

The Law, such as it is

Season 3, Episode 3

Larry

This is Larry Lessig. This is the third episode of the third season of the podcast “The Law, such as it is.” This season is considering the tenure revocation of Francesca Gino from the Harvard Business School.

In the last episode, Francesca and I discussed the first part of the two-part process that eventually removed her as an HBS professor. That first part was the process run by HBS to determine her guilt. I said that first part was flawed. Francesca was gagged. She had no opportunity to build an effective defense, and while HBS relied heavily upon a forensic report produced by a company called Maidstone, Francesca was denied the opportunity to hire her own forensic analyst. HBS thus determined her guilt before she was given any meaningful opportunity to build a defense.

We know this flaw in the process was hugely consequential, because once Francesca was free to hire a forensic firm, and once that firm had had an opportunity to study the Maidstone reports and demonstrate the errors in those reports, Harvard effectively withdrew those reports. HBS had thus determined her guilt based on a flawed report. Indeed, members of the committee expressly stated they had relied upon this flawed report in reaching their conclusions. Francesca had thus been denied the opportunity to show the report was flawed before it was used to condemn her to everything else that would follow. Everything terrible followed from this error.

Let’s call this fundamental error number one, because once this error was made and she was determined to be guilty, then all the resources of the Harvard Business School were deployed to defend this flawed determination of guilt. HBS hired the law firm of Ropes & Gray, a powerful Boston firm that deployed at least five lawyers to defend the HBS determination. That defense is now the topic of this second part of the story, from the moment the Dean notified Francesca that she was to be removed until the university confirmed that determination and took away her tenure.

Stay tuned.

Larry

Francesca, thanks for continuing this conversation. So the last time we’d stopped at the point in the story where you had learned

from the business school that it had concluded that you'd engaged in academic misconduct. The Dean called you into his office to tell you that, and he asked a colleague of yours to "counsel you out," which means what?

Francesca

It means asking a colleague to come to me and say, leave, don't fight.

Larry

Don't fight, but you are innocent, so you are not going to leave without a fight. This is June 13, 2023. Later that month, the Dean asks the University to begin what's called the Third Statute proceedings, which sounds so archaic. Do you actually have any idea what "Third Statute" means here?

Francesca

I had to look it up. And I think it comes from very old universities that had set of rules for the way they think about their governance and discipline.

Larry

So this is the Third of the Statutes exactly in our rules. And of course, it's been around since the beginning. But has it ever been used to actually revoke somebody's tenure before?

Francesca

No, as far as I know, I'm the first person who's ever gone through this process at Harvard.

Larry

And so I think you got a sense, a little bit of a clue of why that might be. Jumping ahead in the story a little bit. In January, so six months later, the lawyers representing you in this Third Statute procedure met with Harvard right and what happened in that meeting?

Francesca

We told Harvard that the committee got it wrong, that there were errors in the Maidstone analysis, and we wanted the chance to present our case, to discuss the merits of my case. And Harvard indicated an interest to just pay me to go away, and that involved me resigning. I decided again that I wouldn't resign.

Larry

But this kind of gives you a clear sense of what actually happens whenever there's a fight like this. There's a meeting, they offer you a little bit of money, and they say, in exchange, you're just going to not fight any of the things we're saying.

Francesca

Yeah, I think there is the belief that Harvard has deep pockets and wide networks, and that if you decide to fight, it's going to be a hard fight.

Larry

Yeah, I guess you've discovered that that's in fact, true.

Okay, so you chose not to resign, going back now again. So, in June, HBS asked them to begin the proceeding to end your tenure. At the end of July, you received a one-page letter from the President, President Gay telling you that a complaint had been lodged based on the research misconduct proceedings that HBS had conducted, and thus they were initiating this tenure revocation process. But then you didn't hear again from them for a couple months, right?

Francesca

That's right, I only heard from Harvard again on October 25. I received an email from President Gay with the Third Statute complaint. And the email was very brief. It was, I think, six sentences long, and it indicated that a Hearing Committee would be convened.

Larry

To review whether your tenure should be revoked?

Francesca

Exactly so.

Larry

The 25th was a significant day in the life of Harvard, at least in the life of the President, because the 24th of October, Harvard had learned something about President Gay. Is that right?

Francesca

Yeah, they had learned that Gay had also been accused of academic misconduct.

Larry

Yeah, so I imagine you've gone through this process. You wouldn't wish it on anyone or anything like this process on anyone. But, of course, her process turned out not to be quite the process you've gone through. Harvard learns of the charges that were made by the New York Post on the 24th of October. Within eight weeks, they had had two separate investigations to determine that while there were multiple instances of her failing to cite work that she had relied upon, for example, by paraphrasing the work or including it without any citation at all, in their view, the mis citations were neither "reckless" nor "intentional," and therefore did not constitute academic misconduct.

But the timing here was unfortunate because it raised an obvious question, right? You later discovered that at the time, President Gay determined to bring the Third Statute procedure against you, she declared, "We have to make an example of this woman." Of this woman, meaning you, maybe also hoping it would be a kind of distraction from what was also going on at the time with her.

Now, I think what's important about this is it just underscores how consequential the flawed HBS procedure was to you and to your case. Because obviously, based on that flawed HBS procedure, the President had decided that you were guilty. And you know, I have no problem with the idea that you're going to make an example of somebody who has committed academic fraud, but only after you really determine whether they've committed academic fraud. But here that determination had been made on the basis of a report that Harvard would subsequently effectively withdraw. So President Gay, of course, couldn't know that, but her determination to make an example of you flowed from this flawed Investigative Committee determination.

But shortly after that, in January, President Gay resigns from the presidency. Maybe it was a promise by her to resign that led the committee to limit its judgment against her. We don't know that. But despite the clear examples of her using the work of others without acknowledgement, she remains a member of the Harvard faculty today without any Third Statute proceedings against her.

So this Third Statute proceeding was to have three stages. HBS would file a complaint. That complaint was to substantiate the charges made against you, the charges that would constitute academic misconduct. You then were to answer that complaint, and

then there would be a hearing by a faculty committee, the Hearing Committee, about that complaint and that answer.

Let's talk a little bit about this hearing committee. How big was the committee?

Francesca

There were seven members. I was told that it was supposed to be eight, but some HBS professors felt conflicted, and so it ended up being seven people.

