

Cornell University
University Assembly

Agenda

Codes and Judicial Committee

Cornell University Assembly

Agenda of the September 17, 2019 Meeting

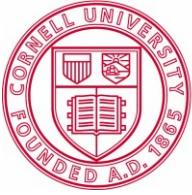
1:15 PM – 2:45 PM

316 Day Hall

- I. Call to Order (Chair)**
 - a. Call to Order
- II. Approval of the Minutes (Chair)**
 - a. April 29, 2019
 - b. September 17, 2019
- III. Business of the Day**
 - a. Resolution to the UA
 - b. CJC Working Draft of the Campus Code of Conduct (student portion)
 - c. UHRB
 - i. Staffing
 - ii. Procedural changes regarding updating members of expiring terms
- IV. Adjournment**

Attachments:

If you are in need of special accommodations, contact Office of the Assemblies at (607) 255-3715 or Student Disability Services at (607) 254-4545 prior to the meeting.



Cornell University University Assembly

109 Day Hall
Ithaca, NY 14853
p. 607.255.3175
f. 607.255.2182
e. assembly@cornell.edu
w. <http://assembly.cornell.edu>

Minutes

Codes and Judicial Committee
University Assembly
April 30th, 2019
4:45pm – 6:00pm
Day Hall Room 316

I. Call to Order

- a. Call to Order
 - i. D. Barbaria called the meeting to order at 4:48pm.
- b. Roll Call
 - i. *Present:* D. Barbaria, R. Bensel, A. Brooks, K. Kebbeh, L. Kenney, R. Lieberwitz, S. Vura
 - ii. *Absent:* K. Ashford, D. Geisler, A. Viswanathan
 - iii. *Others Present:* M. Battaglia, M. Horvath, M. Lee, R. Parker

II. Approval of Minutes

- a. February 20th, 2019
- b. February 27th, 2019
- c. March 6th, 2019
- d. March 20th, 2019
- e. April 10th, 2019
- f. April 16th, 2019
 - i. M. Battaglia motioned to approve the minutes.
 1. Minutes **approved** by unanimous consent.

III. Business of the Day

- a. For Discussion: Reorganized Campus Code of Conduct
 - i. D. Barbaria said that the Committee is not at the point where a formal reorganized Code of Conduct legislation can be sent to the administration. He said that the Codes and Judicial Committee (CJC) and University Assembly (UA) should publicly send the entire current draft version to move forward in passing amendments. He said that the Committee has not been at a place to go through the draft line by line. He added that he will personally recommend improving the structure of the committee to the UA so that it is conducive to reorganizing the Code.

- ii. A. Brooks asked whether anyone from the Committee responded to the email received from the President last week.
- iii. M. Battaglia said that he responded to her email, outlining where the Committee currently stands.
- iv. M. Horvath said that the UA realized that this was a substantial undertaking. She suggested that other committee members were included in M. Battaglia's discussions with the administration.
- v. M. Battaglia said the he would agree in hindsight. He noted that this is a learning experience for him and the Committee, and that he will make this clear for next year.
- vi. A. Brooks said that this was the first time the Committee had quorum in a month. He said that members of the Committee should take responsibility and attend meetings moving forward.
- vii. D. Barbaria said that the seat for a member of the police department also remains vacant.
- viii. R. Lieberwitz asked if there are places within the draft where the Committee should anticipate substantive changes, or if the Committee is more focused on streamlining and simplifying language.
- ix. D. Barbaria said that the UA would not accept a draft without substantive changes.
- x. R. Lieberwitz asked what M. Battaglia has been discussing with the administration.
- xi. M. Battaglia said that he clarified misunderstandings with President Pollack. He said that based on his one-on-one conversations with her, it is his understanding that she and the Board of Trustees are on board with the rest of this Committee regarding some matters, while other issues remain unsettled. He said that it seemed that the administration was willing to compromise in the middle, but the email exchanges indicated otherwise.
- xii. D. Barbaria said that the Committee should have been aware of all that was going on.
- xiii. M. Battaglia said that he specifically discussed the following items as points of discussion with the President: harassment, removing all faculty and staff from the Code, moving minor offenses out of Code. He said that his goal was to have less cooks in the kitchen, but it didn't work out as anticipated.
- xiv. R. Bensel asked if the main item for business today is sending the draft of the Code to the UA.
- xv. D. Barbaria said that the Committee should first settle on University Hearing and Review Boards staffing. He said that there were three more seats left to be filled, with two students and one staff member who received fairly low scores that could potentially be included in the UHRB member list for the upcoming term.
- xvi. R. Bensel asked why this discussion is necessary.
 1. D. Barbaria said that the two students and one staff member were not included in the UA resolution.
- xvii. R. Bensel motioned to add the three names to the UA resolution.

