Is It Legitimate to Criticize the Supreme Court?

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In August 1996, two haredi newspapers published editorials highly critical of the Israeli Supreme Court and its president Aharon Barak, assailing the court's increased involvement in matters outside its traditional purview. The editorials triggered a torrent of denunciations from Israel's political, legal and journalistic establishments: Complaints were filed with the police against the papers and their editors charging them with sedition, incitement and defamation of the court; there were calls in some quarters for the papers' closure, while prominent politicians from almost every party vied to produce the most vicious castigation of the crime. Then-finance minister Dan Meridor, in a typical example, branded the editorials "a severe incitement campaign that is unprecedented in the state's history, aimed at damaging not only senior justices but at undermining the basic values of society and the public's confidence in the justice system."[1]

After a brief lull, the issue resurfaced in late November, when an interview appeared in which Dror Hoter-Yishai, chairman of the Israel Bar Association, blasted the court for its intrusion into matters that were properly the province of the Knesset. Again, across-the-board denunciations were accompanied by police complaints and demands that Hoter-Yishai be

removed from his chairmanship of the Bar and his position on the government committee that appoints judges. The Bar's Ethics Committee recommended that he face disciplinary charges on account of his remarks.

The Israeli public is probably unique in the sanctity it affords its judiciary, and in its bilious intolerance to attacks on the court. Yet it is not for disrespect of the judiciary that many other democracies, most notably the United States, have assiduously protected debate over judicial activism. The question of the judiciary's proper role in explicating the basic values and principles that shape a nation is of vital importance to any democracy—especially one such as Israel, whose governmental structure is still somewhat in flux, and whose Supreme Court has over the past two decades dramatically increased its involvement in public life. By suppressing debate on one of the most vexing questions of democratic theory today, the political, legal and journalistic communities managed to bilk the Israeli public of one of its founding democratic privileges—the ability to define the role and powers of the institutions of government.

After appearing on intellectual and political battlefields around the world for decades, the debate over judicial activism has finally hit Israel. Yet if the events of last year are any indicator, the Jewish state has a long way to go before it can celebrate the establishment of a stable, mature democracy in the Holy Land.

II

While there is a broad consensus in western democracies about the legitimacy of judicial review—the right of courts to overturn laws that expressly violate a written constitution, or to annul government decisions that contradict laws—there is no such agreement on whether courts should be allowed to overturn laws or government decisions that violate principles whose protection under the law is only implicit.

In most of the western world, the debate over court activism has been held not only in scholarly journals of jurisprudence, but in the political arena as well. In the United States, for instance, activist Supreme Courts have been the source of controversy for over a century. In 1857, the famous Dred Scott decision prohibiting Congress from outlawing slavery in the western territories became a major political issue that featured prominently in the 1860 presidential elections. Republicans and abolitionists denounced the decision as "the greatest crime in the judicial annals of the Republic" and "entitled to just so much moral weight as would be the judgment of a majority of those congregated in any Washington bar-room."[2] President Abraham Lincoln blasted the court's activism in his first inaugural address in 1861:

> [T]he candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government to that eminent tribunal.[3]

Similarly, a series of rulings overturning labor laws in the first quarter of the twentieth century, such as *Lochner v. New York*—a 1905 decision that struck down a New York law setting maximum working hours for bakers—led to widespread public criticism of the judicial system, and made the Supreme Court's activism a cause celèbre for the American Progressive movement, which launched a major campaign whose assault on the court's image continued unabated until after the decisions were overturned in the late 1930s.[4]

For the past quarter-century, judicial activism in the U.S. has kept a hold on the public eye in large part because of *Roe v. Wade*, the controversial 1973 Supreme Court ruling which granted women the constitutional right to an abortion. Many Americans were outraged not only by the substance of the decision, but by what they considered its legal illegitimacy: The court had countermanded the will of the people, as expressed in laws in almost every American state regulating or banning abortion, all on the

strength of a "right to privacy" which the court itself admitted that the "Constitution does not explicitly mention."[5] Since then, the controversy has continued largely due to a series of subsequent decisions dealing with anti-abortionists' efforts to repeal the ruling or limit its effects, and abortion advocates' attempts to extend its sway. More recently, the debate over judicial involvement in value-laden issues has been fueled by two federal court rulings that, by extending *Roe*'s doctrine of the right to privacy into a broad right of personal autonomy, forbade states to illegalize physician-assisted suicide. "The sublime arrogance of these judicial pronouncements highlights the danger of allowing courts to set social policy, in defiance of legislatures and referenda, on the basis of their own (often ill-informed) philosophical intuitions," wrote Sen. Orrin Hatch, chairman of the Senate Judiciary Committee, Rep. Henry Hyde, chairman of the House Judiciary Committee, and Rep. Charles Canady, chairman of the House Subcommittee on the Constitution, in one of sixty friend-of-the-court briefs filed in an appeal of these decisions to the Supreme Court last year.[6]

Elsewhere in the democratic world, judicial activism—which at one time was considered a uniquely American phenomenon—has increasingly come to characterize the behavior of high-level courts. As one scholar has pointed out,

> [J]udges in the United Kingdom are increasingly involved in reviewing the discretionary acts of the administrators of a wide variety of government programs, contrary to their tradition.... French and German legislators and executives now routinely alter desired policies in response to or in anticipation of the pronouncements of constitutional courts, and ... member states of the European Community are beginning to alter domestic policies as a result of rulings of the Court of the European Community.... In Russia the legislative-executive confrontation over the constitutional distribution of authority and Boris Yeltsin's economic policies regularly wended its way in and out of the Constitutional Court....[7]

Not surprisingly, the expansion of the role of the judiciary in many of these countries has evoked concomitant concern.

In Israel, however, judicial activism got a relatively late start, and consequently the public argument over its merits is likewise of recent vintage. There are three principal developments—two driven by the court's own evolving conception of its role and the third a function of Knesset action—which have combined to make judicial activism a prominent issue in the last several years.

The first of these developments was the rapid erosion of two self-imposed procedural safeguards which had previously prevented the court from hearing many controversial cases: Narrow definitions of standing and justiciability. Standing—the right of a party to petition the High Court of Justice[8] against a given government decision—was for most of the court's history granted only to people with a direct, personal interest in the outcome of a case; as a result, the public's ability to challenge government decisions was in many cases limited. Justiciability—the determination of whether a particular question is capable of being settled by court action—was also originally defined narrowly, such that wide areas of government policy were simply considered beyond the court's purview.

In the mid-1980s, the Supreme Court, under the stewardship of President Meir Shamgar, undertook to ease substantially the restrictions on standing and justiciability. In the landmark 1986 *Ressler* case, for instance, the court agreed to hear a petition against the exemption from military service that yeshiva students had traditionally enjoyed. Petitions had previously been filed twice on this issue, and both times the court had ruled that the matter was not justiciable. In 1986, however, a three-judge panel including then-justice Aharon Barak held that the issue was justiciable, while rejecting the case on its merits.

At about the same time, the court issued a landmark ruling on standing limitations. In 1987, Citizen Rights Movement MKs Shulamit Aloni and Dedi Zucker petitioned the court against the justice minister's refusal to extradite William Nakash to France, where he was wanted for the murder of an Arab. Justice Menachem Elon, in his dissent, upheld the court's traditional position that the petitioners had no standing. However, the other

four justices, led by President Shamgar, asserted a new standard: Since no one else in the country had a more direct interest in the case, and it was a matter of genuine public interest, the court would hear the petition. Since these rulings, the erosion of standing and justiciability restrictions has continued unabated.

Parallel to the court's rapid expansion of the range of cases it would hear was a second development, the emergence of a far-reaching "reasonability" standard for judging government decisions. Whereas once the court would consider only whether a government action accorded with the letter of the law, the court began routinely overturning decisions which it considered "extremely unreasonable," on the grounds that extreme unreasonability is *ipso facto* illegal. In the words of Shamgar, "unreasonability that extends to the heart of the issue makes the decision of a government authority illegal."[9] The result of this new standard, especially when combined with relaxations on standing and justiciability, was that the range of decisions which could potentially be overturned became almost identical with the totality of government action. The court has made increasing use of the reasonability standard since the early 1980s; during the current decade, employment of this standard has become the norm.[10]

It was against the backdrop of the radical widening of the judiciary's domain that the third impetus for activism emerged: With the 1992 passage of Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation, the Knesset implicitly granted the Supreme Court power to strike down subsequent Knesset legislation that it found to be in violation of the rights embodied in the Basic Laws. Whereas previously the court could and did overturn government actions which did not accord with existing Knesset laws, a determined government always had a recourse: It could pass new legislation giving sanction to the policy the court had struck down, thereby tying the court's hands. The 1992 Basic Laws did away with this recourse; by stipulating that no subsequent legislation could violate the principles protected therein, the laws in effect gave the court the ability to overturn any new legislation that, in its opinion, contradicted those

principles. And although the Basic Laws shielded previously-existing legislation against court review, the Supreme Court has taken the laws' passage as a green light to reinterpret past legislation according to the values endorsed in the Basic Laws.

