

## BOOK NOTES

### THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW

By M. Ethan Katsh.<sup>1</sup>

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We are in the midst of a revolution—a revolution in the technology of storing, processing, and communicating information. The age of the electronic media has brought about profound changes in business, political, and social institutions. Multinational corporations, political campaigns, and professional sports leagues, to name a few, are vastly different from their predecessors of a century ago. Their differences can be traced in great part to the development of the electronic media. Yet there is a popular perception that law, as an institution, has been relatively unaffected by this revolution, that it has been a rock of stability isolated from the currents of change.

The main theme of Professor Katsh's *The Electronic Media and the Transformation of Law* is that "broad changes are occurring to the law, to what it is and how it works, and that these changes are linked to the appearance of [the electronic media]" (p. 3). Katsh compares the law to a living organism whose blood is information and whose veins and arteries are the media of communication. As the veins and arteries change, so must the organism; or in other words, the law must inevitably change as the media evolves (p. 5).

This book is *not* about media law, but about how changes in the media affect law more generally. Katsh examines the law in various contexts: as a source of social stability, as a method of resolving disputes, and as a way of controlling the flow of information. In each context he traces the law's development through four eras of communication: oral, written, printed, and electronic. This history lesson attempts to show that modern law has been shaped by the characteristics and constraints of printing technology. For example, the use of precedent evolved after the invention of printing because only then was it possible to make accurate copies of previous decisions. The electronic media, Katsh asserts, are not merely more powerful versions of print, but have different mechanisms for storing and processing information that will cause fundamental changes in the law.

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One way in which the electronic media will cause the law to change is by accelerating the pace of social change. Katsh argues that the increased pace of social change will alter the role of legal precedent, which evolved as a method of providing society with a sense of regularity and stability. Ancient societies that relied exclusively on oral communication, for example, sought and achieved very little social change, partly because of their inability to store, analyze, and modify large quantities of information. Inherently unable to change rapidly, such societies did not need laws to control the pace of change.

The invention of writing made changes in political institutions and social customs more plausible. Such changes remained unlikely, however, for two reasons. First, those who could write were usually in power and favored preserving the "status quo." Second, the prevalence of errors in copies and transcriptions created suspicion about the accuracy and validity of written works. Thus, laws were literally "written in stone"—Hammurabi's code, the Ten Commandments, the Roman Twelve Tables—to avoid change.

The invention of print radically altered both attitudes about change and the nature of law. Once it became possible to produce accurate copies of written works, revisions could be made with the confidence that changes were improvements, not accidents. The invention of print thus fostered change in fields such as science and religion. For example, new scientific theories increased because printers were able to revise old works and include new data. Through the greater use of precedent, the invention of print had an equally important impact on the law. Before print, judges did not rely on written copies of previous decisions as accurate and authoritative statements of the law.

The electronic media have further accelerated the pace of change in our society by increasing the amount of information that can be stored, the speed of communication, and the ease of copying and revising information. Katsh predicts that this acceleration will diminish the role of precedent in our legal system. He gives three reasons for expecting such a change. First, a system of precedent will be unworkable when there are too many cases. With the advent of computerized legal research systems like WESTLAW and LEXIS, lawyers will have access to an overabundance of case law. Second, decisions will be reported faster, enabling lawyers to modify arguments in pending cases. The trend of continually changing arguments will undermine the perception that legal questions are settled and not open for reconsideration. Third, the importance of prior decisions will diminish as lawyers have access to a broader base of information including nonlegal materials currently missing from law libraries.

Besides promoting a sense of stability and predictability, the law

functions to settle disputes. Katsh predicts that the electronic media will lead to increased use of alternative methods of dispute resolution. Again, he uses an historical analysis to support this prediction. Oral societies generally avoided conflict or resolved it through various forms of speech such as gossip, mediation, and ritual or ceremony. The invention of writing did not significantly alter these methods of settling common disputes. Since writing did not encourage social change, there was little need to adopt new methods of resolving conflict; in fact, early written codes generally served more to identify those in power than to settle disputes. Because printed information was viewed as more accurate, and therefore more authoritative, than oral information, the invention of print led to modern methods of dispute resolution, in particular judicial decisions based on printed statutes or prior decisions.

