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Protecting the Right to Create

By Megan Vosburg, Senior, Dance Performance and Education Major

Most people view copyrights as a protection for the author of a work. Interestingly enough, the first copyright laws were enacted to protect consumers by limiting the length of copyright terms, preventing a monopoly on the part of booksellers. This created a "public domain" that artists today are thoroughly familiar with. In light of this, it is clear that the actions of Congress that extend the term of copyrights are infringing on the rights of the public.

One of the cases currently being argued before the United States Supreme Court is Eldred v. Ashcroft. Eldred v. Ashcroft is challenging the constitutionality of the Sonny Bono Copyright Term Extension Act passed by Congress in 1998. By passing this act, Congress gave current copyrights, from as long ago as 1923, twenty more years of protection. Under the previous copyright law, copyright terms were the life of the author plus fifty years. Now this term has been extended to the life of the author plus seventy years.

The constitutional issue raised by Eldred v. Ashcroft is, just how long may Congress extend copyright terms? Eric Eldred, an Internet publisher, and his supporters believe that the law passed in 1998, "amounts to a perpetual grant of copyright, thwarting the free flow of ideas the framers of the Constitution sought to encourage." The constitutional provision dealing with copyrights is contained in Article 1, Section 8: "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

It is obvious that the framers intended for copyrights to be finite. In reference to the 1998 act, Sandra Day O'Connor said, "I can find a lot of fault with what Congress did. This flies directly in the face of what the framers of the Constitution had in mind." However, O'Connor then went on to question whether or not this fault of Congress is unconstitutional. Indeed it is.

Anything that flies directly in the face of the intention of the framers is inherently unconstitutional.

The need for copyrights is clear. Authors and artists should be the owners of their work, and appropriately compensated for the use of that work. The previous copyright law, which established copyright terms at the life of the author plus fifty years, provided more than adequate compensation for the author and his or her heirs. Extending terms beyond this is excessive. Even just fifty years after the death of the author, the heirs are fairly far removed from him or her. There is no reason for the heirs to continue to receive compensation. At this point the heirs are receiving compensation for something they had absolutely no involvement in.

It would make sense, then, that those who are most actively backing the 1998 act include such entertainment giants as the Disney Company and Dr. Seuss Enterprises. These are huge corporations seeking a profit. Of course they want to make money off of their publications. Nonetheless, the Constitution seeks to "promote the Progress of Science and useful Arts," not to promote the progress of excessive profit making.

The public domain exists so that anyone can use works of art, for profit or otherwise, without paying royalties. Many scholars, publishers, and artists depend on free access to, and dissemination of, art and literature. Many new pieces of art find their origin in works that are currently in the public domain. For new works to be created the authors must have access to what has come before.

Justice Stephen G. Breyer appears to be sympathetic to the new artists of today. Of the 1998 Copyright Extension Act Breyer said, "Here you have a law where billions are going to existing copyright holders and zero to new production." Breyer expressed concern that this law, "showered huge financial benefits on the heirs or corporate successors of long-dead artists, with little foreseeable positive impact on the economic incentives for current artists." Rather than protect the financial interests of copyright holders, lawmakers should be concerned with protecting the creation of new works of art.

The creation of new works of art is vital to the forward progress of any culture. Think of the impact that authors such as George Orwell and artists such as Norman Rockwell have had on our society. There must always be the opportunity for growth and development. This growth and development rise out of what has come before. This is especially true of collaborative efforts. One example of the necessity of the public domain is the collaboration between dance artists and music artists. This can be demonstrated using the very popular holiday ballet, the Nutcracker and its score by Tchaikovsky. Because the music of Tchaikovsky is in the public domain, many ballet companies and schools give performances of some version of the Nutcracker every year. The reason so many companies can afford to do this is because they do not have to pay royalties to use the Tchaikovsky score. Many people, old and young alike, are introduced to the world of ballet, and even classical music through the Nutcracker. This in turn may lead to the development of tomorrow's ballerinas and danseurs, or patrons of the arts. At the very least, seeing a performance of the Nutcracker may ignite a love of the ballet, leading to a deeper understanding of the arts for many individuals.

The above example can be true of any of the arts. It only takes one exposure to an art form to spark a lifetime of interest and learning. All people must always be encouraged to explore as much of the world as they can, especially the arts. The sooner works of art can be placed in the public domain, the sooner they can be utilized to enhance people's knowledge of the arts. The extension of copyright terms only discourages this entire process.

