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CASE COMMENT

ACADEMIC DISMISSALS FROM STATE-SUPPORTED UNIVERSITIES: A STUDY IN POLICY

INTRODUCTION

A fundamental guarantee of the United States Constitution is that a state may not deprive an individual of liberty or property without due process of law.¹ Although the scope of due process extends to state supported universities,² the judiciary has historically been reluctant to apply procedural due process requirements to university administrative decisions.³ Indeed, in cases of academic dismissals, it may be prudently asserted that administrative academia enjoys a reign virtually unfettered by the concept of due process.⁴

This policy of judicial nonintervention stems largely from the belief that any form of judicial intrusion impairs the function of the academic community.⁵ The due process clause, however, is only the constitutional embodiment of the fundamental concept of fair play.⁶ Unfortunately, conditions on university campuses are such that the possibility of arbitrary academic evaluation is very real.⁷ Allowing

1. "No State shall . . . deprive any person of life, liberty, or property without due proces of law." U.S. CONST. amend. XIV, § 1.

2. "The Fourteenth Amendment as now applied to the States, protects the citizen against the state itself and all of its creatures—Boards of Education not excepted. These have . . . important, delicate and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights." West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

In reference to private schools, see, e.g., Hendrickson, "State Action" and Private Higher Education, 2 J. OF L. & EDUC. 53 (1973); Note, *Common Law Rights for Private University Students: Beyond the State Action Principle*, 84 YALE L.J. 120 (1974).

3. See note 57 *infra* and accompanying text.

4. See note 58 *infra* and accompanying text.

5. See note 60 *infra* and accompanying text.

6. The due process clause "embodies a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society" Solesbee v. Balkcom, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting).

7. Young, *Due Process in the Classroom*, 1 J. OF L. & EDUC., 65, 66 (1972). "The pressures on contemporary professors for research and publications, which pro-

university administrators to by-pass all procedural safeguards invites academic tyranny; it does not protect academic autonomy.⁸

Nevertheless, in *Board of Curators of the University of Missouri v. Horowitz*,⁹ the Supreme Court concluded that the due process clause does not require the imposition of procedural safeguards in an academic dismissal from medical school.¹⁰ The aforementioned policy of judicial nonintervention underlies the Court's holding in *Horowitz*. The Court failed in its effort to safeguard academic freedom, and succeeded only in manufacturing a cloak¹¹ for those forms of governmental autocracy which the due process clause was designed to prevent. This commentary examines how the holding in *Horowitz* reflects the policy of judicial nonintervention, the narrowing of the concept of liberty as a means to accommodate that policy, and the effect of *Horowitz* on the academic community.

FACTS

In August, 1971, the University of Missouri-Kansas City School of Medicine¹² admitted Charlotte Horowitz. Instruction included clinical responsibilities as well as academic study. Horowitz received credit for all clinic courses.¹³ However, in the spring of 1972, several faculty members criticized Horowitz's clinical performance.¹⁴ These complaints provoked a flurry of student, faculty and administrative

vide the most rewards, leaves less and less time for attention to teaching responsibilities. On many campuses, the grading of undergraduate papers and tests is relegated to graduate assistants, leaving faculty free for other professional tasks." *Id.* Non-teaching responsibilities assumed by professional school instructors surely equal that of their undergraduate counterparts.

8. See note 85 *infra* and accompanying text.

9. ___ U.S. ___, 98 S. Ct. 948 (1978).

10. "We conclude that considering all relevant factors, including the evaluative nature of the inquiry and the significant and historically supported interest of the school in preserving its present framework for academic evaluations, a hearing is not required by the Due Process Clause of the Fourteenth Amendment." *Id.* at 953 n.3.

11. See note 87 *infra* and accompanying text.

12. Hereinafter referred to as UMKC.

13. Horowitz did not receive credit for her Emergency Room rotation, but this rotation was not completed until after the decision to dismiss.

The University also contended that Horowitz did not satisfactorily complete some courses in which she received credit. This distinction, however, was not communicated to Horowitz or other students. *Horowitz v. Board of Curators of Univ. of Mo.*, 538 F.2d 1317, 1318 n.1 (1976).

