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October 20, 1992

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ATTORNEY GENERAL OPINION NO. 92-135

Vern Jarboe
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215 E. 7th Street, Room 353
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Re: United States Constitution--First Amendment--Constitutionality of an Ethnic Intimidation Ordinance

Synopsis: An ordinance increasing the penalty for certain crimes when the crimes are motivated by bigotry does not violate the first amendment to the United States constitution. Cited herein: U.S. Const., Amend I.

* * *

Dear Mr. Jarboe:

As attorney for the city of Topeka you request our opinion whether a proposed "hate crimes" ordinance would violate the first amendment to the United States constitution.

There are two general categories of legislation aimed at ethnic intimidation. One type of legislation bumps up the penalty when the commission of one of a given list of criminal defenses is motivated by bigotry. These types of ordinances are generally based on model legislation developed by the Anti-Defamation League of B'nai Birth (ADL). Civil Rights Division, ADL Legal Affairs Department, ADL Law Report: Hate Crimes Statuts: A response to Anti-Senitisu, Vandalism, and Violent Bigotry. (The text of the model legislation along with the ethnic intimidation statutes from

other states which are discussed herein, are set forth in the appendix, infra.) A second type of legislation directly criminalizes specific acts such as placing a burning cross in a location where it can be seen publicly and is likely to cause offense.

The proposed Topeka ordinance is a "bump up" ordinance and was taken from Wichita's ethnic intimidation ordinance. It provides, in relevant part:

> "5.01.010 Ethnic intimidation or bias crimes. (a) Any person who violates or attempts to violate any of the following ordinances of the Code of the City of Wichita, Kansas, by reason of any motive or intent relating to, or any antipathy, animosity or hostility based upon, the race, color, gender, religion, national origin, age, sexual orientation, ancestry, disability, or handicap of another individual or group of individuals shall be guilty of a misdemeanor:
>
> "1. Chapter 5.10, Assault and Battery;
> "2. Chapter 5.24, Disorderly Conduct:
> "3. Section 5.66.010, Criminal Damage to Property;
> "4. Section 5.66.050, Criminal Trespass;
> "5. Chapter 5.82, Interfering with Telephone Service;
> "6. Section 5.88.060, Draw Deadly Weapon;
> "7. Section 5.88.010, Carry Concealed Weapon;
> "8. Section 5.88.020, Carry or Possession of Unconcealed Weapon;
> "9. Section 5.88.030, Discharging;
> "10. Section 5.88.060, Draw Deadly Weapon.
>
> "(b) Any person who, by reason of any motive or intent relating to, or any antipathy, animosity or hostility based upon, the race, color or gender, religion, national origin, age, sexual orientation, ancestry, disability, or handicap of another individual or group of individuals knowingly assemble with two or more persons and agree with such persons to violate any of the criminal laws of the

> State of Kansas or of the United States with force or violence shall be guilty of a misdemeanor. (Ord. No. 41-204, § 1.)
>
> "5.01.020 Penalty. (a) Upon a first conviction of a violation of the provisions of this chapter a person shall be deemed guilty of a misdemeanor and shall be punished by a fine of not less than two hundred fifty dollars nor more than two thousand five hundred dollars or by imprisonment for not more than one year, or by both such fine and imprisonment.
>
> "(b) On a second or subsequent conviction of a violation of the provisions of this chapter a person shall be deemed guilty of a misdemeanor and shall be sentenced to imprisonment of not less than five days nor more than one year and a fine of not less than five hundred dollars nor more than two thousand five hundred dollars. (Ord. No. 41-204, § 2.)"

The United States Supreme Court has not directly considered a bump-up ordinance. In R.A.V. v. City of St. Paul, 505 U.S. ____, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), the Court addressed the constitutionality of a city ordinance which banned display of symbols -- including burning crosses -- that arouse anger in others on basis of race, color, creed, religion, or gender. The Court held the ordinance facially violative of the first amendment. The majority opinion said that even if limited to "fighting words," the ordinance was invalid because only fighting words which contained a specific content -- racial hatred -- were prohibited.

The Court stated the following rule: "The government may not regulate use [of fighting words] based on hostility -- or favoritism -- towards the underlying message expressed." 120 L.Ed.2d at 320. The court applied this rule to the facts:

> "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." 120 L.Ed.2d at 324-25.

Does R.A.V. apply to a "bump-up" hate crimes statute? At least two courts think it does. In State v. Wyant, 597 N.E.2d 450 (Ohio 1992) and State v. Mitchell, 485 N.W.2d 807 (Wis. 1992), two different state supreme courts held unconstitutional their states' respective "bump-up" ethnic intimidation statutes. Ohio Revised Code § 2727.12 (Anderson 1987); Wis. Stat. § 939.645 (Wis. 1991 Supp.).

