BOOK REVIEWS

Eternally Vigilant. Edited by Lee C. Bollinger & Geoffrey Stone. Published by the University of Chicago Press, 2002, 316 pp., $35.00

Reviewed by David B. Brown, Esq.

Eternally Vigilant is a collection of ten well informed, mostly well considered, and occasionally imaginative essays by eminent First Amendment scholars and experts. The book also contains an introduction entitled a "dialogue" between the two editors, an epilogue utilizing the same dialogue formula, and one page summaries by the editors for each of the ten essays that function as headnotes. The collection was published in 2002, which led me to anticipate some sort of response to September 11, 2001. There is none, although comments by Professor Bollinger in both the introduction and epilogue, inadvertent or not, seem generally to suggest the challenge for a post-September 11th free speech jurisprudence.

The contributors to this collection, including the editors, seem to take as a given that First Amendment jurisprudence is something of a hodgepodge of theories and doctrines. This is not necessarily a reflection of the Court's incoherence, it is, rather, due to the diverse reach of First Amendment subject matter – political speech, pornography, media, broadcasters, commercial speech, campaign reform – that seems to call for varied, even contradictory, theories and doctrines.

Many of these essays deal with the search for the underlying rationale for giving special constitutional protection to speech – even though allowing such speech can often have widely acknowledged harmful societal effects (e.g., hate speech). Is speech worthy of special protection because it is necessary to our democratic process, as first claimed by Justice Brandeis? Is speech worthy of special protection because "a free marketplace of ideas" will broadly serve the important search for truth as indicated by Justice Holmes? Or is it because it is endemic to self-realization, as has been suggested by some contemporary commentators?

What then is the best rationale for constitutional speech protection? Or is there just one? Or does it matter? Among the contributors who choose one of these three rationales, most would seem to prefer some variation of Justice Brandeis's democratic process argument. Others believe that choosing one all–inclusive rationale is virtually impossible and the best one can hope for is to refine and prioritize the various doctrines. Still some seem to imply that it is fruitless to search for a rationale or even to prioritize.

Finally one contributor, Stanley Fish, believes that the search for a rationale is not only fruitless, but harmful. Professor Fish argues that all court decisions are inherently subjective and political and that the effort to deny or disguise this fact only leads to judicial distortion. Since this essay seems to challenge, if not refute, everything that comes before it (and afterwards), it is in some sense the culmination of the collection.

I think it is possible to sympathize with Fish's comments, and still not be able to resist the lure of the search for new doctrine. Searching for patterns and meaning in the obscure and obtuse is, after all, a fundamental part of what we lawyers are trained to do. Trying to elicit an all–encompassing First Amendment rationale that to date has eluded the Supreme Court is just too much fun for many to resist.

Some of the essays in this collection seemed to have involved less forethought than others. A few reveal rather transparent political agendas, that, like Mr. Fish, I find perfectly acceptable – whether I happen to agree with the political agenda is another matter altogether. Only Kent Greenawalt's essay entitled "Clear and Present Danger in Criminal Speech," which examines the counseling of criminal conduct, has a narrow but clear "utility" to the legal practitioner

All this variety means that one is unlikely to be impressed by all ten essays – or to state it positively, one is likely to be impressed with at least something. Sticking with the negative spin for a moment, I personally found the contribution from Frederick Schauer among the wanting. Schauer argues that because of the broad reach and popularity of First Amendment litigation, social problems that would more aptly be litigated under other theories are instead litigated under the First Amendment, with the result being that the issues are distorted. Perhaps this is true, but it seems to me that pleadings often necessitate an attempt to place a square peg in a round hole (sometimes called legal creativity). The developing law of sex discrimination comes to mind.

