The Prelaw Society Journal

Towson University

A journal of commentary, politics, and opinion

Vol. 18, No. 2 | Joe Esmont, President
Spring/Fall, 2005 | Joe Esmont, Editor

A Roadmap to Law School

By Joe Esmont, Political Science and History; Virginia Law Class of '08

This piece is intended to lead you through the quirks of law school applications with some down-to-earth advice. This is not a stand-alone guide – the best advice I can give you is to supplement this with the Towson University *Prelaw Handbook* and regular contact with Dr. Fruchtman (jfruchtman@towson.edu), who will help you organize your campaign and become as competitive as possible. My second most important piece of advice is: don't just be on time, be early. You have an immeasurable advantage if you start planning by February of your junior year, and apply by the first week of November your senior year.

Expenses

It's important to understand the expenses involved in applying. Most of these expenses can be waived if you can show extreme financial hardship.

Mandatory Fees

LSAT Fee + Data Assembly Fee:	$200 + $12 per school applied to
Applications:	$35 – 75 per school
Seat Deposit (counts toward tuition)	$250 - 750

"Hidden" Costs

Visits (Gas, Hotel, etc.)	$10 - $100 per visit
Need Access Application	$15 per school that requires it.
LSAT Preparation:	$30 – 1200

So if you apply to five schools, no frills, you're looking at about $700. If money is an issue, you may want to wait until you are admitted to visit faraway schools. Many have weekend, admitted student programs and will provide you with lodging, meals, etc (usually with students). Some will even cover your travel costs.

The LSAT

Register for the LSAT well before the test, preferably three months. Testing centers fill up quickly - I had a friend who had to drive two hours for an 8:00 a.m. test. If you have

rowdy roommates or your neighbors keep you up Friday nights, consider going back home for the test, or even staying in a hotel. No, I'm not joking – it's that important.

Don't skimp on preparation. The LSAT usually counts more than your GPA, and the test takes some getting used to. Taking a class isn't mandatory – I got a 173 without one – but consider it, especially if you have problems buckling down. (Will you **really** do a whole prep book and at least four released tests?) Dr. F has some books to loan out.

Finally, sign up for the Candidate Referral Service on your LSAT registration, but only for ABA approved schools. Yeah, you'll get some junk mail, but you may also get free applications to safety (and even bread-and-butter) schools, and it might make you look at a couple places you would not have considered otherwise.

Picking Schools

Choose a wide range of schools, especially for your reach and bread'n butter ones. Schools are all looking for different things, and they **do not** take only numbers into account. Yes, they matter, but consider this:

- I was in the top 25 percent in *both* LSAT and GPA at two schools that waitlisted me.
- A friend of mine with a similar GPA and an LSAT five points lower got into both of them.
- Another friend got in to Berkeley the same day she was waitlisted at Maryland.
- My original scholarship offers from two schools that were back-to-back in the *US News* rankings differed by **$67,000** after adjusting for cost of attendance.

The lesson? Admissions and scholarship committees take different factors into account. I'm convinced, for example, that Virginia went after me very hard because they are trying to build up their legal history program and wanted American historians.

Waitlists

The most effective way to get off a waitlist is to keep in contact with a school and let them know you're interested. Waitlists are usually unranked – they focus more on the student most likely to come, not the "best remaining" student. So every couple of weeks, send them something – updated transcripts, letters of interest, etc. It'll help.

Show Me (More) Money – The Art of Negotiating Scholarships

By a couple weeks before decision time, Penn was my first choice. Virginia came in second, just barely ahead of Duke. At the outset, Penn was offering me nothing, Virginia $19,000 a year, and Duke $11,000 a year. Some of you may feel uncomfortable asking for more, but it's an accepted practice. Besides, is being less jittery worth $10,000?

