

Congressional Legislation Review

Recent Developments: Campaign Finance Reform

CFAR's 1997 Symposium used major players in the field to illuminate campaign finance issues. Yet the rampant raising and spending of soft money continued, and finally culminated on March 5, 2002 in President Bush signing into law the Shays-Meehan bill, successor to McCain-Finegold (the "reform law").

CFAR's First Newsletter: Why?

A Yale Law professor once started a new magazine for the legal community aimed at the lack of interest in what he called "the link between law and actual life."

CFAR tries to enhance that important link through its education work on behalf of middle school, high school and college students, citizens, educators and business, professional and community groups. This Newsletter directly aims at increasing that very link between law and actual life vis-a-vis the First Amendment.

CFAR exists to nourish and assist transmission of the truth that continuity of the free and largely decent civilization we enjoy, unsurpassed in the history of the world but taken, perhaps, for granted by our youth which has known nothing else, and by our adults who accept it as given, emphatically requires a healthy and robust First Amendment; only constant vigilance and hard work can ensure it.

Our editor, Jeffrey White, will enter his final year at the University of Connecticut School of Law this Fall. He has for someone of his youth a wealth of experience in law and in life. We think he will bring perspective, insight and humor to the task.

We will draw on the legal community, the Law School's outstanding faculty and others with relevant expertise and we welcome your comments and suggestions.

Immediately following the passage, Senator Mitchell McConnell (R-KY), who has been joined by a large collection of diverse groups including both the NRA and ACLU, filed suit in federal court challenging the constitutionality of the reform act, with particular emphasis given to alleged impermissible limits on free speech and association under the First Amendment.

The two major provisions in the Shays-Meehan Bill that are the most hotly contested are its ban on "soft"

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CFAR's Elects New Directors As It Expands Its Free Programs

The Center for First Amendment Rights Inc. (CFAR) enlarged its Board of Directors with eight new additions:

The **Honorable Antoinette Dupont**, former Chief Judge of Connecticut's Appellate Court and now a senior judge. A graduate of Brown University and Harvard Law School, she practiced in New London, has won numerous awards and is a Director of *The Day of New London*.

Attorney **Peter Culver**, founder of Sagem Bank & Trust Co. and recently President of State Street Bank & Trust Co., CT, brings to CFAR banking and legal experience. He will also serve CFAR as Chair of Development.

Steven Kaplan, both a CPA and a lawyer, is eminently qualified as CFAR's new treasurer and Director (Mary Ellen Walkama having moved to Durham, NC). A senior tax manager with Centerprise Associates, Steve has 20 years of experi-

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Faculty Focus: Professor Paul Schiff Berman

Editor's Note: This segment will be the first in a series of periodic interviews with law professors that will provide a forum for them to discuss the importance of the First Amendment as it applies to their individual academic scholarship and teaching.

In the fall, Professor Paul Schiff Berman will begin his 5th year at the University of Connecticut School of Law. He teaches courses in Cyberspace Law, Copyright Law, and Civil Procedure, as well as an interdisciplinary seminar called Law, Culture, and Community. Prior to coming to UConn, Professor Berman served as a law clerk first to Chief Judge Harry T. Edwards of the U.S. Court of Appeals for the D.C. Circuit and then to Justice Ruth Bader Ginsburg of the United States Supreme Court. He is a 1988 graduate of Princeton University and received his law degree from the New York University School of Law in 1995.

The following are excerpts from a recent interview with Professor Berman.

Q What made you decide to attend law school?

A I actually came to law from theater. When I left college, all I wanted to do was form my own theatre company and develop and direct shows with an ongoing ensemble of actors. And I did that—I formed my own theatre company and directed shows in Lower Manhattan for seven years after college. Yet, after awhile, I found that it wasn't completely satisfying to me and that I wanted to be a

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Save the Date

Monday, May 5, 2003
Milton Sorokin Symposium

Can you be jailed for posting private information on the Internet?

by James C. Goodale

James C. Goodale, a Debevoise & Plimpton, NY lawyer; is the former vice chairman of The New York Times. He led the paper's defense in The *Pentagon Papers* case. His article, originally published in the August 2, 2002 New York Law Journal is reprinted with the permission of the writer and the publisher. All rights reserved.

