FINAL REPORT

AD HOC COMMITTEE ON DISCRIMINATORY SPEECH

June 6, 1991

A. STATEMENT OF CHARGE AND PURPOSE:

In August of 1990, President Henry Koffler appointed an eight member panel to investigate whether the University of Arizona's rules are adequate to deal with discriminatory speech while protesting freedom of expression, and whether the University should adopt a policy to regulate discriminatory verbal harassment on campus. This report, and accompanying proposed regulations with interpretive guidelines, fulfill the Committee's charge. The Committee regards this full report, including the discussion of the process by which we arrived at our conclusions, as essential to a complete understanding of our recommendations. The regulations should not be extracted from their context, and all personnel charged with the enforcement of the recommendations should read and consider the full report in making their decisions.

B. COMMITTEE INVESTIGATIONS AND FINDINGS

1. Committee Genesis

During the fall of 1990, the University of Arizona community witnessed a tragic confrontation, in which racial slurs escalated a tense encounter between whites and blacks into violence. A campus police officer was shot and killed during the confrontation. One of many lessons that the event conveyed was the peculiar power of racial epithets to trigger deep anger, hostility and pain in the targets of such expression.

In reviewing whether the University could or should punish the student who uttered the racial slurs, administrators discovered that the campus rules regarding regulable speech were vague, and potentially unconstitutional. They also determined that, like numerous other colleges and universities across the United States, the University of Arizona had experienced several incidents of similar verbal harassment of women, minorities, and other outgroups on campus.

Concerned both about the impact of verbal harassment on students and other members of the University community, and about the potential discourse-chilling impact of overbroad speech regulation, the President directed the Ad Hoc Committee to investigate whether the University policy regarding harassment was sufficiently clear, enforceable, and sensitive to both first amendment and fourteenth amendment concerns.

The Committee included the following members, in addition to the Chair, Charles Ares: Dean of Students LuAnn Krager, Philosophy Graduate Student David Gill, Member of Staff Advisory Council Jacquenese Price, Associate Dean of the Graduate College Adela Allen, University Attorney Elizabeth Buchanan, Associate Vice President for Affirmative Action Jay Stauss, and Law Professor Toni Massaro.

2. Committee Investigation and Research

The Committee met over ten times during the 1990-91 academic year, held two open forums on campus, conducted extensive research regarding policies on discriminatory speech in other colleges and universities, read and discussed scholarly articles that address the constitutional and other legal issues at stake in regulating such speech, and exchanged numerous memoranda discussing the Committee members' preliminary observations and sentiments about an appropriate course of conduct. Opinions also were submitted to the Committee, in response to Committee solicitation of community opinion, regarding whether the University of Arizona should adopt a "hate speech policy."

In addition to these efforts, the Committee collected and reviewed a host of written policies of the University of Arizona that arguably might apply to speech that discriminates against a person on the basis of race, sex, or other protected classification.

On the basis of its investigations and research, the Committee learned that verbal harassment of African-American, women, Hispanic, Asian-American, Jewish, handicapped, gay, and other students and staff has occurred on campus. The Dean of Students reported to the Committee that she has learned of several such incidents in the course of her student counseling duties. Moreover, she felt that the University rules regarding this conduct offered inadequate guidance to her in responding to complaints about verbal harassment. The following anecdotes are typical of the stories that the Committee heard from Dean Krager and other University community members:

a. A student was followed by another person in the Union, who made the following statements loud enough for the target to hear: "Nice clothes, fag; nice hair, fag; tell me about it, fag; die from your disease, good riddance."

b. A student posted a sign on her residence hall room door that read: "No kikes or fags allowed."

c. An African-American student walks into the library restroom. A white male washing his hands in the restroom moves directly to the African American and states: "Get outa here, Nigger. I'm to believe this Nigger's in school?"

These and other stories, involving both gross and more subtle forms of insults, led the Committee to conclude that verbal harassment is a serious campus concern. As such, it turned its attention to alternative means of responding to this verbal abuse.

The Committee discovered that at least four different approaches to hate speech on campus have been proposed or adopted at other schools: (1) to regulate all speech that produces a "hostile learning environment" for others, in the manner that

federal civil rights statutes regulate similar speech in the workplace; (2) to regulate only face-to-face, targeted, intentional vilification on the basis of a protected characteristic, or so-called "fighting words"; (3) to regulate personally directed, intentional racial and other forms of discriminatory insults when they cause emotional distress or other actual harm to the target, based on the tort of intentional infliction of emotional distress; and (4) to rely on general campus "breach of peace" rules and other state and federal law, and to discipline only speech that constitutes an immediate threat to public order, without distinguishing between racial or sexual epithets and other forms of disruptive speech.

