Student and Professorial Causes of Action Against Non-University Actors

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Introduction

In February 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" (DCL)[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

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1 To protect the privacy of this student, the author retains materials regarding this incident—including Stanford's investigation file, the official finding of fact, and a post-disciplinary letter from a Stanford administrator to the accused student—on file. They are available in redacted form upon request.

2 Kathleen O'Toole, *Faculty Senate Agrees to New Student Disciplinary System*, Stanford Rep. (May 7, 1997), http://news.stanford.edu/news/1997/may7/justice.html.

3 Dear Colleague Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ. (Apr. 4, 2011) [hereinafter DCL], *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

4 20 U.S.C. §§ 1681-88 (2006).

5 Nearly all universities in the U.S.—with a few rare exceptions, such as Hillsdale College in Michigan—receive federal funding. In fact, Hillsdale specifically cites federal antidiscrimination policy as the reason it chooses not to receive federal funding. *See Frequently Asked Questions*, Hillsdale Coll., http://www.hillsdale.edu/admissions/faq/faq_list.asp?iSectionID=1&iGroupID=45&iQuestionID=108 (last visited Jan. 4, 2013).

harassment and sexual misconduct cases.[6] In response, Stanford University changed the standard of proof *in the 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 DCL, and that the OCR "did not provide any mechanism by which to grandfather in already pending cases."[8] Subsequently, a Stanford panel found the student guilty and suspended the student for two years.[9]

The DCL that prompted the midstream change in disciplinary rules at Stanford was the product of some public debate. 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 one in five female students will be sexually assaulted during college.[11] Although both documents have had their methodology criticized,[12] at the time of their publication they were highly publicized, providing the ED with the impetus for strengthening the

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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. *See* DCL, *supra* note 3, at 3, 10.

7 Kyle Huwa, *Sexual Assault Procedure Questioned*, STANFORD REV., (Oct. 18, 2011), http://stanfordreview.org/article/sexual-assault-procedure-questioned/; Samantha Harris, Op-Ed., *The Feds' Mad Assault on Campus Sex*, N.Y. POST, July 19, 2011, 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 Kristen Lombardi, *A Lack of Consequences for Sexual Assault*, CTR. FOR PUB. INTEGRITY (Feb. 24, 2010), http://www.publicintegrity.org/2010/02/24/4360/lack-consequences-sexual-assault-0.

11 *See* CHRISTOPHER P. KREBS ET AL., NAT'L INST. OF JUSTICE, THE CAMPUS SEXUAL ASSAULT STUDY: FINAL REPORT §§ 2, 6 (2007), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf; *see also* Sam Dillon, *Biden to Discuss New Guidelines About Campus Sex Crimes*, N.Y. TIMES, Apr. 4, 2011, at A13, *available at* http://www.nytimes.com/2011/04/04/education/04violence.html ("[Russlynn H. Ali, assistant secretary of education] cited a private, Internet-based survey of undergraduate women . . . in which 19 percent of respondents reported that they had been victims of attempted or actual sexual assault while at college.").

12 *See, e.g.*, Heather Mac Donald, *Are One in Five College Women Sexually Assaulted?*, NAT'L REV. ONLINE (Apr. 5, 2011), http://www.nationalreview.com/articles/263834/are-one-five-college-women-sexually-assaulted-heather-mac-donald ("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.").

Title IX requirements of universities.[13] When the ED issued the DCL, commentators noted that the studies provided a large part of the initiative behind the agency's new mandates;[14] indeed, the DCL itself, as well as publicity materials published by the ED, cites one of the studies directly.[15]

The DCL purports to clarify certain obligations of universities under Title IX.[16] In addition to other requirements, it states that "in order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard."[17] Consequently, many universities, including Stanford,[18] were faced with an ultimatum: change institutional sexual assault policies, or risk losing federal funding.[19]

The 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.[20] Other commentators, however, have noted that the DCL goes beyond mere clarification and changes the existing rights and responsibilities of students,

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13 *See* DCL, *supra* note 3, at 2 ("The statistics on sexual violence are both deeply troubling and a call to action for the nation.").

14 *See* Richard T. Olshak, *The OCR "Dear Colleague" Letter* (Apr. 4, 2011), http://olshak.com/2011/04/04/the-ocr-dear-colleague-letter/.

15 DCL, *supra* note 3, at 2 n.3 (citing KREBS ET AL., *supra* note 11); U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE 1 n.4 (2011), *available at* http://www.whitehouse.gov/sites/default/files/fact_sheet_sexual_violence.pdf (citing KREBS ET AL., *supra* note 11).

16 *See* DCL, *supra* note 3, at 1 n.1. The DCL contains boilerplate language to this effect: "This letter does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations." *Id.* However, the self-description of a guidance document is not binding on its construction in federal court.

17 *Id.* at 11.

18 For an overview of the effect the DCL has had on universities, *see* FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., STANDARD OF EVIDENCE SURVEY: COLLEGES AND UNIVERSITIES RESPOND TO OCR'S NEW MANDATE (2011), *available at* http://thefire.org/public/pdfs/f17fa5caafd96ccdf8523abe56442215.pdf?direct.

19 *See* 20 U.S.C. § 1682 (2006) (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), http://www.huffingtonpost.com/2012/04/23/for-colleges-rape-cases-a_n_1445271.html.

20 DCL, *supra* note 3, at 1 n.1 ("This letter does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations.").

faculty, and university administrations.[21] Specifically, the DCL appears to overturn prior ED rules.[22] Whatever the legal status of the DCL, however, it is clear that some stakeholders, such as university administrators, students, and faculty, were not involved in the development of the DCL.

While there is no way to know whether the DCL was directly responsible for the expulsion of the Stanford student, based on subsequent communications it is evident that at least one juror would have exonerated the student under the "beyond a reasonable doubt" standard.[23] 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 because of third-party action?

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

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21 *See, e.g.*, Ari Cohn, *Did the Office for Civil Rights' April 4 'Dear Colleague Letter' Violate the Law?*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Sept. 12, 2011), http://thefire.org/article/13547.html; Hans Bader, *Education Department Shreds Presumption of Innocence in April 4 Letter*, EXAMINER.COM (Apr. 8, 2011), 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), http://www.realclearpolitics.com/articles/2011/08/30/on_sexual_harassment_and_title_ix_111065.html.

22 Previous ED policy enshrined a standard quite similar to that announced in *Davis v. Monroe County Board of Education*, in which the Supreme Court concluded that "an action will lie only for harassment that is so severe, persistent, and objectively offensive" that victims "are effectively denied equal access to an institution's resources and opportunities." *See Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633, 651 (1999); *see also* U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, v-vi (2001) (citing *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999)), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf (endorsing the *Davis* Court's standard for actionable harassment). The April 4, 2011 DCL lowered the standard for harassment to conduct "sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program." *See* DCL, *supra* note 3, at 3.

23 *See supra* note 1.

action" for the purposes of a direct constitutional lawsuit.[24] 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."[25]

I. TRADITIONAL CONTRACT LAW GOVERNS THE RELATIONSHIP BETWEEN THE UNIVERSITY AND THE STUDENT

A. *Historical Development of the Relationship Between the University and Student*

Today, state and federal courts conceive of the relationship between students and universities as primarily contractual in nature, with universities having real, contractual obligations to their students.[26] This has not always been the case. The dominance of the contractual view of the student-university relationship traces back to the passage of the Twenty-Sixth Amendment.[27] This amendment was the culmination of a national dialogue affording those of draft age the right to vote, and was a watershed in American cultural consciousness.[28] 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 university involved the university acting *in loco parentis*, 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.[29] Under such a legal regime, students granted the *privilege* to attend public schools had few or no cognizable due

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[24] A direct constitutional lawsuit is that pleaded under either 42 U.S.C. § 1983 (2006) or under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 391 (1971). *See infra*, Part II.

