MASS MEDIA LAW

Don R. Pember

Fifth Edition

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PREFACE

The first edition of this book had its genesis almost 15 years ago. And let me tell you something, many aspects of mass media law have changed dramatically during that decade and a half. Because your reading only the fifth edition, and not the first, second, third, and fourth as well (thank goodness!), this change isn't apparent to you. Let me briefly note some of the differences.

The rights of the student press have been more clearly outlined and limited in the past 15 years. Book banning is a bigger or at least more visible problem today. Attempts by the federal government to cut off the flow of information to the press and the people are more obvious and more frequent.

Libel law is even a bit more complicated today than it was in the mid-1970s (if that is possible), but contrary to what you might hear, the mass media have gained rather than lost ground under libel law. Journalists today have a far broader right to cover the courts than they did in 1975. While material that is legally obscene remains protected today to the same extent it was protected 15 years ago, legal and quasi-legal pressures upon non-obscene sexually-oriented material have sharply grown.

There are far fewer regulations governing both broadcasting and advertising today, but not even all proponents of the First Amendment are sure this is a good idea. And this Spring the Supreme Court agreed to hear its first case on the Newspaper Preservation Act, a law that selectively repealed some of the nation's anti-trust laws as they applied to newspapers. This decision could settle a legal question that has been simmering since the first edition of this text came off the press.

So that is what has changed. Let me tell you something about the book that hasn't changed in 15 years. This text still has a strong bias toward the First Amendment and freedom of expression. The rights to freedom of speech and freedom of the press are easy to defend in the abstract. Every American professes a belief in these constitutional guarantees, but only so long as they remain abstract principles. Arrayed against other tangible values, the often elusive principles embodied in freedom of expression are more difficult to defend. When you stand squarely behind the First Amendment you often end up supporting the right of persons who do things with which you may violently disagree. You support their right to publish and broadcast the name of a rape victim, their right to distribute sleazy, sexually-oriented books and films, their right to express beliefs and join groups whose professed aims are directly antithetical to our democratic principles, and even their right to burn our flag

as a part of a political protest. But that is what freedom is all about. If people used their rights of freedom of speech and press to do only what we all support and believe in, we wouldn't need a First Amendment.

A lot of you who read this book aren't planning careers in mass communications. But I think after reading it you will have a better idea about your rights as citizens—because in almost every case the rights of the press are co-equal with the rights of the average citizen. And many of you who are planning careers in mass communication don't expect to be journalists or broadcasters. Advertising and public relations is drawing more and more of you away from journalism and broadcast journalism. And your question is (I know it because I hear it from my own students) why isn't there more in the book relating to public relations and advertising? My answer is this: Nearly everything in the book relates to public relations and advertising as well as journalism. Someone in public relations surely must know the law of libel and privacy. Advertising practioners must know about copyright and the equal time rules. The real question is, why aren't there more examples of problems that grow out of public relations and advertising? This book is built generally around real life examples, actual cases. There are very few cases in mass communications law that stem from public relations. These disputes just don't seem to generate into litigation. As far as advertising is concerned, there is an entire chapter devoted exclusively to advertising problems. Certainly there are some issues that face persons in public relations and advertising that rarely face journalists. Matters regarding contracts, for example, don't usually concern reporters but may be of interest to a public relations professional. I believe the law of contracts is best taught through a course in business law, not in a communications class. Any time we would spend on these kind of issues would mean less time for other matters, and time is surely short enough as it is. I think it is sufficient to assure you that most of what is contained in this book is relevant to any career in mass communications. Enough said.

Before closing I want to thank some people for helping me on this edition. First, thanks to the crew at Wm. C. Brown Publishers. I received strong support from Stan Stoga, Peggy Selle, and Karen Doland. Next, thanks to my colleagues in the field who gave me their advice and counsel in putting this edition together: John DeMott (Memphis State Univeristy), Robert Drechsel (University of Wisconsin-Madison), Ed Kimbrell (Middle Tennessee State University), Barbara Mack (Iowa State University), James Scotton (Marquette University), Jeffrey Smith (University of Iowa), Michael Vadnie (St. Cloud State University), and John Zelezny (California State University-Fresno). I also want to thank the many students at the University of Washington and at other schools who have given my many suggestions and ideas. Thanks finally to the Pember family for hanging in there one more time.

Don R. Pember
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1 THE AMERICAN LEGAL SYSTEM

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

Americans have protested nearly every war the nation has fought—including the Revolutionary War. The record of these protests is contained in scores of court decisions. Prohibition and the crime of the twenties and the economic woes of the thirties 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, 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 eleven chapters of the book.

The chapter opens with a discussion of the law, giving consideration to the five most important sources of the law in the United States, and moves on to the judicial system, including both the federal and state court systems. A summary of judicial review and a brief outline of how both criminal and civil lawsuits are started and proceed through the courts are included in the discussion of the judicial system. ♦

SOURCES OF THE LAW

There are almost as many definitions of law as there are people who study the law. Some people say that law is any social norm or any organized or ritualized method of settling disputes. Most writers on the subject insist that it is a bit more complex, that some system of sanctions is required before law exists. John Austin, a nineteenth-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. Roscoe Pound, an American legal scholar, has suggested that law is really social engineering—the attempt to order the way people behave. For the purposes of this book, it is probably more helpful to consider the law to be a set of rules that attempt to guide human conduct and a set of formal, governmental sanctions that are applied when those rules are violated.