1. Motion **approved** by unanimous consent.
- xviii. D. Barbaria opened the floor for discussion on whether the Committee should send a draft of the Code for the administration to review over the summer.
- xix. M. Horvath asked whether there were suggestions on who the administration would be.
 1. D. Barbaria said that this process would be more of a request than a formal order.
- xx. D. Barbaria asked if Committee members have suggestions on specific offices to share the draft with.
 1. M. Battaglia suggested the Counsel's office. He said that the University Counsel has been involved with this process even though he is not necessarily in agreement with all of their work. He also suggested sending a draft to the President.
- xxi. M. Horvath said that one of the frustrations of this process is that the Office of the Judicial Administration (OJA) hasn't been consulted. She said that there appears to be a sense of fundamental distrust towards the OJA despite it following the Code exactly and ensuring that checks and balances are at work. She said that as the office that sees 600-700 cases a year and deals most closely with the Code, they were never consulted on the gaps in the Code.
 1. M. Battaglia agreed that the JA should be included in the discussions. He said that regarding distrust of the office, members of the community seem to have a general distrust in authority.
 2. M. Horvath said that she has stressed the need to include all important information in the Code itself and not just in the footnotes. She said that in her conversations with M. Battaglia, they were general meetings without discussions on the specifics of Code changes.
 3. M. Battaglia said that he disagrees and that he remembers having detailed conversations about the Code.
 4. S. Vura motioned to have this conversation stricken from the record.
 - a. S. Vura **withdrew** his motion.
 5. R. Parker said that he agrees with M. Horvath that changes to the Code are necessary.
 6. D. Barbaria said that the Committee could be more effective if it were a review board rather than the actual drafters of the revisions. He said that the Committee is comprised of those who have expertise in identifying what is best for the community rather than dealing with legality.
- xxii. A. Brooks asked, in response to D. Barbaria's suggestion, whether this would mean that the CJC would not be the one that revises the Code moving forward.
 1. D. Barbaria said that the CJC will still be finalizing the amendments to the Code. He said that going back and forth based on M. Battaglia's suggestions has made it impossible to amend the Code as the Committee did not have the language to have a formal debate.
- xxiii. D. Barbaria said that when the Committee returns in the Fall, it should be able to make decisions on revisions.
- xxiv. M. Battaglia said that the Committee may require another working group

moving forward. He recommended having a subset of committee review Code revisions in the next school year. In response to A. Brooks, he said that the letter to the administration would entail an outline of where the Committee is heading and what the Committee is asking from them in order to return to this discussion in the Fall.

