1978

Academic Dismissals: A Due Process Anomaly: 
Board of Curators v. Horowitz, 435 U.S. 78 (1978)

Eileen K. Jennings
University of Nebraska College of Law, eileen.jennings@cmich.edu

Follow this and additional works at: https://digitalcommons.unl.edu/nlr

Recommended Citation
Available at: https://digitalcommons.unl.edu/nlr/vol58/iss2/6

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.
Note

Academic Dismissals: A Due Process Anomaly


I. INTRODUCTION

The 1975 Supreme Court decision in Goss v. Lopez1 established that elementary and secondary students are entitled to notice and some kind of hearing prior to a short term suspension for misconduct;2 a fortiori, notice and hearing would be necessary prior to expulsion for misconduct. What was left unclear was the range of educational activities and penalties to which constitutional procedural due process rights apply. Ingraham v. Wright3 filled in one missing piece when the Court held that corporal punishment in public schools does not require prior notice and hearing to comply with the due process clause.4 Lower courts have been dealing with other variations as they arise. In general, misconduct penalties which are perceived to be less severe than suspension, e.g., restricting participation in extra-curricular activities, have not triggered constitutional due process.5

The situation in public universities has been similar to that in public elementary and secondary schools. Although the Supreme Court has never reviewed a case of disciplinary dismissal or suspension at the college or university level, the lower courts had reached a consensus by the time Goss was decided that procedural

2. Id. at 572-76.
4. Id. at 682. Since common law remedies are available to the student if the punishment is excessive, less procedural protection prior to imposition of the punishment is suitable. Ingraham also held that corporal punishment in public schools does not violate the eighth amendment's cruel and unusual punishment clause.
due process rights attached to students in higher education prior
to disciplinary dismissals. But whether college students have a
liberty or property interest in continued attendance has never
been definitively established. If they do have such interests, the

6. The landmark decision in this area was Dixon v. Alabama State Bd. of Educ.,
294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961), which held that stu-
dents at public universities are entitled to notice and some opportunity for a
hearing prior to expulsion for misconduct. The Dixon court specified that the
notice must "contain a statement of the specific . . . charges . . . . The nature
of the hearing should vary depending on the circumstances of the particular
case." Id. at 158. The "rudiments of an adversary hearing," id. at 159, are
mandated, including furnishing the names of witnesses against the student
and a statement of the facts to which each witness is expected to testify. The
student must have an opportunity to present his or her side of the story, in-
cluding witnesses and evidence. If the board which has final authority does
not itself conduct the hearing, a written report of the hearing must be pre-
pared and made available to the student. A "full dress judicial hearing, with
the right to cross-examine witnesses," id., is not required.

Subsequent cases reinforced the holding of Dixon and fleshed out the
specific procedures necessary. See, e.g., Sill v. Pennsylvania State Univ., 462
F.2d 463 (3d Cir. 1972) (a specially appointed disciplinary panel is satisfac-
tory); Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967) (student's right to
counsel depends on presence of other factors influencing student's overall
ability to defend against the charges); French v. Bashful, 303 F. Supp. 1333
(E.D. La. 1969) (right to counsel exists where prosecutor has strong legal
qualifications); Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747
(W.D. La. 1968) (recommends written and promulgated rules and an appeal
system; open or closed hearing not required); Esteban v. Central Mo. State
College, 277 F. Supp. 649 (W.D. Mo. 1967), aff'd, 415 F.2d 1077 (8th Cir. 1969),
cert. denied 398 U.S. 965 (1970) (college must provide statement of precise
charges at least ten days before hearing; student should have opportunity to
confront witnesses, to present his or her case to person or group with the
responsibility of deciding the facts and the penalty, to examine the college's
evidence in advance, and to have counsel present but not to conduct stu-
dent's case; decision must be based solely on evidence presented at hearing;
either side may record hearing); Goldberg v. Regents of Univ. of Cal., 248 Cal.
2d 867, 57 Cal. Rptr. 463 (Ct. App. 1967) (need not follow judicial rules of evi-
dence).

7. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), cert. denied, 368
U.S. 930 (1961), applied the due process clause "[w]henever a governmental
body acts so as to injure an individual." Id. at 155. The issue of disciplinary
dismissal was resolved in this context, before the liberty and property con-
cepts were developed by the United States Supreme Court in the line of
cases highlighted by Goldberg v. Kelly, 397 U.S. 254 (1970), Board of Regents

Greenhill v. Bailey, 519 F.2d 5 (8th Cir. 1975), Gaspar v. Bruton, 513 F.2d
843 (10th Cir. 1975), and Ross v. Pennsylvania State Univ., 445 F. Supp. 147
(M.D. Pa. 1978), based their holdings that procedural due process attaches to
academic dismissals on the finding of a liberty or property interest. Other
academic dismissal cases cited in this article did not rely on the presence or
absence of a liberty or property interest. In most cases, the student alleged
arbitrariness and capriciousness and did not rest the case on liberty or prop-
erty.
nature of the procedural protections to which they are entitled prior to academic dismissals has never been specified.\(^8\) It was with hope of receiving answers to one or both of these questions that \textit{Board of Curators v. Horowitz}\(^9\) was presented to the Supreme Court.

\section{II. THE FACTS}

Charlotte Horowitz obtained a bachelor's degree in chemistry from Barnard College and a master's in psychology from Columbia University. She pursued graduate work at Duke University and at the National Institutes of Health. Her grades at each institution were superb, as were her scores on the Graduate Record Examination and the Medical College Admissions Test.\(^10\) On the basis of these academic achievements and enthusiastic recommendations, she was admitted with advanced standing to the University of Missouri-Kansas City Medical School\(^11\) in the fall of 1971.\(^12\) She began her studies at UMKC in approximately the third year of a four year curriculum.\(^13\)

The studies during the last two years are organized into rotations in various medical disciplines.\(^14\) During her first year at UMKC, Horowitz received credit for six rotations,\(^15\) but in the spring of that year (1972) her performance in the pediatrics rotation was deemed deficient by several faculty members. UMKC distinguishes receiving credit for work from satisfactory performance in a rotation.\(^16\) The pediatrics faculty complained of her performance in "clinical patient-oriented settings,"\(^17\) of her erratic attendance at clinical sessions, and of her lack of concern for personal hygiene.\(^18\) Because her deficient performance continued, in July 1972, Horowitz was placed on probation.\(^19\)

The process set up at UMKC for reviewing academic progress begins with the Council on Evaluation, which is composed of faculty and students. A Coordinating Committee, composed of

\begin{footnotes}
\item[8] See notes 88-93 & accompanying text \textit{infra}.
\item[11] Hereinafter referred to as UMKC.
\item[14] 435 U.S. at 80.
\item[15] Brief for Respondent at 3.
\item[16] 435 U.S. at 104 & n.18 (Marshall, J., concurring in part & dissenting in part).
\item[17] \textit{Id.} at 80 (majority opinion).
\item[18] \textit{Id.}
\item[19] 538 F.2d at 1319.
\end{footnotes}
faculty, may review the decisions of the Council, and the Dean makes the ultimate decisions on retention or dismissal. The rules do not provide for notice to the student or an opportunity to be heard by either the Coordinating Committee or the Council.

The July notification to Horowitz of her probationary status followed a review by the Council on Evaluation, and a discussion among Horowitz, the Dean, the Chairman of the Council on Evaluation, and Horowitz’s faculty advisor. After the discussion, the Dean notified Horowitz by letter that she had been placed on probation and again specified her deficiencies.

“Faculty dissatisfaction with respondent’s clinical performance continued during the following year.” In December, the Council on Evaluation again reviewed her record and recommended that she be continued on probation and that she not be considered for graduation in June. It further recommended that, unless she showed radical improvement in clinical competence and several other areas, she should be dismissed from the medical school in June. The Coordinating Committee approved these recommendations. In January and February the Dean informed her of these decisions at a meeting with her and also by letter.

Horowitz appealed the decision not to allow her to graduate. As part of the appeal process, seven practical examinations by local physicians were conducted. Two of the physicians recommended she be allowed to graduate in June on schedule; two recommended she be dropped from the medical school immediately; three recommended she be continued on probation and allowed additional time to demonstrate clinical proficiency. Following receipt of these recommendations, the Council on Evaluation and the Coordinating Committee reaffirmed that Horowitz could not graduate in June. She was notified of this decision by the Dean in May.