14. Specifically, the faculty members complained of lack of patient rapport, "lack of expertise in coming to the fundamentals of the clinical problem," erratic attendance, and poor personal hygiene. *Id.* at 1319.

reviews.¹⁵ Following recommendations from the Council on Evaluation the administration decided that Horowitz would not be allowed to graduate on schedule. The UMKC allowed an appeal.¹⁶ Ultimately, Horowitz was dismissed effective July 3, 1973.¹⁷

Horowitz brought an action against UMKC in the United States District Court for the Western District of Missouri under 42 U.S.C. § 1983.¹⁸ Plaintiff alleged, *inter alia*, that the defendant-university failed to satisfy procedural due process requirements prior to her dismissal. Specifically, Horowitz alleged that dismissal from a state-supported educational institution resulted in a deprivation of "liberty"¹⁹ as provided for in the fourteenth amendment.²⁰ Since one may not be deprived of "liberty" without due process, Horowitz asserted that she was entitled to a hearing prior to dismissal. The district court held that immunity was traditionally accorded educational institutions in academic matters, absent a *prima facie* showing of bad faith or capriciousness.²¹ Plaintiff's complaint was, therefore, dismissed.²²

The Eighth Circuit Court of Appeals reversed.²³ The court held that plaintiff's dismissal resulted in stigmatization sufficient to foreclose opportunities in medically related fields.²⁴ Since this foreclosure constituted deprivation of a constitutionally protected

15. Initially, the faculty-student Council on Evaluation reviewed the complaints and recommended Horowitz be advanced to her final year on a probationary basis. Midway through her final year another evaluation yielded recommendations that Horowitz be dropped as a student absent radical improvement. These recommendations were made to the Co-ordinating Committee and ultimately to the Dean. *Id.*

16. The appeal consisted of oral and practical examinations by seven practicing physicians. Two physicians recommended graduation on schedule; three recommended extended probation, and two recommended dismissal. *Id.* at 1320.

17. *Id.*

18. "Every person who, under color of any . . . regulation, . . . of any State . . . , subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable . . . in an action at law, suit in equity, or other proceeding for redress." 42 U.S.C. § 1983 (1976).

19. See note 38 *infra* and accompanying text.

20. See note 1 *supra*.

21. 538 F.2d at 1321.

22. *Id.*

23. *Id.*

24. In *Board of Regents v. Roth*, 408 U.S. 564 (1972), the Court acknowledged that an action by the state which "imposed . . . a stigma or other disability that foreclosed . . . freedom to take advantage of other employment opportunities" was a deprivation of liberty. *Id.* at 573.

liberty interest,²⁵ the court remanded to the district court with instructions to order defendants to provide a hearing.²⁶

The United States Supreme Court reversed,²⁷ holding, per Mr. Justice Rehnquist, that a dismissal for academic cause did not necessitate a hearing before the school's decision-making body.²⁸ The Court distinguished the firmly established right to a hearing accorded a student dismissed from a public school for disciplinary reasons.²⁹ In an effort to prevent enlargement of judicial presence in the academic community,³⁰ four Justices joined in the majority opinion.³¹

Several members of the Court filed separate opinions. Noting that UMKC had complied with minimal procedural due process requirements, Mr. Justice White concurred in the judgment.³² Mr. Justice Blackmun, with whom Mr. Justice Brennan joined, concurred in the result. Both Justices noted that no finding of a protected interest was necessary since due process was accorded Horowitz.³³ Mr. Justice Marshall dissented from that portion of the opinion which suggested that academic dismissals required less procedural protections than disciplinary dismissals.³⁴ Justices Marshall, Blackmun, and Brennan further recommended that the case be remanded to the court of appeals for resolution of plaintiff's substantive due process claim.³⁵ Deciding an issue not before the Court, the majority held that there was no showing of arbitrariness to warrant review of the substantive due process claim.³⁶

TRACING JUDICIAL RESTRAINT

Property and Liberty Interests—Tools for Judicial Passivists

The concept of "liberty" is a flexible one.³⁷ The Court has

25. 538 F.2d at 1321.

