

**FEBRUARY 1998 CALIFORNIA BAR EXAMINATION
ESSAY QUESTIONS AND SELECTED ANSWERS**

Constitutional Law

QUESTION

Hyde, an escapee from a mental hospital for the criminally insane, kidnaped Vic, a prominent citizen of Gotham. In a message to the Gotham police, Hyde warned that he would kill Vic if (a) Hyde's identity as the kidnapper was divulged to the public or (b) *The Press*, Gotham's leading local newspaper, failed to publish prominently and in its entirety Hyde's political "Manifesto," an incoherent essay of over 20,000 words, within 48 hours. Hyde's message was somehow leaked to a reporter of *The Press* at police headquarters.

Asserting that journalistic integrity was at stake and that the cost would be exorbitant, *The Press* rejected an urgent request from the Gotham police chief for compliance with Hyde's demands. Vic's family immediately filed an injunctive action in state court against *The Press*, obtaining an *ex parte* temporary injunction prohibiting *The Press* from publishing Hyde's identity as the kidnapper and mandating it to publish Hyde's full "Manifesto" in a main edition of *The Press* within 48 hours. Publishing the "Manifesto" in accordance with the temporary injunction will cost *The Press* over \$175,000 in lost advertising revenue and overtime wages.

The Press has timely moved to dissolve the temporary injunction on the grounds that it violates rights guaranteed by the First Amendment and by the "Takings Clause" of the Fifth Amendment to the U.S. Constitution.

1. What arguments can *The Press* reasonably make in support of the motion to dissolve the injunction, and how should the court rule? Discuss.
2. May *The Press* ignore the temporary injunction without incurring liability for contempt? Discuss.

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ANSWER A

WHAT ARGUMENTS CAN THE PRESS REASONABLY MAKE IN SUPPORT OF THE MOTION TO DISSOLVE THE INJUNCTION, AND HOW SHOULD THE COURT RULE?

In an emergency situation such as this, an injunction is an appropriate means of preserving the status quo until the court can determine the rights of the parties. Following the issuance of a temporary restraining order, the court will order a hearing on a preliminary injunction, which requires that the court determine that the party seeking the injunction is likely to prevail on the merits. A balancing of hardships is done, to determine what will happen if the injunctive relief is not granted. Here, if it is not, it appears likely that Vic will be killed; the Press has a high burden to overcome in overturning the injunction.

STANDING: In order to bring a suit based upon infringement of constitutional liberties, the party must have standing. This requires that the plaintiff has suffered or will suffer an injury, and that a favorable outcome will redress the claimed injury. Here, the Press will suffer economic damage, in the form of lost advertising revenue and overtime wages, as well as damage to its “journalistic integrity.”

STATE ACTION: Further, because constitutional provisions are not normally enforced against private individuals, state action must be found. Here, although the injunction complained of was sought by individuals (the family of Vic), the enforcement of the injunction by the court is state action.

TAKINGS CLAUSE - FIFTH AMENDMENT: The takings clause of the fifth amendment of the U.S. Constitution provides that property may not be taken without just compensation. In order to find a taking, there must be a “full” taking, i.e., no economically viable use of the property must be left. Here, the Press is essentially claiming that its money is being taken. As such, it has adequately proved a “full” taking.

Furthermore, the taking must be for public use. Here, an argument could be made that the use of a newspaper of general circulation necessarily involves public use. Although the state may argue that there is no public use here, because Vic and his family are the intended beneficiaries of the publication of Hyde’s manifesto, the Press will likely be successful in asserting that the dealings of the state with an escaped mental patient fall well within the parameters of public interest, and that the public at large is a party to this lawsuit, in effect.

However, economic interests are not highly protected under the takings clause. In order to justify a taking, the state need only show that the means used are rationally related to a legitimate state interest. This is a very difficult burden for the Press to overcome; almost any state interest will be found to meet the “rationally related” test. Here, the state has an interest in preserving the life of one of its prominent citizens. Furthermore, potential compliance with Hyde’s demands could assist the police in apprehending him.

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In light of the above, it is unlikely that the Press will be able to overcome the “rational basis” test which it must meet to dissolve the injunction on fifth amendment grounds.

FREEDOM OF THE PRESS - FIRST AMENDMENT: Freedom of the press is guaranteed under the first amendment to the U.S. Constitution. Absent sufficient justification, the press can neither be forced to print or be precluded from printing whatever it deems appropriate.

PRIOR RESTRAINT: The part of the injunction which precludes the Press from publication of Hyde’s identity constitutes prior restraint. Although not completely prohibited, prior restraint is disfavored. In order to prevent the publication of information (versus simply letting the information be published, subject to a later damages remedy), the state must show a compelling interest, and the means used to achieve that end must be necessary and narrowly tailored to achieve that goal.

Here, the state is seeking to prevent the Press from publishing Hyde’s identity. As noted above, publication may result in the death of a citizen; this is certainly a compelling interest. However, the Press may assert that the prior restraint is neither necessary nor narrowly tailored to achieve the state’s goal.

Here, as opposed to the rational basis test, where the burden is on the Press to show that the means chosen do not meet the standard, the state must show that the means it has chosen to achieve its goal of saving Vic are necessary. All options must be explored. Although the facts do not provide any guidance, it is possible that, if the police know Hyde’s whereabouts, other measures, such as tear gas or a SWAT team, could be used to obtain Vic’s release without infringing on the Press’ first amendment rights.

Because of high burden the state must meet to justify its prior restraint of the publication of Hyde’s identity, unless the state can prove that there is simply no other means of achieving its goal of saving Vic, it will not be permitted to prevent the Press from publication of his identity. It should be noted that the information appears to have been lawfully obtained, and in such circumstances, despite the danger of harm to individuals, the courts have maintained that prior restraint is inappropriate.