Now, to negotiate scholarships, you need two things: tact and leverage. They won't listen to demands. They also won't bid against themselves. You need something like more money at a similar school, or an acceptance to a more prestigious school. E-mail the admissions office, and explain the situation – you'd love to attend, but it's hard to turn down your other option. I wrote short letters to Penn and Duke explaining the situation, and attaching a list of what I had done since applying. I also offered to fax them the other offers.

Lo and behold, two weeks later I was looking at a $10,000 a year scholarship to Penn and an additional $5,000 a year at Duke.

Courtesy

Finally, if you are accepted by or waitlisted at a school, especially if you are getting a scholarship offer, withdraw your applications elsewhere as soon as you are certain you won't attend. (Unless you plan on using a scholarship offer as leverage. Then wait.) That way, your seat and any scholarships you got can go to other applicants who **will** go there, and their life can be a little easier. You would want someone to do that for you, right? That doesn't mean rush your decisions to accommodate others, but once you're sure, take your hat out of the ring. If you have any questions, feel free to contact me at joe.esmont@gmail.com.

The Right to Marijuana: Privacy and the War on Drugs

By Amy Triplett, Senior, Computer Information Systems

The clearest and most important of the liberties being swept under the carpet in the war on drugs is the right to privacy, which, according to Justice William O. Douglas, can be found in the "penumbras" of the Bill of Rights (*Griswold v. Connecticut*, 1965). While privacy issues like abortion, sodomy, and assisted suicide have been hotly debated over the past several years, it is clear the Supreme Court holds that American citizens possess the right to privacy. As Justice Harry Blackmun wrote in his 1973 opinion in *Roe v. Wade*, "the Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back as far as *Union Pacific Railroad Co. v. Botsford* (1891), the Court has recognized that a right of person privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."

It is clear that using marijuana in the privacy of one's own home falls under the right to privacy, as Blackmun and many others have described it. Many people would point out that there other negative consequences to smoking marijuana. It is for this reason that, according to Court precedent, judges employ the so-called rational basis test concerning marijuana use. This test is how judges test "the constitutionality of a statute by asking whether the law is reasonably connected to achieving a constitutional and legitimate objective," with the burden of proof on the plaintiff (see Legal-Explanations.com).

Accordingly, we must first examine whether outlawing marijuana use is *reasonably connected* to its objective, which is to deter its use for moral reasons (to prevent the havoc a drug plays in family life), and for the practical reason (to decrease crimes committed involving illegal drug use). Simple economics reveals how fundamentally flawed this reasoning is. When there is demand for a product as inelastic as a drug, to arrest users and sellers does not decrease demand: it decreases the supply, which in turn only increases demand.

It is clear that the criminalization of marijuana (the most highly used and least harmful illegal substance) increases other types of even worse crime, such as assault and murder. High prices on the Black Market create gang and turf wars among drug dealers, during which many innocent citizens are caught in the crossfire. Moreover, to criminalize the use of marijuana is to divert police attention from crimes that truly harm others, such as rape,

assault, and murder. The requirements of the rational basis test therefore of having a reasonable connection in this circumstance are not met in terms of reducing crime.

Now, the second part of the test requires that the objective be *constitutional* and *legitimate*. But the objective – to reduce marijuana usage for moral and practical reasons – is not legitimate. Marijuana is one of the least dangerous substances a human being can take, far less dangerous even than alcohol. DEA Administrative Judge Francis L. Young noted that "there is no record in the extensive medical literature describing a proven, documented cannabis-induced fatality. This is a remarkable statement. First, the record on cannabis encompasses 5,000 years of human experience. Second, cannabis is now used daily by enormous numbers of people throughout the world. . . . By contrast, aspirin, a common used, over-the-counter medicine, causes hundreds of deaths each year."

In addition, the medical community has long found marijuana to have many vital medicinal purposes. It "has many applications as a safe and effective therapeutic agent," wrote William Buckley. "Among them are relief of the intraocular pressure caused by glaucoma and relief of the nausea caused by chemotherapy. Some AIDS patients have also obtained relief from using cannabis. . . . [A] Harvard University survey found that almost half of 1,035 oncologists said they would prescribe marijuana if it were legal."