The most wide-reaching of these discriminatory speech policies was that of the University of Michigan. This policy attempted to regulate speech that stigmatizes or victimizes an individual and creates a hostile educational atmosphere. Although the policy attempted to set forth "zones" on campus, within which fewer restrictions applied than in other zones, and although the policy noted that the severity of a sanction would depend on the gravity of the discriminatory conduct, the policy nevertheless was struck down as unconstitutionally vague and overbroad. See Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989). The case generated significant media and academic attention, most of which was critical of the Michigan policy.

The ACLU in particular decried the Michigan rule, as well as similar "thought control" efforts on other college campuses. It promised to launch legal challenges to the policies at other colleges and universities, to prevent violations of students' and others' constitutional rights. The Committee took note of these criticisms, and recognized that the legal objections to any discriminatory speech policy were hardly negligible, even if that policy were crafted more narrowly than the Michigan policy. In the following section, the Committee outlines its estimation of the relevant legal considerations.

3. Legal Issues

The first and most obvious constitutional concern raised by a hate speech policy is that it may undermine first amendment values. The first amendment bars the state from regulating expression simply because the content of the expression is offensive to some listeners. As the United States Supreme Court in its recent, controversial flag burning case stated, "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Texas v. Johnson, 109 S. Ct. 2533 (1989). Rather, the remedy for offensive speech ordinarily should be counterspeech, not police control. Indeed, the police are obliged to take steps to protect the speaker from a hostile crowd.

The traditional justifications for this general commitment to free discourse include the notions that the marketplace of

ideas will best function to produce truth if it remains unregulated, that freedom of expression is essential to self-actualization, and that government control of individual expression quickly may lead to government oppression of speakers whose ideas challenge the politically dominant groups. At least one theorist also believes that by tolerating offensive speech, government expresses and teaches the moral value of tolerance for others.

Despite the strong interest in unregulated expression, however, the Supreme Court has approved several exceptions to this constitutional right, when the harm of the speech vastly exceeds its value and threatens other important social interests. For example, the state constitutionally can regulate the following forms of harmful discourse: threats of physical harm, extortion, defamation, sexual and racial harassment in the workplace and obscenity. Moreover, as the Court in Texas v. Johnson suggested, speech that is "a direct personal insult or an invitation to exchange fisticuffs" is treated differently than speech that lists generalized grievances with the policies of the government. Speech that is directed at an individual may qualify for the Court's "fighting words" exception, articulated in an earlier decision, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). A final and extremely important context in which the Court has approved of speech regulation involves workplace speech that creates a differentially "hostile environment" for women or minority workers. See Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986). The Court in that case held that sexist speech in the workplace violated the female workers' statutory right to equal employment opportunities.

First amendment caselaw therefore makes plain that in appropriate contexts, the state can regulate harmful discourse. The Court has yet to decide, however, the specific question of whether racial or other epithets, uttered face to face on a college campus, are regulable through college-imposed discipline. In the Committee's view, the question remains debatable. A majority of the Committee believes, however, that a tightly worded policy that restricts the category of regulable speech to speech directed at an individual or small group of persons, and that a reasonable person would recognize as a harmful insult, based on race, gender, or other outgroup status, would be upheld.

In so concluding, the Committee noted that the Court would need to weigh not only the first amendment concerns described above, but also the fourteenth amendment equality concerns. In Brown v. Board of Education, 347 U.S. 483 (1954) the Court concluded that the fourteenth amendment requires that public education be offered on equal terms to all races. The harms of racism, the Court noted, went beyond physical harm. As such, even though the "tangible" features of racially segregated schools may have been equal, they offended the Constitution insofar as they denied black children equal access to intangible opportunities and generated a feeling of inferiority. Id.

In the wake of Brown v. Board of Education, the Congress passed a series of statutes that place specific demands on educa-

tional institutions to fully realize the equal opportunity aspiration. These statutory obligations of public schools go well beyond desegregation or simple equal access. They also extend significant rights to other groups, such as women and handicapped students. In many cases, the conduct that the statutes proscribe may include verbal conduct -- such as workplace harassment.

Taken together, the freedom of expression and equal rights caselaw therefore suggests that the University can regulate some speech, when equality-based concerns are seriously compromised. The competing policy interests, however, are exceptionally powerful, especially when they are applied to the context of a college or university campus. Because these concerns are so weighty, and because they very much influenced the Committee during its deliberations, they deserve elaboration. The following section describes the most salient of these policy concerns.

