



**TOURO UNIVERSITY**  
JACOB D. FUCHSBERG LAW CENTER  
*Where Knowledge and Values Meet*

**Touro Law Review**

---

Volume 28 | Number 2

Article 9

---

July 2012

## **Bribery in the Judiciary: Rethinking Recusal and Judicial Elections in the Wake of Caperton v. A.T. Massey Coal Co.: A Jewish Law Perspective**

Jacob Z. Weinstein

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Judges Commons](#), and the [Religion Law Commons](#)

---

### **Recommended Citation**

Weinstein, Jacob Z. (2012) "Bribery in the Judiciary: Rethinking Recusal and Judicial Elections in the Wake of Caperton v. A.T. Massey Coal Co.: A Jewish Law Perspective," *Touro Law Review*. Vol. 28: No. 2, Article 9.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol28/iss2/9>

This Comment is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact [lross@tourolaw.edu](mailto:lross@tourolaw.edu).

---

## Bribery in the Judiciary: Rethinking Recusal and Judicial Elections in the Wake of *Caperton v. A.T. Massey Coal Co.*: A Jewish Law Perspective

### Cover Page Footnote

28 Touro L. Rev. 519 (2012).

**BRIBERY IN THE JUDICIARY: RETHINKING RECUSAL  
AND JUDICIAL ELECTIONS IN THE WAKE OF  
*CAPERTON V. A.T. MASSEY COAL CO.*:  
A JEWISH LAW PERSPECTIVE**

*By Jacob Z. Weinstein*<sup>\*</sup>

**I. INTRODUCTION**

A fundamental truth exists within the legal systems of civilized societies and cultures, regardless of religious or secular affiliations: all courts must be fair and unbiased. No matter the background, rational people will agree that a fair and unbiased judiciary is crucial for society to function, for order to occur, and for the effectiveness of the other branches of government. The role of the judiciary is central to concepts of justice and the rule of law within all societies, especially Judaism.<sup>1</sup> The manner in which judicial elections take place in thirty-nine states<sup>2</sup> violates the very tenets of fairness and impartiality according to Jewish law.<sup>3</sup> The current electoral system, according to Jewish law, may be tantamount to bribery by judicial

---

<sup>\*</sup> Jacob Z. Weinstein received his J.D. from Touro College Jacob D. Fuchsberg Law Center in 2011. Mr. Weinstein received his Bachelor of Talmudic Letters from Yeshivat Bais Yisroel in 2007. He received Rabbinic Ordination from Rabbi Zalman Nechemia Goldberg of Jerusalem, Israel in 2007. Mr. Weinstein would like to thank Professor Sam Levine for his indispensable insight and helpful comments from the very beginning of this endeavor.

<sup>1</sup> See MISHNEH TORAH, THE LAWS OF THE COURTS AND THE PENALTIES PLACED UNDER THEIR JURISDICTION 1:1 (explaining that the judiciary is the essential factor associated with justice in Jewish law); Genelle I. Belmas & Jason M. Shepard, *Speaking from the Bench: Judicial Campaigns, Judges' Speech, and the First Amendment*, 58 DRAKE L. REV. 709, 718 (2010) (noting that judges have a responsibility to "protect[] the independence and impartiality of the judiciary").

<sup>2</sup> Belmas & Shepard, *supra* note 1, at 709-10 (acknowledging a 2009 American Judicature Society report which noted, "[T]hirty-nine states select or retain judges retain judges by election in at least some respect").

<sup>3</sup> See BABYLONIAN TALMUD, TRACTATE KETUBOT 105a-b.

candidates and their contributors.<sup>4</sup>

It has been eloquently stated that:

Judicial elections require judges to solicit contributions from donors who will likely appear before them in court—a fact that may influence a judge’s future decision making, and certainly, if nothing else, creates the appearance of judicial impropriety. Judicial elections also invite unqualified candidates with deep pockets to run for judgeships,” destroy[] the traditional respect for the bench,” and virtually guarantee that judges will base their decisions partially, if not completely, upon the vicissitudes of popular politics instead of the law.<sup>5</sup>

Furthermore, Justices Kennedy and Breyer have agreed:

When one considers that elections require candidates to conduct campaigns and to raise funds in a system designed to allow for competition among interest groups and political parties, the persisting question is whether that process is consistent with the perception and the reality of judicial independence and judicial excellence. The rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges. And it may seem difficult to reconcile these aspirations with elections.<sup>6</sup>

Clearly, the matter of judicial elections and the potential impropriety on the part of a newly elected judiciary dependent on political relationships is a cause for concern.

---

<sup>4</sup> See MISHNEH TORAH, *supra* note 1, at 23:1-3.

<sup>5</sup> Bronson D. Bills, *A Penny for the Court’s Thoughts? The High Price of Judicial Elections*, 3 NW. J.L. & SOC. POL’Y 29, 30 (2008) (alteration in the original) (quoting Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 8 BAYLOR L. REV. 1, 23 (1956)) (articulating the extensive influence third-parties have over judicial elections).

<sup>6</sup> N.Y. State Bd. of Elections v. Torres, 552 U.S. 196, 212 (2008) (Kennedy & Breyer, J.J., concurring) (upholding the New York law on First Amendment grounds, while mentioning the dangers of judicial elections in general).

The focus of this paper is one of comparative law and critique. It will compare the current United States law and ABA Model Code of Judicial Conduct (“Model Code”) with the Jewish laws regarding bribery, resulting in an analysis ultimately based upon Jewish law and *common sense* instead of a review of constitutional doctrine. Part I will discuss the Model Code, relevant case law and statutes, and *Caperton v. A.T. Massey Coal Co.*,<sup>7</sup> a Supreme Court decision discussing the effect that donations to an election campaign had on the recusal of a duly elected judge.<sup>8</sup> The purpose of discussing *Caperton* is not to criticize the case itself, but rather to use it as a springboard to criticize the judicial electoral process and recusal system as a whole. Part II will introduce the reader to the Jewish laws of *Shochad* (the biblical Hebrew<sup>9</sup> word for bribery)<sup>10</sup> which are far more extensive than those existing in the United States.<sup>11</sup> The introduction to *Shochad* will discuss the Jewish law of bribery with regard to the judiciary from the biblical verses, the Talmud, and its modern day application. Part III will illustrate the relevance of these Jewish laws to the non-Jewish world by applying the Jewish legal and theological understanding of the Seven Commandments of Noah, specifically, the commandment relating to the establishment of a judicial system by the non-Jewish nations.<sup>12</sup> Finally, Part IV will conclude with suggestions for tempering the improper effects on the judicial system resulting from judicial elections and campaigns. Note: this article is based on the author’s own translation of the original text (in Hebrew and Aramaic) versions of the sources cited. The author’s translations have been indicated by italicization throughout the article.

---

<sup>7</sup> 129 S. Ct. 2252 (2009) (also reported as 556 U.S. 868). Since no page numbers are available for the United States Reports version of this case, the Supreme Court Reporter version will be used for purposes of the pincites in the citations of this article.

<sup>8</sup> *Id.* at 2263-64 (holding that the Constitution required the judge to recuse himself due to “a serious risk of actual bias—based on objective and reasonable perceptions”).

<sup>9</sup> All translations are the author’s own unless indicated otherwise.

<sup>10</sup> See *Exodus* 23:8; *Deuteronomy* 16:19.

<sup>11</sup> See discussion *infra* Part II.

