

# Privatization and State Action: Do Campus Sexual Assault Hearings Violate Due Process?

Jed Rubinfeld\*

It's an absurd and astonishing fact about current constitutional law that it still hasn't answered, and can't answer, the most basic questions about privatization.

We know the ratio between American soldiers and American private military contractors in the Iraq war: one to one.<sup>1</sup> We know the Central Intelligence Agency (CIA) used such contractors to interrogate—and in some cases apparently to torture—captives.<sup>2</sup> But thirteen years after Abu Ghraib, we still don't know whether the contractors working there<sup>3</sup> were “state actors.”<sup>4</sup>

If a city privatized its entire police force, replacing it with private security contractors, existing Supreme Court case law suggests that the private officers would *not* be state actors, meaning they could arrest and

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\*Robert R. Slaughter Professor, Yale Law School. The following extraordinary students provided immeasurable assistance: Matt Chou, Greg Cui, Meredith Foster, Heath Mayo, Joey Meyer, Yishai Schwartz, and Sarah Weiner. I owe special debts to Professors Jeannie Suk, Kate Stith, Reva Siegel, and Gideon Yaffe, as well as the terrific editors of the *Texas Law Review*.

1. CONG. BUDGET OFFICE, PUBL'N NO. 3053, CONTRACTORS' SUPPORT OF U.S. OPERATIONS IN IRAQ 8 (2008), <https://www.cbo.gov/sites/default/files/110th-congress-2007-2008/reports/08-12-iraqcontractors.pdf> [<https://perma.cc/5G3Q-BPK6>].

2. *See, e.g.*, S. SELECT COMM. ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION PROGRAM, S. REP. NO. 113-288, at 84–85 (2014) (detailing certain enhanced interrogation techniques used by the CIA and its contractors on detainees); GEORGE R. FAY, U.S. DEP'T OF THE ARMY, AR 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 47–48 (2004) (observing that “[c]ontracting-related issues contributed to the problems at Abu Ghraib prison”); Simon Chesterman, *We Can't Spy . . . If We Can't Buy!': The Privatization of Intelligence and the Limits of Outsourcing 'Inherently Governmental Functions'*, 19 EUR. J. INT'L L. 1055, 1062–64 (2008) (observing many allegations of abuse by contractors).

3. *See* FAY, *supra* note 2, at 47–48 (“Several of the alleged perpetrators of the abuse of detainees [at Abu Ghraib] were employees of government contractors.”).

4. In 2009, a district court in Virginia stated that contract interrogators at Abu Ghraib were “private actors.” *Al Shimari v. CACI Premier Tech., Inc.*, 657 F. Supp. 2d 700, 704 (E.D. Va. 2009). Six years later, the same court found that the military had exercised “plenary” and “direct” control over the contractors—but therefore dismissed the case on political question grounds. *Shimari v. CACI Premier Tech., Inc.*, 119 F. Supp. 3d 434, 443 (E.D. Va. 2015); *see* Laura A. Dickinson, *The State Action Doctrine in International Law*, in 56 STUDIES IN LAW, POLITICS, AND SOCIETY, SPECIAL ISSUE: HUMAN RIGHTS: NEW POSSIBILITIES/NEW PROBLEMS 213, 219 (2011) (concluding that it is unclear whether private military contractors are state actors under current U.S. constitutional law).

search with constitutional abandon.<sup>5</sup> I'm not saying courts would so hold. I assume they wouldn't. But current state action doctrine actually points to that Constitution-gutting conclusion.<sup>6</sup>

The privatization black hole at the heart of constitutional law is well known.<sup>7</sup> “There is no accepted constitutional theory,” as Professor Kimberly Brown puts it, “that prohibits Congress or the President from handing off significant swaths of discretionary governmental power to wholly private entities that operate beyond the purview of the Constitution.”<sup>8</sup> But the real-world effects of this black hole are often still missed.

Beginning in 2011, the federal government induced private colleges and universities all over the country to investigate, prosecute, adjudicate, and punish alleged law violations under Title IX of the Educational Amendments of 1972, conducting secretive trials according to specified procedures, including a government-dictated standard of proof.<sup>9</sup> In other words, the government induced private institutions to do law enforcement on its behalf, a result achieved not through contract, but by threatening to strip those institutions of billions of dollars in federal funding.<sup>10</sup> This too was a kind of privatization.<sup>11</sup>

The existence of state action in the new campus sexual assault trials should be obvious given that the government not only compelled schools to conduct them but mandated certain procedures for them.<sup>12</sup> The question is whether these trials have been violating due process. But courts have refused

5. See *infra* Section II(A).

6. See *infra* Section II(A); Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 929–31 (2007) (explaining that the state action doctrine does not categorize private security guards as government actors); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1253–62 (1999) (summarizing cases holding that private police are not performing a “public function”).

7. See, e.g., Daphne Barak-Erez, *A State Action Doctrine for an Age of Privatization*, 45 SYRACUSE L. REV. 1169, 1183 (1995) (“The probable consequences of the current doctrine are that the policies and decisions of enterprises which will be privatized in the future are not likely to be considered as state actions.”); Kimberly N. Brown, *Government by Contract and the Structural Constitution*, 87 NOTRE DAME L. REV. 491, 496 (2011) (observing that “the Supreme Court . . . has failed to develop a doctrinal framework for meaningfully scrutinizing transfers of governmental power to private parties”); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1373 (2003) (“The inadequacies of current state action doctrine mean that private exercises of government power are largely immune from constitutional scrutiny, and therefore expanding privatization poses a serious threat to the principle of constitutionally accountable government.”).

8. Brown, *supra* note 7, at 496.

9. See *infra* Sections I(A), I(B).

10. See *infra* Sections I(B), II(B).

11. See Metzger, *supra* note 7, at 1377–79 (discussing the “definitional challenge[s]” posed by the term *privatization* and pointing out that in “some privatization contexts, the government does not provide direct funding but nonetheless uses private entities to achieve its programmatic goals—for instance, by . . . relying on private actors for the content and enforcement of government regulations”).

12. See *infra* Section I(B).

to answer that question on the ground that private colleges and universities are not state actors—and therefore due process doesn't apply.<sup>13</sup>

This result is not entirely surprising. If courts *did* find state action, every Title IX sexual assault hearing at every private school in the country could have been affected.<sup>14</sup> Findings of guilt might have to be revisited; expulsions might have to be vacated. District judges have excellent reasons to adhere to the no-state-action result.

Nevertheless, that result is wrong—and plainly so.

This conclusion will be opposed by Title IX activists, but the truth is it should be welcome to everyone who, like the author of this Article, backs stronger policies for, and punishments of, campus sexual assault. There's a reason the Constitution requires due process. No one is served by faulty, unreliable adjudication, and the campus trials conducted all over the country have been so unreliable—in some cases so incompetent, so Kafka-esque—they would almost be risible, if their effects on the lives of the people they touch, both alleged victims and alleged perpetrators alike, weren't as potentially devastating as they are.

Part I summarizes the 2011 Department of Education “Dear Colleague” letter that brought about the new Title IX campus sexual assault trials. Part II shows why, under well-established state action doctrine, due process applies even at private schools to at least some parts of these Title IX trials. But Part II leaves important questions open—questions that can't be answered without confronting the more general problem of privatization in constitutional law. Part III derives principles that would solve that problem, and Part IV applies these principles, identifying the most serious potential due process violations in post-2011 campus sexual assault hearings.<sup>15</sup>

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13. See *infra* Section I(C).

14. See *infra* Section IV(B).

15. On September 22, 2017, as this Article was being edited for publication, the Department of Education announced that it was “withdrawing” the controversial 2011 Dear Colleague letter. Office for Civil Rights, U.S. Dep't of Educ., Letter Withdrawing 2011 Dear Colleague Letter (Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf> [https://perma.cc/NT7N-28Z4]. Secretary of Education Betsy DeVos, emphasizing the due process failings of the current system of campus sexual assault trials, stated that the Department would “launch a transparent notice-and-comment process” aimed at replacing the provisions of the Dear Colleague letter with new, as-yet-unspecified regulations. Betsy DeVos, *Secretary DeVos Prepared Remarks on Title IX Enforcement*, U.S. DEP'T OF EDUC. (Sept. 7, 2017), <https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement> [https://perma.cc/3VLC-CAP7]; *DeVos Says She'll Rescind Obama's Title IX Sexual Assault Guidance*, CBS NEWS (Sept. 7, 2017), <https://www.cbsnews.com/news/devos-to-rescind-obama-era-title-ix-order-on-withholding-school-funds-for-assault-inaction> [https://perma.cc/TE84-J7B7]. The withdrawal of the 2011 Dear Colleague letter does not remedy any due process violations committed by schools in sexual assault trials that have taken place, or may still take place, under the flawed procedures imposed on schools as a result of that letter. The author of this Article hopes that the issues raised here will contribute to the debate over any new regulations that the Department of Education may adopt.

## I. The Dear Colleague Letter

### A. *An Illustrative Case*

It will be helpful to give readers a sense of what campus Title IX adjudications can look like in the real world.

The following facts are from *Doe v. Brandeis University*,<sup>16</sup> decided in March of 2016. In *Brandeis*,<sup>17</sup> a male student had been found guilty of repeated acts of “sexual violence” against another male student during their twenty-one-month relationship,<sup>18</sup> including multiple incidents in which the plaintiff “would occasionally wake [the complainant] up by kissing him,” as well as an attempt to perform oral sex at a time when the complainant “did not want it.”<sup>19</sup>

The plaintiff in *Brandeis* had not been expelled or suspended, but a permanent sex offense notation had been entered onto his academic record, which, he claimed, would adversely affect his future educational and employment opportunities.<sup>20</sup> According to the plaintiff, confidentiality had also been breached, and other students had referred to him “as an ‘attacker’ and a ‘rapist’ in social media postings and in comments to national and local media.”<sup>21</sup>

What procedures had Brandeis followed to judge the plaintiff guilty of sexual violence? In the words of the district court, the university had used:

essentially a secret and inquisitorial process. Among other things, under the new procedure,

- the accused was not entitled to know the details of the charges;
- the accused was not entitled to see the evidence;
- the accused was not entitled to counsel;
- the accused was not entitled to confront and cross-examine the accuser;
- the accused was not entitled to cross-examine any other witnesses;
- the Special Examiner prepared a detailed report, which the accused was not permitted to see until the entire process had concluded; and

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16. 177 F. Supp. 3d 561 (D. Mass. 2016).

17. I use defendant names to identify cases because of the multiplicity of “Doe” plaintiffs.

18. *Brandeis*, 177 F. Supp. 3d at 567, 570–71.

19. *Id.* at 571.

20. *Id.* at 571–72.

21. *Id.* at 572.

- the Special Examiner’s decision as to the “responsibility” (that is, guilt) of the accused was essentially final, with limited appellate review—among other things, the decision could not be overturned on the ground that it was incorrect, unfair, arbitrary, or unsupported by the evidence.<sup>22</sup>

This inquisitorial procedure was new to Brandeis. The school had adopted it in 2012, after receiving a communication from the Department of Education—the Dear Colleague letter referred to above.<sup>23</sup> The new process applied only to sex offenses.<sup>24</sup> For other alleged offenses, Brandeis still provided students with notice and a hearing, as it used to.<sup>25</sup>

The “Special Examiner” mentioned by the judge was the individual hired by Brandeis to investigate the complainant’s allegations: “That same person was given complete authority to decide whether the accused was ‘responsible’ for the alleged violations; in other words, the Special Examiner was simultaneously the investigator, the prosecutor, and the judge who determined guilt.”<sup>26</sup> To reach the conclusion that kissing-while-asleep constituted sexual violence, the Special Examiner “use[d] the definition of sexual violence provided by the U.S. Department of Education, Office for Civil Rights in its April 4, 2011 Dear Colleague letter.”<sup>27</sup>

Many schools, after receiving the Dear Colleague letter, adopted similar inquisitorial processes—approvingly referred to by a White House task force in 2014 as the “innovative” “‘single investigator’ model,” which can “bolster trust in the process.”<sup>28</sup> Moreover, kissing a sleeping longtime partner would meet the new affirmative-consent definitions of sexual assault now in place at schools all over the country—sometimes forced on them by state statute.<sup>29</sup>

22. *Id.* at 570.

23. *Id.* at 575, 577–78.

24. *Id.* at 577.

25. *Id.*

26. *Id.* at 579.

27. *Id.* at 588, 591 (quoting the Special Examiner’s Report).

28. WHITE HOUSE, NOT ALONE: THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT 14 (2014) [hereinafter NOT ALONE: THE FIRST REPORT], [http://www.whitehouse.gov/sites/default/files/docs/report\\_0.pdf](http://www.whitehouse.gov/sites/default/files/docs/report_0.pdf) [<https://perma.cc/T8HX-Y6HY>]; see also, e.g., Prasad v. Cornell Univ., No. 5:15-cv-322, 2016 WL 3212079, at \*10–12, \*22–23 (N.D.N.Y. Feb. 24, 2016) (describing the “investigator model” procedure used at Cornell); Justin Dillon & Matt Kaiser, *Why It’s Unfair for Colleges to Use Outside Investigators in Rape Cases*, L.A. TIMES (Sept. 16, 2015), <http://www.latimes.com/opinion/op-ed/la-oe-0916-dillon-kaiser-campus-sex-assault-javert-20150916-story.html> [<http://perma.cc/JLL7-BSYF>] (“[A] growing number of schools, including Harvard, Dartmouth, the University of Michigan and Boston College, are turning to the ‘single investigator’ model . . .”).

29. See, e.g., CAL. EDUC. CODE § 67386(a)(4)(A) (West 2017) (requiring schools, as a funding condition, in their definition of sexual assault, to provide that a person’s belief that the other party has consented to any “sexual activity” is invalid if the “complainant was asleep”); Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1386

Nevertheless, the *Brandeis* facts are not offered as typical.<sup>30</sup> *Brandeis* simply illustrates what can happen when the federal government threatens schools with defunding unless they adjudicate all sexual assault allegations, induces them to define sexual assault broadly, pressures them to take strong action in such cases, tells them that Title IX does not require a hearing, and instructs them that they need not honor due process for the accused.<sup>31</sup>

The *Brandeis* court refused to dismiss plaintiff's suit, finding that plaintiff might succeed on a variety of contract and state law claims. But as to the most palpable violation—the constitutional due process violation—the court observed that due process applies only to state actors, and “*Brandeis*, of course, is not a governmental entity, or even a public university.”<sup>32</sup>

### B. *The Letter*

On April 4, 2011, the United States Department of Education's Office for Civil Rights (OCR) sent a nineteen-page letter to American colleges and universities.<sup>33</sup> Opening with the government-standard but peculiar salutation, “Dear Colleague”—as if the sender were a fellow academic, or, since that was not so, as if academics were fellow federal administrative agents—the letter set forth a new interpretation of what Title IX requires with respect to allegations of sexual assault on campus.<sup>34</sup>

By its terms, Title IX prohibits sexual discrimination at schools receiving federal funds.<sup>35</sup> By judicial interpretation, it prohibits “sexual harassment” that creates a “hostile environment” significantly interfering with educational opportunities.<sup>36</sup> As to allegations of sexual assault, however, Title IX had previously been interpreted *not* to require schools to conduct their own internal adjudications. In 2005, OCR expressly stated that a school “was under no obligation to conduct an independent investigation” in cases

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(2013) (showing how kissing a sleeping partner would count as sexual assault under Yale's new sex code).

30. Schools vary considerably in their Title IX adjudication processes. *See infra* Section IV(B)(2).

31. *See infra* Section (I)(B).

32. *Brandeis*, 177 F. Supp. 3d at 572.

33. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., DEAR COLLEAGUE: SEXUAL VIOLENCE 1 (Apr. 4, 2011) [hereinafter DEAR COLLEAGUE LETTER], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/LA6D-KHYG>].

34. *See id.* at 1–3 (explaining “specific Title IX requirements applicable to sexual violence” and providing “guidance and practical examples”).

35. Title IX, Education Amendments of 1972 § 901, 20 U.S.C. § 1681(a) (2012).

36. *See, e.g.,* *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 65 (1st Cir. 2002); *see also* *Brown v. Hot, Sexy & Safer Prods.*, 68 F.3d 525, 540 (1st Cir. 1995) (applying to a Title IX case the hostile environment concept from Title VII case law).

involving “a possible violation of the penal law, the determination of which is the exclusive province of the police and the office of the district attorney.”<sup>37</sup>

Whether academic institutions should hold trials for serious alleged student crimes, without involving law enforcement, is a substantial question. If an apparent murder took place at a fraternity house, it would be extremely rare for a school to conduct its own murder trial and unheard-of to fail to bring in the police.<sup>38</sup> Rape, however, might be thought to require very different policies because of victims’ reluctance to report the crime.<sup>39</sup> Citing this underreporting problem, the Dear Colleague letter reversed prior agency interpretations of Title IX—even though the letter purported only to be restating, not changing, the law—and directed schools to investigate and adjudicate every case of alleged sexual violence.<sup>40</sup>

The legal theory set out by the Dear Colleague letter is simple. “Sexual violence is a form of sexual harassment prohibited by Title IX,”<sup>41</sup> the letter reasons, and a “single instance” of student-on-student sexual violence can be sufficient to “create a hostile environment.”<sup>42</sup> The letter went on to detail institutional, substantive, and procedural requirements for receiving, charging, investigating, and adjudicating sexual assault allegations.<sup>43</sup> Schools

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37. Letter from John F. Carroll, Compliance Team Leader, Region II, Office for Civil Rights, U.S. Dep’t of Educ., to Muriel A. Howard, President, Buffalo State Coll., State Univ. of N.Y., Re: Case No. 02-05-2008 (Aug. 30, 2005) (on file with author); *see also* Jacob E. Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 901 (2016) (citing this OCR letter).

38. *See, e.g.*, Kathryn Andreoli, *Clemson Student Charged with Attempted Murder After Stabbing at Party*, WYFF 4 (Apr. 12, 2016), <http://www.wyff4.com/article/clemson-student-charged-with-attempted-murder-after-stabbing-at-party/7021329> [<http://perma.cc/7S3P-SJB6>] (recounting police involvement in the investigation of an on-campus stabbing). Of course, schools can also discipline students in such cases. *See* Press Release, Mitchel B. Wallerstein, President, Baruch Coll., Baruch Response to Criminal Charges in Pi Delta Psi Hazing Investigation (Sept. 15, 2015), [https://www.baruch.cuny.edu/president/messages/September\\_15\\_2015.htm](https://www.baruch.cuny.edu/president/messages/September_15_2015.htm) [<https://perma.cc/577B-WMCC>] (stating that Baruch College had initiated disciplinary proceedings against students involved in a fraternity death). Note, however, that the disciplinary charges brought by Baruch were possibly for hazing, not homicide, and that the police were actively pursuing a murder investigation. *Id.*

39. *See* CHRISTOPHER P. KREBS ET AL., NAT’L INST. OF JUSTICE, *THE CAMPUS SEXUAL ASSAULT (CSA) STUDY* xvii (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> [<https://perma.cc/8CGW-434B>] (stating that only 13% of claimed campus sexual assault victims said they had reported the incident to a law enforcement agency); *see also* Eliza Gray, *Why Victims of Rape in College Don’t Report to the Police*, TIME (June 23, 2014), <http://time.com/2905637/campus-rape-assault-prosecution/> [<https://perma.cc/PVE7-K6DF>] (“For [victim] advocates, doing right by the victim often means respecting her or his wishes not to report the crime to the police and even telling the victim about the possible downsides of the criminal justice system . . .”).

40. *See* DEAR COLLEAGUE LETTER, *supra* note 33, at 8–12 (explaining the grievance procedures required for conformity with OCR guidance).

41. *Id.* at 3.