A similar analysis would dictate that the Press cannot be forced to publish Hyde’s manifesto. Although, as discussed above, a takings clause argument will likely be ineffective, due to the heavy burden the Press must overcome to show a lack of rational basis/legitimate government interest, an argument under the first amendment will likely be successful. A central tenet of the principle of freedom of the press is that the press is not the mouthpiece of the government, and it cannot be compelled to publish against its will absent a showing of a compelling state interest, and that the usurpation of editorial freedom to publish as it sees fit is necessary to achieve the goal.

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In summary, the Press will likely be permitted to have the injunction dissolved, based upon freedom of the press, as guaranteed under the first amendment.

MAY THE PRESS IGNORE THE TEMPORARY INJUNCTION WITHOUT INCURRING LIABILITY FOR CONTEMPT?

Where the court has determined that the burden for the issuance of a temporary restraining order or preliminary injunction has been met, as described above, a party may not ignore the injunction. The injunction must be appealed, and the party must wait for a final resolution of the matter. Failure of a party to comply with the terms of an injunction subject it to contempt sanctions, and furthermore, deprive the party of its remedy of seeking appellate review.

ANSWER B

1. Arguments Press could make in support of motion to dissolve injunction

The Press could argue that the injunction ordering it not to print the identity of the criminally insane kidnapper, Hyde, is an invalid Prior Restraint cap on the 1st Amendment Freedom of the Press. Additionally the Press could argue that the injunction ordering it to publish Hyde's manifesto is a violation of the 1st Amendment Freedom of the Press and also constitutes a violation of the 1st Amendment Takings clause.

Prior Restraint

Press should appeal to the general disfavor of court to Prior Restraint of Speech. Here the facts indicate that through an ex parte temporary injunction, Press has been ordered not to publish the name of Vic's kidnapper. Press should argue that the 1st Amendment protects the Press to the same extent as it protects individual citizens from governmental actions to infringe upon its ability to speak.

Here the court order, the state action, is preventing it, the Press, from speaking before it has begun to exercise its speech rights. Press should argue that prior restraints are so disfavored because of their insidious quality of chilling free expression. Press should point out that prior restraints on speech have been only upheld in narrow circumstances where the state has shown compelling circumstances and where there are no least restrictive alternatives. Such circumstances have been found that deal with matters of National Security, e.g., troop movements during time of war. Here Press could argue that such circumstances do not exist because although Hyde had threatened to kill Vic, the facts indicate that Hyde's primary demand is to Press to publish Hyde's manifesto.

If Hyde were to kill Vic, Hyde's leverage for the manifesto to be published would be eliminated. Additionally, Press could argue that the publishing of Hyde's identity would enhance the chances that Hyde would be captured. However, State's interest in saving one of its citizens would weigh heavy upon the finding that the state interest is compelling and is the least

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restrictive alternative. Additionally the state could argue that its order is only temporary in nature and the Press could eventually, after apprehension of Hyde, reveal his identity. Therefore it would seem that the state interest could be indeed compelling and the prior restraint would be valid.

The order forcing Press to publish Hyde's manifesto.

The Press could convincingly argue that the order that it must publish Hyde's manifesto violates its first amendment right to speech. The Press should argue that the first amendment protects the freedom to speak as well as not to speak. Here the injunction forcing it to publish Hyde's manifesto intrudes upon it. Not to speak - here the courts order is not content neutral because it is forcing the Press to publish Hyde's particular manifesto, it must prove that the state has a compelling interest and its order is narrowly tailored to the achievement of that interest requiring a showing that there are no less restrictive alternatives. Here forcing the Press to print Hyde's manifesto is motivated by Hyde's demand to have it printed. Arguably this is not compelling in that the state could be harmed by setting a precedent that it will publish the writing of terrorists like Hyde, upon their demands. Alternatively the Press could argue that there are other means for the state to "publish" Hyde's manifesto without forcing it to publish it. Press could argue that the Gotham police should first attempt its own distribution, or to take out paid space in the paper itself, without demanding press publish it. Although the state interest is substantial, that being to secure the life of its citizen, it does not rise to the level of compelling and may be in violation of the 1st Amendment. If it is found to be compelling Press may argue that the order is an invalid "Taking" under the 5th Amendment.

5th Amendment

The 5th Amendment Taking Clause applied to the state via the 14th Amendment prohibits the taking of personal property for public use without just compensation. Here the state is ordering the Press to publish the manifesto without ordering the city to compensate the Press for the space. Here the facts indicate the loss to the press would be substantial, \$175K including lost add revenue as well as overtime, therefore the state is infringing upon the Press' property rights. The State is doing so for the protection of one of its citizens, therefore the taking is for a public use. Therefore Press would be entitled to reasonable compensation for its expenses incurred if it were forced to publish the manifesto.

2. Collateral Bar Rule

In the interest of seeing that court orders are followed the doctrine of the Collateral Bar Rule prohibits the violation of court order, even if unconstitutional, where such order may be appealed to higher court. The policy behind such a rule is the interest in seeing court orders followed, because the order may be reviewed by a higher court. Here if Press were to violate the injunction the court could hold the Press in contempt of court. Under certain circumstances where an order is facially invalid and time does not permit appellate review, courts have reversed contempt orders, the party violating such order does so at its' own risk. Given the compelling

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interest of the State, Press should obey the court order under the Collateral Bar Rule and seek timely appeal of the order. If it seeks to disobey the order it may be liable for contempt.