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OMER DEKEL & YOAV DOTAN

DIFFERENT EFFECT OF COGNITIVE BIAS ON DIFFERENT DECISION TYPES – AN EXPERIMENTAL STUDY ON GOVERNMENT PROCUREMENT

To what extent is decision-making by administrative officials subject to cognitive biases? And how can a change in the regulatory framework contribute to de-biasing such influences? In the current article we investigate these questions by referring to decision-making in the field of competitive bidding (CB). In CB procedures there is a substantial concern that when bid evaluators are exposed to the bid price, this may affect their judgment, even with regard to decisions that should not be affected by this information. More specifically, there is a concern that bid evaluators might qualify a faulty bid when they are aware that it is the lowest. Similarly, there is a concern that the evaluation and scoring of qualitative elements of the competing bids (such as experience, recommendations, etc.) might be affected by knowledge of the bid price in a way that will give an undue advantage to the lower bidder.

The purpose of the current study is to examine whether and under what conditions such bias does influence decision-making in CB processes, and whether it can be de-biased by regulatory change. To this end, we conducted a series of six experiments, with the participation of real decision makers, in situations that closely resemble their routine work. Our main finding is that knowing the bid price has a significant effect in favor of the lower bidder in the scoring of competing bids; however, we also found that bid evaluators have the ability to overcome that bias when deciding whether to qualify or disqualify faulty bids. We cautiously ascribe the difference in susceptibility to the bias in favor of the lower bidder to differences in the decision type and suggest a normative regulatory change.

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DAVID GLIKSBERG

THE TAXATION OF CORPORATIONS AND SHAREHOLDERS AND JUDICIAL ATTITUDE

This article belongs to the genre that seeks to decipher the components of the "judicial code", and increase understanding of judicial decision-making. This is a multi-faceted genre of which the attitudinal approach is one pillar. Empirical research is a laboratory arena where recurring efforts are made to crack the code, inter alia by using data regarding the various parties' success rates in the courts, in an assortment of cross-sections. This article introduces to this empirical arena one of the pivotal issues in the discourse of taxation over the past century, focusing on the appropriate model for taxing the corporation and its shareholders. This question arises from the taxation-corporate tension produced by the corporate tax regime's adoption of the doctrine that a corporation is a legal entity distinct from its members. This, in turn, has led to a double tax burden, which taxpayers employ various techniques to reduce. We show in this article that in cases dealing with the taxation-corporate tension, the winning rates of taxpayers in court are significantly lower than those of an individual or a corporation or an individual with a corporation in cases that do not entail that tension. The explanation we offer for this phenomenon is the court's negative attitude towards tax planning in the context of corporations and their shareholders. This study has inherent significance in three contexts: firstly, as it concerns the classic tension attendant on the legal discourse between legal doctrine and the quest for legal realism that is becoming ever more important in tax discourse. Secondly, this research is likely to have distributive implications, due both to its tax content in general, and more particularly due to the content of the tax regime applicable to corporations and their shareholders. And thirdly, it demonstrates the impact of challenges stemming from the use of legal tools that are insufficiently effective, such as the anti-avoidance norms, on the judicial process.

MISHPATIM 44 2015

KEREN WEINSHALL-MARGEL, INBAL GALON
& IFAT TARABOULOS

CASE WEIGHTS FOR THE ASSESSMENT OF JUDICIAL WORKLOADS IN ISRAEL

Judiciaries worldwide are coping with increasing workloads and limited resources, and are thus searching for effective tools with which to allocate resources and proactively manage the courts. One valuable such tool is an empirical “case weight” measure, which assesses and compares judicial workloads based on the average judicial time invested in different case types. This paper describes the creation of a case weights measure within the Israeli judiciary, with special emphasis on the methodologies used to obtain a higher and more refined resolution of case weights than is common in other judicial systems. This measure assigns a weight to 101 case types in the Magistrate, District and Labor courts, ranging from weight ”1”, assigned to a search and entry warrant case, to weight ”1826”, assigned to a severe criminal offense case heard by a panel of District Court judges.