42. *Id.*

43. *Id.* at 8–12.

that did not comply would be subject to monetary penalties, including the loss of federal funding.<sup>44</sup>

According to the Dear Colleague letter, as well as later statements and directives issued by the government, schools were:

- (i) required to investigate and adjudicate campus sexual assault allegations regardless of whether the complainant reported his or her allegations to the police;<sup>45</sup>
- (ii) required to establish a coordinated and centralized investigative and prosecutorial process overseen by a Title IX “coordinator”;<sup>46</sup>
- (iii) required to protect the anonymity of complainants if the student making the allegations so requested;<sup>47</sup>
- (iv) required to investigate and adjudicate in all cases where the school knew or had reason to know of a “possible” incident of sexual assault, regardless of whether the alleged victim had filed a complaint;<sup>48</sup>
- (v) required to investigate and adjudicate student-on-student claims of sexual assault regardless of whether the assault allegedly occurred on campus or off;<sup>49</sup>
- (vi) required to apply a preponderance of the evidence standard in all such cases;<sup>50</sup>

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44. *Id.* at 16.

45. *See id.* at 10 (“[A] criminal investigation into allegations of sexual violence does not relieve the school of its duty under Title IX to resolve complaints promptly and equitably.”).

46. *See id.* at 7 (“The coordinator’s responsibilities include overseeing all Title IX complaints and identifying and addressing any patterns or systemic problems that arise during the review of such complaints.”).

47. *Id.* at 5 (“If the complainant requests confidentiality or asks that the complaint not be pursued, the school should take all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality or request not to pursue an investigation.”). How schools are supposed to “take all reasonable steps to investigate . . . consistent with . . . [a] request not to pursue an investigation” is not explained. *Id.*

48. *Id.* at 4 (“Regardless of whether a harassed student, his or her parent, or a third party files a complaint under the school’s grievance procedures or otherwise requests action on the student’s behalf, a school that knows, or reasonably should know, about possible harassment must promptly investigate to determine what occurred . . .”).

49. *Id.* (“If a student files a complaint with the school, regardless of where the conduct occurred, the school must process the complaint in accordance with its established procedures.”).

50. *Id.* at 11 (“[I]n order for a school’s grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard (*i.e.*, it is more likely than not that sexual harassment or violence occurred).”).

- (vii) required to revise their disciplinary codes to reflect the OCR's interpretation of Title IX requirements, including prohibiting all "unwelcome conduct of a sexual nature";<sup>51</sup>
- (viii) instructed that sexual assault includes all unconsented-to sexual activity;<sup>52</sup>
- (ix) warned not to permit cross-examination of the complainant;<sup>53</sup> and
- (x) warned that they must at least consider expulsion of students found to have committed sexual misconduct and that they can be placed under investigation if they fail to suspend or expel such students.<sup>54</sup>

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51. *Id.* at 6 (requiring recipients of the Dear Colleague letter to examine "current policies and procedures on sexual harassment and sexual violence" and to conform those policies to the requirements of the letter); *id.* at 3 (defining "sexual harassment" as "unwelcome conduct of a sexual nature"). The OCR has explicitly instructed schools that they must prohibit all such conduct, not merely harassment sufficient to create a hostile environment (which is necessary to violate Title IX). See Letter from Anurima Bhargava, Chief, Civil Rights Div., Educ. Opportunities Section, U.S. Dep't of Justice, & Gary Jackson, Reg'l Dir., Office of Civil Rights, Seattle Office, U.S. Dep't of Educ., to Royce Engstrom, President, Univ. of Mont., & Lucy France, Univ. Counsel, Univ. of Mont. 8 (May 9, 2013), <http://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf> [<https://perma.cc/9XVN-6J6X>] ("While [the University of Montana's definition of sexual harassment] is consistent with a hostile educational environment created by sexual harassment, sexual harassment should be more broadly defined as 'any unwelcome conduct of a sexual nature.'").

52. The definitions of sex offenses imposed by the federal government on schools are complex and various. For the most careful discussion, see Gersen & Suk, *supra* note 37, at 892–95. The Department of Education has defined sexual assault to include penetration or any other "sexual act" "without the consent of the victim," "including instances where the victim is incapable of giving consent." *Id.* at 893 (quoting federal regulations). It's a short step from this definition of sexual assault to the conclusion that kissing one's sleeping partner is sexual assault.

53. See OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF JUSTICE, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 31 (Apr. 29, 2014) [hereinafter QUESTIONS AND ANSWERS ON TITLE IX], <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<https://perma.cc/YWT3-HA7C>] (discouraging a school from "allowing the parties to personally question or cross-examine each other"); NOT ALONE: THE FIRST REPORT, *supra* note 28, at 19 ("[T]he parties should not be allowed to personally cross-examine each other.").

54. See Letter from Alice B. Wender, Reg'l Office Dir., Office for Civil Rights, U.S. Dep't Educ., to Teresa A. Sullivan, President, Univ. of Va. 21 (Sept. 21, 2015), <http://www2.ed.gov/documents/press-releases/university-virginia-letter.pdf> [<https://perma.cc/F27S-CD6M>] (noting that UVA's refusal to "consider expulsion as a possible sanction where a finding of sexual misconduct is based on a preponderance of evidence standard or even when there is no question as to the accused student's culpability because he or she has admitted to the conduct," provided "an additional basis for the existence of a hostile environment"); Jake New, *Expulsion Presumed*, INSIDE HIGHER ED (June 27, 2014), <https://www.insidehighered.com/news/2014/06/27/should-expulsion-be-default-discipline-policy-students-accused-sexual-assault> [<https://perma.cc/DAZ5-SUUK>] ("Several of the colleges currently under investigation by the Department of Education's Office for Civil Rights for Title IX violations are on that list because they allowed accused students to remain on campus with their alleged victims.").

With respect to due process, the Dear Colleague letter says that “public” schools (not private ones) “must provide due process to the alleged perpetrator.”<sup>55</sup> However, “schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict . . . Title IX protections for the complainant.”<sup>56</sup>

The latter sentence is troubling. Given the Constitution’s priority over statutory law, one might have expected the opposite admonition: “Schools should ensure that steps taken to accord Title IX protections for the complainant do not restrict the due process rights of the accused.” By reversing this formulation, the Dear Colleague letter went beyond telling private schools they weren’t obliged to respect due process; it warned them that trying to honor due process might violate Title IX.

In a follow-up communication, OCR emphasized that Title IX does not even “require a hearing.”<sup>57</sup> Thus, private schools that choose to hold hearings and vindicate traditional due process values do so at their peril, and it’s no surprise that some universities, like Brandeis, have responded by adopting the hearing-less single investigator model described above.

The amounts of money potentially involved in the threatened defunding deserve emphasis. The federal government spent an estimated \$75.6 billion on major higher education programs in 2013, including Pell Grants, research grants, and other appropriations.<sup>58</sup> Colleges that don’t comply with OCR directives risk their *entire* slice of this amount.<sup>59</sup> That can translate to

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55. DEAR COLLEAGUE LETTER, *supra* note 33, at 12. The letter also says that “state-supported schools” must protect due process, but “state-supported” does not refer to private colleges or universities. *Id.*; *see, e.g., Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 462–63 (S.D.N.Y. 2015) (quoting the letter and rejecting a student’s due process claim against a private college).

56. DEAR COLLEAGUE LETTER, *supra* note 33, at 12.

57. QUESTIONS AND ANSWERS ON TITLE IX, *supra* note 53, at 25.

58. *See* PEW CHARITABLE TRS., FEDERAL AND STATE FUNDING OF HIGHER EDUCATION: A CHANGING LANDSCAPE 3 (2015), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/06/federal-and-state-funding-of-higher-education> [<https://perma.cc/6V6K-QHNW>].

59. DOE implied that noncompliance with OCR directives threatened *all* of a school’s federal funding. *See, e.g.,* Press Release, U.S. Dep’t of Educ. Press Office, U.S. Department of Education Finds Tufts University in Massachusetts in Violation of Title IX for Its Handling of Sexual Assault and Harassment Complaints (Apr. 28, 2014) [hereinafter U.S. Dep’t of Educ.], <http://www.ed.gov/news/press-releases/us-department-education-finds-tufts-university-massachusetts-violation-title-ix-its-handling-sexual-assault-and-harassment-complaints> [<https://perma.cc/TXM6-SZLT>] (threatening to “move to initiate proceedings to terminate federal funding” of an allegedly noncompliant school). DOE’s former Assistant Secretary for Civil Rights Catherine Lhamon made public statements suggesting that OCR could bring about a total termination of a school’s federal funds. *See, e.g.,* Tyler Kingkade, *Senators Eye New Penalties for Colleges Mishandling Sexual Assault Cases*, HUFFINGTON POST (June 27, 2014), [http://www.huffingtonpost.com/2014/06/27/colleges-mishandling-sexual-assault-penalties\\_n\\_5535458.html](http://www.huffingtonpost.com/2014/06/27/colleges-mishandling-sexual-assault-penalties_n_5535458.html) [<https://perma.cc/CE3S-L4AV>] (reporting on a Senate hearing at which several Senators described the possibility that universities could be “cut off from all federal funding” by OCR as a “nuclear option,” to which Lhamon responded by calling it a “good nuclear option”). Nonetheless, it wasn’t clear that OCR or DOE could have achieved this result. Title IX defunding

hundreds of millions of dollars per school, representing in some cases 15%–20% of a school’s overall operating revenue.<sup>60</sup>

Was the defunding threat serious? The government certainly tried to make schools believe so. Since 2011, over 200 schools have been placed under formal investigation by the Department of Education<sup>61</sup> and warned that they could “lose federal funding” if they fail to punish sexual assault assiduously or to comply with OCR directives.<sup>62</sup> In 2014, the head of OCR, Catherine Lhamon, stated she had personally threatened four schools in the last ten months with termination of federal funding.<sup>63</sup> “Do not think it’s an empty threat,” she said.<sup>64</sup>

can apply to all federal funds, but each agency is responsible for its own termination procedures. See 20 U.S.C. § 1682 (2012) (authorizing federal departments and agencies to effect compliance by terminating or refusing assistance but limiting termination or refusal to particular programs or parts of programs in which noncompliance is found). It would seem, then, that DOE could terminate only DOE-administered funds such as Pell Grants—which, however, at over \$30 billion, made up more than 40% of all 2013 federal higher educational funding. See PEW CHARITABLE TRS., *supra* note 58, at 3 fig. 2. But other federal agencies have announced that they intend to “work with” DOE to “terminate funding to any institution found to be in noncompliance with Title IX . . . .” Press Release, Nat’l Sci. Found., The National Science Foundation (NSF) Will Not Tolerate Sexual Harassment at Grantee Institutions (Jan. 25, 2016), [http://www.nsf.gov/news/news\\_summ.jsp?cntn\\_id=137466](http://www.nsf.gov/news/news_summ.jsp?cntn_id=137466) [<https://perma.cc/CZT9-MAFV>]; see also Press Release, Nat’l Aeronautics and Space Admin., NASA Administrator Communicates Harassment Policies to Grantees (Jan. 15, 2016), <https://www.nasa.gov/press-release/nasa-administrator-communicates-harassment-policies-to-grantees> [<https://perma.cc/RE3D-TSFX>] (stating that NASA will “work closely” with OCR to ensure that no funds are given to entities violating Title IX). Hence, a DOE or OCR finding of a university-wide Title IX violation could in theory result in termination of most or all federal funding. The author thanks Professor Kate Stith for emphasizing the issues addressed in this footnote.

60. For example, Yale University’s federal funding exceeded \$500 million in 2010 out of a total \$2.72 billion of operating revenue (or roughly 18%). YALE UNIV., FINANCIAL REPORT 2009–2010, at 1 (2010), [https://your.yale.edu/sites/default/files/2009-2010\\_annual\\_financial\\_report\\_0.pdf](https://your.yale.edu/sites/default/files/2009-2010_annual_financial_report_0.pdf) [<https://perma.cc/J898-2PGW>]. The University of Illinois’s was around \$600 million out of a total \$3.56 billion (or roughly 17%). UNIV. OF IL., ANNUAL FINANCIAL REPORT 2015, at 11 (2015), <https://www.obfs.uillinois.edu/common/pages/DisplayFile.aspx?itemId=391901> [<https://perma.cc/EM7Y-EKDX>]. The University of Virginia’s was about \$200 million in 2015 out of a total \$938 million (or roughly 21%). UNIV. OF VA., FINANCIAL REPORT 2014–2015, at 14 (2015) <http://www.virginia.edu/finance/finanalysis/docs/2015%20UVA%20FS%20FINAL.pdf> [<https://perma.cc/3KZV-Y6GJ>].

61. See *Title IX Tracking Sexual Assault Investigations*, CHRON. HIGHER EDUC., <http://projects.chronicle.com/titleix/> [<https://perma.cc/3TFD-PQGZ>] (listing schools that have been and are being investigated, including schools that are the subject of multiple investigations).

62. Press Release, Office for Civil Rights, U.S. Dep’t of Educ., U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations (May 1, 2014), <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations> [<https://perma.cc/5RXZ-ETJY>].

63. Tyler Kingkade, *Colleges Warned They Will Lose Federal Funding for Botching Campus Rape Cases*, HUFFINGTON POST (July 14, 2014), [http://www.huffingtonpost.com/2014/07/14/funding-campus-rape-dartmouth-summit\\_n\\_5585654.html](http://www.huffingtonpost.com/2014/07/14/funding-campus-rape-dartmouth-summit_n_5585654.html) [<https://perma.cc/3FFX-GQFW>].

64. *Id.*

By now schools all over the country have overhauled their disciplinary codes and processes to comply with the Dear Colleague letter's mandates.<sup>65</sup> Those that resisted were brought quickly into line. Events at Tufts University provide an example. After Tufts's president disputed OCR's finding that the university was in violation of Title IX and (very unusually) refused to agree to a list of OCR directives, the Department of Education published a statement warning that "OCR may move to initiate proceedings to terminate federal funding of Tufts."<sup>66</sup> Within ten days, Tufts had reversed itself and agreed to the terms OCR had sought.<sup>67</sup> As described in the *Boston Globe*, the threatened defunding would have been "a result so catastrophic that it virtually required Tufts to reach some understanding with the government."<sup>68</sup>

### C. *State Action Rulings*

The new Title IX sexual assault adjudications quickly began provoking outcry and litigation. Some students who say they were sexual assault victims have alleged that their claims were mishandled, their hearings biased, and their assailants falsely exonerated or inadequately punished.<sup>69</sup> Other students, found guilty of sexual assault, have alleged that the findings against them were false, unfairly reached, and biased.<sup>70</sup>

In the latter lawsuits, plaintiffs have sometimes filed constitutional due process claims against their schools. In cases where the defendant was a *private* college or university, every court to have reached the issue thus far has dismissed these claims for lack of state action.<sup>71</sup> A one-sentence rejection is typical. For example:

65. Gersen & Suk, *supra* note 37, at 902.

66. U.S. Dep't of Educ., *supra* note 59.

67. Letter from Tony Monaco, President, Tufts Univ., to Members of the Tufts Community, *Affirming Tufts' Commitment to Sexual Misconduct Prevention* (May 9, 2014), <http://president.tufts.edu/blog/2014/05/09/affirming-tufts-commitment-to-sexual-misconduct-prevention> [https://perma.cc/AG6Z-4N6Q].

68. Marcella Bombardieri, *Tufts Accepts Finding It Violated Law in Sex Assaults*, *BOS. GLOBE* (May 9, 2014), <http://www.bostonglobe.com/metro/2014/05/09/reversal-tufts-accepts-finding-that-violated-title-sexual-assault-cases/AljGY7mlMlgZR XmPIgsIxI/story.html> [https://perma.cc/3DTG-MGRM].

69. Emma Sulkowicz's "Carry That Weight" project at Columbia University is one of the most highly publicized of these protests. For an account, see Ariel Kaminer, *Accusers and the Accused, Crossing Paths at Columbia University*, *N.Y. TIMES* (Dec. 21, 2014), <http://www.nytimes.com/2014/12/22/nyregion/accusers-and-the-accused-crossing-paths-at-columbia.html> [https://perma.cc/3NE9-PT5T].

70. See, e.g., Max Kutner, *The Other Side of the College Sexual Assault Crisis*, *NEWSWEEK* (Dec. 10, 2015), <http://www.newsweek.com/2015/12/18/other-side-sexual-assault-crisis-403285.html> [https://perma.cc/U89Q-F98G]; *Student Sues Georgia Tech After Expulsion for Sexual Misconduct*, *USA TODAY* (Nov. 27, 2015), <http://college.usatoday.com/2015/11/27/expelled-student-sues-georgia-tech/> [https://perma.cc/43FB-75CL].

71. See, e.g., *Tsuruta v. Augustana Univ.*, No. 4:15-CV-04150-KES, 2015 WL 5838602, at \*2 (D.S.D. Oct. 7, 2015) (noting that "[t]he courts that have considered [whether a private school's

As an initial matter, to the extent that Yu is claiming that Vassar’s disciplinary proceedings denied him constitutional due process, this argument is without merit. Since Vassar is a private college, and not a state actor, “the federal Constitution does not establish the level of due process that [Vassar] had to give [Yu] in his disciplinary proceeding.”<sup>72</sup>

As mentioned above, this view was also expressed in the Dear Colleague letter itself.<sup>73</sup> This position is apparently so taken for granted that, according to a lawyer in the Ninth Circuit, one district judge not only dismissed his constitutional claims against a private college, but threatened him with Rule 11 sanctions for pleading them.<sup>74</sup>

But as Part II will show, this position is wrong.<sup>75</sup>

## II. Why Due Process Applies to Today’s Campus Sexual Assault Hearings

### A. *A State Action Primer*

The Constitution’s rights apply almost without exception against governmental actors, not private actors.<sup>76</sup> If you kick people out of your house

compliance with Title IX’s complaint-resolution regulations make that entity a state actor] appear to agree that private colleges are not state actors by virtue of their adoption of Title IX grievance procedures”); *Doe v. Washington & Lee Univ.*, No. 6:14-CV-00052, 2015 WL 4647996, at \*8 (W.D. Va. Aug. 5, 2015) (stating that “[h]ad Plaintiff been enrolled at a public university, he would have been entitled to due process . . . [but] [u]nfortunately for Plaintiff, [Washington & Lee] is a private university, and as such, is generally not subject to the constitutional protections of the Fifth Amendment”); *Doe v. Columbia Univ.*, 101 F. Supp. 3d 356, 368 n.5 (S.D.N.Y. 2015) (explaining that “[t]o the extent [the complaint states a constitutional due process claim] the claims fail, as such constitutional claims may be brought only against ‘state actors’ and Columbia is indisputably a private university”); *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 462 (S.D.N.Y. 2015) (rejecting due process argument for lack of requisite state action); *Bleiler v. Coll. of Holy Cross*, No. CIV.A. 11-11541-DJC, 2013 WL 4714340, at \*4 (D. Mass. Aug. 26, 2013) (holding that “[s]ince there is no dispute that Holy Cross is a private school, the federal Constitution does not establish the level of due process that the College had to give [the plaintiff] in his disciplinary hearing” (citations omitted)).

72. *Yu*, 97 F. Supp. 3d at 462 (footnote omitted) (quoting *Bleiler*, 2013 WL 4714340, at \*4).

73. See *supra* notes 55–56 and accompanying text.

74. Confidential communication on file with author (Oct. 19, 2015).

75. As this Article was being edited for publication, the Department of Education announced the withdrawal of the Dear Colleague letter and a plan to replace it with as-yet unspecified regulations to be issued through a notice-and-comment process. See *supra* note 15. If, as this Article argues, private (as well as public) schools have repeatedly violated the due process rights of students found guilty of sexual assault under procedures adopted as a result of the Dear Colleague letter, those rights should of course be vindicated notwithstanding the withdrawal of the letter. In addition, many schools will probably leave in place their recently adopted procedures until the new regulations are enacted; students tried under these procedures may also have due process claims that deserve to be vindicated.