Later in May, the Council again met to discuss whether Horowitz should be allowed to continue in school beyond June, and recommended that, “barring receipt of any reports that [she]
has improved radically, [she] not be allowed to re-enroll.'" When reports of all rotations had been received, the Council reaffirmed its recommendation that she be dismissed. This position was accepted by the Coordinating Committee and by the Dean, and Horowitz was notified of her dismissal by letter in July 1973. She appealed to the Provost for Health Science, but he sustained the school's action.

Throughout this lengthy process, Horowitz was never allowed to appear before the Council on Evaluation or the Coordinating Committee. She did, however, have numerous meetings with her faculty adviser, the Dean, and the Chairman of the Council on Evaluation. At these meetings her deficiencies in clinical performance were discussed, suggestions were made as to what improvements were necessary, and Horowitz was afforded the opportunity to respond to the allegations regarding her performance.

III. THE DECISION

Horowitz filed suit under 42 U.S.C. § 1983 in the United States District Court for the Western District of Missouri. She asked for declaratory and injunctive relief and damages. Her action was based on the theory that she had a liberty interest in continuing her medical education at the state operated university. This liberty interest entitled her to procedural due process rights, including notice and a hearing which she alleged had been denied her. She also alleged substantive due process violations. The district court dismissed her complaint after a trial, asserting that she had been accorded both substantive and procedural due process.

The United States Court of Appeals for the Eighth Circuit reversed and remanded with instructions to order the University to conduct a hearing on Horowitz's dismissal. Building upon Board

32. 435 U.S. at 82. This was a restatement of the Council's original recommendation when it placed her on probation in December 1972.
33. Id.
34. 538 F.2d at 1320.
35. Id.
36. Id.
38. (1976).
40. 435 U.S. at 80. Horowitz did not claim a property interest. See text accompanying note 100 infra.
41. Id. at 80.
42. Id. at 91-92.
44. 538 F.2d at 1321.
of Regents v. Roth, the court of appeals stated Horowitz had "been stigmatized by her dismissal in such a way that she will be unable to continue her medical education, and her chances of returning to employment in a medically related field are severely damaged." While acknowledging that the distinction between misconduct and academic dismissals may be valid under some circumstances, the court concluded that the circumstances of this case demanded a hearing.

The United States Supreme Court granted certiorari "to consider what procedures must be accorded to a student at a state educational institution whose dismissal may constitute a deprivation of 'liberty' or 'property' within the meaning of the Fourteenth Amendment." On March 1, 1978, the Supreme Court reversed the Eighth Circuit. The Court unanimously agreed that if Horowitz had a liberty or property interest in continuing her medical education at UMKC and was thereby entitled to procedural due process, sufficient procedure had been afforded her to comply with fourteenth amendment requirements. A majority of the Court, with three Justices dissenting, also decided not to remand for consideration of Horowitz's substantive due process claim because "no showing of arbitrariness or capriciousness has been made."

The Court's decision for UMKC was unanimous; the reasoning

45. 408 U.S. 564 (1972). A non-tenured college teacher was not entitled to a hearing on the non-renewal of his contract, because he did not allege any stigma tantamount to a deprivation of liberty.

46. 538 F.2d at 1321.

47. Id. (footnote omitted). Since it reversed the decision on procedural due process grounds, the Eighth Circuit did not reach the substantive due process issue. Id. at 1321 n.5. A petition for rehearing en banc was denied, 542 F.2d 1335 (8th Cir. 1976), but three judges filed an opinion stating that a rehearing should be granted on the basis of Bishop v. Wood, 426 U.S. 341 (1976), which was decided between the Eighth Circuit's original decision and the denial of rehearing. In Bishop, the Court held that a city policeman had neither a property nor a liberty interest in his job which entitled him to a hearing prior to his dismissal. Since the reasons for his dismissal were not made public, the court stated he could not claim reputational injury, i.e., a liberty interest deprivation.

Those favoring a rehearing pointed out that Bishop clarified that Horowitz was not deprived of a liberty interest, because there was no public disclosure of the reasons for her dismissal. 542 F.2d at 1335. They further stated that even "if due process rights were involved ... Horowitz received all the process that was called for under the circumstances," id. at 1335-36, because she had notice of her deficiencies, was aware of the danger of dismissal, and was given the opportunity to correct those deficiencies. Id. at 1336.


49. 435 U.S. at 80.

50. Id. at 78.

51. Id. at 85.

52. Id. at 91-92. Justices Brennan, Marshall, and Blackmun dissented.
underlying the decision was not. Justice Rehnquist delivered the opinion of the Court, in which Chief Justice Burger and Justices Stewart, Powell and Stevens fully joined. This opinion indicated that for academic dismissals procedural due process does not necessitate even an informal hearing. Justice Powell also filed a separate concurrence stating that he read the Court's opinion as "upholding the District Court's view that respondent was dismissed for academic deficiencies rather than unsatisfactory personal conduct, and that in these circumstances she was accorded due process."

Justice White concurred in the judgment and with the opinion in part, but believed it "unnecessary to decide whether respondent had a constitutionally protected property or liberty interest or precisely what minimum procedures were required. . . . Whatever that minimum is, the procedures accorded her satisfied or exceeded that minimum." He disagreed with the majority's indication that no hearing or opportunity to respond is required.

Justice Marshall, concurring in part and dissenting in part, agreed that Horowitz received adequate due process, but disagreed with the opinion of the Court that she "was entitled to even less procedural protection than she received." He also stated that characterization of the dismissal as academic or disciplinary is irrelevant to the amount of procedure required. Finally, he would have remanded for resolution of respondent's substantive due process claim.

Justice Blackmun, with whom Justice Brennan joined, believed it unnecessary, as did Justice White, to argue about the "extent or type of procedural protection" required. Whatever process was due, Horowitz received it. But he agreed with Justice Marshall that the case should be remanded for consideration of the substantive due process claim.

IV. GENERAL ANALYSIS OF DECISION

All nine justices agreed that Horowitz had received sufficient procedural protection; there was disagreement on nearly everything else. The heart of the majority opinion focused on what process was due the student prior to her dismissal from medical school.

53. Id. at 92-93 (Powell, J., concurring).
54. Id. at 96 (White, J., concurring in part & concurring in the judgment).
55. Id. at 96-97.
56. Id. at 97 (Marshall, J., concurring in part & dissenting in part).
57. Id. at 103-04.
58. Id. at 107-08.
59. Id. at 109 (Blackmun, J., concurring in part & dissenting in part).
60. Id.
for inadequate academic performance, assuming she had a right to due process at all. *Goss v. Lopez*\(^{61}\) was the Court's starting point in deciding the issues presented by Horowitz: (1) whether the process afforded Horowitz satisfied the requirements of *Goss*; (2) whether less stringent standards suffice for academic dismissals than for disciplinary suspensions or expulsions; and (3) if so, a definition of the outlines of this less stringent due process standard.

*Goss* set forth the minimum procedures necessary for short term suspensions from school: "oral or written notice of the charges"\(^{62}\) and "if [the student] denies them, an explanation of the evidence the authorities have, and an opportunity to present his side of the story."\(^{63}\) *Goss* does not require a formal hearing,\(^{64}\) so long as the student has a chance to explain his conduct and "put it in what he deems the proper context."\(^{65}\)

61. 419 U.S. 565 (1975). *Goss* was the first decision applying procedural due process protection to students, but it followed a long line of cases establishing when due process protections were required and what process was due in other circumstances. See note 81 infra. *Goss* held procedural protections apply because students have a property interest created by mandatory school attendance laws and a liberty interest in reputation which could be damaged by misconduct charges. But regarding the liberty interest, see Paul v. Davis, 424 U.S. 693, 710 (1976).

The Court's decision in *Goss* was five to four. A vigorous dissent denied the existence of a liberty or property interest and stated that, consequently, the Court should not impose any notice or hearing requirements for short term disciplinary suspensions. 419 U.S. at 584 (Powell, J., dissenting). Three justices in the *Goss* majority who are still on the Court (Justices Brennan, White and Marshall) indicated in *Horowitz* that they believed some hearing should be required for academic dismissals. Correspondingly, three of the four *Goss* dissenters (Chief Justice Burger, Justices Powell and Rehnquist) were in the majority in *Horowitz*, agreeing that no hearing was necessary. Justices Blackmun and Stewart take different positions in the two decisions. While Justice Blackmun would not have required a hearing of any kind in *Goss*, he would require a hearing in *Horowitz*. Justice Stewart, on the other hand, advocated a required opportunity to be heard in *Goss*, but no hearing in *Horowitz*. See 419 U.S. at 566; text accompanying notes 53-60 supra.

