1996

When a Speech Code Is a Speech Code: The Stanford Policy and the Theory of Incidental Restraints

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The title of Professor Grey's article, *How to Write a Speech Code Without Really Trying*, is instructive, if in some tension with what follows it. The title suggests two points: first, that Grey did not intend to write a speech code; second, that Grey wrote a speech code. I'll trust Grey on the first; he would know better than I. I'll agree with him on the second — except that I'm agreeing with his title only; as the rest of his article makes clear, Grey still denies he wrote a speech code. It is on that essential point, involving the distinction in First Amendment doctrine between direct and incidental restraints, that I take issue with his exceptionally interesting and provocative article.

Grey wrote an exceedingly narrow speech code — perhaps the narrowest that can be imagined. He wrote a speech code, as he insists, that in some sense recognized the value of a free speech system. He wrote a speech code that a reasonable system of First Amendment law could permit.[1] But Grey did write a

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* Professor of Law, University of Chicago; on leave 1995-96 to serve as Associate Counsel to the President. A.B. 1981, Princeton University; M. Phil. 1983, Oxford University; J.D. 1986, Harvard Law School. Thanks to Geoffrey Stone and David Strauss for helpful comments.

[1] This is not to say that the current system of First Amendment law permits the Stanford Policy. That Policy, as Grey explains, barred a subset of unprotected speech — specifically, fighting words, based on sex, race, or other listed characteristics. As restrictions on speech go, this one is narrow indeed; too, it is prefaced, for whatever this is worth, with a statement of commitment to the principles of free inquiry and speech. But unless Grey is right that the Stanford Policy should be viewed not as a ban on speech, but as part of a generally applicable regulation against discrimination, the Policy falls within the holding of R.A.V. v. City of St. Paul, 505 U.S. 377 (1992), that a prohibition of race-based fighting words violates the First Amendment. I have discussed that decision in an earlier article. *See* Elena Kagan, *The Changing Faces of First Amendment Neutrality:* R.A.V. v. St. Paul, Rust v. Sullivan, *and the Problem of Content-Based Underinclusion*, 1993 S. CT. REV. 29, 60-76. As I noted there, I agree with Grey and all the concurring Justices in *R.A.V.* that even under its

speech code, and from that fact a great deal both does and should follow.

This Comment on Grey's article addresses the scope of the First Amendment's doctrine of incidental restraints, which I think Grey misdescribes. It considers both the rationale and the need for that doctrine, which I think Grey underacknowledges. And finally it notes some practical political effects of the doctrine, which I wish Grey, in his capacity as drafter of the Stanford Policy, had more fully recognized. What is perhaps most disturbing about the Stanford experience is not that the University adopted, yes, a speech code, but that in doing so, it did little to foster, and perhaps much to undermine, its own (and Grey's own) goal of equality.

I. APPLYING THE DOCTRINE OF INCIDENTAL RESTRAINTS

Grey defends the Stanford Policy primarily on the basis of the distinction prevalent in First Amendment law between direct and incidental restraints on expression.[2] The Policy, according to Grey, did not concern speech as such; it concerned all discriminatory harassment, of which "hate speech," narrowly defined, formed just a part.[3] Because the Policy was generally applicable

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own analysis, the *R.A.V.* Court might well have upheld the St. Paul ordinance — and thus also approved the Stanford Policy — as a ban on the subcategory of fighting words that most pose the dangers associated with fighting words generally.

[2] Grey's need to defend the constitutionality of the Policy arises from the Leonard Law, which applies First Amendment requirements to the disciplinary regulations of California's private universities. *See* CAL. EDUC. CODE § 94367 (West Supp. 1996). Even before passage of the Leonard Law, however, both Stanford and Grey had committed themselves to abiding by First Amendment standards. Whether a university like Stanford should commit itself in this manner seems to me a difficult question, which this Comment will not address.

