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Response

## Private Institutions, Social Responsibility, and the State Action Doctrine

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Jed Rubinfeld's *Privatization and State Action: Do Campus Sexual Assault Hearings Violate Due Process?*<sup>1</sup> will likely engender a great deal of controversy because of the topic it confronts—Title IX campus sexual assault hearings and due process. It likely won't engender as much controversy for its attempt to bring clarity and principle to what is quite uncontroversially a confusing and counterintuitive doctrine of constitutional law—the state action doctrine. But adoption of its thesis—that private institutions should be subject to constitutional restraints whenever they have been induced to engage in quasi law enforcement activity—could destroy the potential good that can be done by socially responsible private institutions, as well as impose constitutional norms, such as the protection of hate speech, in too many arenas.

Private institutions—even well-meaning ones—can exercise a great deal of power over the lives of individuals. We should regulate that control, in order to protect those individuals. But the regulations that would best protect the interests of vulnerable individuals are not necessarily *constitutional* regulation. The limits of the Constitution—which was designed to reign in government excesses, rather than the excesses of a school, bank, or business—may be the wrong kind of regulation, depending on the context. In some contexts it may be too little regulation. In others it may be too much. What seems like a finely wrought document can become a blunt instrument if we fall back on it too quickly, rather than considering

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1. Jed Rubinfeld, *Privatization and State Action: Do Campus Sexual Assault Hearings Violate Due Process?*, 96 TEXAS L. REV. 16 (2017).

statutory and common law fixes to the problem of powerful entities exercising control over relatively weaker individuals.

In this response, I will first briefly summarize Rubinfeld's thesis, in which he defines when a private actor has engaged in "state action" that subjects it to the Constitution, with reference to the context that inspired it—Title IX sexual assault and harassment investigations on college campuses. Next, I will interrogate that thesis by providing examples of how it might apply to contexts that have little to do with sexual assault and gender. These examples will hopefully help the reader assess Rubinfeld's thesis independent of the fraught, and fast changing,<sup>2</sup> landscape of campus sexual assault/harassment investigations. Finally, I will point to alternative options, besides the state action doctrine, for reigning in the excesses of private institutions regulating private behavior. These options can be better tailored to the particular contexts at issue than can the Constitution, interpretation of which evolves slowly and amendment of which is notoriously difficult.

#### I. Rubinfeld's Case for Expanding the Definition of State Action

The "state action doctrine" is a principle of Constitutional law that states that only the government must comply with the rules and respect the rights in the Constitution. Thus, if someone believes her constitutional rights have been violated, she must, with few exceptions, point to a government actor that violated her rights. Suppose the only hospital within 100 miles of her home is a privately owned hospital, and that hospital refused to let her doctor perform an abortion for her at its facilities. She cannot sue the hospital for violating her due process right to obtain an abortion<sup>3</sup> because the hospital is not a government actor. She also cannot sue the government for failing to provide a publicly funded health facility closer to her home where she could reasonably travel and obtain an abortion. The government's failure to provide that facility is not action, but rather inaction.<sup>4</sup>

There are a few extremely narrow exceptions to this doctrine that an aggrieved plaintiff can use to vindicate her constitutional rights against a private entity. One exception is the public function doctrine, which holds that when a private entity is engaged in a public function, it can be treated as a "state actor" and thus subject to the requirements of the Constitution.<sup>5</sup>

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2. In September 2017, Education Secretary Betsy DeVos rescinded two Obama administration guidelines and issued new guidance to universities for complying with Title IX during sexual assault allegation investigations and proceedings. Andrew Kreighbaum, *New Instructions on Title IX*, INSIDE HIGHER ED (Sept. 25, 2017), <https://www.insidehighered.com/news/2017/09/25/education-department-releases-interim-directions-title-ix-compliance> [<https://perma.cc/EJE8-RDPX>].

3. *Roe v. Wade*, 410 U.S. 113 (1973).

4. *Cf. Maher v. Roe*, 432 U.S. 464 (1977) (finding no Fourteenth Amendment violation when states participating in Medicaid decline to cover nontherapeutic abortions).

