

ETHICS AND LAW INCLUDING ROE V. WADE

JOHN A. BIRMINGHAM, ESQ.

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### Objective

Ethics and the Law will focus on the law and the ethical issues that arise when laws provide a certain outcome that may not be fair, ethical or necessarily the "right thing." During this session, we will analyze and debate some key Constitutional and State Court Cases that deal with ethical issues outside of the law. Specifically, discussion will include the ethics that attorneys and paralegals face with the Attorney/Client Privilege, 4th Amendment's Search and Seizure, the Right to Privacy, 5th Amendment's Due Process, 8th Amendment's Cruel and Unusual Punishment, and 1st Amendment's Right to Free Speech.

Lastly, this seminar will focus on the ruling by the Supreme Court that overturned Roe v. Wade.

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### Ethics & Law

Ethics: moral code, morals, morality, values, rights and wrongs, principles, ideals, standards (of behavior), value system, virtues, and dictates of conscience.

Law: is a system of rules that are created and enforced through social or governmental institutions to regulate behavior.

Do we have laws that promote morals and values?

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### Obvious Laws that promote Morals and Values

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- Battery
- Burglary
- Robbery
- Kidnapping
- Rape
- Murder

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### Controversial Laws that promote Morals and Values

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- Medicinal marijuana
- Recreational marijuana
- Illegal Immigration
- Right to Die Laws
- Death Penalty

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### Supreme Court Cases that promote morals and values

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- Brown v. Board of Education
- Gideon v. Wainwright
- Obergefell v. Hodges
- Roe v. Wade

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## The Attorney/Client Privilege

is a "client's right or **privilege** to refuse to disclose and to prevent any other person from disclosing confidential communications between the **client** and the **attorney**."

The client owns the privilege not the attorney.

Does this mean a client can confess to murder and prevent the attorney from revealing it?



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### PD Faces Ethics Complaint for Telling of Dead Client's Confession

POSTED NOV 26, 2007 12:17 PM CST  
BY DEBRA CASSENS WEISS



The appellate defender for North Carolina is facing an ethics complaint for testifying that his dead client had confessed he alone committed a double murder for which another man is doing time.

Staples Hughes testified in a January hearing for the convicted man that his client confessed 20 years ago the he was solely responsible for the stayings of Roland and Lisa Matthews, the Charlotte News & Observer reports. Hughes came forward after the 2002 prison suicide of his client, Jerry Cashwell, a co-defendant in the case.

"It's not that I'm not apprehensive about the possible consequences, because I am." Hughes told the newspaper. "But when you think about that up against the fact that this guy is innocent and has been locked up, it puts a different light on that."

Hughes made the decision to testify after a 2003 decision by the North Carolina Supreme Court that held a judge could force a lawyer to testify about a dead client's confidential statements in an arsenic poisoning case. During Hughes' testimony on behalf of Lee Wayne Hunt, the judge warned that he would file a bar complaint against him for revealing client confidences.

The judge refused to reopen the case, and Hunt remains in prison. His appeal is pending before the state supreme court. Part of the evidence against Hunt was FBI bullet lead analysis, a now-discredited forensic tool abandoned by the bureau two years ago. The remaining evidence was testimony by Cashwell and another co-defendant, who received reduced sentences for their cooperation. A fourth co-defendant pleaded guilty to lesser charges and received a three-year sentence, the Fayetteville Observer reports.

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## The ethical dilemma behind the Attorney/Client privilege

Should the attorney/client privilege extend beyond the death of the client?

What is the benefit when the client can tell an attorney anything about the charges against him/her?

Can an attorney ever break the attorney/client privilege and not get in trouble?

Do paralegals have to follow the attorney/client privilege the way an attorney does?

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### 4<sup>th</sup> Amendment Search and Seizure

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

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### Questions

Are we giving up our "Reasonable Expectation of Privacy?"  
Is technology diminishing our privacy rights?  
What are the dangers of allowing government to be more intrusive concerning our lives and whereabouts?  
Should cameras be allowed in public places and throughout town to protect us?  
Or are cameras that are allowed in public places that watch our every move a sign of Big Brother?

