2022 Faculty Accomplishments Reception

Journal Articles

School of Law
University of Richmond
THE FIGHT OVER THE VIRGINIA REDISTRICTING COMMISSION

Henry L. Chambers, Jr.*

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BOOK REVIEW SYMPOSIUM

WHO’S THE BIGOT? THE BOOK MATTERS BUT THE QUESTION DOES NOT


**KEYWORDS:** discrimination, marriage, sexuality, history

**INTRODUCTION**

Linda McClain’s new book, *Who’s the Bigot? Learning from Conflicts over Marriage and Civil Rights Law* is a pleasure to read and a godsend. Well researched and scholarly, the book considers bigotry from every angle as a prelude to determining who should or should not be labeled a bigot. McClain explores how bigoted ideas of the past may inform current ideas that may be regarded as bigoted. Specifically, McClain compares bigoted views related to racial discrimination and interracial marriage to views on same-sex marriage.

Before discussing the substantive issues, a word about McClain’s approach may be helpful. She focuses on the discourse around bigotry. Rather than engage in name-calling, McClain appears intent on ensuring those holding possibly bigoted views are not upset by the conversation. Her cautious treatment of views she or others may find bigoted may strike some as too gentle. However, that approach may be necessary to encourage people holding those views to continue reading the book. The respect she gives to the views of those who oppose the legality of same-sex marriage may frustrate some, but it will hearten others. Regardless, the substance of her work is extraordinarily helpful to all. Anyone who cares about discrimination would profit from reading this book.

In this essay, I address only a selection of the extraordinarily important issues *Who’s the Bigot* raises. I review McClain’s framing of bigotry; her discussion of bigotry, religious belief, and legislating morality; her analysis of bigotry and interracial marriage; and her comparison of views that oppose interracial marriage to views that oppose same-sex marriage or demand religious accommodation to it.

**FRAMING BIGOTRY**

Early in the book, McClain frames multiple issues regarding bigotry, including what makes an opinion bigoted and whether people who hold bigoted views can be distinguished from bigots. Specifically, McClain considers “whether it is the motive for or the content of the belief that makes it bigoted; whether bigotry is simply shorthand for beliefs that are now beyond the pale; and whether bigotry stems from a type of character, ‘the bigot,’ who has specific moral and psychological traits, or whether we all are vulnerable to being bigoted” (6). The framing appears necessary because the terms *bigot* and *bigotry* are loaded. Suggesting someone has bigoted views or might be a bigot can end a conversation that could have been fruitful. Consequently, McClain is very careful when defining bigotry and considering who might be a bigot.
The Problem of Problem-Solving Courts

Erin R. Collins

The creation of a specialized, “problem-solving” court is a ubiquitous response to the issues that plague our criminal legal system. The courts promise to address the factors believed to lead to repeated interactions with the system, such as addiction or mental illness, thereby reducing recidivism and saving money. And they do so effectively — at least according to their many proponents, who celebrate them as an example of a successful “evidence-based,” data-driven reform. But the actual data on their efficacy is underwhelming, inconclusive, or altogether lacking. So why do they persist?

This Article seeks to answer that question by scrutinizing the role of judges in creating and sustaining the problem-solving court movement. It contends problem-solving courts do effectively address a problem — it is just not the one we think. It argues that these courts revive a sense of purpose and authority for judges in an era marked by diminishing judicial power. Moreover, it demonstrates that the courts have developed and proliferated relatively free from objective oversight. Together, these new insights help explain why the problem-solving court model endures. They also reveal a new problem with the model itself — its entrenchment creates resistance to alternatives that might truly reform or transform the system.

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LAW’S ABILITY TO FURTHER THE “MENSTRUAL MOVEMENT”

CHRISTOPHER A. COTROPIA

INTRODUCTION

The current menstrual movement calls for overcoming the cultural stigma associated with menstruation, achieving “menstrual equity,” and ending “period poverty.” The stigma the movement seeks to address is that menstruation is seen as taboo, unclean, and impure. The movement’s aims are twofold: First, it wants to increase awareness of menstruation and remove discrimination against those who menstruate, thus achieving menstrual equity. Second, it intends to provide greater access to menstrual hygiene products (“MHPs”), particularly for homeless and lower income people, thus eliminating period poverty. To achieve these goals, the movement is advocating to legislatively eliminate the “tampon tax” and increase access to MHPs in prisons, homeless shelters, and schools. It also supports lawsuits challenging the constitutionality of the tampon tax.

