

**Presidential Task Force on Campus Climate
Subcommittee on the Regulation of Speech and Harassment**

Final Report

June 8, 2018

INTRODUCTION

Our subcommittee was asked to evaluate the way in which the university responds to bias that operates through speech, on the one hand, and controversial political speech (and conduct aimed at suppressing that speech), on the other. The Campus Code of Conduct addresses both, and the adequacy of the code's treatment of these questions has been the primary focus of our efforts.¹ Over the course of the semester, this subcommittee met with administrators, faculty and students responsible for administering the code, both on behalf of complainants and persons accused. We also carefully considered the results of the survey on campus climate, which was conducted jointly by all three task force subcommittees.

In our meetings with campus personnel and in our deliberations, we have not heard substantial criticisms of the code's ability to protect free expression, nor do we regard the code's protections of controversial political speech as problematic.² We have heard substantial criticism of the

¹ In evaluating the code (as well as speech-implicating provisions within [should this specify Cornell University Policy 6.4?] Policy 6.4), we have confined our attention largely to the code provisions themselves, as opposed to other Cornell University practices outside the code that might have an incidental impact on speech or harassment. We understand those broader practices to fall beyond President Pollack's charge to our subcommittee and to more properly fall within the ambit of the other subcommittees on campus experience and university response. That said, university practices outside the code, such as the imposition of security costs on event planners or university requirements for a police presence at specific events, have the potential to chill speech and are therefore cause for concern. At the time we were preparing this final report, the university was in the process of implementing new event policies. In the absence of information about how those policies will operate in practice, we do not comment on them here, but we encourage the university seek to minimize their impact on speech.

² The code appropriately stakes out a clear position in favor of the right to engage in controversial political speech directly and by inviting speakers to campus. It prohibits efforts to interfere with or suppress controversial political speech, when those efforts take the form of attempts to "disrupt or obstruct" the "lawful exercise of the freedom of speech." (Campus Code, Title IV, art. 2, A.1.) It defines prohibited expression in terms that make reference to (and exclude from those prohibitions) protected free expression. See, e.g., Campus Code, Title III, art. 2. Some respondents to the survey on campus climate said that they engage in self-censorship out of concern that they might suffer formal or informal consequences for expressing conservative points of view. This fear was most pronounced among students. Nonetheless, our subcommittee is satisfied that the code provisions are adequate to ensure the safety of speakers and the

ability of the code to deal with the sorts of incidents that motivated the president to create this task force. We have therefore focused on bolstering the university's ability to respond to bias incidents, with attention to ensure that those proposals do not undermine the protection of political speech.

In making these recommendations, we do not take a position on the process by which they should be implemented. Our charge was a substantive one – to evaluate the content and operation of the campus code with regard to freedom of speech and harassment. The following recommendations constitute our best effort to respond to that charge. Shared governance is an important university value, as are freedom of speech and freedom from bias and harassment. How to strike the proper balance among these values in considering the proper process for implementing the changes we recommend is not a question on which we were asked to opine. That said, it seems unlikely that some of the more comprehensive reforms we propose would be able to be implemented through the existing code amendment process. That process seems better suited for tweaking and fine-tuning the code.

THE CAMPUS CODE'S TREATMENT OF SPEECH AND HARASSMENT

The campus code prohibits speech that takes the form of “harassment,” which it defines as “following” a person or “acting toward that person in a manner that is by objective measure threatening, abusive, or severely annoying and that is beyond the scope of free speech.” (Campus Code, Title III, art. 2) Our understanding is that this definition of harassment was written to closely track New York state's criminal law definition.³

The university has adopted Policy 6.4 regarding sexual violence and sexual harassment (and related policies). With respect to our charge, Policy 6.4 applies to harassment on the basis of sex. It employs a different definition of harassment from the code, one that adheres more closely to

community, protect the expression of persons expressing controversial views regardless of where they fall along the political spectrum, and protect the right of peaceful counter-speech that does not aim to silence those expressing controversial views. Nor are we aware of instances in which students, faculty or others on campus have been subjected to any formal sanctions under the code merely for expressing politically conservative viewpoints. To the extent that the informal norms or the social climate on campus chills conservative students, faculty and staff from expressing their points of view, we are concerned, but we see it as falling mostly outside the scope of this subcommittee's charge. That said, articulation of “respect for diversity, civility, bold ideas, a range of perspectives and constructive dialogue” as core values of the university, as we recommend below, could mitigate the perception of hostility to the expression of conservative (or any other) viewpoint and thus lessen the urge to self-censor.