26. *Id.*

27. ___ U.S. ___, 98 S. Ct. 948, 956 (1978).

28. *Id.* at 953 n.3.

29. Mr. Justice Rehnquist explained that "[a] public hearing may be regarded as helpful to the ascertainment of misconduct and useless or harmful in finding out the truth as to scholarship." *Id.* at 953, quoting *Barnard v. Inhabitants of Shelburne*, 216 Mass. 19, 22, 102 N.E. 1095, 1097 (1913). See generally *Board of Curators of the Univ. of Mo. v. Horowitz*, ___ U.S. ___, 98 S. Ct. at 952-56.

30. ___ U.S. ___, 98 S. Ct. at 955.

31. Justices Burger, Stewart, Powell, and Stevens joined the majority opinion.

32. ___ U.S. ___, 98 S. Ct. at 958.

33. *Id.* at 964.

34. *Id.* at 958-59.

35. *Id.* at 964-65.

36. *Id.* at 956.

37. In *Board of Regents v. Roth*, 408 U.S. 564 (1972), the Supreme Court

recently explained that "liberty" "denotes not merely freedom from bodily restraint but also the right of an individual . . . to engage in any of the common occupations of life, to acquire useful knowledge, . . . and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men."³⁸ Recognizing this innate flexibility, during the early 1970's the Supreme Court greatly expanded the definition of property and liberty interests to include "entitlements."³⁹ Statutory entitlements were state-fostered expectations such as employment, housing and welfare benefits.⁴⁰ Additionally, the Court recognized state-fostered liberty interests of non-statutory origin.⁴¹ The Court thereby extended protection to those interests on which the government had invited dependence.

A few years later, the Supreme Court began to narrow the entitlement concept.⁴² Of particular interest for purposes of the present inquiry was the Court's reluctance to review discretionary decisions of administrative bodies.⁴³ Due process protection was therefore generally narrowed to statutory entitlements. This narrowing resulted in a resurrection of the discredited rights-privilege distinction.⁴⁴ Reasonable state-fostered expectations no longer

stated that

"[l]iberty" and "property" are broad and majestic terms. They are among the [g]reat [constitutional] concepts . . . purposely left to gather meaning from experience [T]hey relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.

Id. at 571, quoting *National Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting).

38. *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972), quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

39. Professor Charles Reich introduced the terminology and concept of entitlement in his ground-breaking article, *The New Property*, 73 *YALE L.J.* 733 (1964).

40. See, e.g., *Perry v. Sindermann*, 408 U.S. 593 (1972) (teacher's implied tenure); *Bell v. Burson*, 402 U.S. 535 (1971) (driver's license); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare benefits).

41. See, e.g., *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (reputation).

42. See, e.g., *Bishop v. Wood*, 426 U.S. 341 (1976) (hearing not required in dismissal of "permanent" city employee).

This rather abrupt change in judicial philosophy may be traced to the substantial change in the composition of the United States Supreme Court beginning in 1969. Within the next few years, President Nixon appointed five Justices to the Court.

43. See *Meachum v. Fano*, 427 U.S. 215 (1976) (state prisoner transferred to inferior institution denied hearing).

44. At one time it was argued that school attendance was merely a privilege and not a right. Expulsion or denial of admission by colleges and universities did not result in a deprivation of liberty or property under the fourteenth amendment. *E.g.*, *Board of Trustees v. Waugh*, 105 *Miss.* 623, 62 *So.* 827 (1914), *aff'd*, 237 U.S. 589 (1915). *Cf.* *Hamilton v. Regents of Univ. of Cal.*, 293 U.S. 245 (1934).

amounted to interests accorded due process protection unless they were of statutory origin. This narrow view of entitlement had no relation to reasonable expectations or to public understanding. More recently, the Court has come to recognize even fewer interests than were recognized before the doctrine of entitlement. For example, in *Paul v. Davis*⁴⁵ the Court found that reputation alone was neither a liberty nor a property interest for purposes of procedural protection.⁴⁶ As will be seen in the subsequent analysis of *Horowitz*, the Court has further eroded the concept of liberty by a reaffirmation of this narrow view of a reputation interest.

