THE ADVOCATE

SANTA CLARA UNIVERSITY SCHOOL OF LAW

School of Law Newspaper Since 1970 | Thursday, September 27 | Volume 43 Issue 2

Toss Your Burner:

6th Circuit Allows Police GPS Tracking on Prepaid "Burner" Phones

By Jake McGowan
Associate Editor

If the name Stringer Bell means anything to you, you probably know what a "burner" is. The third season of The Wire saw aspiring drug runner Bernard tasked with purchasing unregistered pre-paid cellphones from various corner stores in Baltimore. The Barksdale crime organization would use and then discard these burners about every two weeks, avoiding any potential wiretaps and making detective Lester Freamon's life much more difficult.

But even police forces outside HBO's jurisdiction struggled with these "burner" issues, at around the same time season three hit the airwaves. Without IDs tied to the mobile phones, agents had a hard time obtaining proper search warrants and had to come up with new ways to track down the bad guys.

But how far could they go before running afoul of the Fourth Amendment? Could they "ping" the phone's GPS chip to track its location in real-time? The Sixth Circuit Court of Appeals considered this question recently in United States v. Skinner, and handed down its controversial decision on August 14th.

In a 2-1 ruling, the Court held that the police's GPS pinging did not violate the Fourth Amendment, even without a search warrant based on probable cause.

Background

In 2006, DEA authorities gained inside knowledge relating to a large-scale drug-trafficking operation led by James Michael West and supplier Philip Apodaca. Defendant Melvin Skinner was a courier in this operation, transporting marijuana from Mexico to Tennessee. Throughout his travels, Skinner used burners purchased by Apodaca to communicate with West; none of whom were aware that the phones contained GPS chips.

At the time, the police only knew Skinner by his alias: Big Foot. Through a series of wiretaps on regular mobile phones registered to West, agents got an idea of the organization's plan, and discovered the phone number of Big Foot's secret phone. By pinging the phone and observing its GPS data, the police were ultimately able to locate Skinner's RV. They brought out drug-sniffing dogs and then entered the motorhome, uncovering over 1,100 pounds of marijuana and two semi-automatic handguns.

Before trial, Skinner sought to suppress the search of the motorhome on Fourth Amendment grounds, since it took place without a warrant. The district court did not buy this argument, and Skinner appealed.

No Fourth Amendment Violation

The Sixth Circuit affirmed, holding that Skinner did not have a reasonable expectation of privacy in the data given off by his burner phones: "If a tool used to transport contraband gives off a signal that can be tracked for location, certainly the police can track the signal. The law cannot be that a criminal is entitled to rely on the expected untrackability of his tools."

That last sentence really sets the tone for the entire decision--leading with a moral obligation and then weaving through precedent to achieve that result.

Toward this end, the Court cited United States v. Knotts, and reasoned that the agents monitoring Skinner did not violate the Fourth Amendment because the information they received by pinging the burner could have been obtained by following Skinner down

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A *Marbury* For Our Times

The Supreme Court's ruling on the Affordable Care Act was a once in a generation decision that will most likely shape the future of the Court's power

By Bradley Joondeph
Professor of Law

In the Supreme Court's historic decision in *FFIB v. Sebelius* (better known as the *Health Care Cases*), Chief Justice Roberts's opinion for the Court held that the Affordable Care Act's minimum essential coverage provision falls within Congress's power to impose a tax, and thus is constitutional. At the same time, he concluded that the mandate exceeded Congress's power to regulate interstate commerce, and that the Act's dramatic expansion of the Medicaid program is unconstitutional insofar as it jeopardizes the states' preexisting Medicaid dollars. In short, the Court upheld the entirety of the ACA, but with some important caveats.

The end product was—not to put too fine a point on it—brilliant. It was a brilliant act of judicial statesmanship that parallels another landmark decision, *Marbury v. Madison*.

Marbury is best known for its defense of judicial review, the authority of the Court to declare acts of Congress (and the executive branch) unconstitutional. But to really understand *Marbury*, one has to dig into its political context.

In February 1803, Chief Justice Marshall knew that the Jefferson administration would have defied the Court's judgment in *Marbury* had the justices ordered Madison to grant Marbury his commission. (Indeed, the administration did not even dignify the proceedings by appearing. Only Marbury's side argued at the Court.) Thus, Marshall reached the Court's holding—that the Jefferson administration had acted unlawfully, and that the Court had the authority to say so—while ultimately concluding that the Court lacked jurisdiction, forcing the justices to dismiss the case. Marshall asserted the Court's authority in a muscular fashion, delineating the constitutional constraints on Congress and the President, but without actually challenging the other branches in a concrete fashion. He set down important constitutional markers while reaching an immediate result that favored the incumbent President, shielding the Court from political danger or the threat of retribution.

Chief Justice John Roberts defied political expectations with his masterful opinion in the Health Care Cases.

Of course, the analogy is imperfect. In the *Health Care Cases*, the danger to the Court was not as grave or immediate as it was in 1803. There was no realistic chance that President Obama would have simply ignored or disobeyed the Court's judgment.

Indeed, a sizable majority of Americans would have supported the conclusion that the individual mandate was unconstitutional, making such a decision relatively safe in short term.

Yet there was a lurking, long-term danger to the Court's legitimacy: the risk of staining itself with the appearance of partisanship. This risk was especially acute given some other recent decisions (most prominently, *Bush v. Gore* and *Citizens United*) and some others headed the Court's way (such as those involving the constitutionality of affirmative action and the Voting Rights Act). A

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DID YOU KNOW...THERE IS FREE COFFEE IN THE LOUNGE????

Dean Erwin explains it all on page 3 in this issue's "Rumor Mill"

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Article submissions to *The Advocate* are **encouraged and welcomed** from all law students, faculty, alumni, and administrators. Please contact the Editor-in-Chief about format requirements and submission dates. Letters to the Editor are encouraged. Letters should not exceed 350 words. All submissions are published at the sole discretion of *The Advocate* and may be edited for length, grammar and clarity.

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CONGRATULATIONS!

For the second year in a row, The Advocate was recognized by the ABA Law Student Division as the nation's best law school newspaper. We would like to offer our utmost congratulations to last year's staff and Editorial Board for their achievement. We aim to make it three years running.

Lastly, a special thanks to our readers. We put this paper out for you. Thank you for reading it.

School, State, Nation and World

STATE

SAN JOSE, CA - Recent figures show San Jose has the highest median household income of the top twenty-five American cities. The U.S. Census Bureau figures show the median income for a household is $77,000, compared to $51,000 nationally, and $59,540 in California. Other top cities include San Francisco ($70,000), Washington D.C. ($63,000), Seattle ($61,000), and San Diego ($61,000)

NATION

Homeowners in several states have been reporting cases of "zombie bees"--bees that have been infected by a parasitic fly that causes them to wander aimlessly and drop dead. Bees normally spend the night in their hive; zombees fly in erratic patterns and are drawn to light like moths. According to the Seattle Times, nearly 80% of the hives in the San Francisco Bay Area are infected. For more information, visit zombeewatch.org.

WORLD

LONDON - Alison Whelan was sentenced to 112 days in prison after unmooring a double-decker ferry and ramming other boats while yelling "I'm Jack Sparrow!" and "I'm a pirate!" The U.K. Telegraph reported Whelan had been drinking "Lambrini" and eating hallucinogenic plants at the time. As she crashed into other ships, she also yelled to police officers, "I believe this is out of your jurisdiction." When asked if she would ever joyride again, Whelan claims she had the maritime of her life.