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### *Weeks v. United States, 1914*

Police officers in Kansas City, Missouri went to the house of Mr. Fremont Weeks and used his hidden key to enter and search his home. While there, they took papers, letters, books, and other items. They did not have a search warrant. These items were used in court to find Mr. Weeks guilty of sending illegal tickets through the U.S. mail.

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### *Weeks v. United States, 1914*

The evidence collected during the illegal search was in violation of the 4<sup>th</sup> Amendment and was thus inadmissible at the trial. In a criminal investigation, in order for a search to be legal, there must be probable cause. The probable cause must be used to gain a search warrant. If not, the search will be illegal and evidence collected as a result of the search can't be used in court. The *Weeks* decision was the birth of a new legal doctrine – *The Exclusionary Rule*.

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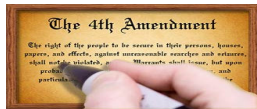
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### *The Exclusionary Rule*

is a legal **rule**, based on constitutional law, saying that evidence collected or analyzed in violation of the defendant's constitutional rights is sometimes inadmissible for a criminal prosecution in a court of law.



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### *Ethics and the 4<sup>th</sup> Amendment*

Police go to a home with a search warrant to search 1 Bird Lane for possible drug dealing within the home.

By mistake they enter 10 Bird Lane as the "0" fell off the "10" on the front door of 10 Bird Lane.

While going into 10 Bird Lane after knocking and announcing their presence, they discover an old man in the act of sexually assaulting a little girl.

However, the police did not have a warrant to enter 10 Bird Lane and any evidence they obtain in 10 Bird Lane is inadmissible.

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### Question

Does the Exclusionary Rule keep out evidence unfairly because the police made an honest mistake?

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### Exception to the Exclusionary Rule

When a search is conducted with a good faith belief that it is a legal search, the evidence discovered may be admitted. See *United States v. Leon*, 468 U.S. 897 (1984).

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### 5<sup>th</sup> Amendment Due Process

#### **Miranda v. Arizona (1966)**

It isn't enough that confessions obtained by law enforcement officials are not coerced; they also must be obtained from suspects who know their rights. Otherwise, unscrupulous prosecutors have too much power to railroad innocent suspects.

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### Miranda Warnings

Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clear-cut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to guarantee that the individual knows he is free to exercise the privilege at that point in time.

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### Confessions

Are Miranda Warnings fair in the sense of justice?  
What if someone voluntarily confesses but is not read the Miranda Warnings? Should this confession be thrown out?  
Do we have too many protections for the accused in our legal system?

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### 8<sup>th</sup> Amendment Cruel and Unusual Punishment

prohibits the federal government from imposing excessive bail, excessive fines, or cruel and unusual punishment.



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*Kennedy v. Louisiana (2008)*

Patrick O'Neal Kennedy from Harvey, Louisiana in Greater New Orleans, was sentenced to death after being convicted of raping and sodomizing his eight-year-old stepdaughter. The rape was uncommonly brutal. Invasive emergency surgery was required to repair the injuries."

Kennedy maintained that the battery was committed by two neighborhood boys and refused to plead guilty when a deal was offered to spare him from a death sentence. Nevertheless, he was convicted in 2003 and sentenced under a 1995 Louisiana law that allowed the death penalty for the rape of a child under the age of 12.

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*Kennedy v. Louisiana*

On appeal, it was challenged as to the constitutionality of executing a person solely for child rape; however, the Louisiana Supreme Court rejected the challenge on the grounds that the death penalty was not too harsh for such a heinous offense.