[25] *See* 5 U.S.C. §§ 500-504, 551-559 (2006).

[26] *See infra* Part I.B.

[27] *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).

[28] *Id.* at 52 ("While the text of the Twenty-Sixth Amendment refers only to voting, the debate leading up to and surrounding its passage reveals that the people understood the right to vote to have broader ramifications—namely, until a person had the right to vote, she was not a full citizen or member of the political community.").

[29] For a concise history of the doctrine of *in loco parentis*, *see* Morse v. Frederick, 551 U.S. 393, 411-16 (2007) (Thomas, J., concurring).

process rights, and even summary expulsion was, in most cases, unchallengeable.[30]

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 a university was conceived as a contractual one, negotiated between equals.[31] 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.[32] It seems that as colleges became managed more like businesses, courts deemed the relationship between student and university as contractual in nature.[33]

B. *The Modern View: Student-University Contractual Relationships*

Today, most American jurisdictions find that the relationship between a student and a university or college is, in at least some sense, contractual.[34] In thirty-two states, Puerto Rico, and the District of Columbia, there is controlling legal authority supporting this para-

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[30] *See, e.g.*, Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 261-63 (1934) (noting that there is no federal right to education and declining to scrutinize the conditions of attendance at a public university).

[31] Sarabyn, *supra* note 27, 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 (1995) ("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.").

[32] Hazel Glenn Beh, *Student Versus University: The University's Implied Obligations of Good Faith and Fair Dealing*, 59 MD. L. REV. 183, 187 (2000).

[33] *See generally* Kent Weeks & Rich Haglund, *Fiduciary Duties of College and University Faculty and Administrators*, 29 J.C. & U.L. 153, 160 (2002).

[34] 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.

digm.[35] In eight states, Guam, the Northern Mariana Islands, and the

[35] Thirty-two states, the District of Columbia, and Puerto Rico recognize the relationship between a student and a university as arguably one of contract:

(1) Alabama, *see, e.g.*, Christensen v. S. Normal Sch., 790 So. 2d 252, 255 (Ala. 2001);
(2) California, *see, e.g.*, Kashmiri v. Regents of Univ. of Cal., 67 Cal. Rptr. 3d 635, 645-46 (Ct. App. 2007) (holding that where a university breaches a specific promise that can be objectively evaluated, contract law is applicable);
(3) Colorado, *see, e.g.*, Cencor, Inc. v. Tolman, 868 P.2d 396, 399 (Colo. 1994);
(4) Connecticut, *see, e.g.*, Burns v. Quinnipiac Univ., 991 A.2d 666, 673-74 (Conn. App. Ct. 2010);
(5) Delaware, *see, e.g.*, Swanson v. Wesley Coll., Inc., 402 A.2d 401, 403 (Del. Super. Ct. 1979);
(6) District of Columbia, *see, e.g.*, Alden v. Georgetown Univ., 734 A.2d 1103, 1111 n.11 (D.C. 1999);
(7) Florida, *see, e.g.*, Jallali v. Nova Se. Univ., Inc., 992 So. 2d 338, 342 (Fla. Dist. Ct. App. 2008);
(8) Georgia, *see, e.g.*, Morehouse Coll., Inc. v. McGaha, 627 S.E.2d 39, 41 (Ga. Ct. App. 2005);
(9) Idaho, *see, e.g.*, George v. Univ. of Idaho, 822 P.2d 549, 557 (Idaho Ct. App. 1991);
(10) Illinois, *see, e.g.*, DeMarco v. Univ. of Health Scis., 352 N.E. 2d 356, 361-62 (Ill. App. Ct. 1976);
(11) Indiana, *see, e.g.*, Gordon v. Purdue Univ., 862 N.E.2d 1244, 1251 (Ind. Ct. App. 2007);
(12) Iowa, *see, e.g.*, Harvey v. Palmer Coll. of Chiropractic, 363 N.W.2d 443, 444-45 (Iowa Ct. App. 1984);
(13) Kentucky, *see, e.g.*, Ctr. Coll. v. Trzop, 127 S.W.3d 562, 568 (Ky. 2003);
(14) Louisiana, *see, e.g.*, Babcock v. New Orleans Baptist Theological Seminary, 554 So. 2d 90, 95-96, 97 (La. Ct. App. 1989);
(15) Maryland, *see, e.g.*, Onawola v. Johns Hopkins Univ., 412 F. Supp. 2d 529, 530, 532 (D. Md. 2006) (citing Harwood v. Johns Hopkins Univ., 747 A.2d 205 (Md. Ct. Spec. App. 2000));
(16) Mississippi, *see, e.g.*, Univ. of Miss. Med. Ctr. v. Hughes, 765 So. 2d 528, 535 (Miss. 2000);
(17) Missouri, *see, e.g.*, Niedermeyer v. Curators of Univ. of Mo., 61 Mo. App. 654, 656-57, 661-662 (Ct. App. 1895);
(18) Montana, *see, e.g.*, Bindrim v. Univ. of Mont., 766 P.2d 861 (Mont. 1988);
(19) Nebraska, *see, e.g.*, Doe v. Bd. of Regents of Univ. of Neb., 788 N.W.2d 264, 294-95 (Neb. 2010);
(20) New Hampshire, *see, e.g.*, Gamble v. Univ. Sys. of N.H., 610 A.2d 357, 360 (N.H. 1992);
(21) New York, *see, e.g.*, Healy v. Larsson, 323 N.Y.S.2d 625, 626 (N.Y. Sup. Ct. 1971);
(22) Ohio, *see, e.g.*, Organiscak v. Cleveland State Univ., 116 Ohio Misc. 2d 14, 17 (Ohio Ct. Cl. 2001);
(23) Oregon, *see, e.g.*, Dauven v. George Fox Univ., No. CV 09-305-PK, 2010 U.S. Dist. LEXIS 142066, at *49 (D. Or. Dec 2, 2010) (citing Tate v. N. Pac. Coll., 140 P. 743 (Or. 1914));
(24) Pennsylvania, *see, e.g.*, Britt v. Chestnut Hill Coll., 632 A.2d 557, 560 (Pa. Super. 1993);
(25) Puerto Rico, *see, e.g.*, Jorge v. Universidad Interamericana, 9 P.R. Offic. Trans. 672, 674, 683 (P.R. 1980);
(26) Rhode Island, *see, e.g.*, Russell v. Salve Regina Coll., 938 F.2d 315, 316, 317-18 (1st Cir. 1991) (applying Rhode Island law);

Virgin Islands, there is no authority on point.[36] Only ten states appear to have rejected the contract paradigm.[37] Thus, the majority of 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 educa-

(27) South Carolina, *see, e.g.*, Hendricks v. Clemson Univ., 578 S.E.2d 711, 716-17 (S.C. 2003);
(28) South Dakota, *see, e.g.*, Aase v. S.D. Bd. of Regents, 400 N.W.2d 269, 270 (S.D. 1987);
(29) Tennessee, *see, e.g.*, Lesure v. State, No. 89-347-II, 1990 Tenn. App. LEXIS 355, at *5-7 (Tenn. Ct. App. May 18, 1990);
(30) Texas, *see, e.g.*, Alcorn v. Vaksman, 877 S.W.2d 390, 403 (Tex. Ct, App. 1994);
(31) Vermont, *see, e.g.*, Reynolds v. Sterling Coll., 750 A.2d 1020, 1022 (Vt. 2000);
(32) Washington, *see, e.g.*, Becker v. Wash. State Univ., 266 P.3d 893, 900 (Wash. Ct. App. 2011);
(33) West Virginia, *see, e.g.*, Bender v. Alderson-Broaddus Coll., 575 S.E.2d 112, 116-17 (W. Va. 2002);
(34) Wisconsin, *see, e.g.*, Cosio v. Med. Coll. of Wis., Inc., 407 N.W.2d 302, 304 (Wis. Ct. App. 1987).

