



## Cornell University University Assembly

### 2020 Proposed Amendments to the Campus Code of Conduct Online comments received (as of 4:30 PM Fri., 5/8/20)

#### **Analysis**

Total # of comments: 79

Total # of individual commenters: 68

Comments submitted by:

- Alumni – 15 or 18.9%
- Faculty – 8 or 10.1%
- Graduate Students – 4 or 5.1%
- Professional Students (Law, Vet, Johnson School) – 21 or 26.6%
- Staff – 7 or 8.9%
- Undergraduate Students – 24 30.4%

Anonymous comments: 32 or 40.5%

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### **COMMENTS OF UNDERSIGNED CORNELL DAILY SUN ALUMNI**

Submitted by Robert C. Platt, Esq on Fri, 2020-05-08 16:11

#### **COMMENTS OF UNDERSIGNED *CORNELL DAILY SUN* ALUMNI**

The undersigned alumni of *The Cornell Daily Sun* file these comments on the Codes and Judicial Committee proposal. Some of us have law degrees and others of us spent our careers as working journalists. We all share a devotion to Cornell and to maintaining *The Cornell Daily Sun* as an independent journalistic voice and critic for the Cornell community, including alumni and Ithaca residents.

*The Sun's* value stems from being the Cornell community's independent newspaper since 1880. It has always operated without University subsidies or control. *The Sun* publishes the facts regardless of whether they cause embarrassment or consternation in Day Hall, including coverage of the Campus Code and the judicial system. Similarly, *The Sun* publishes a wide variety of opinions, regardless of whether those viewpoints will be vexatious to individuals or groups of students, faculty, staff, administrators or local officials. It has been that way since 1880, and so it should continue to be.

#### **1. Statement of Principles and Values Must Recognize Important First Amendment Rights**

"Section 1: Principles and Values" does not fit with the start of a Campus Code of Conduct. Certainly stating general principles and goals will be helpful in interpreting the Code, but this section does not adequately address fundamental rights such as freedom of speech, freedom of the press, freedom of religion, freedom of association and the right to petition for redress of grievances. Valuing these rights has served Cornell well for more than 150 years.

However, recently these important rights have been under attack by people seeking to establish a “speech code” to ban or punish speech that some may find offensive. The best way to avoid this proposed Code’s being misinterpreted, and from trampling on protected rights, is to include a strong statement in Section 1 reaffirming these bedrock First Amendment rights.

One would think that exercising protected First Amendment rights off campus would guarantee freedom from University interference and control. Not so, under the proposed Code. The Code asserts the right to regulate and punish non-registered groups as well as off-campus conduct, which would have a chilling effect on the entire Cornell community. We know of no legal basis for this inadvisable over-reach. The University must respect First Amendment rights as a matter of tradition, as a matter of educational policy as a world leader in academic thought, and as a matter of law. We urge that the improper assertion of jurisdiction over unregistered organizations and off-campus conduct be removed entirely from the Code.

## **2. Strict Vicarious Liability For Student Members of Unregistered Organizations**

Proposed Section 4.1 provides, “known members of unrecognized student groups may be held accountable for prohibited conduct by these groups.” This sentence imposes a strict vicarious liability upon any Cornell student for any asserted Code violation by an “unrecognized student group.” If any student group published a news story, opinion piece or tweet that offended someone, the offended person or group, armed with the Code, could file a complaint with the Judicial Administrator alleging “harassment.” **Any student** known to be a member of that student media group could then be prosecuted for a violation of the Campus Code, even if that student had no direct role in the writing or editing of the offending article or commentary. Such “guilt-by-association” serves no educational purpose, but merely serves to chill free speech and freedom of the press. It should be removed in its entirety from the Code, thereby avoiding a challenge likely to show its enforcement would violate applicable law.

## **3. Traditional Limitations Should Be Respected for Campus Conduct Regulation**

Legalities aside, Cornell traditionally has limited its conduct regulation to on-campus activity. While registered student organizations that seek funding from Student Activity fees or use campus facilities voluntarily submit to Campus Code jurisdiction, unregistered groups such as *The Sun* do not. Unregistered organizations should not be regulated by Cornell. Further, the Campus Code should regulate only on-campus conduct, and jurisdiction should not be expanded to off-campus locations such as the Cornell Daily Sun building (located in downtown Ithaca) or to “online behavior” (Section 3(A)).

We file these comments as individuals concerned about the free exchange of information and views on campus. They do not necessarily reflect the editorial views of *The Cornell Daily Sun*. We urge the Committee to respect the rights of student journalists and the readers they interact with every day.

Signed:

Jay Branegan '71

Kathleen Frankovic '68

Andrew Kreig '70

Carl P. Leubsdorf '59

Robert C. Platt '73

Elaine S. Povich '75

Charles J. Sennet '74

Dineen Pashoukos Wasylik '94

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## Judicial Codes Counselors' Comments

Submitted by Gabrielle Kanter on Fri, 2020-05-08 15:42

I am a third-year law student and currently serve as the Judicial Codes Counselor. The Judicial Codes Counselors (JCCs) are tasked with advising and advocating on behalf of respondents accused of misconduct in the campus misconduct systems governed by the Campus Code of Conduct, Academic Integrity, and Policy 6.4. We advise students, faculty, and staff members. For the last year, we have been involved in the conversations about the campus code of conduct amendments, drafting new sections, commenting on other people's work, and advocating for respondents' rights in the process during the CJC meetings. I would like to share some of my observations from these meetings. Additionally, given that the JCCs were asked *not to speak* at the most recent UA meeting when the CJC Chair presented information about this proposal and another competing proposal—this appeared at the eleventh hour (you can read my comments regarding that proposal [here](#))—I wanted to ensure that the JCC Office had an opportunity to voice our opinion.

While I am generally accepting of the direction the CJC took in this draft, that is only because I've seen how much worse the campus misconduct system could become for students. This draft is a compromise. Earlier drafts and other proposals even more substantially deprived students of due process. However, I still greatly respect and prefer the *existing campus code* to this watered-down version. Regardless, because of the constraints imposed by the administration and the UA, the CJC did not have adequate time to thoughtfully consider public comments made here. These "amendments" (aka a complete overhaul of the existing code) were rushed throughout this academic school year. For example, I agree with Mr. Spitzer's and Professor Garvey's comments about the ambiguities in the substantive/violations section. These problems are a result of the UA constantly pushing unrealistic deadlines—not a reflection of the lack of effort by the members of the CJC. And because of these deadlines, the wonderful suggestions and comments made on this public comment page will not make it into the draft that the UA votes on this coming Tuesday. This process appears to be built on "shared governance" and democratic principles when in fact it is not.

Below are some of the substantive comments on behalf of the JCC Office:

### **Section 1.2 Respondent's Right to Have an Advisor Speak**

*We support the CJC's vote in favor of allowing advisors to speak during proceedings.* At hearings, the University is represented by the Office of the Judicial Administrator (OJA), full-time professionals with an abundance of experience and resources. Meanwhile, respondents typically have a law student advisor (a JCC) if the respondent cannot afford an attorney. It is inherently unfair to allow full-time professionals with the authority of the University to oppose an inexperienced, student-respondent without the active involvement of their advisor during a hearing. It can be incredibly difficult and intimidating for a student-respondent to tell their story clearly and concisely using their evidence and witnesses. Students' oral presentation skills should not affect whether they are found responsible or not responsible. Likewise, students who may have a harder time with spoken or written English may be at an unfair disadvantage. In addition, forcing a respondent to lead and speak in the hearing without the assistance of an advisor in the name of making the process an "educational experience" overlooks the anxiety, stress, and fear a student experiences during campus misconduct proceedings. Silencing advisors exacerbates that emotional toll and makes the process more intimidating and likely less educational for the student. The proposed code does *not* make the hearing more "litigious" either. Attorneys and outside advisors may only speak during limited circumstances. And as JCCs, we always encourage students to make statements on their own behalf during the hearing when they feel comfortable. To prevent the process from becoming unfair and needlessly daunting, the proposed provision allowing advisors to speak during proceedings must be adopted.

### **Section 1.4 The Office of the Judicial Codes Counselor – Office Members**

*We support the CJC's vote in favor of ensuring that JCCs are law students.* While we recognize and are humbled by the intellect and abilities of our undergraduate and graduate student colleagues, having specialized training in the skills most pertinent to the JCC position is essential. This frequently boosts our clients' confidence and trust in our abilities. For example, every Cornell Law student is required to fulfill a certain number of credits through experiential learning. Through the Law School's clinical programs, students receive invaluable client representation experience. Students are taught how to perform interviews, gather information about a client, make effective arguments, and comfort people who are coping with severe trauma. JCCs must be armed with all of these skills. Similarly, having professional training in ethical issues lawyers face, such as conflicts of interests (which is taught in a required law school course) is vital to maintain a professional and functioning office. JCCs must also be able to understand and explain the nuanced difference between confidentiality and attorney-client privilege and be ready to research issues related to these concepts as they arise. Importantly, this provision impacts more than just the Campus Code because JCCs also advise on Policy 6.4 and advocate on behalf of faculty and staff members accused of sexual misconduct. These proceedings can have life-changing consequences. Because these circumstances are so high stakes, having some legal training and an advisor in the Law School who we can turn to for help is crucial. And given that most individuals in the OJA have a law degree and that the student advocates for Policy 6.4 complainants are law students, having law students be JCCs ensures that all community members are provided with an equivalent advisor. Finally, when JCCs begin, they must hit the ground running. JCCs spend most of their time training by learning the different codes and policies. It would place respondents at a serious disadvantage—and potentially risk their future academic and professional goals—if a student did not have the basic understanding of how to advise and advocate on these complicated issues.

#### **Section 1.4 The Office of the Judicial Codes Counselor – Office Independence**

*We support the CJC's vote to keep the JCC Office independent from the Office of Student and Campus Life.* Some members of the CJC suggested that moving the JCC under Student and Campus Life will “increase accountability, understanding of other aspects of student life, and make the process less legalistic and more educational.” First, the JCCs are held accountable through our law school advisor and by our clients. Some CJC members believe that more accountability *by the University administration* would be a good thing. However, separation from the University administration is important to ensure that respondents trust their JCC advisor. Additionally, under these proposed procedures and Policy 6.4, administrators from the Office of Campus and Student Life (including the OJA and the Vice President of Student and Campus Life) determine when a student is responsible, uphold interim measures, and rule on appeals. How (and why) would respondents trust their advisors if they too fall under the same umbrella as those administrators? Second, given that JCCs meet with and interact with students every day through their job, what else must the JCCs do to understand other aspects of student life? Many JCCs take on the position to become more involved in the greater Cornell community. This position frequently attracts law students who attended Cornell as undergrads—currently, one JCC was an undergrad at Cornell. Finally, JCCs do not make the process more legalistic. JCCs make arguments, advise, and advocate for students. Making persuasive arguments, advancing student interests, and protecting the fairness of the campus misconduct system is not legalistic.

#### **Section 4.3 Recordkeeping –Transcript Notations and Withholding Degrees**

The CJC voted 5-3 against the proposed language (but retained the language in the draft because the CJC did not create an alternative). The proposal disallows the use of transcript notations during the pendency of a complaint. The proposed language also disallows withholding degrees when a student may graduate during the pendency of the complaint so long as the student enters into an agreement with the OJA granting the OJA jurisdiction over the student until the final resolution of the complaint (including the completion of sanctions). *We disagree with the CJC's vote and urge the CJC to adopt the proposed language.* First, these notations are frequently imposed before a student is actually found responsible. These notations may cause

damage to a student's academic and professional career; this is especially concerning because the student may ultimately be found not responsible. Noting a student's academic transcript prior to a finding of responsibility prevents that student from applying to academic and professional programs such as summer internships. Second, the OJA has encouraged the CJC to move the new code in an "educational" direction. It is difficult to imagine a bigger threat to a student's ability to attain her "educational objectives" than withholding her degree—especially when a less restrictive and less punitive mechanism (an agreement) may be used.

### **Section 5.1 Disciplinary Probation and Hearings**

The proposed procedures create less extensive hearings (Administrative Panels) for lower violation cases and more involved hearings (Hearing Panels) for higher violations cases. *We support the CJC's vote in favor of having disciplinary probation fall under the Hearing Panel process as opposed to the Administrative Panel process.* Disciplinary probation is a higher sanction and is usually proposed where the respondent is charged with more serious violations of the code. A serious violation of the code may create lasting consequences on a student's disciplinary record. In these circumstances, respondents should be given the opportunity to fully present their narrative before a hearing panel. In particular, respondents should have their opportunity to present all evidence they would like to present without the filtering mechanisms included in the Administrative Panels. When a disciplinary probation is imposed, a respondent may be required to meet with members of the Office of the Judicial Administrator for several semesters, which makes this sanction very different from (and more serious than) a written reprimand, oral warning, or educational sanctions.

### **Section 5.4 & 6.5 Public Hearings**

Disallowing public hearings is a departure from the existing Campus Code of Conduct, which allows respondents to ask to have a public hearing. *The University should maintain the public hearing option.* Consider the OJA's decision to charge Mitch McBride with violations of the Campus Code of Conduct in 2017 for leaking documents from a University working group. After he asked to have a public hearing, the OJA objected. However, [the hearing chair allowed the public hearing to occur](#) and the hearing was streamed to a packed room of observers. The hearing panel found McBride [not responsible](#). Allowing respondents the option of having a public hearing serves as an important check on the University administration. The way to appropriately balance the privacy interests of complainants and other members involved in the hearing process is not to eliminate this right entirely—but to give the hearing chair discretion to determine whether a public hearing is appropriate in circumstances given the competing interests.

### **8.4 Burden of Proof**

*We disagree with the CJC's vote to adopt a preponderance of the evidence standard because the clear and convincing evidence standard better advances principles of fairness and due process, ensures accurate outcomes, and creates trust in the misconduct process.* In a hearing, respondents, who are often still teenagers and frequently are first-time offenders, face the employees of Office of the Judicial Administrator (many of whom are attorneys), the University, and the resources available to both. If the University switches to a preponderance of the evidence standard, the code would effectively be putting its thumb on the scale of justice against a side that is already systematically disadvantaged. This may be especially harmful to students from low-income backgrounds who are unable to afford an attorney. During CJC meetings, some people raised concerns that the University has had difficulty in meeting this burden. However, clear and convincing evidence has been the longstanding standard used in non-sexual assault campus misconduct proceedings at Cornell and no evidence has been presented that would suggest a need to alter that standard. The clear and convincing evidence standard signals to the campus community that the University is committed to avoiding

finding the innocent responsible, thereby giving the community the confidence that the campus adjudicatory system is operating fairly.

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## Views from a JCC

Submitted by Jialin Yang on Fri, 2020-05-08 14:37

I currently serve as assistant Judicial Codes Counselor and I am a third-year law student. I work one-on-one with students, faculty and staff to advocate on their behalf when they are accused of misconduct under the campus.

Before I delve into substantive issues, I first want to critique the fact that the so-called “Public Forum” held on May 7th was hardly public at all. The *wrong link* was sent to the entire Cornell community and participants were left in a Zoom meeting unaware that the panelists were in a different meeting. By the time we were able to access this other meeting, the “Public Forum” was underway. Mistake or not, this is unacceptable when this is purported to be an opportunity “for the entire community to discuss the issues” of the proposed changes.

Secondly, the CJC requested feedback on section 1.4 on the Judicial Codes Counselors. Specifically, the CJC requested feedback about whether the JCCs should be independent from administrative oversight. Requiring oversight from the very administrative bodies that the JCCs seek to hold accountable completely disregards the potential conflicts of interest that would arise. It is important for our office, the advocates for respondents, to remain independent from the University’s administration. We are here to zealously advocate for respondents and we are able to do that because of our *independence*. I’m at a loss for how moving our office under the Student and Campus Life and essentially dismantling us will “increase accountability, understanding other aspects of student life, and make the process less legalistic and more educational.”

Third, the lowering of the burden of proof is wrong. I have witnessed the devastation when respondents are expelled or dismissed. While it may seem like a vague concept to some CJC members, I would like to remind them that these are real peoples’ lives at stake. These are students, like you or me. There is already a structural power difference between students and the University. By lowering the burden of proof to preponderance of the evidence, the Code will be exacerbating the negative consequences of this power dynamic. A student standing in front of a Hearing Panel is already at a disadvantage given the Judicial Administrator’s authority and perceived credibility. The CJC should not downplay the consequences for a student found mistakenly “responsible”. A finding of responsibility can be severe and can destroy students’ chances at graduate school or finding a good job, not to mention students who are suspended or expelled. With such high stakes, Cornell should not lower the burden of proof at all—the proposed change to a preponderance of the evidence standard blatantly erodes the due process and fairness in our campus misconduct system.

Additionally, the campus misconduct system, as with any judicial system, is rife with unconscious bias and disparate outcomes based off of race, class, sexual orientation, gender, and other factors. The proposed changes would only serve to exacerbate these inequalities and do nothing to alleviate them.

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## Strong concerns about proposed changes

Submitted by Anonymous Committee Member on Thu, 2020-05-07 23:52 (user name hidden)

I would like to reiterate below some concerns about the proposed changes, and the importance an overall system that is protective of student’s rights. Being a JCC requires so much more than being a supportive

presence to a student during a disciplinary process. It requires commitment, sacrifice of personal time, and, above all, unwavering advocacy on behalf of your client. A client whose future could hang in the balance whether they be student, professor, or staff member. The presence of the JCCs and their law student status is not what makes the process under the code legalistic. Systems with codes and rules and punishment will always, by default, feel at least a little legalistic. Any time you have a team of professionals employed by the university on one side, whose primary solution is the distribution of punishment, you are going to end up with a process that requires advocacy on behalf of the student facing said punishment. That's just how systems of punishment work.

It's great to suggest a movement toward more restorative justice practices. I applaud it, and hope you've consulted people who make implementing restorative justice practices their life's work in deciding what you will do. But the changes being made or thought about are not restorative justice. Making punishment easier to pass out, suggesting that the people assigned to protect the rights and interests of the students (the JCCs) be supervised under the same administration they are representing students in front of—this is not restorative justice. This is granting more power to the administration, and creating vast conflicts of interest. The OJA, while student focused, is still an administrative office of a large university. This can create many concerns beyond the interests of students: universities do not like facing the possibility of bad press or lawsuits; universities (and the offices within them) are constantly forced to justify how they spend the exorbitant tuition money they take in; universities have internal politics always occurring that the student or general public can only imagine. I believe in a restorative and educational process, and I believe the OJA has good intentions. But in our current system of education, working at a university means balancing many competing interests with the interests of students. Granting any administrative office more power without considering this may not achieve the educational goals envisioned.

While the current proposal separates potential sanctions based on their severity, any sanction could impact a student for years to come. I hope that during this process a diversity of people who have gone before the OJA under different charges and faced different sanctions have been spoken to and heard. For an 18-year-old from any background, but especially from backgrounds underrepresented in the Cornell community, it can be terrifying. Having independent, well trained, disciplined advocates committed to students' rights benefits both those students and the university community as a whole.

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## Burdens Undue and Due Process Undone

Submitted by Brianna J Weaver on Thu, 2020-05-07 23:49

To: Codes and Judicial Committee & University Assembly

From: Brianna Weaver, J.D. candidate 2020

Date: May 7, 2020

Re: Notice and Comment Procedure and Sections 5.4, 6.5, and 8.4 Proposals

### **I. Notice and Comment**

I am frustrated. I am frustrated because I should be writing a seminar paper right now. Because we are in the midst of finals, but I am here, writing this comment. I am frustrated because I am commenting during a global pandemic while some of my peers lack the internet access, emotional energy, or time to comment. I am frustrated because the link to the public forum was broken. Because if it were not for law students posting on their private social media accounts, I would not have known about the proposal to lower the burden of proof. Because "[r]eworking the Code to have an educational and aspirational rather than punitive, quasi-criminal

tone" is indefensibly nondescript. Understand this: when I say I am frustrated, I do not mean to say that I am emotional. I mean that I am aware there has been an effort to frustrate the efforts of students like myself to take note of the changes to the Code and to voice our opinions. That frustration has come in the form of insufficient communication, useless - if not misleading - characterizations of the proposals, and suspect timing. The fundamental unfairness of these proposals is not limited to their substance; whether intentional or not, it began with improper notice and comment procedures.

## II. Burden of Proof

Preponderance of the evidence is a standard lifted from civil law. Preponderance of the evidence is often thought of as 50%+ certainty. It is when one side is more likely than not correct. Civil law does not generally serve to discipline,\* but to set the parties right. The harm of a potential error is, therefore, equal in either direction. If the court decides incorrectly, one party will be erroneously deprived of a certain award to which they are entitled or the other party will be deprived of that same award to which they are entitled. Because the risk is equal to the parties, preponderance (50/50) is a fitting standard of proof.

The same can not be said when we take the preponderance standard out of the context of civil law. For example, in criminal law, the harm arising from an error is not equal. Either a guilty defendant is erroneously acquitted or an innocent defendant is erroneously found guilty. In criminal law we use the beyond a reasonable doubt standard. There are a variety of articulations of the standard, but it is a much higher standard than preponderance. The principle underlying the use of beyond a reasonable doubt in criminal trials was articulated by William Blackstone: "better that ten guilty persons escape, than that one innocent suffer."

The clear and convincing standard falls between preponderance and beyond a reasonable doubt. This makes perfect sense in the context of a university code of conduct. The stakes are not as low as a typical civil suit nor as high as a typical criminal case. The parties would not experience equal harm in the event of error, yet the harm would not be as disproportionate as an innocent defendant going to jail.

What's more is that there is a significantly higher risk of discrimination with a preponderance standard for Code of Conduct violations. Because the preponderance standard asks what is more likely than not to have occurred, implicit biases are more likely to change the outcome of a case. Take, for example, a case where the evidence is perfectly even (50/50). If there were a perfect factfinder without any prejudice or bias, there would be no preponderance of the evidence. If, however, there is any implicit bias in the factfinder *whatsoever*, it will necessarily determine the outcome of that case. Now this is not just true when a factfinder is consciously biased; this is what happens when a factfinder has *implicit* bias, which everyone does. Although it's still possible, implicit bias is much less likely to determine the outcome of a case when there is a higher standard of proof like clear and convincing evidence. In today's political climate, we have to be especially mindful of these biases. Willing away bias is not sufficient; we need systematic protections to protect targeted groups.

## III. Private Hearings

Rather than propose edits to the existing exceptions that allow for a public hearing, this proposal eliminates them in one fell swoop. The proposal does not include any discretion which could allow claimants or respondents to have a say. The proposal does not entertain the possibility that a claimant and a respondent may both favor a public hearing. A claimant who fears that their claim will be buried may favor a public hearing. A respondent who wishes to clear their name may favor a public hearing. The preferences of neither matter in the proposal. This alone makes the proposal breathtakingly overbroad. Even without consensus, there are reasons to have public hearings in certain situations. The public has an interest in monitoring the carriage of justice. Here, the Cornell community has an interest in monitoring the enforcement of the code of



conduct. The interests of the public and the various players may conflict and often do conflict. That alone does not justify a blanket rule. A rebuttable presumption against public hearings would be more appropriate than an outright ban.

\*There are, of course, limited situations where a party is deterred or punished in civil law, such as cases where punitive damages are sought; however, such situations are the exception and not the rule.

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## Timing of the public comment period

Submitted by Anonymous Committee Member on Thu, 2020-05-07 22:18 (user name hidden)

I share GSGIC's concerns with the duration and timing of the public comment period for the Campus Code of Conduct. Three days is not enough time to give everyone a chance to comment on the proposed amendments. Also, many of us are busy with classes (and finals) and don't have much time to participate in this process, especially because it is near the end of the school term.