- xxv. R. Parker said that in the presence of a working group, he recommends that they are involved with the drafting of the Code.
 - 1. D. Barbaria said that the CJC would still be voting on the revisions, and that there will be community input but it would not be necessary at the drafting stage.
 - xxvi. D. Barbaria said that he will draft the letter to send to the administration and share with the Committee.
 - xxvii. M. Horvath asked how notifications will be sent out to new UHRB members, once approved by the UA.
 - 1. M. Battaglia said that they would be signed by D. Barbaria and himself.
 - 2. D. Barbaria said that some are one-year appointments while others' terms last two years.
 - xxviii. A. Brooks asked how much of the President's recommendations have been incorporated so far as revisions to the draft of the Code.
 - 1. D. Barbaria said that he would estimate that around 70% has been incorporated. He said that there are a couple items such as the question of removing faculty and staff from the Code that have been tabled for discussion at a later time. He said that there has not been much progress in terms of the actual reorganization of the Code as a whole.
 - xxix. R. Bensel said that the Committee should get a head start in the Fall. He said that the Committee should decide on whether to ask for community comment in the first meeting, and that this should take place while the Code is being revised.
 - xxx. D. Barbaria said that this Committee has never reached the point of having a full draft.
 - xxxi. R. Bensel said that if the revisions are halfway there with content to work with, they should be put up immediately for comment. He said that committee members should look at the responses that come back and work accordingly.
 - xxxii. A. Brooks agreed and said that the Committee should hit the ground running when committee it recongregates in the Fall.
 - xxxiii. M. Battaglia said that the Committee has a draft and an idea of the direction, although it is not perfect. He said that he trusts that the administration will provide necessary comments and that discussions will take place over to summer to move forward in the Fall.
 - xxxiv. M. Horvath noted the benefit of having an outside consultant look at the draft. She said that having an outside perspective with awareness of best practices and knowledge of student affairs would be beneficial.
- b. For Discussion: Campus Code of Conduct Section on Values
- i. R. Bensel said that he sent the section on values to the President and has received a response in which she indicated that placing this section in the front of the Code would be appropriate. He said that this section should be one of the

most important parts of document as it outlines the university's values.

- ii. M. Battaglia said that he received feedback from some members of the community indicating their appreciation for this section.
- iii. K. Kebbeh asked whether this section would be discussed as a part of the ongoing Code revisions.
 1. D. Barbaria said that the Committee should decide on whether to include the section in the draft to have it as a separate document.
- iv. M. Battaglia said that he sees little harm in including it and that the university's values are important, although the language should be edited.
- v. D. Barbaria asked whether the section should be included in the current draft of the revised Code.
 1. R. Bensel said that although the current language is imperfect, he would prefer that it is included in the draft as a part of the introductory section of the Code.
 2. D. Barbaria said that he will include the values section in the draft, with no objections from the Committee.
- vi. D. Barbaria said that he will send the draft of the revised Code of Conduct as it currently stands with other ideas ready for the Committee to be able to vote on in the Fall.
- vii. M. Horvath said that seeking an outside consultant with a legal background or experience with higher education may be helpful in gathering additional perspectives to draft the revised Code.
- viii. M. Battaglia said that hiring outside consultants should be done with caution as best practices are informative but not always most pertinent. He said that the university's Code and history are unique from that of peer institutions.
- ix. R. Bensel asked when the UA's last meeting is.
 1. M. Battaglia said that the last one will be on the following Tuesday, but an additional meeting could be added.

c. Closing Remarks

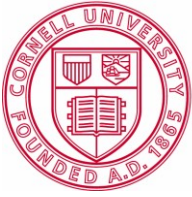
- i. M. Battaglia thanked members of the committee for the rigorous discussions and their service to the community.
- ii. D. Barbaria strongly encouraged members to serve again in the following term.
- iii. R. Bensel thanked D. Barbaria for taking on the duty of chairing the CJC.

IV. Adjournment

a. Adjournment

- i. The meeting was adjourned at 5:49pm.

Respectfully submitted,
Dongyeon (Margaret) Lee
Codes and Judicial Committee Clerk



Cornell University University Assembly

109 Day Hall
Ithaca, NY 14853
p. 607.255.3175
f. 607.255.2182
e. assembly@cornell.edu
w. <http://assembly.cornell.edu>

Minutes

Codes and Judicial Committee
University Assembly
September 17th, 2019
4:30pm – 6:00pm
316 Day Hall

I. Call to Order

- a. Call to Order
 - i. L. Kenney called the meeting to order at 4:41pm.
- b. Roll Call
 - i. *Present:* J. Anderson, R. Bensel, M. Hatch, L. Kenney, R. Lieberwitz, G. Martin, J. Michael, L. Taylor, K. Wondimu
 - ii. *Absent:* J. Bogdanowicz
 - iii. *Others Present:* K. Barth, G. Giambattista, M. Horvath, C. Huang, G. Kanter, M. Lee, C. Van Loan
- c. Welcome and Introductions
 - i. L. Kenney welcomed everyone to the first Codes and Judicial Committee (CJC) meeting of the 2019-2020 Academic Year. Members of the Committee introduced themselves.

