



MASS MEDIA LAW

Don R. Pember | Clay Calvert

mass media law

Mass Media Law

19th Edition

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MASS MEDIA LAW, NINETEENTH EDITION

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CONTENTS

Preface			x
1	The American Legal System		1
	Sources of the Law	2	
	Common Law	2	
	<i>The Role of Precedent</i>	3	
	<i>Finding Common-Law Cases</i>	6	
	Equity Law	7	
	Statutory Law	9	
	Constitutional Law	11	
	Executive Orders and Administrative Rules	14	
	SUMMARY	15	
	The Judicial System	16	
	Facts versus the Law	17	
	The Federal Court System	19	
	<i>The Supreme Court</i>	19	
	<i>Other Federal Courts</i>	25	
	<i>Federal Judges</i>	27	
	The State Court System	28	
	Judicial Review	29	
	SUMMARY	30	
	Lawsuits	31	
	SUMMARY	34	
	Bibliography	34	
2	The First Amendment: The Meaning of Freedom		35
	Historical Development	36	
	Freedom of the Press in England	36	
	Freedom of the Press in Colonial America	37	
	<i>Community Censorship, Then and Now</i>	39	
	SUMMARY	42	
	The First Amendment	43	
	The New Constitution	43	
	Freedom of Expression in the 18th Century	45	
	Freedom of Expression Today	46	
	SUMMARY	54	
	The Meaning of Freedom	54	
	Seditious Libel and the Right to Criticize the Government	55	
	Alien and Sedition Acts	57	
	Sedition in World War I	58	
	The Smith Act	60	
	Defining the Limits of Freedom of Expression	62	
	<i>Real-Life Violence: Blaming Movies, Video Games and Books</i>	66	
	<i>The Gitlow Ruling and the Incorporation Doctrine</i>	73	
	SUMMARY	74	
	Prior Restraint	74	
	<i>Near v. Minnesota</i>	77	
	Pentagon Papers Case	78	
	Progressive Magazine Case	80	
	<i>United States v. Bell</i>	80	
	SUMMARY	81	
	Bibliography	81	
3	The First Amendment: Contemporary Problems		83
	The First Amendment in Schools	84	
	Censorship of Expression in Public High Schools	84	
	<i>The Hazelwood Case</i>	89	
	<i>The Bethel Case</i>	95	
	<i>The Morse Case</i>	97	

Censorship of College Newspapers	98	Prior Restraint and Protests	122
<i>Problems for College Journalists</i>	101	SUMMARY	123
<i>Alcohol Advertisements and the College Press</i>	105	Hate Speech/Fighting Words	124
Book Banning	108	SUMMARY	132
SUMMARY	110	The First Amendment and Election Campaigns	132
Time, Place and Manner Restrictions	111	SUMMARY	135
Forum Analysis	116	The First Amendment and the Information Superhighway	135
SUMMARY	120	Net Neutrality	138
Other Prior Restraints	120	Bibliography	140
Son of Sam Laws	120		

4 Libel: Establishing a Case 143

The Libel Landscape	144	<i>Group Identification</i>	160
Damage Claims	144	Defamation	162
Time and Money	145	<i>Crime</i>	165
Time and the Law	145	<i>Sexual References</i>	165
The Lawsuit as a Weapon	146	<i>Personal Habits</i>	166
Resolving the Problem	148	<i>Ridicule</i>	167
SUMMARY	149	<i>Business Reputation</i>	167
Law of Defamation	149	<i>Criticism of a Product</i>	168
Elements of Libel	150	<i>Banks, Insurance Companies and Vegetables</i>	169
Publication	153	Falsity	170
<i>Publishers and Vendors</i>	155	SUMMARY	173
<i>Libel on the Internet</i>	155	Bibliography	174
Identification	158		

5 Libel: Proof of Fault 175

<i>New York Times v. Sullivan</i>	176	Private Persons	195
The Rationale for the Ruling	177	SUMMARY	196
Public Persons versus Private Persons	179	The Meaning of Fault	197
Who Is a Public Official?	179	Negligence	197
<i>Job Description</i>	179	Actual Malice	200
<i>The Nature of the Story</i>	182	<i>Knowledge of Falsity</i>	200
All-Purpose Public Figures	183	<i>Reckless Disregard for the Truth</i>	201
Limited-Purpose Public Figures	185	<i>Applying the Actual Malice Standard</i>	204
Lower-Court Rulings	188	SUMMARY	208
<i>The Nature of the Controversy</i>	189	Intentional Infliction of Emotional Distress	209
<i>The Plaintiff's Role</i>	190	SUMMARY	211
Businesses as Public Figures	192	Bibliography	211
Public Persons Over Time	194		

6 Libel: Defenses and Damages 213

Summary Judgment/Statute of Limitations	214	The First Amendment	233
Statute of Limitations	216	<i>The Ollman Test</i>	234
<i>Jurisdiction</i>	218	<i>Free Speech and Chimpanzees</i>	235
<i>Jurisdiction and the Internet</i>	219	Fair Comment and Criticism	238
SUMMARY	220	SUMMARY	239
Truth	220	Defenses and Damages	239
Privileged Communications	221	Consent	239
Absolute Privilege	221	Right of Reply	240
Qualified Privilege	222	Damages	241
<i>Legislative Proceedings</i>	224	<i>Actual Damages</i>	241
<i>Judicial Proceedings</i>	224	<i>Special Damages</i>	241
<i>Executive Actions</i>	226	<i>Presumed Damages</i>	242
Neutral Reportage	228	<i>Punitive Damages</i>	242
Abuse of Privilege	228	Retraction Statutes	243
SUMMARY	231	SUMMARY	245
Protection of Opinion	231	Criminal Libel	245
Rhetorical Hyperbole	231	Bibliography	247