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## Comments on proposed Campus Code of Conduct

Submitted by Arthur B. Spitzer on Thu, 2020-05-07 20:42

As invited by the [Codes and Judicial Committee](#) of the University Assembly, I am submitting the following comments on the 2020 Proposed Amendments to the Campus Code of Conduct.

Before turning to my comments, I will briefly state my background, which I think is relevant to my qualifications to comment on these proposals.

I am a loyal and active Cornell alumnus, Class of 1971. During the 1968-69 academic year, I was one of two student members of the Faculty Committee on Student Affairs, which at that time was the final review authority for student conduct matters. After the Willard Straight Hall takeover in April 1969, I became an elected member of the Cornell Constituent Assembly, which was formed to consider and propose changes in university governance. I spent the summer of 1969 researching student codes of conduct across the country, to inform the Constituent Assembly's consideration of that topic.

The Constituent Assembly's major recommendation was the creation of a Cornell University Senate, which would include students, faculty, and staff, and which would have broad authority over non-academic campus affairs, including student conduct. The Board of Trustees approved the creation of the University Senate in early 1970, and the Senate convened that spring. I was elected to the Senate, and the Senate elected me as its Speaker for the 1970-71 academic year.

After graduating, I went to law school; after several years of private practice, in 1980 I became the Legal Director of the American Civil Liberties Union (ACLU) of the District of Columbia, a position I occupied for 40 years. A few weeks ago, I became Senior Counsel at ACLU-DC. Among the ACLU's current and historical concerns is due process—the guarantee of fairness when the government takes action involving persons (whether individuals or groups). Due process includes fair notice of what conduct is prohibited, and fair procedures for determining whether violations have occurred. Because Cornell is in part a governmental institution, the legal requirements of due process apply to many of its actions. And presumably Cornell

wishes to apply the same standards when it acts with respect to individuals or groups connected to the private side of the university, rather than treating them as second-class citizens.

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My main reaction as I read the Proposed Amendments was embarrassment on behalf of Cornell. They are just not ready for prime time. They are filled with inconsistencies, with provisions that are too unclear for a reasonable person to understand (contradicting the stated goal of “simplifying the Code and having it use ‘plain English,’” and with errors that any proofreading would have corrected. I believe that the adoption of these rules in anything like their current form will inevitably result in litigation that Cornell will assuredly lose. In addition to those problems, many proposed provisions raise serious questions of fairness, not to mention common sense.

I present my section-by-section comments below.

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## **Substantive Provisions**

### **Section 1: Principles and Values**

**Comment 1.** The preamble states that “The expectations and standards in this Code of Conduct should be applied in a non-punitive educational objectives including opportunities to demonstrate growth from mistakes, and to implement restorative justice, and sanctions imposed should, to the greatest extent possible, advance Cornell’s educational goals.”

Right from the beginning, the proposal includes a sentence that makes no sense. What does “applied in a non-punitive educational objectives” mean? It is impossible to tell. Did no one proofread these proposed amendments before they were published?

I agree, of course, that any student code of conduct should pursue educational objectives; to the extent the code can be applied in an educational and non-punitive way, that is to the good. But this code, like any such code, does include punishment for prohibited conduct, and I think the preamble should recognize as much, and should also recognize that when punishment is involved, fairness to all parties is essential.

**Comment 2.** The preamble notes that “Authority over and administration of the Code and associated Procedures are vested with the *Vice President for Student and Campus Life (VP SCL)*, in consultation with the elected Assemblies of the University. Student conduct matters are delegated to the Office of Student Judicial Administrator, overseen by the Dean of Students.”

What does “authority over ... the Code” mean? Can the Vice President amend the Code? Can he or she overrule any of the other actors involved in the process? Likewise, what does “overseen” mean? Can the Dean of Students overrule the Office of Student Judicial Administrator what that office makes a decision not to the Dean’s liking?

These statements are never clarified, and are potentially very dangerous. Even the most carefully-designed procedures will fail if they are subject to arbitrary outside control. Just imagine if the President were given “authority over” the U.S. judicial system, or if the courts were “overseen” by the Attorney General. We would soon have a judicial system like the ones in countries where charges and verdicts are dictated for political reasons.

I have no doubt that the current and future Vice Presidents and Deans of Students will make every effort to be fair. But it is inherent in the nature of their offices that concern for fairness to individual students is not the priority. They are—necessarily and properly—more concerned with the university’s public image, the wishes of the President and the Trustees, and the interests of various campus affinity groups. For example, the Dean of Students’ constituency includes the [Asian and Asian American Center](#), the Lesbian, Gay, Bisexual, Transgender Resource Center, and the [Women’s Resource Center](#). <https://scl.cornell.edu/identity-resources/office-dean-students/office-dean-students>. The current Dean states that “the core of [his] role is a commitment to work broadly on aspects of access, equity, and social justice at Cornell.” <https://scl.cornell.edu/identity-resources/office-dean-students>. That’s great. But it means that he cannot be a neutral adjudicator. If the constituencies that he serves are demanding what they view as “social justice” in some individual case, he (or a future dean) is in a poor position to resist.

I assume that the people who administer the campus judicial system need to report to someone for administrative purposes—budget, office space, and the like. But “authority over” and “overs[ight]” sound like much more than that. In my view, it is very important to preserve the independence of the judicial administrators from outside control when it comes to individual case processing and adjudication, and this should be made clear in the Code.

In this regard, see also comment 23, below.

## Section 2: Definitions

**Comment 3.** Section 2(1) of the proposal provides that the term “campus” “can also include streets, sidewalks, and pathways adjacent to or in the immediate vicinity of Cornell campus or property.” “Can” is a very troubling word in this context. Does it, or doesn’t it, include such areas? If it includes them only sometimes, when? Likewise, “immediate vicinity” must mean something further away than “adjacent,” but how much further? A student is entitled to know whether he or she is on campus for purposes of the Code. The person deciding whether to press charges needs to know whether a prospective respondent was or was not on campus. In many cases, the members of a hearing board cannot know how to rule on the defense that certain conduct was not covered unless they know whether it occurred on or off campus. The definition in the proposal is too vague to be fair in any case involving non-electronic conduct that is not literally on Cornell property. (See comment 19, below, for an example of where such a clear definition would be essential.)

## Section 3: Scope and General Provisions

**Comment 4.** Proposed Section 3(A) provides that “The Code covers behaviors by . . . University-recognized or University-registered student organizations and . . . generally applies to conduct . . . on the property of a *University-related* residential organization.” (Italics added.) I hope there are clear rules elsewhere regarding whether an organization is University-recognized or University-registered. But what is a “University-related” organization? If the phrase is supposed to mean University-recognized or University-registered, it would be best to repeat those terms. If “University-related” means something different, then its meaning is entirely unclear.

Again, students are entitled to know whether they are on the property of a “University-related” organization. Code administrators and hearing boards have to know whether or not a student was on the property of a “University-related” organization when he or she committed an alleged offense. The answers cannot be made up after the fact, to suit the desires of Code administrators or board members to punish, or not punish, particular respondents.

**Comment 5.** In addition to the vagueness of the term “University-related,” its use raises the question whether the proposed Code extends the university’s jurisdiction beyond where it can lawfully go. If some organization is neither University-recognized nor University-registered, by what authority does Cornell purport to regulate what the organization does on its own property?

For example, would an off-campus organization that includes students and people who are not affiliated with the University (for example, an off-campus food co-op, or political organization, or film club) be a “University-related” organization? That would raise all kinds of problems for university jurisdiction over the organization. Similarly, if an off-campus organization includes both students and alumni, when (if ever) would such a group be considered “University-related”?

**Comment 6.** Also lacking from this proposed Code are any standards for determining when an organization is responsible, as an entity, for the conduct of some of its members (or the conduct of people on its property). An organization that has an official policy that is prohibited by the Code—for example, an official policy of discrimination based on gender identity—presents an easy case. But other cases are much harder. For example, it is not unusual for one or two people to commit acts of civil disobedience or minor vandalism at the fringes of a political demonstration. Is the organization that sponsored the demonstration responsible for their acts? Nothing in the proposed Code provides any guidance about that. But holding an organization responsible for the actions of individuals whose conduct the organization does not control is problematic. (See also comment 9, below, for the related problem of holding individuals responsible for the conduct of a group.)

**Comment 7.** The same proposed provision provides that “The Code applies to conduct that . . . poses a substantial threat to the University’s educational mission,” and defines “substantial threat” to include “unique violations which shall be left to discretion of the Dean of Students as requested.” Similarly, it provides that “The final determination as to whether off-campus conduct is subject to this Code will be made by the Dean of Students, or their designee.”

It is not easy to imagine provisions more prone to abuse (and legal challenge) than these. The U.S. Constitution contains a prohibition on *ex post facto* laws for a good reason: it would be grossly unfair to allow a prosecutor to decide, after a person has engaged in some conduct, that it should have been a crime, and to punish the person for it. While the off-campus legal system would probably allow the university to respond to unspecified conduct in an educational manner (e.g., with counseling or required reading), it would not likely allow the university to impose serious discipline on a student for conduct the student could not reasonably have known was prohibited by the Code.

#### **Section 4: Prohibited Conduct**

**Comment 8.** Section 4.1 provides that “This prohibited conduct [namely, “To knowingly affiliate with groups, teams, or organizations that have had their University recognition or registration withdrawn, suspended or permanently revoked by the University for disciplinary reasons”] does not apply to unrecognized student groups who have never had University recognition or who are currently not recognized by the University because of non-disciplinary disbandment.” That is fairly clear, and sensible. But the section goes on to provide, “However, known members of unrecognized student groups may be held accountable for prohibited conduct by these groups.”

That sentence is ambiguous. If it means that “known members of unrecognized student groups may be held accountable for *such* prohibited conduct by these groups,” then it is self-contradictory, because section 4.1 does not prohibited any conduct by unrecognized student groups who have never had University recognition

or who are currently not recognized by the University because of non-disciplinary disbandment. Because the prohibition “does not apply” to them, there is no *such* conduct for which a person could be held accountable. On the other hand, if the final sentence means that “known members of unrecognized student groups may be held accountable for *any* prohibited conduct by these groups,” then it amounts to guilt by association, which should not be part of the Code for the reasons given in Comment 9, below.

**Comment 9.** It is far from clear that Cornell could hold a person accountable for conduct by a group (recognized or not) when the student did not personally engage in, assist, encourage, or otherwise support the conduct. “Guilt by association” has long been viewed in this country as an improper basis for punishment. A student can be held accountable for the student’s *own* conduct. But without some personal involvement, it is not right, and probably not legal, to punish a person for the conduct of others over whom he or she had no control. (See also comment 6, above, for the related problem of holding a group responsible for the conduct of some individuals.)

**Comment 10.** Section 4.1 also appears to sweep too broadly in seeking to assure that groups whose recognition or registration has been withdrawn, suspended or revoked do not continue to operate on campus. While that is a reasonable goal, and while formal activities such as rushing or pledging can certainly be prohibited on campus, prohibiting a student from “being involved in any activity that would normally be associated with being a member of such an organization” would seem to forbid students from continuing to be friends or roommates with other students, since living together, eating together, and socializing with each other are “activities” that members of organizations normally do. I certainly hope Cornell does not wish to tell students who were members of a group that has been punished that they cannot continue to be friends or roommates. Beyond that, freedom of association is a core American value, and is protected by the First Amendment. This prohibition should be significantly narrowed.

**Comment 11.** Section 4.1 also prohibits the use of “political persuasion” (among other things), “as a basis for exclusion from university or group activities on campus.” It is odd that the prohibition on excluding people from official university activities, or activities of registered or recognized group activities on campus, is under the heading “Affiliation with Unrecognized Student Organizations or Groups,” since it has nothing to do with affiliating with unrecognized groups. Perhaps this portion of Section 4.1 should be a separate section. Regarding the substance of this proposal, the inclusion of “political persuasion” is questionable. Political persuasion is a valid and constitutionally protected basis on which people choose to associate or not associate. While it would be reasonable for Cornell to require students to allow those of any political persuasion to attend an open meeting or a debate on campus, it would make no sense to require the Cornell Republican Club to allow avowed Democrats to participate in its meetings to plan future activities, or to require the Cornell Social Democrats to allow Republicans to march in their parade with their MAGA signs. Indeed, the Constitution does not allow Cornell (to the extent to which it is a public university) to impose such a requirement. See *Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995). This prohibition should also be narrowed.

The committee should also think carefully about whether it makes sense to enact an across-the-board ban on the use of ethnicity, gender, national origin, race, religion, or sexual orientation or affectional preference as a basis for exclusion from university or group activities on campus. While such discrimination is often improper, it is not always so. Is it wrong to have a Native American club that excludes non-Native Americans? Or a Muslim organization for Muslims? Or a women’s support group for survivors of sexual assault that excludes men?

**Comment 12.** Section 4.1 covers athletic teams and, as written, would prohibit separate male and female sports teams. I presume that was unintentional, but if the Code is adopted as proposed, that would be the result.

**Comment 13.** I also note that the list of prohibited grounds for exclusion does not include “gender identity.” Unless that concept is intended to be included as part of “gender” (which is not the usual understanding of that term, and which would not provide fair notice), it is a surprising omission.

**Comment 14.** Section 4.7, on Disorderly Conduct, makes it a violation “To intentionally cause or recklessly create a risk of disruption to the University community or local community [by] . . . Unreasonably loud . . . behavior.” Causing a disruption is bad conduct. But to punish a student for creating a risk of disruption by being loud, when no disruption actually occurred, gives campus police a great deal of leeway to engage in discriminatory policing. It is well known that police across the country use disorderly conduct laws to arrest members of minority groups for conduct that is tolerated in others. College students are sometimes loud. If they cause no actual disruption, why should they be punished?

**Comment 15.** New York State has a medical marijuana program. But Section 4.9 makes it a Code violation to possess or use any controlled substance prohibited by state or federal law, and federal law continues to prohibit the possession or use of marijuana under any circumstances. It would therefore be a Code violation for a student holding a valid New York medical marijuana certificate to possess or use marijuana on campus, and perhaps off campus as well. Cornell is under no obligation to enforce the benighted federal law, and Section 4.9 should include an exception for the possession or use of medical marijuana that is lawful under New York law.

Likewise, New York State has a “Good Samaritan law,” which (with some exceptions) protects any person from prosecution if the person “seeks health care for someone who is experiencing a drug or alcohol overdose or other life threatening medical emergency.” McKinney's N.Y. Penal Law § 220.78.1. Such laws have been adopted in many states because lawmakers understand that it is more important to save a life than to prosecute someone for drug or alcohol possession. For the same reason, Cornell recently adopted a similar policy: “Under Cornell’s Good Samaritan Policy, individuals that call for help and those that receive help in an alcohol or drug related emergency are protected from individual judicial consequences.” Cornell University Sorority and Fraternity Life Risk Management and Social Event Policy (January 21, 2020), page 6, available at <https://scl.cornell.edu/sites/scl/files/documents/Risk%20Management%20and%20Social%20Event%20Policy%202020%201.21.2020%20Final-VD.pdf>. But proposed Section 4.9 of the Code contradicts that assurance. Section 4.9 should be amended to make clear that the University’s Good Samaritan Policy prohibits punishment under the Code, just as New York State’s Good Samaritan law prohibits punishment by the criminal justice system.

**Comment 16.** Section 4.12, on Harassment, makes it a violation to subject “another person or group” to certain “behaviors,” but it is entirely unclear what harassment of a group is supposed to mean. First, such behaviors become violations if they are made “a term or condition of an *individual’s* participation” in university activities (italics added). So that applies only to individuals. Second, such behaviors become violations if the conduct unreasonably interferes with, limits, or deprives *an individual* from participating in or benefiting from university activities (italics added). So that also applies only to individuals. Those are the only two ways in which such behaviors become violations. The phrase “or group” should therefore be deleted, because the proposed Code does not actually create a violation of harassment of a group—nor should it.

**Comment 17.** Section 4.12 also provides, “The fact that the conduct targets a group that has historically experienced discrimination may be relevant to a determination of whether the conduct creates a hostile environment.” That would create an explicitly discriminatory standard for punishment. The very same words or conduct would be a violation when directed at student A, but not when directed at student B. The off-campus legal system would, at a minimum, be quite troubled by that double standard, and punishment based

on such a standard might be successfully challenged. By contrast, I think a provision that took into account the particular characteristics of an individual victim, that were known to the harasser (for example, that the victim had PTSD and was easily terrorized by particular conduct), would be more legitimate.

**Comment 18.** Section 4.16 prohibits “Obstruction or interference with . . . Code of Conduct processes, including, but not limited to: . . . Falsification, distortion, or misrepresentation of information.” It is quite proper to prohibit obstruction or interference with the judicial system. But it is extremely common for anyone on one side of a disputed matter to believe that people on the other side are distorting or misrepresenting information. No one’s memory is perfect, and one person’s interpretation of a document or event is often very different from another’s. Putting students at risk of punishment because an adjudicator disagrees with the student’s understanding or characterization of certain information is not proper. Proof of deliberate falsification and an intention to obstruct or interfere should be required.

**Comment 19.** Section 4.24 makes it a violation to “possess, carry, or use any . . . object that can be used to cause physical harm.” That would include a cane, a pair of scissors, a baseball, or even a laptop computer, which could inflict serious injury if swung into a person’s face or neck. Under this provision, every student would be guilty every day. Even listing specific objects will not work; presumably Cornell does not really want to outlaw the possession of Swiss Army knives by students. The section should be revised to prohibit the *use*, or *threatened use*, of objects as weapons. If Cornell wishes to prohibit the possession or carrying of firearms (including replica firearms) on campus, it can so specify. Presumably there should be an exemption for members of ROTC. Such a prohibition would be an example of the importance of having a clear and careful definition of what counts as “on campus,” as noted in comment 3, above.

## Procedural Provisions

### Section 1: Participants in the Process

**Comment 20.** The number of typographical errors in Section 1.1 is remarkable: “employee of hte University”; “filing a complaint wittth the OSCCS”; “resolution of the complain”; “Cornell University is names as the complainant”; “Each names complainant”; “a personal advisor of that person’s choise”; “shall not partipate.” If this reflects a rush to publish—which seems likely—it also suggests that the thinking and reviewing process was rushed, as seems pretty clear. A code of conduct that may have very serious consequences for individuals should not be the product of such hasty and sloppy work.

**Comment 21.** Section 1.2 provides that “for a disciplinary probation, suspension or expulsion to be imposed, [a respondent’s] counsel or advisor must have had a reasonable opportunity to participate fully in the hearings.” It is impossible to know what a “reasonable opportunity” to “participate fully” means. Indeed, the sentence is self-contradictory, because “reasonable” necessarily means something less than “full.” The Code should specify what a counsel or advisor may or may not do. Otherwise, hearing panels will almost surely apply different standards in different cases, depending on a host of subjective feelings, which will open the door to subsequent legal challenges.

**Comment 22.** I agree with the CJC majority that advisors should be able to speak on behalf of student parties. Students have widely varying speaking abilities, and will have widely varying levels of emotion about the process they are in. A student is the best judge of whether he or she would be better off asking an advisor to speak.

**Comment 23.** Section 1.3 provides that “The Director of OSCCS shall be appointed by and reports to the Vice President for Student and Campus Life.” The CJS requested feedback on this section.

It is not clear (at least not to me) just what “reports to” means here. I think an annual review is unobjectionable; an employee who is not doing his or her job should not be immune from review. But “reports to” usually means “supervised by” and “takes direction from.” It would be a real problem if a Vice President (current or future) were able to dictate the manner in which a particular investigation or adjudication is handled. If reporting to the Vice President is retained, it should be clearly provided that the Vice President may not become involved in any particular case. In this regard, see also comment 1, above.

**Comment 24.** Regarding Section 1.4, the CJC requested comment on whether the Judicial Codes Counselors should be law school students, or whether the position should be open to any student who goes through an application process. While there are undoubtedly some non-law-students who would make good Judicial Codes Counselors, I find it hard to believe that an application process would do an adequate job of assessing that. Indeed, I think the job should be limited to second-year and third-year law students. Law school teaches a particular way of reading and thinking, and however much the student discipline process may aspire to be educational, imposing punishment on people is unavoidably legalistic. It isn’t a matter of interest or intelligence; few students who have had no legal training will understand how to give good advice and counsel about a legalistic process. Perhaps my comments in this document are a good illustration of the skills that are necessary, and of the unfortunate consequences that ensue when those skills are absent.

**Comment 25.** Likewise, I think the suggestion that the Judicial Codes Counselors should be moved into Student and Campus Life is an exceptionally bad idea. The very reasons for the suggested change demonstrate why: “to increase accountability, understanding other aspects of student life, and make the process less legalistic and more educational.” The job of the Judicial Codes Counselors is to provide assistance and representation to student respondents. Their only accountability should be to the students they are assisting. Making them accountable to others *necessarily* means that they will be less effective at their jobs—indeed, that must be the goal. Likewise, insisting that they be more understanding of “other aspects of student life” means that they should be less understanding of the needs of the students they are assigned to assist. And asking them to make the process “less legalistic” means asking them to fail to provide the students they are assisting with the best counsel and advice.

In the outside world, a core ethical mandate for a lawyer is to represent the client, and only the client. Being accountable to anyone else, or withholding “legalistic” advice or representation because they “understand” other interests, would get a lawyer disbarred. Forcing Judicial Codes Counselors to have divided loyalties will make it clear to students who can afford to hire lawyers that they should do so, and will mean that students who cannot afford to hire lawyers will have poor advice and counsel. The result will be discrimination against non-wealthy students—who may be just the students whose interests would supposedly be advanced by the proposal to make the process less legalistic.

**Comment 26.** Section 1.7 provides that “Copies of student conduct records shall not be released to outside sources without written consent of the subject of such record, except . . . when ... necessary ... to preserve the integrity of proceedings under this Code,” or (with respect to records of organizations) “when deemed necessary to educate the University community.” The proposal provides no clue about what sorts of circumstances might make it necessary to release student conduct records to outside sources, and none come to my mind. Have there been past situations where such release has been deemed necessary? And what sorts of “outside sources” are included? Parents or guardians? Treating medical providers? News media? Additionally, the section is silent about *who* makes these decisions, which is a key question. If the people involved in the judicial system do not believe release is necessary, can they be overruled by some administrator? Should they be?

## **Section 2: The University's Response to a Complaint of Prohibited Conduct**



**Comment 27.** Section 2.1 provides that “If the OSCCS determines that an individual making the complaint of the alleged conduct in violation of the Code was directly harmed by the reported conduct ... the OSCCS will designate the individual as the named complainant.” But how can anyone “determine” at the outset that a person was “directly harmed by the reported conduct.” The reported conduct is only an allegation; it may be unfounded. As written, this provision suggests that respondents are to be presumed guilty. The provision should say, “If the individual making the complaint alleges that he or she was directly harmed by the reported conduct ... the OSCCS will designate the individual as the named complainant.”

**Comment 28.** Section 2.3 provides that an initial inquiry “may lead to ... a determination that the complaint or report ... should be administratively closed because, even if the behavior occurred, the behavior alleged would not violate the Code; a more comprehensive investigation by the OSCCS of the allegations may be appropriate.” This is very puzzling. If the behavior alleged would not violate the Code, then why would a “more comprehensive investigation” be appropriate, and why would OSCCS be the proper entity to pursue it? Students should not be subject to a “comprehensive investigation” about alleged conduct that, even if true, involves no violation. There is nothing to investigate.

