

# JULY 2000 CALIFORNIA BAR EXAMINATION ESSAY QUESTIONS AND SELECTED ANSWERS

## *Constitutional Law*

### QUESTION

State law makes it a felony to either promote a dogfight or knowingly attend a dogfight where admission is charged. Ruth, a reporter for the *Dispatch*, City's only newspaper, observed a staged dogfight by posing as a patron and paying the admission fee. She took over 30 photographs of the event with a concealed camera. Later, she wrote an article about the event in the *Dispatch* that did not identify anyone else present, but which was accompanied by one of her photographs showing two dogs in bloody mortal combat.

The City police then asked Ruth if she knew the names of any persons at the illegal dogfight and requested all of her unpublished photographs in order to try to identify the fight promoters and attendees. With the backing of the *Dispatch*, Ruth flatly refused the police requests.

When Ruth's refusal came to the attention of the city council, several council members stated publicly that the *Dispatch* was guilty of "bad citizenship." The council then unanimously enacted an ordinance banning all coin-operated newsracks from City's public sidewalks and any other public property in order to "improve public safety." The ordinance left unaffected those other newsracks on public property, far fewer in number, that dispensed several kinds of free publications (commercial, political, religious, etc.).

The state prosecutor in City commenced a grand jury investigation of illegal dogfighting in City. The grand jury subpoenaed Ruth to testify and answer questions about the dogfight she had attended and to produce all her unpublished photos of the event. Ruth brought an appropriate action in state court seeking an order quashing the grand jury subpoena.

The *Dispatch* sells about half of its daily editions from coin-operated newsracks located on City's sidewalks. The *Dispatch* commenced an action against the city council in the local federal district court, seeking a declaration that the ordinance banning coin-operated newsracks violates rights guaranteed under the U.S. Constitution.

1. What arguments based on rights guaranteed by the U.S. Constitution could Ruth reasonably make in support of her action for an order quashing the grand jury subpoena, and how should the court rule on each? Discuss.
2. What arguments could the *Dispatch* reasonably make in support of its claim that the city ordinance violates rights guaranteed under the U.S. Constitution, and how should the court rule on each? Discuss.

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**ANSWER A**

I. Ruth's action seeking an order to quash the grand jury subpoena

Standing

Ruth has standing to request this order to quash as she faces an actual injury that is imminent that is caused by the defendant and redressable by the court. Ruth will argue that testifying and producing photographs in compliance with the subpoena will force her to incriminate herself and ruin her professional reputation.

The Fifth Amendment

The Fifth Amendment gives individuals the right to refuse to give compulsory testimonial evidence to the government that will incriminate them. This privilege is available in grand jury proceedings.

First, Ruth will argue that if she is forced to testify about her attendance at the dogfight, she will put herself at risk of being prosecuted under the state law making it a felony to "knowingly" attend a dogfight where admission is charged. Because in answering questions she will be forced to communicate about her attendance at the fight, this evidence qualifies as testimonial. The testimony is compulsory as she is being asked to appear involuntarily and answer questions from a prosecutor in the proceeding. Thus, Ruth will claim that obeying the subpoena will violate her right to remain silent.

The prosecution will argue that Ruth cannot quash the subpoena on these grounds; rather, she must appear at the grand jury proceeding, be called to testify, and claim the Fifth Amendment at that point.

Further, the prosecutor will probably offer Ruth immunity for her testimony regarding the dogfight and people she saw there. Use/derivative-use immunity would protect Ruth for being prosecuted on any evidence gained or derived from her testimony (though it would not protect her from being charged based on evidence from another source). An offer of this type of immunity would require Ruth to appear and testify because she would no longer be at risk of prosecution.

The court will not grant Ruth's motion to quash and will require her to appear.

Second, Ruth will argue that a subpoena ordering her to produce all her unpublished photographs will violate her Fifth Amendment rights. She will argue that by producing them, she admits possession and creates an inference she was present at a dogfight that charged admission.

The prosecution will successfully argue that producing documents does not implicate Fifth Amendment rights. Ruth is not being "compelled" to take the pictures; they were already in

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existence. Further, the photos are not testimonial evidence, they do not require her to say or communicate anything. The court will rule that Ruth must produce the photographs as well.

### Freedom of the Press

Ruth might try and argue that the First Amendment, applicable to the states through the Fourteenth Amendment, guarantees the freedom of the press. She may argue that a subpoena requiring her, a newspaper reporter, to turn over information to the government violates her right to free press.

However, in general, the press is guaranteed no more freedom than an individual. There is no journalist privilege, and reporters do not have a constitutional right to keep their sources silent. The Freedom of the Press is not absolute and it says nothing about giving journalists immunity from processes everyone else is subject to. This claim will fail.

### Defamation

Ruth may try and quash the subpoena on the grounds that she will subject herself to suits for defamation if she is forced to testify about individuals and activities at the dogfight.