7 Invasion of Privacy: Appropriation and Intrusion 249

Conceptions and Sources of Privacy in the United States	250	Life After Death: Post-Mortem	
Invasion of Privacy	252	Publicity Rights	276
The Growth of Privacy Laws	253	SUMMARY	277
Appropriation	256	Intrusion	278
Right of Publicity	257	Intrusion and the Press	279
Use of Name or Likeness	260	No Privacy in Public	280
Advertising and Trade Purposes	267	The Use of Hidden Recording	
News and Information Exception	269	Devices	286
Other Exceptions	270	Intrusion and the Publication of	
<i>Booth Rule</i>	271	Information Obtained Illegally	288
Consent as a Defense	273	SUMMARY	289
<i>When Consent Might Not Work</i>	275	Bibliography	290

8 Invasion of Privacy: Publication of Private Information and False Light 291

Public Disclosure of Private Facts	291	Highly Offensive Publicity	297
Publicity	293	Legitimate Public Concern and	
Private Facts	293	Newsworthiness	300
<i>Naming Rape Victims</i>	295	Ethics and Privacy	305
		Recounting the Past	306

Private Facts on the Internet	307	Other Falsehoods	311
SUMMARY	307	Highly Offensive Material	313
False-Light Invasion of Privacy	308	The Fault Requirement	314
Fictionalization	310	SUMMARY	316
		Bibliography	316

9 Gathering Information: Records and Meetings _____ 319

News Gathering and the Law	322	<i>Law Enforcement</i>	359
The Constitution and News		<i>Financial Records</i>	363
Gathering	322	<i>Geological Data</i>	363
<i>Access to Government Officials: A Right to Interview?</i>	327	Handling FOIA Requests	363
<i>The First Amendment Protection of News Gathering</i>	329	Federal Open-Meetings Law	367
SUMMARY	338	SUMMARY	368
The Freedom of Information Act	338	State Laws on Meetings and Records	368
Applying the Law	341	State Open-Meetings Laws	369
FOIA and Electronic		State Open-Records Laws	372
Communication	345	The Privatization of Public Government	377
Agency Records	348	SUMMARY	378
<i>What Is an Agency?</i>	348	Laws That Restrict Access to Information	379
<i>What Is a Record?</i>	349	School Records	379
<i>What Is an Agency Record?</i>	349	Health and Medical Records	381
FOIA Exemptions	350	The Federal Privacy Law	382
<i>National Security</i>	351	Criminal History Privacy Laws	383
<i>Housekeeping Practices</i>	352	State Statutes That Limit Access to Information	384
<i>Statutory Exemption</i>	352	SUMMARY	387
<i>Trade Secrets</i>	353	Bibliography	387
<i>Working Papers/Discovery</i>	354		
<i>Personal Privacy</i>	357		

10 Protection of News Sources/Contempt Power _____ 391

Journalists, Jail and Confidential Sources	392	Anonymity and the Internet	413
News and News Sources	394	Nonconfidential Information and Waiver of the Privilege	417
The Failure to Keep a Promise	399	Who Is a Journalist?	419
Constitutional Protection of News Sources	402	Telephone Records	421
Lower-Court Rulings	403	SUMMARY	423
<i>Civil Cases</i>	406	Legislative and Executive Protection of News Sources	423
<i>Criminal Cases</i>	409	Shield Laws	424
<i>Grand Jury Proceedings</i>	410	Federal Guidelines	428

Telephone Records:		The Contempt Power	435
The 2013 Associated Press		Kinds of Contempt	436
Controversy	429	<i>Contempt and the Press</i>	436
Newsroom Searches	430	Collateral Bar Rule	437
How to Respond to a Subpoena	433	SUMMARY	438
SUMMARY	434	Bibliography	438

11 Free Press–Fair Trial: Trial-Level Remedies and Restrictive Orders _____ 441

Prejudicial Crime Reporting	442	Restrictive Orders to Control	
Impact on Jurors	444	Publicity	454
The Law and Prejudicial News	446	Restrictive Orders Aimed	
SUMMARY	448	at the Press	456
Traditional Judicial Remedies	448	Restrictive Orders Aimed at	
Voir Dire	449	Trial Participants	460
Change of Venue	450	Contact with Jurors	463
Continuance	452	SUMMARY	465
Admonition to the Jury	452	Bibliography	466
Sequestration of the Jury	453		
SUMMARY	454		

12 Free Press–Fair Trial: Closed Judicial Proceedings _____ 467

Closed Proceedings and		Access and the Broadcast Journalist	488
Sealed Documents	467	<i>Access to Evidence</i>	488
Open Courts and the Constitution	468	Recording and Televising	
Open and Closed Trials	471	Judicial Proceedings	490
<i>Suspected Terrorists, Enemy</i>		SUMMARY	494
<i>Combatants, Et Al.</i>	476	Bench-Bar-Press Guidelines	494
SUMMARY	477	SUMMARY	496
Closure of Other Hearings	477	Bibliography	496
Accessible and Inaccessible			
Documents	481		

13 Regulation of Obscene and Other Erotic Material _____ 497

The Law of Obscenity	498	<i>Patent Offensiveness</i>	506
Early Obscenity Law	501	<i>Serious Value</i>	506
Defining Obscenity	501	Other Standards	507
SUMMARY	502	<i>Variable Obscenity</i>	507
Contemporary Obscenity		<i>Child Pornography</i>	509
Law	503	<i>Children as Child Pornographers</i>	
The <i>Miller</i> Test	503	<i>and Sexting</i>	514
<i>An Average Person</i>	503	<i>Obscenity and Women</i>	514
<i>Community Standards</i>	504	SUMMARY	515

Controlling Obscenity	515	Erotic Materials in Cyberspace	526
Postal Censorship	517	<i>The Communications Decency Act</i>	526
Film Censorship	518	<i>The Child Online Protection Act</i>	527
SUMMARY	519	<i>The Children's Internet Protection Act</i>	528
Regulation of Nonobscene Erotic Material	519	<i>Current Issues Online: The New "Dot XXX" Domain</i>	530
Sexually Oriented Businesses	519	SUMMARY	530
Attacks on the Arts and Popular Culture	524	Bibliography	530

