

# FIRST AMENDMENT

Professor Kevin Francis O’Neill  
Law 680 — Section 1  
Fall Semester 2017

## PROBLEMS FOR IN-CLASS ANALYSIS

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This document contains 83 “Problems” (i.e., hypothetical fact patterns) to be used for in-class analysis in my First Amendment course. As my Syllabus indicates, these Problems are linked to specific reading assignments in your text, *STONE SEIDMAN*. As part of your normal homework, you should read the assigned cases in *STONE SEIDMAN* and any Problems that are linked to those cases in my Syllabus. You should also consult the pertinent passage in my Course Outline, which will serve as a source of black-letter law and “big-picture” explication. Then try your hand at analyzing the fact patterns contained in these Problems, *applying* the doctrines and precedents that you have learned. This will be my principal focus in class—using the Problems as analytical exercises, so that you gain experience identifying the issue, zeroing in on the governing standard, and examining the facts in light of existing precedent. It’s my hope that this approach will give you a better command of First Amendment law than you might have obtained had we covered it in the conventional manner.

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## PROBLEM KEY FOR AALS ATTENDEES

<b>PROBLEMS</b>	<b>FIRST AMENDMENT TOPIC</b>
1-4	Advocacy of Unlawful Conduct: <u>Brandenburg</u>
5-10	Hostile Audience Doctrine
11	Speech-Restrictive Injunctions
12-13	Overbreadth
14-15	Vagueness
16-22	Prior Restraint
23-25	Defamation
26-29	True Threats
30-33	Commercial Speech
34-36	Obscenity and Child Pornography
37-42	Lewd/Profane/Indecent Speech, Including Secondary Effects
43-48	Time/Place/Manner Restrictions
49-59	Public Forum Doctrine
60	Government-Funded Speech
61	Symbolic Conduct
62-64	Speech Rights of Students
65-67	Speech Rights of Public Employees
68-69	Compelled Speech
70	Compelled Disclosure of Expression, Belief, and Association
71-74	Freedom of the Press
75-80	The Establishment Clause
81-82	The Free Exercise Clause
83	Impermissible Accommodation of Religion

# **PROBLEM #1:**

## **ANTI-ABORTION PROTEST OUTSIDE JUNIOR HIGH SCHOOL**

### **A. Background**

The Center for Prenatal Justice (“Prenatal Justice”) is a non-profit organization whose main purpose is to promote “the right to life for the unborn through the development of innovative educational programs.” One such program is called the “Reproductive Choice Campaign.” With this campaign, Prenatal Justice seeks to “expose as many people as possible to the reality of abortion” by displaying large, graphic photographs of first-term aborted fetuses on the sides of large, moving-van-sized trucks. These trucks often drive on surface streets and freeways, but Prenatal Justice employees sometimes take the trucks to specified places to target particular audiences.

Middle school and high school students are a common target audience. Prenatal Justice conducts its campaign at such schools because it believes that its message will discourage teenage abortions. Prenatal Justice also believes that “students who are old enough to have an abortion are old enough to see one.” Prenatal Justice trucks arrive at the start of the academic day so that students will see the enlarged photographic images of first-term aborted fetuses as they arrive for school.

Tom Ontis, Prenatal Justice’s Executive Director, acknowledged in his deposition that he has seen students “faint,” “become physically ill,” “fall to their knees,” and “weep” in response to these pictures. He asserted that exposing children to these images is the best way to teach them about the ethical issues surrounding abortion.

On March 23, 2014, two Prenatal Justice employees drove to Horstman Middle School in Centerville, Ohio. Employee #1 drove a truck that displayed photographic images of aborted fetuses, and Employee #2 drove an escort “security vehicle.” The security vehicle was a Ford Crown Victoria sedan equipped with a security cage, red-and-amber flashing lights, and antennae mounted on the roof. The two men arrived at the school at 7:30 a.m.—thirty minutes before classes began. They then drove on public streets around the perimeter of the school.

As the students began arriving at school, many of them grew angry and upset upon seeing the large, graphic images on the Prenatal Justice truck. Rather than entering the school in timely fashion, they remained outside on the sidewalk, shouting angrily at the truck each time it passed by. Soon they were throwing rocks and garbage cans at the truck, in a fusillade that grew larger each time the truck circled around. A few stray rocks struck and smashed the windows of passing cars.

School officials, alarmed by the growing chaos, called the Sheriff's Department. At 7:50 a.m. two deputy sheriffs arrived on the scene, halted both of the Prenatal Justice vehicles, and arrested Employees #1 and #2. After holding them in the back of a squad car for over an hour, the deputy sheriffs instructed the employees to "leave immediately and don't come back." They asserted that the employees had violated an Ohio statute that criminalizes any "disruptive presence" outside a public school.

Prenatal Justice has now sued the City of Centerville, asserting that the officers violated its First Amendment rights by abruptly suspending its expressive activity.

**B. Question for the Expert Panelists**

Don't worry about performing a complete analysis of this Problem under the First Amendment. My question here is much more basic: Is this fact pattern governed by the Brandenburg line of precedent? Why or why not?

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**PROBLEM #2:**

**SPEECH BY ENVIRONMENTALIST OPPOSING  
THE CLEAR-CUTTING OF OLD GROWTH FORESTS**

**A. Background**

Scott Wegener, a former staff attorney for the Sierra Club, is an environmentalist who is morally and politically opposed to the clear-cutting of old growth forests. (The term "old growth" refers to forests that have remained largely undisturbed by humans, featuring trees that are 300 to 1,000 years old. "Clear-cutting" refers to a logging practice in which virtually every tree in a forest sector is cut down.) In his work for the Sierra Club, Mr. Wegener was often

unsuccessful in attempting to secure injunctions that would have halted clear-cutting on federally-owned lands. Frustrated by his inability to save old growth forests by working within the legal system, he now believes it necessary to pursue those aims through civil disobedience and industrial sabotage. In the past three years, he has physically interfered with the clear-cutting of old growth forests by pouring sugar into the fuel tanks of logging equipment and by placing his body in the path of chain saws.

Mr. Wegener has now written a book in which he asserts that the rapid disappearance of old growth forests has created a moral obligation to protect them, even if it requires civil disobedience or industrial sabotage to achieve that aim. When he makes this argument during a speech at the University of Oregon, he is arrested and prosecuted under an Oregon statute that makes it a crime to teach, counsel, or advocate any interference with logging operations in the State of Oregon.

**B. Questions for the Expert Panelists**

(1) Does the Brandenburg line of precedent deal, IN GENERAL, with the type of fact pattern presented here? (I am not asking *yet* whether Scott Wegener's statement FALLS WITHIN the unprotected boundaries of the Brandenburg TEST; I'm just asking whether the Brandenburg line of precedent deals in general with the kind of statement he's making here.)

(2) If Brandenburg *does* apply, does Scott Wegener's statement to the University of Oregon audience FALL WITHIN the unprotected boundaries of the Brandenburg TEST?

(3) Let's compare the breadth of the Brandenburg TEST with the breadth of the Oregon statute. In other words, let's compare the range of statements left unprotected by Brandenburg with the range of statements prohibited by the Oregon statute. Does the Oregon statute criminalize a range of statements BROADER than the unprotected boundaries of Brandenburg?

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## **PROBLEM #3:**

### **BOMB-MAKING ADVICE BY ANIMAL RIGHTS ACTIVIST**

#### **A. Background**

Rod Coronado is a self-described radical animal rights activist. In 1995 he built an incendiary device that destroyed fur-industry research facilities involved in animal testing at Michigan State University. He pleaded guilty to that offense and was sentenced to 57 months in jail. He is also credited with sinking two illegal whaling ships off the coast of Iceland. And he has served on many occasions as a “hunt saboteur,” thwarting efforts by hunters to kill endangered species. In February 2013, he was released from prison after serving a ten-month federal sentence stemming from his attempts to sabotage a hunt for mountain lions.

On August 17, 2014 Coronado gave a lecture on militant animal and earth liberation rights at the Lesbian Gay Bisexual Transgender Center in Berkeley, California. The flyer promoting the lecture stressed that Coronado is an individual “who lives by the principles of direct action. Rod Coronado talks beyond theory.” Coronado’s speech attracted substantial media attention because, on the day before the lecture, a new animal testing research facility on the Berkeley campus, not yet occupied, had been destroyed by arson, causing an estimated loss of \$50 million. At the scene of the fire, investigators found a large banner reading, “IF YOU BUILD IT, WE WILL BURN IT. THE ELFS ARE MAD.” ELF is the acronym for Earth Liberation Front. The government asserts that ELF is the name of a group of loosely organized cells of individuals dedicated to using illegal means to pursue a radical environmentalist agenda.

During his speech, recorded by FBI agents who infiltrated the audience, Coronado spoke about his experiences and beliefs in direct action in support of animals and the environment against human exploitation. After his prepared remarks, Coronado fielded questions from the audience. One attendee asked, “Tell us about the device you used for the Michigan State arson,” adding that she wanted to know how she could “make a bomb for a direct action.” In response to the question, Coronado explained that he did not use a bomb, but an incendiary device. He then approached the food table, picked up a plastic one-gallon apple juice container, and described how he made the device. Coronado also commented that he “wouldn’t be surprised if investigators found a device similar to this at the fire scene last night,” a reference to the \$50 million arson fire on the Berkeley campus the previous day.

Coronado was arrested the next day by FBI agents and he is now being prosecuted under 18 U.S.C. § 842(p)(2)(A) for explaining how to build an incendiary device. Section 842(p)(2)(A) provides, in pertinent part, that it is unlawful for any person:

to teach or demonstrate the making or use of an explosive, a destructive device, or a weapon of mass destruction, or to distribute by any means information pertaining to, in whole or in part, the manufacture or use of an explosive, destructive device, or weapon of mass destruction with the intent that the teaching, demonstration, or information be used for, or in furtherance of, an activity that constitutes a Federal crime of violence.

**B. Questions for the Expert Panelists**

(1) Is Rod Coronado *advocating* illegal conduct? Or is he doing something else?

(2) Does Rice v. Paladin Enterprises (the *Hit Man* case) have any applicability to this fact pattern?

(3) In the *Hit Man* case, how did the court deal with Brandenburg's requirement of IMMEDIATE law violation?

(4) Using the *Hit Man* case as a guide, does Brandenburg render 18 U.S.C. § 842 (p)(2)(A) unconstitutional on its face (due to overbreadth)?

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## **PROBLEM #4:**

### **OFFERING A REWARD TO ANYONE WHO KILLS OR MAIMS A NAZI**

#### **A. Background**

The year is 1978. The American Nazi Party has announced that it will stage a march in Skokie, Illinois, a town whose population is 70 percent Jewish, including 7,000 Holocaust survivors. Five weeks before the Nazis' scheduled march, Irving Rubin, the national director of the Jewish Defense League ("JDL"), holds a press conference in Los Angeles. At this press conference, Rubin denounces the Nazis for selecting Skokie as the site of their march.

He announces that the JDL will hold a counter-demonstration in Skokie on the very day that the Nazis try to march. The JDL's purpose in traveling to Skokie will be to physically prevent the Nazis from marching. "When the Nazis come to Skokie, they plan to bring big shields with gigantic swastikas on them. They plan to state that, 'We missed you 30 years ago, and we're going to try it again.' This will cause tremendous grief to the people who are living in Skokie, specifically the survivors of the Holocaust. And we feel that it's a desecration of our God, and a desecration of the Jewish people, to allow this march in the name of freedom of speech."

"We are deadly serious that we'll even go to jail, that we'll risk spending time in jail if we have to, in order to stop the Nazis, because we think we've learned from history. ... We're not going there under the intention to be pacifists. The Neo-Nazis like to have a nice non-violent, quiet protest. We're going there to take names and bury them if we have to."

Then, apparently in an effort to generate greater interest in his cause, Rubin held five \$100 bills over his head and made the following announcement: "We are offering \$500, that I have in my hand, to any members of the community, be he Gentile or Jewish, who kills, maims, or seriously injures a member of the American Nazi Party. The offer is being made on the East Coast, on the West Coast. And if they bring us the ears, we'll make that a thousand dollars. The fact of the matter is that we're deadly serious. This is not said in jest; we are deadly serious."

**B. Efforts to Prosecute Rubin**

A criminal complaint was filed, Rubin was held to answer by the presiding magistrate, and an information charged Rubin with solicitation of murder in violation of California Penal Code § 653f. At a hearing to set aside the information, the trial court concluded that Rubin's statements were protected speech under the First Amendment and ordered the information set aside. Prosecutors have appealed.

In its ruling, the trial court concluded that the form and content of Rubin's statements, although they ostensibly solicited murder, evinced a desire to attract national media exposure and thereby displayed a lack of serious intent to solicit the commission of crime.

**C. Questions for the Expert Panelists**

The matter is now pending before the court of appeals. You are clerking for one of the judges on the panel. Based on these facts, how would you advise your judge to rule—and how would your analysis proceed?

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## **PROBLEM #5:**

### **THE MAY DAY RALLY**

**A. Basic Fact Pattern**

1. At a May Day demonstration in suburban St. Louis, six members of the Revolutionary Communist Party are speaking from a platform in a public park, distributing literature to onlookers, and passing out red flags.
2. When word spreads that a Communist rally is underway, an angry crowd of 200 onlookers appears.
3. When police arrive on the scene, they find considerable shouting, shoving, and cursing going on among the onlookers, but they also find the Communists behaving peacefully.
4. Troubled by the crowd's growing agitation, the police mount the platform and order the Communists to disperse.