This argument will fail for several reasons. First, grand jury proceedings are secret and protected. It is not likely that her testimony to the grand jury would satisfy the publication requirement. Further, any defamation claim by an attendee or promoter of the dogfight would fail against Ruth because either she could defend that the information is true, or, if the dogfight issue is considered a public matter, the complainants would have to prove falsity.

The subpoena does not complicate Ruth's Fourth Amendment rights, as there is no search or seizure, and her due process rights will not be violated by a subpoena.

Grand juries can ask for any information they believe they require whether hearsay, irrelevant, or inadmissible. Here, their request for testimony from Ruth and for her photographs will be upheld.

## II. Dispatch's argument that the ordinance violates its constitutional rights

Dispatch has standing to assert this claim as the ordinance directly affects and injures its revenue and circulation. Dispatch can sue the city council without its permission.

### The First Amendment

Dispatch will argue that the ordinance is unconstitutional as it violates the First Amendment. The First Amendment guarantees freedom of speech, but it is not absolute. Where the government tries to regulate the content of speech, strict scrutiny applies and the government must show the regulation burdens no more speech than is necessary for a compelling purpose. If

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the regulation is content-neutral, the government need only show it burdens substantially no more speech than necessary to an important interest. The ordinance passed by the city council does not affect the content of Dispatch's newspaper. Rather, it is a content-neutral time, place and manner restriction. These restrictions are constitutionally analyzed depending on what forum the government is trying to regulate.

In this case, the ordinance bans all coin-operated news racks from "public sidewalks and other public property." The reason given is to "improve public safety." For this ordinance to be valid, it must be (1) content-neutral, (2) narrowly tailored to serve an important interest, and (3) leave open alternative channels of communication, because a public sidewalk is a traditionally public forum.

Here, the ordinance, as discussed, is content neutral. However, it is not narrowly tailored to serve an important interest. The council's desire to protect the public is valid, and it has the authority to do so under its police power. However, there is no evidence of a nexus between keeping coin-operated newsracks off the sidewalk and the public safety. This is made clear by the fact that other newsracks are still permitted in these areas. There is no connection between the means and the ends. The regulation is not narrowly tailored either, as it bans all coin-operated news racks. The council passed the ordinance in retaliation for Dispatch's failure to obey police requests.

The council will point out that Dispatch does have alternate channels. Dispatch sells only half of its editions from these newsracks, and it is possible there are some public areas where these newsracks are still allowed; however, given the regulation fails part 2 of the test, it should be struck down.

### Equal Protection Claim

The Dispatch will also claim that the ordinance violates its right to equal protection under the Fourteenth Amendment, which says that a state may not discriminate arbitrarily. Here, there is state action in that the city council passed the regulation.

Dispatch will argue that the ordinance discriminates between newsracks that are coin-operated (evidently, only those operated by Dispatch as the sole newspaper in City) and those that are not. The ordinance leaves unaffected other newsracks in public spaces that dispense commercial, political, and religious information.

Because no suspect class or fundamental right is involved, Dispatch has the burden of showing that there is no rational relationship between the discriminatory regulation and a legitimate government purpose. Dispatch will have a strong argument that there is no legitimate purpose. The facts indicate that City enacted the ordinance to punish Dispatch for its "bad citizenship." There is no other evidence relating the coin-operated racks to public safety, even though public safety is a conceivable purpose.

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The regulation looks more like retaliation, a bill of attainder, and should be struck as not passing even minimum rationality review.

### **ANSWER B**

#### **I. Ruth's Constitutional Arguments**

The issue is whether Ruth can successfully argue that the grand jury subpoena should be quashed based on her Fifth Amendment right against self-incrimination and her First Amendment rights of Freedom of the Press and Speech.

#### **Fifth Amendment Self-Incrimination**

The Fifth Amendment to the United States Constitution prevents the government (federal or state) to compel an individual to give testimony that could tend to incriminate that person for criminal liability.

As an initial matter, the grand jury subpoena is definitely governmental compulsion of Ruth's testimony. Failure to obey a state subpoena would subject Ruth to criminal contempt charges, so she is being compelled to testify by the government (here, the state).

The real issue is first whether Ruth's testimony regarding her attendance at the dogfight would tend to incriminate her.

#### **Attending the Dogfight - Would this Incriminate Ruth?**

State law makes it a felony to "knowingly attend a dogfight where admission is charged." The question is whether, since Ruth had no subjective intent to encourage or promote the dogfight she attended, but instead was there gathering news, her admission of attending the dogfight would really tend to incriminate her.

Testimony is incriminating if it would have even a tendency to subject an individual to criminal prosecution.

Here, Ruth did intentionally attend a dogfight - she knew she was at a dogfight, so the state penal statute's "knowingly" requirement was met.

Therefore, Ruth's testimony concerning her attendance at the fight would tend to incriminate her, and her motion to quash should be granted as to this testimony.

#### **First Amendment - Free Press**

Ruth could also argue that her news-gathering activities at the fight were protected by her First Amendment right to freedom of the press.

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Generally the press cannot perform otherwise illegal conduct, and claim right is protected news-gathering activity.