Lawrence Lessig, a Stanford University law professor, fears that, "the freedom that writers and musicians and filmmakers must have to interpret, reinterpret, adapt, borrow, sample, mock, imitate, parody, criticize -- the very lifeblood of the creative process," is at stake. According to the *Washington Post*, the media is painting the case of Eldred v. Ashcroft as a "legal battle pitting movie and music moguls against academics and techies." However, the frightening aspect of this issue is the impact it will have on countless regional artists. In the news we hear about the Disneys and the web publishers this issue affects. We will never hear of how hundreds of thousands of individuals across the United States have a whole new realm of possibilities when works are released into the public domain.

Martha Graham, one of the most influential and prolific modern dance choreographers of the twentieth century, firmly believed in the good of the public domain. Graham borrowed extensively from many Indian and African dances, and she was very free about stating that she had done so. Graham did not even copyright most of her dances created before 1978. Recently there was a trial involving the copyrights to many of Graham's dances. As a result of this trial, ten of Graham's dances have become part of the public domain. The statement issued by the Martha Graham Center of Contemporary Dance following the decision of the judge includes this: "The Martha Graham Center is very pleased that the ten dances found to be in the public domain will be available to the public for study and performance." So the legacy of Martha Graham is being carried on through her organization.

It is clear that the lawmakers representing the people in Congress should reflect on the creative process and really think about whose interests they are protecting by extending copyright terms. Historically, prior to 1978 copyright terms were only twenty-eight years. These copyrights could be extended for another if it was shown that there was still a market for the item in question. During this time, even if a copyright was extended it lasted at the most fifty-six years. Now the initial copyright of a work of art is seventy years. This is most definitely not necessary to protect the rights of the creative artist.

And it seems that Chief Justice William H. Rehnquist has missed the point entirely. He questioned lawyer Lawrence Lessig in this manner, "You want the right to copy verbatim other people's books, don't you?" It is frightening to think that this is the perception the Chief Justice of the United States holds. The ability to use a previous artist's work is not about copying. No self-respecting artist would even dream of doing that. The ability to use a previous artist's work is about inspiration and re-creation. There are many who argue that every dance has already been made and every song has already been sung. All we humans do is reorganize works of art so that they seem novel. In that case, should we not have free access to what came before so that we can make the best re-creation possible? Now is the time for the Court to stop worrying about the interests of profit-oriented corporations and start looking out for the creations of tomorrow.

"Grossly Disproportionate": Does $153 Dollars in Thefts Merit 50 Years to Life?

By Joe Esmont, Sophomore, Political Science

Before the Supreme Court this term lays a case that could set one of the most important legal precedents in recent memory. In Lockyer v. Andrade*,* a criminal defendant convicted of petty theft argues that California's popular Three-Strikes Law, which provides a mandatory 25 years to life sentence for a third "strike," is unconstitutionally harsh as it applies to him. All in all, there is both poignant legal precedent and sufficiently narrow grounds to nullify the sentence without jeopardizing the whole of a mostly good law.

Leandro Andrade is by no means what a citizen should strive to be. His record contains several burglaries, petty theft, and escape from prison after a drug possession conviction. In November of 1995, he was convicted of two counts of misdemeanor petty theft for stealing $150 worth of videos from two K-Marts, as Christmas presents for his nieces. Because he had already committed similar offenses, burglaries from 1983 that counted as his first two strikes under the law, the prosecution chose to charge both misdemeanors as felonies. "Wobblers," misdemeanors counting as felonies for the third strike, are unique to California's version of the Three-Strikes law. After Andrade was found guilty, the judge was then forced to issue a minimum sentence of 50 years to life—25 years for each of the thefts. Andrade appealed his case to the Ninth Circuit Court of Appeals, which ruled that his sentence was in violation of the Eighth Amendment's protection against cruel and unusual punishment. California has since appealed to the Supreme Court. Andrade's lawyers intelligently seek a ruling stating that the law as it applied to their client was unconstitutional—not the entire law. Not only is this the reasonable argument—few would argue that the law as it applies to habitually violent criminals is unconstitutional—but it also is more palatable to the Court, which traditionally prefers not to involve itself in political affairs.

