From Cross Burning to Telemarketing and Campaign Finance

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The U.S. Supreme Court's First Amendment docket could not be more varied than it has been this Spring. We report here on some decisions as well as arguments in cases yet to be decided.

Commonwealth of Virginia v. Black

In a divided opinion issued April 7, 2003, the Court revisited the issue of cross-burning. The Virginia statute at issue banned cross-burning with the intent to intimidate, and also provided that burning a cross was prima facie evidence of an intent to intimidate. Justice O'Connor, writing in part for the majority and in part for a plurality, concluded that a state may constitutionally ban cross-burning with the intent to intimidate, but that the prima facie provision in Virginia's statute made it unconstitutional.

The Court reviewed the history of cross-burning, and its inextricable link in this country with the hatred, violence, and terror of the KKK. It concluded that "while a burning cross does not inevitably convey a message of intimidation, often the cross burner intends that the recipients of the message fear for their lives." Recognizing that cross-burning is expressive, the Court nevertheless concluded that because the government may constitutionally punish fighting words, inciting others to imminent lawless action, and true threats, it may punish cross-burning with the intent to intimidate as a threat.

However, a plurality of four justices (O'Connor, Stevens, Breyer, and Rehnquist) held that the provision of the Virginia statute establishing that burning a cross was prima facie evidence of an intent to intimidate violated the First Amendment because it "strips away the very reason why a State may ban cross burning with the intent to intimidate." While some who burn crosses do so solely to intimidate, others may be engaging in core political speech. In addition, such a provision would allow a jury to convict in cases where the defendant exercises his constitutional right not to put on a defense. Thus, the plurality affirmed the reversal of the conviction of Barry Black, who had burned a cross on his property as part of a KKK rally, and vacated and remanded the convictions of two young men convicted of burning a cross on their neighbor's lawn. Justice Scalia joined in the decision to vacate the two convictions, though he would have done so to allow the Virginia Supreme Court to authoritatively construe the statute.

Two dissents followed, from very different viewpoints. Justice Thomas dissented because, in his view, the cross-burning statute prohibited "only conduct, not expression," and therefore raised no First Amendment issues whatsoever. And even if it did, the statute would still be constitutional in his view, because it raised only a rebuttable inference, not a mandatory presumption of intent to intimidate. He concluded, "Considering the horrific effect cross burning has on its victims, it is also reasonable to presume intent to intimidate from the act itself." Thus, he would have found both the statute and the evidentiary portion of it constitutional, and would have upheld all three convictions.

In sharp contrast, Justice Souter (joined by Justices Ginsberg and Kennedy) dissented because the statute makes a content-based distinction within the category of intimidating speech, and that distinction raises the possibility that Virginia may have singled out that speech because it disapproved of its message of white supremacy. They reiterated that the symbolic act of burning a cross may be consistent both with an intent to intimidate and an intent to make an ideological statement without threatening harm. Consequently, the dissenters concluded that, consistent with *R.A.V. v. St. Paul*, 505 U.S. 377 (1992), while the crime of intimidation may be pursued in a case in which a cross-burning is evidence of that intention, the State cannot make cross-burning illegal by raising a presumption of intent to intimidate from the act of cross-burning. Indeed, given the ease with which an intimidation case could be proved with cross-burning, the dissenters concluded that the prima facie evidence provision was so unnecessary that it was "quite enough to raise the question whether Virginia's content-based statute seeks more than mere protection against a virulent form of intimidation. It consequently bars any conclusion that an exception to the general rule of *R.A.V.* is warranted on the ground 'there is no realistic [or little realistic] possibility the official suppression of ideas is afoot.'"

Under this decision, states can generally prohibit cross-burning with the intent to intimidate, but statutory presumptions, rebuttable or not, about the relationship between cross-burning and intimidation will raise serious issues. However, given the relatively unique position of cross-burning as symbolic expression, it is unlikely that this case will pave the way for similarly restricting other types of symbolic speech.

