IX. Access to Information
   a. Access to Records
   b. Access to Governmental Meetings
   c. Access to Institutions
   d. Access to Military Operations
   e. Criminal Law Restrictions on Access
   f. Medium Discriminatory Access
   g. Missouri Sunshine Law

X. Access to Judicial Proceedings
   a. General
   b. Criminal Trials
   c. Pretrial Proceedings
   d. Civil Trials
   e. Grand Jury Proceedings
   f. Access to Jurors’ Identities
   g. Access to Judicial Documents and Discovery Materials
   h. Different Broadcast Mediums
I. Introductory Materials
   a. Values Served by Free Speech
      i. Search for truth: The Marketplace of Ideas
         1. Proponent: *J.S. Mill, On Liberty*
            a. First, the opinion which is suppressed may be true
               i. Likely it will return later if this is the case, but no one authority
                  should have the power to judge truth for all mankind
            b. Second, the opinion against it may be true
               i. However, even if this is so, it will only be assuredly judged so
                  against the other opinion.
            c. Third, each doctrine may be a piece of the truth that assists
            d. This is J. Holmes in *Abrams*: the Marketplace of Ideas - the true ideas will
               be sold for the highest price, and the bad ones will be left to rot in the
               bazaar
      2. Criticism:
         a. *Baker, Scope of the First Amendment Freedom of Speech*
            i. Experience as well as discussion contributes to understanding.
               Thus, restrictions on experience-generating conduct are as likely as
               restrictions on debate to stunt the progressive development of
               understanding, but the marketplace theory gives no constitutional
               protection to experience-producing conduct
         b. *Ingber, The Marketplace of Ideas: A legitimizing myth*
            i. This idea is based on lasses-faire economic theory, which
government over time has had to add some controls to. Similarly,
real world conditions also interfere with the effective operation of
the marketplace of ideas, and state intervention thus may be
necessary.
            ii. Marketplaces aren’t perfect, and we need some regulations
         c. *Wellington*
            i. In the long run, true ideas drive out false ones. However, we live
in a world of short runs, several on top of the other. The Holocaust
is a good example of a short run of awful consequences.
         d. *Class*
            i. The truth might not be absolute – who is to say that there is one
truth, and we could have multiple truth
            ii. If what we care about is truth, why do we protect art, literature, and
other aesthetic things – which may not be about truth, but rather
about opinion, beauty, etc.
   ii. Self-Governance
      1. Proponent: *Meiklejohn, Free Speech and its Relation to Self-Government*
         i. In order to properly govern one another, all ideas must be heard.
An idea, because it is on one side of the fence, should still be
heard, because free men who govern themselves have the right to
decide the issue. Thus, freedom of speech is not a law of nature or
of reason, but a deduction from the basic American agreement that public issues shall be decided by universal suffrage.

ii. Voting is but the outward expression by which we govern. People must have the intelligence, sensitivity, etc. to know how to vote, and these must be acquired by the arts, etc.

iii. Basically, society is a town meeting, and the self-governing citizens have to make the best possible decision, and free-speech allows their information to get out into the open

2. Criticisms
   a. Chafee, *Book Review*
      i. Meiklejohn’s assertion that there is a distinction between public and private speech is weak. There is something public about nearly every aspect of life, and Mieklejohn’s distinction eliminates art and literature from free speech.
   b. Bork, *Neutral Principles and Some First Amendment Problems*
      i. Non-political speech should not be subject to the first amendment. This type of speech should be regulated by society and its elected representatives.
   c. Redish, *The Value of Free Speech*
      i. The appropriate scope of the First Amendment is thus much broader that either Bork or Mieklejohn would have it. Free speech aids all life-affecting decision-making, no matter how personally limited, in much the same manner in which it aids the political process. There thus is no logical basis for distinguishing the role speech plays in the political process.
   d. Sunstein, *Free Speech Now*
      i. The First Amendment is about political deliberation. We should treat speech as political when it is intended and received as a contribution to public deliberation about an issue.
   e. Note that the actual malice standard contributes to this approach by providing an extremely high threshold when discussing public officials in *N.Y.Times v. Sullivan* 

iii. Self-Fulfillment and Autonomy
   1. Proponent:
      a. Richards, *Free Speech and Obscenity Law*
         i. The significance of free expression rests on the central human capacity to create and express symbolic systems . . . freedom of expression permits and encourages these capacities. In doing so, it nurtures and sustains the self-respect of the mature person . . . without which the life of the spirit is meager and slavish.
         ii. Only through participation in speaking, debating, participation in the arts and literature, can we have these mature and developed people
   iv. The Checking Value
      1. Free Speech can serve to check the abuse of power by public officials. Citizens have a veto power when public officials go too far.
v. The tolerant society
   1. Because people have to listen to things they don’t like, it makes them a stronger
      and more tolerant person.

vi. The absolutist approach
   1. General
      a. That “no law” in the first amendment actually means no law.
      b. The absolutist would allow time, place, and manner restrictions on speech,
         but would not allow for any abridgement that is restrictive enough to
         interfere with the substance of the expression
         i. J. Douglass and Black: Some regulation of sound trucks would be
            permissible. However, this decision could not be vested in the
            Chief of Police

vii. Clear and present Danger
   1. This is Holmes in Schenck, in dissent in Abrams, and Brandeis/Holmes in
      Whitney.
   b. Prior Restraints
      i. General
         1. In England, licensing and punishment for seditious libel, etc.
         2. It seems unlikely that the framers of the 1st amendment shared Blackstone’s view
            that freedom of the press meant ONLY freedom from prior restraint. There is no
            question, though, that it meant at least freedom from prior restraints
            a. In Patterson v. Colorado, the SC did embrace this view
               i. Man published pamphlets citing improper motives of the members
                  of the Colorado Supreme Court.
      ii. The Presumption of Unconstitutionality with Prior Restraints
         1. General
            a. Every system of prior restraint of expression goes into court with a heavy
               presumption of unconstitutionality. The government “thus bears a heavy
               burden of showing justification for the imposition of such a restraint.”
         2. Near v. Minnesota (1931) (Leading Case on Prior Restraints)
            a. Minnesota law authorized abatement of “malicious, scandalous, and
               defamatory statements” in a periodical. If charged, the D could present
               defense that “the truth was published with good motives and for justifiable
               ends.” Local prosecutor sought abatement of a newspaper, and the
               newspaper presented no defense. Held, this statute infringes on the liberty
               of the press and is unconstitutional. (1) It is the chief purpose of the 1st
               amendment is to prevent previous restraints upon publication. However,
               even this protection [from previous restraint] is not unlimited (Incitements
               to violence, or wartime, libel – you are responsible for what you say and if
               you say something that hurts somebody, you can be punished for it.). Also,
               the 1st amendment is not just limited to preventing prior restraints. (2) The
               constitutional protection of previous restraint is not lost because it is a
               business or because charges are made of derelictions which constitute
               crimes. (3) It is not constitutional just b/c the person can prove truth – a
person shouldn’t have to be called in to prove the truth and good motives for what he has a right to do.

i. *Near* is the first definitive statement concerning the constitutionality of prior restraints.

ii. Because it states that prior restraints may not always be impermissible, it opens up the question of when the 1st amendment allows prior restraints

3. The *Pentagon Papers* Case

a. NYTimes obtains copy of govn’t report about Vietnam, during its peak, and began publishing a series of papers about the report. Justice Department moved to enjoin the publication. NYDistrict Court denies the injunction and Court of Appeals grants the injunction. At same time, Washington Post began publishing materials from the same report. Report had issues about our bombing of Cambodia. Justice Department moved the same, but DC and Court of Appeals denied the injunction. SC stayed the case. Held, the government has not met this burden of proving that the papers can’t be published. Every member of the court wrote a separate opinion (p. 36-38). Main Points: Prior Restraints are presumptively unconstitutional and it is very difficult to overcome them – even if the military says something is classified or a military trade secret, the court does not have to agree with them.


a. Govn’t sought an injunction against The Progressive magazine because it was going to publish an article with scientific information about the H-bomb. Atomic Energy Act prohibited the production of “restricted data.” Held, the govn’t has met the burden of establishing that the prior restraint is necessary. (1) This case is different than the NY Times case b/c that case contained historical date relating to events that occurred some three to twenty years previously and a specific statute is involved in the present case (The Atomic Energy Act). (2) While it may be true in the long run that death is preferable to life without liberty, in the short run freedom of speech, to worship, and of the press cannot be enjoyed unless one first enjoys the freedom to live. (3) We must weigh the serious right to freedom of expression against the possibility of thermonuclear annihilation for all of us, and the govn’t in that regard wins. (4) The govn’t has met the requirements of the Atomic Energy Act and the SC test in the New York Times case of “grave, direct, immediate and irreparable harm to the United States.”

i. Other alternatives might have been possible in this case: rephrasing or summarizing specific passages, omitting certain technical details or references, or delaying publication

5. Motion Pictures

a. Since the beginning of Motion Pictures, the Court has permitted states to require that films be cleared by a government official or board before being shown. An attempt to declare the scheme unconstitutional failed in *Times Film Corp v. Chicago.*
b. However, in *Freedman v. Maryland* the Court noted the danger of this system and
   i. First, the censor bears the burden of proving that the film was unprotected expression.
   ii. Second, b/c only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint.
   iii. Third, within a brief period the state must either issue a license or go to court to restrain showing the film.
   iv. Fourth, any restraint had to be for the shortest fixed period compatible with sound judicial resolution.
   v. Finally, the state had to assure a prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of license

c. Disobeying Injunctions
   i. The Collateral Bar
      1. One charged with contempt for disobeying an injunction cannot defend on the ground that the injunction was unconstitutional
         a. Theory: Orderly judicial process requires that injunctions be obeyed until found to be invalid, although a statute may be ignored with impunity by one who successfully gambles that it will be held invalid.
      2. *Providence Journal* Case
         a. Journal obtained logs about surveillance of a mobster who had just died, and they wanted to print things from the logs. The mobster’s son sued to enjoin publication, and an injunction was issued pending a trial two days later. The Journal published the article the next day, and stated in the article that they thought they would win at trial, and that was why it was okay to publish it. The court fucked them up good. Court relied on *Walker v. City of Birmingham* and *Dickinson*. The 1st Circuit reversed, stating that *Walker* and *Dickinson* recognized an exception allowing the D to ignore a “transparently invalid” injunction. The injunction in this case was transparently invalid b/c (1) the SC precedents create a heavy presumption of unconstitutionality, (2) There was no statutory authorization for the injunction against the journal, (3) the privacy interests invoked by the son weren’t a sufficient basis for prior restraint, (4) the FBI had already disseminated the same information to other media outlets, making the states interest void.
      3. The *Business Week* Case
         a. 6th Circuit articulates standards that would seem to make most prior restraints against the media invalid. Court states that a TRO is not to be judged by Rule 65 of the FRCP, Ex Parte orders forbidding publication violate the 1st amendment unless “a showing is made that is impossible to serve or notify the opposing parties and give them an opportunity to participate.” The applicant must also show not only that the order is necessary to prevent irreparable injury, but also that the interest threatened
is more fundamental that the first amendment itself. Also, such a restraint is to be reviewed de novo by the appellate court.

d. Why are Prior Restraints Bad?
   i. General
      1. There is a recurring argument called the de facto prior restraint argument, that this might not be a licensing scheme but it has the same effect.
      2. Overall problems
         a. A system of prior restraint is broader in its coverage, more uniform in its effect and more easily and effectively enforced than subsequent punishments.
         b. A system of prior restraints may moot the salience of a particular piece of information.
         c. The procedural safeguards of the Criminal Justice Process, including public scrutiny, are not present to the same degree in the administrative censoring.
         d. The whole system of censorship is geared to censoring, and may thus make censoring more likely.
   ii. The Alexander Case
      1. Man transported lots of porn across state lines, and thus was convicted of RICO violation and the govn’t seized all of his 31 businesses, confiscated $9 million in profits, and destroyed millions of dollars worth of store inventory, most of which had never been found legally obscene and thus protected by the 1st amendment. Held, the forfeiture should not be analyzed as a prior restraint, but rather as a subsequent punishment. (1) There must be preservation of a distinction between prior restraints and subsequent punishments. (2) To hold that the forfeiture order in the present case was a prior restraint would blur the line separating prior restraints from subsequent punishments to such a degree that it would be impossible to determine with any certainty whether a particular measure is a prior restraint or not.
         a. Dissent: This is really de fact prior restraint. What we call the thing is immaterial. In prior cases, we have held not only that licensing schemes requiring speech to be submitted to a censor in violation of the 1st amendment, but also injunctive systems which threaten or bar future speech based on some past infractions.
   iii. Although the Court noted in the above case that we need to make the distinction between prior restraint and subsequent measures firm, there is no more indication of what this distinction is. In Jeffries article, he points out it is difficult to find the distinction between prior restraints and subsequent measures, especially in injunction cases
      1. Injunctions are unlike prior restraints and like subsequent measures
         a. In both cases the threat of punishment comes before publication; in both cases the fact of punishment comes after
         b. The chief difference between the two schemes is this: under a system of injunctions, the adjudication of illegality precedes publication; under a system of criminal prosecution it comes later.
      2. Rejecting three reasons why this distinction matters
a. An injunction may be more effective at stopping an activity that criminal liability, but it is also more narrowly confined.

3. There is only one respect in which injunctions plausibly can be claimed to have a First Amendment impact significantly greater than the threat of subsequent punishment – the fact of a collateral bar.

4. Re-read this later, it is difficult to understand now

e. Methods of First Amendment Analysis
   i. Balancing
      1. Ad Hoc Balancing: Focus on the interests at stake in the individual case
         a. Is it the interest of administration of justice v. free speech
      2. Definitional Balancing:
         a. The interests analyzed transcend the merits of the particular case. This is a generalized interpretation – is this category of speech or this category of person or type of defendant, etc. worth X against X interest
      3. Balancing Standards
         a. The competing interest against speech must be “substantial,” “important,” “compelling,” or “overriding”

4. *Landmark Communications v. Virginia*
   a. Constitution of Virginia directed the legislature to create a commission to investigate charges against judges and decreed the proceedings should be confidential. A Va. Newspaper accurately reported that a certain Judge was under investigation. They were fined and punished as a misdemeanor. Held, it is unconstitutional to criminally punish an outside party for divulging information that was legally obtained in the public domain. (1) The article served those interests in public scrutiny and discussion of gov’t affairs that the 1st amendment was adopted to protect. (2) Confidentiality is a legitimate state interest, but the question is whether these interests are sufficient to justify the encroachment on 1st amendment guarantees which the imposition of criminal sanctions entails with respect to non-participants such as Landmark. (3) While not dispositive, we note that 40 states having similar commission have not found it necessary to enforce confidentiality by use of criminal sanctions against non-participants. (5) The Commonwealth had provided no sufficient reason for disregarding these well-established principles, and thus the statute is unconstitutional.
      i. Concurrence: There could be no higher interest than a State’s interest in the quality of its judiciary. However, if the Constitutional protection of a free press is to mean anything, it means that gov’n’t can’t take it upon itself to decide what a newspaper may or may not publish.