<sup>12</sup> MISHNEH TORAH, THE LAWS OF KINGS AND THEIR WARS 9:14 (stating that it is an affirmative obligation on all non-Jewish nations to establish a judicial system); see Fred Lawrence, *David Novak on Natural Law: An Appraisal*, 44 AM. J. JURIS. 151, 158 (1999) (stating that the Seven Commandments of Noah requires the “establish[ment of] a judicial system in society”).

## II. HOW THE CURRENT VAGUE AND FLEXIBLE VIEW OF JUDICIAL ELECTIONS AND RECUSAL HAS ALLOWED “BRIBERY” TO BECOME RAMPANT IN THE JUDICIARY

### A. The Model Code and *Caperton v. A.T. Massey Coal Co.*

The Model Code has only five Canons, all of which suggest how judges should deal with maintaining fairness in some manner.<sup>13</sup> Significantly, the preamble to the Model Code states:

Our legal system is based on the principle that an *independent, fair* and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to *all* sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.<sup>14</sup>

While the Model Code is not law, it has been adopted by a significant number of states and provides an insightful view of and important reference to the American legal definition and moral view of proper judicial conduct.<sup>15</sup>

Although the Model Code appears to encourage independence and fairness as its goals, it provides only broad definitions with no direct instruction.<sup>16</sup> This is especially troubling when recusal issues

<sup>13</sup> See MODEL CODE OF JUDICIAL CONDUCT, pmbl., Canons 1-5 (1990) (discussing the role of judges and their commitment to maintain the confidence of the legal system).

<sup>14</sup> *Id.* at 8 (emphasis added).

<sup>15</sup> Honorable Howland W. Abramson & Gary Lee, *The ABA Model Code Revisions and Judicial Campaign Speech: Constitutional and Practical Implications*, 20 TOURO L. REV. 729, 730-31 (2004).

<sup>16</sup> See generally Phyllis Williams Kotey, *The Real Costs of Judicial Misconduct: Florida*

come before a judge. A judge may recuse himself on his own accord (or, for example, by order of the New York Court of Appeals if he fails to do so) when either he deems it appropriate to do so or a motion for recusal is filed.<sup>17</sup> The judge has excessively broad discretion to declare that no conflicts exist that would lead to a mandatory recusal, because there are simply no clear legal guidelines regarding recusal for the average judge.<sup>18</sup> Contrastingly, an attorney must be extremely vigilant about any possible conflict of interest whatsoever.<sup>19</sup>

Recusal and allegations of bias are sensitive subjects, and the United States Supreme Court does not often address these delicate issues.<sup>20</sup> When the Court finally addressed the issue of recusals and allegations of bias, it did not apply definitive language and appeared unable to articulate any clear rules.<sup>21</sup> This unfortunate hesitance to establish clear guidelines for recusal and bias was most evident in *Caperton v. A.T. Massey Coal Co.*<sup>22</sup>

Hugh Caperton filed suit against A.T. Massey Coal Co., Inc. for tortious interference, fraudulent misrepresentation, and fraudulent concealment.<sup>23</sup> The West Virginia trial court rendered judgment

---

*Taking a Step Ahead in the Regulation of Judicial Speech and Conduct to Ensure Independence, Integrity and Impartiality*, 31 NOVA L. REV. 645, 653-54 (2007) (stating that the Model ABA Code's lack of a uniform standard results in inconsistencies "in the discipline of judges").

<sup>17</sup> See N.Y. JUD. LAW § 14 (McKinney 2011) (explaining the judicial disqualification rules).

<sup>18</sup> See Jeffrey T. Fiut, *Recusal and Recompense: Amending New York Recusal Law in Light of the Judicial Pay Raise Controversy*, 57 BUFF. L. REV. 1597, 1603 (2009) (noting the subjective recusal standard). From the Jewish law perspective, for a judge to decide his own recusal motion based on nothing more than self-reflection is, in and of itself, improper. MISHNEH TORAH, KESEF MISHNA COMMENTARY TO LAWS OF THE COURTS AND THE PENALTIES PLACED UNDER THEIR JURISDICTION, 23:3 (stating that recusal in Jewish law is set forth within the law itself and mandated under particular circumstances outside of the judge's own discretion).

<sup>19</sup> MODEL RULES OF PROF'L CONDUCT R. 1.10 (2009) (stating the Conflict of Interest rules).

<sup>20</sup> In 2009, the United States Supreme Court granted certiorari for the first time on the issue of recusal involving a judicial election when it decided *Caperton*. *Caperton*, 129 S. Ct. at 2259, 2262.

<sup>21</sup> *Id.* at 2263-64 (reasoning that there is a serious risk of bias which requires a judge to recuse himself "when a person with a personal stake in a particular case had a significant and disproportionate influence in . . . the judge's election campaign").

<sup>22</sup> *Id.* at 2265 (stating that *Caperton* is an extreme situation and "sometimes no administrable standard may be available to address the perceived wrong").

<sup>23</sup> *Id.* at 2257.

against Massey and found it liable for fifty million dollars in damages.<sup>24</sup> The Supreme Court of Appeals of West Virginia granted review;<sup>25</sup> however, prior to the hearing, Caperton made a motion for Justice Brent Benjamin to recuse himself.<sup>26</sup>

Caperton argued that Massey's C.E.O. had donated three million dollars to Justice Benjamin's campaign to win a seat on the Supreme Court of Appeals of West Virginia *while the appeal was pending before the court*.<sup>27</sup> Although Justice Benjamin claimed that there was no bias on his part, his participation in the case presented an unacceptable appearance of impropriety.<sup>28</sup> In a three-to-two decision, with Justice Benjamin voting in the majority, the Supreme Court of Appeals of West Virginia reversed the trial court and ordered the case dismissed.<sup>29</sup> The court granted Caperton's motion for a rehearing on the issue of recusal, denied the motion for a second time in a similar three-to-two decision (with Justice Benjamin *still* in the majority), reversed the trial court, and ordered the case dismissed.<sup>30</sup>

Justice Benjamin, commenting on the motion for recusal with a degree of amazement, focused on why he should not be recused for "independent expenditures" since he had nothing to do with them.<sup>31</sup> In his opinion on the recusal question, he posed the problem as follows:

The primary thrust of the Appellees' argument is

<sup>24</sup> *Id.*

<sup>25</sup> *Caperton*, 129 S. Ct. at 2258.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 2257. According to Jewish law, it does not appear to be particularly relevant that Caperton's case was pending appeal at the time of the election. As seen in the examples cited by Maimonides, even if there was a mere possibility of the case coming before the court, it should have lead to Justice Benjamin's recusal due to what in Jewish law would amount to a bribe taken from the C.E.O. of Massey. *See infra* notes 116-27 and accompanying text.

<sup>28</sup> *Caperton*, 129 S. Ct. at 2257, 2264.

<sup>29</sup> *Id.* at 2258. While the United States Supreme Court emphasized that the *Caperton* case was pending and that Justice Benjamin was on the majority of the decision against Caperton, it is not particularly relevant in Jewish law. *Id.* at 2265. The law of bribery in Jewish law comes into effect even if you are giving a bribe to a judge so that he may decide the case according to the law. SEFER HAHINNUCH: THE BOOK OF [MITZVAH] EDUCATION 324, Commandment 83 (Charles Wengrov trans., Feldheim Publ'g 3d rev. ed. 1991). Thus, even if Justice Benjamin was on the side favoring Caperton, recusal must still occur.

