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Legal Research in Mass Communication

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To the student learning the traditions and tools of communication research, **legal research** in mass communication may seem at first to present a conceptual puzzle. Law, like history, is an area of *substance knowledge*, but legal scholarship is also linked to specific *legal research methodologies*. Confusion increases when you realize that studies of legal issues and problems in mass communication (or in other fields, for that matter) also lend themselves to a variety of other methodological approaches. The methods of history, philosophy, sociology, and other disciplines have been applied to the law for many years.

It is important, therefore, to distinguish substantive legal topics that might interest researchers in various fields using differing scholarly methods from the woods of legal scholarship that have a direction and purpose of their own. At the same time, it is imperative that substantive legal issues and problems of interest to mass communication researchers be put in the context of the law generally.

When it comes to substantive legal topics, historians might want to know something of the evolution of libel law in the English courts; philosophers might want information about the reasoning process of judges in making particular legal interpretations; sociologists might be interested in the influence of the law on social class; and political scientists might explore the relationship between election returns and judicial decisions. In carrying out these studies, the scholarly investigator will use whatever research methodology is appropriate to the problem. These might include the historical method, linguistic analysis, participant observation, survey research, content analysis, experimental design, and other approaches. Researchers will conduct their work in accordance with the standards and norms of their scholarly disciplines. The result of this research might be a better understanding of law and legal institutions, but this is not legal research per se.

Legal research methodology for the student of mass communication falls into a number of general areas. First, there is traditional legal research, which involves an exhaustive examination of legal materials in a law library setting; second, there is empirical and behavioral legal research, which employs the methods of social science while recognizing the unique circumstances and problems of law. Both approaches will be examined.

Another consideration for the student of mass communication law is *context*. Most mass communication researchers are not fully grounded in all areas of law, nor are they generally concerned with them. Yet, from time to time it is necessary to understand the communication of the law problem that has no origins in earlier legal areas unrelated to communication law.

For example, one of the authors of this chapter, in a study of the Pentagon Papers, found it necessary to explore rather than obscure reaches of the ancient law of trover and conversion in order to understand the concept of information as property in the public sector.¹

Areas of law of greatest interest to mass communication researchers have been (1) *torts*, especially libel, privacy, and, since *New York Times* in 1964, constitutional privilege; (2) *criminal law*, affecting sedition, criminal libel, contempt, and journalist's privilege; (3) *personal property*, including copyright, trademark, and commercial speech; (4) *constitutional law*, freedom of speech and press guarantees of liberty under due process of law; (5) *legal procedure*, the enforcement of substantive rights, including free press, and fair trial; and (6) *administrative law*, the regulation of broadcast and other areas of telecommunication and advertising communication. Important as these topics are, they are not the whole of federal and state law.

Frederick S. Siebert, a notable communications scholar, put the point well:

Research in the field of legal problems of communication, like research in other areas of social sciences, cannot be sharply segregated either as to subject matter or as to methods. Almost every research project in the broad areas of communication involves economic, political or social as well as legal problems, and in many cases it is impossible to separate the strictly legal from other aspects. To add to the complications involved in any attempt to segregate the legal aspects is the modern tendency of legal research to branch out into the social sciences and to utilize the findings of those areas in the solution of juridical questions.²

The Status of Communication Law Research

Although legal research is one the oldest areas of communication research, legal studies in schools and departments of journalism had been modest in number until the early 1970s. Central to a sustained interest over the years has been the need for current information on law as it applied to the press. At a time when there was less public interest in issues of press law, journalism education provided colleagues with careful, though sometimes narrowly focused, updates on current cases and their effects.

Doctoral dissertations and master's theses in journalism and mass communication add to the literature, as do occasional articles in the major communication journals. From

time to time historical treatises and textbooks on mass communication law appear. A few communication researchers publish in the law reviews. Fortunately for the field, scholars in other fields (law, political science, and history, for example) have provided a substantial yield of communication law studies and theorizing on freedom of expression.³ Notable exceptions to the overall paucity of legal literature in earlier journalism education are the works of Siebert (legal history)⁴ and J. Edward Gerald (constitutional law and the press),⁵ both of whom held journalism appointments.

Articles on legal research methodology in mass communication have been included in books on communication research since the 1970s, and, increasingly, a unit on legal and jurisprudential methods is taught in graduate courses in communication and media studies.⁶ Several doctoral programs in mass communication have strong communication law components with some offering joint Ph.D.-J.D. programs with law schools. The Law Division of the Association in Journalism and Mass Communication, which dates from the early 1970s, encourages legal scholarship through an active papers competition and also has its own substantial journal, *Communication Law and Policy*, launched in 1996. The International Communications Association similarly has a law and policy division. Serious students of the field also draw on regular meetings and publications of the Practising Law Institute program on communication law, which is aimed at attorneys concerned with media law.

What Is Legal Research?

For those conversant with the scientific method, a first encounter with traditional legal research may be disappointing. Sometimes law review articles will unabashedly advocate a position based in normative assumptions. Other legal research will seem tediously encyclopedic and pedantic.

Legal research, however, serves several explicit functions, including

clarifying the law through analysis of procedure, precedent and doctrine; reforming old laws and creating new ones; providing a better understanding of how law operates in society; and furnishing materials for legal education.⁷

These are somewhat distinctive and differing purposes. Many, if not most, legal researchers would like their research to have an impact on the law itself. It is considered a mark of considerable prestige for a piece of legal scholarship to be cited in a court decision as secondary authority for a new interpretation of the law. Of course, not all legal scholarship finds its way into judicial opinions, but as an ultimate goal, the role of the legal scholar is different than that of a researcher who is satisfied simply to observe, analyze, explain, and sometimes predict. The observation-analysis role is more common to the social scientist engaged in empirical and behavioral legal research.

