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DO JUDGES OBEY THE LAW?

It is commonly believed that when a new law is introduced, judges apply it immediately. This study examines this issue empirically, by analyzing the level of compliance with one of the features of the new sentencing law in Israel (amendment 113 to the Israeli Penal Code). According to this amendment, sentencing judges are required to determine in their written decision a commensurate sentencing range for the offence according to the seriousness of the offence committed by the offender and the degree of his culpability. We found that in approximately one fourth of the magistrates' court sentences, this rule was not complied with. However, the judges' compliance with the law increased over time. The study also examined the effect of judges' characteristics on the level of compliance. We found a significant negative correlation between the age of the judges and their time in judicial service, and the level of compliance with the law. Older judges and judges who have served more years on the bench tend to deviate from the law more often. We also examined the level of compliance in the Supreme Court. The Supreme Court is required to determine a sentencing range if it accepts an appeal against the sentence and rejects the range determined by the lower court. In examining only cases such as these, we found that the level of non-compliance in the Supreme Court was much higher than in the magistrates' courts. Even more importantly, the rate of non-compliance in the Supreme Court increased with time, contrary to the findings in the magistrates' court. We also found strong indications that the Supreme Court disregards the rules intentionally, and not negligently. These results are discussed in the conclusion of the article.

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ASAF WIENER

THE ADOPTION OF THE NEW PROPERTY DOCTRINE IN ISRAELI CONSTITUTIONAL LAW: A MATTER OF PRINCIPAL OR A MATTER OF POLICY?

The term "new property" refers to the legal view that the constitutional right to property is not limited to ownership of material resources but also protects government grants of economic value (such as state subsidies, allowances, or licenses). The aim of those who conceived this new property concept was to address the increasing dependence of individuals on the state as a source of economic resources, which in turn threatens their individual liberties.

This Article offers a descriptive and normative analysis of the emerging adoption of new property rights in Israeli constitutional law. On the descriptive level, the article demonstrates that in recent decades the Israeli Supreme Court has expressed a willingness to expand constitutional protection of property to include governmental grants by classifying it as "new property". By analyzing the court rulings and their rationales, the article outlines the principles of the emerging doctrine for judicial review of termination or change of governmental grants. On the normative level, the article analyses the problems of this emerging constitutional doctrine as a matter of policy and as a matter of principle. I argue that although public law should adapt to answer the increasing threat that the modern regulatory state poses to individual rights, it should not be done by regarding state grants as private property.

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YOTAM KAPLAN & KOBI KASTIEL

CALCULATING EXPECTATION DAMAGES IN RISK-INTENSIVE VENTURES

The issue of contract breach in risk-intensive ventures, such as startup companies or gas and petroleum joint ventures, raises special difficulties relating to the appropriate calculation of expectation damages. Yet, despite the importance of risk-intensive ventures to the Israeli economy, this issue has not been adequately addressed in the academic literature. We provide a comprehensive framework for calculating expectation damages in such cases and use it to evaluate the doctrinal tools developed by the Israeli courts. We show that these doctrinal tools, including intuitively reducing compensation and allowing flexibility in the choice between ex-post and ex-ante mechanisms, do not provide appropriate solutions for the cases of risk-intensive ventures. This is because those tools do not accurately account for the risk in the original contractual venture, and they may also create confusion between different compensatory instruments.

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MICHAEL COHEN

THE RISE AND FALL OF ISRAELI DILUTION DOCTRINE, AND AN OFFER FOR REGENERATION

Over the years, the Supreme Court of Israel has examined cases of non-confusing use of famous trademarks through two different prisms. The first is the doctrine of trademark dilution that was recognized by the Supreme Court two decades ago. The second is the protection of "well-known" trademarks, which the Israeli parliament enacted a year and a half later. Both arrangements protect owners of powerful trademarks against use of their mark even though the use is not likely to confuse consumers. The stated purpose of such protection is to prevent economic damage to the marks' owners.

The present paper explores how the Israeli Supreme Court has shaped both arrangements. It shows that the two have been united over time. Furthermore, the protection of powerful trademarks has declined over time in three distinct contexts: content, scope and the required burden of proof to obtain the law's protection. These developments have emerged from the view that trademark law should protect only against consumer confusion and not against economic damage to the mark's owner. I will offer a new interpretation of the law after critical analysis of the current one. This interpretation is based on the premise that when enacting the legal defense of well-known trademarks, the legislator intended to prevent economic damage to the owners of the marks.

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ADI LIBSON

CONFLICT OF INTERESTS BETWEEN BANKS AND THE STOCK EXCHANGE: MANIFISTATIONS, IMPLICATIONS AND POLICY RECOMMENDATIONS

The Tel-Aviv Stock Exchange (TASE) is in crisis – it is drying-up both in terms of the volume of trade and in terms of the number of listed companies traded. We argue that the legislative reform to restructure the ownership and governance model of the TASE did not sufficiently address one of the primary causes for the crisis: the power of banks serving on the board of TASE and the conflict of interest in which they are situated. Bank deposits are a non-perfect substitute for stock investment. Banks' profits from deposits and credit activity are much higher than their profits from customers' trading activity and thus they have a strong incentive to divert investors from the stock exchange to bank deposits. We argue that this conflict of interest is most strongly manifested in passive forms of behavior. Our argument is based on a behavioral ethics analysis and is supported by economic analysis. Data on the low attendance of directors who represent banks at TASE board meetings between 2004 and 2014 support the hypothesis. From the perspective of the managerial model of boards, the low attendance rate of directors may explain the general passivity of the TASE in engaging in reforms in comparison to other stock markets in OECD countries. Passivity is especially detrimental in times of crisis which call for action, such as the situation of the TASE. We further identify active manifestation of the conflict of interest of banks in the structure of the TASE fee schedule. As compared with fees in other OECD stock markets, the TASE fee schedule reveals inefficient fees designed to limit entry to the TASE. In addition to its practical implications, the article seeks to make a theoretical contribution by extending the application of behavioral ethics to the realm of board decisions. It also contributes to the general international debate regarding the degree of separation between commercial banking and securities trading, established in the U.S. by the Volcker Rule.