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Student and Professorial Causes of Action Against Non-University Actors

Andrew R. Kloster*

* Justice Robert H. Jackson Fellow, Foundation for Individual Rights in Education. J.D., 2010, New York University School of Law.

Introduction: The Stanford Case

In February of 2011, a student at Stanford University was accused of sexual assault.[1] Following its Administrative Guide, Stanford University initiated disciplinary proceedings, seeking to determine if evidence existed to prove his guilt "beyond a reasonable doubt", a policy tracking the criminal justice system that had been in place at Stanford since 1968.[2] Midway through the case, on April 4, 2011, the Office for Civil Rights ("OCR") of the United States Department of Education ("ED") issued a "Dear Colleague Letter"[3] directed at administrators responsible for education programs and activities under the auspices of Title IX of the Education Amendments of 1972 ("Title IX").[4] This "significant guidance document" created a new mandate under Title IX that all schools receiving federal funds[5] adopt the "preponderance of the evidence" standard as their standard of proof in sexual harassment and sexual misconduct cases.[6] In response, Stanford University changed the standard of proof *in the*

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[1] To protect the privacy of this student, the author retains materials referenced on file. They are available in redacted form upon request.
[2] Kathleen O'Toole, *Faculty Senate agrees to new student disciplinary system*, STANFORD REPORT, May 7, 1997, *available at* http://news.stanford.edu/news/1997/may7/justice.html.
[3] Dept. of Ed. Office for Civil Rights, Dear Colleague Letter (Apr. 4, 2011) (uncodified), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.
[4] 20 U.S.C. §§ 1681 *et seq*.
[5] This comprises nearly every university in the nation, with a few rare exceptions, such as Hillsdale College in Michigan. In fact, Hillsdale specifically cites federal antidiscrimination policy as the reason it chooses not to receive federal funding. *See Frequently Asked Questions*, *available at* http://www.hillsdale.edu/admissions/faq/faq_list.asp?iSectionID=1&iGroupID=45&iQuestionID=108.
[6] The "hook" for this change in the rules was that a higher standard of proof creates a "hostile environment" under Title IX and renders a school non-compliant, jeopardizing their federal funds.

middle of the case.[7] When the student protested, Stanford responded by noting that the new standard of proof had been implemented as a direct result of the OCR letter, and that OCR "did not provide any mechanism by which to grandfather in already pending cases."[8] Subsequently, the student was found guilty and suspended for two years.

While there is no way to know the full, practical impact of this change in this particular instance, based on subsequent communications it is evident that at least one juror would have exonerated the student under the "beyond a reasonable doubt" standard.[9] This case raises the broad question addressed in this article: What remedies do students and professors at universities have when their contractual and due process rights are violated due to third-party action?

The April 4, 2011, Dear Colleague Letter

On February 24, 2010, the Center for Public Integrity, a non-profit organization, published an investigation of university procedures for responding to allegations of sexual assault.[10] This investigation followed an earlier study by another non-profit, which had produced the frequently cited statistic that 1 in 5

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[7] Kyle Huwa, *Sexual Assault Procedure Questioned*, THE STANFORD REVIEW, Oct. 18, 2011, *available at* http://stanfordreview.org/article/sexual-assault-procedure-questioned/. Samantha Harris, *The feds' mad assault on campus sex*, N.Y. POST, July 20, 2011, *available at* http://www.nypost.com/p/news/opinion/opedcolumnists/the_feds_mad_assault_on_campus_sex_zjUl29Y8d3NmoYOkKchblO.
[8] *See supra* note 1.
[9] *See supra* note 1.
[10] THE CENTER FOR PUBLIC INTEGRITY, SEXUAL ASSAULT ON CAMPUS (2010), *available at* http://www.publicintegrity.org/investigations/campus_assault/.

female students will be sexually assaulted during college.[11] While both documents have had their methodology criticized,[12] at the time of their publication they were highly publicized, providing the Department of Education with the impetus for strengthening the Title IX requirements of universities. When the Department of Education issued the DCL, commentators noted that the studies provided a large part of the initiative behind the agency's new mandates; indeed, the DCL itself, as well as publicity materials published by ED, cites one of the studies directly.[13]

The DCL purports to "clarify" certain obligations of universities under Title IX. In addition to other requirements, it states that "[a] school's grievance procedures must use the preponderance of the evidence standard to resolve complaints of sex discrimination."[14] Consequently, many universities, including

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[11] NAT'L INSTITUTE OF JUSTICE THE CAMPUS SEXUAL ASSAULT STUDY: FINAL REPORT (2007), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf. *See, e.g.,* Sam Dillon, *Biden to Discuss New Guidelines About Campus Sex Crimes*, N.Y. TIMES, Apr. 4, 2011, *available at* http://www.nytimes.com/2011/04/04/education/04violence.html.

[12] *See, e.g.*, Heather MacDonald, *Are One in Five College Women Sexually Assaulted?*, NAT'L REV., Apr. 5, 2011 ("The survey-taker, rather than the female respondent, decides whether the latter has been raped or not. When you ask the girls directly whether they view themselves as victims of rape, the answer overwhelmingly comes in: No."), *available at* http://www.nationalreview.com/articles/263834/are-one-five-college-women-sexually-assaulted-heather-mac-donald.

[13] Richard T. Olshak, *The OCR "Dear Colleague Letter"*, Apr. 4, 2011, *available at* http://olshak.com/2011/04/04/the-ocr-dear-colleague-letter/.http://olshak.com/2011/04/04/the-ocr-dear-colleague-letter/. *See also* DCL, *supra note* 2, at fn. 3; DEPT. OF ED. OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE BACKGROUND, SUMMARY, AND FAST FACTS (Apr. 4, 2011), *available at* http://www.whitehouse.gov/sites/default/files/fact_sheet_sexual_violence.pdf.

[14] *See* DCL, *supra note* 2.

Stanford,[15] were faced with an ultimatum: change institutional sexual assault policies, or risk losing federal funding.[16]

ED claims that this DCL does not represent a change in regulations and merely provides "guidance" for universities, assisting them in complying with the strictures of Title IX. Other commentators, however, have noted that the DCL goes beyond mere "clarification" and changes the existing rights and responsibilities of students, faculty, and university administrations.[17] Specifically, the DCL appears to overturn prior ED rules.[18] Whatever the legal status of the DCL, however, it is clear that some stakeholders, such as university

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[15] For an overview of the effect the DCL has had on universities, see FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, STANDARD OF EVIDENCE SURVEY: COLLEGES AND UNIVERSITIES RESPOND TO OCR'S NEW MANDATE (2011), *available at* http://thefire.org/article/13796.html.

[16] 20 U.S.C. § 1682 (tying compliance with § 1681 to receipt of federal funds). Indeed, as one risk management consultant put it, Title IX cases represent "the most expensive lawsuits in history" against colleges, driving "such a fear-based reaction that a lot of colleges now are expelling and suspending people they shouldn't for fear they'll get nailed on Title IX." *See* Justin Pope, *For Colleges, Rape Cases a Legal Minefield*, HUFFINGTON POST, Apr. 21, 2012, *available at* http://www.huffingtonpost.com/2012/04/23/for-colleges-rape-cases-a_n_1445271.html.

[17] *See, e.g.*, Hans Bader, *Education Department shreds presumption of innocence in April 4 letter*, WASH. EXAMINER, Apr. 8, 2011, *available at* http://www.examiner.com/scotus-in-washington-dc/education-department-shreds-presumption-of-innocence-april-4-letter; Robert Smith, *On Sexual Harassment and Title IX*, REALCLEARPOLITICS, Aug. 30, 2011, *available at* http://www.realclearpolitics.com/articles/2011/08/30/on_sexual_harassment_and_title_ix_111065.html; Ari Cohn, *Did the Office for Civil Rights April 4 'Dear Colleague Letter' Violate the Law?*, THE TORCH, Sept. 12, 2011, *available at* http://thefire.org/article/13547.html.

[18] For example, previous ED policy enshrined a standard quite similar to that announced in *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 274 629 (1999) ("so severe, persistent, and objectively offensive" that "victim-students are effectively denied equal access to an institution's resources and opportunities"), while the April 4, 2011 DCL unquestionably lowered the previous standard ("sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program."). *Compare* Dept. of Educ., Office for Civil Rights, Dear Colleague Letter (July 28, 2003) ("severe, persistent or pervasive"), *available at* http://www2.ed.gov/about/offices/list/ocr/firstamend.html, *with* DCL, *supra* note 2 at 3. *See also* Dept. of Ed. Revised Sexual Harassment Guidance (2001), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html.

administrators, students, and faculty, were not involved in the development of the DCL.

