HOW NASTY ARE WE FREE TO BE?

RACIST SLURS AND EPITHETS

"Discriminatory Harassment or Protected Speech?"

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I. INTRODUCTION:

In the last few years a number of college campuses have experienced an alarming increase in various racial incidents, from racial graffiti in dorms to abusive racial slurs and epithets on campus. As a result, several universities have adopted policies prohibiting "discriminatory verbal harassment" or "personal vilification."

Brandeis University is no exception. Three or four years ago a paragraph was added to a section of the Student Handbook on "Rights and Responsibilities," Section 6, Paragraph 6.4. The Paragraph reads in full as follows:

> **Racial Harassment**: At Brandeis University, any faculty member, employee, or student who racially harasses a member of the University community shall be subject to disciplinary action, up to and including termination of employment or dismissal of a student from the University. Derogatory comments, epithets, or other behavior are considered racial harassment if the conduct:
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> (A) demeans the race or ethnicity of the individual or individuals, and
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> (B) creates an intimidating, hostile or dangerous environment for education, University related work, living, social, or other University authorized activity.

The Brandeis provision on derogatory comments and racist epithets is not an isolated statement of University policy. It is articulated as part of a number of concerns. It appears in a Section entitled "Policies on Equal Opportunity and Affirmative Action," and directly follows the University's policy on sexual harassment. It figures, therefore, as part of the University's

commitment to the principles of equal protection and non-discrimination. The University is equally committed to principles of free inquiry and free expression, but that commitment is articulated elsewhere.

The provision is also an interpretation of a more fundamental standard of personal conduct required of all members of the University community. The following statement appears in the Introduction to Rights and Responsibilities: "In a Univeristy community it is essential that safeguards be provided for each community member's freedom to teach and freedom to learn. In protection of these freedoms, the University must establish certain standards of personal conduct." Paragraph 6.4 is a specific instance of Paragraph 2.1 which states the fundamental standard that "A student is expected and required to respect the integrity and personal rights of others."

Since incidents in recent years on college campuses throughout the country have revealed some doubt and disagreement about what this fundamental standard might entail for members of the University community in the sensitive area where the right of free expression can conflict with the right to be free from invidious discrimination, Paragraph 6.4 is intended to provide students, administrators, faculty, and staff with some guidance in this area.

Imagine now that a student comes to you for advice. She is concerned. Indeed she is so concerned that she wishes to remain anonymous to protect herself from adverse publicity and she would like to be referred to only as "Jane Doe." She is a teaching assistant in an advanced Psychology class in animal behavior. She wants to discuss mental differences between men and women as well as average differences in intelligence between racial groups and the potential impact of these differences on an individual's career choice. She believes men are demonstrably more intelligent than women and that whites on the whole are more intelligent than blacks as a group. She believes such differences are real and significant and that they have serious consequences upon career choices.

Because some regard her views as sexist and racist, she is worried that some students will experience them as demeaning of their race or gender. She fears being charged under the University's "speech code" (her words for Paragraph 6.4) and she is thinking of bringing suit against the University claiming that Paragraph 6.4 of "Rights and Responsibilities" in the Handbook violates her First Amendment right of free speech. What advice do you give her?

THE FIRST AMENDMENT:

One way to begin to think about the advice you might give to Jane Doe is to give some further thought to her claim and/or suspicion that the Brandeis policy violates her First Amendment right to free speech. Does it? On what basis? Here in its entirety and astonishing simplicity is the First Amendment:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

It may prove helpful to think about several other "Free Speech" cases. How closely does Jane Doe's potential case resemble any one of these recent , quite famous cases? How would you decide each of the following cases? And on what grounds?

