HANDBOOK OF FREE SPEECH AND FREE PRESS

BARRON and DIENES

Handbook of Free Speech and Free Press

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Amendment I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances."

"Full and free discussion even of ideas we hate encourages the testing of our own prejudices and preconceptions. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart." — Mr. Justice Douglas, dissenting, *Dennis v. United States,* 341 U.S. 494 at 584 (1951).

"Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." — Mr. Justice Harlan for the Court, *Barenblatt v. United States,* 360 U.S. 109 at 126 (1959).

"Without a free press there can be no free society. Freedom of the press, however, is not an end in itself but a means to the end of a free society. . . . No institution in a democracy, either governmental or private, can have absolute power. Nor can the limits of power which enforce responsibility be finally determined by the limited power itself." — Mr. Justice Frankfurter, concurring, *Pennekamp v. Florida,* 328 U.S. 331 at 354 (1946).

"In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. . . . The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. . . . Only a free and unrestrained press can effectively expose deception in government." — Mr. Justice Black, concurring, *New York Times v. United States,* 403 U.S. 713 at 717 (1971).

"Perhaps as a matter of abstract policy a newspaper office should receive no more protection from unannounced police searches than, say, the office of a doctor or the office of a bank. But we are here to uphold a Constitution.

And our Constitution does not explicitly protect the practice of medicine or the business of banking from all abridgment by government. It does explicitly protect the freedom of the press." — Mr. Justice Stewart, dissenting, *Zurcher v. Stanford Daily*, 98 S. Ct. 1970 at 1987 (1978).

"Because the First Amendment was meant to guarantee freedom to express and communicate ideas, I can see no difference between the right of those who seek to disseminate ideas by way of a newspaper and those who give lectures or speeches and seek to enlarge the audience by publication and wide dissemination. . . . In short the First Amendment does not 'belong' to any definable category of persons or entities: it belongs to all who exercise its freedoms." — Mr. Chief Justice Burger, concurring, *First National Bank of Boston v. Bellotti*, 98 S. Ct. 1407 at 1429 (1978).

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Introduction

This book is intended to provide courts and the Bar with a short but comprehensive discussion of the central issues in the contemporary law of free speech and free press. We have focused on the major mainstays of contemporary First Amendment litigation — areas such as newsgathering, the enduring and puzzling problems of free press and fair trial, the contemporary fortunes of clear and present danger and prior restraint, the nascent and developing concept of the symbolic speech doctrine, the continuing challenge of maintaining law and order in the local forum, the vicissitudes of obscenity law, and the new and changing status of commercial speech.

Since the chapters in this book deal with controversial subjects, we have tried to avoid dogmatism or partisanship in our statement of the basic First Amendment principles at stake in these and other areas. Our aim throughout has been to explore, collect, and present the issues so that counsel for either plaintiff or defendant may quickly understand the essential nature and the contrariety of the fundamental issues.

Thus, in the chapter on the public law of defamation, in the discussion of *Gertz v. Welch*,[1] one section is entitled "Why Non-Media Defendants Should Be Privileged," and the succeeding section is entitled "Why Non-Media Defendants Should Not Be Privileged." Throughout the book, arguments available for and against a particular point of law are set forth for use by the litigator. While we try to state the arguments available to a particular side, including their attendant difficulties, we also go beyond to state, where possible, the present direction of the law. This is not done for the purpose of

[1]418 U.S. 323 (1974).

presenting the law from a particular perspective, in order to secure acceptance of that viewpoint. Instead, we seek to assist courts and lawyers, bewildered by the turmoil of competing doctrine, in identifying, with neither prejudice nor approval, the current path of the law. The purpose of the book is to dissect and compile the law in an area where *par excellence*, disparate doctrines are often used to address identical problems. Where the overlap of unreconciled doctrine is present, we have also been careful not to make our statement of the law clearer than it is.

At times, we indicate the course we believe the law should take in light of fundamental First Amendment values. However, on the whole, we have tried simply to describe, analyze, and synthesize. Although we may have been identified with one or another First Amendment position in the past, these allegiances have been put aside. Our aim has been a simple one — to retrieve from the wealth of First Amendment doctrine and from its immense case law, state and federal, a concise guide to the law of free speech and free press. Objectivity and brevity have been our goals, in order to aid lawyers and judges, whose initial task, on being plunged into any First Amendment problem, is to understand the issues at stake.

This book is not a summary of all First Amendment law. No effort has been made to include freedom of religion or freedom of association and belief. Inclusion of such matters would have necessitated a larger work than this volume, designed to serve as a guide to the essentials of today's litigation realities in the field of free speech and free press. Similarly, matters relating to First Amendment history, though recent and of personal interest, have not been covered. For example, the story of the attempt to create a right of access to the press, rejected in *Miami Herald v. Tornillo*,[2] has not been memorialized.

In the following paragraphs, we will try to give some of the flavor of the substantive issues which occupy the pages of

[2]418 U.S. 241 (1974). See also *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973).