Law School Grades - Flunked Out, But Did Not Really Fail
LAW SCHOOL GRADES: FLUNKED OUT, BUT DID NOT REALLY FAIL

Harvey Gilmore*

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I. INTRODUCTION

If the plaintiffs in a most interesting, recent lawsuit ultimately get their way, I will need to change the title of this article. After the Spring 2011 semester, plaintiffs Jonathan Chan and Karla Ford were dismissed from their former law school, Texas Southern University Thurgood Marshall School of Law (Texas Southern) for academic deficiency, failing to maintain an overall grade point average (GPA) of at least 2.0. On February 2, 2012, in response to their dismissal, Chan and Ford filed a lawsuit against Texas Southern, along with their Contracts professor, Shelley Smith. In this article, I will look at some of the plaintiffs’ allegations against Texas Southern, specifically the claims for arbitrary and capricious grading, breach of contract, defamation, and intentional infliction of emotional distress.

II. THE COMPLAINT

Chan and Ford were students at Texas Southern from the Fall 2010 semester through the Spring 2011 semester. Chan and Ford received grades of D- and D, respectively, in their Contracts II class taught by Professor Smith. According to Texas Southern’s motion for summary judgment, however, Ford’s transcript showed that she actually received a D minus grade as well. At the end of the Spring 2011 semester, both students were dismissed from Texas Southern. Chan and Ford alleged that

2. Id. at 1.
3. Id. at 4.
4. Id. at 6.
5. Id. at 7–8.
6. Id. at 1.
7. Id. at 3.
8. Id.
9. Regents’ Motion to Dismiss and for Summary Judgment at 5, Chan v. Bd. of Regents of Tex. S. Univ., No. 4:12-CV-325 (S.D. Tex filed May 11, 2012) [hereinafter Regent’s Motion to Dismiss].
10. Id.
their low Contracts II grades were arbitrary, and this resulted in their dismissal. As a result, Chan and Ford are suing Texas Southern for breach of contract, intentional infliction of emotional distress, arbitrary and capricious grading, and defamation, among others. The lawsuit also asks that Chan and Ford be reinstated to Texas Southern, receive compensatory and punitive damages in excess of $150,000, and be reimbursed for their legal fees.

III. THE LAW SCHOOL’S GRADING SYSTEM

According to Texas Southern’s rules and regulations for the 2010–2011 academic year, its grading system is as follows:

**Letter Grade = Honor Point: Definition**

<table>
<thead>
<tr>
<th>Grade</th>
<th>Honor Point</th>
<th>Description</th>
</tr>
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<tbody>
<tr>
<td>A</td>
<td>4.00</td>
<td>Excellent</td>
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<tr>
<td>A-</td>
<td>3.67</td>
<td>Intermediate</td>
</tr>
<tr>
<td>B +</td>
<td>3.33</td>
<td>Intermediate</td>
</tr>
<tr>
<td>B</td>
<td>3.00</td>
<td>Good</td>
</tr>
<tr>
<td>B-</td>
<td>2.67</td>
<td>Intermediate</td>
</tr>
<tr>
<td>C +</td>
<td>2.33</td>
<td>Intermediate</td>
</tr>
<tr>
<td>C</td>
<td>2.00</td>
<td>Satisfactory</td>
</tr>
<tr>
<td><em>C</em>-</td>
<td>1.67</td>
<td>Intermediate</td>
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<tr>
<td>D +</td>
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<td>Intermediate</td>
</tr>
<tr>
<td>D</td>
<td>1.00</td>
<td>Marginal</td>
</tr>
</tbody>
</table>

11. *Id.*
12. *Id.*
13. *Id.* at 6.
14. *Id.* at 7.
15. *Id.* at 5.
16. *Id.* at 1.
17. *Id.* at 8.
18. *Id.* at 9.
19. *Id.* at 8–9.

Like most law schools, Texas Southern University requires its students to maintain an overall GPA of at least 2.0 to remain in good standing, and eventually graduate. Also, the required curriculum for first year students is as follows:

**First Year Program, Required Courses**

Listed below are the required courses for first year students.

### FALL COURSES

<table>
<thead>
<tr>
<th>Course Code</th>
<th>Course Title</th>
<th>Hours</th>
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</thead>
<tbody>
<tr>
<td>L-504</td>
<td>Contracts I*</td>
<td>3</td>
</tr>
<tr>
<td>L-506</td>
<td>Property I*</td>
<td>3</td>
</tr>
<tr>
<td>L-508</td>
<td>Torts I*</td>
<td>3</td>
</tr>
<tr>
<td>L-900</td>
<td>Lawyering Process I</td>
<td>3</td>
</tr>
<tr>
<td>L-530</td>
<td>Criminal Law</td>
<td>3</td>
</tr>
</tbody>
</table>

**TOTAL 15**

### SPRING COURSES

<table>
<thead>
<tr>
<th>Course Code</th>
<th>Course Title</th>
<th>Hours</th>
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</thead>
<tbody>
<tr>
<td>L-502</td>
<td>Civil Procedure</td>
<td>4</td>
</tr>
<tr>
<td>L-505</td>
<td>Contracts II*</td>
<td>3</td>
</tr>
<tr>
<td>L-507</td>
<td>Property II*</td>
<td>3</td>
</tr>
<tr>
<td>L-509</td>
<td>Torts II*</td>
<td>3</td>
</tr>
</tbody>
</table>

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21. See, e.g., Thomas A. Schweitzer, “Academic Challenge” Cases: Should Judicial Review Extend to Academic Evaluations of Students?, 41 Am. U. L. Rev. 267, 270 n.13 (1992) ("At most institutions, the minimum GPA necessary for retention or graduation is 2.00 on a four point scale, where A is four points; B, three points; C, two points; D, one point; and F, zero points. Failing to maintain a 2.00 average usually means being automatically placed on academic probation if not outright dismissal.").

