Correspondence

Judicial Activism

To the Editors:

In her article "The Supreme Court In Loco Parentis" (Azure 10, Winter 2001), Evelyn Gordon assails the recent ruling forbidding all corporal punishment of children by their parents. Gordon focuses mainly on the ruling itself, in the process raising serious questions about the grounds for the Supreme Court's decision. From a broader perspective, however, the author clearly means to offer this case as an example of the court's activism: Ultimately, her aim is to show the dangers inherent in the violation of the separation of powers that takes place when the Supreme Court does not confine itself to its proper role.

I read the article not as a legal expert, but as a student of ethics who is concerned with the question of how authority over education should be divided between parents and the state. Rather than getting into the thorny issues surrounding Gordon's claims about judicial activism and its repercussions for Israeli democracy, I prefer to focus on the arguments she raises against the ruling, and to address them from the viewpoint of an ethicist. Simply put, I want to maintain that on the issue of corporal punishment by parents, the ruling is proper in terms of its essential content, even if Gordon is correct in arguing that it is not a reasonable way to interpret the existing law, and that this is an issue to be settled by the legislature, and not by three judges.

Of Gordon's six arguments criticizing the ruling, the first three relate to the question of what is "generally accepted" concerning the corporal punishment of children. Gordon convincingly demonstrates that (i) most of the world's democracies allow the moderate corporal punishment of children by their parents; (ii) Israeli public opinion does not support the idea that all corporal punishment should be illegal; and (iii) the experts disagree as to whether such punishment is harmful to the child. It is these arguments which I would like to address.

From the viewpoint of ethical theory, the attempt to evaluate the ruling through an empirical examination of data—whether through comparison with other countries, opinion polls, or consulting expert opinions—is problematic. The three arguments which Gordon attacks pertain to what the ethical philosophers call "descriptive ethics." Rather

than concerning itself with whether corporal punishment per se is an ethically valid norm, the discussion turns on questions of what, in practice, is common or accepted—in other countries, in Israeli society, or among the experts.

Since what is common and accepted changes with time and place, the basing of ethical norms on empirical examination necessarily leads to a kind of moral relativism, for it assumes that if a given conduct corresponds to the accepted norms of a society, it is therefore ethical for members of that society. This is a highly perilous position, which blithely gives a stamp of approval to harm inflicted on human beings, and also legitimizes the treading of their rights underfoot. Indeed, there is a problem with similarly simplistic utilitarian positions, which provide moral justification for conduct that leads to "desired results."

Could it conceivably be argued that the "light and reasonable" beating of a wife by her husband is a matter for which the relevant social norms in practice are to be examined? Is it at all fitting to conduct a comparison between Israeli law and other judicial systems regarding this issue? Is it proper to conduct public opinion polls among violent husbands? Is it legitimate to turn to experts and take into account arguments that moderate wife-beating, under appropriate circumstances, strengthens the family unit, since it encourages the wife to fill her traditional roles? Are we to take into consideration studies that show that the divorce rate is lower in societies in which husbands are permitted to beat their wives in moderation, and conclude that there is a solid basis for the argument that such beatings attain good results for the society?

If the child is a person with rights and is entitled to the defense of his body—a premise which is not questioned in Western democracies—then the empirical arguments miss the essential point. Any corporal punishment of children by parents must be absolutely prohibited, not because it leads to adverse results, not because it is not recommended by experts, not because of the opinions people hold, but because it is invalid moral behavior, as a matter of principle, in every society that accepts the idea of human dignity, together with the assumption that the child is a person.

It seems to me that when the court addresses the empirical questions in its arguments, it does so only after having established an absolute moral position regarding corporal punishment, and only in order to support an argument that does not spring from the "data in the field," but rather from a fundamental conception. Of particular importance in this context

is the quotation that Gordon brings from Barak: "We do not make decisions according to statistics of public opinion." The justices write in unequivocal fashion in their ruling that corporal punishment harms the child and his dignity, and Gordon quotes the passage in which they do so. Additionally, Justice Dorit Beinisch, who authored the court's opinion, argues that the Basic Law: Human Dignity and Freedom "serves as an important source" for the ban on spankings, since it declares: "There shall be no violation of the life, body, or dignity of any person." Defense of human rights is not a matter for public opinion polls; rather, it constitutes an essential democratic principle, and any judicial ruling that advances this principle is deserving of our praise.

