
Memo

To: UA, CJC, Cornell Community
From: Matt Campbell, CJC member
Date: Mar 12, 2012
Subject: Proposed changes to Campus Code

Background

Title IX of the Education Amendments of 1972 (Title IX) prohibits gender discrimination by educational institutions receiving federal funds.¹ The purpose of Title IX is to, *inter alia*, eliminate gender discrimination by equalizing opportunities in higher education and make available educational resources, organizations, and disciplinary systems available without the taint of gender bias.² The intent behind Title IX was to address more than just the mere formalities of gender discrimination but to effect substantive change by eliminating sex discrimination in all its forms – especially with respect to women.³

Sexual harassment and sexual violence has consistently been associated with cross-gender inappropriate behavior; however, the cross-gender element is not always present in cases of sexual harassment and violence.⁴ Increasingly prevalent is the

1 See 20 U.S.C. § 1681(a); 34 C.F.R. §§ 106.1-106.8.

2 Cf. David S. Cohen, *Title IX: Beyond Equal Protection*, 28 Harv. J. L. & Gender 217, 271 (2005).

3 See *id.* At 271.

4 See Krista Gesaman, *Abuse of Power*, Newsweek, Jan 12, 2010, <http://www.thedailybeast.com/newsweek/2010/01/12/abuse-of-power.html>.

problem of same-sex sexual harassment.⁵ Instances of sexual harassment may not always invoke elements of gender discrimination, but these instances may still require careful, discerning disciplinary scrutiny. Nevertheless, the Office of Civil Rights of the Department of Education (OCR), the body charged with enforcing Title IX as applied to Cornell University, has promulgated a “Dear Colleague” letter forcefully recommending that “grievance procedures” use a preponderance of the evidence standard when evaluating all allegations of sexual harassment or violence.⁶ Cornell’s Campus Code of Conduct (the Code) was modified approximately one month after the letter was issued to formally comply with the standard set forth by OCR’s letter. Prof. Clermont in his various memos to the Codes and Judicial committee (CJC) on this issue has effectively detailed the sacrifice in the accused’s rights and the increased probably of error that accompanies moving from a clear and convincing standard to a preponderance of the evidence standard. The Codes and Judicial Committee seeks to modify the Code to comply with the spirit of OCR’s letter.

Proposals & Evaluation

1. Purpose and Application of Evidentiary Standard

The Code strives to be a hybrid of a criminal and civil model of dispute resolution. Like a criminal model, the code creates an independent body to investigate and prosecute student, faculty, and staff misconduct. The justification for an independent prosecutorial body is the same no matter the system. For example, “[a prosecutor] reduce[s] the burden upon crime victims to expend their own funds and energy to bring

5 *See id.*

6 Letter from United States Department of Education, Office of Civil Rights, The Assistant Secretary, to Colleagues (April 4, 2011) (available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>).

offenders to justice.”⁷ The creation of a prosecutorial body responsible only to the community at-large supports the idea that some acts are so heinous that “[the] crime was not a private concern between the aggressor and the victim, but a societal concern.”⁸ In a civil system

Because certainty in anything is practically impossible⁹, a standard of proof less than absolute certainty is necessary to evaluate the validity of allegations of misconduct. In a game of probabilities, if enough people are put in front of a hearing board for alleged misconduct, eventually the board will make the wrong decision about fault.¹⁰ Society generally follows the maxim in criminal prosecutions that “it is better that ten guilty persons escape, than that one innocent suffer,”¹¹ and this idea may not be purely historical¹². A higher burden of proof in criminal cases and a lower burden of proof in civil cases may be a rational consequence of the interests at stake. The central priority in a civil case is to compensate a victim for a wrong committed. A mistake in a civil case does not raise the level of disutility in the community, regardless of direction (either a good claim not receiving compensation or a baseless claim receiving compensation). In the case of an incorrect outcome in a civil case, one party is enriched the same amount the opposing party is hurt. While the unfair distribution between the parties may matter a great deal to them, its a wash as far as the wider community is concerned. The situation is completely different in the criminal context. Arguably, the main purpose of a criminal system is to maintain the integrity of the community. And in a criminal case, a wrongful

7 Juan Cardenas, *The Crime Victim in the Prosecutorial Process*, 9 Harv. J.L. & Pub. Pol’y 357, 371 (1986).

8 *Id.* at 369.

9 See John Kaplan, *Decision Theory and the Factfinding Process*, 20 Stan. L. Rev. 1065, 1071 (1968) (noting that that absolute certainty about past events is no more realizable than absolute certainty about the future).

10 *Cf. id.*

11 Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About Reasonable Doubt*, 78 Tex. L. Rev. 105, 110 (1999)(citation omitted).

12 *Cf. supra* note 9.

conviction increases social disutility much more. The prosecutor as the community's representative get no offsetting benefit. The prosecutor's only interest is making sure perpetrators receive the appropriate penalty. Upon a wrongful conviction, not only does the prosecutor fail in that responsibility, but a blameless member of the community is punished and the true perpetrator can rest easy knowing the matter had been put to rest. On the other hand, if the real perpetrator is released, no innocent suffers harm and the guilty party is put on notice that the community is vigilantly protecting its integrity even if in one particular instance it has failed.¹³

2. Application of a Separate Evidence Standard for Procedurally Identical Proceedings is Inherently Unfair

Given the considerations above, it's clear that any attempt to more severely punish individuals that may promote sex discrimination will actually do injustice to the Cornell community as a whole. First, the standard proposed in the alternative by the CJC is over-broad and would include not only those situations involving cross-gender sexual harassment and violence but also those situations where the harassment is not cross-gender. Second, an evidentiary standard should be set based on aggregates; lower the standard of proof means giving the system greater tolerance of erroneous decisions. Third, ad hoc application of a lower standard, while well intentioned, may be motivated by the same prejudices that it attempts to combat. On this last point, the logic is straightforward; either sexual assault and sexual harassment cannot be appropriately adjudicated under the clear and convincing standard, or the victims of these bad acts are unique and deserve additional protection. The former cannot be the right

¹³ More formally, the means (which are generally unpleasant) we use to achieve the purposes of punishment (retribution, rehabilitation, deterrence, and incapacitation) are not used at all in one case rather than applied to the wrong person in the other case. See J.C. Oleson, *The Punitive Coma*, 90 Cal. L. Rev. 829, 838 (2002).

justification. As detailed above, the choice of a standard of proof is not dependent on any particular set of facts, rather the most important consideration is the nature and purpose of the judicial system. If the latter is the reason, the University Assembly (UA) must exercise great care in articulating the reason for additional deference to the victim. Specifically, the UA must not endorse a view that victims of sexual assault and abuse are not “strong” enough or capable enough to present their case (either as a witness or *pro se*) without the advantage of a lower burden of proof.

Conclusion

The proposal to move jurisdiction over sexual harassment and sexual assault from the Campus Code of Conduct's judicial mechanisms to an action under University Policy 6.4,¹⁴ effectively removing all safeguards provided by the campus code (including lowering the burden of proof) and divorcing students from process of making future modifications regarding this issue, should be rejected full stop. In the spirit of full disclosure, such a rejection is likely a violation of federal as interpreted by the US Department of Education. Nevertheless, the purpose of this student organization is not to avoid potential civil liability. Our goal is to give the issue objectively, reasonably and diligently view all sides of the issue and make a determination based on fundamental fairness. Given the facts and weight of authority, I think that counsels against a move to policy 6.4.

Sincere regards,

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¹⁴ See Cornell University Policy Office, *6.4, Prohibited Discrimination, Protected Status (Including Sexual) Harassment, and Bias Activity*,

