

Regulating Campus Hate Speech: Is It Constitutional?

By Charles H. Jones

FROM THE PRESIDENT

This edition of FOCUS is authored by a respected Rutgers University Law Professor, Charles Jones. The article touches on constitutional ways of reducing intergroup violence on university and college campuses. This topic represents a change for traditional readers of NCCD materials, however the recent urban riots in Los Angeles and other cities makes clear the urgent need for all persons concerned about justice to examine the growing racial hostility in our society.

Public school campuses are emerging as major locations of hate crimes. In just two months, newspapers across the country reported 51 incidents of individual attacks, group fighting and racial graffiti on high school and junior high campuses. Bias crimes are disproportionately committed by young people. In several cities, more than half of those arrested for bias crimes are teenagers or young adults.

There have been documented incidents of bias-related violence at over 250 colleges and universities in the last four years. Hate crimes at educational institutions are particularly abhorrent because they create fear and repression in the very environments that should foster curiosity and exploration. We hope that this edition of FOCUS stimulates more thought and action on this important issue.

Barry Krisberg, Ph.D.

Annually between 800,000 and one million American college students are victims of ethnoviolence.¹ As observed by the U.S. Commission on Civil Rights, these incidents take the form of "racist slurs and posters, racial harassment, and alleged racial intimidation; anti-semitic remarks, graffiti, and posters; and harassment and threatening statements toward lesbians and gays."²

This report analyzes the constitutionality of policies regulating hate speech and ethnoviolence on college and university campuses.³ It is a summary of five themes postulated during the discussion of speeches, articles, and memoranda by the participants of a symposium sponsored by the Ford Foundation and Rutgers University Law School of Newark, New Jersey. The symposium participants included lawyers, university administrators, social scientists, and executive administrators/directors for various private and public civil rights organizations. Although the participants represented a diverse range of views, all were actively engaged in speaking, writing, researching, or regulating campus hate speech.

The five themes that dominated the symposium discussions were:

1. Nature and causes of campus harassment.
2. Free Speech versus Equality: the Constitutional basis for university hate speech policies.
3. Basic features of university hate speech policies.
4. Court views of university hate speech policies.
5. "Criminal Harm" as the moral balance between ethnoviolence and tolerance of offensive speech.

1. Nature and Causes of Campus Harassment.

Although it was not one of the original purposes of the symposium to explore the underlying nature or causes of campus harassment, an assessment of the nature of ethnoviolence on many of our college/university campuses was an important theme of the discussions. Dr. Howard Ehrlich, Research Director of the National Institute Against Prejudice and Violence, estimated that 20 percent of students experience some form of ethnic or racial attack during an academic year and one-fourth of these students are victimized more than once.⁴ Unfortunately, 50 to 90 percent of victims do not report the incidents to the university police or administration.⁵

Moreover, more than half of the minority students experience isolation and discrimination and perceive of the campus atmosphere as one of "prejudice and discrimination."⁶ One consequence of these feelings and perceptions is that some majority-race campuses are becoming "hostile environments" and minorities are

transferring from predominantly white to African-American majority colleges.⁷

Although no comprehensive empirical studies have been done to determine the causes of recent ethnoviolence, most studies on the subject⁸ and media reports concur in the view that increased racial and ethnic diversity on American campuses, particularly majority race colleges is the largest single factor in explaining such conflict.⁹ One recent study, conducted at the University of California, Berkeley, suggests that the causes of increased ethnic conflict are very complex but can be partially understood as a dynamic generated by several changes there over the past decade.¹⁰

From the 19th Century until the 1980's, the Berkeley campus had been dominated by Americans of European descent.¹¹ During the decade of the 1980's, the student composition shifted from 66 percent white to less than 45 percent white. At the same time that ethnic and racial diversity were changing, two significant things happened. One was that the University responded to the changing ethnic and racial composition by diversifying its curriculum and its student body.¹² Another was that composition for spaces in the entering classes increased dramatically. As late as the 1960's nearly every applicant to the campus who met the eligibility requirement and who applied was admitted. By the end of the 1980's, however, competition had become so fierce that only 16 percent of those applying and meeting eligibility requirements were admitted.¹³

The Berkeley report notes that student reaction to these changes has been very mixed and conflicting. While many groups of students seem to verbally support affirmative action policies, they hold "strongly conflicting and contradictory views about diversity and the policies necessary to achieve it."¹⁴ The University of California, Berkeley, is an unusual school and its experience might not be representative of many or most American colleges or universities. But, what has

happened there suggests that some of the same things might be happening elsewhere.