76. See, e.g., *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 620 (1991) (“[T]he conduct of private parties lies beyond the Constitution’s scope in most instances . . .”).

because of their political opinions, you're not violating the First Amendment, because the First Amendment doesn't apply against you.<sup>77</sup> This fundamental structuring postulate of American constitutional law is called the "state action" doctrine,<sup>78</sup> where the word "state" means governmental (not Montana or Idaho).

Ascertaining the existence of state action is ordinarily unproblematic. You just look at who the actor was.<sup>79</sup> If the challenged action was taken by official governmental actors—whether legislative, executive, or judicial—the state action requirement is satisfied<sup>80</sup> and ordinarily won't be mentioned. If not, constitutional restraints don't apply.

Occasionally, however, acts taken by nongovernmental parties are deemed state action for constitutional purposes. Speaking very generally, such cases fall into two categories.

In the first, the private party becomes a state actor because governmental authorities have involved or "entwined" themselves with that party in some unusual fashion—as, for example, by renting space in a public building to a privately owned coffee shop open only to whites, and profiting from its revenues.<sup>81</sup> There is no single test for this branch of the doctrine. What the Supreme Court has made clear, however, is that certain relationships between government and private parties are *not* sufficient. For example, being a government contractor is insufficient.<sup>82</sup> Receiving almost all of one's revenue

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77. See, e.g., *Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982) ("[I]t is fundamental that the First Amendment prohibits *governmental* infringement on the right of free speech." (emphasis added)).

78. See, e.g., *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982) ("As a matter of substantive constitutional law the state-action requirement reflects judicial recognition of the fact that 'most rights secured by the Constitution are protected only against infringement by governments.'" (quoting *Flagg Bros. v. Brooks*, 436 U.S. 149, 156 (1978))).

79. See, e.g., *id.* at 937 ("[T]he party charged . . . must be a person who may fairly be said to be a state actor.").

80. See *Virginia v. Rives*, 100 U.S. 313, 318 (1879) ("It is doubtless true that a State may act through different agencies—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the [Fourteenth] [A]mendment extend to all action of the State . . . whether it be action by one of these agencies or by another."); see also, e.g., *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 179 (1972) ("State action . . . may emanate from rulings of administrative and regulatory agencies as well as from legislative or judicial action.").

81. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 716, 726 (1961); see also *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295, 298 (2001) (holding an ostensibly private association to be a state actor because of the "pervasive entwinement of public institutions and public officials in its composition and workings"); *Evans v. Newton*, 382 U.S. 296, 299 (1966) ("Conduct that is formally 'private' may become so entwined with governmental policies . . . as to become subject to the constitutional limitations placed upon state action.").

82. See *Rendell-Baker*, 457 U.S. at 841 ("Acts of . . . private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts."). By contrast, government *employees* are generally state actors. *West v. Atkins*, 487 U.S. 42, 49 (1988).

from the government is not sufficient.<sup>83</sup> Nor is the fact of being highly regulated.<sup>84</sup> Private utility companies are as highly regulated as any commercial entity could be, and often under contract with governments, yet the Court has consistently held that they are not state actors.<sup>85</sup>

In the second category, private parties can become state actors because of the nature of the activity they are engaged in, without involvement by government officials.<sup>86</sup> In this “public function”<sup>87</sup> branch of the doctrine, case law does establish a governing test. An activity is a public function only if it has been “traditionally” “exclusively” performed by the state.<sup>88</sup> This test is extremely hard to meet. As the Court has put it, “[w]hile many functions have been traditionally performed by governments, very few have been ‘exclusively reserved to the State.’”<sup>89</sup>

This short state action primer should indicate why a city’s privatized, contract-police force would seemingly *not* be a state actor under current doctrine. Its status as a government contractor would fail to suffice. Even if it received most of its revenue from the state and was regulated to some degree, there would be no state action under current “entwinement” doctrine. And according to the best article written on the topic, “no aspect of policing, neither patrol nor detection, has ever been ‘exclusively’ performed by the

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83. See *Rendell-Baker*, 457 U.S. at 840–41 (explaining that “private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government” do not constitute as state actors).

84. See, e.g., *Am. Mfrs. Mut. Ins. v. Sullivan*, 526 U.S. 40, 52 (1999) (“[T]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State . . . .” (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 (1974))).

85. See, e.g., *Jackson*, 419 U.S. at 350, 358 (1974) (holding that a utility company “subject to extensive state regulation” did not constitute a state actor).

86. See, e.g., *id.* at 352; see also G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility*, 34 HOUS. L. REV. 333, 344–46 (1997) (discussing situations in which a private entity engages in activity “so predominantly, even uniquely, governmental in nature that the private actor’s action may be fairly attributable to government”).

87. See, e.g., *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 302–03 (2001) (discussing application of the “public function test”).

88. See *id.* at 302 (“[T]he performance of . . . a public function did not permit a finding of state action . . . unless the function performed was exclusively and traditionally public . . . .”); *Rendell-Baker*, 457 U.S. at 842 (1982) (“[T]he question is whether the function performed has been ‘traditionally the exclusive prerogative of the State.’” (quoting *Jackson*, 419 U.S. at 353)); *Jackson*, 419 U.S. at 352 (“[S]tate action [is] present in the exercise by a private entity of powers traditionally exclusively reserved to the State.”).

89. *Flagg Bros. v. Brooks*, 436 U.S. 149, 158 (1978). To give a simple illustration: the Blooming Grove Volunteer Ambulance Corps, created by contract with the city of Blooming Grove, New York, to provide emergency ambulance and medical services to that community, is not a state actor because (1) the contractor relationship fails to suffice under entanglement doctrine, and (2) “ambulance services in this country historically were provided by an array of non-state actors, including hospitals, private ambulance services, and, in what seems to be somewhat of a conflict of interest, funeral homes.” *Grogan v. Blooming Grove Volunteer Ambulance Corps*, 768 F.3d 259, 262, 265 (2d Cir. 2014).

government, and all have at one point or another been left largely to private initiative.”<sup>90</sup>

That statement may be a slight exaggeration,<sup>91</sup> but most police activities—patrolling the streets, investigating crimes, intervening physically in crimes, even making arrests—have undoubtedly been done by private citizens in the Anglo-American tradition for centuries.<sup>92</sup> Citizens’ arrests remain permissible in some form in every state today,<sup>93</sup> and they are not deemed state action when they occur.<sup>94</sup> Private police officers have often been found not to be state actors under public function doctrine, including in cases where the private officer stopped, searched, and detained suspected criminals.<sup>95</sup> Thus, policing has by no means been an “exclusively” governmental affair, and a city that privatized its police would arguably become a Fourth Amendment-free zone.<sup>96</sup>

The case of military contractors is more complicated, although even here arguments can be made under current doctrine that no state action exists. Private military contractors are, after all, contractors (and therefore arguably not state actors under “entwinement” doctrine), while the longtime existence

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90. Sklansky, *supra* note 6, at 1259.

91. Sklansky acknowledges that private police cannot always legally perform all the functions of public law enforcement—for example, searching private homes for evidence of illegal activity. *See id.* at 1183 (observing that tort and criminal doctrines limit the actions of private police).

92. *See id.* at 1193–221 (providing a historical survey of public and private policing in Europe and the United States); Stephen Rushin, *The Regulation of Private Police*, 115 W. VA. L. REV. 159, 176 (2012) (surveying the growing number of state statutes that “formally recognize and protect a private police officer’s ability to engage in coercive behavior” such as “arrest, search, surveillance and interrogation”).

93. *See* Rushin, *supra* note 92, at 177 (“Over the last twenty-five years, states have increasingly moved to codify the common law citizen’s arrest doctrine. In 1976, thirty-two states had codified some . . . right to citizen’s arrest. By 2011, all fifty states had . . .” (footnotes omitted)).

94. *See, e.g.*, *United States v. Lima*, 424 A.2d 113, 120 (D.C. 1980) (“The fact that a private person makes a citizen’s arrest does not automatically transform [him] into an agent of the state. His conduct is not actionable for any deprivation . . . of rights, privileges or immunities secured by the Constitution.”).

95. *See, e.g.*, *United States v. Bowers*, 739 F.2d 1050, 1056 (6th Cir. 1984) (holding that a private detective interviewing a suspect was not required to give *Miranda* warnings); *White v. Scrivner Corp.*, 594 F.2d 140, 143 (5th Cir. 1979) (holding that store employees who detained and searched a suspected shoplifter were not performing a public function because “[w]hile these actions are usually performed by police officers, private citizens do occasionally engage in them”); *United States v. Casteel*, 476 F.2d 152, 154 (10th Cir. 1973) (holding that private citizens interviewing a suspect were not required to give *Miranda* warnings). *But see* *Griffin v. Maryland*, 378 U.S. 130, 135 (1964) (finding an ostensibly private police officer to be a state actor but noting entanglement with state authority—the private officer was a deputized county sheriff who identified himself as such during the events in question); Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49, 99–101 (2004) (discussing *Griffin*).

96. *See* Sklansky, *supra* note 6, at 1183 (“Criminal procedure law—the vast set of interrelated constitutional doctrines that regulate . . . police officers throughout the United States—has almost nothing to say about . . . private security guards. . . . Private searches fall outside the coverage of the Fourth Amendment, and evidence they uncover is almost always admissible . . .”).

of mercenary forces and private militias<sup>97</sup> might suggest that soldiering is not a public function either. Hence the uncertainty surrounding this question too.<sup>98</sup>

I will return to the problem of privatization later. While there are deep uncertainties and inadequacies in current state action doctrine, there's at least one clear principle that the doctrine gets right, and this principle by itself is enough to demonstrate state action in the post-2011 Title IX trials conducted by private schools all over the country.

### B. *The Blum Principle*

If a private citizen were compelled by governmental actors to search his neighbor's house for evidence of a crime, the search would have to qualify as state action. Otherwise, the police could easily evade the Fourth Amendment's restraints, and Congress could circumvent every constitutional right through the simple expedient of passing a statute requiring private individuals to engage in otherwise-unconstitutional acts.

For this reason, a coercion or compulsion principle is central to state action jurisprudence. This principle has long been recognized: as the Supreme Court puts it, a private party becomes a state actor if the government "has exercised coercive power" over him.<sup>99</sup>

The coercion principle is most commonly associated with *Blum v. Yaretsky*,<sup>100</sup> the 1982 case just quoted, but it dates back at least to the sit-in cases of the early 1960s. In *Petersen v. City of Greenville*,<sup>101</sup> the Court found state action in a racially segregated lunch counter because a city ordinance required such segregation.<sup>102</sup> "When the State has commanded a particular result, it has saved to itself the power to determine that result . . . and, in fact,

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97. See generally SEAN MCFATE, *THE MODERN MERCENARY: PRIVATE ARMIES AND WHAT THEY MEAN FOR WORLD ORDER* (2014) (discussing private war making past and present).

98. See *supra* note 4; Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 188 (2005) (arguing that "under even the narrow construction of the state action doctrine found in U.S. constitutional law, . . . the activities at Abu Ghraib would probably be actionable" but that "[i]f the prison were managed entirely by private contractors, showing a nexus to the state would be more difficult"); Craig S. Jordan, *Who Will Guard the Guards? The Accountability of Private Military Contractors in Areas of Armed Conflict*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 309, 316 (2009) (arguing that "it is . . . unlikely that the U.S. would recognize a PMC as acting on behalf of the state" and that "[c]ourts have been reluctant to find PMCs liable under this doctrine"). *But see* *Dobyns v. E-Systems, Inc.*, 667 F.2d 1219, 1225–26 (5th Cir. 1982) (holding a military surveillance contractor assisting in peacekeeping in the Middle East a state actor on the ground that "military surveillance" and "peacekeeping" were public functions).

99. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

100. 457 U.S. 991 (1982).

101. 373 U.S. 244 (1963).

102. *Id.* at 250–51.

has removed that decision from the sphere of private choice.”<sup>103</sup> In a companion case, *Lombard v. Louisiana*,<sup>104</sup> the Court reached the same conclusion where the mayor of New Orleans had issued a public statement that, as interpreted by the Court, prohibited “desegregated service in restaurants.”<sup>105</sup> This official statement, said the Court, had “at least as much coercive effect as an ordinance”<sup>106</sup> and therefore required the same state action conclusion.

As the Court would later affirm in *Blum*, mere governmental “approval of or acquiescence in the initiatives of a private party is not sufficient.”<sup>107</sup> But where the challenged activity resulted from the state’s “exercise[] [of] coercive power,” state action exists.<sup>108</sup> Indeed, in *Blum* and later cases, the Court has gone much further: even if not coerced, a private party’s conduct is state action if government has “provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.”<sup>109</sup>

The *Blum* principle leaves little doubt about the existence of state action in the sexual assault investigations and adjudications conducted under the Dear Colleague letter’s mandate. If “overt,” “significant encouragement” means anything, it includes conditioning hundreds of millions of dollars in federal funds on an institution’s compliance with governmental directives. But the Dear Colleague letter did not merely encourage. It almost certainly coerced.

To be sure, it’s possible to argue that conditional-funding regimes never coerce because the funding recipient is always free to walk away from the funds. But it’s well established that in unusual circumstances, a threat to strip funding can be coercive, operating as a “gun to the head.”<sup>110</sup> And in the case

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103. *Id.* at 248.

104. 373 U.S. 267 (1963).

105. *Id.* at 268, 273.

106. *Id.*

107. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

108. *Id.*

109. *Id.*; *see also, e.g., Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 615 (1989) (finding state action in private employers’ breath and urine testing of employees where the federal government had enacted nonmandatory regulations “ma[king] plain not only its strong preference for testing, but also its desire to share the fruits of such intrusions”).

110. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2604 (2012) (opinion of Roberts, C.J., joined by Breyer & Kagan, JJ.); *see also, e.g., Agency for Int’l Dev. v. All. for Open Soc’y Int’l*, 133 S. Ct. 2321, 2328 (2013) (stating that funding conditions can be found unconstitutional “when the condition is actually coercive, in the sense of an offer that cannot be refused”); *Planned Parenthood of Greater Ohio v. Hodges*, 188 F. Supp. 3d 684, 690 (S.D. Ohio 2016) (same); *Bldg. & Constr. Trades Dep’t, AFL-CIO v. Allbaugh*, 172 F. Supp. 2d 138, 152 (D.D.C. 2001) (stating that “acceptance of conditional funding” can be a “coerced decision”), *rev’d*, 295 F.3d 28 (D.C. Cir. 2002).

most nearly on point, not only did a court find coercion—the federal government conceded it.

A decade ago, Congress threatened to defund universities if any of their departments denied on-campus access to recruiters from the U.S. military (which, at that time, excluded openly gay individuals).<sup>111</sup> In a suit challenging this regulation brought by professors at Yale Law School, the Department of Defense conceded that this defunding threat was coercive, and the court so ruled:

DoD has conceded the fact of coercion. . . . There is no question of fact that the Faculty, acting as Yale Law School, voted to [permit on-campus access to military recruiters] because of the threatened cut-off of \$300 million to other parts of Yale University. This court concludes, as a matter of law, that this conceded coercion is well past the point of pressure and is compulsion.<sup>112</sup>

Although it involved funding to states, the Court's decision in *Sebelius*<sup>113</sup>—the health care case—is also instructive. Seven Justices in *Sebelius* held that the federal government's threat to strip states of Medicaid funding if they refused to participate in the new health care program “crossed the line distinguishing encouragement from coercion.”<sup>114</sup> These Justices stressed, among other things, (1) that the defunding threat was based on a newly imposed condition, meaning that states had not agreed to it when they had initially accepted (and become reliant on) Medicaid funding;<sup>115</sup> (2) the threat applied broadly to preexisting funds unrelated to the newly imposed health-insurance scheme;<sup>116</sup> and, most importantly, (3) the sheer size of the

111. See Doug Lederman, *A Supreme Battle Takes Shape*, INSIDE HIGHER ED. (Sept. 22, 2005), <https://www.insidehighered.com/news/2005/09/22/solomon> [<https://perma.cc/K759-228V>].

112. *Burt v. Rumsfeld*, 354 F. Supp. 2d 156, 175 (D. Conn. 2005) (citation omitted), *rev'd on other grounds sub nom.* *Burt v. Gates*, 502 F.3d 183 (2d Cir. 2007). Note: the author of this Article was a party to and lawyer in *Burt*. The named plaintiff was the late Robert Burt, a devoted colleague and friend.

113. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

114. *Id.* at 2603 (opinion of Roberts, C.J., joined by Breyer & Kagan, JJ.) (“[The States] object that Congress has ‘crossed the line distinguishing encouragement from coercion’ in the way it has structured the funding . . . . Given the nature of the threat and the programs at issue here, we must agree.” (quoting *New York v. United States*, 505 U.S. 144, 175 (1992)); *id.* at 2662 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (“In structuring the ACA, Congress unambiguously signaled its belief that every State would have no real choice but to go along with the Medicaid Expansion. If the anticoercion rule does not apply in this case, then there is no such rule.”).

115. *Id.* at 2606 (“[T]hough Congress’ power to legislate under the spending power is broad, it does not include surprising participating States with post-acceptance or ‘retroactive’ conditions.” (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981)).

116. *Id.* at 2603 (opinion of Roberts, C.J.) (“Instead of simply refusing to grant the new funds to States that will not accept the new conditions, Congress has also threatened to withhold those States’ existing Medicaid funds.”); *id.* at 2606 (opinion of Roberts, C.J., joined by Breyer & Kagan, JJ.) (“A State could hardly anticipate that Congress’s reservation of the right to ‘alter’ or ‘amend’ the Medicaid program included the power to transform it so dramatically.”); *id.* at 2666 (Scalia,

funds under threat.<sup>117</sup> Federal Medicaid funds, noted the Justices, constituted over 10% of most states' total revenue and accounted for roughly 22% of overall state budgets.<sup>118</sup> Faced with so massive a loss in funding, states would have "no real choice" but to participate in the national health care program.<sup>119</sup>

All three of these factors apply to the Title IX context. First, the conditions imposed by the Dear Colleague letter were new, representing a dramatic shift from prior agency interpretations of Title IX,<sup>120</sup> and therefore not what schools had signed up for when initially accepting the funds at issue. Second, the defunding threat applied to all federal funding across the board, making the Title IX defunding threat look more like a coercive penalty than a policy choice about what the government wanted its money spent on. Finally, and most importantly, the threatened funding loss was massive, both in absolute terms and as a percentage of operating budgets—in some cases constituting 15–20% of school budgets.<sup>121</sup>

Because *Sebelius* involved funding to states, not private entities, the case is arguably distinguishable, but the three factors just discussed do not merely state a good argument for coercion under *Sebelius*. They state a good argument for coercion, period. Even if styled as mere "guidance," the Dear Colleague letter, together with the government's investigations of dozens of universities and repeated reaffirmation of its multi-hundred-million-dollar defunding threat, was clearly an attempt to force compliance. The letter was

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Kennedy, Thomas & Alito, JJ., dissenting) ("Congress could have made just the *new* funding provided under the ACA contingent on acceptance of the terms of the Medicaid Expansion[,] . . . so that only new funding was conditioned on new eligibility extensions.").

117. *Id.* at 2605 (opinion of Roberts, C.J.) ("The threatened loss of over 10 percent of a State's overall budget . . . is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion."); *id.* at 2663 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) ("[T]he sheer size of this federal spending program in relation to state expenditures means that a State would be very hard pressed to compensate for the loss of federal funds by cutting other spending or raising additional revenue.").