5. *Smith v. Daily Mail Publishing Company*
   a. WV statute made it a crime to publish juveniles’ names that were on trial. A reporter went to the scene of the crime, found out the name from the police and from witnesses, and published the name. *Held*, this statute is unconstitutional because the state’s interest in protecting the privacy of juveniles does not outweigh the press’s interest in publishing information
that is legally obtained. (1) Our recent decisions demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards [Landmark, Cox Broadcasting Corp.] All of these cases suggest that if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order. (2) The reasoning of another case, Davis, that the Constitutional right must prevail over the state’s interest in protecting juveniles, applies with equal force here. (3) Three radio stations had announced the name over the air. Thus, the state’s interest would not be served by punishing the newspaper. (4) Thus, the state’s interest here is not of the highest order.

i. The principle of Daily Mail applied when the reporter knew the information was obtained illegally or made available by mistake in Peavy v. New Times, Inc.

ii. However, a district court punished a reporter who read a document that gave the price of a settlement agreement that she did not know was under seal until after she read it, but went ahead and published information from the document anyway in Ashcraft v. Conoco.

ii. Categorical Balancing
1. R.A.V. v. City of St. Paul

iii. Literal Approach
1. Black and Douglas and the absolutist approach.
II. Defamation Generally
   a. Freedom of Expression competing with a private interest in reputation
      i. “The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being” [Rosenblatt v. Baer (1966)]

   b. Current Definition
      i. The essential elements common to both libel and slander:
         1. (1) The making by the D of a defamatory statement;
         2. (2) The publication to at least one other than the P of that statement; and
         3. (3) The identification in some way of the P as the person defamed (“of and concerning”)

   c. Definition in Missouri [Overcast v. Billings mutual]
      i. (1) Defendant published
      ii. (2) A defamatory statement
      iii. (3) That identifies the Plaintiff
      iv. (4) That is false
      v. (5) That is published with the requisite degree of fault; and
      vi. (6) Damages the P’s reputation (Such statement tended to expose P to hatred, contempt, ridicule, or deprive the P of the benefit of public confidence and social associations)

   d. Romaine v. Kallinger
      i. Man wrote a book insinuating that a woman had information about a junkie in one section. (1) A defamatory statement is one that is false and injurious to the reputation of another or exposes another person to hatred contempt or ridicule or subjects another person to a loss of the good will and confidence in which he or she is held by others. (2) Court first evaluates whether the statement is susceptible to defamatory meaning by considering the fair and natural meaning which will be given it by reasonable persons of ordinary intelligence. (3) If statement is capable of more than one meaning, trier of fact decides which meaning it is. (4) Allegation that P knows a criminal is not defamatory

   e. Special Damages, Slander Per Se, and Libel Per Se
      i. Libel v. Slander
         1. Libel includes defamatory communications of amore or less permanent sort such as:
            a. Printed material, photographs, paintings, motion pictures, signboards, effigies
         2. Look to the interest is the permanence of the communication (for dissemination and record) and the greater potential injury to the victim.
            a. Matherson v. Marchello
               i. Radio show, band member said he slept with man’s wife. Held, defamation which is broadcast over radio or TV is libel.
         3. Generally, if the defamatory communication is held to constitute libel, the complaining party is not required to plead and prove as part of his or her case actual pecuniary loss resulting from the libel.
            a. Because of the extra damage to the P, some damages would just be assumed.
         4. Libel Per Se and Per Quod
            a. Per Se: The libel is plain on its face
i. John Doe is a bastard
b. Per Quod: The libel requires extrinsic circumstances to give them a defamatory meaning
   i. Mary Doe of 1234 Lollipop lane has just given birth. It is libelous b/c Mary has only been married one month.
c. Rules
   i. Libel per se in all jurisdictions and Libel per quod in a large number of jurisdictions are actionable without the need for special damages
   ii. Libel per quod in other jurisdictions are actionable with special damages unless they fit one of the four categories.

5. *In haec verba: [Nazeri v. Missouri Valley College, p.12]*
   a. Definition: Pleading in the exact words made in the defamation
   b. This rule is strictly applicable only to libel and not to slander
      i. In a case where there is a permanent record of the defamation, it is not unreasonable to expect a verbatim reproduction of the offending statement to assist the court in determining whether it is capable of defamatory meaning.
   c. In slander, the accuracy with which it is pleaded must depend upon the recollection of the original hearer, who might not even be the P.
   d. All that is required is that there be “certainty as to what is charged” as the slander.
   
   ii. Slander includes more ephemeral communications such as the spoken word, gestures and sign language.
      1. If the communication is categorized as slander, the complaining party generally has to establish a loss (special damages)
         a. Special damages consist of “the loss of something having economic or pecuniary value” which must flow directly from the injury to reputation caused by the defamation; not from the [emotional] effects of defamation” . . . and they must be accurately identified with sufficient particularity to identify actual losses” [Matherson v. Marchello]
      2. Exceptions to the general rule – there must be an imputation
         a. That the P committed a crime
         b. That tend to injure the P in his or her trade, business or profession
            i. Nazeri, P. 10
         c. That P has contracted a loathsome disease, and
         d. That impute unchastity to a woman
            i. Nazeri holds that a false imputation of homosexuality is defamatory in MO.
   
   iii. *Nazeri v. Missouri Valley College* (Supreme Ct. MO 1993)
      1. P is Director of Teacher Education in the Missouri Department of Elementary and Secondary Education. D is the Vice-President of Missouri Valley College, a private religious college in Marshall, MO. P gave D’s college teacher education program an adverse evaluation. Thereafter, D spoke to a newspaper and claimed that P was incompetent, out to get the college, prejudiced against the college, and opposed to church schools having education program. The he asserted that she
lives with a well-known homosexual and that P left her husband and children to live with the homosexual.” Later, D met with the reporter again and said the same claims plus “he would not tolerate fags on campus.” D later told faculty members of Lindenwood College that he had “taken care of” P and she would no longer be on campus. P says that these statements injured her reputation and her employment – she has been released from several employment obligations since. She has also suffered emotional distress, etc. Held, P’s in Missouri need not concern themselves with whether the defamation was per se or per quod, nor with whether special damages exist, but must prove actual damages in all cases. (1) Under Gertz v. Robert Welch, a private defamation plaintiff is constitutionally precluded from recovery of presumed or punitive damages absent a showing of malice. Absent malice, a private plaintiff is limited to recovery of damages for actual injury. (2) In Dun & Bradstreet, the plurality opinion states that “the states’ interest adequately supports awards of presumed and punitive damages even absent a showing of ‘actual malice’.” (2) Accordingly, while Dun & Bradstreet, Inc. would allow us to maintain the per se/per quod distinction, we believe the abandonment of this distinction as evidenced by our M.A.I instructions was and still is correct. (3) Publication is simply the communication of defamatory matter to a third person, which occurred at the moment D uttered the allegedly false statements about appellant to each newspaper reporter. It matters not that her superiors heard her say anything. (4) The supreme court has said that expression of opinion may sometimes contain objective facts. The test is whether a reasonable fact-finder could conclude that the statement implies an assertion of objective fact.
II. Breaking Down Defamation Definition
   a. The Defamatory Statement
      i. The words
         1. General
            a. Some words will universally be understood to injure reputation
               i. Thief, cheat, murderer, whore, etc.
            b. Other words may have that effect only in relation to their time and the
               victim’s position
               i. Labelling someone a communist after WWI
         2. Categories of typical defamatory speech
            a. Accusation of a crime;
            b. Sexual impropriety or other immoral behavior
            c. Having a loathsome disease or being mentally ill
            d. Professional incompetence or misconduct in one’s business
            e. Bankruptcy, financial irresponsibility or dishonesty
            f. Disgraceful behavior such as child abuse or substance abuse
            g. Product disparagement (trade libel)
      3. Provided that one other person other than P understands the communication to be
         defamatory and such understanding is reasonable, given its content and context, a
         court may accept the P’s argument that it is defamatory.
   ii. Standard of Interpretation:
      1. Reasonable Person of Ordinary Intelligence
   iii. Extrinsic Information:
      1. A P is allowed to show extrinsic facts that would explain why the statement
         would be understood in a defamatory sense by those who knew the unstated facts
      2. Extrinsic information is called the “inducement” and the inference that may be
         drawn by those who know the facts is called the “innuendo”
   iv. Generally courts view the publication as a whole:
         a. Headline Read “Cops Think Kato Did It!” meaning that he committed
            perjury, but the inference was that he committed murders. They
            publication was defamatory, and the article was far into the publication
   v. Opprobrium:
      1. Today a statement is not likely to be actionable unless it suggests some moral
         opprobrium
      2. New York: “a statement that tends to expose a person to hatred, contempt or
         aversion, or to induce an evil or unsavory opinion of him in the minds of a
         substantial number in the community.”
   vi. Figurative Speech
      1. Rule: A statement is not actionable if it can’t reasonably be interpreted as stating
         actual facts about a person
      2. The rule immunizes certain types of statements:
         a. Statements too fantastic or improbable to be believed
         b. Words used in a “loose figurative sense” – calling someone a “scab”
         c. Rhetorical Hyperbole: That guy is “blackmailing” the government – he
            isn’t, this is just an opinion about how he negotiates
vii. Roles of Judge and Jury

1. First Question (For the Judge): Is the statement capable of defamatory meaning
   a. Ambiguous Statements:
      i. Two interpretations
         1. Some states: It is for the trier of facts to determine the ambiguity
         2. Others (Illinois, e.g.): *Innocent Construction Rule*:
            a. If the statement can reasonably be construed in an innocent sense when the words are given their natural and obvious meaning, it is not actionable.

2. Second Question (For the Jury, if “Yes” above): Is the statement in fact defamatory?

b. Publication
   i. General
      1. Term of art meaning that the defamatory communication, whatever its form, has been perceived by someone other than the person defamed – “publication” doesn’t matter
   ii. Heard by Another
      1. Where the person does not intend the communication to be conveyed to anyone other than the target of his or her attack, and the means chosen to convey the communication will in the normal course prevent reception by third persons, there is no publication.
      2. The requirement of publication is not met by the victim him/herself publicizing the information to others.
      3. Republication –
         a. Repetition of the original defamation by persons other than the victim constitutes republication for which the original communicator will also be held liable provided the republication is foreseeable.
   iii. Statute of limitations
      1. Missouri it is two years, in Illinois it is 1 year.
      2. It runs from when the material was first published.
         a. One long run is considered one publication and the statute begins when the first one hits the street.
   iv. Intracorporate publication privilege
      1. any communication between people at a corporation. People have to talk to each other in order for the corporation to survive, so if (a) it relates to the corporations business and (b) the communication is necessary for the corporation to do what it needs to be doing, then this is not considered publication to a third party
         a. If supervisor is investigating whether employees stole money, and has to report to his supervisor, then this is not considered a publication.
         b. It has been stretched to those people outside the corporation (accountants, etc) who are necessary to do business
      1. P purchased insurance on his house. His house caught on fire, and while he tried to save it, it was destroyed. Company hired an Investigator, who after a very not thorough investigation of inspecting carpet, said that large amounts of flammable
liquid had been poured about the house. Company denied the claim based on Investigator’s report and mailed P a note saying that “the loss resulted from an intentional act committed by you or at your direction.” The letter was sent by registered mail, return receipt requested. Company did so to avoid “publishing” the arson charge to other persons. However, Company knew that the letter would affect P’s ability to obtain insurance policies from other companies. P showed the letter to at least one other insurance agent. Company claims that it was the denial of the coverage, not the defamatory statement, that caused P’s harm and that the company has an absolute privilege to communicate the reason for its denial to its insured. *Held,* the jury determined the statement was made with the requisite degree of fault, and b/c D had reason to suppose the letter would be published in the ordinary course of business, this counts as defamation. (2) While ordinarily communication of defamatory matter only to the plaintiff who then discloses it to third parties ordinarily does not subject D to liability, there is an exception where the utterer of the defamatory matter intends, or has reason to suppose, that in the ordinary course of events the matter will come to the knowledge of some third person. Because D had a reason to expect that other insurance agencies would ask for this information in the regular course of business, this counts as a publication.

### c. Identification

1. **General**
   - This is the “of and concerning” requirement: the person must establish that it was her who was defamed.

2. **Group Defamation**
   - Group defamation was allowable in *Beauharnais v. Illinois* (racist speech) because they said that the prevalence of racism in this state (and country) is enough, and that if you can punish a libel against one person, you can punish a libel against the group.
   - **Cases**
     - R.A.V. v. City of St. Paul, MN (1992), in which the court struck down a St. Paul ordinance against hate speech, further suggests that Beauharnais is no longer viable.
     - Two Factors figure into the decision: *Size of the Group and Inclusiveness of the Language*
   - **General Rule**
     - If it is a large group, the courts will likely not entertain suits by individuals – it must also be specific language
     - However, if it is a small homogenous group, the court will permit actions by the individual members of the group.
       - Any group under 100 may be small enough for a court to find that one or members have been identified.
       - E.g. A Sports Team
     - If the language isn’t specific, then it will be harder for the case

3. **Corporations**
   - Restatment of Torts 2nd: Corporation for Profit may sue if the matter tends to prejudice it in the conduct of its business or to deter others from dealing with it.
b. Same is true of Partnerships and Labor Unions

d. Fault
   i. Actual Malice
         a. Full page ad taken out by civil rights activists in the NYT Times says they
            had arrested MLK 7 times, that the police had padlocked the dining hall to
            starve the students, and that the students sang the Start Spangled manner,
            etc. They had not arrested that much, the police hadn’t padlocked for that
            reason, and my country tis of thee. Sullivan was the commissioner, and
            said the number of arrests was wrong, and it was of and concerning him
            b/c he is in charge of the law enforcement. The ad had some further
            erroneous statements, and there were statements that the police had
            arrested someone unfoundedly, etc. Rationale: People must be free to
            criticize, and erroneous facts are inherent in criticism. This is not a reason
            to penalize the speech without protection. (1) This is not of and
            concerning the Plaintiff (p. 322, top). (2) If you criticize an entity, it is not
            criticizing those individuals who compose that entity. Importantly, the SC
            constitutionalized this niche of “of and concerning,” and the 1st
            amendment applies even to private civil lawsuits. (3) A public official
            suing for defamation of his official acts, the official must prove actual
            malice. The Constitutional guarantees require . . . a federal rule that
            prohibits a public official from recovering damages for a defamatory false-
            hood relating to his official conduct unless he proves that the statement
            was made with “actual malice” – that is, with knowledge that it was false
            or with reckless disregard of whether it was false or not.

      2. Actual Malice Standard
         a. You know it is false or you recklessly disregard whether it is true or false
            at a time when you subjectively entertain serious doubts about its truth

      3. Reckless Disregard
         a. *St. Amant v. Thompson* (1968): D repeated false charges w/o checking the
            charges or investigating the sources reputation. Held, there must be
            sufficient evidence to permit the conclusion that the D in fact entertained
            serious doubts about the truth of his publication. Court holds that “reckless
            disregard” hasn’t been shown. A D’s statement that he didn’t know it was
            false is not enough – the fact finder is to determine this. List of things that
            don’t amount to actual malice:
               i. lack of knowledge one way or another isn’t enough
               ii. Relying on one source for the information isn’t enough
               iii. Not knowing the veracity of the declarant isn’t enough
               iv. Failure to investigate information isn’t enough either
               v. Failure to consider the defamatory nature of the statements is a
                  separate issue
               vi. Had he have acted differently if he would have known he would be
                   on the hook is not enough
               vii. Moreover, all of these things together isn’t enough

b. *Harte-Hanks Communications v. Connaughton*:
i. Paper accused a judicial candidate of using “dirty tricks” to smear his opponent. Source relied on had horrible credibility and whose version of the episode was unconfirmed. Held, the fact that the editor refused to listen to a tape recording which would have cast doubts on the veracity of the story creates evidence of actual malice.

   i. A serious misquotation that hurts a person’s reputation may be libelous if the quotation is rephrased to result in a “material change in its meaning.” Journalist misquoted a psychoanalyst.

   i. P is the alderwoman in St. Louis. During a meeting, a different woman voiced her opposition to a bill on regulating equipment for abortion, stating that having had two abortions herself, such equipment was not required. P, furious about the remarks, left the room to maintain her composure. Later, it was learned in a conversation with a reporter that the other woman had misspoke, and that she had actually had two involuntary miscarriages. At the end of the meeting, a journalist forwarded the remarks via telephone call to his office, and the paper’s rewrite man, confused the names and attributed the other woman’s remarks to P. On testimony, re-write man said he just messed up with his notes, and that it was given correctly to him by the journalist. It was just an error. Held, D did not possess the requisite state of mind at the time of publication so as to enable respondent to overcome the constitutional limitations. (1) Actual malice is to be measured at the time of publication, the state of mind necessary to establish actual malice requires that this knowledge be “brought home to the persons . . . having responsibility to the publication”, and negligence is constitutionally insufficient to show the recklessness that is required for a finding of actual malice. (2)

e. Bose Corporation v. Consumers Union –Supreme Court
   i. D published article evaluating loudspeakers, and claimed that P’s speaker tended to wander “about the room.” D brought a product disparagement claim in District Court. (1) There is a significance difference between proof of actual malice and proof of mere falsity. (2) The author made a mistake and when confronted with it, he refused to admit it and steadfastly attempted to maintain that no mistake had been made – that the inaccurate was accurate. That attempt failed, but the fact that he made the attempt does not establish that he realized the inaccuracy at the time of publication. (3) The statement in this case represents the sort of inaccuracy that is commonplace in the forum of robust debate to which the New York Times rule applies

4. “Official Conduct”
a. As long as the defamatory material is published within the constitutional and statutory bounds of his or her office, the public official would be bound by the N.Y. Times rule.

b. Erroneous charges of criminal conduct on the part of public officials and candidates for public office are protected by the privilege.

