



March 23, 2016

Professor Lisa M. Lynch
Office of the President
Brandeis University
MS 100
415 South Street
Waltham, Massachusetts 02453

URGENT

Sent via U.S. Mail and Electronic Mail (lisalynch@brandeis.edu)

Dear Interim President Lynch:

The Foundation for Individual Rights in Education (FIRE) unites leaders in the fields of civil rights and civil liberties, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, academic freedom, due process, freedom of speech, and freedom of conscience on America's college campuses. Our website, thefire.org, will give you a greater sense of our identity and activities.

FIRE writes to express concern about the threat to freedom of the press at Brandeis University posed by the disciplinary action brought against three student journalists for recording portions of a public event and publishing an accurate account of that public event in a campus newspaper. The disciplinary charges fundamentally violate the expressive rights Brandeis promises its students. They must be reversed.

The following is our understanding of the facts. Please inform us if you believe we are in error.

On April 21, 2015, members of the Brandeis community participated in an annual "Take Back the Night" (TBTN) march, advertised by Brandeis as a "student-run, candle-lit march to raise awareness about sexual violence" on the steps of the Rabb School of Continuing Studies. The event was open to the entire university community.¹ Brandeis student Abby Patkin, an editor at the student newspaper *The Justice*, attended TBTN in order to report on it for an upcoming issue. During the march, several students shared personal stories

¹ Email from Jamele Adams, Dean of Students, Brandeis University, to the Brandeis Community (Apr. 16, 2015).

with attendees to aid in raising awareness. In order to ensure the accuracy of her coverage, Patkin placed her cellular phone on her notebook, in plain view, and began recording while taking notes.

On April 28, 2015, Patkin published a story in *The Justice* about TBTN (Attachment A). She included in the article quotes from some of the students who had shared their experiences openly with the crowd, but did not publish their names. The only picture that accompanied the article was of the candles held by participants; no individuals pictured were identifiable.

In early May 2015, editors and reporters at *The Justice* began to receive messages on Facebook from individuals unhappy with the newspaper's coverage of TBTN. Editors Max Moran and Avi Gold² met with Brandeis Sexual Assault Services and Prevention Specialist Sheila McMahan and one of the student organizers of TBTN. McMahan and the student demanded that the article be removed from *The Justice's* website and that the newspaper publish an apology for anonymously quoting students. Moran and Gold declined to acquiesce to this demand.

Noting that the quotes seemed very accurate, McMahan and the quoted student inquired as to whether the event was recorded. Though Moran and Gold did not disclose the recording at this time, once the deluge of angry messages to *The Justice* died down, Moran privately informed McMahan that Patkin had openly recorded part of the event in accordance with *The Justice's* reporting policy for public events.

Shortly thereafter, Moran met with five students from Brandeis Students Against Sexual Violence, one of the organizational sponsors of TBTN. After Moran informed the students that the event had been recorded, they demanded that the article be removed and an apology be published. Moran again refused. Around the same time, Patkin met with an individual student who assisted in organizing TBTN and was quoted anonymously in her article. The student asserted that the article was a violation of her privacy and demanded that it be removed. Patkin explained that the article was in line with journalistic standards and declined to remove it.

On February 29, 2016—nearly a year after the events in question—Brandeis Director of Student Rights and Community Standards Kerry Guerard informed Patkin, Moran, and Gold via email that a fellow student had filed a Community Standards Report against them. The complainant's narrative, contained in the letter, stated in full (all errors in original):

On Thursday, April 23, 2015 at roughly 8pm I participated in and facilitated "Take Back the Night". I shared some of my own experiences with violence which were later quoted in an article published by The Justice. It was later revealed to me and then confirmed, by a member of the editorial board, that

² Gold and Moran remain unaware of the identity of the individuals quoted in the article, except for those who have voluntarily identified themselves in the course of this matter.

the journalist present at the event recorded the personal narratives of many students experiences of sexual violence without their knowledge or explicit consent. No individuals were made aware of the presence of The Justice, or their decision to record the confidential event and did not consent to their stories being shared in a school paper. I wish to file this CSR against the Justice editorial board, whom, to my knowledge, were aware of the recording, the fact that it was not authorized by organizers, and allowed for the publication of this harmful article.