62. 419 U.S. at 581.

63. *Id.*

64. This contrasts with the adversarial elements necessary to a fair hearing in other contexts. The Court in *Goss* pointed out that it was not requiring that the hearing be adversarial, or that students be allowed to be represented by counsel, to cross-examine witnesses or to call witnesses. *Id.* at 583. Hearings for disciplinary expulsion or longer term suspensions must be more formal, *id.* at 584, although the degree of formality varies according to the circumstances. *See generally* D. Gilmore, The Continuing Responsibility of Due Process in Judicial Programs and Judicial Issues: The Case of the University and the Constitution (1974) (unpublished study materials by University of Georgia Office of Judicial Programs); note 6 supra.

65. 419 U.S. at 584. Whether it would be appropriate to use this less formal hearing in a permanent academic dismissal is not resolved by the Court in
Whether the process afforded Horowitz satisfied the less stringent *Goss* standard is never clearly answered. Justices Brennan, White, Marshall, and Blackmun seemed to believe the *Goss* requirements were met, and that the Court should make no further inquiry. These justices agreed with Justice Marshall that the repeated meetings gave Horowitz "at least three opportunities 'to present her side of the story.'" But the Rehnquist opinion does not rest upon a factual determination that Horowitz had any kind of hearing at all.

Justice Marshall stated that the core of the Rehnquist opinion—answering whether less stringent standards will suffice for an academic dismissal—is dicta. But it is dicta only if the majority believed Horowitz received some opportunity to be heard. The justices joining in the Rehnquist opinion never stated that she did receive a hearing of some sort, and the opinion reads as though they believed she did not. Justice Powell most clearly implies that he does not believe Horowitz received sufficient due process under the misconduct standards established by *Goss*. If Justice Marshall is correct that the core of the opinion is dicta, then the other four justices joining in Rehnquist's majority opinion must have believed Horowitz received a hearing of some sort, but nevertheless felt compelled to spell out their belief that less stringent standards are adequate.

The majority presented a clearer answer to the question of whether standards less strict than *Goss* will suffice for academic dismissals: "[E]ven the 'informal give-and-take' mandated by *Goss* . . . need not have been provided here." The majority stated its decision was based on lower court precedent and reason. Lower courts, except in *Horowitz*, had consistently recognized the difference between academic and disciplinary

---

67. *Id.* at 96 (White, J., concurring in part & concurring in the judgment).
68. *Id.* at 98 (Marshall, J., concurring in part & dissenting in part).
69. *Id.* at 108 (Blackmun, J., concurring in part & dissenting in part).
70. *Id.* at 98 (Marshall, J., concurring in part & dissenting in part).
71. *Id.* at 97.
72. *Id.* at 92 (Powell, J., concurring).
73. Chief Justice Burger and Justices Stewart, Powell and Stevens fully joined in Rehnquist's opinion.
74. 435 U.S. at 99 (Marshall, J., concurring in part & dissenting in part).
75. *Id.* at 87-88 (majority opinion).
76. *Id.* at 88.
dismissals, and had held hearings are not necessary in academic dismissals.\textsuperscript{77} Further, the Court concluded that reason demonstrates academic decisions are not susceptible to meaningful hearings.\textsuperscript{78}

In eliminating a hearing from the elements of procedural due process, the Court makes a dramatic departure from both traditional and recent Supreme Court due process doctrine.\textsuperscript{79} The holding in \textit{Goss} built upon procedural due process concepts which had been developed by the Court in a variety of contexts. While most due process cases cite to \textit{Cafeteria & Restaurant Workers Union v. McElroy}\textsuperscript{80} for the proposition that the mandated procedures for due process vary according to the specific circumstances, thus implying a hearing may not be necessary, at least notice and some opportunity to be heard have been found appropriate to virtually every situation.\textsuperscript{81}

\textsuperscript{77} Id.
\textsuperscript{78} Id. at 88-90. The analytic process for deciding what process is due, which was articulated in Mathews v. Eldridge, 424 U.S. 319 (1976), is given scant attention. See 435 U.S. at 86 n.3. Mathews outlined three factors which are relevant to deciding what process is due: (1) the private interest affected; (2) the governmental interest, including the burden a hearing would impose; and (3) the risk of an erroneous deprivation resulting from the procedures used and the probable value of additional procedural safeguards. 424 U.S. at 335.
\textsuperscript{79} It is open to speculation whether academic dismissals will continue to be a unique area or whether \textit{Horowitz} portends a more general weakening of notice and hearing requirements where some kind of process is due.
\textsuperscript{80} 367 U.S. 886, 895 (1961).
\textsuperscript{81} To list the many cases which hold notice and hearing to be essential to procedural due process would require too much space. Highlights include the following: Wolff v. McDonnell, 418 U.S. 539 (1974) (prisoners have right to notice and some opportunity to be heard before disciplinary penalties are imposed); Morrissey v. Brewer, 408 U.S. 471 (1972) (some opportunity to be heard must be afforded prior to revocation of parole); Fuentes v. Shevin, 407 U.S. 67 (1972) (statutes allowing a private party to obtain a prejudgment writ of replevin through a summary procedure, without prior notice and hearing to the other party, violate due process); Bell v. Burson, 402 U.S. 554 (1971) (unsured motorist may not be deprived of driver's license and registration after an accident without some opportunity to be heard on whether there is a reasonable possibility of a judgment being rendered against him); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (the state cannot post notice to refuse to sell alcoholic beverages to individual without affording her notice and an opportunity to be heard); Goldberg v. Kelly, 397 U.S. 254 (1970) (public assistance payments cannot be terminated without a prior opportunity for an evidentiary hearing); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (prejudgment garnishment of wages without notice and prior hearing violates procedural due process); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (United States Attorney General cannot place group on "Communist" list without notice and opportunity to be heard); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (judicial settlement of accounts of a trustee cannot be completed without notice to interested parties and opportunity to be heard); The Japanese Immigrant Case, 189 U.S. 86
Prior to Horowitz, procedural due process had been held satisfied without a hearing in only a handful of Supreme Court cases.82 The few cases which do exist seem to be the aberration developed to meet special circumstances. There is no precedent for any general proposition that a hearing is not a minimal element of procedural due process. As Roth says, only in "rare and extraordinary situations [has the Court] held that deprivation of a protected interest need not be preceded by opportunity for some kind of hearing."83

Perhaps Ingraham v. Wright84 was a precursor of the Horowitz decision. In that case, no hearing, however informal, was found necessary prior to corporal punishment of public school students. One of the supporting arguments in Ingraham may provide some explanation for Horowitz: "But when the State has preserved what 'has always been the law of the land,' the case for administrative safeguards is significantly less compelling."85 It has long been the "law of the land" that no hearing is necessary for academic dismissals from colleges and universities.86 The primary rationale for eliminating a hearing requirement in Ingraham, however, was that "[p]rior hearings might well be dispensed with in many circum-

---

82. Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961), is the most notable exception. In that case, the Court held neither notice nor a hearing was necessary when a cook was excluded from the Naval Gun Factory, a military installation, as a security risk. The almost absolute authority of a commanding officer over a military base and the fact that the installation was making secret weapons cast this decision in a unique light. The governmental interest is far weaker and the private interest is significantly greater in the academic dismissal of a medical student as compared to a cook's dismissal from employment at a military installation. Continued enrollment of the student creates no risk to the security of the institution, and the tight job market combined with the high competition for medical school education makes alternate employment in the field of the individual's choice much more difficult to obtain. Therefore, McElroy does not seem apt as precedent for dismissal of a student from a public university for inadequate academic performance.

The Court has also held that an alien never admitted to this country may be excluded without a hearing. United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537 (1950). But once the alien has been admitted, he or she is entitled to a hearing before expulsion. Kwong Hai Chew v. Colding, 344 U.S. 590 (1953); The Japanese Immigrant Case, 189 U.S. 86 (1903). The essentiality of a fair hearing and the other unusual circumstances in which a hearing may be dispensed with are discussed by Justice Frankfurter in his concurring opinion in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 165-68 (1951), and in Board of Regents v. Roth, 408 U.S. 564, 570 n.7 (1972).

83. 498 U.S. at 570 n.7.
85. Id. at 679 (quoting from United States v. Barnett, 376 U.S. 691, 692 (1964)).
86. See note 88 infra.
stances in which the state's conduct, if not adequately justified, would constitute a common law tort." That rationale was not present in **Horowitz** since Horowitz cannot sue the University of Missouri for any common law tort arising out of her dismissal.

