The Supreme Court In Loco Parentis

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Israel's Supreme Court is fast making a name for itself as one of the most activist courts in the democratic world.[1] But this past winter, the court took its activism to an unprecedented height: It issued a ruling, based on the flimsiest of legal premises, which declared the overwhelming majority of Israeli adults to be criminals. And it did so by intervening not in political or social issues in the public sphere, but in the way that Israeli parents choose to raise their children.

On January 25, 2000, a three-justice panel of the Supreme Court, acting as Israel's highest appellate court, ruled in the case of *Jane Doe v. State of Israel* that administering a light slap on your child's hand or rear constitutes assault under Article 379 of Israel's criminal code—a provision that carries a jail sentence of two years. Not merely cruel or excessive punishment, the court wrote, but *all* corporal punishment "is completely unacceptable—a residue of a social-educational outlook that has become obsolete."[2] In the view of the justices who decided this case—President Aharon Barak, Dorit Beinisch and Yitzhak Englard—the matter was clear-cut:

> Punishment that causes pain and humiliation does not contribute to the child's character or education; it infringes on his rights as a human being. It damages his body, his feelings, his dignity and his proper development. It distances us from our aspirations to be a society free of violence. Therefore, the use by parents of corporal punishment… is forbidden today in our society.[3]

Lest anyone misinterpret this statement as a moral disquisition rather than a legally binding decision, the justices added the following:

> There are more than a few parents among us who use non-excessive force towards their children (such as a light slap on the rear or hand) in order to educate and discipline them. Should we say that such parents are criminals?… The appropriate response is that in our current legal, social and educational situation, we cannot make compromises that might endanger the safety and well-being of minors. One must also take into account that we live in a society in which violence is spreading like a plague; "minor" violence, if permitted, is likely to deteriorate into very serious violence. We must not endanger the physical and emotional integrity of a minor by administering any corporal punishment at all. The yardstick must be clear and unequivocal, and the message is that corporal punishment is not permitted.[4]

In other words, the court asked whether a parent who slaps his child on the hand should be considered a criminal, and explicitly answered in the affirmative.

It is tempting to discount the decision as merely another in a long string of rulings that demonstrate how far removed the justices are from both the tenets of Israeli law and the views of the overwhelming majority of Israelis. One might also argue that since the ruling is unenforceable and will be generally ignored, there is little cause for concern. Yet the *Jane Doe* case deserves careful attention, for it represents the Supreme Court's most significant incursion to date into Israelis' private lives. It also lowers the

threshold of legal reasoning that the justices deem necessary to justify radical revisions of Israeli law, overturns an established principle of family law in a manner that opens the door to arbitrary enforcement, and threatens to undermine the authority of the rule of law, as well as of the court itself. Indeed, the ruling on spanking indicates more clearly than any other recent decision how the Supreme Court's activism threatens the delicate balances on which Israeli democracy depends.

II

Given the revolutionary nature of the *Jane Doe* ruling, one might reasonably have assumed that the case at hand could not be resolved without a decision on the merits of corporal punishment, and that the justices had the soundest of legal justifications for their decision. Yet in fact, the court could easily have ruled without addressing the legality of spanking at all.[5] Moreover, its argumentation on this issue strays so far from traditional standards of judicial reasoning that it borders on the spurious.

The case itself was straightforward enough: An appeal by a woman from Ramat Gan who was convicted of assault and abuse of her seven-year-old daughter and her five-year-old son. The Tel Aviv District Court had found that during 1994 and 1995, the mother repeatedly struck her children on the head, hands, back and buttocks, and that she frequently threw shoes at them and beat them with rubber clogs. The abuse of the two children left visible marks that were reported by school personnel; one teacher testified, for example, that the girl had come to school with yellow bruises on her arm, which she said were caused by her mother hitting her with a stick because her room was messy. In one instance, the mother hit her son in the mouth so hard that she knocked out one of his teeth.[6] Moreover, both children showed clear signs of emotional damage from the frequent

beatings. One teacher reported that the boy would often recoil in fear when she moved towards him, while another teacher observed that, "Sometimes when I would speak to [the girl] and I would happen to raise my hand, she would make defensive motions and would even hide under the table, because she thought I wanted to hit her."[7] Under the weight of this evidence, the district court rejected the mother's argument that her actions served an educational purpose. The court, wrote Judge Saviona Rotlevy, could not condone such violence, "even when it is dressed up as an 'educational philosophy.'"[8]

The Supreme Court could simply have upheld the conviction. The woman in question had clearly exceeded the bounds of the reasonable in disciplining her children, even if moderate corporal punishment were held to be permissible.[9] Nonetheless, Justice Dorit Beinisch, who authored the court's opinion, insisted on discussing the legality of a hypothetical "light slap on the rear or hand" as well. In so doing, she chose to reconsider a precedent that the Supreme Court itself had set in 1953 in *Rassi v. Attorney-General of the State of Israel*, which had served as an accepted part of Israeli law for nearly half a century.[10] In that landmark ruling, which recognized spanking by parents and teachers to be legal, the court had based itself on English law, as Israeli law at that time instructed it to do in the event that no Israeli statute dealt with the case at hand.[11] Over time, as Israelis turned against corporal punishment in the schools, the Education Ministry categorically forbade teachers to hit students—a policy endorsed by the Supreme Court in rulings in 1994 and 1998.[12] Regarding parents, however, the 1953 precedent was upheld consistently by the Supreme Court—including President Aharon Barak—and had come to be viewed by the legislature, the courts and the legal community as a binding part of Israeli law, even though it was not formally recorded in a statute.[13]

In explaining her decision to overturn this precedent, Beinisch, with the support of both of her colleagues,[14] marshaled no fewer than six independent arguments. Each one would, on its own, have been far too

flimsy to justify the court's conclusion. Considered collectively, they offer a guided tour of the types of untenable arguments favored by the Supreme Court to justify its incursions into judicial lawmaking.

Beinisch's first line of attack in the verdict is to argue that Israel should look to the practices of other democratic countries. She begins the discussion by dutifully noting that, "It is possible to find a range of approaches in this matter, with the difference among them stemming from ethical, social, educational and moral conceptions that have developed in these different societies over the years."[15] She then explores the practices in Britain, Canada and the United States, where the law explicitly permits moderate parental spanking.[16] But all of this is merely a prelude to her laudatory description of the competing approach, as exemplified by Sweden, Finland, Denmark, Norway and Austria. Over the past twenty years, these countries have, according to Beinisch, placed "an emphasis on the right of the child to dignity, to the wholeness of his body and his emotional health," and have therefore passed legislation "forbidding or strictly limiting parents' authority to use corporal punishment on their children."[17] From the language she employs, and from subsequent references in the verdict, Beinisch makes it clear that she believes Israel's place is with the progressive countries that form this second group.

This argument is flawed in a number of respects. To begin with, the court ignored a crucial difference between these five countries and Israel: All of their parliaments have passed legislation explicitly outlawing corporal punishment, while Israel's Knesset has not.[18] Secondly, contrary to what Beinisch's description seems to imply, the five countries she cites constitute a nearly exhaustive list of all the democracies that have prohibited parental spanking, whereas 76 of the world's 84 democratic countries have chosen not to interfere with parents' prerogatives to use moderate spanking in disciplining their children.[19] It is far from obvious that Israel, with its largely traditionalist attitudes towards family life, should be bucking the internationally accepted approach on how to govern the relationship

between parents and children in order to model itself on a handful of European states that have become the world's hothouse for experiments in radical social norms and legislation.