Legal research of the traditional, documentary mode is largely adversarial. The legal researcher sets down a provocative proposition and marshals evidence to support its plausibility, and that evidence may come from opinions for the court, dissenting opinions, legislative histories, constitutional interpretation, and legal commentaries.

The Tools of Legal Research

Cases, statutes, and constitutions are the primary stuff of the law. If you cannot retrieve and read them, you are forever doomed to secondary sources; someone else will have to read and interpret them for you.

Many campuses will not have law school libraries, but there are alternatives. Metropolitan counties often have substantial law libraries in their courthouses or government centers. State capitols usually house law libraries. In addition, general libraries, political science departments, and private law firms may be able to assist you. If there are no law libraries in your area, you might find what you need by searching the growing constellation of law-related sites on the World Wide Web.

With continued computerization and the exponential growth of new media, legal research has been greatly simplified. Web-based systems have made it possible to conduct some legal research from the home or office, vast databases have been recorded onto searchable CD-ROMs, and other technologies have made finding cases, statutes, and articles a process that can take minutes instead of hours.

Despite the benefits of computer-assisted legal research, the traditional resources remain indispensable. Most legal research tasks cannot be completed without spending time in the library, and anyone not acquainted with those resources will inevitably encounter problems.

There are many ways to begin the legal research process, one of which is to learn the language—the legal vocabulary—of the problem you are studying. Any of a number of law dictionaries can serve this purpose (*Black's*, *Ballentine's*). For those studying libel, for example, *Black's* provides a detailed definition and a series of related terms. A deluxe version will also point you to cases and statutes applying your word.

From there, you might want to know in more detail how courts have construed the concept of libel, or perhaps a more specific term like "malice." One way to do that is with *Words and Phrases*. This set of volumes contains common legal words and phrases followed by abstracts of judicial decisions using them. Pocket parts or supplements inside the back cover of each volume keep this and other legal publications up to date. Do not overlook them.

Legal encyclopedias can provide a still wider sweep of information on your topic. The most commonly used are *Corpus Juris Secundum* (C.J.S.) and *American Jurisprudence 2d* (Am. Jur. 2d). C.J.S. and *American Jurisprudence 2d* are alphabetically arranged sets of volumes containing detailed entries on hundreds of topics and subtopics. Both encyclopedias provide definitions and interpretations, as well as citations to relevant state and federal court decisions, statutes, and regulations. Both are also very detailed. "Libel and slander" takes up nearly 300 pages in C.J.S. and nearly 500 pages in *American Jurisprudence 2d*.

For information on a more specific legal issue, particularly an unsettled one on which lower courts have divided, *American Law Reports* (A.L.R.) is an excellent place to turn. A.L.R. volumes contain detailed annotations with essays, notes, and citations to the most significant court decisions on your topic. The two most current A.L.R. series are A.L.R. 5th, which covers state topics, and A.L.R. Fed., which covers federal topics. State and federal topics are mixed together in A.L.R.1st, A.L.R.2C1 and A.L.R.3d. Locate topics by using either the single-volume *Quick Index*, which accompanies each series, or the multivolume *A.L.R. Index*, which covers all of the main A.L.R. series. Locate specific annotations using the *A.L.R. Digests*.

Newer A.L.R. series do not replace earlier ones; however, annotations in the older series are more likely to be out of date. Use the pocket parts in each volume for updates on your annotation,⁸ and *always* check the Annotation History Table, located in the *A.L.R. Index* volumes to find out if your annotation has been supplemented or superseded.

Once you have found case citations using a dictionary, *Words and Phrases*, an encyclopedia, A.L.R., or some other source, you need to know how to locate them. All reported state cases can be found in West Publishing's National Reporter System. West has seven different regional "reporters," each covering a different part of the country. *West Southern Reporter* (So. or So. 2d), for example, contains state court cases from Alabama, Florida, Louisiana, and Mississippi. The other states are grouped within either *Atlantic* (A. or A.2d), *North Western* (N.W. or N.W.2d), *North Eastern* (N.E. or N.E.2d), *Pacific* (P. or P.2d), *South Eastern* (S.E. or S.E.2d), or *South Western* (S.W. or S.W.2d). Additional reporters exist for New York (*New York Supplement*) and California (*California Reporter*). Each of these nine reporters contains the full text of reported cases from the state courts in its region.⁹

State court decisions are cited as: *LeDoux v. Northwest Publishing, Inc.*, 521 N.W.2d 59 (Minn. Ct. App. 1994). *LeDoux* is the name of the appellant (the person who appealed the lower court decision), *Northwest Publishing* is the respondent, 521 is the volume number, N.W.2d is the reporter the case is in, 59 is the page number the case begins on, and Minn. Ct. App. indicates that this is a decision of the Minnesota Court of Appeals.

Federal cases are found in the *Federal Supplement* (F. Supp.), which contains the full text of federal district court decisions, and the *Federal Reporter* (F., F.2d or F.3d), which contains the decisions of the federal appellate courts (circuit courts).

