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Are Students' Rights in Nondisciplinary Cases Only Academic Counterpoint: Introduction

Perry A. Zirkel

Counterpoint—

Are Students' Rights in Nondisciplinary Cases Only Academic?

PERRY A. ZIRKEL

In the Summer 1995 issue of *JLE*, law student Anthony Finaldi heralded a state intermediate, appellate court decision, *Alcorn v. Vaksman*, [1] as a "courageous analysis [that] should serve as a model for academic due process litigation." [2] The *Vaksman* court ruled that the defendant officials, representing a public university, violated the Fourteenth Amendment substantive due process rights of the plaintiff, a doctoral student in American History, by academically dismissing him from the program in bad faith. [3] More specifically, the appeals court upheld the trial court's determination that the dismissal was "'solely because of personal disagreements or grievances wholly apart from academic considerations.'" [4] Although recognizing the competing institutional concerns, such as the congestion of courts and the dilution of faculty integrity with regard to individual grades as well as to weightier academic decisions, Finaldi touted the *Vaksman* approach, at least for students seeking graduate and professional degrees at public universities, [5] as the appropriate alternative for the

1. 877 S.W.2d 390 (Tex. Ct. App. 1994).

2. Anthony Finaldi, *The Vaksman Approach to Academic Dismissals: A Different Beat to the Same Drum*, 24 J.L. & EDUC. 499, 501 (1995).

3. 877 S.W.2d at 397 and 400. The court also upheld the trial court's ruling that Vaksman's dismissal violated his first Amendment freedom of speech. *Id.* at 402. However, the court set aside the award of money damages against the university defendants in their official capacities and thus reduced the money damages from $32,500 to $10,000. *Id.* at 404-05. Similarly, the court also voided, on grounds of governmental immunity, the trial court's award of $90,000 attorneys' fees. *Id.* at 405-06.

4. *Id.* at 400. The extent to which the First Amendment ruling affected this Fourteenth Amendment ruling is a matter of conjecture.

5. The *Vaksman* Fourteenth Amendment ruling obviously does not apply at private colleges. Nevertheless, Finaldi restricted his analysis to the due process issue, ignoring the trial court's alternative ruling based on breach of contract under the catalog of admission. 877 S.W.2d at 396. In addition, he further focused on "graduate or professional" education. Finaldi, *supra* note 2, at 502 and 503.

traditionalist "toothless" [6] nonintervention position cemented by the U.S. Supreme Court in *Board of Curators v. Horowitz* [7] and *Regents v. Ewing.* [8]

In the accompanying Counterpoint, university administrator-attorney Steven Olswang, takes strong issue with Finaldi's interpretation of *Vaksman.* [9] Characterizing Finaldi as dreaming rather than drumming, Olswang argues that *Vaksman* is merely a reaffirmation rather than a replacement of the long *Horowitz-Ewing* line of case law. [10] Moreover, he plumbs limitations and divisions in the *Vaksman* court's bad-faith verdict. [11] Pointing to post-*Vaksman* illustrations, such as *Banks v. Dominican College,* [12] Olswang ends his Counterpoint by warning disgruntled students against following Finaldi's drumbeat into academic quicksand in the courts. [13]

The beauty and beast of the *Vaksman* opinion is that, almost like a Rorschach inkblot, it can be read several ways. For example, as an alternative to the Finaldi and Olswang analyses, another interpretation of the *Vaksman* decision is that it merely follows the established path for the cases not covered by the traditional umbrella of academic abstention; although citing *Horowitz* and its lower court progeny, in upholding the trial court's finding that the university officials' dismissal decision was wholly unrelated to academic considerations the *Vaksman* court treated the matter as if it were a due process [14] or other [15] case involving disciplinary dismissal. Moreover, in proceeding down this path, the *Vaksman* majority did not seem to be mindful of the strong presumption of good faith that is incorporated in the *Horowitz,* or at least *Ewing,* [16] progeny that it cites. [17]

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6. Finaldi, *supra* note 2, at 502.

7. 435 U.S. 78 (1978).

8. 474 U.S. 214 (1985).

9. Steven Olswang, *Academic Abstention Stronger than Ever, Despite Vaksman,* 26 J.L. & EDUC. 91 (1997).

10. *Id.* at 93. Alternatively, in the title and text of his article, Olswang views *Vaksman* as an aberration. *Id.* at 91 and 95.

11. *Id.* at 93-95.

12. 35 Cal. App. 4th 1545 (Ct. App. 1995).

13. Olswang, *supra* note 9, at 95 ("downright dangerous"] and 96 ("substantially less tolerant").

14. This line of cases is also a long one. *See, e.g.,* Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961); *see also* Edward Golden, *Procedural Due Process for Students at Public Colleges and Universities,* 11 J.L. & EDUC. 337 (1982).

15. *See supra* notes 3-4. Whereas the First Amendment claim would not extend beyond public institutions, the breach of contract claim would. *See, e.g.,* Robert Cherry & John Geary, *The College Catalog as a Contract,* 21 J.L. & EDUC. 1 (1992).

16. Inasmuch as the focus here was substantive, not procedural, due process, *Ewing,* rather *Horowitz,* is the more specifically appropriate landmark.

17. *See, e.g.,* Ikpeazu v. University of Nebraska, 775 F.2d 250, 254 (8th Cir. 1985).

In any event, the roles of student Finaldi and administrator Olswang certainly color their perspectives into two distinct interpretations of *Vaksman*. As Finaldi feared [18] and Olswang cheered, [19] thus far the courts have continued the *Ewing-Banks* branch of substantive due process. [20]

But you, and judges, ultimately need to examine *Vaksman* and the Finaldi-Olswang debate about it, in eminently objective (i.e., both impartial and reasonable) terms, balancing the policy arguments that shape the precedents, to determine whether the present cloak of individual and institutional academic freedom [21] properly fits the current contours of student academic dismissals at public institutions. [22]

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18. Finaldi, *supra* note 2, at 503.

19. Olswang, *supra* note 9, at 95.

20. *See, e.g.*, Perez v. Hastings College of Law, 53 Cal. Rptr. 2d 1 (Ct. App. 1996). For a concise but comprehensive analysis, extending to grading disputes and private colleges, see Note, *Student Challenges to Grades and Academic Dismissals*, 18 J.C.&U.L. 577 (1992).

21. For recognition of the two, sometimes complementary and sometimes competing, faces of academic freedom, *see, e.g.*, Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214, 226.n12 (1978).

22. Academic dismissals at private institutions of higher education, where no specific policy or other contractual provision comes into play, are only rarely reviewable. New York is one of the few jurisdictions that has developed an analogous doctrine based on common law. *See, e.g.*, Olsson v. Board of Higher Educ., 402 N.E.2d 1150 (N.Y. 1980); McDermott v. New York Med. College, 644 N.Y.S.2d 834 (App. Div. 1996).