

Jeremy Cohen  
Timothy Gleason

**SOCIAL  
RESEARCH IN  
COMMUNICATION  
AND LAW**

The SAGE COMMTEXT Series

563

**SOCIAL  
RESEARCH IN  
COMMUNICATION  
AND LAW**

## The SAGE COMMTEXT Series

Series Editor:

**EVERETTE E. DENNIS**

*Gannett Center for Media Studies, Columbia University*

**Founding Editor: F. GERALD KLINE**, *late of the School of Journalism and Mass Communication, University of Minnesota*

**Founding Associate Editor: SUSAN H. EVANS**, *Annenberg School of Communications, University of Southern California*

The **SAGE CommText** series brings the substance of mass communication scholarship to student audiences by blending syntheses of current research with applied ideas in concise, moderately priced volumes. Designed for use both as supplementary readings and as "modules" with which the teacher can "create" a new text, the **SAGE CommTexts** give students a conceptual map of the field of communication and media research. Some books examine topical areas and issues; others discuss the implications of particular media; still others treat methods and tools used by communication scholars. Written by leading researchers with the student in mind, the **SAGE CommTexts** provide teachers in communication and journalism with solid supplementary materials.

### *Available in this series:*

1. TELEVISION IN AMERICA  
*George Comstock*
2. COMMUNICATION HISTORY  
*John D. Stevens and  
Hazel Dicken Garcia*
3. PRIME-TIME TELEVISION:  
Content and Control  
*Muriel G. Cantor*
4. MOVIES AS MASS COMMUNICATION,  
Second Edition  
*Garth Jowett and  
James M. Linton*
5. CONTENT ANALYSIS:  
An Introduction to Its Methodology  
*Klaus Krippendorff*
6. INTERPERSONAL COMMUNICATION:  
The Social Exchange Approach  
*Michael E. Roloff*
7. THE CARTOON:  
Communication to the Quick  
*Randall P. Harrison*
8. ADVERTISING AND SOCIAL CHANGE  
*Ronald Berman*
9. COMPARATIVE COMMUNICATION  
RESEARCH  
*Alex S. Edelstein*
10. MEDIA ANALYSIS TECHNIQUES  
*Arthur Asa Berger*
11. SHAPING THE FIRST AMENDMENT:  
The Development of Free Expression  
*John D. Stevens*
12. THE SOAP OPERA  
*Muriel G. Cantor and  
Suzanne Pingree*
13. THE DISSIDENT PRESS: Alternative  
Journalism in American History  
*Lauren Kessler*
14. TELEVISION AND CHILDREN: A Special  
Medium for a Special Audience  
*Aimée Dorr*
15. PRECISION JOURNALISM:  
A Practical Guide  
*David Pearce Demers  
and Suzanne Nichols*
16. PUBLIC RELATIONS:  
What Research Tells Us  
*John V. Pavlik*
17. NEW ELECTRONIC PATHWAYS:  
Videotex, Teletext, and  
Online Databases  
*Jerome Aumette*
18. THE TELEVISION NEWS INTERVIEW  
*Akiba A. Cohen*
19. UNDERSTANDING VIDEO:  
Applications, Impact, and Theory  
*Jarice Hanson*
20. EXAMINING NEWSPAPERS:  
What Research Reveals About  
*America's Newspapers*  
*Gerald Stone*
21. CRITICIZING THE MEDIA:  
Empirical Approaches  
*James B. Lemert*
22. MEDIA ECONOMICS:  
Concepts and Issues  
*Robert G. Picard*
23. SOCIAL RESEARCH IN COMMUNICATION  
AND LAW  
*Jeremy Cohen and  
Timothy Gleason*

*additional titles in preparation*

**Jeremy Cohen  
Timothy Gleason**

**SOCIAL  
RESEARCH IN  
COMMUNICATION  
AND LAW**

Volume 23 ~~The Sage Comm~~TEXT Series

**SAGE PUBLICATIONS**  
*The Publishers of Professional Social Science*  
Newbury Park London New Delhi

TO OUR PARENTS,  
Ruth and Ernest Cohen  
and  
James and Margaret Gleason

---

Copyright © 1990 by Sage Publications, Inc.

All rights reserved. No part of this book may be reproduced or utilized in any form or by any means, electronic or mechanical, including photocopying, recording, or by any information storage and retrieval system, without permission in writing from the publisher.

