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Judicial Review of Academic Student Evaluations: A Comment on Susan 'M' v. New York Law School from Those Who Litigated It

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COMMENTARY

JUDICIAL REVIEW OF ACADEMIC STUDENT EVALUATIONS: A COMMENT ON *SUSAN "M" v. NEW YORK LAW SCHOOL* FROM THOSE WHO LITIGATED IT *

by

HAROLD WEINBERGER AND ANDREW SCHEPARD **

INTRODUCTION

Susan "M" v. New York Law School [1] is the most recent decision of a highest court of a state that vindicates the principle of judicial noninterference in academic evaluation of students. *Susan "M"* has become quite noteworthy, spawning both a major recent law review article exhaustively analyzing all the relevant precedents [2] and poetry.[3] Discussion of the case generates intense interest, particularly among academics (both faculty and administrators) and law students. The former are generally relieved by its outcome; the latter are distressed that they have to aim their developing litigation skills on targets other than their professors.

Our first purpose in this article is to provide another perspective on *Susan "M"*, a strategic one. We will attempt to describe the strategy of the lawyers who represented the academic institution and its supporters. As we will discuss, litigation decisions in the case were based on

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1. *Susan "M" v. New York Law Sch.*, 76 N.Y.2d 241, 557 N.Y.S.2d 297, 556 N.E.2d 1104 [61 Ed.Law Rep. [716]] (1990).

2. Thomas A. Schweitzer, *"Academic Challenge" Cases: Should Judicial Review Extend to Academic Evaluations of Students?*, 41 Am.U.L.Rev. 267 (1992).

3. Robert E. Rains, *The Cautionary Ballad of Susan M.*, 40 J.Legal Educ. 485 (1990).

preserving the principle of noninterference by the judiciary in the day-to-day operation of core academic functions—the grading and evaluation of students. The outcome of the case generally vindicated this choice.

Our second purpose is to editorialize. The New York Court of Appeals decided that, in general, faculty grading decisions are not subject to judicial review. This result, if adopted and followed by other states, leaves individual educational institutions with virtually unlimited discretion in their handling of potential grading disputes with students. We hope that this wide discretion will be properly exercised and the students' interest in rational grading decisions protected by internal faculty policies. We try to identify what we see as the competing values at stake in academic grading controversies and sketch out some of the different paths that academic institutions can follow to balance them.

Part I of this article will describe the background of *Susan "M"* in order to illuminate the significance of the Court of Appeals' decision. Part II will provide insight into the litigation strategy adopted by New York Law School so that other academic institutions facing similar choices might learn from its experience. Finally, Part III will identify the competing values at stake in the academic challenge cases, and will discuss some alternative approaches for serving those values so that each institution can make its own decision about what policy to adopt.

I. THE LAW IN NEW YORK BEFORE *SUSAN "M"*

Prior to *Susan "M"*, the leading case in New York on judicial review of academic decision making concerning students was *Olsson v. Board of Higher Education.*[4] *Olsson* held that judicial review of a school's actions was permissible only if the actions taken were somehow arbitrary, irrational, or in bad faith.[5]

The issue in *Olsson* was not solely an academic one, but rather involved a claim that a professor had misled a student into misallocating time on a final comprehensive examination he had elected to take in lieu of completing a master's thesis.[6] After failing the examination, Olsson petitioned the academic appeals committee for a reconsideration of his grade. The committee declined to award him a passing grade because he had failed the exam under the uniform criteria. The college nonetheless offered to expunge Olsson's test results and allow him to take the exam again without prejudice to his right to sit for the test a second time were he to fail again.[7] Not satisfied, Olsson instituted an action to compel the school to award him a passing grade.

Both the lower and appellate courts ordered the college to award Olsson a diploma *nunc pro tunc,* declaring that the college and not the

4. 49 N.Y.2d 408, 426 N.Y.S.2d 248, 402 N.E.2d 1150 (1980).

5. 426 N.Y.S.2d at 251, 402 N.E.2d at 1153.

