under the contract; (vii) The provider uses the property concurrently to provide services to entities unrelated to the customer; (viii) The provider's fee is primarily based on a measure of work performed or the level of the customer's use rather than the mere passage of time; and (ix) The total contract price substantially exceeds the rental value of the property for the contract period.[125]

The framework in the Proposed Regulations begins to translate the section 7701(e) balancing test into a form that fits cloud transactions, pending detailed clarification as to how certain factors are to be construed.[126] This clarification requires analysis of each of the nine factors to determine what they tell us about the nature of the transaction. That is, whether the factor differentiates between a lease and a service in the context of cloud computing, and how each factor can be tailored to draw a relevant distinction.

To begin, it must be noted that as six of these factors emerge from a balancing test of which the complexities of the internet and cloud computing were far from thought, their application requires interpretation and adjustment to the cloud computing context.[127] For example, the Proposed Regulations explain that the term "property" refers to "computer hardware, digital content, or other similar resources."[128] This definition leads to analysis of the first factor.

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[125] *Id.* at 40326.

[126] *See* Sprague, supra note 101, at 560–63.

[127] *See* Mazur, *supra* note 14, at 15.

[128] Classification of Cloud Transactions and Transactions Involving Digital Content, *supra* note 22, at 40326.

### *A. Physical Possession of the Property*

Due to the above definition of property, whenever that term is invoked, the Proposed Regulations appear to call for a two-prong analysis: (1) physical property (computer hardware), and (2) intangibles (digital content and provision of services).[129] Determining who has physical possession of the computer hardware is easy enough—determine the location of the datacenters (which physically house the servers) that the customer is accessing.[130] If a provider delivers a server to the customer's place of business and installs it on their premises, the transaction looks more like a lease.[131] On the other hand, if the provider physically houses the server in its own data center, this suggests a service contract.[132] As the hardware is tangible property, this factor is similar to a traditional classification of non-cloud transactions.[133]

Often, cloud providers couple their hardware access with extensive software platforms.[134] The Proposed Regulations seem to suggest a necessity to analyze the digital content as "property" just as the physical hardware.[135] If this is truly Treasury's directive, it certainly presents challenges as computer programs have an intangible aspect that

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[129] Classification of Cloud Transactions and Transactions Involving Digital Content, *supra* note 22, at 40326 (noting that property consists of both physical hardware and intangible digital content).

[130] *See, e.g.*, *Id.* at 40326–27 (Examples 1 and 2 refer to physical possession as it relates to possession of the servers.); *see also* Lauren G. Citrome, Note, *Data Centers and REITS: Is There Real Estate in The Cloud?*, 11 N.Y.U. J.L. & BUS. 191, 230 (2014).

[131] *See, e.g.*, *Musco*, 60 T.C.M. (CCH) at 18, 20 (holding that the provider did not have possession of lighting fixtures that it installed on the premises of its customers). This is a very unlikely scenario in a cloud computing transaction because much of the benefit associated with cloud computing stems from the relocation of servers to third party datacenters that are located off-premises.

[132] *See e.g.*, *Smith*, 57 T.C.M. (CCH) at 826, 831-32 (holding that the provider retained possession and control as it housed the machine on its own leased premises).

[133] Prior to the Proposed Regulations, the IRS and courts often treated possession and control as a single factor. This led to many situations in which although the provider placed the property with the customer, it retained enough control to sway the IRS or court to hold that the provider retained possession despite not physically possessing the property. *See* Xerox Corp. v. United States, 656 F.2d 659, 676 (Cl. Ct. 1981), Rev. Rul. 70-313, 1970-1 C.B.9; Rev. Rul. 68-109, 1968-1 C.B. 10. The Proposed Regulations and section 7701(e) separate physical possession and control into two factors, so I believe it is best to confine the physical possession analysis to the question of who physically holds the property (at least in the case of tangible computer hardware).

[134] *See, e.g., AWS Lambda*, *supra* note 44; *IaaS v. PaaS vs. SaaS*, IBM, https://www.ibm.com/cloud/learn/iaas-paas-saas (last visited Jan. 16, 2022) [https://perma.cc/T9FE-F6MD].

[135] *See* Classification of Cloud Transactions and Transactions Involving Digital Content, *supra* note 22, at 40327 (Example 3 contemplates a scenario where the customer is purchasing service access as well as access to a software platform.).

is separate and apart from the physical medium in which they are stored; therefore, possession of the physical medium (in this case the server) does not necessarily equate to possession of the digital content.[136] If this factor is to apply at all to digital content, we must determine what the term "physical possession" could mean as applied to intangibles.

The term "possession" is a variable term and must be adapted to the type of property that is being analyzed.[137] What could "physical possession" mean in the context of cloud computing and the proposed regulations? Physical possession cannot mean control over the digital content because the next factor in this balancing test is control. Therefore, it must be something more. In this context, physical possession of digital content can only mean that the party has downloaded the software onto his or her computer hardware. In this scenario, a different set of regulations apply because there has been a transfer of the digital content.[138] In other words, if the customer ever takes physical possession of digital content, the transaction is now outside the scope of the proposed cloud regulations. For this reason, we need only consider who has physical possession of the computer hardware, which turns the analysis to the second factor.

### *B. Control of the Property*

Where a provider retains control over the property, the transaction looks like a service.[139] On the other hand, when a provider cedes control of the property to its customer, the transaction takes on characteristics of a lease.[140] Control is a measure of the extent to which the recipient may dictate how the property is operated, maintained, or improved.[141]

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[136] *See* Ronnen v. Comm'r., 90 T.C. 74, 96–98 (1988); Bank of Vermont v. United States, No. 86–23, 1988 WL 58045, at *4–5 (D. Vt. Jan. 21, 1988) (explaining that software may be an intangible as it is not necessarily dependent upon its tangible medium); *see also* Raymond T. Nimmer & Patricia Ann Krauthaus, *Information as a Commodity: New Imperatives of Commercial Law*, 55 L. & CONTEMP. PROBS. 103, 105 (1992).

[137] Xerox Corporation v. United States, 656 F.2d 659, 674 (Cl. Ct.1981)

[138] *See* Classification of Cloud Transactions and Transactions Involving Digital Content, *supra* note 22, at 40324, 40327. Proposed regulation section 1.861–18 covers transactions in which digital content is transferred to the customer. Example 5 demonstrates how the downloading of software is not a cloud transaction.

[139] *Id.* at 40326; *see also* Rev. Rul. 70-313, 1970-1 C.B. 9; Rev. Rul. 68-109, 1968-1 C.B. 10.

[140] *See* Rev. Rul. 72-407, 1972-2 C.B. 10; Rev. Rul. 71-397, 1971-2 C.B. 63.

[141] STAFF OF THE J. COMM. ON TAX'N, *supra* note 86, at 59; *see also* Citrome, *supra* note 130, at 230.

Unlike the possession factor (which allows only for analysis of the hardware), the control analysis requires a two-part analysis: (1) control of the hardware, and (2) control of the digital content.[142] This is because the Proposed Regulations acknowledge that, where possible, both hardware and software elements must be considered when characterizing the transaction.[143] First, control of the computer hardware must be analyzed from the perspective of its tangible nature. The ability to manipulate the contents of the server or its intangible structure does not amount to control of the physical hardware.[144] The first prong of the analysis requires determination as to who operates, maintains, and improves the physical computer hardware.[145] Where the cloud provider is responsible for keeping the servers running, maintaining their components, and updating those components, when necessary, the first control prong favors a service.

The second prong of the control factor requires analysis of control over the intangible digital content—that is who operates, maintains, and improves any software.[146] It simply cannot be that when a customer is able to remotely manipulate the digital content on a server, it is now in control of the intangible aspects of that server *despite* an overarching control exercised by the provider.[147] Instead, where the provider's control over the digital content supersedes any control the customer has, this prong favors provider's control.[148] In reality, under all four models of cloud computing, the customer exercises some degree of control over digital content,[149] but it is only able to manipulate digital content within a box, the parameters of which are set by the provider.[150]

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[142] Classification of Cloud Transactions and Transactions Involving Digital Content, *supra* note 22, at 40326 (noting that property consists of both physical hardware and digital content).

[143] *See* Classification of Cloud Transactions and Transactions Involving Digital Content, *supra* note 22, at 40327-29 (illustrating, via example 3, 6, and 10, analysis of both hardware control and software control); Citrome, *supra* note 130, at 230.

[144] *See* Citrome, *supra* note 130, at 230; Sprague, *supra* note 119.

[145] *See* Sprague, *supra* note 101; *see also* STAFF OF THE J. COMM. ON TAX'N, *supra* note 86, at 59.

[146] *See* Classification of Cloud Transactions and Transactions Involving Digital Content, *supra* note 23, at 40329.

[147] *See* Sprague, *supra* note 119; Citrome, *supra* note 130, at 230.

[148] This concept is closely related to virtualization. Virtualization hides the actual computing platform from the user and provides them an emulated interface that appears as its own individual machine despite being a virtual machine within a much larger actual machine. The user cannot escape this virtual machine. *See* Marston et al., *supra* note 1, at 178.

[149] And, in many cases, has no control over to software that runs the server.

[150] *See, e.g.*, *Logical Separation on AWS*, AWS (July 28, 2020), https://docs.aws.amazon.com/whitepapers/latest/logical-separation/logical-separation.pdf [https://perma.cc/43DN-PVT8].

The customer cannot access other data that may be stored on the same server, cannot change orchestration software, cannot modify the proprietary software source code, and cannot suspend access to software for violations of rules and policies since only the provider can do that.[151]

This model of the control dynamic in a typical cloud transaction helps to illustrate what a digital content control factor favoring a lease may look like. For customers to be in control of the digital content that they are paying for, the box must be removed, and the customer must have unfettered access to the server's contents as well as unrestricted ability to modify the software that is on that server.[152] Where there are no restrictions on access or ability to modify, it appears that the customer has control of the digital content involved in the cloud transaction, thus the second prong of this factor favors a lease.[153]

### *C. Right to Determine Specific Property and Replace*

A typical cloud computing transaction may identify the general location of the server(s) involved (for example, the country), but not a specific piece of hardware (as in a specific server).[154] The cloud provider may select the server in which a customer's information is stored and replace that server or move their data at will.[155] This is indicative of a

[151] All of the cloud-based platforms run on Linux. Linux is based on a hierarchy of permissions. Typically, the providers retain root permissions that supersede any permissions that customers are granted, allowing the provider to retain ultimate control of the digital content. *See, e.g.*, David Barrera et al., *A Methodology for Empirical Analysis of Permission-Based Security Models and Its Application to Android, in* CCS '10: PROC. OF THE 17TH ACM CONF. ON COMPUTER & COMM. SECURITY 73 (2010) https://doi.org/10.1145/1866307.1866317 (explaining how the android permission system allows the provider to retain ultimate control on an application and its digital content).

[152] Or at least a degree of control that surpasses that of the provider. After all, one party may have a significant degree of control, but if the other party's control far exceeds that, the control factor will lean in their direction. Where the customer controls digital content within a box and the provider controls the bounds of that box, the provider has far more control over the digital content.

[153] In a typical cloud transaction, the provider will always retain control of their proprietary software, but in some sort of atypical hands-off arrangement, a provider could allow a customer to have free reign over a particular server. This will suggest a lease as to the digital content prong. Professor Mazur notes that a consequence of cloud computing, by definition, is that consumers have less control over programs and applications. *See* Mazur, *supra* note 14, at 10.

[154] *See* Mell & Grance, *supra* note 9, at 2.

[155] *See* Vaquero et al., *supra* note 1, at 53 (explaining that virtualization in cloud computing hides the heterogeneity of the underlying hardware, i.e., the customer does not know, let alone choose, the specific hardware that they are using).

service contract.[156] This is like the difference between a hotel and a rental property. If a customer pays for a specific beach home at a specific address, this appears to be a lease.[157] But, if a customer pays an amount to a resort for any unit that matches the specifications of their purchase, and the resort selects the specific unit, this looks like a service. Additionally, if the provider can replace the property with similar property (switch a customer's hotel room with another of the same specifications), it is further indicative of a service.[158]

The Proposed Regulations contemplate something similar. For example, if the customer selects a specific server, say server number 1234, and the provider cannot replace that server with a comparable server, this factor suggests a lease.[159] In a typical cloud computing transaction, the customer is not occupying an entire server and their data is often spread across several servers.[160] When the customer purchases 1TB of space, for example, and selects a data center in Germany, the provider decides where to house the data within that datacenter. A transaction of this nature will always cause this factor to weigh in favor of a service contract. If, however, the customer contracts with a provider for a specific server, say server number 1234, and the provider cannot replace that server with one of the same specifications, this factor suggests a lease.

Factors two and three—control and the right to determine specific property/replace it—are closely interconnected. Where a

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[156] *See* Classification of Cloud Transactions and Transactions Involving Digital Content, *supra* note 22, at 40326; *see also* Xerox Corp. v. United States, 656 F.2d 659, 675 (Cl. Ct. 1981).

[157] *See* Rev. Rul. 71-397, 1971-2 C.B. 63 (noting that although the customer could select a certain model, the fact that the provider could select the specific machine suggested a service contract).

[158] *See* Rev. Rul. 71-397, 1971-2 C.B. 63 (customer selects model of machine, provider selects the specific machine); I.R.S. Priv. Ltr. Rul. 78-29-066 (Apr. 21, 1978) (provider could replace televisions); Rev. Rul. 70-313, 1970-1 C.B. 9 (provider could move or replace vending machines).

[159] I question whether this distinction makes sense in a transaction where the physical item involved is fungible—like that of storage on a server. Who cares if you are paying for 1TB of space on Server 013456 or 1TB of space on Server 850303 as long as you are receiving the amount of space at the specifications you are paying for? If a provider had one hundred identical milk crates and you pay a fee to use ten of them for one day, does the ability to select which ten crates suggest anything significant? Let's take this a step further. What if you will never even see the crates? Your movers are using them to move some things while you are away. This determination takes on even less importance, and in fact this factor simply is not relevant in a scenario where the tangible item is both fungible and unseen by the customer—a scenario like storage space for cloud computing.

[160] *See* Mell & Grance, *supra* note 9, at 2 (explaining the multi-tenant model in which different hardware resources are dynamically assigned and reassigned).

provider has the right to select which server the customer accesses, it likely also has control of that server.[161]

### *D. Integrated Operation and Other Responsibilities*

Factor number four seeks to determine whether the hardware and digital content are part of a larger integrated operation in which the cloud provider has other responsibilities, such as maintenance and updating.[162] Looking to case law and administrative rulings, the larger question that this factor seeks to answer is whether the provider is using the property to provide a service to its customer, or whether it is providing the customer property so that the customer can provide a service to itself.[163] To answer that broad question, courts look to whether the agreement couples property with services, such as maintenance and improvement,[164] and whether the property is part of an interconnected network used to provide services.[165]

A comparison by way of example illustrates the determination that the Proposed Regulations contemplate. If a cloud provider simply turns over the property to the customer—absent additional service such as maintenance, updating, or scalability via a broader network of servers that is integrated into a larger operation—this appears in favor of a lease.[166] The provider does not provide services in addition to the property, and the property is not part of a larger integrated operation. But, where the cloud provider brings the provision of property into an integrated operation that also provides additional services, this appears to favor a service contract.[167] Typical cloud transactions will follow the second example—the provider will maintain the servers and update the software on those servers, and each server will be part of an integrated

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[161] *See* Sprague, *supra* note 101, at 80 (Gary Sprague points out that factor three will help inform the control analysis.).

[162] Classification of Cloud Transactions and Transactions Involving Digital Content, *supra* note 22, at 40327.

[163] *Compare* Xerox Corp. v. United States, 656 F.2d 659, 675 (Cl. Ct. 1981), *and* Rev. Rul. 68-109, 1968-1 C.B. 10, *with Smith*, 57 T.C.M. (CCH) at 826, 833, *and* Rev. Rul. 71-397, 1971-2 C.B. 63.

[164] *See Xerox Corp.*, 656 F.2d at 676–77 (integrated package of equipment and services).

[165] *See Smith*, 57 T.C.M. (CCH) at 832. ("The camera did not constitute part of an integrated operation of services because the machine stood by itself in the Hospital and was not interconnected with a broad, integrated system designed to provide services.").

[166] *See id.* at 831. "The scanner and camera functioned independently and were not part of a larger process or operation." *Id.* at 832.

[167] *See, e.g.*, I.R.S. Tech. Adv. Mem. 79-13-003 (Nov. 28, 1978).

network of other servers.[168] This integrated network is evidenced by the provider's ability to move customer data from one server, or even data center, to another.[169]

### *E. Economic or Possessory Interest*

When a contract conveys an economic or possessory interest to the customer, this fifth factor suggests a lease.[170] The Joint Committee on Taxation's explanation of section 7701(e) presents guidance to aid in determining whether a customer has an economic or possessory interest in the property.[171] This explanation presents five situations in which a customer may have such an interest.[172] According to the Committee's explanation, failing any of these five situations will cause this factor to weigh in favor of a possessory or economic interest for the customer.[173] The first situation states that a possessory or economic interest exists when the property's use is dedicated to the customer for a substantial portion of the useful life of the property.[174] In the cloud computing context, this would mean that a server has been assigned to a specific customer for a substantial portion of its useful life. For this scenario to make sense in the cloud computing context, a specific server in its entirety must be assigned to the customer for a substantial portion of its useful life. Therefore, this determination aligns closely with factor three explained above.[175]

The second and third situations ask whether the customer shares in the decline or appreciation in value of the property.[176] In a cloud computing context, this asks whether a customer will share in appreciation or depreciation of the hardware and software value. The fourth situation hinges on whether the customer shares in any savings in

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[168] *See* Mell & Grance, *supra* note 9.

[169] *Id*.

[170] STAFF OF THE J. COMM. ON TAX'N, 98TH CONG., *supra* note 86, at 60; *see also* Citrome, *supra* note 130.

[171] *See* STAFF OF THE J. COMM. ON TAX'N, 98TH CONG., *supra* note 86, at 36, 60; *see also* Citrome, *supra* note 130, at 229 (stating the "economic and possessory interest in the property" is a factor under 7701(e)).

[172] STAFF OF THE J. COMM. ON TAX'N, 98TH CONG., *supra* note 86, at 60.

[173] *See id*.; 26 Jeffrey J. Wong and Barry A. Dubin, *Equipment Leasing* ¶ 35.04 (26th ed. 2021).

[174] STAFF OF THE J. COMM. ON TAX'N, 98TH CONG., *supra* note 86, at 60; *see also Smith*, 57 T.C.M. (CCH) at 832.

[175] If the customer is assigned anything less than a specific server in its entirety, the analysis under scenario one becomes complicated if not impossible. What is the useful life of a dynamic portion of a server? How can you determine useful life if the customer's data is moved from one server to another?

[176] STAFF OF THE J. COMM. ON TAX'N, 98TH CONG., *supra* note 86, at 60.

operating costs.[177] If a cloud customer received a reduction in fees due to decreases in maintenance and utility costs, this element would suggest a lease. Finally, the fifth situation looks to who bears the risk of damage or loss of the property.[178] In a scenario, like most cloud computing agreements, where the provider is responsible for keeping the servers up and running, the risk of damage or property loss rests with the provider; therefore, this element suggests a service.[179] However, in a hypothetical situation where the customer contractually agrees to cover the costs of such loss, this element may rest in favor of a lease. Though importantly, a key benefit to cloud computing is the shift of risk from the consumer to the cloud provider.[180] In nearly all cases, these factors will favor the provision of services.[181]

### *F. Risk of Diminished Receipts or Increased Expenditures*

Where the provider risks substantially diminished receipts or substantially increased expenditures due to the provider's non-performance under the contract, this factor suggests a service contract.[182] The Tax Court in *Smith* explained what this means in the context of machinery.[183] If the provider does not risk losing money because the machinery is down, the agreement looks like a lease.[184] But, if the customer is not required to pay the provider when the property is not functional, this factor indicates a service contract.[185] In a cloud computing transaction, this factor must analyze the economic consequences of server or software down time. If payment is suspended or discounted when the servers or the software are down, it indicates a service contract.

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[177] *Id.*

[178] *Id.*

[179] *See, e.g.*, Tidewater Inc. v. United States, 565 F.3d 299, 306 (5th Cir. 2009) ("Tidewater bore the risk of loss if anything happened to the vessel.").

[180] *See* Mazur, *supra* note 15, at 10.

[181] *Id.*

[182] Classification of Cloud Transactions and Transactions Involving Digital Content, *supra* note 22, at 40326; STAFF OF THE J. COMM. ON TAX'N, 98TH CONG., *supra* note 86, at 60.

[183] *See Smith*, 57 T.C.M. (CCH) at 832–33.

[184] *See id.* (stating that the manufacturer provided maintenance on the machines via a service contract; if the machines went down, it had no effect on the provider's fee because they were not responsible for the maintenance); *see also* Rev. Rul. 71-397, 1971-2 C.B. 63, 64 (stating in this situation the customer pays for maintenance outside of regular service hours).

[185] *See, e.g.*, Tidewater Inc. v. United States, 565 F.3d 299, 306-07 (5th Cir. 2009).

For example, AWS explains in its Amazon Compute Service Legal Agreement that they will "use commercially reasonable efforts" to maintain a "Monthly Uptime Percentage of at least 99.99%."[186] If downtime exceeds that 0.01% allowance, AWS provides a service credit based on the amount of down time.[187] In this case, AWS bears the risk of diminished receipts if it is unable to perform at the specifications listed in the agreement. Therefore, this factor weighs in favor of a service.

### *G. Concurrent Use*

Where a provider uses property concurrently to provide significant services to unrelated entities, the agreement is indicative of a service contract.[188] If the provider turns over the use of the property to the customer in a way that it cannot or does not provide services to other customers, this factor suggests a lease.[189] The reason for this distinction is that a lessor characteristically gives up use of the property when she leases it to the lessee.[190]

As to the hardware, when a cloud provider uses its servers to provide concurrent services to various unrelated customers, it indicates a service. But, again, further analysis is required regarding the digital content. If the provider uses its software to provide services concurrently to multiple customers, this also indicates a service. If a provider creates digital content for a single customer and does not use it concurrently, this suggests a lease.

### *H. Fee: Passage of Time or Work Performed*

The Proposed Regulations suggest that when a fee is based primarily on the amount of work performed, rather than the passage of time, this fact is indicative of a lease.[191] This factor takes on its own significance in the cloud computing context as "work performed" translates to server space used, computing power, data transferred, or

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[186] *Amazon Compute Service Legal Agreement*, AMAZON WEB SERVICES (Mar. 19, 2019), https://aws.amazon.com/compute/sla/ [https://perma.cc/8HA4-CP7G].

[187] *Id.*

[188] *See* Xerox Corp. v. United States, 656 F.2d 659, 674 (Cl. Ct. 1981); STAFF OF THE J. COMM. ON TAX'N, 98TH CONG., *supra* note 86, at 27.

[189] *See, e.g.*, *Smith*, 57 T.C.M. (CCH) at 832-33.

[190] *See Xerox Corp.*, 656 F.2d at 672, 674.

[191] Classification of Cloud Transactions and Transactions Involving Digital Content, *supra* note 22, at 40326.

other computing metrics.[192] While many offerings from the largest cloud providers base their fees on these metrics, the same providers also offer fee models based solely or significantly on the passage of time.[193] Where a cloud provider offers unlimited storage for a set fee per month, this factor points to a lease. When the provider requires fees based on the amount of data transferred or a metric of computing power consumed, this factor points to a service.

Most data storage plans utilize fees based on the passage of time while arrangements that involve computations and computing base fees on some measure of computing power.[194] For this reason, products that primarily offer data storage will often tip this factor toward a lease while products that offer primarily computing power will typically favor a service.

### *I. Contract Price Exceeds Rental Value*

If the total contract price of an agreement substantially exceeds the rental value of the property, the customer is paying for something beyond a lease of property, such as a service.[195] On the other hand, when the contract price simply reflects the rental value of the property, the

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[192] *See AWS Pricing*, AMAZON WEB SERVICES, https://aws.amazon.com/pricing/ (last visited June 18, 2020) [https://perma.cc/6R9V-NZYD]; *Azure Pricing*, MICROSOFT AZURE, https://azure.microsoft.com/en-us/pricing/ (last visited June 18, 2020) [https://perma.cc/SSW6-WD96]; *Price List*, GOOGLE CLOUD, https://cloud.google.com/pricing/list (last visited June 18, 2020) [https://perma.cc/Z99C-6VRE].

[193] Amazon Web Services, Microsoft Azure, and Google Cloud all offer services with these pricing models.

[194] *Compare Amazon S3 Pricing*, AMAZON WEB SERVICES, https://aws.amazon.com/s3/pricing/ (last visited June 19,2020, 8:43 AM) [https://perma.cc/V6ZR-DLEM]; *Block Blob Pricing*, MICROSOFT AZURE, https://azure.microsoft.com/en-us/pricing/details/storage/blobs/ (last visited June 19, 2020) [https://perma.cc/YE5E-MHDK]; and *Cloud Storage Pricing*, GOOGLE CLOUD, https://cloud.google.com/storage/pricing (last visited June 19, 2020) [https://perma.cc/PSG6-78QW]; *with Amazon EC2 Pricing*, AMAZON WEB SERVICES, https://aws.amazon.com/ec2/pricing/ (last visited June 19, 2020) [https://perma.cc/G6D3-U2YE]; *Linux Virtual Machine Pricing*, MICROSOFT AZURE, https://azure.microsoft.com/en-us/pricing/details/virtual-machines/linux/ (last visited June 19, 2020) [https://perma.cc/Y4LB-93ET]; *and Compute Engine Pricing*, GOOGLE CLOUD, https://cloud.google.com/compute/all-pricing (last visited June 19, 2020) [https://perma.cc/W2FB-LREX]. It should be noted that typically, cloud storage models couple the passage of time with tiered levels of storage space. This is still like a lease in the same way that a three-bedroom house costs more to lease per month than a studio.

[195] Classification of Cloud Transactions and Transactions Involving Digital Content, *supra* note 22, at 40326; *see also* STAFF OF THE J. COMM. ON TAX'N, 98TH CONG., *supra* note 86, at 27.

customer is simply paying for the use of that property (a lease) rather than a broader integrated operation that includes substantial services.[196] While it is difficult to determine an exact rental value of the servers and hardware that large cloud providers use due to custom construction,[197] it may be possible to look to comparable hardware and its current rental value. The same can be said about computer software since much of this property is developed exclusively for deployment in the very cloud computing transactions this Article is attempting to analyze.[198]

Fortunately, this is unnecessary, as it appears that this factor is simply a byproduct of factor number four—is the property part of an integrated operation in which the provider has other responsibilities? If the property stands by itself and the provider has no other responsibilities, such as maintenance or updating, the contract price will typically reflect the rental value of that property.[199] On the other hand, when additional services are coupled with the property, the company increases the price to reflect those increased responsibilities.[200] This begs the question: Do we really need to figure out the rental value of a given amount of server space plus the rental value of any digital content, and compare that estimate to the fees the provider charges? Most likely not. It seems proper to conclude that where there are substantial responsibilities and services provided beyond just use of the property, the fees will substantially exceed the rental value of the property.

## V. CURRENT CLOUD OFFERINGS: HOW DO THEY FIT?

After taking a detailed look at each factor, it is helpful to apply this structure to some of the popular cloud offerings currently on the market to get a feel for how existing products fit within the Proposed Regulations. AWS is a leader in the cloud computing industry and is on

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[196] *Id.*

[197] *See* Dan Richman, *Amazon Web Services' Secret Weapon: Its Custom-made Hardware and Network*, GEEK WIRE (Jan. 19, 2017, 10:49 AM), https://www.geekwire.com/2017/amazon-web-services-secret-weapon-custom-made-hardware-network/ [https://perma.cc/8H8Z-GYU4].

[198] *See* Sam Daley, *24 Cloud Computing Examples That Keep the World at Our Fingertips*, BUILT IN (Apr. 9, 2021) https://builtin.com/cloud-computing/cloud-computing-examples [https://perma.cc/9ZRW-5QSV].

[199] *See, e.g.*, *Smith*, 57 T.C.M. (CCH) at 832-33 (concluding that because the provider did not perform any services along with the property, the fee was presumably the fair rental value of that property).

[200] *See, e.g.*, Tidewater Inc. v. United States, 565 F.3d 299, 307 (5th Cir. 2009) (explaining that part of the fee was attributable to services that were provided along with the property).

target to reach $40 billion in revenue this year.[201] AWS offers a voluminous catalog of products,[202] with some of their most popular being Amazon Simple Storage Service ("S3"), Amazon Elastic Compute Cloud ("EC2"), and AWS Lambda.[203] Other companies like Microsoft Azure and Google Cloud offer comparable computing, storage, and serverless products,[204] as discussed below.

EC2 is an IaaS platform that provides scalable computing in the cloud.[205] With EC2, the customer can create a virtual server called an instance with "various configurations of CPU, memory, storage, and networking capacity."[206] When the customer launches an instance, they can select a single availability zone, multiple availability zones, or allow Amazon to select where the instance will be physically located.[207]

How does EC2 fit into the Proposed Regulations framework? First, Amazon retains physical possession of the servers and computer hardware in its data centers located in availability zones around the world.[208] Second, Amazon also has control over both the hardware and software that is used to administer EC2 instances. The customer cannot physically touch the servers or hardware let alone move or manipulate

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[201] Larry Dignan, *Top Cloud Providers in 2020: AWS, Microsoft Azure, and Google Cloud, Hybrid, SaaS Players*, ZD NET (May 11, 2020), https://www.zdnet.com/article/the-top-cloud-providers-of-2020-aws-microsoft-azure-google-cloud-hybrid-saas/ [https://perma.cc/6AF3-5ZJJ].

[202] *See Cloud Products*, AMAZON WEB SERVICES, https://aws.amazon.com/products/?nc2=h_ql_prod_fs_f (last visited June 19, 2020) [https://perma.cc/EJK9-BC3H].

[203] *See* Usha Sri Mendi, *AWS Services List – Top 10 AWS Services*, MIND MAJIX (Jan. 27, 2020), https://mindmajix.com/top-aws-services [https://perma.cc/HL8R-YC7W].

[204] *See, e.g.*, *Azure Products*, MICROSOFT AZURE, https://azure.microsoft.com/en-us/services/ (last visited Oct. 21, 2021) [https://perma.cc/GX8C-KSPJ]; *Google Cloud Products*, GOOGLE CLOUD, https://cloud.google.com/products (last visited Oct. 21, 2021) [https://perma.cc/778P-NVAZ].

[205] *Amazon EC2*, AMAZON WEB SERVICES, https://aws.amazon.com/ec2/ (last visited June 22, 2020) [https://perma.cc/ZTQ6-HUH4].

[206] *What is Amazon EC2?*, AMAZON WEB SERVICES, https://docs.aws.amazon.com/AWSEC2/latest/UserGuide/concepts.html (last visited June 22, 2020, 9:28 PM) [https://perma.cc/9E4H-45TS].

[207] *See Regions, Availability Zones, and Local Zones*, AMAZON WEB SERVICES, https://docs.aws.amazon.com/AWSEC2/latest/UserGuide/using-regions-availability-zones.html (last visited June 22, 2020) [https://perma.cc/8X7Y-DYWS].