14 Copyright 533

Immaterial Property Law	534	Copyright Protection and Infringement	568
Patents	535	Copyright Notice	569
Trademarks	535	Registration	570
Plagiarism	540	Infringement	570
Roots of the Law	542	<i>Originality of the Plaintiff's Work</i>	571
What May Be Copyrighted	543	<i>Access</i>	572
Copyright and Facts	548	<i>Copying and Substantial Similarity</i>	572
<i>Telephone Books and Databases</i>	548	Copyright Infringement and the Internet	575
<i>News Events</i>	549	<i>Digital Millennium Copyright Act</i>	576
<i>Research Findings and History</i>	549	<i>File Sharing</i>	577
Misappropriation	551	Film and Television	578
Duration of Copyright Protection	553	Politics and Copyright	579
SUMMARY	554	SUMMARY	581
Fair Use	554	Freelancing and Copyright	581
Purpose and Character of Use	556	Damages	582
Nature of the Copyrighted Work	560	Bibliography	583
The Portion or Percentage of a Work Used	562		
Effect of Use on Market	564		
Application of the Criteria	566		
SUMMARY	568		

15 Regulation of Advertising 585

Advertising and the First Amendment	586	Federal Regulation	600
Commercial Speech Doctrine	587	<i>Telemarketing</i>	603
Compelled Advertising Subsidies and Government Speech	593	Regulating Junk E-Mail and Spam	605
SUMMARY	594	SUMMARY	608
The Regulation of Advertising	594	Federal Trade Commission	608
Self-Regulation	594	False Advertising Defined	610
Lawsuits by Competitors and Consumers	595	Means to Police Deceptive Advertising	613
State and Local Laws	599	<i>Guides and the Children's Online Privacy Protection Act</i>	614
		<i>Voluntary Compliance</i>	616

<i>Consent Agreement</i>	617	Special Cases of Deceptive	
<i>Litigated Order</i>	618	Advertising	625
<i>Substantiation</i>	619	Testimonials	625
<i>Corrective Advertising</i>	619	Bait-and-Switch Advertising	627
<i>Injunctions</i>	620	Defenses	628
<i>Trade Regulation Rules</i>	622	Advertising Agency/Publisher	
SUMMARY	623	Liability	628
The Regulatory Process	624	SUMMARY	630
Procedures	624	Bibliography	630

16 Telecommunications Regulation _____ **633**

A Prologue to the Present	634	Regulation of Political	
History of Regulation	634	Programming	665
The Changing Philosophy		Candidate Access Rule	666
of Broadcast Regulation	636	Equal Opportunity/Equal	
The <i>Prometheus</i> Decision		Time Rule	666
and Continuing Fallout	638	<i>Use of the Airwaves</i>	667
SUMMARY	640	<i>Legally Qualified Candidates</i>	669
Basic Broadcast Regulation	640	SUMMARY	671
Federal Communications		News and Public Affairs	671
Commission	640	Video News Releases, Sponsorship	
<i>Powers</i>	642	Identification and the FCC	672
<i>Censorship Powers</i>	644	The First Amendment	674
Licensing	644	SUMMARY	675
<i>Multiple Ownership Rules</i>	646	Regulation of New Technology	675
<i>License Renewal</i>	648	Satellite Radio	676
<i>The Public's Role and</i>		Internet and Broadband	677
<i>Online Public Inspection Files</i>	650	Cable Television	679
SUMMARY	650	Federal Legislation Regulating	
Regulation of Program		Cable Television	679
Content	651	<i>Purpose of the Law</i>	680
Sanctions	651	<i>Jurisdiction and Franchises</i>	680
Regulation of Children's		<i>Must-Carry Rules</i>	681
Programming	652	<i>Programming and Freedom</i>	
Obscene, Indecent and Profane		<i>of Expression</i>	683
Material	653	SUMMARY	685
Violence on Television	664	Bibliography	685
SUMMARY	664		

Glossary _____ 688

Index _____ 695

PREFACE

As the authors write this preface during the early fall of 2013, there is new movement in Washington, D.C., to finally pass a federal shield law that would provide qualified protection for journalists from revealing their confidential sources and information in federal court proceedings (see Chapter 10 regarding shield laws). Known as the Free Flow of Information Act of 2013 and sponsored by a bi-partisan group of U.S. Senators, the bill also would codify as law the Department of Justice's recently revised policies on the surveillance, search and seizure of the records and activities of members of the news media. The revised guidelines were released in July 2013 by U.S. Attorney General Eric Holder, just two months after it was revealed that the Justice Department had secretly seized the phone records of multiple Associated Press reporters for several months in 2012 and seized the e-mails of Fox News reporter James Rosen. The records were taken by the government in both instances to determine who was leaking classified information to journalists. Many members of the news media, however, saw the tactic as a grievous and egregious intrusion into press freedom. These controversies are discussed in Chapter 10 of this new edition. Ultimately, they illustrate that the tension between the government and a free press in the United States remains high more than 220 years after the adoption of the First Amendment in 1791. Today, in brief, is a propitious and important time to be studying media law.

The 19th edition of the textbook is replete with updated information in every chapter, as new cases, controversies and statutes affecting media law arise on an almost daily basis. Among the new judicial rulings covered in this edition are three issued by the U.S. Supreme Court in 2012 and 2013:

- *United States v. Alvarez*, in which the Court declared unconstitutional part of the Stolen Valor Act that made it a crime to lie about having won a military medal of honor. This case, which is discussed in detail in Chapter 2, illustrates many important principles about both First Amendment and media law.
- *McBurney v. Young*, in which the Court faced the question of whether one state may preclude citizens of other states from enjoying the same rights of access to public records that the one state affords its own citizens. This case is addressed in Chapter 9.
- *Federal Communications Commission v. Fox Television Stations*, a high court ruling affecting the FCC's regulation of broadcast indecency and, in particular, its targeting of so-called fleeting expletives. This case, which is covered in Chapter 16, has far reaching implications, as the FCC was busy considering revamping its entire indecency enforcement regime and rules in fall 2013. Expect much more in this area from the FCC in 2014 and 2015.

