MASS MEDIA LAW

Don R. Pember | Clay Calvert

Mass Media Law

19th Edition

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Mc Graw Hill Education

MASS MEDIA LAW, NINETEENTH EDITION

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PREFACE

As the authors write this preface during the early fall of 2013, there is new movement in Washington, D.C., to finally pass a federal shield law that would provide qualified protection for journalists from revealing their confidential sources and information in federal court proceedings (see Chapter 10 regarding shield laws). Known as the Free Flow of Information Act of 2013 and sponsored by a bi-partisan group of U.S. Senators, the bill also would codify as law the Department of Justice's recently revised policies on the surveillance, search and seizure of the records and activities of members of the news media. The revised guidelines were released in July 2013 by U.S. Attorney General Eric Holder, just two months after it was revealed that the Justice Department had secretly seized the phone records of multiple Associated Press reporters for several months in 2012 and seized the e-mails of Fox News reporter James Rosen. The records were taken by the government in both instances to determine who was leaking classified information to journalists. Many members of the news media, however, saw the tactic as a grievous and egregious intrusion into press freedom. These controversies are discussed in Chapter 10 of this new edition. Ultimately, they illustrate that the tension between the government and a free press in the United States remains high more than 220 years after the adoption of the First Amendment in 1791. Today, in brief, is a propitious and important time to be studying media law.

The 19th edition of the textbook is replete with updated information in every chapter, as new cases, controversies and statutes affecting media law arise on an almost daily basis. Among the new judicial rulings covered in this edition are three issued by the U.S. Supreme Court in 2012 and 2013:

- *United States* v. *Alvarez*, in which the Court declared unconstitutional part of the Stolen Valor Act that made it a crime to lie about having won a military medal of honor. This case, which is discussed in detail in Chapter 2, illustrates many important principles about both First Amendment and media law.
- *McBurney* v. *Young*, in which the Court faced the question of whether one state may preclude citizens of other states from enjoying the same rights of access to public records that the one state affords its own citizens. This case is addressed in Chapter 9.
- *Federal Communications Commission* v. *Fox Television Stations*, a high court ruling affecting the FCC's regulation of broadcast indecency and, in particular, its targeting of so-called fleeting expletives. This case, which is covered in Chapter 16, has far reaching implications, as the FCC was busy considering revamping its entire indecency enforcement regime and rules in fall 2013. Expect much more in this area from the FCC in 2014 and 2015.

This edition of the book eliminates from Chapter 3 a unit previously devoted to prior restraint and censorship during wartime. With U.S. military involvement winding down in both Iraq and Afghanistan, and with an eye toward comments from reviewers and keeping the size of the book manageable, the authors decided to cut this material.

The authors thank several individuals for their support. Clay Calvert thanks his undergraduates at the University of Florida for making mass communications law an awesome teaching experience. He also expresses gratitude to the multiple UF students who helped to read, review and edit new content for this edition of the textbook; their feedback and advice was invaluable. Clay Calvert furthermore appreciates Berl Brechner for continued support of his research and writing endeavors. Last but certainly not least, Clay Calvert thanks Don R. Pember for having him aboard the journey that is writing and assembling a timely and comprehensive book on mass media law. For the record, Clay Calvert worked on Chapters 1, 2, 3, 7, 8, 9, 10, 13, 15 and 16 for this edition, while Don R. Pember took on Chapters 4, 5, 6, 11, 12 and 14.

This is the last time you will see Don Pember's name on this book. After 19 editions and nearly 40 years it is time for me to pack it in. I am certain Clay Calvert will continue to do admirable work so the book will continue to stay alive. Many aspects of mass media law have changed during the past four decades, but more have stayed the same. The growth of the Internet has forced the most significant changes in the law, but the courts and legislatures have been adapting.

I want to use my portion of this preface to thank some people. I am very grateful to Clay Calvert for his work on the last six editions. After writing the book alone for about 25 years, his insights and enthusiasm were invaluable. I am also grateful to all the instructors who, over the years, chose to adopt this text for their classes. Support from peers is always appreciated. But there are several people who helped me as a journalist and journalism teacher that I want to especially thank.