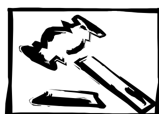
Legal precedent, ranging from last term's decision in Atkins v. Virginia to the early twentieth century case of Weems v. United States, provides strong grounds for the High Court to throw out Andrade's sentence. In Atkins, the Supreme Court invoked the Eighth Amendment and ruled that execution of the mentally challenged was unconstitutionally cruel and unusual. The Court's reasoning, as penned by Justice Stevens, was that "the practice . . . has become truly unusual," separating the case from Penry v. Lynaugh in 1989, where the Court upheld executing the mentally impaired.

Using data from the Court's opinion and Justice Scalia's dissent, we find that twenty of the thirty-eight states (53 percent) that allow the death penalty allow the execution of the mentally challenged, though only five (13 percent) actually have executed a person with a documented IQ below seventy since Penry. From a purely statistical standpoint, one of twenty-five states (four percent) with a Three-Strikes Law allowing misdemeanor crimes to count as a third strike is certainly more unusual than 13 percent of states with the death penalty executing the mentally challenged or 53 percent of death penalty states in which such an execution it is possible. Allowing misdemeanors to count as felonies for the third strike is clearly more unusual than allowing the execution of the mentally challenged.

Three cases provide precedent for the overly harsh punishments being ruled unconstitutionally cruel as well. In Coker v. Georgia (1977) and Enmund v. Florida (1982), the Supreme Court threw out death sentences for rape (in Coker) and for a defendant who "neither took life, attempted to take life, nor intended to take life" (in Enmund) as "impermissibly excessive punishment". And even if one considers the death penalty as subject to entirely different rules, Weems and the concurring opinions of Justices Kennedy, Souter and O'Connor in Harmelin v. Michigan in non-death eligible cases provide the very strong backing for the Andrade sentence to be reduced. In Weems, the Court invalidated a sentence of twelve years for falsifying records and set forth the standard that the crime must be "graduated and proportioned to the offense." In Harmelin, the Justices concurred in upholding the sentence that had been challenged, but set forth the standard Andrade's lawyers argued during oral arguments: that the punishment must not be "grossly disproportionate" to the crime.

According to Erwin Chemerinsky, Andrade's lawyer, "If Andrade's prior offenses had been rape and murder, the most he could have received . . . was a year in jail." California law allows for misdemeanors to be counted as strikes when the criminal has a prior record for a similar offense. Non-violent burglaries from 1983 thus enabled the misdemeanors to become felonies, and the sentence to skyrocket. Perhaps more to the point is that, if Andrade is granted parole at earliest opportunity, he will have served a year for roughly every three dollars worth of merchandise he stole. Which is clearly not graduated and proportioned to the offense he committed, obviously grossly disproportionate, and thus should be considered impermissibly excessive punishment, in accordance with the Eighth Amendment.

Simple reason then leads to the conclusion that Andrade's sentence fails to meet the requirements of the Constitution. The Eighth Amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." While the law can and has provided constitutional results, in this case, the sentence imposed is both cruel and unusual. A sentence of a year for every three dollars stolen is not only wholly irresponsible of the prosecutors and unrepresentative of our thoroughly refined culture, but only possible in California. Leandro Andrade is not a saint persecuted unreasonably; he deserves to be punished. Nor is the Three Strikes law normally anything other than the people of California legitimately deciding that repeat criminals should be treated more harshly than others. The law, however, was created to deal with an ex-convict who kidnapped and murdered a child. Not to crowd jails with people who want a five-finger discount on *Free Willy II*.



Legislative Review of Post-Conviction DNA Analysis and Wrongful Conviction Compensation

By Melissa Denbow, Junior, Psychology

Currently on the books, Maryland's Law 418 (2001) addresses cases of post-conviction DNA testing and compensation for wrongful conviction. The issue arises within the specific

provisions detailed within the law that state that an individual who is proven innocent through DNA analysis is only eligible for monetary compensation if the individual is pardoned by the governor. My proposal is to remove such a provision from Law 418 so that regardless of whether the governor acts, once individuals are found innocent, they automatically receive compensation for time served and projected earnings just as if the individual had not been incarcerated. The case that brought this issue to the forefront was that of Bernard Webster, who after serving twenty years for rape, was recently found innocent through DNA analysis, but he is ineligible for compensation because to the provision in Law 418. Due to the sometimes slow hand of justice, as established through impressionable eyewitness testimony, the current moratorium on the death penalty, and the phenomenon of wrongful conviction, the state needs to reevaluate Maryland Law and Law 418 in light of this case.

