

Student Cheats and Those Who Harbor Them

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You probably think that you know what you would do. While grading law school final exams, you grow highly suspicious that one of your students cheated on the test by using forbidden materials, accessing the Internet during the exam even though the instructions were clear and warnings were issued in class. You believe that you not only have a reasonable suspicion that the student cheated, but that you also have evidence that seems clear and convincing.

Most law schools—surprisingly, perhaps—accept the “preponderance of evidence” standard for a “conviction” of academic dishonesty. But they don’t require faculty members to report student cheating (even at schools where they encourage or force students to report on one another).

Still, I think most law professors when presented with this simple hypothetical would say that they would report the matter to the university authorities, giving the student “due process” to offer a defense, and allowing the administration a chance to dole out punishment as appropriate.

But, as we all know, how we would respond to a hypothetical situation often differs from what we do in real life.

My first instinct was not to report a student—call the student Dani—who I believed (and continue to believe) cheated on my exam. Temperamentally, I am suspicious of authority and bureaucracy. I had less than complete confidence in the administration where this happened because I was visiting away from my home institution, where I am reasonably confident in the administrators’ judgment and good faith. I would have felt more comfortable at my home institution because I know that I could be assured of confidentiality and the weight of the institution behind me; I knew the general counsel’s office was a short walk away. But I just didn’t know enough about the visiting school to navigate it easily. Although I was secure in my own judgments, I had a hard time satisfying myself “beyond a reasonable doubt.” That was not the burden of proof I was required to meet within the regulations of the university, but given the potentially extreme consequences for a law student caught cheating (suspension, expulsion, inability to gain admission to the bar to practice law—up to \$150,000 down the drain), I thought I should hold myself to a higher standard of proof than the university would in any formal administrative

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proceeding. In any event, things take on a life of their own once they leave your hands and get processed through networks and bureaucracies. Assessing what my responsibility would be for setting that train in motion wasn't easy, but it led me to want to handle it on my own, informally.

This wasn't only magnanimity on my part, however. A range of practical concerns haunted me as well, considerations that didn't seem wholly irrelevant to the basic ethical question with which I was presented: Would this eat up large portions of my time as I responded to administrative inquiries and drew up formal explanations of my suspicions? Any time spent on "prosecuting" a cheating case is time away from other students, scholarship that might make more of a difference in the world, and/or my family.

As it was, I hadn't been trained to deal with the situation (whether at my home institution or the visiting school), wasn't really sure about local institutional cultural norms, and wasn't at all clear how the institution would proceed: Would I be given the benefit of the doubt? Would I be treated with suspicion? Would this become an adversarial proceeding? There was no obvious place to look to understand how it would all go down—and I worried that bringing it to the administration's attention to get the details of the process might in itself launch a proceeding I wasn't sure I really had the stomach to see through.

Some brief conversations with colleagues on several campuses revealed that lots of cheating goes unpunished, over-punished, or under-punished, so it wasn't clear to me why I should invest lots of time and energy vindicating a value that law schools are not consistently willing to defend. In any event, if central university administrators are the ones to dole out the ultimate punishment, those officials may have different values from those that law schools need to prioritize.

A negotiated compromise seemed like a way out. I had it on good authority that many schools give students the option for informal resolutions once administrators get their hands on these cases, so why not handle it myself? Settlements and plea bargains have their reasonable opponents, but in this context with this moral landscape, it seemed defensible. I wasn't surprised to learn later that studies of student cheating reveal that faculty "underutilize" formal processes and come up with their own resolutions. I thought I would punish the student by awarding the exam a failing grade—and if the student was willing to accept the failure and not contest it, I would not report the cheating to the administration.

When I shared with colleagues that I was considering this solution, many supported me, thinking it was merciful and fair. Others thought it was too generous to the student. But no one suggested it was morally impermissible, which was interesting in its own right. Colleagues had ideas about what they might do and what they have done in similar situations, but most respected that these were hard questions with a range of morally permissible answers.

