PANEL VI: CIVIL RIGHTS, CIVILITY, AND FREE SPEECH—WHAT TAKES PRECEDENCE?*

DISCRIMINATORY HARASSMENT AND FREE SPEECH

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I want to say a few words on the problem of discriminatory verbal abuse on the American campus. This problem has engaged me in a practical way at Stanford University for the last few years. I was faculty co-chair of the campus disciplinary council when we had a serious racial insult incident. The problem might have come before our council, but ultimately no charges were brought. The incident led others on campus to formulate a set of regulations meant to handle these problems, and I later drafted my own version of such a proposal, which provided the basis for the regulation that the university finally adopted in June 1990.[1]

The title for this panel seems to capture the three clusters of values that overlap on this problem: values of civility, of civil liberty or free expression, and of civil rights or antidiscrimination. I want to start by largely setting the issue of civility to one side. Civility is an important value for universities, and civility and courtesy in manner of speech can be required in the classroom from teachers and students alike. But in my view, this value is not best pursued by coercive disciplinary regulations of campus-wide application.

That brings me to the clash between civil liberties and civil rights on the question of verbal harassment. Liberals of my sort are not used to having these two clusters of values collide with each other; we think of ourselves as supporting both equally. We are uncomfortable when they collide, and our natural im-

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* This panel was introduced by Lois Haight Herrington, Attorney, Walnut Creek, California, and former Assistant Attorney General of the United States.

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1. Stanford University is a private university not technically subject to First Amendment restrictions. The draft proposal recommends that Stanford's "Fundamental Standard" for speech on campus be interpreted under the "fighting words" doctrine.

pulse is to try and wish (or pretend to reason) the conflict away. Nevertheless, I believe that conflict is inescapable here.

The civil-libertarian purist will tolerate no disciplinary regulation whatever of abusive or harassing speech on campus. A more moderate and common civil libertarian position, though, would call for prohibiting the most egregious forms of verbal abuse, as long as this is carried out by some narrowly-defined, content-neutral and viewpoint-neutral restriction of traditionally recognized exceptions to full First Amendment protection like "defamation,"[2] "fighting words,"[3] or speech that constitutes "intentional infliction of emotional distress."[4]

The civil rights approach to harassment regulation starts with the concept of "hostile environment discrimination" that has become familiar in employment law. The basic idea is that a private-sector employer violates Title VII of the Civil Rights Act of 1964[5] (and a public-sector employer violates the Fourteenth Amendment) if it fails to take reasonable steps to remedy a workplace environment that is differentially hostile to women[6] or minority employees.[7] If a woman or black employee is faced by a barrage of sexist or racist insults from fellow workers, the employer is not free to take a hands-off attitude.[8] The work environment, insofar as it is reasonably within the employer's control, is part of the terms and conditions of employment. If those terms and conditions are worse for black or women employees than for white or male employees doing the same work at the same pay, this constitutes illegal employment

2. *See, e.g.*, Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Beauharnais v. Illinois, 343 U.S. 250 (1952).

3. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

4. *See, e.g.*, Hustler Magazine v. Falwell, 485 U.S. 46 (1988).

5. Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e to 2000e-17 (1988).

6. *See* Broderick v. Ruder, 685 F. Supp. 1269, 1277 (D.D.C. 1988) ("A hostile work environment claim is actionable under Title VII if unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature are so pervasive that it can reasonably be said that they create a hostile or offensive work environment.").

7. *See* Gilbert v. City of Little Rock, Ark., 722 F.2d 1390, 1394 (8th Cir. 1983) ("An employer violates Title VII simply by creating or condoning an environment at the work place which significantly and adversely affects the psychological well-being of an employee because of his or her race.").

8. *See* Ways v. City of Lincoln, 705 F. Supp. 1420, 1422 (D. Neb. 1988), *aff'd in part and rev'd in part*, 871 F.2d 750 (8th Cir. 1989) ("An employer may not . . . allow an employee to be subjected to a course of racial harassment by co-workers. Once an employer has knowledge of a racially hostile atmosphere in a place of employment, the employer has an affirmative duty to take reasonable steps to eliminate that hostile atmosphere.").

discrimination.[9] The hostile environment doctrine is not a controversial innovation of liberal judges; a unanimous Supreme Court has endorsed it,[10] and Judge Posner has written an interesting opinion applying the idea to hold a public employer liable.[11] It is well-established civil rights law.