Eyewitness testimony, which was a critical element in the Webster case, has proven over time to be one of the more inconsistent and most impressionable forms of evidence in the judicial system. Consequently, the fact that many people are wrongfully convicted via eyewitness testimony, pre- and post-conviction DNA analysis should become routine to give credence or fault in evidence submitted in trial. In regard to witness accuracy as a crime is taking place, there is, according to sociologist Margaret Matlin, a phenomenon known as "weapon focus," where eyewitnesses are more likely to become diverted from the specifics of the event and focus on the weapon. For the Webster case, the main charge was rape, and the eyewitness may have been diverted from the specifics of the event, like the culprit's face, and focused instead on the actual sexual violation and also on how to escape the situation.

In addition, there is another phenomenon of eyewitness testimony known as "own-race bias" where, says Matlin, "people are generally more accurate in identifying members of their own ethnic group than members of another ethnic group . . . [and people] develop expertise for the facial features of the ethnic group with whom they typically interact." If the attacker and the victim are of different ethnic backgrounds, as in the Webster case, own-race bias as well as weapon focus could have served to influence the victim in her portrayal of the attacker, especially in cases where a line-up is utilized as a form of identification. It is completely expected and reasonable to find the witness's testimony inaccurate in describing her attacker.

Yet, as a safeguard for both the victim and the accused, who may or may not be guilty, DNA analysis should be utilized to remove any doubt that arises as a result of eyewitness testimony. Due to a number of elements, including the witness's focus and the positive feedback received from counsel, eyewitness testimony can be altered to favor the prosecution and lead to false convictions. Many of such convictions lead to spending the prime of one's life incarcerated. In the Webster case, he lost twenty years of his life, starting at the age of nineteen, literally before he had the chance to experience full adulthood.

Many people would argue that the same techniques that are used to wrongfully convict someone could also be used by the defense to persuade a jury to free a guilty person from jail. Consequently, it is my position that due to both prosecutor and defense's use of faulty eyewitness testimony, DNA analysis should be used to dissolve any suspicions.

The Webster case is one of many cases that have been revisited and later found that the convicted person was innocent. Such cases are partially why there is a current moratorium in Maryland on the death penalty. It is one thing to incarcerate someone, later find them innocent, and then set them free, but it is a far more costly to find someone guilty and subject them to lethal injection only to find out later that the now-deceased was in fact innocent.

Along the same lines, many of the cases that are revisited were tried prior to the application of DNA analysis. Therefore, it is critical for the judicial system to continue to revisit older cases and use any remaining facts of evidence to apply current DNA testing to reaffirm or reverse convictions. In fact, I would suggest that the incoming law students looking to perfect the art of law establish clinics and a legal practice that revisits such cases. They ought to undertake research on behalf of those currently incarcerated.

Taking into account the current Webster case and the occurrences of wrongful convictions, Maryland Law 481 should be re-examined and altered so that those who are found innocent after DNA testing are fully eligible for compensation rather than only a pardon by the Governor. If an individual is convicted and later found innocent of a crime, why should compensation for their time spent incarcerated be contingent upon the Governor's pardon? Innocent is innocent, and the years, experiences and life taken away from Webster and others should at the very least be acknowledged by financial compensation.

After twenty years, Webster has no family other than a foster sister who may or may not take him in as he tries to relearn what life is beyond bars. In addition, he will face trials and tribulations far after the case is closed in regard to seeking employment and trying to reintegrate himself into society. The least the judicial system can do is start him off financially and place him on long-term probation for his other offenses prior to the overturned rape conviction.

Protecting Our Children, Protecting Our Rights

By Megan Vosburg, Senior, Dance Performance and Education Major

Few cases that come before the United States Supreme Court ignite the passions of many, like those that deal with pornography and protecting children. There is no doubt that countless individuals find pornography, especially that involving children, morally reprehensible. However, that does not automatically make pornography unconstitutional. The question that is currently plaguing the Court is where do you draw that fine line between protecting our children and protecting our First Amendment rights.

