JOMC 486: Mass Media Law—A Peer Review of Teaching Project Benchmark Portfolio

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MASS MEDIA LAW

Peer Review Portfolio for JOMC 486

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Author’s Objectives

The course I analyze in this portfolio, Mass Media Law, is one I have taught almost every semester since I arrived on the University of Nebraska-Lincoln campus 23 years ago. Before that, I had taught a similar course at a small liberal arts college in northeast Missouri.

The course is one in which I have invested a substantial amount of time and study. That effort has been rewarded with generally good evaluations from students and compliments from faculty members. I often have students tell me the law course is the most or one of the most interesting courses they took as undergraduates. I have had alumni tell me years after graduating that the ideas and information they learned in the law course have been valuable in their professional lives.

In spite of the success the course seems to have had, I sometimes find myself getting stale. And I worry that I am not as successful as I could be in reaching some students. My objectives, therefore, are to take a critical look at the course and how I am conducting it and see if I’m accomplishing all I want to accomplish and determine whether there may be better ways to teach this class.

Description of the Course

Mass Media Law, JOMC 486, is a required course for all majors in the College of Journalism and Mass Communications. This includes majors in journalism (traditional print journalism and online journalism), broadcasting and advertising-public relations. Most students take the course in their junior or senior year, although a few take it as sophomores. The course also has a graduate section, designated JOMC 886, which is taken by master’s students who do not have an undergraduate major in journalism.

The interests and needs of the students vary depending on their majors and career plans. The areas of media law that are of most interest to advertising majors, for example, are different from those that are of interest to students expecting to work as news reporters and vice versa. And inevitably there are some students who, by the time they take 486, have decided they want to pursue careers in other fields. This variety of interests and needs has led me to make adjustments in the course over the years to attain a balance that serves all who take it.

Because the course is for upperclassmen, most of the students have already taken most, if not all, of the skills courses (reporting, editing, copywriting, videography and similar courses) required for their respective majors. The students later may take a capstone course in which they apply some of the ideas and information from Mass Media Law, but there are no later courses that explicitly build on this course. Some faculty in the college have suggested that the course should be offered at the sophomore level so that students would have that knowledge to draw on for later courses and internships.

The college is accredited by the Accrediting Council on Education in Journalism and Mass Communications. That body’s accrediting standards require that students receive instruction on the meaning and purpose of the First Amendment. Beyond that, the standards offer little guidance on what should be covered in a media law course. JOMC 486 is viewed by the college faculty as a valuable preparation for professionals in advertising, public relations, broadcasting or journalism. Therefore, the course must cover those areas of mass media law that professionals must expect to deal with on a regular basis.
Goals for the Course

The most basic and most explicit goal of the course is to acquaint students with the substance of the law governing the major areas of the mass media. This includes some general First Amendment principles as well as libel, privacy, product disparagement, advertising regulation, broadcasting regulation, trademark, copyright and news gathering issues. These issues are diverse, and the legal principles for each vary considerably. So the volume of material to master is great.

Just knowing the substantive principles of media law, however, is not enough for someone working in the mass media. The professional must be able to apply those principles to the problems she or he encounters on the job. The professional must be able to recognize those situations that give rise to legal problems and have some knowledge of how to avoid them (or at least enough sense to know when to call a lawyer). Thus, learning media law must be more than just a process of memorization.

This leads to a second goal for the course, which is building critical thinking skills. In the context of media law, the student must be able to understand how to apply the legal principles to new situations. This requires identifying facts that are relevant to how a problem should be solved, recognizing what facts are not relevant and then applying the legal principles to the relevant facts.

The application of legal principles requires students to construct arguments for how a problem should be resolved. To do this students must understand how arguments are constructed and how to analyze the strengths and weaknesses of arguments. This, in turn, presumes some knowledge of or appreciation of logic.

A subsidiary goal of the course is to acquaint students with the American legal system and how it operates. A few may become lawyers. A few may cover courts as part of their journalistic work. And a few may be involved in civil or criminal litigation. But all of them are citizens, and the operation of the court system should be part of their storehouse of knowledge.

To an extent, the goals of the course are intended to comply with guidelines set by the ACEJMC, which specify that students should become competent in several content and skills areas. Among these are knowledge of law and the First Amendment, critical thinking skills and writing skills. To help the College meet the ACEJMC competencies, the specific objectives for the Mass Media Law class are that the students be able to:

- Apply media law principles for libel, privacy, copyright, advertising, and broadcast regulation and other areas to real-life situations.
- Understand how courts and administrative agencies decide cases in media law.
- Be aware of how the American legal system operates.
- Distinguish relevant from irrelevant information for the solution of a problem.
- Construct a clear, logical argument to support a conclusion.
- Accurately summarize written and oral presentations of others.
- Identify and correct problems in grammar, spelling, punctuation and word usage.

Course Context and Demographics

The class is taught once a semester, including a summer section. Because the course is required for the major, it tends to be one of the largest taught in the College. Enrollment typically runs between 80 and 125. This is different from what students experience in other colleges and departments where freshman and sophomore classes tend to be large and junior and senior classes
are smaller. In the College of Journalism and Mass Communications, students learn basic skills in their freshman and sophomore years, usually in classes of 20 or fewer, while they take law and an ethics course in their senior year in large classes.

The course is required for all majors in the College of Journalism and Mass Communications. The largest major is advertising and public relations. These students compose about half of the college’s enrollment and typically about that proportion of the enrollment in the law class in any given semester. The advertising and PR students may be seeking careers in advertising design or copywriting, account management, public relations or corporate communications. The next largest major is broadcasting, with about one-third of the students. They are pursuing one of two tracks: broadcasting journalism or broadcasting production. The smallest major is journalism (formerly called news-editorial). These students most often are interested in jobs reporting news or sports for print or online publications.

Teaching Methods

The media law class is a relatively large class for the College of Journalism and Mass Communication. Enrollment typically ranges from 85 to 125 students per semester. In a course of such size, the primary approach to using class time necessarily is lectures; however, I try to incorporate opportunities for class discussion and exploration of issues.

I focus the lectures on exploring and explaining the legal principles relevant to each topic we consider during the semester. For instance, the lectures pertaining to libel focus on the elements of a libel case, meaning what a plaintiff in a libel suit must prove in order to recover damages. I define and explain each of these elements and discuss cases illustrating how courts apply the definitions of those elements to the facts of specific cases. One element is identification, meaning the plaintiff must show that the allegedly defamatory statements were about him or her. This does not require that the plaintiff be named. If no name is published or if a pseudonym or fictionalized name is used, the plaintiff still can prove identification if there are other facts that would lead a reader or viewer to conclude reasonably that the story is about the plaintiff. I discuss cases in which plaintiffs were able to do this.

I make extensive use of PowerPoints during my lectures. Most of the slides have major points of emphasis either setting forth or explaining elements of a cause of action or a defense or describing how they are applied. But I also try to use PowerPoints to stimulate discussion or explore how legal principles are applied in real cases. One slide, for instance, has two print advertisements for Campbell’s soups. One ad was held by the Federal Trade Commission to be deceptive. I ask the students to guess which was deceptive and try to figure out why. This leads into a discussion of deceptive advertising generally and, in this case, the use of mock-ups in ads.

Other PowerPoints incorporate videos from the Web or videos I have downloaded from YouTube or other sources or sound files that I have downloaded and edited. One set of slide dealing with copyright infringement has excerpts of pairs of songs that have been involved in infringement disputes so that students can listen to them and discuss and judge whether one infringes on another.

I also try to use class time to discuss court cases that the students have been assigned to read. The level of discussion varies considerably. Some cases inspire considerable discussion; others do not. Which ones do and which ones don’t seems to vary from semester to semester, although inspiring discussion seems to become more difficult as the semester goes along. And it is always
easier to get students to respond to questions that ask for their opinions or their responses to hyp-

othetical situations than to get them to respond to questions asking for specific information about 
the facts of a case or what a court or dissenting judge might have said about it.

Course Materials

The main resource I use is a course packet. This packet contains an essay that provides a 
basic introduction to the U.S. legal system and court structure. It also has an outline of the course, 
based on the PowerPoints I use in class. I use this instead of placing them on the Web because they 
contain copyrighted materials that I do not want to distribute outside of class. At the same time, I 
want the principles I emphasize to be readily available to students so that they are not spending all 
of their class time copying what they see on the screen.

The bulk of the packet, however, consists of court decisions that I have edited to be more 
readable and to focus on the legal issues and principles that I think are most important for journal-

ism and advertising students to understand and master. Students are expected to read these cases 
and discuss them in class.

I also use a supplemental reading, which changes from year to year. I like to use a reading 
that either discusses a situation that raises media law issues or that presents a problem to which 
media law principles may apply. The readings are sometimes works of fiction and sometimes non-

fiction. This semester, I am using The Children’s Hour, a play by Lillian Hellman which in effect 
presents a libel case. Part of the first exam required students to answer questions based on the play. 
The play was a long hypothetical situation, and students had to apply principles from libel law to 
answer questions. In other semesters, I have used Zoe Heller’s What Was She Thinking: Notes on 
a Scandal, as an exercise in privacy law, and I have used Stuart Taylor’s Until Proven Innocent, 
an exhaustive account of the Duke University lacrosse team’s legal travails as an example of how 
news coverage can prejudice a criminal prosecution.

This year I added a textbook to the required readings. I have use supplemental texts in pre-
vious years, but I decided that students needed more background and explanation than I was able 
to provide in class lectures alone. Also, the textbook would help students who missed class or were 
having trouble grasping some concepts.

Also, this year, I started using i>Clickers. I have students answer questions based on the 
readings using their clickers and then I go over the questions. I also use them for starting discus-
sions by presenting students a problem and asking them to choose answers. We can then explore 
what led them to particular conclusions and I can explain why an answer was correct or incorrect 
and what students should do to avoid incorrect answers on the tests.

Course Activities

I have used a variety of outside activities over the years. At present, however, I have two 
primary outside activities (other than reading): papers describing and analyzing court cases they 
are required to read and take-home essay tests.

Analysis Papers

Students read 39 court opinions or similar documents during the semester. I select four
of them as ones for which students write analysis papers. The purpose of these papers is to help
students learn how to read, summarize and analyze a complicated argument. Every court decision
presents an argument, based on legal principles and precedents, for why the case should be decided
in a particular way. In order to understand a court’s conclusion, the critical reader needs to be able
to identify and follow the major steps in the court’s reasoning.

Each analysis papers should begin with a brief summary of the facts of the case and what
happened in the lower courts. The largest section of the paper should be a summary of the court’s
reasoning as it moves toward its conclusion. If the decision included concurring or dissenting opin-
ions, the student has to read and summarize them as well, although in less detail.

Finally, the student is expected to analyze the arguments of the court and of the concurring
and dissenting opinions and offer their own conclusions.

**Tests**

The largest component of a student’s grade is the three tests. The tests are patterned on
the format used by law schools, although I have modified and simplified them to make them
more appropriate for undergraduate students. Each test requires students to apply mass media law
principles to hypothetical situations. For each hypothetical, there were three or four short essay
questions, and each test will have four or five hypotheticals for a total of 12-16 questions. Students
must answer 10 of them. The tests are take-home, and students may use their books and notes to
answers. The tests are not cumulative. The three tests given for this semester are included as ap-
pendices.

**Quizzes**

Students also take three multiple-choice quizzes. The first is a 20-question pre-test to gauge
their knowledge of media law. That quiz does not count toward the student’s final grade, but a
similar 20-question post-test does count in the grade. The third quiz covers an essay in the course
packet titled “American Law and Courts.” The essay explains some basic points about the legal
system and how it works and how it is structured. This is necessary background for understanding
the cases the student read during the rest of the semester.

**Rationale for Teaching Methods**

The Mass Media Law class has three major objectives based on competencies identified
by ACEJMC, the accrediting body for journalism schools and colleges. Those goals are students should

• know and understand how to apply the principles of media law and freedom of speech and
press;
• understand how to think critically, creatively and independently;
• understand how to write correctly and clearly in forms and styles appropriate for the com-
munications professions, audiences and purposes they serve.

These goals drive the manner in which the class is conducted and the tools used to evaluate
student learning.

The course is predominantly a lecture course, but I incorporate numerous opportunities for
students to discuss issues. One way I do this is through the in-class discussion of the cases assigned
as readings. We begin with a summary, presented by one or more volunteers from the class, of the facts of the case. From that we identify the central question of law the case presents and the legal principles the court uses to answer that question. Then we discuss how the court applies the legal principles to the facts of the case. Finally, we discuss any concurring or dissenting opinions and how their approaches differ from those of the majority and whether they improve on the majority’s approach.

Another classroom technique I use is to present materials that raise legal issues and have the class discuss how the relevant legal rules might apply. For example, for the discussion of the concept of substantial similarity as an element of copyright infringement, I show the class clips from two movies, *Yojimbo* and *Fistful of Dollars*. I then ask students to apply the legal definition of substantial similarity to those clips to determine whether there is a case to be made that the latter infringed on the copyright in the former. Other materials I use for stimulating discussions are photographs, sound files, YouTube videos and hypothetical situations.

This lecture-based approach to the classroom is designed both to present key concepts in mass media law and to encourage the students to reflect on those concepts in a critical way.

The most basic goal of the course is that the students leave with a better knowledge of mass media law, including such basic ideas as what constitutes libel or what constitutes copyright infringement. The multiple-choice pre- and post-tests are one vehicle for assessing how well the class meets this goal.

If the students are going to function successfully as professionals in journalism and advertising, they will need more than just knowledge of legal principles. They will need to understand how to apply them to situations they might encounter on the job. The purpose of the essay tests is to assess how well the students are able to apply the legal principles. It is not enough to simply recite the various legal rules and verbal formulas. The students must understand how to apply them in situations that are new to them. The hypothetical situations presented in the tests all have some basis in reality. They are drawn either from real cases or from news stories that raise interesting, if not-yet-litigated, legal issues. It is conceivable the students might encounter similar situations as professionals. The students’ answers to the test questions are graded on the basis of how well they are able to recognize what facts in the hypothetical are relevant to answering the question, to know what rule of law should be used to answer the question and to understand how that rule should be applied.

The analysis papers are also intended to foster critical thinking by the students. The idea is to make sure the students do not simply read a court decision or other document but that they examine it carefully. The exercise of writing the paper requires them to understand and summarize the facts of a case and the reasoning the court used to decide the case. They, then, must critique the court’s handling of the case and explain why they do or do not find it satisfactory.

### Past Changes

Over the years, I have changed the content and the delivery of the Mass Media Law course in numerous ways.

The major content changes have reflected the fact the majority of the students in the class are majoring in advertising and public relations. Traditionally, mass media law courses have emphasized material of interest and importance to students preparing to be print or broadcast journalists. Media law courses have delivered long examinations of libel and privacy along with intensive
looks at access to information and coverage of criminal courts. Much less emphasis has been placed on advertising regulation, trademark and copyright law. Business law usually has been limited to cursory examinations of the application of antitrust law to the mass media. These preferences are reflected in the tables of contents of almost all mass media law textbooks.

I have greatly expanded the amount of time I devote to issues of more value to advertising and public relations students. I spend more time on FTC regulation of advertising, the use of the Lanham Act to police misleading advertising, trademark law and copyright law. What I have eliminated to make room for these expansions has largely been in discussion of law related to newsgathering activities.

In terms of delivery of the course, the major change has been the development of the course packet. This began as a brief supplement to the textbook I was using at the time. I thought it would save time for the students if I put the slides (then presented on an overhead projector) into an outline format and had them buy it. They would be able to spend less time copying and more time supplementing the outline with notes about how the legal rules and principles applied. That thin packet has expanded to include edited summaries of nearly 40 cases or other legal documents. It is the main tool I use in teaching and discussing media law. My rationale for emphasizing it is that students need to learn how to deal with primary source materials. That’s true for students in all majors. Textbooks that simply distill all the complexity out of a topic do not allow students to develop the skill of studying and clarifying for themselves complicated and confusing documents. Yet performing that task is one demanded of professionals in all areas of the mass media.

The Law Course and the Broader Curriculum

Although the law class is one of the last a student takes in any of the journalism sequences, it does not build on other classes in a direct way. Students come into the class with substantial knowledge of the fields of journalism, broadcasting and advertising. Some have already completed all or most of their courses; some have completed one or more professional internships. Others have worked at the Daily Nebraskan in advertising or news positions. It is possible that these professional experiences have brought the students into situations in which media law principles have been important. To an extent, then, I can assume that the students in the course have a solid understanding of their professions and what people in their fields typically do.

No subsequent class builds directly on the material in the Mass Media Law class. Some students may take their capstone courses after the law class. Others might take the Mass Media and Society class, a class that focuses on ethical issues in the media, after they complete the law class. But the order in which students take these courses is not fixed, and there is nothing about the curriculum that would require a student to have taken a capstone class before the law class or vice versa.

Mass Media Law, therefore, stands somewhat outside the broader curriculum in any of the majors in the College of Journalism and Mass Communications. Nevertheless, it contributes to the curriculum in several important ways. First of all, it encourages students to think about their professions in relation to society as a whole. The law of libel or the law of advertising regulation or any of the other areas of media law limit what professionals may do in various situations. The purpose of those limitations is to reconcile the interests in freedom of speech and press and access to a wide range of information with other social interests, such as the protection of privacy or the prevention of commercial fraud. Many of these issues will have arisen in some of the more basic
classes, but the law class is the point in the curriculum where students must think about reconciling these interests in some detail.

The course also serves as an important preparation for students going into one or more of the media professions. Unless they understand their rights and the limitations on their rights, they will not be able to function successfully as professionals in advertising, broadcasting or journalism.

Analysis of Student Learning

I will use two types of data for my analysis of student learning. One type is summary quantitative data. Most of this comes from the results of pre- and post-tests of student knowledge of media law. I also have compiled some averages on scores for two other evaluation tools: the analysis papers and the essay tests.

The other type of data is a qualitative analysis of a sample of student work. I have selected the work of three students—a high-pass student (Student No. 1), a middle-pass student (Student No. 2) and a low-pass student (Student No. 3)—for closer examination. I will look at the four analysis papers each student wrote as well as two questions from each of the three essay tests the students wrote. The questions reviewed will be ones all three students answered so that meaningful comparisons can be made.

Pre- and Post-Test Comparisons

Students were given two 20-question quizzes over media law, one at the start of the semester and a similar quiz at the end. The questions covered all aspects of media law taught in the class and required students to show specific knowledge of legal rules and principles and how they are applied. The purpose of the two quizzes is to determine how much the students learned about media law during the semester.

The bar graph on this page shows the percentage change each student recorded on the post-test over the pre-test. Almost every student showed improvement. Only two had poorer scores on the
post-test than on the pre-test. The average improvement for the class was 80.4 percent; the median improvement was 66.7 percent. These levels of improvement suggest that the class is successful at imparting to students basic knowledge about media law such as what constitutes libel, what the Federal Trade Commission looks for in deceptive advertising cases and what a plaintiff in a copyright infringement suit must prove.

The Analysis Paper Assignments

Analysis Paper No. 1

The first Analysis Paper the students wrote was over the U.S. Supreme Court decision in *Virginia v. Black*. The court reversed the criminal convictions of three men for two separate incidents of burning crosses in violation of a state statute. The U.S. Supreme Court agreed with the Virginia Supreme Court that the state law was contrary to the First Amendment, but it disagreed, in part, on the reasoning. The case is a complicated one both in terms of the legal issues presented and in terms of the number of concurring and dissenting opinions. Part of the goal of the assignment was to help students understand how the First Amendment protects unpopular speech and how some expressive conduct may lie outside the scope of the First Amendment.

Student No. 1, the high-pass student, wrote a paper that was very thorough in its summary of the case. This student not only presented a detailed and accurate summary of the facts of the case, she also recognized the key points of the decision, such as the holdings that states may prohibit cross burning done with an intent to intimidate, that “true threats” lack First Amendment protection, and that the prima facie provision of the Virginia statute (allowing jurors to infer an intent to intimidate simply from the act of burning a cross) would invite jurors to punish speakers of unpopular ideas where there was no evidence of intimidation. Student No. 1 also did an excellent job of distinguishing the multiple concurring and dissenting opinions and correctly identifying how they differed from the plurality opinion. This student’s analysis of the various opinions lacks depth, but she did realize that the justices are trying to reconcile the need to protect citizens from intimidation while assuring that people are free to express their ideas, even when those ideas are unpopular and offensive.

Student No. 2, the middle-pass student, performed nearly as well on this essay. The summary of the facts of the case is complete, but this student seemed to have difficulty distinguishing what the Virginia Supreme Court had ruled from the decision being delivered by the U.S. Supreme Court. The student realized the importance of the prima facie provision in the Virginia statute and why it created First Amendment problems. He went on, however, to compare the *Black* decision to the court’s decisions in *Texas v. Johnson* (flag burning) and *O’Brien v. United States* (draft-card burning). The *Black* case turned on whether the cross-burning constituted a threat or an effort to intimidate. Neither of the other cases involved that issue, so they offer little guidance for understanding the *Black* ruling. Student No. 2’s discussion of the concurring and dissenting opinions is thin and ignores one of the more important partial dissents, that of Justice Antonin Scalia. Finally, his analysis of the case is brief and largely consists of saying all of the justices made good points.

Student No. 3, the low-pass student, provided the briefest summary of the facts of the case. Her summary of the lower court decisions, particularly the Virginia Supreme Court’s holding, is truncated and confusing. She fails to recognize that the Virginia court had offered two distinct bases for finding the cross-burning statute unconstitutional. Her discussion of the plurality opinion
fails to follow or summarize the reasoning behind it. Instead, she jumps to a guess as to how the decision might affect the eventual outcome for the defendants in the two prosecutions that led to the decision. Her guess is probably accurate, but it misses the point of the assignment. This student also did the least in terms of summarizing the concurring and dissenting opinions. She mentions only Scalia’s opinion, but her summary suggests she’s actually confused what Scalia wrote with the opinion of Justice Clarence Thomas. She refers on several occasions to the Supreme Court’s decision as finding that cross-burning is unconstitutional. This reflects a fundamental misunderstanding of what judicial procedure and what the court was actually saying. The court held that states could, consistent with the First Amendment, prohibit cross-burning done with the intent to intimidate. What was unconstitutional was the Virginia statute’s provision allowing juries to infer intent from the act of cross burning itself.

Analysis Paper No. 2

For this paper, the students wrote on the decision of the U.S. Court of Appeals for the 9th Circuit in the case of White v. Samsung Electronics. Vanna White, the cohost of the TV show Wheel of Fortune, sued Samsung and its advertising agency for creating and publishing an advertisement that showed a robot dressed in a blond wig, big jewelry and a long dress on the set of a game show resembling Wheel of Fortune. White said the advertisement misappropriated her likeness, infringed on her right of publicity and and violated the federal Lanham Act by creating the impression she was endorsing Samsung products. Part of the purpose of this assignment was for students to see how courts distinguished misappropriation cases from right of publicity cases.

Student No. 1 again did a good job of summarizing the facts of the case. She also solidly grasped the difference between misappropriation and right of publicity. The appeals court dismissed the misappropriation claim because that involves use of another’s name or likeness, but the Samsung ads never used either White’s name or her likeness. However, the appeals court said the use of the robot did involve the use of White’s identity. Student No. 1 recognized this difference and explained clearly how the appeals court reached its conclusions. She also grasped the key differences between the majority opinion and the dissent, namely that Samsung’s ad had not and could not lead readers to believe that the robot was Vanna White. Further, the ad appropriated not White’s identity, the dissent said, but only the role she played on Wheel of Fortune. Student No. 1 finished with a well considered evaluation of both opinions and her reasons for finding the majority opinion more persuasive than the dissent.

Student No. 2 did an equally good job on this assignment. His summary of the facts and of the two opinions was as detailed and clear as that of Student No. 1. He had an equally good grasp of the reasoning applied by the appellate court and by the dissenting judge. And he offered a cogent analysis of the two opinions. While he finds merits in both, he presented concrete reasons for doing so and explained why he preferred the majority opinion over the dissent.

Student No. 3 also improved in her performance on the second analysis paper. Her summary of the facts and of the legal issues is solid. She recognized the distinction between misappropriation and right of publicity. Her explanation of the court’s reasoning on the right-of-publicity claim is not as clear or as detailed as those of the other two students, but it is adequate. Her explanation of the dissenting opinion was brief but adequate. She concluded by finding more merit in the majority opinion than in the dissent, but her reasons for that conclusion are vague and seem to focus primarily on White’s status as a pop culture figure. The improvement Students 2 and 3 showed on the second assignment is partly attributable to their greater familiarity with court cases. By this
point in the semester they had read about 15 opinions. Also, this particular case is less complicated than the Black case and there are fewer different opinions to sort through.

Analysis Paper No. 3

This assignment required students to write papers on the U.S. Supreme Court decision in Greater New Orleans Broadcasters Assn., Inc. v. United States. The broadcasters were challenging the constitutionality of a federal law prohibiting the broadcasting of advertisements for commercial casinos where the signals might reach states that prohibit casino gambling. The legal issues are complicated as are some of the facts of the case. The students were not asked to read or summarize any of the concurring and dissenting opinions as a way of reducing the burden. The key issues in this case are the degree of protection for commercial speech under the First Amendment and how the courts apply the four-part Central Hudson test for determining whether a government restriction on commercial speech is constitutional.

Much of the complexity of this decision arises from the changes in federal and state law regarding gambling over the last half of the 20th century. These changes were described in detail by Justice John Paul Stevens in his majority opinion. Student No. 1 summarized those changes thoroughly, showing how federal policy had moved from a nearly absolute ban on gambling and the promotion of games of chance to a greater degree of tolerance of them. This history laid the groundwork for understanding the rest of the opinion. Student No. 1 moved on to discuss the Central Hudson test and how the court applied it to the facts of this case. She summarized with clarity and precision Stevens’ argument that the multiple exemptions to the ban on advertising of gambling had created a regime that did not directly advance the government’s substantial interest in reducing the social costs of gambling. Her own analysis of the opinion is somewhat thinner than was her analysis of the White decision. That may be because the class did not read the concurring or dissenting opinions which can help one evaluate Stevens’ arguments.

Student No. 2’s performance on this assignment dropped was less satisfactory. Although he summarized the basic facts of the case clearly, his discussion of how Justice Stevens applied the Central Hudson test is superficial, particularly as to the crucial third and fourth parts of the test. The third part requires that the regulation advance the government’s substantial interest to a material and substantial degree. Student No. 2 said the court found the ban on advertising for commercial casinos failed this part of the test, but his explanation of how the court reached that conclusion was weak. He focused too much on the court’s observation that advertising may do more to switch gamblers from one casino to another than it does to increase the overall demand for gambling. He overlooked the more important point the court was making that the tangled laws and regulations could not possibly advance the government’s interest in a direct manner.

Student No. 3’s paper was even more disjointed. She badly misstates the Central Hudson test making it appear that the purpose of that test is to help the court write regulations rather than assess their constitutionality. She also misstates the court’s conclusion on the question of whether controlling the social costs associated with gambling is a substantial governmental interest. Student 3 said the court had concluded it should not make that judgment. In fact, the court said controlling the social costs was a substantial governmental interest, but the change in policy toward greater acceptance of gambling was blurring the clarity of that interest. She compounded the error by later saying the court had ruled in favor of the broadcasters because it had found no substantial governmental interest motivating the regulation. Also, she said the court had found Congress was promoting Indian casinos and retarding commercial ones, but that was not a conclusion the court
had drawn.