A. RACIST SPEECH IN ILLINOIS:

In April of 1977 the National Socialist Party of America, more commonly known as the American Nazi Party, announced that its was planning a "white power" rally on the steps of the village hall on May 1 in Skokie, Illinois, a suburb of Chicago. Nearly half of Skokie's population at that time was Jewish and the home of more than forty thousand Jews and nearly seven thousand survivors of the Nazi concentration camps The community pressed city officials to obtain a court order preventing the rally and to pass an ordinance prohibiting the dissemination of any material "which promotes and incites hatred against persons by reason of their race, national origin, or religion" or to "incite violence, hatred, abuse, or hostility toward anyone based on race, religion, or ethnicity." The community maintained that neo-Nazi chants and signs or armbands bearing the swastika were racial slurs, unprotected by the First Amendment. Frank Collin, the head of the Nazi Party, challenged the ordinances in federal court and won. Collin is quoted as saying afterwards: "I had to come up with something to use against our enemy, the Jew. . . I used the First Amendment at Skokie. I planned the reaction of the Jews. They are hysterical." During the confrontation, the following Nazi rhetoric was typical: "We want to reach the good people—get the fierce anti-Semites who have to live among the Jews to come out of the woodwork and stand up for themselves. . . I hope they're terrified. Because we're coming to get them again. I don't care if someone's mother or father or brother died in the gas chambers. The unfortunate thing is not that there were six million Jews who died. The unfortunate thing is that there were so many Jewish survivors." — *The Village of Skokie v. National Socialist Party* , 373 N. E. 2d 21 (Illinois 1978)

B. OFFENSIVE CONDUCT IN CALIFORNIA:

On April 26, 1968 Cohen was spotted at the Los Angeles County Courthouse in the corridor wearing a jacket with the words "FUCK THE DRAFT" stitched on the back. The Court observed that "there were women and children in the corridor." Cohen did not further threaten any person or commit any other act of violence or make loud noises or speak out about the slogan affixed to his jacket. He was arrested under a part of the California Penal Code which prohibits "maliciously and willfully disturbing the peace or quiet of any neighborhood or person . . . by offensive conduct." Cohen testified that he knew the words were on his jacket, that he knew what they meant, and that he intended them to convey the depth of his feelings about the Vietnam War and the draft. He was sentenced to 30 days in jail. The Court of Appeal upheld Cohen's conviction on the grounds that "offensive conduct" means "behavior which has a tendency to provoke others to acts of violence or to in turn disturb the peace," and that because on the facts of the case "it was certainly reasonably foreseeable that such conduct might cause others to rise up and commit a violent act against the person of the defendant or attempt to forcibly remove his jacket." Cohen's case finally worked its way all the way up to the U. S. Supreme Court. — *Cohen v. California* (United States Supreme Court, 1971)

C. BURNING THE AMERICAN FLAG IN TEXAS:

During the 1984 Republican National Convention in Dallas, a small group of protestors, including Gregory Lee Johnson, marched through the streets of Dallas. They ended up at the Dallas City Hall. There Johnson took out an American flag, which had been given him during the march, and proceeded to burn it, while chanting "Reagan, Mondale which will it be?/Either one means World War Three." and "Red, White, and Blue/We spit on you/You stand for plunder/You will go under." The Dallas police arrested Johnson and charged him with violating a Texas law that made it a crime to desecrate a state or national flag. The law defined "desecration" as defacing, damaging, or otherwise physically mistreating the flag "in a way that the actor knows will seriously offend persons likely to observe or discover action." Johnson and his attorneys argued that his conduct was protected by the First Amendment and that the Texas law was therefore unconstitutional. Must the law permit Johnson to burn the flag even though it offends, say, a majority of Americans? Why must his freedom be protected over a desire to have it curtailed? How much offensive behavior can (should) our society tolerate? Why isn't burning the flag more like a "fighting word," an insult undeserving of constitutional protection? As Justice Rehnquist argued "surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as . . . profoundly offensive to the majority of people — whether it be murder, embezzlement, pollution, or flag burning." Or is it? — *Texas v. Johnson* (United States Supreme Court, 1989)

