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JURIES AND LAY PARTICIPATION: AMERICAN PERSPECTIVES AND GLOBAL TRENDS

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INTRODUCTION TO JURIES AND LAY PARTICIPATION: AMERICAN PERSPECTIVES AND GLOBAL TRENDS — *Nancy S. Marder & Valerie P. Hans* — 789

The jury in the United States is fraught with paradoxes. Even though the number of jury trials in the United States continues to decline, jury trials play a prominent role in American culture and continue to occupy headlines in newspapers and top stories on television. Americans might not always agree with the verdict that any given jury renders, but they continue to express their support for the jury system in poll after poll. This Symposium of the *Chicago-Kent Law Review* presents new theories and research, with a focus on the contemporary American jury. The Introduction begins by connecting discussions at two recent jury conferences. The conference held in Oñati, Spain examined developments in jury systems worldwide and the conference held at IIT Chicago-Kent College of Law focused on the American jury. This Symposium includes several of the papers inspired by these conferences. This Introduction, in addition to describing issues raised at the conferences, provides an overview of the articles in this Symposium, and concludes by presenting an agenda for the next generation of jury research, with a recommendation for collaborative approaches to incorporate distinctive methods and perspectives.

THE AMERICAN JURY SYSTEM: A SYNTHETIC OVERVIEW — *Richard Lempert* — 825

This essay is intended to provide in brief compass a review of much that is known about the American jury system, including the jury's historical origins, its political role, controversies over its role and structure, its performance, both absolutely and in comparison to judges and mixed tribunals, and proposals for improving the jury system. The essay is informed throughout by 50 years of research on the jury system, beginning with the 1965 publication of Kalven and Zeisel's seminal book, *The American Jury*. The political importance of the jury is seen to lie more in the jury's status as a one shot decision maker largely independent of trial court bureaucracies than in its ability to nullify the law. Despite flaws in the jury process and room for improvement, the message that emerges from the literature

is that juries take their job seriously and for the most part perform well. There is little reason to believe that replacing jury trials with bench trials or mixed tribunals would improve the quality of American justice, and some reason to think it might harm it.

FOUR MODELS OF JURY DEMOCRACY *Jeffrey Abramson* 861

This article proposes a theory of "representative deliberation" to describe the democratic ideal that jurors seek to practice. Given its long history, the jury does not fit neatly into any one of the most familiar types of democracy, such as direct democracy, representative democracy, or deliberative democracy. However, the jury does hold together elements of all of these theories. In line with direct democracy, we select jurors from the people-at-large. In line with representative democracy, we seek to draw jurors from a representative cross-section of the community. In line with deliberative democracy, jurors talk as well as vote and seek to change one another's minds. The resulting hybrid is what this article calls "representative deliberation." The core idea is that deliberation works best on diverse panels where jurors from different backgrounds bring different views and life experiences to bear on the impartial consideration of the evidence. The article reviews empirical studies supporting the theory of representative deliberation and proposes changes in jury selection to remove obstacles to empaneling representative juries.

SOME LIMITATIONS OF EXPERIMENTAL PSYCHOLOGISTS' CRITICISMS OF THE AMERICAN TRIAL *Robert P. Burns* 899

For decades, psychologists have conducted experiments that have suggested severe limitations on human cognitive capacities. Many have suggested that these results have important, and largely negative, consequences for an assessment of the reliability of the American trial. They have pointed persuasively at the disturbing number of exonerations of those convicted after trial. And some have gone on to make specific proposals for the incremental, and sometimes radical, changes in the conduct of the adversary trial. This essay places these studies, as forcefully presented by Professor Dan Simon, in a normative context, and argues that they are more powerful in suggesting changes in pretrial process than in the conduct of trial itself.

JUROR BIAS, VOIR DIRE, AND THE JUDGE-JURY RELATIONSHIP *Nancy S. Marder* 927

In the United States, voir dire is viewed as essential to selecting an impartial jury. Judges, lawyers, and the public fervently believe that a fair trial depends on distinguishing between prospective jurors who are impartial and those who are not. However, in England, Australia, and Canada, there are impartial jury trials without voir dire. This article challenges the assumption that prospective jurors enter the courtroom as either impartial or partial and that voir dire will reveal the impartial ones. Though voir dire fails as an "impartiality detector," this article explores how voir dire contributes to the trial process in two critical, but unacknowledged, ways. First, voir dire helps to transform "reluctant citizens," who might have biases into "responsible jurors," who are able to perform their role impartially. Second, voir dire lays the foundation for the judge-jury relationship, which is aided by other practices during and even after the trial.