5. *Marsh v. Alabama*, 326 U.S. 501 (1946).

Another exception is the “entanglement” or “nexus” doctrine, in which a private entity that is overly entangled,<sup>6</sup> or “entwined,”<sup>7</sup> with the government can be subject to the requirements of the Constitution.

The application of these exceptions is notoriously inconsistent, and a slew of commentators have criticized the exceptions for being far too narrow. For instance, to be deemed a public function, an activity must be something that is traditionally and *exclusively* performed by government entities,<sup>8</sup> which almost nothing, including probably privatized police activity,<sup>9</sup> is.

Professor Rubinfeld wants to fix this unsatisfying situation. He is inspired by Title IX sexual assault and harassment investigations, in which he believes accused students are afforded far too few of the basic protections that we normally associate with “due process” under the Constitution when someone is accused of a crime, such as notice of the accusation being made, a hearing in which the accused is represented by a lawyer, and can at least bring his or her lawyer at personal cost, the right to confront the witnesses presenting evidence against the accused, and the presumption of innocence until proven guilty beyond a reasonable doubt.<sup>10</sup> While lay observers might assume that the failure to provide these protections violates the Constitution, particularly when a student is subject to real punishment, such as expulsion, the truth is that private universities are not subject to the Constitution under the state action doctrine.<sup>11</sup> Thus, students do not succeed when they try to argue their rights have been violated by a private university in one of these investigations.<sup>12</sup> Even though schools seem, in some instances, to be substituting in for criminal law enforcement, the “public function” exception has been held not to apply, at least by courts attempting to apply the state action doctrine as it currently stands.<sup>13</sup> And even though schools have been coerced into conducting investigations and punishing students found guilty by a Department of Education “Dear Colleague” letter, the entanglement exception has not been applied, either.<sup>14</sup> This is despite the fact that schools

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6. *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961).

7. *Brentwood Acad. v. Tenn. Sec. Sch. Athletic Ass’n*, 531 U.S. 288 (2000).

8. *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974).

9. See Rubinfeld, *supra* note 1, at 16 (citing David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1169, 1253–62 (1999)).

10. *Id.* at 60.

11. *Id.* at 16.

12. *Id.* at 26 n.68.

13. See, e.g., *Collins v. Northwestern Univ.*, 164 F. Supp. 3d 1071, 1077 (N.D. Ill. 2016); *Tsurata v. Augustana*, No. 4:15-CV-04150-KES, 2015 WL 5838602, at \*3 (D.S.D. Oct. 7, 2015).

14. E.g., *Faparusi v. Case W. Reserve Univ.*, 711 Fed. Appx. 269 (6th Cir. 2017); *Doe v. Case W. Reserve Univ.*, No. 1:17 CV 414, 2017 WL 3840418 (N.D. Ohio Sept. 1, 2017); *Heineke v. Santa Clara Univ.*, No. 17-CV-05285-LHK, 2017 WL 6026248 (N.D. Cal. Dec. 5, 2017); *Doe v. Univ. of Denver*, No. 16-cv-001520-PAB-KMT, 2018 WL 1304530 (D. Colo. March 13, 2018).

were threatened with the loss of federal funds if they chose not to investigate and punish sexual assault and harassment.<sup>15</sup>

Perhaps because he finds the “coercion” or “inducement” aspect of the Dear Colleague letter to be so extreme, Rubinfeld is inspired to fix the state action doctrine by ensuring that the exceptions cover situations in which the government has done something uncontroversially problematic: contract *all* of its policing out to a private security company.<sup>16</sup> This is an uncontroversial situation in which to find state action because if we *didn’t* find state action, the government could evade the Constitution. It could contract out all the policing it wants to do in a constitutionally offensive manner to some private entity, which then would not be subject to the restraints of the Constitution. Police brutality, warrantless searches and seizures, and the like could all occur, and nobody would find a constitutional violation. Of course, there probably *would* be traditional tort remedies to some egregious actions in this situation—assault, battery, conversion of property, and the like come to mind. But it does seem problematic to say the Constitution wasn’t violated in such a circumstance. Thus, Rubinfeld aims to fix the state action doctrine by *at least* ensuring it covers this situation. (Currently, it doesn’t necessarily cover this situation, given that it’s unclear if the public function exception would apply to police work.)