The Supreme Court recently agreed to review the Children's Internet Protection Act (CIPA), passed by Congress in 2001. This law, which has yet to be enforced, requires libraries to install filters on all computers that provide Internet access to children and adult patrons. If libraries do not install the proper filtering software, they will lose the federal subsidies they receive for online facilities. The law appears to have no effect then on facilities that do not receive monies from the federal government.

This raises an interesting issue. Why is it that the law provides for the protection of children only in libraries that receive funding? If a law is made in the name of protecting children should it not protect all children? It seems that the writers of the law knew they were infringing on First Amendment rights in regulating Internet access. In order to push the CIPA through Congress, the writers chose to try to regulate only those institutions receiving federal funds. Indeed, they had a reason to worry about the fate of their bill. The CIPA is Congress' third attempt since 1996 to protect children from being exposed to pornography on the Internet. The first two attempts, the Communications Decency Act and the Child Online Protection Act were both struck down by the Supreme Court based on constitutional issues.

It is well known that the justices currently serving on the court have shown an extreme concern for protecting our First Amendment rights. All nine justices on the Supreme Court voted to invalidate the Communications Decency Act. The Communications Decency Act was the Congress' first attempt to shield children from access to pornography on the Internet. In the case of Internet filters it is clear, according to the *New York Times*, that there is a "tradition of openness and free inquiry in American libraries," that must be maintained. The CIPA was brought before a special federal three-judge panel court in mid-2002. Library patrons, the ACLU, libraries, and a variety of websites came together to challenge the law in federal court. They chose to bring the case before the United States Court of Appeals for the Third Circuit in Philadelphia because this court has shown strong support of First Amendment rights, especially when dealing with the Internet.

The plaintiffs in the case presented many examples of legitimate websites being blocked by filters. These websites contained information on education, medicine, politics, and religion among other topics. The mandating of filters in a public forum, such as a library, especially when they block perfectly safe material, is a clear violation of rights. The court ruled likewise. In its opinion the court stated that the technology "blocks so much unobjectionable material that it would violate the First Amendment rights of library patrons." The tendency of filters to overblock legitimate sites and underblock objectionable sites was a key point of concern for the justices.

Following the ruling of the Third Circuit, this case was appealed to the Supreme Court. That court just recently agreed to hear this case. It is scheduled to be heard this coming March (2003). In light of the past decisions of the court, which have been overwhelmingly in favor of protecting First Amendment rights, it looks as though the CIPA may never be enforced. Interestingly enough, Congress anticipated the legal challenge to the law it passed, and included the conditions for the three judge panel within the law. If Congress knew the law it passed was questionable, why then did it continue ahead, only to face the Supreme Court before the law has been enforced? In past cases, again according to the *Times*, the court has established that the "government cannot attach unconstitutional conditions to the receipt of its money."

This seems a logical conclusion. Just because the government is providing funding for equipment, does not mean it can regulate to the point of unconstitutionality. Individuals must be able to maintain their right to access all information on the Internet. This much is true: pornography is a touchy subject. Many people find pornography in any form offensive. It is entirely up to an individual how he or she perceives pornography. However, once he or she has

formed an opinion, no matter how strong, they cannot force their opinion on others. Any infringement of individual rights, in this case the right to fully access all information on the Internet, is a violation of the Constitution.

It is true that we have a responsibility to our children to protect them and keep them safe in today's often unstable and dangerous world. Children should not be free to view whatever they like on the Internet and roam the virtual world at will. However, in the interest of looking out for children, it is not right to subject all individuals to restrictions. There are other methods of keeping children out of questionable sites while they are at the library. One solution is providing a set of computers that is available only to children. These computers would have the filtering software, while those designated for adult use would not have filters in place. Perhaps the simplest solution is too much to ask for: parents accompany their children to the library and help them choose which websites to browse while obtaining information. A little supervision and involvement in their child's life and the library problem no longer exists. Realistically though, it is imperative that we find a solution to protecting our children without infringing on the rights of adults.

In recent years the court has had to muddle its way through a number of cases involving the Internet. These cases are particularly difficult to decide because there is no precedent to follow regarding the regulation of the Internet. The Internet is such an intangible, and ever-changing medium of communication that the attempt to create universal regulations is near impossible, if not altogether impossible. This makes itself clear in another case regarding children and pornography. Ashcroft v. Free Speech Coalition came before the court this past spring. This case challenged the Child Pornography Prevention Act of 1996 (CPPA). The CPPA made any "visual depiction that is, or appears to be, of a minor engaging in sexually explicit conduct," a criminal action, carrying up to fifteen years in prison for a first offense, and up to thirty years for a repeat offense. The CPPA made it a crime to "create, distribute or possess virtual child pornography that uses computer images or young adults rather than actual children."