6. *See* 426 N.Y.S.2d at 249–50, 402 N.E.2d at 1151–52. Olsson was told that he had to score three out of five possible points on each of the three of the five exam questions answered. In fact, a passing grade required a score of three out of five on *four* of the five examination questions. *Id.*

7. 426 N.Y.S.2d at 250, 402 N.E.2d at 1152.

student must bear the ultimate responsibility for the mistake.[8] The Court of Appeals reversed, basing its decision on the need for the public to have confidence in the integrity of academic evaluations:

> In order for society to be able to have complete confidence in the credentials dispensed by academic institutions . . . it is essential that the decisions surrounding the issuance of these credentials be left to the sound judgment of the professional educators who monitor the progress of their students on a regular basis.[9]

From a societal perspective, the value of academic credentials would be "seriously undermined" if the courts abandoned their traditional practice of exercising restraint in this area, and instead began to use principles of estoppel to require institutions to award diplomas upon those individuals who they have deemed unqualified. The Court concluded that estoppel might lie in certain instances when an educational institution withholds a diploma on academic grounds (for instance, where some technical requirement has not been fulfilled), but that it was inappropriate in Olsson's case.

The judicial deference accorded to educators' judgments about student fulfillment of academic requirements contrasts with the increased willingness of courts to intervene in academic disciplinary proceedings. Even for disciplinary actions in public institutions governed by the due process clause, there is no federal constitutional right to a hearing because of a strong policy of deference to decisions of school officials.[10] Most academic institutions, however, have established procedures for disciplining students which are generally found in a published student handbook. These procedures may include a meeting with the dean, or review of the behavior in question by a disciplinary board composed of students.

To a large extent, the university's published procedures become part of the contract between faculty and students, a contract both parts of the academic community have to abide by.[11] One reason courts are willing to intervene in disciplinary proceedings, as opposed to academic judgments, is their belief that once procedures are developed and published, institutions should follow them. In contrast to the evaluation of the quality of a student, what published disciplinary procedures are and whether the university has complied with them are relatively defined, concrete issues well within the expertise of judges.[12] Finally, of course, the result of the university's failure to follow proper procedure for discipline is usually not that an unqualified person receives an unde-

8. 426 N.Y.S.2d at 250, 402 N.E.2d at 1152.

9. 426 N.Y.S.2d at 251, 402 N.E.2d at 1153.

10. *Board of Curators v. Horowitz*, 435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978). *See* Schweitzer, *supra* note 2, at 296–313 for a full discussion of the relevant cases.

11. *See* Schweitzer, *supra* note 2, at 338–51.

12. *See Tedeschi v. Wagner College*, 49 N.Y.2d 652, 427 N.Y.S.2d 760, 764, 404 N.E.2d 1302, 1306 (1980) (noting that in a disciplinary case if the suspension had been for purely academic reasons, and the school had followed its own procedures, "the only judicially reviewable question would have been whether it acted in good faith. . . .").

served academic evaluation—it is simply a remand for the university to follow the proper procedure. Public confidence in the ultimate integrity of academic judgments is not undermined by judicial supervision of the procedures of discipline.

II. *SUSAN "M"*—THE LITIGATION

A. Susan M.'s Complaint

The themes of New York law prior to *Susan "M"* thus reflected virtually complete judicial deference to academic evaluations, but a greater willingness to compel compliance with procedures the university itself established. Within this general framework, New York Law School had defended several prior suits by students challenging academic dismissals. All of the cases were dismissed at the early stages based on the well-accepted policy of deference and in view of the Law School's adherence to elaborate hearing procedures set forth in the student handbook.