With the breaching of standing and justiciability restrictions, the increased use of the reasonability test and the passage of the Basic Laws, the Supreme Court has dramatically increased its involvement in the day-to-day governance of the country. In the past five years, it has nixed the cabinet's choice for director-general of a government ministry, forced a minister and deputy minister to resign, overturned a Knesset decision to lift an MK's parliamentary immunity so that he could stand trial, and denied the government the right to continue a fifty-year-old ban on the import of non-kosher meat. It has overturned the attorney-general's decisions not to try certain public figures, prevented the government from dismissing its civil service commissioner, and even overturned the Israel Prize Committee's choice of a prize recipient. Indeed, one gets the impression that to Israel's Supreme Court, virtually no government action is too political, too controversial or too trivial to escape its vigilant eye.

III

The implication of the Supreme Court's radically expanded role is that judicial activism in Israel can never again remain a purely academic issue. And indeed, the court's behavior has occasionally been called into question in the broader public forums and national media. Until last year, however, the public debate over judicial activism generally occurred in a sporadic, almost lackadaisical fashion. Occasional newspaper columns were written, and MKs periodically raised a fuss when court rulings infringed on their prerogatives. But in August 1996, when the Supreme Court issued an

injunction against the Sabbath closure of Bar-Ilan Street in Jerusalem, Israel for the first time faced a full-throated outcry against judicial activism.

The case, at first glance, seems hardly the stuff that defining constitutional moments are made of. The mainly haredi population of Bar-Ilan Street wanted the road closed on the Sabbath, as is already the case for many other roads in predominantly religious neighborhoods in Israel. In 1995, a commission set up by the Jerusalem municipality had recommended closing the street during prayer times, but the Transport Ministry's official traffic supervisor—whose approval is needed since Bar-Ilan is considered a major artery—refused to approve the closure. After the 1996 elections, the new government asked supervisor Alex Langer to reconsider his position, and this time he acquiesced. Labor party activist Li'or Horev and MKs Ophir Pines (Labor) and Yossi Sarid (Meretz) promptly petitioned the High Court against the move. A seven-justice panel chaired by President Aharon Barak issued an injunction against the closure, citing questions about the reasonability of the supervisor's decision.

It was in response to this decision that *Yated Ne'eman*, a mainstream haredi daily, published an editorial branding Barak, the driving force behind the court's increasing activism, as a "dangerous enemy" of both Judaism and democracy:[11]

> He is stronger than any government. He overshadows the police, the legislature and also the executive. With one stroke, he can remove a minister from his post or deprive a party of the right to run in the elections.[12] Democracy has ended. The rule of the people has ended.... [Barak] has arrogated to himself the right to decide for me and for you what we are permitted to think and what we have the right to fight for.[13]

The editorial went on to attribute the court's unusual power to its claim to being above politics, to which it proposed a simple solution: If Supreme Court justices were going to act like politicians, they should be treated like politicians. Once Supreme Court justices were subjected to the same public

criticism that held legislators in check, the editorial claimed, they would lose their superhuman status, and their power would dwindle accordingly.

A similar piece appeared in the more sensationalist haredi weekly *Kol Hashavua*, entitled, "Target: Barak." The article was prefaced with the following words:

> Aharon Barak is the driving force behind the sophisticated battle being waged against the Jewish viewpoint in Israel. We must not disperse the shells. We must throw down the gauntlet and oppose him frontally, and show him as he is—as someone implementing a "judicial revolution," as a threat to the citizen's right to shape the country in which he lives.

The remainder of the article was a lengthy assault on the secular left in general, which ended with a call to concentrate the fight on "the secular regime's trump card: The Supreme Court."

> A "smart" war should be waged to reveal the undemocratic, dishonest and unconscionable efforts of a man called Aharon Barak to force his views—which are far from those of the decisive majority of Israel's Jewish citizens—on the people of Israel.
>
> He should be portrayed in his true arrogance, as a danger to the character of Israeli democracy, as a threat to the citizen's power to decide for himself how his country should be run. We must take away, through [another] "judicial revolution," the authority which is not his and was never granted him—because no one elected him, and he never submitted his governmental aspirations to any real public test.
>
> The battle must focus on this man.... for to defeat Barak and the forces he represents, he himself need not be defeated; it is enough to crack the armor of straw which protects him as a figure who is above political controversy. For the minute he is part of the political game, even if he wins he will have become mortal and vulnerable (of course, this means vulnerability on the level of ideas—not, God forbid, anything else).

> In this war, one must not act foolishly. It is forbidden to act without civility, since in doing so, you will not convince anyone of anything—except that you are a boor.[14]

Predictably, the article's bellicose language—particularly the references to Barak's mortality—drew heavy fire from the public, who ignored its disclaimers to the contrary and read it as a call to violence.

In addition to the editorials, the Bar-Ilan decision also prompted a poster campaign in haredi neighborhoods proclaiming that "Aharon Barak works for Meretz," and ending with a call to "[p]revent the dictatorship of the High Court of Justice. Let the public elect Supreme Court justices."[15] Acerbic though they may have been, nothing in the editorials or the posters exceeded the bounds of ordinary (if unsophisticated) debate, and it is safe to say that had the subject of the barrage been, say, secular MKs Yossi Beilin or Rafael Eitan, they scarcely would have been noticed.

But noticed they were. The entire political establishment roared in outrage, scandalized that anyone, in the words of former Supreme Court justice Haim Cohen, had "dared speak harshly against the Supreme Court,"[16] and brandishing three death threats upon Barak that followed the editorials (two of them only after the storm was in full swing) as proof that the papers were guilty of "sedition" or "incitement," terms that had come into vogue in the wake of the Rabin assassination.[17]

Opposition MKs Yossi Sarid and Dedi Zucker (Meretz) called upon the attorney-general to open a police investigation against the papers for sedition.[18] Knesset Interior Committee chairman Sallah Tarif (Labor) demanded that the government shut down the newspapers.[19] Labor MK Dalia Itzik filed a police complaint against the papers, railing against the "evil and primitive hands, dripping with poison and venom, which wrote these words."[20] The Labor party collected enough signatures to force a special Knesset session to be called to discuss the haredi "incitement" against the Supreme Court. MK Elie Goldschmidt (Labor) submitted a bill which he said would make critics of the Supreme Court subject to prosecution even where

incitement or sedition could not be proven.[21] And former justice minister David Liba'i (Labor) claimed that even without new legislation, the two newspapers had already violated a law against defamation of the court.[22]

Reactions from the ruling right were similar. In addition to Meridor's hyperbolic barb ("a severe incitement campaign that is unprecedented in the state's history"), Prime Minister Benjamin Netanyahu proclaimed that "the Supreme Court is a cornerstone of the legislative authority in the state. We will not permit attacks on this important and central institution."[23] Agriculture Minister Rafael Eitan opined that the "attacks on Supreme Court President Aharon Barak are an intolerable phenomenon—suitable perhaps to South America or the dictatorships of the Middle East."[24] And President Ezer Weizman, who is not part of the government but is rather obligated to represent national consensus, commented that "the legitimate right of dissent does not cover injury to or disrespect for the law."[25]

The legal community seethed, as well. The deans of the country's four major law schools issued a statement calling the editorials "a campaign of incitement" whose purpose was to "intimidate judges."[26] The Association of Municipal Attorneys, a professional association of legal advisors to the country's 1,170 local authorities, asked Attorney-General Michael Ben-Yair to take action against the papers, saying it was "inconceivable in a state of law for newspapers to publish slander and incitement which run the risk of serving as a license to kill Supreme Court justices, and for the legal system to deal with it leniently, as if we were talking about legitimate criticism."[27] Ben-Yair and State Attorney Edna Arbel warned in a joint statement against the "danger that these attacks will undermine the faith of the public in the judiciary as a whole, and in the Supreme Court in particular," arguing that an independent judiciary was "fundamental for the existence of the rule of law and the preservation of a democratic regime in Israel."[28]