Both courts relied on the same analysis, one first suggested in a law review article: Gellman, Sticks and Stones Can Put You in Jail, But Can Words Increase Your Sentence? Constitutional and Policy Dilemmas' of Ethnic Intimidation Laws, 39 U.C.L.A. L. Rev. 333, 363 et seq. (1991). The analysis suggested makes a distinction between motive and intent, motive being "an actor's reason for acting" and intent being something more closely related to the action or means of achieving a purpose. 39 U.C.L.A. L. Rev. at 364 citing W. LaFaue & A. Scott, Criminal Law § 3.6 at 227 (2nd ed. 1986).

The next step of analysis is to note, quite correctly, that motive is not normally an element of a crime. The final step, then, is the assertion that motive may not be an element of a crime and to do so constitutes a violation of first amendment rights. It is this last step in the analysis that is troublesome -- concluding that the government may not criminalize actions based on motive. The Ohio court quoted a number of United States Supreme Court cases for the proposition that motive can not be criminalized. 597 N.E.2d at 456-57. The quotes, however, are taken some what out of context.

In the case of "bump-up" statutes the underlying conduct at issue is not protected conduct, and further, it is by definition criminal conduct. All cases cited by the Ohio Court for the proposition that motive may be criminalized concern matters other than criminal conduct. For instance, the Ohio court quotes from Abood v. Detroit Bd. of Edu., 431 U.S. 209, 234-35 (1977):

> "'[A]t the heart of the First Amendment is the notion that an individual should be free to balance as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State.'" 597 N.E.2d at 456-57.

Abood is a case in which the court considered the extent to which a "closed shop" arrangement violated an employee's first amendment rights. The case factually has nothing to do with unprotected criminal conduct.

Both the Ohio and Wisconsin courts cite R.A.V. for support for their positions. 597 N.E.2d at 459; 485 N.W.2d at 814-15. The Wisconsin court quoted the following from R.A.V.:

> "[T]he only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out. That is precisely what the First Amendment forbids. The politicians of St. Paul are entitled to express that hostility -- but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree." State v. Mitchell, 485, N.W.2d at 185.

The Wisconsin court then said of R.A.V.:

> "The ideological content of the thought targeted by the hate crimes statute is identical to that targeted by the St. Paul ordinance--racial or other discriminatory animus. And, like the United States Supreme Court, we conclude that the legislature may not single out and punish that ideological content." 485 N.W.2d at 815.

Both state courts miss the essential point about R.A.V. R.A.V. concerned conduct which is in and of itself protected conduct -- speech and other conduct which is inherently expressive. The conduct at issue before the state courts was

different; it was by definition criminal and not protected. R.A.V. simply does speak to the facts at issue.

One other state has considered a "bump-up" ethnic intimidation statute. In State v. Plowman, 314 Or. 157, ___ P.2d ___ (1992), the Oregon Supreme Court upheld Oregon's version of this type of statute. See Or. Rev. Stat. § 166.165 (1990). See also Or. Rev. State. § 166.166 (1990). In doing so, the court relied primarily upon the fact that the Oregon statute required that two or more persons must act together, something not required by other state's statutes (although the relevance of this is not entirely apparent.) The court went on to say, as to the challenge that the statute penalizes beliefs: "We also reject the broader argument that ORS 166.165(1)(a)(A) proscribes opinion. Rather than proscribing opinion, that law proscribes a forbidden effect: the effect of acting together to cause physical injury to a victim." 314 Or. at 165. The court held that on this basis, R.A.V. was inapplicable:

> "The [U.S.] Court distinguished laws, such as the St. Paul ordinance, that are directed against the substance of speech from laws that are directed against conduct. With respect to the latter, the wrote:
>
> "'Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a disciplinary idea or philosophy.'

"As discussed . . ., ORS 166.165(1)(a)(A) is a law directed against conduct, not a law directed against the substance of speech." 314 Or. at 168.

Although the Kansas statute does not necessarily require action between two or more persons, we believe that the basis of the Oregon court's analysis is correct. These types of ethnic intimidation statutes do not punish based on opinion; they punish actions which are already illegal when motivation for the action is, in part, derived from an opinion. As such there is no first amendment right at issue.

It is worth noting that restricting an action based on motivation is not without precedent, although such restrictions are found in the civil arena. Title VII of the

civil rights act of 1974 prevents certain employment practices and decisions "because of such individual's race, color, religion, sex or national origin. . . ." 42 U.S.C. § 2000e-2. Title VII, then, by its terms, prohibits certain conduct when it is based on certain motivations.

