THE ADVOCATE

Santa Clara University School of Law

School of Law Newspaper Since 1970 | Wednesday, March 23, 2016 | Volume 46 Issue 5

Robert Reich Talks Politics and the Economy

By Lindsey Kearney
Associate Editor

Robert Reich, prominent UC Berkeley Professor of Public Policy and former Secretary of Labor under President Bill Clinton, spoke to a packed Mayer Theater at Santa Clara University on March 8. Reich was ranked by TIME Magazine on its list of Top 10 Best Cabinet Members. Among his accomplishments in Washington were helping to implement the Family and Medical Leave Act, raising the minimum wage, and leading a crackdown on sweatshops.

Reich began by noting that the American economy is twice as large as it was 30 years ago, yet minimum wage and the middle class "are not doing well" by contrast. Poverty rates, he continued, are higher than ever before in the United States, especially for those who are classified as living in extreme poverty. "I'm not a class warrior, I'm a class worrier!" After recognizing that a capitalist economy requires at least some degree of inequality, Reich went on to discuss his worries.

Reich's primary worry is the expanding inequality in America. The middle class is being "squeezed,"

Professor Colleen Chien asks questions submitted to Robert Reich. Photo Credit: Joanne H. Lee

with little to no expendable income. Lower income people have a higher marginal propensity to consume, meaning that they spend a larger proportion of their income than those with higher incomes, who actually spend only a tiny percentage of their income. This is especially problematic, said Reich, because 70% of the economy depends on consumer purchases. Though the recession may be theoretically over, Reich believes that the economic recovery was one of "the most anemic in history, especially given how low we went."

Reich's second worry is that the American people are angry. He believes that today's anger is different from that of past generations, because there is a certain "surliness" that comes with working so hard and getting nowhere financially. Reich told the audience that with 2/3 of Americans currently living paycheck to paycheck, popular political rhetoric has embraced a belief that "the game is rigged." To illustrate a result of the unique brand of anger bred by this inequality, Reich told a story of how he was recently in the deep south promoting his book, "Saving Capitalism," in an attempt to bring his ideas to new audiences because he believes that one of the biggest problems facing American politics today is a lack of discussion across ideological lines. Speaking to a room full of Bible belt conservatives, many of whom were self-proclaimed Tea Partiers, Reich asked who they were planning to vote for in the primary election. The response was ideologically shocking: The majority were torn between Donald Trump and Bernie Sanders, who most would regard as being political opposites.

See Page 2 **"A Conversation with Reich"**

SCU Law Drops Rank In U.S. News Report

By Nikki Webster
Managing Editor

Last week, U.S. News & World Report published the 2017 law school rankings. Santa Clara Law dropped by 35 positions to #129, from last year's position at #94. This is the largest drop in all law school rankings this year, followed by Gonzaga (-22, #132), and Brooklyn (-19, #97). Our Intellectual Property specialization ranks #6, and the Part-Time Program #16. *The Advocate* reached out to students for questions, and to Dean Joondeph for answers.

Methodology

U.S. News uses four main categories to score our nation's law schools: Quality Assessment (0.40), Selectivity (0.25), Placement Success (0.20), and Faculty Resources (0.15). Quality Assessment is the umbrella for a peer assessment score (0.25) and an assessment by lawyers and judges (0.15). Selectivity includes median LSAT scores (0.125), median undergraduate GPA (0.10), and acceptance rate (0.025). Placement Success aggregates employment rates for grads at graduation (0.04) and 10 months after graduation (0.14), plus the bar passage rate (0.02). Faculty Resources includes expenditures per student (0.015), student-faculty ratio (0.03), and library resources (0.0075).

Santa Clara Law's Dilemma

Placement Success and Selectivity are challenging categories for Santa Clara Law at this time. Notably, the bar passage rate accounts for only 0.02 of the entire ranking score. This is a good thing for us right now, since our bar passage last July was only 69%, up from the prior year's 60%, but still down from the 73% who passed in July 2013.

However, as Dean Joondeph explained to me, bar passage has a linear relationship with full-time J.D. employment. In the Placement Success category, U.S. News gives full weight to "graduates who had a full-time job not funded by the law school or the university that lasted at least a year and for which bar passage was required or a J.D. degree was an advantage." Less weight is given to full-time, long-term jobs that do not require bar passage, and even lesser weight to part-time, short-term jobs. Because graduates who do not pass the bar in July cannot take it until 7 months later (February), and then do not receive their scores until 3 months later (May), such grads most likely will not have full-time J.D. employment within 10 months of graduation since they will not be licensed to practice law during that period. Essentially, bar passage is a threshold requirement to accruing the employment points available in this category.

Our Selectivity ranking has also been hit hard. Dean Joondeph informed me that we are receiving fewer and fewer applications every year. Specifically, we have received 75% fewer applications in the range we normally admit, range meaning LSAT scores and undergraduate GPA. While Dean Joondeph was quick to say that our admissions look to more than just LSAT scores and undergraduate GPA, he said that these two measurements are predictors of law school grades. In turn, law school grades in bar courses are the single greatest predictor of bar passage.

The dean explained that because Santa Clara Law relies primarily on tuition dollars for funding, it has necessarily needed to become less selective in its admissions. While we are getting a new building, Charney Hall will be built on soely on fundraising dollars and with help from Santa Clara University, which wants to use Bannan Hall for a STEM (science, technology, engineering, mathematics) building. Not to spurn any gifts, it appears that donors find funding a new building more attractive than operations and the law school's welfare. Accordingly, since tuition dollars largely determine our fate, the precipitous drop in student applications means we must accept students whose statistics predict lower law school GPAs, decreased likelihood of initial bar passage, and, consequently, lack of full-time J.D. employment within the first 10 months of graduation.

Santa Clara Law's Solutions: Increase Bar Passage & Cut Clinics and Electives

The law school's goal is to increase bar passage rates. Over the past couple years, the school has taken steps towards this goal by increasing its course availability for Advanced Legal Writing: Bar Exam (formerly ALWW) and limiting enrollment to 17 students per class, and has also purchased premium accounts on BarEssays.com for all law students. For those students who began their studies in fall of 2015 or later, Santa Clara is taking an additional step with regard to graduation requirements in order to promote students' chances of passing the bar.

The current requirements for graduating students of earlier classes are: obtain 86 units (64 of which must come from "regularly scheduled classes"), maintain a cumulative GPA of 2.33 or higher, take the required bar courses (Constitutional Law II, Evidence, and Legal Profession), complete a Supervised Analytical Writing Requirement (SAWR), and be in ethical good standing. Those who finished their 1L year with a GPA at 2.33 or below were placed on "Directed Study" and had to complete that program (which requires enrollment in more bar courses), in conjunction with the above requirements.

The new requirements for our current 1Ls and later classes involve something the law school has termed "Upper Division Proficiency Points," or "UP Points." Students obtain UP Points by earning a C+ or better in one of the bar-tested courses: Constitutional Law II, Legal Profession, Evidence, Business Organizations, Wills & Trusts, Community Property, Criminal Procedure: Investigation, and Remedies. By the end of their 2L year, full-time students must take at least 4 UP courses, and part-time students 2 UP courses. To graduate, students must have earned at least 4 UP points.

See Page 5 **"SCU Law Drops Rank In U.S. News Report"**

A Conversation With Reich

Reich made sense of this by highlighting that Americans are growing increasingly wary of "crony capitalism" – a system they believe to be rigged by Wall Street, insiders, and corporations, all in cahoots against "us." Hillary Clinton recently utilized this rhetoric in her campaigning as well, stating that, "The deck is stacked in favor of those at the top." When Bill Clinton ran for office, said Reich, "no politician would have ever said anything like that, because the economy wasn't like that. But in 2016, we think the economy is against us, and we want candidates who are for 'us.'" The biggest division in politics is no longer Democrat vs. Republican, according to Reich. It's establishment vs. anti-establishment.