Still, my form of plea bargain did raise a moral complication: The university requires an explanation for a failing grade. If the reason for the grade in

my heart was the suspected cheating, I would be suggesting to the student a falsification of the documents underlying the student's transcript. I made peace with the idea that I would say something vague like: "This student's exam performance was unacceptable," if the student was willing to take the deal. So I offered it. I was encouraged by lawyers and non-lawyers alike not to put the deal in writing (apparently thinking about litigation from the get-go), so I called the student on the phone to deliver my proposal.

I was expecting contrition and gratitude. And rationality. These were too much to hope for, alas. I had a biased sample before the confrontation: Most colleagues in similar straits wound up with crying students on their hands. Indeed, some ended up giving the students Ds rather than Fs because of the display of remorse and the mitigating explanations for the offense. More conversations with other colleagues after the offer—and its wholehearted rejection—led me to understand that many students think standing on a chair and throwing large objects at you (metaphorically) is the best strategy for moving forward, but, truth be told, I was not prepared for that possible response. Indeed, many good lawyers posture quite aggressively in negotiations, though obviously savvy ones know when to stand down.

Dani was not going to stand down. Denial was followed with fabricated documentary "evidence" to cover up the cheating, which only confirmed my belief that the cheating actually occurred. In the course of mounting a defense by email (the phone call did not prevent follow-up writings), Dani stupidly conceded to violating the local honor code in lesser ways (ways I actually wouldn't have failed a student for), showing a pattern of disregard for exam rules. And then came the threats: Dani made explicit what I latently feared might result from reporting the episode to the administration. First, the student re-characterized my generous offer as an abuse of power and professional misconduct because I was threatening to fail the student no matter what. Then the student pointed out something that wasn't actually untrue: I was willing to cheat the university (in a sense) by not giving Dani due process and just awarding an F. Suddenly, I was starting to think that I had now acted in a way that might make me look bad when it all came to light.

Then more outrageous thrusts: I'd be hearing from Dani's lawyer; Dani would be suing me personally; Dani would be ruining my reputation and trying to sabotage my career; Dani would make sure the visiting school (more prestigious than my home school) would never hire me; Dani thought I would never make it on the streets; that I had no right to be teaching at a top law school; that I had no life. Although the lawyer in me knows not to engage in this type of conversation in writing, I was drawn in. I was doing my best to ignore the threats and the insults, trying to explain (now in writing) just how severe the consequences would be if I reported the student's conduct to the university. But I'm human: Although I knew I was being bullied and baited, I couldn't extricate myself from the argument. Dani needed to understand just how off-the-wall the posturing was and that it wasn't helping bring the matter to a favorable resolution.

Admittedly, law school imbues students with a fighting instinct and an adversarial ethos; we aren't doing our jobs if we don't prepare them for this reality of the profession. But as an educator in this environment, my job surely was to show the student when being adversarial is the wrong approach. Collaborative and negotiated compromise is sometimes the lawyer's best strategy. This was a teaching moment, I thought.

It was also a learning moment for me: If I learned anything from this affair, it really is the following: Engaging the student cheat in extended conversations is a bad idea. I don't regret giving Dani the offer of a way out at all. I would do it again—and giving Dani a chance to explain the irregular answers on the exam helped solidify my sense that there actually had been cheating. But I do regret having been drawn into an e-mail debate about it. I wish I had been better trained and that the university was clearly supportive of professors' handling of these matters, which might have given me more confidence in the formal processes that would follow if I chose to prosecute the case.

All of Dani's aggressive moves, however, changed the moral terrain underneath us. As one colleague suggested to me, Americans are very good at forgiving underlying offenses of this form. But we can't tolerate the lying and the cover-up. Clinton can accept blowjobs from whomever he wants in the Oval Office; he just can't cover it up and lie about it. Nixon might have had a political future if he hadn't lied about his role in Watergate. Apologizing for our sins helps erase them. Although I could forgive the student for bad judgment at exam time (indeed, my proposal of an F and no reporting to the administration was both a punishment and a forgiveness), could I really forgive this personal assault? Even if I turned out to have been wrong about the underlying offense, a new wrong emerged in the negotiations that I also would be ignoring if I didn't report the episode.