This article makes three assertions. First, while courts have increasingly looked to contract law to vindicate the rights of students against universities and colleges, traditional contract law sometimes provides inadequate protections in situations where rights are adversely affected by third-party action. Second, the rise of administrative oversight by the Department of Education and by other third-party governmental actors limits the universe of contracts that can be formed and is constantly changing the student-university relationship. This oversight is so pervasive that adverse administrative decisions of even private universities could possibly be characterized as "state action" for the purposes of a direct constitutional lawsuit.[19] Third, students, professors, and rights advocates should look to other novel remedies, particularly those available under the Administrative Procedure Act, when seeking to challenge ED and third-party rulemaking and adjudication that can fairly be considered "agency action."[20]

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[19] Under either 42 U.S.C. § 1983 or under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), discussed *infra*.
[20] 5 U.S.C. §§ 500 *et seq*.

I. Traditional Contract Law Governs the University / Student Relationship

Historical development of the university / student relationship

The general relationship between a student and his or her university can be conceptualized across the fault line of the Twenty-Sixth Amendment.[21] The national dialogue which culminated in an amendment to the United States Constitution affording those of draft age the right to vote was a watershed in American cultural consciousness. It also affected the institutional (and legal) relationship between the student and the university. Throughout most of our nation's history, the relationship between a student and his or her university involved the university acting *in loco parentis* ("in the place of a parent"), and university discipline was seen as a part of the inculcation of institutional values into the student—not as a quality-control mechanism for evaluating new entrants to the labor market, and certainly not as a crucial tool in the administration of federal laws. [22] Under such a legal regime, students in public schools had few or no cognizable due process rights, and even summary expulsion was, in most cases, unchallengeable. Even in the face of evidence to the contrary, some commentators still believe that universities have license to discipline students, even contrary to the guarantees of the universities themselves.[23]

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[21] *See* Kelly Sarabyn, *The Twenty-Sixth Amendment: Resolving the Federal Circuit Split Over College Students' First Amendment Rights*, 14 TEX. J. C.L. & C.R. 27, 50 (2008).
[22] For a concise history of the doctrine of *in loco parentis*, *see* Morse v. Frederick, 551 U.S. 393, 411–16 (2007) (Justice Thomas, concurring).
[23] *See* Wendy J. Murphy, *Using Title IX's "Prompt and Equitable" Hearing Requirements to Force Schools to Provide Fair Judicial Proceedings to Redress Sexual Assault on Campus*, 40 NEW. ENG. L. REV. 1007, 1009-10 (2006) ("The simple truth is, there is no right of redress for the accused student

By the 1980s, however, the age of eighteen had become a "bright line" of sorts, a new age of majority that permeated the cultural consciousness. For the first time, the legal relationship between a student and the university was conceived as a contractual one negotiated between equals.[24] This development in legal doctrine coincided with massive growth in the higher education sector: Between 1961 and 1991, the number of college students more than tripled, growing from 4.1 million to almost 14.2 million.[25] It seems that as colleges became managed more like businesses, courts deemed the relationship between student and university as contractual in nature.[26]

Today, most American jurisdictions find that the relationship between a student and a university or college is, in at least some sense, contractual.[27] In thirty-one states, Puerto Rico, and the District of Columbia, there is controlling legal authority supporting this paradigm.[28] In eight states, Guam, the Northern

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because schools are free to punish the student as they see fit without governmental regulations or interference."). *See also Schaer v. Brandeis University*, 735 N.E. 2d 373, 376 (Mass. 2000).

[24] Sarabyn, *supra* note 19, at 50 ("Courts saw the legal relationship between a university and its students, for the first time, as one between an adult student and an institution, governed by a contractual agreement."). *In loco parentis* is still more or less applicable in the primary school context. *See, e.g.,* Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 656 (noting that "Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children").

[25] Hazel Glenn Beh, *Student Versus University: The University's Implied Obligations of Good Faith and Fair Dealing*, 59 MD. L. REV. 183 (2000).

[26] *See generally* Kent Weeks & Rich Haglund, *Fiduciary Duties of College and University Faculty and Administrators*, 29 J.C. & U.L. 153 (2002).

[27] For the purposes of the following survey, cases from each of the fifty states, as well as Washington D.C., Puerto Rico, Guam, the Virgin Islands, and the Northern Mariana Islands, are reviewed.

[28] Thirty-one states, the District of Columbia, and Puerto Rico have established the relationship between a student and a university as predominately one of contract: Alabama (*see, e.g.,* Christensen v. S. Normal Sch., 790 So. 2d 252, 255 (Ala. 2001)); California (*see, e.g.,* Kashmiri v.

Mariana Islands, and the Virgin Islands, there is no authority on point.[29] Only nine states appear to have rejected the contract paradigm.[30] Thus, the majority of

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Regents of Univ. of Cal., 156 Cal. App. 4th 809, 823-24 (Cal. App. 1st Dist. 2007)); Colorado (*see, e.g.*, Cencor, Inc. v. Tolman, 868 P.2d 396, 398–99 (Colo. 1994)); Connecticut (*see, e.g.*, Burns v. Quinnipiac Univ., 991 A.2d 666, 673 (Conn. App. Ct. 2010)); Delaware (*see, e.g.*, Swanson v. Wesley Coll., Inc., 402 A.2d 401, 403 (Del. Super. Ct. 1979)); Washington, D.C. (*see, e.g.*, Alden v. Georgetown Univ., 734 A.2d 1103, 1112 (D.C. 1999)); Florida (*see, e.g.*, Jallali v. Nova Se. Univ., Inc., 992 So. 2d 338, 342 (Fla. Dist. Ct. App. 2008)); Georgia (*see, e.g.*, Morehouse Coll., Inc. v. McGaha, 627 S.E.2d 39, 41 (Ga. Ct. App. 2005)); Idaho (*see, e.g.*, George v. Univ. of Idaho, 822 P.2d 549, 557 (Idaho Ct. App. 1991)); Illinois (*see, e.g.*, De Marco v. Univ. of Health Scis. / Chi. Med. Sch., 352 N.E. 2d 356, 358–59 (Ill. App. Ct. 1976)); Indiana (*see, e.g.*, Gordon v. Purdue Univ., 862 N.E.2d 1244, 1251 (Ind. Ct. App. 2007)); Iowa (*see, e.g.*, Harvey v. Palmer Coll. of Chiropractic, 363 N.W. 2d 443. 445–46 (Iowa Ct. App. 1984); Kentucky (*see, e.g.*, Ctr. Coll. v. Trzop, 127 S.W.3d 562 (Ky. 2003)); Louisiana (*see, e.g.*, Babcock v. New Orleans Baptist Theological Seminary, 554 So.2d 90, 97 (La. Ct. App. 1989)); Maryland (*see, e.g.*, Onawola v. Johns Hopkins Univ., 412 F.Supp. 2d 529 (D. Md. 2006)); Mississippi (*see, e.g.*, Univ. of Miss. Med. Ctr. v. Hughes, 765 So.2d 528 (Miss. 2000)); Missouri (*see, e.g.*, Niedermeyer v. Curators of Univ. of Mo., 61 Mo. App. 654, 661–662 (Mo. App. 1895)); Montana (*see, e.g.*, Bindrim v. Univ. of Mont., 766 P.2d 861 (Mont. 1988)); Nebraska (*see, e.g.*, Doe v. Bd. of Regents of Univ. of Neb., 788 N.W.2d 264 (Neb. 2010)); New Hampshire (*see, e.g.*, Gill v. Franklin Pierce Law Ctr., 899 F. Supp. 850 (D.N.H. 1995)); New York (*see, e.g.*, Healy v. Larsson, 323 N.Y.S.2d 625, 626 (N.Y. Sup. Ct. 1971)); Ohio (*see, e.g.*, Organiscak v. Cleveland State Univ., 116 Ohio Misc.2d 14, 17 (Ohio Ct. Cl. 2001)); Oregon (*see, e.g.*, Dauven v. George Fox Univ., No. CV 09-305-PK, 2010 U.S. Dist. LEXIS 142066 (D. Or. Dec 2, 2010)); Pennsylvania (*see, e.g.*, Britt v. Chestnut Hill Coll., 632 A.2d 557, 560 (Pa. Super. 1993)); Puerto Rico (*see, e.g.*, Jorge v. Universidad Interamericana, 109 D.P.R. 505 (P.R. 1980)); Rhode Island (*see, e.g.*, Russell v. Salve Regina Coll., 938 F.2d 315, 317–18 (1st Cir. 1991) (applying Rhode Island law)); South Carolina (*see, e.g.*, Hendricks v. Clemson Univ., 578 S.E.2d 711, 716–17 (S.C. 2003)); South Dakota (*see, e.g.*, Aase v. S.D. Bd. of Regents, 400 N.W. 2d 269, 270 (S.D. 1987)); Tennessee (*see, e.g.*, Lesure v. State, No. 89-347-II, 1990 Tenn. App. LEXIS 355, 5-7 (Tenn. Ct. App. May 18, 1990)); Texas (*see, e.g.*, Alcorn v. Vaksman, 877 S.W.2d 390 (Tex. App. 1994)); Vermont (*see, e.g.*, Reynolds v. Sterling Coll., 170 Vt. 620, 621 (Vt. 2000)); Washington (*see, e.g.*, Becker v. Wash. State Univ., ---P.3d ---, 2011 WL 6358001 (Wash. Ct. App. Oct. 13, 2011)); West Virginia (*see, e.g.*, Bender v. Alderson-Broaddus Coll., 575 S.E.2d 112, 117 (W. Va. 2002)); Wisconsin (*see, e.g.*, Cosio v. Medical Coll. Of Wis., Inc., 407 N.W.2d 302, 304 (Wis. Ct. App. 1987)).