After Reich addressed the crowd on his own accord, the conversation shifted to an audience Q&A moderated by Santa Clara Law Professor Colleen Chien. Questions immediately turned to the giant orange elephant in the room; election results were rolling in live and it had just been confirmed that Donald Trump had won Michigan. A question from the audience asked Reich, "How has Trump been able to tap into people's sense of dissatisfaction so well?" His response was that in the past 25-30 years, inequality has widened and most people do not understand why. But instead of joining together to address that problem, when people feel threatened or in fear, they are much more susceptible to politics of division. Trump channels that fear into scapegoats (by "othering" groups and then assigning blame to "them" – Muslims, immigrants, etc). Reich went on to insist that loud "states rights" activists have hid behind that venire, but what they really want is to keep power in the hands of a small, white minority. Currently, according to Reich, the venire called the GOP encompasses a range of different tribes, but there is no coherence. He was adamant: the way to un-rig politics is to band together.


Robert Reich speaks to the audience at SCU. Photo Credit: Joanne H. Lee

When asked if he believes Donald Trump could actually win the election, Reich replied, "Yes. I worry about that, quite honestly. But I am optimistic because I am a historian. So I know that whenever we get off track in this country, we have the resilience and pragmatism to get back on track. I'm thinking of the 1830s, of the people's response to the gilded age between 1901 and 1916, and of the 1930s when 1 in 4 Americans was unemployed. We don't fall for fascism. Finally, I'm optimistic because I spend a lot of my time in classrooms, so I know that this generation is committed and public spirited."

Concerning Reich's recent endorsement of Bernie Sanders, an audience member asked if Reich believes that Bernie's economic policies are feasible. The response was short, sweet, and to the point: "That answer depends on your thoughts on a single-payer healthcare system. My view is that we are going to have to do it eventually."

When asked by a member of the audience what we can do as individuals to help address political inequality, Reich urged that the solution is in political participation. "Politics is more than a passive exercise. It is a practice we must be engaged in. Politics is hard!" He especially encouraged the college students scattered throughout the audience to get involved in politics. "The younger generation has never experienced political efficacy, which has led them to political apathy."

Underlying all of politics is a moral question: what is a good society? Reich suggests that a good society is one where people have an equal chance to make it, are not prey to arbitrary or unfair forces, and enjoy a system that works for them not against them. Perhaps in one of the most poignant moments of the evening, Reich borrowed the famous quote from Justice Louis Brandeis: "We can have democracy, or we can have great wealth concentrated in the hands of a few, but we cannot have both."

Rumor Mill

By Susan Erwin
Senior Assistant Dean

A couple of professors and deans have mentioned to me that they are hearing from students who are still unhappy about SCU hosting the visit by Justice Scalia last semester. So, I spent the last week or two asking people's opinions and finding out more information.

The Invitation. First, it's a rare opportunity for students to meet an actual U.S. Supreme Court justice! We have had a few visit – Justices O'Connor and Kennedy were the last two that I remember. We have extended numerous invitations, most recently Justices Kagan and Sotomayor. We actually didn't initiate the discussions with Justice Scalia's people. They contacted us and said that the Justice was going to be in the bay area and wanted the opportunity to speak to the law students. We understood and respected that some in our community would find him objectionable, and would wish to boycott or otherwise avoid the event. We also understood and respected that some in our community would want to hear him speak. Most importantly, I think, we recognized that this would be a great learning opportunity for our students.

The Format. Again, the Justice's people gave us the basic format for the events. Some of that had to do with his security and some with his preferences and available time. The time frame we were given was during Professor Hsieh's Con Law class, which seemed perfect. We were told he wanted to speak first and then would leave a little time for some questions.

The Questions. We thought the best use of our limited Q & A time would be to have some questions prepared. Professors Armstrong and Hsieh asked their Con Law students to submit questions in advance because they wanted their students to be thoughtful and have time to craft good questions. Professors Armstrong, Hsieh and Dean Joondeph then worked together to combine and create final questions about issues that seemed to be of the most interest. They were not trying to censor or edit student questions but to maximize use of the time. They skipped questions that were already answered in published opinions or that a sitting Justice would be unlikely to answer because of issues pending in the courts.

The Opportunity. Whether you agreed with Justice Scalia or not, there is no denying that he was a person in a position of power in the field you are studying. It was an opportunity for you to hear directly from him not only about what he thought but how he thought the Constitution led to those positions. As an intellectual exercise, we thought it was worthwhile. You had the opportunity to attend or not. (Some of you chose the middle ground – to attend but then spend the time sitting in the hallway with me and Professor Kreitzberg.)

The Controversy. We know that there were differing opinions on hosting the Justice. As one professor told me, "Justice Scalia's words and opinions over the years have been dismissive, alienating, and hurtful to our shared goal of inclusion and diversity with respect to LGBT people and people of color. Even though I agree that accepting his invitation was the correct choice, it was very good for some people and deeply hurtful for others." A contrasting opinion comes from some of our more conservative community members. In the climate survey we sent around last year, quite a few students pointed out that they felt alienated because of their conservative values and felt that they could not express their opinions in the classroom. A few of these folks have shared with me that they were happy to have the opportunity to hear the Justice and felt that dismissive comments about him were disrespectful. As this conversation goes forward, let's please keep in mind that some of our people have strong feelings about this and we need to be respectful of each other, even as we continue to disagree.

Diversity and Inclusion. I was asked why a law school that prides itself on diversity and inclusion would host someone as controversial as Justice Scalia. It's because we are a law school. Our intellectual and educational mission requires us to engage with competing ideas. We host speakers of many different viewpoints and areas of expertise at SCU Law! We respect that our community members have many different perspectives. Our job, as a law school, is to model and reflect the highest of ethical values by responsibly encouraging intellectual freedom and respectful debate.

Hopefully, this clears up some of the rumors and makes this feel a little less negative. SCU Law remains committed to diversity and inclusion, and hopes that honest and respectful discussions will continue. The Committee for Diversity and Inclusion is interested in your opinions, as is the student-run Public Interest Coalition that continues to hold open forums to talk about issues that were identified in the MLK celebration in January. The University Office for Diversity and Inclusion has been included in many of these discussions and posts and is also here for you.

And me? I am always happy to listen to the latest rumors – serwin@scu.edu

FIRE Visits SCU to Discuss Free Speech

By Jason Peterson
Senior Editor

Americans agree with free speech in theory. When speech is discussed in broad terms you will rarely find opposition to the idea that individuals should be free to express themselves. Yet when the speech in question is something particularly offensive to a certain group, there is an enthusiastic attitude toward government restriction. Bans on confederate flags, concepts like trigger warnings or micro-aggressions, and demanding that university classrooms be safe spaces are common forms of speech repression. Engaging opposing views, even those you consider hateful or bigoted, is a key underpinning of both free speech and the importance of ideological diversity in a republic.

In late February, The Federalist Society at SCU Law hosted Ari Cohn, attorney at the Foundation for Individual Rights in Education, or FIRE for short. FIRE is a non-profit, non-partisan group that defends civil liberties particularly the freedom of speech at both public and private universities. Ari spoke about the state of free speech on college campuses starting with a Pew Research Poll from November 2015 that found 40% of millennials supported a government ban on speech that was offensive to minority groups. In January 2016 The Huffington Post released a poll with 38% saying that colleges should prioritize free speech even if means protecting some nasty or hateful speech while 43% preferred to prioritize non-discrimination even when it meant speech would be restricted. These numbers were stunning coming from a generation that was supposedly interested in "diversity", yet those calls for diversity stopped whenever it wasn't the kind of ideological diversity that fit their view of the world.

