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This letter, drafted by a committee commissioned by the Cornell Law Student Association on behalf of the law school student body, is a response to the *Report on a Review and Proposed Revision of the Cornell University Campus Code of Conduct* submitted by Barbara L. Krause on April 3, 2006 (Report). The letter addresses concerns students have raised about the Report's proposed changes to the Campus Code of Conduct (Code). The letter addresses each proposed change by topic in this order:

- Philosophy of the adjudication process
- Authority to amend the Code
- Structure of the Judicial Administrator's office
- Scope of jurisdiction
- Right to remain silent and right to representation
- Suggestions

Overall, the law student community is opposed to the proposed changes. While the proposals are well-meant, they overlook the fundamental reasons for the existence of the procedural rights that they abolish: to protect the community as a whole as well as ensure that the adjudicative system is balanced and fair for all participants.

Philosophy of the Adjudication Process

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The Report proposes to change the Code in order "to promote an educational environment . . . ."[1] While we are not opposed to educating community members in a disciplinary setting, the Report ignores fundamental realities of the adjudication process.

First, regardless of any educational aspects of the disciplinary system, the process is adjudicative and must be understood as such. The purpose of a Code proceeding, regardless of the educational overtone, is to: (1) determine the extent to which the community member is culpable for misconduct; (2) to rectify any damage done by the community member to others in the community; and (3) to devise some way to deter the community member from committing future violations. While there are opportunities to educate community members throughout the process, the fundamental thrust of the process is inexorably adjudicative, adversarial, and corrective—not educational.

Second, restructuring the Code to be more educational is unrealistic and will not be effective at educating or disciplining community members. Community members appearing before the Judicial Administrator (JA) are not likely to be cooperative pupils in an educational process. They do not appear before the JA or a hearing board voluntarily. In a proceeding, they have been accused of a wrong and are being compelled to defend their conduct. They will be intimidated, defensive, and possibly irascible. Like most people accused of a crime or misconduct, they will not warm to their accuser, much less readily accept the accuser's tutelage.

In recommending that the Code be revised to be more educational, and less like a penal code, the Report ignores a basic reality: Cornell is a community of twenty-thousand students, and over eleven-thousand faculty and staff. With the population of a small city, Cornell must recognize that in order to safeguard the community, it must police the conduct of its citizens like a small city. Hence, an educational adjudicative system will be inadequate to properly police the conduct of individuals undeterred and uncured by educational corrective remedies.

Third, the Report ignores the fact that a code that "reli[es] on language and concepts . . . borrowed from the criminal law"[2] is the community member's best shield from procedural abuse. Community members accused of Code violations who appear before the JA may be intimidated, but are not surprised by the nature of the process. Under the proposed educational system, community members may not actually be aware of the adjudicative nature of the proceedings and thus will not be as adequately prepared to defend themselves. They may mistakenly, and even falsely, incriminate themselves and others. This is especially detrimental if the violation in question is coterminous with a crime, and the community member is subsequently brought to an outside court for that crime. The community member's "testimony" in the University's educational proceeding can be used against her in court, leading to harsh consequences. Concepts from the criminal law, such as due process and the right to an attorney, exist not to confuse the process but to ensure a fair, accurate, and reliable process.

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[1] Krause Report at 1.
[2] Krause Report at 11.

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The current Code has been criticized as intimidating in its language, and eliminating legal terminology has been proposed as a solution. This proposal is based on the idea that there are two kinds of writing: legal writing and readable writing. As legal readers and writers, we can testify that there is a middle ground. Clear, accessible language can make the Code more readable without discarding legal terms that carry with them centuries worth of meaning.[3]

Finally, the Report does the Cornell community a disservice by questioning the community's ability to handle a "real" adjudicatory system. By removing the legalistic nature of the proceedings, and taking the ability to revise the Code away from the democratically-elected University Assembly, the Report sends a message to the Cornell community that it is unfit to govern its own judicial process. This vote of no confidence should not be taken lightly.

Authority to Amend the Code

The law student body would like to address this point first because it causes the most concern. Currently the University Assembly (UA), a democratically-elected body of students, faculty, and staff, approves amendments to the Code proposed by its Codes and Judicial Committee (CJC) and recommends them to the President, who gives final approval. New York State Law requires approval from the Board of Trustees on changes to certain provisions of Title III.[4] The Report proposes to remove the power to amend from the UA and place it in the University Policy Office (UPO).[5] The UPO can then amend all provisions of the Code, with the exception of Title 2, Article III.[6] While this may expedite Code modification, and places the ability to modify the Code in a proficient office for the task, we are strongly opposed to removing the democratic procedure by which the Code is amended.

