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# Does 42 U.S.C. § 1983 Redress Arbitrary, Capricious, or Unfair Student Dismissals from State Colleges?

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## Cover Page Footnote

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# ARTICLES

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# DOES 42 U.S.C. § 1983 REDRESS ARBITRARY, CAPRICIOUS, OR UNFAIR STUDENT DISMISSALS FROM STATE COLLEGES?

*Robert Firester*[*]

## I. INTRODUCTION

Students who are dismissed from school experience an enormous amount of guilt, pain, and shame. In part, this is because of the stigma attached to such an ordeal. In addition, the near necessity of education in establishing one's credentials for economic success is virtually uncontested. Thus, the observation that continuance of one's education in our society is of very great importance,[1] is a gross understatement. Dismissal often means that the doors to many fields as a life's work are permanently closed, as in the case of expulsion from medical, veterinary, or law school.

Thus, given the profound consequences to the individual, the following question must first be raised. Do students have any judicial recourse when they are wrongfully or unfairly dismissed? If the answer to this is "no," then it must be openly acknowledged that all educational institutions have the right to suspend or expel any student at any time, for any reason or no reason. If that were the prevailing belief, there would be nothing further to discuss. Courts, seemingly consonant with common sense, have indicated that, at least on a theoretical level, educational institutions are proscribed from dismissing students in an arbitrary and capricious manner, or without legitimate cause. The question is thus, what redress does a student have when he believes that his dismissal was a consequence of arbitrary, capricious, unfair, or just plain wrong behavior on the part of the school or one of its officials? Part II of this Article explores the right to continue one's education, both as a theoretical construct[2] and as enforced by courts.[3] Part III analyzes the reluctance of courts to intervene in what are considered academic matters,[4] noting the reasons judicial enforcement currently fails to protect students' due process rights.[5] Finally, Part IV concludes that courts must be more assertive in order to protect students against arbitrary or unfair actions by education officials.[6]

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1. Ross v. Pennsylvania State Univ., 445 F. Supp. 147, 153 (M.D. Pa. 1978).
2. *See infra* notes 9-17 and accompanying text.
3. *See infra* notes 18-75 and accompanying text.
4. *See infra* notes 76-93 and accompanying text.
5. *See infra* notes 87-93 and accompanying text.
6. *See infra* notes 94-97 and accompanying text.

## II. BACKGROUND

Various courts have found that a public university student has a protected interest in continuing his studies.[7] Many, if not most, cases brought by students seeking redress for dismissal from state educational institutions arise in graduate schools, where "the status of students at a graduate facility, to which admission is limited and determined on a competitive basis, may differ significantly from that of pupils at the elementary or high school level, where a free education is normally guaranteed by state law and attendance is required."[8]

### *A. Theoretical Underpinnings of the Right to Continue One's Education*

The Fourteenth Amendment states, in part, "nor shall any State deprive any person of life, liberty, or property, without due process of law,"[9] thereby endowing citizens with certain rights against the state. These rights can be secured by the exercise of 42 U.S.C. § 1983, which states, in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[10]

The Fourteenth Amendment has a broader conception of property than do the technical rules of state property law. As defined by the Fourteenth Amendment, the term includes certain entitlements, benefits or expectations created by state law.[11] A student's "right" to education will be addressed from two perspectives, that of a liberty right and that of a property right.

Citing *Board of Regents v. Roth*,[12] the Eighth Circuit ruled: "[A]n individual may be deprived of an interest in liberty where the state makes 'any charge against him that might seriously damage his standing and associations in his community.'"[13] "From a liberty standard there can be little question that an expulsion from college damages the student's good name, reputation and

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7. *See* Ewing v. Board of Regents, 742 F.2d 913, 915 (6th Cir. 1984), *rev'd on other grounds*, 474 U.S. 214 (1985); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 157 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); Picozzi v. Sandalow, 623 F. Supp. 1571, 1576 (E.D. Mich. 1986); Hall v. University of Minn., 530 F. Supp. 104, 107 (D. Minn. 1982); Abbaraio v. Hamline Univ. School of Law, 258 N.W.2d 108, 112 (Minn. 1977); Stoller v. College of Medicine, 562 F. Supp. 403, 412 (M.D. Pa. 1983), *aff'd*, 727 F.2d 1101 (3d Cir. 1984).

8. Greenhill v. Bailey, 519 F.2d 5, 8 n.9 (8th Cir. 1975).

9. U.S. CONST. amend. XIV, § 1.

10. 42 U.S.C. § 1983 (1994).