Theoretical Bases for Judicial Restraint

In *Horowitz*, the Court exhibited substantial concern for the maintenance of academic autonomy. This characteristic reluctance to interfere with post secondary school administrative decisions has several theoretical bases.⁴⁷

Until recently courts had characterized post secondary education as a privilege rather than a right.⁴⁸ Since there was no right, the state could distribute its benefits as it deemed appropriate. Courts have since recognized that even "privileges" may not be denied for reasons which violate constitutional guarantees.⁴⁹ Thus the right-privilege distinction has been abandoned.⁵⁰

The common law doctrine of *in loco parentis*⁵¹ was another early theoretical basis for proponents of judicial passivism. The theory of *in loco parentis* generally stated that a school took the place of a student's parents while the student was attending school. Courts

45. 424 U.S. 693 (1976).

46. Previously, the Court had recognized reputation as an important protected liberty interest. See, e.g., *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972); *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

47. See generally *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1144-54 (1968).

48. See, e.g., *Board of Trustees v. Waugh*, 105 Miss. 623, 62 So. 827 (1914), *aff'd*, 237 U.S. 589 (1915).

49. *Accord*, *Knight v. State Bd. of Educ.*, 200 F. Supp. 174 (M.D. Tenn. 1961). "Whether the interest involved be described as a right or a privilege, the fact remains that it is an interest of almost incalculable value . . ." *Id.* at 178. See generally *Hale, Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935); *Note, Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960).

50. E.g., *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Graham v. Richardson*, 403 U.S. 365 (1971). See generally *Van Alstyne, The Demise of the Right-Privilege Doctrine in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

51. See RESTATEMENT (SECOND) OF TORTS § 153(2) (1965). See, e.g., *Suits v. Glover*, 260 Ala. 449, 71 So. 2d 49 (1954).

soon recognized, however, that the function of the school at higher levels of education differed significantly from the function of the parent. The doctrine of *in loco parentis*, therefore, no longer justified tolerance of virtually unchecked disciplinary dismissals in the nation's public colleges and universities.⁵²

It was not until the landmark decision in *Dixon v. Alabama State Board of Education*,⁵³ however, that students were accorded constitutional guarantees in disciplinary dismissals. In *Dixon*, the Fifth Circuit rejected the privilege theory, noting the incalculable value of education: "[E]ducation is vital and, indeed, basic to a civilized society. Without sufficient education the plaintiffs would not be able to earn an adequate livelihood, to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens."⁵⁴ *Dixon* marked the beginning of an era of judicial recognition and concern for students' constitutional rights.⁵⁵

Judicial Restraint and Academic Dismissals

Academic dismissals remain the final bastion in the public school student battle to secure procedural due process protection.⁵⁶

52. See, e.g., Van Alstyne, *The Judicial Trend Toward Student Academic Freedom*, 20 U. FLA. L. REV. 290, 292 (1968).

53. 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961).

54. *Id.* at 157. Accord, *Brown v. Board of Education*, 347 U.S. 483 (1954). Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Id. at 493.

55. Following *Dixon*, lower federal courts gradually came to extend various elements of procedural due process to students in public institutions. *E.g.*, *Hagopian v. Knowlton*, 470 F.2d 201 (2d Cir. 1972) (entitled to hearing but not counsel); *Brown v. Strickler*, 422 F.2d 1000 (6th Cir. 1970) (entitled to notice and opportunity to be heard); *Esteban v. Central Mo. State College*, 277 F. Supp. 649 (W.D. Mo. 1967) (entitled to notice, inspection of evidence, counsel, hearing, recordings); *Due v. Fla. A. & M. Univ.*, 233 F. Supp. 396 (N.D. Fla. 1963) (entitled to notice and hearing); *Knight v. State Bd. of Educ.*, 200 F. Supp. 174 (M.D. Tenn. 1961) (entitled to notice and hearing). It was not until *Goss v. Lopez*, 419 U.S. 565 (1975), that the United States Supreme Court expressly recognized a student's right to procedural due process when faced with disciplinary suspension from a public secondary school. The Court did not extend this constitutional guarantee, however, to academic dismissals from post secondary schools.