<sup>30</sup> *Caperton*, 129 S. Ct. at 2258.

<sup>31</sup> *Id.* at 2262-63.



not that I should be disqualified because a party or attorney to the instant case directly contributed to my campaign. The Appellees' argument is that I should be disqualified because, without my knowledge, direction or control, an independent nonparty organization, [known as] ASK, received contributions from people or groups that included an employee of a party in this case [namely, the C.E.O. of Massey], and ASK independently used its contributions to wage a campaign against my opponent four years ago.<sup>32</sup>

Before entering into the decision of the United States Supreme Court, and based upon the accepted commonsensical statement that a court must be fair and unbiased, did Justice Benjamin's failure to recuse himself from participation in a case where one of the parties donated three million dollars to his election campaign violate required fairness or impartiality?

Faced with these facts alone, one and all would inevitably answer yes; such a donation by a party who was likely going to appear before the court leads one to question the fairness or impartiality of the presiding court. When discussing Jewish law, the possible questioning of fairness and impartiality on the part of a judge is a reason, in and of itself, for recusal of that judge.<sup>33</sup> However, the Supreme Court of the United States framed the issue as follows: Did Justice Benjamin's failure to recuse himself from participation in a case where one of the parties donated three million dollars to his election campaign violate the Due Process Clause of the Fourteenth Amendment?<sup>34</sup>

The Court answered yes to this question in a five-to-four decision, holding that due process required Justice Benjamin to recuse himself from participation in the case.<sup>35</sup> With Justice Kennedy writing for the majority, joined by Justices Stevens, Souter, Ginsburg, and Breyer, the Court explained that it did not need to find that Jus-

---

<sup>32</sup> *Caperton v. A.T. Massey Coal Co.*, 679 S.E.2d 223, 302 (W. Va. 2008) (Benjamin, Acting C.J., concurring) (refusing to recuse himself from hearing the case), *overruled by* 129 S. Ct. 2252, 2257 (2009).

<sup>33</sup> *Fiut*, *supra* note 18.

<sup>34</sup> *Caperton*, 129 S. Ct. at 2256-57.

<sup>35</sup> *Id.* at 2264-65, 2267.

tice Benjamin was actually biased in his decision-making in order to invalidate the decision.<sup>36</sup> Rather, it must merely be shown that “ ‘under a realistic appraisal of psychological tendencies and human weakness,’ ” Justice Benjamin’s “interest ‘pose[d] such a *risk* of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.’ ”<sup>37</sup> The Court stated that such a risk of bias existed where a judge had “ ‘a direct, personal, substantial, pecuniary interest,’ ” as Justice Benjamin did.<sup>38</sup> Although the Court reasoned that he improperly failed to recuse himself, the majority declared that this application of the law was only for the “extreme” case.<sup>39</sup>

Chief Justice Roberts vehemently dissented, joined by Justices Scalia, Thomas, and Alito, and argued that the majority imprudently expanded the recusal standard to a mere showing of a “probability of bias,” raising forty points of uncertainty that arise because of the majority’s vague standard.<sup>40</sup>

Justice Scalia, who wrote a separate dissenting opinion, argued that the majority poorly performed its duties as a clarifying body by making an area of the law vastly more uncertain.<sup>41</sup> Interestingly, Scalia cited to a Mishneh in *Tractate Avot* to contrast with the Due Process Clause.<sup>42</sup> While divine law may have all the answers, Scalia opined, the Due Process Clause does not “contain the answers to all earthly questions.”<sup>43</sup> However, Scalia neglected to mention the Torah’s opinion regarding the substantive issue raised in *Caperton*, which is in sharp contrast to the result he favored.<sup>44</sup>

<sup>36</sup> *Id.* at 2256, 2263-65.

<sup>37</sup> *Id.* at 2263 (emphasis added) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

<sup>38</sup> *Id.* at 2259 (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)).

<sup>39</sup> *Caperton*, 129 S. Ct. at 2265.

<sup>40</sup> *Id.* at 2267, 2269-72 (Roberts, C.J., dissenting); see Jeffrey W. Stempel, *Playing Forty Questions: Responding to Justice Roberts’s Concerns in Caperton and Some Tentative Answers About Operationalizing Judicial Recusal and Due Process*, 39 SW. L. REV. 1, 8 (2009) (attempting to answer the forty questions posed by the Chief Justice, while addressing the ridiculousness of the questions in the first place).

<sup>41</sup> *Caperton*, 129 S. Ct. at 2274 (Scalia, J., dissenting).

<sup>42</sup> *Id.* at 2274-75.

<sup>43</sup> *Id.* at 2275.

<sup>44</sup> See Chaim Saiman, *Chaim Saiman (guest post) on Caperton*, PRAWFSBLAWG BLOG (June 8, 2009, 10:13 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2009/06/chaim-saiman-guest-post-on-caperton.html> (“[I]f Scalia is going to cite Talmudic law in a case concerning judicial impartiality, he should at the very least inform us that the result he favors

Some have applauded this decision as a step forward regarding recusal,<sup>45</sup> including former Justice O'Connor who stated, "Maybe the Supreme Court's decision in *Caperton* will stop a situation as egregious as *Caperton* from happening again."<sup>46</sup> However, the decision should be viewed as not going far enough.<sup>47</sup> The majority continuously emphasized the monetary amount given to the election campaign of Justice Benjamin.<sup>48</sup> "[T]he majority's reliance on such an 'extreme case' " deserves critique, because more could have been done to further reform and strengthen the argument on the issue of recusal.<sup>49</sup> As stated by one commentator:

The *Caperton* decision is really a second-best solution to the problem of the influx of money designed to influence judges on both issues and cases. It is an *ex-post* solution that tries to control the damage after the fact, rather than an *ex-ante* solution, which would try to prevent the problem from occurring in the first place.<sup>50</sup>

As we will discover, this decision barely scratches the surface

---

lies in sharp contrast to Talmudic conceptions of judicial ethics.").

<sup>45</sup> The commentators and scholars on *Caperton* can generally be placed into two categories: (1) those that support the decision but feel that it did not go far enough; and (2) those who do not support the decision based on a view of judicial restraint and the notion that the states should regulate their own courts. As this paper focuses on Jewish law, and the latter opinion is inconsistent with Jewish law, the author is of the view that the Court in *Caperton* did not go far enough. See Adam Liptak, *Justices Issue a Rule of Recusal in Cases of Judges' Big Donors*, N.Y. TIMES, June 9, 2009, at A1 (describing the case and the positions taken on each side, including comments and reactions to the decision as stated by law professors and attorneys); Statement of H. Thomas Wells Jr., President, ABA, *Re: Ruling of the Supreme Court of the United States in Caperton v. A.T. Massey Coal Co.* (June 8, 2009), available at <http://www.abanet.org/abanet/media/statement/statement.cfm?releaseid=671> (praising the decision as a milestone for the Court and the legal profession).

<sup>46</sup> Honorable Sandra Day O'Connor, *Choosing (and Recusing) Our State Court Justices Wisely: Keynote Remarks by Justice O'Connor*, 99 GEO. L.J. 151, 153 (2010).

<sup>47</sup> See Jeffrey W. Stempel, *Completing Caperton and Clarifying Common Sense Through Using the Right Standard for Constitutional Judicial Recusal*, 29 REV. LITIG. 249, 251 (2010) (stating that the Court should have, and could have, gone further in establishing clear law and by not doing so, it caused more harm than good).

