How we Judge the Judges

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How We Judge the Judges, or Why Personal Ethics and Character are (Even) More Important for Religious Authorities than for the Secular Judiciary

by Maimon Schwarzschild*

How does the importance of personal character, the ethical quality of the individual, compare as between a secular judge - say a United States federal judge or a state court judge - and a religious authority, specifically a rabbinic leader or decisor? To put the question a little more narrowly, how much does a person's moral character count, both in theory and as a practical matter, in attaining and keeping such a position?

An American judge and a rabbinical authority are not strictly comparable, of course: there are obvious differences between the two roles. But if there is a secular authority to which a rabbi is most comparable, especially a rabbi or rosh yeshivah whose rulings are influential among halakhically practising Jews, it is perhaps the judge. In the American system, it is a commonplace - oversimplified of course, but broadly true - that the legislature makes the law, the executive enforces the law, but the judiciary interprets the law. A rabbi who is considered a halakhic authority or decisor likewise - at least somewhat likewise - interprets and adjudicates Jewish law, albeit usually not in the setting of a formal court or *beth din*.

It is clear that such a rabbi is expected to be a morally exemplary person, even to be a kind of living ideal, whereas what is typically expected of a secular judge is much more limited. The reason is partly that a rabbi is a religious leader as well as a legal authority, and as in any religion, expected to be a worthy example and instructor[1]. But beyond that, it seems to me that there are differences in the nature and institutions of Jewish and secular law which go far towards explaining why moral character looms larger for rabbinic authorities than for the judiciary of a secular, liberal state. The differing expectations seem worth exploring for their own sake, and also for what they illustrate about secular and Jewish law as systems and ways of life.

There are explicit and implicit professional and personal qualifications for becoming an American judge, but the formal requirements are fairly simple. A Supreme Court justice or federal judge is nominated by the President and must be confirmed by majority vote in the US Senate. There is no requirement that nominees must be lawyers, although in practice they always are. Once confirmed, they enjoy life tenure, subject to impeachment and removal for bad behaviour. Throughout most of American history, the personal character of nominees usually received little or no explicit scrutiny by the Senate. Supreme Court nominees, for example, never appeared in person before the Senate until Harlan Fiske Stone was summoned before the Judiciary Committee in 1925, and personal appearance at a confirmation hearing has only been routine since 1955. Of the thousands of Supreme Court Justices and federal judges since the country was founded, only twelve have ever been impeached, and only six convicted and removed - most recently Alcee Hastings, a federal judge in Florida who was removed in 1989 for taking $150,000 in bribes in exchange for sentencing leniency, and who is now a member of Congress.

Throughout American history, Supreme Court nominees have sometimes been rejected by the Senate, but almost always for political reasons, and until very recently, almost never with any suggestion that the personal character of the nominee was in question. (Until the 1980s, nominees to federal judicial posts below the Supreme Court were almost invariably confirmed.) Supreme Court and lower federal court nominees were commonly confirmed by unanimous or virtually unanimous votes: as recently as 1993 Ruth Bader Ginsburg was confirmed 96-3, and Antonin Scalia was confirmed 98-0 in 1986.

Political patronage traditionally played a big role in federal judicial nominations, even nominations to the Supreme Court. True, very few federal judges have been the subject of public scandal, but in terms of their personal character it would be fair to say that the "ethical average" has probably not been much different from that of successful American lawyers generally - nominees to federal judgeships typically being successful lawyers in good political standing with a United States Senator of the President=s party.

Some Supreme Court justices have surely been below the ethical average. William O. Douglas, a notable liberal and the longest-serving justice in the history of the Court, is described even by his admirers and political sympathisers as a man of "egregious personal flaws": he drank heavily, treated his wives and children badly, and behaved sourly or worse to almost all who came in contact with him. [2] James McReynolds, a right-wing Justice who opposed the New Deal, was at least equally irascible, petty, and unpleasant. To round out his charms, McReynolds was also an anti-semite who detested the Court's Jewish justices and refused to associate with them.[3]

