How to Write a Speech Code Without Really Trying: Reflections on the Stanford Experience

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This symposium provides an occasion for some reflections on Stanford's policy on Free Expression and Discriminatory Harassment, which was recently struck down by a California trial court.[1] I'll tell how the policy came to be enacted, say why I thought it was a good idea, then why I think it should have been found lawful,[2] and end with some observations on the politics of the hate speech issue.

In its opinion, the court used the official title of the Stanford policy only once, followed by: "(hereinafter the 'Speech Code')."[3] You don't have to read any further than that to know how the case came out. Once placed in the category "Campus Speech Codes," the policy was doomed, first in the public relations arena, and then in court — especially when further modi-

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[1] Corry v. Stanford, No. 740309 (Cal. Super. Ct. Santa Clara County Feb. 27, 1995). The opinion is unreported, but can be found in hypertext format on the Stanford Law Library home page at http://www-leland.stanford.edu/group/law/library/welcome.htm (under "Treasures"). Stanford announced it would not appeal the decision on March 9, 1995. *Casper: Fundamental Standard Court Case Won't Be Appealed*, STAN. CAMPUS REP., Mar. 15, 1995, at 13 [hereinafter *Case Won't Be Appealed*].

[2] I was the main drafter of the policy, and so I must tell the reader here that I am exercising something like the losing lawyer's right to reverse the judge on appeal down at the bar next to the courthouse. Actually, Stanford was represented by its General Counsel's Office and by David Heilbron, Esq., of the San Francisco firm of McCutchen, Doyle, Brown, and Enersen. These able counsel were stuck with defending my legislative handiwork, and so I think of myself as one of the losing lawyers.

[3] *Corry*, No. 740309 at 1.

fied by the term "politically correct," which became part of our national idiom soon after the policy was adopted.

I doubt you think a great university should operate under a Code of Politically Correct Speech. Neither do I. We might also agree that protecting people against sex and race discrimination at work or study is a good thing. In helping draft the Stanford policy, I was trying to define (and so limit) the speech incidental to a kind of *conduct* the university is legally and morally obligated to deal with — harassment of students on invidiously discriminatory grounds.

At the same time, because repeatedly offending someone can be seen as harassment, and people can be offended by ideas they think wrong, a simple prohibition of discriminatory harassment could have the effect of chilling the free flow of ideas in the university. To prevent that, I proposed limiting the speech that could be punished as harassment to "fighting or insulting words" — narrowed in this context to speech that was targeted to an individual, was intended to insult that individual, and made use of one of the commonly recognized racial epithets or their equivalents.[4] But — here's the crux — an anti-harassment regulation that takes extra care to protect free speech will end up talking about speech a lot, and these days that will tend to get it called a "speech code" and condemned. This creates perverse incentives.

I. WHAT HAPPENED

During 1988-89 I was chair of the campus judicial body that hears contested disciplinary charges at Stanford.[5] That fall two white students got into an argument with a black student when he claimed that Beethoven had African ancestry. In the aftermath of the argument, the white students made a blackface caricature of Beethoven and placed it outside the black student's

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[4] The full text of the Stanford Policy, along with the supporting explanation of its terms which was distributed to Stanford Students while it was in effect, are located *infra* in the Appendix.

[5] The Stanford Judicial Council (SJC) is made up of student, faculty, and administration members, and is chaired by a law student in cheating cases, and by a member of the law school faculty in cases involving charges of non-academic misconduct.

dormitory room. Campus-wide protests followed, including demands for discipline of the white students. Stanford's basic rule of conduct, the Fundamental Standard, simply requires that students respect "the rights of others."[6]

After some deliberation, the University's Judicial Affairs Officer decided not to prosecute the white students. Prior to the Judicial Officer's decision, the University's General Counsel issued a report stating that the Fundamental Standard should be interpreted in light of the University's commitment to free expression, and the posting of the Beethoven caricature did not fall within any of the standard exceptions to First Amendment protection.[7] The decision implied that the University would not treat speech as a disciplinary violation unless the First Amendment allowed it to be subject to criminal punishment or tort liability. Soon afterward, however, University President Donald Kennedy stated that a student who directly insulted another using a racial epithet would violate the Fundamental Standard.[8]

A few weeks later, the University's legislative body proposed to interpret the Fundamental Standard to prohibit discriminatory abuse or harassment. The proposal was aimed at protecting "diversity" in the student body, and would have prohibited the conduct involved in the Beethoven incident itself. While it strongly affirmed free speech rights in the abstract, some of its language could easily be read to censor ordinary political and cultural debate.[9] Stanford had pledged respect for First Amend-

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[6] The Fundamental Standard, adopted at the time of the University's founding in the 1890s, states: "Students at Stanford are expected to show both within and without the University such respect for order, morality, personal honor and the rights of others as is demanded of good citizens." The Standard had been applied for nearly a century case-by-case, supplemented in recent years by a few legislative interpretations, one of which had defined the campus policy against disrupting public speakers, while another had specified that drunk driving on campus would be treated as a violation of the Fundamental Standard.

[7] John J. Schwartz & Iris Brest, *First Amendment Principles and Prosecution for Offensive Expression under Stanford's Student Disciplinary System*, STAN. DAILY, Feb. 8, 1989, at 9. The permitted forms of content-based speech regulation mentioned in the Schwartz-Brest memorandum were obscenity, defamation, incitement, and fighting words. The memorandum made no mention of the University's possible obligations under federal civil rights laws to remedy hostile environment discrimination.

[8] *See Senate Hears President on Free Speech, Report on Centennial Campaign Progress*, STAN. CAMPUS REP., Feb. 15, 1989, at 19.

[9] The draft proposed "Interpretations and Applications of the Fundamental

ment limitations, though as a private university it was not bound by them, and the constitutional lawyers on campus, myself included, did not think the draft was consistent with this pledge, nor did we think it good policy for a university committed to academic freedom and free debate. Protest to this effect led to the withdrawal of the proposal, with some of the protesters stating that they could support a narrower provision aimed at discriminatory personal abuse.[10]

Because as chair of the campus judicial body I had been concerned about the prospect of having to decide charges based on an alleged racial insult without any more guidance than the vague terms of the Fundamental Standard, I accepted the invitation of the members of the legislative council (none of whom was a lawyer) to attempt a workable and constitutionally acceptable policy. I offered a draft to the council which it then proposed in the Spring of 1989, and a year later, after much campus-wide debate and some revision, the succeeding legislative council (chaired by my law school colleague Robert Rabin) promulgated it as an interpretation of the Fundamental Standard. Upon receiving the President's approval, the policy took effect in July of 1990 under the title, "Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment." Thereafter, in the nearly five years during which the policy was in effect, no charges were brought for violation of its terms,

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Standard in the Area of Diversity," and stated that community members had a right to be free of "personal attacks which involve the use obscenities, epithets, and other forms of expression that by accepted community standards degrade, victimize, stigmatize, or pejoratively characterize them on the basis of personal, cultural, or intellectual diversity." Even more sweepingly, it stated that community members have a right (under the heading "defamation of groups") not to be "inescapably and involuntarily exposed to" such expression. *Council Proposes Fundamental Standard Additions*, STAN. CAMPUS REP., Mar. 1, 1989, at 17.

[10] My constitutional law colleagues Gerald Gunther and William Cohen filed statements arguing that in First Amendment terms (and as a matter of policy) the original proposal's "personal attack" provision was too broadly drawn, and the "defamation of groups" provision was mistaken in principle. Both said that they could support a narrowly drawn prohibition of personal attacks based on race, etc. *See Proposed Amendments Raise Concerns About Free Expression*, STAN. CAMPUS REP., Mar. 15, 1995, at 18; *Proposed Code Conflicts with First Amendment, Gunther Says*, STAN. CAMPUS REP., Mar. 15, 1995, at 17. I agreed with their criticism, and it was this narrow provision that I undertook to draft — though in the end my efforts did not win their support.

nor, as best I have been able to determine, were any such charges informally threatened.

This did not mean it passed out of controversy. The debate over multiculturalism and political correctness began to focus national attention on how campus harassment regulations were dealing with politically charged speech.[11] As a prominent private university with a "speech code,"[12] Stanford was a frequent target for charges of enforced political correctness, despite the extremely narrow range of speech defined as harassment by the policy. The University had recently also undertaken a much-publicized modification of its undergraduate core curriculum in a more multicultural direction, and this helped make it a natural target in the campaign against political correctness.[13] A very broad regulation of campus speech in the name of equal access to education had been enacted at the University of Michigan, and then struck down by a federal court,[14] and issues involving "speech codes" were beginning to fill the law reviews as well as the editorial pages as the 1990's began.[15]

In 1992, two events combined to put the Stanford policy in legal jeopardy. First, in June, the U.S. Supreme Court decided *R.A.V. v. City of St. Paul*,[16] striking down a city ordinance that banned the display of bigoted symbols like swastikas or burning crosses; on the surface at least, the holding seemed to apply as well to Stanford's singling out of racial and other bigoted epithets for discipline under its anti-discrimination policy.[17] Sec-

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[11] *See* DINESH D'SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS 138-56 (1991); *America's Decadent Puritans*, THE ECONOMIST, July 28, 1990, at 11; Chester Finn, *The Campus: An Island of Repression in a Sea of Freedom*, COMMENTARY, Sept. 1989, at 17, 18.

[12] In my view, developed *infra*, *every* university has a "speech code," explicit or implicit, by operation of federal law, which requires universities to take reasonable steps to prevent creation of a discriminatorily hostile environment on the basis of race or sex. Stanford differed from the other major private universities in making its position explicit. I thought being explicit was good policy, but from early on it turned out to be unquestionably bad public relations.

[13] D'SOUZA, *supra* note 11, at 59-93.

[14] Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989).

[15] *See, e.g.*, Charles R. Lawrence, *If He Hollers, Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 449-51 (discussing Stanford's racist speech regulation); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?* 1990 DUKE L.J. 484, 523-31 (arguing that Stanford's speech policy was unconstitutional).

[16] 505 U.S. 377 (1992).

[17] *Id.* at 396-97. The St. Paul ordinance made it a misdemeanor to display symbols

ond, in September California adopted a new statute, the Leonard Law, a product of the attack on political correctness and hate speech codes, which applied First Amendment requirements to the disciplinary regulations of private universities and granted standing to students to challenge any regulations claimed to violate those requirements.[18]

With the combination of *R.A.V.* and the Leonard Law in hand, nine students brought suit in state court to have the Stanford policy declared invalid. The statute's broad standing provision meant that the plaintiffs did not have to claim that they wanted to do anything prevented by the policy (i.e. to address a hate epithet to a fellow student), or show that the University was enforcing the policy beyond its terms. The case was thus litigated as an abstract question of law before Peter Stone, a respected Superior Court judge in Santa Clara County, who decided in February of 1995 that in light of *R.A.V.* and other Supreme Court First Amendment decisions, the Leonard Law invalidated Stanford's policy. A few weeks later, Gerhard Casper, the constitutional law scholar who had inherited the speech and harassment policy when he became President of Stanford in 1992, announced his decision not to appeal. He said that while he disagreed with the ruling,[19] he believed that the time and ex-

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that caused "anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *Id.* at 380. In a five-four decision, the Court held that even if the ordinance were construed narrowly to prohibit only displays that amounted to constitutionally unprotected "fighting words," it would still violate the First Amendment because the subset of utterances it singled out were chosen on impermissibly ideological grounds — the disfavored ideologies being racial, ethnic, religious, or gender-based bigotry and intolerance. *Id.* at 391, 397. However the majority opinion made an exception for anti-discrimination laws aimed mainly at conduct, such as Title VII. *Id.* at 389. For the argument that the Stanford policy fell within this exception, see *infra* Part III.

[18] CAL. EDUC. CODE § 94367 (West Supp. 1996). Subsection (a) provides:

> No private postsecondary educational institutions shall make or enforce any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution or Section 2 of Article 1 of the California Constitution.

Id.

[19] President Casper particularly stressed his view that the Leonard Law itself violated Stanford's First Amendment right to academic freedom. *Case Won't Be Ap-*

pense of an appeal did not justify what might be gained by it, and so Stanford would live with the decision. He told the campus that the invalidation of the policy did not disable the University from invoking the Fundamental Standard to discipline students who harassed other students.[20] Thus Stanford returned to the post-Beethoven incident status quo.

II. THE CASE FOR THE POLICY

The plaintiffs regarded this as a victory for free speech and so did many other civil libertarians; for example, Nat Hentoff wrote a column headlined *Free Speech Returns to Stanford.*[21] I think they were mistaken. The freedom of students to express conservative or otherwise "politically incorrect" views on issues of race, gender and the like without fear of campus discipline seems to me to have been *more* secure at Stanford with the policy than it now is without it — though quite secure in either case.[22]

My view rests on the two premises that convinced me the policy made good sense in 1989, premises that still hold true today. The first is that universities have a legal and moral obligation to deal with at least some abusive speech aimed at students on the basis of their race, national origin, sex, and other personal characteristics, as part of their duty not to discriminate in the provision of educational services.[23] The second is that freedom of expression is better served by narrow and clear definition of any speech that is to be prohibited.

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pealed, supra note 1, at 13. The lawyers for Stanford made this their lead argument in defending the Corry suit before the Superior Court. The court rejected the argument, and I do not further consider it in this essay, but treat the Stanford case as if it arose at a state university.

[20] Specifically, President Casper emphasized that "harassment, whether accompanied by speech or not, including harassment that is motivated by racial or other bigotry, continues to be in violation of the Fundamental Standard." *Id.*

[21] Nat Hentoff, *Free Speech Returns to Stanford*, L.A. TIMES, Mar. 27, 1995, at B5.

[22] No student disciplinary charges have ever been brought at Stanford on the basis of alleged harassing speech.

[23] Federal law prohibits Stanford as a recipient of federal funds from discriminating in the provision of educational services on the basis of race, color, or national origin, Civil Rights Act of 1964 (Title VI) § 601, 42 U.S.C. § 2000d (1994); on the basis of sex, Education Amendments of 1972 (Title IX) § 901, 20 U.S.C. § 1681 (1994); and since 1990 on the basis of handicap, Americans with Disabilities Act (Title III) § 302, 42 U.S.C. § 12182 (1994). In addition, Stanford on its own initiative pledges not to discriminate on the basis of religion or sexual orientation.

The first premise derives from the well-established legal concept of hostile environment discrimination. An employer discriminates against an employee not only by firing her or not hiring her or paying her less on account of her race or sex, but also by making the employee do her work in an environment so permeated by sex-based or race-based abuse, including verbal abuse, that it affects her ability to do her job.[24] And where fellow workers subject employees to discriminatory harassment and abuse, again including verbal abuse, an employer, who in the face of complaints does nothing to remedy the situation, is likewise guilty of discrimination in providing less favorable working conditions to those subject to the abuse. The emotional toxicity of the work environment is a "condition of employment" for the employee, for which the employer is responsible. By analogy, other private parties subject to anti-discrimination requirements under civil rights laws, such as landlords, innkeepers, and educators, are also required to take reasonable steps to protect those entitled to equal treatment from hostile environment discrimination.[25]

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[24] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64-65 (1986). The Court has not yet considered the regulation of workplace verbal abuse as raising First Amendment issues. It recently unanimously upheld a finding of hostile environment discrimination based entirely on employer verbal abuse without even discussing whether this was consistent with the First Amendment. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370-71 (1993). *See also* Richard M. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog that Didn't Bark*, 1994 SUP. CT. REV. 1. Both parties briefed the First Amendment issues in the case, but only after it reached the Supreme Court level. Thus the case does not precisely stand as formal authority for limited First Amendment review of hostile environment claims based on verbal abuse, but rather suggests a climate of judicial opinion in which this is generally assumed.