Yet even if Scandinavia were to be the model of choice for Israeli family law, there is little in the experience of these countries to support an act of judicial revolution such as the *Jane Doe* decision. The governments of Austria and the Scandinavian states—unlike the Israeli court—were careful not to turn corporal punishment into a criminal offense overnight. Instead, they employed a gradual, consensus-building process, seeking first to change public attitudes and practices, later institutionalizing this change through legislation, and even then declaring spanking a civil rather than a criminal offense.[20] Sweden, which in 1979 became the first country to ban spanking by parents, did so only after a fourteen-year campaign in which successive governments carried out massive public education efforts to inform parents concerning alternative methods of discipline, while the parliament gradually amended family law to place increasing restrictions on corporal punishment. When this process began in 1965, 53 percent of Swedish parents considered occasional physical punishment to be necessary in raising children. Six years later, this number had dropped to 35 percent, and it continued to decline until the law's passage in 1979.[21] Thus the legislature's nearly unanimous vote to ban corporal punishment (only 6 of 265 legislators voted against the law) reflected a broad and growing consensus in Swedish society.[22]

Having presented a distorted image of the practices in the democratic world, Beinisch then turned to the circumstances of Israeli society, noting that

> The question of whether corporal punishment of children is legitimate is to a great extent influenced by one's social-moral worldview. These worldviews are susceptible to changes in accordance with social and cultural developments; what seemed good and right in the past can seem to be not so in the present.[23]

The implication of this statement, which Beinisch articulates more explicitly later in the verdict, is that the "social-moral worldview" in Israel had turned decisively against allowing parents to spank their children.[24] Yet the only proof offered for this is that the Supreme Court itself had changed its position, by twice ruling against corporal punishment in the schools during the 1990s. The court's arguments for a ban in those cases, wrote Beinisch, "are in my opinion appropriate concerning parents as well, despite the differences."[25]

One would expect an argument of this nature to be supported by evidence showing that just as the attitude towards spanking in the schools had changed in society as a whole, the attitude towards parental spanking had also changed among the public at large, and not only among the justices.[26] Incredibly, the verdict offers none. The court failed to cite any polls about the attitudes of the Israeli public, nor did it cite works on child-rearing by Israeli professionals—though both of these possible indicators of Israelis' "social-moral worldview" on spanking are readily available. With regard to expert opinion, the court did not merely sidestep the fact that many Israeli professionals endorse the use of spanking under certain circumstances.[27] It even ignored those Israeli experts who support its position—choosing instead to demonstrate Israelis' "social-moral worldview" by citing works that had been written in English for American and British parents. And its attitude towards survey data was equally dismissive. Only three weeks before the *Jane Doe* verdict was issued, the daily *Yedi'ot Aharonot* published a poll showing that 57 percent of Jewish Israelis believe that it is or at least "might be" appropriate to spank a child on occasion for educational purposes.[28] And in a 1996 study, 75 percent of Israeli parents acknowledged that they punish their children by spanking them at least occasionally.[29]

One cannot even be charitable and assume that the justices were unaware of this reality. The verdict made it clear that they had knowingly chosen to flout the majority view.[30] As court President Aharon Barak later explained in a speech defending the verdict: "We do not make decisions

according to statistics of public opinion. The court must give expression to the deep viewpoints of history, and not to hysteria."[31]

Having failed to demonstrate fundamental changes in the subjective views of Israelis, Beinisch and her colleagues then turn their attention to the social sciences in an effort to provide an objective basis for their decision. "Psychological and educational research studies," Beinisch writes, "show that punishment by parents that causes their children pain or humiliation is undesirable and is even liable to cause damage."[32] After surveying a small number of articles and books that support this claim, she concludes: "The court cannot, and has no right to, close its eyes to societal developments and to the lessons derived from educational and psychological research, which have completely changed attitudes towards the use of corporal punishment for educational purposes."[33]

Yet the justices then proceeded to do precisely that—closing their eyes to all evidence that might contradict their conclusion. As anyone familiar with the state of current research on corporal punishment knows, the results in this field are far from unequivocal.[34] Though it is true that many leading educators and psychologists argue against corporal punishment by parents, a number of important studies have been published in recent years demonstrating that non-abusive spanking is a highly effective method of discipline, which helps children to become better behaved and less violent.[35] In February 1996, for example, the American Academy of Pediatrics held a conference to examine the effects of corporal punishment, and published the presentations in a special issue of its prestigious journal *Pediatrics*.[36] Perhaps the most important of the reports was that of Robert E. Larzelere, who conducted a comprehensive review of 166 studies on spanking that had been published during the previous two decades. After rejecting those that had not undergone peer review or that contained serious methodological flaws—such as lumping child abuse together with mild punishment—Larzelere was left with thirty-five studies that met his standards. Of these, the number showing favorable outcomes from spanking—children who were better behaved and less violent—turned out to be

roughly equal to the number that demonstrated detrimental results.[37] Moreover, "the studies with stronger internal validity tended to find beneficial outcomes," even compared to other effective methods of discipline, such as time-outs, firm verbal rebukes, and reasoning.[38] Similarly, in 1997, the highly regarded *Archives of Pediatrics and Adolescent Medicine* published a study by psychologist Marjorie Lindner Gunnoe, which tracked 1,100 boys and girls over a five-year period and found that children ages four to seven who had been spanked were involved in fewer fights at school—leading the author to conclude that "for most children, claims that spanking teaches aggression seem unfounded."[39]

These studies alone are not sufficient to prove that corporal punishment is a desirable educational tool. What they do show, however, is that the experts have not reached a consensus, and that anyone seeking to base a legal decision on the existence of a consensus is doing so in disregard of the evidence. As Larzelere noted, "The most important finding of the review is that there are not enough quality studies that document detrimental outcomes of non-abusive physical punishment to support advice or policies against this age-old parental practice."[40]

III

Only after having exhausted the comparative, sociological and scientific arguments do Beinisch and her colleagues attempt to ground their decision more directly in Israeli law. Yet here, too, their conclusion is based on what can only be called a tendentious use of the available materials.

This is evident in the court's selection of the legal arguments it considered: It ignored or dismissed out of hand any legal source that might have worked to undercut its conclusion. For instance, though the penal

code is silent on the question of moderate corporal punishment by parents, Israeli tort law is not. One of the factors explicitly listed in the Torts Law as a valid defense against a lawsuit is if "the defendant is the plaintiff's parent, guardian or teacher… and he punished the plaintiff with a degree of force that was reasonable in order to get him to mend his ways." Beinisch acknowledges this fact, but waves it away with the statement that immunity to a civil suit for spanking does not absolve a parent of criminal liability—an assertion which, though technically true, in no way diminishes the statute's relevance as a guide to legislative intent on the question of spanking.[41]

The verdict also ignores the explicit instructions in the 1980 Foundations of Justice Act on how to resolve legal lacunae (instances in which the written law does not provide guidance needed to resolve a case). According to this law, such lacunae are to be filled through the body of texts and traditions constituting "the heritage of Israel."[42] Yet the court declined to make any reference, explicit or implicit, to Jewish sources—most of which allow parents to discipline their children using moderate physical punishment.[43]

Having solved the problem of inconvenient legal sources in this fashion, Beinisch opens her discussion of Israeli law by trotting out what is fast becoming the Supreme Court's all-purpose justification for judicial lawmaking, the 1992 Basic Law: Human Dignity and Freedom. According to Beinisch, this highly abstract statement of principles—which does not say anything about corporal punishment by parents—"serves as an important source" for an absolute ban on spanking.[44]

Characteristically, the verdict cites no specific articles of the law to demonstrate that it implies such a ban, nor does it quote from the lengthy Knesset debates on the law to show that the legislature had intended such a prohibition. When one consults the basic law, as well as its legislative history, it becomes clear that the link between the law and the court's verdict is at best fanciful. The provision in the law that comes closest to addressing the issue of corporal punishment is the statement that "there

shall be no violation of the life, body or dignity of any person"—hardly a clear suspension of the right of a mother to occasionally discipline her five-year-old with a slap on the hand.[45] Nor do the hours of parliamentary debate on this basic law reveal any hint that such a ban was intended by the legislators.[46]

Instead of quoting the law itself or the lawmakers who wrote it, Beinisch defends her position by citing an academic article by former Supreme Court Justice Haim Cohen, who suggests that, in light of the passage of this law in 1992,

> the legislature would do well to rethink a number of the exemptions that are currently found in the law, lest they be broader than necessary. This is particularly the case with regard to the rights of parents and teachers to hit their children or students….[47]

The assumption that a former Supreme Court justice has more insight into the legislature's intent than the legislators themselves is highly dubious. Yet even granting this assumption, this article provides very shaky support for the court's ruling, since Cohen explicitly states in his introduction that he is not attempting to interpret the law in a manner appropriate for a judge. "I have become old," he writes, "and have withdrawn myself from judicial interpretation, and I do not pretend to determine its boundaries. My interpretation is academic, theoretical, amateurish…."[48] When one adds that Cohen is suggesting not that the basic law be interpreted by the courts to ban spanking, but only that the legislature should reconsider its position on this issue, it becomes even more difficult to accept the claim that this basic law can "serve as an important source" for a court-imposed ban.

