Twenty-Second Edition

MASS MEDIA LAW

Clay Calvert | Dan V. Kozlowski | Derigan Silver

Mc Graw Hill

Mass Media Law

22nd Edition

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PREFACE

All college students in the United States today are directly affected by multiple forms of media, from television to Twitter. Furthermore, as potential voters, they also play a vital role in a democratic society. That's why college students should understand not only essential principles of media law but also fundamental tenets of the First Amendment freedoms of speech, press and assembly. From high-profile defamation lawsuits involving public officials to journalists' battles for access to government information, and from the publicity rights of celebrities (and now college student-athletes) to the regulation of broadcasting by the Federal Communications Commission and false advertising by the Federal Trade Commission, the always-evolving legal landscape is captured here in the 22nd edition of *Mass Media Law*.

A fun, but challenging, aspect of keeping a media law textbook fresh is that new cases, controversies and statutes affecting media law and the First Amendment constantly arise. The authors have done their best to make this new edition timely, relevant and helpful to undergraduates across the communication fields of advertising, journalism, media studies, public relations and telecommunications. They have added new examples from all areas of media, communications and First Amendment law to make the book appealing to a wide range of professors and students.

All 16 chapters have been updated with new information and examples. A few highlights of the new material include: content in Chapter 2 regarding the First Amendment right to peaceably assemble (a right crucial during protests across the nation in 2020); an in-depth analysis in Chapter 3 of a 2021 decision by the U.S. Supreme Court affecting the off-campus speech rights of public high school students (*Mahanoy Area School District* v. *B.L.*); descriptions in Chapter 4 of defamation lawsuits involving CNN, *The Washington Post,* Rudy Giuliani, Congressman Devin Nunes and MAGA hat-wearing student Nicholas Sandmann; a discussion in Chapter 9 about covering and recording protests and police, with examples of the dangers (both legal and physical) journalists faced from law enforcement while covering protests following George Floyd's murder in 2020; and a review in Chapter 16 of the U.S. Supreme Court's 2021 ruling in *FCC* v. *Prometheus Radio Project* affecting ownership rules for television stations, radio stations and newspapers.

The 22nd edition of *Mass Media Law* is now available online with Connect, McGraw Hill Education's integrated assignment and assessment platform. Connect also offers SmartBook for the new edition, which is the first adaptive reading experience proven to improve grades and help students study more effectively. All of the title's Web site and ancillary content is also available through Connect, including the following:

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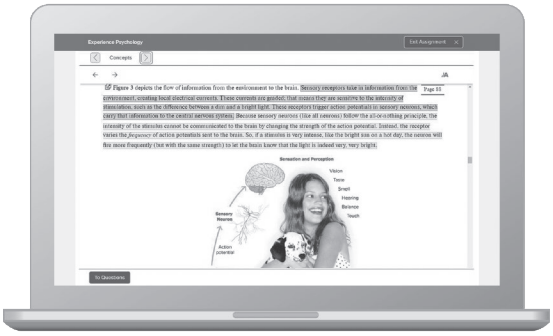

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ACKNOWLEDGMENTS

Clay Calvert lauds his co-authors for continuing to improve the quality of the textbook in its 22nd edition. Much has changed in the world of media and communications law since Don R. Pember, an expert on privacy and a professor at the University of Washington, authored the very first edition of this book by himself more than four decades ago. Dan Kozlowski and Derigan Silver are vigilant in their efforts both to keep the content fresh and to expand it to accommodate not only new legal developments but also students' interests across the various disciplines of communication beyond journalism. Clay, who now has co-authored nine editions of *Mass Media Law,* also thanks his undergraduates in the College of Journalism and Communications at the University of Florida for their enthusiasm in his Law of Mass Communication classes. Finally, Clay recognizes Berl Brechner for his faithful support of both Clay's own work and that of the Marion B. Brechner First Amendment Project.

Dan Kozlowski is grateful for the guidance Clay Calvert provided throughout the writing of this edition. Clay's expertise in the media law field and his experience as an author on this textbook for years are instrumental to the book's success. Working with Clay and Derigan Silver—both talented scholars and good teachers—on the book is fun and rewarding. Dan also thanks his wife and two daughters for being awesome and for helping to keep him levelheaded.

Derigan Silver thanks Clay for inviting himself and Dan to work on this textbook many years ago and for staying on as a co-author. He would also like to thank Dan and Clay for their keen eyes and attention to details as well as their thoughtful approach to updating the book. They are much better writers than he is, and he appreciates their editing. He also wants to thank the professors who send in edits and updates to the authors. Their help keeping our work accurate and fresh is invaluable. Derigan also thanks his wife, Alison, and his four children, for putting up with him.