Some of the greatest American judges, to be sure, have been people of notable personal character, and this undoubtedly contributed to their authority as jurists. Oliver Wendell Holmes, for example, was a remarkable human being: he had been a Union soldier in the Civil War, he continued to think of himself as a soldier throughout his long life, and he was as tough-minded, and as intellectually curious, as he had been brave physically. He was not what one would call an ethical giant in any warm-hearted or compassionate sense, but he was a man of great moral strength. Benjamin Cardozo was a gentler spirit than Holmes: he is described as "witty, sweet-tempered, gentle, deferential to colleagues, legislatures and especially scholars, and as self-doubting as a judicial saint can be""[4] Louis Brandeis, for his part, had a self-conscious and earnest moral code, identified in his own mind with Jews of a refined type whom he called *unser eins* - descendants, as he was, of German Jewish

immigrants whose ancestors had been Frankists, followers of the pseudo-messiah Jacob Frank.[5] Perhaps ironically, Brandeis=s nomination to the Supreme Court provoked one of the most bitter confirmation battles in American history - he was opposed as a radical and hence temperamentally unsuitable - and he was eventually confirmed by a narrow vote only after President Woodrow Wilson personally vouched for his character as a man "imbued to the very heart with our American ideals of justice".

The struggle that Brandeis faced over confirmation was very unusual in its time, but in the past twenty-five years nominations to the Supreme Court, and to the lower federal courts as well, have met growing opposition, in a polarised, often far-from-genteel atmosphere. It is no coincidence that this has happened as the courts have greatly increased their sway over American life, handing down broad rulings on issues like abortion, sexuality, end-of-life questions, and much else. As the courts' sphere of influence grows and there appear to be fewer limits on judicial policy-making, it becomes more important - more worth fighting over - who the judges and justices shall be. The new, contentious era began, in a sense, with the successful left-liberal campaign against Robert Bork=s nomination to the Supreme Court in 1987. Bork was opposed for his legal and constitutional views, but he was also implicitly portrayed as arrogant, uncaring, and cold-hearted: personal, even ethical flaws (if true), not merely ideological ones. Several other confirmation battles raised questions of ethics or character: Douglas Ginsburg withdrew from consideration for the Supreme Court because it was disclosed that he had smoked marijuana on several occasions in younger years; Clarence Thomas was luridly accused of various personal flaws and offences, although he was confirmed in the end.

For the most part, however, battles over Supreme Court appointments are still almost entirely about the nominees= views, not about their characters: what they have written and said, how they would rule on this issue or that; not how they conduct their personal lives. And while appointments to lower federal judgeships have recently met more resistance than ever before, it generally takes the form of procedural delay or obstruction, not an inquiry into personal conduct and character. There is still a kind of common understanding, albeit occasionally disregarded, that nominees to the federal bench will face scrutiny of their views, ideas, and public decisions, but not of their souls.

As for state court judges, who make up the great majority of the American judiciary, most are elected (or initially appointed for a term of years but retained, or not, by popular vote). The Code of Judicial Conduct, adopted by most states, concentrates on professional conduct and private conduct which might directly affect a person=s judicial duties or reputation, like breaking the law or having improper conflicts of interest. (Judges, it is true, are broadly enjoined to avoid impropriety and the appearance of impropriety in all activities, and they are barred from joining discriminatory clubs.) A recent study describes elected judges as "more politically involved, more locally connected, more temporary, and less well-educated... more like politicians and less like professionals".[6] In their personal character, state court judges probably resemble, on average, the moderately successful local lawyers and politicians from among whom they are drawn. Most of them are undoubtedly worthy people, but there is no expectation that they should be moral virtuosi. There is reason to hope that not too many resemble John F. Hylan, the Tammany politician whom Jimmy Walker defeated for Mayor of New York and whose sanity Walker openly questioned during the campaign: after the election, Walker appointed Hylan to the Children=s Court, and when queried about it, memorably replied AI wanted the children to be judged by their peer@.

