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CALIFORNIA POLYTECHNIC STATE UNIVERSITY
San Luis Obispo, California 93407
ACADEMIC SENATE

SPECIAL MEETING OF THE
Academic Senate Executive Committee
Tuesday, April 4, 1995
UU 220, 2:30-5:00pm

I. Minutes:

II. Communication(s) and Announcement(s):

III. Reports:

IV. Consent Agenda:

V. Business Item(s):

VI. Discussion Item(s):

TIME CERTAIN: 2:30 [not 2:40] to 4:00pm

A. **Racial Harassment:** The discussion of this item will include (1) the absence of a racial harassment policy at Cal Poly, (2) the legal aspects of upholding such a policy, and (3) the after-effects of racial harassment on individuals and the institution. Juan Gonzalez (Vice President for Student Affairs), Erica Brown (ASI President), Carlos Cordova (University Legal Counsel), Ray Terry (Chair of the Personnel Policies Committee), members of the Equal Opportunity Advisory Committee, and others will be joining us for this discussion (pp. 2-3).

TIME CERTAIN: 4:00 to 5:00pm

B. **Productivity Enhancement Options:** A discussion of Productivity's definition, measures, and influence on the quality of programs will be held with President Baker and Vice President Koob (pp. 4-6).

II. Adjournment:

encouragement or support of private discrimination on the one hand from (permissible) neutral toleration on the other. Judge Posner's words quoted earlier from the hostile environment discrimination case help make the point: states often deny the equal protection of the laws not by acting, but by omitting to act against private discriminatory action within such areas of responsibility as a government workplace. The point becomes more forceful as, with the growth of the modern welfare and regulatory state, government's sphere of activity broadens, and increased supervision of areas of private conduct brings with it more responsibility for that conduct.[53]

Further, when we look beyond formal constitutional doctrine, we find that our actual civil-rights practices place little weight on the public-private distinction. The social condemnation of a form of discrimination as invidious brings it within the anti-discrimination principle. This principle typically leads both to judicial prohibition of the official forms of prejudice and legislative prohibition where it appears "privately" in employment, housing, education, and public accommodations. By contrast, our civil-liberties practices exhibit no parallel tendency toward legislative protection of Nazis, Klansmen, and flag-burners against private discrimination. "Tolerance," a civil-rights word, and "toleration," a civil-liberties word, name quite different values.

And as I have already stressed, the civil-rights approach likewise does not sharply distinguish between speech and action. "Sticks and stones may break my bones, but words will never hurt me" – which expresses in homely form the First Amendment's Brandeisian ideal of self-reliant civic courage[54] – does not apply within a framework of analysis in which the central injury to be avoided is stigma and humiliation – injury to a socially constructed (and hence socially destructible) personality. Words and symbols are among the chief weapons for inflicting this form of injury. The point becomes clear when one reads the facts of some of the hostile environment discrimination cases; anyone will agree with Judge Posner that the victims in these cases have suffered discrimination in "terms and conditions of employment" as surely as if they had been made to do extra work for the same pay on account of their race or sex.[55]

[53] Thus in *Shelley* v. *Kraemer*, 334 U.S. 1 (1948), extensive legal supervision of the kinds of enforceable covenants running with the land rendered enforcement of a racially restrictive private covenant discriminatory state action; in *Terry* v. *Adams*, 345 U.S. 461 (1953), extensive state regulation of elections rendered the exclusionary practices of the formally private Texas Jaybird Democratic Club (in effect the white Democratic Party) discriminatory state action; in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), public ownership and operation of a parking garage constitutionally entangled the state in the racial exclusion practiced by a privately-owned restaurant leasing space in the building.

[54] See the language from Justice Brandeis's opinion in *Whitney* v. *California*, quoted in text accompanying note 24 above.

[55] Thus in *Bohen* v. *East Chicago*, the plaintiff, a female fire department dispatcher, had to deal with a supervisor who was constantly "speaking to her entirely of sexual matters and describing his preferred sexual positions, Bohen's participation, and his expectations for her behavior." Further, she was "a continual target for obscene comments by firefighters and other male employees and was forced to listen to their filthy talk and descriptions of their sexual fantasies of which she was the object." A fire captain told her that "a forcible rape in some nearby flora would improve her disposition." 799 F.2d, pp. 1182–83.

In *EEOC* v. *Murphy Motor Freight Lines*, 488 F. Supp. 381 (D. Minn. 1980), Ray Wells, a black dockman, was subjected regularly to racial slurs on chalkboards attached to loading carts: "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 in another room, his white co-workers wrote "niggers only" above the door. Management did nothing in response to complaints. See pp. 384–85.

These same hostile environment discrimination cases likewise provide some of the best examples of civil rights analysis that blur the "speech-action" as well as the "public-private" distinction. When a private employer is held liable under Title VII for not taking reasonable steps to prevent racist or sexist verbal assaults by employees on their fellow workers, the government is in effect imposing (as sovereign, not employer) a content- and viewpoint-specific regime of censorship on the speech of private employees. The American Civil Liberties Union has seen the point; it opposes liability for employers or schools who fail to prevent verbal sexual harassment that "has no other effect on its recipient than to create an unpleasant working [learning] environment."[56] But I have found that many good civil-libertarians see these hostile environment cases (at least in the employment context) through the civil-rights lens; they thus agree with current law in accepting that an employer should be obligated to police the workplace to some extent against even purely verbal abuse when it becomes so pervasive and differentially "unpleasant" on grounds of race or sex to affect employees' terms and conditions of employment.

IV

I have tried to suggest how the civil-liberties and civil-rights approaches overlap and clash on the issue of discriminatory harassment; apparently, no higher principle of comparable force and vitality can resolve their conflict.[57] Do these two approaches simply represent, respectively, right- and left-wing political tendencies within American liberalism? It is possible to tell the story that way: civil-liberties (and its marketplace of ideas) then represents a dying classical liberalism, while civil-rights (and its society of equal groups) represents a post-liberal social democracy struggling to be born. Or (to flip the political poles of the historical plot-line) civil liberties now represents the true liberal future at this moment of the end of history, while the asymmetric civil-rights project will be rejected along with other misguided attempts to inject communitarian ideals into the legal governance of free societies.

Both of these sketches operate on the "contradiction" hypothesis; they postulate, on the basis of the structural conflict between the civil-rights and civil-liberties approaches, that one should give way in the name of principled consistency. Following this analysis, one could press (from the right) toward a more formal

[56] *Policy Guide of the ACLU* (rev. ed. 1989), at 142, 400. The ACLU position requires distinguishing between (protected) verbal abuse that merely renders the environment "unpleasant" and that which crosses the line to inflicting actionable emotional distress – hardly a bright line. My thanks to Nadine Strossen for providing me the text of these ACLU provisions.

[57] Which is not to say that verbal formulae may not be offered to supply formal or aesthetic resolution to liberal theory and hence present it as a closed system. John Rawls attempts such a closure with his lexical ordering of liberty over equal opportunity in *A Theory of Justice*; the difficulty is to defend the substance of this firm hierarchy. Joseph Raz supplies an attractive overarching account of "autonomy" as *the* supreme liberal value, resolving liberty-equality conflicts, in *The Morality of Freedom*. I myself prefer the frank pluralism of Isaiah Berlin in "Two Concepts of Liberty," *Four Essays on Liberty*, pp. 167–72 (London: Oxford, 1969).

and neutral "civil-liberties" style of anti-discrimination law or (from the left) toward a more substantive and result-oriented "civil-rights" version of free speech law.

The former move would incline toward an ideal of formal neutrality in civil-rights law, one that stressed not the abolition of caste or status-subordination but the elimination from law of "suspect classifications" – distinctions based upon individuals' immutable characteristics. The latter move would give a larger role in First Amendment law to correction of market imperfections in the marketplace of ideas, pursuing policies such as realistically equal access to media, opening debate to the participation of those previously silenced by social subordination, and so on. As this essay perhaps suggests, I am more inclined to go in the latter direction than in the former, but I am not inclined to go very far[58] – nothing like far enough to bring civil-liberties law into full consistency with the public-private and speech-action treatments characteristic of current civil-rights law.

What, then, is the alternative to seeing this incommensurable conflict as contradiction? My answer is already implicit in the body of the essay; it can be roughly captured by the slogan that the civil-rights approach embodies a *project*, which is to be carried on within a *framework* constituted by the civil-liberties approach. Civil rights has statable social goals, however utopian: the abolition of racism, sexism, and other forms of bigotry. It postulates disease-like social conditions and collective enemies; it then sets us the task of struggling against these and, ideally, eliminating them. The civil-rights mentality represents our collective self-commitment to a definite, though limited and negative, judgment about the nature of the good society, or at least the good society for us – it is one without castes (whether of race, or sex, or sexual orientation, or . . .). Civil-rights law is then conceived mainly as an *instrument* toward that end.

Note that this instrumental account of civil-rights doctrine characterizes even those who are unhappy with affirmative action and who tend to support a symmetric version of anti-discrimination law. First, in my experience, few adherents of this view support a wholehearted symmetry in practice. Second, the reason for this shows up in their arguments; they oppose affirmative action as counter-productive, as a poor strategy in the effort to attain what all concede to be the long-run goal: a caste-free society. To use race as a principle for distributing burdens and benefits, they argue, is to legitimize it as a ground for social action; this reinforces the tendency to revert to less benign uses in moments of social panic or pressure. These neutralists on civil rights are thus, at bottom, instrumentalists too; they share the same conception of the overriding goal, only disagreeing on the best means by which to pursue it.[59]

[58] Thus I sympathize with Owen Fiss's suggestions for moving First Amendment doctrine in a more realistically democratic direction in his "Free Speech and Social Structure," *Iowa Law Review*, vol. 71 (1986), p. 1405. On the other hand, I stop short of endorsing civil-rights-based bans on potentially broad content-defined categories of speech: racist speech, as endorsed by Mari Matsuda, "Public Response"; or sexist pornography, as in the trafficking provisions of the Indianapolis anti-pornography ordinance invalidated in *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985).