22. Student Rules, supra note 19, at 34.

23. Id. at 30.
Thus, it appears that the grades Chan and Ford received in the Contracts class brought their overall GPA below the required 2.0 GPA needed to continue on to the second year. If this one grade did result in their dismissal for academic deficiency, then it would also appear that Chan and Ford received C grades, at best, in their other courses. In fact, Chan finished the academic year with an overall GPA of 1.82, with his best grade being a C plus. Ford finished the academic year with an overall GPA of 1.83.

IV. THE CLAIM OF ARBITRARY AND CAPRICIOUS GRADING

Law school grading requires that instructors make assessments of students’ progress in their courses. Law professors assess student performance based on the fact that they have been practitioners. As such, they can determine whether student performance meets the necessary standards for passing a course and is at least professionally competent. This is also true in other professional courses like accounting, medicine, engineering, architecture, etc. As a tax professor and former practitioner in the accounting profession myself, I also make professional judgments of students’ academic performance.

24. See Schweitzer, supra note 20, at 270 (“Dismissals are typically for failure to maintain a satisfactory grade point average (GPA), and a single low grade can reduce a marginal student’s GPA below the minimum acceptable grade point average for retention or graduation.”).

25. Regents’ Motion to Dismiss, supra note 9, at 5.

26. Id.

27. See, e.g., Michael I. Swygert, Putting Law School Grades in Perspective, 12 STETSON L. REV. 701, 708–09 (1983) (“[U]nderstand that a ‘C’ grade signifies at most schools a ‘professionally competent’ level of work . . . .”)

28. Harvey Gilmore, To Failure and Back: How Law Rescued Me from the Depths, 10 FLA. COASTAL L. REV. 567, 608 (2009) (“Two months after graduating from law school, I accepted a position at a small college where I now teach
such, courts have recognized that academic decisions in grading are best left to those who are qualified to make academic judgments.29 However, when necessary, courts will step in to determine if a student’s grade lacks any rational basis, is arbitrary and capricious, or was formulated in bad faith.30

A. Board of Curators of the University of Missouri v. Horowitz

The plaintiff in Board of Curators of the University of Missouri v. Horowitz, Charlotte Horowitz, was a former student at the University of Missouri-Kansas City Medical School.31 In her final year, she was dismissed by the medical school for failing to meet academic standards.32 She sued the University alleging procedural due process violations.33 Upon rejecting Horowitz’s claims against the University, the United States Supreme Court stated that scholastic decisions, especially those relating to dismissals for academic deficiency, should be left to the professional experts who are qualified to make those judgment calls:

Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative factfinding proceedings to which we have traditionally attached a full-hearing requirement . . . . The decision to dismiss respondent . . . 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. Like the decision of an individual professor as to the proper grade for a student in his course, the

31. See Horowitz, 435 U.S. at 79.
32. Id.
33. Id. at 79–80.
determination 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 decision-making.

Under such circumstances, we decline to ignore the historic judgment of educators and thereby formalize the academic dismissal process by requiring a hearing. The educational process is not by nature adversary; instead it centers around a continuing relationship between faculty and students, “one in which the teacher must occupy many roles—educator, adviser, friend, and, at times, parent-substitute.”

B. Susan M. v. New York Law School

In Susan M. v. New York Law School, the plaintiff was a former student at New York Law School who was dismissed for having an overall GPA of 1.89. The law school required a minimum GPA of 2.0. The student challenged her grade in Corporations, where she received a D grade. The problem was that her Corporations professor wrongfully, as she alleged, gave her zero credit on an essay question that was worth thirty percent of the exam grade. The professor’s position was that she was not entitled to any credit for that question because she answered the question using both New York law and Delaware law when only Delaware law applied. The kicker was that the professor noted that she had correctly analyzed the question under Delaware law and would have received full credit had she not mentioned New York law. The New York Appellate Division noted that if the

34. Id. at 89–90 (quoting Goss v. Lopez, 419 U.S. 565, 594 (1975) (Powell, J., dissenting)).
35. Susan M., 556 N.E.2d at 1105.
36. Id.
37. Id.
38. Id. at 1106.
39. Id.
40. Id.
41. Id.
student had received a C+ on her Corporations exam instead of a D, she would have maintained an overall GPA of 2.0.\textsuperscript{42}

The New York Court of Appeals upheld the student’s dismissal.\textsuperscript{43} First, the court mentioned the desire of the judiciary to stay out of academic matters and allow academicians to properly decide grading issues: “Strong policy considerations militate against the intervention of courts in controversies relating to an educational institution’s judgment of a student’s academic performance.”\textsuperscript{44} The court further explained the policy considerations that keep academic assessments out of the reach of judicial review, with the aim that students have the requisite education to be qualified practitioners:

These determinations play a legitimate and important role in the academic setting since it is by determining that a student’s academic performance satisfies the standards set by the institution, and ultimately, by conferring a diploma upon a student who satisfies the institution’s course of study, that the institution, in effect, certifies to society that the student possesses the knowledge and skills required by the chosen discipline.\textsuperscript{45}

Ultimately, the court decided that the grading dispute was based on the professor’s assessment of the student’s academic performance, and beyond judicial review.\textsuperscript{46} “We conclude, therefore, that, in the absence of demonstrated bad faith, arbitrariness, capriciousness, irrationality or a constitutional or statutory violation, a student’s challenge to a particular grade or other academic determination relating to a genuine substantive evaluation of the student’s academic capabilities, is beyond the scope of judicial review.”\textsuperscript{47}


\textsuperscript{43} Susan M., 556 N.E.2d at 1107–08.