**Comment 29.** Section 2.5.1 establishes the process for review of interim measures by the Vice President of Student and Campus Life. A minority of the CJC recommends a “less formalized,” “ad hoc” process. I agree with the majority. The process described in the draft gives both the respondent and the complainant the opportunity to be involved, and requires the Vice President to provide a written decision. That process is fair to both sides—and also creates a written record in the event the matter goes to court. An informal, ad hoc process invites abuse, with one party perhaps kept in the dark and no requirement that the Vice President be required to account for his decision. Indeed, I suggest that the provision be modified to specify that “The VPSCCL will provide a written decision *explaining his or her reasons* to the parties and the OSCCS” (adding the words in italics), so that a written decision simply saying “request accepted” or “request rejected” is not adequate.

**Comment 30.** Section 2.5.3 deals with a request to the Appeal Panel to lift a Temporary Suspension. I cannot tell from the draft whether this would take place before or after a request to the VPSCCL to do the same thing. Who has the final word?

#### **Section 4: Resolution of a Formal Complaint Following an Investigation**

**Comment 31.** Section 4.1 includes an Educational Conference or Alternative Dispute Resolution as potential avenues for resolving complaints. It is good to make these options available. It should be made clear that the statements of parties during such proceedings are confidential and off the record. If a party’s statement during such proceedings could later be used against him or her (whether as a confession of guilt or an admission of uncertainty about an allegation), the free give-and-take that is an essential part of such proceedings would disappear, and a party’s advisors or representatives would need to have a right to be present.

**Comment 32.** Section 4.2 lists factors that OSCCS will consider in recommending sanctions and remedies. That list does not include doubt about what actually happened. Yet if the burden of proof is anything less than proof beyond a reasonable doubt, many cases will involve doubt—perhaps great doubt—about what happened. It seems to me that the existence of such doubt is a legitimate and important consideration when recommending sanctions and remedies, and it ought to be added to the list. To analogize: If I asked you to bet on whether James Buchanan or Franklin Pierce was the fifteenth President of the United States, you might be willing to bet serious money if you were totally sure which it was, but you might be willing to bet only a token amount if you had little confidence in your answer. Similarly, while an educational response might be justified in a case where there is real doubt about whether a respondent committed the alleged

violation, serious punishment, such as suspension or expulsion, would probably not be appropriate in such a case.

### **Section 5: Administrative Panel Procedures**

**Comment 33.** Section 5.2 indicates that there is an “Administrative, Hearing, and Appeal Panels pool” from which panel members are drawn. But I don’t think there is anything in the draft Code about how individuals get into that pool—what are the qualifications (if any), what training (if any) do they receive, are they volunteers or are they selected involuntarily? These are all very important questions, and there must be answers, but I don’t believe they are in the proposed Code.

**Comment 34.** Section 5.2 also provides that in any case referred to the Administrative Panel for a hearing, “OSCCS shall make a good faith effort to give notice of the hearing at least ten (10) business days prior to the hearing.” But a good faith effort does not require any particular result, so notice could be given two or three days in advance, which would not be fair to parties preparing for a hearing, or to witnesses who may need to arrange their schedules. I think a minimum time should be specified, perhaps 7 business days. Such a flexible requirement for notice by OSCCS also conflicts with the inflexible time limits imposed upon respondents. See comment 39 and 53, below.

**Comment 35.** Section 5.4 provides that all hearings shall be private. I agree with the minority that there should not be a prohibition on public hearings. There are good reasons why the Sixth Amendment to the U.S. Constitution requires public trials: members of the community who did not realize they had relevant information may come forward. Unfair conduct by panel members would be exposed. Flaws in the process could become public. A party may be less willing to lie in public. There may be good reasons to close some hearings, but closure should not be the rule, at least not if the respondent requests an open hearing.

**Comment 36.** Section 5.7 provides that a respondent can appear in person at a sanctions hearing only with the permission of the Administrative Panel Chair and the Administrative Panel. It seems to me that a person facing punishment ought to have the opportunity to address the panel in person before the panel makes a decision. If the respondent wishes to speak and the complainant (or complaining witness) also wishes to speak, both should be allowed to speak.

### **Section 6: Hearing Panel Procedures**

**Comment 37.** Section 6.1 provides that “OSCCS shall make a good faith effort to give notice of the hearing within ten (10) business days prior to the hearing” of a Hearing Panel.” But one day would be “within 10 days.” The word “within” should be deleted. And, as in comment 28, a minimum should be specified.

**Comment 38.** Section 6.2 deals with recusal, and provides that a panel member should be excused only if the member “has first-hand knowledge of the events at issue, has been directly involved in those events, or is personally interested with regard to the outcome.” That is too narrow. A panel member who has second-hand knowledge—in other words, who heard one party’s story directly from that party—should certainly be excused. And a panel member who has any personal connection to a party—a fraternity brother or sorority sister, a roommate, a faculty advisor, a member of the same sports team—should also be excused. This is much broader than being “personally interested with regard to the outcome.”

**Comment 39.** Section 6.3 provides that “Names and written statements of any witnesses to be called at the hearing by the OSCCS or by the respondent, shall be exchanged no later than five business days prior to the hearing.” This may be reasonable if ten business days’ notice was provided. But it would not be reasonable if

six business days' notice was provided (see comment 34, above). It is not fair to give OSCCS only a "good faith" obligation while imposing strict deadlines on parties.

**Comment 40.** Section 6.5 provides that all hearings shall be private. Please see my comment 29.

**Comment 41.** Section 6.6 provides that "The respondent's counsel or advisor must have a reasonable opportunity to participate fully in the hearings. See my comment 26 on that point.

**Comment 42.** Section 6.6 also provides that "when the Hearing Panel Chair believes that direct questioning of a witness would result in undue intimidation, the Chair and the Panelists will ask questions instead of the respondent, in which case the respondent may submit proposed questions to the Chair." The proposal contains no requirement that the Chair of the panel actually ask any question proposed by the respondent. But it is very unfair to allow a witness to testify without challenge. The Code should provide that questions submitted by the respondent must be asked if they are relevant and not duplicative of questions already asked.

**Comment 43.** Likewise, Section 6.6 provides that "If an individual complainant does not testify, the Hearing Panel may proceed to decision only if it finds that the complainant's interests in not testifying outweigh the respondent's interests in questioning the complainant as a witness at the hearing." Even if the respondent objects to the introduction of any earlier statement by the complainant, the complainant's earlier statement can still form the basis for a decision if the "Hearing Panel Chair finds compelling circumstances of need for and reliability of such statement." In other words, the panel can reach a decision relying *only* on the complainant's previous, unchallenged statements. That is a recipe for having a university decision overturned by a court of law, and with Cornell owing attorneys' fees to the respondent's lawyer.

**Comment 44.** In Section 6.6, The CJC notes that a minority believes a Hearing Panel should never order relevant witnesses to testify, because this would be "punitive and would delay the hearing process." I agree with the majority. The hearing is an attempt to find the truth. Not every reluctant witness should be ordered to testify, but a witness with important evidence—perhaps an eyewitness, or perhaps someone who heard a party tell a different story than the story the party told to the investigator—should not be excused simply because the witness finds it inconvenient to attend, or because the witness's evidence would be harmful to the witness's friend. These hearings are serious business.

**Comment 45.** Section 6.7 provides for oral and written closing statements. A minority of the CJC would eliminate them as time-consuming and adversarial. I agree with the majority. A student may not be able to organize his or her thoughts, or to remember every important point, extemporaneously at the end of a hearing. A reasonable opportunity to submit a written statement is important. The time need not be long, and of course the process is already adversarial.

**Comment 46.** Section 6.9 specifies that decisions shall be made based on the preponderance of the evidence. The proper burden of proof is a fairly debatable question. But it is easy to accuse, and difficult to defend. And I believe, in line with the traditional view in the United States, that it is better for a few guilty people to go unpunished than for an innocent person to be punished. I therefore support requiring clear and convincing evidence when serious sanctions are potentially involved. If only educational measures are contemplated, I think a preponderance of the evidence is not unreasonable.

Also, Section 6.9 properly provides that the "burden of proof on violation shall rest on the OSCCS." To assure that all participants fully understand what this means, it would be useful to add that respondents are presumed to be innocent of the allegations against them. Thus, the section might read: "All decisions by the Hearing Panel shall be in writing, including a rationale and any dissenting opinions. A respondent is presumed to be innocent; therefore the burden of proof on violation shall rest on the OSCCS. The standard of proof on

violation shall be clear and convincing evidence. Under a clear and convincing standard, the Hearing Panel must be persuaded that it is highly probable that the respondent violated the Code.”

Because the presumption of innocence should equally apply to respondents before administrative panels, language to that effect should also be included in Section 5.5, or, even better, in Section 8 regarding all types of hearings (see comment 49, below).

### **Section 7: Appeal Panel Procedures**

**Comment 47.** In Section 7.3, the CJC seeks comment on whether the right to appeal should be the same or different for the complainant, respondent, and OSCCS. My view is that it should depend not on the identity of the party but on the ground for the appeal. An appeal based on a claim that University officials prejudicially violated the fair application of relevant University procedures, or committed an error in interpreting the Code of Conduct, or its procedures, should be available to any party, because such an error infects the reliability of the proceedings and should be corrected regardless of which party will benefit from a correction. Such corrections will also benefit OSCCS and future panels by clarifying the proper meaning of the Code and its procedures. On the other hand, I think the other limitations in Section 7.3 are reasonable; the prosecution shouldn't get a second opportunity to put the respondent on trial.

I have the same view regarding appeals from an Administrative Panel (Section 7.4). I think appeals based on a misinterpretation of the Code or a failure to follow proper procedures should always be allowed.

**Comment 48.** Section 7.6 provides that the Review Panel “may, but is not required to, stay a sanction where the appealing party clearly demonstrates the need for a stay.” This is puzzling. If an appealing party *clearly demonstrates* the need for a stay, by what possible reasoning should it be denied? Denying something that is “clearly” justified seems like the definition of injustice.

More broadly, a stay should not be granted only if an appealing party “clearly demonstrates” the need for a stay. I suggest that section 7.6 be revised to provide that “The Review Panel shall stay (i.e. postpone implementation of) any sanctions pending a final decision on the appeal when the appealing party shows that that there was probably an error in the panel’s decision that affected the outcome, or that failing to stay the sanction would create a serious hardship for the appealing party while staying the sanction would not create a hardship for the complainant.”

### **Section 8: General Panel Procedures Applicable to All Types of Hearings Under These Procedures**

**Comment 49.** My main comment on Section 8 is that it shouldn't come at the end. It should come *before* the sections specifying separate procedures for different types of hearings, and the general procedures it provides should not be repeated in the sections specifying separate procedures for different types of hearings. As it is, much of Section 8 does repeat things that have already been said.

**Comment 50.** Section 8.3 lists the grounds on which a party may object to certain evidence, “unless otherwise provided by the Code.” But I didn't see anything elsewhere in the Code about this. If it exists, it would be useful to specify where. If it doesn't exist, it should be deleted.

**Comment 51.** Section 8.3 provides that “The Administrative, Hearing, or Appeal Chair will make a determination on objections and instruct the panelists accordingly.” This highlights the need for the Chair to be carefully selected and to understand such concepts as relevance and prejudice (in its evidentiary sense). Yet nothing in the Code says anything about the qualifications, selection, or training of Chairs or panel members. See also comment 33, above.

**Comment 52.** Section 8.4 specifies the burden of proof. Please see my Comment 46, above. This is a good example of the repetition that should be avoided.

**Comment 53.** Section 8.5 deals with conflicts of interest. But this subject was already covered—but *differently*—in Section 6.2. So the proposed draft is now internally inconsistent.

It is not at all clear why the Vice President of Student and Campus Life is involved in this process, as his or her role seems to be limited to forwarding mail. And the requirement that notification of a possible conflict must be made within 5 business days after the party's receipt of notice of the identity of the panel members may mean that notification is not due until *after* the hearing, as Section 5.2 (for example) provides that the names of panel members do not need to be provided with the notice of hearing, but may be provided "at a later time, prior to the hearing." These various time requirements need to be coordinated with each other. Someone needs to read through the proposal with attention to detail (see related Comments 34 and 39).

**Comment 54.** Section 8.8 provides that "The OSCCS, respondent, and, if applicable, the named complainant may listen to the audio recording of the hearing." Perhaps this is intended to include the advisor or representative of the respondent, and, if applicable, the named complainant; if not, it should be revised to make clear that they are included. The audio recording is a key part of the hearing record for any appeal (Section 7.2), and it is essential that a trained person assisting a party with an appeal—or for that matter a court case—have access to the recording. For that reason, it should also be made clear that a party and the party's advisor or representative will have the opportunity to listen to the recording privately, so that they can freely discuss its contents while listening, and that they have the opportunity to take detailed notes (unless they are allowed to make a copy).

**Comment 55.** Section 8.9 is titled "Public Record of Hearing Decisions," but all it provides is that decisions shall be kept on file in the OSCCS. It says nothing about public access to those files. A sentence should be added providing that any member of the University community may review these files (from which the names of individuals and other identifying information have been redacted) during regular business hours.

I hope the Codes and Judicial Committee finds these comments helpful.

Sincerely,

Arthur B. Spitzer '71

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## Public Hearings/Clear and Convincing Standard

Submitted by Anonymous Committee Member on Thu, 2020-05-07 19:45 (user name hidden)

I am opposed to making all hearings private. There are times when greater transparency is appropriate and that should be an option in some situations.

I also oppose lowering the burden of proof. If disciplinary consequences could result, a clear and convincing standard is appropriate in this context. I disagree that lowering the standard of proof will accomplish the objective proffered or have a more educational impact for the student involved.

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## Concerns about Due Process and Transparency

Submitted by Miranda Rose Herzog on Thu, 2020-05-07 17:45

Dear Codes and Judicial Committee and University Assembly,

I write to express my serious concerns with the proposed amendments, both in terms of content and in terms of the process by which the CJC has distributed these amendments for public comment. With respect, the CJC's communications with the Cornell community about these proposals have been appallingly sparse and misleading, and the proposed amendments are offensive to basic notions of due process and fairness. I can only imagine what the comments on this page would look like if the majority of the Cornell community was actually aware of what is contained in these proposals.

First, I will briefly address the alarming nature of the proposals themselves. As many commenters before me have noted, the amendment to Section 8.4 lowering the burden of proof is at best misguided and at worse disastrous. Given the serious penalties that are possible under the Code of Conduct, along with the enormous power disparity between the University, the OJA, and associated professional attorneys on one hand, and individual college students on the other hand, it is shocking for the CJC to suggest that this standard "[is] the best standard to balance interests of the community, rights of the accused student, and due process." The student in a disciplinary hearing will always be at a disadvantage compared to the University. Recognizing this inherent disparity is crucial to delivering on the promise of due process.

I am further concerned by the amendments to Sections 5.4 and 6.5 making all hearings private without exception. While I don't doubt that many students would prefer a private hearing, giving students the option of requesting a public hearing constitutes an important check on the power of the University. The Cornell community has an interest in ensuring that disciplinary actions are being conducted fairly. If a student wishes to open their disciplinary hearing to the public, they should be allowed to do so. The combined effect of lowering the burden of proof and eliminating the possibility of public hearings is to give the University virtually unchecked discretion in disciplinary matters.

Quite apart from the major substantive issues with the amendments, I am deeply troubled by the notice and comment procedure that has been used by the CJC with respect to these amendments. As has already been extensively noted, we are all in the midst of a one-in-a-lifetime crisis situation, and students are additionally in the midst of attempting to prepare for remote final exams. The timing of these amendments would be less than ideal even if the amendments themselves were fairly minor and routine. Given that they are neither, the choice to release the amendments to the public at this time is insupportable. I don't claim to know the CJC's intentions, but the optics of this situation are that the CJC and the UA are using the cover of a global pandemic to ram through major changes to the Code of Conduct at a time when hardly any community members have the ability to properly consider those changes.

Furthermore, in addition to the timing of the communications with the public, the communications themselves reveal a severe lack of transparency. Hiding the change to Section 8.4 under the vague goal of "[r]eworking the Code to have an educational and aspirational rather than punitive, quasi-criminal tone" cannot be rationalized as anything short of deliberate obfuscation. The initial commenting period was only two weeks long and included no provision for a public forum for discussion. When a public forum was scheduled, it was scheduled the day before the (new) deadline for comments, and students received only a two-day warning of the meeting. And what's more, the Zoom link sent for the "public forum" was incorrect, and no correction was issued to the community. Thus, the supposed "public forum" actually occurred in a Zoom meeting that was completely inaccessible to the majority of the community.

I strongly believe that these amendments are misguided and inappropriate. They should not be adopted. More than that, they should not have been proposed at a time when the community is extremely limited in their ability to evaluate and comment on them. And finally, the CJC should have at least made an honest attempt to communicate the actual content of the amendments to the community. I respectfully urge the CJC and UA to reconsider these proposals.

Sincerely,  
Miranda Herzog  
J.D. Candidate, Class of 2020

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## Absolutely ridiculous.

Submitted by Samuel Jacob Chessler on Thu, 2020-05-07 16:42

Absolutely ridiculous. Students should have the right to freedom of assembly

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## Against

Submitted by Samuel Jacob Chessler on Thu, 2020-05-07 16:39

I am against any policy change that attacks judicial process. We have always lived in a nation with innocent until proven guilty without a reasonable doubt. Any policy that does away with this I would oppose

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## Response to "Clear and Convincing/Preponderance"

Submitted by Anonymous Committee Member on Thu, 2020-05-07 16:36 (user name hidden)

As a previous commenter mentioned, this is for code of conduct violations, not sexual assault which falls under policy 6.4. The preponderance of the evidence standard is already in use. Nonetheless, I strongly oppose this position. First off, I have no clue where you got those numbers like "about 100." Using the preponderance of the evidence standard errs on the side of the accuser, meaning somebody could be falsely accused and then found responsible for something they did not do. Sexual assault is a crime, and our criminal justice system is centered around the presumption of innocence to not convict people of crimes they did not commit. By using the preponderance of the evidence standard, schools can take action against students because they are 50.1% sure that an assault occurred, which is not clear enough to make a guided decision on whether to find somebody responsible since there's essentially a 50/50 chance that it occurred. It's true that forensic evidence and witnesses are not always available in these cases, but that doesn't mean we should reduce the burden of proof so that more people can be falsely found responsible. There have already been many cases of people who have been falsely accused, and these cases harm the innocent's reputations and their academic careers. For that reason, there has been a push for due process and against the preponderance of the evidence standard. The current presidential administration has made a push for the clear and convincing standard to be implemented in schools, and though I personally do not agree with nearly all views of the administration, I am glad that this push for due process is occurring. I am sad that many sexual assault victims do not find justice, but opening up the doors to allow false allegations to lead to convictions of innocent people is not a solution. Imagine somebody accusing you of a crime, say robbery or

even murder, and you had no way to prove that you didn't do it, but you're still convicted for it because a group of people were just over 50% sure it happened. It's unacceptable in the example I gave above, and it's unacceptable in all cases including sexual crimes.

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## Statement of the Undersigned Greek Alumni

Submitted by Robert C. Platt, Esq on Thu, 2020-05-07 14:56

A formatted PDF has been emailed to the Assemblies Office.

### **STATEMENT BY THE UNDERSIGNED GREEK ALUMNI ON CODES AND JUDICIARY PROPOSED DRAFT**

The undersigned are offering comments on the draft code and judicial procedures posted by the Codes and Judicial Committee (CJC). We thank the CJC for their hard work on a project that involves many difficult issues. This project is important because it brings together all elements of the Cornell community to forge a set of widely-accepted conduct rules and procedures that will bring fairness and justice to students as those standards are enforced.

Since Cornell admitted its first students in 1868, Cornell fraternities have provided values-based education and opportunities for self-governance to generations of Cornellians. Fraternities are also valuable inter-generational organizations that promote mentoring and career advising for undergraduates and recent graduates. Fraternities offer skills training and education resources from both Cornell alumni and from each fraternity's national organization. In general, most fraternities operate under the Trustee "recognition policy."<sup>[1]</sup> Most fraternities are single-gender organizations, but some are co-ed. Fraternity alumni have a long history of contributing to Cornell in many ways that further the university's goals of allowing "any person" to get a quality education. Fraternity alumni welcome improvements to the campus judicial system as long as the changes continue to protect student rights and support fairness and objectivity in the adjudication process.

#### **1. Burden of Proof**

If Cornell students were before the criminal justice system, they would face the standard of "proof beyond a reasonable doubt," which was put into Cornell's Campus Code of Conduct in 1970. Later, the Code has required a lower standard of "clear and convincing evidence". It would be a huge mistake to further reduce this standard to a "preponderance of the evidence", as recommended by a 6-4 CJC vote. Society recognizes the importance of the burden of proof protecting the innocent from mistaken identity, erroneous claims and potential bias. A "preponderance of the evidence" or 51% likelihood does not offer adequate protection to students, families and alumni who have invested time and money in a Cornell degree that can be so easily devalued by a finding that does not require clear and convincing evidence. The consequences for a student found mistakenly "responsible" are severe and can damage chances for graduate school acceptance or finding a good job. In essence, Cornell Judicial decisions can be both career- and life-changing. Thus, before putting such a consequential mark on a student's record Cornell has an obligation to be very sure indeed that the sanction is thoroughly examined to a high standard of proof. Cornell should not be advocating reduced standards for due process and fairness.

#### **2. Freedom of Association**

Since Cornell first opened, it has recognized the right of students to form groups. Conduct is best regulated on an individual-by-individual basis rather than a group level by weighing the freedom of association and



expression against the deterrence of group misconduct. In the criminal law, corporations make official decisions through required formalities and leave paper trails. But student groups are usually unincorporated and tend not to leave paper trails documenting their misconduct. The proposed document is too vague on when the misconduct of individuals warrants a complaint and potential sanctions against the organization(s) of which they are members. The same criteria should apply regardless of the type of organization(s) involved. Section 3(A) on jurisdiction would be clearer if there were a consolidated registration process for all student groups, and then have the Code apply only to those student groups who register. In this manner, any disagreements on jurisdiction would be resolved through enforcement of the registration process rather than during an after-the-fact adjudication of Code violations. This would further your goal of “decriminalizing” disputes surrounding the benefits and burdens of registration. Registration would make clear who to notify if a group were to become a party to a proceeding. Notification should be to both the undergraduate leader and to the alumni/faculty advisor. Even if a group is not registered, the conduct of individual students would remain subject to the Code. Proposed Section 4.2 would empower the hearing panels to abrogate contracts between Cornell and respondent groups found “responsible” that should be beyond the scope of a student Code conduct proceeding.

This approach would also allow Section 4.1 to be simplified. To protect freedom of speech and association, Cornell has not required groups to file their membership lists. We encourage Cornell to continue that important tradition of organizational privacy.

The second bullet of Section 4.1 should be replaced with:

To use knowingly, *when acting as an agent of the university*, ethnicity, gender, national origin, political persuasion, race, religion, or sexual orientation or affectional preference as a basis for exclusion from university-funded programs. Nothing in this Code shall be interpreted as preventing single-gender groups or activities.

The goal should be to put students in the same obligation as faculty and staff in ensuring that Cornell-funded programs comply with various civil rights legislation. The current CJC draft is so broad that it could be misinterpreted as prohibiting single-gender groups or club sports.