Larry

I don't think we should talk about names, but just what's the mix? What kind of people? On this committee.

Francesca

Three members were faculty members from Harvard Business School, and then the other four members were from within Harvard. So, there was a person who was from the Harvard Divinity School, the chair of the committee, and then there was one from the Harvard Graduate School of Education, one from the Law School, and one was a biology professor.

Larry

And these are all tenured professors.

Francesca

That's exactly right.

Larry

And I take it they're still carrying their teaching load at the time they're serving on this committee.

Francesca

Yes, I believe so.

Larry

Okay, so it's fair to say this is, in effect, a part time committee drafted by the University to weigh the evidence against you to determine whether HBS had met the burden that they had to meet in order to remove you. So what was that burden, what we call burden of proof that they had to meet?

Francesca

It's clear and convincing evidence of grave misconduct or neglect of duty.

Larry

Okay, clear and convincing evidence. Not that there was some anomaly with the data that was involved with the papers, because that much was given, we all acknowledge that there was weirdness in the data. Rather, it's clear and convincing evidence that you had caused or intended to produce that anomaly, or those anomalies within the data, right?

So this is not within your field of expertise. It's mine. Let's talk a little bit about what it means to say, *clear and convincing*. You know, ordinarily, in a civil lawsuit, the plaintiff or complainant or anybody who wants something from the court has to prove, prove something by what's called a preponderance of the evidence standard, and that just means that the Jury or the Judge, the Fact Finder must believe that the charge is more likely true than not. But that wasn't the standard in your case. In your case, the burden the business school had was not a preponderance of the evidence but clear and convincing, which is a much higher standard of proof. It's not quite the beyond the reasonable doubt standard of criminal law, but it's still very substantial.

So now I want to just unpack this standard a bit, because when we get to the actual evidence, not with you today, but with others in later episodes, I'm going to argue that the evidence doesn't even meet the preponderance standard, because your claim, and I'm convinced of this as well, is not that you couldn't prove my guilt, but I'm not guilty, period. I didn't do anything wrong.

But the reason it's important to think about the standard here is because, again, it just makes clear how bizarre this whole action was, or bizarre that it was allowed to proceed as far as it did, because to meet the clear and convincing standard, the Fact Finder must have what's referred to as a "firm conviction of your guilt," and that guilt must be "highly probable," absent, "serious or substantial doubt." So again, we're going to be asking, when we get to the evidence, whether that standard is met. And I'm going to ask the listener when they hear the evidence whether they think that standard is met, but especially whether they think the standard is met in the way that you know, some prominent courts have described it. So the Ninth Circuit Court of Appeals said clear and convincing means,

when the evidence, “leaves you with a firm belief that the conviction or conviction that it is highly probable that the factual contentions of the claim or defense are true.” New Jersey Supreme Court says the “evidence that produces in your minds a firm belief or conviction that the allegations sought to be proved are true.” Colorado, Supreme Court: “if considering all the evidence, you find it to be highly probable and you have no serious or substantial doubt.”

I might be biased. Of course, I am biased. I have a view here. I’m advancing my belief on the basis of that view, but I’m going to predict that no fair listener, after they hear the evidence which will come in the later episodes, will be able to conclude that the evidence comes anywhere close to these standards. And not surprisingly, I guess you would say, because you have said, and again, I believe you are right about this, that you did not, in fact, commit academic fraud.

Okay, so the Hearing Committee, the Faculty Committee that was to determine this, eventually was to receive these documents - the complaint, the answer, any exhibits associated with them, and then the testimony about them - and then, weighing that and the hearing, determine whether by “clear and convincing evidence,” they had established you were responsible for the data anomalies that had been identified.

Now that was a big job. It’s a hard job. So by the end, how many pages was the record that this committee was supposed to understand to do its work?

Francesca

Over 2,500 pages.

Larry

2,500 pages. And during this process, beginning with the process of the Third Statute, what were the rules that were applied to you? Like, what were the obligations that you had during this process?

Francesca

The largest one was confidentiality. The Third Statute procedure stated that any public statement or publicity about the process had to be avoided. And then what’s interesting is that the Hearing Committee, in a sense, made the rules around confidentiality even tougher. So in one of their memorandum to us, they indicated that this is “a confidential personal matter,” and so anything related to

the Third Statute proceeding could not be disclosed. And in fact, if any information would to be disclosed, there would be consequences, because the Committee might determine that there was bad faith on the part of the person disclosing.

Larry

So you were essentially once again gagged in this process, as you were at the very beginning by the business school, watching the world talk about you and this process, but unable to talk back in this process. So when you think back on that, like, how did that make you feel as you watched that? Were you good at ignoring it or not paying attention?

Francesca

Absolutely not. I had so many emotions when learning about confidentiality, because it truly felt like I was in a cage. I finally had explanations for the anomalies. I was ready to talk about them, and I just couldn't publicize them. I just had to stay quiet. And what's interesting is that some of my co-authors reaching out were making comments about the fact that it seemed like I was just sitting and waiting for the leave to pass, and they had no idea about the process that I was going through, what it entailed and what the truth about the anomalies was.

Larry

So you believe you were developing a way to understand and explain what these anomalies were and how they were created. You couldn't talk about it, but everybody could talk about the anomalies on the outside, they could accuse you of committing fraud, knowingly committing fraud, and you're tied to not saying anything about it. Now, the weird thing about this confidentiality, to me, is that when I heard about it, I kind of thought it would be forever, but what was striking about their rules is that the confidentiality ended at the moment the process was over, right?

Francesca

Yes. But there was an additional confidentiality request before the hearing. There we were asked to sign an agreement, a confidentiality agreement, by which we couldn't talk about the hearing forever, and that is the point where I decided not to sign it. It just seemed really strange, especially in a world where HBS had pushed for the HBS report to be public, and now the world thinks that I have committed fraud when that was not the case.

Larry

Right. So you would have been unable to do what you're doing right now: talk about this procedure. There was one side of the story that had been published and your side would not, and you, you and your lawyer said, No, you're not going to sign that. And at that point they backed off, right? And they said, Okay, well, you at least have to maintain confidentiality during this process.

Francesca

That's right. And it was a difficult decision, because, again, you're thinking through, 'will there be negative consequences by pushing back?,' but it felt the right decision to make.