Thanks goes to Lee Peel, who in 1955 introduced a high school junior to journalism. And to Bud Meyers and George Hough III who helped this same young fellow get through his undergraduate and early graduate studies at the Michigan State University School of Journalism. Thanks also to Ben Kuroki, a feisty newspaper publisher who taught me what a newspaper was supposed to do. And to Bill Hachten and Dwight Teeter who guided me through my doctoral studies at the University of Wisconsin School of Journalism. I am grateful that Henry Ladd Smith and Bill Ames were around when I got to the University of Washington to teach me how to be a journalism teacher. And finally, and most importantly, I want to thank my wife, Diann, for helping me get through the past 50 years of my life. Couldn't have made it without her.

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CHAPTER 1

The American Legal System

Before studying mass media law, one needs a general background in law and the judicial system. In the United States, as in most societies, law is a basic part of existence, as necessary for the survival of civilization as are economic and political systems, the mass media, cultural achievement and the family.

This chapter has two purposes: to acquaint you with the law and to outline the legal system in the United States. While not designed to be a comprehensive course in law and the judicial system, it provides a sufficient introduction to understand the next 15 chapters.

The chapter opens with a discussion of the law, considering the most important sources of the law in the United States, and it 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 start and proceed through the courts are included in the discussion of the judicial system.

FIVE SOURCES OF LAW

1. Common law
2. Equity law
3. Statutory law
4. Constitutional law (federal and state)
5. Executive orders and administrative rules

SOURCES OF THE LAW

There are many definitions of law. Some people say law is any social norm or any organized method of settling disputes. Most writers insist it is more complex, that some system of sanctions and remedies is required for a genuine legal system. John Austin, a 19th-century English jurist, defined law as definite rules of human conduct with appropriate sanctions for their enforcement. He added that both the rules and the sanctions must be prescribed by duly constituted human authority.[1] Roscoe Pound, an American legal scholar, suggested that law is social engineering—the attempt to order the way people behave. For the purposes of this book, it is helpful to consider 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.

What is the source of American law? There are several major sources of the law in the United States: the U.S. Constitution and state constitutions; the common law; the law of equity; the statutory law; and the rulings of various executives, such as the president and mayors and governors, and administrative bodies and agencies. Historically, we 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, our federal Constitution is the supreme law of the land. Yet when each of these sources of law is considered separately, it is more useful to begin with the earliest source of Anglo-American law, the common law.

COMMON LAW

Common law,* which developed in England during the 200 years after the Norman Conquest in the 11th century, is one of the great legacies of the British people to colonial America. During those two centuries, the crude mosaic of Anglo-Saxon customs was replaced by a single system of law worked out by jurists and judges. The system of law became common throughout England; it became common law. It was also called 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

* Terms in boldfaced type are defined in the glossary.
1. Abraham, *Judicial Process*.

to community custom, and governmental sanction was applied to enforce the resolution. As such, common law was, and still is, considered "discovered law."

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 common law reflected not so much the custom of the land as the custom of the court—or more properly, the custom of judges. While judges continued to look to the past to discover how other courts decided a case when given similar facts (precedent is discussed in a moment), many times judges were forced to create the law themselves. Common law thus sometimes is known as judge-made law.

Common law thus sometimes is known as judge-made law.

Common law is an inductive system in which a legal rule and legal standards are arrived at after consideration of many cases involving similar facts. In contrast, in a deductive system of law, which is common in many other nations, the rules are expounded first and then the court decides the legal situation under the existing rule. The ability of common law to adapt to change is directly responsible for its longevity.

Fundamental to common law is the concept that judges should look to the past and follow court precedents.* The Latin expression for the concept is this: "Stare decisis et non quieta movere" (to stand by past decisions and not disturb things at rest). **Stare decisis** is the key phrase: Let the decision stand. A judge should resolve current problems in the same manner as similar problems were resolved in the past. Put differently, a judge will look to a prior case opinion to guide his or her analysis and decision in a current case. Following precedent is beneficial as it builds predictability and consistency into the law—which in turn fosters judicial legitimacy. Courts may be perceived as more legitimate in the public's eye if they are predictable and consistent in their decision-making process.