[59] Thus in the most "neutralist" of recent Supreme Court civil-rights decisions, *City of Richmond vs. J. A. Croson*, 109 S. Ct. 706, 721 (1989), invalidating a municipal minority business set-aside program, the Court majority stated the grounds for treating even benign racial classifications as suspect in terms instrumental to an anti-caste goal: "Classifications based on race carry a danger of stigmatic harm. . . . They may in fact promote notions of racial inferiority and lead to a politics of racial hostility."

The civil-liberties approach, whether in its right- or left-wing versions, postulates no goal for society in the same sense. What would society look like if the "aims" of the First Amendment were achieved? It would be a society where people could in general say what they have to say, but this merely restates First Amendment doctrine in summary form without articulating a social goal at which it aims. Attempts to state positive goals for the First Amendment typically produce vague and eclectic wish-lists that are of little help in shaping free speech doctrine. A similar point could be made, I believe, of the free exercise clause and some aspects of the right of privacy. We cannot say anything very definite about how society would look if these civil-libertarian rights were fully realized.

We might fairly say that these provisions aim at an open society, but that is to say only that they aim at a society that might look like anything at all. Their very goallessness is in a sense the point of these provisions. They capture our skeptical sense that we do not, in general, know where we are going; we have no dominant *overall* collective project, and we want to keep it that way. The First Amendment, along with the other "civil liberties,"[60] is there to maintain possibilities, to keep the future open to the presently unpredictable workings of the human imagination. Its effective enforcement requires a strong dose of skepticism – not (a self-contradictory) "absolute relativism," but a skeptical *attitude* toward collectively-imposed substantive moral judgments. (This skepticism is not inconsistent with a fair degree of romanticism about the possible achievements of the unchecked human imagination.)[61] By contrast, the civil-rights approach, on its more limited subject (the intolerability of a system of group subordination or caste), is not skeptical at all – no more skeptical than were the abolitionists. (Of course, a degree of skepticism about the possibility of authoritatively ranking human beings, hence of identifying "natural aristocrats," also lends support to this limited egalitarian absolutism.)

In this contrast between the dominant skepticism of the civil libertarian and the dominant confidence of the civil-rights advocate lies the best answer to the objection that a narrow prohibition of discriminatory harassment violates "viewpoint-neutrality" by discriminating in favor of the Left against the Right on issues relevant to civil-rights concerns. The answer is that if the prohibition has been framed narrowly enough, it does preserve practical neutrality – that is, it does *not* differentially deprive any significant element in American political life of its rhetorical capital. I would argue that this is the case with the Stanford provision. The Right has no special stake in the free face-to-face use of epithets

[60] The First Amendment is also tied (as the free exercise and privacy rights are not) to the preservation of a functioning democratic system of government; however, there could conceivably be a working free speech guarantee, justified along the lines I suggest, even in a liberal but undemocratic state.

[61] This romantic side of the civil-liberties mentality is very attractively presented in Steven Shiffrin, *The First Amendment, Democracy, and Romance* (Cambridge: Harvard University Press, 1990).

that perform no other function except to portray whole classes of Americans as subhuman and unworthy of full citizenship.

V

In conclusion, I must return to answer an objection to the Stanford provision that I have heard from critics of both the civil-rights and civil-liberties persuasions. This has to do with the charge that the regulation is drafted so narrowly as to make it "merely symbolic," a point that evidently engages one of the key differences between the two approaches. I readily agree that the provision prohibits very little of the behavior that creates the significantly discriminatory hostile environment that faces students of color and others on many campuses. So why bother with it? The point is made with special force by civil libertarians, who think the proposal exacts a high cost in principle through its incursions into the indivisible fabric of the first amendment. But egalitarians, on their side, can also object on principle to the provision as a form of tokenism.

I also concede that the main good the provision can do is through its educative or symbolic effect – though I would add that the harms its opponents see in it are likewise largely symbolic as well. The question then arises: why can we not get the same educative effect through official statements, declarations of concern, and the like, issued with appropriate vehemence by university authorities whenever serious incidents of racist verbal abuse occur? Let me suggest a partial answer by modifying a hypothetical situation I posed earlier.

Suppose a state legislature declared a "white supremacy day," perhaps invoking the descriptive and predictive terms of Justice Harlan's dissent in *Plessy v. Ferguson* as an ideal. ("The white race deems itself to be the dominant race in this country. And so it is. . . . So, I doubt not, it will continue for all time, if it remains true to its great heritage. . . .")[62] That would be a terrible thing, but would it be unconstitutional? I think it would be – but I also admit there is at least some doubt as to the answer. On the other hand, there is no doubt at all that state imposition of racial segregation in public facilities, even if they maintain perfect material equality, are unconstitutional. Yet by hypothesis the injury, the stigma of official racial insult, is the same in both cases – or, if anything, more explicit and obvious in the case of "white supremacy day." Why is segregation more obviously unconstitutional?

One answer: because the government delivers the insult with more force (and hence compounds the injury) when the action expressing the insult *does* something, even if the thing done is (apart from the insult) not itself discriminatory. We think of government as primarily an instrument for the maintenance of law and order and the provision of material public goods.[63] Its ideological centrality in our lives derives mainly from its role as the primary repository of legitimated power in society. It provides such a "bully pulpit" largely *because* it already has

[62] 163 U.S. 537, 559 (1896). Actual current controversies that raise this issue (though less starkly) include the continued official use by southern states of the Confederate flag.

[63] This isn't true of government in all societies; see Clifford Geertz, *Negara: The Theater State in Nineteenth Century Bali* (Princeton: Princeton University Press, 1980).

so firm a grip on our attention through its coercive powers of taxation and law enforcement.

For this reason, government speaks most clearly when its message is delivered through the exercise of one of those powers, such as the provision of schools, parks, and the like. We think of joint resolutions designating state flowers and mayoral proclamations of schoolteacher week as quite apart from the serious business of government. The adoption of a racist resolution or motto, then, though unconstitutional, would not be as obviously so as would, say, resegregating the seats in the courthouse. When the government acts – when it does something – it puts its money where its mouth is.

Similarly, when a university administration backs its anti-racist pronouncements with action, it puts *its* money where its mouth is. The action, if it is to serve this purpose, must be independently justifiable – independently, that is, of the symbolic purpose. Authorities make the most effective statement when they are honestly concerned to do something *beyond* making a statement. And the action of punishing persons who violate the Stanford harassment regulation *is* justifiable independent of the statement it makes. It provides a remedy for an action that causes real pain and harm to real individuals while doing no good, and it may serve to deter such actions in the future.

Notice that the idea of the "main business of government" advanced here is derived from the classical liberal conception of the state, which in turn lies at the heart of the civil-liberties approach. In that conception, government exists to prevent private force and fraud and to supply tangible public goods by taxing and spending. And that is basically *all* it is there for; its other functions are either suspect or "merely symbolic." Yet throughout this essay I have contrasted that conception of government to one implicit in the civil-rights approach, which undermines traditional public-private distinctions as well as denying the automatic association of "merely" with "symbolic" or "intangible" when discussing of the kind of effects law and government should be centrally concerned with.

And yet, at the end, I revert to slogans involving a distinction between real state action and mere gesture! The point is that neither the civil-liberties nor the civil-rights approach will go away; sometimes, as here, one of them even feeds on the other. With that suggestion of the sometimes paradoxical interweaving of these perspectives, incommensurably co-existing at the heart of modern liberalism, let me call a halt to this very limited examination of their mutual relations.

Law, Stanford University

APPENDIX: THE STANFORD DISCRIMINATORY HARASSMENT PROVISION

PREAMBLE

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. The Student Conduct Legislative Council offers this interpretation to provide students and administrators with some 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.

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.

RACIAL HARASSMENT POLICY

California Polytechnic State University, San Luis Obispo, is committed to creating and maintaining an environment in which the faculty, staff and students work together in an atmosphere of mutual respect and free academic interchange. In the University environment, all faculty, staff and students are entitled to be treated on the basis of their qualifications, competence and accomplishments without regard to race or ethnicity. Individuals are entitled to benefit from all University activities and programs as well as to conduct their daily affairs on campus without being discriminated against on the basis of race or ethnicity.

This policy seeks to prevent racial/ethnic harassment and provide prompt and equitable relief to the extent possible when such activity is observed and/or reported. While the University embraces the principles of free speech guaranteed by the First Amendment to the United States Constitution, it abhors the deliberate abuse of this freedom by those who would provoke hatred and/or violence based on race and ethnicity.

Because racial harassment* creates an atmosphere of intimidation and hostility inconsistent with University goals, California Polytechnic State University, San Luis Obispo neither tolerates nor condones racial harassment towards any individual. Racial harassment is defined as:

1. oral, written, or physical acts conveying racial overtones; and/or

2. reprisals, threats of reprisal, or implied threats of reprisal following a racial harassment complaint.

Examples of racial harassment include, but are not limited to:

> **oral**--derogatory or slanderous comments, jokes, epithets, or ethnic slurs, especially those making use of "fighting words;"**
> **written**--written derogatory or libelous comments, jokes, epithets or ethnic slurs, especially those making use of "fighting words;"**
> **physical**--physical violence and destruction of property, the display of racially offensive objects or pictures, cartoons or posters.

Such behavior is especially egregious if it is repeated or if it constitutes a repetition of past similar behavior.

Racial harassment violates University policy, and seriously undermines the academic and working environment. Program managers, Department Heads/Chairs and student leaders are responsible for taking appropriate steps to disseminate and support this policy statement. All faculty, staff, administrators and students will be held accountable for compliance with this policy.

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* In the context of this policy, the term racial harassment also includes harassment based on ethnicity.

** Fighting words are those that are directed at an individual and are likely to cause the average person to retaliate and precipitate a breach of the peace.

Subject: Uncl: Productivity Discussion -4-

From: Dan Howard-Greene, Exec. Asst. to the President

ick:

Bob Koob suggested that I forward for your review the outline of productivity enhancement options that we developed for our initial presentation to the Chancellor. Please note that this is effectively a menu from which policy choices could be made and not a firm statement of University plans. Please give me a call if you have any questions about the attached. -- Dan

DISCUSSION DRAFT DISCUSSION DRAFT DISCUSSION DRAFT

Academic Productivity Enhancements and Employee Incentives

Productivity Enhancements

Potential academic productivity gains should be conceived along two dimensions:

* The potential to produce more SCU's with existing institutional resources, through more effective use of those resources.