Finally, all three authors greatly appreciate the support of McGraw Hill and the multiple individuals there who assisted with the publication of this book.

SELECTED EXAMPLES OF NEW, EXPANDED OR UPDATED MATERIAL

Chapter 1: The American Legal System

- New examples of equity law, including the Justice Department's efforts to block former national security adviser John Bolton from publishing a memoir about his time in the Trump White House
- New case that illustrates the void for vagueness doctrine
- New discussion of how the U.S. Supreme Court shifted oral arguments to telephone conference calls during the COVID-19 pandemic
- New discussion of Justice Ruth Bader Ginsburg's death in 2020 and Amy Coney Barrett's subsequent confirmation

Chapter 2: The First Amendment: The Meaning of Freedom

- New examples are provided on self-censorship or community censorship, including the ramifications country music star Morgan Wallen faced after he used a racial slur
- New discussion of the Assembly Clause's role in protecting the right to peacefully protest

Chapter 3: The First Amendment: Contemporary Problems

- New analysis of the U.S. Supreme Court's 2021 ruling in *Mahanoy Area School District* v. *B.L.* affecting off-campus student speech rights in "The First Amendment in Schools"
- New content regarding theft of college newspapers and threats to the funding of college newspapers
- New material regarding former President Donald Trump's blocking of people on Twitter and the related case of *Knight First Amendment Institute* v. *Trump*, including the U.S. Supreme Court's 2021 decision vacating an earlier ruling against Trump by the 2nd U.S. Circuit Court of Appeals

Chapter 4: Defamation: Establishing a Case

- Updates on the various defamation lawsuits filed in the last three years, including cases involving CNN, Tucker Carlson, *The Washington Post,* Rudy Giuliani and Congressman Devin Nunes
- Updated and expanded section on anti-SLAPP laws, including a discussion of new anti-SLAPP legislation in multiple states and a discussion of whether state anti-SLAPP laws apply in federal courts
- New discussion of the various Nicholas Sandmann defamation lawsuits and the various legal issues brought up by the situation
- New example of libel proof plaintiffs

Chapter 5: Defamation: Proof of Fault

- New section on the direct state-of-mind evidence that can be gathered from journalists during a defamation trial
- New examples of when sub-standard reporting does not equal actual malice in lawsuits against media plaintiffs
- New example of how allegedly defamatory statements must be "germane" to the public controversy in defamation suits involving limited-purpose public figures

Chapter 6: Defamation: Defenses and Damages

- An updated and expanded discussion of when the fair report privilege applies to government documents and when it does not
- A new section about Alan Dershowitz's lawsuit against CNN discussing when qualified privilege does not apply because the report is not fair and balanced even if it is based on government proceedings
- A new example of a retraction request letter

Chapter 7: Invasion of Privacy: Appropriation and Intrusion

- An expanded discussion of the "transformative use" defense in right to publicity cases, including several examples from video games
- New examples of lawsuits involving the right to publicity and updates to cases that were included in previous editions for the textbook, including cases involving Cardi B, Ariana Grande and Bobby Brown
- New examples of what does—and does not—constitute a plaintiff's "identity" in appropriation cases
- Updates on federal cases involving so-called "ag-gag" laws

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

- New example of how newsworthy events cannot be the subject of lawsuits for publication of embarrassing private facts
- New examples of recent lawsuits for intentional infliction of emotional distress

Chapter 9: Gathering Information: People, Places, Records and Recordings

- New discussion of a 2021 appeals court case involving when public officials can bar particular media outlets from accessing press events
- New section focused on covering and recording protests and police, with examples of the dangers (legal and physical) journalists faced from law enforcement while covering protests following George Floyd's murder in 2020.
- New discussion of the U.S. Supreme Court's 2021 decision in *U.S. Fish and Wildlife Service* v. *Sierra Club*

Chapter 10: Protection of News Sources/Contempt Power

- New discussion of a state court ruling that Florida's shield law did not protect CNN from providing copies of emails and text messages as part of a libel lawsuit against the network
- New discussion of a Nevada Supreme Court ruling that its state shield law protected bloggers
- New content addressing the Department of Justice's revised guidelines for when federal prosecutors can subpoena reporters

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

- New section on juror instructions for use of social media during and after trials

Chapter 12: Free Press–Fair Trial: Closed Judicial Proceedings

- Update on R. Kelly's 2021 trial and instructions given to journalists covering the trial
- Update on Harvey Weinstein's request to close his 2021 trial
- New section on a series of lawsuits brought by Courthouse News Services arguing the First Amendment guarantees immediate access to court documents when they are filed with a court

Chapter 13: Regulation of Obscene and Other Erotic Material

- New examples of convictions for distributing and possessing child pornography via the Internet and smartphones
- New content on the controversy surrounding the movie "Cuties"
- New section focused on nonconsensual pornography laws, including discussion of recent state court rulings that have upheld these laws against First Amendment challenges

Chapter 14: Copyright and Trademark

- New section expanding the discussion of "genericism" and trademarks
- Update to the section on copyright and tattoos on avatars in videogames
- New discussion of the ability of journalists to use photos taken by others in news stories under the Fair Use Doctrine. The discussion shows that a news use is not automatically protected under Fair Use.