Larry

Yeah, I think it was okay. So we have a process complaint, answer at a hearing. And so when was a complaint actually filed?

Francesca

I don't know the exact date, because when it was attached to the October 25 note, it was not dated, but probably late June, early July of 2023 okay.

Larry

And so this complaint incorporated the HBS report, right?

Francesca

Yeah.

Larry

So it's, it's based on the HBS report, yes. And so your job, then, or the job of your lawyers, was to file an answer to that complaint, and that's what you and your lawyers then worked on and you worked on it for one year, right? For one year, you were working through this complaint and building the response to the arguments they had made, to make it clear to the Committee that, in fact, the allegations were not correct. Is that right?

Francesca

Yeah, that's all correct.

Larry

So July 28 to August 1. And one of the most important elements of this complaint was a forensic report produced by a

company called Maidstone, which had done the analysis to support HBS' conclusion that there was academic misconduct here.

Okay, so let's talk about the answer that you finally completed after one year. One year worth of work. So how long was this answer?

Francesca

It was 93 pages, single spaced.

Larry

Wow. And were you proud of it? Were you proud of what it could show?

Francesca

I felt it was a really strong answer. In fact, I think I'm very naive. I thought that when the answer was submitted, I thought that the Committee would look at it and read it carefully and possibly decide to have an open conversations about the fact that 'we recognize that HBS got it wrong, and so we're going to end the process.'

Larry

Yeah, I would say that was naive, but based on the answer, I can see why you could feel that, because it is an extremely powerful document, responding to the Maidstone claims, the complaint based on the Maidstone claims. And so when you think about what it showed, like, what do you think it actually showed?

Francesca

It did two things really well. First, it told this story for what it was. Why is it that we got to where we are? Why is it that Harvard HBS got it wrong? And importantly, it previewed the arguments that my independent experts would be making, and also it previewed my testimony, and it explained how Maidstone and HBS were wrong, not just about one of the allegations, but across all four.

Larry

Okay, so you're laying out exactly why the evidence that the business school had relied on was mistaken and that it didn't show what they thought it showed. And you had your own forensic experts who had looked at the same material to draw this conclusion, the conclusions they drew. And let's just emphasize again, because it was a long time ago when we did the other episode with you. You didn't get to have those forensic experts until *after* HBS had made

its determination that you were guilty, they had the Maidstone report, and they determined you were guilty, and then you could hire your forensic experts, and your forensic experts could then point out the problems in the Maidstone report.

Okay, now we're going to cover more in detail the specifics of the Maidstone errors in the subsequent episodes. But if you had to characterize the Maidstone report, what kind of mistakes did it make, and, more importantly, what kind of conclusions did it or did it not draw when it was looking at the evidence against you?

Francesca

What Maidstone did was to analyze different versions of data files for each of the allegations, and in particular, they were looking at an earlier version of a data set and a later version. And what they did is identified some discrepancies between the earlier version and the later version. But what they *didn't do* is explain the discrepancies. I don't even think that that's what they were asked to do. And also what they didn't do is to say these discrepancies are fraud and Francesca is responsible. That is actually a conclusion that the HBS investigation committee made, not Maidstone.

And Maidstone also made some errors in their analysis. I think the one that stands out to me is in looking at the discrepancies they ignored the fact that there was a column in one of the datasets that said, exclude these participants. And so, of course, they saw a discrepancy, since the excluded participants were, in fact, excluded in the later data set. But then they realized that that was the case.

Larry

Yeah. So this is just a classic example of how had you had your own experts to review the Maidstone report at the time Maidstone made their report, before the business school committee had concluded you were guilty, they could have pointed out these mistakes. They could have pointed out the weaknesses and maybe Maidstone would have corrected them. Maybe they would have withdrawn them.

But the point is, at that point, before a conclusion about your was made, there could have been an exchange to reveal the weakness of the foundation that this was all going to be based on. You have said that when you filed your answer, you had this naive belief that they would read it and say, 'huzzah. Okay, we're finished. We see that there's no guilt here, or at least no ability to show, by clear and convincing evidence, that you're guilty.'

You filed this on August 1, 2024 and two weeks later, ish on August 16, Harvard was supposed to submit its testimony in support of its complaint. To be clear, it's not the complaint, but the evidence to support the charges in the complaint is that, right?

Francesca

Yeah, that's my understanding.

Larry

And I expect you were expecting that part of that testimony would again be the Maidstone reports.

Francesca

Yeah. And throughout the Third Statute proceedings, HBS kept saying that the HBS investigation process was a "painstaking and comprehensive process," and they kept referring to the report as the reason for the Third Statute proceedings. So what I expected to do was to just respond to those analyses.

Larry

In fact, that's what you had spent the last year working on responding to.

Okay, so then August 16 happens, and Harvard makes its filing, and its filing was not quite what you expected it to be, right. So what did Harvard do on August 16?

Francesca

HBS dropped Maidstone, and what they submitted instead was a 230 pages report by Stanford Professor Jeremy Freese.

Larry

Okay, so who's Jeremy Freese?

Francesca

Jeremy Freese is a professor of sociology, and what he also does he is interested in social science methods.

Larry

Okay, so he is a tenured professor at Stanford. Does he typically do kind of expert reports like this?

Francesca

No, and in fact, he mentioned that this was the first opportunity that he had to do something like this.

Larry

Okay, so you're expecting evidence that's explaining the Maidstone report and the arguments from that to demonstrate your guilt, you had spent a year preparing the response to that. This 230-page report is dropped on you, and the Maidstone report is gone, and this becomes the basis of the Harvard prosecution against you, this new report.

Francesca

Yes, and I remember reading it, and it was a shock. I felt shattered. I remember standing in front of my husband, Greg, and trying to explain the situation, the disbelief, and asking him to take the kids away so that I could spend the next month just trying to address this additional report. And it just felt awful. I had sent my kids away with my husband earlier to focus on the response, and now I was doing again the same thing. And I remember my husband looking at me and say, "You're in the ninth inning. Stand up straight and give it your best game. I'm going to take off with the kids and let you be." And I just had so many tears coming on my face.