Once a student responds with "a strong offense is the best defense" strategy, many professors just would report the episode. Generosity should, perhaps, come to an end when it is countered by a disrespectful ingrate. And yet it wasn't quite so simple. In its devious way, the student's conduct actually got me thinking that there were now new reasons not to report. Many of these reasons shouldn't really have been part of the ethical calculus—and still it would be dishonest not to acknowledge their gravitational pull in my internal moral compass.

To wit, would I be sued personally? Although I was sure I was protected on the merits (even if I turned out to be wrong about whether the student cheated, I knew my suspicions were reasonable), being embroiled in litigation produces costs that are not reimbursed when you win. Even if the university indemnifies you (as I was told it must under state law), litigation eats up time and energy. The idea of sitting in a room for hours being berated, questioned, and impugned (however dishonestly) hardly seems worth the grain of vindication at the end. Some colleagues who have been sued report a sense

of satisfaction for seeing it through; others found the ultimate punishments doled out by the university so inappropriate that it was hardly worth the effort.

Litigation can lead to lengthy depositions and discovery about one's private life—and might lead to embarrassing revelations that would, in fact, have an effect on your career, even if they have nothing to do with student cheating. And besides trying to get at your browsing history from your various computers, a vindictive student might subject all your writing to very careful scrutiny. Just as some universities now use software to detect plagiarism by students, students might use it against faculty to challenge their credibility in a cheating case. How many faculty members can rule out with 100 percent certainty the possibility that some RA once cut-and-pasted a citation or parenthetical from somewhere else that made its way into a published article in their name? Since Harvard professors have done it and essentially suffered little for it,¹ we might reasonably predict that such accidental copying will not strip us of our tenure. But who wants a student hell-bent on your destruction riffling through every word you have ever written or uttered, looking to cut you down to size? Even if you retain tenure, you may very well never be able to leave your current job because of the finding that an RA stole a footnote from somewhere else. And even if no wrongdoing is revealed because most of us are reasonably confident that our writing is above reproach, who needs the stress?

Of course, my worries about being deposed for hours were probably irrational. The litigation, if Dani carried through on the threat after an administrative finding of academic dishonesty, likely wouldn't have gotten very far; colleagues who have been sued over cheating students assured me judges usually kick these things out of court quickly. But how can one know ahead of time that justice will be done in our courts? And who knows whether a judge would understand that my offer of a deal to the student was an attempt to be merciful rather than an attempt to abuse my power. I knew the odds were with me but I am a pessimist and overweigh negative risks. I'm sure I'm not the only one.

There are also more informal strategies available to students in the modern age that come shy of hiring a lawyer—and are decidedly cheaper. The student might very well “flame” me on the Internet. Dani's threats weren't perfectly explicit on this score—but they were easy to read into some of the rhetoric. It may be that most tenured law professors can put *RateMyProfessors.com* comfortably out of mind. But doesn't the thought of having a website constructed to burn us in effigy reasonably make us scared? We all watched with horror how anonymous posters at *AutoAdmit.com* could affect the careers of law students with falsehoods. We also saw how difficult it was to put a stop to the offending conduct and get the content down. Now I was envisioning more lawsuits, this time ones that I would have to initiate, yet most of us don't carry insurance to cover such suits. Although our legal protections may shield

1. See Harvard Plagiarism Archive, available at <http://authorskeptics.blogspot.com/>.

us from specious charges of “bias,”² who will pay *ReputationDefender.com* to make sure Google doesn’t return outrageous results when prospective employers and clients look us up?

We have always had crazy students with us. But the power they now have in the modern age with the anonymity and permanence of the Internet has shifted the power dynamic. This isn’t paranoia, and our universities haven’t prepared us for this.

Finally, how are we to weigh the sad reality that some students—whether from the revelation of their behavior or the consequences that might flow from a finding of impropriety—might resort to violence, against the accusing professor, his family, or through suicide?

Now that I have raised the specter of you having your head blown off or causing a suicide for defending academic values, surely you are rethinking your clarity about what you would do in the opening hypothetical. Everyone has her limits: If the cheater has your child and will slit her throat if you report the conduct, you will probably walk away from the misconduct to save the child’s life. And no one would think the worse of you. You could live with yourself.