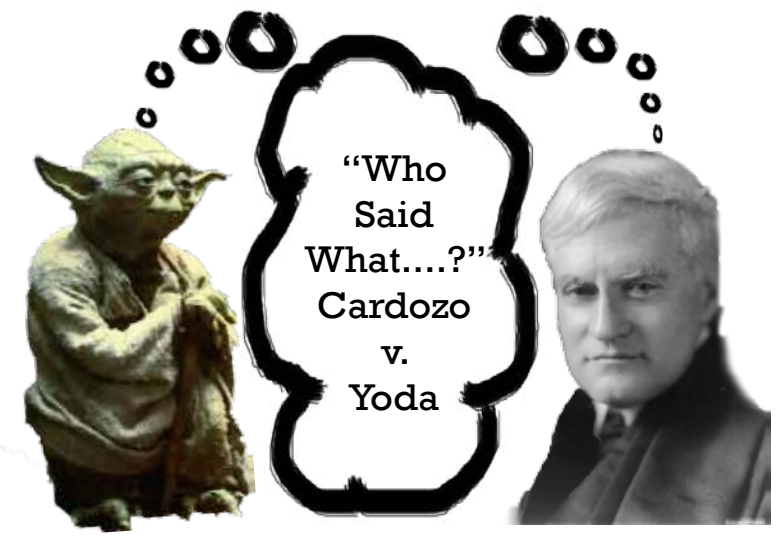
LONDON - The U.K. National Pig Association warned a world shortage of pork and bacon next year is now "unavoidable." Decreased feed crop yields have resulted in smaller and poorly fed sow herds. An article in food magazine Gastronomica reported some commercial hog farmers feeding pigs "spent restaurant grease and rejected ingredients from packaged snack food companies."

UNIVERSE

MARS -The Mars Rover-Curiosity spent several days conducting tests on a Martian rock named "Jake Matijevic." The pyramidal-shaped rock caught the eyes of scientists, who shortly thereafter named it after Curiosity's surface operations system chief engineer, who passed away last month. Curiosity zapped Jake Matijevic and then analyzed the vaporized bits using an Alpha Particle X-Ray Spectrometer. To summarize, NASA found a cool rock, named it after an important recently-deceased scientist, and then proceeded to destroy it with a nuclear-powered laser.

TECHNOLOGY

CALIFORNIA -Recently-signed legislation allows testing of self-driving cars on California roads. Gov. Jerry Brown signed SB 1298 on Tuesday with Google co-founder Sergey Brin at his side. The enactment coincides with recent predictions by the Institute of Electrical and Electronic Engineers that nearly 75% of vehicles on the road in 2040 will be autonomous. When asked who would receive the ticket if an autonomous car ran a red light, Brin responded, "Self-driving cars do not run red lights."



One is a Jedi Master. One shaped American jurisprudence. Both have a certain way with words. Determine who said what can you?

Answers on Page 4 Yoda has for you.

1) "The risk to be perceived defines the duty to be obeyed."
2) "Method is much, technique is much, but inspiration is even more. "
3)" Luminous beings are we, not this crude matter."
4) "Heed must be given to similar considerations of social benefit or detriment in marking the division between reason and oppression."
5) "Named must your fear be before banish it you can."
6) "Always in motion is the future."
7) "For in a wilderness of conflicting counsels, a trail has been blazed."
8) "My own counsel will I keep on who is to be trained."
9) "Danger and disturbing this puzzle is."
10) "Mourn them do not. Miss them do not. Attachment leads to jealously. The shadow of greed, that is."
11) "Danger invites rescue. The cry of distress is the summons to relief."
12) "Fear leads to anger, anger leads to hate; hate leads to suffering."
13) "You must unlearn what you have learned."
14) "Justice is not to be taken by storm"
15) "Truly wonderful the mind of a child is."
16) "There is no instrument yet invented that records with equal certainty the fluctuations of the mind."
17) "Delicate enough and subtle is the inquiry."
18) "Room for doubt there is none."
19) "Always two there are, no more, no less: a master and apprentice."

Students from Santa Clara Law's International Human Rights Clinic file an amicus curiae brief before the Inter-American Court of Human Rights

Prof. Francisco Rivera, Amanda Snyder, Bernadette Valdellon, Sophia Areias, and Clinic Fellow Britton Schwartz

Santa Clara Law International Human Rights Clinic students Amanda Snyder, Bernadette Valdellon, and Sophia Areias filed an amicus curiae brief before the Inter-American Court of Human Rights in a case involving access to in vitro fertilization in Costa Rica. The students co-wrote the brief under the supervision of Clinic Director Francisco J. Rivera Juaristi and Clinic Fellow Britton Schwartz.
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EDITORIAL:

IN ORDER TO GRADUATE, THE SCHOOL SHOULD REQUIRE COMMUNITY SERVICE OR PRO BONO WORK

Santa Clara University is a Jesuit university. While the School of Law cannot bear any religious affiliation, it need not shy away from a key, secular tenant of Jesuit philosophy: Education should empower individuals to be men and women for others.

Lawyers make up approximately 0.36% of the American population. Law students constitute .03% of the population. To be in the legal profession is to be in a position of privilege and of status. As students of the legal system, we are in a similar position. Our privilege does not come from our wealth, as evidenced by the school loans many take out in order to attend law school . But we are the "1%" when it comes to education. Unlike 99.74% of the U.S. population, we have insight into and knowledge of the legal infrastructures that govern daily American life.

In belonging to this privileged population, we have a responsibility to give back. The School of Law should incorporate community service or pro bono work into graduation requirements. As a proposal, law students should be required to have thirty hours of community service or the equivalent pro bono work or enroll in a clinic.

The argument for mandatory service requirements has been floated before. Ultimately, the faculty and administration felt that SCU Law students have sufficient challenges in their curriculum. However, the School of Law's mantra is "Lawyers who Lead." Our challenges should not be defined by the amount class work we have, but the measured impact of how we better our community. If we are to be "Lawyers Who Lead," why not have "servant leadership" be among the first concepts espoused and instilled in SCU law students?

Agree? Disagree? Send your thoughts on a community service requirement to The Advocate at scuadvocate@gmail.com

A Designated Driver Service would ensure that this does not happen to SCU Law students.

Rumor Mill with Dean Erwin

By Susan Erwin
Senior Assistant Dean

Welcome to the new school year and the first Rumor Mill column of the year. Thanks to The Advocate for allowing me the opportunity to answer your questions and share information.

"How are the bar preparation companies chosen to come to the school and are any sponsored by the school?"

Answer from the amazing folks at APD: We strongly encourage students to research the different bar providers. We have information on the providers in the APD Resource Room. We also invite all Bar Prep Providers and tutors to our fall and spring Bar Fairs. It is up the discretion of the providers and tutors if they want to attend. Academic & Professional Development does not endorse or warrant any product or services of any Bar Prep providers.

We have had student organizations sponsor events, where Providers were invited to present on-campus. the programs must be primarily substantive such as teaching skills, practices, or substantive law usable by students. We do not allow Providers to host hour-long infomercials on their products and services. All presentations, sponsored by student groups, must seek approval with Academic & Professional Development at least two weeks prior to the scheduled events. If students have questions regarding our Bar Policy, they may contact us at apd@scu.edu.