Paul Trummel, recently emerged from 111 days in jail where he was sent for what he wrote on his Web site. He had posted the names, addresses, phone numbers and Social Security numbers of his neighbors.



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Mr. Trummel, aged 67, is not your everyday First Amendment freedom fighter. He is a retired professor of journalism and a holder of a press card from the International Federation of Journalists. Until recently evicted, he had lived in a home for the elderly in Seattle, Wash.

He didn't get along with his landlord and neighbors. He published a newsletter detailing his complaints. He included private information, i.e., names and phone numbers.

His neighbors went to court to stop his "harassment" and to evict him. The court agreed and enjoined him from going near them or talking to them. (*Trummel v. Mitchell*).

Undaunted, he posted the same material on his Web site. The court ordered him to take it off. He took it off but then created an off-shore site carrying the same material.

Again he was ordered to remove the material. He refused. He went to jail where he stayed for 111 days until he finally removed the material. His stay in jail was not pleasant. He was in maximum security for 67 days -- 25 days in solitary confinement just two cells away from Gary Leon Ridgway, the notorious serial murderer.

Different Than Street-Corner Speakers?

Nazi Germany? Sounds like it. But with the unprecedented volume of words spewing from the Internet, perhaps it is surprising this has not happened before. There is no reason, however, for treating Mr. Trummel any differently than other speakers on the street corner or on TV or even writers for newspapers.

Judge James Doerty, the Washington judge who incarcerated Mr. Trummel, was put off by Mr. Trummel's behavior.

He called Mr. Trummel a "mean, old man who becomes vicious and threatening when he doesn't get his own way in the chronic disputes he has with employers, landlords, building managers, and neighbors."

Of course, if Paul Trummel was exercising his First Amendment rights, it makes no difference what his motivation

was. But was he?

An order not to speak on the Internet is clearly unconstitutional. It is what lawyers call a "prior restraint," i.e., censorship.

Censorship is what the *Pentagon Papers* case was all about. In that case, the government tried to restrain The New York Times from publishing classified material. The Supreme Court held that it was unconstitutional to impose such a restraint except in the most extraordinary circumstances.

Just as in the *Pentagon Papers* case, Judge Doerty has stopped Mr. Trummel from speaking. He can no longer post information about his neighbors. His speech has been restrained before he can get it out -- hence "prior restraint."

One can hardly applaud Mr. Trummel for publishing Social Security numbers and other allegedly private information. But the solution, if any, is to sue him after publication, not to stop him before he speaks.

Several years ago the Providence Journal published private information about Raymond Patriarca, a Mafia figure. The Journal had come into possession of FBI files that detailed Mr. Patriarca's Mafia role and published information from them.

A federal court in Providence ordered the Journal to stop publication. The Journal refused and was held in contempt. When the Journal appealed the case the appeals court gave short shrift to Mr. Patriarca's claim.

The court noted that Raymond Patriarca's only claim was that his privacy had been violated, but said that merely because the matter was "embarrassing" to Mr. Patriarca or infringed an alleged "privacy right" was "an insufficient basis for issuing a prior restraint." Mr. Patriarca could always sue after publication, but the court noted: "this was an insufficient basis for issuing a prior restraint." Mr. Patriarca could always sue after publication, but the court noted: this was an alternative that he did not pursue." (*In re Providence Journal*).

And so, if Mr. Trummel's neighbors want to sue him after he has posted information about them they can. What they

cannot do is ask a court to stop him before he has posted that information.

If, in fact, such a suit for invasion of privacy would be successful is another matter.