118. *Id.* at 2604–05 (opinion of Roberts, C.J.); *id.* at 2663 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

119. *Id.* at 2608 (opinion of Roberts, C.J.); *id.* at 2662 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

120. *See supra* Section I(B).

121. Yale's federal funding exceeded \$500 million in fiscal year 2015, accounting for roughly 16% of operating expenses. YALE UNIV., FINANCIAL REPORT 2014–2015, at 16, 20 (2015), [https://your.yale.edu/sites/default/files/2014-2015\\_annual\\_financial\\_report\\_0.pdf](https://your.yale.edu/sites/default/files/2014-2015_annual_financial_report_0.pdf) [<https://perma.cc/952Y-6LDW>]. Harvard's \$578 million accounted for roughly 13% of operating expenses. HARVARD UNIV., FINANCIAL REPORT: FISCAL YEAR 2015, at 7 (2015), [http://finance.harvard.edu/files/fad/files/\\_fy15harvard\\_finreport\\_.pdf](http://finance.harvard.edu/files/fad/files/_fy15harvard_finreport_.pdf) [<https://perma.cc/HF2B-4Y8A>]. Tufts's \$138 million in federal funding accounted for 17%. TUFTS UNIV., ANNUAL FINANCIAL REPORT OF TUFTS UNIVERSITY: 2015, at 15 (2015), <http://finance.tufts.edu/budgetacc/files/2015AnnualFinancialReport.pdf> [<https://perma.cc/3VJL-F275>]. Northwestern's \$408.5 million accounted for roughly 20%. NORTHWESTERN UNIV., 2015 FINANCIAL REPORT, at 12, 35 (2015), <http://www.northwestern.edu/financial-operations/annual-financial-reports/2015-Financial-Report.pdf> [<https://perma.cc/FWB7-4JBZ>].

intended to compel, and it was very successful, causing compliance all over the country, even at schools where there was considerable internal opposition.<sup>122</sup> In a remarkable acknowledgment, Secretary of Education Betsy DeVos stated in September, 2017, that the Department of Education and its Office for Civil Rights had been using “intimidation and coercion” to “push[] schools to overreach.”<sup>123</sup> It would take an extraordinary feat of rationalization not to see coercion in the Dear Colleague letter and the government’s enforcement efforts pursuant to it.

Thus *Blum* leaves scant room for doubt. Under *Blum*, coercion and even significant governmental encouragement create state action. At minimum, the Dear Colleague letter strongly encouraged, and for many schools all over the country, it coerced. Far from being Rule 11 sanctionable, the state action argument here is close to unassailable.<sup>124</sup>

Which almost puts us in position to turn to the due process merits—to the question, that is, of whether the procedures used at private colleges’ Title IX sexual assault hearings violate due process. But not quite. *Blum* leaves open two crucial questions that have to be answered before proceeding to the merits.

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122. As mentioned earlier, OCR’s investigation of Tufts provides an illustration. *See supra* notes 66–68 and accompanying text. Tufts University President Anthony Monaco, after initially refusing to comply with OCR directives and denying that his school was in violation of Title IX, quickly agreed to change the school’s policies when OCR warned that it would “move to terminate Tufts’ federal funding if the university did not comply, a result so catastrophic that it virtually required Tufts to reach some understanding with the government.” Bombardieri, *supra* note 67; *see also, e.g.*, Opinion, Elizabeth Bartholet et al., *Rethink Harvard’s Sexual Harassment Policy*, BOS. GLOBE (Oct. 15, 2014) (publishing statement by twenty-eight Harvard Law School professors protesting Harvard University’s adoption of new policies as a result of the Dear Colleague letter). Schools may also be reacting to the potentially highly damaging reputational consequences of OCR’s finding them in violation of Title IX—another form of governmental pressure.

123. *See DeVos, supra* note 15.

124. Not one of the courts finding no state action in private school Title IX hearings, *see supra* note 70, genuinely came to grips with *Blum*. Only two referred to the coercion principle at all, and they did so cursorily. First, in *Tsuruta v. Augustana University*, the court acknowledged that “‘extensive regulation’ that compels or coerces a private school to act in a given way could constitute state action.” No. 4:15-CV-04150-KES, 2015 WL 5838602, at \*2 (D.S.D. Oct. 7, 2015) (quoting *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982)). However, the *Tsuruta* court dismissed the coercion concern, stating only that the plaintiff “has disclosed no cases where a court has found that a private school’s compliance with Title IX’s complaint-resolution regulations make that entity a state actor.” *Id.* Second, in *Doe v. Washington & Lee University*, the court said that “[w]hile it is plausible that [the university] was under pressure to convict students accused of sexual assault in order to demonstrate that the school was in compliance with the OCR’s guidance, for Fifth Amendment protections to apply, ‘[t]he government must have compelled’” the private actor’s conduct. No. 6:14-CV-00052, 2015 WL 4647996, at \*9 (W.D. Va. Aug. 5, 2015) (alteration in original) (quoting *Andrews v. Fed. Home Loan Bank of Atlanta*, 998 F.2d 214, 218 (4th Cir. 1993)). The court then went on, with little explanation, to find that the OCR’s “guidance” did not amount to compulsion—perhaps meaning that the school was not compelled to *convict*, which is not the issue (the issue being whether the school was compelled to *adjudicate*). *Id.*

C. *What the Blum Principle Leaves Unanswered*

First, a puzzle has always lain buried under the *Blum* principle—a problem that, although seemingly obvious, courts almost never confront. *Blum* seems to prove far too much.

*Blum*'s “significant encouragement” test would, for example, seem to make state actors out of every governmental contractor and every recipient of conditional public spending. Anyone who enters a contract with the government is given substantial, overt monetary encouragement to do what the contract requires; anyone who receives conditional benefits is given substantial encouragement to take the acts that generate the benefits. Why aren't they all state actors under *Blum*?

*Blum*'s encouragement test seems, therefore, difficult to take at face value. Perhaps, then, *Blum* should be narrowed to coercion—which, in practice, some lower courts appear to have done by referring to *Blum*'s “state coercion test,”<sup>125</sup> a phrase that seems to drop out “encouragement.” But the same puzzle reappears with equal force with respect to coercion.

Government coerces whenever it applies law to us. On April 15, most adults are legally compelled to file tax returns. Are we state actors when we file those returns? Are we state actors when we stop at a red light? When we refrain from stealing?

The coercion principle implies that private individuals become state actors whenever they obey the law. It would seem to follow that criminals are the only truly private actors left in the country—a logical possibility, but a very odd conclusion. When invoked, the coercion principle is typically treated as self-evident.<sup>126</sup> And it is undoubtedly both correct and indispensable. The puzzle is how to square the correctness of the *Blum* principle with the fact of more-or-less ubiquitous governmental coercion at every moment of our waking lives.

Second, assuming this riddle can be answered, when private schools adjudicate Title IX sexual assault claims, does the *Blum* principle imply that schools are state actors only when they obey the *specific procedural rules mandated by the Dear Colleague Letter*, or does it imply that *the entirety of their Title IX adjudicatory process* is state action? I'll refer to this as the “level-of-generality” problem.

To illustrate, recall the inquisitorial *Brandeis* case described earlier.<sup>127</sup> With respect to some particulars of its Title IX process—for example, its

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125. *E.g.*, *Klunder v. Brown Univ.*, 778 F.3d 24, 30 (1st Cir. 2015); *see also* *Paige v. Coyner*, 614 F.3d 273, 278 (6th Cir. 2010) (referring to the “state-compulsion test laid out . . . in *Blum*”).

126. *See, e.g.*, *Andrews*, 998 F.2d at 217 (referring to the coercion cases as standing for an “obvious proposition that when the government orders specific conduct, it must be held accountable for that conduct”).

127. *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561 (D. Mass. 2016).

standard of proof—Brandeis was complying with express governmental directives or warnings.<sup>128</sup> But many other pieces of Brandeis’s inquisitorial procedure were filled in by the school at its own discretion. Even then, however, Brandeis was still engaged in the more general course of action (adjudicating student-on-student sexual assault claims) that the federal government had compelled it to take.<sup>129</sup> The question is whether due process applies only to the specifically mandated procedural details or instead to all the procedures Brandeis used to discharge the compelled action. The *Blum* principle on its face arguably does not decide this level-of-generality question.

The level-of-generality question returns us to the privatization “black hole” with which this Article began. Every privatization case will raise it. Say that a city disbands its police force and instead contracts with a private security firm to police its streets. Assume that the contract obliges the firm to enforce the law and mandates one or two details, but leaves everything else to the firm’s discretion.

Why might a city craft its policing contract in this open-ended fashion? Because doing so would, precisely, help the private security firm evade constitutional restraints. Gillian Metzger noticed this paradox in state action doctrine years ago: “Private actors given broader discretion in their exercise of [delegated] power are less likely to be subject to constitutional constraints than those who operate under close government supervision and whose potential for abusive action is thus more curtailed.”<sup>130</sup> In just this way, the Department of Education and OCR, while compelling schools to adjudicate sexual assault cases, left schools with a large amount of unsupervised discretion in doing so—which might be said, under existing doctrine, to point against a state action finding.

Now suppose that the city’s newly privatized security firm chooses to initiate suspicionless stop-and-frisks—a clear Fourth Amendment violation if conducted by state actors. The same level-of-generality question would be presented: should constitutional restraints apply only to the particular mandates imposed by the government, or rather to the entirety of the private firm’s acts of policing? Solving the problem of privatization in constitutional law depends on answering this question.

Two issues thus remain. First, how do we preserve *Blum* without turning everyone into state actors most of the time, and second, which campus sexual assault trial procedures are properly subject under *Blum* to due process

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128. See *supra* Section I(B).

129. See *Brandeis*, 177 F. Supp. 3d at 572 (noting that the adoption of new procedures by Brandeis and other universities “has been substantially spurred by the Office for Civil Rights of the Department of Education, which issued a ‘Dear Colleague’ letter in 2011 demanding that universities do so or face a loss of federal funding”).

130. Metzger, *supra* note 7, at 1425.

analysis—only those specifically mandated by the Dear Colleague letter, or all the procedures used by a given school, even those not specifically compelled by the government, when the school was coerced to conduct such trials by the government?

It turns out that these questions are closely related. Answering them will require that we recognize a mistake state action doctrine has been making for a long time. Once we see where current doctrine goes wrong, we will be able to answer these difficulties, tackle the vast problem that privatization poses for constitutional law, and, finally, address the due process merits of today's Title IX sexual assault trials.

### III. Where State Action Doctrine Goes Wrong and How To Make It Right

Current state action doctrine begins with the wrong question. Here's the question state action case law tells judges to answer: *Is the actor who took the challenged action a "state actor"?* Because "the party charged" with a constitutional violation "must be a person who may fairly be said to be a state actor,"<sup>131</sup> the "threshold issue" in every state action case is whether the defendant "is a state actor."<sup>132</sup>

This simple question seems unavoidable, given that constitutional rights apply only against state actors. And it's a perfectly sensible question to ask in most cases. It will deliver the right result when defendants are uncontroversially state actors (legislatures, officials, and so on) and when defendants are uncontroversially private parties acting without state involvement. But it's the wrong question to ask in difficult cases. Specifically, it's the wrong question for every case in which the government has induced private parties to engage in conduct that would be unconstitutional if state actors engaged in that conduct directly.

A criminal law analogy is useful. Some crimes can be committed only by public officials, which is a kind of state actor requirement. Assume New York prohibits public officials from soliciting bribes. If *A*, a New York public official, induces *B*, a private citizen, unknowingly to solicit a bribe on *A*'s behalf from *C*—where *A* and *C* understand what's happening, but *B* has no

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131. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

132. *Communities for Equity v. Mich. High Sch. Athletic Ass'n*, 459 F.3d 676, 691–92 (6th Cir. 2006); *see, e.g., MBH Commodity Advisors v. Commodity Futures Trading Comm'n*, 250 F.3d 1052, 1065 n.7 (7th Cir. 2001) ("[The] defendant must be a state actor in order to be subject to the Constitution's due process requirements." (citing *R.J. O'Brien & Assoc. v. Pipkin*, 64 F.3d 257, 262 (7th Cir. 1995))); *Price v. Int'l Union*, 927 F.2d 88, 91 n.3 (2d Cir. 1991) ("[S]tate action requires: that . . . the party charged with the deprivation must be a state actor."); *Jackson v. Urow*, No. 86-3968, 1986 U.S. App. LEXIS 25988, at \*2 (4th Cir. June 10, 1986) ("The person charged with the wrongful deprivation must be a state actor.").

idea—*A* is guilty of soliciting a bribe even though *B* is innocent.<sup>133</sup> In criminal law, this kind of case is well known; it's called "perpetration by means."<sup>134</sup> Public official *A* perpetrates the crime by having the innocent *B*, who statutorily can't commit it, solicit the bribe for him.

Judges would have no difficulty with such a case under standard doctrines of criminal law. But if they reasoned the way state action doctrine reasons, they *would* have difficulty.

Suppose the judge says to himself, "For this crime to have taken place, the person soliciting the bribe must have been a public official; thus, the threshold question is whether *B* was a public official." The judge might then correctly observe that *B*, a private citizen, was not a public official. Suddenly it begins to look as if no one has committed the crime. *B* solicited money, but he wasn't a public official (and didn't even know he was soliciting a bribe), so he isn't guilty; *A* was a public official, but he didn't solicit, so he isn't guilty either.

The point is this: a violation requiring action by a public official can be committed by and through a private actor, not because the private actor has "become a public official," but simply because the public official has induced the private citizen to commit the violation. In constitutional terms: if state actors are constitutionally prohibited from invading a certain right, and state actor *A* deliberately induces private citizen *B* to invade that very right, then *A* has violated the Constitution—period. *The question of whether B is himself a state actor never properly comes into it.*<sup>135</sup>

Simple though it is, this reorientation of the threshold question points to the solution of all the difficulties identified at the end of the last section.

First, it completely answers the riddle of *Blum*'s seeming to prove too much. Yes, if a private individual is coerced by government to search

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133. MODEL PENAL CODE § 2.06(2)(a) (AM. LAW INST., Proposed Official Draft 1962) ("A person is legally accountable for the conduct of another person when . . . acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct . . ."); *see also, e.g.*, *People v. Brody*, 83 N.E.2d 676, 678–79 (N.Y. 1949) (upholding defendant's conviction of receiving unauthorized fees as a deputy commissioner even though the fees had been received by a private intermediary and reasoning that the "crime of taking unauthorized fees (like the crime of taking bribes . . .) can, obviously, be committed through an intermediary or agent").

134. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 639 (2000) ("Virtually all legal systems . . . recognize the institution of perpetration-by-means."); *see, e.g.*, *United States v. Kelner*, 534 F.2d 1020, 1022 (2d Cir. 1976) ("It is a general principle of causation in criminal law that an individual (with the necessary intent) may be held liable if he is a cause in fact of the criminal violation, even though the result which the law condemns is achieved through the actions of innocent intermediaries.").

135. In criminal cases, difficult proximate-causation issues can arise when the instrumentalized party is not a wholly innocent agent, but is instead a knowing participant or "semi-innocent." Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323, 387 (1985). These complications are not relevant to constitutional law.

someone else's house, the search has to comply with the Fourth Amendment. But *that's not because the private individual has become a state actor*. It's a case of perpetration by means. Yes, if a government contract required an employer to racially discriminate in hiring, the discrimination would be unconstitutional. The reason is not to be found, however, in excessive governmental "entwinement" (there would be no more entwining than in countless governmental-contractor cases), nor in public function doctrine (no public function would be at issue). The reason is not that the contractor has magically transubstantiated into a state actor at all. The true reason is the *Blum* principle as just restated: government cannot purposely induce a private actor to take action that would violate constitutional rights if the government took the action itself. Thus *Blum* is correct, but correctly understood, it does *not* imply that we all turn into state actors whenever we stop at red lights, enter into government contracts, file our tax returns, and so on.

At the same time, we can see why *Blum* was also correct in extending the coercion principle to cover cases of "significant encouragement." To repeat the principle just stated:

- (1) Inducement principle. *Where state actors would violate constitutional rights by taking a particular action, they cannot purposely induce a private actor to take that same action.*<sup>136</sup>

Coercion is only one kind of inducement; significant encouragement is another. That's the lesson of the bribery analogy. Public official *A* is guilty of soliciting a bribe provided that he intentionally induced private citizen *B* to solicit the bribe on his behalf; it makes no difference whether *A* coerced *B* into this action, offered him money to do it, offered him a position in government to do it, or offered him any other significant inducement. The same logic applies to state actors in constitutional law.

Second, we can now pry open the whole problem of privatization in a new way, which will in turn answer the level-of-generality problem.

Return to the case of a privatized state police department. As we've seen, current state action doctrine, which looks to the concepts of entwining and public function to solve privatization cases, generates a disturbing answer. Because policing has not traditionally been an exclusive state preserve, and because a state could contract with a private security firm and deliberately choose not to supervise that firm closely, a privatized police force would apparently be a nonstate actor, hence free to violate the Fourth Amendment at will. To escape that result, the reflexive response of many critics has been to call for elimination of public function doctrine's

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136. To be clear, this principle refers to inducing one party to violate another party's constitutional *rights*; it does not apply when government merely induces parties to take actions that the government lacks the *power* to compel. Congress may pay states to enact a drinking age; it may offer tax benefits to induce action it has no power to compel.

exclusivity requirement, so that many more governmental functions become public functions.<sup>137</sup> A better strategy is to recognize that public function doctrine too has been asking the wrong question.

Consider these two police forces:

- Google hires a private security firm called Blackwater to police the Googleplex, the company's multi-acre corporate headquarters in Mountain View, California; Blackwater employees patrol, prevent trespass, enforce the criminal law, and make arrests.
- California replaces all state and local police by entering into a contract with Blackwater; under this contract, Blackwater employees, unsupervised by the state, perform functions all over California identical to those of Google's officers at the Googleplex.

Public function doctrine tells us that these two cases are to be analyzed identically. In other words, public function doctrine asks once again whether the private parties at issue are "state actors," and Blackwater is either a state actor in both cases or neither. But we don't have to look at the problem this way.

In case two, Blackwater *has* to be subject to the Fourth Amendment, or else the Fourth Amendment will have become a nullity in California. The same isn't true of Google's security force. The Fourth Amendment is not a dead letter in California just because it does not apply to purely private security officers hired to patrol private property. Public function doctrine can't see this difference.

Public function doctrine, in current form, asks whether there is a special set of activities that *even private parties* can't engage in without constitutional restraints. But suppose we asked instead the perpetration-by-means question: is there a special set of activities that *government* can't engage in without constitutional restraints, even if it does so *through the use of private parties*?

The answer is yes, and *law enforcement* is the paradigmatic example of such an activity.

Why? For a simple reason. A host of rights in the Bill of Rights—in particular, in the Fourth through Eighth Amendments—are paradigmatically addressed to law enforcement. In other words, the core, foundational applications of these rights concern the investigation, prosecution, adjudication, and punishment of law-violating activity (both criminal and civil). If the government could evade these rights by privatizing law

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137. See Sklansky, *supra* note 6, at 1259 ("Were the Supreme Court to retract that limitation [the exclusivity requirement], the difficulty would largely disappear."). Sklansky goes on to discuss the problems that would follow if the exclusivity requirement were dropped. *Id.* at 1259–60.

enforcement, much of the Fourth through Eighth Amendments would be rendered nugatory.

For example, it is axiomatic Fourth Amendment doctrine that “general warrants” are unconstitutional.<sup>138</sup> General warrants authorized discretionary searches and seizures of large numbers of persons and places not specified in advance by a magistrate, in order to enforce civil or criminal laws, and they were the Fourth Amendment’s paradigm case—the primary abuse the amendment was enacted to prohibit.<sup>139</sup> But if governments could privatize their police forces without the Fourth Amendment attaching thereto, the privatized police could engage in generalized, unspecified searches and seizures with constitutional impunity. Similarly, if governments could replace their criminal and civil courts with private-adjudication contractors not bound by the Constitution, the core process rights of the Sixth and Seventh Amendments—for example, trial by jury—would be lost.