[3] *See* Thomas C. Grey, *How to Write A Speech Code Without Really Trying: Reflections on the Stanford Experience*, 29 U.C. DAVIS L. REV. 891, 928-35 (1996). Grey assumes in his article, as I do in this reply, that an inarguably general law against discriminatory harassment — a law that did not mention speech at all — would meet any applicable First Amendment requirements, even when applied to such speech as the Stanford Policy covered. The Supreme Court has indicated its agreement. *See* Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993). Some commentators, however, have disputed the point. *See, e.g.*, Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment Harassment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991) (stating that broad judicial definition of harassment in Title VII, including speech, is inconsistent with First Amendment); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992) (arguing that general anti-harassment laws do not satisfy First Amendment requirements).

in this manner, applying to both speech and conduct, it raised no serious First Amendment problem. Of course, the Policy specifically described its application to expression, explaining that fighting words based on sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin fell within its broader coverage. But this explicit notation, according to Grey, should have counted for, rather than against, the Policy because by making clear precisely what speech the general prohibition covered, the reference mitigated the potential chilling effect of the Policy on other expression.[4]

To evaluate this claim, it is necessary to take a step backward and ask what underlies the Court's distinction between direct and incidental restraints on expression.[5] The distinction makes no sense if what matters, under First Amendment doctrine, is the effects of a law on a speaker's expressive opportunities. The Stanford student who wishes to engage in race-based invective will "suffer" no more from a direct restriction on hate speech than from a generally applicable anti-discrimination regulation that covers all the speech affected by the direct restriction, but conduct in addition. The distinction likewise makes no sense if what matters is the effects of a law on an audience's ability to hear and consider a range of viewpoints. Again, the debate about race in the Stanford community will "suffer" no more from the one (speech-directed) form of regulation than from the other (generally applicable) kind. So much is always true of the distinction between direct and incidental restraints: the Court's use of the distinction cannot derive from considering the effects of such restraints, whether on a speaker or on an audience.[6]

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[4] *See* Grey, *supra* note 3, at 923-24.

[5] For more expansive treatment of this subject, see Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Analysis*, 63 U. CHI. L. REV. 413, 491-505 (1996); Frederick Schauer, *Cuban Cigars, Cuban Books, and the Problem of Incidental Restraints on Communications*, 26 WM. & MARY L. REV. 779 (1985); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 105-14 (1987).

[6] To use a far-flung example, compare a (direct) law imposing a penny tax on the Sunday edition of the *New York Times* with a (generally applicable) law providing tax benefits for companies entering into certain kinds of mergers. Even if the effect of the direct law is nil and the effect of the generally applicable law is to restructure the whole communications industry, current doctrine subjects the former to strict scrutiny and the latter to mere rationality review.

But now assume that First Amendment law largely concerns motives, rather than effects — more specifically, that the doctrine has as its primary, though unstated, object the discovery of improper governmental motive.[7] This prohibited motive may roughly be termed "ideological"; it exists when simple disapproval of an idea — as distinct from a neutral evaluation of the harm that idea causes — enters into the decision to limit expression.[8] The Court, of course, cannot ascertain this illicit motive directly — or at least, cannot do so with any effectiveness. Hence, the Court (whether consciously or not is unimportant) has constructed and relied upon a set of rules and categories, most focusing on the facial aspects of a law, that operates as a proxy for this direct inquiry. These rules comprise tools to flush out impermissible motive and invalidate actions infected with it: they enforce the central command of the First Amendment that the government cannot interfere in the realm of speech simply because it finds some ideas correct and others abhorrent.

The doctrine of incidental restraints, as Grey himself recognizes,[9] serves precisely this function of assisting in the discovery of improper motive. A generally applicable law by definition targets not a particular idea, nor even ideas broadly speaking, but an object that need not, and usually does not, have any association with ideas whatsoever. The breadth of these laws makes them poor vehicles for censorial designs; they are instruments too blunt for either effecting or reflecting ideological disapproval of certain messages. (Consider, for example, the likelihood that a law prohibiting fires in public places — though encompassing such speech as the burning of an American flag — has resulted from ideological disapproval of certain messages.) Thus, incidental restrictions receive minimal constitutional scrutiny because of the likelihood that they will also be accidental restrictions in the relevant sense — that they will result from a process in which officials' hostility toward ideas qua ideas played no role.

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[7] For a broadscale defense of this proposition, discussing many aspects of First Amendment law, see Kagan, *supra* note 5.