<sup>48</sup> *Caperton*, 129 S. Ct. at 2257 (stating that the "donations accounted for more than two-thirds of the total funds").

<sup>49</sup> See Symposium, *Session 1: One Symptom of a Serious Problem: Caperton v. Massey*, 33 SEATTLE U. L. REV. 569, 578 (2010) (criticizing the *Caperton* decision for not expounding on the Due Process Clause issues surrounding the case).

<sup>50</sup> *Id.* at 584.

of what should, according to Jewish law, amount to bribery.<sup>51</sup> *Caperton* is not only unhelpful to the rule of law, but is also an example of the Supreme Court's hesitance to establish clear rules of recusal that are especially needed in the case of an elected judge.<sup>52</sup> Ultimately, Justice O'Connor opined, "No amount of election or recusal reform will remove the politics inherent in partisan judicial elections because they are specifically *designed* to infuse politics into the law. Elections are intended to make our courts responsive to electoral politics, and that is the flaw in the concept."<sup>53</sup>

*Caperton* has at least two definitive results. On the progressive side, the ruling recognized that judicial elections are inherently different by nature and that, as a result, campaign contributions may lead to a required recusal.<sup>54</sup> On the other hand, the Court reserved such a requirement only for the most "extreme" of cases.<sup>55</sup> *Caperton* shows "how judicial campaign contributions . . . poison [the] judicial system."<sup>56</sup> It is "a textbook case of why we need to stop electing judges to serve on our courts."<sup>57</sup>

In the end, "*Caperton* [was] wrongly decided."<sup>58</sup> Justice Kennedy's assumption that the facts presented a " 'rare instance' " was inherently flawed, as "[t]here is no indication that the [continued] trend of high-financed, highly contested judicial elections will abate" anytime soon.<sup>59</sup> "Contrary to Justice Kennedy's attempt to limit *Caperton*'s impact and reach by the 'extreme facts' argument, *Caperton* is likely to have far reaching and unintended consequences."<sup>60</sup> "[O]ne leading authority on judicial ethics [has even

<sup>51</sup> See SEFER HAHINNUCH, *supra* note 29.

<sup>52</sup> See Tara Smith, *Reckless Caution: The Perils of Judicial Minimalism*, 5 N.Y.U. J.L. & LIBERTY 347, 354 (2010) (stating that *Caperton* is an example of where judicial minimalism has hurt more than helped).

<sup>53</sup> O'Connor, *supra* note 46.

<sup>54</sup> See *Caperton*, 129 S. Ct. at 2262, 2264-65.

<sup>55</sup> *Id.* at 2265.

<sup>56</sup> O'Connor, *supra* note 46, at 156.

<sup>57</sup> Hugh M. Caperton, *Remarks*, 48 DUQ. L. REV. 727, 733 (2010) (providing a personal reflection of the *Caperton* decision).

<sup>58</sup> Terri R. Day, *Buying Justice: Caperton v. A.T. Massey: Campaign Dollars, Mandatory Recusal and Due Process*, 28 MISS. C. L. REV. 359, 376 (2009) (criticizing the *Caperton* decision).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* (opining that the lack of a clear, strong decision will come back and haunt the Court in the end).

gone so far as to] characterize[] the decision as ‘declaring that a judge’s decision not to recuse violates due process when it’s a cold day in hell.’ ”<sup>61</sup>

### B. Outside of *Caperton*, There Are Many Cases That Give Forth an Ambiguous View of Judicial Recusal

Federal statutory law attempts to clearly establish the parameters for judicial disqualification, stating, “Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”<sup>62</sup>

It appears the focus of the law is to prevent a judge from presiding over a case where a deep-seated bias and an “ ‘inability to render fair judgment’ ” exist.<sup>63</sup> The test set forth by the courts is claimed to be an objective one;<sup>64</sup> the question to be asked, objectively, is whether the (all too famous) “reasonable person” and informed observer would question the judge’s impartiality.<sup>65</sup> It is important to note the problem with the reasonable person standard here, as there is no clear definition of who the reasonable person is.<sup>66</sup> Is it the “reasonable [layman] and informed observer,” as implied in *United States v. Microsoft Corp.*?<sup>67</sup> Or, is the reasonable person a reasonable judge who is an informed observer, as appears to be the opinion in *Caperton* and other similarly reviewed cases where the standard was set and reviewed by the reasonable judge? There is no simple answer to this threshold issue.

Adding to the above statute and case law, the Supreme Court

<sup>61</sup> Stempel, *supra* note 47, at 276 (quoting *Caperton Ruling May Spur States to Enhance Their Process for Judges’ Recusal*, 25 LAW. MAN. ON PROF. CONDUCT (ABA/BNA) 335 (2009) (quoting University of Indiana law professor, Charles Geyh)).

<sup>62</sup> 28 U.S.C. § 455(a) (2006).

<sup>63</sup> *In re Owens Corning*, 305 B.R. 175, 190-91 (D. Del. 2004) (quoting *SEC v. Antar*, 71 F.3d 97, 101 (3d Cir. 1995)) (discussing the federal statute on recusal and stressing that its focus is on the inability of the judge to reach a fair judgment).

<sup>64</sup> *IQ Prods. Co. v. Pennzoil Prods. Co.*, 305 F.3d 368, 378 (5th Cir. 2002) (establishing the objective standard).

<sup>65</sup> See *United States v. Evans*, 262 F. Supp. 2d 1292, 1294 (D. Utah 2003) (applying the reasonable person standard to issues of judicial impartiality).

<sup>66</sup> *Id.* (stating that a reasonable person is “ ‘a well-informed, thoughtful and objective observer’ ” (quoting *United States v. Jordan*, 49 F.3d 152, 156 (5th Cir. 1995))).

<sup>67</sup> 253 F.3d 34, 114 (D.C. Cir. 2001).

has held that the Due Process Clause requires a fair and impartial trial.<sup>68</sup> Thus, the Due Process Clause would automatically apply to matters of fairness and impartiality.<sup>69</sup> Yet, the Court has not directly applied the clause to judicial recusal matters concerning bias or an impartial trial. This was explicitly apparent in the dissenting opinions of *Caperton*, particularly Scalia's statement that the Due Process Clause did not hold all the answers to the issue presented in *Caperton*.<sup>70</sup>

An example of the broad discretion that exists for judges to decide recusal is *Cheney v. United States District Court for the District of Columbia*.<sup>71</sup> In *Cheney*, a motion was made for Justice Scalia to recuse himself because of his friendship with Vice President Cheney, a named party in the action.<sup>72</sup> Scalia denied the motion even though there was a friendship, or at the very least an appearance of a friendship, with Vice President Cheney.<sup>73</sup> For example, Scalia was given guest seats on the Vice President's government airplane for himself and his family.<sup>74</sup> Scalia ruled this way even though a "reasonable person" and objective observer would reasonably conclude that such gifts were likely to affect the Justice's impartiality.<sup>75</sup> Further, newspaper editorials and the general public called for Scalia's recusal based upon the public perception of an appearance of partiality, which thereby tainted the proceedings.<sup>76</sup> Yet, this recusal motion was *decided and denied by the very same judge it pertained to*,<sup>77</sup> illustrating the need for definitive recusal guidelines and demonstrating that the status of the law regarding recusal and bribery needs a major overhaul.

<sup>68</sup> See *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 551 (1976); see also *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

<sup>69</sup> See *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971); see also *Weiss v. United States*, 510 U.S. 163, 177-78 (1994).