First, the change will deprive the community of a guaranteed comment period for future changes. Under the current system, changes to the Code are vetted in the legislative and executive branches of the University before they are effectuated. During this time, community members are put on notice of the proposed changes and have the opportunity to submit comments to the CJC, UA, Office of the President, or Board of Trustees. Under the proposed system, the UPO could change Code provisions without any notice or public comment period. Although Krause is confident that the UPO would

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[3] Consider one legal term: *due process*. While non-lawyers may not know the exact dimensions of this term (and in fact, it does not have *exact* dimensions), most have a basic sense of its meaning. Now consider eliminating the term because it is a legal term and hence automatically undesirable. Explaining that concept without using its name would take volumes. It would make about as much sense as trying to explain what a dog is without using the word *dog*.

[4] Krause Report at 27.

[5] *Id.* at 28.

[6] Changes to this portion must be submitted to the Board of Trustees for approval. *Id.* at 26.

"ensure an adequate voice for student and other community concerns," there would be no safeguard in place to require that the UPO take these concerns into consideration. Even if the new process included a mandatory comment period, the ultimate decision to amend the Code would still lie with an administrator who may not appreciate the community's concerns in the same way as an elected, representative assembly.

Ironically, the proposed changes would remove a student voice in the process. This is inconsistent with the general tenor of the changes: to make the adjudicative process more educational. If students are not an integral part of the Code revision process, they will not have the opportunity to learn from that process. The "lessons" of the Code will emanate from a policy office, not an organic democratic process. This seems to be rooted in the idea that students are incapable of creating their own code of conduct, and that the University, *in loco parentis*, should make the policy decisions for them. Given that we have such a diverse and intelligent community, composed of students from many backgrounds and of all ages and beliefs, it is illogical that the University would deprive this group of the right to democratically design its own code of conduct policies.

Finally, we take issue with this change more than any other because under the proposed system, the UPO will be able to make all of the other changes without consulting the community. That will effectively obviate this debate and run counter to the history of the Code itself: a document crafted by members of the entire community to provide equality in the judicial system.[7]

Structure of the Judicial Administrator's Office

The Report proposes to move the Office of Student Conduct (OSC) into the Dean of Students Office (DSO). The JA will cease to be an independent entity, whose actions are reviewable only by the President and Board of Trustees, and have greater interaction with other student affairs professionals.[8] The merger will make it easier for the OSC and DSO to better coordinate student discipline and corrective education, and give JAs a better perspective on the broader goals of creating a safe and healthy environment for students. Ultimately, the merger may give JAs a better sense of the ultimate goals of the University's adjudicative system: protect and educate members of the community.

There are advantages and disadvantages to this change, and we take no position on whether to adopt it. We support the proposal's logic but strongly believe the JA's Office must remain a distinct entity within the DSO.

Having an independent JA is important for a number of reasons. First, from a logical standpoint, it makes little sense for an office responsible for students take responsibility for prosecuting faculty and staff, both of whom are also governed by the

[7] Krause Report at 8.
[8] *Id.* at 12.

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Code. If the JA mergers with the DSO it must either spin off its responsibility for prosecuting faculty and staff, or retain an independent arm to carry out this function.

Second, keeping the entities distinct will retain a check-and-balance system on the prosecutorial and adjudicative offices of the University. Having a JA that also serves as the administrator of the punishment will make the DSO the judge, jury, and executioner of Code violators. Needless to say, this may affect their impartiality.

Third, the distinction will ensure that the University hire appropriately qualified JAs: trained legal professionals not student affairs professionals. Legal professionals have an acute understanding of the value of due process and the ramifications of adjudicative proceedings that is necessary to properly handle disciplinary actions. While student affairs professions may play a more significant role in the adjudication process as a result of the proposed merger, they should do so in collaboration with legal professionals from the JAs office.

The fourth and most important reason for maintaining the distinction is to emphasize that an adjudicative proceeding is ultimately adversarial in nature. The DSO may work with students on corrective education, but the JA ultimately serves as a prosecutor. The purpose of this is not to intimidate students, but to ensure that students are adequately cognizant of their rights while at the mercy of the system. A student who is faced with prosecutorial charges is more likely to understand her rights in the adjudication than someone sitting down in the DSO to have an educational chat about their alleged infraction. Overall, merging the JA with the DSO will have positive results, but there must be an important distinction between the offices.