Gordon maintains that there are two possible explanations for the silence by the public in the face of a ruling that so blatantly interferes in the personal sphere, that harms parental autonomy and that undermines "the right to educate one's children according to one's own understanding." This silence, she asserts, ensues from a disregard for the Supreme Court, or from despair and a sense of powerlessness in the face of the judicial activism to which the public has become accustomed. It is unfortunate that Gordon does not mention a possible third reason: The public elects to remain silent because it views this ruling as proper, as possessing value, and, as such, as advancing Israeli society. The autonomy of parents in the raising of their children is not absolute, and should be limited in situations in which the good of the child is hampered. The Israeli public is silent because it understands the ruling in the correct light: As a courageous and praiseworthy attempt to inculcate a paramount moral and democratic principle.

Vardit Ravitsky
Mevaseret Tzion

To the Editors:

In discussing the activism of Israel's Supreme Court and its interventionist forays into areas traditionally considered to be outside the judiciary's discretion, David Hazony, writing on behalf of the editors, touches on the case known as Women of the Wall ("The Year of Ruling Dangerously," Azure 10, Winter 2001). However, I am nonplused over the frame of reference and the context of criticism he chooses.

Hazony notes that the court has broken new ground on the question of which religious practices may or may not be conducted at Israel's most sacred sites. For over a decade (the first hearing was in 1989 and the

first decision was in 1994), a small group of women have been petitioning the High Court of Justice to instruct the Religious Affairs Ministry's appointed supervisor of the Western Wall to permit them to pray, once a month, at a location close to and in sight of the Wall. As Hazony records, in the case of *Hoffman v. Director-General of the Prime Minister's Office*, three of the most liberal justices sitting on the bench, Eliyahu Matza, Tova Strassberg-Cohen, and Dorit Beinisch, finally did so agree on May 22, 2000.

However, Hazony's criticism fails to take into account an element which points up the hypocrisy of the court: The ignoring of a parallel demand which has been placed at the court's attention for the past three decades, ever since a petition of the National Organizations in 1968. Indeed, the demand for a recognized Jewish religious presence within the confines of the walled compound on the Temple Mount, which accords with law and logic, has been systematically rejected in literally dozens of cases by the same court.

Hazony may bemoan the fact that the judges, in the matter of the Women of the Wall, entered potentially catastrophic territory where, perhaps, sensitivity would dictate a preference for informal arrangements. Nevertheless, the true outrage in the character of the court's activism should have been directed at the obvious prejudice the court supports in discriminating between Jews who, on the one hand, are female, feminist, progressive, and not all Orthodox, and Jews who, on the other hand, are male, traditionalist, and Orthodox.

The judges, in effect, gave notice that the sensitivity of the religious feelings of the state-recognized Chief Rabbinate, which opposed the petition of the Women of the Wall, can be overridden. Yet, in the matter of the various groups that sought court recognition to be permitted to pray either in a quorum or even individually, the judges gave preference to the Chief Rabbinate, which has sought to prohibit entry onto the Temple Mount.

I also found disagreeable the citing by Hazony in a positive fashion of the Ottoman practices in force at holy sites, as if this were a precedent on which one should rely. Firstly, now that we have a Jewish political entity which has finally assumed sovereignty over the Jewish homeland, any Ottoman code should be superseded and therefore become irrelevant. Secondly, as a result of the Ottoman legislation and practices, which kept Jews away from the Temple Mount (except for singular cases such as the visit of Sir Moses Montefiore), the British were able in 1929

to appoint an international commission following the Arab riots that year. Those riots, resulting in 133 Jewish dead, began, at the behest of the mufti, in the Temple Mount courtyards. One year later, the commission declared that the Western Wall was part of the Haram es-Sharif, it being Waqf property. The practical ramification of that was the prohibition of Jews from blowing the shofar at the Wall. That, to my mind, is not an example of a sensitive resolution of a dispute. In fact, Yasser Arafat continuously refers to the conclusions of this committee to justify his opposition to any arrangement in Jerusalem that would not leave him with sovereign rights over the Temple Mount as well as the Western Wall and, in addition, the prevention of Jews from conducting any archeological digs under the Haram es-Sharif compound on the Temple Mount.