5. “Public Official”
   a. Includes at least those government hierarchies who have or appear to have substantial responsibility for the conduct of government business, from judges to public park supervisors.
   b. Former office holders who exercised substantial responsibility while in office and who are attacked for their past official conduct. [Rosenblatt v. Baer]

6. Criminal Libel
   a. Garrison v. Louisiana:
      i. Court extends NYTimes to Criminal Libel, holding that “only those false statement made with the high degree of awareness of their falsity demanded by NYTimes may be the subject of either civil or criminal sanctions.”

7. Imputing Actual Malice
   a. Rarely will a P be able to show the corporation that published or broadcast the defamation knew or had serious doubts about its falsity. Courts generally say that it is enough to show that an employee did – this is b/c employees and publishers are both liable for what they produce.
   b. Freelance writers are treated as independent contractors and their actual malice is not imputed to the publisher.

ii. Public Figures
   1. Three years after NYTimes, the court considered Butts and Walker:
      a. Court holds that the standard of “actual malice” applies to public figures as well as public officials:
         i. Rationale: Public figures, like public officials, play an influential role in ordering society.
      b. All-Purpose – those who by their very nature are famous
      c. Limited Purpose – those who thrust themselves into a particular controversy to sway the outcome.
   iii. Procedural Issues with the Actual Malice Standard
      1. The standard is clear and convincing evidence – a court must make sure that the evidence is sufficient to prove it as such
      2. Independent Review
            i. Consumer Reports made an erroneous and derogatory statement about the quality of one of Bose’s speakers. Although a panel said that the sound tended to wander along the wall, the article said it “tended to wander about the room.” The author said he believed the two statements were the same. The district court found that the journalist was wholly without merit, and said this constituted actual malice. Held, appellate courts must exercise de novo review
– a reevaluation of the evidence to assure adherence to the standard. (1) “The statement in this case represents the sort of inaccuracy that is commonplace in the forum of robust debate to which the New York Times rule applies.”

1. The SC has neither accepted nor rejected a bifurcated approach which sought to bi-furcate the inquiry on independent review – take all facts which the jury had determined as valid as valid, and then determine whether they met the standard.

iv. Negligence Standard

1. Administering The Negligence Standard
   a. No state has adopted a fault standard lower than negligence
      i. Split Courts However on whether it should be professional or ordinary negligence
         1. Troman v. Wood (Ill.): Rejected professional negligence standard b/c in a community w/only one newspaper, that paper could set its own standard
         2. Gobin v. Globe (Kan): Standard is “the conduct of the reasonably careful publisher or broadcaster in the community or in similar communities under the existing circumstances.”
         3. Restatement: the standard is set by the profession as a whole
   b. Evidence of Negligence
      i. RE(2) states that the reasonableness of investigation (whether something is true) depends on
         1. Time Element: Shoreter for topical news story than for one that has no time pressur
         2. Nature of the Interest Promoted by Publication: Story informing of something important in a democracy may warrant quicker publication than gossip
         3. Potential damage to P if the communication is false

2. Mo. Intentional Torts 23.06 Not a public official [1980 New]
   a. Requires the plaintiff to prove five elements:
      i. (1) publication,
      ii. (2) with the requisite degree of fault,
      iii. (3) of a defamatory statement,
      iv. (4) that identifies the plaintiff,
      v. (5) that is false
      vi. (5) that damages the plaintiff's reputation.

3. Damages
   a. In Missouri, you must prove negligence in private case.
   b. To recover punitive damages you must prove actual malice.
      i. [Overast v. Billings Mutual]

v. Public/Private People Distinction

1. Rosenbloom v. Metromedia (Private P’s - SC first attempt)
a. Court holds that in suit by private individual, the private individual was required to prove actual malice.

   
a. Policeman shot and killed a youth. In the civil trial, Gertz represented the family. Respondent, publisher of American Opinion, said that Gertz was the architect of a “frame up” of the policeman and that Gertz had a criminal record and longstanding communist affiliation. *Held*, the New York Times standard doesn’t apply to all discussion of a public issue. (1) Under the 1st amendment, there is no such thing as a false idea. However, false facts belong to the category of speech that is no fundamental value to free expression. (2) Private individuals are more vulnerable to injury, and the state interest in protecting them is correspondingly greater. Media are entitled to act on the assumption that public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehoods concerning them. (3) The extension of the New York Times standard to defamatory falsehoods relating to private persons if the statements concerned matters of general or public interest would abridge this legitimate state interest to a degree that we find unacceptable. It would occasion the additional difficulty of forcing state and federal judges to decide on an ad-hoc basis which publications address issue of “general or public interest” and which do not. (4) *The private defamation plaintiff who establishes liability under a less demanding standard that that stated by New York Times may recover only such damages as are sufficient to compensate him for actual injury*
   
i. Even if a P shows actual malice, state law may preclude or limit punitive damages. Some states require a showing of some further element, such as animosity toward P, in addition to actual malice. Some states do not permit punitive damages at all, and some do not permit them in libel cases.
   
ii. *Gertz* establishes only a federal constitutional minimum, and states are free to adopt other rules that are more protective of speech. About half a dozen or so. Most of these require private P’s to prove actual malice.

3. *Gertz* creates the dichotomy between public and private figures:
   
a. All Purpose Public Figure:
   
i. Such great general fame or notoriety that his or her name is a household word;
   
b. Limited Purpose Public Figure:
   
i. Voluntary: Someone who thrusts themselves into a public controversy to sway the result; and
   
ii. Involuntary or “Vortex” figures: Someone who is placed in the media by limelight or chance
   
   1. E.g. In the Ford assassination, a bystander saw the woman pulling the gun and saved the president’s life – and then he got outed as a homosexual in the news.
2. E.g. Someone was onstage at the last speech of Robert Kennedy, and later the paper said that it wasn’t “Surhan Surhan (who actually shot him), but actually it was ‘this guy!’” and they lit up the face of the guy on the stage. The court found that ‘this guy’ b/c he was on stage was a public figure

4. Established Public/Private Rules:
   a. Simply appearing in newspapers in connection with some newsworthy story or stories does not make one a public figure;
   b. Social, professional or business prominence does not by itself make one a public figure, except when the people are so famous like Dave Letterman or Michael Jackson.
   c. Forced involvement in a public trial, criminal or civil, does not by itself make one a public figure.
   d. Those charged with defamation cannot by there own conduct in making their victims notorious thereby create their own defense;
   e. Merely applying for and receiving public research grants doesn’t make one a public figure.
   f. In order to meet the Gertz test of thrusting oneself into the forefront of a public issue or controversy, the issue or controversy must be a real dispute, the outcome of which affects the general public in an appreciable way.
   g. In order to meet the Gerts test of access to the media the access must be regular and continuing

5. Case Law on Public/Private Figures
   a. Time Inc. v. Firestone
      i. Time reported that Russell Firestone was given a divorce on grounds of “extreme cruelty and adultery.” Firestone wife was not a “public figure” because she did not assume a role of especial prominence in the affairs of society, other than perhaps Palm Beach Society. Divorce is not the type of public matter Gertz is referring to; rather it’s a private matter.
   b. Wolston v. Reader’s Digest
      i. Book listed Wolston as one of many soviet intelligence agents. Held, one who does not thrust themselves into a controversy is not a public figure. “One who commits a crime does not become a public figure, even for the purpose of comment on a limited range of issues relating to his conviction.” Purely one’s involvement in an issue of public interest is not enough to make them a public figure.
   c. Hutchinson v. Proxmire
      i. Public Life: Director of Research at State hospital; adjunct professor at a state university; long involvement w/publicly funded research; had local press coverage for what he’d done; the public interest in the expenditure of public funds. Held, the receipt of federal funds is insufficient to qualify one as a public figure (1)
Two types of public figures: (a) All-purpose and (b) Limited Purpose (2) All Purpose: “Some people attain such levels of prominence that they are public figures for all purposes” (3) Limited Purpose: “Those who thrust themselves into the forefront of a particular controversy in order to influence the outcome of the issues involved are limited-purpose public figures

1. The court suggests that the person must have:
   a. (1) thrust themselves into the public spotlight and
   (2) have access to the media sufficient to defend themselves

d. **Sigafus v. Pulitzer**
   i. It is clear to us that like Warner, Appellants were well known to a wide audience of people interested in religious and children's music. Also, like Warner, over a span of several years Appellants have sought and received national recognition for their songs and musical performances. Appellants also sought and were granted access to the media when they wanted. We find that here, like in **Warner**, the evidence projects a picture of people who "commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able to expose through discussion the falsehood and fallacies of the defamatory statements." Also similar to the Western District's findings as to Warner, it is inherent in Appellants' activities that they invite public attention to themselves and their views, because of the religious nature of their public performances, as well as the cassette tapes and compact discs they disseminated nationally, and the interviews they sought and were granted. These factors are taken into account in weighing whether one is a public figure, and, in Appellants' case, are indicia of that status. (2) “In properly following the reasoning of Warner, we conclude that Appellants’ status as limited public figures does not limit the statements made about Appellants by Respondents to those concerning only children’s music.”

1. The court in Sigafus was saying that the Sigafuses are not just limited purpose public figures for commentary on children's music, but also as regards their relationship with Christian Identity. Assume for the test that when defamatory comments are made about a limited purpose public figure, the actual malice standard only applies to those statements that concern the subject for which the person is a limited purpose public figure.

2. So, it is a two part review: (1) What are they public figure for, and (2) Is this a comment on the reason they are.

6. Public/Private Issues
   a. **Dun & Bradstreet v. Greenmoss Builders**
i. P, credit reporting agency, disseminated information that Re had voluntarily filed for bankruptcy. State SC upheld an award in favor of Re on the grounds that Gertz is inapplicable to non-media defamation defendants. Held, because this speech is private and does not involve any issues of public concern, Gertz does not apply. Powell’s plurality: It is issues of public, and not private, concern which is at the heart of the 1st amendment. Also, P’s credit report involved a matter that was not of public concern
1. The leading case on non-public-concern on private figures is Dun & Bradstreet
2. Breaking Down the Essence of the Plurality
   a. The best we can do in Gertz is that you can have a standard less than actual malice in matters of purely private concern

e. Falsity
   i. Burden of Proof
         a. (1) There is a constitutional requirement now that P’s bear the burden of proving the falsity, as well as the fault, of the D’s statements. (2) However, states are free to establish their own burdens if the case isn’t of public concern.
      2. Material Falsity
         a. If the defendant charged the P with stealing $10 from a bank, truth was established even if the actual amount was only $12,000.

ii. Falsity and Opinions
       a. Wrestling coach was put on probation after his team brawled with another team. Testifying at a judicial hearing about the suit, he and the superintendent said he didn’t cause the brawl. Newspaper said that they lied at the press conference. Milkovich and superintendent brought charges saying that b/c the newspaper accused them of perjury, this was libel per se. Held, there is no need to distinguish between opinion and fact and this comment is sufficiently libelous to avoid 1st amendment protection. (1) It would be destructive of the law of libel if a writer could escape liability for accusations of defamatory conduct simply by using, explicitly or implicitly, the words ‘I think’ (2) The Hepps case stands for the proposition that a statement on matters of public concern must be provable false before there can be liability under state defamation law, in least in situations where the media defendant is involved. (3) The Bressler-Letter Carrier-Falwell line of cases provide protection for statements that cannot ‘be reasonably interpreted as stating actual facts about an individual’ (4) The Constitutional Fault doctrine further ensures that debate on public issues remains ‘uninhibited, robust, and wide open’. (4) Thus, given these protections, there is no need to determine whether this is opinion or fact. In this case, whether the P committed perjury is sufficiently factual to be proved true or false.
i. This looks like a return to the fair-comment privilege

ii. *Moldea* Case
   1. Book reviewer at N.Y.Times said that book was too sloppy to be considered trustworthy, and then provided examples of how it was sloppy. *Held,* the correct measure of the challenged statements verifiability as a matter of law is whether no reasonable person could find that the review’s characterizations were supportable interpretations of the book. That could not be found here.

iii. *Phantom of the Opera* Case
   1. Two versions of phantom; reviewer says the Hill version is ‘the worst ever produced.’ *Held,* this is so subjective that it is not ‘susceptible of being proved true or false. Also, this could not be construed as stating any actual facts. There could be no objective evidence to prove it, and thus there is no libel.

   2. Four part test to consider with Fact v. Opinion:
      a. Consider specific language (common or ordinary meaning of the words);
      b. Verifiability (whether the statement can be proven true or false)
      c. Journalistic Context (when entire article is considered)
      d. Social Context or setting (Whether it is a column on op-ed page or whether it is a political cartoon, e.g.)

   3. *Nazeri v. Missouri Valley College*:
      a. The supreme court has said that expression of opinion may sometimes contain objective facts. The test is whether a reasonable factfinder could conclude that the statement implies an assertion of objective fact

iii. *Hustler v. Falwell*
   1. Also, the jury found against D on his libel claim when it decided that the Hustler ad parody could not “reasonably be understood as describing actual facts about D or actual events in which he participated.

iv. "For media companies, the best way to deal with this: if you are going to give any sort of opinion , give all the facts that lead to your opinion; then, make sure that your opinion is not based on anything else. LIST THE FACTS THAT UNDERLIE IT! Then, it would be very difficult to show that you weren’t making an opinion.

v. In literary, artistic, sports criticism –these are areas of opinioned criticism, and these are areas where we will always find statements of opinion. When you are in business, statements about things such as competence are treated more seriously. Statements that someone is incompetent, in a serious business context, might be grounds for defamation. It is very much a matter of context.

f. Damages
   i. In Missouri, one must prove negligence to recover for defamation if a private P; However, if they want to recover punitive damages they have to prove actual malice.
III. Privileges Against Defamation
   a. General
      i. Must plead these in your answer and you have the burden of proving them at trial by a preponderance of the evidence.
   b. Truth or “Justification”
      i. Most states require truth as a complete defense
      ii. Other states require both “truth” and “good intent”
      iii. Must prove the WHOLE alleged defamation is true, not just a portion
   c. Privileges
      i. Absolute Privilege
         1. A person with an absolute privilege is not required to establish their good motive in making the defamatory communication
         2. Legislative
            a. All who speak in a legislative forum enjoy an absolute privilege to speak without fear of being sued for libel.
            b. Hutchinson v. Proxmire
      3. Judicial
         a. Courtrooms or grand jury rooms.
         b. Judges, lawyers, witnesses, defendants and plaintiffs are immununie from a libel action provided the remark occurs during the official portion of the hearing or trial
      4. Executive
         a. Presidents, governors, mayors, heads of government agencies
         b. Enjoy absolute privilege for official communications or statements
         c. Reason:
            i. Should participants be forced analyze their remarks for strict legal relevance and risk civil liability should they be in error, their fearlessness and independence may be impaired and their actions on the public’s behalf inhibited
      ii. Qualified Privilege
         1. General
            a. This privilege is defeated by the plaintiff establishing malice on the part of the Defendant
               i. Must prove that a publication was motivated chiefly by some consideration other than furthering the interest for which the law accords the privilege in the first place.
         2. Employer – Manager
            a. In some jurisdictions there is privilege for an employer to comment on an employee’s performance to a manger or to someone requesting a reference for the employee, for communication to an employer regarding an employee’s conduct toward a customer, and for a plant manger to tell employees that P’s were terminated for theft of plant property.
      iii. Fair and Accurate Report Privilege (A qualified privilege)
         1. General
            a. The most important media privilege is the privilege to publish a fair and accurate report of official proceedings. The privilege protects media when
they report someone else’s defamatory statements in a court proceeding, a city council meeting, or a legislative hearing.

b. The public has a legitimate need to be informed of public proceedings of both governmental and private organizations in order to guard against potential abuses of power which could occur if all proceedings were kept a secret.