While the phrase “right of privacy” is loosely used in popular culture, it has an uncertain legal provenance. The ability to keep private matters secret implies the ability to punish someone else’s speech about those private matters. Put another way, in order to protect someone’s right to privacy one must curb another’s First Amendment right to speak.

The Supreme Court has never had occasion to decide whether someone can be sued successfully for disclosing private information. Last year, however, the Court did imply that private conversations about private matters might trump the First Amendment rights of others to speak about them (*Bartnicki*).

Private Conversations, Private Facts

A case like Mr. Trummel’s or even Mr. Patriarca’s does not involve private conversations, however --rather, private facts. Generally the rule set out by the lower courts is that unless the publication of the private facts is highly offensive to the reasonable person, they can be published.

Nonetheless, whatever possibilities there may be for a suit against Mr. Trummel after publication, and they seem few and far between, censorship before publication is simply not permitted.

Outrageous Actions

Internet chatter about this case has been intense, asserting Judge Doerty’s actions were outrageous. They are right.

His injunction against Mr. Trummel still stands. Mr. Trummel cannot say what he wants to say about his neighbors. He cannot even mention their names. The injunction will, without doubt, be dissolved by an appellate court. This will be small consolation to Mr. Trummel who, as of this date, has been gagged eight months and spent 111 days in jail -- some kind of record.

Perhaps it is the season to send journalists and writers off to jail. Earlier this year Vanessa Leggett was in jail for 168 days because she would not obey a court order to disclose her sources.

With all that courts have to do, one wonders whether it would be a better use of their time to consider incarcerating terrorists and other criminals, rather than writers and ordinary users of the Net.

Faculty Focus: Professor Paul Schiff Berman *continued*

little more directly connected to the issues and debates that were at the heart of American culture. Law is very much woven into the fabric of American political life, and I found that I wanted to be involved in that. I loved law school from day one and I obviously still love law school since I am now back in school as a teacher.

Q How would you describe your experience as a law clerk for the U.S. Supreme Court?

A It was a fascinating and exciting experience. Indeed, it was extraordinary just to walk into that imposing Court building each day and think that you’re just going to the office! Also, to see the diligence and thoughtfulness with which Justice Ginsburg approached each case and the amount of time she was willing to spend agonizing over every detail of her opinions were quite inspiring.

Q How does the First Amendment impact your classes?

A The First Amendment greatly affects the discussion in both my Cyberspace and Copyright classes. I believe that many of the most important First Amendment questions of the next 10 to 20 years are going to be related to intellectual property. That is because the technology of the internet has facilitated mass copying and therefore has led some people to believe that copyright will become unenforceable, and they have accordingly sought further protections. At the same time, digital technology increasingly makes it possible to enforce copyright laws perfectly through technological means. Therefore, it becomes increasingly possible to trace and charge for every use of content and also to create technological or contractual barriers for use of content that would go far beyond what would be permissible under current copyright law. As a result, while some worry about the under-protection of copyright online, I think that there is a tremendous danger that we will see in the coming years an over-protection of intellectual property rights, with the consequence being the diminishment of the scope of the public domain.

Q Has the analysis of how one views the relationship between copyright and the First Amendment changed over the past decade or so?

A Yes, there has been a series of changes in thinking about the First Amendment and copyright. The classic First Amendment regime imagines a speaker who is trying to reach a set of listeners using some sort of conduit (classically a bullhorn or a printing press), and then we have a governmental entity that is blocking the speaker from the listeners. It was easy to identify the governmental entity as the censor and then build your First Amendment arguments accordingly.

The world of on-line interaction (and by “on-line,” I include cable operators, internet service providers, telephone companies, satellite television companies, etc.) is much more complicated because the speakers now include both the original content provider (e.g., the writer of a television show, the poster of a website message) and the conduits (e.g., the cable broadcaster, the internet service provider), who also have First Amendment rights as speakers. In addition, the conduits are now just as likely to be the censors of speech as the government, which creates a new set of issues involving the so-called state action doctrine: do non-governmental entities, when they engage in this type of censoring, have any First Amendment obligations? The changes in who counts as speakers, who counts as conduits, and who counts as censors have complicated the analysis significantly.