### **3. Right to Counsel**

Cornell’s current Code protects a student’s “right to be advised and accompanied at every stage by an individual of the accused’s choice”. Restricting the participation or role of counsel violates the student’s rights to due process and fairness. Counsel could be the Judicial Codes Counselor, a private attorney, or a parent or alumnus. “Section 1 Participants in the Process” should be revised to guarantee these rights. “Section 3 Investigations” should be amended to guarantee participation of counsel in the meeting between the Judicial Administrator<sup>[2]</sup> and the student. Section 6.6 should be amended to give counsel the right to question witnesses.

### **4. Off-Campus Conduct**

First, the Code should carefully define the “campus” and include a map to make it clear. The phrase in Section 3(A) “the property of a University-related residential organization” needs to be defined. The definition of campus in proposed Section 2(1) is too vague. How long a distance is meant by “immediate vicinity”? Students need a clear line regarding the jurisdictional scope. We assume that privately owned houses or apartments are not a part of the campus, even if all the residents of a building are Cornell students. We also understand that “space owned, leased, used, or controlled by” a student organization or student-alumni group residence is not part of the campus, because only Cornell controlled spaces are. An official “campus boundary” map should be published and distributed with the Code so that there are no after-the-fact surprises. This same map should be used to determine when campus protests are subject to Cornell regulation or are subject to the permitting requirements of Cayuga Heights or the City of Ithaca.

On-campus conduct and off-campus conduct have different impacts. Extending the “campus” definition to cover the academic campus, university-related housing, and other locations makes it impossible to draw any distinctions based on the context. However, Section 3(A) contemplates extending jurisdiction to off-campus if the conduct poses a “substantial threat.” This exception should be rare and applied in a non-political manner. We believe that the Judicial Administrator should make the initial decision to charge off-campus action subject to the hearing panel finding the student “responsible” for the off-campus conduct. University administrators should not participate in the decision. The basic approach adopted by CJC is to limit the Code to on-campus conduct, unless off-campus conduct poses a “substantial threat.” Yet, the proposal as drafted then attempts to put residential organizations entirely within the scope of the Code regardless of whether the conduct fits the substantial threat test. The Code should treat all student groups equally.

##### **5. Transparent Enforcement Focused on Fairness for All**

When the Campus Code of Conduct and the judicial procedures were instituted in the early 1970s, the Office of the Judicial Administrator and the Judicial Advisor (now the JCC) were established separate from the Central Administration. There was a concern that Cornell’s conduct regulation would be influenced by the political impact of news coverage or following the Kirkpatrick Sale case<sup>[3]</sup> that the Trustees or the President might put a thumb on the scales of Cornell justice. Hence, the present structure has these offices function independently of the Administration. The JA needs more continuity of guidance and an experienced professional to give the office proper focus. We strongly endorse the decision to have the JA report directly to the Vice President and thus become part of the formal administration structure of Cornell.

Although the draft would have the Judicial Administrator as directly under the Vice President on the organization chart, the draft would also give certain roles to the Dean of Students. This is confusing. We suggest that the roles given to the Dean of Students in the current CJC draft be eliminated and that all discipline be consolidated under the JA who in turn will report to the normal administration channels. Many thanks for your consideration of these comments.

Signed:

Gene Kim Arts '82, JGSM '97, Kappa Sigma, Acting Vice President

David Ayers '80, Cornell Association of Phi Gamma Delta, Vice President

Kevin R. Baradet '81, AVC President for NY Beta Chapter of Sigma Phi Epsilon, Inc.

Randy Barbarash, Chairman, Alumni Board, Sigma Alpha Mu - Beta

Nicholas J. Carino BS '69, MS '71, PhD '74, Secretary, Sigma Nu Property Association

Anthony B. Cashen '57, MBA '58, Alumni Director, Delta Upsilon Fraternity

Mark Clemente '73, Alumni Director and General Counsel, Delta Upsilon Fraternity

Norman “Lin” Davidson '71, Delta Chi Association (DKE), Immediate Past President

John S Dyson '65, Former President of Alpha Delta Phi, Emeritus Trustee

Derek Edinger '94, President, Cornell Delta Phi Association

Bob Forness, Chair, FSAC, AIFC, former Chapter Advisor, Pi Kappa Alpha

Thomas Foster ALS '81, Kappa Sigma, Chapter Advisor / Acting Co-Treasurer

Mike Furman '79, Alumni Advisor, Delta Kappa Epsilon

Tristan Hemphill '12, President of Zeta Psi Alumni Association for the Cornell Chapter

Mark Kamon '75, President, Cornell Delta Upsilon Alumni Association

Rich Kauffeld '80, President, Alpha Psi of Chi Psi Corporation

R. Alexander Latella, B.S. '10, Alumni Treasurer, Cornell Delta Phi Association

Bob Linden BA '71, MD '75, President Gamma Theta Property Association, Sigma Nu Undergraduate Brotherhood Chapter Advisor

Thomas McCune '15, Kappa Sigma, Chapter Advisor / Acting Co- Treasurer

Rick Meigs ChemE '80, President Cornell Lambda Chi Alpha Alumni Association

James Munroe '90, President, Alumni Corporation Board of Trustees Zeta Chapter, Alpha Gamma Rho

Peter A. Muth '74, Sigma Pi, Alumni Board Member

Chris Nieves '11, Beta Charge of Theta Delta Chi Inc, President  
Donald A. Noveau, '70, President, Theta Delta Chi Educational Foundation, Inc., President, Spectemur Agendo Foundation, Inc.  
Fred Pape '99, Kappa Sigma, President  
Dennis Paese '73, Chapter Advisor, Sigma Alpha Mu Fraternity  
Jeff Perry, President, Alpha Zeta Corporation Board  
Robert C. Platt AB '73, JD '76, President, Delta Chi Association (DKE)  
Alex Pruce '13, Treasurer of CUAIFC and Chair of Greek Growth Committee  
Matt Roberts '98, President, Gamma Chapter House Association (Phi Sigma Kappa)  
Howie Schaffer '90, Alumni President, Alpha Delta Phi at Cornell University  
William R. Shaw '69, '73, AB, MPA, JD, Delta Upsilon  
Len Shapiro '74, Theta Delta Chi  
Rob Shuck '98, President, Chi Phi Chapter House Association  
David Weber '68, Advisor for the Cornell chapter of Delta Chi  
John Yerger '82, President, Alumni IFC

---Footnotes---

[1] However, some local fraternities, such as Seal and Serpent, continue to operate after Cornell changed its recognition policies to require affiliation with a national fraternity.

[2] We use "Judicial Administrator", "Student Judicial Administrator" and "Office of Student Conduct & Community Standards (OSCCS)" interchangeably, although we think that the proposed new name is too wordy to be useable.

[3]Trustee Minutes 1957-58 pages 3316, 3327 and 3330.

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## Some concerns

Submitted by Anonymous Committee Member on Thu, 2020-05-07 12:43 (user name hidden)

I agree that the Code should not be as punitive. A more educational and less punitive experience will equip students with tools for making better decisions.

The JA should not recommend the same blanket sanctions solely based on what code was violated. Rather, there must be greater consideration of each cases' mitigating and aggravating circumstances.

Prohibited conduct should be more specifically broken down into subsections rather than grouped together in a code section. That is, there should be subsections to appropriately reflect degrees of severity so that, for example, possession of alcohol is not under the same section as selling alcohol or operating a motor vehicle under the influence. It is unjust that a student who committed a less severe alcohol-related behavior violation has the same violation code on their record as a student who committed a more severe alcohol-related behavior violation, or that a student who possessed marijuana have the same code violation as a student who sold a lethal controlled substance. While students may have an opportunity to explain their misconduct to a future employer or admissions office who may interpret the code violation in the most severe sense, the prejudicial effect may not be overcome. Additionally, the added stress to a student of having a code violation on their record that could be interpreted in the most severe sense is unnecessarily punitive.

Plenty has been said in the comments about the burden of proof so I will just add my very strong support for the "clear and convincing" standard.

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## Response to the comment below this one

Submitted by Anonymous Committee Member on Thu, 2020-05-07 12:09 (user name hidden)

These code changes DO NOT apply to sexual harrasment or assault. Title 9 is a completely different campus code and system. These changes only deal with the campus code.

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## Clear and Convincing/Preponderance

Submitted by Anonymous Committee Member on Thu, 2020-05-07 12:01 (user name hidden)

I believe the amount of sexual assaults that are reported, and actually followed through with at Cornell is about 100. It's clear that clear and convincing evidence is not working. Most people are not going to have 7 bystander eyewitnesses or a text message saying "I apologize for assaulting you" and forensic evidence is not applicable to a lot of cases. We need to start addressing what kind of proof we actually want and create the standard of something attainable to achieve.

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## Response from Grads for Gender Inclusion in Computing

Submitted by Maria Alexandra Antoniak on Thu, 2020-05-07 11:34

We represent graduate students concerned about gender issues in computing and across Cornell University. We are very concerned about the feedback process for these proposed changes.

- Giving only three days for feedback is unacceptable (students received notice via email on May 5, the forum is on May 7, and comments close on May 8).
- The open forum is scheduled at the same time as the Graduate Student Town Hall on Teaching Reactivation.
- It is difficult to parse the proposed changes, and a direct comparison of before-and-after texts would be more helpful.
- The proposed changes are not explained. For example, why is the scope narrowed to students, excluding faculty and staff?
- Unstructured open comments without constructive conversations between the committee and student groups will result in changes that do not represent the students.
- Finally, we are in the middle of a global pandemic that has produced huge uncertainty and turmoil for universities, making it difficult to give proper attention to these important changes.

**We therefore ask for the timeline for review and feedback by students to be extended, more transparency and better summarization of proposed changes by the committee with ongoing public forums, and a clear timeline of proposed changes and votes.**

Regarding the Code of Conduct text, we strongly support more specific language about sexual harassment. The more specific the definition, the easier it is to identify destructive behavior. Both the current and proposed Code of Conduct do not contain explicit language describing sexual harassment. Relying only on Title IX is not sufficient; sometimes sexual harassment does not meet the strict legal definitions covered

under Title IX but is still unprofessional, deeply harms the victim, and damages our academic community. Both undergraduate and graduate students experience sexual harassment in alarming numbers, often with little access to redress.

In addition, the standard of evidence should not be changed unilaterally without significant feedback from students over a longer period.

Executive Board  
Graduate Students for Gender Inclusion in Computing at Cornell  
<https://gsgic.org/>

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## safety of students on and off campus

Submitted by Anonymous Committee Member on Thu, 2020-05-07 11:20 (user name hidden)

I have read some of the previous comments. Some are against expanding safety and security measures. Many students live off campus. A statement that maybe specifies a perimeter regarding campus police involvement / authority [and what specific actions would they be authorized to warn against, make arrests, and so on] could help minimize misinterpretations. I agree that all of these proposed statements should be made known publicly to CU constituents and be given a time frame to respond if they so choose. I disagree about not making it punishable by law "consensual" use, sale, purchase of illegal substances. They're called illegal [against the laws or regulations of an institution]. This is besides the undeniable fact that they're dangerous, harmful to health and safety. About the use of the phrase "historically discriminated"...I urge you to rephrase. No human of any group, affiliation, race, etc., deserves nor should be expected to tolerate harassment in any shape or form. However, the more specific about what constitutes harassment, the better. It also needs to be made clear what the procedure to report conduct issues is. Also, how many will be employed and properly trained to implement and enforce the code of conduct?

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## We Need Due Process Especially For Sexual Harassment/Assault

Submitted by Jeffrey B. Deutsch on Thu, 2020-05-07 09:04

We need to carefully reconsider Policy 6.4 as well -- especially since the new Title IX regulations have just been released:

<https://www.ed.gov/news/press-releases/secretary-devos-takes-historic-action-strengthen-title-ix-protections-all-students>  
<https://www2.ed.gov/about/offices/list/ocr/docs/titleix-overview.pdf>

If anything, due process protections are especially important when we're considering branding someone a sexual harasser let alone a rapist. That's much higher stakes than, say, finding someone responsible for vandalism or underage drinking.

Under the new rules, Cornell can use either preponderance of the evidence or clear and convincing evidence -- either way, we'll just need to apply it across the board (among other things, to accused faculty and staff as well as accused students).

I for one urge clear and convincing evidence. It's that important to make sure we get it right.

PS: One more good thing about an independent Judicial Codes Counselor's office: Since the respondent him- (or her-) self can't cross-examine the complainant, a JCC advisor can do this professionally.

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## Procedural Section 6.9: A Concerned Refutation

Submitted by Anonymous Committee Member on Thu, 2020-05-07 00:52 (user name hidden)

I will assert that using a “preponderance of the evidence” burden of proof, as proposed via amendment, in section 6.9 of the Campus Code of Conduct to charge and judge a university action is detrimental to Cornell's academic culture, and therefore shall remain a clear and convincing standard. First I will establish many items that are in the status quo that are missing from the campus code that are implicit in society. Then I will show that the forthcoming CJC Amendments will fail those that are the most vulnerable in our community.

I will start out with many points that are rooted in experience and in law. A Cornellian's word is gold. Those that are highly educated have their statements holding more weight than those who only hold a GRE or equivalent. A person who holds a JD or MD is held in higher regard than those who hold a Bachelors. Their word is supposedly gold and should be speaking the truth, especially when studying at an Ivy League. Secondly, let us then examine the proposed burden of proof. If the preponderance of the evidence is the burden of proof, whoever calls 911 first, nine times out of ten, wins the case. Street knowledge shows that if you initiate a fight with someone, whoever calls 911 first is going to get off without charges. That is due to the fact that whoever calls 911 is the one that feels like they are wronged. If you disagree with this street knowledge, let us take a trip to the Ithaca Commons or behind Walmart, get into a fight and learn the power of calling 911 first. As Section 1 states, “we value engagement in our community, our state, and the broader world, learning about their needs and strengths, and applying the knowledge we create for the benefit of society.” The proposed experiment under the amendment’s burden of proof will most definitely help with this mission. Another fact of the proposed preponderance of the evidence standard is that “the burden of proof is met when the party with the burden [Under the proposed amendments- prosecution] convinces the fact finder that there is a greater than 50% chance that the claim is true.” (Cornell LII Wex). This is a thin margin and it is inherently hard to prove that you did not do something. If someone were to state you were at an alley when you were actually at home typing a thesis, it is then difficult for you to prove you were not at that alley. Therefore, when the 911 call is then started, this places the defendant in an inherent disadvantage.

I cannot go without stating the status quo burden of proof, clear and convincing. In brief summary, this standard burden of proof is used for “claims which involve fraud, wills, and withdrawing life support” (Cornell LII Wex). When the stakes of getting expelled from school is a real possibility, is that not on the same level as withdrawing life support?

Another fact is that having a university action on file with Cornell makes it harder to get into a dream graduate school. Those that are applying to graduate school now are receiving a question that states “Has there ever been a University Action against you, if so explain (500 words)”. In a majority of cases, 500 words is not enough space to explain how an unjust system is rigged against innocents on a systematic scope. This type of additional hurdle that the Administration wishes to freely provide are like ankle weights to the Cornell Track and Field runners. Graduate school to full professorship is a dream for a good proportion of your student population. Having Cornell being able to freely give out University Actions is

like giving handcuffs to dancers. Sure the dancers can still make a passing effort, though they are likely not going to be on the top of the list. In an amendment that supposedly wants to make a climate where “we value diversity and inclusion, and we strive to be a welcoming, caring, and equitable community where students, faculty, and staff with different backgrounds, perspectives, abilities, and experiences can learn, innovate, and work in an environment of respect, and feel empowered to engage in any community conversation”, does giving every dancer handcuffs when they miss a beat (something able to be prosecuted with a preponderance of evidence) sound like an environment of respect?

An implicit assumption in this amendment is that there exists bad apples in the Greek system. I agree wholeheartedly and they should be punished. This is clear and clean and there should be no issue with this. Now bad apples do not follow or care for the rules or common morality, such as not lying. Having a bad apple Cornellian is then a very dangerous person since their lies are then solid evidence against their enemies in a preponderance of the evidence standard.

Finally a key piece of evidence for convictions or university actions are police statements. In a police statement, they interview, take notes and photos of possible pieces of evidence. The police officer is first there to protect the innocent. If you start a fight and call 911 the operator and officer automatically assumes that you are the one being assaulted. The officer is sympathetic to the caller victim’s needs and statements. The report will likely than not be more soft on the caller victim.

Let us take the above and apply them to Cornell after a preponderance of evidence burden of proof standard is enacted. Take Jane, a first generation, hispanic woman who finally went to her first college party in collegetown and aspires to be a professor in business. She does not want to get a judicial action against her. Also take Chad, a white fraternity “bad apple” from ABC fraternity. Chad attempts to seduce Jane, bringing her to his room, though she refuses and exits the house. A frustrated and angry Chad goes to the bathroom and concoct a plan with one of his buddies. His buddy would slap him and Chad can get Jane in trouble for assault and battery(assault IAW amended CCC). Chad calls 911 and Cornell Police arrive on scene. Chad accuses Jane of assault and the police take his statements more lightly than Jane’s, due to him being subject to battery. Jane does not have any evidence to show that she did not slap him. The fabricated evidence and the 911 call to CUPD is the preponderance of evidence that Chad has to deprive Jane of an easy graduation, transition to graduate school and her dream professorship. All Jane can state, especially without a good lawyer that can navigate the “plain english” Campus Code of Conduct, is that she was in his room and left the room after a failed seduction and the handprint could have come from anywhere. There is reasonable cause to believe Chad’s story that assault by Jane happened via the preponderance of the evidence burden of proof during the UA hearing. Assault is classified as at least a class A misdemeanor in NYS (NYSPL 120.00) punishable by up to one year in jail (NYSPL 60.01(3)a).

Now let us examine Cornell in the status quo. If the same scenario were to go down, sure the police will be sympathetic to Chad and see the handprint, though there is not enough evidence to prove that Jane did anything wrong. There is not enough to charge Jane with assault and the innocent Jane can go home free without a university action against her. She can go home free and protected from further retaliation and accusations by bad apple Chad. All people are given what was due.

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Dear Codes and Judicial Committee and (by cc) the greater Cornell Community,

I hope that my examples and carefully laid out argument proves convincing. I am a current undergraduate senior who does not want their alma mater’s judicial system to enable the worst of our community to oppress the most vulnerable. Those who are in a minority status are continually attacked and subjected to

accusations such as stealing and rape, fueled by racist thoughts. I do not want this diverse and amazing body to become a place rife with accusations just to silence their unique and innocent voices.

In response to those on the board who believe that the preponderance of the evidence provides due process to the accused, I will state the following: Bad apple Cornell fraternity boys are smart, or at least their parents are smart. Once their lawyer parents get hold of the Code, they will absolutely tell their child to call emergency services first to abolish themselves of guilt and have the preponderance of evidence on the accused (who are absolutely innocent). This method does not protect the accused. Instead it subjects them in a huge pit that they have to struggle to get out of. Accusals under the preponderance of the evidence burden of proof hold a ton weight, one that many minorities do not have the resources nor ability to defend against. If the minority student were to get charged with a high crime such as an Academic Integrity (AI) violation, having that preponderance of the evidence burden would certainly make the process educational. This realization would occur when they are subjected to many AIs, accusations made by toxic white fraternity boys that cheat the judicial system, forced to take a leave of absence by the administration and working a minimum wage job reflecting on their prior aspirations to get out of the cycle of poverty that they grew up in. Would you be able to look into Jane's innocent crying eyes, after getting accused of AIs that she has no evidence of not doing and only the preponderance of evidence, and say "accusations hold weight, wasn't this process educational?"

I fear that the instances that I have highlighted will come to being and justice at Cornell will be but a vague memory.

Respectfully but forever cautious,  
Iustitia

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## Attack on due process. Needs to be further reviewed by students.

Submitted by Anonymous Committee Member on Thu, 2020-05-07 00:49 (user name hidden)

I'm saddened that the university is essentially making a power grab from its students. First off, I can't help but feel like this amendment is taking advantage of the fact that students are away from campus and busy with pandemic-related issues to enact a policy that could hurt the student body without properly consulting the students. I only recently received an email regarding this and have not been involved much in this discussion. There needs to be **extensive** discussion about this among students.

I have many commitments related to the COVID pandemic, so I will focus on the concern I feel strongest about. I am saddened that Cornell is attacking its students' rights to due process by reducing the evidence standard to what is essentially a preponderance of the evidence standard. An accused student could be held responsible for something he or she may not have done because a committee is essentially 50.1% sure a violation occurred. As you can probably see below, this is an issue that concerns many people. It's unfortunate that many members of Cornell's student body may not realize the implications of changing the standard or worse: will not realize that the standard has been changed until the new amendments are passed. The stakes are way too high for the panel to implement a preponderance of the evidence standard. The possible sanctions include suspension and expulsion, which would mean that again (I want to reiterate this), a student can be suspended or expelled because a panel is 50.1% sure that a violation occurred. This is completely unacceptable and extremely concerning.



I find the comments made on the amendment by the individuals supporting the preponderance of the evidence standard highly offensive. They stated that enacting that standard would be "educational." I have absolutely no clue what is meant by that or how attacking our rights to due process would be educational for anybody. If anything, it takes advantage of students who have not been educated in the field of judicial proceedings as they may not understand the implications of doing so. Additionally, it was stated that reducing the standard would balance "interests of the community," which again, I have no clue what is meant by that. As you can see by the previous comments made here, it is very clear that the community is concerned about reducing the standard and overwhelmingly not in support of the preponderance of the evidence standard. Furthermore, it does not "balance interests of the community, rights of the accused student, and due process" since as it can be seen here, all three concerned parties mentioned seem to agree that standard is an attack on due process.

I think it's very telling that the majority of the people commenting here are faculty and law students. First off, it shows that other undergraduates have barely had an opportunity to raise their concerns. Second, these are well-informed individuals, many of which study law, that are agreeing that there are many issues with these amendments. Particularly, it seems that many agree that it attacks due process and that changing the standard to preponderance of the evidence does not represent the views of the community.

I'm very disappointed that this is happening. Initially, I was proud that Cornell was one of the few schools that had a code of conduct that promoted students' rights to due process. Now, it appears that will be reversed.

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## Sketchy

Submitted by Anonymous Committee Member on Wed, 2020-05-06 22:59 (user name hidden)

Dear Cornell Daily Sun,

Thank you for covering the University Assembly meetings. And specifically for pointing out more bias in this process for individuals who do not have time to attend the meetings.

Dear Codes and Judicial Committee or University Assembly,

Why was the Student Assembly affiliated Office of Student Advocate presenting at the last UA meeting? Is it because that group has a self-interest in the process by wanting to be paid advocates? Is it because they were there to argue for proponderance of the evidence which it is clear from the comments is not the popular choice for Cornell's standard? I looked up the speaker whose name is in the latest Sun article and she was or is running to be a Student Trustee and is also a co-founder of Cornell's ACLU. Interesting. Funny how co-founder of an organization that fights to uphold constitutional rights is proposing to lower the burden of proof and grant the administration absurd power while disadvantaging students. Why is the Student Assembly President also Chair of the Codes and Judicial Committee? There seems to be a conflict of interest. Why are we being asked for comments on one proposal for the Student Assembly to bring another into consideration at the last minute? I don't see that proposal here.

Maybe the students representing the Cornell student body cannot funny understand the magnitude of what they are saying because they are individuals who are graduating or are unlikely to violate the code. Keep the representation where it belongs, under the guidance of legal scholars and with the law students.

I hope that this body asked legal scholars from the law school for their opinion. Reading Professor Garvey's comment makes me worried that they were not consulted and the code is unfinished.