Not to be outdone, the mainstream press also joined in the attack. *Ha'aretz* charged in an editorial that the pieces were "attacks on the rule of law, and in essence, on the fundamental values of our society."[29] Moshe

Negbi, the most influential commentator on legal affairs in Israel, compared the editorials to the incitement against Yitzhak Rabin in the months leading up to his assassination, asserting that in all likelihood they would lead to violence against Barak.[30] *Yedi'ot Aharonot*, Israel's most widely-read daily, published a missive by prominent author Haim Guri declaring that "what we have before us is a serious and well-organized attempt to damage the Supreme Court and the entire legal system."[31] And columnist Yoel Marcus of *Ha'aretz* charged that "it is hard not to see that a contract has been taken out on Aharon Barak. This contract covers a much broader area than just Barak's life; we are talking about a contract on the nature of law and democracy in the state."[32]

But the height of acrimony came from Dor Shalom (the "Peace Generation"), an extra-parliamentary group set up in the wake of the Rabin assassination, which mounted a poster campaign of mock newspaper headlines reporting Barak's murder by "an extremist religious assassin," including a fictitious quotation from haredi MK Avraham Ravitz (United Tora Judaism) that "the possibility of murder never occurred to me," and closing with a none-too-subtle call to the public, "Is this what has to happen to jar you out of your complacency?"[33]

The haredi press, for their part, did not back down. *Yated Ne'eman*, in particular, continued to publish almost daily editorials justifying its position and reiterating its call for the public to treat Barak as just another politician; other haredi papers also joined the fray. Yet outside of these papers, and a few prominent haredi politicians, virtually no voices could be heard defending either what had been written or the right of the papers to write it. Even Attorney-General Ben-Yair, who declined to act on any of the criminal complaints on the grounds that criminal sanctions would infringe on freedom of speech and thus "cause more harm than benefit to our social structure,"[34] made it clear that he did not oppose using social pressure to suppress the writers' views. Indeed, Ben-Yair averred that one of the disadvantages of an indictment was that a publicized trial would give the editorialists another platform from which to express their views.[35]

After a respite of several weeks, the issue resurfaced in November, with Dror Hoter-Yishai, the chairman of the Israel Bar Association, at the center of the storm. Once again, the spark was provided by *Yated Ne'eman*, which carried a lengthy interview with Hoter-Yishai focusing on his views about the Supreme Court. Without mentioning Barak by name,[36] Hoter-Yishai accused the court of busying itself with inappropriate activities to such a degree that it no longer had time to fulfill its basic responsibilities to the law. Echoing Oliver Wendell Holmes' distinction between "justice" and "law," Hoter-Yishai argued that

> A court must not do justice. A court must do law.... The most dangerous thing that can happen to a court is for a judge to be free to do whatever he wants and whatever seems proper, according to his own view of what is right and just....
>
> A court should deal only with the law. The law is determined by the legislature. [The legislature] determines the legal norms, and if the people don't approve, they can replace it.... But the people can't replace judges, who are appointed for life. Therefore, [the judges'] role cannot be to set moral norms."[37]

Hoter-Yishai attacked the court on democratic grounds, claiming like the haredim that because the judges are unelected and unimpeachable, their role in a democracy must never go beyond evaluating a case with respect to the law. To Hoter-Yishai, use of a "reasonability" standard does just that, radically undermining the autonomy of elected officials and, by implication, democracy itself: "If you begin to examine the reasonability and appropriateness of a decision, you're essentially saying, 'I am in charge,' because you are putting your judgment in place of [the government's] judgment." Moreover, the dramatic liberalization of justiciability and standing have so greatly increased the court's caseload that justices no longer have time to do the work they are actually supposed to do:

> [N]ow the court is saying, "I'm overworked and exhausted and I barely have time to hear cases, and I no longer have the patience to hear cases." I don't know if you're aware of what is happening there today: Twenty-five appeals a day are heard. It's a joke. Who can rule on twenty-five cases? Who can even read twenty-five cases? And we're talking about life and death issues! This is simply scandalous![38]

According to Hoter-Yishai, there had even been cases in which people committed suicide because of the delay in deciding their case, while judges were spending their time adjudicating inappropriate cases and delivering lectures for pay—itself raising questions of conflict of interest—instead of performing their basic duties.[39]

Like the editorials three months earlier, the Hoter-Yishai interview provoked a storm of outcry. A number of public figures from the opposition, as well as politically unaffiliated good-government groups, demanded that the Bar's chairman be punished for his remarks. MKs Ran Cohen (Meretz) and Ophir Pines (Labor) called for a criminal investigation of Hoter-Yishai for defamation of the court.[40] The Movement for Quality Government in Israel, a well-known watchdog group, asked Justice Minister Tzahi Hanegbi to remove Hoter-Yishai from the nine-man committee which appoints all of Israel's judges.[41] And the Amitai–Citizens for Good Government group demanded Hoter-Yishai's ouster as chairman of the Bar, and filed a police complaint and urged the Tel Aviv district attorney's office to expedite a stalled investigation against Hoter-Yishai for tax evasion.[42] (Coincidentally or not, Hoter-Yishai was indicted a week after the interview.)

Former Supreme Court President Moshe Landau said it was "impossible to let the Bar Association chairman's crude outburst against the Supreme Court pass in silence,"[43] while Hanegbi warned that "categorical accusations against all the judiciary's activities, or against the entire Supreme Court or against the Supreme Court President personally, are unacceptable—especially when they come from the head of the Bar Association."[44] And Prime Minister Netanyahu decried what he called "unrestrained

attacks" on the court and its justices.[45] The Bar's ethics committee recommended that State Attorney Edna Arbel file disciplinary charges against Hoter-Yishai on account of his comments.[46] And three months after the interview, the Movement for Quality Government filed a petition with the High Court demanding that Hoter-Yishai be removed as head of the Bar Association due, among other things, to his criticisms of the court.[47] Today, the petition is still pending, as is Hoter-Yishai's tax-evasion trial. Yet regardless of the outcome, the message has been made loud and clear: Raise your voice against the Israeli Supreme Court, and be prepared for a war of more than just ideas.

IV

To appreciate just how out of step the Israeli public's reaction to criticism of the Supreme Court is with prevailing democratic standards, one need only consider the example of the United States, where judicial activism got its start. The U.S. is one of the only countries in the world whose Supreme Court can compete with Israel's in the degree to which its rulings go beyond the interpretation of explicit laws; as a result, it has also hosted some of the fiercest disputes on the legitimacy of judicial activism.

The role of the courts has been a hot issue in the U.S. for decades, but the debate became increasingly fierce after the 1973 *Roe v. Wade* decision, due to the court system's growing involvement in highly controversial, value-laden decisions. In last year's *Romer v. Evans*, for instance, the U.S. Supreme Court overturned a Colorado law that barred localities in that state from according homosexuals special protections as a minority group. In *Compassion in Dying v. Washington*, the Ninth Circuit Court of Appeals ruled that the state of Washington could not prohibit physicians from assisting suicides, because "the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[48]

These rulings sparked an angry response from large segments of the American public, on both substantive and procedural grounds. Substantively, many people simply rejected the court's moral conclusions. The procedural objection, however, stemmed from an impression that the Supreme Court had been granting constitutional status to "rights" of its own creation, which in fact did not appear in the Constitution. *Roe v. Wade*, for example, was decided on the basis of a "right to privacy" which, unlike the freedoms of speech and religion, finds no explicit Constitutional protection. These court-initiated rights were then employed by the judiciary to rule on controversial moral questions, such as abortion or physician-assisted suicide, which according to the anti-activist camp should be left to the legislatures, as the body more capable of reflecting accurately the values of society.