We modeled case weights for each case type based upon the interaction between the average frequency of all the events comprising the processing of a case in the courts and the average complexity of those events. We describe the four individual research designs that were utilized in order to obtain data for average event frequency and average event time, including qualitative research to assess judicial time by groups of judges and quantitative analyses of computerized data and representative samples of cases. We demonstrate examples in which case weights can be utilized by the judicial system for effective allocation of resources, standardization of the judicial needs of the judiciary, identification of managerial challenges, and for planning and carrying out evidence-based reforms. We recommend building ”normative case weights” which will reflect the optimal combination between efficiency and justice in the Israeli judiciary.

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OREN GAZAL-AYAL & KEREN WEINSHALL-MARGEL

DOES THE PROSECUTION CALL ALL THE SHOTS? THE LIMITED EXTENT OF PROSECUTORIAL POWER IN THE ISRAELI CRIMINAL JUSTICE SYSTEM

Two central theses have been used to explain the high conviction rate in Israeli criminal proceedings. According to the "prosecutorial court thesis", the court acts to a great degree as an extension of the prosecution, almost always adopting its position. According to the "judicial prosecution thesis", the prosecution submits only factually and legally based indictments, and accordingly, the accused are convicted in most cases.

In this study, a third thesis – the "thesis of prosecution resource constraints" – is proposed and empirically examined. According to this thesis, the rate of prosecutorial success in criminal proceedings can be explained by the cost of the proceedings. In costly stages of the criminal process, such as the indictment phase, the prosecution vigorously screens the cases that go to court. On the other hand, when the cost of asking the court to adopt the prosecution's position is inexpensive, as in requests to remand the defendant, the screening is much less vigorous. Thus, the prosecutorial success rate in expensive stages of the criminal process is expected to be high, while its rate of success in inexpensive stages is likely to be low.

Empirical investigation of these theses was conducted through quantitative analysis of a wide and representative sample including 2,022 criminal cases from Magistrates and District courts in 2010-2011. The results of the following stages were included in the case sample: issuing indictments; choice of the charges to include in the indictment; plea bargains; requests for detentions; requests for imprisonment sentences, and appeals.

The findings refute the two common theses and support the hypothesis that prosecution resource constraint is a dominant factor in the decision as

to which legal requests to present to the court. The prosecution makes sure to issue indictments only when the case is well established, as the cost of managing full criminal proceedings is high. By contrast, when the prosecution can request that the court detain a defendant, when it chooses which charges to include in the indictment, and when requesting an imprisonment sentence at the sentencing hearing, it will not be strict about submitting only well-founded requests and hence it will succeed much less often in these stages.

MISHPATIM 44 2015

OREN GAZAL-AYAL & NOCHI POLITIS

SPECIALIZATION OR GENERALIZATION: THE EFFECT OF JUDICIAL SPECIALIZATION ON PROCEEDINGS AND DECISIONS

Many scholars have discussed the question whether specialization is a positive phenomenon that should be preserved and developed in court systems, or whether the judiciary should maintain its reliance on generalist judges. In this discussion, many potential advantages and disadvantages of specialization were mentioned, but there is little empirical research examining the actual effect of judicial specialization. This study takes advantage of a unique situation that exists in all of the Magistrates Courts in Israel: a detention rotation duty in which both criminal law judges (who specialize in criminal law, including detention law) and civil law judges (who usually deal solely with civil law cases) must hear detention cases that are distributed to them randomly. In this study we examined more than 1600 detention cases. We found no significant direct effect of specialization on the legal decision, but specialization was found to have a significant effect on the number of party agreements on the number of days of detention under arrest. More such agreements were reached in cases heard by criminal judges than in those heard by civil judges. This finding shows that a judge's specialization does matter, and that party agreement is not only very common in criminal trials (plea bargaining) – it is also prevalent in detention hearings. Moreover, we found that prior experience in criminal prosecution influences decisions: judges who are former prosecutors impose more days of detention in their decisions than other judges. Another interesting and significant finding is that judges with more years on the bench are harsher in their decisions, compared to less experienced judges. We found that the identity of the court has a significant correlation with the decisions, and some courts are harsher than others. As in previous research, we also found inter-group bias: Arab

judges released Arab detainees more than Jewish judges. This study showed that specialization correlates to party agreement. As long as decision makers in the legal system think that cases should be decided by judges rather than by way of party agreement, the findings of this study should be taken into consideration when choosing between generalism and specialization in the courts.