Chapter 15: Regulation of Advertising

- New discussion of the U.S. Supreme Court's 2021 decision in *AMG Capital Management* v. *FTC*
- New examples of FTC enforcement actions against deceptive advertising
- New content about a $170 million fine that Google paid to settle allegations that YouTube violated the Children's Online Privacy Protection Act

Chapter 16: Telecommunications Regulation

- New content on the U.S. Supreme Court's 2021 decision in *FCC* v. *Prometheus Radio Project*
- New discussion of a 2021 appeals court case striking down a state's attempt to break up bundled cable subscription packages
- Updated discussion of the FCC's efforts to close the divide between those who have access to broadband Internet service and those who don't

CHAPTER 1

The American Legal System

Jill Braaten/McGraw Hill

Before studying 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 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; common law; the law of equity; 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.

* Terms in boldfaced type are defined in the glossary.
1. Abraham, *Judicial Process*.

Initially, the customs of the people were used by the king's courts as the foundation of the law, disputes were resolved according 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.

Common law thus sometimes is known as judge-made law.

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. As Chief Justice of the United States John Roberts explained in 2020, the principle of stare decisis "is grounded in a basic humility that recognizes today's legal issues are often not so different from the questions of yesterday and that we are not the first ones to try to answer them."[2] 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.

Stare decisis is the key phrase: Let the decision stand.

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

*Appellate courts (see page 19) 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. *June Medical Services* v. *Russo,* 140 S. Ct. 2103 (2020) (Roberts, J., concurring in the judgment).

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,*[3] 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.**

FOUR OPTIONS FOR HANDLING PRECEDENT

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

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 such a picture is not an invasion of privacy. In fact, in 1956 in the case of *Meetze* v. *AP,*[4] 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 more than 75 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's 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

3. 159 S.W. 2d 291 (1942).
4. 95 S.E. 2d 606 (1956).

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.

For instance, in 2003 the U.S. Supreme Court in *Lawrence* v. *Texas*[5] overruled its 1986 opinion called *Bowers* v. *Hardwick*[6] 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 Anthony 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 2018, a closely divided Supreme Court in *Janus* v. *American Federation of State, County & Municipal Employees*[7] overruled a 1977 opinion called *Abood* v. *Detroit Board of Education*.[8] The Court in *Abood* had upheld a Michigan law authorizing a system for union representation of government employees. Under the system, a union and a local government employer could agree to an "agency shop" arrangement "whereby every employee represented by a union—even though not a union member—must pay to the union . . . a service fee equal in amount to union dues." It was constitutional, the Court said in *Abood*, to require nonmembers to help pay for a union's collective bargaining efforts in order to ensure "labor peace."

But in *Janus*, the five conservative-leaning justices on the Court at the time (Kennedy, John Roberts, Samuel Alito, Clarence Thomas and Neil Gorsuch) ruled that a similar arrangement in Illinois was unconstitutional. In the case, Mark Janus, who

5. 539 U.S. 558 (2003).
6. 478 U.S. 186 (1986).
7. 138 S. Ct. 2448 (2018).
8. 431 U.S. 209 (1977).

worked as a child support specialist for the Illinois Department of Healthcare and Family Services, refused to join the union that represented the public employees in his unit. He did not agree with the union's positions, and he said that, if he had the choice, he would not pay any fees or subsidize the union in any way. Under a collective-bargaining agreement, though, he was nevertheless required to pay an agency fee of $44.58 per month.

Writing for the majority in *Janus*, Justice Alito ruled, "Under Illinois law, public employees are forced to subsidize a union, even if they choose not to join and strongly object to the positions the union takes in collective bargaining and related activities. We conclude that this arrangement violates the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern." Justice Alito noted that, in general, stare decisis is the preferred course and that the Court "will not overturn a past decision unless there are strong grounds for doing so." But in this case, he wrote, "*Abood* was poorly reasoned. It has led to practical problems and abuse. It is inconsistent with other First Amendment cases and has been undermined by more recent decisions."

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 28–30 for a discussion of the circuits.) The supreme court of any state is the final authority on the meaning of 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 have 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. These decisions are called "opinions" in legal parlance. 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."