<sup>70</sup> *Caperton*, 129 S. Ct. at 2275.

<sup>71</sup> 541 U.S. 913 (2004).

<sup>72</sup> *Id.* at 917.

<sup>73</sup> *Id.* at 928-29.

<sup>74</sup> *Id.* at 914-15.

<sup>75</sup> *Id.* at 924 ("It is well established that the recusal inquiry must be 'made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances.' " (quoting *Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000))).

<sup>76</sup> *Cheney*, 541 U.S. at 922-23.

<sup>77</sup> *Id.* at 913, 929.

It appears that the position of United States law is that a judge should not recuse himself from a proceeding when a mere casual relationship exists.<sup>78</sup> In contrast, it may appear that in Jewish law one can be recused for a mere casual relationship, but this is not so.<sup>79</sup> Contributing to a judge's election, thereby helping to cause the judge's success, cannot by any means be considered a mere casual relationship (as the dissent in *Caperton* would have us believe).<sup>80</sup> Befriending a judge to the extent where you give the judge's family rides on your jet cannot be considered a casual relationship either. No such acts should be considered casual when they have the potential to affect the decision of the court.

Certainly, any claim involving justice and a fair trial cannot rely on whether or not there is a casual or more substantial relationship between the party and the judge. This is where the Jewish law becomes relevant because, unlike the current state of the law, Jewish law is more direct and clearer on the rules of recusal and bribery regarding a judge's interaction with potential litigants.<sup>81</sup> There is no such thing as a casual relationship between a litigant and a judge when it comes to a fair trial in Jewish law.

### III. THE DEFINITIVE AND EXPLICIT RULES OF RECUSAL WITHIN THE JEWISH LAWS OF *SHOCHAD* AND THEIR RELEVANCE TO JUDICIAL ELECTIONS

#### A. The Jewish Laws of Recusal - The Laws of *Shochad*

The Jewish laws of bribery and recusal are rooted within two verses of the Bible.<sup>82</sup> While the verses specifically speak of judicial bribery, the Judaic laws derived from these verses are significantly more expansive than the common understanding of what constitutes bribery.<sup>83</sup> The verses read as follows:

---

<sup>78</sup> *Id.* at 928-29.

<sup>79</sup> See SEFER HAHINNUCH, *supra* note 29.

<sup>80</sup> *Caperton*, 129 S. Ct. at 2268-69 (Roberts, C.J., dissenting).

<sup>81</sup> See SEFER HAHINNUCH, *supra* note 29.

<sup>82</sup> See *Deuteronomy* 16:19; *Exodus* 23:8.

<sup>83</sup> See *infra* notes 92-123 and accompanying text.

*“And do not accept a bribe, for a bribe blinds the eyes of those who can see and corrupts righteous words.”*<sup>84</sup>

*“Do not pervert justice, do not show favoritism, and do not take a bribe, for bribery blinds the eyes of the wise and perverts legitimate words.”*<sup>85</sup>

These verses constitute the eighty-third commandment to the Jewish people set forth in the Torah.<sup>86</sup> The label<sup>87</sup> of this commandment is simply that “a judge is not to take any bribe.”<sup>88</sup> The commandment, in its simplicity,<sup>89</sup> constitutes the following obligations: “[A] judge should not take a bribe from parties of a lawsuit, even to render true judgment.”<sup>90</sup> This is based on the verse in *Exodus* 23:8.<sup>91</sup> The prohibition is repeated a second time in *Deuteronomy* 16:19,<sup>92</sup> which raises the simple question of why is there the need for repetition? The answer is that the verse in *Deuteronomy* refers to the rule that a judge cannot “take a bribe—even to declare the guiltless innocent and to impose punishment on the guilty.”<sup>93</sup> The purpose of this aspect of the commandment, that a judge is “forbidden . . . to take a bribe even to judge a case truly[,]” is rooted in the intent of expunging bribery altogether.<sup>94</sup>

The commandment goes so far as to make it a violation on both the individual accepting the bribe and the individual giving it.<sup>95</sup>

<sup>84</sup> See *Exodus* 23:8.

<sup>85</sup> See *Deuteronomy* 16:19.

<sup>86</sup> See SEFER HAHINNUCH, *supra* note 29. The *Sefer haHinnuch* lists all 613 negative and positive commandments given by God in the Torah to the Jewish People. See *id.*

<sup>87</sup> Each of the 613 commandments in the Torah has a label. This is because, like a book, each commandment encompasses many categories and numerous laws. Again, similar to a book, the label and title of the book explain the subject matter of that book. This is why a title or label of the commandment is needed, as it refers to the root of the commandment. See *id.*

<sup>88</sup> *Id.*

<sup>89</sup> The simplicity referred to here is the title and label of the commandment itself, without all the subcategories and caveats learned from the commandment by the Talmud and rabbinical scholars. See *id.*

<sup>90</sup> See SEFER HAHINNUCH, *supra* note 29.

<sup>91</sup> *Exodus* 23:8.

<sup>92</sup> *Deuteronomy* 16:19.

<sup>93</sup> See SEFER HAHINNUCH, *supra* note 29.

<sup>94</sup> See *id.*

<sup>95</sup> *Id.* (explaining in commentary that “both the one who gives and the one who accepts [the bribe] violate a negative precept” according to Commandment 83).



The individual giving the bribe falls under the general injunction of “*before the blind, you shall not put a stumbling block*,”<sup>96</sup> while the receiver of the bribe falls under the imprecation “*cursed be the one who takes a bribe*.”<sup>97</sup> But what constitutes a bribe in this sense? It is clear and obvious that money is a bribe for a variety of reasons, even to enjoin the judge to rule properly.<sup>98</sup> However, according to the laws of bribery, even words may constitute a prohibited bribe.<sup>99</sup> The commandments regarding bribery are not limited to location (i.e., the land of Israel, or by time), as the violation of this commandment is a violation of a divine command.<sup>100</sup> One who violates this commandment is not given lashes<sup>101</sup> or the like, because they can rectify the violation by returning the bribe.<sup>102</sup>

Some commentators opine that the source for the requirement that one must return the bribe is found in *Samuel I* 12:3.<sup>103</sup> There it is related that Samuel told the people of Israel: “[F]rom whom have I taken money that I will turn my eyes away from him? [Tell me] and I will make restitution.”<sup>104</sup> It is interesting to note that according to Maimonides, one does not have to return the bribe, as a matter of law,

<sup>96</sup> See *Leviticus* 19:14; HERSHEY H. FRIEDMAN, PHD, PLACING A STUMBLING BLOCK BEFORE THE BLIND PERSON: AN IN-DEPTH ANALYSIS 1 (2002) for a broader understanding of this premise (noting that “the word ‘blind’ is interpreted metaphorically to represent any person or group that is unaware, unsuspecting, ignorant, or morally blind, and individuals are prohibited from taking advantage of them or tempting them to do wrong”).

<sup>97</sup> See *Deuteronomy* 27:25.

<sup>98</sup> See SEFER HAHINNUCH, *supra* note 29 (noting that the underlying “purpose [is] to remove this evil habit from our midst, for fear that in consequence, with a bribe we will come to render false judgments”); see also MISHNEH TORAH, *supra* note 18, at 23:1.

<sup>99</sup> See SEFER HAHINNUCH, *supra* note 29; see also MISHNEH TORAH, *supra* note 18, at 23:1.

<sup>100</sup> As opposed to the violation of a rabbinic command, a violation of a divine command carries other worldly consequences.