Where the great rabbinical authorities are concerned, by contrast, a very lofty personal, ethical character has traditionally been expected, or at least demanded. This traces as far back as the strong emphasis that Judaism always placed on the personal attributes of *Moshe Rabbenu* - although the precise nature of Moses' character has been a subject of debate. Maimonides insists on the perfection of Moses' character: "No defect, great or small, mingles itself with him".[7] Other rabbinic traditions, however, attributed weaknesses to Moses such as slowness of speech, impulsiveness (as when he struck the rock), even occasional sin. There is a legend that Moses acknowledged his own character to be naturally capricious, greedy, arrogant, and worse: that only by great self-discipline was he able to overcome these evil inclinations.[8]

At any rate, Judaism has always insisted on the ethical qualities as well as on the intellectual attainments of a *talmid haham*, a scholar eligible for rabbinic authority. Mishnah Avot ("Ethics of the Fathers" is very largely about the personal qualities of a scholar, and often explicitly about the character of an adjudicator.[9] There are frequent allusions, throughout the Talmud, to the human qualities required of a religious authority: "If the teacher resembles an angel of God, then let [people] seek Torah from his mouth, but if not, then let them not seek Torah from his mouth".[10] After enumerating all the qualities a scholar must have to be eligible for the Great Sanhedrin, Maimonides lists the minimum requirements even for a member of a local *beth din* of three judges: "Each one must have these qualities: wisdom, humility, fear [of sin], hatred of money, love of truth, and love of his fellow human beings".[11]

In recent times, the *musar* movement has put renewed emphasis not only on studying ethical texts, such as those of R. Moshe Haim Luzzato, R. Moses ben Jacob Cordovero, and R. Israel Salanter, but also on formal and informal activities aimed at building a proper religious and ethical character.[12] Sympathetic biographies of leading rabbis almost invariably stress the admirable personal qualities, if not the saintliness, of the rabbi in question.[13] To be sure, sublime personal morality might sometimes be attributed to a rabbi who does not in fact possess it, or who at least does not always display it. No doubt there has always been a range of personalities and of character types among rabbinical authorities, even among those of the highest standing. But both in principle and in practice, how such a rabbi is seen to treat other human beings, how he raises his children, whether he can win the affection as well as the loyalty of his community - these are important to his standing and his influence, perhaps as important as his Jewish scholarship and his commitment to the Jewish people in general, and far more important than such questions would typically be for a member of the secular judiciary.

Why does moral character loom larger for attaining rabbinical authority than for becoming a secular judge? Part of the answer is no doubt sociological or demographic: Jewish communities are smaller than modern secular societies, and hence - as in a village - more able, and perhaps more motivated, to probe the personal character of their leaders. But it seems to me that there are deeper reasons, rooted in the nature of the Jewish and secular legal systems respectively, and their institutions.

First, the scope of law in a secular, liberal society is limited. A theory of this limitation is set out by John Stuart Mill in his short but enormously influential book *On Liberty*. Mill argues that freedom of thought and freedom of argument are essential to arriving at better ideas and better ways of life, and that there cannot readily be freedom of thought without considerable human liberty in general. Liberty, in turn, means that a person's acts are properly subject to legal restraint only when those acts damage other people or their legitimate interests. When a person=s acts concern only himself or herself, and do no damage to the legitimate interests of others, then neither the law, nor perhaps even any informal social pressure, ought to intrude on the person=s freedom.

It is a standard objection to Mill than any human action stands to affect the interests of others. Immoral acts, for example even if done in private and even if they create no risk other than to the actor, are still compromising to others. If the person's immorality harms himself or herself, then others who may depend on the person, or who may have to support the person in the event of any disability, will be worse off; and in any event, the moral ethos of society is liable to suffer from the mere knowledge that immoral acts are being perpetrated. *On Liberty* acknowledges this sort of objection, but Mill insists that "harm to others" ought to be defined narrowly - essentially as physical harm or direct harm to the property of others - in the interest of vindicating human liberty.