Larry

Yeah. I mean, it's literally astonishing. I mean, it's not astonishing that they would want to do this, given the weakness in the Maidstone report, the reports that HBS had relied upon to find your guilt in the first place. It's not surprising they would want a different report, but I think it's literally astonishing that this would be allowed because you had spent, how much money had you spent at that point to write the defense to the Maidstone report in the original complaint over the course of that year?

Francesca

It was over \$2 million.

Larry

\$2,000,000. 14 months of work. A year plus the time before that. And now you had to start over with a brand new report. But even worse, you had had one year to prepare the response to the first Maidstone report, and now you were given one month to prepare a response to the second. And was that all you had to do in the course of that one month before everything was supposed to be completed?

Francesca

Not really. I had to respond to the report that Freese wrote, but that also required going back to the data, trying to understand his analysis, and point out the places where he was wrong. And I had to figure out how to do that in a way that didn't create a Frankenstein-type response, because I had the Data Colada allegations to address, the Maidstone reports to address, what the Committee suggested, and it was almost starting from scratch. And I remember being home alone, and every day of that month, I woke up and glued myself to my chair and worked for 14-16 hours a day. And you have to also remember the context. We have lawyers on each side, and as we are trying to pivot and respond to the report, there are constant back and forth in between lawyers for requests that Harvard is making. At that point, he was the forensic image of my computer.

Larry

Okay, so let's focus a little bit about how the Freese report was actually different from the Maidstone report. Like, what was it? If you had to summarize, characterized the big differences between the two reports.

Francesca

It had new charges, he brought in new evidence to sustain those charges, and he also presented very different analyses. But what was also striking is that Freese did something that Maidstone did not do. He constructed what he called "falsification scenarios" that, according to him, explained how the anomalies could have been created in a way that indicated fraud.

Larry

Falsification scenarios.

Francesca

And personally, I found it really hard to read what he wrote, because he had such great confidence in these falsification scenarios, and yet they came from a person who knew nothing about my research practices and how I worked.

Larry

So these were hypothetical ways in which fraud might have been committed. And the question was whether these would convert into "clear and convincing evidence," evidence that is firm and creates, in the minds of the Fact Finder, a firm belief or conviction that

it is highly probable that they are correct. That's the aim that they were trying to achieve.

And this falsification scenarios was the first time... I just want to emphasize this point, because it's important, the first time in the whole of this process where people had painted these hypothetical scenarios as a way to produce evidence that this is, in fact, what you had done, right?

Francesca

That's right. And the report came at a really tricky moment for some of the analyses. Again, I wanted to have more information. And by then, discovery was over.

Larry

Yeah, let's be clear about that. When he produces new charges and new evidence, if you're going to respond to that, you might yourself need some evidence. So the typical way you would do that is ask for discovery, the process of getting evidence from the other side. But the timing for discovery was over. The rules of the committee forbid you from having any more discovery, right?

Francesca

That's exactly right. No more discovery.

Lawrence Lessig

So you have this one month period where you couldn't get even the evidence to respond, to the extent you needed the evidence to respond to these new charges, new allegations and these falsification scenarios. You know, Stanford's not far from Hollywood, but maybe this is an aspiration to his Hollywood career as he writes the theory of how fraud is conducted.

Francesca

It just felt like I had got punched again and I had my hands tied behind my back.

Larry

Yeah. Okay, so you had great lawyers. I really liked your lawyers. They objected to this new report. They objected to this whole process, right? They asked that the report not be considered. Stated that if the Hearing Committee were to endorse the substitution of this new report over the Maidstone report, "the integrity of the

hearing will be compromised and will be conducted under protest and over the strong objection of the respondent,” you, right?

Francesca

Yeah.

Larry

And were they surprised themselves? I don’t want to breach confidence here, but was this something that anybody was expecting?

Francesca

Everybody was incredibly shocked. And again, not only I had to pivot, but all my experts had to pivot.

Larry

Yeah, pivot because they had developed expert reports based on the allegations that had originally been made. Now there are a whole bunch of new allegations that were made, and so they needed to shift what they were looking at and how they were looking at it. That’s right. And again over a very short period of time.

Okay, so your lawyers objected. The objection was denied. You asked for more time.

Francesca

I did ask for more time, since we needed it.

Larry

And you didn’t get any more time.

Francesca

We did not.

Larry

So let’s be clear about the core mistake here, right? You know, the Hearing Committee was free to consider whatever evidence it wanted. But HBS had made it clear that it didn’t really consider the Hearing Committee to be what we would call a primary Fact Finder. I mean, that’s lawyer speak for you know what the, for example, ordinary jury trial court does? They hear the evidence, they weigh the disputes, they make a determination.

It was clear that Harvard Business School didn’t want the Hearing Committee to do that, because when you had asked for the time

to lay out all of the evidence, and your response to the evidence you'd asked for six days, the business school said you don't need six days. You only needed two days because all of the factual work had already been done by the Investigative Committee in the business school. So now we've already gone through the mistakes that that committee made originally - the process mistakes, gagging you and forbidding you from actually investigating the charges against you, forbidding you from attaining your own forensics firm. And of course, that made this Investigative Committee a particularly terrible fact-finding court. No court gags the defendant or denies her the freedom to develop expert support to defend herself.

But now the point is even stronger because Harvard itself had determined that what the Investigative Committee had done was flawed because it was based on a report that the business school was no longer using to prosecute the case against you. It decided to withdraw the Maidstone report, substitute a whole new report, and that new report was really new. The evidence was new. The charges were new, the theories, the falsification scenarios, were new.

And so given this fundamental shift, I would have thought, you know, the obvious thing for the Hearing Committee to do was to say: hey, hold up here. You know, in the language of judicial litigation, you could have said: Look, you don't get the opportunity to retry your case in this appellate court. You either defend the judgment or we'll send it back. You can try it again in your in your Investigative Committee, and see whether what Freese says stands up. But it's completely wrong for what in effect the business school had argued should be an appellate court to basically hold its own trial. Or if that's what they're going to do, it's completely wrong to do that while limiting your opportunity both to develop a defense by giving you just one month to respond to a 230-page report, and by presenting limit on the defense, they gave you just two days to now respond to all this new evidence.

So I'm going to call this fundamental mistake number two. The first fundamental mistake was gagging you during the investigation. The second now is for the Hearing Committee to become, in effect, the primary Fact Finder. And not just because this is not what a part-time committee could reasonably have been asked to do, but also because it conducted this primary fact finding enterprise so incredibly poorly, and even now worse, you're faced with a record that's just a total mess.