According to Guerard's letter, these allegations constitute a violation of Section 2.11 of the Community Standards of Behavior, entitled "Electronic Devices and Privacy," which provides that students must

Refrain from using computers, cellular phones, tablets, cameras or other electronic devices in any manner that causes disruption to or invades another individual's privacy in a classroom, library or other campus facility or any campus event. This includes misuse of computer and/or cellular devices with photographic, audio or video recording or streaming, or text messaging capability (see sections 3.3.e, 10.2, 10.3, 10.4 and 16.1). The interception or recording of another person by any technological means without the subject's consent, including offline or Internet- connected devices, will be considered a violation of this section.

The disciplinary charge letters instructed the students to schedule a meeting with Guerard within two days. After consulting with Brandeis journalism professors Maura Jane Farrelly and Eileen McNamara, the students elected (as permitted by Brandeis policy) not to meet with Guerard.

Farrelly and McNamara sent a letter to Guerard on March 1, 2016, copying Dean of Students Jamele Adams and General Counsel Steven Locke, encouraging the university to dismiss the charges. On March 3, Locke replied to Farrelly and McNamara, explaining the basis for the charges:

The complainant alleges that the three students violated section 2.11 of R&R by audio recording her statements without her consent. Such conduct is prohibited by R&R, which, I'm sure you know, mirrors Massachusetts state law. It is illegal in Massachusetts to audio record a person's statement without their consent. There is no blanket journalist or public event exception. If a person does not give consent to have her statements recorded, then doing so violates Massachusetts law. It also is a violation of R&R. While it is possible that consent may be inferred depending on the circumstances, including the public nature of the speech, it is also possible that a statement surreptitiously recorded in a public space or at a public event can violate the law as well as the University's conduct code.

At a subsequent meeting with Locke and Senior Associate Vice President of Students Sheryl Sousa, Farrelly and McNamara reiterated that a complete dismissal of the charges would be the only acceptable resolution of the matter.

In anticipation of this year's TBTN event, Moran and Elianna Spitzer, deputy news editor of student newspaper *The Brandeis Hoot*, met with Sheila McMahon and Julia Rickey of Brandeis' Office of Prevention Services and several TBTN organizers. During the meeting, the TBTN organizers proposed a contract detailing how campus newspapers will observe and report on this year's TBTN. When Moran and Spitzer refused the proposed contract's terms, McMahon accused them of having "no empathy" and attempting to "win awards" with their coverage.

On March 11, Kerry Guerard followed up with the charged students, again presenting them with an opportunity to meet with her, this time informing them that if they did not schedule meetings by March 15, the matter would be "forwarded to an administrative hearing." On March 14, the charged students replied to Guerard, requesting that their case be sent to a conduct board pursuant to their rights under Section 18 of the Brandeis Rights and Responsibilities handbook, *Procedural Standards in the Student Conduct Process*. On March 22, the students scheduled the hearing for April 1, 2016.

The disciplinary charges against Moran, Gold, and Patkin violate basic principles of free expression and must be withdrawn immediately. While Brandeis is a private university and thus not legally bound by the First Amendment, it makes explicit promises of free speech to its students. Its mission statement commits to "renew[ing] the American heritage of cultural diversity, equal access to opportunity and freedom of expression." In a January 5, 2015, letter to *The Wall Street Journal*, then-president Frederick Lawrence reiterated that Brandeis "has an unyielding commitment to free speech and expression of ideas."³

To be clear: threatening student journalists with discipline for accurately reporting on a public event is a severe violation of the freedom of expression that Brandeis promises to its students and claims to cherish. If student journalists must fear that accurately describing a public event will result in disciplinary action, even while adhering to journalistic ethics, the student press at Brandeis will be irreparably harmed.