While the opinion in **Horowitz** appears to be a radical departure from prior Supreme Court theory, it follows the traditional, long-established reasoning of the circuit courts of appeals and a number of state courts on the subject of academic dismissals. The result reached, and the reasoning followed, is consistent with that of two circuit courts which have dealt with the problem in recent years. The Tenth Circuit explicitly stated that to satisfy due process in academic termination cases, the university "need only advise the student with respect to his deficiencies." The notice can be in any form. So long as the student knows before dismissal that he or she has failed or is in danger of failing and dismissal, his or her due process rights have been adequately protected. Similarly, the Fifth Circuit has limited notice and hearing requirements to disciplinary cases. A hearing, the court said, "may be

---

87. 430 U.S. at 679 n.47 (quoting from Monaghan, Of "Liberty" and "Property," 62 CORNELL L. REV. 405, 431 (1977) (footnote omitted)).
90. Mahavongsanan v. Hall, 529 F.2d 448 (5th Cir. 1976).
ACADEMIC DISMISSALS

useless or harmful in finding out the truth concerning scholarship. There is a clear dichotomy between a student's due process rights in disciplinary dismissals and academic dismissals.\textsuperscript{91} Almost all courts, except the Eighth Circuit, have held that due process in academic dismissals does not require a hearing. These courts have consistently perceived academia as a unique area into which the courts are ill-equipped to venture. Only the Eighth Circuit had marked out new ground through its decision in \textit{Horowitz},\textsuperscript{92} and in one precursor.\textsuperscript{93} In \textit{Horowitz}, the Supreme Court could have extended minimal due process protections of notice and hearing to academic dismissals, making this area of state action consistent with others. Instead it chose to continue the traditional exemption for this class of decisions.

The Supreme Court majority did not spell out what the minimal protections of this new kind of procedural due process might be. Instead, it retreated to the most elementary definition of procedural due process by equating it with fundamental fairness. Although the element of notice still seems to be a requirement, some more generalized concept of fairness appears to suffice in place of a hearing. The majority does provide a few clues to what will satisfy procedural due process in the academic context: "The School fully informed respondent of the faculty's dissatisfaction with her clinical progress and the danger . . . to . . . continued enrollment. The ultimate decision . . . was careful and deliberate. These procedures were sufficient . . . ."\textsuperscript{94} This indicates that notice, or a warning, is still essential. Beyond that, "careful and deliberate"\textsuperscript{95} are the only guidelines the Court offers.

In contrast, Justice Marshall would apparently distinguish dismissals based strictly on failing grades and those based on "con-
duct-related" considerations. He would examine "whether the facts disputed are of a type susceptible to determination by third parties." His test, applied on an ad hoc basis, could result in inconsistent decisions to review, depending on whether the student failed a sociology class in which the grade was based on an objective exam or whether he or she failed a different section of the same course in which the grade was based on class participation or an evaluation of field work.

Where Justice Marshall would decide what process is due according to the facts of a particular case, the Supreme Court majority appears to have applied the same test prospectively to the kinds of situations it sees as likely to arise. The majority noted that, in general, most cases of academic dismissal will involve facts not "susceptible to determination by third parties." While a few reviewable cases may evade court review, the establishment of a standard by which both students and universities can plan and predict was considered of greater importance.

An application of the Horowitz decision to the kinds of processes employed by universities for academic dismissals reveals that the following procedures are probably adequate:

1. Dismissal occurs pursuant to published, objective standards, which specify a requisite grade point average or limit the number of failing grades.

2. The school always provides for one term of warning or probationary status before dismissal.

3. Clinical skills or classroom performance are unsatisfactory and there have been discussions with and/or a warning to the student during that term.

In these situations, even though the student has no opportunity to be heard, there is notice either of the standard to be applied, or that the student is not performing satisfactorily. However, if a committee or administrator with discretionary power, acting pursuant to individualized standards, dismisses a student at the end of the semester without prior warning of possible failure, it is probable that the Horowitz standard would not be met. This would be true whether the dismissal was based on grades for written tests or whether based on an assessment of clinical skills. Such a dismissal would not comply with Horowitz because no advance notice of any kind was given to the student.

96. 435 U.S. at 106 (Marshall, J., concurring in part & dissenting in part).
97. Id.
98. Id.
V. A RULE WITHOUT A THEORY

A. Disposition by the Supreme Court

The Supreme Court skirted the question of whether Horowitz had a liberty or property interest in continuing her medical education. It strongly indicated that no property interest could be found because of the difficulty of demonstrating that a property interest in continued enrollment was recognized by state law. Since Horowitz did not claim a property interest, however, the Court was not required to decide the question.

It was more difficult to avoid the liberty interest question. Both petitioner and respondent argued this as a critical issue, devoting a major segment of their briefs to this topic. The Court itself pointed out: "To be entitled to the procedural protections of the Fourteenth Amendment, respondent must... demonstrate that her dismissal... deprived her of either a 'liberty' or a 'property' interest." Therefore, unless she could show a liberty interest, Horowitz was not entitled to procedural due process of any kind.

The Eighth Circuit opinion rested squarely on a finding that Horowitz's dismissal had deprived her of a liberty interest. That court quoted from Board of Regents v. Roth, indicating that a state action which "impose[s]... a stigma or other disability that foreclose[s]... freedom to take advantage of other employment opportunities" is a deprivation of liberty. It concluded that her "dismissal... will make it difficult or impossible" to secure admission to another medical school. Since she had accepted an offer of a position at the University of North Carolina, conditioned upon securing her M.D., her dismissal meant she could not take advantage of a firm employment opportunity. In addition, one expert had testified that she would find it difficult to secure employment in a medically related field because of this "significant black mark." The Eighth Circuit found that "Horowitz has been stigmatized by her dismissal in such a way that she will be unable to continue her medical education, and her

99. Id. at 84 (majority opinion).
100. Id. at 82.
102. 435 U.S. at 82.
104. 538 F.2d at 1321.
106. 538 F.2d at 1321 (quoting from Board of Regents v. Roth, 408 U.S. 564, 573 (1972)).
107. Id. at 1320.
108. Id.
109. Id. at 1320 n.3.
chances of returning to employment in a medically related field are severely damaged.  

Under the Roth standard applied by the court, the dismissal had affected her liberty interest, thus invoking the fourteenth amendment requirement of procedural due process.

Despite the focus of the circuit court's opinion and the parties' briefs, and despite the need for clarification of this issue, the Supreme Court declined to answer the liberty interest question after broadly hinting that no such interest was present. It held that even if a liberty or property interest was present, the process provided was sufficient: "Assuming the existence of a liberty or property interest, [Horowitz] has been awarded at least as much due process as the Fourteenth Amendment requires." The remainder of the opinion assumed the existence of such an interest, and no concurring opinion disagreed with this assumption.

B. Consequences of Establishing a Liberty Interest

The consequences of a Supreme Court holding that a student has a liberty interest in continuing a university education are uncertain. Technically, such a finding need only lead to a requirement that the university hold a hearing, and need not involve a court in a review of the merits on each case. It does not mean that the courts will interfere with academic evaluations of graduate students . . ., but only that medical schools must organize their own expertise in making decisions . . . in such a manner as to provide students with an opportunity to learn of and rebut any factual allegations which form the basis of the proposed dismissals.

There is fear, however, that a holding that a liberty interest exists will "of necessity mean that the courts will . . . be the final judge of the qualifications of students to be granted degrees, because if the Fourteenth Amendment requires such action [notice and a hearing] by the public institutions, it must also require a review on the merits by the judicial system."

However, a decision clearly establishing a liberty interest would provide negligible benefits to Horowitz or others similarly situated because the Horowitz decision implies that even if a lib-

110. Id. at 1321.
111. Id.
112. 435 U.S. at 84-85.
113. Id. at 84-85 (emphasis added).
In the event a liberty interest is present, the consequence would be merely the right to notice that the student was in danger of termination for a failing performance. While the benefit to the student being dismissed for academic insufficiency would be slight, the burden on the institution might not be. The burden of providing notice is easily met, but if the ruling "foment[s] future litigation and subject[s] educational institutions to unnecessary monitoring and to possible monetary judgments" the resulting burden might be heavy. In light of the concern that procedural guarantees may become substantive, the burden on institutions heavy, and the benefits to students slight, a finding that a liberty interest was present may not have been believed wise.