The U.S. Commission on Civil Rights cited four causes of campus bigotry at its briefing on "Bigotry and Violence on College Campuses: 1) deficiencies of campus environments, including but not limited to, isolation of minorities, inadequate recruitment and retention of minority students and faculty, exclusion of minority cultures from the curriculum, de-emphasis of minority-interest programs, and discouragement of minorities from entering/continuing certain disciplines; 2) insensitivity and ignorance of minority cultures among staff, course offerings, and guest speakers; 3) competition for limited university resources; and 4) extremist speakers.¹⁵

In sum, it appears that instead of providing equal opportunities for women and minorities, many of our university and college campus are becoming arenas of isolation and intimidation.

2. Free Speech versus Equality: the Constitutional Basis for University Hate Speech Policies.

National discourse about the Constitutional basis for campus hate speech tends to be divided among three main camps: civil libertarians, equalitarians, and university administrators. The civil libertarians argue that the entry of government, in the form of the university, into the business of regulating communication on campus is anathema to free speech concerns of the First Amendment of our Constitution.

The equalitarian camp argues that "hate speech" or ethnoviolence victimizes, stigmatizes and subordinates minority students. Equalitarians contend that the subordination, stigmatization, negatively impacts on the educational experience in such a way as to deprive them of many educational benefits of the university. Thus, they are denied equality of treatment, or equal protection of the law.

Many educational administrators and academics believe that the university has a responsibility for maintaining a campus environment conducive to learning for all. They are resolute in their claims supporting the authority of the university to proscribe communications that are detrimental to that goal.

There is, however, some common ground beneath these divergent viewpoints. All accept limitations upon certain forms of speech, i.e., those that cause definable harm or where privacy or property interests are traduced.¹⁶ Property interests include, but are not limited to, dormitory space or public building surfaces.

The most troublesome and least resolvable issues separating these camps are differences in ideological perspectives. Civil libertarians exalt the virtues of "individualism" over the interests of enhancing the dignity or status of groups. The equalitarians assert the necessity for legal interpretation that promotes values likely to improve the status of subordinated groups. Thus, the debate is whether to accord primacy to group or individual rights, free speech over equality, and the security and order of the campus environment over disruption.

The problems associated with determining primacy between free speech values and equality values are complicated. Scholars differ over the nature of equality and rights as well as over which should have priority. Some say, for example, that liberty is more basic than equality¹⁷ while others argue that equality is the source of all rights and liberties.¹⁸ Professor Ronald Dworkin proposes that individual rights to distinct liberties must be recognized only when the right to equal treatment precedes liberty rights.¹⁹ As a result, rather than competing with the right to equality, the right to individual liberty follows from a concept of fundamental equality.²⁰

3. Basic Features of University Hate Speech Policies.

As of June, 1990, approximately 50 universities and colleges across the country had adopted or modified policies to redress the problem of increased ethnoviolence. Professor Henry McGee at the Law School of the University of California in Los Angeles examined hate speech policies at 40 of these schools — 15 American colleges and 25 universities (20 private and 20 public). The responses by the universities to ethnoviolence and hate speech were of three types. Schools either, 1) ignored the problem as non-existent or isolated incidents, 2) made strong statements that such conduct would not be tolerated, or 3) enacted new policies or modified existing student discipline codes.²¹

Each of the schools had promulgated a statement which consisted of 1) a position and a policy regarding harassment, including definitions and/or 2) a grievance procedure.²² The schools were categorized into four groups, those which had a:

1. Clear, yet broad policy statement but, vague grievance procedures
2. Vague or broad policy statement but, clear grievance procedures
3. Vague or broad policy statement but, vague grievance procedures
4. Narrow policy statement and vague grievance procedures

Professor McGee noted that the statements show variances with respect to the resolution routes, the bases of prohibited discrimination, and their relationship to state or federal laws and constitutional guarantees. They vary in tone from student-centered statements that focus on quality of campus life to detailed and formal declarations of policy that focus on off-campus constituencies. The most striking variances were with respect to right to freedom of speech and expression. He noted that "anti-harassment policies varied from a college that made free

expression an over-riding value that trumped all other concerns, to a university that prohibited harassment as defined as to include conduct that 'annoys' another person or group."

Professor McGee concluded that it appears that "a wide range of schools felt they had to 'do something.' Thus the range extends from sentence-long and even cryptic pronouncements of little or no value, all the way to complicated, constitutionalized statutory schemes that bear the mark of compromise and erudition."²³

4. Court Views of University Hate Speech Policies.

Four university hate speech policies have been challenged. Decisions have been rendered in two, *Doe v. University of Michigan* and *UMV Post v. Bd of Regents, University of Wisconsin*.²⁴ Let us briefly examine the policy of the University of Michigan (U of M) to illustrate the constitutional issues. The U of M created three speech zones — 1) public areas where speech would be maximized, only physical acts would be sanctioned; 2) dormitory areas where speech would be governed by lease provisions; and 3) educational centers (classrooms, libraries, etc.) where speech which "stigmatized" or caused a "hostile learning environment" would be subject to sanction.

The federal district court in *Doe* invalidated the U of M policy as being both unconstitutionally overboard and vague.²⁵ The *Doe* court said that the issue was one of balancing free speech against equality but decided that the university had paid too little attention to speech interests and that the policy would sanction speech that was merely offensive.

There are at least three implications to be considered from the above policy analysis and the court decisions. First, the language of the U of M policy that attempted to distinguish words like "stigma" and "offensive" from protected speech was clearly too vague.

Clear or specific language might have avoided such condemnation. Three hypothetical illustrations delineate this point:

1. A black female student is walking across a mid-western university campus. Three white males follow her for awhile and one states: "We've never tried a nigger!"
2. A Jewish fraternity sponsors a "slave auction" fund raiser at a private residence. The auction includes a number of skits: in one, fraternity pledges wear black face-paint, "Afro" wigs, and lip-synch Jackson Five songs. In another skit, a male pledge with black-face and wig, impersonate Oprah Winfrey while two other males taunt her sexually. A student committee investigates the auction, 200 students demonstrate, yet the Chancellor refuses to expel the frat members because she believes their actions are constitutionally protected.
3. Two tenured college professors: one, white, advocates genetically-based white supremacy; the other, black, that African-Americans are biologically superior to whites, both intellectually and physically. The professors are invited by two campus student organizations to lecture on campus about their racial theories. Black students stage a mass protest against the white professor, and white students stage a mass protest against the black professor.

It is arguable that the use of the epithet "nigger" in case #1 was both offensive and stigmatizing but was it sufficiently "offensive" to constitute harassment and thus warrant sanction? This speech might be defined as harassment because "...by it's very utterance [it] inflicts injury."²⁶

The second implication from the *Doe* decision is that *both* the culpability of the speaker and the likely harm caused the victim are important when determining

whether "offensive speech" is harassment. Harm caused by such an intentionally inflicted insult should be considered when deciding whether the offense should be sanctioned. If the appropriate sanction/response setting principle is "harm," then, the question becomes, "How is harm to be defined?" I suggest that harm be measured exclusively by an intent standard of "mens rea" or in combination with an assessment of the severity of the offending conduct to the victim and/or the university community.

The third implication from *Doe* is that the court did not condemn the creation of the three speech zones. Arguably, the degree of tolerance for offensive communication could be governed by the location of the speech incident. Certainly, the speech involved in Cases #2 and #3 is different from that in Case #1, based simply upon where it occurs. Neither minority-race nor majority-race students constitute a captive audience for a speaker unpopular and offensive to either. Similarly, the location of the "mock slave" auction — an off-campus facility — might be tolerable if it did not contribute to the establishment or maintenance of a "hostile" learning environment.