Scholars still debate the genesis of "the law." A question that is more meaningful and easier to answer is: What is the source of American law? There are really five major sources of the law in the United States: the Constitution, the common law, the law of equity, the statutory laws, and the rulings of various executive and administrative bodies and agencies. Historically we can trace American law to Great Britain. As colonizers of much of the North American continent, the British supplied Americans with an outline for both a legal system and a judicial system. In fact, because of the many similarities between British and American law, many people consider the Anglo-American legal system to be a single entity. Today in the United States our federal Constitution is the supreme law of the land. Yet when each of these five sources of law is considered separately, it is more useful to begin with the earliest source of Anglo-American law, the common law.

The Common Law

The **common law,** which developed in England during the two hundred years after the Norman Conquest in the eleventh 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." It is law that has always existed, much like air and water. When a problem arises, the court's task is to find or discover the proper solution, to seek the common custom of the people. The judge doesn't create the law; he or she merely finds it, much like a miner finds gold or silver.

This, at least, is the theory of the common law. Perhaps at one point judges themselves believed that they were merely discovering the law when they handed down decisions. As legal problems became more complex and as

the law began to be professionally administered (the first lawyers appeared during this era and eventually professional judges), it became clear that the common law reflected not so much the custom of the land as the custom of the court—or more properly, the custom of the judges. While judges continued to look to the past to discover how other courts had decided, given similar facts (precedent is discussed in a moment), many times judges were forced to create the law themselves.

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

Fundamental to the common law is the concept that judges should look to the past and follow earlier court precedents. The Latin expression for the concept is this: *Stare decisis et non quieta movere* (to stand by past decisions and not disturb things at rest). **Stare decisis** is the key phrase: let the decision stand. A judge should resolve current problems in the same manner as similar problems were resolved in the past. When Barry Goldwater sued publisher Ralph Ginzburg for publishing charges that the conservative Republican senator was mentally ill, the judge most certainly looked to past decisions to discover whether in previous cases such a charge had been considered defamatory or libelous. There are ample precedents for ruling that a published charge that a person is mentally ill is libelous, and Senator Goldwater won his lawsuit (*Goldwater* v. *Ginzburg,* 1969).

The Role of Precedent

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

Imagine for a moment that the newspaper in your hometown publishes a picture and story about a twelve-year-old girl who gave birth to a seven-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,* 1942) 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 news magazine is an invasion of privacy.

Now does the existence of this precedent mean that the young couple will automatically win their lawsuit? that the court will follow the decision? No, it does not. For one thing, there may be other cases in which courts have ruled that publishing such a picture is not an invasion of privacy. In fact in 1956 in the case of *Meetze* v. *AP,* 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 almost fifty years ago when people were more sensitive about going to a hospital, since a stay in a hospital was often considered to reflect badly on a patient, but that hospitalization is no longer a sensitive matter to most people. Therefore, a rule of law restricting the publication of a picture of a hospital patient is unrealistic, unless the picture is in bad taste or needlessly embarrasses the patient. Then the publication is an invasion of privacy. If not, the publication of such a picture is permissible. In our imaginary case, then, the decision turns on what kind of picture and story the newspaper published: a pleasant picture that flattered the couple? or one that mocked and embarrassed them? If the court rules in this manner, it *modifies* the 1942 precedent, making it correspond to what the judge perceives to be contemporary life.

As a third option the court can decide that *Barber* v. *Time* provides an important precedent for a plaintiff hospitalized because of disease—as Dorothy Barber was. But that in the case before the court, the plaintiff was hospitalized to give birth to a baby, a different situation: Giving birth is a voluntary status; catching a disease is not. Consequently 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 United States Supreme Court 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.,* 1918). 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.* (1941) 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 6.)

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 United States 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. Lower federal courts are bound to follow precedents from the appellate court in their circuit or region (see pages 25–27) and from the Supreme Court of the United States. But when focusing upon state law, the courts in the fifty separate states are bound to follow only the court rulings or precedents that have been generated within each state. A court in Arkansas, for example, need only look to the precedents from other Arkansas courts when deciding an issue that involves only Arkansas law. It might be useful to look to court decisions in other states that have similar laws or have had similar cases. But the Arkansas courts are not bound by these other state rulings. Because mass media law is so heavily affected by the First Amendment, state judges are frequently forced to look outside their borders to precedents developed by the federal courts. A state court ruling on a question involving freedom of speech and freedom of the press is necessarily governed by federal court precedents on the same subject.

Lawyers and law professors often debate just how important precedent really is when a court makes a decision. Some persons have suggested what is called the "hunch theory" of jurisprudence. Under this theory a judge or justice decides a case based on instinct or a feeling of what is right and wrong and then seeks out precedents to support the decision.

The imaginary invasion-of-privacy case just discussed demonstrates that the common law can have vitality, that despite the rule of precedent a judge is rarely bound tightly by the past. There is a saying: Every age should be the mistress of its own law. This saying applies to the common law as well as to all other aspects of the legal system.

It must be clear at this point that the common law is not specifically written down someplace for all to see and use. It is instead contained in the hundreds of thousands of decisions handed down by courts over the centuries. Many attempts have been made to summarize the law. Sir Edward Coke compiled and analyzed the precedents of common law in the early seventeenth century. Sir William Blackstone later expanded Coke's work in the monumental *Commentaries on the Law of England.* More recently, in such works as the massive *Restatement of Torts* the task was again undertaken, but on a narrower scale.

Courts began to keep records of their decisions centuries ago. In the thirteenth century unofficial reports of cases began to appear in Year Books, but they were records of court proceedings in which procedural points were clarified for the benefit of legal practitioners, rather than collections of court decisions. The modern concept of fully reporting the written decisions of all courts probably began in 1785 with the publication of the first British Term Reports.