5. When the Communists refuse, they are arrested and prosecuted under Missouri's refusal-to-disperse statute.
- B. Based on these facts, how would you advise the judge to rule—and how would your analysis proceed?
- C. Now let's change the fact pattern as follows:
1. The rally and the arrest took place *exactly* as stated above.
  2. But this time the Communist Party members were arrested and prosecuted under the St. Louis breach-of-the-peace ordinance.
  3. Your judge wants to instruct the jury that the First Amendment does not afford absolute protection for freedom of speech—and that government retains the power to punish speech that “stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance.”
  4. How do you advise the judge?
- D. Now let's change the fact pattern again:
1. This time, rather than remaining polite, the Communist Party speakers use anti-Semitic invective, railing against the U.S. political system as “controlled by Jews.”
  2. Should these facts affect the outcome of their breach-of-the-peace prosecution?
- E. Let's change the fact pattern yet again:
1. This time, the Communist Party members never even get to speak.
  2. They apply to the City of St. Louis for a permit to conduct their rally in a public park.
  3. A government administrator denies their permit application on the grounds that their ideas might inspire a hostile response.
  4. The administrator points to a section in the codified ordinances of St. Louis that gives him the discretion to deny a permit application “if

the speaker is likely to advance controversial ideas that could inflame the public to violence.”

5. If the Communists file suit based on these facts, how would you advise the judge to rule—and how would your analysis proceed?

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## **PROBLEM #6:**

### **THE PRESIDENTIAL MOTORCADE**

#### **A. Facts and Procedural Posture**

1. President Donald Trump has come to Houston, Texas in order to deliver a major foreign policy speech on his decision to invade Iran.
2. Eager to welcome him to Houston, a huge throng of Trump supporters is lined up along the route of the presidential motorcade.
3. Standing quietly in their midst is a solitary critic of the war: Heather Lipton, the owner of a local health food store.
4. Five minutes before the president’s motorcade is scheduled to drive by, Ms. Lipton unfurls a sign that proclaims: “Lead us to hate and kill poverty, disease, and ignorance, not each other.”
5. Lipton’s sign prompts grumbling and muttered threats among the Trump supporters in her vicinity.
6. Their escalating anger is noticed by Al Roebuck, a nearby police officer, who fears (as he later testifies) that “the crowd ... [was] going to go over and get her—maybe hurt her.”
7. Obeying a general police directive “to destroy all signs detrimental to the President,” Officer Roebuck approaches Ms. Lipton and, according to his later testimony, asks her, “Would you please take this sign down, lady; it’s detrimental to the United States of America.”
8. When Ms. Lipton refuses, replying that she has a right to display her sign, Officer Roebuck takes it from her and tears it up.

9. Roebuck’s action prompts cheers and high fives among the Trump supporters across the street, who then immediately quiet down and begin to disperse.
- B. Ms. Lipton brings a civil suit, under 42 U.S.C. § 1983, alleging that Officer Roebuck and the Houston Police Department violated her First Amendment rights.
- C. Based on these facts, how would you advise the judge to rule—and how would your analysis proceed?

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## **PROBLEM #7:**

(We previously examined these facts in Problem #1.)

### **ANTI-ABORTION PROTEST OUTSIDE JUNIOR HIGH SCHOOL**

#### **A. Background**

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Tom Ontis, Prenatal Justice’s Executive Director, acknowledged in his deposition that he has seen students “faint,” “become physically ill,” “fall to their

knees,” and “weep” in response to these pictures. He asserted that exposing children to these images is the best way to teach them about the ethical issues surrounding abortion.

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As the students began arriving at school, many of them grew angry and upset upon seeing the large, graphic images on the Prenatal Justice truck. Rather than entering the school in timely fashion, they remained outside on the sidewalk, shouting angrily at the truck each time it passed by. Soon they were throwing rocks and garbage cans at the truck, in a fusillade that grew larger each time the truck circled around. A few stray rocks struck and smashed the windows of passing cars.

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Prenatal Justice has now sued the City of Centerville, asserting that the officers violated its First Amendment rights by abruptly suspending its expressive activity.

**B. Question for the Expert Panelists**

We’ve seen these facts before. If this case isn’t governed by Brandenburg, then what line of precedent *does* apply?

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## **PROBLEM #8:**

### **PROTESTS AGAINST MEXICAN IMMIGRATION**

#### **A. Background**

- 1. Angry residents of Texas and California stage simultaneous protests along the Mexican border in an effort to protest what they call a “flood” of illegal immigration from Mexico.**
- 2. One rally is held in Laredo, Texas, only 50 yards from the Mexican border. The other rally is held in Southern California, just across the border from Tijuana.**
- 3. The Texas rally is attended mostly by angry American citizens who are sympathetic to the speakers’ anti-Mexican message. But the California rally is attended by a large number of Mexican citizens.**

#### **B. The California Rally—Defendant A**

- 1. Castigating Mexicans as “lazy leeches” who come to the United States only to “siphon money from our government and our economy,” Defendant A angrily calls for a military presence along the border.**
- 2. Then, expressing his contempt for the Mexican people and their culture, he burns a Mexican flag.**
- 3. Many of the Mexicans in the audience are unable to contain their anger. Rushing the stage, they attempt to put out the fire and to beat Defendant A with their fists.**
- 4. Defendant A is arrested and charged with disturbing the peace.**

#### **C. The Texas Rally—Defendant B**

- 1. Like Defendant A, Defendant B calls for a military presence along the border and an end to Mexican immigration.**

2. Only 100 yards away is a wooden holding pen where illegal immigrants are held temporarily before being transported back to Mexico.
  3. Stirred by the favorable reaction to his speech, Defendant B starts to burn a Mexican flag. He then gets a “better” idea—and urges his followers to help him light fire to the nearby holding pen.
  4. Defendant B is apprehended while lighting fire to the pen. He is charged with arson and inciting to violence.
- D. How do you analyze the prosecutions of Defendants A and B? Which line of precedent applies to each?

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## **PROBLEM #9:**

### **FIGHTING WORDS PROSECUTION #1**

- A. Same facts as the California rally.
- B. Can Defendant A be punished under a California statute that criminalizes “fighting words”?

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## **PROBLEM #10:**

### **FIGHTING WORDS PROSECUTION #2**

Every year, an Arab culture festival is held in Wayne County, Michigan, which has a large concentration of Muslim residents. The festival is very popular, attracting well over three thousand visitors annually. The vast majority of those attending the festival are of the Muslim faith.

Lee Skimin, a self-described Christian evangelist, walks silently through the festival grounds carrying a large sign that says: “Mohammed was a child molester.”

This sign is deeply upsetting to many of the festival-goers. Skimin is soon surrounded by an angry throng of one hundred Muslims who shout curses and throw garbage at him. Before any real violence erupts, Skimin is arrested by county sheriffs.

Based on these facts, can Skimin be punished under a Michigan statute that criminalizes “fighting words”?

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## **PROBLEM #11:**

### **PRESS COVERAGE GAG ORDER IN THE I-X FEUD BETWEEN CLEVELAND AND BROOK PARK**

#### **A. Background**

1. It is September 1999, and the Cities of Cleveland and Brook Park are embroiled in a court battle over ownership of the I-X Center.
2. Presiding over the case is Judge John E. Corrigan, who is determined to prevent a “media circus” from enveloping the trial.

#### **B. Press Coverage Gag Order**

1. With testimony set to commence in seven days, Judge Corrigan issues an order barring all news media from reporting on any aspect of the trial.
2. Several newspapers and television stations are challenging Judge Corrigan’s gag order.
3. You are the law clerk for the judge who is entertaining this constitutional challenge. How do you advise the judge? What is the controlling *standard* and where do you find it?

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## **PROBLEM #12:**

### **THE UNIVERSITY OF IOWA** **HATE SPEECH CODE**

#### **A. Facts**

1. The University promulgates an Anti-Harassment Policy whose violation gives rise to a range of sanctions—from reprimand and community service to removal from University housing, suspension, and expulsion.
2. The Policy prohibits “stigmatizing or victimizing” individuals or groups on the basis of race, ethnicity, religion, gender, sexual orientation, creed, national origin, ancestry, age, marital status, handicap, or Vietnam-era veteran status.
3. The University then issues an “Interpretive Guide” offering examples of sanctionable conduct. These examples include:
  - a. “A male student makes remarks in class like ‘Women just aren’t as good in this field as men,’ thus creating a hostile learning atmosphere for female classmates.”
  - b. A separate section of the Guide, entitled “You Are a Harasser When...,” gave the following examples of sanctionable conduct:
    - (1) “You exclude someone from a study group because that person is of a different race, sex, or ethnic origin than you are.”
    - (2) “You tell jokes about gay men and lesbians.”
    - (3) “Your student organization sponsors entertainment that includes a comedian who slurs Hispanics.”
    - (4) “You laugh at a joke about someone in your class who stutters.”

4. You may assume, for purposes of your analysis, that the University deems such speech unprotected by the First Amendment because it falls within the ambit of the “fighting words” doctrine.
5. You may also assume that the “fighting words” doctrine is confined, as a matter of law, to unambiguous invitations to brawl, individually directed by the speaker to the hearer.
6. You may also assume that the Policy has never received a narrowing construction.

**B. Constitutional Challenge**

1. The Policy is now being challenged in federal court.
2. You are the law clerk for the judge to whom the case has been assigned.
3. How do you advise the judge to rule? More important, how does your analysis proceed?

**C. Let’s change the foregoing facts in the following way:**

1. The very same hate speech code is being challenged in court.
2. The challenge is being brought by a student who was disciplined for violating the code—but this time, it is undisputed that the student was disciplined for uttering words that fell WITHIN the Supreme Court’s narrow definition of “fighting words.”
3. The University moves to dismiss the suit on the ground that the student lacks standing.
4. How do you advise the judge?

**D. Now let’s change the facts again:**

1. This time the hate speech code is issued without any interpretive guide and the language of the code is much shorter and simpler. It authorizes a University administrator to suspend or expel any student “who fails to be civil to any other student.”

2. The hate speech code is now being challenged in federal court by Robert Feldman, president of the College Republicans, who was expelled for violating the “civility” provision when he offended a number of Arab students while staging an “Anti-Terrorism Rally” on campus. During that rally, Mr. Feldman exhibited two pieces of butcher paper, one depicting the flag of Hamas, a Palestinian Organization, and the other depicting the flag of Hezbollah, a Lebanese organization. Both of the flags featured words in Arabic script that included the word for God: “Allah.” At one point during the rally, Mr. Feldman placed the paper depictions of the Hamas and Hezbollah flags on the ground and began stepping on them. A few Arab students in the large crowd that had gathered to watch the event voiced strong objections to Mr. Feldman, explaining to him the significance and offensiveness of his stepping on the word “Allah.” Mr. Feldman nevertheless persisted. No violence ensued. University police were present at the rally, but it never became necessary for them to intervene. The rally came to a peaceful close, but the Arab students submitted a formal complaint to the University administrator charged with enforcing the hate speech code. After a formal hearing, Mr. Feldman was expelled from the University.
3. Mr. Feldman has brought suit against the University in federal court, asserting that his expulsion under the “civility” provision was a violation of the First Amendment.
4. You are the judicial law clerk assigned to this case. How do you advise your judge?

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## **PROBLEM #13:**

### **A BROAD RESTRICTION ON PUBLIC HANDBILLING**

#### **A. Facts**

1. A municipal ordinance absolutely forbids placing handbills on unattended vehicles parked on public property.

2. A public interest organization, Greenpeace, is challenging the ordinance in federal court, arguing that the prohibition substantially infringes upon an important means by which it communicates its message.

B. How do you advise your judge to analyze this challenge?

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## **PROBLEM #14:**

### **RESTRICTING FORTUNETELLING** **“AND THE LIKE”**

A. **Background**

1. A municipal ordinance states that, “It shall be unlawful to practice or engage in fortunetelling, palmistry, reading futures, and the like.”
2. The ordinance does not define what sort of conduct is meant by “and the like.”
3. You may assume for purposes of this hypothetical that the ordinance reaches expressive conduct that enjoys some protection under the First Amendment.
4. The ordinance was used to close down Plaintiff’s business, The Candle Shoppe, which sold candles and other items related to Plaintiff’s practice as a psychic.
5. Plaintiff brings a vagueness challenge to the ordinance.

B. How do you analyze her claim?

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## **PROBLEM #15:**

### **RESTRICTING “NOISY” CONDUCT IN BARS**

#### **A. Background**

1. Missouri’s Alcoholic Beverage Control (“ABC”) Act provides a comprehensive statutory scheme for regulating establishments that serve intoxicants. The Act creates an ABC Board that is authorized to suspend or revoke the liquor licenses of establishments that offer certain types of sexually suggestive entertainment. Under § 442.25(h) of the Missouri Revised Code, the ABC Board may suspend or revoke any liquor license if it has “reasonable cause to believe that the licensee ... has allowed noisy, lewd, or disorderly conduct upon the licensed premises.” For purposes of this problem, we are concerned only with the prohibition against “noisy” conduct. The statute does not define “noisy.”
2. The plaintiffs own various restaurants and bars located throughout Missouri that serve alcoholic beverages under licenses issued by the ABC Board. In this action, the plaintiffs seek to enjoin the Board from using the prohibition against “noisy” conduct as the basis for suspending or revoking their liquor licenses.
3. You may assume for purposes of this problem that the statute reaches expressive conduct that enjoys some protection under the First Amendment.