Q How do these complications manifest themselves?

A The first wave of complications was focused on the premise that the digital world is a giant copying machine since digital information can be copied instantaneously, costlessly, and with no degradation in quality. As a result, the fear was that online digital communications would upset the copyright balance that had previously existed and that there would be no way to enforce copyright, creating the need for additional legal protections. Certainly the motion picture and music industries continue to be captured by this way of thinking and have repeatedly over the past 5-7 years lobbied Congress for greater protections of content.

We are beginning to see, however, a second wave of thinking about the interaction between

Professor Paul Schiff Berman *continued*

copyright and the First Amendment. As I mentioned earlier, while the digital environment does indeed create the possibility for a world of perfect copying, it also creates the opportunity for perfect control and restriction of information. This is because the same technology that allows for free distribution of information also allows content providers to encrypt or technologically scramble material so that people cannot access it without paying certain charges, even if the access would have been permissible under the copyright law, for instance as fair use. As a result, the balance that has uneasily existed in copyright law between the First Amendment rights of the public to express and receive ideas and the rights of content providers to be paid for their work has been threatened from both sides. I believe these threats require us to think about the interaction of copyright law and the First Amendment more carefully, rather than simply assuming that the copyright law already subsumes First Amendment norms within it. We need to consider seriously the appropriate relationship and to think of the First Amendment as an independent constraint on the expansion of copyright.

Q Have there been any recent court decisions that are relevant to the discussion?

A The recent case that most clearly raised these points was *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2nd Cir. 2002). That was a case where the motion picture industry had put anti-copying technology onto DVDs. The defendant, Corley, released information that included how one could circumvent the technology.

Significantly, one might be circumventing copy protection technology for a purpose that the copyright law would normally consider fair use. For example, I as a law professor recently chaired a panel at a conference about the film 'Amistad' and its relation to the question of reparations for slavery. I wanted to show 4 different excerpts from the film. In order to do that at a conference, it would have been most convenient to rent the movie DVD and copy the 4 excerpts onto a blank DVD and show each of the 4 excerpts all together. Or, if you take it out of the digital context, I would have liked to rent one videocassette copy and record the relevant scenes onto a blank

videotape, again so that I could show the scenes in sequence. To most people, this would seem to be a core fair use or First Amendment protected activity since I am an academic at a scholarly conference, I was not charging an admission fee, and I was using the film excerpts for an educational purpose. However, when it came time to put together the material, I was technologically blocked from being able to do what I wanted in either videotape or DVD format because both the tape and the DVD had technologically encoded information that made it impossible to make the copies.

Congress passed a statute in 1998 called the Digital Millennium Copyright Act, which makes it illegal for someone like Corley or me to circumvent a copyright protection device or to tell someone else how to do it even if we are doing the circumvention for what would be a protected purpose under the Copyright statute. That means that the statute allows content providers to do technologically what they cannot do under the Copyright statute itself, and if one either tries to get around the technological protection or helps someone else do so, that act is itself a violation of the statute, subject to criminal penalties. The Second Circuit nevertheless upheld the statute and blocked Corley from posting the relevant information on his website.

Subsequent to the *Corley* case, a Princeton professor of computer science, Edward Felton, planned to attend an academic conference to deliver a paper about the bugs in the software that the music industry had been designing to secure music for its future on-line distribution site. The industry sent him a cease and desist letter that said that if he presented his paper at the conference, he would be violating the Digital Millennium Copyright Act simply by telling people how to circumvent the industry's copyright protection software. That case never became a lawsuit because the music industry backed down and allowed Felton to deliver his paper, but it gives you an example of the ways in which content providers can use a statute like the Digital Millennium Copyright Act to infringe on First Amendment rights.

Q What are your recommendations for resolving this debate?