This edition of the book eliminates from Chapter 3 a unit previously devoted to prior restraint and censorship during wartime. With U.S. military involvement winding down in both Iraq and Afghanistan, and with an eye toward comments from reviewers and keeping the size of the book manageable, the authors decided to cut this material.

The authors thank several individuals for their support. Clay Calvert thanks his undergraduates at the University of Florida for making mass communications law an awesome teaching experience. He also expresses gratitude to the multiple UF students who helped to read, review and edit new content for this edition of the textbook; their feedback and advice was invaluable. Clay Calvert furthermore appreciates Berl Brechner for continued support of his research and writing endeavors. Last but certainly not least, Clay Calvert thanks Don R. Pember for having him aboard the journey that is writing and assembling a timely and comprehensive book on mass media law. For the record, Clay Calvert worked on Chapters 1, 2, 3, 7, 8, 9, 10, 13, 15 and 16 for this edition, while Don R. Pember took on Chapters 4, 5, 6, 11, 12 and 14.

This is the last time you will see Don Pember's name on this book. After 19 editions and nearly 40 years it is time for me to pack it in. I am certain Clay Calvert will continue to do admirable work so the book will continue to stay alive. Many aspects of mass media law have changed during the past four decades, but more have stayed the same. The growth of the Internet has forced the most significant changes in the law, but the courts and legislatures have been adapting.

I want to use my portion of this preface to thank some people. I am very grateful to Clay Calvert for his work on the last six editions. After writing the book alone for about 25 years, his insights and enthusiasm were invaluable. I am also grateful to all the instructors who, over the years, chose to adopt this text for their classes. Support from peers is always appreciated. But there are several people who helped me as a journalist and journalism teacher that I want to especially thank.

Thanks goes to Lee Peel, who in 1955 introduced a high school junior to journalism. And to Bud Meyers and George Hough III who helped this same young fellow get through his undergraduate and early graduate studies at the Michigan State University School of Journalism. Thanks also to Ben Kuroki, a feisty newspaper publisher who taught me what a newspaper was supposed to do. And to Bill Hachten and Dwight Teeter who guided me through my doctoral studies at the University of Wisconsin School of Journalism. I am grateful that Henry Ladd Smith and Bill Ames were around when I got to the University of Washington to teach me how to be a journalism teacher. And finally, and most importantly, I want to thank my wife, Diann, for helping me get through the past 50 years of my life. Couldn't have made it without her.

IMPORTANT NEW, EXPANDED OR UPDATED MATERIAL

- New examples of equity law, including restraining orders in 2013 affecting the Lifetime broadcast of the movie "Romeo Killer" and Gawker's posting of a Hulk Hogan sex tape and a porn parody of "50 Shades of Grey," pages 8–9
- New content on the U.S. Supreme Court's 2012 decision in *FCC v. Fox Television Stations, Inc.* regarding the void for vagueness doctrine, page 12
- New content on the U.S. Supreme Court's 2012 decision in *United States v. Alvarez* involving the Stolen Valor Act and regarding plurality opinions and the limited First Amendment right to lie, pages 23 and 65–66
- New content on the U.S. Supreme Court's 2012 decision in *American Traditional Partnership, Inc. v. Bullock* regarding corporate expenditures, pages 24 and 135

- New examples of self-censorship of violent media content following the December 2012 school shooting at Sandy Hook Elementary School, pages 40–41
- Multiple new examples of symbolic expression (when conduct constitutes speech) in political protest cases, pages 46 and 55
- Multiple new examples of school censorship, including censorship of newspapers, t-shirts and “I ♥ Boobies” bracelets in public schools, pages 84, 87–88 and 96
- Updates on Clery Act violations by universities, pages 102–103
- New examples of thefts of college newspapers across the country, page 104
- New examples of efforts to ban books in public schools and libraries, page 108
- New content on federal appellate court ruling in *Klen v. City of Loveland* regarding fighting words, pages 125–126
- New examples of true threats of violence using social media, pages 127–128
- New introduction to libel, pages 144–149
- New material on libel proof plaintiffs, page 151
- New material on Communications Decency Act libel defense, page 156
- New material on identification, page 158
- New material on limited purpose public figures, page 191
- New material on knowledge of falsity, page 201
- New material on single publication rule, pages 216–217
- New material on abuse of qualified privilege, page 229
- New material on facts vs. opinion, page 236
- All-new introduction to privacy, pages 250–252
- New discussion of 2013 federal appellate court ruling in *Hart v. Electronic Arts* involving publicity rights of college football players in video games, page 266
- New content on anti-paparazzi statutes, pages 284–286
- New content on federal appellate court ruling in 2012 in *Marsh v. County of San Diego* involving a familial constitutional privacy right over images of dead relatives, pages 298–299
- New content on the 2013 federal appellate court ruling in *Judicial Watch v. U.S. Secret Service* regarding FOIA access to White House visitor logs, page 350
- New discussion of the U.S. Supreme Court’s 2013 ruling in *McBurney v. Young* regarding state public records laws, page 373
- Discussion of the government’s seizure of the telephone records of Associated Press reporters, pages 393 and 429–430
- New and updated material on unmasking the identity of anonymous online posters, pages 413–415
- Updated information on state shield laws, including new numbers, pages 423–435
- New material on pretrial publicity, pages 443–444
- New material on gag orders on trial participants, page 461
- New material on press contact with jurors, page 464

- New material on closing a judicial proceeding, page 470
- New material on open and closed court records, pages 482–484
- New material on cameras in federal courts, pages 491–492
- New material on the 2012 obscenity conviction of Ira Isaacs, pages 497–498
- New material on child pornography issues and cases, pages 509–512
- Updated material on sexting statutes, page 514
- All-new material on revenge pornography websites, page 529
- New material on trademarks, pages 535–540
- New material on plagiarism, pages 540–542
- New material on what can’t be copyrighted, pages 545–546
- New material on fair use, pages 555 and 567
- New material on copyright registration, page 570
- New material on copying and originality of plaintiff’s work, page 571
- New material on copying and access to plaintiff’s work, page 572
- New material on FTC regulation of privacy on social media and search engines, pages 602–603
- New material on the FTC’s 2013 revisions to the Children’s Online Privacy Protection Act (COPPA), pages 614–616
- New material on the FCC’s regulation of broadcast indecency, including the 2012 decision by the U.S. Supreme Court in *FCC v. Fox Television Stations* and the FCC’s decision to only target “egregious” cases of indecency, pages 653–663