D. CENSORSHIP IN INDIANA:

In 1984, the city of Indianapolis, enacted an unusual anti-pornography ordinance, based on the city council's finding that pornography "is a systematic practice of exploitation and subordination based on sex which differentially harms women," and pornography was accordingly defined as "the graphic sexually explicit subordination of women, whether in pictures or in words." Based on these definitions, the ordinance prohibited a number of activities, including "trafficking" in pornography and "forcing" pornography on a person in any place of employment, school, home, or public place. It also prohibited "coercion into pornographic performance." The ordinance gave to any woman aggrieved by trafficking or coercion the right to file a complaint "as a woman acting against the subordination of women." Kitty MacKinnon who helped to draft the Indianapolis ordinance argues against the identification of pornography with the obscene, suggesting that the assimilation of pornography to obscenity obscures its true nature by presenting it as just one more form of expression, one more way of conveying an idea or belief. This reduces, she insists, the debate over pornography to whether such material is in good or bas taste, making it an issue under the First Amendment. Against this position, MacKinnon defends a "civil rights" conception of pornography implicit in the Indianapolis ordinance, arguing that pornography is a discriminatory practice, not just a certain type of offensive picture or text. Pornography is not a political, religious, or social "idea" and as such it does not deserve First Amendment protection, any more than the now-outlawed practice of racial segregation. Displays of violent pornography are not invitations to engage in a dialogue in the "marketplace of ideas"; they are (rather) acts of disempowerment. MacKinnon also believes that pornography not only reflects but reinforces the way men in general tend to regard women, i.e., as commodities for their use. At a more theoretical level MacKinnon challenges the liberal assumption that people will not be silenced socially so long as no legal restrictions are placed on freedom of expression. On the contrary, she argues that permitting pornography to speak "silences" women, indeed "harms" women. What do you think? Does pornography cause harm? What is to count as "harm" to another? Plainly there are ways of harming someone without stealing his new Audi Fox or punching him in the nose. Harm it seems must also include certain forms of psychological injury or distress. But how can we limit further cases of harm in some principled and coherent way? — *American Booksellers Association v. Hudnut* (U. S. Court of Appeals, 7th Circuit, 1985)

How far do our First Amendment rights extend? One critical question raised by Jane Doe and each of the above cases is when and under what circumstances do extremely unpleasant and offensive acts actually cause other persons harm that they can rightly demand legal protection from them.

III. HOW NASTY ARE WE FREE TO BE?

The Clear and Present Danger" Test: In 1917 and then again in 1929 first Justice Oliver Wendell Holmes and second Justice Louis Brandeis set out what is known as the "clear and present danger" test as a justification and rationale for limitations of free speech. In *Schenck v. United States* in 1917 Justice Holmes gave his now famous remark that "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic," and he went on to say that " it does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree." What happens if we apply Holmes' "clear and present danger" test to the cases above. Do the acts of Cohen and Johnson constitute a "clear and present danger" that a "'substantive evil" will occur? What about the acts contemplated by the Nazi marchers or the Indianapolis ordinance? In 1929 Justice Brandeis developed Justice Holmes opinion. In the Supreme Court case *Whitney v. California*, Brandeis wrote a separate opinion in which he said: "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable grounds to fear that serious evil will result if free speech is practiced. There must be reasonable grounds to believe that the danger apprehended is imminent. There must be reasonable grounds to believe that the evil to be prevented is a serious one." Does Justice Brandeis' opinion help to further clarify the "clear and present danger" test? Is the "clear and present danger" test relevant to Jane Doe's potential case against the University?

When the American Nazi Party tried to march in Skokie, the village, as mentioned above, won an injunction preventing various sorts of conduct by the Nazi marchers. An appeals court modified the ban, but allowed the ban on displaying the swastika to stand. The Illinois Supreme Court then considered an appeal by the Nazi leader, Frank Collin, of the lower court's ban. The Illinois Supreme Court declared that the U. S. Supreme Court decision in *Cohen v. California* "compells us to permit the demonstration as proposed, including display of the swastika." What do you think of this ruling? Are you happy with it?

"Fighting Words": The Illinois Supreme Court ruling is an example of the ways our courts make use of and rely upon prior decisions, in this instance, on the U. S. Supreme Court ruling in *Cohen v. California*. But the Court might have placed greater reliance on another case which introduced the notion of "fighting words" and concluded that so-called fighting words were not protected speech. According to the rule in *Chaplinsky v. New Hampshire* (1942):

> It is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have ever been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well understood that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

As the Appeals Court in the Skokie case explained: "Such 'fighting' words are those personally abusive epithets which, when addressed to an ordinary citizen, as a matter of common knowledge, are inherently likely to provoke violent reaction." What do you think? The original complaint filed by the Village of Skokie alleged that by reason of the ethnic and religious composition of the village and the particular circumstances, the public display of the swastika

would incite large numbers of residents to violence and retaliation. Indeed in the hearing at which residents requested that an injunction be issued against the Nazi marchers, one resident who was a survivor testified that to him the swastika was a symbol and a reminder that his closest family was killed by the Nazis and he personally feared his own death and the death of his children at the hands of those displaying the swastika. He testified further that he did not know if "he could control himself if he saw a swastika displayed in the village where he lives." The Mayor of Skokie who was a Roman Catholic testified at the hearing that there was "a terrible feeling of unrest regarding the parading of the swastika in the Village of Skokie, a terrible feeling expressed by people in words that that they should not have to tolerate this type of demonstration, in view of their history as a people." What do you think? Does the display of the swastika in the village of Skokie under the circumstances of the case constitute "fighting" words?