Modern secular societies, broadly along the lines traced by Mill, tend to limit the reach of the law to public-regarding interests, with a considerable zone of private choice exempt from legal restriction. What is considered public-regarding, and hence open to regulation, and what is considered private and hence no business of the law, certainly varies somewhat from time to time and from place to place. The law intrudes much less than it used to in adult sexual behaviour, but still forbids polygamy and in most states declines to recognise gay marriage; the drug laws are very much in force, although marijuana has been virtually decriminalised, at least in practice, in many places; tobacco, on the other hand, is subject to more restriction than ever. Child-rearing is perhaps more intruded-upon than it used to be, especially if one's family attracts the attentions of the social welfare bureaucracy. But broad areas of personal and social life - what one eats, how one dresses, how one conducts oneself with others, what one=s religious beliefs and practices are, if any - these have long been exempt from legal control, within generous limits, in every modern, secular society. If it were otherwise, the society would not be a liberal one.

John Locke, Mill's precursor and a founding thinker of liberalism, argued for the fundamental importance of separation of church and state, and hence for a limit on the reach of the state and the law: "[T]he Church it self is a thing absolutely separate and distinct from the Commonwealth... He jumbles Heaven and Earth together, the things most remote and opposite, who mixes these two Societies; which are in their Original, End, Business, and in every thing, perfectly distinct, and infinitely different from each other."[14] Locke writes that there is a single legitimate exception to this categorical separation of state and religion, namely the Commonwealth of the Jews, [which,] different in that from all others, was an absolute Theocracy... The Laws established there concerning the Worship of One Invisible Deity, were the Civil Laws of that People, and a part of their Political Government; in which God himself was the Legislator,"and hence there was not, nor could there be, " any difference between that Commonwealth and the Church".[15]

Locke was right about Jewish law to this extent: the Torah governs all, or almost all, aspects of life, including many actions and interactions that are outside the scope of liberal, secular law. As one writer recently put it, "the day-to-day interactions between people, the treatment of one another in mundane conversation, in walking in the street, in traveling on a bus, or waiting in line to be served in a store, are no less the home of halakha than are the activities of the synagogue or the kitchen, the study hall or the hospital bed".[16]

An authoritative interpreter or decisor of Jewish law, therefore, has jurisdiction over a much greater part of life than a secular judge. True, in the modern world a rabbi does not wield the coercive power of the state. But for anyone who accepts the rabbi=s authority, his rulings are liable to address areas of concern, including very intimate ones, where no civil court - or any other public body - would ever intervene. Given the breadth of the rabbi=s authority, it is only reasonable that his followers should take a deep interest in his character, and that they should want to be confident of the ethical stature of a person who exercises such spiritual authority in their lives.

There is a second consideration that puts a premium on the rabbi=s personal character, relative to the secular judge. The power of an American judge is hedged in by an elaborate institutional framework of constraints, whereas there are fewer such constraints, at least fewer formal constraints, on a rabbinic decisor. American government is based on separation of powers: a principle first theorised by Montesquieu, who believed or imagined that 18th-century England exemplified it, and by Locke; and actually put into practice under the American Constitution. The judiciary is merely one branch of American government: the "least dangerous branch", or so Alexander Hamilton called it in Federalist # 78. The courts are checked and balanced by the legislative and executive branches, which have a role - in principle the principal role - in law making and the setting of public policy. There is a long-standing doctrine or norm of judicial restraint, sometimes honoured in the breach, to be sure, but rooted in the idea that courts are less answerable to the people through the democratic process than the " representative" branches, and hence that judges ought to be careful not to intrude on legitimate democratic prerogatives.

Moreover, there is a formal hierarchy of courts, and decisions by judges lower on the totem pole are subject to appeal and correction by higher tribunals. A trial judge can be reversed on appeal; and appellate judges - who always sit on multi-judge panels - can be outvoted by their colleagues. State court judges, for their part, are not only subject to appellate review, but in most states they can also be removed from office by the voters.

Federalism itself is yet another check and balance: neither the national government and its federal courts nor the state governments and their courts are all-powerful. Finally, if the people are dissatisfied with the judges= interpretation of the law, the people have the power to change the laws which the courts interpret and apply - through new legislation, or if necessary, by Constitutional amendment.