Federal district court decisions are cited as: *Ayei v. CBS*, 848 F.Supp. 362 (E.D.N.Y. 1994). Many states have more than one federal district court. E.D.N.Y. indicates that this is a decision of the U.S. District Court for the Eastern District of New York. Federal appellate court decisions are cited as: *Hunt v. NBC*, 872 F.2d 289 (9th Cir. 1989). You can see that this is a decision of the U.S. Court of Appeals for the Ninth Circuit.

United States Supreme Court decisions are found in three parallel reporters, one official, published by the Court itself (U.S.), another published by West (S.Ct.), and a third, this one annotated, published by the Lawyers Cooperative Publishing Co. (L.Ed.2d). S.Ct. is an abbreviation for Supreme Court and L.Ed. is an abbreviation for Lawyers Edition. A complete citation for Supreme Court decisions refers to all three reporters and is cited as: *New York Times v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971).

Supreme Court opinions take a long time to appear in the U.S. reporter, so the S.Ct. reporter is used most often for recent cases. Court decisions are initially sent out to law schools as paperback "advance sheets." These look the same as decisions in the bound reporter volumes and they can be cited the same way. When each new bound volume arrives, the advance sheets are discarded.

Another source for recent court opinions is *United States Law Week* (U.S.L.W.). U.S.L.W. provides the full text of U.S. Supreme Court opinions shortly after they are rendered, as well as the latest agency rulings, news notes, statutory developments, and summaries of significant lower-court decisions. It also traces the status of appeals before the U.S. Supreme Court and indicates which have been granted or denied review (certiorari).

The best source for staying on top of the latest court cases affecting the mass media is the Bureau of National Affairs *Media Law Reporter* (Med. L. Rptr.). On an almost weekly basis it reports all cases having a bearing on journalism and communication law.

often providing the full text of those decisions. It also provides news notes on media law issues, occasional bibliographies, special reports, and court schedules and dockets.

Perhaps the easiest way to access the most recent court opinions is through computer-based systems. Westlaw is the most comprehensive computer database for the legal profession, followed by Lexis, which is part of the Lexis-Nexis Network. Westlaw and Lexis are both extraordinary services that dramatically simplify many legal research tasks. Their databases allow you to search and access full texts of law review articles, court cases, bills and statutes, agency regulations, and virtually every other source of law imaginable. Unfortunately, both are expensive subscription services that few individuals can afford.

For those who have Westlaw or Lexis access, most court decisions are accessible within days of being handed down. For those who do not have access, the Internet can be the answer. U.S. Supreme Court decisions are available on many sites, but are best accessed through Findlaw (www.findlaw.com) or Cornell University (www.law.cornell.edu). Findlaw has full texts available from 1893. The Cornell site has decisions from 1990 and more than 600 historic cases from before 1990. Both sites also provide links to the decisions of the federal circuit courts and to state courts, although for many of those courts, only their more recent decisions are accessible on line.

Once you have located one or more cases on your topic, you can quickly find others using digests. Digests provide summaries of court decisions, organized around topics and key numbers. Key numbers are numbers assigned to identify and distinguish different legal topics and points of law. U.S. Supreme Court decisions can be found in the *U.S. Supreme Court Digest*, federal district and circuit court decisions are in the *Federal Practice Digest 4th*, and state court decisions can be found using either regional digests, such as the *Northwest Digest 2d* (covering the same states as the *Northwest Reporter 2d*), or digests for individual states (e.g., *Alaska Digest*). For a more comprehensive range of cases, use the *General Digest*, which covers all of the most recently reported cases from both state and federal courts. For earlier (pre-1996) cases, use the *Decennial Digests* (there are ten of them, each covering a different ten-year period from 1897 through 1996).

Digests are arranged alphabetically by topic, and each set of digests contains an index to help you quickly locate relevant cases. You can also locate cases using key numbers. Once you know the key number for a particular topic, you can quickly find cases in other digests.

Once you have found a case, you need to trace its life history using a citator to make sure it is still "good law." The most commonly used is *Shepard's Citations*, which can tell you whether your case has been modified, reversed, affirmed, superseded, criticized, distinguished, explained, limited, overruled or questioned by other courts. Shepard's can also tell what attorneys general and law review authors have said about your case. There are *Shepard's Citations* for every state, each region of West's National Reporter System, for lower federal courts and the U.S. Supreme Court. Using citators is a necessary step in the legal research process. Bypassing it can be disastrous.

In addition to being able to find and track court cases, legal researchers must know how to locate statutes and regulations. Federal statutes are found in the United States Code (U.S.C.), which is the official, government-produced reporter of federal law. There are two unofficial sources, however, that are often more useful to researchers—*United States Code Annotated* (U.S.C.A.) and *United States Code Service* (U.S.C.S.). Both U.S.C.A. and U.S.C.S. contain the full text of the federal code but add annotations that cite court cases and secondary sources applying and interpreting the law.

Federal statutes are organized by topic into numbered "titles," and each title contains many different laws, which are presented as different "sections" and "subsections" of those titles. The citation 15 U.S.C. §26 (1976) is a reference to federal antitrust law, is located in title 15, section 26 of the U.S. Code, and was adopted in 1976. In the absence of a specific citation, you can locate laws using the multivolume indices that accompany the U.S.C., U.S.C.A., and U.S.C.S.

To trace the legislative history of a statute, use the *U.S. Code Congressional and Administrative News* (U.S.C.C.A.N.), which publishes the text of each law as it appeared at the time of passage, committee reports, and a variety of other documents and data. You can also consult the *Congressional Record*, which is published daily and contains edited transcripts of floor debates and votes.