Finally, it is clear that the objective of a law against the sale and use of marijuana is unconstitutional because it denies to a person the right to privacy. As the chief justice of the Florida Supreme Court put it, "If the zeal to eliminate drugs leads this state and nation to forsake its ancient heritage of constitutional liberty, then we will have suffered a far greater injury than drugs ever inflict upon us. Drugs injure some of us. The loss of liberty injures us all." In a dissenting opinion in *Board of Education v. Earls* (2002), Justice Ruth Bader Ginsberg made an important point about "suspicionless drug testing of all students." "Many children," she said, "like many adults, engage in dangerous activities on their own time; that the children are enrolled in school scarcely allows government to monitor all such activities." There are many substances we ingest far more dangerous than marijuana, such as nicotine and alcohol. Prohibition of alcohol years ago was deemed a huge failure because crime increased in its wake. More important was the severe restriction on liberty all adult Americans faced at the time. The right to do as you wish, as long as you are not harming others, is fundamental in this country's history and in the aim of the Constitution. Outlawing marijuana clearly violates that principle.

If legislating morality in the case of abortion is unconstitutional, so it is in the case of selling and ingesting marijuana. Abortion may be abhorrent to some, but it is still permissible, while marijuana is one of the least toxic substances a person could ever take. And it is not permitted. To restrict the right to privacy is to give credence to the right of a "moral" majority to dictate our actions, and if allow this to happen, there will be no limits to the legal restrictions placed on our lives.

The Right to be Left Alone: Health Clinics and Free Speech

By Kirby Brooks, Junior, International Studies

The Supreme Court in 2000 decided in *Hill v. Colorado* that it was illegal for any person within 100 feet of any health clinic facility's entrance in the state of Colorado to

knowingly approach a person within eight feet, without the consent of that person, in order, according to the statute, to "pass a leaflet or handbill to, display a sign to, or engage in oral protest, education, or counseling with that person." The Court's main objective was to strike a fair balance between First Amendment rights of protestors against abortion clinics and the safety and privacy of patients and staff entering these health clinics. According to the Court, the right to obtain medical treatment and a citizen's right to be left alone was more important than a person's opinion of certain types of treatment and a person's right to consul, educate and protest against these treatments. The Court's opinion was a form of discrimination against the ideas of anti-abortion protestors; this case was clearly content-based.

According to the Court, people have the right to enter and leave health clinics safely. In the past there were reports of demonstrators impeding access into clinics, and occasional violent confrontations. If Colorado's main objective was to address the crowding and physical intimidation of the demonstrators and minimize the dangers of safety and health of its citizens around abortion clinics, wouldn't an increase in police enforcement or stricter consequences to crimes committed near the health clinic help to deter these dangers?

The State claimed that its interests were not completely unrelated to the views of the demonstrators; in other words, this decision was not made because the lawmakers were pro-choice. Justice Scalia, dissenting, says that this case is a "speech regulation directed against the opponents of abortion, and it therefore enjoys the benefit of the "ad hoc nullification machine" that the Court has set in motion to push aside whatever doctrines of constitutional law that stand in the way of the highly favored practice." He further says that controversial issues like abortion are beyond the capacity of judges to decide and should be left to the legislative branch to pass appropriate laws concerning abortion.

