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15.3 Restorative Justice at Dalhousie: A reasoned alternative to the "rush to judgment"

By David R. Karp, Associate Dean of Student Affairs and Professor of sociology at Skidmore College.

Dalhousie University in Nova Scotia, Canada, has chosen to pursue a restorative justice response to a Facebook sexual harassment scandal involving 13 students in the School of Dentistry. This choice has received a significant backlash with a protest, an online petition, a threat of "hacktivism," and news editorials calling instead for immediate expulsion of the students. What is the university to do?

Offensive Facebook postings by 13 male dental students

The 13 male dental students have been accused of posting comments in their private Facebook group endorsing gendered violence. The students gave each other names of female students and asked, “Who would you hate fuck?” The caption to a woman wearing a bikini read, “Bang until stress is relieved or unconscious (girl).” Another post joked about using chloroform on women (CBCNews 2014). At a time when college student sexual assault is prominent in news headlines (Bogdanich 2014) as well as a focus of U.S. presidential executive orders and congressional legislation, (Stratford 2014), it is not surprising that this incident generated heated debate about an appropriate response.

The restorative justice approach

Dalhousie has committed to a restorative justice approach. This process requires careful preparation and will involve dialogue among the accused students, assuming they have admitted responsibility, and the people they have offended. In this case, harm was caused to the women directly named in the posts and to the other women within the class. More broadly, as evident in the public outcry, the men harmed the university community, the dentistry profession, and the public trust.

The restorative process begins with meetings that provide opportunities for the harmed parties to describe how they have been impacted by the men’s actions. They also provide a chance for the men to acknowledge their responsibility by talking about what they did, who they think has been affected and how they think these people have been harmed. The meetings also seek to understand the culture and context that supported or contributed to these harms. All participants will then have to consider what the men must do to take full responsibility and address the harms they have caused and what others with responsibility and authority can do to change problematic underlying conditions identified through the process.

Demands to "expel now"

Campus conduct administrators are typically provided a set of sanctioning guidelines that are predominantly a model of progressive exclusion. As the offense becomes more severe, the student is further separated from the institution beginning with a warning, loss of privileges, removal from campus housing, suspension, and finally expulsion. This range of options did not sit well with protestors, who held signs that read, “Dalhousie hates women,” ‘No more rape,’ and ‘Expel now” (Goodyear 2014), implying that unless the administrators adopt the most severe sanction and expel the students, they would be complicit with the accused students in supporting rape. The protesters’ demands for expulsion were quickly endorsed by newspaper editorials (Chronicle Herald 2014), an online petition that gained over 40,000 signatures (Change.org 2014), and a threat by the hacktivist group Anonymous to expose the names of the accused students unless they were expelled (Bruce 2014).

As tempting as expulsion may be, this kind of punitive justice has its costs. First, it is constrained by due process. Each student must be found in violation of the university code of conduct. As reprehensible as the
Dalhousie Facebook posts may be, it is not immediately obvious that they are conduct violations. A police investigation determined that no crime was committed. Does posting comments—even tasteless and hateful ones—between friends online constitute a conduct violation or is it protected by the freedom of speech? Should a student be expelled for holding obnoxious beliefs?

A comparable example at Brandeis

Simultaneously, another campaign for expulsion has arisen. In this case, activists are calling for the expulsion of a black student at Brandeis University for Tweeting comments such as "I have no sympathy for the nytpd officers who were murdered today" and "the fact that black people have not burned this country down is beyond me." (Jaschik 2014). Similarly, the activists believe she should be expelled for her lack of empathy and condoning violence. Who decides which callous statement is a conduct violation and deserving of expulsion? When does a code of conduct become a form of censorship that is anathema to liberal education?

The restorative justice focus: what harm was done and how can it be repaired?

Restorative justice operates from a different premise than punitive justice. Rather than asking what rule was broken and what punishment does the offender deserve, the primary questions are what harm was done and how can it be repaired? Clearly, many people have been harmed by this incident—not just fellow students, but alumni, university faculty and staff, and perhaps even the wider community of dentists and their patients. Whether or not there is a conduct violation, restorative practices seek to identify who has been harmed and invite them to articulate how they have been harmed and what they believe can be done to repair it.

Can expulsion be the outcome of a restorative process? Yes it can, but the question is framed differently. Instead of asking, "should the students be expelled?" we ask "what, if anything, could the offenders do to rebuild trust to the point others would welcome their continued membership in the university community?" Restorative practices are designed to accommodate expressions of moral disapproval—even outrage. By having offenders face harmed parties who can directly articulate how they have been offended, it is more difficult for them to deny or diminish their responsibility. But they do so within a context of support and reintegration, so that reconciliation and earned redemption are made possible.

