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ARIEL L. BENDOR & HADAR DANCIG-ROSENBERG

THE HEBREW UNIVERSITY LAW JOURNAL JUBILEE: CHANGES IN LEGAL SCHOLARSHIP

The article examines empirically and illumines changes in the characteristics of publications and authors in the Hebrew University Law Journal, the first Hebrew academic legal journal, over fifty years of its publication – from the first issue, released in September 1968, to issue 3 of volume 47, published in November 2018. The article thereby provides indications of trends and developments in legal research in Hebrew in its entirety during this period. The article describes and analyzes, *inter alia*, developments in the genres of the articles published in the Journal, the methodologies and length of the articles, the legal areas they discuss, the extent of their focus on Israeli law, the characteristics of the authors (including their occupation and affiliation with the Hebrew University), and the frequency of co-authored articles. The article also describes and analyzes correlations between the characteristics of the articles published in the Journal and the characteristics of the authors. The findings in the various parameters examined indicate trends and almost all indicate a dynamism in legal research in Hebrew published during the fifty years of the Hebrew University Law Journal. The explanations that the article offers for the various trends and changes are related to developments in Israeli law (and sometimes in comparative law), i.e. developments in legislation and case law; non-legal developments in Israel or in the world, such as technological or political developments; academic developments, such as the development of new research areas, methodologies, theories, approaches and insights; intra-academic organizational and cultural developments, such as developments related to the criteria for academic promotions, the model of public funding of institutions of higher education, and the standards for acquiring academic prestige; and even changes in fashion in academic legal writing.

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ELAD SLOMIANSKY & ITTAI PALDOR

ANTITRUST LAW'S TREATMENT OF TYING: COGNITIVE AND BEHAVIORAL ASPECTS

Antitrust laws prohibit a monopolist from making the sale of the product or service over which it holds a monopoly conditional on terms which, by their nature or according to common commercial usage, are unrelated to the sale. Essentially, a monopolist is prohibited from making the sale of the product or service conditional on the purchase of another service or product – a practice known as 'tying'.

Intuitively, tying harms consumers in a direct manner. It forces them to purchase a product that they do not want in addition to the product they desire. Nonetheless, the literature has long argued that such simple exploitation is impossible. Although the literature has identified certain market conditions under which tying may be harmful, the usage of tying in the most straightforward and intuitive manner is still considered impossible.

This article offers two explanations for the profitability of tying from the monopolistic seller's perspective. The explanations are based on well-known cognitive biases. The article shows that consumers' susceptibility to these biases can systematically and routinely be used by monopolists to increase the amount that consumers are willing to pay for the tied products. The article also explains why exploiting these biases is contingent on the seller's market power.

The analysis does not necessarily imply that the prohibition on tying is justified. The normative implications of the analysis depend on one's attitude toward exploitation of cognitive biases, and on a balancing of the benefits of the prohibition and its costs. Nonetheless, the analysis can explain the legislator's concern with tying. The analysis also reinforces the basic intuition regarding the profitability of tying from the monopolist's perspective.

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EHUD GUTTEL, LIAT DASHT & YUVAL PROCACCIA

COORDINATED OR COMPLEMENTARY? TORTS AND THE ADJUDICATION OF THE ISRAELI HIGH COURT OF JUSTICE

It has long been observed that the Supreme Court often adjusts its adjudication in civil matters, particularly in torts, in an effort to align it with the Court's jurisprudence in constitutional and administrative matters. This paper demonstrates, however, that this interaction between the two legal domains is in fact more complex than previously supposed. Important policy decisions in torts are a consequence not of what the Court *does* in the constitutional-administrative domain, but rather of what the Court *cannot* do. Although the Court may view a petition favorably, it may nevertheless determine that it cannot extend a constitutional remedy. In such cases, it may turn to tort law as an alternative means to address the petitioner's hardship. Policy of this sort is not "coordinated" with the Court's constitutional-administrative jurisprudence, but rather "complements" it. We demonstrate this pattern by examining the Court's adjudication in five primary categories: lawsuits against the military; divorce recalcitrance; cases concerning the Arab minority's right to equality; freedom of speech and the rights of persons with disabilities.