Illinois ex rel. Madigan v. Telemarketing Associates

On May 5, 2003, the U.S. Supreme Court ruled in *Illinois ex rel. Madigan v. Telemarketing Associates* that it does not violate the First Amendment for states to punish as fraud statements by telemarketers designed to deceive consumers. The case involved a fund-raising effort for a charitable cause in which the telemarketing firm was guaranteed 85 percent of the proceeds, leaving only 15 percent for the charity. The Court had previously held that states may not bar fund-raising based solely on the percentage of funds devoted to overhead expenses. In this case, the Illinois trial court had dismissed the complaint and the Illinois appellate courts had affirmed, relying on that earlier line of cases.

The U.S. Supreme Court, by contrast, distinguished its prior cases on the ground that the Illinois Attorney General's complaint alleged affirmative misrepresentations by the telemarketer that a substantial portion of the monies collected would go

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to the charity involved. The case, the Court held, was thus not an end run around earlier First Amendment protections for charitable solicitation but a garden-variety fraud action.

Nike, Inc. v. Kasky

On April 23, 2003, the U.S. Supreme Court heard arguments in *Nike, Inc. v. Kasky*, No. 02–575. *Nike* presents the question whether Nike's attempts to defend itself against attacks regarding its employment practices in the Third World constituted fully protected speech. Nike defended itself through various means, including letters to editors, press releases, and correspondence to university presidents and athletic directors. Marc Kasky, a citizen of California acting as a "private attorney general" under that state's unfair trade practice and false advertising law, sued Nike, alleging that it made false statements regarding its employment practices. The California Supreme Court refused to dismiss the suit on the pleadings, holding that Nike's alleged speech was "commercial" speech and therefore Nike could be held strictly liable for any false or misleading statements. In so doing, the California Supreme Court adopted a very broad definition of commercial speech, defining it to include factual representations of a commercial nature by persons engaged in commerce to an audience including actual or potential consumers. In a somewhat unusual step, the U.S. Supreme Court granted interlocutory review.

The Supreme Court is certain to review a recent district court decision on the McCain-Feingold campaign finance sometime this year.

Arguing for Nike, Professor Laurence Tribe focused on the context and content of Nike's statements. He emphasized that Nike's statements were part of an intense debate on globalization and its effect on the Third World. He noted that Nike's statements were not advertisements to buy any particular product and that Nike's products were mentioned only to rebut allegations relating to the manufacturing of a specific product. Justice Breyer sought guidance on the line between commercial and noncommercial speech. He wanted to know how one could distinguish the letters that Nike wrote to University athletic directors from the pamphlets in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), regarding condoms and venereal disease. Tribe responded that the letters to the universities make no mention of Air Jordans or other Nike products, whereas the pamphlets in *Bolger* specifically mentioned the company's condoms.

Solicitor General Theodore Olson argued for the United States as amicus to Nike. In an attempt to preserve the federal government's use of certain federal statutes (such as the Federal Trade Commission Act) to regulate false or misleading commercial statements, the Solicitor General encouraged the Court to eschew what he described as the practically impossible task of drawing a line between fully protected and commercial speech. Instead, Olson urged the Court to dismiss the suit on the ground that the California statute violated the First Amendment by impermissibly transferring governmental authority to private citizens who did not allege any private harm. Several of the Justices rightly questioned the Solicitor General as to how private harm to the plaintiff would cure the First Amendment concerns: anyone who bought a pair of Nike shoes could claim private injury, but the chilling effect of holding Nike strictly liable for its speech would remain.

Kasky's lawyer, Paul Hoeber, spent a large amount of his allotted time arguing that the U.S. Supreme Court lacked jurisdiction to hear the case because the plaintiff alleged no Article III injury and reversal by the Court on the First Amendment issue would not preclude further litigation. With the possible exception of Justice Stevens, the Court appeared unsympathetic to that argument, which Kasky unsuccessfully had raised at the cert stage. On the merits, and in response to questioning by Justice O'Connor, Kasky's lawyer did not embrace the California Supreme Court's broad definition of commercial speech. Nor did he provide the Court with much guidance when pressed by Justice Breyer regarding what liability standard should apply where (as Justice Breyer apparently thought was the case here) the speaker is trying to both sell its products and make a statement about a public debate.