[25] Following the lead of the U.S. Supreme Court in Franklin v. Gwinnett County Public School, 503 U.S. 60 (1992), courts have applied Title VII standards by analogy in evaluating claims of sex discrimination in education under Title IX, and have held that plaintiffs may bring hostile environment sexual harassment claims under Title IX. *See, e.g.*, Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560, 1571 (N.D. Cal. 1993); Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288 (N.D. Cal. 1993). The court in *Doe v. Petaluma* relied on *Franklin* as well as on Letters of Findings of the Office of Civil Rights (OCR) of the Department of Education in applying Title VII standards in the Title IX context: "The Office of Civil Rights . . . believes that an educational institution's failure to take appropriate response to student-to-student sexual harassment of which it knew or had reason to know is a violation of Title IX." *Petaluma City Sch. Dist.*, 830 F. Supp. at 1573. Courts have similarly applied Title VII case law in cases of hostile environment sexual harassment by landlords under the Federal Fair Housing Act. *See, e.g.*, Honce v. Vigil, 1 F.3d

These requirements apply to universities as well, where their application must take into account the special importance of both academic freedom and open extra-curricular debate within the university. Still, study is the work of students, and like other work it is made more difficult by an environment permeated with abuse and harassment.[26] A university that did nothing to prevent discriminatory harassment of its students would deny the victims their right to equal access to its educational opportunities.

Suppose, for example, that when a formerly all-male college is required by law to admit a woman, she is treated by her fellow students in the same way Mary Carr, the first female apprentice in a tinsmith shop at a division of General Motors, was treated by her fellow employees.[27] Carr faced daily comments such as "I won't work with any cunt," was regularly called "whore," "cunt," and "split tail," had "cunt" painted on her toolbox, had her toolbox and work area festooned with sexual graffiti and pictures, and received a Valentine card in her toolbox addressed to "Cunt," which showed a man carrying a naked woman upside down like a six-pack, with text explaining that the man has finally discovered why the woman has two holes. After putting up with this treatment and indeed trying to go along with it for some time, she complained, but the company took no action. On these facts and others, General Motors was found liable to Carr for discrimination in conditions of employment.[28] I believe

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1085, 1090 (10th Cir. 1993); Shellhammer v. Lewallen, No. 84-3573, 1985 WL 13505, at *4 (6th Cir. July 31, 1985); Beliveau v. Caras, 873 F. Supp. 1393, 1396-97 (C.D. Cal. 1995).

[26] As Justice Ginsburg has put it, the key issue in a hostile environment case is whether "the harassment so altered working conditions as to 'ma[k]e it more difficult to do the job.'" *Harris*, 114 S. Ct. at 372 (Ginsburg, J., concurring) (quoting Davis v. Monsanto Chem. Co., 858 F.2d 345, 349 (6th Cir. 1988)).

[27] Carr v. General Motors Corp., 32 F.3d 1007, 1012-13 (7th Cir. 1994).

[28] *Id.* I have selected out the verbal abuse directed to Carr; she suffered other indignities as well. Judge Posner's opinion in the case gives a clear statement of the present law governing an employer's obligation to deal with abuse by coworkers:

> [T]here really are only two questions in a case such as this. The first is whether the plaintiff was, because of her sex, subjected to such hostile, intimidating, or degrading behavior, verbal or nonverbal, as to affect adversely the conditions under which she worked . . . . The second question is whether, if so, the defendant's response or lack thereof to its employees' behavior was neg-

a university that did nothing in a similar situation would violate a student's right to equal access to educational services under Title IX. And quite apart from the law, shouldn't a college administration concerned with equal treatment of its students take steps to stop this kind of discriminatory abuse?

Or suppose an African-American student at a formerly all-white university faced the treatment given to Ray Wells, the first black dockman at a trucking company.[29] Wells regularly found on chalkboards attached to loading carts in his working area statements such as "Ray Wells is a nigger," "The only good nigger is a dead nigger," "Niggers are a living example that Indians screwed buffalo." When Wells started eating lunch in a separate room, his white co-workers wrote "niggers only" above the door. Management did nothing in response to complaints about these and other incidents of abuse and was found to have violated Title VII.[30] Again, I think a university that failed to take disciplinary action in this situation would violate Title VI, but whether or not this is so, it would violate its educational obligations to the student in question.

Of course nothing as blatant as the abuse recorded in these and many other employment cases has happened at Stanford, or on most university campuses. To many university lawyers and administrators, this means that the sensible course is to wait and see whether serious harassment occurs, and to deal with it only if and when it does. After all, it is hard to define in advance the speech that amounts to harassment, while protecting the free debate that is essential to the life of a university. Further, if a university does attempt such a definition, it is likely to call down on itself criticism as the craven enforcer of political correctness

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> ligent . . . . [I]f it knows or should have known that one of its female employees is being harassed, yet it responds ineffectually, it is culpable. The two questions, harassment of the employee and negligence of the employer, are linked as a practical matter because the greater the harassment — the more protracted or egregious, as distinct from isolated . . . or ambiguous, it is — the likelier is the employer to know about it or to be blameworthy for failing to discover it.

Id. at 1009.

[29] EEOC v. Murphy Motor Freight Lines, 488 F. Supp. 381, 384 (D. Minn. 1980).

[30] *Id.* As in Carr's case, Wells also suffered from non-verbal abuse at his coworkers' hands; I have noted only some of the verbal abuse.

through a speech code. There can be repercussions in Nat Hentoff's column and on the editorial pages of the *Wall Street Journal.* Alumni may think their school has fallen into the clutches of radical multiculturalists, and withhold contributions. Finally, if the university is a public one (or a private one in California), explicitly defining the speech that constitutes discriminatory harassment raises the risk of a possibly costly and embarrassing lawsuit. All these practical considerations are much more forceful today than they were in 1989; they no doubt help explain why the Stanford administration decided not to appeal the invalidation of the Stanford policy in 1995.

Given all this, why shouldn't a university hold off on defining harassing speech at least until a serious situation arises?[31] The main answer lies in my second premise — that the values of free speech themselves, especially important in a university, are better served by clear definition in advance of the speech to be regulated, when regulation is necessary. (I would add that general values of due process for students are also better served by clear notice.) The *Carr* and *Wells* facts are meant to show that indeed some speech does have to be regulated.[32] The alternative to defining that speech is uncertainty about how far the regulation extends, and this casts a chill on speech that might

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[31] Thus Title VII law requires employers to take action when workers are being subjected to "discriminatory intimidation, ridicule, and insult," that is "sufficiently severe or pervasive to . . . create an abusive working environment." *Harris*, 114 S. Ct. at 370 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65, 67 (1986)).

[32] For the contrary view, see Kingsley R. Browne, *Title VII as Censorship: Hostile Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481, 501 (1991), who argues that application of Title VII to verbal abuse in the workplace violates the First Amendment. If his position were correct with respect to the workplace, it would be true a fortiori for the University. Of course universities (like employers) can take action short of discipline to deal with incidents of discrimination — statements of condemnation of bigotry, support for the students subjected to it, promotion of discussion and debate of the issues, and so on. Charles Calleros describes the effective non-disciplinary responses a university can take to incidents of discrimination that fall short of actual threat or harassment. Charles R. Calleros, *Reconciliation of Civil Rights and Civil Liberties after* R.A.V. v. City of St. Paul*: Free Speech, Antiharassment Policies, Multicultural Education, and Political Correctness at Arizona State University*, 1992 UTAH L. REV. 1205, 1206 (describing Arizona State University policy). My premise is that while efforts like these are necessary and may in many cases be sufficient, they need to be backed ultimately by the threat of discipline in cases where, despite them, abuse cumulates to the level of actual harassment of its victims.

or might not fall within the terms of a prohibition of conduct defined loosely as "harassment."

Stanford's official response to the Beethoven incident created just this kind of uncertainty. The General Counsel's memorandum said that the posting of the caricature was not punishable, because the University adhered to free speech standards and the posting did not amount to "fighting words" or one of the other recognized categories of expression exempted from First Amendment protection.[33] The President of the University affirmed the decision not to prosecute, and added publicly that if a student directly insulted another student using a racial epithet, that would be a violation of the Fundamental Standard.[34]

That left it unclear whether, for example, the University would discipline a student who was caught putting an anonymous note saying "Nigger get out" under a black student's door.[35] The President's statement implied that it would, but the General Counsel's memorandum suggested otherwise. A surreptitious message cannot be "fighting words" under the narrow meaning of those terms used in First Amendment law, which requires an imminent likelihood of violent response.[36] Nor was it clear how such an act would fit into any other accepted category of crime or tort. The General Counsel's memorandum had not mentioned any obligation the University might have to protect students against hostile environment discrimination, but in any event a single episode like this would not likely trigger such an obligation.[37]

On the other hand, if the same student received the anonymous note after being subjected to other direct expressions of racial hostility, a discrimination case would begin to build unless the University took remedial action. This point supported the

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[33] *See supra* note 6 and accompanying text.

[34] *See supra* notes 19-20 and accompanying text.

[35] As I learned from speaking with African-American students, actual discriminatory abuse on campus usually takes the form of anonymous messages.

[36] R.A.V. v. City of St. Paul, 505 U.S. 377, 408 (1992) (White, J., concurring); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[37] In the employment context, the Supreme Court has said that the "mere utterance of an . . . epithet which engenders offensive feelings in a employee" is not sufficient by itself to create the kind of "severe" and "pervasive" abusive environment necessary for a Title VII case. Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1985)).

President's statement that direct racial abuse would be disciplined. But what kinds of abusive speech should the University treat as subject to discipline under this obligation? If free campus debate was to be protected, the limits of what could count as punishable verbal abuse needed to be spelled out carefully. This was much more important in a university than in most workplaces, where the freedom of political and cultural discussion are not strongly protected either by law or custom, but generally left entirely subject to the discretion of employers.[38] We had already seen at the University of Michigan how a vaguely drafted anti-harassment policy based on the EEOC's Title VII regulation had allowed campus administrators to threaten discipline for core protected speech, and any campus hostile environment policy had to make clear that speech of this kind was *not* covered.[39]

I thought in these circumstances it would be better to have a clear and narrow definition of what kind of individual acts of verbal abuse would be subject to discipline. My proposal was to limit it to speech targeted to individuals, with intent to insult, using racial epithets or their equivalents.[40] This was a very nar-

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[38] Mary Becker, *How Free Is Speech at Work?*, 29 U.C. DAVIS L. REV. 815 (1996). *But see* CAL. LAB. CODE § 1101(West 1989) (forbidding employers to discharge employees because of their "political affiliation").

[39] Doe v. University of Mich., 721 F. Supp. 852, 865-66 (E.D. Mich. 1989). The Michigan policy prohibited "any behavior, verbal or physical, that stigmatizes or victimizes an individual" on discriminatory grounds, and thereby "creates an intimidating, hostile, or demeaning environment for educational pursuits . . . or extra-curricular activities." The University's Office of Affirmative Action issued an interpretive guide to the policy which gave examples of sanctionable conduct including, "[a] male student makes remarks in class like 'Women just aren't as good in this field as men.'" In another section headed "YOU are a harasser when . . . ," the guide added examples such as "[y]ou tell jokes about gay men and lesbians," "[y]our student organization sponsors entertainment that includes a comedian who slurs Hispanics," and "[y]ou comment in a derogatory way about a . . . group's cultural origins, or religious beliefs." Charges were brought under the policy against a social work student for stating in class that he believed that homosexuality was a treatable disease, though the charge was eventually dismissed; against another student for reading in class a limerick satirizing the homosexual orientation of a well-known athlete; and against a third student for stating that a minority faculty member was not fair to minority students in her dentistry class. *Id.*

[40] The Appendix to this Article contains the actual text. The requirement of intent to insult meant that use of epithets in an attempt at banter or in-group usage, even an unwelcome and insensitive one, would not be punishable. The definition of epithets or their equivalent required use of a word or symbol "commonly

row definition; it meant that even the well-known epithets could be addressed with hateful intent to a general audience, and that individual targeted insults that did not use racial epithets or their equivalent would also not be punishable, even when motivated by bigotry and intended to drive the victim out of the university.

The theory behind this narrowly limited definition was to restrict the punishment of verbal abuse under the anti-discrimination policy to a category of speech that was independently regulable under the First Amendment — "insulting or 'fighting' words" or symbols, those "which by their very utterance inflict injury or tend to incite to an immediate breach of the peace."[41] This narrow definition immunized cruel insults that could inflict as much injury as those prohibited, but in my judgment a narrow and reasonably objective definition was necessary if campus administrators were to be disabled from imposing the kind of censorship that had been visited on disfavored viewpoints at Michigan. The policy was never meant to substitute for the hard work of creating a generally hospitable environment for a diverse student body, a goal that everyone recognized had to be pursued by means other than disciplinary regulation.[42] Its

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understood to convey visceral hatred or contempt;" this meant that if there was any doubt whether a word or symbol was a hate epithet or equivalent, it wasn't. The accompanying commentary identified words such as "nigger," "kike," "cunt," and "faggot," and symbols like the burning cross and the swastika as examples of words or symbols that met the "commonly understood" test. It gave the Confederate flag as an example of a symbol that would not meet this test.

[41] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). For a legal defense of the continued viability of the "inflict injury" branch of *Chaplinsky*, which some commentators have argued has been eliminated by subsequent decisions, see *infra* note 54 and accompanying text. In common sense terms, the idea is that an utterance sufficiently devoid of value to be punishable when aimed at someone who is ready and able to fight shouldn't become constitutionally protected just because the victim is in a wheelchair.

[42] The commentary to the Policy stated:

> In general, the disciplinary requirements that form the content of the Fundamental Standard are not meant to be a comprehensive account of good citizenship within the Stanford community. They are meant only to set a floor of minimum requirements of respect for the rights of others, requirements that can be reasonably and fairly enforced through a disciplinary process. The Stanford community should expect much more of itself by way of tolerance, diversity, free inquiry and the pursuit of equal educational opportunity than can possibly be guaranteed by any set of disciplinary rules.

main point was to narrow the scope of prohibited verbal abuse to those epithets that everyone would recognize as genuinely harmful, and that no one would want to defend as contributing to campus discussion or debate.[43]

And while the policy was controversial, no one in fact did argue that it banned speech which needed to be heard. The main point of attack was always the appearance of ideological bias. It was said that students of color, women, and gays and lesbians, the favored minorities of the politically correct, were protected from being called the names that are hurtful to them, while conservative students could freely be called "racist" or "fascist pig," veterans could have American flags burned in front of them, and the average apolitical student could have his mother called a whore to his face, all without any disciplinary recourse.

This line of criticism could have been blunted by moving the policy away from its roots in the university's anti-discrimination guarantee. If harassment violates students' rights, why not simply proceed against harassment — why single out *discriminatory* harassment as a special target? Or if outrageous personal insults do harm and are not constitutionally protected, why not simply prohibit all such insults? These were the central questions from the start, and let me quote in full the answers to them that appeared in the original commentary to the policy:

> Why prohibit "discriminatory harassment," rather than just plain harassment?
>
> Some harassing conduct would no doubt violate the Fundamental Standard whether or not it was based on one of the recognized categories of invidious discrimination — for example, if a student, motivated by jealousy or personal dislike, harassed another with repeated middle-of-the-night

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See infra Appendix.

[43] Thus fitting the Supreme Court's description of "insulting or 'fighting' words" as one of "certain well-defined and narrowly limited classes of speech" outside the protection of the First Amendment because their utterance is "no essential part of any exposition of ideas" and of such "slight social value as a step to truth" that they can be prohibited on the basis of "the social interest in order and morality." *Chaplinsky*, 315 U.S. at 571-72.

phone calls. Pure face-to-face verbal abuse, if repeated, might also in some circumstances fit within the same category, even if not discriminatory. The question has thus been raised why we should then define *discriminatory* harassment as a separate violation of the Fundamental Standard.