FIRE is concerned that these student journalists face discipline not only for recording a public event, but also for the content of their reporting. While three students have been charged with allegedly violating Brandeis' policy against recording, it is indisputable that only one of the students actually recorded portions of the event. It seems evident that had Patkin only taken notes and published the same quotes, the complaints regarding *The Justice's* coverage would not have been obviated. The remedy sought by aggrieved students

³ Frederick Lawrence, Letter to the Editor, *Brandeis Committed to Free Speech*, WALL ST. J., Jan. 5, 2015, available at <http://www.wsj.com/articles/brandeis-committed-to-free-speech-letters-to-the-editor-1420488271>.

bears out this concern: The students anonymously quoted demanded that *The Justice* remove the article and publish an apology. Only after the student journalists refused this remedy did one of the aggrieved students file a Community Standards Report against them, which objected not only to the manner of the recording but to the mere fact of students' "stories being shared in a school paper."

Even accepting for argument's sake that the charges are *not* mere pretext for punishing the student journalists for the content of the article, the students have not violated the Electronic Devices and Privacy policy. While the policy states that "recording of another person by any technological means without the subject's consent . . . will be considered a violation of this section," the prohibition must be construed in light of the policy's overarching prohibition on conduct that "invades another individual's privacy."

TBTN is a public, outdoor event open to all Brandeis community members. Speakers at TBTN cannot reasonably expect that comments willingly made at a public demonstration of this kind will be private. Indeed, the stated purpose of TBTN is to "raise awareness about sexual violence." Actions taken and words spoken in a public setting for the purpose of raising public awareness are, by definition, *not* private. Even so, *The Justice* endeavored to preserve the privacy of the quoted students by not identifying them. But if the students *did* have a reasonable expectation of privacy when making public remarks outdoors at a public rally (a point that FIRE does not concede), it strains credibility to assert that the publication of anonymous quotations invades the privacy of an unidentified speaker.

To the extent that Brandeis bases the charges on Massachusetts law, such reliance is misplaced. While Massachusetts law does not condition its prohibition on recording conversations on a reasonable expectation of privacy, it only prohibits "secretly recording" any oral communication where all parties have not given consent.⁴ But Patkin did not secretly record the TBTN event; her phone was openly placed on top of her notebook while recording.

Precedent from Massachusetts and federal courts supports the conclusion that Patkin's recording was not "secret" under the meaning of the statute. In upholding the conviction of a defendant who secretly recorded a traffic stop, the Supreme Judicial Court of Massachusetts noted that "if, at the outset of the traffic stop the defendant . . . held the tape recorder in plain sight . . . his recording would not have been secret, and so would not have violated [the statute]." *Commonwealth v. Hyde*, 750 N.E.2d 963, 971 (Mass. 2001). Similarly, in *Commonwealth v. Riviera*, four of the seven justices of the Supreme Judicial Court of Massachusetts expressly rejected the argument that a convenience store surveillance system's recording was "secret" because the defendant did not know that it was capable of recording audio. 833 N.E.2d 1113 (Mass. 2005) (Cowin, J., concurring in part) ("That the defendant did not know the camera also included an audio component does not convert this otherwise open recording into the type of 'secret' interception prohibited by the Massachusetts wiretap statute."). Relying on these precedents, the U.S. Court of Appeals

⁴ MASS. GEN. LAWS ch. 272, § 99 (2015).

for the First Circuit refuted the argument that, because a cellular phone has many functions, its use does not sufficiently convey notice that a recording may be taking place:

Taking the appellants' argument to its logical end, the Hyde defendant's recording would have escaped a wiretap offense only if he had held his tape recorder in plain view and there was affirmative evidence that the officers were aware that the device was switched on and recording audio. To the contrary, Hyde makes the point that the use in plain view of a device commonly known to record audio is, on its own, sufficient evidence from which to infer the subjects' actual knowledge of the recording.

Glik v. Cunniffe, 655 F.3d 78, 88 (1st Cir. 2011).