Perhaps the most interesting element of the oral argument was how little time was spent on what had seemed, at least when the Court granted cert, to be the principal issue: what is (and should there be) a distinction between commercial speech and fully protected speech (although it is interesting to note that Justice Stevens did ask at one point whether the distinction had ever actually made a difference to the holding of a U.S. Supreme Court case). Instead, the questioning was dominated by other issues: whether the Court prematurely had granted review, whether the case should be decided on the alternate ground argued by the United States, and whether the United States' argument had even been raised below. It would thus not be surprising if the Court's opinion does not reach the merits of the commercial/noncommercial speech issue, or if there are so many separate opinions that the result creates more questions than answers. A ruling is expected by early July.

Virginia v. Hicks

On April 30, 2002, the Court heard argument in No. 02–371, *Virginia v. Hicks.* To close down what the City of Richmond called an "open-air drug market" in a low-income housing development, the City closed the streets in the development and deeded them to the Housing Authority. The Authority posted signs announcing that the property was private, and that "unauthorized persons will be subject to arrest and prosecution" if they cannot demonstrate a "legitimate business or social purpose for being on the premises" after being served with notice. Although people could apply for permission to come on the premises, the Housing Administrator's discretion to decide whether they had a proper purpose for being on the premises was essentially unlimited.

Mr. Hicks entered the property after having previously received notice he was not welcome, and after being denied permission twice. Though he said he was delivering diapers to his child, who lived in the development, he was convicted of trespass and appealed. The Virginia Supreme Court held that (1) he could challenge the constitutional valid-

ity of the no-trespassing policy in his criminal proceeding (Virginia argued he had to bring a civil case to challenge the notice barring him from the property) and (2) the trespass procedures are overly broad under the First Amendment because even though they are designed to punish activities that are not speech, they nevertheless also prohibit speech and conduct that is clearly protected by the First Amendment. The conviction was reversed.

The U.S. Supreme Court granted certiorari to Virginia on two questions: (1) May a defendant invoke the overbreadth doctrine when his own offense did not involve any expressive conduct? and (2) Is there a constitutional difference as to actions taken by government as landlord and government as sovereign? Virgina proposed a "bright-line" rule limiting overbreadth standing to cases in which the defendant is engaged in expressive activity and his conduct is prohibited by that portion of the regulation that the defendant challenges. Mr. Hicks responded that because Virginia had never raised the issue below, it had waived this nonjurisdictional overbreadth standing argument. Indeed, by not raising the issue below, Hicks argued that Virginia precluded any factual development as to what Hicks' conduct involved, even arguing at one point that it was irrelevant. Further, Hicks argued that he had standing under a long line of cases which have often allowed people engaged in conduct, not expression, to facially challenge a statute. In addition, he argued that the policy was substantially overbroad and void for vagueness, and that transferring streets from one government entity to another did not avoid the constitutional defects of the policy.

At oral argument, several justices appeared doubtful that the First Amendment would preclude the policy at issue, and expressed concern that under Hick's theory, every run-of-the-mill trespass case could be transformed into a First Amendment case. When counsel for Mr. Hicks argued that Mr. Hicks was engaged in expressive activity since he was going to see his children, Justice Kennedy remarked, "It tends to trivialize the First Amendment to put too much on it." However, several justices also noted that the case presented other very important issues—vagueness and overbreadth—that could be addressed on remand by the Virginia Supreme Court. Thus, the Court will have to determine whether to decide the case solely on the standing issue, or whether to find standing and rule on the merits of applying the First Amendment to the City's trespass policy.

Campaign Finance

As this column went to press, the district court had just issued a 1,700-page decision in the case challenging many provisions of the McCain-Feingold campaign finance law. That decision is certain to be reviewed by the U.S. Supreme Court this calendar year, although the exact timing remains unclear. The ruling, if allowed to stand, would allow the national parties to raise unlimited amounts of "soft money," although they could not spend that money on "issue ads" that can only be understood as advocating the election or defeat of a candidate. It would also allow organizations not affiliated with the parties to run issue ads.