The “Grey Interpretation” of the Fundamental Standard, Stanford University
Adopted June 1990
Overturned in Corry v. Stanford, February 27, 1995

(text from Thomas C. Grey, "How to Write a Speech Code Without Really Trying: Reflections on the Stanford Experience", *UC Davis Law Review*, Spring 1996)

The Fundamental Standard states:

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

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

FUNDAMENTAL STANDARD INTERPRETATION: FREE EXPRESSION AND DISCRIMINATORY HARASSMENT

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

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

***948** 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.

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COMMENTS

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

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

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

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

The answer is suggested by reflection on the reason why the particular kinds of discrimination mentioned in the University's Statement on Nondiscriminatory Policy are singled out for special prohibition. Obviously it is University policy not to discriminate against any student in the administration of its educational policies on any arbitrary or unjust basis. Why then enumerate "sex, race, color, handicap, religion, sexual orientation, and national and ethnic origin" as specially prohibited bases for discrimination? The reason is that, in this society at this time, ***950** these characteristics tend to make individuals possessing them the target of socially pervasive invidious discrimination. Persons with these characteristics thus tend to suffer the special injury of cumulative discrimination: they are subjected to repetitive stigma, insult, and indignity on the basis of a fundamental personal trait. In addition, for most of these groups, a long history closely associates extreme verbal abuse with intimidation by physical violence, so that vilification is experienced as assaultive in the strict sense. It is the cumulative and socially pervasive discrimination, often linked to violence, that distinguishes the intolerable injury of wounded identity caused by discriminatory harassment from the tolerable, and relatively randomly distributed, hurt of bruised feelings that results

from single incidents of ordinary personally motivated name-calling, a form of hurt that we do not believe the Fundamental Standard protects against.

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

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

3. Why is intent to insult or stigmatize required?

Student members of groups subject to pervasive discrimination may be injured by unintended insulting or stigmatizing remarks as well as by those made with the requisite intent. In addition, the intent requirement makes enforcement of the prohibition of discriminatory harassment more difficult, particularly since proof ***951** beyond a reasonable doubt is required to establish charges of Fundamental Standard violations.

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

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

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

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

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

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

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

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

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

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

The Supreme Court's phrase "insulting or 'fighting' words" is often shortened to simply "fighting words," an expression which, while roughly capturing the sort of personally abusive language we mean to prohibit, may also have certain misleading connotations. First, the expression may imply that violence is considered an acceptable response to discriminatory vilification; but we prohibit these utterances so that disciplinary proceedings may substitute for, not supplement, violent response. Second, exclusive focus on the actual likelihood of violence might suggest that opponents of controversial speech can transform it into forbidden "fighting words" by plausibly threatening violent response to it -- the so-called "heckler's veto." The speech, if it to be subject to be restraint, must also be grossly insulting by the more objective standard of commonly shared social standards. Finally, the "fighting words" terminology might be thought to imply that extreme forms of personal abuse become protected speech simply because the victims are, for example, such disciplined practitioners of non-

violence, or so physically helpless, or so cowed and demoralized, that they do not, in context, pose an actual and imminent threat of violent retaliation. Such a limitation might be appropriate under a breach of the peace statute, whose sole purpose is to prevent violence, but does not make sense in an anti-discrimination provision such as this one.

Another and largely overlapping category of verbal abuse to which legal sanctions may be applied is defined by the tort law concept of "intentional infliction of emotional distress." Much of the conduct that we define as discriminatory harassment might well give rise to a civil suit for damages under the "emotional distress" rubric. But that rubric has drawbacks as the legal basis for a discriminatory harassment regulation. It is less well established ***954** in free speech law than is the fighting words concept. Further, taken as it is from tort law, it focuses primarily on the victim's reaction to abuse; the question is whether he or she suffers "severe emotional distress?" We think it better in defining a disciplinary offense to focus on the prohibited conduct; we prefer not to require the victims of personal vilification to display their psychic scars in order to establish that an offense has been committed.

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

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

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

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

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

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

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

In general, the disciplinary requirements that form the content of the Fundamental Standard are not meant to be a comprehensive account of good citizenship within the Stanford community. ***956** They are meant only to set a floor of minimum requirements of respect for the rights of others, requirements that can be reasonably and fairly enforced through a disciplinary process. The Stanford community should expect much more of itself by way of tolerance, diversity, free inquiry and the pursuit of equal educational opportunity than can possibly be guaranteed by any set of disciplinary rules.

8. Is the proposal consistent with the First Amendment?

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

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

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