Thus, although the court, in *Doe*, purported to resolve the tension between free speech and equality, it failed to fully address many vital issues; for instance, culpability, harm, and location.

5. "Criminal Harm" as the Moral Balance between Ethnoviolence and Tolerance of Offensive Speech.

The drafters of university hate speech policies seem to assume that they could constitutionally proscribe face to face harassment as exemplified by Case #1. The more perplexing question is the degree to which policies might constitutionally regulate Cases #2 and #3 — off-campus group-vilifying remarks or behavior and the use of campus facilities by speakers whose remarks may be offensive to some students.

At first view, Case #3 would seem the far easier of the two cases to resolve. Even if an extremist speaker predictably would utter offensive and/or group-vilifying remarks, it might be argued that since the students are not a captive audience for those occasions, there is little reason to expect that they will be harmed by the speaker's remarks. They are not a captive audience because they can simply choose not to attend the lecture.

On the other hand, suppose the campus has already become saturated with hostility. Would a university president violate the extremist speakers' or the students' First Amendment rights by blocking invitations to such speakers because of the likelihood of the speaker stimulating verbal or physical violence? Although, as noted above, extremist speakers have been one of the four major causes of campus ethnoviolence, there seems to be no clear answer.

Unless the university has a systematic way of recording the nature and number of such ethnoviolence incidents, an administrator's non-empirically supported judgment that the environment needs such protection might be challengeable as arbitrary. In the absence of an objective determination that the campus had become a "hostile environment," it would seem that speech interests would prevail over closing the campus to such unpopular speakers as portrayed in Case #3.

Drawing a distinction between Cases #2 and #3 is also not easy. Since the Case #2 incident occurred off-campus, in private accommodations, privacy interests of the fraternity members would support a claim for protection. While the staging of the auction may be offensive to minority students, it is unlikely that they would have directly experienced the event and thus their reaction would be more against the *idea* of the auction than to its direct experience. The abstract idea of the incident is not on the same level of potential harm as the direct face-to-face insult whereas the immediate experience of injury is more certain.

Moreover, there are other remedies. Public exposure of the incident and the reaction it might occasion would, at least, ensure that any such recurrence could not be claimed to be done without awareness of its offensiveness. Certainly, gauging culpability would be easier after even a single repetition of such an incident than for the initial event. The "hostile environment" test, for example, involves questions of whether the perpetrators were acting intentionally, recklessly, or inadvertently. In the campus context, claims of inadvertence are less supportable where it is widely known that similar offensive incidents have occurred and have been deemed unacceptable.