4. Competing Policy Concerns

Assuming that a narrow "fighting words" approach to disciplining hate speech on campus is constitutional, is it also sound educational policy?

The Committee discovered that debate about the potential benefits and costs of disciplining discriminatory speech implicates many important normative and empirical issues, some of which are sharply contested. For example, it raises questions about whether a University is a "special community" with distinct rules of civility, about the prevailing intellectual and moral climate on college campuses, about privacy, about the progress of civil rights, and about the current status of women, racial and ethnic minorities, gays and lesbians, and people with physical or other disabilities. Most of all, the debate raises questions about how best to root out the most pernicious and cruel forms of bigotry and fear of difference.

The Committee discovered, however, significant areas of community agreement, from which the Committee's recommendations proceed. First, it found a broad consensus that the University, of all places, should be governed by a principle of vigorous, free exchange of ideas. The Committee heard no contradiction of the claim that the University should be an environment that fosters and protects paradigm-threatening research, social critique, and intense reconsiderations of traditional intellectual patterns. Scholarship and teaching that challenge the status quo necessarily will discomfit, even enrage, others. People who choose to attend a University choose, in part, to abide by the principle of vigorous exchange of ideas, and to submit their ideas to pointed, sometimes hurtful, critiques. Moreover, the members of the University community typically are verbally privileged, and thus better able than some members of society to meet all but the most invasive speech with counterspeech or counterarguments, rather than by invoking disciplinary measures.

A second area of agreement was that although universities aspire to be centers of free-wheeling exchanges of ideas, they often fail to attain this ideal. Tenure decisions, hiring decisions, pedagogy, research grant awards, promotion, classroom dialogue, and many other aspects of University life are influenced by written and unwritten standards that sometimes defeat free expression goals. As such, teachers, students and administrators must always be vigilant to the risk of capture by powerful, discourse-skewing influences. To modern observers, the word "McCarthyism" best conveys this apprehension.

A third area of agreement was that the University owes a duty of care to its students and personnel. Physical safety, as well as protection against gross invasions of privacy and dignity, are among the University's obligations. Also among its responsibilities is the task of promoting the equality aspirations of the fourteenth amendment. Neutrality among competing ideas thus does not mean that the University cannot, or should not, take a stand with respect to equal opportunity. On the contrary, the University's role as a public institution requires that it take particular care not to endorse or further speech or conduct that violates federal or state laws against such discrimination. Not only must it disassociate itself from discriminatory conduct, the University must take active steps to further the national policy against such discrimination.

A fourth area of agreement was that verbal encounters such as those reported to the Committee by Dean LuAnn Krager are reprehensible, and potentially scarring events. No one argued that the speech was intrinsically valuable, or contributed to the truth-seeking aims of the first amendment. Rather, those who argued for nonregulation of the speech did so either because they feared the "slippery slope" of speech regulation -- that is, that to regulate this speech might lead to the regulation of other, more clearly valuable discourse -- or because they thought that the prejudice that animates such speech is less dangerous when aired than it is when repressed. In other words, they agreed that the speech was "bad" and harmful, but thought that to regulate the speech might prove more harmful. Even those commentators who invoked the phrase "sticks and stones . . ." admitted that the phrase does not adequately protect the victim from the psycho-emotional harm of hate speech.

Beyond these areas of agreement, however, the Committee discovered substantial areas in which contemporary opinion diverges. Of these areas, the more significant are as follows:

a. "Political Correctness" Versus "Full Civil Rights"

According to some observers, colleges and universities have become enclaves of "political correctness." These observers view the hate speech proposals of some institutions as evidence of capture by left-leaning social activists. They argue that the civil rights demonstrators of the 1960s have become the

tenured professors of the 1990s, and that they are foisting their version of elevated consciousness on an overpowered minority of conservative and centrist teachers and students. These observers invoke terms such as "Orwellian" environment, or "liberal hegemony" in critiquing the emphasis on the rights of minorities, women, and other outgroups on campus. They argue that silencing on campus occurs less for members of outgroups than it does for people who take issue with some aspects of the civil rights agenda. In particular, they argue that the words "sexist", "racist", and "homophobic" have become so powerful that the victim of the accusation may suffer serious personal and professional repercussions, even though he or she has not been tried before a neutral fact-finder, and has at most expressed an opinion that is arguably critical of women, racial minorities, or some other protected class. The result, they maintain, is a serious chilling of speech on campus, especially with respect to important and culturally contested questions such as affirmative action, among others.

