



## JUSTICE ANTONIN SCALIA VISITS SCU LAW

By Lindsey Kearney  
Associate Editor

Justice Antonin Scalia, oft regarded as the ringleader of the Conservative wing of the United States Supreme Court, spoke to a full house at Santa Clara University on October 28th. Scalia's ties to SCU are lesser-known but deeply rooted: he and his wife, Maureen, were married in the Mission Santa Clara chapel on campus, and one of his sons graduated from SCU in the late 1980s.

Santa Clara is an important backdrop judicially, as well. Scalia joined the Court's ruling in *Citizens United*, which held that the First Amendment protects political speech by corporations (and unions). That landmark ruling has its precedential roots in the 1886 case *Santa Clara County v. Southern Pacific Railroad Co.*, which established "corporate personhood."

The outspoken Justice had a bold message for attendees in SCU's packed Recital Hall: "The liberal Supreme Court is heralding the destruction of our democratic system." Scalia went on to tell the crowd that the Supreme Court has been liberal



Dean Bradley Joondeph converses with Justice Scalia during his visit. Photo: Joanne H. Lee

ever since Ronald Reagan appointed the 79-year-old judge to the bench almost 30 years ago.

Scalia's interpretation of the Constitution can be characterized as originalist, meaning he interprets the document in terms of what the drafters' viewpoints and intentions were at the time of its inception, rather than those of today. Contrasting to the originalist interpretation is the living Constitution interpretation, embraced by the more "liberal" justices on the Court, which would allow

the document to flow and adapt to changing conditions and evolving norms.

According to its critics, like Scalia, the living Constitution approach effectually degrades the original meaning and intention of the document's text, by treating precedent too casually and allowing appointed judges to override the discretion given to democratically elected representatives to make policy judgments. "God, I hate that phrase," Scalia said. "I prefer 'enduring the Constitution.'"

Scalia identified the Court's application of the living Constitution approach in recent cases as "the first step down a slippery slope," which he "couldn't imagine could

go any further" than legalizing (or, in Scalia's view, creating) "the right to same-sex marriage" in the recent *Obergefell v. Hodges*. In his dissent, the conservative Justice articulated: "To allow the policy question of same-sex marriage to be considered and resolved by a select, patrician, highly unrepresentative panel of nine is to violate a

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## CONGRESSWOMAN ZOE LOFGREN TALKS PRIVACY AND IMMIGRATION

By Stephanie Britt  
Staff Writer

On Monday October 19th, Santa Clara Law was privileged to receive a visit from the notable Congresswoman Zoe Lofgren (D-San Jose). Her work in privacy and immigration legislation provides insight on how our studies regarding legal theories can be effected through public policy.

She opened up her talk stating that "privacy in the digital age [has resulted in a] situation where the laws that have regulated digital privacy are either misconstrued, poorly understood, or in some cases written so far in advance of the Internet as we know it today, that privacy of the individuals...in [her] judgment... is not adequately protected." Congresswoman Lofgren did not hesitate to delve into the issue of metadata and how the NSA collects it.

Congresswoman Lofgren referenced Stewart Baker, the former General Counsel of the NSA, who said that you could learn more about individuals from their metadata than from the content of the data. This is because metadata allows the NSA to see where each individual person has called and what websites they visit, and such information can provide real insight into what that person is up to. She explained that

Section 215 of the PATRIOT Act was a mistake because it didn't fully account for the privacy intrusion of an individual. At this point, the NSA

metadata without a warrant.

The Congresswoman was among the proponents of a necessary amendment that obtained a 2/3 majority with the collaboration of Republicans and Democrats once the administration realized that the metadata program had to go. Her efforts resulted in an amendment that successfully reigned-in Section 215 of the PATRIOT Act. However, the amendment did not manage to limit FISA Section 702 that permits the collection of content data outside of the United States if the government believes it is not that of a U.S. citizen.

Among her achievements, Representative Lofgren managed to reason with her colleagues in opposing the Secure Data Act. For the time being, this alleviated some government pressure against tech companies to put a "backdoor" that would weaken encryption. In fact, Congresswoman Lofgren stated that,

in some cases, the only guarantee to freedom individuals have is encryption, and such a right should not be taken away. If a "backdoor" were placed on encryption, then it would be only a matter of time before that freedom is taken away.

Among the questions by the audience, a few were particularly compelling. One student asked Congresswoman Lofgren how Congress can ensure that data security breaches don't happen



Congresswoman Zoe Lofgren (D-San Jose) address SCU Law students during lunch.

started to sound a whole lot like popular TV show, "Scandal's" very own B613. In this context, Congresswoman Zoe Lofgren acts like a realistic version of Olivia Pope through her efforts in Congress to advocate for the privacy interests of individuals. She explained that during the last congressional session she and her colleagues worked to reign in Section 215, so government bodies can no longer collect certain aspects of the



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## ZOE LOFGREN TALKS WITH STUDENTS

and how the government manages to recruit young minds to protect against them. The Congresswoman admitted that a lot of the tech jobs available are not as fun, not paid as well, and could be seen by some to be burdensome. However, government bodies such as the NSA still manage to recruit excellent people. The only issue is that the NSA needs to be more orientated toward protecting people in the future than it is today.

Another student asked how Congress could legislate when it moves at a much slower pace than technology advances. To this, the Congresswoman gave a wise-old answer as to the nature of law making, “if we move too quickly, you end up making mistakes.” It appears that the slow adaptation to technology is a blessing in disguise that allows lawmakers to understand the broad concept of privacy without narrowing down on specific forms of technology.

Finally, the Congresswoman spent some time communicating her frustrations with the immigration policy in the country. Personally, I find that the developments of 9/11 were some of the most tantamount moments to the legal community, and I think that the way that immigration and technology interact is too often overlooked. After the 9/11 attacks, the United States reacted with some of the most draconian policies against immigrants since the 1882 Chinese Exclusion Act. In its effort to keep terrorists out of the country, the U.S. has made it more difficult for all migrants to enter the U.S. While the Congresswoman did not speak in too much detail regarding the immigration issues due to her open frustration with the stalemate over

the matter, the fact is that the xenophobic ideologies in the country play a large role in the inability to legislate.

I find it interesting that the United States chose to take up a “risk management approach” toward border security to reduce the risk of another terrorist attack because it shows that there is an overarching policy to both privacy and immigration policy. In fact, The PATRIOT Act, mandated that the new student visa plan after 9/11 should have a biometric component to accurately identify visitors. This also poses a risk to personal privacy because the data obtained during biometric enrollment may be used in ways that the individual may not have consented to such as any physical or mental conditions. For more info on this topic see Edward Alden’s *The Closing of the American Border: Terrorism, Immigration, and Security Since 9/11*.

If there is anything to take away from Congresswoman Zoe Lofgren’s visit, it is the fact that the PATRIOT Act, the ECPA and other outdated pieces of legislation pose serious dangers to personal privacy in the digital age. Whether through the Internet, encryption, or biometrics, there is much work to be done on Capitol Hill to define our online civil liberties as our lives become more intertwined with technology. I hope that more Representatives follow Congresswoman Lofgren’s progressive example and take a stand to protect privacy.

