Abstracts

Benjamin Newman, *On Fairness and Reciprocity in the Criminal Investigation – the Defendant's Right to Obtain Material Evidence*

At the outset of a criminal trial, there is an inherent disparity between the defence and the prosecution, with the defence in an inferior position regarding the evidence gathered. While law enforcement agencies have complete exclusivity over the investigation process, the defence's main avenues for gathering evidence in the Israeli criminal process are limited to the discovery rule under Section 74 and an application for an order to produce documents pursuant to Section 108, which may be initiated in open court, but only after the commencement of the trial. Critiquing the recent Israeli Supreme Court's judgement in CrimApp 296/18 *Ploni*, the article discusses the defence's right to obtain material evidence relevant to the criminal investigation, by applying for an ex-parte order pursuant to Section 43 of the Criminal Procedure Ordinance. The article examines the concept of fairness in the criminal process rising from this procedural issue, and argues that due to the power disparity between the parties, fairness does not necessitate reciprocity and should not require a two-way discovery obligation, which infringes upon the defendant's privilege against self-incrimination. The article further argues that only by empowering the defence to gather material evidence, through a judicial order, issued ex-parte without the involvement of the prosecution, will it be possible to eliminate the investigatory disparity between the parties.

Netanel Hansel, *Inmates and the Internet – An Absurd Combination? A Call to Action in Light of Present and Future Developments*

The Internet has revolutionized countless areas of human activity but while it is recognized in International Law as essential to the realization of human rights, it is not often found in prisons.

Concerns about introducing the Internet into prisons are as justified as they are numerous. Technology endangers the inmates' environment and rehabilitation, as well as order and discipline within the prisons. Placing the Internet in the hands of convicted criminals seems absurd.

This article challenges these assertions and calls for reform aimed at making the Internet more accessible to inmates.
The Internet is protected under the rubric of recognized human rights. Penological studies show the benefits of the use of technology in prison. Therefore, the article claims that there is no justification for completely denying prisoners the use of this technology, and indeed the relevant authorities should instead be compelled to provide a certain level of Internet access.
The article proceeds in a forward-looking context arguing that the image of a user sitting in front of a computer may be replaced in coming years with that of a human surrounded by computerized components immersed in 'Things'. As a result, the future prison system could be caught in a trap, raising the question whether technology should be integrated into prisons with the risk of undermining that institution, or pushed aside with the risk of creating an excessive gap between prisoners and the outside world. Ultimately, the article proposes recognizing virtual punishment as a substitute for incarceration, and prohibiting dual physical-virtual sanctions within the prison.

Asaf Harduf, *Liberal Cheating: Should Adultery be Criminalized, Regulated or Ignored*

The article examines the normative aspects of possible criminalization or legal regulation of adultery. It utilizes a democratic criminalization and regulation model to analyze adultery. It demonstrates that adultery is manifestly both harmful and offensive, and that the criminal law can effectively battle it. However, criminalization of this phenomenon will inevitably be overly narrow, as many similar acts , the most prominent of which being sexual cheating, have not been criminalized. The article also examines alternative legal ways to regulate adultery, and recognizes the social price of possible legal regulation. Finally, the article calls for civil regulation of sexual infidelity, utilizing contract and tort law.

Amos Gabrieli & Michal Alberstein, *Judicial Intervention in Mediated Agreements*

Judicial intervention in agreements originating in private mediation processes has resulted a blurring of boundaries between the private and public spheres.
In this article we examine the ways in which judges treat settlements and mediated agreements that have been brought before them for approval. In other words, we study

ways and degrees of intervention in the developing interface between authority and consent. We do this through an analysis of the role of both judges and mediators in the process of conflict resolution.

At times, parties to a mediation process may choose to bring their private mediated agreement for approval by the court in order to reinforce its status. At other times, specific legal arrangements demand that a mediated agreement be approved by the court. These diverse legal arrangements allow us to examine different grounds for court intervention and identify and define criteria for judicial examination of mediated agreements. In addition, we ask whether there is a difference in the way courts treat settlement agreements reached through mediation as opposed to settlement agreements reached without the involvement of any professional third party.

We have found that, in general, courts tend to approve mediated agreements without a close inspection or assessment of their content. Nevertheless, there is a tendency to intervene when the following can be demonstrated: there is clear illegality, the agreement is contrary to public policy; the agreement has been made for the sake of appearance only; issues of confidentiality or privilege arise; formative flaws affect the essence of the agreement; harm has been caused to third party rights; there is concern that one or more of the parties did not intend to enter into the agreement; andsome elements of the agreement are not legally enforceable.

Israeli law does not regulate judicial involvement in settlement agreements. Judges exercise their own discretion and apply their own personal perceptions of, among other things, the importance and uniqueness of consent in general, and the role of the mediator in its design in particular. The case law we have analyzed does not indicate any unified criteria for examining mediated agreements. Judicial conduct demonstrates that courts do not perceive mediators as playing a role in assessing the public interest in the agreements they assist in designing, that is, the courts see mediators as only being in charge of the private interests of the parties before them.

We argue that there is a need for clear and unified standards for the judicial examination and approval of settlements. Such criteria should take into consideration the type of mediation procedure and the role of the mediator within it. Standardization through clear rules, as well as consistent judicial application, will impact the conduct of mediators and impose a duty on them to apply public norms in private agreements, as a built-in interest in the consent of the parties. This is because the mediators will be aware that such public norms will be taken into account by the court when the agreement is brought before it for approval.

