

The Law, such as it is

Season 3, Episode 1

Larry Lessig

This is Larry Lessig. This is the first episode of the fourth [actually, third] season of the podcast, “The Law, such as it is.”

If you know this podcast, you know that the seasons are tied to a particular legal case or story, or law like related case or story, and this season is tied to the extraordinarily depressing story of Francesca Gino, who is a Harvard professor in the business school who this year, was terminated by the Business School and the University on charges of academic misconduct.

My relationship to this story at the beginning was as a friend and then, as the story unfolded, I accepted some obligations as a pro bono lawyer, finding other lawyers to support Francesca and finding litigation support, and then litigation funding. And then I finally was involved just in the appeal of the decision of the hearing committee to the Corporation and the President, an appeal which I failed to prevail in.

So I’m not neutral in this story, but I don’t intend to tell this story as a neutral account. I intend to tell it in a way that helps you understand exactly why I believe, as I firmly do, that this story is a story of an innocent person, wrongfully called guilty, and the consequences for her, her family and for, I think, the university are quite profound.

And so this story will, over the course of a number of episodes, unpack this really complicated account of what happened in a way designed to make it so that you, if you are a careful listener or an interested listener, can understand the charges and the evidence and whether, in the end, you believe the charges, given the evidence.

As we go through the story I will post to the website, which is TheGinoCase.info, and also on the Substack, which you can get off of my Substack and link from the website the papers or documents or evidence or argument that’s relevant to that particular moment of the podcast.

The Design. My intent is to tell the story in bite size chunks so that you can follow along, maybe in real time, or maybe you’ll listen to this long after we’re finished, and understand how each part hangs

together to reach the conclusion, which I firmly believe, that Francesca Gino was innocent.

In this episode, I'm going to explain what I hope the podcast will accomplish and why. But we'll begin by introducing the essential elements of the story that got this case going.

In July 2021, Data Colada, which is a website that hosts investigative reports flagging academic empirical work that seems to have problems with the data supporting that work, contacted the Harvard Business School to inform them that it had identified what I'm going to call in this series data anomalies in four papers by Francesca Gino. Now by data anomalies, I mean problems in the data that make it seem as if the data is fake or faked or supplied rather than actually data which should independently support the conclusions of the paper.

Three months later, after Data Colada contacted HBS, HBS informed Francesca of these charges, and then instructed her not to discuss this issue with anyone except two advisors that she was permitted to appoint. So this is the beginning of the gag rule that blocked Francesca from being able to engage in public discussion about these charges and defend herself. And that's significant, because if you're coming to the story, you're coming to it most likely with a lot of information on the other side. There have been articles in major outlets such as the New Yorker and the Atlantic that have recounted the charges against Francesca. But you'll find, if you pay attention in those articles, there's basically no defense offered by Francesca to those charges. And that was in part because, well, in the whole, in the main, completely because, as she was going through this process in order to comply with the rules the university and the business school were imposing on her, she was not allowed to provide the information, the defense. She wasn't allowed to tell her story.

So at this initial stage, I didn't know anything about this story either, because I wasn't one of the two advisors that she appointed. These were two people from inside the business school, so I never heard about this until later. But the important thing to think about, if you think about the time between the first notification to the business school, July 2021 and then October 2021, when Francesca was notified of these charges, is that between October 2021 and June 13, 2023, so almost two years, Francesca lived under this gag order.

Now there's lots that happened during these two years, and we're going to get to what happened in the later episodes. But on June 13, 2023, the Dean of the Business School, Dean Datar informed Francesca that the investigation had concluded, and that it had concluded that she had committed academic misconduct. And then the Dean, through a colleague, tried to advise her that she should go quietly, and if she does go quietly, then the business school would say nothing more about why, in fact, she would leave. But Francesca refused to go quietly, because, as she insisted then and as she continues to insist now, she had done nothing wrong.

Okay, so after the business school concluded that she was guilty of academic misconduct, it asked the university to begin what's called a Third Statute Proceeding. Third Statute, meaning: the Third Statute governing Harvard University, and that's the procedure for revoking someone's tenure. In the whole of the history of Harvard University, no one had had their tenure revoked under the Third Statute proceeding. Lots of people charged with all sorts of wrongdoing, and those people eventually decided to go away, as she was advised to do by the business school. None of them stayed to fight. Francesca decided to fight because, again, as Francesca believed she was not guilty of anything at all.

So when this university proceeding began, that again, put Gino under a new and different gag order: she was not permitted to discuss the tenure revocation proceeding until it was complete.