Decision-Making in the Dark:
How Pre-Trial Errors Change the
Narrative in Criminal Jury Trials *Kara MacKillop & Neil Vidmar* 957

The jury trial plays a critical constitutional and institutional role in American jurisprudence. Jury service is, technically, the only constitutional requirement demanded of our citizens and, as such, places an important responsibility on those chosen to serve on any jury, especially within the criminal justice system. Jury research has established that, generally, jurors take their responsibilities seriously; they work with the evidence presented at trial and they reach verdicts that correlate to the narratives they develop throughout the trial. But with estimates of wrongful conviction rates as high as five percent in serious felony cases, how are juries getting it wrong? Synthesizing what we know about how juries operate with the patterns identified in wrongful conviction cases, the answer seems clear—the established evidentiary doctrines are sometimes compelling incorrect verdicts by presenting the juries with incomplete and inaccurate evidence while expecting them to develop complete and accurate narratives. Ultimately, the evidence suggests that juries generally bear very little responsibility in the wrongful outcomes in criminal trials. Rather, deeper consideration of the root causes identified across wrongful conviction cases must be considered.

Preventing Juror Misconduct in a
Digital World *Thaddeus Hoffmeister* 981

This article examines the reform efforts employed by common law countries to address internet-related juror misconduct, which generally arises when jurors use technology to improperly research or discuss a case. The three specific areas of reform are (1) punishment, (2) oversight, and (3) education. The first measure can take various forms ranging from fines to public embarrassment to incarceration. The common theme with all punishments is that once imposed, they make citizens less inclined to want to serve as jurors. Therefore, penalties should be a last resort in preventing juror misconduct.

The second reform measure is oversight, which occurs in one of two ways. Under the first method, oversight is conducted by attorneys and court officials. Under the second method, oversight is conducted by the jurors themselves through self-policing. The third reform measure involves education, which occurs both inside and outside of the courtroom. When done outside of the courtroom the education primarily occurs in the school system. Education inside the courtroom involves juror questions, instructions, and oaths.

The purpose of this article is to examine the various ways common law countries have used different types of punishment, oversight, and education to help stem the tide of internet-related juror misconduct. To date, no one country has completely solved this multi-faceted problem. However, this is not to say that various countries cannot learn and adopt practices from each other. For example, to determine the effectiveness or deterrence value of imposing tougher penalties on jurors, one might study Britain, which has taken a hard line on juror misconduct. Similarly, those jurisdictions that believe that jury instructions are the best way to solve juror misconduct should review the in-depth jury instructions employed by the United States.

A Tale of Two Countries' Engagement with the Fair Cross Section Right: Aboriginal Underrepresentation on Ontario Juries and the Boston Marathon Bomber's Jury Wheel Challenge — *Marie Comiskey* — 1001

In both Canada and the United States, the constitutional right to a jury trial includes the right to select a jury from a representative cross-section of the jury-eligible population. This article compares and contrasts how this right has been interpreted in the two countries through the lens of recent controversies. In Part I, the article examines how the Supreme Court of Canada and the United States Supreme Court have defined the representative cross-section component of the right to a jury trial in the two respective countries. In Part II, the article focuses on the crisis of Aboriginal underrepresentation on coroner and petit juries in Ontario, Canada. The findings of the Iaocubucci Report exploring the breadth of the problem, the reasons for the chronic underrepresentation of Aboriginals and recommendations for reform are canvassed. The article then moves to a critical examination of the groundbreaking decision of the Ontario Court of Appeal in *R. v. Kokopenace* where the court extended the doctrine of honour of the Crown to impose heightened obligations on the state to ensure adequate representation of Aboriginals on the jury rolls.

In Part III of the article, the Boston Marathon bombing case of Dzhokhar Tsarnaev is used as a lens through which to understand how defendants marshal representative cross-section of the community arguments in the United States. Tsarnaev asserted that his right to a jury trial was infringed by the underrepresentation of African Americans and almost complete absence of citizens aged seventy and older from the venires in both his grand jury and petit jury. It is argued that the biggest challenge within the American jurisprudence is the conundrum of which statistical test to employ in measuring disparity among the represented groups. The lack of judicial direction has created a difficult abyss where it is impossible for litigants or defendants to assess the likelihood of success that a challenge to a jury venire based on failure to meet the fair representation right will have. The article suggests that the coming years will be critical ones. In Canada, it remains to be seen whether the Iacobucci Report and *Kokopenace* decision mark a watershed moment that will lead to greater representation of Aboriginals on juries and a step toward healing the deep distrust that Aboriginals have for the criminal justice system. And in the United States, the coming years will reveal whether the courts step forward to accept the challenge of establishing principles and setting standards for the measurement of disparity when such guidance is sorely needed.