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

[37] The following jurisdictions have precedent that is either unclear or disfavors the contractual relationship:

(1) Alaska, *see, e.g.*, Hermosillo v. Univ. of Alaska Anchorage, No. S-10563, 2004 WL 362384, at *2 (Alaska Feb. 25, 2004);
(2) Maine, *see, e.g.,* Millien v. Colby Coll., 874 A.2d 397, 401-02 (Me. 2005);
(3) Massachusetts, *see, e.g.*, Govan v. Trs. of Bos. Univ., 66 F. Supp. 2d 74, 82 (D. Mass. 1999);
(4) Michigan, *see, e.g.*, Lee v. Univ. of Mich., No. 284541, 2009 WL 1362617, at *2-5 (Mich. Ct. App. May 12, 2009);
(5) Minnesota, *see, e.g.*, Shuman v. Univ. of Minn. Law Sch., 451 N.W.2d 71 (Minn. Ct. App. 1990); *but see* Alsides v. Brown Inst., Ltd., 592 N.W.2d 468, 472 (Minn. Ct. App. 1999) (noting that when universities fail to provide "*specifically promised educational services*," students may have a valid breach of contract claim);
(6) New Jersey, *see, e.g.*, Romeo v. Seton Hall Univ., 875 A.2d 1043, 1050 (N.J. Super. Ct. App. Div. 2005);
(7) 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);
(8) North Carolina, *see, e.g.*, Love v. Duke Univ., 776 F. Supp. 1070, 1075 (M.D.N.C. 1991); Ryan v. Univ. of N.C. Hosps., 128, 494 S.E.2d 789, 302-03 (Ct. App. 1998) (indicating that there can be no action for breach of contract that would involve "inquiry into the nuances of educational processes and theories");
(9) Oklahoma, *see, e.g.*, State v. Kauble, 948 P.2d 321, 325 n.28, 326 (Okla. Crim. App. 1997); *but see* Mason v. State ex rel. Bd. of Regents, 23 P.3d 964, 970 (Okla. Civ. App. 2000) (indicating that student codes might reach the level of implied contracts);
(10) 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. Ct. App. 1989).

tion and the attendant process due to a deprivation of those rights is generally negotiable.[38] Even today, however, some commentators still believe that universities have license to discipline students, even contrary to the contractual promises of the universities themselves.[39]

To be sure, there are good reasons for believing that traditional contract law can serve to protect the rights of students and faculty.[40] When a court inquires into the "good faith" action of a university, assessing the reasonableness of university behavior in light of higher education 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 universities as free speech institutions without sacrificing the right of private association."[41]

It is easy to see how the student at Stanford University might have a *prima facie* contract claim. Specific representations, contained

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[38] Courts recognize, however, that these negotiations are often one-sided. *See* Corso v. Creighton Univ., 731 F.2d 529, 533 (8th Cir. 1984) (construing a contract against a university because where "the contract is on a printed form prepared by one party, and adhered to by another who has little or no bargaining power, ambiguities must be construed against the drafting party").

[39] *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, 1010 (2006) ("The simple truth is, there is no right of redress for the accused student because schools are free to punish the student as they see fit without governmental regulations or interference."); *see also* Schaer v. Brandeis Univ., 735 N.E.2d 373, 376 (Mass. 2000) ("A college must have broad discretion in determining appropriate sanctions for violations of its policies.") (quoting Coveney v. Pres. & Trustees of Coll. Of Holy Cross, 445 N.E.2d 136, 139 (Mass. 1983)).

[40] *See, e.g.*, Kelly Sarabyn, *Free Speech at Private Universities*, 39 J.L. & EDUC. 145, 158 (2010) ("[T]he 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* Beh, *supra* note 32, at 184-85 ("[T]he 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. *See* Beh, *supra* note 32, at 219. Exaggerating risks or benefits should not allow "best practices" to degenerate into a rights-violative bandwagon effect.

[41] Sarabyn, *supra* note 40, at 146.

within the Stanford Administrative Guide Policy, guaranteed specific procedures to students accused of sexual assault.[42] California state law establishes that these representations constitute part of the contractual relationship between a student and university.[43] These procedures were not followed when jurors in the university proceeding were instructed to convict on a lower standard of proof than was guaranteed.[44] A finding that Stanford breached its contract with the student by failing to provide contractually agreed-upon disciplinary process could lead to monetary damages, or even lead to specific performance, so, theoretically, the contract remedy should be adequate.[45]

C. *Holes in the Current Contract Theory*

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. First, as noted above, there are ten jurisdictions that appear to disfavor the contract remedy.[46] As a result, when a university makes specific representations about academic or disciplinary matters, students and faculty cannot always rely on them. This does not doom contract theory, but merely points out that it is not universally

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[42] *See Dean's Alternate Misconduct Review Process and Procedures*, STANFORD UNIV., http://studentaffairs.stanford.edu/judicialaffairs/process/alternate-review (last visited Jan. 4, 2013) (As of this writing, Stanford's policy give students the right "[t]o be considered innocent until found responsible by a preponderance of the evidence; a preponderance of the evidence is a determination that it is more likely than not that the charge is true"). Prior to the DCL, Stanford's policy would have given students the right to be considered innocent until found responsible beyond a reasonable doubt.

[43] *See* Zumbrun v. Univ. of S. Cal., 101 Cal. Rptr. 499, 504 (Ct. App. 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., 67 Cal. Rptr. 3d 645, 645-46 (Ct. App. 2007) (quoting Wickstrom v. N. Idaho Coll., 725 P.2d 155, 157 (Idaho 1986)) (illustrating the schizophrenic nature of judicial application of contract law to the student-university relationship, noting on the one hand that "[t]here 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") (internal quotation marks omitted).

[44] *See supra* note 1.

[45] *Cf.* Kwiatkowski v. Ithaca Coll., 368 N.Y.S.2d 973, 980 (N.Y. Sup. Ct. 1975) (requiring a rehearing for a student guaranteed the same rights on appeal as at the initial disciplinary hearing, where the college denied the student the right to attend the appeal hearing).

[46] *See supra* note 37.

accepted. Plaintiffs in these jurisdictions need to find a different cause of action.[47]

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 construe contracts against universities.[48]

Third and most 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."[49] Six states have explicitly upheld these types of clauses.[50] Some of these states have also upheld clauses to the effect that "all provisions within this bulletin are subject to change without notice."[51] Perhaps the most significant quasi-contractual move a court can make to remedy this inadequacy is to refuse to uphold these boilerplate disclaimers.

Fourth, the full contractual terms of the student-university relationship cannot be completely 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 often come into play.[52] These reasonable expectations could 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 could be viewed as a part of the contract between students and universities. On a related note, federal regulation might affect the contractual relationship by

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[47] *See infra* Parts II and III (providing two recommended alternatives: constitutional suits and administrative lawsuits).

[48] *See, e.g.*, Corso v. Creighton Univ., 731 F.2d 529, 533 (8th Cir. 1984).

[49] *See, e.g.*, Davis v. George Mason Univ., 395 F. Supp. 2d 331, 337 (E.D. Va. 2005); Manning v. Temple Univ., No. 03-4012, 2004 U.S. Dist. LEXIS 26129, at *12 (E.D. Pa. Dec. 30, 2004); Millien v. Colby Coll., 874 A.2d 397, 401-02 (Me. 2005); Bindrim v. Univ. of Mont., 766 P.2d 861, 863 (Mont. 1988); Ruegsegger v. Bd. of Regents of W. N.M Univ., 154 P.3d 681, 688 (N.M. Ct. App. 2006); Lesure v. State, No. 89-347-II, 1990 Tenn. App. LEXIS 355, at *3 (Tenn. Ct. App. May 18, 1990).

[50] *See* cases cited *supra* note 49.

[51] Abbariao v. Hamline Univ. Sch. of Law, 258 N.W.2d 108, 114 (Minn. 1977) (quoting the university's bulletin regarding failing students).