11. Leon Friedman, *Constitutional Torts*, 380 PLI/LIT 233, 260 (1989).

12. 408 U.S. 564, 573 (1972).

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

integrity."[14] Despite a holding by the United States Supreme Court that something more than mere harm to reputation is required to make an indignity actionable,[15] a panel of the United States Court of Appeals for the Second Circuit noted, "at a minimum, the students' protected liberty interest is at stake because of the 'stigma' attached to suspension from college for disciplinary reasons" and, thereby, such an act by an institution of learning is actionable.[16]

Property rights can be derived from the concept of education as a contractual right. The purpose of the ancient institution of property is to protect those rights upon which people rely in their daily lives. This reliance must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.[17]

### *B. Judicial Enforcement of the Right to Continue One's Education*

Finally, it must be determined how these "rights" are treated by the courts and, ultimately, the effect upon these rights if the courts are reluctant to ensure them, or refuse to do so. Do students have the same opportunity to vindicate those claims as holders of other property rights do, under the same rules of fairness and evidence? If not, do they then, in fact, still have property rights? In short, is a right that cannot be exercised still a right? When does judicial "restraint" abrogate the rights of students?

The Sixth Circuit, in *Ewing v. Board of Regents*,[18] decided in favor of a medical student who alleged that his dismissal from the University of Michigan School of Medicine was due to his failure to pass the national medical licensing exam.[19] Plaintiff argued that the university's action violated his federally protected property interest in his continuing education.[20] He asserted that the university failed to afford the same opportunity to be retested as some of his classmates.[21] Quoting *Booker v. Grand Rapids Medical College*,[22] the Sixth Circuit reiterated that:

> [W]hen one is admitted to a college, there is an implied understanding that he shall not be arbitrarily dismissed therefrom. The required fees may be paid annually, and may be no more than fair fees for the advantages received by the student during the year, and yet it is clear that the fees for the first year are, in fact, paid and received with the understanding that the work of the year will not be made fruitless, a graduation and a degree made impossible, by an arbitrary refusal to permit further attendance . . . . There is no good reason why the law should not recognize, as growing out of these relations, a right of realtors resting

14. North v. West Virginia Bd. of Regents, 233 S.E.2d 411, 415 (W. Va. 1977).
15. Paul v. Davis, 424 U.S. 693 (1976).
16. Albert v. Carovano, 824 F.2d 1333, 1339 n.6 (2d Cir.), *modified*, 839 F.2d 871 (2d Cir. 1987).
17. Board of Regents v. Roth, 408 U.S. 564, 569-70 (1972).
18. 742 F.2d 913 (6th Cir. 1984), *rev'd on other grounds*, 474 U.S. 214 (1985).
19. *Id.* at 914.
20. *Id.*
21. *Id.* at 915.
22. 120 N.W. 589 (1909).

> in contract to be continued as students by the [university].[23]

Furthermore, at least one court has explicitly ruled that a university's catalog constitutes a written contract between the university and the student.[24]

The question of whether due process applies does not only address the weight of the individual's interest, but also whether the nature of the "right" is within the contemplation of the Fourteenth Amendment.[25] The Supreme Court instructs that "[t]he hallmark of property [under the Fourteenth Amendment's due process clause] is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'"[26]

Property interests protected by due process are not created by the Constitution, but rather by existing rules or understandings from sources such as state law.[27] Contract rights are certainly creatures of state law. "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim . . . ."[28] Mutually explicit understandings may arise from tradition or history of an industry.

The United States Supreme Court has held that property interests can arise from "[e]xplicit contractual provisions . . . [or] other agreements implied from 'the promisor's words and conduct in the light of the surrounding circumstances.'"[29] Elaborating on this point, the Sixth Circuit held that "an implied understanding that a student shall not be arbitrarily dismissed from his university is a property interest, resting in the contractual relationship between the parties, which can give rise to constitutional protections."[30] The Seventh Circuit has also recognized that the contractual relationship between a college or university and its students constitutes a property right in the continued education of the student.[31] Further, a federal court in Pennsylvania recognized:

> A student has a reasonable expectation based on statements of policy by [a state university] and the experience of former students that if he performs the required work in a satisfactory manner and pays his fees he will receive the degree he seeks. Pursuant to state law . . . a graduate student ha[s] a property interest in the continuation of his course of study . . . .[32]