A I think that content providers should not be permitted to do technological-ly what they cannot do under the Copyright statute itself. In addition, it is important that any claim that locks up content be measured both against the compromises that have previously been reached in the Copyright statute and against the First Amendment itself. We need to think of the First Amendment as part of the equation rather than relying on the previous assumption that the Copyright statute perfectly embodies the First Amendment. This has always seemed to be an odd theory to me because it implies that the Copyright statute, as it exists in any moment in time, perfectly draws the line that the First Amendment would draw. Given that the Copyright statute itself has changed many times over the past 30 years, it's hard to believe that at each moment it always perfectly embodies the First Amendment. Instead, I think we need to think more about the interaction between copyright law and the First Amendment and treat the First Amendment as an independent check on the expansion of copyright law.

I also believe that the music industry, even without cracking down on anti-circumvention technology, could take advantage of the internet as a revenue stream by marketing its own music through its own website. While there will always be people who can hack around it, the music industry could develop an entirely new way of distributing music, thus bypassing music stores, saving distribution and advertising costs, and marketing and pricing products in a variety of new and creative ways. For example, companies could charge a certain amount to download and play a song one time, another amount to download a song for a month, another amount to download an entire album, and still another amount per month for unlimited downloads. With many different pricing points, the industry could potentially sell their product more effectively than under the current system, where CDs are available at music stores for one fixed price. Ultimately, movies could be distributed similarly. I think it is useful to consider the panic in the motion picture industry when VCRs were introduced in the late 1970s. The industry was worried that videotaping would shrink the size of the paying audience for its product. Several film studios sued the Sony

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Campaign Finance *continued*

money and its broadcast blackouts. First, the bill would prohibit national political parties from accepting or spending any soft money, which are the large, unlimited contributions by corporations, unions and individuals, which totaled 500 million in the 2000 election. To offset this loss, the legislation would increase the amount individuals may contribute directly to candidates to \$2,000 each election, instead of \$1,000. Secondly, the Shays-Meehan Bill would prohibit unions, corporations and nonprofit groups from paying for broadcast advertisements if they mention any specific candidate. This “blackout” would commence 60 days before any general election and 30 days before any primary. As a result, such ads could be paid for only with regulated hard money through political action committees.

The legal team that has been assembled to challenge the bill includes Floyd Abrams, a prominent First Amendment lawyer. Leading the team defending the reform law is West Hartford’s own Seth Waxman, former Solicitor General under

Clinton. Burt Neubourne (a former lecturer for CFAR), and Joshua Rosencrantz (a CFAR panelist in 1997) are both working on the legal team. The case may reach the U.S. Supreme Court by early next year, where the Court will have a chance to reconsider *Buckley*. In its most basic form, *Buckley* upheld limitations of contributions to individual candidates but did not allow for such limitations of expenditures to parties or issues. The threshold inquiry for the Court in *Buckley* and its progeny was whether the legislation was aimed at the prevention of corruption.

Proponents of reform support the bill, encouraged by large segments of the public, pointing to the implicit dangers and undue influence that can be afforded to major contributors of soft money.

Yet opponents argue that the bill does not prevent corruption as soft money contributions, by definition, are not made to the candidates but to the parties. In addition, the ACLU argues that the ban on soft money would make national parties less able to support grassroots activities, such as candidate recruitment and get-out-the vote efforts, and would therefore unnecessarily trample the First Amendment rights of parties and their supporters.

Yet, while the ban of soft money raises many constitutional questions, the broadcast blackouts may deal the fatal blow to the bill. In *Buckley*, the Court allowed for limitations on ads that were defined as “express advocacy,” which meant directly supporting the election or defeat of a particular candidate. The Shays-Meehan Bill broadens the definition of “express advocacy” to include any ad that mentions the name of a candidate. The bill was designed to prevent “sham” ads that typically stated, “Candidate Smith wants to double your taxes. Tell Smith he is wrong.” By avoiding the magic words, “vote against Smith,” these ads could be financed without regard to contribution limits.