[52] *See, e.g.*, Mangla v. Brown Univ., 135 F.3d 80, 85 (1st Cir. 1998).

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.[53] If performance of a contract is legal when the contract is formed but illegal at the time of performance, courts treat performance as impossible.[54] If the university makes representations to provide certain disciplinary procedures, and such procedures are later rendered illegal,[55] a university might have a prima facie defense that non-performance should be excused as impossible.[56]

Even where contract law is found applicable, plaintiffs have difficulty enforcing the obligations of universities because courts generally set the bar very low for performance.[57] Courts rarely review decisions of a university where such decisions are determined to be "academic" in nature because of judicial economy, competence, and deference to tradition.[58] In the very rare case where a court reviews an academic decision and finds the presence of a contractual "right," the university

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53 *See* Gerhard Wagner, *In Defense of the Impossibility Defense*, 27 LOY. U. CHI. L.J. 55, 58-59 (1995).

54 Courts treat supervening illegality as a form of impossibility. *See, e.g.*, Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 554-56 (1995) (Stevens, J., dissenting). However, 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 because non-compliance renders an institution ineligible for federal funding. Compliance is not *mandatory*, but a condition on federal grants.

55 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, e.g.*, Chi. Tribune Co. v. Univ. of Ill., 781 F. Supp. 2d 672, 675 (N.D. Ill. 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." (emphasis added)).

56 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.

57 *See, e.g.*, Baldridge v. State, 740 N.Y.S.2d 723, 725 (App. Div. 2002) (upholding a summary judgment dismissing student's contract claims, noting that "the manner in which his degree program was developed and implemented and the role played by his academic advisor in that academic exercise . . . are the types of academic determinations in which courts have refused to intervene").

58 *See, e.g.*, Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 90 (1978) ("[T]he 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 [sic].").

often easily discharges the correlative obligation.[59] In the non-academic disciplinary context, courts have loosely construed even explicit contractual representations to due process.[60] 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.[61] Apparently, 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. Although, as noted above, some jurisdictions provide specific performance and other injunctive relief, the favored remedy in contract law is money damages.[62] 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.[63] When a student fails to obtain post-graduation employment, is underemployed, or is not given promised research opportunities while at school, courts can quantify this relief in the same way. However, most schools do not explicitly promise employment, but rather only assistance with obtaining employment.[64]

Other statutory complications with available contract remedies can render contract theory inadequate for protecting the student

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59 *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).

60 *See, e.g.*, Jansen v. Emory Univ., 440 F. Supp. 1060, 1062 (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, 381 (Mass. 2000).

61 *See, e.g.*, Am. Computer Inst., Inc. v. State, 995 P.2d 647, 651-52 (Alaska 2000) (holding that a program breached contract in closing mid-term).

62 *See, e.g.*, *id.* at 653 (holding that students had no duty to complete alternate programs offered by the university because they were not substantially similar to the programs described in the contract, and instead ordered the university to reimburse students' tuition rates for the university's breach of the contract).

63 *See, e.g.*, Russell v. Salve Regina Coll., 890 F.2d 484, 489 (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. La. Bus. Coll. of Monroe, 519 So. 2d 384, 387-88 (La. Ct. App. 1988) (determining a student's lost wages and tuition paid were attributable to the delay in her degree award as a result of the university's breach).

64 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* Staci Zaretsky, *Twelve More Law Schools Slapped with Class Action Lawsuits over Employment Data*, ABOVE THE LAW (Feb. 1, 2012, 2:53 PM), http://abovethelaw.com/2012/02/twelve-more-law-schools-slapped-with-class-action-lawsuits-over-employment-data/.

interests at stake in cases like that of the Stanford student. For example, state legislatures determine their litigation exposure under the Federal statute creating a private cause of action for constitutional or statutory violations—42 U.S.C. § 1983—because of the Eleventh Amendment.[65] Although this generally does not affect personal liability under § 1983,[66] states have wide latitude under sovereign immunity to preclude or limit monetary relief in these cases.[67] 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 quasi-contract or tort law must fill the theory's holes.[68] 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.[69] 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 disclaimers—which might be upheld in disputes between parties in an equal bargaining position—only six states have upheld them.[70]

Other quasi-contractual remedies include inquiring into "reasonableness," "good faith," or "fair dealing."[71] That is, courts can provide relief to students with no formal contract with a university where they

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[65] U.S. CONST. amend. XI; s*ee also* Quern v. Jordan, 440 U.S. 332, 332, 337-40 (1979); Edelman v. Jordan, 415 U.S. 651, 671, 678 (1974).

[66] *See* Hafer v. Melo, 502 U.S. 21, 25, 30-31(1991).

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

[68] *See* Sarabyn, *supra* note 40, at 164-66 (quoting Atria v. Vanderbilt Univ., 142 F. App'x 246, 255 (6th Cir. 2005)) (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).

[69] *See id.* at 159 (citing RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981)).

[70] Davis v. George Mason Univ., 395 F. Supp. 2d 331, 337 (E.D. Va. 2005); Manning v. Temple Univ., No. 03-4012, 2004 U.S. Dist. LEXIS 26129, at *12 (E.D. Pa. Dec. 30, 2004); Millien v. Colby Coll., 874 A.2d 397, 401-02 (Me. 2005); Bindrim v. Univ. of Mont., 766 P.2d 861, 863 (Mont. 1988); Ruegsegger v. Bd. of Regents of W. N.M Univ., 154 P.3d 681, 688 (N.M. Ct. App. 2006); Lesure v. State, No. 89-347-II, 1990 Tenn. App. LEXIS 355, at *3 (Tenn. Ct. App. May 18, 1990).

[71] *See generally* Beh, *supra* note 32.

find that the university has acted unreasonably, in bad faith, or by dealing unfairly. By applying such remedies, however, one exits "pure" contract theory and the realm of law, and enters 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.[72] Nevertheless, some courts have found equitable devices inconsistent with the contractual relationship between a college and a student.[73] On this view, because the university and student are seen as bargaining equals, a court might be unwilling to look beyond a formal contract, reasoning that there is no need to balance equities when a freely-made agreement exists.

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 lie against the university, but against third parties, where "(a) . . .a valid contract exist[ed]; (b) . . .a 'third party' had knowledge of the contract; (c). . . the third party intentionally and improperly procured the breach of the contract; and (d). . . the breach resulted in damage to the plaintiff."[74] This Article outlines possible scenarios,[75] but possible defendants could not include the federal government, and likely could not include any state government.[76] Rather, such a situation might involve an accreditation agency imposing additional degree requirements on students. Given the disfavored status of the action generally, it has not been raised in this context.[77]

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72 Max Radin, *The Roman Law of Quasi-Contract*, 23 VA. L. REV. 241, 249-50, 253 (1937).

73 *See, e.g.*, Cornett v. Miami Univ., 104 Ohio Misc. 2d 41, 45 (Ohio Ct. Cl. 2000) (declining to apply estoppel because of the contractual nature of the relationship between a university and student).

74 Cohen v. Davis, 926 F. Supp. 399, 402 (S.D.N.Y. 1996) (citing Finley v. Fiacobbe, 79 F.3d 1285, 1294 (2d Cir. 1996)).

75 *See infra* Parts II-III.

76 The statute defining the scope of federal consent to tort liability is the Federal Tort Claims Act. 28 U.S.C. § 1346 (2006). This limited waiver of sovereign immunity does not apply to interference in contract rights. *See* 28 U.S.C. § 2680(h) (2006). State tort claims acts generally contain such provisions as well.

77 *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 because of 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 rights. And indeed, courts have held that students have a settled core of due process rights that cannot be contracted away, because the Constitution directly provides a number of rights not provided by statute: state actors are forbidden by the Constitution from creating such contracts.[78] In the context of the relationship between a student and a state university, one of the most important bundles of rights is that of procedural due process provided by the Fifth and Fourteenth Amendments.[79] 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."[80]

The landmark 1975 Supreme Court decision *Goss v. Lopez* 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."[81] Subsequently, *Goss* has come to stand for the proposition that "[f]or students facing discipline at 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."[82] 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.[83] However, what precisely that process entails

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[78] *See, e.g.*, Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 151, 154-55, 159 (5th Cir. 1961).