³ See New York Penal Law Sec. 240.26 (defining Second Degree Harassment as, among other things, “following a person in or about a public place” and a course of conduct or repeated acts that “alarm or seriously annoy” another person and “which serve no legitimate purpose”).

federal anti-discrimination law (Title VII). According to the university's policy, sexual harassment is "conduct [that] is sufficiently severe, persistent, or pervasive that it unreasonably interferes with, limits, or deprives an individual's participating in or benefitting from the university's education or employment programs or activities. Conduct must be deemed severe, persistent, or pervasive from both a subjective and an objective perspective."

The policy continues:

Because of protections afforded by academic freedom, speech and other expression occurring in the context of instruction or research will not be considered sexual or gender-based harassment unless this speech or expression also meets one or both of the following criteria:

- it is meant to be either abusive or humiliating toward a specific person or persons, or
- it persists despite the reasonable objection of the person or persons targeted by the speech.

Apart from harassment, the campus code also makes it a violation "to assault or cause any physical injury to another person on the basis of disability, ethnicity, gender, national origin, race, religion, or sexual orientation or affectional preference." Sexual assaults are governed by Policy 6.4, rather than the campus code.

Conduct by any student, faculty or staff that occurs on campus is subject to the campus code. In practice, however, it is extremely rare for faculty or staff conduct to be adjudicated and punished under the campus code. Faculty and staff conduct is typically handled under applicable personnel policies. Off-campus (including online) student conduct is subject to the code only when it rises to a high level of seriousness (e.g., physical assault). Student organizations are subject to the campus code, but Greek organizations (as organizations) are subject to a separate disciplinary process under the Office of Sorority and Fraternity Life.

A number of themes emerged during the subcommittee's deliberations regarding the code's treatment of speech and harassment:

- A. **Coverage/Jurisdiction:** The subcommittee has heard several questions about the reach of the code, both its potential for over-inclusion and for disparate treatment.
 - a. *Over-inclusion:* The code purports to apply equally to faculty, students and staff, but virtually all enforcement actions under the code involve student conduct.
 - b. *Disparate Treatment:* The code applies to the on-campus conduct of all students, as well as some of their off-campus conduct. But, when it comes to student organizations, the code applies to all non-Greek student organizations but not to the conduct of Greek organizations.

- B. **Purpose:** Most campus codes make explicit reference to their universities' core values. In contrast, the Cornell Campus Code focuses on defining infractions and punishments and contains no explicit statement of core Cornell University values. To be sure, it includes an important discussion of "freedom with responsibility," but in general, its discussion of values is incomplete and its overall tone is more punitive than educational or aspirational. Moving beyond tone to substance, the code asks too little. The mere avoidance of criminally harassing behavior toward other community members should not be the standard for what Cornell expects of its students.
- C. **Complexity:** Compared to peers, Cornell's Campus Code is notable for its length and complexity. Several administrators discussed the code's orientation toward defining violations, penalties and process. This quasi-criminal orientation contrasts with other university codes, which typically have an explicitly educational orientation. Codes written in a more educational mode are typically shorter and in plain English. While a more legalistic approach is perhaps appropriate when very serious sanctions are under consideration, those sanctions are relatively rare, and the vast majority of code violations result in educational consequences (e.g., writing an essay).
- D. **Structural questions:** Finally, a number of constituencies have raised questions concerning broader structural features of the code (and Policy 6.4) and attendant enforcement mechanisms. Among those cited were the lengthy nature of some Judicial Administrator (JA) and Policy 6.4 proceedings; the JA's relatively short tenure between reappointments; and the JA's attenuated relationship to the university administration, including the president and the dean of students. In addition, the lack of the power to require student cooperation with reasonable requests of university officials constrains the university's ability to respond to problematic student conduct that falls short of a code violation that would merit punishment.