* The potential to produce more SCU's and more successfully completed SCU's through gains in student productivity.

I. Using institutional resources in more innovative ways, Cal Poly will explore ways of achieving:

A. Increased FTES Per Fixed Costs

1. By moving to true year-round operations, fully subscribing the summer term.

2. By utilizing distance learning technology to serve a larger number of students (beyond the physical limits of our present facil ities) and/or to more efficiently utilize faculty teaching in low-demand courses.

B. Increased FTES:FTEF Ratio

1. By utilizing instructional support resources - assistants, instructional technology - to enable faculty to manage the instructi on of a larger number of students.

II. Cal Poly will also explore ways of attaining gains in student productivity.

At present student productivity gains are not rewarded by the CSU stem's funding formulas. To the extent that we shift our focus to student productivity, we may wish to seek shifts in the funding/reward structure away from FTES counts to student outcome measures.

Among the potential productivity enhancements Cal Poly will explore:

1. Initiatives - for example, in the area of financial aid - that permit/encourage students to attempt more SCU's on average.

2. More intrusive advisement, utilizing technology to establish student plans of study and monitor student progress to degree.

3. Expanded use of instructional technology - and/or other instructional support methods - to increase student pass rates in academi c courses.

4. Expanded access by students to information resources, through use of technology.

Employee Relations and Incentives

Consistent with the need to effect productivity enhancements for the efficient accommodation of added enrollment, the University is s ensitive to the need for strong relations with employee groups and the creationof appropriate incentives to reward efforts of facult y and staff.

feature of the exploration of the charter campus concept included the creation of an Employee Relations Committee. This committee w as the result of meet and confer sessions with representation of all bargainingunits and has the endorsement of the CSU and of the s tatewide bargaining units (Units 6 and 8 serve in an observer capacity by theirchoice).

* The committee, through the exploration of specific issues, is attempting to define parameters and guidelines that would lead to a potential framework for the creation of campus-specific sidebar agreements.

* It is envisioned that this type of mechanism would facilitate a linkage between productivity and incentives not currently recogniz ed or possible.

Such incentives could be individual or group, monetary or non-monetary. Clearly, optimization of the deployment of our human resource s toward achieving enrollment objectives can best be accomplished through the overt linkage of productivity with incentives.

We hope to develop models that can be replicated elsewhere in the CSU System.

Benefits to Students

In the event that the cost of enrollment growth is wholly funded through increased revenues, which may come from increased appropriat ions and/or increased fees, the question will arise of what benefits for students

are associated with the higher cost. The best answ er will be derived through a dialogue with paying stakeholders by asking them what they would like for those additional expenditures.

r plan presents a list of potential benefits to be created, following a dialogue with stakeholders:

I. Increased personal attention

A. Personalized advising and easily accessible networked advising information

B. Automated transcript evaluation

C. Guaranteed access to classes "just in time" to meet their program of study demands.

D. Full screen information while registering
1. course availability
2. schedule information

E. "One stop shop" for University imposed contacts
1. fee payment
2. housing and other auxiliary fees
3. financial aid

F. Steady or improved in-class attention
1. same or smaller class sizes
2. increased class sizes accompanied by offsetting opportunities for personal attention:
a. course ware
b. increased student assistants
c. tutorials available through information technology over the network

II. Improved access to services

A. Library access
1. real time, i.e. hours doors are open
2. virtual access

B. Other instructional services
1. email
2. data bases
3. software tools
4. multimedia courseware

C. Administrative information
1. schedule
2. grades
3. status
4. personal information

D. Higher levels of student/academic support services
1. tutorial services
2. psychological services
3. student life and activities
4. career and placement services
5. assessment and testing services
6. special support programs (Minority Engineering, Student Academic Services, Multicultural Programs and Services, Women's Program s and Services)

Mesa - Exec 9/1/95

3/27/95

Free Speech Returns to Stanford

Law: Court ranks the First Amendment ahead of 'hurt feelings' in nullifying a code that was a model for many campuses.

By NAT HENTOFF

In 1990, Stanford University enacted a speech code that prohibited "personal vilification of students on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin." Its core was the largely unused "fighting words" exception to the First Amendment in the 1942 Supreme Court's Chaplinsky decision.

Preceding the code was a vigorous two-year debate on campus. What particularly startled me then was a letter in the Stanford Daily urgently advocating an even harsher speech code than the administration's. The letter was signed by the African American Law Students Assn., the Asian American Law Students Assn. and the Jewish Law Students Assn.

The most distinguished opponent of the speech code on campus was law professor Gerald Gunther, arguably the preeminent constitutional scholar in the country. Gunther had received his elementary school education in Germany, and during the Stanford debate, he noted that as a child, his teacher, fellow students and the townspeople would address him as *Judensau*—Jewish pig.

But, he said, he learned long ago that the way to deal with vicious speech is "with more speech, with better speech, with repudiation and contempt."

Gunther, however, lost the battle over what he called "this hideous precedent" of a speech code.

For years, Stanford had prized itself for adhering to First Amendment standards of free speech even though it is a private university.

Involuntarily—as of February—Stanford is back on a First Amendment standard because of a suit brought by a law school alumnus, 27-year-old Robert Corry, and eight other alumni and students still at Stanford. They claimed that the speech code obstructed "the development of a healthy atmosphere of free and open discussion on campus."

Santa Clara County Superior Court Judge Peter Stone declared the Stanford code unconstitutional because it was "overbroad," thereby punishing speech that goes beyond "fighting words." After all, Stone ruled, "Stanford cannot proscribe speech that hurts the feelings of those who hear it." The university, having targeted "the content of certain speech," violated the plaintiffs' First Amendment rights.

'Tribalism and tensions have increased despite speech codes. . . . "If you're fearful that somehow you will misspeak, you wind up avoiding the very people you need to get to know."'

But how does the First Amendment apply to a private university? It does in California because of the 1992 "Leonard law": Private educational institutions may not discipline any student "solely on the basis of . . . speech or other communication that when engaged in outside the campus is protected from government restriction by the First Amendment."

Stanford's defeat is likely to affect private and public colleges in other states. Indeed, Sheldon Steinbach, general counsel for the American Council on Education—representing 1,700 colleges and universities—told the San Francisco Chronicle: "This is the final nail in the coffin of speech codes."

Court rulings aside, the codes have not worked. Tribalism and tensions have increased despite speech codes. Actually, in part because of them. As Steinbach says, "If you're fearful that somehow you will misspeak, you wind up avoiding the very people you need to get to know."

The president of Stanford, Gerhard Casper, has decided that the university will not appeal Stone's decision. Yet the Stanford code had been regarded by other colleges as the best drawn of all codes. Exultantly, Paul McMasters of the Freedom Forum First Amendment Center at Vanderbilt University declared: "The big tree in the forest of speech codes has fallen."

Although there is no "Leonard law" in other states, Stone gave encouragement to students at private universities around the country. He approvingly cited the plaintiffs' argument that states' civil rights, sexual harassment and workplace protection measures already affect private institutions and individuals because—like the Leonard law—they are "important to the interests of the people of the state" and so are a "constitutional exercise of the broad police powers of the state."

Tom Grey, the Stanford law professor who designed the speech code, wanted to appeal the court decision. He insists that the code has worked because nobody was brought up on charges in the 4½ years of its existence. A student responds, "That indicates one hell of a chilling effect."

Stanford's president now mourns the imposition of First Amendment standards on "the fragile private sphere." Stanford is hardly that fragile. Nor are its students.

Nat Hentoff is an authority on the First Amendment and the rest of the Bill of Rights.

All the ethnic groups in American life must agree to give up the political struggle to control the federal government. All of them must come to believe that they would be better off with race-neutral law, even if they might otherwise win some rounds of political struggle for governmental favor. I believe that the negative-sum game of ethnic politics can only be stopped by both a broad level of popularly supported constitutional prohibitions against it, and certain institutional constraints on the political process.

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CIVIL RIGHTS VS. CIVIL LIBERTIES: THE CASE OF DISCRIMINATORY VERBAL HARASSMENT*

By Thomas C. Grey

> The expression of a change of aspect is the expression of a *new* perception and at the same time of the perception's being unchanged.
> Wittgenstein, *Philosophical Investigations*[1]

American liberals believe that both civil liberties and civil rights are harmonious aspects of a basic commitment to human rights. But recently these two clusters of values have seemed increasingly to conflict – as, for example, with the feminist claim that the legal toleration of pornography, long a goal sought by civil libertarians, actually violates civil rights as a form of sex discrimination.

Here I propose an interpretation of the conflict of civil rights and civil liberties in its latest manifestation: the controversy over how to treat discriminatory verbal harassment on American campuses. I was involved with the controversy in a practical way at Stanford, where I helped draft a harassment regulation that was recently adopted by the university.

Like the pornography issue, the harassment problem illustrates the element of paradox in the conflict of civil-liberties and civil-rights perspectives or mentalities. This problem does not simply trigger familiar disagreements between liberals of a classical or libertarian orientation as against those of a welfare state or social democratic one – though it does sometimes do that. In my experience, the issue also has the power to appear to a single person in different shapes and suggest different solutions as it oscillates between being framed in civil-liberties and in civil-rights terms. At the same time, however, it remains recognizably the same problem. It is thus a very practical and political example of the kind of tension noted by Wittgenstein in the aphorism that heads this essay – a puzzle of interpretive framing, of "seeing-as."

One of my aims in this essay is to bring the reader to share the sense of paradox that, for me, pervades the experience of trying to categorize and resolve the harassment issue. At the outset, let me sketch what I take to be the two main structural features of the clash between the civil-liberties and the civil-rights perspectives that this problem exemplifies.

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[1] Ludwig Wittgenstein, *Philosophical Investigations* 196e (New York: Macmillan, 1958).