Given the absence of Israeli legal sources on which to base the court's decision, it is not surprising to find Beinisch turning to international law, which in recent years has increasingly been used by the Supreme Court to import "legislation" unendorsed by any act of the Knesset. In this case, the court sought support for its position in Israel's ratification of the UN

Convention on the Rights of the Child in August 1991, and in particular from Article 19, which obligates all signatories to

> take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation… while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.[49]

On the face of it, Israel's status as a signatory to a convention banning "physical or mental violence, injury or abuse" does not require it to ban moderate and non-abusive forms of corporal punishment. One has to stretch terms such as "violence" or "abuse" more than a little to include in them a mother who gives her son a slap on the hand.[50] Nonetheless, there seems to be some basis for the court's interpretation: Just such a stretch has been proposed by the ten individuals who sit on the UN's Committee on the Rights of the Child, which is charged with monitoring compliance with the convention. In 1993—two years *after* the Israeli government ratified the convention—this committee began to interpret Article 19 to mean that spanking must be outlawed in all countries that have ratified the treaty.[51]

Nonetheless, the committee's assertion that the convention prohibits spanking cannot obligate Israel's Supreme Court to impose such a ban. Empirically, it is clear that most countries do not interpret the convention this way: Only 9 of the 190 countries that ratified this treaty had banned spanking at the time of the Israeli court's decision.[52] Moreover, there are sound legal grounds for rejecting the claim that the convention actually obligates signatories to impose a ban on spanking. International law protects parties to such conventions from being bound by subsequent interpretations that expand their responsibilities, on the grounds that allowing such changes would retroactively deprive them of a greater degree of sovereignty than they had agreed to cede. And at the time the cabinet ratified the

convention, there is no evidence that the UN had indicated that signatories were obligating themselves to outlaw parental spanking.[53] Furthermore, the Convention on the Rights of the Child does not carry the force of law in Israel—a fact that the Supreme Court itself has affirmed in previous rulings.[54] Indeed, a Justice Ministry panel recently rejected the possibility of incorporating the convention into domestic legislation.[55]

IV

Having dealt with such a wide range of topics—corporal punishment in the democratic world, the changing norms in Israeli society, social-science research, the Basic Law: Human Dignity and Freedom, and the UN Convention on the Rights of the Child—the justices apparently felt they had made a sufficiently strong case to draw their conclusion: That spanking one's child for educational purposes is "forbidden today in our society."[56] Only then did they turn to a consideration of what Israeli criminal law actually *says* on this subject. "A support for this position…," they write, "can be found in the non-acceptance of Article 49(5) of the proposed penal code"—a reference to the Knesset's 1994 decision to reject an amendment explicitly exempting parents who spank their children from criminal prosecution.[57] But an examination of the Knesset debate demonstrates that the legislators' motives were precisely the opposite of what Beinisch claimed: In fact, the clear intent of Israel's lawmakers was that the courts continue to respect parental autonomy in this area.

At the time, the Knesset had undertaken a comprehensive overhaul of the penal code, one of whose goals was to codify in statutory law those defenses, or exemptions, that had become accepted based on the precedents set by Israeli courts. Among these defenses was that spanking by parents would not be considered assault so long as it was carried out "for the

purpose of educating the child," and "did not exceed reasonable bounds." MK Dan Meridor (then of the Likud), who chaired the subcommittee that did most of the work on the codification, was the leading advocate of putting this exemption into statutory law. He argued that it was wrong in principle for the Knesset to rely on the courts for such exemptions, and also warned that in practice, there were grounds for fearing that the courts might not continue to honor the long-established precedent on this issue.[58] Opposing him in the subcommittee was Yitzhak Levy of the National Religious Party, who agreed that spanking should not be banned, but argued that explicitly inserting this exemption into the penal code was liable to encourage parents to increase their use of corporal punishment.[59] The Knesset should therefore not amend the statutory law on this point, he argued, but should rather rely on the courts to understand legislative intent properly. A number of government and academic legal experts backed Levy's position. S.Z. Feller of Hebrew University's law faculty, for instance, said the issue could be safely left "to the wisdom of the prosecution and the wisdom of the courts…. We've lived with this situation until now, and it hasn't been a problem for us."[60] Even Yitzhak Kadman, director of the National Council for the Welfare of the Child and Israel's most outspoken opponent of spanking, told subcommittee members that the reason not to write the exemption into law was to avoid sending the wrong "message" to parents who might interpret it as a green light to go further than before:

> We are not requesting it [a prohibition on corporal punishment] because we do not think that Israeli society is ripe for this.… All that we are asking at this stage is that you leave the situation as it was… so that a segment of the public does not err in thinking that there is a new message.[61]

This same dispute carried over to the full Constitution, Law and Justice Committee, chaired by MK Dedi Zucker (then of Meretz), which was charged with preparing the bill for presentation to the Knesset. There, Meridor urged his fellow legislators to fulfill their duties by codifying the existing law, warning that otherwise "the court might decide that removing

this defense was intentional, and that from today onward there will be no such defense."[62] Levy again declared that non-inclusion of the exemption left the previous legal situation intact, emphasizing repeatedly that "we are not changing the law."[63] Indeed, he went further, saying that he would in fact object to an actual ban on spanking for two reasons:

> First of all because of the reality—so that we do not turn all parents into criminals. And second, because there could be instances in which a parent needs to take certain actions.[64]

Levy's position was accepted by the majority of committee members, and the defense clause was removed from the draft legislation.

When the bill reached the Knesset plenum for final approval, Meridor, along with MK Avraham Poraz (then of Meretz) and two other Knesset members, sought to reinstate the clause that would have explicitly permitted parents to use moderate corporal punishment. Yitzhak Levy again represented the majority position—this time officially, as he was deputized to do so by committee chair Zucker.[65] "We will not be saying that there is a blanket prohibition," Levy argued. "We will not be saying anything."[66] When pressed by Poraz, he repeated emphatically, "We are not making a change."[67] Thus when Knesset members voted to reject Meridor's proposal, they did so on the understanding that they were not removing the legal exemption that permitted parents to spank their children.

Incredibly, this sequence of events—in which neither the supporters of the explicit exemption *nor* its principal opponents believed the Knesset should ban the parental use of corporal punishment—is cited by Beinisch to claim that the legislature had undermined the legal status of spanking. To justify this interpretation, Beinisch skips over the subcommittee and committee debates and ignores the speeches that Meridor and Levy gave in the plenum. Instead, she quotes a single Knesset member, Yael Dayan of Labor—the only speaker who had argued for a ban on spanking by parents at any stage of the debate.[68] In explaining her opposition to Meridor's proposal, Dayan stated:

> It is completely forbidden to insert any compromise norms, since this must be unequivocal: Violence must not be employed, nor may any means of compulsion be used on a child or on anyone who is under the authority or jurisdiction or care of anyone else.[69]

And it is this quote, representative not of the committee's majority nor even its minority opinion but that of a lone legislator, that Beinisch uses to settle the question of the Knesset's intent.[70]

Taken together, the six arguments advanced by the Supreme Court in this verdict demonstrate the lengths to which the justices are willing to go in order to manufacture a legal facade for their decisions. They assert, without advancing a substantive argument, that Israel's place is with the tiny minority of democracies whose legislatures have banned spanking; they falsely imply that Israeli society favors their position; and they completely ignore important scientific studies that undercut their conclusion. In the legal sphere, they ignore any sources that might contradict their opinion; read the Basic Law: Human Dignity and Freedom as though it settles an issue that it does not even address; and discover legal obligations in a UN committee's interpretation of a convention that neither the Justice Ministry nor the Supreme Court has ever recognized as binding. Finally, the court inverts legislative intent, pretending to be carrying out the will of the Knesset while in fact flouting it.