The *Susan "M"* dismissal thus began as nothing out of the ordinary. The student was dismissed following her second year of law school after having been placed on probation the previous year because she did not maintain a 2.0 grade point average.[13] She was allowed to make a personal appearance before the Law School's Academic Status Committee to present information as to why she should be permitted to continue her studies despite failing to maintain the required average.[14] However, the Academic Status Committee determined that she did not show sufficient promise for improved performance to warrant her retention.[15]

Susan M. brought suit attacking the procedure and substance of her dismissal essentially based upon a state law contract theory. She alleged breach of an implied contract between her and the Law School on various grounds.[16] She claimed that the decision to dismiss her was unfair because the Academic Status Committee did not take adequate notice of her individual circumstances but instead enforced an arbitrary 2.0 grade point average cut-off in an attempt to improve the School's bar examination pass rate.[17] She also claimed her dismissal was arbitrary because no investigation was made of her charges that: (a) her Constitutional Law grade was unfair because the professor failed to communicate to some students (including Susan M.) that they could use their casebooks during the examination; and (b) her Corporations grade was unfair because the professor erroneously subtracted thirty points for one answer that was actually correct.[18]

13. *Susan "M" v. New York Law Sch.*, 76 N.Y.2d 241, 557 N.Y.S.2d 297, 298, 556 N.E.2d 1104, 1105 [61 Ed.Law Rep. [716]] (1990).

14. *Id.*

15. *Id.*

16. *See* Affirmation of Thomas F. Keane dated August 28, 1987 para. 16–19, *Susan "M"* (No. 21057/87); *See generally* Petition dated August 27, 1987, *Susan "M"* (No. 21057/87) (requesting annulment of academic dismissal under Article 78 of the Civil Practice Law and Rules).

17. Petition dated August 27, 1987 para. 27, *Susan "M"* (No. 21057/87).

18. *Id.* para. 10, 13–16.

It is important to understand that Susan M. alleged that, while her grade in Constitutional Law had an impact on her cumulative average, it was the "D" she received in Corporations that was "directly responsible for her failure to maintain an average of 2.0." [19] These allegations about the Corporations grade became central to the later proceedings. Susan M. argued that the professor had misgraded her, because she had answered the question by reference to both Delaware and New York law. The professor, she alleged, wanted an answer only under Delaware law, and thus penalized her for her additional reference to New York law in which she demonstrated that the solution to the problem would be different if New York law controlled.[20]

Susan M. challenged her dismissal in a special proceeding brought under Article 78 of the New York Civil Practice Law and Rules.[21] Article 78 is the modern New York procedural descendent of the prerogative writs of mandamus or certiorari.[22] The New York State Legislature has created an expedited procedure whose purpose is to facilitate the review of decisions of state administrative agencies or state chartered corporations, like universities, in the state's courts.[23] Article 78 proceedings usually do not involve trials, but are rather decided by a procedure analogous to a summary judgment motion, on affidavits and legal memoranda submitted by the parties.[24]

B. Initial Strategy Decisions

New York Law School had to make a key strategic decision in defending against Susan M.'s Article 78 action. Her petition made a number of very specific factual allegations of irregularities both in the procedure that led to her dismissal and in the grading and administration of her examinations. The Law School had detailed, specific factual responses to each of her charges, and was confident that it could rebut every point she raised. *Olsson,* however, suggested that as a matter of principle, the New York courts—and the Law School—should minimize judicial intrusion into academic evaluations of students.[25] Entangling the courts and the Law School in a blow by blow response to each of Susan M.'s allegations would, to a large extent, defeat the very policies of noninterference on which the *Olsson* Court based its decision.

The question therefore became to what extent should the Law School respond to the student's factual allegations. It was obvious that the standard of review that the courts would apply to review Susan M.'s allegations would determine the outcome. A strict application of the deferential standard suggested by the cases would require dismissal of the petition based on the Law School's demonstration of good faith and

19. *Id.* para. 13.

20. *Id.*

21. N.Y. C.P.L.R. §§ 7801–06 (McKinney 1981 & Supp.1992).

22. David D. Siegel, New York Practice § 557, at 870 (2d ed. 1991).

23. *Id.* § 558, at 873.

24. *Id.* § 547, at 860.

25. *Olsson v. Board of Higher Educ.*, 49 N.Y.2d 408, 426 N.Y.S.2d 248, 250–51, 402 N.E.2d 1150, 1152–53 (1980).

procedural propriety; however, an inquiry into the substantive fairness of the Law School's decision would require substantial fact-finding, which would itself create the sort of entanglement in academic affairs the Law School sought to avoid.

