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Northern Illinois University

Law Review

Volume 16 Fall 1995 Number 1

Articles

Francis X. Riley Lecture on Professionalism
George E. Bushnell, Jr. 1

Their Finest Hour: Lawyers, Legal Aid and Public Service in Illinois
Joseph A. Dailing 7

This article details the history of the provision of free legal services for the poor. Advocates of the governmentally-funded Legal Service Corporations (LSC) have encountered numerous obstacles and endured ferocious attacks from opponents. At times it appeared that the entire LSC program was in jeopardy. The author recounts the establishment of the LSC program in Illinois, summarizes the LSC's many accomplishments, and outlines the challenges that the Illinois legal community will face in continuing to offer legal services to the impoverished of our state.

The Disparate Treatment of Student and Family Farmer Debtors: Suggestions for Statutory Reform of Bankruptcy Policy
Nancy H. Kratzke and Thomas O. Depperschmidt 25

The resolution of bankruptcy litigation involving individuals under the governmental student loan programs and family farmers under Chapter 12 of the Bankruptcy Code provides an intriguing insight into congressional policy. That divergence is especially prominent in the treatment of "disposable income" under these two statutory provisions. When deciding issues relating to whether income should go to unsecured creditors or be used to offset future farming costs, courts tend to interpret the Code in favor of debtors; conversely, the Code creates, and courts perpetuate through their rulings, a clear presumption against discharging student loan obligations. The debtor will prevail only if an "undue hardship" can be shown. This paper looks at these "fresh start" differences by analyzing legislative history and case law and making recommendations, including suggested statutory revisions, in order to offer a more balanced and equitable treatment of the two debtor groups.

Retroactive Taxation: *United States v. Carlton*—
The Taxpayer Loses Again!
Ronald Z. Domsky 77

Unlike criminal laws, the ex post facto constitutional protection does not extend to civil tax matters. Nor are the words "fairness" or "equity" found anywhere in the Internal Revenue Code. Even as this is written, Congress is debating major tax changes, some of which may be retroactive. Should taxpayers be required to plan their financial affairs always subject to pending tax legislation or legislation that hasn't even yet been proposed? The Carlton case is one of the most egregious examples of taxpayer abuse in this area.

Vicarious Liability of an Employer-Master: Must There Be a Right of Control?
John Dwight Ingram 93
Most courts impose vicarious liability on an alleged employer-master when it has a right to control the physical conduct or method of doing the work of the person who injures a third party. In other instances, courts impose vicarious liability in cases where there only an appearance of actual control exists. This article examines the difference between actual and apparent control, and the author maintains that a better test for vicarious liability is whether the injurer is acting on the employer-master's behalf.

Awareness of Meaning in Libel Law: An Interdisciplinary Communication & Law Critique
Clay Calvert 111
This article critiques, from a communication and law perspective, a proposal to add another element to the already complex calculus of constitutional libel law. The element—a subjective state of mind hurdle closely akin to the actual malice standard—requires libel plaintiffs to prove that defendants were aware of the defamatory meaning conveyed by their messages at the time of publication. The article suggests that while free speech and press interests under the First Amendment may militate in favor of courts adopting this element, it: 1) conflicts with the reality of communication processes inherent in meaning determination; 2) denigrates the pivotal roles of the audience and message recipient in common law defamation; and 3) allows defendants who plead ignorance of meaning to escape liability despite causing real reputational harm to plaintiffs, jeopardizing the traditional goal of defamation law.

The Public Figure Doctrine: A Reexamination of *Gertz v. Robert Welch, Inc.*, in Light of Lower Federal Court Public Figure Formulations
Mark D. Walton 141
This article focuses new attention on the United States Supreme Court decision in Gertz v. Robert Welch, Inc., the seminal defamation case in which the Court sets out the current test for determining whether a defamation plaintiff is a public figure. The Courts of Appeals have differed in their formulations of the Gertz test, which in turn has led to inconsistent application of the public figure doctrine. Through an examination of the history of defamation law and an analysis of recent lower court public figure decisions, the author posits that the Gertz test is unlikely to ever be universally applied.

Casenotes

Schiro v. Farley: If at First You Don't Succeed, *Trial* and *Trial* Again; The Demise of the Double Jeopardy Clause Within the Context of Capital Punishment
Patrick L. Edgerton 175
This note examines the United States Supreme Court decision allowing a trial judge in the sentencing phase to use as an aggravating circumstance to impose the death penalty, an element of which the jury was silent in the guilt or innocence phase. The author contends that the majority's application of the Double Jeopardy Clause, including the doctrines of collateral estoppel and implied acquittal, was not only erroneous but also inconsistent in light of the Court's prior holdings treating capital

cases as two trials: (1) guilt or innocence phase; and (2) sentencing phase. Focusing on the "trial-like" nature of the sentencing phase in a capital trial, the author suggests that the guilt or innocence phase and the sentencing phase should be treated as two separate trials even absent a remand after appeal.

J.E.B. v. Alabama ex rel. T.B.: Gender-Based Peremptory Challenges on Trial
Stacey L. Wichterman 209
This note examines the United States Supreme Court decision holding that litigators may not discriminate on the basis of gender during the process of selecting jurors in that it violates the Equal Protection Clause of the Fourteenth Amendment. In addition to discussing the history of peremptory challenges and jury selection, the author proposes a limitation on the number of peremptory challenges allowed during jury selection. In doing so, the author explains that peremptory challenges have historically been a useful and integral part of jury selection, but the process is now a fertile ground for abuse. The author concludes that unless the legislative bodies recognize the implications of the Court's holding and act accordingly, any future restrictions on peremptory challenges may mark the end of them.

Designing a "System for Idiots": An Analysis of the Impracticality of *Davis v. United States* on Ambiguous Waivers of the Right to the Presence of Counsel
William G. Worobec 239
This article explains the United States Supreme Court holding that police, upon a suspect's equivocal reference to their Fifth Amendment right to the presence of counsel during interrogation, are no longer required to clarify the suspect's true intent. The author contends the majority was erroneous in holding equivocal waivers to be equivalent to clear waivers, and that the decision could not be reconciled with Miranda and its progeny. The Court has impermissibly placed the burden of a mastery of the law on the less knowledgeable suspect, and consideration need be given to existing lower court proposals, or a modification thereof, to preserve a suspects' valuable Fifth Amendment right.