2. Limitations on the Scope
   a. Majority View:
      i. Most jurisdictions suggest that the privilege doesn’t extend to reporting allegations or statements contained in complaints, affidavits or other pretrial papers unless and until such papers are brought before a judge or magistrate for official action.
   b. Minority View:
      i. The report of the contents of papers properly filed and served on the required parties may be privileged since the filing and serving of pleadings or other papers authorized by the rules of court are public and official acts done in the course of judicial proceedings.
   c. Legislative Proceedings
      i. Must be public in nature unless a statute provides otherwise.
      1. New York allowed a non-public proceeding to be privileged.

3. Fairness and Accuracy Requirement
   a. The test is like this: Restatement 2: “Although it is unnecessary that the report be exhaustive and complete, it is necessary that nothing be omitted or misplaced in such a manner as to convey an erroneous impression to those who hear or read it, as for example a report of the discreditable testimony in a judicial proceeding and a failure to publish the exculpatory evidence.”
   b. Must be motivated by a sense of duty to make disclosure of those receiving the report.
      i. If it is made for a purpose other than to inform those who need to know, it will be called “malicious” and not privileged.
      1. A report given to a friend at a cocktail party.
      2. A report about a competitor.
   c. The report, if not verbatim, must accurately and fairly report what transpired.
      i. An erroneous detail won’t destroy the privilege so long as it doesn’t destroy the general accuracy of the report.

4. Wire Service Defense
   a. Common law recognizes a variation of the fair report privilege that protects republication of stories provided by reputable wire services – at least in the absence of some information that casts doubt on the wire service story.
      i. Policy is that smaller newspapers couldn’t compete with bigger papers if they each had to verify wire service stories, and thus could only publish local news.
5. Truth, Privilege and Republication
   a. The fair report privilege is only available to the republishers – those who are reporting someone else’s defamation. For purposes of the privilege, *Time* is treated as a republisher and the issue is the accuracy of its report and the truth of it.

   a. Time published an article that linked a Congressman to a Rackets Boss through Medico Industries. The article also stated that a Boss described Phillip Medica as a capo (chief) of his Mafia family. The district Court said that the Time article was a fair and accurate account of the FBI documents from which Time gleaned the information. (1) At common law, when a reporter republished defamatory remarks, the law said the reporter claimed the remark as his own. This privilege recognized that with official proceedings, if the reporter provides a fair and accurate summary of the proceedings, he doesn’t adopt the remark as his own. (2) FBI files seem at least as “official” as the pleadings in civil cases, in which people have a motivation to lie. Here, there is no such motivation. (3) Three policies underlie the privilege: (a) one who reports what happened in a public proceeding are agents of those that could have attended, (b) they foster proper administration of justice because they expose the proceedings to the public eye, and (c) the public has an interest in learning of important matters. Both rationales (b) and (c) apply in the present case – it is about a Congressman. (4) Once the libel D establishes the existence of a “privilege”

iv. Fair Comment
   1. The honest expression of the communicator’s opinion on a matter of public interest base upon facts correctly stated in the communication.
   2. Must be free of speculation as the motivation of the person whose public conduct is criticized unless such discussion was warranted by the stated facts.
   3. Commentaries containing exaggeration, illogic, sarcasm, ridicule, and even viciousness were all protected if justified by the underlying facts.
   4. Opinion is not per se protected by the first amendment. [Milkovich v. Lorain Journal Co.]
   5. Malice would negate the defense of fair comment but in could not be inferred merely from the words used by the speaker. Malice could only be found from an examination of the communicators’ motives in publishing
   6. Defense may also be negated if it were made on a major error of fact

v. Neutral Reportage:
   1. Recognized in a few jurisdictions, and requires:
      a. charges must be newsworthy, and associated with a public controversy;
      b. made by a responsible and prominent source;
      c. reported accurately and with neutrality;
      d. about a public official or public figure

d. Incomplete Defenses
   i. Retraction
      1. Common law rule is that you can offer evidence of retraction to mitigate damages
a. Retraction must be complete and unequivocal.

2. Most states have retraction statutes which may or may not abrogate the common law rule
   a. Some apply even if defamation is intentional
   b. In a few states retraction statutes have been held unconstitutional

3. Missouri has NO retraction statute

4. California has the most elaborate retraction statute
   a. A P may recover only special damages unless a correction is demanded and not published or broadcast. The prospective P’s demands must be written, must specify the statements claimed to be defamatory, and must be served on the D w/in 20 days after the P learns of the publication or broadcast. If the D fails to publish a retraction in the same manner as the original w/in three weeks, P can recover general, special, and exemplary damages.
   b. *Burnett v. National Enquirer:* Court holds that Enquirer isn’t a paper, and thus isn’t allowed California under the retraction statute because the statute only applies to papers. Appeals affirms by saying even if they were a paper, they didn’t make the deadline.

5. Usually, retraction statutes require that:
   a. (a) require that the P demand the retraction w/in 3 or 4 weeks, and if you miss it, you are out of luck;
   b. (b) require that the retraction be as prominent as the original story;
   c. (c) if they demand and the retraction is printed, then often times damages will be severely limited

ii. Libel-Proof Plaintiffs
   1. The Plaintiff's Reputation was already so bad that they can’t be entitled to any damage award
      a. Convicted multiple murderer

iii. The incremental Harm Doctrine
   1. If you have a situation where the truth is just as bad as the falsity, so that the incremental harm to the person for you getting it wrong rather than getting it right, is 0, then there is no harm to the reputation
IV. Summary Judgment

a. *Anderson v. Liberty Lobby* (Supreme Court)
   i. P is a lobbying organization who brought libel action against magazine who called them neo-Nazi, anti-Semitic, racist and fascist. **Held**, in ruling on a motion for summary judgment in a libel action to which the actual malice standard applies, the appropriate question for the trial judge is whether the evidence in the record could support a reasonable jury finding either that the P has shown actual malice by clear and convincing evidence or that P has not. (1) on a motion for summary judgment under Rule 56 of the FRCP, or on a motion for a directed verdict under Rule 50(a), the determination whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case.

   i. (1) When considering appeals from summary judgments, the court will review the record in the light most favorable to the party against whom summary judgment was entered. (2) Facts set forth by affidavit or otherwise in support of a party’s motion are taken as true unless contradicted by the non-moving party’s response to the summary judgment motion. (3) The review is de novo. (4) The burden on a summary judgment movant is to show a right to judgment flowing from facts about which there is no genuine dispute. Summary judgment tests simply for the existence, not the extent, of these genuine disputes. Therefore, where the trial court, in order to grant summary judgment, must overlook material in the record that raises a genuine dispute as to the facts underlying the movant’s right to judgment, summary judgment is not proper. (5) A pleading must contain “a short and plain statement of the facts showing that the pleader is entitled to relief.” (MO not a “notice pleading” state). Rule 74.04 is the Sum Judg rule in MO.
V. Other Torts & Criminal Penalties (Discloses Confidential Information)

a. General Issues
   i. Govn’t always has two potential remedies:
      1. (a) prevent the speech by injunction (prior restraint); or
      2. (b) can punish it some other way (damages, jail time, creation of a tort where
         those aggrieved can sue, etc.) (subsequent punishment)
         a. There is a STRONG presumption in English/American law against prior
            restraints (if 1st amendment means anything, it means prior restraints are
            bad)
   ii. We are talking about disclosures of TRUE information (Defamation is dissemination of
       false information)
   iii. Alternatives to Prior Restraints
      1. Criminal punishment of the publisher
      2. Criminal Punishment of the Leakers
      3. Properly screen employees

b. Disclosure of Confidential Information (usually a statute)
   i. Florida Star v. B.J.F.
      1. Newspaper publishes a “police reports” section containing brief articles
         describing local criminal incidents under police investigation. After P reported to
         the sheriffs Department that she had been robbed and sexually assaulted, the
         Department prepared a report, which identified B.J.F. by name, and placed it in
         the Department’s press room. The Department does not restrict access to the room
         or to the reports available there. A reporter copied the report verbatim, and P’s
         name was included in a story in the paper, in violation of the newspaper’s internal
         policy. Florida statute makes it unlawful to print the name of a victim of sexual
         offense. Held, imposing damages on the Star for publishing B.J.F.’s name violates
         the First Amendment. (1) If a newspaper lawfully obtains truthful information
         about a matter of public significance then state officials may not constitutionally
         punish publication of the information, absent a need to further a state interest of
         the highest order. [Smith v. Daily Mail] (2) The “timidity and self-censorship”
         which may result from allowing the media to be punished for publishing certain
         truthful information is harmful to the First Amendment (3) The statute was not a
         direct advancement of the state’s claimed interest – b/c it was under-inclusive in
         that it prohibited only through “instruments of mass media.” (4) The government
         has ample means to safeguard the information that are less drastic than punishing
         truthful publications. Furthermore, it is clear that the news article generally, as
         opposed to the specific identity contained in it, involved “a matter of public
         significance.” (5) Thus, while privacy of a rape victim is a significant interest, the
         imposition on the newspaper is too precipitous a means to accomplish it.
         a. Two prongs to this decision:
            i. (1) The essence of the information
               1. Whether the press (a) lawfully obtained the information,
                  and (b) whether the information is truthful, and (c) whether
                  it is a matter of public significance.
            ii. (2) The state interest in keeping it a secret
1. Whether punishing (a) serves a need of the highest state order that is (i) narrowly tailored, (ii) can’t be under-inclusive, (iii) and there can never be a per se standard – it must be an ad-hoc judgment

ii. Bartnicki v. Vopper

1. Suit involves the repeated intentional disclosure of an illegally intercepted cellular telephone conversation about a public issue. The person who made the disclosures did not participate in the interception, but they did know – or at least had reason to know – that the interception was unlawful. Relying on Federal Wiretap Law (Omnibus CC&SS Act) and Pennsylvania statutory provisions, P’s sought actual, statutory, and punitive damages and attorney fees. Held, where the publisher of information has obtained the information in question in a manner lawful in itself but from a source who obtained it unlawfully, the government may not punish the ensuing publication of that information. (1) These cases present a conflict between “the full and free dissemination concerning public issues” and “individual privacy and the fostering of private speech.” (2) In Florida Star, we stated that “if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need of the highest order.” (3) The government interest is removing an incentive for parties to intercept information is substantial, the proper way to remove this incentive is to punish the wrongdoer. If the sanctions that presently attach to the statute are not severe, make them stronger. (4) We do not decide whether the interest in privacy is sufficient to justify the application of this statute to disclosures of trade secrets or domestic gossip or other information of purely private concern. (5)

iii. Landmark Communications, Inc. v. Virginia

1. Virginia paper accurately reported that the Virginia Judicial Inquiry and Review Commission was contemplating an investigation of a particular state court judge. Convicted of violating statute that prohibited disclosure of confidential matters before the commission. Held, the publication Virginia seeks to punish under its statute lies near the core of the 1st amendment, and the Commonwealth’s interests advanced by the imposition of criminal sanctions are insufficient to justify the actual and potential encroachments on freedom of speech and of the press which follow therefrom. (1) The commonwealth’s interest in protecting the reputation of its judges, nor its interest in maintaining the institutional integrity of its courts is sufficient to justify the subsequent punishment of speech at issue here, even on the assumption that criminal sanctions do in fact enhance the guarantee of confidentiality.

   a. In a series of decisions since Landmark, the Court has consistently held that a state may not restrict the publication of truthful confidential information absent a state interest of the highest order.

iv. Nebraska Press Ass’n v. Stuart

1. In anticipation of a very publicized trial, a Nebraska trial judge entered an order that restrained P newspapers and broadcasters from publishing or broadcasting accounts of confessions made by the accused or any other facts “strongly implicative” of the accused. Held, the order is unconstitutional. (1) The 6th
amendment, and 14th amendment, guarantee that a citizen has a right to an impartial jury. (2) The 1st amendment, though, provides special protection against orders that impose a prior restraint on speech. (3) The question is whether, as in Dennis, the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger. (4) There are several alternatives the state could have used other than prior restraints. In this case, the trial judge has not adequately considered whether the alternative measures would sufficiently have protected the D’s rights to avoid the need for a prior restraint. (5) Because the community is so small, it is doubtful that prior restraints on the publication would have prevented the harm sought to be prevented.

a. The court in Nebraska Press announced ‘a virtual bar to prior restraints on reporting of news about crime.’

b. Gentile v. State Bar of Nevada held that, although the state may not restrict speech by the press about pending criminal cases w/o meeting the clear and present danger standard, it may restrict speech by an attorney about pending cases if the attorney knows or reasonably should know the speech will have a “substantial likelihood of materially prejudicing’ the proceeding.