To be sure, there are kinds of speech that come from bigoted or racist roots. As Ari explained, however, bans on speech are not the way to get rid of hateful ideas. What do you think happens if you banned the Ku Klux Klan from parading down the street? Do people with hateful ideas simply stop believing them if they are no longer allowed to express their views in public? No, they just go underground and find more like-minded hateful people. The key to fighting hateful views or even views you simply disagree with is open public debate.

Just last month, Ben Shapiro's appearance at Cal State Los Angeles was cancelled after the university president thought the function should be moved in favor of an alternative event with greater viewpoint diversity. The event was titled, "When Diversity Becomes a Problem" organized by the local Young America's Foundation and would feature topics on Black Lives Matter and free speech on college campuses. Luckily, Ben Shapiro showed up and gave his speech anyway. Students in protest blocked the main entrance to the auditorium and those who wanted to hear Shapiro's speech had to be rerouted through a back entrance. How can there be healthy debate when one side won't even listen to the other?

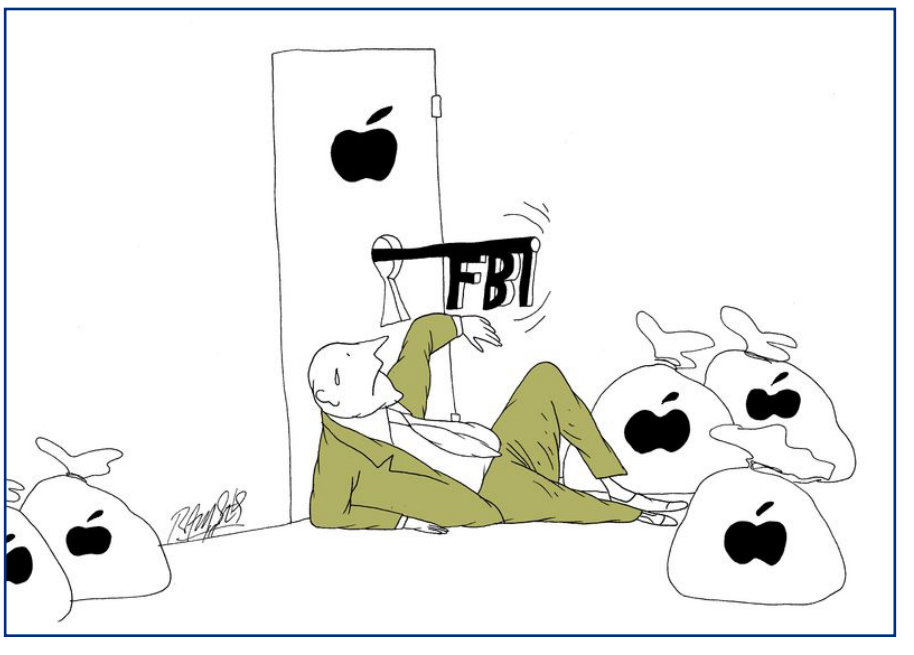
Ari identified several reasons why ideological diversity is important. First was theory of Epistemic Humility. In other words, you must be willing to accept that you do not have all the answers and admitting that you do not know everything means you can always benefit from a different point of view. People are also not automatically right about anything; and most importantly, if we stop engaging opposing viewpoints, we fall into a state of complacency and intellectual laziness and forget why we ever took that position in the first place.

Ari's final story identified the three most important words in the free speech and ideological diversity debate. Ari recounted being an undergraduate student sitting in the back of an early morning class reading the school paper. The opinion section of the university newspaper had a piece on *Lawrence v. Texas*, a Supreme Court case striking down a Texas sodomy law. The article – written by another student named Charlie – took a position Ari strongly disagreed with. Ari penned a letter to the editor that was published in the following issue, Charlie responded, and they went back and fourth for four months each time publicly refuting the other's claims. The exchange became heated and as Ari described it, "Charlie and I were not friends." Senior year, Ari found himself in a constitutional law seminar and for the final paper the professor required each student to peer grade the arguments of classmate. The topic was a case that upheld a ban on same-sex adoption and you might guess who was assigned to peer review his paper – Charlie. Ari asked Charlie to set aside their previous differences by giving him a fair peer review. His final paper however was returned full of criticism. Next to each paragraph was a counter argument complete with Charlie's usual amount of snark, but Ari was surprised when he flipped to final page and saw three words that changed his life. Three words that not only solidified his professional interest in free speech, but demonstrated the importance of hearing and debating opposing views even when those views are extremely different, or downright bigoted. At the bottom of the final page Charlie wrote, "You convinced me."

Apple vs. the FBI

By Lisa Nordbakk
Privacy Editor

Apple and the FBI are entangled in a legal battle over an iPhone. The iPhone in dispute belonged to one of the shooters involved in the December attack that killed 14 and wounded 22 persons in San Bernardino, California. The dispute peaked on Feb. 16 with an order from a federal judge that demanded the tech giant to build custom software to help the FBI break into an iPhone 5c owned by the San Bernardino shooter Syed Rizwan Farook. However, Apple refused and has yet to comply with the order. Neither side is backing down in what is turning into a complicated legal feud…



What does the FBI want from Apple?

In simple terms, the FBI wants Apple to break into the illicit iPhone. Since 2014, with the introduction of iOS 9, Apple's operating system ensures that all iPhones are encrypted by default, so that no one – not even Apple – has access to the encryption keys. Instead, Apple combines users' passwords with unique identifiers stored on the phone to generate encryption keys. Farook's phone is not only equipped with iOS 9, but also the feature that permanently locks the phone after 10 incorrect entries. As if that were not enough, Apple built its software so that only updates with the company's digital signature are accepted. This is not only the "keys to the crown jewels" that make Apple's software legitimate, as professor and cyber security expert Alan Woodward has put it; but it also makes Apple key in the FBI's effort to unlock the secrets of Farook's smartphone: The FBI wants the company to upload a modified iOS that disables the 10-attempt limit and permits electronic entry, allowing the FBI to briskly cycle through the 10,000 possible combinations of Farook's 4-digit passcode.

All Writs Act vs. Freedom of Speech

The FBI is basing its demand on the All Writs Act (AWA). This act gives judges general authority to demand compliance with court orders as long as there are no other legal avenues, the subject of the order is closely connected to the case and it does not impose an undue burden.

Apple not only has rejected the application of the Act by claiming that the order is "far removed" from the case, but also has invoked the right of freedom of speech under the First Amendment. This argument is based on the position that code is a form of speech, and that the court order is compelling Apple to code for the FBI. In this context, whether code is considered speech under the First Amendment is unclear under current precedent and therefore adds to the murkiness of the legally accepted path for this case. Peter Swire, a privacy law expert at Georgia Institute of Technology in Atlanta adds, "Judges sometimes disagree, and if they do, this could quite possibly go up on appeal — maybe all the way to the Supreme Court."

Consumer Rights vs. Government Control

This case carries with it wider implications. The last few years have shown a stark increase in levels of encryption in consumer devices accompanied by an equal increase in law enforcement trying to circumvent encryption to finding "backdoors" into consumer devices. Woodward even goes as far as describing the FBI's legal move as showing private companies that the government has the right to force private entities to unlock phones. Since terrorism is a "very emotive subject" with which public opinion can easily be swayed in favor of the government, Farook's iPhone gives the FBI the optimal opportunity to set precedent. As Swire concludes, "If Apple is forced to open up the San Bernardino phone, then it's hard for it to avoid opening up others' phones when faced with a similar court order."