So what did your team at this point believe they needed to accomplish in their final filings with the Hearing Committee?

Francesca

I think you said it correctly and well: it felt like a mess, because this fundamental mistake had a really important implication, which was, we needed to defend what's in the record. We needed to build on the response that previewed our arguments. But in addition to that, we needed to really dig deep into the 230-page report by Freese and ensure that every single explanation that he provides or different theories, we address it.

Larry

Yeah, so you're fighting on four fronts at the same time, including the Data Colada allegations, so all of these things are out there for you in this short time to respond.

So by September 13, less than a month after they replied, you needed to answer everything in this new complaint, which you did. What exactly did your team then produce in response to all of this stuff?

Francesca

So my testimony, my reply, was 181 pages. My forensic experts submitted a report that was 203 pages long. Then I had data experts that submitted a 43-page report, and a behavioral science expert that submitted a report of 64 pages. And then we had written testimony by three different witnesses.

Larry

Okay, so in the end, Harvard had submitted about 1700 pages against you, considering the report, the complaints, the various experts and fact witnesses, plus the supporting materials, like the data files and copies of the relevant emails you'd responded with, about 600 pages. So that's a total of about 2300 pages for this part time faculty committee to work through without considering the supporting materials that they could also be referencing.

Okay, so two weeks after that, two weeks after September 13, the end of September, Harvard was given the last word against you. What did they file at that point?

Francesca

At that point, Dean Datar and the research integrity officer submitted a supplemental statement, and then Freese submitted

112-page rebuttal to our September 13 submission. And then a forensic expert that was hired by HBS submitted a 62-page rebuttal to

Larry

Okay, so all of this is weird, because, you know, normally, at least in a criminal proceeding, it's the defendant that gets the last word on the facts. So here they are giving the last twist to the facts that the committee is going to have a chance to review. But okay, you know, it's not a criminal trial. Maybe, maybe just say, whatever about that.

But the point is, there's a big mess sitting before the Committee, and so the Committee now is to conduct hearings, and there are just two days of hearings scheduled, and this is November 15 and 16th, which I think are Friday and Saturday.

Francesca

That's right...

Larry

...because that's the only time they could fit, because they all are busy professors doing all the things busy professors do. And so the hearing begins. Fill in the context a little bit... what is the hearing like? Like, where is it? What's the room feel like?

Francesca

I think that people might feel like it's a science presentation, and instead, it was not. The room felt very much like, and looked very much like, a courtroom. So you have the Committee sitting on one side of the room with their counsel by their side, and also a chair where people, in a sense, would get deposed or cross examined. There is a podium in the middle of the room, and then behind the podium you have one side sitting with the lawyers, and the other side sitting with the lawyers. And I remember not even being able to see some of the committee members, which in a context like this one, was really hard...

Larry

...they were far away, or because?

Francesca

Because the podium was right in the middle of it, and it's blocking the view. And so I was there with my forensic expert, and HBS

had their forensic experts in the room, and then the witnesses would come in at the time at which they were cross examined. And it was just a surreal moment and a surreal room. HBS brought these large billboards to show the Committee, and that was really strange. And if you just looked around, there were more lawyers than faculty members.

Larry

So HBS has one set of lawyers from, I think Ropes & Gray is their lawyers, right?

Francesca

That's right.

Larry

Really great Boston firm, really, really good lawyers. And then the Committee, you said, had its own lawyers, or lawyer, I guess, was one lawyer was present. Were there more present?

Francesca

I believe there were a couple of them, plus Harvard General Counsel was present. So I think there were five or maybe even six lawyers on the HBS side, I had two. There are lawyers everywhere, yeah.

Larry

So you had two, and then then the committee had two or three, and then there's just seven members of the committee and you, and then the witnesses.

Okay, so you were given six hours of testimony, or six hours to present your side of the case. And so in those six hours, you were supposed to examine the HBS witnesses, present your own defense, show the mistakes in the Maidstone report, which, though Harvard had walked away from it, the Committee was free to consider it if it wanted show the mistakes that HBS had made based on the Maidstone report, show the mistakes in the Freese reports, and also try to explain your theory of what had happened with these four papers written up to 14 years before, as we're going to get to in a minute to explain how these anomalies had been produced.

So when you when you think back on the hearing, leaving the hearing after those two days, how did you feel about what had been presented?

Francesca

The hearing was very contorted, in a sense. Again, rather than talking science, you have time that is constrained, where you have the opportunity for direct arguments, and then you're cross examined by lawyers. So the feeling was weird as I left the room, but I remember thinking that if the Committee decided on the merits of the case, then I would be back to HBS as a professor. I felt good about the arguments that were made.

And then I remember feeling really exhausted. I was cross examined on day two of the hearing, and I basically woke up with no voice whatsoever, which somehow felt very fitting to the moment. Since, again, he was just a really constrained process.

Larry

Were there big surprises that came out of the hearing that you hadn't expected?

Francesca

The most shocking one was the Research Integrity Officer when he was giving his testimony. There were a lot of things that he said that either he has a bad memory or they were just lies. So he, for example, claimed that he encouraged me multiple times to hire a forensic firm. That's not true, but when he was asked about those conversations, he said, 'I don't remember.' Or he mentioned that the evidence in the HBS investigation was not full evidence, because I somehow directed which files to copy on my computer. And when asked why is it that Francesca directed which files to copy, he said, 'Oh, because we wanted to protect her privacy.' And as it turns out, he was so concerned about my privacy that there are 400,000 files in a folder called personal that has family photos and my tax returns. And so it was just painful and shocking to hear him say, consistently, 'I don't remember.' And again, this is the Research Integrity Officer.

Larry

He didn't remember, except he did remember the critical fact which would negate the strongest charge against the Business School Committee, which was that they gagged you and forbid you from hiring a forensic firm when they themselves had hired a forensics firm. Yeah, that must have been hard to watch.

Okay, so after the hearing, three weeks later, you guys have to submit another post-hearing document, filing some 20 pages. And then seven weeks after that, on January 24 the Hearing Committee

issued its final findings and recommendations, and those findings were against you, and the Hearing Committee recommended that your tenure be revoked.