This parade of distortions and misinterpretations speaks volumes about the quality of judicial reasoning that the court today finds acceptable. But the use of such specious reasoning, grave though it is, is a consequence of the problem rather than its cause. The root of the problem is the court's insistence on acting as a lawmaking body—an insistence that necessitates legal acrobatics if the court also wishes to preserve the myth that it is merely carrying out its role as an interpreter of existing law.

In fact, it is only in the paradigm of a lawmaking body that the court's actions make sense. As the verdict explained, the justices felt that they had "no right to close [their] eyes" to the public's "social-moral worldview," "societal developments" and "the lessons derived from educational and

psychological research." And these are indeed all factors to which lawmakers would have no right to close their eyes.

But according to Israel's written legal code, the justices are not supposed to be the lawmakers. This privilege is reserved for the Knesset. The court's job is to interpret the laws the legislature has passed, and to apply them to particular cases. And there is good reason for this division of labor: An elected legislature, comprising 120 members with varying religious, ethnic, socioeconomic, geographical and educational backgrounds, is far better equipped to determine the public's "social-moral worldview" than a panel of three unelected justices coming from virtually identical backgrounds. As former Supreme Court President Moshe Landau has warned, the court is an "oligarchy," and does a disservice to democracy when it usurps the role of the legislature.[71] Indeed, the available evidence indicates that the public does *not* share the court's social-moral worldview on the issue of parental discipline. But in the court's eyes, what "is forbidden today in our society" and which "social-educational outlooks" are "obsolete" apparently has little to do with the view of the majority, and everything to do with the views of the justices.

V

In addition to the breathtaking precedents it sets for poor legal reasoning and judicial lawmaking, the *Jane Doe* decision also represents a dramatic encroachment into virgin legal territory: The criminalization of commonplace personal behavior that the court holds to be undesirable. And the results are likely to be disastrous, both for family law and for the rule of law more generally.

The most obvious problem with the spanking verdict is that it formally makes criminals of such a large segment of the population—namely, the

three-quarters of parents who use corporal punishment on occasion to discipline their children. Previously, most of the court's activist rulings affected either specific individuals or limited classes of people, and imposed civil restrictions (such as prohibiting someone from serving as minister) rather than criminal liability.

It is tempting to say that this sweeping criminalization of the public does no real harm, since the decision is unenforceable. Indeed, the justices themselves hastened to make this point: "One must not forget… that a parent can make use of the defenses laid down in the penal code, which sets limits on criminal liability."[72] In other words, a parent who is accused of having spanked his child may still have a number of defenses to keep him from being put behind bars.

But these defenses provide scant comfort for anyone concerned with the potential consequences of this ruling. The first such defense, according to Beinisch, is that parents who spank their children, just like other suspected criminals, will be able to avoid conviction if they can prove that "the use of force was necessary to protect the child or someone else."[73] This would be difficult to prove, however, since one can usually keep a small child from hurting himself or others merely by restraining him. The purpose of spanking, in the opinion of those who favor its use, is not to prevent a child from sticking a fork into an electrical socket at a given moment, but rather to deter him from doing so at some future time when a parent might not be around.

In the same vein, the court argued that "criminal law contains enough 'filters' to prevent minor incidents from entering its purview. For instance, the prosecution has discretion not to put someone on trial if there is a lack of public interest; criminal law also offers the defense of 'triviality.'"[74] But this too is less than persuasive, given the court's own rhetoric against moderate corporal punishment. Once the Supreme Court has ruled that even the lightest slap on the hand "infringes on [the child's] rights as a human being" and "damages his body, his feelings, his dignity and his proper development"; and once it has ruled that even the mildest of spankings

should be considered a criminal act because "we live in a society in which violence is spreading like a plague" and where even "'minor' violence, if permitted, is likely to deteriorate into very serious violence"—law-enforcement authorities will be hard-pressed to deem cases brought to their attention to be "lacking in public interest" or too "trivial" to prosecute.

Equally unreassuring is the court's belief that parents will be protected from prosecution because "an act which a person of ordinary temperament would not bother to complain about does not generally constitute a basis for criminal responsibility." If, for instance, you accidentally bump into someone on the street, this would not usually result in criminal liability, even though such an act "might seem to fall within the formal confines of the crime of assault."[75] But since the court has now made it clear that even moderate spanking causes significant harm to both the victim and society, a person "of ordinary temperament" would be well within his rights to complain about it; consequently, this defense would rarely apply.

Whether anyone is really about to begin turning in parents for occasionally spanking their children is anyone's guess. What is certain is that any attempt to implement this ruling would, of necessity, be arbitrary. The goal could not be to catch all or even most of the "criminals," since no one wants to put three-quarters of all Israeli parents in jail. And unless only serious offenders were indicted—in which case existing definitions of assault would have been sufficient—there is no reasonable method of deciding whom to prosecute. Even Deputy Attorney-General Yehudit Karp, herself a strong advocate of banning spanking, warned the Knesset that a blanket prohibition on corporal punishment would lead to "unequal enforcement," because the impossibility of across-the-board enforcement "will accord wide discretion to the prosecution, and parents will be in a condition of uncertainty in everything connected to the question of when they enter the criminal zone and when they do not."[76]

The more likely scenario is that the ruling will simply not be enforced. But even so, its consequences for the legal system are far-reaching. The justices themselves acknowledged one such consequence when they wrote:

"One might argue that in this ruling, we are issuing a decree that the public will not be able to abide by, since there are more than a few parents among us who use non-excessive force towards their children (such as a light slap on the rear or on the hand) in order to educate and discipline them."[77] The court dismissed this objection, but it is in fact a very serious one—because issuing a decree "that the public will not be able to abide by" is a sure way to breed disrespect for the law, and most especially for the court itself. As Dan Meridor observed during the subcommittee debate: "To determine that all parents are criminals all the time, that every day all the parents are criminals—this simply makes a joke of the law."[78]

Indeed, initial reactions to the verdict by some of its most ardent supporters have suggested that it is unlikely to be taken seriously from a legal standpoint. As Yitzhak Kadman of the National Council for the Welfare of the Child explained:

> The Supreme Court does not want to see parents in jail, and neither do we. It does not even want to see parents put on trial for spanking. What we want is for the public to get a clear message from the court: Children and blows do not go together.[79]

When even the court's supporters claim that a ruling it has issued is not meant to be implemented, its status as a legal authority is in trouble. And the result of such an erosion in the court's standing is chaos—a brave new world in which both law-enforcement officials and the public at large must guess which of its decisions are intended to be enforced and which are no more than moral exhortations.

Most dangerous of all, however, is the precedent that *Jane Doe* sets for state intervention in the most intimate realms of human life. Previously, with the exception of a limited number of cases in which the parties to a dispute requested the court's involvement, the court has sought to stay out of the private realm.[80] This has never meant that the home was immune from the law: As the court correctly noted, the law views children as human beings with basic human rights, and personal autonomy has never

extended to using a child "as a punching bag."[81] This is why Israel, like most other countries, has laws against parental abuse and assault, and expects its courts to enforce these laws.

