

# The Prelaw Society Journal

Towson University

*A journal of commentary, politics, and opinion*



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Joe Esmont, President  
Sara Cianferano, Joe Esmont, Diane Moir, Editors

## **God Save This Honorable Court**

*By Dominic Markwordt, Sophomore, Business Administration*

What does the Establishment Clause of the First Amendment to the Constitution mean? This term, the Supreme Court is faced with deciding whether the voluntary recitation of the Pledge of Allegiance is unconstitutional in the case of *Elk Grove Unified School District v. Newdow*. At issue are whether the words "one nation under God," added in 1954 by Congress, violate the constitutional prohibition against the "establishment of religion."

Michael Newdow, a California atheist, sued the Elk Grove Unified School District because he claims his 9-year old daughter is injured when she is compelled to "watch and listen as her state-employed teacher in her state-run school leads her classmates in a ritual proclaiming that there is one God, and that our's is 'one nation under God.'" While his case was originally dismissed by federal district court Judge Milton L. Schwartz, on appeal, a three-judge panel of the United States Ninth Circuit Court of Appeals reinstated the case and ruled 2-1 in Newdow's favor. When the full Ninth Circuit refused to hear the case en banc, Elk Grove appealed the ruling to the United States Supreme Court.

The Supreme Court is now considering the relevant portion of the First Amendment pertaining to the case, which reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Would the Founding Fathers view the voluntary recitation of the Pledge of Allegiance as unconstitutional? (In 1943, the Supreme Court ruled that schoolchildren cannot be *compelled* to pledge allegiance to the flag.) Thomas Jefferson, the principal author of the Declaration of Independence and one of the least religious of the Founding Fathers, referred to God no less than four times in that document. The first paragraph refers to "Nature's God" while the second paragraph includes the famous phrase "they are endowed by their Creator with certain unalienable Rights."

The Ninth Circuit acknowledged in its opinion that “the sponsors of the 1954 Act, [which added the words under dispute,] expressly disclaimed a religious purpose writing in legislative note ‘This is not an act establishing religion. . . .’” Nevertheless, the Court argued that it “may reasonably appear to be an attempt to enforce a “religious orthodoxy” of monotheism, and is therefore impermissible.” The 56 signatories of the Declaration of Independence, including Jefferson, mutually pledged “with a firm reliance on divine Providence” their “Lives, their Fortunes and their sacred Honor” to each other.

Consequently, it is not surprising that members of the First Continental Congress seriously considered the appointment of congressional chaplains before authorizing them. Certainly, a chaplain paid solely with public funds could be construed to tend to establish a religion than would the voluntary recitation of a four-word phrase. Nonetheless, in 1983, the Supreme Court ruled in *Marsh v. Chambers* that the appointment of a chaplain to lead opening prayers in the Nebraska Legislature does not violate the Establishment Clause. “It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the states, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.”

The Supreme Court rightly recognized that the Founders clearly understood the Establishment Clause in the Constitution to mean that the government could not establish a national religion and by extension a national church like those then common in Europe. The Pilgrims came to settle on the shores of this country in 1620 to escape religious persecution that they endured at the hands of the Church of England. Since the Supreme Court has explicitly stated that the overt act of paying congressional chaplains from the public purse “is not . . . a step toward establishment,” surely it must find that a ceremonial, patriotic practice does not violate the Establishment Clause.

Clearly, the Ninth Circuit, widely recognized as the most liberal and most overturned Circuit Court in the nation, erred in its interpretation of the Establishment Clause by breathing more meaning into this phrase than the Framers wisely intended. The Court acknowledges “the undeniably historical significance of religion in the founding of the Republic.”

But then the Court asserts that the Pledge does not describe the United States, but rather that the voluntary recitation of the Pledge “is to swear allegiance to the values for which the flag stands: unity . . . and since 1954—monotheism.” The Court’s claims are specious given that students first hear the Pledge while in pre-kindergarten or kindergarten and are reciting it by rote memorization by, at the latest, the third week. Almost no students will have even heard of the concept of monotheism much less understand its meaning. To conclude that the voluntary recitation of the Pledge of Allegiance “conveys an endorsement of a religious belief” stretches credulity far past the breaking point.