"Why isn't there one food facility open for law students past 5:30 p.m. on campus before undergrads begin? Problematic since most classes are late on the law school schedule."

Great question and a great opportunity for me to brag on the SBA! We had this very discussion in our most recent Council of Leaders and SBA meeting. In the past, we have coaxed Bon Appetit into trying late hours at various venues and we even had a food cart behind Bannan one semester. The problem has always been that at the end of each trial period, the amount of food purchased didn't justify the expense of staying open for law students (not to mention the food that was wasted).

We continue to try to craft new solutions. The SBA is sponsoring the latest attempt – Bon Appetit will provide catering options for $5 a person and many other low cost options for events AND will start providing free coffee in the student lounge! In return, they need a certain volume of business from clubs and law school departments (they are hoping for 5 – 10 orders per week). Advantages to clubs are the new lower cost menu, the convenience of on-campus delivery and the ability to use budget transfers to pay for everything. The trial period starts this week and we are hoping it works out well for everyone. Bon Appetit is also willing to discuss extended hours and other options during the summer. Look for a survey coming soon from Alisa regarding food service on campus. As Bob Lubecky, the GM for SCU Bon Appetit, said "If you all want to eat, we will feed you!"

"Why is graduation a week later this year?" "Why do exams for graduates go into the third week? They conflict with students doing live Barbri at Stanford!"

This is a question we get frequently. Our Academic Calendar is set and approved by the full faculty for five years at a time. For Spring 2013, class start on January 14th. We can't start the week prior, because many of our faculty will be at the Association of American Law Schools meeting that week. We have a number of days off in Spring (MLK day, Pres day, Spring Break, Good Friday). Counting out fourteen class weeks (because we are on semesters, not quarters like some other schools) brings the last day of classes to May 1. We have to give you a couple of days for a reading period, so that puts exams starting on Monday, May 6. We usually schedule 2.5 weeks for exams in Spring, which extends the exam period through May 22. (Because of ExamSoft and the number of rooms we have available with reliable power and internet access, we are limited to how many exams we can give at a time. We also try to prevent conflicting exams.) We could get rid of Spring Break and finish a week sooner . . . . :)

For the majority of our graduates, who are taking bar prep programs on campus, this schedule does not present a problem. For the handful of you that are attending the live Barbri sessions at Stanford, they start a week earlier – which may conflict with exams and with graduation events. We are finishing up the Spring schedule now and adding exams. We will try to keep the week of graduation light on exams. Make sure to check the exam dates before registering for classes in Spring.

Heard any rumors lately? Let me know –
Susan Erwin
Senior Assistant Dean for Student Services
serwin@scu.edu

DRIVING SAFE:
Why a DD Service Makes Sense

By Kirstin Glass
Staff Writer

In 2010, there were 1,768 alcohol related driving deaths and approximately 24,343 traffic-related injuries involving alcohol in California. The California Alcohol and Drug Program further noted that there were 195,879 DUI arrests.

Applicants to the California Bar must pass the Moral Character and Fitness review before they can be sworn in to practice law in California. The Moral Character Determination Application requires information ranging from your addresses for the last ten years to your past criminal record. A DUI on your record can delay the review of your application for a year or result in the denial of your application to the California Bar altogether.

With that in mind, Santa Clara Law students have attempted to establish a Designated Driver Program to arrange transportation for law students after bar reviews.

Last year the Designated Driver Program experienced a revival with Alisa Guglielmo encouraging the class representatives. After talks with the SCU undergraduates and SCU Law risk management, the Program decided that the best way to help students and protect the University would be to negotiate lower fares with local cab companies for SCU law students.

Unfortunately, these conversations with five local cab companies have not produced results. SCU Law lacks negotiating power to obtain reduced rated because it represents a very small number of students and potential business.

Without a functioning Designated Driver Program, the Student Bar Association is left with its ordinary remedies to the problem of drinking and driving: warn and provide information. SBA Vice President Chris Glass has provided the contact information for several local cab companies on every groupwise email and facebook post advertising a law school event but in the end, the choice is yours. You have already spent thousands of dollars on a legal education; pay a few dollars more to protect your investment and get a cab.

Apple® v. SAMSUNG

Where Do $1.05 Billion Verdicts Come From?

By Amy Askin
Co-Editor-In-Chief

In what will be remembered as the intellectual property equivalent of Janet Jackson's wardrobe malfunction, the Apple v. Samsung outcome has sent shockwaves through the mobile industry. Last month's jury verdict ordered Samsung to pay Apple more than $1 billion in damages for patent infringements, causing industry spectators to reel over the judgment's repercussions. Setting aside speculation as to the future woes of smartphones, here is a timeline of events leading up to the litigation and why Apple and Samsung just cannot seem to get along.

April 2011: Apple filed the original lawsuit against Samsung in the U.S. District Court of Northern California. The suit alleged that the South Korean firm's Android Galaxy cellphones and tablets violated Apple's patents and trademarks by copying the look, design, packaging, and user interface of the Apple iPhone 3GS.

July 2011: Samsung counter-sued on the grounds that Apple's iPhone 4, iPhone 4S and iPad 2 infringed upon Samsung's 3G patents.

August 2011: The parties began to file international suits, eventually amounting to approximately fifty lawsuits pending in ten countries.

April 2012: U.S. District Judge Lucy Koh, who presided over a number of the Apple v. Samsung cases, ordered the two sides to engage in court-monitored settlement talks.

May 2012: Apple was given the go-ahead to seek a sales injunction on Samsung's Galaxy Tab 10.1 to ban the product from U.S. stores. Scheduled just one week after the sales injunction ruling, the settlement talks unsurprisingly failed and a lengthy and costly trial became the final option.

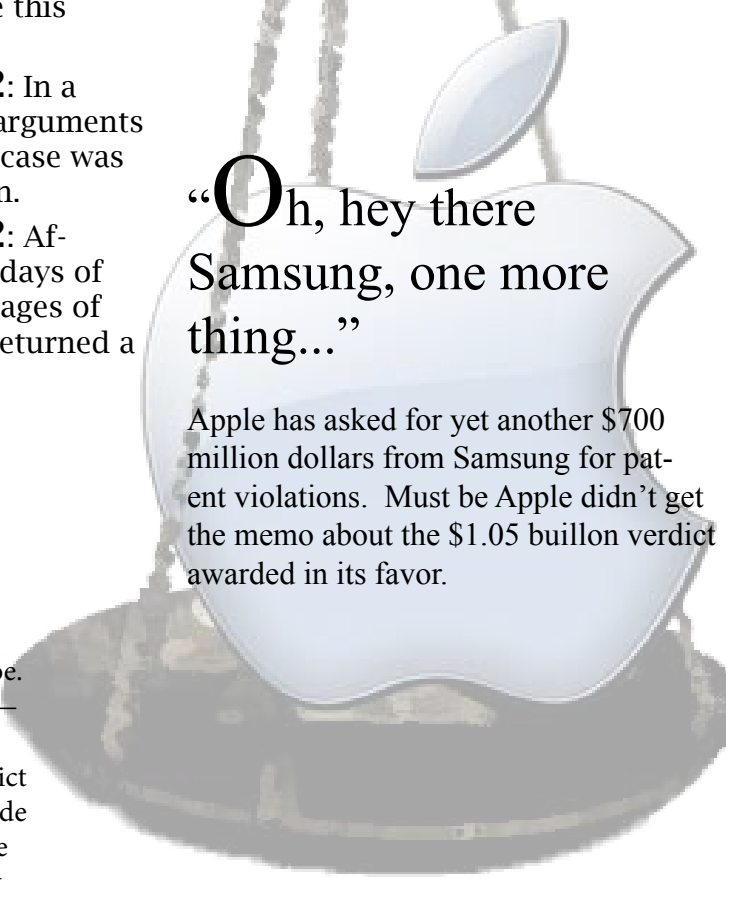
July 2012: The trial kicked off in San Jose with the nine individuals selected as jurors from a pool of seventy-four Santa Clara County residents. Apple originally sought more than $2.5 billion in financial damages. Court speculators estimated that due to the complexity of the case, the trial could potentially run until May 2013.

