

**Presidential Task Force on Campus Climate**  
**Preliminary Report: Regulation of Speech and Harassment Subcommittee**  
May 1, 2018

## **Introduction**

The overarching purpose of our subcommittee has been 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 a primary focus of our efforts.<sup>1</sup> Over the course of the semester, this Subcommittee has met with administrators and students responsible for administering the Code, both on behalf of complainants and persons accused.<sup>2</sup>

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 on their face.<sup>3</sup> We have heard substantial criticism of 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 speech, with attention to ensure that those proposals do not undermine the protection of political speech.

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<sup>1</sup> In confining our focus to the Code (as well as speech-implicating provisions within 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 climate and University response.

<sup>2</sup> Due to the timing of the campus climate survey, we prepared this report before we have had an opportunity to deliberate about those results. We will incorporate those results into our final report.

<sup>3</sup> The Code stakes out a clear position in favor of the right to engage in controversial political speech by speaking 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. Our subcommittee is satisfied that these provisions are adequate to ensure the safety of speakers and the community, protect the expression of persons expressing controversial views, and protect the right of peaceful counter-speech that does not aim to silence those expressing controversial views.

In making these recommendations, we do not take a position on the process by which they should be implemented. Our charge was primarily 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 are at this point prepared to opine. Our final report may contain recommendations that are more far-reaching in their impact on the Code and its related structures.

## **Background**

The 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.<sup>4</sup>

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 is (on its face) narrower and adheres more closely to federal (civil) antidiscrimination 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,

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<sup>4</sup> 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”).

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 are typically handled under applicable personnel policies. Off campus (student) conduct is subject to the Code only when it rises to a high level of seriousness. 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 have emerged from the Subcommittee’s deliberations:

- (1) **Purpose:** Most campus codes make explicit reference to their universities’ core values. In contrast, the Cornell Code focuses on defining infractions and punishments and contains no explicit statement of core University values. To be sure, it includes an important discussion of “freedom with responsibility,” but in general, its tone is more punitive than educational or aspirational. Moving beyond tone to substance, it is worth asking whether the mere avoidance of criminally harassing behavior towards other community members should be the standard for what Cornell expects of its students.
- (2) **Complexity:** Compared to peers, Cornell’s Campus Code is notable for its length and complexity. Several administrators discussed the Code’s orientation towards defining violations and penalties. This quasi-criminal orientation contrasts with other almost all other university codes, which typically have an explicitly educational orientation. Codes written in a more educational mode are typically shorter and written in plain English. While a more legal 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).
- (3) **Coverage/Jurisdiction:** The Subcommittee has heard several questions about the reach of the Code, both its potential for overinclusion and for under-inclusion.
  - a. **Overinclusion:** The Code purports to apply equally to faculty, students, and staff. But virtually all enforcement actions under the Code involve student conduct.
  - b. **Under-inclusion:** 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.
- (4) **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 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 our final report, we plan to offer our recommendations with respect to all of these issues. Due to the shortness of time, however, and the desire to adhere to the original promise of a set of recommendations by May 1, in this interim report we offer a shorter list of four recommendations. We have organized them according to whether they can be implemented relatively quickly or, instead, require additional consideration and process.

### **Recommendations that can be Implemented in the Relatively Short-Term:**

**(1) Definition 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.<sup>5</sup> Second, the Campus Code definition of harassment differs from the definition within Policy 6.4. This divergence leads to the anomalous result that – at Cornell – "harassment" on the basis of race is defined differently from "harassment" on the basis of sex. 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 antidiscrimination 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

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<sup>5</sup> 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.*

definition in Policy 6.4.<sup>6</sup> We believe the following language would constitute a significant improvement and should be adopted as the University’s definition of harassment for both the Campus Code and for Policy 6.4:

*Harassment is: Conduct that creates a hostile environment on the basis of age, race, 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 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 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.*

## **(2) Bias Enhancement:**

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

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<sup>6</sup> 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.

violates the Campus Code when there is evidence that 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):

*A finding that any violation of this Code is motivated by bias against an individual or group on the basis of their age, race, 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.*

### **Recommendations That Require Longer-term Implementation:**

**(1) Articulation of Core Values Within the Campus Code** – The closest thing to a discussion of core Cornell University values in the 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 of the Campus Code 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 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 preliminary 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/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) 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 – fully 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. We see no good reason for treating Greek Organizations differently from any other student

organizations under the Campus Code. We therefore recommend treating Greek organizations identically to other student organizations under the Campus Code.