#### **B. Questions for Our Panelists**

1. If you were lead counsel for the plaintiffs in this lawsuit, what First Amendment doctrine would you be most inclined to invoke?
2. If you were the judicial clerk assigned to this case, how would you analyze the plaintiffs’ claim?

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## **PROBLEM #16:**

### **IDENTIFY THE PRIOR RESTRAINTS**

[To be conducted in a game show format in which students compete for fabulous prizes.]

**In the classroom, please tell me whether each of the following items is or is not a prior restraint. And please give me a reason for your answer.**

- A. A federal statute that imposes a 5-year jail term for burning a draft card.
- B. A disorderly conduct prosecution for wearing a jacket that reads, “FUCK THE DRAFT.”
- C. An ordinance that restricts expressive access to Cleveland’s Public Square to the hours between 6:00 a.m. and 11:00 p.m.
- D. An ordinance that requires a parade organizer to obtain a permit and pay a fee before conducting her parade.
- E. An ordinance that bans the public exhibition of any motion picture until it has been reviewed and certified as “non-obscene” by a local licensing board.
- F. An injunction ordering a halt to all demonstrations outside a certain abortion clinic.

\* \* \*

## **PROBLEM #17:**

### **TWO SPEECH-RESTRICTIVE INJUNCTIONS**

**How would you analyze  
the following two injunctions?**

**Do they require the same  
or a different analytical standard?**

- A. An injunction ordering a halt to all demonstrations outside a certain abortion clinic.
- B. An injunction that imposes, *inter alia*, the following restrictions on demonstrators at a certain abortion clinic: (1) no demonstrations before 7:00 a.m. or after 7:00 p.m.; (2) pro-choice demonstrators are confined to the sidewalk on the *east* side of the entrance driveway, pro-life demonstrators to the sidewalk on the *west* side of that driveway.

\* \* \*

## **PROBLEM #18:**

### **NATIONALIST MOVEMENT**

**v.**

### **CITY OF DETROIT**

- A. The Nationalist Movement—a self-styled “pro-democracy, pro-majority” group viewed by its critics as racist, anti-Semitic, and anti-gay—seeks a parade permit for a march in downtown Detroit.
- B. Invoking the City’s parade permit ordinance, its transportation commissioner denies the Movement a permit.
- C. Under this parade permit scheme, the transportation commissioner is free to deny a permit whenever, in his/her opinion, the requested parade would “disrupt” a street or require police coverage that would “deny reasonable police protection” to the rest of the city.
- D. The Movement challenges this permit denial in federal court.
- E. As the judicial law clerk assigned to this case, how do you advise your judge to rule—and how does your analysis proceed?

\* \* \*

## **PROBLEM #19:**

### **LICENSING SCHEME REQUIRING “GOOD MORAL CHARACTER” FOR DOOR-TO-DOOR SOLICITATION**

#### **A. Background**

1. The City of Seven Hills, Ohio has an ordinance that imposes a licensing scheme for door-to-door solicitation.
2. Such solicitors must first obtain a permit from the Chief of Police. To secure the permit, each applicant must furnish “sufficient proof that such person is of good moral character.”
3. Ohio Citizen Action, a nonprofit political organization, is challenging this licensing scheme under the First Amendment.

#### **B. How do you advise your judge?**

\* \* \*

## **PROBLEM #20:**

### **CIVIL RIGHTS MARCH IN TUPELO, MISSISSIPPI**

- A. Invoking the City’s parade permit scheme, Tupelo’s police chief denies a permit requested by a civil rights group seeking to conduct a protest march.
- B. The permit ordinance authorizes the police chief to deny a permit request if he determines that its issuance would “provoke disorderly conduct.”
- C. The disappointed marchers bring suit in federal court to challenge the permit scheme.
- D. As the judicial law clerk assigned to this case, how do you advise your judge to rule—and how does your analysis proceed?

\* \* \*

## **PROBLEM #21:**

### **NEW YORK CITY'S PARADE ORDINANCE**

- A. A marijuana decriminalization advocacy group unsuccessfully sought to obtain a permit for a march in New York City.
- B. The group has filed a § 1983 action against the City's police commissioner. Their suit claims that New York's parade ordinance—which does not contain an express time limit by which the commissioner must either grant or deny a parade permit application—constitutes an unlawful prior restraint on freedom of speech.
- C. As the judicial law clerk assigned to this case, how do you advise your judge to rule—and how does your analysis proceed?

\* \* \*

## **PROBLEM #22:**

### **PARADE PERMIT ORDINANCE IN LONG BEACH, CALIFORNIA**

- A. The City of Long Beach, California has an ordinance that imposes a permit requirement for events that require street closures: parades, block parties, and “filming activities.”
- B. To obtain a parade permit under this ordinance, it is necessary to file one's application at least 30 “working” days in advance.
- C. By contrast, the ordinance only requires three days' advance registration for filming activities and ten days' advance registration for block parties.
- D. This ordinance is now being challenged by a gay rights group whose parade permit application was denied under the 30-day advance registration requirement. How do you advise your judge?

\* \* \*

## **PROBLEM #23:**

### **DEFAMATION ACTION BY SPORTS AGENT AGAINST FOOTBALL COACH**

- A. A professional football team is on the verge of signing a highly sought-after quarterback when the quarterback hires Plaintiff as his new agent. Upon Plaintiff's arrival, the quarterback's salary demands escalate steeply and the team breaks off negotiations.
- B. At a press conference discussing the collapse of negotiations with the quarterback, Defendant (the team's coach) angrily castigates Plaintiff as a "sleaze-bag agent" who "kind of slimed up from the bayou."
- C. The agent is now suing both the coach and the newspaper that published the story for defamation.
- D. How do you advise your judge as to whether these statements are actionable?

\* \* \*

## **PROBLEM #24:**

### **DEFAMATION ACTION AGAINST WAL-MART STORES, INC.**

- A. A tiny, family-owned clothing store (Levinsky's, Inc.) begins an aggressive ad campaign against Wal-Mart when the giant retailer opens a local store.
- B. Intrigued by this "David-versus-Goliath" confrontation, a business magazine publishes an article about it.
- C. While researching the story, the magazine telephoned the local manager of Wal-Mart's store, who made two statements that appeared in the published article and prompted a defamation suit by Levinsky's.
- D. Here are the two statements that prompted the defamation suit against Wal-Mart:

1. The Wal-Mart manager described the Levinsky store as “trashy.”
  2. The Wal-Mart manager stated that when a person called Levinsky’s, “you are sometimes put on hold for 20 minutes—or the phone is never picked up at all.”
- E. Advise your judge as to whether either of these statements is actionable in a defamation suit.

\* \* \*

## **PROBLEM #25:**

### **DEFAMATION ACTION BY TEXAS TELEVISION REPORTER**

- A. Plaintiff John McLemore is a reporter for a Waco, Texas television station who reported live from the federal raid on the Branch Davidian compound in 1993. He has brought a defamation suit against a rival TV station for suggesting that he communicated with Branch Davidian leaders in advance of the raid and tipped them off that government agents were about to commence the raid.
- B. In February 1993, McLemore learned through various sources that the Bureau of Alcohol, Tobacco and Firearms (“ATF”) was about to raid the Branch Davidian compound.
- C. McLemore and a cameraman were dispatched to the scene, where they were the only media representatives to follow the ATF agents into the compound.
- D. During the ensuing firefight, the two reported live from the scene. Their report was then picked up by other media outlets and broadcast worldwide.
- E. Afterward, McLemore gained celebrity status for his role in the raid.
1. He gave numerous interviews describing his actions in connection with the raid.

2. In these interviews, he spoke with pride about his involvement in the raid, and even portrayed himself as a hero for assisting wounded ATF agents.
- F. As public attention began to focus on why the raid was botched, questions arose as to whether the local media presence was a contributing cause of the raid's failure.
- G. A rival Texas TV station, WFAA, ran a story on McLemore's involvement in the raid.
1. The story reported that ATF agents saw McLemore and his cameraman hiding in the trees as they arrived to commence the raid.
  2. The story suggested that McLemore had tipped off the Branch Davidian leaders that the raid was about to commence.
- H. McLemore is now bringing a defamation suit against WFAA for suggesting that he gave the Branch Davidians advance notice of the impending raid.
- I. McLemore argues that he is a private figure plaintiff who only needs to show negligence by WFAA to establish its liability.
- J. Describe each step that you would take in analyzing this case, and identify any significant issues that it presents.

\* \* \*

## **PROBLEM #26:**

### **CRIMINAL THREATS PROSECUTION** **OF ANIMAL RIGHTS ACTIVIST**

Huntington Life Sciences ("Huntington") is a research corporation that performs testing for companies seeking to bring their products to market. The products in question — pharmaceuticals and veterinary products — cannot be marketed in the United States unless they are tested for safety in accordance with federal and state regulations.

Huntington uses live animals as test subjects. Eighty-five percent of the testing is performed with rats and mice. The remaining fifteen percent is performed with other species, including fish, dogs, monkeys, and guinea pigs.

Two years ago, a Huntington technician secretly videotaped conditions inside a Huntington laboratory. The footage, which depicted animal abuse, was shown on television and ignited a firestorm of protest. Animal rights activists promptly formed an organization — Stop Huntington Animal Cruelty (“SHAC”) — whose mission is to close all Huntington laboratories.

SHAC’s campaign features two basic strategies: (1) breaking into Huntington laboratories to rescue the animals kept inside; and (2) vandalizing the property of Huntington officers and employees. Over the past year, SHAC activists have “liberated” dogs and monkeys from Huntington laboratories; overturned employees’ cars; poured red paint on employees’ houses and cars; physically assaulted Huntington directors by spraying cleaning fluid into their eyes; smashed an employee’s car with a sledgehammer while the employee was inside the car; smashed the windows of employees’ homes while the employees were inside the house; and, when employees were not at home, flooded their houses with water by attaching a hose to an outside tap and inserting the hose through a letterbox or window.

A prominent SHAC activist, Lauren Gazzola, is charged with violating a state statute that makes it a crime to “intentionally place a person in reasonable fear of death or serious bodily injury by means of a threat.” Specifically, Gazzola is charged with threatening Robert Harper, Huntington’s CEO, while protesting in front of Harper’s home. The government showed a video at trial, in which Gazzola can be heard threatening to burn down Harper’s house and warning him that the police cannot protect him. Harper is twenty feet away, standing on his front lawn. Gazzola is standing on the sidewalk in front of his house, holding a protest sign against animal testing by Huntington.

Gazzola defends by arguing that she was engaged in public protest when she uttered those remarks and that her statements are protected by the First Amendment.

How do analyze these facts?

\* \* \*

## **PROBLEM #27:**

### **E-MAIL MESSAGES CONTAINING VIOLENT, EXTREMELY DISTURBING SEXUAL FANTASIES**

Jake Baker, a student at the University of Michigan, is arrested and indicted by federal authorities for e-mailing violent, extremely disturbing sexual fantasies to an individual named Arthur Gonda, who shared and welcomed those fantasies. The government charges Baker with violating 18 U.S.C. § 875(c), which prohibits any communication, transmitted in foreign or interstate commerce, that threatens to kidnap or injure another person.

From November 1994 through January 1995, Baker and Gonda exchanged e-mail messages whose content expressed a sexual interest in violence against women and girls. Baker sent and received messages through a computer in Ann Arbor, Michigan. Gonda—whose true identity and whereabouts are still unknown—used a computer in Ontario, Canada.

Prior to meeting Gonda over the Internet, Baker had posted a number of fictional stories to “alt.sex.stories,” a popular interactive Usenet newsgroup. Baker’s fictional stories generally involved the abduction, rape, torture, mutilation, and murder of young women and girls.

Upon reading these stories, Gonda sought out Baker—and the two commenced an exchange of e-mail messages that generally focused on how much they would like to live out the fantasies that Baker described.

On January 9, 1995, Baker posted a story describing the torture, rape, and murder of a young woman who shared the name of an actual classmate of Baker’s at the University of Michigan. One month later, Baker was arrested and indicted under 18 U.S.C. § 875(c).

Baker defends on the grounds that (1) he did not communicate a “threat” in violation of the statute; and (2) his communications did not fall within the unprotected boundaries of the First Amendment’s “true threats” category.

How do you analyze his defense?

\* \* \*

## **PROBLEM #28:**

### **THE THREATENING LETTER**

Stanley M. Chesley is a Cincinnati lawyer who is widely known for bringing civil rights and civil liberties lawsuits. Recently he filed a lawsuit that has generated a great deal of anger and public controversy. He is the lead counsel in a class-action lawsuit against gun manufacturers. The local chapter of the National Rifle Association (“NRA”) has called the lawsuit “a blatant attempt to take our guns away,” and has labeled Mr. Chesley “Public Enemy Number One.”

Two weeks after filing that lawsuit, Mr. Chesley came home to find an anonymous letter that had been mailed to his address. The letter, written in all capital letters, stated:

STAN,  
YOU CAN TAKE COMFORT IN THE FACT, THAT WE WILL NOT USE A GUN ON YOU. YOU WILL WISH WE HAD! YOU CAN START PACK’N A GUN BUT IT WILL DO ABSOLUTELY NO GOOD.