But even with naïveté aside and the memories of Virginia Tech not quite faded, the likelihood of the reporting itself being a life and death matter is small indeed. Surely a .000001 percent risk of death from reporting cheating is insufficient to outweigh the vindication of serious academic values. Surely we must be ready to sacrifice *something* for these values or they aren’t values at all. I owe an obligation to the university, even if it doesn’t require me to report.

Most universities don’t require faculty to “snitch” but the university is representing that graduates have actually earned their degrees and your failure to report makes you complicit in that fraud. True, universities need to do more to help faculty report if they take cheating seriously—and it isn’t always clear that they do. But the university’s failure to take it seriously isn’t really an excuse for me to let it go, right? Bad training is a bad excuse when the moral basics are clear enough. Even if the university backs down once the parents come in with lawyers and threaten to stop donating to the school (something I heard about more than once in my deliberations with others about what to do), is that really a good reason for me to back down?

Don’t I also owe an obligation to other students in the class who did not cheat and will be subject to a mandatory curve that might change their grades if I don’t report the offense? (In my case, this was a non-issue since the student already had the lowest raw score on the exam, even with the cheating!)

2. We hope: Almost everyone I discussed the issue with wanted to know—almost immediately—whether the accused was a member of a racial minority, as if this was going to be an important factor in the disposition of the dispute.

Although the standard literature tells us that about 50 percent of students in higher education admit to engaging in serious academic dishonesty,³ I doubt I can discharge my responsibilities in the classroom adequately by assuming half of my class is cheating and then ignoring the one student in a decade I am able to catch because I know he or she was just the unlucky one among the half of my class that cheats.

Finally, I owe an obligation to the profession, the bar, and the student's future clients. If I facilitate awarding that student's J.D. and shield the information from the state bar associations, aren't I complicit in any malfeasance the student might commit in the future? It turns out that not reporting can set in motion a chain of events, too, the responsibility for which I can't ignore. So, the omission/action distinction doesn't do much here to help guide moral conduct.

I had a nagging feeling I was supposed to put my fears of wasted time and assault to one side and report. All it takes for evil to triumph is for good people to do nothing, and all that jazz.

These were stressful days; it was hard to believe just how personally I took the incident. It wasn't just something that happened in the world that I was analyzing as an abstract moral dilemma; it happened to me, and was an emotional maelstrom. I spent a lot of time feeling sorry for myself, feeling disappointed in my pedagogy for failing to reach Dani, feeling frustrated that I had not written a better exam on which it would have been harder to cheat, and feeling tremendous anger at Dani for having put me in this situation. And yet I also continued to see myself as Dani's protector from an uncertain and potentially devastating fate. I wasn't sure what Dani deserved but I assumed that if I reported my suspicions—the cover-up and threats now included—Dani was likely to get a very harsh sentence, one I wasn't sure the underlying conduct really merited. After all, since Dani was just trying to be as clever as possible in mounting a defense, maybe law school itself was to blame. It is true that I happen to be a softie and particularly forgiving; others might have been much more certain that Dani deserved to be punished to the fullest extent possible at this point. But I fail very few students and give most the benefit of the doubt. The hardest part to understand—both for others when I convey the narrative and for myself in retrospect—is how I still took pity on the student, after the threats and the high hat. All I can say is that I took my responsibility to protect Dani from shortsightedness and a cold bureaucracy as seriously as I took my concern for my own safety, sanity, and time.

I ultimately had to approach the administration for some guidance. I was worried that if I brought it up to people within the school, they might have an obligation to proceed with an investigation (I turned out to be wrong about this but it wasn't clear what the culture within the university was from the faculty guidebook, which was equally vague about honor code violations). Yet I simply couldn't make this decision alone anymore.

3. Donald L. McCabe, *It Takes a Village: Academic Dishonesty and Educational Opportunity*, 91 *Liberal Educ.* 26, 28 (2005).

