University of Haifa • Faculty of Law

HAIFA LAW REVIEW

DIN UDVARIM

Interdisciplinary Law Review

Vol. 7 • No. 2

January 2014

Table of Contents

Abstracts

Criminal Justice, Ethnic Stratification and Political Legitimation: From Cinematic Representation to Institutional Reform?

Ely Aharonson

This paper examines the intersections between cinematic representations and sociological explanations of the way in which patterns of ethnic stratification shape the practices of crime enforcement in contemporary multiethnic democracies. It applies the insight of this investigation to analyze the challenges faced by the Israeli legal system today with regard to enforcement of criminal law and the minimization of victimization rates among members of the Arab minority.

Over the last three decades, a new genre of realistic films focusing on the experiences of racial and ethnic minorities in the urban ghettoes of post-industrial societies has gained cultural prominence. The film *Ajami* (2008), which describes the experiences of young members of the Arab minority in Israel caught in a vicious cycle of crime, poverty and cultural marginalization, is a recent contribution to this genre. This paper considers the contribution of this genre of realistic films to the shaping of public consciousness regarding the causes and effects of crime and victimization among racial and ethnic minorities. Correspondingly with sociological accounts of the impact of citizens' trust in the legitimacy of criminal justice institutions on their willingness to obey the law and to contribute to its enforcement, these films utilize the distinctive poetic tools of realistic cinema to illuminate the institutional and political conditions underpinning the current failures of the criminal justice system in these communities. The paper discusses the assets and liabilities of using the tools of realistic cinema to represent the current patterns of crime and victimization among racial and ethnic minorities within the current cultural climate in which individualized and

punitive interpretations of crime shape public consciousness. It concludes by examining whether and if so how the criminal justice system may accommodate the lessons conveyed by these films.

AKHNAI'S OVEN: DISCOURSE ETHICS AND STORYTELLING MANIPULATION IN JEWISH LAW AND BEYOND

JONATHAN YOVEL

How can we define a story, legally or otherwise? And what kind of question is this – interpretative, meta-interpretative, or perhaps ethical?

This article proceeds on two levels. On an interpretative level, it offers a reading of Akhnai's Oven, possibly the most heavily cited Talmudic story in the canon of Jewish Law. Extending the reading beyond its usual scope, this revisionist interpretation shows how the story expresses the dialogical discourse ethics of the Halacha rather than addressing its interpretative authority.

On a non-interpretative level, the article employs narrative and textual analysis techniques to question the notion that fixing the boundaries of a story – any story – is a matter of ontological fact, which presupposes and conditions any interpretative practice. The article contests the widespread presupposition that the identification of a narrative continuum as such – in law and elsewhere – is relatively unproblematic. The article analyzes the text's non-linear structure and usage of co-textual devices such as references, quotations, importation, and tacit reliance on mythical and other epistemological patterns. By presenting several plausible alternative readings of Akhnai's Oven, each extending to different textual passages and ostensibly generating different normative interpretations, the article argues that fixing the narrative can only be done as part of an interpretative or adjudicative process where the former cannot precondition the validity of the latter. A key distinction that serves in making the argument is the tension between narrative and text, which is frequently overlooked.

THE DISTINCTION BETWEEN MISTAKE OF LAW AND MISTAKE OF FACT

DORON MENASHE & SHAI OTZARI

This article deals with the distinction between mistake of law and mistake of fact in criminal law defenses. It criticizes the traditional view that distinguishes between mistake of law and mistake of fact using the criterion of perceptibility. The authors argue that the traditional view is problematic since the paradigmatic cases of mistake of law can also stem from mistakes pertaining to perceptible things. On the other hand, institutional facts are not perceptible. They propose an alternative test based on the rationale of promoting compliance with the law, as supplemented by them, following a critical discussion of the rationales for the harsher treatment of mistake of law. That alternative is a two-stage test: 1. Identifying the criminal prohibition—that is, the norm that derives from all the signs (whether linguistic or not) that are (1) made primarily for the purpose of fulfilling a function in the legal context; and (2) are not singular elements, such as proper names, the act of pointing, demonstratives, singular definite descriptions, etc. 2. The distinction between the two types of mistake is as follows: (a) a mistake of law is the omission to infer that the criminal prohibition applies to a given set of facts, where that inference is based solely on the meaning of the criminal prohibition as identified above; (b) a mistake of fact is a mistake in regard to the existence (or lack of awareness of the existence) of the set of facts stated.