Another problem with the expulsion ultimatum is that it is a conflation of needs with strategy. Expulsion is one way for an aggrieved community to get its needs met, but hopefully, there are others. Restorative justice is an approach that allows for the full exploration of those needs. The practice of inviting harmed parties to speak about how they have been impacted by the offending behavior enables participants to identify underlying needs and then to brainstorm ways to address them. Without this process, we cannot know what the harmed parties’ needs are, or if expulsion, for example, is really the best or the only way to address them. It is likely that the many harmed parties have varied needs. They may want to be ensured a safe and respectful learning environment. They may want the leadership of Dalhousie University to dedicate new resources to eliminating sexual misconduct and an insidious rape culture. They may want assurance that the offenders understand the seriousness of their misconduct, that they are remorseful, that they are willing to take responsibility, and that the will do whatever it takes to regain the community’s trust in them as students, as dentists, and as citizens.

Possible outcomes in a restorative justice model:

What kinds of outcomes could be possible from a restorative justice process? Again, it is impossible to specify exact solutions without identifying harms. Expulsion is possible if the participants are unable to reconcile and harmed parties can see no path to redemption and reintegration. If the harmed dental students feel as if their learning opportunity will remain foreclosed, then it is possible for the offenders to be suspended until their cohort graduates. During this period, they might undertake various efforts to regain trust. They could take coursework (elsewhere) on gendered violence. They could do meaningful volunteer
work that demonstrates positive citizenship. Could they spend a year volunteering with Dentists Without Borders? Would that be the kind of transformative experience that could enable people to see them in a new light?

In this case, given the intense public reaction, regaining trust and making amends would be a demanding undertaking, potentially one so onerous that the students would choose to withdraw from the university rather than commit to redeeming themselves. Dalhousie could force them out, and the students would be passive recipients of a punishment that might leave them chastened, but embittered, and with their education and careers in tatters. Or Dalhousie could help them be accountable proactively, engaging them in a restorative learning process that would rebuild trust and invest them along with the larger community in significant efforts to solve the profound problem of gendered violence.

David R. Karp's scholarship focuses on restorative justice in community and campus settings and on prison programs preparing inmates for return to the community. He is a member of the advisory council of the National Association of Community and Restorative Justice and received the 2010 Donald D. Gehring Award from the Association for Student Conduct Administration for his work on campus restorative justice. Karp has published more than 100 academic papers and six books, including The Little Book of Restorative Justice for Colleges and Universities (2013) and Restorative Justice on the College Campus (2004). Karp is the principal investigator of a multi-campus research project on student conduct practices called the STARR Project (Student Accountability and Restorative Research Project). He received a B.A. in peace and conflict studies from the University of California at Berkeley, and a Ph.D. in sociology from the University of Washington.

15.4 Federal courts rejects common plagiarism defense

On December 30, 2014 a federal court in Massachusetts addressed one of the common plagiarism defenses raised on campus: the challenged work was a "draft" not submitted for formal evaluation. Megon Walker v. President and Fellows of Harvard College (United States District Court, D. Massachusetts). The court also reiterated a "basic fairness" standard widely applied to student disciplinary proceedings at private institutions of higher education.

Excerpts from Megon Walker follow in added question and answer format:

**Topic addressed:**

[1] How did this case arise?
[2] What are the facts?
[3] What disciplinary proceedings were conducted?
[4] Is a contract involved?
[5] Was the student's work "submitted?"
[6] Were the disciplinary proceedings properly conducted?
[7] Was the hearing improperly "adversarial?"
[8] Was the proceeding conducted "as favorably" to plaintiff "as possible?"
[1] **HOW DID THIS CASE ARISE?**

Plaintiff Megon Walker sued defendants President and Fellows of Harvard College, Ellen Cosgrove, the Dean of Students at Harvard Law School, and Lloyd Weinreb, Professor of Law at Harvard Law School and Chair of its Administrative Board, for breach of contract and defamation, seeking damages and injunctive relief. Defendants have moved for summary judgment.

[2] **WHAT ARE THE FACTS?**

The plaintiff attended Harvard Law School ("HLS") from 2006 to 2009. She was a member of the *Journal of Law and Technology* ("JOLT") all three years. As a first year student, she was a "sub-citer," verifying the accuracy of citations and quotations of draft articles JOLT selected for publication. In plaintiff's third year of law school, JOLT accepted her application to write a case comment . . . for publication in the journal that spring. Plaintiff was expected to present a completed draft by February 1, 2009, and she understood that the draft would have to include citations to her sources.