## RUMOR MILL

By Susan Erwin

Senior Assistant Dean

With exams around the corner, I will focus this column on your exam questions.

**1. Some friends and I were doing some work in the library last week and heard a bunch of 1Ls on a different floor talking about their LARAW take home. It sounded like they were working on the test together! What are you doing about it?**

We heard from a few upper division students about this rogue group of 1Ls. Unfortunately, we didn’t get any information that identified them. The LARAW professors have been told. Beyond just general disappointment that some of our people would do such a thing, there isn’t much more we can do without more information. A few thoughts on this:

- Did you see the email from Dean Joondeph about the Academic Integrity Policy violations? We had an epidemic this semester! It is really important to protect your reputation and to OWN it! Do you really want to show up to an interview in 10 years and have the attorney remember you as “that first year that was cheating in the library”?
- Frequently when our people get in trouble for issues like this it is just carelessness – you forgot to list a source, you forgot to put in quotes, you didn’t think it was a problem to sit together during your take home, you didn’t think that talking about how hard the questions were would lead to conversations that would be actual cheating. Even if you “accidentally” cheat, you cheat. So be careful and stop it.
- You all took an Oath of Professionalism at orientation-- raised your right hand and everything. You gave us your word. We will continue to believe you because we are your people and you promised.

**2. I think I need a calculator for my tax exam. Are we allowed to bring our own to the exam?**

Nope, you can’t bring in anything that is programmable or that has internet capability. In this age of Apple Watches and Google Glasses, we need to set the rules broadly in order to catch everything. You may not use headphones, fancy calculators, complicated watches, walkie-talkies, ham radios, or web-browsing pants. To be safe, we are just going with “No Electronics!” We don’t have the time (or, in some cases, the expertise) to determine if your particular device meets the criteria or not. We aren’t going to discuss it with you right before an exam. It will all need to be stored in your backpack in the front of the room. And – btw – there is a calculator in Softest if the prof wants you to use one.

**3. Everyone around me seems to be sneezing and coughing lately. What happens if you get sick right before your final?**

It’s never a good idea to try to power through an exam. You might feel better in January, but your grade won’t. If you are sick, don’t go into the exam room. Instead, go to Cowell or go to your doctor and get an excuse note. It needs to say that you were seen that day and that you were sick. Then go home. Then send me an email explaining that you went home. Then get better. Then let me know when you are ready to take the test and we will reschedule it. Once you open an exam packet and see the exam, we cannot reschedule the exam. I can’t tell you how many times a student has come to see me about a bad grade and said, “if someone would have just warned me not to take the test when I was sick . . .” Consider yourself warned. You now need to OWN that decision.

**4. I am so stressed out! If I am this anxious already, how am I going to be at exam time?? I can’t imagine that I will do well on my finals! What should I do?**

- Make an appointment at Law Student Services to

talk with Jill Klees or me – (408) 554 – 4766.

- Make an appointment at CAPS - (408) 554 – 4172. They know all about stress and law exams!
- Make an appointment to talk to Professor Kinyon or Capatos at Academic Success. They are amazing at helping students through exams.
- Talk to your professors! It’s human nature to imagine the worst – go get some facts!
- Talk to your ASP Fellow! They’ve been through this a few times!
- Get some sleep. Get some exercise.
- Don’t boost your energy with caffeine (or other stimulants), don’t calm down with alcohol (or other depressants).
- Tell your people that you are too stressed out to get help and then let them help you.

**5. Why does my LARAW professor care about whether or not I downloaded my Torts exam?**

He doesn’t. Well, he might but that’s not the point. There are 2 Michael Flynns at the law school. One is the beloved LARAW professor and Moot Court Advisor. The other is the lesser known but equally important System Manager for the law school who works in Law Student Services. System Manager Michael will send you emails about downloading Softest, about downloading your exam template, about uploading your exams and any other tricky Softest related thing. Please read his emails, they contain stuff you need to know about finals. Read the other Flynn’s emails too.

We will be here with you through exams. We will have candy. We will have tissues. We are your people and we care about how you are doing.

Good luck!

**Heard any rumors lately? If so, send me an email – [serwin@scu.edu](mailto:serwin@scu.edu)**



# DATA TRANSFERS AFTER SAFE HARBOR INVALIDATION

By Lisa Nordbakk  
Staff Writer

“You’ve changed the world for the better.” Edward Snowden tweeted @MaxSchrems. The 28-year old Law Student from Vienna left an eternal imprint on the data privacy scene by starting a legal campaign, which on October 6, 2015 led to the annulment of the Safe Harbor adequacy decision of the EU Commission by the Court of Justice of the European Union (CJEU). In its annulment decision, the Commission had recognized the Safe Harbor Privacy Principles issued by the Department of Commerce of the U.S. as providing inadequate protection for the purposes of personal data transfers from the EU to the U.S.

European data protection laws are the most stringent in the world. Rigorous requirements for companies that collect, process, or transfer EU residents’ personal data outside the EU / EEA demand an “adequate level of protection.” Up until now, the most popular and convenient method for U.S. companies to establish such “adequate level of protection” was the Safe Harbor system of self-certification. All that had been previously required of U.S. companies was to annually self-certify with the U.S. Department of Commerce; thereby, agreeing to comply with several privacy principles. To demonstrate adherence, companies simply had to create self-regulatory programs, or join an existing one. Once certified, the company could freely transfer personal data from the EU into the U.S.

After the recent annulment of the Safe Harbor adequacy decision, companies will have to find other ways to transfer data without violating EU data protection laws. Consequently, the importance of understanding the meaning of an “adequate level of protection” has grown immensely. U.S. Firms that want to prevent attracting the attention of EU data protection authorities’ watchful eyes have to make sure they abide by the EU’s strict data protection principles.

Sebastian Dienst, an attorney from the renowned German law firm Noerr LLP, has tried to mitigate the ambiguity of the term “adequate level of protection.”

## What does “adequate level of data protection” actually mean?

The term “adequate level of protection” is derived from Art. 25 of the EU data protection directive (Directive 95/46/EC). Pursuant to this provision, the transfer of personal data to a country outside the EU /EEA may only take place if the relevant country in question ensures an adequate level of protection. The adequacy of the level of protection has to be assessed in the light of all the circumstances surrounding a data transfer operation or set of data transfer operations; particular consideration shall be given to the nature of the data, the purpose and duration of the proposed processing operation or operations, the country of origin and country

of final destination, the rules of law, both general and sectoral, in force in the relevant country in question and the professional rules and security measures which are complied with in that country.

According to the EU data protection directive, the EU Commission may find, that a country outside the EU / EEA ensures an adequate level of protection by reason of its domestic law or of the international commitments it has entered into, particularly upon conclusion of negotiations, for the protection of the private lives and basic freedoms and rights of individuals.