The answer is suggested by reflection on the reason why the particular kinds of discrimination mentioned in the University's Statement on Nondiscriminatory Policy are singled out for special prohibition. Obviously it is University policy not to discriminate against *any* student in the administration of its educational policies on *any* arbitrary or unjust basis. Why then enumerate "sex, race, color, handicap, religion, sexual orientation, and national and ethnic origin" as specially prohibited bases for discrimination? The reason is that, in this society at this time, these characteristics tend to make individuals possessing them the target of socially pervasive invidious discrimination. Persons with these characteristics thus tend to suffer the special injury of *cumulative* discrimination: they are subjected to repetitive stigma, insult, and indignity on the basis of a fundamental personal trait. In addition, for most of these groups, a long history closely associates extreme verbal abuse with intimidation by physical violence, so that vilification is experienced as assaultive in the strict sense. It is the cumulative and socially pervasive discrimination, often linked to violence, that distinguishes the intolerable injury of wounded identity caused by discriminatory harassment from the tolerable, and relatively randomly distributed, hurt of bruised feelings that results from single incidents of ordinary personally motivated name-calling, a form of hurt that we do not believe the Fundamental Standard protects against.

Does not "harassment" by definition require repeated acts by the individual charged?

No. Just as a single sexually coercive proposal can constitute prohibited sexual harassment, so can a single instance of vilification constitute prohibited discriminatory harassment. The reason for this is, again, the socially pervasive character of the prohibited forms of discrimination. Stu-

> dents with the characteristics in question have the right to pursue their Stanford education in an environment that is not more hostile to them than to others. But the injury of discriminatory denial of educational access through maintenance of a hostile environment can arise from single acts of discrimination on the part of many different individuals. To deal with a form of abuse that is repetitive to its victims, and hence constitutes the continuing injury of harassment to them, it is necessary to prohibit the individual actions that, when added up, amount to institutional discrimination.[44]

In my view, a campus-wide prohibition of all outrageous insults of one student by another was never a serious possibility.[45] Those enforcing such a prohibition would have to distinguish in a wide range of situations between genuinely harmful insults, and ordinary though deplorable rudeness, and decide which should be subject to the heavy apparatus of formal discipline. It would have been an administrative nightmare, a gross misuse of University resources, and an invitation to selective and potentially biased enforcement. By contrast, the hate epithets are a well-recognized and narrowly limited class of expressions, and they are quite generally understood to be among the most serious kind of "fighting words" when used with insulting intent.

More plausible than prohibiting all serious insults would have been a policy prohibiting all harassment, not just discriminatory harassment. On one quite natural understanding of the concept, that would have made it an offense to persist in abusive or annoying interaction with someone after their desire for it to cease was made known. As the commentary quoted above shows, I

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[44] Stanford Policy, *infra*, Appendix.

[45] In a strongly-worded attack on the Stanford policy, Charles Fried argued that Stanford's failure to adopt a broad regulation requiring generally civil speech of students in their interactions even outside the classroom showed the University's narrower prohibition of bigoted epithets to be "not quite wholesome" — i.e., ideologically biased. Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 246 (1992). This was in response to my statement that while civility-based speech restrictions were appropriate in the classroom, where teachers can enforce a general prohibition of name-calling in a limited setting, they were not feasible as a campus-wide disciplinary rule. Thomas C. Grey, *Discriminatory Harassment and Free Speech*, 14 HARV. J.L. & PUB. POL'Y 157, 158-59 (1991).

took such a prohibition to be implicitly in place under the Fundamental Standard, and President Casper's statement after the invalidation of the policy this last year confirms that to be the case today: "[H]arassment, whether accompanied by speech or not, including harassment that is motivated by racial or other bigotry, continues to be in violation of the Fundamental Standard."[46]

Confining student disciplinary liability to harassment in this sense, however, would immunize all individual incidents of verbal abuse, and thus leave those who face a widespread form of prejudice unprotected against the harassing effect of cumulated abusive insults from many different individuals. Twenty separate students could each call Ray Wells "nigger" or Mary Carr "cunt," and nothing could be done to stop any of them. In my opinion, the University would be in breach of federal law and in default of its moral obligations to its students if it let this happen.

And under a simple prohibition of harassment, what would happen if one drunken undergraduate unleashed a stream of racial epithets at a fellow student in a single episode, and then stood unrepentantly on what he conceived to be his dog's right to one free bite? That would tempt the University to argue that, after all, a single act can indeed constitute harassment. Why? Because such acts, cumulated, can surely produce the effect upon an individual victim that makes harassment punishable — or even because a single seriously abusive insult can constitute harassment by itself.[47] Today, as I write, it is not clear whether

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[46] *See Case Won't Be Appealed, supra* note 1, at 13.

[47] *See* Alan E. Brownstein, *Hate Speech and Harassment: The Constitutionality of Campus Codes That Prohibit Racial Insults*, 3 WM. & MARY BILL RTS. J. 179, 201-02 (1994). Professor Brownstein writes that "[s]omeone who disturbs a woman at three in the morning with a phone call filled with vulgar sexual ravings may be guilty of harassment on the basis of that call alone." *Id.* A recent Alabama decision sustained a harassment conviction against First Amendment challenge, over one dissent, on the basis of a single expressive act, though on the dubious basis of the "fighting words" doctrine. T. W. v. State, 665 So. 2d 987 (Ala. Crim. App. 1995). The court was construing a statute to provide:

> [A] person commits the crime of harassment if, "with intent to harass . . . another person, he . . . makes an obscene gesture towards another person," . . . [t]he term "obscene gesture" . . . narrowly . . . appl[ies] to only those gestures made in conjunction with "fighting words," or words that provoke physical retaliation and an immediate breach of the peace.

President Kennedy's 1989 statement that a single face-to-face insult using a racial epithet would violate the Fundamental Standard — a statement issued *before* the promulgation of the now-invalidated policy, hence under the current status quo — still states University policy.

Uncertainties like these must exist as long as there is no definition of the speech that can be punished as harassment. Imperfect as it no doubt was, the Stanford policy did provide a reasonably clear definition, and one that encompassed only acts of verbal abuse that no one could seriously argue were contributions to robust campus political or cultural debate. The policy was a practical success in its own terms; no charges were brought under it, nor so far as I have been able to find out was it ever used by campus administrators to threaten students or win concessions from them because of their conservative or otherwise "politically incorrect" views or attitudes.[48] Its narrow application to acts that no one was likely to openly commit (or defend on their merits if committed by others) was what made me think the policy worth having in the first place, and what makes me believe that its invalidation was no victory for the cause of civil liberties on the Stanford campus.

Id. at 988. The striking underlying facts, which might provide the premise for a vigilante movie, obviously tempted the court to stretch doctrinal boundaries. A juvenile was charged with raping a teenage girl, but had the charge dismissed when the police lost crucial evidence. *Id.* The juvenile confronted the girl and her mother, grabbed his crotch, and shook it in their direction, and was charged with "harassment" for this single act. *Id.*

[48] *See supra* note 10 and accompanying text. In Nat Hentoff's column celebrating the invalidation of the policy, he quoted an anonymous student as saying that the absence of prosecutions showed that the policy had a powerful chilling effect! Hentoff, *supra* note 21, at B5. But there had been no publicly reported incidents *before* the policy was enacted that would have violated its terms. The extremely narrow terms of the policy, confined to directly addressed insults using racial epithets or their equivalents, made it unlikely that on a campus like Stanford's there would be many cases that would support plausible charges of violation. Students of color and gay and lesbian students on campus have told me of instances in which its terms were violated, both before and after the enactment, but always by anonymous notes or messages.

III. WHY THE POLICY WAS LEGAL

Now let me say why I think the policy was legal under First Amendment doctrine, treating Stanford as though it were a public university, and accepting *R.A.V. v. City of St. Paul* as stating the law of the First Amendment. (Later, I will say where I disagree with *R.A.V.*)

In its opinion, the court in *Corry v. Stanford University* invalidated the policy on two separate grounds. First, the policy was overbroad under the *Chaplinsky* doctrine, in that its concept of "insulting or 'fighting' words" punished speech that did not threaten immediate violence. Second, even if the policy did prohibit only unprotected speech, its focus on bigoted insults while leaving others permitted amounted to improper ideological bias or "viewpoint discrimination" under *R.A.V.*

Each of these grounds has some support in the case law — enough that if I had known that *R.A.V.* and the Leonard Law were coming I probably would have drafted the policy differently to limit litigation risk.[49] But I do think the better view of existing First Amendment law sustains the Stanford provision. First, I argue that, contrary to what the *Corry* court held, the *Chaplinsky* doctrine allows punishing some private targeted insults even when they do not create an immediate danger of violent response; second, under *R.A.V.*, targeted private insults that work invidious discrimination may be singled out for regulation inci-

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[49] For good advice on drafting hate speech regulations in light of *R.A.V.*, see Calleros, *supra* note 32; Daniel A. Farber, *Foreword: Hate Speech After* R.A.V., 18 WM. MITCHELL L. REV. 889 (1992); Elena Kagan, *Regulation of Hate Speech and Pornography After* R.A.V., 60 U. CHI. L. REV. 87 (1993). As these authors suggest, the best strategy is to avoid any reference to racial or other discriminatory content in the definition of the verbal abuse that is to be regulated. Instead, the policy should define the offense purely in terms of the personal characteristics of the victims, or the offender's intent to interfere with the exercise of rights, like the right to equal opportunity in education, housing, or the like. The defendant in *R.A.V.* was successfully prosecuted under federal civil rights statutes for his cross-burning in the yard of a black family, and the conviction was sustained against First Amendment challenge using the theory of a threat directed against the exercise of the federal right of equal access to housing. United States v. J.H.H., 22 F.3d 821 (8th Cir. 1994). While the "victim-selection" strategy is quite appropriate, regulations framed along these lines are *less* speech-protective (because they are more vague and susceptible to discretionary and politically biased enforcement) than the Stanford policy, which restricts punishable speech by the much more objective (though content-based) criterion that it must contain a racial epithet or its equivalent.

dental to a general prohibition of discrimination in the workplace; and third, subject to qualifications that do not affect the Stanford policy, this latter doctrine applies as well to discrimination in the university.

A. Personal Abuse and Public Discourse

Consider a group of white male students who follow an African-American woman student across the campus taunting her with the words "We've never had a nigger."[50] Assume that this is in public, in daylight, and that there is no actual threat of immediate physical attack. Assume also that there is no realistic danger that the woman student will attack her tormentors. Do these assumptions make the conduct into protected free speech?

In its unanimous *Chaplinsky* decision in 1942, the Supreme Court spoke of "certain well-defined and narrowly limited classes of speech" that are outside the protection of the First Amendment because their utterance is "no essential part of any exposition of ideas" and of such "slight social value as a step to truth" that they can be prohibited on the basis of "the social interest in order and morality."[51] Along with libel and obscenity, this category was said to include "insulting or 'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[52]

My view is that extremely abusive private speech targeted to an individual may be sanctioned under this doctrine, even if the individual neither threatens violent response nor reasonably experiences the abusive speech as a "true threat"[53] of physical

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[50] This was reported to have occurred on the campus of the University of Wisconsin at Madison during the time the Stanford policy was being considered. *A Step Towards Civility: Racial Taunts Banned at University of Wisconsin*, TIME, May 1, 1989, at 43.

[51] Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).

[52] *Id.*

[53] On the First Amendment requirement of a "true threat," see Watts v. United States, 394 U.S. 705 (1969); United States v. Kelner, 534 F.2d 1020 (2d Cir.), *cert. denied*, 429 U.S. 1022 (1976); United States v. Baker, 890 F. Supp. 1375 (E.D. Mich. 1995). In the words of the *Kelner* court:

> The purpose and effect of the Watts constitutionally-limited definition of the term 'threat' is to insure that only unequivocal, unconditional and specific expressions of intention immediately to inflict injury may be punished—only such threats, in short, as are of the same nature as

harm. The *Chaplinsky* doctrine makes allowance for the basic "fight or flight" reaction that is the natural human response to hostile aggression, including extreme verbal abuse directed to one's person. Breach of the peace statutes deal with the "fight" response, but people also respond to intimidation and abuse with fear, paralysis, and feelings of humiliation, often leaving lasting psychic scars. Serious insults can "by their very utterance inflict injury" of this kind, and for this injury the law can provide a remedy.[54]

The *Chaplinsky* decision has to be read in counterpoint with the Supreme Court's landmark decision a year earlier in *Cantwell v. Connecticut*.[55] Jesse Cantwell, a Jehovah's Witness, had set up a phonograph on the sidewalk in a Roman Catholic neighborhood and, after first getting their permission, played a record to two passersby attacking the Catholic church in terms that could be expected to offend believers. His listeners responded angrily, and Cantwell was arrested and ultimately convicted for inciting a breach of the peace. In reversing his conviction, the Court held that suppression of speech addressed to the public on matters of public interest could not be justified on the ground that it generated offense or anger in members of the public, though it contained "exaggeration . . . vilification . . . and even . . . false statement."[56]

The *Cantwell* Court drew a crucial distinction between expression on matters of public concern ("public discourse")[57] and

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> those threats which are . . . 'properly punished every day under statutes prohibiting extortion, blackmail and assault without consideration of First Amendment issues.'

Kelner, 534 F.2d at 1027 (citations omitted).

[54] For the "fight or flight" reading of *Chaplinsky*, see Thomas C. Grey, *Civil Rights vs. Civil Liberties: The Case of Discriminatory Verbal Harassment*, 8 SOC. PHIL. & POL. 81, 93 (1991). *Cf.* KENT GREENAWALT, FIGHTING WORDS 53-55 (1995). Severe emotional distress is generally accepted as legally cognizable injury under the law of torts. See RESTATEMENT (SECOND) OF TORTS § 46 (1965). Modern civil rights law also accepts that discrimination which imposes no tangible inequality may violate the constitution. *See* Brown v. Board of Educ., 347 U.S. 483, 493-94 (1954) (describing injury to "hearts and minds"). Richard Delgado was the first to join these two strands of modern American law in his proposal of a tort action for racial verbal assaults. *See* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982).

[55] 310 U.S. 296 (1941).

[56] *Id.* at 309-10.

[57] Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion,*

"personal abuse" or "profane, indecent, or abusive remarks directed to the person of the hearer."[58] Of the latter the Court said that "[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution . . . "[59] A year later the *Chaplinsky* Court relied on these words in affirming a conviction for breach of the peace on the basis of personally targeted "fighting words."[60]

In the decades since *Cantwell* and *Chaplinsky*, the Supreme Court has broadened and clarified the protection given to "public discourse." Speech or symbolic expression directed to the public at large can never be punished simply because of the anger or outrage it provokes,[61] either by virtue of its underlying message or its use of profane language ("Fuck the draft")[62] or abuse of revered symbols (flag burning).[63] The cases protect the public speech of students in universities against university discipline as well,[64] and protect the ideas and symbols of ex-

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Democratic Deliberation, and Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 630 (1990).

[58] 310 U.S. at 309. The Court stated:

> We find in the instant case . . . no personal abuse. On the contrary, we find only an effort to persuade a willing listener to buy a book or to contribute money in the interest of what Cantwell, however misguided others may think him, conceived to be true religion.
>
> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor . . . . But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

Id. at 310.

[59] *Id.* at 309-10.

[60] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[61] *See* Terminiello v. Chicago, 337 U.S. 1, 4 (1947) (holding free speech serves high purpose even when it stirs people to anger).

[62] *See* Cohen v. California, 403 U.S. 15, 22-26 (1971) (holding that First and Fourteenth Amendments prohibit state from criminalizing simple public display of expletives).

[63] *See* Texas v. Johnson, 491 U.S. 397, 404-06 (1989) (holding that flag burning is protected conduct under many conditions).

[64] Papish v. Board of Curators of the Univ. of Mo., 410 U.S. 667 (1973) (holding that student editor could not be expelled for violating "conventions of decency" by publishing cartoon portraying rape of Statue of Liberty and headline reading

treme racism when these are used in public discourse.[65] An additional development, which would likely produce a different result in *Chaplinsky* itself if it were decided today, is that even targeted and personally abusive speech is fully protected when it is also public discourse,[66] and criticism of a police officer carrying out his duties is generally public discourse.[67] If the speech is "public," it can only be punished if it falls within one of the few narrowly defined categories of so-called "unprotected speech," such as obscenity, defamation, incitement to immediate violence, "fighting words" in the narrow sense, or a "true threat." Psychic injury to public officials or public figures, even by way of direct insult, does not justify suppressing public speech.