This assignment opened a bigger gap between the high-pass student and the middle- and low-pass students. The high-pass student continued to perform at a very high level, recognizing key details in the opinion and summarizing arguments clearly. The others showed substantially less grasp of the details of the case and the steps in Justice Stevens’ argument and how those affected the outcome of the case.

Analysis Paper No. 4

The court case students wrote about for this assignment was part of the California Supreme Court’s decision in *Shulman v. Group W Productions*. The class had read a different part of the opinion in the same case earlier in the semester. That part had dealt with the issue of publicity to private facts. The part the students wrote about for this paper dealt with intrusion. Ruth Shulman and her son had been victims of a traffic accident. Ruth had been trapped in her car and was seriously injured. The medical team that responded to the accident was accompanied by a cameraman from Group W. He shot video and recorded audio at the scene of the accident and in the helicopter ambulance that carried the Shulmans to the hospital for treatment. The nurse who treated the Shulmans at the scene was wearing a microphone that picked up her conversations with Ruth. The images and some of the conversations were later included in a television broadcast, *On Scene: Emergency Response*. Shulman sued Group W, saying this constituted invasion of privacy by intrusion.

Student No. 1’s paper on this case is very good, but a notch below her earlier papers. She again presents a thorough summary of the facts of the case. She correctly identifies the central issue of whether the Shulmans had a reasonable expectation of privacy at the accident scene, in the helicopter ambulance and in their conversations with the nurse at the accident scene. Her summary of the court’s discussion of whether Group W’s intrusion could be found highly offensive is also very thorough and accurate. She correctly noted that the court based its conclusion on this point on the conduct of the photographer and on the fact that Ruth Shulman was severely injured and unable to notice what the photographer was doing or object to his presence or his conduct. The major point she overlooks, however, is the role of the California wiretap law in shaping the decision. Although this law and the judicial interpretation of the law played a big role in the California Supreme Court’s decision, Student No. 1 barely mentions it.

Student No. 2 correctly identifies the major issues in the case—the Shulmans’ expectation of privacy and the offensiveness of the intrusion—but his explanation of the court’s decision is superficial. He notes that the California Supreme Court found the Shulmans had a reasonable expectation of privacy in both the helicopter ambulance and in the conversations with the nurse at the accident scene. But he does not explain what facts led the court to this conclusion. Similarly, he offers no explanation of why the court concluded Group W’s intrusion into the Shulmans’ zone of privacy was highly offensive.

Student No. 3 turned in a paper that was much weaker than either of the others. Her fundamental problem was that she confused the portion of the *Shulman* case she was supposed to write about with the portion that had been discussed earlier in the semester. Thus she confuses the issues of intrusion and publicity to private facts. Student No. 3 briefly summarizes the discussion about whether the cameraman’s mere presence at the accident scene constitutes an intrusion and whether the Shulmans had an expectation of privacy in the helicopter ambulance and in the conversations with the nurse. But then she turns to the analysis the court offered of the publicity to private facts claim. Although the California Supreme Court said the Group W program about the accident was
sufficiently newsworthy that the Shulmans could not recover damages for publicity to private facts, the company’s conduct in obtaining video and audio of the accident could be actionable as intrusion. Student 3 simply failed to realize that the court’s conclusion on the intrusion claim was different from its conclusion on the publicity to private facts claim.

The Essay Tests

Students took three essay tests during the semester. Each test presented students with five hypothetical situations (all based to some degree on real cases or real incidents). For each hypothetical there were three or four questions. Students had to answer at least one question from each hypothetical and 10 questions total. The questions required students to state the legal rule needed to answer the question and to apply that rule to the facts of the hypothetical to reach a conclusion as to how the situation would be resolved.

Test 1

This test covered material on basic First Amendment concepts and problems, such as incitement to criminal conduct, limitations on symbolic speech and prior restraints. It also covered libel, a major section of the course. I will evaluate the three students’ answers on questions 8 and 11. Both of these deal with libel but with different aspects. Question 8 comes from a part of the test covering the elements of a libel suit: what a plaintiff must be able to prove in order to get a case to the jury. Question 8 asks students to evaluate whether a particular statement in a hypothetical news story is capable of a defamatory meaning. The question focuses on a statement that is libel per quod, meaning the statement is innocent on its face but becomes defamatory when combined with information known to the audience. Question 11 deals with actual malice. The U.S. Supreme Court has ruled that libel plaintiffs who are public officials or public figures must prove actual malice, meaning that the defamatory statements about them were published with the knowledge that they were false or with a high degree of awareness of their probable falsity. Both libel per quod and actual malice are concepts with which some students struggle.

On Question 8, the Student No. 2, the middle-pass student, outperformed Student No. 1, the high-pass student. Student 2 began with an accurate statement of the legal definition of what it means for a statement to be defamatory. He also noted that facially innocent statements can assume a defamatory meaning when combined with information already known to the audience. He recognized that the statement this question called on him to evaluate was innocent on its face; it simply noted that the plaintiff had been a graduate student working for a famous professor several years earlier. What made it defamatory was that the professor had been caught with child pornography at the time the plaintiff had been working with him. Even though this was not stated in the hypothetical news story, it was a fact that people hearing the story would be likely to remember. Student 2 offers a cogent explanation of how this statement might lower the plaintiff’s reputation. Student No. 3, the low-pass student, did not include a clear definition of what constitutes defamation, but she did correctly recognize this statement as capable of a defamatory meaning based on the information the audience was likely to already have.

For Question 11, students had to decide whether there was evidence that a particular statement about a plaintiff had been made with actual malice. Again Student No. 2 wrote a better an-
swer than Student No. 1. Student 2 began with a correct definition of “actual malice.” Student 1 began her answer with a discussion of whether the plaintiff was a public official, which was not what was asked. Student 2 correctly and clearly identified the facts in the hypothetical that were relevant to deciding whether the statement had been published with actual malice, such as the reporter’s source for the information, whether the source was in a position to have credible information on the topic, the source’s history of reliability, the existence of corroborating evidence and the defendant’s lack of awareness of probable falsity. Student No. 1 reached the correct conclusion and identified some of the same relevant factors, but she used a list of factors derived from earlier cases to determine whether there was actual malice. Although Student 1’s approach was not unreasonable, it may lead to wrong conclusions, because no list of factors indicating actual malice can be exhaustive. Student No. 3 reached the correct conclusion, but she began with an inaccurate definition of “actual malice,” which included “purposefully neglecting to gather more information.” Failure to gather more information can be evidence of actual malice only in rare circumstances. She did note the reliability of the source and the existence of corroborating evidence as key issues, but her answer overall was less complete than those of the other two students.

**Test 2**

The material covered on this test included invasion of privacy torts, regulation of deceptive advertising through the Lanham Act and Federal Trade Commission rules and First Amendment protection for commercial speech. I have chosen questions 4 and 10 from Test 2 for comparing the performances of the three students. Question 4 asks whether a hypothetical celebrity would be able to prove that an advertisement infringed on her right of publicity. Question 10 asks whether an advertiser violated FTC regulations in the way it used a celebrity endorser for its product.

Student No. 1 showed dramatic improvement from the first to the second test. Her answers on both of the questions were logical and well-formulated and applied the legal rules in the correct manner. On Question 4, Student No. 1 stated the three elements of an action for right of publicity and identified the facts in the hypothetical relevant to each part. The first element requires the plaintiff to show that the defendant had used a distinctive aspect of the plaintiff’s identity. In this case, it was the use of distinctive features of the plaintiff’s appearance and a catch phrase very similar to one the plaintiff uses regularly and has trademarked. Student No. 1 noted all of these and concluded the plaintiff could be successful in her suit. The other two elements—lack of consent and injury to the plaintiff—were less complicated to determine, but Student No. 1 had no problem with either. The performance of Student No. 2 was equally strong. He clearly stated the elements for an action for infringement of right of publicity and applied those elements to the facts of the case. Student No. 3 was less successful. She recognized that the problem was similar to that the *White v. Samsung Electronics* case the class had read earlier. But she did not state the elements of an action for right of publicity. She recognized that the character in the commercial was supposed to resemble the plaintiff, but although the similarities between the two were as great and as numerous as the similarities between White and the robot in her case, Student 3 concluded they were insufficient to prove use of the plaintiff’s identity. She also erroneously concluded the plaintiff would be unable to prove injury, ignoring the fact the plaintiff had lost an opportunity to capitalize on her persona.

Question 10 concerned the use of a celebrity, a former pro football quarterback, as an endorser for a juice drink claiming specific health benefits. In the hypothetical, the endorser said the product had helped reduce his enlarged prostate and it had helped other men with erectile dysfunction. Student No. 1 summarized the FTC rules on endorsements that use celebrities and discussed
how those rules applied to the facts of the hypothetical. One part deals with identifying whether the endorser is being paid. The FTC says this normally does not need to be disclosed because people assume endorsers are paid. However, other financial connections between the endorser and the product or company, connections consumers might not suspect, must be disclosed. In this hypothetical, the ads failed to disclose the endorser’s substantial financial investment in the company. Student No. 1 correctly identified this problem. She also noted that the endorsement presented a false picture of the endorser’s experience with the product, because although he had experienced improvement in his prostate, the ad did not disclose he had also been taking a prescription drug for the problem. Student No. 2’s answer was as thorough, clear and well-argued as that of Student No. 1. But, again, Student No. 3 was less thorough in her answer. She identified some, but not all, of the relevant FTC rules for celebrity endorsers and noted that the ad adhered to some, but not all. In particular, she noted that the ads failed to disclose the endorsers financial connections to the advertiser. However, she did not recognize the problem with the distortion of the endorser’s experience with the product.

Test 3

The final test of the semester covered a wide range of issues, including the law governing political broadcasting, trademark and copyright law, the tort of intrusion and other issues arising in connection with news gathering practices and problems involved in the coverage of the judicial system, especially coverage of criminal trials. Perhaps because the test covered so many topics, it was difficult to find two questions all three students answered. However, all three answered Questions 1 and 5, so those two will be used for this assessment. Question 1 covered the regulation of political broadcasting, and Question 5 involved trademark infringement.

Question 1 asked students to apply the equal opportunity rule to a situation involving an appearance by a possible candidate for public office on a television interview program shortly before a primary election and determine two candidates for the nomination were entitled to airtime. The question is simple, but the possibilities for students to mislead themselves are almost endless. Student No. 1 stayed focused on the key issues and wrote an answer that succinctly stated the relevant law and facts. She recognized that the threshold issue is whether the person who appeared on the interview is a legally qualified candidate. She also recognized that because he had not formally declared his candidacy, even though many speculated he might run, he was not a legally qualified candidate; therefore, the other candidates were not entitled to equal opportunity. Student No. 2’s answer is an example of how one can become distracted from the key issues and write an incorrect answer. Student 2 stated the equal opportunity rule and noted that the person interviewed had not formally declared his candidacy. However, the student then discussed whether the interviewee had engaged in campaign activities to an extent that he had made a substantial showing as a bona fide candidate. The student concluded that the interview subject had made a substantial showing, in large part because of his appearance on the interview show; therefore the other candidates were entitled to equal opportunity. However, this overlooks the fact that the candidate must first make a formal declaration of an intent to run for office. Absent that, even engaging in other activities, does not make one a legally qualified candidate. Student No. 3 again failed to state the governing legal rule (the equal opportunity rule), but she did a better job than Student 2 in staying focused on key issues. She realized that the interview subject was not a legally qualified candidate. She also noted that because the appearance had been on a news interview program, it might have fallen into the exemptions to the equal opportunity rule.
For Question 5, students were asked to consider whether a plaintiff in a trademark infringement case could prove one aspect of the multi-factor test for a likelihood of confusion. This particular question involved the strength of the plaintiff’s mark. Student No. 1 wrote an exceptionally detailed and thorough analysis of the entire problem. She began with a definition of “strength of the mark” that noted the idea embraces two issues, conceptual strength and commercial strength. Her answer looks at the conceptual strength of the hypothetical plaintiff’s mark and concludes it is not great—a candy shaped and colored like a blue bird. But she also analyzes the commercial strength and finds that much greater. The amount of advertising, the duration of the advertising campaigns and consumer surveys all showed that the mark was readily recognizable to consumers and, therefore, commercially strong. Students No. 2 and 3 offer answers that are considerably less detailed. Neither of them distinguishes conceptual and commercial strength, although these were concepts covered in their readings. Both focus entirely on the commercial strength of the mark. Student 2 emphasizes the fact that consumer surveys showed that many people believed the defendant’s product had been produced by or in conjunction with the plaintiff as evidence of the strength of the mark. He did not discuss the lengthy advertising campaign to build the mark or the effects of that campaign. Student 3 emphasized the advertising campaign and expenditures and the fact the brand was one of the top five in the U.S., but she did not discuss the consumer surveys. Both Student 2 and Student 3 failed to identify facts relevant to a determination of the strength of the mark, but they overlooked different sets of facts.

Analysis of Grades and Grade Trends

Analysis Paper Assignments

The purpose of the analysis papers was to help students understand how courts resolve cases, to learn to identify and summarize the links in the arguments judges make for one conclusion or another. My expectation was that these assignments would lead to improved understanding of the law and legal reasoning. Certainly the high-pass student seems to have done that in all four papers. That student brought to the class a high level of competence in analyzing and summarizing complex arguments. The middle-pass and low-pass students entered the class with less competence in identifying the major elements of complex arguments. The disappointing aspect of this was their failure to show much improvement. If the assignments were serving their purpose, I would expect to see a noticeable narrowing of the gap between the high-pass student and the other two in their performance. With the exception of the second paper, this was not the case. The gap remained throughout the semester and was probably as great in the fourth paper as it had been in the first.

Quantitative data for the entire class indicate students showed marginal improvement in this assignment over the semester. Between the first and the second papers, scores improved by an average of 2.3 points. The average percentage improvement was 21.6, however. The median improvement was 2 points or 11.1 percent. The change from the first paper to the last, however, was much less. The average improvement was only 0.2 points or 5.7 percent, and the median improvement was 1 point or 5.3 percent. These figures suggest that the students came to look on the assignment as busy work and not something that engaged them intellectually or emotionally.
Tests

All three students showed some improvement from the first to the second test and somewhat less improvement from the second to the third test. This is a fairly typical pattern for students in this course, and it is born out by statistics for the entire class. The scores on the third test were, on average, 5.3 points, or 15.6 percent, higher than the scores on the first test. The median improvement in scores between the first and third tests was 6 points or 12.2 percent.

The statistical evidence and the qualitative assessment of the tests of the three students chosen for this review suggest that the tests are helping students learn basic principles of mass media law and how to apply those principles. They are also encouraging in students the ability to identify facts that are relevant for answering a particular question and for constructing an argument for how a particular issue should be decided.

Planned Changes

This review of my course has persuaded me that I should abandon the analysis paper assignment, at least as it is presently designed. The performance of the students suggests that it is benefiting only a few students, and those are mainly ones who enter the class with above average writing skills and ability to read and understand complex documents.

The nature of the change I will make is a little less clear, but I can think of a couple of options. One would be to have students deliver oral presentations, probably in groups, based on the cases assigned from the packets. The students would be required to analyze the case and suggest questions for the class to discuss. In-class quizzes could be used to make sure all students read the cases.

Another possibility is to replace the analysis papers with a different type of assignment. One possibility would be to divide the students into groups and assign two groups to each case. One group would be given the facts of a real case, perhaps with names and other identifying information deleted. They would be asked to analyze the facts and discuss how the law should apply in that instance. In effect, they would be judge and jury for the case. The other group would be given the full text of the opinion in the case and would follow up with a critique of the first group’s performance to point out what that group had done well in analyzing the case and what it might have missed. Students could also be asked to turn in short papers along with their oral presentations, but the grade would be based mainly on the presentation. They could also be asked to evaluate each other so as to diminish the problem of free riders.

The tests generally seem satisfactory, but for a variety of reasons I may want to modify them slightly. Instead of having the students write on 10 questions, I may reduce that to five. That would help with my grading burden (and next semester’s class looks to be unusually large), but it will also allow student to devote more time to thinking about each individual answer. This might increase the overall quality of responses and encourage more critical thinking.

I started using i>Clickers this semester, but I am not sure I want to make them a permanent feature. I will continue using them for at least two more semesters, but for next semester I may use them more for informal polling of the class than for in-class quizzes. The students seemed to respond when they were asked to vote on a particular issue or question and then asked to explain their votes. That often brought out flaws in their thinking that could be examined and used to make their approaches to the tests more sound.

Another change I will be making is in the supplementary reading. This year I used Lillian
Hellman’s *The Children’s Hour*, but next year I will be using *The Central Park Five* by Sarah Burns. The new book is a nonfiction account of the arrest and prosecution of five young men for a brutal rape in New York City’s Central Park in the 1980s. The five all confessed, but eventually DNA evidence exonerated them. The case is a wonderful example of how the criminal justice system can err and how news coverage can prejudice the atmosphere surrounding a criminal trial and possibly cause a grave injustice to occur. The students will have to complete some kind of out-of-class assignment in connection with the book, but at this point, I’m not sure what it will be.

A final change I plan to make is to the attendance policy. I have been reluctant to require attendance, and in the past, I have instead rewarded students who attend regularly with bonus points. I believe many students, however, are not mature enough manage their attendance in a profitable way. Students get into trouble because of spotty attendance and realize their problems only late in the semesters. I expect I will change my policy to allow a certain number of absences without penalty, perhaps five or six, and then penalize students a certain number or points or partial letter grades for each absence thereafter.

**Overall Assessment of the Portfolio Process**

The process of evaluating my course and preparing the portfolio has allowed me to see with greater specificity and clarity the strengths and weaknesses of the course as I have been teaching it. I doubt I would have come to understand how little the analysis paper assignment was contributing to the class without this process. The assignment seemed to me to be almost obviously valuable. But it became apparent that it had little value to the students, and they were viewing it as busy work, something to be accomplished with as little effort or thought as possible. Replacing the assignment may be a trial-and-error process over the next few semesters, but that will be better than continuing to waste student time and my time on something that contributes little to their understanding of media law.

The peer review process has also exposed me to what excellent teachers in other disciplines are doing in their classes. It has given me inspiration and ideas for things to try in my class. I believe the process will make my next several years as a teacher more rewarding and productive, and it will benefit my work in all of the classes I will be teaching.
Congress shall make no
law respecting an estab-
ishment of religion, or
prohibiting the free exer-
cise thereof; or abridging
the freedom of speech, or
of the press; or the right
of the people peaceably
to assemble, and to peti-
tion the Government for a
redress of grievances.

First Amendment
to the U.S. Constitution
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ACEJMC Competencies
The College of Journalism and Mass Communications is accredited by the Accrediting Council on Education in Journalism and Mass Communications (ACEJMC). The mission of ACEJMC is “to foster and encourage excellence and high standards in professional education in journalism and mass communications.” ACEJMC recommends that all graduates should be aware of certain core values and competencies. This course addresses the following competencies:

- Apply the principles and laws of freedom of speech and press, including the right to dissent, to monitor and criticize power, and to assemble and petition for redress of grievances.
- Understand how to think critically, creatively and independently.
- Understand how to write correctly and clearly in forms and styles appropriate for the communications professions, audiences and purposes they serve.

Outcomes
One of ACEJMC’s principles is to promote student learning by assessing your achievement of the competencies listed above at the course and program level. After completing this course, students will be able to:

- Apply media law principles for libel, privacy, copyright, advertising, and broadcast regulation and other areas to real-life situations.
- Understand how courts and administrative agencies decide cases in media law.
- Be aware of how the American legal system operates.
- Distinguish relevant from irrelevant information for the solution of a problem.
- Construct a clear, logical argument to support a conclusion.
- Accurately summarize written and oral presentations of others.
- Identify and correct problems in grammar, spelling, punctuation and word usage.

Readings
Most of the legal principals governing much of mass media law are scattered throughout thousands of judicial rulings—opinions written by judges interpreting the U.S. Constitution, federal and state laws and the common law and declaring how the law should be applied in particular cases. For this reason, you will read many judicial opinions for this course. Most of the opinions come from the U.S. Supreme Court, but some come from lower federal courts, federal agencies and state courts.

American law’s reliance on judicial interpretation carries drawbacks and advantages. Judges bring their own subjective views to cases, and those views may influence outcomes. Moreover, interpretations may change over time making the law less than 100 percent predictable. Offsetting these drawbacks is the flexibility judges have to reinterpret the law and apply it to new and changing situations.

Truth is a far better weapon than censorship to maintain absolute secrecy.

Dwight D. Eisenhower, U.S. president
The judicial opinions you will read and discuss will challenge you to think about how and why media professionals do what they do, how their actions affect other people, and when they should be punished for what they do. The issues at the center of this course are among the most important for anyone working in communications—indeed, they are important for any American citizen because so much of our political tradition relies on the ability of people to exercise their First Amendment rights. So, we will be discussing some genuinely big issues this semester.

You are required to buy three books for this course:

- *Cases & Questions for Mass Media Law* course packet by John Bender, which is packaged with the Pember and Calvert text.
- *The Children’s Hour* by Lillian Hellman.

In addition to these three books, you must also buy an i>Clicker. You will need the i>Clicker for recording your attendance and for taking in-class quizzes and class participation. Those will be nearly 20 percent of your grade, so having the i>Clicker is important.

The *Cases & Questions* packet contains

- the text of court decisions you will be assigned to read and questions to guide your reading;
- an outline of the course based on the PowerPoint presentations I use in class; and
- an essay explaining the court system and court procedures.

Some of the court opinions deal with complicated issues and are written in a style that you may find difficult at first. But learning to read the opinions will help you see how judges and federal regulators think about the mass media and the First Amendment and how they decide cases that will affect your profession. The opinions also will help you learn about how the American judicial system operates. Finally, reading court opinions will also help you prepare to be a good client. I hope none of you will ever have to defend yourself in court, but should that day come, your success will depend in part on your ability to help your attorney. Knowing how the law works will help you understand what information and insights your attorney needs.

Pember and Calvert’s *Mass Media Law* is one of the outstanding textbooks in the field. The publisher has prepared a special version of the book for this class. The special version omits a few chapters that we will not be using and includes the *Cases & Questions* packet as a supplement. Because there is insufficient time to cover all media law issues during class periods, the textbook offers a way for you to expand your understanding of the material.

Hellman’s *The Children’s Hour* is a play that deals with an instance of defamation. We will use it as the basis for discussing libel law issues in class and for one of the tests.

How to Get an A in This Course

I don’t grade on a curve, which means theoretically everyone in the class could get an A. Here are some tips for doing that:

1. Be sure you take every test or quiz. The tests are all done out of class, either as take-home
exams or as tests at the Burnett testing center. It’s up to you to make sure you take them.

2. Turn in every Analysis Paper. It’s up to you to keep track of the due dates.

3. Attend every class. The lectures and in-class discussion are directed to preparing you for the tests. If you’re not in class, you will not be able to take quizzes and you will not be able to engage in class participation through the i>Clicker.

4. Read the sample answers I post on Blackboard after the tests have been graded. They should help you understand why you did not get full credit for your answer. If you don’t understand, come and talk to me.

5. Take advantage of any extra-credit opportunities. I’ll offer at least one opportunity for extra-credit. Don’t ignore it.

Your Instructor
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Mondays—10:30-noon.
Tuesdays—8-11 a.m.
Wednesdays—10:30-noon.
Thursdays—8-11 a.m.
Fridays—10:30-noon.

Professional experience: I worked at The Morning Sun in Pittsburg, Kan., for six years, first as a reporter, then as news editor, and finally as managing editor. I also spent the summer 2000 working as a copy editor at the Milwaukee Journal Sentinel.


Personal information: My wife’s name is Valerie, and she is a secretary in UNL’s Office of Student Accounts. We have one son, Rob, who is a student at Southeast Community College. I enjoy walking, cooking, traveling and reading mystery novels.

Tests and Quizzes
I will give three tests during the semester. The dates of the tests are indicated on the class schedule at the end of this syllabus. Each test will have questions asking you to apply mass media law principles to hypothetical situations. For each hypothetical, there will be three or four short essay questions, and each test will have four or five hypotheticals for a total of 12-15 questions. You will have to answer 10 of them. Each answer will be worth up to seven points, or 70 points for each test. The tests may also have one or more essay questions drawn from the study questions in the course packet. The tests will be take-home, and you may use your books and notes to prepare your

When the public’s right to know is threatened, and when the rights of free speech and free press are at risk, all of the other liberties we hold dear are endangered.

Christopher Dodd, U.S. senator
answers. Your test answers must be submitted in hard-copy at the time of the class indicated on the schedule. The third test will be due on the date scheduled for the final exam for this class. The tests are not cumulative.

You also will take three multiple-choice quizzes. The first is a 20-question pre-test to gauge your knowledge of media law. That quiz will not count toward your grade. The other two quizzes will contribute to your final grade. One is a quiz over the essay “American Law and Courts” which is in the packet, starting on page 1. That quiz will consist of 20 questions and will be worth 20 points. The second quiz will be part of your last exam. It will be a post-test to determine how much you have learned. Like the pre-test, it will consist of 20 questions, but it will be worth 40 points. You will take all three quizzes at the Arts and Sciences Online Testing Center in 127 Burnett Hall. See http://scimath.unl.edu/wba/testingcenter_home.php to find out the center’s hours and days of operation. The essay tests are not cumulative, but the multiple-choice post-test is.

You can find a sample test question based on a hypothetical situation and an answer on Blackboard. Also, much of the class discussion will deal with hypothetical situations and how they would be resolved using media law principles; therefore, the class discussions are a form of practice for the tests.

Class Participation and i>Clickers
Almost 20 percent of your grade depends on class participation. If you neglect this portion of the assigned work, even if you get perfect scores on all your other work, you will get at best a B for the semester. Much of your class participation grade will be earn through i>Clickers. Your presence in the classroom will be recorded through the i>Clicker, and you will also use the i>Clicker to respond to questions asked during class.

Often classes will begin with brief quizzes over the readings assigned for that day. You will answer the questions using your i>Clicker, so you must bring your i>Clicker to every class.

Collectively, class participation is worth 80 points. The raw points for participation may add up to more than 80, but the points you receive at the end of the semester will be a percentage of 80 points determined by the percentage of possible points you receive. For example, if you the total points possible for attendance and participation equals 138, and you receive 117, you will have earned 84.7 percent of the possible points. That would entitle you to 84.7 percent of 80 points or 68 points.

In addition to the participation points you earn through the i>Clicker, you will be able to pick up additional bonus discussion points through oral participation in class. Anything you con-
Mass Media Law Syllabus — Page 5

tribute to the discussion of cases and legal issues we will be considering will earn you additional points. You can earn participation bonus points by answering questions I ask in class, asking questions of your own or contributing comments relevant to the topics under discussion. The points you earn will be based on the frequency of your contributions to the class discussion, not on whether your comments or conclusions are accurate or factually correct.

The points for oral participation are bonus points. They will be added on to points you earn on your tests, papers and class participation to raise your grade.