II. Approval of the Minutes

- a. April 30, 2019
 - i. G. Martin motioned to table the minutes for the next meeting.
 1. Approval of minutes **tabled** by unanimous consent.

III. Business of the Day

- a. Discussion of the Bylaws
 - i. L. Kenney opened the floor for discussion on Section 3.3 and Section 4.1 of the University Assembly (UA) bylaws to ensure that all procedures within are followed. She said that the last working draft of the Code of Conduct was made public on the website without consultation with the CJC.
 - ii. J. Anderson said that the bylaw makes clear that the CJC has the sole authority to any proposed motion regarding the Code of Conduct, including any public comment or amendments. He said that circumventing any

- existing procedure within the bylaws is not what constitutes trust in building a new Code of Conduct.
- iii. L. Taylor asked if the public has said anything based on what was placed on the website.
 1. L. Kenney said that there have been no comments yet. She said that the Committee can motion to bring this matter in front of the UA for further discussion to express where the CJC stands based on the bylaws.
 - iv. R. Bensel said that the Code is the responsibility of the CJC, and it is important for both the Committee and the UA to follow procedures and defend prerogatives.
 - v. R. Lieberwitz said that she could not find the working draft on the website.
 1. L. Kenney said that the draft was published through the Dean of Faculty's website.
 - vi. R. Lieberwitz asked who gave the authority for the draft to be made public.
 1. L. Kenney said that R. Howarth, Chair of the UA, has made the document public.
 2. R. Lieberwitz said that the Committee should raise concerns.
 - vii. L. Kenney said that the working draft from last year's CJC is rather confusing without context, and that she recommends it to be taken down from the website. She said that she expressed concern and the draft was made public regardless, which violates the authority of the Committee.
 - viii. R. Bensel motioned to create a resolution to be sent to the UA, asking for both drafts from last year's CJC and the University Counsel to be taken down from the website in accordance with the bylaws.
 1. L. Kenney said that the CJC will present motions for the public when they are ready to be made public.
 2. G. Martin asked what the process would entail for this resolution and whether this resolution would be available at the next UA meeting. He said that President Pollack will be at the next UA meeting.
 3. L. Kenney said that she has attempted to contact President Pollack so that she can also speak to the CJC, as it is imperative for the CJC to have the chance to speak to the President regarding recommendations to the Code. She said that if the motion is approved, she will be able to draft the resolution for next week.
 4. R. Lieberwitz asked if the Chair of the UA provided an explanation as to why the draft was posted.
 5. L. Kenney said that the Chair claimed that they were posted on the grounds of transparency – to ensure the community was aware of what the Committee was doing.
 6. The motion was approved by unanimous consent.

- ix. L. Kenney said that she will place this item on the agenda for next week to have a resolution ready to present to the UA.
- b. Campus Code of Conduct
 - i. L. Kenney said that over the past year, the Committee has discussed switching the Code from a Campus Code of Conduct to a Student Code of Conduct as proposed by the President's office, the Judicial Administrator's (JA) position, whether to include Greek organizations in the Code, and the core values statement, among other items.
 - ii. L. Kenney said that the Committee should decide upon a timeline to prioritize items to be completed. She said that the President suggested having all items completed by the Board of Trustees meeting in December, but this may not be realistically attainable. She said that the Committee needs to especially discuss as soon as possible whether to change the Code to only include students and whether the JA's position would change.
 - iii. R. Bensel said that the Committee should utilize the draft provided by the University Counsel's office and revise accordingly, as they have done the Committee a service by providing a framework for discussion. He said that there needs to be a greater emphasis placed on the community nature of the Code of Conduct, in that it is generated for the community. He also said that the position of the JA's office is an important substantive issue that needs to be discussed by the Committee. He also said that if the Code were to be altered to only include students, it should be articulated such that it does not exhaust the Committee's responsibility for community conduct.
 - iv. J. Anderson said that he agrees with R. Bensel to begin working from the University Counsel's draft. He said that altering the Code from a Campus Code to a Student Code of Conduct and changing the Office of the JA's position to be placed under the Vice President of Student and Campus Life are linked. He said that the university's practices should be in line with national best standards of peer institutions. He also said that the Committee should work towards making the Code a Student Code of Conduct, especially considering that the Office of the JA deals with cases primarily concerning undergraduate students.
 - v. K. Wondimu asked whether there would be both a Student Code and a Community Code.
 - 1. R. Bensel said that some aspects such as values, ethics and integrity need to apply to all community members. He said that the Code should be crafted such that values and principles are universal standards across the community as a whole.
 - vi. R. Lieberwitz asked whether other universities have a broader Campus Code, and whether the University is an outlier.
 - 1. L. Kenney said that it is more common to have a Code centered on the student. She said that the University Counsel's draft is based on a

mix of research from Brown University, the University of Virginia and MIT.