Sincerely,  
A young Cornell alumn

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## Administrative Overreach

Submitted by Anonymous Committee Member on Tue, 2020-05-05 19:31 (user name hidden)

While I assume the best of intentions in Campus administrators, the proposed changes will invite administrator overreach and potential misconduct that could create a chilling, almost Orwellian environment on campus. Two particular points of disagreement:

-4.1 Affiliation with Unrecognized Student Organizations or Groups (Previously known as Misconduct Related to Student Organizations or Groups): Assuming these "Unrecognized Groups" are not operating on University property, it makes no sense what right the Administration has to regulate which organizations students affiliate with. If an organization is destructive in a material way, let law enforcement handle the matter. They handle everything from littering to terrorism so they can certainly handle off-campus, unrecognized student organizations. This change could give the Administration coercive power over the social and political activities of the student body (while they are off-campus).

-4.12 (2): *"The fact that the conduct targets a group that has historically experienced discrimination may be relevant to a determination of whether the conduct creates a hostile environment."* Again, while assuming the best of intent on behalf of those who propose this change, it is vague and open to ideological interpretation. All groups of humans have at some point in time experienced discrimination. The other concern is the "may be relevant" portion. When will it be relevant? Perhaps when it suits the political / ideological motivations of those involved?

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## Section 4: Prohibited Conduct

Submitted by Stephen P. Garvey on Tue, 2020-05-05 19:18

I teach substantive criminal law at the Law School. The definitions of prohibited conduct are unnecessarily vague and overbroad. I will give just a few examples:

1. Student A says to Student B while sitting in their dorm room: "I think I'll steal Student C's computer." Student A gets up to walk to Student C's dorm room, where he believes Student C's computer is located. Before he gets to the door of his own dorm room he changes his mind: he won't steal Student C's computer after all. Student A reports Student B to the Office of Student Conduct & Community Services. Section 4.3 (Attempt to Violate the Code) makes it a violation of the Code to "attempt to violate any provision(s) of the Code." Has Student A violated section 4.3, inasmuch as he has "attempted" to violate section 4.23, which makes it a violation of the Code to "violat[e] any federal, state, or local law, regulation, or ordinance," which would include provisions of New York law prohibiting theft?

2. Student A is riding her bicycle on campus. She gets distracted when she hears a loud bang in the distance. She accidentally runs into Student B. Student B suffers "physical harm." Has Student A violated section 4.4 (Assault and Endangerment), inasmuch as she has "engage[d] . . . in conduct that does . . . result in physical harm"? It would seem so, but does the Code really intend for Student A's conduct to constitute a violation of the Code? On its face, section 4.4 imposes strict liability for engaging in any conduct causing "physical harm." A student's mental state with respect to that harm is irrelevant.

3. Student A gives Student B a pencil because Student B said he lost his. Student B uses the pencil to draw on the wall of a University bathroom, which is presumably a violation of section 4.17. Is Student A an accomplice to Student B's violation of section 4.17 and thus (given the way complicity is understood in the criminal law) himself guilty of violating section 4.17? Again, it would seem so, inasmuch as Student A has, pursuant to section 4.6, "aid[ed] . . . another student to commit a violation of the Code." (P.S. Section 4.6 is captioned "Collusion and Complicity." Complicity is a concept known to the criminal law, as is conspiracy; collusion is not.)

4. The definition of bribery doesn't even amount to a definition. It defines "bribery" as "bribery." But that's not a definition. It's a tautology.

These examples would be easy to multiply.

One common response to vague and overbroad prohibitions such as those contained in Section 4 is to claim that those in charge of initiating proceedings against those charged with violating those provisions will do so only when it would be "appropriate" to do so; or in other words, to trust that the charging authority will use wisely the broad discretion vague and overbroad statutes bestow upon it. Perhaps, but those subject to that authority can be excused for being skeptical when that authority gives itself broad discretion and then says, "Trust me." Moreover, vague and overbroad provisions are bound to result in different findings of fact reaching different results when those provisions are applied to the same set of facts. One panel will find a violation; another won't, all in good faith. The process will thus appear arbitrary and capricious, not to mention being vulnerable to charges of bias and discrimination. Provisions as vague and overbroad as those in Section 4 are an open invitation to such charges.

One might think these provisions are to be lauded because they use "plain English." That would be a mistake. Provisions can be drafted in plain English without bestowing on the charging authority what amounts to breathtakingly broad discretion. The desire to speak plainly should not be used as an excuse (or subterfuge) to vest broad and unnecessary discretion in the hands of the charging authority.

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## The Preponderance Standard is a Subversion of Due Process

Submitted by Logan Blake Kinnaman on Tue, 2020-05-05 18:11

I think it's that the "preponderance of the evidence standard" in section 6.9 is a clear and convincing subversion of due process. Being able to punish students for simply "suspecting" a student has violated the Code is a dangerous precedent to set, it assumes that the Panel will be always correct about its suspicions (which will definitively not always be the case), and the only standard truly being set is "guilty until proven innocent." This is dangerous and not acceptable.

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## First of all, any edits to a

Submitted by Cunnie Davenchi Frances Carline Chostel on Tue, 2020-05-05 17:19

First of all, any edits to a judiciary code that affects students should be publicly presented to students for an open forum, town halls, explanation of the policies, and a vote. Doing this on such a random little corner of the Cornell site is shady, and doing it NOW when thousands of your students and staff CLEARLY HAVE OTHER THINGS ON THEIR MIND is VERY shady. At least pretend to be democratic. If y'all can send emails every other day whining about your money troubles and trying to encourage us with empty platitudes, you could have emails us about this too.

Second of all, instead of punishing consensual drug possession, sale, and use, why not put that fire and fury into expanding the healthcare resources available to students? Y'all know damn well that the workload and culture here push people to use uppers to perform and downers to decompress. Y'all must also be aware of the opioid epidemic that's simultaneously got millions of Americans in its grip, including in the Ithaca community. This would be a terrible example; we know you're a bunch of racist hypocrites at the top, but it'd be nice not to see it so well.

Third, under no circumstances should you extend your jurisdiction beyond the campus. You don't even pay property taxes, on what authority do you presume to control our behavior off campus? Do you own us now? Do you own this town? Is profiting off our money, labor, research, and success rates not enough for you bloodthirsty clowns?

Fourth, don't even pretend to PRETEND to care dor the environment. We know you chose not to divest from fossil fuels. We know you waste hundreds of gallons of food every day, turning it into compost instead of feeding the community. We have no illusions of your true values. This greenwashing charade can stop. Finally, you need to make these documents EXCEEDINGLY public and put them in more plain terms. This reads like a trap, like it's meant to confuse us into not caring. My writing got me into this school but I still don't know what the hell this is saying. Stop the charade. Do this another time, or not at all, and MAKE IT PUBLIC.

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## Section 4.1 of the

Submitted by Anonymous Committee Member on Tue, 2020-05-05 17:02 (user name hidden)

Section 4.1 of the substantive section of the Code revision should include disability status

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## Expansion of Harassment Definition

Submitted by Anonymous Committee Member on Tue, 2020-05-05 17:00 (user name hidden)

I'm not going to repeat the criticisms of lowering the burden of proof that others have been made, which are clearly adherent.

I also agree with others that we shouldn't be moving to *expand* the definition of harassment, which is already wide and vague, but to make a better, and more narrow, definition so that we have a clear understanding of what constitutes harassment. Expanding the definition seems completely counterproductive, and increases the likelihood of being used in nefarious ways.

However, I do want to bring attention to the definition of harassment that includes the following clause: "the fact that the conduct targets a group that has historically experienced discrimination may be relevant to a determination of whether the conduct creates a hostile environment." I think this is politically and ideologically motivated language, and *should absolutely not be part of any objective definition of harassment*. What constitutes a "a group that has historically experienced discrimination" exactly? And which "groups" 'deserve' to be part of this category, and what 'groups' don't? And who decides this? More importantly, this amounts to essentially creating a protected class, or set of groups, on campus in that *any remarks made that can be construed as 'conducts that targets' them (which is subjective) can be deemed as creating a hostile environment*. This seems incredibly authoritarian and a potentially extremely dangerous road to embark on in a setting that *claims* to offer a space for opinions to be heard as well as differing viewpoints to be part of a learning environment.

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## Section 4.1 should include

Submitted by Anonymous Committee Member on Tue, 2020-05-05 16:58 (user name hidden)

Section 4.1 should include disability status.

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## Due Process

Submitted by Anonymous Committee Member on Tue, 2020-05-05 16:49 (user name hidden)

These rules completely bypass a students rights to due process.

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## False Advertisement

Submitted by Anonymous Committee Member on Tue, 2020-05-05 16:27 (user name hidden)

The proposed amendment has literally nothing to do with the 'summarized' bullet point list in the email that was sent. All this amendment is, is the University seeking to expand its power in Judiciary proceedings against students. I very strongly disagree with lowering the standard of proof, as "likely" just isn't enough. Due process requires the assumption of innocent until PROVEN guilty, and for that, you need clear and convincing evidence. I'm actually appaled, as I used to think the amendment was a good thing when I read the short list of the amendment's intended purpose, yet saw none of that reflected in the actual amendment itself. Literally, whoever wrote that summary is beyond biased, and clearly sees lowering the burden of proof as "educational," whatever that even means (I don't even see somewhat of a connection).

Also, I don't understand how a 3-year suspension isn't enough? And to almost double it? That's just kind of ridiculous. Seriously though, couldn't this wait until students are back in session, or are you guys just that

power-hungry to try to push massive changes while you think that students won't notice. Something that I think had good intentions, but still disagree with, is making the rules easier to understand. While this may seem like it benefits the general public, having a list of rules in "plain English" could lead to a lot of gray areas. Keeping the vocabulary to be precise is more important in my opinion, so as to have a clear set of rules, rather than have 5th graders think they understand it. We're Cornell Students, so if you think we can't handle some advanced vocabulary, why did you even take us in? That's just insulting.

In regards to Section 6.5, I propose the following:

-Hearings should, by default, be made private, with the only exception being if both the complainant and the accused determine to have a public hearing.

In regards to Sections 6.6 and 6.9, I propose the following:

-Respondents should have the right to ask questions of the complainant, regardless of the situation, but may be stripped of that right only if the Hearing panel believes that the respondent is behaving inadequately (e.g. intimidating).

-Complainants should be required to testify (or have someone testify in their place), except for situations involving sexual harassment and/or assault. I firmly believe that it is immoral to have sexual assault victims be questioned by their potential assailant.

-Witnesses should not be required to testify. As is mentioned, this is indeed punitive and not "educational", as well as a delay tactic.

-The rules of evidence shall be strict, and set in stone. Having the Hearing Panel decide on rules of evidence on a case-by-case basis is completely unfair and unjudicial. These rules, in order to uphold due process, should be clear and convincing. Then, after all admitted evidence is considered, the Panel shall have a written statement with its decision, rationale for that decision (including why they believe that the evidence is clear and convincing) and related opinions. If the burden of proof is changed to preponderance of evidence (more likely than not basis) then I believe that the current sanctions are unfair. I would hate to see students be expelled, for example, for something that was "more likely than not". As unlikely as it may be to win a lottery (and by unlikely, I mean really really really unlikely) people still do win it sometimes.

With all this said, I do wish students were given more time to fully review the amendment. Not only am I busy now with class and upcoming finals, but we still are in the midst of this pandemic, and I know that not every family is as fortunate as mine to be going through this pandemic as smoothly as mine is. I would like to push for this comment period to be extended until end of June, which should be plenty of time for everyone to review the amendment fully, and not just blindly accept the University's power hungry request.

On the other hand, here is what I agree with:

-Literally nothing

Anonymous, '21

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## Controlling Who Students Affiliate With?

Submitted by Nicholas Brodack Allen on Tue, 2020-05-05 16:25

I am extremely discouraged by the vagueness of section 4.1 of the proposed changes, making a point to go after students who "knowingly affiliate with groups, teams, or organizations that have had their University recognition or registration withdrawn." This could imply that a previous friend, sibling or even new acquaintance could be punished for "being involved in any activity that would normally be associated with

being a member of such an organization," like how more vague can you get? Are people of a disaffiliated organization supposed to just dissolve their friendships as to not have someone who was not a "member" potentially live with them, or even worse, share mutual interests? And besides the definition, how would you enforce it? Will you raid former frat houses and write up any sophomores? Or will you check Instagram for pictures of people hanging out with members of Mock Trial before they got the boot? Like what is the burden of proof to show someone has friends they're not supposed to have? Oh that's right, I guess we don't even need proof anymore either.

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## Lowering burden of proof, among other concerns

Submitted by Christopher P Dunn on Tue, 2020-05-05 16:07

Like many others who have posted comments here, I, too am concerned about the apparent lowering of the burden of proof. In addition, some types of conduct might be construed as denying free speech. For instance, blocking vehicular and pedestrian traffic could be the consequence of a student, faculty, or community rally, demonstration, or protest. I hope there is some leeway here, but I don't see it. Furthermore, I do not see any aspects of the code that refer to despicable behaviours such as racism, anti-Semitism, or other hateful or bigoted acts or utterances.

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## Problematic language in sections 4.12

Submitted by Anonymous Committee Member on Tue, 2020-05-05 16:05 (user name hidden)

The language in section 4.12 leaves an opening for subjective "reasonable objection" and "my truth" arguments.

*Because of protections afforded by principles of free speech and academic freedom, expression will not be considered harassment (**up to here it is objective**) unless the expression also meets one or both of the following criteria (**here is when it turn subjective**):*

- 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 person targeted by the speech.

I can be easily shown how an ideology bent individual could easily wrap and use these subjective criteria as a hammer to silence free-speech as we have all witnessed in recent years with "cancel culture". NOTE: We have all witnessed in recent years, protesters shutting down campus conservative speakers because of opinion they deemed "humiliating" or "abusive" by their subjective perspective)

It is in my opinion that if Cornell wishes to be a place where free-speech presides, the subjective part of the wording of this section should be removed to protect freedom of speech. There are matters for courts of law. This wording will enable ill-intended individuals to promote fascism and silence opinion, not their own.

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## Opposition to proposed changes to Section 8.4

Submitted by Conor P Cathey on Tue, 2020-05-05 15:48

I write to voice my opposition to the proposed changes to Section 8.4. The standard of proof should remain clear and convincing evidence. The supposed rational of switching to preponderance of evidence to make the process more "educational" is a level of Orwellian doublespeak that even Mr. Orwell would not have considered possible. The possible consequences of disciplinary hearings for many Cornell students are significantly harsher than any civil proceeding and the standard of proof before taking such harsh measures should be correspondingly higher.

Furthermore, the decision to move ahead with this process during an unprecedented global crisis defies explanation. The failure of the CJC to complete the revisions on time is not an excuse to proceed with fundamental changes to the Campus Code of Conduct during such crisis. It reeks of impropriety and gives the appearance of using the crisis to duck opposition to changes that will be extremely unpopular with Cornell community.

I would have liked to review the entirety of the proposed changes, but under the circumstances it is simply not possible. I am extremely disappointed in Cornell.

Respectfully,  
Conor P. Cathey  
J.D. Candidate, Cornell Law School, Class of 2021

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## -At the same time that

Submitted by Nick Fanelli on Tue, 2020-05-05 15:42

-At the same time that Cornell is illegally extending their "power" further into the off-campus and un-Cornell related parts of students lives, they are also lowering their own standards of proof. In order to ward off the outcry that would come from admins, staff and faculty due to this clearly faulty policy, they also decide to have it only apply to students and to pass it when theres not a single person on campus and half of our student body is in the most affected parts of the country.



Is there any other institution in the country that so clearly demonstrates utter disregard for their own students, its frankly disgusting that just an esteemed university created on the basis of fairness and opportunity for all students would pull foolish stunts like this.

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## Educational versus punitive intervention

Submitted by Levent V. Orman on Tue, 2020-05-05 15:33

First of all, I agree with all those comments opposing the lowering of standards for burden of proof. I am not going to repeat their arguments.

I would like to go further and suggest that the goal of pursuing educational rather than punitive measures, and expanding the definition of harassment are contradictory. The definition of harassment, especially sexual but not limited to that, is already too expansive and too vague. Especially concerning is the use of the word "subjective perception" in the definition of a hostile work place. People's subjective experiences are not an appropriate criteria for punitive measures. Most importantly, we should strive to a more narrow the definition of harassment to limit ourselves to clear and legally acceptable cases, and try to deal with them through educational means, rather than punitively, as much as possible. Requiring community service or mandatory attendance in educational programs are commonly used in the legal system. We should rely on them even more as an educational institution.

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## I have many problems with the

Submitted by Jack Eoin Schluger on Tue, 2020-05-05 15:32

I have many problems with the substantive section of this code, which is all I had time to read.

### **Section 1 Respect for the Natural Environment**

This section is b.s.; Cornell is not truly committed to "acting in ways to live and work sustainably" while the university continues to fund the fossil fuel industry which is destroying our planet. You should either remove this section and admit that this is not a real university value, or commit to a real plan to divest from fossil fuels and affirm that this is a real university value.

### **Section 3.A Jurisdiction**

1) "Substantial threat includes the following: (a) the selling of drugs; (b) physical contact exceeding a shove; (c) hazing; (d) property damage or theft valued over \$500; and, (e) unique violations which shall be left to discretion of the Dean of Students as requested." First, please explain to me how selling of drugs is a substantial threat to "the University's educational mission, the health or safety of individuals (whether affiliated with the University or not), or the University community." Second, part (e) gives the university unlimited jurisdiction making this entire section completely meaningless.

2) "The final determination as to whether off-campus conduct is subject to this Code will be made by the Dean of Students, or their designee." What does this mean? First, *off-campus* conduct in my view should certainly not be subject to the *campus* code of conduct. It's literally the *Campus* code of conduct. Secondly, why should this decision not be included in the code, but subject to change at the whim of the Dean of Students?

#### **Section 4.9 Drug-Related Behavior**

It is well documented how marijuana prohibition leads to disproportion enforcement of these laws on black people, at alarming rates. Yet, this code explicitly enshrines marijuana (or even just the intent to use marijuana) as against the code of conduct. In my experience CUPD is extremely unprofessional and poorly trained, so I see no reason to believe the disproportionate outcomes for people of color would not happen on our campus, just as it has across the country. Further, with marijuana legalization spreading across the nation and likely to happen in NY soon, the inclusion of marijuana in this section is likely to soon have Cornell living in the past, continuing to enforce this racist agenda for no apparent reason.

I expect a response addressing these concerns.

- Jack Schluger, Cornell College of A&S '21

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#### **Due Process**

Submitted by Anonymous Committee Member on Tue, 2020-05-05 15:31 (user name hidden)

To reiterate what others have said below: I am confused about how the university treat students who are purported to have violated the Code. It seems that there is no necessity for sufficient evidence that the student violated the code - the only necessity is that there is enough evidence to make others suspect that the student did so. This is ambiguous and indicates that the student is guilty before proven innocent, rather than vice versa. I do not understand how the university could operate on such a principle and still ensure that accused students are treated justly.

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#### **Due Process**

Submitted by Anonymous Committee Member on Tue, 2020-05-05 15:30 (user name hidden)

I wish to simply reiterate why my fellow students are saying, as I believe that it is important for as many students to bring this to light as possible, even if the responses are short and simple.

Section 6.9 proposes that students are considered to be violating code if there is more evidence of a violation than evidence of not being in violation. This simply changes the status quo of judiciary process, proposing that students are considered guilty until proven innocent. This is a clear violation of due process, and has no place in the Cornell Code of Conduct.

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#### **Due Process**

Submitted by Anonymous Committee Member on Tue, 2020-05-05 15:09 (user name hidden)

Others have already detailed this at great lengths below, but as a quick summary, the proposed changes in Section 8.4 goes against the United States Constitution and even the United Nation's Universal Declaration of Human Rights. This blatant violation of rights by the university is inexcusable and indefensible in addition to this all being poorly timed given the current pandemic.

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## Reiterating what others have been saying

Submitted by Anonymous Committee Member on Tue, 2020-05-05 14:39 (user name hidden)

Hey, uh Cornell Uni?  
Could you fuck off pls?

Thanks,  
Cornell Students

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## Comment

Submitted by Taji Alessandra Hutchins on Sun, 2020-05-03 23:21

Because I do not want to needlessly reiterate opposition to lowering the standard of proof or stripping students of due process, I will mention something which has not been mentioned—Good Samaritan. Although it looks like Cornell has a policy of not charging students for alcohol related violations if they call or receive medical help, this is inexplicably left out of the code. This is not a policy which should be discretionary. I hope the administration makes this policy binding.

Respectfully,  
Taji A. Hutchins  
J. D. Candidate, Cornell Law '21

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## Restorative Justice should be the focus of this code

Submitted by Zach Jagielski on Sun, 2020-05-03 23:01

I have little specific suggestions for code revision, however after reading through the comments of fellow law students/professors, **I would like to oppose lowering the standard of proof.**

In general, I was surprised when joining the Cornell Community to see how differently their disciplinary system operates compared to my undergrad at the University of San Diego. After being involved extensively with the Office of Ethical Conduct and Restorative Practices at USD, and dabbling as a campus mediator at Cornell, I can honestly say it's somewhat of a night and day difference. Cornell could really benefit to adopt more restorative practices when responding to violations of the code. Some of these proposed revisions are positive steps forward, but I still feel like the process is highly judicial in nature.

Cornell isn't here to punish us when we make a mistake, it's here to help us grow from those mistakes. This isn't the often-cold-and-uninterested punitive criminal justice system, and yet Cornell holds immense coercive power with their ability to deal out sanctions. Let's work toward softening how the code is upheld. I

think if the process is shifted toward an educational rather than punitive system, it will embolden other communities on campus such as IFC and Panhellenic to adopt similarly-focused models to improve Greek life culture.

There are many excellent professors and students who have a deep understanding and appreciation for Restorative Justice. I can't stress enough how many positive results can flow from an adoption of these practices.

Very Respectfully,  
Zach Jagielski  
Cornell, J.D. (here's hoping) '21  
USD, BA '17

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## Proposed Changes

Submitted by Zachary R Sizemore on Sun, 2020-05-03 00:20

I share the concern about the system which Cornell University seems to be moving toward that many of my fellow students have expressed in their well-reasoned comments. In some of these proposals, Cornell University has gotten dangerously close to adopting a system which violates the due process of respondents. I completely respect the need to make sure the process is as “educational” as possible, but there is nothing educational about a process which the respondent, and the entire student body, perceives to be fundamentally unfair. With that in mind, I make the below specific comments.

### Section 1.2

I support allowing respondents to have an advisor speak on their behalf at the hearing.

I do not see the “educational” value in forcing an untrained, scared respondent to speak on their own behalf. This is especially compounded by the fact that the University puts a full-time, trained professional against this student. I could never say it as well nor with as much experience as they did, but to reiterate a point made by the JCCs themselves: The stress and anxiety which is already inherent in this process will just be made worse if the student is forced to make all of their own statements. As informed as I must assume the Committee is on the process, no one can be more informed than those who have experienced it from the respondent’s side time and again. Given that, I urge the Committee to give a particular deference to the JCCs viewpoint.

### Section 8.4

I oppose the Committee’s proposal to lower the burden of proof.

In providing the justification for this change, the Committee only noted that this would make the process “more educational” in the eyes of those who voted in favor of it. Once again, I see nothing educational about this change. The Committee talks in a very abstract way about the process, as if it does not have very real consequences on the accused, providing them with a mere educational experience. But its not just an educational experience for the accused. The withholding of a degree, expulsion, and more is on the table at some hearings. The idea that a respondent would walk away from a trial where they are subject to a preponderance of the evidence standard and summarily expelled thinking about the educational value is simply unrealistic.