Office Hours Unwound

Gary G. Neustadter
Professor of Law

Areas of Specialization:
Debtors' and Creditors' Rights, Secured Credit, Sales, Contracts, Consumer Protection, Interviewing and Counseling

Education:
-J.D., University of California, Los Angeles
-B.A., University of California, Los Angeles

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

My wife Patty and I directed the Law School's summer program in Oxford, United Kingdom in July 2015, having previously done so in 2007, 2009, 2011, and 2013. Before arriving in Oxford, we spent time enjoying London, probably our favorite city (in part because we've never been there during winter), and the area near Tintern, Wales, site of Tintern Abbey and a famous Wordsworth poem. Travel tip: When traveling to Tintern, don't set your GPS to "shortest route" unless you relish hair raising ¾ lane roads with blind curves and unseen oncoming speeding locals.

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

I can't pick one, but three come to mind immediately as very valuable: a course in Commercial Transactions (go U.C.C.!!) because the professor, William Warren, was so good - knowledgeable, rigorous, but also a really decent human being; a course in Corporate Taxation, because it made me work very hard to understand complicated tax regulations governing entities and transactions completely foreign to me; Law, Lawyers, and Social Change, an introductory first year course, because it invited us to think seriously about the role lawyers can play in making the world a better place.

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

David Copperfield. Charles Dickens was an extraordinary writer and this was one of his many extraordinary characters. Captain Queeg, from the Caine Mutiny, and Henry Fleming, from the Red Badge of Courage, also come to mind. I have been reading mostly biographies in the last few years, and am currently immersed in Robert Caro's incredibly interesting multi-volume biography of Lyndon Johnson. Bless the Kindle for enticing me to read non-law again.

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

Credit Slips, a blog that focuses on current issues involving credit and bankruptcy, the American Bankruptcy Institute's daily newswire, Contracts and U.C.C. Article 9 listservs, and advance sheets containing or describing decisions of California courts, the Ninth Circuit, and the Supreme Court of the United States.

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

I was fortunate not to have to work during the academic year. My favorite pastime was playing pick-up basketball on the storied Pauley Pavilion court at U.C.L.A. (as U.C.L.A. was in the midst of winning its first ten national basketball championships – go Bruins). I worked in a non-legal job in the summer following my first year of law school, but can't remember what it was. It can't have been my favorite. I worked at a law firm in the summer following my second year of law school. It must have been my favorite.

6. To date, what has been your favorite or most memorable concert experience?

The half dozen or more Neil Diamond concerts that my wife and I have attended over many years, followed closely by a like amount of Moody Blues concerts (her favorite), followed closely by a recent concert at the Mountain Winery by Steve Martin and the Steep Canyon Rangers. Now that's music! We're old.

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

Nothing compares with any soccer game that I can find, most especially one in which the U.S. Women's National Team is playing. My wife would say this is the most predictable answer she could imagine, by a long shot (no pun intended).

8. What Bay Area restaurant do you recommend for those on a law school budget?

Mondo Burrito. Oops, it just went out of business. Panera Bread. Not all that inexpensive, but at least it's healthy (except for the desserts). Hot dogs and a piece of fruit from the concession stand at a SCU women's soccer game. Do you sense an obsession here?

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

Enforcement of prohibitions of class actions that are included in mandatory arbitration clauses that now bind millions of consumers in connection with their purchase of goods, services, and information. The recently created Consumer Financial Protection Bureau (CFPB) may soon put an end to those prohibitions, but a Republican Congress and Republican President might well "Trump" any such action by the CFPB.

10. How do you unwind?

Walks and movies with my wife, playing with my grandchildren, weeding our garden, and see answer to number 7. Reading the Uniform Commercial Code (no, just kidding).

---

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

In the summer of 2012 my family and I travelled to the Algarve region of Portugal for a week. My husband is British so we have the benefit of a bi-continental family. His cousin was getting married in England, so en route, Portugal felt like an obvious detour.

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

NCIP! As a public defender, my NCIP student manual was a staple in my personal library. It was an invaluable reminder of the flaws in the criminal justice system and that all of the players in the system have a duty to make sure justice is served.

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

My current favorite character from film is Rebel Wilson's "Fat Amy (Patricia)" from Pitch Perfect. She doesn't take herself or others too seriously and she's hysterical! Life's too short to not laugh often!

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

My NCIP colleagues are my go-to source! At NCIP we continuously have discussions on current legal precedent, legal battles and movements happening throughout the country. I'm also an avid reader of "The Week's Cases" a public defender circulation of all current court opinions relevant in the criminal sector.

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

In law school I had a parade of awesome legal jobs including a job as a program director at FLY (Fresh Lifelines for Youth). However, my favorite job was dancing at the Jingle Ball 2000 as the in-between act for Pink, 98 Degrees, Brian McKnight, and Mya. My co-dancers were undergrad dance majors at SCU!

6. To date, what has been your favorite or most memorable concert experience?

Aside from answer #5. Hands down… Prince!

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

I love HGTV! Fixer Upper, Property Brothers, Love it or List it…you get the idea :) My favorite crime show is Castle, good balance of suspense and humor.

8. What Bay Area restaurant do you recommend for those on a law school budget?

I lived off of Cocoa Pebbles and Frosted Flakes in law school, not the best diet unless you're a seven-year-old, but, working right off SCU's campus now, those of us at NCIP love the Hungry Hound--I didn't even know the Hound was here when I went to SCU!

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

Advancements in DNA technology has had a significant impact on the criminal justice system. DNA serves the twin aims of solving crimes and ensuring that rightful convictions remain intact and wrongful ones are reversed. The intersection between forensic science and criminal cases has also led to efforts throughout the nation to help bridge the gap between the science and legal worlds to improve the integrity of the criminal justice system.

10. How do you unwind?

Unwind? More like pass out! I'm a working mom (three kids: 7y/o, 3y/o, 2y/o)…on a Friday night I melt into a bag of peanut M & M's and watch anything with cursing!

Melissa Dague O'Connell
Professor of Law

Areas of Specialization:
Criminal Law, Innocence work, DNA (from a lawyer's perspective)

Education:
-J.D., Santa Clara University School of Law
-B.S., Villanova University

Is the First Amendment Safe from Donald Trump?

By Marc J. Randazza
Managing Partner, Randazza Legal Group, PLLC
Blawger, Popehat.com

Republished with permission.

Donald Trump has said a lot of strange things -- some funny, some creepy, but none scarier than what he said on Friday[3/26]: that if he is elected president, he will "open up our libel laws" to make it easier to sue the media and "win lots of money." No matter what you may think about his other policy ideas, if he keeps this promise, we won't be able to effectively express dissent against anything else he might want to do. We can fight any bad policy if we have a robust First Amendment.

Some say that Trump is just being a blowhard, that he doesn't know what he is talking about, and that for all his bluster, there is nothing he could or would do.

I am not so sure. Trump has a history of filing SLAPP suits. SLAPP stands for Strategic Lawsuit Against Public Participation. This describes a lawsuit filed against someone for exercising his or her First Amendment rights -- filed with little chance of success, but with the knowledge that the lawsuit itself is the punishment. After all, if people have to spend hundreds of thousands of dollars to defend themselves because they criticized Donald Trump, they might think better of doing so again in the future.

However, some states, like California and Nevada, have strong anti-SLAPP laws, which dispense with such cases early and force the plaintiff to pay the defendant's attorneys' fees. (Full disclosure: I was instrumental in urging passage of the Nevada Anti-SLAPP law.)

Trump recently got stung with an anti-SLAPP decision, which he probably had in mind when he spoke about "opening up" our libel laws. In fact, he isn't the first big shot to try to make it easier to sue for defamation after having a SLAPP suit blow up in his face.