First, the two approaches take contrasting views of intangible or psychic injury. The civil-liberties mentality, centrally concerned with protecting freedom of expression against censorship, tends to limit the kinds of harms that can justify abridgment of that freedom to traditionally recognized infringements of tangible interests in property and bodily security. In particular, claims that government can interfere with speech to protect sensibilities, emotional tranquillity, or self-esteem – in general, *feelings* – are strongly disfavored. It is a "bedrock principle" of civil liberties that censorship is not justified to prevent even what is "deeply offensive to many."[2] The civil-libertarian counsel to fellow citizens is the traditional parental advice to the child wounded by insult or rejection: "Sticks and stones may break my bones, but words will never hurt me" – not hurt *enough*, that is, to justify the known costs of censorship.

By contrast, the civil-rights approach, with its roots in anti-discrimination law and social policy, is centrally concerned with injuries of stigma and humiliation to those who are the victims of discrimination – conduct generating "feelings of inferiority" that damage "hearts and minds," in the language of the most famous American civil rights case.[3] The point is not so much to protect a sphere of autonomy or personal security from *intrusion* as to protect potentially marginal members of the community from *exclusion* – from relegation, that is, to the status of second-class citizens.

The second contrast is a related one: it comes in the treatment of the public-private distinction. The active state is traditionally conceived as the sole or dominant threat to civil liberties. Civil libertarians do not spend much of their time or energy seeking ways to positively empower dissenters, deviants, and nonconformists against the pressures brought on them by unorganized public opinion, or by private employers or landlords. The catalogue of civil liberties is certainly what Judge Richard Posner has called the Constitution: "a charter of negative rather than positive liberties."[4]

"But [to continue with the same quotation from Judge Posner] where the liberty asserted is the right to equal treatment irrespective of race or sex, the analysis is more complex."[5] Under the civil-rights perspective, defense of basic human rights is by no means simply a matter of limiting state power. Government may deny equal protection by omission as well as by action – for example, by refusing law enforcement protection to minorities. The tendency of the civil-rights mentality is to favor the prohibition of all invidious treatment that has the effect of "implying inferiority in civil society" to individuals on the basis of their membership in identifiable social groups.[6] This "anti-discrimination principle" goes beyond cleansing government action of bias; it also attacks discrimination on the suspect bases of race, sex, and so on, in the other major institutions of civil society. Thus the identification of a new form of invidious

[2] *United States v. Eichman*, 110 S. Ct. 2404, 2410 (1990).
[3] *Brown v. Board of Education*, 347 U.S. 483, 494 (1954).
[4] *Bohen v. City of East Chicago*, 799 F.2d 1180, 1189–90 (7th Cir., 1986) (concurring opinion).
[5] *Ibid.*
[6] *Strauder v. West Virginia*, 100 U.S. (10 Otto) 303, 308 (1880).

discrimination today typically brings with it pressure for legislation against private as well as official discrimination of that kind in housing, employment, and education.[7]

When the conflict of civil-liberties and civil-rights perspectives is described in terms of the structural features just sketched, it resonates with a number of the binary oppositions of social philosophy: liberty against equality; liberty against democracy; individualism against collectivism; the methods of economics and rational choice theory against those of sociology and cultural anthropology. Though I hope what I have to say here may intrigue those interested in the practical implications of the standard theoretical dichotomies, I do not analyze the harassment issue in these terms.

This is partly to avoid one of the temptations of classic social philosophy, the urge to make it as nearly as possible like geometry or physics. One seeks, using this paradigm, to formulate contending theoretical positions as models, stated as broadly and at the same time as rigorously as possible. Adopting this approach, one then sees an actual controversy that brings these oppositions into play as simply a manifestation of underlying theoretical contradictions. The practical issue serves the purpose of forcing choice between the theories, just as crucial experiments are supposed to force choice between rival scientific hypotheses. On the harassment issue, the structural conflict between civil-liberties and civil-rights approaches then naturally appears as the vivid illustration of a contradiction between, for example, opposed libertarian and egalitarian theories of liberalism. Intellectual rigor and respect for consistency would then require forthright resolution of the contradiction, most readily achieved by rejecting one of the conflicting alternatives.

This seems to me the wrong way to deal with the harassment problem; indeed, it generally seems the wrong way to deal with most theoretical disagreements as they bear on social, political, and legal questions. Rarely can important theories in these areas be plausibly formulated as models or axiom-systems precise enough to give rise to "contradictions." Much more often the actual working theories are perspectives, approaches, or mentalities constituted of more or less vague (but never completely open-ended) clusters of goals, ideals, guidelines, and presumptions. When theories this imprecise clash, no principle of logic requires rejection of either one.

Methods of social philosophy that seek to formulate theories with maximum precision do so with an eye to determinacy – they seek theories that can actually *compel* results where they apply. Theories that conflict over a practical issue then compel conflicting results; when a contradiction arises, one theory must be chosen to the exclusion of the other. Yet in problematic practical situations, each of the conflicting theories (perspectives, approaches, mentalities) may have something valuable and even essential to contribute to a resolution. In such situations, oversharpened theories tend to produce incomplete and one-sided

[7] See Paul Brest, "Foreword: In Defense of the Antidiscrimination Principle," *Harvard Law Review*, vol. 90 (1976), p. 1.

outcomes, whereas a pragmatist tolerance of theoretical ambiguity and imprecision can conduce to better results.

Such a situation is, it seems to me, presented by the issue of discriminatory harassment. This problem exemplifies something liberal pragmatists should accept as normal – a conflict between plural, sometimes incommensurable, structured clusters of values and principles, here the familiar ones surrounding the terms "civil liberties" and "civil rights." Where these conflicting approaches overlap, as they inevitably will, liberal democrats can identify a range of mediating solutions that respect the claims of both conflicting approaches. I offer the Stanford provision on discriminatory verbal harassment as an example of such a solution. But first I should more fully describe the practical issue and the opposed civil-rights and civil-liberties approaches to it.

I

There has recently been an upsurge in the number and intensity of reported incidents of racist, homophobic, and sexist abuse in American universities.[8] An extreme example was the incident reported at the University of Wisconsin in which white students followed a black woman student across campus shouting "We've never tried a nigger."[9] Perhaps less unequivocal in its implications was this exchange at Stanford: after a dormitory argument in which a black student had claimed that Ludwig van Beethoven was a mulatto and other students had objected to placing such stress on racial origins, two white students defaced a picture of the composer into a blackface caricature and posted it near the black student's room.[10]

The question is: what disciplinary action (if any) is appropriate in such cases? A pure civil-rights approach treats the conduct in question as discriminatory harassment. Then principles of equal treatment not only entitle but *require* universities to punish the behavior, at least if it becomes sufficiently widespread to create a pervasively hostile environment. The analogy is to employers' obligations to deal with racial or sexual harassment by fellow employees in the workplace. When black or female employees must endure a barrage of race- or sex-based insults from co-workers, an employer who ignores the situation

[8] I will often make the oversimplifying assumption that all these forms of discrimination can and should be treated the same. Each form of insult has its own unique features and problems, however, and may ultimately generate its own distinct body of legal doctrine, as does each form of discrimination recognized as "invidious" under equal protection law and civil rights statutes. I will, moreover, put discrimination against gays and lesbians in with the rest, though it has *not* yet been recognized as invidious under federal constitutional law. A number of state and local civil rights laws, and the anti-discrimination policies of many public and private institutions (including Stanford) do prohibit sexual-preference discrimination, as in my view all should.

[9] *Time*, May 23, 1989, p. 89.

[10] I was faculty co-chair of the campus judicial council at Stanford when this incident occurred; no disciplinary charges were ultimately brought. Thereafter I worked on the drafting of a disciplinary standard to deal with racial harassment, which was adopted by the campus legislative body and became effective in June of 1990. The Beethoven incident is treated eloquently, strictly from a civil-rights perspective, in Patricia Williams, "The Obliging Shell: An Informal Essay on Formal Equal Opportunity," *Michigan Law Review*, vol. 87 (1989), pp. 2128, 2133–37.

may be guilty of unlawful (and if a public employer, unconstitutional) race or sex discrimination.[11] Again I quote Judge Posner, certainly no civil-rights extremist:

> By taking no steps to prevent sexual harassment, the city created a worse working environment for women than for men . . . That is discrimination . . . It is as if the city decided to provide restrooms for male but not female employees, and when pressed for a reason said it simply didn't care whether its female employees were comfortable or not.[12]

In the case in question, the sexual harassment included some physical contact and coercive sexual proposals by supervisors, as well as sexist obscenities and epithets from fellow workers. In discriminatory harassment cases, however, courts have not sharply differentiated between action and verbal abuse in evaluating claims by black or female employees. Typically, action and speech are blended together in a course of conduct that gives rise to liability for the employer when it creates an intolerably "hostile environment" for women or racial minority employees. In some cases, which the courts have not singled out for special treatment on this ground, harassment is found from speech alone – typically a stream of racist or sexist jokes, pictures, and epithets. To avoid liability, the employer must take reasonable steps to keep verbal as well as physical or otherwise coercive abuse below the level of a "sustained pattern of harassment."[13] The decisive question is not whether the harassment constitutes speech or action, but whether it is widespread and serious enough to go beyond what the courts judge must be tolerated as part of life's ordinary rough and tumble.

A civil rights approach to the verbal abuse problem on campus simply applies the doctrine of hostile environment discrimination to the university. Most

[11] The applicable legal provisions are (for most private employers) Title VII of the Civil Rights Act of 1964, which prohibits employers from discriminating against employees on the basis of race or sex in the "terms or conditions of employment," and (for public employers) the Fourteenth Amendment's requirement that no state may "deny to any person the equal protection of the laws," which has been construed to prohibit race and sex discrimination in public employment.

[12] *Bohen v. East Chicago*, p. 1191. Judge Posner alternatively analyzed the employer's inaction as analogous to a selective withdrawal of protection, as if a government denied police protection to blacks, or failed to punish rapes alone among violent crimes.