And though these proceedings were supposed to be an academic process, where academics get together and try to decide whether they believe the evidence supports the claim that some type of misconduct had occurred, this proceeding turned out to be more lawyers than academics. Francesca was represented by lawyers. HBS was represented by lawyers. The hearing committee that ultimately would decide whether her tenure would be revoked was also counseled by lawyers. And Harvard involved its own General Counsel office in the proceeding as well. So a gaggle of lawyers, all working out the question whether the evidence supported the claim that Francesca had committed academic misconduct with respect to these four articles identified by Data Colada.

Eighteen months later — *eighteen months later* — the Hearing Committee, which was a faculty committee composed of seven faculty members from five departments, including one from the law school, heard evidence. Two months after that, the Committee concluded that Francesca was guilty. Now, as I said, I wrote the appeal

to the President and Corporation from that finding, submitting this 25-page document in March of 2025. But in May, the university informed Francesca that it would accept the findings of the Hearing Committee, and effectively immediately she was removed from the University.

Okay, as I said, the aim of this podcast series is to unpack that story. In principle, we could write, I could write a 50,000 word — I don't know how many words it would take — article, essay, book, to tell the story in a way that may clear what I believe. But I think it's going to be more useful to tell this story in a way that people can listen to and hear. In the exchange that I'm going to have with the — well, he is, in my view, kind of a — genius in unpacking the evidence in this story, and also in a couple episodes with Francesca and with some other people who are involved and can provide some perspective and context, we can hear a better understanding of what happened, and help a neutral listener or an interested listener, or even a motivated listener, come to understand more fully what happened. And what was so wrong about what happened.

As I said, the most regular participant I'll introduce in a later episode, he's going to help us understand the facts and the statistics. I've invited Data Colada to participate in this podcast. That might seem odd. They started this whole thing. Why would I want to include them in the story? But the truth is, I'm a fan of the work of Data Colada, and I believe what they do is incredibly important, and so I think they should be a part of this conversation. And I hope they are.

Depending on how the facts unpack, it might be helpful to include the expert who prepared the analysis that was submitted to the university as well, but Data Colada is the core beginning of this story, and I hope they will, with us, unpack that evidence in light of what was discovered about that evidence in the investigation and hearing. We'll see. And as I said a couple times during this podcast, you'll hear from Francesca directly.

So why is this a series that you should listen to? I mean, there's so much out there that you could be listening to, so much going on, so much that is existential to the nation, depending on your P(Doom) to humanity, to the universe. I guess the answer to that depends upon who you are. If you've already heard about this case to any extent, I hope you'll listen, if only to hear the other side of the story. Lots of people have said lots of stuff about Francesca and about this case, most of it with absolute confidence. It's kind of

hilarious when I read these absolutely certain claims by people who basically knew nothing. But that's the nature of the internet these days. It brings out the best of the worst of us in hilarious color.

So you've heard maybe lots about this case, but you've never heard her side. And as I've said, that's because she's effectively been gagged during almost all of these past four years. So you might believe you know the truth. I'm not going to call you out for that, but just give me some time and listen at whatever pace you want. And after you've heard everything, just ask yourself again, were you right, originally? Are you confident you were right?

Because to me, a lawyer, a law professor who teaches at Harvard Law School, that's the bit that gets me the most about this case. As Francesca's lawyers presented her case to the hearing committee that would ultimately decide to remove her tenure — as I reviewed the case that they presented at the stage at which I was engaging in writing the appeal of the decision — I was pretty confident that that evidence would have led the committee to conclude that they didn't have the evidence to decide that she had committed academic misconduct. Why? Because the question the committee was supposed to answer was not, "Is it possible that Francesca committed academic misconduct?" It was not even, "Is it more likely than not that Francesca committed academic misconduct?" The question they were supposed to answer is: "Was there clear and convincing evidence that she committed academic misconduct?"

Clear and convincing evidence. Now any lawyer will recognize that's an extraordinarily high bar. It's not quite the no reasonable doubt standard that a jury must meet in order to find somebody guilty of a crime, but it plainly requires clear proof of a wrong. Clear proof.

Now, as I've said, I'm convinced Francesca did no wrong. I'm convinced she is innocent, absolutely.

But I would concede that there's at least a conceivable scenario to support the idea she's not innocent. Conceivable. I'm going to describe that as the 'evil genius scenario' later on that could show how indeed she could be guilty. But I'm quite certain that scenario is just fantasy. And while I don't think anybody could fairly conclude that it's more likely than not that she committed academic fraud, I guess that's a possible conclusion. We'll hold that idea as we work through the evidence and see whether it can be sustained.