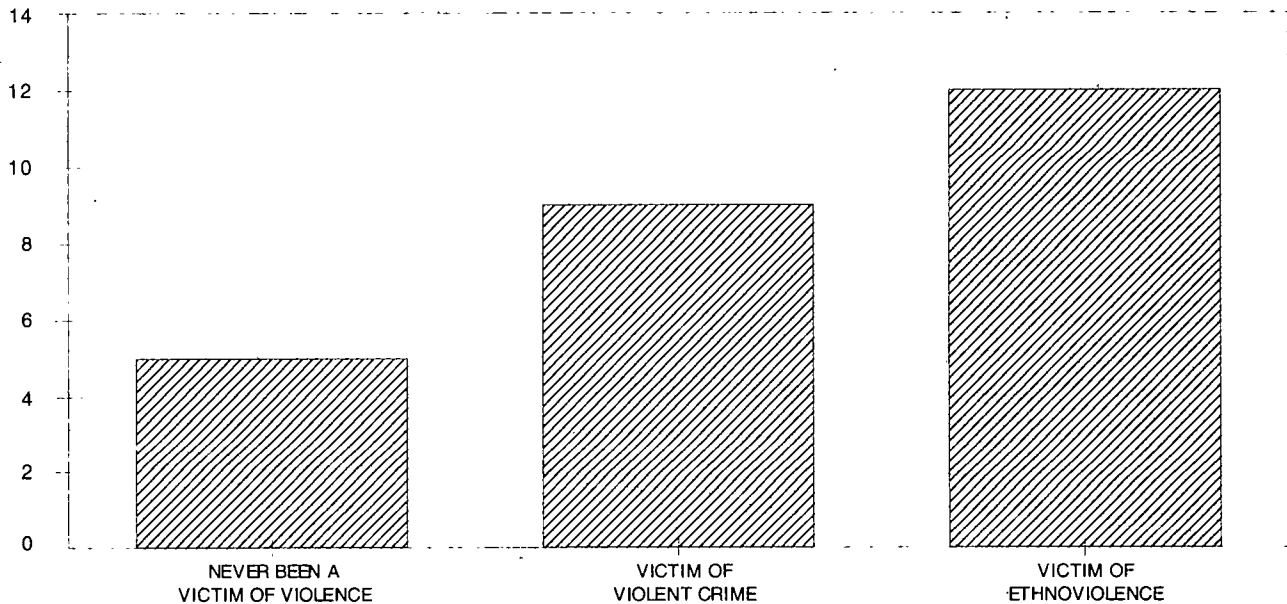
The ultimate question in determining whether the speech exemplified by Cases #2 and #3 should ever be limited, even when an argument for a "hostile environment" can be supported, may depend, in part, upon how a court, legislature, or university would interpret *Beauharnais v. Illinois*.²⁷ The main source of strength and current relevance of *Beauharnais* lies in its focus on the harm indirectly caused individuals by denigration of the value of the group with which the individuals identify and are identified.

While disagreements over the applicability of *Beauharnais* to campus ethnoviolence are likely to persist, it seems reasonable that if the utterances involved are not "political" speech in any traditional sense of the concept, the harmful qualities of group vilification should be subject to proscription. On the other hand, government/universities should be prevented from interfering with either liberty of action or speech that is not "harmful."

Many contend that group defamation must be tolerated to "give extra breathing space for vigorous public debate on campuses."²⁸ But this perspective avoids the fundamental point that much group-vilifying speech — slurs, epithets like those in Case #1 — is not "bad" or "untruthful" speech but rather, hate communication whose purpose is to transmit dislike

FIGURE 1

AVERAGE NUMBER SYMPTOMS REPORTED (BLACK SAMPLE)



and/or contemptuous feelings, i.e., an assault or slap in the face.

When the utterance of words is designed primarily to accomplish something, rather than *to say something*, it is usually either not protected (as with assaults, threats, conspiracies, challenges to duels, etc.) or is entitled only to reduced protection. Thus, if the actor's intent is to harm — humiliate, degrade, or deligitimize the minority group member's status — free speech values are not well served and the pursuit of equality is distinctly stifled.

The culpability of the perpetrator and harm to the victim(s) should be greater where there is a higher likelihood of injury to the psyche of the targeted individuals or group members *and* to the decorum of the university. Thus, more severe sanctions are warranted when the perpetrator acts intentionally and/or when the campus is saturated with incidents of ethnoviolence.

Group-defaming utterances should be subject to regulation because they constitute "harms" to either collective or individual interests of minorities. There is already, some empirical evidence suggesting that the nature of harm caused to individuals targeted by ethnoviolence is greater than violence absent prejudice. In a national study conducted in 1989, the National Institute Against Prejudice and Violence recorded symptoms of stress, such as depression, anxiety, withdrawal, insomnia, loss of confidence, and interpersonal difficulties with friends and family for three groups: 1) persons who had never been victims of violence, 2) persons who had been victims of violent crime not motivated by prejudice, and 3) persons who had been victims of violence that was motivated by prejudice.²⁹

As shown in Figure 1, individuals who have never been victims of violence reported, on average, five behavioral and psychological symptoms. Those who

were victims of violent crime reported an average of nine symptoms. Finally, the victims of ethnoviolence reported, on average, twelve behavioral and psychological symptoms.³⁰ These results are remarkable, for they clearly illustrate the special "harm" often experienced by the victims of ethnoviolence.

