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DATE: June 3, 1992

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

REQUESTED BY: Senator Brad Ashford, District #6

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

You have requested an attorney general's opinion regarding the constitutionality of LB 396, the Hate Crimes bill you originally introduced in January 1991, and which you plan to introduce once again in the next legislative session.

LB 396 prohibits "institutional vandalism" and "ethnic intimidation," provides criminal penalties and authorizes a civil action for violations of such offenses, and requires the Nebraska State Patrol to maintain information on crimes motivated by bigotry and bias. LB 396 provides, in part,

> Section 1. (1) A person commits the crime of institutional vandalism by knowingly vandalizing, defacing, or otherwise damaging:
> (a) Any church, synagogue, or other building, structure, or place used for religious worship or other religious purposes;
> (b) Any cemetery, mortuary, or other facility used for the purpose of burial or memorializing the dead;
> (c) Any school, educational facility, or community center;
> (d) The grounds adjacent to and owned or rented in connection with any institution, facility, building, structure, or place described in this subsection; or

(e) Any personal property contained in any institution, facility, building, structure, or place described in this subsection.

(2) Institutional vandalism shall be a:

(a) Class II misdemeanor if the person causes damage to or loss of the property of another in an amount of one hundred dollars or less or if the person causes no pecuniary loss;

(b) Class I misdemeanor if the person causes damage to or loss of the property of another in an amount in excess of one hundred dollars; and

(c) Class III felony if the person causes damage to or loss of the property of another in an amount in excess of three hundred dollars.

In determining the amount of damage to or loss of property, the amount shall include the cost of repair or replacement of the property that was damaged or lost.

Section 2. (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, 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

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.

II. Analysis

A. Section One

We see no constitutional problems with Section 1 of LB 396 (institutional vandalism).

B. Section Two

Statutory provisions similar to Section 2 (ethnic intimidation) have been subject to constitutional challenge in other states. Therefore, we will set forth a detailed analysis of this section.

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 review this section under the constitutional law doctrines of vagueness and overbreadth.

1. Vagueness

A fundamental requirement of a statute is that it not be vague and uncertain. See Neeman v. Nebraska Natural Resources Commission, 191 Neb. 672, 217 N.W.2d 166 (1974). The void for vagueness doctrine is based on the due process requirements contained in the Fifth and Fourteenth Amendments to the federal constitution, and contained in Article I, section 3 of our Nebraska Constitution. U.S. v. Articles of Drug, 825 F.2d 1238 (8th Cir. 1987); In Interest of D.L.H., 198 Neb. 444, 253 N.W.2d 283 (1977). In order to pass constitutional muster, a statute must be sufficiently specific so that persons of ordinary intelligence must not have to guess at its meaning, and the statute must contain ascertainable standards by which it may be applied. Id. See also State v. Adkins, 196 Neb. 76, 80, 241 N.W.2d 655 (1976).

In State ex rel. Douglas v. Herrington, 206 Neb. 516, 294 N.W.2d 330 (1980), the court said that the established test for vagueness in a statute is whether it either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. See also State v. Hamilton, 215 Neb. 694, 340 N.W.2d 397 (1983).

The dividing line between what is lawful and unlawful cannot be left to conjecture, and a citizen cannot be held to answer to charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A penal statute must express the crime and the elements constituting it so clearly that an ordinary person can intelligently choose in advance what course is lawful for him to pursue. Id. See also State, Dept. of Roads v. Mayhew Products Corp., 211 Neb. 300, 304-05, 318 N.W.2d 280 (1982).

The constitutional prohibition against undue vagueness does not invalidate every statute which a reviewing court might believe could have been drafted which greater precision; all that due process requires is that a statute give sufficient warning that men may conform their conduct so as to avoid that which is forbidden. State v. Robinson, 202 Neb. 210, 274 N.W.2d 553 (1979), cert. denied, 444 U.S. 865.

Section 2 of LB 396 makes "sexual orientation" a protected class of equal status with race, color, religion and national origin for purposes of protection from "ethnic intimidation." While we assume the intent of LB 396 is to make homosexuals a protected class, the term "sexual orientation" leaves room for potential challenge on the basis of vagueness. This term could conceivably include all "orientations" of a sexual nature (bigamy, pedophilia, etc.). It is true that the constitutional requirement of reasonable certainty in statutory language is satisfied by the use of ordinary terms which find adequate interpretation in common usage and understanding. Fulmer v. Jensen, 221 Neb. 582, 379 N.W.2d 736 (1986). Statutes are sufficiently definite when they use language which is commonly grasped. In Re Interest of Metteer, 203 Neb. 515, 279 N.W.2d 374 (1979). However, you may want to avoid potential challenges by making the proposed language more precise.[1]

2. Overbreadth

A second issue is whether portions of LB 396 are unconstitutionally overbroad. "An attack based on the overbreadth of a statute asserts that the questioned language impermissibly infringes on some constitutionally protected right." State v. Two IGT Video Poker Games, 237 Neb. 145, 148, 465 N.W.2d 453 (1991). However, the Nebraska Supreme Court has held that "a statute may be

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[1]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 is a policy matter for the Legislature to address.

unconstitutionally overbroad on its face only if its overbreadth is substantial, that is, when the statute would be unconstitutional in a substantial portion of the situations to which it is applicable." Id. See also Doe v. University of Michigan, 721 F.Supp. 852, 864 (E.D. Mich. 1989) ("[T]he state may not prohibit broad classes of speech, some of which may indeed be legitimately regulable, if in so doing a substantial amount of constitutionally protected conduct is also prohibited.").