How does Rubinfeld propose to fix the state action doctrine? He says state action should be found whenever we can show 1) inducement, which, as he concedes, is so common as to be omnipresent, to 2) do something that he hasn’t fully fleshed out, but that seems suspiciously like performing a “public function,”<sup>17</sup> and which includes, at minimum, quasi law enforcement activity.<sup>18</sup> This test would cover private universities engaged in Title IX sexual assault and harassment investigations because 1) they were induced by the federal government to act and 2) they are engaged in quasi law enforcement activity because they are investigating something that is either a crime or, at the very least, “tortious,” in Rubinfeld’s words.<sup>19</sup>

To be clear, the exclusivity element in the traditional public function test is notoriously too restrictive, so while Rubinfeld hasn’t fully fleshed out the alternative, he is certainly in good company in wanting to expand it and get rid of the “exclusivity” part of the test.<sup>20</sup>

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15. Rubinfeld, *supra* note 1, at 24 n.58.

16. *See id.* at 40–45 (using the privatized police force example to show the deficiencies of and possible solutions to current state action doctrine).

17. *Id.* at 29.

18. *See id.* (discussing how the test of whether the government induced private actors to take a particular action could fix the problems associated with the public function doctrine).

19. *Id.* at 47.

20. *Id.* at 40–41.

And the entanglement doctrine is notoriously confusing,<sup>21</sup> so isolating the strand of it that makes the most intuitive sense (encouragement)<sup>22</sup> is a worthy contribution. But Rubenfeld not only isolates and clarifies the test, he also broadens it, from something like “encouraging rights violations” to inducing quasi law enforcement activity.

The policy of affording stronger procedural protections than many schools do in these hearings, at least those hearings that could end in expulsion or similarly strong punishment, is one I endorse. Such protections would mean that more perpetrators of sexual assault and harassment may avoid strong punishments such as expulsion. Therefore, I also, like Professor Rubenfeld and others, endorse exploring options such as more moderate punishments on lesser standards of proof,<sup>23</sup> as well as providing increased assistance to accusers in forms other than punishment of the accused, regardless of what standard of proof is met. For instance, schools could erase an accuser’s grades for the semester in which the most harmful actions allegedly took place, as well as one semester following that. Schools could allow those classes to be re-taken without the usual “incomplete” or “withdrew” appearing on the transcript. Facilitating separation between the accuser and the accused to the extent possible also seems largely unobjectionable and arguably required, at least where requested, by the obligation to provide an educational environment free from sex-based harassment.<sup>24</sup> These responses are not enough to deal with sexual assault and harassment on campus, but they are examples of options to be considered as part of a package for reforming schools’ responses to sexual assault and harassment.

I also believe reform is needed to make sure that schools do not promote harmful gender stereotypes in their responses to sexual assault and harassment. Without sufficient care, schools may promote stereotypes of women as non-desirous of sex (and therefore generally not assumed to be implicitly consenting), and men as desirous of sex (and therefore generally assumed to be implicitly consenting). For instance, if a school is confronted with an instance of two students who engaged in sexual conduct, and the evidence indicates both students were likely heavily intoxicated, some

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21. Christopher W. Schmidt, *On Doctrinal Confusion: The Case of the State Action Doctrine*, 2016 BYU L. REV. 575, 589 (2016).

22. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 582 (5th ed. 2017).

23. Rubenfeld, *supra* note 1, at 67–68; *cf.* Kari Hong, *A New Mens Rea for Rape: More Convictions and Less Punishment*, AM. CRIM. L. REV. (forthcoming 2018) (promoting, in criminal law, a moderate sentence of 5 years for most instances of rape).