[13] In sex discrimination cases under Title VII, the courts distinguish between "*quid pro quo*" harassment (efforts to extract sexual favors in return for job retention or promotion) and "hostile environment" harassment of the kind described in the text. Racial harassment takes only the latter form. The Supreme Court recognized hostile environment sexual harassment as a Title VII violation in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). On hostile environment discrimination, see *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) ("sustained pattern of harassment"); *Bundy v. Jackson*, 641 F.2d 934 (D. C. Cir. 1981), and *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982) (sexual harassment cases involving mixed *quid pro quo* and pure verbal harassment incidents); *Erbia v. Chrysler Plastics*, 722 F.2d 1250 (6th Cir. 1985); *EEOC v. Murphy Motor Freight Lines*, 488 F. Supp 381 (D. Minn. 1980) (employer failure to take action against racist insults of black employee by fellow workers held unlawful discrimination).

educators, like most employers, are required by law (as they should feel required by fairness) to provide equal opportunity to women and students of color. Campus harassment can make the educational environment hostile, just as workplace harassment makes the employment environment so. Many campuses have already recognized this with respect to sexual harassment and have adopted disciplinary restrictions accordingly. There is no good reason why racial or anti-homosexual harassment should not be treated in the same way. As a legal matter, an unremedied "sustained pattern of harassment" might make the university itself guilty of unlawful discrimination.[14] Prudent and sensitive administrators will prohibit acts of harassment before the point at which the conduct cumulates into a sustained pattern and thus creates a legally actionable hostile environment.

An analysis like this can easily lead to a prohibition defined purely in terms of civil rights. Thus the University of Michigan, faced with an upsurge in racial harassment, enacted a prohibition against any "behavior, verbal or physical" that "stigmatizes or victimizes" an individual on the basis of race, sex, or other characteristics protected under the university's non-discrimination policy and that has the "reasonably foreseeable effect of interfering with an individual's academic efforts," or "[c]reates an intimidating, hostile or demeaning environment for educational pursuits." This is a prohibition drafted to track the form of injury dealt with by the civil-rights approach – conduct contributing to a hostile environment that denies equal educational opportunity.[15]

And yet, in the first major case involving the regulation of campus verbal harassment, a federal district court struck this provision down on First Amendment grounds.[16] Civil libertarians applauded the opinion; they qualified their applause at the result only because the case seemed so easy that it did not establish a particularly powerful precedent for other cases of regulation of campus harassment. And an easy case it was – as soon as it was considered from the angle of a civil-liberties, rather than a civil-rights, approach.

Viewed through a First Amendment lens, the Michigan regulation – now seen as a "hate speech" or "group defamation" rule rather than a harassment prohibition – was a dramatically overbroad incursion into core areas of protected speech. Consider just one example of the kind of speech prohibited by the regulation, taken from the guidelines the university distributed to student to explain the new policy:

[14] As with public employers, the Fourteenth Amendment prohibits public universities from discriminating on the basis of race or sex in providing educational services. Private universities receiving federal grants are subject to similar prohibitions under Title IX of the Civil Rights Act of 1964. In some states, statutes also prohibit discriminatory practices by private universities. Finally, most private universities in the United States have committed themselves to non-discrimination policies, which may give rise to contractual liability when a student can show discrimination that would be unlawful for a public university.

[15] Indeed it was evidently drafted on the model of the Equal Employment Opportunity Commission guidelines, which define sexual harassment to include "verbal or physical conduct of a sexual nature" that "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 CFR §1604.11(a).

[16] *Doe v. University of Michigan*, 721 F. Supp. 852 (E. D. Mich. 1989). See 856 for the text of the regulations.

> A male student makes remarks in class like 'Women just aren't as good in this field as men,' thus creating a hostile learning atmosphere for female classmates.[17]

From this one can readily extrapolate to other statements (made in class or in a dorm hallway debate) that would violate the standard: arguing on the basis of IQ data that blacks are less intelligent than whites; that homosexuality is "unnatural," or is a disease; that women are naturally less creative than men.[18] The expression of these opinions is certainly experienced as "stigmatizing" and "demeaning" by many, probably most, students belonging to the groups thus insulted; when cumulated to create a climate of opinion, comments like these might well foreseeably "interfere with the academic efforts" of the students whose basic humanity or equal mental capacity they deny.

Because the Michigan regulation has been so universally condemned, it is important to understand how campus authorities might have drafted and enforced it the way they did. They evidently viewed the problem of verbal harassment from one perspective only: the perspective of civil rights. Viewed solely through the lens provided by anti-discrimination law and policy, the kind of statements to which the regulation was applied might well appear as more polite but no less demeaning versions of the kind of racist, sexist, or homophobic insults routinely prohibited under anti-harassment codes in the employment area.

Indeed, the very "politeness" of these statements might rationally be thought to make them *more* disabling to the educational performance of those exposed to them than are the relatively rare incidents involving gutter epithets. At most universities, the victims of the crudest insults can partly discount them because they clearly transgress the dominant mores. By contrast, the more academically respectable forms of denigration of blacks, women, and gays can be supported by evidence and argument, the forms of discourse with maximum credibility in the university. And the damage such statements do is probably enhanced when the stereotypes they reinforce deny the ability of groups of students to study and learn whose members already feel marginal on many campuses. The discourse of "statistics show . . ." and "environmental factors cannot fully explain . . ." may much more effectively create a hostile educational environment than "[Epithet] go home!"

But as soon as a civil-liberties perspective is brought to bear, the kind of speech reached by the Michigan regulation is readily seen as close to the core of the First Amendment. The record in the federal court challenge to the regulation, with a large number of complaints processed, and many resolved

[17] *Doe v. Michigan*, p. 858. The Guide went on to warn students that "YOU are a harasser when . . . You comment in a derogatory way about a . . . group's . . . cultural origins, or religious beliefs" – a very sweeping restriction on the discussion of history and current events. Might not screening *The Last Temptation of Christ* or selling *The Satanic Verses* count as "derogatory comment" on a "group's religious beliefs"?

[18] Under the University of Michigan regulation, a social work student was in fact prosecuted for expressing the view that homosexuality was a disease, for which he hoped to develop a counseling plan in a research class; *Doe v. Michigan*, p. 865. The other two statements propound views that I trust my readers will admit are widely held, or at least entertained, if relatively rarely expressed, on American campuses.

informally to require apology (and, in some cases, what looks suspiciously like University of Beijing-style "re-education")[19] in response to speech expressing views on issues of public and campus concern, did indeed present an easy case. If questions that go to the core of human rights and social policy issues cannot be freely debated on campuses, what issues can?

The regulation established a general, content-based regime of censorship of politically and socially controversial speech, with speech concerning issues of race, gender, and sexual orientation subject to special restriction. Worse, within that content-defined field of regulation, the censorship regime imposed a viewpoint-specific orthodoxy: students were allowed to state radical or liberal, but not conservative or reactionary, views on controverted issues. They could say that the mental abilities of blacks were equal to or greater than those of whites, but not lesser; that homosexuality was a culturally formed category of sexual preference or a natural inclination, but not a disease or a sin; that women's genetic endowments made them equal or superior to men in socially valued activities, but not inferior.[20]

Viewed from the civil-liberties perspective, regulations such as these are highly suspect because they are aimed squarely at the content of speech rather than at its incidental injurious consequences. Under current First Amendment doctrine, no restriction focused on the communicative impact of speech is permissible unless it is necessary to prevent serious and imminent harm; the harm in question cannot be simply offense, however strong and justified, at what is said. Finally, any restriction within these narrow confines must be "viewpoint neutral."

The underlying idea is that there must be no ideological censorship – no official regime of screening utterances for the political, moral, or social acceptability of the message they deliver.[21] "The First Amendment recognizes no such thing as a 'false' idea."[22] The idea behind this slogan need not be a paralyzed relativism. It can be a historically-founded liberal suspicion that officials are peculiarly unlikely to accurately distinguish falsity from truth under a regime of censorship, as expressed in Justice Jackson's classic *Barnette* opinion:

[19] For example, a student who had recited a homophobic limerick in class plea-bargained the dropping of a charge against him under the Michigan regulations in return for a classroom apology, a letter of apology to the campus paper, and attendance at a "gay rap session;" *Doe v. University of Michigan*, p. 865. It has become a commonplace among civil-libertarian opponents of verbal harassment regulation to stress the utility of "education" (rather than disciplinary rules) as a remedy for campus discrimination, generally without much serious attention to the question of what such "education" may entail. In my own view, the worst of both worlds is achieved when multicultural sensitivity training (valuable as it can be when done well) is imposed as a penal sanction for harassment. I would sharply separate punishment of harassment (which should be confined to cases of intentional wrongdoing) from orientation efforts aimed at acquainting students and others with the diverse cultural backgrounds, expectations, and sensitivities they are likely to meet in the contemporary university.

[20] The plaintiff in the Michigan case was a psychology graduate student working on the biological basis of differences in personality traits and mental abilities. He alleged, quite plausibly, that certain theories in his field could be perceived as sexist or racist, so that their discussion might be sanctionable under the policy. *Doe v. Michigan*, p. 858.

[21] An excellent and often-cited doctrinal analysis, distinguishing the key terms of art's "communicative impact," "content," and "viewpoint," is Geoffrey Stone, "Content Regulation and the First Amendment," *William and Mary Law Review*, vol. 25 (1983), p. 189.

[22] *Hustler Magazine v. Falwell*, 108 S. Ct. 876, 879 (1988); compare *Gertz v. Robert Welch*, 418 U.S. 323, 339 (1974).

> If there is any star fixed in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . .[23]

Or it can be a republican faith in the citizenry's ability to respond to bad speech with better speech, as in Justice Brandeis's equally classic *Whitney* opinion:

> Fear or serious injury alone cannot justify suppression of free speech . . . Those who won our independence by revolution were not cowards . . . If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[24]

The civil-liberties analytical framework tends to confine regulation of campus verbal harassment to prohibiting conduct verging on assault, including perhaps tortious "intentional infliction of emotional distress" and certain face-to-face insults that are especially likely to provoke immediate violence – so-called "fighting words." Further, the civil-liberties framework requires that any speech regulations must be evenhanded; universities may not single out ideologically defined classes of provocations or verbal assaults for prohibition. This, let it be said, is the moderate civil-libertarian position. Civil-liberties purists find even the "emotional distress" and "fighting words" theories insufficiently content-neutral and so oppose *any* disciplinary measures against verbal harassment whatever – even in the extreme Wisconsin example I mentioned above.[25]

For some, of course, the civil-rights and civil-liberties approaches are not "perspectives" on this problem; rather, one or the other of these approaches simply states the reality of the situation. Thus on the civil-rights side, many students at Stanford were sincerely shocked when free speech concerns led university authorities not to prosecute the Beethoven poster episode at Stanford that I described above. A number of them described this as an instance of taking something that was clearly one thing – a racist atrocity, which if left unpunished established an officially condoned practice of discrimination – and "turning it into" a civil liberties issue. Later in the year, when members of a left-activist student coalition seized (forcibly, but without causing personal injury or property damage) the office of the president of the university, they cited the

[23] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 641 (1943). Compare *Texas v. Johnson*, 109 S. Ct. 2533, 2544: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea because society finds the idea itself offensive or disagreeable."