Lillian R. Bevier finds it paradoxical that legal accountability for harmful speech has been diminished under First Amendment jurisprudence, while legal accountability under tort liability has increased dramatically in recent years. If ever there were an apples/oranges comparison this would seem to be it. Her conclusion that "all things considered, the relative lack of formal legal accountability of the press does not have consequences that are on balance perverse" is so ambiguous as to make it not worth stating.

Judge Posner, on the other hand, is thought – provoking, as always. If rather than "economic analysis," Posner were to speak of his legal methodology as that of utilizing a "sliding scale," a "balancing act", or even if he spoke simply in terms of "cost benefit" analysis, I think his conclusions would be little different from what they are – though certainly less controversial. It has always been mysterious to me why Posner insists that a slippery social science like economics lends credibility and objectivity to the legal process. It reminds me of lawyers trained under the communist legal system who to this day insist on calling their legal methodology "scientific," without indication that it is anything of the sort. On the other hand, for whatever reason, Posner is unique in his ability and willingness to step outside the box of conventional legal jargon and thinking, and address concrete issues in a straightforward and revealing manner.

Taken as a whole this collection tends to be as interesting for what it says about contemporary legal scholarship as for what it has to say about the First Amendment.

David B. Brown practiced law in Washington, D.C. He recently became a member of the Vermont Bar after returning from five years of teaching law in Eastern Europe.

Model Asset Purchase Agreement with Commentary. Published by the American Bar Association, Section of Business Law, 2001, 478 pp., $229.00 ($179.00 for members)

Reviewed by Eric E. Hudson, Esq.

To refer to the *Model Asset Purchase Agreement with Commentary* as just another form book would be a gross understatement. The *Model APA* includes a thorough asset purchase form, exhaustive commentary analyzing all aspects of the typical asset purchase, complete forms for a number of ancillary documents, and an analysis of the exhibits typically required in an asset purchase. Although not included in the review set, the third volume of the *Model APA*, entitled *International Asset Acquisitions*, offers comparisons of asset transactions law and procedure for thirty-three countries. The *Model APA* is a detailed work that provides a useful analysis of all aspects of the asset purchase transaction.

According to the American Bar Association's Committee on Negotiated Acquisitions, which drafted the *Model APA*, the work took over six years to complete, and the Committee's painstaking effort is clearly visible.[1] Volume One of the *Model APA* sets forth a comprehensive buyer's form with commentary on each of the form's provisions. Although the commentary varies depending on the provision, the Model APA generally contains a detailed analysis of each section of the form, including the purpose of the provision, due diligence which may be required in connection with the particular provision, arguments the buyer and seller may make in attempting to modify the form in their favor, and the consequences of omitting various provisions. As a general indication of the scope of the commentary, volume one consists of 274 pages, and approximately eighty percent of the text is devoted entirely to commentary.

Volume Two, entitled *Exhibits, Ancillary Documents and Appendices*, is devoted to an analysis of the exhibits called for by the model form and five ancillary documents which may be utilized in connection with the asset purchase.[2] Volume Two also contains appendices on successor liability, federal income tax considerations, acquisition of a division or line of business, and hypothetical indemnification scenarios. The exhibits and ancillary agreements generally track the format in the first volume, but there is significantly less commentary devoted to the exhibits and ancillary documents than to the asset purchase agreement.

Appendix C, which analyzes the purchase of a division or line of business, walks through the analysis buyer's counsel should make in modifying the form to purchase only a particular division or line of the seller's business (rather than the seller's entire operation). I found this appendix particularly insightful because the analysis tracks the continuing relationship which inevitably results between the buyer and seller where only a portion of the seller's business is purchased. This continuing relationship affects numerous aspects of the asset purchase, including the scope of the seller's representations and post-closing covenants by the buyer. Where the buyer is acquiring the seller's good will and intellectual property in a line of business, the buyer's post closing covenants can be crucial to the seller's overall success. Appendix C effectively analyzes these issues, and in doing so it outlines a number of points that both a buyer's and seller's counsel should consider in any transaction of this type.