24. U.S. DEP’T OF EDUC., *REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 2* (2001) <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [https://perma.cc/SC6H-FZTR] (describing how [s]exual harassment of students is . . . a form of sex discrimination prohibited by Title IX under the circumstances described . . .).

schools might engage in a pattern of concluding that the male student was capable of, and indeed did, consent to the sex despite being intoxicated, while the female student did not. Such a pattern would violate antidiscrimination principles required by both Title IX<sup>25</sup> and, for state action, the equal protection clause.<sup>26</sup> Schools might also promote these gender stereotypes through poorly constructed assault and harassment trainings provided to students. Promoting these stereotypes to masses of young people who are in the middle of learning about sex, gender, and relationships in the context of their personal lives is concerning, to understate the problem.

But as I will demonstrate in the next section, Rubinfeld's fix—to expand the state action doctrine to cases of induced quasi law enforcement—is far too blunt.

## II. Private Institutions and Social Responsibility

The thesis that the kinds of reforms Rubinfeld endorses, and that the Department of Education, under new leadership,<sup>27</sup> is moving towards, are *constitutionally* required at private universities is quite hard to endorse without hesitation. To get a sense of why, it can be useful to first think about some hypotheticals that don't have much to do with sexual assault or gender.

Suppose a tax collecting government authority, be it the Internal Revenue Service or a State Municipal Tax Board, is bothered by rampant failure to declare tips as income by servers in restaurants and workers in beauty salons. Thus, the agency sends threatening letters to the restaurants and beauty salons in its jurisdiction. These letters tell the business that they must come up with procedures for policing how much income employees are receiving in tips and ensuring that income is reported to the state agency. The letters encourage the businesses to come up with punishments for employees caught hiding or understating their tips, and it gives examples, such as firing. The letters point out that if a business merely provides for a “slap on the wrist,” it could be found guilty of assisting in tax fraud and lose its license to operate.

Now suppose a hair salon responds to this letter by searching employees' belongings and counting how much cash they have with them at the start and end of each shift. It then assumes any cash obtained during the work shift was a tip, unless the employee demonstrates otherwise by clear

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25. 20 U.S.C. § 1681(a) (2012).

26. *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))); U.S. CONST. amend. XIV, § 1.

27. U.S. DEP'T OF EDUC. OFFICE OF CIVIL RIGHTS, Q&A ON CAMPUS SEXUAL MISCONDUCT 5–6 (2017) <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> [<https://perma.cc/H6UW-AT4K>].

and convincing evidence. It fires a hairdresser under this approach after she refused to disclose \$20 she received during a shift as a tip. She claimed that the money was not a tip, but was in fact dropped off during the shift by a friend who owed her money. Because she failed to maintain evidence of this, and because the burden of proof was on her to prove her innocence by clear and convincing evidence, the hair salon fired her. Perhaps something wrong has been done here that the law should remedy—one’s intuition likely depends on 1) whether one believes employees should have privacy rights at work (they usually don’t, but they do to some degree in California),<sup>28</sup> and 2) whether one believes the common law “employment-at-will” doctrine that prevails in most American states is proper. But under Rubenfeld’s rule, both the Fourth Amendment<sup>29</sup> and the Due Process Clause<sup>30</sup> of the Constitution appear to have been violated, regardless.

Suppose a second hair salon responds to the tax agency’s letter even more grotesquely, by deciding to lock accused employees in a closet without adequate water and food in order to extract confessions from them. Clearly something terribly wrong has been done to the employees in the second case, and the law should provide a remedy, which it probably does, in tort law. There may even be punitive damages available. But under Rubenfeld’s rule, the Due Process Clause of the Constitution has been violated.

Under his rule, the elements of state action are met in both scenarios. The agency has 1) induced the business to 2) conduct quasi law enforcement activities. And once those elements are met, *everything* the business does in carrying out that activity, no matter how disconnected from the particular advice and coercion provided by the agency, is state action. So even though both hair salons have gone well beyond what it seems the government wanted them to do, they are treated essentially as agents of the government. And in the case of the torturing hair salon, this is so even though the business has gone beyond what the agency even reasonably should have worried it might do.