Judge Ferdinand F. Fernandez in his dissent aptly remarks, “My reading of the stellascript suggests that upon Newdow’s theory of the Constitution we will soon find

ourselves prohibited from using our album of patriotic songs in many public settings. 'God Bless America' and 'America The Beautiful' will be gone for sure." Judge Fernandez rightly realizes that the Establishment Clause was "not designed to drive religious expression out of public thought; [the First Amendment religion clauses] were written to avoid discrimination."

I suspect Newdow will next object to the existence of federal holidays, many of which fall on major Christian holidays. CNN legal analyst Jeffery Toobin called the case now before the Supreme Court "dead on arrival" and "outside the mainstream of American legal opinion." Republican Missouri Senator Kit Bond rightly observed that "our Founding Fathers must be spinning in their graves." The Supreme Court can and should quickly put a stop to this spinning. Considering that in 2000 the Court ruled in *Santa Fe Independent School District v. Jane Doe* that student-initiated and student-led prayer at high school football games violated the Establishment Clause, the Court will have to perform astonishing feats of intellectual gymnastics to rule in favor of the voluntary recitation of the Pledge of Allegiance. An overwhelming majority of Americans wish the justices well. God save this honorable court.

## **Cruel and Unusual Death** *By Erin Lorenz, Sophomore, English*

Washington-area convicted sniper John Allen Muhammed was sentenced to death on March 9, 2004. For many, this brought relief as the man who caused so much terror would finally receive justice. Muhammed's execution is supposedly what he deserves, and the families of his victims hope to have closure as a result of his death. However, there will be those who protest Muhammed's execution as a violation of the Eighth Amendment of the Constitution, which forbids cruel and unusual punishment. These complaints are justified. Capital punishment is cruel and unusual and is therefore unconstitutional. Execution amounts to state-sponsored murder. Murder is cruel, and because of the way capital punishment is administered in this country, it is unusual.

And yet, it is difficult to claim that capital punishment is unusual. It has been the recourse of governments for centuries to execute criminals. However, several agencies of the United Nations have condemned the United States specifically for continuing to allow capital punishment. Furthermore, the infrequency with which the death penalty is used within this country to deter crime is unusual. According to Sr. Helen Prejcan in *Dead Man Walking*, only one to two percent of those who commit homicide each year are sentenced to death and out of those, only a handful are actually executed. Of the average 22,000 homicides committed per year, 300 convicted murderers are given the death sentence. Out of those 300, two-thirds are released from the death sentence via a retrial, a commuted sentence, or a pardon. It is laughable to think that out of the thousands guilty, the 100 or so convicts remaining on death row serve as a sufficient example to those contemplating murder.

Another curious aspect of the death penalty is the number of people on death row who are eventually exonerated. Since 1976, at least 107 people have been released from

death row after they were determined innocent. Unfortunately, 23 others have been executed, only after those investigating the case discovered that none of the 23 were guilty of the crime for which they were put to death. Could it be that 130 souls waiting to be killed for nothing is neither "cruel" nor "unusual"?

What is still very strange about capital punishment in this country is how private it has become. The days of lynch mobs and public hangings are long passed. Now, the executioners are as far away as possible. All those witnessing the death are in another room, separated from the prisoner by a glass wall. Aside from the actual execution, the lawyers and lawmakers often shuffle responsibility for the execution between each other, as if they are trying to avoid responsibility.

In terms of cruelty, capital punishment by definition is cruel. There has been a quest, of sorts, for some time in the courts to find a humane method of execution. However, all of these methods carry with them pain and gore. Hanging is still a legitimate form of execution in the states of Washington, Montana, Delaware, and New Hampshire. In *Campbell v. Wood*, a case appealed to the U.S. Ninth Circuit in 1994, the court held that hanging was constitutional. Judge Stephen Reinhardt dissented, saying that hanging possesses by nature a "high risk of pain for more than is necessary to kill a condemned inmate. If the drop is too short, the prisoner will strangle to death, a slow and painful process. . . . [If the drop] is too long the prisoner may be decapitated."

Even death by electrocution can be brutal. Reports of botched electrocutions are horrifying, with flames spouting from the bodies of the prisoner. In some cases it took several minutes for the person to die. However, even accounts of normal electrocutions are disturbing. In his dissenting opinion in *Glass v. Louisiana* in 1985, Justice William Brennan says of electrocution: "The prisoner's limbs, fingers, toes, and face are severely contorted. . . . The force of the electric current is so powerful that the prisoner's eyeballs sometimes pop out on his cheeks . . . . The body is frequently badly burned." Indeed, Brennan's words suggest that electrocution is merely burning a human being alive very quickly.