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1 See NADYA OKAMOTO, PERIOD POWER: A MANIFESTO FOR THE MENSTRUAL MOVEMENT 10-12 (2018) (“The Menstrual Movement is the fight for equitable access to period products and the fight to break down the stigma around periods. . . . It is up to us to start conversations and change the narrative around periods so turn to your neighbor and ask, ‘Why are we so afraid to talk about something so natural?’”).


5 See Kuhlmann et al., supra note 3, at 239.


7 See Margaret E. Johnson, Emily Gold Waldman & Bridget J. Crawford, Title IX & Menstruation, 43 Harv. J. L. & Gender 225, 227-228 (2020).
Patents and crowdfunding both attempt to foster early stage innovations. In theory, patents signal quality and value to attract investment and buyers and ultimately facilitate commercialization. Crowdfunding allows multiple individuals to make small contributions to finance start-up ventures. This Article reports on two related studies investigating the interaction between these two innovation tools by determining the impact of a crowdfunding campaign’s patent status on the campaign’s success and delivery. The first study examines 9,184 Kickstarter campaigns in patent-eligible categories to determine whether patented or patent-pending labeled projects are more likely to reach their funding goal and in turn achieve actual, on-time delivery when compared to non-patented projects. This study finds, perhaps surprisingly, that patented projects are not more likely to obtain funding compared to non-patented ones. In contrast, patent-pending projects are more successful in getting funded. The second study confirms this preference for patent-pending projects but not patented ones through a series of laboratory experiments on Amazon Mechanical Turk (“MTurk”). The MTurk results also indicate that patent-pending status, as compared to patented status, is more likely to be noticed by potential backers and an identified reason for such backers to invest and buy crowdfunded products. These results provide insight into whether patents (1) act as signals to attract funding and buyers, and (2) assist in commercialization in the crowdfunding context. These results also inform the proper focus of patent marking statutes.

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We are indebted to Jack Balkin for our ongoing techlaw conversations and for his unwa- veering encouragement, and we are grateful to Douglas Bernstein, Hannah Bloch-Webba, Kiel Brennan-Marquez, Kristen Eichensehr, Jim Gibson, Claudia Haupt, Corinna Lain, Mark Lem- ley, Linda Lin, Michael Madison, Kathy Strandburg, and Rebecca Tushnet for valuable clarifying questions and suggestions. Thanks also to the participants in the Law & Tech Virtual Workshop, Junior Law & Tech Scholars Virtual Workshop, AI and Justice in 2035 PULSE workshop, Privacy Law Scholars Conference, Stanford/Harvard/Yale Junior Scholars Faculty Forum, and the Harvard Journal of Law and Technology editors for constructive feedback and to Chloe Hillard ’22 Richmond, Leighton Mair ’22 Richmond, and Mason Schraufnagel ’21 Wisconsin for research assistance. Support for this research was provided by the Office of the Vice Chancellor for Research and Graduate Education at the University of Wisconsin–Madison with funding from the Wisconsin Alumni Research Foundation.
COVID-19’s Impact on Renewable Energy Development

Joel B. Eisen* 

INTRODUCTION

In keeping with this Symposium’s focus on accelerating clean energy growth and nations’ ability to meet climate goals, this Article examines recent trends during the COVID-19 pandemic that at least temporarily set back the pace of growth, although conditions have rebounded somewhat since a disastrous spring of 2020. This Article supports several near-term policy prescriptions aimed at promoting a speedier return to the upward trajectory renewable energy enjoyed before the pandemic. These include extending the tax policies that support renewables beyond their short-term extensions in pandemic relief legislation and establishing robust programs to help workers in renewable energy industries who have been harmed by the pandemic. As Part II explains, these policies do double duty. They can help reverse the adverse conditions in the renewable energy sector, and they can promote a green recovery from the pandemic that helps reach climate goals while being more effective for economic growth than the stimulus programs that have been put in place so far. As this Article went to press, the Biden Administration released its broad-based infrastructure plan, which addressed these policies, highlighting how they are viewed as critical to the nation’s economic recovery.