By last year, the furor in the anti-activist camp had reached an almost revolutionary pitch, exploding in a symposium entitled "The End of Democracy? The Judicial Usurpation of Politics" in the November 1996 issue of *First Things*, a conservative, religious monthly published by the Institute for Religion and Public Life. The symposium was explicitly devoted to the question of whether judicial imperialism had essentially transformed the U.S. into an oligarchy rather than a democracy, and whether, in the words of editor-in-chief Richard John Neuhaus, "we have reached or are reaching the point where conscientious citizens can no longer give moral assent to the existing regime."[49] "Again and again," wrote Neuhaus in his introduction to the symposium, "questions that are properly political are legalized, and even speciously constitutionalized." Neuhaus went on to delineate the purpose of the symposium:

> The proposition examined in the following articles is this: The government of the United States of America no longer governs by the consent of the governed. With respect to the American people, the judiciary has in effect declared that the most important questions about how we ought to order our life together are outside the purview of "things of their

> knowledge...." The courts have not, and perhaps cannot, restrain themselves, and it may be that in the present regime no other effective restraints are available. If so, we are witnessing the end of democracy.[50]

The language used by most of the authors in this symposium was similarly extreme, and reflected a much deeper dissatisfaction with the institutions of government than did the editorials in *Yated Ne'eman* and *Hashavua*. Robert Bork, a former federal judge who was Ronald Reagan's first choice for a seat on the Supreme Court (the nomination was rejected by the Senate), went as far as calling the justices "outlaws": "An outlaw is a person who coerces others without warrant in law. That is precisely what a majority of the present Supreme Court does. That is, given the opportunity, what the Supreme Court has always done," Bork wrote, referring to a series of cases in which the court upheld "rights" which were not explicit in the Constitution. "The justices are our masters in a way that no president, congressman, governor or other elected official is. They order our lives and we have no recourse, no means of resisting, no means of altering their ukases. They are indeed robed masters."[51] Hadley Arkes, a professor of jurisprudence at Amherst College, concurred: "In one issue after another touching the moral ground of our common life, the power to legislate has been withdrawn from the people themselves, or the 'consent of the governed,' and transferred by the judges to their own hands."[52]

In advocating their various solutions, the symposium's contributors called for a serious counteroffensive. Bork, for instance, suggested that court rulings be made subject to reversal by a majority vote of both houses of Congress, or that the courts simply be stripped of the power of judicial review:

> On the evidence, we must conclude, I think, that this tendency of courts [toward judicial lawmaking], including the Supreme Court, is the inevitable result of our written Constitution and the power of judicial review. A court majority is impervious to arguments about its proper

> behavior. It seems safe to say that, as our institutional arrangements now stand, the court can never be made a legitimate element of a basically democratic polity.[53]

Russell Hittinger, a professor of law and Catholic studies at Tulsa University, went even further, raising the specter of open resistance. If reform cannot be achieved through other means, he said, "the option remaining to right reason is the one traditionally used against despotic rule: Civil disobedience."[54]

One can easily fault the symposium's contributors on numerous grounds, including their analysis, their tone and especially the radicalism of their remedies. Indeed, the overwhelming majority of conservative opponents of court activism were highly critical of the symposium. But the symposium, and especially the reactions it evoked, are instructive from a wholly different perspective: How public debate on such a controversial question ought to be handled. Not surprisingly, a wave of ferocious responses followed its publication, including from conservative circles generally in agreement with the editorial line at *First Things*. Two members of *First Things*' editorial board promptly resigned, as did a member of its editorial advisory board. The magazine was bombarded by enraged letters to the editor (although it received a healthy number of favorable responses as well). "I am appalled," wrote *Commentary* editor-at-large Norman Podhoretz in a typical negative response, "by the language ... you use to describe this country."[55]

But unlike in Israel, no one went so far as to demand a criminal investigation of the authors or to call for the magazine's closure.[56] Nor did the angry reaction to the symposium include any attempt to delegitimize the issues it had raised—despite the symposium's sharp tone and drastic proposals. Gertrude Himmelfarb, for instance, opened her letter of resignation from *First Things*' editorial board with the following declaration: "I entirely agree with those contributors to the November symposium ... who maintain that the judiciary has vastly exceeded its proper powers and that this is a very serious problem for our polity. But I do not at all agree that this raises the specter of the illegitimacy of our government."[57]

A telling indicator of the widespread belief that the symposium was a legitimate part of a healthy debate was the wave of letters, both pro and con, published in subsequent issues of the magazine. That people chose this medium to express their reactions underscored the fact that the publication continued to be seen as a reasonable forum for conducting a serious ongoing discussion. Presumably, one does not write letters to the editor of a seditious publication which should be shut down, and whose editors should be imprisoned.

This attitude was also reflected in the opinions of many leading conservatives who particpated in a symposium *Commentary* organized in response. Most objected to *First Things'* radical approach, but nevertheless defended the importance of the issues it had raised. "It is totally unsurprising and entirely appropriate for conservatives to worry [about] the issue of judges abusing their powers," wrote Robert Bartley, editor of the *Wall Street Journal*. While he disapproved of *First Things*' "inflammatory rhetoric," he went on to opine that "[a]s the conservative cause prospers, its proliferating publications inevitably have to practice what the business world calls brand differentiation.... If *First Things* finds its thing with the illegitimacy of the 'regime,' so what? May they all in their own ways prosper."[58]

Nor did anyone conclude that *First Things*' harsh rhetoric precluded further discussion on the topic. Five weeks after the symposium appeared, for instance, the conservative magazine *The Weekly Standard*, which had also opposed the tone of the *First Things* articles, published a fighting editorial of its own entitled, "It's Time to Take On the Judges," attacking a recent decision by a California judge to suspend implementation of a statewide ban on affirmative action—a measure that had been approved by a referendum of 4.7 million California voters. Incensed by the fact that these millions had been set at nought by a man "with only one vote in any election," the *The Weekly Standard* called for "a popular outcry against unelected officials and their efforts to invalidate the results of elections" and advocated instituting term limits for judges.[59] The original constitutional guarantee of lifetime tenure for judges, the *The Weekly Standard* argued,

had been predicated on the assumption that the judiciary was not a policymaking institution, but a check on those institutions that did make policy. Now that judges had become policymakers as well, the price they had to pay for ignoring the popular will should be the same as that of any other policymaker.

In short, the *First Things* symposium—despite being far more radical than the editorials or interviews published in Israel critiquing the Supreme Court—was taken in stride, and the long-standing debate on the issue continued in full force. Instead of using the fact that the legitimacy of America's constitutional regime had been called into question as an excuse to dismiss the contributors' substantive criticisms of the court—as the fallacious charge of incitement was employed against the haredi papers—the symposium's critics managed to separate rhetoric from substance, and encouraged discourse on the latter. Critics of the *First Things* symposium acted on a belief that America's democratic institutions, including the Supreme Court itself, were strong enough to cope with such a discussion, and that the issue itself was far too important to permit its suppression.

V

In Israel, on the other hand, the volume and rancor of the public's response exceeded the bounds not only of normative public discourse, but even of Israel's own vitriolic traditions. In the name of democracy, moral and legal censure was advocated to crush debate on an issue essential to the maintenance of a democratic society. In their attack, critics advanced a series of highly specious arguments to explain why the usual protections of free speech should not apply—arguments which, if taken to their logical conclusions, could effectively squelch public discourse on almost any important issue. But even if limited to the particular case of judicial activism,

these arguments would deprive the citizens of Israel of the right to debate a fundamental question affecting their system of government, as well as their daily lives.

The principal claim against the court's critics was that the statements against Barak and his court amounted to incitement to violence, the same charge hurled at political opponents of Yitzhak Rabin after the assassination. As a rule, democracies offer little room for legal sanction against people who write or speak their opinions, except in the rare instances of actual incitement to violence.[60] As explained by none other than Israel's Supreme Court, the test employed in such cases is whether a given statement is "almost certain" to result in violence, a judgment that depends on both the context and content of the statement. With respect to context, an editorial is not a speech before an inflamed mob; it is one of the tamer forums in which to get across criticism. It is for this reason, among others, that the written press has traditionally been afforded a very high level of protection in democracies.

With respect to content, the editorials made every effort to limit their prescription to actions that were strictly political in nature. The *Yated Ne'eman* piece, for instance, concluded with the following statement:

> Now that Aharon Barak has become a third-rate politician, we simply need to change the way we relate to him. [Former Meretz minister] Shulamit Aloni has been pensioned off ... and something has gone wrong with the account [former Labor minister] Binyamin Ben-Eliezer was going to settle with the haredim. Now we have to deal with this new enemy who has come to replace them. And as, with God's help, we succeeded with them, we will also succeed with him.[61]

In other words, Barak should be fought with political weapons, just as Aloni and Ben-Eliezer were: Aloni was persuaded to retire by her own colleagues when it became clear that her inability to refrain from criticizing values and institutions cherished by religious Jews made her a political liability. Ben-Eliezer's party was voted out of office in national elections, in large part

because of the overwhelming haredi vote against Labor's prime ministerial candidate.