In this report, we have organized our recommendations under these same headings.

ANALYSIS AND RECOMMENDATIONS

We understand all universities to have two basic functions – the production of knowledge and its transmission to their students. In addition, Cornell University is committed to the preservation and transmission of an additional set of distinctive values embodied in the founding vision of Ezra Cornell and Andrew Dickson White and frequently identified with the university's motto of "... any person ... any study." Student discipline in general – and the campus code in particular – should be understood and structured in ways that are consistent with these goals and values.

A. Coverage

Every member of the university community – students, faculty and staff – has a crucial role to play in the accomplishment of Cornell's mission, but the role of each is distinctive. Students contribute to the production of new knowledge through their involvement in research, but they

also occupy a unique role in the ecology of the university as the recipients of instruction. While the campus code's ambition to provide a single set of standards that applies to all members of the Cornell community is laudable, it has the potential to distort the content of the code. Articulation of a single set of core values and a clear statement that these values apply to every constituency should suffice to provide all of the uniformity needed. Meanwhile, the application of the code – at least in principle – to faculty and staff – likely inhibits the realization of a code that is more aspirational and educative, and thus more in harmony with the university's instructional goals with respect to students. We make two recommendations with regard to code coverage.

Recommendations

1. Revise the Campus Code of Conduct to Make it Applicable to Student Conduct Only

We understand from multiple sources that the campus code is virtually never invoked against faculty and staff. Some view this fact as indicating that the code's application to faculty and staff is, in practice, a nonissue. We take a different view. Even the merely nominal application of the campus code to faculty and staff can have an impact on how the code operates and how it is understood. Narrowing the code to focus exclusively on student conduct acknowledges the reality of the code's operation in practice and allows the implementation of a code that aligns more closely with the educative function of the university in its relationship to students. Provisions of the code that apply expressly to faculty and staff should be excised.⁴ The limited function that the code performs with regard to non-employment related misconduct by faculty and staff can and should be reproduced through university personnel and other policies. Faculty or staff conduct that would constitute a code violation can and should be addressed under those policies.

2. Harmonize the Treatment of Greek Organizations and Other Student Organizations

Currently, individuals within Greek organizations are fully subject to the campus code and its procedures. All student organizations other than Greek organizations are – as organizations – subject to the campus code and its procedures. In contrast, Greek organizations (unlike other student organizations) have a separate disciplinary procedure that applies only to them that is managed out of the Office of the Vice President for Student and Campus Life. The reasons for handling student organization misconduct differently depending on whether the groups are Greek or not are not clear, and the disparate treatment seems hard to justify. All student organizations are managed through contractual and policy relationships with the university through the vice president for student and campus life. We can see benefits in moving adjudication and management of all student group misconduct to the vice president's office, where the university's relationship with such groups could be more effectively and directly addressed with both educational and other policy concerns clearly conveyed. Alternatively, we could see Greek organization misconduct directed to the JA under the Campus Code of Conduct.

⁴ See, e.g., Title II, Art. I.C.

Certainly, we see no good reason for treating Greek organizations differently from any other student organizations, and the current bifurcation of the system leads to suspicion that Greek life is being privileged as against other student organizations. This is not healthy and should be resolved through alignment either under the vice president for student and campus life or the campus code.

B. Purpose

Once the campus code is properly focused on student conduct, its purpose should be broadened beyond delineating violations, punishments and adjudicative process. In keeping with the university's mission to educate its students inside and outside the classroom, the campus code has a vital role to play in the articulation and transmission of university values. Our understanding is that most of the "sanctions" imposed by the JA are in fact educational in nature – the writing of an essay, for instance. The subcommittee believes that expressly reorienting the code toward the university's educational mission would largely ratify the current practice and render that practice more transparent. In order to accomplish this reorientation, we make the following recommendations.