Now let's talk a bit about this document that they released. I'm going to post it on the website and on the Substack. We know from the header data that it was drafted by the lawyers working for the Committee. Might not be surprising, I don't know but, but you know, you've got a 2500-page record. How many pages long was this document with findings?

Francesca

It was 11 pages.

Larry

Okay, and in those 11 pages, how many citations are there to the record that had been developed?

Francesca

There was none. It was actually quite shocking not to see any.

Larry

Yeah. I mean, you know, even the United States Supreme Court feels obligated to point to the evidence that supports its findings or its claims.

This document reads like edicts from Zeus, but as we'll see in the episodes that follow, that this was not the work of Zeus, or at least an omniscient Zeus, because we'll see the obvious mistakes and flat out falsities that are within this report, we'll see it does nothing to explain how it could conclude by clear and convincing evidence that what it did, established your guilt.

But the point I want to emphasize here again is just the failure of this process. They had air dropped new charges three months before the hearing. We'll consider the rebuttal. Considering the rebuttal, you could say it's one and a half months before the hearing, but with no real, meaningful opportunity to respond.

The record was already complex, extremely long, and these were already part time fact finders.

We'll work through not with you, but with others, what their mistakes were.

But at some point it should have been obvious that there was something deeply flawed about this whole enterprise.

Harvard had spent many more times than you could afford to buttress the conclusions of an HBS Faculty Committee, conclusions based on a report that HBS itself abandoned, but rather than rerunning that process after they had abandoned that report, rather than a new HBS Committee being given a chance to evaluate the charges against you grounded in Freese's report and give a real chance to respond to Freese's report, Harvard used the Hearing Committee essentially as this Primary Fact Finder, and that fact finding had gone against you.

And so at this point, when I read this, I volunteered to try to carry the burden of the next step in this case.

I mean, I thought your lawyers had been great, but I was eager to help, because as I unpacked what had happened, it struck me that this case was not really just about you. It was, of course, first about you, the extraordinary injustice that you had suffered. But it was also about this astonishingly bad process by Harvard, not just the Business School process that had gagged you when you needed to actually mount a defense, but this whole bait and switch process with the Third Statute proceeding. Yes, spend a year and \$3 million building a defense against this complaint, and then, oops, sorry, you need to race in the next month to build a new defense against a new complaint with multiple new charges and new theories and falsification scenarios added in, like icing on a cake.

And so when I thought about that, it just felt like insult added to injury when I read this extraordinary line from the hearing committee's report, and I'm going to quote it in its full quote:

Much of Professor Gino's presentation at the hearing focused on her criticisms of the HBS inquiry and investigation. Although we do not find her criticisms compelling, they are ultimately irrelevant to our determination because we did not defer to or rely on the outcome of the HBS inquiry or investigation, nor did we limit this proceeding to arguments or evidence presented in that forum.

Now I don't know. Maybe I'm too naive, too idealistic in my understanding of what fair process would be, but anyone who would look at this process - from the gagging of the defendant during the most critical time to gather evidence, to the fact that the report that was the basis of the finding of guilt was essentially withdrawn, to the bait and switch on the charges being made against her, to a forensic report filled with charges and evidence never reviewed by anyone - anyone who would look at that process and say that the

“criticisms” were not “compelling” obviously, in my view, this is a technical legal term, does not know jack shit about process. This process was an embarrassment.

No one accused of academic misconduct should be restricted in developing a defense before a committee concludes she is guilty.

In developing that defense, the target must be free to hire whatever experts may help her make her case to the initial fact-finder.

She must be free to interview anyone who would have relevant knowledge to demonstrate her innocence.

She must be given adequate time to develop her defense before a committee determines her guilt.

Should an allegation make it as far as Third Statute proceedings, the allegation must be fixed at the start of such proceedings, not subject to changing claims and new experts arriving midway through.

And most obviously, if it does change, the Hearing Committee should just return the process to the school raising the complaint. Do your own hearing, and bring those results to the Hearing Committee. The idea that the Hearing Committee should be a fact finder — as they said, “we did not defer to or rely on the outcome of the HBS inquiry or investigation, nor did we limit this proceeding to the arguments or evidence presented in that forum” — is flat out bonkers.

And anyone who doesn’t see its embarrassment is simply not looking. Okay. So Am I overreacting here? Francesca, or is that how it felt to you?

Francesca

It felt that way for sure. It felt as if the target kept moving.

Larry

Yeah, and that’s a problem with process. With fair process, and there was no fair process here.

Francesca

It felt very unjust.

Larry

Which brings us finally to one more extraordinary error of process. So as we’ll be clearer when we get to the four allegations, three

of those allegations were about papers written a long time ago, when were the allegations related to two through four written?

Francesca

Allegation 4 was about a paper now 13 years old. Allegation 3 was about a paper now 11 years old. And allegation 2 was about a paper that is now 10 years old.

Larry

Okay, so you've had, you're not terribly old. You've had a significant career. So you know, how many years have you been in this business?

Francesca

Over 20...

Larry

Okay, 20-25 years. You've written how many papers?

Francesca

140

Larry

Okay, so we're now talking about four papers over these 25 years, and the allegations in this case are about four papers, three of which are at least 10 years old. Now anyone with any sense of fair process, would ask a pretty obvious question here. Isn't there the equivalent of a statute of limitations about such charge? Is it really the case that an academic can be forced to defend a 13-year-old paper, forced to show how the data for that paper was collected by whom and when? For example, as you hear in the next episode, allegation 4 was about a study conducted in 2010 while you were at the University of North Carolina, right?

Francesca

Yeah...

Larry

And so tell us about that study.

Francesca

That was a study where my coauthors and I were looking at whether signing a pledge of honesty would affect the honesty in the reporting by the person who signed. And so we had different

conditions, three conditions, one in which there was no pledge of honesty, one in which there was first the pledge of honesty and then the reporting of what participants did. And then there was a condition where first participant reported their performance and then they signed a pledge of honesty. And the idea was that people would be more honest if they signed the pledge of honesty first.

Larry

Okay, so how was the data collected for that study, wWay back in 2010?

Francesca

It was collected on paper, which was very common at the time.

Larry

And so, as it just turns out, and amazingly, makes you seem a little bit like a pack rat, but amazingly, you discover that you still had the paper receipts for this, right?