Scope of Jurisdiction

Currently the President may exercise off-campus jurisdiction in cases of "exceptionally grave misconduct."[9] The report proposes to expand the University's off-campus jurisdiction in the event of "a direct and serious threat" to the University, its educational mission, or a member of its community.[10] The proposed change seems to be aimed at curbing off-campus student alcohol and drug use. While this is an important goal for the University, the proposed language, "direct and serious threat," is be overly broad and vague. It will give campus police more license to patrol non-University property, which may be problematic when campus police exercise jurisdiction over non-University members who consequently find themselves subject to University adjudication.[11] The University will have no limit on whom it can adjudicate and where.[12]

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[9] *Id.* at 16.
[10] *Id.*
[11] Although not discussed by this committee, others in our community were worried that expanding off-campus jurisdiction would cause students to be doubly liable for violations that are coterminous with civil infraction.
[12] Krause herself alludes to the possibility of adjudicating Code violations that occur far from Ithaca.

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We feel that the current provision allowing the University President to invoke University jurisdiction on an ad hoc basis for particularly egregious or threatening circumstances is sufficient. It has also been argued that extending the reach of the Code off-campus would allow the University to have a greater role in addressing violent crimes committed by its members. This is a solution without a problem. Violent misconduct is sufficiently rare and sufficiently serious as to fall within the President's current authority to invoke the Code for "exceptionally grave misconduct" off campus. Recent history shows that this process works, and that no jurisdictional expansion is necessary.

The "default" should be against the expansion of University jurisdiction, rather than a presumption of expanded jurisdiction as suggested by the Krause report. The current policy with jurisdiction is sufficiently flexible to allow for the University President to invoke jurisdiction when absolutely necessary, while limiting University jurisdiction in all other presumably minor cases/situations.

Furthermore, we are concerned that if the University expands its jurisdiction as proposed by the Krause Report, the University may subject itself to further and unnecessary liability. By expanding its jurisdiction, the University will effectively create a duty to police and protect its expanded sphere of influence. In any instance where a wrong occurs in such an expanded jurisdiction, this expansion of duty may subject the University to excessive and unnecessary additional litigation and possible damages.

There is also a small possibility that this proposed change would allow the University to suppress public knowledge of more severe crimes that occur off campus. While we do not believe that this is the intention of the proposed change, nor do we believe it is likely to happen, the proposed change would still make a cover-up easier to accomplish—at the very least it would give the University a tool to control public knowledge of community-member Code violations.

We suggest that if jurisdiction is to be expanded at all, it either be expanded in limited cases, for instance only covering fraternity or sorority property, or that the language qualifying the expansion be narrowed. For instance, the University may only: exercise off-campus jurisdiction in the event of: "a direct, *substantial*, and serious threat" to the community, or "exceptionally grave misconduct, *or series of incidents*."

Right to Remain Silent and Right to an Attorney

We comment on these issues together because these changes, operating in tandem severely undermine community members' rights and the integrity of the process. The Report proposes to remove the "right to remain silent" from the Code in an effort to encourage community members to "promot[e] an educational environment."[13] Krause insists that the change will not "compel[] students to speak against their will," but merely force students to "respond to a request from the Office of Student Conduct to meet."[14]

[13] Krause Report at 22.
[14] *Id.*

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In addition, the Report proposes to eliminate the right of an accused community member to have a representative speak on her behalf. Members of the university community (which includes community-member attorneys or the Judicial Codes Counselors) would be permitted to advise the community member, but the community member "must answer for her or his behavior."[15] The change is intended to make the process seem less adjudicative and also prevent affluent community members from having the unfair advantage of being able to afford a lawyer for the proceedings.

Combined these changes deprive community members of basic due process and make the proceedings even more intimidating than under the previous system. Unable to shield themselves with a "right to remain silent," and unable to have a representative speak on their behalf, community members have no choice but to "answer for [their] behavior." When accused of a violation they are "required to present [their] own explanation of the events in question."[16] In sum, they are compelled to speak, despite what the Report claims. If they do not choose to speak, the adjudicators may take their silence as an admission of guilt.