[79] *See* U.S. CONST. amends. V, XIV.

[80] 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.

[81] Goss v. Lopez, 419 U.S. 565, 574 (1975).

[82] Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289, 290 (1999).

[83] *See, e.g.*, 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 enroll-

has been the subject of some debate.[84] However, the scope of both the property interest in education and attendant procedural due process rights in a disciplinary proceeding can be seen as defined, at least partly, by the free contracting between the student or professor and the university.[85]

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.[86] The private right of action is provided by either § 1983[87]—against state governments—or else the analogous private right of action announced by the Supreme Court in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[88]—against the federal government. These causes of action can secure constitutional rights and other legal rights.[89] Many entities have been found as state actors 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.[90] Officials of any of these subjects

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ment in a state school is an important entitlement protected by the Due Process Clause of the Fourteenth Amendment."); Leonard Kreynin, *Breach of Contract as a Due Process Violation: Can the Constitution Be a Font of Contract Law?*, 90 COLUM. L. REV. 1098, 1105 (1990) (citing Goss v. Lopez, 419 U.S. 565, 572-74 (1975)) (noting the difficulty of limiting "property" under the Due Process Clause to non-contractual property).

84 *See, e.g.*, Flaim v. Med. Coll. of Ohio, 418 F.3d 629, 633 (6th Cir. 2005) (citing the three-prong test in Mathews v. Eldridge, 424 U.S. 319 (1976), and noting that requisite due process varies with circumstance). *See also* Dixon v. Ala. State Bd. of Educ., 294 F. 2d 150, 158 (5th Cir. 1961) (holding that whatever the circumstances, "due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct").

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

86 *See* 42 U.S.C. § 1983 (2006).

87 *Id.*

88 403 U.S. 388 (1971).

89 *See* 42 U.S.C. § 1983 (2006). These can be used, for example, to vindicate civil rights where no private right may explicitly exist in the statute.

90 *See, e.g.*, Kaimowitz v. Bd. of Trs. of Univ. of Ill., 951 F.2d 765, 767 (7th Cir. 1991). *But see, e.g.*, Colburn v. Trs. of Ind. Univ., 739 F. Supp. 1268, 1280 (S.D. Ind. 1990) (finding Indiana University as an alter-ego of the State for § 1983 purposes, so plaintiff cannot recover compensatory damages from Indiana University or official capacity defendants because they are not "persons" under § 1983, but this does not prevent state officials from being sued under § 1983 in their individual capacities for damages); Severson v. Bd. of Trs. of Purdue Univ., 777 N.E.2d 1181, 1190-96 (Ind. Ct. App. 2002) (noting that state officials, such as the Board of Trustees of a university, acting in their official capacity are only subject to prospective injunctive relief under § 1983).

may be sued in their individual capacities as well, putting their personal property on the line.[91]

Procedural due process rights apply only against those engaging in state action.[92] But even facially private action becomes subject to statutory civil rights guarantees and the Bill of Rights if a court determines it is actually state action.[93] 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.[94] The determination of where "state action" exists is, at best, a fact-intensive inquiry assessed on a rather ad hoc basis.[95] What is clear, however, is that governmental actors, such as public universities, are state actors and formally private actors "so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."[96]

When an otherwise private institution has a number of contacts with the government such that its obligations and responsibilities indicate state participation in the operation of the institution, that institution is a state actor.[97] Or, when there is mutuality of benefit or a symbiotic relationship between the state and otherwise private entity, that entity might be considered a state actor.[98] To assess either of these possibilities, a court will often look to the financial or regulatory relationship between the state and the private entity.[99]

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91 Alden v. Maine, 527 U.S. 706, 757 (1999) (citing Scheuer v. Rhodes, 416 U.S. 232, 237-38 (1974)) ("Even a suit for money damages may be prosecuted against a state officer in his individual capacity for unconstitutional or wrongful conduct fairly attributable to the officer himself, so long as the relief is sought not from the state treasury but from the officer personally.").

92 *See* United States v. Cruikshank, 92 U.S. 542, 554-55 (1875).

93 *See, e.g.*, United States v. Price, 383 U.S. 787 (1966) (18 U.S.C. § 242 case); Braden v. Univ. of Pittsburgh, 552 F.2d 948 (3d Cir. 1977) (Bill of Rights case); Am. Future Systems, Inc. v. Pa. State Univ., 464 F. Supp. 1252 (M.D. Pa. 1979) (First Amendment case); Corp. of Haverford Coll. v. Reeher, 329 F. Supp. 1196 (E.D. Pa. 1971) (First Amendment case).

94 Formulating such a test has been deemed an "impossible task." *See* Reitman v. Mulkey, 387 U.S. 369, 378 (1966).

95 *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.").

96 Evans v. Newton, 382 U.S. 296, 299 (1966).

97 *See Burton*, 365 U.S. at 721-24.

98 *Id.* at 723-24. *See also* Benner v. Oswald, 592 F.2d 174, 179 (3d Cir. 1979) (holding that state action can be found between a state and an entity when the state and the entity are "joint participants in a symbiotic relationship" or when the entity is "pervasively regulated by the state and a sufficient nexus exists between the state and the challenged activity").

99 *See Benner*, 592 F.2d at 176, 179.

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."[100] 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 revisited as facts change.

Currently, for example, when a private university disciplines a student, that discipline is deemed non-state action; consequently, a requirement for procedural due process—not to mention substantive due process—has not been found.[101] 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.[102] It is true that universities themselves sometimes violate the procedural due process rights of students and faculty, and universities receive what is, perhaps, undue deference by courts in their decision-making.[103] Still, it is often the case that public and quasi-public

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[100] Weise v. Syracuse Univ., 522 F.2d 397, 407 n.11 (2d 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.

[101] *See* Rendell-Baker v. Kohn, 457 U.S. 830, 840 (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, 750 (D.P.R. 1974) (citing Buckton v. Nat'l Collegiate Athletic Ass'n, 366 F. Supp. 1152 (D. Mass. 1973)) (holding that public funding alone was sufficient to find state action). *See also* Guillory v. Adm'rs of the Tulane Univ. of La., 306 F.2d 489, 490 (5th Cir. 1962) (affirming judgment below that "substantial state control" rendered Tulane University's policy of segregation "state action" for Fourteenth Amendment purposes).

[102] *See, e.g.*, Harvey v. Palmer Coll. of Chiropractic, 363 N.W.2d 443, 444 (Iowa Ct. App. 1984). *But see* Gorman v. St. Raphael Acad., 853 A.2d 28, 34 (R.I. 2004) (holding that contracts for private education need to be construed in a manner giving school administrators "broad discretion" to meet their educational and doctrinal responsibilities).

[103] 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, 2011), http://www.huffingtonpost.com/adam-

actors tie the hands of universities.[104] In student disciplinary matters, universities are often legally obligated to carefully orchestrate the proceedings from start to finish in a prepackaged, formulaic way.[105] In the Stanford case, it is clear that governmental policies overturned longstanding Stanford policies and caused the adverse action.[106] 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.[107] Ostensibly, federal regulation need not contravene the academic mission of a university. Such concern certainly suggests state action.[108] There is classic "entanglement" when the institution receives funding and good press, and the adminis-

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 because a similar argument, and similar challenges, confront the concept of judicial review. *See* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1358, 1391 (2006).

104 *See supra* Introduction; *see also* Equity in Athletics, Inc. v. Dept. of Educ., 639 F.3d 91, 97 (4th Cir. 2011) (discussed *infra* Part III).