Similarly, the *Hashavua* article concentrated on political strategies, stressing that Barak's "armor" is his status as a figure who is above criticism, and that he can only be defeated once he is "part of the political game." And while cries of incitement focused on the piece's reference to Barak's mortality ("even if he wins he has become mortal and vulnerable"), the context of the military metaphor made it clear that the article was referring to political rather than physical vulnerability. Coupled with the explicit disclaimer ("of course, this means vulnerability on the level of ideas—not, God forbid, anything else") and the ensuing call to civility ("It is forbidden to act without civility, since in doing so, you will not convince anyone of anything—except that you are a boor"), the claim that the piece constituted incitement was more than just irresponsible. Its promotion by a legal community that prides itself on the careful reading of texts bears the appearance of a deliberate distortion.

The editorials' legal unimpeachability did not prevent a number of prominent figures from claiming that the emergence of death threats retroactively incriminated the editorials in incitement, an argument that was problematic on two counts: First, no evidence was ever offered that the editorials actually inspired the threats. It was far more likely that the latter were a reaction to the same event which prompted the editorials—that is, the court's ruling on the Bar-Ilan case. It may even be that the ensuing media blitz charging the editorials of endangering Barak's life, and not the editorials themselves, triggered the death threats. It was precisely this possibility that convinced State Attorney Edna Arbel to oppose the publicity over the bodyguards assigned to Barak following the editorials: "It could, God forbid, give people ideas."[62]

Far more disturbing, however, was the implication that the threats of a few depraved individuals justified suppressing the opinions of anyone sharing their gripes. Were this the case, public debate could never take place on any but the tamest of issues. In Israel as everywhere, there will always be

those for whom the allure of threats to violence in support of their views will prove irresistible. There is almost no controversial move in Israel's recent political history—the Oslo Accords, the Hebron redeployment, the 1996 election campaign, the privatization of state-owned enterprises, to name just a few—which has not resulted in death threats against major public figures. Nor is Israel unique in this regard: The United States, for example, has a long history of politically motivated violence, including a number of assassinations. And it is frequently tempting to blame the behavior of the violence-prone on statements made in the course of heated argument. But the moment debate is curtailed for fear that violence may result from statements which themselves meet no reasonable standard of incitement, then the actions of the few have succeeded in undermining rights which should be enjoyed by every citizen.

A second complaint of the court's defenders was that the editorials had carried out a "personal attack" on the court's president. By singling out Barak, it was argued, the critics were guilty at best of an inappropriate personalization of the debate, and at worst of turning Barak into a target for assassination. The underlying premise here was that debates of this sort must be conducted impersonally, and that the failure to do so calls into question one's moral or even legal right to speak out.

Although in some cases the argument may hold water (such as the public castigation of an army officer acting upon orders from a civilian government), in the case of Aharon Barak the suggestion was more than a little bizarre: Not only is he the driving force today behind what is possibly the most activist judiciary in the democratic world, he is also Israel's leading theorist of judicial activism. As a popular law school professor before ascending to the bench, he had a major influence on a generation of students, who today include many of Israel's most prominent lawyers and politicians. He is a prolific writer who continues to influence new generations of attorneys and judges through his books and opinions. Throughout his tenure on the Supreme Court, Barak has deliberately carved out for himself a central role in what he has termed a "constitutional revolution." If one wants to

take on the theory of judicial activism in Israel, there is no way to do it *without* confronting Barak. Indeed, to suggest otherwise would deprive him of the credit he has justly earned for successfully promoting an idea he considers vital to the country's democracy.

More dangerous, however, was the claim that even had the content of the critique been legitimate, the tone of the court's critics was so egregious as to warrant the suppression of their views. Whereas few would disagree that in an ideal world, political debate would always be conducted with civility, the idea that the right to express one's views is conditioned upon a particular standard of decorum constitutes an insidious threat to the very possibility of debate on any public issue. For if every word must be carefully weighed for fear that too harsh a tone will trigger moral and legal recriminations, most people whose opinions contradict the establishment wisdom will simply hold their peace, and the public debate will be silenced.

A further argument for censorship was the charge that the haredim in particular had no right to make such arguments—whether or not the arguments themselves were valid—because that community does not share the secular democrat's view of what the state should look like in other respects. Thus *Ha'aretz* columnist Yoel Esteron said the editorials should be a call to arms for the secular public, because the haredim "are trying to destroy the secular democracy which has arisen here, and to set up, in place of the State of Israel which was established in 1948, a state based on Jewish law."[63] Since the haredim as a whole are engaged in a constant battle to destroy democracy, the argument goes, they should be silenced at every turn, using any means.

This claim seems highly exaggerated on purely factual grounds: As another *Ha'aretz* columnist, Ya'ir Sheleg, correctly pointed out, there are many reasons for the secular public to dislike and fear the haredim, but "[n]o haredi body today (other than a few eccentrics) is appealing against either the existence of a democratic regime in Israel or the existence of a secular judicial system headed by the High Court of Justice."[64] Yet even if Esteron's charge had some basis, the conclusion drawn would be completely intolerable: For

if the Israeli public rejects all arguments about the nature of government coming from the haredim on the basis of their presumed intentions, then it has created an extraordinarily effective device for excluding all members of that group—or, in theory, any other ethnic or religious minority—from participating in the national debate. The damage to democratic principle here is palpable, and one wonders how any group permanently excluded from the public discourse would *not* after a while begin to question the desirability of Israeli democracy.

VI

The final, most substantive claim put forth by defenders of the court charged Hoter-Yishai and the editorials with undermining the public's faith in the courts in particular, and in the rule of law in general. This idea underlay many of the attacks, such as those of President Weizman ("the legitimate right of dissent does not cover injury to or disrespect for the law"), Haim Guri ("a serious and well-organized attempt to damage the Supreme Court and the entire legal system") and the joint statement issued by Attorney-General Ben-Yair and State Attorney Arbel claiming that the editorials "undermine[d] the faith of the public in the judiciary as a whole, and in the Supreme Court in particular," which were "fundamental for the existence of the rule of law and the preservation of a democratic regime in Israel." Put bluntly, criticism of the Supreme Court is out of bounds *regardless of how it is made*, since any attack on the Supreme Court as it currently functions is tantamount to an assault on the "judiciary as a whole," "the rule of law" and even Israel's "democratic regime."

Such a claim rests upon the fallacy of a monolithic idea of democracy in general and the role of the courts in particular. In fact, theorists have been arguing these issues for centuries, and no consensus has yet been reached. The demand that Israel's courts practice judicial restraint is certainly a

call for a shift in the balance of Israel's governmental powers, but it is one well within mainstream democratic theory and practice—indeed, it was the accepted position within the Israeli judiciary for most of the state's history. Thus the challenge to court activism is not an assault on everything Israeli democracy holds sacred, but the presentation of an alternate model for what *kind* of democracy the people of Israel are to choose for themselves—a model that in many ways shows a greater loyalty to the western democratic heritage.

Traditional democratic theory creates a sharp division of labor between the legislative and executive branches, on the one hand, and the judiciary on the other. The former are charged with making and executing policy since, being directly elected, they are most representative and most responsive to the values of the broad public; the latter, due precisely to its relative insularity, is assigned the role of watchdog, ensuring that governments stay within whatever bounds the society has established. In other words, the courts are entrusted with protecting from government encroachment those rights the society deems fundamental.