State courts have also found property rights in a student's relationship

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23. *Ewing*, 742 F.2d at 915.
24. University of Tex. Health Science Ctr. v. Babb, 646 S.W.2d 502, 506 (Tex. Ct. App. 1982).
25. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).
26. Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982).
27. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 572-73 (1975); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985).
28. Perry v. Sindermann, 408 U.S. 593, 601 (1972).
29. *Id.* at 602.
30. Ewing v. Board of Regents, 742 F.2d 913, 915 (6th Cir. 1984), *rev'd on other grounds*, 474 U.S. 214 (1985).
31. Akins v. Board of Governors, 840 F.2d 1371, 1373 (7th Cir. 1988), *cert. granted and judgment vacated*, 488 U.S. 920 (1988).
32. Ross v. Pennsylvania State Univ., 445 F. Supp. 147, 152 (M.D. Pa. 1978).

with a state institution of higher learning. The Supreme Court of Appeals of West Virginia held that one's "interest in obtaining a higher education with its concomitant economic opportunities, coupled with the obvious monetary expenditure in attaining such education, gives rise to a sufficient property interest to require procedural due process on a removal."[33] Subsequently, this same court held that there is "sufficient property interest in the continuation and completion of [one's] medical education to warrant the imposition of minimal procedural due process protections."[34] Having begun a medical education, this court continued, one has "a reasonable expectation that he would be permitted to complete his education absent a showing that specific conditions and circumstances had developed since his original admission which would prevent him from successfully completing the remainder of his education."[35]

The New York State Supreme Court, Appellate Division, has ruled that "when a student's very right to remain in school depends on it, we think the school owes the student some manner of safeguard against the possibility of arbitrary or capricious error."[36] In 1988, the First Circuit summarized the current state of the law by acknowledging that, "[i]t is also not questioned that a student's interest in pursuing an education is included within the fourteenth amendment's protection of liberty and property."[37]

### *C. Procedural Due Process*

Academic dismissals from state institutions can be enjoined if shown to be clearly arbitrary or capricious,[38] and "[o]nce it is determined that due process applies, the question remains what process is due."[39] If a school has published procedures, then the right to have these procedures applied to a particular student has been deemed a property interest which must be strictly respected.[40] Absent specific rules promulgated by a school, however, a student is entitled only to "adequate" due process.[41]

Due process, which may be said to mean fair procedure, is not a "fixed" or rigid concept.[42] Rather, it is a flexible standard which varies depending

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33. North v. West Virginia Bd. of Regents, 233 S.E.2d 411, 415 (W. Va. 1977).
34. Evans v. West Virginia Bd. of Regents, 271 S.E.2d 778, 780 (W. Va. 1980).
35. *Id.*
36. Susan M v. New York Law School, 544 N.Y.S.2d 829, 832 (N.Y. App. Div. 1989), *aff'd as modified*, 556 N.E.2d 1104 (N.Y. 1990). Additionally, the Supreme Court of Minnesota determined that a "university may not arbitrarily expel a student." Abbaraio v. Hamline Univ. School of Law, 258 N.W.2d 108, 112 (Minn. 1977). Plaintiff's allegations of expulsion without due process stated a claim upon which relief could be granted both at common law and under the due process clause of the Federal Constitution. *Id.*
37. Gorman v. University of R.I., 837 F.2d 7, 12 (1st Cir. 1988).
38. Mahavongsanan v. Hall, 529 F.2d 448, 449 (5th Cir. 1976).
39. Morrissey v. Brewer, 408 U.S. 471, 481 (1972).
40. Skehan v. Board of Trustees, 501 F.2d 31, 39 (3d Cir. 1974).
41. Ross v. Pennsylvania State Univ., 445 F. Supp. 147, 153 (M.D. Pa. 1978); *see also*, Cafeteria & Restaurant Workers Union Local 473 v. McElroy, 367 U.S. 886, 895 (1961).
42. Mathews v. Eldridge, 424 U.S. 319, 334 (1976); *see also*, Keough v. Tate County Bd. of Educ. 748

upon the nature of the interest affected, and the circumstances of the deprivation.[43] Due process usually requires at a minimum that a deprivation be preceded by a notice and an opportunity for a hearing appropriate to the nature of the case.[44] The hearing, obviously, must be held at a meaningful time and in a meaningful manner.[45]

In *Dixon v. Alabama State Board of Education*,[46] the Fifth Circuit[47] defined the notice and hearing required by colleges expelling a student as "an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply that a full-dress judicial hearing, with the right of cross-examination of witnesses, is required."[48] That court further held, in *Boykins v. Fairfield Board of Education*,[49] that where basic fairness is preserved, due process does not require cross-examination of witnesses nor a full adversary hearing.[50] Two other circuits have held that college students might be permitted to confront witnesses in certain circumstances.[51]

In *Board of Curators University v. Horowitz*,[52] the United States Supreme Court stated:

> The decision to dismiss respondent, by comparison, rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. Such a judgment is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision.[53]

This case involved a woman who was dismissed from medical school, where subjective evaluations during her clinical training determined her to be unfit to continue.