July 2012-August 2012: Courtroom shenanigans ensued. While the trial was underway, Samsung released documents previously excluded from court to the press. In response, Apple's legal team planned to file an "emergency motion for sanctions" as well as "other relief that may be appropriate." Not amused by Samsung's media stunt or Apple's subsequent threat, Judge Koh stated, "I will not let any theatrics or sideshows distract us from what we're here to do, which is to fairly and timely decide this case." Lawyered.

August 22, 2012: In a shocking turn, closing arguments were delivered and the case was sent to jury deliberation.

August 24, 2012: After only two and a half days of deliberation (and 109 pages of instructions), the jury returned a verdict in favor Apple. The jury found that Samsung infringed upon a number of Apple's design and utility patents, willfully infringed on five of six patents, and that Samsung "diluted" Apple's registered trade dresses on several iPhone products. As to Samsung's counterclaim, the jury found no Apple infringement on Samsung patents.

While this battle ended in a decisive victory for Apple, the war is far from over. For now, we can sit back and enjoy the wonders of the new iPhone 5 and Samsung Galaxy S III until the next clash of the technological titans. The wait will likely not be long.



"Oh, hey there Samsung, one more thing..."

Apple has asked for yet another $700 million dollars from Samsung for patent violations. Must be Apple didn't get the memo about the $1.05 buillon verdict awarded in its favor.

Is There Inherit Bias Toward Apple In CA?

By Ava Miller
For The Adocate

On August 24th, a California jury awarded Apple $1.05 billion upon the court's ruling that Samsung violated a number of Apple's patents. But did Samsung ever stand a chance at a fair trial in the heart of Silicon Valley?

Apple is the largest technology company in the world by revenue and profit–more than Google and Microsoft combined. Due to the debt-ceiling crisis in 2011, Apple's financial reserves were even greater than those of the U.S. government for a brief period. The agricultural industry in California accounts for roughly 2% of the state's gross domestic product. Apple makes up 4%, which means that it is more important to the Californian economy than any other single company. A recent Forbes article declared that Apple's iPhone 5 launch could add 0.5% to US GDP on an annualized basis.

But aside from the economic influence Apple wields in the Golden State, it also enjoys a reputation as a home grown Californian innovator. Apple is headquartered in Cupertino, not far from the San Jose courtroom in which the case was heard and the jurors were selected from this localised area. Although jurors are selected to be objective, how objective can jurors from the Valley really be?

Although Samsung is a worldwide brand making significant inroads in the smartphone industry, it has not quite achieved the quasi cult-like status of Apple. Could an average person off the street even name its CEO? (It's Kwon Oh Hyun for those who are interested). Conversely, the spectre of Steve Jobs still looms heavily and the dominance of the Apple brand in the local area is clear to see. And with such localized internal predisposition prevalent in the Valley, it is not difficult to imagine that such bias could seep through to a jury considering whether California's golden goose had been wronged by a foreign foe. Samsung was most definitely the proverbial underdog—the David to Goliath in this epic patent dispute.

The turnaround time between the trial and the verdict has also evoked suspicion that the jury had already made up its mind. The jury deliberated for a mere twenty one hours and thirty seven minutes following an extremely complex three-week trial. One juror even professed that he had wanted to "send a message". If he had taken a closer looks at the full jury instructions (all 109 pages) he would have read that damages are not supposed to punish, merely to compensate for losses. Perhaps his unconscious (or conscious!) loyalty to Apple and its native reputation for innovation was such that it engendered a deep emotional reaction, somewhat of a knee jerk.

Interestingly, on the same day the California court handed down its decision, a South Korean court issued a split decision widely seen as more favourable to Samsung. A week later, a Japanese court ruled against Apple outright and ordered it to pay Samsung's legal costs. It should be noted that these foreign decisions were decided not by juries, but by judges. If the U.S. decision holds up on appeal, it will stand as the largest patent verdict of all time. Furthermore, since Samsung's patent infringement was found to be wilful in many cases, the $1.05 billion damages figure might be tripled.

Santa Clara's own Professor of Law, Brian Love, has covered the case extensively. According to Professor Love, "A lot of the evidence that's presented will be over the head of the jury pool. They'll tend to make more of a decision based on emotion and storytelling". It seems that in this case, Apple didn't just have the best story, but also the upper hand when it came to engaging emotionally with the jury.

"Answers • I have."

1) Cardozo
2) Cardozo
3) Yoda
4) Cardozo
5) Yoda
6) Yoda
7) Cardozo
8) Yoda
9) Yoda
10) Yoda
11) Cardozo
12) Yoda
13) Yoda
14) Cardozo
15) Yoda
16) Cardozo
17) Cardozo
18) Cardozo
19) Yoda

ON THE BRINK, DELAY OF GAME

By Michael Bedolla
Staff Writer

The middle of September is normally a pretty good time for me. Sure, it can be a bit annoying with having to start those pesky outlines and practice exams, but at least I have the upcoming NHL season - which normally begins in early October - to keep up my spirit. The electric jolt when the Sharks score a goal sends me leaping out of my seat - regardless of whether I'm watching live at HP Pavilion or just listening to the game in the silent confines of Heafey. Alas, it appears that the Sharks - along with the other twenty nine teams of the NHL - may not be lacing up their skates for some time.

The NHL owners and the players' union have been at war over a new collective bargaining agreement (CBA) for the entire summer. The CBA will determine several issues surrounding the future of hockey (rule changes, drug testing policy, and player discipline, to name a few), but most crucially, it will divide up the billions of dollars in league revenue between the owners and the players. With last season's NHL record $3.3 billion dollars to divide up, both sides are hard at work to secure the largest portion of the money that they can grab.w Fans of the NFL or NBA went through this painful process last year. The owners cry that too much of their revenue is devoted to player salaries, that too many teams are struggling to make a profit, and therefore, the players should rightfully reduce their share to make the league a successful (read: profitable) one. The players do not accept the league's grim financial picture, arguing that the financial problems are the result of wealthy teams unwilling to share the fruits of success with the poorer ones, and resist any attempts to "correct" the flaws that the owners are themselves responsible for. And just like the NFL and NBA, the NHL owners warned throughout negotiations that they would lockout the players if a new CBA was not in place before the beginning of the season.