[24] *Whitney v. California*, 274 U. S. 357, 377 (1927).

[25] The moderate view is especially well articulated, by a present General Counsel of the ACLU, in Nadine Strossen, "Regulating Campus Speech: A Modest Proposal," *Duke Law Journal*, p. 483. Strossen, like other moderates, is more skeptical of the "fighting words" than of the "emotional distress" rationale. The purist view is inferrable from Franklyn Haiman, *Speech and Law in a Free Society* (Chicago: University of Chicago, 1981). Haiman altogether rejects the "insulting or fighting words" doctrine, (pp. 132–35, 256–59); he would confine sanctions for verbal infliction of emotional distress to cases of injury through intentional factual misrepresentation (pp. 148–56).

Beethoven incident as one of their main grievances; when they were charged (and ultimately found guilty) under the university disciplinary code for the takeover, they said it was an irony that their "peaceful protest" had been punished while this clear incident of racist persecution had been treated as protected free speech.

On the other side, many civil libertarians simply do not see the problem as involving issues of civil rights or discrimination at all. It is *not* a clash of equal protection and free speech, they insist, but a pure civil liberties issue, in which fragile free speech values are threatened by powerful political pressure groups on liberal campuses. For these civil libertarians, protecting discriminatory verbal harassment is no different from protecting flag-burning; it represents the principled defense of reason against the perennial collective emotional impulse to censor, rather than answer, the speech of unpopular and often unpleasant dissenters.[26]

My own view is that there are plenty of good reasons, and plenty of worthy passions, on both sides of the issue. And they seem to me really to be *sides* – mutually incommensurable perspectives – rather than the poles of a well-defined continuum along which negotiators may approach each other in search of a solution that measurably splits the difference between them.[27] The epigraph to this essay occurs in the course of Wittgenstein's famous discussion of the ambiguous "duck-rabbit" drawing, which can appear as either a duck or a rabbit, depending on how you look at it.[28] You can learn facility at shifting between seeing the figure as a duck and seeing it as a rabbit, but at any moment it appears only in one aspect or the other. The campus harassment issue has something of the same quality.

II

Let me now describe the proposal I originally drafted, which was recently adopted as a disciplinary rule covering discriminatory verbal harassment at Stanford.[29] The provision is an attempt to accommodate competing values, to mediate the incommensurable conflict of civil-liberties and civil-rights approaches on this issue. I am not confident that it is better than other mediating solutions, though I can give a reason for the choice of each of its elements. But I do

[26] It has been my personal experience in debating this issue with colleagues and students that few causes attract more powerful *emotional* adherence than does First Amendment absolutism. I make the point not to disparage this aspect of their commitment, but because civil libertarians frequently pose the verbal harassment issue (typically with analogy to the flag-burning issue) as a clash between "reason" on their side and "emotion" on the other. On the other side, not a few civil-rights egalitarians take up the same binary opposition between "reason" and "passion" and turn it around to accuse free speech defenders of the moral defect of cerebral and unfeeling elitism.

[27] Incommensurable conflicts are, roughly, those we have to resolve in the absence of a satisfactory determining norm (substantive rule, agreed procedure, or common metric). They are not contradictions and need not be resolved "irrationally." A good discussion of value-incommensurability in the context of individual action can be found in Joseph Raz, *The Morality of Freedom*, 321–66 (Oxford: Clarendon Press, 1986).

[28] Wittgenstein, *Philosophical Investigations*, p. 194.

[29] The text of the Stanford regulation is given in the Appendix.

believe that some such accommodating solution, as against a "principled" choice implementing one approach to the exclusion of the other, is needed.[30]

The first section of the provision restates Stanford's policy on free expression, including an insistence that students must learn to "tolerate even expression of opinions which they find abhorrent." Counterposed is a second section restating the university's existing policy against discrimination "in the administration of its educational policies" on the basis of "sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin," and adding that harassment on the basis of these characteristics can, when cumulated, constitute hostile environment discrimination under the policy. The third section notes that the free expression and anti-discrimination policies conflict on the issue of verbal harassment; it provides that "protected free expression ends and prohibited discriminatory harassment begins" at the point where expression of opinion becomes "personal vilification" of a student on the basis of one of the characteristics stated in the anti-discrimination policy.

The operative part of the provision comes in the fourth and last section, which defines "personal vilification" as speech or other symbolic expression that (a) is intended to insult or stigmatize individuals on the basis of one of the designated characteristics; (b) is "addressed directly" to those insulted or stigmatized; and (c) makes use of "insulting or 'fighting' words," defined (quoting from *Chaplinsky v. New Hampshire*[31]) as words (or non-verbal symbols) that "by their very utterance inflict injury or tend to incite to an immediate breach of the peace."

Finally, the proposal adds a narrowing proviso designed to adapt the *Chaplinsky* insulting-or-fighting words concept to civil-rights enforcement. In the context of discriminatory harassment, punishable words (or symbols) are defined as those "commonly understood to convey direct and visceral hatred or contempt for human beings on the basis of" the characteristics specified in the anti-discrimination policy – a phrase meant to capture the sense of the common expression "racial epithets" and to extend it to other prohibited forms of discrimination.

To summarize, the rule would punish speech directed to individuals: speech meant to insult them on the basis of a protected characteristic that also makes use of one of the gutter epithets of bigotry. It thus adopts one element of what I have called the "moderate civil libertarian" view of harassment regulation; it prohibits only expression that falls roughly within the categories of fighting words or intentional infliction of emotional distress doctrines. The provision therefore only prohibits a very narrow category of expression, immunizing even

[30] One example of an alternative mediating solution was the situation at Stanford before adoption of the harassment provision. The university's president and general counsel had said publicly that face-to-face use of racial epithets could be considered to violate the long-standing "Fundamental Standard" which required of students conduct manifesting such "respect for the rights of others as is expected of good citizens." Though that solution gave too little guidance to satisfy civil liberties concerns in my view, it was in the same ballpark as the one later adopted. Other examples of mediating solutions include the regulation adopted at the University of California and the one proposed at the University of Texas. See note 32 below.

[31] 315 U.S. 568, 572 (1942).

the vilest hate-speech addressed generally to a campus audience as well as many serious face-to-face discriminatory verbal assaults. Many students of color and other civil-rights advocates at Stanford have opposed it, for these reasons, as too weak an anti-discrimination measure.

At the same time, narrow as it is, the proposal retains enough of the civil-rights approach to trouble most civil libertarians. It seems to violate the second central civil-liberties tenet: not only can speech be regulated only to the minimum extent necessary to prevent immediate and otherwise unremediable harm; further, any speech regulation must be *neutral* – generally neutral as to content, certainly neutral as to viewpoint. The provision's apparent violation of the neutrality constraint results directly from its being framed as civil-rights protection or anti-discrimination measure.

To bring out the neutrality problem, I need to describe more fully the legal underpinnings of the proposal. It does not precisely track either of the most common bases for narrow discriminatory harassment regulations: the "fighting words" or "intentional infliction of emotional distress" rationales, which have been adopted at other universities in the wake of the Michigan case.[32] Rather, it draws on the relevant common elements in those two theories, adapting them to the context of a civil-rights-based campus harassment regulation.

In the *Chaplinsky* case, a unanimous Supreme Court excluded from First Amendment protection "insulting or 'fighting' words," those which "by their very utterance inflict injury" *or* that "tend to incite an immediate breach of the peace." Subsequent cases have focused on the "breach of the peace" half of the category, and the Court has made clear that its reach is narrow indeed; it has never affirmed a conviction under the doctrine since *Chaplinsky* itself in 1942.[33] During those years, the Court has also developed the "heckler's veto" doctrine as a counterweight to its "fighting words" proviso, putting the burden on law enforcement to protect speakers against threatened violence, rather than avoiding the violence by silencing the speaker.[34]

The heckler's veto analysis brings out the weakness in the "fighting words" doctrine as it was traditionally formulated. The concept seems to ask purely factual and predictive questions. Can imminent violence be expected from an audience? Are available law enforcement resources insufficient to protect the speaker? As many civil libertarians have argued, however, it seems inconsistent with free speech values to punish a speaker simply because the heckler's veto

[32] The University of California has adopted a prohibition on student harassment by "fighting words," defined as "those personally abusive epithets which, when directly addressed to any ordinary person are, in the context used and as a matter of common knowledge, inherently likely to provoke a violent reaction whether or not they actually do so." These "include, but are not limited to" terms abusive in terms of race, sex, or the other categories of discrimination law. Harassment occurs when fighting words are used to "create a hostile and intimidating environment" which the utterer should know will interfere with the victim's education.

A committee at the University of Texas has proposed a regulation of "racial harassment" tracking the Restatement of Torts definition of intentional infliction of emotional distress, with the addition of the element of intent to "harass, intimidate, or humiliate . . . on account of race, color or national origin." Establishing a violation requires an actual showing of "severe emotional distress" on the part of the victim.

[33] See *Cohen v. California*, 403 U.S. 15 (1971); *Gooding v. Wilson*, 405 U.S. 518 (1972).

[34] Compare *Gregory v. Chicago*, 394 U.S. 111 (1969) with *Feiner v. New York*, 340 U.S. 315 (1951).

is made effective – because, that is, a sufficient number of thugs have plausibly threatened violence and available police protection is inadequate. A serious civil-libertarian presumption in favor of free speech seems to require some evaluation of what the speaker has said – are they really "*fighting* words"? – before silencing the speaker in the face of a hostile audience can be said to be a proper response.