The law drafted in Colorado was based on "content-neutral" reasons, namely time, place and manner reasons, dealing with regulating where protesting could occur, and it therefore wasn't a regulation of speech. The Court was aware of individual First Amendment rights and argued that the law left open ample alternative channels of communication for the petitioners; the Court claimed that signs and leaflets could still be seen and speech could still be heard within eight feet. Yet, how effective could leaflets and personal conversations be if the petitioners were forced to keep a distance of eight feet from another person? There is a science to leafleting: the leafletter stakes out the best piece of property he or she can find and then takes a couple steps toward the vicinity of the passerby; he or she will extend their arm, making it as easy as possible for the person to receive a leaflet. The passerby's natural inclination is not to seek out these leaflets, but to accept the offering. Likewise with conversations, many religious men and women will quietly approach and walk with women on their way to the clinic and try to communicate through sensitive conversation why they shouldn't have an abortion. These people will be deterred since they will no longer be able to approach people closer than eight feet. Let's be reminded that just because a petitioner's opinion may be offensive to others doesn't mean that the Court can deny a petitioner's right to freely express those opinions. This law was contrary to the right of American citizens to converse with, persuade, debate and change the minds of other Americans.

In addition, the law was adopted to apply to all demonstrators within 100 feet of a health clinic; not just anti-abortion demonstrators. Justice Scalia quoted Anatole France as saying that "the law, in its majestic equality, forbids the rich as well as the poor to sleep

under bridges. . . ." In all fairness, "this Colorado law is no more targeted at used car salesman, animal rights activists, fundraisers, environmentalists, and missionaries than French vagrancy law was targeted at the rich."

The last issue raised by the state of Colorado was the concern for its residents to have the "right to be left alone," the right of the unwilling listener to avoid the unwanted communication. Since when has privacy in the public arena become a right? If people were granted this new right, the effects of political discourse in this country would be devastating. "This Court once recognized, as the Framers surely did, that the freedom to speak and persuade is inseparable from, and antecedent to, the survival of self-government." It is the speaker's right in a public forum to be left alone by the government; it is not the citizen's right to be left alone by a fellow citizen. Soon, if the Court continues on the path of granting citizens the privacy of eight-foot bubbles in public space, the right to be left alone will carry onto the right not to be spoken to without permission from a distance closer than eight feet.

The Court's suppression of uncongenial ideas is the worse offence of the First Amendment in the Constitution. The most effective place, if not the only place, where persuasion to not have an abortion can occur, is outside the entrances to abortion faculties; yet, these anti-abortionists' First Amendment rights are now limited due to the Court's decision to allow an eight-foot buffer zone of human contact. Clearly the Court's opinion is that the protection of people entering and exiting abortion clinics is far more important than allowing full expression of one's opinions.

Reversing Past Wrongs

By Allison Barger, Senior, Law and American Civilization

The case of *Lawrence v. Texas* (2003) asked the Supreme Court three pivotal questions. First, the court was asked whether the sodomy conviction of two homosexual men violated the Fourteenth Amendment guarantee of equal protection of the laws. The court was also asked to decide whether the conviction violated the men's rights to liberty and privacy as protected by the Due Process Clause of the Fourteenth Amendment. Finally, the case raised the question of whether the court's decision in *Bowers v. Hardwick* (1986) should be overturned. A thorough review of the background of this case and its implications for the future revealed a need to answer "yes" to each of these three questions.

While responding to a reported weapons disturbance in a private residence, Houston police entered John Lawrence's apartment to find him engaged in a consensual act of sodomy with another adult man, Tyron Garner. The two men were subsequently arrested and convicted of deviate sexual intercourse in violation of the Texas "Homosexual Conduct" law, which forbids two persons of the same sex to engage in certain forms of intimate sexual conduct. The Texas State Court of Appeals upheld the conviction, stating that the statute was not unconstitutional as represented by *Bowers v. Hardwick.* However, the fact that the State Court of Appeals upheld this ruling, which seemed to deny the rights of liberty and privacy while neglecting the Fourteenth Amendment's right to equal protection of the laws, was disturbing and was therefore reversed.