## What are the alternatives for U.S.-companies mining data in Germany?

At present there are a couple of different ways to satisfy the ‘adequate level of protection’ for personal data being transferred outside the EU / EEA. The EU has defined and approved different sets of “Standard Contractual Clauses” that can be used by data exporters and importers. Since, unlike Safe Harbor, such contractual clauses are not self-certifiable; they are unchangeable and can only be adopted as the EU has approved them. They are in a sense stricter. Still, some EU data protection authorities have critiqued the fact that these clauses have outlived Safe Harbor as they also have been deemed to provide inadequate protection. There is speculation that the only reason why they have survived the abolishment of the Safe Harbor decision is due to the fact that the CJEU was not requested to evaluate them.

Another safeguard for the use of personal data are “Binding Corporate Rules.” These regulations, authorized by data protection authorities, provide adequate protection for group intern data transfers. They are especially useful for multinational companies for intra-company use; however, they are not appropriate for external data transfers.

Furthermore, the transfer and use of personal data can also be made lawful by consent of the customer. Yet, even this method has been critiqued by some EU data protection authorities when U.S. companies try to make use of it on the grounds that certain U.S. legislation intervenes in the basic privacy rights of EU-citizens in such an extreme way that even if you wanted to, you could not consent to it. As you can see none of these alternatives are optimal; further, they take time to implement.

## How long do U.S. companies have to adjust to this change?

Regarding compliance, the decision of CJEU provides no specific deadline. However, the “Article 29 Working Party,” which consists of members of the data protection authorities of each of the EU member states, have unanimously attached a deadline of January 2016, after which measures against violating entities will be taken.

This is quite a short term, considering the massive

amount of restructuring U.S.-companies will have to perform to adhere to the EU’s strict data regulations. Imagine the time and effort it will take a multinational company with 50,000,000 customer contracts to incorporate exactly 50,000,000 standard clauses.

## What are the consequences of failure to provide adequate protection?

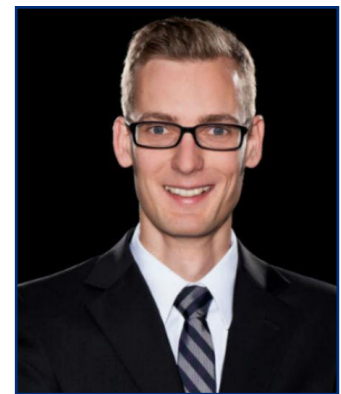
The statutory penalties for violation of the adequate protection requirement differ between the EU member states. Under German data protection law, for example, statutory penalties can be found in Section 43 of the German Federal Data Protection Act (FDPA). It provides a maximum monetary fine of 300,000 Euros for violators of the adequate protection requirement. However, a bigger fine may also be issued in certain cases. Section 44 FDPA also provides prison sentence for certain cases of intentional violations.

## What is your outlook on the future of Safe Harbor?

According to a recent statement of the EU Commission, Safe Harbor 2.0 is already in the works. And, the probability of a new agreement being concluded in the near future is considered to be high given the fact that transfers of personal data are an essential element of the transatlantic relationship between the EU and the U.S. Both regions are each other’s most important trading partner, with data transfers, increasingly, forming an integral part of their commercial exchanges. Once January comes around and EU data protection authorities start to take measures against those companies that fail to provide adequate level of protection, the political pressure to pull through with a more .... well “adequate” Safe Harbor Agreement will be intensified.

## About Sebastian Dienst

Sebastian is an Associate at Noerr LLP, as well as a Member of the Practice group “IT, Outsourcing and Data Security.” His core competencies include data protection law, E-commerce, IT-Security law, and IT-Contract law.



# ERWIN CHEMERINSKY LECTURES AT SCU LAW

By Nikki Webster  
Managing Editor

On November 10th, Erwin Chemerinsky visited Santa Clara Law to offer some of his insight. Our own Dean Kloppenberg introduced her former constitutional law professor, who is Dean of the U.C. Irvine School of Law and a renowned expert on constitutional law, federal practice, civil rights and liberties, and appellate litigation.

Without notes or presentation aids, Chemerinsky commenced his lecture by remarking on the significant decline in quantity of cases SCOTUS has decided each term. Last year, the Court decided 66 cases after briefing and oral argument. Not too long ago, the bench was handling 200 cases a year, then averaging 160 cases. Dean Chemerinsky noted that this is a dramatic change.

Chemerinsky also discussed Justice Anthony Kennedy’s voting pattern. Last term, Justice Kennedy voted with the conservatives 75% of the time. On this note, Chemerinsky cautioned against the conclusion that the Roberts court is becoming more liberal. Instead, he said, the outcomes turn more on the docketed cases. To support this, Chemerinsky revealed that 66% of all cases were decided unanimously in 2013. Last term, October of 2014, only 24% of cases were decided unanimously.

The dean then turned his talk to two very important cases decided last term, one on marriage equality,

and the other statutory. For marriage equality, Justice Kennedy wrote the opinion for *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015), holding that the Fourteenth Amendment requires a state to license a same-sex couple’s marriage, and to recognize such marriages where lawfully licensed and performed out of state. Chemerinsky highlighted Justice Kennedy’s focus on the right to marry, further stating, “Almost as an afterthought, [Justice Kennedy] said that laws that prohibit same-sex marriage deny equal protection to gays and lesbians.” Also noteworthy is that the Court did not identify the level of scrutiny in this decision, just as it did not for the prior two decisions expanding rights for gays and lesbians - *Lawrence v. Texas*, 539 U.S. 558 (2003); *United States v. Windsor*, 133 S. Ct. 2675 (2013). Regarding future issues on this topic, Chemerinsky doubts that there will be many cases with regard to religious participation in same-sex marriages. However, he predicts that the lack of an established scrutiny level will cause problems with regard to whether peremptory challenges can be used on sexual orientation.

On statutory interpretation, Chief Justice Roberts wrote the opinion for *King v. Burwell*, 135 S. Ct. 2480 (2015), holding that the tax credits provided under The Patient Protection and Affordable Care Act Section 36B are available to individuals who purchase health insurance from the federal government’s health insurance exchange. Congress had found that 50 million Americans lacked health insurance or

meaningful health care coverage. For those just above the 33% income level, there were tax credits if they purchased insurance from a state established healthcare exchange. The federal government establishes an exchange wherever a state has not created one (34 states have not). SCOTUS said that all who qualify economically get tax credits whether they purchase from a state or a federal exchange. To Chief Justice Roberts, Congress’s purpose was clear: all who qualify economically get tax credits. Congress did not want to give those states that did not want to establish an exchange to have the power to collapse all of the other exchanges, which were considered interdependent.

Chemerinsky then briefly remarked on the importance of rhetoric in the Supreme Court. He noted that the rhetoric of last term – particularly Justice Scalia’s – was unlike that of any other term. Chemerinsky believes that using terms like “pompous and egotistical” is not an appropriate way to remark on another justice’s opinion, and that this sets a bad example for our profession.