Bishop v. Wood, however, makes it probable that the Court would have found that no liberty interest was implicated in Horowitz had it so inquired; the decision itself strongly implies this. While Charlotte Horowitz will undoubtedly find it difficult to secure admission to another medical school and will be at least somewhat handicapped in efforts to secure certain related employment, she probably did not suffer the kind of injury intended to be protected as a liberty interest under the fourteenth amendment. The Roth and Bishop standard does not encompass every action by the state which might injure the reputation or employment opportunities of the person injured. Roth, read in its entirety, distinguishes between dismissals which imply allegations of "dishonesty, or immorality," and dismissals for simple lack of work performance. The second kind of dismissal, absent publication of the reasons for the termination, has not been viewed as imposing the kind of stigma which gives rise to a liberty interest violation. The mere fact that it might be difficult for the person

---


117. 426 U.S. 341 (1976). See note 47 supra. This analysis utilizes only the portion of Bishop relating to liberty interest. See 426 U.S. at 347-49. Paul v. Davis, 424 U.S. 693 (1976), while relevant and not inconsistent with this analysis, deals with reputational injury alone, whereas Horowitz claimed not just reputational injury but also loss of employment and educational opportunities.

118. 435 U.S. at 82-84.

119. 408 U.S. at 573.
discharged to secure other employment is not sufficient to give rise to a liberty interest.\textsuperscript{120}

The public employment principles, as clarified in Bishop v. Wood,\textsuperscript{121} when analogized to student dismissals, may mean that the liberty interest is not intended to protect mere dismissals for insufficiency of academic performance. Unless the university does more than simply dismiss, or takes some other active step to impose a stigma upon the student which forecloses his or her opportunity for further schooling or employment, the university may not have violated a liberty interest.\textsuperscript{122} The logical, but somewhat speculative, consequences of the dismissal alone would not be sufficient to trigger procedural due process rights.

If in fact Horowitz had no liberty interest violated by this dismissal, it is difficult to understand why the Supreme Court did not simply say so. The most likely reason for its silence may be its fear that a definitive answer would undermine the due process principles established for disciplinary dismissals in post secondary institutions. Since Dixon v. Alabama State Board of Education,\textsuperscript{123} lower federal and state courts have required quite formal procedural protections before a student may be dismissed for misconduct from either universities or public elementary and secondary schools.\textsuperscript{124} This line of cases evolved before the Supreme Court developed the liberty and property interest criteria for applying procedural due process to governmental actions. The Supreme Court merely adopted the lower courts' holdings regarding dismissals for misconduct in Goss v. Lopez,\textsuperscript{125} and that decision rested primarily on a finding of a property interest.\textsuperscript{126} Students at colleges and universities have not established a property interest in their continued education beyond the current term for which registered.\textsuperscript{127} If the Court decides there is no liberty interest, then

\textsuperscript{120} Bishop v. Wood, 426 U.S. 341 (1976). See also LaBorde v. Franklin Parish School Bd., 510 F.2d 590 (5th Cir. 1975); Blair v. Board of Regents, 496 F.2d 322 (6th Cir. 1975); Russell v. Hodges, 470 F.2d 212 (2d Cir. 1972); Dessem, supra note 115, at 286-87, esp. n.74.

\textsuperscript{121} 426 U.S. 341 (1976). See note 47 supra.

\textsuperscript{122} UMKC consciously refused to divulge the reasons for Horowitz's dismissal to anyone; UMKC did not impose any stigmatizing labels in any records which would normally be distributed to the Association of American Medical Colleges (AAMC) or to other schools or potential employers at Horowitz's request. Cf. Greenhill v. Bailey, 519 F.2d 5 (8th Cir. 1975) (informing AAMC of student's intellectual deficiencies violated liberty interest). See note 93 supra.

\textsuperscript{123} 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930 (1961).

\textsuperscript{124} See note 6 supra.

\textsuperscript{125} 419 U.S. 565 (1975).

\textsuperscript{126} Id. at 572-74. The Goss reliance on a liberty interest is at least made questionable by Paul v. Davis, 424 U.S. 693, 710 (1976).

\textsuperscript{127} Only in Gaspar v. Bruton, 513 F.2d 843 (10th Cir. 1975), and Ross v. Pennsylvania State Univ., 445 F. Supp. 147 (M.D. Pa. 1978), did the courts find that
there is no foundation for requiring procedural due process for disciplinary dismissals from colleges and universities. It might be better to leave the liberty interest question unresolved in order to avoid a resurgence of challenges to established legal principles in the student misconduct area. Evasion of the question is especially appropriate if the Court anticipates that students might successfully demonstrate a property interest. Since Horowitz did not argue that she had a property interest, it would have been difficult for the Court to posit one for her. Yet if the Court believed she could have shown such an interest, it was neither fair nor efficient to rely on a spurious issue to resolve the case.

Other universities, wishing to plan on the basis of Horowitz, must apparently assume a liberty interest does exist, at least in professional school enrollment. Whether other graduate colleges, and even more speculatively whether undergraduate colleges, must also assume their students can demonstrate such a liberty interest is uncertain. But in light of the minimal consequences upon the dismissal process which a liberty interest imposes, the burden upon the university of assuming such a liberty interest exists is so slight as to be almost non-existent. It simply makes no practical difference to the institution whether or not such a liberty interest exists since "this sort of minimum requirement will impose no burden that is not already being shouldered and discharged by responsible institutions."128

VI. THE SCHOOL-COURT RELATIONSHIP: ARE SCHOOLS UNIQUE?

The historical reluctance of the courts to become involved in academic matters129 arises from a number of distinct but converging concerns. First is the assumption that ordering procedural protections will involve the courts in a review of the merits of the decisions which result. Following from that is the premise that the courts are not capable of wisely substituting their judgments for an institution's decisions about academic performance. Less talked about, but certainly as strong an influence, is the belief that imposing a hearing requirement on the university itself would demand the impossible. Even if the courts could restrict their involvement strictly to the imposition of procedural safeguards, requiring a hearing before an academic dismissal would still be unwise. These then are the premises which should be examined.130

the complaining student had a property interest in continuing enrollment. See note 7 supra.
128. 435 U.S. at 97 (White, J., concurring in part & concurring in the judgment).
129. See note 88 supra.
130. In addition to these primary concerns, other factors play an influential, but
Further analysis will show each of them to be vulnerable in varying degrees.

A. Whether Court Review of Procedure Necessarily Leads to Court Review of the Merits of the School Decision

Court decisions focus primarily on the second premise, that courts are not fully capable of substituting their judgment for that of educators.131 This assumes, however, an affirmative answer to

less determinative role. Even if a court were convinced that mandating a hearing would not involve it in reviewing the merits of academic dismissals, it must at least be prepared to answer further questions about procedure. Since the courts began to mandate hearings for misconduct dismissals (as well as hearings in other settings), there have been myriad suits to clarify the procedures which must be followed at the hearings. See, e.g., note 6 supra. How formal the hearing must be, whether the student must be allowed legal counsel, the need for a permanent record of the hearing, and many other issues have been brought to the courts for resolution. Answers to these questions in the academic dismissal context require a knowledge of how decisions are presently made within institutions, and what alternatives are possible within the academic framework. Judges, together with many others outside academia, do not know what academic administrators or faculty do and what procedures are feasible within the academic environment. Hence, there is a great deal of uncertainty about which differing means of resolving these questions would provide for the best interests of the students and institutions. While this uncertainty alone would probably not dictate a decision that courts should not become involved, or that no hearing is necessary, it may tip the balance enough to explain the ultimate decision where other difficult factors are involved.

Courts have also been reluctant to intervene in academic matters because they perceive the teacher-student role as a cooperative one which can best be nurtured by being left alone. See 435 U.S. at 90-91 & n.6. See also Goss v. Lopez, 419 U.S. 565, 594-95 (1975) (Powell, J., dissenting); Note, Due Process and Student Suspensions—Goss v. Lopez, 13 Am. Bus. L.J. 266, 270-71 (1975). While there may be some merit to this argument in small institutions or public elementary and secondary schools where continued attendance is mandated, there is little validity to it in the large university setting where the personal relationship between faculty and student is not essential. Certainly the relationship should not be an adversary one. See 435 U.S. at 90-91 n.6. But it is difficult to see how either a mandated university hearing or a court review of academic dismissals will contribute to this. Any student with a grievance serious enough to make him consider court action is not likely still to see the university as friend or mentor. By the time the argument becomes this serious, the student and institution are already adversaries. The only question is whether the courts will ensure a somewhat neutral decision maker or whether the university will automatically win. Knowledge of an automatic victory by the university, rather than encouraging a more cooperative relationship, is likely only to provoke greater bitterness and hostility. In the long run, a neutral referee may promote the most healthy relationship.

the threshold question, i.e., whether requiring due process within
the institution would necessitate court review of the merits of the
dismissal. Most courts which have heard academic cases and
found in favor of the university have based their decision at least
in part on the belief that court review on the merits would be re-
quired. Although the fact that so many courts assume this
would be a necessary outcome must be given some weight, no
court has explained why it believes this assumption warranted.

