MEMORANDUM OF LAW

DATE: August 28, 1992

TO: Councilmember Tom Behr

FROM: City Attorney

SUBJECT: R. A. V., Petitioner v. City of St. Paul, Minnesota

On June 22, 1992, the United States Supreme Court rendered a decision in R. A. V., Petitioner v. City of St. Paul, Minnesota, 92 D.A.R. 8395 (1992). In the decision, the Court held that a St. Paul, Minnesota bias-motivated crime ordinance was constitutionally invalid. You have asked how this decision will affect the hate crime and graffiti legislation for California and San Diego.

The St. Paul, Minnesota ordinance provides:

> Whoever 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 or has reasonable grounds to know 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.

St. Paul, Minn. Leg. Code section 292.02 (1990).

The Court, in reaching its conclusion, found that the St. Paul, Minnesota statute was addressed only to expressions which constitute "fighting words." Under general constitutional principles, fighting words are not constitutionally protected by first amendment rights. However, in this case the court did not address the issue of the fighting words doctrine. Rather, the Court concluded the ordinance is "facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses." R. A. V., Petitioner, 92 D.A.R. at 8396.

The decision of the Court was written by Justice Scalia and joined in by Chief Justice Rehnquist and Justices Kennedy, Souter and Thomas. Three concurring opinions were written, one by

Justice White, one by Justice Blackmun and one by Justice Stevens. In each of these concurring opinions, the Justices noted that the majority opinion seriously undermines previous Court decisions dealing with the interpretation of fighting words and their affect on first amendment rights. Each of the concurring opinions agrees with the holding of the majority; that is, that the statute is unconstitutional. However, each concurrence indicates that it is unconstitutional because it is overbroad, not because it is content-based. Due to the wide divergence of opinion in the R. A. V. case, it is difficult to say what effect the decision will have on first amendment rights generally. As a result, it is difficult to predict the affect on current California or San Diego hate crime legislation.

California has two principal Penal Code sections which deal specifically with hate crimes. Penal Code section 422.6 reads:

> Section 422.6. Interference with exercise of civil rights; damaging property; punishment; speech
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> (a) No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate, interfere with, oppress, or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the constitution or laws of this state or by the Constitution or laws of the United States because of the other person's race, color, religion, ancestry, national origin, disability, gender, or sexual orientation.
>
> (b) No person, whether or not acting under color of law, shall knowingly deface, damage, or destroy the real or personal property of any other person for the purpose of intimidating or interfering with the free exercise or enjoyment of any right or privilege secured to the other person by the constitution or laws of this state or by the Constitution or laws of the United States, because of the other person's race, color, religion, ancestry,

national origin, disability, gender, or sexual orientation.

(c) Any person convicted of violating subdivision (a) or (b) shall be punished by imprisonment in a county jail not to exceed one year, or by a fine not to exceed five thousand dollars ($5,000), or by both that imprisonment and fine. However, no person shall be convicted of violating subdivision (a) based upon speech alone, except upon a showing that the speech itself threatened violence against a specific person or group of persons and that the defendant had the apparent ability to carry out the threat. (Emphasis added.)

Penal Code section 11411 reads:

(a) Any person who places or displays a sign, mark, symbol, emblem, or other physical impression, including, but not limited to, a Nazi swastika on the private property of another, without authorization, for the purpose of terrorizing the owner or occupant of that private property or in reckless disregard of the risk of terrorizing the owner or occupant of that private property shall be punished by imprisonment in the county jail not to exceed one year, by a fine not to exceed five thousand dollars ($5,000), or by both the fine and imprisonment for the first conviction and by imprisonment in the county jail not to exceed one year, by a fine not to exceed fifteen thousand dollars ($15,000), or by both the fine and imprisonment for any subsequent conviction.

(b) Any person who engages in a pattern of conduct for the purpose of terrorizing the owner or occupant of private property or in reckless disregard of terrorizing the

owner or occupant of that private property, by placing or displaying a sign, mark, symbol, emblem, or other physical impression, including, but not limited to, a Nazi swastika, on the private property of another on two or more occasions, shall be punished by imprisonment in the state prison for 16 months or 2 or 3 years, by a fine not to exceed ten thousand dollars ($10,000), or by both the fine and imprisonment, or by imprisonment in a county jail not to exceed one year, by a fine not to exceed five thousand dollars ($5,000), or by both the fine and imprisonment. A violation of this subdivision shall not constitute felonious conduct for purposes of Section 186.22.