Analysis Papers
You will read about 39 court opinions or similar documents this semester. I have selected four of them as ones for which you will write analysis papers addressing specific questions. The purpose of these papers is to help you learn how to read, summarize and analyze a complicated argument. Every court decision presents an argument, based on legal principles and precedents, for why the case should be decided in a particular way. In order to understand a court’s conclusion, you need to be able to identify and follow the major steps in the court’s reasoning.

In the competitive rush to be first, the old admonition of saying where you get the news, as well as making sure it’s true when you get it, has been a conspicuous casualty.

Jack W. Germond and, Jules Witcover, newspaper columnists

Each of the four analysis papers you will write should begin with a brief summary of the facts of the case and what happened in the lower courts. The largest section of the paper should be a summary of the court’s reasoning as it moves toward its conclusion.

Sometimes, the decisions you will read will have concurring or dissenting opinions. You must read these as well as the majority opinion, and your analysis paper should summarize them, too. The summaries of the concurrences and dissents may be brief.

You also must analyze the reasoning of the majority, concurring and dissenting opinions. You may find yourself agreeing with the majority or one or the other opinions. Or you may find faults in all of them. You must, however, offer concrete reasons for your views.

You must summarize the opinions in your own words. Do not use long quotations; do not copy summaries of the opinions from other sources. It is important that you develop the ability to read what others have written and then summarize that material in your own words.

All papers must be turned in on the date indicated in the assignment schedule in hard copy (no emailed papers accepted). Late papers will not be accepted unless I specifically agree to accept them.

The Children’s Hour Test
American playwright Lillian Hellman wrote her first play, The Children’s Hour, about an incident in a girls’ boarding school in which one of the students makes a defamatory accusation against two of the teachers. The setting for the play is indeterminate, but the dialogue and action create the impression of New England in the 1920s or 1930s.

One part of the first test will require you to apply contemporary libel-law principles to the facts described in the play. We will discuss the play in class as part of our consideration of libel law.

Although the questions over The Children’s Hour will comprise only part of the test, every-
one will have to answer at least one and possibly two or three questions based on the play.

**Format for Work Submitted**
All work submitted for this class must be typed, single-spaced and turned in as hard copy (not sent by email). The only handwritten work I will accept will be the tests (if any) that you will complete in class. For all papers prepared outside of class, your grade will be based on grammar, spelling and clarity of expression as well as on content.

**Grades**
Your grade will be based on three tests, one 20-point quiz, one 40-point quiz, four analysis papers, and class participation, totalling 430 points (not including bonus points). The points are distributed in the following manner:

- Tests (each test worth 70 points): 210 points
- American Law and Courts Quiz: 20 points
- Post-Test: 40 points
- Analysis Papers (20 points each): 80 points
- Class Participation: 80 points

Graduate students and students taking this class for honors credit will be assigned additional work worth 100 points (530 points possible).

**Grading Scale**
Grades for the course will be assigned on the basis of the following scale:

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<th>%</th>
<th>Undergraduate</th>
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* I award A plus grades at my discretion to those students who excel on all measures.  
** C minus is an unacceptable grade for journalism and mass communications majors. Any person majoring in one of the majors offered by the College of Journalism and Mass Communications who receives a C minus must retake the course.

**Graduate and Honors Students**
Students taking this course for graduate credit or undergraduate honors credit must complete an additional project. Such a project may take many forms, but usually it will be a paper or series of papers representing a substantial effort to research and analyze a media law problem.
Research papers should be a minimum of 20 pages (typed, double-spaced—an exception to the rule above—with one-inch margins) and should be based on research that draws on secondary and primary sources. Secondary sources are books, law review articles and similar materials. Primary sources are court opinions, statutes, administrative decisions, attorney general’s opinions, transcripts of hearings or floor debates on proposed legislation and similar materials.

There is no fixed minimum or maximum number of sources, but a general guideline is that you should have at least one source for every page in the paper. So, a 20-page paper should have about 20 sources.

No matter whether you do a traditional research paper or something else, you must consult with me about both the topic and the nature of the work. Furthermore, it is your responsibility to schedule regular appointments with me to discuss your project and the progress you are making toward completing it.

Policy on Academic Integrity
Every student must adhere to the policy on academic integrity set forth in the UNL Student Code of Conduct as outlined in the UNL Bulletin. Students who plagiarize may receive a failing grade on an assignment or for an entire course and may be reported to the Student Judicial Review Board. The work a student submits in a class must be the student’s own work and must be work completed for that particular class and assignment. Students wishing to build on an old project or work on a similar project in two classes must discuss this with both professors. Academic dishonesty includes

- handing in another’s work or part of another’s work as your own.
- turning in one of your old papers (including something you wrote in high school) for a current class.
- turning in the same paper or similar papers for two different classes,
- using notes or other study aids or otherwise obtaining another’s answers for a quiz or an examination.

Anything and everything you include in your papers that comes from another source must be attributed with proper citation. That includes ideas and opinions.

Plagiarism consists of using phrases, sentences or paragraphs from any source and republishing them without alteration or attribution. The sources include, but are not limited to, books, magazines, newspapers, television or radio reports, Web sites and other students’ papers.

Students with Disabilities
Students with disabilities are encouraged to contact the instructor for a confidential discussion of their individual needs for academic accommodation. It is the policy of the University of Nebraska-Lincoln to provide flexible and individualized accommodation to students with documented disabilities that may affect their ability to fully participate in course activities or meet course requirements. To receive accommodation services, students must be registered with the Services for
Students with Disabilities (SSD) office, 132 Canfield Administration, 472-3787 voice or TTY.

Diversity
The College of Journalism and Mass Communications values diversity, in the broadest sense of the word—gender, age, race, ethnicity, nationality, income, religion, education, geographic, physical and mental ability or disability, sexual orientation. We recognize that understanding and incorporating diversity in the curriculum enables us to prepare our students for careers as professional communicators in a global society. As communicators, we understand that journalism, advertising and other forms of strategic communication must reflect society in order to be effective and reliable. We fail as journalists if we are not accurate in our written, spoken and visual reports; including diverse voices and perspectives improves our accuracy and truthfulness. In advertising, we cannot succeed if we do not understand the value of or know how to create advertising that reflects a diverse society and, thus, appeals to broader audiences.

Class Topic and Assignment Schedule
What follows is a tentative schedule for this class. What we actually cover and how quickly we cover it may depend on outside events and your needs and interests. This schedule lists the topics we will cover. You must read the assignments by the date indicated. You should finish reading The Children's Hour by Feb. 6.

<table>
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<tr>
<th>Date</th>
<th>Topic and Assignment</th>
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<tr>
<td>Jan. 7</td>
<td>Introduction to the course; First Amendment principles; levels of scrutiny. Packet, Levels of Scrutiny, p. 56.</td>
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Jan. 16  Fighting words; prior restraints.
Packet, Nebraska v. Drahota, p. 78.

Jan. 18  Prior restraints, continued.
Pember & Calvert, pp. 70-77.

Jan. 21  **Martin Luther King Jr. Day—No class**

Jan. 23  Introduction to libel; the elements of a libel case.

Jan. 25  Elements of a libel case, continued.

Jan. 28  Elements of a libel case, continued.
Pember & Calvert, pp. 157-66

Jan. 30  Elements of a libel case, continued.
Pember & Calvert, pp. 174-78 and 244-47.

Feb. 1  Common law defenses to a libel suit.
Pember & Calvert, pp. 224-35.

Feb. 4  Common law defenses, continued.
Pember & Calvert, pp. 235-43.

Feb. 6  Constitutional defenses to a libel suit.
Pember & Calvert, pp. 201-12.

    **Finish reading The Children's Hour.**

Feb. 8  Constitutional defenses, continued.

Feb. 11  Public and private libel plaintiffs.
Pember & Calvert, pp. 183-201.

    **Test 1 will be posted on Blackboard.**

Feb. 13  Introduction to privacy; publicity to private facts.
Packet, Shulman v. Group W Productions, p. 133.
Pember & Calvert, pp. 291-308.
Feb. 15  Private facts (continued); false light. 
Pember & Calvert, pp. 308-16. 
**Answers to Test 1 due at class time.**

Feb. 18  Appropriation. 
Packet, Beverley v. Choices Women's Medical Center, p. 139. 
Pember & Calvert, pp. 258-77.

Feb. 20  Right of publicity. 
Packet, White v. Samsung Electronics, p. 142; Winter v. DC Comics, p. 146; and 
Doe v. TCI Cablevision, p. 149. 
(*Analysis Paper 2 over White v. Samsung Electronics due.*)

Feb. 22  Liability for physical and emotional harm. 

Feb. 25  Trade libel and Lanham Act suits. 
Pember & Calvert, pp. 171-74.

Feb. 27  Trade libel and Lanham Act (continued). 
Packet, McNeil v. Pfizer, p. 163.

March 1  FTC regulation of advertising. 
Pember & Calvert, 589-602.

March 4  FTC regulation continued. 
Packet, FTC Policy Statement Regarding Advertising Substantiation, p. 179. 
Pember & Calvert, pp. 603-07.

March 6  Advertising and the First Amendment. 
Pember & Calvert, pp. 570-77. 
(*Analysis Paper 3 over Greater New Orleans Broadcasters v. U.S. due.*)

March 8  Obscenity; broadcast indecency. 
Packet, Miller v. California, p. 188. 
Pember & Calver, pp. 624-37.

March 11  Broadcast indecency. 
ABC, et al., p. 200. 
**Test 2 questions will be posted on Blackboard.**
March 13  Political broadcasting; equal opportunity.
Packet Communications Act of 1934 (As Amended), p. 204.
Pember & Calvert, pp. 637-47.

March 15  Political broadcasting; access for federal candidates.

Answers to Test 2 due at class time.

March 18-22  SPRING BREAK — No class.

March 25  Trademarks.
Abercrombie & Fitch, p. 222.
Pember & Calvert, pp. 519-23.

March 27  Copyright basics.
Pember & Calvert, pp. 526-35.

March 29  Copyright infringement.
Pember & Calvert, pp. 551-63.

April 1  Copyright infringement (continued).

April 3  Copyright—fair use defense.
Pember & Calvert, pp. 538-51.

April 5  Intrusion.
Pember & Calvert, pp. 277-89.

April 8  Intrusion (continued).
(Analysis Paper 4 over Shulman v. Group W Productions due.)

April 10  Newsgathering rights and limitations.

April 12  Trespass; ride-alongs; posing.
Teeter & Loving, Sec. 45.

April 15  Free press—fair trial controversy.
Pember & Calvert, pp. 432-44.
April 17  Coverage of courts; prejudicial coverage; bar-press guidelines.
Packet, Nebraska Bar-Press Guidelines, p. 263.

April 19  Controlling prejudicial news coverage—gag orders.
Pember & Calvert, pp. 444-56.

April 22  Controlling prejudicial news coverage—access to courts.
Pember & Calvert, pp. 457-71.

April 24  Confidentiality and state shield laws
Pember & Calvert, pp. 394-421.

**Test 3 questions will be posted on Blackboard.**

April 26  Business issues: taxation and antitrust.
Reading assignment to be announced.

April 29  **Answers to Test 3 due at 5 p.m. Post-test must be completed at the Online Testing Center by closing time.**

Barry Black led a Ku Klux Klan rally in Carroll County Virginia with about thirty people in attendance on private property with the permission of the owner who was also in attendance. This property was located on an open field just off of State Highway 690. The sheriff observed the rally from the side of the road and reported that a number of cars went by the rally with some stopping to ask what was going on. The rally was held within the vicinity of eight to ten houses, too. One property owner watched the rally take place, listened to the Klan’s speeches, and watched them burn a cross. Black was prosecuted under a State of Virginia statute that prohibited the burning of a cross with the intent of intimidating a person or group of persons. The jury was instructed that intent to intimidate meant the motivation to intentionally put a person or a group of persons in fear of bodily harm.

Richard Elliott and Jonathan O’Mara were also convicted under Virginia’s cross burning statute after driving a truck onto Jubilee’s farm who was a black neighbor of Elliott. They planted a cross on Jubilee’s yard and started it on fire. Elliott and O’Mara faced charges of attempted cross burning and conspiracy to commit cross burning. O’Mara pleaded guilty to both counts. Elliott was convicted of attempted cross burning.

The Court of Appeals of Virginia affirmed all three’s convictions which then made their way to the Supreme Court of Virginia. The Supreme Court of Virginia consolidated all three cases and reversed the conviction. Their reasoning was that the state statute was unconstitutional because it discriminates on the basis of content. The U.S. Supreme Court concurred.

Justice O’Connor, who wrote the opinion of the court, began by looking at the history of burning crosses. In the United States, cross burning had become a symbol of hate because of its use by the Klan. It was also a prominent part of Klan gatherings and ideology. Cross burning was used by the Klan to communicate threats of violence and shared ideology. The Klan was known for their violence and injury or death by their group was not just a hypothetical possibility. Furthermore, the association of the Klan and cross burning was reinforced in Thomas Dixon’s book depicting Klan members burning crosses to celebrate the execution of former slaves in Thomas Dixon’s book. In the movie, The Birth of a Nation, Klan members were also associated with cross burning.

While Elliott and O’Mara did not have any known Klan affiliations, the court recognized the fact that they used the Klan’s association of what cross burning means to intimidate Elliott’s neighbor and cause him to fear for his life.

After establishing the history of cross burning in the United States, the court reviewed how the First Amendment permits a State to ban a “true threat”. True threats are defined as statements where the speaker means to communicate a serious expression of intent to commit an act of unlawful violence to a particular individual or a group of individuals. However, the speaker need not actually intend to carry out the threat. Prohibiting truth threats protects individuals from the fear of violence and from the possibility that the threatened violence will occur. The court has agreed that intimidation is a type of true threat with the intent of placing the victim in fear of bodily harm or death.

The court then looked at why the Supreme Court of Virginia ruled the cross burning statute as unconstitutional. The Supreme Court of Virginia ruled the statute as unconstitutional for discrimination on the basis of content and viewpoint. They based this decision on the U.S. Supreme Court ruling in R.A.V. v. City of St. Paul. R.A.V. banned certain symbolic conduct when done with the knowledge that the conduct would arouse anger, alarm or resentment based on race, color, creed, religion, or gender. The
U.S. Supreme Court said RAV's content based discrimination was unconstitutional because it allowed the city to impose special prohibitions on those speakers who express views on disfavored subjects. Yet, the U.S. Supreme Court points out that some types of content discrimination do not violate the First Amendment.

RAV cannot be applied to this Virginia v. Black, because the Virginia statute does not single out only that speech directed toward one of the specified disfavored topics. The statute does not care who burns a cross with the intent to intimidate. Therefore, the First Amendment does permit Virginia to outlaw cross burning done with the intent to intimidate. The U.S. Supreme Court believes the real problem is in the prima facie evidence provision. The provision reads that any such burning of a cross shall be prima facie evidence of intent to intimidate a person or group of persons which makes the statute unconstitutionally overbroad.

In Elliott's trial the jury did not receive any instruction on the prima facie evidence provision and this provision was not an issue it the case of O'Mara because he plead guilty. In Black's case, the jury was instructed that provision meant the burning of a cross, by itself, is sufficient evidence from which you may infer the required intent. The way the jury was instructed to define the prima facie provision makes it unconstitutional, because with this definition it does not matter what the reasoning was of the person who burned the cross whether it was to say something about ideology, part of a ceremony, or as an intent to intimidate. The prima facie portions allow the state to arrest, prosecute, and convict based solely on the fact of cross burning which would violate the First Amendment because it is a suppression of ideas.

The majority found that the prima facie evidence provision as interpreted through the jury's instruction and as applied in Black's case is unconstitutional making the state statute as it stands unconstitutionally as well.

Justice Stevens joined O'Connor's opinion, saying that cross burning with intent to intimidate is a threat that is not protected by the First Amendment, because of the proposition.

Justice Thomas dissented. He argued that the statute only addresses conduct and therefore does not need to be analyzed by the First Amendment. To back up his dissent, he takes a close look at the history of cross burning and what was occurring in the United States when the statute was written to back up his argument. At the time this statute was written segregation laws were in place in Virginia. This statute was written to specifically penalize violent conduct no matter what race the recipient was. Furthermore, he points out that the prima facie provision is defined as an inference not a presumption. Since the provision is an inference, the statute is rebuttable which would protect a person who was to burn a cross without the intent to intimidate. Meaning the jury would have to prove beyond a reasonable doubt that the defendant was intending to intimidate with cross burning.

Justice Scalia agreed with Justice Thomas on parts and concurred with O'Connor on parts and dissented in part. He focuses on the validity of the provision. Specifically he addresses the issue of someone burning a cross as a statement of ideology or as a symbol of group solidarity. He agrees with the majority that someone could be convicted with these expressions of intention, but they would have the opportunity in court to prove that they did not intend to intimidate. He does say that the Virginia Supreme Court needs to better instruct the jury on this issue and make sure they take into account rebuttal evidence.

Justice Souter, Justice Kennedy, and Justice Ginsburg concur in the judgment in part and dissent in part. These Justices looked at the statute as a content based distinction of punishable intimidate under the First Amendment. They point out that cross burning can symbolize other things, such as shared ideology, group solidarity, besides intent to intimidate. The Justices focused on the fact that cross burning can
symbolize any one of those ideas or multiple at a time. They find that this statute does not meet any of the qualification established under R.A.V. to limit content based proscription within a broader category of expression. The Justices find the real problem is with the prima facie provision. They believe the provision is unconstitutional because its primary effect is to skew the jury toward conviction in cases where the evidence toward conviction is relative weak and arguably consistent with a sole ideological reason for burning. Plus, the provision encourages fact finders to err on the side of intent to intimidate when the evidence does not clearly identify any criminal intent.

Justices O'Connor and Thomas both took into account the history of cross burning and what was going on in the United States at the time this statute was implemented. Both the timing and history of cross burning play an important part in how the general public would react to a burning cross. This public opinion is important in establishing the association of intent to intimidate with cross burning. The Justices also differed in deciding whether this case hindered expression and/or conduct. However, the biggest difference in opinions resulted over the prima facie evidence provision. O'Connor ruled on the provision in a way that would protect the most individuals and limit First Amendment rights the least while recognizing the need to stop cross burning that was intended to intimidate. Justices Thomas and Scalia did point out that the provision did give the defendant a right to prove that they did not intend to intimidate anyone and were using cross burning for sharing ideology or group solidarity. Yet Justice Souter, Justice Kennedy, and Justice Ginsburg all present compelling evidence that the provision may skew the jury toward conviction increases where evidence is weak and arguably consistent with intent to intimidate. If the provision was gotten rid of there was strong support for the rest of the statute to stand as read, since most of the argument was over the prima facie provision's constitutionality.

On August 22, 1998, a Ku Klux Klan rally was held in Carroll County, Virginia. The rally was led by Barry Black, and about twenty-five to thirty people were in attendance. The gathering was held on an open field to the side of Brushy Fork Road in Cana, Virginia on private property that was owned by one of the people in attendance at the rally. The Carroll County sheriff went to investigate the rally soon after he heard what was going on. Towards the end of the rally, a cross was burned to the tune of Amazing Grace over the loud speakers. Shortly after the cross went up in flames, the sheriff drove up the driveway to the rally and informed Black that it was illegal to burn the cross as there is a law in the state of Virginia that prohibits such actions. Black was placed under arrest and charged with burning a cross with the intent to intimidate a person or group of persons.

At his trial, Black was found guilty by the jury, and fined $2,500. The case was upheld by the Virginia Court of Appeals after Black objected, claiming that the provision in the law stating that burning a cross automatically qualifies for intent to intimidate is a violation of his First Amendment rights.

On May 2, 1998, Richard Elliott, Jonathan O’Mara, and a third individual, none of whom were affiliated with the Klan in any way, attempted to burn a cross in the yard of an African-American man named James Jubilee. The cross burning was suspected as a way to “get back” at jubilee for telling authorities that Elliot had been firing weapons in his backyard. Elliot and O’Mara were arrested and charged with attempted cross burning and conspiracy to commit a
cross burning. Elliot pleaded guilty to both counts and was charged to 90 days in prison and a $2,500 fine, but was able to challenge the cross-burning statute’s constitutionality. The Virginia Court of Appeals upheld the case and convicted both Elliot and O’Mara.

All three cases were appealed to and consolidated by the Supreme Court of Virginia. The court overturned the rulings, and concluded that the law under which the three men had been prosecuted was unconstitutional. The court’s rational was that the law discriminates based on content because it “selectively only chooses only cross burning because of its distinctive message,” and the court also referred to the case of RAV v. City of St. Paul to uphold the ruling.

In the case of Barry Black, the Supreme Court ruled in favor of Black, and agreed with the Virginia Court of Appeals that the law applied to the Black case was unconstitutional. With respect to Elliot and O’Mara, the Supreme court ordered that there be further proceedings to determine the use of the cross burning law.

Justice O’Connor delivered the opinion of the court and determined that while the Virginia law may prohibit cross burning with the intent to intimidate, the statute is unconstitutional because of a provision that treats any cross burning “prima facie” or on its face, as an attempt to intimidate. Essentially, the Supreme Court agrees with the state of Virginia in that a burning of a cross with the intent to intimidate an individual or group of individuals can be legally prohibited. However, because the law in question states that the burning of the cross in itself can be considered to have the required intent in order to be prosecutable under the Virginia Statute, the law cannot be applied because that is a violation of first amendment rights.
In this case the clause in the First Amendment that protects the freedom of expression, which has been used in other cases, such as flag burning and the burning of draft cards, can be applied with respect to the cross burning. In earlier cases, such as Texas v. Johnson which dealt with flag burning, it was determined that flag burning could not be punishable simply because the action was offensive. The court also held that Johnson was being punished more for his ideas rather that the action of burning the flag itself.

Similarly, in the case of Virginia v. Black, the court was forced to ignore the offensiveness of the action and focus on whether or not cross burning itself can be grounds for punishment as the Virginia Statute suggests. And as in the case of Texas v. Johnson, it was ruled that such a law cannot be practiced.

The O'Brien test cannot be used in this case because it does not pass the third requirement under the test in that the interest must not be related to the suppression of speech. Since the act of cross burning is most often used as a form of expression, and demonstrates a certain ideology, it thus qualifies as a form of speech, and the government must not enforce laws that suppress that speech.

Justice Stevens concurred with the ruling handed out by Justice O'Connor, stating that burning a cross with intent to intimidate qualifies as a threat that is unprotected by the first amendment, but Stevens also agrees with O'Connor in that the provision dealing with “prima-facie” evidence cannot be practiced and is unconstitutional. Justice Scalia also concurred, stating that among other things, she thinks the law should be unconstitutional because “individuals who engage in protected speech may, because of the prima-vacie-evidence provision, be subject to conviction.”
Justice Thomas put forward a dissenting opinion, stating that he believes cross burning had gathered a profane meaning in our culture, and as a result, he does not see any first amendment issues arising from the provision stating that the act alone qualifies for intent to intimidate because the history of cross burning suggests that it is an intimidation tactic.

Justice Souter, Justice Kennedy, and Justice Ginsburg joined together concurring in part, and dissenting in part. The three agree with the majority decision that the Virginia statute is unconstitutional because it is content-based, just like in RAV v. St. Paul. They disagree, however, that “any exception should save Virginia’s law from unconstitutionality.”

Both sides to this argument make valid points. For example, in Justice Thomas’ dissenting opinion, he put forth a great deal of evidence that throughout history cross burning has obtained an intimidating message. And whether it be used with the intent to intimidate or not, it can still be considered to do so based on the history of the action.

The concurring opinions also make good arguments, with the point being that simply because a cross is being burned, it does not necessarily mean that immediate harm will be done. And in the case of Virginia v. Black, the people in attendance at the rally did not appear to be capable of immediate harm; they were merely using the burning of the cross as a form of expression.

In October 1998, a Ku Klux Klan rally occurred on the field of a man in the state of Virginia. The owner of the property allowed the group to be there and allowed a cross burning, as a part of the ceremony. But, Virginia state law prohibits cross burning because of the inferred “intent to intimidate a person or group of persons.” So the leader of the rally, Barry Black, was charged with cross burning and intent to intimidate. In May of that year, also in Virginia, two white men, Richard Elliot and Jonathon O’Mara, attempted to burn a cross in a black neighbor’s yard to “get back at him” for complaining about one of the men shooting for a hobby. Both men were charged with attempted burning of a cross.

The case of Barry Black brought to the Supreme Court of Virginia. The Court ruled that even if it is constitutional to burn a cross in a content-neutral manner, the specific statute in the Virginia law that infers that all cross burnings to be meant to be intimidating was unconstitutional. It determined that inferring that all cross burnings to be intentionally intimidating was unfair to those who were apparently using cross burning in more traditional, or group unifying manners.

The case went on the United States Supreme Court and the majority of the justices concluded that cross burning with the intent to intimidate is unconstitutional. However, the prima facie in the Virginia law that said that all cross burnings were evidence of intent to intimidate was unconstitutional. The court based its decision on some of the history behind cross burnings across many cultures around the world. For example, in some Scottish rituals, cross burning was used as a way to send smoke messages long distances.

One of the main points the Supreme Court makes is that the provision by the Virginia statute is a blanket rule. It applies to every situation, without regard to the real intent of the cross burning. For example, it is very hard to prove that Black’s cross burning event was meant to intimidate because there were no non-Ku Klux Klan members on the property at the time, the owner of the property gave permission, and the burning was done as part of the ceremony. However, in Elliot and O’Mara’s cases, the cross burning was done on the property of a black man, James Jubilee, without the consent of the black man. When looking at the history of threats and patterns of violence within the Ku Klux Klan, it can be assumed that the cross burning on the man’s private property was meant to intimidate him. Other Ku Klux Klan cross burnings in the past were usually a first phase before more violent action (i.e. physical attacks and murders) took place.

Justice Scalia goes against the majority of the Supreme Court by saying that even though cross burning can, in theory, be done in a manner that is not intended to intimidate, he believes the population that would use cross burning in a non-intimidating way, is so small that a change in the law about whether or not it is constitutional is, frankly, pointless. He believes that in the modern-day culture of the United States, cross burning is so directly associated with the actions and memories of the Ku Klux Klan, a terrorist group, that anytime a cross burning occurs, the memories of the Ku Klux Klan
will come to mind, only introducing the concept of intimidation, racism, prejudice, terrorism and fear.

I agree with the United States Supreme Court in their decision to label the cross burning as unconstitutional. But I agree the most with Justice Scalia because I agree that because of the cultural history of the U.S. in the context of racism, and the Ku Klux Klan, the idea that any cross burning in modern times could not be intended to intimidate is irrational and too forgiving. Any image of a burning cross will immediately bring up the image of the KKK and similar terrorist groups, so the argument that some burnings hail back to traditional times is over-optimistic, and a bit naïve. I agree with the original Virginia statute that labeled all cross burnings as having the intent to intimidate. I think that is a valid assumption in modern times in the United States.
White v. Samsung Electronics America, Inc.

Vanna White is suing Samsung’s advertising agency David Deutsch Associates, Incorporated. In the late 1980s and early 1990s, Samsung circulated ads featuring a Samsung product with a current pop culture celebrity or item. This ad in particular showcased a Samsung product with a robot dressed in a long gown, jewelry and a blond wig posed on a game show set resembling Wheel of Fortune. The text with the ad read, “Longest-running game show. 2012 A.D.” The advertising agency also referred to it as the “Vanna White” ad. White was not asked to appear or for permission to run the ad or get paid for the ad.

