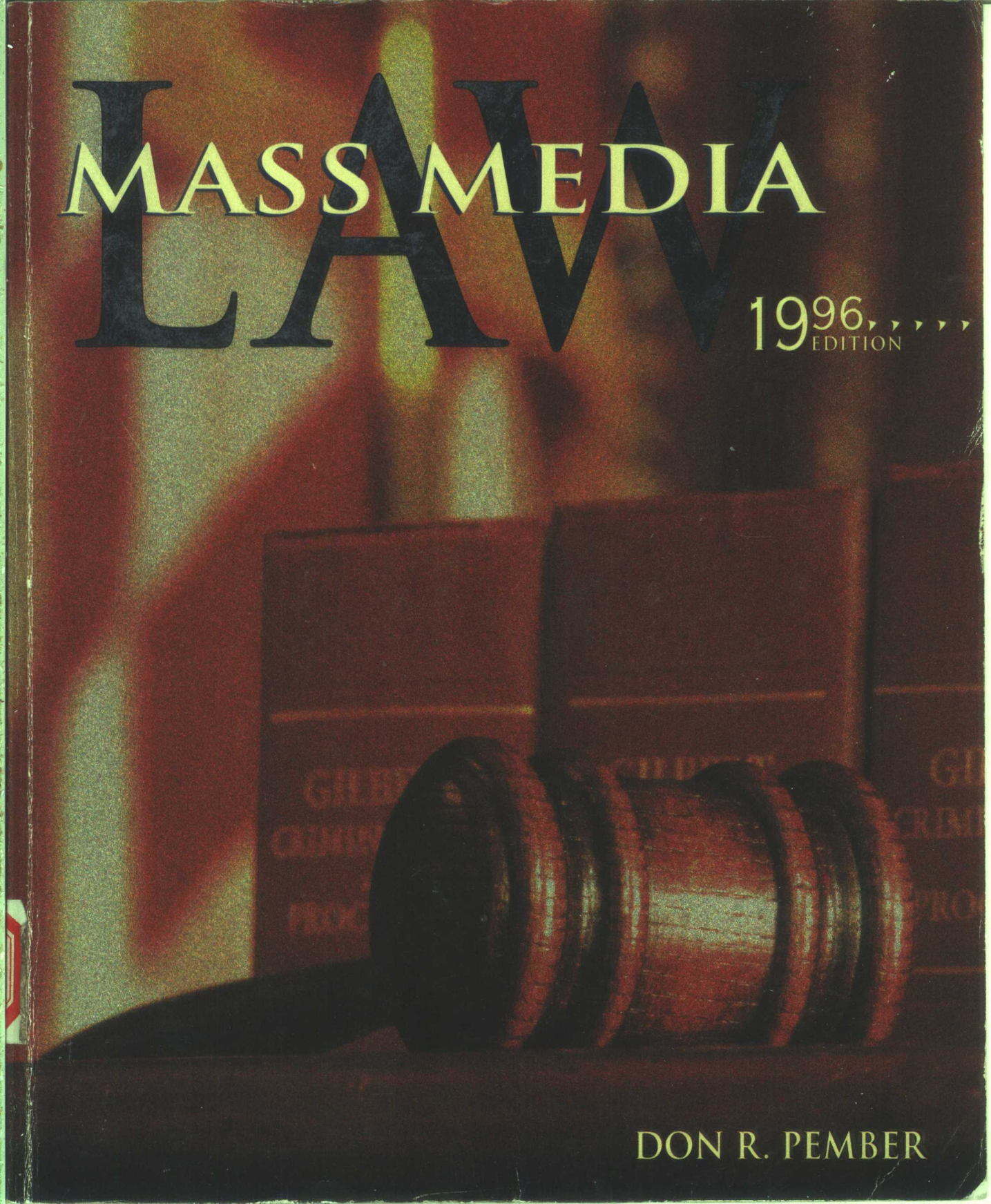
MASS MEDIA LAW

1996 EDITION



DON R. PEMBER

MASS MEDIA LAW

1996 EDITION

DON R. PEMBER

University of Washington

Brown & Benchmark
PUBLISHERS

Madison Dubuque, IA Guilford, CT Chicago Toronto London
Caracas Mexico City Buenos Aires Madrid Bogota Sydney

Preface

Preparing a book on mass communications law has always been a daunting task. In each of the preceding six editions of this book I have had to deal with the myriad of diverse subjects related to media law and the fact that sometimes the law changes so rapidly that even parts of a revised book may be out-of-date by the time copies of the text arrive in the bookstore. This new seventh edition, or what we are calling the 1996 edition, was even more difficult than the previous six for several reasons.

More and more Americans are starting to use some lanes of the new information superhighways for communication. Legal problems are beginning to arise; problems relating to libel, copyright, access to records, and especially pornography. Unfortunately, current laws are not well suited to properly resolve some of these issues, forcing the courts and others in the legal community to struggle to devise solutions to these problems. The tentative beginnings of this new law emerge in this book, but it has been difficult to predict in which ways this law will develop.