[29] The states with no caselaw directly favoring or disfavoring the contract paradigm are Arizona, Hawaii, Kansas, Nevada, North Dakota, Utah, and Wyoming.

[30] The following jurisdictions have precedent that is either unclear or disfavors the contractual relationship: Alaska (*see, e.g.*, Hermosillo v. Univ. of Alaska, Anchorage, No. S-10563, 2004 WL 362384, at *2 (Alaska Feb. 25, 2004); Maine (*see, e.g.*, Millien v. Colby Coll., 874 A.2d 397, 401–02 (Me. 2005); *but see* Gomes v. Univ. of Me. Sys., 304 F. Supp. 2d 117, 130-31 (D. Me. 2004)); Massachusetts (*see, e.g.*, Govan v. Ts. of Bos. Univ., 66 F. Supp. 2d 74, 82 (D. Mass. 1999)); Michigan (*see, e.g.*, Lee v. Univ. of Mich. – Dearborn, Docket No. 284541, 2009 WL 1362617 (Mich. Ct. App. May 12, 2009)); Minnesota (*see, e.g.*, Shuman v. Univ. of Minn. Law School, 451 N.W.2d 71 (Minn. Ct. App. 1990); *but see* Alsides v. Brron Inst., Ltd., 592 N.W.2d 468, 472 (Minn. Ct. App. 1999)); New Jersey (*see, e.g.*, Romeo v. Seton Hall Univ., 875 A.2d 1043, 1050 (N.J. Super. Ct. App. Div. 2005); *but see* Mittra v. Univ. of Med. And Dentistry of N.J., 719 A.2d 693, 694 (N.J. Super. Ct. App. Div. 1998)); New Mexico (*see, e.g.*, Ruegsegger v. Bd. of Regents of W. N.M Univ. 154 P.3d 681, 688 (N.M. Ct. App. 2006)); North Carolina (*see, e.g.*, Love v. Duke Univ., 776 F. Supp. 1070

United States jurisdictions recognize that the dominant relationship between a student and the university is a contractual one. Under this paradigm, the scope of a public school student's property right in education and the attendant process due a deprivation of those rights is generally negotiable.

To be sure, there are good reasons for believing that traditional contract law can serve to protect the rights of students and faculty.[31] In an inquiry into good faith, assessing the reasonableness of university behavior in light of sector best practices may capture those outlier cases of university misconduct that the current legal regime permits. Some have even argued that pure contract theory has normative weight in favor of philosophical liberalism, offering "the best solution [to the problem of how to adjudicate disputes between a student or professor and the university] because it can protect the liberal ideal of

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(M.D.N.C. 1991); *but see* Vurimindi v. Fuqua Sch. of Bus., 435 Fed. Appx. 129, 133 (3rd Cir. 2011)); Oklahoma (*see, e.g.*, State v. Kauble, 948 P.2d 321, 326 (Okla. Crim. App. 1997); *but see* Mason v. State ex rel. Bd. Regents, 23 P.3d 964, 970 (Okla. Civ. App. 2000)); and Virginia (*see, e.g.*, Davis v. George Mason Univ., 395 F.Supp. 2d 331, 337 (E.D. Va. 2005)). In addition, courts in Texas have disfavored the contractual relationship between a student and a public university, even while upholding a contractual relationship in the context of private universities. *See* Eiland v. Wolf, 764 S.W. 2d 827, 837–38 (Tex. App. 1989).

[31] *See, e.g.* Kelly Sarabyn, *Free Speech at Private Universities*, 39 J.L. & EDUC. 145, 158 (2010) ("the best framework for the various interests at stake in a dispute is to view [the relationship between a student and a university] as a contractual relationship, with the schools' written policies and codes forming the main part of that contract"); *see also* Hazel Glenn Beh, *Student Versus University: The University's Implied Obligations of Good Faith and Fair Dealing*, 59 MD. L. REV. 183 (2000) ("the work horses of contract law, the implied obligations of good faith and fair dealing, hold the potential to define and to police the student-university relationship while avoiding the pitfalls of judicially second-guessing and intruding into the management of the institution or into its academic freedoms"). One problem with inquiries into best practices is that following standard protocol serves as a "safe harbor" for universities that are risk-averse, allowing universities to behave poorly, so long as everyone else does too. *Id* at 219. Exaggerating risks or benefits should not allow "best practices" to degenerate into a rights-violative bandwagon effect.

universities as free speech institutions without sacrificing the right of private association."[32]

It is easy to see how the student at Stanford University might have a *prima facie* contract claim. Specific representations, contained within the Stanford Administrative Guide Policy, guaranteed specific procedures to students accused of sexual assault. California state law establishes that these representations constitute part of the contractual relationship between a student and university.[33] These procedures were not followed when jurors in the university proceeding were instructed to convict on a lower standard of proof than was guaranteed. This could lead to monetary damages, but in theory could even lead to specific performance, so there is no reason that the contract remedy in theory be inadequate.[34] In practice, however, while contract law can often be adequate to vindicate individual rights against universities reneging on their promises, there are a number of reasons why it cannot vindicate the rights of most individuals in positions similar to the student at Stanford.

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[32] Sarabyn at 146.

[33] *See* Zumbrun v. Univ. of S. Cal., 25 Cal. App. 3d 1, 10 (Cal. App. 2.d Dist. 1972) ("The catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant become a part of the contract [between a student and university]"). *See also* Kashmiri v. Regents of Univ. of Cal., 156 Cal. App. 4th 809, 823–24 (Cal. App. 1st Dist. 2007). *Kashmiri* illustrates the schizophrenic nature of judicial application of contract law to the student-university relationship, noting on the one hand that "there seems to be almost no dissent from the proposition that the relationship between a public post-secondary educational institution and a student is contractual in nature," but also noting that "'[u]niversities frequently publish numerous catalogues and bulletins, but not all statements in these publications amount to contractual obligations." *Id.* at 829.

[34] *See* Kwiatkowski v. Ithaca College, 363 N.Y.S.2d 973 (N.Y. Sup. Ct. 1975) (requiring a rehearing for a student guaranteed the same rights on appeal at as the initial disciplinary hearing, where the college denied the student the right to attend the appeal hearing).

First, as noted above, there are nine jurisdictions that appear to disfavor the contract remedy.[35] As a result, when a university makes specific representations about academic or disciplinary matters, these cannot always be relied upon by students and faculty. This does not doom contract theory, but merely points out that it is not universally accepted. Plaintiffs in these jurisdictions need to find a different cause of action. Second, universities themselves are the authors of the policies that might be considered contracts. Again, this does not indict contract theory, but demonstrates that a quasi-contract thumb needs to be placed on the scale to remedy the unequal bargaining power: in fact, some jurisdictions do construe contracts against universities.[36] Third, and more importantly, some courts have upheld reservations clauses, even where courts have generally recognized a contractual relationship between student and university, effectively upholding the right of universities to say "this contract is not a contract."[37] Nine states have explicitly upheld these types of clauses.[38] Similar clauses that have been upheld include clauses to the effect that "all provisions in this publication are subject to change without notice."[39] Perhaps the most significant quasi-contractual move a court can make to remedy this inadequacy is to refuse to uphold these boilerplate disclaimers.

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[35] *See supra* note 30.
[36] *See, e.g.*, Corso v. Creighton Univ., 731 F.2d 529, 533 (8th Cir. 1984).
[37] *See* Manning v. Temple Univ., CIVIL ACTION NO. 03-4012, 2004 U.S. Dist. LEXIS 26129 (E.D. Pa. Dec. 30, 2004). Similar cases can be found in Arizona, Maine, Montana, New Mexico, Tennessee, and Virginia.
[38] Arizona, Maine, Montana, New Mexico, Pennsylvania, Tennessee, and Virginia.
[39] Abbariao v. Hamline Univ. Sch. of Law, 258 N.W.2d 108 (Minn. 1977).