The Fourteenth Amendment to the Constitution states that no state may "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The latter part of this statement guarantees equal treatment through state laws for all people, despite race, class, gender, or sexual orientation. However, the Texas statute in question failed to equally apply the law to all citizens without bias or selectivity. The argument calling into question Texas's application of "equal protection" of the law holds that states cannot promulgate laws discriminating against certain classes of people unless there is a rational basis for the law and a legitimate government purpose behind that law. Although the statute would still be overturned on the basis that it violated the Appellant's rights to liberty and privacy, the importance of the Equal Protection Clause should not be overlooked. A person's sexual orientation should not be a deciding factor in determining whether or not an act of sexual intimacy is lawful. By pinpointing homosexual acts of sodomy rather than all acts of sodomy, including those by heterosexuals, the Texas statute discriminated against a particular group of people and thereby unequally applied to the law to citizens of the state.

Precedent shows the importance in maintaining the guarantee of equal protection of the laws as set forth by the Fourteenth Amendment. One powerful example was the Supreme Court's decision in *Romer v. Evans* (1996) when the Court struck down class-based legislation aimed at homosexuals due to the fact that the legislation violated the Equal Protection Clause. *Romer* overturned an amendment to the Colorado constitution depriving homosexuals of protection under state anti-discrimination laws.

Although the importance of the Fourteenth Amendment's Equal Protection Clause should not be overlooked in this case, the fact that the Texas statute under scrutiny violated the rights to liberty and privacy as guaranteed by the Constitution declares the statute void no matter how the Court had decided in terms of the interpretation of the Fourteenth Amendment as it applied to this case. The Appellant has a fundamental right protecting intimate, private, consensual choices from state interference. This right stems largely from precedent contraception and abortion cases dealing with similar issues (see the 1965 case of *Griswold v. Connecticut* and the 1973 case of *Roe v. Wade*).

In *Bowers*, the Court found a Georgia statute criminalizing consensual sodomy to be constitutional. Parallel to the case before the Court today, the Respondent, Hardwick, was charged for committing the act of sodomy with another adult male in his bedroom. The Court ruled that the Constitution does not confer a fundamental right upon homosexuals to engage in sodomy and that the controversial act in the *Bowers* case was much different from any previous cases involving private family matters or relationships. According to the Court, since "No connection between family, marriage, or procreation on the one hand and homosexual activity on the other" was demonstrated, the Respondent could not effectively argue that he had a Constitutional right to privacy in condemning the Georgia statute. The Court also struck down the argument that the right to engage in conduct such as sodomy is "deeply rooted in this Nation's history and tradition." *Moore v. East Cleveland* (1977) ruled that in order to be viewed as fundamental, certain liberties had to embody this definition. Whereas proscriptions against the act of sodomy have "ancient roots," the pardoning for and allowance of this act is a very modern concept with very shallow roots. Therefore, *Bowers* ruled against the Respondent and upheld the Georgia statute.

In *Lawrence*, the Texas statute and the Supreme Court decision in *Bowers v. Hardwick* were rightly overturned. In contemporary American society, homosexuality has very much become a term that can easily be associated with relationships and private family matters, thereby entitling a homosexual act of intimacy such as sodomy to the Constitutional right of privacy as set forth by *Griswold*. Furthermore, it is true that the right to partake in an act of sodomy does not necessarily have far-reaching roots in American history. However, perceptions and beliefs are constantly changing and evolving, and therefore we cannot base the incorporation of every fundamental right on archaic beliefs of the past.

Texas did not prove it had an important governmental interest in maintaining an antiquated and discriminatory law barring acts of homosexual sodomy. The statute violated constitutional rights to equal protection of the laws set forth by the Fourteenth Amendment and the right to privacy as confirmed by Justice Douglas in *Griswold*. This was not an act of activism or policy-making: human beings, even those who hold positions of power or publicity, are not infallible and are not insusceptible to the ever-changing and evolving perceptions of the surrounding world. By overturning the *Bowers* decision, the Court re-enforced the evolving nature of society and the Constitution. The Court did not act as a legislative body, but instead simply interpreted the law in the most constitutionally sound manner as to reverse past wrongs and misperceptions.