The asset purchase agreement form is meticulously drafted and thorough, and in the event a practitioner chooses not to adopt a modified version of the form as his or her own, the *Model APA* could certainly be utilized to sharpen even the most carefully prepared asset purchase form. The *Model APA*'s drafters intended it to serve as a mid-sized asset purchase form that could be modified for larger or smaller transactions, but the form is probably over-detailed for most Vermont transactions. However, considering that even the simplest asset purchases are generally more complex than a stock purchase, the form provides an excellent starting point for smaller transactions. As the *Model APA* includes a CD-ROM containing the asset purchase agreement, exhibits, and ancillary documents, the form can readily be tailored to specific transactions.

Although drafted as a buyer's form, the *Model APA* in many instances addresses the seller's perspective on particular provisions and includes some "carve-outs" that a seller may propose in attempting to modify the buyer's form. For example, in the commentary addressing the "no material adverse change" representation typically requested by a buyer, the *Model APA* proposes a seller carve-out significantly limiting the scope of such a representation.[3] The Model APA then discusses a buyer's potential response to the seller's proposal, along with a general analysis of the case law interpreting the phrase "material adverse change."[4] Although the specific structure of the Model APA's commentary varies from section to section, the "no material adverse change" provision is a good example of the utility of this text.

I have very few criticisms of the *Model APA*, but practitioners considering the text should be aware that, other than the commentary, it may not be particularly useful as a quick reference. As a result of the form's detail, many of the provisions are interrelated, and it would be a mistake to pull one provision from the *Model APA* without analyzing its effect within the context of the entire form. However, to some extent this is true of all detailed forms, and I think even the most seasoned transactional attorney could glean significant insight from a careful reading of the *Model APA*. The *Model APA* provides a comprehensive analysis of the asset purchase, and it should become a standard transactional reference.

Eric E. Hudson, Esq., is an associate at Sheehey Furlong & Behm P.C. He maintains a general business practice with an emphasis on employment and general transactional law.

[1] AMERICAN BAR ASSOCIATION SECTION OF BUSINESS LAW, MODEL ASSET PURCHASE AGREEMENT WITH COMMENTARY ix (2001).

[2] The *Model APA* contains forms for the following ancillary documents: confidentiality agreement; letter of intent; disclosure letter; earnout agreement; and contribution agreement. *Id.* at 91-131.

[3] *Id.* at 98-99.

[4] *Id.*

Construction Litigation Model Jury Instructions. Published by the American Bar Association, Section of Litigation, 2001, 197 pp., $95.00 ($80.00 for members)

Reviewed by Michael J. Harris, Esq.

The American Bar Association's *Construction Litigation Model Jury Instructions* serves as a handy reference tool for practitioners who handle construction disputes. The book's main value may be to collect concise statements of construction law principles, with case citations, rather than as a jury instruction manual. Sophisticated construction law practitioners will find the volume less useful.

This 197 page softbound volume is the American Bar Association's fourth offering in its attempt to provide balanced and neutral model jury instructions. Its ten chapters and approximately seventy-five separate jury instructions covers an ambit of construction contract issues from contract formation to damages. Other topics include bidding, implied contract terms, changes and extra work, contract breaches, non-contract claims, design professional liability and defenses. The instructions are clear and cogent, and each is followed by commentary and citations to cases and secondary sources.

This book's concise but limited depth of coverage is both a strength and a weakness. Litigators who occasionally handle construction matters will appreciate this volume as a handy compendium of basic construction law principles apart from its obvious use as a trial tool. The book contains precise statements of common law rules for recurring construction dispute issues. In addition, the instruction citations provide a starting point for further legal research to flesh out the nuances of the law for the specific construction dispute at hand. Thus, busy practitioners, especially those who do not specialize in construction matters, will refer to this book to check the law quickly when analyzing a construction dispute from the initial client contact, through pre-litigation discussions, and following commencement of litigation.