- vii. R. Lieberwitz said that the Committee should ensure that if the Code is designed for students, certain rights should apply to all community members so that faculty and staff are able to maintain rights. She said that the JA may lose some independence by being placed under the VP of Student and Campus Life.
- viii. M. Horvath said that the University is an extreme outlier in having a non-student Code, and that there should be differences between students and faculty for pedagogical reasons. She said that the JA figure in peer institutions typically reports to the Dean of Students or a Vice President, and that they would preserve the ability to exert independent judgment regardless of where they report to. She said that not having a reporting structure has been difficult as the Office of the JA receives no protection for some of the decisions made.
- ix. J. Anderson said that harmonizing Student and Campus Life with the rest of the administration would be beneficial even from a student perspective.
- x. L. Kenney recommended that the Committee continue to discuss whether to have a student Code while ensuring that faculty and staff do not lose protections if the change were to take place.
- xi. J. Anderson motioned for the Committee to utilize the University Counsel's draft and incorporate R. Bensel's draft on the first section of the Code on values to create a Student Code of Conduct.
 1. R. Lieberwitz asked whether the CJC would oversee both if there were to be separate Codes for students and faculty/staff.
 2. J. Anderson said that line 53 of the bylaws could be interpreted such that the CJC would oversee both. He said that the bylaws could also be revised to specifically include the Campus Code of Conduct and other necessary documents under the jurisdiction of the CJC.
 3. R. Lieberwitz said that a separate faculty Code may need to be administered by the Faculty Senate and Employee Assembly. She said that this should be discussed further and that the CJC should not lose jurisdiction of governance over separate Codes.
 4. R. Bensel said that the Committee also needs to discuss whether to include Greek organizations under a Student Code of Conduct as part of the revision process. He suggested that the Committee utilize the University Counsel's draft and set a timeline for revisions to each part of the draft.
 5. L. Kenney said that the Committee will do just that. She said that J. Anderson's original motion would require a slight amendment.
 6. J. Anderson **amended** his motion to discuss revisions to the Student Code of Conduct within a greater Campus Code of Conduct.

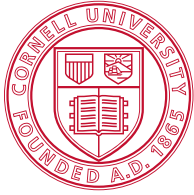
7. The motion was approved by unanimous consent.
- xii. J. Anderson asked whether the draft provided by the University Counsel is a complete version.
 1. L. Kenney said that she has not yet received the rest of the draft.
- xiii. R. Bensel said that L. Kenney should praise the Counsel for their work and request the rest of the draft. He said that the Committee should wait before sending out draft revisions since parts of the revisions would interrelate.
 1. L. Kenney agreed and said that the Committee should wait to send out the draft with a single product, and that she will articulate this to the UA on behalf of the Committee if everyone agrees.
 2. R. Lieberwitz moved to publicize Code revisions once the Committee has a comprehensive draft.
 3. Motion approved by unanimous consent.
- xiv. L. Kenney said that she is excited about how much the Committee has discussed already. She proposed to table discussions on the values section of the Code, reorganization of the Code, and University Hearing and Review Boards (UHRB) staffing to the next meeting.
- xv. G. Martin motioned to table the items from the agenda.
 1. J. Anderson seconded.
 2. J. Anderson asked whether there are any concerns regarding UHRB staffing.
 - a. L. Kenney said that the UHRB needs more staff, but she does not currently have the numbers.
 3. Motion approved by unanimous consent.
- xvi. L. Kenney said that the Committee can examine the first four pages of the University Counsel's draft Code to see if anything is missing. She said that the Committee does not need to produce specific language at this point, but recommendations would be helpful. She said that members should read each sentence within Section 3 to raise discussions on clarity.
- xvii. L. Taylor said that she would be happy to volunteer but is not yet familiar with the Code.
 1. L. Kenney said that many of the members are new to the Committee. She said that last year's Committee did not move quickly as there lacked ample discussion. She recommended that the Committee read through the entire draft.
- xviii. Members of the Committee each volunteered to review subsections within Section 3 of the draft provided by the University Counsel.
- xix. L. Kenney said that Committee members should examine the draft for readability and whether any important details are missing.
- xx. R. Bensel asked how the Committee would proceed with the individual suggestions.