(c) Any person who burns or desecrates a cross or other religious symbol, knowing it to be a religious symbol, on the private property of another without authorization for the purpose of terrorizing the owner or occupant of that private property or in reckless disregard of the risk of terrorizing the owner or occupant of that private property shall be punished by imprisonment in the state prison for 16 months or 2 or 3 years, by a fine of not more than ten thousand dollars ($10,000), or by both the fine and imprisonment, or by imprisonment in a county jail not to exceed one year, by a fine not to exceed five thousand dollars ($5,000), or by both the fine and imprisonment for the first conviction and by imprisonment in the state prison for 16 months or 2 or 3 years, by a fine of not more than ten thousand dollars ($10,000), or by both the fine and imprisonment, or by imprisonment in a county jail not to

> exceed one year, by a fine not to exceed fifteen thousand dollars ($15,000), or by both the fine and imprisonment for any subsequent conviction.
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> (d) As used in this section, "terrorize" means to cause a person of ordinary emotions and sensibilities to fear for personal safety.

Additional statutes address penalties, enhancements etc., but the above-cited sections are the sections that would most reasonably be effected by the Court's decision. It is important to note that it appears each of the California statutes attempts to punish conduct, not speech. In contrast, the Court in the R. A. V. case, said "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 merely obnoxious) manner." Rather, the court said, the statute is unconstitutional because it impermissibly regulates speech based upon the content of the speech. Left unsaid is whether the Court would have found the statute constitutional if the statute had singled out a particular mode of expression, as the California statutes specifically target speech intended to terrorize. The Court equated cross burning and the display of swastikas to flag burning, see Texas v. Johnson, 491 U.S. 397 (1989), and indicated that, however reprehensible the actions may be, the acts could not be viewed as anything other than a protected expression of opinion. The concurring opinions indicated that the proscribed acts did involve speech that could be banned under the fighting words theory. The concurring opinions noted, however, that the statute needed to be more narrowly tailored to address the compelling governmental interest associated with the prevention of violence brought about through the expression of fighting words.

Another jurisdiction has had a hate crime enhancement statute tested. The Supreme Court of the State of Wisconsin recently decided that Wisconsin's hate crime enhancement statutes, similar to California's enhancement statute Penal Code section 422.7, were invalid based upon the holding in R. A. V. v. St. Paul. In that case the Court said:

> Merely because the statute refers in a literal sense to the intentional "conduct" of selecting, does not mean the court must turn a blind eye to

> the intent and practical effect of the law - punishment of offensive motive or thought. The conduct of "selecting" is not akin to the conduct of assaulting, burglarizing, murdering, and other criminal conduct. It cannot be objectively established. Rather, an examination of the intentional "selection" of a victim necessarily requires a subjective examination of the actor's motive or reason for singling out the particular person against whom he or she commits a crime.

Wisconsin v. Mitchell, 61 LW 2035 (1992). The court went on to say that punishing motive or reasons would have a "chilling effect" on speech (or thought) and was therefore clearly violative of first amendment rights. The Wisconsin decision is not, however, binding on California and a California court could reach a different decision.

Notwithstanding, the Wisconsin case, the California statutes may be narrowly interpreted in the manner the Supreme Court has indicated they are required to be. With this narrow construction, the California statutes may survive judicial scrutiny. Each is directed at a specific type of conduct and each prohibits only conduct acted out on the private property of another. Thus, the carrying of a swastika in a parade or the burning of a cross at a rally, clearly political speech in the Court's view, is not prohibited. There are, however, no absolutes in Constitutional law as evidenced by the divergent constitutional theories in the R. A. V. opinion. Therefore, although it appears the California statutes specifically punish conduct, it is difficult to predict with certainty whether, under either the majority opinion or the concurring opinions, they will be affected by the R. A. V. decision.

You have also asked how the R. A. V. decision will affect local ordinances dealing with graffiti and hate crimes. San Diego has two Municipal Code ordinances which deal with graffiti.

San Diego Municipal Code ("SDMC") section 56.40 provides:

> Section 56.40 Mar, Deface Windows -- Prohibited
> That it shall be unlawful for any person or persons to mark, mar or daub windows with paraffin, soap, beeswax or other substance, in The City of San Diego.

Although this Code section is most likely rarely enforced,

it is difficult to conceive of this section withstanding a constitutional attack under any circumstances should it ever be challenged. This Code section makes it unlawful for an individual to mark windows even on an individual's own property. It is a classic example of a statute which is vague and overbroad and appears to serve no governmental interests. The standard of judicial scrutiny for statutes which would limit one's freedom of expression is that the government must have a compelling interest to enact the statute. No such interest is demonstrated by this statute.

