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C O N T E N T S

ARTICLES

The Rule of Law: “A” Relation Between Law and Morals

Alani Golanski208

H. L. A. Hart allowed that “there are many different types of relation between law and morals.” But he mostly, and sparingly, focused on law’s role in facilitating human survival, necessitating the legal system’s “mini-mum content of natural law.” Hart’s minimum-content view, in service of his concern to separate law and morals, spilled over into his laconic pronouncement on “legality,” typically deemed synonymous with the rule of law. He claimed that, if the legal system is to fulfill its social control function while abiding by legality, it will have to enact rules that are “within the capacity of most to obey.” This minimal expression has influenced slim and formal conceptions of the rule of law ideal and, as argued here, counts as the sort of reductive misapprehension that he himself so masterfully refuted with respect to the concept of law itself.

Taking issue with such a thin view of the rule of law, this Article’s starting premise is that the concept affords “a” critical relation between law and morals by providing both legal officials and ordinary citizens with a construct by which to evaluate legal systems in progress. Because a legal system’s central features are both duty-imposing and power-encouraging, those are the features naturally appropriate for the rule of law appraisal. Unappreciated in the academic literature, this in turn suggests that, within conceptual constraints discussed, the rule of law project implicates a moral inquiry into the legal system’s impacts upon both the capacity of the people to comply with law’s commands and their capabilities — whether political, economic, or within some other adjectival category defining life’s lived qualities and conditions — to partake of the powers and entitlements sought to be conveyed by legal norms.

The Demise of the *Bivens* Remedy is Rendering Enforcement of Federal Constitutional Rights Inequitable But Congress Can Fix It

Henry Rose229

A federal statute allows a person whose federal constitutional rights are violated by state actors to sue for damages. There is no analogous federal statute that allows a person whose constitutional rights are violated by federal actors to sue for damages. In 1971, the United States Supreme Court allowed a suit for damages

against federal law enforcement officials who allegedly violated Fourth Amendment rights to proceed directly under the Constitution, creating the Bivens remedy.

Beginning in 1983, the Supreme Court reversed course and issued ten consecutive decisions in which it denied a Bivens remedy because no federal statute authorizes suits against federal officials who violate federal constitutional rights. The Supreme Court now considers recognition of a Bivens remedy to be a “disfavored judicial activity.”

It is inequitable for a person whose federal constitutional rights are violated by state actors to be able to sue for damages but not if federal actors violate the same rights. Congress should address this inequity by enacting legislation that authorizes a person whose federal constitutional rights are violated by federal actors to sue for damages.

A New Approach to Felony Murder in Illinois

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In August of 2019, six teenagers drove to a rural area of Lake County, Illinois, in a stolen vehicle with the intention of burglarizing vehicles. Startled, the homeowner retrieved his gun, went out on the porch, and observed one of the teens approaching him, with what the homeowner determined to be a weapon. The homeowner fired his gun and killed one of the teens. The remaining five teens were charged with felony murder. At the time of this incident, Illinois applied the “proximate-cause theory” to felony murder.

In response, the General Assembly amended the felony-murder rule with the intent to create an “agency theory.” However, the current version does not make this clear. It is possible that the proximate-cause theory would still apply and remain the most logical application of the law. Regardless, rather than attempting to abolish the proximate-cause theory, public concerns could have been addressed through amended sentencing provisions.

Fundamental First Amendment Principles

David L. Hudson, Jr. & Jacob David Glenn271

First Amendment law is highly complex, even labyrinthine. But, there are fundamental principles in First Amendment law that provide a baseline for a core understanding. These ten fundamental principles are: (1) the First Amendment protects the right to criticize the government; (2) the First Amendment abhors viewpoint discrimination and often content, or subject-matter discrimination; (3) the First Amendment protects a great deal of symbolic speech or expressive conduct; (4) the First Amendment protects a great deal of offensive and even repugnant speech; (5) the First Amendment does not protect all forms of speech; (6) the First Amendment often depends upon the status of the speaker; (7) the first Amendment also protects the right not to speak (the no-compelled speech doctrine); (8) the First Amendment also protects the right to freedom of association; (9) the First Amendment rights of speakers are sometimes limited by the actions or reactions of others; and (10) First Amendment rights are fragile, especially in times of emergency or war.

It is the authors' hope that the articulation of these principles will help many understand and navigate the challenging area of First Amendment free-expression jurisprudence.

COMMENT

Real Harm in a Virtual World: Establishing Federal Standing in the Seventh Circuit Under Illinois's Biometric Information Privacy Act

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Illinois became the first state to regulate the collection and use of biometric information by private entities when it enacted the Biometric Information Privacy Act in 2008. In the years since, more and more businesses have begun to collect biometric information from their employees and customers. As lawmakers in other states and in Congress look to enact legislation to protect biometric privacy rights, their drafting choices may be informed by three recent Seventh Circuit decisions analyzing when a plaintiff alleging a violation of the Biometric Information Privacy Act has, or has not, established Article III standing as required to proceed in federal court. This Note examines those three closely related decisions: Bryant v. Compass Group USA, Inc., and Fox v. Dakkota Integrated Systems, LLC, both decided in 2020, and Thornley v. Clearview AI, Inc., decided in early 2021.

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