Joe Louis Arena, home of the Detroit Red Wings, and many other rinks around North America will be empty unless a compromise can be reached. (Source: Toledo Blade)

For the NHL, the issue is more than just dividing up the money, but defining exactly what money is fair-game versus off-limits to division. What income should be included and what expenses should be excluded when it comes to dividing up who gets what is at the heart of the CBA impasse. The owners are not simply looking to renegotiate a smaller portion of revenue for the players, but are looking to reduce the whole from which that portion is calculated.

The final hurdle in the negotiations is that there is no love lost between the two sides when they sit at the negotiating table. The players, having surrendered in the previous round of CBA negotiations seven years ago, are better organized and more unified in their resolve to forge an agreement that is more compromise than capitulation. The owners, meanwhile, continue to state that playing hockey under a broken system is worse than not playing hockey at all, and are showing no signs of making any meaningful concessions. To media observers and fans, the players are seeking a degree of retribution for their humiliating defeat seven years ago, when the entire 2004-05 NHL season was cancelled, while the owners are hell-bent on dictating terms at whatever the cost.

This brings me to my current sense of despair. As of midnight on September 15th, the NHL initiated yet another lockout, its fourth work stoppage within the past 20 years, postponing any professional hockey indefinitely. The two sides appear so entrenched in their respective positions that hockey observers fear the 2012-13 season is now in serious jeopardy. A second cancelled season within an eight-year span would destroy whatever goodwill the league has earned and push hockey even further from America's sports consciousness. With neither side giving indications that a deal will be reached anytime soon, I am faced with the near-certainty of spending plenty of quiet nights in Heafey without my beloved Sharks to motivate me.

49ers PREVIEW

By Amanda Demetrus
Associate Editor

While the distain for Kyle Williams and the sting of just missing the opportunity to play in the Superbowl lingers from last season, there are plenty of improvements that 49er's fans can look forward to in the 2012 season. Several offensive improvements should increase the efficacy of the passing game and beefing up the roster with playmakers should eradicate the Niner's red-zone offensive woes. While the Niner's defense never needed much improvement, minimal changes should help sustain the game-winning defense in the upcoming season.

Offense

One of the Niner's biggest objectives is attempting to get Alex Smith performing at the level he was expected to perform when drafted as the number one pick in 2005. Smith is notorious for getting nervous when rushers get too close to him in the pocket. The longer he holds the ball, the less effective he seems to be. This year, Harbaugh has simplified the offensive plays to accommodate Smith's less instinctual passing game. The simplified plays tolerate Smith releasing the ball as soon as possible instead of analyzing the field and delivering the pass after several reads.

The 2012 season may mark the return of the mythical 49er's red-zone offense. After finishing the season ranked nearly last in the league in red-zone offense, San Francisco has acquired some key playmakers to help score touchdowns. One key player new to the Niners this season is Mario Manningham who played for last year's Superbowl winners, the New York Giants. Additionally, after a one-season retirement, the former Viking, Randy Moss has signed with the Niners.

Although many consider Moss a "shot in the dark," his performance in the first few games of this season has shown that he will be a huge asset to the Niner's offense. The Niners drafted LaMicheal James, a Heisman trophy finalist from University of Oregon. Niners also drafted wide receiver A.J. Jenkins out of University of Illinois. Unfortunately, both Jenkins and James sustained injuries early in the preseason, but their return is highly anticipated. The roster now supports existing offensive stars like Michael Crabtree, Frank Gore, Vernon Davis, which should make a discernable difference in the upcoming season.

Defense

The Niner's defense never truly needed any improvements as they finished with one of the best turnover ratios in the league. There were not too many changes to the already complex and powerful defense other than a few talent changes like replacing starting outside linebacker Parys Haralson with first-round pass-rusher Aldon Smith. Patrick Willis and NaVorro Bowman remain part of the powerhouse defense and are expected to continue making awe-inspiring defensive plays.

Is this the duo to get it done for the Niners this season?

Predictions

With these changes, the Niners should have an exciting season. There remain some problems that will keep them from reclaiming the Lombardi trophy. As in years past, injuries should be a major concern for San Francisco. Although their first string is full of powerhouse players, their second string lacks the same depth. With major players already on the injured list, like wide receiver Ted Ginn, the Niners will suffer significant setbacks if the list continues to grow.

As seen in week three's game against the Vikings, interceptions pose a more serious threat this season since Smith's passing game is expected to see more playing time. San Francisco, known more for their effective running game, will have difficulty matching last season's mere five interceptions in 445 attempts, even with the improvements to Smith's passing game. We are already seeing evidence of this as week three marks the end of Smith's franchise record of 249 pass interception-free streak. Additionally, keeping Smith generally focused is an ongoing challenge facing the 49ers that will continue into the current season.

Finally, the Niners are facing a more difficult schedule than last season. Starting the season off against two playoff teams, including the season opener at Lambeau, is confirmation the Niners are facing greater difficulty in 2012.

The San Francsico 49er's look like they are in for a promising season. They may not finish with a 13-3 record like last year but if they keep injuries low, they can finish first in the NFC West with likely success in the post season.

Historic Decision Affects More than Health Care

"**Marbury**"
From Front Page

steady string of 5-4 decisions on a range of controversial issues, cleaving perfectly along partisan lines, would jeopardize the Court's diffuse support—support that turns on the public's faith that the Court stands above partisan politics, that it renders its decisions based on legal and constitutional principles.

The Chief Justice's opinion can rightly claim the mantle of bipartisanship and judicial modesty, and in the highest of high-profile cases. His paeans to the limited role of the judiciary in our constitutional framework, which he articulated eloquently during his Senate confirmation hearings, now seem considerably more sincere than they did following *Citizens United*.

This lifting of the Court above the polarized, partisan fray is apt to prove valuable to the Court's long-term institutional standing. The decision will largely immunize the Court, at least for some time, from Democratic attacks that the five Republican appointees are "conservative judicial activists." If the Court declares that all governmental affirmative action programs violate the Equal Protection Clause this coming spring in *Fisher v. University of Texas*, for instance, the predictable accusations of partisanship are less likely to stick. The Health Care Cases will stand as a highly salient counter-example.

At the same time, the Chief Justice established some important, conservative doctrinal beachheads. He reaffirmed or established (depending on your perspective) some potentially important limits on Congress's powers under the Commerce Clause, the Necessary and Proper Clause, and the General Welfare Clause. Congress cannot use the Commerce Clause to regulate commerce in a manner that *compels* people into commerce; it can only regulate existing commerce. Further, such regulation, even if "necessary," can never be "proper," no matter its importance to the proper functioning of a broader regulatory scheme. And the General Welfare Clause does not permit Congress to use the states' dependence on an existing conditional spending program as a means to forcing them to participate in a separate program. Rather, states must be given the choice to accept or deny the funds associated only with the new program—at least when the existing program is similar in size to Medicaid.

We can debate the significance of these limits. And whatever we think today, what really matters is how future majorities interpret the opinion. In all events, the Chief Justice stated clearly that the Obama administration's principal defense of the Act—as a regulation of interstate commerce—amounted to a regulatory overreach. He embraced the essence of the conservative constitutional argument—that Congress cannot use its commerce power to regulate "inactivity." And in wrapping the Court in bipartisanship, he made it more difficult for liberals to attack the Court going forward.

Further, it is important to keep in mind a critical difference between the decision and some of the other controversial matters the Court has decided or will decide soon. The *Health Care Cases* merely held that the ACA is *permissible*; a Republican Congress and President could repeal the Act *in toto* in January. By contrast, *Citizens United*—or decisions declaring affirmative action or Section 5 of the Voting Rights Act unconstitutional—could only be undone via a constitutional amendment or subsequent overruling. The policy result of the ACA decision is more ephemeral.