Two caveats are in order. The Article focuses on the use of renewable resources to generate electricity (for convenience, using the shorthand “renewable electricity”). Of course, renewable resources have numerous other applications, such as their significant and growing use in transportation. But changes in electricity usage patterns during the

* Professor of Law, University of Richmond School of Law. Many thanks to the University of Kansas School of Law for its kind invitation to take part in the Symposium on “Accelerating Clean Energy: The Next Decade of Reform,” and to Professor Uma Outka for her continued leadership and outstanding scholarship on these issues. Thanks also to Caroline Jaques for her research assistance.


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Tax law reaches all parts of life, and societal expectations about life’s activities often affect how the law is applied. As those expectations change, application of the law should be expected to change in turn. This essay highlights changing societal views about commuting, particularly as a result of the COVID-19 pandemic, to demonstrate how even long-standing positions under the tax law can be quickly uprooted. Specifically, as working from home becomes standard, taxpayers should be afforded tax relief when required to commute into the workplace, despite the fact that the tax law traditionally has rejected such relief.

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provide an entire document as a search, which would allow for similar time-saving techniques as previously explained above. Casetext’s CARA is a good example of this newer type of research-focused AI. There are also answer tools that assist in finding answers to more straightforward questions, such as the elements of a particular crime, for example, or statutes of limitations. Most modern legal research platforms, such as LexisNexis and Westlaw, have implemented such quick answer features already.

In another vein are analytics tools. LexisNexis, Bloomberg Law, and Westlaw all have judicial analytic features. These tools can help predict how a judge will rule on a certain issue, given their past body of work and recommend suggestions as to phrasing and keywords to utilize in motions and briefs in order to persuade a judge. This AI tool could be essential for law school clinics to understand how to frame an argument to a judge or which judges might be worse or better on certain immigration issues. It would increase the odds of being successful on any sort of immigration claim or case.

**Document Review and E-discovery**

Document review tools, such as legal research tools, could operate to cut the time necessary to review a case and prepare for litigation. These could work to possibly free up additional time for law school clinics to assist a greater number of immigration clients.

E-discovery is a large section of legal AI development. These types of programs sort and organize discovery and can even do visualization and sentiment analysis, as well as threading emails together in the correct order, revealing code words or linked relationships. AI e-discovery could again be a large time saver for law school clinics, allowing students to assist more clients.

**Drafting Pleadings**

There are some AI tools that can assist in drafting pleadings as well. Within this category, there are many that specialize in the creation of smart contracts. Because most immigration forms, like contracts, are very specific in what they require, this could be a type of AI that could be replicated for immigration forms. This could also be a powerful tool for law students to use, in order to assist clients in filing out a form correctly, with all the necessary elements, and decrease the amount of time needed on supervisory oversight.

**Chatbots**

Chatbots are a form of AI that has been around for a very long time and that more or less everyone who uses a computer has encountered at some point. From making a return on Amazon to being informed about your pizza delivery, chatbots are now commonplace. However, chatbots could also be crucial in assisting individuals with immigration questions, who could receive an answer by simply going to a law school clinic website (*Plumb, 2020, Chapter 9). Even just the direction as to what form to use, or a question as to the definition of a term, could mean the difference between a successful immigration case, spending life savings on an attorney, or in some cases even possible deportation.

In conclusion, the possibilities for creating a partnership between immigration clinics and cutting-edge vendor AI technologies are endless. In most of the categories described above, legal vendors have already begun developing these technologies for use by their clients. AI in the legal field is here and is advancing the ability for law school clinics to be better advocates, reach more clients, achieve better outcomes and further the interests of justice. All we have to do is harness it.


**THE IMPORTANCE OF IMAGES**

**ALEX CLAY HUTCHINGS**

LAW LIBRARY FELLOW

UNIVERSITY OF ARIZONA COLLEGE OF LAW
Baker Donelson and Richmond School of Law partner on inaugural legal business design challenge

They gathered together – 11 law students; general counsel and legal operations leaders from Red Robin, Microsoft and UnitedHealthcare; a law firm’s CEO and chairman along with its COO and Chief Client Solutions Group Officer; six professionals from the client solutions group; and a handful of curious partners.