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*Kennedy v. Louisiana*

The Louisiana Supreme Court applied a balancing test set out by the U.S. Supreme Court in more recent death penalty cases, *Atkins v. Virginia* and *Roper v. Simmons*, first examining whether there is a national consensus on the punishment and then considering whether the court would find the punishment excessive. The Louisiana Supreme Court concluded that the adoption of similar laws in five other states, coupled with the unique vulnerability of children, satisfied *Atkins* and *Roper*.

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*Kennedy v. Louisiana*

In seeking certiorari to the U.S. Supreme Court, Jeffrey L. Fisher, a Stanford Law School professor appealing on behalf of Kennedy, argued that five states do not constitute a "national consensus" for the purposes of Eighth Amendment analysis, that *Coker v. Georgia* should apply to all rapes regardless of the age of the victim, and that the law was unfair in its application, singling out black child rapists for death at a significantly higher rate than whites. Certiorari to the defendant was granted on January 4, 2008.

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*Kennedy v. Louisiana*

The case pitted the Eighth Amendment definition of "cruel and unusual punishment" against states' rights as defined in the Tenth Amendment, with the issue being whether states may constitutionally impose the death penalty for any crime other than murder as a principle of a state's right to impose punishment as it saw fit, under the Tenth Amendment.

In particular, whether a death sentence is a disproportionate penalty, under the Eighth Amendment, for raping a child. No person has been executed in the United States for rape since 1964.

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1<sup>st</sup> Amendment

prohibits the making of any law respecting an establishment of religion, ensuring that there is no prohibition on the free exercise of religion, abridging the freedom of speech, infringing on the freedom of the press, interfering with the right to peaceably assemble, or prohibiting the petitioning for a governmental redress of grievances.

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### Westboro Baptist Church

Is a Baptist church which is known for its hate speech, especially against LGBT people (homophobia), Catholics (anti-Catholicism), Orthodox Christians (anti-Orthodoxy), Muslims (Islamophobia), Jews (anti-Judaism/religious antisemitism), American soldiers and politicians.

The church is widely known as a hate group and is monitored as such by the Anti-Defamation League and the Southern Poverty Law Center. The church has been involved in actions against gay people since at least 1991, when it sought a crackdown on homosexual activity at Gage Park six blocks northwest of the church.

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### Westboro Baptist Church

**Snyder v. Phelps**, 562 U.S. 443 (2011), was a United States Supreme Court case in which the Court held that speech on a public sidewalk, about a public issue, cannot be liable for a tort of emotional distress, even if the speech is found to be "outrageous".



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### Snyder v. Phelps

On March 3, 2006, U.S. Marine Lance Corporal Matthew A. Snyder was killed in a non-combat-related vehicle accident in Iraq. On March 10, Westboro Baptist Church (WBC) picketed Snyder's funeral in Westminster, Maryland, as it had done at thousands of other funerals throughout the U.S. in protest of what they considered America's increasing tolerance of homosexuality.

Pickers displayed placards such as "America is doomed", "You're going to hell", "God hates you", "Fag troops", "Semper fi fags" and "Thank God for dead soldiers."

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### Gay Marriage



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### Gay Marriage

The decision wasn't solely or even primarily the work of the lawyers and plaintiffs who brought the case. It was the product of the decades of activism that made the idea of gay marriage seem plausible, desirable, and right.

By now, it has become a political cliché to wonder at how quickly public opinion has changed on gay marriage in recent years—support for "marriages between homosexuals," measured at 60 percent this year, was just 27 percent when Gallup first asked the question in 1996.

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### Gay Marriage

The fight for gay marriage was, above all, a political campaign—a decades-long effort to win over the American public and, in turn, the court. It was a campaign with no fixed election day, focused on an electorate of nine people. But what it achieved was remarkable: not just a Supreme Court decision but a revolution in the way America sees its gay citizens.

I would say it is a case about morals, values, and ethics.

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## Gay Marriage

Many claimed the case was about law, equal protection and due process.

Many claimed it was about allowing two people who love each other, to marry.

This is how ethics and law intertwine.

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ROE V. WADE

How the Constitution gave women a right to choose, and what happened 49 years later.

