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ARTICLES

Dehumanization “Because of Sex”: The Multiaxial Approach to the Rights of Sexual Minorities

Shirley Lin 731

Although Title VII prohibits discrimination against any employee “because of such individual’s . . . sex,” legal commentators have not yet accurately appraised Title VII’s trait and causation requirements embodied in that phrase. Since 2015, most courts assessing the sex discrimination claims of LGBT employees began to intentionally analyze “sex” as a trait using social-construction evidence, and evaluated separately whether the discriminatory motive caused the workplace harm. Responding to what this Article terms a “doctrinal correction” to causation within this groundswell of decisions, the Supreme Court recently issued an “expansive” and “sweeping” reformulation of but-for causation in *Bostock v. Clayton County*, one that combined the sex-trait analysis with causation analysis in determining that Title VII protects “traits or actions” related to sexual orientation or gender identity.

Because *Bostock* did not foreclose the use of social evidence or intersectional approaches in additional subordination contexts in which sex is a factor, this Article builds on this important development by introducing “multiaxial analysis,” a framework with which judges and stakeholders identify the role of Title VII’s protected traits as socially constructed along four axes: the aggrieved individual’s self-identification, the defendant-employer, society, and the state. This context-sensitive approach to subordination has the potential to give fuller effect to Title VII’s provisions and purposes as compared to sex-stereotyping theory or the Court’s reformulated “but-for causation.” Uncoupling causation from the sex trait analysis realizes the statute’s civil rights protections within relational, structural, and institutional dynamics as the law increasingly recognizes that the scope of sex extends beyond a fixed binary.

Manipulating Risk: Immigration Detention Through Automation

Kate Evans & Robert Koulish 789

The U.S. Department of Homeland Security arrests as many as 500,000 migrants per year and detains more than 350,000 of them through Immigration and Customs Enforcement (ICE). Since 2012, ICE has relied on an automated Risk Classification Assessment (RCA) system to recommend whom to detain and whom to release. The authors are the first to obtain access to its algorithm and this Article is the first to make that system’s methodology public. While purportedly basing these recommendations on indicia of flight risk and risk to public safety, the RCA in fact relies on an algorithm driven by political preferences. By linking detention to enforcement policy rather than risk, the RCA lost its underpinning in the Constitution. In addition, compromises in its logic thwarted the program’s ability to deliver the harm reduction, transparency, and uniformity it promised. Ultimately, our data and analysis reveal that manipulation

of the RCA resulted in automated detention recommendations for hundreds of thousands of people in violation of the Constitution. The RCA thus delivers mass incarceration of immigrants with staggering efficiency. In the end, we argue the RCA supplied a veneer of risk to a tool of punishment.

Separation of Functions for AI: Restraining Speech Regulation by Online Platforms

Niva Elkin-Koren & Maayan Perel..... 857

The Free Speech Clause of the First Amendment of the U.S. Constitution restricts government regulation of private speech. However, it generally does not apply to private management of speech. New forms of speech regulation by online platforms disrupt this constitutional framework. Platforms, such as Google, Facebook, and Twitter, are responsible for mediating much of the public discourse and governing access to speech and speakers around the world. These private businesses match users and content in whatever way best benefits their commercial interests. At the same time, however, they exercise regulatory power when they filter, block, and remove content at the request of governmental agents or state actors. Consequently, platforms effectively blend law enforcement and adjudication powers, and sometimes even lawmaking powers.

Courts and scholars who tackle speech regulation by platforms have basically relied on the well-settled constitutional divide between private functions and governmental ones. To the extent that platforms exercise governmental powers in allowing or banning speech or speakers, platforms should be subject, as the argument goes, to public law principles of accountability, legitimacy, oversight, and power separation.

In this paper, we question this approach. As a practical matter, the public/private framework presumes that public functions of a private entity could be neatly separated from its standard business affairs. We argue that with the increasing use of Artificial Intelligence (AI) by platforms for content moderation, the public, law enforcement functions are integrated with the private, business functions that are driven by commercial interests. The same technical design which is used for targeted advertising and for curating personalized content is also deployed for monitoring and censoring online content. Using machine learning, the system is informed by the same labeling of users and content, and makes use of the same application programming interfaces (API), learning patterns, and software. Consequently, decisions on removal of speech, for (public) law enforcement purposes, are driven by the same data, algorithms, and optimization logic, which are also underlying all other functions performed by the platform. Therefore, the use of AI in content moderation calls for a fresh approach to restraining the power of platforms and securing fundamental freedoms in this environment.

