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NO. STATE OF NEBRASKA
OFFICIAL
DEC 7 1992
DEPT. OF JUSTICE

DATE: December 7, 1992

SUBJECT: The Constitutionality of LB 396, the "Hate Crimes Bill"

REQUESTED BY: Senator Brad Ashford, District #16

WRITTEN BY: Don Stenberg, Attorney General
Steve Grasz, Deputy Attorney General

On June 4, 1992, this office issued Attorney General Opinion No. 92078 in response to your request for an opinion regarding the constitutionality of LB 396, the Hate Crimes bill you originally introduced in 1991, and which you apparently plan to introduce again in the next legislative session. Subsequent to our opinion, the United States Supreme Court issued a decision in ***R.A.V. v. City of St. Paul, Minnesota***, 505 U.S. ___, 112 S.Ct. 2538 (1992). You have now requested a "revised" opinion that incorporates consideration of the impact of the ***R.A.V.*** decision.

Only Section 2 of LB 396 appears to be impacted by the ***R.A.V.*** decision. Therefore, with respect to Section 1 of LB 396, we refer you to our original opinion.

Section 2 of LB 396 creates the crime of "ethnic intimidation".

> (1) A person commits the crime of ethnic intimidation if, by reason of the actual or perceived race, color, religion, national origin, or sexual orientation of another individual or group of individuals, he or she commits assault as defined in sections 28-308 to 28-310,

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criminal mischief as defined in section 28-519, criminal trespass as defined in section 28-520, or disturbing the peace as defined in section 28-1322.

(2) Ethnic intimidation shall be classified one offense higher than the underlying offense on which the crime is based.

I. Standard of Review

In Op. Att'y Gen. No. 92078, we stated,

> Although a duly enacted statute normally carries with it a presumption of constitutionality, ***State ex rel. Wright v. Pepperl***, 221 Neb. 664, 671, 380 N.W.2d 259 (1986), when a statute allegedly infringes on the exercise of First Amendment rights, the presumption is to the contrary and the burden of proof is shifted. The statute's proponent bears the burden of establishing by competent evidence the statute's constitutionality. ***ACORN v. City of Frontenac***, 714 F.2d 813, 817 (8th Cir. 1983). ***See also Goward v. City of Minneapolis***, 456 N.W.2d 460, 464 (Minn. 1990) ("The ordinary presumption of constitutionality afforded legislative enactments does not apply to laws restricting first amendment rights.") (citing ***Meyer v. Grant***, 486 U.S. 414, 426 (1988)). However, in ***State v. Mitchell***, 473 N.W.2d 1, 3 (Wis.App. 1991), review granted, 475 N.W.2d 164, the court acknowledged this rule, yet imposed the burden of proof on the defendant rather than the state, and found Wisconsin's hate crime statute was not vague or overbroad.

Subsequent to our opinion, the Wisconsin Supreme Court reversed the Wisconsin Court of Appeals decision in ***Mitchell***. ***State v. Mitchell***, 485 N.W.2d 807 (Wis. 1992). Unlike the Wisconsin Court of Appeals, the Wisconsin Supreme Court held the burden of proof was on the proponent of the challenged hate crimes statute (the State). "Because the hate crime statute punishes the defendant's biased thought . . . and thus encroaches upon First Amendment rights, the burden is upon the State to prove its constitutionality." Id. at 811. Thus, if LB 396 were to be challenged on First Amendment grounds, the State of Nebraska rather than the challenger would likely bear the burden of establishing the statute's constitutionality.

II. Constitutional Analysis

Section 2 of LB 396 provides increased penalties for assault, criminal mischief, criminal trespass and disturbing the peace where such crimes are motivated by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals. We will again review the constitutionality of this section.

In our original opinion, we generally concluded LB 396 was constitutional, and that "cross burning in the context of ethnic intimidation, as defined by LB 396, may not enjoy First Amendment protection." Id. at 5. This conclusion was based, in part, on the following analysis:

> The United States Supreme Court in ***Texas v. Johnson*** found that the burning of an American flag under the circumstances of that case did not constitute fighting words, ***Texas v. Johnson***, 109 S.Ct. at 2542, because "no reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the Federal Government as a direct personal insult or invitation to exchange fisticuffs." Id. In contrast, LB 396 deals with cross burnings only in the context of crimes against individuals or a group of individuals. This is an important distinction. LB 396 is not as broad in its application as the hate crimes ordinance currently before the U.S. Supreme Court. In ***Matter of Welfare of R.A.V.***, 464 N.W.2d 507 (Minn. 1991), the Court has granted certiorari to decide whether a St. Paul, Minnesota city ordinance is unconstitutionally overbroad. That ordinance provides:
>
>> [w]hoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Id. at 6-7. We will now revisit this analysis in light of the U.S. Supreme Court's ***R.A.V.*** decision.

1. *R.A.V. v. St. Paul*

In ***R.A.V. v. City of St. Paul, Minnesota***, 112 S.Ct. 2538 (1992), the U.S. Supreme Court reversed the Minnesota Supreme Court

and held the St. Paul ordinance (quoted above) was facially invalid under the First Amendment.

Despite the Supreme Court's invalidation of the St. Paul ordinance, we conclude the ***R.A.V.*** decision is not dispositive of the issue of the constitutionality of LB 396. In our original opinion, we contrasted the provisions of LB 396 with the flag burning statute held unconstitutional in ***Texas v. Johnson*** and the ordinance challenged in ***R.A.V.***, based on the fact LB 396 covers only conduct constituting crimes against individuals. In holding the St. Paul ordinance unconstitutional in ***R.A.V.***, the U.S. Supreme Court specifically stated, "What we have here, it must be emphasized, is not a prohibition of fighting words that are directed at certain persons or groups . . . but rather, a prohibition of fighting words that contain . . . messages of `bias-motivated' hatred. . . ." Id. at 2548. The Court further stated,

> St. Paul has not singled out an especially offensive mode of expression--it has not, for example, selected for prohibition only those fighting words that communicate ideas in a threatening (as opposed to a merely obnoxious) manner. Rather, it has proscribed fighting words of whatever manner that communicate messages of racial, gender, or religious intolerance. Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas.