\textsuperscript{44} Id. at 1106.

\textsuperscript{45} Id. at 1106–07.

\textsuperscript{46} Id. at 1107–08.

\textsuperscript{47} Id. at 1107.
C. Girsky v. Touro College, Jacob D. Fuchsberg Law Center

In Girsky v. Touro College, Jacob D. Fuchsberg Law Center, a law student sued Touro after being dismissed for academic deficiency and after the school denied his request to be placed on academic probation. The student alleged that Touro’s actions were arbitrary and capricious. The court upheld Girsky’s dismissal on purely academic grounds, as his performance was very poor. “The petitioner failed Civil Procedure I in his first semester, causing the school to inform him of its dissatisfaction with his progress. In the succeeding semesters the petitioner also failed Constitutional Law II, performed lower than average in other courses, and did not complete other courses.”

D. Tobias v. University of Texas

In Tobias v. University of Texas, a student brought an action against the University to challenge a failing grade he received in a nursing course. Tobias had failed Nursing 4541 in the Spring 1984 semester and Fall 1984 semester. Pursuant to the University’s grade appeal policy, Tobias tried on numerous occasions to get the grade overturned. After his appeals failed, along with his request to take the nursing course for a third time denied, Tobias brought his suit against the University.

First, the Texas Court of Appeals noted that the student handbook stated that a professor’s grade is final unless the grade was the result of the professor’s bad faith or ill-will, requiring “compelling evidence [that] shows discrimination, differential treatment, or procedural irregularities.” Next, the court took
the position that it should not interject itself into academic affairs without a legally justifiable reason.\textsuperscript{59} Thus, as long as there is a proper academic basis for an instructor’s determination of a student’s grade, the court will ordinarily allow the decision to stand on its own merits.\textsuperscript{60} The court found that the “decision of an individual professor as to the proper grade for a student in a particular course requires an expert evaluation of cumulative information and is not readily adapted to the tools of judicial decision making.”\textsuperscript{61}

In quoting the Supreme Court case \textit{Regents of the University of Michigan v. Ewing},\textsuperscript{62} the \textit{Tobias} court went on to mention that courts will not step into academic grading decisions unless the grading process deviated so far from normal procedures that the grade is inconsistent with the grader’s professional judgment:

> When judges are asked to review the substance of a genuinely academic decision . . . 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.\textsuperscript{63}

Finally, the Texas Court of Appeals upheld Tobias’ failing grade in the nursing class and upheld the University’s motion for summary judgment dismissing Tobias’ complaint, stating that “[i]n light of the record before us and our analysis of applicable authority, we find that the trial court did not err in granting summary judgment for appellees. Appellant’s third point of error is overruled.”\textsuperscript{64}

This is only a sample of cases where courts have upheld the proposition that a school’s decision based on strictly academic

\textsuperscript{59} \textit{Id.} at 207–08.
\textsuperscript{60} \textit{Id.}
\textsuperscript{61} \textit{Id.} at 208.
\textsuperscript{62} 474 U.S. 214 (1985).
\textsuperscript{63} 
\textsuperscript{64} \textit{Id.}
factors will be given deference by the courts.\textsuperscript{65} In light of these decisions, Chan and Ford would be severely hard pressed to overturn their dismissal from their law school without a conclusive showing of arbitrariness, or other malfeasance. According to Texas Southern, Chan and Ford’s grades were calculated as follows: First, the law school administered a uniform sixty question multiple choice exam administered to all first year students. This counted for fifty percent of the overall grade.\textsuperscript{66} The other fifty percent of the grade came from the actual Contracts II examination.\textsuperscript{67} The Contracts II exam was an eight question test, and Chan and Ford both got seven of the eight test questions wrong.\textsuperscript{68} In my opinion, it is extremely difficult to argue about the fairness of an exam grade when a student gets only one question right on the entire exam. Needless to say, Chan and Ford were not exactly dealing from a position of strength.

V. THE CLAIM OF BREACH OF CONTRACT

Some courts have recognized that an implied contract exists between a student and an institution of higher learning.\textsuperscript{69} Thus, as long as a student satisfies all of the school’s academic and other pedagogical requirements, he will graduate from his school and receive his diploma.

\textsuperscript{65} See also Mucci v. Rutgers, No. 08-4806, 2011 WL 831967, at *20 (D.N.J. 2011) (“However, as the New Jersey Supreme Court has held, ‘[a]ssessing a student’s academic performance must be left to the sound judgment of the individual academic institution.’) (alteration in original); Olsson v. Bd. of Higher Educ., 402 N.E.2d 1150, 1153 (N.Y. 1980) (“This judicial reluctance to intervene in controversies involving academic standards is founded upon sound considerations of public policy. When an educational institution issues a diploma to one of its students, it is, in effect, certifying to society that the student possesses all of the knowledge and skills that are required by his chosen discipline.”).