This paper takes a design perspective to speech regulation. It contends that the normative distinctions between public and private functions could be upheld in online content moderation, provided that these distinctions are embedded in the system design. It introduces “separation of functions,” a novel approach to restraining the power of platforms while enhancing the accountability in AI driven content moderation systems. We propose to facilitate independent tools embedding public policy. These tools would run on the platforms’ data and would include their own optimization processes informed by public policy. Such separation between independent public tools and private data may enhance public scrutiny of law enforcement speech restrictions, which are a traditionally exclusive public function. This functional separation may also facilitate competition among different players who may enrich the design of speech regulation and mitigate biases. Finally, we explore the implications of this approach and discuss its possible limitations.

The JOBS Act of 2012 launched a number of experiments in the regulation of securities offerings. The exemption it created that allows online equity crowdfunding offerings to retail investors garnered the most attention, in part due to widespread concerns regarding the potential for fraud and abuse. More than three years after the first crowdfunding offering, no empirical analysis of compliance has been conducted that would debunk or confirm critics' concerns. This Article plugs that gap by analyzing a sample of 362 crowdfunding offerings and evaluating compliance with some of crowdfunding regulation's simplest, most fundamental regulatory requirements. During the first 13 months of crowdfunding, almost half of issuers failed to file complete financial statements that met the applicable standard of review, barely one-quarter of issuers that were required to file two annual reports did so, less than 15% of issuers timely filed the final amount raised in their offering, and the only data point on Form C that was reviewed was, far more often than not, substantially inaccurate. Finally, the third-largest crowdfunding funding portal may be violating the prohibition against a funding portal's giving advice. In short, these findings reveal a deeply embedded culture of noncompliance. This Article is timely in light of the issuance of a concept release by the Securities and Exchange Commission that is intended to set the table for further liberalization of exempt offerings. Rather than supporting such changes, the findings set forth in this Article create doubt as to whether the crowdfunding experiment will even survive. This Article proposes a series of reforms that would address some of the above-mentioned noncompliance problems while both benefiting investors and reducing costs and burdens for issuers.

The Demise of the Rule of Reason

The rule of reason under Section 1 of the Sherman Act, the primary framework for analyzing the legality of agreements in restraint of trade, has degenerated into a muddled and incoherent guessing game, with courts applying disparate and convoluted versions of the test that are inconsistent across and within circuits and are untethered from the basic goals of antitrust law. A primary cause of the atrophy of the rule of reason has been the ascension of the less restrictive alternative as the dispositive analytical factor for determining the legality of restraint of trade. Rather than focus on the net competitive effect of a restraint, the modern rule of reason has transformed into a means-ends analysis that focuses on the availability of less restrictive alternatives.

The transformation of the rule of reason has accelerated through a series of antitrust challenges to the amateurism model of the National Collegiate Athletic Association (NCAA). These cases have generated significant attention because of their potential impact on the future of college sports and the economic rights of college athletes, but their impact on the future of the rule of reason and antitrust law has gone virtually unnoticed. These cases illuminate the fatal flaws of the modern rule of reason and the devolution of antitrust law into a new "sea of doubt."

Every federal circuit has adopted at least one of three different new permutations of the rule of reason that have emerged over the last few decades, each using a form of the less restrictive alternative analysis as a dispositive factor while subverting or eliminating the traditional balancing of competitive effects. The first version of the new rule of reason is a conjunctive test that hinges legality on whether the restraint's procompetitive benefits outweigh its anticompetitive effects and whether there were no less restrictive alternatives for achieving those benefits. The second variant excludes balancing and asks solely whether the

restraint's procompetitive benefits could have been achieved through less restrictive alternatives. The third permutation also excludes balancing and asks only whether the restraint is "directly related" to its procompetitive benefits.

These new frameworks have exacerbated the complexity and confusion of the rule of reason and threaten to convert antitrust law from an *ex ante* deterrent of anticompetitive conduct to an *ex post* regulator of procompetitive business decisions. This Article examines the evolution of the rule of reason and traces the emergence, disappearance, and reappearance of the less restrictive alternative as the analytical core within the rule of reason. This Article also provides a new descriptive framework for analyzing the different formulations of the modern rule of reason analysis and assesses the flaws of each of the formulations, with a focus on the antitrust challenges to the NCAA's amateurism model. The Article concludes that the role of the less restrictive alternative should be limited to reorient the rule of reason on the overall competitive effect of the challenged restraint. A renewed focus on the net competitive effect will provide a clearer and more coherent framework for the rule of reason and better serve the competition-protecting function of antitrust law.

Lessons About Franchise Risk from Yum Brands and Schlotzsky's

Robert W. Emerson & Lawrence J. Trautman 997

This Article presents YUM! Brands, Inc. disclosure information and valuable insight into the risks of starting a business that shares intellectual property with another party. YUM is the parent of entities such as KFC, Pizza Hut, and Taco Bell, with locations around the world. YUM is particularly useful for our analysis because of its mature operating concepts.