The entire U.S. Code is now available on the World Wide Web in searchable form through a number of websites. The most useful and comprehensive is the Government Printing Office's site (www.access.gpo.gov). That site also contains the *Congressional Record*, Congressional reports, transcripts of hearings, copies of public laws, and a wealth of other information. Similar information can be found on the Cornell and Findlaw sites noted earlier, as well as the Library of Congress site (www.loc.gov), which also contains a link to the Thomas system (www.thomas.loc.gov). Thomas provides the most current information on developments in Congress. With Thomas and the GPO sites alone, researchers have comprehensive access to the past and present work of Congress.

To access state law on the Internet, go to the Cornell site or the Findlaw site and find links to every states' statutes and courts. Updates, court interpretations and secondary source treatments of both state and federal statutes can be found in *Shepard's State Citations* and *Shepard's United States Citations*, respectively.

Administrative agency rules and determinations are another important source of law. Rules and regulations of federal agencies are presented in the *Code of Federal Regulations*, supplemented daily by the *Federal Register*. The latter includes official notices of rulemaking and other proceedings conducted by agencies such as the Federal Communications Commission (FCC).

Both the Federal Register and the Code of Federal Regulations are available on the GPO website. The Findlaw and Cornell sites, among others, provide links to sites containing state administrative regulations. Check *Shepard's Code of Federal Regulation Citations* for updates on agency rules.

FCC and other agency regulations affecting communications industries are also found in *Pike & Fischer's Communication Regulation* (C.R.). This is an excellent resource that provides comprehensive access to all of the statutes, treaties, cases, and agency rules that affect communications. C.R. is really the third installment of *Pike & Fischer's Radio Regulation* (R.R. regulation and R.R.2d). The new name reflects the current breadth of its coverage, which has moved far beyond just radio.

C.R., like R.R. and R.R.2d, comes in three sections—current service, digests, and cases. The current service volumes include a complete index and the texts of all statutes, treaties, and agency rules affecting communications. Digest volumes contain summaries of all cases found in C.R. and R.R.2d (back to 1990). And the cases volumes present the full text of all court decisions, FCC rulings, and other materials.

The latest activities of federal agencies can also be monitored by going directly to their websites. The FCC (www.fcc.gov) and FTC (www.ftc.gov) websites provide detailed

information on their latest hearings, rules, and projects. You can also consult the *Trade Regulation Reporter*, or industry periodicals like *Broadcasting*, *Broadcasting & Cable*, and *Advertising Age* for timely reports on FCC and FTC actions.

Once you have located all of your primary sources—cases, statutes, administrative rules, etc.—you might want to examine some secondary sources to learn more about your topic and to consider what others have written about it. These sources can occasionally be good as starting points to legal research, but you should avoid the temptation to rely on them too early and too often. The best legal research tends to be built around primary sources.

Law reviews are one of the most widely used secondary sources.¹⁰ They can be found in most law libraries, and specific articles can be located using *Legaltrac* (a searchable database available in many law libraries), the *Index to Legal Periodicals*, the *Legal Resource Index*, or the *Current Law Index*. Most law reviews are also available in full-text form on Westlaw and Lexis. A few law reviews offer full text on the World Wide Web, while most others offer only abstracts or tables of contents. To see how articles have been treated by courts and other authors, use *Shepard's Law Review Citations*.

Treatises, *hornbooks*, and *nutshells* are other useful secondary sources. A hornbook is a single-volume summary of a field of law. A nutshell is an even more concise summary. A treatise is similar to a hornbook but is more likely to reflect the opinions of the author whose comments are interspersed with the presentation of the "black-letter" law.

Restatements are books that attempt to identify the enduring principles governing a particular area of law and to present them in almost code form. Of particular interest to communication scholars are the *Restatement of Torts 2d* and the *Restatement of Contracts 2d*.

In addition to these secondary sources, it should be noted that the Internet now provides thousands of websites and other online resources for legal research. Government agencies, academic departments, media organizations, foundations, industry associations, and law firms provide volumes of information on their websites that can be useful research material. But you must exercise extreme caution when using any of these sources, which can be imprecise, slanted, incomplete, out of date, or just plain wrong.

Before you begin tackling your research project, be sure to take advantage of the growing list of books devoted to legal research on the Internet,¹¹ as well as the abundance of traditional legal research tutorials.¹²

Finally, when conducting legal research, you must know how to cite items properly. While styles for different publications vary, most legal work and research follows the guidelines presented in *A Uniform System of Citation*, typically referred to as the "blue book." When in doubt, use this citation standard.

Types of Legal Research in Mass Communication

We have indicated that several explicit functions are performed by legal research generally. These also apply to legal research in mass communication. *Some research clarifies the law and offers explanation through an analysis of procedure, precedent, and doctrine.* Pember, in his important book *Privacy and the Press*, used historical analysis and a synthesis of leading cases affecting the press to clarify the law of privacy.¹³ In such works as the American Law Institute's *Restatement of the Law of Torts, 2d*, an effort is made to codify and otherwise make sense out of court decisions in libel law.¹⁴

Some legal law research tries to reform old laws and suggest changes in the law. Law professors Jerome Barron and Benno Schmidt, Jr., have pushed and pulled the concept of "access to the press." Barron, in a landmark law review article and in his book *Freedom of the Press for Whom?*,¹⁵ calls for "realistic reinterpretation of the First Amendment so as to accommodate the public to have access to the major media in order to express one's opinions where they will matter." Barron lost a decisive battle for his proposed changes in the law before the U.S. Supreme Court in the case of *Miami Herald Publishing Co. v. Tornillo* (1974).¹⁶ Recent studies of libel law also reflect on possible changes in this troublesome area of law.¹⁷

