



THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW

M. ETHAN KATSH

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To my parents
Estelle and Abraham Katsh

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The Electronic Media
and the Transformation of Law

The study of the legal system takes us straight to the central problems faced by the society itself.

ROBERTO UNGER
Law and Modern Society

Once mankind has created a printing press, a musket, a cotton gin, a telephone, an automobile, an airplane, a television, each of these takes on a life of its own.

DANIEL BOORSTIN
The Republic of Technology

Introduction: Law as a Process of Communication

There is an old story of an ax that had been in a family for many generations. Each generation inherited the ax, used it, and, as a cherished family heirloom, passed it along to the next generation. Recently, an old drawing of the ax was discovered, showing it as it had been originally. To the surprise of the current owners, the original was much smaller, perhaps one-half the size of what it is now, and with a smaller blade as well. Other records indicated that in the past 200 years, the ax handle had been replaced ten times and the blade five times.

In many ways, the law is our ax. It has been a useful, important, and powerful tool. It is an heirloom, an item that we cherish and take pride in. It is also extremely different from what it once was, although we have difficulty understanding how different it actually is. What we call law is not the same concept that our ancestors had in mind when they used the term.

The main theme of this book is that broad changes are occurring to the law, to what it is and how it works, and that these changes are linked to the appearance of new methods of storing, processing, and communicating information. We are the first society in history to have the ability to communicate electronically. Because of various qualities of electronic communication that will be described below, the control of information, the organization of information, and the movement of information are no longer the same as they once were. This will have a considerable impact on an institution, such as the law, whose foundation is the processing of information but whose goals, values, capabilities, and modes of operation are tied to the older methods of communicating.

Some of the areas of ferment in the law that are discussed in this book have been observed by others. Richard Abel, for example, has asked,

Do the following phenomena have anything in common: the attack on professionals, the state, and bureaucracy, calls to deregulate the economy, the advocacy of decentralization, demands for the decriminalization and delegitimation of private behavior (drug use, divorce), deinstitutionalization (in education, care of the mentally ill, restraint and punishment of the delinquent and criminal), the preference for informality in hearing complaints and processing disputes? What is it that is really changing: ideology, substantive norms, processes, or institutions? Is the ambit of state control contracting or expanding? What impact will these changes have on fundamental social, economic, and political structures? Or is it all a lot of talk, with minimal significance for anyone except those who manage the legal system.¹

Another scholar has suggested that “the law is becoming more fragmented, more subjective, geared more to expediency and less to morality; concerned more with immediate consequences and less with consistency or continuity.”² The main contribution of this volume is to suggest why and how these and other seemingly unrelated or isolated facets of law are being affected by modern developments in the transmission, storage, and processing of information. Marshall McLuhan wrote that when “a new technology comes into a social milieu it cannot cease to permeate that milieu until every institution is saturated.”³ This book is an attempt to identify some of the ways in which law, an institution that has relied greatly on print, writing, and the spoken word, is highly vulnerable to the influence of new means of communicating information that possess very different qualities.

In 1886, when twenty-three-year-old Guglielmo Marconi tried to carry his small black box past British customs agents, the cautious and uncomprehending officials examined it and then smashed it to pieces. The customs personnel feared violence and revolution. They finally allowed Marconi to enter England, not comprehending that the box was indeed revolutionary, although not of the kind that they had imagined. When his rebuilt black box evolved into the radio several years later, society began a journey toward a way of life that is vastly different from what it was at the end of the last century.

Radio, television, and computers, the principal forms of electronic communication, have had an enormous impact on our basic institutions. Many of the changes brought about by the new media

are already known. Modern multinational corporations could not exist were it not for the ability of the computer to facilitate management of worldwide corporate empires. The television has largely replaced the political party as the vehicle for organizing and persuading voters. In summarizing the findings of scholarly research on the impact of television on American life, Dean George Gerbner has asserted that "it has reshaped politics, changed the nature of sports and business, transformed family life and the socialization of children, and affected public security and the enforcement of laws."⁴

Of all the important institutions just mentioned, law appears to have been affected the least. The traditional nuclear family is hard to find; some business empires are now larger than many nation-states; and politicians employ a style of campaigning that would mystify the Founding Fathers. The development of the electronic media may not be the only explanation for these developments, but it is a significant contributing factor and has been the subject of much scholarly research. The number of studies of the impact of the electronic media on the nature of law and its role in society, however, is negligible.