[8] This definition of impermissible motive raises many hard questions, of both a conceptual and a practical nature. For discussion of these issues, which I cannot explore here, see generally *id.* at 428-37.

[9] *See* Grey, *supra* note 3, at 919.

With this as background, turn to the Appendix of Grey's article and review the text of the Stanford Policy.[10] The Policy is not a regulation that, in the manner of incidental restraints generally, refers to a broad class of activity, including but nowhere mentioning expression. The Policy is not even a regulation that breaks down a broad class of activity into all its component parts, listing expression but equivalently listing kinds of non-expressive conduct as falling within the scope of the general prohibition. The Policy, although referring to a broad anti-discrimination ideal, is nonetheless — on its face and by its terms — all about expression. It explicitly considers the benefits and harms of expression; weighs the one against the other; determines the point at which ideals of free inquiry should give way to opposing values. The Policy, in other words, constitutes the very opposite of the usual incidental restraint: a specific and considered judgment of the desirability of restricting certain expression.

As a law takes on this form, the Court's motive-based concerns rise to the fore. Consider, to continue the example previously offered, if a city were to replace its general ban on public fires with an ordinance explicitly discussing application of the ban to flag-burning. No one deciding whether to adopt the new, focused ordinance could do so without evaluating its effect on speech — more, without evaluating its effect on a particular message. And in considering this effect, sheer hostility of the idea — that is, impermissible motive — well might enter the decision-making process. So too when Stanford adopted its new Policy, moving from a generalized "morals code" to an explicit exposition of how this code applied to certain racist (sexist, etc.) expression. In general, as a limit on speech becomes less hidden, the danger of illicit motive increases: hence the current doctrine's distinction between facially direct and facially incidental restrictions.[11] For a court to do what Grey suggests — to classify an explicit speech-directed action as "incidental" whenev-

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[10] *See id.* at Appendix.

[11] Of course, this generalization, like all generalizations, sometimes fails; it even could be argued that it does not hold up in the Stanford case because the initial incidental ban obviously and importantly (even if not facially) applied to speech. But the generalization works well enough to make it a useful test for ascertaining governmental motive, given the difficulty of finding such motive directly.

er it can be conceptualized as a component of a broader, non-speech prohibition — would subvert the very basis of the doctrine. Such a move would prevent the doctrine of incidental restraints from performing its core function of ferreting out impermissible governmental motive.

Grey is right that the rule against directly referring to speech, if followed in this case, would have made the Policy's application to speech more vague and hence more chilling. But it is not surprising that First Amendment doctrine declines to take account of this point. First, the enhanced chilling effect that Grey notes is not usually, let alone invariably, the result of a narrow (i.e., the current) understanding of the category of incidental restraints. Such an effect arises here only because the contours of the general prohibition are unusually uncertain; in the more common case, a list of applications to speech will serve as much to confuse as to clarify the issue.[12] Second and more important, First Amendment doctrine, as I have suggested earlier, always cares less about effects than about motives.[13] In any clash between the two — in any case in which a concern with untoward effects points to one doctrinal rule and a concern with improper motive points to another — the doctrine tracks the concern with motive. The distinction between direct and incidental restraints, in both its broad outlines and its shadings, provides but a single instance.[14] Grey's attempt to rework the distinction — to divorce it from its underlying motive-based rationale, which in turn links it with the rest of First Amendment doctrine — thus was preordained for failure.

II. CHALLENGING THE DOCTRINE OF INCIDENTAL RESTRAINTS

Perhaps recognizing the difficulty of labeling the Stanford policy an incidental rather than a direct restraint, Grey turns

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[12] Consider, for example, the law against lighting fires in public places (incidentally restricting a person who burns a flag as a means of protest), or a law against vandalism (incidentally restricting a person who draws a swastika on a synagogue wall), or a law against trespass (incidentally restricting a person who burns a cross on private property). In cases of this kind — which are very much the norm — listing the law's potential applications to expression cannot serve a constitutionally legitimate purpose.

[13] *See supra* note 8 and accompanying text.