The Law School ultimately decided that the best chance for dismissal of Susan M.'s action without invasive fact-finding and second-guessing of the School's academic judgments would be to present a minimal factual defense, stressing the absence of any procedural irregularity or evidence of bad faith, ill-will, discriminatory motives, or other improper conduct. Essentially, this strategic choice meant that the Law School would not submit Susan M.'s examination answers in Corporations or Constitutional Law to the Court, or provide a detailed explanation from the responsible faculty member of why she received the specific grades.

This minimalist approach presented both advantages and risks to the Law School. The advantages included minimizing judicial review of actual academic decisions, controlling the costs of defending litigation, and keeping the focus of the litigation on the legal question of the deferential standard. On the negative side, there was some risk that the Law School would appear high-handed, arrogant, or might be seen as "hiding the ball." Additionally, there was concern that a limited record might hamper the Law School on any necessary appeals.

There was no scientific way to assess which risks were greater. The decision to pursue the minimalist factual defense and emphasize the non-interference principle was simply the one the Law School was ultimately most comfortable with. In hindsight, the decision was vindicated; no one knew that at the time it was taken. There were many anxious moments in-between.

C. Trial Court Proceedings

Susan M. sought a preliminary injunction based on the allegations described above.[26] Her petition was supported by her own affidavit and her attorney's affirmation.[27] The Law School submitted a memorandum of law seeking dismissal on the authority of *Olsson*,[28] and accompanied by supporting affidavits from professors and deans of the Law School explaining in abbreviated fashion that:

(1) Susan M. had been dismissed in full accordance with the procedures set forth in the Student Handbook after a hearing and multiple opportunities to be heard.

(2) Her case was given individualized consideration and she was neither dismissed automatically based upon a 2.0 grade point average cut-off, nor singled out for unfair treatment in any way.

26. *See* Petition dated August 27, 1987, *Susan "M" v. New York Law Sch.*, 76 N.Y.2d 241, 557 N.Y.S.2d 297, 298, 556 N.E.2d 1104, 1105 [61 Ed.Law Rep. [716]] (1990) (No. 21057/87).

27. *See* Affirmation of Thomas F. Keane dated August 28, 1987, *Susan "M"* (No. 21057/87).

28. Memorandum of Law in Opposition to Motion for Preliminary Injunction dated September 30, 1987.

(3) Her Constitutional Law grade was beyond judicial review because the professor had made a reasonable, good faith judgment as to how to grade the examination.

(4) Her Corporations grade was beyond judicial review because her complaints merely constituted a disagreement with the academic judgment of the professor.[29]

After oral argument, the Court determined that there was no need for a factual hearing, and proceeded to decide the matter based on the papers submitted. Based on the authority of *Olsson*, the Court held that Susan M. had failed to present allegations of bad faith or arbitrary conduct and therefore could not obtain judicial review of the School's academic decision to dismiss her.[30] On reargument, the Court reaffirmed its decision, noting that the decision to dismiss a student is for "the academy, not the court." [31] The Court noted that the implied contract between a student and her school requires the student to meet the school's academic standards before being entitled to a diploma.[32]

So far, the minimalist litigation strategy seemed to be working and the policies of non-intervention in academic affairs articulated by the New York courts were vindicated. However, as is typical in the legal process, surprises lay ahead. A routine case was about to become a minor landmark in academic relationships.

D. The First Appeal

Susan M. appealed the Trial Court's decision to the Appellate Division (New York's intermediate appellate court) which affirmed that decision in all respects but one critical one. The Appellate Division reversed only on the basis that Susan M.'s allegation concerning the irrationality of her Corporations grade was sufficiently concrete to create a duty for the Law School to conduct a further factual investigation.[33] The Appellate Division stated:

> [A]t least 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 in grading, and that, in the absence of any such safeguards, concrete allegations of flagrant misapprehension on the part of the grader entitle the student to a measure of relief.[34]

29. *See* Affidavit of Randolph Jonakait, dated September 29, 1987, *Susan "M"* (No. 21057/87); Affidavit of Edward Samuels, dated September 29, 1987, *Susan "M"* (No. 21057/87); Affidavit of Jethro K. Lieberman, dated September 25, 1987, *Susan "M"* (No. 21057/87); Affidavit of Barbara Black, dated September 28, 1987, *Susan "M"* (No. 21057/87).