Though the Supreme Court has not sustained a conviction with full opinion under the "fighting or insulting words" doctrine since *Chaplinsky*,[68] the Court has often restated the doctrine in unqualified terms,[69] and I don't see good grounds to

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"Mother Fucker Acquitted").

[65] *See* United States v. Eichman, 496 U.S. 310, 318 (1990) (protecting "virulent ethnic . . . epithets"); Collin v. Smith, 578 F.2d 1197, 1201-04 (7th Cir.) (striking down ordinances designed to prevent Nazi demonstration in Skokie, IL, home of many Holocaust survivors), *cert. denied*, 439 U.S. 916 (1978).

[66] *See* Hustler Magazine v. Falwell, 485 U.S. 46, 50 (1988) (holding that First and Fourteenth Amendments prohibit public figure from suing over "'outrageous' personally insulting advertisement parody").

[67] *See* City of Houston v. Hill, 482 U.S. 451, 461 (1987); Lewis v. City of New Orleans, 415 U.S. 130, 131-32 (1974); Gooding v. Wilson, 405 U.S. 518, 528 (1972). Chaplinsky himself called the police officer who was arresting him for distributing Jehovah's Witness leaflets a "God damned racketeer" and a "damned fascist." *Chaplinsky*, 315 U.S. at 569. Justice Powell's concurring opinion in *Lewis* suggested that the First Amendment should protect what would otherwise be fighting words when addressed to police officers and others in authority. *See Lewis*, 415 U.S. at 135 (Powell, J., concurring). Justice Powell put this on the ground that police are supposed to be trained to withstand insults and not respond violently. I would add that speech protesting how officials carry out their duties, even very crude and offensive speech, is "public discourse," and can be considered a form of "petition for redress of grievances." *Cf.* Lawrence, *supra* note 15, at 453-54 n.92 (arguing that speech which preempts further speech rather than inviting responses does not serve purposes of First Amendment).

[68] *But see* Steven H. Shiffrin, *Racist Speech, Outsider Jurisprudence, and the Meaning of America*, 80 CORNELL L. REV. 43, 49 n.22 (1994) (discussing Lucas v. Arkansas, 423 U.S. 807 (1975)).

[69] *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 409 (1989); *Gooding*, 405 U.S. at 522-23; Cohen v. California, 403 U.S. 15, 20 (1971).

doubt that the Court would sustain a breach of the peace conviction under a properly drawn statute for a face-to-face barroom insult that is meant to start a brawl and does so.[70] With respect to speech that does not threaten to cause violence but rather to "inflict injury," while the Court continues to quote the whole *Chaplinsky* formula when reaffirming the doctrine,[71] it has never explicitly discussed the application of this part of it, and some have argued that this aspect of the doctrine has been silently read out of the law.

The issue is clearly posed by the question whether tort damages may be awarded against one who (as the formula goes) "by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another,"[72] where the "conduct" in question is pure speech, and the emotional distress is caused (and intended to be caused) by the content of the speech. In *Hustler Magazine v. Falwell*, the Supreme Court answered "no" — when the speech is public and the plaintiff is a public figure. *Hustler* reversed an emotional distress judgment for an advertisement parody that portrayed Falwell having sexual intercourse with his drunken mother in an outhouse. The Court held that a form of tort liability that measured speech by whether it was sufficiently "outrageous" could not be applied to "expressions of ideas" criticizing "public men and measures" within "the area of political and social discourse."[73]

Robert Post has persuasively argued that the *Falwell* doctrine does not prevent imposing emotional distress liability for purely private speech. The boundaries of public discourse are not sharp, but some things lie clearly outside them; hence if

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[70] This branch of the *Chaplinsky* doctrine is in effect an application of the doctrine of Brandenburg v. Ohio, 395 U.S. 444 (1969), permitting punishment of direct incitement to imminent violence. Contrary to criticisms often made, the doctrine does not imply *approval* of violence (or "male violence") as a response to provocative speech, any more than the *Brandenburg* incitement doctrine justifies violence responsive to inciting speech. The inquiry is whether the violence, itself undoubtedly criminal, is foreseeable enough that the speaker (as well as the actor) can be held responsible for it, and imminent enough that "more speech" is not a plausible remedy.

[71] Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988); *Hill*, 482 U.S. at 464 n.12; *Gooding*, 405 U.S. at 522.

[72] RESTATEMENT(SECOND) OF TORTS § 46 (1965).

[73] *Hustler*, 485 U.S. at 51-56.

Hustler's publisher "had privately mailed the [ad] parody to Falwell's mother, or had telephoned Falwell in the middle of the night to read him the words of the parody . . . no court would classify the speech as public discourse."[74]

If this is right, courts are constitutionally free to award tort damages for emotional distress based on abusive private expression directed from one private individual to another outside of "the area of political and social discourse." And they have done so, especially in cases of verbal abuse using racial epithets.[75] These cases exemplify what the Court meant in *Chaplinsky* when it spoke of "insulting words" which "by their very utterance inflict injury," and in *Cantwell* when it placed "personal abuse" outside the full protection of the First Amendment. The exception fits well with general First Amendment theory, which offers extra protection to speech for which "more speech" is an effective remedy; talking back to a personally abusive attack may be dangerous and generally does no good, any more than it would to talk back when someone spits in your face. Further, it protects the right of hearers to be left free of speech that they do not want to hear, in situations where the speaker knows they do not want to hear it and indeed intends to force it on them against their will, and where they are the sole or primary audience for the speech.[76]

The "personal abuse" doctrine also justifies the Stanford policy, which is confined to targeted insults that have an objective indicator (use of a racial epithet or equivalent) identifying them as extreme and outrageous in character. The policy departs from the law governing tortious infliction of emotional distress in two respects, both based on a university's responsibility to offer education on reasonably equal terms to its students. First,

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[74] Post, *supra* note 57, at 679.

[75] *See* Jean C. Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 WASH. & LEE L. REV. 123, 128-35 (1990) (citing cases where plaintiffs sued for racist pure speech on theory of intentional infliction of emotional distress).

[76] This is the principle that lies behind the "captive audience" doctrine. *See* Rowan v. Post Office Dep't, 397 U.S. 728 (1970). The same principle also explains why it is harassment and not protected speech to pursue someone down the street, or continue telephoning someone, to tell them something after they have made clear they do not want to hear it. For an excellent analysis of the First Amendment issues involved in prohibiting harassment, both generally and in the hate speech context, see Brownstein, *supra* note 47.

the policy did not require a showing that the victim actually suffered severe emotional distress as a result of the abuse.[77] Second, the tort law of emotional distress in most jurisdictions probably would not support a damage award for a single insult using a racial epithet from one peer to another; the cases seem to require some additional factor such as action in addition to speech, sustained abuse over time, or a relationship of responsibility or control between speaker and victim.[78] Again, Stanford's special responsibility to prevent harassment of a student by the cumulative effect of individual acts of abuse justifies this departure.

I will have more to say later about how the university's role as both a workplace for students and a part of the marketplace of ideas should affect its position in the scheme of hostile environment discrimination law. For now, it is enough to establish that the *Chaplinsky* category of "insulting or 'fighting' words" can apply to incidents of serious personal abuse that do not imminently threaten violence either to or by the addressee.

B. Viewpoint Discrimination

Suppose I am right and a state university could constitutionally prohibit a seriously abusive verbal attack by one student on another, even when the victim posed no likelihood of violent retaliation — say, someone confined to a wheelchair. Could that university punish an abuser who said "you dirty cripple," and yet

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[77] The University of Texas discriminatory abuse policy, drafted by Mark Yudof, required an actual showing of severe emotional distress before speech could be punished. UNIVERSITY OF TEXAS, REPORT OF THE PRESIDENT'S AD HOC COMMITTEE ON RACIAL HARASSMENT 4-5 (Nov. 27, 1989) (on file with author) [hereinafter UNIVERSITY OF TEXAS REPORT]. Stanford rejected this limitation, stating: "We think it better in defining a disciplinary offense to focus on the prohibited conduct; we prefer not to require the victims of personal vilification to display their psychic scars in order to establish that an offense has been committed." In this respect Stanford anticipated the Supreme Court's opinion in Harris v. Forklift Systems, Inc., 114 S. Ct. 367 (1993), in which the Court held that a plaintiff need not have suffered severe enough emotional distress to have a tort action in order to make out a hostile environment discrimination case.

[78] Thus, where liability has been imposed for a single incident of verbal abuse, the defendant has stood in an innkeeper-customer or employer-employee relation to the plaintiff. *See* Love, *supra* note 75, at 128-35 (describing history of actions brought against verbal abuser using racial and ethnic slurs).

not one who said "your mother is a whore?" The Stanford policy did distinguish between bigoted and other insults, and Justice Scalia's opinion for a five-justice majority in *R.A.V.* seems at first glance to prohibit this. The court in *Corry v. Stanford University* read *R.A.V.* as saying so, but I believe it misapplied Justice Scalia's crucial distinction between laws directed at speech on the one hand, and laws directed at conduct but incidentally sweeping up unprotected speech on the other.

In *R.A.V.*, the Court unanimously struck down as invalid on its face a St. Paul city ordinance that made it a crime to display "a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."[79] The Minnesota Supreme Court had attempted to save this sweeping prohibition by construing it to apply only to displays or utterances which qualified as "fighting words" under the *Chaplinsky* line of cases. But in giving its understanding of "fighting words," the court had indicated that the ordinance punished expression that "'by its very utterance' causes 'anger, alarm or resentment.'" Four U.S. Supreme Court Justices thought this violated the familiar *Cantwell* principle as it had been developed in the flag-burning cases and many others, and rendered the statute overbroad and invalid.[80]

But these four sharply dissented from the more sweeping rationale on which the majority of five rested. Justice Scalia's opinion held that even if the ordinance were successfully confined by construction to fighting words in the narrow sense, it was still unconstitutional on its face because it singled out for punishment a subset of fighting words on the basis of their bigoted content — intolerance on the basis of race, color, creed, religion or gender. This was impermissible viewpoint

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[79] *R.A.V.*, 505 U.S. at 380.

[80] The Minnesota Court's narrowing construction was a long reach, given the language of the ordinance, and (perhaps as a result) Justice White's opinion was rather strict in scrutinizing the state court's abstract statements construing the ordinance for possible unconstitutional implications. In another case, a federal court might have waited to see if a state court that announced an intention to follow the *Chaplinsky* doctrine and did not say anything clearly inconsistent with it could successfully enforce its limitations in application.

discrimination. The fact that "fighting words" were not protected speech did not mean that some of them could be punished on impermissible ideological grounds, grounds unrelated to the reason why fighting words were left unprotected.[81]

Though in dissent Justice White argued that it was illogical to give First Amendment protection to unprotected speech, it seems hard to argue with Justice Scalia's general proposition. A statute that allowed damages to be awarded only against libels critical of capitalism would surely be void on its face as an unconstitutional viewpoint discrimination. Ideological selectivity in the imposition of optional legal burdens skews democratic deliberation and the marketplace of ideas toward favored official viewpoints, and as a general matter this is impermissible.

But when this general proposition is applied to anti-discrimination laws, it seems to condemn much existing regulation of (at least) hostile environment discrimination. And yet not long before *R.A.V.*, the Supreme Court had unanimously endorsed the proposition that Title VII, the federal fair employment law, prohibited discrimination of this kind.[82] The Court knew that this meant enlisting employers to suppress at least some sexually and racially abusive speech; indeed it approvingly cited the EEOC Regulations which prohibited "verbal or physical conduct" that "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[83]

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[81] *R.A.V.*, 505 U.S. at 393. Justice Scalia starts out as if to impose a broad prohibition on content discrimination, but then makes many and various exceptions to it, the last and most general of which makes clear that viewpoint discrimination is the real target of the doctrine: "Indeed, to validate [content] selectivity (where totally proscribable speech is at issue) it may not even be necessary to identify any particular 'neutral' basis, so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." *Id.* at 390.

[82] *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

[83] 29 C.F.R. § 1604.11 (1995). *See also Meritor Sav. Bank*, 477 U.S. at 65. The case law and regulations made clear that hostile environment discrimination on the basis of race, religion, and national origin was equally illegal under Title VII. *See* 29 C.F.R. § 1604.11 n.1. Indeed the first case to establish the hostile environment concept was a race discrimination case. *See* Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). The regulation speaks of "verbal or physical conduct *of a sexual nature*," but the italicized words obviously do not apply in a case involving race-based or religion-based harassment. Whether sex-discriminatory

Yet this whole body of law, insofar as it deals with "verbal conduct," would be unconstitutional under an unqualified application of the principle adopted by the *R.A.V.* majority. Title VII operates to ban abusive or harassing workplace speech used to discriminate on the prohibited bases of sex, race, and the like, but leaves other abusive or harassing speech in the workplace untouched.[84] The St. Paul ordinance had been invalidated for similar selectivity.

Recognizing this, and indeed strongly pressed on the point by Justice White's opinion, Justice Scalia took care to make clear in *R.A.V.* that Title VII harassment law survived. What he said on this score also exempts the Stanford policy from the operation of the viewpoint discrimination doctrine. His vehicle was a crude but serviceable distinction between speech laws and conduct laws. Title VII, the Court said, is generally aimed at a form of conduct, employment discrimination, that (like many other forms of conduct, up to and including murder) can incidentally be committed by speech. By contrast, the St. Paul ordinance was aimed entirely at expression.[85]

As a rough guideline, the distinction between conduct-laws and speech-laws makes sense. If the goal is to get rid of censorship — i.e., the official imposition of ideological orthodoxy on the marketplace of ideas — one criterion for a law's benign (non-censoring) purpose is that its main function is unrelated to

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harassment that is not of a sexual nature violates Title VII is an interesting question that, luckily, I don't have to answer here.

[84] *See* Browne, *supra* note 32, at 510-31 (applying First Amendment protections developed for public discourse to employment discrimination law in unqualified form, and consistently reaching conclusion that essentially all Title VII hostile environment regulations treating "verbal abuse" as harassment violate First Amendment).

[85] Justice Scalia wrote:

> [S]ince words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the nation's defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech .... Thus, for example, sexually derogatory "fighting words," among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices.

R.A.V., 505 U.S. at 389.

ideas as such. If in the neutral application of such a law to a lot of conduct, some low-value or unprotected speech gets regulated on the basis of its content, this suggests that the speech was prohibited for the same (presumptively non-ideological) reason as the action.[86]

The distinction the Court made in dictum in *R.A.V.* between speech-regulating and action-regulating laws became the basis a year later for its holding in *Wisconsin v. Mitchell*.[87] In *Mitchell*, the Court unanimously sustained a "hate crime" statute that enhanced penalties when crime victims were selected out of racial and other bias. The Wisconsin Supreme Court had said the victim selection statutes were invalid after *R.A.V.* because a "legislature cannot criminalize bigoted thought with which it disagrees."[88] The U.S. Supreme Court recognized that the hate crime statute did indeed place extra burdens on those holding the class of disfavored (racist and other discriminatory) beliefs that had been protected in *R.A.V.* But "whereas the ordinance struck down in *R.A.V.* was explicitly directed at expression . . . the statute in this case is aimed at conduct unprotected by the First Amendment."[89] Justice Scalia's speech-law versus conduct-law distinction turned out not to be an expedient for *R.A.V.* only, but a doctrine on which a unanimous Court was prepared to rely.

In his dissent in *R.A.V.*, Justice White pointed out some difficulties with applying a test that turns on whether a law is aimed at speech or action. In the case of Title VII's prohibition on hostile environment discrimination, what was the applicable unit of analysis, the "law" to be categorized as regulating either speech or conduct? If the EEOC hostile environment regulation were considered a separate law, its explicit and extensive concern with speech would be hard to call "incidental". On the other hand, if the unit of analysis was Title VII as a whole, what was to stop the St. Paul authorities from re-enacting their ordi-

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[86] Of course the doctrine does not mean that laws aimed generally at conduct can operate to suppress fully *protected* speech; it is a principle confined to unprotected or low-value speech.