- xxi. L. Kenney proposed tracking changes made to the document.
 - 1. R. Bensel asked whether changes would be made after individual recommendations are made.
 - 2. L. Kenney opened the floor for discussion.
 - xxii. J. Anderson suggested for each member to send their part to L. Kenney and for her to combine the individual edits.
 - xxiii. R. Bensel said that the Committee should send in revisions 48 hours before whenever the Committee meets next week.
 - 1. R. Lieberwitz said that faculty members of the Committee would be unable to attend the meeting next week if it were to be on Tuesday.
 - xxiv. L. Taylor asked how sending L. Kenney the revisions would be different from tracking changes on a single document.
 - xxv. J. Michael suggested revising the draft on a Google Doc.
 - xxvi. G. Giambattista suggested utilizing the Box folder.
 - xxvii. J. Michael said that Google Docs allow for easier edits.
 - xxviii. L. Kenney recommended to work on Google Docs.
- c. Discussion of Meeting Time
- i. R. Lieberwitz said that Tuesdays would generally not work for faculty members.
 - ii. L. Kenney proposed meeting on Wednesdays.
 - 1. J. Anderson said that he would need to leave at 5:15pm on Wednesdays for another meeting.
 - 2. K. Wondimu said that he would need to leave at 4:45pm on Wednesdays.
 - iii. J. Michael asked whether the Committee would meet weekly or biweekly.
 - 1. L. Kenney said that the Committee would usually meet biweekly, with the exception of the next two weeks.
 - iv. J. Anderson moved for the next meeting to take place on Monday, September 23rd from 1:15pm to 2:45pm.
 - 1. Motion **approved** by unanimous consent.
 - v. L. Kenney said that she will send out a doodle poll to the Committee in the meantime.

IV. Adjournment

- a. Adjournment
 - i. The meeting was adjourned at 6:00pm.

Respectfully submitted,
Dongyeon (Margaret) Lee
Codes and Judicial Committee Clerk



Cornell University
University Assembly

University Assembly Resolution #X

**Unauthorized Online Publication of Campus Code of
Conduct Working Drafts**

September 23, 2019

1 **Sponsored by: Logan Kenney, Chair of the Codes and Judicial Committee**

2

3 **Whereas**, the University Assembly bylaws state: “by delegation from the Assembly, the [CJC]
4 will review any proposed motion related to [the] Campus Code of Conduct,” “the [CJC]
5 must approve resolutions referred for its consideration before they can be advanced to the
6 Assembly for a vote and for debate;” and that it is the responsibility of each committee to
7 submit public notice on the Assembly’s website related to each motion related to a
8 substantive policy change;

9

10 **Whereas**, posting of the University Counsel draft through the Dean of Faculty’s website was
11 done without approval by either the CJC or the UA.

12

13 **Be it therefore resolved**, the CJC requests that the UA remove any and all published drafts
14 relating to the Campus Code of Conduct revisions from any and all platforms.

15

16 **Resolved**, that the CJC working draft and Office of the University Counsel’s working draft are
17 removed from the Dean of Faculty’s website and any additional platforms.

18

19 **Be it finally resolved**, that the CJC will provide final approval of any and all drafts posted for
20 public review and comment upon a formal vote of the committee.