VI. RACIAL INSULTS AND EPITHETS: ARE THEY PROTECTED SPEECH?

In the last few years a number of college campuses have experienced an alarming increase in various racial incidents, from racial graffiti in dorms to abusive racial slurs and epithets in the quad. As a result, several universities have experimented with policies prohibiting "discriminatory harassment" or "personal vilification." In the late 80's the University of Michigan, for example, adopted a policy that prohibited "stigmatizing or victimizing" individuals or groups on the basis of "race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, marital status, handicap, or Vietnam era status" by creating an "intimidating, hostile, or demeaning" educational environment. Are racial insults and slurs deserving of protection or do they amount to harms undeserving of protection? Do you think that restricting the use of racial epithets and slurs by a university can be justified?

One way to address this question is to ask yourself if racist speech causes harm? If it does, then surely restricting the use of racial epithets and other related symbolic forms of speech by a university might well be justified, no? Charles Lawrence has argued that "racist speech inflicts real harm, and that this harm is not trivial." What do you think? Racist speech, it can be argued, does not communicate ideas; rather it uses words like weapons. Its purpose is to hurt, not to inform, and it can hurt in four distinct, though related, ways: There is (1) the danger of immediate violence, 2) the psychological and emotional hurt that a person subject to such abuse may suffer, (3) the general offensiveness that the use of such language may cause, and (4) the destructive long-term effects from the attitudes reinforced by abusive remarks. These harms, surely, are non-trivial and real enough. If you think restricting the use of racial epithets on campus can be justified, do you think that the wording of the Brandeis policy is such that it serves as an example of a justifiable restriction? Is it too vague? Is it overly broad or too narrow? What do you think?

VII. RACIAL HARASSMENT UNDER UNIVERSITY POLICY?

One way to explore the scope and limits of the Brandeis policy (is it too broad, is it too narrow?) is to think up a number of hypothetical situations and/or examples of conduct which might be sanctionable under the provision. So, for instance, which of the following are examples of racial harassment under the policy? Remember the policy defines racial harassment as follows: "Derogatory comments, epithets, or other behavior are considered racial harassment if the conduct: (A) demeans the race or ethnicity of the individual or individuals, and (B) creates an intimidating, hostile or dangerous environment for education, University related work, living, social, or other University authorized activity. " Each of the following stories tells a tale in which a student or group of students is subjected to extremely unpleasant and offensive conduct. Project yourself into the shoes of someone who is subjected to the unbecoming conduct in each story described below. How would you feel, how would you react, if you were in that person's shoes? In your considered opinion is anyone in any of the stories "harmed?" How much of the conduct described in the stories does the Brandeis policy prohibit, how much does it allow? Is the policy more restrictive or more tolerant than your own intuitions in this matter?

TWENTY STORIES

Story 1. A student excludes someone from a study group because that person is of a different race, ethnic origin, gender, and/or sexual orientation than the students in the group. She says "You people are inferior and should not even be at Brandeis."

Story 2. After a dormitory argument in which a black student claims that Ludwig van Beethoven was *mulatto* and other students object to placing such stress on racial origins, two white students deface a picture of the composer into a blackface caricature and post it on the wall opposite the entrance to the black student's dorm room so that it can be clearly seen by anyone leaving the room.

Story 3. A male student makes the remark in an advanced math class that "Women just aren't as good in this field as men."

Story 4. A student in a class on the Holocaust says: "All Krauts are stupid." Another in an American Studies class on the Vietnam War describes the North Vietnamese as "Gooks." There are no students of German origin in the Holocaust class or Vietnamese in the American Studies class.

Story 5. A student in a Sociology class says that as far as he is concerned "Homosexuality is unnatural and anyone who is "into it" ought to grow up and get over it." A gay student in the class considers the remark demeaning and finds that this student's opinion about homosexuality makes it difficult, if not impossible, for him to come to class, let alone participate in class discussions.