Recommendations:

1. Articulate the University's Core Values Within the Campus Code

Most university campus codes begin with an articulation of the institution's core values. The closest thing to a discussion of Cornell University's values in the existing campus code is in Title I, Article 1. That discussion, while it contains many important insights, fails to articulate what makes Cornell distinctive from other institutions of higher learning. Cornell University has, since its founding, rightly claimed to be a different kind of elite university. Its melding of Ivy League tradition and land-grant mission and its commitment to becoming an "institution where any person can find instruction in any study" set it apart. The campus code should reflect those aspirations and should embody the university's ambition to attract and train a different kind of student. We therefore recommend that Title I, Article 1 be amended to incorporate a clear statement of Cornell University's defining values. Once articulated and adopted, those core university values should be promulgated more broadly throughout the university.

We do not understand our subcommittee's charge to include the drafting of a statement of such values. We believe the process for doing so must necessarily include a comprehensive and inclusive conversation that engages the broader university and alumni communities. But – as members of the Cornell community – we include in this report the values that some of our subcommittee members suggested:

- “... any person ... any study”;
- Creating an inclusive environment where any person can thrive academically and socially without fear, embarrassment or persecution;
- Sustaining a community that values and fosters respect for diversity, civility, bold ideas, a range of perspectives and constructive dialogue;
- Fostering a community dedicated to the collaborative pursuit of truth.

2. Re-orient the Campus Code Toward the University’s Educational Mission

For historical reasons, the campus code as currently written is focused almost exclusively on defining violations and prescribing the process for adjudicating those violations. This emphasis on due process is typically justified by the gravity of the sanctions at stake – particularly suspension and expulsion. But the most common code violations are relatively minor, and the typical sanction for them is appropriately less grave.

We believe the university should acknowledge this reality by revising the campus code in order to give it a more educational and aspirational tone. This shift will be facilitated by the narrowing of the code to focus on student conduct.

Educational interventions under the code should be administered through the Office of the Dean of Students, rather than by the JA. For cases in which serious sanctions are sought, the independent JA and the code’s formal processes are appropriate and should remain in place. They ensure that the university only imposes the most serious sanctions with appropriate due process. The dean of students should be free to pursue educational remedies and less serious sanctions for any violations of the campus code that – in his or her judgment – do not rise to the level of requiring suspension or expulsion of an individual student (or a comparably severe punishment for an organization). In pursuing educational interventions and less serious sanctions, the dean of students should be free to employ less formal processes of fact-finding and enforcement than currently envisioned by the code.

Even in the case of sanctions administered by the JA, the code’s educational function should be paramount. For example, the current practice under the code is to allow respondents to effectively freeze the process by withdrawing from campus (e.g., by taking a voluntary leave or by spending a semester off campus). This practice has the effect of giving the respondent a great deal of control over the timing of adjudication. Delayed adjudication of high-profile and disruptive code violations harms the university’s educational mission and leaves the community with the impression that the university does not care about the violations or is powerless to combat them. The code should be amended in order to give the JA more control over the timing of adjudications.

3. Reinstate the Obligation of Students to Comply with the Reasonable Requests of a University Official Within the Course of His/Her Duties

Article II.A.2. of Title IV of the campus code as written makes it an offense for a person subject to the code “[t]o refuse to comply with any lawful order of a clearly identifiable university official acting in the performance of his or her duties,” but we were informed that this provision has been effectively rendered a dead letter through adjudication except in situations involving public disorder. If so, that is unfortunate. The obligation should be reinvigorated and clearly articulated within Title III, although we think – within the context of that title – it could be rephrased as an “obligation to comply with a reasonable request of a university official.”