1. NYTimes obtains copy of govn’t report about Vietnam, during its peak, and began publishing a series of papers about the report. Justice Department moved to enjoin the publication. NYDistrict Court denies the injunction and Court of Appeals grants the injunction. At same time, Washington Post began publishing materials from the same report. Report had issues about our bombing of Cambodia. Justice Department moved the same, but DC and Court of Appeals denied the injunction. SC stayed the case. Held, the government has not met this burden of proving that the papers can’t be published. Every member of the court wrote a separate opinion (p. 95-96). Main Points: Prior Restraints are presumptively unconstitutional and it is very difficult to overcome them – even if the military says something is classified or a military trade secret, the court does not have to agree with them. There are a number of separate opinions on 96-103


1. Govn’t sought an injunction against The Progressive magazine because it was going to publish an article with scientific information about the H-bomb. Atomic Energy Act prohibited the production of “restricted data.” Held, the govn’t has met the burden of establishing that the prior restraint is necessary. (1) This case is different than the NY Times case b/c that case contained historical date relating to events that occurred some three to twenty years previously and a specific statute is involved in the present case (The Atomic Energy Act). (2) While it may be true in the long run that death is preferable to life without liberty, in the short run freedom of speech, to worship, and of the press cannot be enjoyed unless one first enjoys the freedom to live. (3) We must weigh the serious right to freedom of expression against the possibility of thermonuclear annihilation for all of us, and the govn’t in that regard wins. (4) The govn’t has met the requirements of the Atomic Energy Act and the SC test in the New York Times case of “grave, direct, immediate and irreparable harm to the United States.”
a. Other alternatives might have been possible in this case: rephrasing or summarizing specific passages, omitting certain technical details or references, or delaying publication

c. Other Torts (I.I.E.D.)
   i. *Hustler v. Falwell*

   1. Ad parody in Hustler said that Falwell, a nationally known minister, had sex with his mother in an outhouse. He tried to recover for Intentional Infliction of Emotional Distress, alongside invasion of privacy and defamation. In order to win on the IIED claim, he had to prove that the conduct of the magazine was “outrageous.” *Held*, public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of a publication without first showing that the publication contains a false statement of fact which was made with “actual malice.” (1) D would have us find that a State’s interest in protecting public figures from emotional distress is sufficient to deny First Amendment protection to speech that is patently offensive. (2) The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or general and limited-purpose public figures. (3) *New York Times v. Sullivan* has already stated the level of fault one must have to be liable for defamation. (4) An “outrageousness” standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on its audience. (5) Also, the jury found against D on his libel claim when it decided that the Hustler ad parody could not “reasonably be understood as describing actual facts about D or actual events in which he participated.”
VI. Commercial Speech
a. Early Cases
i. *Valentine v. Chrestenson* (1942)
   1. Guy bought a submarine in Florida and realizes that people aren’t interested in it. He sales the submarine from Florida to New York and parks it on a pier by the East River and prints up handbills to show the submarine to people. On the opposite side of the handbill, “I think it’s a public outrage that the NY sanitary commission won’t let me park the submarine where I want to park it.” This gets him in trouble under the sanitary code. **Held**, *The constitution imposes no restraint on govn’t with respect to purely commercial advertising*.
   a. Thus, there is no protection for commercial speech
   b. Why does the Court not protect this speech?
      i. It’s only economic speech; it doesn’t contribute to the marketplace of ideas
      ii. The Court for the previous fifty years had embarked on an experiment in protecting economic rights; that experiment has been a disaster, then comes the New Deal, and these are all justices for government regulation – This is POST–LOCHNER, so the justices are for regulation. This is Carolene Products. Thus, the court doesn’t want to rejuvenate economic rights because it just put them to bed four years earlier.
   c. *Briar v. City of Alexandria* (1951) – reaffirms *Chrestenson*
   ii. *Bigelow v. Virginia* really messes it up (1975):
      1. advertising abortions were illegal, and the court invalidates his restriction for illegally advertising a lawful product ( Abortions were legal)
      2. This is more *Roe v. Wade* (1973) speech than a commercial speech case
      1. Virginia statute said that Virginia pharmacists couldn’t advertise the prices of prescription drugs. Pharmacist publishes the price of his drugs and is convicted. **Held**, the state cannot punish the dissemination of advertising that “does no more than propose a commercial transaction.” (1) The “idea” the pharmacist wants to communicate is that he will sell X prescription drug for Y price. (2) Those whom the suppression of prescription drugs price information hits the hardest is the poor, the sick, and particularly the aged. (3) These people have a strong interest, and society has a strong interest in this information b/c they can make better informed decisions if they know all the facts. (4) Because we are a free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well-informed. (5) Some forms of commercial regulation are permissible: (a) time, place, and manner restrictions, (b) false and misleading advertising restrictions, (c) advertising illegal transactions, (d) electronic broadcast media issues.
      a. Court invalidates the statute and overrules the *Chrestenson* case. The people challenging the law are merely consumers – they want to get ad’s saying where they can get cheap drugs. Thus, this is really a RIGHT TO LISTEN case; not a RIGHT TO SPEECH case
b. Commercial Speech is in between economic activity and the rest of speech
c. It is “speech that proposes a commercial transaction”; not speech with a
commercial motivation and not political speech by corporations
d. The theory is that it deals with the free enterprise economy; it is a matter
of public interest that our economic decisions in the aggregate be
informed. The free flow of economic information serves that goal.
e. This is mainly J. Holmes’s dissent in Lochner
f. What J. Rehnquist have done is write laissez-faire economics into the
Constitution
   i. However, it’s clear that he doesn’t believe that economic ad’s can
      NOT be regulated
   ii. It doesn’t follow that b/c some economic decisions are matters of
      public concern that all economic issues are matters of public
      concern
g. Truthful, nondeceptive advertising after Virginia Pharmacy
   i. Bates v. State Bar of Arizona: Held, no ban allowed on lawyer
      advertising
   ii. Linmark Associates v. Township of Willingboro: Held, ordinance
      prohibiting the display of “For Sale” or “Sold” signs on all but
      model homes.
b. Central Hudson Gas v. Public Service Commission of New York
   i. Court sets out the four part analysis.
      1. If the expression is commercial speech (“Does nothing more than propose a
         commercial transaction”), it comes within the meaning of the first amendment if it
         concerns lawful activity and is non-deceptive.
      2. Second, we ask whether the asserted government interest is substantial
      3. Third, we must determine whether the regulation directly advances the
         governmental interest.
      4. Fourth, if the government interest could be served as well by a more limited
         restriction on commercial speech, the excessive restrictions can’t survive.
         a. J. Rehnquist dissents again and insists the court is doing Lochner all over
            again.
         b. SUNY v. Fox (this is still good law); the court clarified that prong four is
            not a least restrictive means test – you have to show that the alternative
            regulation (what it could have done to be less restrictive) is substantially
            less restrictive of speech in order to invalidate the regulation.
            i. The court is reluctant to judge the legislature.
            ii. Also, the trend in these cases is that there is more protection for
                commercial speech over time – from Chrestenson till present
            iii. The question today is whether a meaningful distinction can be
                 made between commercial speech and core political speech – the
                 majority of the court says there is not a meaningful distinction
c. Cases Examining Central Hudson
   i. Posadas De Puerto Rico v. Tourism Co of Puerta Rico
1. Court upholds statute that allows gambling but prohibits advertising the gambling. The court holds that the power to completely ban casino gambling necessarily includes the lesser power to ban advertising on the issue.

ii. *44 Liquormart v. Rhode Island*
1. Court abandons the “bitter with the sweet” doctrine announced in *Posadas*
2. The legislature doesn’t have the broad power to suppress truthful, non-misleading information for commercial purposes
3. Court intimates that it is rejecting the deferential *Posadas* posture and arguably rejecting the deferential position of *Central Hudson* altogether.
   a. Strict scrutiny applies where truthful information is being withheld from consumers
4. This is a return to the anti-paternal instinct – Blackman’s *Virginia Pharmacy* position – the state doesn’t have the right to protect its citizens from truthful, non-misleading information.

iii. *Lorillard Tobacco v. Reilly*
1. State bans tobacco advertising w/in 100 ft of schools. Court holds that w/regard to cigarettes, it is pre-empted by federal law. W/regards to other tobacco products, it can’t pass the test. Would have banned advertising in 87%-91% of Boston.
   a. Main Problems
   i. Scope of Message: This regulation is too broad in terms of the type of communication that it covers. Nothing distinguishes between the billboards or certain price advertising, etc. She links the scope to empirical studies. If studies had proven that certain advertising was more effective for children or moved children to a certain lifestyle, then it could be possible to uphold this statute.
      1. Problem with linking speech to empirical studies: this might be a return to the “bad tendency” test – if the govn’t can prove there is a bad tendency under empirical evidence, then it can support basically any speech restriction.
      2. This would thus fly in the face of the strict scrutiny the court is leaning toward.
   ii. (2) Geographic: This would also eliminate advertising in a majority of the city (87%-91%). This is too much.

iv. *Thompson v. Western States Medical Center*
1. Congress enacted the FDA Modernization Act, which, among other things, exempted compounded drugs from the FDA’s standard drug approval requirements if, but only if, the providers of those drugs don’t advertise the use of specific compounded drugs. *Held*, this restriction on advertising violations the first amendment. (1) Because obtaining FDA approval for a new drug is a costly process, requiring such approval of all drug products compounded by pharmacies for the particular needs of an individual patient would, as a practical matter, eliminate the practice of compounding, and thereby eliminate the availability of compounded drugs for those patients who have no alternative treatment. (2) Several non-speech related means of drawing a line between compounding and large-scale manufacturing might be possible here. (3) Even if the fear is that
advertising compounded drugs would put people who do not need such drugs at risk by causing them to convince their doctors to prescribe the drugs anyway, that fear doesn’t justify the restrictions.

a. Violates the 1st amendment under the prong four “Reasonable fit” tailoring inquiry of *Central Hudson*

   i. Congress could have drawn a less speech-restrictive line
      1. Could have banned the use of commercial scale manufacturing for compounding drug products
      2. Prohibited pharmacists from wholesaling compounded drugs – anticipating customers before prescriptions arrived

v. Complete Bans
   1. The Court upheld a ban on all billboards in San Diego

vi. Compelled Disclosure
   1. The court has upheld compelled disclosure in certain advertising [*Zauderer v. Office of Disciplinary Counsel*]

d. Final Thoughts

   i. Note there is a DEEPLY DIVIDED COURT ON THIS ISSUE?

   ii. What are consistently allowable regulations?
      1. Ads for unlawful activity (buy crack for cheap, murder for hire, etc.)
      2. False or Misleading Ads
         a. The problem with these is that misleading may be truthful and the fear that people will come to a bad decision is against the courts economic Darwinism principles
      3. Non-information ads: lifestyle ads, Joe Camel, Budweiser girls, etc.
VII. Jurisdiction, The Internet, & The Communications Decency Act

a. Jurisdiction
   i. Calder v. Jones (Supreme Court 1983)
      1. Respondent, a professional entertainer who lives and works in California and whose television career was centered there, brought suit in California Superior Court, claiming that she had been libeled in an article written and edited by petitioners in Florida and published in the National Enquirer, a national magazine having its largest circulation in California. Petitioners, both residents of Florida, were served with process by mail in Florida, and, on special appearances, moved to quash the service of process for lack of personal jurisdiction. Held, jurisdiction over petitioners in California is proper because of their intentional conduct in Florida allegedly calculated to cause injury to respondent in California. (1) The Due Process Clause permits personal jurisdiction over a defendant in any State with which the defendant has "certain minimum contacts ... such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' [International Shoe v. Washington]. (2) In judging minimum contacts, a court properly focuses on "the relationship among the defendant, the forum, and the litigation."[Shaffer v. Heitner] (3) Here, California is the focal point both of the allegedly libelous article and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the "effects" of their Florida conduct in California. (4) Petitioners are not charged with mere untargeted negligence, but rather their intentional, and allegedly tortious, actions were expressly aimed at California. They wrote and edited an article that they knew would have a potentially devastating impact upon respondent, and they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the magazine has its largest circulation. Under these circumstances, petitioners must "reasonably anticipate being haled into court there" to answer for the truth of the statements made in the article. (5) While petitioners' contacts with California are not to be judged according to their employer's activities there, their status as employees does not insulate them from jurisdiction, since each defendant's contact with the forum State must be assessed individually. (6) First Amendment concerns do not enter into the jurisdictional analysis. Such concerns would needlessly complicate an already imprecise inquiry. Moreover, the potential chill on protected First Amendment activity stemming from defamation actions is already taken into account in the constitutional limitations on the substantive law governing such actions.

      a. The Calder “effects test”
         i. Whether the D should know it is going to affect the P in their home state. It can be read very differently by the lower courts.

   ii. Demaris v. Greenspun (9th Cir. 1983)
      1. Demaris filed an action for libel in the United States District Court for the Central District of California, under that court's diversity of citizenship jurisdiction § 1332. The defendants are the LAS VEGAS SUN, INC., which is incorporated in Nevada and has its principal place of business there. Held, no jurisdiction lies for P because the contacts are not sufficient to establish that it would be foreseeable that a risk of defamation would arise in California. (1) Under the state’s long-arm
statute, the applicable test is "whether or not it was foreseeable that a risk of injury by defamation would arise in the forum state." (2) The district judge correctly held that the foreseeability test was not met in this case. (3) The SUN is a local, privately-owned newspaper published in Nevada. It is not qualified to do business in California and has no agent for service of process there. It has no office or employees in California and its reporters do not go to California with any regularity. (3) Subscriptions are not solicited from California, and during 1981 only about 0.69% of the weekday circulation and 1.3% of the SUN's Sunday circulation went to California. The subject of the article was P in his capacity as a writer of exposes about criminal activity in certain American cities. Two of his books focused on Las Vegas or residents of Las Vegas, thus giving rise to an interest about him in that city. The column in question did not identify him as a California resident or in any direct way refer to California events. (4) This is not a local place of doing business case, or a case of local agents conducting business of the SUN in California. Absent doing of business in the foreign State, we are not disposed to carry the jurisdiction beyond the area of the paper's primary circulation. Moreover, there is no evidence of a sizable impact in California.

b. Jurisdiction & The Internet
   i. *Planet Beach Franchising Corp. v. C3UBIT, Inc.*
      1. P's are Louisiana corporations in the business of franchising tanning salons. D operates a website on which users share information and news related to the tanning salon industry. D is a Pennsylvania corporation that is operated and managed in Pennsylvania. It is undisputed that D's have no officers, employees or property in Louisiana and that D's have never entered into or performed a contract or other transaction with a Louisiana citizen or business. Article posted on website stated "we are alerting the ENTIRE INDUSTRY, warning everyone with business dealings with Planet Beach to review your status, your arrangements, and hunker down." Defendants further assert that Stephen Smith, the President of Planet Beach, had experience with four failed tanning salons.

   **Specific Jurisdiction:** (1) The exercise of personal jurisdiction over a nonresident defendant satisfies due process when (a) the defendant has purposefully availed itself of the benefits and protections of the forum state by establishing "minimum contacts" with that state; and (b) exercising personal jurisdiction over the defendant does not offend "traditional notions of fair play and substantial justice." (2) The facts of this case are similar to those in *Calder*. (3) D's published a controversial, allegedly defamatory article about a corporation that defendants knew to be based in Louisiana. The primary source of defendants' information is a deposition of the President of P, who D know to live in Louisiana. D drew from Louisiana sources when they discussed Smith's deposition with a former P franchisee located in Louisiana. That the effects of D's publication would be felt in Louisiana was either "intended" or "highly likely to follow." (4) Furthermore, defendants reached out to the forum state in several ways. First, they tried to obtain information about Planet Beach through a phone call. Even a single phone call placed to the forum may be enough to sustain personal jurisdiction. Second, D called a former P franchisee located in Louisiana to discuss the contents of the allegedly defamatory article. Third, D posted alongside the allegedly defamatory
article an electronic version of plaintiffs' logo that was obtained from plaintiffs' Internet server located in Louisiana.  (6) That defendants' article appeared online, as opposed to in print, does not substantially alter the Court's analysis. There is good reason to maintain the same jurisdictional standard for Internet communications as that which applies to print communications: to hold otherwise would give publishers an incentive to disseminate libelous speech via the medium with the more restrictive standard. (7) **General Jurisdiction:** "At the one end of the spectrum, there are situations where a defendant clearly does business over the Internet by entering into contracts with residents of other states which involve the knowing and repeated transmission of computer files over the Internet.... In this situation, personal jurisdiction is proper." The opposite end of the spectrum consists of situations "where a defendant merely establishes a passive website that does nothing more than advertise on the Internet." Here, personal jurisdiction is not appropriate. In the middle of the spectrum are situations in which a defendant has a website that allows a user to exchange information with a host computer. "In this middle ground, the exercise of jurisdiction is determined by the level of interactivity and commercial nature of the exchange of information that occurs on the Website."

ii. **Griffis v. Luban**

1. P, an Alabama resident, has taught noncredit courses in ancient Egyptian history and culture at the University of Alabama, Birmingham. P also works as a self-employed consultant. D, a Minnesota resident, maintains a nonprofessional interest in the history and culture of ancient Egypt. Both P and D have participated in the *sci.archaeology* newsgroup, since at least 1996. D allegedly defamed P over the newsgroup. Held, jurisdiction does not lie because D did not specifically aim her tortuous conduct at Alabama. (1) In judging minimum contacts a court focuses on the "relationship among the defendant, the forum, and the litigation." For the minimum contacts requirement to be satisfied, the defendant must have "purposefully avail[ed]" herself of the privilege of conducting activities within the jurisdiction." (2) Within the spectrum of differing circuit court interpretations of *Calder*, we believe the most cogent analysis of the *Calder* effects test is that of the Third Circuit in *Imo Industries*. (3) The test requires the plaintiff to show that: (a) the defendant committed an intentional tort; (b) the plaintiff felt the brunt of the harm caused by that tort in the forum such that the forum state was the focal point of the plaintiff's injury; and (c) the defendant expressly aimed the tortious conduct at the forum such that the forum state was the focal point of the tortious activity. (4) If foreseeability of injury in the forum is not enough, it follows that something more than defendant's knowledge that the plaintiff is a resident of the forum and will feel the effects of the tortious conduct there must be necessary to satisfy the effects test. We conclude that something more than mere effects in the forum state is required, and agree with the Third Circuit that the Supreme Court did not "carve out a special intentional torts exception to the traditional specific jurisdiction analysis, so that a plaintiff could always sue in his or her home state." (5) As noted above, to satisfy the third prong, the plaintiff must show that "the defendant knew that the plaintiff would suffer the brunt of the harm caused by the tortious conduct in the forum,
and point to specific activity indicating that the defendant expressly aimed its tortious conduct at the forum." (6) While the record supports the conclusion that Luban's statements were intentionally directed at Griffis, whom she knew to be an Alabama resident, we conclude that the evidence does not demonstrate that Luban's statements were "expressly aimed" at the state of Alabama. The parties agree that Luban published the allegedly defamatory statements on an internet newsgroup accessible to the public, but nothing in the record indicates that the statements were targeted at the state of Alabama or at an Alabama audience beyond Griffis herself. The newsgroup on which Luban posted her statements was organized around the subjects of archeology and Egyptology, not Alabama or the University of Alabama academic community.

c. Communications Decency Act

i. § 230:

1. “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”

2. Zeran v. American Online

   a. Unknown individual posted a message on AOL advertising T-shirts with offensive slogans related to the 1995 Oklahoma City bombing. The message said to call Ken at a phone number that was the home number of Kenneth Zeran. After receiving numerous abusive phone calls, Zeran complained to AOL and eventually the message was removed. However, several similar messages were posted over the next few days and the number of abusive and threatening calls reached a level of one every two minutes. Zeran sued AOL saying AOL should have removed the messages sooner. Held, AOL is specifically protected by CDA § 230, regardless of its knowledge of the defamatory message.