The reasoning here is simple but inexorable. It follows from the existence of constitutional paradigm cases.<sup>140</sup> Certain governmental powers or functions are the paradigmatic objects of constitutional rights. Allowing government to privatize those powers, cut loose from constitutional safeguards, would permit the government to evade and erase those constitutional rights. That result cannot be tolerated. Allowing privatization of law enforcement, without attaching constitutional restraints thereto, would erase core constitutional rights; therefore, the Constitution must continue to apply when the government induces private parties to do law enforcement on its behalf.

This is *not* to say that law enforcement is an exclusively “public function” or an “inherently governmental function.” Private actors can take, and have always taken, law enforcement into their own hands. Rather, law enforcement is an *inherently constitutional function for the government*, meaning that state actors *cannot circumvent the constitutional rights that attach to it by inducing private parties to do the job on their behalf*.

What other powers, beyond law enforcement, belong in this category? This Article is not the place for a full-fledged theory dealing with that question, but the general outlines of an answer may be as follows.

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138. See, e.g., *Payton v. New York*, 445 U.S. 573, 583 (1980); *Stanford v. Texas*, 379 U.S. 476, 480 (1965).

139. See AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE* 1–31 (1997) (discussing the centrality of the ban on general warrants to the enactment and historical understanding of the Fourth Amendment).

140. See generally Jed Rubenfeld, *The Paradigm-Case Method*, 115 *YALE L.J.* 1977 (2006) (showing that paradigmatic “Application Understandings,” that is, the core historical applications of a given constitutional prohibition, anchor and shape the development of the doctrine governing that prohibition).

When first enacted, the Constitution established a new national government vested with two powers: that of war, and that of law.

“War powers” is a familiar enough term. The “law power” is less familiar, but not esoteric. By that term, I’m simply referring to making the law, executing it, and adjudicating it—the functions that were the primary objects of Articles I to III of the Constitution. Making law consists primarily of enacting rules governing individuals’ conduct that apply without their individualized consent. Executing the law includes policing compliance, prosecuting violators, and punishing violations. Adjudication refers both to authoritative fact-finding (to determine whether a law has been broken) and to authoritatively interpreting the law. Making law can also be referred to as “legislating” or “regulating.” Executing the law and adjudicating it, taken together, can be referred to as “law enforcement.”

The war and law powers share certain features in common. Both involve force. Both can be used to dispense death. Both can be used to coercively take away liberty and property. Both enable tyranny in any government vested with them.

Which is precisely what made a Bill of Rights necessary. All the guarantees laid out in the Bill of Rights are directed, paradigmatically, at the law or war powers. If this is so, then war making also falls into the special class of inherently constitutional activities. And if this is so, then—to answer the question posed at the beginning of this article—private military contractors would be bound to uphold constitutional rights.<sup>141</sup>

This highly general law-and-war principle, however, is much broader than the present article requires. For present purposes, the following, much narrower principle suffices:

- (2) Law enforcement principle. *When government requires or induces a private party to engage in law enforcement, all relevant constitutional restraints apply.*<sup>142</sup>

Does this law enforcement principle swallow up everything that government does, making it impossible for governments to privatize anything without constitutional rights attaching thereto?

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141. Other powers too may carry constitutional restraints when privatized. If, for example, the state has a constitutional *duty* to do X, constitutional restraints may be required if the state seeks to have X done by private actors.

142. This principle refers only to cases in which government uses private parties for its own ends—i.e., when it delegates powers to private parties but continues to direct their objectives—not cases in which government purports to withdraw altogether, as for example by disbanding its police completely and “letting the market” take over. Such cases would require a separate analysis. In this path of inquiry lies the true importance of landmark state action cases like *Marsh v. Alabama*, 326 U.S. 501 (1946), and *Shelley v. Kraemer*, 334 U.S. 1 (1948), which current doctrine can no longer even explain.

No. Governments do a great deal beyond law enforcement—indeed, beyond the law and war powers altogether. If government privatizes the construction of buildings, for example, constitutional restraints need not attach. Governments can privatize their trains and train stations, their airports, their fire departments, their utilities, their garbage collection, their community colleges, and their power plants—all without imposing constitutional requirements on the private parties that take over these functions. Government could privatize the welfare state.

But policing is different, because it's law enforcement. A state can contract with private security firms to police its streets and enforce its laws, but the Constitution will still apply. Privatized prisons fall under the same rule; the Eighth Amendment directly targets criminal punishment, and punishing law breakers is central to the business of law enforcement. (This analysis provides a far better explanation of why courts have found private prisons to be state actors than current public function doctrine can.)<sup>143</sup> Privatized tax collection is also law enforcement.<sup>144</sup>

What about private arbitration—is it bound by constitutional due process? Not if it's genuinely private, freely chosen by private parties. But if the federal government retained a private arbitral body and compelled its use, that body *would* have to abide by due process.<sup>145</sup>

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143. The “extensive history” of private imprisonment in America is well-known. JAMES AUSTIN & GARRY COVENTRY, BUREAU OF JUSTICE ASSISTANCE, EMERGING ISSUES ON PRIVATIZED PRISONS 9 (2001) (“Private enterprise in the United States has an extensive history of involvement in the provision of correctional services.”); see WILLIAM B. SECREST, BEHIND SAN QUENTIN’S WALLS: THE HISTORY OF CALIFORNIA’S LEGENDARY PRISON AND ITS INMATES 1851–1900, at 9–10 (2015):

In early 1851, [General Mariano Guadalupe] Vallejo presented a plan to the state legislature to establish and maintain a state prison. . . . Vallejo and his associate, [James Madison] Estill, would build the prison, staff it, clothe and feed all the convicts, and offer rewards to be in effect for a ten-year period for any prisoner who escaped. . . . All that was asked in return was that Vallejo and Estill could utilize the convict labor for their own profit.

Nevertheless, courts have repeatedly held that privatized prisons are state actors under public function doctrine—a result they have reached only by ignoring or torturing the exclusivity requirement. See, e.g., *Rosborough v. Mgmt. & Training Corp.*, 350 F.3d 459, 461 (5th Cir. 2003) (“Clearly, confinement of wrongdoers—though sometimes delegated to private entities—is a fundamentally governmental function.”); *Skelton v. Pri-Cor, Inc.*, 963 F.2d 100, 102 (6th Cir. 1991) (treating a private prison corporation as having acted under color of law without mentioning the exclusivity requirement). On the analysis proposed here, courts would not need to hold, falsely, that privatized prisons are “state actors” performing an “exclusively” governmental function; the principle is simpler—government cannot privatize its law enforcement power without passing on the applicable constitutional restraints.

144. See, e.g., *Cohen v. World Omni Fin. Corp.*, 457 Fed. Appx. 822, 830 (11th Cir. 2012) (holding that a private company “was a state actor” in collecting taxes under statutory mandate, regardless of public function analysis).

145. On just this ground Judge Posner found the National Railroad Adjustment Board to be a state actor. See, e.g., *Elmore v. Chi. & Ill. Midland Ry.*, 782 F.2d 94, 96 (7th Cir. 1986) (“The National Railroad Adjustment Board, however, while private in fact, is . . . the tribunal that

The most critical feature of the law enforcement principle is that it answers the level-of-generality problem raised earlier. When law enforcement powers are privatized—whether by statute, under a contract, or through a defunding threat—constitutional restraints apply to *all* the actions taken by the private parties in discharging their delegated functions, not merely to those actions specifically mandated.

To see why, we need only consider once again a privatized police force that decides on its own to engage in house searches without probable cause or a warrant—or a privatized prison that decides in its own discretion to torture recalcitrant inmates. Under the law enforcement principle, these actions are categorically unconstitutional; that the state had not specifically ordered them would be no defense. When government privatizes its law enforcement powers, constitutional rights must attach to the delegated powers *in their entirety*, not merely to the specific actions dictated by the state. The reason, to repeat, is straightforward: otherwise, core rights established by the Fourth through Eighth Amendments could easily be evaded and essentially erased.

The law enforcement principle is an anti-evasion principle. It's a matter of preserving the Bill of Rights against circumvention. I will not say more here defending it. Instead I will assume its premises and return now to private colleges' Title IX sexual assault hearings.

#### IV. Do Today's Campus Sexual Assault Hearings Violate Due Process?

##### A. Which Procedures Are Subject to Due Process Analysis?

Which procedures in campus sexual assault hearings must satisfy constitutional due process requirements—only those specifically mandated by the government, or all the procedures used by a school when it complies with a governmentally imposed duty to prosecute and adjudicate? We are now in a position to answer this question. In the last section, we identified two core principles:

- (1) *Inducement principle. Governments cannot purposely induce private parties to take actions that would violate constitutional rights if state actors took those actions themselves.*

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Congress has established to resolve certain disputes in the railroad industry. Its decisions therefore are acts of government, and must not deprive anyone of life, liberty, or property without due process of law.”). Stock exchange organizations that enforce federal securities laws against broker-dealers offer another analogy. There is a circuit split concerning whether due process applies to such proceedings. Jerrod M. Lukacs, Note, *Much Ado About Nothing: How the Securities SRO State Actor Split Has Been Misinterpreted and What It Means for Due Process at FINRA*, 47 GA. L. REV. 923, 926 (2013). Assuming these organizations are compelled by the federal government to enforce the law, state action should be found and due process held applicable, according to the arguments presented in this Article.

- (2) Law enforcement principle. *If government requires or induces a private party to engage in law enforcement, all relevant constitutional restraints apply.*

Under principle (1), those procedural rules specifically mandated by the Dear Colleague letter for Title IX hearings must plainly satisfy due process—for example, the standard of proof. Principle (2), however, reaches further. As we’ve just seen, under principle (2), if it applies, private schools’ Title IX hearings pursuant to procedures adopted as a result of the Dear Colleague letter would have to satisfy due process in their entirety.

Does principle (2) apply here? Did the Dear Colleague letter require schools to engage in law enforcement?

The answer is clearly yes. The Dear Colleague letter required schools to investigate, charge, adjudicate, and punish law-breaking conduct—the very definition of law enforcement.

It’s important to reemphasize the change effected by the Dear Colleague letter on just this point. As noted earlier, prior to 2011, by OCR’s own express acknowledgment, a school “was under no obligation to conduct an independent investigation” in cases involving “a possible violation of the penal law, the determination of which is the exclusive province of the police and the office of the district attorney.”<sup>146</sup> The Dear Colleague letter reversed this position. Under the letter, in every case where schools have reason to know of a “possible” incident of “sexual violence,” they must investigate that offense, charge the alleged perpetrator if sufficient evidence is found, adjudicate the charge, and impose significant punishment, potentially including expulsion, on a student found guilty.<sup>147</sup> In short, schools used to be able to leave law enforcement to state law enforcement officers, if they chose; under the Dear Colleague letter, they had to do it themselves.

The language of the Title IX bureaucracy may be calculated to avoid this appearance: for example, students are usually said to be found *responsible* rather than *guilty*; the word *charge* is rarely used; the word *crime* is almost never used.<sup>148</sup> But there can be no doubt that, pursuant to the Dear Colleague letter, campus Title IX hearings all over the country were (and still are) discharging core law enforcement functions that previously could be left to the police.

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146. See *supra* note 36.

147. See *supra* notes 40, 47 and accompanying text.

148. See, e.g., *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 595 (D. Mass. 2016) (observing use of the term “responsible” in the Brandeis handbook); *Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 193 (D.R.I. 2016) (observing use of the terms “responsible” and “violation” in Brown’s code of conduct); *Tsuruta v. Augustana Univ.*, No. 4:15-CV-04150-KES, 2015 WL 5838602, at \*6 (D.S.D. Oct. 7, 2015) (referring to proof of a “violation” as required before a “resolution proceeding” may be initiated).

Some may feel that this conclusion denies or undermines Title IX's status as a civil rights statute. Campus sexual assault hearings are not about law enforcement, some might say; they're about educational equality.

The dichotomy is a false one. The question is not either-or. Under the Dear Colleague letter, Title IX remained of course an equality statute, but OCR was pursuing Title IX's equality objectives by compelling schools to do law enforcement on the federal government's behalf.

It is true that universities do not, in their Title IX hearings, expressly decide whether state law has been violated, but only whether school disciplinary codes have been violated. And on occasion, students are found guilty on the basis of conduct that would not violate local criminal (or even tort) law. A case like *Brandeis*, which involved kissing a sleeping boyfriend, might be an illustration. If schools are merely enforcing their own regulations, and if those regulations cover conduct that doesn't violate local criminal or tort law, doesn't that show that Title IX hearings are *not* enforcing the law?

On the contrary, it confirms and compounds the problem: the Dear Colleague letter had universities enforcing federal law in just the same way Congress characteristically has administrative agencies enforce federal law.

Congress frequently sets out a general statutory prohibition (for example, employers must not subject employees to unsafe working conditions),<sup>149</sup> instructing an administrative agency first to enact regulations defining that prohibition, and then to investigate, charge, adjudicate, and punish violations thereof.<sup>150</sup> When agencies follow these directives, they are plainly enforcing the law, however broadly or narrowly they choose to define the prohibition Congress has established for them.

In exactly the same way, the Dear Colleague letter told schools they had to enact regulations proscribing "sexual assault" or "sexual violence"—terms that undoubtedly cover core acts of criminal and tortious assault and that are in turn further defined by the Department of Education to include all unconsented-to sexual activity.<sup>151</sup> Schools were then told to investigate, adjudicate, and punish every alleged instance of sexual violence, so defined. This is the very model of *regulatory* or *administrative* law enforcement: schools are positioned here, in relation to the Department of Education, exactly as administrative agencies are positioned in relation to Congress.

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149. *E.g.*, 29 U.S.C. § 654(a)(1) (2012) ("Each employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees . . .").

150. *See, e.g., id.* § 655 (authorizing and establishing procedure for promulgation, modification, and revocation of occupational safety and health regulations); *id.* § 657 (authorizing inspections, investigations, and record-keeping); *id.* § 659 (outlining enforcement procedure).

151. *See supra* note 52.

Just as OSHA is doing law enforcement on Congress's behalf when its workplace safety regulations go beyond local criminal or tort law, so too are schools doing law enforcement on OCR's behalf when their sexual assault regulations go beyond local criminal or tort law. The Dear Colleague letter, not metaphorically but literally, turned schools all over the country into federal regulatory field agents.<sup>152</sup>

Does this mean that every employer in the country, directed by federal statute to police its employees' compliance with federal laws, is a "state actor"? Must every Title VII workplace harassment hearing necessarily provide constitutional due process? No.

The distinction between mere law compliance and law enforcement is critical here. All laws require compliance; few impose on private parties duties of law enforcement. Speed limit laws require you to obey the speed limit, but they don't require you to enforce the speed limit against anyone else. (That's the job of the police—of law enforcement.) Compliance means discharging one's *own* obligations under a law; enforcement means policing, adjudicating, and punishing *others'* violations.<sup>153</sup>

The Dear Colleague letter turned schools into law enforcers in just this sense. The letter not only required schools to ensure that *they themselves* complied with Title IX—ensuring, that is, that their officers, supervisors, and other agents did not discriminate. More than this, it required schools to police, adjudicate, and punish sexual assaults committed by *third parties*, namely their students. Students are not a university's agents.<sup>154</sup> By contrast, employees *are* their employer's agents.<sup>155</sup> Hence, while Title VII demands law compliance from employers, the Dear Colleague letter had universities engaged in paradigmatic law *enforcement*.

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152. Moreover, several states have passed statutes requiring schools to enact "affirmative consent" definitions of sexual assault. *See, e.g.*, CAL. EDUC. CODE § 67386(a)(1); *see generally* 50 *States of Consent*, AFFIRMATIVE CONSENT, <http://affirmativeconsent.com/affirmative-consent-laws-state-by-state> [<https://perma.cc/4P32-GRZ5>] (maintaining a list of state affirmative consent laws). In such states, schools are doubly engaged in government-mandated law enforcement in their sexual assault hearings.

153. The same distinction—between law compliance and law enforcement—underlies *Printz v. United States*, which holds that while Congress may require states to comply with laws of general applicability, it may not require states to "implement," "enact or administer a federal regulatory program." 521 U.S. 898, 925, 933 (1997) (citing *New York v. United States*, 505 U.S. 144, 188 (1992)).

154. *See* *Miles v. Washington*, No. CIV-08-166-JHP, 2009 WL 259722, at \*4 (E.D. Okla. Feb. 2, 2009) ("The students are not agents of the school and their actions cannot be considered the actions of the school."); *Bruneau v. S. Kortright Cent. Sch. Dist.*, 935 F. Supp. 162, 171 n.7 (N.D.N.Y. 1996) ("[S]tudents are not agents of the school."); *Hanson v. Kynast*, 494 N.E.2d 1091, 1095 (Ohio 1986) ("[A] student is not an agent of a university . . .").

155. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (AM. LAW INST. 2006) ("The elements of common-law agency are present in the relationship[] between employer and employee . . .").

Thus, in every Title IX sexual assault hearing conducted as a result of the Dear Colleague letter, due process applies. Not only must the specific procedural mandates of the Dear Colleague letter satisfy due process. The entire adjudicatory process must do so as well.

A judge that so held today, although contradicting several district courts, would not be without precedent. In 1969, New York passed a statute requiring every private college in that state to enact “‘rules and regulations for the maintenance of public order on college campuses,’” including providing for “‘suspension, expulsion or other appropriate disciplinary action’ for student violators.”<sup>156</sup> In 1970, twenty-four students were expelled from a private college on Staten Island under rules the school had enacted pursuant to that statute.<sup>157</sup> The students brought a due process claim.<sup>158</sup> The district judge dismissed for lack of state action, but the Second Circuit reversed.<sup>159</sup>

A two-judge majority held that, although the statute on its face only required schools to have a disciplinary code—saying nothing, in other words, about what the codes should prohibit—further inquiry into the statute’s intent and application was warranted:

[S]pecifically, section 6450 may [have been] intended or applied as a command to the colleges of the state to adopt a new, more severe attitude toward campus disruption and to impose harsh sanctions on unruly students. The Governor’s Memorandum approving section 6450 referred to an “intolerable situation on the Cornell University Campus” and spoke of “the urgent need for adequate plans for student-university relations.” . . . *If these considerations have merit and section 6450 was intended to coerce colleges to adopt disciplinary codes embodying a “hard-line” attitude toward student protesters, it would appear that New York has indeed “undertaken to set policy for the control of demonstrations in all private universities” and should be held responsible for the implementation of this policy.*<sup>160</sup>

Reactions at other New York schools, said the majority, would be relevant on remand. “A reasonable and widespread belief among college administrators,” held the court, “that section 6450 required them to adopt a particular stance toward campus demonstrators would seem to justify a conclusion that the state intended for them to pursue that course of action.

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156. *Coleman v. Wagner Coll.*, 429 F.2d 1120, 1122 (2d Cir. 1970) (quoting N.Y. EDUC. LAW § 6450 (McKinney 2016) (repealed 2004)).

157. *Id.* at 1121–22.

158. *Id.* at 1123.

159. *Id.* at 1123, 1125.

160. *Id.* at 1124–25 (emphasis added) (citations omitted).