56. The Court has previously addressed the due process rights of teachers who have been dismissed. See, e.g., *Board of Regents v. Roth*, 408 U.S. 564 (1972). *Slochower v. Board of Educ.*, 350 U.S. 551 (1956); *Wieman v. Updegraff*, 344 U.S. 183 (1952).

Historically the dismissal of a student for failure to maintain a prescribed scholastic rating had been left wholly to the discretion of school officials.⁵⁷ Courts would not review an academic dismissal absent a prima facie showing that the decision to dismiss was arbitrary, capricious or in bad faith.⁵⁸ In *Connelly v. Univeristy of Vermont*⁵⁹ the court explained:

[I]n matters of scholarship, the school authorities are uniquely qualified by training and experience to judge the qualifications of a student, and efficiency of instruction depends in no small degree upon the school faculty's freedom from interference from other non-educational tribunals. It is only when the school authorities abuse this discretion that a court may interfere with their decision to dismiss a student.⁶⁰

Once again, the underlying assumption is that judicial interference jeopardizes academic freedom.

This strict policy of judicial nonintervention has given way in recent years to two principal exceptions. First, when a purportedly academic dismissal is clearly based on non-academic considerations, courts have been willing to intervene.⁶¹ For example, in *Connelly*, the district court recognized that the judicial policy of nonintervention into academic affairs was not applicable where a medical student alleged that his instructor had decided to assign a failing grade before the student had completed the course.⁶² Secondly, when an academic dismissal involves unusually serious consequences for the student, courts will scrutinize the allegation that the dismissal was for academic reasons.⁶³ Nevertheless, the rule remains one of broad judicial deference to administrative determinations. The recent decision in *Mahavongsanan v. Hall*⁶⁴ again enunciated the distinction be-

57. *E.g.*, *Mahavongsanan v. Hall*, 529 F.2d 448 (5th Cir. 1976); *Mustell v. Rose*, 282 Ala. 358, 211 So. 2d 489, *cert. denied*, 393 U.S. 936 (1968); *Barnard v. Inhabitants of Shelburne*, 216 Mass. 19, 102 N.E. 1095 (1913); *West v. Miami Univ.*, 41 Ohio App. 367, 181 N.E. 144 (1931); *Foley v. Benedict*, 121 Tex. 193, 55 S.W.2d 805 (1932).

58. *See, e.g.*, *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Gasper v. Bruton*, 513 F.2d 843 (10th Cir. 1975); *Greenhill v. Bailey*, 519 F.2d 5 (8th Cir. 1975); *Brookins v. Bonnell*, 362 F. Supp. 379 (E.D. Pa. 1973); *Keys v. Sawyer*, 353 F. Supp. 936 (S.D. Tex. 1973).

59. 244 F. Supp. 156 (D. Vt. 1965).

60. *Id.* at 160.

61. *Id.*

62. *Id.* at 161.

63. *Greenhill v. Bailey*, 519 F.2d 5 (8th Cir. 1975).

64. 529 F.2d 448 (5th Cir. 1976).

tween standards of review for academic as opposed to disciplinary dismissals: "Misconduct and failure to attain a standard of scholarship cannot be equated. A hearing may be required to determine charges of misconduct, but a hearing may be useless or harmful in finding out the truth concerning scholarship."⁶⁵

THE HOROWITZ ANALYSIS

Hearing Requirement Satisfied

In *Horowitz*, respondent alleged that her fourteenth amendment right to procedural due process had been violated.⁶⁶ The fourteenth amendment guarantees procedural safeguards to one who has been deprived of either a liberty or a property interest.⁶⁷ Although *Horowitz* did not allege a deprivation of a property interest,⁶⁸ she did allege a deprivation of a liberty interest.⁶⁹ In spite of this allegation, *Horowitz* simply did not present an opportunity to determine whether an academic dismissal from a public university constituted a deprivation of liberty. Assuming the existence of a protected liberty interest, UMKC accorded respondent ample procedural protection.⁷⁰

Admittedly the necessary elements of a dismissal hearing are still widely disputed.⁷¹ But "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."⁷² What process is due will vary "according to the specific factual context."⁷³ It is generally agreed that an "informal give and take"⁷⁴ between the student and the administration

65. *Id.* at 450.