Israel's policy regarding the Temple Mount since 1967, supported by the Supreme Court, has been self-defeating. The issue of the Temple Mount, thrust to the fore at the Camp David II deliberations, is at a point where the Israeli establishment is forced to choose either to ignore its importance to the fabric of Jewish historical and political self-identification or to capitulate in the name of compromise and self-abnegation. That the justices of the country's Supreme Court would lend a hand to this while supporting such relatively trivial matters as the Women of the Wall should have been a point raised by Hazony.

Yisrael Medad
Shiloh

Secret of the Sabbath

To the Editors:

The central argument of Yosef Yitzhak Lifshitz's essay on the meaning of the Sabbath ("Secret of the Sabbath," Azure 10, Winter 2001) is that the Jewish day of rest represents a unique synthesis of the passive and the active: Of the individual's acquiescence to nature, which according to Lifshitz expresses passivity, and his attempt to control nature and transform it into a symbol of his power and uniqueness, which is active.

At first glance, this sounds like another version of the Aristotelian golden mean, according to which virtue may be found by avoiding extremes and walking a middle path. But in applying this model to the idea of the Sabbath, Lifshitz ends up making a far more dramatic claim, in effect arguing for the complete uniqueness of Jewish culture and theology. Not satisfied with depicting the Sabbath as a golden mean between activity and passivity, Lifshitz turns it into a

tool by which Judaism as a whole may be seen to act as such a mean, between Western civilization, which represents the domination of nature by man, and Eastern civilization, which encourages man to be receptive to nature and subservient to it. In the Sabbath, Lifshitz argues, Jewish civilization offers a balanced alternative to both.

We may leave aside the problems inherent in such generalizations. (For example, Lifshitz contents himself to cite Descartes' ideas about nature as proof of his claim, as if Descartes were somehow representative of all of Western culture, from its cradle in Greece to our own technological age.) The real problem with this argument lies, however, in the way it depicts the relationship between God and man in Jewish theology as one based on imitation. In Lifshitz's mind, God's creations observe the Sabbath not because they are thus commanded, without reference to any rational meaning. Rather, man observes the Sabbath in imitation of God's creativity, an act which transforms man into a creative being as well.

This line of reasoning is sophisticated, but it does not work. It is sophisticated because, in arguing that this is imitation not of God per se but of his actions, Lifshitz seems to avoid the problem of fashioning an image of God—and Judaism always distinguished itself from paganism through its unequivocal prohibition of "graven images," of imitations of the divine essence. But this effort to preserve the imitation of God's creativity while avoiding the problem of divine images does not, in the end, succeed.

For the biblical command against imitating the image of God is a sweeping one. It does not merely prohibit the fabrication of likenesses of him; it goes as far as to include the idea of imitating divine actions through actions of our own. An absolute separation is required, one that does not allow any connection between the divine and the human. While Lifshitz himself argues strongly that part of Judaism's uniqueness is its complete separation between God and his creations, he nonetheless violates this division by calling for imitation of the divine, particularly through creative action.

Aside from this problem, I would like to call into question Lifshitz's employment of the Sabbath idea in his critique of instrumental rationalism as formulated by the Frankfurt school. The only connection between the two, it seems, is that both address the idea of "labor." The Sabbath indeed requires that one refrain from work one day per week, but Judaism does not argue that labor itself leads to man's dehumanization, as do the thinkers of the Frankfurt

school. In order to show that there is anything here more than a similarity of terms, what is required is a far broader conceptual effort, one that would analyze the entire pattern of consciousness inherent in the idea of the Sabbath, and not only the prohibition of labor, in order to offer a critique of a complete way of thinking—as the philosophers of the Frankfurt school attempted to do with the idea of rationalism as it developed in Western culture with the Enlightenment.

In principle, I am sympathetic to Lifshitz's basic insight that the "critical thinking" of the Frankfurt school may be connected with the fundamentals of Jewish philosophy. Special care, however, must be taken in articulating this point, so as not to undermine the fundamental principles of Jewish belief, on the one hand, while still showing that the connection between the two is more profound than a mere affinity of terms.

Pini Ifergan
Jerusalem

Orde Wingate

To the Editors:

I read with interest the article by Michael B. Oren on Orde Wingate ("Orde Wingate: Friend Under Fire," Azure 10, Winter 2001). I would, however, like to point out two errors in his article.