\textsuperscript{66} Regents’ Motion to Dismiss, supra note 9, at 4.

\textsuperscript{67} Id., at 5.

\textsuperscript{68} Id., at 5, 6.

A. Olsson v. Board of Higher Education

In Olsson v. Board of Higher Education, the New York Court of Appeals dealt with a student’s complaint alleging that he failed an examination because he relied on the professor’s mistaken statement that he needed to score a passing grade on only three of the five examination questions. The professor had intended to tell the class that the students needed to get passing grades on four of the five examination questions. Unfortunately, Olsson failed the exam precisely because he received passing grades on three of the five test questions. Although the school refused to change his grade, the school offered to throw out the test score and let Olsson retake the exam.

Olsson refused and brought a suit demanding that the college issue him a diploma, since it was the professor, as an agent of the college, who made the mistake. In overturning the lower court’s verdict favoring Olsson, the New York Court of Appeals noted that there was an implied contract between Olsson and the college. The court also determined that an element of the implied contract is that the college deals with its students in good faith:

In addition, it has been suggested that there exists an “implied contract” between the institution and its students such that “if (the student) complies with the terms prescribed by the (institution), he will obtain the degree which he sought.” The essence of the implied contract is that an academic institution must act in good faith in its dealings with its students.

In this case, John Jay College amply fulfilled its obligation to act in good faith when it offered Eugene Olsson the opportunity to retake his comprehensive examination. Certainly, the college was not obliged to confer a diploma upon Olsson before he demonstrated his competence in accordance with the

70. Olsson, 402 N.E.2d at 1151–52.
71. Id. at 1152.
72. Id.
73. Id.
74. Id.
76. Id. at 1153.
institution's academic standards.\textsuperscript{77}

Thus, the college upheld its contractual obligation of good faith by letting Olsson retake the exam. Consequently, the New York Court of Appeals concluded that the college upheld its end of the bargain, and Olsson could not conclusively prove that he would have received a passing grade if he had answered four questions instead of three.\textsuperscript{78}

B. \textit{Merrow v. Goldberg}

\textit{Merrow v. Goldberg} dealt with a student’s loss of academic credits for courses that he had not taken.\textsuperscript{79} "In plaintiff's case, 11 courses came under review. As a result of the panel's review process, 27 credits were expunged from plaintiff's transcript. In all but two courses, all of plaintiff's credits were expunged; in the remaining two, the credits earned were reduced from three to one."\textsuperscript{80}

Needless to say, in the academic contract between a student and school, one of the student's obligations under the contract is to actually register for and take classes in order to receive a satisfactory grade and ultimately graduate. The student in this case admitted not taking courses in Biology 101 and 102\textsuperscript{81} and English 281 and 397.\textsuperscript{82} Thus, he lost credit for those courses.\textsuperscript{83} In two other courses, Education 513 and 597, his classmates in those courses could not recall that he ever attended.\textsuperscript{84} Consequently, he lost credit in those courses as well.\textsuperscript{85}

In deciding this case, the United States District Court for the District of Vermont also held that there is a contract between a student and the college he attends.\textsuperscript{86} As such, the student must

\textsuperscript{77} Id. (citations omitted).
\textsuperscript{78} Id.
\textsuperscript{80} Id. at 769.
\textsuperscript{81} Id. at 769–70.
\textsuperscript{82} Id. at 770.
\textsuperscript{83} Id. at 770.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Id. at 774 ("Between a student and a college there is a relationship that is contractual in nature. The terms of the contract are contained in the
conform to the college's requirements in order to graduate. This is the student’s contractual obligation.\textsuperscript{87} Since the court agreed with the college’s findings that the plaintiff did not attend the classes for which he originally received credit, the plaintiff was the party who breached the contract.\textsuperscript{88} The court stated that, “plaintiff breached the contract by failing to perform academically according to the college’s, or any reasonable[] standards. As a result, defendants are relieved of any obligation under the contract.”\textsuperscript{89}

\textbf{C. Harwood v. Johns Hopkins University}

A college student is contractually obligated to satisfy the conditions necessary to graduate and receive a diploma.\textsuperscript{90} That said, one might presume that one student’s refraining from killing someone would be a reasonable condition precedent for graduating. Believe it or not, in \textit{Harwood v. Johns Hopkins University}, the Court of Special Appeals of Maryland had to decide whether a college student was entitled to receive his diploma after completing his degree requirements \textit{despite} his having killed another student on campus.\textsuperscript{91}

Robert Harwood, Jr., had completed his course of study at Johns Hopkins University (“JHU”) by the end of the Fall 1995 semester.\textsuperscript{92} He had not registered for any classes during the Spring 1996 semester.\textsuperscript{93} JHU has an annual graduation ceremony at the end of the Spring semester.\textsuperscript{94} I would presume, therefore, that Harwood would have participated in the Spring 1996 graduation ceremony.

\textsuperscript{87} Id. (“If a student performs financially, academically, and behaviorally with the college rules and regulations, he is entitled to the credits in the courses in which he enrolled.”).

\textsuperscript{88} Id.

\textsuperscript{89} Id.