3. Blumenthal v. Drudge

   a. AOL hired Drudge to publish the DrudgeReport on AOL. After Drudge accused White House aide Sydney Blumenthal of spousal abuse, he sued both AOL and Drudge. Court held that the suit could go forward against Drudge, but that AOL was protected by § 230.
VIII. Subpoenas and Searches
a. The Contemporary Problem
   i. Through the 1950s there were only a handful of cases involving attempts by the
government to force disclosure from unwilling members of the press.
   ii. The information on subcultures and corrupt government heightened prosecutors desires to
get information
   iii. The 1970s engendered a widespread attitude among government officials that if reporters
had unpublished information concerning crimes and anti-establishment conduct, they
had the same legal duty as anyone else to disclose it
   iv. Problems for reporters:
      1. Divulging confidential information conflicts with the ethics of their profession
      2. It will chill people from providing information b/c they will be seen as unreliable
      3. Reporters think of themselves as professionals like lawyers or doctors – and thus
work product
   v. Both sides say they are serving the public interest
b. The Branzburg-Pappas-Caldwell trilogy
   i. Branzburg v. Hayes (together with In re Pappas and U.S. v. Caldwell – Per Curiam)
      1. (1) First, the Court says that newsgathering qualifies for some 1st amendment
protection. Without protection, freedom of the press could be eviscerated. (2)
However, there is no unrestrained right to gather news. The right of the media in
newsgathering is no more significant than the right of the rest of us the citizenry.
This is even though the press thinks that by affecting what happens after we talk
to people, you are affecting our ability to gather the news. (3) Third, the court
held there is no reason to suggest that the public interest in law enforcement is
insufficient to outweigh the burden on news-gatherers. (4) Fourth, there is no
evidence that a large percentage of confidential sources are implicated in crimes
or present relevant evidence related to the grand juries task. (5) Fifth, there is no
indication that communication with reporters will be chilled. If the press can
show that a large number of informants are involved in crime, or if you could
show that information would be chilled, then it is up in the air whether the lower
court could hold otherwise (The lower courts since the case have been all over the
board). (6) Sixth, b/c the privilege is conditional, it won’t give informants
security anyway. Held, the First Amendment does not guarantee the press a
constitutional right of special access to information not available to the public
generally. (1) There is no testimonial privilege for news-gatherers to refuse to
appear before a grand jury to testify to (a) possible criminal activities they might
have witnessed in the course of their professional responsibilities, and (b) the
identity of those who engaged in such activities.
      2. Concurrence: Powell: (1) That state and federal authorities are not free to
“annex” the newsmedia as an investigative arm of the government. (2) If a
newsman believes that the grand jury investigation is not being conducted in good
faith his is not without remedy. (3) if newsmen believes his relationship is
tenuous and remote or if he believes his testimony implicates confidential sources
without a legitimate need of law enforcement, he will have access to the court on
a motion to quash. (4) The courts will be available to newsmen under
circumstances where legitimate First Amendment interests require protection.
3. **Dissent: Stewart, Brennan, Marshall**: (1) There should be ad-hoc balancing before the reporter was required to appear before a grand jury. If the government can show, in a proceeding to quash the subpoena, that (1) there is probable cause to believe that he newsperson has information that is clearly relevant to a specific probable violation of law; (2) Demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) Demonstrate a compelling and overriding interest in the information.

   a. Most lower federal and state courts have limited the application of *Branzburg*.

c. **How the Privilege Works?**

   i. **Laying the Foundation**

      1. Reporters must respond, either by appearing or by moving to quash the subpoena. Usually the reporter must supply some information to lay the foundation for the privilege. Sometimes an affidavit setting out the basis for the reporter’s objections to disclosure is sufficient to support the motion to quash. Other times, courts have insisted that the reporter testify as to the circumstances in which the claim of confidentiality arises.

d. **Consequences of Non-Compliance**

   i. **Array of Sanctions**

   ii. Sentenced to a specific term or fine for criminal contempt

   iii. If it appears that the reporter will remain in jail indefinitely rather than comply, some courts hold that the sanction becomes penal rather than coercive, and thus subject to maximum sentence provisions of the criminal contempt laws

   iv. Destruction of materials after receiving a subpoena could be a violation of the obstruction of justice statute.

e. **The Legal Situation After *Branzburg***

   i. **General**

      1. There is no absolute First Amendment newpersons’ privilege

      2. The recognition by the courts of a qualified newspersons’ privilege depends to a great extent on the legal context in which the claim of privilege is made

      3. The courts will not honor the claim of privilege made before grand juries and trial courts when it would protect the sources and others who have been seen by the reporter engaging in the suspected criminal activity under investigation.

   ii. **Criminal Grand Juries**

      1. The courts will not honor the claim of privilege made before grand juries when the reporter is asked to produce physical evidence in his or her possession of suspected criminal activity under investigation such as tape recordings and documents

   iii. **Criminal Trials**

      1. The courts *will not honor* the claim of privilege at a criminal trial or collateral hearing the information or evidence is *sought by the prosecutor and it is relevant and material to his or her case.*

      2. The courts *will honor* the claim of privilege at a criminal trial or collateral hearing when the confidential information or evidence is *sought by the accused and it is not critical to his or her defense.*
3. Ten of Thirteen Courts of Appeals have accepted the idea of a qualified privilege which protects reporters when they are subpoenaed to testify about confidential matters.

iv. Civil Proceedings
   1. The courts will generally honor the claim of privilege in civil pretrial proceedings and trials unless the information or evidence sought by the litigant goes to the heart of his or her case and there is no alternative source for that information.
   2. When the newsperson is a D in a civil litigation, the courts are more likely to find that the information or material sought to be protected under the privilege goes to the heart of the P’s case and cannot be obtained from alternative sources.
   3. When the newsperson is a P in civil litigation and claims the qualified privilege to prevent the D from obtaining information relevant to his or her defense, the claim of privilege will be denied [Anderson v. Nixon]
   4. If the newsperson’s claim to a qualified privilege in the particular context is not accepted, he or she will have to choose between revealing confidential

f. Newsmen’s Shield Laws
   i. General
      1. In Branzburg, J. White wrote that Congress and the state legislatures were free to write laws extending to journalists a privilege against being forced to testify so long as that privilege didn’t run afoul of the 1st amendment.
      2. Now, 30 states have added shield statutes and numerous bills have been introduced in Congress to provide some kind of protection for newsgatherers.

   ii. State Shield Laws
       1. Statutory analysis
          a. They usually address the following questions:
             i. Who should be protected against testimonial compulsion;
             ii. Which kinds of media should be covered;
             iii. What information should be protected;
             iv. What types of government proceedings and at what stages in these proceedings is the privilege against testimonial compulsion available;
             v. The availability of the privilege; and
             vi. Whether the privilege may be waived at all
       iii. What do they cover?
             2. *U.S. v. LaRouche Campaign* (1st Cir. 1988)
                a. 1984 Presidential candidate was indicted for mail fraud, wire fraud, and conspiracy to obstruct justice in connection with his campaign. Defendants subpoenaed NBC to produce videotaped material that was not broadcast of an interview with a former LaRouche consultant who was expected to be a key prosecution witness. NBC claimed it had five interests to protect by not disclosing the information: (a) disclosure would increase the harassment of the witness by the LaRouche organization; (b)
the threat of administrative and judicial intrusion into the newsgathering and editorial process; (c) the disadvantage of a journalist appearing to be an investigative arm of the judicial system or a research tool for the government; (d) the burden on journalists time and resources in responding to subpoenas; and (e) the disincentive to compile and preserve non-broadcast material. The TC denied NBC’s motion, then NBC was held in civil contempt and fined $500/day. (1) Courts faced with enforcing requests for the discovery of materials used in the preparation of journalistic reports should be aware of the possibility that the unlimited or unthinking allowance of such requests will impinge upon First Amendment Rights. (2) Disclosure of confidential materials would clearly jeopardize the ability of journalists and the media to gather information and, therefore, have a chilling effect on speech. (3) However, when dealing with non-confidential information, we are pointed to no authority explaining how any chilling effect could result from the disclosure of statements made for publication without any expectation of confidentiality. (4) Branzburg: Certainly state and federal authorities are not free to annex the news media as an investigative arm of the government. (5) Against the defendants interest of a fair trial under the 5th Amendment and his right to confrontation under the 6th Amendment, the 1st Amendment interests asserted by the media are outweighed.

i. Sometimes demand to see the material in question to help them decide whether to compel disclosure – in camera inspection

g. Overcoming a Privilege
   i. Defeating a Qualified Privilege
      1. Riley v. City of Chester
         a. Policeman, running for mayor, sued the city alleging officials smeared him by leaking information from his police file. Reporter was called in as witness and asked who leaked her the information; she invoked the 1st Amendment and the Pennsylvania Shield Law to avoid testifying. She was held in civil contempt and committed to jail. Held, the trial court did not make sufficient finding of necessity to overcome the qualified reporters privilege in the present case. (1) A determination of the specific circumstances in which the privilege will be required to yield to a paramount interest must be made on an ad hoc basis. (2) The asserted claim to privilege should be judged on its facts (ad-hoc) by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. (3) All courts which have considered this issue have agreed that the federal common law privilege of news writers shall not be breached without a strong showing by those seeking to elicit the information that there is no other source for the information requested. (4) In striking the delicate balance between the assertion of the privilege on the one hand and the interest of either criminal or civil litigants on the other, the (a) materiality, (b) the relevance and (c) the necessity of the information sought must be shown. (5) The party seeking the information must show “that his only
practical access to the crucial information necessary for the development of the case is through the newsman’s source.

i.  SEE EVALUATION OF NECESSITY ON 656.
ii. California Supreme Court says that “a criminal defendant must show a reasonable possibility the information will materially assist his defense.”

h. Search Warrants
   i. Zercher v. Stanford Daily
      1. Local district attorney obtained a search warrant issued on a judge’s finding of probable cause to believe that the student newspaper possessed photographs and negatives revealing the identity of demonstrators who assaulted and injured police officers who were attempting to quell a riot at the Stanford University Hospital. Nothing was found. Paper sought a judicial declaration that the search had deprived them of their constitutional rights and an injunction against further searches: they seriously threaten the ability of the press to gather, analyze and disseminate news; they are physically disruptive to orderly publication; confidential sources of information will dry up and access to various news events will be denied because of a fear that press files will be readily available to law enforcement authorities; reporters will be dissuaded from recording and preserving their recollections for verification and future use; the processing of news and its dissemination will be chilled by the prospect that searches will disclose internal editorial deliberations; and the press will resort to self-censorship to conceal its possession of information of potential interest to the police – all of this is in violation of the First Amendment. Held, searches and seizures in newsrooms pursuant to warrant did not violate the First Amendment because (a) the drafters of the constitution had not forbidden search warrants directed to the press under the Fourth Amendment, (b) the Fourth Amendment didn’t require special showing s that subpoenas would be impractical before warrants could be issued to search a newsroom, and (c) if a press organization was named in a warrant, the police would not have to show first the organization’s complicity in the alleged offense being investigated. (1) Ultimately, if a search warrant is issued properly with probable cause, specificity, and overall reasonableness, there is no reason to believe this doesn’t afford sufficient protection.

i. The Privacy Protection Act (Congressional Response)
   i. General
      1. The Act substantially restricts the situations in which a newsroom search and seizure may legally occur
      2. The act says it’s unlawful for a governmentt officer or employee to search for or seize work-product materials if they are in the hands of somebody who is reasonably believed to have a purpose to disseminate a newspaper, a book, a broadcast, or similar publication to the public.

ii. Requirements
    1. Generally, law enforcement personnel must have a subpoena rather than merely a search warrant.
2. Law allows searches and seizures of documentary materials such as photographs or videotapes with only a search warrant if
   a. The person with the information is suspected of a crime;
   b. Law enforcement officers believe the materials must be seized immediately to prevent someone’s death or injury;
   c. There is reason to believe that giving notice with a subpoena would result in the materials being destroyed, changed or hidden; or
   d. The materials were not produced pursuant to a court order that has been affirmed on appeal

3. A journalist’s “work product” such as notes or rough drafts cannot be seized unless:
   a. The journalist is suspected of a crime; or
   b. Such seizure is necessary to prevent someone’s death or bodily injury.

iii. Once you have sued
   1. **Good Faith Defense** by the Officers, Employees: If, in good faith, they believed that they had the right to go in and do it, then they are off the hook. The entities aren’t off the hook, but the individuals are.
      a. Saying “I didn’t know there was a Privacy Protection Act is not enough.” They have to show why this particular situation is unclear.
      b. Some Courts have said that simply not knowing of the Act is enough
   2. **Official Immunity**: This can save the individuals so long as the state HAS WAIVED sovereign immunity. But it CAN SAVE the EMPLOYEE.
      a. Unless the liability on behalf of the government is the responsibility of a judicial officer

iv. Civil Remedy – Sovereign Immunity
   1. Then, it also takes the additional step to say there is a civil remedy for the media if there is a violation by the government entity of the Privacy Protection Act
      a. The government can be sued
      b. A state can be sued if they have waived their sovereign immunity
         i. Why would a state do it: Because - You can sue officers, employees, or those under color of state law in those states that have NOT waived their sovereign immunity.