White sues Samsung and Deutsch alleging violations of the California Civil Code § 3344 for misappropriation of likeness, the California common-law right of publicity and the federal Lanham Act. A federal district court granted the defendants summary judgments on all claims. White appealed to the U.S. Court of Appeals for the 9th Circuit who affirmed in part, reversed in part, and remanded. In remanding the case, the jury found that White has pleaded claims which can go to the jury for its decision.

Circuit Judge Goodwin, who wrote the opinion of the court, first looked at Section 3344. This law prohibits the use of another person’s name, voice, signature, or likeness for commercial purpose. They affirm the dismissal of this section because Samsung used a robot to resemble White, not her likeness or name.

The appeals court then looks into the right of publicity law. The California court of appeal has stated that the common law right of publicity cause of action may be pleaded by alleging (1) the defendant’s use of the plaintiff’s identity; (2) the appropriation of plaintiff’s name or likeness to defendant’s advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury. The court recognizes that the robot ad did not make use of White’s name or likeness and that the common law right of publicity is not so confined. When making their decision, Judge Goodwin reviewed several other law cases decided in California that indicated the right of publicity protects more than name and likeness, and a plaintiff’s right of publicity may be infringed even when the defendant does not use the plaintiff’s name or likeness. The cases Judge Goodwin reviewed the defendants in these cases avoided the most obvious means of appropriating the plaintiffs’ identities, each of their actions directly implicated the commercial interests which the right of publicity is designed to protect. The court specifically points out that it is not important how the defendant has appropriated the plaintiff’s identity, but whether the defendant has done so. The court points out that the right of publicity was infringed on when all the facts were combined together and not viewed separately.

Next, the court looked at the Lanham Act and concluded it should not be dismissed from the case. Their reasoning was that there was sufficient likelihood consumers would be confused as to whether White was endorsing Samsung products or not.

The final part the court reviewed was the parody defense of Samsung and Deutsch. The cases of relevance they presented were Hustler Magazine v. Falwell and L.L. Bean, Inc. v. Drake Publishers, Inc. which involved parodies of advertisements run for the purpose of poking fun at Falwell and L.L. Bean. The court distinguishes that this case involved a true advertisement run for the purpose of selling Samsung VCRs. The court denotes that the spoof of Vanna White and Wheel of Fortune are subservient and only tangentially related to the ad’s primary message of buy Samsung VCRs.

One Circuit Judge Alarcon concurred in part and dissented in part. Judge Alarcon agreed with the majority’s conclusion that no reasonable jury could find the robot as a likeness of Vanna White within the meaning of section 3444. He dissents from the majority’s viewpoint on the right to publicity. The precedents the court relied on were advertisements that depicted the plaintiff. In this case, he believes the robot (defendant) not the plaintiff Vanna White was depicted and nobody would confuse a robot to be
Vanna White. Judge Alarcon also says that the attributes the majority used to describe White are actually attributes of the role she plays. Although, he does consent that not many female performers or celebrities work on a Wheel of Fortune set. Judge Alarcon also disagreed that White could sue under the Lanham Act. He did not think the majority would find confusion as to White's association with Samsung. All in all, Judge Alarcon believes that the majority's position seems to allow any famous person or entity to bring suit based on any commercial advertisement that depicts a character or role performed by the plaintiff.

As this is an appeals case, the court did a thorough job of looking at each law and all facts presented to back up each claim. Judge Alarcon brings up a good point that all the precedents referred to for the right of privacy violation differed from this case because the robot was depicted not the plaintiff Vanna White. On the whole, the majority's opinion is stronger than the Judge Alarcon's opinion. In reference to section 3344, the majority is very specific in pointing out that a robot is not a likeness of White. The right to publicity violation, the majority makes a good point that the characteristics when represented together depict Vanna White. The media used for the advertisement left little doubt that the characteristics would be seen together and were meant to look like her. The third violation, the Lanham Act, the majority makes a reasonable conclusion that by portraying White in an ad with Samsung products that a reasonable person may believe that she supports Samsung.
White v. Samsung Electronics America, Inc., 971 F.2d 1395 (9th Cir. 1992)

In the White v. Samsung court decision, there was a disagreement between two parties regarding appropriation and privacy laws. Vanna White was suing Samsung electronics for depicting her as a robot in a commercial without her consent. The commercial did not directly use White's name, or give any specific references to positively identify the robot as something that was supposed to be Vanna White. However, the robot dressed very similarly to how White dresses, and in an environment that looked similar to the wheel of fortune, where White is normally seen. The advertisement was even referred to as the "Vanna White" ad by the creators. White then sued Samsung based on two California laws claiming that the commercial clearly depicted her and that they were a violation of California Civil Code 3344 (misappropriation of likeness), as well as the California common-law right of publicity, and the federal Lanham Act.

A federal district court sided with the defendant on all claims, and White then appealed to the U.S. Court of Appeals for the 9th Circuit. Goodwin, a Circuit Judge delivered the majority opinion on the case. He said in regard to the California code 3344 that the court agreed with the previous decision. He supported this based on the fact that the Samsung ad used a robot that did not qualify as White's likeness based on the definition in the law, and the ad did not mention her by name as the 3344 code requires.

On the next matter, however, the court of appeals overturned the previous ruling in regard to the common-law right of publicity. The court of appeals agreed that the ad did not use White's name or likeness, but argued that the common-law right of publicity is not that "confined." To support this claim, Goodwin reviewed many previous California cases and it was determined that those cases indicated that the right of publicity protects more than just name or likeness. He goes on to argue that even though the company did not directly mention Vanna White or her likeness in the commercial, the actions in the commercial clearly implied that the robot was supposed to be her.

"A rule which says that the right of publicity can be infringed only through the use of nine different methods of appropriating identity merely challenges the clever advertising strategist to come up with the tenth," Goodwin said. In other words, there cannot be a concrete formula to determine whether or not somebody has been appropriated or not, but rather, each case must be evaluated individually based on the circumstances. He also argues that if the individual aspects are shown separate of one and other, then the commercial is just fine, and would not leave the viewer to believe that the robot is an appropriation of Vanna White. However, when all of the aspects are shown together, the blond hair, jewelry, long dress and the style of game show, Goodwin says that the advertisement leaves "little doubt about the celebrity the ad is meant to depict."

In regard to the Lanham Act, the appeals court agreed with the lower court that there was sufficient likelihood that consumers could potentially be confused about whether or not White was endorsing Samsung products.

Goodwin also responds to Samsung's parody defense in which the company claims that many ads before have done similar things and that this should be protected under
constitutional free speech. The court only agrees that two previous cases, Hustler Magazine v. Falwell and L.L. Bean v. Drake Publishers, resemble the White v. Samsung situation. The court determines that the difference between those cases and White v. Samsung is that the other two cases were made with the sole purpose of poking fun at Falwell and L.L. Bean, whereas the Samsung ad was made with an attempt to sell Samsung VCRs.

Circuit Judge Alarcon issues a concurring opinion in regard to the California Code 3344, and a dissenting opinion in regard to the right to publicity claim. He concurs with the majority in that a reasonable jury would not be able to find that the robot was a likeness of Vanna White based on the meaning of the California Civil Code 3344. His dissenting opinion about the publicity claim says that he disagrees with the majority ruling because the majority confused a robot with an actual person (Vanna White). Alarcon also said that Vanna White (the person) should not be confused with the character that she plays on a TV show. In essence, the details in the commercial such as the hair, dress, jewelry and profession are not unique to her, but rather they are unique to the character that she plays. Alarcon also adds that the Wheel of Fortune set that is depicted in the ad is not an attribute of Vanna White's identity, but it is instead an identifying characteristic of a game show, or a prop that White interacts with in her role on the game show.

In regard to the Lanham Act, Alarcon disagrees with the majority opinion which held that White could sue under the act. He says that the majority misapplied the factors for finding likelihood of confusion. He also disagrees with the majority decision regarding the Samsung First Amendment Defense. He said that the majority decision would allow any famous person to sue based on any ad that depicts a character that was once played by that famous person. He cited examples saying, "Under the majority's view of the law, Chuck Norris could sue all karate experts who display their skills in motion pictures," and he also cited other examples.

I tend to agree with the majority's opinion that appropriation can be made. When I first read the facts of the case without knowing the exact way that the laws were going to be applied, I thought to myself that I could easily relate the robot depicted in the commercial to Vanna White if I were to see this commercial at the time. Even though the ad does not directly reference Vanna White, I agree with the majority that the individual features of the robot—the hair, dress, jewelry and profession—do not imply Vanna White on their own, but when put together, a reasonable person would connect the ad to Vanna White.

However, I also understand and agree with the point that Alarcon makes in his dissenting opinion regarding Samsung's First Amendment Defense. I think he makes a very good point when talking about celebrities being unattached to their roles. In other words, if an actor plays the bad guy in a movie, that doesn't necessarily mean that the person is a bad guy in real life, it's just the role that he is playing. Similarly, Vanna White is merely a character on a TV show, and the actual person Vanna White does not necessarily reflect what is depicted on the show.
White vs. Samsung Electronics America, Inc. 971 F.2d 1395 (1992)

In the late 1980s and early 1990s, Samsung Electronics ran a series of television advertisements featuring futuristic situations and their products still being used. In one ad, referred to by the defendant as the “Vanna White” ad, a robot in a long gown, big jewelry and a blond wig, turns letters on a set resembling the “Wheel of Fortune” game show set. Vanna White ended up suing Samsung and their advertising agency for misappropriation of likeness, the right of publicity and the Lanham Defense, stating that the ad would create a likelihood that consumers would be confused as to whether or not White were endorsing the Samsung product.

In the lower courts, White lost her claim for misappropriation of likeness, she lost her right of publicity claim because she couldn’t prove the appropriation of the person’s (White’s) name or likeness to the defendant’s advantage. She also had her point dismissed about the Lanham Defense.

When the United States Court of Appeals for the 9th Circuit was given the case in 1992, Senior Circuit Judge Alfred Goodwin wrote the opinion of the court.

As for the misappropriation of likeness and the Landham Defense, the court agreed with the lower courts. But the Court of Appeals determined that simply using the name or likeness of a person was not the only way to break a person’s right of publicity. Goodwin sighted several other cases in California that had to do with celebrities and concluded that the identification marks in an ad or other medium do not need to be “accomplished through particular means to be actionable.”

The court’s opinion went on the explain that even though the defendant had avoided the obvious and blatant identification measures, like a name or photo, the strategy and planning that went into the add was a planned event. It was definitely designed to be a representation of Vanna White, they even called it the “Vanna White” ad in their case. The court indicated that even without the name or likeness of Vanna White being used in the ad, her identity was.

It is impossible to come up with a set list of rules that one cannot break in order to avoid a case of breaking one’s right of publicity, because they can rarely be taken one at a time. It is the thought out combination of details that can create an identity of a celebrity.

For example, Vanna White wears a long gown on Wheel of Fortune, lots of women wear long gowns. She has blond hair, lots of women have blond hair. She turns letters, but so do women playing scrabble or another similar game. She is on the Wheel of Fortune set. No other women have that job. Combined, all those elements create the unquestionable identity of Vanna White on the Wheel of Fortune the court said.

The U.S. Court of Appeals of the 9th District concluded that Vanna White should have won her argument in the district court of Samsung Electronics break of her right to publicity of her identity.

Circuit Judge Alarcon dissented with the majority opinion of the court on White’s right to publicity claim. He said that no right-minded person would confuse a metal robot with the human Vanna White. He also said that even those the elements of her identity that are meant to bring up images of her are not really elements of her identity. He said
the gown, jewelry and set were all parts of her role on the Wheel of Fortune game show, not part of her actual, personal identity. He said the only way a viewer could truly identify the robot as Vanna White was because of the set she was on. Without the set; an identity of the show, not a person; it could have been any robot meant to look like an attractive woman.

Overall, the majority of the Court of Appeals for the 9th District did the right thing in awarding the case to Vanna White on the issue of her right of publicity. To any right-minded person with any pop culture knowledge at all, it would have been obvious that the robot was meant to look like Vanna White. She has a very unique “job” in television, one that only she does.

However, it is unlikely she was financially injured because of the airing of the ad. She probably didn’t lose any money because it was shown. But had she officially endorsed the product and actually appeared in the commercial, she could have gained. She did not lose money, she just lost the opportunity to gain more money.
Greater New Orleans Broadcasting Assn., Inc. v. U.S.

The Supreme Court decided whether or not 18 U.S.C. §1304 may be applied to advertisements of private casino gambling that are broadcast by radio or television stations located in a state where such gambling is legal, but the broadcasts cross state lines where such gambling is unlawful. Louisiana and Mississippi both have legal private, for-profit casinos. However, the problem is that the broadcast signals originating in Louisiana can be heard in neighboring states where private casino gambling is unlawful. The broadcasters are suing §1304 and FCC regulation on violation of First Amendment and for an injunction preventing the enforcement of the statute and rule against them.

The constitutionality of 18 U.S.C. §1304 was upheld in an earlier ruling in United States v. Edge Broadcasting Co. This court will not use that previous case as precedent due to the geographical situation in this case. In the precedent case, the broadcast advertising for a lottery in Virginia was done by a radio station located in North Carolina where no such lottery was authorized.

The District Court ruled in favor of the Government applying the standards for assessing commercial speech restrictions set in Central Hudson Gas & Electric Corp. v. Public Serv. Common of NY. The District Court concluded that the restrictions consented had substantial government interest in protecting the interest of non-lottery states and in reducing participation in gambling which minimizes the social costs associated with. The District Court also pointed out that the federal law does not prohibit the broadcast of all information about casinos. The Court of Appeals for the Fifth Circuit agreed with the District Court. The U.S. Supreme Court reverses.

Justice Stevens, who wrote the opinion of the court, began by reviewing the original lottery policies established by Congress in the 19th and first half of the 20th centuries. The first policy discouraged the operation of lotteries and forbade the dissemination of information concerning such enterprises by the use of mail, even when the lottery in question was chartered by a state legislature. Congress then extended it to broadcasting as §316 of the Communications Act of 1934 which was codified to 18 U.S.C. §1304. This statute prohibited radio and television broadcasting by any station for which a license is required of any advertisement of or information concerning any lottery, offering prizes dependent in whole or in part upon lot or chance. The statute had criminal charges and was typically enforced by the Federal Communications Commission (FCC).

Over the years, §1304 has become more narrowly defined. The first revision was made in 1950 exempting “innocent pastimes” such as not-for-profit fishing contests. In 1975, Congress passed amendments that exempted advertisements of state-conducted lotteries from the nationwide postal restrictions in §1301- §1302 and from the broadcast restriction in §1304. The new broadcast amendment exempted broadcasts by a radio or television station licensed to a location in a state that conducts such a lottery, but the §1304 broadcast restriction still regulated stations licensed in states that did not conduct lotteries.

The adoption of two other statutes in 1988 affected the limits of §1304. The first was the Indian Gaming Regulatory Act (IGRA) which authorized Native American tribes to conduct various forms of gambling pursuant to tribal-state compacts if the state permitted such gambling. The IGRA also exempted any gambling conducted by an Indian tribe pursuant to the Act from both postal and transportation restrictions in 18 U.S.C §1301-1302, and the broadcast restrictions in §1304. The second statute was the Charity Games Advertising Clarification Act of 1988 which extended exemptions for §1301-1304 for state-run lotteries when conducted by any governmental organization, any not-for-profit organization, or a commercial organization as a promotional activity that is clearly occasional and ancillary to the primary business of that organization. Both of the new exemptions were not geographically limited.

In 1992, the Professional and Amateur Sports Protection Act exempted gambling schemes conducted by states or other governmental entities at any time between Jan. 1, 1976 to Aug. 31, 1990; gambling schemes authorized by statutes in effect on Oct. 2, 1991; gambling conducted exclusively in casinos located in certain municipalities if the schemes were authorized within one year of the effective date of the Act and for commercial casino gambling schemes that had been in operation for the preceding ten years pursuant to a state constitutional provision and comprehensive state regulation applicable to that...
municipality; and gambling on pari-mutuel animal racing or jai-alai games. The court specifically points out that the exemptions from this Act made the scope of the law’s advertising prohibition somewhat unclear, such as the limit to broadcast media and whether location of a broadcast station plays a part. The take away from the changes to 18 U.S.C §1301-1304 is that the statute has both pro-gambling and anti-gambling segments of national policy.

To resolve the case, the Court decided to apply Central Hudson’s four part test to resolve the First Amendment challenge. Part 1: Speech concerns a lawful activity and is not misleading. The Court found part one fulfilled. The speech concerned lawful activity and was not misleading. The Court also found the proposed messages to be informational, beneficial to listeners by informing on the consumption choices, and fostering competition.

Part 2: The governmental interest is substantial. The Solicitor General identified two interests: reducing the social costs associated with gambling or casino gambling and assisting states that restrict gambling or prohibit casino gambling within their own borders. While the Court accepted the characterization of the previously mentioned interests substantial, the Court pointed out that the conclusion is not self-evident. The social costs that support the suppression of gambling are often outweighed by economic benefits. The Court highlighted Congress’ exemptions of gambling for Indian tribes; state-run lotteries and casinos; and promotion of different gambling policies in different states. Specifically, Justice Stevens said the court cannot ignore Congress’s unwillingness to adopt a single national policy that consistently endorses either interest asserted by the Solicitor General.

Moving on to Part 3: Does the regulation directly advance the governmental interest asserted? The governmental body seeking to sustain a restriction on commercial speech must demonstrate the harms it recites are real and that its restriction will in fact alleviate them to a material degree. The Government asserted that restricting broadcasts alleviates the social costs of casino gambling by limiting demand. The Government argued advertising would increase demand for gambling increasing the amount of casino gambling which causes the social costs. The Court believes that advertising will most likely have an impact on the demand for gambling, but that the advertising would merely channel gamblers to one casino or another.

Furthermore, the Court finds Congress’ encouragement of tribal casino gambling contradictory to their attempt to minimize the social costs of gambling by restricting advertisements. Under current law, a broadcaster cannot carry advertising about private operated commercial casino gambling regardless of the location of the station or casino. Whereas tribal casino gambling authorized by state compacts have no such broadcast ban as do government operated, non-profit, or occasional and ancillary commercial casinos. The Court finds a large flaw in the operation of §1304 and its attendant regulatory regime because of the numerous exemptions and inconsistencies that the Government cannot hope to exonerate it. Thus, the court does not feel the need to resolve the question whether there is a lack of evidence in the record to satisfy the standard of proof under Central Hudson.

In addition to Governmental inconsistencies, the FCC interpretations of §1304 and §1307 is different than that of the Government. The FCC allows broadcasters a commercial if “casino” is part of the establishment’s proper name and the advertisement can be taken to refer to the casino’s amenities rather than directly promoting its gaming aspects.

On the other hand, the Government is committed to prohibiting accurate product information not commercial enticements of all kinds and then only when conveyed over certain forms of media and for certain types of gambling. The Court points out that the Government allows other types of gambling such as state lotteries and pari-mutuel betting on horses and dogs. The Government also admits tribal casinos offer the same amenities as private casinos. The only distinction between tribal and different classes of casino gambling is the amount of regulation.

Justice Stevens touches on potentially practical and non-speech-related forms of regulation including a prohibition of supervision of gambling on credit; limitations on the use of cash machines on casino premises; controls on admissions; pot or betting limits; location restrictions; and licensing requirements. He believes these regulations could be more direct and effective in alleviating some of the social costs of casino gambling. The Court also recognized the federal interest in protecting the welfare of Native
Americans by imposing commercial regulations on non-Indian businesses. Yet, the Court does not believe that justifies the differences abridging non-Indians freedom of speech more severely than the freedom of their tribal competitors.

The second interest asserted by the Government derived from assisting states with policies that disfavor private casinos was seen as null by the Court. The Court did not see any correlation between the interests as of now and how it might directly and adequately further any state interest in dampening consumer demand for casino gambling if it cannot achieve the same goal with respect to the similar federal interest.

Part 4: Is it more extensive than necessary to serve the interest? The scope must be proportional to the interest served. The Court found §1304 sacrifices an intolerable amount of truthful speech about lawful conduct when compared to all of the policies at stake and the social ills one could reasonably hope such a ban to eliminate. The Court finds the regulations to be overbroad it does not make reasonable accommodations of competing state and private interests. The speaker and audience not the government should be left to assess the value of accurate and non-misleading information about lawful conduct.

All in all, the Court found that §1304 does not satisfy part 3 or 4. The Supreme Court does allow that if the Federal Government adopted a more coherent policy, or accommodated the rights of speakers in states that have legalized the underlying conduct, the outcome of this case could have been different. Under the current federal law as applied the broadcast prohibition in 18 U.S.C. §1304 and 47CFR §73.1211 violates the First Amendment. The judgment of the Court of Appeals is reversed.

Justice Stevens takes a thorough look at the history of 18 U.S.C. §1304 and how it has changed over time. The Court immediately threw out a precedent that had previously upheld 18 U.S.C. §1304. The Central Hudson four part test systematically tested the Government's reasoning for trying to ban certain types of commercial speech. The biggest conflict was over Part 3 of the Central Hudson test. The number of exemptions was all over the board making it difficult for the Government to really back up their legitimate claims. The lack of consistency from policy makers pertaining to gambling and the restrictions to some groups definitely seemed to restrict or at least cause some unfair First Amendment rights. Disconnect between the FCC and Government regulation did not assist their side of the case. By the time Part 4 came up, the Court barely touched on it. Part 3 introduced enough complications that the majority seems to have agreed with little dissent. The Court offers possible solutions to reduce social ills and the Court does touch on the fact that the case could have ended differently if there was a more coherent policy or accommodates the rights of the speakers in the states that have legalized gambling.

In the Greater New Orleans Broadcasting Assn., Inc. v. U.S. court case, the broadcasting association wanted to promote private for-profit casinos through radio and television advertisements. In this case, the broadcaster was challenging a U.S. statute and FCC regulation that prohibits private for-profit radio advertisement in a location or state where gambling is unlawful. The broadcaster claims that it should be able to advertise for a private casino in Louisiana, where gambling is legal, on their radio station, but the statute prohibits it because their broadcast signal can be picked up and listened to in surrounding states that do not allow private, for-profit casinos to operate. As a result of this, the Greater New Orleans Broadcasting Association believes that the statute prohibiting them to broadcast advertisements for private casinos is unconstitutional, because it violates First Amendment rights in regard to commercial speech, and that an injunction should be made so that the enforcement of the regulation cannot be applied to them. 18 U.S.C, section 1304 is the law that prohibits the broadcasting of such advertisements.

The District court that this case was first heard at ruled in favor of the government. The court applied the standard of assessing commercial speech restrictions that originated from the Central Hudson Gas & Electric Corp. v. Public Serv. Comm’n of N.Y. (1980), concluding that the restrictions in question advanced a substantial governmental interest both in protecting the interest of non-lottery states as well as reducing gambling participation and as a result, reducing the social costs associated with gambling. The Court of Appeals for the Fifth Circuit sided with the District Court.

In assessing this case, the Supreme Court referenced the Central Hudson four-part test to determine whether or not this statute was applicable under the First Amendment. The first part of the Central Hudson test asks whether the expression is protected under the First Amendment in that it concerns lawful activity and is not misleading. Secondly, the given governmental interest must be substantial. If the first two parts to the test are both said to be true, then the court must determine whether the regulation in question advances that interest directly. Lastly, according to the Central Hudson test, the regulation must not be more extensive than necessary to accomplish the goals of the governmental interest. The Supreme Court determined that the Central Hudson test “provides an adequate basis for decision.”

In regard to the first requirement of the Central Hudson test, the Supreme Court decided that it was clear that the content in the advertisement was not misleading and that it concerns lawful activity, since gambling is legal in Louisiana. In the second part of the test, asking if the governmental interest leading to the restriction of speech is substantial, the Solicitor General indentified two qualifying interests. The interests were that the regulation would reduce the social costs that come as a result of casino gambling and that the regulation would assist other states that restrict casino gambling within their borders. The Solicitor General cited negative results of gambling as evidence that the governmental interests were substantial. The Solicitor General claimed that gambling could lead to organized crime, that it poses a regressive tax on the poor and offers a false and irresistible hope of financial gain. The
Solicitor General also said that these social costs result from the 3 million compulsive gamblers, and that compulsive gambling has grown with the expansion of legalized gambling throughout the country. While understanding that these interests may indeed be substantial, the Supreme Court said that the potential economic benefits were being ignored by this particular view of the Solicitor General.

Referencing the third requirement of the Central Hudson test that asks whether the restriction of speech directly advances the stated governmental interest, the Supreme Court said that the restriction must be determined to alleviate the harms to a “material degree” and that the regulation may not be sustained if it provides ineffective support for the purpose. In other words, the court did not think that the regulations had a direct enough effect on the governmental interest to warrant protection under the Central Hudson test. As to the fourth requirement under the Central Hudson test, the government must narrow the regulation to fit the interest reasonably and the costs and benefits must be carefully calculated and associated with the prohibition of the speech. The Supreme Court determined that the interests had not met these standards, citing the government’s contention that broadcasting restrictions would advance their interest because promotional advertising for gambling would increase the demand, and thus increase the social costs that come with such gambling was incomplete. The Supreme Court held that even if this casual chain of events were true, the government’s speech ban does not directly and materially further the expressed interest, saying that it is fair to assume that some demand for gambling would result from the advertisement, but that the advertisement would only “channel gamblers to one casino rather than another.”

As a result, the Supreme Court determined that prohibiting advertisements of private casinos in broadcast signals that reach states which prohibit such activity regulates an intolerable amount of truthful speech about lawful conduct. In other words, the regulation does more than is necessary to achieve the goals of a substantial governmental interest, and thus violates the broadcaster’s First Amendment Right to commercial speech under the Central Hudson test.

After reading through the details of this case, I find myself siding with the Supreme Court. I think it is unlikely that people from the surrounding states would be more likely to make the long trip after hearing the advertisements anymore than they normally would, as the court pointed out. Although I personally am against gambling, I think that the broadcasting association acted well within their rights and should not be prohibited from using gambling advertisements, in a state where gambling is lawful, as a source of income just because the radio signal can be picked up in other states that outlaw gambling.

Justice John Paul Stevens delivered the opinion of the United States Supreme Court for this 1999 case. Casino advertisements had been airing in Louisiana, where gambling and privately owned casinos were legal. However, some of the airwaves made it to states like Arkansas and Texas, where gambling and privately owned casinos are outlawed. The Federal Communications Commission (FCC) was going to start applying sanctions to the broadcasters for airing the ads. They were basing this off a case from 1993 that said lottery advertisements could not be aired in states that did not have a legal lottery.

In this case, the district court sided with the FCC. They agreed that airing these advertisements for casinos could have a social risk that is within governmental interest. Gambling addictions can financially ruin families, so advertising gambling establishments could encourage people to gamble. They said it was a governmental interest to protect the U.S. from the social risk of gambling and casinos, especially in states where these activities were illegal.