The FBI recovered two latent fingerprints from the letter, found a match for the fingerprints in its database, and subsequently questioned and arrested John A. Polson as the suspected author of the letter. Mr. Polson has now been indicted under 18 U.S.C. § 876, which makes it a crime to use the U.S. mail system to communicate to another person a threat to physically injure that person.

Mr. Polson admits that he sent the letter. Nevertheless, he now moves to dismiss the indictment on two separate grounds: (1) Mr. Polson asserts that he is a strong supporter of Second Amendment gun rights and that his statements in the letter are deserving of First Amendment protection as political speech. (2) Mr. Polson asserts that his letter does not constitute a true threat and is therefore not punishable under 18 U.S.C. § 876.

How do you analyze his motion to dismiss the indictment?

\* \* \*

## **PROBLEM #29:**

### **THREATENING VOICE MAIL MESSAGES TO ARAB AMERICAN ORGANIZATION**

Defendant Patrick Syring is being prosecuted for sending threatening voice mail messages to two individuals, James Zogby and Rebecca Abou-Chedid, who work at the Arab American Institute (“AAI”), a non-profit organization in Washington, D.C. that represents the interests of Arab Americans in the United States. Mr. Zogby, AAI’s Executive Director, frequently appears on television and radio news talk shows. Ms. Abou-Chedid is the AAI’s Legal Director; her name sometimes appears in AAI press releases.

The government’s prosecution of Mr. Syring is in its earliest stages. He was indicted and arrested less than three weeks ago under 18 U.S.C. § 875(c), which makes it a crime to communicate, through interstate commerce, any threat to injure another person. Mr. Syring has now moved to dismiss the indictment.

Mr. Syring’s four voice mail messages are set forth below. To better understand the content of his statements, it should be borne in mind that Mr. Zogby and Ms. Abou-Chedid are both of Lebanese descent; moreover, the acronym “IDF” refers to the Israeli Defense Forces. Each of the four voice mail messages was recorded on the AAI’s main telephone line during a nine-day span in July 2014.

On July 17 at 11:39 p.m., the following voice mail message was recorded at AAI: “This is Patrick Syring from Arlington, Virginia. I just read James Zogby’s statements online on the MSNBC website, and I condemn him for his anti-Semitism and anti-American statements. The only good Lebanese is a dead Lebanese. The only good Arab is a dead Arab. Long live the IDF. Death to Lebanon and death to the Arabs.”

On July 21 at 11:51 p.m., the following voice mail message was recorded at AAI: “This is Patrick Syring from Arlington, Virginia. James Zogby’s anti-Semitic, anti-American statements are abhorrent, repulsive, and disgusting. So are the press releases issued by that evil snake, Rebecca Abou-Chedid. The only good Lebanese is a dead Lebanese—as the IDF knows and is carrying out in its security operations, God bless them! Fuck the Arabs. Fuck James Zogby. And Fuck Rebecca Abou-Chedid. Fuck you and all your wicked Hezbollah conspirators. You will burn in hellfire on this earth and in the hereafter.”

On July 24 at 11:28 p.m., the following voice mail message was recorded at AAI: “This is Patrick Syring from Arlington, Virginia. Hello, James Zogby. You are a fucking anti-Semitic, anti-American stooge who sympathizes with Hezbollah terror. You and your Arab American Institute fuckers should burn in the fires of hell for eternity. The IDF is bombing Lebanon back into the Stone Age where it belongs. Arabs are dogs. Long live the State of Israel. Death to Arab American terrorists. The only good Lebanese is a dead Lebanese.”

On July 26 at 11:56 p.m., the following voice mail message was recorded at AAI: “This is Patrick Syring from Arlington, Virginia. Hello, Rebecca Abou-Chedid. You are a fucking Arab American terrorist, a Hezbollah sympathizer pig. James Zogby is a vile, evil, anti-Semitic pig terrorist member of Hezbollah who is attempting to destroy the State of Israel. God bless America. God bless the State of Israel. The only good Lebanese is a dead Lebanese.”

How do you analyze Mr. Syring’s motion to dismiss the indictment? Are his words a political rant or do they cross the line into true threats?

\* \* \*

## **PROBLEM #30:**

### **LEAFLETING BAN IN LAS VEGAS**

- A. The Las Vegas City Council wants to stop a particular method of advertising by erotic dance cabarets: leafleting on public sidewalks.
- B. To accomplish this objective, City Council completely bans all leafleting along Las Vegas Boulevard and on the sidewalks lining the Las Vegas Convention Center.
- C. When the cabarets file suit against the City, several non-profit public advocacy groups (including Greenpeace) intervene as plaintiffs, complaining that their own leafleting activities are prohibited by the ban.
- D. The City urges your judge to analyze this First Amendment case under the standard for commercial speech. Is that the correct standard to apply? What is your advice?

\* \* \*

## **PROBLEM #31:**

### **REGISTRATION REQUIREMENT IMPOSED BY THE COMMODITY FUTURES TRADING COMMISSION**

- A. Commodity trading advisors are required to register with the Commodity Futures Trading Commission under 7 U.S.C. § 6m(1), a provision of the Commodity Exchange Act.
- B. This requirement would seem to be limited to the purveyors of personalized, client-specific trading advice. But the Commission has begun to enforce it against financial publishers: those who publish books and periodicals that feature market commentary, charts, and other information about commodities trading.
- C. One of these publishers, CTS Inc., has been targeted by the Commission for refusing to comply with the registration requirement.
- D. The Commission has subpoenaed thousands of documents from CTS and is threatening to impose fines against the company.
- E. CTS is now challenging the registration requirement in federal court as an infringement of its First Amendment rights.
- F. There is no dispute that CTS only publishes information about market trends and the performance or value of particular commodities; it does not provide personalized, client-specific trading advice.
- G. The Commission argues that this case should be analyzed under the lower speech protection afforded to commercial speech. CTS argues that the commercial speech standard does not apply to this case.
- H. How do you advise your judge on the applicable standard?

\* \* \*

## **PROBLEM #32:**

### **ALLEGED MISREPRESENTATIONS BY NIKE REGARDING ITS LABOR PRACTICES IN ASIAN FACTORIES**

- A. Widely criticized for exploiting its Asian workforce, Nike responds with a public relations campaign. In the course of that campaign, Nike allegedly made false statements of fact about its labor practices and about the working conditions in its Asian factories.
- B. Nike is now being sued in a private attorney general action under California laws that are designed to curb false advertising and unfair competition.
- C. The issue here is whether Nike's false statements are commercial or noncommercial speech for purposes of First Amendment free speech analysis.
- D. Resolving this issue is important because commercial speech is a less-than-fully-protected category of expression that is more vulnerable to regulation than other types of speech, and because governments may entirely prohibit commercial speech that is false or misleading.
- E. It has yet to be determined at trial whether Nike's statements were in fact false — our task is simply to determine whether they fall inside or outside the Supreme Court's conception of commercial speech.
- F. Beginning in October 1996 and continuing through December 1997, a large number of news organizations ran articles about the Asian factories where Nike products are made.
- G. They asserted that...
  - 1. Most of the workers who make Nike products are women under the age of 24;
  - 2. Nike's workers are paid less than the applicable local minimum wage;
  - 3. they are required to work overtime;

4. they are allowed and encouraged to work more overtime hours than actually permitted by applicable local laws;
  5. they are subjected to physical, verbal, and sexual abuse; and
  6. they are exposed to toxic chemicals, noise, heat, and dust without adequate safety equipment, in violation of applicable local laws governing occupational health and safety.
- H. In response to this adverse publicity, Nike executives launched a public relations campaign featuring press conferences, press releases, letters to the Op-Ed pages of newspapers, letters to university presidents and athletic directors, and full-page newspaper advertisements.
- I. In these statements, Nike executives specifically asserted that...
1. Nike workers are protected from physical and sexual abuse;
  2. they are paid in accordance with applicable local laws governing wages and hours;
  3. they are paid on average double the local minimum wage;
  4. they receive a “living wage”;
  5. they receive free meals and health care; and
  6. their working conditions are in compliance with applicable local laws governing occupational health and safety.
- J. At oral argument before the California Supreme Court, both sides conceded that if Nike’s statements were regarded as political, rather than commercial, speech, then they would be immune from government regulation and the Plaintiff would have no case.
- K. Nike maintains that it was speaking here as a participant in a wide-ranging debate about the effects of globalization, and that it should no more face liability for what it says in such a context than a politician, editorial writer, or any other participant in that debate.
- L. The Plaintiff responds that Nike’s statements were made simply “for the commercial purpose of selling shoes,” as his brief argues.

- M. **ISSUE:** Do these statements fall within the Supreme Court’s conception of commercial speech?

\* \* \*

## **PROBLEM #33:**

### **REGULATION OF “JUNK” FAXES:** **THE TELEPHONE CONSUMER PROTECTION ACT**

- A. In this case, the State of Missouri has sued American Blast Fax, Inc. for violating statutory restrictions on unsolicited fax advertising.
- B. The statute that Missouri seeks to enforce is the Telephone Consumer Protection Act of 1991 (the “TCPA”), 47 U.S.C. § 227.
- C. American Blast Fax transmits client advertisements to the fax machines of potential customers.
- D. In response to numerous consumer complaints, Missouri sought injunctions and civil penalties against the company, alleging that American Blast Fax had violated a provision of the TCPA that prohibits “send[ing] an unsolicited advertisement to a telephone facsimile machine.” 47 U.S.C. § 227(b)(1)(C).
- E. An “unsolicited advertisement” is defined in the statute as “any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person’s prior express invitation or permission.” 47 U.S.C. § 227(a)(4).
- F. In response to Missouri’s suit, American Blast Fax has moved to dismiss the complaint, arguing that § 227(b)(1)(C) is an unconstitutional restriction on its freedom of speech.
- G. The government has presented evidence that unsolicited fax advertising shifts costs to the recipients, who are forced to contribute ink and paper, to sustain extra wear and tear on their fax machines, and to waste personnel time. Missouri has also presented evidence to show that a fax advertisement interferes with the recipients’ use of their machines by tying up the fax line for the time it takes to send a message.

- H. The legislative history of the TCPA indicated that many state officials had urged Congress to deal with the “junk fax” problem. Legislative testimony indicated that some fax advertisers routinely send 60,000 fax advertisements per week and that business owners were frustrated by the extent to which these unwanted communications were preventing “legitimate” faxes from coming in.
- I. In this case, Missouri is arguing that there is a substantial governmental interest in preventing the imposition of costs and the clogging of phone lines that unwanted fax advertising creates for recipients.
- J. American Blast Fax has responded by presenting evidence that technological advances have reduced the costs and phone line interference that recipients experience, and that fax advertising benefits both advertisers and consumers.
- L. Focus on the Defendant’s assertion that it is a violation of the First Amendment to enforce § 227(b)(1)(C) against it. How do you rule — and how does your analysis proceed?

\* \* \*

## **PROBLEM #34:**

### **IDENTIFY THE OBSCENITY**

As to each of the following examples, my question is this:  
Is it obscene or not obscene? Please tell me why or why not.

- (1) A jacket bearing the words “Fuck the Draft.”
- (2) A recording by 2 Live Crew, *As Nasty as They Wanna Be*, whose lyrics and song titles contained references to male and female genitalia, including the turgid state of the male sex organ, semen, fellatio, cunnilingus, oral-anal contact, group sex, specific sexual positions, masturbation, and sado-masochism, and also featured sounds of moaning.
- (3) A pamphlet offering detailed information on various birth control methods.
- (4) Erotic dancing at a cabaret where the dancers wear only pasties and a G-string.

- (5) The graphic visual depiction of oral, anal, or vaginal penetration.

\* \* \*

## **PROBLEM #35:**

### **LOCAL OBSCENITY ORDINANCE**

- A. The City Council of Stamps, Arkansas has adopted an ordinance prohibiting the sale of obscene materials.
- B. The ordinance is now being enforced against the operator of a local video store, who rented “Girls of Penthouse” to an undercover officer.
- C. The video store is challenging this prosecution on First Amendment grounds.
- D. The ordinance defines “obscene” to mean that “to the average person, applying contemporary standards, the dominant theme of the material taken as a whole appeals to the prurient interest.” This is the entire definition; there is no additional language.
- D. The ordinance does not specify the sex acts that cannot be depicted. Nor does the ordinance require that the work, taken as a whole, must lack serious literary, artistic, political, or scientific value.
- F. How would your analysis of this ordinance proceed?

\* \* \*

## **PROBLEM #36:**

### **CHILD PORN PROSECUTION**

- A. Robert McKelvey is indicted by a federal grand jury, charged with possession of photographs depicting minors engaged in sexually explicit conduct in violation of 18 U.S.C. § 2252(a)(4)(B).
- B. The statute defines “sexually explicit conduct” as including, inter alia, the “lascivious exhibition of the genitals or pubic area of any person.” 18 U.S.C. § 2252(a)(4)(B)(i).

- C. The photographs that formed the basis of these charges were taken while McKelvey was a summer camp counselor. They show a number of young boys “skinnydipping” (i.e., swimming and splashing in the nude).
- D. The photos are taken from 10 to 20 feet away, but it is possible to see some of the boys’ genitalia. The boys are not, however, openly displaying their genitalia to the camera.
- E. McKelvey has moved to dismiss the charges. Do these photos fall within the unprotected boundaries of child porn?