WEB MATERIAL

- Banning registered sex offenders from online social networks, page 13
- Access theory and the Internet, page 53
- Violent-themed Internet postings, page 72
- Wikileaks and prior restraints, page 75
- Student speech rights on the Web, pages 94–95
- Threats of violence on the Internet, pages 127–130
- Information Superhighway and Net Neutrality, pages 135–140
- Errors on web postings, pages 155–156
- CDA libel defense, page 156
- Single publication rule and the Internet, pages 216–217
- Jurisdiction in Internet libel cases, pages 219–220
- FTC regulation of privacy on the Internet, pages 252 and 255
- Facebook’s “Sponsored Stories” settlement, page 259
- Intrusion and the Internet, page 279
- Familial privacy over death-scene images on the Internet, page 299

Private facts on the Internet, page 307
FOIA and electronic communication, page 345
E-mails and public records, page 373
Anonymity and the Internet, page 413
Defining who is a journalist on the Internet, page 421
Bloggers and shield laws, page 426
Using shield laws to protect anonymous posters, page 428
Community standards in Internet-based obscenity cases, pages 505–506
Aggregators, page 552
Copyright and the Internet, pages 575–577
File sharing, pages 577–578
Pirating film and TV shows, page 579
Politics and copyright, page 580
Variable obscenity and the Internet, page 508
Possession of child pornography on the Internet, page 513
Erotic materials in cyberspace, pages 526–530
FTC regulation of online privacy and social networks, page 602
Regulating junk e-mail and spam, pages 605–608
FTC jurisdiction over Internet ads, page 609
FTC enforcement of COPPA on the Internet, page 614
FTC regulation of blogging testimonials and reviews, pages 626–627
Online advertiser liability and CDA immunity, pages 629–630

CHAPTER 1

The American Legal System

Sources of the Law	2	The Judicial System	16
Common Law	2	Facts versus the Law	17
<i>The Role of Precedent</i>	3	The Federal Court System	19
<i>Finding Common-Law Cases</i>	6	<i>The Supreme Court</i>	19
Equity Law	7	<i>Other Federal Courts</i>	25
Statutory Law	9	<i>Federal Judges</i>	27
Constitutional Law	11	The State Court System	28
Executive Orders and Administrative Rules	14	Judicial Review	29
Summary	15	Summary	30
		Lawsuits	31
		Summary	34
		Bibliography	34

Before studying mass media law, one needs a general background in law and the judicial system. In the United States, as in most societies, law is a basic part of existence, as necessary for the survival of civilization as are economic and political systems, the mass media, cultural achievement and the family.

This chapter has two purposes: to acquaint you with the law and to outline the legal system in the United States. While not designed to be a comprehensive course in law and the judicial system, it provides a sufficient introduction to understand the next 15 chapters.

The chapter opens with a discussion of the law, considering the most important sources of the law in the United States, and it moves on to the judicial system, including both the federal and state court systems. A summary of judicial review and a brief outline of how both criminal and civil lawsuits start and proceed through the courts are included in the discussion of the judicial system.

FIVE SOURCES OF LAW

1. Common law
2. Equity law
3. Statutory law
4. Constitutional law (federal and state)
5. Executive orders and administrative rules

SOURCES OF THE LAW

There are many definitions of law. Some people say law is any social norm or any organized method of settling disputes. Most writers insist it is more complex, that some system of sanctions and remedies is required for a genuine legal system. John Austin, a 19th-century English jurist, defined law as definite rules of human conduct with appropriate sanctions for their enforcement. He added that both the rules and the sanctions must be prescribed by duly constituted human authority.¹ Roscoe Pound, an American legal scholar, suggested that law is social engineering—the attempt to order the way people behave. For the purposes of this book, it is helpful to consider law to be a set of rules that attempt to guide human conduct and a set of formal, governmental sanctions that are applied when those rules are violated.

What is the source of American law? There are several major sources of the law in the United States: the U.S. Constitution and state constitutions; the common law; the law of equity; the statutory law; and the rulings of various executives, such as the president and mayors and governors, and administrative bodies and agencies. Historically, we trace American law to Great Britain. As colonizers of much of the North American continent, the British supplied Americans with an outline for both a legal system and a judicial system. In fact, because of the many similarities between British and American law, many people consider the Anglo-American legal system to be a single entity. Today, our federal Constitution is the supreme law of the land. Yet when each of these sources of law is considered separately, it is more useful to begin with the earliest source of Anglo-American law, the common law.

COMMON LAW

Common law,* which developed in England during the 200 years after the Norman Conquest in the 11th century, is one of the great legacies of the British people to colonial America. During those two centuries, the crude mosaic of Anglo-Saxon customs was replaced by a single system of law worked out by jurists and judges. The system of law became common throughout England; it became common law. It was also called common law to distinguish it from the ecclesiastical (church) law prevalent at the time. Initially, the customs of the people were used by the king's courts as the foundation of the law, disputes were resolved according

* Terms in boldfaced type are defined in the glossary.

1. Abraham, *Judicial Process*.

to community custom, and governmental sanction was applied to enforce the resolution. As such, common law was, and still is, considered “discovered law.”

As legal problems became more complex and as the law began to be professionally administered (the first lawyers appeared during this era, and eventually professional judges), it became clear that common law reflected not so much the custom of the land as the custom of the court—or more properly, the custom of judges. While judges continued to look to the past to discover how other courts decided a case when given similar facts (precedent is discussed in a moment), many times judges were forced to create the law themselves. Common law thus sometimes is known as judge-made law.

