THE LAW OF PUBLIC COMMUNICATION

KENT R. MIDDLETON

BILL F. CHAMBERLIN

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KENT R. MIDDLETON

University of Georgia

BILL F. CHAMBERLIN

University of Florida

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PREFACE

Much has been made of the so-called Information Age, a label that acknowledges the increasing importance of communication in the American economy. Less has been said about the changes taking place in schools and departments of journalism and mass communication.

No longer are journalism schools dedicated primarily to preparing reporters and editors for newspapers. While the training of journalists for the print industry is still important, schools of journalism and mass communication dedicate an increasing number of professors and classrooms to the training of future broadcasters, advertisers, and public relations practitioners. Advertising and public relations students frequently comprise 50 to 60 percent of the student body. Radio, television, and film students make up another 20 percent. To reflect the broader mission, the Association for Education in Journalism changed its name to the Association for Education in Journalism and Mass Communication. Many schools and departments of journalism have also lengthened their names.

Communication law also has changed during the last 20 years. Plaintiffs now might sue for "emotional distress" if unable to win money from the media for libel or invasion of privacy. New technologies fuzz the distinction between print and broadcast media. Meanwhile, the Supreme Court extends speech rights to corporations, advertisers, and other commercial participants in information markets.

The Law of Public Communication reflects changes in the student population and in the law. The text treats traditional journalism law comprehensively, but it also includes the law that applies to new technologies, public relations, and advertising. Chapter 3, "Libel," for example, discusses not only how a newspaper can defend a suit, but also when a business executive might file one. Chapter 4, "Privacy," deals not only with the permissions communicators' need to publish news photos but also with their need to use a private individual's name in a public relations promotion. The sections on the federal Freedom of Information Act discuss both journalists' access to government records and businesses' extensive use of the FOIA to acquire information about competitors.

The book also includes extended treatment of the electronic media and sections on new corporate and public relations law. Chapter 12 outlines the regulatory framework for new communication technologies and discusses developing technologies not yet available for the general public.

Chapter 6, "Corporate Speech," includes sections on emerging First Amendment rights for corporations in referenda and elections and discusses communication law affecting lobbyists, foreign agents, management, unions, and corporations that trade shares on the stock exchanges. Chapter 5, "Intellectual Property," adds sections on commercial performance rights and trademarks.

The Law of Public Communication is a practical book for students planning careers in communication, because it explains the law as it applies to the daily work of writers, editors, artists, and photographers. The innumerable statutes and case decisions are in a cohesive narrative to help those students studying law for the first time, and frequent summaries help students retain major points.

Communication law is a liberal arts course. It is therefore important that students learn not only the practical rules but also the principles, theory, and methods of analysis of such a dynamic and challenging subject. Students need to understand how the law evolves so that they can keep abreast of inevitable shifts after they graduate. We try to discuss cases in sufficient detail—often with quotations—for students to learn to identify legal issues, court holdings, and judicial rationale while gaining professional guidance. We also discuss theories of the press and the legal tools and tests used by the courts in First Amendment analysis. The text is extensively, but unobtrusively, footnoted to document the scholarship on which statements are based and to suggest further reading for the student or professor.

The Law of Public Communication focuses on the law as it affects communicators, not as it regulates the business aspects of communication companies. In most places, the book discusses regulation of communication content—what people can say or publish. Therefore, we devote little space to broadcast license renewal procedures but quite a bit of space to political broadcasting. Taxes on the media are important in this book only if they restrict what might be said or published. We leave discussion of newsroom safety standards and labor contracts to business law and management courses.

We would like to thank many people for their help and encouragement. Among the many communication professors who contributed by commenting on early drafts are John B. Adams, now retired, and Tom Bowers , University of North Carolina; Donna Dickerson, University of South Florida; David Gordon, Emerson College, Boston; Steve Helle, University of Illinois; Richard Hixson, Rutgers University; William Rainbolt, State University of New York at Albany; and Todd Simon, Michigan State University.

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Kent R. Middleton
Bill F. Chamberlin

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PUBLIC COMMUNICATION AND THE LAW

Many have called *CBS v. Westmoreland* the libel trial of the century. It certainly has the credentials. The top U.S. military officer in Vietnam, General William C. Westmoreland, sued one of the three major television networks for $120 million. The two sides to the dispute spent several million dollars in legal expenses, the most for any libel trial in history. The suit spawned several legal sideshows—court battles over the location of the trial, the protection of confidential sources, and the existence of cameras in the courtroom. The trial itself questioned Vietnam War tactics and the integrity of one of the most powerful news organizations in the world.