30. Decision dated January 21, 1988 (Wright, J.), *Susan "M"* (No. 21057/87).

31. Decision dated March 21, 1988 (Wright, J.), *Susan "M"* (No. 21057/87).

32. *Id.*

33. *Susan "M" v. New York Law Sch.*, 149 A.D.2d 69, 544 N.Y.S.2d 829, 831–32 [55 Ed.Law Rep. [701]] (1st Dept. 1989), *aff'd as modified*, 76 N.Y.2d 241, 557 N.Y.S.2d 297, 556 N.E.2d 1104 [61 Ed. Law Rep. [716]] (1990).

34. 544 N.Y.S.2d at 831–32.

The School had dismissed Susan M. without "reasonable assurances [that her Corporations grade] was a rational exercise of discretion by the grader," [35] and without resolving the issue of credibility between the professor and the student. In an unusual procedural move, the Appellate Division remanded the case directly back to the School for further inquiry.[36]

The Appellate Division's decision caught the Law School by surprise and raised the question of whether the initial strategy decision to present a "minimalist" case had been unwise. Counsel's impression at oral argument and in reviewing the decision was that the Appellate Division regarded what the School had intended to be a principled factual posture as an expression of hubris. Questions from the bench during oral argument at the Appellate Division seemed to imply that the School did not protect the student from arbitrary and irrational grading.[37]

E. Strategic Considerations and the Second Appeal

The Law School was thus faced with the decision whether to appeal to the Court of Appeals (New York's highest court) and risk an unfavorable decision at the statewide level, or live with the Appellate Division decision. All involved in the decision whether to appeal recognized the importance of the issue now posed. For the first time in anyone's memory, a court had actually ordered an educational institution to reconsider a specific grade on a specific test and to resolve "credibility issues" between a faculty member and a student regarding a grade in a particular course.

Given student (particularly law student) creativity in defining grading grievances, the Appellate Division decision seemed to create great potential for further litigation and increased adversarial behavior in relationships between faculty and students. Thus there really was no choice but to try to reverse the Appellate Division decision, which was a dramatic deviation from the policy of judicial noninterference in academic grading disputes.

On a more pragmatic level, the Appellate Division decision would bind all educational institutions within its geographic jurisdiction, which included Manhattan and the Bronx.[38] A large number of educational institutions are located there. In addition, of course, it could be persuasive authority in other courts in New York and throughout the United States.

Other schools, which were understandably concerned about the Appellate Division decision, were consulted; most urged an appeal. The

35. 544 N.Y.S.2d at 832.

36. 544 N.Y.S.2d at 832.

37. This theory was suggested in the oral argument at the Court of Appeals. *See* Judge Bellacosa, Transcript of Oral Argument in the Court of Appeals at 7, *Susan "M" v. New York Law Sch.*, 76 N.Y.2d 241, 557 N.Y.S.2d 297, 556 N.E.2d 1104 [61 Ed.Law Rep. [716]] (1990) (No. 21057/87) (transcript on file with the authors).

38. *See* N.Y.Jud.Law §§ 70, 140 (McKinney 1983).

chances for reinstatement of the Trial Court decision seemed good. Indeed, leave to appeal to the New York State Court of Appeals was sought from and granted by the Appellate Division itself, a tacit recognition of the importance of the issues raised by the Court's own decision.[39]

F. The Strategy for the Court of Appeals Argument

The original minimalist strategy choice, reflected in the record of the lower courts, dictated the strategy of the Law School's argument to the Court of Appeals. The Law School argued that the petition's factual allegations were inadequate as a matter of law to justify judicial intervention, because they failed to establish bad faith, a procedural defect, or other facts suggesting the absence of a *genuine* academic judgment.