<sup>101</sup> The violation of a Divine command often involves the punishment of lashes (being whipped). Punishment of this sort in Jewish law is attached to the concept of repentance. Thus, if there is another manner in which the violator can repent, such as returning the bribe, lashes are not given. See SEFER HAHINNUCH, *supra* note 29 (noting that a judge violates Commandment 83 upon acceptance of a bribe and “disobey[s] a [Divine] royal command, [but] [h]e is not given whiplashes, however, because it is given to rectification [the bribe can be returned]).

<sup>102</sup> See *id.* It is interesting to note that since bribery can come in the form of words, there would be no returning of such words—which would presumably lead to automatic recusal of the judge.

<sup>103</sup> See *Samuel I* 12:3; MA’HARI KRAH COMMENTARY TO SAMUEL I 12:3.

<sup>104</sup> See *Samuel I* 12:3.

until requested to do so from the one who gave the bribe.<sup>105</sup> However, according to the *Minchehs Chinuch*, even if the giver does not demand restitution from the judge, the judge is obligated to return the bribe.<sup>106</sup>

The most direct and clear elucidation of the Jewish obligations rooted in these verses are found in Maimonides's codex of Jewish law, known as the *Mishneh Torah*,<sup>107</sup> where Maimonides expounds the laws of *Shochad* and their application. "*It is clear that the Torah is declaring it a sin to pervert judgment by the use of a bribe.*"<sup>108</sup> Such a perversion of justice is forbidden by the Torah under all circumstances, at all times.<sup>109</sup> There are four incidents cited by Maimonides that show the effect even the simplest of acts by a potential litigant have on the recusal of a judge.<sup>110</sup> The point of these illustrations is to show that it is not only a bribe of money that causes the commandment to be violated and recusal to be necessary, but that anything may be considered a bribe under the appropriate circumstances.<sup>111</sup>

All of these examples are originally sourced in the Talmud, *Tractate Ketubot* on page 105b.<sup>112</sup> According to Maimonides, these examples are not mere illustrations but reflect the conduct mandated by Jewish law.<sup>113</sup> This is in contradiction to *Tosafot's* opinion in *Tractate Sanhedrin* 8a,<sup>114</sup> where *Tosafot* suggests that these examples are merely illustrations of pious behavior that would be desirable to emulate but are not legally binding.<sup>115</sup> The examples set forth in the Talmud and cited by Maimonides are as follows:

<sup>105</sup> See MISHNEH TORAH, *supra* note 18, at 23:1.

<sup>106</sup> SEFER HA'HINNUCH, *supra* note 29; see MINCHAS CHINUCH COMMENTARY TO COMMANDMENT 83; see also S'DAY CHEMED, KUNTRIS HA'KLALIM, MARECHES VAV § 26.

<sup>107</sup> This is the Code of Laws set forth by Maimonides.

<sup>108</sup> MISHNEH TORAH, *supra* note 1, at 23:1.

<sup>109</sup> SEFER HA'HINNUCH, *supra* note 29; see also S'DAY CHEMED, KUNTRIS HA'KLALIM, MARECHES VAV § 26.

<sup>110</sup> MISHNEH TORAH, *supra* note 1, at 23:3.

<sup>111</sup> *Id.* Note that in *Laws of Borrowing* 5:12, Maimonides states that words can also constitute usury.

<sup>112</sup> BABYLONIAN TALMUD, TRACTATE KETUBOT 105b.

<sup>113</sup> See *supra* notes 107-11 and accompanying text.

<sup>114</sup> An authoritative medieval commentary on the Talmud.

<sup>115</sup> See MISHNEH TORAH, *supra* note 1, at 23:3. The *Halacha* appears to be in accordance with Maimonides.

1. An incident occurred concerning a judge who stood up in a small boat, as he was crossing a river. A person extended his hand and helped him as a he was standing. At a later date, that very same person came before the judge with a case. The judge stated: "I am unacceptable to serve as a judge for you."

2. An individual removed a feather from a fowl that was upon a judge's scarf. Another person covered some spittle that was lying before the judge and the judge told both of them: "I am unacceptable to serve as a judge for you."

3. There was another incident where a person brought one of the presents required to give to a priest<sup>116</sup> to a judge who was a priest. The judge told him: "I am unacceptable to serve as a judge for you."

4. The final incident cited took place regarding a sharecropper of a field belonging to a judge. The sharecropper would normally bring the fruits of the field every Friday. On just one occasion the sharecropper brought forth the fruits on a Thursday. The sharecropper did this because he had a case over which he wanted the judge to preside. The judge told him: "I am unacceptable to serve as a judge for you." Since he brought the fruits of the field earlier than normal, that small favor caused the judge to be disqualified.<sup>117</sup>

Clearly, Jewish law significantly restricts bribery in any form. In each of these cases, it is specifically mentioned that the judge removes himself.<sup>118</sup> There is no motion for recusal, but rather the judge is automatically invalid to give judgment on the case where there is any form of bribery, even if the form of bribery seems insignifi-

<sup>116</sup> See ISSAC KLEIN, THE CODE OF MAIMONIDES: BOOK SEVEN THE BOOK OF AGRICULTURE 292 (Yale University Press 1979) (noting that a priest receives twenty-four different gifts obligated by the Torah for others to give him); MISHNEH TORAH, LAWS OF THE FIRST FRUITS 1:1.

<sup>117</sup> See MISHNEH TORAH, *supra* note 1, at 23:3.

<sup>118</sup> See *id.*

cant.<sup>119</sup> If the judge does not properly recuse himself, his judgment is automatically invalid.<sup>120</sup>

Compare this to American law, where a judge has broad discretion to recuse himself, as the guidelines are vague at best as to when a judge shall recuse himself.<sup>121</sup> Jewish law, however, requires the recusal by the judge even under circumstances that appear inconsequential.<sup>122</sup> Furthermore, Jewish law takes the next logical step from American jurisprudence, decreeing that such conduct is outright bribery and not just “bias” or “unfairness.”<sup>123</sup>

In addition, it is obvious that in all of these examples the individuals involved are merely potential litigants. This clearly teaches us that even if there is no pending case before the court, the judge must recuse himself in advance of any such case being brought where recusal is proper. The judge must recuse himself in circumstances where the case is already before the court. It may be possible to conclude, based on the above examples, that if the judge does not know, and never finds out, who it was that covered up the spittle he does not have to recuse himself. It follows that anonymity may be a way around the disqualification of the judge in such circumstances.

Furthermore, it is the law that a judge may not adjudicate a case where a friend is a party to the action.<sup>124</sup> Maimonides and the *Radbaz*,<sup>125</sup> another codifier, are of the opinion that this is tantamount to bribery and that the judgment is void.<sup>126</sup> However, the *Beit Yosef* and the *Ramah*<sup>127</sup> are of the opinion that such adjudication would still result in a binding judgment.<sup>128</sup> This is despite the fact that it would

<sup>119</sup> See *id.*

<sup>120</sup> See *id.*

<sup>121</sup> *Fiut*, *supra* note 18, at 1603 (stating that the recusal standard is subjective).

<sup>122</sup> See MISHNEH TORAH, *supra* note 1, at 23:3.

<sup>123</sup> See *Deuteronomy* 16:19.

<sup>124</sup> MISHNEH TORAH, *supra* note 1, at 23:6.

<sup>125</sup> Rabbi David ben Rabbi Shlomo Ibn (Abi) Zimra, one of the greatest Rabbis of his time, and famed authority on *Halachah*.