The electronic media, Katsh predicts, will affect both the amount of conflict in society and the means of dealing with it. The amount of conflict will increase because, contrary to popular belief, "the electronic media promote fragmentation and heterogeneity rather than uniformity and homogeneity" (p. 103). By expanding and accelerating the flow of information, the electronic media tend to highlight differences among people and thus generate more conflict. As the amount of conflict increases, new methods of dispute resolution become necessary. Some of the new methods, such as computer simulations, will undoubtedly employ the electronic media.

Another area that Katsh examines is the impact of the electronic media on legal doctrines regulating the flow of information. He addresses both doctrines promoting freedom of expression (such as the First Amendment) and those restricting freedom of expression (such as copyright, privacy, and restrictions on obscenity). His conclusion is that the electronic media, by making communication easier to achieve and harder to control, will favor the former and threaten the latter. This conclusion rests on the premise that "legal doctrines related to expression are vitally affected by the communications environment of a particular society" (p. 120). For example, censorship laws generally became more common, but also less effective, after the invention of printing. Eventually, as the difficulty of enforcing such laws became apparent, doctrines preserving freedom of expression emerged. The electronic media will make it even more difficult for the government to control the flow of information, and, contrary to the picture painted by Orwell's *1984*, will promote freedom of expression.

Conversely, the electronic media will threaten doctrines that restrict the flow of information such as copyright, common-law privacy, and restrictions on obscenity. It would be a mistake, Katsh warns, "to assume

that legal, political, economic, philosophical, or social goals alone will determine the outcome of struggles taking place in each of these fields of law" (p. 170). Having developed only after the invention of print, these doctrines depend heavily on values shaped by methods of communication. Copyright laws, for example, reflect the belief that there can be a single author of a printed work who should have the right to control its reproduction and distribution. The electronic media will affect the values underlying copyright laws in that they will make it more difficult to identify a single "author." Thus, the most important changes in these fields of law will be in the core ideas behind the laws, not simply in the means of enforcing them.

Katsh predicts that the electronic media will also have a significant impact on the legal profession. He argues that any profession depends on its control of an organized body of information. "Lawyers" first appeared when the invention of writing enabled them to capture and control the body of legal knowledge. The invention of print helped establish the legal profession by aiding the organization of this body of knowledge, particularly in law libraries. As methods of storing and communicating that knowledge change, however, so will the profession—in ways its practitioners might not anticipate or welcome. The electronic media threaten the legal profession because lawyers will have less control over knowledge of the law. "The end result," according to Katsh, "will not be the elimination of lawyers from modern society but a reorganization of what legal work is and who will do it" (p. 219).

Katsh also addresses the impact of the electronic media on individual rights. The concept of the individual, largely unknown in cultures dependent on oral and written communication, emerged with the invention of print. Print increased opportunities for individual achievement and fame; furthermore, it allowed deviant individuals, previously silenced by conformity, to explain themselves. The growing recognition of the individual culminated in the establishment of individual rights in constitutions. Katsh argues that the electronic media, by facilitating group communication, threaten to undermine the law's focus on individuals. One example of this transformation is the recent series of affirmative action rulings that balance the interests of individuals against those of a group. Another example, not provided by Katsh, is the prevalence of class-action suits.

Finally, Katsh argues that the electronic media threaten the use of abstract legal concepts themselves. The inventions of writing and print led to an increase in legal abstractions such as "rights" and "duties" by providing a tangible form to something intangible. Modern legal educa-

tion reflects the law's reliance on abstractions by teaching students to identify the "relevant" facts in hypothetical and real cases; textbooks rarely contain illustrations because illustrations would divert the student's attention to "irrelevant" information. Katsh predicts that the electronic media, which provide a more vivid and complete description of reality, will cause the law to shift focus from the abstract to the real because society will be less willing to accept the abstract in place of the real. For example, he believes the electronic media will lead us to seek "real equality instead of legal equality, equal treatment and not merely equal rights, a system with perhaps less law but more justice" (p. 15).

*The Electronic Media and the Transformation of Law* should appeal to historians and legal scholars alike. It is written in an academic tone and contains numerous references to historical and contemporary works in fields such as anthropology, sociology, literature, religion, and jurisprudence. Only time will tell whether the author's many predictions about the future of the law will be fulfilled. However, it is hard to find fault with his underlying premise—that the law has been, and will continue to be, greatly affected by changes in the media.

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