Privacy Outside the Bedroom

By Caitlin Carlson, Senior, Law and American Civilization

Discussions in this country about the right to privacy tend to be centered on people's private sex lives, and the extent to which these can be regulated by the government. While the ability to control one's intimate life is very important, it is the idea that privacy is fundamental that is what is really at issue. Instead of focusing on hot-button topics such as abortion or consensual sodomy, people should focus on the idea behind the right to privacy, and on less inflammatory issues. This would lead to a better understanding of the need for constitutionally protected privacy rights in the United States, as well as furthering the debate in a more civil, less heated manner.

Court recognition of some sort of right to privacy has existed since the late nineteenth century. In *Boyd v. U.S.* (1886), the Supreme Court said that the Fourth and Fifth Amendments imply that people have an "indefeasible right of personal security, personal liberty and private property." At the time, this right applied only to "invasions on... the sanctity of a man's home and the privacies of life." The Court was dealing only with search and seizure protections, not with other types of privacy.

From this point the debate over whether privacy rights exist should commence. People on all parts of the political spectrum will probably agree that the government, at least in some circumstances, does not have the right to enter your house and search through your belongings. Certainly everyone can agree that, if you are not suspected of a crime, the government should not be snooping through your things.

This principle can be extended to apply to private citizens as well. Who would not be disturbed to learn that their neighbors had entered their house and snooped through their medicine cabinet or their private financial papers? This would upset anyone; breaking and

entering is a crime. Now what about private entities, like corporations? Employers and prospective employers have the right to access all sorts of personal information about you. They can contact previous jobs, look up your credit ratings, even monitor your email and Internet access and snoop through your desk. Although searches like these implicate an individual's privacy, we consent to this when we apply for a job or accept a position at a company.

It is from an issue like this, credit reports or invasion into one's home, that I believe the debate over privacy rights should begin, mostly because there can be little reasonable debate. It seems clear that people have an expectation of privacy in their personal possessions, absent of course suspicion of criminal activity and a search warrant obtained with sufficient probable cause.

The next issue to consider, when talking about privacy rights, is the idea of liberty of thought. The First Amendment protects freedom of speech, of publication, and of religion, but does not explicitly mention the liberty of thought. However, if we have the liberty to publish (more or less) anything, the liberty to discuss that work with others, and the liberty to worship as we choose, possibly in a manner that is based on a published work, should we not have the liberty to think about the ideas that we have read or heard?

This implicates things like book-burnings, the banning of certain books from school libraries, censorship by the government or postal service, and other activities that restrict a person's access to ideas. All of these are things that have happened in the past; banned books and to some extent book burnings still exist. This topic is more politically contentious; some people feel that the government should protect its citizens from "dangerous" ideas, while others feel that people should be allowed to determine for themselves what they and their children read. However, I think that there is a good case to be made that, given that we will never agree on what precisely constitutes a dangerous idea, it is better to err on the side of personal autonomy and permit only self-censorship.

Since we have determined that there should be no governmental censorship of access to published ideas, we come next to the issue of transmission of those ideas. This is where freedom of speech and of religion comes into play. After someone has read something new, possibly provocative, they may want to share these new ideas with others. People may discuss with their friends and families, or they may decide that they want to spread their message to a wider audience. This could be done by forming discussion groups, by distributing pamphlets, even by standing on a street corner and pontificating. All of these activities were banned by our government at one time, and all have since been determined to be protected free speech activities. This protects both an individual's right to speak, and another person's right to receive new information.

Another way that ideas are transmitted is in religious settings. Chaplains have great influence over their congregants, and religious institutions are responsible for the transmission of ideas about morality, faith, even politics to many Americans. This transmission of ideas, too, cannot be censored.