Again, Patkin's phone was placed in plain view, providing adequate notice that she may have been recording the event. The recording therefore falls outside of the Massachusetts statute's prohibition on secret recordings. Accordingly, fundamental fairness dictates that Patkin's recording should not be considered "secret" by Brandeis for the purposes of student discipline.

FIRE recognizes the sensitive nature of student discussions regarding sexual assault. It is apparent that *The Justice* does as well. By quoting the students anonymously, Moran, Gold, and Patkin acted with journalistic integrity in providing readers with accurate coverage of TBTN. We further understand that Brandeis, like other universities throughout the country, faces increased pressure to respond to concerns on issues regarding sexual violence. But that commitment cannot justify violating students' expressive rights or the unjust and illogical imposition of disciplinary action.

We urge you to dismiss the charges against Max Moran, Avi Gold, and Abby Patkin and to reassure the campus community that students will not face disciplinary action for reporting on public events.

FIRE is committed to using all of the resources at our disposal to see this matter through to a just conclusion. We have enclosed with this letter as Attachment B signed FERPA waivers from Moran, Gold, and Patkin, permitting you to fully discuss this case with FIRE.

We request a response to this letter by March 30, 2016.

Sincerely,



Ari Z. Cohn

Senior Program Officer, Legal and Public Advocacy

Encls.

cc:

Jamele Adams, Dean of Students

Sheryl Sousa, Senior Associate Vice President of Students

Steven Locke, General Counsel

Kerry Guerard, Director of Student Rights and Community Standards

Sheila McMahon, Sexual Assault Services and Prevention Specialist

Julia Rickey, Survivor Advocate and Education Specialist

Attachment A

STANDING WITH SURVIVORS



HEATHER SCHILLER/The Justice

SOLIDARITY: Students hold candles at the "Take Back the Night" event to show support for the survivors of sexual assault.

University community marches for awareness in "Take Back the Night"

■ The march last Tuesday sought to raise awareness of the problem of sexual assault on campuses.

By **ABBY PATKIN**
JUSTICE EDITOR

On Tuesday night, community members gathered on Rabb steps for a cross-campus march focused on discussing and eliminating sexual and domestic violence, titled "Take Back the Night." The event was sponsored by Students Talking About Relationships, the Brandeis Feminist Majority Leadership Alliance and the Brandeis Rape Crisis Center.

Take Back the Night is a non-profit organization and an international event that began in Europe and came to the United States in the late 1960s, according to the organization's website. The University has held "Take Back the Night" walks on campus since 2005.

"Since the 1970s in the United States, TBTN has focused on eliminating sexual and domestic violence in all forms," the website reads in its description of the organization. "Thousands of colleges, domestic violence shelters, and rape crisis centers have held events all over the country."

At the top of Rabb steps, participants were given lit candles as student coordinators and administrators spoke to the crowd of more than a hundred. In attendance were Dean of Students Jamele Adams, Senior Vice President for Students and Enrollment Andrew Flagel, Sexual Assault Services and Prevention Specialist Sheila McMahon, Provost Lisa Lynch and Assistant Dean of Students and Director of Student Activities Stephanie Grimes. To begin the

march, student leaders of STAR, FMLA and the RCC explained to the crowd that the walk would take them through all the quads, ending on the Great Lawn in front of the Shapiro Campus Center. During the stops in each of the quads, the circle would be open for anyone who wanted to share stories about themselves or others or present statistics on sexual violence, the students said.

Next, a few of the administrators in attendance addressed the crowd, discussing both the importance of the march and noting the various resources available to students, including the Rape Crisis Center and the Psychological Counseling Center, among others.

"Taking back the night is where we take action, where we take back power over fear and a lot of other things associated with sexual assault," Lynch said. "This is a special evening. Let's take back some power."

"We walk both in solidarity with the survivors of sexual assault and some of us as victims of sexual assault," McMahon said.