PROCEDURE, GOALS, AND JUDICIAL DISCRETION: AN EMPIRICAL EXAMINATION OF REGIMES FOR MEDICAL EXPERTS IN ISRAELI TORT LAW

ORIT NINAI-KLEIN & OREN PEREZ

This article examines the way judges resolve epistemic dilemmas – mainly when they need to review and choose from conflicting medical experts' testimonies – and how different legal procedures of treating expert evidence in Israeli tort law influence on the way judicial discretion is exercised. The article critically examines the classical adversarial view, according to which, presenting the court with multiple views and subjecting them to cross-examination serves the value of the pursuit of truth**.** The article further examines an alternative thesis according to which, judicial decision-making is based on the use of various heuristics that either supplement or replace in-depth scrutiny of the evidence. These strategies are the product of pragmatic pressures that reflect epistemic and institutional constraints. As such, they are not necessarily aligned with neither the goal of uncovering the truth nor with the goals of the substantive law that governs the dispute (in this article, tort law). The article also examines the linkage between these procedural rules and the tort law's ability to meet its goals.

To answer these questions, the article empirically examines the two regimes that exist in Israeli tort law with respect to expert testimonies on disability levels. The empirical analysis is based on a sample of 446 rulings handed down between 2008 and 2011. In addition, the study reports the results of in-depth interviews with relevant agents. The empirical analysis comparatively examines the efficiency of these two regimes and their epistemic contributions. The findings of this study support a reform in the regime that governs expert testimonies regarding disability levels in Israeli tort law (applying the procedures that govern road accidents to all tort actions). In that context, the article also examines the recent proposal of the Israeli Ministry of Justice that could improve the review of experts that give testimony in court.

ENTICEMENT BY OMISSION – IS IT POSSIBLE?

RONI ROSENBERG

Synopsis

The article addresses the question of whether enticement can be done by omission. The goal of the article is to prove that even if a person can be enticed without any bodily movement on the part of the enticer (for example, by silence), such enticement should be classified under criminal law as act and not as omission, since the definition of these terms is not subject to the bodily movement test. According to this theory, it is possible to imagine scenarios in which a person is silent, does not move his body, and yet his behavior is still defined as an act under the law. On the other hand, there are other scenarios in which a person does move his body and his behavior is defined as omission nevertheless. The latter person would only be liable if a duty to act existed in the relevant case. This theory rests on the rationale of risk creation, which suggests that criminal law defines "act" as behavior that creates damage, while "omission" is behavior that allows damage to be realized, but does not create it.

The article proceeds to suggest two categories of lack of bodily movement under criminal law. The **first category** is "risk-permitting absence of movement." In other words, lack of movement that permits the realization of the risk, but does not actually create it. The **second category** is "risk-creating absence of movement." This type of movement does not only permit the risk to be realized, but actually creates it. The contention at the core of the article is that silence of the second type should be classified as an act under criminal law, not as omission. Therefore, it follows that scenarios that are generally characterized as enticement by omission are actually enticement by act, since they meet the criteria of the second category of movement.

The final portion of the article demonstrates that Israeli legal precedent is not uniform in presenting a clear definition of act and omission, and at the very least several judges have opined that act, as defined under criminal law, does not require bodily movement. According to this view, it is possible to imagine a scenario in which enticement that does not require bodily movement is defined as enticement by act and not by omission.

UNDERSTANDING THE (FUNCTIONALLY) LIMITED CAPACITY OF LEGAL PERSONAE

YAAD ROTEM

The theoretical aspects associated with acknowledging the existence of separate legal persons, the resulting economic and financial implications of such acknowledgements, and the question of acknowledging the existence of such persons in several borderline cases have been long debated in Israeli law. Nevertheless, Israeli case law and literature have never discussed how the legal capacity of separate legal persons is to be determined when that capacity is viewed as limited rather than general. This paper criticizes the manner in which the Israeli Supreme Court approached this issue in the **Kidmat Lod** Case, where the legal capacity of a homeowners' association was litigated. The paper points to a general methodological error in the Supreme Court's decision, and to a subsequent error concerning the capacity of such an association under the facts of the particular case. The paper suggests a new, functional approach to construing norms that bestow limited legal capacities that applies to any legal personality with limited capacity. In short, this paper points to the Court's failure to distinguish between the various relationships and interactions that are directly affected by the decision on whether or not to acknowledge the capacity of a given legal personality.