Should this doctrine be applied to the campus? The notion is that students are deprived of equal educational opportunity if discriminatory harassment is prevalent and university administrators fail to take reasonable remedial steps. But direct transfer of the hostile environment discrimination concept to the campus, without any civil liberties check, can readily produce the kind of regulation that was enacted at the University of Michigan, and subsequently struck down by a federal district court, properly in my mind, as a violation of the First Amendment.[12]

The Michigan regulation simply prohibited conduct or speech that foreseeably contributed to an unequally hostile environment for racial minorities, women, gay and lesbian students, and the other groups already protected under the university's general antidiscrimination policy.[13] This rule is a classic example of the "bad tendency" test that modern First Amendment analysis so strongly disfavors.[14] Administrators straightforwardly applying this regulation could plausibly charge students with disciplinary violations for saying such things as that women are not naturally suited to the hard sciences, or that black people are genetically less intelligent than whites, or that homosexuality is a disease or a sin.

Statements like these, frequently repeated in the presence of members of the groups in question, simply *do* as a matter of common sense make the atmosphere more difficult for these

9. *See* 42 U.S.C. § 2000e-2 (1988); Bohen v. City of East Chicago, Ind., 799 F.2d 1180 (7th Cir. 1986).

10. *See* Meritor Savings Bank v. Vinson, 477 U.S. 57, 65-67 (1985).

11. *See* Bohen v. City of East Chicago, Ind., 799 F.2d 1180 (7th Cir. 1986).

12. *See* Doe v. University of Mich., 721 F. Supp. 852, 863 (E.D. Mich. 1989) (a public university may not "establish an anti-discrimination policy which had the effect of prohibiting certain speech because it disagreed with ideas or messages sought to be conveyed," and may not "proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people").

13. Under the Michigan rule, persons were subject to discipline for "any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status." *Id.* at 856.

14. For the modern position that discredits the Whitney v. California, 274 U.S. 357 (1927), "bad tendency" test, see Brandenburg v. Ohio, 395 U.S. 444 (1969).

individuals on a campus and hence deny them a level educational playing field with students not so stigmatized. At the same time, such statements are core examples of what the First Amendment is meant to protect. There can hardly be a free university, or a free society generally, without open public debate of such central issues of science, public policy, and social organization.

So we do have a conflict between civil rights and civil liberties, as both have come to be commonly (and relatively uncontroversially) understood. The Stanford harassment regulation offers a mediation of this clash. The basic idea is not original (though the regulation does differ from others in some of its details); the University of California at Berkeley has adopted a regulation roughly along these lines,[15] and a similar regulation has been adopted at the University of Texas at Austin.[16] What all these proposals share in common is the idea of *intersecting* one or more of the established exceptions to full First Amendment protection with the civil rights doctrine of hostile environment discrimination. The proposals prohibit speech that both amounts to "fighting words" or "intentional infliction of emotional distress" on the one hand, and discriminates on an otherwise prohibited basis on the other.

The Stanford regulation establishes a campus offense with three elements. First, the speaker must intend to insult or degrade an individual or small group of individuals on the basis of their race, sex, or other characteristic mentioned in the university's general antidiscrimination policy. This predicate protects insensitive but unintentional slurs, and also protects "group defamation" (as traditionally understood) from punishment as harassment. Second, the speech must be directly addressed to the individual or individuals. This caveat restricts the offense to the face-to-face or "I-thou" situation. Third, the speech must use "insulting or 'fighting' words," a requirement that quotes the Supreme Court's language from *Chaplinsky*.[17] In

15. *See* Office of the President, Univ. of Cal. at Berkeley, Addition to Section 51.00, Student Conduct, Policies Applying to Campus Activities, Organizations, and Students (Part A) (Sept. 21, 1989) (utilizing "fighting words" approach) (available in office of *Harvard Journal of Law & Public Policy*).

16. *See* Office of the President, Univ. of Texas at Austin, Policy Memorandum 4.120, Prohibition of Racial Harassment of Students (Aug. 1, 1990) (utilizing "intentional infliction of emotional distress" approach) (available in office of *Harvard Journal of Law & Public Policy*).

17. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).

the context of antidiscrimination policy, these words are defined as those that are "commonly understood to convey direct and visceral hatred or contempt for human beings on the basis of their sex, race,"[18] and so on.

This formula is a lawyerly attempt to define a concept everyone intuitively understands: the basic gutter epithets of racism, sexism, homophobia, and the like. That requirement very much narrows the regulation. What might be called the speech of polite bigotry is not covered, even when it is addressed directly to the victim. And by virtue of the requirement of individual address, even gutter epithets, used with degrading intent, can be uttered with impunity in a general publication or a speech to a general rally; Klan speech, neo-Nazi speech, and Farrakhan-style speech do not violate the regulation.

The prohibition is thus quite narrow from a civil rights perspective, and it is narrow for civil libertarian reasons. But even moderate civil libertarians may not be satisfied because the regulation seems to violate *neutrality*. It is certainly not content-neutral. It addresses only speech that is discriminatory, that insults people on the basis of their race, sex, and the other "suspect classifications" of antidiscrimination law. You can say something horrible to someone's face about his or her mother without violating the campus disciplinary code.