Therefore, Trump is clearly frustrated with anti-SLAPP laws (which shows that they work) and the landmark defamation case, *New York Times v. Sullivan*.

When people say that Trump can't do anything about defamation law at the federal level, I think they miss the point that there is a lot of support for a federal anti-SLAPP law. I think we need one, and in fact, HR 2304 was one such proposal this last session. If it passes, we could expect President Trump to veto it.

Beyond new federal legislation, defamation law is a matter of state law, leaving little for a president to do about it. To win a defamation case, the plaintiff must show publication of a false statement of fact that damages the plaintiff's reputation. This standard can vary a bit from state to state, but it generally fits that general set of requirements.

Therefore, what could Trump do to "open up" the libel laws? He personally? Nothing legally, but if elected, he could pick Supreme Court justices willing to revisit *New York Times v. Sullivan*, which is in my view the most important case protecting our First Amendment rights. It is the greatest protection we have from government officials or powerful businesses choking the life out of public debate and a free press. Overturning it would change everything we know about freedom of the press.

In a defamation case involving an ordinary citizen suing for defamation, the citizen only needs to show that the defendant knew the statement was false, or failed to exercise "reasonable care" before publishing it. So let's say that a blogger writes an article about a private citizen accusing that person of a crime, based on a false statement by a witness, without following up. That might be a failure to exercise reasonable care, and the blogger might lose the case.

But if the same blogger wrote one about a public figure, like Trump, then Trump has to prove that the blogger did so with "actual malice."

Even some judges and lawyers get this wrong, so don't feel bad if you didn't know what "actual malice" means. It has nothing to do with "malice" at all. It means that the defendant published the statement knowing it was false or with a reckless disregard for the truth.

So if we return to my example, let's say someone wrote a blog post about Donald Trump, accusing him of a crime, but based it just on an anonymous email, without following up -- that might be considered to be "reckless disregard."

Why the different standard depending on the plaintiff?

From *New York Times v. Sullivan*: "(W)e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

How beautiful that language is. It encapsulates what America is all about, the way only Justice William Brennan could.

The court recognized that public figures have access to the media to defend themselves, and it went on to reject any notion that the speaker must prove truth; instead the plaintiff must prove falsity. This is all because the First Amendment needs "breathing space" in order for free speech to survive. And if we impose liability for merely erroneous reports on political conduct, it would reflect the "obsolete doctrine that the governed must not criticize their governors."

So what if Trump appoints one or two Supreme Court judges who are willing to overturn *Sullivan*? Justice Elena Kagan has already voiced skepticism about the extension of *Sullivan* too far into other kinds of libel cases. The only member of the court I think we could count on to be strongly opposed to overturning it is Chief Justice John Roberts.

No matter how flawed it is, our democracy depends upon robust free speech and free press rights. *New York Times v. Sullivan* matters more than anything else. If we lose the right to criticize the government in wide-open and robust debate, we lose an important part of what it means to be free.

SCU Law Drops Rank In U.S. News Report

This is a notable shift in Santa Clara Law's course and graduation requirements. Instead of requiring completion of three bar courses by the final semester, students must now enroll in four bar courses before the end of their second year with the goal of obtaining a C+ or better. Students who fail to obtain four UP points by the end of their final semester will not be eligible to take the bar exam immediately. Such students must defer their graduation and enroll in a specialized bar prep course. This will prevent them from sitting for the bar until the next time it is offered. So, a student without four UP points after his final spring semester will be enrolled in the specialized bar prep course during the summer and will not be permitted to take the July bar, but will have to complete the prep course and wait to sit for the February bar.

Dean Joondeph said the UP points requirement is intended to signal to those who would be in jeopardy of not passing the bar that they should increase their focus on bar courses. He reported that 80% of our students take at least 4 or 5 upper division bar courses anyway, so in theory the UP points requirement should have little impact on the majority of students. According to the dean, the result the school hopes to see from using UP points is that bottom-tier students will be required to shift from trying to boost their GPA by taking non-curved electives, to taking courses that will expose and prepare them for material tested on the bar exam.

Financially, the school's solution thus far has been to cut electives and clinical offerings, such as our tax clinics. Santa Clara Law is designed to run on 1,000 students, so we are missing out on a significant amount of tuition dollars with our current smaller classes. According to Dean Joondeph, there is little flexibility in the budget, as 80% goes to salaries, benefits, and tenure. Even as programs are cut to save money, in order to attract and retain students who are more likely to succeed in law school and on the bar, the law school is offering more scholarships to discount tuition than it ever has.

Impact

Our top GPA law students have reported that they chose Santa Clara Law for its ranking and its scholarship offers. What with our financial situation, ranking, and the decrease in applications, Santa Clara Law is in a bind. If it decreases selectivity to increase tuition dollars, it directly loses points towards its U.S. News ranking. Indirectly, the law school decreases its chance of raising students' bar passage and full-time J.D. employment rates; these also negatively impact the ranking. If the law school increases or maintains selectivity, it will not have the money to fund operations.

Dean Joondeph claims that all of the northern law schools have been hit particularly hard with regard to decreased student applications on account of the employment market. Specifically, he named Hastings, McGeorge, University of San Francisco, and Golden Gate. Hastings, however, has a much higher ranking at #50, so it is likely retaining its applicant pool. McGeorge ranks #144, and USF and Golden Gate did not have published ranks as they fell into the bottom quarter of law schools rated by U.S. News.

Regardless of what is happening to other schools, there are steps we students can take to improve our ranking. First, the bar exam is a threshold requirement. We should pass on the first go. Yes, bar passage percentage forms a very small portion of our law school's ranking; but each individual who passes the bar on the first attempt personally saves a lot of time, money, and stress, and ultimately contributes positively to the law school's ranking as a whole by making herself immediately employable in a full-time J.D.-required position.

Second, we should continue taking externships, clinics, and specialty electives that make us more hirable because they give us real world experience. Even though Santa Clara Law has limited some of its offerings internally, we are still able to seek out experience externally with the judiciary, government, public service organizations, firms, and the many companies that exist in the Bay Area. Practical experience is crucial to full-time J.D. employment post-bar, because while we have a wonderful alumni network, we are in competition with many other law schools in the Bay Area. We have to prove ourselves every step of the way. So, let us continue to work on accruing practical experience, but let us do it with the bar exam first in mind.

Brent Tuttle contributed to this article.

Thomas Jefferson School of Law Sued by Former Student

By Ben Schwartz
Senior Editor

All reputable financial advisors assess their clients' investment opportunities in the form of a cost-benefit analysis. While the models and figures may be complex, the endgame is very simple. Essentially, an investment's reward or payoff must outweigh its risk of failure to reap a return on the investment. As consumers, it is human nature to assess this cost-benefit analysis daily, whether or not we are aware of it at the time of purchase. Should we go out to eat at a more expensive restaurant tonight? Should I buy the cheaper laundry detergent instead of a name brand? Is it finally time to replace the microwave? All of these questions are ultimately determined after weighing the costs and benefits of each decision. Investing in one's education to secure future income is perhaps the most significant evaluation in a person's life as it is both costly and time-consuming. However, what happens when the decision to attend a graduate program, usually at a six-figure ticket price, is based on misleading information?

Former law student Anna Alaburda is a 37-year-old that has filed a lawsuit against her alma mater, Thomas Jefferson School of Law (hereinafter TJSL), alleging that inflated employment data for its graduates led to her unwise decision to spend over $150,000 to attend and earn a J.D. degree from their law program. Alaburda alleges that the misleading post-graduate employment data provided by TJSL lures prospective students to enroll, and ultimately receive zero monetary return on the substantial investment to attend law school. Alaburda's case is not significant in the form of its accusations, as 15 lawsuits in the past several years have been filed to hold various law schools accountable for providing misleading employment statistics. What makes Alaburda's case noteworthy is the fact that it will be the first of its kind to go to trial when Judge Joel Pressman, presiding in the California Superior Court in San Diego, allowed the case to proceed this past Monday. Only one suit of this nature, other than Alaburda's, remains active.