MISHPATIM 44 2015

SHOMRON MOYAL & MIMI AJZENSTADT

SENTENCING DISPARITY IN DRUNK DRIVING OFFENSES

In Israel, the offence of drunk-driving is a useful setting for exploring the effect of restricted judicial discretion on equality and uniformity in sentencing. In addition to any other penalty, this offence is subject to a minimum sentence of driving-license suspension for at least two years. Our review of appellate court cases shows that the discretion of Magistrates Court judges is further restricted by District and Supreme Court rulings. In a series of decisions, it was held that the minimum sentence should be fully imposed, and not be shortened, made conditional or replaced by alternative penalties except in very exceptional circumstances. Does this regime of statutory minimum sentences and restricted judicial discretion produce uniform and unbiased sentences? This question was studied using a random sample of 1209 court cases adjudicated in four Magistrates Courts in the years 2008-2011. In order to increase the homogeneity and comparability of the court cases, we limited the statistical analysis to offences in which driving under the influence of alcohol (and not drugs) was the sole accusation and to offences in which car accidents did not occur (no injury or damage). We also controlled for a series of legally relevant variables, including blood alcohol concentration (BAC), refusal to perform alcohol breath test, number of prior traffic offences, prior drunk driving offences, criminal history, denial of facts, trial length and plea bargains. All other case characteristics being equal, we found that the imposition of the minimum sentence and lengthier license suspension terms were most likely to be enforced against defendants who were not represented by an attorney, and/or did not reach a plea bargain, and/or were tried in absentia. These three extra-legal variables had a strong independent and cumulative effect on the level of punishment. Moreover, adjusting for the clustered nature of the data by using multilevel linear regression models, we found that the length of

license suspension varies considerably across judges, from one court to the next, and between junior (more stringent) and senior judges. In conclusion, despite the existence of statutory minimum sentences and formally restricted judicial discretion, we found that similarly situated cases receive widely divergent sentences based on the presence and quality of legal representation and plea bargains, the identity of the judge and the courts' location. Possible legal and theoretical interpretations of the findings are discussed.

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SHARON BAR-ZIV, YAEL BREGMAN-ESCHET,
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HOW DOES LAW AFFECT RESEARCH AND DEVELOPMENT: EMPIRICAL ANALYSIS OF PATENT APPLICATIONS

The question how legal and policy decisions affect research and development (R&D) activity has been widely debated in recent years. An empirical analysis of patent applications provides a tool to understand the relationship between legal decisions pertaining to R&D and actual R&D activity. Understanding the relationship between the two may shed light on the effects of legal policy and help shape future policies. This article focuses on stem cell research in Israel as a case study. This is a highly promising yet controversial line of research, which raises ethical, legal, and financial dilemmas leading to frequent policy changes and legal uncertainty. The article examines changes in stem cell R&D activity through an analysis of Israeli stem cell patent applications, while tracking changes in Israeli, European and American stem cell policies pertaining to patent rights and public funding.

We report the findings of a comprehensive empirical study of Israeli stem cell patent applications filed between 1990-2013 in Israel, in the U.S., in Europe and through the Patent Cooperation Treaty (PCT). Our findings indicate that following a 2004 European decision, holding that *human embryonic stem cells* are not patentable in the European Patent Office (EPO), there has been a decline in patent filing activity in the entire stem cell field, extending to non-embryonic stem cell inventions as well. Moreover, even though this is a local decision that applies only to patent filing in the EPO, it had a significantly wider effect, influencing Israeli R&D activity too. Interestingly, the number of Israeli stem cell academic publications did not decline during the same time period, indicating that stem cell R&D activity did not come to a halt. At the same time, changes in American stem cell federal funding policies did not influence stem cell research as

dramatically. These findings are particularly striking as they indicate that game-changing decisions pertaining to IP may have an impact that is broader and wider than their intended scope. The findings further suggest that the private sector, which depends primarily on private investment, is more susceptible to policy changes pertaining to patent rights. Frequent policy changes create uncertainty and increase the risk associated with private investment, and consequently affect the scope of R&D activity. These findings call for caution among policymakers in making frequent policy shifts, because such shifts may involve some unintended consequences for R&D.