*For information address:*



SAGE Publications, Inc.  
2111 West Hillcrest Drive  
Newbury Park, California 91320

SAGE Publications Ltd.  
28 Banner Street  
London EC1Y 8QE  
England

SAGE Publications India Pvt. Ltd.  
M-32 Market  
Greater Kailash I  
New Delhi 110 048 India

Printed in the United States of America

Library of Congress Cataloging-in-Publication Data

Cohen, Jeremy, 1949-

Social research in communication and law / Jeremy Cohen,  
Timothy Gleason.

p. cm. — (The Sage commtext series ; 23)

Includes bibliographical references.

ISBN 0-8039-3266-9. — ISBN 0-8039-3267-7 (pbk.)

1. Mass media—Law and legislation—United States. I. Gleason,  
Timothy W. II. Title. III. Series: Sage commtext series ; v. 23.

KF2750.C64 1990

343.7309'9—dc20

[347.30399]

89-10732  
CIP

FIRST PRINTING, 1990

## CONTENTS

<i>Foreword by Everette E. Dennis</i>	6
<i>Preface and Acknowledgments</i>	8
1 Probing Communication and Law	11
2 An Introduction to Law and Legal Theory	22
3 Theories of Freedom of Expression	54
4 A Social Research Approach to Libel	80
5 Reconciling Communication with Law	103
6 A Research Agenda for Communication and Law	132
<i>Index</i>	137
<i>About the Authors</i>	140

## FOREWORD

It is not unusual for legal scholars to study *communication law*, nor is it uncommon for communication and media scholars to study law and legal issues. But it is something of a departure for the two to commingle. Studies of law and communication with emphasis on law (especially media law) as a communication process have evident value to anyone who considers the intrinsic importance of these interrelated, but rarely explored concerns.

This is the mission that engages Jeremy Cohen and Timothy Gleason in *Social Research in Communication and Law* which makes a persuasive case for the interdisciplinary study of law and communication. To their research colleagues in the nation's communication and journalism schools they suggest that following the lead of law professors in publishing traditional law review articles about media law is not the way to go. Similarly, they urge scholars in other fields to move beyond a "sociology of law" approach wherein legal topics are simply fodder for research, as is religion, the family, or the school. While they do not deny the value of these studies, they believe that "communication and law" scholars can do something original that contributes to knowledge and, thus, to the public understanding of two symbiotic processes.

The mission that professors Cohen and Gleason outline provides a daunting challenge for students of communication law, history, and sociology. They have produced a book that is a valuable augmentation to courses by those names and for media ethics, issues, and problems in mass communication and several others. Students of communication law, criminal justice, judicial administration, and other fields will also benefit from reading and using this thoughtful book.

Although they don't say it bluntly, a subtext of this book is clearly a call for more rigorous work by students interested in the interface of communication and law. It is not enough, Cohen and Gleason posit, for a student of media law to work in isolation on one narrow legal specialty without a broader knowledge of jurisprudence and legal philosophy. Simi-

larly, those who study media law from a legal perspective ought to know more about the communication process and theoretical underpinnings.

Blessedly, this book is not a polemic nor a sermon, but rather a practical guide to doing research on law and communication questions. Along the way the authors offer rich citations and examples from the literature.

This book is a natural outgrowth of a current movement among communication law scholars to make more effective use of the methodologies of communication science. It is a stand against First Amendment reductionism which takes the researcher on a too easy path toward simple advocacy. Both authors have been active in that movement, although the book is a quite original step beyond social science applications in communication law. It is instead the confrontation of two substantive areas of knowledge with the scholarly tools of both as well as a few from related disciplines.

*Social Research in Communication and Law* appears at a time when we are experiencing a renaissance of interest in the interface of these vital social processes. Thoughtful readers will appreciate its message both in literal and more subtle ways.

—Everette E. Dennis  
Series Editor



## PREFACE AND ACKNOWLEDGMENTS

This book represents the authors' belief that freedom of expression is an area of research especially appropriate to the discipline of communication studies. Yet while freedom of expression may be anchored well within our discipline, understanding clearly requires familiarity with a variety of substantive fields and methodological approaches beyond the usual concerns of communication theory, such as legal studies, history, and jurisprudence.

Our approach is an interdisciplinary approach, which we refer to as *communication and law* to distinguish our concerns from traditional media law analyses harbored in case law and constitutional scholarship. This book is prefaced on the notion that communication researchers should not simply duplicate the efforts of legal scholars. A *communication and law* approach must distinguish itself from research generally recognized as within the traditional purview of law or legal studies. It should add to the literature of communication. It should be generated from the perspective of the communication scholar, not in competition with the legal scholar, but in recognition of the objectives of communication research.