[87] 508 U.S. 476 (1993).

[88] State v. Mitchell, 485 N.W.2d 807, 815 (Wis. 1992).

[89] *Mitchell*, 508 U.S. at 487 (citations omitted).

nance with a preamble that associated it with its general public policy (backed by other laws) against discrimination generally?

This is a difficulty, but not an insuperable one in practice, and indeed Justice Scalia's test could have worked in *Corry v. Stanford University*. The University defended the harassment policy as what it in fact was, the application of a general prohibition of discriminatory conduct. The court found, however, that it was a speech-law — a Speech Code. "Examination of the Speech Code reveals no mention of conduct or harassment as being proscribed. Rather, what is addressed is the prohibition of a certain category of expression which may result in a breach of the peace. Speech, in this respect, is not swept up incidentally, but is the aim of the proscription."[90]

But of course Section 2 of the harassment policy[91] restates the University's general prohibition of discrimination in access to its educational services, and then provides that discriminatory harassment (a form of conduct) violates this prohibition; in this respect it is just like the EEOC Regulation validated in *R.A.V.* Why did the *Corry* court ignore the text before its eyes? The court seems to have been impressed by the fact that most of the detailed provisions of the policy, those set out in Sections 4 and 5, concerned speech. Presumably this led it to see the policy not as an anti-discrimination provision but rather as what the plaintiffs called it, a "speech code." So characterized, it fell under the *R.A.V.* rule rather than the *Mitchell* exception.

Yet most of the behavior prohibited by Stanford's anti-discrimination policy is *not* speech. The extensive textual attention to speech was intended to assure that very little speech would be affected by the policy, and to clearly define what that speech was. For a reviewing court to use this speech-protective kind of detailed attention as the basis for characterizing the overall policy as a speech code creates a perverse set of incentives for the drafter — as this drafter can report.

Imagine how easily an anti-harassment policy could be drafted to avoid the *Corry* court's concern. It would be titled "Stanford University Policy on Nondiscrimination and Harassment" (no

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[90] Corry v. Stanford, No. 740309, slip op., at 13 (Cal. Super. Ct. Santa Clara County Feb. 27, 1995).

[91] *See infra* Appendix.

mention of speech). It would repeat the University's general nondiscrimination policy (the first sentence of Section 2 of the actual provision), but omit any mention of the University's policy on free expression (Section 1). It could then recite in some detail the many kinds of *conduct* that violate the nondiscrimination policy — discrimination in admissions, course availability, grading, student discipline, housing, access to extracurricular activities and the like, finally adding as yet another form of prohibited conduct harassment of students (the substance of the second sentence of Section 2.) Discriminatory harassment would be defined as "conduct that has the purpose or effect of unreasonably interfering with an individual's educational performance or creating an intimidating, hostile, or offensive educational environment on the basis of the individual's sex, race, etc." Sections 3, 4, and 5, with their explicit attention to what speech counts as prohibited harassment, would be omitted. The commentary would focus on examples of prohibited harassment involving physical conduct — pushing or striking people, defacing or destroying their property.

If anyone asked about verbal abuse, University authorities would simply affirm their commitment to free debate and academic freedom on campus, while stating that of course prohibited conduct can be carried out by words. If they were asked why they had not included any examples of harassment by speech in the commentary, they would say that they meant to emphasize that the policies were aimed at conduct, not at expression, adding some flourish like: "We do not contemplate that the policy will have to be applied to verbal conduct. This University, unlike some others, does not believe in speech codes and will never have one."

Given the standard implicit in the *Corry* court's opinion, this would have been a much better strategy for litigation purposes, especially in a case litigated in the abstract form that the Leonard Law's broad standing provision made possible — which is to say in the absence of any actual application of the policy. The Stanford lawyers could have easily shown the judge that the regulation, especially in light of the accompanying statements of University officials, was simply a regulation of discriminatory action. Its text made no mention of speech, and any possible

application to discriminatory speech, when that constituted the kind of conduct prohibited by the policy, was minor and incidental. A policy drafted in these terms would have clearly come within the exception for conduct-laws made in *R.A.V.* and confirmed in *Mitchell.*

But it would have been *less* protective of free speech on campus than the actual policy. This is because a prohibition of discriminatory harassment in general terms, without further definition of what this meant for speech, would be more likely to chill debate. Suppose this scenario: a student's habit of loudly proclaiming his admiration for *The Bell Curve* around the dormitory becomes the target of protest by African-American students, who say it is aimed at (and certainly has the effect of) making them feel unwelcome in the university and making it more difficult for them to do their work. He refuses to stop, and the dispute gets in the campus newspaper, which quotes the offending student as saying that he has no intention of letting "a bunch of affirmative-action morons" silence him, and that he hopes "what I'm saying will get some of them to think about whether they are really qualified to be here." Organized African-American students, along with many other students who support the University's efforts to attract and retain a diverse student body, now demand that he be disciplined for violation of the anti-harassment policy. Publicity on the incident starts to spread across the country, and word filters back from admissions recruiters that it is making a number of promising African-American admittees look elsewhere.

Under the Stanford policy that was invalidated, the result would be clear: the white student could be freely criticized, but he would not be in violation of University disciplinary standards. No racial epithet or its equivalent had been addressed to a targeted individual. Under the alternative policy I have hypothesized as better likely to survive court challenge after *Corry*, the outcome is by no means so clear. Yes, the University is committed to free speech; but it is also committed to preventing racial harassment. The terms of the anti-harassment policy seem to apply to the white student; he has admitted that he intends his statements to make living and working on campus more difficult for African-American students, and they say that he is succeeding. Many cases could be cited from employment law where

racially or sexually offensive expression, even though not targeted to an individual, was treated as harassing conduct.[92] In these circumstances, a university spokesperson eager to get the case out of the newspapers might tell the white student that he is in jeopardy of disciplinary charges and would be well advised to stop his public preaching of doctrines of racial inequality.

The point is that the test of whether a regulation is mainly a regulation of speech or one of conduct should not be how much the regulation and its supporting material *talks* about speech as compared to other kinds of conduct. The protection of speech from over-regulation typically requires careful definition of exactly what speech can be captured within a category of conduct. This is why the Stanford policy should have been upheld under the *R.A.V.-Mitchell* test. Its detailed focus on the small part of Stanford's anti-discrimination effort that concerned ideologically charged expression was the result of special concern to protect free speech on campus against what otherwise is the potentially chilling vagueness of the now-standard concept of hostile environment discrimination.

C. Hostile Environment Discrimination and the University

The Supreme Court has pretty clearly approved the general outlines of Title VII's prohibition of hostile environment discrimination, while showing its full awareness that this is a government mandate to employers to regulate their employees' speech in a content-specific way.[93] I have argued that this supports the Stanford policy, which like the Title VII regulation involves the application to speech of a general prohibition of discriminatory action. But the Court has not yet approved

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[92] *See, e.g.*, Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991).

[93] *R.A.V.*, 505 U.S. at 389. *Cf.* Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993); *supra* note 24. In the lower courts, some of the more far-ranging uses of the hostile environment concept to suppress offensive workplace speech are beginning to be found to violate either the First Amendment or a construction of Title VII animated by concerns for free expression. *See, e.g.*, DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 59 (5th Cir. 1995); Johnson v. Los Angeles Fire Dep't, 865 F. Supp. 1430 (C.D. Cal. 1994). I expect the Supreme Court to confirm this reining in of the concept, but not to repudiate the basic validation of workplace hostile environment law found in *R.A.V.* and *Harris*.

hostile environment regulation in universities, and a number of lower courts have refused to do so, striking down university regulations as "campus speech codes" and distinguishing them from similar regulations in the employment area.[94] Although these decisions fail to explain why harassment law should not extend by analogy to the university,[95] they reveal a growing judicial consensus that anti-harassment regulation in employment and education differ significantly for First Amendment purposes.

There are indeed important differences between the two, which should serve to limit but not block the application of harassment law developed in the employment area to student speech. The first important difference is that, as Mary Becker points out in this symposium, speech at work is not all that free.[96] By definition, employment involves subjecting oneself to another person's business purposes, and allows extensive control over what employees say on the job. The point extends to public employers as well; the government has broader powers as an employer to regulate its employees' speech than it does as sovereign to regulate the speech of its citizens. The state as employer may discipline or dismiss employees for speech that demonstrates unfitness for the job or interferes with it even in relatively intangible ways, without much restraint from the usual prohibitions against content-specific and even viewpoint-specific regulation.[97]

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[94] *See* Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386 (4th Cir. 1993); UWM Post, Inc. v. University of Wis., 774 F. Supp. 1163 (E.D. Wis. 1991); Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989). *Iota Xi* did not involve a regulation, but the University's suspension of a fraternity chapter for public performance of a racist and sexist skit on the grounds that it tended to create a "hostile learning environment for women and blacks, incompatible with the University's mission." *Iota Xi*, 993 F.2d at 388. *See also* Dambrot v. Central Mich. Univ., 839 F. Supp. 477 (E.D. Mich. 1993).

[95] This is particularly stark in *UWM Post*, where the court struck down a regulation that was confined to targeted discriminatory speech intended to render the educational environment hostile. Its long opinion addressed the Title VII analogy only with the unilluminating observation that "Title VII addresses employment, not educational, settings." *UWM Post*, 774 F. Supp. at 1177. It went on to say that in any event because "Title VII is only a statute, it cannot supersede the requirements of the First Amendment," *id.*, suggesting that it may actually have regarded Title VII hostile environment law as unconstitutional. A year later in *R.A.V.*, the Supreme Court went out of its way to affirm the constitutionality of the Title VII harassment regulations. *R.A.V.*, 505 U.S. at 389.

[96] Becker, *supra* note 38, at 817-18, 842-68.

[97] *See, e.g.*, Connick v. Myers, 461 U.S. 138 (1983). There are good arguments for

In theory, the state as sovereign does not have such broad powers over speech in the private workplace, but in practice its powers are still quite extensive. Collective bargaining law permits sweeping restriction on both employee and worker speech in its regulation of elections and organizing campaigns.[98] Anti-discrimination legislation like Title VII cannot of course regulate private employees' speech in the interests of "getting the job done" as such. But it can require employers to regulate the workplace so that employees do not find getting *their* jobs done more difficult by virtue of their religion, race, sex, or national origin.[99] Given the pervasive supervision of employee speech in pursuit of both employee morale and general work discipline that is customary in employment, the power to prohibit private discrimination leaves government a relatively wide scope in its regulatory pursuit of an equal opportunity private workplace.[100]

Education is another area where the state has extensive powers to impose content-specific speech regulation which would be quite unacceptable if imposed on the general citizenry through criminal or tort law.[101] This is true at all levels for regulation of student speech within the curricular setting, and in public primary and secondary schools speech may also be regulated to

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more First Amendment protection of the speech of public workers against discipline. *See, e.g.*, Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Work Force*, 61 S. CAL. L. REV. 1 (1987). But even with the most stringent practicable protection, employers could discipline or dismiss employees for a wide range of speech that could never be made criminal or tortious under the First Amendment.

[98] Employer speech can be sanctioned as "threatening" when it could never be considered a regulable "true threat" in other contexts, and secondary boycott law imposes viewpoint-specific restrictions on labor picketing of businesses other than the employer. *See* Becker, *supra* note 38, at 843-44.

[99] *See* Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 372 (1993) (Ginsburg, J., concurring).

[100] *See* Becker, *supra* note 38, at 817; Fallon, *supra* note 24, at 12. For the more restrictive view that workplace harassment law should incorporate a targeting requirement for speech, see Nadine Strossen, *Regulating Workplace Sexual Harassment and Upholding the First Amendment — Avoiding a Collision*, 37 VILL. L. REV. 757, 777-82 (1992) and Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1843-47 (1992).

[101] Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 509 (1969) (recognizing comprehensive authority of schools to control student activities that "would materially and substantially disrupt the work and discipline of the school," while affirming students' First Amendment right to wear armbands in protest of Vietnam War).

inculcate pupils with community norms of civility and decorum. High school administrators can discipline a student for a sexually suggestive speech to a student assembly,[102] and censor a newspaper for language that would be protected outside the school setting.[103] Under these decisions, school officials could clearly stop a high school newspaper from printing racial slurs or discipline a drama club for performing a sexually demeaning skit on school property. The justification would be frankly viewpoint-specific — the school's mission to teach civic values, including racial and gender tolerance.

The educational mission of universities also permits extensive content-specific regulation of student speech in the form of the grading and other evaluation of curricular work. On the other hand, the courts have come to treat the public university as constitutionally committed to the pursuit of truth through free inquiry. Public universities' control over student life has in consequence been subordinated to those aspects of First Amendment law that are most directly based on the concept of the free marketplace of ideas. So a state university, unlike a high school, cannot punish a student editor for publishing headlines and cartoons that violate "conventions of decency;"[104] the First Amendment protects most extra-curricular student expression on campus, and precludes censorship that is ideological, parental, or even pedagogical in nature.[105] There are arguments to be made in favor of allowing more regulation of extra-curricular student speech by state universities in pursuit of educational goals.[106] But the case law presses the other way, forbidding uni-

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[102] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).

[103] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

[104] Papish v. Board of Curators of the Univ. of Mo., 410 U.S. 667 (1973).

[105] Rosenberger v. Rector of the Univ. of Va., 115 S. Ct. 2510, 2520 (1995); Healy v. James, 408 U.S. 169, 169-70 (1972).

[106] Mary Becker has argued that because of the extensive content-based regulation of speech that makes up the core academic function of the university, it is arbitrary for courts to prevent universities from excluding student speech that they judge to be unacceptably racist or sexist. Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U. COLO. L. REV. 975, 1030-46 (1995). Peter Byrne also argues for allowing universities broader discretion than is allowed by decisions like *Healy* and *Papish* to pursue educational aims through the regulation of extra-curricular speech. J. Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 GEO. L.J. 399, 434 (1991). There seems to be much more of a case for allowing *private* institutions to make judgments about which viewpoints will be

versities from screening out bad ideologies — whether unpatriotic, anti-democratic, or racist and sexist — on the ground that these will infect the minds of students.[107] Because universities have no more than general governmental regulatory power over student speech, absent a showing that the strictly educational mission of the university requires additional authority, university anti-harassment regulations should be generally confined to prohibiting speech that falls outside the First Amendment's full protection.

This would still allow the prohibition of the kind of targeted "personal abuse" that, as I have argued, comes within the *Cantwell-Chaplinsky* doctrine. Universities, moreover, need not confine themselves to prohibiting speech that threatens breach of the peace or tortiously inflicts severe emotional distress. Because of their constitutionally recognized mandate to "exclude . . . First Amendment activities that . . . substantially interfere with the opportunity of other students to obtain an education,"[108] universities should be free to punish some private insults which, though lacking full constitutional protection, are not generally criminal or tortious. Finally, it is a reasonable presumption that insults reflecting group bias are most likely to cumulate so as to substantially interfere with student work, so that universities may prohibit these without banning all abusive individual insults.

These principles support a number of the recent campus speech decisions. The regulations that broadly prohibited speech tending to create a hostile environment for students of color or women students did lend themselves to a regime of ideological censorship, and have rightly been invalidated.[109] By contrast,

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heard. California's Leonard Law makes this allowance to religious institutions, but not to other private ones; the latter judgment seems too restrictive.

[107] Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 317-25 (1991). Professor Post usefully distinguishes among "civic", "democratic," and "critical" models of education, generally favoring the last of these for universities. *Id.* The "civic" model would permit speech regulation in the name of virtue and good taste, and the "democratic" model would treat the campus as a full-fledged public forum, while the "critical" model sees the university as a limited-purpose public forum dedicated to the critical pursuit of truth.

[108] Widmar v. Vincent, 454 U.S. 263, 277 (1981) (citing Healy v. James, 408 U.S. 169, 188-89 (1972)).