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Common law is an inductive system in which a legal rule and legal standards are arrived at after consideration of many cases involving similar facts. In contrast, in a deductive system of law, which is common in many other nations, the rules are expounded first and then the court decides the legal situation under the existing rule. The ability of common law to adapt to change is directly responsible for its longevity.

Fundamental to common law is the concept that judges should look to the past and follow court precedents.* The Latin expression for the concept is this: “*Stare decisis et non quieta movere*” (to stand by past decisions and not disturb things at rest). **Stare decisis** is the key phrase: Let the decision stand. A judge should resolve current problems in the same manner as similar problems were resolved in the past. Put differently, a judge will look to a prior case opinion to guide his or her analysis and decision in a current case. Following precedent is beneficial as it builds predictability and consistency into the law—which in turn fosters judicial legitimacy. Courts may be perceived as more legitimate in the public’s eye if they are predictable and consistent in their decision-making process.

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The Role of Precedent

At first glance one would think that the law never changes in a system that continually looks to the past. Suppose that the first few rulings in a line of cases were bad decisions. Are courts saddled with bad law forever? The answer is no. While following **precedent** is desired (many people say that certainty in the law is more important than justice), it is not always the proper way to proceed. To protect the integrity of common law, judges developed means of coping with bad law and new situations in which the application of old law would result in injustice.

Imagine that the newspaper in your hometown publishes a picture and story about a 12-year-old girl who gave birth to a 7-pound son in a local hospital. The mother and father do not like the publicity and sue the newspaper for invasion of privacy. The attorney for the parents finds a precedent, *Barber v. Time*,² in which a Missouri court ruled that to photograph a patient in a hospital room against her will and then to publish that picture in a newsmagazine is an **invasion of privacy**.

Does the existence of this precedent mean that the young couple will automatically win this lawsuit? Must the court follow and adopt the *Barber* decision? The answer to both questions is no. For one thing, there may be other cases in which courts have ruled that publishing

*Appellate courts (see page 17) often render decisions that decide only the particular case and do not establish binding precedent. Courts refer to these as “unpublished decisions.” In some jurisdictions it is unlawful for a lawyer to cite these rulings in legal papers submitted in later cases.

2. 159 S.W. 2d 291 (1942).

FOUR OPTIONS FOR HANDLING PRECEDENT

1. Accept/Follow
2. Modify/Update
3. Distinguish
4. Overrule

such a picture is not an invasion of privacy. In fact, in 1956 in the case of *Meetze v. AP*³ a South Carolina court made such a ruling. But for the moment assume that *Barber v. Time* is the only precedent. Is the court bound by this precedent? No. The court has several options concerning the 1942 decision.

First, it can *accept* the precedent as law and rule that the newspaper has invaded the privacy of the couple by publishing the picture and story about the birth of their child. When a court accepts a prior court ruling as precedent, it is adopting it and following it for guidance. Second, the court can *modify*, or change, the 1942 precedent by arguing that *Barber v. Time* was decided 72 years ago when people were more sensitive about going to a hospital, since a stay there was often considered to reflect badly on a patient. Today hospitalization is no longer a sensitive matter to most people. Therefore, a rule of law restricting the publication of a picture of a hospital patient is unrealistic, unless the picture is in bad taste or needlessly embarrasses the patient. Then the publication may be an invasion of privacy. In our imaginary case, then, the decision turns on what kind of picture and story the newspaper published: a pleasant picture that flattered the couple or one that mocked and embarrassed them? If the court rules in this manner, it *modifies* the 1942 precedent, making it correspond to what the judge perceives to be contemporary sensibilities and circumstances.

As a third option the court can decide that *Barber v. Time* provides an important precedent for a plaintiff hospitalized because of an unusual disease—as Dorothy Barber was—but that in the case before the court, the plaintiff was hospitalized to give birth to a baby, a different situation: Giving birth is a voluntary status; catching a disease is not. Because the two cases present different problems, they are really different cases. Hence, the *Barber v. Time* precedent does not apply. This practice is called *distinguishing the precedent from the current case*, a very common action. In brief, a court can distinguish a prior case (and therefore choose not to accept it and not to follow it) because it involves either different facts or different issues from the current case.

Finally, the court can *overrule* the precedent. When a court overrules precedent, it declares the prior decision wrong and thus no longer the law. Courts generally overrule prior opinions as bad law only when there are changes in:

1. factual knowledge and circumstances;
2. social mores and values; and/or
3. judges/justices on the court.

3. 95 S.E. 2d 606 (1956).

For instance, in 2003 the U.S. Supreme Court in *Lawrence v. Texas*⁴ overruled its 1986 opinion called *Bowers v. Hardwick*⁵ that had upheld a Georgia anti-sodomy statute prohibiting certain sexual acts between consenting gay adults. By 2003, American society increasingly accepted homosexuality (evidenced then by both the dwindling number of states that prohibited the conduct referenced in *Bowers* and by at least two Supreme Court rulings subsequent to *Bowers* but before *Lawrence* that were favorable to gay rights and thus eroded *Bowers*' strength). There also was growing recognition that consenting adults, regardless of sexual orientation, should possess the constitutional, personal liberty to engage in private sexual conduct of their choosing. Furthermore, six of the nine justices on the Supreme Court had changed from 1986 to 2003. Thus, 17 years after *Bowers* was decided, there were changes in social values, legal sentiment and the court's composition. The Supreme Court in *Lawrence* therefore struck down a Texas anti-sodomy statute similar to the Georgia one it had upheld in *Bowers*. It thus overruled *Bowers*. Justice Kennedy noted that although "the doctrine of stare decisis is essential to the respect accorded to the judgments of the court and to the stability of the law," it "is not, however, an inexorable command." In the hypothetical case involving the 12-year-old girl who gave birth, the only courts that can overrule the Missouri Supreme Court's opinion in *Barber v. Time* are the Missouri Supreme Court and the U.S. Supreme Court.