This ordinance was enacted in 1952, well before the plethora of first amendment cases that were decided by the Supreme Court in the nineteen-sixties and seventies which greatly expanded the parameters of expression protected by the first amendment. It is unlikely that such a vague statute would be considered necessary or useful today. Consequently, we recommend that this section be repealed or amended to make it clear the marking of windows of another is prohibited.

Of greater concern, however, is the recently enacted Graffiti Abatement Ordinance. SDMC section 95.0127 provides in pertinent part:

> Section 95.0127 Graffiti Abatement Procedure
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> c. Graffiti Prohibited.
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> 1. To the extent not otherwise provided for by state law, it shall be unlawful for any person to place graffiti, as defined herein, upon buildings, fences, structures and similar places within the City of San Diego.
>
> 2. It shall be unlawful for any person owning or otherwise being in control of any real property within the City to maintain, permit or allow any graffiti to be placed upon or to remain upon any structure located on such property when the graffiti is visible from the street or other public or private property.
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> SDMC section 95.0127 (b):
>
> 1. "Graffiti" means the unauthorized spraying of paint or marking of paint, ink, chalk, dye or other similar substances on buildings, fences, structures and similar places.

> 2. "Unauthorized" means without the permission of the property owner or else being in violation of this Article and Division.

In enacting the ordinance it was specified that: "The City finds and determines that graffiti is obnoxious and constitutes a public nuisance, as defined in Section 13.0301 through 13.0306, and must be abated to avoid the detrimental impact of such graffiti on the City and its residents and prevent the further spread of graffiti." SDMC section 95.0127(a).

These defined interests are certainly laudatory municipal goals. Indeed, in a concurring opinion in Metromedia, Inc. v. San Diego, 453 U.S. 550 (1981), Justice Brennan said:

> I believe a community has the right to decide that its interests in protecting property from damaging trespasses and in securing beautiful surroundings outweigh the countervailing interest in uninhibited expression by means of words and pictures in public places. If the First Amendment categorically protected the marketplace of ideas from any quantitative restraint, a municipality could not outlaw graffiti.

The City's graffiti abatement ordinance at Section C(1) prohibits and makes unlawful the placing of unauthorized graffiti on buildings, fences, structures and similar places. The statute is specifically targeted at graffiti and thus may withstand a constitutional challenge because it is directed only to unauthorized graffiti thereby giving the ordinance the narrow tailoring the Court requires. (Note that the statute in the R. A. V. case simply enumerated graffiti as one of a number of prohibited acts). Additionally, the prohibition is content-neutral. That is, it prohibits all graffiti, not just gang graffiti or racist graffiti, etc.

However, Section C(2) prohibits and makes unlawful the maintenance of graffiti on one's own property. There can be little doubt that regulation by the City of the private property of a resident would be subject to the most intense level of judicial scrutiny. As the Court noted in Frisby v. Schultz, 487 U.S. 484 (1988): "The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."

Though most cases dealing with the sanctity of one's home viewed by the Court have dealt with protection of the unwilling listener in his or her home, see for example, Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), it must be anticipated that the Court would be equally as protective of an individual's right to express his or her own views from a private residence. The total prohibition of expression on private property of the graffiti ordinance would most likely be viewed as having a chilling effect on a resident's freedom of expression. A similar problem existed with the R. A. V. case in that the statute prohibited the display of swastikas and crosses on one's private property, rendering the statute impermissibly overbroad in the eyes of the concurring justices.

Restrictions on first amendment rights are subject to reasonable time, place and manner restrictions. Ward v. Rock Against Racism, 491 U.S. 781 (1989). If the graffiti abatement ordinance had clearly defined time, place and manner restrictions, it might be enforceable. However, the breadth of the ordinance has implications for limitations of many types of expression, including political speech. Accordingly, we recommend the ordinance be amended and more narrowly tailored to meet the specific needs of the City.

Finally, The City of San Diego's recently enacted Hate Crime Tracking Ordinance, SDMC sections 52.9701 et seq., will not be affected by the R. A. V. decision. San Diego's ordinance does not legislate the commission of hate crimes. Rather, the ordinance is designed to aid the Police Department and the Human Relations Commission in monitoring the number and degree of seriousness of hate crimes. The goal is to track trends with the expectation that such tracking will enable more efficient and effective apprehension and prosecution of hate crimes under the existing California statutory scheme. Since the Hate Crimes Tracking Ordinance has such a narrow scope, it will not be affected by the R. A. V. decision.

If we can be of further assistance, please feel free to contact us.

JOHN W. WITT, City Attorney
By
Sharon A. Marshall
Deputy City Attorney

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