66. ___ U.S. ___, 98 S. Ct. at 950.

67. *See* note 1 *supra*.

68. ___ U.S. ___, 98 S. Ct. at 951.

69. *Id.*

70. *See* note 15 *supra* and accompanying text. The assessment procedures used at UMKC included notice, a hearing, and an appeal.

71. *See, e.g., Sullivan v. Houston Independent School Dist.*, 475 F.2d 1071 (5th Cir. 1973) (impartial decisionmaker); *French v. Bashful*, 303 F. Supp. 1333 (E.D. La. 1969) (counsel); *Due v. Florida A. & M. Univ.*, 233 F. Supp. 396 (N.D. Fla. 1963) (record of proceedings).

72. ___ U.S. ___, 98 S. Ct. at 953, *quoting* *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961).

73. ___ U.S. ___, 98 S. Ct. at 952, *quoting* *Hannah v. Larche*, 363 U.S. 420, 442 (1960). *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Bell v. Burson*, 402 U.S. 535, 540 (1971). *Accord, Goss v. Lopez*, 419 U.S. 565, 584 (1975); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring).

74. *Goss v. Lopez*, 419 U.S. 565, 584 (1975).

will suffice.⁷⁵ The UMKC assessment procedures amply complied with this requirement.

This determination was dispositive of *Horowitz*. Nevertheless, Mr. Justice Rehnquist went on to resolve issues not necessary to the disposition of the case. Obviously this approach may be disastrous. As Mr. Justice Marshall emphasized:

[The] great gravity and delicacy of our task in constitutional cases should cause us to shrink from anticipat[ing] a question of constitutional law in advance of the necessity of deciding it, and from formulating a rule of constitutional law broader than is required by the precise facts to which it is to be applied.⁷⁶

As a result, further determinations by the Court may reasonably be considered dicta. In view of the force of the Supreme Court forum, however, it becomes necessary to analyze those findings.

Injury to Reputation Does Not Constitute Deprivation of Liberty

Justice Rehnquist reiterated the requirement of "reputation plus" to constitute a recognizable liberty interest.⁷⁷ A dismissal alone is not sufficient damage to reputation to constitute a deprivation of a liberty interest. However, publication of the reasons for the dismissal could amount to stigmatization sufficient to constitute an infringement of liberty.⁷⁸ Noting that *Horowitz* had been dismissed without publication of the reasons for her dismissal, the Court concluded that the damage to her reputation was not sufficient to constitute a deprivation of liberty.⁷⁹

This argument is specious at best. Initial institutionally generated publication of the reasons for dismissal is inconsequential. Realistically, a student dismissed from medical school will be compelled to reveal the fact of dismissal to other educational institutions and prospective employers during application procedures. As noted by Justice Marshall, *Horowitz* had been stigmatized to the ex-

75. *Id.* See *Greenhill v. Bailey*, 519 F.2d 5, 9 (1975).

76. ____ U.S. ____, 98 S. Ct. 948, 959-60 (Marshall, J., dissenting), quoting *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 345-47 (1936) (Brandeis, J. concurring).

77. See *Bishop v. Wood*, 426 U.S. 341, 348 (1976); *Paul v. Davis*, 424 U.S. 693, 697 (1976); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Greenhill v. Bailey*, 519 F.2d 5 (1975).

78. ____ U.S. ____, 98 S. Ct. at 952.

79. See ____ U.S. ____, 98 S. Ct. at 951-52.

tent that she was unable to continue her medical education.⁸⁰ Furthermore, her chances for employment in any medically related field were severely damaged.⁸¹ An academic dismissal with or without publication of the specific reasons for dismissal results in comparable injury to the student. The resulting need for procedural protection is equally compelling.⁸²

