

## The Law, such as it is

### Season 3, Episode 5

#### Larry

This is Larry Lessig. This is the fifth episode, technically, of the third season of the podcast, “The law such as it is.” It’s just a supplement to the episode we’ve just released about quote, allegation number two,

As we release these podcasts, I’ve received lots of emails and communication from members of the Harvard faculty and the public as well. I’ve said that we’re going to not talk about the evidence in the case prior to completing all of these podcasts, which is taking a long time, just because this isn’t my only job.

But I received an email from one of the most respected members of the Harvard faculty, a friend and somebody I’ve worked with in various forums for democracy reform. I was keen to dig into what he said he found when he looked at the hearing committee’s report, which led him to wonder whether, in fact, we had demonstrated that hearing that allegation number two was not actually fairly found against Francesca.

He pointed to one particular fact that the hearing committee had relied on that did make it seem completely implausible that anybody other than Francesca would have been responsible for the anomalies which form the basis of allegation number two. That fact is the finding by the hearing committee that the modifications of these data happened between Thanksgiving Day 2014 — that’s November 27, 2014 — and the next day. The allegation is she started with a clean set of data on Thanksgiving, presumably after dinner that night, and sat down and started modifying those that spreadsheet. And by the next day, she had a spreadsheet that supported the allegations or the hypothesis of the paper more strongly. That’s the basis for them believing that she had done this, because who else would have had access to the data on Thanksgiving? This is not when RAs are working. It’s a very short period of time. Who else than Francesca?

It’s a strong argument. If it were true, one could well believe that it’s very highly probable that she must have made those changes.

Here’s the problem with the argument: The evidence shows it’s completely false. False. Because, as the expert report of Michael

McGowan demonstrated, when the Business School's investigative committee went through this evidence and concluded that she modified the data between Thanksgiving and the next day, they had missed *five* other files in the archive that had been collected that traced the modifications of these data from September 27 — literally, two months before Thanksgiving, through Thanksgiving. There was a file from September 27 a file from September 30, a file from October 6, a file from October 7, and then the file on October, November, 26 which contains the results from the participants who took the survey, which was created then on the 27th.

These earlier files trace the evolution of these data. But it's not as if the hearing committee or the investigative committee considered these five files and said these files are irrelevant for the following reasons, or they're fabricated for the following reasons, or they're made up for the following reasons. They didn't consider these data at all. What they did was ignore them. Inconvenient facts they ignored, so that they could reaffirm the false assertion that the modifications began on Thanksgiving and ended on the day after Thanksgiving.

This is a common pattern in the hearing committee's report. It's kind of obvious if you read the hearing committee's report, because they don't cite a single source for their claims: They speak as if, standing on Mount Olympus declaring these truths to be true, but without pointing where in the record, the evidence is to support what they've said.

Here in particular, the lawyers had pointed them to the fact that the claim from the Investigative Committee grounding this charge on the changes occurring within the 36 hours, or 24 hours between Thanksgiving and the following day was false. Just false. But they ignored that fact. Or they overlooked it, or they were so busy they couldn't consider it, whatever the reason is, this critical fact, which my colleague pointed to, to suggest that this shows that she must have made the changes, is not true.

That's all for this episode. The next episode will then pick up on one of the other three remaining charges. As you'll see as we move through these other three remaining charges, each of them has flaws as fundamental as the ones we've identified with allegation number two. Putting them all together, with the extraordinary procedural flaws that this case evinced, should lead any fair observer to conclude that this was a mess: An outrageous mess that Harvard pushed to avoid the embarrassment of admitting that they were wrong. Because God forbid, Harvard University would be

embarrassed, even if that refusal to acknowledge that they are wrong has cost an extraordinarily talented young academic her career.

Stay tuned. I can't promise when, but stay tuned for the next episode.

This podcast is produced by me, not my nonprofit, and working with Josh Elstro of Elstro Productions. You can find all of the episodes for this podcast on Apple podcast or Spotify, though, Spotify is a little bit clumsy in giving you access to the podcast in the right order. And you can find them on the website that I've built for this case, TheGenoCase.info. I've also put it on a sub stack, which you can find connected to me. Lawrence Lessig, thanks again for listening. Thanks for keeping an open mind, and thanks for the feedback, if, even if I don't have the cycles right now to respond to all of it.

This is Larry Lessig. Thanks for listening.