Westmoreland sued CBS after the network aired a 1982 documentary called "The Uncounted Enemy: A Vietnam Deception." The program claimed that Westmoreland had led a conspiracy to underestimate enemy strength in Vietnam. The network contended "the highest levels of American military intelligence" had deliberately misled President Johnson, the Congress, the Joint Chiefs of Staff, and the American public in order to convince them the country was winning a war it was actually losing. Westmoreland, on the other hand, argued that CBS's shoddy journalism presented only one side of the story. Westmoreland said that CBS misrepresented an argument within the military over how the enemy ought to be counted.

Neither Westmoreland nor CBS "won" the libel suit after 18 weeks of trial. The lawyers for both sides agreed to settle out of court before the case reached the jury. CBS did not have to pay monetary damages to Westmoreland, but the network's reputation was severely battered.[1]

Although the Westmoreland case was not decided in court, the law of libel dictated the outcome. Because of libel law, the critical legal issue in the case was not whether CBS had libeled Westmoreland. Rather, the decisive factor was the legal requirement that Westmoreland, as a public official, to show that CBS had lied or had exercised extreme recklessness in the preparation of a story. Because CBS could present witnesses who endorsed its version of the truth, Westmoreland would have had a very difficult time meeting his **burden of proof.***

Libel law, and other law that affects public communication, is the focus of this book. Public communication includes printed publications, the electronic media, public relations, and advertising.

This chapter will examine legal concepts and procedures important to the understanding of the law of communication. It will talk about the purpose and organization of law. It will describe court procedures, explain how to find legal materials, and discuss how to work with lawyers.

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*Definitions for the terms printed in boldface can be found in the Glossary, on page 613.

[1]*See generally,* R. Adler, *Reckless Disregard* (1986); D. Kowet, *A Matter of Honor* (1984); R. Smolla, *Suing the Press* 198–237 (1986); and Lewis, "Annals of Law: The Sullivan Case," 60 *The New Yorker* 84–95 (1985).

THE SOURCES OF LAW

Law, in general, is the system of rules that govern society. Law serves many functions in society. It regulates the behavior of citizens, for example, by restricting what advertisers can say about their products. It provides a vehicle to settle disputes, such as in the Westmoreland case. And law limits the government's power to interfere with individual rights, such as the right to freedom of expression.

The law in the United States comes primarily from five sources: constitutions, statutes, administrative rules and regulations, the **common law**, and the law of equity. A sixth source—an order from the top officer in the executive branch—will be important to the discussion on access to government information. The president uses an executive order to establish the procedures for classifying documents important to the national security.

Constitutional Law

Constitutions are the supreme source of law in the United States and are the most direct reflection of the kind of government desired by the people. They therefore supercede all other governmental institutions. The Constitution of the federal government and those of the 50 state governments establish the framework for governing. They outline the structure of government and define its authority and responsibilities.

Frequently, a constitution specifically limits the powers of government, as in the case of the Bill of Rights, the first 10 amendments to the U.S. Constitution. The Bill of Rights was adopted to protect the rights and liberties of U.S. citizens against infringement by government. The First Amendment, particularly the prohibition against laws abridging freedom of speech and the press, provides the foundation for communication law.

The federal Constitution is the ultimate law of the land. Any federal law, state law, or state constitution that conflicts with the U.S. Constitution cannot be enforced. A state constitution prevails in conflicts with the **statutory** or common law in the same state.

The U.S. Supreme Court, the nation's highest judicial authority, has the last word on the meaning of the federal Constitution. In each state, the state supreme court is the interpreter of each state constitution unless it conflicts with the U.S. Constitution. The courts make constitutional law when they decide a case or controversy by interpreting a constitution. Constitutional law can be understood only by reading the opinions of the courts.

The U.S. Supreme Court constitutionalized the law of libel in 1964 when it decided that the First Amendment required special protection for the robust debate about the actions of public officials. In *New York Times v. Sullivan*, the Court said that the First Amendment guarantees of free speech and free press made it necessary for public officials to prove the media lied or were

reckless in order to win a libel suit.[2] The constitutional protection the Court provided the media is a major reason that public officials such as General William Westmoreland have seldom won libel suits in the last two and a half decades.

Constitutions are hard to change and so are amended infrequently. Amendments to the U.S. Constitution must be ratified by three-fourths of the state legislatures or by constitutional conventions in three-fourths of the states.

Statutory Law

A major source of law in the United States is the collection of statutes and ordinances written by legislative bodies—the U.S. Congress, the 50 state legislatures, the county commissions, the city councils, and countless other lawmaking bodies. Statutes set forth enforceable rules to govern social behavior. In communication, statutory law controls advertising, copyright, obscenity, the electronic media, and access to government-held information.

Almost all of this country's criminal law, including a prohibition against the mailing of pornography, is statutory. However, statutes not only prohibit antisocial acts, but also frequently provide for the oversight of acceptable behavior. A primary purpose of the Federal Communications Act of 1934 is to administer the use of the broadcast spectrum in the public's interest.