The existence of a liberty or property interest carries with it
only the consequence of procedural due process. As the remedy
prescribed by the Eighth Circuit in _Horowitz_ indicates, a finding
of a violation of procedural due process leads only to an order to
the institution to remedy the defect, e.g., to conduct a hearing. In
fact, however, the ramifications of finding a liberty or property in-
terest may go much further. Where no procedural due process is
required, a person may be fired or dismissed or lose a benefit with-
out the reasons for the decision being given to him or her. Once
notice and hearing are required, the necessary implication is that
the notice will contain the reasons for the termination.

Even without a finding of a liberty or property interest, courts
may still agree to review an academic dismissal which was arbi-
trary, capricious, or in bad faith, but the burden of showing that
the decision falls into one of these categories is upon the plain-
tiff. Once a liberty interest is found, or a hearing mandated, so
that the institution must give reasons for its action, the plaintiff

132. _Gaspar v. Bruton_, 513 F.2d 843, 851 (10th Cir. 1975); _Brookins v. Bonnell_, 362 F.
Mass. 1957); _Wong v. Regents of Univ. of Cal._, 15 Cal. App. 3d 823, 830-31, 93 Cal.
1970); _Barnard v. Inhabitants of Shelburne_, 216 Mass. 19, 22, 102 N.E. 1095, 1097
(1913); _Sofair v. State Univ._, 54 A.D.2d 287, 295, 388 N.Y.S.2d 453, 458 (1976);
_People ex rel. Jones v. New York Homeopathic Medical Center College of Medicine_,
20 N.Y.S. 379, 380 (Super. Ct. 1892).

133. _Gaspar v. Bruton_, 513 F.2d 843, 851 (10th Cir. 1975); _Brookins v. Bonnell_, 362 F.
Mass. 1957); _Wong v. Regents of Univ. of Cal._, 15 Cal. App. 3d 823, 830-31, 93 Cal.
1970); _West v. Board of Trustees_, 41 Ohio App. 367, 384, 181 N.E. 144, 150 (1931);
_People ex rel. Jones v. New York Homeopathic Medical Center College of Medicine_,
20 N.Y.S. 379, 380 (Super. Ct. 1892).

135. _Perry v. Sinderman_, 408 U.S. 593, 603 (1972); _Sofair v. State Univ._, 54 A.D.2d
287, 295, 388 N.Y.S.2d 453, 458 (1976). _See also_ text accompanying notes 114-16
_supra_.

134. 538 F.2d at 1321.


Vt. 1965).
can more easily meet that burden by using the information provided by the institution. Thus, the consequences of awarding procedural rights may quickly become substantive.

Although the finding of a liberty or property interest may lead to court review of the merits of more cases, the basis for this review need not change. The same standard which now determines whether the court will examine the merits (arbitrary, capricious or bad faith) will continue to be applied. Even if the standard of review were less stringent, the court would normally use the record already prepared at the university hearing as the basis for its decision. A court would "substitute its judgment" only in cases where the applicable standard of review is de novo or de novo on the record. In all other cases, where the standard is substantial evidence, or some variation thereof, courts will rely on the record already created and will give at least some (and probably considerable) weight to the decision of the initial administrative tribunal. In practice, this is the form of review which will occur in nearly all cases in state courts, and a federal court would not reverse, on due process grounds, if this procedure were followed.

The guarantee of procedural due process would only assist a student to secure the information needed to build a case. While a guarantee of a hearing might in fact involve the court in more academic cases, it need in no way change the basis of the review from that which now exists, and would not involve courts in substituting their judgment for that of university officials.

B. Whether Courts are Competent to Review the Merits of the School Decision

If the courts simply impose a framework of procedure within which the university continues to determine questions of academic standards, then rhetoric about court interference in the internal operations of the institution is irrelevant. But if in fact procedural rights carry with them increased substantive rights, then whether the courts are competent to evaluate these substantive rights becomes a critical question.

While innumerable cases tell the litigants that educational decisions are special and the courts should not intervene, an articulation of why they are special is extremely difficult to find. Most cases refer to *Barnard v. Inhabitants of Shelburne* and *Connelly*.

---

137. Perhaps the courts fear that once institutions give reasons for dismissals, it will be apparent that many of these actions are arbitrary or at least without substantial foundation.
139. See note 88 supra.
140. 216 Mass. 19, 102 N.E. 1095 (1913).
v. University of Vermont & State Agricultural College141 and simply recite their conclusions. Connelly makes the only serious attempt to explain why the courts should let school officials be the final arbiters of academic qualifications or performance:

The reason for this rule is that in 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.

The rule of judicial nonintervention in scholastic affairs is particularly applicable in the case of a medical school. A medical school must be the judge of the qualifications of its students to be granted a degree; Courts are not supposed to be learned in medicine and are not qualified to pass opinion as to the attainments of a student in medicine. . . Whether the plaintiff should or should not have received a passing grade for the period in question is a matter wholly within the jurisdiction of the school authorities, who alone are qualified to make such a determination. The subject matter . . . is not a subject for judicial review . . . .142

The courts view academic dismissals as qualitatively different from disciplinary dismissals.143 While disciplinary matters are somewhat analogous to the kind of fact finding in which courts normally engage, the adjudication of academic issues is seen as requiring a different kind of knowledge and approach to problem solving.144 While a misconduct dismissal usually focuses on behavior at a given time, academic dismissals are likely to be based on cumulative behavior and performance throughout one or several terms. Even the questions of fact—whether the student answered an essay examination question correctly—may often not be as objectively answerable as the question of whether a student stole some money. In both academic and disciplinary situations, the questions can be broken down ultimately into questions of fact. But the intermediate steps between the facts and the decision may be more numerous where an academic dismissal is involved. The interpretation of those facts through a process of

142. Id. at 160-61.
judgment by the professor and then by a review committee is more complex than the interpretation by a witness in a misconduct case.145

How can a judge, untrained in chemistry, evaluate whether in fact this examination or research paper is worthy of a B or an F146 or assess whether these grades indicate that the student is capable of serving as a physician or dentist? The court does not have ready access to this kind of expertise. And if it secures the services of an expert to review a final examination, outsiders cannot apply the standards of a particular faculty member or institution. As the Horowitz case makes evident, an increasing number of challenges to academic decisions involve not the grading of exams but rather the assessment of behavioral demonstrations of competence which have occurred over time. No expert can review and assess activities which have been completed and which leave no tangible product. If competence to perform a task were the only thing being evaluated, the problem would be difficult enough. But the grades which lead to the academic dismissal are not based on what students can accomplish, but rather on what they did accomplish. Even if students know and can apply good clinical skills, if they did not in fact demonstrate them to the instructor during the past semester, few would argue that they should pass the course.

While certain standards must be common to all professional preparation programs, variety of methodology and detail are accepted. Above the minimum established level, institutions should be able to apply their own standards. Court review would almost necessarily promote conformity, thereby curbing experiment and excellence.147

It is important to recognize, however, that all academic evalua-

145. See 435 U.S. at 88 n.5 (Powell, J., concurring).
147. Courts could (and sometimes do) separate the decision to give a failing grade from the decision to dismiss. See, e.g., Hagopian v. Knowlton, 470 F.2d 201 (2d Cir. 1972), which distinguished the process which must be available for appeal of demerits given during a semester, and the process needed when demerits accumulate enough to raise the question of dismissal. Courts could refuse to review the correctness of a particular grade (unless the student can meet the burden of showing arbitrariness, capriciousness, or bad faith), and only review the decision to terminate the student. See Keys v. Sawyer, 353 F. Supp. 936, 939-40 (S.D. Tex. 1973). But the decision to dismiss is still highly subjective, especially at professional schools, where a variety of combinations may lead a faculty committee to believe one student will make an adequate dentist while another will not. Perhaps colleges should have to set out more objective standards for grade failures or academic dismissals. However, they should not be forced upon the university for the sake of judicial convenience, unless it is certain they will also strengthen (or at least not weaken) the academic soundness of the course of study. But faculty, as well
tions are based on facts and conduct. The student is dismissed for what he or she has done or has neglected to do. Even where general suitability for a profession is the issue (what a student is), this can only be discovered through his or her conduct. Although it may be difficult to explain what conduct led to the judgment that the student should be dismissed, such conduct must have occurred if the dismissal is not to be completely arbitrary. Courts (and educators) must recognize that faculty and administrators have no mysterious, specialized methods of evaluating students. Overly simplistic distinctions based on the conduct—academic deficiency dichotomy do not further the resolution of the problem.