Story 6. A student with neo-Nazi sympathies hangs a brightly colored, historically accurate Nazi banner embroidered with a swastika from his window.

Story 7. A student with neo-Nazi sympathies waves a brightly colored, historically accurate Nazi banner embroidered with a swastika in the face of a particular student on campus, a student whose parents the Nazi sympathizer knows both lost a close relative at Buchenwald. This happens only once.

Story 8. A student with neo-Nazi sympathies takes out and waves a brightly colored, historically accurate Nazi banner embroidered with a swastika during a public forum on the Holocaust at which many members of the Brandeis community are present.

Story 9. A student with neo-Nazi sympathies takes out and waves a brightly colored, historically accurate Nazi banner embroidered with a swastika during an invited talk he is delivering at a public forum on the Holocaust at which many members of the Brandeis community are present.

Story 10. A student with neo-Nazi sympathies waves a brightly colored, historically accurate Nazi banner embroidered with a swastika in the face of a particular student on campus, a student whose parents the Nazi sympathizer knows lost relatives at Buchenwald. The student repeatedly

confronts this student in a variety of settings, waving the banner in his face, in Sherman at lunch-time, in the Boulevard at tea-time, outside the student's dorm, even in the library.

Story 11. A student defaces a picture of Martin Luther King on Martin Luther King Day in front of the Main Library and then sets it on fire.

Story 12. A student heckles the main speaker during a public forum to which all members of the Brandeis community have been invited. The student yells out "You stupid bastard" and "Your mother must have met your father in a pig-sty." What difference does it make if the speaker is white, female, black, Jewish, American Indian, Chinese, gay, or a Veteran of World War II?

Story 13. A student walks across campus wearing a jacket with the words "I HATE ALL _____ " stitched on the back. Each week a new epithet is stitched in the blank space; among these are "WOPS," "KIKES," "SPICKS," "PANSIES," "POLACKS," "HONKIES," "FRUITS," "CUNTS," and "SLANT-EYES."

Story 14. A student tells jokes at lunch using these same epithets.

Story 15. A student organization sponsors a comedian who makes ethnic slurs and derogatory comments against Hispanics and gays.

Story 16. A student displays a confederate flag on the door of his room in his residence hall.

Story 17. A black student is confronted and racially insulted by two white students in the cafeteria.

Story 18. Derogatory comments demeaning of the race of a student are printed up and slipped into a book that the student is reading in the library.

Story 19. The same derogatory comments are printed in *Justice*. the student newspaper.

Story 20. A student comments about the physical appearance of another student during a class discussion and in a way that is intended to be demeaning of that student's ethnic background.

Armed with your sense of what conduct the Brandeis policy would permit, and what conduct it would prohibit, does Jane Does have a reason to be concerned in her own case? Is she justified in her apprehension that if she were to express her views in class, she might be subject to disciplinary action under the Brandeis policy? What do you think?

VIII. VAGUENESS AND OVERBREADTH

If you had difficulty answering this question does it suggest that the wording of the Brandeis policy is (perhaps) impermissibly vague. A regulation or statute must given adequate warning of conduct which is to be prohibited and must give explicit and clear guidance to those in a position to apply the regulation or statute. In 1939 the United States Supreme Court, in *Lanzetta v. New Jersey*, opined:

> "No one may be required at the peril of life, liberty or property to speculate as to the meaning of penal statutes. all are entitled to be informed as to what the State commands."

In the law, a statute is generally considered to be vague when "citizens of common intelligence have to guess at its meaning." Does the University's wording of its policy put Jane Doe in that position?

Is the policy too vague? 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." Might the Brandeis policy benefit from this wording? After all "fighting words" is a phrase that has both a history and fairly clearly defined meaning through precedent. A committee at the University of Texas has proposed a regulation of "racial harassment" tracing 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. Does any part of the Texas proposal improve upon the Brandeis policy? Or does it give too great an emphasis on a showing of "actual" distress?