The process of adopting statutory law allows lawmakers to study carefully a complicated issue—such as how to regulate the use of the electromagnetic spectrum—and write a law accordingly. The process permits anyone or any group to make their views known—through letters, personal contacts, and hearings. In practice, well-organized special interests—such as broadcasters and movie producers—frequently have enough power to thwart legislation contrary to their interests.

The adoption of a statute, however, does not necessarily conclude the lawmaking process. When statutes are challenged in court, they must be interpreted by judges. The judges apply the statutes to specific problems and conflicts, as the Supreme Court did in 1983 when asked to decide if the home taping of copyrighted television programs violated the 1976 Copyright Act. Although the copyright act generally provides protection to television programs, it does not specifically discuss whether taping such shows at home violates the law. VCRs were not widely used when the law was passed. The Supreme Court, interpreting the statute, decided that home taping did not violate the statute as long as the tapes were not sold, and viewers were not charged admission.[3]

The courts also can invalidate statutes that conflict with federal laws or a state constitution. In 1974, the U.S. Supreme Court declared unconstitutional a Florida statute that required newspapers to print a reply to attacks

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[2]376 U.S. 254.

[3]Sony Corp. v. Universal City Studios, 464 U.S. 417 (1984).

made on political candidates. The Supreme Court ruled that the Florida statute conflicted with the freedom of the press protected in the First Amendment.[4]

The courts also strike down state laws that try to regulate matters preempted by the federal government. In 1984, the U.S. Supreme Court nullified an Oklahoma statute banning the advertising of wine on cable television. The law conflicted with the 1976 Copyright Act and regulations adopted by the Federal Communications Commission. Both the copyright act and the FCC regulations prohibit broadcasters from editing programming imported by cable companies from out of state. The Supreme Court said that the federal government had preempted television regulation.[5]

Administrative Law

Administrative law, the rules and decisions made by administrative agencies, has mushroomed in the last few decades and now dominates several areas of communications law. Administrative agencies are created by legislative bodies to supervise specialized activities that require more attention than a legislature can provide. Agencies such as the Federal Communications Commission adopt rules and **adjudicate** disputes as authorized by statute.

The FCC was established by Congress in the 1934 Communications Act to regulate telephone, telegraph, and radio communications. Other agencies that oversee communications include the Federal Trade Commission, which regulates advertising; the Securities and Exchange Commission, which controls the publications of corporations registered to sell securities; the Federal Election Commission, which regulates political campaign contributions and expenditures; the National Labor Relations Board, which regulates communication between labor and management; and the Copyright Royalty Tribunal, which distributes user fees to copyright holders.

Administrative agencies can develop detailed regulatory plans and procedures, monitor industry practices, and discourage and penalize undesirable behavior. For example, the FCC has declared that broadcasters must provide programming on issues important to their communities. In the 1960s and 1970s, the FCC regularly required broadcast licensees to fill out programming reports. In a few cases, the FCC decided that a broadcaster's local programming was not sufficiently serving the public interest and refused to renew the station's license.

Congress has provided administrative agencies with two kinds of legal authority. The agencies can establish enforceable rules and regulations through an administrative procedure known as **rule making**. Rule making will be explained in the advertising and electronic media chapters of this book. The administrative agencies also can resolve complaints initiated by business competitors, the public, or the agency itself. Each side in the dispute has a chance

[4]Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).
[5]Capital Cities Cable, Inc. v. Crisp, 104 S. Ct. 2694 (1984).

to be heard. Far more disputes are settled by the executive agencies than by the courts.[6]

Agency regulations and decisions can be challenged in a federal appeals court.

The Common Law

The most important source of law during the early development of our country was the common law, often called judge-made law. The common law is the continually growing accumulation of rulings made by the courts in individual disputes, as opposed to the body of general rules adopted by legislatures. Judicial decisions, for example, have created a law of privacy that provides individuals with limited protection against media disclosure of highly personal information.

Common law in the United States grew out of the English common law. For centuries, judges in England, under the authority of the king, decided controversies on the basis of tradition and custom. These rulings became **precedents** for future decisions that, together, became the law of the land. Later, since the common law principles were familiar to the colonists, they became the basis of early American law.

The common law recognizes the importance of stability and predictability in the law. When editors are considering articles for publication, they need to know, for example, which stories may be considered to violate rights of privacy. In the common law, editors can know which stories present risks by understanding previous privacy cases. The common law is based on the judicial policy of *stare decisis*, which roughly means "let past decisions stand." In the common law, a judge decides a case by applying the law established by other judges in earlier, similar cases. The reliance on precedent not only leads to continuity, but also restricts judicial abuse of discretion.