Chief Justice John Marshall revolutionized the Court with the Marbury *opinion. Will Chief Justice Roberts do the same?*

No doubt, liberals should be excited by the Court's decision. The bottom line is that the most significant piece of social welfare legislation since the 1960s survived the exacting review of a conservative Supreme Court. In an age of growing economic inequality, the Court has upheld the biggest effort to redistribute income since the end of the Great Society. And the ACA's guarantee of access to affordable health coverage for all Americans—regardless of their income, health, or job status—may well become a basic element of the Nation's social contract. As such, the ACA may soon become an entrenched part of our constitutional firmament—something akin to Social Security, Medicare, or the Civil Rights Act of 1964—with which all viable political movements (and constitutional theories) will have to come to terms.

But no one should forget that, in the long run, it was the views of the Federalists—and Chief Justice Marshall in particular—that shaped the future direction of the Nation. By cultivating the Supreme Court's institutional legitimacy, Marshall was able to pursue his nationalist visions, even while suffering transitory policy defeats to the Jeffersonians. Marshall saw that, as the Court's prestige grew, so, too, did the influence of his Court over the growing Nation.

The supporters of the ACA won big on June 28. But so did the Court—and, by extension, the Chief Justice. It was a stroke of judicial genius. A *Marbury* for our time.

The Advocate sincerely thanks Professor Joondeph for this contribution, which has been republished with his permission.

Hello SCOTUS fans! The October Term 2012 officially begins on Monday, October 1, and the court is set to hear some major cases. Here is sneak peek into what is on the docket:

1. *Kiobel v. Royal Dutch Petroleum Co.* – In this landmark case, the Court is slated to resolve whether corporations could be the held liable under the Alien Tort Statute, and whether that statute permits U.S. Courts to hear lawsuits based on violations of international law committed entirely on foreign soil.

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2. *Fisher v. Univ. of Texas at Austin* – The Court will determine whether the Equal Protection Clause of the Fourteenth Amendment permits the University of Texas at Austin to use race as a factor for consideration in undergraduate admissions decisions.

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3. *Florida v. Jardines* – The Court will decide whether a police officer may bring a dog to the front door of a house to smell for drugs without a search warrant. The case will be heard with another dog-sniffing case, *Florida v. Harris.*

What's the Matter with Kansas, the Youth, and Romney?

By Tom Skinner
Staff Writer

In the 2004 book "What's the Matter with Kansas," journalist Thomas Frank asked why rural, lower income Americans vote for Republicans when it is clearly in their best economic interest to vote for Democrats. He theorizes that these voters identify with the GOP on social issues even while GOP candidates promote economic policies that make them worse off.

For my money, the most bizarre phenomenon in American politics is that so many voters do not vote in their economic interests. Karl Marx argued that humans interpret reality through the prism of class consciousness. By and large, Americans do not.

If Marx were alive today, he would be just as puzzled as Frank. Similarly, he would find Mitt Romney's class-conscious worldview to be synergistic with his own. In a recently leaked hidden video speaking to wealthy donors, Romney complains that the 47% of the electorate who don't pay income taxes will vote for Obama, so he won't focus on these Americans who "are dependent upon government, who believe they are victims, who believe the government has a responsibility to take care of them, who believe they are entitled to health care, to food, to housing, to you name it."

Mitt Romney would be more respectable, though perhaps more unpopular as well, if he delivered similar but better phrased messages on the record. Politicians do and say things to get elected, that much is obvious; what distinguishes Romney is his craven tendency to bend and remold himself to befit the times whenever politically expedient. Jon Huntsman aptly described Romney as a "perfectly lubricated weather vane."

Take Medicare, one of the most important issues of the election. Medicare is the second largest entitlement program and it is truly a fiscal mess. Seniors who turn 65 today and enroll in Medicare pay less than a third of the cost over the working lifetime of the benefits they will eventually receive. While not as large a program as Social Security, Medicare's funding is far more tenuous and its projected growth rate is steeper. Budget experts on both sides of the political aisle agree that health care costs, particularly Medicare, will be the biggest

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See "**Election**"

Political Rhetoric Soars Over Fiscal Cliff

By Michael Branson
Managing Editor

While four debates and an election stand in its way, 2013 is quickly approaching, and with it comes the "fiscal cliff." A direct product of failed negotiations over the debt ceiling, the fiscal cliff aims to force deficit reduction in areas sacrosanct to liberals and conservatives.

When Congress passed the Budget Control Act of 2011, it formed a bipartisan "Supercommittee" to negotiate $1.2 trillion dollars in deficit reduction measures. To no one's surprise, the committee failed to compromise and has since abandoned further negotiation efforts. But this time, Congress's inability to compromise may have far-reaching consequences. As an "incentive" for negotiations, the Budget Control Act specified consequences for not drafting reductions. If Congress was forced to raise the debt ceiling because of failed negotiations, dramatic cuts, or "sequestrations," would apply to nearly every facet of the budget, starting in January 2013.

Congress has been in a donnybrook over how to avoid the sequestration. Both Democrats and Republicans fear the cuts will send the nation spiraling back into a recession and threaten national security. The Congressional Budget Office recently announced the sequestrations would weaken the economy, lower taxable incomes, and raise unemployment. If the sequestrations cause the economy to shrink, it could actually increase the debt-to-GDP to ratio, similar to the consequences of austerity measures in Europe.

But what exactly is included in the sequestration that could cause this meltdown? First, the Defense budget is scheduled to be slashed by $55 billion. More specifically, the reductions are to projected levels of discretionary spending--a reduction not on the current budget, but on how much the defense budget is scheduled to increase. Defense spending will remain at $500 billion (in

real terms) for the next decade. For context, adjusted projected defense spending was $312 billion in 2000, and peaked at $536 billion in 2006.

The fiscal cliff would also spell the end of several tax savings benefiting the wealthiest Americans. Capital-gains tax rates—the amount paid on profits from stocks, bonds, and real estate—would increase from 15% to 20%. Dividend tax rates—tax rates on corporate profits paid out to its shareholders—would rise from 15% to the income tax rate. The estate tax—the tax imposed on the transfer of taxable estate of deceased persons—would change from a $5 million exemption and a 35% tax rate to a $1 million exemption and a 55% tax rate.

But the pain of the cliff is not limited to defense contractors and the 1%. Many of the cuts are rollbacks of recent tax holidays for those who have struggled the most through the economic recession. President Obama's payroll tax holiday would terminate, ending 2% cuts to Social Security taxes on the first $110,000 in wages—up to $2,200. The $1000 child tax deduction would be halved. Unemployment benefits, currently set at a 99-week limit, would revert to a 26-week limit, denying millions of struggling Americans needed benefits.

> "Many of these cuts could place significant added burdens on states to continue providing essential services. For already-foundering California, this encumbrance could be devastating."

Finally, all discretionary government programs will see an across-the-board 8% reduction. This includes education, law enforcement, low-income subsidies, infrastructure, homeland security, research and development, and many other areas. Many of these cuts could place significant added burdens on states to continue providing essential services. For already-foundering California, this encumbrance could be devastating.