Concurring in *Horowitz*, Justice Powell observed that: "[u]niversity faculties must have the widest range of discretion in making judgments as to the

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F.2d 1077, 1081 (5th Cir. 1984) ("[T]he standards of procedural due process are not wooden absolutes.") (quoting Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970)). "The sufficiency of procedures employed in any particular situation must be judged in the light of the parties, the subject matter and the circumstances involved." *Ferguson*, 430 F.2d at 856.

43. *Mathews*, 424 U.S. at 334.

44. *See generally* Goss v. Lopez, 419 U.S. 565 (1975).

45. *Mathews*, 424 U.S. at 333.

46. 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

47. This case was decided by the Fifth Circuit prior to the creation of the Eleventh Circuit, where this case would now be heard and where this case is considered mandatory precedent.

48. 294 F.2d at 159.

49. 492 F.2d 697 (5th Cir. 1974), *cert. denied*, 420 U.S. 962 (1975).

50. *Id.* at 701.

51. Blanton v. State Univ. of N.Y., 489 F.2d 377, 385 (2d Cir. 1973); Jaksa v. Regents of the Univ. of Mich., 597 F. Supp. 1245, 1252-53 (E.D. Mich. 1984), *aff'd*, 787 F.2d 590 (6th Cir. 1986).

52. 435 U.S. 78 (1978).

53. *Id.* at 89-90.

academic performance of students and their entitlement to promotion or graduation."[54] If a school, however, exercises its discretion to dismiss a student for academic reasons in an arbitrary or irrational fashion, the courts indicate that they will intervene.[55]

The Supreme Court subsequently reaffirmed judicial deference to "academic" decisions in *Regents of University of Michigan v. Ewing*:

> When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.[56]

The Supreme Court's affirmation of judicial deference to academic opinion may appear to be in tension with the holdings of courts which have found that the burden of proof on the issue of whether one's enrollment as a student was properly terminated by the school must be borne by the college.[57] However, placing the burden on schools does not necessarily represent a burden on the schools. Similar to the burden on an attorney who wishes to use her peremptory challenges and is accused of a discriminatory intent,[58] the school, as the attorney, to meet its burden, need only provide a minimally believable rationale for its decision.

Additionally, in order to establish arbitrary and capricious action, various courts have held that, "the plaintiffs must show that there is no rational basis for the University's decision, or that the decision to dismiss was motivated by bad faith or illwill unrelated to academic performance."[59] Moreover, universities may establish standards of student conduct and scholastic attainments higher than average "and may require superior ethical and moral behavior."[60] The school, however, must apply whatever standards it establishes in a fair and equitable manner.[61] In *Crook v. Baker*,[62] the Sixth Circuit quoted approvingly from a decision of the Ohio Supreme Court which observed that, "[a]cademic degrees are a university's certification to the world at large of the recipient's educational achievement and fulfillment of the institution's standards."[63]

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54. *Id.* at 96 n.6 (Powell, J., concurring).

55. Olsson v. Board of Higher Educ., 402 N.E.2d 1150, 1153 (N.Y. 1980).

56. 474 U.S. 214 (1985); *see also* Hines v. Rinker, 667 F.2d 699, 704 (8th Cir. 1981).

57. *See, e.g.*, Fussell v. Louisiana Business College, 478 So. 2d 652, 655 (La. Ct. App. 1985).

58. *See* Batson v. Kentucky, 476 U.S. 79, 97 (1986).

59. Ewing v. Board of Regents, 742 F.2d 913, 915 (6th Cir. 1984), *rev'd on other grounds*, 474 U.S. 214 (1985); *see also* Stevens v. Hunt, 646 F.2d 1168, 1170 (6th Cir. 1981); *Hines*, 667 F.2d at 703; Gaspar v. Bruton, 513 F.2d 843, 851 (10th Cir. 1975).

60. Esteban v. Central Mo. State College, 290 F. Supp. 622 (W.D. Mo. 1968), *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970).

61. *See, e.g.*, Wright v. Texas S. Univ., 392 F.2d 728, 729 (5th Cir. 1968); Gay Students' Org. of the Univ. of N.H. v. Bonner, 367 F. Supp. 1088, 1096 (D.N.H. 1974), *modified*, 509 F.2d 652 (1st Cir. 1974).