But what I am certain of, beyond being certain that she is innocent, what I am certain of, as a lawyer, is that there is no way a fact finder could fairly conclude that there is clear and convincing evidence of her guilt. To anyone who knows anything about such standard, such a conclusion is just crazy talk.

Okay, which will bring us to the final points I want to make in this first brief episode of this podcast. Crazy talk by Harvard University. Now you might have heard of Harvard University. It's been in the news a lot recently because President Trump is doing everything in his power to force Harvard to bend the knee to him, and essentially turn over to him and his cronies, the management of this, the oldest university in America.

This won't be a podcast about that outrage. Suffice it here that I believe the actions of the President are illegal and unconstitutional, and so will the courts eventually conclude. But many institutions and individuals have caved to the President's threats, technically extortionate threats. Harvard hasn't. Harvard is fighting the illegal threats and punishments being thrown against it by a President with an aggressive and effective legal defense. I have enormous respect for Harvard doing this. Actually, I have enormous respect for the President of Harvard, Alan Garber, and the Corporation, in choosing to do the right thing rather than the easy, or at least easier thing.

No one should doubt that Harvard is going to suffer dearly, even when we win. That suffering is a true act of integrity. And I would say even more. I've taught at many law schools, Chicago, Yale, Stanford. This is my second gig at Harvard. I've been here this time since 2009 and I love it here. I love the Law School. I have enormous respect for my colleagues. They are among my closest friends, and I have never known a more talented and inspiring student body. It couldn't be better for a person with a job like mine.

But one can love and respect a person or an institution, and yet believe they have committed a mistake, indeed a great wrong. That is what I believe here. And this wrong is not just an abstract wrong, it's a wrong that has effectively ended the academic career of an extraordinary teacher and scholar. At the very least, we owe her the best statement of her defense, so that anyone keen to understand at least this version of the truth, which turns out to be the right version of the truth, can.

So in telling somebody I was going to do this, they said to me, aren't you afraid of what Harvard will do to you if you do this? And

when this friend said this to me, I realized both how extraordinary this moment is in American history and how much faith I still have at this moment in American history.

If I were taking on President Trump in a way that would matter to him, in a way that he would even notice, because, of course, nothing would matter to him that I could do and not that he would ever notice it. But the truth is, if I were taking on President Trump in a way that would matter and he would notice, I would be afraid. The truth is, I'm not sure I would have Harvard's courage. I'm an oldish guy. I don't really have another career I could take up. I have three kids still not finished with college. One not even finished with high school. I live in an extraordinarily expensive part of the world. I could not afford not to work. Given everything I've seen, if I were taking on Trump, I would be terrified. And though I'd like to tell myself, I would risk it all to do the right thing, like Harvard has, I can't honestly say that I would.

But at the same time, when my friend asks me this question, am I afraid of Harvard? I realize the enormous faith, maybe just hope I have, about Harvard. Do I believe Harvard would retaliate against me for stating publicly what I believe is true? I don't. I think there is zero chance that Harvard would punish me for criticizing it or them, at least, so long as the story stays true and appropriately respectful. I could never imagine them retaliating. That is what I thought when my friend asked me that question. That is what I believe, because I believe that is what America and Harvard and every great institution should be.

But then, as I thought that, I realized that six months ago, I could never have imagined where we are today, with Trump illegally threatening Harvard, news organizations, law firms, governors, essentially any institution independent of him, and so far, at least getting away with it. So I realize my confidence is just a prediction, and I see that it may be totally naive, but I'm going to act on the assumption that the institution whose motto is *Veritas*, truth, will allow me to describe what I believe is true, even if, maybe especially because, it criticizes Harvard.

So stay tuned for the next episode, which will be one of the few to include Francesca. Thank you for listening.

This podcast is produced by me, not by Equal Citizens. Actually, the production part is done by Josh Elstro of Elstro Productions, but this podcast is independent of the institution of Equal

Citizens, and obviously the institution of Harvard. I'm in my basement with my microphone, reading from my notes, looking forward to the next episode.

And one final note about timing, I can't promise the regular production of these episodes. This story is hard. I discovered how hard it was when I wrote the appeal. I discovered how difficult it was to unpack the story in a way that will make it understandable. And as we will include conversations with others and scheduling those will take time. This season will take time. So if this is a year from now, then certainly you'll be able to listen to all episodes, which I expect will be between six and eight by the end. But if you're waiting right now for the next, all you can do is sign up and we will notify you when the next episode drops. Thanks for your patience. Stay tuned for the next episode.