And this intent, if present, would provide a basis for a finding of state action.”<sup>161</sup>

The third judge was Henry Friendly, who, concurring, said that state action was already established and that no further inquiry was necessary:

[D]o not rules of private colleges framed in response to a state mandate have a significantly different symbolic appearance than rules formulated in the absence of such a statute? . . . [O]bjections to the very existence of a detailed code would be met by the answer that one was state-compelled. When a state has gone so far in directing private action that citizens may reasonably believe this to have been taken at the state’s instance, state action may legitimately be found even though the state left the private actors almost complete freedom of choice.<sup>162</sup>

The Dear Colleague letter presents a striking parallel, except that the federal government went much further than the New York legislature did. The federal government unquestionably “set policy”—an explicit, detailed sexual assault policy—for all private universities; it unquestionably demanded that schools adopt “a ‘hard-line’ attitude”; it dictated important procedural rules that schools had to incorporate into their disciplinary codes; and it unquestionably warned schools to “impose harsh sanctions” on violators, at the peril of losing their federal funding. Under the Second Circuit’s reasoning, the federal government was therefore “responsible for the implementation of this policy.”<sup>163</sup>

#### B. *The Chief Due Process Requirements for Title IX Sexual Assault Hearings*

Outside of criminal law, where strict and well-known procedural rules govern, due process requirements are said to be decided by a “balancing test” under *Mathews v. Eldridge*.<sup>164</sup> As everyone knows, however, “balancing tests” can generate virtually any outcome a decision maker wants.<sup>165</sup> The

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161. *Id.* at 1125.

162. *Id.* at 1126–27 (Friendly, J., concurring). In 1988, the Second Circuit returned to the same statute and found no state action in a private college’s disciplinary proceedings, on the grounds that the statute contained nothing about the content of the required disciplinary codes, that “the state’s role under the [statute] has been merely to keep on file rules submitted by colleges and universities,” that the state “has never sought to compel schools to enforce these rules and has never even inquired about such enforcement,” and that there was no “evidence whatsoever that any private college administrators anywhere in the State of New York believe, reasonably or not, that the [statute] requires that particular sanctions be imposed . . .” *Albert v. Carovano*, 851 F.2d 561, 568, 570 (2d Cir. 1988) (en banc). What OCR has done is obviously distinguishable.

163. *Id.*

164. 424 U.S. 319, 334–35 (1976); see, e.g., *Turner v. Rogers*, 564 U.S. 431, 444–48 (2011) (applying the *Mathews* factors to a civil contempt proceeding).

165. See Patrick M. McFadden, *The Balancing Test*, 29 B.C. L. REV. 585, 645 (1988):

result is that little can be said with certainty in this area, and everything will ultimately depend on the instincts, attitudes, and ideologies of the particular judges who make the final determinations.<sup>166</sup> All the same, there are some procedural rules that serve as bedrock in our system. Accordingly, the following sections will identify those bedrock rules and, with respect to other matters, will highlight the most prominent issues, rather than trying definitively to resolve them.

*1. Notice and Hearing.*—The most fundamental, minimal requirements of due process are notice and a hearing.<sup>167</sup> The Supreme Court has insisted on these requirements even in public high school disciplinary proceedings.<sup>168</sup> In 1998, a federal appellate court held that “procedural due process” on college campuses (in a state school) required “adequate notice, definite charge, and a hearing . . . with all necessary protective measures.”<sup>169</sup> Thus,

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If we take balancing seriously, as a legitimate means of deciding cases, we not only invite the possibility that different judges may treat the same case differently, we abandon the grounds upon which to consider this situation problematic. The internal logic of balancing is not offended by this state of affairs; different judges mean different world views, and different world views are acceptable.

166. See Henry J. Friendly, “*Some Kind of Hearing*”, 123 U. PA. L. REV. 1267, 1278 (1975) (describing the procedural balancing test as “uncertain and subjective”).

167. See *Mathews*, 424 U.S. at 348 (“The essence of due process is the requirement that ‘a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.’” (alteration in original) (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171–72 (1951) (Frankfurter, J., concurring))); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (“The fundamental requisite of due process of law is the opportunity to be heard.” (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914))).

168. *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (“At the very minimum, . . . students facing suspension . . . must be given *some* kind of notice and afforded *some* kind of hearing.”). Due process applies only when “property” or “liberty” interests are threatened, but the law is clear under *Goss*—and has been clear for decades—that university disciplinary proceedings threaten such interests, at least where the student faces suspension or expulsion. See, e.g., *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 633 (6th Cir. 2005) (“[T]he Due Process Clause is implicated by higher education disciplinary decisions.”); *Gaspar v. Bruton*, 513 F.2d 843, 850 (10th Cir. 1975) (applying *Goss* to a school disciplinary hearing); *Doe v. Ohio State Univ.*, 136 F. Supp. 3d 854, 865 (S.D. Ohio 2016) (“Disciplinary processes [at universities] implicate due process because they have the potential to deprive a student of either ‘the liberty interest in reputation’ or ‘the property interest in education benefits temporarily denied.’” (quoting *Goss*, 419 U.S. at 576)). *But cf.* *Krainiski v. Nevada ex rel. Bd. of Regents*, 616 F.3d 963, 971 (9th Cir. 2010) (holding that it was not “clearly established” that students *not* “suspended or expelled” had a right to due process in disciplinary hearings).

169. *Woodis v. Westark Cmty. Coll.*, 160 F.3d 435, 440 (8th Cir. 1998) (quoting *Jones v. Snead*, 431 F.2d 1115, 1117 (8th Cir. 1970)); see also, e.g., *Hennessy v. City of Melrose*, 194 F.3d 237, 250 (1st Cir. 1999) (“A hearing—or the offer of one—usually is necessary when a school takes serious disciplinary action against a student.” (emphasis omitted)); *Gorman v. Univ. of R.I.*, 837 F.2d 7, 13 (1st Cir. 1988) (“Indeed, in student discipline cases, since [*Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961)], the federal courts have uniformly held that fair process requires notice and an opportunity to be heard before the expulsion or significant suspension of a student from a public school.”); *Jenkins v. La. State Bd. of Educ.*, 506 F.2d 992, 1003 (5th Cir. 1975) (“There is no question but that a student charged with misconduct has a right to an impartial tribunal.”).

inquisitorial processes like those described in *Doe v. Brandeis*—where, as summarized earlier, the accused had no right to be informed of the charges against him, no right to confront the evidence against him, and no hearing in its usual sense—are plainly unconstitutional.

It defies belief that courts would permit a governmental agency to have students judged guilty of sexual assault, to have a permanent notation thereof placed in their academic records, and to impose other punishment therefor, without at a minimum informing the accused of the allegations against him and providing a hearing at which he could confront and rebut the evidence against him. But that’s exactly what the Department of Education was doing through the Dear Colleague letter. The only difference is that DOE achieved this result by inducing private schools like Brandeis to take the unconstitutional actions on its behalf.

Kafka-esque failures of notice, sometimes accompanied by significant threats to free speech, are disturbingly common in the Title IX process. Professor Laura Kipnis of Northwestern University has written of being charged with a Title IX violation after publishing an essay in the *Chronicle of Higher Education*.<sup>170</sup> Her university hired a team of lawyers to investigate the charges against her.<sup>171</sup> These lawyers, when they contacted Professor Kipnis, refused to provide her with the complaint and initially refused to tell her what she had been accused of.<sup>172</sup> Similarly, in *Brandeis*, the accused party had to guess at the accusations against him through the questions put to him by the investigator.<sup>173</sup>

Yale’s “informal complaint” process allows a Title IX officer to investigate complaints without telling the accused student what he has been accused of doing or who has accused him.<sup>174</sup> At San Diego State University, administrators sent out a campus-wide email warning of an alleged sexual

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170. Laura Kipnis, *My Title IX Inquisition*, CHRON. HIGHER EDUC. (May 29, 2015), <http://chronicle.com/article/My-Title-IX-Inquisition/230489/> [<https://perma.cc/U2RJ-QPY6>].

171. Jonathan H. Adler, *Northwestern’s Kipnis Cleared in Title IX Investigation*, WASH. POST: VOLOKH CONSPIRACY (June 1, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/01/northwesterns-kipnis-cleared-in-title-ix-investigation/> [<https://perma.cc/ZZ9F-ZJKL>].

172. See Erik Wemple, *Northwestern University Professor Laura Kipnis Details Title IX Investigation over Essay*, WASH. POST (May 29, 2015), <https://www.washingtonpost.com/blogs/erik-wemple/wp/2015/05/29/northwestern-university-professor-laura-kipnis-details-title-ix-investigation-over-essay/> [<https://perma.cc/D6CU-XK8L>] (“Kipnis wasn’t allowed to have an attorney with her for her meeting with investigators; she wasn’t apprised of her charges before the meeting; she had to fight with the investigators over recording the session.”).

173. *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 583 (D. Mass. 2016) (“[I]t was not until February 2014, when John had his first interview with the Special Examiner, that he began to learn of the factual allegations behind the charges. Even then, John was forced to speculate based on the particular questions the Special Examiner asked him about certain incidents.” (citation omitted)).

174. YALE UNIV., OFFICE OF THE PROVOST, UWC PROCEDURES 3 (2015), [provost.yale.edu/sites/default/files/files/UWC%20Procedures.pdf](http://provost.yale.edu/sites/default/files/files/UWC%20Procedures.pdf) [<https://perma.cc/9TTD-JQDP>].

assault and naming the accused student,<sup>175</sup> but again, the school refused to tell the accused student not only who had accused him, but what he had been accused of.<sup>176</sup> Unsatisfied by the student's responses to the unspecified allegations, the school ordered him to leave campus; only later, having found out the identity of his accuser, was the student able to submit evidence that led to his exoneration.<sup>177</sup> There should be little doubt: these procedures are unconstitutional.

2. *If a Hearing Is Held.*—Assuming a school does hold a hearing, what are its minimal due process conditions?

Let's first consider cross-examination: as noted earlier, OCR specifically warned schools not to permit cross-examination of the complainant.<sup>178</sup> Instead, typically, following OCR recommendations, schools allow the accused to submit questions to a hearing panelist, who "screens" the questions and decides whether or in what words to pose them.<sup>179</sup>

Moreover, cross-examination is frequently prevented even as to other witnesses. At many schools, a Title IX investigator reports to the decision makers either in writing or orally about interviews he has conducted.<sup>180</sup> There

175. Charles M. Sevilla, *Campus Sexual Assault Allegations, Adjudications, and Title IX*, 39 CHAMPION 16, 17 (2015) ("As soon as SDSU received notice of the complaining witness's sexual assault allegation, it sent an email blast across the campus warning of the threat he posed—naming him in the more than 20,000 emails.").

176. *Id.*

177. *Id.*

178. See *supra* Section I(B); QUESTIONS AND ANSWERS ON TITLE IX, *supra* note 53, at 31 ("strongly discourag[ing] a school from allowing the parties to personally question or cross-examine each other during a hearing on alleged sexual violence").

179. See *id.* ("A school may choose, instead, to allow the parties to submit questions to a trained third party (e.g., the hearing panel) to ask the questions on their behalf. OCR recommends that the third party screen the questions submitted by the parties and only ask those it deems appropriate and relevant to the case."). Yale's policy allows "each party . . . to submit questions for the panel to ask the other party or witness. The panel, at its sole discretion, may choose which, if any, questions to ask." YALE UNIV., OFFICE OF THE PROVOST, *supra* note 174, at 6; see also, e.g., UNIV. OF VA., APPENDIX A: PROCEDURES FOR REPORTS AGAINST STUDENTS 17, <https://eocr.virginia.edu/appendixa> [<https://perma.cc/9LP4-C4LL>] ("The parties may not directly question each another [sic] or any witness, although they may proffer questions for the Review Panel, which may choose, in its discretion, to pose appropriate and relevant questions to the Investigator, the parties and/or any witnesses."); UNIV. OF KAN., STUDENT NON-ACADEMIC CONDUCT PROCEDURES 9 (2015), [http://policy.ku.edu/sites/policy.ku.edu/files/Non%20Academic%20Misconduct%20Procedures\\_Revised%208.21.15.pdf](http://policy.ku.edu/sites/policy.ku.edu/files/Non%20Academic%20Misconduct%20Procedures_Revised%208.21.15.pdf) [<https://perma.cc/2BEZ-C7RG>] ("Only the Chair and Panel members are given absolute authority to directly question parties and witnesses. At the discretion of the Chair, parties may directly question witnesses and each other, but the Chair is empowered to have questions directed to the Chair, disallow or reframe any questions.").

180. See, e.g., HARVARD UNIV., APPENDIX A3: OVERVIEW OF FAS PROCEDURES ON SEXUAL AND GENDER-BASED HARASSMENT BY STUDENTS 2, [http://www.fas.harvard.edu/files/fas/files/appendix\\_a3\\_overview\\_of\\_fas\\_procedures\\_students.pdf](http://www.fas.harvard.edu/files/fas/files/appendix_a3_overview_of_fas_procedures_students.pdf) [<https://perma.cc/7HCL-K52S>]:

Once the [Investigator's] report has been given to the Complainant, the Respondent, and the Title IX Coordinator, the report is forwarded to the School's Administrative

is no requirement that these investigators record their interviews—indeed, as in Professor Kipnis’s case, they may not even permit a recording to be made<sup>181</sup>—so there will be no independent way to verify that the investigator’s report of what the witnesses said is accurate and complete. In such cases, the investigator presents hearsay summaries of statements allegedly made by other individuals, whom the accused student is never given an opportunity to confront or cross-examine directly.

At least one judge—in a Title IX case involving a state school—has found that both these limitations on cross-examination violated due process, but that opinion was reversed on appeal,<sup>182</sup> and the appellate court’s ruling squares with existing case law. Prior to the recent Title IX controversies, several federal courts had held that due process does *not* require cross-examination in school disciplinary proceedings—or at least that the accused has no “right to unlimited cross-examination.”<sup>183</sup> A school disciplinary hearing is not a criminal trial and should not be turned into one, especially given that litigation-style cross-examination can be extremely painful for victims of sexual assault.

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Board for consideration of discipline. The Administrative Board must accept as final the ODR report’s findings of fact and its conclusions about policy violations; the Board’s only role is to determine the appropriate discipline to administer in response to the violation.

*Id.*; UNIV. OF CAL., STUDENT ADJUDICATION MODEL FOR SEXUAL VIOLENCE & SEXUAL HARASSMENT CASES 10 (2016), [https://students.ucsd.edu/\\_files/student-conduct/ucsd-sexual-violence-sexual-harassment-adjudication-implementing-procedures1-4-16.pdf](https://students.ucsd.edu/_files/student-conduct/ucsd-sexual-violence-sexual-harassment-adjudication-implementing-procedures1-4-16.pdf) [<https://perma.cc/YMK7-M3XU>] (“The Title IX investigator will be present at the appeal hearing. The Appeal Body may question the investigator . . . The investigation report . . . will be entered as evidence at the appeal hearing.”).

181. Kipnis, *supra* note 170:

They told me, cordially, that they wanted to set up a meeting during which they would inform me of the charges and pose questions. . . . We finally agreed to schedule a Skype session in which they would inform me of the charges and I would not answer questions. . . . I said I wanted to record the session; they refused but said I could take notes.

182. A California trial court found that the procedure employed by the University of California at San Diego was “unfair” because it did not allow the accused to cross-examine the complainant. *Doe v. Regents of the Univ. of Cal.*, 210 Cal. Rptr. 3d 479, 494 (2016). Reversing, the appellate court observed that “there is no California or federal authority requiring an accused be permitted, in a disciplinary hearing, to directly question the complainant.” *Id.* at 504.

183. *Gorman v. Univ. of R.I.*, 837 F.2d 7, 16 (1st Cir. 1988) (“As for the right to cross-examination, suffice it to state that the right to unlimited cross-examination has not been deemed an essential requirement of due process in school disciplinary cases.”); *see, e.g., Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987) (“Where basic fairness is preserved, we have not required the cross-examination of witnesses and a full adversary proceeding.”); *Winnick v. Manning*, 460 F.2d 545, 549 (2d Cir. 1972) (“The right to cross-examine witnesses generally has not been considered an essential requirement of due process in school disciplinary proceedings.”).

A troubling consideration, however, is that campus sexual assaults frequently lack physical evidence or corroborating eye witnesses.<sup>184</sup> Indeed, this “absence of corroborating evidence” has served as the basis for arguments in favor of the preponderance of the evidence standard (discussed further below), on the theory that higher evidentiary standards “make it inevitable that date rapists will be frequently acquitted.”<sup>185</sup> But if the evidence in a campus sexual assault trial consists solely or primarily of the complainant’s statement, and especially if the burden of proof is lowered for that reason, cross-examination would be more critical than it might be in other disciplinary proceedings. In such a case, some opportunity to directly question the complainant, and challenge his or her statements, would seem essential to due process.

The ultimate question is what sort of cross-examination rights judges would insist on for a student if the Department of Education itself had conducted the hearing and, say, found the student guilty of sexual assault and therefore expelled him from his university. What an agency cannot constitutionally do itself, it cannot make private parties do.

The same analysis applies to the other components of Title IX hearings, which vary from school to school. Some block lawyers from participating;<sup>186</sup> others permit it.<sup>187</sup> Almost no schools provide a lawyer to a student who can’t afford one.<sup>188</sup> At some schools, accused students may call witnesses, while at

184. Lavinia M. Weizel, Note, *The Process That is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1649 (2012).

185. See, e.g., Katherine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 691 (1999).

186. See, e.g., *Conduct Process Settings*, U. NOTRE DAME, <http://dulac.nd.edu/community-standards/process/settings/#hearing> [<https://perma.cc/J6JP-8G46>] (“The student may be accompanied, but not represented, by a University Support Person at the Hearing. A University Support Person may be any University of Notre Dame student, faculty or staff member, with the exception of parents and attorneys. . . . The student may not proceed through an attorney.”); see also Allie Grasgreen, *Students Lawyer Up*, INSIDE HIGHER ED (Aug. 26, 2013), <https://www.insidehighered.com/news/2013/08/26/north-carolina-becomes-first-state-guarantee-students-option-lawyer-disciplinary> [<https://perma.cc/4WVW-8SZ3>] (“Previously, institutions in the 17-campus UNC System allowed lawyers to attend hearings only when a student was also being tried in criminal court, and only to advise. (Most universities operate this way, or do not permit lawyers at all.)”).

187. E.g., UNIV. OF KAN., STUDENT NON-ACADEMIC CONDUCT PROCEDURES 8 (2015), [http://policy.ku.edu/sites/policy.ku.edu/files/Non%20Academic%20Misconduct%20Procedures\\_Revised%208.21.15.pdf](http://policy.ku.edu/sites/policy.ku.edu/files/Non%20Academic%20Misconduct%20Procedures_Revised%208.21.15.pdf) [<https://perma.cc/Y69M-YFUW>] (“The complainant and the respondent shall submit to the Vice Provost for Student Affairs, or designee, . . . the name of their advisor(s) and if s/he is an attorney . . .”).

188. On the contrary, the current debate is whether students will be allowed to be represented by attorneys that the *students* pay for. See Grasgreen, *supra* note 180 (“The legislation, signed into law on Friday, guarantees any student at a public institution in the state the right to legal representation, at the student’s expense, during campus judiciary proceedings.” (emphasis added)); Tovia Smith, *For Students Accused of Campus Rape, Legal Victories Win Back Rights*, NPR (Oct. 15, 2015), <http://www.npr.org/2015/10/15/446083439/for-students-accused-of-campus-rape->

others, that prerogative is vested in the hearing panel.<sup>189</sup> Due process analysis will demand that courts look at each case on its own facts, but the question should always be whether the procedures would satisfy due process were a federal agency conducting the hearing itself.