The Court of Appeals for the Fifth Circuit was divided on the issue and therefore had to maintain the decision of the lower court. When the case came to the U.S. Supreme Court, the decision was reversed.

The Supreme Court used the Central Hudson's four-part test to determine the opinion of the court. The test must determine whether or not the ad in question is protected by the First Amendment as free speech. The commercial speech must concern legal activity and not be misleading to the audience. Then they question whether there is a substantial governmental interest in the commercial speech. Then they must determine the best regulations to advance the governmental interest and make sure those regulations are not more extensive than necessary.

After applying the Central Hudson test, the court agreed that this is indeed considered commercial speech and that the expressions were not misleading the activities described were not unlawful. So the next question was of the governmental interest in the case, more specifically, in gambling.

The U.S. Supreme Court ultimately decided it was not their place to determine the social cost of gambling. This was not the central concern of this case. They acknowledged their displeasure in the United States Congress for not coming to a unified decision on the social cost of gambling and whether or not it should be a nationwide, blanket regulation or law. They also noted that advertising of one casino might only draw potential gamblers to one specific casino, not so much make gambling a more widespread habit. Also, because Indian tribal casinos were growing so rapidly at this particular time, the U.S. Supreme Court decided they could not make a decision on the morality or social cost of casinos. They said Congress was encouraging the growth of Indian tribal casinos while simultaneously trying to downgrade privately owned casinos.

The United States Supreme Court made the right decision in reversing the opinions of the district court and the Appeals Court of the Fifth Circuit. Because the
casinos being advertised were in Louisiana and the broadcasting stations were also in Louisiana, no unlawful practices were being advertised. The ads also did not mislead the viewers.

As to whether or not the social coast of gambling is great enough to affirm the decisions of the lower courts, the Supreme Court also made the right choice. The social costs of gambling were not the case presented. And even if it were, the mixed messages coming out of Congress about casinos made it difficult for them to make a decision on constitutionality. They would have needed more background info and statistics to support the Solicitor General’s idea that gambling hurts society. The only facts presented to the court were a “casual chain” of reactions that could stem from gambling and casino popularity in society.

Because the court could not establish the substantial governmental interest in the case, the decision was reversed. They said that is Congress had a concrete decision on gambling and who could operate casinos, then they might have come to a different conclusion. They ultimately said that 18 U.S.C. 1304 violated the First Amendment by restricting free speech in commercial speech. The broadcasters won the case.

This decision has stood until today, as shown by the amount of Council Bluffs, Iowa, casino adds that are aired and even printed in Omaha, Neb. Omaha does not allow casinos, yet many TV, radio, billboard and print ads promote not only the environment of the casino, but also the gaming.
Shulman v. Group W Productions Inc.
Shulman sued for invasion of privacy by publication of private facts and by intrusion upon seclusion. A television show broadcast an account of her accident and rescue. Unbeknownst to her, her paramedics were microphone and being filmed.

The tort of intrusion into private places, conversation or matter encompasses unconsented-to physical intrusion into the home, hospital room or other place that privacy of which is legally recognized as well as unwarranted sensory intrusion such as eavesdropping wiretapping and visual or photographic spying.

The court looked back on the California decision in Miller v. National Broadcasting Co., which involved a news organization’s videotaping the work of emergency medical personnel and adopted the Restatement’s formulation of the cause of action: “One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns is subject to liability to the other for invasion of his privacy, the intrusion would be highly offensive to a reasonable person.”

The Miller case and Restatement show intrusion has two elements: (1) intrusion into a private place, conversation or matter; (2) in a manner highly offensive to a reasonable person.

The court first looked at whether the defendants intentionally intruded physically or otherwise upon the solitude or seclusion of a place or conversation private to Wayne or Ruth, the plaintiffs. The court also noted that the plaintiffs must show the defendant breached a zone of physical or sensory privacy surrounding or obtained unwarranted access to data about the plaintiff to prove actionable intrusion. The plaintiff must prove an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source.

The court goes on to say that the cameraman’s presence at the scene of the accident cannot be deemed either a physical or sensory intrusion on the plaintiff’s seclusion because the plaintiff had no right of ownership or possession of the property where the rescue took place, nor any actual control of the premises. The court also says that it is a reasonable expectation for journalists to be present at the scene of a crime photographing and reporting on the accident.

Two triable issues are raised about the defendants conduct. The first issue exists as to whether the plaintiffs had an objectively reasonable expectation of privacy in the interior of the rescue helicopter serving as an ambulance. The court is not aware of any law or custom permitting the press to ride in ambulances or enter hospital rooms during treatment without the patient’s consent. The Court of Appeal mentioned it is not a habit to have any member at large or its media representative to ride in an ambulance and ogle as paramedics care for injured strangers.

The second issue is whether Ruth was entitled to a degree of privacy in her conversations with the medical rescuers at the accident and in Carnahan’s conversation conveying medical information regarding Ruth to the hospital base. The court says the defendants intruded into a physical privacy zone but also by placing a microphone on Carnahan amplifying and recording everything she said and heard. The court equates this to eavesdropping on a conversation that parties would have expected to be private.

The Court of Appeals ruled plaintiffs had no reasonable expectation of privacy at the accident scene itself because the scene was within sight and hearing range of members of the public. This court does not support the decision held by the Court of Appeals after reviewing the summary judgment. The summary judgment reflects the existence of triable issues relating to the privacy of certain conversations at the accident scene such as within the helicopter. The videotapes also show that the accident was not on a heavily traveled highway and many yards from and below the rural superhighway. Based off the tapes it is arguable as to whether a passing car would have even been able to observe the rescue and even more unlikely is that they would have heard Ruth’s conversation with rescuers.
Based off of the summary judgment record the court finds the defendant's recording of Ruth's communication to the rescuers and filming in the air ambulance to be highly offensive to a reasonable person. This court also finds the depth of intrusion highly offensive because the placement of a microphone on a medical rescuer in order to intercept what would otherwise be private conversations with an injured patient. The setting places the patient/defendant in a situation that she would not know her words were being recorded and would not have occasion to ask, object or consent to the recording. The defendants took advantage of the patient's vulnerability and confusion. The media's intention was to record everything for the possible edification and entertainment of casual television viewers. For this reason the court believes entering and riding in an ambulance with injured patients is also highly intrusive on a place expected to be secluded. Plus the patients were not in a position to pay attention to what was happening and consent to everyone's presence. The court recognizes the producers' desire to get footage conveying the look and feel of the event but does not feel this justifies using a microphone on the rescuer. The court does not believe the defendant's actions were evil or malicious but lacked sensitivity and respect for plaintiff's privacy.

As to the question of constitutional protection for newsgathering, one finds the decisional law reflects a general rule of nonproduction: the press in its newsgathering activities enjoys no immunity or exemption from generally applicable laws. California's intrusion tort and section 632 apply to all private investigative activity whatever its purpose and whoever the investigator. Neither the tort nor section 632 places a heavy burden on the press. The court recognizes the fact that a reporter may be seeking "newsworthy" material does not in itself privilege the investigatory activity. The intrusion tort does not subject the press to liability for the contents of its publications.

The defendants have asked for more protection for press investigative activity specifically on the context of newsgathering conduct. They wish the conduct be protected as long as the information being gathered is about a matter of legitimate concern to the public and the underlying conduct is lawful. Neither tort law or constitutional precedent and policy support such broad privilege.

The threat of infringement on the liberties of the press from intrusion liability is minor compared with the threat from liability for publication of private facts. Intrusion does not raise First Amendment difficulties since its perpetration does not involve speech or other expression. No constitutional precedent or principle of which gives a reporter general license to intrude in an objectively offensive manner into private places, conversations or matters merely because the reporter thinks he or she may thereby find something that will warrant publication or broadcast.

The judges took a lot of time to go back and expand on the intrusion tort which was established by the Miller case. They named two main elements for intrusion to be actionable. The first being intrusion into a private place, conversation or matter. The second element was it had to be in a manner highly offensive to a reasonable person. This case set all ambulances as an intrusive place where conversations would be expected to be private. They also took into consideration where the accident had happened and how likely passersby would have been able to see the accident. Moving on to the second element, the court referred strongly to the Miller case to determine offensiveness by considering all circumstances of the intrusion, including its degree, setting, and the intruder's motives and objectives. This part really focuses on the use of photographic and electronic recording equipment. While they believe those tools can be useful to journalists, the journalist must be in a situation where there is significant public interest in the discovery of the information sought. They also laid the groundwork that it is not reasonable for a person who has just been in an accident to have to worry about approving everyone's business and reason for assisting in
a rescue. The court also made sure to touch on the constitutional protection for newsgathering. Clarifying that none of these rules were infringing on a journalist's constitutional right and that the defendant's urge of creating a protective rule for press investigative activity was too broad a privilege.
Shulman v. Group W Productions, Inc. (1998) Supreme Court of California

Ruth Shulman and her son Wayne were injured and trapped in their car after it went off of a California highway and rolled. A helicopter and medical transport came to the aid of Shulman and the passenger and there was also a producer from Group W Productions who had a video camera and was with the paramedics during the rescue. The cameraman filmed Shulman as she was removed from the car, as well as the medical care that she received and the helicopter transporting her to a hospital. While this was being filmed, a small microphone that was attached to a nurse recorded the conversations that Shulman had during the helicopter transport. The video and audio recordings were featured in a documentary that aired on television. The Shulmans did not consent to have either the video or audio recordings of the rescue air in the documentary. Due to this, they sued Group W Productions for invasion of privacy by publication of private facts and by intrusion upon seclusion. Group W requested and was granted a summary judgment by the trial court and Shulman appealed. The court of appeal honored Shulman’s request, saying that there were genuine issues of material fact to her claims. Group W then appealed to the California Supreme Court.

The court views the tort of intrusion into private places, conversations or matter as one that best captures the understanding of “invasion of privacy.” It defines invasion of privacy as unapproved physical intrusion into the home, hospital room or other place that privacy is legally recognized. The tort also protects unwarranted sensory intrusions like wiretapping and photographic spying. The court cites another case, Miller v. National Broadcasting Co., in which a similar incident occurred with a news organization filming an emergency rescue. In that case, the ruling was, in part, that anyone who intentionally intrudes “upon the solitude or seclusion of another or his private affairs or concerns,” is subject to the invasion of that person’s privacy if the intrusion would be highly offensive to a reasonable person.

In order to prove that there was actionable intrusion, The Shulman’s had to prove that Group W crossed a zone of physical or sensory private surrounding and the tort can only be proven if it is determined that the plaintiff had a reasonable expectation of seclusion or solitude in the place that this occurred. The court first said that there could not be physical or sensory intrusion on the Shulman’s seclusion since they had no right of ownership of the property where the rescue took place and it is not unusual for journalists to attend and record accident scenes and subsequent rescues.

The court did say, though, that there were issues of intrusion on seclusion while the Shulmans were inside the helicopter, which was operating as an ambulance in this situation. The court also said that Ruth was entitled to a certain degree of privacy in her conversations with Wayne and the medical
staff in the helicopter and that it was reasonable to assume that those conversations would be private.

The court again referenced the Miller case for the second part of intrusion, saying that determining offensiveness requires consideration of all the circumstances of the intrusion. The court in the Miller case concluded that a reasonable person could regard the production crew's conduct in filming emergency medical treatment inside of his home and without consent "a cavalier disregard for ordinary citizens' rights of privacy," and therefore it would be highly offensive. The court concluded that a jury could find the recording of the conversations of the Shulman's to be "highly offensive to a reasonable person," as far as the placement of the microphone to record private conversations. The court also said that although Group W's purpose could rarely be viewed as malicious, the behavior could be thought to show a highly offensive lack of sensitivity for the situation.

The court was then forced to decide whether or not the intrusion could be justified by the motive of gathering news. The court went on to say that just because the recording was done with the intent to gather news, it does not guarantee that it would be protected because it still may violate laws. The court said that newsworthy exceptions must fall under 1: the information being gathered must be about a matter of legitimate concern to the public, and 2: The underlying conduct is lawful. And in the end, the court says that no constitutional precedent would give a reporter license to intrude in an offensive manner into private place, conversations or matters just because the reporter is in search of something newsworthy.

I agree with this court in this case, that the reporter should not be able to violate the privacy of another person even when something worth publishing may come of it. There are laws in place that deny access to conversations that occur in the privacy of a hospital room, and in this case, the transporting helicopter was functioning as such and should therefore be treated the same. This would render the recordings unlawful in my opinion.

In 1990, Ruth Shulman and her son Wayne were involved in a rollover accident off a highway. Both were pinned inside the vehicle and the “jaws of life” had to be used to remove them. A helicopter was called to the scene to rescue the pair. And a camera operator for a television station was riding with the helicopter crew. He was filming the scene for a later broadcast called On Scene: Emergency Response. The nurse on the helicopter wore a wireless microphone throughout the timeline of the rescue.

Wayne was not shown in the final broadcast, but Ruth was shown a lot in the nine-minute segment. Because the nurse was wearing a microphone the conversations between her and Ruth could be picked up clearly by the camera. Ruth was delirious from the accident and many of her remarks made little sense and she “certainly did not look [her] best.” The cameraman not only followed the rescue from inside the vehicle, but on the flight to the hospital emergency room as well.

When the case originally went to court, Shulman was suing for intrusion of privacy and publicity of private facts. The lower court sided with Group W Productions saying it was a First Amendment right to gather newsworthy information. The Court of Appeals reversed that decision saying there were violations for Ruth’s publication of private facts and that the trial had general errors anyway. The Supreme Court of California agreed with some, but not all, of the Court of Appeals’ decisions.

The Supreme Court of California debated the newsworthiness of the accident. An accident scene is expected to be populated with reporters and cameramen from various media outlets, especially in the case of rollover, it is an usually severe kind of accident. However, one would not expect the cameras to follow the patient into an ambulance or helicopter en route to the hospital. Also, even when the other media outlets would be on the scene, recording the events surrounding the accident, they would probably not be able to pick up on the one-on-one conversation between a nurse and patient without the use of wireless microphones. A typical person would reasonably expect a certain privacy while talking with a nurse or other medical official, especially while in the confines of the ambulance or helicopter, just as they would expect privacy inside a hospital room.

Also, because Ruth Scholman was not in her right mind immediately following the accident, she was not aware of the camera and definitely did not consent to being filmed in that state.

The Court ultimately decided that the story shown was of legitimate public concern because traffic accidents are important for a population that travels by car so much. Also, the care provided by the medical and emergency personnel is important because people want to know what kind of care they will have if they are ever in a similar situation. And the Court decided that, although not totally ethically strong, the broadcasted material showing Ruth in a disoriented state was legal. They didn’t use her full name and barely showed her face. She would have been identifiable by her first name, general appearance, voice and the accident itself, because the information was published in newspapers the day of and after the accident.
The Supreme Court of California concluded that included bits of Ruth were essential to the narrative of the accident and that the court had no right to interfere with the editing process of a media outlet.

Although the information scene at the accident may have been embarrassing for Ruth Shulman, it wouldn't have been for a reasonable person. A viewer would understand the severity of the accident and expect that the patient might be disoriented. Also, because accidents and the care provided by emergency and medical personnel would be important for any reasonable person to know, the Court made the right choice in saying the broadcasted material was newworthy.
1. Is the mayor’s decision to deny a permit for the NARS rally consistent with the standards of the Brandenburg test? Why or why not?

Yes, the mayor’s decision is consistent with the standards of the Brandenburg test. The first standard is that there must be evidence of intent to incite violence. The mayor believes that the NARS president’s speech from last year was delivered to inspire violence. The speech talked about taking whatever steps were necessary, letting nothing stand in their way, and letting no law or scruple deter them from rescuing the animals. The second standard is that there must be evidence of the imminence of violence. This standard is fulfilled because of the large number of people gathered in one spot protesting on a controversial issue. It is reasonable to believe violence would be imminent in such a situation. The third standard is there must be evidence of the likelihood of violence. The mayor points out that last year there were twelve arrests at the rally. The possibility of arrests happening again is likely.

4. Using the guidelines derived from the Pentagon Papers case, would the CIA be able to obtain an injunction preventing publication of Thrillin’s article in Peace Now? Why or why not?

No, the CIA would not be able to obtain an injunction preventing publication of Thrillin’s article. The Pentagon Papers case established three factors to be identified in national security prior restraints. The first factor was that prior restraints bear a heavy presumption against their constitutionality. The CIA argues that the publication would disclose intelligence sources and methods and undermine public support for the war on Ohadi. Although the documents do not name spies, the CIA believes that the information in them could enable others to deduce who in the duPerrier regime had been spying for the United States. The CIA points out that Thrillin does not have authorization to the documents. The second factor was that only proof that publication must inevitably, directly, and immediately cause harm to national security akin to imperiling a ship at sea can justify a prior restraint. All of the information Thrillin plans on publishing is from a document that is 20 years old which questions and does not state the names of any spies. However, the U.S. is about to commence an attack against Ohadi, The third factor is courts lack authority to enjoin publication in the absence of laws authorizing such prior restraints. The federal law does not authorize the director of central intelligence to seek injunction on publications about U.S. intelligence sources and methods nor does federal law authorize criminal prosecution of those who unlawfully obtained or disclosed classified information by publication.

5. Using the guidelines derived from the Pentagon Papers case, would the Defense Department be able to obtain an injunction preventing CCN from broadcasting the satellite photos of al-Alabama? Why or why not?

No, the Defense Department would not be able to obtain an injunction preventing CCN from broadcasting the satellite photos of al-Alabama. The first factor is prior restraints bear a heavy presumption against their constitutionality. The Defense Department said the photos would help the Ohadi military figure out how accurate U.S. bombs and artillery are and that it would help Ohadi devise ways to protect its tanks, artillery, and anti-aircraft guns. It is arguable that the Ohadi military could buy the photos from the Russian satellite themselves and figure out how to protect their military weapons on their own without the photos. The second factor, only proof that publication must inevitable, directly, and immediately cause harm to national security akin to imperiling a ship at sea can justify a prior restraint is not justified either. No inevitable, direct, or immediate harm can be proven due to publication. The Ohadi would be capable to figure out all of the reasons the Defense Department presented on their own without the publication. The third factor affecting this decision is that courts lack authority to enjoin publication in the absence of
laws authorizing such prior restraints. The Defense is relying on the president’s constitutional power to command the military rather than any statute as legal authority for the injunction.

6. Using the guidelines derived from the Pentagon Papers case, would FBC be able to obtain a court declaration that preventing Ravioli from broadcasting his story on the assault on the Ohadi Bridge was an unconstitutional prior restraint? Why or why not?

No, preventing Ravioli from broadcasting his story on the assault on the Ohadi Bridge is not an unconstitutional prior restraint. First factor is prior restraints bear a heavy presumption against their constitutionality. FBC points out the broadcast is happening during an immediate wartime effort, capturing the bridge was crucial to the final assault, surprise was a key tactic in the mission, and if Ohadi’s were prepared for the attack they could delay the Americans for days and inflict heavy casualties on U.S. troops. The second factor is that only proof that publication must inevitable, directly, and immediately cause harm to national security akin to imperiling a ship at sea can justify a prior restraint. Broadcasting the story in real time will inevitably allow the publication to reach the ears of Ohadi defenders. Ravioli’s report describes the assault in great detail. He physically draws a map showing the location of the Ohadi defenders and the directions from which the U.S. attacks were to come. The direct result of such a broadcast is that U.S. forces will be harmed and the attack is happening the next day which is in the immediate future. The third factor, courts lack authority to enjoin publication in the absence of laws authorizing such prior restraints. A federal court does not have the right to order the army to reinstate Ravioli as an embedded reporter or declare the action to prevent Ravioli from transmitting his story an unconstitutional prior restraint.

8. Is the portion of the KRUD-TV story describing Lettuce’s association with Sigmund Frog capable of a defamatory meaning? Why or why not?

Yes, KRUD-TV story describing Lettuce’s association with Frog is capable of defamatory meaning. The story is defamatory if it tends to so harm the reputation of another so as to lower him or her in the estimation of the community or deter third persons from associating or doing business with him. By associating Lettuce with Professor Sigmund Frog the reporter is attempting to harm her reputation because he did not report when she worked for him or that she was not part of his child pornography scandal. Anyone related to child pornography would lower his/her reputation in the community. As a day care manager she works closely with children and her association with Sigmund Frog a highly publicized story that all area residents are likely to know about would deter third person from doing business at the day care. Lettuce can prove injury, too. Eight children were pulled out of her day care. Hedda also claims to have been depressed, contemplated suicide, and experienced insomnia.

11. Assuming Trotter was able to prove all other elements of a libel suit, would he be able to prove actual malice on the part of Limburger and American Intelligencer in regard to the allegations about the death squad? Why or why not?

No, Trotter would not be able to prove actual malice on the part of Limburger and American Intelligencer in regard to the allegations about the death squad. The first part would be to prove that Trotter is a public official or figure. He can be proven as a public official for the following reasons. He is in government. He has or appears to have substantial responsibility for or control over government affairs. His rank is high enough that the public has an interest in his performance and qualifications beyond the general interest in government employees.
Limburger's investigative reporting has no indicators of actual malice. There is proof that he did not just make the article up. The article is based on information from a verified source, Dewey Moss, whom Limburger had worked with before. The source is also allowing the publication of his name in the article. The article is probable. The source worked in the U.S. Army Criminal Investigation Division. Limburger looked for direct confirmation. The source has not disavowed any information he provided. Limburger looked for corroborating evidence. The closest he could find where documents showing some FBI agents were receiving sniper training from the U.S. Army with no explanation to why they were receiving the training. Although Limburger did select a reasonable, but possible mistaken interpretation of ambiguous documents that is not evidence of actual malice. Neither is disregarding a subject's unsubstantiated denials.

12. Assuming Trotter was able to prove all other elements of a libel suit, would he be able to prove actual malice on the part of Limburger and American Intelligencer in regard to the allegations about Trotter's involvement in the Ohadi-Anozira scandal? Why or why not?
Yes, Trotter would be able to prove actual malice on the part of Limburger and American Intelligencer in regard to the allegations about Trotter's involvement in the Ohadi-Anozira scandal. The first part would be to prove that Trotter is a public official or figure. He can be proven as a public official for the following reasons. He is in government. He has or appears to have substantial responsibility for or control over government affairs. His rank is high enough that the public has an interest in his performance and qualifications beyond the general interest in government employees. The second part to this question is whether he can prove actual malice. This article has several indicators of actual malice. The majority of this article rests on one source, Virginia Hamm, who under other circumstances would have been a good source. The problem is that there is an obvious reason to doubt the veracity of the source. She was in a love affair with West during their time at the White House. This relationship ended when West was linked to the Ohadi-Anozira scandal and ended with bad feelings on both sides. The fact that she wishes to remain anonymous also makes one question the validity of using her as the only source.

14. Karen Wright and Martha Dobie claim to have been defamed. What are the statements about which they complain? Are those statements capable of a defamatory meaning?
Mary said that Miss Dobie had unnatural feelings toward Ms. Wright and that Ms. Dobie was jealous of Ms. Wright marrying Cousin Joe. Mary had also talked about how they would be in the same room late at night and there were noises, fights, crying and making up heard/seen from Ms. Wright's room. A communication is defamatory if it tends to so harm the reputation of another so as to lower him or her in the estimation of the community, or deter third persons from associating or doing business with him. In Nebraska today, Mary's statements would harm the reputation of another and lower their reputation in the community because of widely held beliefs that homosexuality is a particularly reprehensible and immoral conduct. Because the first two factors are harmed it is likely that her reputation would deter third persons from associating or doing business with him.
15. Assume Wright and Dobie must prove actual malice (which they would have to do to recover punitive damages.) What evidence, if any, shows Mary Tilford made defamatory remarks about Wright and Dobie with actual malice? What evidence, if any shows Mrs. Tilford made defamatory remarks about Wright and Dobie with actual malice? Remember, the issue is the defamer's state of mind at the time the remarks were made.

Type A actual malice means the publisher either knew the remarks were false and this amounts to intentional lying or it could be Type B actual malice and the publisher showed reckless disregard showing that the defendant in fact entertained serious doubt as to the truth of a statement or possessed a high degree of awareness of the probable falsity of the statement. From the act, we know that Mary had a history of lying and manipulating people to get what she wanted. We also know that she bases her responses off of how people respond to what she is saying. She has a penchant for eaves dropping and has a book that would not be allowed in the school if the teachers knew about it. Mrs. Tilford showed reckless disregard. She knows that Mary is a habitual liar. She also questions Mary several times whether she is really telling the truth. Mrs. Tilford doesn’t bother to question the teachers and at first she believes Mary’s statements to be untrue.

16. Assuming Wright and Dobie want to recover punitive damages from the Vapid City Bugle, they will have to prove actual malice. Would Wright and Dobie be able to establish actual malice on the part of the newspaper and Bill O’Really? Why or why not?

Yes, Wright and Dobie would be able to establish actual malice on the part of the newspaper. There are a couple of indicators of actual malice. The most notable is that there are obvious reasons to doubt the veracity of the source. The publisher did not check with Rosalie or any of the other girls whether they had reached the same conclusions about their teacher. Several times Mary denies information that she originally stated.
1. The Brandenburg test says that a state may punish speech that is seditious or may encourage criminal behavior provided there is evidence of intent to incite violence, imminence of violence, and a likelihood of violence. In the case of Vapid City Mayor Donny Brooke’s decision to deny a permit for the NARS rally, Brooke says that previous rallies have resulted in hostile behavior from attendees and that many get involved in fights or disturbances while at the rally. Last year, Vapid City police made 12 arrests at the rally for disturbing the peace, which happens to be exactly 12 more than the average of 25 disturbance arrests per day in Vapid City—a 48 percent increase. Although the NARS organization denies being an advocate of violence, NARS president Penny Lane made a particular comment last year that suggested breaking laws in order to act for the cause of the organization. Brooke says that this sort of comment has inspired violence in the past and is likely to do so in the future. Applying the first principle of the Brandenburg test to this case (intent to incite violence), the previous tone in Lane’s speech suggests that her intent is to accomplish the organization’s goal by all means necessary—including violence. Applying the second provision (imminence of violence), there is substantial evidence based on Lane’s comments as well as the arrest statistics from the previous rally that if the rally does occur then violence will occur. Based on the third provision of the Brandenburg test (likelihood of violence), because of the 48 percent increase in disturbance arrests from the normal Vapid City amount on the day of last year’s rally, and the particularly aggressive tone that Penny Lane has taken in her previous speech, one can reasonably assume that there is a likelihood that violence will occur at the rally if it were to take place. Therefore, Brooke can legally deny the organization of a rally permit by applying the Brandenburg test to the situation because a casual connection between the rally and violence can be made.

3. In the Virginia v. Black case, the Supreme Court determined that a law banning cross burning can be within the powers of the First Amendment so long as the cross burning is done with the intent to intimidate a specific person or group of people. In the case of Bud Wiser, the facts of the case state that he and other people at the rally against NARS joined in a song that threatens to “Hang Penny Lane from a sour apple tree...” Wiser also gathered materials to make a large stuffed doll and hung a sign that read “Penny Lane” around the doll’s neck, and the doll was then thrown into the fire. Because Wiser hung a sign with Lane’s name on it around the effigy that was burned in the fire, and the group sang a song that specifically referenced Penny Lane, who is the president of the organization that they are protesting against, it can reasonably be determined that the act was done with the intent to intimidate Penny Lane. Though it is worth noting that the law that resulted from the Virginia v. Black case cannot be applied in this situation because that only dealt with the act of cross burning, the cases are closely related and the same principles can be used in both cases. After considering these facts and the similarities between the two cases, the arrest of Wiser by the Vapid Police is consistent with the ruling handed down by the Supreme Court in the Virginia v. Black case, because the act was done with the intent to intimidate.