Dean Chemerinsky concluded his lecture by discussing several cases set for the next SCOTUS term, which is ¾ set. With affirmative action, non-union member collective bargaining activities, voter districting, and contraceptive insurance coverage on the docket, next term holds yet another set of important societal issues.



# OFFICE HOURS UNWOUND



**Tyler Ochoa**  
Professor of Law

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-J.D., with distinction, Order  
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University

**1. When was the last time you left the country? Where did you go and why?**

We took the entire family on vacation to Colombia (Bogota and Cartagena) in July. Our son-in-law is from Colombia, but he had not been back in two decades. His family helped arrange much of our sightseeing. The contrast was remarkable: Bogota is in the mountains and the weather was quite cool, while Cartagena is on the Caribbean coast, sunny, hot and humid.

**2. What was the most valuable course you took in law school and why?**

Civil Procedure was probably the most valuable, because a lot of what you are doing as a young litigator is using the Federal Rules. My favorite courses were Intellectual Property and Copyright, which led to my career as a professor in those areas!

**3. Who is your favorite character from literature and/or film?**

I enjoy Sherlock Holmes a lot, because he is observant and intelligent, even though few people would be able to put up with him if he was real. Also, he's in the public domain, so we get lots of different variations, from traditional (Basil Rathbone, Jeremy Brett) to contemporary (Benedict Cumberbatch).

**4. What is your top source (news / journal / legal blog / other) for keeping current with the law?**

I get daily updates from BNA's Patent, Trademark and Copyright Journal. Also, Professor Goldman's Technology and Marketing Law Blog.

**5. What was your favorite job you had while in law school?**

I was a research assistant for Professor John Kaplan, a genuinely warm and funny man.

**6. What is favorite Thanksgiving dish and why?**

Pumpkin pie, when I can get it made without milk. (I have quite a sweet tooth, but I also have an allergy to milk protein, which makes it hard to find good desserts.)

**7. What is your favorite show on Netflix, HBOGO, etc.?**

Game of Thrones, and Real Time with Bill Maher.

**8. What is your favorite sports team? If no team, then do you admire a particular athlete and why?**

Stanford is having a great season in college football. They're doing much better than my favorite pro football teams, the 49ers and the Chargers. In baseball, my wife bleeds Dodger blue, so I root for the Dodgers if I know what's good for me!

**9. What do you consider to be the most important development in your field over the last 5 years?**

The Supreme Court's active interest in intellectual property: 28 cases in the last five years.

**10. How do you unwind?**

Movies, TV, theater, and going to the Symphony!

**1. When was the last time you left the country? Where did you go and why?**

In 2012, we spent the summer traveling to Peru, Ireland, and Scotland. First, I went with my family to Machu Picchu. All three of my sons have studied Spanish since they were young and wanted the chance to speak Spanish. And one of my sons was interested in being an archeologist. We had wonderful time learning about the history of Peru and the Incas. Despite having travelled to a different continent, we ran in to two other families that we knew while in Peru! We returned to California for 4 days and headed off to Ireland and Scotland, taking additional family with us. We met the half of my family that did not emigrate to the United States. It was a blast to see people who looked just like my father and uncles (and me) who lived half a world away! We spent time doing genealogy research back in to the 1600s. And the Giant's Causeway is another "must see" World Heritage Site.

**2. What was the most valuable course you took in law school and why?**

I took a small writing seminar with Gerald Gunther, a constitutional law scholar. His mentor was Judge Learned Hand, and Prof. Gunther had Judge Hand's original draft notes/ thoughts regarding opinions. I was able to do original research regarding Judge Learned Hand's opinions regarding patent law and antitrust. If I could choose a second course, I would also have to say ethics. Almost every day, ethics issues arise in practice and knowing how to analyze those issues is crucial.

**3. Who is your favorite character from literature and/or film?**

Ripley from Aliens! The movie came out in 1986. Up until that point in my life, whenever there was a "rescue" scene in a movie or TV show, the men fought and the women followed or stood by shrieking. I was always thinking – pick up the lamp and hit him with it! With Aliens, gender roles were really challenged. Ellen Ripley (played by Sigourney Weaver) was not someone to be "rescued." She was not there to "look pretty." She was competent, determined to survive, determined to save others, and kicked ass. Really – a simple mantra is "What would Ripley do?" I have an original action figure on my desk.

**4. What is your top source (news / journal / legal blog / other) for keeping current with the law?**

I subscribe to many sources. Much of my work now is presenting seminars to attorneys but also to executive teams and even entire companies. So, I am always looking for "content." Because I am a patent litigator, I would probably

say that the daily feed from Docket Navigator is where I start. I also appreciate posts at Law360 as a way to get updates on current cases across many disciplines. I subscribe to several ethics blogs as well as professional development blogs which provide information on current issues and cases for classes and seminars.

**5. What was your favorite job you had while in law school?**

I worked part time during the school year at Brown and Bain, which was a litigation firm doing IP work. Truly, I enjoyed clients with actual problems to more substantive law or theory classes in that third year.

**6. What is favorite Thanksgiving dish and why?**

Leftovers! Truly, my Mom makes this great casserole after Thanksgiving with the turkey leftovers that is my favorite! But, if I had to choose something from the traditional Thanksgiving menu, it would have to be my mom's stuffing. You only get it one or two times a year so there is a lot of anticipation. And, she makes it with love.

**7. What is your favorite show on Netflix, HBOGO, etc.?**

This is tough as I must admit I enjoy TV shows running in the background when I am doing things. I enjoy The Closer and Elementary.

**8. What is your favorite sports team? If no team, then do you admire a particular athlete and why?**

The team my son is playing on! If you make me choose a professional team, I must say the Warriors and the Giants. I enjoy teams that play with heart all the time, win or lose.

**9. What do you consider to be the most important development in your field over the last 5 years?**

The Supreme Court has decided many more IP cases in the past few years. The resulting changes have had great impact on cases, especially in the area of software patents. There are also more strategies for pursuing patent issues in both the district courts and in the U.S. Patent and Trademark Office. The increasing globalization of business also means that many IP disputes require global litigation and business strategies.

**10. How do you unwind?**

Nothing beats dinner with friends. I also love reading a good mystery or thriller.



**Michelle Galloway**  
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Lecturer, Stanford Law  
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**Areas of Specialization:**  
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patent litigation & strategic  
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compliance, & ethics advising

**Education:**  
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-B.A., Stanford University



# JUSTICE SCALIA ADDRESSES SCU COMMUNITY

principle even more fundamental than no taxation without representation: no social transformation without representation.”

Of the majority decision in *Obergefell*, Scalia lamented, “The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.”