[109] *See* Iota Xi Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d

the decisions in the Wisconsin and Stanford cases struck down regulations that prohibited only targeted and severely insulting discriminatory speech that falls outside the sphere of campus public discourse;[110] these were based on too narrow a view of both the *Chaplinsky* doctrine and the implications of *R.A.V.*[111] Similarly, the regulations now in place in the University of California system and at the University of Texas, respectively confined to targeted speech that constitutes fighting words and intentional infliction of emotional distress, should likewise be upheld against First Amendment challenge.[112]

Federal civil rights statutes prohibit recipients of federal funds from discriminating on grounds of race, national origin, sex, or handicap. The principles just sketched would allow the universities to meet their responsibilities under these laws to protect students against discriminatory harassment, including verbal abuse, on grounds of race and sex. The early cases decided under Titles VI and IX (none of which involve universities) suggest that the hostile environment concept will indeed be applied within education, using the definitions developed within employment law as a presumptive guide.[113] The Department of Education internal guidelines for Title VI enforcement, issued in 1994, contemplate the enforcement of such an obligation, though in my view those guidelines should give some definition to the speech that they require to be regulated.[114] Given the

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386, 393 (4th Cir. 1993); Dambrot v. Central Mich. Univ., 839 F. Supp. 477, 490 (E.D. Mich. 1993); Doe v. University of Mich., 721 F. Supp. 852, 868 (E.D. Mich. 1989).

[110] *See* UWM Post, Inc. v. University of Wis., 774 F. Supp. 1163, 1178 (E.D. Wis. 1991); Corry v. Stanford, No. 740309, slip op., at 13 (Cal. Super. Ct. Santa Clara County Feb. 27, 1995).

[111] *UWM Post*, 774 F. Supp. at 1178. The Wisconsin rules were broader than the Stanford policy; they prohibited targeted "racist or discriminatory comments, epithets or other expressive behavior" that intentionally "demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and create an intimidating, hostile or demeaning environment for education, university-related work, or other university-authorized activity." *Id.* at 1165. But the university lawyers offered to narrow the reach of the rules by construction to, in effect, racial epithets and their equivalents, and the judge held that even this would have been overbroad, as it was not confined to "fighting words" in the narrow sense. *Id.* at 1178.

[112] UNIVERSITY OF TEXAS REPORT, *supra* note 77; UNIVERSITY OF CALIFORNIA, POLICIES APPLYING TO CAMPUS ACTIVITIES, ORGANIZATIONS, AND STUDENTS § 102.11 (August 15, 1994) (stating University of California harassment policy).

[113] *See supra* note 25.

[114] Racial Incidents and Harassment Against Students at Educational

likely direction of this body of law, universities cannot safely declare themselves free-fire zones for the imposition of racial and other discriminatory abuse by students on other students.

The main point, though, is not that universities risk lawsuits if they fail to prohibit targeted racial abuse. After all, they clearly risk lawsuits if they *do* institute such prohibitions. The main point is that if an African-American student at an American university has to walk through a hailstorm of "Nigger!" to get to class or to the library and the university takes no action to stop this, it is violating its moral responsibility to protect that student's right to equal access to its educational services without discrimination on the basis of race. That is why the Stanford policy should have been upheld in the *Corry* case.

IV. HEARTS AND MINDS

I have argued that the Stanford policy should have survived *R.A.V. v. City of St. Paul* on the basis of Justice Scalia's distinction between speech laws and conduct laws. But I don't think *R.A.V.* represents a good accommodation between the competing rights on the contested legal terrain of hate speech.[115] The de-

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Institutionals: Investigative Guidance, 59 Fed. Reg. 11448 (Mar. 10, 1994). The Regulation provides that "the existence of a racially hostile environment that is created, encouraged, accepted, tolerated or left uncorrected by a recipient also constitutes different treatment on the basis of race in violation of Title VI." *Id.* Further, the Regulation states that such an environment may be created by "harassing conduct (e.g., physical, *verbal, graphic, or written*) that is sufficiently severe, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by a recipient." *Id.* at 11449 (emphasis added). Footnote one indicates that Title VI is "directed at conduct that constitutes race discrimination . . . and not at the content of speech," and states that "[i]n cases in which verbal statements or other forms of expression are involved, consideration will be given to any implications of the First Amendment to the United States Constitution. In such cases, regional staff will consult with headquarters." *Id.* at 11448 n.1. A later footnote adds that the Department "cannot endorse or prescribe speech or conduct codes or other campus policies to the extent that they violate the First Amendment to the United States Constitution," but there is no attempt to say what verbal, graphic, or written conduct must be prohibited in order to comply with the guidelines. *Id.* at 11450 n.7. The virtually unguided discretion the Regulation grants to the Department's Office of Civil Rights gives rise to a powerful vagueness challenge to Title VI insofar as it prohibits hostile environment discrimination in universities.

[115] For similar criticisms of *R.A.V.*, see Akhil R. Amar, *The Case of the Missing Amendments:* R.A.V. v. City of St. Paul, 106 HARV L. REV 124 (1992); Cass R. Sunstein, *Words,*

cision invalidates laws against discriminatory and unprotected speech that should survive First Amendment scrutiny.

An example of a law that seems clearly invalid under *R.A.V.* but in my opinion shouldn't be is the special tort cause of action for targeted racial insults proposed by Richard Delgado.[116] Professor Delgado would make a single episode of serious verbal racial abuse tortious, whereas the current common law of intentional infliction of emotional distress typically requires something more than a single speech-act — a relationship of authority or control between speaker and victim, or a persistence in verbal abuse, or additional conduct. The idea behind the Delgado tort is that targeted private abuse is unprotected speech under *Chaplinsky*, and that the state can reasonably single out racially oriented abuse as particularly likely to inflict significant emotional distress in a single episode.

Another and even clearer example of a legal development that should be constitutional but seems clearly invalid under *R.A.V.* is the tort action for racial intimidation proposed by John Nockleby.[117] Threats are a recognized category of unprotected speech, similar in that respect to fighting words. As with the closely related category of personally abusive insults, the law typically does not treat all threats as crimes or even torts; rather some additional element is normally required — either some further and imminently threatening action, as under the common law of assault; or a manifested intent to extract some benefit by threat, as under the law of extortion; or the use of some particular medium, such as the mails or the telephone.[118] A federal statute does make threats against the life of the President of the United States criminal. Professor Nockleby's propos-

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Conduct, Caste, 60 U. CHI. L. REV. 795 (1993).

[116] Delgado, *supra* note 54, at 179-81. This is the seminal article in the development of a synthesis of free speech and equal opportunity law that focuses on *targeted* hate speech. In addition, see Donald A. Downs, *Skokie Revisited: Hate Group Speech and the First Amendment*, 60 NOTRE DAME L. REV. 629, 651-66 (1985) (distinguishing targeted speech).

[117] *See* John T. Nockleby, *Hate Speech in Context: The Case of Verbal Threats*, 42 BUFF. L. REV. 653 (1994). The proposed tort allows damage recovery for a threat "motivated by racial animus." *Id.* at 700. The example is clearer than that of the Delgado tort because it is universally agreed that threats are unprotected speech, whereas this is controversial with respect to targeted "personal abuse."

[118] *Id.* at 700 n.167.

al would likewise make simple threats tortious if they were motivated by racial animus, while leaving otherwise similar threats made from other motives not subject to liability.

This proposal cannot be justified under the distinction between speech-laws and conduct- laws made in *R.A.V.* and *Mitchell;* no one could say of an anti-threat law that its regulation of speech was "only incidental." Of course the statute prohibiting threats against the President is also a content-specific speech law. The *R.A.V.* Court said it was nonetheless constitutional because "the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable." That is, "the reasons why threats of violence are outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President." In these circumstances "no significant danger of idea or viewpoint discrimination exists. Such a reason, having been adjudged neutral enough to support exclusion of the entire class of speech from First Amendment protection, is also neutral enough to form the basis of distinction within the class."[119]

At first glance, it would seem that Professor Nockleby's proposed tort of racial intimidation could be defended on the same grounds as the presidential threat statute. Given the nature of group bias, it seems plausible to suppose that group-based threats are particularly likely to induce fear in their targets, cause more of the disruption that fear engenders (because the fear will be felt by other members of the same racial group as well), and are especially likely to be carried out.[120] But this ra-

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[119] *R.A.V.*, 505 U.S. at 388. The phrase "neutral enough" conceals a multitude of sins. Many of the categories of unprotected or low value speech are designated as such on the basis of evaluation of the messages they are likely to carry. Consider the varying treatment of political speech, high art, commercial advertising, sexually explicit popular entertainment, ordinary obscenity, and child pornography, to name just a few of the content-based categories recognized in the case law.

[120] In *Mitchell*, the Court noted:

> [T]he Wisconsin statute singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm. For example, according to the State and its amici, bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest . . . . The State's desire to redress

tionale would also justify the ordinance against group-based fighting words struck down in *R.A.V.* One of things that provokes people to fight is fear, and if bigoted insults provoke more fear than other insults generally, they also create more danger of violent response. The Court in *R.A.V.* anticipated this argument, and ruled it out on the ground that "[t]he only reason why such expressive conduct would be especially correlated with violence is that it conveys a particularly odious message." The increased violence rationale could not prevail because it would still be the case that "the St. Paul ordinance regulates on the basis of the 'primary' effect of the speech — i.e., its persuasive (or repellant) force."[121]

So even a plausible showing that racist fighting words were clearly more likely to cause fights than other fighting words would not justify singling them out under an anti-violence statute — because this neutral justification could too easily be used to cover a legislative motive to punish them for ideological reasons. And this prophylactic prohibition is likewise fatal to Professor Nockleby's proposed tort action for racial threats. Yes, racial threats may in general arouse more fear than other threats, but if so this is because they summon up in hearers' minds the history and experience that make racial threats special — the history of slavery, lynchings, race riots, and the contemporary urban racial tinder box. This history is ideologically charged, and psychic effects that are mediated through ideas in this way cannot, under *R.A.V.*, be treated as a ground for special legal intervention consistent with the viewpoint neutrality required by the First Amendment.

The same hyperbolic concern with ideological neutrality also appears in the Court's justification for the key distinction between laws aimed speech and laws that while aimed at conduct sweep up some speech. "Where the government does not target

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> these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases.

Wisconsin v. Mitchell, 508 U.S. 476, 487-88 (1993). The Court is evidently applying only rational basis review to the factual underpinnings of the claim — as it had in validating the threat against the President statute in *R.A.V.*

[121] *R.A.V.*, 505 U.S. at 394 n.7.

conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy."[122] This is the distinction that preserves Title VII hostile environment law from invalidation as mainly a conduct-regulation, and as such not targeted at expressive content.

But here we can see the central flaw of *R.A.V.* in its application to civil rights law. The fact is that while discrimination is conduct, we prohibit it partly *because of* its "expressive content," because of the message of group inferiority it sends. We call the forms of discrimination prohibited under civil rights laws "invidious," and the very name makes the point, which has been embedded in anti-discrimination doctrine from the beginning. One of the first important decisions construing the Equal Protection Clause invalidated a statute excluding black people from juries because it was "unfriendly . . . against them distinctly as colored," and so worked a discrimination wrongful because "implying inferiority in civil society."[123] The point became central in the segregation cases. Even with equal facilities, Jim Crow was unconstitutional because it rested on a premise of white supremacy; by delivering this message, segregating black children into separate schools "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[124] Similarly, the laws preventing racial intermarriage were racially discriminatory, even though their burdens fell with formal equality on white and black alike. Why? Because the purposes behind the law, to preserve "racial integrity" and prevent "a mongrel breed," were so

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[122] *Id.* at 390.

[123] Strauder v. West Va., 100 U.S. 303, 308 (1880).

[124] Brown v. Board of Educ., 347 U.S. 483, 494 (1954). Any notion that it was not the psychic injury or "feeling of inferiority" that was the relevant injury, but rather the deficit in education thought to flow from it, was dispelled in the post-*Brown* cases which invalidated separate but equal segregation for facilities like parks and beaches. In those cases, the only plausible injury that could justify the constitutionally required finding of *inequality* was the psychic one. *See* Gayle v. Browder, 352 U.S. 903 (1956) (buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (municipal golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (public beaches and bathhouses).

obviously "an endorsement of the doctrine of White Supremacy."[125]

The condemnation of race discrimination for imposing stigmatic injury does not merely apply to the actions of governments, which of course have no First Amendment rights. Separate-but-equal segregation is also prohibited to private suppliers of housing, employment, education, and public accommodations under the various state and federal civil rights acts. Under the 1964 Civil Rights Act, a restaurant could not maintain separate "white" and "colored" service areas, even if these were entirely equal and maintained solely in symbolic affirmation of the traditional Southern way of life. The same result would certainly apply under fair housing laws to an apartment owner who wanted to maintain white and colored sides to an apartment complex, or under employment discrimination laws to an employer who wanted to segregate his work force by race while providing equal wages and working conditions. What is the unequal treatment here, unless the law takes account of the stigma imposed on the black tenants and employees by the message?

Civil rights statutes can suppress not only "expressive segregation" but even pure speech in the interest of preventing the psychic and stigmatic injury flowing from discrimination. The maintenance of "white" and "colored" signs to designate different parts of the restaurant are illegal[126] even if the restaurant owner is willing to serve black customers who ask to be served in the part designated "white."[127] Similar prohibitions could be applied, consistent with the First Amendment, to a landlord or employer who wanted as a last resort to retain only the symbols of segregation — say, "white" and "colored" signs over separate entrances to the workplace or the apartment building, even without any further effort to enforce the old ways.

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[125] Loving v. Virginia, 388 U.S. 1, 7 (1967).

[126] *See, e.g.*, United States v. Boyd, 327 F. Supp. 998, 1005-06 (S.D. Ga. 1971) (ordering recalcitrant restaurateur to post specific signs designating both front, formerly white, and back, formerly black, as available to all customers without respect to race).

[127] *See* Lawrence, *supra* note 15, at 442 n.50 (giving example of segregatory signs over separate entrances at diner in Georgia). I believe Professor Lawrence was the first to emphasize the connection between the "stigma" theme in basic civil rights law and the hate speech issue.

Unusual cases like these, where stigma creates the only inequality, are useful in showing that civil rights law recognizes the injury inflicted by the message of caste. In these marginal cases, stigma is the *only* injury. Of course in reality, stigmatic injury is almost always closely intertwined with the imposition of material inequality. The one justifies the other (they are less than us, so we need not accord them the same benefits) and then returns in a vicious feedback loop (look how they live; it proves they are less than us). It would be a great mistake to say that civil rights law is concerned *solely* with stigma — a policy meant to deprive black people of jobs, housing, and other material benefits is illegal even if it is effectively concealed.

During the school desegregation litigation, it became an important constitutional fiction to posit that the separate schools provided for black and white children were materially equal, although they never were, because if material inequality had to be proved school district by school district, massive resistance could have kept legalized segregation in place forever. As a result, we now have firmly planted in our formal legal doctrine the basic human point that bigotry works much of its evil on the hearts and minds of its victims by the messages it sends and continually reinforces.

Historically, however, there have been few cases since the fall of Jim Crow in which a discrimination plaintiff has needed to rely on stigmatic injury alone to make a case. In addition, the disputes over affirmative action have come to the center of civil rights law, and those who would argue for a "color-blind constitution" naturally prefer not to stress the importance of stigmatic injury in anti-discrimination law, as its incidence is so obviously asymmetrical. But the first Justice Harlan, who framed the color-blind slogan, also pointed that segregation is unequal because of what it proclaims: that "colored people are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens."[128] Our constitutional law should remember these words. The majority opinion in *R.A.V. v. St. Paul* forgets them.

Justice Stevens in his separate opinion in *R.A.V.* argued that a prohibition of discriminatory fighting words was not viewpoint-

[128] Plessy v. Ferguson, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting).

based, as the majority concluded, but injury-based.[129] Justice Scalia said this was "wordplay;" bigoted fighting words inflicted "anger, fear, sense of dishonor, etc.," and all that distinguished this from the injury produced by other fighting words was "the fact that it is caused by a distinctive idea, conveyed by a distinctive message"[130] – the message of white supremacy.