\* \* \*

## **PROBLEM #37:**

### **ZONING RESTRICTIONS ON SEXUALLY ORIENTED BUSINESSES**

- A. The City of Little Rock, Arkansas adopts a zoning ordinance limiting the areas of the city where sexually oriented businesses are allowed to operate.
- B. The ordinance expressly governs adult bookstores, adult arcades, and cabarets featuring nude or erotic dancing.
- C. You may assume, for purposes of this hypothetical, that there are no vagueness or overbreadth issues here.
- D. The ordinance prohibits sexually oriented businesses from operating within 750 feet of any religious facility, public or private school, boundary of any residential or single-family zone, public park, medical facility, local historical district, or any other sexually oriented business.
- E. The owners of an adult bookstore, Ambassador Books & Video Inc., bring suit in federal court challenging this zoning ordinance as a content-based restriction on free speech.

### **QUESTIONS**

1. What First Amendment doctrine governs this dispute?

2. Under that doctrine, will the judge treat this ordinance as content-based or content-neutral?
3. Ultimately, what TEST will the judge employ in deciding this case?

\* \* \*

## **PROBLEM #38:**

### **RESTRICTING THE HOURS OF OPERATION OF SEXUALLY ORIENTED BUSINESSES**

- A. The City of Vineland, New Jersey enacts an ordinance that singles out sexually-oriented businesses for a special restriction on their hours of operation, limiting them to 8:00 a.m. to 10:00 p.m., Mondays through Saturdays.
- B. The legislative history of the ordinance shows that it was adopted by City Council for the following reasons: (1) to reduce the likelihood that patrons of these businesses would discard sexually-oriented materials on adjoining residential property under cover of nightfall; (2) to reduce the likelihood that such patrons would make middle-of-the-night use of the private booths in these establishments to have unprotected sex with anonymous partners and thereby facilitate the spread of sexually-transmitted diseases; and (3) to give the owners of adjoining residential property some middle-of-the-night respite from the noise and traffic that these establishments generate.
- C. The ordinance is being challenged on First Amendment grounds by the owner of an adult bookstore/arcade/cabaret.
- D. How should this problem be analyzed?

\* \* \*

## **PROBLEM #39:**

### **PERMIT SCHEME GOVERNING ADULT BOOKSTORES**

- A. Prince George's County, Maryland enacts a special ordinance governing adult bookstores.
- B. The ordinance prohibits adult bookstores from operating anywhere in the county unless and until they obtain a permit from the district council.
- C. The owner of an adult bookstore in Prince George's County files suit in federal district court challenging this ordinance on First Amendment grounds.
- D. Invoking the secondary effects doctrine, the district court upholds the ordinance as a content-neutral time, place, and manner regulation.
- E. As a law clerk on the 4th Circuit Court of Appeals, how do you analyze this case?

\* \* \*

## **PROBLEM #40:**

### **SECONDARY EFFECTS ZONING — THE NEED FOR STUDIES SUPPORTING THE REGULATION**

- A. A cabaret featuring erotic dancing challenges the constitutionality of a local ordinance imposing zoning restrictions on adult businesses.
- B. The city seeks to justify its ordinance — and to have it reviewed as content-neutral — under the secondary effects doctrine.
- C. The city asserts that it enacted the zoning ordinance to combat the undesirable secondary effects of adult businesses — namely, declining property values and an increase in such crimes as prostitution.
- D. But the cabaret establishes that the city never conducted any studies or gathered any evidence to support the causal connection between the presence of sexually oriented businesses and the secondary effects (increasing crime, decreasing property values) that it seeks to remedy by means of its ordinance.
- E. If the cabaret is right, how does that affect your analysis of the ordinance?

\* \* \*

## **PROBLEM #41:**

### **SECONDARY EFFECTS ZONING — AVAILABILITY OF LAND FOR ADULT BUSINESSES**

- A. Owners of an adult bookstore are challenging a local zoning ordinance that specifically targets sexually oriented businesses.
- B. They assert that the zoning ordinance, by severely restricting the available land for adult businesses, offends the First Amendment by failing to leave open reasonable alternative avenues of communication.
- C. Specifically, they point out that all of the available parcels of land will require extensive excavation and landscaping to be made suitable for adult (or, for that matter, any commercial) businesses.
- D. How should this problem be analyzed?

\* \* \*

## **PROBLEM #42:**

### **BAN ON TOTAL NUDITY IN ADULT ENTERTAINMENT ESTABLISHMENTS**

The City of Cocoa Beach, Florida enacts an ordinance that regulates the dancers who perform at adult entertainment establishments, prohibiting them from performing in a state of total nudity.

Under the ordinance, an erotic dancer can avoid violating this prohibition by wearing a G-string and pasties.

The City justifies its ordinance by claiming an intent to combat the secondary effects associated with nude dancing — including an increase in crime and a decrease in local property values. The City does not explain why *totally*

nude dancers are more likely to produce these secondary effects than *partially* nude dancers.

The Tool Box, a local cabaret that features nude dancing, files suit in federal court to challenge the constitutionality of the new ordinance. Lawyers for The Tool Box argue that the key Supreme Court decisions on nude dancing — Barnes v. Glen Theatre, Inc. and City of Erie v. Pap's A.M. — are both inapplicable to these facts. Barnes involved a public indecency statute, not an ordinance narrowly targeting expressive conduct. Pap's A.M. imposed a total ban on ALL public nudity, not an ordinance that focused solely upon erotic dancers. And the secondary effects cases like Renton v. Playtime Theatres involved ZONING ordinances, not a job-specific regulation applicable only to erotic dancers.

How do you advise your judge — and how does your analysis proceed?

\* \* \*

## **PROBLEM #43:**

### **CLEVELAND'S BAN ON CRITICIZING THE MAYOR**

- A. Cleveland City Council enacts an ordinance that flatly prohibits anyone from criticizing the mayor.
- B. Violating the ordinance subjects the speaker to criminal penalties.
- C. A columnist for The Scene is now being prosecuted for writing a scathing column in which he criticized Mayor Frank Jackson.
- D. The columnist moves to dismiss the charges, asserting that the ordinance offends the First Amendment.
- E. How do you analyze the constitutionality of this ordinance? Specifically, what level of scrutiny do you apply and why?

\* \* \*

## **PROBLEM #44:**

### **CLEVELAND'S RESTRICTION ON SIGNS WITHIN 500 FEET OF CITY HALL**

- A. Cleveland City Council enacts an ordinance restricting the display of certain signs in the vicinity of City Hall.
- B. The new law bans the display of any sign criticizing the mayor within 500 feet of City Hall.
- C. The new ordinance is now being challenged in federal court. The City argues that the ordinance should be analyzed as a time, place, and manner restriction.
- D. How do you advise your judge — and how would your analysis proceed?

\* \* \*

## **PROBLEM #45:**

### **NUMERICAL RESTRICTIONS ON DEMONSTRATORS IN A SMALL DOWNTOWN PARK**

- A. The City Council of Durham, North Carolina enacts an ordinance that governs the number of demonstrators who may occupy a small downtown park at any one time.
- B. Though a popular site for demonstrations, the park is extremely small, producing severe crowding if any more than 50 protesters seek to occupy it.
- C. On previous occasions, demonstrations of more than 50 protesters spilled out of the park and into the street, disrupting the flow of pedestrian and vehicular traffic.

- D. The new ordinance prohibits more than 50 people from assembling in the little park at any one time.
- E. The ordinance is being challenged on First Amendment grounds in federal court.
- F. How do you advise your judge — and how would your analysis proceed?

\* \* \*

## **PROBLEM #46:**

### **REGULATION BANNING THE OVERNIGHT MAINTENANCE OF ANY “PROPS” ON THE U.S. CAPITOL GROUNDS**

- A. To publicize the plight of the homeless, protesters plan to carry out a seven-day vigil on the grounds of the U.S. Capitol.
- B. As part of this vigil, the protesters plan to erect a 500-pound clay statue of a man, woman, and child huddled over a steam grate.
- C. According to their plan, this statue will serve as the symbol and centerpiece of their seven-day vigil.
- D. But U.S. Capitol Police, citing a regulation that bans the overnight maintenance of any “props” on the Capitol grounds, inform the protesters that they will have to dismantle their statue every night and reinstall it the next morning.
- E. This overnight ban effectively thwarts the protesters’ plan to use their statue. Erecting and dismantling it every day for seven days would not only prove enormously difficult, but would cause the statue to disintegrate from wear and tear.
- F. Prior to the start of their seven-day vigil, the protesters file suit in federal court. They argue that the regulation, by thwarting their use of the statue, violates their First Amendment rights.

- G. The government defends by arguing that its regulation was not adopted with a view toward suppressing anyone's speech. Instead, the regulation was adopted merely to afford the government meaningful day-to-day control over the Capitol grounds and to permit the nightly cleaning of those grounds.
- H. How do you advise your judge — and how does your analysis proceed?

\* \* \*

## **PROBLEM #47:**

### **CLEVELAND'S BAN ON SIDEWALK LEAFLETING**

- A. In April 1999, the Nation of Islam begins sending its young men (the "Fruit of Islam") onto the public sidewalks of downtown Cleveland, where they pass out leaflets containing excerpts from recent speeches by the organization's leader, Minister Louis Farrakhan.
- B. For the most part, the content of these leaflets is not terribly controversial.
- C. Nevertheless, the public perception of Minister Farrakhan as virulently anti-Semitic makes the Fruit of Islam leafleters a controversial presence on Cleveland's downtown sidewalks.
- D. After receiving a flood of complaints, Mayor White approaches key members of City Council, inquiring: "How can we make this Nation of Islam problem go away?"
- E. In private meetings with key downtown business constituents, Mayor White and the City Council leaders pledge that they will enact legislation to "sweep the Fruit of Islam off of our sidewalks."
- F. These statements begin to appear in newspaper stories, and they are soon echoed both in the mayor's public speeches and in debates on the floor of City Council.
- G. Finally, in September 1999, City Council enacts an ordinance that bans all leafleting on Cleveland's downtown sidewalks — from West 9th Street in the Warehouse District all the way to East 18th Street.

- H. In a preamble to the ordinance, City Council states that the legislative purpose is to combat littering.
- I. The Nation of Islam brings suit in federal court, challenging the new ordinance on First Amendment grounds.
- J. How do you advise your judge — and how does your analysis proceed?

\* \* \*

## **PROBLEM #48:**

### **TOTAL BAN ON YARD SIGNS IN SHAKER HEIGHTS**

- A. With a view toward promoting the aesthetic integrity of its neighborhoods, the City of Shaker Heights enacts an ordinance that bans all yard signs.
- B. Neither the text of the ordinance nor its legislative history reveals any intent by City Council to use this law as a means of restricting expressive content.
- C. Instead, the legislative history consistently reveals a desire to regulate for aesthetic reasons.
- D. The ordinance is now being challenged on First Amendment grounds.
- E. How would you analyze this problem? Is there any Supreme Court decision that strikes you as particularly applicable to these facts?

\* \* \*

## **PROBLEM #49:**

### **RESTRICTIONS ON PROTESTS AT NUCLEAR WEAPONS TEST SITE**

- A. Anti-nuclear protesters bring a First Amendment challenge to Energy Department regulations governing demonstrations at the Nevada Nuclear Weapons Test Site.

- B. The regulations confine all demonstrators to a designated “Parking and Demonstration Area.”
- C. The protesters argue that they should be free to demonstrate at other locations throughout the Test Site. How do you advise your judge — and how does your analysis proceed?

\* \* \*

## **PROBLEM #50:**

### **PERMIT SCHEME GOVERNING USE OF OUTDOOR PAVILION FOR RALLIES IN CITY-OWNED PARK**

- A. Plaintiff marijuana advocacy group brings suit under the First Amendment after it is barred by the city from using an outdoor pavilion in a city-owned park for an intended rally.
- B. The group sought access under the city’s permit scheme governing use of the pavilion.
- C. Under that scheme, the pavilion was available only for those events that advertised the city, promoted the city, or promoted “family values.”
- D. How do you advise your judge — and how does your analysis proceed?

\* \* \*

## **PROBLEM #51:**

### **CHRISTMAS IN THE PARK**

- A. Teenage Republican Club members bring suit after the city excludes their sign from the municipal Christmas in the Park event — an event that is staged each year in a city-owned park in the heart of downtown.
- B. Plaintiffs’ sign was barred by the city under a policy that banned from the event any signs conveying a “partisan message.”

- C. How do you advise your judge — and how does your analysis proceed?

\* \* \*

## **PROBLEM #52:**

### **OBAMA VOTER REGISTRATION RALLY**

- A. In an effort to increase the number of African-Americans eligible to vote in the 2008 presidential election, Barack Obama's campaign officials apply to the City of Cleveland for a permit to stage a voter registration rally in the Hough district, a Cleveland neighborhood with a heavy concentration of African-American residents. The City refuses to grant the permit, insisting that the rally be held instead on Whiskey Island.
- B. Whiskey Island is eight miles from Hough, is completely inaccessible by public transportation, and is uninhabited.
- C. The Obama Campaign brings suit under the First Amendment, challenging the City's permit denial and its imposition of Whiskey Island as the only permissible site for the rally.
- D. How do you advise your judge — and how does your analysis proceed?

\* \* \*

## **PROBLEM #53:**

### **PROTESTS BY FEMINISTS AT THE MASTERS GOLF TOURNAMENT**

- A. The Masters Golf Tournament — a world-renowned event — is held every year in Augusta, Georgia at the Augusta National Golf Club.
- B. Augusta National is a private club that persistently maintained a men-only membership policy until the year 2012, when the club finally admitted *two* female members (among them former Secretary of State Condoleezza Rice).