Yet at the same time, respect for personal autonomy demands that legal restrictions on an individual's private life be kept to the minimum necessary for a functioning society. Indeed, the Supreme Court itself has taken the lead in trying to promote this concept, and respect for personal autonomy lies at the heart of many of its rulings, on subjects ranging from religious pluralism to homosexual rights.[82] Yet in this case, the court threw its vaunted concern for autonomy to the winds. It is hard to imagine a more personal matter than how one chooses to teach one's child to do the right thing. The right to educate one's children according to one's own understanding is among the most precious rights that a free society grants its members. This is why the overwhelming majority of enlightened states have decided that non-abusive spanking falls into that realm of legitimate personal autonomy where the law has no place.

Indeed, one of the most worrying aspects of this verdict is that it demonstrates that for Israel's Supreme Court, there are truly no limits to the law's reach—a position that Supreme Court President Aharon Barak has long advocated. It was Barak who coined the famous dictum that "the world is filled with law," which he explained as follows:

> Every human behavior is subject to a legal norm. Even when a certain type of activity—such as friendship or subjective thoughts—is ruled by the autonomy of the individual will, this autonomy exists because it is recognized by the law.[83]

Yet this is the first time the court has so fully put this idea into practice. Nor can one assume that this decision was an aberration. President Barak later defended the ruling by declaring explicitly that familial relationships should be justiciable—that is, subject to decisionmaking by the courts—just like other relationships within society:

> The moment that a certain realm is not justiciable, the wielder of power does whatever he wants. The meaning of this is that the executive branch, which is the wielder of power, or the police, do what they want. To say that normal family relations are not justiciable means that the one who will be hurt is the child, since the father and mother are the wielders of power.[84]

But if personal autonomy indeed exists only because "it is recognized by the law," in the person of the Supreme Court, then the ruling on spanking indicates that such autonomy is in grave danger. For through this ruling, the court has indicated that there is virtually no moral principle held by the justices that they would not be willing to translate into a binding legal norm—thereby depriving Israelis of their right to choose for themselves.

VI

The decision on spanking should have demonstrated to the Israeli public that its values are being systematically subjugated to those of the Supreme Court justices. One might have hoped, therefore, that the ruling would goad Israel's citizens into demanding greater adherence to the norms and practices that preserve democracy—an increased role for elected representatives in appointing the court's justices, an end to the stigma attached to citizens who criticize the Supreme Court, and a greater deference in Supreme Court decisionmaking to the views of the Knesset.[85] Yet the public reaction to the ban on spanking indicates that such a response is unlikely in the near future. The ruling did produce a brief debate on the pros and cons of spanking one's child, but there was virtually no discussion of the court's right to issue such a verdict.[86] And though a poll conducted shortly after the ruling found that three-fifths of Jewish Israelis opposed the

court's intervening to prevent parents from spanking their children, this majority chose, for the most part, to remain silent.[87]

There are two reasonable explanations for this silence, either of which is cause for worry. One is that the public has already begun relegating the court to the sidelines: It is perfectly willing for the court to issue any rulings it pleases, because it has no intention of following them. The other is that years of increasing judicial activism have convinced most Israelis that they are powerless to combat the court's intrusion into their private lives. This, of course, is hardly more comforting: A citizenry that considers itself helpless in the face of the whims of its highest court is liable to find its faith in democratic government severely undermined. But whether the reason is contempt or despair, ignoring the verdict is not a viable long-term response. Ultimately, Israelis will have to decide whether they want their highest court to serve as an arbiter of moral issues great and small.

But on a day-to-day level, the body that bears primary responsibility for restraining the court is the Knesset. And it is up to Israel's legislature to start fulfilling its duty as a lawmaking body by ceasing to create legal vacuums that the court then seizes the opportunity to fill. It is no longer justified today to rely, as Yitzhak Levy did, on the restraint and common sense of the judiciary. As Dan Meridor told his fellow legislators in the debate over the defense clause for spanking, "We do not want the court to legislate, but rather that the legislature legislate."[88] Mordechai Kremnitzer, a former dean of Hebrew University's law faculty who played a role in drafting the penal code, also urged the Knesset not to sit on the legal sidelines, but to live up to its duties as a legislature:

> The fact that the courts can continue… to create categories of legal exceptions is not a reason to invite the legislature to divest itself of its responsibility to impose legal order. If I ask myself which is the body that ought to make the determination on this matter, a determination on a question of values of the first rank—whether it is the courts, regarding which we never know how a case will reach them, and which case will be

appropriate or inappropriate for generalizing, or the legislature—it seems to me that it has to be the legislature.[89]

In the wake of the Supreme Court verdict, three MKs did submit private member's bills to legalize spanking by parents.[90] But such ad hoc, after-the-fact responses will always be more difficult to make into law, since they are inevitably portrayed by the legal establishment, and consequently by much of the media, as an illegitimate incursion by the legislature into the court's prerogatives.

Until the Knesset desists from its cowardly habit of enacting vaguely worded laws that leave the truly important decisions to the courts, the balance of power among Israel's three branches of government can never be restored. The Knesset, and the public from which it receives its mandate, should therefore view the spanking verdict as a wake-up call for a legislature that is becoming more irrelevant with each passing year.

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Notes

1. On the activism of Israel's Supreme Court, see Hillel Neuer, "Aharon Barak's Revolution," Azure 3, Winter 1998, pp. 13-49; and Evelyn Gordon, "Is It Legitimate to Criticize the Supreme Court?" Azure 3, Winter 1998, pp. 50-89.

2. *Jane Doe v. State of Israel* (CA 4596/98), unpublished, paragraph 29. In Hebrew, the term *plonit* is used to connote an anonymous woman, so this case was referred to as *Plonit v. State of Israel*. Throughout this article, the English equivalent, "Jane Doe," has been used as the translation of *plonit*.

3. *Jane Doe*, paragraph 29.

4. *Jane Doe*, paragraph 30.

5. In legal jargon, this is called an *obiter dictum*—an opinion issued by a judge on a matter that is not essential to the case at hand. *Obiter dicta* are generally frowned on by legal theorists, on the grounds that the court's job is the resolution of actual disputes, rather than theoretical ones that may or may not ever arise. Many theorists even say that such opinions are not binding. Another reason for theorists' leeriness of *obiter dicta* is that they can open up vast, if unintended, cans of worms. One of the best-known *obiter dicta* in history was the opinion authored by Justice Roger Taney of the United States Supreme Court in the Dred Scott case of 1856—in which, apropos of deciding that Scott, a slave, had no right to sue in federal court, Taney declared that the entire Missouri Compromise, which determined whether slavery would be legal or illegal in new states entering the United States, was unconstitutional. Many historians consider this decision to be one of the main proximate causes of the American Civil War.

6. The daughter also charged that her mother had hit her once with a vacuum cleaner, but the court was not able to corroborate this charge.

7. *Jane Doe*, paragraph 3.

8. *Jane Doe*, paragraph 20.

9. Indeed, the court itself made such an argument in sustaining the mother's conviction for the more serious crime of abuse—a crime for which, in the court's words, there is no "defense based on a justification rooted in an accepted social norm." *Jane Doe*, paragraph 17. By convicting her of abuse, the court had already declared that her actions went beyond the bounds of the reasonable, and this determination was sufficient to justify her conviction for assault without addressing the issue of moderate corporal punishment at all.

It should be noted that the district court also failed to exercise restraint on this subject: Judge Rotlevy used her findings as a springboard for a sweeping declaration that all spanking by parents is illegal. The Supreme Court, however, apparently did not consider Rotlevy's opinion on this subject particularly significant: Though Beinisch's verdict quoted extensively from Rotlevy's factual findings and reasoning, it made only the briefest of references to her diatribe against spanking.

10. *Dalal Rassi v. The Attorney-General* (CA 7/53), in *Decisions of the Israel Supreme Court*, vol. 7, 1953, p. 790.

11. This link to British law was removed by the 1980 Foundations of Justice Act, which stated that such lacunae should be resolved instead by reference to "the heritage of Israel," i.e., Jewish tradition. This would constitute a strong argument for saying that the *Rassi* precedent is no longer valid were it not for the fact that in this case, Jewish tradition and English law produce the same results. This may be

the reason why the court, though it noted the cancellation of the link to British law, did not actually cite this as one of its reasons for considering the *Rassi* precedent outmoded.