6. The Pentagon Papers case concluded that National Security Prior Restraints can be obtained if it can be proved that the publication of the information in question “inevitably, directly and
immediately cause(s) harm to national security akin to imperiling a ship at sea.” In other words, if the information puts U.S. citizens at a high risk of being harmed, prior restraints can legally be obtained. In this case, the Army was getting ready to attempt a dangerous surprise assault to take over a bridge where they did not believe the opposing forces to be expecting them. It is stated in the case that if the attack was met by prepared opposition that it could result in a severe delay of the mission, and “inflict heavy casualties on U.S. troops.” The facts describe an FBC reporter by the name of Geraldo Ravioli who is traveling with a group of soldiers in the army and was reporting detailed facts about the surprise assault that the army was getting ready to execute, and he even drew a map in the dirt detailing the attack. At this time, an Army officer who was watching Ravioli give the report switched off his transmitter and told him that he would no longer be allowed to report from the front lines. Following the incident, the FBC asked a federal court to reinstate Ravioli and declare that preventing him from reporting was an unconstitutional prior restraint. Using the rules outlined by the pentagon papers case, it can be determined that the information being reported could have resulted in immediate and direct harm to soldiers participating in the mission because the report could have tipped off the opposition and allowed them to prepare, thus putting U.S. troops in enhanced danger, and qualifying the situation for prior restraints. Because of this, the FBC would not be able to obtain a court declaration stating that preventing Ravioli from broadcasting the story was an unconstitutional prior restraint.

7. In order for a statement to be considered defamatory, the statement must be false and one that a reasonable person might understand as stating actual facts about the plaintiff, and also damage his or her reputation so as to lower his or her standing in the community, or deter people from associating or doing business with them. Examples of statements that are defamatory on their face are those that imply criminal conduct, professional incompetence, sexual immorality, or a loathsome disease. Facialy innocent statements can also become defamatory when they are combined with unstated facts known to the audience. In this case a woman named Ann Zyme is upset with her daycare provider because she claims that her son was sexually abused by another child at the daycare. In the KRUD-TV news report that described the incident, it was only mentioned that the child was sexually abused while at the daycare and the fact that the acts were done by another child were not detailed in the report. In our society, the words “sexual abuse” in this sense, are largely used in a situation where a younger child is abused by an older adult. Because of this, a reasonable person would come to the conclusion that the child abuse was carried out by an adult who worked at the daycare, therefore suggesting that criminal conduct occurred, that there was professional incompetence by the daycare provider, and sexual immorality was also implied by the news report. The fact that the KRUD-TV news statements fall under the mentioned categories when understood by a reasonable person means that the statements are capable of a defamatory meaning.

8. In order for a statement to be considered defamatory, the statement must be false and one that a reasonable person might understand as stating actual facts about the plaintiff, and also damage his or her reputation so as to lower his or her standing in the community, or deter people from associating or doing business with them. Examples of statements that are defamatory on their face are those that imply criminal conduct, professional incompetence, sexual immorality, or a loathsome disease. Facialy innocent statements can also become defamatory when they are combined with unstated facts known to the audience. In this case a news report stated that Hedda Lettuce, who is the owner of a daycare that has had complaints about child abuse, “worked with Sigmund Frog just before he resigned from Nirvana S&M
University five years ago." Sigmund Frog is described as an expert in the field of childhood development. Frog's career ended when it was discovered that he had images of child pornography on his personal computer that included many of the children he was working with at the university's child care clinic. The Frog scandal was widely reported in Vapid City, where Lettuce's daycare is located, and most residents of the city remember Frog and the pornography scandal. Lettuce had no connection to the pornography scandal or the care clinic, but because those facts were not mentioned in the news report, a reasonable person would connect Lettuce to the scandal based on the fact that she worked closely with Frog. Because it can be inferred that she was connected with the scandal, the statements in the news report suggested criminal conduct, professional incompetence, as well as sexual immorality. As a result, that information would lower her standing in the community, and also deter people from associating or doing business with her. The fact that the statements fall under the mentioned categories when understood by a reasonable person means that the statements are capable of a defamatory meaning.

9. In order for a statement to be considered defamatory, the statement must be false and one that a reasonable person might understand as stating actual facts about the plaintiff, damage his or her reputation so as to lower his or her standing in the community, or deter people from associating or doing business with him or her. Examples of statements that are defamatory on their face are those that imply criminal conduct, professional incompetence, sexual immorality, or a loathsome disease. Facially innocent statements can also become defamatory when they are combined with unstated facts known to the audience. In this case, a news report from KRUD-TV said that Hedda Lettuce and her husband were current members of the Democratic Central Committee. That information was false in this situation because the couple switched parties more than 12 months ago, and is now registered to the Republican Party but not in the central committee. Even though the statement is false, the information linking her to the Democratic Central Committee is certainly not linking her to criminal behavior, professional incompetence, sexual immorality or a loathsome disease. And even though Vapid City is a heavily republican area, the statements are not enough to damage their reputation enough to lower them in the community, or deter people from doing business with the daycare. Therefore, the part of the story that reports on Lettuces' political activities is not capable of a defamatory meaning because they do not fall under any of the categories that would make them defamatory, and they do not damage her reputation or deter people from associating with her.

10. Fair-Report Privilege, also known as Qualified Privilege, states that the publication of defamatory statements made in official documents, official proceedings or public meetings dealing with matters of public concern is privileged if the publication is a full, fair and accurate abridgement of the document, proceeding or meeting. In this case a woman named Ann Zyme is upset with her daycare provider because she claims that her son was sexually abused by another child in the daycare. In the News report that described the incident, it was only mentioned that the child was sexually abused while at the daycare and the fact that the acts were done by another child were not detailed in the report. During the report, Zyme was the only person cited in the portion about the abused child despite the fact that the official DHR report said that "child neglect had not occurred". The KRUD-TV report did not reference the DHR report when talking about the sexual harassment; they only referenced the report when talking about the workers smoking. As a result the station would not be able to use the common-law defense of Fair-Report Privilege in regard to the portion of the story about the
sexual abuse of the 4-year-old, because the statements made by the TV station were not a full, fair or accurate abridgement of a document, proceeding or meeting.

11. Actual Malice implies that the person who is responsible for the publication or the publication itself published the information with knowledge that the communication was false and defamatory, or acted in reckless disregard of whether it was false and defamatory. Reckless disregard means publishing with a high degree of awareness of the probable falsity of the statement. In this case, reporter Rash Limburger reported a story that linked former FBI agent Fox Trotter to a secret “death squad” within the organization. Limburger got his information from Dewey Moss, who is a retired colonel and has been a trusted source of information for Limburger on several occasions. Limburger published what he believed to be facts about Trotter and the “death squad” based on information that Moss had told him. Moss was so confident about what he had told Limburger that he agreed to be named in the story. Although Limburger could not find any other sources to backup the story, but he found a document confirming that a group of FBI agents had received special training from the Army that involved sniper rifles, but the reason was unknown. Assuming that Trotter was able to prove all other elements of a libel suit, including the falsity of the statements, Trotter would not be able to prove actual malice on the part of Limburger or the American Intelligencer because Limburger got his information from a reliable source who he believed to be telling the truth at the time of publication.

12. Actual Malice implies that the person who is responsible for the publication or the publication itself published the information with knowledge that the communication was false and defamatory, or acted in reckless disregard of whether it was false and defamatory. Reckless disregard means publishing with a high degree of awareness of the probable falsity of the statement. One factor that may be used as evidence of actual malice in a case is the use of one unverified anonymous source to provide the basis of the information. In this case, Toliver West was involved in an under the table deal providing Ohadi militants weapons in exchange for money and the release of American hostages. He then used the money to finance anti-communist rebels in the South American country of Anozira. In a story written by reporter Rash Limburger for the American Intelligencer, Limburger accused former FBI agent Fox Trotter, who was a key member of the Vice President’s Task Force on Antiterrorism at the time, of collaborating with West on the secret deal. Limburger based this information on Virginia Hamm, a former staff member of the National Security Council. Hamm told Limburger that she had seen Trotter come to the White House for multiple meetings with West around the time that the Ohadi militants released the hostages, and that her conversations with the two men led her to believe that they were sharing information. Limburger checked with White House records and found that the meetings had indeed occurred around the time that the hostages were released. However, because there is no way to positively conclude what was discussed in the meetings, it cannot be assumed that they were about the Ohadi-Anozira. This makes all of the information regarding this story based on the statements of Hamm, who said that she wanted to remain anonymous in the story. As a result, assuming Trotter was able to prove all other elements of a libel suit, he would be able to prove actual malice on the part of Limburger and American Intelligencer in regard to the allegations about Trotter’s involvement in the Ohadi-Anozira scandal because of the fact that the story is wholly based on information from an unverified anonymous source, making it evidence of actual malice.

14. In order for a statement to be considered defamatory, the statement must be false and one that a reasonable person might understand as stating actual facts about the plaintiff, damage his or
her reputation so as to lower his or her standing in the community, or deter people from associating or doing business with him or her. Examples of statements that are defamatory on their face are those that imply criminal conduct, professional incompetence, sexual immorality, or a loathsome disease. In this case, Karen Wright and Martha Dobie, who run an all girls boarding school, have been accused of having a sexual lesbian affair with one another. The rumor was spread by one of the students at the school named Mary Tilford, who told her grandmother, Mrs. Amelia Tilford. Amelia Tilford went on to tell many of her friends, who also have children at the school. In a state like Nebraska, the views of the general public tend to be on the conservative side concerning same sex relationships compared to other places in the Country. The views of the general public regarding same sex relationships are what I would consider to be fairly negative, and Nebraska does not allow same sex marriages. As a result of this negative view held by the general public, statements alleging a lesbian affair would be capable of defamatory meaning because they imply sexual immorality and professional incompetence as the two are business partners, and the statements also have the potential to lower their standing in the community and deter people from associating or doing business with them.
1. Is the mayor's decision to deny a permit for the NARS rally consistent with the standards of the Brandenburg test? Why or why not?

The Brandenburg Test states that there must be intent for violence, the imminence of the lawless action and that it must be likely to happen. In the case of Mayor Brooke and the NARS group, the mayor had every right to not approve the permit. Based on last year's number of increased arrests due to disturbance, the number went up 50 percent from the typical day. There is a history of this rally becoming violent. Also, based on what the president of the group said in a speech to rally-goers, a call to break the law was made clear.

3. Was the arrest of Bud Wiser for burning the effigy of Penny Lane consistent with the Virginia v. Black decision of the U.S. Supreme Court? Why or why not?

In Virginia vs. Black, the U.S. Supreme Court struck down the charges because of the prima facie evidence in the case. It made the assumption that all cross-burnings were done with intent to threaten. In the Bud Wiser case, the authorities had every right to arrest him. The doll, or effigy, he created and then burned was clearly labeled as one person. It was not a generic burning that could be taken as a symbolic ritual for a certain sub-culture. Because he specifically named one person in his act of burning the effigy, it could be considered a threat, unlike in the Black vs. Virginia case where there was never any one person singled out.

4. Using the guidelines derived from the Pentagon Papers case, would the CIA be able to obtain an injunction preventing publication of Thrillin's article in Peace Now? Why or why not?

According to the precedent set by the Pentagon Papers, the CIA would not be able to prevent the publication of Thrillin's article. In the Pentagon Papers, the information was published at least four years after the events and in Thrillin's case, the events detailed happened about 20 years before. Also, the CIA was concerned that they could be dangerous to the agents who were mentioned in the information, but none of them were named, so it would be difficult to identify them after so much time had passed. In the case of the Pentagon Papers, the court ruled that the public had a right to know the goings on of their government, and in this case the same holds. There is no threat for immediate or likely violence following the release, so it wouldn't be a matter of national security.

6. Using the guidelines derived from the Pentagon Papers case, would FBC be able to obtain a court declaration that preventing Ravioli from broadcasting his story on
the assault on the Ohadi bridge was an unconstitutional prior restraint? Why or why not?

In the case of Geraldo Ravioli, the military had the right to prior restraint. But airing the details of an assault that had not happened and actually mapping out the plan, he put the troops in his regiment, and potentially more who would need to come in as back up, in danger. In this case, the prior restraint is constitutional because by airing the details of the planned attack, Ravioli was putting himself, other troops and the overall plan of the speediness of the time in Ohadi in jeopardy and potentially severe danger.

7. Is the portion of the KRUD-TV story about the sexual abuse of the 4-year-old capable of a defamatory meaning? Why or why not?

The part of the KRUD-TV broadcast explaining the alleged sexual abuse of the child can be defamatory for Hedda Lettuce. The story did not explain that the offender was another child, and by associating her name with the locally well-known case of Sigmond Frog, a reasonable person could deduce that she would have a history of child sexual abuse, even though she was not directly involved in either case. Sexual abuse, especially child sexual abuse, is illegal and considered to be highly immoral by most reasonable people. The allegations could definitely be defamatory. And if she could prove that she had suffered the medical conditions she had and lost customers at her daycare immediately following the broadcast, she would have a real case proving defamation.

8. Is the portion of the KRUD-TV story describing Lettuce’s association with Sigmund Frog capable of a defamatory meaning? Why or why not?

Hedda Lettuce’s broadcasted association with Sigmond Frog would be capable of defamatory meaning. Because his case was known so well to anyone in the community, they would know that he was charged with having child pornography. Madhaus’ story did not directly say that Lettuce was involved in Frog’s incident, but it also didn’t mention that another child at the day care was the offender to Zyne’s child. Any relatively informed person could reasonably assume that based on the current story of sexual assault and the past story of child pornography by Lettuce’s professor, that she had a history involving child sexual abuse of some nature. By neglecting to include the information of the other child and neglecting to clarify Lettuce’s involvement (or lack there of) in the Frog case, Madhaus created a defamatory meaning in her story.

9. Is the portion of the KRUD-TV story reporting on the Lettuces’ political activities capable of a defamatory meaning? Why or why not?

The explanation of Lettuce’s political associations, though not current, would not be considered defamatory. It is not illegal to be a Democrat or a Republican. Also, if people did drop out of her daycare because of what they saw on the
broadcast, most people would assume it was because of the sexual abuse allegations, not her political party. So she could not prove any directly immediate loss because of that part of the broadcast.

11. Assuming Trotter was able to all other elements of a libel suit, would he be able to prove actual malice on the part of Limburger and American Intelligence in regard to the allegations about the death squad? Why or why not?

Trotter wouldn’t be able to prove actual malice against Limburger in regards to death squad allegations. Actual malice means purposefully neglecting to gather more information or publishing information that the reporter knew to be false. Based on Limburger’s research, Dewey Moss was a historically reliable source and he was willing to have his identity published with his side of the story. Also, Limburger found FBI documents that would seem to verify the existence of training for a new sniper team in the FBI. Based on the information Limburger was given and the outside research he was able to obtain, one could reasonably assume that Trotter had some sort of involvement with a death squad (which may not be the politically correct title, but that is beside the point). As far Limburger could deduce about this portion of “The Politics of Terror” story, this was all trustworthy and verifiable information.

13. Assuming Trotter was able to prove all other elements of a libel suit, would he be able to prove actual malice on the part of Limburger and American Intelligence in regard to the allegations about the cover-up of the reasons for the bombing of Flight 333? Why or why not?

In this aspect of the story, Trotter would be able to prove actual malice. Actual malice means purposefully neglecting to gather more information or publishing information that the reporter knew to be false. He only had one source, Dana Skullduggery, who basically just had a hunch about Trotter’s potential involvement in the Flight 333 case. He could find no one else to back it up and he could find no documentation to defend the story. In fact, when he spoke with Trotter and two other people about the conversation between Skullduggery and Trotter, no one confirmed that the conversation had even taken place. Limburger published the information with having more information to back it up, thus it was published with reckless disregard as to whether the information was true or false.

14. Karen Wright and Martha Dobie claim to have been defamed. What are the statements about which they complain? Are those statements capable of a defamatory meaning?

Karen and Martha claim they have been defamed in their community because they were allegedly having and affair, especially a homosexual affair. They claim the Amelia’s claims against them were unfounded and caused them harm. In this case, the claims do have defamatory meaning. Not so much that it was a lesbian relationship, but that it was an affair, made the ordeal worsen. Also, because the
two women ran a boarding school for girls, that would mean they were carrying out their affair around the children, which is considered immoral by most reasonable people. They could prove that they were directly harmed by the allegations because they had students drop out right away, Karen felt compelled to break up with her fiancé and Martha actually ended up committing suicide.
Mass Media Law Test #2

1. Would Torquemada be able to show that the information in the Chronicle story pertained to his private life, as required by the second element of an action for publicity to private facts? What information would and would not be considered private under the law and why?

Torquemada would be able to show that some of the information in the Chronicle story pertained to his private life, as required by the second element of an action for publicity to private facts.

The second element—private facts—states only the disclosure of private facts is actionable. Publicity to public information or matters that occur in public cannot be the basis for a lawsuit. Private facts usually pertain to topics of sexual relations, disgraceful illnesses, intimate personal letters, family relationships and personal finances.

Reporter Walter Crankcase interviewed Sam Stone, Rosetta Stone, the Stone children, close friends of both families and Torquemada. Crankcase was able to gather information on where and how often Torquemada and Rosetta met; how they maintained an apartment in Vapid City after moving there; how they liked to exchange gifts of underwear and lingerie; and how they liked to videotape themselves after making love. Crankcase was also able to obtain records from the Stone’s divorce trial which is public record. The court documents contained details about the financial managements Torquemada made for the daughter he fathered by Rosetta.

According to the law, any information gathered from public records about the Stone’s divorce trial would be legal to print because it has already been made public. The fact that Rosetta and Torquemada maintain an apartment in Vapid City would not be protected under private facts. Place of residence can be found in public record.

One subject matter private facts usually protects is sexual relations. The private facts that should be withheld from this story deal with sexual relations. The information on where and how often Torquemada and Rosetta met; how they like to exchange gifts of underwear and lingerie; and how they like to videotape themselves after making love should be withheld.

2. Would Torquemada be able to show that the information in the Chronicle story was highly offensive to his private life, as required by the third element of an action for publicity to private facts? What information would and would not be considered highly offensive under the law and why?

Torquemada would be able to show that some of the information in the Chronicle story pertained to his private life, as required by the second element of an action for publicity to private facts.

To be highly offensive, the unreasonable publicity must be highly offensive to a reasonable person. Minor and moderate annoyance is not enough. It is only considered highly offensive when a reasonable person would feel seriously aggrieved.

Reporter Walter Crankcase interviewed Sam Stone, Rosetta Stone, the Stone children, close friends of both families and Torquemada, himself. Crankcase was able to gather information on where and how often Torquemada and Rosetta met, how they maintained an apartment in Vapid City after moving there, how they liked to exchange gifts of underwear and lingerie, and how they liked to videotape themselves after making love. Crankcase was also able to obtain records from the Stone’s divorce trial which is public record. The court documents contained details about the financial managements Torquemada made for the daughter he fathered by Rosetta.

Highly offensive material would be the release of information on how Torquemada and Rosetta liked to exchange gifts of underwear and lingerie and how they liked to videotape themselves after making
love. All of the other information (where and how often they met; how they maintained an apartment together in Vapid City; and how Torquemada supported his daughter through financial arrangements) is public knowledge or would not be considered highly offensive to a reasonable person.

4. Would Stilton be able to prove Profit & Grumble and its ad agency infringed on her right of publicity?

Stilton would be able to prove Profit & Grumble and its ad agency infringed on her right of publicity. There are three elements that must be met to meet the right of publicity.

Element one is the use of a distinctive element of the plaintiff’s identity to defendant’s commercial advantage. In this case, the actress has been hired to be a resemblance of Stilton from her height, weight, body proportions, hairstyle, hair coloring, and makeup. Even the actress’s reply of “That’s not” is similar to Stilton’s trademark phrase “That’s not” used in her show. All of the previously mentioned items when looked at as a whole suggest that the actress in the commercial is Paris Stilton. Element one is met.

The second element is there must be a lack of consent by plaintiff. Paris Stilton was not asked whether or not Profit & Grumble could use elements when used together represent Stilton from her show. She does not seem to have given her consent to Profit & Grumble. Therefore, the second element is met.

The third element is injury to the plaintiff this injury can be the loss of opportunity for plaintiff to capitalize on her identity either economically or as loss of image control. The account manager duplicated so much of Paris Stilton’s TV persona that it is reasonable to argue she has loss control of her image. Also, the account manager of the advertising agency seems to have wanted to capitalize on representing the waitress on Paris Hilton. Element three is met.

7. Would Bitsosushi be able to show the statements in Fjord’s Color-and-Comfort Spot was false and misleading under the Lanham Act? Why or why not? P. 170

Bitsosushi would be able to show the statements in Fjord’s Color and Comfort Spot were false and misleading under the Lanham Act. Under the Lanham Act, a plaintiff must demonstrate the falsity of the challenged advertising by proving that it is either (1) literally false, as a factual matter; or (2) implicitly false, i.e. although literally true, still likely to mislead or confuse consumers. The false or misleading statement must be material. The advertisement should be considered in its entirety. The visual images in a commercial must also be considered in assessing falsity.

To prove an advertisement claim literally false, the plaintiff must prove that the tests referred to were not sufficiently reliable to permit one to conclude with reasonable certainty that they established the proposition for which they were cited. When a superiority claim doesn’t purport to rest on test results, the plaintiff must prove falsity only upon adducing evidence that affirmatively show’s defendant’s claim to be false.

If the case is about an implied falsehood, the plaintiff must demonstrate by extrinsic evidence that the challenged commercials tend to mislead or confuse consumers. The trial judge must first determine what message was actually conveyed to the viewing audience and then determine the truth or falsity of message. Implied claims are usually proven through a consumer survey that shows a substantial percentage of consumers taking away the message that the plaintiff contends the advertising is conveying. Cases have held that 20 percent would constitute a substantial percentage of consumers. District courts will then evaluate whether the message is false or likely to mislead or confuse. Other factors to be considered will be the commercial context, the defendant’s prior advertising history and the sophistication of the advertising audience. The plaintiff may prove implied falsity claim without relying on consumer
survey if the plaintiff can adequately demonstrate that a defendant has intentionally set out to deceive the public and the defendant’s deliberate conduct in this regard is of an egregious nature.

Bitsosushi is able to challenge Fjord’s advertising as implicitly false. In the “Color-and-Comfort Spot”, the woman actress talks about how the Fjord Expire has more color variety than the other popular SUV directly referring to Bitsosushi Tuna. Fjord and Bitsosushi are direct competition. The man also comments about how the Fjord Expire has more room than a tin can referencing the Bitsosushi Tuna. Bitsosushi Tuna is offered in 12 different colors; two more colors than the Fjord Expire. In addition, Bitsosushi contends that the Tuna has only 2 percent less passenger space than the Fjord Expire which is hardly noticeable. From a researcher Bitsosushi hired, the research company found that the color-and-comfort commercial had 28 percent of consumers believing that the Fjord Expire had substantially more interior room than the Bitsosushi Tuna. Likewise, 54 percent of consumers believed that the Expire was available in more colors than the tuna. Both percentages are higher than the 20 percent precedent set by prior cases to constitute a substantial percentage of consumers believing Fjord’s claims about how the Expire is better than the Tuna.

Additionally, Bitsosushi has experienced a 7 percent drop in sales and gross revenues since the release of the Fjord ads. Bitsosushi dealers also reported dramatic declines in the number of potential customers entering their showrooms.

8. Would Fjord be able to prove that Bitsosushi’s “Power Plus” commercial was false and misleading under the Lanham Act? Why or why not?

Fjord would not be able to prove that Bitsosushi’s “Power Plus” commercial was false and misleading under the Lanham Act.

Under the Lanham Act, a plaintiff must demonstrate the falsity of the challenged advertising by proving that it is either (1) literally false, as a factual matter; or (2) implicitly false, i.e. although literally true, still likely to mislead or confuse consumers. The false or misleading statement must be material. The advertisement should be considered in its entirety. The visual images in a commercial must also be considered in assessing falsity.

To prove an advertisement claim literally false, the plaintiff must prove that the tests referred to were not sufficiently reliable to permit one to conclude with reasonable certainty that they established the proposition for which they were cited. When a superiority claim doesn’t purport to rest on test results, the plaintiff must prove falsity only upon adducing evidence that affirmatively show’s defendant’s claim to be false.

If the case is about an implied falsehood, the plaintiff must demonstrate by extrinsic evidence that the challenged commercials tend to mislead or confuse consumers. The trial judge must first determine what message was actually conveyed to the viewing audience and then determine the truth or falsity of message. Implied claims are usually proven through a consumer survey that shows a substantial percentage of consumers taking away the message that the plaintiff contends the advertising is conveying. Cases have held that 20 percent would constitute a substantial percentage of consumers. District courts will then evaluate whether the message is false or likely to mislead or confuse. Other factors to be considered will be the commercial context, the defendant’s prior advertising history and the sophistication of the advertising audience. The plaintiff may prove implied falsity claim without relying on consumer survey if the plaintiff can adequately demonstrate that a defendant has intentionally set out to deceive the public and the defendant’s deliberate conduct in this regard is of an egregious nature.
The plaintiff, Fjord, would be unable to prove literal or implicit falsity. The commercial compares the Tuna’s standard engine and its performance directly to the Fjord’s standard engine. Admittedly, Bitsosushi does not clarify that the Fjord’s front-wheel drive model accelerates at a faster speed than the four-wheel drive in the Tuna. They also do not clarify that Fjord’s Expire offers an optional engine that is comparable to the Tuna’s engine and that this optional Fjord engine is sold more than the standard engine. The main point here is that the commercial focuses on the standard engine for both Fjord and Bitsosushi.

Fjord claims that the sales gap between Expire and Tuna halted after the release of the “Power Plus” campaign. Fjord hired a research firm to conduct consumer surveys. The surveys found that 30 percent of viewers of the commercial took away the message that the Tuna is more powerful and accelerates faster than most other SUVs. Fjord could possibly prove a change in consumer perception that is above the 20 percent allowed from this survey to prove falsity. However, this commercial compared the standard engines and by comparison the standard engine was more powerful in the Tuna.

Nineteen percent of viewers took away the message that the Tuna outperforms all other SUVs and 14 percent of viewers took away the message that all Tuna SUVs outperform all Expire SUVs. These two percentages are not high enough to meet the precedent for implied falsehood.

9. Do the advertisements for Drole’s CranVocado juice violate FTC rules on deceptive advertising in their claims for the benefits of the product and the level of substantiation for those claims? Why or why not?

The advertisements for Drole’s CranVocado juice violate FTC rules on deceptive advertising in their claims for the benefits of the product and the level of substantiation in those claims.

The FTC rules on substantiation are advertisers must be prepared to substantiate claims, particularly as to efficacy of drugs. The advertiser must have competent, reliable scientific evidence. The amount and kinds of evidence may depend on the claim and the product.