The most common method of execution in use today is lethal injection. As recently stated by a federal district court, according to political scientist Austin Sarat, "There is general agreement that lethal injection is at present the most humane type of execution available and is far preferable to the sometimes barbaric means employed in the past." Although such courts have busied themselves with finding a humane method of execution, it is important to remember that each new method of execution has been considered more humane than the last. A witness to a botched electrocution has an interesting perspective on humane execution. Again, according to Sarat, "seeking a 'humane' form of execution has nothing to do with it. It is not about sparing the condemned, but sparing ourselves. We like to keep the whole awful business at arms length, to tell ourselves capital punishment is civilized."

Although physical violence is certainly cruel and painful, the mental and emotional distress brought on by waiting for death is also cruel. When a prisoner is

awaiting execution on Death Row, he is often given the option of tranquilizer drugs that will calm him during the last days prior to his death. How backwards is this? The government has imprisoned these criminals for heinous crimes and is submitting them to torture as they wait out their final days, and then offers medication to ease the anxiety. This business of tranquilizers tells us that torture is occurring in these prisons and that the torture is sometimes too much for a human being to bear without medical intervention. Many punishments have been outlawed for being too cruel because they dragged out the pain for too long. However, regardless of how the person dies, he or she still must wait for death in varying degrees of emotional distress.

Chief Justice Earl Warren once wrote that the Eighth Amendment must "draw its meaning from the evolving standards of decency that mark the progress of a mature society." The standards of decency evolve constantly. It is clear that the death penalty is mishandled and unjustly administered today. It is also clear that regardless of the method of execution, the government has still taken the life of another human being. This has become morally repugnant, as indicated by the ways in which executions are kept so private. People do not wish to have anything to do with execution, aside from allowing its existence. Richard Moran says in *Executioner's Current* that "the concept of humane punishment has come to mean punishment that conceals its violent nature. If the true violence is killing, then all methods of executions are equally violent." It would seem that the evolving standards of decency prove that the death penalty, in all its forms, is cruel and unusual punishment. Even for John Allen Muhammed.

## **Blue Genes: The Case for Genetic Testing**

*By Thomas Berk, Freshman, Undeclared*

Who doesn't want to live a long and fulfilling life? Genetic testing has given thousands of people who otherwise would have been lost causes as fulfilling a life as you and I have. Genetic testing can signal an oncoming illness and in the long term may even eradicate many diseases forever, changing the face of our society. Now more than ever, with genetic tests becoming more and more commonplace, a close examination of this subject is necessary to determine its place in society and the government's obligation to provide it.

There are three basic categories of genetic testing: testing newborns for metabolic diseases that would otherwise be unknown, testing for carrier status (determining whether parents-to-be may pass along a birth defect to their child) and the predictive testing—to see if someone has a predisposition towards a specific disease. In all three categories, a federal program implementing and funding these tests is essential for the betterment and proliferation of future generations.

The first type of testing, on newborns, is the one most obviously beneficial. Fifty years ago a child could not be diagnosed for metabolic diseases such as Phenylketonuria (PKU) until its symptoms began to form. By that time, the child was already irreversibly mentally handicapped. Modern medical breakthroughs have changed this reality. Now children can be diagnosed by looking at their blood, and the proper precautions can be

implemented. A child born with PKU can live a normal life with slight dietary modifications—all thanks to the simple solution of genetic screening.

From its inception, newborn testing has been noted for its life-giving importance. Beginning in 1960, genetic testing was immediately accepted worldwide as a potential life-giver. President John F. Kennedy increased funding for genetic testing, and many states began implementing programs screening newborns for genetic diseases. Many other countries also took the initiative to start screening their own newborns.

Since then, even more has been done to increase the reach of newborn testing. With the advent of modern technology, with the influx of new techniques, screenings are now more accurate with fewer false readings. The most famous of these techniques is Tandem Mass Spectrometry, which can screen for dozens of metabolic diseases in minutes. Many children who would have died within days or months can now live full, healthy lives.

While nearly all states mandate some form of genetic testing, the federal government must act in order to standardize those laws. Tests one state mandates another may not fund. The government already does so much to help its citizens through education initiatives, Medicare, Medicaid and the like, how much more will it put in for a proven life-saver?