If courts are looking for a list of procedures to satisfy due process, they might do well to start with a case decided almost fifty years ago, when two state college students in Missouri had been suspended for allegedly participating in riots.<sup>190</sup> The court ordered the college to grant the students a new hearing with the following procedures:

- (1) a written statement of the charges to be furnished each plaintiff at least 10 days prior to the date of the hearing;
- (2) the hearing shall be conducted before the President of the college;
- (3) plaintiffs shall be permitted to inspect in advance of such hearing any affidavits or exhibits which the college intends to submit at the hearing;
- (4) plaintiffs shall be permitted to have counsel present with them at the hearing to advise them;
- (5) plaintiffs shall be afforded the right to present their version as to the charges and to make such showing by way of affidavits, exhibits, and witnesses as they desire;
- (6) plaintiffs shall be permitted to hear the evidence presented against them, and plaintiffs (not their attorney) may question at the hearing any witness who gives evidence against them;
- (7) the President shall determine the facts of each case solely on the evidence presented at the hearing therein and shall state in writing his finding as to whether or not the student charged is guilty of the conduct charged and the disposition to be made, if any, by way of disciplinary action;
- (8) either side may, at its own expense, make a record of the events at the hearing.<sup>191</sup>

These procedures obviously need updating. Instead of the university president, cases should be tried before impartial decisionmakers. Instead of access to “affidavits” or “exhibits,” the accused should be given prehearing access to the investigator’s report. Cross-examination of the complainant

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legal-victories-win-back-rights [https://perma.cc/NB6W-KR5R] (discussing the bill for the Safe Campus Act, which would require that institutions “permit each party to the proceeding to be represented, *at the sole expense of the party*, by an attorney or other advocate for the duration of the proceeding . . .” H.R. 3403, 114th Con. § 164(a)(4) (2015) (emphasis added)).

189. See, e.g., YALE UNIV., OFFICE OF THE PROVOST, *supra* note 174, at 6 (“At its sole discretion, the panel may request the testimony of additional witnesses.”).

190. *Esteban v. Cent. Mo. State Coll.*, 277 F. Supp. 649, 650–51 (W.D. Mo. 1967).

191. *Id.* at 651–52.

should be done by someone representing the accused, not by the accused himself. Both sides should be entitled to call witnesses. And modern conceptions of due process might require that the school provide an attorney to students who can't afford one.

3. *Competence and Impartiality.*—There are, however, still deeper and more structural problems in campus Title IX rape adjudications: in particular, problems of basic competence and partiality. Sexual assault is not like plagiarism, a matter well within academic expertise. Not to put too fine a point on it, but faculty, administrators, and students often have little idea what they're doing when called on to judge rape allegations, which can lead to errors in both directions.

In one Title IX case, a faculty member reportedly had to ask the complainant to explain anal sex.<sup>192</sup> At many schools, fellow students—who may well know the parties or at any rate know people who know them—sit as judges.<sup>193</sup> In one case, a college bookstore manager served as a judge.<sup>194</sup> “Our disciplinary and grievance procedures,” as the American Council on Education—which represents 1,700 higher education institutions—has put it, “were designed to provide appropriate resolution of institutional standards for student conduct, especially with respect to academic matters. They were never meant for misdemeanors, let alone felonies.”<sup>195</sup>

The truth is that academic institutions are self-interested parties in their own campus rape cases. Their self-interest can bias them in some cases

192. Vanessa Grigoriadis, *Meet the College Women Who Are Starting a Revolution Against Campus Sexual Assault*, N.Y. MAG. (Sept. 21, 2014), <http://nymag.com/thecut/2014/09/emmasulkowicz-campus-sexual-assault-activism.html> [<https://perma.cc/L9JK-H7KE>] (quoting a sexual assault claimant as saying that judges “kept asking me to explain the position I was in . . . . At one point, I was like, ‘Should I just draw you a picture?’ So I drew a stick drawing,” and stating that “one of the three judges even asked whether [the accused] used lubricant, commenting, ‘I don’t know how it’s possible to have anal sex without lubrication first’”).

193. See, e.g., Office of the Provost, *Title IX FAQs*, YALE U. (Feb. 3, 2014), <http://provost.yale.edu/title-ix/faq> [<https://perma.cc/7WE7-3EHA>] (“Undergraduate, graduate, and professional students are appointed as members of the UWC and sit on formal hearing panels reviewing student complaints.”); Sara Ganim & Nelli Black, *An Imperfect Process: How Campuses Deal with Sexual Assault*, CNN (Dec. 21, 2015), <http://www.cnn.com/2015/11/22/us/campus-sexual-assault-tribunals/> [<https://perma.cc/9JZY-9N7W>] (“From campus to campus, the process varies. Some have students on the panels, some don’t.”).

194. See Walt Bogdanich, *Reporting Rape, and Wishing She Hadn’t*, N.Y. TIMES (July 12, 2014), <http://www.nytimes.com/2014/07/13/us/how-one-college-handled-a-sexual-assault-complaint.html> [<https://perma.cc/3C2Q-E9GY>] (“The [panel] chairwoman, Sandra E. Bissell, vice president of human resources, was joined by Brien Ashdown, an assistant professor of psychology, and Lucille Smart, director of the campus bookstore, who the school said had expressed an interest in serving.”).

195. Letter from Molly C. Broad, President, American Council on Educ., to Senators Tom Harkin and Lamar Alexander, Comm. on Health, Educ., Labor, and Pensions 2 (June 25, 2014), <http://www.acenet.edu/news-room/Documents/Letter-Senate-HELP-Sexual-Assault-Hearing.pdf> [<https://perma.cc/8R89-E8BB>].

against victims, in others against the accused. Cases currently pending may reveal egregious instances where sexual assailants have been falsely exonerated or insufficiently punished because of their connection to important school sports teams.<sup>196</sup> But as pressure has mounted from the opposite direction, schools today can have powerful incentives—legal and reputational—to find guilt.<sup>197</sup>

Courts have acknowledged this possibility, while rejecting it as a basis for holding that a school violated Title IX or the Constitution. “It may well be,” stated one district court recently, “that a desire to avoid Title IX liability to the alleged victims of sexual assault or an effort to persuade the DOE and others that it takes sexual assault complaints seriously caused Columbia to ‘maladminister’ Plaintiff’s disciplinary hearing, as he alleges,” but “that is not discrimination against Plaintiff because of sex.”<sup>198</sup> Nor could a due process claim be stated, according to the court, because “constitutional claims may be brought only against ‘state actors.’”<sup>199</sup>

Some Title IX advocates argue that these biases are good for the process. “If there were only pressure one way,” according to Michelle Anderson, “you’d have a problem. But you have pressure on both sides,” and that “will lead to more equitable and fair outcomes.”<sup>200</sup> It’s disturbing and disheartening for a law professor to make this kind of argument. Two conflicts of interest do not equal impartiality. A more likely result is that in some schools, or in some cases, one bias will dominate, and in others the other—undermining everyone’s prospects for a fair adjudication.

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196. See, e.g., Nick Martin, *Lawsuit Alleges Baylor Officials Ignored Multiple Claims of Sexual Assault*, WASH. POST (Mar. 31, 2016), <https://www.washingtonpost.com/news/early-lead/wp/2016/03/31/lawsuit-alleges-baylor-officials-ignored-multiple-claims-of-sexual-assault/> [<https://perma.cc/7S2X-DPCZ>] (describing lawsuit allegations that school officials ignored multiple sexual assault reports against then-football player Tevin Elliot, who is now serving a twenty-year sentence for rape); Anita Wadhvani & Matt Slovin, *Two More Women Join University of Tennessee Sexual Assault Lawsuit*, TENNESSEAN (Feb. 2, 2016), <http://www.tennessean.com/story/sports/college/ut/2016/02/24/women-join-ut-sexual-assault-suit/80860462/> [<https://perma.cc/L74K-WATB>] (summarizing allegations including that a football player was allowed to reenroll “even after an internal investigation found that he had assaulted one of the new plaintiffs”).

197. See Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 71, 74–75 (describing OCR pressure on colleges to reinvestigate cases where students have been previously found not guilty); Sara Lipka, *The ‘Fearmonger’*, CHRON. HIGHER EDUC. (Nov. 20, 2011), <http://chronicle.com/article/TheFearmonger/129833> [<https://perma.cc/R9HK-8RC9>] (describing “panic” over the threat of federal investigation).

198. *Doe v. Columbia Univ.*, 101 F. Supp. 3d 356, 371 n.7 (S.D.N.Y. 2015).

199. *Id.* at 368 n.5.

200. Michelle Anderson, Dean, CUNY Sch. of Law, Transcript of Debate on Courts, Not Campuses, Should Decide Sexual Assault Cases, INTELLIGENCE SQUARED U.S. 28 (Sept. 17, 2015), <http://www.intelligencesquaredus.org/debates/courts-not-campuses-should-decide-sexual-assault-cases> [<https://perma.cc/GEN7-4VWG>].

One piece of the partiality problem may be the government-mandated creation at every school of a Title IX office vested with training, prosecutorial, investigatory, and adjudicatory authority.<sup>201</sup> Title IX bureaucracies are a growth industry in the academy today,<sup>202</sup> and the “training” they offer is sometimes less than fully objective. At Stanford, training materials given to student jurors advised them of certain “indicators” on the part of an accused man that he is an “abuser,” which included “feel[ing] victimized” by the accusation and “act[ing] persuasive and logical.”<sup>203</sup> At Ohio State, the Title IX office’s training materials for hearing judges included:

statements like a “[v]ictim centered approach can lead to safer campus communities”; “[s]ex offenders are overwhelmingly white males”; “[i]n a large study of college men, 8.8% admitted rape or attempted rape”; “[s]ex offenders are experts in rationalizing their behavior”; and “22-57% of college men report perpetrating a form of sexually aggressive behavior.”<sup>204</sup>

In a recent case involving Washington and Lee University, the plaintiff, found guilty of sexual intercourse without consent, asserted that:

[the complainant had] attended a presentation put on by W & L’s Title IX Officer, Lauren Kozak (“Ms. Kozak”). During Ms. Kozak’s presentation, she introduced an article, *Is it Possible That There Is Something In Between Consensual Sex And Rape . . . And That It Happens To Almost Every Girl Out There? . . .* to make her point that “regret equals rape,” and went on to state her belief that this point was a new idea everyone, herself included, is starting to agree with.<sup>205</sup>

An “impartial tribunal” is of course fundamental to due process,<sup>206</sup> but Washington and Lee is a private university, and so as usual, the court found that due process did not apply. “Had Plaintiff been enrolled at a public

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201. DEAR COLLEAGUE LETTER, *supra* note 33, at 7; see Elizabeth Bartholet et al., *supra* note 118, (expressing concern about vesting investigatory, prosecutorial, and adjudicatory authority in “a Title IX compliance office rather than an entity that could be considered structurally impartial”).

202. Gersen & Suk, *supra* note 37, at 904 (“Schools must employ Title IX coordinators to oversee their compliance . . . . At some schools this is a single person, but at many schools this entails an entire office, staff, and structure dedicated to implementing federal directives regarding regulation of sexual conduct.”).

203. Mike Armstrong & Daniel Barton, Opinion, *A Thumb on the Scale of Justice*, STAN. DAILY (Apr. 29, 2011), <http://www.stanforddaily.com/2011/04/29/op-ed-a-thumb-on-the-scale-of-justice/> [<https://perma.cc/965X-AYYJ>].

204. Doe v. Ohio State Univ., No. 2:15-cv-2830, 2016 U.S. Dist. LEXIS 21064, at \*8–9 (S.D. Ohio Feb. 22, 2016).

205. Doe v. Wash. & Lee Univ., No. 6:14-cv-00052, 2015 WL 4647996, at \*3 (W.D. Va. Aug. 5, 2015).

206. *E.g.*, Jenkins v. La. State Bd. of Educ., 506 F.2d 992, 1003 (5th Cir. 1975) (“There is no question but that a student charged with misconduct has a right to an impartial tribunal.”).

university,” said the court, “he would have been entitled to due process and the proceedings against him might have unfolded quite differently.”<sup>207</sup>

4. *Burden of Proof*.—Finally, there is the government-mandated standard of proof. Of the Dear Colleague letter’s many procedural directives, its imposition of the preponderance of the evidence standard drew the most attention.<sup>208</sup>

There are three well-recognized standards of proof in the American legal system: “preponderance of the evidence,” which is just another way of saying “more likely than not”; “clear and convincing evidence”; and criminal law’s “beyond a reasonable doubt.”<sup>209</sup> Some schools previously used the “clear and convincing evidence” standard in their disciplinary hearings—and still do, for nonsexual offenses.<sup>210</sup> Critics of the Dear Colleague letter argue that the preponderance standard affords insufficient protection for students accused of sexual assault.<sup>211</sup>

But as the letter’s supporters have pointed out, “more likely than not” is the most common and widely accepted burden of proof in the American legal system, used in the overwhelming majority of civil suits.<sup>212</sup> Outside of

207. *Wash. & Lee*, 2015 WL 4647996, at \*8.

208. *See, e.g.*, Amy Chmielewski, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 BYU EDUC. & L.J. 143, 145 (2013) (“Much of the media attention directed at the Dear Colleague Letter has focused on the preponderance of the evidence standard . . .”); Valerie Bauerlein, *In Campus Rape Tribunals, Some Men See Injustice*, WALL ST. J. (Apr. 10, 2015), <http://www.wsj.com/articles/in-campus-rape-tribunals-some-men-see-injustice-1428684187> [<https://perma.cc/V4SZ-TNHJ>] (discussing the preponderance of evidence standard at length and garnering over 700 comments and over 1,100 Facebook shares).

209. *See* Chmielewski, *supra* note 208, at 150 (discussing the standards of proof in the American legal system).

210. *See, e.g.*, *UWS Chapter 17: Student Nonacademic Disciplinary Procedures*, U. WIS. WHITEWATER § 17.12(4)(f) (2009), <https://www.uww.edu/student-handbook/system-17intro> [<https://perma.cc/AQ2U-YBAU>] (stating the evidentiary standard of clear and convincing for some offenses but preponderance of the evidence for all sexual offenses); *XI. (B.) Procedures for Disciplinary Cases*, HARV. LAW SCH. (2016), <http://hls.harvard.edu/dept/academics/handbook/rules-relating-to-law-school-studies/xii-administrative-board/b-procedures-for-disciplinary-cases-except-for-cases-covered-under-the-law-schools-interim-sexual-harassment-policies-and-procedures-see-appendix-viii/> [<https://perma.cc/36V4-59T7>] (establishing “clear and convincing evidence” as the standard for all disciplinary sanctions with the exception of sexual offenses).

211. *See, e.g.*, Statement, Comm. on Women in the Acad. Profession, Am. Ass’n Univ. Professors, *Campus Sexual Assault: Suggested Policies and Procedures* 371 (2012), [https://www.aaup.org/file/Sexual\\_Assault\\_Policies.pdf](https://www.aaup.org/file/Sexual_Assault_Policies.pdf) [<https://perma.cc/ED8T-SDLJ>] (“The AAUP advocates the continued use of ‘clear and convincing evidence’ in . . . discipline cases as a necessary safeguard of due process and shared governance.”).

212. Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 YALE L.J. F. 281, 290–91 (2016), <http://www.yalelawjournal.org/forum/for-the-title-ix-civil-rights-movement-congratulations-and-cautions> [<https://perma.cc/N2DA-WH58>] (“In reality the preponderance standard is used in the vast majority of cases, not only in internal disciplinary proceedings but also in other administrative or civil court proceedings and under other civil rights statutes that protect equality.” (footnotes omitted)).

criminal law, the Supreme Court has found it unconstitutional only very occasionally, when an individual was threatened with extraordinary sanctions—for example, civil commitment, termination of parental rights, or deportation.<sup>213</sup> The preponderance standard is even used at criminal sentencing hearings.<sup>214</sup> Thus the notion that the preponderance standard might be unconstitutional in Title IX hearings faces steep obstacles.

The issue is not, however, quite open-and-shut.

The Court has frequently stated that “fundamental fairness” may require an “intermediate standard of proof” where the threatened penalty is grievous and involves “‘stigma,’”<sup>215</sup> and lower courts have often applied this precept to “quasi-criminal” proceedings. “[C]lear and convincing’ evidence is required,” a state supreme court has put it, “in various quasi-criminal proceedings or where the proceedings threaten the individual involved with . . . a stigma.”<sup>216</sup> Clear and convincing evidence has been held required for violations of a city ordinance prohibiting conduct of a “criminal nature” but punishable only by a fine,<sup>217</sup> as well as for attorney disciplinary proceedings, at least where “bad faith” is at issue and the attorney faces suspension.<sup>218</sup> Title IX hearings would also seem to be quasi-criminal in nature.

The fact that Title IX hearings involve sex offenses may itself be important. In 2015, the Massachusetts Supreme Court held that the state’s Sex Offender Registry Board (SORB) violated due process when it used the

213. See *Herman v. Huddleston*, 459 U.S. 375, 389 (1983) (citing cases).

214. See, e.g., *United States v. Gerick*, 568 F. App’x 405, 409 (6th Cir. 2014). *But cf.* *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (requiring proof beyond a reasonable doubt for facts increasing potential maximum sentence).

215. *Santosky v. Kramer*, 455 U.S. 745, 756–57 (1982) (citing cases).

216. *Riley Hill Gen. Contractor v. Tandy Corp.*, 737 P.2d 595, 602 (Or. 1987). In *Chenega Mgmt. v. United States*, 96 Fed. Cl. 556 (2010), the court observed that:

The United States Court of Appeals for the Federal Circuit has held that a “quasi-criminal” claim requires the application of the clear and convincing standard. Recently, the United States Court of Federal Claims also has held that “clear and convincing” evidence is required to prove a violation of FAR 3.101–1, i.e., “[g]overnment business shall be conducted in a manner above reproach . . . with complete impartiality and with preferential treatment for none.”

*Id.* at 582 n.31 (alterations in original) (citations omitted).

217. *City of Milwaukee v. Wilson*, 291 N.W.2d 452, 459 (Wisc. 1980).

218. “In attorney suspension and disbarment cases, the finding of bad faith must be supported by clear and convincing proof.” *White v. Reg’l Adjustment Bureau, Inc.*, 632 F. App’x 234, 236 n.1 (5th Cir. 2016) (quoting *Crowe v. Smith*, 261 F.3d 558, 563 (5th Cir. 2001)). *But see, e.g., Jones v. Conn. Med. Examining Bd.*, 72 A.3d 1034, 1041 (Conn. 2013) (upholding the preponderance standard in physician license revocation proceeding); *see also Steadman v. Sec. & Exch. Comm’n*, 450 U.S. 91, 96–97 n.15 (1981) (upholding on statutory grounds the preponderance standard in SEC broker registration revocation proceedings, although noting that petitioner had not argued a constitutional violation).

preponderance standard to adjudge the plaintiff a “level two sex offender,” posing a “moderate risk” of re-offense.<sup>219</sup> Said the court:

Although a preponderance standard is generally applied in civil cases, the clear and convincing standard is applied when “particularly important individual interests or rights are at stake.” . . .

. . . Balancing the *Mathews* factors, we conclude that sex offender risk classifications must be established by clear and convincing evidence in order to satisfy due process.

. . . “Classification and registration entail possible harm to a sex offender’s earning capacity, damage to his reputation, and, ‘most important, . . . the statutory branding of him as a public danger.’” Internet dissemination . . . magnifies these consequences. Although the State has a strong interest in protecting the public from recidivistic sex offenders, allowing SORB to make classification determinations with a lesser degree of confidence does not advance that interest.<sup>220</sup>

The *SORB* case is hardly controlling in the Title IX context, but it can’t be entirely ignored. Both SORB and Title IX hearings are noncriminal proceedings; both determine whether an individual is a sex offender; and both create a documentary record of a person’s sex offender status, made available to others. Many individuals found guilty of sexual assault in Title IX hearings have also had their names disseminated over the media or Internet, subjecting them to vilification and adverse consequences.<sup>221</sup> Indeed, from a certain point of view, the great accomplishment of the Dear Colleague letter was, under the aegis of an antidiscrimination statute, to turn every school in the country into a Sex Offender Registry Board.