Given this climate of political correctness, these observers fear that any hate speech policy would be abused to serve particular political interests. Moreover, the policy would provide no protection for people who are called racist or sexist, or whites who are called racist terms, such as "honky." As such, these observers believe that the policy would further tilt the power balance in favor of particular groups on campus, and exaggerate the discourse-skewing climate that already exists.

In sharp contrast to this account of life on campus is the report of some outgroup members. These commentators argue that the root of the outcry against "political correctness" is actually a battle for turf. The results of the post-Brown regulations have included a dramatic increase in the numbers of minorities attending public universities, an expansion of hiring and promotion of women and minority scholars, the creation of educational departments and programs devoted to women and minority issues, an expansion of the definition of the "core curriculum" to include works by writers and scholars of color and of non-European origin, and a host of other affirmative steps to diversify the curriculum, the student body, the faculty and staff, and University life in general. According to the outgroup commentators, these advancements and changes have at last shifted some participatory power to previously powerless groups. As the number of outgroup teachers and students has increased, this has produced apprehension in people whose interests and status are threatened or compromised. Derrick Bell of Harvard University has termed this the "tipping phenomenon," which means that the dominant group only favors hiring of outgroup scholars, or other diversity-promoting strategies until the scale begins to "tip", and the minority groups attain sufficient numbers to truly influence policy.

These outgroup commentators also argue that colleges and universities remain in many ways unfriendly and violent environments for students of color, or students of other outgroups. Far from being over, they believe the battle for civil rights has only begun. In the 1950s and 1960s, the principal equality challenge

was to eliminate access barriers. Although access equality remains a serious concern, in many respects this goal has been achieved. Today, the equality challenges are less blunt, but more complex. Discrimination is more subtle than in 1960, and harder to combat. Resistance to the modern goal of achieving root-down equality, a form of cultural consciousness raising, is thus likely to be quite powerful, especially when people who regard themselves as non-racist, conscientious egalitarians are asked to reexamine their prejudices.

Compounding this dilemma, they add, is that both the context and the terms of the equality agenda have changed. For example, in some circumstances being female arguably can enhance one's chances of securing a position, rather than reducing them. Nor does minority group status inevitably mean fewer educational opportunities. Though modern observers disagree strongly about the relative advantages and disadvantages of outgroup status, the truth is that some things have changed for the better for women and minorities, perhaps especially on college campuses. As such, the rhetoric and the strategies of the 1960s often are ill-suited to our modern situation. Instead, the University community must find a new, more complex, vocabulary if it is to deal adequately with the problems of this changed environment. Yet at present, this new vocabulary is missing. The result is an apparent stalemate and a widespread failure to see that the civil rights agenda remains unfulfilled, despite the progress in equal access.

Finally, the outgroup commentators note that history remains intensely relevant to contemporary life, and to modern opportunities for some groups. The University must continue to take account of the cumulative impact of these historical patterns of prejudice, if it wishes to transcend this history. It thus still must adopt some policies and rules that are "asymmetrical" in application, in order to achieve full equality. In other words, American history, <u>not</u> contemporary political fashion or "correctness", is what justifies a policy that would punish a white speaker who says "Nigger", but not a black speaker who says "Honky." Things simply have not changed enough, to make the impact of these epithets equal.

b. "Fresh Air" Versus Deterrence

Another significant area of disagreement involves differing estimations of the impact of regulation on the hatred that animates epithets. One group of commentators believes that by allowing this speech, we permit the hatred to vent itself. That is, "fresh air" tends to exhaust the bad feeling, as well as to identify the centers of racial and other bigotry. If the speaker cannot vent, then the hatred will go underground where it may collect force and win adherents. Also, by punishing the speaker, the University may engage others' sympathy for her, however reprehensible her message. Thus, the safest course is to permit the hate speech, in order to secure greater long-run protection for outgroup members.

The counterargument to the "fresh air" position is that hate begets hate, and that free expression of anti-Semitic ideas in Germany hardly exhausted the speaker; rather, it gained him a considerable and murderous following. In any event, if the University were to adopt a narrow, "fighting words" type policy the speaker still could vent prejudicial thoughts, provided that she did not vent them directly and personally at an individual. Yet, by providing a remedy for personal, targeted hate speech, the University might deter such attacks, and protect the potential target's autonomy. If this meant that the speaker's hatred for the individual would go "underground", this would be a desirable consequence, in that the target's psycho-emotional integrity would be preserved. An analogy to sexual harassment makes this clear, insofar as regulation of this speech protects the integrity of the worker, even though the silenced co-worker or supervisor may still wish to make harassing remarks.