The same requirement of normative evaluation of the speech must also apply, it seems, in the case of intentional infliction of emotional distress. And here, indeed, the evaluative element is explicitly built into the standard common law elements of the tort. The victim must foreseeably suffer severe emotional distress from what the defendant does or says, but this is not sufficient. In addition, the defendant's conduct must be, as Section 46 or the Torts Restatement puts it, in unmistakably evaluative terms, "beyond all possible bounds of decency" and "regarded as atrocious and utterly intolerable in a civilized community" – in short, "outrageous."[35]

I suggest that we interpret the *Chaplinsky* category of "insulting or 'fighting' words" as designating utterances that at least meet the standard set by Restatement Section 46. For free speech purposes, though, the Section 46 standard is *too* purely evaluative – too vague.[36] But if the vagueness problem can be met (by delineating a category of utterances that *are* "outrageous" and are given further and more objective definition), then it would be reasonable – under *Chaplinsky* – to treat those utterances as subject to prohibition because they are likely *either* to provoke violence or to cause severe emotional distress.

The Stanford provision thus interprets *Chaplinsky*'s dual formulation to suggest a category of speech, objectively "insulting" in character, that attacks the very identity of its victim in such a way as to stimulate the familiar "fight or flight reaction." Among certain classes of hearers, particularly young males socialized to be physically aggressive, the typical reaction to a vile personal insult may be "fight." For others – many men; perhaps most children, most older people, most women; invalids – the typical reaction to this kind of verbal assault is some combination of extreme fear, numbness, and impotent rage: reactions calculated to produce the sort of "severe emotional distress" to which the Restatement of Torts makes reference. We should read *Chaplinsky*, in my view, to have identified two distinct kinds of reactions (fight or flight) to the same category of intolerable speech when it speaks, respectively, of utterances that "tend to incite an immediate breach of the peace" and those that "by their very utterance inflict injury."

The Stanford provision identifies discriminatory "personal vilification" as a class of utterances of which any instance is particularly likely to produce one

[35] *Restatement of Torts*, 2d, sec. 46, comment (d).

[36] "'Outrageousness' in the area of political and social discourse has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." *Hustler Magazine v. Falwell*, 108 S. Ct. 876, 882. The Court's decision, however, does not foreclose granting tort damages under the "outrageousness" test for infliction of emotional distress through speech alone in a private or face-to-face context, rather than in a published and nationally distributed lampoon of an important public figure, such as was involved in *Falwell*.

or the other o[illegible]e kinds of injury covered by the "fighting words" and "emotional distress" analysis. These are, in Richard Delgado's phrase, "words that wound" – utterances directed to members of groups specially subject to discrimination, intended to insult or stigmatize them, and making use of the small class of commonly recognized words or symbols that have no other function but to convey hatred and contempt for these groups.[37]

Professor Delgado offers as the test for liability under his proposal the requirement that the words directed to the victim be such as "a reasonable person would recognize as a racial insult." In a campus context, where claims of insult and ideological debate are often intertwined, this phrasing raises special, and I think avoidable, civil-liberties problems. Some ideas might be taken as racial or ethnic insults by virtue of their content alone: for example, claims that the Holocaust never happened, or that blacks are genetically inferior to whites. To avoid banning ideas as such on the basis of propositional content, on campus or elsewhere, the Stanford regulation prohibits only verbal abuse including actual racial epithets, or their equivalents for other forms of discrimination.[38] These are the all-too-familiar words that carry with them so inseparable a message of hatred and contempt that apologies are in order for the affront involved in even quoting them: "nigger," "kike," "faggot," "cunt," and the like.[39]

Racial and other discriminatory hatred and contempt can be effectively expressed without using these words, of course, but (partly in the interests of avoiding vagueness and its chilling effect) such cases are not included under the regulation. A white student can tell a black student, face-to-face, "you people are inferior and should not be here," but not be guilty of harassment. In addition, even gutter epithets are immunized when uttered to the campus or public at large, in order to give the widest possible leeway for speech in the public forum; the Klan or the neo-Nazis may demonstrate and display their

[37] Richard Delgado, "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-calling," *Harvard Civil Rights-Civil Liberties Law Review*, vol. 17 (1982), pp. 133–81. Professor Delgado has assembled on pp. 136–49 an impressive body of evidence and argument that supports the identification of racial verbal abuse as inflicting a distinctive and identifiable form of injury, and so qualifying as a distinctive wrong. His proposal is limited to *racial* insults.

[38] Because I believe to this extent in the "no false ideas" strand of American First Amendment law, I reject group defamation and hate speech prohibitions of the kind called for by the International Convention on the Elimination of All Forms of Racial Discrimination: "States Parties . . . shall declare as an offence punishable by law all dissemination of ideas based on racial superiority or hatred. . . ." Mari Matsuda ably argues the contrary view, urging modification of First Amendment law to permit the extension of a limited version of the international standard to this country in "Public Response to Racist Speech: Considering the Victim's Story," *Michigan Law Review*, vol. 87 (1989), p. 2320. As Professor Matsuda's article documents, many Western countries have such laws. The Canadian hate-speech statute is currently under review by the Supreme Court of Canada for its consistency with the free expression guarantee of the recently adopted Canadian Charter of Rights and Freedoms.

[39] It would be possible, in the interests of maximum clarity, to attempt a comprehensive list of the "discriminatory fighting words" and equivalent visual symbols (swastikas, burning crosses, etc.). I think this would be a mistake; new examples of such words and symbols are constantly being invented by the creativity of the collective bigoted mind. Even without a definitive list, however, the Stanford regulation gives clearer notice of what will count as an offense than any other similar proposal I know. I should add that as I understand the provision, derogatory epithets aimed at (white) national origin groups ("dago," "Polack," etc.) would come within its terms to the extent they were determined to be still "commonly understood" to "convey direct and visceral hatred or contempt" on the basis of national origin.

symbols and shout their words of hatred with impunity. This very much narrows the reach of the proposal and exposes it to the charge, mentioned before, that it is mere tokenism. But at the same time, it helps meet traditional and legitimate civil-liberties concerns about public political expression, and about vagueness and its accompanying chilling effect.[40]

The Stanford provision has also been drafted with an eye on another concern – one rooted in the civil-rights perspective, and often noted as well in civil-libertarian objections to "hate speech" or "group defamation" regulations.[41] The concern is illustrated by one of the cases that occurred under the Michigan regulation. A black woman law student, in the course of a heated argument, called a classmate "white trash." She was charged with a violation of the harassment rule; she ultimately agreed to write a formal letter of apology to the classmate in settlement of the charge.

Under the Stanford provision, calling a white student "white trash" would not constitute harassment. In its commonly understood meaning, the term is (like "redneck") derogatory to the poor whites of the rural South by virtue of their class, not their race.[42] If the student addressed came from that social background, and if class bias were a form of discrimination covered by the proposal (as it is not), there might be a disciplinary case. But as a white person, she is not a victim of discriminatory *racial* harassment; the term "white trash" is clearly not "commonly understood" to convey hatred or contempt for whites on the basis of their race as such – a requirement for liability under the provision. This is not to deny that the black woman student intended to express race-based hatred or contempt, or that she may have effectively conveyed a racial insult, just as a white student does who tells a black student that "you people are inferior and shouldn't be here." In neither case, though, is the regulation violated, because in neither case is there use of one of the required "commonly understood" assaultive epithets or symbols of discriminatory contempt.

The point of the "white trash" case can be generalized, and in a way that is most troubling to civil libertarian defenders of viewpoint neutrality. As best I can see, there are *no* epithets in this society at this time that are "commonly understood" to convey hatred and contempt for whites *as such*. The same can be said, I believe, of males as such, and heterosexuals as such.[43] If this is

[40] The narrow confinement of the harassment regulation to the use of the gutter epithets also emphasizes that it is meant as an anti-discrimination provision, not a "civility rule." As a teacher, I would not let students address each other in class using personally derogatory terms of any kind, and would exclude students who persisted in doing so. That is a civility rule, similar to those applied in most American parliamentary bodies. Such rules are not, in my opinion, appropriate for campus-wide enforcement. The campus should be thought of as primarily a general public forum, and secondarily as a workplace (the work of education). I would add that values of residential privacy may justify more stringent regulation of offensive speech in student dormitories than in classrooms or in public campus areas, but this is a complex issue which I cannot treat adequately here.

[41] This is the concern raised by Justice Black in his dissent from the Supreme Court's decision sustaining conviction of a white racist pamphleteer under a group libel statute: "If there be any minority groups who hail this holding as their victory, they might consider the possible relevance of this ancient remark: 'Another such victory and I am undone.'" *Beauharnais v. Illinois*, 343 U.S. 250, 275 (1952).

[42] Indeed in its usual sense, the term is implicitly racist toward people of color – with its implication of surprise that a *white* person would be "trash."

[43] I realize that others might disagree with this, citing terms such as "honky," "gringo," "breeder," et

indeed a socio-linguistic fact, it is of course one not fixed in stone; on the other hand, it is no accident. The denigrating epithets covered by the Stanford provision are able to inflict the serious and distinctive injuries characteristic of legally prohibited invidious discrimination because they strike at groups subjected to longstanding and deep-rooted prejudices widely held and disseminated throughout our culture. American children grow up with the negative stereotypes of blacks, women, and homosexuals in their bones and in their souls. This is tragically true, too, of children who are black, female, or later identify themselves as homosexual.

The denigrating epithets draw their capacity to impose the characteristic civil-rights injury to "hearts and minds" from the fact that they turn the whole socially and historically inculcated weight of these prejudices upon their victim. Each hatemonger who invokes one of these terms summons a vicious chorus in his support. It is because, given our cultural history, no such *general* prejudices strike against the dominant groups that there exist no comparable terms of universally understood hatred and contempt applicable to whites, males, and heterosexuals as such.[44]

III

The Stanford provision, then, while neutral on its face, will foreseeably be asymmetric in its application. This aspect of the provision allows its interpretation to reflect a state of affairs central to civil-rights analysis – the continued existence of asymmetric social relations of group domination and subjugation in the United States. Contrary to the democratic ideal, American society (like other societies) is still characterized by a hierarchy of relatively stable ascriptive status groups. To rephrase the point from the jargon of sociology to the rhetoric of movement politics, there still exist "oppressor" and "oppressed" (or, to lower the political pitch, "privileged" and "subordinated") groups, identified as such by characteristics such as race, gender, class, and sexual preference. Indeed, the civil-rights project can best be understood as at once premised on the existence of these groups' asymmetric power relations and aimed at the ultimate elimination of the asymmetries. (To describe it thus is not to decide in advance the debatable question of affirmative action – the question of whether symmetric or asymmetric policies are best suited to attain the goal.)