The reason it seems odd to claim that the state agency bears responsibility for the actions of the hair salons here, while it doesn’t seem so odd to hold a city that contracts out all its policing to a private force accountable, is that in the second case, it seems that the city is *trying* to evade the constitution by using a private actor. We want to make sure they don’t get away with it. But in the first case, the tax agency is not *trying* to evade due process. It is trying to get a party that is far better positioned to police the

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28. CALIF. CONST. art. I, § 1; *Sanders v. Am. Broad. Co.*, 978 P.2d 67, 69 (Cal. 1999) (explaining that “[i]n an office or other workplace to which the general public does not have unfettered access, employees may enjoy a limited, but legitimate, expectation that their conversations and other interactions will not be secretly videotaped by undercover television reporters, even though those conversations may not have been completely private from the participants’ coworkers”).

29. U.S. CONST. amend. IV.

30. U.S. CONST. amend. XIV, § 1.

criminal behavior to do so. Even though restaurants and hair salons have no law enforcement expertise, they do have proximity to the first step in the criminal act—receiving the tip that later goes undisclosed. Receipt of the tip almost always happens on premises of the business. That proximity makes them well-suited to police the activity even though they aren't police or IRS agents. There is no grave threat to the constitutional order when the agency tries to be efficient by calling upon the employer to do something about the crime being committed right under its nose.

Rubinfeld would likely claim that the businesses are engaged in compliance, not law enforcement, because their employees are their agents, while students are not agents of universities. He uses this distinction to explain why sexual harassment investigations under Title VII would not be covered by his rule.<sup>31</sup> However, it is entirely unclear whether employees who are engaging in intentional violations of the law or other persons' rights are acting within the scope of employment, which is what would be required to consider them agents of the employer when they commit those violations. In fact, the reason we have Title VII-inspired harassment investigations (not just sexual harassment, but racial, religious, and skin-color harassment, too), is that the Justices of the Supreme Court could not agree on whether alleged harassers are agents of the employer in the first place.<sup>32</sup> Going around harassing one's coworkers is not typically for the company's benefit, and therefore potentially outside the scope of employment. On the other hand, employers are reasonably well-positioned to catch and prevent harassment—as well as to intervene before it is so severe as to essentially alter workplace conditions on the basis of race, sex, and other protected categories. They are reasonably well-positioned to do this because they govern workplace behavior generally. Thus, a compromise—between vicarious liability and forcing plaintiffs to prove something like negligent supervision in every case—was forged. The Court provided employers with a judge-made affirmative defense if they engaged in preemptive harassment training as well as prompt investigations and effective responses to harassment that does occur.<sup>33</sup>

And we could easily change our tax enforcement hypothetical to take it outside the realm of employment anyway. Restaurants and grocery stores have an obligation in some jurisdictions to collect taxes at a higher rate on food that is consumed on the premises rather than taken home to eat.<sup>34</sup> Few businesses aggressively police their customers on whether they really eat their “to go” food off premises. But we can imagine a state tax agency

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31. Rubinfeld, *supra* note 1, at 43 n.142.

32. *Faragher v. City of Boca Raton*, 524 U.S. 775, 802–07 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 754–64 (1998).

33. *Faragher*, 524 U.S. at 807–08; *Burlington*, 524 U.S. at 764–65.

34. *E.g.*, CAL. REV. & TAX CODE § 6359 (West, Westlaw through urgency legislation of Ch. 10 of 2018 Reg. Sess.).

cracking down on restaurants and coercing them into policing their customers more aggressively, even though customers are clearly not agents of the restaurants they buy food from. The resulting “police” action by restaurants would not be the result of attempted constitutional evasion, but rather efficiency-seeking by the tax agency. Similarly, banks and other institutions must avoid facilitating money laundering activities of their customers, who, again, are clearly not their agents. They are subject to multiple laws that impose obligations on them to do so, so they are clearly being coerced into looking for and reporting suspicious activity.<sup>35</sup>