<sup>126</sup> RADBAZ COMMENTARY TO MISHNEH TORAH, LAWS OF THE COURTS THE PENALTIES PLACED UNDER THEIR JURISDICTION 23:6; MAIMONIDES COMMENTARY TO MISHNEH SANHEDRIN 3:5.

<sup>127</sup> Rabbi Yosef Cairo (the *Beit Yosef*) was the author of the *Shulchan Aruch*, which is still an authoritative work for all Jews pertaining to their respective communities, and Rabbi Moses Isserles (the *Ramah*) is renowned for his fundamental work of additions made to the *Shulchan Aruch*. Both the *Beit Yosef* and *Ramah* are considered primary sources for the law.

<sup>128</sup> SHULCHAN ARUCH, CHOSEN MISHPAT 7:7.

still be a violation of Jewish law for the judge to preside over such a case.<sup>129</sup>

### B. The Reasoning Behind the Jewish Law

Now that the basics of the commandment set forth in Jewish law have been discussed, the focus shifts to the “why.” There is an established tenet in Jewish law that a third-party to the action must render judgment for a person to become liable.<sup>130</sup> The reasoning behind this is that one does not have the proper state of mind to accurately make himself liable in a legally binding manner.<sup>131</sup> This concept is simply that a person cannot be a judge in his own case.<sup>132</sup>

The relevance this has regarding *Shochad* bribery is as follows: When the judge accepts the bribe, either in monetary form, verbal form, or by any other act, the judge becomes like the person who gave the bribe. This means that when the judge accepts the bribe, the judge is considered to be part-and-parcel with the potential litigant.<sup>133</sup> Because of the aforementioned reasoning, the verses state: “*For a bribe blinds the eyes of those who can see and corrupts righteous words*” and “*For bribery blinds the eyes of the wise and perverts legitimate words.*”<sup>134</sup> Even the wise are considered “blind” when it comes to a case regarding their own interest.

Based on this reasoning we can ask the following question: What if both potential litigants gave a bribe? Say both potential litigants donated money to the judge’s campaign, does the judge then have to recuse himself? An argument can be made that the judge is now equally favorable to both sides and thus recusal would be pointless. However, the reasoning that one cannot be his own judge in a case would apply to the case where both parties bribed the judge as well.<sup>135</sup> Jewish law views the judge as if he is actually physically

<sup>129</sup> See MISHNEH TORAH, *supra* note 1, at 23:6.

<sup>130</sup> BABYLONIAN TALMUD, TRACTATE SHABBOS 119a; BABYLONIAN TALMUD, *supra* note 3, at 105b.

<sup>131</sup> See BABYLONIAN TALMUD, TRACTATE KETUBOT, RASHI’S COMMENTARY TO 105b (stating that one is legally incapable of having the proper mindset to judge themselves, even if they are only seeking to do the right thing).

<sup>132</sup> *Id.*

<sup>133</sup> See BABYLONIAN TALMUD, *supra* note 3, at 105b.

<sup>134</sup> Exodus 23:8; Deuteronomy 16:19

<sup>135</sup> See BABYLONIAN TALMUD, *supra* note 133.

part-and-parcel with the litigant (as if completely co-dependent—think of Siamese twins who share vital organs and body parts). Thus, it would be similar to saying that the judge should choose between which body parts to favor. Since at the end of the day one of the litigants will be held liable and the other will not, it would be as if the judge would decide which of his own body parts should win over the other. Therefore, the judge would still be disqualified even if both litigants gave a bribe of any sort.

### C. Judicial Elections in Jewish Law

Judicial elections of the sort that take place in thirty-nine of the United States are clearly an issue in Jewish law. As previously discussed, the Jewish laws of bribery are not limited to the giving of money, but extend to all things that influence a judge in his decision-making.<sup>136</sup> This includes compliments, kind acts, and non-monetary donations or favors.<sup>137</sup> Judicial elections, after all, require judges to solicit from donors who possibly may appear before them to adjudicate a matter.<sup>138</sup> As such, according to Jewish law, a judge who knows who has donated in any form to his campaign cannot judge that person or entity.<sup>139</sup>

However, the problem is not the election itself, since the actual act of electing judges would not be a problem in Jewish law *per se*; rather, the issue is pre-election and post-election. The taint of the campaign will carry over to the judge's term on the bench. According to the Jewish law, anyone who was known by the judge to have been involved in these elections would not be able to come before that judge without the judge recusing himself.<sup>140</sup> Therefore, it is clear that the election of a judiciary may take place in Jewish law, but the effect would likely be impracticable. This is all true unless the election is done in such a manner that the judge has no knowledge of the donations in any way whatsoever. If this election formula was instituted, the ramifications associated with the Jewish laws of bribery

<sup>136</sup> *Id.* (stating that it is not just money that constitutes bribery but anything that can influence the judge); MISHNEH TORAH, *supra* note 1, at 23:3.

<sup>137</sup> BABYLONIAN TALMUD, *supra* note 133; MISHNEH TORAH, *supra* note 1, at 23:3.

<sup>138</sup> See Bills, *supra* note 5 and accompanying text.

<sup>139</sup> See BABYLONIAN TALMUD, *supra* note 133; MISHNEH TORAH, *supra* note 1, at 23:3.

<sup>140</sup> See Deuteronomy 16:19 (commanding that judges be impartial).

would never come into effect.

Had *Caperton* been decided according to Jewish law, there is no doubt that Justice Benjamin would have been required to recuse himself. While Justice Benjamin did not have direct control over the funds used to support him, the funds at the very least constituted bribery by words according to Jewish law.<sup>141</sup> It therefore follows that such bribery would have disqualified Justice Benjamin from presiding over the case.

**IV. THE SIGNIFICANCE OF THE NOAHIDE LAWS, THEIR UNDERSTANDING ACCORDING TO JEWISH LAW, AND WHAT AMERICAN JURISPRUDENCE SHOULD ACQUIRE FROM *SHOCHAD***

According to Jewish law, the Children of Noah (all people that are not Jewish) have seven commandments that they must follow by divine precept.<sup>142</sup> These seven laws are made up of six negative commandments and one positive commandment. According to Jewish law and tradition, these commandments were handed down to Moses on Mount Sinai by God to disseminate to all nations; just like the Torah, the interpretation of these commandments resides in the Oral Torah.<sup>143</sup> These commandments are as follows:

1. Not to worship idols;
2. Not to curse God's Name;
3. Not to murder;
4. The prohibition against specific forbidden sexual relations, such as incest and adultery;
5. Not to steal;
6. Not to eat the flesh of a living animal; and
7. The positive commandment to establish laws and courts of justice.<sup>144</sup>

Non-Jews have an obligation to establish a judicial system.<sup>145</sup>

---

<sup>141</sup> See BABYLONIAN TALMUD, *supra* note 131 (stating that one is legally incapable of having the proper mindset to judge themselves, even if they are only seeking to do the right thing).

<sup>142</sup> MISHNEH TORAH, *supra* note 12, at 9:1.

<sup>143</sup> *Id.* at 8:11.

<sup>144</sup> *Id.* at 9:14.