\textsuperscript{91} Id. at 207.

\textsuperscript{92} Id.

\textsuperscript{93} Id.

\textsuperscript{94} Id.
Before any of this happened, Harwood shot and killed another student, Rex Chao, on the JHU campus on April 10, 1996.\textsuperscript{95} Harwood pled guilty to the homicide.\textsuperscript{96} Afterwards, JHU notified Harwood that he was expelled from the University and would not receive his diploma.\textsuperscript{97} JHU based its decision on a provision in the University’s handbook, which stated: “In order for a student to be approved for graduation, s/he must resolve any outstanding charges of fees or of misconduct . . . and must have complied with the terms of any penalties imposed as a result of the misconduct . . . .”\textsuperscript{98} In Harwood’s case, his guilty plea resulted in his receiving a thirty-five year prison sentence.\textsuperscript{99}

When Harwood sued JHU to receive his diploma, the Court of Special Appeals of Maryland, determined that there is a contract between a college and its students:

\begin{quote}
The relationship between a student and a private university is largely contractual in nature. “When a student is duly admitted by a private university . . . there is an implied contract between the student and the university that, if [the student] complies with the terms prescribed by the university, [the student] will obtain [a] degree.”\textsuperscript{100}
\end{quote}

Since this particular contract also imposes a duty on the student to have all charges of misconduct resolved, the court held that JHU was within its contractual right not to issue Harwood a diploma.\textsuperscript{101} The court also noted a provision in JHU’s Conduct Code that stated: “For example, students are expected to refrain from: B. Behavior which causes, or can reasonably be expected to cause, physical harm to a person.”\textsuperscript{102} Consequently, an educational contract can include prohibitions against a student committing homicide. At the risk of sounding cynical . . . what a novel concept!

\begin{flushright}
\textsuperscript{95.} \textit{Id.} \\
\textsuperscript{96.} \textit{Id.} \\
\textsuperscript{97.} \textit{Id.} at 208. \\
\textsuperscript{98.} \textit{Id.} at 207 (alterations in original). \\
\textsuperscript{99.} \textit{Id.} \\
\textsuperscript{101.} \textit{Id.} at 211–12. \\
\textsuperscript{102.} \textit{Id.} at 213.
\end{flushright}
D. University of Texas Health Science Center v. Babb

In University of Texas Health Science Center v. Babb, the student brought suit against her nursing school to complete her nursing degree under the terms of the course catalog then in effect at the time of her original matriculation. She had originally matriculated during the 1978–1979 academic year. During her first matriculation in Fall of 1979, she had withdrawn from the program after being told by her academic advisor that she was failing one of her required twelve-hour courses. At the time, the school academic year was on a semester basis. She was re-admitted the next semester, in Spring 1980, when the school changed its academic year from a semester basis to a quarter basis. The school’s catalog for the 1979–1981 academic years had a new provision that stated: “A student with more than two D’s in the program will be required to withdraw.” As she progressed through the program, she received two D grades and was dismissed. The student’s attempts to meet with the Dean were unsuccessful, so she commenced her suit against the University.

The central issue was that the 1978–1979 course catalog did not have the restrictions on D grades that the 1979–1981 catalog contained. Thus, she argued that she should have been allowed to continue in the program under the terms of the 1978–1979 catalog and that the D grade restrictions in the 1979–1981 catalog should not have been applied retroactively to her.
essence, she should not be subjected to a different set of rules because the college changed its academic catalog.\footnote{114}{Id.}

The Court of Appeals of Texas found that there is a contractual relationship between a student and a private university.\footnote{115}{Id. at 506.} The court found that this particular contract was based on the terms then existing in the 1978–1979 catalog.\footnote{116}{Id.} More specifically, the court held “that a school’s catalog constitutes a written contract between the educational institution and the patron, where entrance is had under its terms.”\footnote{117}{Id. (“Further, the 1978–1979 catalog did not permit the school to dismiss a student based on the number of bad grades that that student made; it only required a student to maintain a 2.0 GPA.”).}

The terms of this contract did not have any restrictions on the number of D grades that a student received, as long as the student finished with an overall GPA of at least 2.0.\footnote{118}{Id.} Thus, the court allowed the student to continue her studies under the terms of the 1978–1979 catalog.\footnote{119}{Id. (affirming lower court’s grant of a temporary injunction to permit appellee to resume classes and complete her degree requirements).}

As to the current situation involving Chan and Ford, there appears to be an academic contract between Texas Southern and the law students currently matriculated there. Pursuant to the terms of the Texas Southern handbook, a student must complete ninety hours of course study\footnote{120}{STUDENT RULES, supra note 19, at 33.} and have a minimum GPA of 2.0 in order to graduate.\footnote{121}{Id. at 34.} In the case of first year students, they must maintain an overall GPA of 2.0 in order to continue to their second year.\footnote{122}{Id. at 25.}

Therefore, if there is an existing contract between plaintiffs Chan and Ford and defendant Texas Southern, it would logically follow that Chan and Ford have a contractual obligation to maintain the necessary GPA to continue in good standing. Assuming that their Contracts II grades are indeed accurate, I think they would be severely hard pressed to prove by a
preponderance of the evidence that they did not breach the contract when they fell below the required GPA.