The importance of the issues involved in the appeal was emphasized by the intervention of the academic community. The Deans of nine New York area law schools supported the Law School's appeal in an *amicus* brief noting the destructive effect that the Appellate Division's decision would have on the student-teacher relationship and the academic environment.[40] This brief underscored the importance of the case to the Court of Appeals and emphasized the educational community's deep practical concerns about the Appellate Division decision. More on this in our editorial section.[41]

G. Oral Argument in the Court of Appeals

Oral argument, as expected, focused on the question of the appropriate standard of review of academic decision-making—or, more precisely, the kind of factual allegations that must be present before the deferential standard of *Olsson* can give way to judicial scrutiny of the merits of a student's claim.

The Law School's counsel stressed the sharp distinction between academic and disciplinary decisions recognized in *Olsson* and *Tedeschi* and urged the Court to avoid becoming entangled in the merits of an academic decision simply on the basis that the complaining student could frame a "concrete" allegation of incorrect grading. He argued that

> in order to have to force review of an academic decision, this Court has to find . . . that the decision [is] either a ministerial act or administrative act, [a] failure to add up the grades [correctly, or] a statement of animus so that either animus is proven or can be inferred.[42]

39. The jurisdiction of the Court of Appeals in New York is largely discretionary. One way that cases reach it is by permission from the Appellate Division. *See* N.Y. C.P.L.R. § 5602(a) (McKinney Supp.1992).

40. *See* Brief of *Amici Curiae, Susan "M"* (No. 21057/87).

41. *See infra* part III.

42. Harold Weinberger, Transcript of Oral Argument in the Court of Appeals at 5, *Susan "M"* (No. 21057/87) (transcript on file with the authors).

Quoting *Regents of the University of Michigan v. Ewing*,[43] the Law School's counsel urged the Court not to overturn the School's academic judgment unless it found that it constituted " 'such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not [apply] professional judgment.' " [44]

The Court sought clarification of the standard being suggested in the following exchange:

> Judge Kaye: . . . Mr. Weinberger [Law School Counsel], I just want to be sure I understand your test, you're suggesting that there has to be proof of bad motivation before there can be arbitrary and capricious conduct, is that your definition of arbitrary and capricious? . . . . Either something so ministerial or something ill motivated?
>
> Counsel: I'm saying that when it comes to academic, purely academic judgments, that that is correct. There has to be bad faith or something that gives rise to an inference of bad faith.
>
> Judge Kaye: And just where do you find that test in the law?
>
> Counsel: . . . [T]he actual question of the extent to which an institution must review a grade when a complaint is made has never been decided by this Court, I guess that's why we're here. My suggestion for that test comes from . . . the evolution of this Court's cases and the deference [standard]—if you don't do that, I submit you will be making the grading decision the same as the disciplinary decision—a distinction this Court has striven so hard to draw a line between. . . . . The second place from which I get that test is the Supreme Court in the *Ewing* case and I would submit that if that test is appropriate for public institutions where the due process requirements apply it clearly is appropriate for private institutions where there are no such requirements.[45]

Susan M.'s Counsel urged that her factual allegations were sufficiently concrete to entitle her to a review of the merits of the grading decision.[46] He was sharply challenged by Chief Judge Wachtler, who questioned whether the courts should be "subjected" to such an overview function for the grades assigned to "the thousands and thousands

43. 474 U.S. 214, 106 S.Ct. 507, 88 L.Ed.2d 523 [28 Ed.Law Rep. [720]] (1985).

44. Harold Weinberger, Transcript of Oral Argument in the Court of Appeals at 6, *Susan "M"* (No. 21057/87) (transcript on file with the authors).

45. Judge Kaye and Harold Weinberger, Transcript of Oral Argument in the Court of Appeals at 8–9, *Susan "M"* (No. 21057/87) (transcript on file with the authors).

46. Thomas Keane, Transcript of Oral Argument in the Court of Appeals at 13–17, *Susan "M"* (No. 21057/87) (transcript on file with the authors).

of students we have in the State of New York in all different levels of school." [47] This exchange followed:

Counsel: Your Honor, *Olsson* already allows a student into the courtroom—

Judge Kaye: But are you suggesting that we should be grading examinations?

Counsel: No Your Honor, not at all.

Judge Kaye: It certainly sounds that way.