[208] *See id.*

them.[209] Further, the customer cannot alter the software or escape the box that Amazon fixes.[210] Third, although the customer may choose the availability zone within which their data will be stored and the hardware will be located, Amazon selects the specific server and can replace the server or move data to another server at any time.[211] Fourth, EC2 instances are part of a massive integrated operation in which Amazon has other responsibilities, such as maintenance and improvement.[212] Amazon's network of servers spans the globe in order to provide services to a great number of unrelated customers.[213] Fifth, Amazon retains economic and possessory interest in the hardware and the proprietary software used to provide EC2 instances.[214] This is clear because it is Amazon who bears the risk of damage or loss of property, that is, if a server is destroyed, that burden is on Amazon.[215] Sixth, when Amazon's system is down, they face diminished receipts as their user agreement provides for fee reduction for system downtime.[216] Seventh, Amazon uses the property, both hardware and software, to provide concurrent services to many customers around the world.[217] Eighth, Amazon's EC2 fee is primarily based on computing power— a measure of work performed as opposed to the passage of time.[218] Ninth, the total contract price exceeds the rental value of the property because the provider has

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[209] *See AWS Customer Agreement*, AMAZON WEB SERVICES, https://aws.amazon.com/agreement/ (last visited July 28, 2020) [https://perma.cc/7GYF-8AH8]; *AWS Service Terms*, AMAZON WEB SERVICES, https://aws.amazon.com/service-terms/ (last visited July 28, 2020) [https://perma.cc/ZEK8-BAVS]; *AWS Acceptable Use Policy*, AMAZON WEB SERVICES, https://aws.amazon.com/aup/ (last visited July 28, 2020) [https://perma.cc/3K5W-BJPF] (showing the voluminous restrictions on customers that AWS asserts to retain control of its hardware and software. As noted, violation of these restrictions can result in suspension or termination of service).

[210] *See AWS Customer Agreement*, *supra* note 209.

[211] *See Regions, Availability Zones, and Local Zones*, *supra* note 207.

[212] *See What is Amazon EC2?*, *supra* note 206.

[213] *See Global Infrastructure*, AMAZON WEB SERVICES, https://aws.amazon.com/about-aws/global-infrastructure/ (last visited Oct. 13, 2021) [https://perma.cc/555G-9FVR].

[214] *See AWS Service Terms*, *supra* note 209.

[215] *See Disaster Recovery of Workloads on AWS: Recovery in the Cloud*, AWS (Feb. 12, 2021) https://docs.aws.amazon.com/whitepapers/latest/disaster-recovery-workloads-on-aws/disaster-recovery-workloads-on-aws.pdf#disaster-recovery-workloads-on-aws [https://perma.cc/UF57-YFH5].

[216] *See Amazon Compute Service Legal Agreement*, AMAZON WEB SERVICES (Mar. 19, 2019), https://aws.amazon.com/compute/sla/ [https://perma.cc/9RFX-AJAX].

[217] *AWS Customer Success Stories*, AMAZON WEB SERVICES, https://aws.amazon.com/solutions/case-studies/ (last visited July 30, 2020) [https://perma.cc/FN2D-9UEM].

[218] *See Amazon EC2 Pricing*, AMAZON WEB SERVICES, https://aws.amazon.com/ec2/pricing/ (last visited June 19, 2020) [https://perma.cc/DCZ4-TN2W].

other responsibilities that the customer pays for.[219] With Amazon EC2, every factor suggests a service. In general, available cloud services that sell computing power, such as instances, will always result in a service contract.

What happens with storage solutions such as Google Cloud Storage? Google Cloud Storage provides "globally unified, scalable, and highly durable object storage for developers and enterprises."[220] Customers can select a worldwide region, a dual region (which places the data redundantly in two regions "such as Finland and the Netherlands"), or a multi-region which places the data in a large geographic area made up of several regions.[221] As to the Proposed Regulations factors, all result in the same outcome as the above EC2 analysis, *except* factor eight, since the providers fee is not based on a measure of work performed, but rather on the passage of time.[222] Google Cloud Storage, like most storage models, offers a tiered payment structure that is based on usage per month.[223] This factor, and only this factor, suggests a lease. With eight factors in favor of a service and one factor in favor of a lease, Google Cloud Storage, like similar offering from major providers, will be classified as a service.

A final example, so-called "serverless" cloud computing, results in the same outcome as the EC2 analysis—every factor favors a service contract.[224] These three examples are just a few among immense offerings of cloud computing products. This Article will save the reader

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[219] *See Amazon EC2*, *supra* note 205.; *see also supra* text accompanying note 140 (explaining that fees will exceed rental value when the provider has other responsibilities like maintenance and updating).

[220] *See Cloud Storage*, GOOGLE CLOUD, https://cloud.google.com/storage (last visited June 27, 2020) [https://perma.cc/HQ87-7QRD].

[221] *See Bucket Locations*, GOOGLE CLOUD, https://cloud.google.com/storage/docs/locations (last visited June 27, 2020) [https://perma.cc/634J-NJSN].

[222] *See* Classification of Cloud Transactions and Transactions Involving Digital Content, *supra* note 22, at 40326; *see also Cloud Storage Pricing*, GOOGLE CLOUD, https://cloud.google.com/storage/pricing (last visited June 19, 2020) [https://perma.cc/R8RX-9UXS].

[223] *Id.* The Google Cloud fee structure charges a fee based on gigabytes/per month. For example, a user the requires 500 gigabytes of storage will pay $0.12 x 500 gigabytes per month. I analogize this to a lease in which the lessee pays $700 per month for a studio apartment, $1,000 per month for a one-bedroom apartment, or $1,200 per month for a two-bedroom apartment. This is the same size/time fee structure as Google Cloud Storage uses.

[224] *See, e.g.*, *AWS Lambda*, *supra* note 44; *Azure Functions*, MICROSOFT AZURE, https://azure.microsoft.com/en-us/services/functions/ (last visited July 30, 2020) [https://perma.cc/D2AY-4K3S]; *Cloud Functions*, GOOGLE CLOUD, https://cloud.google.com/functions (last visited July 30, 2020) [https://perma.cc/95T8-6XD7].

from analysis of every cloud product on the market, for simply stated, I have yet to encounter a current offering that comes close a lease. This begs the question: can a cloud transaction based on the current definition result in a lease?[225]

## VI. A HYPOTHETICAL LEASE?

Unable to find an example of an available cloud product that must be classified as a lease, this Article endeavors to create one to see if such a transaction is practical or even possible. As a preliminary matter, this Article aims to answer some categorical questions that hinge on practicality.

### *A. Can a Lease Exist Where the Servers Remain on the Provider's Premises?*

As mentioned earlier, the Proposed Regulations' balancing test has several interdependent factors.[226] Often the interdependency is one of practicality. It just would not be practical to have one fact without the other. Possession, as one of the most influential factors, controls the direction of several other factors.[227] Practically speaking, a provider will always have control over hardware that it has physical possession of.[228] The provider that possesses the property will always have additional responsibilities, such as maintenance and repairs.[229] Further, where the provider has additional responsibilities, it will charge the customer more than the rental value of the property.[230] Four factors will typically move as one. It is worth nothing that these factors are not equally weighted, and it seems clear that possession and control demand more influence.[231]

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[225] *See* Gary Sprague, *Proposed Cloud Transaction Regulations: Analysis of the Classification Factors Derived From §7701(e)*, 48.11 TAX MGMT. INT'L J. 572 (2019).

[226] *See supra* Section IV.G; *see also* Sprague, *supra* note 225.

[227] *See* Sprague, *supra* note 101.

[228] It would be a very strange transaction indeed if the provider housed the hardware on its premises, but the customer was responsible for operating, maintaining, and improving those servers. *See* STAFF OF THE J. COMM. ON TAX'N, *supra* note 86, at 59–60 for the elements of control. Further, this would sacrifice a key advantage inherent in cloud transactions, that is the outsourcing of hardware maintenance and improvement. *See* Mell & Grance, *supra* note 9, at 2 ("The consumer does not manage or control the underlying cloud infrastructure . . .").

[229] *Id.*

[230] *See supra* Section IV.I.

[231] *See* Classification of Cloud Transactions and Transactions Involving Digital Content, *supra* note 23, at 40326; *see also* Sprague, *supra* note 118, at 2-3; *see also* Mazur, *supra* note 14, at 24 (noting that an element of cloud computing is that that cloud vendor bears the risk of loss and retains control of the software and hardware).

In this way, it is hard to imagine that a transaction can be classified as a lease while the provider retains possession and control of the property.

### *B. Does it Make Sense to Create a Cloud Transaction in which the Hardware Sits on the Customer's Premises?*

It is important to keep in mind the key advantages of cloud computing during this analysis. Businesses turn to cloud computing because it offers unlimited scalability, cost savings, speed, performance, and reliability.[232] When the hardware is placed on the customer's premises, several of these advantages are undermined. For one, on-demand scalability is eliminated.[233] When the hardware is housed in massive provider data centers, the customer can increase storage capacity and computing power instantaneously as additional provider assets spin up as needed.[234] This cannot occur when the maximum amount of storage or power is capped by the amount of hardware on the customer premises, reminiscent of the days before the cloud.[235] As follows, the cost savings associated with this instant scalability as well as the speed and reliability are not present when scalability is not available.[236]

With these key advantages gutted, it seems impractical to create such a transaction, but to be sure, what would that transaction look like? The transaction this Article tepidly envisions is one in which the cloud provider places the computer hardware on the premises of a company and removes all barriers to control over access to the hardware and software aspects of the servers.

In this hypothetical transaction, the customer would have physical possession of the hardware since it would be physically located

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[232] *See* Mell & Grance, *supra* note 9, at 2; Marston et al., *supra* note 1, at 176-77; *see also* Foster et al., *supra* note 1, at 1–2.

[233] *See* ARMBRUST ET AL., *supra* note 2, at 1–2; *see also* Marston, *supra* note 1, at 176–77.

[234] *See, e.g.*, *Patterns for Scalable and Resilient Apps*, GOOGLE CLOUD, https://cloud.google.com/solutions/scalable-and-resilient-apps (last visited Aug. 3, 2020) [https://perma.cc/6CSA-WSVV]; *AWS Auto Scaling*, AMAZON WEB SERVICES, https://aws.amazon.com/autoscaling/ (last visited Aug. 3, 2020) [https://perma.cc/5KEH-3FZA]; *Overview of the Performance Efficiency Pillar*, MICROSOFT AZURE (Dec. 13, 2021), https://docs.microsoft.com/en-us/azure/architecture/framework/scalability/overview [https://perma.cc/4H8A-CS2Q].

[235] *See* ARMBRUST ET AL., *supra* note 2, at 1–2.

[236] *See id.; see also* Marston, *supra* note 1, at 176–77.

and installed on their premises, favoring a lease.[237] The customer will have control over the computer hardware with responsibility for maintenance and updating, either through its own IT department or a third-party maintenance contract.[238] Further, the customer may have control over the software as it can access anything on the servers, add any software it pleases, and alter that software in anyway.[239] The box is removed, and the provider does not have control over digital content. The duality of control over property (hardware and software) together suggests a lease. The cloud service provider can then select the specific property to be used, and even replace it with similar property, suggesting a service.[240] The property will not be part of an integrated operation, as it will not be connected with a provider's larger network.[241]

Further, the customer will use the property to provide services to itself, and the provider will not have additional responsibilities, like maintenance and updating.[242] The customer may make use of the property for a substantial part of its useful life,[243] the parties may contract in a way that the customer receives a fee reduction when the provider saves on expenses,[244] and may take on risk in the case of damage to the servers by agreeing to cover repair and replacement costs.[245] These prongs of the economic or possessory interest factor cumulatively

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[237] *See, e.g.*, *Musco*, 60 T.C.M. (CCH) at 20 (explaining that the customer had possession of sports lighting because the lights were installed at the customer's athletic fields across the country); *Smith*, 57 T.C.M. (CCH) at 832-33 (camera and xeroxographic equipment).

[238] *See, e.g.*, *Smith*, 57 T.C.M. 826 (explaining that the xerographic equipment was maintained by the manufacturer rather than the provider).

[239] Possibly the company uploads its own proprietary software onto the servers. I presume a scenario like this for the purpose of exploring the outer limits with this hypothetical transaction.

[240] This is similar to the machinery that the provider placed in the customer's manufacturing business. The customer could select the model, but the provider selected the individual machines and could replace them if need be. Due to the fungibility of individual servers, it seems unlikely that the customer would care to select a specific machine and refuse a replacement of the same specifications. *See e.g.*, Rev. Rul. 71-397, 1971-2 C.B. 63.

[241] *See Smith*, 57 T.C.M. (CCH) at 832 (not connected to a broader network).

[242] Xerox Corp. v. United States, 656 F.2d 659, 675-76 (Cl. Ct. 1981) (noting the distinction as to whether the property is used by the taxpayer to provide service to the customer or whether the customer is using the property to provide service to itself).

[243] *See, e.g.*, *Smith*, 57 T.C.M. (CCH) at 832 (significant portion of equipment's life).

[244] *See, e.g.*, Tidewater Inc. v. United States, 565 F.3d 299, 306 (5th Cir. 2009) ("The customer did share in some of the benefits of any reduction in operating costs . . .").

[245] *Cf. Xerox Corp.*, 656 F.2d at 675 (explaining that because the provider was responsible for machine loss or damage, the transaction appeared more like a service contract than a lease).

suggest a lease. Additionally, if the customer agrees that there will be no reduction in fees due to downtime of the hardware or software (since it will be responsible for maintaining it), the provider will not bear the risk of diminish receipts or increased expenditures, suggesting a lease.[246] Since the servers are on the customer's premises and setup up for their exclusive use, the provider does not provide concurrent use of the property to other unrelated customers, suggesting a lease.[247] The fee would be primarily based on the passage of time, rather than the computing power used, suggesting a lease.[248] Finally, the total contract price would be the rental value of the property because the property does not come with and additional services.[249] This also suggests a lease.

As noted above, the factors that trigger the domino effect toward a lease are the possession and control factors.[250] Once possession and control are shifted to the customer, it is rationally possible to start shifting other factors toward a lease characterization. For example, once possession and control are both shifted to the customer, it is possible to imagine a transaction in which the customer is responsible for maintenance and updating. Once the customer is responsible for these tasks, other factors, such as risk of increased expenditures, integrated operation, contract price as rental value, etc., begin to follow. What is most interesting to note here, however, is that this hypothetical transaction looks nothing like a cloud transaction. Instead, the transaction just looks like a lease.[251] The provider takes the computer hardware, drops it off at the customer's place of business, and tells them "you are on your own, be sure to send our monthly fee." The advantages of cloud computing—scalability, cost savings, speed, performance, and reliability—[252] are absent. Thus, one must wonder how this type of lease transaction could be captured under the current Proposed Regulations.

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[246] *See, e.g.*, *Smith*, 57 T.C.M. (CCH) at 830 (arguing that because the provider did not operate the machines and was not responsible for maintenance, there was no risk of diminished receipts if the xeroxographic equipment went down).

[247] *Id.; see also Tidewater*, 565 F.3d at 307.

[248] *See, e.g.*, *Musco*, 60 T.C.M. (CCH) at 20; *Smith*, 57 T.C.M. (CCH) at 832 (the camera). In a cloud computing context, this sort of fee arrangement is typical to cloud storage solutions.

[249] See *Smith*, 57 T.C.M. (CCH) at 833 for the proposition that where there are no additional services coupled with the property, the court presumes that the fee is equal to the rental value of that property.

[250] *See supra* Section VI.A.

[251] *See* Sprague, *supra* note 23.

[252] *See* Mell & Grance, *supra* note 9, at 2; Marston, *supra* note 1, at 177–78; Vaquero et al., *supra* note 1, at 51; Foster et al., *supra* note 1, at 1–2.

## VII. A BETTER SOLUTION: DEFINITIONAL REFINEMENT

As illustrated above, the Proposed Regulations demand a great deal of multi-faceted analysis and unweighted balancing to arrive at a forgone conclusion—cloud computing is a service.[253] This definitive conclusion stems from a comprehensive dive into the definition of what cloud computing truly is. True cloud computing consists of several essential characteristics inextricably tied to the benefits that drive customers to adopt the cloud.[254] Some of these characteristics include on-demand self-service, broad network access, resource pooling, rapid elasticity (scalability), and measure service.[255]

The essential characteristics of cloud computing elucidate a potential solution to the complexities of a multi-factor balancing test. The problem is a definitional one. The Proposed Regulations, presumably relying on a simplified and expansive reading of the National Institute of Standards and Technology definition ("NIST"),[256] define a cloud transaction as "a transaction through which a person obtains non-deminimis on-demand network access to computer hardware, digital content . . . or other similar resources."[257] This only encompasses the first essential element of the NIST cloud definition, and seemingly would include a transaction similar to this Article's hypothetical—a transaction that is just a lease of computer servers and not a cloud transaction at all.[258] Definitional specificity that reflects the true character of a cloud computing transaction would exclude any lease examples from the Proposed Regulations.

First, the definition in the Proposed Regulations must include language requiring scalability of resources, that is, the customer can dynamically reconfigure resources in real time as demand increases or decreases.[259] The NIST definition upon which the definition in the

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[253] *See* Sprague, *supra* note 20; *see also* Classification of Cloud Transactions and Transactions Involving Digital Content, *supra* note 22, at 40319. Even the Proposed Regulations note that the analysis should generally result in a service.

[254] *See* Mell & Grance, *supra* note 9, at 2.

[255] *See id.*; *see also* Marston, *supra* note 1, at 177–78; Bhardwaj et al., *supra* note 27, at 60–61; Vaquero et al., *supra* note 1, at 51; Foster et al., *supra* note 1, at 1–2.

[256] *See* Mell & Grance, *supra* note 9, at 2.

[257] Classification of Cloud Transactions and Transactions Involving Digital Content, *supra* note 13, at 40319.

[258] Mell & Grance, *supra* note 9, at 2.

[259] *See* Lizhe Wang et al., *Cloud Computing: A Perspective Study*, 28 NEW GENERATION COMPUTING 137, 139 (2010) ("Cloud computing is a set of network enabled services, providing scalability . . ."); Vaquero et al., *supra* note 1, at 51 ("These resources can be dynamically reconfigured to adjust to variable load (scale), allowing also for an optimum resource utilization").

Proposed Regulations is based, recognizes rapid elasticity (scalability) as an *essential* characteristic.[260] Adding scalability as a key element of the Proposed Regulations' definition would eliminate potential lease scenarios that do not comport with this key aspect of the cloud computing model.

Further, where apparent unlimited scalability exists, resource pooling must also exist. Resource pooling occurs when a provider uses its resources to serve multiple consumers by dynamically assigning and reassigning those resources based on consumer demand.[261] This is a natural extension of scalability because a provider will put unused resources to work. Where massive datacenters are constructed to provide a customer with apparently unlimited scalability, this infinite appearance is created by shifting resources between various customers. As NIST suggests, this aspect belongs in the Proposed Regulations' definition.[262]

With these two minor tweaks in place, the above hypothetical and other lease transactions that are not cloud transactions properly fall outside the definition of a cloud transaction. In this form, the section 7701(e) factors may serve as a justification for the service contract designation, but they are unnecessary as a balancing test requisite for classification. In other words, it can be clearly stated that cloud computing transactions always constitute the provision of services *because* of the way they fit into the section 7701(e) framework—a cloud transaction under a more refined definition can be classified outright as a service. This simplification effectively and efficiently resolves the difficulties and ambiguities of a balancing test.

Importantly, the expansive and obscure definition in the Proposed Regulations is not a mere oversight of the Treasury. Rather, the definition was intentionally broadened to encompass other types of transactions, such as streaming services and database access.[263] This expansion is unnecessary and conceptually incorrect.[264] Every server that is used to deliver digital content to a customer is not properly characterized as a "cloud," and every instance of on-demand network access is not a cloud computing transaction. The expansive definition

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[260] Mell & Grance, *supra* note 9, at 2 ("Capabilities can be elastically provisioned and released, in some cases automatically, to scale rapidly outward and inward commensurate to demand").

[261] *See id.*; *see also* Foster et al., *supra* note 1, at 1–2; Bhardwaj, *supra* note 27, at 60–61; Vaquero, *supra* note 1, at 51.

[262] Mell & Grance, *supra* note 9, at 2.

[263] *See* Classification of Cloud Transactions and Transactions Involving Digital Content, *supra* note 22, at 40319.

[264] *See supra* note 26 and surrounding text.

captures transactions that have no business in the cloud realm, in an effort to capture transactions such as streaming services which in no way can be characterized as leases. It is this Article's view that such transactions are separate in nature.

To be sure, a look into the ubiquitous streaming service that is Netflix makes clear that it is a cloud computing *customer*, rather than a cloud computing *provider*.[265] The Netflix story is that of the model migration away from in-house datacenters and toward the massively scalable resources of cloud computing. In 2008, database corruption crippled Netflix-owned datacenters and left the streaming service searching for a third-party horizontally scalable solution.[266] Netflix selected Amazon Web Services as their cloud provider and transitioned all client-facing services to the cloud.[267] By 2016, Netflix was able to completely shut down their last remaining datacenters.[268] Netflix notes several benefits obtained by this shift to the cloud: (1) scalability, as they simply would not have been able to scale their own datacenters quickly enough; (2) increase in service availability through increased reliability of Amazon's massive global network; and (3) ultimately the cost reduction that comes with optimal elasticity and economies of scale.[269] Therefore, Netflix is a cloud computing user rather than a cloud computing provider. It cannot be that simply being a customer of a cloud provider makes a streaming service one under the cloud rules. It also cannot be the case that mere access to content that is stored in a datacenter should be treated in the same way as true cloud computing transaction.[270]

But, there is again a simple solution. The Treasury must say what it means by properly defining the digital content transactions it wishes to capture and denoting those transactions as service contracts. For example, if Treasury wishes to capture streaming transactions in the Proposed Regulations, "streaming" will be defined as the real time continuous transmission of audio or video files from a remote server to

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[265] *See* Yury Izrailevsky et al., *Completing the Netflix Cloud Migration*, NETFLIX (Feb. 11, 2016) https://about.netflix.com/en/news/completing-the-netflix-cloud-migration [https://perma.cc/4D4W-M7ZH]; *Netflix Case Study*, AMAZON WEB SERVICES (2016), https://aws.amazon.com/solutions/case-studies/netflix-case-study/ [https://perma.cc/PM65-W86B].

[266] Izrailvsky et al., *supra* note 265.

[267] *Id.*

[268] *Id.*

[269] *See id.*

[270] ALEXANDER WEISSER, INTERNATIONAL TAXATION OF CLOUD COMPUTING: PERMANENT ESTABLISHMENT, TREATY CHARACTERIZATION, AND TRANSFER PRICING 5, 13-17 (2020).

a client.[271] Just as with cloud computing, streaming, by definition, is a service.[272]

## VIII. CONCLUSION

Cloud computing has eliminated the need for internet service providers, application developers, and organizations to purchase and maintain the hardware necessary to support their needs. As this attractive third-party model has increased in popularity, those who operate in the cloud require clarification as to how cloud computing transactions are classified. The Proposed Regulations move to answer the classification question by applying section 7701(e) factors, supplemented with additional unique factors, to cloud computing transactions. The cloud definition in the Proposed Regulations attempts to broaden the term far beyond its technical definition to capture additional non-cloud computing transactions.[273] This captures transactions that do not fall within the cloud family and requires the application of a nine-factor balancing test to transactions that clearly fall within the "services" classification.

For this reason, the Proposed Regulations must tailor the "cloud transaction" definition to capture only cloud computing transactions by including language of scalability and network resource pooling. Transactions properly defined under the cloud computing heading will always be service contracts, as will transactions properly defined as streaming transactions. By simply defining these terms and labeling them as services, the Treasury can avoid confusion while consistently producing the correct classification result.

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[271] *See What is Streaming?*, CLOUDFLARE, https://www.cloudflare.com/learning/performance/what-is-streaming/ (last visited Nov. 23, 2020).

[272] *See* Classification of Cloud Transactions and Transactions Involving Digital Content, *supra* note 22, at 40326
(applying the nine factors makes clear that a streaming transaction cannot garner enough factors to weigh in favor of a lease).

[273] *Id.* at 40319.

# DOMESTIC VIOLENCE AND BODY-WORN CAMERAS: SHOULD PRIVACY LAW GUIDE RULES ON RECORDING?

*Emily Bordelon**

## I. INTRODUCTION

> She was standing close to him and that funny tingling started in his fingertips, went fast up his arms and sent his fist shooting straight for her face…it wasn't until she screamed that he realized he had hit her in the mouth – so hard that the dark red lipstick had blurred and spread over her full lips, reach[ing]…out toward her cheeks…He kept striking her and he thought with horror that something inside of him was holding him, binding him to this act…And even as the thought formed in his mind, his hands reached for her face again and…again.[1]

In the aftermath, you are a police officer that arrives at this scene of domestic violence with a camera. Experience tells you to tread carefully but your training provides little specific guidance. Your patrol guide, however, has implemented a new rule that requires you to turn on your body-worn camera. There is a nagging thought in the back of your mind…is this a good idea? How will the victim be impacted? If you tell her you are filming, how will she react? Would the presence of a camera make a difference, right now or in the future? Is the victim even thinking about you filming her?

There are currently over 410,000 body-worn cameras (BWCs) on police officers around the United States.[2] This number is only expected to grow. Yet what is left out of discussions to increase BWCs on officers is the impact cameras could have on domestic violence

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[1] Ruth Nadelhaft, *Domestic Violence in Literature: A Preliminary Study*, 17 MOSAIC: AN INTERDISC. CRITICAL J. 242, 250 (1984) (quoting ANN PETRY, LIKE A WINDING SHEET (Crisis ed. 1945)).

[2] Shelley Hyland, *Body-Worn Cameras in Law Enforcement Agencies, 2016*, 2018 BUREAU OF JUST. STATS. 3, https://www.bjs.gov/content/pub/pdf/bwclea16.pdf [https://perma.cc/D88K-2HFB].

victims.[3] This comment explores the questions raised by the scenario above by analyzing the value of BWCs from the point of domestic violence victims, not police officers or the state.

BWC policy has largely been piecemeal. In the domestic violence arena, some states require officers use BWCs when answering domestic violence calls while others do not specify a policy, leaving the choice to individual police departments and officer discretion.[4] The connecting theme through each existing policy is privacy.[5] This comment presents two key points about this foundation. First, changing privacy law will not solve the problems posed by BWCs at domestic violence scenes. Second, feminist legal theory explains why privacy law fails to assist domestic violence victims.

Part II will address the foundational understanding of privacy in the United States. This discussion centers on the Fourth Amendment and ensuing interpretations of its "reasonable expectation of privacy" standard.[6] Additionally, to further define privacy and analyze the soundness of United States privacy law, Australia's privacy standard is introduced for comparison. Unlike most other jurisdictions, Australia specifically lists what it believes should be private in its foundational law.[7] This approach is starkly different from the American catchall. This comment uses Australia as a case study to examine whether simply being more specific with privacy is worthwhile or if there needs to be a new foundation for BWC policies.

Furthermore, Part II will demonstrate how the different American and Australian approaches to privacy nevertheless lead to similar uses of BWCs in domestic violence cases in each jurisdiction. While both countries are relatively new to the use of BWCs, Australian BWC laws included domestic violence concerns from the beginning

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[3] *See* Joanne Belknap & Deanne Grant, *Fifty Years After the 1967 Crime Commission Report: How Nonpolicing Domestic Violence Research and Policies Have Changed and Expanded*, 17 CRIMINOLOGY & PUB. POL'Y 467, 472 (2018).

[4] *See, e.g.*, KY. REV. STAT. ANN. § 61.168 (West 2018); N.Y. EXEC. LAW § 234 (McKinney 2021); New York City Police Department, *Use of Body-Worn Cameras* (March 22, 2017), https://www1.nyc.gov/assets/ccrb/downloads/pdf/investigationspdf/oo1617.pdf [https://perma.cc/J4P4-DES2] (NYPD patrol guide).

[5] *See* Urban Inst., *Police Body-Worn Camera Legislation Tracker*, (October 29, 2018), https://apps.urban.org/features/body-camera-update/ [https://perma.cc/6MLE-HB6Y].

[6] U.S. CONST. amend. IV.

[7] *See Privacy Act 1988* (Cth.) s 2A (Austl.).

while the United States did not.[8] For reasons that will be clear, this makes Australia a unique comparison when evaluating United States BWC policy.

After determining that different approaches to privacy law reach similar ends, the inevitable question arises: is privacy a good standard to determine whether BWCs should be used at domestic violence scenes? Due to its gendered roots and failure to adequately capture rights, the ultimate answer is no. To reach this conclusion, Part III analyzes the differences between the United States and Australian schemes and applies feminist legal theory to privacy law and BWC use at domestic violence scenes. BWCs pose a new privacy concern and this comment shows that the standard definition of privacy does not help victims. Instead, there needs to be a reconceptualization of privacy to declare the more specific rights the term aims to protect. If the discussion is shifted to victim agency freedom, BWCs are not a useful tool to begin efforts against domestic violence. The act of filming raises issues of consent, and the footage is of little assistance in court.[9] Once this is discussed, Part III then outlines how states can clarify BWC policies and create an initial policy of "no use" at domestic violence scenes. Additional steps of education for law enforcement and criteria for reintroduction will also be presented. These solutions address the fundamental concern of BWCs reliance on privacy law and this approach's inadequate understanding of rights important to domestic violence victims.

## II. BACKGROUND

Any current discussion of BWC use involves privacy. Thus, the first step to determine the usefulness of the current approach to BWC

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[8] *See* Darren Palmer, *The Mythical Properties of Police Body-Worn Cameras: A Solution in the Search of a Problem*, 14 SURVEILLANCE & SOC'Y 138, 139 (2016); Chris Pagliarella, Comment, *Police Body-Worn Camera Footage: A Question of Access*, 34 YALE L. & POL'Y REV. 533, 535 (2016) (presenting that the United States was motivated by concerns about race and police force).

[9] *See In re* Marriage of Everard, 260 Cal. Rptr. 3d 556, 564-65, 569 (Cal. Ct. App. 2020) (noting that, while there was BWC footage, the primary reasons for the court's decision were party testimony, officer testimony, and officer reports); Sherry F. Colb, *What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 123 (2002) (arguing that Fourth Amendment reasonableness jurisprudence conflates risk taking with consent); *see generally* Kamin N. Chavis, *Body-Worn Cameras: Exploring the Unintentional Consequences of Technological Advances and Ensuring a Role for Community Consultation*, 51 WAKE FOREST L. REV. 985, 1002, 1010 (2016) (discussing BWC use and consent in the context of police brutality concerns).

policies is to discuss foundational privacy law. This discussion occurs in two parts: (1) the United States Fourth Amendment, and (2) Australian privacy law. American and Australian BWC policies are then analyzed to determine whether the different privacy approaches lead to different practical results. Lastly, feminist legal theory is introduced to show why privacy law ultimately fails to protect victim rights at domestic violence scenes.

### *A. American Privacy Law Per the Fourth Amendment*

States and police departments often rest BWC policy on the Fourth Amendment, relying on general privacy laws that mimic the Amendment's language and premise.[10] As such, this section will introduce the Fourth Amendment's reasonable expectation of privacy standard. The influence of this standard in the creation of a public and private distinction is then analyzed. Lastly, the growing case law on privacy and technology is presented.

#### i. A Reasonable Expectation of Privacy Standard

The Fourth Amendment provides a constitutional foundation for privacy against unreasonable searches in the United States.[11] The Fourth Amendment protects against searches when there is a "reasonable expectation of privacy."[12] The Amendment specifically cites the right for people to be secure "in their persons, houses, papers, and effects" against unreasonable searches.[13] This comment will not go into each category and what constitutes a search. Instead, the focus is on an understanding of a reasonable expectation of privacy.