Francesca

That's right, and it's not so surprising, because when this study was conducted, we're back in July of 2010 I was in between jobs. So I was moving from UNC to the job at Harvard that would officially start on August 1. So I likely brought the receipts with me.

Larry

Okay, so you packed them in a box, and they put it in the moving van, and it was moved up here and thrown into your garage, or something like that. So it turned out to be hidden in your garage. And so, you know, you might ask, 'Well, what if you didn't happen to have the receipts?' Because these receipts as well here, when we go through this episode, are really important in establishing your innocence with respect to the charge that was made here. But you know, what if you hadn't had the receipts? You know, the fair process question is, 'Can it really be fair, right, that somebody is forced to defend something a decade ago, that they would have no reason to continue to have the evidence to be able to defend yourself?'

Now some people might hear that and say, why not? You know, fraud is fraud. Why should we allow somebody to get out get away with fraud?

But the reason we have statutes of limitations is not to allow someone to get away with something. It is instead because we understand that evidence grows stale—and it doesn't necessarily grow

stale in an even way. It might grow more stale for the defense, as it were, than the prosecution. Either way, it becomes incomplete. And any effort to understand what happened a decade ago will be skewed by the incompleteness of the evidence. No one keeps every email. Harvard by default flushes email after a number of years. Harvard's own data retention policy (for research materials) is 7 years. But maybe one party in a dispute is obsessive about archiving his own email. Then the facts will be framed around what he saved, even if, what he saved is a skewed and incomplete picture of what actually happened.

All this is why, in fact, there is a statute of limitations for charges of academic misconduct. As the rule provides:

“allegation about research that is more than 6 years old cannot be investigated, unless”: the [scholar] has continued or renewed an incident of alleged research misconduct through the citation, republication, or other use for the potential benefit of the respondent of the research record in question.

Okay, obviously the “unless” clause here is pretty complicated.

Let's do it again...

“UNLESS the [scholar] has continued or renewed an incident of alleged research misconduct through the citation, republication, or other use for the potential benefit of the respondent of the research record in question.”

Okay, let's do a little bit more to unpack this mess.

It's clear that the “unless” clause is saying that staleness is not an excuse if you have “continued or renewed an incident of alleged research misconduct.”

That much makes sense. If you have a dataset that you fabricated in 2000, but use it again in 2025 to write another paper consistent with its fabrication, the mere fact that you had first used it in 2000 can't block you from being charged with fraud in 2025.

The ambiguity comes from the specification of how one “continues or renews an incident of alleged research misconduct.”

The language after that clause states “through the citation, republication, or other use for the potential benefit of the respondent of the research record in question.”

So that complicated clause has three parts. One is

“through the citation, republication, or other use”

Second part is “for the potential benefit of the respondent”

Third part is “of the research record in question.”

So that too is a mess.

One simple way to make clearer what it’s trying to say is to re-order the clauses a bit.

So, for instance,

“through the citation, republication, or other use”

“of the research record in question.”

“for the potential benefit of the respondent”

But even this clarification raises an obvious question: If I simply cite an article I wrote 20 years ago, is that my “continuing or renewing an incident of alleged research misconduct through the citation, republication, or other use of the research record in question for the potential benefit of the respondent”?

In a literal sense, it seems the answer to that question must be yes. Why am I citing the article unless to benefit myself, and the rule expressly mentions “citation.”

But the problem with literal interpretations is that they are often literally absurd. Because what this interpretation means is that if an academic keeps a list of all his citations on his website, or cites them in a string cite in a paper, he is persistently liable for a charge of academic misconduct for everything he’s written for as long as he’s been writing. Or put another way, the only way, as an academic, to get the benefit of the statute of limitations is to stop citing an article after it is 6 years old.

The drafters of this rule realized this problem. In September 2024, they clarified the rule, specifying that “the subsequent use exception applies to the “citation to the portion(s) of the research record ... alleged to have been fabricated ... for the potential benefit of the respondent.”

Now, in my view, this is a completely sensible interpretation. It’s a little bit opaque. We could unpack it like this. What it is saying is that the “subsequent use exception” — the exception that allows them to prosecute a 13 year old paper — depends on showing that the academic has cited “to the portion of the research record alleged to have been fabricated.”

So if you cite a paper that pulls together a bunch of research but not point to the “portion of the research record alleged to have been fabricated,” that’s not subject to the exception. But if you pull the alleged fabrication out and write a new paper based on it, it might be.

Okay, so that complicated rule, but again, it’s their job to interpret the rule that they’re supposed to be implying that complicated rule. How do you see that complicated rule applying to the four allegations?

Francesca

In this case, when I use the clarification to the rule, then what you see is that I did not cite the portion of the research record that was said to have been fabricated within the last six years.

Larry

So what you did, and what we’re going to do is we’re going to post all of the examples of your citing so people can look at how you cited them, and you can see that how you cited them is basically the way that you would cite just a string side of things that you had worked on in before. You would not cite to the portion of the research record said to be fabricated. And so if that’s true, you would not be within the exception, which means that if that’s true, you should not have been prosecuted for all four of these papers. At most you should have been prosecuted for just one.

Okay. Now, astonishingly, the HBS Committee didn’t even bother to explain why it was allowed to investigate because, remember, the rule says you cannot investigate the charge if it’s more than six years old. They didn’t even explain why they were allowed to investigate these three papers despite the rules.

The Third Statute proceeding did explain why they were allowed to investigate and prosecute for these despite the rule, but it held that the mere citation of the article, not the citation or use of the allegedly fabricated data was enough to trigger the exception.

And my view is that is just a plain misreading of this rule.

And again, you listeners can verify. You can look at the citations as we post them on the website. You decide whether it fits this exception, which we’ll also post with a little bracket that shows you exactly how it has changed.

But as I read this reinterpreted rule, what this means is that three quarters of this case should never have been in the case, three quarters just disappear, which means that 75% of the over \$3 million that you have spent, and 75% of the who knows how much Harvard has spent? Obviously, much more than you, because they had five times the number of lawyers you had working on this case would never have been spent.