105 *See* Sara Lipka, *Discipline Goes on Trial at Colleges*, THE CHRONICLE OF HIGHER ED. 1 (Mar. 27, 2009), *available at* http://chronicle.com/article/Discipline-Goes-on-Trial-at/30030. 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.

106 Marianne LeVine, *Assault Policy Under Review*, THE STANFORD DAILY (Oct. 6, 2011), 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.").

107 *See, e.g.*, Dear Colleague Letter from Kenneth L. Marcus, Deputy Assistant Sec'y for Enforcement, Office for Civil Rights, U.S. Dep't of Educ. (Aug. 4, 2004), http://www2.ed.gov/about/offices/list/ocr/responsibilities_ix_ps.html ("Specifically, this letter is to remind postsecondary institutions that the Title IX regulations require recipients to designate a Title IX coordinator . . . .").

108 *See* Weise v. Syracuse Univ., 522 F.2d 397, 407 n.11 (2d Cir. 1975). Where there is evidence that the risk of the loss of federal educational funding influences led to a decision—

trator receives a 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 personal liability as well.[109]

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, courts may even find that private third parties engaged in state action. Following the Supreme Court's decision in *Brentwood Academy v. Tennessee Secondary School Athletic Association*, in which the Court held that a Tennessee non-profit organization that governed public and private high school athletics was a state actor having "pervasive entwinement to the point of largely overlapping identity,"[110] a rash of commentators noted that this decision might herald a new avenue for vindication of students' rights against third parties.[111] Indeed, third-party accreditation agencies function in a manner similar to the ED: Just as the 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.[112] Loss of accreditation is a seri-

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rather than "sound academic policy"—there is a prima facie case of financial entanglement indicating state action for § 1983 purposes. *See id.*

109 *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 701 (1978).

110 Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 303 (2001).

111 *See* Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1415, n.166 (2003) (noting that *Brentwood* is a broad reading of what constitutes state action). *See also* Emily Chang, *No State Actor Left Behind: Rethinking Section 1983 Liability in the Context of Disciplinary Alternative Schools and Beyond*, 60 BUFF. L. REV. 615, 646 (2012); Alan R. Madry, *Statewide School Athletic Associations and Constitutional Liability;* Brentwood Academy v. Tennessee Secondary School Athletic Association, 12 MARQ. SPORTS L. REV. 365, 368-69 (2001).

112 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, SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR STANDARDS REVIEW COMM., GENERAL PURPOSES AND PRACTICES; DEFINITIONS 1

ous matter, which does more than simple reputational damage.[113] To sit for the bar examination in most states, for example, one must generally have graduated from a law school accredited by the American Bar Association (ABA).[114] Furthermore, many states require membership in an "integrated" state bar association,[115] often established by statute, which itself may incorporate ABA rules in some fashion.[116] Thus, if a law school loses or is denied ABA accreditation, that law school loses most, if not all, ability to attract students.[117] Other professions have similar accreditation schemes.[118] Although these agencies are often publicly-delegated and publicly-funded,[119] the mere promulgation by state actors of standards regulating these private schools does not in itself lead courts to find those schools to be state actors for

(2011), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/jan2012/20111222_standards_chapters_1_to_7_post_nov11.authcheckdam.pdf.

113 *See* Andy Portinga, Note, *ABA Accreditation of Law Schools: An Antitrust Analysis*, 29 U. MICH. J.L. REFORM 635, 636 (1996) (noting 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 Mem'l Univ. Duncan Sch. of Law v. American Bar Ass'n, No. 3:11-CV-608, 2012 U.S. Dist. LEXIS 5546, at *56-57 (E.D. Tenn. Jan. 18, 2012) (highlighting many of the injuries causes by non-accreditation).

114 *See* NAT'L CONFERENCE OF BAR EXAM'RS & 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, Michigan, Nevada, and Tennessee allow individuals to pass their first bar examination after graduating from law schools unaccredited by the ABA, but otherwise approved by state accreditation entities.

115 *See State & Local Bar Associations,* AM. BAR ASS'N, http://www.americanbar.org/groups/bar_services/resources/state_local_bar_associations.html (last visited Jan. 4, 2013).

116 *See* Preamble From the Maine Task Force on Ethics, STATE OF ME., BD. OF OVERSEERS OF THE BAR, http://www.maine.gov/tools/whatsnew/index.php?topic=mebar_overseers_bar_rules&id=87798&v=article (last visited Jan. 4, 2013).

117 *See* George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091, 2150 (1998).

118 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* LIAISON COMM. ON MED. EDUC., STANDARDS FOR ACCREDITATION OF MED. EDUC. PROGRAMS LEADING TO THE M.D. DEGREE: FUNCTIONS AND STRUCTURE OF A MED. SCH. 20 (May 2012), *available at* http://www.lcme.org/functions.pdf.

119 *See* Michael W. Prairie & Lori A. Chamberlain, *Due Process in the Accreditation Context*, 21 J.C. & U.L. 61, 69 (1994) ("[P]ublic institutions often provide the majority of the funding for the accrediting agencies.").

§ 1983 purposes.[120] Being a government contractor does not lead inexorably to one's identification as a state actor.[121] Further demonstration of financial or other entanglement is required.[122] Still, there is no reason, in principle, that a court should not find a private university to be a state actor for the purposes of a § 1983 suit where the underlying conduct giving rise to the claim *is* governmental in nature.

However, direct constitutional suits have limitations. First, procedural due process rights are limited, especially in the private context. Second, there are strong defenses to personal liability under both § 1983[123] and *Bivens*.[124] Chief among them is the defense of "qualified immunity,"[125] which provides officials with "good faith" immunity from personal liability when actions otherwise depriving plaintiffs of civil rights were undertaken in good faith.[126] Although such a defense would shield an individual from liability, it would not defend against the underlying claim against the government. Third, state legislatures have wide latitude to limit recovery under the doctrine of sovereign immunity, governed by the Eleventh Amendment to the Constitution.[127] Sovereign immunity for states only applies to suits against state entities and officials where the suits seek to obtain monetary

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120 *See, e.g.*, Krohn v. Harvard Law Sch., 552 F.2d 21, 23-24 (1st Cir. 1977); *see also* Francis v. LeHigh Univ., No. 10-4300, 2011 U.S. Dist. LEXIS 6406, at *12-15, 17-18 (E.D. Pa. Jan. 24, 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)).

121 *See supra* Part II.

122 *See supra* Part II.

123 *See* 42 U.S.C. § 1983 (2006); Jacob E. Meyer, Note, *"Drive-by Jurisdictional Rulings": The Procedural Nature of Comprehensive-Remedial-Scheme Preclusion in § 1983 Claims*, 42 COLUM. J.L. & SOC. PROBS. 415, 421 (2009) (citing Anderson v. Creighton, 483 U.S. 635, 638 (1987); Pierson v. Ray, 386 U.S. 547, 553-54 (1967)).

124 *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 391 (1971); Alexander A. Reinert, *Measuring the Success of Bivens Litigation and its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 809, 812 (2010).

125 *See, e.g.,* Azhar Majeed, *Putting Their Money Where Their Mouth Is: The Case for Denying Qualified Immunity to University Administrators for Violating Students' Speech Rights*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 515, 519 n.9, 521-22, 564-68 (2010). Since state officials need to perform their functions without undue fear of lawsuit, when they act in "good faith"—that is, when they violate constitutional rights where those rights are not "clearly established"—they are entitled to immunity from personal liability for those constitutional violations.

126 *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("[G]overnment 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.").