Policy Considerations

Justice Rehnquist acknowledged the severe deprivation involved in dismissal from medical school.⁸³ But the Court explained that the nature of the interest affected was only one of several considerations. Other relevant factors included "the evaluative nature of the inquiry and the significant and historically supported interest of the school in preserving its present framework for academic evaluations"⁸⁴ In this expression of policy lies the foundation for judicial nonintervention in academic affairs. Courts have historically attempted to protect academic institutions from interference from outsiders. In doing so the judiciary has unwittingly subjected those same institutions to ill-will and caprice generated within their own educational confines. Only through judicial protection of the right to individual academic freedom can institutional academic freedom flourish.⁸⁵

In summary, the allegation that a dismissal is for "academic" reasons does not warrant wholesale judicial acceptance of a school's determinations. Such a "talismanic reliance on labels"⁸⁶ may provide a cloak for administrators who are reluctant to accord due process to their students.⁸⁷ The judiciary can most effectively safeguard academic freedom through the imposition of procedural due process

80. *Id.* at 960 (Marshall, J. dissenting).

81. *Id.*

82. *Id.*, quoting Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1296-97 (1975): "[W]hen the State seeks 'to deprive a person of a way of life to which [s]he has devoted years of preparation and on which [s]he . . . has come to rely,' it should be required first to provide a 'high level of procedural protection.'"

83. ___ U.S. ___, 98 S. Ct. at 953 n.3.

84. *Id.*

85. Fuchs, *Academic Freedom—Its Basic Philosophy, Function, and History*, 28 LAW AND CONTEMP. PROBLEMS 431, 440 (1963).

86. ___ U.S. ___, 98 S. Ct. at 963 (Marshall, J. dissenting).

87. For example, the minutes of the meeting at which it was decided that Horowitz should not graduate contained the following: "This issue is not one of academic achievement but of performance, relationship to people and ability to communicate." *Id.* at 962. See note 14 *supra*. Yet the Court persistently characterized Horowitz's dismissal as an "academic" one.

requirements. Due process is a minimal and essential safeguard against suppression of academic freedom.⁸⁸ Substantive evaluation of an academic dismissal may be beyond the realm and ability of the judiciary, but certainly a hearing requirement within the school will provide at least "a meaningful hedge against erroneous action."⁸⁹

CONCLUSION

Students are essentially in a position of dependence on their respective educational institutions. Admission, curriculum, grading and degree requirements are within the sole discretion of the individual school. The school holds the key to the student's intellectual and economic future. These respective interests of student and administration need not be in opposition. The student facing an academic dismissal is interested in participating in a hearing to test the validity of the pending dismissal. On the other hand, the school has an interest in maintaining its discretionary power. The obvious resolution is to require a university to employ its discretionary and academic expertise within a school-conducted hearing. Judicial passivists should have no objection to such a resolution, for it is only in substantive review of administrative decisions regarding academic expertise that academic freedom becomes subject to judicial scrutiny.

In an effort to preserve academic autonomy, the Court utilized an unrealistically narrow view of the concept of liberty. Ultimately it was suggested that an academic dismissal from a public medical college did not constitute a deprivation of liberty in the absence of publication or other acts. Those acts which would constitute stigmatization were never clearly delineated by the Court but still depend on the specific fact situation and must be decided on a case by case basis.

Interested parties must employ caution in the interpretation and application of the *Horowitz* findings. The entire Court agreed that *Horowitz* had been accorded all the procedural due process required under the fourteenth amendment. In the majority opinion, Justice Rehnquist seemed to base this holding upon a finding that the fourteenth amendment did not require any hearing before an

88. See Murphy, *Academic Freedom—An Emerging Constitutional Right*, 28 LAW AND CONTEMPORARY PROBLEMS 447 (1963). "The struggle for academic freedom has demonstrated that due process is a means essential to achieve that great end." *Id.* at 484.

89. *Goss v. Lopez*, 419 U.S. 565, 583 (1975).

academic dismissal. But five Justices, a majority of the Court, filed separate opinions noting that UMKC accorded Horowitz all the due process required, assuming a constitutionally protected interest. Since this finding was dispositive, other judicial determinations may be fairly viewed as dicta. It should also be noted that Horowitz did not allege a deprivation of a property interest. This possible theory of recovery still awaits Supreme Court consideration. The fate of students dismissed for academic reasons therefore rests heavily on lower court interpretation.