I was given the benefit of confidentiality when I approached the administration, but was not assured that the university would stand behind me and represent me in any subsequent litigation. In retrospect, it was probably just a lack of information—I was talking to people who probably just didn't know the legal terrain. I doubt it was a strategy of being noncommittal about whether the university would defend the suit. But without that assurance, I still didn't know what I should do—and I wasn't dying to string Dani along for much longer. Other students were entitled to their grades and I was delaying releasing them to resolve this situation.

I then learned that my options were actually somewhat different from what I had represented to Dani. The school didn't want me to award an F unless I was sure that, cheating aside, I'd have given the student an F for exam performance alone. It wasn't clear whether I was being told that I couldn't proceed with my "deal" if the student accepted my conditions, but what was clear was that I couldn't just give an F and walk away, as people I know have done when they suspect cheating with clear and convincing evidence. If I wanted to fail the student, I had to go through with the formal complaint and await its adjudication with due process. I could easily justify a D to myself without even considering the cheating but I didn't feel I could let on to Dani that I might very well issue a D, after all, with no mention on the proverbial permanent record of my belief that Dani cheated. Although the idea of handing it all over to the administration was immediately appealing—in part because I wouldn't be making any more of the decisions and Dani would have only the administration to blame for what would come from handing over the file—I knew that Dani would never see the affair as anything but my fault.

I couldn't sleep during these days—and didn't get a wink the night before my grading deadline. All night, I went back and forth about what I was going to do. Dani was drawing up a complaint against me that would be submitted in the morning when I released my grades. The student was sure that I'd be reporting the cheating to the administration. I was letting Dani sweat it, hoping that reason would prevail at the last moment. I really thought that any rational person in the student's position would take my deal. This was assuming, of course, Dani actually cheated. And that Dani was rational.

By 4:00 a.m., I was starting to doubt myself. No rational cheater would take this risk. I was disbursing a "get out of jail free" card. Why wouldn't the cheater take it? Although part of me was convinced that Dani was just a sociopath, the other part of me saw a totally rational actor. Dani's written responses, though outrageous, seemed calculating and thought out. The cover-up, though full of holes, was still the product of a very capable mind. But could that capable mind have been so good at manipulating me and preying on pretty standard professor anxieties and fears? You can recover from an F, but the consequences of cheating are much more uncertain, especially for lawyers-to-be. I never gave Dani any reason to suspect that I'd enter a D on the transcript in the morning.

Ultimately, I did pass Dani when the moment came. It still doesn't sit right. And yet I calculated that I'd be sleeping through the night in a week or two if I

passed Dani and walked away. If I had reported Dani, I could be losing sleep a year from now as a motion to dismiss was pending in federal court. This pro-sleep calculation may turn out to be wrong: Some friends reminded me that I might be losing sleep still in a decade or two as I reflect on whether I've lived a good life, one with integrity. Yet, hindsight reveals that I was giving Dani's rationality too much credit: Dani miscalculated what I would do and the complaint the student filed against me ended up requiring that I divulge the cheating incident to the law school administration anyway in a formal memo, though it was my decision not to prosecute the student further and trigger an investigation by the central administration.

At the time of the decision, on no sleep, I really just wasn't sure anymore about whether the underlying cheating occurred. Who would risk their future and the astronomical amount of money already invested in tuition when I was offering a free pass? It just didn't add up. And yet in retrospect, it is notable how Dani—with the aggressive responses—had a capacity to make me doubt myself rather than simply make me lose sympathy.

In those last few hours before I made my decision, a pattern did emerge in what others thought I should do. Although colleagues were of two minds—some thought that I should report Dani and others would have walked away giving Dani a D—my family all thought I should walk away. As a group, my family probably cared more about my career, my sanity, my happiness, and me personally than they did about upholding the principles of academic honesty.

The one who surprised me in his reaction was my father, a man of uncompromising principle who also holds a professorship. Yet he too was urging that it was prudent not to pursue the cheat to the end.

His advice has to be viewed in a historical context. He is also a surgeon. And surgeons get sued from time to time. Even when elements out of control of the doctor are the root cause of something gone wrong, patients with bad outcomes sometimes are encouraged to sue their doctors by their lawyers. He was once sued for several million dollars. His malpractice insurer, representing him in the litigation, covered claims only up to a \$1 million; anything over \$1 million would be his personal responsibility. He wasn't willing to settle and stood up for principle: He was going to see the case through because he had done nothing wrong and would not give a litigious patient whom he gave the very best care he could a penny—even if it was his insurer's penny.