Fourth, the full contractual terms of the student-university relationship are not reduced to writing, because the student-university relationship is incredibly complex and contractual materials often speak with broad strokes; consequently, the "reasonable expectations" of the parties come into play quite often.[40] These reasonable expectations could arguably anticipate interference from regulatory bodies, and, in the Stanford case, Stanford could argue that any incoming student would reasonably expect that his or her rights be subject to federal law, even where non-compliance with federal law would not be criminal. That is: the federal regulatory scheme can be viewed as a part of the contract between students and universities. On a related note, federal regulation might affect the contractual relationship by providing universities with an added *defense* to a contract suit: impossibility, specifically supervening illegality. In contract law, where a change in circumstances renders performance on a contract literally impossible, a party may default without liability for expectation damages.[41] If performance of a contract is legal when the contract is formed but illegal at the time of performance, courts treat performance as impossible.[42] If the university makes representations to provide certain disciplinary procedures, and

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[40] *See, e.g.*, Mangla v. Brown Univ., 135 F.3d 80 (1st Cir. 1998).
[41] *See, e.g.*, Gerhard Wagner, *In Defense of the Impossibility Defense*, 27 LOY. CHI. L.J. 55.
[42] Courts treat supervening illegality as a form of impossibility. *See, e.g.*, Vimar Seguros Y. Reaseguros v. M/V Sky Reefer, 115 S. Ct. 2322, 2337 (1995). This does not address the plausible claim that non-compliance with some statutes, such as Title IX, is not "illegal" per se, but simply undesirable since non-compliance renders an institution ineligible for federal funding. Compliance is not *mandatory*, but a condition on federal grants.

such procedures are later rendered illegal,[43] a university might have a prima facie defense that non-performance should be excused as impossible.[44]

Even where contract law is found applicable, plaintiffs have difficulty as courts generally set the bar very low for performance, making it very difficult for students or professors seeking to enforce the obligations of universities. Rarely do courts review decisions of a university where such decisions are determined to be "academic" in nature, for reasons of judicial economy, competence, and deference to tradition.[45] In the very rare case where a court reviews an academic decision and finds the presence of a contractual "right," the correlative obligation is often easily discharged by the university.[46] In the non-academic disciplinary context, courts have construed even explicit contractual representations to due process loosely.[47] The few cases where a court has found in favor of a student plaintiff on academic and contractual grounds are limited to instances in which the university simply shut down a degree program midstream. (Apparently,

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[43] Again, it is an open question whether changing conditions on receipt of optional federal grant money—as in, for example, Title IX and Family Education Rights and Privacy Act of 1974 (FERPA)—could be considered "supervening illegality." *See, cf.*, Chi. Tribune Co. v. Univ. of Ill. Bd. Of Trs., 781 F. Supp. 2d 672 (N.D. IL. 2011) ("[The University of] Illinois could choose to reject federal education money, and the conditions of FERPA along with it, so it cannot be said that FERPA prevents Illinois from doing anything.")

[44] The student or professorial claimant in such a situation might be able to obtain some restitution from the university, but this would probably be a small portion of his or her actual damages.

[45] See, e.g., Board of Curators of the Univ. of Missouri v. Horowitz, 435 U.S. 78, 90 (1978) ("The determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.").

[46] *See generally*, Eileen K. Jennings, *Breach of Contract Suits by Students Against Postsecondary Education Institutions: Can They Succeed?*, 7 J.C. & U.L.. 191 (1981).

[47] *See, e.g.,* Jansen v. Emory Univ., 440 F. Supp. 1060 (N.D. Ga. 1977) (noting that guarantees to "due process" in the student handbook did not incorporate the legal definition, but merely "fair and reasonable" procedures in the circumstances). *See also* Schaer v. Brandeis Univ., 735 N.E. 2d 373 (Mass. 2000).

courts find it difficult to conceive of a situation in which the failure to receive a degree from a bankrupt program was a student's fault.)

A final problem with the contractual cause of action is the inadequacy of relief where money damages are the only relief available. While, as noted above, some jurisdictions provide specific performance and other injunctive relief, the favored remedy in contract is money damages.[48] Where a student is wrongly expelled and specific performance is not requested, the cost to make the plaintiff whole is expectation damages, which may include tuition and lost wages.[49] When a student fails to obtain post-graduation employment or is underemployed, or a student isn't given promised research opportunities while at school, in theory courts could quantify this relief in the same way. However, most schools do not explicitly promise employment, only assistance with obtaining employment. [50]

Most importantly, however, there are numerous other statutory complications with available contract remedies that often render contract theory inadequate for protecting the student interests at stake in cases like that of the

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[48] *See, e.g.*, Am. Computer Inst. V. State, 995 P.2d 647 (Alaska 2000).

[49] *See, e.g., Russell v. Salve Regina College,* 890 F.2d 484 (1st Cir. 1989) (upholding $25,000 damage award to expelled nursing student equivalent to lost salary for the year her education was delayed). *See also Fussell v. Louisiana Business College of Monroe,* 519 So. 2d 384 (La. Ct. App. 1988) (dismissed student's lost wages attributable to the delay in degree award, as well as tuition paid to previous school recoverable).

[50] While there has been recent publicity surrounding the class-action suits against law schools regarding unemployment among recent graduates, these suits are premised on allegations of fraud. *See* Stacy Zaretsky, *Twelve More Law Schools Slapped with Class Action Lawsuits over Employment Data*, ABOVETHELAW.COM, Feb. 1, 2012, *available at* http://abovethelaw.com/2012/02/twelve-more-law-schools-slapped-with-class-action-lawsuits-over-employment-data/.

Stanford student found guilty of sexual assault. For example, state legislatures themselves determine their litigation exposure under § 1983 due to the Eleventh Amendment.[51] While this generally does not affect personal liability under § 1983[52], states have wide latitude under sovereign immunity to preclude or limit monetary relief in these cases.[53] In general, then, even if students and professors were able to freely contract for what procedures would to be applied to them in a disciplinary context, the contract remedy itself would be of limited utility.

For all these reasons, protecting student rights from third-party interference solely by means of state law contract remedies is not a perfect solution. Advocates of the contract approach have noted that the theory's holes must be filled by quasi-contract or tort law.[54] In this vein, some state courts have noted that contracts should be read against their drafter, a principle that would likely be applied to the contract between a student and a university.[55] As noted above, perhaps the most significant quasi-contractual maneuver of courts in this area has been to refuse to apply the disclaimers discussed above. Cognizant that students cannot negotiate away such boilerplate (which might be upheld in

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[51] U.S. CONST. amend. XI. *See also* Quern v. Jordan, 440 U.S. 332 (1979); Edelman v. Jordan, 415 U.S. 651 (1974).

[52] *See, e.g.,* Hafer v. Melo, 502 U.S. 21 (1991).

[53] *See generally* William E. Thro, *The Education Lawyer's Guide to the Sovereign Immunity Revolution*, 146 EDUC. L. REP. 951 (2000).

[54] *See* Sarabyn, *supra* note 30 at 164–66 (citing *Atria v. Vanderbilt Univ.*, 142 F. App'x 246, 255 (6th Cir. 2005), and noting that in situations where courts uphold provisions in traditionally "contractual" materials, such as student manuals, that disclaim contractual status, it might be that equity demands colleges be estopped where they "should reasonably have expected [that their promises would] induce the action or forbearance" of students).

[55] *See* Sarabyn, *supra note* 30, at 159 (citing Thornton v. Harvard Univ., 2 F. Supp. 2d 89 (D.Mass. 1998)).

disputes between parties in an equal bargaining position), only seven states have upheld such disclaimers.[56]

Other quasi-contractual remedies include inquiring into "reasonableness," "good faith," or "fair dealing." By doing this, however, one has exited "pure" contract theory and the realm of law, and entered the realm of equity. In the tutor-pupil relationship, this is perhaps natural: quasi-contract, as first developed in the Roman Code, was applied in precisely this context.[57] Nevertheless, some courts have found equitable devices inconsistent with the contractual relationship between a college and a student.[58]

A final quasi-contractual option for students and professors might be suits in tort against third parties for tortious interference in their contractual relationship. Such an action would not lay against the university, but against third parties, where "(1) …a valid contract exist[ed]; (2) …a third party had knowledge of the contract; (3)… the third party intentionally and improperly procured the breach of the contract; and (4)… the breach resulted in damage to the plaintiff."[59] Some possible scenarios are outlined *infra*, but possibly defendants could not include the federal government, and likely could not include any state government.[60] Rather, such a situation might involve an

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[56] Arizona, Maine, Montana, New Mexico, Pennsylvania, Tennessee, and Virginia.
[57] Radin, *The Roman Law of Quasi-Contract*, 23 VA. L. REV. 249 (1937).
[58] *See, e.g., Cornett v. Miami Univ.,* 728 N.E.2d 471, (Ohio Ct. Cl. 2000) (estoppel is not applied due to the contractual nature of the relationship between a university and student).
[59] Cohen v. Davis, 926 F. Supp. 399, 402 (S.D.N.Y. 1996).
[60] The statute defining the scope of federal consent to tort liability is the Federal Tort Claims Act, 28 U.S.C. § 1346(b). This limited waiver of sovereign immunity does not apply to interference in

accreditation agency imposing additional degree requirements on students. Given the disfavored status of the action generally, it has not been raised in this context.[61]

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contract rights. 28 U.S.C. § 2680(h). State tort claims acts generally contain such provisions as well.

[61] *But see* Adelman-Reyes v. St. Xavier Univ., 500 F.3d 662 (7th Cir. 2007) (upholding a summary judgment in a tortuous interference claim by a professor for a negative tenure recommendation due to lack of causation). In such a case, the immense difficulty of showing causation serves to render tenure decisions *de facto* unreviewable.

