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MASS MEDIA LAW

2005–2006 Edition

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PREFACE

Twenty seven years ago when the first edition of Mass Media Law was going to press the most compelling issues discussed in the text were the growing involvement of the Supreme Court in the development of libel law, the struggles faced by reporters who were being dogged by government agencies to reveal their sources or to surrender their notes and video outtakes, and rulings by the high court that most aspects of news gathering were not protected by the First Amendment. A lot has changed in a quarter of a century. While libel law remains a constant focus, and legal problems associated with news gathering continue to vex the press, the reporter/source questions has moved to the back burner. Who could have imagined then, that in 2004, when the 14th edition was written, major developments in communications law would include the heavy push by celebrities to send their lawyers to court to protect their images from being appropriated, federal and state laws regarding election campaign funding, press coverage of a major war, whether military tribunals and deportation hearings are open to the press and public, and a host of questions relating to communication on the Internet. (Eh? What the heck is the Internet?) And these are just some of the newer issues highlighted in this edition.

This book is about censorship of the press by the government, including courts which sustain the rights of individuals in civil actions, and the topic is covered pretty thoroughly. But we shouldn't ignore the fact that other, non-governmental censorship is a serious issue in the United States today, censorship that is often applied by the mass media itself. In 2002, award-winning political cartoonist Doug Marlette drew a cartoon that showed a man in Middle Eastern clothing driving a rental truck with a nuclear bomb in the back. The cartoon's caption, "What Would Mohammed Drive?" was a takeoff on a public relations campaign mounted by evangelical Christians (What Would Jesus Drive?) that was a challenge of the morality of driving a gas-hog SUV. Marlette's newspaper, The Tallahasee Democrat, ran the cartoon briefly on the newspaper's web site, but when complaints were heard the cartoon was pulled and was banned from the newspaper altogether. In time the paper received more than 20,000 e-mails demanding an apology for what critics said was misrepresenting the peaceful nature of the Muslim faith. The outpouring was generated by an advocacy group called The Council on Islamic Relations. It is important to note that Marlette had been uncompromising in the past in attacks on what he perceived to be the hypocrisy in other religions. He penned cartoons lampooning conservative Christian televangelists like Jerry Falwell and Jimmy and Tammy Faye Bakker and even the Roman Catholic church. In an article in the Columbia Journalism Review Marlette lamented that "A laptop Luftwaffe was able to blitz editors into not running the cartoon in my own newspaper." But Marlette's experience is not unique. Today there are only about 90 political cartoonists working for newspapers. Twenty years ago there were 200. Censorship by the mass media today comes in all forms. In January 2004 The New York Times reported that in early 2003 NBC offered to pre-empt a documentary critical of Michael Jackson if the pop icon would agree to a celebrity-type interview (with videotapes taken by Jackson's staff) on the network during February sweeps month. The deal fell through. But the

quid pro quo was blatant—provide us ratings during sweeps months and we won't tarnish your image. During the 2004 Super Bowl broadcast CBS rejected an appearance by controversial pop superstar Bono because he wanted to sing a song about the problem of AIDS in Africa. CBS also refused to broadcast a public service announcement by an advocacy group criticizing the growing federal deficit. The network said these items were "too political." But the network included an interview with President George Bush during its broadcast. Remember, the White House had backed a change in regulations that allowed CBS (and the other networks) to substantially increase their broadcast holdings. (See Chapter 16.) (Of course, instead of Bono the network ended up with a breast-baring performance by Janet Jackson that set off a national firestorm of criticism which included Congressional hearings.) In his article in the Columbia Journalism Review Marlette wrote this:

> The censors no longer come to us in jackboots with torches and baying dogs in the middle of the night. They arrive now in broad daylight with marketing surveys and focus group findings, certified in sensitivity, and wielding degrees from the Columbia journalism school. They are not known for their bravery, but for their efficiency.

This is a timely warning for all who hope to work in the mass media, or for those who simply use the mass media as a source of information to help them control their relationship with their environment.

Clay Calvert has added his expertise and wisdom to this edition of Mass Media Law. Professor Calvert, who teaches communication and law at Penn State University, created an innovative student study guide for the last edition. This time around he revised and edited Chapters 9, 10 and 15, in addition to his work on the study guide. And he did a terrific job. A lot of other people also helped in getting this edition off the presses. The team at McGraw-Hill was excellent as always, and thanks go to Phil Butcher, Laura Lynch, Cathy Iammartino, Christine Pullo, Jennifer Henderson, and Craig Leonard. Clay and I also appreciate the help of several colleagues at a variety of schools.