Research may be conducted to provide a better understanding of how law operates on society. Levy's *Freedom of Speech and Press in Early American History: Legacy of Suppression* deals with the social and political effects of constitutional interpretations of the crime of seditious libel in the formative years of the U.S. republic. The endurance of the crime of sedition in the U.S. experience is the chilling theme of this revisionist history, although Levy modifies his thesis in *Emergence of a Free Press*.¹⁸

Preston's *The Great American Blow-Up*¹⁹ is a legal analysis of the social effects of false and deceptive advertising (puffery) and of the inability of the courts and regulatory agencies to deal with it. Most of the empirical behavioral studies discussed later in this chapter also fall under the general heading of "social effects."

Research may analyze the political and social processes that shape our communication laws. Here the focus is not on the effect of the law on society; rather, it is on the effect of society upon the law. Krasnow, Longley, and Terry's *The Politics of Broadcast Regulation*²⁰ is a perceptive analysis of how formal legal institutions, such as the FCC, Congress, and the courts interact in social and political terms with citizen groups and the communication industry lobby to create and enforce broadcasting law.

Research may furnish materials for legal and journalistic education in mass communication. Here we think of two kinds of textbooks that provide the basis for mass communication law courses. These include the hornbooks that synthesize and present in easily understood categories the law of mass communication. Examples are the works of Dwight Teeter and Don Le Duc, Kent Middleton and Bill Chamberlin, as well as Donald Pember.²¹ Another kind of text is the casebook that presents a series of analytical comments and questions integrated with edited selections of leading cases. The best known casebooks are by Gilimor and Barron; Carter, Franklin, and Wright; and—for the electronic media—Carter, Franklin, Anderson, and Wright.²²

Beyond the general materials of mass communication law there are programmed instruction materials in libel law, treatises on advertising, and broadcast and cable law and regulation. Communication law research also focuses on news media coverage of courts and the law. A major work on news coverage of the U.S. Supreme Court is Grey's *The Supreme Court and the News Media*. Drechsel does the same for trial courts.²³

Empirical and Behavioral Legal Research in Mass Communication

Sir Henry Finch observed in his *Discourses on Law* in 1627 that "the sparkes of all the Sciences of the World are raked up in the ashes of the Law."²⁴ If Sir Henry intended to con-

vey the idea that law, like other realms of human thought and action, is amenable to a variety of mental disciplines, he was prophetic. That is where we are today.

Methodologies applicable to the study of legal questions have been called traditional, **empirical**, and **behavioral**. Yet the most insistent advocates of each recognize the inevitable overlap. The traditional legal material retrieval system we have described depends for its logic upon words and numbers; thus the relative ease of its computability. Methodologies diverge, however, when their adherents are pressed to define what they mean by "theory." For the traditionalist, theory may be no more than a preference for a particular ordering of values, a model of action that can be applied generally and with feeling to a set of everyday occurrences. Oliver Wendell Holmes' "clear and present danger" test, Thomas Emerson's "speech/action" dichotomy, and the Rehnquist court's doctrine of judicial restraint are such models, lending themselves to the logical process of analogy, discrimination, and power deduction.

Behavioral theory is presented as something grander. It assigns to itself the of prediction, but perhaps not its invention. Holmes, in his 1897 address to the Massachusetts Bar, "The Path of the Law," has already staked a claim to prediction:

The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts. . . . The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.²⁵

Legal sociologist Aubert believes it important to understand the characteristics of traditional legal research that set it apart from scientific thinking. They are:

1. Scientific approaches tend to emphasize, often to the exclusion of everything else, that aspect of a phenomenon which is general. Judicial opinions, and also legal theory, tend . . . to stress the unique aspects of the case.
2. The web of relationships which legal thought throws over the facts of life is not a causal or functional one. Legal thinking, legislation, and judicial decision making are (only) peripherally touched by schemes of thought in terms of means and ends.
3. Legal thinking is characterized by absence of probabilism, both with respect to law and with respect to facts. Events have taken place or they have not taken place. A law is either valid or invalid.
4. Legal thinking is heavily oriented to the past. . . .
5. Law is a comparison process. . . . The legal consequences expected to follow a certain action. . . .
6. Legal thinking is dichotomous. Rights or duties are either present or absent.²⁶

The goal of legal scholarship in mass communication is not always knowledge for the sake of knowledge; it is often an applied knowledge in keeping with the lawyer's adversarial purpose. Political behaviorist S. Sidney Ulmer writes:

In choosing among hypotheses concerning historical fact, the lawyer seeks victory, not truth. The adversary process repels evidence as do delays in litigation. In making

decisions the judge recognizes (1) that the case must be decided one way or another, whether or not the evidence is sufficient for a scientific conclusion; (2) that judicial fact-finders are not bound by rules of consistency; and (3) that facts may be bent by the judicial process to serve an ulterior purpose.²⁷

It is perhaps unfortunate that much legal scholarship methodologically parallels the opinions of judges. The mass communication researcher, less wedded to the judiciary than the legal scholar, has an opportunity to make more scientific applications and to develop a more disinterested scholarship. Unfortunately, however, the communication scholar gets caught up in another kind of adversarial system and often becomes an advocate for the press and the communication theory; he or she looks for the effects of law on the absolute command of the First Amendment that "Congress shall make no law, abridging freedom of speech or of the press. . . ."