Check out all the articles in the latest issue of Forum magazine.

This was not an academic exercise; it was a real effort by law firm Baker Donelson and others to find emerging competitive advantages while bringing a new twist to legal education.

The program, conducted through the University of Richmond School of Law, was the outcome of learning and applying the discipline of business design coupled with deep collaboration among law students,
DEATH PENALTY EXCEPTIONALISM AND ADMINISTRATIVE LAW

CORINNA BARRETT LAIN*

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INTRODUCTION

In the world of capital punishment, the oft-repeated refrain “death is different” stands for the notion that when the state exercises its most awesome power—the power to take human life—every procedural protection should be provided.¹ Every safeguard should be met. Granted, doing so makes the death penalty cumbersome. And granted, it slows what

* S.D Roberts and Sandra Moore Professor of Law, University of Richmond School of Law. I thank Eric Berger, Joel Eisen, Jessica Erickson, and Jim Gibson for their comments on an earlier draft, and the Belmont Law Review for inviting me to participate in this worthy event.

¹ See, e.g., Beck v. Alabama, 447 U.S. 625, 637 (1980) (“As we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments. ‘Death is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality.’”) (quoting Gardner v. Florida, 430 U.S. 349, 357–58 (1977)); Gregg v. Georgia, 428 U.S. 153, 187 (1976) (because death is different, capital punishment may not be imposed unless “every safeguard is ensured”); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (“[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. . . . Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”).
ESSAY

DISRUPTING DEATH: HOW SPECIALIZED CAPITAL DEFENDERS GROUND VIRGINIA'S MACHINERY OF DEATH TO A HALT

Corinna Barrett Lain *
Douglas A. Ramseur **

Virginia’s repeal of capital punishment in 2021 is arguably the most momentous abolitionist event since 1972, when the United States Supreme Court invalidated capital punishment statutes nationwide. In part, Virginia’s repeal is momentous because it marks the first time a Southern state abolished the death penalty. In
Three Observations about the Worst of the Worst, Virginia-Style

Corinna Barrett Lain*

Much could be said about Virginia’s historic decision to repeal the death penalty, and Professor Klein’s essay provides a wonderful starting point for any number of important discussions. We could talk about how the decision came to be. Or why the move is so momentous. Or what considerations were particularly important in the decision-making process. Or where we should go from here. But in this brief comment, I’ll be focusing not on the how, or the why, or the what, or the where, but rather on the who. Who are condemned inmates, both generally and Virginia-style?

They are “the worst of the worst”—or at least that is what we are told. Time and again, the Supreme Court has stated that the death penalty is not for just any murderer; it is for the worst of the worst offenders.1 The fact that the death penalty was not being imposed in any semblance of a targeted fashion is what led the Supreme Court to invalidate it in 1972.2 And the fact

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1. See, e.g., Roper v. Simmons, 543 U.S. 551, 568 (2005) (“Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution.”); Atkins v. Virginia, 536 U.S. 304, 319 (2002) (“Thus, pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the [intellectually disabled] is appropriate.”); see also infra note 4 and accompanying text.

2. See Furman v. Georgia, 408 U.S. 238, 239-40 (1972) (invalidating the death penalty as it was then administered as a violation of the Eighth Amendment’s “cruel and unusual punishments” clause); id. at 293–94

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STRIKING THE RIGHT BALANCE: FOLLOWING THE DOJ’S LEAD FOR INNOVATION IN STANDARDIZED TECHNOLOGY

Kristen Osenga*

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The case for subsidizing harm: constrained and costly Pigouvian taxation with multiple externalities

