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MICHAL S. GAL & HILA NEVO

THE EFFECTS OF DECISION THEORY ON THE DESIGN OF LEGAL RULES: THE CASE OF ABUSE OF DOMINANCE BY WAY OF CHARGING UNFAIR PRICES

The design of a legal rule is based, first and foremost, on the rule's legal purpose. Yet for the law to achieve its purpose, the design of a legal rule should also take into account the limitations inherent in the decision-making process when implementing the rule in practice. Accordingly, an efficient rule is one that would best achieve the rule's purpose under realistic assumptions regarding the decision-making process. Finding such a balance is the task of decision theory, which influences the rule-making decisions of legislators and courts around the world. The purpose of this article is two-fold. Firstly, to introduce the basic premises of decision theory, which can assist the rule-maker in creating better rules across a large variety of legal fields and create a better understanding of existing rules; and secondly, to exemplify the application of decision theory in the field of competition law. Competition law is extremely well suited for such an analysis, as it is based on economic insights regarding market behavior. The non-rebuttable presumption included in section 29A(1) of the Israeli Competition Law, that unfair high pricing constitutes an abuse of dominance, serves as the main basis for the analysis. As will be shown, decision theory leads to the conclusion that high prices should not be regulated through section 29A(1).

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TAL HAVKIN

ERROR CORRECTION AND EFFICIENT DIVISION OF LABOR IN A THREE-TIER JUDICIAL SYSTEM

A three-tier judicial system is based on a division of labor designed to utilize judicial resources efficiently: the court of first instance acts as a trier of fact and decides the case; the appellate court corrects errors; and the role of the highest appellate court is to develop the law. This article argues that in Israel the conditions necessary for efficiency are not met because errors that should be corrected in the erring court are instead corrected by higher courts, including the Supreme Court, where their resolution requires greater and more valuable resources. This inefficiency stems from the absence of any power of the erring court to correct its own errors. In Israel a court is authorized to correct only clerical errors but not substantive ones. The article recommends that Israel adopt the rule existing in the United States which enables every court to correct material errors in limited circumstances. Such an arrangement would result in a more efficient utilization of judicial resources, and specifically those of the Supreme Court.

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SHULAMIT ALMOG & KARIN CARMIT YEFET

SEXUALITY, GENDER AND THE LAW – PART I: REGULATING SEXUAL ECONOMICS

This article, the first part of a wider project, deals with sexuality, gender and law. According to a cumulative body of existing literature from diverse disciplines, including psychology, sociology, economics and cultural studies, often referred to as "theories of the sexual economy", heterosexual sex can be described as taking place within a market in which sex is perceived as a resource and in which female sexuality is of significantly greater value than male sexuality. However, it seems that the individual and collective female ownership of the sexual resource is not transformed into other forms of symbolic capital or into economic and social power. Rather, in practice, sexuality is traditionally employed to promote feminine suppression and according to Catherine McKinnon's widely accepted analysis, the current perception of sexuality produces and perpetuates gender inequality in society.

The paper aims to analyze and deconstruct complex cultural-legal strategies employed by contemporary society, still bound by patriarchal values, in order to convert the sexual economy into a 'sexual dysonomy'. As a result of such conversion women are prevented from using their sexuality as an invigorating resource and the preservation of hierarchal gender gaps between men and women is actually facilitated. As we suggest, the axis of the sexual dysonomy project is the construction of an inescapable link between women, sexuality and shame. The systematic assertion of this link was enabled by regulating feminine sexuality, through the current "price-prize" equation and the earlier virgin-whore dichotomy.

Against this background, the paper aims to lay a cornerstone of a project geared towards re-conceptualizing sexuality in Israeli law. It offers an outline, to be developed in the second part of the project, for the reformulation of legal doctrines regulating human sexuality in a positive way that will transform female sexuality from a site of danger, humiliation and weakness to a source of power, self-assertion and empowerment.

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ADAM HOFRI-WINOGRADOW

TRUST LAW IN ISRAEL: FROM STUMBLING BLOCKS TO CHARMS?

The Israeli trust regime as enacted in the Trust Act of 1979 was, at the time of its enactment, exceptional among trust regimes worldwide. Unlike most trust regimes, the Israeli regime permitted a trust to be created without the transfer of ownership in the trust assets to the trustee; it did not set a limit on the duration of trusts; it included two different sub-regimes, requiring different levels of formality for trust creation; and it provided that as a default position, beneficial entitlements under the sub-regime requiring a greater degree of formality could not be assigned, encumbered, levied upon or attached.

The Act met with strong criticism, and the current draft Civil Code proposes to abandon most of the unconventional aspects of the existing regime. However, enactment of the Code is proceeding very slowly and meanwhile, many other trust regimes around the world have been subjected to sweeping reforms, the results of which approximate the very aspects of the existing Israeli trust regime that have been heavily criticized and are now facing possible abolition.

The article re-examines the controversial aspects of the existing Israeli trust regime, asking whether these aspects have remained "stumbling blocks", as Prof. Joshua Weisman called them in his classic article, or whether altered circumstances and the extreme changes made to many other trust regimes have turned some or all of those aspects into charms. I argue that the existing regime should be extensively amended.

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SHACHAR TAL

THE DREAD OF LIBEL: THE INCENTIVE STRUCTURE OF SLAPP'S IN ISRAEL

During the 1980's and 1990's, North American courts were "flooded" by a novel type of law suit: libel suits filed against civilians participating in various public arenas - social organizations, local protests, unions and other similar activities. Scholars George Pring and Penelope Cannan identified this phenomenon and named it "SLAPP", *i.e* Strategic Lawsuits against Public Participation. Following their research, over the years, American law has steadily developed various instruments to deal with this phenomenon, in the hope of eliminating it, *inter alia* through Anti-SLAPP legislation. This direction was promoted due to the realization that American civil procedure creates an incentive for plaintiffs to use libel suits to deter undesirable activity. In recent years libel suits similar in character to those seen in the United States have been identified here in Israel; a small portion of these have received some media attention, but many remain "under the radar", causing significant social and civil damage due to the "chilling effect" they have on public participation. This article examines the emergence of this phenomenon in Israel. It argues that procedural rules in Israel, similar but not identical to the pre-Anti-SLAPP legislation American civil procedure rules, not only facilitate such law suits, but even provide incentives for their growth, leaving defendants without adequate protection. However, in light of the significant differences between Israel and the United States in the scope of protected freedom of expression, and due to the immaturity of Israeli doctrine and the current political reality, it seems that the time has not yet come to adopt full-scale Anti-SLAPP legislation. Rather, this article suggests making use of existing procedural instruments in order to develop Israeli doctrine and change the incentive structure, maximizing the risks imposed on a plaintiff filing a SLAPP suit, while reducing the risks imposed on the defendant. It will emphasize that while the

appropriate long-term solution indeed lies in an appropriate legislative move, it can be hoped that, until that occurs, a judicially developed Israeli anti-SLAPP doctrine will provide adequate protection for freedom of expression and permit informed public debate on controversial issues.