This book is an attempt to encourage distinctions that recognize the relationships among communication theory, freedom of expression, history, and law and place them squarely within the identifiable domain of communication scholarship. Contextual understanding of communication and law can only benefit from familiarity with, and respect for, the integrity of each of these disciplines.

Throughout the preparation of these chapters the authors have shared, and benefited from, each other's ideas. The sum of the individual chapters is a shared approach and commitment to interdisciplinary social research in communication and law.

In fact, Jeremy Cohen holds principal responsibility for Chapters 1, 4, and 5. Timothy Gleason bears the primary responsibility for Chapters 2, 3, and 6. We accept equally the blame for whatever errors of thinking or fact are present.

We are grateful to a number of people for their encouragement, their criticism and their patience. Particular gratitude is due Everette Dennis at the Gannett Center for Media Studies at Columbia University, Richard Carter and Don Pember at the University of Washington, Arnold Ismach at the University of Oregon, Steven Chaffee at Stanford University, Jerilyn McIntyre and David Eason at the University of Utah, Al Gunther and Diana Mutz at the University of Wisconsin, and Vincent Price at the University of Michigan.

The Stanford Department of Communication lightened a teaching load and the University of Oregon Freshman Seminar Program and the School of Journalism provided much appreciated support. At Stanford, doctoral candidates Kathleen Kurz, Sara Spears, and Judy Polumbaum provided useful commentary. Gloria Beckwith untangled the mysteries of word processing and kept the phone at bay. Roni Holeton provided administrative support and continued encouragement and always found a way to make it possible to get in one more long-distance phone call, to secure one more needed journal and to make the project a lot easier on two authors living and working 500 miles apart.

Transaction Books provided gracious permission to quote Morris Cohen from his book of essays on law and legal philosophy, *Law and the Social Order*. We also appreciate permission to quote liberally from Sage Publications' *Handbook of Communication Science* by Charles Berger and Steven Chaffee.

And, of course, we are grateful for the love and encouragement of Jennifer Ulum, Catherine Jordan, and Leah and Joshua.

— Jeremy Cohen

— Timothy Gleason



## PROBING COMMUNICATION AND LAW

**Social research in communication and law requires the integration of two seemingly distinct disciplines that lay claim to numerous schools of research, methodology, and theory. Where law and communication maintain shared interests, such as in the study of freedom of expression, they invite new methods of study and observation and offer the potential for new perspective and theory.**

Communication researchers interested in media law and freedom of expression require more than the ability to navigate the labyrinths of a law library, just as they must comprehend more than the application of a statistical analysis to legal phenomena. Legal scholars concerned with communication, too, have reason to consider the law in a context that goes beyond the narrow legal rule appropriate to adjudication and courtroom advocacy. Communication research involving law and legal questions is quite different from traditional legal research.

Too often, however, researchers specialize in communication *or* in law. Too rarely do individuals possess methodological and theoretical competency in both disciplines, probably because law and communication represent fundamentally different approaches to knowledge. Yet, if members of legal studies and communication research communities are to work with each other or simply understand each other's work, grounds must be prepared to make such a meeting possible.

More than a half century ago, legal scholar Roscoe Pound wrote, "Until some Anglo American jurist arises with the universal equipment of Joseph Kohler, the results of common-law incursions into philosophy will resemble the effort of the editorial writer who wrote upon Chinese metaphysics after reading in the *Encyclopedia Britannica* under China and metaphysics and then combining his information."<sup>1</sup> The rationale here is to provide communication scholars, whatever their primary research approach, with the ability to avoid encyclopedic approaches to integrated investigations involving communication and law. Legal scholars, too, should find the discussion a useful introduction to the concerns that drive communication

research exploring freedom of expression, media law, and the interactions of communication and law.

### CONCEPTUAL MAPS

This book is neither a text on how to conduct traditional legal research nor a guide to communication research methodologies. It is presented instead as a conceptual map of the emerging area of *communication and law*, which is, in turn, a means of raising basic questions about communication assumptions inherent in law. In doing so, there is a need to find suitable means for identifying those assumptions and for testing both their scientific and their legal validity. The research is at times *applied research*, as most of legal research has been. It is useful to use social research to challenge legal norms governing such areas as electronic news gathering in a courtroom, the prejudicial effects of pretrial publicity, and the influence of pornographic communications.