Drole alleged that drinking CranVocado could help prevent premature aging, heart disease, stroke, Alzheimer’s, and even cancer in the first ad. The second ad claimed drinking CranVocado could reduce plaque up to 30 percent according to unnamed scientific research. The third commercial alleged that drinking CranVocado on a daily basis could reduce the number of times you have to go to the bathroom. The third commercial did cite a quote from Dr. Alfred Addled placing written so that it is inferred that the doctor was referring to CranVocado specifically in the commercial. The fourth commercial alleged that a pilot study in the World Quarterly of Impotence Studies found CranVocado to have beneficial effects on erectile dysfunction.

No research has established that CranVocado or any other product containing antioxidants is effective in preventing, treating, or curing heart disease; reducing arterial plaque; or lowering blood pressure on its own. FTC investigators did not find a doctor who would or should prescribe CranVocado or any other product for use by patients with heart problems or at risk of heart disease simply on the basis of this product having high levels of antioxidants.

Plus, the studies Drole cited were not up to standard for testing the efficacy of any drug or product for treatment of specific diseases. The pilot study conducted for erectile dysfunction had several errors. It was not randomized or a controlled clinical trial with multiple groups of test subjects including a placebo group. The study found significantly longer PSA doubling times was not designed to establish a causal relationship between the consumption of CranVocado and reduced risk of prostate cancer.
10. Do the commercials for Drole’s CranVocado juice that uses Joe Wyoming as a spokesperson violate FTC rules on deceptive advertising and rules regarding endorsements? Why or why not?

The commercials for Drole’s CranVocado juice that uses Joe Wyoming as a spokesperson violate FTC rules on deceptive advertising and rules regarding endorsements.

The rule on celebrity endorsements is that the audiences are presumed to understand that endorsers are paid. Other connections between the endorser and the product that might materially affect the credibility of the endorsement must be disclosed. Disclose if the endorser is an officer in the advertising company. Disclose if the endorser is a major stockholder in the company. Disclose if the endorser is a member of the company’s board of directors. Disclose if the endorser is receiving a percentage of product sales.

According to the rule on celebrity endorsements, Drole does not need to inform viewers that Wyoming is a paid endorser. That fact is taken for granted. Wyoming also meets the general endorsement guidelines. He drinks CranVocado on a regular basis and has a slightly enlarged prostate. Wyoming runs into endorsement problems, because he is a stakeholder of Drole owning $1.35 million worth of stock and sits on the Company’s board of directors. This information was not disclosed in the commercial. He is also taking a prescription medicine in addition to drinking CranVocado to help with his prostate cancer which he did not disclose either.

11. Do the advertisements for Drole’s CranVocado juice violate FTC rules on deceptive advertising in their claims about a special price reduction for the product? Why or why not?

The advertisements for Drole’s CranVocado juice would violate FTC rules on deceptive advertising in their claims about a special price reduction for the product.

The FTC has three deceptive pricing guidelines:

1. Former-price comparisons. Former prices should be one at which the product was openly and actively offered for sale over a period of time. Should not be a price that was used in the remote past.
2. Retail-price comparisons. Advertisers should be reasonably sure that the higher price is one at which substantial sales of the item are being made in the trade area.
3. List-price comparisons. List price must be one at which the articles are sold at the principal retail outlets in the trade area.

All four advertisements announce a special offer claiming that for a limited time consumers can buy a 64-ounce bottle of CranVocado for $8 instead of its normal price of $12.99. Drole officials decided to reduce the base price of CranVocado after its disappointing first year sales and to make it more comparable to the price of other health drinks in the market. The reduced base price will be $8.75. Drole plans to let the special offer expire in three months, and reduce the normal price from $12.99 to $8.75.

This change in normal price is deceptive under the former-price comparison. The product was not sold actively over a period of time at the price of $12.99 which the sale ad claims was the original price. This product will go instead directly from the sale price of $8 to $8.75 which is deceptive. This no longer allows for the claim that CranVocado is 40 percent off the original price.
12. What is the governmental interest motivating the prohibition on distribution of advertising promoting contraceptives? Is it a substantial one under the second prong of the Central Hudson test? Why or why not?

The governmental interest motivating the prohibition on distribution of advertising promoting contraceptives is to shield residents from materials that may be offensive to them and to help parents control the manner in which their children become informed about sex and birth control.

The second prong of the Central Hudson test is whether the asserted government interest for the regulation is substantial.

Phalanx Pharmaceuticals produced a pamphlet that describes various kinds of STDs and how to use condoms to reduce the risk of contracting such diseases. Part of the pamphlet discussed the advantages of Spartan prophylactics specifically. Seven medical doctors, all experts in reproductive health, concurred that the pamphlet was factually accurate and made no unsubstantiated claims for the efficacy of condoms. A panel of religious leaders and educators agreed the information was presented in a tasteful manner.

The local ordinance allows some distribution of information about contraceptives. The ordinance does not prohibit distribution of publications that discuss sex or contraception. Nirvanans for Life circulated literature describing the abortion process and psychological effects afterward. Planned Parenthood also distributed literature describing means of contraception. Only literature that is an advertisement for contraceptive drugs or devices is barred from door-to-door distribution in Paradise City. The city has even allowed the distribution of materials promoting a gentlemen’s club. The ban only applies to door-to-door distribution. The same information can be distributed by mass media or U.S. mail.

In this case, the asserted governmental interest is not substantial enough. The pamphlet distributed by Phalanx Pharmaceutical was overall informational and approved by expert medical doctors, religious leaders, and educators. The local government allows the distribution of abortion and contraception by Planned Parenthood and Nirvanans for Life. Plus the city allowed door to door distribution of materials promoting a gentlemen’s club. The biggest deciding factor is that the city allows the type of information delivered by Phalanx Pharmaceutical if it is delivered by mass media or U.S. mail so why can’t it be delivered door to door when other information that could be considered just as controversial such as abortion or contraception is allowed to be delivered door to door.

13. Does the ordinance directly advance the governmental interest as required by the third prong of the Central Hudson test? Why or why not?

The ordinance does directly advance the governmental interest as required by the third prong of the Central Hudson test.

The third prong of the Central Hudson test is whether the regulation directly advances the governmental interest. The governmental interest mentioned is to shield resident from materials that may be offensive to them and to help parents control the manner in which their children become informed about sex and birth control.

The ordinance does advance the governmental interest because it does not allow door-to-door delivery about sex and birth control. Children may answer the door and be presented with this information as was the case here.

The ordinance does allow information about sex and birth control to be delivered by mass media or U.S. mail. Parents are able to limit children from viewing mass media and can put restrictions on who gets the mail so that children do not have access to materials on sex and birth control before their parents are able to intervene.
1. In order for a statement to fall under the second element of an action for publicity to private facts, the statement must contain information that is considered to be a matter concerning the private life of another. In this case, Tom Torquemada, an attorney, was investigating allegations that Gov. Hugh Mongus had received bribes from businesses. Sam Stone became angry when he heard Torquemada speak about restoring morality and trust in Nirvana government because Torquemada had previously engaged in a sexual affair with Stone's wife, Rosseta. Stone went to Walter Crankcase, a reporter, and told him about the love affair that ruined his marriage. After their conversations, as well as conversations with Rosetta Stone, the Stone children and other close friends of the two families, Crankcase learned about how often Rosetta and Torquemada had met, how they maintained an apartment in Vapid City, how they liked to exchange gifts of underwear and lingerie and how they liked to videotape themselves making love. Crankcase also gathered information about the Stone divorce trial from public records and published a story about the affair containing all of the mentioned details. Under publicity of private facts restrictions, Torquemada would be able to show that the information in the Chronicle story pertained to his private life as required by the second element of an action for publicity to private facts. The information regarding the intimate facts of Torquemada's affair with Rosetta Stone, such as where and how often they met, the kinds of gifts they exchanged, and elements of their sexual practices would all be considered private facts because only a few people close to Torquemada and Rosetta knew about those details. The information regarding the Stone divorce, and the financial arrangements Torquemada made for the daughter he fathered by Rosetta would not be considered private facts, because that information was gathered from public documents.

2. In order for a statement to fall under the third element of an action for publicity to private facts, the statement must contain information that would be highly offensive to a reasonable person. In this case, Tom Torquemada, an attorney, was investigating allegations that Gov. Hugh Mongus had received bribes from businesses. Sam Stone became angry when he heard Torquemada speak about restoring morality and trust in Nirvana government because Torquemada had previously engaged in a sexual affair with Stone's wife, Rosseta. Stone went to Walter Crankcase and told him about the love affair that ruined his marriage. After their conversations, as well as conversations with Rosetta Stone, the Stone children and other friends of the two families, Crankcase learned about how often Rosetta and Torquemada had met, how they maintained an apartment in Vapid City, how they liked to exchange gifts of underwear and lingerie and how they liked to videotape themselves making love. Crankcase also gathered information about the Stone divorce trial from public records and published a story about the affair containing all of the details. Under publicity of private facts restrictions, Torquemada would be able to show that some of the information in the Chronicle story would be highly offensive to a reasonable person. The information regarding the affair itself, the fact that Torquemada had a child with Rosetta as a result of the affair, tore apart the Stone marriage, and videotaped sexual acts would all be considered highly offensive to a reasonable person because our society does not view those actions as acceptable. The information regarding the Stone divorce in general, however, would not be considered to be highly offensive to a reasonable
person because divorce is a somewhat regular event in our society, and most people are understanding when a couple gets divorced.

4. Right of publicity is designed to protect any distinctive and readily recognizable aspect of a famous person’s identity. One aspect of right of publicity is the use of a distinctive element of the plaintiff’s identity to the defendant’s commercial advantage. Other aspects include the lack of consent by the plaintiff and injury to the plaintiff, which can be equated to the loss of opportunity for the plaintiff to capitalize on his/her identity. In this case, Profit & Grumble ran a series of advertisements promoting their dish soap. In the advertisements, the company used an actress that had her physical appearance altered to closely resembled Paris Stilton and she was performing unusually dirty activities, as Stilton is known for in her reality show. The actress also used the phrase “That’s not!” in the commercial, which is very similar to the “That’s snot!” phrase that Stilton is known for and has trademarked. While viewed separately, the physical appearance of the actress and the tasks she is performing aren’t necessarily associated with Stilton. However, when you put the physical features and the actions together with the phrase at the end of the commercial, there are clearly distinctive elements of Stilton’s identity used to Profit & Grumble’s advantage. Stilton did not give the company her consent to do this, and thus it qualifies as injury to her because she was not able to capitalize on her identity. Therefore, Stilton would be able to prove Profit & Grumble and its ad agency infringed on her right of publicity.

6. The Lanham Act imposes a civil liability on anyone who, in connection with any goods or services in commerce, conveys any false or misleading description in advertising or promotions that misrepresents the nature, characteristics, qualities, or geographic origin of another’s goods, services, or commercial activities. Elements of action under the Lanham Act include False or misleading statements about another’s product, a tendency to deceive the intended audience, material deception—deception that influences a person’s decision to buy that product or not—or a likelihood of injury to the plaintiff. In this case, Fjord motor Inc. made “The Safety Claim” commercial to show that Fjord’s Expire SUV was less likely to roll over than Bitsosushi Motor Co.’s Tuna SUV. The commercial showed both cars going through seemingly identical test courses and resulted in the Tuna swaying off balance, and if it weren’t for the outrigger wheels it would have rolled over, while the Expire did not show signs of this. Bitsosushi tried to replicate the test but was unable to do so, and a Fjord test driver later admitted that the course was set up in a way that would allow the Expire to make it through with no problems, but make the Tuna show signs of rolling over. Fjord made the claim that the test was “clear proof the Expire is the safer SUV” at the end of the commercial. Thus, Bitsosushi would be able to show that the statements in Fjord’s “The Safety Claim” spot were false and misleading under the Lanham Act because the statements described the Tuna is less safe than the Expire when in fact there is no conclusive evidence of this since the test was rigged. That description also misrepresents the qualities of the two cars regarding the safeness of the Expire compared to that of the Tuna, and could potentially influence customers to buy the product.

7. The Lanham Act imposes a civil liability on anyone who, in connection with any goods or services in commerce, conveys any false or misleading description in advertising or promotions that misrepresents the nature, characteristics, qualities, or geographic origin of another’s goods, services, or commercial activities. Elements of action under the Lanham Act include False or misleading statements about another’s product, a tendency to deceive the intended audience, material deception—deception that influences a person’s decision to buy that product or not—
or a likelihood of injury to the plaintiff. In this case, Fjord motor Inc. made the “Color-and-Comfort” commercial that compares the Expire and the Tuna on comfort and styling. The commercial shows two actors getting into a car while one says “Wow! This is so roomy and comfortable. I don’t feel like I’m being packed in a tin can like I did with the other SUV we tested.” The other actor then says “These colors are fabulous! And there’s so much more variety than there is the other popular SUV.” While neither of those statements specifically reference the Tuna, there is the “tin can” reference and references to “the other popular SUV” that implies the commercial is referring to the Tuna and Bitsosushi has statistics showing that reasonable consumers made connections between the two SUVs as a result of the commercial. When consumers were asked, 28 percent said that they thought that the Fjord Expire had substantially more interior room than the Tuna as a result of the commercial, and 54 percent said that they gathered the Expire was available in more colors than the Tuna. The Tuna has only 2 percent less passenger space than the Expire, not enough for anyone to notice a difference, and the Tuna is available in two more colors than the Expire. Therefore, Bitsosushi would be able to show that the statements in Fjord’s “Color-and-Comfort” commercial were false and misleading under the Lanham Act because Fjord unjustifiably implies that the Expire has substantially more interior room than the Tuna, which it does not, and is available in more colors than the Tuna, which is also false, and these implications have clearly cause confusion among some consumers.

9. The FTC defines deceptive advertising as a deceptive act or practice that must be likely to mislead consumers who are acting reasonably in circumstances, and the act or practice must be material. The FTC has determined that if an implicit claim is false, it will consider the ad deceptive. In this case, the Drole Fruit & Vegetable Corp. was promoting their CranVocado drink with a national advertising campaign through cable television as well as print outlets. In the advertisements, Drole claims that because the drink has more antioxidants than any other drink, it can help prevent prostate cancer, heart disease and erectile dysfunction (along with more diseases). They claim that eight ounces a day can significantly reduce the risk of the mentioned diseases. The FTC concluded that the advertisements implicitly argued that free radicals cause or contribute to heart disease; CranVocado contains antioxidants that neutralize free radicals; therefore, CranVocado is effective for treating heart disease. However, even though some research has shown that antioxidants reduce free radicals and free radicals contribute to heart disease (or other ailments mentioned), no research has established that CranVocado or any other product containing antioxidants is effective in preventing, treating or curing heart disease (or other ailments mentioned). The FTC also determined that the studies that Drole cites in the advertisements were not of the kind that most doctors and researchers rely on to establish the efficacy of any drug or product for the treatment of specific diseases. Thus, the advertisements for Drole’s CranVocado juice violated FTC rules on deceptive advertising in their claims for the benefits of the product and the level of substantiation for those claims because Drole implied that CranVocado would help prevent these diseases when in fact there is no scientific evidence that the juice does such things, and those implications could lead a reasonable consumer to purchase the product.

10. The FTC defines deceptive advertising as a deceptive act or practice that must be likely to mislead consumers who are acting reasonably in the circumstances, and the act or practice must be material. With regard to endorsements, the FTC contends that the message must reflect the honest opinions, findings, beliefs, experience of the endorser, may not distort the endorser’s opinion or experience, and the endorser must be a good faith user of the product as long as the
campaign runs. If the endorser is an officer, major stockholder, a member of the company’s board of directors, or is receiving a percentage of the sales, that information must be disclosed in the advertisement. In this case, Joe Wyoming, a famous pro football quarterback was a spokesman for Drole Fruit & Vegetable Corp.’s CranVocado juice that the company claimed could help with heart disease, PSA and ED. Wyoming claims that drinking eight ounces of the juice each day has dramatically reduced the number of bathroom urges he has daily. Wyoming is a stockholder in the company, with $1.35 million invested in the company, and is also on the company’s board of directors. Those facts were not mentioned in the commercial, but it can be assumed that Wyoming is a paid endorser. The commercials for Drole’s CranVocado juice that use Joe Wyoming as a spokesman violate FTC rules on deceptive advertising and rules regarding endorsements because although Wyoming drinks CranVocado, he is also on prescription medicine to treat his enlarged prostate, which is not mentioned in the commercial, and it violates the rules regarding stockholders and board members by not disclosing those facts.

11. The FTC defines deceptive advertising as a deceptive act or practice that must be likely to mislead consumers who are acting reasonably in the circumstances, and the act or practice must be material. The FTC also regulates deceptive pricing, stating that when running an item on sale, the list price, or recommended retail price, must be one at which the articles are sold at the principal retail outlets in the trade area. In this case, in every copy advertisement, a special offer was made to introduce customers to CranVocado. The ad states that for a limited time, a 64 ounce bottle of CranVocado will be offered for $8, down from the normal price of $12.99. $12.99 was the initial price for CranVocado when it first came on the market last year, but through research, Drole has decided to sell the drink at $8.75 after the special is over in three months. The advertisements for Drole’s CranVocado juice violate FTC rules on deceptive advertising in their claims about a special price reduction for the product, because the list price, $12.99, which they were advertising the 40 percent off sale from, is not a price at which the product is sold at principal retail outlets in the trade area.

12. The second prong of the Central Hudson test deals with whether or not the asserted governmental interest for the advertising regulation is substantial. In this case, Phalanx Pharmaceuticals produced a factually accurate pamphlet entitled “Condoms and Sex” that promotes its Spartan-brand prophylactics. The pamphlet mostly covers different kinds of sexually transmitted diseases and how the use of condoms can reduce the risk of such diseases. Phalanx distributed the advertisements door to door, which is not legal in the city of Nirvana because, while other advertisements are legally distributed door to door, the city does not allow advertisements promoting goods that are designed, adapted, or intended for the prevention of conception to be delivered door to door. The governmental interest in this case is to shield residents from materials that may be offensive to them and to help parents control the manner in which their children become informed about sex and birth-control. This interest would be substantial under the Central Hudson test because sexual education is a sensitive issue in our society, and most parents prefer to have conversations with their children about sexual education on their own terms, rather than them finding out from other sources, such as this pamphlet.

13. Under the third prong of the Central Hudson test, it is required that the regulation of advertisement directly advance the governmental interest that has been given as the reason for regulation. In this case, Phalanx Pharmaceuticals produced a factually accurate pamphlet
2. Would Torquemeda be able to show that the information in the Chronicle story was highly offensive as required by the third element of an action for publicity to private facts? What information would and would not be considered highly offensive under the law and why?

To determine whether or not a piece of information would be considered highly offensive in a legal case, it must be considered highly offensive by a normal, reasonable person. It doesn’t matter so much if the information revealed is highly offensive to the person bringing the matter to court or to a highly sensitive person. In the case of an affair, it could be considered highly offensive. Most people do not want news of theirs affairs to be made public. However, Torquemeda was now considered a public personality and was promoting the value of morality in his public speeches. Historically, the courts have sided with mass media in cases regarded publicity of private facts, and in this case, I think Torquemeda would not be able to argue the offensiveness of the story, because it would be outweighed by the legitimate public concern.

3. Would Torquemeda be able to show that the information in the Chronicle story was not of legitimate public concern as required by the fourth element of an action for publicity of private facts? What information would and would not be considered of legitimate public concern in the law and why? (You must use the approach described in Shulman v. Group W Production in answering this question.)

In most cases regarding publicity of private facts, the courts will use the whether or not the information is of legitimate public concern as the main determinant of the case. As shown in the decision in the Shulman v. Group W Production, the newsworthiness of the information, outweighs the offense taken by the person bringing the case to court. Even though the plaintiffs did not consent to the information being broadcast, it was still considered newsworthy information. The plaintiffs were not public figures either. Torquemeda is considered a public official, only slimming his chances of winning the case based on the publicity of private facts. He is a public official and the information that was published was true and was of legitimate public concern because of the kind of work he does and his public philosophy on the morality of government.

4. Would Stilton be able to prove Profit & Grumble and its ad agency infringed on her right of publicity?

The Profit and Grumble ad case is similar to the Vanna White v. Samsung Electronics case. The ad was definitely designed to have the actress resemble
7. Would Bitsosushi be able to show the statements in Fjord's "Color-and-Comfort" were false and misleading under the Lanham Act? Why or why not?

The Lanham Act uses three main criteria to determine a false or misleading ad. (1) What message, either explicitly, or implicitly, does the ad convey? (2) Is the message false or misleading? (3) Does the message injure the plaintiff? The part of the ad that talks about the interior space of the Expire is misleading and implicitly describes the Tuna. It even mentions "tin can", a reference to tuna fish can. The part of the ad describing the color options of the Expire vs. "the other popular SUV" is false. They are implying the Tuna, and the Tuna actually comes in more colors than the Expire. The message in the ad was proven to mislead 28 percent (for the interior room claim) and 54 percent (for the color option claim) of consumers. In order for an ad to be considered misleading enough to be actionable in court, just 20 percent of consumers must take away the misleading or false message, so this obviously could be taken to court by Bitsosushi and they would win the case.

8. Would Fjord be able to prove that Bitsosushi's "Power Plus" commercial was false and misleading under the Lanham Act? Why or why not?

The Lanham Act uses three main criteria to determine a false or misleading ad. (1) What message, either explicitly, or implicitly, does the ad convey? (2) Is the message false or misleading? (3) Does the message injure the plaintiff? The ad doesn't meet the first part of the requirements for the Lanham Act. Fjord claims the ad conveys that the Tuna always is faster and outperforms the Expire. However, only 14 percent of viewers of the ad took away the implicit message saying Tunas outperform Expires. It needs to be at least 20 percent for the message to be taken by a significant amount of the audience. And the message was not false. Compared to the standard model of the Expire, the standard model of the Tuna did outperform its rival. It may have been slightly misleading because most Expire on the road are not the standard model, but as mentioned earlier, only 14 percent of viewers took that message away from the ad, so it wasn't misleading enough to be able to be brought to court.

10. Do the advertisements for Drole's CanVacado juice that use Joe Wyoming as a spokesman violate FTC rules on deceptive advertising and rules regarding endorsements? Why or why not?

The FTC says celebrity endorsers have to be actual users of the product at the time of the endorsement. Also, they must truly subscribe to their testimonials presented in the ads they appear in. Also, the ads can only run for the amount of time the celebrity holds the beliefs of the product being endorsed. That being said, all of this was true in the case of Joe Wyoming and CanVacado. He drinks the juice and does believe in the product. It is assumed that because he is a celebrity, he is being paid to appear in the advertisements. However, the regular consumer would not assume he is a major stockholder and has a seat on the board of
directors. This makes his endorsement much more about his financial gain, rather than his genuine belief in the value of CranVacado. The fact that the ads did not disclose this information in violation of the FTC rules of deception in advertising.

11. Do the advertisements for Drole's CranVacado juice violate FTC rules on deceptive advertising in their claims about a special price reduction for the product? Why or why not?

The first rule used by the FTC to define false or deceptive advertising is: “There must be a representation, omission or practice that is likely to mislead the consumer.” Because the Drole company knows it is already going to reduce its base price of CranVacado, the ad is misleading. They are omitting certain information that could cause a reasonable consumer to maybe stock up on the product while they believe there is an almost 40 percent discount, when in reality, it is only a 9 percent discount. Also, because the cost of a product is considered material, it works with the final part of the FTC’s definition of false or deceptive advertising.

12. What is the governmental interest motivating the prohibition on distribution of advertising promoting contraceptives? Is it a substantial one under the second prong on the Central Hudson test? Why or why not?

The stated governmental interest in prohibiting the distribution of ads promoting contraceptives is that the ordinance is necessary to protect residents from things that “may be offensive to them and to help parents control the manner in which their children become informed about sex and birth control.” However, the city ordinance still allows the distribution of materials as long as there is no specific product advertised. There is no substantial governmental interest in preventing the distribution of the pamphlets, no matter the commercial aspects involved. The first part of their reasoning is to not offend homeowners. But the only people who are usually offended by the use of contraceptives like condoms are those who are religious and contraceptives go against the rules of their religion. The separation of church and state should make this part of the city ordinance unacceptable. The second part of the ordinance is meant to help parents teach their kids about sex and birth control on their own terms. However, pamphlets that go into detail on abortion and others that go into detail on contraceptives are allowed. This doesn’t shield the children anymore than a pamphlet with the same information, and an ad for a related product would. There is not a substantial state interest to justify the regulation, as the second part of the Central Hudson test requires.
1. Are Mander and Buttz entitled to equal opportunity to respond to Firr’s appearance on Issues and Questions? Why or why not?

Mander and Buttz are not entitled to equal opportunity to respond to Firr’s appearance on Issues and Questions.

The equal opportunity rule states if any licensee permits a legally qualified candidate for public office to use a broadcasting station, the licensee must afford equal opportunities to all other candidates for that office to use the station.

The question to focus on is whether Douglas Firr is a legally qualified candidate. A legally qualified candidate is a person that has publicly announced his intention to run for office or nomination. That he is qualified to hold office under applicable local, state or federal laws. He has qualified to be on the ballot, is seeking nomination, or has made a substantial showing as a bona fide candidate.

Douglas Firr has not announced that he will run for a democratic senator nomination. It seems that he is qualified to hold office under all applicable laws. He has not yet qualified to be on the ballot or made and he refused to commit during his interview with Limburger as whether or not he would run as a write-in candidate.

2. Is Mander entitled to air time under Sec. 315 because of Buttz’s appearance in his commercials? Why or why not?

Mander is entitled to air time under Sec. 315 because of Buttz’s appearance in his commercials.

The equal opportunity rule states if any licensee permits a legally qualified candidate for public office to use a broadcasting station, the licensee must afford equal opportunities to all other candidates for that office to use the station.

Buttz is a legally qualified candidate. The part of the equal opportunity rule this question focuses on includes use of a station. This means any recognizable appearance of a candidate’s face or voice on a broadcasting station is a “use” of that facility under Sec. 315, unless otherwise exempt.

In this case, Buttz’s car commercial would qualify as “use of a station”. He would be recognizable because he appeared in the commercial and narrated it himself. His face and voice were both shown during the commercial.

3. Is Buttz entitled to air time under Sec. 315 because WHUH carried the governor’s press conference? Why or why not?

Buttz is not entitled to air time under Sec. 315 because WHUH carried the governor’s press conference.

The equal opportunity rule states if any licensee permits a legally qualified candidate for public office to use a broadcasting station, the licensee must afford equal opportunities to all other candidates for that office to use the station.
The governor, Mander, and Buttz are both legally qualified candidates for public office. It is important to look at the equal opportunity exemptions. One of the exemption categories is on-the-spot coverage of a bona fide news event which is the category press conferences fall under. To qualify for exemption the broadcaster must decide in advance whether the event is newsworthy.

In this case, WHUH did decide in advance to cover the press conference. The event is newsworthy because most questions focused on income tax which was an important issue during this legislative session in Nirvana.

5. What is meant by "strength of the mark" for purposes of trademark law? How strong is the senior mark in this case? Which side does this factor favor? What facts lead you to that conclusion?