The Supreme Court has established a two-prong test to determine what is a reasonable expectation of privacy.[14] This test was

[10] *See* Urban Inst., *supra* note 5; Leadership Conference on Civil and Human Rights & Upturn, *Police Body Worn Cameras: A Policy Scorecard*, LEADERSHIP CONF. (Nov. 2017), https://www.bwcscorecard.org/ [https://perma.cc/9L4R-PRS6].

[11] U.S. CONST. amend. IV. *See generally* City of Los Angeles v. Patel, 576 U.S. 409, 419 (2015); Arizona v. Gant, 556 U.S. 332, 338 (2009) (holding that a warrantless search is per se unreasonable); Katz v. United Sates, 389 U.S. 347, 357 (1967).

[12] *See* U.S. CONST. amend. IV.

[13] *Id.*

[14] *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

first mentioned in the concurrence of *Katz v. United States*.[15] Charles Katz was convicted under a federal statute against betting.[16] He placed his bet over the phone, in a public telephone booth.[17] The authorities learned of his wager by attaching an electronic listening device to the outside of the booth.[18] The Court addressed whether the act of listening was a search and seizure; and whether the search complied with constitutional standards.[19] With the search, the Court readily noted that the surveillance method deployed constituted a search because the Fourth Amendment does not focus on types of intrusion but, instead, protects people.[20] As such, while not a physical intrusion, impeding the integrity of the telephone booth with a listening device violated Katz's privacy and was a search.[21] The remaining question was whether that search was valid under the Fourth Amendment.[22]

Ultimately, the Court held that the search violated the safeguards inherent in Fourth Amendment protections.[23] The concurrence, written by Justice Harlan, elaborated and presented a two-prong test. The first prong requires a court to look at whether the specific individual expressed a reasonable expectation of privacy.[24] The second prong looks at whether general society expresses a reasonable expectation of privacy or shows a willingness to recognize an expectation of privacy.[25] This test is now the traditional method to

[15] *Id.* For discussions on how this test and its ensuing applications is insufficient for the modern world, see Woodrow Hartzog, *Body Cameras and the Path to Redeem Privacy Law*, 96 N.C. L. REV. 1257 (2018); Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-First Century*, 65 IND. L.J. 549 (1990); Brian J. Serr, *Great Expectations of Privacy: A New Model of Fourth Amendment Protections*, 73 MINN. L. REV. 583 (1989); Donald R.C. Pongrace, *Stereotypification of the Fourth Amendment's Public/Private Distinction: An Opportunity for Clarity*, 34 AM. U. L. REV. 1191 (1985).

[16] *Katz*, 389 U.S. at 348.

[17] *Id.*

[18] *Id.* at 348-49.

[19] *Id.* at 352-54.

[20] *Id.* at 353.

[21] *Id.*

[22] *Katz*, 389 U.S. at 354.

[23] *Id.* at 359.

[24] *Id.* at 361.

[25] *Id.*

determine a reasonable expectation of privacy.[26] Also, when applying the test, the "reasonableness" of the action is largely emphasized.[27]

ii. A Public and Private Distinction

Fourth Amendment protections are also drawn on public and private lines. Previous Supreme Court decisions have protected a home from warrantless physical intrusions.[28] In *Silverman v. United States*, police officers used a "spike mike" from inside a row house to listen to conversations and activity in the house next door.[29] The "spike mike" was a microphone with an extension attachment, amplifier, power pack, and earphones.[30] By inserting the microphone into the wall, the officers touched the heating duct of the other house.[31] This contact, even though small, violated the Fourth Amendment because it intruded on the home.[32] The Court held that the intrusion was unlawful because at the core of the Fourth Amendment is "the right of a man to retreat into his own home and there be free from unreasonable government intrusion."[33] While *Silverman* emphasizes physical intrusions, a physical intrusion is not necessary to trigger Fourth Amendment protections.[34]

With this dual approach that maintains an emphasis on the private but leaves room for other exceptions, the distinction between public and private has been applied with various weights depending on

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[26] Smith v. Maryland, 442 U.S. 735, 740 (1979) ("[T]his Court uniformly has held that the application of the Fourth Amendment depends on whether the person invoking its protection can claim a . . . 'reasonable,' or a 'legitimate expectation of privacy' . . . ."); Joshua Schow, *Defying Expectations: A Case for Abandoning Katz by Adopting a Digital Trespass Doctrine*, 49 STETSON L. REV. 339, 340 (2020); Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 805 (2004); *see also* Florida v. Jardines, 569 U.S. 1, 5 (2013) ("By reason of our decision in *Katz* . . . property rights 'are not the sole measure of Fourth Amendment violations,' . . . ."); Oliver v. United States, 466 U.S. 170, 177 (1984); Rawlings v. Kentucky, 448 U.S. 98, 112 (1980) (Blackmun, J., concurring). *But see* United States v. Jones, 565 U.S. 400, 406 (2012) ("[B]ecause Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation.").

[27] *See* Riley v. California, 573 U.S. 373, 381 (2014); *see also* Brigham City v. Stuart, 547 U.S. 398, 403 (2006); Kentucky v. King, 563 U.S. 452, 459 (2011).

[28] *See* Georgia v. Randolph, 547 U.S. 103, 115 (2006); Silverman v. United States, 365 U.S. 505, 513 (1961) (Douglas, J., concurring); Cullins v. Wainwright, 328 F.2d 481, 482 (5th Cir. 1964).

[29] *Silverman*, 365 U.S. at 506.

[30] *Id.*

[31] *Id.* at 506-07.

[32] *Id.* at 509-10.

[33] *Id.* at 511; *see also* Todisco v. United States, 298 F.2d 208, 210 (9th Cir. 1961).

[34] *See* United States v. White, 401 U.S. 745, 747-48 (1971) (citing Katz v. United States, 389 U.S. 347 (1967)). *Katz* was decided a few years after Silverman.

whether the intrusion is against a home or other property.[35] This treatment is due to the home being considered the foundation of Fourth Amendment principles.[36] In *Kyllo v. United States*, the Supreme Court held that the Fourth Amendment draws a line at the home's threshold.[37] Lower courts have applied the emphasis on the home in *Kyllo* to extend special protections to the home.[38] A home is a place of privacy that has repeatedly been protected against government intrusion under the Fourth Amendment.[39] Certain decisions have defended this rationale by arguing that the search was *not* conducted in a home.[40]

This approach has made the home an important factor in determining a reasonable expectation of privacy. The Supreme Court has recognized a privacy interest for renters,[41] overnight guests,[42] and people in hotel rooms.[43] Lower courts have even recognized a privacy interest for people in a tent on private property adjacent to a home.[44] Nonetheless, the protections of the home are not absolute. An individual can alter a reasonable expectation of privacy by allowing people into private spaces.[45] This applies to undercover government agents.[46] There is no Fourth Amendment protection when a person trusts the "wrong

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[35] *See* United States v. Agrusa, 541 F.2d 690, 697 (8th Cir. 1976) (holding that business premises are not "entitled" to the same protections as a home).

[36] *See* Kyllo v. United States, 533 U.S. 27, 40 (2001) (the Fourth Amendment draws a line at the entrance of the home); Wilson v. Layne, 526 U.S. 603, 612 (1999) (the home is central to Fourth Amendment rationale); United States v. Dunn, 480 U.S. 294, 301 (1987) (describing the home's "umbrella" of Fourth Amendment protections); United States v. U.S. Dist. Court, 407 U.S. 297, 313 (1972) (includes rhetoric of the evil of violating the home under the Fourth Amendment).

[37] *Kyllo*, 533 U.S. at 40.

[38] *See, e.g.*, Loria v. Gorman, 306 F.3d 1271, 1286-87 (9th Cir. 2002); United States v. Tolar, 268 F.3d 530, 532 (7th Cir. 2001).

[39] *See* Payton v. New York, 445 U.S. 573, 590 (1980).

[40] Dow Chem. Co. v. United States, 476 U.S. 227, 237 n.4 (1986) (noting the importance of the area *not* being adjacent to a private home); Serr, *supra* note 15, at 607 ("[F]ields are not very much like a home.… [Justice Powell] concluded that open fields are undeserving of [F]ourth [A]mendment protection.").

[41] *See* Chapman v. United States, 365 U.S. 610, 617 (1961); Minnesota v. Carter, 525 U.S. 83, 95-96 (1998) (Scalia, J., concurring) (specifying that renter must actually live there).

[42] *See* Minnesota v. Olson, 495 U.S. 91, 98-99 (1990).

[43] *See* Stoner v. California, 376 U.S. 483, 487-88 (1964); *see also* United States v. Nerber, 222 F.3d 597, 600 n.2 (9th Cir. 2000) (a hotel room is treated essentially the same as a home).

[44] United States v. Gooch, 6 F.3d 673, 677 (9th Cir. 1993).

[45] *See White*, 401 U.S. at 749, 752 (1971) (specifically addressing the home); Lopez v. United States, 373 U.S. 427, 438 (1963) (discussing an undercover cop in an office).

[46] Hoffa v. United States, 385 U.S. 293, 302 (1966).

person."[47] A reasonable expectation of privacy does not prevent associates from turning to the police or simply sharing information.[48]

The privacy of the home is also not protected by the Fourth Amendment when information is exposed to the public.[49] For example, general visual surveillance, like walking by a home, is permissible under the Fourth Amendment.[50] This understanding of general surveillance is not absolute, as the Supreme Court upheld a search that involved an officer purposefully looking through the *closed* blinds of an apartment, thus viewing the sanctimonious interior.[51] Regardless, this principles rests on the notion that, if an officer "has a right to be in the position to have [a] view" of an object in plain view, the object is not protected by the Fourth Amendment.[52] In addition, the notion of the "right to be in the position" may implicate how technology engages with what is in view. Fourth Amendment jurisprudence has slowly addressed the tension between what can be seen, what is legitimately in view, and modern technology.[53]

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[47] *Id.*

[48] *White*, 401 U.S. at 752; *see also Hoffa*, 385 U.S. at 296-302 (holding that the defendant shared information and invited the informants inside his hotel room at his own risk); Lewis v. United States, 385 U.S. 206, 211 (1966) (an undercover government agent was invited to the home to purchase narcotics); *Lopez*, 373 U.S. at 438 (an Internal Revenue Service agent entered the defendant's office, with consent, under the guise of accepting a bribe).

[49] California v. Ciraolo, 476 U.S. 207, 213 (1986) (if the information is exposed to the public, the sanctity of the home does not protect it); *see also* Florida v. Riley, 488 U.S. 445, 449 (1989) (quoting Katz v. United States, 389 U.S. 347, 351 (1967)) (holding that law enforcement can view what people "knowingly expose[] to the public"); Arizona v. Hicks, 480 U.S. 321, 323 (1987) ("[I]n certain circumstances a warrantless seizure by police of an item that comes within plain view during their lawful search of a private area may be reasonable under the Fourth Amendment."); United States v. Knotts, 460 U.S. 276, 281 (1983) (holding that there is no reasonable expectation of privacy when traveling on public roads, even if the final destination is private property).

[50] *See Ciraolo*, 476 U.S. at 213.

[51] Minnesota v. Carter, 525 U.S. 83, 86 (1998).

[52] Harris v. United States, 390 U.S. 234, 236 (1968).

[53] For a discussion on developing privacy concerns with smart homes, *see* Andrew Guthrie Ferguson, *The Smart Fourth Amendment*, 102 CORNELL L. REV. 547 (2017); Stefan Ducich, *These Walls Can Talk: Securing Digital Privacy in the Smart Home Under the Fourth Amendment*, 16 DUKE L. & TECH. REV. I 278 (2017-2018).

### iii. A Growing Application to Technology

Many of the cases that analyze the use of technology address how technology is used against a home and the concept of public view.[54] In *Kyllo v. United States*, the Supreme Court addressed the possibility of technology exposing previously undiscoverable aspects of the home.[55] In *Kyllo*, the defendant was suspected of growing marijuana in his home.[56] Because indoor marijuana growing requires high-intensity lamps, law enforcement used thermal imagers to detect "infrared radiation," which is not visible to the human eye.[57] The scan showed that certain portions of the house, specifically the garage and one side of the home, were hotter than the rest of the home.[58] The Court struck down the search because it violated the privacy of the home.[59] Even though the search only revealed heat radiating from the house, the Court did not want to leave a homeowner subject to the power of advancing technologies.[60] Similar concerns have arisen with the potential reach of Fourth Amendment exceptions.[61]

While not specific to BWCs, privacy cases have also addressed the general use of cameras,[62] nanny cameras,[63] pole cameras,[64] technology from the air,[65] and GPS technology.[66] The First Circuit held that there is a public interest in police activity in private homes that could justify a release of nanny camera footage.[67] While a nanny camera is voluntarily placed in a home and a BWC is not necessarily voluntarily in a home, the decision could be impactful in BWC privacy cases. With this, the potentially invasive nature of cameras has been recognized.[68] A

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[54] *See, e.g.*, *Riley*, 488 U.S. at 451-52 (considering aerial surveillance); United States v. Garcia-Gonzalez, No. 14-10296, 2015 WL 5145537, at 8-9 (D. Mass. Sept. 1, 2015) (considering a pole camera's view of a home).

[55] *Kyllo*, 533 U.S. at 27.

[56] *Id*. at 29.

[57] *Id.*

[58] *Id.* at 30.

[59] *Id.* at 35.

[60] *Id.*

[61] *See* Carpenter v. United States, 138 S. Ct. 2206, 2223 (2018); *see* Kerr, *supra* note 26, at 865-67 (discussing how changing technology challenges privacy assumptions and implications).

[62] *See* United States v. Taketa, 923 F.2d 665, 677 (9th Cir. 1991).

[63] *See* Jean v. Mass. State Police, 492 F.3d 24, 30 (1st Cir. 2007).

[64] *Garcia-Gonzalez*, 2015 WL 5145537, at 8-9.

[65] *Riley*, 488 U.S. at 451-52 (the view from the air will not always "pass muster under the Fourth Amendment").

[66] *Jones*, 565 U.S. at 402.

[67] Jean v. Mass. State Police, 492 F.3d at 30.

[68] *Taketa*, 923 F.2d at 677.

camera presents different privacy concerns than the human eye.[69] This potential disqualifier may be limited by what an individual has exposed to the public.[70] This notion was used to consider surveillance from the air.[71] While not inherently unconstitutional, surveillance from the air can make the view particularly intrusive and, consequently, violate the Fourth Amendment.[72]

There exists a potential threshold question, which was highlighted in *United States v. Jones*.[73] In *Jones*, the Supreme Court held that the use of a GPS surveillance device was a search under the Fourth Amendment because it encroached the defendant's vehicle.[74] The concurrence, however, argued that the prolonged use of the device (28 days) was more significant to an individual's expectation of privacy.[75] Taking the duration of the use into consideration, the action constituted a search and was invasive.[76] The rationale included a temporal element that is increasingly common in privacy and technology cases.[77]

This temporal element was important when analyzing the use of pole cameras. Pole cameras raised Fourth Amendment concerns due to their consistent use.[78] In *United States v. Garcia-Gonzalez*, a camera was placed in a public location to consistently record a suspect when he left his home.[79] The amount of information gathered over time and the level of surveillance raised the court's concern.[80] While BWCs currently do not continuously record, the temporal element or notion that individual elements can combine to violate the Fourth Amendment may be applicable to BWCs.

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[69] United States v. Anderson-Bagshaw, 509 Fed. Appx. 396, 405 (6th Cir. 2012); United States v. Nerber, 222 F.3d 597, 603 (9th Cir. 2000).

[70] *See* United States v. Dionisio, 410 U.S. 1, 14 (1972) (holding that there is no expectation of privacy in identifying features displayed in public).

[71] *Riley*, 488 U.S. at 451-52.

[72] *Id.* (the view from the air will not always "pass muster under the Fourth Amendment").

[73] *Jones*, 565 U.S. at 430 (Alito, J., concurring).

[74] *Id.* at 402.

[75] *Id.* at 430 (Alito, J., concurring).

[76] *Id.*; *see also* United States v. Maynard, 615 F.3d 544, 555-56, 562 (D.C. Cir. 2010) (holding that when actions are considered together, they can constitute a search).

[77] *See, e.g.*, *Jones*, 565 U.S. at 430 (Alito, J., concurring); *Maynard*, 615 F.3d at 555-56, 562.

[78] *Garcia-Gonzalez*, 2015 WL 5145537, at 8-9; United States v. Wymer, 40 F. Supp. 3d 933, 938-39 (N.D. Ohio 2014); United States v. Houston, 965 F. Supp. 2d 855, 871-72 (E.D. Tenn. 2013).

[79] *Garcia-Gonzalez*, 2015 WL 5145537, at 8-9.

[80] *Id.*; *see also Wymer*, 40 F. Supp. 3d at 938-39 (N.D. Ohio 2014); *Houston*, 965 F. Supp. 2d at 871-72.

### *B. Australian Privacy Law*

Australia does not have a historic, common law right to privacy.[81] Australian privacy law slowly developed in response to technology.[82] The Australian government, the Commonwealth and state, attempted to address privacy concerns during the 1970s and 1980s.[83] Unlike the United States, Australia did not begin addressing privacy concerns with existing law. Instead, Australia called for examinations of privacy for the purpose of enacting specific privacy laws.[84] An influential report, the Report on the Law of Privacy (released in 1973), did not call for legislative action *per se*.[85] Rather, the author recommended that a statutory body monitor privacy concerns, develop codes of conduct, investigate individual complaints, and conduct research into what legislation on privacy should invoke.[86] This report informed Australian action for two decades and provided the framework for enacted legislation.[87]

The reports were not the only reason for Australia to enact privacy legislation. One reason for increasing privacy protections was that Australia signed the International Covenant on Civil and Political Rights.[88] The treaty requires states to provide privacy protections for individuals.[89] After signing, Australia enacted the Invasion of Privacy Act 1971, which makes it an offense for anyone to use a listening device to overhear or record a private conversation.[90] This act addressed a

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[81] Margaret Jackson, *Data Protection Regulation in Australia After 1988*, 5 INT'L J.L. & INFO. TECH. 158, 160 (1997).

[82] *Id.* Australian legislation and police policy either use the term "body worn video" or "body worn camera." For consistency, this comment will continue to use "body worn camera."

[83] *Id.* Australia has a federal system of government, where powers are distributed between the national government (the Commonwealth) and states. The states are New South Wales, Queensland, Tasmania, Victoria, Western Australia, and South Australia (which includes the Northern Territory). CONSTITUTION July 9, 1900, Covering Clauses § 6 (Austl.).

[84] Jackson, *supra* note 81.

[85] *Id.*

[86] *Id.* at 161.

[87] *Id.* at 160-61 (influenced the *Privacy Committee Act 1975* (NSW) and *Privacy Committee Act 1984* (Qld.)).

[88] Palmer, *supra* note 8 (noting that the federal government would reiterate an interest in privacy in 1996, when the government released a Discussion Paper that said the government would make privacy law in Australia "comparable with best international practice."); Moira Paterson, *Privacy Protection in Australia: The Need for an Effective Private Sector Regime*, 26 FED. L. REV. 371, 372 (1998).

[89] International Covenant on Civil and Political Rights, art. 17(1), Dec. 16, 1966, 999 U.N.T.S. 171.

[90] Palmer, *supra* note 8.

specific action or concern, but it did not inherently say what privacy as a whole means in Australia.[91] Australia continued to request reports to inquire about the state of privacy concerns in the country.[92]

In 1983, a report by the Australian Law Reform Commission was released and recommended the adoption of the Information Privacy Principles.[93] Upon this recommendation and to abide by the International Covenant on Civil and Political Rights, Australia enacted the Privacy Act 1988.[94] The Privacy Act 1988 enacted the eleven Information Privacy Principles, or IPPs.[95] The IPPs specified how government agencies could handle private information.[96] The majority of regions in Australia enacted the IPPs into their law.[97] These acts apply the IPPs to each regions respective government agencies.[98]

When Australia recognized that information is handled by more than government actors, the Privacy Act 1988 was amended.[99] The amendment included principles called the National Privacy Principles, or NPPs.[100] "These principles applied solely to private organizations,"[101]

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[91] *See id.*

[92] *See, e.g.*, Jackson, *supra* note 81, at 161 (noting that The Federal Attorney General asked the Australian Law Reform Commission to determine the "status of privacy protections" in 1976). More current reports have addressed data privacy concerns. *E.g.*, Australia Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report No. 123 (2014), https://www.alrc.gov.au/wp-content/uploads/2019/08/final_report_123_whole_report.pdf [https://perma.cc/GDH7-2J2C]; Australian Law Commission, *For Your Information: Privacy Law and Practice*, Report No. 108, vol. 1-3 (2006), https://www.alrc.gov.au/publication/for-your-information-australian-privacy-law-and-practice-alrc-report-108/ [https://perma.cc/FK9E-TYM5].

[93] Jackson, *supra* note 81, at 161.

[94] *Id.* at 163-64; Des Butler, *The Dawn of the Age of the Drones: An Australian Privacy Law Perspective*, 37 U.N.S.W.L.J. 434, 461 (2014) (noting that Australia attempted to pass an earlier version in 1986 but it failed because it was connected to the Australia Card Bill, which the government dropped. The first Privacy Act quickly followed suit and the Privacy Act 1988 became Australia's first enacted privacy legislation).

[95] *Privacy Act 1988* (Cth) (Austl.) (original bill).

[96] *Id.*

[97] *See Information Act 2002* (NT) sch 2 (Austl.); *Privacy and Personal Information Protection Act 1998* (NSW) pt 2 div 1 (Austl.); *Information Privacy Act 2009* (Qld) sch 3 (Austl.); *Personal Information Protection Act 2004* (Tas) sch 1 (Austl.); *Information Privacy Act 2000* (Vic) sch 1 (Austl.); Department of Premier and Cabinet (SA), *Cabinet Administrative Instruction 1/89*, August 5, 2013..

[98] Butler, *supra* note 94, at 461-62.

[99] *Id.* at 462; Palmer, *supra* note 8.

[100] Butler, *supra* note 94, at 462*; Privacy Amendment (Private Sector) Act 2000* (Cth) sch 1.

[101] Butler, supra note 94, at 462.

though the number of exceptions limited their effectiveness.[102] With the amendment, Australia had privacy standards for government agencies and private organizations. Yet the principles, the IPPs and NPPs, created confusion.[103] Consequently, the Privacy Act 1988 was amended again to create one scheme of standards called the Australian Privacy Principles, or APPs.[104] There are thirteen Australian Privacy Principles and they apply equally to private and public organizations.[105] The APPs present specific privacy interests that are protected by Australian privacy law. Under the APPs, Australian courts have "held that a photograph or video of an individual constitutes 'personal information'," which falls under the APPs.[106]

While the APPs specify protections, the Australian regions have inconsistently applied these protections.[107] The regions accepted the basic principle that personal information should be protected but the threshold for a violation varies. The Commonwealth, New South Wales, and Queensland state that information cannot be collected unless it is lawful, and "the collection…is necessary for or directly related to th[e] purpose."[108] Lawful refers to collections that directly relate or are necessary to the actions of the agency.[109] Tasmania, the Northern Territory, and Victoria have a slightly lower threshold. Their legislation states that an agency cannot collect personal information unless the information is necessary for at least one of the agency's functions.[110]

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[102] *See Privacy Amendment (Private Sector)* sch 1; Moira Paterson, *Criminal Records, Spent Convictions and Privacy: A Trans-Tasman Comparison*, 2011 N.Z. L. REV. 69, 78-79 (2011).

[103] *See* AUSTRALIAN LAW REFORM COMMISSION, FOR YOUR INFORMATION: AUSTRALIAN PRIVACY LAW AND PRACTICE 109 (Report/108, 2008) (Executive Summary).

[104] *See Privacy Amendment (Enhancing Protection) Act 2012* (Cth) sch 1; Butler, *supra* note 94, at 462.

[105] *Privacy Amendment (Enhancing Protection) 2012* sch 1; Butler, *supra* note 94, at 462.

[106] *See* Butler, *supra* note 94, at 462; *see also SW v Forests NSW* [2006] NSWADT 74 (Austl.) (photograph of person at work retreat); *NG v Dep't of Educ* [2005] VCAT 1054 (Austl.) (surveillance video of teacher in a classroom).

[107] *See* Butler, *supra* note 94, at 462-63.

[108] *Id.* at 462; *Privacy Act 1988* (Cth) sch 1 pt 2 (Austl.) (version currently enforced); *Privacy and Personal Information Protection Act 1998* (NSW) pt 2 div 1 (Austl.); *Information Privacy Act 2009* (Qld) sch 3 (Austl.).

[109] *See Privacy Act 1988* sch 1 pt 2; *Privacy and Personal Information Protection Act 1998* pt 2 div 1; *Information Privacy Act 2002* sch 3.

[110] *Information Act 2002* (NT) sch 2 (Austl.); *Personal Information Protection Act 2004* (Tas) sch 1 (Austl.); *Information Privacy Act 2000* (Vic) sch 1 (Austl.); Butler, *supra* note 94, at 462.

Lastly, South Australia has a lower threshold for information collection. The region specifies that information cannot be collected unlawfully or "unnecessarily."[111] Consequently, the regions have room to collect large amounts of personal information.[112]

### *C. BWCs in the United States and Australia*

Both the United States and Australia greatly increased their use of BWCs within the past five to ten years,[113] largely in response to social problems.[114] In the United States, BWCs increased as a response to concerns about police use of force, transparency, and racial tensions.[115] In Australia, BWCs increased in regions like New South Wales and Queensland due to domestic violence concerns.[116] While more research is needed, these reasons may influence how BWC policy is created.[117] To show how BWCs are handled in the United States and Australia, this section will expound on cases, legislation, and police department policies.

#### i. Court Cases

The value of BWC footage in court is unclear and there is little existing research that specifically looks at the use of BWC footage in court.[118] With this, there are some examples of how footage may be considered in a courtroom. The Court of Appeals of Kentucky noted that BWCs are public records and accessible, but the right to access is not

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[111] Department of Premier and Cabinet (SA), *Cabinet and Administrative Instruction 1/89*, 5 August 2013; Butler, *supra* note 94, at 462-63.

[112] *See* Butler, *supra* note 94, at 462-63.

[113] *See* Callum Christodoulou, Helen Paterson & Richard Kemp, *Body-Worn Cameras: Evidence Base and Implications*, 31 CURRENT ISSUES CRIM. JUST. 513, 515-16 (2019); Josh Sanburn, *The One Battle Michael Brown's Family Will Win*, TIME (Nov. 25, 2014, 10:26 PM), https://time.com/3606376/police-cameras-ferguson-evidence/ [https://perma.cc/K5HC-MVVT].

[114] *See, e.g.*, Floyd v. City of New York, 959 F. Supp. 2d 668, 685 (S.D.N.Y. 2013) (police body cameras "should . . . alleviate some of the mistrust that has developed between the police and the black and Hispanic communities."); Alberto R. Gonzales & Donald Q. Cochran, *Police-Worn Body Cameras: An Antidote to the "Ferguson Effect"?*, 82 MO. L. REV. 299, 310-11 (2017).

[115] *See, e.g.*, Pagliarella, *supra* note 8, at 534-36; Sanburn, *supra* note 113.

[116] Palmer, *supra* note 8.

[117] *See generally* Timothy IC Cubitt et al., *Body-Worn Video: A Systematic Review of Literature*, 50 AUSTL. & N.Z J. CRIMINOLOGY 379 (2017); CYNTHIA LUM ET AL., EXISTING AND ONGOING BODY WORN CAMERA RESEARCH: KNOWLEDGE GAPS AND OPPORTUNITIES (2015).

[118] LUM ET AL., *supra* note 117, at 20, 26.

absolute.[119] The New York Supreme Court held that domestic violence videos can be withheld because, in certain circumstances, information about a victim may be an unwarranted invasion of privacy.[120] These cases were concerned with the type of information the footage portrayed.

Similarly, the California Court of Appeals, Fourth District viewed BWC footage when addressing competing domestic violence restraining orders.[121] During the domestic conflict, the police officer activated the BWC to record an interview.[122] The same officer wrote a report on the conflict.[123] The court also heard from all parties, including the officer.[124] When making its decision, the court noted the testimony of the parties and the officer, and found each testimony credible; the relationship between the parties included domestic violence.[125] The key facet to the decision was the testimony of the parties involved, not the BWC footage.[126] Other cases, where the video footage is available, also emphasize the focus on testimony.[127]

A stronger approach to BWC footage in court can be seen in the Australian case *R v. RT* (No. 2), a domestic violence case where the court based the decision on viewing the footage.[128] At the scene, the officer began her recording and continued recording through her interviews with the parties.[129] At the end of the interviews, the officer read her notes to the eventual defendant.[130] He was asked to sign a statement, which he did, saying he agreed with the record of events.[131] The footage that captured the interviews and his signature were the basis for the decision.[132] A transcript of a conversation with police was only used to aid the interpretation of the video.[133]

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[119] Parish v. Petter, 608 S.W.3d 638, 639, 641 (Ky. Ct. App. 2020) (a man appealed the denial of his motion to compel body worn camera video).

[120] *See* Time Warner Cable News v. N.Y.C. Police Dep't, 36 N.Y.S.3d 579, 589-90 (N.Y. Sup. Ct. 2016).

[121] *See Everard*, 260 Cal. Rptr. 3d at 557, 560.

[122] *Id.* at 559-60.

[123] *Id.*

[124] *Id.* at 560-61.

[125] *Id.* at 564, 569.

[126] *See id.* at 564-65, 569.

[127] *See, e.g.*, State v. Williams, No. 2014AP2186-CRNM, 2015 WL 13122777, at *2 (Wis. Ct. App. Feb. 11, 2015).

[128] *R v. RT* [No. 2], (2020) QDC 158 (Austl.).

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

In addition, Australian courts treat BWC information in a general manner. In *R. v. Dowd*, quotes from the BWC footage were repeatedly provided in the opinion.[134] While not a domestic violence incident, *Dowd* addressed a conflict between two people who had known each other for years.[135] The victim did not testify, but the quotes describing the event were used in evaluating the case.[136] This treatment of BWC footage is potentially contrary to the treatment of BWC footage in American courts[137] American courts often place less weight on footage, with quotes or descriptions rarely appearing in judicial opinions.[138]

Lastly, BWC footage may be most useful in instances where an alleged abuser becomes violent in front of police officers. In *State v. McRae*, the Court of Appeals of Ohio was shown BWC footage to support officer testimony.[139] In *McRae*, officers were called to a domestic violence scene.[140] When the officers approached the suspect, he fired a gun at one of the officers.[141] This incident was caught by the BWC and used in the case.[142] In Australia, a similar video was useful in demonstrating when a responding officer was overpowered and injured by a suspect.[143] In *R v. Mickelo*, officers were dispatched to an apartment to address a noise disturbance.[144] Upon arrival, the officers were engaged in a conflict with an apartment resident, resulting in a physical altercation.[145] At trial, BWC footage was shown to support the officer's testimony and convict the resident.[146] Similarly, in *Ebatarinja v. Dunne*, BWC footage showed the chaotic nature of violent behavior towards officers.[147] In conjunction with officer testimony, footage was used to determine the crime's severity.[148] These cases show that footage may be useful in court. There is, however, the possibility that these situations

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[134] *R v. Dowd*, [2018] NSWDC 459 (Austl.).
[135] *Id.*
[136] *Id.*
[137] *See Petter*, 2020 WL 5266145; *Time Warner Cable News*, 36 N.Y.S.3d at 589-90 (domestic violence footage may be withheld).
[138] *See Everard*, 260 Cal. Rptr. 3d at 569.
[139] State v. McRae, N. C-180669, 2020 WL 1042283, at *3-4 (Ohio Ct. App. Mar. 4, 2020).
[140] *Id.* at *1.
[141] *Id.*
[142] *Id.* at *3-4.
[143] *R v. Mickelo*, [2018] QCA 295 (Austl.).
[144] *Id.* at 4.
[145] *Id.*
[146] *Id.*
[147] *See Ebatarinja v. Dunne* [No. 3], (2018) NTSC 66 (Austl.).
[148] *Id.*

need the least evidentiary video support and, consequently, the BWC footage is just another box to tick.

ii. Legislation

a. United States

Most of the legislative action that applies to BWCs is at the state level.[149] Federal proposals are often about pilot programs or funding mechanisms.[150] An area that is addressed by state law is public access.[151] Most states have laws that, if applied, exempt police from public records request.[152] For example, Arkansas exempts records related to "undisclosed investigations" from the Arkansas Freedom of Information Act.[153] The state has a broad statute for what is exempt from public records request. In other states, "records" is used in the context of creating exceptions for material that could, if made public, create risks for criminal informants or criminal investigations.[154] Such access laws could impact how BWC footage is treated.[155]

There are also state laws protecting privacy interests in relation to recordings.[156] Specifically, states have passed legislation that prohibits recordings when a person exhibits a reasonable expectation of privacy.[157] The interest of introducing BWCs, the role of law enforcement, and the meaning of "reasonable expectation of privacy" make the application of these laws unclear. Some states make the law slightly clearer by starting with reasonable expectation of privacy and then creating an exception for law enforcement.[158] Generally, in these states, a recording cannot be made when a person is exhibiting an expectation of privacy, but law

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[149] *See* Urban Inst., *supra* note 5.