At the same time, the common law need not be rigid. It can adjust to fit changing circumstances. Under the common law, each judge is an interpreter, modifier, and even creator of the law. Judges have five options when considering a case. They can (1) apply a precedent directly to the case; (2) modify a precedent to fit the present circumstances; (3) establish a new precedent by distinguishing the new case from the previous judicial tradition; (4) overrule a previous precedent as no longer appropriate; or (5) ignore any precedent. In most cases, a precedent is followed or adjusted to meet the facts at hand. Judges only rarely directly overrule previous precedents. Ignoring precedents greatly increases the risks of an opinion being overturned by a higher court.

Common law recognizes the superiority of both constitutional law and statutory law. The task of lawmaking in a representative form of government is assigned to the legislatures. Sometimes, the common law gets confused with constitutional law. Both consist, at least in part, of judicial opinions that rely

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[6]S. Mermin, *Law and the Legal System* 84–85 (1982).

substantially on precedents. However, constitutional law is based on judicial interpretation of a constitution, while common law is based on custom and practice.

Common law is primarily state law. Each state has its own judicial traditions. Long ago the U.S. Supreme Court essentially ruled that there is no federal common law.

The general principles of common law are not written down in one book. For example, while the 1976 Copyright Act can be found in a volume of United States statutes, anyone interested in studying the common law of libel would have to read court opinions scattered throughout a law library.

The Law of Equity

The fifth source of law, **equity**, is historically related to the common law. Although *equity* is a legal term, it means what it sounds like it should, which is not always true in law. Equity is what is fair or just.

The law of equity developed because of a limitation in the English common law. The common law provided for damage awards only after an injury had occurred. However, under the law of equity, a litigant could petition the king to "do right for the love of God and by way of charity."[7] The law of equity allowed for preventive or remedial action.

Unlike England, the United States and most states have never had separate courts of equity. Equity developed in the same courts that decided common law cases, but juries are never used in equity suits. In addition, although judges sitting in equity must consider precedent, they have substantial discretion to order a remedy they believe fair and appropriate.

Equity is significant in communication law primarily because of the preventive possibilities it provides. A judge can use it, for example, to stop a false and misleading advertisement or to halt the publication of a story before it damages national security. Punishment after publication could not accomplish the same thing.

SUMMARY

Law in the United States comes from constitutions, statutes, administrative agencies, common law, and equity. Constitutions outline the structure of government and define governmental authority and responsibilities. Statutes are enforceable rules written by legislative bodies to govern social behavior. Administrative agencies make law as they adopt rules and adjudicate disputes, as authorized by statute. The common law is the collection of judicial decisions, made in individual cases, that establish precedents for the future. Equity provides alternatives to the legal remedies available through the common law.

[7]H. Abraham, *The Judicial Process* 14 (1980).

THE COURTS

Although all three branches of government in the United States help make law, the judiciary is the most important to the purpose of this book. In order to understand the law of public communication, it is necessary to know how the court system works.

Actually, there is more than one court system. There are 51: the federal system and a system for each state. The 51 systems are generally similar structurally, but the 50 state systems operate independently under the authority of the individual state constitutions and state laws.

Most court systems can be best understood in three layers. The bottom layer is a network of trial courts, where the facts of each case are evaluated in light of the law. The middle layer for both the federal system and many states is an intermediate appellate court. All court systems maintain a court of ultimate appeal, usually called a supreme court. The federal court system is the most important for the law of public communication. (See Figure 1.)

The Federal System

The U.S. Constitution mandates only a single federal court, the U.S. Supreme Court, but provides for "such inferior courts as the Congress may from time to time ordain and establish."[8]

The Constitution also spells out the **jurisdiction**, or areas of responsibility, of the federal courts. Arguably, the most important federal jurisdiction for communication law is the resolution of disputes involving the constitution, laws, or treaties of the United States. This includes any First Amendment ques-

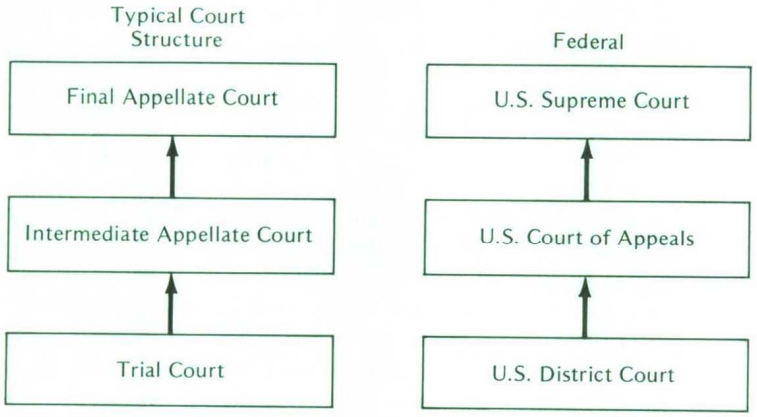

Figure 1. Comparative examples of federal and state court structures.

[8]U.S. Const. art. III, sec. 1.