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WHERE HAVE WE BEEN? WHERE ARE WE GOING?

Anthony C. Sabbia*

During this 50th Anniversary of the DePaul Law Review, it is worthwhile to ask ourselves what we have learned from that fifty year history, and how those experiences help us to focus on what should be the role of the DePaul legal community in the next fifty years.

A vision of DePaul's future within the legal community, as well as its future in the larger societal community in general, should be examined in the background of the relationship that the legal community has with the larger societal community in general. In considering this relationship, we must remember that fifty years ago the rule of law most affecting the community was local. At that time, television was in its infancy and no highway system existed. Communities were localized and local law governed. In considering this relationship at this time, we see that in the past fifty years the legal community has had an increasingly profound effect on the community in general.

Not only have federal laws become increasingly applicable to situations where they have never before been applied, but local laws have also become enforced in a more vigorous manner. It is fair to say that almost everywhere you look these days the rule of law is present, from attending athletic events to going shopping, from reading the newspaper to channel surfing on television, we are made aware of how the law looks at just about every situation. Although the increased effect of local law could be expected, the expansion of federal law to local matters could not have been so expected.

Much of the local expansion in the federal law has been due to the expansion of Constitutional rights and duties as interpreted by the United States Supreme Court. In Mapp v. Ohio, the Court held that all evidence obtained by searches and seizures in violation of the federal constitution were inadmissible in state courts. In Escobedo v. Illinois, the Court held that an accused is entitled to have counsel present during an interrogation and that denial of the assistance of

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2. Id. at 655.
counsel prohibited the police from using any statement elicited against him at the ensuing criminal trial. In *Miranda v. Arizona*, the Court declared that, at trial, the prosecution may not use the fact that an accused stood mute or claimed his right to remain silent when under police custodial interrogation.

Previously, states were not prohibited from denying these individual rights. The amendments to the Constitution directly securing these rights were applicable to the federal government. The Fourteenth Amendment, however, applied to the states. State law affecting individuals must provide them due process of law, and states are prohibited from denying equal protection of the laws. The above cases applied these substantive rights to state action by holding that the denial of these rights amounts to a denial of due process.

In *Mapp*, *Miranda*, and *Escobedo*, the practice and procedures of police stops, arrests, and interrogations were radically changed. Previously, these were local matters controlled by state law. Reading an accused his rights has become an ingrained part of the United States culture. This fact only highlights the increasing effect that “the law” has had on our society. This expansion of the law under the due process clause was accompanied by an expansion of the law under the equal protection clause of the Fourteenth Amendment, as discussed below.

Civil laws have also increasingly imposed upon our lives. Federal anti-trust law has been applied to modern business and technology. With the boom of the computer age and the Internet, business communication has been revolutionized. A current case imposing a court order breakup of Microsoft exemplifies how the expansion of the law has intensified. In *United States v. Microsoft*, the United States District Court for the District of Columbia found that Microsoft improperly refused to license its personal computer operating systems without its Internet web browser. The Court further found that Microsoft had bundled the browser with the operating system and wrongfully prevented developers of rival web browsers to develop cross-platform software, while ensuring that the majority of existing software could run only on the software company’s operating system.

Due to its actions in the web browser market, and in order to prevent

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4. Id. at 490-91.
6. Id. at 468 n. 37.
8. Id. at 40-44.
further violations, the court concluded that Microsoft should be broken into two companies.9

Increased legal effect in criminal and business areas has now been met by increased legal effect in political matters. Most recently, one can point to the presidential decision by the United States Supreme Court as a great leap of expansion in the rule of law.10

The case involved the race for the highest executive positions, President of the United States and Vice President. The candidate's victory or defeat in the electoral college depended upon Governor George W. Bush's challenge of the Florida Supreme Court's order of a manual recount. A bare majority of the Court agreed with Governor Bush's argument that manual recounts of undervotes in select counties would deny George W. Bush equal protection of the law under the Fourteenth Amendment of the United States Constitution. The basis of the decision was that the recount lacked uniform standards to determine the voter intent.

What will be the effect of the Bush decision on the development of the law interpreting the equal protection clause of the Fourteenth Amendment? By examining the limitations considered in previous equal protection decisions, one can conclude that the expansion will be significant. The overbroad use of the equal protection clause has been discussed for many years. Justice Holmes categorized the concept of equal protection as "the last resort of constitutional arguments."11 Despite the concern of overbroad expansion of the due process and equal protection clauses of the Fourteenth Amendment, both have undergone widespread expansion.

The United States Supreme Court used the due process clause to scrutinize state laws, and later turned to the equal protection clause to support judicial intervention. With regard to the equal protection clause, the Court developed a two tiered test. When economic regulations were challenged, the test imposed was one of a "rational basis." The second tier was one of a "strict scrutiny test," which required that a classification be the only means of achieving a compelling state interest. This test applied when race or fundamental rights are at issue.

This approach was followed in McGowen v. Maryland,12 when Chief Justice Warren stated:

The Fourteenth Amendment permits the States a wide scope for discretion in enacting laws which affect some groups of citizens dif-

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The Constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.¹³

The election process has been the focus of equal protection analysis and it has been held that the right to vote should be subjected to “strict scrutiny” by the Court.¹⁴ Generally, equal protection arguments in election cases involved barriers to a citizen's ability to vote.