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

The Role of Precedent

At first glance one would think that the law never changes in a system that continually looks to the past. Suppose that the first few rulings in a line of cases were bad decisions. Are courts saddled with bad law forever? The answer is no. While following **precedent** is desired (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 common law, judges developed means of coping with bad law and new situations in which the application of old law would result in injustice.

Imagine that the newspaper in your hometown publishes a picture and story about a 12-year-old girl who gave birth to a 7-pound son in a local hospital. The mother and father do not like the publicity and sue the newspaper for invasion of privacy. The attorney for the parents finds a precedent, *Barber* v. *Time,*[2] in which a Missouri court ruled that to photograph a patient in a hospital room against her will and then to publish that picture in a newsmagazine is an **invasion of privacy.**

Does the existence of this precedent mean that the young couple will automatically win this lawsuit? Must the court follow and adopt the *Barber* decision? The answer to both questions is no. For one thing, there may be other cases in which courts have ruled that publishing

*Appellate courts (see page 17) often render decisions that decide only the particular case and do not establish binding precedent. Courts refer to these as "unpublished decisions." In some jurisdictions it is unlawful for a lawyer to cite these rulings in legal papers submitted in later cases.

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

FOUR OPTIONS FOR HANDLING PRECEDENT

1. Accept/Follow
2. Modify/Update
3. Distinguish
4. Overrule

such a picture is not an invasion of privacy. In fact, in 1956 in the case of *Meetze* v. *AP*[3] a South Carolina court made 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. When a court accepts a prior court ruling as precedent, it is adopting it and following it for guidance. Second, the court can *modify,* or change, the 1942 precedent by arguing that *Barber* v. *Time* was decided 72 years ago when people were more sensitive about going to a hospital, since a stay there was often considered to reflect badly on a patient. Today hospitalization is no longer a sensitive matter to most people. Therefore, a rule of law restricting the publication of a picture of a hospital patient is unrealistic, unless the picture is in bad taste or needlessly embarrasses the patient. Then the publication may be an invasion of privacy. In our imaginary case, then, the decision turns on what kind of picture and story the newspaper published: a pleasant picture that flattered the couple or one that mocked and embarrassed them? If the court rules in this manner, it *modifies* the 1942 precedent, making it correspond to what the judge perceives to be contemporary sensibilities and circumstances.

As a third option the court can decide that *Barber* v. *Time* provides an important precedent for a plaintiff hospitalized because of an unusual disease—as Dorothy Barber was—but that in the case before the court, the plaintiff was hospitalized to give birth to a baby, a different situation: Giving birth is a voluntary status; catching a disease is not. Because the two cases present different problems, they are really different cases. Hence, the *Barber* v. *Time* precedent does not apply. This practice is called *distinguishing the precedent from the current case,* a very common action. In brief, a court can distinguish a prior case (and therefore choose not to accept it and not to follow it) because it involves either different facts or different issues from the current case.

Finally, the court can *overrule* the precedent. When a court overrules precedent, it declares the prior decision wrong and thus no longer the law. Courts generally overrule prior opinions as bad law only when there are changes in:

1. factual knowledge and circumstances;
2. social mores and values; and/or
3. judges/justices on the court.

3. 95 S.E. 2d 606 (1956).

For instance, in 2003 the U.S. Supreme Court in *Lawrence* v. *Texas*[4] overruled its 1986 opinion called *Bowers* v. *Hardwick*[5] that had upheld a Georgia anti-sodomy statute prohibiting certain sexual acts between consenting gay adults. By 2003, American society increasingly accepted homosexuality (evidenced then by both the dwindling number of states that prohibited the conduct referenced in *Bowers* and by at least two Supreme Court rulings subsequent to *Bowers* but before *Lawrence* that were favorable to gay rights and thus eroded *Bowers'* strength). There also was growing recognition that consenting adults, regardless of sexual orientation, should possess the constitutional, personal liberty to engage in private sexual conduct of their choosing. Furthermore, six of the nine justices on the Supreme Court had changed from 1986 to 2003. Thus, 17 years after *Bowers* was decided, there were changes in social values, legal sentiment and the court's composition. The Supreme Court in *Lawrence* therefore struck down a Texas anti-sodomy statute similar to the Georgia one it had upheld in *Bowers*. It thus overruled *Bowers*. Justice Kennedy noted that although "the doctrine of stare decisis is essential to the respect accorded to the judgments of the court and to the stability of the law," it "is not, however, an inexorable command." In the hypothetical case involving the 12-year-old girl who gave birth, the only courts that can overrule the Missouri Supreme Court's opinion in *Barber* v. *Time* are the Missouri Supreme Court and the U.S. Supreme Court.