I sat through much of the trial, at least in part because his lawyer thought that would look good for the jury. It looked like it was going his way. But I was distant enough from the principle to feel that he was taking a dumb risk. Although I thought a reasonable jury wouldn't have awarded a substantial sum in favor of the plaintiff and that there was an infinitesimally small likelihood that the jury was going to award the plaintiff more than the million for which my father was covered, I also felt strongly that my father's moralist behavior was dangerous. What good would the principle be if he was reduced to bankruptcy to pay a jury verdict? What if he lost his practice and his home

to satisfy a judgment? Would he sleep well for the next year as the case went through appeals? How many days of work was he willing to miss to defend the principle?

I had no qualms in telling him to stop being so damned principled and just settle the case for an amount his insurer would pay in full. This was gambling and we aren't gamblers. He settled. His family convinced him that his moral absolutism was foolhardy—and that the ethics of this decision shouldn't be ripped away from the real effects his decision could have: He could save several people a day for every day spent wasted fighting his principled battle in the courtroom. And our collective financial security was on the line.

Yet when it was me worrying about principle, notwithstanding my advice to my father, I had a hard time walking away; a good part of me thought I should take the gamble and see the principle through, come what may. But my father had no trouble in telling me what to do—and he was clear that he thought I should give Dani a D and get on with my life.

I do wonder if I would have behaved differently if my father had told me to stand up for the principle. I suspect if he had told me I'd be letting him down if I didn't prosecute the cheat, I would have prosecuted the cheat.

None of this is to say that it was actually clear—with my particular facts—that reporting Dani was the only principled course to take. To this day, I'm not sure. But the psychological influences on our decision-making are noteworthy: Do we worry about moral condemnation from our parents in thinking it through? How secure are we in our own integrity? To be sure, our judgment about our own integrity is influenced by how we behave when we have a test like this before us, but it is harder to take the morally righteous position if we aren't convinced of our own righteousness. Most of us have done some things that don't make us proud and we aren't eager to have those imperfections blasted all over the Internet, even if they have nothing to do with academic honesty.

That our psychology influences our moral decisions isn't news. Nor is it news that most instances of moral decision-making in the real world are ambiguous and complex. These realities—once we take notice of them—probably incline us to the view that every instance of cheating is *sui generis*, each has unique facts, and we can't pre-judge or know in advance what we would do. But that conclusion is too lazy, I suspect, and causes more moral paralysis than necessary for professors facing cheats.

When it happens to you, it is incredibly lonely. Even with a supportive community of colleagues it isn't easy. There isn't literature to help us through the thicket and most faculty codes and regulations seem to fumble, giving due respect to academic freedom. Freedom is great, perhaps, but we need a broader conversation to help each other muddle through these hard decisions with real consequences.

It might very well be that clearer faculty rules—ones that don't give us unlimited discretion to do what is fair in our own minds—with clearer faculty protections that we are all made aware of early could be a way forward. I doubt

there is a one-size-fits-all solution but there are a set of solutions and useful guidelines that could be developed, if only we would stare the problem in the face and talk about it.

But there is no doubt that we'd rather not talk about it; the status quo is that every faculty member is an island. Talking about it risks revealing our own moral failings, our own unwillingness to enforce one of the bedrock principles of our chosen profession. It isn't pretty. And we aren't doing ourselves a great service by sweeping it under the rug. A broader discussion might help us achieve a joint strategy, a renewed commitment to core academic values, and maybe a reflective equilibrium that could make the moral dilemma feel less vertiginous for others in the future.

My effort here has been to bring into the open something we will all face, hopefully infrequently but probably more than once. But I am also exploring my ambivalence here with the hope that it might actually be therapeutic for others, too. And it might just get administrations to realize that professors need them to provide better training and to vindicate our academic values.

I spent several hours during my visiting appointment being trained on how not to engage in sexual harassment in the workplace; a half hour on what to do with student cheats really would have been time better spent.