Student leaders then instructed the crowd to chant, "Stop the violence, keep the fight, we are stronger, take back the night," as they made their way to North Quad. Once the group was standing in the middle of the quad, they yelled, "Hey North Quad, take back the night," three times.

Several students stepped up to share stories of their own past experiences with sexual violence and the impact it has left on them. "What worries me is that he still walks around campus, preying for another victim," one student said.

Others spoke of "institutional betrayal" during the investigation and hearing processes, discussing how they felt the University did

not support them and help them as it should have. Specifically, many students mentioned that their attackers were able to remain on campus and have their verdicts overturned through the appeals process.

In East Quad, more students addressed the crowd with statistics and accounts of sexual violence.

One student told of being raped at a party during her freshman year. She described remaining silent for several years, unable to discuss her experience.

For years, she said, she dismissed the sexual assault with jokes and suffered alone, subsequently feeling like she was not allowed to seek help when she decided to share her story. Of this experience, she stated, she learned that every victim has a right to ask for help at any time.

"Silence does not make you ineligible to seek support and help," she said.

Another student described feeling disconnected after her experience with sexual violence. "I long for the day I can express genuine happiness," she said. "When will I feel like myself again?"

The crowd chanted, "Shatter the silence, stop the violence," and, "The culture needs to change and it needs to change now" as it marched through Rosenthal Quad and Massell Quad, respectively.

At the end of the night, McMahon addressed the crowd, likening being the victim of sexual violence to being stuck in winter, "being cold and in the dark [and] fearful and alone."

"Remember that regardless of how cold and dark the winter inside of us may make us feel ... that spring always comes," McMahon said. "When we stand together, violence cannot live."

Attachment B

I, Abraham (Aji) Gold, hereby waive any privacy rights or protections with regard to conversations about my current status and/or dispute (see the attached letter) with Brandeis University and authorize a full discussion and disclosure of all matters pertaining to this situation to any staff member of the Foundation for Individual Rights in Education, Inc. (FIRE).

In waiving such protections, I am complying with the instruction to "Identify the party or class of parties to whom the disclosure may be made" as stated at http://www.ed.gov/policy/gen/reg/ferpa/rights_pg18.html under the authority of 20 U.S.C. 1232g(b)(2)(A).

This specific waiver does not extend beyond the Foundation for Individual Rights in Education, Inc.

I also consent that FIRE may disclose information obtained with regard to this dispute, but only the information that I authorize.

Abraham Aji Gold
Student's Signature

03/22/16
Date

I, Max Moran, hereby waive any privacy rights or protections with regard to conversations about my current status and/or dispute (see the attached letter) with Brandeis University and authorize a full discussion and disclosure of all matters pertaining to this situation to any staff member of the Foundation for Individual Rights in Education, Inc. (FIRE).

In waiving such protections, I am complying with the instruction to "Identify the party or class of parties to whom the disclosure may be made" as stated at http://www.ed.gov/policy/gen/reg/ferpa/rights_pg18.html under the authority of

20 U.S.C. 1232g(b)(2)(A).

This specific waiver does not extend beyond the Foundation for Individual Rights in Education, Inc.

I also consent that FIRE may disclose information obtained with regard to this dispute, but only the information that I authorize.

 Student's Signature 3/23/13 Date

I, Abigail Patkin, hereby waive any privacy rights or protections with regard to conversations about my current status and/or dispute (see the attached letter) with Brandeis University and authorize a full discussion and disclosure of all matters pertaining to this situation to any staff member of the Foundation for Individual Rights in Education, Inc. (FIRE).

In waiving such protections, I am complying with the instruction to "Identify the Party or class of parties to whom the disclosure may be made" as stated at http://www.ed.gov/policy/gen/reg/ferpa/rights_pg18.html under the authority of 20 U.S.C. 1232g(b)(2)(A).

This specific waiver does not extend beyond the Foundation for Individual Rights in Education, Inc.

I also consent that FIRE may disclose information obtained with regard to this dispute, but only the information that I authorize.

Abigail Patkin
Student's Signature

3/23/16
Date