c. "Slippery Slope" Versus Workable Standards

Perhaps the most common criticism of hate speech regulation is that because the policy deals with language, it inevitably will prove unworkable, and may lead to overenforcement. The concern is that the definition of hate speech is too murky. A vague term can lead to overbroad interpretation by zealous administrators. Thus the policy invites a tumble down the "slippery slope" of an increasing restriction of free speech. Moreover, inventive racists will simply coin new terms, further complicating disciplinarians' efforts to determine whether particular speech falls within the hate speech policy. In order to meet this concern, the policy would need to allow for factfinder discretion, which can lead to greater abuse of freedom of expression.

The counterargument made by those who favor hate speech regulation is that all regulation, including regulation of speech, involves some element of factfinder discretion, and calls for contextual assessment of whether the regulation should be applied. The policies that rely on "fighting words" and "intentional infliction of emotional distress" are no more amorphous than "breach of the peace" statutes, the tort of intentional infliction of emotional distress, or even of speech that creates a "hostile environment" at work. In many respects, these hate speech policies are more tightly worded than much speech regulation. And, because they offer some guidance to administrators, they actually may better control discretion that already is being exercised when students and others are disciplined for disrupting the peace on campus.

d. Educational Strategies Versus Disciplinary Strategies

Nearly everyone who discusses the issue of hate speech on campus argues that educational strategies are appropriate ways to combat prejudice. They disagree about whether discipline should <u>also</u> be invoked.

Those who prefer education over discipline argue that discipline is too harsh a tool, and potentially counterproductive for the reasons stated above. In particular, they object to expulsion as a penalty for "bad speech."

The rejoinder to this argument takes two forms. One rejoinder is that if education were working, then the speech would not be occurring. Educational strategies already are in force, but they are not preventing some hate speech. Moreover, to use educational remedies alone is to signal that the speech is "not that bad", in contrast to stealing, cheating, physical assault, or other bases for discipline. Some observers believe that hate speech is "that bad," and thus deserves comparably harsh measures.

A second, different rejoinder to the educational remedy for hate speech is that it is likely to provoke as much, or more, resistance in ways that would undermine its effectiveness. In order to prove more effective than current educational efforts to root out prejudice, the new efforts presumably would need to be more aggressive and pervasive. For example, all entering students might be obliged to attend a consciousness-raising class in the fall semester. Yet, given the often bitter disputes about any required college courses, and the resentment of some students and faculty to the alleged new "political correctness", it is unlikely that more interactive educational attempts to "cure" prejudice would be well received by students or faculty. As such, to argue for educational strategies instead of disciplinary ones likely would mean -- as a practical matter -- that the University simply would continue on its present course. That is, to adopt the educational strategy argument in effect, is to endorse current practices regarding hate speech on campus.

e. Silly Versus Symbolic

A final significant area of disagreement concerns whether a constitutional, tightly worded policy would deal only with the bare tip of the iceberg, and regulate so little of the range of destructive discriminatory discourse as to be a silly rule, not worth adopting. The argument here is that the real enemy is not the occasional outlandish speaker who uses epithets, but the subtle and more insidious racist, who avoids epithets in favor of more elegant expressions of bigotry. The proposed hate speech policy does nothing to prevent polite racism, and thus is much ado about too little to warrant this potentially dangerous incursion into free expression.

The counterarguments are first, that the evidence on this and other campuses indicates that gutter racism is not rare, and second that the symbolic effects of the rule are likely to prove more beneficial than harmful. Simply because the rule would not cover all expressions of bigotry does not mean that it is silly or pointless. For example, it might deter the student who insulted the African American student in the library bathroom, a non-negligible, positive outcome.

5. Summary of Investigation

In sum, the Committee discovered that although most people are committed to the constitutional ideals of equality and freedom of expression, they disagree about how to reconcile these interests in the specific context of hate speech on campus. Many commentators argue for no regulation beyond existing breach of the peace rules. Others argue that the nature of the wound that a racial insult inflicts, coupled with the strong University commitment to equal opportunity, point in the direction of hate speech regulation. Some of these observers favor aggressive control of discriminatory speech, such that any speech that stigmatizes or vilifies another because of a protected characteristic could be controlled. Others favor narrower rules that would discipline only speech uttered face-to-face, at an individual or small group of people, and that uses the most offensive, "gutter" words of racism or other prejudice.