127 Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238-241 (1985).

relief "paid from public funds in the state treasury . . . ."[128] Consequently, states are only liable for money damages to the extent that they affirmatively waive sovereign immunity.[129] However, because states' sovereign immunity is limited to monetary relief, it would not affect equitable judgments such as injunctions or declaratory judgments. In a related manner, state legislatures themselves grant the property interests protected by procedural due process in these contexts: no state is obliged by the Federal constitution to provide educational rights.[130]

Students and professors employ direct constitutional suits frequently in the education context.[131] What has been limited, however, is the aggressiveness of their use against third parties, partly because of litigation strategy. University liability can be found wherever there is third-party liability, and universities have the added benefit of deeper pockets. Failure to sue the ED or professional school accreditation agencies might be partly explained by this. However, because suing universities has a low success rate[132] and because universities are quite often not the driving force behind unconstitutional conduct, the practice of focusing legal action on universities should be revisited.

III. AVAILABLE ADMINISTRATIVE PROCEDURE ACT REMEDY

In addition to direct constitutional remedy, students and professors have another cause of action when their rights are violated due to third-party action. Many of the third parties who establish the rules and regulations that universities implement are themselves governmental or quasi-governmental actions that can be sued if they act con-

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128 Quern v. Jordan, 440 U.S. 332, 337 (1979) (citing Edelman v. Jordan, 415 U.S. 651, 663 (1974)).

129 *See, e.g.*, Kentucky v. Graham, 473 U.S. 159, n.14 (1985).

130 *See*, *e.g.*, San Antonio Indep. Sch. Dist. V. Rodriguez, 411 U.S. 1, 35 (1973).

131 *See, e.g.*, Hayut v. State Univ. of N.Y., 352 F.3d 733 (2d Cir. 2003) (student sued university and university employees alleging violations of her equal protection rights and Title IX under § 1983); Trejo v. Shoben, 319 F.3d 878 (7th Cir. 2003) (professor filed § 1983 suit against university alleging violations of his constitutional rights to freedom of speech and due process). 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. Cmty Sch. Dist., 393 U.S. 503 (1969) (in the First Amendment context); *see also* Goss v. Lopez, 419 U.S. 565 (1975); Brown v. Bd. of Educ., 347 U.S. 483 (1954).

132 *See* Severson v. Bd. of Trs. of Purdue Univ., 777 N.E.2d 1181, 1191-92 (Ind. Ct. App. 2002) (citing a number of decisions in the Seventh Circuit and Indiana holding that public universities are "arms of the state and, therefore, are not 'persons' under § 1983").

trary to the federal Administrative Procedure Act (APA).[133] This federal statute circumscribes the legal authority of federal agencies, and provides a private remedy for persons aggrieved by agency action.[134] Thus, where students or professors are adversely affected by decisions of the ED, they might have direct recourse through a federal court. In the Stanford case, the student suffered an injury directly attributable to the ED.[135] Consequently, at several stages in the disciplinary process, he could have challenged agency action directly in federal court under the APA. Under the APA, federal courts are empowered to "hold unlawful and set aside agency action, findings, and conclusions" found to violate certain norms of reasoned decision-making.[136] These norms are codified in the APA, and two provisions are discussed in more depth below. The first provision prohibits certain agency decisions from being made without "substantial evidence."[137] The second is a catch-all provision, prohibiting agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[138]

In discharging its mission, the ED has all the authority of a cabinet-level, executive branch agency, which falls broadly into two categories: rulemaking and adjudication.[139] Formally, the ED is involved in adjudication in three broad contexts: hearing grantee appeals,[140] hearings related to the administration of student loan providers,[141] and hearings related to civil rights statutes.[142] These adjudications all fall

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133 5 U.S.C. §§ 701-06 (2006).

134 *Id.* at §§ 500-04, 551-559, 571-84, 701-06.

135 *See supra* Introduction.

136 5 U.S.C. § 706.

137 *Id.* at § 706(2)(E).

138 *Id.* at § 706(2)(A).

139 Case law and the APA both support this broad distinction. *Compare* 5 U.S.C. § 553 (2006), *with* 5 U.S.C. § 554 (2006).

140 For example, recipients of federal student loan monies and other educational grants. *Office of Hearings and Appeals*, U.S. DEP'T OF EDUC., http://www2.ed.gov/about/offices/list/om/fs_po/om/oha.html (last modified June 16, 2011).

141 The Office of Higher Education Appeals (OHEA) hears these actions. *See, e.g.*, 20 U.S.C. §§ 1082(g)-(h), 1094(b)-(c) (2006).

142 Pursuant to 42 U.S.C. §§ 2000d, 2000e (2006), 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. *See Office of Hearings and Appeals*, U.S. DEP'T OF EDUC., http://www2.ed.gov/about/offices/list/om/fs_po/om/oha.html (last modified June 16, 2011). The ED also adjudicates disputes that arise in every agency. *See, e.g.*, Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 7701-7714 (2006), Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000d-7 (2006); Pro-

under the auspices of the Office of Hearings and Appeals (OHA), and are ultimately appealable to the Secretary and reviewable under the APA.[143] These formal adjudications do not involve students themselves. For example, if a court found that a school such as Stanford violated the DCL and was in non-compliance with Title IX, affected students would not be a party to the adjudication seeking to remove federal funding from Stanford: the proceeding would involve only the University. In the rulemaking context, the ED has been tasked with implementing a number of statutes.[144] While it has issued a few formal rules over the years,[145] it primarily regulates with informal pronouncements that skirt "notice and comment" strictures, perhaps as a result of the ponderous nature of formal rulemaking.[146] The majority of ED regulatory action includes "Dear Colleague" letters, "guidance" documents, and policy "clarifications."[147] Because 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 regula-

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gram Fraud Civil Remedies Act of 1986, 31 U.S.C. §§ 3801-12 (2006). The number of decisions made by the Secretary is actually quite low. *See List of Decisions of the Secretary*, DEP'T OF EDUC., OFFICE OF HEARINGS & APPEALS, http://www.ed-oha.org/secretaryindex.html (last updated Jan. 14, 2013).

143 *See* 20 U.S.C. §§ 1082(g)(6), (h)(2) (2006); 20 U.S.C. § 1094 (b)(1); 5 U.S.C. § 706.

144 The Assistant Secretary for Civil Rights has general authority to enforce:

> 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, The Age Discrimination Act, Title II of the Americans with Disabilities Act of 1990, as delegated to the Department by the Attorney General under Title II implementing regulation, [and] Section 9525 of the Elementary and Secondary Education Act of 1965.

U.S. Department of Education Principal Office Functional Statements: Primary Delegations of Authority, U.S. DEP'T OF EDUC. (citations omitted), http://www2.ed.gov/about/offices/list/om/fs_po/ocr/dels.html (last modified April 15, 2004).

145 *See* Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 404 (2007). 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. *Id.*

146 *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.").

147 In contrast to the twenty-nine final rules, there are hundreds of these informal actions. *See generally Reading Room*, U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, http://www2.ed.gov/about/offices/list/ocr/publications.html#General-Pubs (last modified Aug. 15, 2012); Mendelson, *supra* note 145, at 404.

tions it deems "significant guidance."[148] The ED has issued over 150 "significant guidance documents" since 1970.[149] These documents represent the policy heart of the ED and include documents on subjects as varied as the relation of the Family Educational Rights and Privacy Act to the H1N1 virus,[150] guidance on student prayer in schools,[151] and the April 4, 2011, DCL.[152] "Significant guidance documents" are not the only informal guidance that the 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.[153]

Formal, notice-and-comment rulemaking is challengeable under 5 U.S.C. § 706(2)(E): agency findings and conclusions must be supported by "substantial evidence."[154] Where an agency makes a conclusion without substantial evidence, federal courts are empowered to overturn that conclusion.[155] 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."[156] The cause of action is found

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148 *See* Office of Mgmt. & Budget, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3432 (Jan. 25, 2007), *available at* http://www.whitehouse.gov/omb/fedreg/2007/012507_good_guidance.pdf.

149 *See* List of Significant Guidance Documents, U.S. DEP'T OF EDUC., Dec. 20, 2012, http://www2.ed.gov/policy/gen/guid/significant-guidance.doc (listing 155 unique "Significant Guidance Documents" by category, with some documents falling within multiple categories).