<sup>145</sup> *Id.*

However, must these non-Jewish courts abide by the same laws that bind Jewish courts? The issue is whether the laws of *Shochad* regarding bribery and recusal apply to non-Jewish courts as they do to Jewish courts, according to Jewish law. To phrase the issue fully, is one allowed to bribe (according to the Jewish law definition of bribery) a non-Jewish judge—or is such a person who gives a bribe violating the tenet “*before the blind, you shall not put a stumbling block*,”<sup>146</sup> since all non-Jews are commanded to establish courts governed by the laws of bribery as understood in Jewish law?

According to some commentators, the laws regarding bribery do not apply to the non-Jewish courts.<sup>147</sup> The explanation for this is based in the reasoning behind the laws of bribery in Jewish law itself. As discussed above, the reason for the prohibition of bribery is that the potential litigant and judge become one entity,<sup>148</sup> thus becoming so intertwined that it would be as if the judge would be judging himself. However, there is no concept of *Krovim* for non-Jews in general.<sup>149</sup> As such, since the concept of *Krovim* is exclusive to Jewish law, the entire reasoning behind the prohibition of bribery in Jewish law does not apply to non-Jews. Therefore, non-Jews should not be bound by the Jewish law of bribery.

However, Nachmonides<sup>150</sup> states in an unequivocal manner that non-Jewish courts are bound to the laws of bribery as interpreted by Jewish law.<sup>151</sup> This means that the one giving the bribe would be in violation of “*before the blind, you shall not put a stumbling block*.”<sup>152</sup> The reasoning behind Nachmonides’ position is that the

<sup>146</sup> *Leviticus* 19:14.

<sup>147</sup> See S’DAY CHEMED, KUNTRIS HA’KLALIM, MARECHES VAV § 26.

<sup>148</sup> Referred to as *Krovim*, which literally means one who is truly close—such as a familial relationship.

<sup>149</sup> There is no concept of *Krovim* for non-Jews in Jewish law because the Jewish people are considered to be consistently interconnected with one another as if to make up a familial unit.

<sup>150</sup> NACHMONIDES COMMENTARY TO GENESIS 34:13.

<sup>151</sup> See S’DAY CHEMED, *supra* note 147 (citing to the *Mal’Lay Ha’Romym* who takes an interesting approach to this argument). The *Mal’Lay Ha’Romym* attempts to combine both opinions with jurisdictional reasoning, stating: Since Jews are not subject to the jurisdiction of Noahide courts, the laws of bribery would not apply to a Jew giving a non-Jewish judge a bribe. *Id.* However, since non-Jews are subject the jurisdiction of a Noahide court, for one non-Jew to give a non-Jewish judge a bribe would be prohibited under the laws of bribery. *Id.*

<sup>152</sup> See *Leviticus* 19:14.



commandment to establish a justice system for non-Jews applies with the very same reasoning as that of the Jewish courts—to have a fair and unbiased judiciary. To allow the laws of bribery to be ignored would effectively make the commandment moot. At the end of the day, the law follows the opinion of Nachmonides.<sup>153</sup>

The effect this should have on American jurisprudence is simple: adoption. Not adoption of the Jewish law itself, but rather of the concept. Outside of Jewish law, there is no secular definition of bribery that is so broad and clearly defined. American jurisprudence should catch up to this established and defined standard of bribery in the judiciary which has existed for thousands of years. At the very least, the definition of bribery as set forth in Jewish law should be a guide to American jurisprudence. Jewish law gives forth a clear and direct view of when recusal should take place. The system set forth in Jewish law allows for true objectivity, something that is lacking in the United States judiciary. This is even more so because Jewish law goes so far as to equate all manner of undue influence as bribery.<sup>154</sup> The explicit labeling of bribery shows the gravity of the offense of undue influence. Such strict standards when dealing with our judicial system should be adopted universally. The current United States case law and guidelines are simply too broad and vague to be effective in preserving justice and fair trial rights.

However, to advocate that American law take the Jewish legal position on recusal and judicial elections would not be appropriate. This is because Jewish law is a distinct code of laws based on divine precept.<sup>155</sup> However, American law is not so, and it should not become so. But, at the very least, Jewish law should become a guide to American jurisprudence in this area.

## V. CONCLUSION

The simplest way to rectify this judicial bias and fairness problem would be to forbid judges from knowing the financing sources of their campaigns. It would also be necessary to bar judicial candidates from actively soliciting money and to mandate blind cam-

---

<sup>153</sup> ARUCH H'SHULCHAN, LAWS OF JUDGES 9:1.

<sup>154</sup> See *supra* notes 92-123 and accompanying text.

<sup>155</sup> See TRACTATE AVOT 1:1; see also MISHNEH TORAH, FUNDAMENTALS OF TORAH 8:1.

paigning. While this goes against the “transparency” that we hear so much of in the news, the interest in a fair and impartial judiciary should require that we discard the transparency argument. However, even this solution is not palpable, because elections by their very nature are politicized and it will become known to the judge the people who are supporting him.

As such, the entire electoral process for judges should be abandoned. It should be replaced with a two-tier system. The first tier would be the appointment of judges based on merit, similar in nature to those made in the federal system.<sup>156</sup> This may limit the amount of bribery and unwarranted influence that can take place in the courts because it would dispose of campaign contributions to judges. The second tier would enact universal laws in all states that mandate the disclosure, by a judge to an independent review board or judge, of any possible impartiality issues. “Americans agree that reform is needed: A 2009 Justice at Stake poll showed that more than [eighty] percent of all voters agree that judges should not hear cases involving major campaign backers, and support the idea of a different judge deciding recusal requests.”<sup>157</sup>

In the end, are elections an intelligent way to choose judges? It is a matter of fact that in many places throughout the country, such as New York, voters are not even acquainted in the most cursory manner with the judicial candidates. Voters do not know the candidates or their backgrounds, but only the judicial candidates’ political party. Many judicial candidates run unopposed, resulting in a farce of an election. Judicial elections have long been a political process. If the courts are to be trusted, this cannot be allowed to continue.

It is with a firm and sad belief that should the courts and the country continue down this path of judicial election and subjective recusal, the inevitable result will be an unfair and partial judiciary. This is something that cannot be tolerated in any part of the world, let alone the United States.

I can only conclude with the words of Maimonides warning judges and reminding them of their duty:

---

<sup>156</sup> The author understands that such appointments are political in nature; however, he believes that a line in the sand must be drawn for practical reform.

<sup>157</sup> James J. Sample, Charles Hall, & Linda Casey, *The New Politics of Judicial Elections*, 94 JUDICATURE 50, 56 (2010).

*A judge should always see himself as if a sword is drawn on his neck and that he is standing over the open gates of Hell. The judge should know who he is judging, before Whom<sup>158</sup> he is judging, and Who<sup>159</sup> will ultimately exact retribution from the him if he deviates from the path of truth . . . .<sup>160</sup>*

*On the outset a judge should always look upon the litigants as if they enter the court wicked.<sup>161</sup> A judge should adjudicate only based on his perception of the situation, not outside influences. Once the judgment is rendered the judge should view both litigants as righteous, seeing them in a favorable light.<sup>162</sup>*

These are very powerful words of warning and direction by Maimonides. Should our secular judiciary heed this wise advice, the problems that are present because of judicial elections and recusal may become moot. The end result would be better for the judiciary and the country.

---

<sup>158</sup> Referring to God.

<sup>159</sup> Again, referring to God.

<sup>160</sup> MISHNEH TORAH, *supra* note 1, at 23:8.

<sup>161</sup> This is to say that the judge is to take the litigant's word with a grain of salt.

<sup>162</sup> MISHNEH TORAH, *supra* note 1, at 23:10.