Given its narrow coverage, the Stanford provision obviously does not embody a particularly radical or utopian civil-rights approach. Its categories and its thrust largely reflect a civil-liberties perspective on the racial harassment problem. The exclusive remedy it contemplates for all but a tiny fraction of discriminatory speech is the one civil libertarians favor: more speech. But the features it adopts from a civil-rights approach still jar most civil libertarians; indeed, they jar me when I look at the problem through a civil-liberties lens. First, the provision lacks content-neutrality; it regulates only speech bearing on matters of race, gender, sexual orientation, and the like while neglecting other speech that might similarly provoke violence or cause similarly severe emotional distress. Second, and even more troubling, the rule bears asymmetrically on its restricted subject matter in a way that, to some, will seem inconsistent with viewpoint-neutrality.

That is, it may seem biased against the disfavored ideologies of racism, sexism, and homophobia, openly favoring "politically correct" egalitarians against their adversaries in the campus marketplace of opinion. It arguably takes from the bigots emotively powerful rhetorical weapons – the traditional hate epithets – without imposing comparable restrictions on the other side. It is as if terms like "commie" and "pinko" were barred from political debate, while "imperialist lackey" and "capitalist running dog" were allowed. This seems to violate official neutrality: the principle of "no orthodoxy in matters of opinion," "no such thing as a false idea."

This civil-libertarian objection helps bring out the deep structure of the conflict between the two approaches. From the civil rights perspective, there *are* false ideas and ideologies, among which white supremacy and related forms of bigotry are the paradigm examples. The insult and stigma involved in the imposition of supremacist ideologies on those whom they oppress and exclude from full citizenship attacks what John Rawls has called the most fundamental of those "primary goods" that government is established to allow individuals to pursue – those that form the basis of self-respect.[45] The protection of the basis of the individual's capacity for self-respect against violation by socially authoritative humiliation is as much at the heart of equal protection as is official viewpoint-neutrality in regulating the marketplace of ideas that is at the heart of free expression.

The analysis of the civil-rights approach in terms of preventing exclusion by the social imposition of caste-based stigma supplies the standard rationale for the central doctrine of modern anti-discrimination law: the rejection of the "separate but equal" version of Jim Crow.[46] The doctrinal problem was this: A state supplies equal (but separate) facilities to whites and blacks – schools, public parks, beaches, buses, amenities in public buildings, etc. How does this

myself do not know which of these terms are current and seriously-used epithets of hatred or contempt – evidence that they are not "commonly understood" as such. On the other side, no sentient black, Latino, or gay American has any doubt about the current standard insulting epithets for their groups.

[44] A similar analysis applies to the unjustified use of the term "white racist," which many of my white students have invoked as the equivalent, applied to them, of the standard racial epithets as applied to the students of color. Leaving to one side whether unjustified use of a term like this inflicts the same level of injury, it does not in any event come within the class of injuries that concern civil rights law and policy. The term "white racist" does not denigrate whites *as such*, any more than "black separatist racist" denigrates blacks as such. In addition, strong civil-liberties considerations distinguish the cases. Terms of *political* abuse like "white racist" (or "Stalinist," "Nazi," "terrorist") are sometimes accurately and appropriately applied to individuals in robust debate; exactly when they properly apply, however, is politically controversial. In contrast, the Stanford provision rests on the premise that the racial (and other) discriminatory gutter epithets it deals with are *never* appropriately directed at individuals; enforcement of the provision, therefore, does not involve the politically charged task of discriminating between justified and unjustified uses.

[45] John Rawls, *A Theory of Justice* (Cambridge: Harvard, 1971), pp. 178–79, 440–46, 543–47.

[46] *Brown v. Board of Education*, 347 U.S. 483 (1954); see also *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (beaches); *Gayle v. Browder*, 352 U.S. 903 (1956) (buses); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (golf courses); *Johnson v. Virginia*, 373 U.S. 61 (1963) (courthouses).

equality-preserving separation of the races violate the Constitution's prohibition of racially *unequal* treatment? The *Brown* line of cases answers that the inequality inheres in the subordinating character of the *message* delivered by the separation – the material state action, separate but equal segregation, viewed in isolation from its communicative impact, fully preserves equality. *Plessy* had said that if black people felt insulted by the separation, that was only their interpretation; *Brown* finally (and realistically) accepted that the insulting interpretation was the only plausible one.[47]

But the *Plessy* formula is a quite appropriate response to a complaint of discriminatory segregation in some social contents. Separation sometimes stigmatizes no one. The maintenance of separate men's and women's restrooms in public buildings, for example, does not by itself constitute invidious sex discrimination. But in the context of this society and its history, the Jim Crow variety of racial segregation imposed inequality because it rested on the assumption, and hence delivered the message, that whites were a superior caste to be protected from the polluting contact of their black inferiors. The insulting message, the wound inflicted by the authoritative endorsement of the "false idea" of white supremacy and black unworthiness, was what made Jim Crow unconstitutional.[48]

Essentially the same wound is the injury inflicted on minority, female, and gay students or employees when endemic verbal abuse renders educational or work environment discriminatorily "hostile" within the terms of discrimination law. In this sense, the focus on symbolic injury to the "hearts and minds" of black children in the desegregation cases supplies the basic authority for campus verbal harassment regulation; *Brown*, as Charles Lawrence strikingly argues, "may be read as regulating the content of racist speech."[49]

The civil-libertarian, dedicated to a principle of liberal official neutrality in the marketplace of ideas, sees this as a perverse misstatement of *Brown*. It ignores two crucial distinctions, the argument runs: speech vs. action, and public vs. private.[50] First, the civil-libertarian insists that the *practice* of white (or male, or heterosexual) supremacy must be kept distinct from its *preaching;* while the former violates the anti-discrimination principle, the latter is protected by the principle of free expression. Questions of the boundary between speech and action may present difficulty, but the structure is clear.

The point is quite general: the Constitution certainly requires the *practice* of republican government, due process, and non-establishment of religion, as well as non-discrimination. But equally central is the principle of free expression, which includes the freedom to *preach* dictatorship, summary justice, theocracy – or even universal censorship. And so, the argument continues, the same principle guarantees freedom to advocate racist and other inegalitarian doctrines – as, indeed, many First Amendment decisions firmly establish.[51]

Second, the argument continues, the invocation of *Brown* to support the suppression of racist speech ignores the public-private distinction, which is essential to the maintenance not only of free speech but also of such other civil liberties as freedom of religion. If *Brown* does perhaps strike at certain "speech" (more precisely, at the communicative element in certain actions), it is only at *official* speech, which has never been thought protected by a principle of free expression. What the First Amendment protects is the right of *private* individuals to deliver those same messages.

While the equal protection clause might, for example, prohibit a legislature from placing a white supremacist slogan on a state's seal, flag, public buildings, and the like, the First Amendment just as firmly protects the freedom of private individuals to put that slogan into free competition against more egalitarian ones in the marketplace of ideas. Not only the flag, but also a copy of the *Brown* decision, or a picture of Martin Luther King, can be defaced in public with impunity under the First Amendment – though of course, as the civil-libertarian usually adds, government officials should denounce such racist outrages, just as university authorities should denounce racist speech on campus while resolutely protecting it against coercive interference.

When we turn to look at the world through the civil-rights lens, though, we find much less clarity in the public-private distinction.[52] The civil-rights approach seeks to cleanse not only the state but civil society generally of racist and other bigoted practices. The formal constitutional expression of the public-private distinction, the state action doctrine, tends to break down in the area of discrimination law. Nothing approaching a clear line separates (prohibited) official

[47] *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896), rejecting the claim that "the enforced separation of the two races stamps the colored race with a badge of inferiority" on the ground that "[i]f this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." Compare *Brown v. Board of Education*, 347 U.S. 483, 494 (1954).

[48] Edmond Cahn early on offered this rationale as the proper interpretation of *Brown:*

> As is observed in the ancient Babylonian Talmud, to shame and degrade a fellow-creature is to commit a kind of psychic mayhem upon him. Like an assailant's knife, humiliation slashes his self-respect and human dignity. He grows pale, the blood rushes from his face just as thought it had been shed. That is why we are accustomed to say he feels "wounded." . . .
>
> So one speaks in terms of the most familiar and universally accepted standards of right and wrong when one remarks (1) that racial segregation under government auspices inevitably inflicts humiliation, and (2) that official humiliation of innocent, law-abiding citizens is psychologically injurious and morally evil . . .

"Jurisprudence," *New York University Law Review*, vol. 30 (1955), pp. 148–59.

[49] Charles Lawrence III, "If He Hollers Let Him Go: Regulating Racist Speech on Campus," *Duke Law Journal*, vol. 1990, pp. 901, 909. My treatment of *Brown* has been much influenced by this excellent article.

[50] Nadine Strossen contests the *Brown* analogy in these terms in her article cited above.

[51] *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), *cert. denied* 436 U.S. 953 (1978); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Terminiello v. Chicago*, 337 U.S. 1 (1949). The Court has reiterated the point in significant dicta in the flag-burning cases. "The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole – such as the principle that discrimination on the basis of race is odious and destructive – will go unchallenged in the marketplace of ideas." *Texas v. Johnson*, 109 S. Ct. 2533, 2544 (1989). "We are aware that desecration of the flag is deeply offensive to many. But the same might be said, for example, of virulent ethnic and religious epithets [citing *Terminiello*]. . . ." *United States v. Eichman*, 110 S. Ct. 2404, 2410 (1990).

[52] The reliance of traditional civil-liberties law on a public-private distinction much stronger than we recognize elsewhere is the theme of Frank Michelman, "Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation," *Tennessee Law Review*, vol. 56 (1989), p. 291.