II. Available Direct Constitutional Remedies Against Universities and Third Parties

Recognizing the possible problems with suits in contract, the student adversely affected by Stanford's change of disciplinary procedures would have to look elsewhere to vindicate his or her rights. And indeed, courts have held that students have a settled core of due process rights that cannot be negotiated away, because the Constitution directly provides a number of rights not provided by statute. In the context of the relationship between a student and a state university, one of the most important bundles of rights is the procedural due process provided by the Fifth and Fourteenth Amendments.[62] Due process "imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment."[63] The landmark 1975 Supreme Court decision *Goss v. Lopez*[64] struck down an Ohio statute allowing for summary expulsion on the grounds that a previous Ohio statute guaranteeing a public education had created a cognizable property interest that could not be withdrawn in the absence of "fundamentally fair procedures."[65] Subsequently, *Goss* has come to stand for the proposition that "[f]or students facing discipline at

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[62] U.S. CONST. amend. V; U.S. CONST. amend. XIV.
[63] Mathews v. Elridge, 424 U.S. 319, 332 (1976). The three-part test in *Mathews* has been particularly influential in due process jurisprudence, holding that to determine the process due when a liberty or property interest is at issue, a court must weigh the interest in the property owner, value of additional procedure in mitigating administrative error, and the cost of the additional procedures. *Id.* at 334–35.
[64] 419 U.S. 565 (1975).
[65] *Id.* at 574.

public colleges and universities, the Constitution shapes the proceedings: Federal courts view the student's continued enrollment as a protected property interest, immune from arbitrary state action."[66] In the abstract, where students have some property right in education, government must afford some sort of process before that right can be limited or taken away.[67] What precisely that process entails has been the subject of some debate,[68] however, but the scope of both the property interest in education and attendant procedural due process rights in a disciplinary proceeding have come to be defined, at least partly, by the free contracting between the student or professor and the university.[69]

Unlike suits in contract, which would likely be settled in state court, the vehicle for due process lawsuits has been a direct constitutional claim in federal district court. The private right of action is provided by either 42 U.S.C. § 1983 (against state governments) or else the analogous private right of action announced by the Supreme Court in *Bivens v. Six Unknown Named Agents* (against

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[66] Curtis Berger and Vivian Berger, Academic Discipline: A Guide to Fair Process for the University Student, 99 COLUM. L. REV. 289 (1999).

[67] *See, e.g.* Leonard Krenin, *Breach of Contract as a Due Process Violation: Can the Constitution be a Font of Contract Law?*, 90 COLUM. L. REV. 1098 (1990) (noting that *Goss* is a paradigmatic expression of difficulty of limiting "property" under the Due Process Clause to non-contractual property). *See also* Barnes v. Zaccari, 669 F.3d 1295, 1305 (11th Cir. 2012) ("[N]o tenet of constitutional law is more clearly established than the rule that a property interest in continued enrollment in a state school is an important entitlement protected by the Due Process Clause of the Fourteenth Amendment.")

[68] *See, e.g.,* Dixon v. Alabama State Board of Education, 294 F. 2d 150 (5th Cir. 1961). The watershed case of *Dixon* held that "due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct." *Id.* at 158. In determining what process is due to students, courts have generally applied the test laid out in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See* Flaim v. Medical College of Ohio, 418 F.3d 629 (6th Cir. 2005).

[69] *See, e.g.* Golden, *College Student Dismissals and the Eldridge Factors: What Process is Due?*, 8 J. COLL. & U.L 495, 498 (1981) (noting an additional reason why the relevant due process property interest to college students is grounded in contract: most states do not provide a statutory right to a postsecondary education).

the federal government).[70] These causes of action can secure constitutional rights and other legal rights.[71] Many entities have been found subject to § 1983 liability in the university context: boards of regents; universities and their employees; federal, state, and local governments and agencies; and private third-parties engaged in state action. Officials of any of these subjects may be sued in their individual capacities as well, putting their personal property on the line.

As noted above, procedural due process rights apply only against "state action." But even private action becomes subject to statutory civil rights guarantees and the Bill of Rights if it is found to be state action.[72] What precisely constitutes "state action" is the subject of a library's worth of legal scholarship: no single test has been elaborated by the Supreme Court.[73] The determination of where "state action" exists is, at best, a fact-intensive inquiry assessed on a rather *ad hoc* basis.[74] What is clear, however, is that governmental actors (such as public universities) are state actors, as are formally private actors "so entwined with governmental policies or so impregnated with a governmental character as to

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[70] 403 U.S. 388 (1971).
[71] These can be used, for example, to vindicate civil rights where no private right may explicitly exist in the statute.
[72] *See, e.g.,* United States v. Price, 383 U.S. 787 (1966) (42 U.S.C. § 1983); Braden v. University of Pittsburgh, 552 F.2d 948 (3d Cir. 1977) (Bill of Rights); Corporation of Haverford College v. Reeher, 329 F. Supp. 1196 (E.D. Pa. 1971) (First Amendment); American Future Systems, Inc. v. Pennsylvania State Univ., 464 F. Supp. 1252 (M.D. Pa. 1979) (Fifth Amendment).
[73] Formulating such a test has been deemed an "impossible task." Reitman v. Mulkey, 387 U.S. 369, 378 (1966).
[74] *See* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U.L. REV. 503, 548 (1985). *See also* Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961) ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance").

become subject to the constitutional limitations placed upon state action."[75] When an otherwise private institution has a number of contacts with government such that its obligations and responsibilities indicate state participation in the operation of the institution, that institution is a state actor.[76] Or, when there is "mutuality of benefit" or a "symbiotic relationship" between the state and otherwise private entity, that entity might be determined to be a state actor.[77] To assess either of these possibilities, a court will often look to the financial or regulatory relationship between the state and the private entity.[78] In the context of universities, with each regulation passed, with each grant awarded, with each student receiving financial aid, and with each administrator or lobbyist hired, the contacts and symbiotic relationship between a university and the federal government grows. Importantly, courts have noted that "[f]inancial dependence may be demonstrated by evidence other than budget figures... [as when] administrators were so conscious of the need for currying favor with those who exercised the power over the state's purse that they actually made decisions contrary to what they believed was sound academic policy."[79] Consequently, the assessment of whether a university is a state actor for constitutional lawsuit purposes is truly a fact-intensive, historical inquiry that can and should be

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[75] Evans v. Newton, 382 U.S. 296, 299 (1966).
[76] *See* Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).
[77] *Id.*
[78] *See* Benner v. Oswald, 592 F.2d 174 (3rd Cir. 1979).
[79] Weise v. Syracuse Univ., 522 F.2d 397, 408 fn. 11 (2nd Cir. 1975) (citing *Rackin v. Univ. of Penn.*, 386 F.Supp. 992, 1005 (E.D. Pa. 1974)). This broad point applies not only to private universities seeking favorable treatment by a state legislature, but also universities making decisions hoping to receive National Science Foundation grants, or worrying that they might lose federal funding under Title IX or FERPA.

revisited as facts change. Currently, for example, when a private university disciplines a student, that discipline has been deemed non-state action.[80] Consequently, a requirement for procedural due process (not to mention substantive due process) has not been found. However, private colleges are often contractually bound to follow their disciplinary procedures, and deviations by a private university from its established rules, even when not sounding in contract, might be reviewable in court as arbitrary or capricious.[81]

But while universities themselves sometimes violate the procedural due process rights of students and faculty, and while universities receive what is, perhaps, undue deference by courts in their decision-making,[82] the universities themselves often find their hands tied by public and quasi-public actors. In student disciplinary matters, universities are often legally obligated to carefully orchestrate the proceedings from start to finish in a prepackaged, formulaic

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[80] *See* Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (declining to find state action in a § 1983 action even where a private school was almost completely supported by public funds); *but see* King v. Conservatorio de Musica de Puerto Rico, 378 F Supp. 746 (D.P.R. 1974) (holding that public funding alone was sufficient to find state action); *see also* Guillory v. Administrators of Tulane Ed. Fund, 306 F.2d 489 (5th Cir. 1962) (affirming judgment below that "substantial state control" rendered Tulane University's policy of segregation "state action" for Fourteenth Amendment purposes).

[81] *See, e.g.*, Harris v. Trs. Of Columbia Univ., 468 N.E. 2d 54 (N.Y. 1984). *But see* Gorman v. St. Raphael Academy, 853 A.2d 28 (R.I. 2004).

[82] Some commentators note that while judges may not be educators, they can certainly adjudicate civil rights disputes. *See, e.g.*, Adam Goldstein, *Judges Should Stop Giving Deference to School* Officials, HUFFINGTON POST, Dec. 12, 2012, *available at* http://www.huffingtonpost.com/adam-goldstein/judges-should-stop-giving_b_1139824.html. In fact, it may be that courts protest too much in defending the "unique" and unreviewable role of academic institutions, especially since a similar argument, and similar challenges, confront the concept of judicial review. *See, e.g.*, Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006).

way.[83] In the Stanford case, it is clear that the adverse decision was caused by governmental policies that overturned longstanding Stanford policies.[84] It is hard to argue that this is not a core case of Stanford University acting on behalf of the federal government, thus becoming a classic example of a "state actor" during its disciplinary proceedings.