For another example, one that is not hypothetical, consider reforms many companies that use the internet as a platform have started to make, in part as a response to threat of law enforcement, and in part in order to become more socially responsible. Airbnb recently entered a consent agreement with California’s Department of Fair Employment and Housing (DFEH).<sup>36</sup> Under this agreement, Airbnb has agreed to engage in testing, with decoy renters, to catch discriminatory landlords.<sup>37</sup> The company will provide users with the ability to see the profile pics of renters that landlords have rejected and accepted, so that they can more easily catch landlords who are discriminating against potential renters on the basis of race.<sup>38</sup> And the company has also agreed to kick discriminatory landlords off the site.<sup>39</sup> Airbnb’s actions clearly meet Rubinfeld’s definition of state action, and once again, it’s hard to conceive of DFEH as inducing Airbnb to take these actions because it wanted to evade due process or any other constitutional restriction. Rather, it did so because it can prevent and deter far more discrimination in renting this way, as opposed to through waiting for short-term renters to file complaints with DFEH (an agency the renters may not even know exists, particularly if they are visiting California from out of state), and then bringing lawsuits against landlords that are the subjects of repeat complaints. But Rubinfeld’s rule would appear to sweep in Airbnb, thereby requiring it to comply with due process before kicking allegedly racist landlords off the site.

As a final example, consider a website that removes “revenge porn,” hate speech, or harassing material. Such a website is often acting out of a combination of social responsibility and desire to avoid potential law

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35. See generally OFFICE OF THE COMPTROLLER OF THE CURRENCY, MONEY LAUNDERING: A BANKER’S GUIDE TO AVOIDING PROBLEMS (2002) (outlining numerous statutes).

36. Voluntary Agreement, Dep’t of Fair Emp’t & Hous. of the State of Calif. v. AIRBNB, Inc., Case Nos. 574743-231889 & 574743-231624 (Apr. 19, 2017), <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2017/06/04-19-17-Airbnb-DFEH-Agreement-Signed-DFEH-1-1.pdf> [<https://perma.cc/6G4W-DHY4>].

37. *Id.* ¶ 38; Sam Levin, *Airbnb Gives in to Regulator’s Demand to Test for Racial Discrimination by Hosts*, GUARDIAN (Apr. 27, 2017), <https://www.theguardian.com/technology/2017/apr/27/airbnb-government-housing-test-black-discrimination> [<https://perma.cc/8T58-VTMR>].

38. Voluntary Agreement, *supra* note 36, ¶ 34.

39. *Id.* ¶ 32.

enforcement.<sup>40</sup> It seems that websites seeking even in part to avoid legal liability for the harassing speech of individual users of the site would clearly meet Rubinfeld's test for state action. They 1) are induced by the threat of legal liability to remove content, and 2) are engaged in the policing and screening of content in search of harassing content, which is tortious conduct. Rubinfeld indicates that investigating and policing potentially tortious conduct counts as law enforcement activity.<sup>41</sup> Thus, websites that police content would, under his rule, be subject to the constraints of the First Amendment.

The significant distinction between all these hypotheticals and the intuitively "state action" case of a privatized municipal police force<sup>42</sup> is that the primary incentive behind inducing private law enforcement activity in all the hypotheticals seems to be pragmatic rather than evasive of constitutional norms. The relationship between the person being policed and the private policer (employee, student, customer) is not a significant distinction. In any of those relationships, it is possible for the private entity to be in very close proximity to the bad behavior. It may occur on the entity's premises; it may move through the entity's servers. So it is possible for the government to seek out the assistance of the private entity in policing that behavior for the entirely innocent reason that there is proximity.

### III. Beyond the Constitution—Statutory and Common Law Regulation of Private Institutions' Excesses

One response to all this may be, who cares if the government is innocent in all of this, if they are not the ones who have to pay? While Rubinfeld does not say in his article who should be liable, the state action doctrine can be used when someone sues a *private* entity yet claims a constitutional violation.<sup>43</sup> We can probably assume this is how he wants his proposed state action rule to be used as well. Thus, one might point out it is the hair salons, the restaurants, and the websites that will be sued for the constitutional violations. The damages are going to come out of the businesses' accounts, and any injunctive relief is going to be against those businesses, not the tax agency, the fair housing agency, or the state whose common law threatens a website with potential liability for threatening speech. Thus, perhaps we shouldn't worry that no proof of fault or intent to evade the Constitution on the part of the government is required to find that the private entities at issue are liable as if they were state actors.