- C. But our fact pattern takes place nearly a decade earlier — in the year 2003. Martha Burk, who chairs the National Council of Women’s Organizations, has been leading a campaign that urges Augusta National to drop its exclusionary policy and grant the admission of female members.
- D. Each year, during the four days of the Masters Golf Tournament, Augusta National receives thousands of visitors and a deluge of media attention.
- E. Two months in advance of the tournament, Burk files a permit request with the local sheriff to stage a small protest (with 23 other picketers) on a public sidewalk just outside the gates to Augusta National. She wishes to stage this protest on only *one* of the four days comprising the tournament.
- F. In her permit request to the local sheriff, Burk makes clear that she does not want to block the entrance to club. Instead, she wants to be stationed to the left or to the right of the entranceway — so that her protest will be visible to her intended audience: the members and guests of the club who attend the tournament.
- G. Rejecting her permit request, the sheriff grants her access to an alternative location: a 5.1-acre tract of land that is situated one-third of a mile from the club’s entrance.
- H. This alternative site would not be visible to motorists traveling to and from the club’s entrance — because it is nearly 30 feet *below* the level of the roadway.
- I. Burk has now filed suit, bringing a First Amendment challenge to the sheriff’s ruling on her permit application. How do you advise your judge — and how does your analysis proceed?

\* \* \*

## **PROBLEM #54:**

### **LILITH FAIR’S BAN** **ON ANTI-ABORTION SPEECH**

- A. Lilith Fair — a privately-sponsored musical, cultural, and political festival — is held annually in northeast Ohio on the privately-owned grounds of Blossom Music Center.

- B. The Fair’s organizers permit a variety of entities to set up exhibition booths and tables in the so-called “Village” area (an area distinct from the stage, where invited musical groups perform).
- C. A variety of pro-choice organizations (NOW, NARAL, and Planned Parenthood) are granted space for their booths, but the Fair’s organizers refuse a similar request by an anti-abortion group, Feminists for Life (FFL). FFL sues, seeking access to the Fair under the First Amendment.
- D. How does your analysis proceed?

\* \* \*

## **PROBLEM #55:**

### **IDENTIFY THE FORUM**

- A. A federal building corridor.
- B. A military base.
- C. State fairgrounds.
- D. Utility poles.
- E. Any of the main concourses at Cleveland-Hopkins Airport.
- F. A conference center at a public university, expressly dedicated solely to use by registered student organizations.
- G. Chicago’s municipally-owned pier — formerly a naval facility but now converted into a recreational and commercial center, with pedestrian thoroughfares lined by shops and restaurants, an outdoor amusement park, an indoor shopping mall, and a convention hall.

\* \* \*

## **PROBLEM #56:**

### **DESIGNATED OR NON-PUBLIC FORUM?**

Before you attempt to answer this question, let me give you the relevant background information. The issue posed by this Problem—whether the advertising spaces inside and outside public transit vehicles should be treated as *designated* or *non-public* forums—is governed by a narrow body of precedent stemming from *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). In *Lehman*, the City of Shaker Heights was sued when it refused to allow a political ad to be displayed in or upon its transit vehicles. Finding that the city had never allowed political ads and consistently accepted only commercial ads, the Supreme Court held that the city’s advertising spaces constituted a NON-public forum. Accordingly, the city did not violate the First Amendment when it rejected the plaintiff’s political ad. In the years since *Lehman*, the lower federal courts have developed a line of precedent that looks carefully at the government’s policy and practice toward its advertising spaces. If the government consistently refuses to allow political ads, its advertising spaces will be deemed a NON-public forum. But if the government consistently *accepts* political ads, its advertising spaces will be deemed a DESIGNATED public forum, and the government will *not* be free to prefer some political ads over others.

\* \* \*

In three separate cases, federal courts were required to decide whether advertising space on municipally-owned buses fell into the category of a *designated* or a *non-public* forum. In each case, the facts were slightly different...

- A. In Phoenix, the city had consistently limited bus advertisements to commercial advertising, treating its buses as an inappropriate platform for political or public-interest speech. It was sued when it rejected a political ad submitted by an anti-abortion group.
- B. In New York, the transit authority had accepted commercial AND political advertising. It was sued when it rejected a political ad that was critical of the mayor.
- C. The Southwestern Ohio Regional Transit Authority had accepted bus advertisements reflecting a wide array of political and public-issue speech. It was sued when it rejected a pro-union ad as too controversial.

How would you advise your judge — and why?

\* \* \*

## **PROBLEM #57:**

### **CINCINNATI'S BAN ON OVERNIGHT DISPLAYS IN FOUNTAIN SQUARE**

- A. Fountain Square is a public square in the very heart of downtown Cincinnati.
- B. For many years, City Council has allowed a broad range of private groups to erect expressive signs and exhibits on Fountain Square and to leave them there overnight for short periods of time.
- C. Recently, however, Council members have grown annoyed by the efforts of a Jewish group and the Ku Klux Klan to erect overnight displays on Fountain Square.
- D. Council now enacts a new ordinance that bans all overnight displays by private groups. But an exception in the ordinance allows overnight displays that are sponsored or co-sponsored by the City.
- E. Subsequently, the City co-sponsors overnight displays by private groups like the Kiwanis Club, an Oktoberfest committee, and a librarians organization — but the City rejects overtures by the Klan and the Jewish group to erect overnight displays.
- F. The Klan and the Jewish group now bring suit under the First Amendment, challenging the City's enforcement of its new Fountain Square ordinance.
- G. How do you advise your judge — and how does your analysis proceed?

\* \* \*

## **PROBLEM #58:**

### **UNIVERSITY MEETING CENTER — SCENARIO #1**

- A. Alabama State University unveils its new University Meeting Center, a facility that contains a broad range of rooms and halls for meetings, conferences, and seminars.
- B. The University expressly dedicates this facility for use by — and only by — registered student organizations.
- C. During the Meeting Center’s first year of existence, the University consistently allows the new facility to be used only by registered student organizations.
- D. The National Abortion Rights Action League (NARAL) then approaches the University about holding a two-day conference at the new facility.
- E. NARAL says that its conference will feature speakers ranging from judges and health care professionals to lawyers and other advocates for reproductive freedom.
- F. NARAL also says that its conference will be open both to students and the public at large.
- G. The University rejects NARAL’s request, telling the organization that the Meeting Center is reserved exclusively for student organizations, so NARAL will have to go elsewhere in its quest to find a suitable forum for its conference.
- H. NARAL sues the University in federal court, arguing that this rejection is a violation of its First Amendment rights.
- I. How do you advise your judge — and how does your analysis proceed?

\* \* \*

## **PROBLEM #59:**

### **UNIVERSITY MEETING CENTER — SCENARIO #2**

- A. Alabama State University unveils its new University Meeting Center, a facility that contains a broad range of rooms and halls for meetings, conferences, and seminars.

- B. The University expressly dedicates this facility for use by — and only by — registered student organizations.
- C. During the Meeting Center’s first year of existence, the University consistently allows the new facility to be used only by registered student organizations.
- D. Now a newly but duly registered student organization, GLB (a gay, lesbian, and bisexual group), approaches the University about holding its monthly meetings in one of the small conference rooms at the facility.
- E. The University rejects GLB’s request.
- F. In explaining its denial, the University asserts that it does not want to appear to be endorsing the “lifestyle” of GLB’s members.
- G. Such a stance, says the provost, would be a public relations fiasco, alienating the very donors whose money helped to build the Meeting Center in the first place.
- H. GLB brings suit in federal court, asserting a violation of its First Amendment rights.
- I. How does your analysis proceed? And which Supreme Court decision seems particularly applicable?

\* \* \*

## **PROBLEM #6o:**

### **THE BROOKLYN MUSEUM BROUHAHA**

- A. The following facts are drawn from an October 1, 1999 dispatch by the Associated Press.
- B. On the eve of the opening of a controversial exhibit, demonstrators gathered outside the Brooklyn Museum of Art yesterday to denounce Mayor Rudolph Giuliani, who has called the show “sick” and threatened to cut the museum’s funding.

- C. Hundreds of signs held by the demonstrators contained crude pictures of the mayor and pointed statements asserting that he has no respect for the First Amendment.
- D. Giuliani is under fire for his strident criticism of the British exhibit, “Sensation,” set to open October 2, and his threat to pull \$7 million in funding to the museum or about one third of its budget.
- E. The exhibit includes a painting of the Virgin Mary with a spot of elephant dung on it.
- F. Questions:
  - 1. Can Mayor Giuliani get away with this under the First Amendment?
  - 2. How would you analyze this issue?
  - 3. Are there any applicable Supreme Court precedents?
  - 4. Are those precedents distinguishable from these facts?

\* \* \*

## **PROBLEM #61:**

### **PRO-CASTRO DEMONSTRATIONS**

- A. In November 2007, in a military raid directed by George W. Bush, U.S. forces invade Cuba and take Fidel Castro into custody. Castro is now being held in a federal prison.
- B. In south Florida, pro-Castro demonstrators express their anguish by strangling doves — a method of protest that horrifies the nation, but is meant by the protesters to symbolize what the U.S. is doing to Castro.
- C. Florida law enforcement officials arrest and prosecute these protesters, using an animal cruelty law that has been on the books for 40 years.
- D. The protesters assert a First Amendment defense.
- E. How do you advise your judge — and how does your analysis proceed?

\* \* \*

## **PROBLEM #62:**

### **PUNISHING A STUDENT FOR REMARKS PUT FORTH IN HIS PERSONAL INTERNET HOMEPAGE**

- A. Working at home with his own equipment and without any trace of school sponsorship, supervision, or support, a high school student creates his own Internet homepage.
- B. His homepage features derogatory comments about his school, its principal, and its teachers. The comments are neither lewd nor profane.
- C. When his homepage is brought to the attention of school officials, they announce that he will receive a lengthy suspension as punishment for the sentiments expressed on his homepage.
- D. The student files suit, invoking the First Amendment to obtain injunctive relief restraining the school's threatened punishment.
- E. How do you analyze this case — and which precedent (Tinker, Hazelwood, Morse, or Bethel) do you invoke?

\* \* \*

## **PROBLEM #63:**

### **PUNISHMENT FOR A STUDENT'S "DISCOURTEOUS" REMARKS WHILE CAMPAIGNING FOR STUDENT OFFICE**

- A. While campaigning for student office, a student gives a speech at a school assembly in which he makes "rude and discourteous" remarks about an assistant principal.

- B. Specifically, the student asked: “Why does Mr. Davidson stutter when he is on the intercom?” As punishment for asking that question, the student is removed from the election and briefly suspended from school.
- C. Were his First Amendment rights violated?
- D. In analyzing this question, which standard/precedent do you apply — Tinker, Hazelwood, Morse, or Bethel?

\* \* \*

## **PROBLEM #64:**

### **“SCAB” BUTTONS SUPPORTING TEACHER STRIKE**

- A. During a teachers strike, students are punished for wearing “scab” buttons to protest the presence of replacement teachers during a strike.
- B. The buttons bore the following messages: “I’m not listening, scab,” and “Do scabs bleed?” — part of a campaign to support striking teachers.
- C. Faced with lengthy suspensions for wearing these buttons, the students file suit, invoking the First Amendment.
- D. How do you analyze their claims?

\* \* \*

## **PROBLEM #65:**

### **POLICE OFFICER’S RETALIATION LAWSUIT**

- A. Martin Kenworth is a career officer in the Gary, Indiana Police Department.
- B. He represented his police department in a multi-jurisdictional task force formed to investigate gang activity.
- C. After a botched raid in which key targets of the investigation managed to evade arrest, Kenworth became convinced that those targets had been tipped off in some capacity by somebody associated with the task force.

- D. He reported his suspicions to his chief of police, who told him to remain silent about all circumstances surrounding the raid.
- E. A short time later, Kenworth was removed from the task force and the related investigation. Moreover, Kenworth was denied promotion to sergeant, even though his rank placed him at the top of the list of eligible candidates.
- F. Kenworth has now filed suit in federal district court, claiming that he was retaliated against for speaking out as a whistleblower against possible government corruption.
- G. How do you analyze his claims?

\* \* \*

## **PROBLEM #66:**

### **RETALIATION CLAIM BY PUBLIC SCHOOL TEACHERS**

- A. Paul Lauritzen and Diane Shah, husband and wife, are tenured teachers in the Oakland, California public school system. In 2007 they were vocal opponents of a plan by Oakland's Board of Education to close 38 schools due to budget difficulties.
- B. On May 1, 2007, there was a march and rally in opposition to the school closing plan. The march was organized by a group called BAMN ("Coalition to Defend Affirmative Action, Integration, and Immigrant Rights and Fight for Equality By Any Means Necessary"), of which group Lauritzen and Shah were members. Lauritzen and Shah both attended the march, having first received advance permission to be off work for the demonstration.
- C. The march was also attended by some students at Malcolm X Middle School — the public school where Lauritzen and Shah are both employed as teachers. Most of these students supplied the school with parental permission slips authorizing them to attend the march.
- D. Police officers employed by the Oakland Public Schools were aware of the planned demonstration in advance. They were deployed, together with video tape technicians, along the planned route of the march. The march

began at Malcolm X Middle School and was scheduled to end at Martin Luther King High School, all within the municipal boundaries of Oakland.

