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SYMPOSIUM: THE MODERN AMERICAN JURY

ARTICLES

Judicial Nullification? Judicial Compliance and Non-Compliance with Jury Improvement Efforts
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Many jury trial procedures and practices are left to “the sound discretion of the trial court.” This discretion provides judges with flexibility to meet the individual needs of each trial. Using information from the State-of-the-States Survey of Jury Improvement Efforts, this article documents the extent to which trial judges exercise that discretion with respect to trial procedures and practices designed to improve jury comprehension, performance, and satisfaction. It describes legal, cultural, and case-specific factors that contribute to jurisdictional variation in the use of these procedures and practices, including judicial non-compliance with prohibited and mandatory practices. Finally, it discusses whether judicial non-compliance with procedural prohibitions and mandates amounts to a form of judicial nullification and, if so, whether it serves the same purpose as jury nullification (e.g., as a check on judicial, executive, and legislative excesses).

Jury Nullification: An Empirical Perspective
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Prominent jurists have suggested that it may be permissible to inform juries of their power to decide verdicts according to their conscience, regardless of the law. Juries may be informed of their power, known as jury nullification, to nullify the law either by carefully crafted instructions from the judge or by permitting the defense counsel to make a nullification argument during closing statements. This article exams these proposals in light of the latest empirical research on these issues. This article also presents a short history of jury nullification and its current status in the U.S. legal system. Current research suggests that the original notion expressed in U.S. v. Dougherty that nullification instructions would have a chaotic effect, appears to have some empirical support. Chaos
means that jury verdicts may be unpredictable, determined by personal prejudices and possibly vindictive. Earlier work suggested that juries in receipt of nullification instructions will be more merciful to a morally worthy defendant than when not given such instructions. It is important to note that the bulk of the research still shows that jurors do use information about their power to nullify in a circumscribed and careful manner. However, more recent research, which directly manipulated emotionally biasing information, as opposed to factually biasing information, suggests juror verdicts may be considered to be “chaotic.”

In the Vanguard of the American Jury: A Case Study of Jury Innovations in the Northern District of Iowa
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Since taking the oath of office nearly fifteen years ago, United States District Court Judge Mark Bennett has made it a priority to champion the American jury. While jurors are typically less than thrilled to be summoned for service, Judge Bennett makes sure their “day in court” is memorable and rewarding. This article discusses how Judge Bennett does it: from creating the “evidence corridor” to debriefing the jury post-verdict. Some techniques are simple, some complex, but most all are innovations. Moreover, with at least 300 jury trials under his belt, Judge Bennett’s techniques are battle tested and proven, and ripe for a discussion in this case study of the Modern American Jury in the Northern District of Iowa.

People v. Coughlin and Criticisms of the Criminal Jury in Late Nineteenth-Century Chicago
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The last decades of the nineteenth century and the first decades of the twentieth century are often described as the era in which the criminal jury trial came to an end. Criminal juries did not completely disappear, of course, but their role became smaller in those decades. Studies of the phenomenon typically attribute that decline to the rise of plea bargains in that same period. These studies note that institutional factors, such as case loads and the political pressure on elected prosecutors to be “tough on crime,” made plea bargains an increasingly attractive option for the State, and conclude from this that the rise of plea bargains caused the decline of criminal juries. In this article I argue that this explanation does not fit the case of late nineteenth-, early twentieth-century Chicago. In that period the felony courts in Chicago, like felony courts in Los Angeles, Philadelphia, and Boston, did make increasing use of plea bargains and jury trials declined, as well. But the data suggest that the greater use of pleas did not lead to the decline of criminal juries, so much as result from efforts to avoid jury trials. To consider why that might be so, this article explores the contemporary views of criminal juries by unpacking a trial from late nineteenth-century Chicago, People v. Coughlin.
The Federalization of Punitive Damages and the Effect on Illinois Law
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Punitive damages have traditionally been a matter of state law, left to state courts and legislatures to review and regulate. But in the midst of the tort reform movement of the 1990s, the United States Supreme Court took sides in the policy debate, fashioning a novel substantive due process right limiting punitive damage awards and suppressing the power of juries to punish and deter egregious conduct. This article traces the evolution of the federalization of punitive damages based on questionable authority, criticizes the Supreme Court's intrusion into an area of state law, demonstrates how Supreme Court precedent has been misapplied by lower courts, and suggests a methodology for practitioners to withstand a constitutional due process challenge to the size of a punitive damage award.

COMMENT

SLAPPed in Illinois: The Scope and Applicability of the Illinois Citizen Participation Act
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This article examines the origins, structure, and consequent effectiveness of the recently enacted Illinois Citizen Participation Act. Designed to combat a particular breed of vexatious litigation known as "Strategic Lawsuits Against Public Participation," or "SLAPPs," the Citizen Participation Act conditionally immunizes potential civil defendants from liability when they are sued for acts implicating their First Amendment rights. The article briefly examines the nature of SLAPPs, why they stand contrary to public policy, and outlines some proposed solutions to eliminate or reduce their use. The article then explores the substantive and procedural mechanisms employed by Illinois to bring about the objectives behind the new law. After comparing the Citizen Participation Act to similar laws passed in other states, it becomes apparent that the broad language and applicability of the Act, coupled with its one-sided remedial mechanisms, presents a significant risk of destabilizing the fine balance of adversarial rights held by civil plaintiffs and defendants in Illinois—a balance the Act, on its face, seeks to protect. Finally, the article offers two relatively simple solutions that, if enacted, would help ensure the Citizen Participation Act successfully attains its goal of creating a more equitable and democratic judicial process for all.
Leegin Creative Leather Products, Inc. v. PSKS, Inc.: The Final Blow to the use of Per Se Rules in Judging Vertical Restraints – Why the Court Got it Wrong

Christopher S. Kelly

This case note provides an in depth discussion of Leegin Creative Leather Products, Inc. v. PSKS, Inc., in which the United States Supreme Court held that minimum resale price maintenance should be analyzed under the rule of reason, and thus striking down the century-old per se rule against vertical price fixing. After providing a brief overview of antitrust law, with a particular emphasis on Supreme Court vertical restraint jurisprudence, an in depth discussion of both the majority and dissenting Leegin opinions is provided. Next, the note argues that the Court erred in striking down the per se rule by finding that the use of vertical minimum price restraints is not “always or almost always” anticompetitive. Specifically, it will be asserted that the Court erred by failing to examine any empirical data in support of its economic assumptions, discounting the importance of intramarket competition as a check on the market, by not considering if procompetitive uses of vertical minimum price restraints are even practical or likely to be implemented, and by lending no credence to stare decisis considerations. Finally, the note will consider the anticipated impact of the decision on both the market and antitrust enforcement, and will discuss the possible congressional response it may have triggered.