62. 813 F.2d 88 (6th Cir. 1987).

63. *Id.* at 93 (quoting Waliga v. Board of Trustees, 488 N.E.2d 850, 852 (Ohio 1986)).

Universities, it follows, have a profound interest in assuring that every recipient of their degrees well represents its standards and will not sully its reputation.

The courts have had numerous opportunities to consider the application of constitutional due process guarantees in the academic setting. The Fifth Circuit held that although students "cannot be arbitrarily disciplined without the benefit of the ordinary, well recognized principles of fair play,"[64] the courts will not interfere with "uniform application of [a universities'] academic standards."[65]

Specifically, the United States Supreme Court compared "academic" due process to "disciplinary" due process in *Horowitz*, distinguishing the academic concerns present in *Horowitz*[66] from the disciplinary concerns implicated in *Goss v. Lopez*.[67] In *Goss*, the Court reviewed the disciplinary suspensions of nine high school students arising out of alleged disruptive or disobedient conduct.[68] In distinguishing *Goss*, the *Horowitz* Court, citing *Matthews v. Eldridge*,[69] stated: "[A] relevant factor in determining the nature of the requisite due process is 'the private interest that [was] affected by the official action.' But the severity of the deprivation is only one of several factors that must be weighed in deciding the exact due process owed."[70] The Court continued: "We conclude that considering all relevant factors, including the valuative 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."[71] The schools' historical immunity from court intervention seems to be an untenable rationale for the abrogation of student rights.

### *D. Substantive Due Process*

In his concurrence in *Ewing*,[72] Justice Lewis Powell noted that "[w]hile property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution, substantive due process rights are created only by the Constitution."[73] A recent Sixth Circuit case[74] summarized the requirements of substantive due process in the academic setting:

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64. *Wright*, 392 F.2d at 729.
65. *Id.*
66. Board of Curators v. Horowitz, 435 U.S. 78, 86 (1978).
67. 419 U.S. 565 (1975).
68. *Id.*
69. 424 U.S. 319 (1976).
70. *Horowitz*, 435 U.S. at 86 n.3.
71. *Id.*
72. 474 U.S. 214 (1985).
73. *Id.* at 229 (citation omitted) (Powell, J., concurring).
74. Gutzwiller v. Fenik, 860 F.2d 1317 (6th Cir. 1988).

> Substantive due process, a much more ephemeral concept, protects specific fundamental rights of individual freedom and liberty from deprivation at the hands of arbitrary and capricious government action. The fundamental rights protected by substantive due process arise from the Constitution itself and have been defined as those rights which are "implicit in the concept of ordered liberty." While this is admittedly a somewhat vague definition, it is generally held that an interest in liberty or property must be impaired before the protections of substantive due process become available. Even if such an interest has been impaired by governmental action, courts will review the challenged decision only for arbitrariness or capriciousness.[75]

Thus the question of substantive due process, as delineated above by Justice Powell, is not a separate issue.

## III. ANALYSIS

In 1951, Wood noted that "[i]n recent years, due process has been described as 'what the judges say it is' on the 'approval of the Supreme Court.'"[76] In 1975, the Tenth Circuit ruled, in *Slaughter v. Brigham Young University*,[77] that:

> When the courts lay down requirements for procedural due process in these situations as required by the Constitution, and when the school administrators follow such requirements (and other [undefined] basic conditions are met), some weight must then be given to their determination of the facts when there is substantial evidence to support it. Thus if the regulations concerned are reasonable; if they are known to the student or should have been; if the proceedings are before the appropriate persons with authority to act, to find facts, or to make recommendations; and if procedural due process was accorded the student, then the findings when supported by substantial evidence must be accorded some presumption of correctness.[78]

There are quite a few "ifs," however.

### *A. Limited Application of Judicial Scrutiny*

Quoting *Olsson v. Board of Higher Education*,[79] the New York State Supreme Court, Appellate Division warned that "[a]s seldom and reluctantly as the principle has been applied to actually override a determination, a school's academic evaluation of a student is not 'completely immune from judicial scrutiny.'"[80] For example, a "fair trial in a fair tribunal is a basic

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75. *Id.* at 1328 (citations omitted).
76. V. WOOD, DUE PROCESS OF LAW viii (1951).
77. 514 F.2d 622 (10th Cir.), *cert. denied*, 423 U.S. 898 (1975).
78. *Id.* at 625.
79. 402 N.E.2d 1150 (N.Y. 1980).
80. Susan M v. New York Law School, 544 N.Y.S.2d 829, 831 (N.Y. App. Div. 1989), *aff'd as modified*, 556 N.E.2d 1104 (N.Y. 1990).