Even though they are housed at an ostensibly private institution, certain Stanford employees, such as the Title IX administrator, have an overriding concern with implementing governmental policy that ties them to the Bill of Rights and opens them up to direct constitutional suit. Their day-to-day activities involve implementing federal regulations, and sometimes the existence of their very occupation is mandated by federal regulation.[85] Ostensibly, federal regulation need not contravene the academic mission of a university, such concern certainly suggests state action.[86] There is classic "entanglement" when the institution received funding and good press, and the administrator receives a

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[83] Often, university counsel relies upon the representations of interested third parties as to the contours of the law as well. Higher education risk management consultants perhaps have little incentive to highlight the fact that new regulations are on shaky legal footing, as fees may be higher for the work of bringing a university into compliance with new regulations, regardless of their legality.

[84] Marianne LeVine, *Assault policy under review*, THE STANFORD DAILY, Oct. 6, 2011, *available at* http://www.stanforddaily.com/2011/10/06/university-analyzes-sex-assault-review-process/ ("The University recently lowered its standard of proof and granted sexual assault victims the right to appeal final decisions during University judicial proceedings. These changes are in response to a new set of guidelines issued by the Obama Administration in early April 2011 through the Department of Education's Office of Civil Rights.").

[85] *See, e.g.*, Dept. of Ed. Office for Civil Rights, Dear Colleague Letter (Aug. 4, 2004) (uncodified) ("Specifically, this letter is to remind postsecondary institutions that the Title IX regulations require recipients to designate a Title IX coordinator…"), *available at* http://www2.ed.gov/about/offices/list/ocr/responsibilities_ix_ps.html.

[86] *See Weise*, 522 F.2d at fn 11. Where there is evidence that the risk of the loss of federal educational funding influences led to a decision (rather than "sound academic policy"), there is a prima facie case of financial entanglement indicating state action for section 1983 purposes.

job on the one hand, and executive and legislative policies are discharged on the other hand. University counsels should be on notice that "rubber stamping" the recommendations of a Title IX administrator may open the door to his or her own personal liability as well.[87]

With almost no risk, Stanford could have "grandfathered" the student into the previous "beyond a reasonable doubt" standard. By failing to do so, Stanford evinced either an overriding concern with federal policy rather than its institutional rules and outstanding contracts, or a negligent policy towards the campus disciplinary process. In either case, it is clear that Stanford's obligation to its students was, in practice, secondary to its relationship with the federal government.

Furthermore, while the paradigmatic case of state action is one in which a government employee directly acts, third parties, and even private third parties, can be found to have engaged in state action for the purposes of a direct constitutional lawsuit. Following the Supreme Court's decision in *Brentwood Academy v. Tennessee Secondary School Athletic Association*,[88] in which a Tennessee non-profit organization which governed public and private high school athletics was held to be a state actor having "pervasive entwinement to the point of largely overlapping identity," a rash of commentators noted that this might

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[87] *See* Monell v. City of New York Dept. of Social Services, 436 U.S. 658 (1978).
[88] 531 U.S. 288.

herald a new avenue for vindication of students' rights against third parties.[89] Indeed, third-party accreditation agencies function in a manner similar to ED: just as ED conditions receipt of federal funds on ever-expanding procedural requirements for preventing and punishing discrimination under federal statutes, third-party accreditation agencies condition accreditation on university compliance with these standards. [90] Loss of accreditation is a serious matter, which does more than simple reputational damage.[91] To sit for the bar examination in most states,[92] for example, one must generally have graduated from a law school accredited by the American Bar Association. Furthermore, many states require membership in an "integrated" state bar association,[93] often

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[89] *See, e.g.*, Michael W. Prairie & Lori A. Chamberlain, *Due Process in the Accreditation Context*, 21 J.C. & U.L. 61 (1994); *see also* Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003).

[90] The American Bar Association, for example, notes that "[a] law school approved by the Association or seeking approval by the Association shall demonstrate that its program is consistent with sound legal education principles. It does so by establishing that it is being operated in compliance with the Standards." AM. BAR ASS'N, GENERAL PURPOSES AND PRACTICES; DEFINITIONS, *Standard 101. Basic Requirements for Approval* (2011), *available* http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2011_2012_aba_standards_chapter1.authcheckdam.pdf.

[91] *See, e.g.*, Andy Portinga, Note: ABA Accreditation of Law Schools: An Antitrust Analysis, 29 U. MICH. J.L. REFORM 636 (1995) (noting for example that the vast majority of states require a bar applicant to graduate from an ABA-accredited law school, and that academic credits do not transfer between accredited and unaccredited schools). *See also* Lincoln Memorial Univ. Duncan School of Law v. American Bar Ass'n, 2012 U.S. Dist. LEXIS 5546 (E.D. Tenn. 2012) (highlighting many of the injuries causes by non-accreditation).

[92] *See* NAT'L CONFERENCE OF BAR EXAMINERS & AM. BAR ASS'N, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 8-9 (2012), *available at* http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf. Alabama, California, Connecticut, Massachusetts, Tennessee, and West Virginia all allow individuals to pass their first bar examination in the state graduating from law schools unaccredited by the ABA but otherwise approved by state accreditation entities.

[93] *See* AM. BAR ASS'N, STATE AND LOCAL BAR ASSOCIATIONS (2012), *available at* http://www.americanbar.org/groups/bar_services/resources/state_local_bar_associations.html.

established by statute, which itself may incorporate ABA rules in some fashion.[94] Thus, if a law school loses or is denied ABA accreditation, that law school loses most, if not all, ability to attract students. Other professions have similar accreditation schemes.[95] While these agencies are often publicly-delegated and publicly-funded[96], the mere promulgation of professional standards used by private schools to justify academic dismissal does not in itself lead courts to a finding of state action for § 1983 purposes.[97] Being a government contractor does not lead inexorably to one's identification as a state actor. Additional showing of financial or other entanglement is required, but there is no reason, in principle, that a private university should not be found a state actor for the purposes of a § 1983 suit where the underlying conduct giving rise to the claim *is* governmental in nature.

Direct constitutional suits have limitations, however. First, procedural due process rights are limited, especially in the private context, as noted above.

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[94] *See* THE FLA. BAR, RULES REGULATING THE FLA. BAR, CHAPTER 20. FLA. REGISTERED PARALEGAL PROGRAM, *available at* http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/43709F4CEB5E4B9E85257155005CEBE1/$FILE/Ch%2020%20Paralegal%20Rule.pdf.

[95] The medical profession, for example, is regulated by a number of accreditation agencies, most notably the Liason Committee on Medical Education, sponsored by the American Medical Association and the Association of American Medical Colleges. This organization's standards explicitly impose a vague code of conduct on students that might otherwise violate the First Amendment. *See* LIASON COMMITTEE ON MEDICAL EDUC., STANDARDS FOR ACCREDITATION OF MEDICAL EDUC. PROGRAMS LEADING TO THE M.D. DEGREE: FUNCTIONS AND STRUCTURE OF A MEDICAL SCHOOL, MS-31-A (May 2011), *available at* http://www.lcme.org/functions.pdf.

[96] "Public institutions often provide the majority of the funding for the accrediting agencies." Michael W. Prairie & Lori A. Chamberlain, *Due Process in the Accreditation Context*, 21 J.C. & U.L. 61, 68 (1994).

[97] *See, e.g.*, Krohn v. Harvard Law Sch., 552 F.2d 21 (1st Cir. 1977). *See also* Francis v. LeHigh Univ., 2011 U.S. Dist. LEXIS 6406 (E.D. Pa. 2011) ("[c]ourts have… widely rejected suggestions… that a private university imbues itself with the color of state authority *merely* by providing higher education) (emphasis added).

Second, there are strong defenses to personal liability under both section 1983 and *Bivens*. Chief among them is the defense of "qualified immunity," which provides officials with a "good faith" immunity from personal liability when actions otherwise depriving plaintiffs of civil rights were undertaken in good faith.[98] While such a defense will shield an individual from liability, however, it will not defend against the underlying claim against the government. Third, since the property interests protected by procedural due process in these contexts are granted by the government in the first place, state legislatures have wide latitude to limit recovery. This is sovereign immunity governed by the Eleventh Amendment to the Constitution. This only applies to suits against state entities and officials where the suits seek to obtain monetary relief "paid from public funds in the state treasury."[99] Consequently, states have latitude to preclude monetary relief, in the form of precluding monetary judgment entirely, limiting damage awards, or adding other hurdles. However, this would not affect equitable judgment: for example, injunctions or declaratory judgments.

Direct constitutional suits have been widely employed in the education context.[100] What has been limited, however, is the aggressiveness of their use against third-parties, partly because of litigation strategy. Where third parties

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[98] "Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[99] Quern v. Jordan, 440 U.S. 332, 337, 99 S. Ct. 1139, 59 L. Ed. 2d 358 (1979).