[14] *See* Kagan, *supra* note 5, at 491-505.

midway through his article to challenging the coherence of that distinction, at least when civil rights law is at issue.[15] The basic point is by now familiar, having become a staple of certain critical race theory.[16] We cannot distinguish, or so the argument goes, between civil rights statutes (incidental restraints) and hate speech codes (direct restraints), because both really target expression. In Grey's words, "we prohibit discrimination in significant part because of its 'expressive content,' because of the message of group inferiority it sends."[17] The proscription, for example, of segregated schools should be viewed at least in part as a ban on the message of racial inferiority, deemed to cause stigmatic injury. The proscription contained in a hate speech code is nothing more. Hence, to put the point in its bluntest form, the Supreme Court's decision in *Brown v. Board of Education*[18] conflicts with the district court's decision invalidating the Stanford Policy.

In staking this claim, Grey no doubt is on to something. Antidiscrimination laws are in part about message. Indeed, we can abstract Grey's point, because so too are other kinds of laws apparently directed at conduct. Many incidental restraints interfere, as civil rights laws do, with the communication of a message attending an act, as well as the injury that follows from that communication. This is because both conduct and speech may cause identical "expressive" harms, such as stigmatization. The phenomenon is not limited to the sphere of civil rights, but exists all over, by virtue of the simple fact that most acts say, as well as do, something.[19]

But it is well not to overstate the equivalence of an act and the message it carries, whether in the field of civil rights or in any other. Grey provides, though perhaps does not highlight

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[15] *See* Grey, *supra* note 3, at 934.

[16] *See, e.g.*, Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 449-57.

[17] Grey, *supra* note 3, at 934.

[18] 347 U.S. 483 (1954).

[19] Conversely, most speech does as well as says something in some sense. For the most extreme version of this claim and its implications, see CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 129-30, 193-94 (1987). For a more moderate version, in part critiquing MacKinnon, see Cass R. Sunstein, *Words, Conduct, Caste*, 60 U. CHI. L. REV. 795, 836-40 (1993).

sufficiently, the appropriate caveat: after all, he notes, discrimination (in employment, housing, or other material benefit) remains discrimination even when well hidden.[20] Message matters, but it is not all that matters; when the government forbids, say, segregated schools, it does more than shape the world of communication. This wider significance is precisely what justifies the generalization, discussed earlier, that an incidental restriction is less likely than a direct restriction to arise from hostility toward certain messages: because the government is regulating on the basis of something other, or at least more, than expressive content, this illicit factor should have less effect on the decision-making process.

Perhaps more important, I count Grey's claim as a prime example of a category of academic ideas that I call Ultimately Useless Insights — ideas that, however true and even important in some sense, do not and cannot assist in the elaboration of legal doctrine. Grey himself half-concedes this point by noting the logical conclusion of his insight: If civil rights laws partly target the "stigmatic messages" associated with conduct and if, therefore, the same messages, when conveyed by speech, are likewise subject to limit, "there wouldn't," in Grey's own words, "be much to freedom of speech on some of the central contested issues in our politics and culture."[21] Under the proposed analysis, the government (or a university operating under the government's rules) could restrict not only race-based (or sex-based, etc.) fighting words, but all speech that stigmatizes on the basis of group characteristics. The care that Grey put into crafting a carefully limited restriction, applying only to fighting words, would have been wasted. The expressive content of the conduct that civil rights laws target would render vast amounts of speech on race (or gender, etc.) proscribable.

The same point applies generally. If the conduct encompassed by an incidental restriction has some expressive content, as almost all conduct does, Grey's insight would seem to allow direct

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[20] *See* Grey, *supra* note 3, at 934-36.

[21] *Id.* at 937. The alternative conclusion of Grey's insight is that there wouldn't be much to civil rights laws. This conclusion would hold if the message associated with discriminatory conduct brought laws prohibiting that conduct under the protection of the First Amendment.

restriction of any speech with the same message. Alternatively, though Grey does not consider the possibility, his insight might require the protection of any conduct expressing a message — that is, of conduct generally. Either way, First Amendment analysis becomes impossible: either the First Amendment protects no speech, or it protects speech and all else in addition. Some distinction between direct and incidental restraints, regardless whether the precise motive-related distinction used in current law, thus seems a necessary component of a free speech system.