According to Scalia, the Court has used the living Constitution approach to give citizens rights that the Constitution does not guarantee or provide (for example gay marriage and federal health insurance subsidies). In his view, the court has too long been comprised of a majority of justices who disregard the Constitution’s text and original meaning if it happens to conflict with their views. “People don’t say anymore, ‘That’s unconstitutional,’” he said. “Instead, anything you hate should be prohibited and anything you love should be supported by the Constitution. I don’t know where this idea came from.” Rather than conforming a case to the Constitution, Scalia asserted that a majority of the justices instead conform the Constitution to the case, voting “on the basis of what they feel . . . My colleagues on the high court are creating rights ex nihilo [out of nothing].”

“Do you think the American people would ever have ratified the Constitution [if they knew

that] the meaning of this document shall be whatever a majority of the Supreme Court says it is?” Scalia asked rhetorically. To this point, he



Justice Scalia speaks to a sold out crowd in SCU’s Recital Hall. Photo: Joanne H. Lee

pointed out the lack of diversity on the Supreme Court and how unfair it would be to allow such an unrepresentative group of individuals to change the Constitution. Of the nine justices, four are from New York, two from California, one is from the South and one is from the Midwest. There are six practicing Catholics and three who practice Judaism. All of the current Justices attended either Harvard or Yale law schools. “Are you crazy to allow this [highly unrepresentative] group to speak for the whole country what ought to be in the Constitution?” he asked the audience.

At Santa Clara, Justice Scalia also shared his views on capital punishment, suggesting that even a botched lethal injection is less painful than death by hanging, which the

Founders did not consider to be cruel and unusual punishment when drafting the 8th Amendment.

Scalia also said that he would consider supporting television coverage of SCOTUS proceedings if he “thought the American people, or even a substantial number of them, would watch our proceedings gavel to gavel.” But most people, Scalia said, seek brief, oversimplified “takeouts” on the nightly news, exacerbated by the fact that news corporations “don’t want to educate the American people, they want to make money.”

When asked to share his favorite opinion, Scalia surprised some by responding that it was Justice Robert Jackson’s dissent in *Korematsu v. United States*. He told the Santa Clara audience that he admired Jackson’s opinion because of his writing style, and because Jackson had become a lawyer, and later a justice, without ever attending law school. Speaking to the wartime internment of Japanese-Americans, Scalia said, “It was nice to know that at least somebody on the court realized that that was wrong.”

## NEW DESIGNS OF CHARNEY HALL RELEASED

By **Kerry Duncan**  
Staff Writer

Santa Clara’s law school has moved about campus as it has expanded and grown. Once occupying St. Joseph’s Hall, the law school later moved to Bergin Hall in 1939. After being partly enclosed in Bannan Hall in 1973, it was given sole use of the building in 2008. It has now come time for the law school to move yet again. The 105 year old law school is moving to the former location of the parking lot for Lucas Hall and the designs for the new building have been released.

The new building will be four stories with a modern style with lots of glass to ensure that views of Abby Sobrato Mall will not be blocked. The stacked building will have tan stucco and terracotta tiles to match the mission style architecture of the university, while also continuing to add elements of modernity with shade terraces. The building will use LEED standards to follow the university’s commitment to environmental sensitivity and sustainability.

Santa Clara University hosted its first architectural design competition for the new

building, after the 10 million dollar donation by Howard Charney and his wife, Alida Schoolmaster Charney. Four bay area architectural firms worked for 30 days to create and present designs for the building. The competition required that designs



would fit the mission style architecture of the university, have open space for student and faculty use, and not block the view of Sobrato Mall and the Mission Church. The winning design was from Solomon Cordwell Buenz. The architectural firm has also designed buildings in the past for Loyola University in Chicago.

While room designations and plans are not final, the new 96,000 square foot building is planned to hold the entirety of the law school, including the current facilities and the law library. Law school events are hoped to be held in-house

with a large amphitheater, seating 250 to hold events such as the visit from Supreme Court Justice Scalia, in the future. The new building will also host a diversity of classroom sizes akin to Bannan Hall with 25, 50, and 100 seating

arrangements. More bathrooms are also planned for the new law school in comparison to Bannan Hall. The focus is to create a good learning environment.

According to Professor Yosifon, the Chair of the Building Committee, the new building is being designed with flexibility and a look toward the future of Santa Clara Law. The building is planned to be complete

in December 2017 and open for use in January 2018. Some new amenities to look forward to will be a coffee service and a meditation room in the building. There will also be a community lounge for faculty, staff, and students to foster an integrated community. Student organizations will have a designated area. The building committee welcomes ideas and suggestions from the law school community. Ideas for the new school can be sent to [dyosifon@scu.edu](mailto:dyosifon@scu.edu).



# HAPPY TO BE HERE

By Ken White

Partner; Brown, White & Osborn LLP

Blawger; [Popehat.com](http://Popehat.com)

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*Mental Illness Awareness Week (MIAW) took place earlier in October.*

The first thing you need to know about secure psychiatric facilities is that their bathrooms smell strongly of pee.

That may not seem remarkable to you. Many bathrooms smell of pee. But the facility in which I was a guest this time last year was notably immaculate in every other way. A lot of time and attention went towards making it clean and welcoming. Yet the private bathrooms — one to a two-person dorm room, no lock — always smelled of pee. That's because there's an elaborate metal cage built around the workings of the toilet, like one of those Hannibal Lecter masks. This makes the toilets very difficult to clean. Hence, the constant smell of pee.

The people who run the facility protect the toilets like that so that you won't disassemble them and use the pieces to hurt yourself. My wife would tell them that this concern dramatically overestimates my home improvement skills, but I guess they want to be careful. It seems to me that if you take the time and effort to disassemble a toilet with your bare hands, you're committed enough to be allowed to do to yourself as you see fit. To date my view has not prevailed in the psychiatric community.

I found this out exactly a year ago, when I had a particularly bad day. My family and friends had a worse one.<sup>1</sup> I'll spare you the particulars; they aren't the point. I had the sort of day that illuminates the distinction between "I've fought depression for sixteen years" and "I've successfully fought depression for sixteen years." It turns out the difference matters.

I'm still here. That's a consequence of the grace, and love, and generosity, and decency of others, and my own ridiculously good luck. I'm here, I feel good — not just okay, but good — and I'm very happy to still be here. Not only that, I feel hope. If you haven't been depressed, that may seem like just a little thing, but it's not. I don't feel the hope that I'll never have a low point of anxiety and depression again. It's going to happen again; that's the deal. No: I feel hope that when it happens again, I have the tools to face it.

Every time I write about [depression](#), I feel like I'm having the naked-at-school dream, exposed and poised for incoming ridicule. No matter how often I say that depression is nothing to be ashamed of, and how sincerely I believe it in my head, my gut tells me otherwise. But every time I write about depression, I get emails from people thanking me for talking openly about the subject and for describing what it's like. And, as I said, I'm only here because of the decency of others. I owe back. I owe back more than I can possibly repay. A little squeamishness doesn't weigh much in the balance.

So here we are. I'm Ken, and though I live an outwardly "normal," high-functioning and successful life, I suffer from grave anxiety and depression, and last year it got bad enough that I was hospitalized "voluntarily" for it.<sup>2</sup> Maybe you suffer, or maybe you love somebody who suffers, or maybe you want to understand depression and anxiety more so you can support people who suffer. I want to share some things I've learned in the course of a harrowing experience, in hope that it might help someone, even a little.