Ms. Walker delivered a first draft of her comment to JOLT on February 2, 2009, a second draft on February 8, 2009, and a third draft on February 16, 2009. Plaintiff's fourth and final draft was due February 22, 2009. She turned it in late, on February 24, 2009.

After sub-citing of plaintiff's draft comment was completed, JOLT staff began "tech edits," in which the focus is on spelling, grammar, punctuation and other errors. During this process, concerns arose that plaintiff's argument was derivative of one of the dissents in the *Bilski* case and that it was similar to other published pieces. As a result of these concerns, the co-Editors-in-Chief of JOLT, Bradley Hamburger and Lindsay Kitzinger, decided to halt further production until their concerns could be addressed.

Mr. Hamburger reviewed plaintiff's entire draft for plagiarism, using Google to run internet searches on full sentences from her final draft. Hamburger found that significant portions of the article had been copied from other publications concerning the *Bilski* case, and Walker had either not attributed those portions or had done so improperly. He stopped this process after documenting twenty-three instances of apparent plagiarism.

[3] **WHAT DISCIPLINARY PROCEEDINGS WERE CONDUCTED?**

After showing this evidence to Ms. Kitzinger, Mr. Hamburger and Ms. Kitzinger brought the matter to the attention of Dean of Students Ellen Cosgrove. Dean Cosgrove in turn notified the HLS Administrative Board (the "Board"), which is responsible for academic regulations and standards of conduct at HLS. The Board reviewed the record and voted to go forward on charges of plagiarism.

As Dean of Students, Dean Cosgrove served as the Secretary to the Board. In that capacity, prior to the hearing she provided to each Board member copies of the 29 page statement and 313 pages of exhibits plaintiff's attorneys submitted. The Dean also worked with plaintiff's attorneys to help them collect evidence, including internal JOLT emails. Dean Cosgrove was not a voting member of the Board.

Though plaintiff attempted to resolve the situation without a hearing, she was informed that plagiarism is
too serious a charge to resolve informally. Plaintiff also requested to change her exam schedule to allow more time to prepare for the hearing, but was denied.

At the conclusion of the hearing, the Board issued Walker a formal reprimand, rather than the normal sanction of suspension, thus allowing Walker to graduate on time with her class. The letter of reprimand is kept private in Ms. Walker's file and not published, though its existence is noted on her transcript. Her transcript is not made available without her consent.

[4] WAS A CONTRACT INVOLVED?


"[A]n entering student forms a contractual relationship with her university and . . . a disciplinary code can be part of that contract." Kiani v. Trustees of Boston Univ . . . (D. Mass. 2005). Contracts between students and universities are interpreted "in accordance with the parties' reasonable expectations, giving those terms the meaning that the university reasonably should expect the student to take from them." Havlik v. Johnson & Wales Univ., 509 F. 3d 25, 34 (1st Cir. 2007); see Schaeer v. Brandeis Univ., 432 Mass. 474, 478 (2000)(citing Cloud v. Trustees of Boston Univ., 720 F.2d 721, 724 (1st Cir. 1983)). Contract interpretation, including whether any ambiguities exist in the disputed contractual terms, is generally a question of law for the court. . . .

[5] WAS THE STUDENT'S WORK "SUBMITTED?"

Count I of the complaint alleges that Harvard breached its contract with Walker by finding she had committed plagiarism because her February 24 draft was "not a `submitted' work as defined by the . . . Student Handbook." The parties do not dispute that work for JOLT fell within the Student Handbook. Rather, plaintiff argues that "[t]he plain meaning of the word `submitted' is "to yield or surrender to the will of another." But that is far from the plain meaning of "submitted" in this context.

The relevant Handbook provision states that

[all] work submitted by a student for any academic or non-academic exercise is expected to be the student's own work. In the preparation of their work, students should always take great care to distinguish their own ideas and knowledge from information derived from sources . . . Students who submit work that is not their own without clear attribution of all sources, even if inadvertently, will be subject to disciplinary action.

Far more reasonable than the meaning proposed by plaintiff is the first definition in Merriam-Webster's dictionary, "to give [a document, proposal, piece of writing, etc.] to someone so that it can be considered or approved." Submit, MERRIAM-WEBSTER DICTIONARY ONLINE, (2014), available at www.merriam-webster.com/dictionary/submit.