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 10–12) and law journal articles. In most jurisdictions, lawyers may file documents electronically with the court.

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.

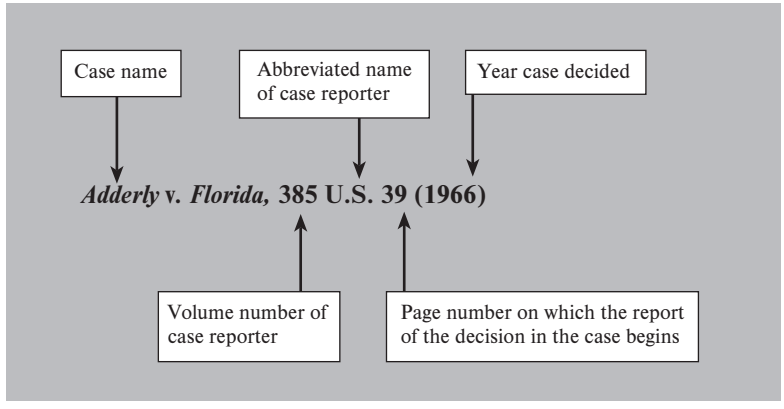

FIGURE 1.1

Reading a case citation.

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 irremediable 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.

In 2020, the Justice Department and the U.S. attorney's office in Washington, D.C. filed a breach-of-contract lawsuit against former national security adviser John Bolton. The lawsuit sought a preliminary injunction to enjoin, or stop, Bolton from publishing a memoir about his time in the Trump White House. The lawsuit alleged that Bolton had prematurely halted a prepublication review process and that his book, *The Room Where It Happened,* contained classified information that could compromise national security.

But a federal judge denied the preliminary injunction in *United States of America* v. *Bolton*. The judge, Royce C. Lamberth of the U.S. District Court for the District of Columbia, ruled that the preliminary injunction would have been ineffective in stopping the alleged harm to national security that the book might cause. At the time of the lawsuit, the book had already been printed, bound and shipped to booksellers around the world, and reviews and excerpts of the book were already widely available online.

Judge Lamberth thus wrote, "With hundreds of thousands of copies around the globe—many in newsrooms—the damage is done. There is no restoring the status quo." In other words, the judge denied the preliminary injunction because he determined that issuing an injunction at that point would have been useless. A judge generally won't grant an injunction if the injunction won't do any good or if the judge perceives it to be futile.

YOU CAN'T SAY THAT AGAIN!: ENJOINING DEFAMATION

As discussed in Chapters 4, 5 and 6, when a speaker publishes something defamatory about another person—a false statement of fact that damages that person's reputation—the traditional legal recourse in the United States is a lawsuit for defamation, with the defamed party receiving monetary damages from the defendant. But as Professor David Ardia has argued, the Internet has brought increased attention to the adequacy of monetary damages as the only remedy for defamation. Today, defamation cases are increasingly arising from online speech, with plaintiffs claiming speech published by bloggers or users of social media defames them. Rather than seek monetary damages to compensate themselves or to punish the defendants, some of the plaintiffs in these cases have instead sought to have the speech stopped altogether using injunctions. Alarmingly, some courts have been willing to grant injunctions that bar—or forbid—speakers from repeating their defamatory comments.

For instance, a district court in Indiana issued a permanent injunction that would have prevented an Indiana man and a former religious sister from repeating blog comments they had made in what amounted to an online smear campaign. The blog comments came in the midst of a dispute over who was entitled to the documents and artifacts of a religious sister who had experienced a series of apparitions of the Virgin Mary. The particulars of the case were messy, but, ultimately, the district court permanently enjoined the defendants from repeating several specific comments—even though the jury had not ruled that those specific comments were defamatory—as well as "any similar statements that contain the same sort of allegations or inferences, in any manner or forum."

On appeal, the 7th U.S. Circuit Court of Appeals struck down the injunction as unconstitutional. In *McCarthy* v. *Fuller*, the 7th Circuit said the injunction was a "patent violation of the First Amendment" because it was "so broad and vague" that it threatened to silence the defendants completely. Although this particular injunction was poorly crafted and thus problematic, the court left open the question of whether defamation could *ever* be enjoined.

In another example, in May 2020 a North Carolina trial court denied a request for a preliminary injunction meant to prevent allegedly defamatory statements. The defendants in the case sought to enjoin ongoing and future speech they claimed was defamatory, including censoring a Web site and Facebook page, before a full trial on the merits of their claims had taken place. In denying the motion in *Ford* v. *Jurgens*, the judge noted, "Many courts have recognized the difficulty in designing a restraint on unlawful speech that does not also chill protected speech."