requirement of due process."[81]

Although courts have indicated that, "[n]otwithstanding this customary 'hands-off' policy, judicial intervention in school affairs regularly occurs when a state educational institution acts to deprive an individual of a significant interest in either liberty or property,"[82] the United States Supreme Court, in *Horowitz*, found that a "determination of whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking."[83]

Despite the claims made by many courts that students have protection from arbitrary and capricious dismissals from state universities,[84] the courts have found few occasions to provide such protection. In fact, the United States Supreme Court addressed this position directly in *Regents of the University of Michigan v. Ewing*,[85] when it stated that "[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision-making by the academy itself."[86]

### *B. Reasons Judicial Enforcement Falls Short*

The discrepancy between the courts' acknowledgment of the rights of students who may have been dismissed from school arbitrarily, unfairly, wrongfully and/or capriciously and their reluctance or outright refusal to ensure proper behavior by schools is reminiscent of the denial of justice to professors unfairly dismissed or denied tenure and civil rights advocates alike.

#### 1. The Assumption of Good Faith

First, courts proceed from an assumption that defendant officials invariably have acted equitably and in good faith. The United States Supreme Court wrote:

> When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it *unless it is such a*

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81. Withrow v. Larkin, 421 U.S. 35, 46 (1975) (quoting *In re* Murchison, 439 U.S. 133, 136 (1955)).

82. *See, e.g.*, Greenhill v. Bailey, 519 F.2d 5, 7 (8th Cir. 1975).

83. Board of Curators v. Horowitz, 435 U.S. 78, 90 (1978); *see also*, Sofair v. State Univ. of N.Y. Upstate Med. Ctr. College of Medicine, 377 N.E.2d 730, 731 (N.Y. 1978). In yet another case of a medical student seeking redress for dismissal, the Eighth Circuit held that "[r]espect for the discretion of those best qualified to make such judgments dictates that the Medical School and not the federal courts should determine the qualifications of [plaintiff] to continue his medical studies." Hines v. Rinker, 667 F.2d 699, 704 (8th Cir. 1981).

84. *See supra* notes 16, 28, 48 and accompanying text.

85. 474 U.S. 214 (1985).

86. *Id.* at 226 n.12 (citations omitted).

> *substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.*[87]

At a minimum, one would like to know exactly what constitutes "accepted academic norms" and what does not. A more cynical question, but one rooted in reality, would be whether these "accepted academic norms" are ethical and fair. After all, it was the accepted norm for black people to be denied admission to a "white" school, hospital, town, or swimming pool.

This attitude is summarized well in an amicus brief of the American Council on Education (ACE) to the United States Supreme Court in the *Ewing* case. Quoted in a journal article by John A. Beach, General Counsel to Syracuse University and Albany Medical College, the brief read: "If the [Sixth Circuit's] decision is sustained, every academic suspension or dismissal of a state university student is potentially a federal case, open to de novo evidentiary reexamination by United States district courts under 42 U.S.C. § 1983, no matter how fair the university's procedures and honest its evaluations."[88] Would the assumption that all landlords (or all tenants) always act fairly and honestly be an acceptable premise upon which all landlord-tenant disputes were adjudicated? Mr. Beach and the ACE leave no doubt about where their sympathies lie: they seem to be only concerned that educational institutions be free from accountability and litigation and not that students be treated properly.

2. Misplaced Deference to Subjective Assessments

Second, the courts' questionable deference to the "unique expertise" of vested institutional authorities is, perhaps, somewhat disingenuous. It appears that, given certain moral and political climates, courts have, increasingly, felt entirely comfortable in their qualifications to intrude in areas they had never before deemed themselves competent to enter. Housing issues, standards for diverse private sector and civil service job entry and promotion, educational questions such as how to best provide for the learning needs of the handicapped, the learning impaired, the non-English speaker, and busing are just a few of the areas which come to mind. Indeed, in Jersey City, N.J., a state administrative law judge considered himself sufficiently qualified to remove an entire educational administrative staff.[89] If highly complex patent issues requiring extraordinary amounts and types of specialized knowledge can be equitably litigated, the courts' humility in cases affecting students appears to be that of a failure of will, not skill.

As Mr. Beach notes with reference to the *Horowitz* case,

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87. *Id.* at 225 (emphasis added); *see also Hines*, 667 F.2d at 699.