Moreover, the definition provided by plaintiff is properly that of the verb when it takes no object, that is, in its intransitive form. In the phrase "all work submitted" from the Handbook, "submit" takes the object "work," clearly in its transitive form and matching the "to give to someone for consideration or approval" definition. See Submit, Oxford Dictionaries, available at http://www.oxforddictionaries.com/us/definition/american_english/submit/.

There is simply no situation where HLS could have reasonably expected a third-year member of a law journal to believe that the handing over a draft article to that journal for editing prior to publication was not "submitting" the work within the meaning of the Handbook. Plaintiff gave a piece of writing, a draft of her note, to an editor of JOLT so that it could be approved for publication. Plaintiff suggests that because she viewed the piece she turned in as a work in progress, it was not a submission within the meaning of the Handbook . . . Nowhere in any reasonable meaning of the term "submit" is any concept of finality, as
plaintiff attempts to insert. Ms. Walker's subjective understanding of the term here is irrelevant; because the meaning she ascribes to the term is unreasonable . . .

Under the proper meaning of the term "submit," there is no question that turning in a draft of an article for editing by JOLT would qualify as a "submission," whether or not the draft was the author's "final" draft.

[6] WERE THE DISCIPLINARY PROCEEDINGS PROPERLY CONDUCTED?

Plaintiff alleges that Harvard breached its contract with her because it failed to comply with the Handbook provisions for Board proceedings in four ways: (1) that the hearing "would be non-adversarial"; (2) that "it would be concluded in the manner most favorable to [her] in light of the circumstances"; (3) that "[she] would have the right to cross-examine any witness at the hearing who had offered evidence against [her]"; and (4) that "[she] would [not] be sanctioned unless the charged infraction [was] established by clear and convincing evidence." I will address each of these claims in turn.

"Where, as here, the university specifically provides for a disciplinary hearing. . . we review the procedures followed to ensure that they fall within the range of reasonable expectations of one reading the relevant rules." Cloud, 720 F.2d at 724-25. As above, it is not what plaintiff's expectations of the proceeding were, but whether the proceedings fell "within the range of reasonable expectations of one reading the relevant rules," an objective reasonableness standard. Id. The court must "also examine the hearing to ensure that it was conducted with basic fairness." Id.

[7] WAS THE HEARING IMPROPERLY "ADVERSARIAL?"

Ms. Walker's first claim on this count is that the Handbook guarantees a nonadversarial proceeding and that the proceedings here were adversarial. The relevant Handbook provision states that the "Board does not consider itself to be an adversarial or prosecutorial body. Even if HLS could reasonably expect a student to interpret that passage as guaranteeing a non-adversarial proceeding, the transcript and undisputed facts reflect nothing to indicate the proceeding was conducted in an adversarial manner. Plaintiff recites a litany of conduct she found objectionable during the proceedings, and seeks to weave those isolated events into an impression of an inquisitorial proceeding. The fact is this impression is simply not borne out by the transcript.

None of the instances Ms. Walker cites, even taken together in the light most favorable to her, can transmute the proceedings into a prosecution. Several of her claims in this regard simply had no evidence in the record or cannot logically lead to the inference plaintiff seeks to draw. There is no evidence to support Dean Cosgrove's "failure to act as an impartial liaison" or any "consistent[ ] hostil[ity]." There is no evidence to support plaintiff's contention that Dean Cosgrove "coached" Hamburger and Kitzinger before the hearing.

There is no provision in the Handbook allowing, let alone mandating, an "informal resolution" without a hearing, and plaintiff does not dispute that "plagiarism is too serious to resolve without a hearing." Therefore, failing to allow an informal resolution cannot be viewed as a breach of the Handbook. Likewise, the Dean's refusal to grant an extension for taking exams and handing in papers to allow plaintiff to prepare for the proceedings was not contrary to the Handbook. And requiring plaintiff to answer a single question, concerning her own belief, cannot on its own or in any context give rise to any inference of an adversarial atmosphere.

Dean Cosgrove's initial failure to aid plaintiff in discovery might have given some support to plaintiff's contentions—if the Dean had not eventually yielded and helped.
This leaves plaintiff's objection to allowing Hamburger and Kitzinger to consult one another during their joint testimony. Even ignoring the informal tone of the proceedings and the limited extent to which the two conferred, no rational finder of fact could find that this ruling amounted to a breach of any promise of non-adversary proceedings in the Handbook.

Because there is no genuine dispute that the proceedings were non-adversarial, summary judgment for the defendants as to the claim of improper adversarial proceedings is appropriate.