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## What Supreme Court's decision that overturned Roe v. Wade means for abortion rights

When the news reported that the US Supreme Court was on the verge of overturning the landmark Roe v. Wade abortion ruling it raised many questions about the implications of such a momentous decision and exactly how we got to this point in legal history.

The draft document, which was leaked to Politico and revealed, said a majority of the Supreme Court was prepared to overrule the Roe case, which legalized abortion nationwide nearly 50 years ago.

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### Roe v. Wade

The historic Roe v. Wade decision from 1973 legalized the right to have an abortion until the point when a fetus can survive outside the womb — roughly 24 weeks.

Under the Supreme Court ruling, states have been able to regulate, but not ban, abortion before the point of viability.

**Substantive due process** is a principle in United States constitutional law that allows courts to establish and protect certain fundamental rights from government interference, even if procedural protections are present or the rights are unenumerated (not specifically mentioned) elsewhere in the U.S. Constitution.

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### What did the SCOTUS opinion say?

The opinion states there is no constitutional right to abortion and argues that “Roe was in error and wrong from the start.”

The ruling gives states the power to decide whether to ban or heavily regulate abortions going forward.

The opinion rejects both Roe v. Wade and the subsequent Planned Parenthood v. Casey decision in 1992, which reaffirmed the Roe ruling.

“We hold that Roe and Casey must be overruled,” the opinion says. “It is time to heed the Constitution and return the issue of abortion to the people’s elected representatives.”

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### Dobbs v. Jackson

The 6-3 decision in *Dobbs*, authored by Justice Samuel Alito, largely followed the draft opinion leaked to the public in early May.

The conservative block of justices held that the Constitution does not guarantee the right to an abortion, instead finding that while substantive due process under the Fourteenth Amendment may protect some unenumerated rights, it does not protect a woman’s right to choose whether to continue her pregnancy.

Justices Brett Kavanaugh, Amy Coney Barret, Clarence Thomas, and Neil Gorsuch joined Justice Alito’s majority opinion in full. Chief Justice John Roberts concurred in the judgment — that the “viability” standard set out in *Casey v. Planned Parenthood* was unworkable — but would have chosen a different approach, one that gave women a “reasonable opportunity to choose”.

Justice Thomas joined the majority opinion in full but wrote separately to note his support for ending all unenumerated rights under the Fourteenth Amendment, including the right to birth control, private sexual acts, and interracial marriage.

Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan dissented.

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## Dobbs v. Jackson

### What's to Come?

With the overturn of *Roe v. Wade*, over 40 million people are directly impacted in states where abortion is expected to be banned or criminalized. Existing "trigger" laws, passed in anticipation of the Court's overturning of *Roe*, will take effect immediately in states like Texas and South Dakota and ban abortion.

Further legislation in states without trigger bills are also expected. It is yet to be determined whether some or all of those states will completely ban abortion or choose instead to implement harsher restrictions. State laws already vary. Florida, for example, will implement a 15-week abortion ban in July. This will have no exceptions for rape or incest. An abortion could be permitted if the parent's life is in danger.

Similar anti-abortion legislation is expected from many other U.S. states. Sixteen states and the District of Columbia have protected abortion in state law.

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## Dobbs v. Jackson

There remains some uncertainty in the law even after the Court's decision in *Dobbs*. For example, it's still unclear if it will be difficult, or perhaps even impossible, for pregnant women to get an out-of-state abortion.

In Kavanaugh's concurring opinion, he expressed the view that states choosing to implement abortion bans or restrictions would not be able to prohibit pregnant women from traveling out of state to get an abortion "based on the constitutional right to travel."

However, as a concurring opinion, Justice Kavanaugh's view does not carry the force of law and the ultimate answer to that question may still need to be resolved in the courts.

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## What does it mean if *Roe v. Wade* is overturned?

Twenty-six states are certain or likely to restrict abortion, according to the Guttmacher Institute, a New York-based pro-choice think tank.