[100] Section 1983 claims have been attempted in a wide variety of statutory and constitutional contexts, and have been successful in some landmark cases. *See, e.g.*, Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) (in the First Amendment context). *See also* Goss v. Lopez, 419 U.S. 565 (1975); Brown v. Board of Educ., 347 U.S. 483 (1954).

have liability, universities often do as well, and have deeper pockets, besides. Failure to sue ED or professional school accreditation agencies might be partly explained by this. This practice should be revisited.

III. Available Administrative Procedure Act Remedy

The Administrative Procedure Act (APA) circumscribes the legal authority of federal agencies, and provides a private remedy.[101] Thus, where students or professors are adversely affected by decisions of ED, they might have direct recourse to federal court. In the Stanford case, the student had an injury directly attributable to ED.[102] Consequently, at several stages in the disciplinary process, he could have challenged agency action directly in federal court, under the APA. The specific causes of action, discussed below, are 5 U.S.C. § 706(E) ("substantial evidence" review) and 5 U.S.C. § 706(2)(A) (the catch-all provisions, including "arbitrary and capricious" review).

In discharging its mission, ED has all the authority of a cabinet-level, executive branch agency, which falls broadly into two categories: rulemaking and adjudication.[103] Formally, the ED is involved in adjudication in three broad contexts: hearing appeals by grantees,[104] hearings related to the administration of student loan providers,[105] and hearings related to civil rights statutes.[106] These

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[101] 5 U.S.C. §§ 500 *et seq*.
[102] *See* discussion of the Stanford case in the introduction.
[103] This broad distinction is supported in caselaw and in the APA itself. *Compare, e.g.,* 5 U.S.C. § 553 *with* 5 U.S.C. §§ 554.
[104] For example, recipients of federal student loan monies and other educational grants.
[105] The Office of Higher Education Appeals (OHEA) hears these actions. *See, e.g.* 20 U.S.C. § 1082(g); 20 U.S.C. § 1082(h)(1); 20 U.S.C. § 1082(h)(2); 20 U.S.C. § 1082(h)(3); 20 U.S.C. § 1094(b); 20 U.S.C. § 1094(c)(1)(D); 20 U.S.C. § 1094(c)(1)(P); 20 U.S.C. § 1094(c)(2).
[106] Pursuant to 42 U.S.C. 2000-1, the ED adjudicates administrative appeals pertaining to Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975. ED also adjudicates disputes that arise in every agency, for example sections 5(d)(2)(A) and 5(g) of the Impact Aid Law (P.L. 81-874), Title VI, subtitle B of the Program Fraud Civil Remedies Act (P.L. 99-509).

adjudications all fall under the auspices of the Office of Hearings and Appeals (OHA), and are ultimately appealable to the Secretary and reviewable under the APA. These formal adjudications do not involve students themselves: if a school such as Stanford were found to violate the DCL and be in non-compliance with Title IX and risk losing its federal funding, affected students would not be a party to the adjudication. In the rulemaking context, ED has been tasked with implementing a number of statutes.[107] While it has issued a few formal rules over the years[108], it primarily regulates with informal pronouncements that skirt "notice and comment" strictures, perhaps as a result of the ponderous nature of formal rulemaking.[109] This is the vast bulk of ED regulatory action: "Dear

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[106] The number of decisions made by the Secretary is actually quite low. *See* DEPT. OF EDUC. OFFICE OF HEARINGS AND APPEALS, INDEX OF SECRETARY'S DECISIONS, *available at* http://www.ed-oha.org/secretaryindex.html.

[107] The Assistant Secretary for Civil Rights has general authority to enforce the following: Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*; Title IX of the Education Amendments of 1972, *as amended*, 20 U.S.C. § 1681 *et seq*; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; The Age Discrimination Act, 42 U.S.C. § 6101; Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12131-34 (as delegated under Title II implementing regulation, 28 C.F.R. 35.1909b0(2)); Section 9525 of the Elementary and Secondary Education Act of 1964 (as amended by Boy Scouts of America Equal Access Act, 20 U.S.C. § 7905).

[108] Of the twenty-nine non-interim final rules promulgated since the ED was established in 1980, five are purely technical revisions, four are multi-agency regulations[108] related to administering federal employment within ED itself, five are initial regulations due to recodification or new legislation, and five amend grant application processes with no substantial changes. That leaves ten substantive final rules, of which six amend the substantive grantee categories, and only four are unarguably pure "policy" rules that one would expect to be the central case in regulation. Indeed, the universe of formal agency rulemaking is in the ED context is extremely limited. With respect to Title IX, for example, the Department of Education had promulgated only one notice-and-comment rule in response to a congressional directive since Congress enacted it. None of these are omnibus rules; most of them are one paragraph in length. *See, e.g.*, Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L.REV. 397, 404 (2007).

[109] *See, e.g.*, Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803, 808 (2001) ("The more costly it becomes to generate regulations, and the fewer resources agencies have available to pay those costs, the greater will be the temptation to find other means to generate policy - shortcutting a desirable, even necessary public process.").

Colleague" letters, "guidance" documents, and policy "clarifications." Since designating a particular regulation as "formal" or "informal" is largely up to the agency, the Executive Branch has, through the Office of Management and Budget (OMB), sought to objectively quantify the impact of regulation and require additional procedural safeguards for those regulations it deems "significant guidance." [110] ED has issued 224 "significant guidance documents" since 1975.[111] These documents represent the policy heart of ED and include documents on subjects as varied as the relation of the Family Educational Rights and Privacy Act to the H1N1 virus,[112] guidance on prayer of students in schools,[113] and, of course, the April 4, 2011, DCL. "Significant guidance documents" are not the only informal guidance that ED provides. The agency also issues direct correspondence in particular cases on everything from FOIA requests, to policy inquiries, to guidance for compliance with Title IX in the cases of specific schools or in the context of specific complaints.[114]

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[110] Office of Management and Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 16, 3432 (Jan. 25, 2007), *available at* http://www.whitehouse.gov/omb/fedreg/2007/012507_good_guidance.pdf.

[111] This number includes such documents that "carried over" to ED following its creation in 1980. DEPT. OF EDUC., GENERAL: SIGNIFICANT GUIDANCE DOCUMENTS, *available at* http://www2.ed.gov/policy/gen/guid/significant-guidance.html.

[112] *See* 20 U.S.C. § 1232(g) (conditioning the receipt of federal education funds upon compliance with privacy rules governing students' "education records"). DEPARTMENT OF EDUC., FAMILY EDUC. RIGHTS AND PRIVACY ACT (FERPA) AND H1N1 (Oct. 2009), *available at* http://www2.ed.gov/policy/gen/guid/fpco/pdf/ferpa-h1n1.pdf.

[113] DEPARTMENT OF EDUC., GUIDANCE ON CONSTITUTIONALLY PROTECTED PRAYER IN PUBLIC ELEMENTARY AND SECONDARY SCHOOLS (Feb. 7, 2003), *available at* http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html.

[114] For example, ED investigates compliance with the civil rights statutes, and will craft plans sufficient, but not necessarily required, to bring a program into compliance with federal law. *See, e.g.*, Dept. of Educ. Office for Civil Rights Ltr. To Northwestern Univ. (Jan. 5, 2000), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/nrthwstern.html.

Formal, notice-and-comment rulemaking is challengeable under 5 U.S.C. § 706(E); agency findings and conclusions must be supported by "substantial evidence."[115] Furthermore, section 553 of the APA notes that opportunity for public notice-and-comment is not required for interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice."[116] The cause of action is found in 5 U.S.C. § 702, stating that a person "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." In reviewing a formal agency rule, a court asks whether "a reasonable mind might accept a particular evidentiary record as adequate to support a conclusion."[117]

In the case of the Stanford student, this mechanism could be used to review either the factual basis of his conviction or the underlying policy change: the DCL itself.[118] That the due process implications of the DCL were not

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[115] *See* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

[116] However, where the agency finds "good cause" that it is "impracticable, unnecessary, or contrary to the public interest" to hold notice-and-comment rulemaking, it can avoid that requirement. *See* 553(b). Finally, and importantly in the ED context, section § 553(a) has a special exception that rules related to "agency management or personnel or to public property, *loans*, *grants*, *benefits*, or *contracts*" need not comply with notice-and-comment strictures. Thus, even major changes in substantive ED rules, provided that the rules fall into these broad exceptions, can be issued without notice-and-comment rulemaking. Cognizant of this, other agencies have instituted "best practices" to determine where, even when the § 553(a) exception applies, notice-and-comment is nevertheless appropriate, in part to comply with notions of fundamental fairness.[116] ED has promulgated no such rule, making it all the more difficult for university counsel to assess the legal status of this or that Guidance Document. Nevertheless, a large chunk of ED regulation could plausibly fall under the exceptions to § 553(a), which would render them subject only to § 706(A)(2) review.

[117] Dickinson v. Zurko, 527 U.S. 160, 162 (1999).