[150] *See, e.g.*, Police CAMERA Act of 2019, H.R. 120, 116th Cong. (2019); DHS Body-Worn Camera Act of 2018, S. 3538, 115th Cong. (2018).

[151] Urban Inst., *supra* note 5.

[152] *See id.*

[153] Ark. Code Ann. § 25-19-105(b)(6).

[154] N.Y. Pub. Off. Law § 87(2)(e).

[155] *See* Brian Liebman, *The Watchman Blinded: Does the North Carolina Public Records Law Frustrate the Purpose of Police Body Cameras?*, 94 N.C.L. REV. 344, 348 (2015) (discussing how these laws would undermine the purpose of BWCs); Steve Zansberg, *As Body-Worn Cameras Proliferate, States' Access Restrictions Defeat Their Purpose*, 32 COMM. LAW. 12 (2016).

[156] Urban Inst., *supra* note 5.

[157] *See*, *e.g.*, Wyo. Stat. Ann. § 7-3-701(a)(xi); W. Va. Code. § 62-1D-2(i); Va. Code Ann. § 19.2-62; La. Rev. Stat. Ann. § 15.303.

[158] *See, e.g.*, Utah Code Ann. § 77-23a-4; Tex. Code Crim. Proc. Art. 18.20 § 1(2); Tenn. Code Ann. § 40-6-303.

enforcement may act differently.[159] Consequently, police departments have fewer concerns about conflicting with state law on privacy grounds.

These laws are all general, as they are laws that either existed before the introduction of BWCs or address related principles. They do not directly address how to handle a BWC or what to do with footage. These general laws are consistent in protecting privacy interests and limiting access to "records" that relate to a criminal investigation. However, when the law is specific to BWCs, the state law scene changes in two ways.[160] First, there is less developed law. The country is learning as it goes, and some states, due to community interest or tragic events, are faster at creating specific policies than others.[161] Second, BWCs were first introduced to increase accountability and transparency.[162] What those terms mean and how a community achieves them may take time. For example, New York is now moving towards releasing all footage of police-involved shootings and use of force cases.[163] This policy is like the long-standing policy in Washington, DC. Every six months, the DC Mayor is required to collect information on BWC usage in the District and release it to the public.[164] State law shares some common ideals but adapts as legislators learn what their communities need.

b. Australia

When BWCs were first introduced, Australia relied on general police powers to justify the use of cameras.[165] Yet, within a few years, states passed legislation that addressed law enforcement use of BWCs to avoid conflicts with existing legislation on privacy and listening devices.[166] For example, Queensland amended the Invasion of Privacy Act 1971 to make BWCs an exception.[167] Currently, New South Wales

[159] *See* Urban Inst., *supra* note 5.
[160] *Id.*
[161] *See generally* Floyd v. City of New York, 959 F. Supp. 2d 668, 685 (S.D.N.Y. 2013); Pagliarella, *supra* note 8, at 533; Sanburn, *supra* note 113.
[162] *See* Sanburn, *supra* note 113.
[163] Associated Press, *New Policy Requires NYPD to Release Body Camera Footage* (June 16, 2020) https://apnews.com/article/2fea6f0179f8e95e332c2c4deeaa861a [https://perma.cc/KCT7-RLZA].
[164] DC Code § 5-116.33.
[165] Palmer, *supra* note 8, at 139.
[166] *Id.*
[167] *Id.*

and Victoria also rest police action on the Surveillance Devices Act.[168] Such efforts are specific to the use of BWCs in the state.[169]

Australia has other legislation that, while not specific to BWCs, may be applicable. The Freedom of Information Act 1982 gives Australians the right to request government-held information.[170] BWC recordings are the property of each police service.[171] Therefore, a person may be able to request access to a recording under Australia's Freedom of Information Act.[172] The law provides a foundation for public access.

Depending on what state a person is in, public access can be sought under different legislation. In Queensland, access can be requested under the Right to Information Act 2009 or the Information Privacy Act 2009.[173] There is also the Public Records Act 2002, which defines a public record as a record made, received, or kept by a public authority.[174] A BWC made and stored by the police department would constitute a public record.[175] The Act provides a method for accessing such records.[176] Similarly, New South Wales provides a method of accessing information if a "public interest" does not outweigh disclosure.[177] Lastly, Victoria has a general public access law as well as a data protection law.[178] Under this law, there is another opportunity for Australian citizens to access BWC footage.

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[168] Victoria Police, *Body Worn Cameras* (Dec. 2, 2019), https://www.police.vic.gov.au/body-worn-cameras [https://perma.cc/X7YV-LWZ5]; Gov't of New South Wales, *BWV: Legislation*, https://www.police.nsw.gov.au/safety_and_prevention/policing_in_the_community/body_worn_video/bwv/legislation#:~:text=The%20Surveillance%20Devices%20Act%20has,in%20the%20Surveillance%20Devices%20Act. (last visited Jan. 9, 2022) [https://perma.cc/46ES-XDHP].

[169] Palmer, *supra* note 8, at 138.

[170] *Freedom of Information Act 1982* (Cth) (Austl.).

[171] *See* Queensland Police Service, *Body worn cameras* (2020), https://www.police.qld.gov.au/initiatives/body-worn-cameras [https://perma.cc/4PVN-DD96].

[172] *E.g.*, Victoria Police, *supra* note 168.

[173] *Right to Information Act 2009* (Qld.) (Austl.).

[174] *Public Records Act 2002* (Qld.) div 1 s 6(1)(a)-(b) (Austl.).

[175] *See id.*

[176] *Public Records Act 2002* (Qld.) (Austl.).

[177] *Government Information (Public Access) Act 2009* (NSW) (Austl.).

[178] *Freedom of Information Act 1982* (Vic) (Austl.); *Privacy and Data Protection Act 2014* (Vic) (Austl.).

iii. Police Department Policies

a. United States

Police departments have played a significant role in crafting BWC policy since the introduction of the cameras.[179] In 2017, the Leadership Conference looked at seventy-five police departments across the country to analyze BWC policies.[180] The seventy-five departments include the largest in the country, departments that have received more than $500,000 in Department of Justice grants for a BWC program, and cities that have experienced significant civilian-police conflicts.[181] The policies were judged according to Civil Rights Principles that have been supported by institutions including the ACLU, Center for Democracy and Technology, NAACP, and the Lawyers' Committee for Civil Rights Under Law.[182]

Many police departments either allow officer discretion or specify that officers must record certain events.[183] Departments that include recording requirements are often not clear on what "required" means. For example, Las Vegas, Miami, New Orleans, and San Francisco require that officers must record but are not clear about what happens when officers do not record.[184] The policies are unclear on whether officers must justify their decision, whether there will be consequences, or whether nothing will occur if an event is not recorded.[185] In contrast, Los Angeles specifies recording and requires justification when officers do not comply with the requirement.[186] Ambiguity in a policy can weaken the notion of a requirement to record and it leaves space for officer discretion, undermining the policy.

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[179] *See* Leadership Conference on Civil and Human Rights & Upturn, *supra* note 10.

[180] *Id.*

[181] *Id.*

[182] *Id.* The general principles are: (1) develop policies in public with the input of the community; (2) commit to a narrow, well-defined purpose for the cameras; (3) specify clear operational policies for recording, retention, and access; (4) make footage available to promote accountability, with privacy safeguards in place; and (5) preserve the independent evidentiary value of officer reports. While beneficial and applicable, these factors are not specific to domestic violence scenes.

[183] *Id.*

[184] *See* Leadership Conference on Civil and Human Rights & Upturn, *supra* note 10.

[185] *Id.*

[186] *Id.*

There are also potential problems with not specifying what events trigger the required recording.[187] Many departments require officers to record "calls for service" and similar law-enforcement related activity.[188] As "calls for service" is rarely defined, the officer is left to determine what action is appropriate. Some departments provide a specific list, such as New Orleans, which presents a list of offenses that must be recorded.[189] The policy starts like other departments, listing "all calls for service," but continues by listing domestic violence calls, emergency responses, swat rolls, and others.[190]

Another key area is officer review, which addresses whether an officer can view footage before writing an initial report.[191] Fifty-eight of the seventy-five cities looked at by the Leadership Conference allow or encourage officers to review footage before filing a report.[192] These cities include the largest police departments in the United States: New York City, Chicago, and Los Angeles.[193] People who support these policies claim that review helps officers remember events clearly, which helps them report the truth.[194] This support is a general evidence claim. Police departments have concerns about conflicting reports and BWC footage impacting officer credibility.[195] There are some people countering this position, arguing that officer reports should reflect the initial perspectives of the officer.[196] Twelve cities require that officers file an initial report for some incidents before they review the footage.[197]

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[187] *See* Lindsey Miller, Jessica Toliver, & Police Exec. Research Forum, *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned*, Washington, DC: Office of Community Oriented Policing Services (2014), 18.

[188] *Id.*

[189] New Orleans Police Department, *Chapter 41.3.10: Body Worn Camera*, (2015) https://www.nola.gov/getattachment/NOPD/Policies/Chapter-41-3-10-Body-Worn-Camera-EFFECTIVE-12-6-20.pdf/?lang=en-US [https://perma.cc/K5JN-AYVW]; *see also* Chicago Police Department, *Body Worn Cameras*, (April 30, 2018) https://directives.chicagopolice.org/#directive/public/6120 [https://perma.cc/XU8E-2WSR]. The Chicago Police Department requires the filming of "law-enforcement-related activities." The policy then specifies eighteen instances that constitute such activities.

[190] New Orleans Police Department, *supra* note 189.

[191] Leadership Conference on Civil and Human Rights & Upturn, *supra* note 10.

[192] *Id.* at 2-4.

[193] *Id.*

[194] Miller et al., *supra* note 187, at 29.

[195] *Id.* at 9.

[196] *Id.* at 30.

[197] Leadership Conference on Civil and Human Rights & Upturn, *supra* note 10, at 2-4.

These incidents may include "in custody death" situations or restrictions on members under investigation for use of force.[198]

The remaining key area involves how footage is treated. This area includes footage retention, security protection for footage, and access to footage.[199] With footage retention, some states specify a time that footage must be deleted.[200] For example, Dallas sets the limit at ninety days.[201] Las Vegas has an even shorter threshold at forty-five days.[202] There are a few places that retain footage for longer periods.[203] New York City keeps footage for a minimum of eighteen months and states that "significant incidents" will be held for longer periods.[204] The difference in storage times may be due to the cost of storage, as it is often the most expensive part of BWC programs and may impact how a department crafts it policy.[205] As an example, when New Orleans launched its plan to introduce 350 cameras, it anticipated spending $1.2 million in storage per year.[206] In comparison, New York City has 24,000 cameras.[207]

With security protections for footage, some departments are intentional about preventing footage tampering.[208] Washington, DC specifies audits to ensure compliance with privacy standards.[209] The policy also logs those who view the footage and does not allow the person who recorded the footage to delete the video.[210] Omaha is also

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[198] *See* Baltimore Police, *Policy 824: Body Worn Camera* (Jan. 2018), https://www.baltimorepolice.org/sites/default/files/Policies/824_Body_Worn_Cameras.pdf [https://perma.cc/B2CB-SPRD].

[199] *See* Leadership Conference on Civil and Human Rights & Upturn, *supra* note 10, at 2-4.

[200] *See generally id.* For a state breakdown, see Urban Inst., *supra* note 5.

[201] Leadership Conference on Civil and Human Rights & Upturn, *supra* note 10, at 85-88.

[202] *Id.* at 136-141.

[203] *See id.* at 40, 76, 112. Baltimore County retains footage for 18 months. Cleveland specifies a retention period of 2 years for "citizen encounters." Fort Lauderdale specifies a minimum retention period of one year.

[204] *See* New York Police Department, *Body-Worn Cameras: NYPD Body-Worn Camera Program*, https://www1.nyc.gov/site/nypd/about/about-nypd/equipment-tech/body-worn-cameras.page (last visited Jan. 9, 2021).

[205] *See* Miller et al., *supra* note 187, at 32.

[206] *Id.*

[207] *See* New York Police Department, *supra* note 204.

[208] *See* Leadership Conference on Civil and Human Rights & Upturn, *supra* note 10 at 2-4.

[209] DC Council, *Body-Worn Camera Program Regulations Amendment Act 2015*, https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/B21-0351-Body-Worn%20Camera%20Program%20Regulations.pdf [https://perma.cc/R8QX-3LY7].

[210] *See id.*

very specific; its policy states that a person cannot alter, edit, copy, modify, tamper, share, download, or transfer footage without authorization.[211] Despite these departments providing specific guidance, there are many others who do not explicitly or clearly prevent footage misuse.[212]

Lastly, police departments address footage access in different ways. Privacy concerns are at the forefront of these policies. Despite the touted reason for BWCs, many departments have rested policies on privacy concerns and protections for criminal investigations.[213] There are also departments that recognize a privacy interest in BWC footage but allow access to footage if someone wants to make a complaint. Washington, DC explicitly outlines the steps a person in a recording must take if the person wishes to view BWC footage.[214] Some departments do not explicitly forbid public access, but they do not provide information on how footage may be viewed.[215] Despite the goals of police accountability and transparency, BWC footage is carefully handled due to privacy claims.

b. Australia

Australian police departments have less discretion than their American counterparts. Police departments have less control in shaping BWC policy due to Australia's specific legislation. New South Wales Police Force, the largest in Australia, cites the Surveillance Devices Act for how it manages its BWC program.[216] The Queensland Police Service also determines what footage may be accessed under the Information Privacy Act 2009.[217]

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[211] Leadership Conference on Civil and Human Rights & Upturn, *supra* note 10, at 212-16.

[212] *See id*. at 2-4.

[213] *See*, *e.g.*, Philadelphia Police Department, *Directive 4.21: Body Worn Cameras* (Jan. 15, 2016), https://www.valorforblue.org/Documents/Clearinghouse/PPD-Body_Worn_Cameras.pdf [https://perma.cc/K56L-WBH2].

[214] Leadership Conference on Civil and Human Rights & Upturn, *supra* note 10, at 320. This access is particularly relevant for people seeking to file complaints.

[215] *See* New Orleans Police Department, *supra* note 189.

[216] *See* Gov't of New South Wales, *supra* note 168.

[217] Queensland Police Service, *Right to Information and Privacy*, https://www.police.qld.gov.au/units/right-information-and-privacy (last visited Jan. 4, 2021) [https://perma.cc/LX64-JCLV].

Furthermore, many Australian police departments do not make their specific BWC policies readily accessible.[218] The Northern Territory declined to reveal the policies, with the police minister stating that the information is "a matter for NT Police[.]"[219] While Western Australia does not reveal the specifics of its BWC policies, it does require officers to record all family violence complaints and "physical or hostile" events.[220] Queensland and Tasmania provide more specific information on BWCs. These states allow their residents to check when cameras will be on, how footage will be stored, and who may access the footage.[221] Victoria and New South Wales do not reveal much information but do provide general guidelines on when BWCs will be used.[222] Consequently, each department does use BWCs at domestic violence scenes.[223]

### *D. Feminist Legal Theory's History with Domestic Violence and Privacy*

Feminist legal theory has addressed privacy for decades. Much of this discussion centers on domestic violence concerns.[224] In the 1960s, a movement began to shift violence in the home from being a "private problem" into a "public concern."[225] The premise was that violence in the home should not be ignored simply because it takes place in the home.[226] This work challenged the traditional understanding of privacy. By saying that the state and criminal justice system should be involved

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[218] *See* Julian R. Murphy & David Estcourt, Comment, *Surveillance and the State: Body-worn Cameras, Privacy and Democratic Policing*, 32 CURRENT ISSUES CRIM. JUST. 368, 374 (2020) (Austl.).

[219] *Id.* at 374-75.

[220] Gabrielle Knowles, *WA Police Body Cameras to Automatically Record When Gun is Drawn in Australian First*, WEST AUSTRALIAN (March 22, 2019), https://thewest.com.au/news/wa/wa-police-body-cameras-to-automatically-record-when-gun-is-drawn-in-australian-first-ng-b881142958z. The police commissioner revealed a few features of the cameras WA police were purchasing. The department also prohibits officers from deleting or revising footage.

[221] *See* Murphy & Estcourt, *supra* note 218, at 375.

[222] *See* Victoria Police, *supra* note 168; Gov't of New South Wales, *supra* note 168.

[223] *See id.*

[224] ELIZABETH M. SCHNEIDER, *Battered Women, Feminist Lawmaking, Privacy, and Equality*, *in* WOMEN AND THE U.S. CONSTITUTION: HISTORY, INTERPRETATION, AND PRACTICE 197, 199 (Sibyl Schwarzenbach & Patricia Smith eds., 2004).

[225] *Id.*

[226] *See id.* at 201. This work led to the development of shelters, hotlines, and other remedies for domestic violence victims.

in domestic conflicts, the sanctity of the home's threshold was no longer viewed as absolute.[227]

With this challenge, feminist legal theory confronted the traditional understanding of privacy. There are two consistent concerns with privacy.[228] First, the public and private distinction in privacy law relies on a historic understanding of gender.[229] The public, or marketplace, is masculine while the private, or domestic, is feminine.[230] This dichotomy is illusory.[231] The state defines the private sphere by the defining the family while it also defines the public sphere by defining the market.[232] The state is implicated in drawing the line between public and private. The Supreme Court illustrated this line in *O'Connor v. Ortega*, where the majority ruled on a privacy interest along the public/private dichotomy.[233] The Court noted the privacy interests of employees' private objects that they bring to the workplace but held that employees could leave the objects at home.[234] The dissent, however, pointed to the illusory nature of this distinction and argued that "the workplace has become another home for most working Americans."[235] The increase in remote work also shows that the line between the home and the marketplace is not as distinct as privacy law has held.

Second, privacy law assumes that the personal is distinct from the political.[236] This separation results in rights that women want protected not being considered in the same manner as men's interests.[237] Women primarily call for privacy interests that are corporeal, like

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[227] *See id.* at 203.

[228] For more feminist concerns, see Dana Raigrodski, *Reasonableness and Objectivity: A Feminist Discourse of Fourth Amendment*, 17 TEX. J. WOMEN & L. 153 (2008); Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181 (1994); Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Tracy E. Higgins, *Reviving the Public/Private Distinction in Feminist Theorizing*, 75 CHI.-KENT L. REV. 847 (2000); Rosa Ehrenreich, *Privacy and Power*, 89 GEO. L.J. 2047 (2001).

[229] SCHNEIDER, *supra* note 224, at 202.

[230] *Id.*

[231] Dana Raigrodski, *Property, Privacy and Power: Rethinking the Fourth Amendment in the Wake of* U.S. v. Jones, 22 B.U. PUB. INT. L.J. 67, 84 (2013).

[232] *Id.*

[233] *See* O'Connor v. Ortega, 480 U.S. 709, 715-16 (1987).

[234] Raigrodski, *supra* note 231, at 86.

[235] *Ortega*, 480 U.S. at 739 (Brennan, J., dissenting).

[236] SCHNEIDER, *supra* note 224, at 204.

[237] MARTHA C. NUSSBAUM, *What's Privacy Got to Do With It?*, *in* WOMEN AND THE CONSTITUTION: HISTORY, INTERPRETATION, AND PRACTICE 153, 162 (Sibyl Schwarzenback & Patricia Smith eds., 2004).

physical violations.[238] Men's priorities have largely centered on how information is handled by the state.[239] This distinction relates to a fundamental difference in what privacy means to an individual.[240] Privacy law is linked to the self and is a means through which people can articulate their sense of self.[241] This personal connection means privacy is inherently not neutral. Privacy law inevitably reflects political interests. Feminist legal theory critiques the notion that privacy is a disembodied idea that is removed from lived reality.

These two concerns and their impact on women have appeared in court. In 1868, the Supreme Court of North Carolina held a man who had beaten his wife not guilty of assault or battery.[242] According to the court, "[w]e will not inflict upon society the greater evil of raising the curtain upon domestic privacy, to punish the lesser evil of trifling violence."[243] The case exhibits both concerns. First, the court operated on the clear lines of public and private.[244] The state cannot enter a private, domestic space.[245] Second, the court did not consider the violence against the wife as a potential offense against her privacy.[246] This understanding emphasizes information and is historically masculine.

More recently, in *Deshaney v. Winnebago City Department of Social Services*, the Supreme Court faced a suit from a mother against the department for failing to protect her child against his abusive father.[247] The mother lived elsewhere (as the parents were separated) and the father had custody.[248] The department had removed the child once,

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[238] *See* Jessica Lake, *Disembodied Data and Corporeal Violation: Our Gendered Privacy Law Priorities and Preoccupations*, 42 U.N.S.W.L.J. 119, 120 (2019).

[239] *Id.*

[240] For further reading on the definition of privacy, see Julie E. Cohen, *What Is Privacy For*, 126 HARV. L. REV. 1904 (2013); Janice Richardson, *The Changing Meaning of Privacy, Identity and Contemporary Feminist Philosophy*, 21 MINDS & MACHINES 517 (2011); David Lindsey, *An Exploration of the Conceptual Basis of Privacy and the Implications for the Future of Australian Privacy Law*, 29 MELB. UN. L. REV. 131 (2005); Helen Nussbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 119 (2004); Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087 (2002); Richard B. Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275 (1974).

[241] Lake, *supra* note 238.

[242] State v. Rhodes, 61 N.C. 453, 454 (1868) (recognized as overruled by Virmani v. Presbyterian Health Servs. Corp., 515 S.E.2d 675 (1999)).

[243] *Id.* at 459.

[244] *See* Lake, *supra* note 238, at 125.

[245] *Id.*

[246] *Id.*

[247] The petitioner specifically sued claiming that the departments failure deprived the child of his liberty under the Fourteenth Amendment. Deshaney v. Winnebago Cty. Dep't of Soc. Serv., 489 U.S. 189, 191 (1989).

[248] *Id.*

investigated numerous complaints about the father hitting the child's head, and was aware that the father was not following department orders.[249] By the time the case was brought, the child had permanent brain damage from being repeatedly hit on the head.[250]

The Supreme Court held that the department was not responsible, partially due to a privacy rationale.[251] There are various types of concerns in a case like *Deshaney*. One concern is that violence, even violence the state knows about, can occur in the home because it is the home. Consequently, privacy law connects to a historical, gendered dichotomy that poses concerns for domestic violence victims.

## III. ANALYSIS

### *A. Simply Changing Privacy Law is Insufficient*

The American and Australian approach to privacy law is starkly different. The United States began with an interest in privacy protections. A concern about technology encroaching privacy arose as technology developed.[252] Australia is the opposite. Privacy law arose as a response to concerns about technology and potential violations of individual rights.[253] This starting point led Australia to take a more intentional and focused approach to crafting privacy law than the United States. Australia has specific privacy principles that inform violations while the United States' Fourth Amendment presents a "reasonable expectation" standard.[254] These foundations place the United States and Australia at different starting points for BWC use.

Despite these differences, Australia and the United States have followed similar paths in applying their foundational privacy laws. In Australia, the states have taken the foundational privacy principles and interpreted a privacy violation differently. New South Wales requires information collection to be lawful and necessary to a purpose while South Australia provides that (in addition to lawful) information cannot be collected "unnecessarily."[255] These varied applications are like how

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[249] *Id.* at 191-92.
[250] *Id.* at 193.
[251] *Id.* at 191, 195.
[252] *E.g.*, *Kyllo*, 533 U.S. at 27.
[253] Jackson, *supra* note 81.
[254] U.S. CONST. amend. IV; *Privacy Act 1988* (Cth) (Austl.).
[255] *Privacy and Personal Information Protection Act 1998* (NSW) pt 2 div 1 (Austl.); Department of Premier and Cabinet (SA), *Cabinet and Administrative Instruction 1/89*, August 5, 2013; Butler, *supra* note 94, at 462-63.

the various states craft privacy law in the United States. For example, some states specify a violation that mimics the Fourth Amendment while others do not.[256]

When applied to BWCs, both countries initially forewent specific legislation and simply used general police powers and privacy law.[257] The countries eventually changed and created specific legislation.[258] Here, the United States is slightly different from Australia as some states crafted legislation while others left the task to police departments.[259] Australia prioritized legislation.[260] Regardless of the approach, both countries use BWCs at domestic violence scenes and they appear in court.[261]

These similarities show that privacy law, regardless of how it is crafted, is an insufficient tool to craft BWC policy. The United States and Australia still have concerns about privacy and information collection.[262] This concern perpetuates because there is no clear understanding of what privacy is and what a privacy right entails.[263] The result is that exceptions to privacy law arise and protections are undermined.[264] Whether the law starts with a broad framework or with specifying rights, the result is the same. Privacy law can shift away from the rights that society wants to protect. Consequently, simply altering the United States' approach to privacy law will not resolve the problems privacy law creates in BWC policies. While the goals of privacy law should be retained, there needs to be a shift to a new framework.

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[256] *E.g.*, State v. Roden, 321 P.3d 1183, 1186 (Wash. 2014) (holding that recording a conversation if a person has a reasonable expectation of privacy is violative of the Fourth Amendment); Va. Code Ann. § 19.2-62 (using "justifiable expectation of privacy"); Ohio Rev. Code § 2933.52(A)(1) (making it a felony to record a person when they are unaware).

[257] Palmer, *supra* note 8; Urban Inst., *supra* note 5.

[258] Palmer, *supra* note 8; Urban Inst., *supra* note 5.

[259] Urban Inst., *supra* note 5; Leadership Conference on Civil and Human Rights & Upturn, *supra* note 10.

[260] *See, e.g.*, Gov't of New South Wales, *supra* note 168; Queensland Police Service, *supra* note 217.

[261] *E.g.*, *Everard*, 260 Cal. Rptr. 3d at 557; *R v RT* [No. 2], (2020) QDC 158 (Austl.).

[262] Office of the Australian Info. Comm'r, *2020 Australian Community Attitude to Privacy Survey* (Sept. 2020); Brooke Auxier et al., *Americans and Privacy: Concerned, Confused and Feeling Lack of Control Over Their Personal Information*, PEW RES. CENTER (Nov. 15, 2019), https://www.pewresearch.org/internet/2019/11/15/americans-and-privacy-concerned-confused-and-feeling-lack-of-control-over-their-personal-information/ [https://perma.cc/LT4X-CBM4].

[263] Hartzog, *supra* note 15, at 1268.

[264] *See, e.g.*, Minnesota v. Carter, 525 U.S. 83, 86 (1998); Palmer, *supra* note 8, at 142 (discussing a case in Victoria where the plaintiff was thwarted due to history and state use of exemptions).

### *B. Privacy Law has a Gendered History*

While feminist legal theory does not completely reject the goals of privacy, privacy is not neutral and is a problematic foundation for BWC policy.[265] Ultimately, BWCs are treated as a quick solution and privacy law prevents society from addressing the fundamental problems of domestic violence.[266] Privacy law short-circuits a close examination of specific domestic violence concerns because privacy rationales present a specific understanding of what is valuable and worth protecting. This understanding has historically resulted in domestic violence being ignored because the violence took place in the home.[267] This behavior occurred because the state created a line between the public marketplace and the private domestic sphere, leaving domestic violence victims with fewer protections.[268] Privacy law cemented this line, tying privacy to particular social concerns and imbuing it with a gendered history.

When applied to domestic violence, privacy law faces competing concerns. Returning to the woman in the introduction, she may want assistance to leave, to fix her relationship, to prosecute, or to simply be left alone. The nature and complexity of domestic violence means that there are no simple answers. Some have advocated that BWCs should be continually on, breaking from standard privacy concerns.[269] This position has not addressed potential harms from the lack of control over the narrative or the impact from footage being

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[265] *See* Lake, *supra* note 238.

[266] Howard M. Wasserman, *Recording of and by Police: The Good, the Bad, and the Ugly*, 20 J. GENDER RACE & JUST. 543, 547 (2017) (BWC's are used as a fast solution); SCHNEIDER, *supra* note 224, at 201 ("Concepts of privacy permit, encourage, and reinforce violence against women.").

[267] *See* SCHNEIDER, *supra* note 224.

[268] *Id.* at 202; Raigrodski, *supra* note 231.

[269] *E.g.*, Kelly Freund, Note, *When Cameras Are Rolling: Privacy Implications of Body-Mounted Cameras on Police*, 49 COLUM. J.L. & SOC. PROBS. 91, 128 (2015). The ACLU has discussed how continuous recording would be a problem due to control over footage. Jay Stanley, *Police Body-Mounted Cameras: With Right Policies in Place, A Win for All* (March 2015), https://www.aclu.org/other/police-body-mounted-cameras-right-policies-place-win-all [https://perma.cc/VU94-4NHK]. For a discussion and analysis of a state that requires the recording of all assaults, see Monica Fagerlund et al., *Recording Offences on Police Domestic Violence Call Outs*, 42 INT'L J. COMP. & APPLIED CRIM. JUST. 119 (2017) (interpreting changes to Finnish Criminal Code Chapter 21 to make the recording of domestic violence offenses mandatory and examining the ensuing recordings).

interpreted. Yet this control and choice over self, image, and body, is important to victims of domestic violence.[270]

This concern about footage and narrative is important because the officer who immediately arrives on the scene with the camera will not know what happened. The jury or judge who views the footage will not know what happened. They will have to interpret the scene for themselves. As such, BWCs pose new concerns about bias, prejudice, and power structures. Footage does not present an unambiguous narrative.[271] A BWC recording is not an objective, neutral, or clear portrayal of what happened.[272] In the modern world, people believe that what is captured on film gives them the ability to see an event; they become eyewitnesses.[273] At domestic violence scenes, the assumption that the film presents the truth may be problematic because an image can mean different things depending on its relationship to the shots before and after it.[274] If an officer gets there after the violence occurs and the victim is calm, people who believe they are witnessing the event through the video may conclude that little to no violence occurred. The woman in the introduction may be negatively impacted if the footage ends too early or she has tidied herself before the filming starts, appearing physically normal on camera.