Ears of the Deaf: The Theory and Reality of Lay Judges in Mixed Tribunals — *Sanja Kutnjak Ivković* — 1031

This paper explores mixed tribunals, a unique form of lay participation in which lay and professional judges make legal decisions jointly. A short overview of different types and sizes of mixed tribunals around the world will be discussed first. Then, the paper will elaborate on the theoretical arguments that hypothesize about the nature and extent of interaction in mixed tribunals. These theoretical arguments, developed using the status characteristics theory, will be assessed using the evidence obtained in empirical studies of mixed tribunals. In addition, the paper will discuss other potential challenges faced by mixed tribunals. In the end, the paper will provide recommendations for further research.

STUDENT NOTES

RESTRICTIVE COVENANTS IN ILLINOIS: ADEQUATE CONSIDERATION PROBLEMS SHOW THAT THE COMMON LAW IS AN INADEQUATE SOLUTION *David S. Repking* 1071

Illinois courts have long dealt with whether restrictive covenants, specifically non-compete clauses, can and should be enforced when they involve employees of businesses. Many aspects of restrictive covenants have been litigated, but a recent Illinois Appellate Court case analyzed the issue of what is adequate consideration in order to enforce a restrictive covenant against a former employee. The First District in *Fifield v. Premier Dealer Services, Inc.*, affirmed a bright-line, two-year rule for deciding how long an employee must work for an employer before a restrictive covenant can be enforced.

The two-year rule protects employees because an employer cannot require them to sign a non-compete and then terminate their employment the next day. However, the two-year rule does not adequately take into account the employer's standpoint because an employee could voluntarily resign one day short of two years of employment and the restrictive covenant would be void. This note analyzes the bright-line, two-year rule in Illinois for adequate consideration and shows its development over time; it looks to how other states have tried to solve this very problem; and it discusses how the problem in Illinois could be fixed either through legislative or judicial change.

COMING TO A CAR DEALERSHIP NEAR YOU: STANDARDIZING EVENT DATA RECORDER TECHNOLOGY USE IN AUTOMOBILES *Kara Ryan* 1097

Event Data Recorders are receiving more attention as owners of automobiles have begun to realize that their driving histories are recorded. Event Data Recorders are the "black boxes" in automobiles that are installed in the vast majority of vehicles currently on the road. In the majority of states, the restrictions on what information can be retrieved from Event Data Recorders and used by police officers, advertising firms, and insurance companies remains a gray area. State laws governing Event Data Recorder technology greatly fluctuates by jurisdiction. If Event Data Recorder information falls into the wrong hands, the possession of the data raises serious privacy concerns. This note argues that as the use of Event Data Recorders becomes more widespread, enactment of uniform federal laws are needed to standardize the data that can be recorded by these devices and to restrict the use and dissemination of the retrieved information.

BECAUSE I SAID SO: AN EXAMINATION OF PARENTAL NAMING RIGHTS *Ashley N. Moscarello* 1125

Naming a child is often one of the most exciting parts of having a baby. Some parents, of course, choose to be more creative and unique, which leads to some very interesting names like Toilet Queen, Acne Fountain, Crimson Tide Redd, Messiah, Candy Stohr, and Violence. Although some of these names are quite absurd, should the government be able to tell parents that they have crossed the line?

When parents agree about the name they want to give their child, should the state or courts be able to intervene in that decision if the state has problems with the name? To what extent do parents have the right to name their child free from government regulation? This note argues that parents' rights to name their children should be protected, either as fundamental rights guaranteed through the Fourteenth Amendment, or through the First Amendment's protection of speech. Either analysis would require states to show a compelling interest in order to regulate the names that parents give their children or before judges exercise their authority to change the name.

Contact That Can Kill: Orders of Protection, Caller ID Spoofing and Domestic Violence *Gabriella Sneeringer* 1157

The Illinois Domestic Violence Act (IDVA) was created as a means of providing protection and remedies to domestic violence victims through orders of protection. The orders of protection can insulate victims from abusers through a variety of ways such as mandating that the abuser be prohibited from contacting the victim by any means. Under the IDVA, any violation of the order is a crime. As technology advances, abusers begin using more and more technology as a means to circumscribe orders of protection. One such technology, Caller ID spoofing, is particularly problematic. This technology enables abusers to easily contact, stalk and harass victims in violation of orders of protection, while concealing the abuser's identity. Thus, when an abuser violates an order of protection with Caller ID spoofing, it is very difficult to prove. This allows caller ID spoofing to perpetuate the psychological and emotional abuse inherent in domestic violence relationships. The Illinois criminal justice system must recognize that caller ID spoofing is covered under the IDVA so it may begin addressing and prosecuting violations of orders of protection involving this technology. Ultimately, the best way to protect victims of domestic violence in Illinois and across the nation is by eliminating access to and banning all forms of caller ID spoofing technology.

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