In 2010, a closely divided Supreme Court in *Citizens United v. Federal Elections Commission* overruled a 1990 opinion called *Austin v. Michigan State Chamber of Commerce*. The Court in *Austin* had upheld a Michigan law banning corporations from spending money from their own treasury funds in order to create their own ads in support of, or in opposition to, any candidate in elections for state office. By 2010, the composition of the Court had shifted over 20 years and the five conservative-leaning justices (Anthony Kennedy, John Roberts, Antonin Scalia, Samuel Alito and Clarence Thomas) in *Citizens United* voted to overrule *Austin* in the process of declaring unconstitutional a federal law that prohibited corporations and unions from using their general treasury funds to make independent expenditures for speech expressly advocating for the election or defeat of a candidate for public office. In reaching this conclusion, Justice Kennedy wrote for the majority about the importance of protecting political speech, regardless of who the speaker is (a corporation, a union or the common citizen), and he concluded "that stare decisis does not compel the continued acceptance of *Austin*. The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether."

Obviously, the preceding discussion oversimplifies the judicial process. Rarely is a court confronted with only a single precedent. Indeed, as attorneys would put it, there may be several prior cases that are "on point" or may apply as precedent. And whether or not precedent is binding on a court is often an issue. For example, decisions by the Supreme Court of the United States regarding the U.S. Constitution and federal laws are binding on all federal and state courts. Decisions by the U.S. Court of Appeals on federal matters are binding only on other lower federal and state courts in that circuit or region. (See pages 25–27 for a discussion of the circuits.) The supreme court of any state is the final authority on the meaning of

4. 539 U.S. 558 (2003).

5. 478 U.S. 186 (1986).

the constitution and laws of that state, and its rulings on these matters are binding on all state and *federal* courts in that state. Matters are more complicated when federal courts interpret state laws. State courts can accept or reject these interpretations in most instances. Because mass media law is so heavily affected by the First Amendment, state judges frequently look outside their borders to precedents developed by the federal courts. A state court ruling on a question involving the First Amendment guarantees of free speech and press will be substantially guided by federal court precedents on the same subject.

Lawyers and law professors often debate how important precedent really is when a court makes a decision. Some suggested a “hunch theory” of jurisprudence: A judge decides a case based on a gut feeling of what is right and wrong and then seeks out precedents to support the decision.

Finding Common-Law Cases

Common law is not specifically written down someplace for all to see and use. It is instead contained in hundreds of thousands of decisions handed down by courts over the centuries. Many attempts have been made to summarize the law. Sir Edward Coke compiled and analyzed the precedents of common law in the early 17th century. Sir William Blackstone later expanded Coke’s work in the monumental “Commentaries on the Law of England.” More recently, in such works as the massive “Restatement of the Law, Second, of Torts,” the task was again undertaken, but on a narrower scale.

Courts began to record their decisions centuries ago. The modern concept of fully reporting written decisions of all courts probably began in 1785 with the publication of the first British Term Reports.

While scholars and lawyers still uncover common law using the case-by-case method, it is fairly easy today to locate the appropriate cases through a simple system of citation. The cases of a single court (such as the U.S. Supreme Court or the federal district courts) are collected in a single **case reporter** (such as the “United States Reports” or the “Federal Supplement”). The cases are collected chronologically and fill many volumes. Each case collected has its individual **citation**, or identification number, which reflects the name of the reporter in which the case can be found, the volume of that reporter, and the page on which the case begins (Figure 1.1). For example, the citation for the decision in *Adderly v. Florida* (a freedom-of-speech case) is 385 U.S. 39 (1966). The letters in the middle (U.S.) indicate that the case is in the “United States Reports,” the official government reporter for cases decided by the Supreme Court of the United States. The number 385 refers to the specific volume of the “United States Reports” in which the case is found. The second number (39) gives the page on which the case appears. Finally, 1966 provides the year in which the case was decided. So, *Adderly v. Florida* can be found on page 39 of volume 385 of the “United States Reports.”

Computers affected the legal community in many ways. Court opinions are now available via a variety of online services. For instance, two legal databases attorneys often use and that frequently are available free to students at colleges and universities are LexisNexis and Westlaw. These databases provide access to court opinions, statutory law (see pages 9–10) and law journal articles. In most jurisdictions, lawyers may file documents electronically with the court.

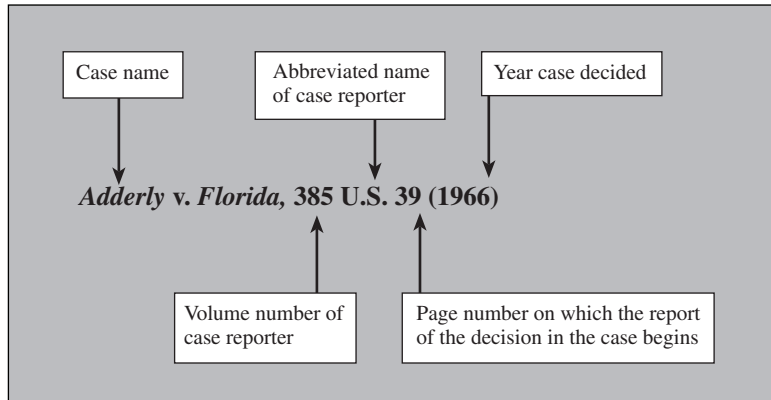


FIGURE 1.1

Reading a case citation.

If you have the correct citation, you can easily find any case you seek. Locating all citations of the cases apropos to a particular problem—such as a libel suit—is a different matter and is a technique taught in law schools. A great many legal encyclopedias, digests, compilations of common law, books and articles are used by lawyers to track down the names and citations of the appropriate cases.

TYPICAL REMEDIES IN EQUITY LAW

1. Temporary restraining order (TRO)
2. Preliminary injunction
3. Permanent injunction

EQUITY LAW

Equity is another kind of judge-made law. The distinction today between common law and equity law has blurred. The cases are heard by the same judges in the same courtrooms. Differences in procedures and remedies are all that is left to distinguish these two categories of the law. Separate consideration of common law and equity leads to a better understanding of both, however. Equity was originally a supplement to the common law and developed side by side with common law.