BWC footage of domestic violence also poses concerns because of society's tendency to deny abuse. Domestic violence is threatening to core social beliefs.[275] While slowly changing, few people ask about power and control in intimate relationships.[276] With BWC footage, this failure is concerning because viewers must make sense of the footage.[277] Interpretation of video material is a two-step process. The first is objective: people can agree on what they see.[278] The second is subjective: people provide context to explain what they see.[279] The second step can

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[270] NANCY J. HIRSHMANN, *Freedom, Power and Agency in Feminist Legal Theory*, *in* THE ASHGATE RESEARCH COMPANION TO FEMINIST LEGAL THEORY 71, 82 (Margaret Davies & Vanessa Munro eds., 2013).

[271] Wasserman, *supra* note 266.

[272] *Id.* at 551.

[273] Jessica Silbey, *Cross-Examining Film*, 8 UNIV. MD. L.J. RACE, RELIGION, GENDER, AND CLASS 17 (2008).

[274] *Id.* at 19.

[275] SCHNEIDER, *supra* note 224, at 205.

[276] *Id.*

[277] Jessica Silbey, *Evidence Verité and the Law of Film*, 31 CARDOZO L. REV. 1257, 1269 (2010).

[278] *Id.*

[279] *Id.*

pose problems with BWC footage of domestic violence scenes.[280] The experiences of battering may be foreign to those who watch footage of the initial scene.[281] Consequently, the behavior of the victim may be interpreted as unreasonable.[282] What if the woman in the introduction does not respond the way she "should"? A viewer may not be able to provide appropriate context.[283] The criminal justice system also removes the context. Domestic violence is not considered in a social or historical context, leaving people to provide it for themselves.[284] These features of BWC footage present risks to domestic violence victims.

### *C. Proposal*

Because privacy law is an insufficient tool to inform BWC use at domestic violence scenes, states must refashion their BWC policies. To accomplish this process, this comment makes two assumptions. First, the default position is that a state that has BWCs is not required to use them at domestic violence scenes. A BWC is an additional tool, not a necessity. Second, any state that has specific BWC legislation built on privacy law has addressed this foundation and there is a blank slate for a new law. Consequently, this section discusses a new framework to apply to a new BWC law and how that law would function.

#### i. A New Foundation

In crafting a new BWC law, there needs to be a new framework that informs BWC use. To account for domestic violence victims, states

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[280] Different worldviews have been associated with diverging interpretations of whether a video depicts excessive or appropriate force. Mary D. Fan, *Democratizing Proof: Pooling Public and Police Body-Camera Videos*, 96 N.C. L. REV. 1639, 1663-64 (2018).

[281] SCHNEIDER, *supra* note 224, at 213; CHRISTINE A. LITTLETON, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, *in* APPLICATIONS OF FEMINIST LEGAL THEORY 327, 330-31 (D. Kelly Weisberg ed., 1989).

[282] SCHNEIDER, *supra* note 224, at 213; LITTLETON, *supra* note 281.

[283] When addressing portrayals of domestic violence on television screens, people have described sexual violence as S&M and downplayed abuse because the woman does not leave. The way society handles fictional portrayals is an indicator of what society values and believes. This raises concerns for how people will interpret BWC footage, both due to their ability and their interest. *See* Nina Metz, *When Women are Abused on Screen – And How That Shapes Opinions About Whose Stories We Believe in Real Life*, CHI. TRIB. (Feb. 15, 2018), https://www.chicagotribune.com/entertainment/tv/ct-mov-how-we-talk-about-domestic-violence-movies-0216-story.html (going through examples of domestic violence on screen, most recently Big Little Lies, and how public responses indicate ambivalence to real domestic violence).

[284] SCHNEIDER, *supra* note 224, at 213-14.

should shape BWC practices to account for victim agency freedom. Agency freedom is the ability "to achieve whatever the person…decides he or she should achieve[.]"[285] This framework is a form of empowerment for domestic violence victims because they are able to recognize their capabilities and make decisions for their well-being.[286] The key to the framework is the victim's ability to make an individual choice.

Agency freedom shifts the discussion away from the broad United States privacy standard and the historical line drawn at the threshold of the home. United States privacy law requires a general, broad view that has resulted in historically male priorities being preferred.[287] For example, the emphasis on the home, the threshold, is broad as it captures anyone who enters and resides in the home.[288] This approach is inevitably impersonal and raises feminist legal concerns as it ignores the specific position of the victim. Instead of this impersonal approach, BWC policies at domestic violence scenes need to be concerned with the perspective of the victim.[289] This shift changes the focus from a general view of family rights to a specific, individual view which is inevitably more personal.

Moreover, while the specificity of Australian privacy protections may raise fewer concerns connected to the home, the focus on information entrenches one type of privacy understanding. Simply being more specific than the Fourth Amendment is not enough to resolve the problems posed by privacy law. The emphasis on information as privacy, inherent in Australian privacy law, is historically male and not useful for a BWC framework that informs use at domestic violence scenes.[290] Shifting the foundation to agency freedom forces police departments to ask new questions about victim choice and requires a recognition of power dynamics inherent in police and civilian interactions.[291]

A victim agency freedom approach is also critical because it places the choice of whether to film a victim with the victim. Privacy law

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[285] Hee Jin Kim et al., *Women's Agency Freedom Through Empowerment Against Domestic Violence: Evidence from Nepal*, 62 INT'L SOC. WORK 1088 (2018).

[286] *Id.* at 1089.

[287] *See* Lake, *supra* note 238.

[288] *See* Hartzog, *supra* note 15, at 1268 (arguing that privacy is unclear).

[289] *See* Bridget A. Harris, *Visualizing Violence? Capturing and Critiquing Body-Worn Video Camera Evidence of Domestic and Family Violence*, 32 CRIM. JUST. 382, 396 (2020).

[290] *See* Lake, *supra* note 238.

[291] *See* Harris, *supra* note 289, at 396-397.

rest this decision with law enforcement or the court. Agency freedom shifts this dynamic and empowers victims to have more control and power in their lives.[292] This agency has been associated with more victims seeking help and less domestic violence.[293] This framework provides a useful foundation to overcome the limits of BWC footage while also informing a state law that benefits victims.[294]

ii. A New BWC Law

Upon establishing a new framework for BWC use, states need to specify their approach to BWCs and provide guidance to police departments. Each state should pass a new law that begins at the initial act of filming. This starting point is important because harms can occur from limited control, altered behavior due to being in front of a camera (which can impact the victim negatively in court), or footage being

[292] Kim et al., *supra* note 285, at 1089.

[293] *Id.* at 1097-99 ("Women with higher levels of decision-making participation and higher levels of help-seeking practices are less likely to experience domestic violence.").

[294] This framework is applied in the context of BWC use at domestic violence scenes. It is not intended to provide domestic violence victims control over prosecutorial decisions. Institutions such as courts should "be trained to appropriately intervene when women engage in formal help-seeking practices." Kim et al., *supra* note 285, at 1098. For discussions on domestic violence and prosecutions, *see generally* Mary Russell & Linda Light, *Police and Victim Perspectives on Empowerment of Domestic Violence Victims*, 9 POLICE Q. 375, 387-93 (2006) (discussing how efforts at victim empowerment and police behavior can impact prosecutions); Mary A. Finn, *Evidence-Based and Victim-Centered Prosecutorial Policies Examination of Deterrent and Therapeutic Jurisprudence Effects on Domestic Violence*, 12 CRIMINOLOGY & PUB. POL'Y 443 (2013) (comparing two court jurisdictions with different approaches to domestic violence prosecutions to determine which presents a higher risk of recidivism); Andrea J. Nichols, *No-Drop Prosecution in Domestic Violence Cases: Survivor-Defined and Social Change Approaches to Victim Advocacy*, 29 J. INTERPERSONAL VIOLENCE 2114 (2014) (a feminist look at no-drop prosecutions); Lauren Bennet, Lisa Goodman & Mary Ann Dutton, *Systemic Obstacles to the Criminal Prosecution of a Battering Partner: A Victim Perspective*, 14 J. INTERPERSONAL VIOLENCE 761 (1999) (discussing victim "drop-out" and assistance with prosecutions); Kris Henning & Lynette Feder, *Criminal Prosecution of Domestic Violence Offenses: An Investigation of Factors Predictive of Court Outcomes*, 32 CRIM. JUST. & BEHAV. 612 (2005) (a study on domestic violence defendants to determine if certain defendant characteristics led to certain legal outcomes).

placed online.[295] Laws must be crafted to address the potential impact of BWC footage on domestic violence victims.

These laws will begin at the state level and take a two-step approach. The first step is to create an initial standard of "no use" and develop criteria for when BWCs can be used at domestic violence scenes.[296] This initial step compels better education, training for officers, and other means of shifting the burden off victims, taking away the temptation to just film. This step should be addressed at the state level. Within this first step is the recognition that BWCs are not permanently prohibited from domestic violence scenes. This temporal element reflects a balancing approach to victim agency freedom and domestic violence. Due to the problems posed by bias, misunderstandings, and footage leaks, the first step involves the absence of cameras. This prohibition is due to the problem involving a lack of understanding of the impact on victims, an understanding that BWCs are *one* piece of the effort against domestic violence, and a healthy relationship between officers that makes the recording and ownership of domestic violence footage worth the risk.[297] To address this temporal element, the law under the first step establishes criteria for when BWCs can be reintroduced at domestic violence scenes. The criterion includes training

[295] *See*, *e.g.*, Mary D. Fann, *Privacy, Public Disclosure, Police Body Cameras: Policy Splits*, 68 ALA. L. REV. 395, 397 n. 1 (2016) [hereinafter *Policy Splits*) (citing *Bellingham Washington Police Body Camera: Prostitution Part 01*, YouTube (Nov. 5, 2014), https://www.youtube.com/watch?v=CpPR3zw2aUs [https://perma.cc/GMX2-3A3C] (part of a series of videos requested by a "notorious" requester); Elisa Hahn, *Cities Give in to Notorious Records Requester*, KING5 News (Jan. 8, 2016), https://www.king5.com/article/news/local/cities-give-in-to-notorious-records-requester_20160118133749991/18017161 [https://perma.cc/S52N-TWVF]; Martin Kaste, *Transparency vs. Privacy: What to Do with Police Video Cameras*, NPR (Dec. 19, 2014), https://www.npr.org/2014/12/19/371821093/transparency-vs-privacy-what-to-do-with-police-camera-videos [https://perma.cc/TM4Y-QYUL].

[296] With this policy, more empirical research should be done on whether BWCs being on provide a benefit to victims at the domestic violence scene itself. Specifically, there should be research with specific groups, like LGTBQ+ or black people. There is little to no existing research on whether BWCs would alter any inappropriate use of force at domestic violence scenes and research in broader contexts is varied on the impact on police behavior. *See generally* LUM ET AL., *supra* note 117. Consequently, as these groups face more risks with video footage, this policy starts with "no use" to address fundamental concerns.

[297] Wasserman, *supra* note 266.

officers on trauma and how it manifests,[298] public awareness campaigns that let victims know formal services (police and legal) are available and approachable,[299] and community consultations to foster involvement and craft BWC policy.[300]

With the first step, the state level is appropriate because the federal level is too broad. Because different states have different cultures, states are the proper actors to determine the best approach to domestic violence victims in the context of "no use". Second, the state level is better than the police department level because such a law must be consistent. Now, department policies are inconsistent, and requirements are unclear. The state should create a clear and accessible standard for how BWCs must be handled at domestic violence scenes. The state also holds the best position to present criteria that must be met to reintroduce the cameras while also balancing authority, neutrality, and a level of personal connection.

The second step is to determine when those criteria are met and then create a law that requires offers to ask whether victims would like to be filmed.[301] Upon receiving an answer, the police officer must respect it. The requirement of victim approval to film is critical as it provides the choice inherent in victim agency freedom. Furthermore, evaluating the criteria should be handled at the community level. The state cannot adequately judge when individual police departments have satisfied education and community requirements to engage with victims and not abuse or mishandle domestic violence footage. Community leaders and general community involvement is essential in this step.

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[298] When officers expect a certain manifestation of trauma and it is not met, they have questioned survivor credibility. The same doubt arises when a victim does not match other expectations, like dressing a certain way. These expectations raise direct concerns for the effectiveness of BWC footage. *See* Cortney A. Franklin et al., *Police Perceptions of Crime Victim Behaviors: A Trend Analysis Mandatory Training and Knowledge of Sexual and Domestic Violence Survivors' Trauma Responses*, 66 CRIME & DELINQ. 1055, 1056-57 (2019).

[299] Kim et al., *supra* note 285, at 1099.

[300] Murphy & Estcourt, *supra* note 218, at 374; Kim Shayo Buchanan & Phillip Atiba Goff, *Bodycam and Gender Equity: Watching Men, Ignoring Justice*, 31 PUB. CULTURE 625, 638 (2019); *E.g.*, New York City Police Department, *NYPD Response to Public and Officer Input on the Department's Proposed Body-Worn Camera Policy* (April 2017), https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/body-worn-camera-policy-response.pdf (also requested information from officers) [https://perma.cc/E7ZL-L6BS]. These consultations could be used to determine domestic violence situations not specifically addressed here, like situations where the victim is unclear, or children are involved.

[301] *Policy Splits*, *supra* note 295, at 441, 443 (arguing that, instead of requiring victims to demand that officers stop recording, the officers ask if they may record).

With the second step, individual communities need to determine when they are ready to use BWCs at domestic violence scenes. Domestic violence is a highly personal matter that also impacts broader society. Authorities are involved to provide protections and stop violence. Yet how this involvement occurs, when it occurs, and how it is received can vary depending on the communities. History indicates very little appreciation for the experiences of domestic violence victims.[302] Consequently, there is not much trust in the criminal justice system.[303] Within this, victims are resilient, and many find avenues to improve their lives.[304] Moreover, if law enforcement, through education and training during step one, can create a better relationship with domestic violence victims, then many of the legal problems may be improved.

If communities believe that education and training efforts are sufficiently effective, the state law may permit reintroduction of BWCs with the requirement that officers ask if a victim is comfortable being filmed.[305] First, this requirement is useful as it alters the harmful norm that society accepts under privacy law. Under the Fourth Amendment, the court determines what is reasonable and what is a valid interest. Under a victim agency standard, the victim makes a choice and law enforcement accepts it. This requirement to listen respects the victim's agency. There is the question or concern of what occurs if the victim makes the "wrong" decision. This concern often arises in domestic violence cases.[306] Yet, what society must recognize, is that these "wrong" decisions express a level of agency.[307] Even if officers disagree with a victim's choice not to film because they believe the footage would be valuable evidence, they must abide by the victim's decisions.[308] Unlike with current police department policy, [309] the officer has no power to overrule that agency.

There is an alternative option of filming all domestic violence incidents and then presenting victims with a choice to use or retain the footage. While this alternative does give a victim a choice, it recreates

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[302] *See* HIRSHMANN, *supra* note 270, at 79.

[303] *See id.* at 83.

[304] *Id.*; Kim et al., *supra* note 285, at 1090 (presenting an example of how women in Korea sought different systems for help).

[305] *Policy Splits*, *supra* note 295, at 443; Chavis, *supra* note 9, at 1010.

[306] *See*, *e.g.*, HIRSHMANN, *supra* note 270, at 79 (discussing factors that may influence a women's desire; like not being able to get a job that will pay enough to support her children, so she stays in the abusive relationship. Or a woman, knowing her partner will soon hit her, starts a fight to get it over with. These are choices where women have some control in the outcome, but the outcome is undesirable.)

[307] *Id.*

[308] *See id.*

[309] *E.g.*, Philadelphia Police Department, *supra* note 213.

the problems posed by BWC policies informed by privacy law. First, the use of cameras in all incidents does not require or encourage better law enforcement practices and engagement with domestic violence victims. When cameras are rolled out without intentional guidelines, other efforts suffer because the BWCs are seen as a fast solution. Second, people behave differently when they know they are being filmed. Without the adjustments in the proposed step one and the victim's choice to be filmed, this alternative option mimics BWC use under privacy law. Third, once the footage is created, there are ensuing problems of security, access, and the footage belonging to the police department. The most manageable option is to determine whether there should be footage at all, which the new law rests with the victim.

This approach to victim agency freedom does pose a risk. The benefit is that this view accepts that self-choice or agency can be expressed under oppression.[310] The risk is that complicity with violence is identified and then nothing happens to address this complicity.[311] To prevent this risk from actualizing, there must be accompanying action to stop the violence.[312] While not their sole responsibility, law enforcement plays an important role in this effort.[313]

Law enforcement can accomplishment this goal without the use of BWCs at domestic violence scenes. To start, footage does not provide objective evidence and is subject to biased interpretations. Where bias plays a role in decisions, video footage is unlikely to be beneficial for victims. While education efforts within police departments will help combat initial biased interpretations, social change is required to make BWC footage effective evidence in court. That change will take time. Also, BWC footage is supported as evidence because it assists prosecutors in deciding to initiate a case.[314] This reasoning is supported in both the United States and Australia.[315] This reasoning is an insufficient foundation to subject domestic violence victims to the harms of BWC footage when they gain few benefits and prosecutions can be sought in other ways. By removing the temptation to film in the proposal's first step, education is prioritized, and funding is freed up for

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[310] HIRSHMANN, *supra* note 270, at 80.

[311] *Id.*

[312] *See id.*

[313] Russell & Light, *supra* note 294, at 378 ("[A]lthough police cannot ensure women's safety, they can function to enhance conditions that enable women to keep themselves safe.")

[314] Weston J. Morrow et al., *Assessing the Impact of Police Body-Worn Cameras on Arresting, Prosecuting, and Convicting Suspects of Intimate Partner Violence*, 19 POLICE Q. 303, 316 (2016).

[315] *Id.*; Palmer, *supra* note 8.

secondary services that combat domestic violence.[316] The presence of cameras at domestic violence scenes is not vital to evidence gathering or prosecutions. Instead, they present risks to victims that current law does not adequately address. Consequently, a new state law that accounts for a victim's agency in determining BWC use is necessary.

## IV. CONCLUSION

The presence of BWCs at domestic violence scenes presents many concerns. In each scenario, the victim is vulnerable, battered, and captured on film. The introduction's woman has little control over her image and words, is susceptible to bias and increased scrutiny, and will likely experience little benefit from the footage. Yet, to address these concerns, policymakers have relied on privacy law. American BWC policy has been based on the Fourth Amendment's reasonable expectation of privacy standard while Australian BWC policy has relied on specific privacy protections. Nonetheless, each country has gaps in privacy protections that leave domestic violence victims susceptible. Privacy law also fails to inform BWC policies that specifically account for domestic violence victims' concerns. Instead, privacy law has been used to provide a unique protection for domestic activity. This history conflicts with feminist legal theory because it leaves victims of domestic violence with fewer options to escape violence. The concerns of victims are inadequately addressed, and they receive fewer protections. Consequently, BWC policy needs a new foundation to account for domestic violence victims.

This new foundation should begin with victim agency freedom. Instead of impersonal privacy law, a victim agency approach begins with a personal account of the domestic violence victim. The focus moves from the general to the specific. This shift moves away from the broad Fourth Amendment standard, which allows for interpretation of "reasonable expectation" as determined by the court. Victim agency is determined by the victim and then respected by the legal system. BWC policy accounts for victim choice, empowering domestic violence victims, while also being a law enforcement tool.

[316] In the family violence context, prosecution and conviction rates can be improved by enhancing support services that are underfunded and secondary to law enforcement resourcing. Palmer, *supra* note 8, at 142 (discussing how police culture and accountability has been an identified problem).

# THE BUFFET DOESN'T STOP UNTIL COVID-19 WALKS IN: HOW THE HANDS-OFF APPROACH OF FLAG STATES EXPOSED LEGAL NIGHTMARES ONBOARD CRUISE SHIPS DURING A GLOBAL PANDEMIC AND WHY CHANGES MUST BE MADE

*Suzanne Schultz**

## I. INTRODUCTION

The year 2020 was supposed to be record-breaking for the cruise industry.[1] For the prior ten years, the number of people taking cruises had increased annually to make the cruise industry a $45 billion[2] cash cow, despite facing a litany of legal issues relating to sexual assaults, viral outbreaks, illegal dumping, and mistreatment of workers.[3] Additionally, a record number of new cruise ships were scheduled to be introduced in 2020 with innovative features such as roller coasters, two-level pools, sky rides, and robot bartenders, in addition to the classic draws including top-class entertainment and lavish buffets.[4] Another "feature" that was added unexpectedly was the Coronavirus (Covid-19) in February 2020, when the media began to report a "novel" outbreak on the Diamond Princess cruise ship that was sailing around Asia.[5] Much of the world watched from afar in fascination as passengers quarantined in their staterooms for weeks on end with little entertainment other than tweeting reviews of the meals delivered by the crew.[6] One such tweet

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[1] Joseph Micallef, *State of the Cruise Industry: Smooth Sailing Into the 2020's*, FORBES (Jan. 20, 2020), https://www.forbes.com/sites/joemicallef/2020/01/20/state-of-the-cruise-industry-smooth-sailing-into-the-2020s/?sh=4cce47ba65fa.

[2] Aditi Shrikant, *The Coronavirus Cruise Ship Quarantines Confirm Cruises are Bad,* VOX (Mar. 5, 2020), https://www.vox.com/the-goods/2020/2/25/21152903/coronavirus-cruise-ship-outbreak-cruises-sexual-assault-environment.

[3] Tim Murphy, *The Cruise Industry Is Donald Trump Personified*, MOTHER JONES (June 17, 2020), https://www.motherjones.com/politics/2020/06/cruise-control/.

[4] Elissa Garay, *Best New Cruise Ships for 2020,* CNN (Dec. 23, 2019), https://www.cnn.com/travel/article/best-new-cruise-ships-2020/index.html.

[5] Adele Berti, *Timeline: How Coronavirus Is Disrupting the Cruise Sector*, SHIP TECH. (June 23, 2020), https://www.ship-technology.com/features/coronavirus-and-cruise-timeline/.

[6] *See* Bill Chappel, *Quarantined By Coronavirus, Cruise Ship Passengers Make 'Life-Long Friends'*, NPR (Feb. 12, 2020), https://www.npr.org/sections/goatsandsoda/2020/02/12/805233801/halfway-through-quarantine-diamond-princess-passengers-form-unique-online-commun.

stated, "[y]es, 66 new cases have been id'ed on board, and I do feel bad for those people, but because life goes on . . . here was lunch: tater salad, three bean something, and pork adobo. And Coke! No complaints here."[7] Unfortunately, the 712 infections and fourteen deaths onboard the *MS Diamond Princess* was only the beginning of the story of how Covid-19 rocked the cruise industry as well as the rest of the world.[8]

Not long after the heart-breaking disaster on the *MS Diamond Princess* and on other cruise ships, the cruise industry received the record-breaking and devastating news that all future sailings would be cancelled as a result of a series of no-sail orders from nations around the world.[9] While many current and future passengers throughout the globe were simply disappointed that their vacations were cancelled, these no-sail orders were not perfectly timed to match the end of a sailing.[10] These orders came out mid-cruise and left cruise lines scrambling to figure out where to dock, how to unload passengers and get them home, and what to do with crew onboard.[11] The fact that almost every country closed its borders, including its ports to ships, did not help, either.[12] As a result, resolving the docking and unloading issue was quite the diplomatic feat since the crew and passenger make-up on any given cruise ship is similar to a mini–United Nations with people onboard from all corners of the Earth.[13]

Since all vessels around the world are required to be registered to a state,[14] many people assumed that these registering states, the "flag states," could help with the massive undertaking of repatriating hundreds

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[7] Matthew Smith, (@Mjswhitebread), TWITTER, (Feb. 10, 2020 2:37 AM), https://twitter.com/mjswhitebread/status/1226772121302384641.

[8] *See* Berti, *supra* note 5.

[9] *Id.*

[10] *See* Erin McCormick, *'Stranded At Sea': Cruise Ships Around the World Are Adrift as Ports Turn Them Away*, THE GUARDIAN (Mar. 27, 2020), https://www.theguardian.com/world/2020/mar/27/stranded-at-sea-cruise-ships-around-the-world-are-adrift-as-ports-turn-them-away.

[11] *Id.*

[12] *See* Alice Hancock, *Coronavirus: Is This the End of the Line for Cruise Ships?*, FIN. TIMES (June 7, 2020), https://www.ft.com/content/d8ff5129-6817-4a19-af02-1316f8defe52.

[13] *See* Amy Paradysz, *Six Months Into Outbreak, Cruise Lines Still Repatriating Crews by Ship*, PROF'L MARINER (Oct. 1, 2020), https://www.professionalmariner.com/six-months-into-outbreak-cruise-lines-still-repatriating-crews-by-ship/.

[14] Eric Powell, *Taming the Beast: How the International Legal Regime Creates and Contains Flags of Convenience,* 19 ANN. SURV. INT'L & COMP. L. 263, 270-72 (2013).

of thousands of people on cruise ships around the world.[15] While that assumption might be true if cruise ships were registered where most of their corporate employees worked, such as in the United States or the United Kingdom, the majority of cruise ships are registered to Panama, The Bahamas, Bermuda, Malta, and formerly Liberia.[16] Cruise ships, therefore, need to abide by the laws of those states while on the high seas and are not subject to a port state's jurisdiction until they are close enough to territory of that state or docked in that state's port.[17] Such registrations have allowed them to fly what has been coined as "flags of convenience," essentially a flag with very few strings attached.[18] Cruise lines prefer these registrations because of the *laissez-faire*, hands-off approach these states take in regard to environmental regulations, taxes, and labor relations.[19] While that *laissez-faire* approach works for the cruise industry when the global environment is relatively calm, the cruise industry's response to the pandemic lacked coordination and exposed to society the long-standing legal and ethical issues that result when cruise ships are registered in obscure countries. The reality is that those states are often unable and unwilling to provide aid if disaster strikes.[20]

As a result of the hands-off approach from the flag states, some at-capacity cruise ships were left sailing on the high seas with nowhere to go as borders closed.[21] While these port closures and docking refusals around the world were arguably illegal under international law, cruise ships sailing in limbo out at sea led to horrible consequences and legal nightmares as port states were relied upon to solve many of the questions

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[15] *Frequently Asked Questions About How COVID-19 Is Impacting Seafarers*, INTERNATIONAL MARITIME ORGANIZATION, https://www.imo.org/en/MediaCentre/HotTopics/Pages/FAQ-on-crew-changes-and-repatriation-of-seafarers.aspx (last visited Oct. 4, 2021); *see also* Maritime Labour Convention, reg. 2.5, Feb. 23, 2006 (entered into force Aug. 20, 2013), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/normativeinstrument/wcms_090250.pdf [hereinafter MLC].

[16] *See Cruise Ship Registry, Flag State Control, Flag of Convenience*, CRUISE MAPPER (Nov. 26, 2015), https://www.cruisemapper.com/wiki/758-cruise-ship-registry-flags-of-convenience-flag-state-control.

[17] *Id*.

[18] Powell, *supra* note 14, at 273-75.

[19] *See* Carlos Felipe Llinas Negret, *Pretending to Be Liberian and Panamanian; Flags of Convenience and the Weakening of the Nation State on the High Seas,* 47 J. MAR. L. & COM. 1, 6-9 (2016).

[20] *See* Sam Bateman, *Costly Cargo: The Plight of Seafarers in a Pandemic*, THE INTERPRETER (July 8, 2020), https://www.lowyinstitute.org/the-interpreter/costly-cargo-plight-seafarers-pandemic.

[21] *See* Nancy Trejos, *Ships Still at Sea Are on Cruises to Nowhere*, TRAVEL WKLY (Mar. 18, 2020), https://www.travelweekly.com/Cruise-Travel/Ships-still-at-sea-are-on-cruises-to-nowhere-coronavirus.

of how and where to dock.[22] This limbo left the families of passengers who contracted and died of Covid-19 few modes of recovery and also essentially held captive employees on cruise ships who were neither being paid nor able to go home.[23] As such, it has become obvious that flag states and cruise lines are the only parties that benefit from the flag of convenience system.[24]

Through the lens of the Covid-19 pandemic, this comment will argue that the flag of convenience system led to the ensuing chaos after no-sail orders were issued because the cruise industry could not respond adequately to the crisis on its own. Flag states bore little to none of their legal burdens while leaving the nightmare of docking, repatriation, and subsequent lawsuits for cruise companies and port states to solve.[25] Crew members and passengers were also severely impacted by the events and were left with no significant means of recourse by either the flag states or the cruise lines.[26] In an ideal world the flag of convenience system would be abandoned, but that is extremely unlikely given the power and influence the Cruise Lines International Association[27] holds and the fact that cruise ships rely on the low administrative costs and almost complete control that results from being registered to one of the traditional flag states.[28] Instead, this comment proposes that powerful states, especially the United States, should expand its legal jurisdiction for cruise lines headquartered in its state or work with other major states to create an international tribunal for claims stemming from cruise ships to provide stronger legal remedies for passengers and crew members.

Part II will provide an overview of the concept of the high seas, a brief history of cruise lines using flags of convenience and their benefits, a discussion of international treaties regulating cruise lines, and

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[22] *Id.*

[23] *See* Mina Kaji, *300,000 Seafarers Still Stuck on Ships 'We Feel Like Hostages*,' ABC NEWS (Sept. 11, 2020), https://abcnews.go.com/Politics/300000-seafarers-stuck-ships-feel-hostages/story?id=72948111#:~:text=The%20cruise%20industry%20has%20returned,aboard%20cargo%20and%20shipping%20vessels.

[24] *See* Freya Higgins-Desbiolles, *This Could Be the End of the Line for Cruise Ships*, THE CONVERSATION (Apr. 13, 2020), https://theconversation.com/this-could-be-the-end-of-the-line-for-cruise-ships-135937.

[25] *See* Murphy, *supra* note 3; *see also* Bateman, *supra* note 20.

[26] Murphy, *supra* note 3.

[27] The Cruise Lines International Association is the world's largest cruise trade association where all major cruise lines are members and is very influential when it comes to cruise-related laws and regulations, especially in the United States. *See About CLIA*, CRUISE LINES INTERNATIONAL ASSOCIATION, https://cruising.org/en/about-the-industry/about-clia (last visited Oct. 29, 2021).

[28] *See* Negret, *supra* note 19, at 6-9.

how the Covid-19 has impacted cruise lines. Part III will examine the legal nightmares Covid-19 created and exacerbated in the cruise industry for port states, employees, and passengers and how many of those resulting legal issues stemmed from the hands-off approach of flag states and from the cruise industry's inability to respond in such a crisis. Finally, Part IV will propose changes to the *laissez-faire* environment in which cruise ships operate today. Those changes include the US taking a more active role in adjudication or the establishment of an international tribunal for private claims. Both solutions aim to provide better venues for legal recourse given that the abolishment of flags of convenience is unlikely.

## II. BACKGROUND

The international legal system that governs cruise ships is a complex one that cannot be explained by just one convention, treaty, or set of laws. This section will provide an overview of the laws, practices, and conditions that have contributed to the recent predicaments that the cruise industry faced in 2020 during the height of the global pandemic. First, the section will explain the historical principle of freedom on the high seas followed by an overview of the United Nations Convention on the Law of the Sea and a discussion of its relevant provisions. The section will also provide an overview of other relevant international treaties and conventions. Next, the section will explore the development of the flag of convenience system followed by an explanation of instances where port states exercise expanded jurisdiction. The following section will discuss the types of people who work on cruise ships and examine the nature of the living and working conditions onboard as well as the usual passenger demographics. This will be followed by an explanation of the medical care provided onboard and how the Cruise Lines International Association protects the interests of cruise lines. Finally, the Background section will conclude with a discussion of how Covid-19 made its way onboard cruise ships and the events that immediately followed.