VI. THE CLAIM FOR DEFAMATION

Libel is an intentional tort. Texas law defines libel as:

a defamation expressed in written or other graphic form that tends to blacken the memory of the dead or that tends to injure a living person’s reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury.123

In order for a plaintiff to successfully prevail in a defamation lawsuit, the plaintiff has the burden of proving the following: “that the defendant: (1) published a statement ‘of and concerning’ him; (2) that was defamatory; (3) with the requisite degree of fault with respect to whether it was false.”124 While a plaintiff can claim an injury in the form of a defamatory statement, the defendant who is accused of making the defamatory statement has the burden of proving that the statement was in fact true.125

Applying the law to the case of Chan and Ford, I see a number of potential problems which would make it extremely difficult, if not otherwise impossible, for them to successfully prove that they were victimized by defamation or libel by Texas Southern. I am going on the presumption that Professor Smith was diligent and accurate in the grading process. First, according to the Texas Southern handbook, final exams are graded anonymously:

Examination numbers shall be employed for all examinations; and different numbers shall be employed for each examination. Examination papers shall be graded anonymously and tentative grades submitted to the Office of Student Affairs in

123. TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (West 2011).
125. TEX. CIV. PRAC. & REM. CODE ANN. § 73.005 (West 2011) (“The truth of the statement in the publication on which an action for libel is based is a defense to the action.”).
the first instance. Instructors may thereafter learn the identity of students before finally submitting grades in order that factors other than the final examination scores may, at the instructor’s discretion, be included in the final determinations.¹²⁶

According to the Texas Southern handbook, Professor Smith would not have known Chan and Ford’s tentative grades until she had received them from the Office of Student Affairs. I would also presume that it is rather unlikely that Professor Smith, after learning the identities of Chan and Ford, would have deliberately gone out of her way to adjust their grades so far down that they would have finished with an overall GPA less than 2.0. I also think for this to happen as Chan and Ford allege, Professor Smith would have to have (1) found out who Chan and Ford were after turning in her initial grades, (2) found out what grades they received in their other courses, and then (3) deliberately adjust their grades downward. The idea of anonymous grading is to ensure that the professor grades the student’s work product only, absent any extraneous subjective factors that could potentially impact a grading decision.¹²⁷

However, the truth of the matter is that professors have adopted anonymous grading as much, if not more, to protect themselves than to protect the students. I, for example, want anonymous grading and religiously adhere to it, because in some ways it is much easier not to know who the students are than it is to know. When you are coming down to give that very difficult grade of an “F,” it is truly a relief to be able to grade knowing that you are simply looking at the test and not taking into account other factors that are extraneous to the exam.¹²⁸

Moreover, the myth that professors wish to violate anonymous grading turns on an important and unspoken assumption. This assumption is that the professors care enough to try to manipulate the grades. The truth of the matter is, the professors have very little incentive and interest in manipulating grades. It really does not matter much at all to

¹²⁶. STUDENT RULES, supra note 19, at 22.
¹²⁸. Id.
us who gets an “A,” who gets a “B,” who gets a “C,” or who gets a “D.” I do not mean to sound callous, but the myth that professors manipulate grades assumes the professors really care one way or the other. The truth is, we have hundreds of exams to grade and in no time at all, we encounter thousands of students. A student may believe that a professor likes that student or a student may believe that a professor dislikes the student[]. In fact, you might be surprised that in many of those situations, the professor does not even know the student’s name. Also, professors have many obligations outside of the classroom that press upon their attention and time. To be successful in our business, you must publish and do a variety of service activities. This means that the day is terribly full of important and positive things to do and manipulating student grades is hardly a priority.129

Admittedly, I do not see the likelihood (or motive) that Professor Smith would have gone to all that trouble (after grading a sizeable stack of Contracts exams, presumably) to deliberately put the screws to Chan and Ford to the point of intentionally sending their GPAs below the required 2.0. I do not know what Professor Smith or Texas Southern could possibly have gained if Professor Smith deliberately graded Chan and Ford’s exams that low.

The next problem I see with Chan and Ford’s defamation claim is based on the allegation that the submission of their grades to the registrar’s office would have subjected them to public ridicule. According to the Texas Southern handbook, all final exams are retained by the Dean’s Office for one year.130 I am assuming that there was no leak from the Dean’s Office, or other breach in the law school’s internal controls. Thus, the only way I can see that Chan and Ford’s grades could have put them up to public ridicule was by way of instigating their lawsuit against Texas Southern. Consequently, Chan and Ford have taken a beating in the so-called court of public opinion in several blogs and online articles.131 Even the law school took a shot at Chan

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129. *Id.*
130. *Student Rules, supra* note 19, at 23.
and Ford in their motion for summary judgment. “There is some irony in two law students getting a D- in Contracts II class, then turning around and suing their law school for, among other things, breach of contract.”

I believe that the biggest hurdle that Chan and Ford must overcome in proving defamation is that Professor Smith intentionally gave them low grades that she knew to be false. It’s one thing if she made an honest, good faith mistake and gave them an erroneous grade. If that were the case, the Texas Southern handbook specifically lays out the procedures for changing a grade. However, Chan and Ford would have to prove that Professor Smith knowingly and intentionally gave them low grades. Since no one is a skilled mind reader, there is no way of knowing what was going through her mind as she was grading the exams. The best Chan and Ford could do is try to extrapolate from the surrounding facts and circumstances that Professor Smith deliberately lied about the quality of their exam answers. Frankly, I just do not see how this would be possible.