But it is overstatement to say, as Schubert does in the introduction to his landmark book, *Judicial Behavior*, that "the traditional approach is interested in neither the descriptive politics of judicial action (i.e., the facts) nor the development of a systematic theory of judicial decision making (through the use of scientific theory and methods).²⁸ The aversion is not that strong, and such methodology may simply not be appropriate to some kinds of research. Often the legal scholar works with the singular instance, that is, the individual case. A new court decision is regarded as a landmark and the law changes. That singular instance can be related historically to earlier cases and to external influences that may have brought it about. But does this lead to theoretical formulation?

"Theory" in mass communication studies generally implies a set of related and highly abstract statements from which propositions testable by scientific measurement can be drawn and upon which explanations and predictions about human behavior can be based. Theoretical models in legal research are different since they must accommodate changes in the law created by case adjudication and statute. This difficult task is compounded by the fact that "theory" in law, according to *Black's Law Dictionary*, is explicitly defined as "facts on which the right of action is claimed to exist." When a judge asks the question, "On what theory?" he wants to know the basis of liability or grounds of defense. From Mill to Micklejohn to Emerson, First Amendment claims have issued from theoretical frameworks that validate the asking of these questions. To lack a persuasive theory of freedom of expression is to lack any explanation for individual cases.

Drawing too rigid a line between traditional and empirical methodologies, however, can be misleading. Traditional legal methodologies, it is true, are qualitative, their outcomes sometimes inexplicable, even unique, but not always. Scientific methodologies are quantitative, their outcomes lawful and noncontradictory, but not always.

Basic steps in the empirical test of generalizations might be (1) reviewing the relevant literature, (2) deciding upon testable hypotheses, (3) setting up a research design, (4) collecting and analyzing data, (5) testing the hypotheses with the data collected, and (6) offering conclusions and explanations for one's findings.

The traditional researcher, though in a less formal and systematic way, follows the same procedure. But again there are differences. If the trial is substituted for, say, the experimental research design, the difference becomes dramatic. The trial can never be repeated or replicated. It can only happen once. The legal hypothesis can be retested in an

appeal, and often is, but the appeal process is finite. In principle, the retesting and reformulation of hypotheses in science may continue endlessly. The legal scholar, however, unlike the trial lawyer, can enjoy some of the experimentalist's theoretical opportunities.

The application of social science methods to the study of mass communication law and other legal problems is of relatively recent origin, and there is a paucity of literature. The new approach is an outgrowth of scholarly trends in jurisprudence and political science away from natural law toward positivism (legal realism, political jurisprudence, and judicial behavioralism). Legal realists, including Holmes, Roscoe Pound, Llewellyn, Frank, and Olivecrona,²⁹ reacted to traditional legal philosophy and the self-contained structure of legal research. They saw the judiciary as an integral element of contemporary social life, amenable to systematic observation and analysis.

Motivated by the legal realists, a number of political scientists and legal scholars observed that traditional legal research, relying on the exhaustive reading of cases and statutes, focused only on an intrinsic aspect of the law: The law is what the courts and the legislatures say it is, nothing less, nothing more. But thoughtful observers knew that extrinsic factors like politics and elections also influence the court and the law, although these influences were seldom acknowledged in the decisions of courts or in the opinions of individual judges or justices. This concern led to a school of political jurisprudence that included the study of judicial lobbying, the political functions of judges, and constitutional politics.³⁰

Political jurisprudence concerns itself largely with the impact of politics on judicial institutions. Judicial behavioralism looks more closely at the behavior of individual judges, blocs of judges (liberal versus conservative, for example), and the courts generally. Using theoretical models created by social psychologists to study individual and group behavior, a number of political scientists began to analyze judicial behavior in order to explain and predict what courts were doing and would do.³¹

Again it is important not to overlook the overlap in methodologies. Courts, of course, have not been oblivious to social science techniques. Indeed, legal empiricism may have begun with the *Brandeis Brief* in 1908,³² a legal argument based on sociopsychological data. And scientific data collection was advocated by Loevinger, a former Federal Communications Commissioner, jurist, and law professor, in a system he called "jurimetrics." All other jurisprudence, said Loevinger, is

based upon speculation, supposition, and superstition; it is concerned with meaningless questions; and, after more than two thousand years, jurisprudence has not yet offered a useful answer to any question or a workable technique for attacking any problem.³³

Judicial behavioralism is designed to take the scholar beyond any one court decision or line of cases into an examination of patterned behavior. It might also look at judges in attitudinal terms or explore ethnic and religious variables in their decisions. Ulmer points out some of the virtues of the behavioral approach in legal research:

It is both pertinent and instructive to study the interpersonal relationships and behavior patterns of the members of a collegial court. By doing so, we recognize what legal analysis ignores, namely, that the law, the courts and the judges are something

more than mere abstractions. The nature of the endowments, outlooks and attitudes which judges bring to the discharge of their duties may be revealed in the identification of individual behavior patterns. The discrepancies among these patterns, in turn, reflect the differences among the actors.³⁴

Examples of Nontraditional Methods in Communication Law Studies

Judicial behaviorism moves away from the factual web of particular cases and their idiosyncratic nuances and moves toward generalization. Space will permit only a few examples of empirical and behavioral studies from mass communication.