The Committee's review of the constitutional caselaw indicates that regulation of this speech is permissible in some contexts, on the ground that it represents an unreasonable interference with the victim's rights to freedom from intimidation and to equal opportunity. But the caselaw also suggests that respect for the speaker's right to freedom of expression demands that others tolerate even expression of ideas that they find abhorrent. The Committee reads this caselaw to mean that federal statutes that regulate discriminatory speech in the workplace, or in other regulated contexts, likely is constitutional. In other campus settings, however, regulation of discriminatory speech likely cannot exceed the parameters of a "fighting words" or an "intentional infliction of emotional distress"-type model. Even such narrow policies, however, might be ruled unconstitutional on the ground that they distinguish between racial and other types of verbal harassment, and thus reflect a preference for certain values or ideas over others.

Finally, the Committee determined that the problem of discriminatory speech has occurred on the University of Arizona campus. Some students and staff have reported instances of explicit and veiled harassment, and some perceive the University of Arizona atmosphere as hostile, discriminatory and alien to people of color, to religious and ethnic minorities, to gays and lesbians, to women, and to people with handicapping conditions.

C. COMMITTEE PROPOSAL, INTERPRETIVE GUIDELINES, AND DISCIPLINE GUIDELINES

Preamble

Based on the foregoing investigation, and with due respect for all viewpoints expressed, the Committee has decided that a "fighting words" policy, as adopted and interpreted by officials at Stanford University, represents an appropriate and well-reasoned response to the competing concerns.

It therefore recommends that the University of Arizona adopt the following policy, which would apply to all faculty, staff, students, and other members of the University community. The policy does not preempt any other regulations on discriminatory conduct on campus that may be imposed by state or federal authority, to the extent that these regulations control or punish certain verbal conduct. It does, however, preempt any other general, campus-specific rule that purports to regulate verbal harassment on the basis of race, sex, sexual orientation, handicapping condition, color, religion, or national or ethnic origin.

The Committee further recommends that this proposed policy take effect for a two year period only, after which the policy would be reconsidered in light of experience. The strength of the arguments in favor of a more aggressive policy, as well as those against adopting any policy, convince the Committee that the issue deserves continuing attention and investigation. As such, debate on the matter should not be foreclosed or dampened by any particular Committee's recommendation. On the contrary, the Committee believes that both equality and freedom of expression are better promoted if the wider campus community applies ongoing intellectual effort to exploring the themes addressed in this Report. To force the community to revisit the question, and to keep the campus engaged in conscious, reflective self-governance, the proposed policy should expire in spring of 1993.

In proposing the following policy, the Committee recommends, in effect, that the University follow a three-tiered approach to discriminatory speech. These tiers reflect contextual factors that the constitutional caselaw acknowledges as relevant to a speaker's right to free expression.

The first tier consists of speech that occurs in a highly controlled environment, such as the workplace, in which the rules of interpersonal conduct necessarily are different from the rules that govern conduct in less confined, less structured environments. Thus, for example, an employee cannot engage in racist speech at work that creates a hostile environment for coemployees, as that term is defined by federal law. Likewise, an instructor who engages in sexual harassment of students might be disciplined for conduct that would not be disciplinable outside the teacher-student relationship. The Committee defers to the applicable state and federal regulations to define the contexts in which speech of this sort would be regulable. In general, however, these rules require situation-appropriate conduct, including verbal conduct, which may be more restrained than "streetcorner" conduct. The Committee acknowledges that the federal and state regulations that govern such conduct may take inadequate account of the potential conflict between first amendment and fourteenth amendment values. Nevertheless, the appropriate body to evaluate this relationship is a court. The University, as a state institution, must abide by the prevailing statutory and decisional discrimination laws.

The second tier consists of speech that is directed personally to an individual or small group of persons, and that is in-

tended to insult or stigmatize her on the basis of a protected classification, and that uses fighting words or symbols, as they are defined in the Committee proposal. This rule would entitle the University to regulate the most violent forms of discriminatory speech, under the limited conditions set forth in the Policy below.

The third tier consists of all other forms of discriminatory speech, including general statements against members of a particular group, epithets directed at a general audience, speeches on the campus mall, and any other speech not covered by tier one or tier two. Most campus speech would fall into this broad category. The Committee proposes that all such speech remain immune from official regulation, in order to promote the strong interest in preserving the campus as a center of robust first amendment exchange. Instead, such speech should be subject only to the traditional first amendment remedy for "bad speech"--which is counterspeech.