## Ask For Help. You Can't Go It Alone.

I'm not an addict. But dealing with depression and anxiety has resembled what I've read about addiction treatment. I've had to reach bottom and concede my own powerlessness to get better. I'm not still here because of strength of character. I didn't survive because I found it in myself to hope that things could improve. In fact I didn't have that hope a year ago today. I survived because at my worst moment I knew that, however hopeless I was, I could put myself in the hands of the people who care about me. I'm here because, at my lowest, I admitted that I was powerless to help myself, admitted that I needed help from others, admitted that I had to rely on other people. That wasn't easy; I'm stubborn and fully invested in the classic American self-image of independence and grit. But it was necessary.

I bring this up because even mentally ill people are bombarded with the message of self-reliance. Learn how to eliminate negative thoughts! Take control of your depression! Fix yourself with these four methods! Overcome your problems! Be strong! There's something appealing about these messages — even as they fail to produce results — because social interaction can be unpleasant and painful when you're depressed and anxious. An elaborate excuse to withdraw and self-rely is welcome, like a doctor telling you to drink more milkshakes.

Part of my improvement was about taking personal responsibility and achieving some mastery of my condition, as I'll discuss below. But the core of it was admitting that I had to trust and rely on people, and that I needed them to help me, and that I could not just stoic it out all by myself. I had to be okay admitting to other people that I was broken — admitting to colleagues that I needed help at work to get some time to get better, admitting to family that I needed help, admitting to various medicos the extent to which I'm fucked up. Instead of being the guy who can always offer a solution or a plan or a strategy, the one people can count on, the one always ready to take responsibility for results, I had to say "I don't know what to do, and I need help." You can be pressed firmly to the vast bosom of your loving family and friends and still be all alone if you're not ready to say that.

I am incredibly lucky in my family and friends. Not everyone has that support network. Maybe you think you don't. But if you are in pain, your family and friends and coworkers may surprise you. Even if you're on your own, there are dedicated professionals out there whose purpose is helping you. Seek that help. I don't mean "go someplace for an hour to talk, and then go back to work and back to carrying the weight on your shoulders." I mean bring yourself to admitting you can't do it without other people.

If you have a loved one in pain, from my perspective the best thing to do is to say "I don't know what I can do, but whatever it is, I'll do it. I'll help you, and I'll take you to others who can help. Let me help you carry the weight." You can help by eliminating the excuses we use not to get help. "I'll miss work!" I'll cover your shifts. "The kids need me!" The kids can stay with us for a month. "I'll lose my job!" No you won't — I'll go to bat for you. "I don't know who to call!" I'll call for you.

## Don't Rule Anything Out.

If you asked me a few years ago, I would have been horrified at the concept of a stay in the looney bin.<sup>3</sup> I know people who have spent time in psychiatric facilities; it doesn't diminish my respect

for them. I admire people who have spoken openly about such hospitalization, like [David Weigel](#) or [Annmarie Timmins](#), and think that their stories prove how being hospitalized doesn't make you less of a responsible adult, or professional, or trustworthy person. I knew that intellectually. But down in my lizard brain, where I whisper my failings to myself, I told myself if you go to a mental hospital, that's it. You're not a parent and a law firm partner and a citizen any more. You're a Crazy Person.

It took a crisis to get me past that — it took reaching bottom and thinking, hey, it can't possibly get worse, so why the hell not? Acute ward, here I come!<sup>4</sup> Letting go of that arbitrary line and opening myself to the possibilities was a huge relief. Thank God I did it. It was what I needed — time unconnected, away from the sources of crippling anxiety and accompanying depression, so that people could help me figure out how to deal with it, instead of just suffering through it. When you're depressed and anxious to the point of crisis your daily life is like drowning; you're too focused on surviving to figure out how to change.

Hospitalization may not be right for you or your loved one. I'm not saying to go check yourself in. I'm telling you to be open to the array of possibilities. Be open to medication. Be open to therapy. You may be surprised to discover what works for you once you give it a try. I had rejected talk therapy for years; I always found that it provoked more anxiety than it prevented. (I'm the sort to have a panic attack trying to figure out what to say when I cancel my therapy appointment because of a work conflict.) But, having admitted that I needed to listen to other people, I tried a new doctor and a new modality — cognitive behavioral theory, specifically — and found it effective and liberating.

Just consider what you've previously ruled out, is all I'm saying. Question your disqualifying assumptions, or help your loved ones do so. I assumed without reflection that hospitalization meant the end of my career; I went on to have one of my most successful years ever. I was better as a spouse and parent and lawyer and boss because I wasn't miserable.

## Keep Re-evaluating.

I was diagnosed 16 years ago with major depression. I've been cruising along, in good times and bad, with medicines working or not working, assuming that was the case. Doctors didn't seriously re-evaluate that diagnosis until this crisis, nor did I. Careful evaluation led me to understand that I've got both depression and what we'll charitably call an "anxiety problem." This combination is apparently common in annoying Type As like me — and with it comes the ability to mask pain, to remain very high-functioning so nobody sees how you feel until you snap. The way it works for me is this: during a bad cycle, the anxiety begins, and feeds on itself until it becomes omnipresent and all-consuming, in a way [I've tried to describe before](#):

*"Think of the most stressed and worried you have ever been in your life, and then imagine that your stomach feels like that all the time.*

*Imagine that you are constantly gripped with overwhelming feelings of dread and crushing hopelessness — irrational, not governed by real risks or challenges, but still inexorable.*

*Imagine that you are often fatigued to the point of weakness and irritability because you can't get to sleep until late at night, or because your mind consistently shakes you awake at four in*



# ...STILL HAPPY TO BE HERE

*the morning, racing with worry about the day's activities as your stomach roils and knots.*

*Imagine that most social interactions become painful, the cause of nameless dread. Imagine that when the phone rings or your computer dings with a new email you get a short, hot, foul shot of adrenaline, sizzling in your fingertips and bitter in your mouth.*

*Imagine that, however much you understand the causes of these symptoms intellectually, no matter how well you know that you are fully capable of meeting the challenges you face and surviving them, no matter how well you grasp that these feelings are a symptom of a disease, you can't stop feeling this way.*

*Imagine that you have moments — maybe even minutes — where you forget how you feel, but those moments are almost worse, because when they end and you remember the feelings rush back in like a dark tide that much more painfully."*

Then, once I'm in anxiety's grip, depression kicks in. And, as the Bloggess says, [depression lies](#). Depression tells me that it's never going to change. Depression tells me that there's no hope, that I'm going to feel this way forever. Depression tells me I've tried everything to get better and it doesn't work. Depression tells me that I'm a failure as a husband, a father, a friend. Depression tells me that I suck at my job — that if clients are happy with my work it's only because they are deluded.

You can see how this one-two punch can put you down.