v. Damages
   1. Actual Damages Suffered (Rare that this occurs)
   2. If not, you get a liquidated damage amount of $1,000
   3. You get attorney’s fees
IX. Access to Information
   a. Access to Records
      i. Freedom of Information Act (5 USC § 552)
         1. 1967 Act
            a. Notice of agency actions, including organization, procedures, policies, as
               well as final opinions rendered, and permitted “any person” to request
               records from “each agency.”
         2. 1974 Amendments
            a. FOIA applies to all government agencies except Congress, the courts, the
               government of D.C., and courts martial or the military during wartime.
            b. Agencies must publish list of sources from whom the public can obtain
               information, final opinions, internal instructions that affect the public and
               current indexes.
            c. Any person may request information from an agency, unless it fits an
               exception
               i. If refused, you can ask a federal district court to enforce the
                  request. Agency bears the burden of proving it fits into an
                  exemption. If Court orders information released, the Court can
                  make agency pay all costs.
            d. Nine Exemptions
               i. Properly Classified national Defense and Foreign Matters
               ii. Information related solely to internal agency personnel rules and
                    practices
               iii. Disclosures forbidden by other statutes
               iv. Trade secrets and certain financial information
               v. Some inter- and intra-agency memoranda
               vi. Personnel and medical files and similar files the disclosure of
                    which would constitute a clearly unwarranted invasion of privacy
               vii. Many categories of law enforcement records
               viii. Records of bank examinations
               ix. Geological information relating to oil and gas wells
         3. Exemptions
            a. **Exemption 7(D):** allows agencies to withhold information in law
               enforcement records if its release could reasonably be expected to disclose
               the ID of a confidential informant.
               i. Whether a source is confidential can be determined by the nature
                  of the crime and the source’s relation to it. [*D.O.J. v. Landano*]
            b. **Exemption 6:** Personnel and medical files and similar files.” Much
               litigation on what is a “similar file.” Disclosure is required unless the
               privacy invasion “would constitute a clearly unwarranted invasion of privacy.
               i. *N.Y.Times v. NASA:* Times wanted access to vocal recordings of
                  Challenger crew. Court rejected it because the privacy interest was
                  strong (family members of deceased) and there were transcripts
                  and the records didn’t contain any personal information of NASA
                  crew.
4. Waiver of Fees
   a. Fee waivers are allowed “if disclosure of the information is in the public interest b/c it is likely to contribute significantly to the public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”

5. Access to Electronic Records:
   a. See Electronic FOIA on p. 682

   a. FBI maintains rap sheets on people until they are 80 (arrests, charges, convictions, and incarcerations). Sometimes they are incorrect or incomplete or information on other people with the same name. Much of the information is a matter of local public record. FBI makes rap sheets available only to other law enforcement personnel on request or for publicity to apprehend fugitives. CBS and Reports Committee wanted information on a member of the Medico family (alleged organized crime figures that obtained defense contracts from corrupt congressman). FBI wouldn’t give up rap sheet on living Medico family member. Held, these fall under exemption 7(c), which covers “law enforcement records that could reasonably be expected to constitute an unwarranted invasion of personal privacy. (1) Under 7(c), we must balance the privacy interest in maintaining the practical obscurity of the rap sheets against the public interest in their release. Privacy Interest: Privacy encompasses the individual’s control of information concerning his or her person. Recognition of this attribute of privacy supports the distinction between scattered disclosure of the bits of information contained in a rap sheet and revelation of the rap sheet as a whole. The fact that federal funds are used to compile these sheets shows the general public would likely not have access to the information. This is supported by statutes that limit the disclosure of rap sheets and cases that recognize an interest in the nondisclosure of certain information even where the information may have been at one time public. Public Interest: (1) Whether an invasion of privacy is warranted cannot turn on the purposes for which the request for information is made – it must turn on the nature of the requested document and the basic purpose of FOIA. (a) The public’s interest in full agency disclosure does not support information compiled about private citizens. (b) The public’s interest b/c of corrupt dealings w/Congressman is unsupported b/c Medico’s conviction of crimes would tell us nothing about the Congressman’s behavior or about the DOD’s behavior in awarding his company contracts.

ii. State Open Records Act
   1. General
      a. Even when a state statute is modeled on the FOIA, it may be construed to require disclosure of more (or less) than the FOIA required

   2. Statutory Restraints on Access to Information
      a. Most state open records statutes don’t inquire into the purpose for the request – it is available to everyone, including the media, equally.
b. *Driver Privacy Protection Act* prohibits disclosure of information from drivers license records except for law enforcement and other specified purposes. *Reno v. Condon* held this was a proper exercise of the commerce power. State’s must now register individual’s consent to have this information released.

   a. California, Massachusetts, New York, and Texas are all considering privacy legislation which would prohibit a commercial or governmental entity from disclosing for a “commercial purpose” any information “that identifies or describes an individual” without the individuals “express permission.”

4. Telephone Records
   a. In New Jersey, these records must be confidential. In Georgia, this is not the case.

b. Access to Governmental Meetings
   i. Federal Law
      1. The Sunshine Act
         a. General
            i. All federal agencies headed by boards of two or more persons appointed by the President must hold “every portion of every meeting” open to the public.
            ii. Must provide adequate notice.
            iii. Even if meeting is closed b/c it falls under one of ten exceptions, must make public parts of meeting that does not contain exempt materials.
      2. Federal Advisory Committee Act
         a. Covers committees and task forces set up by Congress, the President, or a federal agency, and contains both an open-records and an open-meetings provision.
         b. Adopts by reference the exemptions of the FOIA.
      3. Senate and House
         a. May close their sessions for any purpose by majority vote.
         b. Senate committee meetings may be closed only for certain enumerated reasons, including discussion about national defense or foreign affairs, committee personnel matters, trade secrets, confidential by law matters, etc.
         c. House committee may be closed for national security or if it may “degrade, defame, or incriminate any person.”
   ii. State Law
      1. General
         a. Usually the statute provides that all meetings of governmental bodies shall be preceded by public notice and shall be open to the public, then sets forth detailed exceptions, definitions of such terms as “meeting” and “governmental body,” notice requirements, and provisions for enforcement.
b. The most effective statutes are those that invalidate any action taken in violation of the openness requirement; the least are those whose enforcement depends on criminal prosecution of officials who do not comply (prosecutors usually don’t like this).

c. Access to Institutions
   i. General
      1. Public institutions – such as mental hospitals or prisons
      2. Government contends that issues of security, maintenance and discipline, and protection of the privacy of persons who are unable to defend themselves arise.
      3. Two SC cases:
         a. Pell v. Procunier (SC): a regulation of the California Department of Corrections provided that “media interviews with specific individual inmates will not be prohibited
         c. In both cases, the court said the press didn’t have access to things that the public does not have access to – it does not abridge the freedom of the press to avoid these certain prisoners
   ii. Houchins v. KOED, Inc.
      1. Suicide occurred and televisions station quoted a psychiatrist saying that the conditions in one of the Jail buildings had caused the suicide. Earlier proceeding judge said the conditions constituted cruel and unusual punishment. Station and NAACP filed 42 U.S.C. § 1983 claiming violation of their 1st amendment right (conditions were needed to stir public debate). After suit, sheriff announced monthly tours of 25 people – press received advance notice (KQED went on the first tour), but tour people couldn’t interview inmates. KQED said the tours were insufficient. Sheriff defended the policies on grounds of “inmate privacy,” the danger of creating “jail celebrities” who would “undermine jail security,” an concern that unscheduled tours would “disrupt jail operations.” Held, neither the 1st or 14th amendment mandates a right os access to government information or sources of information within the government’s control. (1) Jails and Prisons are matters of great public importance. (2) The media is “ill equipped to deal with matters of prison administration.” (3) We do not believe that the public importance of prison conditions warrants a Constitutional right of the public or the media to enter these institutions. (4) Furthermore, this is clearly a legislative task – when to open penal institution is a policy decisions. (5) Respondent does have rights of access to prisons (to receive letters from inmates, interviewing those who render legal services to the inmates, seek out former inmates, visitors to the prison, public officials and institutional personnel).
      2. Dissent: For two reasons the decisions in Pell and Saxbe do not control the preliminary injunction. First, the unconstitutionality of petitioners policies that gave rise to this litigation does not rest on the premise that the press has a greater right of access to information regarding prison conditions that do other members of the public. Second, relief tailored to the needs of the press may properly be awarded to a representative of the press which is successful in proving that it has been harmed by a constitutional violation and need not await the grant of relief to
members of the general public who may also have been injured by P’s unconstitutional access policy but have not yet sought to vindicate their rights.

iii. Notes
1. In *Richmond Newspapers, Inc. v. Virginia*, J. Stevens interpreted the case as repudiating *Houchins* insofar as the latter held that the 1st Amendment does not guarantee a right of access to information within the government’s control.
2. It is clear after *Houchins* that prisons do not have an obligation to arrange for interviews with specific inmates at the request of the media.
3. California disputes whether calls from specific inmates to reporters is legit.

d. Access to Military Operations
   i. General
      1. The 1991 Persian Gulf war was the first time (since Vietnam) that the Department of Defense adopted a pool system whereby media organizations chosen by the Department would identify specific reporters who would then be transported to cover the early stages of military operations.
         a. Largely, this failed and the military restricted too much access to the media. They weren’t allowed to show films of certain bombings or film coffins returning to Dover Air Force Base.
      2. For more information since the Gulf War, see 703-705.

e. Criminal Law Restrictions on Access
   i. General
      1. In some situations, criminal law controls penalties regarding access to information.
   ii. *City of Oak Creek v. Ah King* (S.C. Wisconsin)
      1. After a plane crashed outside an airfield, P’s reporting crew followed an emergency vehicle through a police roadblock. After being chased by a detective and ordered to leave the site, P jumped a fence and took pictures of the crash. He said he wouldn’t leave unless he was arrested. P advances two arguments: First, the 1st amendment protects the right to gather information; and Second, art. 1, sec. 3 of the State Constitution protects the right of the press to gather information. *Held*, news gatherers have no special right of access to a crime scene to which the public has not been allowed access. (1) Under the first amendment and prior precedent, the newsgatherer does not have a right access, solely because he is a newsgatherer, to the scene of this airplane crash when the general public has reasonably been excluded. (2) The needs and rights of the injured and dying should be recognized by this court as having preference over newly created “rights” given to a “news gatherer” who is simply concentrating on beating out his competition to make his employer’s deadline.

iii. Notes
1. *Lierson* (California) held that arrest for not following the lawful order of a police officer was valid b/c it was a disaster site covered by a statute and a site of potential criminal investigation.
2. *PSO Case*: Company convicted reporters of trespass for following demonstrators onto their land. Court held for government (balancing test) b/c the restrictions didn’t deny access to particularly significant news since those in the viewing area could see everything
3. Other cases 711-714

f. Medium Discriminatory Access
   i. General
      1. This involves discrimination against categories of news gatherers (types of media, types of reporting tools – cameras, etc.)
   ii. Discrimination against Individuals
      1. Sherrill v. Knight
         a. P was a correspondent for The Nation, and she had House andSenate passes. She was denied a press pass to the White House b/c Secret Service believed she was a security risk b/c she had assaulted the press secretary to the governor of Florida and faced assault charges in Texas. DC said that the Secret Service had to find “narrow and specific” standards to judge who received these passes. Held, First Amendment and Fifth Amendment due process concerns to not require articulation of detailed criteria upon which the granting or denial of a White House press pass is to be based. Also Held, notice, opportunity to rebut, and a written decision are required because the denial of a pass potentially infringes upon first amendment guarantees. (1) Because it is important that bona fide reporters have access to the White House Press Room, they should not be denied arbitrarily – and “reason of security” is arbitrary. (2) Secret Service must publish or otherwise make publicly known the actual standard employed in determining whether an otherwise eligible journalist will obtain a White House Press Pass. The Secret Service has leeway in determining who poses a threat to the President or his family. (3) Thus, we require notice of the factual bases for denial, an opportunity for the applicant to respond to these, and a final written statement of the reasons for denial.

   2. Notes
      a. Secret Service did codify the standard on page 718.
      b. In Borreca v. Fasi, a judge prevented the mayor from enjoining a reporter from a paper who had been “irresponsible, inaccurate, biased, and malicious in reporting on the mayor and the city administration.”
      c. Retaliatory Exclusion: A reporter’s right to be free from governmental retaliation is a “clearly established constitutional right” for purposes of civil rights law.

   iii. Categorical Discrimination
      1. General
         a. Discrimination against whole groups of people
         b. When the discrimination is not by an official governmental body, First Amendment objections will be unavailing unless the press can establish that the exclusion is nevertheless “state action.”

      2. Substantive Disagreement with Employers
         a. In Times-Picayune Corp. v. Lee, an officer hated a paper and told his officers not to respond to questions from them. Sheriff argued that he was promoting objectivity in reporting. Court held that the Sheriff’s policy was unconstitutional because promoting accuracy or objectivity is not a compelling governmental interest and it is the essence of censorship when
the official’s discriminatory conduct seeks to promote an action with which the government may not concern itself.

3. Sex Discrimination
   a. Yankees banned women reporters from the locker rooms after games. Judge said Yankees stadium is on city property and that Sports Illustrated women reporter was allowed to go in.

4. Labor Disputes as Basis for Discrimination
   iv. Discrimination against Types of Media
      1. Defining Press
         a. *Jersawitz v. Hansberry*
            i. Federal penitentiary allowed interviews to prisoners and defined press as including those who report for the radio or the television news program with FCC licenses. P was a cable access person and was denied. The court held this constitutional b/c it didn’t violate the 1st amendment b/c under *Pell* and *Saxbe* there is no right to public interviews of prisoners; Second, this didn’t involve a strict scrutiny claim, so the position of the government was rationally related to its objectives b/c the prison has a right to security and not to investigate every single person who comes into the prison.
            ii. More on 722-23
      2. Excluding Cameras
         i. Cameras are regularly excluded from courtrooms and from executions – this has been upheld commonly.
      3. Excluding Tape Recorders
         a. Sometimes this has been legitimate also.

   g. Missouri Sunshine Law
      i. 610.010 – definitions
      ii. 610.010 – law
         1. It is the public policy of this state that meetings, records, votes, actions, and deliberations of public governmental bodies be open to the public unless otherwise provided by law. Sections 610.010 to 610.028 shall be liberally construed and their exceptions strictly construed to promote this public policy.
      iii. Too Lengthy From Westlaw
      iv. Look at HOW TO HANDLE A COMPLAINT PAPER
X. Access to Judicial Proceedings
   a. General
      i. While it had long been our history that the doors of courtrooms were open to the public and press, a trend toward closing the courtroom doors developed in the 1970s as a judicial response to the threat to fair trials allegedly posed by publicity surrounding those trials.
      ii. *Gannett Co. v. DePasquale* (1979)
          1. Murder Case. Doors are closed on pretrial hearings. Press says this violates the 1st and 6th amendment rights. *Held,* the media does not have a constitutional right of access to pretrial motions. (1) Sixth Amendment argument is rejected on the ground that the amendment guarantees a public trial to the defendant, not to the public. (2) Court does NOT decide whether First Amendment created a right of judicial access to the proceeding, but held that even if it did, the trial judge could properly determine that the right was outweighed in the circumstances of the case by the D’s right to a fair trial.
             a. Provoked outrage in the press and uncertainty among the lower courts at a time when many closures were being challenged.
   b. Criminal Trials
          1. Murder D has had three mistrials. At the beginning of his fourth trial, his counsel moved to exclude the press and public, apparently primarily to prevent jurors from being influenced by news coverage of the trial. Judge agreed and prosecutor agreed. Later, the papers sought to have the order vacated. *Held,* the right of the public and press to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated. (1) Throughout its evolution, the trial has been open to all who cared to observe it: (a) it has therapeutic value, (b) promotes confidence in the fair administration of justice, and (c) contributes to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system. (2) Thus, a presumption of openness inheres in the very nature of a criminal trial under our system of justice. (3) The First Amendment guarantees of speech (the right to listen) and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that amendment was adopted. (4) The three rights of the first amendment (speech, press, assembly) all come together to decide this case. (5) Access to trials is not absolute: if the trial court could find that there was a specific overriding interest in closing a trial, then an occasional courtroom closure might pass constitutional muster.
      ii. *Globe Newspapers v. Superior Court*
          1. Massachusetts closed a rape trial involving minor victims because of a state law requiring that trials be closed without exception when juvenile victims of a sexual assault testified. *Held,* this statute is unconstitutional b/c it violates the First Amendment right of access to court proceedings. (1) The compelling interest of the state in protecting minor victims of sex crimes from further trauma and
embarrassment is insufficient to justify indiscriminate exclusion of the press and public from those portions of criminal trials during which the victims testify.

a. Courts have often allowed trials to be closed when an undercover officer is testifying in order to protect the officer’s safety.

b. It is also allowable to close when there is issues of national security.

c. If juveniles are the perpetrators of crimes, there is no guarantee of access to juvenile proceedings under the Federal Juvenile Delinquency Act. Courts may grant access to juvenile records and proceedings on a case-by-case basis.

   i. The current trend is to open the courts when a minor is charged with a violent crime inciting community outrage.

c. Pretrial Proceedings

   i. General

      1. Because the Supreme Court didn’t resolve the issue with pretrial proceedings in Gannet v. Depasquale, some confusion remained in the lower court during the five years following Gannett concerning criminal and civil proceedings.