12. The 1994 ruling was in *State of Israel v. Marbat Abed Al-Nagi* (CA 4405/94), in *Decisions*, vol. 48, section 5, 1994, p. 191. The 1998 decision was in *State of Israel v. S'deh Or* (CA 5224/97), in *Decisions*, vol. 52, section 3, 1998, p. 374. In the latter verdict, the court cited three separate directives from the director-general of the Ministry of Education, which were issued in 1991, 1994 and 1997, banning all corporal punishment in the schools.

13. In the 1988 case of *Lichtman v. State of Israel* (CA 103/88), in *Decisions*, vol. 43, section 3, 1989, p. 373. Barak wrote that a parent who threatens to hit his child "for educational purposes, and within the framework of reasonable necessity to get him to mend his ways," would not be guilty of a criminal offense, because the blow the parent was threatening to administer would be "a blow that is in accordance with the law." Cited in Amnon Straschnov, *Children and Youth in the Eyes of the Law* (Tel Aviv: Israel Bar Association, 2000), p. 275. [Hebrew] There have been a few lower court rulings declaring parental spanking illegal, with the most notable being the Tel Aviv District Court's 1997 verdict in the *Jane Doe* case. However, the legal status of a lower court ruling in Israel does not extend beyond the bounds of the case at hand, so these verdicts constituted little more than public advocacy of the anti-spanking cause.

14. Justice Englard wrote a dissenting opinion in which he argued that the mother's conviction for abuse should be overturned, while leaving the conviction for assault intact. He did not, however, take issue with anything that Justice Beinisch wrote in the majority opinion regarding the illegality of all corporal punishment by parents.

15. *Jane Doe*, paragraph 21.

16. Though there is no federal law permitting spanking in the United States, the American Model Penal Code allows corporal punishment by parents, and the majority of the fifty states have either adopted this provision from the Model Penal Code or have otherwise acted through state legislatures or courts to explicitly legalize corporal punishment by parents.

17. *Jane Doe*, paragraph 22.

18. For an overview of how bans on spanking were adopted in these countries, see Peter Newell, *Children Are People Too: The Case Against Physical Punishment* (London: Bedford Square, 1989), pp. 67-96; and Susan H. Bitensky, "Spare the Rod, Embrace Our Humanity: Toward a New Legal Regime Prohibiting Corporal Punishment of Children," *University of Michigan Journal of Law Reform* 31:2, Winter 1998, pp. 362-379.

19. The determination as to which countries are democracies is taken from Freedom House data as of January 1, 2000. Adrian Karatnycky, "A Century of Progress," *Journal of Democracy* 11:1, January 2000, pp. 192-193. The three additional countries whose statutes or judicial decisions have been interpreted by some commentators to imply a ban on even light spanking by parents are Cyprus, Latvia and Italy. The Italian case is similar to that of Israel, in that it was the High Court rather than the legislature that ruled corporal punishment illegal. However, Italian courts do not formally practice *stare decisis*, and therefore other courts are not obligated to follow this ruling, and are free to interpret Italy's law as not imposing a ban on capital punishment. Regarding the situation in Italy, see Bitensky, "Spare the Rod," pp. 380-386.

20. On this point, see in particular Newell, *Children Are People Too*, pp. 67-96. Bitensky offers a contrary interpretation, arguing that although Sweden and most of the countries that have banned spanking did so in their civil code, the imposition of these bans indirectly rendered spanking a criminal offense as well. Bitensky, "Spare the Rod," pp. 362-378.

21. Kandice K. Johnson, "Crime or Punishment: The Parental Corporal Punishment Defense—Reasonable and Necessary, or Excused Abuse?" *University of Illinois Law Review* 1998:2, p. 478. By 1981, the proportion of parents supporting corporal punishment had dropped to 26 percent. For additional data on Swedish public opinion, see Dennis Alan Olson, "The Swedish Ban of Corporal Punishment," *Brigham Young University Law Review* 1984:4, pp. 454-455.

22. Johnson, "Crime or Punishment," p. 478. In the other countries that imposed a ban, there was a similar pattern. Denmark, for example, passed a law in 1985 substantially restricting spanking by parents, and twelve years later amended that law to make the ban absolute. Bitensky, "Spare the Rod," pp. 371-373. Similarly, in Finland (1983) and Austria (1989), the legislatures unanimously adopted the prohibition on corporal punishment by parents, which indicates that the idea must have earned broad support by then. On Finland, see Bitensky, "Spare the Rod," pp. 368-370; on Austria, see Bitensky, "Spare the Rod," pp. 375-378.

23. *Jane Doe*, paragraph 25.

24. See, in particular, *Jane Doe*, paragraph 27: "The court cannot, and has no right to, close its eyes to societal developments and to the lessons derived from educational and psychological research, which have completely changed attitudes towards the use of corporal punishment for educational purposes." See also *Jane Doe*, paragraph 29: "In light of the above, we may conclude that the corporal punishment of children, their debasement, the violation of their dignity on the part of parents is completely unacceptable—a residue of a social-educational outlook that has become obsolete."

25. *Jane Doe*, paragraphs 25 and 26.

26. The court's verdicts banning spanking in the schools merely upheld a policy already instituted by the Education Ministry. While this is not proof positive that attitudes among the general public had changed—government agencies do not always reflect the popular will—the fact that the ministry directive banning spanking was reissued under three successive governments, in 1991, 1994 and 1997, by ministers from both the left-wing Meretz party and the right-wing National Religious Party, suggests that it enjoyed a fairly broad consensus.

27. Of the fourteen Hebrew-language books that were examined in writing this article, all of which were published in the past decade and a half, seven argue that spanking children is an appropriate punishment under certain circumstances, and seven argue that it is not. However, four of the six written by Israelis favor the use of spanking: Rafi Ya'akobi, *Be Friends with Your Children* (Tel Aviv: Pecker Literary Agency, 1995); Miriam Levi, *Proper Parenting* (Jerusalem: Reuven Mass, 1991); Yaffa Barzakai, *Parents as Teachers* (Jerusalem: Otzar Hasfarim, 1985); Danny Wolf, *Being Parents* (Tel Aviv: Yedi'ot Aharonot, 1993). The two books that oppose spanking in all circumstances are Michal Rosman and Mira Dital, *Parental Intelligence—PQ: Groupwork with Parents* (Kiryat Bialik: Ach, 1999); and Rachel Pasternak, *The First Circle* (Tel Aviv: Eitav, 1994). In contrast, five of the eight translated from English oppose such punishments. Though this data is obviously insufficient for any conclusions about the majority opinion among Israeli experts, it does render the court's implied assertion of a new Israeli consensus highly questionable.

28. This poll was carried out by the Geocartography research firm, which interviewed five hundred adults. *Yedi'ot Aharonot*, January 2, 2000. Moreover, this poll understated the degree to which Israelis were resistant to the idea of a ban on spanking. It did not include Arab-Israelis at all, and almost certainly underrepresented Haredi Jews—which meant that it did not reflect the views of two of the communities in which corporal punishment of children is most widely accepted.

29. The poll was conducted for the National Council for the Welfare of the Child and was quoted in Tova Tzimuki, "No Hands," *Yedi'ot Aharonot*, October 30, 1996. It almost certainly understated the percentage of parents using corporal punishment, as there is a tendency to underreporting in such surveys by those parents who oppose spanking in principle and do not want to admit that in practice they have hit their children. On this point, see Murray A. Straus, *Beating the Devil Out of Them: Corporal Punishment in American Families* (New York: Lexington Books, 1994), pp. 52-53.

30. Beinisch wrote in her verdict: "One might argue that in this ruling, we are issuing a decree that the public will not be able to abide by, since there are more than a few parents among us who use non-excessive force towards their children (such as a light slap on the rear or on the hand) in order to educate and discipline them." Yet only a ruling that runs counter to the habits and beliefs of much of the population is in danger of being one that "the public will not be able to abide by." *Jane Doe*, paragraph 30.