It would not have to be much. According to the National Institutes of Health (NIH), testing would not be very expensive. In arguing that we should test for PKU, the NIH made the following simple calculation: each test costs \$1.25, and one in 14,000 is positive. Approximately \$17,000 is spent on finding one case of PKU, and in addition \$8,000-\$16,000 is spent to cure the disease, for a total cost of about \$33,000. At twenty dollars a day for fifty years of institutionalization, the cost of *not* testing is \$365,000. It is far more expensive to ignore the disease than to test for it.

Just as important as newborn screening, carrier screening also has enormous potential. In theory, it has the possibility of eradicating birth defects. It has worked in private circles and it can work on a nationwide scale. The Ashkenazi Jewish community has, for example, a high incidence of certain genetic diseases passed on by two carrier parents. Each parent can live life without ever knowing that they are a carrier. Only when two carriers produce a child is there a chance of a birth defect.

To stamp out these diseases, premarital genetic testing was introduced into the community. The idea was to test prospective parents to see whether both are carriers of a disease. They realized that love takes a seat behind the consequence of generations of birth defects.

Carrier testing has caused a dramatic decrease in the incidents of birth defects in the Jewish community. Within years these diseases will become extinct. One generation's sacrifice is giving life to all of their descendants. It works there, and it can work everywhere.

A world without birth defects is possible. If proper emphasis is given to the importance of carrier testing, more and more people will realize its potential. As previously stated, the federal government has a duty to protect its citizens. This applies to our future generations just as much as to our past and present ones. To fulfill its duty, the government must mandate or at least fund carrier testing.

Some people object to the federal government becoming involved in this issue. Can it require two rational people not to have children because of their genes? I answer yes. Just as the government can take children away from abusive parents, the government can stop the lifelong abuse these parents will cause in their apathy to a genetic reality. Disregard for one's children warrants government intervention regardless of how it is done.

The third type of genetic testing is the most controversial. Genetic testing can inform us of a predisposition to a number of specific diseases. This information is useful when defenses to these diseases are available, defeating the disease before it strikes. It has the ability to save people from incurable diseases. It therefore falls into the government's duty to protect its citizens. More information should be made available about it, and it should be, at the least, federally funded. However, together with these improvements to society, a number of questions still remain about predictive screening.

Some people believe that insurance companies will take advantage of this information, but that will not happen if privacy laws are passed. Twenty-eight states already have laws banning insurance companies from using genetic information. The federal government can establish similar laws controlling the use of genetic information. Insurance companies would be unable to use the information.

Another concern has to do with the depression triggered once an oncoming illness is discovered. Knowing too much can be a problem—ignorance is bliss. This could not be more wrong. Would you tell a sick man to ignore his symptoms because of the depression he'll get with his results? Ignorance can be fatal.

With a simple drop of blood, lives can be saved, generations changed, and books of information obtained. Every day new breakthroughs are occurring throughout the scientific world, each with its own future implications. The federal government has a duty to foresee these implications and act accordingly, with moral standards and an eye for its citizen's well being. We will then be able to enhance our own lives and give the best possible future to our children.

## **Same-Sex Public Education: Is it Beneficial?**

*By Dana Parciasepe, Sophomore, Pre-Elementary Education*

Co-educational public schools in the United States are about to undergo huge changes—the biggest in about three decades. On March 3, 2004, the US Department of Education will alleviate its enforcement of the milestone anti-discrimination law, Title

IX, to make it easier for districts to produce single-sex classes and schools. The new changes can result in a science class, a grade level or an entire school tailored to one gender. These new educational options have led to a heated debate questioning the benefits same-sex schools will produce, if any at all. Personally, as a future public school teacher, the new ideas have made me wonder if I would like to teach in a same-sex public school.

According to Greg Toppo, of the Associated Press, "Congress' education bill . . . clarified federal law on single-sex schooling, saying school districts could receive federal funding for single-sex schools and classes if comparable coursework and facilities are available to girls and boys." Although there are only ten completely single-sex schools now, this bill could lead to many others. The main question on many people's minds is what the actual benefits of single sex education are.

While many people believe this is an extremely beneficial idea, there are just as many critics of the new provisions. Those in favor say it demonstrates better student achievement, higher attendance, and fewer obedience problems. Detractors say there is no clear verification, and that single-sex education does not prepare students for an integrated world.