By contrast, seasoned construction law litigators may find the volume too basic. These practitioners are likely to have previously approved jury instructions from past cases on perennial construction law specific issues. Often recovery in an actual dispute will turn upon a precise refinement of a basic legal tenet. The final jury instructions in such cases will often be the result of a revised general instruction to reflect case specific additional research and argument presented to the trial judge. This volume will not eliminate that process. Nor will it stop one's adversary from objecting that a general jury instruction should be modified by a more "precise" instruction that subtly favors your opponent.

The jury instructions themselves are a mixed bag. While the volume claims to skip generalized "standard" jury instructions, about one-third of the offerings relate to routine sounding instructions covering basic topics that arise outside of the construction area – basic contract formation, negligence, burden of proof, mitigation, accord and satisfaction, etc. However, the subtleties in other areas – like recovery rights for work order changes, unexpected site conditions, of design or performance deficiencies, and implied duties and warranties – are well covered.

At $95 ($80 for ABA members), this book can save considerable research time compared to locating and confirming the basic construction law precepts using traditional paper volume or electronic research methods. In the end, the cost/benefit analysis of purchasing this volume for your practice will depend upon your construction law expertise level and the frequency with which your firm handles construction law matters. If you handle such matters too much, or too little, this book may not be right for you.

Michael J. Harris, Esq., is a member of the Burlington firm of Collins McMahon & Harris, PLLC. His practice focuses on civil litigation matters.

Republic.com. Published by the Princeton University Press, 2002, 236 pp., $12.95 paperback ($29.95 hardcover)

Reviewed by Anna Vaserstein, Esq.

I confess that I approached reading this book with some dread. Would I be able to wade through the small print of this assuredly tedious academic essay? It was a surprisingly short read (though in fairness it could have taken forty pages to say what the author said in more than two hundred).

Republic.com by Cass Sunstein is a salient exploration of the role of the Internet in a democracy. The two premises *Republic.com* sets out are: (1) democracy requires citizens to have access to public forums where they are exposed to ideas and topics that they have not chosen in advance; and (2) democracy requires citizens to have shared experiences that act as social glue. Cass Sunstein explores the effects of Internet use on a democracy. He discusses the consequences of the increased ability of the Internet user to personalize and filter the information he/she accesses, including news, creating what he terms the "Daily Me." Sunstein contends that these personalized dailies serve democracy poorly because they do not cover the broad range of topics of traditional media. Sunstien argues that the "Daily Me" reader only selects topics of interest to her/him. Thus, according to Sunstein, the "Daily Me" reader gets limited information and is also isolated from other people who read a different "Daily Me."

The author also describes the effects of chat rooms and special interest sites. Only visiting sites where the ideas expressed are the same as the users', Sunstein contends, results in group polarization, where members of the chat group move toward the more extreme position. Sunstein asserts that if a person reads only what s/he agrees with and never seeks opposing views, s/he can become extreme in his/her views and also isolated from others whose views are different. Sunstein views this result as a problem for democracy. Can a citizen really take active part in a democracy without hearing the arguments on both sides and with limited or no understanding of current events? Sunstein explores ways to counter the balkanization of ideas resulting from the "Daily Me" and special interest sites/chat rooms. These solutions include government sponsored discussion forums on the Internet and requirements that each site have a link to another site with an opposing view.

Republic.com contains a lot of food for thought. Reading this book was like revisiting the best aspects of college: the exposure to new ideas and the limitless possibilities they entail. In its discussion of the First Amendment, *Republic.com* brought back echoes of law school Constitutional Law class. This is not surprising given that Cass Sunstein is a professor at Chicago Law School and a constitutional law scholar.

The *Republic.com* flimsy paperback cover is graced with a pleasing minimalist design. However, even if the book does not last beyond several readings, the ideas contained in it surely will.

Anna Vaserstein has a small practice consisting of private clients and contract work for law firms.