Let us briefly return to our cases to illustrate the potential harm. Specifically, in Case #1 above, the actors' purpose is to humiliate the victim, to convey contempt, as would a direct slap in the face. This conduct should be sanctioned, even if the incident is isolated. If the actor's intent is primarily that of inflicting humiliation, it is of little value to society for free speech purposes.

Case #2, from this perspective, is a little different. Although there could be harm to the individual(s) because of group identification, the speech act (a mock slave auction) should not be sanctionable.

However, if the auction occurred on the university grounds at a location where minority group members were prevented from going to the library or class without experiencing its offensiveness, there would be the harm of interference with enjoyment of the campus facilities.

Case #3 is clearly different from Case #1 and #2. The extremist speaker's intent is less clearly one of contempt or hatred. Moreover, the speaker is communicating opinions. Further, unlike the student in Case #1, students can choose not to attend the lectures or can opt to lead a rally in opposition. The harm, therefore, is minimal and thus *not* sanctionable.

In assessing the constitutionality of university policies, it is an inescapable requirement that courts should balance, as far as possible, the protection of the First Amendment with the basic rights to equal participation in the educational functions of the university. However, no "model policy" is recommended because each university must consider the specific context, culture, and history of problems on that particular campus. On the other hand, suggestions for addressing the core issue of race conflict include better educational programs; more discussions among faculty, students, and administrators; affirmative action; and curriculum changes, as well as a clear university policy statement condemning acts of ethnoviolence supported by a fair grievance procedure.

CONCLUSION

Free speech issues have often overwhelmed the problem of ethnoviolence on our college and university campuses. In formulating policy, university administrators and legal counsel are now considering free speech issues as much, if not more, than the race conflict issue itself. Of course, free speech is of concern to all Americans. Minorities have clearly benefited from free speech. There is no question that the First Amendment has been of inestimable value to the civil rights movement. But the shift here, to focus

primarily or exclusively on First Amendment concerns, reflects not minority concerns, but the prejudicial priorities of some members of the dominant social order. Our universities as well as our culture must confront the dilemma presented by the extent to which free speech or racial conflict should be given priority.

ENDNOTES

1. Ehrlich, H.J. (1990). *Campus Ethnoviolence and Policy Options*, Institute Report No. 4. Baltimore, MD: National Institute Against Prejudice and Violence.
2. United States Commission on Civil Rights (1990). *Bigotry and Violence on American College Campuses*, page 4. Washington, DC: U.S. Government Printing Office.
3. Ethnoviolence, according to Ehrlich (1990), is defined as any act or attempted act in which the actor is motivated to do psychological or physical harm because the victim(s) is perceived as representative of a group defined by ethnicity, race, religion, national origin, political belief, gender, age, physical condition, disability, or sexual orientation.
4. *ibid.*
5. Ehrlich, H.J., comments during the Symposium discussion.
6. *ibid.*
7. "Racial Harassment Altering Blacks' Choices on Colleges," *New York Times*, May 9, 1990; letter to author from George Neely of Fisk University, Nashville, Tennessee, September, 1990.
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9. Marwell, "What 'Epidemic' of Campus Bigotry?" *New York Times*, May 27, 1988, Section 1 at 31, col. 1; "Campus Blacks Feel Racism's Nuances," *New York Times*, April 17, 1988, section 1, col. 3.
10. "The Diversity Project An Interim Report to the Chancellor," (undated) Institute for the Study of Social Change, University of California, Berkeley.
11. *ibid.*
12. *ibid.*
13. *ibid.*, 5.
14. United States Commission on Civil Rights (1990). *Bigotry and Violence on American College Campuses*. Washington, DC: U.S. Government Printing Office.
15. *ibid.*
16. Harm, as defined by Feinberg (*Harm to Others*, New York, Oxford University Press, 1985), is a setback to something in which one has a "personal or collective investment." The harm concerned with is the reputation or sense of self-worth of the minority students and their enjoyment of civil rights — the right to pursue an educational experience with dignity and respect, without being subject to the humiliation of behavior likely to cause withdrawal from participation in campus life.
17. Beck. (1980). "Liberty" and "Equality," *Ten Idealistic Studies* Nos. 24 and 36. Cited in P. Westen, "The Empty Idea of Equality," *Harvard Law Review* 95:537, 539, note 7.
18. Dworkin, R. (1977). *Taking Rights Seriously*, pp. 273-4. Cited in Westen, *supra*, p. 539, note 7.
19. *ibid.*