The American Civil Liberties Union (ACLU) and the American Association of University Women are the biggest opponents. They think that the program neglects to put forward credible proof for how same-sex schools will improve instructive opportunities for American students while guaranteeing that there will be no discriminatory issues. Critics also believe that Title IX has been influential for more than thirty years in closing the huge gender gap that had existed in education in the United States. The ACLU states, "In many observable ways its prohibition on sex discrimination has had results that range beyond education into broader social equality for women. Any change to that law promises to stymie further progress."

Many in favor of single sex education believe American students going to public schools should have the same opportunities as private school students. For example, Senator Kay Bailey Hutchison, R-Texas, said, "It's time our nation's public school children have the same options as their private school contemporaries."

Those in favor of single-sex education also believe it will change the way education is perceived in the most positive way. Boys and girls can be instructed through different methodologies. For example, in Greensboro, North Carolina, about 100 high-school girls who grapple with both their academic and social skills were given their own public school on the Bennett College campus. According to history teacher Shawn Watlington, because of this, they are much more willing to discuss any issues or problems and are less distracted by boys. Watlington states, "Male students in high school have different needs—more organizational problems—while females have problems with confidence," she said. "As a teacher, I would have to split myself and deal with both issues, so I had less time to go more in depth."

While many may conclude that single-sex schools may only benefit girls due to the glass ceiling wavering over their heads, new research shows that it is in fact the boys who are struggling in school. According to research found on the Web site of the National Association of Single Sex Public Education, "on an MRI scan, the brain of a 17-year-old boy looks like the brain of an 11-year-old girl. So, while the 17-year-old girl is ready to tackle Jane Austen and Charlotte Bronte, the 17-year-old boy still wants to read his *World Wide Wrestling* magazine. In single-sex schools, teachers are (or should be) free to choose materials that fit the interests of their students. In coed schools, the girls are often held back or held down to the abilities and interests of the boys." By creating different options for different sexes, each gender can learn in ways that relate to their academic level.

Creating an all boys school can also get rid of stereotypes that boys are only "jocks" or "nerds"—never both. In a same-sex school, these boys can be the star football player as well as the valedictorian, although it may seem like it would be the opposite. Stereotypes seem to wither away at same-sex schools, possibly because there is less pressure to be "cool" and to follow the norm.

These new ideas about same-sex education made me wonder, mostly because I am a future educator—would *I* enjoy teaching at a single sex school?

In all honesty, I think I would have to say I would not enjoy teaching in a single sex school. I believe that such a vital part of education comes from the interaction of peers of both sexes. Yes, I do think that *some* children may be better off learning in an environment with fewer distractions, but in general, single-sex schools will not prepare children for the world they will face when they are done with their education. A girl or boy who attends a single-sex school may have trouble dealing with the opposite sex because of the few interactions they had in school.

A great deal of research also shows that the percent of graduates at single-sex schools is almost 100 percent. While one may conclude that this is evidence enough that these schools are successful, I think that this can also show that the students dedicated to and serious about education are the ones attending same-sex schools.

Only time will tell if single-sex public education actually works. Research will be performed for years to come. I will, however, be watching the evidence unfold as a teacher from a public school that caters to both genders.

## **Medical Testing: The Only Testing**

*By Rachel Kanner, Senior, Law and American Civilization*

Animals, like humans, experience pain and suffering. Tests on them causes agony, and therefore it should only be used when absolutely necessary—and even then, it must be tailored to impose the least amount of discomfort possible. For these reasons, medical testing is the only kind of testing that should be performed on animals. Cosmetic

testing and dissection for educational purposes should not be done on animals because of the torturous methods used.

Dr. Paul Silver, Associate Professor of Clinical Medicine at Georgetown University, argues that "testing for cosmetic research should not be used unless it is absolutely necessary and there is a compelling interest. In the case that cosmetic testing is used, the test must employ the absolute minimal amount of pain and distress to the animals."

The status of testing cosmetics on animals has not yet been established. The Food and Drug Administration (FDA) has mandated that manufacturers make sure their products are safe for the general public. FDA warnings are placed on all products whose safety has not been determined, but safety is determined by testing products on animals. The problem is obvious. There are no laws regarding cosmetics testing on animals, so researchers and manufacturers do as they please.