In most democracies, these basic rights are enshrined in a written constitution, which serves as the reference point for court evaluation of government activity. It was the desire to protect these democratically-determined rights that provided the original rationale for judicial review, the court's power to strike down legislative or executive action that contradicts constitutional principles. As John Marshall, former chief justice of the U.S. Supreme Court, said in his famous assertion of the right to judicial review in *Marbury v. Madison* (1803): "The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?"[65]

An absence of written constitutional limits, however, clouds the court's role. If judges are granted the power to overturn government action in defense of rights which are themselves not explicitly protected, there is a constant danger that the justices will end up imposing their own ideas of what

types of behavior should be protected, thereby usurping the prerogatives of the legislature. Very few rights are so universally recognized that the courts can simply assert their inalienability, without reference to a constitution or similar legal framework. Such universal laws, in the words of former U.S. Supreme Court Justice James Iredell, "are regulated by no fixed standard: The ablest and purest of men have differed upon the subject."[66] And even in the rare case where a right does command a broad societal consensus, or is absolutely necessary for the preservation of democracy (such as freedom of expression), the lack of explicit authorization obligates the courts to treat these rights in minimalist terms, protecting them only to the degree that is absolutely necessary.

The Israeli Supreme Court, however, sees the lack of a constitution not as a call for restraint, but the opposite: Since the early 1980s, the Shamgar and Barak Courts have granted themselves carte blanche to fill the vacuum, granting the broadest possible protection to a host of rights of their own contrivance. Consider, for instance, a recent court ruling which, basing itself on the right to free expression, overturned a government decision to cut a few minutes from a movie because the scenes were determined to be pornographic.[67] In Israel, the screening of pornography is prohibited, and the government's Film Censorship Board is charged with the duty of judging a film's debauchery according (in the court's own words) to "contemporary community standards." In this case, the Supreme Court ruled that despite the judgment of a majority of both the Censorship Board and a panel of independent experts consulted, the testimony of those few experts who thought it was "art" was enough to warrant its protection on free speech grounds.

Aside from the obvious objection—noted by Justice Mishael Cheshin in his dissent—that the Censorship Board, which includes representatives of all sectors of the public, is probably a much better judge of "contemporary community standards" than the court, the ruling raises a fundamental question about the court's activities. For unlike in the U.S., where freedom of expression is unambiguously protected in the First Amendment, the Knesset has never even bothered to protect freedom of expression

via an ordinary law. In other words, the court had struck down the action of a government body acting responsibly and fully within its legal mandate, in favor of a free-speech principle that not only had no legislated basis whatsoever, but was interpreted so widely that it included pornography—an interpretation which many free-speech advocates would themselves not support. Though the court clothed itself as the valiant defender of legitimate rights, in reality it was a clear-cut case of the court making a value judgment—that freedom of expression is more important than the prevention of pornography—and imposing it upon the country in contravention to existing legislation.

Nor has the creation of rights been limited to freedom of speech. In January 1997, for example, the High Court ruled on the case of a secular, bearded man who had petitioned against the government's refusal to supply him, free of charge, with a special gas mask which, unlike the ordinary masks given out to the public, could fit over a beard. The special masks were already being handed out for free to observant men who cited a religious prohibition against shaving; the government required that nonobservant men who wanted them pay a fee, since they cost the state two-and-a-half times as much as the ordinary masks.

The court ruled that this constituted unjust discrimination, since many orthodox authorities permit the shaving of beards with an electric razor, and all permit shaving in a life-threatening situation such as a chemical weapons attack. Yet instead of allowing the government to decide how it wanted to solve the problem—by issuing the special masks for free to either everyone or no one—the court then ordered the issuance of the masks, since "a beard is part of a man's self-image," and the right to determine one's self-image is implicitly protected by the Basic Law: Human Dignity and Liberty. The verdict continued:

> There will, perhaps, be people who will want to know if it is possible to assign this right to one of the specific basic rights [enumerated in the law].... But in this case, I would choose not to deal with the question of ascribing the right to grow a beard to any of the specific basic rights, whether those

> listed in the body of the Basic Law: Human Dignity and Liberty (such as the right to bodily integrity and the right to privacy) or those which are not explicitly mentioned (such as freedom of expression, for example).... In our case there is no need for attribution of this sort. Human dignity, as a protected constitutional value, has a broader meaning than the sum total of the recognized specific rights.[68]

In other words, the court need not restrict itself to those rights actually enumerated in the Basic Law; that law has a "broader meaning" under which the court may protect a host of other rights of its choosing—in this case, a man's "right" to define his own self-image. In so ruling, the court invoked a right that was neither legislated nor at all obvious—the right to keep a beard even in time of a chemical attack—in order to trample wholesale upon a prerogative of government that is both legally entrenched and universally recognized—the right to control the budget. Thanks to the new court-created right, the government today has to divert an unknown sum—potentially in the millions of shekels—from the budget approved by the Knesset into protecting the self-image of the bearded in time of war.

But the court's encroachment upon legislative privilege does not end there. Not only has it given broad protection to a wide range of rights of its own concoction, it has even arrogated to itself the authority to overturn government decisions which violate no law or right, based solely on its judgment that the action in question is "unreasonable." In the case that sparked the haredi editorials, for instance, the law was clear: The Transport Ministry's traffic supervisor is legally authorized to close major roads, and this official chose to close Bar-Ilan Street on the Sabbath. The court issued an injunction against the closure, citing no law or right that had been violated, but simply because the justices were unconvinced that the supervisor had weighed all the relevant factors properly: They wanted to know why he now supported closing the street when he had previously opposed the closure, and whether the elections and the subsequent change of governments had had any influence on his decision ("Other than the identity of the minister,"

they asked, "what has changed?"[69]); they charged him with improperly weighing the precedent this would set for future road closures that might eventually choke off the city on the Sabbath ("Where will the limit be?"[70]), criticized his inadequate research of the matter ("From the factual point of view, you have no idea what is going on!"[71]), and asked why he recommended closing the street for more hours than a public commission which studied the problem earlier had proposed.[72] Eight months later, in April 1997, the court finally ruled definitively that the decision was unreasonable, and therefore illegal. The verdict detailed how the government would have to change its decisionmaking to convince the court of its reasonability, and in the end, the government made the necessary changes and closed the road on the court's terms.

The problem with the reasonability standard lies in its disregard of the separation of powers. In the Bar-Ilan case, all the objections raised by the court concerned the competence of policy decisions, rather than matters of law or protected rights—there is no "right" to use any road at any time. (As the state noted in its response to the court on this case, if such a right existed, governments would not be able to declare certain streets one-way, because that would infringe on people's "right" to use that road when they happened to be at the wrong end.) There are sound reasons why constitutional theorists have long espoused the clear delineation of roles for the various branches of government. While rights are best protected by a judiciary which is insulated from the majority's whim *du jour*, policy and value judgments, which are meant to reflect the current consensus, are best left to those bodies most responsive to popular opinion. The question of a decision's reasonability is the perfect example of something which is a matter of judgment rather than law. To the secular MKs who petitioned the court against the decision—and apparently, to most of the justices as well—the government's original decision to close Bar-Ilan Street was unreasonable. But to the government, the haredim, and a mixed secular-religious commission set up by the Jerusalem municipality to study the issue, the closure was eminently reasonable.[73]

The court has responded to this objection by insisting that it only overturns decisions so egregious that "it is inconceivable that any reasonable authority would be likely to make [them]."[74] But a glance at only a few of the dozens of cases in which the court has applied this test shows how subjective a call it really is. In 1990, for instance, the High Court overruled the attorney-general's decision not to indict a group of senior bank officials whose share manipulations caused a severe stock market crash in 1983. This was certainly one of the worst, if not the worst, economic disasters in Israel's history, and it cost the government some $6.9 billion in compensation to shareholders who had lost their shirts. On the face of it, the court's assessment that no reasonable man would fail to indict those allegedly responsible would seem to make sense. And indeed, after one of the lengthiest and most expensive trials in Israel's history (two-and-a-half years at an estimated $30 million[75]), the bank managers were finally convicted and sentenced to prison. But in an appeal to the same Supreme Court that had originally ordered their indictment, the bankers in the end managed to reverse the key element of the convictions and the prison sentences—and the attorney-general's original decision not to spend several years and tens of millions of taxpayer dollars prosecuting a case he did not think he could win suddenly did not seem so unreasonable after all.[76]

Equally indicative was the court's 1993 ruling that Prime Minister Yitzhak Rabin's decision not to dismiss Interior Minister Aryeh Der'i, who had been indicted on corruption charges, was so unreasonable as to be illegal. While there is no denying the reasonability of the court's position that a minister under indictment would badly damage the public's faith in government and should therefore resign, it is absurd to suggest that in a society which claims to value the rights of the individual, the alternate position—that even a government minister deserves the presumption of innocence until proven guilty—is so unreasonable that no reasonable man could agree to it. Indeed, the degree to which the court's position risked punishing the innocent was made clear three years later, when then-justice minister Ya'akov Ne'eman was indicted for perjury and forced to resign by the

court's ruling in the Der'i case. Ne'eman was completely cleared by a trial court nine months later—but by then someone else was firmly ensconced in his former post, and he was unable to return.[77]