**[8] WAS THE PROCEEDING CONDUCTED "AS FAVORABLY" TO PLAINTIFF "AS POSSIBLE?"**

Plaintiff claims that defendant Weinreb violated the Handbook's terms because "he deemed `submitted' [her] uncompleted, virus-impaired draft" and "engaged in additional unfair conduct." She alleges this is a violation because of the Handbook's provision stating that the Board seeks to resolve hearings "as favorably to students as possible consistent with the maintenance of the high academic and ethical standards of Harvard Law School." This aspiration is reasonably susceptible only to the interpretation that students will usually receive the most favorable outcome possible *within the bounds of the rules*. As discussed [above], plaintiff had plagiarized within the meaning of the Handbook. The Board therefore had no obligation under the Handbook to find plaintiff not in violation. Defendants did not breach the terms of the Handbook by issuing a lessor sanction, or reprimand, rather than the standard penalty of suspension, at their own discretion. See *Schaer*, 432 Mass. 474, 482 ("A college must have broad discretion in determining appropriate sanctions for violations of its policies.")

**[9] WAS PLAINTIFF DENIED AN OPPORTUNITY TO CROSS-EXAMINE WITNESSES?**

Walker claims that she was denied the opportunity to cross-examine witnesses in violation of the terms of the Handbook. While the Handbook guarantees the right to "examine all witnesses," there is no further description of what this would entail. The transcript reflects that the instances where cross-examination was curtailed were on the grounds of irrelevance to the proceedings. Given that similar limits exist in most courts, no reasonable student could have expected a completely unlimited right of cross-examination. "It is not the business of lawyers and judges to tell universities what statements they may consider and what statements they must reject." *Schaer*, 432 Mass. at 481.

**[10] WAS THE STANDARD OF PROOF MET?**

The Handbook guarantees that "[d]isciplinary sanctions shall not be imposed unless conduct warranting sanction is established by clear and convincing evidence." Walker alleges that the Board's finding of a violation was not supported by clear and convincing evidence.

Part of this claim is premised on the use of impermissible evidence. "Although [some] statements would be excluded from a courtroom under the rules of evidence, a university is not required to abide by the same rules." *Schaer*, 432 Mass. at 481.

There is no genuine dispute Ms. Walker turned in work that was not properly attributed. Given that this court will not second-guess the Board's evidentiary rules and that Ms. Walker's conduct fell within the Handbook's provision . . . [T]here is no genuine dispute of fact that the Board had sufficient evidence to find a violation.

Plaintiff claims that the Board's proceedings were "unfair." While a reviewing court must examine disciplinary proceedings to ensure they comport with notions of "basic fairness," Cloud, 720 F.2d at 724-25, "[a] university is not required to adhere to the standards of due process guaranteed to criminal defendants or to abide by rules of evidence adopted by courts." Schaer, 432 Mass. at 482. It is undisputed that Ms. Walker had notice of and understood the charges she faced and had a hearing before the Board. She had the assistance of legal counsel, both in preparation for the hearing and during it, and her counsel examined witnesses and argued on her behalf. She was entitled to call witnesses and submitted whatever documents she desired. The hearing was transcribed and the transcript made available to her. Finally, Ms. Walker was herself a sophisticated party, having nearly completed her JD at Harvard Law School. All of this comports with principles of basic fairness.

[12] HOW SHOULD THE DEFAMATION CLAIM BE RESOLVED?

Count IV of the complaint alleges that the defendants defamed Ms. Walker because her HLS transcript states that she "was issued a letter of Reprimand by the Administrative Board," which states that she committed plagiarism, and that the defendants "knowingly and intentionally communica[ed] and publish[ed] [these] false statements."

To establish a defamation claim under Massachusetts law, proof of four elements is required: (1) that "[t]he defendant made a statement, concerning the plaintiff, to a third party"; (2) that the statement was defamatory such that it "could damage the plaintiff's reputation in the community"; (3) that "[t]he defendant was at fault in making the statement"; and (4) that "[t]he statement either caused the plaintiff economic loss ... or is actionable without proof of economic loss" [citation omitted].

As a matter of law defendants were not at fault, failing the third . . . factor, because . . . the publications of fact she alleges libelous are true . . .

Even though the written statements at issue are true, plaintiff may still recover for them if she can prove defendants acted with "actual malice." Actual malice, in this context, means common law malice, ill will, or malevolent intent. The Harvard defendants believed that the findings of the letter of reprimand were true and had come to this conclusion through a thorough and fair proceeding. Ms. Walker does not plead ill will or malevolent intent on the part of the defendants and can make no such showing on the record before the court.

[13] WHAT IS THE CONCLUSION?

[Harvard's] motion for summary judgment is ALLOWED.