Sandwich shop franchisor and operator Schlotzsky's, Inc. presents a different aspect of shareholder and franchisee risk. The facts leading up to Schlotzsky's bankruptcy filing represent what can go wrong with undercapitalized franchise operations and illustrate that franchising is inherently risky for anyone.

This Article seeks to answer questions facing all seeking to use a franchise concept: "What are the major risks perceived by those engaged in the universe of franchise businesses? What potential risks, if they become reality, may cause substantial increases in operating costs or threaten the very survival of the enterprise?"

This Article provides a roadmap for understanding franchise risk and an opportunity to understand and reflect upon the multi-million-dollar research, investment, and documentation of perceived system risks. Relevant annual report disclosures from YUM, along with other YUM documents, are discussed. Descriptive language from YUM's regulatory filings with the Securities and Exchange Commission is utilized to show what the management personnel of this franchise powerhouse perceive to be its major categories of risk exposure.

The primary point of this Article is to repackage the risk disclosure language from these enterprises so that franchise entrepreneurs, their lawyers, and other readers may benefit. Our goal is to have a meaningful and scholarly impact on readers who are now, or will be, creating jobs through their efforts in growing businesses. They will proceed into the chaos of the capitalistic marketplace with valuable lessons in franchise risks.

This Article has five Sections. First, we provide a background and overview of franchising. Second, we give a primer on franchise law. Third, we examine YUM, and focus on its risk disclosure language. Fourth, we describe the history and circumstances leading up to the 2004 bankruptcy of Schlotzsky's. Lastly, we

conclude with our thoughts on the lesson gained from disclosure documents and our bankruptcy investigation.

LECTURES

The 2019 Higgins Distinguished Visitor Lecture: The Subversive Side of Textualism and Original Intent

Donald B. Ayer..... 1049

The Lorene Sails Higgins Charitable Trust provides the Lewis & Clark community access to leading legal scholars from around the world. Each year, the campus is graced with a visitor renowned in their field whose stay is funded by a grant from the trust. This lecture, given by the former Deputy Attorney General and Principal Deputy Solicitor General Donald B. Ayer during the course of his visit, discussed the changes in American legal thinking during his career.

NOTES & COMMENTS

Originalist Sin: The Failure of Originalism to Justify the Unitary Executive Theory

Marc Mohan 1063

Originalists justify a “unitary executive” theory of presidential powers using the Constitution’s vesting of the executive power in “a President,” as opposed to a council or other multi-member setup. In spite of this justification’s popularity with originalists, a deeper understanding of prerogative and power, as the Founders understood those key concepts, reveals that the unitary executive theory cannot be justified through either the original intent or the original meaning of our founding document. In the absence of this grounding, the unitary executive theory is underpinned by modern exigencies and therefore loses coherency as an originalist theory.

Holding Oregon Benefit Companies Accountable for Greenwashing and Faux CSR

Sophia von Bergen..... 1097

The notion of corporate social responsibility (CSR) has gained popularity in recent years with both consumers and businesses, leading to Oregon and currently 35 other states adopting benefit company statutes that allow companies to elect status as a benefit corporation. CSR, however, can be marred by what is known as “greenwashing” and “faux CSR,” which occur when a company falsely claims that it engages in environmentally friendly or socially responsible practices to boost sales or improve its brand. Oregon’s benefit company statute contains features designed to protect against greenwashing and faux CSR, but the statute’s accountability mechanisms are lackluster. Enforcement proceedings provide remedies for only a narrow class of stakeholders and are otherwise ineffective and perhaps unenforceable. A lack of accountability perpetuates greenwashing and faux CSR and threatens the legitimacy of the CSR movement.

While much has been written about greenwashing and benefit corporations, commentators have paid scant attention to viable causes of action against greenwashing benefit companies. Virtually no literature addresses the potential for Oregon benefit companies to engage in greenwashing or faux CSR, or what causes of action or remedies are available to aggrieved stakeholders. This Note seeks to fill this gap by assessing the potential for greenwashing and faux CSR under Oregon’s benefit company legislation and considering avenues to hold an Oregon benefit company accountable. It analyzes how the enforcement proceeding under the Oregon benefit company statute allows these practices to occur, and proceeds to consider what avenues for accountability are available and to whom under the

Oregon Uniform Trade Practices Act, the Federal Trade Commission Act, and the Lanham Act.

Close analysis reveals that these statutes together fail to ensure accountability. Until Oregon's benefit company statute includes more stringent protective mechanisms, benefit company status may offer companies merely seeking to capitalize on the CSR movement a safe haven from responsibility.

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