An obligation on the part of students to comply with the reasonable request of a university official will be especially important if the university implements our recommendation that responsibility for responding to all but the most serious offenses be transferred to the dean of students. The dean of students or persons acting on the dean’s behalf need to be able to call students into meetings, to require students to participate in discussions, and to fulfill educative sanctions. We heard from the dean of students that under the existing structure most students voluntarily comply with his requests but that the formal power to compel would greatly simplify his mission.

Because the obligation to comply has apparently fallen into desuetude, it has not been subject to abuse. Although our subcommittee has no reason to think its reinvigoration would be abused, we also would recommend that it be made clear that the obligation to comply with *reasonable* requests does not authorize university officials to use educational sanctions or alternative dispute resolution processes to dissuade students from the expression of protected political speech.

4. Add a Bias Enhancement to Title III’s Penalties Discussion

We have heard widely divergent accounts of when the university is willing or able to impose the most extreme sanctions – suspension and expulsion – in response to student misconduct. Some officials have told us that expulsion is never an option in response to a student who commits assault in the absence of “grievous bodily injury” to the victim, even where the assault is motivated by bias. Others have said that the sanctions for assault are far more flexible.

We believe that nondiscrimination is a core university value. As such, we believe the university should at least have the option of suspending or expelling from our community someone who violates the campus code when the violation was motivated by bias.

Consequently, we recommend that the following provision be added to the end of the discussion of penalties within Title III, Art. IV, No. 1(a)⁵:

A finding that any violation of this code is motivated by bias against an individual or group on the basis of their age, race, ethnicity, creed, color, national origin, sexual orientation, military status, sex, gender identity, disability, predisposing genetic characteristics, familial status, or marital status will be grounds for enhancing the penalty imposed on the respondent, up to and including suspension or dismissal.

C. Complexity

The campus code is daunting in its complexity. In undertaking the revisions to the code we describe above, the university should strive to simplify wherever possible. Where possible, the code should be written in plain English and provide numerous illustrative examples. And, except where the most severe sanctions are at stake, adjudicative processes should be simpler and less formal.

Recommendations

1. **Harmonize the University's Definitions of Harassment** – The campus code's treatment of "harassment" and bias are unusual in two respects. First, the categories the code protects ("disability, ethnicity, gender, national origin, race, religion, or sexual orientation or affectional preference") fail to include several categories protected under the New York State Human Rights Law.⁶ Second, the campus code definition of harassment differs from the definition within Policy 6.4. The campus code harassment provisions exclusively govern student-on-student complaints except in the category of gender violence and harassment, which was moved several years ago to Policy 6.4 in order to enable compliance with state and federal laws. Complaints against faculty and staff arising within the broad scope of employment are handled exclusively under Policy 6.4. As a result, harassment complaints against students are subject to entirely different standards depending on whether the claim involves gender as against race, disability, ethnic origin, or other Equal Employment Opportunity (EEO) protected status

⁵ We note that similar escalation or enhancement of criminal sanctions under so-called "Hate Crimes" laws has been tested repeatedly in the courts and found to be compatible with free speech protections under the First Amendment. *See, e.g., Wisconsin v. Mitchell*, 508 U.S. 47 (1993).

⁶ N.Y. Exec. L., Art. 15. New York law protects against discrimination on the basis of the following categories: age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, familial status, or marital status. *See id.* § 296. Some provisions of New York law also protect on the basis of domestic violence victim status. *See id.*

categories. This divergence leads to the anomalous result that for students at Cornell “harassment” on the basis of race, for example, is defined more restrictively than “harassment” on the basis of sex. On the other hand, Cornell faculty and staff are held to stricter uniform standards defining harassment consistently across all EEO categories. We can think of no good reason for this difference.

As noted above, the campus code’s definition is drawn from New York criminal law. Avoiding criminal harassment is too low a bar for members of the Cornell University community. Moreover, the New York criminal harassment definition regulates a different category of behavior (something more akin to stalking) than what we would normally consider harassment in private settings like a workplace or a university. In contrast, Policy 6.4’s definition of harassment is drawn from federal anti-discrimination law, which regulates conduct in the workplace (Title VII of the Civil Rights Act of 1964) and in educational settings (Titles VI and IX).