While preponderance of the evidence is the standard traditionally used in a civil lawsuit, I would argue that a proceeding like this warrants a standard higher than preponderance. As stated above, some proceedings have grave consequences at stake. This is particularly significant given the younger age of some of the

respondents. A preponderance standard risks erroneously subjecting some respondents at the beginning of their educational and professional careers to severe consequences. This is especially true because some other procedural safeguards which are used in a civil lawsuit are not present, such as the right to a jury trial in some cases. In the absence of these procedural safeguards, I believe the current clear and convincing standard serves to best protect the due process of the respondent.

In conclusion, I write the Committee today as not only a member of the Cornell community, but as a law student who is deeply concerned that a school that I am so proud to attend is moving in the direction of adopting a wholly unfair system where students, potentially representing themselves pro se against a trained professional, are tried in a private hearing and are subject to a dangerously low burden of proof. The adoption of any of these changes is troubling, but the idea that the Committee would propose all of these in concert quite frankly worries me. Adopting some of these procedures would turn Cornell Law School into a place that teaches the value of due process while the University at large shows people how easy it is to rob someone of it.

For those reasons, I ask the Committee to reconsider some of its more fundamental proposals, and to ensure that both the complainant and respondent receive a fair, just, and "educational" experience.

Respectfully,  
Zachary Sizemore  
J.D. Candidate, Cornell Law School, Class of 2021

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## Comment on Proposed Change to Burden of Proof

Submitted by Hannah Jung on Fri, 2020-05-01 20:50

As colleagues have already expressed in their comments, the proposed changes by the CJC, if passed, will have significant consequences for those subject to hearings. All students who potentially face sanctions due to misconduct deserve a fair process. The "clear and convincing" standard for the burden of proof better protects innocent students while compelling investigation and complaint procedures to examine allegations of misconduct thoroughly. For misconduct other than sexual assault (where, for reasons specific to evidence in such cases, the "preponderance" standard already applies), lowering the burden of proof serves no real benefit and only makes it easier to subject students to discipline for something they may or may not have done. In light of the disciplinary measures and what is at stake, the current system should at least be able to prove that the conduct in question is substantially likely to have occurred. This is not a demanding standard; it places a reasonable duty on the adjudicatory system to ensure fair proceedings and minimize the risk of bias.

Finally, I share the concerns in previous comments that this is far from an ideal time to be introducing such changes. I am glad that the deadline for comments has been extended for another week, but it is still unrealistic to expect members of the community to be able to review proposals during a pandemic and an already stressful time of the semester. If at all possible, please consider alternative timelines to ensure input regarding Section 8.4 in particular.

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## Do not lower the standard of evidence

Submitted by Anonymous Committee Member on Fri, 2020-05-01 17:29 (user name hidden)

Please do not lower the standard of evidence in cases governed under the proposed rule changes. It endangers the right to due process of all students and poses a severe threat to marginalized students.

A concerned alum.

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## Extend the Comment Period; Don't Lower the Standard of Proof

Submitted by Robert Ward on Fri, 2020-05-01 16:49

As many commenters have already observed, Cornell students are living through an unprecedented public health crisis. The effects of this crisis have been profound: on short notice, students were asked to leave their friends and classmates; "going to class" suddenly meant clicking a Zoom link; a cloud of uncertainty hangs over summer internships, and for those graduating, post-grad employment. The University has shown an admirable degree of flexibility in its response to the COVID-19 pandemic. Yet, for some reason, we are told that there can be no such flexibility with regards to sweeping changes to the Campus Code of Conduct. The explanations for this lack of flexibility, as described in [The Cornell Daily Sun](#), fail to adequately grapple with the challenges we are all facing as a result of the COVID-19 pandemic in favor of pointing the finger at others. This is unacceptable, particularly in light of the significance of the proposed changes. Take, for example, the proposed revision to Section 8.4 (Burden of Proof). A move to a preponderance of the evidence ("more likely than not") standard as opposed to a more demanding clear and convincing betrays a misguided perception of what serves the interests of the Cornell community. As several commenters have noted, making it easier to mete out punishment is not what serves the interests of the community -- ensuring that the right students are punished does. The clear and convincing standard better serves this interest by ensuring that students are found responsible based on sufficiently strong proof. Pointing to the use of the preponderance of evidence standard in the context of civil litigation is similarly misguided. The sanctions available under the Code, including suspension and expulsion, can have devastating consequences that will follow a student for the rest of their lives. They go far beyond what we see in a typical civil proceeding, where one party may be found liable and pay monetary damages to the other. If we want code of conduct proceedings to have any resemblance to a fair process, we should expect that those seeking to impose such significant sanctions be able to build a sufficiently strong case as to meet something more demanding than the standard proposed here.

Adopting this proposal at any time would be a major failure on the part of the administration. Adopting it now, in the midst of a global pandemic, without giving those most affected adequate time to make their voices heard, would be truly inexcusable.

Respectfully,  
Robert Ward  
J.D. Candidate, Class of 2021

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## More time needed, Higher standard better

Submitted by Joshua Christine on Fri, 2020-05-01 13:42

You've got to be fucking kidding me.

you want to make a decision that involves students, in the midst of god damn global pandemic, while students are trying to figure out what the heck their going to do about online classes, finals, cancelled summer internships, a dying job market, and a crashing economy. Many of these students may have family members who are sick with Covid 19 or who have already died, and some students themselves may be sick with the virus- this is particularly salient for lower SES students who may not even have adequate access to computers and Internet (let alone food, healthcare, or other basic services) now that they are home. Honestly you should be ashamed of yourselves, and if I had the money I would file a lawsuit over this madness. This is a decision that needs to wait until students are back in session and student representatives can actually be a part of the process face to face.

Further, the idea that we would lower the standard of burden of proof is ludicrous. I agree with what so many commenters have already said- except in cases of sexual assault, the burden of proof must be as high as possible. This is not only to reduce 'bias' as many have correctly pointed out, but to reduce the opportunity for mistakes and errors in judgment by the JAO. In a world where hundreds of thousands of members of black and brown communities all over this fucking country are thrown behind bars because they cannot afford proper representation, because the system is biased against them, and because the subsystems which develop such as plea deals etc make it so that it is often easier to accept a plea deal for something you are INNOCENT OF than attempt to go through the legal process which is stacked against minorities and against the poor. I would reiterate what one commentator so eloquently said, that I would rather 10 guilty students be found to be not responsible than for one single innocent student to have their academic life (and in large part their future financial and professional lives) ruined or halted because they were unjustly found responsible due to the lower standard. In a University which prides itself on requiring its students to meet the highest of academic standards, and who accepts only the top 10% of applicants based largely on that criteria- it is absurd to me that the JAO would like to lower the standards for themselves. As a formerly active duty US Marine I swore to uphold and defend the ideals of freedom, democracy, and justice for this country. As a Cornellian, I will not stand by and watch those ideals be degraded by the very institution which is supposed to shape and develop young minds toward those lofty aims. I DO NOT support lowering the evidentiary standard for the JAO, I DO NOT support expanding their power and jurisdiction in any way, and I DO NOT support the name change which would reflect, support, and reinforce that expansion of power in the minds of students and faculty.

Fuck your power grab.

-Joshua  
MPS Cornell University '19  
BA University of Pennsylvania '18  
Defense Language Institute '09

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## Preponderance of Evidence Not Strong Enough

Submitted by William James Eden on Fri, 2020-05-01 11:53

Hello everyone. I really don't see the argument for switching to preponderance of evidence for accusations that could lead to suspension or termination (outside of sexual assault charges). While these aren't criminal charges, the consequences can be very severe. Suspension or expulsion for some people might not be a big deal: they may have a strong social network, their parents might be able to support them, they could study

elsewhere. But for some students, they have worked very hard to attend Cornell and expulsion would seriously damage their economic and social prospects. And the evidence tells us that students in these situations, of lower SES, are exactly the kinds of students who face biases in judicial proceedings. We should not be lowering the standard and risking irreparable damage to the wrongly accused.

Thank you,  
Fil Eden, '10

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## I don't have enough time to write a more thorough comment

Submitted by Julian J Xu on Fri, 2020-05-01 02:54

I agree with preceding comments regarding the poor decision not to extend this notice and comment period. The current law students are sitting exams and facing uncertainty about their future employment in the face of a global pandemic.

With the time I can spare, I find myself disagreeing with the amendment to 8.4. Section 8.4's proposed amendment to lower the burden of proof seems short-sighted. The amendment notes state that proponents of a preponderance of the evidence standard argue it balances the interests of the community, rights of the students, and due process. Frankly, I don't see how that's possible, unless it's in the interest of the community to simply discipline *more* Cornell students. Surely the community's interest would be better served by disciplining the *right* students - those who are shown to have actually committed a violation through clear and convincing evidence.

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## Extend commenting period

Submitted by Anonymous Committee Member on Fri, 2020-05-01 02:13 (user name hidden)

Such sweeping changes cannot be made without extending the period for comments until at least June. It would be a disgrace to the integrity of Cornell University if such changes that affect the rights of students are made during exam period and a pandemic. As a law student and a future alumni, I condemn any changes that are made without adequately extending the commenting period. Specifically, the standard of proof of clear and convincing evidence cannot be changed without more time for students to engage in discourse with the university. Again, if such changes are made, any claim that Cornell University is an institution that looks out for its students is shallow and false. Moreover, if changes are made without extending the commenting period, I will explicitly express to prospective Cornell student my believe that Cornell took an underhanded approach to undermine the right of students without sufficient dialogue when students were already struggling to finish the semester during a pandemic. I will also never donate to Cornell University if such changes are made without extending the commenting period.

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## Public Notice and Comment is Important

Submitted by Michael G Mills on Fri, 2020-05-01 01:27



I write today in opposition to the proposed amendments. While there are many issues with the proposed amendments, I will only discuss what I view to be the most important issue: that the administration seeks to rush through these amendments despite the COVID-19 pandemic obscuring the amendments' passage from public debate.

The proposed amendments have many flaws, yet students inevitably will not have a chance to comment on them because the administration seeks to rush through these changes during what is perhaps the greatest global health crisis in 100 years. The attempt to scurry these amendments through under the cover of night offends the very notion of community involvement and representation.

The COVID-19 virus needs no introduction. It has thrown the world into an unprecedented lockdown. Cornell has taken the drastic step of closing its doors and sending students home for their own protection. It extended Spring Break for undergraduate students to approximately three weeks. It has radically altered its grading policy as a result of the crisis. In many ways, the school's response to the pandemic has been sensible and responsive to the fact that students' lives have been upended and many are facing extraordinary hardship. Yet, the administration believes now is the best time to pass a radical overhaul to the campus code of conduct. Students do not have the bandwidth right now to be concerned about changes to the code of conduct. Many are worried for their own health and safety, and that of their loved ones. Many are worried with providing full time childcare now. Many are worried about their summer jobs or entering the workforce during a recession. Many are worried about how they will pay rent or feed themselves. One thing they're not worried about? Changes to Cornell's code of conduct. It is an affront to the idea of public notice and comment to pass these changes during a time of crisis while so few people are watching. Yet the administration—over much objection and request to delay—continues to try and push these changes through under the darkness the COVID-19 pandemic has brought over this world. The administration's proposal can only benefit from public comment, as it can only demonstrate public sentiment towards these changes and raise concerns the administration may not have thought of. As Justice Brandeis once said, "[s]unlight is said to be the best of disinfectants." Yet the administration seems content using a lamp with a shoddy bulb.

I urge the administration to take my comments, and the other thoughtful comments submitted during these troubling times, into account before rushing these amendments through.

Respectfully,  
Michael Mills  
J.D. Candidate, Cornell Law School, Class of 2021

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## [The CJC Meets Tomorrow at 9AM \(EST\)](#)

Submitted by Anonymous Committee Member on Thu, 2020-04-30 23:32 (user name hidden)

I would invite those of you interested in this process to attend the final meeting of the Codes & Judicial Committee:

<https://cornell.zoom.us/j/985442729>

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## [Which standard should I use?](#)

Submitted by Anonymous Committee Member on Thu, 2020-04-30 23:24 (user name hidden)

Perhaps someone can help alleviate my troubles by suggesting how I should interpret the proposed changes. If I am to evaluate these proceedings in my own mind with the standard of a preponderance of evidence, then I am led to conclude that a potentially controversial Code of Conduct featuring sweeping changes which take away basic rights from students, such as the right to a public hearing, is being pushed through at a time when students are focused on the end of the academic semester and the current pandemic. The preponderance of evidence certainly suggests that this process has been oriented to avoid much real public comment on this matter. However, I genuinely respect all of the work that the administration and the UA do for us. I have long believed that they held my best interests as a student at heart... So perhaps I should use a clear and convincing standard instead and provide them the benefit of the doubt? It's a difficult decision when it seems the administration and the UA ask for a benefit of the doubt which they currently seek to eliminate in us, students, through the lowering of the evidentiary standards.

I understand the importance of reforming the Code, and I respect that there are legitimate arguments to be made on both sides of many of these issues... But we need to have a full and vibrant public discourse on this matter before making such impactful changes. This level of discourse is not available in our current chaotic times, so for the sake of a process which matches the integrity of our great school, I would respectfully request that we do not reform the Code of Conduct prior to Cornell resuming in-person classes.

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## Please Do Not Rush This Process

Submitted by Logan Rue Kenney on Thu, 2020-04-30 23:18

### **We all deserve a voice.**

At the origin of this process, we were tasked with making the code more readable and eliminating ambiguities and redundancies. The revision has expanded to encompass fundamental issues involving the governance of the Cornell community. A substantial amount of people are raising the following issues which need more open and public discussion: 1) the lower and more punitive burden of proof (there is no regulation stating that there must be a universal standard of proof), 2) the importance of public hearings, and 3) suspensions being up to five years. These discussions would best be carried out in open and public meetings—something we cannot properly accomplish at the moment (nor has the CJC attempted to accomplish).

It is irresponsible to push through an entirely new code which will radically alter the student judicial experience during a global crisis. Furthermore, it is both unrealistic and unfair to expect students to read these documents while the semester is ending and/or finals are starting. We, as a community, are not being given adequate time to read the suggested changes. I ask you—what is the rush? Where is our compassion? Here is an article written by The Cornell Daily Sun discussing Tuesday's meeting of the University Assembly: <https://cornellsun.com/2020/04/29/university-assembly-considers-lowering-evidentiary-standard-in-j-a-proceedings/?fbclid=IwAR1GaTomyRuOF1bfpXQ07M58Cl6nECRMZBBxjTxxTsuBnaMzawnN9kzLFck>

Sincerely, Logan R. Kenney J.D. (expected) '21, B.S. '15  
Former Chair of the CJC, Current voting member of the UA

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## Due Process and Education

Submitted by Jeffrey B. Deutsch on Thu, 2020-04-30 22:00

Due process and education go together.

When deciding whether someone is guilty or innocent (college officials like to call them "responsible" and "not responsible"), Cornell still leads the way in due process -- that is, in educating the community on how to protect the innocent while punishing the guilty. It requires not only institutions and procedures like hearing panels, dissenting opinions and judicial codes counselors but also a certain attitude. That attitude is: We're going to work hard and apply the law/rules, logic and safeguards to find the facts and make a fair decision -- even if it goes against our millennia-evolved emotions.

In theory, decision makers can do a good job with preponderance of the evidence. In practice -- precisely especially because these are not strict courtroom proceedings -- clear and convincing evidence provides a stronger check and makes the decision makers do more of the hard work needed. That's how it's not only fair but educational too. It teaches us all the importance of fairness and objectivity.

We should focus on education when considering whether and when to let a suspended student rejoin the community -- for the last time, since suspension is usually the final stop before expulsion. It seems to me that while fixed-term suspensions may have a place, they seem to me a bit arbitrary. How can we know (1) from the outset that So and So needs exactly, say, three years away from Cornell and (2) at the end of those three years whether or not So and So has in fact learned enough to come back?

Several universities take a somewhat different approach. They specify, not a definite period after which the student is commonly automatically welcome back, but rather a definite period after which the student is free to try to prove that s/he has learned his/her lessons. The Office of Student Conduct & Community Services (OSCCS), or possibly the dean of students, can read the student's petition and perhaps even speak with him or her and then make an informed decision in the particular case. That can give the student a stronger incentive to learn the most from his/her suspension, because s/he's not guaranteed another chance at the end.

(In fact, a discussion of the process, and of the student's criteria for readmission, given at the beginning of the suspension, can help start the learning. And when Cornell has to tell a suspended student to try again in a year or two, a bit of dialogue can help the student figure out where s/he still needs to improve.)

Finally, educational conferences are a great idea. Among other things, I suspect many if not a majority of students who get into trouble need a little -- and some quite a bit -- of education in social skills, conflict resolution and other aspects of emotional intelligence (such as "reading the room"). Having taught social skills myself (at Northern Virginia Community College), I think Cornell could get a great return from a small investment of reading lists (not to mention the books and online pieces themselves) and ongoing classes -- in overall social skills and also things like roommate situations, socializing with peers (especially those you might want to date), dating and intimate relationships, workplace relations and the like. (My own fondest Cornell memories have included attending a few of these classes.)

As I'm sure we all know, different people have very different susceptibility to subtlety. More bluntly, some people can take a hint and some need a clue by four (wrapped in flannel so as not to actually hurt). More than a few people need to learn how to take hints **via** clue by fours -- I've been one of them. Yes, taking and giving hints can be explicitly taught. Calibrate the messaging accordingly.

Keep up the great work!

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## A Few Thoughts on Due Process

Submitted by Jeffrey B. Deutsch on Thu, 2020-04-30 21:06

The Judicial Codes Counselor should be legally trained, should be independent and should be allowed to actively participate as appropriate (not just be a "potted plant"). This institution helps bolster Cornell's assurance of due process -- especially for those who due to cultural differences, socioeconomic status, background, etc., have trouble organizing their own defenses or speaking for themselves.

The standard of proof should be clear and convincing evidence -- **especially** for Policy 6.4 matters (and also including the Greek system). Due to the strong emotions, subjectivity and ambiguity of many if not most Policy 6.4 cases, we want to be sure we're making the right decision. Preponderance of the evidence -- "50% + a feather" -- offers too much leeway. Especially when probation, let alone suspension or expulsion, is on the table.

I believe cross-examination can do much good or much evil, and obviously the panel chairs need to control questioning in hearings. Since panel chairs will therefore sometimes ask questions themselves, of their own choosing, they should get some training in good cross-examination including (but not limited to!) good follow up questions and arranging lines of questioning. (If the Judicial Codes Counselor's office does not already get that training too, they should!)

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## Proposed Amendments to Code of Conduct

Submitted by William R. Shaw, Esq on Thu, 2020-04-30 17:37

Attn: JCC Members and UA members:

First, extend the deadline for comments. Past delays do not excuse a limited time for comments during an unprecedented absence from campus by all students, some faculty and staff. Their ability to review, digest, discuss among their peer groups was severely compromised by the short notice to leave, pack, travel, then learn a new era of on line learning during April. A two month extension is minimal. (Note: At present (4/30/20), I see less than two dozen comments, and only one from a student.

Second, after 45 years of experience with the Code, I am greatly troubled by the depth and breadth of these proposed "amendments." I reported to Pres. Dale Corson in 1972-73 on the drafting of the Code, a "noble experiment." I have represented hundreds of students before the JAO (and Title IX Coordinator) for over 30 years. While I appreciate the opportunity comment, the complexity of the changes in contrast with the rush to judgment fail to make the time for providing comments justified.

Third, the comments suggesting a lower standard of proof is justified are wholly mistaken. The sanctions provided are equal or greater than criminal sanctions. (I had one client commit to 90 days jail, in hopes Cornell's JA would not suspend or expel him. That at similar experiences demonstrate that Cornell's degree represents who students expect to be after years earning admission, then four years of committed academic achievement. In that one instance, he lost a full scholarship at prominent law school.) A goal in our country and at Cornell should be to accept a guilty person may be found not responsible, rather than an

innocent one be suspended/expelled. In one documented case, among many others, the respondent attempted suicide twice upon being temporarily suspended. He ultimately prevailed in Federal Court (John Doe v. Cornell, NDNY), but only after years in therapy and hundreds of thousands of dollars in legal and professional fees.) The inequity between the burden of proof within Policy 6.4 and the Code of Conduct needs correction. But by having both require “clear and convincing” evidence, akin to 75% probability, not the proposed “preponderance” standard of proof; commonly known as “50% plus a feather.” The potential for bias for the complainant is demonstrable.

Fourth, Due Process is refuted by University Counsel at Cornell, claiming it is a private institution, thus not subject to the 4th or 14th Amendment protections. However, Cornell has four “statutory colleges.” The students in those “state schools” will find due process protection one day in federal court. Moreover, federal judges across the nation are holding other “private” universities to a due process standard. Citations omitted due to shortness of time. Cornell should lead not follow in assuring due process.

Fifth, the tilt toward “educational” objectives is attractive and sound, but the “devil is in the details,” as comments to date note. The proposed process further limits rights to trained and competent “advisors.” JCC’s (2nd and 3rd year law students) are committed and hard-working and independent. They should not be put under the thumb of the very bureaucracy which they must challenge on behalf of their students. The sanctions imposed under the Code include tens of thousands of dollars (lost tuition, room, board, fees for a student suspended mid-semester) and career threatening records and transcripts. Students need and should have advisors or attorneys of their choice. Students charged under the Code are not trained, nor able to self-represent themselves. Some are impaired with emotional difficulties that preclude representing themselves (anxiety, depression, bi-polar, etc.). The JAO can be intimidating, and the entire process and hearing panels overwhelming. Independent representation is a must to ensure “fundamental fairness.”

With more time, detailed questions and criticisms can be submitted to the expanded claim of jurisdiction and the increased use of vague misconduct standards. They need to be redressed before imposed, not after a successful court challenge.

The comments and CJC discussion to date have apparently also lost sight of the myriad of other Codes and Polices Cornell students are subject to: Academic Integrity, Athletic Conduct Codes, and Regulations for Maintenance of Educational Environment, to name a few. They have different standards and procedures.

My time is up. Extend the Deadline.

Respectfully submitted, William R. Shaw '69, '73, BA, MPA, JD

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## Feedback from a team of professional academic advisors

Submitted by Lisa A. Ryan on Thu, 2020-04-30 16:45

Feedback from a team of professional student services academic advisors

Section 1.2 The JCC or other advisors should not speak for students in a hearing. While they should seek advice and support, students should speak for themselves as part of the educational process to talk about their behavior and learn from the choices made and impact on the community.

Section 1.4: JCCs should at least have a dotted line of supervision to Student and Campus Life

Section 2.4: Formal notification should be sent by Secure Drop Box or Maxient in addition to mailing a letter

Section 4.2: We suggest three years for suspension as sufficient because that is a lifetime developmentally for students in their early 20s, and in three years curriculum changes can make completion of degree challenging. For reasons including possibly rapidly changing curriculums, many college withdraw student who have been gone longer than five years.

Section 4.3: There should be no notation made on a transcript while a Formal Complaint or investigation is pending. This is consistent with Academic Integrity procedures because charges can be false or inaccurate. We agree that The University should not withhold awarding a degree otherwise earned until after the resolution of the Formal Complaint unless the respondent does not enter into a separate agreement with the University. The student would likely be motivated to enter an agreement in order to receive their degree to help them secure employment or graduate school.