Grey may agree with this much; perhaps in questioning the conceptual foundations of the distinction, he wishes not so much to overturn it as to render it irrelevant to certain (but only certain) civil rights-type cases. But if that is the point of his critical insight, he must show how what he calls the "hearts and minds" argument can fit within, rather than subvert, a workable, judicially administrable doctrine of incidental restrictions. Until then, *Brown* will not justify the Stanford Policy.

III. POLITICS, THE POLICY, AND THE DOCTRINE OF INCIDENTAL RESTRAINTS

Stanford, of course, had a policy before (and after) the Policy — a policy that the Policy was supposed to enhance. Termed the Fundamental Standard, it requires "respect for order, morality, personal honor and the rights of others."[22] Interpreted on a case-by-case basis over the years, the Standard is understood to prohibit, in the words of the President of the University, all "harassment, whether accompanied by speech or not, including harassment that is motivated by racial or other bigotry."[23] This regulation, unlike Grey's Policy, is an incidental restraint.[24]

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[22] *Id.* at 893 n.6 (quoting Stanford's Fundamental Standard).

[23] *Id.* at 897 n.20 (quoting Stanford President Gerhard Casper).

[24] To say that the Standard is an incidental restraint is not to say that the First Amendment is irrelevant. An incidental restraint, when applied to speech, may trigger heightened scrutiny (usually of an intermediate level), as the seminal case of United States v. O'Brien, 391 U.S. 367, 376-77 (1968), shows. Applications of the Standard to expression thus may have to meet certain First Amendment requirements. But I agree with Grey — and with the dictum in R.A.V. v. City of St. Paul, 505 U.S. 377, 389 (1992) — that this would not be the case where the speech affected falls within a category of wholly proscribable speech, as do threats or fighting words. And even when speech is fully protected, as in *O'Brien*, the application of an incidental restriction to the speech usually (though not always) will receive

Like many incidental restraints, the Standard has a potentially profound effect on expression. The Standard, as interpreted, already may have prohibited all of the speech specifically barred by the Policy. No doubt the Standard prohibited more speech besides. Judged solely by its efficacy in eradicating a certain kind of harmful speech, the direct restriction held no advantage over the incidental restraint.

Proponents of the Policy might claim for it a symbolic function. True, the Standard might succeed in punishing bigoted speech of a harassing nature. What the Standard cannot do — precisely because it is an incidental restriction — is to send a clear message about the University's attitude toward this expression. Grey has argued in support of his Policy on another occasion that it was necessary to convey the University's attitude toward bigotry and intolerance.[25] Similarly, Richard Delgado has urged on behalf of his proposed tort action for racial insults, which Grey approves, that it "communicat[es] to the perpetrator and to society that such abuse will not be tolerated."[26] The general proscription can accomplish all the garden-variety ends of regulation; the particular, speech-directed proscription is needed, or so the argument runs, to communicate as forcefully as possible the governmental actor's commitment to the goal of equality.

This understanding of the Policy, which views an orientation toward speech as critical to the achievement of the regulatory goal, itself casts doubt on Grey's claim to have drafted an incidental restriction. Indeed, this view of the Policy, by highlighting the different motives that may lie behind direct and incidental restrictions, suggests one of the key reasons for distinguishing between these kinds of regulation. But I want to end this commentary by placing these doctrinal issues to one side and evaluating Grey's handiwork solely in terms of its own primary objective: the advancement of equality in the University and the broader community. This evaluation suggests some practical

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more deferential treatment than a direct restraint on the same expression.

[25] *See* Thomas C. Grey, *Civil Rights vs. Civil Liberties: The Case of Discriminatory Verbal Harassment*, 8 SOC. PHIL. & POL'Y 81, 104 (Spring 1991) (writing that "I concede that the main purposes behind the proposal are in a certain sense educative or symbolic.").

[26] Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 147 (1982).

political drawbacks of moving, as Grey and Stanford decided to do, from the generally applicable to the speech directed.