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40. See, e.g., *Operator of 'Revenge Porn' Website Convicted in California*, WALL ST. J. (Feb. 2, 2015), <https://www.wsj.com/articles/operator-of-revenge-porn-website-convicted-in-california-1422933816> [<https://perma.cc/LZ8M-A92L>].

41. Rubinfeld, *supra* note 1, at 30.

42. *Id.* at 29.

43. E.g., *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

On the other hand, what if we want the law—whether tort or criminal—at issue enforced? And what if there is good reason to involve the private entity at issue in enforcing the law—whether efficiency or some other reason? And, here is the crucial step: what if the alleged lawbreaker has opened itself up to policing by the private entity voluntarily?

In such a situation, why should we want injunctions against the private entity that hamper its law enforcement abilities? Wouldn't it be better to simply say to the person whose constitutional rights are allegedly violated: "You shouldn't have taken that job," or "You shouldn't have eaten at that restaurant," or "You shouldn't have tried to use that website, whose terms of service put you on notice that your behavior would not be tolerated"?

If it's going to be tough to get away with socially harmful activity because one can't find an employer or bank or school or restaurant or website to transact with that is willing to look the other way, then perhaps we ought to be glad because we want it to be tough to get away with socially harmful activity.

The reason the state action doctrine's failure to reach private employers and private schools seems awful in many circumstances is that the voluntariness of the worker or student's interaction with an employer or school is often compromised. People need jobs because they need income, so telling someone they lose all privacy and other rights the moment they work for a private employer seems like a socially harmful result, separate and apart from the government's inducement of the invasion of those rights. For this reason, some believe employees shouldn't have to choose between privacy rights, speech rights, or basic human dignity and employment. And for those who feel this way, it feels incredibly wrong to tell an employee fired for his or her speech, especially political speech, "You should have worked for a public employer."

Tort and contract law do not protect non-unionized employees very well in most states, given the default at-will employment rule in most states, combined with a very narrowly understood duty of good faith and fair dealing in contract performance and negotiation.<sup>44</sup> But this is all a complaint with state contract, tort, and statutory employment law, all of which is incredibly protective of employers in most states. For those of us who are bothered by the hair salon searching its employees' belongings at the start and end of each shift, we would still be bothered if it did so in the absence of any government inducement. The fact that there is often no remedy against such an overreach is a failure of state contract and tort law, not federal constitutional law. And in extremely egregious cases, there sometimes *is* a remedy at tort law or statutory employment regulation: wrongful discharge in violation of public policy, outrageous conduct, and intentional infliction of emotional distress

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44. Sid L. Moller, *Birth of a Contract: Arbitration in the Non-Union Workplace*, 50 S.C.L. REV. 183, 222 (1998).

are tort remedies for egregious violations. Title VII provides a statutory remedy for some of the worst discriminatory actions by an employer.<sup>45</sup>

Similarly, education is an important part of a fulfilling life, and a crucial step towards employment and political participation. Indeed, many think we ought to treat it as a fundamental constitutional right. And public universities do not, in many people's view, fully supply society's need for higher education. Thus, it seems wrong to tell the student who is discriminated against on the basis of gender by her private school and told she must put up with harassment or assault based on her sex if she wants to keep attending, "You should have gone to a public university." Indeed, this is part of why Title IX's prohibitions on gender discrimination make such a meaningful impact. Similarly, it seems wrong to tell the student expelled from school for a legal violation he did not commit, "You should have gone to a public university." Do we really want young people to feel like they shouldn't go to any private school if they want to be protected from arbitrary rights violations?

But in both these scenarios, the fact that the school did this to the student in the absence of any government coercion doesn't mitigate it at all. If some of the horror stories are true, the ones told by students who were purportedly wrongly disciplined for sexual harassment and assault or defamed by their university, would they become less horrible if repeated in the future, simply because Betsy DeVos is revoking the "Dear Colleague" letter? Don't we want students to get remedies anyway, and more importantly, don't we want schools to treat their students well anyway?