VII. THE CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Texas law requires a plaintiff to prove several elements to show intentional infliction of emotional distress. The plaintiff must establish that: (1) the defendant acted intentionally or recklessly; (2) the defendant’s conduct was extreme and outrageous; (3) the defendant’s actions caused the plaintiff

02/law-students-sue-school-over-being-graded-on-a-curve/ (“Except dreams do. Sometimes, dreams need to. THAT’S WHAT HAPPENS WHEN YOU GROW UP. You couldn’t maintain a 2.0 GPA at Texas Southern.”); Jonathan Turley, Clinical Credit? Texas Southern University Law Students Sue Over Poor Grades, JONATHAN TURLEY.ORG (Feb. 10, 2012), http://jonathanturley.org/2012/02/10/clinical-credit-texas-southern-university-law-students-sue-over-poor-grades/ (“I am afraid that I would not give them much higher points for torts based on these claims. If the defamation claim is based on the grades themselves, it is a curious claim since it is the lawsuit that publicized the grades.”).

132. Regents’ Motion to Dismiss, supra note 9, at 2.
133. See, e.g., U.C.C. § 1-201(b)(20) (2001).
134. STUDENT RULES, supra note 19, at 19–21.
emotional distress; and (4) the resulting emotional distress was severe.\textsuperscript{136} Texas law also defines extreme and outrageous conduct as being “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.”\textsuperscript{137} Finally, severe emotional distress must be more than suffering “mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.”\textsuperscript{138}

Naturally, failing at any academic pursuit can be a fairly traumatic experience.\textsuperscript{139} In addition to dealing with the fallout from just the academic side of failure, a student suffers other losses resulting from academic failure. As explained by Touro Law Professor Thomas Schweitzer:

Today, with higher education vital to economic success for most people, and tuition costs at record levels, the ramifications of academic failure have never been greater. Academic dismissal or denial of a diploma does not merely mean forfeited time, money, and effort expended on an education, but also that the student may effectively be foreclosed from pursuing the same degree at another institution.\textsuperscript{140}

However, the standard for proving intentional infliction of emotional distress is “extreme and outrageous” behavior on the defendant’s part.\textsuperscript{141} The mere release of mediocre to bad law school grades can hardly be characterized as extreme and outrageous conduct under Texas law. This means that Professor Smith and the law school would have to have gone far out of their way to traumatize Chan and Ford with their bad grades. For the reasons stated above in my defamation analysis, Professor Smith would have had to find out all of Chan’s and Ford’s other grades and then deliberately give them low and false Contacts II grades.

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\textsuperscript{136} See, e.g., id.; Standard Fruit & Vegetable Co. v. Johnson, 985 S.W.2d 62, 65 (Tex. 1998).
\textsuperscript{137} Hoffmann-La Roche, 144 S.W.3d at 445 (internal quotation marks omitted).
\textsuperscript{138} Id.
\textsuperscript{139} Turley, supra note 124 (“[M]ost students experience emotional distress with poor grades but it hardly satisfies the standard under the common law.”).
\textsuperscript{140} Schweitzer, supra note 20, at 269–70.
\textsuperscript{141} Hoffman-La Roche, 144 S.W.3d at 445.
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In addition, Chan and Ford would have to have suffered some “industrial strength trauma” (as my former Torts professor called it). Industrial strength trauma could include things like suffering chest pains, developing stress related ulcers, or suffering from depression, for example. Unless they could prove some sort of physical evidence resulting from their academic trauma, I do not know exactly how Chan and Ford could prove extreme emotional distress. They would need to prove their emotional distress far beyond their shock and being merely mortified and embarrassed by their final grades, as disappointing as they were.

VIII. CONCLUSION

As shown above, legal precedent has firmly established that courts normally adopt a hands-off approach when it comes to academic grading. Additionally, it is generally accepted in academia that student complaints about grades are an

142. See, e.g., Haryanto v. Saeed, 860 S.W.2d 913, 922 (Tex. App. 1993) (“Immediately after the incident, appellee suffered from chest pains and visited a heart specialist at MacGregor Medical Association, who then referred him to Dr. Thomasson.”).

143. See, e.g., Hockman v. Rogers, No. 12-09-00441-CV, 2010 WL 2784435, at *4 (Tex. App. July 14, 2010) (“In her affidavit filed in response to Rogers’s no evidence motion, Hockman asserted that '[a]s a result of the discrimination undertaken against me, I developed ulcers and three sleeping disorders for which it became necessary for me to take medication.' . . . Finally, in her letter of resignation, Hockman stated, 'The medical conditions, my doctor advises me, are a direct result of my work environment-retaliation of Westward employees, particularly.’”).

144. See, e.g., Stokes v. Puckett, 972 S.W.2d 921, 925 (Tex. App. 1998) (“Shirley stated that Stokes’ actions upset her and that she left his office crying quite a few times. She also stated that his actions caused her to shake at her desk and to have occasional diarrhea, headaches and neckaches. Dr. Axelrad testified that Shirley suffered from sleep dysfunction, restlessness, anxiety and depression due to Stokes’ actions. He also testified that each of the appellees exhibited signs of depression, anxiety and low self-esteem, all attributable to Stokes’ actions. In his opinion, all of the appellees needed to seek help for their problems associated with Stokes’ behavior and that all suffered from severe mental anguish. We find the evidence is both legally and factually sufficient to support the jury's finding of intentional infliction of emotional distress. The evidence shows that Stokes acted intentionally or recklessly; that his conduct was extreme and outrageous; that his conduct caused the appellees emotional distress; and that the emotional distress was severe. Additionally, the evidence shows that Stokes' conduct goes beyond all possible bounds of decency, and is utterly intolerable in a civilized society.”).
occupational hazard. How has academic jurisprudence evolved to the point that a grader’s academic judgments are seemingly inviolate (as compared to a doctor’s judgment, for example)?