A major political upheaval in the Congressional elections of 1994 has given a new set of players control of the government, and massive new initiatives are being forged in the Congress, many of which relate to communications. Before the end of the summer of 1995 there may be new telecommunications legislation that substantially changes the regulation of broadcasting and cable television. Laws relating to erotic material transmitted via the Internet and other electronic transmission systems are being considered. New efforts have been put forth to try to amend the United States Constitution to prohibit flag burning. The bombing in Oklahoma City and subsequent revelations about the size and power of right-wing militia organizations engendered calls for tougher sedition laws and a crackdown on talk radio programs. For these and other reasons no previous edition of *Mass Media Law* has gone to the printer with so many issues seemingly unresolved. There is a massive amount of new material in this edition, but we must still pay close attention to newspapers, magazines, and other sources to see how many of these evolving changes are played out.

The new content represents only one change in the 1996 edition. There are other substantial changes as well. The book has been shortened slightly and reorganized. The twelve chapters of the sixth edition have become eighteen chapters in this edition. Brown & Benchmark Publishers has succeeded in producing a brighter, cleaner book with more graphics and other art. The 1996 edition is being published in a paper-cover format and costs less. And instructors will find a greatly enhanced Instructor's Manual with computerized test capabilities available for the asking. Finally, this edition is the first annual edition of *Mass Media Law*. From now on a new edition of the book will be published annually. The text will contain the most up-to-date material possible, without the need for the annual updates which have been published for the past six years. New publishing technology makes it possible for me to add material to the book up to about seven weeks before it is in the bookstores. I hope you find the changes useful and to your liking. I always appreciate hearing from both students and faculty who use the book, and welcome their ideas for changes that would improve the text.

While there is only a single author listed, without the help of many other people the book would not have been completed. The crew at Brown & Benchmark Publishers outdid themselves in providing me with extraordinary support. Thanks go to Kassi Radomski, Jayne Klein, Karen Dorman, and Stan Stoga. I also want to thank my colleagues for their help in preparation of the manuscript: George Bohrer, *Fitchburg State College;* Linda Lotridge Levin, *University of Rhode Island;* Whitney Mundt, *Louisiana State University;* Paul Shaffer, *Austin Peay State University;* Joseph Spevak, *San Diego State University;* and John Wellman, *Southeastern Louisiana University*. Special thanks to now Dean Jeremy Cohen for completion of another Student Study Guide, a difficult chore in normal times but one made a bit more challenging as he undertook a new job at Penn State University. Finally, my deepest love and gratitude go to my wife Diann, who acted as a copy editor and proofreader on the manuscript. More importantly, however, she designed and produced (with both the help and hindrance of our Macintosh desktop system) the Instructors Manual. Without all of these people, and especially Diann, the 1996 edition of *Mass Media Law* would still be a stack of papers in my "out" basket.

Don R. Pember
Seattle, Washington
July 20, 1995

BILL OF RIGHTS
FIRST 10 AMENDMENTS TO THE CONSTITUTION

Article I

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

Article II

A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

Article III

No soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Article IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Article VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Article VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Article VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Article IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Article X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The first 10 Amendments (Bill of Rights) were adopted in 1791.

CONTENTS

THE AMERICAN LEGAL SYSTEM 1

Before a physician can study surgery, he or she needs to study anatomy. So it is with the study of mass media law. Before a study of this narrow aspect of American law is undertaken, a student must first have a general background in the law and in the operation of the judicial system. That is the purpose of this short chapter.

Probably no nation is more closely tied to the law than the American Republic. From the 1770s, when in the midst of a war of revolution we attempted to legally justify our separation from the motherland, to the 1990s, when citizens of the nation attempt to resolve weighty moral, political, social, and environmental problems through the judicial process, and during the more than 200 years between, the American people have showed a remarkable faith in the law. One could write a surprisingly accurate history of this nation using reports of court decisions as the only source. Not that what happens in the courts reflects everything that happens in the nation; but as has been observed by Alexis de Tocqueville and others, political issues in the United States often end up as legal disputes. Beginning with the sedition cases in the late 1790s, which reflected the political turmoil of that era, one could chart the history of the United States from adolescence to maturity. As the frontier expanded in the 19th century, citizens used the courts to argue land claims and boundary problems. Civil rights litigation in both the mid-19th and mid-20th centuries reflects a people attempting to cope with racial and ethnic diversity. Industrialization brought labor unions, workers' compensation laws, and child labor laws, all of which resulted in controversies that found their way into the courts. As mass production developed and large manufacturers began to create most of the consumer goods used, judges and juries had to cope with new laws on product safety, honesty in advertising, and consumer complaints.

Americans have protested nearly every war the nation has fought—including the Revolutionary War. The record of these protests is contained in scores of court decisions. Prohibition and the crime of the '20s and the economic woes of the '30s both left residue in the law. In the United States, as in most other societies, law is a basic part of existence, as necessary for the survival of civilization as are economic systems, political systems, mass communication systems, cultural achievement, and the family.