There is value in applied research that supplies the rounds for the volleys fired by attorneys prosecuting their cases. Trend surveys, studies of case law, predictions of judicial stances, and analyses of constitutional arguments play important roles in the development and understanding of normative, positivist law. As a practical matter, Wayne Newton's attorney included public opinion survey data in his 1987 libel suit against NBC.<sup>2</sup> The intent was to provide empirical proof that a series of television news broadcasts harmed the singer's reputation. The jury awarded \$19 million in damages. After the trial Newton commissioned a second survey. This one purported to show a causal link between the size of the jury's award and the restoration of his positive public image. Does communication research bode greater fairness in the law with an increased ability to establish social facts? Or does the relative infancy of the field promise only smoke and mirrors and little substance in the courtroom for the foreseeable future?

### Theoretical Value

Our primary concern, in any case, is with theory—with providing a means for *understanding* and for *explaining* communication and law rather than providing libel guidelines for journalists or courtroom strategies for defense and plaintiff attorneys. Before communication or legal scholars can operate effectively in an intellectual terrain influenced by both disciplines, however, some fundamental labors are in order. The first

is to identify and explicate the differences among legal, communication, and philosophical theories of law; communication; and freedom of expression. Social scientists and legal advocates, after all, often seek differing ends and in turn have differing expectations for the use of theory.

Alone, neither the theories and attendant methodologies of communication nor of legal scholarship provide tools powerful enough to explain the full range of issues that exists within the study and practice of freedom of expression. Yet the fabrics of law and communication are too heavily interwoven to reasonably believe that we can ignore the tenets and postulates of one while trying to understand the other. The importance of expression in our constitutional framework and the prevalence and role of mass media subject to regulation in the civil courts, by administrative agency, and at times by criminal statute are daily reminders.

### MERGING DISCIPLINES

There are of course dangers in the integrative process. It is easy to become snared in a trap that leaves social scientists calling for law based on the truths of their craft. The notion is hardly new. Roots can be found in the social engineering doctrines of the late 19th and early 20th centuries. Nor do the difficulties of reconciling theories from distinct disciplines end with the realization that while the social scientist analyzes libel as a concept requiring steadfast objectivity, the attorney views it as the object of a courtroom clash—the outcome of which is based on skills of unabashed, result-oriented advocacy.

The rational place to begin an interdisciplinary approach to communication and law is with the identification of freedom of expression as the common ground—yet mere recognition is hardly sufficient to generate theory that explains the complexity of the forces at work. We need to recognize and understand the variety of social concerns at play and the fundamental dichotomy between traditional legal and communication studies approaches.

The social research scholar—whether historian or communication scientist—is normally concerned with theory for its long-term value, not with how theory will be applied tomorrow in the legislature or the courthouse. Yet for many interested in freedom of expression, this is not entirely the case. First Amendment theory, for example, begins with a bias—the recognition of a compact among citizens that freedom and individual choice are preferable to an autocratic dictatorship. Many who conduct research in freedom of expression share this value. In communication and law we

must recognize and respect the dichotomy that exists between communication scientists and legal theorists—and which may cause at least a mild case of schizophrenia in communication researchers.

### CONSEQUENCES OF DECISION

Law is ultimately a set of normative constraints on human behavior. Some laws are simply based on decisions that certain behavior is unacceptable. Societies universally condemn murder, robbery, and fraud. Laws make such behaviors illegal and punishable, not based on any theory of how humans operate so much as on a belief that law provides an organized means for dealing with what we dislike. Other laws, such as those dealing with libel or sedition or pornography, are based on legal theories of why people will behave in manner *X* if exposed to condition *Y*. We fear a gullible and malleable public exposed to a bombardment of defamatory or politically or sexually provocative messages. It is quite logical to investigate this second type of law—often found in regulations involving freedom of expression—armed with both legal and communication theories.

Legal and communication theories are, indeed, different animals. The most obvious difference is one of function. Law is based on advocacy. The goal is to settle disputes and to regulate behavior. The judge faces the responsibility of the consequences of his decision. For the theorist, the arena is the journal rather than the courtroom. And while legal theory may indeed often originate within the academy, the scholar possesses the luxury of time unavailable to the judge. Parties to a law suit must concentrate on answerable questions that will lead to a win for one and a loss for the other. They must reach an answer. The law must provide the answer whatever the weaknesses in our understanding. And the time allotted to reach an answer is finite. Communication researchers, on the other hand, need not have immediate answers. They may ask questions with no thought of winners and losers, judgments and verdicts, or appeals and settlements.