Of those, 22 states had total or near-total abortion restrictions that kicked in once *Roe v. Wade* was overturned: Alabama, Arizona, Arkansas, Georgia, Idaho, Iowa, Kentucky, Louisiana, Michigan, Mississippi, Missouri, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wisconsin and Wyoming.

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### What does it mean if Roe v. Wade is overturned?

Texas' law banning abortion after six weeks was already allowed to go into effect by the Supreme Court due to the state's unusual civil enforcement structure.

Meanwhile, 16 states — including New York — and the District of Columbia have protected access to abortion in state law.

New York Gov. Kathy Hochul said that people seeking abortions could head to the Empire State, tweeting: "For anyone who needs access to care, our state will welcome you with open arms. Abortion will always be safe & accessible in New York."

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### Some states are now introducing new laws, emboldened by the Supreme Court's decision

▪ "Fetal heartbeat law" in effect in South Carolina - The so-called Fetal Heartbeat Protection from Abortion Act prohibits abortion if cardiac activity can be detected, which is around six weeks of pregnancy. If a heartbeat is detected, an abortion can only be performed if the pregnancy is the result of rape or incest, or if the mother's life is in danger.

▪ Utah ban on nearly all abortions goes into effect - Utah's abortion ban went into effect on Friday, after the Supreme Court overturned Roe v. Wade.

The Utah Legislature allowed a 2020 law prohibiting all elective abortions in the state to go into effect. The law makes exceptions for circumstances involving rape, incest or medical emergencies.

▪ Planned Parenthood files lawsuit to block Utah abortion ban - Planned Parenthood of Utah announced that it filed a lawsuit in Utah State Court to block the state's ban on abortions at any stage in pregnancy. Planned Parenthood said it would soon seek a temporary restraining order on the ban.

▪ Minnesota governor signs executive order to protect abortion - Minnesota Governor Tim Walz signed an executive order Saturday to protect people seeking or providing abortions in the state from legal repercussions in other states, he said in a Tweet.

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### Roe v. Wade

Conservative jurists have long derided Substantive Due Process. Former Justice Antonin Scalia — a famous Roe dissenter who unsuccessfully fought his entire career to overturn the decision — told CNN in 2012 the Substantive Due Process "does not make any sense."

"It's a constitutional stew. It's completely made-up judicial activism," said Mike Davis, a former Chief Counsel for Nominations Sen. Chuck Grassley. "Roe V. Wade was an egregiously wrong power grab, regardless of what you think about abortion."

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### Roe v. Wade

Former Justice Ruth Bader Ginsburg, a ferocious champion of abortion rights, has also said the decision was flawed.

In many public remarks, Ginsburg argued an incremental approach to abortion rights would have been preferable and that the sweeping ruling in Roe ultimately ended up fueling divisions around the issue.

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### Could the Roe v. Wade decision be made federal law?

President Biden and Democrats in Congress renewed calls to make Roe v. Wade into federal law following the leak.

To codify the ruling, Congress could pass the Women's Health Protection Act — which narrowly passed in the House last fall — however it failed to garner enough support to move it to a Senate vote last February, only garnering 46 votes in favor.

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### Can Congress override the Supreme Court with a 2/3 vote?

Congress can override the Supreme Court by passing new legislation. If a Supreme Court decision is made on constitutional grounds, Congress can amend the Constitution to influence the Supreme Court's decision or strike it down.

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### How can Congress get around a Court ruling?

Congress is able to get around a court ruling in various ways. Congress can amend the Constitution, and this will affect a court ruling.

Another way involves making new laws around a court ruling and this can influence Federal law.

Congress is also able to decrease or increase the number of Justices. They can select those who might share the same sentiments of laws with Congress or remove those who oppose.

Congress has the power to approve and impeach Justices for incompetence or misconduct. This directly influences a court ruling.

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### Thank you!

Phone: 602-703-3717  
Email: johnabermingham@aol.com  
LinkedIn & Facebook



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