In another arena, birth control is a fairly benign issue when compared to something like abortion, homosexual acts, or the "right to die." However, when these issues are viewed

as grounded in a right to privacy that is made up of freedom of thought and of personal autonomy, the controversy is removed. Take abortion for instance. If a woman becomes pregnant, she has basically three options: she can continue the pregnancy and raise the child herself; she can continue the pregnancy and have someone else raise the child (either a family member or adoptive parents); or she can terminate the pregnancy. Again, the woman can exercise her free speech rights by going to her doctor and asking for information about all three options. She can take any literature she is given back to her home and read and think about it. All of these activities involve her freedom of thought and her autonomy within her own home. If she, after careful moral consideration, determines that she wants to terminate the pregnancy, and her doctor agrees that it is medically safe, the woman has the right to choose an abortion. Society's morals do not have to enter into this debate, except as each individual woman wants to invite them into her own private considerations.

Homosexual acts are almost an easier situation to contemplate. If two people choose to engage in sexual activity in a private home, they are exercising their freedom of personal autonomy in their own home. It really is no one else's business what they choose to do. Free speech issues don't even really enter into this situation, except perhaps if the two people in question choose to discuss their activity. Here though, the sexual activity is really confined entirely into a private residence, and there can be no justifiable degree of societal intrusion.

I believe that basing a debate about issues that arise from the right to privacy, such as abortion of homosexual acts, will be much more civil if the debate centers around the two main reasons for why we have privacy rights at all. Considering something based on how it is affected by intrusions into First Amendment rights or into personal autonomy, rather than on one's subjective moral judgments is a much more reasonable way to proceed. It is only when you are in the situation in question – contemplating an abortion, considering your own desires for end-of-life care – that your morals should come into play in the debate. Until then, part of the freedom of thought that we have includes being able to make one's own personal moral judgments.

Do Criminal Defendants Really Have Too Many Rights?

By Daran Barfield, Junior, Political Science and History

The Court's ruling in *Gideon v. Wainwright* (1963) came in the middle of the Warren Court's so-called "Rights Revolution," a period in which the High Court expanded the rights of criminal defendants exponentially – much to the chagrin of the nation's prosecutors, politicians, and social conservatives. *Gideon* was just the beginning. By the time Earl Warren resigned from the Court in 1969, he had reshaped constitutional law in general, and criminal procedure specifically, with a series of landmark rulings that in turn reshaped the manner in which courts and law enforcement officials dealt with the right's of criminal defendants. But while this so-called "expansion of rights" might have been dismaying to most political and social conservatives, the Court's actions should not have been a surprise at all. These rulings were, in fact, a logical progression in a long line of cases that starting far back as 1884, with *Hurtado v. California*, in which the Court dealt with constitutional interpretation in addressing the rights, privileges, or immunities of criminal defendants under either the Fourth, Fifth, and Sixth Amendments and whether or not those rights were "incorporated" by way of the Fourteenth Amendment into "the several States."

Given the Warren Court's civil rights rulings, this so-called "expansion of rights" for criminal defendants was viewed by some – chiefly conservatives, but not exclusively – as an "unprincipled" and "illegitimate" exercise of power, and the Court had become viewed as a "legislator of policy."

For years, conservatives had been dejected and furious over what they saw as the "liberal excesses" of American society that they blamed chiefly on the federal judiciary in general, and the Supreme Court under Earl Warren specifically. With the election of Richard Nixon in 1968, a man who promised to appoint "strict constructionists" to the federal judiciary, the days of "liberal activism" by the federal judiciary were numbered, particularly in criminal law. The attack on the Warren Court for being a "legislator of policy" is wholly unjustified, unsupported by history, and completely without merit.

First, as Chief Justice John Marshall said in 1803, "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."

This is the role intended for Article III judges when the Framers of the Constitution conceived the judiciary as part of our tripartite government. Moreover, despite what some judges have articulated, the fact remains that it is indeed the duty and responsibility of the judiciary to declare "what the law means," not only because this is part and parcel of the legal heritage imported to this nation from England, but it would defy logic, reason, history, and the very principles of system of republican government, as intended by the Constitution's framers, if the judiciary did not undertake constitutional interpretation or adjudication. Should Congress decide if Congress is acting illegally?