First, Oren repeats the tale of Wingate greeting guests in the nude. In point of fact, I went to his hut in Ein Harod every day to receive a summary of his daily talk (in English, obviously). Before he permitted anyone to enter his room, he would cover himself with a towel.

Second, Oren writes that I was in the Palmah. At the time, I was in fact part of the standing forces of the Hagana. I did, however, have a hand in determining the name "Palmah": In 1940 we offered two proposals to Ya'akov Dori—*pelugot sa'ar* ("Assault Brigades") and *pelugot mahatz* ("Shock Brigades")—as an appellation for the new Hagana units that were to be established. Dori chose the term *pelugot mahatz*, which he abbreviated as *Palmah*.

Avraham Akavia
Haifa

To the Editors:

Michael B. Oren claims that the origin of the IDF battle cry of *aharai* ("after me") lies with the military command standard set by Orde Wingate. That may very well be the case.

Nevertheless, as Oren recounts, Wingate himself lectured his soldiers from a Bible he always carried with

him prior to setting out on raids, in order to raise morale, and remind them that they were fighting in places where Jews had fought in the past.

That being so, he himself probably was aware of the verse located in I Samuel 14:12. There, Jonathan, son of Saul, leading a small commando raid against the Philistines near Michmas, instructs his weapon-bearer: "Arise after me, for the Eternal has given them unto Israel." The Hebrew word there is the same: *Aharai*.

So the IDF came full circle, needing a Christian lover of Zion to recall to the Special Night Squad troops, who, in turn, inspired Moshe Dayan and Yigal Allon, that it was a prince in Israel, companion to the warrior-king David, who set the standard that Jewish commanders lead.

Eve Harow
Efrat

On Love and Lennon

To the Editors:

With regard to Ze'ev Maghen's essay, "Imagine: On Love and Lennon" (Azure 7, Spring 1999), it should be stated clearly that the importance of the article does not lie in any major innovations in his arguments; on the contrary, the latter tend to be overstated reformulations of familiar claims, presented as if they were new. Rather, the importance of the essay consists in its addressing the question of preferential love, as opposed to egalitarian love, and in its application of the issue of cultural diversity, as opposed to nihilistic pluralism, to discussions concerning our cultural future. Even though they are not sufficiently cogent, his claims that no intelligent person could allow himself to forgo his own cultural heritage seem to be on the mark. Whoever burns the bridges to his own culture always ends up relying on those of others; without the ability to give, one can only receive, like a beggar without home or family. Such a renunciation is not only foolish, but a kind of spiritual suicide. Maghen is right when he argues that the denial of one's own culture is not pluralism, even if it comes with a longing for other peoples' cultures. In pluralism, it is not enough for everyone to receive, but one must also give something of one's own. Someone who has nothing to give is, at best, a thief or a plagiarist, but in no way is he a pluralist.

Still, I have several major problems with the article, the most severe of which is the degree to which it insults the intelligence of the reader. Whereas the author goes out of his way to promise that he will not do so, he nonetheless manages to insult flagrantly any reader of minimal

intelligence. Maghen makes a string of such promises, all the while ignoring the proverb from Ecclesiastes that "it is better not to vow than to vow and not fulfill." In one instance, he declares that the views of Hare Krishna are legitimate and important. Two pages later comes the promise: "I am not going to advocate that we stay Jewish because Doron's [Krishna] dispensationalist vision of a new world order… is pure Hindu hallucination…." He immediately follows with the complementary claim that "I am not now and never will be a Jew and a Zionist out of fear, or because I have no choice." Finally, Maghen declares that he is committed to the idea of preferential love, "regardless of which theology or philosophy is privileged to be used or abused as the paradigm."

Of course, these promises are false and mutually contradictory. It seems that the author thinks all his readers must be incapable of recalling the assurances he made only a few pages earlier. If he regards the path of Hare Krishna, that of universal love, as legitimate, how can he declare his allegiance to "preferential love"? Conversely, if preferential love is the answer, then the Krishna approach is *precisely* the Hindu hallucination that he said he would not claim it to be. Similarly, Maghen's claim that the fulfillment of John Lennon's dream would mean no less than "the wholesale and irreversible destruction of the dreams, hopes, happinesses, and very reason for living of yourself and every single person you know" also means that the Krishna approach must too be a catastrophic lie, for it too deprives man of the reasons for which life is worth living.

Dov Landau
Petah Tikva

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