88. John A. Beach, *The Management and Governance of Academic Institutions*, 12 J.C. & U.L. 301, 330 (1985).

89. Robert Hanley, *State Takeover Upheld for Jersey City Schools*, N.Y. Times, July 27, 1989, B2.

> Ms. Horowitz did very well in her "book learning" courses as a medical student, but very poorly in her clinical work involving patients. Because of the latter difficulties—characterized by school officials as "inadequacies in such areas as personal hygiene, peer and patient relations, and timeliness [such as] would impair her ability to be a good medical doctor"—she was warned, counseled, reviewed specially by seven area doctors in clinical settings, and finally dismissed from medical school.[90]

What, if any, relationship exists between "difficulties" identified by the school and the ability to be an effective physician? Many "top" physicians are cold, arrogant and, often, late for appointments. That there is so little consensus about what is a "good" doctor (some are excellent on Park Avenue but absolute failures in Harlem, for example) should lead one to question where, in subjective evaluations, the line lies between a true indication of future professional incompetence and a means to mask vindictiveness, spite, malice or mere personal dislike.

Major Richard D. Rosen, an instructor at the Judge Advocate General's School, summarizes the prevailing court view of the inviolability of subjective evaluations.

> At the other end of the spectrum from the objectively-determined automatic disqualifiers, an agency may rely on subjective, professional judgments in terminating established property or liberty interests. Where agency decisions concerning the abrogation of property or liberty interests are based on some uniquely-held expertise, the courts have sometimes been reluctant to interfere with the agency's determinations. This reluctance is especially evident in challenges to the academic decisions of educational institutions. In *Board of Curators v. Horowitz*, the Court upheld the dismissal of a medical student for academic deficiencies without a hearing . . . . Adversarial fact-finding procedures were deemed unsuitable to academic evaluations of students; instead, the judgment was one for professional educators.[91]

Major Rosen does not indicate, then, what, if any, recourse such a student has. The implication seems clear that he believes that the school may follow subjective, professional judgement for any action it chooses, whether warranted or not, without fear of being held accountable.

Despite the claims of the special status of "uniquely-held expertise," it is the fact that these "evaluations" are indeed entirely subjective that provides the greatest opportunities for abuse and poses the greatest hazards for students. Particularly vulnerable are those students who may be culturally, or in personality, "different." It is these students who are most in need of protection from arbitrary, capricious and/or unfair evaluations. These are exactly the "academic" standards which most plainly need explication and review. If the question of "uniquely-held expertise" is probed even a bit, it becomes abundantly clear that this is a highly ambiguous "expertise"—one which is

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90. Beach, *supra* note 88, at 329.

91. Major Richard D. Rosen, *Thinking About Due Process*, ARMY LAW., Mar. 1988, at 11.

often subject to as many different opinions as there are "experts." Thus, the courts' deference to such "expertise" makes little sense as anything other than a means of allowing schools carte blanche in maintaining their own power and the status quo.

Subjective evaluations, under the cloak of "academic standards," can be the perfect vehicle for the expression of personal bias and animus, with court-guaranteed immunity from review. This is not to argue that such evaluations have no place in the educational process, but rather that they should be amenable to review and substantiation, accurately and fairly based upon observable and documented relevant behaviors.

One may take a cue in this question of standards from the countless challenges to standards for job acceptance and promotion, which may bear little or no relationship to abilities to function competently in the new position. The recent case of *Hopkins v. Price Waterhouse*,[92] which involved a female partnership candidate who successfully argued that she was denied a partnership in a privately-held company due to gender discrimination, illustrates this point.

3. Lack of Consensus Regarding Adequate Process

Third, the courts' inconsistent and contradictory definitions of what constitutes adequate due process for students places yet another hurdle (in an already obstacle-ridden course) before the student who believes his rights have been violated by a school. Students are often confronted by subjective evaluations, and then again, by subjective standards of what their due process rights are. Given the ambiguity of their position throughout, students must, at every step, depend upon the goodwill of others. Only the most oppressed in this society are required to function from this vulnerable position. For example, much recent litigation, such as "welfare rights," has involved efforts to provide some increased measure of predictability and protection to those whose lives depend upon such entitlements. Heretofore, welfare recipients have often found themselves at the mercy of arbitrary and sometimes vindictive bureaucrats. It would be naive to believe that students are not, sometimes, so victimized. At least, then, they ought to have the safeguard of a judicial system in which due process rights are clearly defined and widely honored.