The Committee defines "counterspeech" to include official expressions of disagreement with sexism, homophobia, racism and other forms of bigotry. That is, the faculty, the administration, and other members of the academic community do not, in the words of the United States Supreme Court, shed their constitutional rights at the schoolhouse gate. It is therefore appropriate for all members of the academic community to voice disapproval of polite racism or of other subtle forms of subordination, without fear of censure. Likewise, those who insist that the pendulum has swung too far, and who decry the new "political correctness" also should be entitled to speak without fear of discipline. All speakers, of course, may suffer costs because of their speech -- such as shunning of their classes, critiquing of their ideas, or disregard for their proposals. This is, however, how the marketplace crucible works; those who favor the marketplace model cannot have it both ways.

In promoting the counterspeech alternative for most verbal expressions of prejudice, however, the Committee does not endorse the status quo, or romanticize the prevailing speech conditions for nondominant speakers. In particular, the Committee recommends that the University expend more resources to fund educational strategies to promote equal opportunity. These could include enrichment speakers, teach-ins, and reach-out efforts to attract scholars whose research, teaching, service, and life experiences will promote democratic pluralism. The Committee further recommends that the University provide adequate counseling and other resources to assist students and others to cope with the emotional and physical injuries that may be inflicted on them by members of a community who have not yet learned to appreciate diversity. The full range of these educational and other alternatives is beyond the scope of the Committee's charge. Nevertheless, the Committee believes that current efforts by the University in this regard are not adequate -- which it believes is demonstrated, in part, by the continued and undisputed verbal attacks on some University community members.

In recommending both disciplinary and expanded educational efforts to root out prejudice, the Committee rejects the increasingly popular apology for continued inequalities, i.e., that the problem of discrimination has been "solved." It also rejects the debilitating and counterprogressive laments that "Prejudice will always be with us," or that "Adults are impervious to consciousness-raising strategies." It rejects these latter views on the basis of historical experience, which demonstrates that progress has occurred. Moreover, it regards cynicism about the mind-altering potential of higher education as fundamentally inconsistent with the purpose of a university.

The Committee proposes that appropriate authorities adopt the following policy and implement it by amending Paragraph F10 of the Student Code of Conduct to read as set out in Paragraph 3 below. We also recommend that the Proposed Rules for the Maintenance of Public Order, Paragraph C13, be amended to the same effect.

Policy

1. The University of Arizona 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.

2. The University of Arizona is also committed to principles of equal opportunity and non-discrimination. Each student has the right of equal access to a university education, without discriminatory harassment on the basis of age, sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin, as defined in paragraph 3 below.

3. The following conduct is subject to disciplinary action: Discriminatory intimidation by threats of violence, and personal vilification of another on the basis of their age, sex, race, color, handicap, religion, sexual orientation, national and ethnic origin or veteran status.

4. Speech or other expression constitutes personal vilification if it:

a) is intended to insult or stigmatize an individual or individuals on the basis of their age, sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin or veteran status; and

b) is addressed directly to the individual or individuals whom it insults or stigmatizes;

c) makes use of insulting or "fighting" words or non-verbal symbols "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 age, sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin or veteran status.

Interpretive Guidelines

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

Some conduct would no doubt violate University rules 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 speech as a separate violation.

The answer is suggested by reflection on the reason why the particular kinds of discrimination mentioned in the University's Nondiscriminatory Policies 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 "age, 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, these characteristics tend to make individuals the target of socially pervasive invidious discrimination. These characteristics thus tend to serve as the basis for cumulative discrimination: repetitive stigma, insult, and indignity on the basis of a fundamental personal trait. In addition, for most of the groups suffering such discrimination, 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 University policy protects against.

2. Why is intent to insult or stigmatize required?

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.

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 a 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.

3. Why is only vilification addressed directly to an individual prohibited, and might a verbal attack addressed to more than one individual ever violate the rule?

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 an individual, directed to that individual, and expressed in viscerally offensive form.

The requirement of individual address 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 the potentially chilling effect of the threat of disciplinary proceedings. Thus, for example, a speaker on the campus mall who gives a speech in which he defames members of an ethnic group cannot be silenced, even if the speaker uses epithets, provided that the remarks do not become an intentionally personalized attack against a particular member of that group.

The proposal 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 vilification by telephone is not (for our purposes) essentially different from vilification that is literally face to face. And occasions may arise in which an epithet is targeted at a small number of individuals each of whom is directly and personally addressed. Each has been subjected to disciplinable conduct in the meaning of the proposed rule.

4. 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 limited classes of speech which are outside the protection of the First Amendment. 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."

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). 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 directly to 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 is to be subject to 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, post 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 esta-

blished 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 psychological scars in order to establish that an offense has been committed. Rather, the fact of injury is established by the insult itself.