Is the policy overly broad? The Brandeis provision tracks the form of injury dealt with by a civil rights approach, i.e., speech creating a hostile environment that denies equal educational opportunity. Talk of "hostile environments" may appear overly broad but the principles of equal treatment, including Title IX of the Civil Rights Act, not only entitle but require universities to punish discriminatory conduct, at least if it becomes sufficiently widespread to create a pervasively hostile environment. The analogy is with an employer's obligations to deal with sexual and racial harassment by workers in the workplace. When female or black employees must endure a barrage of demeaning sex- or race-based insults from co-workers, an employer who ignores the situation may be guilty of unlawful sex or race discrimination. In *Bohen v. City of East Chicago* Judge Richard Posner put the workplace equivalent this way: "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." To avoid liability, an 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."

A civil rights approach to verbal abuse and hate speech simply applies the doctrine of hostile environment discrimination to the university. Most educators, like most employers. are required by law 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 hostile. Brandeis first recognized this with respect to sexual harassment and adopted disciplinary restrictions accordingly. Why not treat racial and/or anti-gay and anti-handicap harassment in the same way? As a legal matter, an unremedied "sustained pattern of harassment" might make the university itself vulnerable to charges of unlawful discrimination. Prudent educators will want to prohibit acts of harassment before the point at which the conduct becomes a sustained pattern and thus produces a legally actionable hostile environment. What do you think?

Having considered whether the University's policy might be overly broad, there is one respect at least in which it may be too narrow. The policy as stated regulates only speech bearing on matters of gender, race and ethnicity while neglecting other speech that might be just as demeaning: insults and epithets directed at a person's national origin, sexual orientation, handicap, or social class. The narrow focus of the Brandeis provision may please some civil libertarians. In the areas it does not touch it would seem to favor what civil libertarians most

want: more speech. On the other hand, by virtue of its narrow focus the provision may lack neutrality. What do you think?

The University provision also does not appear to make a distinction between racial epithets directed at individuals and those same epithets addressed generally to a campus audience. Is this a distinction the policy should make or is it a difference that ought to make no difference?

In sorting out these your own answers to these questions, you may find "The Stanford Discriminatory Harassment Provision" useful. In June of 1990 Stanford University modified its policy with regard to racial speech. The new policy prevents harassment by "personal vilification," defined (now) as "words or non-verbal symbols . . . 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." The harassing conduct must "be intended to stigmatize an individual or small number of individuals" and must be addressed directly to those it stigmatizes. Should Stanford's policy be judged constitutionally permissible? Is it in keeping with your understanding of the First Amendment? Does the "harassing conduct" defined by the Stanford policy constitute harm? How is it different from the Brandeis policy? Does it include words or phrases that you would like to see included in the Brandeis regulation? The Stanford policy like the Brandeis policy is preceded by a statement of a fundamental standard. The first two sections of the Stanford policy are devoted to restatements of the university's commitment to principles of free expression and equal opportunity:

> *Preamble*
> The Fundamental Standard requires that students act with "such respect for the rights of others as is demanded of good citizens."
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> *The Stanford Discriminatory Harassment Provision*
> 1. Stanford is committed to the principles of free inquiry and expression. Students have the right to hold and vigorously defend and promote their opinions, thus entering 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 opinion 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.
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> 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 or ethnic origin. Harassment of students on the basis of any of these characteristics contributes to a hostile environment that makes access to education for those subjected to it less than equal. Such discriminatory harassment is therefore considered to be a violation of the Fundamental Standard.
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> 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.
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> 4. Speech or other expression constitutes harassment by personal vilification if it:

a.) is intended to insult or stigmatize an individual or a small group 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, intimidates 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 sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin.

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Recommended Reading:

American Booksellers v. Hudnut, Indiana Court of Appeals, 1985
Chaplinsky v. New Hampshire, 1942
Cohen v. California, United States Supreme Court, 1971
Thomas Grey, "Civil Rights and Civil Liberties: The Case of Discriminatory Verbal Harassment," in *Social and Political Philosophy*, 1991
Franklyn Haiman, *Speech and Law in a Free Society*, 1981
Charles Lawrence, "If He Hollers Let Him Go: Regulating Racist Speech on Campus," Duke Law Journal, 1990, pp. 901-909.
John Stuart Mill, *On Liberty*, 1856
Schenck v. United States, United States Supreme Court, 1919
Steven Shiffrin, The First Amendment, Democracy, and Romance, 1990
Texas v. Johnson, United States Supreme Court, 1989
Village of Skokie v. National Socialist Party of America, Supreme Court of Illinois, 1978
Whitney v. California, United States Supreme Court, 1929

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