Thomas A. Schwartz, a journalism professor at Ohio State University, did pioneering work in a master's thesis, "A Study of the Relationship Between the Ideological Tendencies of the United States Supreme Court Justices and Their Young Behavior in Selected Cases Affecting the Press, 1946-74." Schwartz tested three hypotheses:

1. Basic attitudes of Supreme Court justices contribute to their voting behavior.
2. Basic attitudes of Supreme Court justices toward civil liberties contribute to their voting behavior in civil liberties cases.
3. Basic attitudes of Supreme Court justices toward press issues contribute to their voting behavior in press cases.³⁵

Schwartz used judicial behaviorism in this mass communication law study. The Supreme Court case was his unit of analysis. He drew his data from all nonunanimous cases decided on their merits by the Supreme Court between October 1946 and February 1974 and two subsamples of civil liberties and economic cases. Units of measurement included Supreme Court justices, "courts" formed by the justices, ideological outcomes of cases, press favorableness of outcomes, and votes of individual justices. Schwartz was able to use a data package collected by the American Political Science Association and to computerize his work.

Patterning his study on the work of Schubert, Schwartz replicated tests of justices' attitudes using factor analysis. His conclusions: (1) Supreme Court justices tend to form blocs; (2) in all instances in civil liberties cases these blocs can be identified as liberalism, conservatism, moderation, neutralism, and independence; (3) in cases affecting freedom of the press, these blocs normally can be identified as favorableness, unfavorableness, and neutralism.³⁶ More important perhaps were the implications of his work for the study of mass communication law:

1. The establishment of the existence of distinct voting blocs in First Amendment cases can facilitate study of Supreme Court justices' attitudes toward a system of free expression.
2. Since the justices vote in blocs in First Amendment cases, mass communication law researchers can have more confidence in describing the attributes of blocs and in explaining First Amendment freedoms.

3. Explication of Supreme Court bloc arrangements in such areas as economic and civil liberties adjudication is well developed. Comparisons between those arrangements and First Amendment block arrangements could be worthwhile.³⁷

In another instance, Cecile Gaziano, as a graduate student at the University of Minnesota, became interested in the relationship between Supreme Court decisions and public opinion about freedom of expression for deviant political groups. Relying on a sociopsychological model of judicial behavior—the higher the tension and the greater the uncertainty, the more likely the group will seek a dominant outside referent such as public opinion—Gaziano stated the hypothesis: Decisions of the Supreme Court on freedom of expression for deviant political groups are related to public opinion on this issue. Data fitting her research design were available in Court decisions and poll results over her stipulated thirty-four-year period, and she found support for her hypothesis.³⁸

Although the data do not account for judicial *behavior*, they do provide for an empirical test of at least a significant statistical relationship. If empirical studies do not permit us to predict judicial behavior, they begin to explain it, and they help to reveal the nature of the rules of law. As has been noted, these rules are expressed in constitutions, statutes, ordinances, regulations, judicial opinions, and scholarly writings. And these are systematically preserved and catalogued. The traditional study of law is more than hunch and hope, and it lends itself to rational analysis in a number of modes.

Other mass communication law studies include Robbins' examination of the uses of social science data in deciding First Amendment decisions,³⁹ Anderson's empirical investigation of social responsibility theory,⁴⁰ Holim's look at a conflict between two professions (lawyers and journalists),⁴¹ Stempel's scale analysis of Burger Court press decisions,⁴² and the important Iowa libel study.⁴³

These studies and others that could be cited were careful to take into consideration linkages between and among court cases, as well as that long march of the law sometimes called the "dead hand of precedent" or *stare decisis*. The point is this: One does not "sample" cases in the sense of drawing a random sample. Conventional sampling procedure could be disastrous in legal studies if employed without real knowledge of all the cases in a particular area of law.

No doubt, the authors suggested in an earlier book chapter,⁴⁴ there are many paths one might follow in searching for a research model. The creative researcher will find one best suited to his or her own needs. However, some considerations are immediately evident. For legal scholarship to become part of the totality of communication research it must:

1. Consider the systematic, step-by-step procedures of the scientific method from the problem formulation to hypothesis development, methodological strategy, data collection and analysis, and discussion of findings.
2. Frame hypotheses that move away from normative, adversarial positions and are instead based on a preponderance of evidence growing out of a complete review of the relevant literature.
3. Present the often-important dissenting views of judges in their full historical context so that they can be understood as part of the fabric of judicial behavior and

not simply as exercises in legal reasoning (it is here that the distinction must be made between holdings and dicta).

4. Make efforts to temper normative assumptions when analyzing the admittedly normative behavior of jurists. That is, while recognizing the value-laden quality of court decisions, the communication researcher should nonetheless seek systematic and value-free modes for dissenting and discussing them and their implications.⁴⁵

Publication Outlets for Research in Mass Communication Law

Scholars seeking publication in this field have a variety of outlets from which to choose. These include the periodicals of journalism and mass communication and numerous law reviews and journals. As noted earlier, *Communication Law and Policy* is devoted solely to research in mass communication law, but other journals use articles on mass communication law.

Two factors may determine where the scholar will publish: (1) form and style of the research paper and (2) the audience one desires to reach. Most journalism and mass communication publications do not want traditional law review articles with their length, heavy documentation, and adversarial tone. They simply would not *fit*. By the same token, brief analytical papers without detailed backgrounding and exhaustive precedential referencing will not make it in the law reviews.