Yes. But the special nature of the "anger, fear, sense of dishonor, etc." done by that bigoted "distinctive message" is recognized throughout civil rights law. If the First Amendment makes treating it as a legally cognizable injury an unconstitutional basis for governmental action, it undoes far more of our legal effort to overcome the legacy of racism and other forms of prejudice than the opinion in *R.A.V.* lets on.

To point this out is only to start the process of accommodating free speech and anti-discrimination principles. If everything that conveyed a stigmatic message against members of groups subject to prejudice could be treated as unlawful discrimination, there wouldn't be much freedom to speak on some of the central contested issues in our politics. But we have to begin by recognizing that the clash is between human rights of the first magnitude, free speech and equality, and then move on to try and find a truce line that respects both of them.[131]

The treatment of hate speech by other liberal democracies may lend some perspective. Most of them have accepted as consistent with free expression general criminal prohibitions against promulgating doctrines of racial hatred and persecution. Actually, this has been our own approach until recently, under *Beauharnais v. Illinois*,[132] still not formally overruled. An interna-

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[129] Justice Stevens stated:

> [T]he St. Paul ordinance regulates speech not on the basis of its subject matter or the viewpoint expressed, but rather on the basis of the harm the speech causes. . . . In this regard, the ordinance resembles the child pornography law at issue in Ferber, which in effect singled out child pornography because those publications caused far greater harms than pornography involving adults.

R.A.V., 505 U.S. at 433-34.

[130] *Id.* at 392-93.

[131] For a particularly good discussion of the importance of explicit recognition that resolution of the issue requires accommodation of conflicting rights, see Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 WM. & MARY L. REV. 211 (1991).

[132] 343 U.S. 250 (1952). Though it has never been formally overruled, *Beauharnais*

tional human rights convention requires signatories to prohibit racial hate speech as a basic protection for racial minorities,[133] and Canada has recently held such a law constitutional.[134] Mari Matsuda has ably argued that we should in effect retain *Beauharnais* and recognize an explicit First Amendment exception for racial hate speech.[135] On the related issue of pornography regulation, there have been forceful arguments for a general ban on at least violent pornography as a form of hate speech against women;[136] and again Canada has adopted a version of this approach.[137]

I've been persuaded by the arguments for extending to hate speech the perhaps quixotic (and certainly internationally deviant) American faith that "more speech" is the better remedy than suppression for forms of speech that can in some practical way be countered by argument.[138] But given the practices of other liberal societies, it doesn't seem to me that this should be an easy and confident conclusion — especially given that the costs of our regime of cultural laissez-faire are not borne equally or randomly, but fall disproportionately on those already suffering from discrimination and prejudice. Indeed the practical operation of giving full protection to hate speech may be to

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is generally no longer considered good law. *See* American Booksellers Ass'n, v. Hudnut, 771 F.2d 323, 331 n.3 (7th Cir. 1985); Collin v. Smith, 578 F.2d 1197, 1204 (7th Cir. 1978).

[133] International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195. *See also* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2341-46 (1989).

[134] *See* Regina v. Keegstra, 3 S.C.R. 697 (1990); GREENAWALT, *supra* note 54, at 64-70.

[135] Matsuda, *supra* note 133, at 2348-56. Steven Shiffrin argues to the same effect in the wake of *R.A.V. See* Shiffrin, *supra* note 68, at 67-68, 81-84.

[136] *See* ANDREA DWORKIN & CATHARINE A. MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY (1988).

[137] See GREENAWALT, *supra* note 54, at 113-23 for an account of the Canadian approach.

[138] The premise is not that good arguments will necessarily win out, libertarian classics to the contrary notwithstanding, but rather that we are willing to *bet* on argument in the absence of proof — the leap of faith whose perilous nature Holmes stressed in the *Abrams* dissent, Abrams v. United States, 250 U.S. 616, 630 (1919). The certitude of First Amendment true believers who are *sure* that hate speech regulation must do much harm and little good is inconsistent with this attitude. *See* Frederick Schauer, *The First Amendment as Ideology*, 33 WM. & MARY L. REV. 853, 869 (1992).

exclude many people from the full civic participation that it is one of the aims of the First Amendment to promote.[139]

In any event, *targeted* personal abuse is not readily dealt with by more speech, and the concentration of its burdens justifies lowering the legal threshold of harm required by each incident of it. As I understand it, *R.A.V.* would invalidate the moderate proposals for civil remedies along this line made by Professors Delgado and Nockleby, and in my opinion that is reading the First Amendment for more than it is worth.

V. POLITICS: AFFIRMATIVE ACTION AND IDENTITY POLITICS

Let me conclude with some speculations on how recent politics have affected the law of campus hate speech. How did I get to be the author of a "speech code?" Recall, I wanted to protect students against ordinary invidious discrimination, including discriminatory harassment, of the sort that even conservative courts have found unproblematically prohibitable in the employment area.[140] At the same time, I thought that prohibiting harassment on campus could easily turn into enforcing political orthodoxy. Having a cross burned outside your dorm window is harassment that should be stopped, but constantly hearing affirmative action called a concession to the inferior could easily be considered harassment too.

The best guardrail against that slippery slope would be a regulation defining narrowly and clearly what speech could count as harassment; this just follows standard civil-libertarian strictures about the dangers of vagueness and chilling effect. But in the public and finally the judicial mind, the regulation enacted to provide this protection became a "speech code," and the whole effort ended up with a grotesquely unreal portrayal of

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[139] My resolution of the hate speech dilemma, set out previously in Grey, *supra* note 54, is criticized as failing to take adequate account of the equality side in john powell, Worlds Apart: Reconciling Freedom of Speech and Equality 98-99 (unpublished manuscript, on file with author). Professor powell, drawing on the writings of Jürgen Habermas, argues that both free speech and equality values are founded in a more basic value of participation, and that hate speech regulations should be evaluated in terms of whether they advance or retard citizen participation.

[140] Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993); R.A.V. v. City of St. Paul, 505 U.S. 377, 389-90 (1992).

Stanford as a campus under the dominion of the thought police.

Two political subplots may help explain how this came to pass. First, while anti-harassment regulation is not affirmative action but rather ordinary prohibition of invidious discrimination, it naturally attracts (at least on campuses) the opposition of those who are also opposed to affirmative action. Second, campus anti-harassment regulation is associated with "identity politics," and as such disturbs many liberal social democrats, most of whom support affirmative action in faculty hiring and student admissions.

I don't mean to suggest that all opposition to regulations like the Stanford policy is to be explained as part of some unconscious or unstated political agenda. Some libertarian opponents of these policies consistently argue that the intrusion on free speech caused by anti-harassment policies is not justified by the discrimination they prevent. The distinguishing mark of these critics is that they take primary aim at the genuinely significant form of hostile environment discrimination law in our society, that which is so broadly enforced in the employment area.[141] With respect to discriminatory harassment, the campus is a minor sideshow to the workplace.

But most opponents of "campus speech codes" see no serious civil liberties problems with hostile environment protection in the workplace. They accept this as a straightforward application of the widely accepted prohibition of discrimination in hiring, pay, and working conditions. Why isn't a campus harassment regulation an example of the same straightforward extension of normal prohibitions of discrimination in education?

One answer comes from a familiar story told against campus affirmative action, which goes something like this:

> Affirmative action lets into the university minority students who are less qualified to do the work than the rest of the students. This reinforces racial stereotypes, and leads the majority to resent the minority as usurpers, or to patronize

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[141] *See* Browne, *supra* note 32; Volokh, *supra* note 100. Though in my opinion Browne throws out the baby with the bathwater and even Volokh's more moderate proposal is unduly limiting, these critics do a service in pointing out the censorial and puritanical excesses that are occurring in workplace anti-harassment enforcement, which have so far gotten a free ride from most liberals.

> them as objects of charity. The minority know this, and it adds to the anxiety many of them already feel about whether they truly belong. This leads them to perceive imagined slights and to elevate slights into assaults, whereupon their militant, separatist, and "over-sensitive" response further reinforces stereotypes and stimulates additional resentment or patronization, which in turn . . . . In this downward spiral of misunderstanding and conflict, a campus speech code becomes (if it is narrow) a symbolic sop to the beneficiaries and supporters of the failed affirmative action admission policy, and (if it is broad) gives affirmative action administrators a weapon with which to silence the critics of the policy.

This is not the place to debate the merits of affirmative action in university admissions. Stanford has such a policy, which it regards as consistent with its pledge of non-discrimination. I personally think it is a good policy. But the need to protect unpopular minorities against harassment is quite independent of any affirmative action policy. For example, the students who are probably most likely in practical terms to face the sort of targeted personal abuse forbidden in the Stanford policy are gay and lesbian students, and yet they are not the beneficiaries of any preferential treatment in admissions.

The Stanford policy attracted opposition from critics of affirmative action in another way, one that was more specific to its own details. The policy was neutral on its face, but foreseeably asymmetric in application. What made the Stanford policy both exceptionally narrow and relatively more objective than others was the requirement that to violate it, someone had to make insulting and targeted use of *an actual racial epithet or its equivalent* — or as the somewhat ponderous legal definition had it, a word or symbol "commonly understood to convey direct and visceral hatred or contempt for human beings on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin."[142] This had the virtue for anti-vagueness purposes that practically everyone knows what these words and symbols are, and that when used to insult, they automatically make an insult into a very serious one.

Indeed the test *built in* an "almost everyone knows" element — in order to be an epithet, a word or symbol had to be "com-

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[142] *See infra* Appendix.

monly understood" to have the force of extreme insult against members of the group to which it is applied. But this narrowing and clarifying feature also heightened the asymmetric aspects of the regulation. There are lots of nasty epithets that are applicable in a blanket fashion to black people, Jews, Mexicans, Chinese, Japanese, gay men and lesbians, and women, and everyone knows what they are. There are no such epithets (or at least hardly any) that are "commonly understood" as insulting slurs upon white people,[143] heterosexuals, and men[144] as such. This meant that in practice nothing said to a white heterosexual male would obviously violate the policy, while plenty of things that could be said to women, people of color, and gays and lesbians would do so.

This seemed to me an advantage of the policy. In addition to narrowing it and making its application relatively objective (via the "commonly understood" proviso), it served the educational purpose of pointing out that harassment, like other forms of discrimination, is not a symmetrically or randomly distributed phenomenon. Group-based stratification is an historical and contemporary reality in American life, and thinking about the distribution and intensity of the "epithets" provides a window upon the nature and degree of this stratification that is easily accessible to every native speaker of Americanese.

The policy might have served this educational purpose for some people, but I believe this feature also angered defenders of symmetrical civil-rights policy by emphasizing social facts whose reality (or at least relevance to civil rights policy) they deny. This may have been an important factor in keeping oppo-

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[143] Does the word "honkey" qualify? It seems to me a close case, as the word is not in wide or familiar use. In any event, before it penetrated the general culture in the 1960s, there certainly were no recognized group epithets for white people that were recognized by most white people as such — the very idea was inconceivable.

[144] The difference between the epithets based on sexual parts is instructive. "Prick" is a sex-linked but not sex-based epithet — it always means "unpleasant person who happens to be male." "Cunt" can have a similar connotation with respect to women, but in its more usual usage it is a sex-based slur, meaning simply "woman — all of whom are low and vile." "Bitch" more often used to be only sex-linked, but recently seems to have shifted toward becoming another sex-based epithet. "Bastard" (the comparable sex-linked word for males) doesn't seem to have shifted toward becoming a sex-based epithet in the same sense at all.

sition to the policy alive and even fervent in some quarters, despite the policy's extremely narrow scope, and the absurdity (given that narrow scope) of claims that it was exerting a chilling effect on campus debate.

I was not surprised when some opponents of affirmative action also opposed the policy, for the reasons these two stories suggest. But affirmative action admissions policies in universities are still flourishing, though under attack, while campus anti-harassment regulations like Stanford's that mention speech have been grouped together under the fatal label "speech codes," and are generally in retreat.

I believe this is because they unexpectedly (at least to me) attracted the opposition not only of anti-affirmative-action conservatives and libertarians, but also of many liberals who support both vigorous traditional civil-rights enforcement and affirmative action. These liberals generally support strong hostile environment discrimination enforcement in the workplace, but when it shows up on campus, they readily see its manifestation is a "speech code" and turn against it.

Part of this is no doubt explained simply by the power of categories. Some of the campus anti-harassment regulations do cast a serious chill over ordinary cultural and political debate. The paradigm case remains the Michigan regulation, which told students they would be subject to discipline if they argued in class that women were genetically less aggressive than men or that homosexuality was a disease. Liberals of course oppose this kind of censorship, and then it becomes natural to group together all campus anti-discrimination regulations that mention speech as "speech codes." By familiar linguistic pathways, this carries the connotations created by regulations of the Michigan type over to condemn the Stanford or Wisconsin rules, which protect all public discourse on campus from regulation and prohibit only private and targeted personal abuse. If what they regulate includes "speech," they are "speech codes," and subject to the blanket condemnation generated by their prototype.[145]

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[145] Robert Post writes perceptively about the distortions of First Amendment doctrine caused by thinking of it as designed to protect a single basic category of human activity called "speech," rather than paying attention to the values that justify special constitutional scrutiny of various rationales for regulation and

But another factor also lies behind the opposition of many traditional liberals to anti-harassment regulations on campus — their association with "identity politics." This is the label placed by liberals on roughly the same phenomenon as conservatives and libertarians call "political correctness." Many traditional liberals, and I include myself, do think that the intense recent focus on matters of culture and group identity, especially on the academic left, has served to splinter the traditional liberal coalition and to distract attention from the issues that should most concern liberals, those involved with the widening income and class gap in our society. As a result, liberals have not been as effective as we should be in articulating and promoting a program aimed at the crisis in our political economy.

Henry Louis Gates elegantly states this critique in his essay "Let Them Talk,"[146] one of the most effective pieces of political writing to come out of the hate speech controversy. Professor Gates says that liberals and radicals in the academy have put too much stress on matters of group identity and culture, and not enough on matters of class and economics. He thinks that deconstructing hegemonic texts will not do much to undermine the American caste system, and that cultural studies will not protect poor mothers' welfare checks or blue and pink collar workers' jobs. To him, speech codes epitomize both the distracting and the splintering aspect of identity politics. They divert intellectual attention to cultural issues that are much less important than the dramatic increase of economic inequality associated with globalization, the information economy, and the assault on the welfare state. And by setting previously allied civil rights advocates and civil libertarians against each other in a sideshow debate, they unnecessarily divide people who need to present a united front at a time when the left is weak.

Professor Gates goes on to distinguish carefully between campus "speech codes" that challenge the fundamentals of liberal free speech doctrine, and narrow regulations like the Stanford

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protection for various social practices that involve communication. Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1270-79 (1995). But freedom of speech is about "speech," and that is another illustration of the power of categories.

[146] Henry L. Gates, Jr., *Let Them Talk*, 209 THE NEW REPUBLIC, Sept. 20-27, 1993, at 37.

policy, which accept the basic civil libertarian framework. The former unnecessarily alienate civil libertarians, and hence fragment the liberal coalition in a way the latter do not. But still he sees them all as "speech codes," all part of identity politics, and all a mistake. While the Stanford policy does not disunify, it does distract, turning attention from (for example) the arguments and evidence in *The Bell Curve,* which play an important role in maintaining America's racial caste system, toward the isolated drunken undergraduate shouting epithets on the campus of an elite university.

As I have tried to say here, the policy as I conceived it was never meant to channel the intellectual agenda in any such ambitious way. It had very modest aims, mostly of a civil-libertarian kind — to limit and specify the kind of speech that could be treated as discriminatory harassment. It did presuppose a duty on the part of the University to hold reasonably equal the terms and conditions of study for its students, and assumed that this duty is violated if students who belong to groups traditionally subject to discrimination are allowed to be humiliated by unchecked verbal abuse while trying to get their work done. This seems not a dramatic or unsettling claim, but rather one that readily follows by analogy from the treatment of the workplace generally accepted by liberals today. The principle of equality that lies behind it is also traditional, and I had hoped uncontroversial — that the concern for equal civil rights has to do not only with paychecks and penalties, but also with hearts and minds. If that is identity politics, then identity politics is not all bad.