An additional and still more difficult point, from many civil libertarians' perspective, is that the rule appears to lack viewpoint neutrality, and so to violate one of the core principles of free speech law. The rule covers only speech using terms or other symbols that are "commonly understood" as viscerally insulting on the basis of sex, race, and so on.[19] As I understand this requirement, it will be asymmetrical in practice because there *are* just no terms that are "commonly understood" to be viscerally insulting to white people as such, to men as such, or to straight people as such.

As a "framer" of the Stanford regulation, I do not claim any particular interpretive privilege for my understanding of its meaning. A judicial officer will have to apply the ordinance to the facts of a case and interpret it in that context. But if I were

18. Stanford Univ., Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment 1 (June 1990) (available in office of *Harvard Journal of Law & Public Policy*).

19. *Id.*

that judicial officer, I would not regard a term to be "commonly understood" as viscerally insulting to people having the trait to which the term refers in the absence of a widely shared, deeply felt, and historically rooted social prejudice against people with that trait. I do not even know what terms are current among blacks, Latinos, or gays to refer in a derogatory way to whites, Anglos, or straights. No sentient black, Latino, or gay person is in similar doubt about the standard gutter epithets that refer to their groups.

The result is asymmetrical in the following sense. In those unhappy moments when the contemporary campus becomes a multi-cultural armed camp, the Stanford regulation would prevent me from firing my most powerful verbal assault weapons across racial, sexual, or sexual preference lines. By contrast, people of color, women, and gays and lesbians can use all the words they have at their disposal against me. This result seems an impermissible failure of viewpoint neutrality to some civil libertarians.

In my view, the asymmetry revealed here already exists in the social world in which we live and is neither created nor enhanced, but rather combatted, by the harassment ordinance. My point is not original; I am merely applying the basic doctrine animating civil rights law from *Brown v. Board of Education*[20] onward. That doctrine makes the concept of stigma or insult central to civil rights analysis. *Plessy v. Ferguson*[21] stood for the proposition that so far as the law was concerned, the racial insult of separate-but-equal segregation did not exist except in the over-sensitive imaginations of black people. *Brown* settled the issue that Jim Crow's legal impact did *not* fall equally on blacks and whites.[22] In the same spirit, and on the same basis of knowledge of our society, we should recognize that the insults "nigger" and "whitey" are not equivalent.

Yet we still hear *Plessy*'s doctrine preached. Today it takes the form of the claim that asymmetrical restrictions of racial insults

20. 347 U.S. 483 (1954).

21. 163 U.S. 537 (1896).

22. *See Brown*, 347 U.S. at 494 ("Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.").

are patronizing to students of color.[23] Such restrictions imply, it is said, that whites can take care of themselves in verbal rough-and-tumble, while blacks as a "protected group" are weaker and need official protection. *Brown*'s answer to *Plessy* is also the answer to this argument. American society and its history have created the asymmetry; a regulation cannot attempt to redress that asymmetry without taking it into account.

On the issue of patronization, I should add that in my experience, most students of color support discriminatory harassment restrictions of the Stanford type or stronger ones. If these restrictions are somehow insulting to them, why do they not see it? Are they too dumb? Is it not patronizing to suppose that they do not see their true interests on this question?

The limitation of the harassment prohibition to *discriminatory* insults is actually supported by civil liberties considerations as well. It is constitutional to punish other (nondiscriminatory) fighting words, but the policy of keeping restrictions on free speech as narrow as possible counsels against doing so. Fitting the prohibition to the civil rights enforcement model justifies the restriction on its scope.

A number of students and colleagues have urged to me that if hurtful fighting words are to be banned, an evenhanded approach requires restrictions against using terms like "racist" against white conservatives when, for instance, they oppose affirmative action. These are, in current conditions on our campuses, said to be fighting words or words that inflict emotional distress.

I do not dispute the premise. The reason for not extending prohibition to such utterances again sounds in civil libertarian values. It can be hurtful and enraging to be called a racist, a Nazi, a terrorist, or a Stalinist when one is not. But these are legitimate terms applied, sometimes appropriately, in political debate. There *are* real racists, Nazis, terrorists, and Stalinists. The proper extension of these terms is an endlessly disputable political question, and I would prefer not to involve the disciplinary adjudicative process in deciding when the terms are applied appropriately and when not. The questions are too political to be settled in a judicial hearing.

23. *See* Keyes, *Freedom Through Moral Education*, 14 HARV. J.L. & PUB. POL'Y 165 (1991).

By distinction, no one is appropriately called one of the gutter insults of discrimination. No one is ever a "nigger" or a "faggot." The connotation of these terms is that persons of a certain race or a certain sexual orientation are less than human. To say that is what the terms are there for—it is all they are there for. When they are used against a fellow human being, face-to-face, in the posture of I to thou, these words can inflict injury worse than many a physical assault. To treat them as such is the minimum that a decent code of conduct can do.