For example, the Business Judgment Rule in corporate law establishes the proposition that corporate managers are not personally liable for good faith decisions that turn out to be erroneous. The rationale is that courts do not have the necessary acuity to deal with business affairs, and are thus disinclined to substitute their own judgment for that of corporate officers and directors. Similarly, in academia, courts take a like-minded approach where they will not attempt to substitute their judgment for an academic instructor’s judgment. With judicial resources being as limited as they are, I do not believe that anyone wants to unnecessarily open a Pandora’s Box where courts are perpetually called upon to re-grade exams in Calculus, Psychology, Engineering, Estate Taxation, and so on.

Unfortunately, however, a student does not suffer the same kind of harm from a professor’s academic judgment the same way a patient is harmed by a doctor’s judgment. Why? A doctor’s “judgment” is subject to the rules of the medical profession and can expose him to malpractice liability for a bad judgment or

145. See, e.g., Moire v. Temple Univ. Sch. of Med., 613 F. Supp. 1360, 1372 (E.D. Pa. 1985) (“Faculty and administrators are accustomed to receiving numerous complaints from students who receive grades lower than they feel they deserve.”). See also Schweitzer, supra note 20, at 270 n.15 (“In nearly seven years of teaching in law school, the author cannot remember a single semester in which no student questioned a grade in one of his courses. Such complaints, of course, are not limited to students at the lower end of the academic spectrum: students are universally aware of the importance of grades and academic class rank in helping to determine access to attractive jobs after graduation.”).

146. See, e.g., 18B AM. JUR. 2D Corporations § 1470 (2012) (the “Business Judgment Rule”); see also Lael Daniel Weinberger, The Business Judgment Rule and Sphere Sovereignty, 27 T.M. COOLEY L. REV. 279, 284 (2010) (“The standard formulation of the Business Judgment Rule usually includes the following components: courts will not review the substantive reasonableness of a business decision that is reasonably well informed, made in good faith, and without conflicts of interest, fraud, or illegality. This doctrine has been applied to decisions of directors, officers, and majority shareholders of corporations.”).


misdiagnosis (which could lead to physical incapacity or even death). That said, I do not mean to suggest that courts are trivializing academic affairs in any way. If a professor makes a good faith, honest mistake (like giving a student with a 93 average a B minus instead of an A), then the professor can easily fix the mistake. As long as a school has proper remedial and procedural due process mechanisms in place, and a professor can explain his rational basis for “A” quality as compared to the “C” (or worse) quality work the student actually submitted, then a court is likely to tell a student to live with his final grade.

Finally, on a personal note, I can empathize with Chan and Ford. I know what it is to live with the indignity of academic failure. Many years ago, I dropped out of high school during my senior year. I still remember the day that I was supposed to graduate with my friends, and it was a lonely feeling knowing that everyone in the universe (or so it seemed) was graduating that day . . . except me. Admittedly, my time in high school was truly a demoralizing, spirit crushing experience for me. Especially that senior year. I remember sitting in class after class, day after day, just knowing that nothing positive would ever happen for me in that place. I knew I was not going to get a passing grade in any class anyway. This only added to the day to day hopelessness that I lived with, and things eventually deteriorated to the point where I just did not care anymore. So I stopped going and got my high school equivalency a short time later.

With the benefit of several decades of hindsight, I know that my own failures back then were self-inflicted. Even though I had some teachers there who I absolutely detested (and who did not think much of me, either), I never thought that the faculty went out of its way to fail me. They did not have to—I gave them no reason to pass me.

I do not mean to suggest that Chan and Ford’s situation is identical to my high school situation. All I had to do was pass the high school equivalency exam and I could finally put that nightmare behind me. With that, I could re-start academic life on a clean slate. From the day I started college to the day I graduated with my Master of Law Degree (LL.M.), I’ve been blessed to enjoy academic life all the way through.
Chan and Ford have a lot more at stake. If it turns out that they lose their case against Texas Southern, they probably would not be re-admitted to the law school under any circumstances. After the notoriety this case has generated, I think it would be extremely difficult (but not impossible) for them to attain admission to another law school. Perhaps law school and practicing law was a lifelong dream for both of them, and it is out of reach . . . at least for now.

As one who has recovered from the devastation of academic failure, I can only say: “There but for the Grace of God go I.” Also, I am reasonably sure that there are practicing attorneys who needed a second chance to prove themselves, even if it meant going to another law school after not making the cut the first time around. Thus, there might be a possibility that Chan and Ford could get a fresh start someplace else. As of this writing, the District Court has not made a ruling on Texas Southern’s summary judgment motion. Unfortunately, for all of the legal reasons I’ve explained in this piece, I believe that nothing short of a miracle will help them prevail in this case. No matter what happens, however, I wish them well.

149. Schweitzer, supra note 20, at 269–70.