APPENDIX: THE STANFORD POLICY — TEXT AND COMMENTS[147]

The Fundamental Standard states:

> "Students at Stanford are expected to show both within and without the University such respect for order, morality, personal honor and the right of others as is demanded of good citizens. Failure to do this will be sufficient cause for removal from the University."

Some incidents in recent years on campus have revealed doubt and disagreement about what this requirement means for students in the sensitive area where the right of free expression can conflict with the right to be free of invidious discrimination. This interpretation of the Fundamental Standard is offered by the Student Conduct Legislative Council to provide students and administrators with guidance in this area.

FUNDAMENTAL STANDARD INTERPRETATION: FREE EXPRESSION AND DISCRIMINATORY HARASSMENT

1. Stanford is committed to the principles of free inquiry and free expression. Students have the right to hold and vigorously defend and promote their opinions, thus entering them into the life of the University, there to flourish or wither according to their merits. Respect for this right requires that students tolerate even expression of opinions which they find abhorrent. Intimidation of students by other students in their exercise of this right, by violence or threat of violence, is therefore considered to be a violation of the Fundamental Standard.

2. Stanford is also committed to principles of equal opportunity and non-discrimination. Each student has the right of equal access to a Stanford education, without discrimination on the basis of sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin. Harassment of students on the basis of any of these characteristics contributes to a hostile environment that makes access to education for those subjected to it less than equal. Such discriminatory harassment is therefore considered to be a violation of the Fundamental Standard.

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[147] As adopted June 1990. The Comments were distributed to students along with the text during the period the policy was in effect.

3. This interpretation of the Fundamental Standard is intended to clarify the point at which protected free expression ends and prohibited discriminatory harassment begins. Prohibited harassment includes discriminatory intimidation by threats of violence, and also includes personal vilification of students on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin.

4. Speech or other expression constitutes harassment by personal vilification if it:

a) is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin; and
b) is addressed directly to the individual or individuals whom it insults or stigmatizes; and
c) makes use of insulting or "fighting" words or non-verbal symbols.

In the context of discriminatory harassment, insulting or "fighting" words or non-verbal symbols are those "which by their very utterance inflict injury or tend to incite to an immediate breach of the peace," and which are commonly understood to convey direct and visceral hatred or contempt for human beings on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin.

* * * *

COMMENTS

The Fundamental Standard requires that students act with "such respect for . . . the rights of others as is demanded of good citizens." Some incidents in recent years on campus have revealed doubt and disagreement about what this requirement means for students in the sensitive area where the right of free expression can conflict with the right to be free of invidious discrimination. This interpretation is offered for enactment by the Student Conduct Legislative Council to provide students and administrators with some guidance in this area.

The interpretation first restates, in Sections 1 and 2, existing University policy on free expression and equal opportunity respectively. Stanford has affirmed the principle of free expression in its Policy on Campus Disruption, committing itself to support "the rights of all members of the University community to express their views or to protest against actions and opinions with which they disagree." The University has likewise affirmed the principle of non-discrimination, pledging itself in the Statement of Nondiscriminatory Policy not to "discriminate against students on the basis of sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin in the administration of its educational policies." In Section 3, the interpretation recognizes that the free expression and equal opportunity principles conflict in the area of discriminatory harassment, and draws the line for disciplinary purposes at "personal vilification" that discriminates on one of the bases prohibited by the University's nondiscrimination policy.

1. Why prohibit "discriminatory harassment," rather than just plain harassment?

Some harassing conduct would no doubt violate the Fundamental Standard whether or not it was based on one of the recognized categories of invidious discrimination — for example, if a student, motivated by jealousy or personal dislike, harassed another with repeated middle-of-the-night phone calls. Pure face-to-face verbal abuse, if repeated, might also in some circumstances fit within the same category, even if not discriminatory. The question has thus been raised why we should then define *discriminatory* harassment as a separate violation of the Fundamental Standard.

The answer is suggested by reflection on the reason why the particular kinds of discrimination mentioned in the University's Statement on Nondiscriminatory Policy are singled out for special prohibition. Obviously it is University policy not to discriminate against *any* student in the administration of its educational policies on *any* arbitrary or unjust basis. Why then enumerate "sex, race, color, handicap, religion, sexual orientation, and national and ethnic origin" as specially prohibited bases for discrimination? The reason is that, in this society at this time,

these characteristics tend to make individuals possessing them the target of socially pervasive invidious discrimination. Persons with these characteristics thus tend to suffer the special injury of *cumulative* discrimination: they are subjected to repetitive stigma, insult, and indignity on the basis of a fundamental personal trait. In addition, for most of these groups, a long history closely associates extreme verbal abuse with intimidation by physical violence, so that vilification is experienced as assaultive in the strict sense. It is the cumulative and socially pervasive discrimination, often linked to violence, that distinguishes the intolerable injury of wounded identity caused by discriminatory harassment from the tolerable, and relatively randomly distributed, hurt of bruised feelings that results from single incidents of ordinary personally motivated name-calling, a form of hurt that we do not believe the Fundamental Standard protects against.

2. Does not "harassment" by definition require repeated acts by the individual charged?

No. Just as a single sexually coercive proposal can constitute prohibited sexual harassment, so can a single instance of vilification constitute prohibited discriminatory harassment. The reason for this is, again, the socially pervasive character of the prohibited forms of discrimination. Students with the characteristics in question have the right to pursue their Stanford education in an environment that is not more hostile to them than to others. But the injury of discriminatory denial of educational access through maintenance of a hostile environment can arise from single acts of discrimination on the part of many different individuals. To deal with a form of abuse that is repetitive to its victims, and hence constitutes the continuing injury of harassment to them, it is necessary to prohibit the individual actions that, when added up, amount to institutional discrimination.

3. Why is intent to insult or stigmatize required?

Student members of groups subject to pervasive discrimination may be injured by unintended insulting or stigmatizing remarks as well as by those made with the requisite intent. In addition, the intent requirement makes enforcement of the prohibition of discriminatory harassment more difficult, particularly since proof

beyond a reasonable doubt is required to establish charges of Fundamental Standard violations.

Nevertheless, we believe that the disciplinary process should only be invoked against intentionally insulting or stigmatizing utterances. The kind of expression defined in Section 4(c) does not constitute "insulting or 'fighting' words" unless used with intent to insult. For example, a student who heard members of minority groups using the standard insulting terms for their own group in a joking way among themselves might — trying to be funny — insensitively use those terms in the same way. Such a person should be told that this is not funny, but should not be subject to disciplinary proceedings. It should also not be an disciplinary offense for a speaker to quote or mention in discussion the gutter epithets of discrimination; it is using these epithets so as to endorse their insulting connotations that causes serious injury.

4. Why is only vilification of "a small number of individuals" prohibited, and how many are too many?

The principle of free expression creates a strong presumption against prohibition of speech based upon its content. Narrow exceptions to this presumption are traditionally recognized, among other categories, for speech that is defamatory, assaultive, and (a closely related category) for speech that constitutes "insulting or 'fighting' words." The interpretation adopts the concept of "personal vilification" to help spell out what constitutes the prohibited use of fighting words in the discrimination context. Personal vilification is a narrow category of intentionally insulting or stigmatizing discriminatory statements *about* individuals (4a), directed *to* those individuals (4b), and expressed in viscerally offensive form (4c).

The requirement of individual address in Section 4(b) excludes "group defamation" — offensive statements concerning social groups directed to the campus or the public at large. The purpose of this limitation is to give extra breathing space for vigorous *public* debate on campus, protecting even extreme and hurtful utterance in the public context against potentially chilling effect of the threat of disciplinary proceedings.

The expression "small number" of individuals in 4(a) is meant to make clear that prohibited personal vilification does not include "group defamation" as that term has been understood in constitutional law and in campus debate. The clearest case for application of the prohibition of personal vilification is the face to face vilification of one individual by another. But more than one person can be insulted face to face, and vilification by telephone is not (for our purposes) essentially different from vilification that is literally face to face.

For reasons such as these, the exact contours of the concept of insult to "a small number of individuals" cannot be defined with mechanical precision. One limiting restriction is that the requirements of 4(a) and 4(b) go together, so that a "small number" of persons must be no more than can be and are "addressed directly" by the person conveying the vilifying message.

To take an important example, I believe that a racist or homophobic poster placed in the common area of a student residence might be found to constitute personal vilification of the African-American or gay students in that residence. Any such finding would, however, be context-specific, turning on the numbers involved, as well as on the evidence of the perpetrator's own knowledge and intentions.

5. What is the legal basis for the concept of "insulting or 'fighting' words," and what is the concept's relation to the actual threat of violence on the one hand, and to the actual infliction of emotional distress on the other?

In its unanimous decision in *Chaplinsky v. New Hampshire* (1942), the Supreme Court spoke of "certain well-defined and narrowly limited classes of speech" which are outside the protection of the First Amendment because their utterance is "no essential part of any exposition of ideas" and of such "slight social value as a step to truth" that they can be prohibited on the basis of "the social interest in order and morality." Along with libel and obscenity, this category was said to include "insulting or 'fighting' words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

In subsequent opinions, the Court has consistently reaffirmed the basic *Chaplinsky* doctrine. At the same time, the Court has clarified the concept of "insulting or 'fighting' words" in two important ways. First, where the state attempts to punish speech for provoking violence, the threat of violence must be serious and imminent (*Gooding v. Wilson*, 1972). Second, the "insulting or fighting words" exception does not allow prohibition of utterances offensive to the public at large, but must be confined to insults or affronts addressed to directly individuals, or thrust upon a captive audience (*Cohen v. California*, 1971).

The Supreme Court's phrase "insulting or 'fighting' words" is often shortened to simply "fighting words," an expression which, while roughly capturing the sort of personally abusive language we mean to prohibit, may also have certain misleading connotations. First, the expression may imply that violence is considered an acceptable response to discriminatory vilification; but we prohibit these utterances so that disciplinary proceedings may substitute for, not supplement, violent response. Second, exclusive focus on the actual likelihood of violence might suggest that opponents of controversial speech can transform it into forbidden "fighting words" by plausibly threatening violent response to it — the so-called "heckler's veto." The speech, if it to be subject to be restraint, must also be grossly insulting by the more objective standard of commonly shared social standards. Finally, the "fighting words" terminology might be thought to imply that extreme forms of personal abuse become protected speech simply because the victims are, for example, such disciplined practitioners of non-violence, or so physically helpless, or so cowed and demoralized, that they do not, in context, pose an actual and imminent threat of violent retaliation. Such a limitation might be appropriate under a breach of the peace statute, whose sole purpose is to prevent violence, but does not make sense in an anti-discrimination provision such as this one.

Another and largely overlapping category of verbal abuse to which legal sanctions may be applied is defined by the tort law concept of "intentional infliction of emotional distress." Much of the conduct that we define as discriminatory harassment might well give rise to a civil suit for damages under the "emotional distress" rubric. But that rubric has drawbacks as the legal basis for a discriminatory harassment regulation. It is less well estab-

lished in free speech law than is the fighting words concept. Further, taken as it is from tort law, it focuses primarily on the victim's reaction to abuse; the question is whether he or she suffers "severe emotional distress?" We think it better in defining a disciplinary offense to focus on the prohibited conduct; we prefer not to require the victims of personal vilification to display their psychic scars in order to establish that an offense has been committed.

6. What is included and excluded by the provision requiring "symbols . . . commonly understood to convey direct and visceral hatred or contempt?"

These terms in Section 4(c) provide the most significant narrowing element in the definition of the offense of discriminatory personal vilification. They limit the offense to cases involving use of the gutter epithets and symbols of bigotry: those words, pictures, etc., that are commonly understood as assaultive insults whenever they are seriously directed against members of groups subject to pervasive discrimination. The requirement that symbols must be "commonly understood" to insult or stigmatize, and so injure "by their very utterance," narrows the discretion of enforcement authorities; it means that particular words or symbols thought to be insulting or offensive by a social group or by some of its members must also be so understood across society as a whole before they meet the proposed definition.

The kind of expression covered are words (listed, not exhaustively, and with apologies for the affront involved even in listing them) such as "nigger," "kike," "faggot," and "cunt;" symbols such as KKK regalia directed at African-American students, or Nazi swastikas directed at Jewish students. By contrast, a symbol like the Confederate flag, though experienced by many African-Americans as a racist endorsement of slavery and segregation, is still widely enough accepted as an appropriate symbol of regional identity and pride that it would not in our view fall within the "commonly understood" restriction. The direction of profanities or obscenities as such at members of groups subject to discrimination is also not covered by the interpretation, nor is expression of dislike, hatred, or contempt for these groups, in the absence of the gutter epithets or their pictorial equivalents.

Making the prohibition so narrow leaves some very hurtful forms of discriminatory verbal abuse unprohibited. Substantively, this restriction is meant to ensure that no *idea* as such is proscribed. There is no view, however racist, sexist, homophobic, or blasphemous it may be in content, which cannot be expressed, so long as those who hold such views do not use the gutter epithets or their equivalent. Procedurally, the point of the restriction is to give clear notice of what the offense is, and to avoid politically charged contests over the meaning of debatable words and symbols in the context of disciplinary proceedings.

7. Does not the narrow definition of vilification imply approval of all "protected expression" that falls outside the definition?

Free expression could not survive if institutions were held implicitly to endorse every kind of speech that they did not prohibit. The Stanford community can and should vigorously denounce many forms of expression that are protected against disciplinary sanction. For example, while interference with free expression by force or intimidation violates the Fundamental Standard, less overt forms of silencing of diverse expression, such as too hasty charges of racism, sexism, and the like, do not. Yet the latter form of silencing is hurtful to individuals and bad for education; as such, it is to be discouraged, though by means other than the disciplinary process.

Similarly, while personal vilification violates the Fundamental Standard, even extreme expression of hatred and contempt for protected groups does not, so long as does not contain prohibited fighting words, or is not addressed to individual members of the groups insulted. Yet the latter forms of speech cause real harm, and should be sharply denounced throughout the University community. Less extreme expressions of bigotry (including off-hand remarks that embody harmful stereotypes) are also hurtful to individuals and bad for education. They too should be discouraged, though again by means other than the disciplinary process.

In general, the disciplinary requirements that form the content of the Fundamental Standard are not meant to be a comprehensive account of good citizenship within the Stanford com-

munity. They are meant only to set a floor of minimum requirements of respect for the rights of others, requirements that can be reasonably and fairly enforced through a disciplinary process. The Stanford community should expect much more of itself by way of tolerance, diversity, free inquiry and the pursuit of equal educational opportunity than can possibly be guaranteed by any set of disciplinary rules.

8. Is the proposal consistent with the First Amendment?

Though Stanford as a private university is not bound by the First Amendment as such, it has for some years taken the position that, as a matter of policy, it would treat itself as so bound. We agree with the policy, and we believe that this proposal is consistent with First Amendment principles as the courts have developed them. However no court has ruled on the constitutionality of a harassment restriction based on the "insulting or 'fighting' words" concept, and no one can guarantee that this approach will prove acceptable.

Some civil libertarians would urge abolition of the fighting words category altogether; others would urge that it be strictly confined to cases involving the imminent threat of violence; still others would object to the content-specificity of a prohibition of *discriminatory* abusive utterances. We believe these objections are not likely to prevail with the courts, especially as applied to a narrowly drawn prohibition like this one. What in our view is virtually certain is that any much broader approach, for example one that proceeds on the basis of a theory of group defamation, or (like the University of Michigan regulation recently struck down by a federal court) on the basis of the tendency of speech to create a hostile environment, without restriction to "fighting words" (or some comparably narrow equivalent), will be found by courts applying current case law to be invalid.