**No signature block is present until the resolution has been disposed of by the Assembly
(Passed, Failed, Withdrawn, etc.) Then a block with the certifying member (customarily
Chair/Vice-Chair) verifying the authenticity and vote tally of the resolution.**

MEMORANDUM

To: CJC
From: Kevin Clermont, Professor of Law
Date: September 18, 2019
Subject: Proposed Changes to Campus Code Violations

As to my overall view of the draft, I think it is important to note that this list combines [3.II.A](#) and [4.II.A](#) , but it can apply only to Title 3. The UA and CJC cannot alter Title 4 (RMPO, a sort of martial-law provision that the Board of Trustees had to adopt). Title 4 has a much more limited list of violations, which are incorporated by reference in current Title 3. State law requires a separate Title 4 to be continued in some form. See NY Education Law § 6430:

The trustees or other governing board of every college chartered by the regents or incorporated by special act of the legislature and which maintains a campus, unless otherwise provided, shall adopt written rules for implementing all policies required pursuant to this article and for the maintenance of public order on college campuses and other college property used for educational purposes and provide a program for the enforcement thereof. Such rules shall prohibit, among other things, any action or situation which recklessly or intentionally endangers mental or physical health or involves the forced consumption of liquor or drugs for the purpose of initiation into or affiliation with any organization. Such rules shall govern the conduct of students, faculty and other staff as well as visitors and other licensees and invitees on such campuses and property. The penalties for violations of such rules shall be clearly set forth therein and shall include provisions for the ejection of a violator from such campus and property, in the case of a student or faculty violator his or her suspension, expulsion, or other appropriate disciplinary action, and in the case of an organization which authorizes such conduct, rescision of permission for that organization to operate on campus property. Such penalties shall be in addition to any penalty pursuant to the penal law or any other law to which a violator or organization may be subject.

So I take it that the CJC will redraft only Titles 1 to 3, and the Counsel's proposed draft can apply only to what is now Title 3.

As to the contents of the proposal, it is a good job. They seem to have been careful and neutral. But there are of course a bunch of things that need attention:

1. The order of the sections is mystifying. For example, why are 3.1 (alcohol) and 3.6 (drugs) so far apart? The grouping should be by type of activity. And 3.2, 3.8, and 3.9 should be together because of their link to discrimination. And 3.3 should be treated with “attempt” in the preamble and with a restored provision on incitement.
2. Some violations have been omitted. This is troublesome because every provision was added in response to a felt need. (That is why the Code is such a hodgepodge.) The omitted stuff includes:

To incite another person toward a likely and imminent violation of this Title.

To defraud, including by such acts as failure to redeem a bad check.

3. The proposed 3.8 tries to codify the protected activity that the Campus Code tried to exempt by its reference to free speech. I think Counsel’s Office made a good try. But the CJC really has to think about whether Counsel captured everything that free speech takes out of Harassment. I’ll run that by some First Amendment experts here, and let you know if they have anything useful to say.
4. The language “Subjecting another person or group to abusive, threatening, intimidating, harassing, or humiliating actions” in 3.2 seems out of place and unauthorized. This idea appears in the new provision on Hazing. It is not an Assault. **Omit it.**
5. The Campus Code makes the following a violation in Three.II.A.3.k:

To refuse to participate, without a substantial reason, as a witness in the campus judicial system, as outlined in Title Three, Article III.E.3.b(6)(c).

The latter cross-reference to the hearing procedure provides:

If a witness critical to the proof of the charges or to the defense against those charges indicates to the Judicial Administrator or the accused that he or she refuses to testify, the Judicial Administrator or accused may ask the Hearing Board Chair to order the witness to testify. The Hearing Board Chair shall, in his or her sole discretion, grant or deny the request based on the balance of equities for the witness, the complainant, the accused, the victim, and the University.

This provision certainly implies that the OJA itself has no “subpoena” power in the investigative phase. But recently there have been abusive invocations of such a power. The JA has gone after uncooperative investigation witnesses who don’t show by charging violation of "g. To destroy evidence or otherwise obstruct the application of this Code" and is active in charging witnesses who lie with "e. To furnish false information to the University with intent to deceive." This has enabled them to go after hazing victims who refused to cooperate! Not so bad? But think of this. Police are called to home on domestic violence. The wife, to keep the peace, says nothing happened. Can she then be prosecuted for lying?

The proposal in 3.5 says:

Refusing to participate, without a substantial reason, as a witness in an investigation of or proceeding brought to enforce potential violations of this Code.