- E. When the marchers reached Martin Luther King High School, the march and rally descended into chaos. Some students among the marchers ran up to the doors and windows of the school and exhorted the students inside to come out and join them. The Oakland Public School police moved in and shooed the children away from the building. At some point, pepper spray was used at or near a group of children.
- F. Lauritzen and Shah were filmed on videotape during the march and throughout its chaotic conclusion. Though they appear to be angry and upset by the police behavior at the end of the march, Lauritzen and Shah remain consistently non-violent, focusing all of their concern on controlling and protecting the student marchers.
- G. Notwithstanding their peaceful behavior, Lauritzen and Shah were both arrested at the end of the march, charged with disorderly conduct. Those charges were subsequently dropped — but School Board President Bobby Womack told other members of the Board that he intended to “get rid” of Lauritzen and Shah for their public opposition to the planned school closures.
- H. Disregarding its normal disciplinary proceedings (in which teachers are given an administrative hearing and a chance to tell their side of the story), the Board issues an order that Lauritzen and Shah are to be placed immediately and indefinitely on unpaid leave, “pending an investigation of the May 1, 2007 incident.” But the Board never conducts the investigation, leaving Lauritzen and Shah on perpetual unpaid leave. “We’ll starve them out,” said Board President Womack.
- I. Lauritzen and Shah have now filed suit in federal district court, alleging that they’ve been punished by the School Board in retaliation for engaging in protected First Amendment expression. How do you analyze their claims?

\* \* \*

## **PROBLEM #67:**

### **RETALIATION CLAIM BY FIREFIGHTER**

Plaintiff Ron Westmoreland is a 16-year veteran of the Bay Village Fire Department. Westmoreland was a member of the Fire Department's Dive/Rescue Team and served as its diving instructor. In the spring of 2008, budget concerns prompted the Fire Chief to recommend that the Dive Team be disbanded and its diving equipment sold off. Testifying before City Council, the Fire Chief noted that the Dive Team was put to use less than once per year, had never actually rescued anyone, and had cost between \$10,000 and \$12,000 in overtime pay annually. His recommendation was adopted by the Mayor and approved by City Council.

In August 2008 — only two months after the Dive Team was disbanded and its diving equipment sold off — a seven-year-old boy drowned at Huntington Beach, a Cleveland Metropark located within the City of Bay Village. On duty that day, Westmoreland responded to the scene of the drowning and felt anguish that he lacked the equipment to perform a dive that might have saved the child's life.

One month later, Westmoreland appeared at a regular meeting of the Bay Village City Council and spoke for eight minutes during the public comment segment of the proceedings. Westmoreland, off duty and out of uniform, identified himself as a 16-year veteran of the Bay Village Fire Department and a former member of the disbanded Dive Team. He reminded the Council members that “when these budget cuts were on the table, you were warned that it was not a question of IF, but WHEN there would be a loss of life because of the cuts.”

Describing the drowning of the seven-year-old boy, Westmoreland said that he was in the first responding vehicle. “We had two helicopters flying around. We had two Jet Skis sailing around. We had two boats going around. Let me make something clear. The child was on the *bottom*. Divers have to go down and *get* him.”

“Bay Village firemen placed themselves at great personal risk that day, many of them without proper training, without proper equipment, and refused to give up. But what happened that day on the beach is that we couldn't do the job because we didn't have our tools.”

“A little boy had to die, but you guys saved some money. It is my personal opinion that this Council, this administration, is partly responsible for condemning that child to death.”

Three weeks later, the Mayor ordered Westmoreland to serve a three-tour unpaid suspension — the equivalent of three 24-hour shifts — on the grounds that his statements to City Council constituted insubordination, failure of good behavior, and conduct unbecoming of an officer. He has filed suit, alleging that this punishment is a violation of his First Amendment rights.

How do you analyze his claim?

\* \* \*

## **PROBLEM #68:**

### **COMPELLED SPEECH CHALLENGE** **TO OKLAHOMA LICENSE PLATE**

In 2007, the Oklahoma legislature created the Oklahoma License Plate Design Task Force to update the design of the standard Oklahoma license plate. This change was motivated by the public-safety concern that the old license plates were difficult to read. But the task force also viewed the redesign as an opportunity to market Oklahoma as a tourist destination.

In 2008, the task force chose a design that included an image of a Native American man shooting an arrow towards the sky. It also featured the words “Native America.” The image is based upon a sculpture by acclaimed Oklahoma artist Allan Houser, entitled *Sacred Rain Arrow*, which depicts the story of a young Apache warrior who fired into the heavens an arrow that was blessed by a medicine man; as the tale goes, the arrow carried prayers for rain to the Spirit World.

Plaintiff Keith Cressman, an Oklahoma resident, professes “historic Christian beliefs,” including monotheism and the view that “Jesus Christ is the mediator between all people and God.” He learned about the new license plate design, the *Sacred Rain Arrow* sculpture, and the Native American legend that inspired Mr. Houser’s work from various news stories covering the redesign.

Plaintiff alleges a First Amendment injury from having to use Oklahoma’s new license plate because it features an image that “depict[s] and communicate[s] Native American religious beliefs in contradiction to [plaintiff’s] own Christian religious beliefs.” In the plaintiff’s view, this image “retells the story of a Native American who believes in sacred objects[,] in multiple deities[,] in the divinity of nature[,] and in the ability of humans to use sacred objects to convince gods to alter nature.” Thus, the plaintiff alleges that the “message, connotation, and purpose” of the *Sacred Rain Arrow* image are “antithetical to [his] sincerely-held religious beliefs.”

The State of Oklahoma defends on the grounds that “[a] reasonable observer, even one living in Oklahoma,” would not likely know about “the *Sacred Rain Arrow* sculpture or the legend behind it.” They would simply regard the license plate as depicting “an Indian shooting a bow and arrow,” not as a message endorsing Native American religious beliefs.

How do you analyze plaintiff’s compelled speech claim?

\* \* \*

## **PROBLEM #69:**

### **COMPELLED SPEECH CHALLENGE TO ARIZONA’S USE OF TRAFFIC FINES**

- A. In the 1998 general election, Arizona voters approved the Citizens Clean Elections Act to “encourage citizen participation in the political process ... by diminishing the influence of special-interest money.” The Act provides public financing — distributed on a viewpoint-neutral basis — to the campaigns of qualifying candidates for certain elected offices. To fund the campaigns of such candidates, the Act collects money from four sources: voluntary contributions to the fund; funds earmarked through a “check-off” provision on state income tax returns; a fee on certain registered lobbyists; and a ten percent surcharge on civil and criminal fines.
- B. This case presents a compelled-speech challenge to the collection of that ten percent surcharge. The petitioner, Steve May, argues that the surcharge violates the First Amendment by impermissibly compelling those who pay the fines to support the speech of political candidates whom they might not otherwise support.
- C. This controversy began when Mr. May received a parking ticket and was fined \$27, on which a ten percent surcharge (authorized by the Act) was imposed. May refused to pay the \$2.70 surcharge, claiming that to do so would violate his First Amendment right to free speech because the money might be used to fund the campaigns of candidates whose views he opposed.
- D. He is pursuing the instant challenge under the compelled speech doctrine in First Amendment law. You may safely assume that there are no

procedural defects in this action and that it is properly pending before an appropriate court.

- E. How do you advise your judge — and how does your analysis proceed?

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## **PROBLEM #70:**

### **BAN ON WEARING MASKS IN PUBLIC**

- A. In anticipation of a Ku Klux Klan rally, the City of Goshen, Indiana enacts an ordinance that bans the wearing of masks for purposes of concealing one's identity in public.
- B. The KKK challenges the ordinance under the First Amendment.
- C. How do you advise your judge — and how does your analysis proceed?

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## **PROBLEM #71:**

### **INVESTIGATIVE JOURNALIST PROBING THE CHILD PORN INDUSTRY**

- A. Lawrence Matthews, an award-winning investigative journalist, sets out to write a story probing the child porn industry.
- B. In performing his research for the story, Matthews sends and receives child pornography over the Internet.
- C. He is apprehended by federal law enforcement authorities and is now being prosecuted for violating the Protection of Children Against Sexual Exploitation Act, 18 U.S.C. § 2252.
- D. Matthews asserts a First Amendment defense to these charges, arguing that any violation of the Act was merely a by-product of his news-gathering activities.

- E. How do you analyze his defense?

\* \* \*

## **PROBLEM #72:**

### **REQUIRING REPORTERS TO DIVULGE THE IDENTITIES OF CONFIDENTIAL NEWS SOURCES**

- A. A federal grand jury is investigating evidence of price-fixing in the corrugated paper industry.
- B. Carol Mintz, an investigative reporter for the Wall Street Journal, has spent the past months researching that very subject for a long feature story that she is writing for the paper.
- C. During the course of that investigation, Mintz has obtained leads and quotes from several sources inside the industry — sources to whom she has given pledges of confidentiality in order to protect them from possible violent retaliation.
- D. Now Mintz is subpoenaed to testify before the grand jury — and she is asked to tell the grand jury everything she has learned about price-fixing in the industry, including the identities of her confidential sources.
- E. Invoking the First Amendment, she refuses to disclose her confidential sources.
- F. You may assume that there is no statutory “shield” law available to Mintz under these circumstances.
- G. How do you analyze her First Amendment defense?

\* \* \*

## **PROBLEM #73:**

### **PRESS ACCESS TO CALIFORNIA EXECUTIONS**

- A. Press and public access to California executions has long been sharply circumscribed. The witnesses are ushered into the viewing chamber only after the prisoner has been strapped onto the gurney and the lethal injection has commenced.
- B. A coalition of press and broadcast journalists brings a First Amendment action challenging these restrictions and requesting access to the viewing chamber from the moment the prisoner is brought in.
- C. How do you advise your judge — and how does your analysis proceed?

\* \* \*

## **PROBLEM #74:**

### **CLOSURE OF ECONOMIC ESPIONAGE TRIAL**

#### **A. Background**

1. A federal judge is being asked to decide whether to bar the public and reporters from the criminal trial of a scientist accused of helping to steal sensitive biological materials from the Cleveland Clinic.
2. At issue is whether anyone, including Clinic rivals, should be able to hear details about the microscopic lab samples at the crux of the case.
3. Federal prosecutors say the stolen materials, used in Alzheimer's Disease research at the Clinic, are the institution's trade secrets and shouldn't be revealed in the courtroom.
4. Lawyers for the defendant, Japanese researcher Hiroaki Serizawa, argue that he is entitled under the Sixth Amendment to a public trial and that thorough review of the samples is crucial to their argument that the items are widely available, not trade secrets.
5. Serizawa formerly worked at the Clinic with a friend and fellow scientist, Takashi Okamoto, both of whom were charged in May 2007 with violating the Economic Espionage Act.

6. Okamoto allegedly stole or destroyed biological materials used in his Clinic lab after taking a research job in Japan; Serizawa is accused of briefly storing some of the stolen materials and aiding in covering up the theft.
7. The Act, passed in 1996, makes it a federal crime to steal trade secrets to benefit a foreign entity, in this case the government-funded brain institute where Okamoto now works.

**B. Question Presented**

Under these facts, can the judge close his courtroom without violating the First and Sixth Amendments?

\* \* \*

## **PROBLEM #75:**

### **THIRTY-ONE CHRISTIAN CROSSES** **ON PUBLIC PROPERTY**

Situated in the southwest corner of Indiana, the City of Evansville has a population of 120,000 persons. The City's riverfront area ("the Riverfront") is a mile-long stretch of green space, constituting a public park, that sits between the Ohio River and a major thoroughfare called Riverside Drive.

The Riverfront is a popular gathering spot in Evansville, offering recreational space and picturesque views of both the Ohio River and the City's skyline. Thousands of people visit the Riverfront every day, and many more view it from their cars while traveling on Riverside Drive.

Recently the City approved a request from a local church to erect thirty-one six-foot-tall Christian crosses along the Riverfront, to remain in place for a two-week period. The crosses will be lined up immediately adjacent to Riverside Drive, covering a four-block span of the Riverfront that is nearest to the City's downtown.

Some residents of Evansville are now bringing a First Amendment challenge to the two-week-long display of these crosses on public property. How do you analyze their claim?

## **PROBLEM #76:**

### **ESTABLISHMENT CLAUSE CHALLENGE TO NEW YORK CITY'S SEPTEMBER ELEVEN MUSEUM**

In the days and weeks following the September Eleven attacks, hundreds of professional and volunteer rescue workers descended on lower Manhattan, where they pored through mountains of debris looking for survivors — or, at least, some human remains of the thousands who had died. Two days into this grim task, on September 13, 2001, construction worker Frank Silecchia spotted in the wreckage a large column and cross-beam, formed entirely by chance in the falling debris, that gave him the impression of a Latin cross.

To Silecchia, the cross “was a sign that God hadn’t deserted us.” News about the cross spread quickly, and it soon became known as “The Cross at Ground Zero.” To the relief workers who labored at Ground Zero, the Cross came to be viewed not simply as a Christian symbol, but also as a symbol of hope and healing for all persons. One of them said that the Cross served as a source of inspiration for workers of all faiths and of none at all: “It was a matter of human solidarity. Whether you believed was irrelevant. We needed some type of fellowship down there, other than working.” Another said: “It didn’t matter what religion you were, what faith you believed in. It was life; it was survival; it was the future.”

Today, Ground Zero is the site of the National September Eleven Memorial and Museum, which is owned and operated by a governmental entity, the Port Authority of New York. The outdoor Memorial recognizes by name each person who lost his or her life in the September Eleven attacks. The indoor Museum is located primarily underground and directly beneath the Memorial.