Section 5.1: Disciplinary probation can and should be administrative decisions hearing. Full hearing boards are typically used for suspension or dismissal and reviewing lower level cases is extreme and time consuming. Section 5.4: We believe that all hearings should be private, consistent with Academic Integrity hearings. The respondent question a witness seems inappropriate in all circumstances and the chair should moderate questions.

Section 6.5: We believe that all hearings should be private, consistent with Academic Integrity hearings.

Section 6.6: We have no power to enforce relevant witnesses to participate in a hearing unless they are charged with a code violation, making the process longer. If someone files a complaint and gives a report to a trained Cornell investigator, the report or representative should suffice.

Section 6.7: 10 minutes for oral closing statements seems unnecessary and time consuming. More appropriately the Chair could ask if either party has something they'd like to add at the end of the hearing.

Section 6.9: Preponderance of evidence is the best practice in higher education as endorsed by professional associations such as ASCA (Association of Student Conduct Administrators) and other student affairs/services organizations. There are years of precedence and research to support this approach. Preponderance of evidence is used in Title IX, hazing and academic integrity cases. Additionally, clear and convincing evidence is extremely difficult to prove in a college environment. As this process is deemed an education process and to support our community's wellbeing, it would be detrimental to only sanction/educate when there was a clear and convincing burden.

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## Re: Proposed Procedural Amendments 1.4, 4.3, 6.9, and 8.4

Submitted by Violet G Nieves Cylinder on Thu, 2020-04-30 14:48

I submit the below comment on the Proposed Amendments to the Campus Code of Conduct on behalf of myself, Violet G. Nieves, and Emily Van Dyne. We are J.D. Candidates for the Class of 2022, and we write as members of Cornell Law School. Our comment is also available at the following link: [https://drive.google.com/file/d/1vWXYW3zb0DaWTCVVD2qKSG\\_iMYh\\_4zMC/view?usp=sharing](https://drive.google.com/file/d/1vWXYW3zb0DaWTCVVD2qKSG_iMYh_4zMC/view?usp=sharing).

We write to express our support for **Proposed Amendments to Procedural Sections 1.4 and 4.3** and our opposition to **Proposed Amendments to Procedural Sections 6.9 and 8.4**.

**Section 1.4: The Judicial Codes Counselors should be law students.** We agree that the Counselors should remain law students. As Professor Kevin M. Clermont writes in his comment, the position is legal in nature. The Counselors provide fundamentally legal advice and therefore require legal training and supervision. We believe that giving this responsibility to individuals with no legal training would not provide respondents with sufficient due process or adhere to normative standards of fairness. We are not confident that students without legal training can properly advise respondents in administrative proceedings. Indeed, we seriously question whether this would comport with basic standards of legal ethics. Insofar as the administrative process is opaquely legalistic, law students are better situated to manage the proceeding's legal aspects, and thereby reduce that burden for individuals who lack legal training. Furthermore, we balk at the insinuation that the educational value of this experience should rank in importance with the quality of counsel and due process concerns. However, even considering potential educational value to Counselors, that education is most valuable to law students.

**Section 1.4: The Office of Judicial Codes Counselor should remain independent.** We agree that the OJCC should remain independent from the Office of Student and Campus Life. As the Judicial Codes Counselors have written in their comment, we disagree with the suggestion that incorporating the OJCC into the OSCL will increase accountability or transparency. Rather, we suspect that such a move would create a perceived or actual conflict of interest. The JCCs are accountable to their clients, not to the administration. We question whether transparency in this context would not result in, at minimum, the perception of administrative interference in a confidential relationship. The OJCC's continued independence encourages participants to trust its guidance and advocacy, and thereby preserves their trust in the administrative process. Additionally, we worry that moving the OJCC to the OCSL would further intimidate and confuse participants who are already uncomfortable or lack experience with administrative proceedings.

**Section 4.3: Transcript notations should not be permitted prior to a final finding.** We support the Proposed Amendment prohibiting transcript notations prior to a final finding. Preliminary notations to respondents' transcripts will unfairly harm respondents who are ultimately found not responsible. These notations may damage respondents' professional and academic prospects, precluding them from jobs, internships, grants, or scholarships while a complaint is pending. Respondents who miss such opportunities may in turn need to explain gaps in their work or academic history, irrespective of whether they are ultimately found responsible. These errors are particularly burdensome to respondents who lack access to finance or professional connections. The Proposed Amendment will reduce these errors and their consequences, and provide more robust due process. Even respondents who are ultimately found responsible should not preemptively bear those consequences.

**Sections 6.9 and 8.4: The burden of proof regarding violations should be clear and convincing evidence.** We disagree with the Proposed Amendments to lower the burden of proof. The preponderance of evidence standard of proof is not high enough to guarantee respondents due process. These administrative proceedings often adjudicate conduct that, were it prosecuted outside of the University, would require a finding beyond reasonable doubt. *See generally* **Substantive Section 4**. Furthermore, lowering the burden of proof may exacerbate existing inequities between the parties. Students with the resources to obtain external advocates and guidance may be advantaged, while students who lack such resources will lack choices about how to present their case, while operating under a burden of proof that may favor their well-resourced University and peers. Finally, we fail to see that the University has a compelling interest in lowering the burden of proof.

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## Complainants' Advisors Comments on Section 1.4

Submitted by Morgan Lindsay Anastasio on Thu, 2020-04-30 14:27

### **Complainants' Advisors Comments on Section 1.4 The Office of the Judicial Codes Counselor**

Complainants' Advisors (CAs) are law students who serve as procedural advisors, free of charge, to Complainants under Cornell's Policy 6.4. Like the Judicial Codes Counselors (JCCs), CAs are housed in the law school and are advised by a Professor of Law. We write to voice our support for proposed Section 1.4 The Office of the Judicial Codes Counselor, Office Members and Office Independence.

#### **(1) Section 1.4 The Office of the Judicial Codes Counselor – Office Members**

***We support the CJC's vote in favor of ensuring that JCCs are law students.***

In addition to the JCCs' work under the Campus Code of Conduct and Academic Integrity, the JCCs also serve as procedural advisors to Respondents under Cornell Policy 6.4 (Title IX). While Respondents are free to have an advisor of their choice, they are offered a JCC free of charge. Many Respondents cannot afford to hire outside counsel and so rely on JCCs to guide them through the complex Title IX process. JCCs should remain law students for the following reasons:

*First*, due process values would be better served by law-student advisors. It is imperative that Respondents and Complainants understand the external, legal implications of Policy 6.4. Specifically, many of the policy violations found in 6.4 are also criminal acts. Complainants can and do bring civil or criminal charges against Respondents concurrently with or consecutively to their Title IX Complaints. Importantly, because the Title IX process is not privileged, anything uncovered in the investigation or hearing can be used in subsequent legal action. While an undergraduate student may learn the intricacies of the Title IX process, law students are better served to advise Respondents in a way that appreciates and considers possible legal consequences. Moreover, law students, while knowledgeable of common legal implications of Policy 6.4, understand the limits of their role and when to refer a client to a licensed attorney. This is especially true regarding the new Procedures on Prohibited Discrimination, which have extensive civil legal implications. Law students are also likely to have more familiarity with applicable law that governs their actions, such as the requirements of the Family Educational Rights and Privacy Act (FERPA).

*Second*, JCCs have a particularized skillset. Policy 6.4 is complex. The JCCs have years of institutional knowledge and experience not only guiding Respondents through the Title IX process, but also writing effective and creative procedure-based arguments. Non-law students often emphasize narratives that are not as relevant to the policies at hand and can miss effective procedural arguments. Given that Respondents face serious consequences under Policy 6.4, such as expulsion, it is important that their advisors have years of experience defending these cases and the necessary legal training to make effective procedural arguments.

*Third*, JCCs are better suited to maintain professional relationships. In addition to advising students, JCCs may represent faculty and staff in the Title IX process. A law school advocate will engender greater trust than an undergraduate student for other students, and in particular for faculty or staff. Moreover, mandatory ethics and experiential learning classes help law students navigate confidential relationships and conflicts of interest. Understanding the balance between being a procedural advocate and offering emotional support can be difficult. Law students have experience balancing these dynamics through ethics courses, clinical work, externships, and summer jobs. Lastly, CAs and JCCs have a close working relationship that would be better fostered with law-student JCCs. Specifically, we attend trainings together and collaborate when advocating for policy clarification or changes that impact our clients. As law students ourselves, CAs would



have a better working relationship with law-student JCCs, made even easier by being housed in the same building.

*Fourth*, equitable representation. In the Campus Code of Conduct and Academic Integrity, the imbalance between student and University is sharpened when the student is represented by someone with no legal training and the University is represented by the OJA. The same is true for Title IX. Complainants under Policy 6.4 are often advised by a CA, who will remain a law student, or an attorney. Students advised by non-law students will thus be at a disadvantage. Additionally, JCCs will serve as better advocates to these students because law students have greater time and energy to dedicate to this work compared to undergraduates who often participate in multiple student groups while taking more credits per semester compared to law students. Moreover, many JCCs and CAs are pursuing careers directly related to the work they do for the school, and use their role as a JCC or CA to sharpen their advocacy skills. Thus, law-student JCCs are more likely to dedicate the time and energy it takes to successfully represent their clients through these complex procedures.

#### **Section 1.4 The Office of the Judicial Codes Counselor – Office Independence**

***We support the CJC's vote to keep the JCC Office independent from the Office of Student and Campus Life.***

The JCC office should remain independent from the Office of Student and Campus Life. CAs share the JCCs' concern that Respondents would not trust their advisors if they fell under the same umbrella as the entities investigating them. This concern is even greater when it comes to Policy 6.4. Respondents and Complainants have the right to file complaints against the University with the New York State Division of Human Rights (DHR) and federally through the Office of Civil Rights (OCR). When they do this (sometimes concurrently with a 6.4 investigation), New York or the federal government initiates an investigation into the Title IX office and process. Respondents who file a complaint with DHR or OCR will not trust an advisor that is part of the same entity they are complaining about. Moreover, this creates the potential for a conflict of interest, as JCCs may both advise Respondents through the DHR/OCR process but also become a subject of the investigation. Lastly, because CAs will remain an independent office supervised by law school faculty, like the JCCs are now, there would be an imbalance if Respondents are not granted independent advisors by those investigating them, but the complainants are.

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## Standard of Evidence

Submitted by Anonymous Committee Member on Thu, 2020-04-30 11:23 (user name hidden)

It is concerning to me that so many alumni (many of whom seem to be Greek and are a part of IFC chapters) fail to recognize that the current Greek Judicial System uses the preponderance of the evidence standard. In addition, they do not seem to understand that greek organizations have always been subject to a separate system, under a different lower standard than the Code. Therefore, what this seems to be is a blatant play to raise the standard of evidence for the greek system alone as they recognize that greek life might be incorporated into the Code and view this as a chance to change the system. I feel that moving greek life under the code and having a preponderance of the evidence standard is the only way to ensure that there is a balance between what it means to be a Cornell student, a greek, community interests, and due process. I say that with experience in both the Code/JA and the greek judicial process.

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## These Changes Will Eliminate Fair Process for Students

Submitted by Anonymous Committee Member on Thu, 2020-04-30 11:11 (user name hidden)

The proposed change to lower the burden of proof is a travesty and Cornell should be ashamed of itself for proposing to eliminate a fair process for students.

The higher burden of proof of "clear and convincing" signals to the entire campus community that students can trust they will be ensured a fair process. The punishment for certain violations can be as high as suspension or expulsion, so we as a community should want to err on the side of being more certain if we are punishing students in such a way that can have long-term ramifications for their education and career. The "clear and convincing" standard has been the long-time standard and there is no data offered suggesting that the clear and convincing standard is either no longer workable nor no longer beneficial.

On the other hand, I strongly support that the current changes include continuing to provide for students to have representation during their hearings by law student advisors, and I urge that the final version of the code maintain that commitment. This is especially important for students from low socio-economic backgrounds or for whom English is not a native language. This is an equity issue as not all students have had access to the same training to defend themselves in a hearing, or are able to speak in English with a comfort level that would provide themselves an adequate defense. Other students may suffer from anxiety and stress, compounded by having to face an employee of the JA's office (who is typically a barred attorney) and the serious ramifications that can result from being found in violation of the Code of Conduct. By not allowing advisors to speak on behalf of their clients during hearings, these rules strip fairness from the system and make a mockery of the values Cornell supposedly stands for.

I will not mince words, if you vote to lower the standard of proof or deprive students of the opportunity to have their law student advisors represent them in a hearing, you will be betraying the values of equity and fairness that Cornell has stood for since it opened its doors 1865. For the student unable to adequately defend themselves who will be convicted of a charge that they did not commit because you voted for to change these rules, you will carry the weight of their ruins.

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## Student Perspective

Submitted by Anthony Nunziato Cicileo on Thu, 2020-04-30 00:25

I agree with the comments put forth by the Cornell University Alumni IFC ("CUAIFC") in regard to the proposed changes for the Campus Code of Conduct. The proposed changes, as they currently stand, overexert Cornell's jurisdiction and inhibit an impartial judicial system. CUAIFC is raising these concerns with the best intentions to protect the rights of students and invested alumni in the campus judicial process. Additionally, these comments expose the flaws in the proposed changes which will deter future accepted (prospective) students from choosing a university where they are not provided judicial process.

The most concerning of these changes is in regard to burden of proof. Further reducing the standard of proof from "clear and convincing evidence" to a "preponderance of evidence" would be an egregious loss of due process. 51 percent likelihood is an undefendable threshold that will establish a guilty until proven innocent judicial system. With this standard, students' entire futures rest on findings that are biased in favor of the Judicial Administrator (as prosecutor). As a Cornell student I feel especially unprotected by these proposed standards and would not consider becoming an involved alumnus if I knew my time, energy, and money were held to such judicial process standards. I encourage serious reconsideration of these proposed changes.

Anthony Cicileo  
Chi Phi Xi Chapter President

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## JCC Eligibility / Student and Campus Life; Public Hearings

Submitted by Anonymous Committee Member on Wed, 2020-04-29 13:55 (user name hidden)

"The CJC voted 4-3 to keep the language above. The 3 members who voted against believed that the position of the JCC should be open to any graduate, professional, or undergraduate student who is interested and goes through the necessary application process. In addition, some members believed the Office of Judicial Codes Counselor's should be moved into Student and Campus Life to increase accountability, understanding of other aspects of student life, and make the process less legalistic and more educational. In addition, the name might be subject to change."

I agree with the members who voted against this proposed change. Being a member of the Cornell community gives them a greater understanding of the various situations that students and faculty are facing, which gives them better context with which to make decisions.

"The CJC voted 5-3 to make all hearings private. The 3 who voted against believed that there should be some exceptions to allow for a public hearing. The existing code allows for public hearings in certain circumstances and believed those exceptions should be included."

This is somewhat concerning. As detailed in the current Code of Conduct, in cases where neither party is at risk of harm from a public trial, the accused should have the right to opt for a public hearing. This provides for greater accountability, and increases transparency in the hearing process.

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## Best Practices for Judicial Affairs

Submitted by Anonymous Committee Member on Wed, 2020-04-29 13:36 (user name hidden)

I have previously worked in Student Affairs at James Madison University (JMU) and during my time there I volunteered to sit on on their Judicial Affairs "Accountability Board" which helped determine judicial decisions for student code violation cases. JMU's Judicial Affairs office has since been renamed the Office of Student Accountability and Restorative Practices (OSARP). JMU's OSARP office is deeply grounded in Student Development Theory, and I believe there are some areas of this Cornell Campus Code of Conduct that could be improved upon to better align with JMU's best practices for Judicial Affairs. For example:

- Accused JMU students speak on their own behalf
- Witnesses to the JMU code violation case also speak on their own behalf (I don't believe witnesses are required to participate, as enforcing this would cause more headaches)
- JMU Students are notified of their "alleged policy violation" through an email sent to the student's official JMU e-mail address (as students are expected to check this email regularly)
- Accused JMU students first have to complete a 1 on 1 conversation (or "case review") with an OSARP staff member, and that staff member makes an initial decision of "Responsible" or "Not

Responsible". If the student would like to appeal this decision, even minor cases would then be reviewed by an "Accountability Board" made up of faculty, staff, and student volunteers. I served as one of these volunteers during my time at JMU, and we all had to complete an in-person training in order to volunteer.

- During training to sit on the Accountability Board, volunteers are made aware that all repercussions (for students that are deemed "Responsible" for their accused code violation) are designed to be educational and restorative in nature. Students deemed "Responsible" might be sanctioned to attend an educational training that is related to their code violation, or they might be sanctioned meet with a faculty/staff mentor for a set number of hours/meetings, etc.
- Rather than looking for 100% certainty or "beyond a reasonable doubt" (as they look for in a court of law), Accountability Board volunteers were instead trained to look for "reasonable doubt" or a 51% chance that the student committed the code violation. During our training, the OSARP office explained that the reason we were being asked to make a decision based on only 51% certainty was because 1) this is not a court of law, and 2) the cases that we were being trained to review were minor, and the corresponding sanctions were educational, so there was no need for 100% certainty. I believe the 51% certainty benchmark was raised to a higher percentage for Title IX cases or cases that involved the possibility of Probation or Dismissal, but I personally was not trained to sit in on those cases.
- Here are some links with more information: <https://www.jmu.edu/osarp/handbook/OSARP/accountability-process.shtml> and <https://www.jmu.edu/osarp/handbook/OSARP/standards-policies.shtml> and <https://www.jmu.edu/osarp/handbook/OSARP/ap-case-review-procedures.shtml>

These are all areas in which I believe JMU's OSARP office sets an excellent example, and areas in which I believe Cornell's Campus Code of Conduct could improve, in order to better align with nation-wide standards for best practices in Judicial Affairs. Thank you for your time and consideration.

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## Timing of These Changes

Submitted by Anonymous Committee Member on Wed, 2020-04-29 09:31 (user name hidden)

Hi I would just like to comment that attempting to make these changes during a pandemic when students are off campus dealing with a lot of issues feels inappropriate. Many students aren't aware these changes are being made due to being off campus and thus a large portion of the people who might want to comment and express an opinion won't be able to. I would suggest revisiting these changes at a later, better time.

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## Fundamental Flaws and Improvement Opportunities to Address

Submitted by Richard W. Kauffeld Jr on Sun, 2020-04-26 20:23

As an engaged fraternity advisor for the past eight years, I appreciate Cornell's need and the CJC's efforts to enhance our Code of Conduct and judicial procedures. The Substantive Sections articulate aspirational principles and values with high standards for student conduct. Living-up to these values requires the CJC to address some fundamental flaws, primarily in the procedural sections: 1. The draft Code seeks to remove fairness protections in the current Code and violates students' rights to due process. A Cornell student or organization can be suspended or expelled without "clear and convincing evidence" (the current standard),

but by a “preponderance of evidence” standard that simply means the offense was more likely than not. The severe sanctions only require 3 of the 5 panelists, of which 3 are students, to decide that the offense was probable – at a Hearing that was called after the OSCSS “determined that it has met the burden of proof” and recommends sanctions of probation, suspension or expulsion (6.1). The procedures put an incredible amount of power in the hands of students who are seeking approval and recommendations from the university, with an unconscionably low burden of proof for the damage that they can inflict on other students’ lives. If the Administrative and Hearing Panels pull from a common pool, the OSCSS should ensure that those serving on a Hearing Panel have already demonstrated their capabilities and judgement on the lower panel, risks of errors or bias are not as high.) 2. As drafted, the Code appears discriminatory rather than applying to all students and all student organizations fairly. The Respondent (1.2) is described as a student, University-recognized organization, or University-registered organization (2.1 includes “group of students”, 3A “University-related residential organization”, and somewhere there is a reference to “living groups”). These organizations are not defined in the Code and it is not clear whether there are classes of non-recognized organizations that are exempt or somehow treated differently by the Code. There are no standards to determine when a group of students would be Respondents or the entire organization(s) to which they belong. If organizations are to be restricted or sanctioned for the misconduct of individuals or groups of members, the organizations must be broadly complicit and organizational accountability must apply not only to fraternities and sororities, but equally to all organizations, including sports teams and other clubs. Finally, the restrictions on Unrecognized Student Organizations (4.1) should not be construed to prohibit the freedom of recognized same-sex organizations, including gender-specific sports teams and non-coed fraternities and sororities. 3. The Administrative Procedures (5.2) lack guidelines or standards for determining “less severe” vs “most severe” offenses subject to Probation, Suspension or Expulsion. Such guidelines (perhaps as described as “Grave Misconduct” in the current Code”) should be clear and consistently apply across individuals and organizations. 4. The procedures for less severe misconduct with modest sanctions remain complex, cumbersome and legalistic. Procedures for conduct and sanctions that would not go on a student’s permanent record could be further streamlined. 5. The Code should use clear language and accurate descriptions. A Code that applies only to students and beyond campus is a Student Code of Conduct (not a Campus Code). Is OSCCS necessarily better than JA or just OSC? The Administrative and Hearing Panels both involve administrative hearings. Shouldn't we accurately call them the Misconduct Panel and the Severe Misconduct Panel? The CJC and UA should address these issues and opportunities before moving ahead with this Code. Rich Kauffeld '80

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## Rights of Cornell Community Members

Submitted by Homer William Fogle, Jr on Sat, 2020-04-25 12:17

Since my time as an undergraduate, a half-century ago, I have seen Cornell University become increasingly authoritarian, repressive and intrusive. The mantra of “diversity, inclusiveness and safety” has been used to shut down student organizations and stifle dissent. This is the expected course of any one-party leftist state, and Cornell is no exception. Consider what is missing from the Campus Code of Conduct: a clear statement of the fundamental “natural” rights that Cornellians deserve, but do not have and will never have. • The right of all Cornellians, faculty, staff and students, to speak about, to endorse or to oppose any state, faction, group or person, on any issue, political, social or moral, in a non-abusive manner is absolute and shall not be abridged, regardless of the claimed sensitivities of those criticized or offended. • The right of all Cornellians to assemble in any body of their own choosing and, by mutual consent, to exclude others therefrom, and the right to conduct their affairs in said body as the members alone shall dictate, shall not be abridged. • The right of all Cornellians to be secure in their persons against unreasonable searches, seizures and surveillance. A good example of what is happening occurred last year when President Trump signed an executive order on

11 December that, according to the New York Times, essentially defines Judaism as a race or national origin, not just a religion, under the Civil Rights Act, expands the definition of anti-Semitism to include some anti-Israel sentiments, and compels the U.S. Government to withhold funds to any college or university that allows speech critical of the Jewish State. Inevitably, this will “stifle free speech and legitimate opposition to Israel’s policies toward Palestinians in the name of fighting anti-Semitism.” Firstly, the Cornell Administration reacted with absolute silence to this affront. We conclude that Day Hall was satisfied that this policy provided cover for the University’s own efforts to suppress speech offensive to Cornell’s most powerful faction. But that is not the end of the story. The Cornell Daily Sun refused to print an alumnus letter protesting the Trump policy, again out of fear that such “speech” would offend. So, this amended Campus Code of Conduct will give Day Hall another hammer to use on those students and student organizations that do not buy into the uncompromising demands of “diversity, inclusiveness and safety.” H. William Fogle, Jr. '70 (Engineering) 25 April 2020, Mesa, AZ

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## Some Thoughts on Proposals

Submitted by Jeffrey B. Deutsch on Sat, 2020-04-25 11:39

Arielle Rose Johnson raises some interesting points.