Arguably, some of these cuts are necessary, even desirable. Many Americans are convinced the government budget is massively bloated. For those who truly believe America's number one issue is the debt crisis, the fiscal cliff is a dream. Ron Paul fanatics rejoice. But most "deficit-hawks" like Paul Ryan and other house Republican are being forced to make a decision between deficit reduction and short-term job growth. Moreover, the across-the-board nature of the cuts makes everyone unhappy. For Republicans, increased taxes and cuts to the military are simply off the table. For Democrats, many of the cuts are exactly what they have been asking for, but become unpalatable when the size and timing risks tanking the economy.

The election cycle has made jobs the top three issues for all who hold political office. As a result, reducing the deficit is temporarily not an option, at least in the shape of sequestrations. But looking too closely at the individual cuts misses the forest for the trees. One of the most compelling arguments against absorbing the pain from the fiscal cliff has been maintained by defense contractors who argue that cuts in government spending would result in thousands of layoffs.

Few question the premise: in times of economic strife, the government should not take actions resulting in job loss. If anything, this is the time the government should be spending more to create jobs. Perhaps the government should support some sort of stimulus, money allocated to projects in infrastructure, energy, construction, and even the military. Does Keynesian economics only apply to jobs created by the defense budget? We will have to wait until after the election to see.

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"Election"
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future driver of our national debt. Sure, Medicare spending was "only" $560 billion in 2011, but the Congressional Budget Office predicts in will double in roughly ten years. The longer-term projections are even worse as more baby boomers retire.

Mitt Romney, Republican presidential nominee, is somehow trying to run to the left of Barack Obama on Medicare. He accuses Obama of using over $700 billion of future Medicare funds to help finance the Affordable Care Act, known as Obamacare. That's a misleading distortion, but it is true that, thanks to Obamacare, there is less projected growth in Medicare spending, though Obama argues that there will be no cuts in benefits. The argument is that health care providers will receive less in compensation for given services, and the jury is still out on whether or not this will ultimately inhibit the services provided.

Incredibly, while Romney seems to privately believe that Americans who are "dependent upon government" will vote for Obama, he nevertheless is trying to run to Obama's left with regards to the most underfinanced entitlement program. He does this because he cannot lose Florida or seniors in general. Indeed, seniors will likely favor Romney as they favored McCain in 2008.

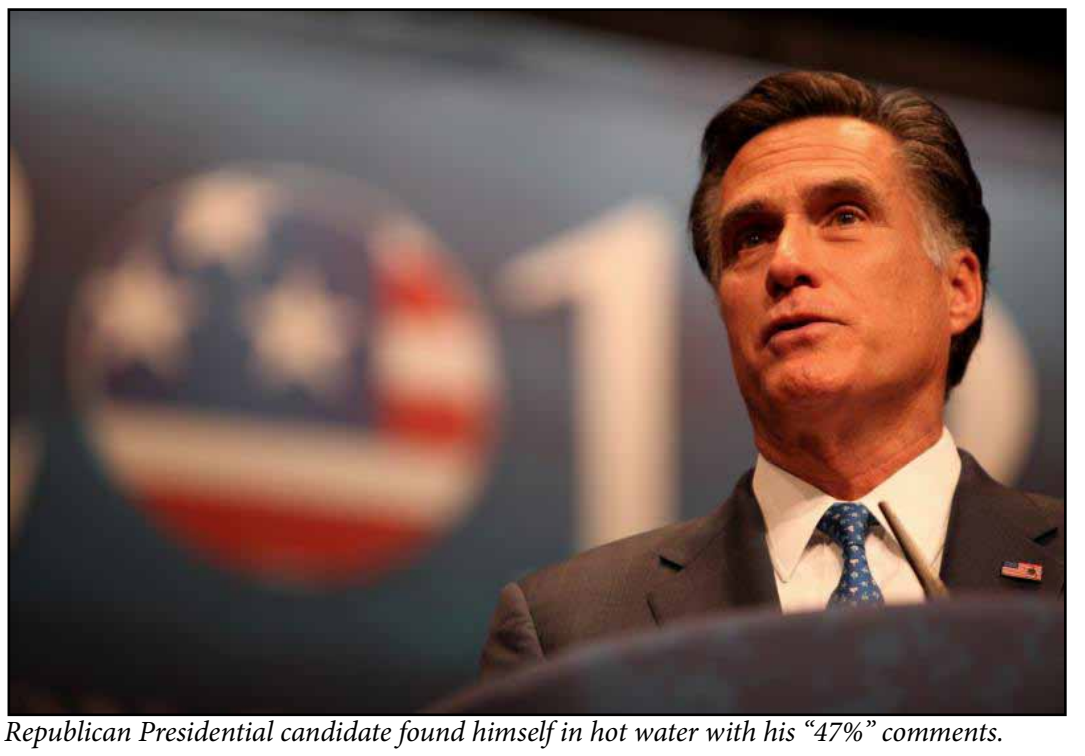
Conventional wisdom is that even though Romney talks the talk, he would be serious about entitlement reform if elected. If that is so, senior citizens should think twice about voting for Romney.

Similarly, if it is true that Romney would curb the costs of unaffordable programs like Medicare, the youth might consider voting for him if they were to vote based on their economic interests. Obama doesn't say anything about reforming Medicare. In fact, the Democratic Party only talks about defending, not reforming Medicare. Democrats are in denial about the status quo, signifying they would continue shoveling resources towards senior citizens.

Currently, all workers who pay payroll taxes are paying towards current Medicare recipients. The problem is that even poorer workers pay payroll taxes. This means that even a young worker making $30,000 pays into a program that showers benefits even on wealthy senior citizens.

That makes no sense at all.

Ironically, though Romney publicly tries to run on Obama's left on the Medicare issue, he chose a running mate, Paul Ryan, who is prominently to the right of Obama on this issue, strangely sandwiching Obama inside a sloppy joe of bad Medicare ideas.



Republican Presidential candidate found himself in hot water with his "47%" comments.

There is no true center on this issue, which is to recommend means-testing now: wealthy senior citizens have no business receiving benefits, or at least receiving them to the generous extent to which they are granted today. The current unsustainable level mounts debt that eventually must be serviced by… the youth.

In the land of the economically incoherent politicians and under-informed voters, older Americans will vote for Romney even though he criticizes those "who are dependent upon government," the youth will vote for Obama even though he would continue programs that over-generously but nonsensically redistribute resources from young to old, and Kansas will vote Republican. Marx was wrong, Romney won't get elected, and all we can hope for is that Obama will reduce and reform programs like Medicare, even though he says he won't.

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Sixth Circuit's Decision Expands GPS Tracking

"**GPS"**
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public roads. In other words, the Court saw the GPS data as "simply a proxy for [the defendant's] visually observable location."

Continuing this "proxy" argument, the Court brought up United States v. Forest, where DEA agents pinged the defendant's cellphone and used the coordinates to reconnect after losing visual contact along a public roadway. Again, the Court points to the fact that the police only used the GPS data to "augment" what they could have seen with their own eyes, and thus did not conduct a "search" within the meaning of the Fourth Amendment.

Later on, the Court distinguishes United States v. Jones by emphasizing the 'trespassory nature of the police action" in that case. The DEA agents in Jones "lojacked" the vehicle by attaching a tracking device. In Skinner, the police did not place a tracking device on the RV; they didn't have to since they suspected he already had the phone. Nor did the Court see the police's surveillance as "extremely comprehensive" to the point that it violated the Fourth Amendment in and of itself.