5. 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 kinds of expression covered are words or combinations of 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 an African-American students, or a Nazi swastika directed at a Jewish student. 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. Directing 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.

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.

6. 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 University of Arizona 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 policy, 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 Policy, even extreme expression of hatred and contempt for protected groups does not, so long as it does not contain prohibited insulting or fighting words, and is not addressed to individual members of the groups insulted. Yet such extreme expressions of hatred and contempt cause real harm. Members of the university community have every right to denounce them. At the same time, however, respect for the right of free expression -- so critical to a university community -- requires that students tolerate opinions aimed at suppressing the exercise of this right, although violence, or the threat of violence, constitutes a violation of University rules.

In general, the disciplinary requirements are not meant to be a comprehensive account of good citizenship within the Arizona community. 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 Arizona 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.

Discipline Guidelines

The foregoing Policy shall be subject to all procedural requirements of the applicable University disciplinary rules, with the following modification: No student shall be suspended or expelled from the University for a first violation of this rule. Discipline of a student for a first offense may include official warning, mediation, probation, or other appropriate steps short of suspension or expulsion.

Charles E. Ares
For the Committee
Dr. Adella Allen
Mr. David Gill
Dean LuAnn Krager
Professor Toni Massaro
Ms. Jacquenese Price
Dr. Jay Stauss

Dissent By Elizabeth A. Buchanan

I dissent form the committee recommendation and report. Following is a brief statement of my reasons.

I agree with the committee's conclusion that the current code of conduct rule prohibiting harassment of individuals simply because they happen to belong to certain traditionally discriminated against groups is too vague and too potentially restrictive of constitutionally protected speech. I also agree with the committee's conclusion that the university should be concerned seriously when speech is used on this campus for the purpose of stigmatizing and intimidating individuals simply because they happen to belong to any of those discriminated against groups. I do not agree that the rule recommended by the committee sufficiently protects individual expression of opinion that should be free from state restraint in the guise of this state university rule. As to the kinds of stigmatizing and intimidating speech that I believe should and can be restrained, most of it can be restrained right now by recourse to existing university rules and policies and to applicable federal and state laws. Thus, adoption of the rule recommended by the committee or retention of the vague and more restrictive current Code of Conduct rule is not necessary.

SEPARATE STATEMENT OF PROFESSOR CHARLES E. ARES

Despite misgivings about any attempt to regulate speech that is not an integral part of illegal conduct, I join wholeheartedly in the recommendation of the Committee that the Code of Conduct and the Rules for the Maintenance of Public Order be amended to prohibit racial, sexual and other slurs that are the practical equivalent of assaults.

My concerns flow from the realization that underlying our recommendations are pathologies such as racism, sexism, etc., that we do not, because we cannot, propose to eradicate by controlling speech. Our tradition of freedom of expression does not permit us to attack attitudes regarded by the majority as abhorrent by regulating speech. Even a rule prohibiting personal verbal assaults applied in circumstances in which it is difficult to separate strong political-social views from personal venom poses considerable risk to free-wheeling discourse, as Ms. Buchanan's statement shows. Nevertheless, relying on the good judgment of University officials in applying this rule, I join in the recommendation of the Committee. I particularly join in wanting the University to send an unmistakable message that racist, sexist and other discriminatory epithets delivered as personal insults are not acceptable behavior on this campus.

I do wish to express a reservation about an aspect of the rationale for its action stated by the Committee. Beginning on p.8 of the Report, it is explained that the principle of equal education opportunity flowing from Brown v. Board of Education is a constitutional value equal to that of freedom of expression and that the "University can regulate some speech, when equality-based concerns are seriously compromised." This argument, though attractive, is quite debatable and subject to very careful qualification. It also suggests that the University may simply "balance" the value of free expression against the value of equal opportunity in attempting to decide whether certain speech is to be prohibited. With all respect, I reject this oversimplified description of the way such decisions are to be made because it simply invites an institution to relegate free speech to less than the paramount position it occupies in our democratic system. In any event, the rationale sweeps far beyond what the Committee actually recommends. Our proposal is designed to prevent personal harm. The equality rationale would, if applied with vigor, justify restrictions on speech that creates a "hostile educational atmosphere." Such restrictions of speech would, in the view of the Committee, be unconstitutional. I fear that our unnecessary expression of such a far-reaching rationale may be misunderstood by an aggressive and well intentioned administrator as a warrant to push disciplinary rules for beyond what the Constitution will allow.

With this reservation as to part of the Report's rationale, I join the Committee Report.