### COMMUNICATION AND LAW

Social research in communication and law, then, involves the integration of two, seemingly distinct, disciplines that in turn lay claim to numerous schools of research and theory. While one researcher applies scientific inquiry to the processes and effects of communication, another develops a juristic “logic” that unabashedly slants the evidence to fit the legal cause

advocated. Their methods, goals, and operational rules differ fundamentally, yet both are well within the norms of their respective disciplines.

Researchers arrive at an intersection of interests where law is based on behavioral and social assumptions about communication. Libel law, for example, balances the value of unabated speech against the destruction of personal reputation. The libel tort encompasses the belief that defamatory untruths have the power to alter significantly public attitudes and opinions about individuals. Despite the inherent overlap of communication and law, however, the legal scholar focuses almost exclusively on the attorney's advocacy and shaping of legal theory to meet the client's needs, and the acceptance or rejection of those arguments by the courts. The communication scientist, meanwhile, may investigate the processes and effects of the defamatory expression on public opinion, without attending to the judicial encounters that drive the dispute. Combining the study of law and communication is not as simple as recognizing that the two disciplines share some common conceptual interests.

Social research in *communication and law* implies inquiry that goes beyond traditional jurisprudential case analysis by recognizing the structure of jurisprudence and examining that structure with tools and theory normally associated with communication science, historiography, and critical studies—the traditional tools of the communication scholar.

This book is intended to bridge the conceptual and methodological canyons that separate the disciplines—law and communication—when they are seen as distinct. In many senses, law and communication are unique fields. Yet where they maintain shared interests, such as in the study of freedom of expression, the fields invite new methods of study and observation and offer the potential for new perspective. We are interested not simply in studying law *and* in studying communication, but in studying *law and communication*, a combination meant to suggest an awareness of the relation between the two fields as well as the offerings and limitations of each.

## CONTEXT

The focus of this book is social research in communication and law. It is the result of both interest and frustration. The interest is in freedom of expression which carries the question, how should freedom of expression be studied? There is, of course, no single answer. Understanding requires context. How are expression and thought affected by regulation? How do institutions and economic systems encourage or interfere with freedom of



expression? How do sociological ebbs and flows and historical currents play upon the course of expression and freedom? Scholars and students may study First Amendment theory, case law, or legal and social history. Journalism and mass communication professors Donald Gillmor and Everette Dennis wrote,

Law, like history, is an area of *substantive knowledge*, but legal scholarship is also linked to specific *legal research methodologies*. Confusion increases when you realize that studies of legal issues and problems in mass communication (or in other fields, for that matter) also lend themselves to a variety of other methodological approaches. The methods of history, philosophy, sociology and other disciplines have been applied to the law for many years.<sup>3</sup>

The frustration is the result of attempts to apply to communication law methodologies appropriate to other disciplines in a helter-skelter fashion. It is tempting for social researchers to view communication law through the eyes of their own field. The practice, however, is fraught with peril when the attempt is made without fully understanding the processes and practices of law. It is a little like attempting to translate a French newspaper with a Japanese dictionary. Both French and Japanese are languages, but the rules of one do not apply to the other.

In fact, legal scholars have been interested in social research for nearly a century. Historians credit the first successful use of social research in the courts to Louis Brandeis in *Muller v. Oregon* (1908).<sup>4</sup> At issue was an Oregon statute forbidding women from working more than 10 hours per day. Brandeis presented the Court with a brief that included a collection of social, economic, and public health research on the theory that "[legal] propositions are not considered abstractly, but always with reference to facts."<sup>5</sup>

On the other hand, eight decades after *Muller*, law professor Geoffrey Hazzard framed the issue of applying social research to law in pragmatic terms hardly appreciative of Brandeis' pioneering work:

In the end, as against the exigencies of the law's processes, the uses of behavioral science are relatively remote, its methods relatively expensive, and its results relatively inconsequential. Its findings are, of course, more satisfying to the modern mind than the conclusions advanced from authority. That, however, is not much consolation for law men, whose concerns are for immediate, cheap, and significant decision making. For them, there are continuing attractions to the Delphic Oracle.<sup>6</sup>