For these reasons, the Court held that Skinner did not have a reasonable expectation of privacy in the GPS data and location of his burner phone.

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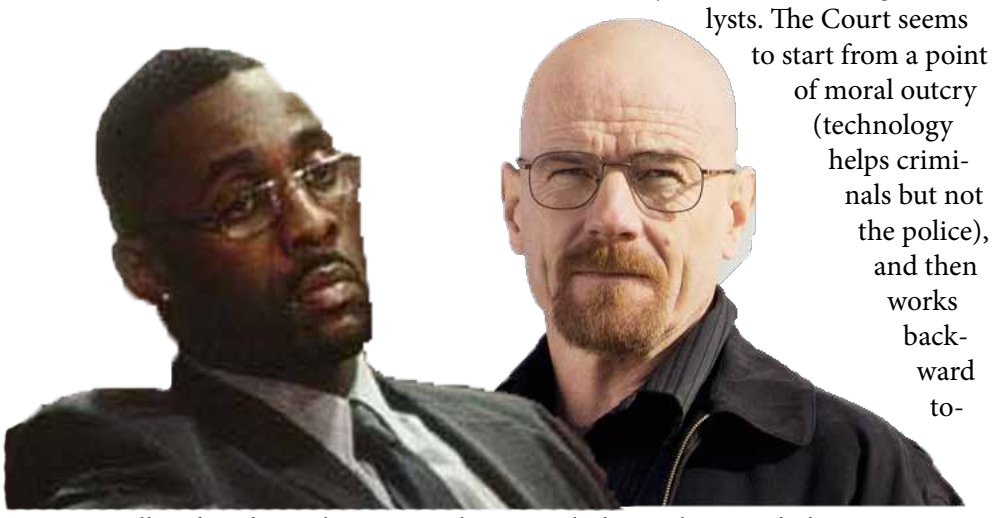
This decision reeks of "You're gonna get what you deserve" to the point where it has already rankled a lot of legal analysts. The Court seems to start from a point of moral outcry (technology helps criminals but not the police), and then works backward to-



Stringer Bell and Walter White are not happy with the Sixth Circuit's decision.

ward a passable legal explanation for its ruling. Maybe there is a good legal explanation, but this decision is filled with logical leaps and slippery slope analogies.

For example, the Court reasons that a criminal should not be able to "rely on the expected untrackability of his tools." But this reasoning seems to gloss over the important question of when the "suspect" turns into a full-fledged "criminal." True, it's hard to feel bad for Skinner (especially knowing what he did), but how will the Court's logic affect future suspects? Will it not deprive them of Fourth Amendment rights on the police's assumption that they are conducting criminal activity? It's hard to see where the idea of probable cause fits into the equation.

Immediately following, the Court reduces the opposing argument to absurdity--imagining a world where "dogs could not be used to track a fugitive if the fugitive did not know that the dog hounds had his scent," or where "a getaway car could not be identified and followed based on the license plate number if the driver reasonably thought he had gotten away unseen." Without further development, these analogies do not seem to support the idea that Skinner forfeited his constitutional protections by driving on a public road.

As Julian Sanchez pointed out on the Cato@Liberty blog, the Supreme Court held in Katz v. United States that "what a person knowingly exposes to the public, even in his own home or offices is not a subject of Fourth Amendment protection . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected" (emphasis added).

This is important because while Skinner's RV was viewable by the general public, the location of his phone and its connection to the drug plot were not. This would seem to cut against the Court's comparison to Knotts.

The decision also seems to sidestep the fact that the police did not even know Skinner's true identity when they started tracking him. To the Court, it is an irrelevant question because the police could have obtained this info "by other means." In response, critics have pointed to Kyllo v. United States (absent from the decision), where the Supreme Court held that the agents' use of thermal imaging did not escape the requirements of the Fourth Amendment, simply because the same information could have been acquired through other lawful means.

All in all, this decision is definitely worthy of its resemblance to The Wire--it forces you to grapple with the moral dilemma of admiring creative police work, while fearing how it could be abused. But hey . . . it's all 'n the game, right?

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Fall Fashion Preview

By Paria Amini
For The Advocate

With summer coming to an end and the weather cooling down, it is not too soon to start thinking about fall fashion. Making sense of the trends and figuring out what to wear can be daunting, so here are some tips on creating the perfect fall wardrobe:

Be bold

When you think of fall, naturally the thoughts of dark and neutral colors come to mind. Black is generally the staple of fall, and for some like myself, a staple year-round. However, this year, trendsetters are paring the traditional colors of fall with bright bold colors typically associated with spring. Push yourself this season to supplement one item in your outfit, whether your jacket, scarf, or shoes with something colorful, different from what you would usually choose. Select the bright tomato red shoes, or the fuchsia coat, balancing your look with the standard blacks, whites, and grays.

Prints and Patterns

Prints and patterns are an absolute essential this fall. Stacey Bendet, designer of Alice and Olivia, commented on this trend at New York Fashion Week, "[p]rints are personality, they have emotion, they tell a story." Consider this an invitation to exercise your creativity. Use fashion as a way to express your personality—specifically by use of a bold print. Popular prints and patterns this fall include stripes, leopard, and flowers, as well as graphic prints and hints of mod.

More Wine

Wine is the color of the season. Varying from different shades, this color will be everywhere this fall. Invest in a few pieces, like a coat or a scarf. My favorite way to integrate the hue into my outfit is with a cable-knit sweater or sweater dress. A warm color, wine pairs well with other autumn colors like mustard yellow and emerald green, as well as with neutrals. Also, consider incorporating wine as a nail polish color.

Show Leg - In moderation, of course

It is fall, after all. Wearing dresses and skirts with tights is a great way to look fashionable and stay warm. With bright colors and bold prints in fashion, wearing plain tights is the perfect, simple way to complete your look without overdoing it.

Peplum, Peplum, Peplum

The look is back and here to stay, at least for now. For special events and evenings this fall, a peplum dress is the way to go. The peplum cut has the ability to make a woman of any shape look slender, as well as add elegance and sophistication. Peplum tops go well with pencil skirts and pants, allowing for a great deal of versatility.

Boots with the Fur

I am not just talking about the Flo-Rida song. This boot trend is one of many boot trends this season. If fur is not your thing, the biker boot look is another option, combining leather, zippers, studs, and buckles into a low heel shoe. Other styles include booties, lace-up, and equestrian boots. One of the most popular picks this season is the wedge boot. The wedge boot is the ultimate way to add height but maintain comfort.

Men's Fall Fashion

For men this season, do not be afraid of some color and print in your wardrobe. Instead of your typical plain fall sweater, try one with stripes or a color you would not have attempted before. Another way to add these trends to your look is with a printed or colorful dress shirt or tie/bow-tie. Men's biker boots and other fall accessories like knit scarves and hats can effortlessly elevate your existing fall closet.

To give a brief recap of what to expect this season, this fall provides every individual with much creative license. Stretch yourself to incorporate various prints, colors, textures, and styles into your wardrobe. Statement collars, pea coats, and pointy pumps are also key trends to consider. If you are ever in doubt about your look, fashion blogs, Pinterest, and Tumblr offer great ideas on ways to pair together outfits this fall. Embrace the new season and stay fashionable!