Gellman and the Ohio court reason that Title VII does not speak to an employer's motivations in discriminating. 39 U.C.L.A. L.Rev. at 368; 597 N.Ed.2d at 456. They conclude that because Griggs v. Duke Power Co., 401 U.S. 424 (1971), interprets Title VII to prohibit discrimination based on disparate impact," discriminatory motive is irrelevant." This ignores the fact that Title VII also prevents disparate treatment, i.e., purposeful discrimination.

The ethnic intimidation ordinance proposed by Topeka, and in place in Wichita, criminalizes certain unprotected (and already criminal) conduct, when the conduct is motive in part by the actor's racial bigotry. We believe that the Ohio and Wisconsin courts' analysis is incorrect and that a governing body may constitutionally regulate and prohibit conduct based on motive, when the underlying conduct is not constitutionally protected and is in and of itself already criminal. We believe the proposed ordinance to be valid.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

Steve Phillips

Steve Phillips
Assistant Attorney General

RTS:JLM:SP:jm

APPENDIX

The ADL model statute provides:

> "Intimidation
>
> "A. A person commits the crime of 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 violates Section ___ of the Penal Code [insert code provision for criminal trespass, criminal mischief, harassment, menacing, assault and/or any other appropriate statutorily proscribed criminal conduct].
>
> "B. Intimidation is a ___ misdemeanor/felony [the degree of criminal liability should be made contingent upon the severity of the injury incurred or the property lost or damaged].

The Ohio ethnic intimidation statute provided

> "(A) No person shall violate section 2903.21 [aggravated menacing], 2903.22 [menacing], 2909.06 [criminal damaging or endangering], 2909.07 [criminal mischief] or division (A)(3)(4), or (5) of section 2917.21 [telephone harassment] of the Revised Code by reason of the race, color, religion, or national origin of another person or group of persons.
>
> "(B) Whoever violate this section is guilty of ethnic intimidation. Ethnic intimidation is an offense of the next higher degree than the offense the commission of which is necessary element of ethnic intimidation."

The Wisconsin statute provided

"If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):

"(a) Commits a crime under chs. 939 to 948.

"(b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property which is damaged or otherwise affected by the crime unde par. (a) because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.

"(2)(a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is $10,000 and the revised maximum period of imprisonment is one year in the county jail.

"(b) If the crime committed under sub (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is $10,000 and the revised maximum period of imprisonment is 2 years.

"(c) If the crime committed under sub. (1) is a felony, the maximum fine prescribed by law for the crime may be increased by not more than $5,000 and the maximum period of imprisonment prescribed by law for the crime may be increased by not more than 5 years.

"(3) This section provides for the enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (1).

> "(4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime. Wis. Stat. Annot. § 939.645 (West 1991 Supp.) (The statute was amended slightly in 1992. The amendments do not appear relevant. See Wis. Stat. Annot. § 939.645 (West 1991 Supp.).

The Oregon statute at issue provides:

> "(1) Two or more persons acting together commit the crime of intimidation in the first degree, if the persons:
>
> "(a)
>
> "(A) Intentionally, knowingly, or recklessly cause physical injury to another because of their perception of that person's race, color, religion, national origin, or sexual orientation; or
>
> "(B) With criminal negligence cause physicalinjury to another by means of a deadly weapon because of their perception of that person's race, color, religion, national origin or sexual orientation;
>
> "(b) Intentionally, because of race, color, religion, national origin or sexual orientation of another, place that person in fear of imminent serious physical injury; or
>
> "(c) Commit such acts as would constitute the crime of intimidation in the second degree, if under taken by one person acting along.
>
> "(2) Intimidation in the first degree is a Class C felony.
>
> "(3) 'Sexual orientation' has the meaning given that term in ORS. Or. Rev. Stat. § 166.165 (1990).

Oregon also has a statute on intimidation in the second degree. It was not at issue. It provides:

> "(1) A person commits the crime of intimidation in the second degree is the person:
>
> "(a) Tampers or interferes with property, having no right to do so nor reasonable ground to believe that the person has such right, with the intent to cause substantial inconvenience to another because of the person's perception of the other's race, color, religion, national origin or sexual orientation;
>
> "(b) Intentionally subjects another to offensive physical contact because of the person's perception of the other's race, color, religion, national origin or sexual orientation; or
>
> "(c) Intentionally, because of the person's perception of race, color, religion, national origin or sexual orientation of another or of a member of the other's family, subjects such other person to alarm by threatening;
>
> "(A) To inflict serious physical injury upon or to commit a felony affecting such other person, or a member of the person's family; or
>
> "(B) To cause substantial damage to the property of the other person or of a member of the other person's family.
>
> "(2) Intimidation in the second degree is a Class A misdemeanor. Or. Rev. Stat. § 166.155 (1990).