      1. P protested the exclusion of reporters from nearly six weeks of jury questioning (voir dire) at the trial of Albert Greenwood Brown, who was later convicted and sentenced to death for the rape and murder of a thirteen year old girl. Held, voir dire proceedings should be open to press and public unless those wishing to close the proceedings can demonstrate that (a) there is an overriding interest that would be prejudiced by open proceedings, (b) the closure is no broader than necessary to protect that interest, (c) reasonable alternatives to closure have been considered, and (d) the trial court made findings adequate to support closure.

   iii. Press Enterprise Co. v. Superior Court II (1986)

      1. California court closed a pretrial hearing at the request of a nurse accused of murdering 12 elderly patients at a nursing home by injecting them with lethal doses of the heart drug lidocaine. The P protested the closure. Held, a presumption of openness may be overcome only by an overriding interest based on finding that closure is essential to preserve higher values and is narrowly tailored to serve those interests. (1) An historical analysis shows that the public has often had access. (2) A functional analysis shows that openness enhances the fairness of a criminal trial and the appearance of fairness essential to public confidence in the judicial system. (3) Often, the preliminary hearing is the most important of the trial b/c most often cases don’t go to trial. (4) Also, the pretrial hearings are in the absence of the jury, so there is no other safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.

      a. Thus, a pretrial hearing may be closed if:

         i. There is a substantial probability that the D’s right to a fair trial will be prejudiced by publicity; and

         ii. A judge cannot find reasonable alternatives to closure to protect the defendants fair trial rights

      b. Mere risk of prejudice does not automatically justify refusing public access to pretrial hearings
c. This is not a BLANKET RULE OF OPENNESS
d. Note that the closure of voir dire might result where people are afraid to express their view openly in the press [Don King case]
e. Documents  
   i. Press-Enterprise test applies to documents as well as to hearings
d. Civil Trials  
   i. There is very little case law on civil trials  
      1. Perhaps b/c these are of less interest to the media or b/c judges are less likely to attempt to exclude the media from them.
   ii. The First Amendment right to attend civil trials is at least as strong as the right to attend criminal trials
   iii. Publicker v. Cohen (3d Cir. 1984): Leading case recognizing a qualified First Amendment right of access to civil trials.
   iv. California holds the precedents from Richmond Newspapers – Press Enterprise are applicable in the civil setting as well.
e. Grand Jury Proceedings  
   i. Grand Jury proceedings are traditionally secret under federal rules of criminal procedure
f. Access to Jurors’ Identities  
   i. General  
      1. To protect jurors from the fear of reprisals should they find a D guilty, and to shield jurors from harassment by the media, some judges have refused to disclose names and addresses of jurors even after a trial has concluded.
      2. Courts are DIVIDED ON THE QUESTION of whether there is a right to access information about a jurors identity.
         a. Fourth Cir., Third Cir say YES, there is a right to this information
         b. Fifth Cir. says NO right.
g. Access to Judicial Documents and Discovery Materials  
   i. General  
      1. There is some First Amendment right of access to records
      2. Press Enterprise I and II – the precise issue was access to transcripts. The court stated that if the proceedings themselves should have been open, then there should be a right to the transcripts of the proceedings
      3. Press Enterprise II – “When limited closure is ordered, the constitutional values sought to be protected by holding open proceedings may be satisfied later by making a transcript available within a reasonable time, if the judge determines that disclosure can be accomplished while safeguarding the juror’s valid privacy interests.”
      1. A controversial religious group sued two newspapers for libel. During discovery, the newspapers asked for list of contributors to the organization. Trial court ordered them to be disclosed, but issued a protective order forbidding the newspapers from publishing the information, divulging it to other media, or otherwise using it for any purpose other than litigation. Supreme Court of Washington found that although this was a prior restraint, maintaining the integrity of the judiciary met the burden required to defeat its presumptive invalidity. Held, news media do not have a First Amendement right to
disseminate, in advance of trial, materials obtained through discovery materials. (1) Petitioners argument that discovery is like any other gathering of information and as such can not be restrained; this would impose an unwarranted restriction on the duty and discretion of a trial court to oversee the discovery process. (2) The main question is “whether the practice in question furthers an important or substantial government interest unrelated to the suppression of expression and whether the limitation of First Amendment freedoms is no greater than is necessary or essential to the protection for the particular interest involved.” (3) Pretrial depositions and interrogatories are not public components of a civil trial. (4) This is different from a traditional prior restraint because it prevents only that dissemination which was obtained only by use of the discovery process. (5) Thus, when a protective order is entered on a showing of good cause, is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment.

a. Despite the ruling, subsequent lower court decisions suggest that discovery materials are available to the public once they have been filed with the trial court

b. Public Citizens v. Liggett Group
   i. Wall street journal won access to a tobacco company’s discovery document in a lawsuit by survivors of a smoker.

iii. Sealed Documents
   1. Split among the Courts
   2. The Second Circuit follows a balancing test:
      a. The presumption of access should be balanced against (1) the danger of impairing law enforcement, (2) judicial efficiency and (3) the privacy interests of those resisting disclosure [U.S. v. Amodeo]
   3. Ninth Circuit
      a. The media havea right by mandamus to intervene to seek access to court records in civil cases [San Jose Mercury News, Inc. v. District Court]

iv. Videotapes, Audiotapes, and Still Photos
   1. Third and D.C. Circuits hold that there is a strong presumption in favor of access to videotaped material if it has already been introduced into evidence
   2. Fifth Circuit believed that there is no absolute right to copy judicial documents and that it could not find a basis for the presumption of access to audio and videotaped materials.
   3. Eight Circuit ruled that neither the press nor the public had a First Amendment or common law right of access to President Bill Clinton’s videotaped deposition in the criminal trial of Susan McDougal in Arkansas.
      a. They held it was not a court record
   4. Pennsylvania, Massachusetts and Virginia at least have all held that audiotapes of 911 calls are not public records subject to disclosure under state FOIA laws [North Hills News Record v. Town of McCandless; Tull v. Brown]

h. Different Broadcast Mediums
   i. Different Broadcast mediums are treated differently
      1. The right to public access does not carry with it the right to memorialize the proceedings in any way you want
a. Cameras, etc.
2. It would be strange for a court to eliminate note-taking
3. Court has said there is not a first amendment right to shoot video
4. And in places that allow video, they usually allow video, but not still photographs
   a. This all has to do with the intrusiveness of the story
Pre-Publication Review:

(1) Pre publication review
   a. What do you do?
      i. The key is to identify those statements that could pose a risk to the publisher
      ii. Provide alternatives of other ways to convey the information with less risk and let the
          publisher decide what to do
      iii. Not to tell them what to say
   b. Pre-publication review exercise in class (no idea what is going on)
      i. It is always better to put in where you get the facts from, rather than implying the facts
         1. It is immaterial if you get them right (It is fully legal to make an implication if it
            is true – though it may make you a lawsuit)
         2. If you get them wrong, then you are left holding the bag
      ii. Generally, if you repeat a defamatory statement that someone else said, it may make you
          responsible for what they said
          1. Exceptions: Official Government Document

(2) An irate call from a lawyer for a person subject of publication
   a. All lawsuits have in common a P who felt that they talked to a D and were given the short thrift –
      so tell D’s to listen to P’s

(3) You have a lawsuit filed against you or your client
   a. Know the law
      i. First, look at state common law (cases, civil rules of the state, jury instructions) and find
         the elements of the cause of action
Receiving a Complaint - What to do as a D if you get a complaint against your client:

(1) Call in the reporter and find out what went on
   a. Find anyone else who might have been involved and find out what they knew
   b. Make sure you keep clear what was known at the time of the publication and what was known afterward
   c. Find anyone who contributed to the story, and talk to them
   d. Be careful to find out under what circumstances the information was given to your reporter
   e. You also want to know if there are other articles on this subject (how other media entities handled the issue)
   f. Find out if your people have any notes
   g. Then, go get the court file and find out what really happened

(2) Then you get to the issue of deciding whether to answer or whether to file a motion to dismiss the pleading
   a. Motion to Dismiss: With motion to dismiss, you are stuck with the pleadings as you find them, and you must prove this isn’t enough for a case
      i. Motions to dismiss are more readily available
      ii. These are more readily available. Many of the issues are law (for the court to decide)
      iii. Common failures on motions to dismiss:
         1. Failure to plead in hake verba
         2. Proving how it is “of and concerning” the plaintiff
            a. In our case, it might not say something about Frutt & Smith
         3. Whether the statement is defamatory at all – is it defamatory to say someone is part of the Christian identity movement?
         4. Is it an opinion?
         5. Statute of limitations
   b. Then sort out the summary judgment issue:
      i. Whether you can establish that it is true at the summary judgment stage, so it won’t go to jury at all.
      ii. Whether you have public figure and actual malice
      iii. Whether you have the existence of the other privilege.
Subpeonas - Forcing Your Client To Testify – Possible Arguments Against it:

(1) The prosecutor is not acting in Good Faith
   Branzburg
   “Finally, as we have earlier indicated, news gathering is not without its First amendment
   protections, and the grand jury investigations if instituted or conducted other than in good faith,
   would pose wholly different issues for resolution under the first amendment. Official harassment
   of the press undertaken not for purposes of law enforcement but to disrupt a reporters
   relationship with his news sources would have no justification.”

   You can’t use the media as an investigative arm of the government
   Powell
   If a newspaperman believes that the grand jury investigation is not being conducted in good faith
   he is not without remedy.

(2) The Reporter himself was not a witness to the crime
   Distinguishable from Branzburg
   Our reporter was not witnesses to the crime
   Pinkard v. Johnson
   First Amendment privilege extends to both confidential and non-confidential information
   gathered in the course of a reporter’s employment

(3) Balancing
   Third Circuit
   When a privilege is grounded in Constitutional policy, a demonstrated specific need for evidence
   must be shown before it can be overcome

   The party seeking the information must show that his only practical access to crucial information
   necessary for the development of the case is through the newsman’s sources

McGraw Hill v. Arizona:
   Highly material and relevant, necessary or critical to the maintenance of the claim, and not
   obtainable from other available sources

In re Special Grand Jury (Illinois):
   We think it clear that the statute requires more than a showing of inconvenience to the
   investigator before a reporter can be compelled to disclose his sources
Searches & Subpeonas: When you get a subpeona against your media client:

(1) Negotiate with the other side, to see if there is something you can give them that is not too much – that is satisfactory for both sides

(2) File a Motion to Qwash
a. Convince the Court that the party seeking the information has some sort of burden they must meet (unlike discovery or subpoenas in other areas) before they get the information. They don’t just get it because they ask for it.
   i. The Burdens - Are you dealing with a Grand Jury, Criminal Case, or Civil Case? If Criminal, is it the Prosecutor or the Defense seeking the information? If Civil, is it a Plaintiff, Defendant, or Third Party? Is it a Confidential or Non-Confidential Source?
   ii. Grand Jury
      1. There is very little burden that the Grand Jury must satisfy. If the media entity can show that the Grand Jury was instituted in bad faith or to harass the media, then it can be qwashed. Outside of that, it is very difficult to qwash it – and also the burden (if Grand Jury not instituted in bad faith) is on the Media
   iii. Criminal Case – Defendant Seeking Information
      1. Convince the court that the normal rights of the defendant (6th amendment) do not outweigh the 1st amendment rights of the media to withhold the information. For the most part the courts have said that 1st amendment outweighs the 6th amendment rights in the head to head competition.
      2. Before the burden shifts to the party seeking the information, does the media have to make a prima facie showing in order to get the burden to shift?
         a. Courts are split – some require the media to show the request will chill the medias ability to obtain information in the future (people won’t provide it, etc.). Other courts just presume that requiring the media to produce information will chill the medias ability to gather news.
      3. Explain to the court the test, where the other party has the burden, that the party seeking information has to meet:
         a. The information has to be highly relevant and material
         b. Has to be necessary or critical – has to go to the heart of the case – the case would “rise or fall” without the information
         c. The party seeking the information has exhausted all other remedies
         d. The information is not available from any of the other sources
   iv. Criminal Case – Prosecutor seeking information
   v. Civil Case – Media is third party
      1. If the media is a third party, you are right back above in The Test – but courts tend to make the burden less hard on the party seeking the information as when it is a criminal defendant
   vi. Civil Case – Media is Plaintiff
      1. Courts will usually say “it’s your lawsuit, if you don’t want to turn the information over, you don’t have to.” Just dismiss the lawsuit.
   vii. Civil Case – Media is Defendant
      1. Party seeking information must make some showing about the strength of their case – some courts require “not frivolous” be met; some require “clear and
convincing” evidence that the party will win; some require that they have some
worth in the case
2. If they can, then they have to prove The Test
viii. Confidential or Non-Confidential Sources
1. Some courts only provide this protection when dealing with Confidential sources
   – no protection for non-confidential
2. Other courts, when it is a non-confidential source, they make the burden a little
easier
3. Other courts, when dealing with non-confidential source, make the burden equal
to confidential sources
Sunshine Laws & FOIA: What you do if you face a sunshine law case?

- First, file a separate lawsuit in the location where the documents or meeting are/is?
  o You must allege that the entity from which you are seeking the documents is a public governmental body
  o The meeting is a meeting of that body or the document is a document of that body or prepared by that body
    ▪ The issues become whether the entity you’re seeking information from is indeed a public governmental body (statute defines these), whether it is a meeting of or a document of or by that body.
      • Meeting: whole body together? Parts of the body? Can body get away with splitting itself up to get away from the meeting rules?
      • Are meetings of the whole group public body if not discussing public business (they go on a float trip together)
  o Then, wants you’ve shown these two things, the governmental body has the burden to show that the document/meeting is subject to one of the exceptions
  o If they can’t: Relief
    ▪ You can get injunctive relief getting you into the meeting or the document
    ▪ If meeting has already taken place, you can ask the court to reverse what took place at the meeting and do the meeting over again.
    ▪ You also get attorney’s fees if you prove it was a *purposeful* violation
Access to the Courts: How to handle a media client who has been shut out:

- (1) There has to be notice and an opportunity to be heard. If you can’t find something out until the last minute, the court can notify the public then, but you at least have to provide those people who contest it an opportunity to be heard.
  - If the parties know ahead of time, there has to be notice ahead of time
- (2) Must show you have the right to intervene
  - Being denied a right under the 1st amendment provides a right to intervene
- (3) The argument:
  - Show that this is the type of proceeding that is historically open to the public
  - Show that public access provides public benefit
  - If you show these two things, then the burden shifts to party wishing to close must make a showing:
    - There must be a compelling interest for closing it;
    - There has to be a substantial possibility that that interest will be prejudiced if the public is allowed into the proceedings;
    - The closure is narrowly tailored & there are not alternatives to closing the trial
- You can file a writ of mandamus – and you should file it fast

- Civil v. Criminal Access
  - Historically, civil and criminal trials are both open to the public
  - Important for society to know what is going on
    - There is some argument that civil trials should not be open because they aren’t as important as criminal trials
    - Courts do at times close portions of civil trials if there is information that would be particularly embarrassing to the witness or particularly sensitive to the parties (true trade secrets)
- Not historically open
  - Depositions
  - Grand Jury proceedings
  - The question is whether the proceedings, or the place is publicly open
    - Parties in the court can’t shift proceedings to areas that the public is not allowed – it has to be judged by where it normally takes place
  - Juvenile Proceedings
    - There has to be a case-by-case approach (some statute that says “all are closed” will not stand)