The Bush decision concerned the equal protection rights of the candidate. As Justice Stevens's dissent in Bush illustrates, the Florida Supreme Court's failure to specify in detail the precise manner in which the intent of the voter was to be determined did not rise to the level of a Constitutional violation.¹⁵ Even if it did, the appropriate remedy would have been a remand to allow for more specific procedures. Furthermore, as expressed by Justice Ginsburg in her dissent in Bush, the equal protection claim was not substantial, since the Florida Supreme Court's recount, flawed as it might be, would not yield a result any less fair than the certification that proceeded the recount.¹⁶

Although the Bush decision resulted in quick closure of the Presidential election issues, the expansive way in which the equal protection clause was used carries a potential of unleashing a wave of similar equal protection arguments. Will the court be able to put a lid on this new equal protection theory? One thing is certain: a great change in the development of the law has taken place. A review of the history of the development of the rule of law during the past fifty years leads to a foregone conclusion; the next fifty years will catapult the rule of law into our daily lives. And, now that we know that this is a given, we can more fully consider the role of the DePaul legal community in the next fifty years.

The DePaul legal community can help foster an appreciation of the entire legal system. It can do this by fostering the ideology of sound legal reasoning based on established rules of law. This includes basing legal decisions on precedent while remembering that the bedrock of the legal reasoning is to ensure that basic human rights, or what our forefathers called inalienable rights, do not become subservient to political causes.

¹³. Id. at 425-26.
¹⁵. 121 S.Ct. at 540-41 (Stevens, J., dissenting).
¹⁶. Id. at 550 (Ginsburg, J., dissenting).
In examining the expansion of the rule of law, one should recognize the benefit of slowing down its rate of progression. When courts exceed the powers vested in them, so as to take on political issues by an expansion of the limits of constitutional privileges, they open themselves up to the criticism of creating overly ambitious judicial activism. A prerequisite to a continuing society is somewhat stability in its laws. A society with ever changing laws seems unstable to its citizens who are not sure what the law is in any given time.

Adherence to a rule of law is not as esoteric as it may sound. Confidence in our rule of law is not only important to business and what sometimes are called solid citizens, but it is also important with regard to the more “fringe elements” of our society. Society is in a constant state of change. The conservative elements in our society seek to slow the pace of that change. The “rule of law” tends to solidify the power of the incumbent group, thus, the government plays a conservative role. In order to avoid the anchor placed on him by society, a rational individual may choose to work outside of the law if he decides that is the best way to attack prejudice. Requiring the oppressed to work within the law when the law has no legitimacy, creates a frustrating existence. Acquiescence to an illegitimate rule of law is demeaning, and violating that rule of law is a risky proposition.

A rule of law which applies general principles equitably in a changing society is one whose flexibility will be embraced by society. It is only then that our rule of law can achieve its potential, as embodied by the United States Constitution.

For the past fifty years, this rule of law has had a more and more overwhelming effect on society. The risk during the next fifty years is that left unchecked, without limiting the expansion of the rule of law beyond logical extension of reasonable limitations, we may alienate society. Instability leads to mistrust and then to general apathy. When this stage is reached, those that follow the law are not especially respected and violators of the law are not denounced.

The DePaul Law Review and the DePaul College of Law can and should act as a catalyst to dissect, analyze and (yes) criticize developments in the law so as to allow us to think issues through completely and to come to sound legal conclusions based on accepted legal principles. The application of the Equal Protection Clause should be consistent with existing jurisprudence.

As Justice Breyer forcibly argued in his dissent in *Bush*, the decision runs the risk of undermining the public’s confidence in the court it-
Justice Breyer concluded by quoting Justice Brandeis who once said of the court, "[t]he most important thing we do is not doing." Is the Supreme Court correct, or are its critics correct? Will the expansive use of the equal protection clause result in misapplication of the law, or will it, instead, open new areas of judicial application similar to those opened by the Warren Court? Only time will tell.

Let us try to imagine the future. The onset of the personal computer explosion and its widespread popularity will certainly be ripe for government and business to intrude on our personal lives by invasive use of our personal computer information. Can we rely upon the law to protect our privacy? In addition, satellites equipped to communicate with planted monitored devices, and powerful telescopes could "peek" into any area of the world. Will this conduct be sanctioned by the law? Here, we see that applying general principles equitably in a changing society is a truly significant undertaking.

We may think that an examination of how the DePaul legal community can affect the community at large is an esoteric study and that the development of the law will continue unheeded by our assistance. We may even think that the status quo is acceptable and even comfortable. However, we should never get complacent. Prejudice and harassment are not condoned by our laws. We think that this day and age would not allow a controlling group to crush an opposition group. We may believe that Hitler and his political party could not now commit genocide. However, it is currently reported by Amnesty International and others that in China, torture by authorities is quite common. Beijing seems unable to control local authorities' use of torture as a common occurrence. Although it is not suggested that these atrocities could take place in the United States, the challenges posed by worldwide issues make international law more and more real and exciting.

The collapse of communist Russia is another factor which has vaulted the United States to the forefront in global military and economic strength. As cultures assimilate and grow in complexity, rules of business and rules of law will gravitate to those of the United States system.

Young DePaul law graduates speak more and more of a career in international law. One can envision them, and others like them, forming the basis of a legal structure reaching world-wide. Advocating and practicing the implementation of sound legal principles in an equitable manner, in a changing society, is a lofty goal. The preparation pro-

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17. Id. at 557 (Breyer, J., dissenting).
18. Id. at 558.
vided by the DePaul College of Law, gives us confidence that the challenges presented in the next fifty years (local, national, or international) will be more than adequately met.