150 U.S. DEP'T OF EDUC., FAMILY EDUCATION RIGHTS AND PRIVACY ACT (FERPA) AND H1N1 (2009), *available at* http://www2.ed.gov/policy/gen/guid/fpco/pdf/ferpa-h1n1.pdf.

151 Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools, 68 Fed. Reg. 9645 (Feb. 7, 2003), *available at* http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html.

152 *See* DCL, *supra* note 3.

153 *See, e.g.*, Letter from Linda McGovern, Dir., Chicago Office, Office for Civil Rights, U.S. Dep't of Educ., to Dr. Henry Bienen, Pres., Northwestern Univ. (Jan. 5, 2000), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/nrthwstern.html (Title IX guidance).

154 5 U.S.C. § 706 (2)(E) (2006); *see also* Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (defining evidence as "substantial evidence").

155 5 U.S.C. § 706(2) (2006).

156 *Id.* at § 553 (b)(3)(A). 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 id.* at § 553(b)(3)(B). Finally, and importantly in the ED context, § 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. *See id.* at § 553(a) (emphasis added). Thus, even major changes in substantive ED rules, provided that the rules fall into these broad exceptions, can be issued

in § 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."[157] 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."[158]

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. In effect, the student would argue that the DCL itself was a formal rules change without "substantial evidence" in support.[159] For example, the due process implications of the DCL were not considered, and affected groups were not consulted: this is not to say that the ED could not have determined that the obligation to prevent a hostile environment for Title IX purposes was more important than due process; rather, the record shows that the ED never even *considered* due process, something a reasonable policymaker would have done. Although 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 the ED to show that it considered due process while developing the new rules. If the 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 § 706(2)(A): Courts shall "hold unlawful and set aside

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without notice-and-comment rulemaking. *See id.* 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. *See* Recommendations of the Administrative Conference Regarding Administrative Practice and Procedure, 57 Fed. Reg. 30,101, 30,102 (July 8, 1992) (to be codified at 1 C.F.R. pt. 305), *available at* http://www.acus.gov/best-practices/wp-content/uploads/2011/09/92-1.pdf. The 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.

157 5 U.S.C. § 702 (2006).

158 Dickinson v. Zurko, 527 U.S. 160, 162 (1999) (internal citations omitted).

159 *See, e.g.*, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971); Consolidated Edison Co. of N.Y. v. NLRB, 305 U.S. 197, 217 (1938); Davis v. S & S Builders, LLC, 188 P.3d 554, 559 (Wyo. 2008); *see also* Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc. 419 U.S. 281, 285-86 (1974).

agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[160] Challenges to informal rulemakings represent the bulk of challenges under this section.[161] 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 the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.[162]

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 the 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, § 706(2)(A) would permit review of federal agency rules that violated the constitution.[163] For example, under the APA, the Stanford student would be able to challenge the 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.[164] This avenue for constitutional rights vindication would be independent of a *Bivens* action.

When the Department of Education Office for Civil Rights (OCR) issues guidance documents in response to controversies arising in specific cases, it is difficult to determine whether the OCR is engaged in rulemaking or adjudication. This question is particularly important, because adversely affected parties, such as students and professors accused of misconduct, have the ability to challenge the agency in court in certain circumstances. Such parties can sue, for example, when OCR investigates a complaint and issues a Guidance

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160 5 U.S.C. § 706(2)(A) (2006).

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

162 Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

163 *See* 5 U.S.C. § 706(2)(B) (2006).

164 *See, e.g.*, Andrew Kloster, *The Violence Against Women Act and Double Jeopardy in Higher Education*, 65 STAN. L. REV. ONLINE 52, 53-56 (2012).

Document, where the document has a de facto binding effect.[165] In such a circumstance the ED adjudication is reviewable in district court to the extent that it violates either § 706(2)(A) or § 554(a).[166]

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).[167] In *Allentown*, the Court overturned a National Labor Relations Board informal adjudication that applied a higher standard of proof than formally announced.[168] 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."[169] This is quite similar to the Stanford adoption of a lower standard of proof in the midst of a campus adjudication.[170] Stanford's official standard of proof at the time of the proceedings was "beyond a reasonable doubt" and longstanding ED policy had deferred to universities in choosing their own standards.[171] Thus, insofar as 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*, be a core case of arbitrary and capricious agency adjudication, with the university adjudicating on behalf of the ED. Furthermore, the ED's assertion that the DCL simply provides additional examples and "clarifies" existing precedent and thus non-adjudicatory is not conclu-

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165 *See* ROBERT A. ANTHONY, CATO INST., UNLEGISLATED COMPULSION: HOW FEDERAL AGENCY GUIDELINES THREATEN YOUR LIBERTY 1 (1998), *available at* http://www.cato.org/sites/cato.org/files/pubs/pdf/pa312.pdf (explaining that although agency guidance documents do not have a legal binding effect, they have a practical binding effect "whenever the agencies use them to establish criteria that affect the rights and obligations of private persons").

166 *See* 5 U.S.C. §§ 554(a) (2006); *id.* at § 702 ("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.").

167 Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 374, 376-77 (1998) (citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 52 (1983)).

168 *Id.* at 373-74, 376, 380.

169 *Id.* at 374.

170 *See supra* Introduction.

171 *See supra* Introduction.

sive.[172] Reviewing courts make their own determination whether agency action creates new legal obligations or not.[173]

One last problem is standing. Because federal courts are constitutionally bound to adjudicate cases in limited contexts,[174] courts ensure that litigants meet three requirements: (1) plaintiffs challenging agency actions must have suffered an injury, (2) the injury must have been caused by the challenged action, and (3) it must be likely that the injury can be "redressed by a favorable decision."[175] Although it is beyond the scope of this Article 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 Education*, the Fourth Circuit Court of Appeals found that a non-profit organization had standing to challenge a new ED rule implementing Title IX.[176] 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.[177]

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 the OCR to adjudicate disciplinary disputes, insofar as that is precisely what OCR is doing with its "Guidance Documents," the ED opens itself up to challenge under the APA.

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172 *See* DCL, *supra* note 3, at 1 n.1 ("This letter does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations.").

173 *See id.*; *see also* Am. Mining Congress v. Mine Safety & Health Admin., 995 F.2d 1106, 1112-13 (D.C. Cir. 1993) ("An interpretive rule may be sufficiently within the language of a legislative rule to be a genuine interpretation and not an amendment, while at the same time being an incorrect interpretation of the agency's statutory authority.").

174 *See* U.S. CONST. art. III, § 2, cl. 1.

175 *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976)).

176 Equity in Athletics v. Dep't of Educ., 639 F.3d 91, 95, 99, 101 (4th Cir. 2011).

177 *Id.* at 98, 101 ("JMU announced that it was relying on the proportionality prong of the Three-Part Test in making the cuts; accordingly, a declaration invalidating the Three-Part Test would likely significantly affect JMU's decision.").

IV. RECOMMENDATIONS

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 remedies. 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, third parties induce universities to breach contracts. In many jurisdictions, this traditionally left students and professors without a remedy. Rather than directing all criticism at universities that—justifiably or not—pin the blame for violations of due process on third party state actors, students should consider civil actions against those third parties themselves.

There are adequate causes of action for direct constitutional suits under *Bivens* and § 1983.[178] 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 § 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, although 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

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[178] *See* 42 U.S.C. § 1983 (2006); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

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 the ED itself, suits under the APA are also available, particularly substantial evidence review of APA § 706(2)(E) in federal district court.[179]

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.[180] Third, shifting litigation risk to the 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.

CONCLUSION

Although 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 the 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 the ED and against Stanford itself. Had Stanford applied its "beyond a reasonable doubt" standard, it could have limited its exposure to a contract and constitutional lawsuit by

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179 5 U.S.C. § 706(2)(E) (2006).

180 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.

the student in question. This is not to downplay the risks involved: fighting back 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 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.