For some reason, creators of this law tried to place virtual and real images in the same category. It is clear that child pornography is a form of child abuse and illegal. However, virtual pornography does not involve a physical child or adult. There is no one to abuse in the creation of virtual pornography, thus leading to no laws being broken in its creation. Justice Kennedy, who wrote the opinion for the majority of the court, chided Congress for passing this law, "First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end."

Perhaps soon Congress will see that it cannot continue to create and pass laws that infringe on the public's right in the name of protecting the innocent. Regulations regarding the Internet fall under the same constitutional review as those for books or other forms of print media. Constitutional rights cannot be watered down for the Internet. The Supreme Court must remain strong in protecting our First Amendment rights even in the face of the many attempts to let our rights be infringed upon in the name of protecting our children. The legislature must be forced to find another way to protect children.

News on the Prelaw Front

Record Numbers of Test Takers

The Law School Admissions Council announced that the number of test takers in the current LSAT cycle is higher than ever before in the history of the test. The June test marked a 16.3 percent increase over last year and the October LSAT test was up by 12.5 percent. (The actual numbers were 27,808 in June and a whopping 52,604 in October. The December test is projected to continue the trend with more than 40,000 test takers.

The increased interest in law school began in the fall of 2000 after several years of decline. The fact is these numbers show that there are now increased applications to law school, and this at an all-time high. For the entering class of 2002, the number of applicants increased 17.4 percent over last year's class, a total of some 89,157 applicants. Twenty-seven law schools had applicant increases of 40 percent or more. The total number of applications sent to all law schools numbered an incredible 447,136, for a total increase of some 26 percent over the previous year (the average applicant applied to five law schools). While the final figures are not yet in, we can count on last year's record number of first-year law students increasing from 42,700 as well, perhaps driving closer to 44,000.

Law Services also announced that the number of people attending the law school forums held across the country this fall also increased by 32.3 percent over last year.

We are clearly going through a period when competition for admission is about as heavy as it has ever been.

Prelaw Society Survey Results

In December, the Prelaw Society surveyed its members to determine what most students would like to see on the agenda for the Spring, 2003, agenda. Of 67 members of the Society, 19 responded, or a result of almost 28 percent. Here are the responses:

A Corporate Lawyer:	16 votes
A Domestic or Family Lawyer:	11 votes
A Criminal Court Judge:	19 votes (unanimous)
A Mock Law School Class:	14 votes
Alternative Careers in the Law:	15 votes
A Practice LSAT:	12 votes
Other suggestions:	Observe a trial, entertainment or sports lawyer, a mock trial, prosecutor or states attorney, the J.D. degree, a

government lawyer (FBI, CIA, DEA, AFT), panel of lawyers

Join the Prelaw Society distribution list so you will be informed when these events are scheduled.

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Write for the *Prelaw Society Journal*! Published once each semester, the journal is written and edited by Towson University undergraduates. If you have a legal or constitutional issue that you have strong feelings about, write a 1,000 to 1,200-word commentary, and we will consider it for publication. Please provide it to us on disk (WordPerfect or Microsoft Word). We particularly would like to see a debate on a particular subject. If you wish to take a position and know someone who takes the opposite point of view, please submit such essays to us. We also consider essays about legal internships and other experiences you may have had in a legal or judicial setting, including, but not limited to, law firms, states attorneys' offices, judges' chambers.

The Constitution

Words We Live By

JOIN the Prelaw Society. If you would to be informed of upcoming events, we can place your name on our e-mail distribution list. Send a request to jfruchtman@towson.edu.

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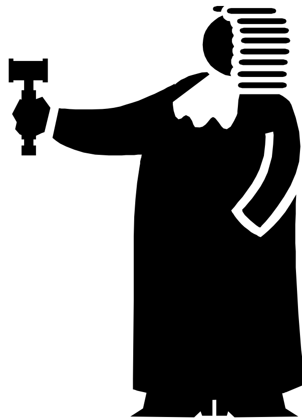

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