Here, Ruth attended a dogfight - which is illegal conduct; the fact that she was gathering news does not insulate her from criminal liability, so this argument would fail.

### Right to Protect Identities of News Sources

The next issue is whether Ruth's testimony and/or photographs would be protected from disclosure because of Ruth's First Amendment right to protect her sources.

Generally, the press does not have a free press right to protect the identity of their sources in a grand jury proceeding.

Here, Ruth is being called to testify by the grand jury, so she cannot claim protection of her sources as a defense to the subpoena.

### The Photographs - Fifth Amendment Self-Incrimination

The issue here is whether Ruth can prevent disclosure of her photographs of the fight, since these would tend to incriminate her, i.e., prove that she did attend the dogfight.

The Fifth Amendment privilege against self-incrimination only applies to testimony, not pre-existing physical or documentary evidence.

Here, Ruth's photos are already in existence, so she cannot claim that they constitute "testimony." She could argue that the act of revealing the photos, and admitting ownership of them, is an implicit assertion of her identity. This argument will fail, though, since the photos themselves are not necessarily incriminating.

Because they are not testimony, the Fifth Amendment self-incrimination right does not apply, and Ruth's motion to quash regarding the photos will be denied.

## II. The Dispatch's Constitutional Arguments

The Dispatch will challenge the City ordinance on the grounds that it violates its rights under the First Amendment (as incorporated to the states through the Fourteenth Amendment), the Equal Protection Clause of the Fourteenth Amendment, and possibly the Due Process Clause of the Fourteenth Amendment.

### Standing - Article III

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To assert these challenges, the Dispatch must have standing, i.e., a concrete stake in the outcome of this case.

Standing requires actual or imminent injury in fact, causation, and redressability.

Here, Dispatch sells about half of its papers through coin-operated machines in City. The ordinance would completely shut down these sales - half of Dispatch's revenues would be gone if the ordinance is enforced. This is concrete, economic injury, so Dispatch would suffer immediate injury.

Also, the injury would be directly caused by City's ordinance, and a favorable ruling striking the ordinance down would redress the injury, so Dispatch does have Article III Standing.

### State Action

The Fourteenth Amendment only applies to state action, i.e., traditional state functions or significant state involvement. This also applies to municipalities like City.

Here, City enacted an ordinance, which is a traditional function, i.e., legislation essentially, so there is state action here.

### First Amendment - Free Speech

The issue is whether the coin-operated machine ban violates the Dispatch's First Amendment free speech rights.

### Content-Based vs. Content-Neutral

Dispatch will argue that the ordinance is a content-based regulation targeting Dispatch because of the content of Ruth's story, and therefore should be subject to strict scrutiny (necessary to serve a compelling governmental interest, and no less restrictive means).

City will argue that the ordinance is a valid time, place, and manner restriction, and is content-neutral, so it must only substantially further an important governmental interest, and allow alternative channels of speech.

Here, there is evidence that City intentionally discriminated against Dispatch because of Ruth's refusal to cooperate with the investigation of dogfighting. Several council members publicly stated that Dispatch was guilty of "bad citizenship," and then immediately enacted the ordinance. Also, since Dispatch is the only not-free newspaper in City, the ordinance only affects Dispatch. An inference could be drawn that City was punishing Dispatch for the content of its paper, i.e., the dogfighting story.

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If strict scrutiny were applied, it is highly doubtful that City could come up with a compelling interest in suppressing dogfighting stories, let alone proving that the machine ban is necessary to achieve this goal.

### Time Place and Manner Restriction - Public Forum

City will argue that the ban is content-neutral since it applies public forum applies to all coin-operated machines, regardless of subject matter.

The question is whether City's "public safety" rationale is even "important" enough. Here, City has not shown any concrete reason why the coin-operated machines pose a threat to safety and the free machines do not.

Also, the ban is underinclusive, since it exempts the free machines (which also indicates that it is content-based), so it is not narrowly tailored. It is also overinclusive, since it flatly bans all coin-operated machines. It does not leave "adequate alternative channels" of communication open for newspapers such as Dispatch to disseminate their information.

Overall, then, the ordinance would fail strict scrutiny and time, place and manner scrutiny.

### Equal Protection

Dispatch could also argue that the discrimination between free materials and its paper constitutes an unlawful discrimination.

Discrimination based on fundamental rights is subject to strict scrutiny. Here, Dispatch could argue that discriminating against its speech rights triggers strict scrutiny. As such, it would fail (see above).

If not, as an economic regulation, the ordinance would only be subject to the rational basis scrutiny, i.e., rationally related to a legitimate interest. Here, City's public safety interest probably would suffice.

If strict scrutiny applied, equal protection challenge would prevail.

### Due Process

Dispatch could also argue that City's denial of their economic interest in selling papers is arbitrary and capricious, and violates Dispatch's Due Process rights, because the "public safety" rationale is totally unfounded, and City was really just vindictively targeting the Dispatch.