Grey himself alludes to such concerns, in the conclusion to his article, when he discusses the way in which adoption of the Stanford Policy distracted from debate, and potential progress, on more important issues of race and gender.[27] Grey notes that a broader argument about affirmative action on the Stanford campus was diverted into the controversy over fighting words. And citing Henry Louis Gates's potent arguments, Grey more generally concedes the ability of disputes on speech to shift attention from, even excuse inattention to, weightier issues, extending far beyond the academic setting, of inequality in housing, employment, and other material goods.[28] But even while acknowledging these costs, Grey stubbornly hangs on to the Stanford Policy, just as other academics in other educational institutions insist on still broader restrictions on expression. Hence occurs the direction of energy away from the alleviation of material inequalities and toward the elimination — yes, of "only words"[29] — of "insults, epithets, and name calling."[30]

The costs of opening this two-front war are higher even than in the usual case — greater than the inevitable loss of focus and dispersion of resources. As an initial matter, the second front here occurs in the one place where the opposition — however disingenuous and hypocritical in fact — seems to many to hold the high ground.[31] It is poor strategy to turn a battle about discrimination into a battle about speech — to mount the kind of attack most likely to transform the forces of hatred into the

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[27] Grey, *supra* note 3, at 939-45.

[28] *See id.* at 928. Gates terms the critical race theorists' focus on hate speech "a see-no-evil, hear-no-evil approach toward racial inequality," noting that "even if hate [speech] did disappear, aggregative patterns of segregation and segmentation in housing and employment would not disappear." Henry L. Gates, Jr., *Let Them Talk: Why Civil Liberties Pose No Threat to Civil Rights*, THE NEW REPUBLIC, Sept. 20, 1993, at 49.

[29] CATHARINE A. MACKINNON, ONLY WORDS (1987).

[30] *See generally* Delgado, *supra* note 26.

[31] Even Charles Lawrence, a defender of at least some speech codes, has noted:

> I fear that by framing the debate as we have — as one in which the liberty of free speech is in conflict with the elimination of racism — we have advanced the cause of racial oppression and . . . placed the bigot on the moral high ground, fanning the rising flames of racism.

Lawrence, *supra* note 16, at 436.

defenders of constitutional liberty. Relatedly, the second front here causes not merely the division, but the permanent loss of resources. As speech codes, in Grey's words, "set civil rights advocates and civil libertarians . . . against each other," they threaten to rend the coalitions that have served well on other, more important issues.[32] Grey's tactic of limiting and hedging such a code can contain, but not avert, this damage.

I suspect that the temptation to fight on this ground, seemingly irrespective of tactical advantage, derives from frustration, even desperation, over the slow pace of progress in eradicating the tangible, socio-economic inequalities existing between blacks and whites and, to a lesser extent, between men and women. The magnitude and duration of these inequalities may make them appear impervious to political (let alone to academic) efforts. We do not know how to solve these problems; we may not even know how (or perhaps we are afraid) to talk about them. So some succumb to the allure of sideshows, such as the one involving the Stanford Policy. There, the issues seem contained, the solutions discernible, the link between activism and result still full of potential. Victory is achievable, if ultimately empty.[33]

The lesson the Stanford experience suggests to me is one about resisting such urges. If, as Grey laments, "the effort ended up with a grotesquely unreal portrayal of Stanford as a campus under the dominion of the thought police"[34] — if in doing so, the effort only undermined serious attempts to advance the goal of equality — neither Grey nor Stanford should profess much surprise. Stanford's course of action — its shift from a generally applicable ban on harassment, including racial or sexual harassment, whether or not accompanied by expression, to a targeted ban on certain bigoted harassing speech — misjudged the political, as well as the legal, environment. Just as the Policy, in directly rather than incidentally restricting speech, became vulnerable to judicial invalidation, so too did it become a focal point

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[32] Grey, *supra* note 3, at 944-45.

[33] *See* Gates, *supra* note 28, at 49 (stating that "[t]he advocates of speech restrictions will grow disenchanted not with their failures, but with their victories, and the movement will come to seem yet another curious byway in the long history of our racial desperation").

[34] Grey, *supra* note 3, at 939-40.

for all manner of public complaint over Stanford's race and gender policies. The law and the politics of moving from the general to the particular thus coincided. From either perspective, Stanford and Professor Grey should have declined to convert an incidental into a direct restraint.