Id. at 2549.

Finally, we would note the Court's comment that "since words can in some circumstances violate laws directed not against speech but against conduct . . . a particular content-based subcategory of a prescribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech." Id. at 2546. Thus, based on the Supreme Court's own limitations on the applicability of its ***R.A.V.*** decision, we conclude the ***R.A.V.*** decision does not invalidate LB 396 since LB 396 is a statute aimed at criminal conduct against individuals and not merely hateful speech.

2. ***State v. Mitchell*** and ***State v. Wyant***

In our original opinion, we stated "a statute similar to LB 396 was upheld in ***State v. Mitchell***, 473 N.W.2d 1 (Wis. App. 1991), when challenged as vague and overbroad." Subsequent to our opinion, the Wisconsin Supreme Court reversed this decision. ***State v. Mitchell***, 485 N.W.2d 807 (Wis. 1992). This case, and an Ohio case decided two months later, ***State v. Wyant***, 597 N.E.2d 450 (Ohio 1992), are much greater a threat to the constitutionality of LB 396

than ***R.A.V.*** On November 5, 1992, the State of Nebraska joined as an amicus curiae in support of the States of Wisconsin and Ohio. We have asked the U.S. Supreme Court to hear an appeal of the ***Mitchell*** and ***Wyant*** decisions and to reverse both decisions.[1] Obviously, we are of the opinion these cases were wrongly decided.

The statutes at issue in ***Mitchell*** and ***Wyant*** are very similar to LB 396. Both create the crime of "ethnic intimidation."

In ***State v. Wyant***, the court found "the effect of [the Ohio hate crimes statute] is to create a `thought crime.'" ***Wyant***, 597 N.E.2d at 459. "If the thought or motive behind a crime can be separately punished, the legislative majority can punish virtually any viewpoint which it deems politically undesirable. . . ." Id. at 457.

In ***State v. Mitchell***, the court stated, "Because all of the crimes under [the Wisconsin hate crimes statute] are already punishable, all that remains is an additional punishment for the defendant's motive in selecting the victim. The punishment of the defendant's bigoted motive by the hate crimes statute directly implicates and encroaches upon First Amendment rights." ***Mitchell***, 485 N.W.2d at 812.

In their opinions, both the Ohio and Wisconsin Supreme Courts create a chilling scene of legislatively created "thought crimes." If that is what LB 396 did, it would and should be promptly declared unconstitutional. However, the frightening scenarios described in ***Mitchell*** and ***Wyant*** are the product of faulty reasoning.

LB 396, and similar statutes, do not punish constitutionally protected speech. Biased (i.e. racist) "thought" is not subject to prosecution under LB 396; neither is other biased First Amendment "speech." What is proscribed is certain criminal conduct directed at individual victims committed by reason of race, gender, etc. This is no different than many antidiscrimination statutes currently in use (i.e. statutes making it illegal to refuse to rent to a person because of the person's race). The biased motive is only punishable when manifested as conduct aimed at an individual.

The Ohio and Wisconsin courts lost sight of the fact that "ethnic intimidation" statutes do not punish speech protected by

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[1] As of the date of this opinion, the Court has not decided whether to grant the Petition for a Writ of Certiorari.

the First Amendment.[2] For example, a racist thought is protected by the First Amendment as silent First Amendment "speech." However, when a racist thought manifests itself in a manner likely to incite an immediate breach of the peace (i.e. conduct directed at an individual) it constitutes a "fighting word" which is a class of "speech" not protected by the First Amendment. Thus, we conclude a state may constitutionally proscribe "ethnic intimidation" consisting of criminal conduct committed against an individual by reason of race, gender, etc. as set forth in LB 396.[3] In such circumstances, the thought is not being punished, but rather conduct aimed at an individual victim. Our conclusion is consistent with at least one court decision, ***Dobbins v. Florida***, 605 So.2d 922 (Fla. App. 5 Dist., Sept. 24, 1992) (not yet published). You should be advised, however, that only review of the ***Mitchell*** and ***Wyant*** decisions by the U.S. Supreme Court will produce a definitive answer to the question of the constitutionality of LB 396.

Sincerely yours,

DON STENBERG
Attorney General

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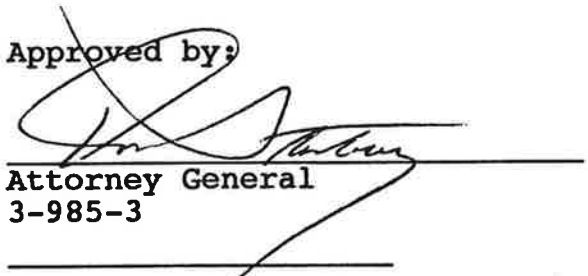
Approved by:



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[2] Nor does LB 396 criminalize a sub-class of "fighting words" based on their content. *See R.A.V.*, 112 S.Ct. at 2547. Rather, only "fighting words" directed at individuals in the context of criminal activity is proscribed. "[A] particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech." Id. at 2546.

[3] See Op. Att'y Gen. No. 92078 for our discussion of other overbreadth concerns. As with our original opinion, this opinion is in no way intended to endorse the concept of making "sexual orientation" a protected class of the same status as gender, race or religion. This continues to be a policy matter for the Legislature to address.