"The Racist Algorithm?"

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Are we on the verge of an apartheid by algorithm? Will the age of big data lead to decisions that unfairly favor one race over others, or men over women? At the dawn of the Information Age, legal scholars are sounding warnings about the ubiquity of automated algorithms that increasingly govern our lives. In his new book, The Black Box Society: The Hidden Algorithms Behind Money and Information, Frank Pasquale forcefully argues that human beings are increasingly relying on computerized algorithms that make decisions about what information we receive, how much we can borrow, where we go for dinner, or even whom we date. Pasquale's central claim is that these algorithms will mask invidious discrimination, undermining democracy and worsening inequality. In this review, I rebut this prominent claim. I argue that any fair assessment of algorithms must be made against their alternative. Algorithms are certainly obscure and mysterious, but often no more so than the committees or individuals they replace. The ultimate black box is the human mind. Relying on contemporary theories of unconscious discrimination, I show that the consciously racist or sexist algorithm is less likely than the consciously or unconsciously racist or sexist human decision-maker it replaces. The principal problem of algorithmic discrimination lies elsewhere, in a process I label viral discrimination: algorithms trained or operated on a world pervaded by discriminatory effects are likely to reproduce that discrimination.

I argue that the solution to this problem lies in a kind of algorithmic affirmative action. This would require training algorithms on data that includes diverse communities and continually assessing the results for disparate impacts. Instead of insisting on race or gender neutrality and blindness, this would require decision-makers to approach algorithmic design and assessment in a race and gender conscious manner.

"Marriage Equality and its Relationship to Family Law"

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This Essay is a Response to Professor Douglas NeJaime’s article Marriage Equality and the New Parenthood. NeJaime’s piece offers critical new insights into the evolution of legal parenthood and its relationship to marriage. First, NeJaime shows how evolving protections for nonbiological parents served as stepping stones in the march toward marriage equality. Surprisingly, few scholars have acknowledged, much less carefully explored, this connection. Second, NeJaime uses his meticulous parentage case study to complicate our understanding of the extent to which this earlier parentage advocacy directly challenged marriage’s privileged role in our society. Finally, NeJaime argues that this history suggests more progressive possibilities with regard to the future legal treatment of nonmarital children post-Obergefell.

After highlighting these three key contributions, this Essay makes two additional points. First, this Essay considers why this important story about parentage law and its relationship to marriage equality has attracted less attention than it deserves. Second, this Essay considers a critical possibility not addressed by NeJaime. NeJaime uses parentage law to show how Obergefell might facilitate, rather than foreclose, additional protections for nonmarital children. This Essay posits an even more radical proposition: it argues that marriage equality might open up progressive possibilities not just for nonmarital children, but also for nonmarital adult relationships.

"Preliminary Injunctive Regulation"

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Rapid technological changes pose serious challenges for the Environmental Protection Agency (EPA) and other regulators charged with protecting human health and the environment. These changes can result not only in significant harms, but also in the entrenchment of new technologies that can be difficult to undo should the need arise. In urgent circumstances, agencies often must act quickly, but they face an increasingly ossified rulemaking process. The Administrative Procedure Act’s good cause exception to notice and comment rulemaking offers the most promising option for a swift and effective response. Empirical analysis of EPA’s use of that exception demonstrates that, contrary to concerns regarding potential agency abuse, EPA has exercised restraint in invoking the exception. Going forward, EPA should consider more aggressive use of the exception to respond to urgencies resulting from rapid technological developments and environmental changes. In justifying an expedited approach, EPA can make explicit reference to congressional inaction on an issue, the generally protracted nature of contemporary rulemaking, and the particular delays that the agency has encountered in ordinary rulemaking.

"Interstitial Citizenship"

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We think of American citizenship as a binary concept. There is citizenship, which is acquired at birth or through naturalization, and there is non-citizenship accounting for everyone else. I argue that this understanding is woefully incomplete. Conventional framing of citizenship has overlooked a different type of political membership: American national status. American nationals possess some rights of citizenship, such as the right to enter and reside in the United States without a visa. Similar to non-citizens, however, they cannot vote or serve on the jury. Thus, the status of American nationals reveals that there are individuals who are neither citizens nor non-citizens or “aliens.” Instead, they have what I have coined “interstitial citizenship.” Disrupting the citizen/alien binary, interstitial citizenship demonstrates that citizenship is far more flexible than previously thought. Indeed, it reveals that citizenship rights may be unbundled and conveyed to non-citizens. In this way, interstitial citizenship offers important legal and policy implications for contemporary debates on comprehensive immigration reform, including the question of whether to provide undocumented immigrants with a path to citizenship.
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