4. Protecting the Ivy-Covered Facade

Fourth, there is the powerful impulse to sustain the "orderly" functioning of educational institutions and dispose of any real or imagined threat to such order. The amicus brief of the American Council on Education in the *Ewing* case cited continues, "[t]he mere threat of such litigation would disrupt public

92. 737 F. Supp. 1202 (D.D.C.), *aff'd*, 920 F.2d 967 (D.C. Cir. 1990).

universities' ability, and infringe their freedom, to establish and uphold academic standards. It would demoralize their faculties. Limited financial and teaching resources would be committed to avoiding litigation and defending it, rather than to educating students."[93]

It is hard not to read this plea against "making waves" without recalling the opposition to school integration, busing for integration, and other civil rights legislation. The same arguments were made for the wisdom of maintaining the status quo because of the havoc that empowerment of a minority would wreak upon the institutions and life of the country. Despite the warnings of dire consequences, substantial integration of schools, neighborhoods, and workplaces was achieved; lo and behold, the sky did not fall. It is even probable that the benefits of moral behavior by the legislative and judicial bodies have outweighed the costs. It is pertinent to note that it is precisely when order is valued more highly than individual rights that abuse may lead to arbitrary or capricious action, and thereby, the way is paved for totalitarianism.

Thus, although the courts have recognized explicit contractual, property, and liberty rights to students in pursuit of the completion of their educational programs, they have, with their assumptions of fundamental fairness and good will, "uniquely-held expertise" of academics, ambiguous definitions of "due process," and fear of upsetting educational institutions, effectively nullified those same rights.

Given the courts' proclivities, it is not surprising that so few students bring their cases to court. In order to do so, a student would not only have to believe that her case is of clear-cut merit, but must also have the personal and material resources to initiate what every lawyer must know to be, not only an up-hill battle, but in every sense, a "long shot." Since so few of even this small number of carefully selected cases have apparently been resolved in the students' favor, the only reasonable conclusion to be drawn is that, in fact, students have virtually no contract, property or liberty rights vis-a-vis the educational establishment. State universities, and obviously private ones as well, remain bastions of absolutely unchecked and unaccountable institutional power.

## IV. CONCLUSION

The question of what rights students have is one of power. By its very nature, power is a zero-sum equation. The more rights students have, the fewer institutions have. Hence, in their reluctance to intervene on behalf of students, the courts guarantee educational institutions the power to engage in all but the most egregious criminal behavior. When individuals or institutions are granted virtual freedom from accountability, the inevitable result is abuse. There is a

93. Beach, *supra* note 88, at 330.

growing body of evidence which documents that the abuse of professional, especially medical, students is considerable, but unreported because of fear of retribution—retribution which schools and the professions can blithely extract because of the virtual certainty of judicial acquiescence.[94] Despite the rationalizations cited above, if history has taught us anything, the most significant lesson ought to have been that of the dangers of absolute power; dangers not entirely unrecognized by the courts,[95] but which the courts have been unwilling to address.

If one reads those opinions which vigorously opposed both the passage and implementation of the civil rights legislation of the past forty years, one cannot help but be struck by the similarity of the justifications proffered for such opposition. Dr. Martin Luther King, Jr. wrote, on April 16, 1963, from a Birmingham, Alabama jail:

> Lamentably, it is an historical fact that privileged groups seldom give up their privileges voluntarily. Individuals may see the moral light and voluntarily give up their unjust posture, but, as Reinhold Niebuhr has reminded us, groups tend to be more immoral than individuals.
>
> We know through painful experience that freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed.[96]

> Truth by government will not assert itself. It has to be institutionalized. Truth needs a form of its own that transcends the men who happen to be in charge of the machinery of government at any given moment. This is what is meant by a government of laws rather than of men.[97]

94. Lawrence K. Altman, *Wide Abuse of Medical Students Found*, N.Y. TIMES, Jan. 26, 1990, at B7; *see also* Henry K. Silver & Anita Glicken, *Medical Student Abuse: Incidence, Severity, and Significance*, 263 JAMA 527 (1990); K. Harnett et al., *A Pilot Study of Medical Student 'Abuse,'* 263 JAMA 533 (1990); Jerald Kay, *Traumatic Deidealization and the Future of Medicine*, 263 JAMA 572 (1990).

95. *See, e.g.*, Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 157 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961). "[T]he governmental power to expel the plaintiffs . . . is not unlimited and cannot be arbitrarily exercised. Admittedly, there must be some reasonable and constitutional ground for expulsion or the courts would have a duty to require reinstatement." *Id.*

96. JOAN WILLIAMS, EYES ON THE PRIZE 187 (1987).

97. NORMAN COUSINS, THE PATHOLOGY OF POWER 207 (1987).