Counsel: Your Honor . . . this is not a case where we're asking you to look at that exam and determine whether or not that exam deserves twenty-six points or twenty-five points or twenty-seven points. In this particular case, the Professor said, because I couldn't figure out whether it was New York law or Delaware law that applied, I decided not to give you twenty-five points or thirty points, I gave you absolutely zero credit on that entire essay. Now when it came to the point that this is the exam that lowered Susan below 2.0 and that subjected her to the Academic Status Committee, when those allegations are made that I sat with the Professor and the Professor changed her story three times and then told me she was powerless to change it, that the school should have done something. Unfortunately, they didn't and that's why we're here.

Judge Simons: Sounds like grading the exam to me. You're asking to say that they graded it wrong.[48]

H. The Decision of the Court of Appeals

Ultimately, the Law School's minimalist factual, policy oriented strategy was vindicated. The Court of Appeals unanimously reversed the Appellate Division decision and reinstated the original Trial Court decision which had dismissed the entire petition.[49] The Court held that the allegations in Susan M.'s petition "go to the heart of the professor's substantive evaluation of the petitioner's academic performance and as such, are beyond judicial review." [50] The Court further held that:

[I]n the absence of demonstrated bad faith, arbitrariness, capriciousness, irrationality or a constitutional or statutory violation, a stu-

47. Chief Judge Wachtler, Transcript of Oral Argument in the Court of Appeals at 15, *Susan "M"* (No. 21057/87) (transcript on file with the authors).

48. Judge Kaye, Judge Simons, & Thomas Keane, Transcript of Oral Argument in the Court of Appeals at 15–16, *Susan "M"* (No. 21057/87) (transcript on file with the authors).

49. *Susan "M" v. New York Law Sch.*, 76 N.Y.2d 241, 557 N.Y.S.2d 297, 298, 556 N.E.2d 1104, 1105 [61 Ed.Law Rep. [716]] (1990).

50. 557 N.Y.S.2d at 300, 556 N.E.2d at 1107.

dent'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.[51]

This holding, and the overall tone of the Court of Appeals decision, is a reaffirmation of the principle of judicial noninterference in faculty evaluation of students. The opinion suggests that a student will need concrete evidence of bad faith, retaliatory motivation, sex or ethnic discrimination, or other facts giving rise to a clear inference that the school did not in fact make a sincere academic judgment on the merits of a student's performance. Otherwise, under the standard of *Susan "M"*, academic decision making is immune from judicial review. A collective sigh of relief emanated from the New York area law schools and others who knew of the case.

III. A BRIEF EDITORIAL ON GRADING FREEDOM

Susan "M" thus is a general license to the academy to grade students as faculty see fit without fear of judicial intervention. While we believe that, in most cases, the freedom from judicial scrutiny granted by cases like *Susan "M"* to faculty grading has been exercised responsibly, the result in the case requires that the academy examine its practices to insure that arbitrary grading is minimized.

Students have a lot at stake in grading decisions—an emotional and financial investment in education and their futures. These stakes can provide the student with a strong incentive to view the grading process as an adversarial one—a powerful, but arbitrary and irrational person is making a key adverse decision. As a result, some students would no doubt like to have a procedure by which they could challenge adverse grading decisions in court.

Courts should not be involved in reviewing grading decisions made by faculty even if occasional professorial arbitrariness goes unredressed. First, courts are simply not competent to question a professor's grade. The only reason that the petition in *Susan "M"* even appeared plausible is that law school grades were involved and judges have some expertise on the substance of what is taught in law school. If the case involved a grade in an engineering course, or advanced English literature, or physics, or a foreign language, the notion of allowing a student to challenge the merits of a grading decision before a judge untrained in that discipline becomes ludicrous.

Additionally, judicial review of grading decisions would also discourage experimentation in evaluation methods. The only examination in which there is likely to be one set of correct answers graded the same way by everyone would be a multiple choice question format. This format is appropriate and necessary for certain types of courses, but has significant attendant educational costs. The multiple choice question rewards a narrow range of concrete thinking skills and acquisition of

51. 557 N.Y.S.2d at 300, 556 N.E.2d at 1107.

factual information, but provides no way to assess (or inspire) creativity, research ability, energy or judgment.