The strength of mark test has two components (1) conceptual strength or the placement of the mark on the spectrum of marks which encapsulates the question of inherent distinctiveness and (2) commercial strength or the marketplace recognition value of the mark.

The senior mark is rather strong. This conclusion was reached by the results of the survey and the wide use of advertising done for the Blue Bird. Another factor that weighed in on this decision was the marketing techniques of the Fish Fowl birds. They were sold in similar size, shape, color and packaging.

The Blue Bird mark is a blue, candy coated chocolate candy sold in bags or boxes that have a picture of the candy on the exterior and the trade name "Blue Bird". FishFowl are chocolate candies sold in bags under the FishFowl label. Half of the candies are shaped like fish and wrapped in orange foil while the other half are shaped like birds wrapped in blue foil. Both bird candies are similar in shape and size, although the FishFowl birds are slightly larger and flatter. They are also both sold primarily through supermarkets and discount department stores. The candies are usually positioned next to each other and sell for a similar price.

Physically these two bird candies are both chocolates in the shape of birds and sold in bags. They are also of a similar shape and size. They are both blue, but one is candy coated while the other is wrapped in blue foil. The physical distinction of Blue Bird candy versus the FishFowl birds is not inherently distinctive in uniqueness or its potential to draw in customers in an unusual manner as was the case in Maker's Mark Distillery, Inc. Vs. Diageo North America, Inc.

However, Blue Bird has registered trademarks for its design and names. It also advertised nationally on major television networks, newspapers, and magazines. For six years Blue Hills Ranch spent $20 million per year marketing the Blue Bird candy. During those six years, Blue Bird candy sales doubled from $200 million to $400 million. Sales have continued to increase at a rate of 5 percent per year even though Blue Hills has decreased its marketing budget. Blue Bird candies have ranked in the top five brands in U.S. sales for the last five years. The candies have also appeared in movies and television shows under product placement agreements. Currently, Blue Bird candies have a Web and social media campaign to keep awareness in front of its adult target market. Ads and commercials usually show adult actors enjoying the Blue Bird candies during cocktail parties or
during quiet evenings at home. However, some ads have shown adults sharing their Blue Bird candies with their children.

The amount of money and national attention Blue Bird candies has received due to its marketing and advertising efforts has created a well-known commercial recognition of Blue Bird candies acquired through years of extensive advertising and use and branding. Blue Bird candies have also received a significant amount of public attention through brand placements, national advertisements, and social media creating high levels of consumer dialogue.

On the other hand, FishFowl birds have been advertised to children and promoted during a children's cartoon program on Funhouse Network and other channels operated by Galaxy Studios Inc. during network and local broadcast programming. FishFowl has been selling its birds for two years.

After FishFowl candies appeared on market, Blue Bird candy sales did not continue to increase although they did not decline either. This ended a 15 year stretch of steadily increasing sales. A survey conducted by the Trotter Research Group commissioned by Blue Hills found that 58 percent of consumers believed there was a connection between Blue Bird candy and Fish Fowl candy. This survey also found that 38 percent of consumers believed FishFowl candies were the kids' version of Blue Bird candies.

The senior mark's physical difference is the blue coated chocolate candy bird is not wrapped in blue foil like the FishFowl chocolate bird. The Blue Bird advertising and marketing has set the brand apart by gaining nationwide recognition as an adult chocolate candy.

10. What is meant by “substantial similarity” for purposes of copyright law? Is Village of the Strage substantially similar to Son of Ursus? Why or why not?

Substantial similarity for purposes of copyright law is when the average lay observer must recognize the alleged copy as having been appropriated from the original. Copying need not be of every detail so long as the works are substantially similar. The similarity should not be of the idea but of the expression of the idea. Similarity must concern only non-copyrightable elements of work or no reasonable trier of fact could find the works substantially similar for summary judgment to be appropriate.

The Village of Strage is substantially similar to Son of Ursus. The idea that a person who has superpowers and can increase those powers by surrounding himself with people who also have superpowers cannot be substantially similar, but the way in which these books express that idea is substantially similar to an average lay observer. Both books use the carnival as the center point for their plots. The carnival scenes are similar in expression of how the events are carried out. The theme of girl dies to save the life of the guy she loves is not protectable and neither would be the theme of good defeats evil. However, the plot is substantial similar once the carnivals come to town or Deven gets to the carnival. The characters are caged at the carnival while the evil man tries to take power and controls the power of all those around him.
11. Would Lucre be able to prove all the elements of intrusion in regard to its investigation of his financial arrangements with Divine Prosperity? Why or why not?

Lucre would not be able to prove all the elements of intrusion in regard to CCN’s investigation of his financial arrangements with Divine Prosperity. There are five elements of intrusion. The first part is one may be liable for invasion of privacy if one intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs and concerns, and the intrusion would be highly offensive to a reasonable person. In this instance, CCN did not violate element one, because they looked at public records of a nonprofit organization. These records are available for anyone to look at. Especially since it is on behalf of a nonprofit, public records are important to hold a check-and-balance system to make sure the nonprofit is being run in the way that they portray themselves. The second element is that one may be liable for intrusion even if the information gathered is not published. The information in this instance was published, but again it was public information attainable by anyone. The third element is one may be liable even if the information obtained is true or harmless. CCN could be held liable for disseminating the information about Lucre’s salary and benefits he receives from his nonprofit, Divine Prosperity. However, it is doubtful that he would be held liable because the information is available to the public. The fourth element intrusion may be made by physical means has no standing in this case. There was no physical intrusion conducted toward Lucre. The fifth element intrusion may be by use of one’s senses, with or without mechanical aids. This element would not stand either, because no individual senses or mechanical aids were used to acquire the information.

12. Would Deco be able to prove all of the elements of intrusion in regard to his interview with Bridges and Harbor at his company headquarters? Why or why not?

Deco would not be able to prove all of the elements of intrusion in regard to his interview with Bridges and Harbor at his company’s headquarters. There are five elements of intrusion. The first part is one may be liable for invasion of privacy if one intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs and concerns, and the intrusion would be highly offensive to a reasonable person. In this instance, Bridges and Harbor did not intrude upon private affairs or concerns of Deco. Deco is a public company. All information disclosed by Deco would have been disclosed to any other prospective client. The second element is that one may be liable for intrusion even if the information gathered is not published. The information in this instance was published, but again it was information that Deco would have provided any client interested in investing in his company would have been able to obtain. The third element is one may be liable even if the information obtained is true or harmless. Bridges and Harbor could be held liable for publishing the information obtained relating to the techniques employed by Divine Prosperity to raise money for their nonprofit. However, employees and patrons of business do have privacy rights. Divine Prosperity may be able to sue Deco for release of private business details since they are patrons of Deco, if they had client confidentiality between the two organizations. The fourth element intrusion may be made by physical means has no standing in this case. They were given a tour by the owner of headquarters. The fifth element intrusion may be by use of one’s senses, with or without mechanical aids. In this case mechanical aids were used to record the entire conversation between Bridges and Harbor and Deco via audio and video tape.
taken to remedy prejudice such as continuance, change of venue, change of venire, etc. Another problem with the restraining order is it was asked for in the judge's chambers with only the public defender, prosecuting attorney, and judge present. The prosecuting attorney did not object either.

Element two questions whether or not the judge took substantial measures to prove that restraining broadcast of the tape was the only way to mitigate the effects of the potential coverage. Element two is not met. The judge took no other actions or considerations to other potential remedies for prejudice. He also accepted all of the public defender's assertions about the need to ban the videotape as fact.

Element three states a restraining order would prevent the threat to a fair trial. This restraining order may prevent the threat to a fair trial but it also may cause an unfair trial. The release of the video allows the public to watch and make sure the judges and lawyers are fulfilling their jobs to the utmost of their abilities.

15. Is the court order prohibiting any news organization from reporting the names of jurors consistent with the Nebraska Press Association v. Stuart guidelines? Why or why not? Consider each part of the guidelines and explain your answer.

The court order prohibiting any news organization from reporting the names of jurors is not consistent with the Nebraska Press Association v. Stuart guidelines.

The Nebraska Press Association v. Stuart guidelines state that a prior restraint on news reporting may be justified to protect a fair trial only after the trial judge determines (1) whether the nature and extent of prejudicial news coverage poses threat of a fair trial; (2) other measures would be unlikely to mitigate the effects of the coverage; (3) a restraining order would prevent the threat to a fair trial.

Guideline one is whether the nature and extent of prejudicial news coverage poses a threat of a fair trial. In this case, the jurors were selected in a public trial. The public already knows the names or has seen who the jurors are. There is no legal merit in limiting the reporting of jurors' names now.

Guideline two asks whether other measures could be taken by the judge to mitigate the effects of the coverage. When the judge ordered news reporters not to name any member of the jury in their news reports, he had no arguments on the issue from either the defense or the prosecution against his action. He took no evidence for the need of such a ban on reporting their names. The judge could have looked into other actions that may mitigate the fear of the juror becoming the focus of unfavorable publicity and harassment that could lead to mistrial. He might have informed jurors of actions that they could or could not take. He might have been able to remove the juror and get a new group of jurors.

The third guideline questions whether a restraining order would be able to prevent the threat to a fair trial. This guideline cannot be proven. The names of the jurors were not sealed. This means any member of the public could find those names in the court records. The judge's order applied only to news reporters. Plus anyone following the case would have known who the jurors were because they were picked in an open trial.
1. The Equal Opportunity Rule regarding the broadcast of political speech says that if any licensee permits a legally qualified candidate for public office to use a broadcasting station the licensee must afford equal opportunities to all other candidates for that office to use the station. A legally qualified candidate is defined as a person who has publicly announced his or her intention to run for office, is qualified to hold office under the current laws and has qualified to be on the ballot, is seeking nomination or has made a substantial showing as a bona fide candidate. In order to qualify as a substantial showing, evidence must indicate that the person has engaged to a substantial degree in activities commonly associated with political campaigning. In this case, Douglas Firr, who has not yet publicly declared whether or not he will run for the Democratic nomination for U.S. Senator from Nirvana, appears on an interview show aired on WHUH-TV in Vapid City, Nirvana. During the interview, Firr talked with the host about the Senate race and the major issues facing the state and country. Firr said neither of the current candidates offered the voters a real choice and that those candidates were products of the aging and increasingly irrelevant state Democratic machine. He added that a political outsider like himself, with extensive experience in private business, would offer the voters a choice. When asked if he was going to run as a write in candidate, Firr declined to answer and said he would wait until the deadline. Under the Equal Opportunity rule, I think that Firr has met the standard to have a substantial showing as a bona fide candidate because he engaged to a substantial degree in activities commonly associated with political campaigning because he made statements against the people who would be his competitors, and said that he would be a better option, which is a main part of political campaigning. Following the test for the Equal Opportunity rule, both parties would be considered legally qualified candidates (Because Firr made a substantial showing), the candidates would be competing for the same position and Firr has used the licensee’s facilities. However, because the TV show is regularly scheduled, has had longevity, has licensee control and the licensee selects content, format and participants using good faith journalistic judgment, the interview falls under the second category of the equal opportunity exemptions. Thus, the other two candidates, Mander and Buttz, would not be entitled to equal opportunity to respond to Firr’s appearance on Issues and Questions.

2. The Equal Opportunity Rule, Sec. 315, regarding the broadcast of political speech says that if any licensee permits a legally qualified candidate for public office to use a broadcasting station the licensee must afford equal opportunities to all other candidates for that office to use the station. A legally qualified candidate is defined as a person who has publicly announced his or her intention to run for office, is qualified to hold office under the current laws and has qualified to be on the ballot, is seeking nomination or has made a substantial showing as a bona fide candidate. In order to qualify as “use” of a station, the alleged use can be any recognizable appearance of a candidate’s face or voice on a broadcasting station. According to the guidelines, Gov. Mander would be entitled to air time under sec. 315 because Buttz is a legally qualified candidate since he has publicly declared his intention to run, and he has “used” the broadcasting facility by appearing both visually and audibly in the commercial.

3. The Equal Opportunity Rule, Sec. 315, regarding the broadcast of political speech says that if any licensee permits a legally qualified candidate for public office to use a broadcasting station the licensee must afford equal opportunities to all other candidates for that office to use the station. A legally qualified candidate is defined as a person who has publicly announced his or
her intention to run for office, is qualified to hold office under the current laws and has qualified to be on the ballot, is seeking nomination or has made a substantial showing as a bona fide candidate. In following the test for the equal opportunity rule, it is clear that the candidates are legally qualified because they have both announced publicly they are competing for the same position. Mander is deemed to have “used” the licensees facilities since he appeared on the channel. However, since Mander appeared in a press conference that was previously determined to be newsworthy because of its effects on viewers, Mander falls under the exception of press conferences, and thus Buttz would not be entitled to air time under Sec. 315.

5. By both sides agreeing that the case depends on the “strength of the mark,” it means that it will depend on whether the trademark is unique enough and unmistakably connected to that particular brand. What makes a trademark strong has a lot to do with how recognizable it is to consumers, and in this case, the senior mark, the Blue Bird trademark, is strong because a majority of people thought that the Blue Bird candies and FishFowl candies were related in some way because the way the two candies were presented were so similar. This factor favors the Blue Bird Company because it proves that FishFowl may have overstepped its boundaries in this case and violated the Blue Bird trademark. The facts that a majority of people made a connection between Blue Bird candies and FishFowl candies, and the fact that a bird-shaped chocolate candy wrapped in blue wrapping is very unique in itself led me to the conclusion that the Blue Bird mark is a strong mark, which favors the Blue Bird company in this case.

6. By both sides agreeing that the case depends on the “relatedness of the goods,” it means that in order for there to be a violation of a trademark, the two goods must be closely related in the sense that they are similar products that would be sold in the same area of a store at a similar price. In this case, the goods are strongly related in that they are both chocolate candies, both are positioned next to each other in stores and the products are similarly priced. This factor favors the Blue Bird side because it shows that FishFowl may have overstepped its boundaries in this case and violated a Blue Bird trademark. The fact that the two products are similar in terms of what they are (chocolate candy), where they are sold in a store and the price they are offered at leads me to the conclusion that the goods are very much related and thus favors Blue Bird.

7. By both sides agreeing that the case depends on the “similarity of the marks,” it means that in order for there to be a violation of a trademark, the two products must be similar in their presentation. In this case, the two marks are very similar because the product is a bird-shaped chocolate candy, and both products are wrapped in blue. This factor favors Blue Bird because it shows that FishFowl may have overstepped its boundaries in this case and violated a Blue Bird trademark by presenting their product in such a similar way. In the same way that many companies can make a chocolate candy bar, nobody but Hershey’s can make a chocolate candy bar that has the distinct markings and rectangle pattern that a Hershey’s candy bar is known for. The fact that the products are similar in terms of what they are (chocolate candy), and that they are presented (bird shaped wrapped in blue wrapping) leads me to the conclusion that the marks are very similar and that it favors Blue Bird.

8. By both sides agreeing that the case depends on whether or not there is “actual confusion,” it means that in order for there to be a violation of a trademark, the two products must be confused with each other among average consumers. In this case, a survey conducted by the Trotter Research Group found that 58 percent of consumers believed that there was some sort of connection between Blue Bird and FishFowl candies, and 38 percent of people believed that
FishFowl candies were a kid version of Blue Bird candies. Those facts could be used to show that there was actual confusion among the public in this case. This favors Blue Bird because it shows that FishFowl may have overstepped its boundaries in this case and violated a Blue Bird trademark. The fact that a majority of people thought that the two products were connected in some way when they’re actually not leads me to the conclusion that there was actual confusion among consumers, which favors Blue Bird.

9. Originality for purposes of copyright law means that the work must owe its origin to the author, and originality is “the absolute prerequisite of copyright.” In other words, in order for a work to be considered for copyright, it must first be determined that the work came from the author and was not taken from somebody else. Since only a small amount of originality is sufficient to qualify a work for copyright protection, Son of Ursus possesses enough originality to have copyright protection because it features the original story line, a man who possesses superhuman powers and was raised among bears living in the Canadian Rockies, that owes its origin to the author, Sal Manilla in this case. Village of the Strange would not possess enough originality to have copyright protection because the overall plot and flow of the story seems to have come from Sal Manilla’s Son of ursus, and thus the work does not owe its origin to the author, meaning that it cannot be a copyrighted work.

13. Elements of intrusion include invasion of privacy if one intentionally intruded, physically or otherwise, upon the solitude or seclusion of another or his private affairs and concerns and the intrusion would be highly offensive to a reasonable person. Intrusion may be by physical means or use of one’s senses, and news gathering may be restricted in private businesses, even if open to the public. In this case, an employee, Jack Hammer, was secretly recorded by CCN employee Benton Harbor during a lunch-room conversations when he made statements about carrying out a fraud while working for Divine Prosperity. The statements were broadcast on CCN and led to the decline in business at Divine Prosperity. Hammer would be able to prove all the elements of intrusion as to his conversation with Harbor in the lunch room because even though federal law may only require one party to consent to the recording, news gathering may be restricted in private businesses, the intrusion was done intentionally, and being secretly recorded would be highly offensive to a reasonable person.

14. The Nebraska Press Association v. Stuart guidelines offer a three-part process to decide whether or not the gravity of the evil justifies such invasion of free speech as is necessary to avoid the danger of invading one’s rights. The nature and extent of pre-trial news coverage must first be determined, and then it must be considered whether other measures besides a restraining order would be likely to mitigate the effects of unrestrained pre-trial publicity. Lastly, the court must determine how effectively a restraining order would operate to prevent the threatened danger. In this case, the court is consistent with the Nebraska Press Association v. Stuart guidelines in that it was determined that a crime of this nature would undoubtedly garner a lot of media and public attention. The court, by insisting that there be a gag order in this case, was inconsistent with the second part of those guidelines. In the Nebraska Press Association case, it was determined that there is no reason to believe that alternative measures would have failed to protect the defendant’s rights. Lastly, The court in this case is inconsistent with the court in Nebraska Press v. Stuart, which said “It is far from clear that prior restraint on publication would have protected (the defendant’s) rights,” whereas in the KRUM case it is determined that a gag order would be successful.
1. Are Mander and Buttz entitled to equal opportunity to respond to Furr's appearance on Issues and Questions? Why or why not?

Mander and Buttz are not entitled to equal opportunity to respond to Furr’s appearance on Issues and Questions because Furr is not a legally qualified candidate. Though he and Rash Limburger, the host of Issues and Questions, talked about concerns related to the race for the Democratic seat of the U.S. Senate, because Furr hasn’t filed the necessary papers to be an official candidate yet. He also did not publicly announce his official candidacy, refusing to commit to running for U.S. Senate. Even if Furr were a fully qualified candidate, Mander and Buttz still wouldn’t be entitled to equal opportunity to respond to Furr’s appearance on Issues and Questions because the program counts as a bona fide news interview. The show is regularly scheduled and is produced as a newsworthy journalistic endeavor. Bona fide news interviews are exempt from the Section 315 equal opportunity/equal time rule.

4. Is WHUH-TV within its legal authority in absolutely refusing to sell Mander half-hour blocks of time for presenting his proposals for reforming federal entitlement programs? Why or why not?

According to Section 312 of the Federal Communications Act, broadcasters cannot all-out reject paid and non-paid appearances by candidates running for federal offices. But requests for air-time can be rejected if it would cause serious disruption in program scheduling for the station or if the time aired would prompt an excessive amount of requests for equal time by other qualified candidates. Mander’s request for a total of six half-hour time slots during prime time could be considered excessive and could be rejected by the station, legally. The station is already scheduled and contracted to air conference baseball games during prime time and because other candidates would most likely request equal time to Mander’s if it were allowed, the amount of airtime needed to be open for other candidates’ requests would be extraordinary. The station didn’t fully reject Mander’s proposal for time, allowing him to purchase up to 60-second slots. This keeps him within the bounds of following the Section 312 rule to not completely block a federal candidate’s request to buy airtime.

5. What is meant by “strength of the mark” for purposes of trademark law? How strong is the senior mark in this case? Which side does this factor favor? What facts lead you to that conclusion?

Trademark infringement is the unauthorized use of a trademark, or substantially similar mark, on competing or related goods and services. The strength of the mark refers
to how strong a company’s image or name is to consumers. In the Blue Bird vs. FishFowl case, the strength of the mark would favor Blue Bird. The company has been making its blue bird shaped candies for 44 years and is one of the top five selling brands in the U.S. Television commercials and product placement have been used to create an awareness of the brand across several demographics, besides those who the candy is mainly marketed to; adults. FishFowl candies are relatively new to consumers, only two years old. The blue bird shaped mark they have used does not equal anywhere near the strength of the mark of Blue Bird candies on consumers. Also, Blue Bird candies are considered an arbitrary trademark because the name can mean more than one thing. But in the context of candies, the term blue bird is very obviously meant to mean Blue Bird candies. This is similar to Apple. As a fruit, it is one thing, but in the context of computers, it is a very recognizable as a major brand.

8. What is meant by “actual confusion” for purposes of trademark law? What evidence exists of actual confusion in this case? Which side does this factor favor? What facts lead you to that conclusion?

Actual confusion in a trademark infringement case means that relevant consumers had a likelihood of confusion or an actual instance of confusion between the two goods or services. In this case, an independent research group found that 58 percent of consumers believed there was some sort of connection between Blue Bird candies and FishFowl candies. With 38 percent of people believing FishFowl candies were the “kids’ version” of Blue Bird candies. Blue Bird candies should win this portion of the trademark infringement argument because of the high percentages of consumers showing some sort of confusion or false link between the products. It should be noted that consumers didn’t actually confuse the two candies, thinking one was the other, but they assumed a relation that doesn’t exist. This is still considered confusion in the context of a trademark infringement case where two separate companies are trying to make profits off of similar goods or services.

9. What is meant by “originality” for purposes of copyright law? Does Son of Ursus possess enough originality to have copyright protection? Why or why not? Does Village of the Strange possess enough originality to have copyright protection? Why or why not?

Originality in copyright law is what distinguishes one piece from any others. Originality is what makes one expressed idea new and unique. An original work stands out because it wasn’t copied from other works. Several of the elements, individually, brought up in court in the Manilla heirs vs. Galaxy Studios Inc., case would not qualify as original to either side. “Both deal with characters who have supernatural powers.” Stories of all kind, for centuries, have had characters with supernatural powers. “The villains in both stories are trying to eliminate the heroes to prevent them from becoming competitors to the villains.” Many stories in many media hold to the idea that the villain wants to gain power and is threatened by anyone else who could challenge him/her. “Both stories use
carnivals as settings for much of the action.” Setting, unless it is a totally new, made-up universe, is bound to be repeated in all kinds of stories. “Both stories end with the heroes expecting further violent conflicts.” This is the classic cliffhanger. These concepts of the ones in question in the case, especially, do not prove originality in Manilla’s Son of Ursus graphic novel series. These are concepts that are used in all kinds of stories over all kinds of cultures and time periods. They are not the original idea of the author and neither side of this case could claim the originality of these individual elements to prove their case of copyright infringement.

10. What is meant by “substantial similarity” for purposes of copyright law? Is Village of the Strange substantially similar to Son of Ursus? Why or why not? (Use the factors from Brown v. Perdue to analyze whether the two stories are substantially similar.)

To prove copyright infringement, in the absence of directed evidence, copying is shown by proving the defendant had knowledge of the earlier, valid copyrighted work and that there is a substantial similarity on expression of ideas and concepts in both works. Brown vs. Perdue was a case in 2005 where Lewis Perdue wanted to prove Dan Brown had broken copyright of his books Daughter of God and The Da Vinci Legacy with his best seller The Da Vinci Code. The ideas of a work cannot be protected by copyright, only the expression of those ideas. To determine substantial similarity between two works, the court must look at theme, feel, plot, characters, sequence, pace and setting. In the Brown vs. Perdue case, the court said there was no substantial similarity between the works because although the general themes of the works were similar, they were so broad that they could not be counted as original. And the other elements of the books, like plot and characters were so different, that no case could be made for substantial similarity. In the Manilla heirs vs. Galaxy Studios Inc., case, there could be a case for substantial similarity. As explained above, the general themes are too broad to be counted as original to Manilla. But, when examining the similarities in theme, feel, plot, characters, sequence, pace and setting. The only differentiating factor is characters. The Village of the Strange has many more characters than Son of Ursus, but much of the plot remains the same. Bad guy wants to take down those who also have power, but he can only gain more power by being around those with power. So he must kill those who threaten him or keep them as his prisoner. The bad guy is somehow related to the hero(s) and the hero(s) work to release all the bad guy’s prisoners in order to reduce the bad guy’s strength. Even the settings of the stories are the same. In the end, the hero(s) aren’t sure of their fate. Because the screenwriter of the Village of the Strange had knowledge of the Son of Ursus series, he could be tried for copyright infringement with substantial similarity.
11. Would Lucre be able to prove all the elements of intrusion in regard to its investigation of his financial arrangements with Divine Prosperity? Why or why not?

Lucre wouldn’t be able to prove intrusion in regard to the investigation of his financial arrangements with Divine Prosperity. All the forms Continuous Cable News gathered to make its report on that subject were of public record and could be requested by anyone at anytime. CCN used public record of IRS forms, local real estate records and filings with the Federal Aviation Administration to form their story of Lucre’s financial status. They did nothing illegal and weren’t intruding on anything because Lucre cannot assume a reasonable expectation to privacy if all his financial statements are of public record.

12. Would Deco be able to prove all of the elements of intrusion in regard to his interviews with Bridges and Harbor at his company headquarters? Why or why not?

Deco would not be able to prove intrusion in regard to his interview with Bridges and Harbor at his company headquarters. He assumed he was talking to a potential client, yes, but he also keeps his office open to the public. Deco was also openly answering Bridges’ and Harbor’s questions and providing information of the Divine Prosperity on his own, without their specific questions. Bridges and Harbor did use a hidden recording device, but because at least one person in the conversation consented to its use, that isn’t an arguable part of the case.

13. Would Hammer be able to prove all the elements of intrusion as to his conversation with Harbor in the lunchroom? Why or why not?

Hammer would be able to prove intrusion as to his conversation with Harbor in the lunchroom. The lunchroom at the Divine Prosperity offices isn’t open to the public, just employees, so there is a reasonable expectation of privacy. One assumes that he or she is simply talking to another employee of the company, not a member of the public or someone undercover in the business. The fact that Harbor used a recording device is of no concern because Nirvana law allows recording devices to be used as long as one party in a conversation consents to it, which Harbor obviously did.

14. Is the court order prohibiting KRUM from airing any portion of Chester Drawers’ tape consistent with the Nebraska Press Association v. Stuart guidelines? Why or why not? Consider each part of the guidelines and explain your answer.

The court order prohibiting KRUM-TV from airing any portion of Chester Drawers’ tape isn’t consistent with the Nebraska Press Association vs. Stuart guidelines.
The court argued that showing the tape on air would prevent an impartial jury. But the tape would also be presented in court as evidence; so seeing it beforehand would make no difference. This isn't evidence based on rhetoric or argument; it is a videotape of the event, making seeing the tape at different times of no matter. And the requirement of an impartial jury doesn't depend on the jury members' knowledge of the case before going to trial. It depends on their ability to put that knowledge aside and look solely at the evidence presented in court to make their determination.