Eddith Dashiell, Ohio University
Alisa White, University of Texas at Arlington
Lyombe Eko, University of Maine
Mark Goodman, Mississippi State University
Brad Thompson, Penn State
Jeffrey Newcombe, Emerson College

Finally, I want to dedicate this edition to my family: Alison, Brian and especially my wife, Diann. Thanks for hanging in there during tough times.

Don Pember
Seattle, Washington
February 15, 2004.

Clay Calvert
University Park, Pennsylvania
February 15, 2004

NEW MATERIAL IN THIS EDITION

We have added a lot of new material for this edition of the text. What follows is a list of the more important additions or changes.

Substantial revision of section on military censorship, including new material on the press coverage of the war in Iraq; pages 78–88.

Material on college press censorship on pages 96–100.

Material on time, place and manner rules on pages 105–109.

The new Jehovah's Witness door-to-door solicitation ruling, page 116.

New Supreme Court hate speech ruling, *Virginia* v. *Black,* page 123.

Bipartisan Campaign Finance Reform Act ruling, pages 125–127.

Rulings on anti-SLAPP laws, 136–138.

Cases on Internet publication of libel, 146–147.

Material on Intentional Infliction of Emotion Distress moved to pages 204–206 in Chapter 5.

Rulings on Internet/libel jurisdiction questions, pages 213–214.

New rulings on punitive damages, 236–237.

Criminal libel cases, page 239.

New material on right to publicity/appropriation cases, pages 248, 253–254 and 257–258.

Children's Online Privacy Protection Act developments, page 270.

New cases on intrusion, page 272.

Revised section on news gathering, trespass and fraud, pages 314, 319.

Government secrecy in light of terrorist attacks, pages 326–328.

New FOIA cases, including the lawsuit involving the death scene photos of Clinton aide, Vince Foster, page 345.

Journalists, anonymity and the Internet, pages 384–388.

Chapter 12, which focuses on closed judicial proceedings and records, was heavily revised and reorganized and includes material on military tribunals, deportation hearings and the Moussaoui case.

New ruling on zoning laws for adult businesses, pages 482–483.

Material on erotic material on Internet reorganized, with rulings on Child Online Protection Act and Children's Internet Protection Act, pages 488–492.

New cases on trademark law, including Supreme Court ruling in Victoria's Secret case and the dispute between Rosa Parks and rap duo Outkast, pages 499–501.

Supreme Court ruling on copyright protection extension, pages 512–513.

Material on copyright and the Internet revised, pages 537–540.

Kasky v. *Nike,* Inc. commercial speech case, pages 549–550.

Material on FTC Do-Not-Call Registry, pages 561–562.

Material on deregulation of broadcasting and changes in multiple ownership rules, pages 586–589, and 592–593.

CONTENTS

The American Legal System

CHAPTER 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 is the American Republic. From the 1770s, when at the beginning of a war of revolution we attempted to legally justify our separation from the motherland, to the 21st century, 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 19th-century French political scientist and historian Alexis de Tocqueville and others, political and sometimes moral 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. In recent years Americans have gone to court to try to resolve disputes over abortion, gay rights, press coverage of wars and other military operations, university admission policies and even national elections.

Americans have protested every war the nation has fought—from the Revolutionary War to the invasion of Iraq. The record of these protests is contained in scores of court decisions. The prohibition and 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 15 chapters of the book.

The chapter opens with a discussion of the law, giving consideration to the 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 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, 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 several 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 executives, such as the president and mayors and governors, 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 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 arose, the court's task was to find or discover the proper solution, to seek the common custom of the people. The judge didn't create the law; he or she merely found 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.*

*Terms that are in boldface type are defined in the glossary, which begins on page 625.

This common-law system was the perfect system for the American colonies. 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.

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

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 high school wrestling coach Mike Milkovich sued the Lorain (Ohio) Journal Company in the mid-1970s for publishing the claim that Milkovich had lied during a hearing, 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 lied is libelous, and Milkovich won his lawsuit.[2]

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 the courts 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 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

*Appellate courts (see page 16) often render decisions that decide only the particular case and do not establish binding precedent. Courts refer to these as "unpublished decisions." In some parts of the country it is even unlawful for a lawyer to mention these onetime rulings in legal papers submitted in later cases. But change may be in the wind. In early 2003, the U.S. Court of Appeals for the District of Columbia and the Texas Supreme Court reversed their restrictions on citing these unpublished decisions. Courts in other jurisdictions may follow this pattern as well.

2. *Milkovich* v. *Lorain Journal Co.,* 110 S. Ct. 2695 (1991).

3. 159 S.W. 2d 291 (1942).

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.

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 60 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 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 sensibilities.

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 10.) 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 24–25 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*

4. 95 S.E. 2d 606 (1956).
5. 242 U.S. 402 (1918).
6. 313 U.S. 33 (1941).