### *A. Freedom on the High Seas*

One benefit of cruise lines is being able to sail from one end of the Earth to the other end on waters open to all. This has been made possible because of the international principle of freedom on the high seas. This is the principle that all states have equal, unfettered rights in

the use of the oceans and its resources.[29] Today, waters further than 200 nautical miles from land can safely be said to be part of the high seas.[30] While the mileage has not always been so clearly delineated, the principle of freedom of the high seas has existed at least as early as the Roman Empire when the Dutch humanist and legal scholar Hugo Grotius first clearly enunciated this principle in his book *Mare Liberum*, which translates to The Freedom of the Seas.[31] Respect for this general principle endures today and the freedom of the high seas is regarded as customary international law.[32] However, society today also has clearer expectations regarding the law and customs pertaining to the law of the freedom of the seas because international treaties and agreements were developed due to modern concerns.[33] As a result, this customary international law as well as treaty provisions largely guide the legal analysis of cruise ships today instead of the law of any one state.

### *B. United Nations Convention on the Law of the Sea*

Modern maritime law started to first take shape in 1958 with the first United Nations Convention on the Law of the Sea (UNCLOS), followed by the second convention in 1960.[34] Then, with what the United Nation's Secretary-General called "[p]ossibly the most significant legal instrument of this century," the third United Nations Convention on the Law of the Sea was ratified in 1982.[35] This treaty was significant because of its breadth, international ratification, and because it was a "package deal" that was required to be accepted in whole or not at all.[36] Reservations, which allow countries to accept a treaty or convention in

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[29] *See* United Nations Convention on the Law of the Sea, art. 87, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

[30] *See* Steven Katona, *What Are The High Seas And Why Should We Care About Them?*, OCEAN HEALTH INDEX (Aug. 24, 2014), http://www.oceanhealthindex.org/news/High_Seas_August.

[31] *See generally* HUGO GROTIUS, THE FREEDOM OF THE SEAS, (Ralph Van Deman Magoffin, trans., Oxford University Press 1633) (1609).

[32] *See* Ian Patrick Barry, *The Right of Visit, Search and Seizure of Foreign Flagged Vessels on the High Seas Pursuant to Customary International Law: A Defense of the Proliferation of Security Initiative*, 33 HOFSTRA L. REV. 299, 307 (2004).

[33] *See generally* George P. Smith II, *The Concept of Free Seas: Shaping Modern Maritime Policy within a Vector of Historical Influence*, 11 INT'L L. 355 (1977).

[34] *See* Tina Shaughnessy & Ellen Tobin, *Flags of Inconvenience: Freedom and Insecurity on the High Seas,* 5 J. INT'L L. & POL'Y 1, 3 (2006-07).

[35] Division for Ocean Affairs and Law of the Sea, *The United Nations Convention on the Law of the Sea (A historical perspective)*, UNITED NATIONS (1998), https://www.un.org/depts/los/convention_agreements/convention_historical_perspective.htm.

[36] *Id.*

part, were not allowed here.[37] To date, 168 parties have ratified the treaty.[38] However, the United States has never officially ratified the treaty by action of the US Senate, mainly because of internal political strife, despite the country being a signatory to it and adhering to most of its contents.[39] Still, because many scholars have argued the UNCLOS has become customary international law, even states that have not formally ratified the treaty still follow many of its major principles.[40] Thus, some scholars say the United States has little to gain from formal accession now.[41] Nonetheless, the 17 parts, 320 articles, and 9 annexes to the UNCLOS have been instrumental in clarifying international laws surrounding jurisdiction, navigation rights, resource exploitation rights, environmental protections, and for creating a dispute settlement process.[42] Laws surrounding navigation and jurisdiction are most applicable to this comment.

UNCLOS guarantees the right of freedom of navigation to both coastal and land-locked states and also provides for other navigation-related rights including submarine cable installation, the construction of artificial islands, fishing rights, and marine research.[43] Regarding jurisdiction, UNCLOS divides the sea into zones demarcating where states have territory.[44] In general, a state has jurisdiction twelve nautical miles off its coastline.[45] States can freely regulate access to their ports as a result of their sovereignty.[46] States also maintain jurisdiction an additional twelve miles for the contiguous zone, and states also have the exclusive jurisdiction for up to 200 nautical miles off of the state's coastline making up its exclusive economic zone.[47] The water outside

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[37] *Id*.

[38] *States Parties,* INT'L TRIBUNAL FOR THE L. OF THE SEA, https://www.itlos.org/en/main/the-tribunal/states-parties/ (last visited Nov. 8, 2021).

[39] *See* David Sandalow, *Law of the Sea Convention: Should the U.S. Join?*, BROOKINGS (Aug. 19, 2004), https://www.brookings.edu/research/law-of-the-sea-convention-should-the-u-s-join/; *see also* Indigo Funk, *Lawless on the High Seas: Why the U.S. Can and Must Ratify UNCLOS*, BROWN POL. REV. (Dec. 16, 2018), https://brownpoliticalreview.org/2018/12/lawless-high-seas-u-s-can-must-ratify-unclos/.

[40] Stewart Patrick, *(Almost) Everyone Agrees: The U.S. Should Ratify the Law of the Sea Treaty*, THE ATLANTIC (June 20, 2012), https://www.theatlantic.com/international/archive/2012/06/-almost-everyone-agrees-the-us-should-ratify-the-law-of-the-sea-treaty/258301/.

[41] *See id.*

[42] *See* Shaughnessy & Tobin, *supra* note 34, at 6.

[43] *See* UNCLOS, *supra* note 29, at art. 87.

[44] *See id*. at art. 25.

[45] *See id.* at art. 3.

[46] *See id.* at art. 25.2.

[47] *Id.* at art. 86.

200 nautical miles constitutes the high seas where no state has jurisdiction.[48]

However, even when a state technically has jurisdiction over waters, Article 17 of UNCLOS guarantees the right of innocent passage in the territorial sea.[49] Passage is considered innocent so long as "it is not prejudicial to the peace, good order or security of the coastal State" and excludes activities such as threats or use of force, loading or unloading of people or goods, research activities, intelligence collection, and practice with weapons of any kind.[50]

Still, states maintain jurisdiction over the vessels that sail under their state's flag.[51] This principle was affirmed in the 1927 case *S.S. Lotus (France v. Turkey)* by the Permanent Court of Justice in a dispute between Turkey and France over which law would apply to determine liability after the two states' vessels crashed into one another.[52] There, the court specifically stated, "apart from certain special cases which are defined by international law—vessels on the high seas are subject to no authority except that of the State whose flag they fly."[53]

Articles 91, 92, 94, and 98 of the UNCLOS stipulate when a vessel is under a state's jurisdiction.[54] Article 91 provides for the states' ability to determine under what conditions states will grant vessels the use and the ability to fly its flag.[55] Article 92 states that vessels shall be under the flag of one state only except in narrow circumstances where an international treaty or other provision specifically allows for a vessel to have multiple flags.[56] Article 94 details the duties which the flag state must undertake.[57] Such duties include: keeping a registry of the names of the ships, assuming jurisdiction for the ships flying that state's flag, ensuring safety at sea in regards to the seaworthiness of ships, and regulating labor conditions onboard.[58] However, Article 94 is not absolute. Regulation 33.1 of the International Convention for the Safety of Life at Sea provides an exception to the duty to rescue in cases where

[48] *Id.* at art. 57.
[49] *Id.* at art. 17.
[50] *Id.* at art. 19.
[51] *See generally* S.S. Lotus (Fr. v. Turk.) 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).
[52] *See id.*
[53] *See id.*
[54] *See* UNCLOS, *supra* note 29, at arts. 91, 92, 94, 98.
[55] *See id.* at art. 91.
[56] *See id.* at art. 92.
[57] *See id.* at art. 94.
[58] *Id.*

the state finds it unreasonable or unnecessary to do so,[59] even though Article 98 mandates nations to require vessels flying its flags to render assistance to ships in distress.[60]

While UNCLOS has been important in regulating many aspects of maritime law, its efficacy is limited by the fact that this treaty only applies to states and does not directly apply to private vessels or private individuals.[61] Additionally, compliance with UNCLOS is constrained because of the treaty's "optional clause" that in theory grants jurisdiction to a United Nation's body in all disputes concerning the interpretation or application of the Convention and other ancillary agreements.[62] However, parties are able to choose from a variety of dispute settlement bodies including the International Tribunal for the Law of the Sea, the International Court of Justice, and various arbitral panels[63] to resolve the parties' disputes as well as relying on aspects of one's domestic laws.[64] As a result, the effectiveness of the bodies are constrained.

### *C. Flags of Convenience*

Because UNCLOS allows states to maintain their own registries and create limitations on the type of vessels that can be registered in that state,[65] states have jurisdiction over vessels on their registries and those vessels must follow the state's laws.[66] Vessels do not simply register to the state where the owner's headquarters are located or where the vessel routinely sails from. Instead, ships, especially cruise ships, use the international maritime system to their benefit and register to a specific list of states with flags of convenience that usually includes places such as Panama, The Bahamas, and Malta.[67] This is because of the generally *laissez-faire* approach those states take in their administration. While non-flag states, individuals, and organizations commonly look at flag states in a pejorative manner, a registration to one of these states provides cruise lines real monetary benefits and almost complete control

[59] International Convention for the Safety of Life at Sea, reg. 33.1.l, Nov. 1, 1974, 32 U.S.T.47, 1184 U.N.T.S. 278 [hereinafter SOLAS].
[60] *See* UNCLOS, *supra* note 29, at art. 98.
[61] *See* Shaughnessy & Tobin, *supra* note 34, at 8.
[62] *See* UNCLOS, *supra* note 29, at art. 297.
[63] *See id.* at art. 287.
[64] *See* Shaughnessy & Tobin, *supra* note 34, at 8.
[65] *See* UNCLOS, *supra* note 29, at art. 91.
[66] *See id.* at art. 94.
[67] *Cruise Ship Registry, supra* note 16.

regarding the workings onboard vessels without burdensome regulation or bureaucratic red tape.[68]

The practice of vessels registering to flag states instead of the owner's own state began after World War II but boomed in the 1990s.[69] Since then, flags of convenience have truly become a business for states.[70] For example, the registration for many of these states are completely divorced from the state itself.[71] In fact, the day-to-day operations of the Liberian registry are managed by a company in Virginia.[72] Furthermore, 6% of Liberia's national budget comes from fees associated with the registry, totaling more than $20 million each year.[73] Additionally, Cambodia's registry is run by a company in South Korea and The Bahamas' registry is run by a group in the City of London.[74]

The International Transport Workers Federation[75] (ITF) has deemed thirty-five countries to be flags of convenience states.[76] Six criteria[77] are used to determine if a state is a flag of convenience state:

> (1) the country of registry allows ownership and/or control of its merchant vessels by non-citizens; (2) access to the registry is easy; a ship may be usually registered at a consulate abroad, and transfer from the registry at the owner's option is not restricted; (3) taxes on the income from the ships are not levied locally, or are very low, and a registry fee and annual fee, based on tonnage, are normally the only charges made. A guarantee or acceptable understanding regarding

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[68] Powell, *supra* note 14, at 273.

[69] Negret, *supra* note 19, at 9.

[70] *Id.*

[71] *See id.* at 22.

[72] *See id.*

[73] *See* Julia Simon, *Liberia's 'Flags Of Convenience' Help It Stay Afloat*, NPR (Nov. 7, 2014), https://www.npr.org/2014/11/07/362351967/liberias-flags-of-convenience-help-it-stay-afloat.

[74] Negret, *supra* note 19, at 9.

[75] The International Transport Workers' Federation works to ensure that seafarers have adequate working conditions onboard and helps seafarers in times of need. The ITF also performs inspections on ships and creates agreements regarding working conditions. *See Seafarers*, ITF GLOBAL, https://www.itfglobal.org/en/sector/seafarers (last visited Oct. 9, 2021).

[76] *Flags of Convenience,* ITF GLOBAL, https://www.itfglobal.org/en/sector/seafarers/flags-of-convenience (last visited Dec. 22, 2021).

[77] *See* H. Edwin Anderson, *The Nationality of Ships and Flags of Convenience: Economics, Politics and Alternatives*, 21 TUL. MAR. L. J. 139, 157-58 (1996).

> future freedom from taxation may also be given; (4) the country of registry is a small power and receipts from very small charges may produce a substantial effect on its national income and balance of payments; (5) manning of ships by non-nationals is freely permitted; and **(**6**)** the country of registry has neither the power nor the administrative machinery to effectively impose any governmental or international regulations, nor does the country even wish or have the power to control the shipowner companies themselves.[78]

Thus, the safety, labor, and environmental codes of flag states end up being extremely lax.[79] This allows for significant forum shopping and evasion of US wage laws, Title VII suits, and collective bargaining agreements.[80] Significantly, there are very few taxes owed to flag states.[81] For example, companies with ships greater than 14,000 tons on the Liberian registry pay just $0.10 per ton plus an additional fee of $3,800.[82] As such, cruise lines make billions of dollars each year and end up paying only thousands of dollars in fees annually.[83]

However, jurisdiction of the flag state is not absolute. Whenever cruise ships or any other visiting vessels are in foreign ports, there is dual jurisdiction between the port state and the flag state.[84] This is because states have the right to promulgate rules and regulations within its own territory.[85] As a result, cruise lines must comply with the laws of the flag the vessel is flying as well as any additional rules from the port state.[86] Because the laws from the flag state are extremely lax with little to no enforcement, cruise lines and other vessels can devote more time, energy, and resources to ensure compliance with the law of the port state, especially since those states are usually the ones that can

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[78] *Id.*

[79] Negret, *supra* note 19, at 6-9.

[80] *Id.* at 7.

[81] *See* Tanya Snyder, *Coronavirus On The High Seas: Why the U.S. Can't Touch Cruise Lines*, POLITICO (Mar. 11, 2020), https://www.politico.com/news/2020/03/11/coronavirus-cruises-126426.

[82] Negret, *supra* note 19, at 24-25.

[83] *Id.*

[84] Nathaniel Kunkle, *The Internal Affairs Rule and the Applicability of U.S. Law to Visiting Foreign Ships*, 32 BROOK. J. INT'L L. 635, 638-40 (2007).

[85] *See id.*

[86] *See id.*

bring civil and criminal charges against cruise lines in case rules are broken while in port.[87]

Even so, states do not always claim this right to jurisdiction.[88] This is largely due to the transient nature of the individual cruise ships and the fact that some ships have an ever-changing itinerary that make it difficult for bureaucracy to regulate and enforce such laws.[89] The internal affairs rule, therefore, has developed in the US and around the world that provides that "visiting foreign ships are not subject to port state jurisdiction in matters touching only upon the internal order and discipline of the ship unless those internal matters disturb the peace and tranquility of the port."[90] Within the United States, internal matters include disputes regarding wages and other employment conditions,[91] personal injury for both employees and passengers,[92] ship discipline[93], and collective bargaining agreements.[94]

Most cruise ships are registered to states deemed to be flags of convenience with only a few exceptions. The UK, Netherlands, and France have cruise ships registered to their flag.[95] The US has one cruise ship registered to its registry, NCL's *Pride of America*, which only sails to the islands of Hawaii.[96] Without this American registration, this

[87] After Carnival Cruise Lines was already on probation from the US government for illegally dumping oil into the ocean and for lying about its actions to the US government, Carnival continued to evade audits and manipulate records. And while it did not ultimately happen, a federal judge in Miami did move to ban Carnival corporation from docking its ships in US ports as a result violating its five-year probation agreement. *See, e.g.,* Danielle Wallace, *Carnival Cruise Ships Face Possible Ban from US Ports for Allegedly Violating Probation*, FOX NEWS (Apr. 11, 2019), https://www.foxnews.com/lifestyle/carnival-corp-may-be-banned-from-u-s-ports-for-allegedly-violating-probation.

[88] *See* Kunkle, *supra* note 84, at 639.

[89] *See id.*

[90] *See id*.

[91] *See* Lopes v. S.S. Ocean Daphne, 337 F.2d 777, 777 n. 1 (4th Cir. 1964).

[92] *See* The Paula, 91 F.2d 1001, 1004 (2d Cir. 1937).

[93] *See* Wildenhus's Case, 120 U.S. 1, 17 (1887).

[94] *See generally* McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963). *But see* Shorter v. Bermuda & West Indies S.S. Co., 57 F.2d 313 (S.D.N.Y. 1932) (jurisdiction will be exercised when seafarer is an American citizen).

[95] Cruise Ship Registry*, supra* note 16.

[96] The Pride of America sails the Hawaiian islands and does not leave the United States. Thus, to comply with the Passenger Vessel Services Act, it needs to be registered to the United States. *See* Jana Kasperkevic, *Why There Is Only One Cruise Ship in the World with an All-American Crew*, MARKETPLACE (Sept. 29, 2017), https://www.marketplace.org/2017/09/29/working-cruise-ship-america-jobs-hiring/.

itinerary would be impossible since the Passenger Services Vessel Act[97] makes it illegal for foreign built and registered ships to transport passengers without leaving the United States.[98] Section 27 of the Jones Act, dealing with cabotage (coastal shipping), also forbids goods to be transported within the US by foreign flagged ships.[99] Without being registered to the US, it could not have this itinerary.

In normal circumstances, most passengers do not even realize they are spending a week on a vessel flagged to Panama or Malta. Cruise lines benefit greatly as well since they are able to cherry-pick what laws are followed, pay only very minimal taxes, and are subject to very minimal regulations.[100] Prior to Covid-19, cruise ships saw few downsides to being on a registry from a state that is known as a flag of convenience; but now, the danger is more known, especially for crew and passengers.[101]

### *D. Other Relevant International Maritime Laws and Treaties*

While UNCLOS is still regarded as one of the most impactful and groundbreaking treaties to govern the seas, there have been countless other international agreements and treaties established that have helped shape maritime law today. Many of these conventions help to set standards for employees that otherwise might not be enforced under the flag of convenience system. For example, Regulation 2.5 of the Maritime Labour Convention guarantees that seafarers have a right to repatriation or to be granted a safe stay in the country of disembarkation.[102] It states that "[e]ach [ILO] Member shall require ships that fly its flag to provide financial security to ensure that seafarers are duly repatriated."[103]

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[97] In an effort to revive the Alaskan economy, the Alaska Tourism Restoration Act was passed in May 2021to temporarily allow cruise ships to sail from Washington state to Alaska without stopping in Canada, as was previously required under the Act. This Act will likely remain in effect until the Canadian ban on cruise ships entering its waters ends in 2022. *See* Alaska Tourism Restoration Act, Pub. L. No. 117-14, 135 Stat. 273.

[98] *Id.*

[99] Jones Act, 46 U.S.C. § 30104; Jim Walker, *Why Can't You Cruise From One U.S. Port to Another U.S. Port?*, CRUISE LAW NEWS (Sept. 9, 2011), https://www.cruiselawnews.com/2011/09/articles/flags-of-convenience/why-cant-you-cruise-from-one-us-port-to-another-us-port/?fbclid=IwAR3xPrIN9y6mV9AIGJXK5YmB5DO2jOhEiuT5m5T6kqIpmTXMx3Bi1ugkZcY.

[100] Negret, *supra* note 19, at 6-8.

[101] Priyanka Ann Saini, *Flags of Convenience -- Advantages, Disadvantages & Impact on Seafarers*, SEA NEWS (Oct. 27, 2017), .

[102] MLC, *supra* note 15, at reg. 2.5.

[103] *Id.*

Regulation 4.1 of the Maritime Labour Convention[104] also requires the flag state to ensure that seafarers have access to timely and adequate medical care while working on ships registered to that state, which is comparable to medical care received on shore.[105] However, this goal is often not achieved. Such failure occurred recently when a Florida jury awarded a Disney Cruise Line worker four million dollars after the cruise ship doctor failed to diagnose the worker's three broken ribs after she was hit by a car and deemed her fit to continue her work in the dining room.[106] However, after seeing a doctor in Florida, she was sent back to her home country of Portugal to receive treatment for nerve damage associated with the misdiagnosis.[107] Thus, medical treatment on cruise ships often does not reach the level intended by Regulation 4.1 of the Maritime Labour Convention.[108]

Another area that has been the focus of multiple treaties and conventions following UNCLOS concerns the health and safety of those onboard, especially during emergencies. Numerous articles of the International Health Regulations, which are binding on all 194 member states of the World Health Organization (WHO), provide rules for sanitary emergencies.[109] While recognizing that states are sovereign, these regulations aim to ensure the practice of *free pratique*, the "permission for a ship to enter a port, embark or disembark, discharge or load cargo or stores," is maintained when there are sanitary emergencies.[110] Article 2 provides a framework to respond to health emergencies while avoiding "unnecessary interference with international traffic."[111] Article 28.1 states that "a ship or an aircraft shall not be prevented for public health reasons from calling at any point of entry" and Article 28.2 promulgates that a ship will not be denied the embarkation or disembarkation of passengers for matters of public health.[112] Article 43 explains that while states can adopt measures which

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[104] The MLC is colloquially known as the "bill of rights" for seafarers because it sets out seafarers' rights to decent working conditions. It has been ratified by 97 countries. *See id.* at tit. 4, reg. 4.1.3.

[105] *Id.*

[106] Michael Guilford, *Cruise Line Worker Gets $4M from Disney*, CREW COUNSEL (Mar. 5, 2020), https://www.crewcounsel.com/cruise-line-worker-gets-4m-from-disney/.

[107] *Id.*

[108] MLC, *supra* note 15, at tit. 4, reg. 4.1.3.

[109] *See generally* World Health Org., Revision of the International Health Regulations (2005), World Health Assembly Res WHA58.3 (May 23, 2005), www.who.int/csr/ihr/WHA58-en.pdf [hereinafter IHR].

[110] *See* IHR, *supra* note 109, at art. 1.

[111] *See id.* at art. 2.

[112] *See id.* at art. 28.1-2.

are more restrictive, there are limits.[113] Furthermore, any additional measures taken must rely on scientific studies or recommendations from the WHO and the justifications must be conveyed to the WHO.[114] The WHO, however, still retains the right to ask members to reconsider those measures.[115]

Facilitation of International Maritime Traffic (FAL) Convention Rules[116] 2.17-2.24 explain that states must allow disembarkation in the event of a medical emergency onboard.[117] If disembarkation is denied, ships may invoke distress as a last resort, or *ultima ratio*, in order to try and obtain permission to dock under IHR Art. 28.6.[118] However, while vessels may have a legal right of entry into a port, a declaration of *ultima ratio* is not always successful in changing a state's mind in permitting the entrance into its territory.[119] Even when the request is granted per International Convention on Maritime Search and Rescue (SAR)[120] Regulations 3.1.6, 3.1.8, and 4.8.5, the duty to render assistance to ships in distress ends when passengers disembark at a safe location.[121] Thus, even if there is a true emergency, a state is not legally required to burden itself after the vessel reaches a place of safety.[122]

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[113] *See id.* at art. 43 (Measures "shall not be more restrictive of international traffic and not more invasive or intrusive to persons than reasonably available alternatives.").

[114] *See id.* at art. 43.

[115] *See id.* at art. 43.

[116] The International Maritime Organization's FAL Convention's main objectives are "to prevent unnecessary delays in maritime traffic, to aid co-operation between Governments, and to secure the highest practicable degree of uniformity in formalities and other procedures. In particular, the Convention reduces the number of declarations which can be required by public authorities." *See* London Convention on the Facilitation of International Maritime Traffic r. 2.17-2.23, Apr. 9, 1965, 18 U.S.T. 411, 591 U.N.T.S. 265 [hereinafter FAL Convention].

[117] *Id.*

[118] *See* IHR, *surpa* note 109, at art. 28.6.

[119] Alina Miron, *Port Denials: What are States' International Obligations?*, MAR. EXEC. (Apr. 12, 2020), https://www.maritime-executive.com/editorials/port-denials-what-are-states-international-obligations.

[120] This Convention was established to facilitate the adoption of international search and rescue plans for around the world as well as training and coordination assistance. *See* Int'l Convention on Maritime Search and Rescue, April 27, 1979, T.I.A.S. No. 110931405, U.N.T.S. 118 [hereinafter SAR Convention].

[121] *Id.* at regs. 3.1.6, 3.1.8, 4.8.5.

[122] *Id.*

### *E. Port States that Exercise Limited Jurisdiction Over Maritime Matters*

Besides the flag state, some port states extend their jurisdiction onto cruise ships even when not docked at port. For example, the US, specifically the FBI, exercises its Special Maritime and Territorial Jurisdiction as set forth in 18 U.S.C. § 7. US jurisdiction will be exercised over a cruise ship in certain criminal matters when,

> The ship, regardless of flag, is a U.S.-owned vessel, either whole or in part, regardless of the nationality of the victim or the perpetrator, when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular state; The offense by or against a U.S. national was committed outside the jurisdiction of any nation; The crime occurred in the U.S. territorial sea (within 12 miles of the coast), regardless of the nationality of the vessel, the victim or the perpetrator; or The victim or perpetrator is a U.S. national on any vessel during a voyage that departed from or will arrive in a U.S. port. [123]

Other states have similar regulations providing that jurisdiction will be exercised when a crime is committed by or against one of its own citizens.[124] A significant number of states have also ratified the International Maritime Organization's Convention for the Prevention of Pollution from Ships (MARPOL), which grants jurisdiction over vessels that pollute.[125] The US has ratified all but one of its annexes under the Act to Prevent Pollution from Ships[126] and has employed this jurisdiction numerous times as a result of cruise ships polluting in its waters.[127]

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[123] *See* Matthew Galluzzo, *Federal Crimes on Cruise Ships Explained by Defense Attorney,* GJILP (Feb. 26, 2016), https://www.gjllp.com/news/federal-crimes-on-cruise-ships-explained-by-defense-attorney/;*see also* 18 U.S.C. § 7.

[124] *See* Lindsey Bever, *Why Authorities In Spain Were Forced To Release An Alleged Cruise-Ship Rapist*, WASH. POST (Apr. 15, 2019), https://www.washingtonpost.com/world/2019/04/15/cruise-ship-rape-suspect-set-free-due-international-waters-loophole/.

[125] International Conference on Marine Pollution: Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 12 I.L.M. 1319 [hereinafter MARPOL].

[126] Act to Prevent Pollution from Ships, 33 U.S.C., §§1905-1915.

[127] *See, e.g.,* Sarah Mervosh, *Carnival Cruises to Pay $20 Million in Pollution and Cover-Up Case,* N.Y. TIMES (June 4, 2019), https://www.nytimes.com/2019/06/04/business/carnival-cruise-pollution.html.

### *F. Cruise Ship Employees*

A diverse employee pool exists on cruise ships. Because there are few minimum wage laws promulgated by the flag states, many service employees, such as cabin stewards, cooks, and waiters, come from Southeast Asia, including the Philippines and Indonesia.[128] However, upper-ranking crew members, such as officers, as well as dancers and singers, still come from the United States and Western Europe to work onboard.[129] What results is a huge disparity in pay between the highest ranking crew and the lowest ranking crew members.[130] For example, some cruise ship employees make as little as $500 per month.[131] Not all are paid this little; yet, the majority of workers make below $2000 per month while working twelve hours per day.[132] In comparison, high-ranking officers easily make six-figures every year.[133] Despite some of these extremely low salaries by US standards, cruise lines present a good opportunity to many employees coming from states such as the Philippines and Indonesia.[134] These employees are able to make more money than they would be able to make at home and do not have to spend money on room or board; this allows them to send more money home to support their families, as well as increase their skills with on-board training.[135] Nevertheless, many flag states do not permit unionization on board, so these low-level employees have very little bargaining power.[136]

Furthermore, most cruise ships have employed forum selection provisions in their employee contracts requiring arbitration first[137] and then litigation, which is often limited to the US.[138] While this may sound

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[128] *See* Christine Chin, *Labour Flexibilization at Sea*, 10 INT'L FEMINIST J. OF POLITICS 1, 11-12 (Mar. 2008).

[129] *Id.* at 11.

[130] Mark Matousek, *Cruise-Ship Workers Reveal How Much Money They Make*, BUS. INSIDER (Dec. 4. 2019), https://www.businessinsider.com/cruise-ship-workers-reveal-how-much-money-they-make-2019-5.

[131] *Id.*

[132] *Id*.

[133] *Id.*

[134] Chin, *supra* note 128, at 12.

[135] *Id.* at 15.

[136] Negret, *supra* note 19, at 7.

[137] Mark Matsousek, *A Lawyer who Represents Cruise-Ship Workers Reveals It's Nearly Impossible for Them to Sue Their Employers when They Feel Like They've Been Mistreated*, BUS. INSIDER (Nov. 11, 2019), https://www.businessinsider.com/why-its-nearly-impossible-for-cruise-workers-to-sue-employers-2019-11?op=1.

[138] *See generally* Axel Gehringer, *After Carnival Cruise and Sky Reefer: An Analysis of Forum Selection Clauses in Maritime and Aviation Transactions,* 66 J. AIR L. & COM. 633 (2001).

like a good thing to some people, there is actually little recourse to be had because US law is designed to protect US employees on vessels but not vessels comprised almost entirely of foreign workers. As a result, the protections of the Jones Act, which allows employees on vessels to recover for injuries they sustain during employment on a US flagged ship employing at least 75% of its crew as American sailors on a US built ship being sailed by a US company, does not apply to cruise ship workers. [139] This is because virtually all cruise ships do not fly the US flag, were not built in the US, and US employees onboard constitute a very small percentage of the workforce, nowhere near the required 75%.[140] The Jones Act's remedies, therefore, which are "designed to protect those who perform services upon a ship and are exposed to unique hazards of work upon sea," do not apply to cruise ship workers working for a vessel that flies a flag of convenience, which is every cruise ship but the *Pride of America*.[141]

### *G. Cruise Ship Passengers*

When examining the types of passengers most affected by Covid-19 for purposes of this comment, two types of demographics are important: the countries that passengers come from and their respective ages. First, the top three countries cruise passengers come from are the United States at 11.9%, China at 2.4%, and Germany at 2.19%.[142] Given the huge percentage that hail from the United States, it is not surprising that many cruise lines are headquartered in Miami, Florida.[143] Second, the international average age of cruise ship passengers is forty-six years old.[144] The average age has been declining as a result of family-focused

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[139] Jones Act § 30104.

[140] *See* Jamie Christy*, The Almost Always Forgotten, Yet Essential Part of Our World: An Examination of the Seafarer's Lack of Legal and Economic Protections on Flag of Convenience Ships*, 32 U.S.F. MAR. L.J. 49, 63 (2019); *Why Most Cruise Ships are Foreign-Flagged*, CRUISE JOB FINDER (Oct. 2021), https://www.cruisejobfinder.com/fm/cruises/foreign-flagged-cruise-ships.php.

[141] Jones Act § 30104; Christy, *supra* note 140, at 63; Robert Smith, *Cruise Ship Sails Under American Flag*, NPR (June 18, 2005), https://www.npr.org/templates/story/story.php?storyId=4709434.

[142] CLIA, *Where Are Passengers Coming From?*, CRUISING (2019), https://cruising.org/news-and-research/-/media/CLIA/Research/CLIA-2019-State-of-the-Industry.pdf.

[143] Ken Storey, *Coronavirus is Forcing Florida-Based Cruise Lines to Face the Consequences of Their Shady Business Practices*, ORLANDO WKLY (Mar. 30, 2020), https://www.orlandoweekly.com/Blogs/archives/2020/03/30/coronavirus-is-forcing-florida-based-cruise-lines-to-face-the-consequences-of-their-shady-business-practices.