Now again, this argument doesn't wipe away all 4 allegations. One would remain. And in the next episodes, as we address the evidence for each, we'll see that the evidence for this one is also embarrassingly weak. But I want to call this fundamental mistake number 3: And recognizes just how astonishing is the waste that this process has spread, given the narrowness of the only legitimate case that could have been brought here. Data Colada was free to raise questions about whatever it wanted. It wasn't bound by a rule that said that allegations older than 6 years "cannot be investigated." But Harvard was bound by that rule. Despite being forbidden—under its own rules — from "investigating" three of the 4 allegations against you, it has forced you to defend all four.

Maybe someone would say, Harvard wasn't forbidden. It was free, someone might say, to interpret the rule in the absurd way — in a way that means no one is ever free from an allegation of misconduct.

True. But then at the very least, Harvard should be honest about the fact, and not pretend, either to the public, and certainly not to its faculty, that it gives anyone the benefit of a limitations rule. Under this interpretation, it does not. Under its interpretation, citing work you have done in the past is enough to expose you to the burden of defending yourself against a charge of fraud from that work, however old.

And that burden, as we've seen in Francesca's case, is an extraordinary burden.

Okay, so let's bring this episode to ground. You submitted your appeal of the Hearing Committee's determination on March 14. When was the next you heard from the administration?

Francesca

It was May 20 in 2025

Larry

And how did you hear from them?

Francesca

Through a one paragraph email.

Larry

So we've got the email here. I want to give it to you and ask you to read it. Can you read the email?

Francesca

The subject is "Message from President and Fellows." And I'm going to read the text:

At the request of the President and Fellows of Harvard College, I write to inform you of the President and Fellows' decision to accept the findings and recommendations of the hearing committee empaneled to consider the matter concerning Professor Francesco Gino of Harvard Business School pursuant to the Third Statute of the University, and to remove Professor Gino from her appointment as a tenured professor at Harvard University. And then there is the signature.

Larry

Okay, so when the Dean of the Business School informed you of the Business School's decision, they had the character at least, to call you into the office and confront you face to face. Here's Harvard dismissing you effectively in a one paragraph email. Is there something you noticed about that email?

Francesca

They misspelled my name. It's Francesco instead of Francesca.

Larry

So they send you an email that misspells your name to tell you and then dismissed. They haven't responded to your appeal. They've given you no explanation beyond that. And so when you read that, notice this, how did that make you feel?

Francesca

It felt cruel. It lacked humanity. I had spent 15 years giving my heart and mind to the institution. I taught, I did research, I mentored and advised. I thought of myself as a good citizen. I am certainly far from perfect and if I were to go back, I would spend time thinking about how to improve the practices in the field. But I did not commit academic misconduct.

And that email was such a hard reality. I had spent almost two years on unpaid leave, navigating through a process that was truly an insane emotional roller coaster. And here we are, about three weeks before the end of my leave, and I got fired this way.

And I kept thinking about what this university stands for, which is Veritas, and with this motto in mind, I just still... I didn't understand what I went through. And to this day, I don't get it. It was not a search for truth. It was just a really painful process that I don't wish on anyone.

Larry

There will be some who hear this and think to themselves, okay, fine, but if you committed academic fraud, you got what you deserved, and I think it's a fair thought.

In the next episodes we're going to work through whether anybody could fairly believe that the evidence shows that you committed academic fraud. And so from my perspective, it's both because I think there's no sufficient evidence that you committed academic fraud, and that I think that this process was an embarrassment to a great university, that I thought it is important that we find a way to tell this story.

So I'm grateful you've put yourself through these two interviews. These will probably be the last times we talk, although, depending on how the next episodes unpack, we might find it helpful to bring you back at the end, but I'm grateful you would suffer this for us too.

Francesca

I really appreciate you talking to me, Larry, and I appreciate the courage that you're showing and making sure that people know more about my story, my side of the story. But also, I hope that it causes people to pause and reflect on the type of processes that were used here and that that changes.

Larry

That ends the third episode of this season of the podcast, "The Law, such as it is."

In the next episodes, we will turn to the actual papers and the claims of academic misconduct made against each of them. I will be joined in that conversation with a friend who has studied this case as carefully as anyone.

And as I said at the start, I have invited Data Colada to participate in these conversations, but I've not yet received any reply to my request. Now, some might think it weird to ask Data Colada to participate. They, after all, began all this, but as I've said from the very beginning, I don't fault them for raising questions. I praise them for raising questions. Once they had raised those questions, it was for Harvard to fairly and accurately evaluate whether the anomalies that Data Colada had identified could fairly be tied to Francesca's intentional actions. They didn't conduct that investigation. They're not responsible for whether Harvard got it right or not.

So I was hopeful, I remain hopeful, that they could participate in the post-mortem of what Harvard did and what Harvard concluded, to see whether they agree with the decisions that Harvard has made based on the evidence that was adduced beyond the anomalies they had identified. We'll see. Stay tuned.

This podcast, "The Law, such as it is," is my production. The actual producing of it is done by Josh Elstro of Elstro Productions.

This episode marks the end of the conversation with Francesca, and the next two or three conversations will then cover the substance of the charges, as I've just said. And then at the end, we will have a reflection on what we might learn from the whole of this extraordinary process.

I've been inspired or condemned, you can decide which, to try to tell this story through a podcast, in part because there are so many different parts to think through. And to think through them slowly is, I think, the best way to think through this issue.

But it's hard for some to keep up with the pace or to slow down to the pace. And the classic picture, perhaps this is the best image of the moment we are in, in our time as a culture.

Someone tweeted about this new podcast. Here's what they said — remembering, of course, that from the very beginning, I've described how each step of this podcast will introduce more of the case, and that the final proof that there is no evidence to convict Francesca will come at the end. After the second episode was released, this is what this tweeter said,

"a new passionate defense of Francesca Gino, this time a podcast series by Lawrence Lessig. I'm tired of reading whataboutism on this case, so I fed the released transcripts to Claude to check if there was finally an

explanation for the data anomalies. LOL. You know the answer.”

Yes. We know the answer to whether there’s finally an explanation for the data anomalies in podcasts that have said we are not yet getting to the explanation for the data anomalies, but stay tuned. We will get there, and then we’ll see if Claude will agree with the conclusion that I’ve drawn: that this prosecution was based on a mistake.

Thanks for listening.

I hope we can get to the next episode soon.

This is Larry Lessig.