The rules and procedures under equity are far more flexible than those under common law. Equity really begins where common law leaves off. Equity suits are never tried before a jury. Rulings come in the form of **judicial decrees**, not in judgments of yes or no. Decisions in equity are (and were) discretionary on the part of judges. And despite the fact that precedents are also relied upon in the law of equity, judges are free to do what they think is right and fair in a specific case.

Equity provides another advantage for troubled litigants—the restraining order. While the typical remedy in a civil lawsuit in common law is **damages** (money), equity allows a

judge to issue orders that can either be preventive (prohibiting a party from engaging in a potential behavior it is considering) or remedial (compelling a party to stop doing something it currently is doing). Individuals who can demonstrate that they are in peril or are about to suffer a serious irreparable wrong can usually gain a legal writ such as an injunction or a restraining order to stop someone from doing something. Generally, a court issues a temporary restraining order or preliminary injunction until it can hear arguments from both parties in the dispute and decide whether an injunction should be made permanent.

For instance, in March 2013 a New York judge issued a temporary restraining order (TRO) stopping Lifetime cable channel from airing a movie called “Romeo Killer: The Christopher Porco Story.” The injunction came just four days before the movie was slated to premiere. According to Lifetime, the movie was inspired by a true story—the conviction of Christopher Porco for murdering his father and attacking his mother with an axe in Delmar, New York. Although now behind bars, Porco sued Lifetime, seeking a judicial decree stopping the movie’s broadcast. He claimed the movie violated his right of publicity (see Chapter 7 regarding the right of publicity). Such injunctions—even TROs, which are brief in time, as the word “temporary” suggests—stopping the dissemination of truthful speech about a newsworthy matter (a murder) presumptively violate the First Amendment (see Chapter 2 regarding prior restraints). Furthermore, newsworthiness is a defense against right-of-publicity lawsuits (see Chapter 7). Lifetime thus sought and successfully obtained an emergency order from an appellate court vacating the TRO and allowing the movie to air.

On the other hand, equitable remedies in the form of injunctions are more likely to be granted in copyright cases where the plaintiff can demonstrate the defendant is selling copyrighted material owned by the plaintiff (see Chapter 14 regarding copyright). Universal Studios, which owns the movie rights to the “50 Shades of Grey” book series, sought an injunction in 2013 against an adult-movie company called Smash Pictures to stop the distribution of a movie called “Fifty Shades of Grey: A XXX Adaptation.” While parodies that make fun of or comment on the original work often are protected against copyright claims, this porn parody copied many lines from the book nearly verbatim and simply claimed to be a hard-core version of the book. The case ultimately settled, with Smash Pictures consenting to a permanent injunction prohibiting the distribution of its parody.

Ultimately, a party seeks an equitable remedy (a restraining order or injunction) if there is a real threat of a direct, immediate and irreparable injury for which monetary damages won’t provide sufficient compensation.



WRESTLING WITH INJUNCTIONS: THE HULK HOGAN SEX TAPE

In April 2013, former wrestler and reality TV star Hulk Hogan (real name Terry Gene Bollea) was granted a temporary restraining order (TRO) by a Florida judge requiring Gawker to take down a brief clip from a 30-minute sex tape and barring Gawker and its affiliated sites from posting other excerpts. The tape purportedly shows Hogan having sex with Heather Clem in a canopy bed.

While Gawker removed the tape from its site in light of the TRO, it left up a lengthy narrative of the action, asserting it was newsworthy because Hogan is a famous public person. As Gawker's John Cook wrote in response to the TRO, "the Constitution does unambiguously accord us the right to publish true things about public figures." The failure to follow a judicial order like a TRO, however, can place an entity like Gawker in contempt of court, subjecting it to fines.

With more and more celebrities becoming "accidental porn stars" due to the leaking or stealing of their sex tapes, one can safely bet that there will be more cases like Hogan's in the near future. In this particular case, Judge Pamela Campbell proved—even if just temporarily—to be Hogan's hero.

STATUTORY LAW

While common law sometimes is referred to as discovered or judge-made law, the third great source of laws in the United States today is created by elected legislative bodies at the local, state and federal levels and is known as statutory law.

Several important characteristics of statutory law are best understood by contrasting them with common law. First, **statutes** tend to deal with problems affecting society or large groups of people, in contrast to common law, which usually deals with smaller, individual problems. (Some common-law rulings affect large groups of people, but this occurrence is rare.) It should also be noted in this connection the importance of not confusing common law with constitutional law. Certainly when judges interpret a constitution, they make policy that affects us all. However, it should be kept in mind that a constitution is a legislative document voted on by the people and is not discovered law or judge-made law.

Second, statutory law can anticipate problems, and common law cannot. For example, a state legislature can pass a statute that prohibits publication of the school records of a student without prior consent of the student. Under common law the problem cannot be resolved until a student's record has been published in a newspaper or transmitted over the Internet and the student brings action against the publisher to recover damages for the injury incurred.

Third, the criminal laws in the United States are all statutory laws—common-law crimes no longer exist in this country and have not since 1812. Common-law rules are not precise enough to provide the kind of notice needed to protect a criminal defendant's right to due process of law.

Fourth, statutory law is collected in codes and law books, instead of in reports as is common law. When a bill is adopted by the legislative branch and approved by the executive branch, it becomes law and is integrated into the proper section of a municipal code, a state code or whatever. However, this does not mean that some very important statutory law cannot be found in the case reporters.

Passage of a law is rarely the final word. Courts become involved in determining what that law means. Although a properly constructed statute sometimes needs little interpretation by the courts, judges are frequently called upon to rule on the exact meaning of ambiguous phrases and words. The resulting process of judicial interpretation is called **statutory construction** and is very important. Even the simplest kind of statement often needs interpretation. For example, a statute that declares "*it is illegal to distribute a violent video game to minors* [emphasis added]" is fraught with ambiguities that a court must construe and resolve

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