[144] *See How old is the average cruise ship passenger,* SHIP TECH. (Feb. 4, 2020), https://www.ship-technology.com/features/how-old-is-the-average-cruise-passenger/.

cruise lines, trendier cruise lines for younger passengers, and theme cruises.[145] These developments have helped to alter the clientele slightly away from a retired, elderly passenger base. Nonetheless, the focus of cruise lines remains on those with disposable income who can not only pay for the cruise, but also the extras onboard.[146]

Since cruise ship passengers have sufficient disposable income to take a cruise, one would assume those same passengers would have the disposable income to sue the cruise ship in the case of any criminal event or malfeasance onboard. For civil suits, cruise passengers must bring the case in whatever forum their ticket specifies.[147] Typically the selected forum is the United States District Court of either Miami, Seattle, or Los Angeles.[148]

Efforts to evade federal court and federal laws – such as filing suit *in personam* – have been deemed creative, but courts are unwilling to allow such loopholes so that claims can be brought in US state court.[149] While this may seem inconvenient and unfair to some, the Supreme Court of the United States in 1991 held that such forum selection clauses are legal and enforceable unless the clause completely eradicates the cruise line's liability or prevents a claimant from having his or her case heard in a court that has competent jurisdiction.[150] The Supreme Court reasoned that "cruise lines have a special interest in clarifying where they can be sued, since their business involves transporting passengers through many jurisdictions."[151] Thus, these clauses have been held lawful so long as "(1) the forum was not selected to discourage pursuit of litigation of legitimate claims; (2) no fraud or overreaching occurred; (3) adequate notice was available; (4) and the consumer has a reasonable opportunity to reject the cruise contract without penalty."[152]

For crimes that occur on the high seas, it is up to the flag state to prosecute them.[153] That means relying on states such as Bermuda or Panama to prosecute individuals who committed crimes like rape and

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[145] *Id.*

[146] *Id.*

[147] *See* Damian Sullivent, *Cruise Ship Litigation in a Nutshell,* NASSER LAW (Feb. 15, 2018), https://www.nesslerlaw.com/blog/cruise-ships#_ftn11=.

[148] Logistically this makes sense Miami, LA, and Seattle are large cruise cities. *See id.*

[149] *See* DeRoy v. Carnival Corp., 963 F.3d 1302, 1307 (11th Cir. 2020).

[150] *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 596 (1991).

[151] *Id.*

[152] *See* Cismaru v. Radisson Seven Seas Cruise, Inc., No. Civ. A. 07-00-00100-CV, 2001 WL 6546, at *1 (Tex. App. Jan. 2, 2001) (internal citations omitted).

[153] *See* Bever, *supra* note 124.

sexual assault, which is extremely unlikely.[154] Because port states do not have jurisdiction for crimes on the high seas even if their state is closest to the crime, states have needed to release perpetrators because there was no jurisdiction to prosecute them.[155]

### *H. Medical Care Onboard Cruise Ships*

Even though cruise ships carry thousands of people at any given time, cruise ships have never promised to be hospital ships. Usually, cruise ships only have the bare minimum medical staff—typically one doctor,[156] and "par" levels of medical equipment,[157] sometimes only having a single ventilator.[158] Prior to the pandemic, the US did not even require by law that cruise ships have a doctor onboard.[159] However, at the end of 2020 and after seeing the catastrophes due to the virus, Congress passed an Act that would require all cruise ships to have one doctor onboard at all times and to install video cameras in all public areas around the ship.[160] Because most cruise ships already have one doctor onboard, this regulation is unlikely to have much effect on the already minimal level of medical care onboard cruise ships.

### *I. Cruise Lines International Association*

Cruise lines are powerful companies that have largely remained free from government regulation because of the strength and influence of the Cruise Lines International Association (CLIA), a trade association

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[154] *See* Hanna Kozlowska, *Why Cruise Ships Have a Sexual-Assault Problem*, QUARTZ (July 6, 2017), https://qz.com/1022245/why-cruise-ships-have-a-sexual-assault-problem/.

[155] Eda Harotounian, *Cruise Ship and Crime: How to Better Protect United States' Citizens Who Are Victims of Crime on the High Seas*, 54 LOY. L.A. L. REV. 959, 960 (2021).

[156] Taylor Dolven, *How Should Cruise Companies Protect Passengers and Crew from COVID-19? We Asked Doctors*, MIAMI HERALD (May 31, 2020), https://www.miamiherald.com/news/business/tourism-cruises/article242945396.html.

[157] Cassie Shortsleeve, *Cruise Ship Doctors Will Have a Tougher Job Than Ever Once Sailings Resume*, CONDE NAST TRAVELER (Dec. 21, 2020), https://www.cntraveler.com/story/cruise-ship-doctors-will-have-a-tougher-job-than-ever-once-cruising-restarts.

[158] *See* Stephanie Pappas, *Cruise Ships Still Struggling to Dock as Coronavirus Spreads*, LIVE SCIENCE (Apr. 2, 2020), https://www.livescience.com/cruise-ships-coronavirus-covid-19.html.

[159] *Id.*

[160] 46 U.S.C. § 3509.

that represents the biggest cruise lines.[161] The CLIA spends millions of dollars each year lobbying Congress on issues that favor cruise lines.[162] From 1997 to 2016, the cruise industry spent $1.38 million lobbying Congress, a number which has grown since then.[163] Most recently, the CLIA was tied to a disinformation campaign in Key West which sought to defeat a proposal that would restrict the types of cruise ships that could visit the Florida Keys.[164] The CLIA was also instrumental in helping to defeat a proposed tax on the cruise lines in the US that would have forced them to pay a tax on a portion of their income.[165] When cruise ships are faced with possible legislation that would negatively impact their bottom line, organizations such as the CLIA are prepared to lobby hard to protect the cruise lines' interests,[166] which may not align with the best interests of passengers.

### *J.* Covid-19 *and Cruise Ships*

In December 2019, the world first heard about a "novel" virus that was making its way through China.[167] One especially challenging aspect of Covid-19 is that the virus manifests itself so differently across the population—some people experience severe symptoms and require hospitalization while others do not even know they are infected.[168] While Covid-19 rates vary considerably across the globe, the virus has

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[161] *See About CLIA*, CRUISE LINES INTERNATIONAL ASSOCIATION, https://cruising.org/en/about-the-industry/about-clia, (last visited Oct. 8, 2021).

[162] *See* Jim Walker, *Foreign-Flagged Cruise Industry Spends Millions of Dollars Lobbying U.S. Congress*, CRUISE LAW NEWS (June 13, 2016), https://www.cruiselawnews.com/2016/06/articles/lobbying/foreignflagged-cruise-industry-spends-millions-of-dollars-lobbying-us-congress/.

[163] *Id.*

[164] *See* Jim Walker, *Miami Herald: Cruise Line "Secretly Funded a Disinformation Campaign" to Try and Defeat Recent Key West Referendum*, CRUISE LAW NEWS (Dec. 10, 2020), https://www.cruiselawnews.com/2020/12/articles/uncategorized/miami-herald-cruise-line-secretly-funded-a-disinformation-campaign-to-try-and-defeat-recent-key-west-referendum/.

[165] *See* Jessica Lipscomb, *Miami's Cruise Industry Gave $23,500 to Senator Who Stopped New Cruise Tax*, MIAMI NEW TIMES (Dec. 7, 2017), https://www.miaminewtimes.com/news/miamis-cruise-industry-gave-23500-to-senator-who-stopped-new-cruise-tax-9888119.

[166] *Id.*

[167] *See* Berti, *supra* note 5.

[168] Claudia Wallis, *Why Some People Get Terribly Sick from COVID-19*, SCI. AM. (Aug. 20, 2020), https://www.scientificamerican.com/article/why-some-people-get-terribly-sick-from-covid-19/.

spread from China to almost every country across the world.[169] Most states initially responded to Covid-19 by taking some or all of the following measures: closing borders, halting flights in and out of the country, requiring quarantines for anyone exposed, "locking down" neighborhoods, cities, or even the whole country, requiring people to social distance by standing or sitting six feet apart, and closing schools, bars, restaurants and gyms to stop the spread.[170]

The cruise industry was uniquely affected by the virus after the US Centers for Disease Control (CDC) issued a no-sail order on March 14, 2020, that halted all future sailings to help contain the spread of the virus.[171] Because border closures also meant port closures, cruise ships were left stranded around the world unable to dock, let off passengers, or repatriate the crew.[172] For example, Holland America Cruise Line used its *MS Rotterdam* to come to the aid of another one of its ships, the *MS Zaandam*.[173] This was because there was a Covid-19 outbreak on board the *MS Zaandam*, supplies were running low, and no South American countries would permit docking to disembark passengers or even to restock food and medical supplies.[174] Holland America eventually had to rely on the US State Department (even though the US is not its flag state) to gain permission to traverse the Panama Canal,[175] a waterway that is supposed to permit neutral passage in times of both peace and war.[176] Similarly, the *MS Braemar* was denied entry into its flag state, The Bahamas and instead relied on Cuba to grant entry to its docks so repatriation could take place.[177] There was no reasonableness

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[169] Charlie Campbell, *Inside the Global Quest to Trace the Origins of COVID-19—and Predict Where It Will Go Next*, TIME (July 23, 2020), https://time.com/5870481/coronavirus-origins/.

[170] Kevin Dayaratna, *A Comparative Analysis of Policy Approaches to COVID-19 Around the World, with Recommendations for U.S. Lawmakers*, HERITAGE FOUND. (July 20, 2020), https://www.heritage.org/public-health/report/comparative-analysis-policy-approaches-covid-19-around-the-world.

[171] *See* Berti, *supra* note 5.

[172] *See* Miron, *supra* note 119.

[173] *See* Michael Smith, *The Pariah Ship*, BLOOMBERG (June 11, 2020), https://www.bloomberg.com/features/2020-zaandam-pariah-ship/.

[174] *See id.*

[175] *See id*.

[176] The Panama Canal Treaty of 1977, Sept. 7, 1977, U.S.-Pan., 33 U.S.T. 39, 16 I.L.M. 1022 [hereinafter Panama Canal Treaty].

[177] Alleen Brown, *The Cruise Industry Pressured Caribbean Islands to Allow Tourists Onto Their Shores Despite Coronavirus Concerns*, THE INTERCEPT (Mar. 14, 2020), https://theintercept.com/2020/03/14/coronavirus-cruise-ships-caribbean/; *see also* Jon Stone, *UK Thanks Cuba For 'Great Gesture Of Solidarity' In Rescuing Passengers From Coronavirus Cruise Ship*, INDEPENDENT (Apr. 7, 2020), https://www.independent.co.uk/news/world/americas/coronavirus-cruise-ship-cuba-rescue-ms-braemar-havana-cases-a9451741.html.

evaluation as required in IHR Article 43 in these situations.[178] As a result, flag and port states adopted practices including:

> indiscriminate prohibitions on access to ports (hardly compatible with the principles of reasonableness and necessity); to measures discriminating between ships on account of their nationality (which is not permissible); and to more detailed bans, based on objective considerations, like previous calls in infected areas. A more appropriate approach is specifically based on the health situation on the ship, assessed after appropriate testing. But very few states adopted it.[179]

Unlike various travel bans that gave people a few days for the ban to take effect, cruise ships did not have that luxury. In addition to dealing with millions of cancellations and the logistics of disembarking passengers and crew in the most efficient manner, there were real concerns about outbreaks on the ships after the outbreak on the *MS Diamond Princess* garnered attention globally.[180] Not only was this the first outbreak that received almost global attention from the masses, but it was messy because neither Japan nor Britain, the vessel's flag state wanted to be in charge.[181]

The CDC later reported that there were 3,689 Covid-19 or other Coronavirus-like cases found on cruise ships in US waters from March 1 through September 29, 2020.[182] Thus, describing cruise ships as floating "petri dishes" was not a stretch of the imagination.[183] Other large-scale outbreaks also occurred in Australia on the Bermudan-

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[178] *See* IHR, *supra* note 109, at art. 43.

[179] *See* Miron, *supra* note 119.

[180] *See Tourism Policy Responses to the Coronavirus (COVID-19)*, OECD (June 2, 2020), https://www.oecd.org/coronavirus/policy-responses/tourism-policy-responses-to-the-coronavirus-covid-19-6466aa20/#endnotea0z27.

[181] *See* Matt Apuzzo, Motoko Rick & David Yaffe-Bellany, *Failures on the Diamond Princess Shadow Another Cruise Ship Outbreak*, N.Y. TIMES (Mar. 10, 2020), https://www.nytimes.com/2020/03/08/world/asia/coronavirus-cruise-ship.html.

[182] Rebecca Falconer, *CDC: 3,689 COVID-19 or Coronavirus-Like Cases Found on Cruise Ships In U.S.*, AXIOS (Oct. 1, 2020), https://www.axios.com/cdc-covid-19-cruise-ship-thousands-cases-us-7f942f86-a56d-44bd-a010-5b5d52cf6d96.html.

[183] *See* Motoko Rich, *'We're in a Petri Dish': How a Coronavirus Ravaged a Cruise Ship*, N.Y. TIMES (Feb. 22, 2020), https://www.nytimes.com/2020/02/22/world/asia/coronavirus-japan-cruise-ship.html; *see also* Alina Miron, *Port Denials and Restrictions in Times of Pandemic: Did International Law Lose its North Star*, EJIL TALK (April 22, 2020), https://www.ejiltalk.org/port-denials-and-restrictions-in-times-of-pandemic-did-international-law-lose-its-north/.

flagged *MS Ruby Princess,*[184] off the coast of California on the *MS Grand Princess*[185] where the US came to its recue, and on the *MS Celebrity Apex.*[186] The latter incident was unique because Celebrity failed to take any precautions on its new vessel that solely held crew members when the company knew about the dangers of the virus.[187] Celebrity continued to permit crew parties onboard, served all food buffet-style, and mandated participation in safety drills.[188] A class-action lawsuit was then filed by crew members as a result of Celebrity's negligence in allowing an outbreak to occur.[189] However, the case was dismissed pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i) without prejudice.[190] No subsequent case has been filed, despite everything these employees endured while on board.

Furthermore, it was demonstrated early on in the pandemic that flag states would not assume more responsibilities than usual at the beginning of the outbreak.[191] In fact, not only were flag states simply complicit for not doing more to facilitate docking and repatriations, some of these states actively undermined efforts by the cruise lines.[192] For example, The Bahamas denied the *MS Braemar* from docking in order to repatriate its crew despite the fact that it is registered in The Bahamas.[193] Italy and Malta, suffering from their own outbreaks of Covid-19 on land, also declared that their ports were not places of safety so that Rule 2.5 of the Maritime Labour Convention, which permits cruise ships to dock at a safe location in times of emergency, would not

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[184] *See* Donald Rothwell, *The Ruby Princess Inquiry and International Law*, ANU COLLEGE L. (Aug. 19, 2020), https://law.anu.edu.au/research/essay/covid-19-and-international-law/ruby-princess-inquiry-and-international-law.

[185] *See* Christopher Goffard, *'We called it Voyage of the Damned': Days of despair on the Grand Princess',* LA TIMES (Dec. 23, 2020), https://www.latimes.com/california/story/2020-12-23/covid-19-spread-despair-grand-princess; Bill Chappel, *Coronavirus: Cruise Ship in Limbo Off of California After a Former Passenger Died*, NPR (Mar. 5, 2020), https://www.npr.org/sections/health-shots/2020/03/05/812456413/coronavirus-cruise-ship-in-limbo-off-california-after-former-passenger-diedff (The vessel is registered to Bermuda's registry. However, the US handled the outbreak when it occurred off the coast of California by flying tests to the vessel and coordinated the docking and repatriation of passengers.).

[186] Michel Morin, *Le Navire en Attente de Livraison, une Zone de Non-Droit? Le Cas du Celebrity Apex*, [The Ship Awaiting Delivery, a Lawless Zone? The Case of Celebrity Apex] 26 NEPTUNUS, 1, 1-6 (2020).

[187] *Id.*

[188] *Id.*at 2.

[189] *Id.* at 6.

[190] Nedeltcheva v. Celebrity Cruises Inc., No. 1:20-cv-21569-UU, 2020 U.S. Dist. LEXIS 131416, at *2 (S.D. Fla. July 21, 2020).

[191] *See* Brown, *supra* note 177.

[192] *Id.*

[193] *Id.*

apply.[194] France also made a similar pronouncement but allowed ports to stay open for people rescued at sea, such as refugees.[195] The UK and The Netherlands were also largely unable or unwilling to help, depending on the timing, for ships that were part of their registry.[196] Without much help from any flag states, cruise lines utilized their own resources to repatriate most of their passengers by June, at great cost.[197] However, by September 2020, repatriation was still not complete for all crew members.[198]

Many employees from lesser-known countries, such as Mauritius, were still stuck on cruise ships in late 2020 since their entrance was denied, even after personally requesting entrance from the Mauritius government when sailing by.[199] Other employees were forced to extend their employment with very unfavorable conditions, such as agreeing to longer working hours and lower pay so as to not face retaliation in the industry.[200] This was the case with the Bahamas Paradise Cruise Line that also did not pay its workers any salary for months.[201] As a result, a class action suit was filed[202] and the case was settled for $875,000, which would go towards ensuring that the employees were paid.[203] However, since that settlement was reached, the federal judge overseeing the matter sent both legal teams back to the negotiating table after calling the settlement "wholly inadequate" as not

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[194] *See* Andrea Maria Pellicon*, Covid-19: Italy Is Not A "Place Of Safety" Anymore. Is The Decision To Close Italian Ports Compliant With Human Rights Obligations?*, EJIL TALK (Apr. 23, 2020), https://www.ejiltalk.org/covid-19-italy-is-not-a-place-of-safety-anymore-is-the-decision-to-close-italian-ports-compliant-with-human-rights-obligations/; *see also* MLC, *supra* note 15, at reg. 2.5.

[195] *See* Miron, *supra* note 183.

[196] *See* Smith, *supra* note 173; Stone, *supra* note 177.

[197] Some passengers chose to remain onboard and sail back to Hamburg, Germany, the start of the around-the-world cruise. *See* Francessca Jones, *After Months At Sea, The Final Cruise Ship Carrying Passengers Makes It Home*, CNN TRAVEL (June 8, 2020), https://www.cnn.com/travel/article/artania-cruise-ship-docks/index.html

[198] *See* Kaji, *supra* note 23.

[199] Taylor Dolven, *Stranded At Sea: Crew Members Weigh COVID-19 Trauma As They Decide Whether to Return*, MIAMI HERALD (Nov. 18, 2020), https://www.miamiherald.com/news/business/tourism-cruises/article246754091.html.

[200] *See* Taylor Dolven, *Pay Promises, Threats of Jail. How Bahamas Paradise Cruise Line Made Crew Work Without Wages*, MIAMI HERALD (Aug. 12, 2020), https://www.miamiherald.com/news/business/tourism-cruises/article244768187.html.

[201] *Id.*

[202] *Id.*

[203] Tony Davis, *Crew of Idled Cruise Line Reaches Deal for Back Pay*, PALM BEACH POST (Aug. 25, 2020), https://www.palmbeachpost.com/story/news/2020/08/25/bahamas-paradise-cruise-line-pay-grand-celebration-crew-back-wages/3434175001/.

enough was done to compensate the crew onboard.[204] Bahamas Cruise Lines responded by arguing that the matter should never have gone to court because of the arbitration provisions in the contract.[205] Despite this gamesmanship, the final approval of the settlement came on May 19, 2021, with the terms being that the employees would receive 100% of their wages plus customary tips during the period at issue.[206]

Additionally, and not very surprisingly, passengers have flocked to courts to bring suits against cruise lines relating to Covid-19. For example, in *Maa v. Carnival Corp. & PLC*, the decedent's family brought a wrongful death claim as a result of decedent becoming infected on a Carnival ship and succumbing to the virus.[207] The court foreclosed all relief aside from pecuniary damages because Covid-19 was caught after the plaintiff had left the United States.[208] Also against Carnival, the petitioners requesting class certification in *Archer v. Carnival Corp. & PLC* alleged that the cruise line was liable for a variety of claims of negligence and infliction of emotional distress for not acting sooner to prevent a widespread outbreak on the *Grand Princess*.[209] Plaintiffs on other cruise ships have tried to bring similar claims, though they have been unsuccessful.[210] A multitude of other plaintiffs have attempted to bring either negligent infliction of emotional distress claims or intentional infliction of emotional distress claims as a result of being on

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[204] *See* Taylor Dolven, *Bahamas Paradise Forced Crew to Work for Months. Judge Says Proposed Payout Isn't Enough*, MIAMI HERALD (Nov. 7, 2020), https://www.miamiherald.com/news/business/tourism-cruises/article247014557.html.

[205] *See* Caroline Simson, *Ex-Cruise Ship Workers Eye Deal Over COVID-19 Claims*, LAW360 (Dec. 14, 2020), https://www.law360.com/articles/1337507/ex-cruise-ship-workers-eye-deal-over-covid-19-claims.

[206] *See* Janicijevic v. Classica Cruise Operator, Ltd., No. 20-cv-23223, 2021 U.S. Dist. LEXIS 95561, at *5 (S.D. Fla. May 19, 2021).

[207] Maa v. Carnival Corp. & PLC*,* No. CV 20-6341 DSF (SKx), 2020 U.S. Dist. LEXIS 172621, at *25-28 (C.D. Cal. Sept. 21, 2020).

[208] *Id.;* Christopher Yasiejko, *For Carnival Cruise Lines, 1920 'Death on the High Seas Act' Curbs Coronavirus Damages*, INSUR. J. (Sept. 23, 2020), https://www.insurancejournal.com/news/national/2020/09/23/583823.htm.

[209] Archer v. Carnival Corp. & PLC, No. 2:20-cv-04203-RGK-SK, 2020 U.S. Dist. LEXIS 199304 (C.D. Cal. Oct. 20, 2020) (The court denied the class certification in Archer v. Carnival Corp., 9th Cir. No. 20-80152, 2021 U.S. App. LEXIS 4683 (Feb. 17, 2021). However, Carnival has since settled with the petitioners.).

[210] *See, e.g.,* Kantrow v. Celebrity Cruises, Inc.*,* 510 F. Supp. 3d 1311, 1326 (S.D.Fla. 2020) (finding plaintiff's claim that the cruise line lied about all passengers being healthy when they were not was not "outrageous").

one of the cruise ships where there was an outbreak.[211] Most courts have dismissed the claims for failure of the plaintiffs to allege extreme and outrageous conduct or for basing their claim entirely on fears of exposure from being in close proximity to those with Covid-19.[212]

Additionally, a class action suit was filed in Australia against Carnival and Princess Cruises.[213] Notably, this lawsuit will involve class members from around the globe and not just from Australia.[214] The Australian justice believed this was the best means to avoid passengers bringing duplicative lawsuits around the globe, despite Princess and Carnival alleging the US and UK groups agreed to different terms and conditions.[215] In short, Covid-19 created massive problems on cruise ships.

## III. ANALYSIS

Covid-19 has greatly affected the cruise industry in unimaginable ways since February 2020. First, this section will explain why legally the flag of convenience system is problematic and even dangerous. Next, this section will present solutions to the flag of convenience system. Finally, this section will explain why it is unlikely that the outright ban of the flag of convenience system will happen and why the international community must work within the system to provide adequate legal remedies for passengers and employees.

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[211] *See, e.g.,* Tucker v. Princess Cruise Lines, C.D.Cal. No. 2:21-cv-01504-RGK-SK, 2021 U.S. Dist. LEXIS 201623 (July 30, 2021) (finding fears relating to exposure alone were insufficient); Paul v. Celebrity Cruises, Inc., S.D.Fla. No. 21-20814-CIV-LENARD, 2021 U.S. Dist. LEXIS 133037 (July 15, 2021) (finding fears relating to exposure alone were insufficient); Kantrow v. Celebrity Cruises, S.D.Fla. No. 20-21997-CIV, 2021 U.S. Dist. LEXIS 96548 (Apr. 1, 2021) (finding fears relating to exposure alone were insufficient); Weissberger v. Princess Cruise Lines, Ltd., No. 2:20-cv-02267-RGK-SK, 2020 U.S. Dist. LEXIS 123743 (C.D. Cal. July 14, 2020) (finding plaintiffs could not recover monetarily under an emotional distress claim for fear of contracting Coronavirus while onboard).

[212] *See id.*

[213] Thomas Bywater, *Ruby Princess: International Cruise Passengers Join Class Action Covid 19 Lawsuit*, NEW ZEALAND HERALD (Sept. 14, 2021), https://www.nzherald.co.nz/travel/ruby-princess-international-cruise-passengers-join-class-action-covid-19-lawsuit/T37AKMRJTNN6QY2PPXBAINPPIQ/.

[214] *Id.*

[215] Bernadette Chua, *Judge Rules US And UK Passengers Can Join Ruby Princess Class Action*, CRUISE PASSENGER (Sept. 10, 2021), https://cruisepassenger.com.au/new-ruling-finds-international-passengers-will-be-included-in-ruby-princess-class-action/.

### *A. The Flag of Convenience System Allows Flag States and Cruise Lines to Shirk Their International, Legal Obligations to the Detriment of Others.*

This subsection will analyze the ways in which cruise lines, with the help of port states, endured the brunt of the burden of the efforts to repatriate passengers and crew after cruise lines needed assistance but did not receive it from the flag states. Next, the role of the cruise ship employees will be analyzed as they were asked to take on new roles, work long hours, and extend their contracts, sometimes with a decrease in pay or with pay stopping altogether. The employees have been left with very little recourse.

#### i. After Cruise Lines Could Not Adequately Deal with Covid-19 on Their Own, the Burden Shifted From Flag States to Port States

In the midst of a global pandemic, even billion-dollar industries needed help and guidance from states.[216] When cruise lines needed additional help, most flag states were nowhere to be found and illegally shirked their international responsibilities.[217] The burden shifted from flag states to port states even though the jurisdiction of the flag state always remains.[218] Port states and other global leaders, such as the US, Japan, and Australia, dealt with outbreaks, arranged for dockings, and figured out how to safely get people off the cruise ships.[219] However, the intervention of port states still was not enough; cruise ships had to rescue other cruise ships since states were hesitant to allow docking to even refuel.[220] For example, Holland American Cruise Line used its *MS Rotterdam* to come to the aid of another one of its ships, the *MS Zaandam*, when there was an outbreak of Covid-19 onboard, supplies were running low, and no South American countries would permit docking to disembark passengers or to restock supplies.[221]

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[216] Jeff Stein & Peter Whoriskey, *The U.S. Plans To Lend $500 Billion To Large Companies. It Won't Require Them To Preserve Jobs Or Limit Executive Pay.*, WASH. POST (Apr. 28, 2020), https://www.washingtonpost.com/business/2020/04/28/federal-reserve-bond-corporations/.

[217] *ITF Takes Flag States to Task Over Coronavirus Response*, MAR. EXEC. (Mar. 18, 2020), https://www.maritime-executive.com/article/itf-takes-flag-states-to-task-over-coronavirus-response.

[218] *See* Kunkle, *supra* note 84, at 639.

[219] *See, e.g.,* Rothard *supra* note 183; Goffard, *supra* note 185.

[220] Smith, *supra* note 173.

[221] *Id.*

The first and possibly most significant example of the failure of the flag system was with the *MS Diamond Princess* sailing in Japan in February 2020.[222] While much about Covid-19 was still unknown, there also was confusion as to which state should be running point in dealing with the outbreak on the ship. Should it have been Japan, since the ship was docked at one of its ports or Britain since the *MS Diamond Princess* sailed with Britain's flag?[223] While it was clear that Japan had a duty to render assistance to vessels in distress under Article 98 of the UNCLOS, Britain also had legal duties under Article 94 of the UNCLOS to ensure the safety and health of those on board.[224] Ultimately, however, Britain did not live up to those legal obligations. The responsibility fell on the port state of Japan despite the Japanese foreign minister stating that under international law "'Japan is not the only state that is obliged to conduct measures to prevent the expansion of infection' … he suggested international law was unclear as to whether both the country where the ship was officially licensed — Britain — and the cruise operator should share the burden."[225] This dual jurisdiction gives flag states an out. As a result, when disaster strikes a cruise ship at port or within the territorial sea of another state, flag states tend to wait until the port state acts, because that state also has a legal obligation.

The world saw this occur again with the *MS Ruby Princess* in Australia.[226] The *MS Ruby Princess* sails with a Bermudan flag; however, it was Australia and not Bermuda that respected the practice of *free pratique* found in Article 1(1) of the IHR and permitted passengers to disembark as well as Article 28 of the IHR relating to docking during medical emergencies.[227] Unfortunately, there were serious missteps by Australia since it permitted passengers to disembark the ship and make their way to public transportation and commercial airlines without being tested. [228] This decision likely contributed to the spread of the virus in both Australia and elsewhere in the world. However, the letter of the international law was maintained throughout by Australia.

The United States, a port state, also dealt with the *MS Grand Princess,* a cruise ship flying a Bermudan flag off of the coast of California and responded to the crisis when Bermuda was nowhere to be

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[222] Apuzzo, *supra* note 181.
[223] *Id.*
[224] *See* UNCLOS, *supra* note 29, at arts. 94, 98.
[225] Apuzzo, *supra* note 181.
[226] *See* Rothwell, *supra* note 184.
[227] IHR, *supra* note 109, at arts. 1(1), 28.
[228] *See* Rothwell, *supra* note 184.

found.[229] Instead of totally respecting the practice of *free pratique* like Australia, the United States employed Article 23 of the IHR that gives states the right to conduct inspections before allowing the release of passengers.[230] As such, the United States flew Covid tests out to the vessel to test and isolate passengers before anyone stepped foot on US soil.[231] As a result, the spread of Covid-19 was somewhat mitigated.[232] But again, it was the port state and not the flag state that dealt with Covid-19 outbreaks onboard; and, it was the concept of dual jurisdiction that allowed another state to come to the rescue.

After states closed their borders and their ports, the situation unsurprisingly got worse as flag states continued to focus inward rather than outward. Holland America Line's *MS Zaandam* essentially became stuck in South America after being denied entry from multiple ports in mid-late March and needed to rely on the US Department of State to negotiate with Panama in order to traverse the Panama Canal.[233] This was contrary to international law as cruise ships should have been able to dock per FAL Convention Rules 2.17-2.24[234] and SAR Convention Regulations 3.1.6, 3.1.8, and 4.6.[235] The Netherlands did little to organize the *MS Zaandam* and *MS Rotterdam*'s passage through the Panama Canal.[236] The cruise ships later docked in Florida where the US helped to orchestrate a safe disembarkation of passengers.[237] From an international law standpoint, however, The Netherlands, the state to which the vessel is registered, had the greatest legal responsibility in ensuring the vessel was able to dock and unload its passengers. Moreover, Panama had a duty to allow the peaceful passage of the vessel per the Panama Canal Treaty, which Panama was not going to allow originally.[238]

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[229] Bill Chappel, *Coronavirus: Cruise Ship in Limbo Off of California After a Former Passenger Died*, NPR (Mar. 5, 2020), https://www.npr.org/sections/health-shots/2020/03/05/812456413/coronavirus-cruise-ship-in-limbo-off-california-after-former-passenger-died.

[230] IHR, *supra* note 109, at art. 23.

[231] *See* Chappel, *supra* note 229.

[232] *Id.*

[233] Patrick Greenfield & Erin Mcormick, *Cruise Operator Says Lives Are at Risk on Zaandam as Nations 'Turn Their Backs' on Ship*, THE GUARDIAN (Mar. 31, 2020), https://www.theguardian.com/world/2020/mar/31/cruise-ship-chief-zaandam-and-rotterdam-passengers-left-to-fend-for-themselves-covid-19-crisis.