[118] *See, e.g.*, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971); *see also* Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc. 419 U.S. 281, 285-86 (1974).

considered, and that affected groups were not consulted, both point to the fact that the DCL, directly challenged under 706(E), might fail under substantial evidence review. This is not to say that ED could not have determined that the obligation to prevent a hostile environment for Title IX purposes was more important than due process; merely that the record shows that ED never even *considered* due process. While a suit challenging an ED decision under substantial evidence review would not permit the court to second-guess the ED policy decision, any party challenging such rules would place the onus on ED to show that it considered due process while developing the new rules: if ED could not show that it thought about the due process implications of its rule change, that rule change would likely be overturned.

Informal rulemaking is challengeable in court as well. Both informal and formal rulemaking may be challenged under the catch-all provisions of 5 U.S.C. § 706(2)(A): courts shall "hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Challenges to informal rulemakings represent the bulk of challenges under this section.[119] An agency rule would be overturned if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before

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[119] *See* HARRY T. EDWARDS & LINDA A. ELLIOTT, FEDERAL COURTS STANDARDS OF REVIEW: APPELLATE COURT REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS 168 (2007).

the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[120]

Again, the Stanford case implicates each of these categories, and even while the DCL might ultimately withstand challenge, the student has a right to argue, for example, that because ED "entirely failed to consider" alternative views, it acted in violation of 706(2)(A). Furthermore, even if there were no *Bivens* action for direct constitutional remedy, section 706(2)(A) would permit review of federal agency rules that violated the constitution. Thus, for example, our Stanford student would, under the APA, be able to challenge ED rules requiring equal appeal rights for accused and accuser if this provision were alleged to violate the Double Jeopardy clause of the Fifth Amendment, or other constitutional rights, such as other substantive due process rights.[121] This avenue for constitutional rights vindication is independent of the *Bivens* action.[122]

When OCR issues guidance documents in response to controversies arising in specific cases, it is difficult to determine whether OCR is engaged in rulemaking or adjudication. This question is particularly important, because where complaints are made to OCR, where OCR investigates and issues a Guidance Document, and where this document has de facto binding effect, adversely affected parties, such as students and professors accused of misconduct, have the ability to challenge the agency in court. Specifically, ED

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[120] Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).
[121] U.S. CONST. amend. V.
[122] *See* supra page 19.

adjudication is reviewable in district court to the extent that it violates either 5 U.S.C. § 706(2)(A) or § 554(a).

In *Allentown Mack Sales & Service v. NLRB*, the Supreme Court held that the "reasoned decisionmaking" requirement of the APA ensures that agency adjudication is also subject to arbitrary and capricious review under § 706(2)(A).[123] In *Allentown Mack*, the Court overturned a National Labor Relations Board informal adjudication that applied a higher standard of proof than formally announced. As the Court held, "[i]t is hard to imagine a more violent breach of [the § 706(2)(A)] requirement than applying a rule of primary conduct or a standard of proof which is in fact different from the rule or standard formally announced. And the consistent repetition of that breach can hardly mend it."[124] This is quite similar to the Stanford adoption of a lower standard of proof in the midst of a campus adjudication. Thus, were it the case that the DCL conflicted with prior agency deference to universities' disciplinary procedures, the insistence on applying a "preponderance of the evidence" standard of proof would, following *Allentown Mack*, be a core case of arbitrary and capricious agency adjudication, with the university adjudicating on behalf of ED. Furthermore, ED's assertion that the DCL simply provides "additional examples" and "clarifies" existing precedent and thus non-adjudicatory is not conclusive: reviewing courts make their own determination whether agency

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[123] *See* 522 U.S. 359 (1998).
[124] *Id.* at 374.

action creates new legal obligations or not.[either the sentence needs to be strengthened or taken out.].[125]

One last problem is standing. Since federal courts are constitutionally bound to adjudicate cases in limited contexts,[126] courts ensure that litigants meet three requirements. Plaintiffs challenging agency actions must have suffered an injury, the injury must have been caused by the challenged action, and it must be likely that the injury can be redressed by a favorable decision.[127] While it is beyond the scope of this paper to survey the contours of standing law in this context, it is worth noting at least one important case. In *Equity in Athletics v. Department of Ed.,*[128] a non-profit was found to have standing to challenge a new ED rule implementing Title IX. The non-profit represented adversely-affected students, who also had standing to sue, because the university in question claimed that their cuts to programs were due entirely to bringing the institution into compliance with the new ED rules.

In principle, whenever an ED rule requires a university to make a change that adversely affects a student by narrowing the universe of favorable outcomes for that student, such as in the Stanford case, these rules are challengeable in court. While the ED enabling statutes do not explicitly permit OCR to adjudicate

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[125] *See* DCL, *supra* note 2, at 2. For the definition of a substantive rule, *see* American Mining Congress v. Mine Safety & Health Admin., 995 F.2d 1106, 1112 (D.C. Cir. 1993).
[126] U.S. CONST. art. 2, cl 1.
[127] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).
[128] 639 F.3d 91 (4th Cir. 2011).

disciplinary disputes, insofar as that is precisely what OCR is doing with its "Guidance Documents," it opens itself up to challenge under this section.

Conclusion

As the Stanford example shows, the due process rights of students cannot always be adequately protected with contract law. Insofar as a disciplinary action is private action (for example, in private sectarian institutions ungoverned by Title IX), the laws of contract and tort provide adequate remedy: students and universities can freely establish their working relationship and stick to it, within the dominant legal framework set up by state courts. At Stanford, the student had agreed to a set of disciplinary procedures that ordinarily form a binding contract, and California contract law could have provided a vehicle for lawsuit. However, in many cases, such as at Stanford, universities are induced to breach contracts by third parties. In many jurisdictions, this traditionally left students and professors without remedy. Rather than directing all criticism at universities that (justifiably or no) pin the blame for violations of due process on third party state actors, students should seriously consider civil actions against those third parties themselves.

There are adequate causes of action for direct constitutional suits under *Bivens* and section 1983. Aside from usual barriers to rights vindication (among them the cost of litigation), the main reason lawsuits in this arena have not kept up with the numerous abuses is that the natural section 1983 plaintiff in these cases are the universities, and the cost-benefit analysis of litigation in these situations is massively tipped on the side of maintaining accreditation and ED grants, including student loan monies. Furthermore, the university is the

proximate actor and the "deep pocket" makes it an attractive litigation target; however, suits against third-parties are potentially low-hanging fruit that should not be neglected.

Students, while generally unable to challenge accreditation requirements or ED regulations in the abstract, may sometimes (as in the Stanford case) be able to concretely link an adverse disciplinary decision on the part of universities to decisions made by non-university third parties. Insofar as the upstream non-university third party action is governmental, the downstream adverse disciplinary action of the university can constitute state action, and can open the door to liability under § 1983, providing an avenue for rights vindication that would otherwise be foreclosed. Possible plaintiffs include all relevant state actors: public and private universities, third-party accreditors, and all officials in their respective individual capacities. Insofar as a disciplinary decision can fairly be said to be "adjudicated" by ED itself, suits under the APA are also available, particularly substantial evidence review of APA § 706(2)(E) in district court.

Courts and universities, rather than dreading increased APA and third-party lawsuits, should consider the potential benefits of such a change in litigation strategy. First, such suits would incentivize state actors to avoid APA liability by establishing administrative best practices and following those practices. Second, courts should welcome the opening to encourage a well-functioning administrative regime that might even decrease the costs of litigation system-wide. Universities and students can be natural litigation allies when both

are on the receiving end of onerous third-party requirements.[129] Third, shifting litigation risk to ED is advantageous to universities, especially during budget crises. Third party actors such as ED and accreditation agencies should recognize that if they are given governmental power, they must respect the Bill of Rights and statutory civil rights of students and faculty.

While the traditional wisdom is that the risk of loss of accreditation or federal funding are so catastrophic that university general counsels should always defer unquestioningly to ED or accreditors, earlier pushback by colleges against excessive regulation would provide additional litigation cover, and provide institutional breathing space as well. As it stands, the student in the Stanford case likely has a remedy against ED and against Stanford itself. Had Stanford applied its "beyond a reasonable doubt" standard, it could have limited its exposure to contract and constitutional lawsuit by the student in question. This is not to downplay the risks involved: showing a little backbone could have risked ED funding, bad press, and the loss of other government grants, for example. However, even in the event that ED had initiated an adjudication to determine the eligibility of Stanford to receive federal funding, Stanford would have had ample opportunity to change its mind. Universities typically err on

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[129] In the current regime, universities tend to simply accept such regulations. This is more complicated than simply fear of loss of accreditation or federal funding. Rather, universities are complex entities and even within a single university institution there may be competing interests. University counsel and a board of trustees may have an interest in protecting students' rights, but subordinate administrators, such as Title IX administrators, campus security, or judicial affairs officers might prefer to limit these rights. Needless to say, however one defines the interests of "the university," it is clear that where there is a violation of constitutional right, there is a proper plaintiff.

one side of the risk equation, to the detriment of student and professorial rights. When universities have an overriding concern with applying government regulations rather than respecting students' rights, this should tell courts two things: First, it is a doctrinal reason for finding state action. Second, it provides a structural reason for favoring lawsuits by students and professors, because, as a normative matter, no rights should exist without remedy.