This will have several consequences. First, community members will feel defenseless and afraid at the adjudication—which, under the proposed change, looks much more like an inquisition than a trial. This defeats the Report's goal of making the process less intimidating for community members. Also, the chances that the community member will learn from the educational aspects of such an adjudication are slim.

Second, if a community member is compelled to speak and incriminates herself or others that testimony may be used against the community member in subsequent criminal proceedings, something the Report fails to take into account.

Third, not allowing legal representatives to speak on behalf of community members is unfair in light of the fact that JAs are legal professionals. Even if the community member faced a non-legally-trained student-affairs professional, that person would still be a repeat-player in the system who would be intimately familiar with its details. The accused, on the other hand, would often be a first-time participant attempting to comprehend the details of the system during a period of extreme stress.

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[15] *Id.* at 18.

[16] *Id.* at 19. But compare with Krause's proposed draft of a Student Disciplinary System (Procedural Code) at IX(G)(1):

> 1. All members of the University community are required to cooperate with the Student Disciplinary System**.** *Individuals who are requested by the OSC to provide information or to appear as witnesses in disciplinary proceedings must do so*. This obligation may be excused for good cause (for example, if a person chooses not to answer questions because of pending criminal charges), but the individual must respond to the OSC's request. (emphasis added)

Contrary to what Krause proposes in her report, her Procedural Code mandates that students give whatever information is asked of them, except where the Office of Student Conduct, the prosecutor, decides that they have "good cause" not to. Krause says that students should not be compelled to speak against their will, but her Code permits the OSC to infer that because a student does not speak in his or her defense, he or she must be guilty. The very nature of this requirement's mandatory language also implies that a student could be separately disciplined for failure to cooperate if she refused to make a self-incriminating statement.

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In short, community members would not be qualified to mount an adequate defense. If the University is concerned with ensuring that each community member has equal representation, it could provide attorneys for all community members, or compel all students to be represented by the Office of the Judicial Codes Counselor. Taking away some community members' right to an attorney because others cannot afford to exercise their right results in less justice for everyone. The answer to ensuring equality is not to equally deprive all students of rights. Finally, making students "answer for [their] behavior" assumes that students are guilty before proven innocent, a concept that is anathema to American sensibilities of due process and justice.

Suggestions

We now offer some alternative suggestions to the proposed changes. As we have already noted, we endorse the logic of incorporating the JAs office with the DSO to increase communication between the offices and enhance bureaucratic efficiency, but we strongly believe the offices maintain distinct identities and students retain their procedural due process rights. We also feel the Code is a cumbersome document in need of some revision. We propose combining titles two and three of Article III and eliminating redundancy within the two provisions.

In response to the Report's concern that people use their "right to remain silent" to avoid meeting with the JA, we believe that the JAs Office could improve communications and possibly develop alternative methods of compelling students to attend the meeting, such as levying a fine for a failure to attend. Once the JA and DSO combine, they may be able to better allocate resources to further this goal. Taking away a student's right to remain silent is unnecessary and unrelated to compelling student attendance at JA meetings.

We understand that the University may have compelling reasons to act before the conclusion of any outside criminal/civil actions. With this in mind, we likewise would be receptive to the University invoking any temporary sanctions to adequately protect and promote the Cornell Community during the resolution of outside judicial action. The student could waive this, if the student felt compelled to remedy the situation with Cornell prior to the resolution of outside judicial actions. However, such an action should only be made when the student is fully aware of their rights, and has the opportunity to avoid self-incrimination if the student so chooses.

Conclusion

The Code is legalistic and can be daunting to the untrained eye. This is an unfortunate byproduct of a code of conduct designed to thoroughly protect the community and its members' rights. They are intended to provide an interconnected web of rights and procedural safeguards to ensure that students receive fair and just treatment

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in the adjudicative system, and to safeguard the community against a system that produces arbitrary results. While the University's adjudicative process is adversarial and the judgments it renders can be harsh, it pales in comparison to the criminal justice system. Students navigating the current quasi-judicial system will hopefully learn from the experience and, in receiving a taste of criminal justice, be deterred from criminal wrongdoing before making a grievous mistake later in life.

While the Krause Report offers helpful suggestions and provides a useful contrast to the current Code, it proposes a system that is not appropriate for this community. We applaud Ms. Krause's efforts to improve our judicial system, but like many on campus, we do not think it is broken.[17]

Campus Code Revisions Committee
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[17] *See id.* at 9.