The other cases that failed to proceed to trial was a result of judges presiding in states such as New York, Illinois, and Michigan generally concluding that law students had opted for legal education at their own peril and were sophisticated enough to have known that employment as a lawyer was not guaranteed. Most notably in 2012, Justice Melvin Schweitzer of the New York Supreme Court wrote that the case brought forth by 9 graduates against New York Law School lacked a cause of action for the court to decide and was essentially a case of caveat emptor; let the buyer of a legal education beware. More specifically, Justice Schweitzer stated that college graduates "seriously considering law schools are a sophisticated subset of education consumers, capable of sifting through data and weighing alternatives before making a decision regarding their postcollege options." In this case that was ultimately dismissed, the plaintiffs sought $225 million in damages, a number that supposedly represented the difference between what they argued was inflated tuition and the true value of their degree.

The one remaining lawsuit that is still active, other than Alaburda's, accuses Widener University School of Law, in Delaware, of posting employment data that included "any kind of job, no matter how unrelated to law." A Federal District Court judge denied the case class-action status, and that decision is currently on appeal. In two other cases, one against Golden Gate University School of Law and the other against the University of San Francisco School of Law, judges did not grant law graduates suing the schools class-action certification, which could have led to higher damages awards. The students later dropped their lawsuits. Judge Pressman ruled that Alaburda's claim could not proceed as a class-action representing other graduates, which sought $50 million in damages. Thus, she is pursuing the case on her own behalf and requesting damages of $150,000.

Alaburda filed this claim in 2011, arguing that she would not have enrolled at TJSL had she known the misleading nature of the law school's post-graduate employment statistics. The cost of attending school, about $150,000 in student-loan debt at the time, has since risen to about $170,000 due to interest accruing over time. When Judge Pressman allowed the case to go to trial, he wrote that it was reasonable for someone to assume the employment figures didn't include "any and all" jobs, and a figure that is "meaningless in the context of a legal education." TJSL, like other accused law schools, proclaims that it merely filed the data the American Bar Association's (ABA) accrediting body required.

As a defense to the claim filed against it, TJSL argues that Alaburda never incurred any actual injury because she was offered, and subsequently turned down, a job offer from a law firm with a $60,000 salary shortly after she graduated. Alaburda argues that she received "only one job offer" out of over 150 resumes she sent out, and it was "less favorable than non-law-related jobs that were available." TJSL President and Dean Thomas Guernsey claimed in an issued statement that the school "is whole-heartedly committed to providing our students with the knowledge, skills and tools necessary to excel as law students, pass the bar exam and succeed in their professional careers." However, a finding of deceptive statistics upon discovery, whose intentions were to entice prospective attendees to invest in an over-valued education, could undermine this self-proclaimed commitment to its students.

In response to the recent lull of law graduate hiring in the legal job market, the ABA has modified its reporting requirements in an effort for law schools to become more transparent to prospective students and reveal more precise information about the status of their alumni. Law schools must now report to the ABA details about the jobs graduates are receiving, indicating whether one needs to pass the bar for the position, if having a J.D. is an advantage, and if it's full- or part-time.

However, this desired transparency is in direct competition with law schools' efforts to keep their employment data at the highest possible figure because it is a determinative aspect in national law school rankings. High national law school rankings in turn lead to more prospective students paying money for an education in a university's law program. Fudging the numbers, as Alaburda's attorney plans to argue in the case against TJSL, entices students to choose an education that can result in lifelong debt that cannot be easily discharged even in bankruptcy.

Whether or not Alaburda is granted the monetary relief requested for her claim against TJSL, it is clear that law schools, at the very least, need to be more transparent in the data they provide to prospective students about the legal job market upon graduating from their program. In order to make the most informed decision while consulting a cost-benefit analysis, prospective law students need greater clarity when taking into account key factors such as likelihood of employment after earning a degree.

Intellectual Property Rights for the Decadent

By Stephanie Britt
Associate Managing Editor

The predominant role of law is to help align governance and morality into a cohesive rule of law. However, the presence of morality-based law places detrimental strains on certain intellectual property rights.

In the past, the United States Patent and Trademark Office (USPTO) relied upon the "moral utility" doctrine to deny any "immoral" inventions patent protection for their alleged lack of usefulness. Over the years, a series of U.S. Supreme Court decisions strayed away from the moral utility doctrine and thus rendered it irrelevant. This ideology persisted in the European Patent Office (EPO) where patents may not be granted if the patent challenges the public order or established standards of morality. As a result, patents for embryos or mice susceptible to cancer would be denied for the mere reason that they violate human dignity. In this respect the morality doctrine was uncomplicated because it clearly barred the act of patenting research on human embryos, etc. However, the issue now is that this doctrine can be used to bar copyright on text discussing "prohibited" content.

Consequentially, this creates a grey area in "soft IP," such as trademarks, where morality can be a key factor in determining whether federal intellectual property protection should be granted. Recently, the USPTO completely disregarded *In re Tam*, a 2015 ruling in which the court held that the First Amendment trumps certain restrictions on trademark registrations. Through this ruling the Federal Circuit declared unconstitutional the use of morality-based prohibition of "disparaging" trademarks.

In re Tam led the Department of Justice to concede that Section 2(a) of the Lanham Act, 15 U.S.C. § 1052(a) was unconstitutional. Regardless, the USPTO now refuses to follow the federal ruling against Section 2(a) and continues to rely upon it to examine trademark applications for compliance with the "disparagement" provision. As a result, the moral utility doctrine remains relevant for the USPTO in a way that curbs free speech under the guise of prudence.

As for now, any trademark applications that are suspended due to the disparagement provision of Section 2(a) will remain suspended unless the following occur: "(1) the period to petition for a writ of certiorari (including any extensions) *In re Tam* expires without a petition being filed; (2) a petition for certiorari is denied; or (3) certiorari is granted and the U.S. Supreme Court issues a decision."

When it comes to trademarks, the United States has traditionally been the most restrictive jurisdiction in regards to immoral and scandalous trademarks while other jurisdictions opted for more permissive approaches. For more information see Randazza, Marc J., *Freedom of Expression and Morality Based Impediments to the Enforcement of Intellectual Property Rights* (January 16, 2016). Nevada Law Journal, Vol. 16, No. 1, 2016. Available at SSRN: http://ssrn.com/abstract=2716892

For example the Canadian Trademarks Act, section 9(1)(j), prohibits the registration of any scandalous, obscene, or immoral word or device. The problem, though, is that Canadian courts have yet to define these terms so they look to the United States and British jurisdictions to set a standard for the morality doctrine. This was not an issue when the moral doctrines were perceived to follow similar standards. That is no longer the case; each country has modified its moral legal codes so laws reflect its respective public opinion.

One clear discrepancy in trademarks has to do with the word "fuck." In Australian courts, Section 42 of the Australian Trade Marks Act of 1995 states that a trademark must be rejected if it contains or consists of: (a) scandalous matters, or (b) its use would be contrary to law. However in 2012, Section 42 did not prohibit the mark "Nuckin Futs" that is a clear analogy for "Fucking Nuts." The scandalous matter was permitted in this case because the court recognized that this language is part modern colloquial language. In comparison, the USPTO has never accepted the word "fuck" in any trademark registration because it believes that this type of language may still shock and offend the public medium.