[234] FAL Convention, *supra* note 116, at r. 2.17-2.24

[235] *See* SAR Convention, *supra* note 120, at regs. 3.1.6, 3.1.8, 4.6.

[236] Smith, *supra* note 173.

[237] *Id.*

[238] *See generally* Panama Canal Treaty, *supra* note 176; *see also* Greenfield, *supra* note 233.

The United Kingdom, whose citizens comprised most of the passengers on Fred Olsen's *MS Braemar*, also worked with the Cuban government to ensure the vessel could dock in Cuba after The Bahamas, the state to which the vessel is registered, denied the vessel's request to dock.[239] Again, this was a clear violation of the duties of a flag state under Article 94 of UNCLOS since the *MS Braemar* was under the jurisdiction of The Bahamas.[240]

These cases demonstrate how little legal responsibility is contemplated by flag states before registering cruise ships and the disconnect between the flag state and the cruise line. Despite it undoubtedly being more difficult for a cruise ship in South America to sail to The Netherlands to dock or for the ship in Japan to sail to Panama, states, such as The Bahamas, did not even allow entry when it was fairly easy for ships to do so given their location.[241] Port states and other states with a significant number of passengers onboard the distressed cruise ships resolved issues when borders and ports closed with little to no aid from the official flag states.

ii. Cruise Ship Employees Have Been Uniquely Burdened by the Flag System

Cruise lines largely failed at repatriating their crew in a timely manner and were not aided by their flag states. After the no-sail order, it was not economically feasible nor was it safe to continue to have employees stay on cruise ships that idled in the sea while waiting for authorities to give the all-clear that cruising was safe again.[242] Thus, very complex repatriation efforts were commenced, which is legally required under Regulation 2.5 of the Maritime Labour Convention.[243] As previously noted, that Regulation provides that seafarers have a legal right to repatriation, and it is up to the flag state to ensure that "ships that fly its flag provide financial security to ensure that seafarers are duly repatriated."[244] States have also been unhelpful historically in ensuring the living and working conditions for crew per the Safety of Life at Sea Convention.[245] This crisis was no different.

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[239] Brown, *supra* note 177.

[240] *See* UNCLOS, *supra* note 29, at art. 94.

[241] *Id.*

[242] *See* Joshua Nevett, *Coronavirus: Anger Grows for Stranded Crew on Forgotten Cruises*, BBC NEWS (May 19, 2020), https://www.bbc.com/news/world-us-canada-52722765.

[243] MLC, *supra* note 15, at reg. 2.5.

[244] *Id.*

[245] *See* SOLAS, *supra* note 59, at reg. 33.1.

Efforts to repatriate crew proved to be very difficult with flights cancelled around the world and cruise ships not being near states where a significant number of employees hail from. The legal responsibility was clearly on the cruise line and secondarily on the flag state to repatriate the crew while on the high seas.[246] However, a large number of cruise ships were sailing in the Caribbean, South America, and in Australia, which are not convenient locations for getting employees back to places such as Indonesia and the Philippines.[247] And because of the global situation with planes virtually grounded, the only possibility for cruise lines to repatriate crew and fulfill their legal obligations was by sailing them home, which sometimes took months.[248] Additionally, some states with a sizable population of people onboard chartered flights home for their citizens to avoid employees spending months on end waiting for a workable repatriation plan.[249]

Despite cruise ship employees having this legal right and flag states having a legal responsibility to ensure this occurred, repatriation of crew has taken a significant amount of time.[250] In mid-September 2020, there were still 10,000 cruise ship employees waiting to be repatriated, clearly demonstrating that this legal commitment was not being strictly adhered.[251] The Supreme Court of Mauritius had previously denied a cruise ship employee's emergency request to dock because Mauritius had no legal responsibility to allow such action and because of the danger surrounding Covid-19.[252] Additionally, on September 13, 2020, the International Maritime Organization called on all United Nations Member States to repatriate more than 300,000 seafarers stuck on ships around the world.[253] And while not all of these seafarers were on cruise ships, this statement clearly demonstrates the difficulties of repatriating so many seafarers and the lack of commitment by flag states during a global pandemic.

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[246] *Id.* at reg. 33; *see also* MLC, *supra* note 15, at reg. 2.5.

[247] *See* Chevanev Charles, *Who is Responsible for Seafarers Stranded by the Pandemic*?, MAR. EXEC. (Apr. 29, 2020), https://www.maritime-executive.com/editorials/who-is-responsible-for-seafarers-left-stranded-by-the-pandemic.

[248] *See* Robert McGillivray, *It's a New Reality for Thousands of Cruise Ship Crew Members*, CRUISE HIVE (Sept. 29, 2020), https://www.cruisehive.com/its-a-new-reality-for-thousands-of-cruise-ship-crew-members/42191.

[249] *See* Charles, *supra* note 247.

[250] *See* Kaji, *supra* note 23.

[251] *Id.*

[252] Dolven, *supra* note 199.

[253] *See A humanitarian Crisis at Sea: All United Nations Member States Must Resolve the Crew Change Crisis*, IMO (Sept. 14, 2020), https://www.imo.org/en/MediaCentre/PressBriefings/Pages/27-crew-change-joint-statement.aspx.

As a result of repatriation taking a very long time, cruise lines asked employees to work well beyond the terms of their contract, essentially forcing employees to take pay cuts in order to keep their jobs,[254] and sign contract extensions with decreased pay so as to avoid being black-listed from the industry.[255] Again, because the flag states rarely have strict labor standards or laws, these demands, according to the laws of the flag states, were legal. In an extreme case, employees who did not immediately sign contract extensions were threatened by cruise management onboard with an immediate cancellation of their work visa and being thrown in jail.[256] Since there are no unions onboard, these seafarers had little bargaining power and had little choice but to agree to the cruise lines' demands,[257] which is what happened on the Bahamas Paradise Cruise Line where workers were essentially forced to work without pay or risk being black-listed from the industry.[258] And although the class-action lawsuit has finally been resolved, Bahamas Paradise Cruise Lines' gamesmanship throughout the lawsuit, especially procedurally, underscores how cruise lines are able to take advantage of the lack of judicial processes in their flag state, leaving employees with very little legal relief.

The failure of the cruise lines and flag states to quickly repatriate all of the crew, in violation of Maritime Labour Convention Regulation 2.5,[259] has also exacerbated medical problems onboard. While passenger repatriations were relatively quick by comparison, crew repatriations were not.[260] There has arguably always been insufficient medical care onboard cruise ships to help employees,[261] but mental health concerns were exacerbated as a result of being asked to care for

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[254] *See* Jasper Jolly, *Cruise firm Carnival slashes jobs and pay in face of Covid-19 crisis*, THE GUARDIAN (May 14, 2020), https://www.theguardian.com/business/2020/may/14/cruise-firm-carnival-slashes-jobs-and-pay-in-face-of-covid-19-crisis.

[255] *See* Teo Armus, *'Held Hostage': Cruise Employees were Stuck on a Ship and Forced to Work without Pay Lawsuit Says,* WASH. POST (Aug. 6, 2020), https://www.washingtonpost.com/nation/2020/08/06/cruise-ship-workers-covid-lawsuit/.

[256] *See* Dolven, *supra* note 200.

[257] *See* Jamie Christy, *The Almost Always Forgotten, Yet Essential Part of Our World: An Examination of the Seafarer's Lack of Legal and Economic Protections on Flag of Convenience Ships*, 32 U.S.F. MAR. L.J. 49, 74 (2019).

[258] Katie Reilly, *In Lawsuit, Cruise Line Crew Members Say They're 'Effectively Held Hostage' on Stranded Ships, Working Without Pay*, TIME (Aug. 5, 2020), https://time.com/5875938/cruise-ship-worker-lawsuit-coronavirus/.

[259] MLC, *supra* note 15, at reg. 2.5.

[260] *See* Kaji, *supra* note 23.

[261] *See* Mark Matousek, *Working on a Cruise Ship Can Be Brutal — But 2 Lawyers Who Represent Cruise Workers Explain Why Even Terrible Cruise-Ship Jobs Can Be Attractive*, BUS. INSIDER (Apr. 3, 2020), https://www.businessinsider.com/why-cruise-ship-workers-take-brutal-jobs-2018-11.

sick passengers, working longer hours if others fell ill, having one's pay cut, not knowing the next time one will be able to see their family, as well as having a general concern about an extremely infectious virus circulating the globe.[262] It is no wonder, then, that mental health issues are a serious concern, with a significant number of crew members committing suicide while stuck at sea awaiting repatriation without the ability to see any doctor while onboard. [263]

Additionally, while Title 4, Regulation 4.1.3 of the Maritime Labour Convention[264] has provided the general standard that flag states must ensure that the crew is receiving comparable medical treatment to what would be provided on shore, that requirement was not met during the pandemic since crew could not leave the ship to see a doctor.[265] This was demonstrated with the fiasco surrounding the Holland America cruise ships when ships could not even dock to let off even the sickest passengers.[266] Moreover, the single ventilator that is required to be onboard a cruise ship that carries thousands of people at any given time is wholly inadequate to deal with Covid-19 outbreaks, especially when the virus attacks the respiratory system in such a harsh manner and the rate of spread is so high.[267] As a result, the plaintiff in *Nedeltcheva v. Celebrity Cruises* felt as if "'[n]obody [at Celebrity] care[d] about the little people, if they get sick, or don't get sick.'"[268] It is evident, then, that the cruise lines failed at respecting Title 4, Regulation 4.1.3 of the Maritime Labour Convention at the start of the pandemic.

Despite the problems with pay, medical care, and lack of concern for mental health, the benefit of higher pay often outweighs the burdens associated with the job.[269] And since a limited amount of cruising has restarted, employees have re-signed contracts with these

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[262] *See* Jonathan Levin & K. Oanh Ha, *What Life Is Like for More Than 90,000 Cruise Workers That Have Been Stuck at Sea for Two Months*, FORTUNE (May 12, 2020), https://fortune.com/2020/05/12/coronavirus-cruise-workers-stuck-at-sea/.

[263] *See* Jim Walker, *Crew Member Dies on the Island Princess Awaiting Repatriation*, CRUISE LAW NEWS (June 19, 2020), https://www.cruiselawnews.com/2020/06/articles/maritime-death/crew-member-dies-on-the-island-princess-awaiting-repatriation/.

[264] MLC, *supra* note 15, at tit. 4, reg. 4.1.3.

[265] *Id.*

[266] *See* Smith, *supra* note 173.

[267] *See* Pappas, *supra* note 158.

[268] *See* Frances Robles, '*Nobody Cares About the Little People': Cruise Crews File Covid-19 Suit*, N.Y. TIMES (Apr. 14, 2020), https://www.nytimes.com/2020/04/14/us/coronavirus-cruise-ship-crew-lawsuit.html.

[269] *See* Ahiza García-Hodges, *Shocked, Afraid And 'Blessed': Cruise Line Workers Remained on Board for Months to Keep Ships Operational*, NBC NEWS (Mar. 22, 2021), https://www.nbcnews.com/business/travel/shocked-afraid-blessed-cruise-line-workers-remained-board-months-keep-n1261365.

lines while finding not much has changed besides more stringent regulations on their movement and freedoms while onboard.[270]

### iii. Passengers Can Recover Little for Becoming Infected with Covid-19 Onboard Due to the Lack of Legal Remedies

Passengers are dealing with their own unique legal issues that have been exacerbated by Covid-19 and the inadequacy of the flag of convenience system. Because many of the flag states would be able to provide no legal recourse for passengers given their legal system,[271] cruise lines permit passengers to file lawsuits in the United States, which has historically been anti-passenger as a result of numerous statutes that limit the responsibility of foreign corporations.[272]

However, the outlook on many lawsuits is not positive and will largely leave passengers unsatisfied because of the lack of legal remedies available, even when a passenger has died onboard from Covid-19. For example, the court determined in *Maa v. Carnival Corp. & PLC* that the family of the decedent-plaintiff would not be able to recover monetarily, aside from pecuniary damages provided for by the Death on the High Seas Act.[273] This was because the court ruled that even if the cruise line was negligent for not doing more once there was a confirmed outbreak, recovery could not happen in the United States, aside from under the Death on the High Seas Act, because the negligence occurred on the high seas when the virus was caught.[274] This determination was reached despite the cruise executives being in Miami and declining to take further precautions. Thus, the family was only entitled to pecuniary damages, which usually includes only the amount the deceased contributed to wages or housework. [275] This ruling is significant because of the demographics on cruise ships. Because a significant percentage of people that take cruises are older and almost all of the people that died on cruise ships were retirees, the families are unlikely to recover

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[270] *See 'Happy To Have A Job' Crew Excited to Return to Cruise Ships*, CRUISE INDUS. NEWS (May 4, 2021), https://www.cruiseindustrynews.com/cruise-news/24849-happy-to-have-a-job-crew-excited-to-return-to-cruise-ships.html.

[271] Many cruise ships were still sailing under the Liberian flag even amidst the country being in a civil war. *See* Negret, *supra* note 19, at 8.

[272] *See* Ira Leesfield, *Cruise Ship Litigation*, PLAINTIFF MAG., Oct. 2009, at 1 https://www.plaintiffmagazine.com/images/issues/2009/10-october/reprints/Leesfield_Cruise_ship_litigation_Plaintiff_magazine.pdf.

[273] *See* Maa v. Carnival Corp. & PLC, No. CV 20-6341 DSF (SKx), 2020 U.S. Dist. LEXIS 172621 (C.D. Cal. Sept. 21, 2020).

[274] *Id.*

[275] *Id.*

anything greater than burial costs as a result of the application of the antiquated Death on the High Seas Act. For many, this is truly a slap in the face after the horrors that occurred not only onboard, but also afterward. This law does not contemplate the events we are seeing today mid-pandemic.

Similar to employees who have suffered mental health issues as a result of cruise lines not being able to repatriate crew quickly enough, passengers are also claiming emotional distress from either being forced to quarantine onboard or catching Covid-19 during their cruise. A US court previously ruled in *Weissberger v. Princess Cruise Lines, Ltd.,* that the Weissbergers could not recover emotional distress damages based on their fear of contracting Covid-19 nor punitive damages because they failed to explain how they were in the zone of danger.[276] However, with the information we now have about just how dangerous the virus is once airborne, a very plausible argument could have been made about the plaintiffs being in the zone of danger.

Unfortunately, the *Weissberger* decision is not unique. Dozens of emotional distress cases resulting from Covid-19 on cruise ships have been tossed as courts are weary about opening the flood gates to these sorts of suits.[277] It is now clear that it is not enough for plaintiffs to simply allege that the infliction of emotional distress resulted from proximity alone; catching the virus seems necessary for a claim.[278] Despite these bumps on the road to recovery under an emotional distress claim, plaintiffs continue to file these cases as well as other negligence claims. New data may lead to a judge ruling in a plaintiff's favor but it is unlikely based on the data currently available.

Several class actions have shown some promise. For example, a justice in Australia ruled that international plaintiffs should be allowed in the class action regarding the *Ruby Princess* outbreak so as to avoid drastically different results for essentially the same claims.[279] This case

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[276] *See* Weissberger v. Princess Cruise Lines, Ltd., No. 2:20-cv-02267-RGK-SK, 2020 U.S. Dist. LEXIS 123743 (C.D. Cal. July 14, 2020).

[277] *See* Amanda Bronstad, *'New Waters for the Law': Dismissal of Cruise Passengers' COVID-19 Lawsuits Stresses Hurdles for Proving Causation, Damages*, LAW (Sept. 8, 2020), https://www.law.com/2020/09/08/new-waters-for-the-law-dismissal-of-cruise-passengers-covid-19-lawsuits-stresses-hurdles-for-proving-causation-damages/.

[278] Tucker v. Princess Cruise Lines, C.D.Cal. No. 2:21-cv-01504-RGK-SK, 2021 U.S. Dist. LEXIS 201623 (July 30, 2021).

[279] *See* Thomas Bywater, *Ruby Princess: International Cruise Passengers Join Class Action Covid 19 Lawsuit*, NEW ZEALAND HERALD (Sept. 14, 2021), https://www.nzherald.co.nz/travel/ruby-princess-international-cruise-passengers-join-class-action-covid-19-lawsuit/T37AKMRJTNN6QY2PPXBAINPPIQ/.

will be unique because the Australian members are basing their claims off of Australian Consumer Law, though the US and UK passengers purchased their cruise with either US or UK terms and conditions that included a class action waiver.[280] Despite this fact, the Australian justice determined Australia was an appropriate forum since the cruise departed from Australia.[281] This case will certainly be impactful not only for the cruise industry but also for class action suits around the world.

Another class action lawsuit was filed against Princess Cruises and settled[282] after the class alleged the cruise line negligently allowed over sixty passengers that were exposed to the virus to remain onboard the *Grand Princess* without informing others or warning them of the risks.[283] Plaintiffs also alleged that Princess did not quarantine the passengers promptly enough after discovering there was an outbreak on board.[284] While this class action did not end up being litigated, this case is notable because Carnival Corp., the parent of Princess Cruises, initially failed to persuade the judge to throw out the case, something that most legal experts expected to happen.[285] The limited success of the class actions are at least a step in the right direction for cruise lines possibly being held accountable after largely escaping all liability in the recent past for incidents onboard, aside from environmental damage.[286]

These cases reflect the overall difficulty of recovering anything from cruise lines because the corporations have isolated themselves by registering the ships with flag of convenience states. Cruise lines have insulated themselves from litigation by incorporating in one state, having

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[280] Chua, *supra* note 212.

[281] *Id.*

[282] *See* David McAfee, *Carnival Settles Covid Lawsuit by Quarantined Cruise Passengers*, BLOOMBERG L. (July 20, 2021), https://www.bloomberglaw.com/bloomberglawnews/coronavirus/XF97FK00000000?bna_news_filter=coronavirus#jcite.

[283] *See* Christopher Kende, *Class Action Waiver In Cruise Ticket Held Enforceable In COVID-19 Lawsuit*, SEATRADE CRUISE NEWS (Oct. 23, 2020), https://www.seatrade-cruise.com/people-opinions/class-action-waiver-cruise-ticket-held-enforceable-covid-19-lawsuit.

[284] *See* Dani Alexis Ryskamp, *Cruise Lines Face Lawsuits From Passengers and Crew Over COVID-19 Outbreaks*, EXPERT INST. (June 25, 2020), https://www.expertinstitute.com/resources/insights/cruise-lines-face-lawsuits-from-passengers-and-crew-over-covid-19-outbreaks/.

[285] *See* Robert Bursion, *Carnival's Princess Cruise Lines Must Face Passengers' COVID-19 Lawsuit,* INS. J. (Nov. 24, 2020), https://www.insurancejournal.com/news/national/2020/11/24/591817.htm.

[286] *See, e.g.,* Merrit Kennedy, *Carnival Cruise Lines Hit with $20 Million Penalty for Environmental Crimes*, NPR (June 4. 2019), https://www.npr.org/2019/06/04/729622653/carnival-cruise-lines-hit-with-20-million-penalty-for-environmental-crimes.

ships registered in another obscure state with a usually weak legal system, and mandating that any litigation occurs in the Southern District of Florida, which the Supreme Court found was not fundamentally unfair in *Carnival Cruise Lines Inc. v. Shute*.[287] While it cannot be said definitively that litigation outcomes for passengers would improve if there was a different system besides the flag of convenience system, passengers would likely have more remedies available.

### *B. Proposed Solutions*

Because of Covid-19 spreading across the world in 2020, people have been enlightened about the horrors that can result from cruise lines registering their vessels to obscure states around the world while these corporations and flag states gain monetarily at the expense of port states, employees, and passengers.[288] As a result, it is clear that changes must be made to secure adequate legal relief for employees and passengers. The question remains of who or what state should step up to ensure this legal relief. Presently, flag states have been unable or unwilling to ensure that international law and treaties are being followed by cruise lines. This has even been the case for major states such as France, The Netherlands, and the United Kingdom.[289] While these states obviously are more capable of regulating these cruise lines, there is still a disconnect between where the individual ships are registered and the fact that the three largest cruise lines–Carnival, Royal Caribbean, and Norwegian Cruise Lines–are all headquartered in Miami, Florida.[290]

Despite all of this confusion, one thing is clear: there is currently not enough oversight and regulation of the cruise industry. Vessels are on registries solely for the economic benefits and the lack of regulations. The harsh realities of the system were evident as the cruise industry scrambled and struggled in the wake of Covid-19. Moreover, given that the three largest cruise lines are headquartered in the United States, and more specifically Miami, Florida, it would not be unreasonable to adjudicate many of the "internal affairs" issues that are discussed herein with US courts. This is especially true since employment contracts and passenger agreements provide that all

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[287] *See* Carnival Cruise Lines Inc. v. Shute, 499 U.S. 585, 595 (1991).

[288] *See, e.g.,* Christina BN Chin, *The Real Problem with the Cruise Industry*, WASH. POST (May 13, 2020), https://www.washingtonpost.com/opinions/2020/05/13/real-problem-with-cruise-industry/.

[289] *Cruise Ship Registry, supra* note 16.

[290] *See* Ashley Kosciolek, *Where Is My Cruise Line Based*, CRUISE CRITIC (July 7, 2021), https://www.cruisecritic.com/articles.cfm?ID=5305.

litigation must be filed with either the District Court in Miami, Los Angeles, or Seattle.[291] Additionally, laws such as the Jones Act[292] and the Death on the High Seas Act,[293] which limit recovery in the US, could not have contemplated a flag of convenience system where the flag states do not even assert their own jurisdiction. As a result, giving US courts an expanded ability to decide private maritime disputes would not be unreasonable.

Moreover, the US already asserts jurisdiction on environmental violations and also allows the FBI and Coast Guard certain investigatory and prosecutorial powers for incidents by or against US citizens and for vessels owned by Americans.[294] Remedies could easily be permitted for issues that arise out of employee and passenger concerns, especially since so many cruises sail out of the United States and such a high percentage of Americans are the ships' passengers.[295] Again, while it is unlikely the flag of convenience system will fall in a post Covid-19 society, its negative effects can certainly be mitigated by the US taking a more active role in adjudicating disputes with what are essentially US corporations. Even though cruise lines do not pay any taxes to the US,[296] we may see them begin to pay taxes if Congress enacts legislation similar to a 2017 bill that would begin to tax the cruise industry following the scrutiny now placed on the industry as a result of the pandemic.[297] Finally, because the cruise lines have selected Florida as their preferred forum, it is only right that there be actual remedies available to passengers and crew since the cruise lines are already receiving an advantage by being headquartered in Miami.[298]

In the alternative, the effects of the flag of convenience system could also be mitigated by establishing a tribunal to deal with private

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[291] *See Carnival Cruise Lines Inc*, 499 U.S. at 578-88; Damian Sullivent, *Cruise Ship Litigation in a Nutshell,* NASSER L. (Feb. 15, 2018), https://www.nesslerlaw.com/blog/cruise-ships#_ftn11=.

[292] *See* 46 U.S.C. § 50102.

[293] *See* 46 U.S.C. §30302.

[294] *See* 18 U.S.C. § 7.

[295] *See* Sarah J. Tomlinson, *Smooth Sailing - Navigating the Sea of Law Applicable to the Cruise Line Industry*, 14 JEFFREY S. MOORAD SPORTS L.J. 127, 135 (2007).

[296] *See* Jonathan Wolfe, *Cruise Lines Were Shut Out of the Stimulus. Here's Why.,* N.Y. TIMES (Apr. 4, 2020), https://www.nytimes.com/2020/04/08/travel/cruises-coronavirus-stimulus.html.

[297] *See* Tom Stieghorst, *Senate Republicans Take Aim at Cruise Tax Exemption*, TRAVEL WKLY (Nov. 20, 2017), https://www.travelweekly.com/Cruise/Senate-Republicans-take-aim-at-cruise-tax-exemption/307023.

[298] *See* Axel Gehringer, *After Carnival Cruise and Sky Reefer: An Analysis of Forum Selection Clauses in Maritime and Aviation Transactions*, 66 J. AIR L. & COM. 633, 686 (2001).

matters, especially those involving passengers and crew. While the International Court of Justice and the International Tribunal on the Law of the Sea already exist, those bodies are unusable by passengers and employees because they are reserved for state versus state disputes.[299] So, if Australia wanted to bring a claim against The Bahamas for inadequate supervision of the *Ruby Princess,* it could do so in those forums. However, since the United States is not a party to UNCLOS, it is unable to bring any claims and neither can other private actors.

The establishment of a separate tribunal would take the burden off of all states, both flag and port, and allow for individual relief. Passengers need to know that if they continue to cruise, they will have adequate modes of recourse available to them in case another unforeseeable event occurs. In fact, the viability of cruise ships has been questioned,[300] especially since they did not receive any financial assistance from the US government during the shutdown,[301] even though some of the lines did receive aid from the UK government.[302] The establishment of these tribunals could at least alleviate some of the worries of previous cruisers to entice them back into the industry as well as to help assure ensure employees who are uneasy about committing to another contract that they will not be held hostage without pay again if there is another outbreak.[303] Thus, meaningful legal recourse would be a step in the right direction to not only protect passengers and employees, but also to assist the vitality of the cruise industry.

### *C. Why The Abolishment of the Flag of Convenience System is Unlikely*

Despite all of the events that occurred with Covid-19 and cruise ships since March 2020, the abolishment of the flag of convenience system remains unlikely. As of early 2022, no cruise line has announced an effort to reflag any vessel as a result of the pandemic. This demonstrates that cruise lines are unlikely to act on their own because cruise lines would lose their almost tax-free status, would have to pay American/European wages, and their regulatory costs would also

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[299] *See* John Noyes, *The International Tribunal for the Law of the Sea*, 32 CORNELL INT'L L.J. 110, 111 (1999).

[300] *See* Rosemary McClure, *To Cruise or Not to Cruise. Loyalists Face a Dilemma,* L.A. TIMES (Sept. 10, 2020), https://www.latimes.com/travel/story/2020-09-10/will-cruise-industry-survive-coronavirus-pandemic.

[301] Wolfe, *supra* note 249.

[302] *See* Alex Dunnagan, *Cruising for a Bailout*, TAX WATCH UK (July 17, 2020), https://www.taxwatchuk.org/boe_bailout_cruise_lines/.

[303] *See* Dolven, *supra* note 199.

skyrocket, resulting in the depletion of their profits.[304] This unilateral action is especially unlikely when cruise lines are strapped for cash as the pandemic continues to spread, and they are making very little income as ships remain at sea with either limited passengers or ghost crews. The reality is that flags of convenience are a way for cruise lines to save money and to survive during these challenging times.[305]

If the United States and other powerful port states enacted legislation or signed treaties that would require vessels to register and follow the laws in the state where the parent company is headquartered, society would see the greatest amount of change. Such an occurrence would enable more suits to be brought in the United States on more sweeping matters since Carnival, Norwegian, and Royal Caribbean are all headquartered in Florida.[306] This would enable people to better utilize laws, such as the Jones Act, to hold vessels accountable for what happens onboard as well as higher medical, employment, and environmental standards to be set by those in the US. As a result, some in the maritime profession advocate for this to occur.[307]

However, action by these states is also unlikely because of the strength and influence of the CLIA. The CLIA has already donated millions of dollars to elected officials to ensure cruise lines remain largely unregulated and tax free. [308] CLIA is not afraid of spending money and gaining the allegiance of elected officials to ensure this favorable treatment continues.[309] At least in the United States, we continue to see legislation stalled that would negatively affect cruise ships' independence and tax status, in part because of the influence of the CLIA.

At the same time, flag states do not have the means to regulate these cruise lines and often do not wish to do so because these states greatly rely on the fees associated with registration. For example, Liberia made profits in excess of $20 million per year associated with its vessel registry.[310] In 2014, this amount of money made up approximately six

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[304] *See* Zachary Crockett, *The Economics of Cruise Ships*, THE HUSTLE (Mar. 15, 2020), https://thehustle.co/the-economics-of-cruise-ships/.

[305] *Id*.

[306] *See* Storey, *supra* note 143.

[307] *See, e.g.,* Kelly Sweeney, *Flags of Convenience Are a Disgrace to the Maritime Industry*, PROF'L MARINER (Nov. 30, 2015), https://www.professionalmariner.com/flags-of-convenience-are-a-disgrace-to-the-maritime-industry/.

[308] *See* Walker, *supra* note 99.

[309] *Id.*

[310] *See Why Do One in Ten Ships Fly Tiny Liberia's Flag,* THE ECONOMIST (Oct. 17, 2019), https://www.economist.com/middle-east-and-africa/2019/10/17/why-do-one-in-ten-ships-fly-tiny-liberias-flag.

percent of its national budget, an amount likely much larger today since Liberia's registry continues to grow.[311] As a result, change will likely need to come from working within the system of flags of convenience by the US expanding its jurisdiction or from the creation of a new tribunal and not from the abolishment of the system.

## IV. CONCLUSION

Cruise ships have cautiously resumed sailing in most destinations around the world,[312] albeit with continuous reports of Covid-19 cases onboard[313] as well as a few resulting deaths.[314] While some changes have been made–namely ships sailing below capacity, requiring proof of vaccination or a negative Covid test, and removing self-serve buffets–the fact that cruise ships are registered to flag of convenience states in this day and age still presents very serious problems and legal challenges that must be addressed.[315] As was proven in 2020, cruise ships are not equipped to deal with these disasters on their own. Again, what resulted was flag states passing the burdens and responsibilities of flag registry to port states, while leaving employees and passengers uniquely burdened.

The current system is unworkable for everyone except the cruise lines and the flag states. What needs to occur is the adoption of adequate modes of legal recourse for employees and for passengers so that the industry can recover and not sink, like some have predicted.[316] Given the number of US passengers on these cruises and the fact that these cruise lines are headquartered in the US, expanding the US'

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[311] *See* Simon, *supra* note 73.

[312] *See* Christina L. Wright, *Cruises Are Back: Here's What You Need to Know About Safety Before You Climb Aboard,* WALL ST. J. (Sept. 21, 2021), https://www.wsj.com/articles/cruises-are-back-heres-what-you-need-to-know-about-safety-before-you-climb-aboard-11631290608; *see also* Margherita Stancati, *Cruise Ships Cautiously Resume Sailing in Europe After Deadly Outbreaks*, WALL ST. J. (Aug. 28, 2020), https://www.wsj.com/articles/cruise-ships-cautiously-resume-sailing-in-europe-after-deadly-outbreaks-11598616000.

[313] *See* Graham Rapier, *At Least 3 Cruise Ships Are Battling Coronavirus Outbreaks As The Industry's Return Hits A Rocky Start*, BUS. INSIDER (Aug. 4, 2020), https://www.businessinsider.com/coronavirus-outbreaks-cruise-ships-bad-sign-industry-return-2020-8.

[314] *See* Rebecca Cohen & Monica Humphries, *Carnival Cruise Passenger Dies After Testing Positive for COVID-19 Onboard Ship*, BUS. INSIDER (Aug. 24, 2021), https://www.businessinsider.com/carnival-cruise-passenger-dies-after-testing-positive-for-covid-19-2021-8.

[315] *See* Stancati, *supra* note 312.

[316] *See* Hancock, *supra* note 12.

purview to adjudicate the "internal affairs" of cruise lines would create a more workable system. So would creating an international tribunal.

As the rest of the world is adapting to the "new normal" brought on by Covid-19, this is the perfect time for cruise lines, flag states, port states, as well as the international system to also adapt and create a new normal. Ideally, then, cruise ships would not be insulated from their wrongs, flag states would be held responsible, and ordinary people, the passengers and employees alike, would not be left floundering without any recourse or remedies.