If the students whose due process and equal protection rights are violated have no remedy, perhaps the problem is a failure of contract law, which ought to protect students—usually the weaker contracting party as against the school—from arbitrary expulsion. Or it may be a failure of defamation law, given that an inaccurate notation on the student's record of why he was expelled can prevent him from seeking an education or employment elsewhere. There may also be a failure of statutory regulation. Title IX protects students at federally funded private schools from certain kinds of discrimination, but perhaps other laws should vigorously protect them from due process and speech violations.

All of this is more than an academic exercise about what type of law should remedy violations of students' and employees' rights. If we use a blunt version of the state action doctrine to fix our concerns with the compromised "choices" of students to attend school and employees to take jobs, we may end up hampering private institutions like Airbnb from acting diligently and responsibly to check illegal and socially harmful behavior. Not every person who is policed and investigated by a private institution is as sympathetic as a low wage worker whose bags get sorted through or a young

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45. 42 U.S.C. §§ 2000e-5 & 2000e-6 (2012) (establishing both state and private actions for discriminatory employment practices).

student who gets arbitrarily kicked out of school. And not every problem is best fixed by giving law enforcement a warrant to invade private institutions and look out for problematic behavior.

This is true even in the case of sexual assault allegations on campus, which many commentators have described as inappropriate for schools to adjudicate, given their lack of expertise in criminal law enforcement. There are some advantages that come from schools not being police or prosecutors. For instance, schools are probably better suited to provide mitigation and protection in the form of course scheduling and grading accommodations than any government entity is—whether the DOE or local law enforcement or a state criminal court judge. There is a long history of victims being treated poorly by police when they raise accusations of sexual assault and especially gender based harassment. That is why women often need to go before a judge to get a restraining order. They unfortunately can't get one so easily in some states. There is also simply an evidentiary problem in many cases of sexual assault. But there are many things schools can do to help alleged victims that traditional law enforcement cannot. There shouldn't be a problem with the DOE inducing them to take these actions, even though at times, they may violate due process. (Imagine an accused's graduation being delayed because he had to wait to take certain courses, in order to avoid a conflict with an alleged victim's course schedule. While the delay is harmful to the accused, and it would be best if a school could avoid it, there may be no option available that fully protects the educations of both accused and accuser, depending on the circumstances.)

It is true that certain private institutions wield a great deal of power over the lives of the individuals they employ, enroll, or otherwise transact with. This is a reason to regulate those institutions. But the regulations that would best protect the interests of the individuals are not necessarily constitutional regulation. The limits of the Constitution may be both too much and too little, depending on the context.

### Conclusion

It's understandable to be concerned with powerful institutions exercising unchecked control over vulnerable individuals. When those institutions are public, the Constitution is meant to keep them in check. But importing constitutional regulation onto every private institution that engages in law enforcement like activities would subject virtually all socially responsible institutions to constitutional norms. This is a blunt instrument for checking private excesses. The power private entities wield over individuals is not always analogous to the awesome power that the State wields, and it is therefore not always sensible to use the Constitution as the means of checking them. If most private entities, even most powerful ones, are subject to Constitutional checks, then the constitutional principles of liberty and equality may be diminished: Imagine if every online community looked like 4chan's random board, in which racist and sexist speech, false and

misleading information, and other speech protected by the First Amendment can go unpoliced. Even if one believes 4chan to be an unqualified good, were every online community to look the same way, by force of law, this would represent a reduction, not an increase, in equal access to the internet's benefits.<sup>46</sup> Sometimes a statute, a regulation, or a common law action in tort or contract simply makes more sense.

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46. David Kushner, *4chan's Overlord Christopher Poole Reveals Why He Walked Away*, ROLLING STONE (March 13, 2015), <https://www.rollingstone.com/culture/features/4chans-overlord-christopher-poole-reveals-why-he-walked-away-20150313> [<https://perma.cc/E3Q9-LV7P>].