This issue was addressed by the European Union through the "relevant marketplace" standard. The EU decided that trademark restrictions based on morality should not be based on the general public but rather analyzed from the standpoint of the relevant marketplace. In this manner, notions of morality would be catered towards the expected audience to allow the trademarks to receive the appropriate protection without the cumbersome censorship that an umbrella of propriety would place over the whole population. Despite the EU's change in policy, the United States continues to approach trademarks from the standpoint of the general population and refuses to shift toward the relevant marketplace standard.

Such was the deadlock for U.S. policies towards trademarks until the *In re Tam* ruling where the Federal Circuit called for change in its approach to morality-based impediments to intellectual property rights. The Court held at least one part of Section 2(a) was unconstitutional and called for a more permissive approach to morality based IP restrictions. However, *In re Tam* did not directly confront the "immoral and scandalous" clause and only addressed the "disparaging" nature in Section 2(a). While the ruling brings to light the unconstitutionality of Section 2(a), the USPTO still refuses to dig the morality doctrine's grave. Despite the fact that the language of Section 2(a) still clings to life, there is no denying that the censorship ideology supporting it is under scrutiny.

Credit Card EMV Chips Result In Fraud Liability

By Kyle Glass
Serjeant-at-Arms

In the last few years, there has been a major push among American and foreign credit card companies to incorporate EMV chip credit cards into the standard payment system. If you use a credit card, you probably have received a new card that has a small square on the front of the card. Instead of swiping your card, you insert it into the merchant's card reader, wait, and remove your card. The major credit card companies implemented a deadline back in October of 2015 to require all merchants who accept credit cards to use the EMV chip readers instead of the magnetic strip. Even though this transition may seem straightforward, many merchants have had significant difficulty making the necessary changes and now an anti-trust law suit has been filed by several retail merchants against the major credit card companies.

Although the EMV chip reader is just now becoming a part of the modern payment system, the technology and standards governing its use have been around for over two decades. The EMV chip's main benefit over the magnetic strip is an improvement in security. Credit card's magnetic strip first came into use in the 1960s. Broadcasting a magnetic field, the strip uses tiny magnetic variations to indicate the customer's credit card information. While the magnetic field was an effective mechanism to transmit customer information, any technology that was capable of detecting the magnetic field could be used to detect and store the customer's credit card information. Instead, using an electronic chip and a user pin protects a person's credit card information from being cloned.

Despite these added security benefits, the EMV chip's road to common usage in the U.S. has not been smooth. Especially in comparison to other modern regions, such as the European Union, which implemented adoption of the EMV chip back in 2005, U.S. merchants have been very entrenched in the use of the magnetic strip. One reason is that using the EMV chip takes longer than just swiping your credit card. The encryption on the EMV chip requires the merchant's payment terminal to interface with the chip, sometimes taking several minutes or requiring multiple attempts. Although this seems trivial, the speeds at which people have become accustom to transacting make the new chip seem impractical and slow. Merchant's hesitancy to adopt the new system has exposed them to serious liability arising from credit card fraud.

Ordinarily, when a person has fraudulent purchases made on their credit card, they are not liable for the amounts paid. In order to avoid liability, credit card users will have to give prompt notice to the credit card company and indicate which purchases were fraudulent. Since tracking down the fraudster is almost impossible, credit card companies have had to bear the loss for these charges. This incentivizes credit card companies to implement systems or procedures which limit the wrongdoers' ability to be able to successfully commit credit fraud. Arguably, by implementing the new EMV chips, the credit card companies are making an effort to make credit cards more secure. Now, credit card companies have shifted the liability for credit fraud to individual merchants who have not implemented the EMV chip reader technology.

Recently, almost a dozen Florida-based small food and alcohol retailers filed an anti-trust law suit against four of the largest credit card companies, claiming 8 billion dollars in damages. Seeking certification as a class, merchants who failed to implement the new chip readers and receive the appropriate certification are now liable for fraudulent purchases made at their store. If an improper purchase is made and later reported, the retailer will have to charge back the funds to the credit card companies. This could cause a substantial detriment on small retailers that don't have the resources to handle the amount of losses they may face. Instead of being liable for hundreds of dollars, small businesses may be required to return tens of thousands of dollars to the credit card companies. In addition, this will make recognizing revenue more of an issue and may hurt small companies' inventory systems. Furthermore, the plaintiffs claim the implementation process was unilateral and they were never consulted.

Given how large and complicated the modern payment system is, it is unclear how the courts will determine who should bear the costs for fraud. On one hand, there are large credit companies that are forcefully implementing nationwide reform in an effort to increase anti-fraud protections. On the other, there are small retailers who have been slow in implementing change but cannot afford to bear the cost of credit card fraud.

Our Generation's *Roe v. Wade*

By Kerry Duncan
Associate Editor

In early March, the Supreme Court heard arguments on an abortion case for the first time in 20 years in *Whole Women's Health, et al., Petitioners, v. John Hellerstedt, Commissioner, Texas Department of State Health Services, et al.*. The Texas case is centered around the House Bill 2 that passed in 2003, which creates strict building specifications and doctor requirements for abortion clinics. Two major points of the bill are being contested by Whole Women's Health. First, the bill requires hospital building standards on abortion clinics including hallway width, direction of swinging doors, the angle that water flows out of drinking fountains. Second, it requires doctors to have "admitting privileges" at nearby hospitals. Depending upon the hospital, "admitting privileges" can vary. It can be determined based upon how close the doctor lives to the hospital and a minimum number of patients that they admit per year.

The Republican backed bill is a growing trend of additional restrictions on abortion clinics. Five other states have laws that have similar restrictions. This trend can be attributed to a changing of tactics by anti abortion organizations. In a memo focused on "how best to advance the pro-life cause" distributed by James Bopp for the National Right to Committee, there was encouragement to focus on incremental closures of clinics through procedural regulations. A U.S. district court judge said that if the bill was fully implemented, it could drop the existing abortion clinics to eight in Texas.

The main issue at contention in this case is whether the *Casey* decision allows restriction on abortion access to protect patient safety without proving that the new rules have medical merit. In *Casey*, no "undue burden" can be placed, but is not defined.

Challengers of the law say that the requirements in House Bill 2 are mundane and have no benefits to patient safety and health. The law instead is forcing closures of abortion clinics that are reducing the availability of women to get an abortion. Whole Women's Health and supporters also say that the lack

of abortion clinics due to forced closure by the bill will lead to women taking matters into their own hands and trying to end their pregnancies, which is much riskier than if they were in a clinic. Requiring abortion clinics to have surgical requirements is unnecessary as most abortions are done medically with a swallowing of a pill. This is one of the reasons that Whole Women's Health conclude that "admitting privileges" are an unnecessary block that won't help patients. Requiring patients to take the pill in front of the doctor is unnecessary as most of the complications occur when they are at home, making the closeness of the doctor and their "admitting privileges" moot. Their argument continues to say that chemotherapy patients who have similar treatments do not go through this and have a greater likelihood of complications.

Proponents of the law argue that these laws are for the benefit of the patients' health, to create a safe environment for them. In their evidence they cite clinics that have holes in the floor where rats can crawl inside the clinic. They challenge the plaintiffs' claim that the court is to determine the medical benefits of the law. According to the Texas Solicitor General, *Casey* only requires the bill to pass a two pronged test. First, it must survive a "rational basis" review, that the legislation relates logically back its stated purpose. Second, the law must be shown that it would not make it too difficult for women to end their pregnancy. Supporters of the bill argue that they do not have to defend the bill based upon medical merit.