Under Jewish law, there are fewer such institutional constraints. There is no separation of powers: no legislative or executive branch. There are, in general, no appellate courts.[17] This is not to say that there are no checks and balances in Jewish life. Throughout Jewish history there has been a complex process of "legislation" - of adaptation and reform - within the halakhic system.[18] There is the principle within the halakhah itself that "One cannot enact an ordinance unless the majority of the community will observe it".[19] There is, very importantly, the decentralised nature of Jewish life - a kind of federalism. Every Jewish community chooses its own rabbis, and at least in modern times, it is fair to say that every Jew ultimately chooses his or her own rabbi. (This is "ultimately" so, but there are considerable barriers - material, psychic, and spiritual - against an individual=s choosing a new rabbi if this entails abandoning an established community of which one is a part.) The customs (*minhagim*) both of the Jewish people as a whole and of particular Jewish communities have considerable force of law as a matter of halakhah. In all these ways and more, rabbinic rulings are not made in isolation. As R. Aharon Lichtenstein puts it about the corpus of halakhic responsa, Athe classic *meshivim* are likely to be among the more lenient, inasmuch as inquirers are disinclined to turn

to *mahamirim@*.[20]

Yet while there are checks and balances to rabbinic leadership, they are for the most part informal. Jewish authority is not bounded by what might be called the framework of mistrust which limits the power of the American judiciary. The moral character of rabbinical leaders, in whom Jewish communities confide, therefore takes on especial importance. And in fact, Jewish communities have always "tested" a potential rabbi, authority, or decisor, not only for learning but also for piety, personal adherence to a demanding halakhic way of life, and personal character generally: in short, for *yir'at shamayim* and *ahavat yisrael*. In the absence of an elaborate system of institutional checks and balances, it could hardly be otherwise.

All this has a further implication. It is a commonplace that the trend in much of the Orthodox world in recent decades has been towards greater rigour in religious observance and greater strictness - or caution, or antipathy to innovation - in interpretation of Jewish law. The trend is palpable both in the Orthodox rabbinical leadership, and in the Orthodox communities at large. It affects not only ritual questions, but also - among many others - such issues as conversion to Judaism, the problem of *agunot*, and the extent to which Orthodox Jews ought to conform to rabbinic opinion (*da'at torah*) on questions that are not strictly legal. The reasons for the trend are no doubt complex: R. Haym Soloveitchik has penetratingly explored some of them.[21] The trend is an ironic reversal, in a sense, of R. Aharon Lichtenstein=s observation that classical responsa incline toward leniency because through most of Jewish history legal rulings would more often be sought from authorities known or believed to be lenient.

But given today's trends, if personal character is a qualification for any rabbinic leader or decisor, it is apt to be all the more important for a decisor who would challenge the prevailing trends. Simply put, the standards are always higher for anyone who would swim against the current. To rule "leniently" or innovatively, especially on issues felt to be of defining religious importance, a decisor would surely need strong Jewish scholarship but also strong personal authority, a strong ethical character, at least if such rulings are to hope for acceptance in today=s Orthodox world. (In old-fashioned English, " character" meant both what we mean by character, and also reputation and "personal recommendation" .)

Rabbinic leaders and decisors, of course, throughout Jewish history have taken a wide variety of views on almost every debatable question of Jewish law. Whatever the rabbis= views on legal and religious questions, the Jewish world has always expected that its rabbis should be people of exemplary ethical character. This expectation flows from the fact that they are religious leaders as well as interpreters and adjudicators of Jewish law. But it also stems from the distinctive nature of Jewish law itself, the nature of its institutions, and the breadth of its command. The modern American legal system is such that judges, although they are certainly expected to be law-abiding people, need not be moral virtuosi. Even so, the personal character of some of the greatest American justices and judges has surely been important to their standing. The expectations under Jewish law are higher. Rabbi Benzion Uziel, the great Sephardic Chief Rabbi of Israel in the mid-twentieth century, summed it up eloquently: "The entire image of Judaism is reflected in the judges of Israel, who were - and are supposed to be - the regulators standing at the rudder and the watchtower to guide the ways and to strengthen the fortifications for peace and unity, the eternal foundations of the nation of Israel and its Torah."[22]