Massachusetts SORB classifications, however, impinge on rights more severely than do sexual assault determinations under Title IX. For example,

219. *Doe, Sex Offender Registry Bd. No. 380316 v. Sex Offender Registry Bd.*, 41 N.E.3d 1058, 1060–61 (Mass. 2015).

220. *Id.* at 1068–72 (citations omitted).

221. *See, e.g.*, Richard Pérez-Peña, *At Yale, the Collapse of a Rhodes Scholar Candidacy*, N.Y. TIMES (Jan. 26, 2012), <http://www.nytimes.com/2012/01/27/sports/ncaafootball/at-yale-the-collapse-of-a-rhodes-scholar-candidacy.html> [<https://perma.cc/U8P8-7L5C>] (revealing the identity of a Yale student investigated for sexual assault while maintaining the confidentiality of the story’s sources: “This account of the accusation against Witt . . . is based on interviews with a half-dozen people with knowledge of all or part of the story; they all spoke on the condition of anonymity because they were discussing matters that the institutions treat as confidential.”); Cathy Young, *Columbia Student: I Didn’t Rape Her*, DAILY BEAST (Feb. 13, 2015), <http://www.thedailybeast.com/columbia-student-i-didnt-rape-her> [<https://perma.cc/Z9VB-RAAX>] (describing social media attacks on a student acquitted of sexual assault at Columbia and stating that a “Tumblr post that began to circulate last September said, ‘The name of Emma Sulkowicz’s rapist is Jean-Paul Nungesser. Don’t let him have any feeling of anonymity or security. Rapists don’t get the luxury of feeling comfortable.’”); *supra* Section I.A (describing an alleged episode of this kind at Brandeis).

“level two sex offenders” must comply with self-reporting requirements whenever they move.<sup>222</sup> Failure to do so can lead to incarceration,<sup>223</sup> and offenders’ names can be officially, publicly disseminated.<sup>224</sup>

But the potential consequences of a Title IX conviction of sexual assault are undoubtedly grievous and in some cases life-damaging. Students not only face expulsion and calumny; the expulsion and its reasons may be noted on their academic record, making it very difficult for them to complete their education because other schools won’t admit them. The case for a higher standard of proof in the Title IX context probably comes down to the combination of these potentially life-damaging sanctions with the uncomfortable fact (mentioned earlier) that in campus sexual assault cases, there is frequently no evidence of the offense other than the complainant’s statement.<sup>225</sup> Because such cases often come down to a “‘he said/she said’ conflict,” critics have questioned using a proof standard that “requires a finding of responsibility even if the factfinder is almost 50% sure that the accused student is not guilty.”<sup>226</sup>

Supporters of the Dear Colleague letter sometimes respond that a higher standard of proof would perpetuate the invidious calumny that rape victims are lying. According to Nancy Chi Cantalupo, applying a clear and convincing proof standard to sexual assault cases would imply a “societal belief that victims lie,” and “in the context of sexual violence, a systemic assumption that victims lie is a kind of gender-stereotyping that is widely recognized as a violation of equality rights . . . .”<sup>227</sup>

It’s hard to know how to respond to this kind of argumentation. Undoubtedly rape victims have historically been<sup>228</sup>—and often still are—outrageously disbelieved and doubted.<sup>229</sup> But not all sexual assault claims are true; the question is what to do about that fact, and on that score Cantalupo’s argument doesn’t seem helpful. Indeed it seems badly mistaken.

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222. *Doe*, *SORB No. 380316*, 41 N.E.3d at 1065.

223. *Id.* at 1065–66 (“If a judge determines that incarceration is a more appropriate penalty for a noncompliant offender than a fine, the judge now must impose a mandatory minimum sentence of at least six months.”).

224. *Id.* at 1066.

225. Weizel, *supra* note 178, at 1649.

226. Open Letter from Members of the Penn. Law Sch. Faculty, *Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities 2* (Feb. 18, 2015), <http://media.philly.com/documents/OpenLetter.pdf> [<https://perma.cc/J4JS-9NZY>].

227. Cantalupo, *supra* note 212, at 289.

228. Susan Estrich, *Rape*, 95 *YALE L.J.* 1087, 1094 (1986); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 *U.C. DAVIS L. REV.* 1013, 1028–29 (1991).

229. Christopher Ingraham, *How a Vicious Cycle of Skepticism Keeps Cops from Treating Rape Seriously*, *WASH. POST: WONKBLOG* (Nov. 13, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/11/13/how-a-vicious-cycle-of-skepticism-keeps-cops-from-treating-rape-seriously/> [<https://perma.cc/6MAE-CCYA>].

First, higher standards of proof cannot be equated with systemic assumptions about accusers' veracity. For example, proof beyond a reasonable doubt isn't required in criminal law because of a "societal belief" that most witnesses or prosecutors are lying. It's required because some accusations are wrong, and the Constitution demands an extremely high degree of confidence when individuals face the special punishments and stigmatization associated with criminal liability. Similarly, a school like Yale, which requires clear and convincing evidence in cheating cases, does not do so because of a "systemic assumption" that the accusers, whoever they may be, are lying.

More fundamentally, it's difficult to understand how a school that used the clear and convincing evidence standard in *all* its disciplinary proceedings could possibly be said to be implying anything invidious about sexual assault complainants. Prior to the Dear Colleague letter, no school I know of singled out sexual assault cases for a higher proof standard than it applied in other cases. The schools previously using the clear and convincing standard for sexual assault cases did so for *all* serious disciplinary charges. The claim that such schools were implying anything special about sexual assault complainants seems based more on ideology than logic.

Perhaps the presumption of innocence itself is the issue here. Many Title IX activists feel that it is imperative not to question the validity of sexual assault claims,<sup>230</sup> suggesting a kind of reverse presumption—that all sexual assault claimants are, or must be assumed to be, victims. This way of thinking is sometimes explicitly embraced:

In this book we will be using the term *victim* to refer to people who claim to have been sexually assaulted. Even if the alleged perpetrator was not found guilty, that does not mean that the person assaulted does not still feel like a victim. In fact, the victim may suffer from a more severe case of rape trauma . . . if she thinks that no one believes her.<sup>231</sup>

Note that over the course of these sentences, the person who "claim[s] to have been sexually assaulted" becomes, simply, "the person assaulted." If it's assumed that all rape complainants are rape victims, any proof standard will seem too high. The presumption of innocence will itself seem grotesque. "I'm really tired of people suggesting that you're somehow un-American if you don't respect the presumption of innocence," said adjunct law professor Wendy Murphy in 2006, as the Duke lacrosse sexual assault case was

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230. See, e.g., *Supporting a Survivor: The Basics*, KNOW YOUR IX, <https://www.knowyourix.org/for-friends-and-fami/supporting-survivor-basics/> [<https://perma.cc/M84L-MWQR>] ("DO NOT: Question the validity of the victim's claims. . . . Having someone question whether or not a person was actually violated, assaulted, or raped is a huge insult that can shake a survivor to his or her core.").

231. CAROL BOHMER & ANDREA PARROT, *SEXUAL ASSAULT ON CAMPUS: THE PROBLEM AND THE SOLUTION* 5 (1993).

unfolding, “because you know what that sounds like to a victim? Presumption you’re a liar.”<sup>232</sup>

The reality and the problem is that some sexual assault claims are false. Unfortunately, it’s impossible to know how many. An often-repeated claim asserts that only two percent of rape allegations are false,<sup>233</sup> but the figure seems to be one of those self-perpetuating statistics with no evidence behind it.<sup>234</sup> A 1994 study found that the true figure was closer to forty percent,<sup>235</sup> but that study is extremely controversial and subject to numerous criticisms.<sup>236</sup> Recently, it has become common to assert that a 2%–8% false-reporting rate is the “accepted” figure,<sup>237</sup> but again acceptance seems to mean only that the figure is repeatedly stated; the analysis putatively supporting it appears to be highly misleading.<sup>238</sup>

A source that may be worth attending to on this point is the NCHERM Group, a vigorous supporter of the Dear Colleague letter reforms, an advocate of affirmative consent measures, and a leading firm in the provision of assistance to Title IX officers, including supplying investigators to schools.<sup>239</sup> In 2014, the partners of that group published an open letter warning “the public and the media” that “campus [sexual assault] complaints are not as clear-cut as the survivors at Know Your IX would have everyone believe” and that students are being found guilty when the evidence doesn’t support it.<sup>240</sup> To illustrate, the open letter provided synopses of several cases the firm had been recently asked to investigate, including:

232. STUART TAYLOR JR. & KC JOHNSON, *UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE* 166 (2007).

233. See, e.g., DEBORAH L. RHODE, *SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY* 125 (1997); Torrey, *supra* note 227, at 193.

234. See *RAPE INVESTIGATION HANDBOOK* 237–40 (John O. Savino & Brent T. Turvey eds., 2011) (discussing studies contradicting the 2% figure).

235. Eugene J. Kanin, *False Rape Allegations*, 23 *ARCHIVES OF SEXUAL BEHAV.* 81, 84 (1994).

236. See, e.g., Philip N.S. Rumney, *False Allegations of Rape*, 65 *CAMBRIDGE L.J.* 128, 139 (2006).

237. E.g., Donna Zuckerberg, *He Said, She Said: The Mythical History of the False Rape Allegation*, *JEZEBEL* (July 30, 2015), <http://jezebel.com/he-said-she-said-the-mythical-history-of-the-false-ra-1720945752> [<https://perma.cc/DB2Z-WF42>] (“The most commonly accepted statistic is that 2–8 percent of rape allegations are false.”).

238. See Francis Walker, *How to Lie and Mislead with Rape Statistics: Part 2*, *DATA GONE ODD* (Jan. 27, 2015), <http://www.datagoneodd.com/blog/2015/01/27/how-to-lie-and-mislead-with-rape-statistics-part-2> [<https://perma.cc/N3M4-4TQH>] (arguing that the 2%–8% figure is highly misleading).

239. *Welcome to The NCHERM Group, LLC*, NCHERM GROUP, LLC, <https://www.ncherm.org> [<https://perma.cc/SCS2-MW9F>]; Nancy Hogshead-Makar & Brett A. Sokolow, *Setting a Realistic Standard of Proof in Sexual-Misconduct Cases*, *CHRON. HIGHER EDUC.* (Oct. 15, 2012), <http://chronicle.com/article/Setting-a-Realistic-Standard/135084> [<https://perma.cc/E5LL-VMA6>].

240. Open Letter from Brett A. Sokolow, President and CEO, NCHERM Grp., to Higher Education About Sexual Violence 5 (May 27, 2014), <https://www.ncherm.org/wordpress/wp-content/uploads/2012/01/An-Open-Letter-from-The-NCHERM-Group.pdf> [<https://perma.cc/>

A female student . . . had spread rumors by social media that she had been raped by a male student. When the rumors got back to the male student, he approached her about it, and she offered him a lengthy apology, and then put it in writing. We had to investigate nevertheless [because the Dear Colleague letter requires an investigation whenever school officials learn of a rape allegation], and she told us that they'd had a drunken hook-up that she consented to. She was fine with what happened. We asked her why she called it a rape then, and she said, "you know, because we were drunk. It wasn't rape, it was just rapey rape." We asked her if she was aware of what spreading such an accusation might do to the young man's reputation, and her response was "everyone knows it wasn't really a rape, we just call it that when we're drunk or high."

. . . .

A female student was caught by her boyfriend while cheating on him with another male student. She then filed a complaint that she had been assaulted by the male student with whom she had been caught cheating. The campus investigated, and the accused student produced a text message thread from the morning after the alleged assault. It read:

Him: How do I compare with your boyfriend?

Her: You were great

Him: So you got off?

Her: Yes, especially when I was on top

Him: We should do it again, soon

Her: Hehe

. . . .

A male student performed demeaning, degrading and abusive sexual acts on a female non-student. They engaged in BDSM, and he ignored her protests throughout the entire sexual episode, despite her screaming in obvious pain and trying to get away from him. She filed a grievance with the campus, and we soon discovered instant messages in which she consented just before the incident to exactly these acts, and agreed to forgo the use of a "safe word" common in BDSM relationships.<sup>241</sup>

These incidents are not offered as representative, and of course there are vastly more cases of actual sexual assault. In fact, it's conceivable that in each of the above cases there *was* an assault. The point and the worry, rather,

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RD6U-PXFV] [hereinafter "NCHERM Open Letter"]; *see also* Gersen & Suk, *supra* note 36, at 934–35 (discussing the NCHERM Open Letter).

241. NCHERM Open Letter, *supra* note 240, at 4–5.

is that, according to NCHERM, accused students are being found guilty in similar cases *notwithstanding* the lack of evidence, due to perceived governmental pressure: “We could go on and on with a litany of these complicated and conflicting cases. We hate that some of them provoke tired old victim-blaming tropes,” but “[w]e hate even more that in a lot of these cases, the campus *is holding the male accountable in spite of the evidence—or the lack thereof—because they think they are supposed to, and that doing so is what OCR wants.*”<sup>242</sup> If true, a higher standard of proof would ameliorate this problem.

The most forthright defense of the preponderance standard is also the simplest: that its benefits outweigh its costs. A “more likely than not” standard makes true claims of sexual assault easier to prove; that’s a good thing. Unfortunately, it does the same with false claims. There’s no getting around either of these facts. Under the “balancing test” prescribed by *Mathews*,<sup>243</sup> this price could be deemed perfectly defensible (after all, even false findings of guilt can serve valuable deterrence goals). An extreme version of this view was stated by an Oberlin student: “So many women get their lives totally ruined by being assaulted and not saying anything. So if one guy gets his life ruined, maybe it balances out.”<sup>244</sup>

This position cannot be rejected out of hand. No metric exists for weighing the costs to innocent individuals falsely found guilty against the benefits of increased protection (assuming such increased protection resulted) for actual and potential sexual assault victims. There is no a priori basis for claiming that the former outweigh the latter. But running roughshod over the rights of people accused of crimes, or of conduct tantamount to crimes, seems once again more indicative of ideology than logic; it is hard to square with the fundamental commitments of American constitutionalism.

Moreover, those who engage in this kind of balancing should take into account a cost that’s frequently overlooked: damage to the credibility of actual rape victims. Unreliable, closed-door campus sexual assault trials—conducted under a low standard of proof, using unrecognizably broad definitions of sexual assault, judged by incompetent personnel answerable to administrations that have obvious conflicts of interest—may well be reinforcing, not helping to overcome, skepticism about rape claims. As Catharine MacKinnon said years ago, “It is not in women’s interest to have men convicted of rape who did not do it . . . . Lives are destroyed both by

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242. *Id.* at 5 (emphasis added).

243. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

244. Nara Schoenberg & Sam Roe, *Rape: the Making of an Epidemic*, BLADE, Oct. 10, 1993, at A9, <https://news.google.com/newspapers?nid=1350&dat=19931010&id=w2NPAAAAIIBAJ&sjid=XgMEAAAAIIBAJ&pg=3761,2515343&hl=en> [https://perma.cc/2DVE-QGX3].

wrongful convictions and the lack of rightful ones, as the law and the credibility of women—that rare commodity—are also undermined.”<sup>245</sup>

With a little ingenuity, and a little less ideology on both sides, new solutions might be found to deal with this problem. For example, upon meeting a lower standard of proof—whether a preponderance or something even lower than that, like “substantial evidence”—a student claiming sexual assault could be entitled to certain protective measures as well as medical, psychological, and legal assistance. At the same time, clear and convincing evidence could be held necessary before the accused could be seriously sanctioned—for example, suspended, expelled, or designated a sex offender on his educational record.<sup>246</sup>

Few judicial decisions have reached the question of the standard of proof required by due process in (public) university disciplinary hearings. One of the federal courts that did reach it—long before the current controversies—suggested that due process might require clear and convincing evidence at least where the student faces possible expulsion and where the charge involves conduct constituting a criminal offense.<sup>247</sup>

The ultimate question is whether the Constitution would permit the government to adjudicate a sexual assault claim, order the expulsion of a student as a sex offender, and have a notation to that effect placed in his academic record, on a preponderance of the evidence. If so, there is no constitutional problem. If not, then the Department of Education cannot achieve that result by making schools do it on the government’s behalf.

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245. CATHARINE A. MACKINNON, *WOMEN’S LIVES, MEN’S LAWS* 131 (2005).

246. As an analogy, consider that, in many states, courts can issue domestic violence protective orders based on a preponderance standard, and in some, such orders may issue upon meeting a lower, “reasonable grounds” standard. AM. BAR ASSOC., *COMM’N ON DOMESTIC & SEXUAL VIOLENCE, SEXUAL ASSAULT CIVIL PROTECTION ORDERS (CPOS) BY STATE* (2015), [https://www.americanbar.org/content/dam/aba/administrative/domestic\\_violence1/Charts/SA%20CPO%20Final%202015.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/domestic_violence1/Charts/SA%20CPO%20Final%202015.authcheckdam.pdf) [<https://perma.cc/JPJ8-XHH6>]. Some schools already have policies allowing administrators to implement protective measures with no official standard of evidence at all. In Yale’s “informal” complaint process, for example, there is no required standard of proof, and the Title IX Coordinator is empowered to provide “accommodations and interim measures that are responsive to the party’s needs as appropriate and reasonably available.” YALE UNIV., OFFICE OF THE PROVOST, *supra* note 174, at 4 (2015), [provost.yale.edu/sites/default/files/files/UWC%20Procedures.pdf](http://provost.yale.edu/sites/default/files/files/UWC%20Procedures.pdf) [<https://perma.cc/9TTD-JQDP>]. Such accommodations include:

providing an escort for the complainant; ensuring that the parties have no contact with one another; providing counseling or medical services; providing academic support, such as tutoring; and arranging for the complainant to re-take a course or withdraw from a class without a penalty, including ensuring that any changes do not adversely affect the complainant’s academic record.

*Id.* at 10 n.8.

247. *Smyth v. Lubbers*, 398 F. Supp. 777, 797 (W.D. Mich. 1975).

### Conclusion

Constitutional law today is woefully unable to deal with privatization—or even sometimes to see it. But the principles that would solve this problem turn out to be simple. What government cannot itself do without violating constitutional rights, it cannot induce private individuals to do. And whenever the federal government privatizes its law enforcement powers, constitutional restraints apply in full. They apply, that is, not only to specifically mandated acts, but to the private parties' discharge of these powers in their entirety.

This means that many of the post-2011 Title IX sexual assault trials that took place, and still are taking place, all over the country were and are unconstitutional. Some will be outraged by this conclusion. We have reached a point where merely arguing for fair process can trigger charges of sexism, rape apology, and so on.

As it considers new regulations to replace the Dear Colleague letter, the Department of Education should bear two points in mind. First, if the Department continues to require schools to try sexual assault cases, it should not only ensure that public schools comply with due process; it should ensure that private schools do so as well, because their trials will be equally subject to the Constitution's due process constraints. Second, the entire business of shadow courts trying rape cases on college campuses, severed from the institutions of law enforcement, may be too deeply flawed to remedy. If a murder allegedly took place on a college campus, most of us would strenuously object were the school to keep the matter secret, never informing law enforcement, and instead convening a secretive trial of its own in which faculty, school administrators, and students sat as judges and juries. We should have the same reaction when the alleged crime is rape.

Future historians will wonder how we went through this looking glass. They will ask what combination of activism and appeasement, of real victimization and false victim-mongering, could have led to this new hysteria in which a morning kiss becomes an act of "sexual violence," its perpetrator to be marked with a scarlet letter, and all this done under the trappings of law, but where the proceedings take place in such secrecy that the accused isn't even to know what he is accused of. They will wonder how so many in positions of respect and authority, who knew or should have known what was happening, not only at Brandeis but around the country, willingly participated or did not speak.

That history remains to be written.