According to the FDA, the Federal Food, Drug, & Cosmetic Act was established to "ensure product safety and effectiveness, thereby protecting consumer's health." That is wonderful, but it does not help the poor, defenseless creatures forced to suffer while the manufacturers experiment with the safety of their products. Tests are run with everything from eye shadow to oven cleaners, and can involve gruesome practices like "eye irritancy tests," which involve dropping chemicals into the eyes of rabbits and noting, over an average of three days, how much damage was caused.

This is how God's creatures are being treated. And why? So that humans (also God's creatures) can look their best with lipstick and rouge? The sad and painful truth is that researchers believe testing cosmetics on animals is as compelling as testing vaccines. It is apparent that testing makeup on animals is unnecessary and not compelling.

Testing animals for other purposes, such as dissection for educational research, is also unnecessary. Nursing student Amanda Spivey has come to realize that learning about animals plays no real role in furthering her education. "Animals are not humans, [when dissected] they do not have the same systems, the same organs, or produce similar results in testing." She thought long and hard and then commented, "why not use prisoners who are on death row instead of animals?"

While more classrooms are opening up to the dissection of human cadavers as well as animals, animal dissection for educational purposes is used more frequently. And there is an alternative, such as using human tissue samples in experiments or using computer models.

A pre-medical student at the University of Connecticut, Jacqueline Solomon, stated that, "in high school, dissection is pointless. In college and medical school it is okay." She added that, "it is important to know comparative anatomies of different species before entering [the medical] profession."

Veterinary technician, Pet Advisor, and Pre-Veterinary student at Towson University David Shar commented that “dissection should be more specific to pre-medical, pre-veterinary, and pre-dental students. A psychology student taking Anatomy & Physiology for extra credits could easily work on a computer program. They are just as good and it harms fewer animals.”

According to the National Anti-Vivisection Society, “when dissection was introduced into the educational curriculum in the 1920s, it was thought to be a good learning tool in the study of anatomy, physiology and the theory of evolution. Today, more sophisticated teaching methods have been developed which can replace dissection and save animals. The study of a ‘life science’ was meant to instill wonderment and respect for life but has become the science of death.” Today, many argue, other teaching methods have far exceeded dissection.

Some groups go farther. People for the Ethical Treatment of Animals, the American Society for the Prevention of Cruelty to Animals, and the Animal Liberation Movement readily protest the immoral and inhumane treatment of animals across the board. These organizations think that killing animals is as unethical as killing another human being. Many of them believe that animals have as many rights as humans do, and that therefore, killing animals for research is unnecessary and morally wrong. While the sentiment is sweet, in actuality it could lead to human extinction.

While those positions are extreme, some major religions agree that cosmetic testing is wrong. Islamic groups, for example, argue that testing cosmetic products on animals is wrong, but that medical testing is legitimate if done as painlessly as possible. Judaism also rejects the use of torture when dealing with animals: even killing an animal for food must be done with in a way causing the animal the least amount of pain. Both agree that finding a cure for AIDS or cancer is a good thing, but testing new makeup in rabbits’ eyes is not. Furthermore, even medical testing should be done as little, and as painlessly, as possible. When suffering occurs, these religions allow only what is necessary and minimal.

Performing tests on animals for medical purposes, such as cancer or vaccine research, should be completely permissible. Animal testing has helped to develop vaccines against diseases such as the measles, rabies and the mumps, along with drugs to help fight the effects of HIV and cancer. Operations on animals helped to develop organ transplant and open-heart surgery techniques.

Animal testing for medical research serves quite a significant purpose. Animal operations have helped develop organ transplant techniques, testing on rats is providing leads in the fight against obesity, and testing on Old World monkeys is providing clues to how to fight the HIV-1 virus. But for minor benefits—another shade of rouge, for example—we should leave the animals in peace.



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Co-Editors of the Prelaw Journal: Sara Cianferano, Junior, Law and American Civilization  
Joe Esmont, Junior, Political Science  
Diane Moir, Freshman, Sociology/Anthropology

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Faculty adviser of the Prelaw Society: Jack Fruchtman  
Department of Political Science  
Linthicum 118B, X43350  
jfruchtman@towson.edu

Web site: [www.towson.edu/polsci/prelawsociety/Welcome.html](http://www.towson.edu/polsci/prelawsociety/Welcome.html)

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