Grading decisions on essay questions involve much greater exercise of discretion on the part of the faculty member. There will be large areas of agreement between different faculty members grading the same essay answers for a large number of students, but there will also be disagreement in a small but significant number of cases. One can only imagine the disagreements within the faculty that will be engendered if colleagues are required by courts to review each other's grading decisions on essay examinations.

When evaluations are expanded beyond multiple choice and essay questions to include oral performance in class, performance in professional tasks (e.g. for lawyers—taking a deposition, interviewing a client, negotiating a settlement), or the writing of substantial papers, the range of discretion, and therefore of possible disputes, increases. Judicial review of faculty grading decisions would discourage faculty use of these broader, more subjective methods of evaluation for fear of having grading decisions challenged in court.

Like doctors facing malpractice suits, educators will rely on defensive testing practices to avoid potential litigation if decisions they make are reviewable in court. The incentives to take the easy way out in grading are already great, as it takes additional time and effort to use evaluation methods other than multiple choice examinations.

In the long run, then, it would be the students who would suffer from judicial review of grading decisions, because the number of alternative methods of doing well would shrink. Some students do well on multiple choice questions, others on essays, others on research papers and still others on reality based tasks. The broader the range of evaluation methods in an institution and among professors, the greater the opportunity for a student to shine in some courses, if not in all. Thus, both students and society are better served and protected from arbitrariness not in standardization in evaluation, but by diversity. The student interest in evaluation diversity is the one ultimately vindicated by the Court of Appeals' decision in *Susan "M"*.

A rule of judicial non-intervention in grading decisions should not, however, encourage academic institutions to abdicate responsibility for supervision of faculty grading decisions to insure a modicum of accountability and rationality. Grading curves for large classes insure that individual faculty grading decisions are not wildly deviant in the aggregate. Required process for internal review of grading decisions also have a role to play in protecting justified student expectation of fairness.

At a minimum, the institution should require that, at the student's option, professors be available to meet with the student to discuss the student's grade. Such meetings, painful and time consuming though they may be for the faculty member, are essential to insure that the faculty member made no computational errors, or that something significant to the grading has not been overlooked. A face to face meeting can

also provide an important growth experience for the student by discussing his or her grievance with the person who allegedly inflicted it. Even if the student ultimately disagrees with the professor, at least the student can come away with the idea that the grade has a rational basis.

Appeals beyond the initial professor-student conference can be left to the professor's judgment. Here, creativity, diversity and experimentation should be encouraged. At one New York area law school, for example, there is a professor who creates a panel of students from the complaining student's class. One panelist is selected by the student, one by the professor, and the third panelist is selected by the other two. The panel then hears argument by the professor and the student and determines the appropriateness of the grade. The panel may only choose between the grade given by the professor and the grade advocated by the student.[52] Other approaches to allow students to question individual grades no doubt exist; a faculty committee can gather and critically analyze them.

The ultimate option is that the institution itself could create some kind of internal appeals process for review of grades in certain kinds of courses. Such an internal review process would almost certainly insulate the ultimate grade from judicial review unless the institution failed to follow its own procedure. However, internal review would present great potential for faculty conflict and raises issues of academic freedom. The issues posed by internal review of academic grading disputes threaten faculty collegiality and harmony. Despite these costs, the student's interest in accountability and consistency in grading decisions may require some faculties to consider this option.

The immunity from judicial scrutiny that *Susan "M"* provides for faculty grading decisions should not be taken as a license for an academic institution to avoid the self-study and scrutiny necessary to create internal policies in the area. Fairness to students and the importance of their investment in their education requires nothing less. The less the number of Susan M.'s who feel themselves unfairly treated with no where to turn but the courts for relief among our student bodies, the better.

52. *See* Monroe H. Freedman, *The Professional Responsibility of the Law Professor: Three Neglected Questions*, 39 Vand.L.Rev. 275, 283 (1986) (Professor Freedman is Professor Schepard's colleague on the Hofstra Law School faculty).