In 2010, a closely divided Supreme Court in *Citizens United* v. *Federal Elections Commission* overruled a 1990 opinion called *Austin* v. *Michigan State Chamber of Commerce*. The Court in *Austin* had upheld a Michigan law banning corporations from spending money from their own treasury funds in order to create their own ads in support of, or in opposition to, any candidate in elections for state office. By 2010, the composition of the Court had shifted over 20 years and the five conservative-leaning justices (Anthony Kennedy, John Roberts, Antonin Scalia, Samuel Alito and Clarence Thomas) in *Citizens United* voted to overrule *Austin* in the process of declaring unconstitutional a federal law that prohibited corporations and unions from using their general treasury funds to make independent expenditures for speech expressly advocating for the election or defeat of a candidate for public office. In reaching this conclusion, Justice Kennedy wrote for the majority about the importance of protecting political speech, regardless of who the speaker is (a corporation, a union or the common citizen), and he concluded "that stare decisis does not compel the continued acceptance of *Austin*. The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether."

Obviously, the preceding discussion oversimplifies the judicial process. Rarely is a court confronted with only a single precedent. Indeed, as attorneys would put it, there may be several prior cases that are "on point" or may apply as precedent. And whether or not precedent is binding on a court is often an issue. For example, decisions by the Supreme Court of the United States regarding the U.S. Constitution and federal laws are binding on all federal and state courts. Decisions by the U.S. Court of Appeals on federal matters are binding only on other lower federal and state courts in that circuit or region. (See pages 25–27 for a discussion of the circuits.) The supreme court of any state is the final authority on the meaning of

4. 539 U.S. 558 (2003).
5. 478 U.S. 186 (1986).

the constitution and laws of that state, and its rulings on these matters are binding on all state and *federal* courts in that state. Matters are more complicated when federal courts interpret state laws. State courts can accept or reject these interpretations in most instances. Because mass media law is so heavily affected by the First Amendment, state judges frequently look outside their borders to precedents developed by the federal courts. A state court ruling on a question involving the First Amendment guarantees of free speech and press will be substantially guided by federal court precedents on the same subject.

Lawyers and law professors often debate how important precedent really is when a court makes a decision. Some suggested a "hunch theory" of jurisprudence: A judge decides a case based on a gut feeling of what is right and wrong and then seeks out precedents to support the decision.

Finding Common-Law Cases

Common law is not specifically written down someplace for all to see and use. It is instead contained in 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 17th 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 the Law, Second, of Torts," the task was again undertaken, but on a narrower scale.

Courts began to record their decisions centuries ago. The modern concept of fully reporting written decisions of all courts probably began in 1785 with the publication of the first British Term Reports.

While scholars and lawyers still uncover common law using the case-by-case method, it is fairly easy today to locate the appropriate cases through a simple system of citation. The cases of a single court (such as the U.S. Supreme Court or the federal district courts) are collected in a single **case reporter** (such as the "United States Reports" or the "Federal Supplement"). The cases are collected chronologically and fill many volumes. Each case collected has its individual **citation,** or identification number, which reflects the name of the reporter in which the case can be found, the volume of that reporter, and the page on which the case begins (Figure 1.1). For example, the citation for the decision in *Adderly* v. *Florida* (a freedom-of-speech case) is 385 U.S. 39 (1966). The letters in the middle (U.S.) indicate that the case is in the "United States Reports," the official government reporter for cases decided by the Supreme Court of the United States. The number 385 refers to the specific volume of the "United States Reports" in which the case is found. The second number (39) gives the page on which the case appears. Finally, 1966 provides the year in which the case was decided. So, *Adderly* v. *Florida* can be found on page 39 of volume 385 of the "United States Reports."