Notes

[1].Many Jews in particular believe, whether as a matter of hope or experience, that Torah learning itself makes its possessors better, more moral people; hence the expectation that the more learned the rabbi, the loftier the ethical character.
[2].David Garrow, AThe Tragedy of William O. Douglas@, The Nation, March 27, 2003.
[3].Laura Krugman Ray, AJustices At Home: Three Supreme Court Memoirs@, 101 Michigan Law Review 2103 (2003). Monstrous as McReynolds was, there do seem to have been (usually well-hidden) rays of kindness in his character. He privately supported 33 children left homeless in the London Blitz in 1940; he left a sizable fortune to charity; and both Holmes and Douglas, in their memoirs, report moments of goodness in him.
[4].Jeffrey Rosen, AThe Hopeless Moralist@, New York Times, Nov. 2, 1997 (reviewing Richard Polenberg, *The World of Benjamin Cardozo*, Cambridge, Mass 1997).
[5].See Melvin I. Urofsky and David W. Levy, eds, *The Family Letters of Louis D. Brandeis* (Norman, Okla. 2002).
[6].Stephen J Choi, G. Mitu Gulati, Eric A. Posner, AProfessionals or Politicians: The Uncertain Empirical Case for an Elected Rather Than Appointed Judiciary@, U. Of Chicago Law and Economics Working Paper No. 357, p. 41 (August 2007).
[7].*Perek Helek*, The Seventh Principle. See also *Guide* II:35 (Moses had a fully active intellect and was without physical or character blemish). See gen=lly Daniel Jeremy Silver, A>Moses Our Teacher Was A King=@ 1 Jewish Law Annual 123 (1978).
[8].Shnayer Z. Leiman, AR. Israel Lipschutz: The Portrait of Moses@, 24 (4) Tradition 91 (1989). This legend may originally have been about Socrates or Aristotle, not Moses, and R. Lipschutz was criticised by other rabbis for quoting it, and attributing it to Moses.
[9].*E.g.* Avot 1:8,9,18.
[10].Hagigah 15b; see also Moed Kattan 17a.

[11].Hilhot Sanhedrin 2:7,8. See also Shulhan Aruh, Yoreh Deah 246:8: AA rabbi who does not go in a good path, even if he is a great scholar and the whole nation needs him, they should not learn from him until he returns to the good@.
[12].Emanuel Etkes, *Rabbi Israel Salanter and the Mussar Movement* (Philadelphia 1993).
[13].See Eliyahu Stern, AModern Rabbinic Historiography and the Legacy of Elijah of Vilna@, 24 (1) Modern Judaism 79, 82 (2004) (on the tendency of such biographies toward hagiography).
[14].John Locke, *A Letter Concerning Toleration*, ed. James H. Tully, p.33 (Indianapolis 1983)
[15].*Id.*, p. 44.
[16].Daniel Z. Feldman, *The Right and the Good*, p. xii (Northvale, NJ 1999).
[17].The Israeli Chief Rabbinate has established a Supreme Rabbinical Court of Appeals. But R. David Bleich writes that the halakhic authority for appellate review is Afar from clear@, citing the general rule AIf a scholar has prohibited another scholar dare not permit@. Nonetheless, R. Bleich does not entirely reject the idea of appeals under Jewish law. See J. David Bleich, *Contemporary Halakhic Problems* pp.17-45 (New York, 1995).
[18].See Menachem Elon, *Jewish Law: History, Sources, Principles* (Philadelphia 1994); Aaron M. Schreiber, *Jewish Law and Decision-Making: A Study Through Time* (Philadelphia 1979).

[19].Bava Batra 60b.
[20].Aharon Lichtenstein, AThe Human and Social Factor in Halakha@, 36:1 Tradition 1, 7 (2002). R. Lichtenstein quotes R. Avraham Schapira on this point. *Id*.
[21].Haym Soloveitchik, ARupture and Reconstruction: The Transformation of Contemporary Orthodoxy@, 28:4 Tradition 64 (1994).
[22].Hayyim David Halevy, *A*The Love of Israel as a Factor in Halakhic Decision-Making in the Works of Rabbi Benzion Uziel@ (tr. Rabbi Marc D. Angel), 24:3 Tradition 1, 17 (1989).