Nitzana Ben-David, *Who Determines the Future of Our Children? Youth (Care and Supervision) Law – 1960*

The architects of the Youth (Care and Supervision) Law – 1960, intended it to address the social problem of "neglected children", which they perceived as threatening social and political order in Israel. The law was enacted at the height of the struggle between government officials and "Mizrahi" immigrant families over the state's responsibility to provide basic living conditions for its citizens. The article analyzes the institutions and key actors which shaped the various incarnations of the law and explains how the class-ethnic characterization of the problem affected the solutions designed by the law. In the early 1950s the law was intended to deal with the neglected child, however, by the late 1950s, it was also utilized as a means of removing potential 'threats' posed by "Mizrahi" children. In the name of ensuring the welfare and education of children, the legislature allowed and continues to allow broad intrusion into the family cell and violation of the human rights of children and families. The implementation of the Youth Law, which was originally intended to produce normative members of the Jewish-Israeli collective, has become one of the practices used to create a normative distinction between "Mizrahi" families and other families. The clearest expression of the classification of "Mizrahi" families and children as "other" may be seen in the creation of a special legal regime. The legislature established a special legal arrangement in which the scope of the duty of parental care and the nature of its violation was defined in respect of poor families, which in the circumstances comprise mostly "Mizrahi" immigrant families, albeit this issue has also been regulated in parallel in another law.

Sharon Atzmon-Halevi & Ronen Atzmon, *Positive Jurisprudence – Positive Psychology in the Juvenile Courts*

One of the main objectives of the Juvenile Court is to increase the likelihood that minors coming before it will better integrate into society, thereby living normative and successful lives. According to the doctrine of therapeutic jurisprudence, Juvenile Courts have therapeutic characteristics, and juvenile judges have the ability to greatly influence the well-being of the minors and parents who appear before them. Positive psychology is the scientific study of the causes of human prosperity, it emphasizes the importance of positive emotions, positive individual traits, and positive actions, as the foundations and promoters of a happy and fulfilling life. The article examines how insights of positive psychology, and practical measures and interventions based on

these insights, enable the application of therapeutic jurisprudence and can assist the Juvenile Courts to fulfil their objectives both in criminal proceedings and in the treatment of high-risk youth.

Asaf Harduf, *Killing Animals in the Name of Public Health*

Two principal laws in Israel regulate the killing of animals in the name of public health: The Rabies Law, 1934, and The Animals Sickness Law, 1985. This article demonstrates the cruelty of these statutes, their disrespect for the lives of animals and the manner in which they promote apathy instead of empathy. An even more acute problem arises from the fact that the legal regime operates within the framework of administrative law, which strictly limits any possibility of judicial review. Moreover, the district veterinarians suffer from an inherent conflict of interest between their duty to public health and preserving animal life. This article suggests reshaping this legal regime and creating a hierarchy of principles. The first is the notion of proportionality, which asserts that harming animals will always be the last resort; the second is the legal commitment to important concepts: empathy, decency and sensitivity. The article calls for broader legal review of the protection afforded to public health. Finally, it reminds readers that numerous human diseases have been introduced to the world in context of exploiting, harming and killing animals.

Ruth Plato-Shinar, P*ayments Services Law, 5779-2019: Consumer Protection in a World of Digital Payments*

The article explores the new and innovative Israeli regime for digital payment services created by the Payment Services Law, 5779–2019.
This statute provides a legal framework for the revolution currently taking place in the payment sector in Israel, encouraging a transition to digital payments, in an attempt to keep pace with rapid technological developments and supply solutions to the issues raised by the new world of payments.
The statute addresses the relationship between payment service providers and their customers, and confers broad protection on the users of digital payment services.
The article analyzes three major issues regulated by the statute: the liability of the payment service provider upon executing the customer's instructions for payment; the customer’s ability to cancel a payment order; and unauthorized use of a payment instrument by a third party.

Daniella Assaraf & Pnina Lifshitz-Aviram, *Attorneys as Gatekeepers in Urban Renewal Enterprises*

Urban renewal may be described as an intervention in the physical and social characteristics of urban residential areas with the stated objective of guaranteeing the improvement of residential conditions. One form of urban renewal, under Plan 38, offers an opportunity to renew buildings vulnerable to earthquake damage by strengthening them.

The large number of stakeholders involved in implementing these projects, the duration, nature, and complexity of the operations and the power disparity between the entrepreneur on the one hand, and the apartment owners on the other hand, create difficulties, obstacles, violations, injuries, risks and inconvenience to the apartment owners.

“The Gatekeepers” who are supposed to ensure that the apartment owners' rights are safeguarded in such complex projects, and while doing so display loyalty, devotion and fearlessness, are the attorneys who represent them. In transactions of urban renewal, there is an added importance to assuring the proper legal representation of apartment owners.

Legal representation of apartment owners in their dealings with entrepreneurs is a complicated and prolonged process, and includes both legal and non-legal aspects that give added weight to the attorneys’ duties of care, trust and devotion towards their clients. In cases of urban renewal the conflicting interests of entrepreneurs and apartment owners necessitate the exercise of extra-caution on the part of the attorneys to avoid conflicts of interests.

The purpose of this article is to examine whether the existing position in the State of Israel regarding the representation of apartment owners in urban renewal projects is appropriate from a social-legal perspective. We do not believe it is. We found that in practical terms the boundaries concerning the attorneys' representation in the relations between apartment owners and entrepreneurs are blurred, and worse still, there is a lack of awareness on the part of apartment owners regarding this situation. The attorney, by virtue of his relationship with the entrepreneur is knowingly or unknowingly, entangled in a structured conflict of interest for multiple reasons, which include inter alia, the fee arrangements between the attorney and the entrepreneur and the attorney's desire to be regarded by the entrepreneur as a strong business factor.

This situation, where on the one hand, the attorney is engaged in a long and complex process, and on the other hand, he is subject to a structured conflict of interest – is improper and demands normative correction that is offered in this article.