Second, there is an undeniable connection between the Fourth, Fifth, and Sixth Amendments. At the nexus of these amendments was a determined effort on the part of the framers to ensure that judicial proceedings in this nation would be fair, open, fact-finding in nature, and not inquisitorial like in Europe. Courts in this nation have been burdened with the complexities of how to best ensure that the administration of justice and the rights of the accused were as balanced as possible. Unfortunately, in many instances, particularly in the South, not only did the judiciary fail to provide even the most minimal constitutional protections, it did not even try. It took the Warren Court to give life and meaning to the promises enshrined in this nation's Constitution.

Those who deplore the Warren Court's so-called "judicial activism" truly do oppose the principles of fairness and equal justice. They act as if police and prosecutorial misconduct is and has not been a problem in our society.

With Earl Warren writing for the majority and with only Justice Douglas dissenting, the Court established the "stop and frisk" doctrine on the basis of "reasonable suspicion" rather than "probable cause." With few exceptions, this began the long and tragic evisceration of Fourth Amendment's requirement that searches and seizures be based upon "probable cause" and executed with a warrant that would go on essentially unabated for almost 30 years. This is particularly troubling because, as I have indicated, the Fourth, Fifth, and Sixth Amendments are all inextricably linked. Thus, as goes the Fourth Amendment, so too goes the Fifth and Sixth Amendments.

One of the most contentious rulings handed down by the Warren Court – and if you believe the hyperbole of those on the Right, there were many – dealt with the Fifth Amendment's right against self-incrimination.

Once again, political and social conservatives accused the Court of "coddling criminals" and essentially ignoring roughly 70 years of precedent when it handed down the decision in *Miranda v. Arizona* (1966). Within a few years, however, the Court, now headed by Warren Burger and William Rehnquist, began an incremental assault on *Miranda*. From 1970 through 1994, the Court issued no less than 34 decisions that in one way or another limited the scope of the *Miranda* decision, and, in my view, gutted it.

Remarkably, in 2000, Chief Justice Rehnquist himself authored an opinion announcing the that the Court's holding in *Miranda* was indeed a constitutional rule and may not be overruled by an act of Congress (*Dickerson v. United States*). Justice Antonin Scalia, joined by Justice Clarence Thomas, vigorously dissented from the Court's ruling in *Dickerson*. Regrettably, Rehnquist's overall reasoning for upholding *Miranda* leaves much to be desired. For example, while he announced that *Miranda* was indeed a "constitutional decision," he did not announce that the Court was overruling the more 30 decisions that have limited the scope of *Miranda*. What good is an initial holding in a "constitutional decision" when it has been made into a Paper Tiger as a result of subsequent rulings? I most assuredly cannot support Justice Scalia's disingenuous attack on *Dickerson*, and by extension *Miranda*, simply because he ignores the history of prosecutorial and police misconduct that resulted in the Court's original holding in *Miranda* in the first place.

Criminal defendants do not have too many "rights." Indeed, rulings by the Burger and Rehnquist Courts have dramatically limited the rights of criminal defendants. It is especially troubling that jurisprudential doctrines, judicial reasoning, and judicial precedents are readily applied in one case, and then with an astonishing degree of deftness that would make Houdini green with envy, those doctrines and judicial precedents are completely ignored in another case with virtually the identical same set of facts. I cannot think of a greater abdication of judicial responsibility or more bankrupt, corrupt, and unprincipled use of judicial power than when judges exercise their power in this fashion. In my view, nothing does more to undermine the average person's respect for and faith in this nation's judicial system, and perhaps nothing can breed a deeper cynicism and contempt for the rule of law than the seemingly malleable and amorphous "results-oriented" jurisprudence of the Rehnquist Court.

The *Prelaw Society Journal* reflects the views and opinion of the writers whose work is contained herein and in no way reflects the views or opinions of the Towson University Prelaw Society or Towson University.

Towson University is in compliance with federal and state laws and regulations that prohibit illegal discrimination. The University does not discriminate on the basis of sexual orientation.