On the surface, the law appears to be relatively immune from the effects of the new media compared with these other institutions. A judge of 1889 who was transported through time to a modern courtroom would undoubtedly be mystified by many cases brought before him. But he would be far more understanding of what was transpiring than a businessman, an athlete, or a politician who underwent a similar experience. A judge of a century ago who found himself in the Supreme Court of the United States today would need some orientation, but the process being used would not be totally alien. Imagine, however, how bewildered a business executive of a past age would feel on entering the floor of the New York Stock Exchange during a day of heavy trading.⁵

Law's appearance today will not be law's appearance tomorrow. The law's resistance to the persuasive charms of the new media is nearing an end. Anyone who reads professional legal journals, particularly the advertisements in such magazines, knows that the high-technology invasion of the legal process is in full swing. What is not recognized is that law cannot remain unaffected by large-

scale changes in the communication of information. The law is an institution built on the creation, storage, processing, and communication of information. It has even been defined as “ethical control applied to communication.”⁶ It can resist change and has done so more effectively than the other institutions just mentioned. It perhaps has understood instinctively that not resisting would lead to deep and permanent change. Yet the era of resistance appears to be over, and it is appropriate to examine what parts of our system of law are most susceptible to change and what these changes will mean to us. The law is about to catch up to the rest of society and, in so doing, become as different as the electronic businessman, the electronic politician, and the electronic athlete are from their predecessors.

Law is an organism whose lifeblood is information and media of communication are the veins and arteries that channel the information through the system. Harvard law professor Harold Berman has written that a legal system requires that there be a “belief in the power of certain words, put certain ways, to bring about certain effects denominated as legal. This kind of magic is necessary if law is to work.”⁷ Manipulation of information underlies the way legal institutions work, how legal doctrines are applied, and how social and moral values are translated into legal values. Law is a response to information received *from* the public. Law is also information that is communicated *to* the public. Law is the result of judgment and decision making involving the evaluation and organization of information. As Professor Marc Galanter has observed, law

usually works not by exercise of force but by information transfer, by communication of what’s expected, what forbidden, what allowable, what are the consequences of acting in certain ways. That is, law entails information about what the rules are, how they are applied, with what costs, consequences, etc. For example, when we speak of deterrence, we are talking about the effect of information about what the law is and how it is administered. Similarly, when we describe “bargaining in the shadow of the law,” we refer to regulation accomplished by the flow of information rather than directly by authoritative decision. Again, “legal socialization” is accomplished by the transmission of information. In a vast number of instances the application of law is, so to speak, self administered—people regulate their conduct (and

judge the conduct of others) on the basis of their knowledge about legal standards, possibilities and constraints.⁸

The information-processing aspect of law is rarely noticed by legal scholars, by journalists who write about law, or by lawyers themselves. Yet this facet of the legal system is as important to law as the central nervous system is to human beings. Without such a system, both the human being and the legal process would be paralyzed and nonfunctioning. What a general once claimed about the military is true of law as well: "If you ain't got communications, you ain't got nothing."⁹ Or as legal philosopher H. L. A. Hart stated in a more scholarly style, "If it were not possible to communicate general standards of conduct, which multitudes of individuals could understand, without further direction, as requiring from them certain conduct when occasion rose, nothing that we would now recognize as law could exist."¹⁰ The new media, however, the means by which much of this communication occurs, are radically different from the old, and as information begins to be handled by different means, those facets of law that are reliant on the older media will change or disappear. Since so much of law is dependent on the uses of the traditional media, the end result for law will be very substantial change.

It is considerably easier to understand the transformation of the ax than it will be to comprehend how the law will change or how the new media will exert their influence. For the ax, we have not only hindsight, but also a process of change that is discrete and an object that is easily identifiable. The law, on the contrary, is something that different people perceive in different ways. It resists definition even among legal scholars. While at a particular moment we may grab hold of it and try to use it to our advantage, looked at from afar it is a process that is in motion and whose form and qualities are somewhat blurred.

To understand the significance of the new media to law, it is necessary to discard some of the images and definitions that both law and media evoke. Typically, when law is referred to, the focus of attention is either on legal rules or on legal institutions. Law is considered to be a set of rules located in a book or library; a place, such as a courthouse; or a group of people, such as lawyers or police officers. These are, however, merely the visible parts of the

system. They are the end products of a complicated process that the public does not see and therefore tends to ignore. To look solely at rules or institutions is like looking only at the words coming out of an individual's mouth and not understanding that there is something important going on inside the head that makes the external manifestation possible. In evaluating an individual's behavior, we make great efforts to understand not only what he or she does, but also the goals, perceptions, values, and choices that underlie human behavior. We need to adopt the same approach to our examination of law.

The philosopher Iredell Jenkins has warned against accepting the visible facets of law as a complete or adequate description of law:

Law is very like an iceberg; only one-tenth of its substance appears above the social surface in the explicit form of documents, institutions and professions, while the nine-tenths of its substance that supports the visible fragment leads a sub-aquatic existence, living in the habits, attitudes, emotions and aspirations of men.¹¹

What sits on the surface of the legal iceberg is undeniably important in ordering our lives and in making educated predictions about the resolution of problems. It is not, however, particularly reliable as a predictor of the long-term evolution of the legal process. The method of this book is to explore some of what lies hidden from view: the values, goals, and functions of law in our society; the habits of thought that underlie various legal concepts and approaches; and the symbols and myths that affect public perceptions of law. Significant occurrences in the law's deep structure can reveal developments that will be visible to the public later.