"There is no 'objective' perspective on sexual harassment and assault. Ask Kate Manne, a famous scholar who works on sexual harassment and misogyny and is based at Cornell!"

What Professor Manne is perhaps best known for is the concept of "himpathy" -- that powerful men overly sympathize with other powerful men.

In other words, a subjective perspective...and one that is wrong. How is it wrong? Because we know **objectively** that we need to look at the evidence, facts and logic when evaluating someone's behavior...not at their level of power, gender let alone race.

Without objective standards, we have either anarchy (or at least people harassing and worse at will, because **their** subjective standards are what matter) or totalitarianism (or at least punishing anyone and everyone accused, because the **accusers'** subjective standards are what matter).

"Some assault isn't 'intended' to be abusive or humiliating, but absolutely is."

In other words, Ms. Johnson wants an objective standard. I completely agree.

There's a middle ground between "intended harm" and "innocent". It's "reckless/negligent". Objectively, under the circumstances someone should have known something was abusive or humiliating but did it anyway. It could be simply negligent, when the person didn't know better, or just forgot or made a small mistake in judgement. Or it could be reckless, say when the person was so ticked off s/he didn't care about crossing the line.

Abuse doesn't have to be intentional to be culpable.

"And sometimes a person can't verbally say no, but it's abundantly clear from non-verbal cues that they mean no."

And yes, we do need objective standards of clarity here. Also keep in mind that different individuals have different levels of ability to read non-verbal cues -- especially given how culturally bounded the cues must be. As most of us know, a small number of people are on the autism spectrum and have a difficult time reading non-verbal cues. We should extend them at least a little mercy.

More broadly, in a diverse community like Cornell's, people will from time to time misread -- and just plain miss -- others non-verbal cues. Too strict an objective standard risks being culturally narrow. Let's also keep in mind the classic knowledge curse: We all tend to assume others know what we know. The corollary is that all tend to overestimate how obvious our own signals are. In fact, snarling at or punishing people for missing them is something I call minefielding.

I think one value the Code of Conduct should encourage is directness: At least when reasonably safe, we should use our words and make clear what we mean so as to avoid ballooning misunderstandings. And when a complainant says s/he didn't spell out what s/he meant, sometimes the only thing the authorities can or should do is simply tell the respondent something like: "Sally [or John or whoever] didn't feel able to tell you to stop calling her, so we're telling you: Stop calling. And don't retaliate for reporting this, or you'll be severely punished."

All that having been said, I completely agree that an instructor talking about a student's breasts (presumably not in a clinical context, eg, an advanced biology class discussing breast cancer) in front of the whole class is way out of line. As in, I'd seriously consider firing the instructor over that.

"4.16: Need to make an exception here for survivors of traumatic experiences (e.g. sexual assault) who have unclear memories of the experience or give slightly differing stories at different times as a result of trauma." In other words, Ms. Johnson wants people to be judged on their intent, not only or even mainly on the effects of their actions. I completely agree.

I for one think it should go without saying that Policy 4.16 should apply only to intentional behavior. By all means, specify that if it will help.

Finally, I completely agree with Professor Kevin M. Clermont: The JCC should have legal training and should be independent. That will help Cornell University maintain due process -- a value it's justly famous for.

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## Off-campus activities (International)

Submitted by Chris Cook on Fri, 2020-04-24 11:56

I would like to first like to thank the CJC for their hard work on this and for, as I read it, addressing a gap in the current code, namely, off-campus jurisdiction. As the Associate Director of International Travel Health and Safety, the current code language has led to concerns and practical applicability when it comes to Cornell-related international activities such as study abroad. A few colleagues and I have spent quite a lot of time working with the Judicial Administrator's office (JA) and the Codes and Judicial Committee (CJC) this past year and a half to get clarifying language put into the Campus Code of Conduct. Our attention was on language that specifically addressed international activities from a jurisdiction/applicability standpoint. The current code reads, "This Title shall apply to conduct on any campus of the University, on any other property or facility used by it for educational purposes, or on the property of a University-related residential organization in the Ithaca or Geneva area." (Title Three: Article I. Applicability). It is welcome to see Section 2: Definitions-2: "The term "University" means Cornell University, as well as any affiliated programs or virtual

programs, computing, and spaces including, but not limited to, University programs in remote locations within or outside of New York or the United States" and, "Section 3: Scope and General Provisions: "The Code applies to conduct that involves the use of University computing and network resources from a remote location, and to online behavior. The Code will apply regardless of the location of the conduct when: (1) the behavior occurs in the context of a University program or activity; or (2) poses a substantial threat to the University's educational mission, the health or safety of individuals (whether affiliated with the University or not), or the University community" in the revisions. While these revisions still stand as a draft, I would like to encourage the CJC to maintain the awareness that instruction takes place off-campus and in unique situations where the Code is an essential component to enforcing behavior that represents Cornell well in the eyes of our partners and takes into account the cultural norms, geopolitical risks, and group safety that is inherent in education abroad activities. Justification for specifically calling out -perhaps even more so than the revisions already do -the Code's applicability in international settings has been identified as:

- Expanded Code jurisdiction will help enforce off-campus activity guidelines because it is part of a student's permanent record.
- Expanded Code jurisdiction will elevate the authority of program-specific guidelines/rules because it is part of a student's permanent record.
- Expanded Code jurisdiction will show institutional support of the authority of an Off-Campus Activity Leader who is responsible for the safety and education of a group of travelers in a short amount of time and unconventional environments.
- Off-campus activities are unique in the risks from and response to misconduct as they occur in settings that have limited resources and time but can impact vast amounts of people and the Cornell reputation in the public opinion.
- Off-campus activities are Cornell activities and carry weight, in terms of reputation, as such (ie., Prohibited drinking in a host family's home is not, reputationally, the same as drinking underage in one's apartment off-campus).

For reference and suggestions on how to further clarify jurisdiction in the Code revisions, I list below examples from other institutions:

Duke: The honor code at Duke is named the community standard because it expresses our institution's core values and a concomitant set of expectations for behavior. Because behavior is derivative of fundamental values, the standard applies off-campus as well as on. Students may be held accountable by the university for their behavior off-campus, from Durham to Dubai The university reserves the right to respond to any report of alleged misconduct on or off-campus

Northwestern: The University reserves the right to investigate and resolve any report or incident in which a student is alleged to violate any of the principles or policies published by the University or local, state, or federal laws or policies, regardless of the location where the incident occurs. Students are also expected to follow the policies and procedures of institutions that they may visit, including during international travel.

Georgetown: When alleged violations of University regulations or local laws take place off-campus and come to the University's attention, the university reserves the right to take appropriate action when, in the judgment of University officials, the alleged conduct has a negative impact on the University community, the pursuit of its mission, or the broader community in which we live. Georgetown's Code of Student Conduct and the procedures through which it is implemented apply to students studying abroad. Students should also be aware that while studying abroad they will be subject to local laws of their host country and regulations of their host institution.

ASU: Sanctions may be imposed for acts of misconduct that occur on university property or at any university-sponsored activity. As further prescribed in these rules, off-campus conduct may also be subject to educational interventions or discipline. "University-sponsored activity" means any activity on or off campus authorized, supervised, or controlled by a university. <https://public.azregents.edu/Policy%20Manual/5-308-Student%20Code%20of%20Conduct.pdf>

USF: In the code, the jurisdiction and discipline extends to "conduct which occurs on University premises or which adversely affects the University community and/or the pursuit of its mission. Specifically, University officials may initiate disciplinary charges for conduct off-campus when the behavior relates to the good name of the University; the integrity of the educational process; or the safety and welfare of the University community, either in its public personality or in respect to individuals within it; or violates state or federal law." <http://regulationspolicies.usf.edu/regulations/pdfs/regulation-usf6.0021.pdf>

Uni of Illinois at Urbana-Champaign (1) all actions that are violations of law or Board of Trustees' action or any University rule of conduct and that occur on University premises or property (2) all actions that violate any of the laws or regulations cited in section (a) above and that substantially affect the



University community's interest, even though such actions do not occur on University premises or property (for further information about the criteria used by the Senate Committee on Student Discipline in determining the kinds of conduct covered by this jurisdiction, see [www.conflictresolution.illinois.edu](http://www.conflictresolution.illinois.edu) or § 1-111 Student Code 9 contact the Office for Student Conflict Resolution) Uni of Oklahoma 9.) Failure to comply with the direction of a University official who is performing his or her duties. This responsibility includes complying with faculty/staff requirements and directions of study abroad programs, including off-limits designations and other restrictions or instructions.

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## OFFICE OF THE JCC

Submitted by Kevin M. Clermont on Tue, 2020-04-21 16:36

I am a law professor and the long-time advisor to the JCCs. Proposed Section 1.4 of Section 5 on procedures is also a very good provision. The proposal provides that the JCCs will be law students and that the Office is to be independent. It should be adopted despite the expressed concerns, which are particularly uninformed. First, it is essential that the JCCs have law training. Any disciplinary code, no matter how "educational" it is meant to be, will present an endless flow of legal questions. The general populace may not appreciate this unavoidable fact, but I do. I stand in utter admiration of how well these upperclass law students use their legal education and research skills. Nonetheless, many questions prompt them to consult with me. Their questions are truly hard. I have to research them too. And then discuss the questions with people who can understand them. The job of the JCCs, which they pursue with wondrous dedication and effort, is a very hard job. The JCCs also work collaboratively. They must do so, because of the extraordinary demands of the position. They operate out of an office provided by the Law School. We would lose a lot more than esprit de corps by spreading the JCCs across the campus. The JCCs do a lot more that help with the Code. For instance, they advise respondents under Policy 6.4. That is a job strictly for the law-trained. The issues there are very legalistic, and respondents' whole futures are at stake. Advising them is certainly not a task suited to the fair-minded and well-meaning lay person. Second, it is essential that the JCC office remain independent. A good part of the job involves standing up to the Day Hall machine. I hope the reader is never charged under the Code, but if you are, I promise you that you will want an advisor from outside the bureaucracy. I can say that in all my years at this University I have never encountered a group more impressive in carrying out their function than the JCCs. They rise to the challenges and perform them with ardor, skill, energy, knowledge, and devotion that I could never describe. I am in awe. Do not mess with this singular success.

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## WITHHOLDING DEGREES

Submitted by Kevin M. Clermont on Tue, 2020-04-21 15:59

I am a law professor and the advisor to the JCCs. Proposed Section 4.3 of Section 5 on procedures is a very good provision. It should be adopted despite expressed concerns. It says: "If the OSCCS believes that the respondent may graduate or otherwise leave the university prior to the resolution of a Formal Complaint, the OSCCS must first attempt to enter into a separate agreement with the respondent to allow the University to maintain jurisdiction over the respondent if the respondent graduates prior to the resolution of the Formal Complaint, including the completion of sanctions/remedies agreed to or imposed. The University may not withhold awarding a degree otherwise earned until after the resolution of the Formal Complaint unless the respondent does not enter into a separate agreement with the University." The current Code says this: "The University may withhold awarding a degree otherwise earned until the completion of proceedings, including

compliance with a prescribed penalty or remedy.” The current practice is routinely to withhold degrees until the completion of proceedings under the Code (or under Policy 6.4). Additionally, there is no way for the would-be graduate to challenge the interim measure of withholding the degree. Some last-minute-before-graduation filings have resulted in unjust results. Indeed, there have been trumped-up cases brought at the last minute just to victimize, and the degree was withheld. The lengthy adjudication process has then resulted in jobs and graduate admissions put in jeopardy, professional examinations precluded, and settlements accepted because the delay in getting the degree was unbearable. This practical penalty may be completely out of proportion to the offense, even if the respondent is found responsible. Because there is none of the balancing used for all other interim measures and no consideration of the merits at all, as well as no possibility of appeal, it appears that the Code’s concern must be with preserving jurisdiction over the graduate. A much fairer approach would follow from amending the Code to provide in effect for withholding the degree unless the OSCCS exercises discretion to enter into an agreement with the respondent to preserve the University’s jurisdiction over the respondent for the Formal Complaint and to provide revocation of the degree as an available final sanction or remedy.

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## Two Major Issues

Submitted by Keenan Thomas Ashbrook on Mon, 2020-04-20 16:19

I am a current student member of the University Hearing and Review Boards and have served in that capacity since 2018. I have comments on two major issues that I believe still must be resolved in the Code of Conduct.

\*\*\*\*\* #1. University Policy 4.7 does not give any leeway to alter the reporting period for violations. The text of the current proposed Code amendments includes the following passage in Section 3: Disciplinary Record Reporting by the Student Conduct Office is based on the seriousness of the underlying violation, with recognition of the educational and rehabilitative purpose of this Code. Towards that end, the following guidelines shall generally apply to such reporting: (1) minor offenses are not reported; (2) probationary status may be reported until the student graduates; if the student departs the university prior to graduation, then at the point of departure if the student has incurred no further Code violations; (3) suspension is reported until it has been fully served, the student has demonstrated one-year of good conduct without subsequent Code violations, and a request has been reviewed and approved by the Dean of Students; (4) expulsion is reported permanently. I want to emphasize that under Policy 4.7 in its current form, this proposed text is untenable. The reporting period for violations (e.g. the mandatory duration for retaining a record of the violation) is not set by the Code, \*\*\*it is set by Policy 4.7.\*\*\* Policy 4.7 currently mandates the following durations for record retention: Expulsion: permanent (matches proposed new language) Suspension: permanent (conflicts with proposed new language) Disciplinary probation: retained at discretion of the OJA (may or may not conflict with new language depending on OJA practice) Written reprimand: until graduation (conflicts with proposed new language) Oral warning: not retained (matches proposed new language) Proposed guideline (1) is particularly in conflict with the existing policy. It is the practice of the OJA to issue a written reprimand for \*\*\*essentially all violations\*\*\* no matter how minor. The OJA has explained to the UHRB that oral warnings are reserved for extremely rare circumstances, and the office is hesitant to issue them because they believe a lack of a written record fails to ensure accountability for students found responsible for code violations. The OJA’s default action is to issue a written reprimand for all violations. This means that, contrary to the intent of the new proposed language, Policy 4.7 currently makes minor violations reportable until graduation because these violations almost always carry a penalty of written reprimand. Guidelines (2) and (3) are also problematic from the standpoint of Policy 4.7. The policy allows the OJA to retain records of disciplinary probation at their discretion, and my understanding is that the OJA’s current practice is to retain such records for some years after graduation. I do not know if the OJA would be obligated to follow the proposed new language in the revised Code, or if it could maintain its right to retain the records at its discretion pursuant to Policy 4.7. Clearly proposed guideline (3) is also in conflict

with Policy 4.7, which states records of suspension will be maintained permanently. It has been my long-standing belief that the UHRB should have discretion to alter the duration of the reportability of violations (though I have no problem with default durations being set by the Code). This is because reportability is itself a de-facto punishment, and the UHRB is supposed to have discretion to adjust the severity of sanctions based on the circumstances of each individual case. Reporting requirements are often “hidden sanctions” themselves, with the ability to severely impact a student’s future career and graduate school prospects. Inflexible reporting requirements force the UHRB into a very difficult position when determining sanctions. Increasing the “level” of sanction (from oral warning to written reprimand, probation, etc.) also increases the duration of reporting requirements in a way the board cannot control. For example, the UHRB may feel a violation would otherwise warrant probation, but be hesitant to impose this sanction because of the long reporting period and feel compelled to impose a written reprimand. Moreover, this problem is compounded by the fact that most cases are resolved through Summary Decision Agreements (SDAs) and very few make it before a hearing board. Since the OJA’s practice is to propose a written reprimand by default, this means that potentially hundreds of students are agreeing to sanctions with reportability periods that they do not know can be challenged. In theory, it is possible for a student to reject a such proposed SDA with a written reprimand and argue to the UHRB that the sanction should be reduced to an oral warning so as to avoid the reporting requirement. But very few students are in a position to know about (much less opt for) this complex and arcane maneuver, especially those accused of low-level violations unlikely to be working with a JCC. My understanding is that Policy 4.7 is the responsibility of the University Counsel. I would strongly recommend opening a discussion with the University Counsel on amending Policy 4.7 so that it supports the objectives outlined in the proposed amendments to the Code, which I believe are laudable. Numerous Cornell students have likely been saddled with inflexible reporting requirements for even the most minor of Code violations--requirements that can have a major negative impact on their futures in a way disproportionate to their violations. I also recommend adding language to the Code allowing the UHRB discretion to change reportability durations, so that the board retains its ability to set sanctions at a level appropriate for the offense. \*\*\*\*\* #2. The expansiveness of the “Obstruction” provision (4.16) risks exaggerating the seriousness of a respondent’s conduct if a disciplinary record is created. The text of the current proposed Code amendments includes the following passage in Section 4: 4.16 Obstruction with Code of Conduct Investigation and Adjudication Process Obstruction or interference with, or failure to comply in, Code of Conduct processes, including, but not limited to: Falsification, distortion, or misrepresentation of information; Failure to provide, destroying or concealing information during an investigation of an alleged Code violation; Attempting to discourage an individual’s proper participation in, or use of, the campus conduct system; Harassment (verbal or physical) and/or intimidation of a member of a campus conduct body prior to, during, and/or following a campus conduct proceeding; Influencing, or attempting to influence, another person to commit an abuse of the campus conduct system; Refusing to participate, without a substantial reason, as a witness in an investigation of or proceeding brought to enforce potential violations of this Code; Failure to comply with the sanction(s) imposed by the Code or other conduct policy, including Policy 6.4. I have major concerns about how the Code (both present and proposed) treats students who fail to complete their sanctions in a timely manner. No matter whether a student intentionally refused to complete sanctions or just procrastinated, they are charged with obstruction of the Code. The proposed text of this section, like the OJA’s current practice of charging respondents who fail to complete sanctions with obstruction (Title Three, Article II, Section A(3)(g)) is problematic because the language of the Code can be read to exaggerate the seriousness of violations falling under the last bullet point. The disciplinary record that will be created by a written reprimand for this Code violation under Policy 4.7 includes \*\*\*no context about the circumstances of the violation\*\*\* other than the language of the obstruction provision in the Code. Someone reading the disciplinary record of a student who was charged under this provision because of failure to complete sanctions could infer that the respondent also committed such serious violations as destroying evidence, lying to an investigator, or taking other active measures to hamper an investigation. There is an incredibly wide gap between the seriousness of these offenses and such actions as missing a deadline to complete sanctions. But this gap would not be perceptible to any individual

(e.g. a graduate school admissions officer) reading the respondent's disciplinary record with no additional context. It would be up to the respondent to provide the context that they were only charged under the last bullet point, which the OJA is under no obligation to corroborate. There is a serious risk in this scenario that some students' graduate school or job prospects could be unduly damaged by the omission of context from the disciplinary record created by a written reprimand. It is certainly reasonable for there to be a Code provision punishing failure to complete sanctions, but this should not be lumped in with the other extremely serious violations covered in 4.16, which would be felonies in the actual criminal justice system. There should be a separate, stand-alone provision for punishing students who fail to complete their sanctions.

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## Ideas for improvements to Section 4

Submitted by Arielle Rose Johnson on Thu, 2020-04-09 13:16

In 4.1 I have no idea what "affectional preference" means and it isn't clarified elsewhere. Does it mean gender presentation? Racial/ethnic presentation? Who you choose to be romantically/sexually involved with as opposed to sexual orientation? (e.g. a bi woman is romantically involved with another woman?) If "affectational preference" could just be clarified that would be great. Also 4.1: I notice that disability is excluded from the list, which, again, is: "To use ethnicity, gender, national origin, political persuasion, race, religion, or sexual orientation or affectional preference as a basis for exclusion from university or group activities on campus." I realize that some groups can't have physically disabled members just for logistical reasons, e.g. an outdoor rock climbing club, but disability should be included in this list. Maybe something like "disability status (except in cases where a physical disability is incompatible with an activity and no reasonable accommodations can be made)". Also 4.1: "political persuasion"... interesting... you have to let a Republican join the Cornell Democrats? Not sure I would change this, but just noting that it does seem odd given how many campus groups are explicitly political. 4.2: I think it's fine for graduate and professional students who are of legal drinking age to be publicly intoxicated on campus sometimes, e.g. at the BRB during TGIF. Is there a way to make that clarification? 4.4: I really like that "unwelcome" is in there to clarify that e.g. BDSM in a campus dorm room is fine. Keep that word in the final version! 4.7: Do protests violate the campus code of conduct? I really think that there should be a way for students to protest without breaking the code of conduct. 4.9: Might need to clarify that students with legal medical marijuana can be in possession of it on campus (as long as they also have their card with them) and can use it in their dorm rooms? I guess the "unlawful" wording might already take care of that? 4.10: Really? If you fail to comply with any policy issued in an informal way by a departmental administrator, e.g. "Make sure to rinse out the coffee pot after you use it!" you're in violation of the code of conduct? Maybe clarify which types of policies this actually applies to. 4.12: Remove "Conduct must cause unreasonable interference from both a subjective and an objective perspective." There is no "objective" perspective on sexual harassment and assault. Ask Kate Manne, a famous scholar who works on sexual harassment and misogyny and is based at Cornell! Also 4.12: In terms of needing to meet one or more of "- 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 person targeted by the speech.": Some assault isn't "intended" to be abusive or humiliating, but absolutely is. And sometimes a person can't verbally say no, but it's abundantly clear from non-verbal cues that they mean no. (Again, consult Kate Manne on this.) Consider the example of a creepy graduate student instructor talking in detail about an undergraduate student's breasts in front of the whole class. The graduate student "intends it as a compliment" and not as abuse or humiliation, but it is abusive and humiliating. The undergraduate student doesn't speak up or say anything because they're shocked and humiliated, but they absolutely do not want for it to be happening. A graduate student instructor talking about an undergraduate student's breasts in front of a class should violate the code of conduct but it doesn't under these criteria. 4.16: Need to make an exception here for survivors of traumatic experiences (e.g.

sexual assault) who have unclear memories of the experience or give slightly differing stories at different times as a result of trauma. General note: it may be better to lean more heavily on referring to Policy 6.4 than to effectively make new ideas about what constitutes harassment, etc. in this Campus Code of Conduct document. Thanks for the ongoing good work!

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## Amendments to the codes

Submitted by Rich Gourley on Wed, 2020-04-08 13:11

I would hope that during this time of reviewing and amending the code that the University recognizes that the time of having a two tiered system of accountability must end. Currently there is a carve out that Fraternities & Sororities are not held to be accountable to the code of conduct as it relates to their activities. That means that for all intents and purpose approximately 20% of the student population is exempt from the code of conduct. The explanation has always been the IFC's self governance and judicial review are adequate. I can tell that after 32 years of seeing the disparity, it in fact does not work and that a protected class has been allowed to exist. It's time to end this carve out and make ALL students/staff/faculty held to the same standard.

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## Application of Code of Conduct

Submitted by Daniel J. Mansoor on Wed, 2020-04-08 09:51

- Code of conduct must be applied consistently across all student groups. Clubs and sports teams (whether club or varsity level) should be held to the same requirements as fraternities and sororities. There is a perception that there is a set of rules for Greek members and a separate (lax) standard for varsity athletes.
  - I would be more explicit on "public intoxication" to include "pre-gaming" which in addition to being physically dangerous to users, also has been an excuse to claim that an event is "dry" -- where no alcohol is being served but participants are intoxicated.
  - Is there a way to place an emphasis on healthy or reasonable use of alcohol (regardless of age)? Seems to me not only would alcohol abuse be reduced but so would the behaviors linked to over-consumption of alcohol: sexual assault and harassment; hazing,...
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