

Hate Speech versus Harassment

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Initially comparing the two concepts

- Hate speech regulations tend to focus (or at least include as a primary element) the *content of expression*
- Harassment regulations tend to focus on the *conduct involved*
- Both types of regulations typically address the impact of the speech/conduct
- But harassment always involves the targeting of an individual person

Campus Codes Restricting “Hate Speech”

- Have had a uniformly negative outcome when challenged in courts.
- 1990’s – over 350 colleges and universities had adopted some form of code
- Every court to consider them, declared the codes unconstitutional or otherwise found them defective.

What was “Hate Speech”? – University of Michigan

Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap, or Vietnam-era veteran status and that:

- Involves an express or implied threat to an individual’s academic efforts, employment, participation in university sponsored extra-curricular activities or personal safety; or
- Has the purpose or reasonably foreseeable effect (of doing so); or
- Creates an intimidating, hostile, or demeaning environment (with respect to same)

Michigan Code Outcomes

- Complaints filed against students based on wide range of classroom comments
- Vast majority of complaints were filed against minority students by majority students
- Code was challenged in federal court
- Code was struck down on the grounds that the definition of prohibited speech was so broad and vague “it was simply impossible to discern any limitation” on the policy’s reach.
- To qualify as prohibited under the code, language must “stigmatize or victimize an individual. However, both of these terms are general and elude precise definition. Moreover, it is clear that the fact that a statement may victimize or stigmatize an individual does not, in and of itself, strip it of protection under the accepted First Amendment tests.”

University of Wisconsin

University could discipline a student in non academic matters in following situations:

For racist or discriminatory comments, epithets or other expressive behavior directed at an individual or on separate occasions at different individuals, or for physical conduct, if such comments, epithets or other expressive behavior or physical conduct intentionally:

1. Demean the race, sex, religion.... of the individual; and
2. Create an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity.

Federal court found regulation unconstitutional, mostly because a great deal of speech that individuals might consider “demeaning” was clearly protected by the First Amendment.

Stanford (a private university)

- Student conduct code drafted by the Student Conduct Legislative Council that prohibited “discriminatory harassment” including “personal vilification of students on the basis of their sex, race, color, handicap, national origin...” Personal vilification is defined as “fighting words or non-verbal symbols.. Commonly understood to convey direct and visceral hatred or contempt for human beings.”
- Struck down under a California law prohibiting any private educational institution from subjecting a student to disciplinary sanctions solely on the basis of conduct that is “speech” and that would be protected by the First Amendment.

After seeing these case outcomes in courts

- University of Pennsylvania withdrew its hate speech code
- Yale announced theirs would not be enforced
- Many other universities quietly followed suit

Wisdom from Justice Harlan: “We cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon censorship of particular words as a convenient guise for banning the expression of unpopular views.”

Options

- *Could* a “Hate Speech Code” be developed that would survive judicial scrutiny?
 - Potentially, and this issue will be looked at carefully by the President’s task force
- *Should* Cornell adopt such a code as a private institution with greater flexibility than a public institution might possess?
 - Implicates very deep values for faculty, students, and community
 - Implications for faculty could be significant if such a code applied to them
 - Requires extremely serious thought
 - AAUP and FIRE would say NO
 - Task force consideration would only be a beginning of a campus and board conversation

Existing Harassment provisions at Cornell

CAMPUS CODE OF CONDUCT

c. To harass another person in a manner that would violate Cornell University Policy 6.4 if it were applicable.

d. To harass another person (1) by following that person or (2) by 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.

(Article II A. , page 16)

Policy 6.4 (Title IX) Sexual and Gender-Based Harassment (Students)

Sexual Harassment is unwelcome sexual advances, requests for sexual favors, or other unwanted conduct of a sexual nature, whether verbal, nonverbal, graphic, physical, or otherwise, when the conditions outlined in (1) or (2), below, are present.

Gender-Based Harassment is harassment based on gender, sex, sexual orientation, gender identity, or gender expression, which may include acts of aggression, intimidation, or hostility, whether verbal, nonverbal, graphic, physical, or otherwise, even if the acts do not involve conduct of a sexual nature, when the conditions outlined in (1) or (2), below, are present.

(1) Submission to or rejection of such conduct is made, either explicitly or implicitly, a term or condition of a person's employment, academic standing, or participation in any University programs or activities or is used as the basis for University decisions affecting the individual (often referred to as "quid pro quo" harassment); or

(2) Such conduct creates a hostile environment. 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 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.

Policy 6.4 Protected Status Harassment (Faculty and staff)

Protected-status harassment, including sexual harassment, occurs when an individual is targeted with verbal, written, visual, or physical conduct based on that person's EEO-protected status that unreasonably interferes with the individual's work or academic performance, or creates an intimidating, hostile, or offensive working or learning environment. The conduct constitutes harassment under any of the following conditions:

1. The conduct is direct.
2. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment or academic status.
3. Submission to, or rejection of, such conduct by an individual is used as the basis for an employment or academic decision affecting that person.
4. The conduct is sufficiently severe or pervasive to alter the conditions of the victim's employment or academic pursuits, and creates a work or educational environment that a reasonable person would find abusive.

Policy 6.4 Sexual Harassment in the Workplace (Faculty and staff)

Sexual harassment is a form of protected-status harassment. Unwelcome sexual advances, requests for sexual favors, and other oral, written, visual, or physical conduct of a sexual nature may constitute sexual harassment under one or more of the following conditions:

1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment.
2. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.
3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Academic Freedom Constraints

Because of protections afforded by academic freedom, under item three (3) above, speech and other expression occurring in the context of instruction or research will not be considered sexual 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.
- It persists despite the reasonable objection of the person or persons targeted by the speech.

Note: The condition described in item three (3) of both sections above concerning sexual harassment in the work and educational environments involves an objective standard. The question is whether the conduct would interfere with a reasonable person's work or academic performance or participation in extracurricular activities, or would create an intimidating, hostile, or offensive working or educational environment in the mind of a reasonable person.

“Bias Activity” (Policy 6.4 Faculty and Staff)

Bias activity is defined as an act of bigotry, harassment, or intimidation that occurs on the Cornell campus or within an area that impacts the Cornell community that targets an individual or group based on EEO-protected status. Although bias is not always a violation of the law or of this policy, such behavior does impact the university’s commitment to diversity and inclusion.