Not surprisingly, treatment that focused only on depression — or that saw anxiety as a mere part of depression, instead of a separate phenomenon magnified by depression — wasn't effective.

But, sixteen years down the path, trying a new approach was remarkably effective. Treating the anxiety and depression as distinct problems with distinct causes and solutions worked better than anything ever has. Perversely, admitting defeat and giving up control led to getting much more command over my disease and my response to it.

So, if what you've tried hasn't worked so far, never stop questioning your premises. Maybe you're not solving the right problem.

## Think About Your Body Along With Your Head.

One of the things I learned after my crisis was that I had never seriously thought about how my body contributed to the state of my mind. As a long-time out-of-shape unathletic geek, my body was never a focus. I heard that exercise and diet could impact my mental health, but I didn't grasp why.

Starting from scratch let me re-evaluate this and think about how I could address mental symptoms by addressing physical symptoms. An example: when I was anxious and depressed it was common for me not to eat anything until dinner. What I figured out is that my stomach would start churning and rumbling from hunger. That feeling is remarkably close to the unquiet stomach of anxiety, and my mind would tell me you're really anxious, which would make me more anxious and less likely to eat, and so on, in a vicious cycle. What I figured out was that if I addressed the physical symptom reasonably — for instance, by taking pains to have a bit of protein for breakfast and mid-morning — the mental symptom followed. I also discovered that calling out and naming physical symptoms helped prevent them from making the mental symptoms worse. When I am in the grip of anxiety I get nasty hot shots of adrenaline, like an electrical charge through my

chest, when the phone rings or an email comes in or I read something concerning or anything else happens. The physical symptom makes me more anxious. But I learned to say that's not anxiety — that's a symptom of anxiety. That's an adrenaline surge, and it will pass. I'll work it off by taking a walk around the office. The anxiety's still there, but the vicious body-mind cycle of escalation stops.

I found the book "[Why Zebras Don't Get Ulcers](#)" to be extremely helpful in understanding the biology of how my body impacts my mood, and vice-versa. Before I had been very skeptical of any body-focus as sort of crystal-thumping woo. But not surprisingly, there's actual science to the concept that our bodies impact our minds.

This particular approach may not be as helpful for anyone. Consider it, then, in the category of keeping an open mind to new approaches.

## Talk To People; You're Not Alone.

I mask extremely well. I'm told this is typical of people with both anxiety and depression. I'm very adept at keeping people — even those close to me — from detecting how badly I feel. A lot of us are.

The problem with this, of course, is that people can't help us if they don't know we need help. Plus, even when we know on some level we're hiding our pain, on some level the failure to detect it increases feelings of alienation and loneliness. There's nothing lonelier than nobody around you knowing you're in pain.

Just as you have to ask for help, you've got to reach out. This can be terribly painful until it starts to work. Human contact is intolerable when I'm very anxious and depressed. But human contact helps me see that I'm not as apart as my disease tells me.

In the hospital my roommate was roughly my age, but could not have been more different if a sitcom casting crew had chosen us for an Odd Couple remake. He was an adventurer, a long-haired aspiring rocker, a dude who was used to wearing leather pants the way I wear Dockers. I have a conservative haircut; he had tattoos on the palms of his hands. Our upbringing, our education, our tastes, our relationship history, our ambitions were worlds apart. But when we talked, we got each other. We spoke the same language. I could describe exactly how one of his surges of anxiety would take hold; he could describe exactly how hopelessness would set in with me after a few days of worry. Our good days are nothing alike, but our bad days are eerily similar.

The more I talk to other people with this disease the more I get that I'm not alone. The more I read brave people opening up in public about anxiety and depression — like [Wil Wheaton](#) or [Jenny Lawson](#) or [Larry Sanders](#) — the less alone I feel. I live in hope that if I open up some other people may feel less alone. My disease tells me I'll never feel better; the existence of other people who have survived and thrived tells me that my disease lies.

## Laugh.

I couldn't get through this if I couldn't laugh at myself and at the absurdity of it all.

I first recognized this because of golf pencils. You're encouraged to write to loved ones when you're hospitalized. But pens are potential weapons, so they give you the short, stubby pencils that you'd use to score miniature golf. These induce hand cramps but are highly ineffective for suicide. Once a day they'd ask me to sign a promise not to hurt myself, or others. When they asked that they gave me a pen. An oath written with a golf pencil is of mickle might; nobody expects your word to

be binding unless it's written with, at a minimum, a Bic. After you sign the no-harm promise they take the pen back, and give you back the golf pencil. One day the cosmic ridiculousness of this struck me so hard that I started to laugh until tears rolled down my face. I do not recommend this as a strategy to get out of a mental institution more promptly.

Human frailty is the root of comedy. My disease is a flaw, a brokenness, and I'll be damned if it doesn't help to laugh at it. This can be disconcerting to others. A dear friend called after I got out of the hospital and asked, very worried, what I was up to that day. "Just hanging around," I said. Beat. "Maybe that's a poor choice of words." The resulting horrified silence was painful. For him. Sorry/not sorry. "The soft-serve machine in the looney bin was broken," I took to saying when people commented on my weight loss. Rather than become socially anxious about whether or not people knew what had happened, I cheerfully probed. If you run into a neighbor in the grocery store, ask them if they know where the knife aisle is. If they twitch, then they know.

We're ridiculous, all of us, grunting and squinting and snorting our way from one end of life to the other. Laughing's the best way to go. It's hard to worry what people are going to think about your disease when you're laughing at it. Laughter is defiance, it's power, it's hope. A thing I can laugh at does not fully control me.

So laugh at it all. Forgive your loved ones their black humor about their condition; it's an effective coping mechanism.

I won't ask you to be fine. Nobody's fine. Be better. Reach out.

*The National Suicide Prevention Lifeline at 1-800-273-TALK (8255) is available 24/7. The [National Institute of Mental Health](#) has links to many other resources for people in pain and their loved ones. So does the [Suicide Prevention Resource Center](#).*

*Call the SCU Health Center CAPS at 408-554-4501*

*Stop by Law Student Services in B210*

*Call the National Foundation for Depressive Illnesses at 800-248-4344*

## Notes

- 1 Today I sent my wife a very nice "thanks for sticking with me even though I'm nutty" bouquet.
- 2 I mean "voluntarily" in the sense of "you can check yourself in voluntarily, or we will check you in involuntarily."
- 3 That's the correct psychological term, unless you have an HMO, in which case it's "nuthatch."
- 4 I only spent a day and a half in the acute ward of the facility. I did not enjoy it. That's a story for another time.



# MARKKULA CENTER HOSTS SPEAKER ON TROLL ETHICS

By **Jodi Benassi**  
IP Editor

Antonio Casilli, a Professor of Digital Humanities at Telecom Paris Institute of Technology, recently spoke at Santa Clara University about how, within the digital ethos, trolling and labor cut across the same socio-technological territories. Trolling in this sense includes perpetrators of Internet incivility who post thoughtless comments, trolls who stimulate engagement in discourse, troll activists who hijack political debates online, and trolls for hire. Here, troll labor and digital labor both monetize our social media environments, but with troll labor society as a whole suffers the direct harm.