Clearly, the difficulties of court review must be balanced against the consequences of judicial non-intervention. If court review will involve judges in reviewing academic decisions on the merits, there are serious problems. Yet it is questionable whether the difficulties are too great to be overcome, particularly since the student's interest is not insignificant. The educational judgments which courts would make if they accepted review of academic dismissals seem no more complex than those made in antitrust, environmental or discrimination suits, and would similarly require expertise on the part of the court.

C. Whether a University Can Conduct a Meaningful Hearing

Decisions have focused almost exclusively upon the ability of the court to review academic dismissals. Ignored in most discussions, but certainly of critical importance in any decision to impose a hearing requirement upon a university, is whether or not it is possible for the university to hold a meaningful hearing.148

Many of the same factors influencing reviewability by the court also arise in the context of an on-campus hearing procedure. Just as the courts have difficulty reviewing the fairness of a subjective grade, so too do campus review committees. Only the instructor is present during classes and thus capable of assigning a grade for class participation. Even if it is determined to allow other faculty to re-grade the paper and/or exam, a small college may not have any other faculty competent to review that particular subject matter. And it seems improbable that faculty who know little about the subject matter can adequately assess a student's knowledge of the material.

---

148. The Horowitz decision does seem to be based partially on these grounds. 435 U.S. at 88-89. See also Mahavongsanan v. Hall, 529 F.2d 446, 450 (5th Cir. 1976); Barnard v. Inhabitants of Shelburne, 216 Mass. 19, 22, 102 N.E. 1095, 1097 (1913).
At some point the right granted to a student to appeal a grade collides with the right of the instructor to academic freedom.\textsuperscript{149} Review by a campus committee or by a court comes dangerously close to chilling the speech of the teacher within the classroom by dictating at least the methodology which must be used.\textsuperscript{150} Fear of having to prove the validity of every grade before a panel composed of faculty from other disciplines may encourage adoption of objective tests even where they are not suitable to the subject matter. Again, innovation and excellence may be stifled.

Questions of fact can be more easily reviewed by a campus hearing procedure. A hearing could quite readily resolve questions about the accuracy of the recording of a grade, or whether a warning was given prior to dismissal. A campus hearing could also deal with evidentiary matters to determine whether a dismissal or a failing grade was actually the result of misconduct rather than inadequate academic performance.

A campus hearing body would be more capable than a court of deciding cases where a student claims his poor performance involved extenuating circumstances, such as illness. The campus board would have a reserve of past experience to help it decide the likelihood of a student's success if given a second chance.

The university review committee has another advantage over a court: its members are familiar with the academic standards and processes of the institution. The members have an experiential background which allows them to put testimony into context, and are better able to judge how important certain skills or attitudes are in the particular profession. Of course, there are variations in approaches within every institution. Every instructor would not give the same grade for the same work, but the faculty may have a more meaningful concept of what grade disparity is great enough to amount to an abuse of discretion.

The purposes of a hearing are multiple. While ability to resolve an issue through a particular process should be fundamental to any decision to require it, other factors are also important. A hearing may make the persons involved feel that justice has been done.\textsuperscript{161} An opportunity for a hearing may satisfy the student's need to have someone impartial listen and have a long-term impact on the sense of fairness which pervades the entire campus.

\begin{footnotes}
\footnote{149. Grace, \textit{Academic Freedom versus Student Rights}, 5 NOLPE SCHOOL L.J. 110, 110-11 (1975); Young, \textit{Due Process in the Classroom}, 1 J.L. & EDUC. 65, 70 (1972).}
\footnote{150. \textit{See Keyishian v. Board of Regents}, 385 U.S. 589, 603 (1967): "[The] First Amendment ... does not tolerate laws that cast a pall of orthodoxy over the classroom." Orthodoxy can be as effectively imposed by delimiting methods of grading and hence of teaching as by direct controls on what can be taught.}
\footnote{151. Dessem, \textit{ supra} note 115, at 293-94.}
\end{footnotes}
community. A sense that one will not be dealt with arbitrarily can promote security and a sense of community.

In addition, a hearing would make the university more accountable by encouraging a more careful assessment of the real reasons for a decision. It would permit internal correction of any inadvertent or careless errors. Where the initial decision was clearly correct, little burden would be imposed on the institution; where the initial decision was questionable, the institution should not be adverse to a careful review before causing serious injury to a student.\(^{152}\)

Another function of a hearing requirement is the creation of a record for court use if the matter later comes to litigation.\(^{153}\) A campus hearing can produce the facts and statements of involved parties. It can also conserve judicial time and effort since the issues can be tried on the already existing record, with little need for supplementation. Even if the only basis for court review is arbitrariness, a record enables the court better to decide whether the facts will sustain such a charge.

These latter functions can be well served by an on-campus hearing prior\(^{154}\) to an academic dismissal. Especially where the grounds for appeal are extenuating circumstances or a question of fact, but also where more complex questions of judgment are involved, the student—and other students—will have a greater ten-

---

152. Some administrators report that the imposition of procedural requirements has made decisions regarding both students and faculty harsher. It is claimed that the frustration with procedures perceived to be unnecessary, combined with the necessity to be prepared to defend the decision before the courts, leads to anger and antagonism which takes the form of a harsh decision against the person seeking the review. Whether this perception is accurate and whether, if it is, the result is temporary would seem to deserve close attention.

153. Dessem, supra note 115, at 293-94.

154. It is possible that a post-dismissal right of appeal, if it could be completed before commencement of the next semester, would suffice. Educators point out that, in fact, most of those dismissed do not appeal. The students often expect the dismissal, sometimes even welcome it—"The college kicked me out, now I don't have to decide to quit." While these students probably would not take advantage of a predismissal hearing opportunity, time delays and uncertainty would require the college to hold class seats open for all those considered for dismissal. This in turn would deprive other students of the opportunity to be admitted either to the institution or to a particular class. Notice of dismissal which also notifies of a right to file a notice of appeal within one week could satisfy the needs of the institution and also the interests of the student. It would allow the institution to clear its records of the dismissed students who did not appeal, thereby opening most of the classroom and dormitory spaces which would be available. The small number of students who wished to appeal could do so before the next term began, so that they would in no way be injured by the post-, rather than pre-, dismissal hearing. See, e.g., Gaspar v. Bruton, 513 F.2d 843 (10th Cir. 1975).
dency to believe that justice has been done and, in addition, a record will have been created for use if the case continues into the courts.

The hardest problems remain. They are especially difficult in areas where "conduct" and "clinical skills" merge. The case of a medical student who repeatedly fails to wash his or her hands before examining a patient, or a clinical psychology student who hallucinates at unpredictable times presents both a question of fact (whether he or she engages in such conduct) and a question of judgment (how much weight the behavior should be given). Even more difficult to deal with is the student who is dismissed for attitudinal and personality faults which are believed critical to a particular profession. These failures may either be reflected in a failing grade or may be assessed outside the grading structure as in Horowitz. Listening skills and rapport with clients or patients are often as important to the competence of a social worker or physician as are diagnostic skills. An apparent dislike of children or a tendency to instill great fear in children is fatal to successful teaching. These weaknesses appear over time as a supervisor observes the student in a variety of situations and circumstances. It is extremely difficult, if not impossible, for a review committee or a court to second guess the on-site supervisors. It is also difficult for a supervisor to communicate to a committee or court the specific grounds for a conclusion that the student is not suited for a particular profession. When translated into specific instances of conduct, the criticisms may appear petty or unsubstantiated.

On the other hand, it is because evaluation of clinical skills and attitudes is so subjective that the evaluation ought to be subject to some review. This will force faculty members to articulate to themselves as well as to students the inadequacies on which decisions are based. Subjective evaluations are harder, where faculty choose to use this method, or where it is necessary, they must carry the burden of exercising more care in evaluating and in communicating the results of the evaluation to the student.