This chapter has two purposes: to acquaint readers with the law and to present a brief outline of the legal system in the United States. While this is not designed to be a comprehensive course in law and the judicial system—such material can better be studied in depth in an undergraduate political science course—it does provide sufficient introduction to understand the remaining 17 chapters of the book.

The chapter opens with a discussion of the law, giving consideration to the five most important sources of the law in the United States, and 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 are started and proceed through the courts are included in the discussion of the judicial system.

SOURCES OF THE LAW

There are almost as many definitions of law as there are people who study the law. Some people say that law is any social norm or any organized or ritualized method of settling disputes. Most writers on the subject insist that it is a bit more complex, that some system of sanctions is required before law exists. 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, has suggested that law is really social engineering—the attempt to order the way people behave. For the purposes of this book, it is probably more helpful to consider the 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.

Scholars still debate the genesis of "the law." A question that is more meaningful and easier to answer is: What is the source of American law? There are really five major sources of the law in the United States: the Constitution, the common law, the law of equity, the statutory law, and the rulings of various executive and administrative bodies and agencies. Historically, we can 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 in the United States, our federal Constitution is the supreme law of the land. Yet when each of these five sources of law is considered separately, it is more useful to begin with the earliest source of Anglo-American law, the common law.

THE COMMON LAW

The **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 the common law. It was also called the 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 to community custom, and governmental sanction was applied to enforce the resolution. As such, the common law was, and still is, considered "discovered law." When a problem arises, the court's task is to find or discover the proper solution, to seek the common custom of the people. The judge doesn't create the law; he or she merely finds it, much like a miner finds gold or silver.

This, at least, is the theory of the common law. Perhaps at one point judges themselves believed that they were merely discovering the law when they handed down decisions. 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 the common law reflected not so much the custom of the land as the custom of the court—or more properly, the custom of the 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.

1. Abraham, *Judicial Process.*

This common-law system was the perfect system for the American colonies. Like most Anglo-Saxon institutions, it was a very pragmatic system aimed at settling real problems, not at expounding abstract and intellectually satisfying theories. The common law is an inductive system of law in which a legal rule is arrived at after consideration of a great number of cases. (In a deductive system the rules are expounded first and then the court decides the legal situation under the existing rule.) Colonial America was a land of new problems for British and other settlers. The old law frequently did not work. But the common law easily accommodated the new environment. The ability of the common law to adapt to change is directly responsible for its longevity.

Fundamental to the 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. When Barry Goldwater sued publisher Ralph Ginzburg for publishing charges that the conservative Republican senator was mentally ill, the judge most certainly looked to past decisions to discover whether in previous cases such a charge had been considered defamatory or libelous. There are ample precedents for ruling that a published charge that a person is mentally ill is libelous, and Senator Goldwater won his lawsuit.[2]

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

The Role of Precedent

At first glance one would think that the law can never change in a system that continually looks to the past. What if the first few rulings in a line of cases were bad decisions? Are we saddled with bad law forever? Fortunately, the law does not operate quite in this way. While following **precedent** is the desired state of affairs (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 the common law, judges have developed several means of coping with bad law and with new situations in which the application of old law would result in injustice.

Imagine for a moment 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*,[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.**

Does the existence of this precedent mean that the young couple will automatically win this lawsuit? that the court will follow the decision? No, it does not. 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 just 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.

2. *Goldwater* v. *Ginzburg*, 414 F. 2d 324 (1969).
3. 159 S.W. 2d 291 (1942).
4. 95 S.E. 2d 606 (1956).

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. Second, the court can *modify* or change the 1942 precedent by arguing that *Barber* v. *Time* was decided more than 50 years ago when people were more sensitive about going to a hospital, since a stay in the hospital was often considered to reflect badly on a patient, but that 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 is an invasion of privacy. If not, the publication of such a picture is permissible. 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 life.

As a third option the court can decide that *Barber* v. *Time* provides an important precedent for a plaintiff hospitalized because of 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.

Finally, the court can *overrule* the precedent. In 1941 the Supreme Court of the United States overruled a decision made by the Supreme Court in 1918 regarding the right of a judge to use what is called the **summary contempt power** (*Toledo Newspaper Co.* v. *U.S.*).[5] This is the power of a judge to charge someone with being in contempt of court, to find that person guilty of contempt, and then to punish him or her for the contempt—all without a jury trial. In *Nye* v. *U.S.*[6] the high court said that in 1918 it had been improperly informed as to the intent of a measure passed by Congress in 1831 that authorized the use of the summary power by federal judges. The 1918 ruling was therefore bad, was wrong, and was reversed. (Fuller explanation of summary contempt as it applies to the mass media is given in Chapter 11.) The only courts that can overrule the 1942 decision by the Missouri Supreme Court in *Barber* v. *Time* are the Missouri Supreme Court and the U.S. Supreme Court.

Obviously, the preceding discussion oversimplifies the judicial process. Rarely is a court confronted with only a single 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 22–24 for a discussion of the circuits.) The supreme court of any state is the final authority on 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

5. 242 U.S. 402 (1918).
6. 313 U.S. 33 (1941).