Under this formulation of overbreadth analysis, the first question is whether conduct punishable under LB 396 is protected by the First Amendment. This would appear to be an issue only with respect to that portion of Section 2 which provides increased penalties for the crime of disturbing the peace committed by reason of race, color, religion, national origin or sexual orientation. The question of overbreadth could arise in the context of cross burnings which are prosecuted as disturbances of the peace instead of, or in addition to, being prosecuted as acts of criminal trespass or other crimes.

Cross Burning

The hateful activity most often associated with hate crimes statutes is cross burning. Cross burning may, under some circumstances, constitute "speech" for purposes of First Amendment analysis.

> The First Amendment literally forbids the abridgement only of "speech," but we have long recognized that its protection does not end at the spoken or written word. . . . [W]e have acknowledged that conduct may be "sufficiently inbred with elements of communication to fall within the scope of the First and Fourteenth Amendments."

Texas v. Johnson, 491 U.S. 397, 109 S.Ct. 2533, 2539 (1989) (holding that flag burning was protected speech under the circumstances of the case).

However, cross burning in the context of ethnic intimidation, as defined by LB 396, may not enjoy First Amendment protection. As the United States Supreme Court has long held,

> it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the

> profane, the libelous, and the insulting or "fighting" words - those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (1941) (emphasis added); U.S. v. Eichman, 496 U.S. 310, 110 S.Ct. 2404, 2407 (1990) (fighting words do not enjoy the full protection of the First Amendment); State v. Broadstone, 233 Neb. 595, 447 N.W.2d 30, 34 (1989) (fighting words are not constitutionally protected speech and may be punished as a breach of peace under Neb.Rev.Stat. §28-1322); Attorney General Opinion No. 86030, dated March 7, 1986 (fighting words do not fall within protection of First Amendment).

The Eighth Circuit Court of Appeals has stated, with respect to a particular cross burning incident, "we proceed on a predicate that cross burning is conduct which possesses sufficient elements of communication to implicate the first amendment. However, it does not necessarily follow that the burning of this cross was protected first amendment activity." U.S. v. Lee, 935 F.2d 952, 954 (8th Cir. 1991) (opinion and judgment vacated as to count 1, August 14, 1991). "Although persons must generally tolerate highly offensive and disturbing speech, the government may restrict such speech where it intrudes on the privacy of the home or where the degree of captivity makes it impractical for an unwilling listener or viewer to avoid exposure to the speech." Id. at 956.

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.

The Minnesota Supreme Court held the ordinance was not overbroad as it is "reasonably subject to an interpretation limiting its scope" to conduct likely to provoke imminent lawless action (fighting words). Matter of Welfare of R.A.V., 464 N.W.2d at 510. See U.S. v. Hayward, 767 F.Supp. 928, 929 (N.D.Ill. 1991) ("While the Supreme Court has granted certiorari in R.A.V. v. St. Paul, Minnesota, ___ U.S. ___, 111 S.Ct. 2795, 115 L.Ed. 2d 969 (1991), a determination that the ordinance at issue in that case is overbroad will not necessarily decide . . . that cross-burning is constitutionally protected activity. [A defendant] would still be required to show that his cross-burning was expressive conduct."). It does not appear to be illegal, under LB 396, to burn a cross on one's own private property or in a public forum as a general form of expression (repugnant though these acts may be). Furthermore, 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.

The only potential infirmity we foresee would arise if conduct proscribed by LB 396 was prosecuted as "disturbing the peace" and such conduct would not fall under the parameters of fighting words.[2] If challenged on this basis, we believe a court would judicially narrow the statute to exclude such conduct.

In Attorney General Opinion No. 253, dated March 14, 1980, it was stated, with respect to a proposed criminal statute concerning "disturbing the peace" that "in light of the specificity required by the Supreme Court in State v. Coomes [170 Neb. 298, 102 N.W.2d 454 (1960)] [with respect to the crime of disturbing the peace under Nebraska law]," the statute would be upheld against an overbreadth challenge. "We also believe that should the statute come before our Supreme Court, our court, would adopt those limiting constructions heretofore approved by the United States Supreme Court in cases such as Cox v. Louisiana, 379 U.S. 536 [1965]." This opinion also noted that "In Lewis v. New Orleans, 415 U.S. 130 [1974], the Supreme Court limited a breach of the peace complaint to one involving fighting words rather than just

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[2]This same overbreadth problem could occur with respect to other "speech" besides cross burnings. If a citizen was charged under LB 396 with "ethnic intimidation" for standing in a public park or sidewalk and loudly proclaiming his or her views on homosexuality or religion, a court would likely find the statute overbroad or would judicially narrow its application so as not to punish such speech.

words." See also State v. Moore, 226 Neb. 347, 352, 411 N.W.2d 345 (1987).

It must be noted, however, that the Nebraska Supreme Court will not judicially narrow an overbroad statute under all circumstances. "A court cannot under the guise of its powers of construction, rewrite a statute, supply omissions or make other changes." State v. Adkins, 196 Neb. 76, 85 (1976), Clinton, J., (responding to the dissent). Therefore, we recommend you consider avoiding possible court challenges by either removing the offense of disturbing the peace from the parameters of ethnic intimidation or by drawing LB 396 more narrowly so as to make it clear that only fighting words, and not First Amendment speech, fall within the reach of its criminal penalties.

C. Sections Three through Seven

We see no constitutional problems with sections 3 through 7. We would observe that sections 4 and 5 create unlimited liability on the part of parents for damage or loss suffered as a result of crimes committed pursuant to sections 1 and 2 by unemancipated minors. Such liability is in derogation of common law, and this provision would be strictly construed by the courts. With respect to section 6, we recommend the terms "bigotry" and "bias" be defined to provide guidance to the State Patrol, as bigotry and bias can refer to any strongly held belief or opinion.

Sincerely yours,

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APPROVED BY:

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