That reasonable people can disagree over the reasonability of a decision is itself a major strike against employment of the standard. There is, however, a more vexing problem: Once the court becomes the final arbiter of all policy decisions great and small, people have essentially been deprived of any effective means with which to influence these decisions. If people disagree with a government's judgment on what is reasonable—if they do not approve of the closure of certain streets on the Sabbath, for instance, or if they do not like the idea of cabinet ministers under indictment continuing to hold their posts—they are not without recourse. That is what all the tools of political activity are for: Lobbying, demonstrations and, ultimately, the ballot box. No similar venue, however, exists for those who are unhappy with High Court rulings. Precisely because justices are unelected and unrepresentative, and cannot be dismissed by a disgruntled public, the court has no place substituting its own judgment for that of the people on the question of the reasonability of government actions. Indeed, Hoter-Yishai's criticism—"If you begin to examine the reasonableness and appropriateness of a decision, you're essentially saying 'I am in charge,' because you are putting your judgment in place of [the government's] judgment"—put it mildly. The court in such cases not only substitutes its judgment for that of the government, but deprives the people of its right to judge the government's actions itself. And in such a situation, it becomes difficult to disagree with the editorialist in *Yated Ne'eman* who wrote that "the rule of the people has ended."

This is not to say that every unpopular ruling by the court represents the overstepping of its bounds; an unpopular decision could be a very proper legal result. The objections to judicial activism have nothing to do with whether one likes the *outcome* of the court's decisions; they have to do with the *process* by which those decisions were reached. For example, the court's 1994 decision to force El Al to grant the same benefits to employees with

homosexual partners that it gives to workers with unmarried live-in partners of the opposite sex raised a storm of protest from the religious community. Yet this decision was fully grounded in a law which forbids discrimination on account of sexual preference. It was a proper legal decision, and the only recourse for those who opposed it was to lobby the Knesset to change the law. This is not the case, however, when the Supreme Court bases its decisions on standards of "reasonability," or on rights of its own divination. Not only do rulings of this sort entangle the judiciary in decisions which are rightly the province of other branches of government, but they effectively deprive the public at large of any say in the matter.

The problem with an activist court is its incompatibility with the empowerment of a people to chart its own destiny. To the extent that the judiciary protects a range of values that have received no explicit authorization from the legislature, and imposes its particular view of "reasonability" upon the ongoing functioning of elected officials, it competes against the people for the reins of sovereignty. Its success is therefore marked by a disenfranchisement, both real and perceived, of the people. Although it is true that all democracies place some limitation on the powers of a capricious majority, in the form of constitutional legislation, the unpleasant side effect of an activist court is that it can rapidly embue a minority of the population—or even, in some cases, a majority—with the belief that they have no way of influencing policy. Citizens who use all the available devices of politics—elections, lobbying and so on—to persuade a government to act one way or another will inevitably become frustrated when they discover that the fruits of their efforts have been carted away by an unelected judiciary on the basis of principles that appear to have been manufactured out of whole cloth. Since an unelected body can never represent the values of a people in the way that elected officials can, every imposition of court-conjured values upon government actions must take a toll on the public's confidence in democratic institutions—especially in a culture as variegated and dynamic as Israel's. In the long run, judicial activism shakes the public's faith in democracy to its foundations.

VII

Despite the best efforts of Israel's opinionmakers, the debate over judicial activism cannot remain dormant for long. So long as the court retains its activist stance, which it will certainly do for the duration of Aharon Barak's presidency, it will continue to tread upon the sensibilities of a substantial portion of the Israeli public, and challenges such as Hoter-Yishai's will be raised again and again.

The choice that Israel's political and legal leadership face, then, is whether the discussion will be encouraged, as befits a democracy, or whether an inflexible view of the court's purpose, combined with a disdain for truly free expression, will continue to thwart efforts to engage the debate. If Israel goes down the latter route, it will find the rule of the people undermined by a judiciary bent on foisting its particular vision of government on an unwilling populace. Far worse, however, will be the increased alienation of those segments of Israeli society, a wide cross-section hardly limited to *Yated Ne'eman*'s readership, who find themselves at odds with the court's judgment, yet face moral and legal censure whenever they express their views.

Israel has reached the stage where it can ill afford to stifle the judicial activism debate. Yet last year, Israel's leading public figures demonstrated an eagerness to do just that. But the topic has at long last been broached, and the nation now finds itself at a crossroads, compelled to decide whether the values underlying the laws of the land will continue to be decided by a small group of unelected judges, or whether such vital questions will be returned to the public forum. Few decisions will be more fateful in determining the shape of the country over the coming decades.

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Notes

1. *The Jerusalem Post*, August 27, 1996.

2. J.G. Randall and David Donald, *The Civil War and Reconstruction* (Boston: D.C. Heath and Company, 1961), p. 114.

3. *Inaugural Addresses of the Presidents of the United States* (Washington, DC: United States Government Printing Office, 1989), p. 139.

4. Arthur Link, *American Epoch* (New York: Alfred A. Knopf, 1967), p. 337.

5. *Roe v. Wade*, quoted in Robert Bork, *The Tempting of America* (New York: The Free Press, 1990), p. 113.

6. *The New York Times*, January 5, 1997. In June 1997, in a major reversal from decades of activism, the court accepted these appeals, ruling 9-0 that physician-assisted suicide was not a constitutionally protected right. Chief Justice William Rehnquist, writing for himself and three other justices in one of several concurring opinions, wrote: "Throughout the nation, Americans are engaged in an earnest and profound debate about the morality, legality and practicality of physician-assisted suicide.... Our holding permits this debate to continue, as it should in a democratic society." Elsewhere in the opinion, he explained this statement: "By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action." *The New York Times*, June 29, 1997.

7. C. Neal Tate and Torbjorn Vallinder, eds., *The Global Expansion of Judicial Power* (New York: New York University Press, 1995), pp. 3-4.

8. Israel's Supreme Court serves two distinct functions. First, it serves as the nation's highest civil and criminal appellate court. Second, it serves as a court of first (and last) instance for anyone with a grievance against the government. In this capacity, it is referred to as the High Court of Justice. According to the Basic Law: The Judiciary, the High Court of Justice is authorized to hear any case in which "it sees a need to give assistance for the sake of justice, and which is not in the jurisdiction of any other court."

9. *The Movement for Quality Government in Israel v. The Government of Israel* (HCJ 4319/93), in *Decisions of the Israel Supreme Court*, volume 47, section 5 (1993), p. 421.

10. See, for instance, Mordechai Kremnitzer's comments in *The Jerusalem Post*, July 26, 1993.

11. Though the editorials were motivated largely by what the haredim perceived as the anti-Jewish nature of Barak's decisions, the texts focused primarily on the "democratic" side of the problem.

12. The statement is referring to two decisions: A 1993 ruling ordering the government to remove then-interior minister Aryeh Der'i from his post because of an indictment against him, and an earlier decision banning the Kach party from running in the elections on the grounds that it was racist.

13. *Yated Ne'eman*, August 25, 1996.

14. *Kol Hashavua*, August 22, 1996.

15. *Yedi'ot Aharonot*, August 28, 1996. Meretz is one of Israel's farthest-left parties, perceived by substantial portions of the electorate to be hostile to Jewish values. The use of the party's name is also a play on the Hebrew word *meretz,* "energy," so the phrase means that Barak is working energetically as well.

16. *Ha'aretz*, August 28, 1996.

17. Barak received a death threat on his answering machine shortly after the editorials appeared. *Yedi'ot Aharonot*, August 28, 1996. A few days later—after the editorials and the reactions to them had already become front-page news in all the country's newspapers—the police received two anonymous death threats against Barak from pay phones located in haredi neighborhoods. *Ha'aretz, Yedi'ot Aharonot*, August 29, 1996.

The ostensibly bizarre accusation that the existence of death threats retroactively turned the criticism into incitement stemmed in part from the widely-held misconception in the Israeli public that the Rabin assassination was the product of months of harsh public criticism by Rabin's political opponents—despite the fact that Attorney-General Michael Ben-Yair concluded after investigating the assassination that Rabin's murderer, Yigal Amir, had not been influenced by right-wing incitement. See *Ha'aretz* and *The Jerusalem Post*, December 13, 1995.