We believe that the definition of harassment in Policy 6.4 is a more appropriate means of upholding what we understand Cornell University’s values to be. Consequently, we recommend that the university (a) update the list of protected categories in Title III of the campus code to reflect New York law and (b) harmonize the university’s definitions of harassment by adopting for the campus code something much closer (though our proposal is not identical) to the definition in Policy 6.4.⁷ We believe the language such as the following would constitute a significant improvement in the definition of “Harassment” and should be considered/adapted for implementation across both the campus code and other relevant university policies such as Policy 6.4:

Harassment is: Conduct that creates a hostile environment on the basis of age, race, ethnicity, creed, color, national origin, sexual orientation, military status, sex, gender identity, disability, predisposing genetic characteristics, familial status, or marital status.

A hostile environment exists when the conduct is sufficiently severe, persistent, or pervasive that it unreasonably interferes with, limits, or deprives an individual’s participating in or benefiting from the university’s education or employment

⁷ In addition to this “hostile environment” harassment, Cornell University policy also rightly prohibits so-called “quid pro quo” sexual harassment. Our proposal would leave that prohibition intact in Policy 6.4 and simply extend the “hostile environment” harassment prohibition to the code, which covers harassment based on characteristics other than sex and gender for student-on-student cases. In addition to promulgating this new definition, the university should offer guidance to students in the form of examples of conduct that would presumptively generate a hostile environment. These might be published in the form of FAQs about the campus code more generally.

programs or activities. Conduct must be deemed severe, persistent or pervasive from both a subjective and an objective perspective. The fact that the conduct targets a group that has historically experienced discrimination may be relevant to a contextualized judgment about whether the conduct should be deemed severe, persistent or pervasive.

Because of protections afforded by academic freedom, speech and other expression occurring in the context of instruction or research will not be considered harassment unless this speech or expression also meets one or both of the following criteria:

- *it is meant to be either abusive or humiliating toward a specific person or persons, or*
- *it persists despite the reasonable objection of the person or persons targeted by the speech.*

Offensive conduct that does not by itself amount to harassment as defined above may be the basis for educational or other non-punitive interventions to prevent such conduct from becoming harassment if it were repeated or intensified. Mere disagreement with the political viewpoint of a student—as opposed to the means or manner by which the student communicates—shall not be the basis for any intervention, even a non-punitive one.

D. Structure

The complexity of the existing structures of code enforcement are as daunting as the code's text. The bias reporting system, for example, involves people in multiple offices across campus. Its operation is opaque not only to those who file reports but also to those accused of bias and those who administer various pieces of it.⁸ Similarly, efforts at alternative dispute resolution (ADR) currently reside in the School of Industrial and Labor Relations, within the JA's office and in the Office of the Dean of Students.

Some of this complexity is simply unavoidable within an institution as large and decentralized as Cornell. And some of it is mandated by the regulatory environment within which Cornell operates. But some of the complexity seems to be self-imposed. In keeping with the more educational goals of the campus code structure, however, we recommend that the university simplify and harmonize wherever possible.

Recommendation:

⁸ We understand that efforts are currently underway to study and simplify the bias reporting system. We are fully supportive of those efforts.

Unify the University’s Student ADR Efforts – ADR seems to be a very promising approach to low-level, unintended conflicts, including conflicts relating to offensive speech that falls short of harassment. We applaud the university’s efforts to expand its use of ADR across a number of contexts. We worry about the duplication of effort and confusion that may arise when ADR is administered to address student conduct from several different offices. In keeping with our recommendation above to limit the operation of the campus code and the JA to the most serious sanctions, we believe that responsibility for the administration of the university’s student-focused ADR efforts should be consolidated within the Office of the Dean of Students. This would not necessarily mean eliminating other ADR programs where they exist, but such programs would need to be coordinated within a single administrative structure to ensure consistency of practices.

Regulation of Speech and Harassment Subcommittee Members

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