This represents a huge and ill-advised expansion of the JA’s powers. It should say:

Refusing to participate, without a substantial reason, as a witness **in a hearing after being ordered to testify by the Hearing Board Chair.**

Moreover, the next provision in 3.5 should read:

Destroying evidence or otherwise ~~obstructing~~ **actively impeding** the application of this Code.

6. The new 3.17 omits the needed qualifier of “**in or upon University premises, except by law enforcement officers or except as specifically authorized by the University.**” Don’t forget the Code reaches behavior anywhere.
7. The new 3.5 is a bit messy, as you can see by a careful reading that the meaning of Title 4 has been perverted by the new phrasing. At the least, the first bullet needs to be amended to avoid a major cutback in scope from the current Campus Code: add at the end “any action including but not limited to” so that it reads: “Disrupting, obstructing, or interfering with the lawful exercise of freedom of speech, freedom of movement, freedom of peaceable assembly, or other right of an individual, by **any action including but not limited to:**”.

MEMORANDUM

To: CJC
From: Kevin Clermont, Professor of Law
Date: September 19, 2019
Subject: Addendum: Proposed Changes to Campus Code Violations

I have spoken to the JCC about all this. And so I am speaking for the JCC Office on these matters.

1. She made the excellent point that these big sections in the new draft present a real problem because records will say, for example, "Convicted of violation of Section 3.4," but that section covers everything from public urination to violent behavior. You have to insert many numbered subdivisions.
2. I have spoken to Mike Dorf about the free speech provision, mentioned in my previous point #3. You will recall that the General Counsel has proposed to codify the protected activity exempted by the Campus Code in its reference to free speech. I think Counsel's Office made a good try. But I don't know whether they captured everything that free speech takes out of Harassment.

Here is the old language:

To harass another person (1) by following that person or (2) by acting toward that person in a manner that is by objective measure threatening, abusive, or severely annoying and that is beyond the scope of **free speech**.

And the proposed language:

3.8 Harassment

Subjecting another person or group to uninvited or unwelcome behaviors that are abusive, threatening, intimidating, or humiliating, when the conditions outlined in (1) or (2) below, are present.

1. Submission to or rejection of such conduct is made, either explicitly or implicitly, a term or condition of an individual's participation in any of the University programs or activities or is used as the basis for a decision affecting the individual.

2. Such conduct creates a hostile environment. A hostile environment exists when the conduct unreasonably interferes with, limits, or deprives an individual from participating in or benefiting from the University's programs or activities. Conduct must cause unreasonable interference from both a subjective and an objective perspective. The fact that the conduct targets a group that has historically experienced discrimination may be relevant to a contextualized judgment about whether the conduct creates a hostile environment.

Because of protections afforded by free speech and academic freedom, expression will not be considered harassment unless the expression also meets one or both of the following criteria:

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

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

Actions that constitute stalking or sexual harassment as defined by Policy 6.4 (“Prohibited Bias, Discrimination, Harassment, and Sexual and Related Misconduct”) shall be handled pursuant to that Policy and its associated Procedures.

I have spoken to Mike Dorf about this section, and he made several good points. He suggested “Because of protections afforded by free speech and academic freedom, expression will not be considered harassment unless the expression also meets one or both of the following criteria: it is meant to be either abusive or humiliating toward a specific person or persons” should read “Because of protections afforded by free speech and academic freedom, expression will not be considered harassment unless the expression also meets one ~~or both~~ of the following criteria: it is meant to be ~~either~~ abusive, **threatening**, or humiliating toward a specific person or persons **who hear the expression**”.

3. I have spoken to the JA about my point #5. She indeed does claim a general subpoena power. She bases it on Campus Code 1.I.B.2's “duty to cooperate.” That provision is, however, aspirational. Uncooperativeness does not constitute a violation.

Accordingly, I would amend my insertion of “actively impeding” to “otherwise actively impeding,” making clearer that the impeding must be like destroying

evidence. Maybe the prohibition on a subpoena power should be made even more express.

If you do conclude that the subpoena power is a good idea, however, it should be provided in a new provision of the code, so that limitations could be considered and delineated. The power is currently unlimited because the JA just made up the power.