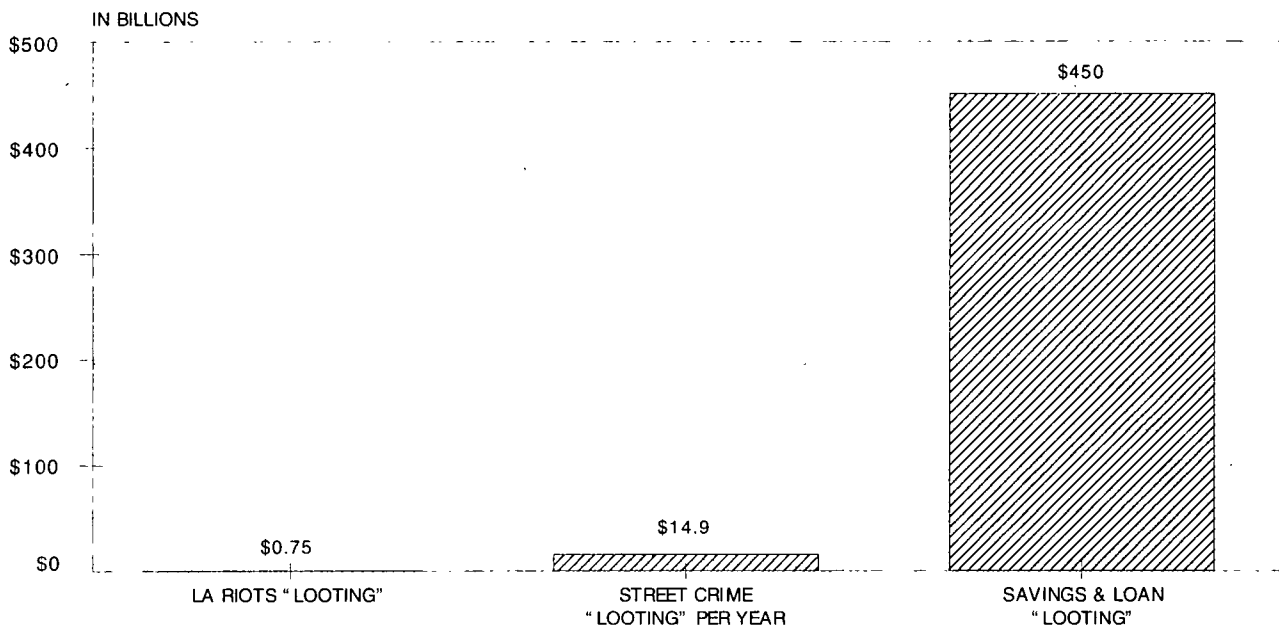
- 20. *ibid.*
- 21. This is a synthesis of an analysis prepared by Professor H. McGee, Jr. The full memo is available from the author of this article.
- 22. *ibid.*
- 23. *ibid.*
- 24. *Doe v. Michigan*. 721 F. Supp. 852 (E.D. Michigan, 1989); and *UWM Post v. Board of Regents of University of Wisconsin* 774 F. Supp. 1163 (E.D. Wisconsin, 1991).
- 25. The federal court in the Wisconsin case also invalidated the *UMV* policy as "overboard and vague." The *UMV* court refused even to balance equality against speech interests, adopting instead a nearly absolutist free speech position.
- 26. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).
- 27. *Beauharnais v. Illinois*, 343 U.S. 250 (1951).
- 28. Grey, T. (1990). "Responding to Abusive Speech on Campus: A Model Statute," *Reconstructionist*, Winter, p. 50.
- 29. National Institute Against Prejudice and Violence. (1990) *Forum* 5(1):(1:January-February).
- 30. *ibid.*

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