The past decade has brought about significant advances in digitization, ever increasing processing power, cloud computing, and the “sharing economy.” Technology has created environments for explosive growth in cyber labor across a multiplicity of industries. Take for example “like farms,” which hardly existed three years ago, which have since made transactions to purchase Facebook “likes” easy and inexpensive. A simple Internet search for “buy Facebook Likes” will show how straight forward it is to purchase 1,000 “likes” for \$29.99. It’s just as simple to purchase thousands of Twitter or Pinterest followers or if video is your preference, YouTube views. Most of the likes and followers come from digital middlemen known as “click farms” which create these counterfeit likes and fake followers, which in turn buy fake Facebook accounts from “account farms.” It’s a multi-tiered



Professor of Digital Humanities at Telecom Paris, Antonio Casilli, speaks about trolling. Photo: Carrie Jaffet-Pickett

industry empty of any meaningful information.

Take also the practice of Astroturfing, which masks the sponsors of a message to make it appear as though it originates and is supported by an authentic participant. Examples include political groups and politicians that hire trolls to taint the reputation of political adversaries through online comments and forums. Fake comments, made-up claims, phony product reviews, and false testimonials all to encourage society to buy something or buy into someone, as the case may be. Today there are entire industries based on the capitalization of fallacious data.

This type of behavior isn’t new to the Internet. In the early years, scamming people on the Internet was done through email. Email spamming was so prevalent that between 2010-2012, teams of law enforcement officials dismantled several spambot networks across the world. These efforts, along with improved spam filters of email hosts, effectively put an end to these

spammers.

The growth of social media on the Internet has been rapid and remarkable. Internet trolls range from professional organizations that maintain 24/7 customer service and subscription packages to teenagers supplementing their allowances. Over the past ten years the percentage of American adults on a social media platform has grown to 70 percent. Celebrities, politicians, and companies have increasingly found their value to be measured by Facebook fans and Twitter followers. The value is not trivial, take LeBron James, who reportedly earns \$139,000 every time he tweets something. Where there is money, there are scammers and unfortunately it takes the government time to establish an effective regulatory regime and laws

to protect consumers.

In the U.S., attorneys general from several states have legislated against fake reviews, but no formal ruling has been handed down. The Federal Trade Commission, in its most recent update to its Endorsement Guide, stated they are generally not monitoring trolls. If concerns about possible violations of the FTC Act are brought to their attention, they will evaluate them on a case by case basis. With regards to the “likes” the FTC stated that an advertiser buying fake “likes” is very different from an advertiser offering incentives for “likes” from actual consumers. If “likes” are from non-existent people or people who have no experience using the product or service, they are clearly deceptive, and both the purchaser and the seller of the fake “likes” could face enforcement action. So we wait.

## ALUM REMINISCES ON HER UNCONVENTIONAL PATH TO SUCCESS

By **Flora Kontilis**  
Staff Writer

Santa Clara Law School alum Lisa Herrick can credit the onset of her legal career and subsequent achievements in part to chance and choice.

She didn’t end up where she thought she would. Herrick laughs when asked how she came to attending Santa Clara University Law School. “You know, looking back, I probably didn’t have a ‘very good reason,’” Herrick says. Herrick remembers taking a road trip with a girlfriend to look at law schools in northern California over winter break in her final year at UC San Diego. She made her rounds to neighboring schools, but none convinced to commit. “There was Hastings -- but I didn’t feel safe in that area of the city; then University of San Francisco -- but that area seemed too ‘cold’ to me. So I left and thought, ‘Oh well!’” she says. Closing her law school tour, she went back to San Diego seeming a bit empty-handed. The feeling didn’t last long.

“So when we were driving from the city that day it was gloomy and overcast. But when we pulled up to Santa Clara’s campus, the clouds [actually] parted! Everything was in bloom that time of year, too, so I just thought the campus was so beautiful and sunny,” Herrick recalls. She laughs a little again looking at me as she admits this. Herrick’s law school choice was as simple as that. She shrugs her shoulders, and I join her. “I’d say that Santa Clara chose me,” Herrick adds.

While I’m not bothered by Herrick’s process of elimination that led to her revelation, I concede where it appears idealistic or romanticized. To that I argue her decision mattered, and positively impacted Herrick personally and professionally. For instance, exhausted from 1L, Herrick recalls taking a waitressing job the first summer of law school. “Then, sometime in [2L] I broke my wrist so I couldn’t waitress anymore!” Herrick says. A classmate, working at a small litigation

firm, approached her about applying for a law clerk position that recently opened up. She went for it. Herrick continues, “I applied. I sent a resume, even with my waitressing job, and they hired me! I stayed for 12 years (two years while in law school and 10 years out).”



SCU Law Alum Lisa Herrick

Herrick admits, working in-house to a technology company seemed it would be a “good fit and transition from private practice.” Rather, after extensive history in litigation (12 years working for a small litigation firm) she ended up working in-house for the government as Deputy County Counsel, followed by Senior Deputy Attorney for the City of San Jose. Herrick’s current role is General Counsel for Superior Court of Santa Clara County, where her days of litigating have ended (for now). While it seems Herrick strayed from her original career path, she says, “Everything I’ve done along the way has made me the lawyer I am today.” For example, she notes the nature of her position at

the Superior Court is more advisory in nature, but her background skillset is still crucial to her present role. Herrick emphasizes litigation experiences fosters successful lawyering. “[In] private practice litigation you’re fixing a client’s problem. In government you’re effecting change,” Herrick points out. Additionally, she recommends attaining litigation skills for transactional lawyering, “You know how things can go wrong. Take contracts, for instance, [litigation experience] helps you [identify] potential contract disputes. You’re able to see where [things] can go wrong,” Herrick says.

Private practice was particularly pivotal in developing Herrick’s skillset. “[There’s] a mentorship-situation in private practice,” Herrick says, “You get good training because there’s an incentive for the partner, a hierarchy or structure. You draft, [and] they review – there’s a benefit of [having] experience with more senior [lawyers].”

Moreover, Herrick nods to other practical skills she picked up from working on the Sunshine Reform Task Force from in 2006. Established by the City Council, this was a group of local San Jose citizens encouraging government transparency. “[This] experience helped me listen,” Herrick says. Wait, listening? Is it that simple? I agree when Herrick emphasizes, “People want to be heard. So my job was to try to solve [their] problem and advocate where to compromise.” In sum, Herrick says she sought finding where to “add value in the process [and make] realistic expectations.”

These points amount to just a snapshot of Herrick’s accomplishments set forth by surprising stepping stones. Sure, looking back, Herrick’s legal career may seem it started unconventionally, rolling onto a sunny Santa Clara campus. Yet briefly touching on her progress here, it’s easy to see, as Herrick puts it, “all the things that happened made a big impact.”