18. *Ha'aretz*, August 27, 1996.

19. *Ha'aretz*, August 29, 1996. Under Israeli law, the interior minister can shut down any newspaper indefinitely and without warning if, in his opinion, it has published something which has endangered the peace. He can also revoke a newspaper's operating license "as he sees fit, without giving any reason for his decision." These powers are rarely invoked, however.

20. *Ha'aretz*, August 27, 1996.

21. *Ha'aretz*, August 29, 1996.

22. *Yedi'ot Aharonot*, August 27, 1996, and *Ha'aretz*, August 28, 1996. Liba'i's claim was made jointly with Knesset Law Committee chairman Sha'ul Yahalom (National Religious Party).

23. *The Jerusalem Post*, August 27, 1996.

24. *Ha'aretz*, August 28, 1996.

25. *Yedi'ot Aharonot*, August 27, 1996.

26. *The Jerusalem Post*, August 28, 1996.

27. *Ha'aretz*, August 30, 1996.

28. *Ha'aretz*, August 27, 1996.

29. *Ha'aretz*, August 28, 1996.

30. *The Jerusalem Post*, August 27, 1996.

31. *Yedi'ot Aharonot*, August 27, 1996.

32. *Ha'aretz,* August 30, 1996.

33. *The Jerusalem Post*, September 1, 1996.

34. *Ha'aretz,* October 15, 1996.

35. *The Jerusalem Post*, October 15, 1996.

36. Hoter-Yishai did not actually mention Barak by either name or title anyplace in the full-page interview. The editors of *Yated Ne'eman*, however, unfairly stated in their introduction to the piece that Hoter-Yishai had attacked Barak in the interview, and they also put in bracketed interpolations at certain places indicating that particular statements referred to Barak. As a result, most of the news reports on the interview treated it as a personal attack on Barak, and so in turn did most of the public figures who responded to the interview. Two days after the interview was published, Hoter-Yishai publicly said that while he did not retract his remarks, it had been a mistake to make them in *Yated Ne'eman*.

37. *Yated Ne'eman*, November 26, 1996. There are only two legal methods for removing a Supreme Court justice from the bench: Either through the ruling of the same nine-member panel that appoints the judges—only four of whom are cabinet or Knesset members (i.e., "elected" officials who are themselves elected as members of parties, not through direct elections), while the other five are justices or Bar Association representatives—or through the decision of a special disciplinary committee of whom a majority must be Supreme Court justices themselves. In short, justices are neither selected nor removed via any serious democratic test. Compare this with the United States, where Supreme Court justices must overcome two fully democratic hurdles, the president's nomination and the Senate's approval, in order to attain their position.

38. *Yated Ne'eman*, November 26, 1996.

39. *Yated Ne'eman,* November 29, 1996.

40. *Ha'aretz*, November 28, 1996. Cohen asked the police to open the criminal investigation, while Pines' request was directed to the attorney-general.

41. *Ha'aretz*, November 28, 1996.

42. *Ha'aretz*, November 29, 1996. The case had been sitting on the state attorney's desk for a few years already, and it is not clear whether the timing of the indictment was purely coincidental or whether it was prompted by the interview. In the interview, Hoter-Yishai had accused Attorney-General Michael Ben-Yair of "digging" for something against him; Ben-Yair later countered that Hoter-Yishai had been trying to discredit his office's motives in advance via the interview.

43. *Ha'aretz*, November 29, 1996.

44. *Ha'aretz*, November 29, 1996.

45. *The Jerusalem Post*, November 28, 1996.

46. *Ha'aretz*, March 3, 1997.

47. *Ha'aretz*, March 13, 1997. The petition also cited Hoter-Yishai's tax evasion indictment. The Bar's executive committee rejected a motion by some of its members to oust Hoter-Yishai.

48. *Compassion in Dying v. Washington*, quoted in Russell Hittinger, "A Crisis of Legitimacy" in *First Things*, November 1996, p. 26. This statement was originally made by the Supreme Court in *Planned Parenthood v. Casey* (1992), but has been adopted in many subsequent decisions.

49. Richard John Neuhaus, "The End of Democracy? The Judicial Usurpation of Politics," editorial in *First Things*, November 1996, p. 18.

50. Neuhaus, "The End of Democracy?" p. 19.

51. Robert Bork, "Our Judicial Oligarchy" in *First Things*, November 1996, p. 23.

52. Hadley Arkes, "Culture Corrupted," in *First Things*, November 1996, p. 30.

53. Bork, "Our Judicial Oligarchy," p. 23.

54. Hittinger, "A Crisis of Legitimacy," p. 29.

55. Norman Podhoretz, quoted in David Brooks, "The Right's Anti-American Tempation," in *The Weekly Standard*, November 11, 1996, p. 25. In his introduction to the symposium, Editor-in-Chief Richard John Neuhaus said that "America is not and, please God, will never become Nazi Germany, but it is only blind hubris that denies it can happen and, in peculiarly American ways, may be happening here." Neuhaus, "The End of Democracy?" p. 19.

56. Personal communication with Richard John Neuhaus, editor-in-chief of *First Things*.

57. Letter in *First Things*, January 1997, p. 2.

58. Robert L. Bartley in "On the Future of Conservatism: A Symposium," in *Commentary*, February 1997, p. 16.

59. "It's Time to Take On the Judges," editorial in *The Weekly Standard*, December 16, 1996, pp. 9-10.

60. Certain countries such as Canada also limit "hate speech" and other types of expression that are viewed as antithetical to the norms needed to underpin democratic societies.

61. *Yated Ne'eman*, August 25, 1996.

62. *The Jerusalem Post*, September 6, 1996.

63. *Ha'aretz*, September 1, 1996.

64. *Ha'aretz*, September 4, 1996.

65. *Marbury v. Madison*, quoted in Bork, *Tempting*, p. 24. The existence of written limits was also the basis for the Israeli Supreme Court's assertion, ever since it was established, that it had the right to examine the legality of government actions in light of Knesset legislation: The Knesset passed laws for the purpose of having them obeyed, and while the Knesset might repeal these laws as it pleased, the government had no right to violate them as long as they had not been repealed.

66. Quoted in Bork, *Tempting of America*, p. 20. Iredell was responding to the assertion of Justice Samuel Chase that the court should be able to overturn legislative acts contrary to "the first great principles of the social compact." Bork, *Tempting of America,* p. 19.

67. *The Jerusalem Post*, January 10, 1997.

68. *Akiva Nof v. Ministry of Defense* (HCJ 205/94), unpublished.

69. Aharon Barak, quoted in *The Jerusalem Post*, July 14, 1996.

70. Barak, quoted in *The Jerusalem Post*, August 16, 1996.

71. Justice Mishael Cheshin, quoted in *The Jerusalem Post*, August 16, 1996.

72. *The Jerusalem Post*, July 14 and August 16, 1996.

73. At the court's urging, a second public commission was set up to study the issue by the government, and this commission also recommended closing the street. However, some of the secular commission members said the recommendations included an implicit promise of a quid pro quo to the secular community, in the form of instituting public taxi service in the capital on the Sabbath, though no such deal was included in the written recommendations. These members later withdrew their signatures when the government rejected this interpretation of the document.

74. *Shmuel Wickselbaum v. The Minister of Defense* (Rehearing HCJ 3299/93), in *Decisions of the Israel Supreme Court*, volume 49, section 2 (1995), p. 210.

75. *Ha'aretz*, September 10, 1993.

76. In a similar case in 1989, the court overturned the attorney-general's decision not to prosecute the editor-in-chief of *Yedi'ot Aharonot* and one of its reporters for alleged violations of *sub judice* laws. Again, after a conviction was obtained in a trial court, the accused were acquitted by the Tel Aviv District Court on appeal. Looking back, it seems the attorney-general's inclination not to indict was in fact *more* reasonable than that of the High Court. *Ha'aretz*, July 3, 1997.

77. It is only by chance that Ne'eman's political career was not completely ruined: Shortly after Ne'eman's acquittal, Finance Minister Dan Meridor resigned his post, and Prime Minister Binyamin Netanyahu offered Ne'eman the vacant ministry.