In fact, most dismissals are reviewed or decided upon by a faculty committee prior to implementation. The question is only whether the student whose record is under review will be allowed to attend the meeting and present his or her side of the story. It is difficult to believe that offering this opportunity to the student will interfere with fair decision making. The potential injury to the student is great enough to justify any administrative inconvenience and delay which a hearing may entail. While imperfect and diffi-


cult, it would seem worth the effort to afford some hearing opportu-
nity for the student dismissed for those reasons.

Rather than avoid an on-campus hearing altogether, it would be
preferable to require a hearing but to resolve the problems
presented through allocation of the burden of proof and creation of
a standard of review. In academic dismissal hearings, grades could
be assumed to be fair, unless the student can show sufficient evi-
dence of arbitrariness, capriciousness, or bad faith. Alternately, a
separate hearing could be conducted for any grade appeal prior to
a hearing on dismissal. The hearing body could use a standard of
clearly wrong in determining whether a grade or a clinical evalu-
ation should be changed, but the university would be required to
present sufficient evidence at the hearing to justify dismissal of the
student. While it is arguable that faculty should not be forced to
carry a heavy burden of proof for every failing grade, certainly the
university ought to be able to carry this burden of showing that an
individual should be dismissed before such a serious penalty is im-
posed. "It is obvious that colleges are not courts, and academic
deans are not prosecutors; however, both can provide clearly de-

While not easy and not perfect, an on-campus hearing on aca-
demic dismissals need not be an exercise in futility. It can resolve
many factual issues and serve as a check on questions of judg-
ment; it can nurture a feeling that fairness will occur; and it can
create a record for cases which proceed to litigation. It certainly
will not be "harmful in finding out the truth concerning scholar-

D. Schools Do Not Require Special Due Process Standards

The obstacles to imposition of a hearing prior to academic dis-
missals are far less formidable than the courts and some academi-
cians allege them to be. Universities can conduct meaningful
hearings on academic performance even in clinical programs like
medicine. Whether imposition of a hearing requirement must lead
to greater court review of the merits of such dismissals is doubtful.
If substantive review does result, the courts will have great diffi-
culty making decisions about subjects foreign to them. But as they
have found ways to deal with highly technical matters in other
kinds of suits, so too can they master the intricacies of academia.
Lastly, if courts limit their involvement to questions of procedure,
they can find answers to questions about the formality of the hear-

---

156. Young, supra note 149, at 68.
ing fully as successfully as they have in the disciplinary dismissal area.

The Supreme Court has weighed these arguments and decided that judicial non-intervention in academic dismissals should continue. Only notice is required to provide adequate procedural due process. Future student challenges must continue to allege arbitrariness, capriciousness, or bad faith, the violation of a constitutional right, or—since Horowitz—failure of notice. Efforts to change university procedures must focus internally. Students must convince educators that a hearing process prior to dismissal should be set up, not because the courts have mandated it, but because it is fair or because it will work well.

VII. CONCLUSION

As with most Supreme Court decisions in a new area, the answers in Horowitz lead to a list of additional questions. The Horowitz decision will have little direct impact on public elementary and secondary schools, since by virtue of compulsory attendance laws, public schools cannot usually dismiss a student for academic failure.\textsuperscript{158} Some of the questions evolving from Horowitz will, however, arise at both the public school and university levels, for example, its effect on court challenges to grades in a particular course.\textsuperscript{159} Although grade appeals would not necessitate more process than academic dismissals, it is unsettled whether they would require as much.\textsuperscript{160} It is possible an appeal of a single, alleg-

\textsuperscript{158} Where public schools dismiss students who are beyond the compulsory age of attendance on the ground that they are not making satisfactory progress towards a diploma, Horowitz would seem fully applicable.

\textsuperscript{159} Most challenges thus far have attacked specific grades only where they lead to a dismissal. No reported cases have been found where appeal was based solely on an alleged unfair grade. In Keys v. Sawyer, 353 F. Supp. 936 (S.D. Tex. 1973), plaintiff specifically asked the court to order a grade changed, but the court declined. The court in Connelly v. University of Vt. & State Agric. College, 244 F. Supp. 156 (D.C. Vt. 1965), categorically refused to review the fairness of any particular grade. The plaintiff in Hill v. Trustees of Ind. Univ., 537 F.2d 248 (7th Cir. 1976), challenged a failing grade, but the grade was based on plagiarism, which would probably trigger misconduct due process requirements. See note 163 & accompanying text infra.

\textsuperscript{160} In Knight v. Board of Educ., 38 Ill. App. 3d 603, 348 N.E.2d 299 (1976), the court said lowering a student's grade by one letter in one quarter, because of truancy, was not so harsh as to deprive him of substantive due process. In Depperman v. University of Ky., 371 F. Supp. 73 (E.D. Ky. 1974), the court refused to review proceedings which had led to probation because probation was not a sanction rising to the level of a constitutional infringement. Id. at 75. See also Sill v. Pennsylvania State Univ., 462 F.2d 463, 470 (3d Cir. 1972). Similarly, some courts view Goss v. Lopez, 419 U.S. 565 (1975), as not applying to the separate components of the educational process. See, e.g., Albach v. Odle, 331 F.2d 983, 985 (10th Cir. 1976) (barred from participation in athletics); Fen-
edly unfair grade would be seen as *de minimis*, and simply never be reviewed by a court. Where a single failing grade leads to other serious loss, though short of dismissal, it is difficult to view it as *de minimis*. To be safe, a teacher should provide notice to students of the standards to be applied in grading each course. This would protect both failing grades and passing grades which a student believed were too low. A warning to the student at least once before giving a failing grade would also probably suffice to meet the *Horowitz* standard. Such a warning may be essential in a course where grading is highly subjective.

The line between dismissal for academic failure and for misconduct remains undefined. Lower courts have indicated they will take a strict line on this distinction. Cheating and plagiarism, for example, will be considered misconduct. Similarly, deprivation of an academic privilege as a disciplinary measure for conduct rule infractions has been held subject to misconduct procedural due process standards. But at what point personal conduct becomes properly a part of the academic requirements of an institution remains a most hazy issue. This distinction, wherever it is drawn, is likely to have an impact on both public elementary and secondary schools and public universities.

*Horowitz* dealt with a dismissal at the end of a semester. It is unknown if procedures must be any different if a student is dismissed from a class or from the institution during a term. Suppose, for example, a teacher dropped a student from a course in

---

161. For example, a student might lose his or her eligibility for the basketball team, for participation in a prestigious extra-curricular activity, or for a part-time job at the school.


166. *Miller v. Dailey*, 136 Cal. 212, 68 P. 1029 (1902) (student dismissed during student teaching because supervisors believed him unfit to be a teacher, but court issued mandamus reinstating him stating he must be allowed to finish the course he had begun); *West v. Board of Trustees*, 41 Ohio App. 367, 181 N.E. 144 (1931) (student dropped at mid-term of semester, but court upheld
the middle of a term because he did not turn in a required paper. Is this misconduct or academic insufficiency? Is a warning necessary?

One of the most pressing questions is what process is necessary before a school can restrict participation in extracurricular activities because of poor academic performance. If this is considered an academic matter, notice of the standard to be applied will be sufficient. If, however, this is seen as a disciplinary measure, some form of hearing may be required.167

In order to avoid mandating formal hearings prior to all academic dismissals, the Supreme Court has eliminated hearing requirements from the necessary procedural protections. While the Court points out that less formal opportunities to be heard often satisfy the hearing requirement in certain contexts, its opinion seems to lose sight of this fact. The options are presented as either no hearing at all or a formal, adversary hearing. The Court chooses the first option as more reasonable and as consistent with historical practice.

Although probably not required by the facts of the case at hand, and in the face of wide disagreement among the justices of the Court, a fragile majority has affirmed that academic dismissals do not necessitate the same kind of procedural protections which disciplinary dismissals demand.

The question is undoubtedly a hard one, but the consequences of mandating some kind of hearing for academic dismissals, upon careful examination, are not as dire as painted by the courts and educators. Such hearings might actually be healthy for universities, especially if only an informal opportunity to be heard were mandated.

Most observers would agree that Charlotte Horowitz was fairly dealt with; what is regrettable is that five justices of the Court said she was given more process than necessary. The spectre of sudden, impersonal dismissals based upon an obscure provision in a university catalogue is real indeed. For despite talk about going beyond court requirements to comply with moral mandates, too often the legal minimum becomes the maximum.

Eileen K. Jennings '79

---

167. See note 5 supra.