In a space of approximately 110,000 square feet, the Museum recounts the history of the September Eleven attacks and their aftermath. Displayed in the Museum are some one thousand objects, drawn from a collection of more than ten thousand artifacts recovered from Ground Zero. Some of these objects are small and personal — for example, eyeglasses, an identification card, a pair of shoes, a loved one’s photograph. Others are monumental, such as a 60-foot-high section of the World Trade Center’s slurry wall foundation, which, although cracked on the day of the attack, successfully held back the Hudson River, preventing the

flooding of lower Manhattan. Other large artifacts include a 20-foot segment of the communications antenna that stood atop the North Tower; mangled fire trucks and ambulances; and the concrete “Survivors’ Staircase,” down which hundreds of people fled on the day of the attack.

The Cross at Ground Zero is displayed in a section of the Museum entitled, “Finding Meaning at Ground Zero.” The artifacts displayed there are accompanied by a textual panel that provides visitors with the following information:

Workers at Ground Zero struggled to come to terms with the horrific circumstances in which they found themselves. Some sought to counter the sense of utter destruction by holding onto something recognizable, whether a metal bolt, a shard of glass, or a [chunk of] marble salvaged from the debris. Others...found purpose by forging relationships with relatives of a particular victim....Many sought comfort in spiritual counseling, religious symbols, and the solace of ceremonies and ritual. Some workers turned to symbols of patriotism to reinforce a sense of commitment and community, hanging flags across the site....

Plaintiff American Atheists Inc. alleges that the Port Authority, by including the Cross at Ground Zero inside the Museum, is impermissibly promoting Christianity in violation of the Establishment Clause. How do you analyze this claim?

\* \* \*

## **PROBLEM #77:**

### **CHRISTIAN CROSS ON OFFICIAL CITY SEAL OF STOW, OHIO**

- A. The City of Stow, Ohio has adopted an official seal that is displayed on the City’s police, fire, and other governmental vehicles; on the City flag; on official City stationery and letterhead; at City Hall; on City tax forms; and on the shoulder patches worn by City police officers.
- B. In terms of design, the seal is a circle divided into four quadrants...
  - 1. The upper left quadrant depicts an open book (seemingly a Bible), overlaid with a large Christian cross.

2. The lower left quadrant features the image of a factory.
  3. The upper right quadrant features the image of a home.
  4. The lower right quadrant depicts a scroll with a quill and an ink bottle.
- C. The seal is now under attack in federal court as an Establishment Clause violation.
- D. How do you advise your judge — and how does your analysis proceed?

\* \* \*

## **PROBLEM #78:**

### **OHIO'S STATE MOTTO:**

### **"WITH GOD, ALL THINGS ARE POSSIBLE"**

- A. Ohio's state motto, "With God, All Things Are Possible," is a direct quotation from the New Testament of the Christian Bible, Matthew 19:26, as the State itself concedes.
- B. In 1996, then-Governor George Voinovich proposed that the motto be etched in stone on the facade of the Ohio Statehouse. Voinovich came up with this idea while visiting India, where he saw a government building inscribed with the motto, "Government Work is God's Work."
- C. Where did Ohio's state motto come from? In 1958 Jimmie Mastronardo, a sixth grade student in Cincinnati, became concerned that Ohio was the only state to have no motto. He selected it from the Bible and, assisted by many friends, he circulated a petition to the Ohio General Assembly, which enthusiastically adopted it in 1959.
- D. To get a sense of its context, here is the Biblical passage in which the motto appears: "And Jesus said to his disciples, 'Truly, I say to you, it will be hard for a rich man to enter the kingdom of heaven. Again I tell you, it is easier for a camel to go through the eye of a needle than for a rich man to enter the kingdom of God.' When the disciples heard this they were greatly astonished, saying, 'Who then can be saved?' But Jesus looked at them and

said to them, *‘With men this is impossible, but with God all things are possible.’* Matthew 19:26, OXFORD ANNOTATED BIBLE (emphasis added).

- E. While the mottos of other states use the word “God” in various combinations, Ohio’s is the only state motto that quotes directly from either the Old Testament or the New Testament of the Christian Bible.
- F. The proposal by Governor Voinovich to etch the motto in stone on the Ohio Statehouse facade triggers a federal lawsuit challenging the motto’s constitutionality under the Establishment clause.
- G. The State’s lawyers argue that it makes no constitutional difference that the words of the motto are drawn directly from the words of Jesus. Standing apart from their original context in the New Testament, the words of the motto do not convey a message of endorsement of any one religion. Rather, the words of the motto “inculcate hope and acknowledge the humility of Ohio’s government and its leaders.”
- H. How do you analyze the Establishment Clause issue here?

\* \* \*

## **PROBLEM #79:**

### **MANDATORY “MOMENT OF SILENCE”** **IN GEORGIA PUBLIC SCHOOLS**

- A. On July 1, 1994, a new state statute in Georgia — “The Moment of Quiet Reflection in Schools Act” — went into effect.
- B. The Act amended an earlier statute that had authorized Georgia public school teachers to conduct a brief period of “silent prayer or meditation” at the start of each school day.
- C. As codified, § 20-2-1050 provides, in pertinent part, that...
  - (a) In each public school classroom, the teacher in charge shall, at the opening of school [each day], conduct a brief period of quiet reflection for not more than 60 seconds with the participation of all the pupils therein assembled.

- (b) The moment of quiet reflection authorized by subsection (a) of this Code section is not intended to be and shall not be conducted as a religious service or exercise but shall be considered as an opportunity for a moment of silent reflection on the anticipated activities of the day.
  - (c) The provisions of subsections (a) and (b) [above] shall not prevent student-initiated voluntary school prayers at schools or school-related events which are nonsectarian and non-proselytizing in nature.
- D. The Act's preamble stresses the legislation's secular purpose, asserting that "in today's hectic society, all too few of our citizens are able to experience even a moment of quiet reflection before plunging headlong into the day's activities."
- E. The Act's primary sponsor asserted that he had observed from personal experience that, following several killings on school campuses, students came together for moments of silent reflection that seemed to have a beneficial and calming effect on the student body.
- F. But during the legislative debates that led to passage of the Act, a number of legislators delivered floor speeches expressing their support for the Act because they wanted school prayer and believed that the Act would accomplish that goal. Other legislators expressed opposition to the Act because they believed it instituted school prayer. Some delivered floor speeches asserting that the Act did not have a religious purpose.
- G. As to the Act's enforcement in the Georgia public schools:
  - 1. Teachers are not allowed to suggest or imply that students should utilize the moment of silent reflection for prayer.
  - 2. Students are allowed to pray — but they are not allowed to pray audibly and they are not allowed to "coerce" others into praying.
  - 3. Students are also allowed to bring Bibles to school and, during the moment of silent reflection, they are allowed to read silently from the Bible.
- H. The Act is now being challenged in federal court as offensive to the Establishment Clause.

- I. How would you analyze this fact pattern? Finally, how would Justice O'Connor rule on this statute — and where would you look to find out?

\* \* \*

## PROBLEM #80:

### DETROIT'S DOWNTOWN REVITALIZATION PROGRAM

- A. Acting to revitalize its local economy, the City of Detroit in the late 1990s built a new downtown stadium for its professional baseball team (the Tigers) and a new downtown stadium for its football team (the Lions).
- B. In 2003, striving to beautify its downtown area, the City created a development program empowered to reimburse up to 50% of the costs of refurbishing the exteriors of its downtown buildings.
- C. The program was limited to property in a discrete section of downtown Detroit, but it reached out to *all* property in that area, including property owned by religious organizations.
- D. Three churches participated in the program: a Methodist church, a Baptist church, and an Episcopal church. Of the \$11.5 million allocated for completed and authorized projects, 6.4% (or about \$737,000) went to these churches.
- E. The question at hand is whether the Establishment Clause prohibits the City from including religious organizations in this funding program. The lead plaintiff in this case, American Atheists Inc., has filed suit in federal district court seeking to enjoin the City from making any grants to religious entities. You may safely assume that the Atheists have *standing* to bring this suit.
- F. Under the program, the City allocated reimbursement grants, funded by local property-tax revenues, to the owners of property situated inside the program area who made approved renovations to their buildings. Qualified applicants were reimbursed for 50% of the renovation costs, subject to caps of \$150,000 per building.

- G. Anyone who owned property within the program area (a nine-block swath of downtown Detroit) could apply for a grant, so long as the applicant was current on its state and local taxes and could fund the project initially on its own.
- H. In addition to the three churches, those receiving grants under this program included a music hall, a bank, a hotel, an opera house, a theater, and an apartment building.
- I. The Plaintiff argues that the City violated the Establishment Clause by giving tax-generated funds to the churches under this program. How do you analyze this problem, and which Establishment Clause precedents do you invoke?

\* \* \*

## **PROBLEM #81:**

### **RELIGIOUS REFUSAL TO DISCLOSE SOCIAL SECURITY NUMBER**

- A. Plaintiff Donald Miller was denied a driver's license renewal by the State of California when he refused, on religious grounds, to supply his Social Security number to the Department of Motor Vehicles.
- B. Invoking the Free Exercise Clause, Miller is challenging the California statute that requires every applicant for driver's license renewal to disclose his/her Social Security number.
- C. The statute's purpose in requiring such disclosure is to aid the State in identifying and collecting child support obligations, tax obligations, and delinquent fines, bail, or parking penalties.
- D. For purposes of this hypothetical, you may assume that:
  - 1. Miller's religious beliefs are sincere and deeply held.
  - 2. Though Miller does not belong to any organized religion, he has a long-standing and well-established personal system of theological belief.

3. The centerpiece of Miller’s religious belief is the conviction that every individual is unique and is obligated to pursue his/her individuality.
- E. According to Miller, disclosing his Social Security number to any entity other than the Social Security Administration contributes to the creation of a “caricature” of his identity as an individual and is “tantamount to a ‘sin,’ as that term is commonly used.”
- F. Consistent with that belief, Miller has refused to provide his Social Security number in many contexts over several decades, including his application to the State Bar of California and his applications to practice law before several federal courts.
- G. Miller now challenges, as a violation of his rights under the Free Exercise Clause, the California statute requiring Social Security number disclosure when applying for driver’s license renewal.
- H. How do you advise your judge — and how does your analysis proceed?

\* \* \*

## **PROBLEM #82:**

### **‘NO-BEARD’ POLICY CHALLENGED BY SUNNI MUSLIMS**

- A. Two police officers bring a lawsuit alleging that the City of Newark and its police department violated their Free Exercise rights by requiring them to shave their beards in violation of their Sunni Muslim religious beliefs.
- B. Though Plaintiffs concede that their claims would ordinarily be analyzed under Smith-mandated rational-basis review, they argue that heightened scrutiny is appropriate here because the City has not been evenhanded in creating exemptions from its no-beard policy.
- C. Specifically, the City refuses to permit any religious exemptions from its policy, but it does permit certain secular exemptions, including a medical exemption.
- D. Plaintiffs argue that since the City provides medical, but not religious, exemptions from its no-beard policy, it has unconstitutionally devalued

their religious reasons for wearing beards by judging them to be of lesser import than medical reasons.

- E. How do you advise your judge — and is there anything in Smith to support the Plaintiffs' argument?

\* \* \*

## **PROBLEM #83:**

### **TOWN'S NOISE EXEMPTION FOR CHURCH BELLS: PERMISSIBLE ACCOMMODATION OF RELIGION?**

Plaintiff homeowner John Devaney is unhappy about the ringing of church bells in the small New England town where he lives. That town (Narragansett, Rhode Island) has a Noise Ordinance *exemption* for church bells. The plaintiff alleges that this exemption is an accommodation of religion that violates the Establishment Clause.

Plaintiff's home is located across the street from one church (St. Thomas) and within three blocks of another (St. Peter's). The bells of St. Thomas chime four times on Saturday and Sunday, three times on Monday through Friday. The bells of St. Peter's mark the hours during daylight.

The Town of Narragansett has a Noise Ordinance that imposes a general set of decibel-level restrictions on noises occurring in residential and business zones. But it exempts from these restrictions certain "noise-producing equipment that is not amenable to such controls and yet is essential to the quality of life in the community." The Noise Ordinance contains two separate exemptions that specifically embrace bells. The first bell exemption (in § 22-54(a)) covers "[s]tationary nonemergency signaling devices," which include "any stationary bell, chime, siren, whistle, or similar device." This exemption relieves all stationary bells and chimes from the maximum decibel levels in the Ordinance, as long as the signal is limited to no more than one minute of sounding in an hour. Section 22-54(b) further exempts from the one-minute-per-hour limit "[d]evices used in conjunction with places of religious worship." This exemption was in place as far back as 1986, and has persisted without change to the present day.

The Town of Narragansett defends its decision to exempt performing and signaling bells, both secular and sectarian, on the basis of a longstanding historical tradition. In 18th century New England, most communities used ringing

**bells to mark the passage of time, to open markets, to summon churchgoers to religious services and civic leaders to meetings, and to call inhabitants to mutual assistance in moments of danger. Today, nearly 40 percent of Rhode Island municipalities have noise ordinances that expressly exempt bells in general, church bells in particular, or specifically bells used in religious worship.**

**But the Plaintiff insists that the Town of Narragansett's noise exemption for church bells confers a special benefit upon religion and therefore violates the Establishment Clause. How do you analyze this claim?**

**END**