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MIRIAM GUR-ARYE

HUMAN RIGHTS AND SUBSTANTIVE CRIMINAL LAW

Human rights discourse, as developed in Israeli law since the enactment of the Basic Law: Human Dignity and Liberty (1992), is barely noticeable in the context of substantive criminal law. The lack of human rights discourse in this context is not unique to the Israeli legal system. In other western legal systems, there is a significant gap between the willingness to exercise constitutional control over criminal proceedings and punishment on the one hand, and the reluctance to exercise such control over crimes, on the other.

The article exposes both the reluctance to exercise constitutional control over crimes and the exceptions to this reluctance. The article further provides an explanation for such reluctance based on the dual nature of substantive criminal law. Criminal law aims at protecting either the victim's basic rights - such as the right to life, to bodily integrity and to property - or vital public interests. By doing so, criminal law infringes upon the offender's basic rights: the prohibition of the offense infringes upon the autonomy to act as one pleases, the stigma involved in criminal conviction infringes upon dignity, and the punishment infringes upon the right to free movement and additional rights. As a rule, modern criminal law balances the need to protect rights (of victims) with the infringement of rights (of offenders) by distinguishing between the criminal process and punishment on the one hand and criminalization on the other. Offenders' rights are guaranteed by the presumption of innocence and by the constitutional rights to both a fair trial and a humane punishment. Once these rights are guaranteed, the need to protect victims' rights prevails.

The article's conclusion is that in order to fully guarantee offender's basic rights, substantive criminal law should be subject to constitutional constraints.

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AMIT PUNDIK & URIEL ROSS

SEX FOR SALE: IS THE CRIMINALISATION OF PROSTITUTION JUSTIFIABLE?

In this article, we argue that offenses specific to prostitution, including those that criminalise clients (Prohibition on Prostitution Consumption Law – 2019) lack theoretical justification. Justifying criminal intervention in prostitution requires identifying a component that makes acts of prostitution wrongful. At the very least, one must establish that a world without prostitution is preferable to one with prostitution. Furthermore, the identified component must establish prostitution's wrongfulness without going so far as to place it in the category of rape. Otherwise, an offense specific to prostitution would impose an unjustifiably lenient sanction on rapists. The component must also be unique to prostitution. If not, the justification would also apply to sexual relations that should not be criminalised. This article presents a spectrum of cases in which some consideration, either monetary or in-kind, was necessary for the sexual relations to take place, from street prostitution to marriage based on financial interests, but does not justify criminalisation. We analyse a number of variables found in cases of prostitution but absent from other cases and claim that their absence does not impinge on the normative flaw that existing theories attribute to prostitution. We conclude that, even if existing theories can justify the criminalisation of prostitution, they are grossly over-inclusive because they are also applicable to various forms of sexual relations that demonstrably should *not* be criminalised.

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DAVID GLIKSBERG

SHMUEL YOSEF AGNON – "ON THE TAXES"

S.Y. Agnon's story "On the Taxes" is a fascinating and challenging discussion of tax regimes and the social order that provides insights about the nature of society and humankind. This work tells the story of a political decision to impose a tax on walking sticks and of the grotesque randomness of its legislation, arrangements and enforcement. Agnon has ontological difficulties in understanding the social order and the irresponsibility of the leadership, and these are reflected in his work.

Agnon portrays social order as a miracle that constitutes an additional tax burden on society. This paradigm leads to important historical and contemporary insights into the social order and the tax regime. The tax discourse in the story is rich, diverse and critical, with many components related to fundamental issues of socio-economic policies in general and tax policy in particular: distributive justice, efficiency, tax legislation and responsible public governance.

The ideas expressed in the work correspond with philosophical-political and theological currents of thought: the "Invisible Hand" of Adam Smith, Thomas Hobbes, and the civilizational conception of the tax regimes of Oliver Wendell Holmes. The story does not merely portray the "tax-miracle" track; its plot has important lessons for the modern social order.

This literary work makes a significant contribution to the law and literature discourse, due to its surprising context, since the field of taxation is almost completely absent from the arena of law and literature.