Computers affected the legal community in many ways. Court opinions are now available via a variety of online services. For instance, two legal databases attorneys often use and that frequently are available free to students at colleges and universities are LexisNexis and Westlaw. These databases provide access to court opinions, statutory law (see pages 9–10) and law journal articles. In most jurisdictions, lawyers may file documents electronically with the court.

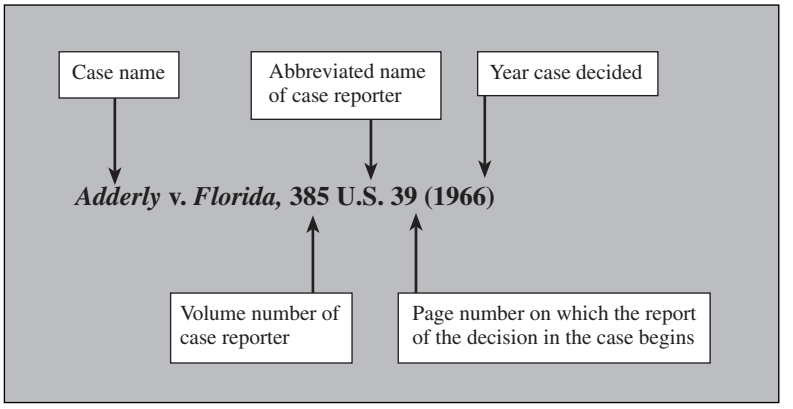

FIGURE 1.1
Reading a case citation.

If you have the correct citation, you can easily find any case you seek. Locating all citations of the cases apropos to a particular problem—such as a libel suit—is a different matter and is a technique taught in law schools. A great many legal encyclopedias, digests, compilations of common law, books and articles are used by lawyers to track down the names and citations of the appropriate cases.

TYPICAL REMEDIES IN EQUITY LAW

1. Temporary restraining order (TRO)
2. Preliminary injunction
3. Permanent injunction

EQUITY LAW

Equity is another kind of judge-made law. The distinction today between common law and equity law has blurred. The cases are heard by the same judges in the same courtrooms. Differences in procedures and remedies are all that is left to distinguish these two categories of the law. Separate consideration of common law and equity leads to a better understanding of both, however. Equity was originally a supplement to the common law and developed side by side with common law.

The rules and procedures under equity are far more flexible than those under common law. Equity really begins where common law leaves off. Equity suits are never tried before a jury. Rulings come in the form of **judicial decrees,** not in judgments of yes or no. Decisions in equity are (and were) discretionary on the part of judges. And despite the fact that precedents are also relied upon in the law of equity, judges are free to do what they think is right and fair in a specific case.

Equity provides another advantage for troubled litigants—the restraining order. While the typical remedy in a civil lawsuit in common law is **damages** (money), equity allows a

judge to issue orders that can either be preventive (prohibiting a party from engaging in a potential behavior it is considering) or remedial (compelling a party to stop doing something it currently is doing). Individuals who can demonstrate that they are in peril or are about to suffer a serious irremediable wrong can usually gain a legal writ such as an injunction or a restraining order to stop someone from doing something. Generally, a court issues a temporary restraining order or preliminary injunction until it can hear arguments from both parties in the dispute and decide whether an injunction should be made permanent.

For instance, in March 2013 a New York judge issued a temporary restraining order (TRO) stopping Lifetime cable channel from airing a movie called "Romeo Killer: The Christopher Porco Story." The injunction came just four days before the movie was slated to premiere. According to Lifetime, the movie was inspired by a true story—the conviction of Christopher Porco for murdering his father and attacking his mother with an axe in Delmar, New York. Although now behind bars, Porco sued Lifetime, seeking a judicial decree stopping the movie's broadcast. He claimed the movie violated his right of publicity (see Chapter 7 regarding the right of publicity). Such injunctions—even TROs, which are brief in time, as the word "temporary" suggests—stopping the dissemination of truthful speech about a newsworthy matter (a murder) presumptively violate the First Amendment (see Chapter 2 regarding prior restraints). Furthermore, newsworthiness is a defense against right-of-publicity lawsuits (see Chapter 7). Lifetime thus sought and successfully obtained an emergency order from an appellate court vacating the TRO and allowing the movie to air.