A central theme of this book is that changes in the means used to communicate information are important to law because law has come to rely on the transmission of information in a particular form. Law does not simply consume or produce information; law structures, organizes, and regulates information. The effectiveness and operation of law depends on controlling access to some information and highlighting or directing attention to other information. It has been observed that "organizations are networks of information flow; therefore, directing flow to the right places, filtering it in useful ways, and even preventing it from flowing to

certain locations improves organizational performance. . . . the primary goal from this perspective is not to produce more information, but rather to reduce the amount that any one subsystem must process."¹² Some of the ways the law channels information have been consciously developed, but many of the patterns and traditions of information use result from limits built into the media of communication that have been employed. Law, which one scholar has labeled "the science of inefficiency,"¹³ has been conditioned in many ways by various characteristics and constraints of traditional modes of communication, particularly print. It has come to depend on information being organized and communicated in a particular form. The introduction of new forms of communication that possess different qualities will not simply extend trends that are associated with print. The electronic media are not to be considered merely as more powerful versions of print. They have different mechanisms for transmitting and processing information, some of which will pressure the law to change course and become a different and not simply a more efficient institution.

Although this book is about media and about law, it is not strictly about media law. We often read about cases involving libel and slander, broadcasting regulation, obscenity and pornography, and similar issues where, because of some conflict, the involvement of law has been felt to be necessary. The development of new forms of communication has caused the field of media law to be an area of great growth and activity. Legal cases in this area often involve powerful people, large sums of money, or disputes affecting deeply held values. Such cases are newsworthy, attract our attention, and dominate public discussions about law and media. Yet media law, no matter how important it might be, reveals only a small part of the relationship between law and the new forms of communication in our society. It informs us about newly developed legal rules and changes in traditional doctrines, about how law is trying to exert its authority on the means of communication. But it reveals relatively little about how the new media are changing the general process of law, the institutions of law, the values of law, and the concepts of law in our society. While we shall inevitably touch on many topics of media law, our main concern is broader and will also reach some areas of law that are not normally thought of as being related to the media.

Media, the means we use to communicate, and law, the process we employ to settle conflicts, establish values, and secure liberties, are two of the most basic parts of society's structure. They both influence the operation of institutions that are central to our society. When these two forces clash publicly, media law is the result. When they struggle quietly—sparring, adjusting, and accommodating each other in less visible ways—the end result may be change that is broader, more pervasive, and more significant, albeit less newsworthy. This book is mainly about the quiet struggle, the one that is generally not considered newsworthy enough to be reported by either print or broadcast journalists. Its purpose is to look beyond the pressing media law problems of the day and explore the wider impact of the new media on law. It is intended to illuminate new challenges that will affect the resolution of all cases rather than to analyze the details of particular cases.

When we examine our system of communication, there are also areas of activity that are visible and above the surface and others that get less attention and are often hidden from public view. The tip of the iceberg, for many researchers and for the public, is television, particularly the content of commercial television. Much research in the area of communications is based on the theory that measuring or determining the content of a televised message will reveal to us the impact of that communication on the individual or group that receives it. Some studies that measure the amount of violence on television, for example, employ this model. They assume that there is a connection between the amount of violence viewed on television and the level of violence in society.

This approach regards television or any medium of communication as being similar to a moving company.¹⁴ Its job is to gather, pack, and dispatch messages from sender to receiver; its impact results from the combination of pictures, words, and sounds that the viewer sees and hears. While television may affect the speed at which something is moved, it is presumed to have no effect on the information itself. Whether a car is shipped by truck, train, airplane, or boat, for example, does not change the car. Similarly, it is thought, whether one sends a message to consumers by television or by carrier pigeon does not affect the content of the message. Under this view, the medium seems largely irrelevant.

This is a model that appears plausible, particularly given our

personal experiences and contact with television programming. When one sits in front of a television set watching a program, it is natural to assume that the sounds and images being seen on the screen are more influential than any other aspect of modern communication. Yet when one moves away from the television and one's range of vision becomes wider, it can be seen that the communication of information in society, particularly within institutions, involves a great deal more than the television program of that moment. If we were able to peer into many homes at once, each of which had a television set on, we might begin to think more about the process of watching television and less about what program was being watched. And if, while observing all these homes, we saw some people watching television, some talking on the telephone, some reading a book or newspaper, some talking with someone else face to face, and some transmitting data across the country through a personal computer, we would think even less about the content of the television program that some were watching. We would realize that we spend much of our lives engaged in the process of communication and being affected by communication about us, that many forms of communication are employed, and that how we communicate can influence our existence considerably.

Although I believe that television programming can and does influence viewers,¹⁵ the emphasis in this volume will be less on the current content of that medium and more on the novel qualities which most media that transmit information electronically share. The economist Harold Innis, more than a decade before McLuhan became popular, stressed that "the materials on which words were written down have often counted for more than the words themselves."¹⁶ This is a more restrained and, therefore, more accurate statement than McLuhan's famous assertion that "the medium is the message."¹⁷ It suggests that the instruments carrying information are worthy of study and that we should explore the effect of a shift from a medium with certain qualities to a new form of communication having other qualities. This is particularly true for an institution, such as law, whose reliance on the printed word has been substantial.

Technologies of communication are being recognized by more and more scholars as being more than mere containers for carrying