31. Aharon Barak, speech of June 27, 2000, at the Zionists of America House in Tel Aviv, quoted in Dalia Shahori, "Aharon Barak: The View that 'Everything Is Justiciable' Must Also Apply to the Family Unit," *Ha'aretz*, June 28, 2000.

32. *Jane Doe*, paragraph 27.

33. *Jane Doe*, paragraph 27.

34. The existence of conflicting opinions within the social science research community is one reason that legal theorists have always considered reliance on such research questionable: Not only is social science research generally inconclusive, but the weight of the "evidence" frequently shifts from one side of the argument to the other—often rapidly.

35. For a discussion of the research and arguments demonstrating the negative effects of spanking, see Straus, *Beating the Devil Out of Them*; and Irwin A. Hyman, *The Case Against Spanking: How to Discipline Your Child Without Hitting* (San Francisco: Jossey-Bass, 1997), pp. 58-62.

36. *Pediatrics* 98:4, October 1996, Supplement.

37. Robert E. Larzelere, "Presentation: A Review of the Outcomes of Parental Use of Nonabusive or Customary Physical Punishment," *Pediatrics* 98:4, October 1996, pp. 824-828.

38. Larzelere, "Presentation," p. 824. Developmental expert Diana Baumrind concurred with Larzelere's findings: "Disciplinary spanking in the home, used prudently, can shape socially constructive behavior, thereby protecting children from the natural and more painful consequences of misbehavior occurring outside the nurturing family setting." Diana Baumrind, "Response: A Blanket Injunction Against Disciplinary Use of Spanking Is Not Warranted by the Data," *Pediatrics* 98:4, October 1996, p. 830. She also cited a study showing that children of parents who used moderate physical punishment were the least violent towards other children, and that violence in children was associated either with excessive physical punishment or with its total absence.

39. Marjorie L. Gunnoe and Carrie Lea Mariner, "Toward a Developmental-Contextual Model of the Effects of Parental Spanking on Children's Aggression," *Archives of Pediatrics and Adolescent Medicine* 151, August 1997, p. 768.

40. Larzelere, "Presentation," p. 827.

41. *Jane Doe*, paragraph 24. What is most surprising about this airy dismissal is that the court could have produced a much stronger argument for considering the tort law irrelevant: On November 3, 1999, a bill to remove this clause had passed its first reading in the Knesset (it passed its final reading in June 2000, five months after the court issued its verdict). The court could therefore have argued that legislative intent appeared to be swinging in the opposite direction. Regarding the possibility of using tort law to clarify legislative intent on whether spanking by parents should be exempted from being a criminal offense, see Straschnov, *Children and Youth*, pp. 234-236.

42. This act replaced the earlier legal reference to British law as the source for resolving such lacunae.

43. The court's verdict on spanking, as District Court Judge Amnon Straschnov noted in a recently published book, included "not a single citation or reference, even an implicit one, to Jewish law." This "disregard of the rulings of Jewish law," Straschnov stressed, "does not accord with the instructions of Article 1 of the Foundations of Justice Act." Straschnov, *Children and Youth*, p. 273. For a discussion of Jewish sources demonstrating that they allow parental autonomy in spanking children, see the concurring opinion of Justice R. Assaf in the Rassi case of 1953; and Straschnov, *Children and Youth*, pp. 219-225. For an opposing view, see Yitzhak Levy, "Judaism and Hitting Children," in *The Rights of Children in Israel: A Collection of Articles and Sources*, eds. Yitzhak Kadman and Galia Efrat (Jerusalem: National Council for the Welfare of the Child, 1998), pp. 97-100. [Hebrew]

44. *Jane Doe*, paragraph 28.

45. The purpose of Basic Law: Human Dignity and Freedom, as set out in its opening clause, "is to protect human dignity and freedom, in order to establish in a basic law the values of the State of Israel as a Jewish and democratic state." The law details six fundamental freedoms that it was designed to protect, among which are: "There shall be no violation of the life, body, or dignity of any person as such," "There shall be no violation of the property of a person," and "There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition, or otherwise." Finally, since these rights cannot be absolute—the police must arrest suspected criminals, the government must levy taxes, and so on—the basic law also includes a balancing clause, which states that these freedoms may be infringed "by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required."

46. Knesset Proceedings, vol. 10 (1991), pp. 1235-1249; Knesset Proceedings, vol. 12 (1991), pp. 1527-1532; Knesset Proceedings, vol. 24 (1992), pp. 3781-3794.

47. Haim Cohen, "The Values of a Jewish and Democratic State: An Inquiry into the Basic Law: Human Dignity and Freedom," *Hapraklit*, Jubilee Volume, December 1993, p. 30.

48. Cohen, "The Values," p. 11. Moreover, Cohen noted that he was, as a matter of interpretive policy, ignoring legislative intent—as he did not consider "all the parliamentary and extra-parliamentary discussions that ended with the political compromises that found their expression in the basic law" to be of relevance in interpreting the law. Cohen, "The Values," p. 18.

49. The court quotes this article, in its official Hebrew translation, in *Jane Doe*, paragraph 28. The English-language version here comes from the official version of the convention, which is available at United Nations Human Rights Website (www.unchr.ch).

50. On the ambiguity of the convention's language regarding this point, see David P. Stewart, "Ratification of the Convention on the Rights of the Child," *Georgetown Journal on Fighting Poverty* 5:2, Summer 1998, pp. 161-184.

51. Based on the official documents of the Committee on the Rights of the Child, it would appear that the committee came to this position sometime between its second and fifth sessions, which took place between September 1992 and January 1994. Conclusions and Recommendations Adopted by the Committee on the Rights of the Child at its Second to Fifth Sessions, paragraphs 482 and 483, May 19, 1994. United Nations Human Rights Website: Treaty Bodies Database. On a number of occasions, the committee has even suggested that individual countries change their laws. See especially reports on Poland, United Kingdom, Canada, Belgium, Portugal and Germany. United Nations Human Rights Website: Treaty Bodies Database. For an overview of the position adopted by the UN Committee on the Rights of the Child, see Bitensky, "Spare the Rod," pp. 388-404.

52. In addition to the eight democracies noted earlier in this article, one non-democratic nation, Croatia, banned spanking, in January 1999. The 190 ratifying countries comprise all UN member states except the United States and Somalia.

53. Indeed, Israeli child-welfare advocates noted at the time that Israeli law "is basically in consonance with the provisions of the convention." Surie Ackerman, "Israel Ratifies UN Child Rights Convention: Changes Expected in Processing of Minors' Arrests in Areas," *The Jerusalem Post*, November 5, 1991. See also Irwin Cotler and Philip Veerman, "A Tool for Teaching Human Rights," *The Jerusalem Post*, October 7, 1991.

54. See, for example, *Shohrei Gilat v. Minister of Education* (HCJ 1554/95 and HCJ 7715/95), paragraph 38, in *Decisions*, vol. 50, section 3, 1996, p. 2 (these two cases were dealt with by the High Court in a single verdict). Nonetheless, the

Supreme Court has adopted a method of interpretation whereby it will, whenever possible, interpret Israeli law so as to make it conform to international law. On this point, see *Sufian Abu-Hasan v. State of Israel* (CA 3112/94), paragraph 9, in *Decisions*, vol. 53, section 4, 1994, p. 422. Presumably, Beinisch was applying this same interpretive principle in using the Convention on the Rights of the Child as a source for banning spanking, though she did not address this point in her verdict.

55. The Justice Ministry's position was presented by Deputy Attorney-General Yehudit Karp before the Knesset Committee on the Status of the Child, June 12, 2000. Proceedings of the Knesset Committee on the Status of the Child, June 12, 2000, p. 24. Since 1995, Karp has been a member of the UN's Committee on the Rights of the Child, and therefore is extremely conversant with the issues relating to whether the Convention is binding on signatories.