Daniel Jaqua1 · Daniel Schaffa2

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Abstract
Many activities are subsidized despite generating negative externalities. Examples include needle exchanges and energy production subsidies. We explain this phenomenon by developing a model in which the policymaker faces constraints or costs. We highlight three examples. First, it may be optimal to subsidize a harmful activity if the policymaker cannot set the first-best tax on an externally harmful substitute. Second, it may be optimal to subsidize a harmful production process if the activity mix at lower levels of output uses more harmful activities than the activity mix at higher levels of output. Third, it may be optimal to subsidize a harmful activity if there is a large administrative cost associated with taxing a harmful substitute. We also show how the functional form of the cost of administering a Pigouvian tax affects the optimal tax. When administrative cost is a function of only tax rates, the policymaker should tax each activity. However, an increase in the tax presents a trade-off: lower externality but higher administrative cost. A subsidy may be optimal for some externally harmful activities. When administrative cost is a function of only activity levels, it may not be optimal to tax every activity. If it is optimal to tax each activity, the policymaker should set the tax equal to the externality plus the marginal administrative cost. If it is not optimal to tax every activity, the complementarity between activities comes into play, and it may be optimal to subsidize externally harmful activities.

Keywords Administrative cost · Corrective taxation · Externality · Optimal taxation · Optimal tax systems · Pigouvian taxation · Second best

JEL Codes: H21 · H23

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A Human Rights and Anti-Corruption Legacy: Building A Conceptual Model

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Final report for
the IOC Olympic Studies Centre
Advanced Olympic Research Grant Programme
2019/2020 Award

January 2021
Revised September 2021
Custom of the Country: Trusts and Marriage Planning in High-Wealth Families

by
Allison Tait*

“Even now, however, [Undine] was not always happy. She had everything she wanted, but she still felt, at times, that there were other things she might want if she knew about them.”
—Edith Wharton, The Custom of the Country (1913)

Introduction

That marriage has always been a property arrangement in some form or another – particularly for those families and couples with property to arrange – is a truism. It is a truism because marriage has significant property implications for the intended spouses, with the result that financial planning around marriage is both a historical and continuing reality, despite changes in the social and economic norms governing marriage. Moreover, the wealth management industry has, past and present, trained its eye and its expertise on marriage planning as part of a family’s larger wealth planning, offering services and products to help mitigate the economic risk of marriage to family wealth preservation. In particular, wealth managers and lawyers have long recommended that families pay close attention to the effects of divorce because “the divorce of a family member . . . can paralyse a [wealth] structure and produce major problems and uncertainty for the family members who have a stake in the family wealth structures.”

Divorce, these advisors warn, presents a particularly grave danger because it redistributes fam-

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ENTRENCHED RACIAL HIERARCHY: EDUCATIONAL INEQUALITY FROM THE CRADLE TO THE LSAT

Kevin Woodson

INTRODUCTION

For my contribution to this special issue of the Minnesota Law Review, I will attempt to situate the problem of black underrepresentation at America’s law schools within the broader context of racial hierarchy in American society. The former has generated an extensive body of legal scholarship and commentary, centering primarily on the racial impact of

† I would like to thank Bret Asbury for his helpful comments on previous drafts of this article. I would also like to thank Chris Chavarria for his excellent research assistance. Copyright © 2021 by Kevin Woodson.

1. See AMERICAN BAR ASSOCIATION, ABA PROFILE OF THE LEGAL PROFESSION 33 (2020) (black Americans make up only five percent of the profession even though they are over thirteen percent of the overall U.S. population). See Law School Enrollment by Race & Ethnicity (2019), ENJURIS, https://www.enjuris.com/students/law-school-race-2019.html [https://perma.cc/BZH5-MNWW] (black students were 7.57% of incoming law students in 2019); id. (“Black enrollment in law school dropped for the fourth consecutive year” and nearly half of all black law school applicants are not admitted to a single institution); Aaron N. Taylor, The Marginalization of Black Aspiring Lawyers, 13 FLA. INT’L U. L. REV. 489 (2019) (nearly half of all black law school applicants did not gain admission into a single program). Further, black students who enroll in law school are less likely than other students to persist until graduation. Kyle Thomas & Tiffane Cochran, ABA Data Reveals Minority Students are Disproportionately Represented in Attrition Figures, ACCESSLEX (Sept. 18, 2018), https://www.accesslex.org/xblog/aba-data-reveals-minority-students-are-disproportionately-represented-in-attrition-figures [https://perma.cc/5PNS-C4MT] (black students are only nine percent of all 1Ls but account for 15.5 percent of all 1L non-transfer attrition).