On the other hand, equitable remedies in the form of injunctions are more likely to be granted in copyright cases where the plaintiff can demonstrate the defendant is selling copyrighted material owned by the plaintiff (see Chapter 14 regarding copyright). Universal Studios, which owns the movie rights to the "50 Shades of Grey" book series, sought an injunction in 2013 against an adult-movie company called Smash Pictures to stop the distribution of a movie called "Fifty Shades of Grey: A XXX Adaptation." While parodies that make fun of or comment on the original work often are protected against copyright claims, this porn parody copied many lines from the book nearly verbatim and simply claimed to be a hard-core version of the book. The case ultimately settled, with Smash Pictures consenting to a permanent injunction prohibiting the distribution of its parody.

Ultimately, a party seeks an equitable remedy (a restraining order or injunction) if there is a real threat of a direct, immediate and irreparable injury for which monetary damages won't provide sufficient compensation.

WRESTLING WITH INJUNCTIONS: THE HULK HOGAN SEX TAPE

In April 2013, former wrestler and reality TV star Hulk Hogan (real name Terry Gene Bollea) was granted a temporary restraining order (TRO) by a Florida judge requiring Gawker to take down a brief clip from a 30-minute sex tape and barring Gawker and its affiliated sites from posting other excerpts. The tape purportedly shows Hogan having sex with Heather Clem in a canopy bed.

While Gawker removed the tape from its site in light of the TRO, it left up a lengthy narrative of the action, asserting it was newsworthy because Hogan is a famous public person. As Gawker's John Cook wrote in response to the TRO, "the Constitution does unambiguously accord us the right to publish true things about public figures." The failure to follow a judicial order like a TRO, however, can place an entity like Gawker in contempt of court, subjecting it to fines.

With more and more celebrities becoming "accidental porn stars" due to the leaking or stealing of their sex tapes, one can safely bet that there will be more cases like Hogan's in the near future. In this particular case, Judge Pamela Campbell proved—even if just temporarily—to be Hogan's hero.

STATUTORY LAW

While common law sometimes is referred to as discovered or judge-made law, the third great source of laws in the United States today is created by elected legislative bodies at the local, state and federal levels and is known as statutory law.

Several important characteristics of statutory law are best understood by contrasting them with common law. First, **statutes** tend to deal with problems affecting society or large groups of people, in contrast to common law, which usually deals with smaller, individual problems. (Some common-law rulings affect large groups of people, but this occurrence is rare.) It should also be noted in this connection the importance of not confusing common law with constitutional law. Certainly when judges interpret a constitution, they make policy that affects us all. However, it should be kept in mind that a constitution is a legislative document voted on by the people and is not discovered law or judge-made law.

Second, statutory law can anticipate problems, and common law cannot. For example, a state legislature can pass a statute that prohibits publication of the school records of a student without prior consent of the student. Under common law the problem cannot be resolved until a student's record has been published in a newspaper or transmitted over the Internet and the student brings action against the publisher to recover damages for the injury incurred.

The criminal laws in the United States are all statutory laws.

Third, the criminal laws in the United States are all statutory laws—common-law crimes no longer exist in this country and have not since 1812. Common-law rules are not precise enough to provide the kind of notice needed to protect a criminal defendant's right to due process of law.

Fourth, statutory law is collected in codes and law books, instead of in reports as is common law. When a bill is adopted by the legislative branch and approved by the executive branch, it becomes law and is integrated into the proper section of a municipal code, a state code or whatever. However, this does not mean that some very important statutory law cannot be found in the case reporters.

Passage of a law is rarely the final word. Courts become involved in determining what that law means. Although a properly constructed statute sometimes needs little interpretation by the courts, judges are frequently called upon to rule on the exact meaning of ambiguous phrases and words. The resulting process of judicial interpretation is called **statutory construction** and is very important. Even the simplest kind of statement often needs interpretation. For example, a statute that declares "*it is illegal to distribute a violent video game to minors* [emphasis added]" is fraught with ambiguities that a court must construe and resolve