The scholar's purpose in doing legal research may be varied, but inevitably one hopes that one's work will be read. By whom is the question. If one wants to become part of the standard legal literature, be indexed in the *Index to Legal Periodicals*, be accessible on Westlaw and Lexis, and included in *Shepard's Citations* periodical references, the legal periodicals are one's outlet. However, legal periodicals are parochial in their nonlibrary circulations and not likely to be well read by persons in mass communication law, unless your article is discovered as part of the specific search. If one wishes to be read by the journalism community, the mass communications periodicals are the primary outlet. To find research journals in mass communication, and to learn more about their publication procedures and requirements, consult the *Iowa Guide: Scholarly Journals in Mass Communication and Related Fields*, published by the University of Iowa's School of Journalism and Mass Communication. For legal publications, see *Current Publications in Law and Related Fields* and also the *Index to Legal Periodicals*.

Communication Journals

Publications such as *Journalism and Mass Communication Quarterly*, *Journal of Broadcasting and Electronic Media*, and the *Journal of Communication* are interested in short, scholarly studies on legal topics. Behavior studies can find an audience in *Communication Research* or *Public Opinion Quarterly*. Short articles with broad implications for media and society can be directed to *Mass Media and Society*, and updates, essays, and analyses can be submitted to *Media Law Notes*. Legal historical work on a wide range of commu-

nication topics is sought by *Journalism History*, *American Journalism*, and the *American Journal of Legal History*. Critical, cultural, and other qualitative studies are seen in such publications as *The Journal of Communication Inquiry*, *Critical Studies in Mass Communications*, *Media Culture & Society*, and *Communications*. Lengthy legal articles sometimes growing out of dissertations are occasionally published in *Journalism and Mass Communication Monographs*. An article on teaching mass communication law might find a home in the pages of *Journalism and Mass Communication Educator*. Articles of current interest written in traditional magazine style might (after a query to the editors) be sent to such publications as *American Journalism Review*, *Columbia Journalism Review*, *Nieman Reports*, *The Quill*, *Editor & Publisher*, *Broadcasting & Cable*, *Brill's Content*, and others.

Legal Periodicals

There is a significantly greater number of legal periodicals than there are communication publications. Legal periodicals are published mainly by law schools, but also by professional associations, groups of legal specialists, and commercial legal publishers. *Index to Legal Periodicals* is the *Reader's Guide* of the law field. Included in it are most American legal periodicals, both scholarly and professional. Articles about the law in more general circulation publications, as has been indicated, are indexed in *Legal Resources Index* and *Current Law Index*, international materials in the *Index to Foreign Legal Periodicals*. One of the best publication outlets for legal research is *Communication Law and Policy*. Its editorial board is composed of mass communication educators and scholars, lawyers, law professionals, and others, and it is designed to bridge the substantive gap between purely legal publications and traditional mass communications journals. It welcomes submissions on all areas of mass communication law and policy and is open to all methods and approaches.

Communication and the Law, a commercially published journal, is another publication to consider. This is a specialized law journal that, like *Communication Law and Policy*, contains articles from mass communication scholars as well as from lawyers and legal scholars.

The major publication outlet for the serious legal scholar who wishes to reach a legally minded audience is the law reviews, published mainly by an elite corps of third-year law students. These are *student* publications only in a technical sense. They feature articles by important legal scholars, judges, political scientists, and others. Nearly every law school has a law review, and most are general publications interested in a brief spectrum of legal topics. As one might expect, some give special attention to proximate federal circuit courts or the special legal problems of a region. But, for the most part, the law reviews are not parochial in content. An article on the Freedom of Information Act, for example, would be of interest to a wide variety of law reviews. Like most publications, law reviews have a pecking order. The Harvard, Yale, Columbia, Michigan, Chicago, and Stanford law reviews are the most prestigious.

Content differs from review to review, but two types of content constitute the prevailing pattern. There are (1) *articles* and (2) *comments* or *notes*. Articles are substantive legal studies, usually well documented in nearly exhaustive, and exhausting, footnotes chronicling the judicial and legislative histories of particular cases, statutes, and legal concepts. Articles often begin with a hypothesis or proposition offered forcefully in an introductory section. This is followed by supporting units set off by subheads, a conclusion, and

a discussion of implications. Legal scholars are the main contributors, but other disciplines may be represented as well. A number of communication law scholars publish regularly in the law reviews.

Comments are briefer treatments of legal issues and frequently focus on recent cases, putting them in context and analyzing their meanings. Most comments are written by the law review staff, although outside comments are welcomed. A few law reviews favor review essays on current books and recruit outside specialists for this purpose.

The neophyte legal scholar may be overwhelmed by the number of law reviews in a law library. How is one chosen for publication purposes? The *Index to Legal Periodicals* is a place to start. It will tell you where recent articles on your topic have been published. It will help you decide when to query an editor. By looking under headings such as freedom of expression, freedom of the press, or specific media headings, one can begin to detect the editorial patterns of particular law reviews.

There is some specialization in the law reviews. Some emphasize public law, others administrative law or property law. There are a few law journals that emphasize media and communication law and should be given special attention as possible venues for your research. These include the *Hastings Communications and Entertainment Law Journal* (*Comm/Ent*), published by the University of California's Hastings College of Law; the *Federal Communication Law Journal*, published by the UCLA School of Law; the *Cardozo Arts & Entertainment Law Journal*, published by the Benjamin N. Cardozo School of Law; and the *Loyola Entertainment Law Journal*, published by the Loyola of Los Angeles School of Law.

Another possible publication outlet, but less varied in its approach, is the professional legal journal. Virtually every state and major metropolitan bar association has one. Some are scholarly, others newsy. For topics with a particular state or jurisdictional bias, these are outlets to consider.

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