“I’ll tell you what this election is about. It’s about homework, and pitiful allowances, and having to clean your room. It’s also about candy, and ice cream, and staying up late.”

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Berman ... continued from page 4

Corporation (makers of one of the first VCRs) under the Copyright statute, but lost at the Supreme Court level, which turned out to be the best thing that ever happened to the motion picture industry because videotape movie rentals became a huge secondary market and have become a major profit center. This demonstrates something I think is usually true about new technologies: it is easier to see the threats posed by a new technology than it is to see the new opportunities or business plans that might have a tremendous upside.

In the end, I think that the First Amendment needs to be viewed as a separate constraint on copyright law and that the constraints of both the First Amendment and copyright law need to be applied to new technology. And, I think that both the public and the content providers themselves would be better served in the long run if the content industries focused more of their attention on the potential creative uses of new technologies, rather than spending their time, effort, and money clamping down on the perceived threats.

However, groups such as the ACLU, have argued that the ban is overly broad in that it would violate the constitutionally protected right of the people to express their opinions about issues through broadcast advertising if they simply mention the name of the candidate. Instead, under Shays-Meehan, these groups would have to create a PAC, where donors would have to be disclosed in order to issue such ads. According to opponents, this complicated process will make it more difficult for non-mainstream and minority voices to be heard. In addition, many commentators have argued that this provision would have a difficult time meeting the corruption threshold that was established in *Buckley*.

In the end, one final point to keep in mind is that a number of justices on the Supreme Court have expressed their uneasiness with the framework established in *Buckley* and the Shays-Meehan Bill may provide ample opportunity for a change in philosophy which would almost certainly impact any First Amendment analysis.

CFAR's New Directors *continued*

ence in practicing accounting. He also practiced law for several years.

Attorney **George Hastings**, retired partner at Robinson & Cole, Hartford, has been a premier corporate and civil litigator. A graduate of Yale and Yale Law School, he also serves CFAR as chair of the nominating committee.

Elizabeth M. Devine, a social studies teacher at Hall High School in West Hartford, was named West Hartford Teacher of the Year 2000-2001 and has won numerous awards for her teaching skills. She served as host to the 2001 CFAR Pilot Curriculum at Hall High.

Bruce Spatz, comptroller of the Herb Chambers Companies, brings to CFAR a wealth of business and economic experience. A graduate of Albright College in

PA, he is a vital business expert on the Board.

Attorney **Judith Blank**, a graduate of Union College and Albany Law School, practices municipal bond law with Day Berry & Howard. She too has served CFAR previously and continues as Chair of the Annual High School First Amendment Contest.

Attorney **Maria Santos**, practices corporate and business law with Rome McGuillan & Sabanosh, LLC. A graduate of the University of Connecticut Law School, she also served CFAR while a student as chair of the Speakers Bureau and currently as Historian.

Attorney **James D. Scrimgeour**, practices at Day Berry & Howard. A graduate of Amherst College and the University of Connecticut School of Law, he served as Notes Editor of the Connecticut Journal of International Law and was named the Alvin Pudlin Memorial Scholar, while at law school, an endowment initiated by CFAR.

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CFAR Hosts 2002 High School Conference

Interactive role for all students

Friday, October 4, 2002 is the date for the next High School Conference. The program adds a special feature for the students as they will be actively participating as advocates for the plaintiff, Ronald White, tattoo artist and for the defendant South Carolina Attorney General arguing as to whether or not a virtually complete ban on tattoo art for public health reasons is barred or permitted under the First Amendment. The Plaintiff's Petition for Certiorari to the U.S. Supreme Court along with a news article about the case are set forth on CFAR's website, www.cfarfreedom.org. Students and teachers, check out the website, research the issues, prepare your arguments -- you will present them to the whole group. Line up your transportation, obtain your school's permission, register early with CFAR to save your place, and come to the Conference. Don't miss the continental breakfast.

CFAR

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