56. *Jane Doe*, paragraph 29.

57. *Jane Doe*, paragraph 29. The amendment was proposed in 1992, but the final vote took place only two years later.

58. Meridor's main argument was that all exemptions should be explicitly written into law: "People should not have to look for the law in the rulings of the Supreme Court; they should be able to go to an article [in the legal code] and find things there." Proceedings of the Subcommittee on the Penal Code, Knesset Constitution, Law and Justice Committee, May 23, 1993, p. 2. However, he also worried that if this exemption were left out, the Supreme Court would later interpret the omission as a statement of the Knesset's intent to ban spanking—a fear that proved prescient.

59. Proceedings of the Subcommittee on the Penal Code, May 23, 1993, pp. 24-25.

60. Proceedings of the Subcommittee on the Penal Code, July 20, 1993, p. 39. Deputy Attorney-General Yehudit Karp also stressed that "there is a difference between an explicit criminalizing statement and the abolition of a defense." Proceedings of the Subcommittee on the Penal Code, May 23, 1993, p. 11. Superintendent E. Mazoz from the legal affairs division of the Israel Police put the underlying assumption bluntly during the subcommittee's discussion of a different proposed defense in the Penal Code: "Even if we eliminate [the] article, I do not see any concern that any judge will create for himself new doctrines…. Not on every subject does a judge wake up every morning—except, perhaps, for [Supreme Court Justice Aharon] Barak—and create a new doctrine." Proceedings of the Subcommittee on the Penal Code, February 23, 1993, p. 7.

61. Proceedings of the Subcommittee on the Penal Code, May 23, 1993, p. 17.

62. Proceedings of the Knesset Constitution, Law and Justice Committee, April 25, 1994, p. 37.

63. Proceedings of the Knesset Constitution, Law and Justice Committee, April 25, 1994, p. 40.

64. Proceedings of the Knesset Constitution, Law and Justice Committee, April 25, 1994, p. 38.

65. Knesset Proceedings, vol. 40 (1994), p. 9823. Levy was also designated as the representative of the majority opinion by Meridor, the subcommittee chairman. Knesset Proceedings, vol. 40 (1994), p. 9832.

66. Knesset Proceedings, vol. 40 (1994), p. 9844.

67. Knesset Proceedings, vol. 40 (1994), p. 9845. Levy said the explicit exemption was not necessary to protect parents, as one could rely on the prosecutors and judges not to indict or convict in cases where it was unwarranted. Knesset Proceedings, vol. 40 (1994), p. 9833.

68. Though Dayan voted with the majority in the committee discussions, she did not state her position then, and indeed, did not do so until the closing moments of the plenum debate.

69. Knesset Proceedings, vol. 40 (1994), pp. 9847-9848.

70. A few years later, MK Dedi Zucker told the press that the committee had considered it "important to lay down a general principle that forbids the use of force in any framework and under any condition, even in the context of relations of dependency within the family. The Basic Law: Human Dignity and Freedom forbids the violation of a person's body." Tzimuki, "No Hands." However, Zucker never articulated that position during the committee or plenum sessions, and he designated Yitzhak Levy—who opposed a ban on spanking—to represent the committee's position. Thus Zucker's retrospective view cannot be weighed heavily in determining legislative intent.

71. Moshe Landau, "Giving Israel a Constitution through Judicial Decisionmaking," *Mishpat Umimshal* 2:3, 1996, p. 705.

72. *Jane Doe*, paragraph 30.

73. *Jane Doe*, paragraph 30.

74. *Jane Doe*, paragraph 30.

75. *Jane Doe*, paragraph 30.

76. Proceedings of the Subcommittee on the Penal Code, May 23, 1993, p. 6. Karp, as mentioned in note 55 above, is one of the members of the UN Committee

on the Rights of the Child, which decided to interpret the Convention on the Rights of the Child as obligating signatory countries to prohibit parental spanking. In addition, she made it clear throughout the subcommittee discussions that she would favor a ban on spanking. For an elaboration of Karp's views on the danger of arbitrary enforcement, see Yehudit Karp, "Corporal Punishment: A Legal Perspective," in *Education by Violence—Education for Violence: Corporal Punishment and Hitting Children* (Jerusalem: National Council for the Welfare of the Child, 1993), pp. 8-9. [Hebrew] Dan Meridor also raised the issue of arbitrary enforcement: "The attorney-general or the police will decide as they see fit… or in accordance with their worldview of the minute when they will prosecute and when they will not. A person will be a criminal, but the attorney-general will decide as he likes that he will prosecute Reuven, but he won't prosecute Shimon." Proceedings of the Subcommittee on the Penal Code, May 23, 1993, p. 2.

77. *Jane Doe*, paragraph 30.

78. Proceedings of the Subcommittee on the Penal Code, July 20, 1993, p. 43. Deputy Attorney-General Karp likewise warned the subcommittee that "non-enforcement of the law will lead to contempt for the law." Proceedings of the Subcommittee on the Penal Code, May 23, 1993, p. 6.

79. Interview on Army Radio's *Good Morning, Israel* program, January 26, 2000.

80. A good example of this is the famous Nahmani decision, in which the court ruled that Ruti Nahmani could implant eggs fertilized by her ex-husband Danny into a surrogate mother, despite Danny's objections. This is certainly a deeply personal question, but in this case, Ruti and Danny explicitly asked the court to decide the issue. Furthermore, the court could not have avoided a decision by deferring to the appropriate statute, since there was none: The law was completely silent on this issue. Prior to the court's intervention, a decision had been made by the hospital in which the eggs were stored. But since Danny and Ruti had not appointed the hospital as their arbiter, and no law gave it the authority to assume this role unasked, the hospital's decision had no legal validity whatsoever.

81. *Jane Doe*, paragraph 29.

82. At times, the court's deference to personal autonomy has verged on the absurd—as in its ruling that the state must provide special gas masks to bearded men free of charge because "a beard is part of a man's self-image." *Akiva Nof v. Ministry of Defense* (HCJ 205/94), in *Decisions*, vol. 50, section 5, 1994, p. 449.

83. Aharon Barak, "Judicial Philosophy and Judicial Activism," *Iyunei Mishpat* 17, 1992, quoted in Neuer, "Aharon Barak's Revolution," pp. 15-16.

84. Barak, speech at the Zionists of America House.

85. For a discussion on how Israel's process of appointing justices compares to those used in other democracies, see Mordechai Haller, "The Court that Packed Itself," Azure 8, Autumn 1999, pp. 64-92. On the stigmatization of those who criticize the Israeli Supreme Court, see Gordon, "Is It Legitimate to Criticize the Supreme Court?"; and Evelyn Gordon, "The Creeping Delegitimization of Peaceful Protest," Azure 7, Spring 1999, pp. 30-46.

86. See, for instance, the responses cited in *Yedi'ot Aharonot* on January 26, 2000, or the various radio interviews on this subject on January 25 and 26.

87. The poll, conducted for the Gesher Center by the Mahshov survey research company, found that 58 percent of respondents said the court should not have acted to ban spanking.

88. Proceedings of the Subcommittee on the Penal Code, May 23, 1993, p. 20.

89. Proceedings of the Subcommittee on the Penal Code, July 20, 1993, p. 40. The Knesset's handling of the penal code actually pales before some of the other *cartes blanches* it has granted to the Supreme Court. The most notable of these is the Basic Law: Human Dignity and Freedom itself, in which the Knesset stated that the rights delineated in the Basic Law may be infringed by a law befitting the values of the State of Israel "as a Jewish and democratic state," but then left the court to determine what Israel's Jewish and democratic values are.

90. The three were Avraham Ravitz and Moshe Gafni of the United Torah Judaism party and Reuven Rivlin of the Likud. Legislation proposed by Moshe Gafni, P1345, February 20, 2000; legislation proposed by Reuven Rivlin, P1487, March 6, 2000; legislation proposed by Avraham Ravitz, P1468, July 19, 2000.