With Justice Scalia's passing, the court is shorthanded and the outcome is unclear. From oral arguments, four justices seem to side with the challengers of the law. Justice Ginsburg questioned the necessity of the law, asking, "what was the problem the legislature was responding to that it needed to improve the facilities for women's health?" In the meantime, Justice Kennedy, often a swing vote, is keeping everyone guessing. Requesting more evidence, Justice Kennedy even suggested sending the case back to the lower courts to get more facts that show a causal link between the legislation and closing of clinics, as well as the impact of fewer clinics on abortion demands. His past rulings only add to the uncertainty of the outcome. He has supported the constitutionality of abortion but also some restrictions as well. The Court is expected to make a final decision by the end of June, if it is not remanded for additional fact finding.

DUI Laws Clouded By A Cannabis Dilemma

By Elena Applebaum
Staff Writer

Will the Golden State take the next step? In 1996, California led the nation in becoming the first state to legalize medical marijuana, and now it may approve its recreational use. America's infant cannabis industry is growing up, and the benefits of its development are met with some challenges. "The State of Legal Marijuana Markets," a report by Arcview Market Research, shows that national sales of adult use grew by 184% last year, reaching $998 million in 2015. Arcview projects that by 2020, the national marijuana sales market will hit $21.8 billion. With cannabis use becoming more common, concerns about the accuracy of DUI testing has sparked investigation. Some states with legal cannabis use blood tests to measure intoxication levels of drivers, much like they do with alcohol, but advocates fear this method leads to wrongful arrests.

Making its debut on California's November 2016 ballot, the heavily endorsed Adult Use of Marijuana Act sets forth an agenda to legalize recreational cannabis for adults over age 21, and provides guidelines for cannabis licenses, taxes, and regulations. As for DUIs, Californians will still be bound by the vehicle code, which says it is "unlawful for a person who is under the influence of any drug to drive a vehicle." *But what does under the influence mean?* Jury instructions say it happens when a person's "physical or mental capabilities" are impaired to such a degree that they no longer have the ability to drive as cautiously as a sober person. So, a per se limit that doesn't stand on fact-based reasoning simply can't hold up.

The affects of marijuana vary from person to person, and researchers are still trying to pin down the best way to measure marijuana intoxication. Some states have zero-tolerance policies for cannabis, while others impose per se limits on drivers. In Washington, for example, a driver is considered intoxicated at 5 nanograms of delta-9-THC per one milliliter of blood. Unlike alcohol, for which studies agree that a driver is impaired at .08% blood content, marijuana impairment is not so easy to determine. In some cases, THC can remain in the urine and blood for several days. In 1993, the U.S. Department of Transportation concluded that it was not possible to predict driving impairment by THC content in blood plasma. When tested, the driving capabilities of cannabis users show both impairment and non-impairment at varying levels. A 2012 study out of the University of Maryland Baltimore concluded that there was no direct correlation between impaired driving and THC concentration. This might be because THC can remain in the blood for several days after it is consumed. In 2009, Volume 104 of "Addiction" by the Society for the Study of Addiction showed that when 25 frequent cannabis users were studied during a seven-day sobriety window, six of them had detectable THC levels in their blood on day seven.

Ben Rice, Bay Area attorney and expert in medical cannabis law, says that the challenge is in coming up with a method that keeps people safe on the highways, while not causing those who are not impaired to be charged and arrested for driving under the influence. "What has been happening for a very long time, pretty successfully, is if law enforcement pulls somebody over, because they are driving badly or for whatever reason, and there is evidence that they are impaired by marijuana or anything else, they use drug recognition experts, folks who are trained in evaluating people and looking for symptoms of impairment. There are simply discrete sorts of implications that a person is under the influence that are not necessarily susceptible to easy observation." Rice explains that although "they can take a urine sample and add that to the mix, to have that kind of basically zero tolerance just doesn't make sense to most people."

When I asked Ben Rice what he thought about per se limits, he said that given what we know about cannabis, it would be terrible to have them. In a more optimistic, reassuring tone, Rice explained, "I don't think we will see that in California, and there is really a lot of effort that has gone into smart rules and methods of bringing cannabis into our reality." The proposed Adult Use of Marijuana Act acknowledges that more research is needed on the subject. It provides that starting in 2018, $3 million will be allocated every year for five years, to researching marijuana impairment in drivers, and adopting protocols for law enforcement.

Clinical Training Must Remain

By Nnennaya Amuchie
Social Justice Editor
Op-Ed

Why do you want to become a lawyer?

Like many law students, I get asked this question a lot. Throughout my personal and my academic life, I've always been a leader. I founded numerous organizations, hosted countless programs, and continuously used my voice to speak up about issues that affect the most vulnerable in our society. Although I did not grow up around a plethora of lawyers, I witnessed lawyers creating change in movies and books. I was taught that lawyers were change makers so I wanted to be a lawyer.

In my personal statement, I concluded with the sentence, "The legal profession will give me the tools needed to utilize this country's higher courts and laws to exhibit change in my community." For the most part, my legal education has failed me for a number of reasons. Law schools like Santa Clara are still sticking to the traditional way of teaching courses; utilizing Socratic method, furthering the myth of objectivity, and most importantly cutting clinical training.

By contrast, one of my most memorable and enriching experiences at Santa Clara Law School was working for the International Human Rights Clinic. Within this clinic, I was able to learn how to problem solve, talk to clients, produce a variety of legal documents, travel to different countries, and make an impact on a large scale. This clinic allowed me to play the role of a lawyer as a law student. While medical, dental, pharmacy, social work, speech therapy, communications and business students boast about their experiential training, law students are forced to read and write for long hours at a time. Writing is an essential part of practicing the law, but real life experiences affect the way people understand the world. Being proximate to the limitations of the law and witnessing the surmountable barriers to justice gives law students an informed perspective that enhances one's writing and reading comprehension skills. These experiences force law students and lawyers to think outside of the textbook and problem solve with real people in real situations.

For many first generation law students, clinics provide an outlet from elitist law school classrooms and reaffirm why so many students come to law school. Oftentimes low income and non-traditional students do not have the finances or the time to receive alternative opportunities for skills training. Clinical training allows for students to maximize their experience in law school and actually get their money's worth. Why struggle to find legal internships and externships that will ultimately determine your career, when one can acquire this training at school or in the classroom?

According to Taking Lawyering Skills Training Seriously, which was published in the UCLA Clinical Law review, clinical education serves two purposes:

1) Client counseling and interaction skills such as interviewing, collecting facts, counseling, drafting pleadings, preparing for trial, and conducting trial matters.

2) Empathy and sensitivity to issues by learning how to use the law to promote justice and effect change.

In my opinion, law schools should be skills training and clinic centered. While professional development classes are mandatory, clinical training that requires proximity to marginalized groups is extremely important. Santa Clara Law has admittedly done a great job of providing clinical training through the Katherine and George Alexander program, Northern California Innocence Program, Low Income Tax Clinic, and International Human Rights Clinic. However, every year clinic participants and directors worry that their job may disappear in the next fiscal year.

Why is that? The fear is well-founded in the idea that clinical education does not matter. When budgets become tight, programs, courses, and professors that directly prepare students to be hands-on socially conscious lawyers are the first to go.

As a JD/MBA student, I have considerable insight into how elitist and traditional the law school remains. As an MBA student, I was able to acquire the soft skills that lawyers are often criticized for lacking. In the classroom and within the legal profession, I have noticed a profound lack of empathy. I have watched lawyers grow impatient. I have witnessed lawyers take on a paternalistic approach to their clients and the issues they represent.

We can do better and we should do better. Santa Clara Law must ensure that all clinics remain and that more clinics are incorporated into our curriculum. At what point do law schools take a stand and break away from traditional ideas of success and promote radical progress and diversification. We keep doing the same thing and expect a different result. When we cling to our elitist law school traditions, we reaffirm the virtues, principles, and practices that have excluded large groups of people from legal education.